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IN APACHE COUNTY SUPERIOR COURT  
OF THE STATE OF ARIZONA

Civil No. 6417-201

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DEPOSITION OF: CHARLES R. CUTTER, PH.D.  
February 28, 2012

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IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE  
WATER IN THE LITTLE COLORADO RIVER SYSTEM AND  
SOURCE.

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PURSUANT TO NOTICE, the deposition of  
CHARLES R. CUTTER, PH.D., was taken on behalf of the  
the Navajo Nation at 999 18th Street, Suite 370,  
Denver, Colorado 80202, on February 28, 2012, at  
10:05 a.m., before Sharon L. Szotak, Registered  
Professional Reporter, Certified Realtime Reporter,  
and Notary Public within Colorado.



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1                   WHEREUPON, the following proceedings were  
2 taken pursuant to the Colorado Rules of Civil  
3 Procedure.

4                                   \*     \*     \*     \*     \*

5                   CHARLES R. CUTTER, PH.D.,  
6 having been first duly sworn to state the whole truth,  
7 testified as follows:

8                                   EXAMINATION

9 BY MR. STEUER:

10                   Q.    Good morning.

11                   A.    Good morning.

12                   Q.    My name is Dan Steuer.  I represent the  
13 Navajo Nation.

14                                   Can you state for the record your full  
15 name and address.

16                   A.    My name is Charles Ross Cutter.  I live  
17 at 492 Littleton Street in West Lafayette, Indiana.

18                                   MR. MENTOR:  Excuse me a second.  We  
19 can't hear you at all, Dr. Cutter.  We're going to  
20 have to get closer, then, or --

21                                   THE DEPONENT:  I'll speak up.

22                                   MR. McELROY:  You can sit here, Joe.

23                                   (Discussion off the record.)

24                   Q.    (BY MR. STEUER) Dr. Cutter, have you ever  
25 had your deposition taken before?

1 A. Yes, I have.

2 Q. Well, then you probably have some sense  
3 of how this is going to go. I'm going to ask a bunch  
4 of questions. If you're unsure of what I'm asking,  
5 let me know; otherwise, I'm going to assume you  
6 understood the question.

7 Your answers have to be verbal; nodding  
8 your head doesn't work. And this isn't an endurance  
9 test, so if you need a break, just let me know and  
10 we'll take a break.

11 Let's start with your CV.

12 (Deposition Exhibit 1 was marked.)

13 Q. And so what is your current position?

14 A. I am a professor of history at Purdue  
15 University.

16 Q. And you have a PhD from the University of  
17 New Mexico?

18 A. That's correct.

19 Q. And what is the subject of that?

20 A. The subject of that was the Spanish legal  
21 system in Texas and New Mexico.

22 Q. And generally speaking, is that a PhD in  
23 history or --

24 A. Yes. PhD in history.

25 Q. And a master's from the University of New

1 Mexico, as well?

2 A. Yes.

3 Q. And that is in history, as well?

4 A. In history.

5 Q. Did you have a thesis for that?

6 A. Yes, I did.

7 Q. What was the subject of that?

8 A. The subject was an office in the Spanish  
9 colonial legal system called the Protector of Indians.  
10 And I looked at the Protector of Indians as it  
11 operated in colonial New Mexico.

12 Q. So it's fair to say that your area of  
13 expertise is colonial Spanish law?

14 A. Yes.

15 Q. And does that study include water rights?

16 A. I have not -- in my publications,  
17 typically I don't look at only water rights, but it  
18 includes water rights.

19 Q. In your CV in a lot of places, you refer  
20 to colonial New Mexico. Does that include modern day  
21 Arizona? Does that reference modern day Arizona?

22 A. Yes.

23 Q. Okay.

24 A. Let me clarify.

25 Q. Sure.

1           A.    Parts of modern day Arizona.  The  
2 province of Moqui, for example, would be part of New  
3 Mexico.  But modern day southern Arizona was part of  
4 the province of Sonora.

5           Q.    Okay.  But the Little Colorado River  
6 Basin is part of this colonial New Mexico reference?

7           A.    Yes.

8           Q.    Okay.  You said you've had your  
9 deposition taken before.  Can you tell me about those  
10 time or times?

11          A.    It was in the Abbott case in New Mexico  
12 that had to do with the water rights adjudication  
13 along the Chamita River.

14          Q.    Okay.  And who were you working for?

15          A.    The Department of Justice.

16          Q.    On behalf of certain tribes?

17          A.    Well, they had, of course, their own  
18 experts, but, yes.

19          Q.    Have you ever done any work directly for  
20 tribes?

21          A.    Uh-huh.  Yes.

22          Q.    And can you tell me about those?

23          A.    When I was in graduate school, I did a  
24 report for the Pueblo of Acoma.

25          Q.    And that's the only tribe that you've

1 done work directly for?

2 A. Yes.

3 Q. Have you ever testified as an expert  
4 witness before? Not at a deposition but in court.

5 A. I did testify many years ago in the  
6 Aamodt case as a translator for one particular  
7 document.

8 Q. So not as an overall expert, but just as  
9 a translator for one particular document?

10 A. Yes.

11 Q. Can you tell me about that document?

12 A. That was a long time ago. And it had to  
13 do with -- I believe it was a -- it contained  
14 demographic information that was being presented to  
15 the court, and they wanted to verify whether the  
16 translation was correct or not.

17 Q. Demographic information for a tribe or  
18 for a --

19 A. For -- I don't remember the exact  
20 content. I was working with a demographer named Lynn  
21 Wombold, and she was the one who wanted to make sure  
22 that the information that she was providing was  
23 correct, and so I was brought onboard for that.

24 Q. Now, you said just a little bit ago that  
25 you did work for the Department of Justice in the

1 Abbott case; is that correct?

2 A. Yes.

3 Q. Can you describe that work?

4 A. It had to do with the water rights of  
5 San Juan and Santa Clara Pueblos.

6 Q. And what --

7 A. So the confluence of the Rio Grande and  
8 the Chama River.

9 Q. And do you remember, generally speaking,  
10 your opinions in that case?

11 A. With respect to what?

12 Q. Well, you said -- with the water rights  
13 of those particular Pueblos.

14 A. I'm not sure what you're asking.

15 Q. Okay. Let's backtrack, then. You did  
16 this report for the Department of Justice on --

17 A. Uh-huh.

18 Q. -- water usage. Or perhaps maybe you can  
19 explain more about what the report was.

20 A. It had to do with land tenure and the  
21 water rights that would go with land ownership, and  
22 specific instances where, in the documentary record,  
23 the issue of land -- or water usage was addressed.

24 Q. Okay. And do you have a recollection of  
25 the general conclusions that you drew in that case, or

1 is that too broad a question for you?

2 A. That's a little too broad. What --

3 Q. I'm just trying to educate myself about  
4 what this -- the work that you did before. That's  
5 all. And the conclusions that you drew in that case.

6 A. Well, that under Spanish law, Pueblo  
7 Indians had particular rights with respect to their  
8 property, including water.

