No. 20-2145

# In the United States Court of Appeals
## for the Tenth Circuit

PUEBLO OF JEMEZ, a federally recognized Indian Tribe,
*Plaintiff - Appellant,*

v.

UNITED STATES OF AMERICA,
*Defendant - Appellee*,
and
NEW MEXICO GAS COMPANY,
*Intervenor Defendant - Appellee*.

**On Appeal from the United States District Court**
**for the District of New Mexico – Albuquerque - 1:12-CV-00800-JB-JFR,**
**Judge James O. Browning**

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**BRIEF OF 9 PROFESSORS OF INDIAN LAW AS *AMICI CURIAE***
**IN SUPPORT OF APPELLANT AND REVERSAL**

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## QUESTION PRESENTED

Whether the District Court erred in disallowing testimony of oral history by Plaintiffs'-Appellants' witnesses.

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## INTERESTS OF THE *AMICI CURIAE*

The *Amici Curiae* who are signatories to this Brief are professors and scholars who teach, write, and/or practice in the area of federal Indian law and federal Indian policy. They file this brief to interrogate and answer the question whether there is, in fact, a dichotomy between "oral history" and "written history" as evidence in modern Indigenous land claims cases.[1]

## SUMMARY OF ARGUMENT

The Jemez Pueblo asserts a claim of Aboriginal title to a portion of the Banco Bonito in the southwest corner of the Valles Caldera. Its claim derives from centuries of historic agriculture, trails, and devotionally important shrines of reverence within Redondo Peak (Wavema). Federal common law, as it applies *sui generis* to Native Americans, U.S. Congressional legislation and policy, and Indigenous peoples' law, allow the admissibility of both oral history and written testimony in Indigenous land claim cases. The admission of such testimony is based not only on the Federal Rules of Evidence, but on well-established federal

[1] Counsel for *Amici Curiae* certifies that no person or entity other than *Amici Curiae* and their counsel authored this brief in whole or in part. Persons or entities who made small monetary contributions to the Law College Association for costs of the preparation and filing of this submission, none of whom have any personal or financial interest in the litigation, are identified: Michael G. Rossetti (Lippes Mathias); Jim Maddox; Michael P. Gross; Frederick R. Petti (Petti and Briones); and Diana Hadley. The law professors who are signatories to this brief received no remuneration for their work. All parties were notified of the intention of *Amici Curiae* to file this brief, as required, and each has consented.

Indian Claims Commission (ICC) precedents that determined the extent of Aboriginal land title and occupancy. The admissibility of oral history testimony is also a vital part of a legal tradition that existed before the United States was formed and continues to exist today. The federal judiciary's acceptance of Indigenous oral history persisted in the United States Court of Claims after ICC cases were transferred to that Court.[2] The focus of this brief is to interrogate and answer the question whether there is, in fact, a dichotomy between "oral history" and "written history." There is not. There is no appreciable difference that warrants the exclusion of Indigenous oral history in modern Indigenous land claims cases. The Court should treat oral history testimony as a valid category of probative evidence. To exclude that evidence without allowing its presentation, or to fail to give consequential effect to oral tradition, would perpetuate a prejudice in the law.

[2] Oral tradition and oral history are used interchangeably herein. It has been posited that the terms be distinguished, with "oral history" as the *product* of communication and "oral tradition" signifying the *process* of communication. The product and process of communication are inseparably intertwined. One example, among many that can be cited, is that the Hopi refer to "traditional history" rather than oral history because the transmission is not always oral. Katsina dances impart tribal history, as well as the songs and prayers that are performed orally. History is also painted on rattles and other ritual cultural patrimony. *See* Emory Sekaquaptewa and Dorothy Washburn, *The Go Along Singing: Reconstructing the Past From Ritual Metaphors in Song and Image*, 69 Am. Antiquity 457 (2004).

## ARGUMENT

### I. Native American Oral Histories Are Reliable And Verifiable Sources Of Probative Evidence

Indigenous scholar John Borrows states that "[f]or many communities the transmission of oral tradition is not conveyed in … a singular, detached, and decontextualized way." John Borrows, *Listening for a Change: The Courts and Oral Tradition*, 39 Osgoode Hall L. J. 1, 7-8 (2001) (hereafter *Borrows*). The evidentiary value and veracity of Jemez Pueblo oral traditions and history in the case at bar, like that of other Indigenous people within North America, are supported and corroborated by their "language, political structures, economic systems, social relations, intellectual methodologies, morality, ideology, and the physical world." *Id.* at 8.[3] These traditions are transmitted generation after generation through "memorized speech, historical gossip, personal reminiscences, formalized group accounts, representations of origins and genesis, genealogies, epics, tales, proverbs, and sayings." *Id.* Indigenous oral tradition never stands alone. It is woven into a broader cultural framework that has checks and balances for determining its value, limits, and verity. It is embedded within Indigenous peoples' own law. As Professor Borrows observes: "These practices include such complex

