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ABSTRACT

The Federal Rules of Evidence hearsay rules unjustifiably exclude legitimate and trustworthy evidence that support many Native American legal claims. Native American communities traditionally were not literate and rarely recorded the treaties, contracts, and other legal instruments they drew up or honored in any kind of written format, oftentimes recording their histories and diplomatic events in other ways; take for example wampum belts used by the Haudenosaunee Confederacy, among others. While the U.S. legal system presupposes that evidence in written statements provides a greater assurance of accuracy and truth than oral statements, this is not always the case. Writing is as susceptible to forgery, revision, manipulation, and misinterpretation as oral knowledge. Traditional Native American accounts of past experiences and realities are not honored in the courtroom, which strips authority from the robust institutions Native Americans employ in order to pass down and collectively maintain their own bodies of knowledge. This is a serious problem in Native American jurisprudence today.

This article compares the American legal system's treatment of oral evidence and history with its treatment in the legal systems of Canada, the Inter-American Court of Human Rights, and Norway. Each of these legal systems has developed methodologies that enable it to admit oral evidence in ways that respect the unique circumstances that often characterize disputes arising between indigenous and non-indigenous people. Canada, for example, has broadened its rules of evidence to admit First Nation (Canadian Native American) oral histories and cultural knowledge at times, so that they may be evaluated on par with Eurocentric written evidence. The Inter-American Court similarly admits oral histories from indigenous parties, expert witnesses, and anthropological studies, if it finds them legitimately probative in the context of a legal dispute. Norway's highest court, the Høyesterett, critiqued its own historical treatment of legal disputes involving Sámi land and cultural rights and began adopting Sámi-centric approaches in its jurisprudence that reference Sámi lifestyle and custom. Canadian, Inter-American, and Norwegian legal practices may have persuasive value in U.S. courts deciding how to approach cases involving Native American parties who seek to introduce knowledge and expertise that has not traditionally been admitted in state and federal court systems. Failure to accommodate these parties not only violates the trust doctrine that federal and state governments are responsible to uphold for their relationship with sovereign indigenous nations, but also perpetuate cycles of injustice Native Americans have endured for the last 400 years. In the spirit of increasing access to the courts and advocating for equal justice, U.S. jurisprudence should evolve to

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consider the evidentiary value of modes of knowledge that many indigenous societies historically developed and preserved to this day.

I. Admitting Native American Oral Evidence

The Federal Rules of Evidence (FRE) and state evidentiary rules exclude hearsay, which is defined by FRE 801 as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Indigenous oral history statements fall squarely within this definition, because past events recounted by word of mouth are not statements originally made by the declarant in court under oath. The original declarant is also not subject to cross-examination or observational scrutiny by the fact finder, whether judge or jury. Yet indigenous oral history is not as unreliable or prejudicial as many assume. The attitude of U.S. courts toward Native American oral evidence is in stark contrast to its treatment in Canada, the Inter-American Court, and Norway. This does not have to be the case. The United States should adopt alternative approaches to indigenous oral history evidence to ensure that indigenous communities receive equal and nondiscriminatory access to the judicial system, to abide by the international prerogative to uphold indigenous rights, and to honor the federal government's trust responsibility to Native American nations.[1]

The American legal system favors written over oral evidence. This fundamental principle is reflected in the best evidence doctrine and the prohibition of hearsay in the Federal Rules of Evidence.[2] The best evidence rule originated in eighteenth century British law with the statement that evidence is admissible if it is "the best that the nature of [a] case will allow."[3] On its face, the Federal Rules of Evidence adhere to the best evidence doctrine by privileging original written documents as, without exception, more reliable than subsequent copies or parol evidence of the content of a written document.[4] The Federal Rules of Evidence define hearsay as statements made by a declarant that were not made while testifying under oath at a trial or hearing.[5] Since the statements were made out of the courtroom, a lawyer cannot test the validity or accuracy of hearsay by cross-examination.[6] Because

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[1] *See* United States v. Mitchell, 463 U.S. 206 (1983) (finding that the Federal Government has full responsibility to manage Native American resources and land on their behalf and for their benefit); Friends Committee on National Legislation, *The Origins of our Trust Responsibility Towards Tribes*, https://www.fcnl.org/updates/the-origins-of-our-trust-responsibility-towards-the-tribes-132 (Sept. 29, 2010); U.S. Congress, American Indian Policy Review Commission, *Final Report of Task Force One, Trust Responsibilities and Federal-Indian Relationship, including Treaty Review*, § 7.

[2] Fed. R. Evid. 802.

[3] Omychund v. Barker, 26 Eng. Rep. 15, 33 (1745).

[4] Fed. R. Evid. 1001-8.

[5] Fed. R. Evid. 801(c).

[6] *See* Crawford v. Washington, 541 U.S. 36 (2004).

of this, apart from thirty-six exceptions,[7] courts generally do not allow hearsay to be admitted into evidence.

An overlooked consequence of these doctrines and the primacy of written evidence over oral evidence underlying both of them is an aversion to the introduction of evidence that could vindicate the claims of indigenous communities to ancestral land, cultural artifacts, sacred sites, etc.[8] Oral histories continue to play an important role in many Native American nations. The diverse forms that Native American oral histories take include the intangible such as songs, rituals, and ceremonies; oral histories may also be referenced by tangible items such as totems, weavings, pottery, and architecture.[9] Oral histories inform how Native American nations maintain cultural ties to their lands. The relationship that indigenous people have to land they traditionally inhabit and use does not consist of mere economic exploitation. Rather, indigenous communities, to a much greater degree than non-indigenous people, share a bond with land that is crucial for their physical, cultural, and spiritual well-being.[10] For these communities, their traditionally-used and inhabited lands inform their worldview and are a part of their cultural identity.[11]

This connection is codified in multiple international treaty instruments[12] signed by the United States and in customary international law[13]

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[7] Fed. R. Evid. 803, 807. The very fact that the hearsay doctrine is subject to 36 exceptions and exemptions calls into question its categorical nature.

[8] *See generally* Rachel Awan, *Native American Oral Traditional Evidence in American Courts: Reliable Evidence or Useless Myth?*, 118 PENN STATE L. REV. 697 (2014).

[9] 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, 32 (2012-2013).

[10] Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263, 265 (2010) (explaining the unique ways in which indigenous people live off and craft identities through a constant relation to the land they occupy).

[11] *See generally* Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006) (hereinafter *Sawhoyamaxa*).

[12] International Covenant on Economic, Social and Cultural Rights art. 1, ¶ 1, art. 15, ¶ 1(a), Dec. 16, 1966, 993 U.N.T.S. 3; U.N. Charter art. 73, ¶ 1(a); United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

[13] *See generally* Seth Korman, *Indigenous Ancestral Lands and Customary International Law*, 32 HAWAI'I L. REV. 391 (2010) (describing how recent approaches to indigenous rights around the world may start to inform customary international law as more and more nations' behaviors strengthen the case for a developing *opinio juris* on the scope of indigenous rights); Paul Kuruk, *The Role of Customary Law Under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge*, 17 IND. INT'L & COMP. L. REV. 67 (2007)

that the country selectively follows. When American law disregards indigenous oral histories, it selectively delegitimizes indigenous communities' lived experiences and potentially violates international norms.[14] Many aspects of indigenous rights, most prominently the issue of recognizing the authority of non-written documentation, do not lend themselves to easy assimilation into the American legal system.[15] As a result, cases involving Native American parties tend to be fraught with preconceptions about the nature of authoritative documentation that frustrate the very purpose of a judicial system meant to render fair and impartial treatment before the law.[16]

Some societies place such a great degree of importance on passed-down spoken word to the point that they consider such spoken word authoritative in the same manner by which other societies place a great degree of importance on written documentation. These oral-knowledge societies exercise an entire range of practices and institutions that give formality and legitimacy to their non-written evidence, similar to how societies that place more importance on written documents have developed practices and institutions that reinforce the idea that written documentation is more reliable than spoken word.[17] Nothing inherent in written documentation makes it more reliable than spoken word. While spoken word can be ill-remembered, altered in content over time, or recounted differently, written documents can be forged or amended or re-written after being signed onto. Despite this potential for both mediums of knowledge to be faulty, U.S. courts usually presume that written documents are valid unless a party presents evidence suggesting they

(explaining how indigenous customary legal systems and communities' traditional knowledge may ultimately affect international intellectual property laws and norms).

[14] "[The Inter-American Human Rights Commission (HRC)] has shown that past wrongs could constitute a continuous violation of the contemporary rights enjoyed by indigenous peoples under the [International Covenant on Civil and Political Rights (ICCPR)]." Jeremie Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine of Indigenous Title*, 56 INT'L & COMP L.Q. 583, 595 (2007).

[15] Consider communal rights that make up large parts of many Native American nations' customary law. They are often seen as incompatible with the way only individual rights are codified in American law. "To grant sub-groups a special status or alternative basis for defining themselves calls into question the 'substantiality of the ethical order' that defines 'rights' in terms of individuals." Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 657 (1990).

[16] For example, in *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979), *cert denied*, 444 U.S. 866 (1979), the court favored written over oral evidence. In fact, the bias towards written evidence was so strong that even the expert witness for the Mashpee Tribe had telling language creep into his testimony when he stated that he looked at *every piece of paper* surviving from that period. Gerald Torres & Kathryn Milun, *supra* note 15, at 649, n.78.

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

were forged or amended or their accuracy is doubtful. This is understandable; American society employs practices and institutions that protect the reliability of written documents, so courts are not initially skeptical of a written document's accuracy.

Spoken word, when preserved by practices and institutions, can lend credence to its accuracy. These practices may take form as the memorization of important stories by specific community members or elders, including when a community engages in consistent retellings of a story at certain important times of the year to mark its relevance. The documentation of knowledge passed down by spoken word tends to be institutionalized through the formal transmission of stories from one person of authority to another who is recognized as an heir or apprentice. The community may selectively pass oral histories down or have a secretive or sacred transmission process so that a few privileged community members safeguard the accurate story from alteration.[18] Some communities hold festivals or celebrations where a story's retelling is traditionally held for all the community to hear and anyone can voice a correction or disagreement with the retelling; this allows the community as a whole to police the story's authenticity.[19] Yet these forms of authority and practice are alien to U.S. courts and therefore judges tend to consider oral histories unreliable.[20] Reasonable arguments can discredit both written and unwritten forms of evidence by virtue of their respective mediums. In order to better-reflect the realities of handling Native American land claims, U.S. judges will have to challenge longstanding assumptions about unwritten information presented in the courtroom.