9 Q. How did you first hear about this case?

10 A. I was contacted by Hannah Norton.

11 Q. And what did she tell you? What was  
12 the --

13 A. That she was working on this case, and  
14 that an expert for the Spanish period was needed.

15 Q. And then how did it proceed from there?  
16 Did the U.S. -- did any attorney from the U.S. contact  
17 you, or --

18 A. Yes. But I can't remember exactly who.  
19 It may have been Vanessa. Although, this -- the  
20 beginnings of this may have predated when you were on  
21 the case.

22 Q. Do you remember when all this -- when you  
23 were first contacted by --

24 A. No.

25 Q. Okay. What is your understanding of what

1 this case is about?

2 A. This subcase here?

3 Q. Well, both the subcase and the overall  
4 case.

5 A. Well, it has to do with water rights in  
6 the Little Colorado River Basin.

7 Q. And what is your understanding of the  
8 subcase?

9 A. My understanding of the subcase is trying  
10 to establish a seniority or priority for Hopi.

11 Q. And do you have any understanding of the  
12 legal theories in this case?

13 A. For the American period?

14 Q. For any of it. So let's start with the  
15 American period.

16 A. I am not an expert in that, and I  
17 wouldn't venture to guess.

18 Q. What about the Spanish period?

19 A. Spanish period, I'm well versed in  
20 Spanish law.

21 Q. And so what is your understanding of  
22 legal theories of this case as it pertains to the  
23 Spanish period?

24 A. Well, it would -- the legal theory would  
25 rest on whether Hopi were considered to be vassals of

1 the crown, subjects of the crown, and whether, as  
2 Pueblos, they had those rights that were granted by  
3 the crown.

4 Q. And how would that translate to current  
5 day rights?

6 A. Well, that is a question that American  
7 lawyers have been dealing with for -- what? -- 150  
8 years.

9 Q. Sure. But what's your understanding of  
10 that?

11 A. I think that there is a whole corpus of  
12 American law that speaks to that that I'm not  
13 qualified to talk about. But there is an underlay of  
14 Spanish and Mexican law.

15 Q. I mean, you're familiar with the Treaty  
16 of Guadalupe Hidalgo?

17 A. Sure.

18 Q. So would it be your understanding that  
19 the rights prior to that would translate into American  
20 law through that treaty?

21 A. In ways construed by American jurists,  
22 yes.

23 Q. Did you read any of the other expert  
24 reports for this case?

25 A. Yes.

1 Q. Which ones did you read?

2 A. I read the report by Michael Brescia. I  
3 read the report that David Weber wrote. And I read  
4 John Kessell's endorsement of the Weber report.

5 Q. And Michael Brescia wrote three reports.  
6 Did you read all three?

7 A. No.

8 Q. No? You just read one report of his?

9 A. One report. I believe it was -- seems to  
10 have been a -- if he wrote three, it would have been  
11 his first one, I guess.

12 Q. What was your general impression of the  
13 report? Let's start with Michael Brescia's report.

14 A. There -- I think he made some good  
15 points. I think he erred in some parts of his report.

16 Q. In what ways? What specifically?

17 A. I think his discussion of propiedad  
18 perfecta and imperfecta is -- I think he misread his  
19 source.

20 Q. And what did that -- how did he misread  
21 it, or what is your --

22 A. Well, I don't have his report in front of  
23 me. And if you have it --

24 Q. I don't have it prepared as an exhibit.

25 A. I believe the section that begins on

1 page 2 --

2 Q. First of all, let me just backtrack here.

3 A. Okay. Yes.

4 Q. Let me just have you identify what it is  
5 that you're reading.

6 A. I'm citing from a report by Michael M.  
7 Brescia dated March 25th, 2009, entitled, Hopi Water  
8 Rights Under the Treaty of Guadalupe Hidalgo with  
9 Special Reference to the Spanish and Mexican Civil Law  
10 of Property.

11 Q. Thank you.

12 A. On page --

13 MS. WILLARD: Excuse me. Are we going to  
14 mark this as an exhibit?

15 MR. STEUER: You know, I wasn't prepared  
16 to mark it as an exhibit. We can if we -- I don't  
17 have copies of it.

18 MS. WILLARD: I can make copies. I would  
19 propose, if you don't have an objection, Dan, that we  
20 mark it as an exhibit, just so that it's clear in the  
21 record what we were discussing.

22 MR. STEUER: I don't have any objection  
23 to that.

24 MS. WILLARD: May we go off the record  
25 for one moment?

1 (Discussion off the record.)

2 (Deposition Exhibit 2 was marked.)

3 A. Well, he has a lengthy discussion on the  
4 difference between probiedad imperfecta and probiedad  
5 perfecta. But, in fact, Mariano Galvan -- and it's  
6 Rivera, not Rivero as he has it -- goes on to say in  
7 his book here that air and water are not subject to  
8 private property.

9 So from the beginning, his discussion is  
10 sort of off base here.

11 Q. (BY MR. STEUER) Let me just ask you a  
12 little bit about that. Do you agree with that opinion  
13 that air and water are not subject to private  
14 property?

15 A. No. I have no -- I'm not giving that as  
16 my opinion. I'm saying that this is what Mariano  
17 Galvan said.

18 Q. Okay. Are there other areas where you  
19 disagree with Dr. Brescia?

20 A. Yes, I do. On page 7, he writes that,  
21 about the middle of the page here, "Spanish law, on  
22 the other hand, vested original ownership of all land  
23 and natural resources in the crown."

24 And then he goes on to cite book 3 --  
25 Libro 3, Titulo 1, Ley 1. Book 3, Title 1, Page 1.

1 And cites that particular law to show that the crown  
2 claimed ownership over all land. And what that really  
3 does is speak to the issue of dominion on sovereignty,  
4 not of ownership of land.

5 Q. Okay.

6 A. And the context for that is early modern  
7 European politics where, instead of a nation state,  
8 there were families that ruled. And they would  
9 acquire different polities, principalities, kingdoms,  
10 and so forth, and then partition them according to  
11 their own family politics.

12 And what this addresses is that  
13 situation, that the crown guaranties that it will  
14 never -- it will be -- these lands will be  
15 incorporated in the crown of Castile, and that it will  
16 not be partitioned. They will always remain part of  
17 the crown of Castile. So there's really no -- no  
18 discussion of ownership of land.

19 Q. Are there other things in his report that  
20 you disagreed with?

21 A. Without going back and rereading it  
22 again, I -- I think those are the major issues.

23 Q. Now, you had also said that there were  
24 other things about his report that you agreed with.

25 A. Well, I think are worthy of

1 consideration, yes. And one is the question of  
2 whether, after the Pueblo revolt, the Hopis really  
3 were, you know, within the orbit of Spanish control,  
4 and whether rejection of one's sovereignty -- of  
5 claims of sovereignty of one side, if a party rejects  
6 those claims, you know, to what extent is sovereignty  
7 being exercised. Or control or sovereignty.

8 Q. Okay. Are there other things  
9 specifically about his report that you remember that  
10 you agreed with or --

11 A. I thought that was a point that was  
12 worthy of consideration.

13 Q. So you've read also Dr. Weber's report.  
14 And what did you think of that report?

15 A. Generally speaking, I thought it was well  
16 researched, solid. His discussion of Pueblo Indian  
17 rights under Spanish law was -- I would agree with --  
18 in general, with what he had to say there.

