Writing History by Litigation: The Legacy and Limitations of Northwest Indian Rights Cases
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During the past two decades, the rights of Indians in the Northwest have been the subject of numerous well-publicized and often controversial lawsuits. The outcome of much of this litigation has turned on the resolution of historical questions. In order to construe nineteenth-century laws and treaties or settle the present status of Indian groups and reservations, judges have had to determine what happened 100 years ago or more. As part of this process, they have made extensive findings concerning surprisingly varied aspects of our region’s history.

The resulting court opinions and trial records have become sources of historical information for many government officials, tribal community members, lawyers and judges, among others, who regard the rulings as authoritative history. On some subjects the judges' opinions constitute the first or only summary histories published. In other words, among the most influential people writing Northwest history are judges acting in their official capacity.

Historians have played key roles in the production of this court-authored history. Because eyewitnesses to the events at issue are no longer living, the witnesses at trials of Indian rights cases have included persons proficient in researching and analyzing the historical record. In addition to oral testimony, these experts have provided the courts with copies of historic documents and often with detailed written reports setting out their interpretation of such sources. Some of the material assembled is not readily available in any other form. Indian litigation has thus generated a record which contains valuable resources for history researchers.

On the other hand, scholars who look to the court rulings for historical information will find that they have significant shortcomings: they lack depth, balance, narrative power and sometimes accuracy. For the most part, the historians who supply the data on which the judges rely are not to blame for these deficiencies. Rather, judicial opinions make inferior historical narratives because the courts' reasons and procedures for determining what happened in the remote past differ in essential respects from those of historians. Several of the goals and values which guide judges conflict with historians' central goals and values.

The contradictions between the courts' tasks and historians' traditional orientation also beget unfamiliar challenges and uncomfortable dilemmas for historians who participate in litigation as expert witnesses. The pressures of the adversary system can strain even a veteran scholar's objectivity, persuasive powers and composure. Still, by their involvement in Indian rights disputes, historians are making valuable contributions to the writing of Northwest history.
Although most trials involve a reconstruction of events in the past, suits involving Indian tribal rights are nearly unique in their focus on events of antiquity. The litigation which confirmed and clarified Washington tribes' rights to fish off their reservations required an examination of the circumstances surrounding events in 1854 and 1855. The Puyallup Tribe's claim that its reservation included the bed of the Puyallup River was founded on actions taken by federal officials in 1855, 1857 and 1873. Recently the Supreme Court considered claims by a New York tribe based on events which predate the Union.

The courts face such formidable tasks in Indian cases, but rarely in other litigation, for several interrelated reasons. First, many Indian tribes have grievances which went unresolved for decades because federal law and lack of resources prevented them from seeking redress in court. Until 1946, when Congress created the Indian Claims Commission and gave it power to award tribes compensation for wrongs committed by the United States, the courts regarded all tribal claims as political matters for the legislature to resolve. Without a special act of Congress, a court had no jurisdiction to consider a tribal complaint. Not until 1966 did Congress open the federal courts to recognize tribal governing bodies with any claims arising under federal law. Furthermore, only since the government began channeling federal funding to and through tribal governments in the 1960s have most tribes been able to develop the leadership and resources necessary for the pursuit of legal redress.

Second, tribal suits are not subject to the laws which usually prohibit aggrieved persons from litigating stale complaints and trying to prove matters far in the past. The exemption of tribal claims from such statutes of limitations derives from a complex set of legal principles and policy considerations. Federal law characterizes tribes both as limited sovereigns and as beneficiaries of a United States responsibility to protect the tribes' property and sovereign status. Therefore, a tribe may not be exposed to the risk of losing its resources without explicit government and tribal consent. Because federal law preempts any contrary state law, the doctrines of tribal sovereignty and federal trust responsibility thus insulate tribes from the state statutes of limitations invoked in most federal lawsuits.