[3] This enumeration is from J. Vansina, *Oral Traditions as History* 13-27 (1985). *See also* Hope M. Babcock, *"[This] I Know From My Grandfather:" The Battle For Admissibility Of Indigenous Oral History As Proof Of Tribal Land Claims*, 37 Am. Indian L. Rev. 19 (2012).

customs as pre-hearing preparations, mnemonic devices, ceremonial repetition, the appointment of witnesses, dances, feasts, songs, poems, the use of testing, and the use and importance of place and geographic space to help ensure that certain traditions are accredited within the community.*" Id.*

Indigenous origin stories in America, and their conceptions of time and space document their *relationship to the land*, describe how their particular customs and laws developed, and reflect distinct philosophies and communication styles. These stories contain standards, principles, criteria, guideposts, measures, authorities, traditions, precedents and processes that are vital to their decision-making and dispute resolution. Ideas of justice, morality, and social cohesion are integral to the telling of Indigenous stories about practices, techniques, weather, and strategies like subsistence farming, hunting locations, or to identify the *location of their culture's sacred spaces.* As one example, the location of such spaces or sites may be accurately determined by the time it takes a tribe's traditional runners to cover a specified distance. Dance steps, repeated by tribal members over successive generations during ceremonies, can also articulate historical traditional knowledge (descriptions) about sacred *landscapes* they once occupied or still occupy.

Lakota theologian Vine Deloria, Jr., has likewise confirmed that Indigenous revelations of reality are continuous and context dependent and necessary to making judgments:

> The structure of their [Indigenous] religious traditions is taken directly from the world around them … Context is therefore all-important for both practice and understanding of reality … Thousands of years of occupancy on their lands taught tribal people the *sacred landscape* for which they were responsible and gradually the structure of ceremonial reality became clear. It was not what people believed to be true that was important but *what they experienced as true* … Hence revelation was seen as a continuous process of adjustment to the *natural surroundings*…

Vine Deloria, Jr., *God is Red* 65-66 (1972) (emphasis added by *Amici*).

It is well established by ethnographers that Indigenous peoples claim and live their lives with the knowledge and truth that the physical landscape is a process of building comprehension. *See* Keith Basso, *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (1996). "Explanations of how certain features of the landscapes were formed entail moral lessons and provides [sic] … information … often related to epic time struggles of survival and cultivation. Landmarks reveal strong connections to land, an imprint on the land. Alexander Reilly, *The Ghost of Truganini: Use of Historical Evidence as Proof of Native Land*, 28 Fed. L. Rev. 453, 468 (2000). These moral lessons also inform legal decisions within Indigenous societies.

In the Pacific Northwest, totems are an example of land imprinting. Likewise, in addition to totem-poles, Indigenous peoples in America have used wampum belts, masks, culturally modified environments, songs, ceremonies, and pictographs, to name a few ways, to memorialize and interpret what occurred in the past. They connote both the tangible and intangible Indigenous knowledge to establish an *essential fact of occupation*. They also represent a legal archive recorded in forms where writing was not prominent. “Indigenous stories also provide origin, including the [a] tribe’s cosmology, and explain why a particular tribe would be tied to a particular place in the universe—a *specific geographic spot*.” (emphasis added by *Amici*). *Babcock supra* at 34.

Similarly, written histories, or even a casual visit to any museum displaying non-Indigenous culture through the ages, relies on similar artifacts, archaeological findings, and language as it has evolved over centuries to describe locations, beliefs, and values, as well as clothing, carvings, and hand-created items to explain their history, including prewritten culture and physical domain. When law is considered from a functional perspective, designed to provide guidance and facilitate order, one can see that law is found in more than legislatures and courts, particularly when considering Indigenous societies.

Indigenous oral histories are reliable and verifiable sources of evidence even when not memorialized in written form. *See* Max Virupaksha Katner, *Native American Oral Evidence: Finding a New Hearsay Exception*, 20 Tribal L. J. 1 (2020), https://digitalrepository.unm.edu/tlj/vol20/iss1/3 (last visited February 11, 2021) (hereafter *Katner*); Glen Stohr, *The Repercussions of Orality in Federal Indian Law*, 31 Ariz. St. L. J. 679, 687 (1999). They are important in their own right in reconstructing and invigorating the past and may evoke understandings and recollections that were previously ignored or silenced. *See* Alistair Thomson, *Fifty Years On: An International Perspective on Oral History*, 85 J. Am. Hist. 586 (1998). Despite the confirmed veracity of Indigenous oral histories, the lack of a written history has led to difficulties in the admissibility of Indigenous oral history. Historiographer Jan Vansina and others have observed that:

> [t]ests for [Indigenous] evidence must still be received and evaluated by people within a structure and institution that often has a very different ideological and cultural orientation from most [Indigenous] traditions. *** The leading historiographer of oral tradition, Jan Vansina, has observed that 'all messages are a part of a culture.' … [He] wrote that messages 'are expressed in the language of a culture and conceived, as well as understood, in the substantive terms of a culture.' … The people who decide the 'fact' are inexorably defined from within the matrix of relationships they share with others.
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> *Borrows*, *supra* at 29-30.

