
Comments

Native American Oral Traditional Evidence in American Courts: Reliable Evidence or Useless Myth?

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Abstract

American history is rife with conflict between Native American cultures and the Anglo-American legal system. When Native American groups bring claims in federal court, they face a host of biases that fail to consider their distinctive cultural background. One such bias concerns the use of oral traditional evidence as testimony at trial. Because Native American groups were largely non-literate prior to European contact, Native Americans often use oral traditional evidence as testimony if the matter requires evidence extending centuries into the past. Unfortunately, the law regarding Native Americans' use of oral traditional evidence as testimony has been particularly problematic because the existing jurisprudence has created uncertainty and inconsistency. This generates negative consequences because without the use of oral traditional evidence, Native American groups may lack the means to contend with opposing parties.

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American courts have attempted to handle this genre of evidence for almost a century. Their efforts, however, have resulted in an array of cases that are nearly impossible for future claimants and litigants to follow. Specifically, cases from both the U.S. claims court and circuit courts do not detail the methods used in rejecting or admitting the oral traditional evidence. This creates harmful uncertainty for potential claimants who wish to use oral traditional evidence.

This Comment discusses American and Canadian jurisprudence, as the Supreme Court of Canada has explicitly created an evidentiary exception to accommodate aboriginal oral traditional evidence. This Comment then proposes a rule of evidence to guide American courts in making informed decisions regarding Native American oral traditional evidence.

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I. INTRODUCTION

While American courts have handled disputes regarding the clash between European and Native American cultures since the earliest years of this nation,¹ legal areas concerning these conflicts still exist today, and are uncertain and difficult to reconcile. One example of an area with such uncertainty is the use of Native American oral tradition as evidence.

Native American groups often lack documentary information about their extensive pasts, as many of these societies were non-literate prior to the arrival of Europeans.² Consequently, when Native American groups bring claims into federal court—such as land claims,³ tribal status claims,⁴ or cultural artifacts claims brought under the Native American

1. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 14 (1831) (stating that the Native Americans’ “relations to the United States resemble that of a ward to his guardian”); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823) (holding that “discovery [of the United States] gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.”). See generally *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (stating that the Cherokee Nation has laws which the United States cannot hinder), abrogated by *Nevada v. Hicks*, 533 U.S. 353 (2001).

2. See generally Glen Stohr, Comment, *The Repercussions of Orality in Federal Indian Law*, 31 ARIZ. ST. L.J. 679 (1999) (detailing the numerous issues stemming from the non-literacy of most Native American societies, primarily the difficulties Native Americans have under the Free Exercise Clause).

3. See generally *Sokaogon Chippewa Cnty. v. Exxon Corp.*, 2 F.3d 219 (7th Cir. 1993) (discussing oral evidence concerning a treaty and the Sokaogon’s claim to the land covered by the treaty); *Zuni Tribe of N.M. v. United States*, 12 Cl. Ct. 607 (1987) (discussing the Zuni’s title to land in a land damages case); *Confederated Tribes of the Warm Springs Reservation of Or. v. United States*, 177 Ct. Cl. 184 (1966) (discussing whether the oral traditional evidence presented sufficiently proved that the tribal claimants had occupied the land for a long time); *Pueblo de Zia v. United States*, 165 Ct. Cl. 501 (1964) (holding that the tribal claimants established title to land when their oral traditional evidence was the only evidence presented in the case); *Coos Bay Indian Tribe v. United States*, 87 Ct. Cl. 143 (1938) (asserting that the oral traditional evidence presented was not sufficient to afford the tribal claimants title in the land in question); *Assiniboin Indian Tribe v. United States*, 77 Ct. Cl. 347 (1933) (asserting that the oral traditional testimony was not reliable enough to afford the tribal claimants damages for the land they had lost).

4. See generally *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977) (discussing whether the Mashpee people were a “tribe” under the Indian Nonintercourse Act).

Graves Protection and Repatriation Act⁵ (NAGPRA)—Native American groups may wish to support their cases with oral traditional evidence.⁶

To ease discussion when describing various types of oral traditional evidence, this Comment will adopt the definitions, with some modifications, that Jan Vansina created in his seminal work, *Oral Tradition as History*.⁷ Vansina differentiates between two kinds of oral evidence: oral histories, “which occur[] during the lifetime of informants[,]”⁸ and oral tradition, “which [include] reported statements from the past beyond the present generation.”⁹ Both oral histories and oral tradition are “oral statements spoken, sung, or called out on musical instruments only.”¹⁰ While this Comment will use Vansina’s definitions, it will also use the phrase “oral traditional evidence” as an umbrella term to refer to all oral sources unique to non-literate societies.

Part II of this Comment will begin with an overview of oral traditional evidence and its potential use as a source of truth. Part II will then describe the American and Canadian jurisprudence that discusses oral traditional evidence. The United States has two branches of caselaw dealing with oral traditional evidence: those cases decided in the claims court¹¹ and those decided in the circuit courts. Part II will first detail two U.S. Court of Claims cases from the 1930s along with two more recent U.S. Court of Appeals cases, all of which treat oral traditional evidence in a negative manner,¹² followed by a discussion of three U.S. claims

5. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3005 (2012).

6. See, e.g., Bonnichsen v. United States, 367 F.3d 864, 881–82 (9th Cir. 2004) (discussing whether 9,000 year old oral traditional evidence was reliable enough to prove tribal affiliation or ancestry with ancient human remains).

7. JAN VANSINA, ORAL TRADITION AS HISTORY (1985). Vansina is a well-known anthropologist and historian who specializes in the study of Central Africa. He is a professor emeritus at University of Wisconsin-Madison. See *Living with Africa*, U. WIS. PRESS, <http://bit.ly/1jRrAva> (last updated Aug. 11, 2010) (referring to Vansina’s autobiography, *Living With Africa*).

8. VANSINA, *supra* note 7, at 12.

9. *Id.* at 27.

10. *Id.* at 27–28.

11. This court was called the U.S. Court of Claims from 1855 until 1982, when it was abolished and replaced by the U.S. Claims Court, which retained jurisdiction over all the U.S. Court of Claims’ cases. *U.S. Court of Federal Claims, 1982–Present*, FED. JUD. CENTER, <http://1.usa.gov/1jdAa4F> (last visited Feb. 19, 2014). In 1992, the court was renamed U.S. Court of Federal Claims. *Id.* This Comment will use each court title as it applies to the case being discussed, and will use “claims court” to refer to this court generally. “The Court of Federal Claims is authorized to hear primarily money claims founded upon the Constitution, federal statutes, executive regulations, or contracts, express or implied-in-fact, with the United States.” *About the Court*, U.S. CT. FED. CLAIMS, <http://1.usa.gov/1nOMSXy> (last visited Feb. 19, 2014).

12. See Bonnichsen v. United States, 367 F.3d 864, 881–82 (9th Cir. 2004); Sokaogon Chippewa Cnty. v. Exxon Corp., 2 F.3d 219, 222 (7th Cir. 1993); Coos Bay

court cases that took a more positive stance in admitting the evidence.¹³ Finally, Part II will discuss three Canadian cases that together created an evidentiary exception for oral traditional evidence.¹⁴

Part III of this Comment will compare and analyze the American and Canadian jurisprudence in order to demonstrate the need to adopt a Federal Rule of Evidence that will accommodate the use of oral traditional evidence in U.S. courts. The Part will also discuss the strengths and weaknesses of an anthropologist's unique methods in presenting oral traditional evidence to the Claims Court¹⁵ in *Zuni Tribe of New Mexico v. United States*,¹⁶ as well as the hearsay exception in the line of Canadian cases. Part III will culminate with a proposed rule of evidence that explicitly allows for the use of oral traditional evidence and requires courts to balance several factors when determining whether to admit or reject the evidence at hand.

II. BACKGROUND AND CASES FROM THE UNITED STATES AND CANADA

A. *Oral Traditional Evidence in Anglo-American Courts and Its Disputed Reliability*

While the terms "oral tradition" and "oral history" differentiate the ages of oral traditional evidence, the manner in which oral information is passed from generation to generation also varies widely between cultures. For example, the formalistic oral tradition told by the Gitksan and the Wet'suwet'en Nation in the Canadian case *Delgamuukw v. British Columbia*¹⁷ were "'repeated, performed and authenticated at important feasts.'"¹⁸ On the other hand, the oral histories presented in

Indian Tribe v. United States, 87 Ct. Cl. 143, 152–53 (1938); Assiniboine Indian Tribe v. United States, 77 Ct. Cl. 347, 368 (1933).

13. See Confederated Tribes of the Warm Springs Reservation of Or. v. United States, 177 Ct. Cl. 184, 204 (1966); Pueblo de Zia v. United States, 165 Ct. Cl. 501, 505 (1964). See generally Zuni Tribe of N.M. v. United States, 12 Cl. Ct. 607 (1987).

14. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 87 (Can.); R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 68 (Can.); *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para. 152 (Can.).

15. See generally Andrew Wiget, *Recovering the Remembered Past: Folklore and Oral History in the Zuni Trust Lands Damages Case*, in *ZUNI AND THE COURTS: A STRUGGLE FOR SOVEREIGN LAND RIGHTS* 173 (E. Richard Hart ed., 1995) [hereinafter *Folklore and Oral History*] (detailing Wiget's methods while working with the Zuni; he had over 1,000 pages of depositions, worked with numerous informants, and did not have access to outside evidence while he was with the Zuni).