Canada has liberalized its evidentiary standards in the context of First Nation litigation by allowing judges to accept more unwritten documentation as probative or relevant to a case.[21] This is particularly relevant to the United States since Canada has experienced a similar colonial history and has sought to solve the same problems with evidence standards that American courts

[18] Secret or sacred histories which a community may believe holds power in its words themselves are especially tricky in the context of evidentiary treatment. "Aboriginal peoples have at times been forced into a position whereby they must reveal sacred knowledge in order to show long- standing affiliation with land or objects. Such knowledge is typically held very secretly, passed down orally by women to women and men to men…[After] oral knowledge is given as evidence, it becomes written text, available to be read by Native peoples and non- Native peoples alike," which may clash with the values a party or witness may hold. Nicholas Buchanan & Eve Darian-Smith, *Introduction: Law and the Problematics of Indigenous Authenticities*, 36 L. & SOC. INQUIRY 115, 121 (2011).

[19] GISDAY WA & DELGAM UUKW, THE SPIRIT IN THE LAND: THE OPENING STATEMENT OF THE GITKSAN AND WET'SUWET'EN HEREDITARY CHIEFS IN THE SUPREME COURT OF BRITISH COLUMBIA MAY 11, 1987, 26 (1989).

[20] Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1301 (1996).

[21] Babcock, *supra* note 9, at 61.

face. The First Nations[22] enjoy a unique legal status that is semi-autonomous in a way similar to the unique sovereignty Native American nations in the United States enjoy. Given these parallels between the two countries, Canada is a useful case study for examining the benefits of relaxed hearsay standards.

The Inter-American Court acknowledges that decisions involving indigenous communities require the active participation of those communities that will be impacted by the court's decision.[23] In practice, the Court has implemented this recognition by respecting indigenous repositories of knowledge. This includes admitting oral testimony from indigenous community members and from expert witnesses who collect this oral testimony. The result is a more accurate and informed verdict.[24] Norway also recognizes the customary law of its indigenous people, the Sámi (who orally transmit norms and practices), in its judicial process.[25] Although Norway, Sweden, Finland, and Russia do not officially recognize Sámi customary law as binding or co-equal with national law (and likely never will because of extraneous considerations),[26] Norwegian judges have recently begun reviewing the authoritative Sámi cultural corpus so that the Sámi perspective on an issue informs decisions centered around Sápmi (the Sámi homeland) land, water, and resource use.[27] Such judges keep Sámi cultural sensitivities in mind when ruling on a case. This trend is a promising one given the wide scope American judges enjoy in consulting persuasive, if not binding, legal sources to inform their common law decisions. Norway's approach could propagate indigenous-sensitive standards of evidence in cases involving Native American parties. The judicial systems in Canada, Norway, and the Inter-American Court handle oral evidence in different ways; however, each of these ways serves the same function: expanding court access to indigenous communities in an effort to better address their grievances. Few obstacles prevent American courts from adopting similar approaches for the same result. Before analyzing how these three legal systems handle oral evidence, it is necessary to explain how the American judicial system can accommodate oral histories given the current rules of evidence.

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[22] First Nations are indigenous societies that survived British and French colonization in Canada. They are considered legally distinct from Iñupiat communities and Métis, people of mixed indigenous and European ancestry who are not affiliated with any First Nation and yet have uniquely distinct indigenous-influenced cultural practices.

[23] Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 HUMAN RIGHTS L. REV. 281, 281-322 (2006).

[24] *Id.*

[25] *See generally* Dawid Bunikowski, *Indigenous Peoples, Their Rights and Customary Laws in the North: The Case of the Sámi People*, 43 NORDICA GEOGRAPHICAL PUBLICATIONS 75 (2013).

[26] After all, allowing a migratory population of Sámi to regularly cross Scandinavian and Russian borders would clash with those nations' standards for border security, not to mention taxation of inhabitants and uniformity of national policies.

[27] *See Selbu*, *infra* note 191.

II. Oral Histories as Evidence in the United States

Limited exceptions exist for the inclusion of oral and other forms of non-written evidence in certain situations. Consider the states that adopted the rules of the Uniform Commercial Code (U.C.C.) on parol evidence of a course of performance, or course of dealing, when elucidating the meaning of a business contract. U.C.C. § 1-303(f) states that "a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance" of a contract. Oregon lifts this language entirely for its statute on terms of trade:

> "A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which the parties are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement and may supplement or qualify the terms of the agreement."[28]

Illinois likewise inserted this language into its commercial code.[29]

In Oregon and Illinois state courts (and other U.C.C.-adopting states), the written contract between two parties does not always settle disputes about contract performance or what express terms in a contract apply. Instead, if a judge finds it reasonable in the context of a case, she or he will analyze the behavior and oral communication of the contract parties in order to elucidate the meaning of a contract; in situations where the parties' behavior does not match the contract and the business deal concluded despite that, even provisions of a contract that appear essential on paper could be thrown out or omitted. Under the U.C.C., the behavior of contract signatories can override what is presumably agreed upon in writing. According to the Illinois Appellate Court, "the course of performance is more than an interpretive tool" for determining the meaning of a contract since it also gives "rise to waiver of express contractual terms if those terms are not strictly adhered to."[30] In U.C.C.-influenced jurisdictions, performance is powerful enough to affect how courts interpret a binding contract. This results in legal decisions where non-written documentation not only informs but also takes precedence over written word.

U.C.C. § 2-202 provides another example of a situation where non-written evidence can affect a binding contract. In U.C.C.-adopting jurisdictions, even a mutually agreed-upon contract intended by both parties to be the final expression of their agreement can be "explained or supplemented" by a "course of dealing or usage of trade," a "course of

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[28] OR. REV. STAT. § 71.3030(4) (2017).
[29] 810 ILL COMP STAT. § 5/1-303(d) (2017).
[30] Midwest Builder Distrib., Inc. v. Lord & Essex, Inc., 383 Ill. App. 3d 645, 673 (Ill. App. Ct. 2007) (finding that when a homebuilder and subcontractor exchange a credit information sheet and their behavior complies with that sheet, it becomes part of the contractual agreement between the two parties arising from the behavior of the parties alone).

performance," or "evidence of consistent additional terms" not present in the finalized contract.[31] The Supreme Court applied this principle to settle the dispute between New York and New Jersey over which state held title to Ellis Island, the home of the Statue of Liberty. The Court looked to the behavior of both states in order to elucidate the meaning of the "poorly drafted and ambiguous" Compact of 1834, a contract that both states relied upon to regulate ownership of the island.[32]

Departing from the U.C.C., unwritten documentation also holds power in some areas of contract law, such as with issues involving promissory estoppel. When a party undergoes performance relying upon the promise or word of another, and the performer is negatively affected by the promise-maker going against their word, some jurisdictions such as Nebraska may interpret the oral agreement as part of a binding contract with legal repercussions.[33] Especially in the field of land rights and property law, many disputes may be quelled if non-written evidence can be introduced for a fact-finder to better-understand the context of a treaty, title, or contract.

A. Native Americans and the Hearsay Problem

Despite these examples, it remains doubtful that most state and federal courts would admit Native American oral history, traditional storytelling, or the recounting of past events as a matter of principle. Judges wield broad discretion over the admittance of evidence and, too often, they use that discretion to the detriment of Native American parties in court.[34] Consider *Coos Bay Indian Tribe v. United States*, where the court remarked that the oral histories the Coos Bay Nation presented as evidence would be in theory sufficient to prove "by hearsay" that it occupied a territory and yet held that the evidence was still insufficient to meet the required burden of proof since it was, ultimately, hearsay.[35] Court refusal to admit Native American oral history is far from a relic of colonialism; it continues to affect courts today. In *Chippewa Community v. Exxon Corp.*, similarly, the Sokaogon Nation unsuccessfully used oral history to justify its right to occupy its land based on the federal government's promise of a reservation.[36] The Seventh Circuit characterized the oral history evidence as "at best embroidered [and] at worst fictitious."[37] The Sokaogon failed to "cast [the oral history evidence] into a form in which it would be admissible in a court of law," and as a result, failed to state a valid claim.[38] This is a major problem because many land

[31] U.C.C. § 2-202(a-b).
[32] New Jersey v. New York, 523 U.S. 767, 830 (1998).
[33] *See* Ricketts v. Scothorn, 57 Neb. 51, 54 (1898) (finding that a granddaughter is entitled to her deceased grandfather's money after she quit her job because her grandfather promised her that if she did so, he would gift her a pension when he passed away since he wanted "none of [his] grandchildren [to] work.")
[34] Babcock, *supra* note 9, at 38.
[35] 87 Ct. Cl. 143, 150-153 (1938).
[36] 2 F.3d 219 (7th Cir. 1993).
[37] *Id.* at 222.
[38] *Id.* at 224-5.

disputes originate from oral agreements, or settlers wrote their interpretation down in a manner that conflicted with the version Native Americans passed down orally,[39] or codified in other non-written archival modes.[40]

The judicial practice of refusing to admit Native American oral histories may also blind courts to the cultural significance Native Americans attach to a given site or artifact. According to the Native American Graves Protection and Repatriation Act (NAGPRA), scientists conducting tests on "certain human remains, funerary objects, sacred objects, and objects of cultural patrimony with which [certain Native American tribes] are affiliated" must obtain a license from the Native American nations involved.[41] This requirement was the heart of the issue in *Bonnichsen v. United States*.[42] The Ninth Circuit criticized the U.S. Secretary of Interior's reliance on oral history evidence as it found the stories too tenuous to suggest "authenticity, reliability, and accuracy."[43] The Interior Secretary used oral histories provided by the Nez Perce, Umatilla Reservation, Yakama, and Colville Reservation nations in order to establish the cultural affiliation NAGPRA requires between the tribes from the Columbia Plateau region and a prehistoric skeleton named the Kennewick Man by anthropologists.[44] The goal of the Interior Secretary was to show how important and significant the human remains were to the local Native American nations so that those remains could be repatriated in a dignified manner instead of kept for anthropological testing. The Ninth Circuit interpreted the Interior Secretary literally, believing the oral histories were meant to establish a strong scientific relation (rather than a cultural relation, the only criteria required to invoke NAGPRA protections) between the remains of a prehistoric Native American and contemporary tribes; the judge revealed his literal interpretation with the

[39] "However, where written records do exist, they often do not contain adequate information on Aboriginal use and occupation of land and tend to be tainted by the European perspective of the persons who produced them." Lori Ann Roness & Kent McNeil, *Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts*, 39 J. West 66, 67-68 (2000).

