

May 2017

## Evidence Issues In Indian Law Cases

Taylor S. Fielding

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/ailj>



Part of the [Evidence Commons](#), and the [Indian and Aboriginal Law Commons](#)

---

### Recommended Citation

Fielding, Taylor S. (2017) "Evidence Issues In Indian Law Cases," *American Indian Law Journal*: Vol. 2 : Iss. 1 , Article 2.

Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol2/iss1/2>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in American Indian Law Journal by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact [coteconor@seattleu.edu](mailto:coteconor@seattleu.edu).

## EVIDENCE ISSUES IN INDIAN LAW CASES

Taylor S. Fielding\*

### INTRODUCTION

“American archaeology has reached the point where its very survival depends upon close interaction with the realm of law.”<sup>1</sup> This statement appeared in a report of a seminar in law in archaeology in 1977. Granted, this seminar was held just a few years after the *United States v. Diaz*<sup>2</sup> case, where the Ninth Circuit reversed a conviction under the Antiquities Act of 1906,<sup>3</sup> and ruled the Act itself was unconstitutionally vague. Ironically, however, it would be thirteen more years before the anthropological world was shaken through the passage of the Native American Graves Protection and Repatriation Act (NAGPRA),<sup>4</sup> which would precipitate extensive litigation between tribes, museums, and federal government agencies.

Jack F. Trope and Walter R. Echo-Hawk write in their historical overview of NAGPRA that it was meant to emphasize *human rights* origins, and to address one of the flagrant violations of the civil rights of Native Americans – proper respect for the burial of their dead.<sup>5</sup> Trope and Echo-Hawk also write that the passage of NAGPRA was seen by many in Congress as a logical extension of the federal government’s trust responsibility to Native American, Hawaiian, and Alaskan Native groups.<sup>6</sup>

---

\* Author received his M.S. degree in anthropology from Idaho State University in 2004 and graduated cum laude from Gonzaga University with a J.D. degree in 2008. The author currently works for the Kalispel Tribe of Indians in Washington. The author would like to thank former Gonzaga Law Professor and current Chief Judge of the Eastern District of Washington, Rosanna Malouf Peterson for her assistance in the development and editing of this article.

<sup>1</sup> Michael Moratto, *A Consideration of Law in Archeology*, MANAGEMENT OF ARCHEOLOGICAL RESOURCES: THE AIRLIE HOWE REPORT 9 (CHARLES R. MCGIMSEY III AND HESTER A. DAVIS EDS., 1977).

<sup>2</sup> *United States v. Diaz* 499 F.2d 113 (9th Cir. 1974).

<sup>3</sup> 16 U.S.C. § 431-433.

<sup>4</sup> Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. § 3001 to 3013).

<sup>5</sup> Jack F. Trope and Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act Background and Legislative History*, REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS? 123-168 (DEVON A. MIHESUAH ED. 2000).

<sup>6</sup> *Id.*

NAGPRA outlines a series of actions that are required if archaeological investigations inadvertently uncover Native American remains.<sup>7</sup> These include: cessation of activities, notification of supervisory personnel or the state historic preservation officer, and consultation with “affiliated or potentially affiliated” Native American groups.<sup>8</sup> NAGPRA also directs museums and other federally-funded institutions<sup>9</sup> to inventory and attempt to determine the cultural affiliation of Native American remains, funerary objects, and objects of cultural patrimony in their collections.<sup>10</sup> If cultural affiliation could be established, notification is then required of the appropriate federally recognized tribal group that may request repatriation.<sup>11</sup>

In the thirty years since the report on the interaction of law and archaeology seminar, practitioners of all of the anthropology sub-disciplines have served as expert witnesses in numerous cases, both civil and criminal. Often, anthropologists are called as experts to provide the court with information on the culture and history of Native American groups, rather than Native American groups informing the court themselves. This paper will examine whether anthropologists are really more qualified to give testimony about Native American groups, while tribal member testimony, especially about the tribe’s oral history, is marginalized. Part I of this paper will examine some of the problems identified with applying the *Daubert* factors to “soft science,” and will examine the disparity in cases where anthropologists have testified. Part I will also discuss whether anthropologists, specifically archaeologists, can even provide complete expert testimony without talking to tribal members. Part II of this paper will examine how the testimony of tribal members regarding oral history could be admitted into court. Part III of this paper will then turn to the issues of bias against oral history testimony.

---

<sup>7</sup> 25 U.S.C. § 3002.

<sup>8</sup> *Id.*, see generally THOMAS F. KING, THINKING ABOUT CULTURAL RESOURCE MANAGEMENT (2002); BRIAN M. FAGAN, IN THE BEGINNING (HarperCollins, 8th Ed. 1994).

<sup>9</sup> The Smithsonian Institution and its approximately 18,500 skeletons are exempt, as its collections are specifically covered by the National Museum of the American Indian Act of 1989, Pub. L. No. 101-185, 103 Stat. 1336 (codified at 20 U.S.C. § 80q to 80q-15); see also Fagan, *supra* note 8, at 471; see generally, JACK UTTER, AMERICAN INDIANS: ANSWERS TO TODAY’S QUESTIONS (2d ed. 2002).

<sup>10</sup> 25 U.S.C. § 3003.

<sup>11</sup> *Id.* at § 3005.

## I. EXACTLY WHO ARE ANTHROPOLOGISTS AND WHAT DO THEY STUDY?

Anthropologists, like ice cream, come in various flavors. Anthropology is so diverse that practitioners often specialize in one area.<sup>12</sup> Thus, not every anthropologist will have knowledge of Native American cultures, traditions or life ways, just as not every medical doctor would know how to treat a heart condition. Since the major topics of study are cultural and biological, the field is sometimes dichotomized in this manner.<sup>13</sup> The broad field of anthropology is traditionally broken down into four subfields: cultural anthropologists, anthropological linguists, physical or biological anthropologists, and archaeologists.<sup>14</sup>

Cultural anthropologists study people and their cultures.<sup>15</sup> Cultural anthropology is also sometimes called social anthropology,<sup>16</sup> although some see the term social anthropology as describing those who specifically study social relations.<sup>17</sup> Cultural anthropologists as a group contain additional variation: ethnographers, who study the specific cultural practices of a certain group of people; and ethnologists,<sup>18</sup> who use the data recorded by the former to make general comparisons between cultures.<sup>19</sup> Linguists are a division of anthropologists who study language,<sup>20</sup> work closely with cultural anthropologists and are considered by some to be a subdiscipline of cultural anthropology.<sup>21</sup>

Physical or biological anthropologists study the bones and other physical features of the human body.<sup>22</sup> Archaeologists excavate and examine “the material remains of extinct cultures.”<sup>23</sup> Archaeologists’ work is often focused on the structures and items left behind in a certain

---

<sup>12</sup> E. ADAMSON HOEBEL, ANTHROPOLOGY: THE STUDY OF MAN 9 (4th ed. 1972).

<sup>13</sup> *Id.*

<sup>14</sup> MARVIN HARRIS, CULTURE, MAN, AND NATURE, AN INTRODUCTION TO ANTHROPOLOGY 1 (1971).

