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Oral Tradition and the Kennewick Man

Cathay Y. N. Smith

In April 2016, the U.S. Army Corps of Engineers confirmed that the ancient human body discovered in 1996 near Kennewick, Washington, often referred to as the "Kennewick Man" or "The Ancient One," is genetically related to modern-day Native Americans.[1] This confirmation ended a twenty-year-long struggle between scientists at the Smithsonian, the U.S. Department of the Interior, and Native American tribes of the Columbia Plateau, and will now jumpstart the process for repatriation of the Kennewick Man to the Native American tribes for reburial in accordance with the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).[2]

The Kennewick Man has been beset by scientific, anthropological, ethical, and legal controversy from the day his remains were unearthed in 1996. In July 1996, two college students discovered a human body on federal land close to the town of Kennewick, Washington. The body belonged to a forty-five- to fifty-year-old man who had a stone point embedded in his pelvis. Initially, local anthropologists believed the man was an early European settler or trapper.[3]

1. *See* Laura Frazier, *Army Corps Finds that Kennewick Man is Native American, Subject to Federal Burial Act*, OREGONIAN (Apr. 27, 2016, 11:25 AM), http://www.oregonlive.com/pacific-northwestnews/index.ssf/2016/04/army_confirms _that_kennewick _m.html#incart _river_home [http://perma.cc/5VJH-3VSJ]; Tasneem Raja, *A Long, Complicated Battle Over 9,000-Year-Old Bones Is Finally Over*, NPR (May 5, 2016, 11:47 AM), http://www.npr.org/sections/codeswitch/2016/05/05/476631934/a-long-complicated-battle-over-9-000-year-old-bones-is-finally-over [http://perma.cc/9HDW-YYJA]. In order to be consistent with case law and reporting, this Essay uses "Kennewick Man" instead of "The Ancient One" to refer to the ancient human body discovered near the town of Kennewick, Washington.

2. 25 U.S.C. §§ 3001-3013 (2012).

3. Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1120 (D. Or. 2002).

However, the stone point in his pelvis and radiocarbon dating of a bone from his hand indicated that the body was likely between 8,340 and 9,200 years old.[4] Five Native American tribes sought repatriation of the Kennewick Man for proper burial pursuant to NAGPRA.[5] Enacted in 1990, NAGPRA requires the repatriation to tribes of Native American human remains and affiliated cultural items discovered or excavated from federal or tribal lands.[6] A number of scientists, including anthropologists and archaeologists at the Smithsonian Institution, however, argued that the remains should not be repatriated for burial but rather retained for scientific study because there was no evidence linking the Kennewick Man to current-day Native Americans. When the U.S. Army Corps of Engineers demonstrated its intent to repatriate the remains and refused to release the remains to the scientists for study, the scientists initiated litigation against the U.S. Army Corps of Engineers, the U.S. Department of the Interior, the National Park Service, and others involved.[7]

An eight-year-long legal battle over ownership of the Kennewick Man ensued, culminating in the Ninth Circuit Court of Appeals' controversial *Bonnichsen v. United States* decision in 2004.[8] In that opinion, the court affirmed the trial court's finding that the Kennewick Man was not Native American because there was no evidence he was related to a "presently existing tribe, people, or culture."[9] In making its decision, the court relied on then-available scientific evidence, but refused to consider the oral-tradition evidence introduced by the U.S. Department of the Interior and the Native American claimants' expert in the lower court. According to the court, "the value of such [oral-tradition] accounts is limited by concerns of authenticity, reliability, and accuracy, and be-

4. *Id.*

5. *Id.* at 1121. The five tribes were the Confederated Tribes and Bands of the Yakama Indian Nation, the Nez Perce Tribe of Idaho, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Colville Reservation, and the Wanapam Band. *Id.* at 1121 n.8.

6. 25 U.S.C. § 3002(a) (2012).

7. *See Bonnichsen*, 217 F. Supp. 2d at 1119-20, 1122.

8. 367 F.3d 864 (9th Cir. 2004). Some criticized the Ninth Circuit's decision as being "fundamentally flawed," 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, 60 (2005), while others heralded the decision as being "the way forward," *Science Wins Ancient Bones Battle*, BBC NEWS (Feb. 5, 2004, 2:44 AM), http://news.bbc.co.uk/2/hi/americas/3460773.stm [http://perma.cc/6B9Q-PXE6], and having "effectuate[d] Congress's actual intent in enacting NAGPRA," Robert Van Horn, *The Native American Graves Protection and Repatriation Act at the Margin: Does NAGPRA Govern the Disposition of Ancient, Culturally Unidentifiable Human Remains?*, 15 WASH. & LEE J.C.R. & SOC. JUST. 227, 243 (2008).