19 Q. Are there things with his report that you  
20 disagreed?

21 A. Well, I wouldn't say disagree so much  
22 as -- getting back to the last thing we talked about  
23 on Brescia's report, whether, if -- if, in western  
24 political theory, claiming sovereignty over peoples  
25 who reject it, and, you know, to what extent is that

1 true sovereignty. And that's in -- in the last part  
2 of his report, he -- that's -- it's the most  
3 innovative part of Weber's report. It's probably the  
4 one most open to discussion.

5 MS. WILLARD: Counsel, are you planning  
6 on introducing the Weber report as an exhibit?

7 MR. STEUER: Well, if you want to refer  
8 to it, I can introduce it as an exhibit. If you'd  
9 like me to introduce it, I can.

10 MS. WILLARD: I think, if we're going to  
11 discuss it, that makes sense.

12 MR. STEUER: That's fine.

13 MS. WILLARD: But if we're not really  
14 going to discuss it, it's fine.

15 (Deposition Exhibit 3 was marked.)

16 Q. (BY MR. STEUER) And just for the record,  
17 if you could identify this.

18 A. Yes. This is a report by David J. Weber  
19 dated March 2009, entitled, Hopi Land and Water Rights  
20 Under Spain and Mexico.

21 Q. Are there any other parts of his report  
22 that you disagreed with or questioned? Perhaps  
23 disagree is too strong a word.

24 A. No, I don't think so, from what I  
25 remember.

1 Q. I'll just do this in the right order now.

2 (Deposition Exhibit 4 was marked.)

3 Q. I'm going to hand you the next exhibit.

4 If you could identify that.

5 A. Yes. This is a report by John L. Kessell  
6 dated April 2010, entitled, "Hopi Land and Water  
7 Rights under Spain and Mexico: An Endorsement of and  
8 Supplement to David J. Weber's Report of the Same  
9 Title.

10 Q. And you've read this report, as well?

11 A. Yes.

12 Q. And what did you think of this report?

13 A. I thought it -- the subtitle of the  
14 report reflected accurately the contents of it.

15 Q. You're allowed to disagree with it, even  
16 if he's sitting right here.

17 A. That it is clearly an endorsement, that  
18 he -- he revisits the issues that Weber had brought up  
19 with respect to the place of Pueblo Indians under  
20 Spanish law.

21 And probably the most telling addition,  
22 supplement, is the chronology of contact between Hopi  
23 and Hispanics that generated documentation.

24 Q. And what did you think of that  
25 chronology?

1           A.    I can't say that I was surprised that  
2 there was that contact between Hopi groups and Spanish  
3 authorities. But having it laid out was very  
4 compelling.

5           Q.    So did you find it persuasive that Hopi  
6 was within Spanish control?

7           A.    Well, Weber had claimed that. And there  
8 are a lot of different perspectives on what it means  
9 to be a sovereign nation. Right? So -- I know I'm  
10 not supposed to ask questions.

11                    There are a lot of different perspectives  
12 on that. For example, the Comanches; they lived  
13 within -- in the orbit of the Hispanic world, but they  
14 were not -- they considered themselves to be  
15 sovereign, even though Spain might, at some point,  
16 have wanted to claim sovereignty over them. Or the  
17 Mexican government, for that matter, later on.

18                    And so I think you'd have to consider a  
19 native American perspective on what sovereignty means,  
20 as well.

21           Q.    Now, in Dr. Kessell's report, and as well  
22 in Dr. Weber's report, there's a discussion of a  
23 preference for sedentary Indians. Would you agree  
24 entirely with their discussion, agree in part? What  
25 are your --

1           A.    I generally agree.  I maybe wouldn't have  
2    used the word "preference."  But there were certain  
3    things that denoted being a subject of the crown, and  
4    that is loyalty to the crown, living in fixed  
5    villages, practicing agriculture mostly, or animal  
6    husbandry, being Catholic.  And all of those things  
7    sort of, you know, come together to indicate being a  
8    good subject of the crown under Spanish law.

9           Q.    Okay.  Does that mean that groups that  
10   were not sedentary would not have any rights  
11   recognized, or --

12          A.    No, I don't think it means that.

13          Q.    So a non-sedentary group could have  
14   rights recognized under Spanish law?

15          A.    They could.  They could.  But they would  
16   not be part of the colonial world, you know.  There  
17   is -- there's a social world and there's a legal  
18   world.  And they would not be part of the Spanish  
19   legal matrix in terms of a relationship between the  
20   crown and Indian subject.

21                   And I think it's a question of not so  
22   much -- this gets back to Brescia a little bit, but  
23   not so much a question of sedentary/non-sedentary, but  
24   one of subject/non-subject.  And the Navajos were not  
25   subjects of the crown.

1 Q. Okay.

2 A. So Spaniards might recognize usage by the  
3 Navajos; location, occupation, that kind of thing.  
4 But that would not be within this kind of colonial  
5 subject-crown relationship.

6 Q. But it would still be a legal right that  
7 could be recognized.

8 A. Well, maybe we're getting into the realm  
9 of international law. Relationships with pagans, what  
10 have you, you know. But it would certainly be a  
11 different relationship than with their Pueblo  
12 subjects.

13 Q. We may return to some of these topics as  
14 we move along here, but --

15 A. All right.

16 Q. Other than your expert report, have you  
17 prepared any other documents in connection with this  
18 case?

19 A. I -- I did write some comments for  
20 Vanessa Willard on the Weber report and the Brescia  
21 report.

22 Q. And what were the subject of those --  
23 what was the substance?

24 A. I think we've kind of gone over them.

25 Q. Do you intend to do any more work on this

1 case, or look at anything else?

2 A. Not unless instructed by the Department  
3 of Justice.

4 (Deposition Exhibit 5 was marked.)

5 Q. Can you identify that for the record.

6 A. This is a report prepared by me,  
7 Charles R. Cutter, dated March 30th, 2009, entitled,  
8 Documentary Evidence for Hopi Agriculture and Water  
9 Use in the Spanish and Mexican Periods.

10 Q. Okay. What were you asked specifically  
11 to do with respect to preparing this report?

12 A. I think the title of the report gives a  
13 pretty good indication of what I was asked to do, and  
14 that was to look for documentary evidence for Hopi  
15 agriculture and water use.

16 Q. So did you study Navajo water use at all,  
17 or the water use of any other groups?

18 A. Not in this report, no.

19 Q. Have you in other contexts?

20 A. No, not specifically.

21 Q. Were you provided with any materials by  
22 the U.S. to prepare this report?

23 A. No.

24 Q. Can you just tell me a little bit about  
25 how you went about preparing it?

1           A.    Well, I'm familiar with the archival  
2 record from the Spanish period and a lot of the source  
3 material, the printed and translated documents, and so  
4 that's where I started. And went at it  
5 chronologically. Went to those sources to find some  
6 mention of water use or location of water used by the  
7 Hopi during the Spanish and Mexican periods.