<sup>15</sup> Harris, *supra* note 14.

<sup>16</sup> *Id.*

<sup>17</sup> Hoebel, *supra* note 12, at 12.

<sup>18</sup> ROBERT B. TAYLOR, INTRODUCTION TO CULTURAL ANTHROPOLOGY 16 (1973).

<sup>19</sup> *Id.*

<sup>20</sup> JOSEPH H. GREENBERG, ANTHROPOLOGICAL LINGUISTICS: AN INTRODUCTION 20 (1968).

<sup>21</sup> Hoebel, *supra* note 12, at 12.

<sup>22</sup> THOMAS W. MCKERN AND SHARON MCKERN, HUMAN ORIGINS, AN INTRODUCTION TO PHYSICAL ANTHROPOLOGY 5 (1969).

<sup>23</sup> DAVID HURST THOMAS, PREDICTING THE PAST, AN INTRODUCTION TO ANTHROPOLOGICAL ARCHAEOLOGY 1 (1974).

geographic area.<sup>24</sup> Archaeologists may work closely with physical anthropologists if human remains are present.<sup>25</sup> Unfortunately for modern archaeologists, this subfield still carries some taint from its past, as the first “archaeologists” were in fact “the looters and grave robbers in antiquity.”<sup>26</sup>

### A. Soft Science, Meet the *Daubert* Factors

Anthropologists and archaeologists are considered social scientists, and despite the difference between these and other *soft science* fields when compared to *hard science* fields of the natural and physical sciences, the same evidentiary rules apply in court.

As part of the United States Supreme Court ruling that Federal Rule of Evidence 702 replaced the *Frye* standard for the Federal Rules of Evidence in *Daubert v. Merrell Dow Pharmaceuticals*,<sup>27</sup> the Supreme Court outlined five criteria courts could employ in their preliminary assessment of the reliability of scientific testimony. These factors are:

1. whether the theory offered had been tested;
2. whether it had been subjected to peer review and publication;
3. the known rate of error;
4. the existence of standards and controls; and
5. whether the theory is generally accepted in the scientific community.<sup>28</sup>

The application of these factors – especially the known rate of error criteria – work well when dealing with *hard sciences* such as chemistry and physics. However, the difficulty comes in applying the *Daubert* factors to non-scientific expert opinion testimony, where instead of a particular scientific methodology, an expert’s opinion is based upon experience or training.<sup>29</sup> After *Daubert*, courts had mixed opinions as to whether the

---

<sup>24</sup> *Id.* at 3-4.

<sup>25</sup> Patricia M. Landau and D. Gentry Steele, *Why Anthropologists Study Human Remains*, 20 AM. INDIAN Q. 209, 212, 214 (1996).

<sup>26</sup> Thomas, *supra* note 23, at 1.

<sup>27</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

<sup>28</sup> *Id.* at 593

<sup>29</sup> See *Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1518 (10<sup>th</sup> Cir.), *cert. denied*, 117 S.Ct. 611 (1996)(collecting 10<sup>th</sup> Circuit cases where *Daubert* did not apply to non-scientific expert testimony.)

*Daubert* factors were applicable to non-scientific expert opinions.<sup>30</sup> The Supreme Court answered the question definitively in 1999:

*Daubert's* general holding – setting forth the trial judge's general “gatekeeping” obligation – applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge. . . . [A] trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is “flexible,” and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case.<sup>31</sup>

Thus, as a result of the Supreme Court's decision, the *Daubert* factors apply to testimony presented by *soft scientists*, such as anthropologists. Some practitioners in the field of archaeology itself even question “whether the field of archaeology can ever be pursued as a science.”<sup>32</sup> While some archaeological methodologies are based on scientific principles, these methodologies may not be as objective and scientific in practice as they are in theory.<sup>33</sup> For example, in physical anthropology, the use of precise measurements in craniometric analysis<sup>34</sup> seems objective and scientific.<sup>35</sup> In reality, however, these variables “tend to exhibit a high degree of intra- and inter-observer error.”<sup>36</sup> In addition,

---

<sup>30</sup> Compare *Berry v. City of Detroit*, 25 F.3d 1342 (6<sup>th</sup> Cir. 1997) (applying *Daubert* factors to non-scientific expert testimony on police discipline), and *Moore v. Ashland Chemical, Inc.*, 126 F.3d 679 (5<sup>th</sup> Cir. 1997) (holding *Daubert* factors not applicable to testimony by clinical physician, differentiating clinical medicine from laboratory or research medicine).

<sup>31</sup> *Kumho Tire Co., Ltd v. Carmichael*, 526 U.S. 137, 142 (1999).

<sup>32</sup> Allison M. Dussias, *Kennewick Man, Kinship and the “Dying Race”: The Ninth Circuit's Assimilationist Assault on the Native American Graves Protection and Repatriation Act*, 84 NEB. L. REV. 55, 116 (2005) (quoting J.M. ADOVASIO AND JAKE PAGE, *THE FIRST AMERICANS: IN PURSUIT OF ARCHAEOLOGY'S GREAT MYSTERY* 15 (2002)).

<sup>33</sup> See also Ashley Young, *Continuing an American Legacy of Racial and Cultural Injustice: A Critical Look at *Bonnichsen v. United States**, 17 DEPAUL LCA J. ART & ENT. L. 1, 34 (2006) (discussing the fact the methods and theories of craniology were once believed to be objective and neutral).

<sup>34</sup> Craniometrics is the science of studying the size and shape of the skull. See Eleanor M. Miller and Carrie Yang Costello, *The Limits of Biological Determinism*, 66 AM. SOC. REV. 592, 592 (2001).

<sup>35</sup> Dussias, *supra* note 32, at 116.

<sup>36</sup> *Id.* (quoting the Osteological Assessment Report on the Kennewick Man remains completed by Joseph F. Powell and Jerome C. Rose). See also Nicholas Wade, *A New Look at Old Data May Discredit a Theory on Race*, N.Y. TIMES, (Oct. 8,

these measurements can be perverted into supporting incorrect conclusions, as they do in craniology.<sup>37</sup> Moreover, the use of the geological method of stratigraphy suffers from the same variability. For instance, the number of stratigraphic layers that can be identified in the side-wall of an excavation unit<sup>38</sup> can depend on who is viewing the side-wall as well as lighting and soil conditions. The technique of radiocarbon ( $C^{14}$ ) dating, developed in the late 1940s, fulfills the *Daubert* factors of a well-tested theory that has been peer reviewed and accepted by the scientific community.<sup>39</sup> However, even this relatively *scientific* method does not always hold up to the *Daubert* factor of replication to receive the same result, as other hard science tests would. As an example, evidence of this is present in the *Bonnichsen* case, where the results of radiocarbon dating on bone samples varied greatly between the 1996 and 1999 tests.<sup>40</sup>

Thus, the objectiveness and scientific characteristics of anthropology clearly fall to the *softer* side of the spectrum, even for more scientific methodologies such as radiocarbon dating. Anthropology is not alone in this plight, as historians and linguists are similarly situated. How effectively the *Daubert* factors apply to soft science fields, such as history and linguistics, and how successfully the methodologies used in those soft science fields would hold up against the *Daubert* inquiry is open to debate.