A third reason that tribal claims require the examination of events in the remote past also stems from Indians' peculiar legal history. The present relation of tribal Indians to other governments and institutions is largely determined by laws and official acts which date from bygone eras. A tribe in the Northwest is likely to owe its land base, its economic resources and limitations, and its federally-protected autonomy to a treaty negotiated in the 1850s, an executive order issued in the 1870s, and statutes enacted by Congress in the 1880s and 1930s. Through many changes in federal policy and in the tribes' conditions, these venerable laws have remained in effect.

When a tribe's rights derive from an unrepealed nineteenth-century treaty and a conflict arises about the scope of those rights, a court must determine how the treaty should be construed in present circumstances. If the meaning of the treaty language is not indisputably clear, legal doctrine requires that the court ascertain what the signatories intended by that language. The court must infer probable intent from all the circumstances surrounding the negotiation and approval of the treaty. Such a process of determining the drafters' aims may also be necessary in order to construe a statute. Thus, when an Indian tribe seeks adjudication of a dispute regarding the effect of an old law, order or agreement, the need to discover the original intent of the document involves the court in a case of historical detective work.
In recent years courts have had to determine what the United States and Northwest tribes meant by particular provisions of treaties negotiated in 1854 and 1855, where government officials and tribal leaders intended to locate the boundaries of Washington Indian reservations, whether federal representatives expected certain reservations to include bodies of water within or adjacent to their boundaries, and whether the federal government has consistently discouraged or sanctioned certain tribal activities. In order to answer such questions, judges have considered diverse historical phenomena.

Naturally, treaty rights and reservation boundary cases have provided occasions to examine the histories of particular Indian tribes. These inquiries have not been limited to the years immediately preceding and surrounding the treaties or orders at issue. For example, the trial court's opinion in United States v. Washington, the Boldt fishing rights case, briefly described the experiences of western Washington tribes not only at the time they treated with the United States but also during the following century, their reaction to non-Indian settlement in the area, their adjustments to the changes which followed American colonization, the impact of non-Indian activities on their economic life, and post-treaty transformations and continuities in tribal composition and leadership. Judge George Boldt illustrated his conclusion that "acculturation of Western Washington Indians into western culture began prior to treaty times and has continued to the present day" by noting various evidences of such acculturation. More specifically, he identified the factors which contributed to the twentieth-century decline in the number of Indians fishing for food and income.

For each tribe which was a party to the lawsuit, Judge Boldt's opinion also related assorted ethnographic and historical data on such matters as aboriginal and modern fishing practices, intertribal relations, the tribe's early encounters with non-Indians, the organization of the present tribal government, and the tribal members' efforts to cope with ecological and political change. Much of this history was previously unwritten.

In addition to tribal histories, judges in Indian rights cases must learn regional political history and the history of government Indian policy. In order to determine which groups succeeded to the treaty rights at issue in United States v. Washington, the court reviewed the background, aims and effect of twentieth-century federal policy. It traced the shift from a strategy of dismantling tribes to one of encouraging the revitalization of tribes as political and cultural entities.

The subject matter of a tribal claim may further require that the court become acquainted not just with political developments affecting Indians but also with varied aspects of the wider society's history, national as well as regional. Indian cases have provided judges with lessons on such matters as historical surveying practices, the evolution of modern fishing techniques, and the history of major engineering projects. The complaint that the state of Washington had interfered with tribal fishing rights prompted Judge Boldt to write a condensed chronicle of early non-Indian commercial fishing ventures:

At the time of the treaties, non-Indian commercial fishing enterprises were rudimentary and largely unsuccessful. In the 1840s and 1850s, salmon was packed and shipped from the Columbia River and [Puget Sound] to such distant places as New York, San Francisco, the Hawaiian Islands, South America and China, but inadequate preservation techniques and slow transportation facilities caused the salmon to reach the markets in unsatisfactory condition, and it obtained a bad reputation among dealers....The non-Indian commercial fishing industry did not fully develop...until after the invention and perfection of the canning process. The first salmon cannery in Puget Sound began in 1877 with a small operation at Mukilteo. Large-scale development of the commercial fisheries did not commence in Puget Sound until the mid-1890s. The large-scale development of the commercial fishing industry in the last decade of the Nineteenth Century brought about the need for regulation of fish harvest.