[40] For just one of numerous examples of indigenous non-written archival production, consider diplomacy via wampum exchange. *See generally* Wilbur R. Jacobs, *Wampum: The Protocol of Indian Diplomacy*, 6 Wm. & Mary Q. 596 (1949); READING THE WAMPUM: ESSAYS ON HODINÖHSÖ:NI' VISUAL CODE AND EPISTEMOLOGICAL RECOVERY (Penelope Myrtle Kelsey ed., 2014); George S. Snyderman, *The Functions of Wampum*, 98 PROC AM PHILOS SOC 469 (Dec. 1954). Note that as both native and settler societies spread the concept of wampum further west to the Great Plains and Rocky Mountain regions, the functions and uses of wampum changed drastically from those employed by the eastern cultures where wampum originated. Jordan Keagle, *Eastern Beads, Western Applications: Wampum Among Plains Tribes*, 33 GREAT PLAINS Q. 221, 221 (Fall 2013).

[41] 25 U.S.C. § 3002(c)(1).

[42] 367 F.3d 864 (9th Cir. 2004).

[43] *Id.* at 882.

[44] *Id.* at 881. The Kennewick Man is human remains found in Kennewick, Washington along the banks of the Columbia River in 1996. Anthropologists have been studying these remains hoping to elucidate the genetic origins of early Americans.

words "8340 to 9200 years between the life of Kennewick Man and the present is too long a time to bridge merely with evidence of oral traditions."[45]

From a scientific perspective, it is questionable to connect contemporary tribes to prehistoric remains, yet this approach unjustifiably excludes consideration of the cultural significance of the remains. Scientifically and historically, there is no verifiable connection between Jesus Christ's alleged burial place or crucifixion spot in Jerusalem and the Christian deity's actual burial and crucifixion location, given that the site of the Church of the Holy Sepulchre was identified and built upon over three centuries after Jesus's death.[46] Yet this does not diminish the cultural and spiritual significance of the site to the world's Christian population.[47] The archaeological excavation done within the church at Jesus's burial site could only have occurred with the permission of the Christian orders that held custodial duties over the sacred site.[48] In a similar manner, by establishing a cultural connection to the Kennewick Man through oral histories, the Interior Secretary aimed to repatriate the remains into the tribes' custody as the remains held significant value for a people who spiritually venerate ancestors, triggering NAGPRA protections.[49] If scientists wished to conduct tests on the

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[45] *Id.* at 882.

[46] *See generally* Socrates Scholasticus, *Historia Ecclesiastica*, http://www.ccel.org/ccel/schaff/npnf202.toc.html (ebook) ("It is not probable that any person whose opinion is worth expressing would now positively assert that the buildings which are known all the world over as the Church of the Holy Sepulchre do actually cover the spot where Jesus of Nazareth was buried…it is at least extremely improbable that their site has any claims to authenticity, having been selected by mere chance by persons who knew, at all events, no more about the matter than we do."); *See also* J. R. Macpherson, *The Church of the Resurrection, or of the Holy Sepulchre*, 7 ENGLISH HISTORICAL REV. 417 (1892).

[47] Macpherson, *supra* note 46, at 417 ("But if on the ground of historical accuracy these buildings must cease to draw towards them the religious devotion of Christendom, they become scarcely less interesting to the historian and the archaeologist. Their rise and their fall have been for fifteen centuries epoch-marking events in history: they bring us face to face with the first Christian emperor of the Romans [up to] the quarrels of east and west for nearly a thousand years.").

[48] Kristin Romey, *Exclusive: Christ's Burial Place Exposed for First Time in Centuries*, NAT'L GEOGRAPHIC (Oct. 26, 2016), https://news.nationalgeographic.com/2016/10/jesus-tomb-opened-church-holy-sepulchre/ ("The Church of the Holy Sepulchre (also known as the Church of the Resurrection) is currently under the custody of six Christian sects. Three major groups—the Greek Orthodox Church, the Roman Catholic Church, and the Armenian Orthodox Church—maintain primary control over the site, and the Coptic, Ethiopian Orthodox, and Syriac communities also have a presence there. Parts of the church that are considered common areas of worship for all of the sects, including the tomb, are regulated by a Status Quo agreement that requires the consent of all of the custodial churches.").

[49] The Native American defendants made it clear to the court that they believed "when a body goes into the ground, it is meant to stay there until the end of time. When remains are disturbed and remain above the ground, their spirits are at unrest….To put these spirits at ease, the remains must be returned to the ground as

Kennewick Man, they ought to have followed the NAGPRA guidelines and requested a license from the Native American nations to whom these ancestral remains are considered sacred and worthy of proper ceremonial treatment as per their customs.[50] The Ninth Circuit misunderstood the relevance of introducing the oral history as evidence which prevented it from accurately interpreting the NAGPRA statute.

Outside of the courtroom, oral history is sometimes more reliable than written documentation. This arises occasionally in disciplines such as history, anthropology,[51] and archaeology.[52] For example, physical anthropologists who did tests on remains found in a mass grave uncovered information that contradicted the written accounts of the Church of Jesus Christ of Latter-Day Saints about the Mountain Meadows Massacre and more closely aligned with oral histories passed down by Native Americans in the region.[53] If it is possible for oral histories to be more factual than written documents in some circumstances outside of the courtroom, it would be alarming if courts did not consider this possibility arising in the context of a legal dispute when presented with information that suggests such. With the help of corroborating evidence, a judge could allow oral history into a courtroom given a preponderance of evidence sufficient to support a finding that it is reliable[54] and probative.[55] Sometimes, the consequence may be that the oral history invalidates a contract, treaty, or other legal instrument. As long as this remains a possibility, it would be imprudent for a judge to reject all oral testimony.

Some cases show workarounds to the hearsay problem through creative use of existing evidence rules. The Federal Rules of Evidence allow witnesses to be qualified as experts if they have specialized knowledge or experience about a probative topic.[56] The judge is a metaphorical gatekeeper for expert information and uses the *Daubert* factors to determine the validity

soon as possible." Bonnichsen v. United States, 367 F.3d 864, 870 n.8 (9th Cir. 2004). Yet the Ninth Circuit's approach to Native American oral testimony stopped it from seriously analyzing all the evidence that would have resulted in a deeper appreciation for the magnitude of the defendants' religious beliefs regarding the Kennewick Man's remains.

[50] 25 U.S.C. §§ 3001-5.

[51] 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).

[52] Peter M. Whiteley, *Archaeology and Oral Tradition: The Scientific Importance of Dialogue*, 67 AM. ANTIQUITY 405, 408 (2002) (critiquing experts who believe written records compiled during the Spanish colonial era are accurate accounts of historical events).

[53] Taylor S. Fielding, *Evidence Issues in Indian Law Cases*, 2 AM. INDIAN L.J. 285, 297 (2017).

[54] Fed. R. Evid. 104.

[55] Fed. R. Evid. 403.

[56] Fed. R. Evid. 702.

of an expert witness's testimony.[57] These factors are neither dispositive nor exhaustive; they provide ample discretion for a judge to admit oral history into evidence.[58] Since the majority of the 574 federally recognized Native American nations have their own cultural norms about who maintains or archives oral traditions and history, these orators may well be experts in the legal sense in that they have access to a specialized knowledge that is not readily available to other tribal members.[59] A Native American elder recounting oral history often relies on cultural canons of appraisal, which, within that elder's community, distinguish between the non-expert account of a layperson and a qualified recounting.[60] In the past, the Ninth Circuit has approved of expert testimony that was based on hearsay in certain circumstances.[61] In particular, the Circuit deferred to an expert's own standards of reliability, as Rule 703 authorizes: "[I]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."[62] Judges could apply the same evaluation to oral history evidence in cases involving Native American parties.

Occasionally, cases arise in which oral histories of indigenous people may play a pivotal role. The Ninth Circuit admitted oral history in *Cree v. Sandberg*, for example, which involved a treaty dispute (although not to elucidate the contents of the treaty).[63] Rather, the trial judge allowed the oral testimony in order to establish how tribal members interpreted the treaty language. This was a use of probative evidence that fell well within his discretion.[64] The Federal Court of Claims, too, at times attributes weight to

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[57] Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579, 594 (1993). The five *Daubert* factors are (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.

[58] *Id.* at 592.

[59] Bruce G. Miller, *Culture as Cultural Defense: An American Indian Sacred Site in Court*, 22 AM. INDIAN Q. 82, 90 (1998).

[60] Peter M. Whiteley, *Archaeology and Oral Tradition: The Scientific Importance of Dialogue*, 67 AM. ANTIQUITY 405, 407 (2002). If it strikes the reader as difficult or impossible to challenge the reliability of oral histories if they are assumed to be accurate, consider the following possible ways: the opposing party could discredit the elder's standing (by providing witnesses from the elder's community who dispute his or her leadership), engage in a battle of the experts with testimony from other elders, introduce social scientists who can draw attention to flaws in the oral history's narrative, etc. A judge can use his or her discretion and may give little weight to admitted oral history if the opposing party brings forth witnesses contesting the elder's recognized leadership, whether the elder's recounting is inaccurate based upon another elder's recounting of the same story, or whether the oral history is contradicted by other admitted evidence.

[61] United States v. Sims, 514 F.2d 147 (9th Cir. 1975).

[62] Fed. R. Evid. 703.

[63] Cree v. Sandberg, 157 F.3d 762, 773-744 (9th Cir. 1998).