8           Q.    Can you just tell me a little bit,  
9 generally speaking, about the appropriateness of the  
10 methodology? I'm not a historian, so --

11          A.    I think it's within the context of the  
12 discipline of history. It's a normal approach.

13          Q.    Did you make any assumptions that you  
14 started with in preparing your report?

15          A.    Are you looking for a philosophical  
16 answer? I mean, we all start with assumptions.

17          Q.    Well, what assumptions did you -- I mean,  
18 just -- I just want to know if there's anything that  
19 you didn't look at because you took it as an assumed.

20          A.    No. No.

21          Q.    Did you prepare a draft of your report?

22          A.    That is the normal way of doing  
23 historical writing, of working through several drafts.

24          Q.    Were there drafts that were provided to  
25 the United States? To the attorneys?

1           A.    I don't believe so.  Possibly -- I think  
2   the original writing was done much earlier.  Several  
3   years earlier.  And I don't know if that one had been  
4   provided or not.  I don't remember.

5           Q.    Did you receive -- so maybe this is a  
6   moot question based upon that answer, but did you  
7   receive any comments from the U.S. that you  
8   incorporated into your final report?

9           A.    I don't recall.

10          Q.    How much did you know about Hopi and  
11   Navajo history prior to taking on this assignment?

12          A.    I would say, within the context of New  
13   Mexico colonial history, that is what I was familiar  
14   with.  So my expertise is probably more in Hispanic  
15   New Mexico.

16          Q.    And as we've discussed earlier, your  
17   subjects of study involve Spanish law in colonial New  
18   Mexico --

19          A.    Uh-huh.

20          Q.    -- and yet there is no opinion expressed  
21   in your report about rights under Spanish law.

22          A.    That's correct.

23          Q.    And I'm kind of wondering why that is.

24          A.    Because I was not asked to do that in  
25   this report.

1 Q. Okay. I'm just going to go through your  
2 report and ask you a few questions about it.

3 A. All right.

4 Q. So if you would turn to page 1 of your  
5 report. You discuss, in the introductory paragraph,  
6 that the examination of primary and secondary sources.  
7 And based upon what I've gathered here, you read  
8 Spanish --

9 A. Yes.

10 Q. Were the original documents in Spanish,  
11 or were they translations?

12 A. I used -- for ease, so that other people  
13 could also have access to them, I used mostly  
14 translated -- the sort of standard translations of the  
15 important early documents.

16 Q. Okay.

17 A. But you're correct. I do read Spanish,  
18 and I read the paleography of the age.

19 Q. Well, I'll apologize now for any name  
20 butchering I do later on, since I'm sure to do that.

21 Now, you looked at Hopi agriculture and  
22 water use. And you said that you didn't study Navajo  
23 water use at all. Do you know if there were other  
24 water users in the Little Colorado River Basin during  
25 the time period you studied?

1 A. I didn't -- I didn't do research on that.

2 Q. So you don't know.

3 A. I would hate to give an opinion on that.

4 Q. Okay. We discussed a little bit about  
5 this earlier as far as Spanish control of Hopi, and I  
6 want to sort of run through a number of places in your  
7 report where you touch upon that and just have you  
8 expound upon that a little more.

9 On page 1, you describe the period before  
10 the Pueblo revolt in 1688, and you say, a time when  
11 Spaniards exercised real political and spiritual  
12 authority over the Hopi people. Does that mean that  
13 after that time period, they did not exercise real  
14 political and spiritual authority over the Hopi  
15 people?

16 A. That is my opinion, yeah.

17 Q. On page 2, kind of just above the middle  
18 of the page, you mention that unlike the other Pueblo  
19 groups, the Rio Grande Pueblos, the Hopi people  
20 maintained their political independence. So they were  
21 not, in your opinion, under any political influence  
22 from Spain or Mexico?

23 A. That's where we get the issue of  
24 perspective once again. According to the crown, they  
25 were still subjects of the crown. According to the

1 Mexican nation, all people born within the boundaries  
2 of Mexico were citizens.

3 But if you look at it from a different  
4 perspective, and rejecting those claims of authority,  
5 then you have to wonder to what extent is there  
6 real -- you know, real authority being exercised here.

7 Q. Okay. Now, would the Navajo have fallen  
8 into that same category that you just described,  
9 according to the crown being under their jurisdiction,  
10 according to Mexico being everyone born within the  
11 borders is citizens?

12 A. In -- let's start with Spain first.

13 Q. Okay.

14 A. They had a different relationship with  
15 the crown. And that is a -- I think you can pinpoint  
16 that by the fact that late in the colonial period,  
17 they signed a couple of different treaties with  
18 Spanish authorities, something you wouldn't do with  
19 Pueblo Indian groups, which would indicate, you know,  
20 a recognition of maybe an alliance but not -- not  
21 coming into the fold as far as being subjects.

22 With respect to the Mexican period,  
23 that's an interesting question as to what extent  
24 Navajos were seen as true citizens of the country of  
25 Mexico. In theory, in the Mexican political

1 imagination, anybody born within the boundaries of the  
2 country of Mexico would be a citizen.

3 But we have the examples of not only  
4 Navajo but also Comanches, Apaches and various other  
5 groups who were not treated very well as citizens or  
6 maybe citizens in a rebellion. But certainly the  
7 relationship is not the same as with sedentary  
8 agriculturalists.

9 Q. Now, you just described the fact that  
10 Spain signed treaties with Navajo, which sort of calls  
11 into question whether Spain would have considered them  
12 part of the Spanish empire, because that behavior  
13 wouldn't lead to a treaty.

14 However, I would like to point to -- let  
15 me find the page here. On page 12, you discuss  
16 military expeditions with the Hopi, with the intent to  
17 subjugate the Hopis. Wouldn't that also be  
18 inconsistent with subjects of the crown?

19 A. Well, the purpose of the expeditions was  
20 to bring them back into the fold as subjects.

21 Q. And how is that different than what may  
22 have happened with Navajo Spanish?

23 A. Well, the Navajos, to my knowledge, never  
24 went through any ceremonies of vasallage or acts of  
25 obedience like the Hopis did.

1           Q.    Okay.  So is that the difference, the key  
2 difference?

3           A.    That is a good indicator of a different  
4 relationship.

5           Q.    So on page 14, you speak of the Spanish  
6 authorities seeking to reassert their jurisdiction.  
7 So the converse of that would be that -- or the  
8 implication of that is that at the time there was no  
9 Spanish jurisdiction?

10          A.    A matter of perspective, right?  From the  
11 Spanish point of view, they never gave up hope that  
12 the Hopis were part of Spanish and Mexico.  But in  
13 real fact, spiritually and politically, in my opinion,  
14 the Hopi were independent.

15          Q.    On page 15 -- I apologize.  I'm sort of  
16 beating you over the head on this particular topic,  
17 but -- and I'm going to butcher this name probably.  
18 Luxan?  This is about a third of the way down the  
19 page.  You wrote that he believed that the province of  
20 Moqui could be regained.  And you have a quote there,  
21 "taken by siege force."

22          A.    Uh-huh.

23          Q.    So I'm just -- I guess I'm questioning --  
24 that kind of language doesn't sound like the language  
25 that a country or political entity would use if they

1 believed they already had these as subjects.