Professor Borrows describes the dilemma often faced by Indigenous Americans in presenting their oral history evidence in the non-Indian court system:

> There are enormous risks for non-apprehension and misinterpretation when [Indigenous] peoples submit their 'facts' to the judiciary for interpretation. This fact is especially poignant in litigation as factual determinations are presented in an adversarial environment, and interpretations made by judges with a different language, cultural orientation, and experiential background than [Indigenous] people. The potential for misunderstanding exists because each culture has somewhat different perceptions of space, time, historical truth, and causality. … Therefore, judges who evaluate the meaning, relevance, and weight of [Indigenous] evidence must appreciate the potential cultural differences in the implicit meanings behind the explicit messages if they are going to draw appropriate inferences and conclusions from this data.
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> *Id.*

Oral histories' inclusion of "mythic" elements does not preclude the admission of oral history testimony. Written histories too can present the same challenge of distinguishing historical facts from myth. For example, how much of the King Arthur story of pulling a sword from a rock is myth and how much of it is historical.[4]

[4] One need not travel as far back as "Arthurian" times to explore a more complete understanding of another mythos: the conquest of the American Western frontier. "The national creation epic of a simple, agrarian, 'Anglo' race of conquerors defeating 'a fierce race of savages' for control and civilization of an extraordinary wilderness land has long provided us with a catalog of images and stories of who we think we are as a people." Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* at 14 (1997). *See also* Patricia Limerick, *Legacy of Conquest: The Unbroken Past of the American West* (1987); Richard Slotkin, *Regeneration Through Violence: The Mythology of the American Frontier, 1600-1860* (1973); Helen Hunt Jackson, *A Century of Dishonor: A Sketch of the United States Government's Dealings with Some of the Indian Tribes* (1881). *See also* Robert A. Williams, Jr., *Documents of Barbarism:*

William M. Doty has analyzed such conundrums and has charted a commonsense guide to understanding "myth." Rather than viewing myth and history on a continuum, with myth representing 'primitive superstition' and 'history as the product of enlightened and objective fact-finding,' Professor Doty contends that myth is an attempt to express the quality and range of human existence. It is an attempt to capture emotional, moral, and aesthetic aspects, not an attempt at scientific description. Consequently, myth is not an unsophisticated science, but sophisticated poetic enunciation of meaning and significance. S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man,* 79 Temp. L. Rev. 89, 139-140 (2006) (citing William G. Doty, *Mythography: The Study of Myths and Rituals* 95 (2000)).

Judges are charged with comprehending the unspoken symbolic aspects of these messages in order to evaluate their veracity and weight. Thus, it is incumbent upon the judiciary to afford its Indigenous litigants, as it does for non-Indigenous cultures and their values, opportunities to present relevant cultural context and explanation, in their culturally appropriate forms, for their proffered evidence in helping the Courts determine the veracity of and give appropriate probative weight to oral history evidence. Indigenous oral traditions include rules for evaluating veracity and value. "Giving oral tradition its due might require examining and

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*The Contemporary Legacy of European Racism and Colonization in the Narrative Traditions of Federal Indian Law*, 31 Ariz. L. Rev. 237, 239 (1989).

partially overturning the values that lie hidden behind the most pervasive methods of 'factual' interpretation …[in] western historical and legal interpretation." *Borrows, supra* at 18.

Such caution extends a moral point of view that conquest should not automatically quiet title to Aboriginal land claims. As Professor Joseph Singer posits rhetorically:

> How do we, as a nation deal with the issue of conquest? We adopt two competing strategies. *** If we can relegate conquest to the distant past, we can concentrate instead on the fact that the United States was founded on respect for property rights. We do not acquire property by conquest today. *** [We say] [t]oo much time has passed to rectify the wrongs of conquest. *** Repression is a time-honored method for dealing with painful events. But if we face facts, we cannot be comforted with the idea that conquest is something that predates the United States. Nor is it a thing of the past to grant Indian nations less protection for their property rights than is granted to non-Indians. Conquest is part and parcel of the American story and it is not something we can treat as finished or completely repudiated. *** We have no choice but to live with the burdens of history. The democratic way to deal with this is to reduce the injustices associated with conquest. The absolute minimum that we could do today to accomplish this is to stop engaging in acts of conquest now.

Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Protection*, 86 Ind. L. J. 763 (2011)[5] When considering ideas of so-called conquest one should also question the category itself,

[5] *See also* Matthew L.M. Fletcher & Wenona Singel, *Power, Authority, and Tribal Property*, (Tulsa L. Rev. 2005, MSU Legal Studies Research Paper No. 04-15, 2006), htpps://ssrn.com/abstract=873643; Kristen A. Carpenter *et al.*, *In Defense of Property*, 118 Yale L. J. 1022 (2009).

when some tribes did not even engage in armed conflict with the United States, and may even have treaties in place, such as the Treaty of Guadalupe Hidalgo. *See* Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. Rev. 1615 (1999-2000).

According to historical, archaeological, and ICC and Claims Court precedent[6] writing is not always a more reliable way to inform the veracity of the past than Indigenous forms of communication. Despite good intentions by courts and judges, there can be in varying degrees an "unexamined bias built into the very process of Western historical and legal interpretation that is often not apparent to those of us who use it as if it were second nature." *Borrows, supra* at 29-30. Western law, not unlike Indigenous peoples' manner of remembering the past through their artifacts, is also an "artifact" of both culture and power and may result in unintentional bias and negative repercussions for Indigenous litigants, *consequently so* for the Jemez Pueblo. "Judicial norms and procedures can erase historical complexities in order to fit the procedural structure of a case and, in the process, reinvent social meanings and understandings." *Babcock, supra* n. 2 at 37.[7]

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[6] *See* Arguments II and III, *infra.*

[7] *See* Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 Wash. L. Rev. 1133 (2012); Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, Duke L. J. 625 (1990). *See also* Val Napoleon, *Delgamuukw: A Legal Straightjacket for Oral History?*, 20 Can. J. L. & Soc'y 123 (2005); Russell Binch, *'Speaking for Themselves': Historical Determinism and Cultural Relativity in Sui*

The judiciary must guard against the erasure of Indigenous evidence by an overly narrow and rigid interpretation of the hearsay exceptions.

Acknowledging the differences between oral and written histories does not mean they have nothing in common. On the contrary, the two approaches are more alike than they are different. Much of the written or documentary record of non-Indigenous people arose out of, and maintains its features because of its underlying oral history, *i.e.*, the customs shaping English Common Law. Additionally, both oral and written records *may* be subject to revision.[8] Just as there may be differing oral accounts of a single event, there are often competing written accounts and competing visions within one account. The mere fact of differences, however, does not preclude those accounts from being reliable. Instead, the fluidity and dynamism of oral history and traditional history should be acknowledged and analyzed, and both should be transmitted in a manner that mimics the organic way that it was historically transmitted. *See* Lecture by James Enote, the Director of the A:shiwi A:wan Museum and Heritage Center at Zuni, New Mexico, https://vimeo.com/37065671 (Part I); https://vimeo.com/37065759 (Part II);

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*Generis Aboriginal and Treaty Rights Litigation*, 13 Nat'l J. Const. L. 245, 251 (2002).

[8] Some oral traditions, such as memorized speech, however, are not subject to continuous revision from the perspective of tribal members. Donald Barr discusses the difference between prose and chant versions of origin and emergence narratives. Chants have fidelity in reproduction from one telling to the next, with near perfect replication. Donald M. Barr, *On the Complexities of Southwest Indian Emergence Myths*, 33 J. Anthropological Res. 317 (1977).

https://vimeo.com/37035885 (Part III). *Accord,* Andrew Wiget, "Recovering the Remembered Past: Folklore and Oral History in the Zuni Trust Lands Damages Case," in ZUNI AND THE COURTS 173 (E. Richard Hart, ed. 1995).

Written history, it has been argued, is tied to an implicit cultural evolutionism in which literacy is the marker of civilization, but in the first instance, it is often based upon oral traditions. *See* Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* 91 (2011). The writers of the Old and New Testaments and the Muslim hadiths most certainly built their writings on spoken traditions. The same can be said of classical Greek writings and the English written history.[9] "The constructionist nature of historical knowledge

[9] For centuries the use of oral sources in comprehending the past was commonplace. Thucydides, the Greek historian writing in the 5th Century B.C., made much of the eye-witness accounts of the Peloponnesian Wars. Bede, in the *History of the English Church*, noted his appreciation to countless faithful witnesses who either knew or remembered historical facts. *See* Donald L. Wasson, *Ancient Greek Literature,* ANCIENT (Oct. 11, 2017), https://www.ancient.eu/Greek_Literature/; *History of Oral History*, ORAL HIST. SOC'Y, https://www.ohs.org.uk/about/history-of-oral-history/ (last visited Jan. 31, 2021); Paul Thompson, *The Voice of the Past: Oral History* (1978) (discussing the reliability of oral evidence in comparison with other sources). Indeed, the importance of *Aesop's Fables* (probably derived out of oral tradition centuries old) lay not so much in the story as in the moral derived from it.