[64] *Id.*

oral histories based on the precedent established in *Pueblo De Zia v. United States*.[65] The Indian Claims Commission had ignored oral histories recounted by witnesses because, in its view, they, "in point of time, are far removed from the issue in question."[66] On appeal, the Court of Claims reversed, holding that oral history is "entitled to *some* weight" and should not be categorically "discarded as 'literally worthless'" when used in conjunction with corroborating historical and archaeological evidence.[67] The Pueblo De Zia community thereby met the burden of proof for establishing its aboriginal title to the land.[68]

Courts have seldom used FRE 803(20), the hearsay exception for Reputation Concerning Boundaries or General History,[69] yet it holds the potential to use oral evidence in bolstering land claims. The U.S. Court of Claims has adopted the language of FRE 803(20) on its face, implicitly if not explicitly. In *Wally v. United States*, the court never directly mentioned the rule, yet the court admitted the testimony of a number of witnesses as parol evidence to prove the location of different tracts of land.[70] The court admitted that the testimony was hearsay. The witnesses had no personal knowledge of the land's location. Still, the court agreed with the plaintiffs that the witness testimony was acceptable as an exception to the hearsay rule. The court stated "community reputation about facts which are no longer available to individuals or susceptible of other proof has long been admissible to show the location of ancient boundaries." [71] The court rationalized this exception by stating that a community's general acceptance of a fact is unlikely to be false given how "prolonged and constant exposure of these facts" among a community "sifts out" inaccuracies and errors by popular belief and allows the facts to be presented as reliable evidence in court.[72]

If one court reaches this conclusion about a rural community's collective memory, but another rejects the same sort of evidence from a rural Native American community, the issue lies in the evidentiary discretion afforded judges. In *New Mexico ex rel. State Engineer v. Aragon*, Judge Khalsa demonstrated the flexibility inherent in judicial discretion when dismissing New Mexico's motion in limine seeking to exclude a family's oral history from consideration at trial.[73] The state argued that a family's insistence on the existence of irrigation ditches when their property was first settled under the Homestead Act constituted impermissible hearsay. Yet the court ruled that the family should have "the opportunity to lay foundation regarding the admissibility of the reputation evidence at trial, and the State an opportunity to challenge the foundation" before the court decided whether the

[65] Pueblo De Zia v. United States, 165 Ct. Cl. 501, 505 (1964).
[66] *Id.* at 504 (citing 11 Ind. Cl. Comm., 131, 168 (1962)).
[67] *Id.* (emphasis in original).
[68] *Id.*
[69] Fed. R. Evid. 803(20).
[70] Wally v. United States, 148 Ct. Cl. 371, 373 (1960).
[71] *Id.*
[72] *Id.* at 373-74.
[73] New Mexico *ex rel.* State Eng'r v. Aragon, 2017 U.S. Dist. LEXIS 5310 (2017).

testimony was admissible as evidence.[74] The court recognized that there was a formal process by which to evaluate the family's statements and refused to bar the hearsay's admittance outright.

Some evidence scholars have long criticized the hearsay rule's inadequacy and argued it is in desperate need of reform.[75] Indeed, updating the Federal Rules of Evidence could ameliorate the issues this note covers.[76] Yet an overhaul of the Federal Rules of Evidence is unlikely given the inertia of the status quo.[77] Nonetheless, adoption of a new perspective on the existing rules of evidence to recognize the validity of Native American oral testimony under some circumstances would ameliorate a significant injustice in cases involving greater burdens of proof on indigenous parties who rely on traditional knowledge to make a claim.

Rules of evidence from other legal systems can be readily incorporated into the FRE by reinterpreting existing rules or by modest amendments. For many land claim cases, FRE 803(20)'s hearsay exception is directly relevant and would allow oral history to be used as permitted hearsay evidence: "A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation."[78] Judges may find this reading valid in an appropriate context rather than dismissing indigenous oral histories as unauthoritative or unreliable.

In *Pueblo of Jemez v. U.S.*, the New Mexico District Court described the conditions necessary for it to accept indigenous oral histories as evidence pursuant to the FRE.[79] According to the Court, finding a FRE 807 residual hearsay exception, or exercising judicial discretion, is "reserved for exceptional cases."[80] For the court in *Jemez*, oral histories did not fall into that category since exceptional cases "occur when hearsay evidence is relevant

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[74] *Id.* at 12-13.

[75] David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 1 (2009).

[76] For example, adopting a "best evidence hearsay rule" where a court determines that hearsay is better evidence than that which is readily available, would encompass most of the existing exceptions to the hearsay doctrine and allow a degree of flexibility that would maximize the amount of evidence under consideration by the fact-finder within the spirit of the existing hearsay exceptions. Michael L. Siegel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U.L. Rev. 893, 934 (1992). For reasons I will go into later in the note, a court could conceivably consider Native American oral testimony better evidence than what is available, for example when compared to forged or inaccurately recorded land deeds, or even in the face of no written or conflicting evidence at all.

[77] As Justice Jackson famously wrote when he remarked upon whether the Federal Rules of Evidence required amendment, "[t]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice." Michelson v. United States, 335 U.S. 469, 486 (1948).

[78] Fed. R. Evid. 803(20).

[79] *Pueblo of Jemez v. United States*, No. CIV 12-0800 JB\JHR, 2018 U.S. Dist. LEXIS 195368 (2018) (hereinafter *Jemez*).

[80] *Id.* at 34.

and reliable, and no other evidence, or little other evidence, is available on the same point."[81] The court was skeptical that oral histories counted as exceptional in all situations:

> The Court need not and should not shoehorn to get the oral history evidence in. It is not worth much. It is often legend or myth that defies scientific proof, or it is self-serving testimony that does little more than state Jemez Pueblo's position. The Court knows Jemez Pueblo's position. The Court does not need
> rule 807 to get that position into the case.[82]

With those words, the court rejected both the relevance and reliability of oral histories as a broad class of evidence. Yet the *Jemez* court did admit oral histories into evidence on two occasions. The court found that "the most relevant oral tradition evidence" submitted, testimony about land use boundaries, satisfied FRE 803(20) as community reputation evidence and so any of the numerous 803 exceptions were valid.[83] The court also admitted oral history evidence that was satisfactorily corroborated by expert opinion pursuant to FRE 702. Although the *Jemez* Court barred oral evidence from FRE 807 consideration, it did prove that U.S. courts can admit oral history testimony in many circumstances.[84] Detailed in the following section, Canadian judges go further in their level of discretion almost to the point of elevating indigenous oral histories into a permanent FRE 807 exception.

III. Adapting Oral Evidence Standards to Native American Practice: Canada

Canada, in what appears to be a good faith attempt to grapple with its colonial and imperialist history, has created avenues for exempting hearsay evidence that allow indigenous groups to introduce evidence that ordinarily would be barred by British common-law hearsay prohibitions.[85] Canada amended its Constitution in a way that gave courts discretion to liberalize oral evidence rules with the purpose of aiding First Nation land rights claims.[86] The historical and legal context that led to this amendment is critical to understanding its rationale, as is understanding the relationship between the Canadian government and Canada's First Nations.

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[81] *Id.* at 53.
[82] *Id.*
[83] *Id.*
[84] Indeed, the ability of the *Jemez* court to admit oral histories under two classes of hearsay exceptions encouraged the court to find that there was no need for a FRE 807 treatment since "on balance, such need is insufficient to compel admission" of oral history as an exceptional case.
[85] There has been a push in other Commonwealth countries to adopt this initiative. For a South African commentary on dismantling hearsay rules, *see* Jamil Ddamulira Mujuzi, *Hearsay Evidence in South Africa: Should Courts Add the 'Sole and Decisive Role' to Their Arsenal?*, 17 INT'L J. ENV'T POLLUTION 347 (Oct. 2013).
[86] Babcock, *supra* note 9, at 50.

A. A New Standard is Born

Canada's progressive policy toward First Nation land claims began with *Calder v. Attorney-General of British Columbia* in 1973.[87] Frank Calder, an elder of the Nisga'a First Nation, claimed that no treaty ever extinguished their land title.[88] British Columbia's Supreme Court and the Provincial Court of Appeal both rejected the claim, ruling that "after conquest or discovery, the native people have no rights at all except those subsequently granted or recognized by the conqueror or discoverer."[89] The Supreme Court overturned the lower decision and ruled that the Nisga'a Nation did have aboriginal title.[90] Unlike the norm in the American legal system, the Supreme Court of Canada said:

> When the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal

[87] Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313 (Can.).

[88] *Id.* at 313. The Nisga'a chiefs had a long and defiant struggle in challenging Canadian sovereignty, especially given that the government colonized British Columbia via land grants to settlers instead of enacting any formal agreements with them. In 1888 when the government of British Columbia attempted to set up First Nation reservations, they responded, "what we don't like about the Government is their saying this: 'We will give you this much land.' How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land—our land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new things, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed it. He would be foolish. We have always got our living from the land; we are not like white people who live in towns and have their stores and other business, getting their living in that way, but we have always depended on the land for our food and clothes; we get our salmon, berries, and furs from the land." *Id.* at 319.

[89] *Id.* at 315.

[90] *Id.* at 313. Interestingly, the Canadian Supreme Court describes how the Canadian judiciary's approach to aboriginal title was influenced by two decisions from the United States' own Chief Justice Marshall: *Johnson v. McIntosh*, 21 U.S. 543, 587, 588 (1823) and *Worcester v. Georgia*, 31 U.S. 515 (1832). In *McIntosh*, Marshall states "the power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees…All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy; and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." The Canadian courts have since held that the First Nations could only transfer title of their occupied lands to the Crown. *See also* St. Catharines Milling and Lumber Co. v. R., (1887) 13 S.C.R. 577 (Can.).

> or usufructuary right'. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived.[91]

With this language, the Canadian Supreme Court essentially rejected the transmission of land rights by conquest over previous inhabitants and described a right to intergenerational cultural transmission embedded by reliance on, or strong connection to, the land itself. It was also the first time the Canadian legal system acknowledged aboriginal title not derived from colonial law. Unfortunately for the Nisga'a Nation, the court reasoned that the Crown properly extinguished the aboriginal title the Nation held with its establishment of the Colony of British Columbia over their lands.[92] Yet *Calder* opened the door to subsequent litigation by First Nations eager to assert claims of aboriginal title.

Subsequently, in *R. v. Van der Peet*, the Supreme Court of Canada established a new approach to evaluating evidence in aboriginal cases.[93] Chief Justice Lamer adopted a standard for "whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom, or tradition integral to a distinctive aboriginal culture."[94] For

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[91] *Calder*, [1973] S.C.R. at 328.