9. *Bonnichsen,* 367 F.3d at 878, 880.

cause the record . . . does not show where historical fact ends and mythic tale beings."[10] It was not until 2015 that an international team of scientists compared DNA removed from the hand bone of the Kennewick Man with DNA from modern-day Native Americans and other humans around the world, concluding that the Kennewick Man's DNA was, in fact, most similar to that of Native Americans.[11] Unfortunately, it took modern science twenty years to prove what the Native American claimants had been saying all along—that their oral tradition confirmed that "the Ancient One was one of us."[12]

On the eve of the upcoming repatriation of the Kennewick Man, this Essay focuses on the Ninth Circuit Court of Appeals' summary rejection of the oral-tradition[13] evidence introduced by Native American claimants in *Bonnichsen v. United States* which, as we now know, was ultimately more reliable than the then-available written historical and scientific records upon which the court relied. Courts disadvantage Native American claimants when they summarily reject oral-tradition evidence and prohibit "a major source of their knowledge, transmitted orally, across time, and in a distinctive style, [from being] meaningfully . . . entered as evidence, with the same consideration as written historical evidence."[14] Furthermore, courts' inconsistent treatment of oral tradition also results in uncertainty and deprives Native American claimants of clear guidelines on what evidence they should or should not submit to prove their claims. This Essay suggests four factors for courts to consider on a case-by-case basis in the future to evaluate the probative value of oral-tradition evidence. It then proceeds to examine the inconsistent treatment of oral tradition evidence by U.S. courts, and urges courts to employ a balanced approach and adopt the factors offered in this Essay when evaluating Native American oral tradition in legal cases involving Native Americans claimants.

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10. *Id.* at 882.

11. Morten Rasumussen et al., *The Ancestry and Affiliations of Kennewick Man*, 523 NATURE 455, 455 (2015); *see also* Associated Press, *Kennewick Man Related to Native Americans, DNA Study Says*, OREGONIAN (June 18, 2015), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/06/kennewick_man_related_to_nativ.html [http://perma.cc/ASF5-A3MU].

12. Associated Press, *supra* note 11 (quoting Jim Boyd, chairman of the council that governs the Confederated Tribes of the Colville Reservation).

13. In order to be consistent with the language of NAGPRA and the *Bonnichsen* case, this Essay uses the term "oral tradition," although it is presumed to encompass oral tradition, oral narrative, oral history, legend, folklore, and story.

14. BRUCE GRANVILLE MILLER, ORAL HISTORY ON TRIAL 2-3 (2011) (citation and internal quotation marks omitted).

I. ORAL TRADITION AND ITS CHALLENGES AS EVIDENCE

Oral tradition is a "coherent, open-ended system for constructing and transmitting knowledge"—"probably the oldest form of history."[15] It is "the means by which knowledge is reproduced, preserved and conveyed from generation to generation . . . connecting speaker and listener in communal experience and uniting past and present in memory."[16] Oral traditions are often expressed in parables and include mythological components in addition to genuine historical and factual elements that are usable in understanding the past.[17] For several thousand years, oral tradition has been the primary vehicle for Native Americans in North America to record facts and events.

It is undeniable that oral tradition poses certain challenges when introduced as evidence in a modern U.S. court proceeding. One of the major obstacles to a court's acceptance of oral tradition as evidence is the deeply ingrained Eurocentric bias of valuing the written record over oral evidence. Peter Whiteley describes this phenomenon as "the Western cult of the written word," characterized by "engrained—though largely unexamined—ideas about the supposed instability and unreliability of oral narratives."[18] This prejudice is evident not only in the court system, but also in past anthropological and archaeological studies. These ingrained ideas are usually concerned with uncertainty about whether oral tradition may have been altered over time, whether its conveyance through hundreds of intermediaries over thousands of years may have created errors within the narrative, whether language changes may have altered the meaning of the oral tradition, and whether the narratives have been influenced by biases or politics.[19] These ideas explain why anthropologists, archaeologists, and historians in the past largely ignored Native American oral tradition but were wholly willing to take literally colonial records that were written in missionaries' or government officials' diaries or journals—even though such diaries, journals, and reports were equally "interpretively problematic,"[20] were likely to be influenced by biases or politics, and often included "self-serving

15. MILLER, *supra* note 14, at 12 (quoting Julie Cruikshank, *Oral Tradition and Oral History: Reviewing Some Issues*, 75 CAN. HIST. REV. 403, 408 (1994)).

16. Renée Hulan & Renate Eigenbrod, *Introduction: A Layering of Voices: Aboriginal Oral Traditions*, *in* ABORIGINAL ORAL TRADITIONS 7, 7 (Renée Hulan & Renate Eigenbrod eds., 2008).