---

2002)<http://www.nytimes.com/2002/10/08/science/a-new-look-at-old-data-may-discredit-a-theory-on-race.html> (last visited Apr. 19, 2013).

<sup>37</sup> During the Nineteenth Century, a pseudoscience called craniology, although sometimes incorrectly referred to also as craniometry, developed based on numerous studies completed using craniometric methods that showed different skull capacities between ethnic groups and genders, leading to conclusions that skull capacity was a way to measure intelligence. See Miller and Costello *supra* note 34; Catherine E. Martin, *Educating to Combat Racism: The Civic Role of Anthropology*, 27 ANTHROPOLOGY & EDUC. Q. 252, 255 (1996).

<sup>38</sup> The identification of stratigraphic layers in an archaeological excavation is based on the geological law of superposition, which in archaeology, is interpreted as a distinct layer of soil or refuse occurring above another layer is presumed to have been deposited later in time than the underlying layer. This technique allows for an archaeologist to create a rough chronology of occupation for the site based on the layers. This technique can be inaccurate if the layers are mixed by natural or human processes. See generally John Howland Rowe, *Stratigraphy and Seriation*, 26 AM. ANTIQUITY 324 (1961); Edward C. Harris, *The Laws of Archaeological Stratigraphy*, 11 WORLD ARCHAEOLOGY 111 (1979).

<sup>39</sup> See R.E. Taylor, *The Contribution of Radiocarbon Dating to New World Archaeology*, 42 RADIOCARBON 1, 3-4 (2000).

<sup>40</sup> *Bonnichsen v. United States*, 217 F. Supp. 2d at 1128, (noting the great variability in the results may have been due to any number of factors) see also, Thomas *supra*, note 23 (radiocarbon dates ranged from 8410 +/- 40 years before present to 5570 +/- 100 years before present; with several sample results falling in between).

Courts experience difficulty in applying the *Daubert* standards to historical scholarship, according to one author.<sup>41</sup> In her analysis, Schneider found that the testability factor is difficult to apply without an objective historian.<sup>42</sup> Specifically, the publication and peer review factor is not necessarily helpful in weeding out “junk history.”<sup>43</sup> Additionally, the potential rate of error, the third *Daubert* factor, is “completely inapplicable as a standard for evaluating historical scholarship.”<sup>44</sup> The existence of standards is also difficult to apply due to a lack of a “widely recognized code of conduct.”<sup>45</sup> Lastly, general acceptance could be deceiving, since general acceptance may be roughly gauged by scholarly works, yet they are a poor test for methodological reliability.<sup>46</sup>

Alternatively, linguistics “should fare quite well” in response to a *Daubert* inquiry, at least according to two legal scholars.<sup>47</sup> Scholars cite the fact that “[l]inguistics is a robust field that relies heavily on peer-reviewed journals for dissemination of work.”<sup>48</sup> While acknowledging that multiple theories may exist in the field of linguistics, Tiersma and Solan assert the facts would be immutable:

“while there may be disagreement as to *why* we understand a given linguistic structure to have a particular range of meanings, the *fact* of the range of meanings should not normally be controversial.”<sup>49</sup>

Alternatively, the presence and even the use of multiple theories in data analysis have been advocated in some fields as an inquiry into “how findings are affected by different assumptions and fundamental premises.”<sup>50</sup> The issue of multiple theories in a field of study is also present in anthropology, and cannot be easily dismissed. Anthropologist Kerry D. Feldman asks the question, “to what extent are we, or can we be,

---

<sup>41</sup> Wendie Ellen Schneider, *Past Imperfect*, 110 YALE L. J. 1531 (2001).

<sup>42</sup> *Id.* at 1538.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Peter Tiersma and Lawrence M. Solan, *The Linguist on the Witness Stand: Forensic Linguistics in American Courts*, 78 Language 221, 225 (2002).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 226 (emphasis in original).

<sup>50</sup> Michael Q. Patton, *Enhancing the Quality and Credibility of Qualitative Analysis*, 34 HEALTH SERVICES RESEARCH, 1189, 1196 (1999).

competent expositors of all of them?”<sup>51</sup> Feldman, who was an expert witness in litigation involving an Alaskan Native Village corporation, noted “both sides found scientific data to support their claims” which he feels “forces the anthropologist to examine even more closely the nature of ‘facts’ in relation to personally held ‘theories’ which purport to explain those facts.”<sup>52</sup>

Feldman further describes “a fundamental incongruence” between the research methods of social science and legal evidence rules.<sup>53</sup> Specifically, the ethnographies produced by anthropologists are entirely based on oral narratives that would be deemed hearsay in court.<sup>54</sup> However, another scholar, Lawrence Rosen, advocates that anthropologists acting as expert witnesses may actually be able to glean something from their experience.<sup>55</sup> Rosen writes that participation in the Indian Claims Commission (ICC) hearings may have resulted in scholars’ altering their classification systems in their studies to more closely parallel the categories being used by the ICC.<sup>56</sup>

Additionally, Rosen cites an overhaul of anthropological methodologies.<sup>57</sup> The conclusion to Rosen is obvious, “it is clear that participation in legal cases has had a reciprocal effect on anthropological thinking.”<sup>58</sup> Even if Rosen is correct, and some members of that generation of anthropologists did alter their practices based on the ICC experiences, it is doubtful that this change would make anthropology more robust if tested against the *Daubert* factors.

Even if anthropologists altered their methodologies based on legal experiences, it does not change the fact that the *Daubert* factors were originally developed for a hard science field, that of medicine and pharmaceuticals. Thus, many of the *Daubert* factors are easily applied to laboratory research where most if not all variables can be controlled, and

---

<sup>51</sup> Kerry D. Feldman, *Ethnohistory and the Anthropologist as Expert Witness in Legal Disputes: A Southwestern Alaska Case*, 36 J. OF ANTHROPOLOGICAL RES. 245, 246 (1980).

<sup>52</sup> *Id.* at 248.

<sup>53</sup> *Id.* at 246.

<sup>54</sup> *Id.*

<sup>55</sup> Lawrence Rosen, *The Anthropologist as Expert Witness*, 79 AM. ANTHROPOLOGIST 555 (1977).

<sup>56</sup> *Id.* at 567.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

an experiment repeated to achieve the same result. While each of the subfields of anthropology has established methods and procedures designed to eliminate error, it remains that anthropological research has a subjective quality that cannot be eliminated. In addition, it is clear that some anthropological methodologies, such as the gathering of oral narratives and histories to compose ethnographies, did not change. As Feldman points out, this methodology is part of the problem, since the source material is deemed unreliable by courts.<sup>59</sup>

### ***B. Anthropologists Take the Stand as Expert Witnesses***

This paper will focus on cases where anthropologists have testified as expert witnesses. In order to sufficiently narrow the topic of discussion, the cases examined involved Native American groups and can be easily divided into two categories: treaty right cases and cultural resources cases.