2 MS. WILLARD: Objection. What's the  
3 question?

4 Q. (BY MR. STEUER) Well, the question is,  
5 how do you view this sentence in light of the other  
6 opinions that you've expressed?

7 A. I think this shows once again that they  
8 never gave up hope that the Hopi could be brought back  
9 into the fold, so to speak.

10 Q. Okay. But I understand not giving up  
11 hope, but wouldn't this be a recognition, this  
12 statement, that they did not have the Hopi within  
13 their polity, within their political entity?

14 A. They -- as I've said before, I think that  
15 they did not exercise real political or spiritual  
16 control over the Hopis.

17 Q. And they were aware that they did not  
18 have that control?

19 A. The Spaniards?

20 Q. Yes.

21 A. Yes.

22 Q. Did Spanish law apply to Hopi?

23 A. Well, Spanish law probably did.

24 Q. How so?

25 A. Because Spain considered the Hopi to be

1 subjects of the crown. Perhaps in a rebellion,  
2 perhaps in apostates. But needed to be brought back  
3 in.

4 Q. So Spain -- am I understanding you to say  
5 that Spain would say that their law applied to Hopi?

6 A. Yes.

7 Q. Practically speaking, did Spanish law  
8 apply to Hopi?

9 A. After the Pueblo revolt?

10 Q. After the Pueblo revolt, yes.

11 A. In practical terms, I would say probably  
12 not.

13 Q. Okay. We'll move on from this subject.  
14 We've covered it enough.

15 I want to point you to a few mentions of  
16 something in your report. On page 3, the third  
17 sentence down, you just mention several large  
18 communities, and there were some other mentions --  
19 I'll just quickly point you to them.

20 On page 10, towards the bottom of the  
21 page, you mention the relatively large sedentary  
22 communities. And on page 19, in your conclusion,  
23 third line of the conclusion, you mention relatively  
24 large populations. How large were these communities?

25 A. Well, we have the estimates from early

1 16th century expeditions. I think I gave those  
2 figures in the report. Right?

3 Q. I remember one reference.

4 A. So particular number of souls, right?

5 Q. I don't remember the specific reference,  
6 but overall -- so is that all you're referring to, is  
7 that one mention, or --

8 A. I took the reports when they said  
9 thriving villages, large populations and so forth  
10 without specific numbers at face value. There's  
11 always a comparative dimension when you say a large  
12 community.

13 Q. So you didn't make an attempt to evaluate  
14 what those numbers meant in terms of how many people.

15 A. True.

16 Q. Okay. Do you know if those numbers  
17 varied over the time period you studied?

18 A. I'm sure that they did.

19 Q. But are you aware of those variations,  
20 whether they grew, shrank?

21 A. No. I didn't look into that.

22 Q. Okay. On page 3 of your report, you  
23 mention two expeditions, Tovar and Cardenas, and you  
24 say that they make no mention of agricultural fields  
25 or crops. And you also note that Tovar was presented

1 with flour, and you draw the inference of sedentary  
2 agriculture from that. Is that fair?

3 A. Yes.

4 Q. Are there any inferences that can be  
5 drawn from their lack of mention of agriculture?

6 A. I'm not quite sure what you're getting  
7 at, but here's the way I would respond to that. That  
8 the chronicles of the explorers were not -- the  
9 chroniclers were not required to list certain things.  
10 Sometimes they did mention agriculture, sometimes they  
11 didn't. But it wasn't like a field expedition where  
12 you, you know, went out and consciously enumerated  
13 this, that, and the next thing.

14 Q. On page 4, the very bottom of the page,  
15 you just mention a party that traveled two leagues.  
16 And you say a league equals 2.6 miles.

17 A. Uh-huh.

18 Q. You don't discuss it here, but it was  
19 mentioned in some of the other expert reports, and  
20 I've also seen it elsewhere in your works, the Pueblo  
21 league.

22 A. Uh-huh.

23 Q. And I was just wondering if you could  
24 explain that concept.

25 A. The Pueblo league?

1 Q. Yes.

2 A. As things developed -- well, let me back  
3 up. In the vice royalty of new Spain, there developed  
4 policy on part of the Spanish crown to guaranty a  
5 minimum land base. And it varied from region to  
6 region in new Spain.

7 In New Mexico, as things developed, the  
8 Pueblo league was construed to mean one league in each  
9 of the cardinal directions from the center point;  
10 typically a church or central plaza of a village.

11 Q. Okay.

12 A. So the Pueblo league refers to that.  
13 That guaranty of --

14 Q. So did all Indian communities receive  
15 that as a matter of course?

16 A. That was the generally recognized norm,  
17 as the minimum. Some Pueblos were granted extensions  
18 to their lands.

19 Q. Did it have to be adjudicated in some  
20 fashion to receive that, or was it just assumed?

21 A. In New Mexico, it was -- it was assumed.  
22 And I am not sure of when that developed. The  
23 earliest references to the Pueblo league are from the  
24 year 1704. But certainly, if you look at the  
25 adjudication, that is an assumed minimum amount of

1 land.

2 Q. What would be the status of lands and  
3 water outside of that boundary? The Pueblo league  
4 boundary.

5 A. I think that's circumstantial. In other  
6 words, if there's a contest over -- you know, for  
7 occupation and use of lands and water, then the status  
8 would be -- and typically in New Mexico, in the middle  
9 Rio Grande and -- not so much in the Laguna and Acoma  
10 region, the adjudication might consist of something  
11 like measuring off the Pueblo league and then granting  
12 land to non-Indians for lands outside the league.

13 Q. So am I understanding it basically that  
14 the lands and resources outside that would be open,  
15 subject to disagreements as to whether that land  
16 really was available?

17 A. It would be -- if there were people  
18 interested in settling it, it would be open for the  
19 possibility of settling there.

20 Q. On page 6 of your report, you discuss  
21 Espejo's -- I don't know what the appropriate word  
22 is -- mission or expedition.

23 A. Uh-huh.

24 Q. And then at the bottom of the last full  
25 paragraph, you discuss they encountered other

1 groups -- another group on the Little Colorado River  
2 that was not Hopi or Pueblo. Do you know who those  
3 people were?

4 A. I don't. They are referred to in the  
5 document as mountain people.

6 Q. Do you know if Espejo encountered any  
7 other peoples in his expedition?

8 A. Other people from the time he left --

9 Q. In the Little Colorado River Basin.

10 A. Besides the Hopi and these mountain  
11 people, I don't think he did.

12 Q. Are you familiar with the term "corecho"?

13 A. Yes.

14 Q. Can you describe that term?

15 A. Well, the corecho was a term used in the  
16 16th century. And there is disagreement as to who the  
17 the corechos are. Some people think they are an  
18 Apachian group, but -- I don't think there's any hard  
19 and fast agreement as to who the corechos were.

20 Q. Did Espejo encounter corechos in his  
21 expedition?

22 A. I don't know if he used that term or not.

23 Q. Do you know if corechos, whoever they may  
24 have been, occupied the Little Colorado River Basin?

25 A. I don't know that.

1           Q.    On page 7, you describe a number of other  
2    expeditions or -- led by a number of people: Obregon,  
3    Chamuscado, Sosa, and a few others. And if I  
4    understand it, none of these expeditions traveled to  
5    Hopi. Is that correct?