16. *Zuni Tribe of N.M. v. United States*, 12 Cl. Ct. 607 (1987).

17. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 87 (Can.).

18. *Id.* at para. 93 (quoting *Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97, 164 (Can. B.C. S.C.)).

*Zuni Tribe of New Mexico v. United States*¹⁹ consisted of little more than individuals' accounts of information relayed to them by their parents and grandparents.²⁰ The *Zuni Tribe* oral histories were not ritualistic; an anthropologist presented the evidence to the court in the form of numerous depositions—an uncommon method—rather than having the native group perform the oral traditional evidence.²¹ Whether the evidence is ritualistic oral tradition or informal anecdotal evidence, oral traditional evidence can cause problems in Anglo-American courts, which have long been dependent on textual evidence.

While the rift between oral and textual documentation is one difference between aboriginal and European cultures, concepts of history differ as well.²² For example, in many Native cultures, the concept of time is cyclical, while in Judeo-Christian culture, time is linear.²³ Moreover, oral traditional evidence cannot be viewed in a vacuum; these traditions and histories are closely tied to culture and must be viewed in that context, thus providing “strong continuity with a past group.”²⁴ Understanding the culture of a speaker is relevant, as the sources are often “repositories of fact, observation, and history intertwined with personal belief and analogy,” rather than clear fact.²⁵ These differences between oral traditional evidence and the culture in Anglo-American legal systems often cause confusion, and scholars have discussed at length whether courts ought to admit this genre of evidence.

B. *The Disputed Reliability of Oral Traditional Evidence as a Source of Truth*

While courts often hesitate to admit oral traditional evidence, scholars have explored both the legal and historical uses of this genre of evidence in courts and histories.²⁶ The hallmark of oral traditional

19. *Zuni Tribe of N.M. v. United States*, 12 Cl. Ct. 607 (1987).

20. See *Folklore and Oral History*, *supra* note 15, at 175–76 (exhibiting brief excerpts of the depositions).

21. See *id.* at 173–74; Stohr, *supra* note 2, at 693–94 (explaining how performance of formal, ritualized oral tradition in court can place claimants at a disadvantage); see also *infra* note 135 and accompanying text.

22. See Stohr, *supra* note 2, at 684–85.

23. See *id.*

24. John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One)*, 27 ENVIRONS ENVT'L L. & POL'Y J. 349, 395 (2004).

25. John W. Ragsdale, Jr., *Some Philosophical, Political and Legal Implications of American Archaeological and Anthropological Theory*, 70 UMKC L. REV. 1, 45–46 (2007).

26. See Cohan, *supra* note 24, at 396 (detailing why oral traditional evidence should not be construed as historical fact); Ragsdale, *supra* note 25, at 45–46 (arguing that oral traditional evidence has its roots in truth). See generally Gordon M. Day, *Oral Tradition*

evidence is its relative fluidity: edition and translation occur *during* interpretation rather than after, as with textual documents.²⁷ When the oral tradition or history is interpreted, reinterpretation occurs multiple times in a chain. This differs greatly from textual evidence, as readers are isolated in their reinterpretations of written works.²⁸ A reader of a written work is not forced to depend on the interpretation of a previous reader.²⁹ This defining aspect of oral traditional evidence has resulted in varying views among scholars concerning whether oral traditional evidence can ever be a source of “truth” in either legal or historical settings.

One view scholars advocate is that courts should admit and recognize Native American oral traditional evidence for its potential as a source of truth.³⁰ Despite its shortcomings, some tribalists and non-Native American scientists “recognize that the oral tradition is premised on fact rather than imagination, and that both the nature and necessity of accurate recounting within oral societies make these histories valuable indicators of the past.”³¹ If courts treat oral traditional evidence with the suspicion ordinarily given to hearsay evidence,³² one may counter with the well-known axiom, “[w]here there is smoke, there must be fire[.]”³³ While hearsay rumors can be, and often are, false, these “rumors tend to die out as the expected consequences of the rumors do not occur.”³⁴ When groups have reason to believe the rumors are true, the rumors

as *Complement*, 19 ETHNOHISTORY 99 (1972) (arguing that, in the context of the Abenaki people, oral tradition can complement history); David M. Pendergast & Clement W. Meighan, *Folk Traditions as Historical Fact: A Paiute Example*, 72 J. AM. FOLKLORE 128 (1959) (analyzing Paiute informants’ statements and their consistency with archaeological data); Andrew O. Wiget, *Truth and the Hopi: An Historiographic Study of Documented Oral Tradition Concerning the Coming of the Spanish*, 29 ETHNOHISTORY 181 (1982) [hereinafter *Truth and the Hopi*] (arguing that the cultural significance of the oral traditional evidence, rather than its form, indicates its reliability).

27. John Miles Foley, *Foreword* to NATIVE AMERICAN ORAL TRADITIONS: COLLABORATION & INTERPRETATION vii, vii (Larry Evers & Barre Toelken eds., 2001).

28. See VANSINA, *supra* note 7, at 29.

29. *See id.*

30. See Ragsdale, *supra* note 25, at 45–46.

31. *Id.*

32. While courts are often suspicious of oral traditional evidence, they do not cite the rule against hearsay as precluding the testimony. *See, e.g.*, Coos Bay Indian Tribe v. United States, 87 Ct. Cl. 143, 152 (1938) (“If this testimony is to prevail in every way over documentary and historical evidence *it is sufficient to observe that it does prove by hearsay* that plaintiffs did occupy the lands claimed from time immemorial.” (emphasis added)). The rule itself may indicate a broader cultural bias against “hearsay,” or oral evidence, whether or not it actually falls under the rule; however, this topic is beyond the scope of this Comment.

33. VANSINA, *supra* note 7, at 6.

34. *Id.*

may become part of an oral tradition.³⁵ Additionally, in some Native American traditions, “an aged person carefully and deliberately train[ed] young children until some of them knew the old stories verbatim, as an American child . . . might know *The Night Before Christmas*.³⁶ Thus, oral traditional evidence may not necessarily bear the risk of error at each generational transmission.³⁷ Finally, advocates of using oral traditional evidence as a source of truth note that collective knowledge can be of vital importance; individuals may not have particularly deep knowledge about their group’s past, but taken together, these individuals may be able to piece together a comprehensive history.³⁸

Conversely, many scholars oppose the use of oral traditional sources for historical and legal evidence.³⁹ From this perspective, the way oral traditional evidence passes through generations is similar to how messages are passed in the childhood game of telephone. During such games, a message changes from person to person so as to be entirely different by the end of the game. One scholar has identified numerous pitfalls that occur when using oral traditional evidence to support factual determinations of past occurrences, and has noted:

We have no way of knowing whether a narrative has been altered The opportunity for error increases when information is relayed through multiple persons over time. Intervening changes in language may also alter the meaning of certain words or of the oral tradition itself. Narratives can also be influenced by . . . biases and are often intertwined with spiritual beliefs. It is not always clear whether myths are being blurred with or even superseding historical facts. Narratives are thus of limited reliability in attempting to determine truly ancient events or linkages between present groups and the past.⁴⁰

Jan Vansina, an advocate for the use of oral tradition and histories in the study of history, similarly doubts how well such evidence can provide truth about actual facts or events; rather, oral traditional evidence may best be used to determine “events generalized”⁴¹ or group opinions and trends.⁴² Vansina goes so far as to say “[i]t is . . . important to scrutinize traditions for signs that they are in fact expressions of

35. See *id.*

36. Day, *supra* note 26, at 103.

37. See *id.*

38. See Pendergast & Meighan, *supra* note 26, at 131. See generally *Folklore and Oral History*, *supra* note 15.

39. See VANSINA, *supra* note 7, at 31–32, 193; Cohan, *supra* note 24, at 396.

40. Cohan, *supra* note 24, at 396.

41. VANSINA, *supra* note 7, at 31.

42. See *id.*

generalizations or norms rather than statements of observations of events or situations.”⁴³

Oral traditions that are particularly ancient come with their own challenges. As tradition grows older, the risks become magnified and “peak when one deals with traditions of origin.”⁴⁴ Vansina, however, states that recent oral traditional evidence that extends only “one or two generations beyond the eldest living members in a community . . . suffers only small damage.”⁴⁵

The rule against hearsay,⁴⁶ one of the hallmarks of Anglo-American legal systems, can influence courts’ decisions regarding the reliability of oral traditional evidence.⁴⁷ Because oral traditional evidence, by definition, is told from one person to another, courts could consider it hearsay. Thus, if the evidence spans numerous generations, it will contain several layers of hearsay.⁴⁸ Although relevant, American courts have rarely cited the rule against hearsay when confronted with oral traditional evidence.⁴⁹ Canadian courts, however, have acknowledged that oral traditional evidence is hearsay and have created an evidentiary exception.⁵⁰

C. Use of Oral Traditional Evidence in Court

Native Americans in the United States and aboriginal groups in Canada use oral traditional evidence for cases in which they must prove activity extending before the arrival of Europeans.⁵¹ In the United States and, until recently, Canada, the written word has triumphed in courts, with oral traditional evidence looked upon as inferior or in need of

43. *Id.* at 31–32.