The sources of such a historical account are primarily testimony and documents which the litigants have proffered. As a rule, the American adversary system makes the judge a passive fact-finder, charged only
with evaluating the persuasiveness of evidence presented by contending advocates. Occasionally, particularly in the appeal of a decision, judges have on their own initiative delved into and relied on historical material not mentioned at trial. * Ordinarily, however, even for facts which are the common currency of history texts, the judge must usually depend on the litigants.

*One of the most notorious of such instances occurred in a case from Washington. Justice Rehnquist’s majority opinion in Oliphant v. Suquamish Tribe drew on historical information not cited by any of the parties, including secondary sources describing the career and views of a federal judge in Arkansas at the end of the nineteenth century. 435 United States Reports 191, 198-9 (1978).

Another important feature of the adversary system is the preference for live witnesses whose statements can be tested by cross-examination under oath. To prove some distant events, the court may admit parts of the written record left by those alive at the time. Litigants in Indian cases thus occasionally rely on government documents to tell their stories. Usually and increasingly, however, they must enlist experts to locate, describe and interpret in oral testimony the documentary record and any other data from which the relevant history can be extracted.

The persons who testify regarding the historical record, referred to here as historians, need not have training and expertise in history: they may be anthropologists, archaeologists, ethnohistorians, or even geologists or biologists. Neither are they necessarily academicians. They may be private consultants, public employees, or free-lance scholars who by training or experience are qualified to research and analyze historical data. In order to describe events which they did not observe, however, they must meet criteria by which the courts identify experts.

Once classed as experts, historians and other specialists are permitted to testify in ways that lay witnesses may not. They are not limited to reciting facts and presenting documents, but may also state their opinions, even on the ultimate issues facing the court, such as the intentions of the long-dead players in the historical drama. They may base their testimony not only on primary but also on secondary sources, on oral histories or interviews, and on any other material that persons in their field typically use, even if court rules ordinarily forbid the introduction of such items.

In most Indian cases, a historian presents his conclusions orally in response to questions posed by a lawyer representing the party who hired the historian. Usually the witness has first prepared and made available to the adversaries a written narrative and analysis revealing his opinions and the basis for them. On occasion, including the trial in United States v. Washington, the expert’s written conclusions have replaced testimony on direct examination, and he has then mounted the witness stand to be cross-examined by counsel for the opposing party.

In addition to history as reconstructed by experts, the courts have sometimes considered oral history as recalled by laymen, particularly elderly Indians of even non-Indian members of reservation communities. In the treaty fishing rights litigation, for instance, the witnesses included tribal members old enough to remember grandparents who were present at the treaty negotiations or who had been told and could retell the collective memories of their ancestors. At other times, however, courts have refused to admit lay testimony regarding tribal oral history. Ironically, in the latter instances the courts have usually heard the oral history second-hand, pursuant to the rules for expert testimony, from ethnographers and ethnohistorians who have relied on elderly informants.

Whatever they offer to support their claims, the adversaries in Indian litigation identify and analyze much more historical data than they eventually present or succeed in introducing at trial. For this reason the parties' files and often the court record may be rich repositories of historical material. In a recent case
concerning the location of the Suquamish reservation boundary, documents assembled by experts but not introduced in evidence covered such subjects as early settlers’ reactions to their Indian neighbors, nineteenth-century approaches to the education of Indian children, non-Indian efforts to acquire and develop land within Indian reservations, and the evolution of twentieth-century tribal political institutions.

After listening to all witnesses and examining all documents which the tribes, their allies, and their opponents produce, the judge in an Indian rights case has a duty not only to decide which party has correctly interpreted the effect of a treaty or statute, but also to explain the reasons for that conclusion. The resulting written findings of fact are a summary of history as the judge understands it. Yet, most historians would recognize only a crude resemblance between court opinions and a professional historical narrative. Judges’ findings will undoubtedly disappoint and even frustrate uninitiated researchers who look to them for historical information.