#### ***1. Treaty Rights Cases***

The cases classified here as treaty rights cases arose in United States district courts and were both state challenges to the validity and possible state regulation of Native Americans' off-reservation fishing rights.

The first case, *United States v. Washington*,<sup>60</sup> adjudicated the validity of off-reservation treaty rights in rivers and off-shore waters of Western Washington Native American groups. Due to the trust relationship between Native Americans and the federal government, the suit was brought by the United States against the State of Washington. The *Washington* case also addressed the issue of state regulation of Native Americans' off-reservation fishing activities, with the court holding that the power of general regulation was with the tribes and not within the state's police powers. However, the court did allow for the State to impose some regulations on off-reservation Native American fishing, but only where the State did not discriminate against Native American fishermen, and where the State could show the restrictions were "reasonable and necessary to conservation."<sup>61</sup>

---

<sup>59</sup> Feldman, *supra* note 51, at 246.

<sup>60</sup> *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash., 1974).

<sup>61</sup> *Id.* at 342.

The beginning of the section of the *Washington* opinion discussed the pre-treaty role of fishing in the lives of northwest Native Americans, and focused on a classic situation seen in civil cases: dueling experts. The anthropologists presented reports on “Indian life in the case area at and prior to the time of the treaties, including the treaty councils, Indian groups covered by the treaties, the purposes of the treaties and the Indians’ understanding of treaty provisions.”<sup>62</sup> The court found the testimony and reports of the plaintiffs’ anthropologist more credible. Specifically, the court said, “nothing in [the anthropologist appearing for the plaintiffs’] report and testimony was controverted by any credible evidence in the case.”<sup>63</sup> The use of oral histories is not even mentioned in the opinion until the next to last finding of fact in that section, three pages later in the reporter. The use of oral histories appears to have been limited to the identification of traditional fishing areas used by the Native American plaintiffs in the case.

The second case, *United States v. Michigan*,<sup>64</sup> also involved a challenge by tribes to the regulation of their off-reservation fishing activities by the state. The opinion specifically names three plaintiff witnesses: an ethnohistorian,<sup>65</sup> and two anthropologists. The *Michigan* court dedicated a paragraph to each of these witnesses, describing their qualification as an expert, and in one case, criticizing the defense’s attempt to impeach the plaintiffs’ anthropologist. While testimony regarding oral histories of the tribes involved was heard, the court fails to mention any of these witnesses by name. In fact, the court gives only two lines in the opinion to recognize the Native American witnesses who appeared for the plaintiff United States and tribes: “The oral testimony of the tribal witnesses educated in the history and customs of their people by tribal elders is found to be reasonable and credible factual data regarding certain relevant aspects of Indian life at and after treaty times.”<sup>66</sup>

---

<sup>62</sup> *Id.* at 350.

<sup>63</sup> *Id.* at 350.

<sup>64</sup> *United States v. Michigan*, 471 F. Supp. 192 (N.D. Mich., 1979).

<sup>65</sup> An ethnohistorian is a practitioner of the ethnohistorical method, where the history of a specific group or culture is developed through the use of “ethnography, linguistics, archaeology and ecology.” See American Society for Ethnohistory, About the ASE, [http://www.ethnohistory.org/sections/about\\_ase/index.html](http://www.ethnohistory.org/sections/about_ase/index.html) (last visited Apr. 19, 2013).

<sup>66</sup> *United States v. Michigan*, 471 F. Supp. at 219.

## 2. Cultural Resource Cases

Ironically, both of the cultural resource cases examined arose in the Ninth Circuit, the same circuit that found the Antiquities Act<sup>67</sup> unconstitutionally vague in *United States v. Diaz*,<sup>68</sup> Both *Bonnichsen v. United States* and *Fallon-Paiute Shoshone Tribe v. United States* also involved the extremely old (8,300 to nearly 10,000 years old) remains of an individual male.

In *Bonnichsen v. United States*,<sup>69</sup> the Ninth Circuit was hearing a challenge by tribes to a district court ruling that the remains of an individual, who died possibly as long as 9,200 years ago, were subject to the Archaeological Resource Protection Act (ARPA),<sup>70</sup> not (NAGPRA). The lower court rejected the government's determination that the individual was a Native American, and thus held that NAGPRA was inapplicable.<sup>71</sup>

In the lower court, the magistrate judge held that "reliance upon oral narratives under the circumstances presented here is highly problematic." Even though the narratives were presented by an anthropologist, the lower court still found this evidence to be unreliable. The district court's ruling demonstrates that even when oral narrative evidence is presented by an anthropologist, who would have been qualified as an expert under the *Daubert* standard, acceptance of the evidence by the court is not a foregone conclusion. It must be concluded that the court, despite the involvement of an anthropologist, finds the underlying material from which the anthropologist draws his conclusions, the oral narratives themselves, to be defectively unreliable. The court instead used archaeological and radiocarbon dating evidence to find there were sufficient gaps in the chronological record, which the court concluded showed a lack of cultural affiliation between the remains and the tribal claimants.

The second case, *Fallon Paiute-Shoshone Tribe v. United States*,<sup>72</sup> is factually similar to the *Bonnichsen* case, also involving the remains of an individual of similar age and described as "an extremely ancient

---

<sup>67</sup> 16 U.S.C. § 431-433.

<sup>68</sup> *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

<sup>69</sup> *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004).

<sup>70</sup> Pub. L. No. 96-95, 93 Stat. 721 (1979) (codified at 16 U.S.C. § 470aa to 470mm).

<sup>71</sup> *Bonnichsen v. United States*, 217 F. Supp. 2d 1116 (D. Or., 2002).

<sup>72</sup> *Fallon Paiute-Shoshone Tribe v. United States*, 455 F. Supp. 2d 1207 (D. Nev., 2006).

habitant of Northern Nevada.”<sup>73</sup> However, the United States District Court noted neither the tribe, nor the Bureau of Land Management (BLM), had raised the issue of whether the individual was a Native American. Therefore, the *Bonnichsen* cases, and the determination that ARPA rather than NAGPRA was applicable to a skeleton of this antiquity, were not controlling.<sup>74</sup> The Tribe argued that the BLM did not take into account scientific evidence it presented,<sup>75</sup> while the BLM argued it could rely on its own experts.<sup>76</sup> The Tribe retained its own experts and provided the BLM with the evidence it had gathered, at which point the Tribe claims it was shut out of the process for determining the affiliation of the remains.<sup>77</sup> The Tribe provided additional evidence when the issue was presented to the NAGPRA Review Committee, which issued a non-binding advisory opinion stating that the tribe was affiliated with the remains.<sup>78</sup> The court acknowledged the BLM’s right to believe its expert, but noted that position “does not leave the BLM free to ignore other competing views by failing to recognize their existence and refusing to describe the reasons why they were not accepted.”<sup>79</sup> This case was remanded to the BLM by the court after it found the determination the remains were culturally unaffiliated to be arbitrary and capricious. In remanding the case, the court instructed, “BLM is reminded that it must present cogent reasons for its findings, even when it is essentially choosing between two competing theories.”<sup>80</sup>

### ***C. Consideration of Oral History as an Interpretive Guidepost***

Whether archaeologists should look to Native American oral traditions themselves is debated. Some archaeologists advocate using oral histories as a resource for interpreting archaeological findings, possibly giving the archaeological findings context.<sup>81</sup> Others dismiss oral histories as not testable as an archaeological hypothesis,<sup>82</sup> but “[n]evertheless, foolish or angelic archaeologists will continue to pick and

---

<sup>73</sup> *Id.* at 1209.