[92] *Id.* at 338. The Canadian Supreme Court looked to American jurisprudence to decide the issue of whether, given that the Nisga'a Nation no longer held aboriginal title to their lands, if it was proper for the Canadian government to compensate them for their loss. *See generally* United States v. Alcea Band of Tillamooks*,* 329 U.S. 40 (1946). The Tillamooks tribe sought compensation for Congress's reduction of their reservation lands, which was done illegally since the Tillamooks' treaty allowing a cession of their land in exchange for a reservation, was never ratified by the Senate. The Supreme Court ruled that the Tillamooks were entitled to compensation without the need to prove that their aboriginal title was recognized by the United States. *Tee-Hit-Ton Indians v. United States* later clarified that this earlier compensation arose out of a statute granting the Court of Claims jurisdiction over legal and equitable claims arising out of aboriginal title disputes. 348 U.S. 272 (1955). As such, the Tee-Hit-Ton (a subgroup of the Tlingit tribe) lost their argument that the Fifth Amendment's Takings Clause applied to Congressional takings of aboriginal titled-land. "This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Id.* at 279. The Supreme Court, apparently deciding that recognition of aboriginal title was as far as it was willing to go in supplying justice to the colonized people of Canada, ruled that the Crown was not required to compensate the Nisga'a Nation for seizing their land without treaty or conquest. *Calder* at 346. A powerful dissent argued the exact opposite of the majority: that the Nisga'a Nation still held aboriginal title as it was never extinguished, and they were entitled to compensation. *Id.* at 422 (Hall, Spence, and Laskin, JJ., *dissenting*). The majority opinion was at least somewhat more favorable to the First Nations than the dissent that claimed Canada enjoyed sovereign immunity from its subjugated nations. *Id.* at 427 (Pigeon, J., *dissenting*).

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

[94] *Id.* ¶ 68.

a court to properly follow this standard, it must "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."[95] This follows naturally from *Calder*'s establishment of aboriginal title, for if the title predates colonial contact and government, then title would naturally be unwritten, requiring proof by alternative means. Chief Justice Lamer further ruled that Canadian courts should not "undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case."[96] And so the Canadian judicial system recognized that First Nation oral histories deserved treatment that brought them closer to the probative value afforded to settler society's written documents.

Lest ambiguity persist, one year later, the Supreme Court clarified in *Delgamuukw v. British Columbia* that all Canadian courts must "take into account the perspective of the aboriginal people" when they are parties to a case involving their land and cultural rights, as well as "the perspective of the common law," putting both "on an equal footing."[97] Chief Justice Lamer wrote that "aboriginal rights are truly *sui generis*" and cases involving them "demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples."[98] Oral histories recounted by the First Nations received their proper sanctioning with these words since they fulfill the role of historical documents as their communities' formal accounts of the past.[99]

The Canadian Supreme Court ruled this way mainly because of the difficulties associated with proving pre-colonial legal rights and the "impossible burden of proof on those claiming this protection."[100] The Court further elaborated on this rationale in *Mitchell v. M.N.R.*, where Chief Justice McLachlin held that the "special nature of Aboriginal claims" mandated this flexible approach to admissible evidence.[101] But he also warned that the Court

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[95] *Id.*
[96] *Id.*
[97] Delgamuukw v. British Columbia, [1997] 2 S.C.R. 1010, ¶¶ 83, 87 (Can.).
[98] *Id.* ¶ 82.
[99] However, it is important to recognize that *Delgamuukw* did not wholly dismantle the Canadian judiciary's pre-existing anti-First Nation structural issues. The Court quoted *Van der Peet*, writing "that accommodation must be done in a manner which does not strain 'the Canadian legal and constitutional structure.'" *Delgamuukw*, ¶ 49. As one commentator writes, "Thus, even though the Court has made great efforts to ensure that the 'laws of evidence [are] adapted in order that [oral histories and tradition] can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with,' the fact that they must be reconciled with assertions of Crown sovereignty means that, in the end, this new standard risks 'perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies.'" John Borrows, *Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia*, 37.3 OSGOODE HALL L.J. 537, 557 (1999).
[100] *Van der Peet*, ¶ 68.
[101] Mitchell v. M.N.R., [2001] 1 S.C.R. 911, ¶ 68 (Can.).

did not mean to dismiss traditional evidentiary standards by creating this new application. Rather, "there is a boundary that must not be crossed between a sensitive application" of the existing rules of evidence and "a complete abandonment of" them.[102] When First Nation testimony could not sufficiently supply convincing evidence, even by these appropriately sensitive standards, an "absence of even minimally cogent evidence" could not justify a finding of Aboriginal rights.[103] In short, the evidentiary standards should depend on the context of each individual case rather than on any categorical guidelines. Canadian judges thereafter had to undertake the formidable task of balancing "sensitively applying evidentiary principles" with "straining these principles beyond reason" in the course of evaluating whether to dismiss aboriginal evidence as too attenuated under ordinary evidentiary rules—or allowing them in circumstances where the old evidentiary rules would not.[104] The Supreme Court concluded that the overall consideration should be forever to eschew evaluating "oral histories [in a way that would] count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence."[105]

In Canadian courts, oral history may therefore be admitted if it is *both* probative and reasonably reliable in the discretion of the trial judge.[106] This is similar to the discretion of American judges under FRE 403. In the context of aboriginal rights, as framed by Canadian Supreme Court precedent, oral histories have probative value if they offer evidence that would be unavailable in textual sources or that seriously conflicts with textual sources.[107] Reasonable reliability requirements are satisfied not through an analysis of the content of the oral history presented but rather by the credibility of the source, such as the status of the witness within an aboriginal community. This adheres to the principle established in *Mitchell*, where Chief Justice McLachlin cautioned against "assumptions based on Eurocentric traditions of gathering and passing on historical facts."[108]

B. Applying *Van der Peet* and *Mitchell* in the Lower Courts

Lower courts in the Canadian system have borne the brunt of these reforms. They have had to change longstanding presumptions about the unreliability of oral histories and to develop procedural respect for Native American standards for establishing facts, lest they risk admonishments on appeal. Half-hearted treatments of oral history evidence have been critiqued by the Court in order to emphasize the paradigm shift that *Mitchell* wrought. For example, in *Delgamuukw*, the Supreme Court remanded the case for a

[102] *Id.* ¶ 39.
[103] *Id.* ¶ 41.
[104] *Id.* ¶ 52.
[105] *Delgamuukw*, ¶ 87.
[106] *Mitchell*, ¶ 31.
[107] *Id.*
[108] *Id.* ¶ 34.

new trial because the trial judge had not adequately applied the principles established by its precedents to oral history.[109]

Over a period of 318 days of trial testimony,[110] the Gitksan and Wet'suwet'en Nations submitted examples of totem poles with their Houses' crests and distinctive regalia carved on them documenting their genealogies.[111] The Gitksan Houses also presented their "adaawk," a "collection of sacred oral tradition about their ancestors, histories, and territories."[112] The We'suwet'en Houses individually presented their "kungax" or "spiritual song[s] or dance[s] or performance[s] [tying] them to their land."[113] Additionally, both the Gitksan and Wet'suwet'en recounted stories shared and passed down during spiritual occasions at their ceremonial feast halls;[114] these stories' purposes were to "identify their territories and remind themselves of the sacred connection that they have with their lands."[115] During the recounting of these stories, any participant had the "opportunity to object if they question[ed] any detail and, in this way, [to] help ensure the authenticity of the adaawk and kungax."[116]

The trial judge, although recognizing that the evidence constituted hearsay, considered all of it admissible "on the basis of the recognized exception that declarations made by deceased persons could be given in evidence by witnesses as proof of public or general rights."[117] It was also admitted out of necessity since the plaintiffs could not otherwise prove the history of their respective nations.[118] Yet, on the merits, the Supreme Court held that the trial judge erroneously interpreted these items of evidence in a way that conflicted with the Court's stated goal of reconciliation with aboriginal communities, a goal it clarified later in the decision.

Nonetheless, the trial judge claimed that since individual Houses presented their adaak and kungax, these did not account for the "uniform custom relating to land outside the villages" these specific oral histories represented.[119] The trial judge therefore concluded that "the spiritual beliefs exercised within the territory were [not] necessarily common to all the people" or "universal practices," and so the "oral histories, totem poles, and crests were not sufficiently reliable or site specific to discharge the plaintiff's burden of proof."[120] The trial judge also dismissed the ceremonial feast hall testimony because although important decisions regarding the entire

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[109] *Delgamuukw*, ¶ 66.
[110] *Id.* ¶ 89.
[111] *Id.* ¶ 13.
[112] *Id.*
[113] *Id.*
[114] Until 1951, these halls were criminalized under the Canadian Criminal Code in institutionalized attempts of cultural eradication during a destructively assimilationist period of history. *Id.* ¶ 14.
[115] *Id.*
[116] *Id.* ¶ 93.
[117] *Id.* ¶ 95.
[118] *Id.*
[119] *Id.* ¶ 18.
[120] *Id.*

community originated there in the context of the generational transmission of cultural knowledge, the judge "did not accept its role in the management and allocation of lands," remarking that he "[could not] infer from the evidence that the Indians possessed or controlled any part of the territory, other than [specific] village sites."[121] Since the Gitksan and Wet'suwet'en failed to establish ownership, jurisdiction over, or aboriginal rights to their wrongfully appropriated lands, the trial judge dismissed their claims.[122]

The Court of Appeals affirmed and dismissed the First Nations' allegation that the judge's fact-finding constituted an abuse of discretion.[123] The Supreme Court criticized the lower court's judgements since "the trial judge…went on to give these oral histories no independent weight at all."[124] Rather, he devalued the oral history presented because it could not be characterized as "literally true," "confounded 'what is fact and what is belief,'" "included…mythology," and "projected a 'romantic view' of the history." While he framed his decisions based on the individual items of evidence, he did so, in the Supreme Court's opinion, only to mask broad and sweeping misgivings about oral history in general, claiming that it "did not accurately convey historical truth."[125] If the trial judge's remarks went unchecked, the Supreme Court continued, "the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system, in contradiction of the express instruction to the contrary in *Van der Peet*," which demanded that trial courts consider the merit and value of oral histories in light of the difficulties inherent for aboriginal parties in litigation.[126]

Since he erred so egregiously in his fact-finding and analysis and contravened the spirit of *Van der Preet* and *Mitchell*, the Supreme Court ordered a new trial. *Calder* laid the groundwork for the importance of subsequent oral history evidence. In particular, *Van der Preet* and *Mitchell* outlined the rationale for finding oral histories probative. *Delgamuukw* established that while oral histories may be valid evidence, Canadian judges should not evaluate them in the same way as traditional written evidence; rather, courts should give oral histories due respect and weigh them from an indigenous perspective.