For one thing, judges are not trained in or required to employ the conventions of citation accepted by historians. It is usually difficult and sometimes impossible to tell from a written opinion how a jurist arrived at his version of the facts. If the judge cites the sources on which he relies, he usually references oral testimony by transcript page numbers and trial exhibits by the court clerk’s identification codes. A reader interested in examining the items cited in order to get further details, to see copies of the original source documents, or to assess the accuracy of the judge’s account would have to consult the trial record stored at the clerk’s office of the courthouse. More importantly, court opinions are short on analysis and enlivening detail and long on simplicity and overstatement.

The contrasts between judicially produced histories and those written by professional historians reflect the divergent goals and methods of their authors. Historians’ efforts to reconstruct the past stem from an interest in the past for its own sake and in the influence of earlier events on present conditions, a perspective which colors their view of the past. Their cultural and temporal settings determine both the questions they ask of the past and the significance of their answers. Historians may even choose their subject in the hope that greater knowledge about the events scrutinized will enhance their contemporaries’ understanding of the present; but a good historian, aspiring to objectivity, does not consciously select facts for their ability to affect people’s current or future rights and interests.

Judges, on the other hand, charged with determining the respective rights of people in conflict, delve into history for the help it can provide in resolving the conflict. When the parties’ rights depend on something that happened in the past, judges seek only the historical data which will affect the parties’ future. Judges must provide not only an opportunity for all disputants to submit information, but also a clear, final, and practical rule for future conduct. For this reason, the judicial process places less value on developing a complete or even an accurate picture of historical events than it does on ensuring a fair, predictable conclusion to disputes.

The courts strive for predictability in part by applying precedent, by invoking rules and conclusions set out in earlier decisions of higher courts. Contrast this practice with that of historians: far from feeling themselves bound to accept either the methods or opinions of earlier scholars, they habitually question, criticize, and revise each other’s conclusions. For historians who view one court’s version of history as distorted or incomplete, it may be disappointing to see that version perpetuated in decision after decision. For litigants, this reliance on precedent is preferable to the expense and uncertainty they face if the same questions have to be retried in each case.

Nevertheless, the courts’ deference to earlier rulings does not entirely protect litigants from having to prove facts already established in other cases. Legal doctrine binds judges to follow principles of law laid down by superior courts but leaves them free to explore the facts anew in each case. In the Northwest, where Isaac
Stevens negotiated more than half a dozen boilerplate treaties with numerous tribes, it is therefore possible for the different trial courts to arrive at varying interpretations of the same historical events. To date, perhaps because the line separating law from fact is indistinct in Indian cases, this has not happened. Judges have tended to adopt without substantial revision the general history recited in previous cases.

For example, Judge Boldt's construction of treaties between the United States and several western Washington tribes included the following summary of the government's guiding purposes:

The principal purposes of the treaties were to extinguish Indian claims to the land in Washington Territory and provide for peaceful and compatible coexistence of Indians and non-Indians in the area. The United States was concerned with fore-stalling friction between Indians and settlers and between settlers and the government....At the treaty negotiations, a primary concern of the Indians whose way of life was so heavily dependent upon harvesting anadromous fish, was that they have freedom to move about to gather food, particularly salmon...,at their usual and accustomed fishing places....The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish, but that the white man would be allowed to fish.... It was the intention of the United States Government, in negotiating treaties with the Indians, to make at least non-coastal tribes agriculturists, although not to restrict them to that, to diversify Indian economy, to teach western skills and trades to the Indians and to accomplish a transition of the Indians into western culture. There was no intent, however, to prevent the Indians from using the fisheries for economic gain.

Although litigants in later cases have argued for findings which place greater emphasis on the government's intent to discourage the Indians' aboriginal subsistence patterns, the courts have not significantly departed from Judge Boldt's version of the facts.