<sup>74</sup> *Id.* at 1216.

<sup>75</sup> *Id.* at 1219-1220, 1223.

<sup>76</sup> *Id.* at 1224.

<sup>77</sup> *Id.* at 1219.

<sup>78</sup> *Id.* at 1223.

<sup>79</sup> *Id.* at 1224.

<sup>80</sup> *Id.* at 1225.

<sup>81</sup> Peter M. Whiteley, *Archaeology and Oral Tradition: The Scientific Importance of Dialogue*, 67 AM. ANTIQUITY 405 (2002).

<sup>82</sup> *Id.* See also Ronald Mason, *Archaeology and Native North American Oral Traditions*, 65 AM. ANTIQUITY 239 (2000).

choose among the offerings of oral traditions.”<sup>83</sup> Those archaeologists who question the value of oral histories and traditions and advocate not relying on them, are often the greatest proponents of archaeology as a scientific endeavor. These proponents argue that “[t]o preserve, let alone extend, the unparalleled power of science and systematic historiography to produce testable historical statements requires, like liberty, eternal vigilance.”<sup>84</sup> The view of this position is that archaeologists are objective, truth-seeking scientists.<sup>85</sup>

This position is contrasted by those who believe Native American oral histories and traditions not only have value, but can in fact be tested.<sup>86</sup> For example, the examination of the remains of massacre victims by a physical anthropologist contradicted the Church of Jesus Christ of Latter-day Saint’s historic accounts of the event, and were more consistent with the accounts obtained through interviews of various parties, including Native Americans, done by United States Army officers within a couple of years of the event.<sup>87</sup> In addition, Whiteley points to the presence of specific place names and locations in Hopi migration legends which could theoretically be tested archaeologically.<sup>88</sup> Archaeologists holding this latter view often point to the *classical archaeology* where archaeological discoveries are compared to ancient Greek and Roman records,<sup>89</sup> noting that field of study is “hardly lacking analytical vigor.”<sup>90</sup> The difference between the acceptance of Greek and Roman written records in classical archaeology versus the rejection of oral histories and traditions in prehistoric archaeology comes down to the method of recordation.<sup>91</sup> Yet, many anthropologists who are willing to accept oral history and tradition as valid evidence believe it may be more accurate than written accounts of the same event.<sup>92</sup> Of course, there exists the real possibility that no matter which source is being tested, Native American

---

<sup>83</sup> Mason, *supra* note 82, at 262.

<sup>84</sup> *Id.* at 263.

<sup>85</sup> *Id.* at 264.

<sup>86</sup> Whiteley, *supra* note 81, at 413.

<sup>87</sup> See Kevin Vaughan, *Utah’s Killing Field*, ROCKY MOUNTAIN NEWS, available at <http://denver.rockymountainnews.com/killingfields/index.shtml> (last visited Apr. 19, 2013).

<sup>88</sup> Whiteley, *supra* note 81, at 408-410.

<sup>89</sup> *Id.* at 408.

<sup>90</sup> *Id.* at 413.

<sup>91</sup> *Id.* at 408.

<sup>92</sup> Feldman, *supra* note 51, at 246; *see also* Whiteley, *supra* note 81, at 408 (criticizing Southwestern archaeologists for accepting Spanish colonial written records as accurate without question).

oral history or written records of the dominant culture, the resulting data uncovered by scientists and their conclusions may disprove the very fact being investigated.<sup>93</sup>

It appears the one point archaeologists can agree on is that there is a schism in the field, based on an idea there are, at least, two ways to view and interpret the past,<sup>94</sup> either through the examination of archaeological artifacts or through the learning of Native American oral narratives and histories, with the heart of the disagreement being the amount of weight and credibility to be given to which and whose interpretation.<sup>95</sup>

## II. NATIVE AMERICANS SPEAK FOR THEMSELVES

The use of Native American tribal members in presenting testimonial evidence of their oral traditions may be accomplished in one of two ways: qualifying the tribal member as an expert witness or via a hearsay exception.

### A. *An Elder as an Expert*

A Native American can serve as an expert witness as to the tribe's traditions, understanding and history, as shown in *Cree v. Sandberg*.<sup>96</sup> This case was an appeal by the State of Washington of a district court ruling that the Yakama Tribe's treaty exempted the tribe from paying Washington's truck license and permit fees. The Ninth Circuit upheld the exemption, noting the district court's reliance on a tribal member's

---

<sup>93</sup> See D. Gareth Jones and Robin J. Harris, *Archaeological Human Remains: Scientific, Cultural and Ethical Considerations*, 39 CURRENT ANTHROPOLOGY 253, 260 (1998); James W. Springer, *Scholarship v. Repatriation*, Academic Questions 6, 19-20 (2005).

<sup>94</sup> The schism between these ways of knowing the past has been characterized as analogous to the evolution versus creationism conflict involving the origin of the human species. See Tamara L. Bray, *Repatriation, power relations and the politics of the past*, 72 ANTIQUITY 440, 442 (1996); Taylor S. Fielding, *Digging Up Controversy*, STANDARD-EXAMINER, Nov. 11, 2001, at D1. Other authors cite the difference as being due to "fundamentally different worldviews," in which "the two groups do not share concepts concerning time, death and self-identity..." D. Gareth Jones and Robin J. Harris, *Archaeological Human Remains: Scientific, Cultural and Ethical Considerations*, 39 CURRENT ANTHROPOLOGY 253, 256 (1998). See also Whiteley, *supra* note 81, at 405; Mason *supra* note 82, at 248.

<sup>95</sup> Whiteley, *supra* note 81 at 408; Mason *supra* note 82, at 263.

<sup>96</sup> *Cree v. Sandberg*, 157 F.3d 762 (9th Cir. 1998).

testimony as to the tribe's understanding of the treaty language was not an abuse of discretion.<sup>97</sup>

Qualifying a tribal member to be an expert witness is not outside the realm of the Federal Rules of Evidence. Rule 702 allows for a witness to be qualified as an expert not only through scientific credentials, but also if the witness has specialized knowledge or experience.<sup>98</sup> In examining Rule 702, authors have commented, “[t]here are no definite guidelines for determining the knowledge, skill or experience required either in a particular case or of a particular witness.”<sup>99</sup> In Native American culture, it is often that only certain members of the tribe may know the “particulars of the territory, its mythological construction, and cultural uses.”<sup>100</sup> In hearing evidence on matters related to Native Americans, courts should consider that certain tribal members, including elders, testifying as to their own oral traditions and history would be *experts* as they would have access to knowledge that may not generally be known. Being able to include this knowledge in the evidentiary records clearly would be helpful to the trier of fact, which is the *touchstone* for the admissibility of expert testimony.<sup>101</sup>

Not all are so willing to find the testimony of tribal members, especially elders, as helpful in the search for truth. Mason, an anthropology professor, claims such testimony is biased because it “credits ‘elders’ with powers of memory credibility far beyond anything that would be granted anyone else.”<sup>102</sup> Mason further attacks those identified as tribal elders as having “a credential with known power to disarm otherwise worldly scholars. . . a potential trap as likely constructed by the information seeker as by its giver.”<sup>103</sup>

---

<sup>97</sup> *Id.* at 773-4.