44. *Id.* at 193.

45. *Id.* at 192–93.

46. “Hearsay” means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” FED. R. EVID. 801(c).

47. See, e.g., Coos Bay Indian Tribe v. United States, 87 Ct. Cl. 143, 152 (1938); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 86 (Can.).

48. See *Delgamuukw*, 3 S.C.R. at para. 86.

49. In fact, only one American court acknowledged that such evidence was hearsay, but that court rejected the evidence on other grounds. See *Coos Bay Indian Tribe*, 87 Ct. Cl. at 152 (rejecting tribal claimant’s evidence because the witnesses were too self-interested).

50. See *Delgamuukw*, 3 S.C.R. at para. 87.

51. See Bonnichsen v. United States, 367 F.3d 864, 881–82 (9th Cir. 2004); Pueblo de Zia v. United States, 165 Ct. Cl. 501, 504 (1964); *Delgamuukw*, 3 S.C.R. at paras. 64–

65. See generally Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977) (discussing whether the Mashpee people were a “tribe” under the Indian Nonintercourse Act).

corroboration by other evidence.⁵² In many situations, Native American and Canadian aboriginal groups do not have documentary evidence of high quality from the requisite time periods.⁵³ Instead, these groups can attest only to the information their ancestors have passed down orally.⁵⁴

Oral traditional evidence is typically utilized in four different types of claims. First, the use of oral traditional evidence is often discussed in land claims.⁵⁵ To establish a valid land claim, tribal claimants usually must show that they have occupied the land for a significant period of time, sometimes referred to as “time immemorial,” which typically extends to a time before European contact.⁵⁶ Often the only evidence claimants can produce is the oral traditional evidence of their tribe.⁵⁷ Next, tribal claimants may use oral traditional evidence to repatriate sacred or funerary objects or human remains through the NAGPRA.⁵⁸

52. See *Confederated Tribes of Warm Springs Reservation of Or. v. United States*, 177 Ct. Cl. 184, 204 (1966) (“The importance of corroboration and cross-checking cannot be undervalued since informants can mislead researchers by describing some period (usually the reservation one) besides the aboriginal, pre-treaty period.”); *Pueblo de Zia*, 165 Ct. Cl. at 504 (referring to the lower court’s decision: “Notwithstanding such specific documentary corroborations and the general dovetailing, and hence corroboration of historical and archaeological evidence and testimony which we are about to discuss, the Commission saw fit to virtually ignore the Indians’ testimony . . .”); see also Stohr, *supra* note 2, at 680–81.

53. See *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700, para. 152 (Can.) (stating that, while corroboration through other evidence would be helpful, oral traditional evidence should still be able to stand on its own without corroboration or if it contradicts other evidence, implying that corroboration may be difficult); *Truth and the Hopi*, *supra* note 26, at 183 (explaining that the seventeenth century documentary evidence, with which the author was corroborating the Hopi oral tradition, was unreliable, because much of it was from a Spanish Inquisition trial).

54. See *Delgamuukw*, 3 S.C.R. at para. 87; *Tsilhqot’in*, 2007 BCSC at para. 152.

55. See generally *Sokaogon Chippewa Cnty. v. Exxon Corp.*, 2 F.3d 219 (7th Cir. 1993) (discussing oral evidence concerning a treaty and the Sokaogon’s claim to the land covered by the treaty); *Zuni Tribe of N.M. v. United States*, 12 Cl. Ct. 607 (1987) (discussing the Zuni’s title to land in a land damages case); *Confederated Tribes*, 177 Ct. Cl. 184 (discussing whether the oral traditional evidence presented sufficiently proved that the tribal claimants had occupied the land for a long time); *Pueblo de Zia*, 165 Ct. Cl. 501 (holding that the tribal claimants established title to land when their oral traditional evidence was the only evidence presented in the case); *Coos Bay Indian Tribe*, 87 Ct. Cl. 143 (asserting that the oral traditional evidence presented was not sufficient to afford the tribal claimants title in the land in question); *Assiniboine Indian Tribe v. United States*, 77 Ct. Cl. 347 (1933) (asserting that the oral traditional testimony was not reliable enough to afford the tribal claimants damages for the land they had lost).

56. See *Zuni Tribe*, 12 Cl. Ct. at 607; *Pueblo de Zia*, 165 Ct. Cl. at 504; *Assiniboine*, 77 Ct. Cl. at 358.

57. See *Zuni Tribe*, 12 Cl. Ct. at 607; *Pueblo de Zia*, 165 Ct. Cl. at 504; *Assiniboine*, 77 Ct. Cl. at 358.

58. 25 U.S.C. §§ 3001–3005 (2012).

This statute includes oral tradition as acceptable evidence.⁵⁹ Tribal claimants also use this evidence to prove their status as an Indian tribe in order to proceed with a substantive claim.⁶⁰ Finally, oral tradition is used to obtain or maintain aboriginal rights, such as hunting or fishing.⁶¹ While it is not difficult to conceive of claims in which Native American or aboriginal Canadian groups may need to admit oral traditional evidence, courts have often addressed the evidence in a negative manner, especially in the early days of these claims' existence.

D. Rejection of Oral Traditional Evidence: Past and Present

Before the 1960s, and even in some recent circuit court cases, the attitude toward oral traditional evidence in American courts was one of dismissal.⁶² The following four court opinions address the use of oral tradition in a limited and unhelpful manner, either by mentioning it in dicta or giving the topic very little attention.⁶³ The general trend of the cases, however, illustrates that courts did not accept oral traditional evidence as reliable.⁶⁴

1. U.S. Claims Court Cases

In *Assiniboine Indian Tribe v. United States*,⁶⁵ a U.S. Court of Claims case from 1933, the tribal claimants sought the right of occupancy to two tracts of land, one of which fell under the Fort Laramie Treaty of 1851.⁶⁶ The claimant Indian tribe was required to prove by a preponderance of the evidence⁶⁷ that it had occupied the land in question

59. *Id.* § 3005(a)(4). See generally Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004) (discussing whether the plaintiffs could establish either tribal affiliation or ancestry with 9,000 year old human remains).

60. See generally Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977) (discussing whether the Mashpee people were a "tribe" under the Indian Nonintercourse Act).

61. See generally R. v. Van der Peet, [1996] 2 S.C.R. 507 (Can.) (discussing whether aboriginal fishing rights extended to commercial venues).

62. See Bonnichsen, 367 F.3d at 881–82; Sokaogon Chippewa Cnty. v. Exxon Corp., 2 F.3d 219, 222 (7th Cir. 1993); Coos Bay Indian Tribe v. United States, 87 Ct. Cl. 143, 152–53 (1938); *Assiniboine*, 77 Ct. Cl. at 368.

63. See Bonnichsen, 367 F.3d at 881–82; *Sokaogon*, 2 F.3d at 222; *Coos Bay Indian Tribe*, 87 Ct. Cl. at 152–53; *Assiniboine*, 77 Ct. Cl. at 368.

64. See Bonnichsen, 367 F.3d at 881–82; *Sokaogon*, 2 F.3d at 222; *Coos Bay Indian Tribe*, 87 Ct. Cl. at 152–53; *Assiniboine*, 77 Ct. Cl. at 368.

65. *Assiniboine Indian Tribe v. United States*, 77 Ct. Cl. 347 (1933).

66. See *id.* at 362–63. The Fort Laramie Treaty of 1851 afforded protections and land to "the Sioux or Dahcotahs, Cheyennes, Arapahoes, Crows, Assinibones, Gros-Ventre Mandans, and Arrickaras." Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749.

67. See *Assiniboine*, 77 Ct. Cl. at 366. The second edition of *Black's Law Dictionary* from 1910 defines "weight of evidence" or "preponderance of the evidence" as "the inclination of the greater amount of credible evidence, offered in a trial, to support

by “immemorial possession.”⁶⁸ While the court was not explicit in the particulars of the evidence submitted by the Assiniboine, it did state that the “[p]laintiff . . . introduced the greater number of witnesses giving oral testimony[.]”⁶⁹ The court was hesitant to accept this evidence, stating that “much of the evidence . . . is from a source that lessens its weight[,]”⁷⁰ emphasizing that the witnesses “were either . . . children at the time of the signing of the treaty or very old men at the time when they gave their testimony, and on account of age having at best a very incomplete recollection of matters that occurred fifty years prior thereto.”⁷¹ The court concluded that “[t]he circumstances of the case make this testimony so unsatisfactory as to be unworthy of any credit.”⁷² Instead, the court accepted the testimony of government agents, asserting that the agents were less biased and had lived with the Assiniboine for a considerable period of time, thereby adding to their credibility.⁷³ The agents alleged that the Assiniboine had migrated often during their history and that they had never excluded other Native American tribes from the land in question.⁷⁴ Thus, the court found that the Assiniboine did not occupy the land for the requisite period of time and denied their claim of occupancy.⁷⁵

In *Coos Bay Indian Tribe v. United States*,⁷⁶ a case from 1938, the U.S. Court of Claims addressed the issue of oral traditional evidence more clearly than the *Assiniboine* court. The Coos Bay Indian Tribe, along with several other smaller tribes, resided on a reservation over which they did not have any treaty rights.⁷⁷ In 1855, the Superintendent of Indian Affairs in Oregon, authorized by an act of Congress, negotiated a treaty with these tribes for the possession of the tribes’ land.⁷⁸ This treaty was never ratified, and the plaintiffs sought to prove their occupation of the land by submitting oral traditional evidence in support of their position.⁷⁹ Similar to the court in *Assiniboine*,⁸⁰ the *Coos Bay*

one side of the issue rather than the other.” BLACK’S LAW DICTIONARY 1224 (2d ed. 1910).