17. Peter M. Whiteley, *Archaeology and Oral Tradition: The Scientific Importance of Dialogue*, 67 AM. ANTIQUITY 405, 412-13 (2002).

18. Whiteley, *supra* note 17, at 407, quoted in Dussias, *supra* note 8, at 146.

19. *See, e.g.*, John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One)*, 27 ENVIRONS ENVTL. L. & POL'Y J. 349, 396 (2004).

20. Whiteley, *supra* note 17, at 406-08.

documents, . . . edited and doctored diaries, and memoranda written 'for the record'" with a deliberate eye toward posterity.[21] Recognizing the inherent biases against oral tradition, the current Chief Justice McLachlin of the Canadian Supreme Court cautioned in *Mitchell v. Minister of National Revenue* that claims involving Native Americans[22]

> give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, "a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records . . . ." In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions.[23]

Another challenge to admitting Native American oral tradition in courts is the hearsay rule of evidence.[24] This rule prevents the introduction of testimony from a person who heard another person assert something outside of court, in order to prove the truth of the matter asserted.[25] Oral tradition—which by its very nature is passed down orally through generations—could be excluded as hearsay if used as evidence of the events it describes. Recognizing this issue, Native American claimants typically introduce oral tradition through expert testimony and reports, which courts have found not to be subject to the hearsay rule.[26] Similarly, one U.S. court found that oral-tradition evidence about family history fell under an exception to the hearsay rule that applies when the declarant is unavailable.[27] Even though U.S. courts have rarely addressed this issue,

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21. Alice M. Hoffman, *Reliability and Validity in Oral History*, 22 TODAY'S SPEECH 23, 27 (1974).

22. To be consistent, I continue to use the term "Native American" even though Canadian courts generally use the term "aboriginal."

23. [2001] S.C.C. 33, para. 27, 34 (Can.) (quoting R. v. Vanderpeet, [1996] 2 S.C.R. 507, para. 68 (Can.)).

24. *See, e.g.*, FED. R. EVID. 802.

25. FED. R. EVID. 801(c).

26. *See, e.g.*, Cree v. Flores, 157 F.3d 762, 773 (9th Cir. 1998) (ruling that the trial court could admit oral-tradition evidence given by a tribal elder testifying as an expert witness, who therefore was not subject to the hearsay rule).

27. See Makila Land Co. v. Kapu, where the Hawai'i Court of Appeals found that "family oral history can reasonably be viewed as an exception to the hearsay rule under [Hawai'i Rules of Evidence 804 (Hearsay exceptions; declarant unavailable)]." 156 P.3d 482, 499 (Haw. Ct. App. 2006) (citing Haw. Rev. Stat. § 626-1, Rule 804).

the Canadian Supreme Court has declared 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."[28] In *Delgamuukw v. British Columbia*, Native American claimants introduced their oral traditions in three forms: the tribes' sacred official history (in the *adaawk* and the *kungax* oral traditions), personal recollections of tribal members, and affidavits filed by tribal elders.[29] The Canadian Supreme Court found that the trial court had erred when it refused to admit the tribal elders' affidavits or give any weight to the tribes' sacred official history, and ordered a new trial.[30] Specifically, Chief Justice Lamer recognized that, for many Native American tribes, oral traditions "are the only record of their past."[31] Requiring Native American claimants to conform to strict evidentiary rules would "impose an impossible burden of proof" on Native American claimants, and "'render nugatory' any rights that they have."[32]

A third challenge that plagues Native American oral tradition in courts relates to oral tradition's incorporation of parables and myth with "genuinely historical components."[33] Native American oral tradition is often told in parables, and traditionally contains accounts of factual events mixed with legend or myth. For instance, in Whiteley's account of the oral tradition of the First Mesa's Water clan chief, historical facts—such as detailed attention to specific, named village sites and clans—were interwoven with myth—such as an oral tradition describing the Water Serpent deity clothing elders in turkey skin to fly over water.[34] Similarly, in the oral traditions that Boxberger examined, evidence that bison were present in the Columbia Plateau in the past came in the form of parables about coyotes.[35] The use of parables often not only reinforces the Eurocentric ingrained prejudice against Native American oral tradition; it

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

29. *Id.* at para. 92.

30. *Id.* at para. 107-08.

31. *Id.* at para. 84.

32. *Id.* at para. 87 (quoting Simon v. The Queen, [1985] 2 S.C.R. 387, 408 (Can.)).

33. Whiteley, *supra* note 17, at 412-13; *see also Delgamuukw*, [1997] 3 S.C.R. 1010 at para. 97 (recounting trial court's decision to discount oral tradition evidence because "it was impossible to make an easy distinction between the mythological and 'real' aspects of these oral histories . . . because they . . . confounded 'what is fact and what is belief,' [and] 'included some material which might be classified as mythology'").