<sup>98</sup> Fed. R. Evid. 702, *see also* Bratt v. Western Airlines, 155 F.2d 850 (10th Cir. 1946).

<sup>99</sup> STEVEN GOODE AND OLIN GUY WELLBORN III, COURTROOM EVIDENCE HANDBOOK, 2006-2007 STUDENT EDITION 206 (2006) (Author's commentary on Fed. R. Evid. 702 and citing *Lauria v. Nat'l Railroad Passenger Corp.*, 145 F.3d 593 (3d Cir. 1998)).

<sup>100</sup> Bruce G. Miller, *Culture as Cultural Defense: An American Indian Sacred Site in Court*, 22 AM. INDIAN Q. 83, 90 (1998).

<sup>101</sup> Werth v. Makita Elec. Works, 950 F.2d 643 (10th Cir. 1991); *see also* Payne v. Soft Sheen, 486 A.2d 712 (D.C. 1985) (holding as a rule, expert testimony is admissible if it has the ability to aid the trier of fact in the search for truth).

<sup>102</sup> Mason, *supra* note 82, at 256.

<sup>103</sup> Mason, *supra* note 82, at 261.

Expert testimony given by tribal members or elders faces the difficulty of meeting the *Daubert* factors described above.<sup>104</sup> Clearly, the testimony being given by tribal elders is non-scientific in nature, versus testimony given by *soft science* anthropologists. How this would alter the application of *Daubert* is unclear. While the Supreme Court in *Kumho* tells the courts to apply the *Daubert* factors, the *Kumho* case, and some commentators, leaves open the possibility that “a court may have to consider factors other than those listed in *Daubert*.”<sup>105</sup> Since the list of *Daubert* factors is “neither dispositive nor exhaustive,”<sup>106</sup> some of the alternative factors that may be considered include “unjustified extrapolation ... to an unfounded conclusion,”<sup>107</sup> accounting for alternative explanations, and “whether the field of expertise ... is known to reach reliable results.”<sup>108</sup>

The basis for an expert’s opinion testimony is governed by Federal Rule of Evidence 703. This rule sets forth three bases for expert testimony: personal knowledge, facts already in the record, and facts not in the record.<sup>109</sup> The facts in the third category must be “of a type reasonably relied upon by experts in the particular field in forming opinions and inferences upon the subject.”<sup>110</sup> The third category is noted to be controversial since the expert can base an opinion on facts not in the record, and could base that opinion on “facts [that] may be inadmissible hearsay.”<sup>111</sup> Courts have defended the policy allowing this external basis for an expert opinion since the court believes “the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion.”<sup>112</sup>

A tribal member’s expert opinion testimony about the tribe’s oral traditions and history would fall under this third basis. While the testimony about oral histories cannot be expected to “conform exactly to scientific models of falsifiability,”<sup>113</sup> in other words, they cannot be subjected to a mechanical formula to prove their truth, there are cultural “canons for

---

<sup>104</sup> *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. at 142.

<sup>105</sup> *Goode and Wellborn*, *supra* note 99, at 210 (citing *Kumho Tire Co., Ltd. v.*, 526 U.S. at 150).

<sup>106</sup> PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 317 (2006).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 318.

<sup>109</sup> *Id.* at 351.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 355 (quoting *United States v. Sims*, 514 F. 2d 147 (9th Cir. 1975)).

<sup>113</sup> *Whiteley*, *supra* note 81, at 411.

evaluating truth-claims and appraising the plausibility of particular accounts of the past.”<sup>114</sup> Whiteley gives the example of two stories, each about the migration of a particular Hopi clan to their present day location. These stories “are entrenched features of a corpus of Hopi narratives,” thus an individual who tells the stories incorrectly “would be dismissed as a know-nothing...”<sup>115</sup> This process, which Whiteley describes as subjecting the account to “critical standards of historical judgment,”<sup>116</sup> is the same process described by the *United States v. Sims*<sup>117</sup> court as the expert’s own evaluation of a reliable basis.

### ***B. Making Use of Hearsay Exceptions***

The other option for admitting testimony about Native American oral traditions in court is to use an existing hearsay exception that allows the admission of hearsay testimony to prove “reputation concerning boundaries or general history.”<sup>118</sup> The text of the hearsay exception allows testimony going to the “[r]eputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community . . .”<sup>119</sup>

In order to better understand the exception, the notes of the advisory committee prove somewhat helpful. These notes show that this hearsay exception “is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries.”<sup>120</sup> There is sparse modern case law on this hearsay exception.

---

<sup>114</sup> *Id.* at 407.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *United States v. Sims*, 514 F.2d 147 (9th Cir. 1975) (A forgery case where the court allowed expert opinion testimony based on hearsay evidence). *See also* Gianelli, *supra* note 106, at 355 n.16 (referencing *Soden v. Freightliner Corp.*, 714 F.2d 498 (5th Cir. 1983) that the court’s focus should be on the reliability of the opinion and its foundation rather than the fact, that it technically hearsay, upon which it is based).

<sup>118</sup> Fed. R. Evid. 803(20).

<sup>119</sup> *Id.*

<sup>120</sup> Fed. R. Evid. 803, Notes of Advisory Committee, citing McCormick § 299.

In *Rickert v. Thompson*,<sup>121</sup> the court held hearsay evidence was admissible to prove ancient boundaries. However, the advisory committee notes appear to restrict the applicability of the exception: “the reputation is required to antedate the controversy, *though not to be ancient.*”<sup>122</sup> Thus, testimony by a tribal member may not be admissible for the controversies found in the *Bonnichsen* and *Fallon Paiute-Shoshone* cases, which involve human remains that are several millennia old. However, the term “ancient” is not defined in either the Federal Rules of Evidence or in the advisory committee notes. Therefore, testimony from tribal members about the tribe’s more recent oral history and traditions is still beneficial in establishing a presence in the area where remains are found so the tribe will be consulted upon the discovery of the remains<sup>123</sup> and possibly to establish cultural affiliation with the remains.<sup>124</sup> This is also important since past relocation or removal of tribes by the federal government may have resulted in a tribe being far removed from their aboriginal territory.<sup>125</sup> In addition, prior to European contact, many tribes were highly mobile hunter-gathers, who moved across large territories to exploit available resources.<sup>126</sup> This exception would have more applicability in cases where the subject of the controversy is not several millennia old, such as the treaty rights cases discussed above.

Another example where testimony regarding oral history was important evidence is the Indian Claims Commission<sup>127</sup> cases, although even in those cases, such testimony was sometimes given little or no

---

<sup>121</sup> *Rickert v. Thompson*, 8 Alaska 398 (1933) (A boundary dispute over mining claims where the court allowed testimony as to the boundaries where the boundary stakes were missing or had been removed).