68. See *Assiniboine*, 77 Ct. Cl. at 358.

69. See *id.* at 366.

70. *Id.*

71. *Id.* at 369.

72. *Id.*

73. See *Assiniboine*, 77 Ct. Cl. at 367.

74. *Id.* at 360.

75. *Id.* at 368.

76. *Coos Bay Indian Tribe v. United States*, 87 Ct. Cl. 143 (1938).

77. See *id.* at 148.

78. *Id.* at 150.

79. See *id.* at 152. The court did not specify the length of time required to prove occupation. See *id.* at 153.

80. See *Assiniboine*, 77 Ct. Cl. 347.

court did not describe the evidence in the opinion.⁸¹ Instead, the court stated that “[i]f this testimony is to prevail in every way over documentary and historical evidence it is sufficient to observe that it does prove *by hearsay* that plaintiffs did occupy the lands claimed from time immemorial[,]” perhaps indicating that the rule against hearsay does not apply to oral traditional evidence as it does to most oral evidence.⁸² Nevertheless, the court concluded that the oral testimony was insufficient on its own to carry the tribal claimants’ burden of proof.⁸³ The court emphasized that “at least seventeen of the twenty-one witnesses produced ha[d] a direct interest in the outcome of the case”; thus, the evidence could not overcome the written evidence presented by the government.⁸⁴ While these U.S. claims court cases illustrate the prevailing ethnocentric attitudes from the 1930s, the following, more recent U.S. circuit court cases have used reasoning remarkably similar to that detailed above.

2. U.S. Court of Appeals Cases

Nearly 60 years after the two Court of Claims cases were decided, the U.S. Court of Appeals for the Seventh Circuit decided *Sokaogon Chippewa Community v. Exxon Corp.*⁸⁵ Although in a different jurisdiction,⁸⁶ the *Sokaogon* court reached a result similar to the preceding cases.⁸⁷ Here, the Sokaogon sought a declaration that the tribe had the right to occupy a particular tract of land rich in mineral deposits.⁸⁸ The issue before the court was whether the Sokaogon had ceded their right after negotiating a treaty during the 1800s.⁸⁹ The Sokaogon primarily used oral traditional evidence detailing a promise of a reservation.⁹⁰ The court, skeptical of the evidence, stated that “there is no documentation of this tradition, which is at best embroidered (too many ransoms, shipwrecks, lost and stolen maps, and deathbed revelations to be plausible) and at worst fictitious.”⁹¹ The court held that the Sokaogon had failed to state a claim sufficient to bypass summary

81. See *Coos Bay Indian Tribe*, 87 Ct. Cl. at 150–53.

82. *Id.* at 152 (emphasis added).

83. *Id.* at 152–53.

84. *Id.* at 152.

85. *Sokaogon Chippewa Cnty. v. Exxon Corp.*, 2 F.3d 219 (7th Cir. 1993).

86. The former cases were decided in the Court of Claims. *Sokaogon* and *Bonnichsen*, discussed *infra*, were decided in federal circuit courts.

87. See *Sokaogon*, 2 F.3d at 222.

88. *Id.* at 220.

89. *Id.* at 221.

90. See *id.* at 222.

91. *Id.*

judgment.⁹² The court explained that the oral traditional evidence was not admissible because “no effort was made by the Sokaogon’s counsel to cast it into a form in which it would be admissible in a court of law.”⁹³ The *Sokaogon* court used a rationale similar to that used in *Assiniboine* and *Coos Bay*, even though the string of Court of Claims cases from the 1960s through the 1980s all but overruled that earlier rationale.⁹⁴ Most recently, though, a case in the Ninth Circuit abided by reasoning similar to that used by the *Sokaogon* court.⁹⁵

Bonnichsen v. United States,⁹⁶ a 2004 case from the U.S. Court of Appeals for the Ninth Circuit, examined the use of oral traditional evidence within the context of NAGPRA.⁹⁷ In *Bonnichsen*, human remains approximately 9,000 years old were found in Washington State.⁹⁸ Due to the extreme age of the remains, archaeologists and other scientists sought to study the body.⁹⁹ Several local Native American groups protested and wished to have the remains, known popularly as the “Kennewick Man,” repatriated under NAGPRA.¹⁰⁰

While NAGPRA allows courts to admit oral traditional evidence in some quantity,¹⁰¹ it remains unclear whether oral traditional or folkloric evidence would be accepted on its own, without the corroboration of any other type of evidence.¹⁰² The Native American coalition in *Bonnichsen* attempted to establish through published “folk narratives” and statements from tribal members that either the Kennewick Man’s remains had lineal, Native American descendants, or they were affiliated with a modern tribe.¹⁰³ The Native Americans failed to satisfy either of the above as the

92. *Sokaogon*, 2 F.3d at 224.

93. *Id.* at 224–25.

94. See *Pueblo de Zia v. United States*, 165 Ct. Cl. 501, 505 (1964) (declaring that oral traditional evidence entitled to “some weight”). See generally *Confederated Tribes of the Warm Springs Reservation of Or. v. United States*, 177 Ct. Cl. 184 (1966) (following *Pueblo de Zia*).

95. See *Bonnichsen v. United States*, 367 F.3d 864, 881–82 (9th Cir. 2004).

96. *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004).

97. See generally *id.*

98. See *id.* at 868.

99. See *id.*

100. See *id.* at 869–70.

101. Congress enacted NAGPRA to allow Native American tribes to retrieve sacred and funerary items and human remains from the federal government where:

the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, *oral traditional*, historical, or other relevant information or expert opinion.

25 U.S.C. § 3005(a)(4) (2012) (emphasis added).

102. See Elizabeth M. Koehler, Comment, *Repatriation of Cultural Objects to Indigenous Peoples: A Comparative Analysis of U.S. and Canadian Law*, 41 INT’L LAW. 103, 116 (2007).

103. See *Bonnichsen*, 367 F.3d at 875, 881–82.

remains were far older than any “presently existing” tribe.¹⁰⁴ The court was wary of the evidence and responded:

[B]ecause the value of such accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record as a whole does not show where historical fact ends and mythic tale begins, we do not think that the oral traditions . . . were adequate to show the required significant relationship of the Kennewick Man’s remains to the Tribal Claimants. . . . 8340 to 9200 years between the life of Kennewick Man and the present is too long a time to bridge merely with evidence of oral traditions.¹⁰⁵

Again, this rationale shares similarities not only with the *Sokaogon* court’s reasoning, but also with that of the two Court of Claims cases from the 1930s, *Assiniboine* and *Coos Bay*. Later claims court cases, however, split from the 1930s cases, and tentatively admitted oral traditional evidence.

E. Hesitant Acceptance of Oral Traditional Evidence

Beginning in the 1960s with *Pueblo de Zia v. United States*,¹⁰⁶ the U.S. Court of Claims began accepting oral traditional evidence, at least to an extent.

1. The 1960s U.S. Court of Claims Cases

The 1960s brought change regarding the acceptance of Native American oral traditional evidence by the U.S. Court of Claims with two cases: *Pueblo de Zia*¹⁰⁷ and *Confederated Tribes of the Warm Springs Reservation of Oregon v. United States*.¹⁰⁸ In each of these cases, the Court of Claims explicitly recognized oral traditional evidence and assigned it evidentiary weight.¹⁰⁹

In *Pueblo de Zia*, the Native American claimants offered evidence from various tribal council members.¹¹⁰ The testimony consisted of “oral accounts handed down from father to son . . . from time immemorial.”¹¹¹ The lower court did not give the claimants’ oral tradition much weight,

104. See *id.* at 876–77.

105. *Id.* at 882 (footnote omitted).

106. *Pueblo de Zia v. United States*, 165 Ct. Cl. 501 (1964).

107. See generally *id.*

108. *Confederated Tribes of the Warm Springs Reservation of Or. v. United States*, 177 Ct. Cl. 184 (1966).

109. See *id.* at 204; *Pueblo de Zia*, 165 Ct. Cl. at 505.

110. *Pueblo de Zia*, 165 Ct. Cl. at 504.

111. *Id.*

and held that the claimants failed to uphold their burden.¹¹² Appellees' brief further stated that the evidence was "literally worthless."¹¹³ The Court of Claims, in contrast, emphasized that because the opposing party did not proffer any evidence of its own, the court would give the oral tradition "some weight."¹¹⁴ Even so, the court qualified the use of the oral traditional evidence by stating that "corroboration of historical and archaeological evidence and testimony" may be necessary.¹¹⁵

In *Confederated Tribes*, the tribal claimants sought Indian title to land by establishing "actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land."¹¹⁶ The court followed the reasoning in *Pueblo de Zia* and heavily emphasized the importance of cross-checking the evidence "since informants can mislead researchers by describing some period . . . besides the aboriginal, pre-treaty period."¹¹⁷ Thus, while these two cases established that tribal claimants could indeed use oral traditional evidence in courts, the requirement of corroboration by outside sources still severely limited its use.¹¹⁸ The following case, *Zuni Tribe of New Mexico v. United States*, goes further than the above cases, and allowed for the admission of a large amount of oral traditional evidence, likely because of the expert witness's innovative presentation.¹¹⁹

2. Presentation of Oral Traditional Evidence: *Zuni Tribe of New Mexico v. United States*

The *Zuni Tribe* case demonstrates that the manner in which oral traditional evidence is presented to a court is important. Like the previous cases, the U.S. Claims Court opinion in *Zuni Tribe* does not reveal much detail about the claimants' oral traditional evidence.¹²⁰ Nevertheless, the *Zuni Tribe* case is important because of the way in

112. *Id.* at 503.