34. Whiteley, *supra* note 17, at 408-09.

35. Daniel L. Boxberger, *Review of Traditional Historical and Ethnographic Information*, NAT'L PARK SERV. (Feb. 15, 2000), http://www.nps.gov/archeology/kennewick/boxberger.htm [http://perma.cc/3JA9-3KZ4].

also presents courts with the task of having to separate myth from fact when evaluating oral-tradition evidence. However, modern-day scientists and geologists have time and time again proven the accuracy of oral tradition in recalling environmental changes (such as the presence of bison, great floods, rivers changing course),[36] catastrophes (earthquakes, tsunamis, volcanic eruptions, and lava flows),[37] and other prehistoric and historic occurrences. For instance, in the 1990s, the Mohegan Nation of Connecticut employed archaeologists to document the location of a 300-year-old historic cabin site.[38] When asked, tribal elders were able to pinpoint the exact location of the buried cabin's foundation, even though there was no evidence of the cabin on the surface of the land.[39] Elders were also able to recollect the names of those who occupied the cabin 300 years ago.[40]

Recognizing the issues described above, NAGPRA requires a museum, a federal agency, or the judiciary to examine "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion" in order to determine cultural affiliation of artifacts (including human remains) for repatriation to Native American claimants.[41] In other words, once the artifacts and human remains are considered Native American, NAGPRA explicitly directs the decision maker to consider oral tradition when determining which tribe is entitled to repatriation. There have been more than 300 instances where museums and federal agencies have relied on oral traditions to determine the cultural affiliation of

36. *See* Dussias, *supra* note 8, at 103 (finding that place names in the Sahaptin language include cultural memory of the Bretz floods from 13,000 to 18,000 years ago); Boxberger, *supra* note 35 (finding oral traditions that include stories of bison present on the Columbia Plateau and of the Columbia River changing course).

37. *See, e.g.*, Ruth S. Ludwin et al., *Dating the 1700 Cascadia Earthquake: Great Coastal Earthquakes in Native Stories*, 76 SEISMOLOGICAL RES. LETTERS 140 (2005); D. Wayne Moodie et al., *Northern Athapaskan Oral Traditions and the White River Volcano*, 39 ETHNOHISTORY 148 (1992) (providing examples of oral tradition supported by scientific evidence); Dorothy B. Vitaliano, *Geomythology: Geological Origins of Myths and Legends*, *in* MYTH AND GEOLOGY 1 (L. Piccardi & W.B. Masse eds., Geological Soc'y Special Pub. 273, 2007); *Native American Oral Traditions Tell of Tsunami's Destruction Hundreds of Years Ago*, OR. DEP'T OF GEOLOGY & MINERAL INDUS. (2009), http://www.oregongeology.org/sub/earthquakes/oraltraditions.htm [http://perma.cc/Z78N-YNRQ].

38. David Hurst Thomas, SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY 244-45 (2000); *see also id.* at 247-51 (providing additional examples of oral traditions locating historic and prehistoric sites).

39. *Id.* at 244-45.

40. *Id.*

41. 25 U.S.C. § 3005(a)(4) (2012).

items to be repatriated.[42] In fact, one of those instances involved human remains dating back to 1000 B.C.E., whose cultural affiliation was determined through "oral traditions that place[d] . . . ancestors in the region 'since the beginning.'"[43] By listing oral-tradition evidence next to biological and historical evidence in NAGPRA, and by not assigning priorities or weight between those types of evidence, Congress effectively acknowledged that oral tradition is valuable evidence. Oral-tradition evidence should not be explicitly sought for one purpose, but have its probative value totally denied in others. Courts should be encouraged to consider oral-tradition evidence to determine whether artifacts and human remains are considered "Native American" under NAGPRA in the first place. Courts should also consider oral-tradition evidence in claims involving Native American issues outside of NAGPRA, such as treaty rights, compensation claims, and traditional religious claims, where Native American claimants are often required to prove their ancestors' interpretation of treaties, to demonstrate continuity between current practices and pre-contact practices, to establish historic and prehistoric uses of land or water, or to show their ancestors' usual and customary practices, customs, and traditions.