Like historians' reliance on earlier historical works, borrowing from preceding court opinions for background facts ease the judges' task; but it also exacerbates the courts tendency to oversimplify. The application of principles developed by the Supreme Court enabled a federal appellate court to sum up purposes of an Oregon reservation, a subject which had undoubtedly been the focus of considerable research, testimony and argument, quite neatly:

The state and individual appellants argue that the intent of the 1864 Treaty was to convert the Indians to an agricultural way of life. The government and the tribe argue that an equally important purpose of the Treaty was to guarantee continuity of the Indians' hunting and gathering lifestyle. Under the guidelines established in Cappaert and New Mexico, we find that both objectives qualify as primary purposes of the 1864 Treaty and accompanying reservation of land.

The courts' synopses undeniably oversimplify and perhaps distort the complex motivations of historical actors. Because someone must win and someone must lose a lawsuit, judges and litigants alike place high priority not only on certainty and predictability, but also on clear and final resolutions. In justifying an award to one party rather than the other, a court therefore declares assertions made by the winner proven, even if they are only slightly more likely to be true than the losers contentions. Opinions commonly recite facts which were hotly disputed at trial as if there is little or no doubt as to their accuracy.

Historians are not likewise constrained to provide unequivocal answers to either/or questions. They may explore various aspects of a question without resolving all uncertainty, discuss probabilities yet not cast their lot with one possibility, declare two or more explanations equally plausible, and even speculate without damaging their credibility. Indeed, most historians deem it improper not to point out the ambiguities and gaps in their data.
To answer questions and explain discrepancies which historians might acknowledge without resolving, the courts have developed an arsenal of rules for interpreting incomplete, ambiguous and contradictory evidence. Such rules aim more at ensuring fairness or achieving policy objectives than at promoting the elucidation of historical reality.

The principles guiding the courts' construction of treaties with Indian tribes, for example, require that judges who find the language susceptible to more than one reasonable construction adopt the interpretation which the Indians probably give it or which most favors Indian interests. This doctrine reflects a policy of compensating for the fact that Indian treaty negotiators were usually at a great disadvantage: the treaties were always drafted by United States officials in English, often using technical terms, and the Indians usually could not read, did not speak English, and learned the treaties' contents through translators, sometimes in an extended chain of communication which included a limited trade jargon.

From the standpoint of a historian asked to ascertain and describe the intentions of the treaty parties, the courts' concise and one-sided restatement of the facts may seem inaccurate. But fair judges do not consciously distort facts or arrive at conclusions which disregard historical facts. They view the evidence in the light of overriding policies, including some which have evolved since the events in question. For example, although federal strategy for many years was geared to ending Indians' distinct status, the courts that construe the old assimilationist laws are aware of the present policy favoring tribal self-determination. In order to reconcile past and present policy, judges may knowingly emphasize and base their decisions on facts which tell only part of the story.

It is worth emphasizing, too, that judges, unlike historians, must follow rules which limit the kinds of material they can even examine. The rules of evidence are in theory aimed at preventing judges or juries from considering statements whose reliability cannot be tested in court, material that is only marginally relevant to the central issue, or information that is likely to provoke an emotional reaction strong enough to override reason. Evidence rules also exist to ensure that court time is efficiently used and to keep trials focused. At the same time, they undeniably prevent judges from drawing on sources which historians would routinely consult.

Historians resort, for example, to second- or third-hand accounts, confident that they can assess each one's accuracy and importance. Historians also strive to understand the broad context of the events they describe. They often look at remotely related developments for the light those events may shed on such things as people's attitudes and influence. The rules of evidence, on the other hand, generally preclude judges from considering just such data, deeming second-hand accounts hearsay and much background information irrelevant.