113. *Id.* at 505 (internal quotation marks omitted) (quoting Appellee's Brief at 12).

114. *Id.*

115. *Pueblo de Zia*, 165 Ct. Cl. at 504.

116. *Confederated Tribes of the Warm Springs Reservation of Or. v. United States*, 177 Ct. Cl. 184, 194 (1966) (footnote omitted) (citations omitted).

117. *Id.* at 204 (citations omitted).

118. See *Folklore and Oral History*, *supra* note 15, at 173.

The problem of how to substantiate claims that depend on testimonies from oral tradition is an especially serious one for traditional peoples for whom large spans of their history and large areas of their domain lack written documentation and whose conceptions of history do not always conform to Western notions.

Id. (citing Fred Eggan, *From History to Myth: A Hopi Example*, in STUDIES IN SOUTHWESTERN ETHNOLINGUISTICS 33 (Dell Hymes & William E. Bittle eds., 1967)).

119. See generally *Folklore and Oral History*, *supra* note 15.

120. See generally *Zuni Tribe of N.M. v. United States*, 12 Cl. Ct. 607 (1987).

which the Zuni's expert witness utilized intensive methods to present the evidence to the court.¹²¹

The availability of both the description of the evidence and the expert's methods makes *Zuni Tribe* a particularly unusual case. The claimants here sought compensation for the alleged taking of lands, though the court opinion only discusses whether the Zuni had aboriginal title to the land in question.¹²² Again, the claimants had to prove "actual, exclusive, and continuous use and occupancy for a long time (or from time immemorial)."¹²³ The claimants succeeded and prevailed.¹²⁴ Much of the evidence offered consisted of oral histories, which the court acknowledged:

Defendant conjectures, but offers no evidence to contradict or impeach the Zuni recounting of their history. And, given the import attached to the oral transmission of history and religious observation by the Zuni, there is no reason to suspect gross or deliberate distortion. Accordingly, the court is persuaded that, notwithstanding some insufficiency, this recounted history is of evidentiary probity.¹²⁵

Despite this statement, the court did not describe the oral traditional evidence, provide any binding authority for other courts to follow, or explain why exactly the court was persuaded that the histories were "of evidentiary probity."¹²⁶

Andrew Wiget, the anthropologist who worked with the Zuni during this case, provided some insight through a detailed description of the process he used to gather and organize the Zuni's oral histories.¹²⁷ Wiget presented the oral histories to the court with 1,300 pages of depositions.¹²⁸ This strategy likely had a greater impact than simply allowing witnesses to give unstructured monologues on the stand because Wiget presented the evidence in a format with which Anglo-American courts are familiar.¹²⁹

121. See generally *Folklore and Oral History*, *supra* note 15 (detailing the efforts of the anthropologist who worked with the Zuni to present their large amount of oral traditional evidence to the court). This evidence was anecdotal, rather than formalized oral tradition. See *id.* at 184. Although the court did not mention any details concerning the evidence in the opinion, the tribal claimants prevailed. See generally *Zuni Tribe*, 12 Cl. Ct. 607.

122. *Zuni Tribe*, 12 Cl. Ct. at 608–09.

123. *Id.* at 607.

124. See *id.* at 609.

125. *Id.* at 616 n.12.

126. *Id.*

127. See generally *Folklore and Oral History*, *supra* note 15.

128. *Id.* at 173–74.

129. See Stohr, *supra* note 2, at 693–94. Stohr refers to an instance in a British Columbia court in which the Haida Indians testified as to their own oral histories, dressed in traditional, ceremonial garb. *Id.* at 693 (citing PETER GOODRICH, LANGUAGES OF LAW

Furthermore, Wiget created a method to demonstrate the “integrity” of oral traditional evidence to courts.¹³⁰ He used three criteria: validity, reliability, and consistency.¹³¹ Validity depends on the relationship between the oral tradition and other documents and evidence;¹³² reliability depends on the ability of one individual to “tell the same story about the same events on different occasions[;]¹³³ and consistency depends on “the degree to which the form or content of one testimony conforms with other testimonies.”¹³⁴

Wiget used depositions to acquire the oral histories.¹³⁵ He then studied both the Zuni’s repeated answers to his questions regarding land conditions relevant to the claim and the answers that disagreed with the majority of deponents.¹³⁶ He determined what most likely occurred based on what the depositions alone provided.¹³⁷ Only *after* recording the depositions did Wiget examine other evidence that supported the conclusions he derived from his informants’ statements.¹³⁸ In the end, the oral histories supported and added detail to the available archaeological evidence.¹³⁹ The court found Wiget’s representation credible, and the Zuni successfully established their “exclusive use and occupancy” of the land in question.¹⁴⁰

F. Canadian Treatment of Oral Traditional Evidence

Unlike the United States, Canadian courts have explicitly addressed the admissibility of oral traditional evidence and permitted its use, giving

179–208 (1990) (referring to *Western Forest Products, Ltd. v. Richardson*, an unreported case)). The court was uncomfortable with the evidence and deemed it irrelevant, though the Haida won their claim. *Id.* Stohr goes on to state:

When courts permit Indians to testify as to their own histories, the judges have difficulty fitting such views of the world into the parameters of the legal system. As such, they transform the court into a museum or ethnographic interview. While this fits the model of ‘collection’ and appropriation by which Indian speech is usually presented to non-Indians, it seriously undermines the validity of such speech as courtroom testimony.

Id. at 694.

130. See *Folklore and Oral History*, *supra* note 15, at 177.

131. *See id.*

132. *Id.*

133. *Id.* at 178 (quoting Alice Hoffman, *Reliability and Validity in Oral History*, in *ORAL HISTORY: AN INTERDISCIPLINARY ANTHOLOGY* 67, 70 (David K. Dunaway & Willa K. Baum eds., 1984)).

134. *Id.* at 179.

135. *Folklore and Oral History*, *supra* note 15, at 173–74.

136. *See id.* at 176–81.

137. *See id.*

138. *See id.* at 185.

139. *See id.*

140. *Zuni Tribe of N.M. v. United States*, 12 Cl. Ct. 607, 609 (1987).

such evidence the same weight as written evidence in aboriginal title cases.¹⁴¹ The two Supreme Court of Canada cases that illustrate the judicially created evidentiary exception for aboriginal oral traditional evidence are *R. v. Van der Peet*¹⁴² and *Delgamuukw v. British Columbia*.¹⁴³ Because these cases, while revolutionary, have promulgated a somewhat vague and unwieldy standard, this Comment further discusses *Tsilhqot'in v. British Columbia*,¹⁴⁴ which provides insight into how one lower court has interpreted and applied the evidentiary standard.

R. v. Van der Peet addressed the issue of an aboriginal group's right to commercially sell fish caught with a Native fishing license.¹⁴⁵ If widespread fishing and trade were historically integral to the aboriginal group in question, the group could continue selling the fish; thus, the group sought to admit oral traditional evidence to support that fact.¹⁴⁶ The Court found that the evidence demonstrated that the commercial sale of fish was not integral to the aboriginal group.¹⁴⁷ The Court addressed the group's evidence, stating that "[t]he courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case."¹⁴⁸ This statement implied that an evidentiary exception was applicable to aboriginal claims. The Supreme Court of Canada would readdress and clarify the issue one year later.¹⁴⁹

Delgamuukw expanded on the rationale set forth in *Van der Peet*, revolutionizing aboriginal title claims in Canada. While the Supreme Court of Canada did not reach a decision regarding the underlying land dispute,¹⁵⁰ it did address the use of oral traditional evidence.¹⁵¹ The Gitksan and the Wet'suwet'en Nations presented to the Court two highly ritualized systems of oral tradition: the *adaawk* and the *kungax*.¹⁵² The

141. See e.g., *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 87 (Can.).

142. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (Can.).

143. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.).

144. *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 (Can.).

145. *Van der Peet*, 2 S.C.R. at para. 2.

146. *Id.*

147. *Id.* at para. 91.

148. *Id.* at para. 68.

149. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 87 (Can.).

150. *Id.* at para. 74.

151. *Id.* at para. 87.

152. *Id.* at para. 93. The trial court described the *adaawk* and the *kungax* as "a sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House." *Id.* (internal quotation marks omitted) (quoting *Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97, 164 (Can. B.C. S.C.)). In

Court noted that the oral tradition was ““repeated, performed and authenticated at important feasts[,]”” which added to its reliability.¹⁵³ The court acknowledged that the use of oral traditional evidence in Anglo-American courts creates certain difficulties¹⁵⁴ and that the evidence at hand would ordinarily be considered hearsay.¹⁵⁵ Nevertheless, the court asserted that “the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.”¹⁵⁶ To do otherwise, would ““impose an impossible burden of proof” on aboriginal peoples, and ‘render nugatory’ any rights that they have.”¹⁵⁷ While groundbreaking, this standard lacks detail, and, as of this writing, only one lower Canadian court has interpreted this standard.