Similarly, the U.S. Supreme Court has dictated that when evaluating treaties made between Native Americans and the United States, such treaties must be interpreted "as the Indians would have understood them."[44] This canon of construction was first introduced by Chief Justice Marshall in *Worcester v. Georgia*, in which the Court interpreted the Treaty of Hopewell as the Cherokees would have interpreted it and accordingly recognized the tribe's right to exercise control over the agreed-upon land for use and occupancy (rather than merely reserving the tribe's right to hunt on it).[45] In order to comply with this canon of construction, it is crucial that Native American claimants be able to introduce evidence of their ancestors' interpretation of treaties, which would primarily be in the form of oral tradition rather than written record. Indeed, it would be unjust if Native American claimants had to rely on written documentation by outsiders, such as missionaries or government officials, to prove their

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42. Steven J. Gunn, *The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of Our National Consensus*, 36 WM. MITCHELL L. REV. 503, 528 (2010) ("At least 266 notices of inventory completion and 42 notices of intent to repatriate have relied, in whole or in part, on oral histories and oral traditions in determining the cultural affiliation of Indian cultural items.")

43. Notice of Inventory Completion: Phoebe A. Hearst Museum of Anthropology, University of California, Berkeley, Berkeley, CA, 68 Fed. Reg. 62,321, 62,321 (Nov. 3, 2003).

44. *See* Cree v. Flores, 157 F.3d 762, 769 (9th Cir. 1998) (citing Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970)) (explaining the canons of Indian treaty interpretation).

45. 31 U.S. (6 Pet.) 515 (1832); *see* Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1102-03 (2013) (describing *Worcester v. Georgia*).

own ancestors' interpretation of a treaty—when such information may have been directly passed down from their ancestors in the form of oral tradition.[46] Recognizing this potential injustice, the Ninth Circuit in *Cree v. Flores* acknowledged that oral-tradition testimony by tribal elders testifying on their ancestors' understanding of treaties "has been sanctioned for over twenty years" and that the court was "entitled to accord [such] testimony preference over that of other experts."[47]

II. FACTORS FOR ASSESSING CREDIBILITY OF ORAL TRADITION EVIDENCE

This Essay does not advocate that courts must regard every aspect of Native American oral tradition as evidentiary fact, or that all oral tradition is of equal probative value. On the contrary, U.S. courts should implement a reasonable, balanced, and consistent approach to evaluate and consider the probative value of oral-tradition evidence in cases involving Native American claimants. As a starting point, courts and litigants can consider applying the four factors of *individual consistency*, *conformity*, *context*, and *corroborating evidence* to evaluate the credibility and persuasiveness of factual accounts in oral traditions. These four factors, described in more detail below, are adopted from past successful incorporations of oral-tradition evidence in legal proceedings and anthropological studies. They may be applied to evaluate and weigh the probity of oral-tradition evidence introduced through expert testimony and reports by tribal elders or experts, or through direct testimony by tribal elders and members.

First, when a court is faced with evidence in the form of oral tradition, it should analyze the *individual consistency*[48] of historical facts in oral tradition; specifically, how consistently an individual "will tell the same story about the

46. Having to rely on outsiders' written documentation of ancestors' interpretation not only prejudices Native American claimants because of the potential bias and political propensities in such written documents, but also because of language misinterpretation. For instance, in *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, the U.S. Supreme Court acknowledged that there "is no evidence of the precise understanding the Indians had of any of the specific English terms and phrases in the treaty" because "the interpreter used a 'Chinook jargon' to explain treaty terms, and that jargon not only was imperfectly (and often not) understood by many of the Indians but also was composed of a simple 300-word commercial vocabulary that did not include words corresponding to many of the treaty terms." 443 U.S. 658, 666-67 & n.10 (1979).

47. *Cree*, 157 F.3d at 773-74.

48. The *individual consistency* factor is adopted from Hoffman's and Wiget's "reliability" criterion, described in Hoffman, *supra* note 21, at 25, and Andrew Wiget, *Recovering the Remembered Past: Folklore and Oral History in the Zuni Trust Lands Damages Case*, *in* ZUNI AND THE COURTS 173, 178-79 (E. Richard Hart ed., 1995).

same events on a number of different occasions."[49] This factor looks at whether an individual narrator's accounts of an event are consistent with each other and are, somehow, replicated.[50] In a legal proceeding, it could mean comparing oral tradition obtained at a deposition with the testimony of the same narrator in a previous deposition, proceeding, or affidavit, where available.[51] For instance, in *Zuni Tribe of New Mexico v. United States*, Andrew Wiget, a folklore analyst and expert witness for the Zuni Tribe, reviewed a total of thirty-three depositions (consisting of thousands of pages) of Zuni members.[52] Using the commonalities he found within the oral tradition discussed in those deposition testimonies, Wiget pieced together relevant historical facts relating to Zuni occupation of the land at issue.[53] He then compared those deposition testimonies with the available testimonies from the same persons in a previous litigation, which showed the *individual consistency* of the oral-tradition evidence.[54]

Second, courts should analyze the *conformity*[55] of historical facts in oral tradition. Conformity shows "the degree to which the form or content of one [individual's] testimony conforms with other[s'] testimonies"—in other words, the conformity between the oral traditions of multiple people or tribes.[56] For instance, oral tradition recorded and expressed by multiple individuals, whose accounts conform to the same pattern in both structure and content, should be considered more reliable as historical facts.[57] On the other hand, accounts in oral tradition that are only endorsed by single individuals may be rejected as failing to conform to "indigenous canons of the truly historical."[58] In the *Zuni Tribe of New Mexico* case mentioned above, in addition to showing individual consistency, Wiget compared the oral-tradition testimonies of all of the deponents with each other, and found *conformity* between the testimonies of most, if not all, of the deponents.[59]

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49. Hoffman, *supra* note 21, at 25.