When a judge declines to consider material because it is an unsworn statement made out of court, because it is repetitive, or because it is remote in time or place from the events on which the controversy is centered, a historian who has relied on such material for his conclusions may be dismayed. As indicated earlier, qualifying the historian as an expert witness makes possible the circumvention of these strictures to some extent. Nevertheless, the judge's application of evidence rules or other principles of law may thwart the witness' effort to present material he deems important. For instance, when the Muckleshoot Tribe claimed paramount rights in a reservation stream, the defendants sought to show through a reputable local historian that government officials had endorsed policies inconsistent with maintaining the reservation as an exclusive enclave where Indians could continue obtaining their subsistence from fish in the stream. The court indicated before trial began that it would not permit such testimony:

There is no question that many government officials in the last century hoped that Indians could be persuaded to adopt the lifestyle of independent farmers and to be assimilated into the mainstream of
contemporary society. Clearly, the government's allotment policies were designed to further that end. There is no evidence, however, that the government intended to remove the Indians from their tribal reservations. Hence, even though the government policy was in fact inconsistent with a permanently segregated reservation for the exclusive use and occupancy of plaintiff's members, that fact is irrelevant to the issue in this case.

Unfamiliar rules of evidence and law are not the only hazards and frustrations awaiting historians who serve as consultants and expert witnesses in Indian litigation. Inherent in the adversarial process are a number of potential pitfalls. For one thing, although expected to provide an independent, objective opinion, the historian cannot help but be aware of his work's potential repercussions. He knows that the questions he is addressing arise from issues which need immediate resolution. Moreover, the questions are usually framed by advocates for a party with a stake in the impact of the expert's opinion. Particularly if the consultant has strong sympathies for one party, maintaining objectivity can be exceedingly difficult. Often the party's attorneys exacerbate this difficulty by deciding which arguments they wish to make and then asking whether the historian can find data to support such arguments.

Not infrequently the historical data cannot provide definitive answers to the questions the parties pose. The principles of treaty interpretation require that the courts determine what treaty-makers intended; but modern disputes often concern issues which those at the treaty probably neither foresaw nor formed any opinion about. Nevertheless, the conditions of the history experts' employment impel them to wrest from available sources the information that the litigants seek.

The consultants must then be prepared to defend their conclusions and methods against attacks more direct and hostile than academicians usually face. During pre-trial procedures and at trial, attorneys for the opponents of a historian's employer may subject him to rigorous, even antagonistic examination. Although this questioning should aim primarily at testing the accuracy of the witness' conclusions, it may also focus on any aspects of his career or personal attributes that tend to diminish his credibility. A historian may thus be dismayed to find his professional efforts impugned for reasons which have little relationship to the soundness of his scholarship.

Finally, the differing perspectives of the judge and the historian can impede communication between the two. Some judges, mistrusting people who qualify their conclusions, highlight unknowns or weigh probabilities, may set greater store by witnesses who relate history in bold strokes, obscuring the contradictions and uncertainties that so often characterize human experience. In such circumstances, the judge may reject the testimony of a scholar who faithfully abides by the standards of academicians in favor of the conclusions of a witness who is less cautious, thorough and precise, but whose approach appears consonant with the court's values and priorities.

The credibility and persuasiveness of an expert witness can be the decisive factor in an Indian rights case. Judge Boldt considered the competing expert witnesses' demeanors, methodologies and experiences, and then accepted wholesale the conclusions of the witness he deemed more credible and reliable. But at other times judges, perhaps believing that they are as capable as any historian of interpreting historical documents, appear to give expert testimony very little weight.

Bewildering as participation in litigation can be for historians, it does have important positive features. Knowing that they will be subjected to the testing process of the adversary system should encourage historians who take part to produce high quality work. In addition, scholars involved in Indian rights cases have a rare opportunity to engage in research which has immediate relevance to practical matters of great importance. Finally, the need to answer questions raised by lawsuits has prompted the parties to subsidize historical research which might not otherwise be undertaken.
As long as there is a need to clarify the rights, resources and status of tribal Indians, there will be a concomitant need for high quality, unbiased scholarship relevant to the historical questions on which the tribes' claims turn. Such scholarship should contribute not only to a just resolution of the issues but also to our knowledge of Northwest history. As a consequence of modern Indian rights cases, court records already contain a large volume of unique historical data, and future litigation will augment this library. Viewed with an understanding of their origins, purposes and limitations, these court records can be a valuable resource for Northwest historians.

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