In 2007, the Supreme Court of British Columbia interpreted the *Delgamuukw* court’s reasoning in *Tsilhqot’in Nation v. British Columbia*. The aboriginal claimants in *Tsilhqot’in Nation* sought to secure aboriginal title as well as rights to hunt and trap.¹⁵⁸ Similar to the evidence in *Delgamuukw*, the oral traditional evidence presented in this case was reinforced through ritual, adding some degree of reliability.¹⁵⁹ The court adopted Vansina’s definitions and applied them to the rationale of the Supreme Court of Canada quoted above to conclude that determining the reliability of the oral tradition was a key factor in the tradition’s admissibility as hearsay evidence.¹⁶⁰ The court also stated that oral traditional evidence does not *need* to be corroborated by historical documents or archaeological evidence.¹⁶¹ The *Tsilhqot’in Nation* court proposed that “even where oral tradition is contradicted by

addition to the oral tradition, the *adaawk* and *kungax* are represented physically through “totem poles, crests and blankets.” *Id.* Both the *adaawk* and *kungax* are largely used for the same purpose among the Gitksan and Wet’suwet’en, respectively, though the trial judge noticed that the *kungax* is more ““in the nature of a song . . . which is intended to represent the special authorities and responsibilities of a chief”” *Id.* (omissions in original) (quoting *Delgamuukw*, 3 W.W.R. at para. 342).

153. *Id.* (quoting *Delgamuukw*, 3 W.W.R. at 164).

154. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 87 (Can.).

155. *Id.* at para. 86.

156. *Id.* at para. 87.

157. *Id.* (quoting R. v. Simon, [1985] 2 S.C.R. 387, 408 (Can.)).

158. See *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700, paras. 26–28 (Can.).

159. See *id.* at paras. 133–34.

160. See *id.* at paras. 139–46.

161. *Id.* at para. 152. The court opined that “[o]ral traditional evidence] were never given any independent weight but only used and relied upon where there was confirmatory evidence[,]” it would result in such evidence being ““consistently and systemically undervalued.”” *Id.* at para. 153 (quoting *Delgamuukw*, 3 S.C.R. at para. 98).

documentary evidence, oral tradition may still prevail and assessment must be made to gauge which, on a balance of probabilities, is more plausible.”¹⁶² The *Tsilhqot'in Nation* court further stated that it would only seek corroborative evidence if the oral traditional evidence on its own were insufficient to reach a conclusion of fact.¹⁶³

Because of *Van der Peet*, *Delgamuukw*, and *Tsilhqot'in Nation*, Canadian courts today have a flexible attitude toward aboriginal oral traditional evidence, as well as an explicit evidentiary exception. The following Part will compare the Canadian standard with the American courts’ statements on oral traditional evidence, examine problematic areas in the court decisions of both countries, and propose a new Federal Rule of Evidence that addresses Native American oral traditional history.

III. CONFUSION, INCONSISTENCY, AND A SOLUTION

A. *Discussion of American and Canadian Court Decisions: That Which Was Left Unsaid*

1. American Courts

Although American courts have addressed the issue of oral tradition and history as evidence, the decisions are difficult to parse. Native American groups are disadvantaged because the treatment of oral traditional evidence is murky and nearly impossible to discern. Future tribal claimants and litigants may be unable to decide what evidence to present or whether it will be admissible because of this lack of consistency. While courts could address this issue directly, the American claims court and circuit courts have failed to do so. As the following subsection explains, the claims court is perhaps most problematic because of the number of cases relating to this topic the court regularly encounters.

a. The Silence and Inconsistencies of the Claims Court

The claims court, with its lack of detail and consistency between cases, has been particularly haphazard in addressing oral traditional evidence. Thus, there exists precedent supporting both the denial¹⁶⁴ and admission¹⁶⁵ of this evidence. *Confederated Tribes* followed *Pueblo de*

162. *Id.*

163. See *Tsilhqot'in*, 2007 BCSC at para. 196.

164. See *Coos Bay Indian Tribe v. United States*, 87 Ct. Cl. 143, 152–53 (1938); *Assiniboine Indian Tribe v. United States*, 77 Ct. Cl. 347, 368 (1933).

165. See *Confederated Tribes of the Warm Springs Reservation of Or. v. United States*, 177 Ct. Cl. 184, 204 (1966); *Pueblo de Zia v. United States*, 165 Ct. Cl. 501, 505 (1964).

Zia,¹⁶⁶ but *Zuni Tribe*, the most recent case, did not refer to either.¹⁶⁷ While there is a general trend toward acceptance of oral traditional evidence, neither *Zuni Tribe*, nor *Pueblo de Zia*, nor *Confederated Tribes* addressed the viewpoint of the older Court of Claims cases that looked upon oral traditional evidence with a less favorable eye.¹⁶⁸ The unpredictability of the claims courts' cases is detrimental to Native American claimants seeking relief. Future claimants will not know if they should refer to the 1930s U.S. Court of Claims cases, the 1960s U.S. Court of Claims cases, or only to *Zuni Tribe*, the most recent case from the U.S. Claims Court.¹⁶⁹ Each case, except for *Pueblo de Zia* and *Confederated Tribes*, seems to stand on its own, and the court can freely and unpredictably choose which rationale to adopt.

Moreover, in all of the above cases, the claims courts repeatedly failed to describe the evidence or its rationale in a manner that tribal claimants would be able to follow, leaving future claimants unsure as to whether their evidence is at all analogous to the evidence successfully admitted in previous cases. This neglect is evident in *Zuni Tribe*, in which the U.S. Claims Court failed to address or mention the claimants' use of over 1,000 pages of depositions of anecdotal evidence¹⁷⁰—evidence that the court ultimately accepted. Nevertheless, future claimants will not be able to discern whether presentation in the form of depositions determined the court's decision, whether the content of the evidence indicated its reliability, or whether the court relied on some other factor. Perhaps the *Zuni Tribe* court accepted the depositions as evidence because Wiget used his three-pronged test—validity, reliability, and consistency—and avoided outside corroborative evidence until after he had finished interviewing informants.¹⁷¹ Or perhaps the U.S. Claims Court accepted the oral traditional evidence because the content seemed credible. As discussed above, the *Sokaogon* court found the content of the oral traditional evidence to be suspiciously farfetched.¹⁷² While *Zuni Tribe* occurred several years earlier in a different jurisdiction, perhaps

166. See *Confederated Tribes*, 177 Ct. Cl. at 204.

167. See generally *Zuni Tribe of N.M. v. United States*, 12 Cl. Ct. 607 (1987).

168. See generally *id.*; *Confederated Tribes*, 177 Ct. Cl. 184; *Pueblo de Zia*, 165 Ct. Cl. 501.

169. Again, because the Court of Claims was abolished, it is unclear how the cases should serve as precedent. The Claims Court, which replaced the Court of Claims, retains all of the Court of Claims' jurisdiction and "continues, uninterrupted, a judicial tradition more than 140 years old." *About the Court*, *supra* note 11. In addition, neither Westlaw nor LexisNexis indicates caution for the oldest, negative cases. Regardless, the Court of Claims cases' historical significance provides valuable context for this Comment. The Court of Claims and the Court of Federal Claims are one and the same.

170. *Folklore and Oral History*, *supra* note 15, at 173.

171. See generally *id.*

172. See *Sokaogon Chippewa Cnty. v. Exxon Corp.*, 2 F.3d 219, 222 (7th Cir. 1993).

the U.S. Claims Court found that the content of the Zuni's oral traditional evidence was reasonable enough to be plausible.

Furthermore, future claimants have little guidance as to how they need to present their evidence, thus limiting a claimant's ability to satisfactorily prepare for court. In *Coos Bay*, the U.S. Court of Claims stated that the oral traditional evidence must outweigh any conflicting documentary evidence, but it did not say how claimants should accomplish this task.¹⁷³ The U.S. Court of Claims in *Pueblo de Zia* and *Confederated Tribes* stated that corroboration with documents or other outside sources is necessary in order for claimants to use oral traditional evidence.¹⁷⁴ Again, there is no mention of how much corroboration is necessary, or what to do if documents detailing the events in question do not exist. Even if contemporary documents are available, they will likely portray only European Americans' experiences and perceptions, and will likely not be useful to a Native American tribe. As the law stands now, it seems that tribal claimants instead must test their luck, risking funds and resources to present evidence in a manner that a court may ultimately find to be inadequate proof of the tribe's claim.

b. The Circuit Courts' Lack of Explanation

The federal circuit court cases, *Sokaogon Chippewa Community* and *Bonnichsen*, both rejected the use of oral traditional evidence.¹⁷⁵ Notably, however, neither circuit addressed questions such as whether oral traditional evidence could ever be admissible, and, if so, whether courts would accept such evidence *only* in Native American claims cases. Furthermore, both circuits failed to address why exactly they found the oral traditional evidence inadequate.