A good example of ancient histories that are not written but which are taken to be absolutely reliable and true are the famous Cro-Magnon cave paintings that show humans hunting animals, some of which are now extinct, and handprints that are next to these cave paintings. No one doubts their authenticity that they are contemporaneous pictures of life 30,000 to 40,000 years ago at that physical location. Likewise, oral traditions of American Indians and Indigenous people going back hundreds of years (based on the time of their advent into their claimed

means that one cannot study the written histories of any period or culture without discovering numerous contradictions, permutations, and changes." *Borrows*, *supra* at 16 n.38. This means that each format encounters similar challenges in verification and authentication.

Indigenous notions of truth require that a speaker's words be supported by appropriate claims to authority. These lines of authority are precisely what establishes reliability in Indigenous epistemology, a justified belief as opposed to opinion. Plato maintained that our knowledge of universal concepts is a kind of *recollection*. Authoritative recollection or unwritten customs and beliefs and knowledge in Western scholarly culture is based upon the knowledge of previously living or contemporary persons and the processes of knowledge construction. The difference, if any, between Western authority and Indigenous authority is the knowledge keeper. "Western notions of authority evolved to require reliable knowledge to be contained in written documents and place storytelling in the individual and singular realm, but [Indigenous] notions rely on the knowledge contained within people and passed on with built-in culturally required veracity. In both cases, however, truth is only recognized if supported by accepted authority." Robert Alan Hershey *et al.*, *Mapping Intergenerational Memories (Part I):*

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Aboriginal location) ought to be viewed by courts and others at least as reliable and believable as 30,000-year-old cave paintings depicting location and hunting culture, especially if corroborated by archaeological, anthropological, ethnographic, and linguistic evidence, be it physical or oral.

*Proving the Contemporary Truth of the Indigenous Past* 23 (Arizona Legal Studies, Discussion Paper No. 14-01, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377486.

Despite their commonality, when Western jurisprudence favors written records as proof of the past in support of Indigenous traditional history, while being dismissive, in whole or in part, of oral testimony offered as evidence by Indigenous peoples to prove their case, it constructs a firewall against legitimate and credible evidence. This exclusion effectively denies Indigenous people a fair adjudication of their land claims. Congruently, the stereotype of the ancient, changeless Indian results in a static picture of tribal custom, legitimized not by sovereign, tribal decision making, but by its mysterious and unprovable antiquity. *Stohr*, *supra* at 701. This conundrum is essentially a contest of ontological understandings in which the Indigenous truth is often posed as the losing and untrue perspective—even if the testimony is sympathetically appreciated for its spiritual, "prehistoric" relevance. *See* F. Cohen, *The Vocabulary of Prejudice*, *in* THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 429, 434 (L. K. Cohen, ed.,1960).[10]

[10] Western jurisprudence courts also freely allow oral testimony to challenge a testator's state of mind in a will that might be forged; to explain or supplement a course of dealing under the Uniform Commercial Code; to establish the affirmative defense of promissory estoppel; or when asserting a claim of adverse possession,

## II. American Legislative and Judicial Precedent Has Long Recognized Indigenous Oral History as Admissible Evidence

The United States Congress has enacted legislation that calls upon intergenerational memories as evidence of cultural affiliation. The Native American Graves Protection and Repatriation Act (NAGPRA) lists oral tradition along with linguistic, archaeological, and genetic evidence without indicating whether any listed type of evidence should be allotted more weight than another. *See* Debora L. Threedy, *Claiming the Shields: Law, Anthropology, and the Role of Storytelling in a NAGPRA Repatriation Case Study*, 29 J. Land Res.'s & Envtl. L. 91. NAGPRA puts Indigenous oral history on an equal footing with documentary evidence and expressly treats hearsay evidence as competent. *Id.*

The National Park Service's (NPS) regulations take a "preponderance of the evidence"[11] approach to evaluating cultural affiliation of contemporary tribes under NAGPRA back to prehistoric and historic times, at least in part, by admission and consideration of oral tradition evidence. Since evidence cannot be scientifically quantified, the establishment of a preponderance of the evidence must be determined through informed interpretation, meaning a determination is made based on a majority of available evidence (not the previous standard of "scientific

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and even in contested river and other land related boundaries, to name just a few of many examples.