Canada's acceptance of oral history as evidence is a robust grant of access for indigenous people to a court system in a way that respects and reaffirms their cultural practices and beliefs. It is not difficult to imagine the United States adopting these evidentiary standards and following Canada's lead, especially given the similarities between the two nations' historical treatment of evidence and their shared Anglo-American jurisprudential traditions. Although Canada's reforms have been spearheaded by constitutional reform that would be difficult in the United States, its

[121] *Id.*
[122] *Id.* ¶ 26.
[123] *Id.* ¶ 32.
[124] *Id.* ¶ 96.
[125] *Id.* ¶ 98.
[126] *Id.*

arguments for an indigenous-based exception to the hearsay rule can be applied with current U.S. procedural evidentiary jurisprudence.[127] The rationales adopted by the Inter-American Court of Human Rights and Norwegian courts achieved the same result by a different, but no less persuasive, route.

IV. Direct Admission on Probative Value: Inter-American Court

The Inter-American Court of Human Rights is no stranger to indigenous land rights cases. Due to the frequency of indigenous rights claims brought before it, the Court has developed a sophisticated method for admitting oral evidence from indigenous parties. In each case where it admits such evidence, the Court goes out of its way to recognize the role that oral expressions and traditions play in bolstering the legal claims of indigenous people.[128] The Court's rules of procedure reflect this philosophy; they are sparse compared to the U.S. Federal Rules of Evidence and leave much discretion to the Court in terms of both how to admit evidence and what evidence to admit. Article 44 of the Court's procedural rules contain the relevant provisions:

> The Court may, at any stage of the proceedings:
> 1) Obtain, on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement, or opinion it deems to be relevant.
> 2) Request the parties to provide any evidence within their reach or any explanation or statement that, in its opinion, may be useful.
> 3) Request any entity, office, organ, or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point…
> 4) Commission one or more of its members to conduct measures in order to gather evidence.[129]

The Inter-American Court's broad discretion therefore includes the ability (i) to obtain "any evidence it considers helpful" including oral evidence; (ii) to hear from "any person" whose opinions or statements it deems "relevant"; (iii) to admit expert testimony from indigenous elders and leaders versed in the oral histories of their communities; (iv) to request "any

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[127] *See supra* Part II.

[128] "[T]o guarantee the right of indigenous peoples to communal property, it is necessary to take into account that the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values." Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 154 (June 17, 2005).

[129] Rules of Procedure of the Inter-American Court of Human Rights, art. 44, ¶¶ 1-4.

evidence" or "statement" that "may be useful" in which case a party may consult oral histories or statements relating to them; and (v) to order member states to gather this evidence insofar as it deems it necessary.[130]

The high volume of indigenous-issue cases before the Court coupled with its liberal rules of procedure places the court in a prime position to set an example for how to gather evidence in a way that treats indigenous oral histories as authoritative and probative evidentiary sources. *Sawhoyamaxa Indigenous Community v. Paraguay* and *Mayagna Awas Tingni v. Nicaragua* demonstrate how the Inter-American Court has not wasted this potential. The Court not only admitted indigenous plaintiffs' oral histories as evidence but also invalidated Paraguay and Nicaragua's documentation and fact-finding when the indigenous perspective conflicted with them. The Court referenced its procedural rules for prioritizing relevancy whenever it sought to justify its reliance on the indigenous people's accounts of past events and anthropological evidence of their lands' history.

A. *Sawhoyamaxa v. Paraguay*

Paraguay's Gran Chaco is a vast stretch of sparsely populated, semi-arid land. Its name derives from the Quechua word *chaccu*, meaning 'hunting land' and it comprises 60% of Paraguay's landmass (but only 2% of its population).[131] The Paraguayan government, eager to economically exploit this vast region, sponsored its development into ranchland.[132] The Sawhoyamaxa Community, a group of Enxet speakers indigenous to the Chaco region, are one of many indigenous groups that have appealed to the Paraguayan government to honor their ancestral land claims amidst harassment and forced removal by the ranchers.[133] The state deemed their land to be private property held by business interests. To avoid convictions of trespass or local vigilante justice, the Sawhoyamaxa Community fled their lands to live at the ranches' gates that prevented them from returning home; they remained destitute by the roadside for eight years.[134] Meanwhile, the health and economic conditions of the Sawhoyamaxa Community deteriorated to such a point that in 1999, President Luis Ángel González Macchi declared a state of emergency drawing attention to the deprivation of the community's "access to the traditional means of subsistence tied to

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[130] *Id.*

[131] *The World Factbook: Paraguay*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/pa.html (last updated Feb. 22, 2018).

[132] *Paraguay – Maskoy and Enxet*, MINORITY RTS. GROUP INT'L (last visited Apr. 29, 2020), http://minorityrights.org/minorities/maskoy-and-enxet/.

[133] *See* Cheryl Lynn Duckworth, Revitalizing Our Dances: Land and Dignity in Paraguay (Fall 2008) (unpublished Ph.D. dissertation, George Mason University) (on file with ProQuest LLC) for more context on the situation these indigenous people face.

[134] *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, at V ¶ 34(a).

their cultural identity as a result of the prohibition by the owners to their entry to the habitat they claimed as part of their ancestral territories."[135]

In Paraguay, rural lands are governed by the administrative law promulgated and applied by the Instituto de Bienestar Rural (IBR).[136] The Sawhoyamaxa Community leaders invoked Article 64 of the Paraguayan Constitution while entreating the IBR, which states:

> The indigenous peoples have [the] right to communal ownership of the land, in [an] extension and quality sufficient for the preservation and the development of their particular forms of lifestyles. The State will provide them gratuitously with these lands, which will be nonseizable, indivisible, nontransferable…The removal of [indigenous peoples] from their habitat without their express consent is prohibited.[137]

After fourteen years of inaction from the IBR, the Sawhoyamaxa grew tired of waiting for their pending land claim and filed against Paraguay with the Inter-American Court in 2005.[138] The landowners responded with "admitting the ridiculous and absurd claim made by the applicants would seriously and irreparably impair the economic interests of a company in full development."[139] Ultimately, the Court found Paraguay in violation of multiple articles of the American Convention on Human Rights due to the abject poverty, disease, and death suffered by the Sawhoyamaxa Community as a result of their forced removal from their lands.[140]

The Inter-American Court remarked that its "procedures observed [for evaluating evidence] are not subject to the same formalities as those required in domestic judicial actions."[141] This flexibility "must be effected paying special attention to the circumstances of the specific case, and bearing in mind the limits set by respect for legal certainty and for the procedural equality of the parties."[142] The Inter-American Court took "into account international precedent, according to which international courts are deemed to have authority to appraise and assess evidence based on the rules of a reasonable credit and weight analysis"—in other words, it applied a balancing test similar to that mandated by FRE 403, which calls for the courts to weight the probative value of the evidence provided.[143] The Inter-American Court tends to err on the side of allowing rather than excluding evidence and has "always avoided rigidly setting the quantum of evidence required to reach a decision. This criterion is especially valid with respect to international human rights courts…to assess the evidence submitted to them

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[135] Para. Exec. Order No. 3,789 (June 23, 1999).
[136] Ley [Law] No. 1863, Jan. 30, 2001, Registro Oficial de la República de Paraguay [Official Register of the Republic of Paraguay].
[137] CONSTITUCIÓN NACIONAL art. 64 [Para. Nat'l Const.].
[138] *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, at I ¶ 2.
[139] *Id.* at VII ¶ 73(27).
[140] *Id.* at XIV ¶ 248.
[141] *Id.* at V ¶ 32.
[142] *Id.*
[143] *Id.*

concerning the pertinent facts, in accordance with the rules of logic and based on experience."[144]

The Inter-American Court accepts oral statements into evidence "inasmuch as they are in accordance with the object thereof."[145] Statements "given by the alleged victims['] next of kin," barred in U.S. courts by the hearsay doctrine, "may provide useful information on the alleged violations and the consequences thereof."[146] When Paraguay challenged the validity of some of the community's testimony, the Court dismissed the concerns by explaining the purpose behind allowing the style of testimony offered by the indigenous party. The Sawhoyamaxa Community's statements "regarding their situation and living conditions, may contribute to the determination of such facts" and a complete picture of the case's context could not materialize if it were excluded.[147]

The Court additionally relied upon anthropological studies of the Sawhoyamaxa Community presented by expert witnesses.[148] Although these reports are written documents, not oral evidence, they recounted oral histories describing the generations of land dispossession, forced resettlement, Christianization, and other trials the indigenous people of the Gran Chaco faced over the last century.[149] Through these reports, the Court considered how the Sahoyamaxa Community maintained their pre-colonization relationship to their traditional lands to the point where they defied the encroaching ranchers by crossing their fences so that "the men [could] hunt and fish, and the women [could] gather fruit and honey."[150] The Court evaluated this documented history along with the community leaders' pleas for "their right as members of the original people from t[hat] area [to] be given back a part of what had once belonged to [their] ancestors."[151]

Rebuking Paraguay's challenge to the acceptance of these oral histories, the Court wrote that it analyzed the community's testimony "as a whole with the rest of the body of evidence, applying thereto the standards of reasonable credit and weight analysis and taking into consideration the comments submitted by the State."[152] The Court did not allow the Sawhoyamaxa Community's testimony unconditionally as Paraguay suggested. Instead, the Court considered its merit in light of the totality of circumstances surrounding the case and concluded that the testimony was admissible because of its probative value for the case.

As another example, an expert witness who interviewed sick members of the community and their next of kin to document the Paraguayan government's neglect had little in the way of hard data because of the

[144] *Id.*
[145] *Id.* at V ¶ 37.
[146] *Id.*
[147] *Id.* at V ¶ 38.
[148] *Id.* at VII ¶ 73(1).
[149] *Id.*
[150] *Id.* at VII ¶ 73(70).
[151] *Id.* at VII ¶ 73(18).
[152] *Id.*

community's lack of medical records or written documents.[153] This made "obtain[ing] further supporting evidence" an "actual impossibility," and so Paraguay's calls for a heightened evidentiary burden of proof, in the Court's view, compromised procedural parity to the detriment of the Sawhoyamaxa party.[154] This holistic take on the parties' relative positions influenced which pieces of evidence the Court accepted.

Paraguay attempted to discredit the negligence accusation through alternate explanations for the indigenous people's deaths. Yet, since the government failed to support its statements with any form of documentation and merely stated the contrary to what the Sawhoyamaxa Community alleged, the Court considered Paraguay's claims to be unsubstantiated.[155] As a result, the Court gave preference to the indigenous people's oral account of the deaths as the best evidence available. Putting the burden on Paraguay to disprove the oral testimony of the Sawhoyamaxa Community was not only a reasonably light burden for a government whose civic duty it is to document and record medical issues and deaths among its citizens, but also resulted in fair procedural treatment in face of the impossible task for the illiterate community to produce written documents.