It is unclear why the *Sokaogon* court deemed the evidence unacceptable. The court was hesitant regarding the content of the oral traditional evidence, opining that there were "too many ransoms, shipwrecks, lost and stolen maps, and deathbed revelations to be plausible[.]"¹⁷⁶ The court did not explain whether it would have admitted the oral traditional evidence had the content been more plausible.¹⁷⁷ The court also mentioned that counsel had not attempted to present the

173. See *Coos Bay Indian Tribe v. United States*, 87 Ct. Cl. 143, 152–53 (1938).

174. See *Confederated Tribes of the Warm Springs Reservation of Or. V. United States*, 177 Ct. Cl. 184, 194 (1966); *Pueblo de Zia v. United States*, 165 Ct. Cl. 501, 504 (1964).

175. See *Bonnichsen v. United States*, 367 F.3d 864, 881–82 (9th Cir. 2004); *Sokaogon*, 2 F.3d at 224.

176. *Sokaogon*, 2 F.3d at 222.

177. See generally *id.* at 219.

evidence in a way that would allow the testimony to be admissible.¹⁷⁸ Again, the court failed to specify exactly how the evidence was presented or how it should have been presented.

The *Bonnichsen* reasoning raises similar questions as to why the court rejected the oral traditional evidence presented by Native American groups. There, the court also failed to describe the evidence or detail why it was not sufficient to support the NAGPRA claim.¹⁷⁹ The court first examined the inadequacies of oral traditional transmission, noting that over generations, oral tradition becomes increasingly inaccurate.¹⁸⁰ The court concluded that the evidence was too ancient to be admissible.¹⁸¹ The court never explained how ancient evidence must be for a court to consider it too ancient to be reliable. Thus, the court failed to provide any guidance for future plaintiffs to follow. Potential claimants do not know if the Ninth Circuit is completely adverse to oral traditional evidence or if it will admit more recent evidence. If courts addressed these issues, future tribal claimants would be better prepared to submit their evidence in a manner that would likely be admissible, perhaps reducing appeals and evidentiary inquiries.

2. Canadian Courts and an Evidentiary Exception for Oral Tradition

As stated above,¹⁸² the Supreme Court of Canada explicitly created an evidentiary exception for aboriginal oral tradition.¹⁸³ While the *Delgamuukw* standard was indeed revolutionary and positive for tribal claimants seeking to submit their oral traditional evidence, one must also keep in mind its shortcomings: the Court did not detail how to gauge the reliability of oral tradition or whether oral histories, such as anecdotal evidence, would also be accepted. The next section will detail the strengths of the Canadian evidentiary exception for oral traditional evidence, as well as the effects the exception may have for future claimants.

a. *Delgamuukw* and *Tsilhqot'in*: Strengths

First, the Supreme Court of Canada formulated the evidentiary exception to combat the injustice the Court perceived.¹⁸⁴ The Court

178. *Id.* at 224–25.

179. See generally *Bonnichsen*, 367 F.3d 864.

180. See *id.* at 881–82.

181. *Id.*

182. See *supra* Part II.F.

183. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 87 (Can.).

184. *Id.*

stated that oral traditional evidence would be hearsay because it is not direct testimony from an eyewitness.¹⁸⁵ However, assumedly because the Court realized that aboriginal claimants would have few other mechanisms with which to support their claims, the Court articulated an evidentiary exception, allowing aboriginal groups to submit oral traditional evidence without violating the rule against hearsay.¹⁸⁶

The Court also stated that corroborating evidence is not necessary,¹⁸⁷ further increasing aboriginal groups' ability to use oral traditional evidence. In many cases involving Native American oral traditional evidence, it seems that the only way to validate the evidence is to compare it with documents, archaeological records, or other generally accepted forms of evidence.¹⁸⁸ Unfortunately, contemporary documents written by individuals of European descent could be biased or otherwise suspect.¹⁸⁹ The decision establishes that oral traditional evidence is analogous to documentary evidence and has similar potential for reliability.¹⁹⁰ With this nuance in the standard, aboriginal groups are more easily able to support their claims. Despite this, however, the standard is not highly detailed and raises many questions for lower courts to consider.

b. *Delgamuukw* and *Tsilhqot'in*: Weaknesses

While foregoing corroboration acknowledged the bias in contemporary European documents, the *Delgamuukw* and *Tsilhqot'in* courts did not offer any other solution to prove the veracity of oral tradition. The *Tsilhqot'in* court emphasized that reliability is a hallmark of an oral tradition that can be used as evidence,¹⁹¹ but did very little to define how to determine that reliability, or how potential claimants could gauge that aspect of their own evidence.

The *Tsilhqot'in Nation* court, like this Comment, chose to adopt the definitions used by Vansina¹⁹² but failed to acknowledge Vansina's

185. See *id.* at para. 86.

186. See *id.* at para. 87.

187. See *id.*

188. See *Folklore and Oral History*, *supra* note 15, at 185.

The validity of oral testimonies is often established by corroboration with other forms of evidence, but in many aspects of Indian claims cases such other evidence is often missing or itself subject to dispute. In such instances, the only guarantor of the validity of oral testimonies is the reliability or internal integrity of the tradition.

Id.

189. See *id.*

190. *Delgamuukw*, 3 S.C.R. at para. 87.

191. See *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para. 139 (Can.).

192. See *id.* at paras. 141–46.

criticisms of oral tradition. Vansina has concerns that ancient oral tradition will be unable to provide factual truth about events.¹⁹³ He advocates for the use of oral tradition in determining general trends and attitudes in a historical context.¹⁹⁴ In tribal claims, however, claimants may not always wish to merely prove general trends in their history. Claimants may hope to prove their occupation of a specific tract of land,¹⁹⁵ their use of hunting or fishing techniques at a certain time in history,¹⁹⁶ or recent damages to land that they currently occupy.¹⁹⁷ If corroboration proves to be unhelpful or harmful, especially in the case of racially biased documentary evidence, it is unclear how tribal claimants can demonstrate the reliability of their evidence.

Furthermore, the courts in *Delgamuukw* and *Tsilhqot'in* rely on the fact that the oral traditional evidence in question was oral *tradition*, not oral history, and, moreover, was often repeated and verified at gatherings.¹⁹⁸ The *Delgamuukw* court was unclear about whether it favored the oral traditional evidence for reasons other than the fact that it was told repetitively under much scrutiny by members of the same Nation.¹⁹⁹ Unfortunately, oral tradition of this type is uncommon in the United States.²⁰⁰ Rather, most Native American oral traditional evidence is anecdotal in nature²⁰¹ and does not have the history and extensive cultural repetition of formal oral tradition that the courts valued in both *Delgamuukw* and *Tsilhqot'in*.²⁰²

Because of the lack of history and formality of oral tradition in Native American cultures, this anecdotal evidence may be more difficult for American courts to accept. Courts may view anecdotal evidence as too similar to ordinary hearsay, rather than as evidence as reliable as historical documents. It remains to be seen whether Canadian courts will

193. See VANSINA, *supra* note 7, at 31.

194. See *id.* at 31–32.

195. See generally *Delgamuukw*, 3 S.C.R. 1010 (using oral traditional evidence to prove title to land).

196. See generally R. v. Van der Peet, [1996] 2 S.C.R. 507 (Can.) (using oral traditional evidence to support the claim that aboriginal fishing rights included the right to sell commercially); *Tsilhqot'in*, 2007 BCSC 1700 (using oral traditional evidence to attain hunting and fishing rights).

197. See generally Zuni Tribe of N.M. v. United States, 12 Cl. Ct. 607 (1987); *Folklore and Oral History*, *supra* note 15 (using oral traditional evidence to describe the negative changes in land over time, though the *Zuni Tribe* court opinion discusses only *title* to the land in question).

198. See *Delgamuukw*, 3 S.C.R. at para. 93; *Tsilhqot'in*, 2007 BCSC at paras. 133–34.

199. See generally *Delgamuukw*, 3 S.C.R. 1010.

200. See *Folklore and Oral History*, *supra* note 15, at 184.

201. See *id.*

202. See *Delgamuukw*, 3 S.C.R. at para. 93; *Tsilhqot'in*, 2007 BCSC at paras. 133–34.

also accept anecdotal oral history and oral tradition, along with well-established, formal oral tradition.

B. *Andrew Wiget's Research Methods from Zuni Tribe of New Mexico v. United States*

Wiget's research methods were groundbreaking in that they presented oral, anecdotal evidence to an Anglo-American court in a manner comprehensible to and compatible with the documentary culture of Anglo-American courts. This section will discuss the benefits of having this case and such detailed records for future claimants and expert witnesses. However, there are also drawbacks to Wiget's methods, and the methods that worked for one tribe's oral traditional evidence should not be considered a cure-all. The final section will present a proposal for a Federal Rule of Evidence providing an exception for oral traditional evidence.