6           A.    If you go down to the bottom of the page,  
7    Chamuscado, Castano, Morlete, and Humana, those  
8    didn't. Obregon, going back to the middle paragraph,  
9    never was in New Mexico. So he's describing earlier  
10   expeditions.

11          Q.    So none of these people went to Hopi at  
12   all.

13          A.    My understanding is that they didn't.

14          Q.    Okay. As a historian, how do you value  
15   reports from these people when you have -- on Hopi  
16   when you have firsthand accounts of visits to Hopi?

17          A.    Value whose accounts?

18          Q.    Well, you -- you discuss -- let's look at  
19   Obregon.

20          A.    Uh-huh.

21          Q.    And you say he made reference to various  
22   expeditions to New Mexico, including those of Coronado  
23   and Espejo, and you describe what Obregon said about  
24   Hopi. And I am wondering how valuable his description  
25   of Hopi is, based upon, I presume, Coronado and

1 Espejo's expeditions when we have firsthand accounts  
2 from Coronado and Espejo.

3 A. I would -- I would value the firsthand  
4 accounts over this one, which is a secondhand account.  
5 Obregon was never in New Mexico but did make use of  
6 reports generated by those expeditions. And that's  
7 how he wrote his history of -- which included much  
8 more than focusing on New Mexico, but one part of his  
9 history does deal with New Mexico. He's relying on  
10 other accounts that he had seen.

11 Q. Okay. So at the bottom of the page,  
12 there's discussion of these expeditions, you say, in  
13 all the documentary evidence for the 16th century  
14 indicates -- and it continues on to the next page.

15 And that documentary evidence, as far as  
16 firsthand accounts, is really just Coronado and  
17 Espejo, correct?

18 A. It's very limited. Yes.

19 Q. And so these other people are just  
20 reporting on those --

21 A. Obregon is the only other one who reports  
22 on that for the 16th century.

23 Q. Okay. So these other expeditions you  
24 mentioned don't even have any documentary evidence  
25 related to Hopi.

1           A.    Right.

2           Q.    Okay.  On page 8, the last sentence of  
3   that first incomplete paragraph, you say, "The Hopi  
4   seemed to have practiced effective water management."

5                    And similar to that, I'm going to point  
6   you to page 17 in that last full paragraph there  
7   where, in sum, you discuss the references to Hopi  
8   agriculture and water use.

9                    And my question is, do these references  
10   or, in general, your opinions suggest irrigation as we  
11   think of it?  Is that what you mean by water  
12   management?

13           A.    Irrigation.  How do you -- I don't know  
14   how you envision irrigation.

15           Q.    Well, I mean, typically, irrigation would  
16   be, you know, canals, bringing water in a channel from  
17   some water source to fields.  That type of thing.

18           A.    No, they didn't practice the acequia  
19   system that you find along the Rio Grande and the Rio  
20   San Jose for Acoma and Laguna later on.  There is no  
21   documentary evidence that speaks to an acequia system  
22   for the Hopis.

23           Q.    So can you describe what their water  
24   management practices were?

25           A.    Well, they describe catchments and

1 making -- pooling water, cisterns, and saving snow to  
2 use. I believe -- and I'm probably going out on a  
3 limb here, but I believe that also planting and sand  
4 is also effective use of water and water management.

5 Q. So essentially using precipitation or  
6 gathering up -- effective use of precipitation?

7 A. Right.

8 Q. Do you have an opinion on how much water  
9 they were using?

10 A. None.

11 Q. Do you know if --

12 MR. MENTOR: Can I ask for clarification?  
13 When you said none, you meant you have no opinion  
14 or --

15 THE DEPONENT: I have no opinion. I'm  
16 sorry.

17 MR. MENTOR: Thanks.

18 Q. (BY MR. STEUER) Do you know if their  
19 water use varied over time, or was it consistent  
20 through the whole period you studied?

21 A. I don't know for sure. Certainly, with  
22 the acquisition of livestock, their water use would  
23 change -- the way the water was used would change over  
24 time.

25 Q. Okay. Did that happen at some point

1 during this period that you studied? The acquisition  
2 of livestock?

3 A. Yes. Uh-huh. After the arrival of  
4 Spanish missionaries. And certainly in the 18th  
5 century, we have lots of documentary evidence that  
6 speaks of livestock that the Hopi had.

7 Q. On page 10 of your report, you mention  
8 Father Nicholas Martinez and that he opined that  
9 travel to and from Hopi was perilous. Do you see  
10 where I'm --

11 A. Uh-huh.

12 Q. Do you know why it was perilous?

13 A. No, I don't. Certainly, what I -- what I  
14 took that to mean was that you might be attacked by  
15 somebody.

16 Q. By somebody. Do you know who?

17 A. And I don't know.

18 Q. Do you know if -- what parts of that  
19 journey might be perilous, or is it --

20 A. I can't tell from the evidence here.

21 MS. WILLARD: Dan, do you think we should  
22 take a break? Depending on how much further you want  
23 to go. We've been going about an hour and 15. Or  
24 alternatively, if you're -- if you have 15 or 20 more  
25 minutes, we could keep going. But I think we should

1 plan to break in the next 10 or 15.

2 MR. STEUER: We can break now.

3 (Recess taken, 11:11 a.m. to 11:24 a.m.)

4 Q. (BY MR. STEUER) If you could turn to  
5 page 11 of your report. Right in the middle of the  
6 page, you note that Hopi afforded a haven for  
7 disaffected Pueblo Indians. And what I'm wondering  
8 is, why was Hopi a refuge for them?

9 A. Because it was out of reach for Spanish  
10 authorities.

11 Q. Okay. By fleeing to Hopi, these people  
12 become Hopi?

13 A. I can't answer that question. I --  
14 that's a question for an anthropologist to know the  
15 cultural attributes.

16 Q. In this same time period, do you know if  
17 anyone left Hopi and joined other groups?

18 A. There were some Tiwas and some Hopi who  
19 came and settled at Sandia Pueblo in 1778 when that  
20 was reestablished.

21 Q. Do you know of any other Hopis who may  
22 have left Hopi and joined other groups?

23 A. I don't know that.

24 Q. Do you know if there's a lot of movement  
25 like this from Hopi to other groups, other groups to

1 Hopi? Or was this uncommon?

2 A. Are you talking about native American  
3 groups?

4 Q. Yes.

5 A. I'm not fully informed on that.

6 Q. On page 12, you note that there was a  
7 scarcity of water around Hopi such that Vargas didn't  
8 even go to Oraibe. And on page 13, you note that  
9 Serna's forces couldn't be supported by the existing  
10 water. What does this say to you about Hopi water use  
11 and the quantity of water that Hopi used?

12 A. That water was scarce.

13 Q. So that there wasn't much water to be  
14 used.

15 A. Well, there are dry seasons and rainy  
16 seasons and so forth. It would suggest to me that  
17 there wasn't a steady supply of water.

18 Q. On page 16 of your report, you discuss  
19 Escalante's expedition. Do you know if Escalante  
20 encountered other people in the Little Colorado River  
21 Basin?