<sup>122</sup> Fed. R. Evid. 803(20) (emphasis added).

<sup>123</sup> Such consultation is required by NAGPRA, 25 U.S.C. § 3002(d)(1); *see also* *Fallon Paiute Shoshone Tribe*, 455 F. Supp. 2d at 1217.

<sup>124</sup> Governed by NAGPRA, 25 U.S.C. § 3002(a)(2).

<sup>125</sup> Kurt E. Dongoske, *The Native American Graves Protection and Repatriation Act: a new beginning, not the end, for osteological analysis – a Hopi perspective*, 20 AM. INDIAN Q. 287, 289-290 (1996).

<sup>126</sup> This can be complicated, such as in Colorado, where the discovery of Native American remains on public land requires the notification of at least 14 different tribes who hunted or gathered on lands within Colorado at one time or another. *See generally* ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS (2000).

<sup>127</sup> A commission created by Congress in 1946 (60 Stat. 1049) that waived the federal government’s sovereign immunity and handled pre-1964 claims by Indian tribes for uncompensated ceded lands, unfulfilled treaty rights and obligations and other claims. The commission terminated in 1978.

credit.<sup>128</sup> In *Wally v. United States*,<sup>129</sup> the court allowed testimony as to reputation about facts which were no longer available to individuals or other proof to show the location of ancient boundaries. An argument can therefore be made that the oral histories of tribes would qualify as testimony to prove the reputation of facts about past events that are known by the community as a whole, but are no longer available to individuals. Testimony about oral histories could provide information not only about the boundaries of aboriginal lands, but also regarding tribal activities such as hunting, fishing and gathering methods,<sup>130</sup> and locations where those activities took place.<sup>131</sup>

Ironically, the exceptions to the hearsay rule reflect the preference, or perhaps bias, for written records, generally based upon the assumption that written records are a more correct and accurate reflection of an event than an oral statement, or as here, oral history. For example, exceptions to the hearsay rule exist for the records of religious organizations,<sup>132</sup> marriage and baptism certificates,<sup>133</sup> and personal family histories contained in family Bibles.<sup>134</sup> However, this is not surprising, since “[t]he law implicitly embodies the religious premises of the dominant culture.”<sup>135</sup> Therefore, since the nature of many Native American traditions, practices, and religious activities are foreign to the courts, it is not surprising that evidence rules which seem to favor records of Christian and other Western religions have a preferred position. This reality is described well by Whiteley: “the Bible’s very textuality enables it to be conceptualized as including history more easily than is the case with oral mythology, owing to the engrained – though largely unexamined – ideas about the supposed instability and unreliability of oral narratives in the Western cult of the written word.”<sup>136</sup> In addition, other hearsay exceptions reflect this preference, in this case for history and science, in the existing exceptions for statements in ancient documents<sup>137</sup> and learned treatises.<sup>138</sup>

---

<sup>128</sup> See *Pueblo de Zia v. United States*, 148 Ct. Cl. 371 (1960) (discussed below).

<sup>129</sup> *Wally v. United States*, 148 Ct. Cl. 371 (1960).

<sup>130</sup> See *United States v. Washington*, 384 F. Supp. at 352.

<sup>131</sup> See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §18.04[2][e] (2005).

<sup>132</sup> Fed. R. Evid. 803(11).

<sup>133</sup> Fed. R. Evid. 803(12).

<sup>134</sup> Fed. R. Evid. 803(13).

<sup>135</sup> Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1301 (1996).

<sup>136</sup> Whiteley, *supra* note 81, at 407.

<sup>137</sup> Fed. R. Evid. 803(16).

<sup>138</sup> Fed. R. Evid. 803(18).

### III. BIAS AGAINST NATIVE AMERICAN ORAL HISTORY AND TRADITION

Judges wield great power in acting as gatekeepers on the admissibility of evidence and testimony, however, in being human, are influenced by their paradigm or worldview. Worse yet, the decisions of some judges reflect, directly or indirectly, discrimination and bias. Some jurists have written, “[t]he testimony of Native Americans in court provides compelling evidence of cultural practices.”<sup>139</sup> However, the testimony of tribal members, especially regarding oral traditions and history, is not always met with the *considerable respect* as was the case in *Cree v. Sandberg*.<sup>140</sup> There, the trial court considered Mr. William Yallup, a full-blooded Yakama Indian, as the “ultimate expert” on the tribe’s interpretation of their treaty.<sup>141</sup> Contrast that situation with the one in *Pueblo de Zia v. United States*,<sup>142</sup> where the Indian Claims Commission “virtually ignored” oral accounts of history passed from father to son, despite the fact some of this oral history was corroborated by other documentary evidence.<sup>143</sup> The Commissions’ reasoning: “all of these witnesses were young men (ages 47 to 59) who, in point of time, are far removed from the issue in question . . . .”<sup>144</sup> The Court of Claims reversed and remanded, chastising the Commission for its treatment of the oral history testimony: “[s]uch evidence is entitled to *some* weight; it cannot be ignored or discarded as ‘literally worthless.’”<sup>145</sup> Interestingly, the Commission also disregarded the historical and archaeological evidence that was offered in support of the oral history testimony in finding no claim. The Court of Claims disagreed, finding the “specific documentary corroborations and the general dovetailing . . . of [the] historical and archaeological evidence and [the] testimony”<sup>146</sup> fulfilled the plaintiff tribes’ burden of proof in establishing aboriginal title to a tract of land outside the land granted to them by the federal government.

One series of cases that has been roundly criticized for appearing biased against Native American oral tradition and history is the *Bonnichsen* line of cases. The Ninth Circuit’s decision in the case has

---

<sup>139</sup> Sherry Hutt, *The Archaeological Resources Protection Act: Charting the Progress of the Last Decade, Assessing Current and Future Issues*, 42 FED. LAW 30, 34 (1995).

<sup>140</sup> *Cree v. Sandberg*, 157 F.3d at 767.

<sup>141</sup> *Id.*

<sup>142</sup> *Pueblo de Zia v. United States*, 165 Ct. Cl. 501 (1964).

<sup>143</sup> *Id.* at 504.

<sup>144</sup> *Id.* citing 11 Ind. Cl. Comm., 131, 168 (1962).

<sup>145</sup> 165 Ct. Cl. at 505 (emphasis in original).

<sup>146</sup> *Id.* at 504.

been called by one commentator “the most lethal attack on Native American identity in recent American jurisprudence,”<sup>147</sup> due to the district and appellate courts’ disregard of the oral history evidence. Much of the criticism of the decision is centered on Ninth Circuit’s focus on science in the case.<sup>148</sup> The Ninth Circuit was critical of the Secretary of Interior’s use of oral history evidence, and noted the presence of gaps in the empirical record that precluded the Secretary’s finding of cultural affiliation between Kennewick Man and modern tribes. The court made this ruling despite the fact the regulations implementing NAGPRA specifically note that a finding of cultural affiliation is based on an “evaluation of the totality of the circumstances.”<sup>149</sup> Thus, the Secretary’s use of the oral history evidence was valid under the regulations. Those same regulations dictate that a finding of cultural affiliation “should not be precluded solely because of some gaps in the record.”<sup>150</sup> It appears from the Ninth Circuit’s holding that there is a point at which there are too many gaps in the record, however, the court fails to offer either a bright line rule or test that would produce consistent results in future situations or litigation. Without further discussion or clarification by the courts, the basic lesson drawn from the *Bonnichsen* line of cases is that science will tip the scales. Other commentators have reached the same conclusion.

