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Docket Entry 369 - Filed Memorandum in opposition to the Introduction of Historical books on behalf of the Yakima Tribe

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al., Plaintiffs, -vs- STATE OF WASHINGTON, et al., Defendants.	CIVIL NO. 9213 MEMORANDUM IN OPPOSITION TO THE INTRODUCTION OF HISTORICAL BOOKS ON BEHALF OF THE YAKIMA TRIBE

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Rule 802 of the Rules of Evidence for United States Courts and Magistrates provides:

> Hearsay is not admissible except as provided by these rules or by other rules adopted by the Supreme Court or by Act of Congress.

Rule 803 in the same provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> . . .
>
> (18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judician notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

In the advisory committee's notes to the rules the following explanation is given to Exception (18):

369
983

> The writers have generally favored the admissibility of learned treatises, . . . but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professions, subject to scrutiny and exposure for inacuracy, with the reputation of the writer at stake. . . . Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. . . . The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designated to further this policy. [Emphasis added]

The federal rule accurately reflects the law of evidence on historical works exception to the hearsay rule. In Wigmore on Evidence, § 1699(b), 3d ed. (1940) the rule is stated:

> As to historical and encyclopedic works, most questions are disposed of usually from the point of view of Judicial Notice (post, § 2565), i.e. the Court will or will not dispense with evidence of certain notorious facts; while the Exception in favor of Ancient Reputation on Matters of General Interest (ante, §§ 1586, 1598) will admit many treatises. Apart from these two principles, it is doubtful where there is yet any general exception in favor of works of history.

Wigmore amplifies his statement of the rule more fully in § 1598 which states:

> When a treatise on history is offered as embodying a reputation of the community upon the fact in question, the treatise, in the first place, cannot be regarded as more than the statement of the individual author, unless it is a work so widely known, so long used, and so highly respected, that it can be said to represent the assenting belief of the community.
>
> In the next place, the facts for which such an opinion or reputation can be taken as

> trustworthy must (on the principle of § 1583, ante) be such facts as have been of interest to all members of the community as such, and therefore have been so likely to receive general and intelligent discussion and examination, by competent persons, that the community's received opinion on the subject cannot be supposed to have reached the condition of definite decision until the matter had gone, in public belief, beyond the stage of controversy and had become settled with fair finality.

It is submitted that plaintiff Yakima Tribe's proposed exhibits in question do not meet the tests set down in Wigmore. In the first instance they are offered to prove facts which are not of such notoriety as this court may take judicial notice. In the second instance the proposed exhibits do not come within the exception in favor of ancient reputation on matters of general interest as Professor Wigmore explains that exception in § 1598 quoted above. It can hardly be said that the facts sought to be proved by the Yakima Tribe through the introduction of these exhibits can be supposed to have reached the condition of definite decision in public opinion as to be beyond the stage of controversy and settled with fair finality.

In 29 Am. Jur.2d, Evidence, § 887 (1967) the historical works exception to the hearsay rule is stated as follows:

> The rule fairly to be deduced from the authorities is that general histories of deceased authors of established reputation are competent evidence to prove historical facts--that is, facts of notoriety of a general and public nature. As a general rule, the work of an author who is living and available for cross-examination may not be used to prove facts of general interest. In such cases, the author should be called as a witness and examined as to the sources and accuracy of his information.

Cases cited by the Yakima Tribe do not contravene this statement of the rule. In Montana Power Co. v. Federal Power Commission, 185 F.2d 491 (1950) the court specifically found that the federal power commission was not bound by rules of evidence binding on federal courts. Additionally it should be noted, in that case, that there were no living witnesses who could testify to the facts sought to be proved by the introduction of newspaper articles, contemporaneous to the events and historical works.

Nor does the case of Nordstrom v. White Metal Co., 75 Wn.2d 629, 453 P.2d 619 (1969) support plaintiff Yakima Tribe's position. In that case the court held that a safety code for manufacturing ladders was admissible under the exception to the hearsay rule. Clearly a safety code promulgated by an official regulating agency is a completely different type of material than an historical work containing expressions of the author's opinions.

The crux of this objection is that the Yakima Tribe seeks to introduce these publications into evidence without expert testimony to support the conclusions reached by the authors. The opinions contained therein cannot, therefore, be cross-examined. Rule 803(18) expressly states that such publications may not be received as exhibits. This was also the holding of the court in Prince Hall Lodge v. University Lodge, 62 Wn.2d 28, 381 P.2d 130 (1963) sustaining the trial court's ruling that a treatise on Masonic history was not admissible where its author had not been qualified as an expert. In the instant case the Yakima Tribe seeks to introduce these exhibits through the testimony of one of its tribal members who has not been qualified as an expert witness. The failure to qualify such an exhibit through expert testimony cannot be cured by a witness testifying that in his opinion the exhibits are accurate and correct. Darnell v. Panhandle Cooperative Association, 175 Neb. 40, 120 N.W.2d 278, 286 (1963).

It is respectfully submitted that under the federal rules of evidence plaintiff Yakima Tribe's proposed exhibits are not admissible.

DATED this 17th day of September, 1973.

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