22 A. I don't recall.

23 Q. Do you know what language Escalante used  
24 to communicate with the people of Oraibe?

25 A. No, I don't.

1           Q.    Also on page 16, you discuss Governor  
2 Anza and his noting that Hopi was struggling because  
3 of drought and constant attacks from Utes and Navajos.  
4 What does this say to you about Hopi control of Little  
5 Colorado River Basin and its resources?

6           A.    I -- I'm not really sure what you're  
7 asking.  Whether they were the sole occupants?

8           Q.    Sure.

9           A.    The attacks could be from afar.  That is,  
10 raids from people who were not living in the immediate  
11 vicinity, but I don't know for sure.

12          Q.    And as far as not just documents, but  
13 users of the water -- of the resources?  Sole users?  
14 Does it suggest that they were the sole users of the  
15 resources?

16          A.    I have no opinion on that.

17          Q.    On page 17, this is Governor Anza, as  
18 well.  And there's a possible contradiction here with  
19 earlier parts of your report that I want to know how  
20 you reconcile the two.  Here Anza discusses the lack  
21 of water and quality of water and lack of firewood.

22                   And I'd like to point you to page 5 of  
23 your report.  And Luxan -- again, I apologize if I'm  
24 mangling these names -- observed that the soil was  
25 fertile, that they had no trouble cultivating sandy

1 places. And on page 7 of your report, Obregon  
2 mentions how they enjoyed good lands, woodlands, and  
3 water. So how do you reconcile these pretty stark  
4 differences in description?

5 A. Well, I know that when Anza went on his  
6 expedition, there was a severe drought in those --  
7 there was a two or three-year period where there was a  
8 severe drought.

9 I also know that the 16th century was  
10 unusually cold in New Mexico, and wetter than normal.  
11 And that's what I would account -- how I would account  
12 for the difference.

13 Q. What about firewood? I mean, that  
14 wouldn't seem to change so drastically from drought  
15 to --

16 A. I don't know.

17 Q. On page 18, at the bottom of the page,  
18 you discuss the Vizcarra campaign. You indicate that  
19 he was scouting the First Mesa area in search of  
20 Navajo livestock. Does that suggest Navajo presence  
21 and use of the area during that time to you?

22 A. Well, it would to me.

23 Q. Similarly, on page 19, you note that  
24 Vizcarra continued westward looking for Navajo. So  
25 does that also indicate Navajo presence in the Little

1 Colorado River Basin at that time?

2 A. Navajo presence, yes.

3 Q. And given the relatively sparse water  
4 resources of the region, would Navajo have needed to  
5 have a fairly intimate knowledge of the basin to  
6 survive there?

7 A. I don't -- I'm not qualified to answer  
8 that question.

9 Q. Also on page 19, you note Brugge's  
10 analysis that -- this one is even tougher -- Los  
11 Algodones is a translation into Spanish of the Navajo  
12 name for Moencopi.

13 And what I'm wondering is, if the Navajo  
14 name for Moencopi had been translated into Spanish to  
15 ultimately be used by Vizcarra, does that suggest  
16 fairly extensive Navajo presence in the basin?

17 A. It could.

18 Q. Also on page 19, you indicate that -- or  
19 you suggest that both tribes used the springs in  
20 the -- or I shouldn't say you suggest that. The quote  
21 suggests that both tribes used the springs in the  
22 Moencopi vicinity. Does that also suggest --

23 MR. MENTOR: Excuse me. I'm going to  
24 object for the record to this whole line of  
25 questioning, because I think that Dr. Cutter has

1 already indicated that he has no expertise in the  
2 subject of Navajo occupation or water use in the  
3 Little Colorado Basin. So I just want that on the  
4 record.

5 Q. (BY MR. STEUER) You can answer the  
6 question.

7 A. The -- the suggestion that both tribes  
8 used the springs is one of Brugge's -- the quote  
9 there.

10 Q. Is that what you're referring to when you  
11 say his -- you say linguistic analysis may be subject  
12 to disagreement. Is the suggestion that both tribes  
13 were using the springs subject to disagreement?

14 A. What I would say is how I finish the  
15 sentence. "Navajo collective memory recalls Hopis as  
16 cultivators of this particular location."

17 Q. What is the disagreement that you -- what  
18 is the disagreement that you note there regarding  
19 Brugge's analysis?

20 A. You know, it's been a long time since I  
21 wrote this report. And at the time I had read  
22 something where somebody quibbled, but I don't recall  
23 what that is. And probably in 2009 I should have  
24 taken that out, but I didn't.

25 Q. Okay. I have some general questions for

1 you, not specific to pages of your report.

2                   How did Spanish and Mexican law address  
3 disputes between two Indians or Indian tribes as  
4 compared to Indian-Spanish disputes?

5                   MS. WILLARD: Objection. Counsel, just  
6 for purposes of the record, to clarify, I think you  
7 may be going outside the scope of Dr. Cutter's work in  
8 this case. So I'd like that to be noted for the  
9 record.

10                  A. This all in the realm of theory? Is that  
11 what you're asking?

12                  Q. (BY MR. STEUER) I don't know. Is it in  
13 the realm of theory? Is there evidence of disputes  
14 between two Indian entities, or is that not --

15                  A. Yes. In New Mexico, to recognize Pueblo  
16 entities, numerous cases involving groups along the  
17 Rio Grande, the Santa Ana and San Felipe, for example;  
18 later on, Laguna and Acoma. And typically a Spanish  
19 magistrate would hear both sides and try to come to  
20 some compromise or agreement.

21                  Q. Is it any different than a dispute  
22 between a Spanish entity and an Indian entity?

23                  A. There are different things at play,  
24 certainly. But I would say to Indian -- recognized  
25 Indian entities, to Pueblos de Indios, would be on the

1 same footing, you know, on par with each other.

2 Whereas, if it were a Hispanic individual versus an

3 Indian community, then there would be other issues at

4 play.

5 Q. Okay. Is there -- go ahead.

6 A. I don't know of any adjudication between

7 non-subject Indians and subject Indians in New Mexico.

8 Q. So is that the theory part that you're

9 wondering about?

10 A. Yeah.

11 Q. And what would you think in theory?

12 A. Well, I've never seen how that would have

13 played out. Preference would have been given to the

14 recognized legal entity of a Pueblo de Indios.

15 Q. And what does that preference mean?

16 A. A first right to water. A right to a

17 land base.

18 Q. Would it be a right to all the water, or

19 would it be --

20 A. No.

21 Q. Would the same principles of that --

22 A. Same principles at play -- now are you

23 talking about a non-subject and a subject Indian

24 group?

25 Q. Yes. I thought we were talking -- the

1 theory of that. You said that you're unaware of that  
2 in practice, so we're discussing it theoretically.

3 A. Well, I would say I am -- having never  
4 seen any cases like that, an actual adjudicated case  
5 between a Pueblo de Indios and a non-subject group, I  
6 would say that a non-subject group had -- did not have  
7 the same kind of rights under Spanish law.

8 Q. Did the Spanish desire to -- the  
9 non-subject groups in the -- I believe that's referred  
10 to as the Indios barbaros. Is that correct?