50. *Id.*; Wiget, *supra* note 48, at 178.

51. *See* Wiget, *supra* note 48, at 178. In order to determine individual consistency of deponents' oral tradition in *Zuni*, Wiget compared their testimonies to their deposition testimonies from a Native American title case five years prior to the *Zuni* case. With the exception of small changes, most of the deponents' testimonies were consistent. *Id.*

52. *See* Wiget, *supra* note 48, at 173-74.

53. *Id.*

54. *Id.* at 178.

55. The *conformity* factor is adopted from Wiget's "consistency" criterion. *Id.* at 179-80.

56. *Id.* at 179.

57. *See* Whiteley, *supra* note 17, at 412.

58. *Id.*

59. Wiget, *supra* note 48, at 179.

Additionally, courts should consider the *context* of the oral tradition. Narratives that occur in ritual contexts may be more credible as historical facts because in Native American tradition, violations of truth in ritual contexts may subject the individual narrator to the possibility of supernatural sanctions.[60] Furthermore, oral traditions that are subjected to authentication may also be more credible. For instance, the *adaawk* and *kungax* oral traditions of the Gitksan and Wet'suwet'en nations in Canada, as recounted in *Delgamuukw*, are the "sacred official litany, or history, or recital of the most important laws, history, traditions and traditional territory" of a tribe.[61] Those oral traditions are "repeated, performed and authenticated at important feasts" where dissenters may object if they disagree with the narratives, thereby ensuring their authenticity.[62] The *context* of the *adaawk* and *kungax*—that they are sacred, the most important laws of the tribes, and regularly authenticated by the tribes—weighs in favor of finding the historical facts in those oral traditions credible.

Finally, courts should analyze the availability of *corroborating evidence* in the oral tradition, looking at whether the historical facts in the oral tradition conform to events "recorded in other primary source material such as documents, photographs, diaries and letters."[63] The availability of corroborating evidence—from anthropological, scientific, or historic sources—will help to confirm credibility and persuasiveness and to discern "whether the story is consistent with what is known about how the world works."[64] This factor does not necessarily seek external evidence corroborating the specific facts asserted in the oral-tradition evidence. Rather, it seeks evidence corroborating other aspects within the Native American claimants' oral tradition in order to support the credibility of the oral tradition as a whole. For instance, in 2001, three tribes—Navajo, Southern Ute, and Ute/Paiute—filed competing claims under NAGPRA for repatriation of the Pectol shields.[65] The Pectol shields were three large painted bison hide shields that were unearthed by Ephraim Portman Pectol and his wife in central Utah (near what is now Capital Reef National Park) in 1926.[66] In order to determine which tribe had the closest cultural affiliation with the shields, the park archaeologist relied on oral-tradition evidence from the tribes,

60. Whiteley, *supra* note 17, at 412. A similar concept is Western courts' reliance on oral testimony given under oath in depositions and trial.

61. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 93 (Can.) (quoting Delgamuukw v. British Columbia, [1993] 3 W.W.R. 97, 164 (Can.)).

62. *Id.*

63. Wiget, *supra* note 48, at 177 (quoting Hoffman, *supra* note 21, at 25).

64. Debora L. Threedy, *Claiming the Shields: Law, Anthropology, and the Role of Storytelling in a NAGPRA Repatriation Case Study*, 29 J. LAND, RESOURCES & ENVTL. L. 91, 113 (2009).

65. *Id.* at 98-99.