[11] The Regulations follow NAGPRA, 25 U.S.C.§§ 3001 *et seq*., Pub. L. No. 101-601, which sets forth the "preponderance" standard.

certainty").[12] The NPS's 1995 regulations state that the preponderance of such evidence "reasonably leads to such a conclusion." 43 CFR § 10.2 (e)(1) (2011).

There have been more than 300 instances where museums and federal agencies have relied on oral traditions to determine the cultural affiliation of items to be repatriated.[13] In fact, one of those instances involved human remains dating back to 1000 B.C., whose cultural affiliation was determined through "oral traditions that place[d] . . . ancestors in the region 'since the beginning.'"[14] 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. As a matter of policy and fair dealings with Indigenous peoples, oral tradition evidence should not be explicitly sought for only one purpose (grave protection and repatriation), only to have its probative value denied in other contexts (Aboriginal land claims).[15]

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[12] *See* NAGPRA §§ 3001 *et seq*.
[13] 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).
[14] Notice of Inventory Completion: Phoebe A. Hearst Museum of Anthropology, University of California at Berkeley, 68 Fed. Reg. 62,321 (November 3, 2003).
[15] In addition to the implications for NAGPRA, not recognizing the value of oral traditions would greatly impact the identification of traditional cultural properties for compliance with Section 106 of the National Historic Preservation Act. Patricia L. Parker & Thomas F. King, *Guidelines for Evaluating and Documenting Traditional Cultural Properties,* Nat'l Register Bulletin 38 at 12,

Tribal oral histories were often dominant and determinative of Aboriginal title and occupancy in the Indian Claims Commission cases. Patterns of exclusive or joint and hospitable aboriginal occupancy were demonstrated through this type of evidence.[16] In *Pueblo of Zia v. United States and Pueblo of Jemez*, the Court discussed favorably the "oral accounts handed down from father to son in continuity-from generation to generation from time immemorial." 165 S. Ct. Cl. 501, 504 (1964). The Court further concluded that "[w]e cannot agree with the [United States] that 'testimony of that kind is literally worthless and justifiably *not given any weight* by the Commission.' Such evidence is entitled to *some* weight; it cannot be ignored or discarded as "literally worthless." *Id.* at 505.

A court's evaluation of the credibility of such evidence and corroborating verification (be it archaeological, anthropological, or ethnographic) can be conjoined with other factors such as individual consistency, conformity, and

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https://www.nps.gov/subjects/nationalregister/upload/NRB38-Completeweb.pdf (last visited Jan. 31, 2021).

[16] For a history of the Indian Claims Act and Commission and oral history in evidence, *see generally Irredeemable America: The Indians' Estate and Land Claims* (Imre Sutton ed., 1985); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 Am. U. L. Rev. 753 (1992). Indian Claims Commission decisions are linked at https://library.okstate.edu/search-and-find/collections/digital-collections/indian-claims-commission-decisions. *See Pueblo of Zia v. United States*, 11 Ind. Cl. Comm'n 131 (1962), https://cdm17279.contentdm.oclc.org/digital/collection/p17279coll10/id/846/rec/2; *See also Pueblo of Nambe v. United States,* 16 Ind. Cl. Comm'n 393 (1965), https://cdm17279.contentdm.oclc.org/digital/collection/p17279coll10/id/2612/rec/3; *Pueblo of Laguna v. United States*, 17 Ind. Cl. Comm'n 615 (1967), https://cdm17279.contentdm.oclc.org/digital/collection/p17279coll10/id/1695/rec/2.

context. In *Zuni Tribe v. United States*, experts relied on individual consistency and conformity to validate the oral testimony. 12 Cl. Ct. 607 (1987). To automatically deem oral tradition inadmissible for lack of trustworthiness has serious policy implications for Indigenous communities and the interpretation of various statutes that provide fundamental rights protection. At the Indian and Non-Indian community level, such a statement could be read that American Indian traditional religions are not trustworthy since their very source has been deemed by the courts as untrustworthy. At the statutory or treaty level, the implications can be far-reaching as well, given that oral tradition evidence may be the only evidence that American Indian tribes and individuals have in a range of cases to substantiate their claims.