In his concurring opinion, Judge Antônio Augusto Cançado Trinidade cautioned against burdening "the ostensibly weaker party, wanting the means for surviving with a minimum of dignity" with an unrealistic standard of evidence for land claims.[156] He described the challenges indigenous people face in proving land possession or title as an example of *probatio diabolica* (devil's proof), or a legal requirement to obtain impossible proof.[157] Judge Cançado Trinidade described how this evidence law concept existed in Roman law with respect to land possession and title, and explained that the jurisprudence lives on in the present where *probatio diabolica* "is entirely inadmissible in the area of International Human Rights Law."[158] Just as the Romans could comprehend the uphill battle untitled landholders faced in a judiciary system focused on written documentation, so does the Inter-American Court recognize the challenges indigenous people face in bringing forth valid evidence for land claims.[159] The Court uses its broad evidence admission powers to even the playing field between indigenous parties that rely on authoritative oral evidence and settler parties that rely on authoritative written evidence.

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[153] *Id.* at V ¶ 53.
[154] *Id.*
[155] *Id.* at V ¶ 54.
[156] *Id.* at IV ¶¶ 20-21 (Judge Cançado Trinidade, *concurring*).
[157] *Id.*
[158] *Id.* at IV ¶ 21 (Judge Cançado Trinidade, *concurring*). This is especially fitting given that contemporary human rights law has its roots in Roman natural law.
[159] *See* Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PENN. L. REV. 691 (1938). It is odd that this concept did not survive into U.S. property law given the heavy historic influence Roman law still holds in that field today.

B. *Mayagna Awas Tingni v. Nicaragua*

Like the previous case, *Mayagna Awas Tingni* involves private enterprise acquiring control of an indigenous group's land. The Awas Tingni Community lives along the northernmost part of the Miskito Coast in an autonomous region of Nicaragua called the Northern Atlantic Autonomous Region.[160] They regard multiple hills in the region as sacred burial and ceremonial sites. Nicaragua believed the area to be under its direct possession and the Awas Tingni Community could not challenge the state because it held no formal title to the land. The Nicaraguan government established a "forest management plan" with logging development firms MADENSA and SOLCARSA by granting them a thirty-year concession for use of the Awas Tingni Community's land.[161] At first, the logging firms appeared civil in their pursuit of profit by signing an agreement with the Awas Tingni Community whereby the firms agreed to sustainably preserve the forested lands and maintain respect for the Awas Tingni Community's communal land. Yet, after the firms began felling trees in areas that violated its environmental permit, such as part of the forest that belonged to the neighboring Kukulaya Community, Awas Tingni leaders decided to take precautions to prevent encroachment on its land.[162]

The community leaders asked the government to survey the community's land in order to demarcate it officially and safeguard it by granting the community a formal title (the Nicaraguan government has the power to legally recognize communally held indigenous land) and also challenged the logging concession's constitutionality in court. Yet despite a ruling by the Supreme Court to that effect (declaring the concession unconstitutional), the logging company continued to operate on the land, and the Awas Tingni Community went to court a second time. This proved disastrous; the Supreme Court declared the complaint inadmissible since it was technically filed too late.[163] With no other recourse left, the community went to the Inter-American Commission. The Inter-American Court eventually found Nicaragua in violation of American Convention Article 25 (right to judicial protection) for not enforcing the first judgement,[164] and Article 21 (right to private property) over the government's failure to recognize and protect the Awas Tingni Community's ancestral land.[165]

As with the previous case, the Inter-American Court used a holistic approach to evaluate admitted evidence. The Court allowed multiple leaders of the Awas Tingni Community to testify in order to explain the community's relationship to the land. Jaime Castillo Felipe was a syndic of the group responsible for resolving conflicts within the community and acting as a liaison with Nicaraguan authorities. He explained that his people were "the

[160] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 103(a) (Aug. 31, 2001).
[161] *Id.* ¶ 103(j).
[162] *Id.* ¶ 103(l).
[163] *Id.* ¶ 103(r iii).
[164] *Id.* ¶ 139.
[165] *Id.* ¶ 155.

owners of the land which they inhabit because" the community has "historical places" in the region and "their work takes place in that territory."[166] This work included local agriculture, fishing, and long hunting trips into the wilderness lasting more than two weeks, during which the hunters carefully select the animals they hunt and the food they gather so that the forest is not depleted.[167] Mr. Felipe could also recognize and name every member of the community and their non-Awas Tingni neighbors, which roughly corresponded with the borders of their communal land.[168]

According to Mr. Felipe's testimony, the disputed land was occupied and used by everyone in the community and "nobody owns the land individually; the land's resources are collective. If a person does not belong to the Community, that person cannot utilize the land… To deny the use of the land to any member of the Community, the matter has to be discussed and decided by the Community Council." Mr. Felipe also explained the way the community transmits property from one to another by next-of-kin relations, but how land is a strict exception to this rule: "since lands are collective property of the community, there is no way that one member can freely transmit to another his or her rights in connection with the use of the land."

Mr. Felipe admitted that his ancestors may not have obtained any title deed to the land, but recalled that when the logging firms signed their agreement with the Awas Tingni Community to respect its traditional land, he and other leaders were confident that they "had a property right recognized by the Central Government and by the National Government" because they "had lived on them for over 500 years."[169] Another community leader explained that when the leaders signed the forest management agreement, they drew up a map of the communally-held lands to clear up any ambiguity and explained to the logging firms that they had title to the lands through historical possession.[170] Other admitted testimony included the names of the sacred hills the community uses for religious ceremonies and for planting special fruit trees. When members of the community pass through these areas, "which date 300 centuries, according to what [one witness's] grandfather said," they walk "in silence as a sign of respect for their dead ancestors, and they greet Asangpas Muigeni, the spirit of the mountain, who lives under the hills."[171] Nicaragua challenged these evidentiary submissions:

> Almost all the expert witnesses presented by [t]he Commission recognized that they had no direct knowledge of the claim to ancestral lands made by the Awas Tingni Indigenous Community; in other words, they recognized that their professional opinions were based on studies carried out by other persons… [T]hey should not be admitted as

[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.* ¶ 83(b).
[171] *Id.*

> scientific evidence to substantiate an accusation of non-titling of ancestral lands.[172]

In evaluating the evidence before it, the Court again referenced Article 44 of its Rules of Procedure in allowing both the Awas Tingni Community and Nicaragua to present relevant materials and information.[173] The Court elaborated that "[s]o as to obtain the greatest possible number of items of evidence, this Court has been very flexible in admitting and evaluating them…The non-requirement of formalities in admission and evaluation of evidence are fundamental criteria for its evaluation, as evidence is assessed rationally and as a whole."[174]

The Court found that the Awas Tingni Community did not have a real property deed to its claimed lands and that the agreement they signed with the logging firms was a valid binding contract.[175] Yet, according to the Court, the Nicaraguan government's own neglect caused the community's hardship in failing to obtain a land title. It criticized Nicaragua for lacking "an effective mechanism for titling and demarcation of indigenous lands" despite its obligations to do so under the American Convention and its guarantee to recognize communal indigenous property according to the 1986 Nicaraguan Constitution.[176] Granting the logging concession without implementing measures that protected the rights of the Awas Tingni Community to enjoy their land "according to their traditional patterns of use and occupation" constituted a breach of Articles 1 and 2 of the American Convention.[177] The Court wrote:

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[172] *Id.*

[173] *Id.* ¶ 85.

[174] *Id.* ¶¶ 89-90.

[175] *Id.* ¶ 103(g-h).

[176] *Id.* ¶ 104(i). Article 180 of the Constitution states "The Communities of the Atlantic Coast have the right to live and develop under the forms of social organization which correspond to their historical and cultural traditions. The State guarantees these communities the enjoyment of their natural resources, the effectiveness of their communal forms of property and free election of their authorities and representatives. It also guarantees preservation of their cultures and languages, religions and customs." CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] art. 80, ch. II, LA GACETA, DIARIO OFICIAL [L.G.] 9 January 1987.

This has been given legislative form in Law No. 28, the Autonomy Statute of the Caribbean Coast Regions of Nicaragua. Art. 4 of this law states "The Regions inhabited by the Communities of the Atlantic Coast enjoy, within the unity of the Nicaraguan State, an Autonomous Regime which guarantees effective exercise of their historical and other rights, set forth in the Constitution." Art. 9 of the same law states "Rational use of the mining, forestry, fishing, and other natural resources of the Autonomous Regions will recognize the property rights to their communal lands, and must benefit their inhabitants in a just proportion through agreements between the Regional Government and the Central Government**."** Ley [Law] No. 28, 29 July 2016, Estatuto de Autonomía de las Regiones de la Costa Caribe de Nicaragua [Autonomy Statute of the Caribbean Coast Regions of Nicaragua] tit. III, capítulo I-II, LA GACETA, DIARIO OFICIAL [L.G.], 20 October 2005.

[177] *Mayagna*, ¶ 104(ñ).

> The Community has no formal title nor any other instrument recognizing its right to the land where they live and where their cultural and subsistence activities take place, even though it has been requesting it from the State for years. Since 1987, Nicaragua has granted no title deeds at all to indigenous communities. The situation of the Community has continued despite efforts made since 1991 to attain demarcation and titling of their traditional land. The State has been negligent and arbitrary in the face of the titling requests by the Community…The principle of *estoppel* does not allow the State to argue that the Community has no legitimate claim based on traditional or historic land tenure...[178]

To remedy this and comply with the American Convention, the Court advised Nicaragua to "adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the Awas Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community." The Court later explained how the indigenous party's testimony informed its reading of the property rights involved in the case:

> [The Awas Tingni Community has] a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. [This confers] the right to live freely in their own territory…For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations…Indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.[179]

The evidence presented to the Court by the community proved probative enough to inform the Court of the nature of the property right the Awas Tingni Community enjoyed without a written land title. The Count concluded that the community had a communal property right to the disputed land under article 5 of the Nicaraguan Constitution and that the government had an obligation to accurately survey and grant the community title to its land.[180]

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[178] *Id.* ¶ 104(l-m).
[179] *Id.* ¶¶ 149, 151.
[180] *Id.* ¶ 164.