66. *Id.* at 91.

and found the oral tradition of the Navajo to be most persuasive.[67] The Navajo oral tradition presented a narrative of two men, entrusted to care for the shields, hiding them "in the area we call the Mountain With No Name [Henry Mountains] and Mountain With White Face [Boulder Mountain]" when the Navajos were being rounded up by war parties.[68] The oral-tradition accounts of Navajos being rounded up and having "transitory presence" in the area where the Pectol shields were found was corroborated by historic record.[69] The recorded historic evidence corroborating certain aspects of the oral tradition made it more likely that other aspects of the oral tradition—including the Navajo ownership of the shields—would be credible. Similarly, in *Zuni Tribe of New Mexico*, during Wiget's process of reviewing testimonies of members of the Zuni Tribe, he deliberately avoided reviewing parallel scientific expert reports in order not to influence his findings from the oral tradition. It was not until after he had pieced together a historical report based on the oral tradition accounts that Wiget reviewed other evidence to corroborate his report—thereby showing the availability of corroborating evidence.[70] After evaluating the oral-tradition evidence under the individual consistency, conformity, and corroborating-evidence factors, the U.S. Claims Court in *Zuni Tribe of New Mexico* was convinced of the evidentiary value of Zuni oral tradition when proffered to prove that the Zuni had occupied an area "from time immemorial."[71]

III. IMPROPER REJECTION OF ORAL-TRADITION EVIDENCE IN U.S. COURTS

Courts in the U.S. have been inconsistent in their consideration and treatment of oral-tradition evidence. In two cases discussed above, *Cree v. Flores* and *Zuni Tribe of New Mexico*, the courts considered and recognized the evidentiary value of oral-tradition evidence, and applied that evidence effectively to establish Native American ancestors' interpretation of treaties and Native American historical occupation of land. However, in many more cases, including *Bonnichsen*, courts either rejected or discounted oral-tradition evidence on the sole basis that the evidence was in the form of, or was derived from, Native American oral traditions.

In *Bonnichsen v. United States*, the U.S. Department of the Interior and Native American claimants submitted the expert report of Dr. Daniel Boxberger, a

67. *See id.* at 99, 110.

68. *Id.* at 110-13 (alterations in original).

69. *Id.* at 114-15.

70. Wiget, *supra* note 48, at 174.

71. Zuni Tribe of New Mexico v. United States, 12 Cl. Ct. 607, 607 (Ct. Cl. 1987).

professor of anthropology at Western Washington University, in support of their claim for repatriation.[72] Boxberger reviewed a number of the Native American claimants' oral traditions,[73] explaining that

> For the Native people of the [Columbia] Plateau oral traditions are true histories . . . . The oral traditions speak of a way of life not unlike that described in the ethnographies of the Plateau. From this perspective we might see the oral traditions as a form of historical documentation that can be used to supplement the descriptive ethnographic accounts.[74]

Boxberger's report concluded that "[t]he oral traditions . . . relate to geological events that occurred in the distant past. These events cannot be dated with precision but they are highly suggestive of long-term establishment of the present-day tribes."[75] In other words, Boxberger's report supported the Native American claimants' position that their ancestors had long lived in the region in which the Kennewick Man was found and that the Kennewick Man was therefore one of their ancestors and Native American under NAGPRA.

In spite of Boxberger's report, the lower court found "no[] evidence that will support the conclusion that the remains are" Native American within the meaning of NAGPRA and, therefore, held that the Kennewick Man was not subject to NAGPRA's repatriation guidelines.[76] The Ninth Circuit affirmed, stating that "because Kennewick Man's remains are *so* old and the information about his era is *so* limited, the record does not permit the Secretary [of the Interior] to conclude reasonably that Kennewick Man" was Native American.[77] In its opinion, the Ninth Circuit expressed extreme skepticism towards the probative value of oral-tradition evidence. In the court's words, oral-tradition accounts were

> just not specific enough or reliable enough or relevant enough . . . [b]ecause oral accounts have been inevitably changed in context of transmission, because the traditions include myths that cannot be considered as if factual histories, because the value of such accounts is limited by concerns of authenticity, reliability, and accuracy,

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72. *See* Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1151 (D. Or. 2002).

73. *Id.* at 1151-55.

74. Boxberger, *supra* note 35.

75. *Id.*

76. *Bonnichsen*, 217 F. Supp. 2d at 1138.

77. Bonnichsen v. United States, 367 F.3d 864, 882 (9th Cir. 2004) (emphasis in original).

> and because the record as a whole does not show where historical fact ends and mythic tale begins . . . .[78]

With these statements, the Ninth Circuit summarily rejected the evidentiary value of all Native American oral tradition and essentially relegated Native American oral tradition to the same evidentiary value as myth. Instead of examining the district court's record to determine whether it had engaged in a balanced and reasonable examination of the credibility of the specific oral-tradition evidence proffered by the Native American claimants, the Ninth Circuit dismissed the probative value of *all* evidence in the form of oral tradition. The Ninth Circuit's decision permitted scientists to study the Kennewick Man, and his body has since been stored in the Burke Museum in Seattle, Washington.