## III. There exists Judicial Recognition of Native American Oral Histories as Evidence in Land Claim Cases

Courts have characterized American Indian oral traditions as generational evidence, the principal tribal record of the history of all Indian tribes.[17] These

[17] See *Pueblo De Zia*, 165 Ct. Cl. at 504.
As a practical matter, American Indian oral traditions may address a plethora of historical topics, from the esoteric to the meaning of particular historical events. For instance, Grant W. Jonathan reflects on the meaning of the Two Row wampum belt (Guswentah) among the Haudenosaunee (Iroquois) Confederacy, noting its meaning is expressed in a phrase that accompanies the belt: "We will NOT be like Father and Son, but like Brothers… These TWO ROWS will symbolize… vessels, traveling down the same river together. One…will be for the Original People, their laws, their customs, [and] [t]he other for the [European] people and their laws, their customs and their ways. We shall each travel the river together,…but [each]

traditions represent a coherent, open-ended system for constructing and transmitting knowledge and are most probably the oldest form of history. Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (2011). In many cases, oral tradition is corroborated with other evidence, whether it be historical documents or additional testimony. A court's primary concern with Indigenous oral tradition is its reliability. Accordingly, evidentiary barriers to the acceptance of Indigenous oral history must be scrutinized and addressed. *See generally* Rachel Awan, *Native American Oral Traditional Evidence in American Courts: Reliable Evidence or Useless Myth*, 118 Penn St. L. Rev. 697 (2014); *Babcock*, *supra* at 48-58. Evidence must be useful, reliable, and probative.

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in our [own] boat. [And] [n]either of us will try to steer the other's vessel." Grant W. Jonathan, *Protecting Mother Earth for the Seventh Generation* 44, http://nyfedstatetribalcourtsandindiannationsjusticeforum.org/GLPJ.pdf (last visited February 6, 2021). Indeed, written treaty rights have been construed in accordance with what the Indian interpretation of those rights meant. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). *See also United States v. Washington*, 384 F. Supp. 312, 379 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975) (recognizing the reliability and validity of Yakama elder witnesses in providing oral tradition testimony). For a contemporary legal interpretation of the concept of oral tradition and how it applies in law, *see Means v. District Court of Chinle*, No. SC-CV-61-98, at 23 n. 12 (Supreme Court of the Navajo Nation, May 19, 1999), *available at* http://www.tribal-institute. org/cases/navajo/means.htm. In that case, the Navajo Supreme Court expressly commented: "We understand this canon [of construction on construing a treaty 'as the Indians understood it'] to mean that we have the authority to interpret the treaty as Navajos understand it today. That includes the knowledge passed on to us by our ancestors through the oral traditions." *Id.*

The reliability requirement underpins two deemed-essential evidentiary rules that judges use to bar Indigenous oral tradition: hearsay and best evidence. Oral history is archetypical hearsay evidence. And, seemingly, written evidence is preferred over oral testimony in most circumstances. Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 Duke L. J. 625, 654 (1990). These rules penalize Indigenous societies for not maintaining records written in the Western manner and style at a point in their histories when European writing was unknown to them. Many cases, therefore, involved the introduction of writings by ethnographers working closely with Indigenous persons entrusted with the tribe's oral history. Without more flexibility in the rules of evidence, future or pending Indigenous land claims, in many cases, cannot succeed. Indeed, those land claims would not have succeeded in the early Claims Commission cases that determined pre-reservation Indian land occupancy without oral testimony.[18]

The District Court below, *Pueblo of Jemez v. United States*, in its extensive analysis of the Aboriginal title claims and the law of evidence regarding American

[18] To be sure, a review of a few ICC cases indicates that, within the bodies of the opinions themselves, oral history gathered from tribal witnesses, with rare exceptions, was not replicated *verbatim* into text and that their accounts, some translated into affidavit form, were channeled through the expert testimony of anthropologists. The irony is that while the original knowledge keepers' memory and recitation might be construed as hearsay, the "experts," whose written reports were based upon those memories and recitations, are regarded as knowledge holders of greater weight.

Indian oral tradition, scrutinized a host of federal District Court, Circuit Court, and Court of Claims opinions. 430 F. Supp. 3d 943, 1174-1229 (D.N.M. 2019). Yet, in its final determination, it disallowed a broadened receptivity for the testimony of the Pueblo's witnesses[19] and was largely dismissive of the decisions lending significant support to the Jemez Pueblo. *Id.* at 1257-66. *See Pueblo of Zia*, 165 Cl. Ct. 501, *Zuni Tribe*, 12 Cl. Ct. 607, and *Wally v. United States*, 148 Cl. Ct. 371, 373-374 (1960).