1. Andrew Wiget's Methods: Strengths

Wiget's research techniques in *Zuni Tribe* provide a method to demonstrate how oral traditional evidence could be admissible without corroboration from outside sources and how to establish the veracity of anecdotal evidence.²⁰³ Wiget did not corroborate the evidence with outside documents or archaeology.²⁰⁴ Instead, he was fairly isolated during his research, which later proved to be "useful in revealing the integrity of the [oral] tradition."²⁰⁵ Wiget cross-referenced each informant's histories and used the consistency and integrity of a particular informant's history to produce evidence that agreed with that of archaeological and documentary research.²⁰⁶ Furthermore, because oral history and oral tradition may incorporate myth, exaggeration, or bias, Wiget had to determine if an informant was coloring his or her story in the way he or she wished to see it, or if an informant was stating what he or she actually experienced.²⁰⁷ For example, Wiget found that if an informant neatly told his or her history with meaning assigned to events, the information was likely second-hand knowledge organized in a manner that made sense to the informant.²⁰⁸ If the informant told some portions confidently but also gave disorganized or hesitant answers, Wiget found that the answer was indicative of the limits of the

203. See generally *Folklore and Oral History*, *supra* note 15.

204. See *id.* at 174.

205. *Id.*

206. See *id.* at 174, 185.

207. See *id.* at 177.

208. See *Folklore and Oral History*, *supra* note 15, at 182.

informant's knowledge, and Wiget was able to depend on the information about which the informant was certain.²⁰⁹ Finally, Wiget did not depend on one or a few informants; rather, he interviewed numerous people and amassed 1,300 pages of deposition testimony to present to the trial court.²¹⁰ Wiget could accurately estimate the years in which certain events occurred by analyzing the trends among numerous deponents. As a result, the evidence appeared that much more reliable.²¹¹

Wiget's methods are also useful for Native American groups because the methods can apply to the presentation of both oral tradition and oral history.²¹² As stated above,²¹³ oral traditional evidence presented to American courts would likely be anecdotal, which courts may view as less reliable.²¹⁴ Organizing the anecdotal evidence into depositions may be more palatable for courts²¹⁵ because the evidence will be organized and will not appear to be mere gossip. Moreover, this method could be used to interpret formalized oral tradition,²¹⁶ like that in *Delgamuukw* and *Tsilhqot'in*. Experts can analyze the validity, reliability, and consistency of formal oral tradition, as well as anecdotal evidence. Many view formal oral tradition as more reliable than anecdotal evidence,²¹⁷ but, in practice, that may not necessarily be true. Rather than requiring a court to interpret a performed monologue of oral tradition,²¹⁸ courts may be more accepting of interviews and depositions, which transform an exotic genre of evidence into a more familiar medium. Using Wiget's methods will allow courts to better understand oral traditional evidence and articulate holdings in an informed manner. Thus, until the judges themselves are more educated about oral traditional evidence, it may be effective to present the evidence to the court in deposition form.

2. Andrew Wiget's Methods: Weaknesses

Wiget's methods are not ideal, however. A notable shortcoming is the possible necessity of anthropologist expert witnesses. Native American groups may need to hire an expert like Wiget for a court to comprehend their evidence. Anthropologists with experience in

209. See *id.* at 176.

210. *Id.* at 173–74.

211. See *id.* at 185.

212. See *id.* at 184.

213. See *supra* Part III.A.2.b.

214. See *supra* Part III.A.2.b.

215. See Stohr, *supra* note 2, at 694.

216. See *Folklore and Oral History*, *supra* note 15, at 184.

217. See *id.*

218. See Mary Ann Pylypchuk, *The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources*, ARCHIVARIA, Summer 1991, at 51, 52.

interpreting oral traditions and histories may be difficult to locate, and the financial cost of an expert will pose another hurdle for Native American groups to overcome in seeking relief.

Another limitation to Wiget's methods is that some cultures believe that recording and translating the evidence corrupts the essence of the oral tradition or history.²¹⁹ In some cases, the oral traditional evidence may have sacred aspects and cultural significance of which Anglo-American courts are ignorant, and Native American groups may be hesitant about recording such sacred tradition.²²⁰ In these situations, Wiget's methods may not satisfy certain Native American peoples. Even so, the use of anthropological expert witnesses could ensure that judges better understand the sacredness or cultural relevance of the evidence, and thus afford the evidence the appropriate respect. Unfortunately, the lack of cross-cultural education between Anglo-American courts and Native American claimants indicates that expert witnesses will likely prove crucial to these cases. Wiget's methods, in these instances, would be a compromise between the claimants and the courts: the claimants' evidence may have to be "translated," but in return, the judge will be far more likely to examine the evidence in a fair, unbiased manner because the evidence would now exist in a form familiar to a judge schooled in the Anglo-American legal culture.

If the United States adopted a rule of evidence like the one detailed below, tribal claimants would still need a manner in which to present their evidence, especially if it is anecdotal rather than traditional. Wiget's methods remedy the courts' unfamiliarity with oral tradition and history with expert testimony and depositions, thereby freeing up courts to consider the oral traditional evidence as they would anything else.

C. *Proposal: An Evidentiary Rule Allowing for Oral Traditional Evidence as Testimony*

The following is a proposed rule of evidence that will allow courts to better accommodate the use of oral traditional evidence. Judicial precedent has proven unwieldy in the face of this particular issue, and, in the United States, a Federal Rule of Evidence is better equipped to handle the various criteria that courts should consider. This proposed rule incorporates Wiget's innovations, definitions from NAGPRA, and aspects of oral traditional evidence emphasized by both American and

219. See *id.* at 54.

220. See *id.* at 52–53 ("Aboriginal evidence is . . . more than simply court evidence relating to aboriginal peoples. It is testimonies and exhibits which, having emanated from aboriginal societies, substantiate the enduring validity of the laws, philosophies, norms and customs of those societies.").

Canadian courts, resulting in a series of factors. The proposed rule is as follows:

Oral traditional evidence, defined as any oral technique conveying information including, but not limited to, cultural information, past events, or legend, shall be admitted as testimony if its veracity can be proven by a preponderance of the evidence. Courts shall balance the following criteria:

1. Validity, or the ability of the Native American group to corroborate the evidence with other materials, such as documents, recordings, photographs, etc.²²¹
2. Reliability, or “the consistency with which an individual will tell the same story about the same events on different occasions.”²²²
3. Consistency, or “the degree to which the form or content of one testimony conforms with other testimonies.”²²³
4. The age of the oral traditional evidence, if over 1,000 years old.
5. The degree of formality used in conveying the oral traditional evidence.

This rule gives courts more guidance in analyzing oral traditional evidence while allowing Native American groups the freedom to establish the above criteria through any number of methods. While Wiget’s depositional method is a viable technique for demonstrating the reliability of oral traditional evidence, it is an intense and expensive process. Courts should not require every group seeking to use oral traditional evidence to take thousands of depositions if, for example, the evidence is reliable in other ways, like the *adaawk* and *kungax* detailed in *Delgamuukw*.²²⁴

In addition, the above rule accounts for the decisions from the claims courts, circuit courts, and Canadian courts and ensures that American courts do not focus solely on one aspect of oral traditional evidence. For example, as noted in *Bonnichsen*, the age of the evidence may be a significant factor in examining the evidence.²²⁵ The proposed rule suggests that courts scrutinize the age of the evidence if it dates well

221. See *Folklore and Oral History*, *supra* note 15, at 177.

222. *Id.* at 178 (internal quotation marks omitted) (quoting Alice Hoffman, *Reliability and Validity in Oral History*, in *ORAL HISTORY: AN INTERDISCIPLINARY ANTHOLOGY* 67, 70 (David K. Dunaway & Willa K. Baum eds., 1984)).

223. *Id.* at 179.

224. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 13 (Can.).

225. *Bonnichsen v. United States*, 367 F.3d 864, 881–82 (9th Cir. 2004).

before European contact. Even so, if the other factors of the proposed rule weigh in favor of admission, the age of the evidence may be of no concern. Corroboration is also considered even though other evidence, especially documentary evidence, could be biased. However, if the oral traditional evidence *can* be corroborated by some other genre of evidence, that could be an indicator of the oral evidence's veracity. If not, other factors could balance that weakness. Only the criterion used in *Sokaogon*—that of believable content—has been excluded. The content of oral traditional evidence may be too susceptible to cultural bias to be included in the list of factors. If the oral traditional evidence is truly farfetched, the other factors—particularly corroboration, reliability, and consistency—will demonstrate that the evidence may not be suitable for use in court.

IV. CONCLUSION

While predicting the outcome of a case is nearly impossible, one ought to be able to anticipate whether a court will admit the evidence supporting one's claim. The manner in which the American claims court and circuit courts have decided the cases involving oral traditional evidence has created uncertain terrain, and claimants and plaintiffs are unable to predict whether courts will accept the content, presentation, or age of such evidence. Moreover, both American and Canadian courts have consistently avoided articulating what is required to establish reliable oral traditional evidence.

Any kind of rule providing guidance would be far better than no rule at all. Wiget's methods of establishing the reliability of oral traditional evidence,²²⁶ along with decisions like *Delgamuukw*,²²⁷ have shown that oral traditional evidence can indeed be a source of truth that has the full potential to illuminate facts, like any other source of evidence. Because of this reality, the Federal Rules of Evidence should allow Native American groups to present such evidence in American courts. The rule proposed in this Comment attempts to remedy this legal deficiency. The law, as it currently stands, is unpredictable with regard to this genre of evidence. A clearly stated rule will grant future claimants increased accessibility to the courts and ensure that evidentiary confusion and ignorance will not bar remedies to past injustices.

226. See generally *Folklore and Oral History*, *supra* note 15.

227. See *Delgamuukw*, 3 S.C.R. at para. 87.