U.S. courts may already have the ability to admit the same kinds of evidence as the Inter-American Court, even with their stricter evidence standards. Whether the focus is on admitting expert witnesses,[181] direct oral testimony, or anthropological reports, there is debate over the limits of U.S. judges' discretion in admitting traditionally unusual forms of evidence.[182] The persuasiveness of cultural arguments is still an uphill battle in most courts that view such statements as indicative of a party's position rather than as an informer of context.[183] Norwegian courts on the other hand embrace values of cultural sensitivity when doing so proves useful in obtaining justiciable outcomes or vindicating public policy. The *Selbu Case* is the landmark Norwegian decision that applied the above in the context of reforming its indigenous rights jurisprudence.

V. Considering Customary Law: Norway

The history of Sámi-settler relations, sharing similarities with the history of Native American-settler relations, reveals a struggle between preserving Sámi customary law as a separate respected authority and adopting non-Sámi legal regimes in the hopes of securing legal rights recognized by the Scandinavian governments. The road to reforming settler society legal regimes has been difficult for the Sámi. In Norway's Supreme Court (Høyesterett) and Sweden's Supreme Court (Högsta Domstolen), the results have been mixed for Sámi litigants and similar to the U.S. Supreme Court's Native American jurisprudence–a complex dance of precedents. Justices continue to rely upon archaic laws that the Norwegian or Swedish governments fashioned when their policy towards the inhabitants of Sápmi reflected colonial ambitions and prioritized assimilation, resulting in a legal framework that blatantly disregarded indigenous Sámi legal systems or practices.

A. The Sámi Struggle for Courts' Deference

In the *Reindeer Grazing* cases of 2002, a Swedish Court of Appeal placed the burden of proof on Sámi reindeer herders to show that they customarily and consistently used the disputed land.[184] The court demanded written evidence of reindeer migrations or Sámi presence in the area—without interruption by non-Sámi settlers. Yet accumulating such evidence was an

[181] *See* LAWRENCE ROSEN, LAW AS CULTURE: AN INVITATION, 117-25 (2006) for a reflection on expert anthropological testimony specifically.
[182] *See* Iris Jean-Klein & Annelise Riles, *Anthropology and Human Rights Administrations: Expert Observations and Representation After the Fact*, 28 POL. & LEGAL ANTHROPOLOGY L. REV. 173 (2005).
[183] *See* Brooke Glass-O'Shea, *The Cultural Offense: How Plaintiffs Use Cultural Claims in U.S. Courts*, 10 J.L. SOCIETY 56 (Winter 2009).
[184] Mattias Åhrén, *Indigenous Peoples' Culture, Customs, and Traditions and Customary Law: The Saami People's Perspective*, 21 ARIZ. J. INT'L & COMP. L. 63, 100 (2004).

impossible task for the Sámi.[185] The Sámi made agreements over land use orally, with little or no written documentation. They also never had a need to document the migrations of their reindeer herds because reindeer roam in irregular patterns that the Sámi learn through collective traditional knowledge passed down via intergenerational transmission.[186] The Swedish court acknowledged that the disputed lands were grazing pastures, but still wanted documented evidence of continuous settlement despite the nomadic nature of reindeer herding and the long breaks of time between instances of land use in any specific pasture.[187] Furthermore, the Sámi practiced sustainable living habits that left few traces of their habitation in a pasture once they began migrating to a new area.[188] The Swedish court's demands disregarded the Sámi's specialized knowledge and their patterns of land use by asking them to satisfy elements of proof that favored Swedish settler society standards of habitation.

Across the border in the Norwegian *Aursunden* case of 1997, the Høyesterett relied heavily on judgements from a century ago (1897) in resolving a reindeer herding land dispute because "the courts were considerably closer to the evidence" then.[189] Yet the racism and bias inherent in these early decisions is plainly clear. They relied upon Lapp Commission reports, using language such as "the farmer, during his hard and difficult cultivating work, often carries hard burdens, while the Lapp, whose lifestyle changes from hardship to laziness, usually escape those."[190] Despite these problematic decisions, more recent ones introduce a new chapter of Sámi-settler relations, and it is from these newer cases that U.S. courts may extrapolate a favorable indigenous evidence policy.

B. *The Selbu Case:* A Norwegian First

Five years after *Aursunden*, in *Jon Inge Sirum v. Esslan Reindeer Pasturing District* (also known as *The Selbu Case*), another reindeer grazing rights case the Høyesterett relied on Sámi testimony and refashioned its analysis to take into account Sámi cultural realities.[191] The court ruled that the Sámi had grazing rights over the privately-held lands in question since the traditional standards used to denote land use were rejected in favor of Sámi-sensitive criteria.[192] Although not citing Sámi customary law directly, Norway's highest court nonetheless preserved aspects of Sámi customary law in its favorable ruling.[193] The court analyzed the legislative intent of the Lagting (Norway's quasi-upper house in Parliament) to inform the meaning

[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.* at 99.
[190] *Id.*
[191] *See generally* Jon Inge Sirum v. Esslan Reindeer Pasturing District, Norges Høyesterett [Norwegian Supreme Court] HR-2001-4-B - Rt-2001-769.
[192] *Id.*
[193] Åhrén, *supra* note 184, at 101.

of the Reindeer Husbandry Act and came to the conclusion that in situations where a dispute arises about whether reindeer grazing is allowed in an area lying within an approved reindeer pasturing district, the burden of proof lies on the landowner to show that the Sámi have abandoned the use of that land by a preponderance of the evidence.[194]

This marked a change in Norwegian law because, previously, it was the Sámi who had been required to prove that they held disputed land use rights (in line with the standard in Sweden). The court also amended the standards for land use to better reflect Sámi lifestyles. The test applied to decide whether the Sámi party had usufructuary rights over grazing land was no longer permanent use or even regular yearly land use. As the court explained, the test must take into account how "the reindeer makes use of huge areas… a typical pasturing pattern is that reindeer roam… Thus the acquisition of a right cannot be excluded solely because it is what is called 'occasional pasturing' that has taken place."[195] The court called into question the validity of Lapp Commission reports used in previous judgements given that the Lapp Commission had no Sámi representation, was composed of Norwegian farmers, and catalogued information collected by permanent settler residents, not nomadic Sámi inhabitants.[196] The court referred to Sámi oral accounts which it said "cannot be generally rejected. And where they are supported by other information, they may be given increased weight."[197] The Sámi used organic materials to create turf huts that decomposed once they migrated to a new area, and so it would be "difficult to find physical traces of reindeer husbandry" and a lack of physical evidence of Sámi habitation could not prove land disuse.[198]

By factoring in all of this evidence, the Høyesterett rendered a decision that honored Sámi land use rights by partially using Sámi cultural knowledge and customary law in lieu of Norwegian written documentation that misrepresented Sámi practices and lifestyles. The Høyesterett changed its evidentiary procedures to take into account indigenous knowledge and acted in accordance with Norway's human rights mandate under international law.[199] The Høyesterett also made it possible for the Sámi to preserve their

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[194] *See generally Selbu*.

[195] *Id.* at the "Other Judicial Points of Departure" section of the decision.

[196] *Id.* at the "General Remarks on the Significance of the Lapp Commission's Report" section of the decision.

[197] *Id.* at the "Particular Methodological Problems" section of the decision.

[198] *Id.*

[199] According to the U.N. I.C.C.P.R., "[i]n those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, *to enjoy their own culture*, to profess and practice their own religion, or to use their own language" [emphasis added]. International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171.
The Høyesterett mentioned the above article 27 and article 14(1) of ILO Convention No. 169 in the decision since the Sámi party invoked international law in its argument. Yet the court stated that since Norwegian law adequately protects Sámi

customary law in their internal communities knowing that it is more likely to be respected and observed in non-Sámi courts.

The *Svartskog* case likewise concerned Sámi rights to uncultivated land in a valley named Svartskog in Norwegian and Čáhput in Sámi. The Høyesterett granted the Sámi party collective property rights with the rationale that the inhabitants maintained use of the land customarily and in good faith.[200] The ruling goes beyond the *Selbu* case in that it grants rights to an unspecified group consisting of the entire population of the Svartskog area, rather than limited to individually named parties (outside of the United States where class actions are not a universally accepted legal concept, this is quite a feat).[201] The Høyesterett's deference to Sámi cultural practices did not require any new legislation but simply acceptance of a new judicial canon, namely, interpretation of the law in the best light possible for indigenous communities.

United States courts are already well-poised to employ this canon. For instance, state and federal courts may draw persuasive authority from the large body of developed jurisprudence in tribal court systems in order to work culturally-appropriate standards into cases concerning Native Americans.[202] Doing so can help integrate our nation's tribal court systems easily with our state and federal court systems, so that Native Americans may obtain justiciable outcomes on terms favorable to them when it matters most.

VI. Conclusion: Where We Go From Here

The evidentiary methods by which Canada, the Inter-American Court, and Norway handle oral histories and native customs and practices can aid American courts in approaching the legal issues and challenges Native Americans face. These methods not only address cultural biases that inform American judges' treatment of Native American parties[203] but also enlighten and expand our legal tradition to appreciate the sociocultural realities of this land's first inhabitants.

The United States has many choices in deciding how to allow Native American oral history into evidence in its courts. Our current evidence laws are satisfactory enough, if judges interpret FRE 802(20) more permissively. Other possibilities exist if we broaden our scope to include what foreign judiciary systems employ in similar situations. We could follow the example of Canada and reinterpret existing hearsay and best evidence rules in light of

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rights by granting them rights to reindeer husbandry "from time immemorial", only in the event that Norwegian protections fail Sámi can they invoke these international conventions in their dispute with private landowners.

[200] Bjørn Bjerkli, *'Traditional Knowledge' in the Courtroom*, 26 NORSK ANTROPOLOGISK TIDSSKRIFT 129, 130 (2015).

[201] *Id.* at 145.

[202] *See generally* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287 (Spring 1998).

[203] *See generally* Masua Sagiv, *Cultural Bias in Judicial Decision Making*, 35 B.C. J.L. & SOC. JUST. 229 (Spring 2005).

the historical realities surrounding the context of pre-colonial forms of authoritative knowledge, developed when Native Americans held sovereign aboriginal title over their lands. We could honor Native American oral histories through the allowance of expert evidence from indigenous leaders and anthropologists, the way the Inter-American Court does. Our judges could also review the cultural customs and practices of our indigenous populations and discretely rule in ways that complement or favor Native American parties for just outcomes the way Norwegian courts do. Ultimately, our judiciary should seek a solution to this pervasive issue by fulfilling our government's duty of trust toward Native American nations whose legal existence and limited sovereignty operate under American authority. Allowing Native Americans increased access to the nation's courts by admitting evidence that respects their cultural forms of knowledge would constitute a step in that direction.