Ashley Young wrote, “the court’s analysis clearly reinforced the long-standing norm of the dominant society that science trumps culture.”<sup>151</sup> Allison Dussias concurs with this view, noting the Native American’s “understandings of kinship, ancestry, and history were treated as uncivilized and unscientific, and therefore not entitled to respect from the dominant society and its judicial system.”<sup>152</sup> The issue of courts accepting science over other forms of evidence is a problem that apparently Congress anticipated. While prescribing a preponderance of the evidence standard, the regulations also state, “[c]laimants do not have to establish cultural affiliation with scientific certainty.”<sup>153</sup>

Thus, the Ninth Circuit’s rejection of tribal oral histories in favor of more scientific evidence appears to conflict with Congress’ understanding

---

<sup>147</sup> Young, *supra* note 33, at 31.

<sup>148</sup> *Id.*, see also Dussias, *supra* note 32; S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMP. L. REV. 89 (2006).

<sup>149</sup> 43 C.F.R. § 10.14(3)(d).

<sup>150</sup> *Id.*

<sup>151</sup> Young, *supra* note 33, at 35.

<sup>152</sup> Dussias, *supra* note 32, at 110.

<sup>153</sup> 43 C.F.R. § 10.14(3)(f).

of the circumstances faced by tribes.<sup>154</sup> S. Alan Ray writes that the problem was the court's lack of a "conceptual scheme . . . to understand and take seriously the testimony of present-day members of tribal claimants."<sup>155</sup> Thus, because the oral histories failed to provide facts similar to modern historical studies, they were dismissed as unpersuasive.<sup>156</sup> Commentators find this action to be contrary to Congress's intent for NAGPRA, and that rather than discounting oral history testimony, Congress in fact viewed it as one of the "relevant types of evidence to be considered without indicating that it was to be given lesser weight than other forms of evidence."<sup>157</sup> In affirming the district court ruling, the Ninth Circuit's decision in *Bonnichsen* is seen as contrary to the prior acceptance of oral tradition and history in United States courts.<sup>158</sup> The Ninth Circuit's ruling in *Bonnichsen*, of course, was welcomed by the plaintiff scientists who felt the Army Corps of Engineers and Secretary of the Interior were "anti-science,"<sup>159</sup> and others who object to the incorporative endorsement of minority religions that reject science and scholarship into federal law.<sup>160</sup>

### CONCLUSION

The issue of allowing testimony on Native American oral history and traditions in the courts is not easily resolved. The same issue has caused a schism among archaeologists themselves. This type of evidence has been treated differently depending upon the facts of the case and the court hearing it. It is difficult to tell whether this is based on genuine

---

<sup>154</sup> Diane Teeman, *Is it Possible to Identify Cultural Affiliation in "Prehistory"? A NAGPRA Case Study from Nevada*. (unpublished manuscript presented at the 28<sup>th</sup> Annual Great Basin Anthropological Conference, Elko, Nevada) (manuscript on file with author) (2002).

<sup>155</sup> Ray, *supra* note 148, at 141.

<sup>156</sup> See Ray *supra* note 148, at 138-139; See also Young, *supra* note 33, at 33.

<sup>157</sup> Dussias, *supra* note 32, at 146. See also Young *supra* note 33, at 11 (discussing Congress's lack of prioritizing the types of evidence considered under NAGPRA for determining cultural affiliation indicates they should be given equal weight); 43 C.F.R. § 10.14(e).

<sup>158</sup> Brief for Haudenosaunee Standing Committee on Burial Rules and Regulations as Amicus Curiae Supporting Appellant-Intervenors, *Bonnichsen v. United States*, 367 F.3d 864 (2003) (Nos. 02-35994 and 02-35996), 2003 WL 22593879 (noting testimony by tribal elders has been sanctioned for over 20 years) (quoting *Cree v. Flores*, 175 F.3d at 337).

<sup>159</sup> Douglas W. Owsley and Richard L. Jantz, *Archaeological Politics and Public Interest in Paleoamerican Studies: Lessons from Gordon Creek Woman and Kennewick Man*, 66 AMERICAN ANTIQUITY 565, 572 (2001).

<sup>160</sup> Springer, *supra* note 93, at 19-20.

concerns by some courts over the reliability of the testimony, is the result of incompatibility based on the differences between the law and the evidence's underlying cultural origins, or is simply the work of biased jurists.

One thing is certain: the Ninth Circuit's decision in *Bonnichsen* muddied the already murky waters of the ambiguous language of NAGPRA. The clash between science and oral history was highlighted by this very public dispute. It resulted in calls for amendments to clarify the wording of several provisions in NAGPRA. And the Ninth Circuit's decision in *Bonnichsen* has done little to put a definitive end to the debate: the decision has already been deemed not controlling in the *Fallon Paiute-Shoshone Tribe* case being heard in the U.S. District Court in Nevada.

While the Indian Claims Commission is no longer, and the treaty rights cases referenced here were heard 30 years ago, there are certain to be additional non-cultural resource cases that will be heard by the federal courts, some which may involve the introduction of testimony on Native American oral tradition. It is clear that an argument can be made for allowing tribal elders themselves to testify, either using a hearsay exception, or by qualifying the tribal elder as an expert witness. Attorneys for tribes will need to be prepared to use one or both strategies to have oral history testimony allowed into litigation, especially if it is critical to the tribes' arguments, as reflected in the treaty rights and cultural resources cases touched on here.

The Ninth Circuit in *Bonnichsen* showed that even oral history presented by an anthropologist was not necessarily more influential evidence than having it *straight from the elders' mouths*. While the facts of *Bonnichsen* may have not been the best for a strong argument in support of oral traditions because of the age of the remains involved, the district court in the *Fallon Paiute-Shoshone Tribe* case was not as quick to dismiss the oral history evidence.

Considering the resurgence of tribes exercising their sovereign powers and with the support of the federal government's position on tribes defining their own self identity, tribes are putting money, often gaming revenues, into programs preserving their culture, history and language. While some of this preservation may involve the writing down of narratives or interviews with tribal elders, it is likely traditional methods of passing information, through learning and listening of these narratives and

knowledge from elders, will continue. With tribes' increasing wealth due to gaming revenues, and their efforts to further broaden their economies, there will undoubtedly be more interaction between tribes and non-Indians, some of which may result in litigation in the federal courts. A tribal attorney will have to be ready to muster the arguments if oral history testimony is needed, and will have to have some luck that the judge hearing the case was more like those in *Cree v. Sandberg* than those in *Bonnichsen*.