Similarly, in *Sokaogon Chippewa Community v. Exxon Corp.*, the Sokaogon brought suit seeking a declaration that the tribe had the right to occupy a tract of 144 square miles in northeastern Wisconsin where the tribe had resided since 1842.[79] In response to Exxon's summary-judgment motion, the Native American claimants submitted evidence that, according to Sokaogon oral tradition, beginning in 1854, the tribe was repeatedly promised its own reservation by Commissioner Manypenny and his successors.[80] In order to defeat Exxon's summary-judgment motion, the Native American claimants merely needed to show that there was a genuine dispute of material fact. In spite of this low burden, the Seventh Circuit affirmed the lower court's decision to grant Exxon's motion, stating that there was "no *documentation*" of the oral tradition, "which is at best embroidered (too many ransoms, shipwrecks, lost and stolen maps, and deathbed revelations to be plausible) and at worst fictitious,"[81] and finding that "[t]he oral tradition of a promised reservation is not *evidence*, that is, evidence admissible in a court of law, which is what Fed.R.Civ.P. 56 explicitly requires in order to create a triable issue."[82] The court placed the blame on the Sokaogon's counsel who made "no effort . . . to cast [the oral tradition] into a form in which it would be admissible in a court of law."[83]

Had the lower court or the Ninth Circuit in *Bonnichsen* applied the four factors of individual consistency, conformity, context, and corroborating evidence

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78. *Id.* at 881-82.

79. 2 F.3d 219, 220 (7th Cir. 1993).

80. *Id.* at 222 (emphasis added).

81. *Id.*

82. *Id.* at 224-25 (emphasis in original). The Seventh Circuit ultimately held that the Native American tribal claimant had no right to occupy nonreservation land.

83. *Id.* at 225.

to weigh the probative value of the oral tradition evidence, they might have given more thought to the evidence proffered by the Native American claimants. For instance, there was *conformity* of the historical facts in the oral-tradition evidence in *Bonnichsen*. To prepare his expert report in *Bonnichsen*, Boxberger relied on oral traditions from six separate Columbia Plateau tribes: Nez Perce, Yakama, Umatilla, Cayuse, Wanapum, and the Confederated Tribes of the Colville. His expert report was based on the common historical and factual themes found in the oral traditions of these tribes.[84] The fact that there were common historical and factual themes in the oral traditions of six separate tribes that had resided in the same area for centuries showed the conformity of the oral tradition.

The factor of *corroborating evidence* also weighed in favor of the credibility of the oral-tradition evidence in *Bonnichsen*. In Boxberger's expert report, he opined that the Native American claimants' "oral traditions speak of a way of life not unlike that described in the ethnographies of the [Columbia] Plateau."[85] He further showed that the oral traditions he examined described geological events that occurred in the distant past, such as the change in the flow of the Columbia River and the past presence of bison on the Columbia Plateau.[86] Geologists and archaeologists confirmed many of the phenomena described in the Native American claimants' oral tradition. For example, all of the Native American claimants' oral traditions included a story outlining the reason for the absence of bison on the Columbia Plateau.[87] A number of the oral traditions suggested that bison had been present on the Columbia Plateau in earlier times—a phenomenon that archaeological evidence dates to over 2000 years ago.[88] Additionally, Boxberger examined oral traditions that described the change in the flow of the Columbia River from the Grand Coulee to the present channel. Current-day geologists have confirmed this phenomenon, and dated it to over 10,000 years ago.[89] These historical events described in the oral traditions and confirmed by geologists and archaeologists show the availability of corroborating evidence.

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84. Boxberger, *supra* note 35.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1153-54 (D. Or. 2002).

CONCLUSION

Oral tradition is a valuable historical and evidentiary source of information that should not be overlooked by attorneys or judges. Attorneys representing Native American claimants should endeavor to demonstrate that oral-tradition evidence satisfies the criteria of individual consistency, conformity, context, and corroborating evidence, whether such evidence is presented through expert testimony or witness testimony by tribal elders. More importantly, courts should not reject or discount evidence solely because it is in the form of oral tradition, but should evaluate the probity of oral-tradition evidence using the four factors discussed above. Courts do a disservice to Native American claimants when they summarily dismiss oral tradition without first considering its value or credibility as evidence. This effectively silences the voices of Native American claimants, and imposes an almost impossible burden of proof on Native American claimants, "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."[90] The Kennewick Man may finally be going home, but had the courts given more thought to the oral-tradition evidence introduced by the Native American claimants in *Bonnichsen*, it might not have taken twenty years to repatriate his body to his tribal descendants and to fulfill the purpose of NAGPRA.

Cathay Y. N. Smith is an Assistant Professor of Law at the University of Montana Blewett School of Law. *She thanks Jesse Dodson, Maylinn Smith, Monte Mills, Kathryn Ore, Alexandra Perloff-Giles, and Jeremy Aron-Dine.*

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90. Wiget, *supra* note 48, at 173.