The *Jemez* Court found that oral tradition evidence could only be admissible if it fulfilled a non-hearsay purpose, or if it fit within a hearsay exception. *Jemez*, 430 F. Supp. 3d at 1257-58. Yet, in *Zuni*, the court found, to the contrary, that the oral history was abundant, that the "*ancient ties of the Zuni to the land … were 'manifest in the tribal oral tradition …. Zuni Tribe*, 12 Cl. Ct. at 616 (emphasis added). The Court specifically found evidentiary value in the tribe's oral tradition *because of the importance attached in the community to the accurate transmission of oral history …. Id.* at 616 n.12. The validity of testimony was established through corroboration between different pieces of the oral history testimony; *'reliability,' or repeatability tested through the ability of the deponents to tell the*

[19] Order of Dist. Ct. at 50, November 15, 2018, ECF 326. If, in fact, the hearsay rule exceptions to the Federal Rules of Evidence, especially Rules 803(20) and 807, had been interpreted more permissibly, it is posited that an accommodation for the Jemez Pueblo's oral history evidence could have been made and would have ameliorated the Court's final detrimental determination. *See Katner, supra.*

*same story on various occasions; and 'consistency,' meaning the conformity of testimony with other testimony* (*emphasis* added)." *Babcock, supra* n.2 at 58. *See also* Andrew Wiget, *Recovering the Remembered Past: Folklore and Oral History in the Zuni Trust Lands Damages Case*, ZUNI AND THE COURTS 173, 173-174 (E. Richard Hart ed. 1995); Peter M. Whiteley, *Archaeology and Oral Tradition: The Scientific Importance of Dialogue*, 67 Am. Antiquity 405 (2002).

Although the court in *Zuni Tribe of New Mexico, supra,* did not embrace an all-encompassing standard for the acceptance of oral history, the same issues of conflicting evidentiary bases have been highlighted in numerous Canadian cases, often resulting in legal victories for Indigenous title claims in which oral testimony was paramount. Instructive is the Canadian case of *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, where the Supreme Court of Canada held that Indigenous peoples' oral history had to be received in order to "adapt the laws of evidence so that Aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight." *Id.* at 1066. This approach allows courts to give oral histories "independent weight," *id.*, and place them "on an equal footing with the types of historical evidence that courts are familiar with." *Id.* The *Delgamuukw* Court noted that these modifications to the rules of evidence were necessary when litigating Indigenous peoples claims because to do otherwise would "impose an impossible burden of proof on

Aboriginal peoples, and render nugatory any rights they have" because "most Aboriginal societies did not keep written records." *Id.* (quoting from *R. v. Simon,* [1985] 2 S.C.R. 387 at 408). The *Delgamuukw* Court's reconciliation of the perspective of Aboriginal people with the perspective of the common law found in these new evidentiary standards is an important development in the Court's identification of principles in creating fairness - to bridge the differences between Aboriginal and non-Aboriginal cultures. *Borrows, supra* at 23.[20]

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[20] *See also* Federal Court—Aboriginal Bar Liaison Committee: PRACTICE GUIDELINES FOR ABORIGINAL LAW PROCEEDINGS 29-42, https://www.fct-cf.gc.ca/Content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf (considering best practices for oral history and elder evidence); *see also Katner, supra* (comparing best practices for the introduction of Indigenous oral history evidence in Canada, Norway, and the Inter-American Court of Human Rights); S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System,* 14 Harv. Human Rights J. 33 (2001). International law bulwarks flexibility in evidentiary rules to support the rights of Indigenous Peoples. *See Cohen's Handbook of Federal Indian Law*, §§ 5.07 *et seq.* (Nell Jessup Newton ed. 2012); *see also* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 Art. 31(1), U.N. Doc. A/RES/61/295 (September 13, 2007) (United States endorsed Declaration December 16, 2010); *Id* at Articles 11, 13, 15, 25, 27 (Article 27 states, in part: "States shall establish and implement, in conjunction with indigenous peoples … a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems …."); American Declaration on the Rights and Duties of Man, Arts. II, XVIII, XXIII, Inter-Am. Comm'n H.R., O.A.S. Doc. OEA/Ser.L./V./I.4 (1948), https://www.cidh.oas.org/basicos/english/basic2.american%20declaration.htm.

## CONCLUSION

Oral traditions are deeply important, if not sacred, to Indigenous Peoples because they document not only the living memory of their Aboriginal history and occupancy of land, but also their treatment, especially in regards to the identification of the when and where of the unconsented or coerced taking of their Indigenous or Aboriginal lands. As John Borrows writes, Indigenous peoples' own legal and historical traditions often challenge the nation state's narrative of extending law and order over Indigenous lands. Like the unwritten common law, Indigenous Americans' own laws and perspectives evaluate government "deception, lies, theft, broken promises, unequal and inhumane treatment, suppression of language, repression of religious freedoms, restraint of trade and economic sanctions, denial of legal rights, suppression of political rights, *forced physical relocation,* and plunder and *despoliation of traditional territories.*" *Borrows*, *supra* at 25-26 (*emphasis* added).

The decision of the District Court should be reversed and remanded with instructions to allow the Jemez Pueblo to introduce oral history evidence in support of their Aboriginal land claims.

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