11 A. Yeah. Or Indios and Amigos.

12 Q. Did the Spanish desire to make them  
13 subject groups? Sedentary Indian communities, if you  
14 will?

15 A. There were different phases of Indian  
16 policy with respect to non-subject Indians in New  
17 Mexico. For most of the colonial period, yes, the  
18 desire was to have them become sedentary  
19 agriculturalists, become subjects of the crown.

20 Beginning in the last quarter century of  
21 the 18th century, the policy began to shift towards  
22 probably a practical accommodation with groups that  
23 weren't going to do that, and actually threatened the  
24 colony. Particularly the Comanches and the Apaches,  
25 also the Navajo and the Ute. And that's where you

1 begin to see a policy of treaties, gift-giving, and  
2 that kind of thing; of bringing them into this Spanish  
3 orbit, but as allies rather than as subjects.

4 Q. Would that suggest to you that Spanish  
5 and Mexican law would deny rights to use resources to  
6 these Indians as part of that policy?

7 A. To use resources?

8 Q. Water.

9 A. No, they wouldn't deny them the right to  
10 use resources.

11 Q. Can you just generally describe the  
12 general principles of adjudication -- Spanish law  
13 adjudications with respect to two Indian entities,  
14 say?

15 A. The principles of adjudication?

16 Q. That they would apply to a dispute  
17 between two parties.

18 A. I think the whole Spanish legal system  
19 was predicated on flexibility, compromise where  
20 possible. And those same principles would come into  
21 play when dealing with Indian groups that were subject  
22 to Spanish authority.

23 Q. So those principles would not apply to  
24 Indios barbaros?

25 A. Well, that's really -- not having

1 anything to go on, it's hard to say how things would  
2 be adjudicated.

3 Q. Did the Hopi Tribe ever avail themselves  
4 of the Spanish legal system?

5 A. I don't know of any documentary evidence  
6 for the pre-revolt period. And that's a problem of  
7 destruction of documents probably.

8 And in the post -- the post-conquest, the  
9 reconquest period -- I'm going to -- did you say  
10 adjudication? Avail themselves --

11 Q. Avail themselves of the Spanish legal  
12 system.

13 A. No. That I know of in the  
14 post-reestablishment period.

15 Q. Do you know of any instances where Indios  
16 barbaros or -- ever availed themselves of the Spanish  
17 legal system?

18 A. I don't know of any, but I was not asked  
19 to look into that.

20 MR. STEUER: Can we take a short break  
21 here?

22 (Recess taken, 11:48 a.m. to 11:51 a.m.)

23 Q. (BY MR. STEUER) I meant to ask you this  
24 earlier, but what did you do to prepare for today's  
25 deposition?

1           A.    I reviewed my report.  I reviewed reports  
2   of the other experts.  This morning, Vanessa and I  
3   met, and she kind of briefed me on what was going to  
4   happen during the deposition.

5           Q.    Told you how to answer all the questions?

6           A.    To answer them as best as I could.  Yes.

7           Q.    And I note in some of your stuff --

8           MR. MENTOR:  I'm sorry.  You're not  
9   saying that she told you how to answer all the  
10  questions.  Is that what you said?

11          THE DEPONENT:  No, no.  I didn't say  
12  that.

13          MS. WILLARD:  Thanks for that  
14  clarification.

15          MR. STEUER:  I guess that's a good point.  
16  The joke probably won't show up as well on the  
17  transcript, so -- I understand.

18          Q.    (BY MR. STEUER) I note in some of the  
19  materials that you have, I believe, studied under  
20  Dr. Kessell.  Is that correct?

21          A.    I had some classes with him.  I was his  
22  TA.

23          Q.    What is your professional relationship  
24  with Dr. Kessell?

25          A.    At present?  We are friends and

1 colleagues.

2 Q. But have you worked for him or with him  
3 on other things in the past?

4 A. Not professionally. And only as a  
5 student.

6 Q. Do you have any -- did you have any  
7 professional relationship with Dr. Weber?

8 A. Yes. Knew him as a colleague.

9 Q. Did you ever work with Dr. Weber in any  
10 capacity?

11 A. No.

12 Q. And I'll ask the same question of  
13 Dr. Brescia.

14 A. No. And I never worked with him, and I  
15 have never met him personally.

16 Q. Have you discussed this case with  
17 Dr. Kessell at all?

18 A. Not at all.

19 Q. Dr. Weber?

20 A. No.

21 Q. And you said you never Dr. Brescia.

22 MR. STEUER: Let's break for lunch.

23 MS. WILLARD: Great. Go off the record.

24 (Recess taken, 11:53 a.m. to 1:20 p.m.)

25 Q. (BY MR. STEUER) Dr. Cutter, I just have a

1 few more questions.

2 We touched upon this some earlier, and  
3 you've done some reports on the Rio Grande Pueblos.  
4 And I'm just wondering what you can tell us about the  
5 difference between how Spain treated the Rio Grande  
6 Pueblos versus how they treated Hopi. Treated and  
7 interacted with them.

8 A. I think, in the pre-revolt period, the  
9 interaction, the treatment would be similar. Efforts  
10 at conversion, efforts to win Pueblo leaders over to  
11 sort of an administrative reference for Spanish  
12 authority.

13 And as you pointed out, in the  
14 post-revolt period, the treatment of Pueblo Indians  
15 and Hopi seems to be different than -- there's a  
16 continual effort to get the Hopi back into the fold.

17 Q. What did it mean to be within the fold?  
18 In other words, presumably how the Rio Grande Pueblos  
19 were treated.

20 A. To accept Spanish administration  
21 politically, and to accept spiritual guidance from the  
22 Franciscans.

23 Q. So the Pueblos were all converted to  
24 Catholicism?

25 A. They accepted the authority of the crown.

1           Q.    And the Hopis were not Catholic?  
2    Converted to Catholicism?

3           A.    They're -- I'm not an anthropologist, but  
4    they rejected Franciscan missionaries.  There was an  
5    attempt at Awatovi to reestablish a mission there, and  
6    there were missionaries accepted there.  And that  
7    Pueblo was then defeated by other Hopi groups.  And as  
8    far as I know, that was the extent of the conversion  
9    success in the post-revolt period.

10          Q.    What kind of civil control was exercised  
11    over those Pueblos that you said was not exercised at  
12    Hopi?

13          A.    In the -- most of the Pueblo world?

14          Q.    Yes.

15          A.    Well, certainly interior government for  
16    Pueblo communities was respected.  But there were  
17    certain kinds of crimes that had to be reported to  
18    Spanish authorities:  things like murder, things like  
19    witchcraft.  And there is enough documentary evidence  
20    to indicate that generally Pueblos did report those  
21    kinds of things to Spanish authorities.

22                    There was a ceremonial investment of the  
23    cane of office that took place typically every year on  
24    January 1st that symbolized bestowing the authority of  
25    the crown onto these community leaders and, therefore,

1 in theory, acting in -- you know, in the name of the  
2 crown.

3 Q. And none of those things you just  
4 described happened at Hopi after the Pueblo revolt?

5 A. Not to my knowledge.

6 Q. Was there an economic control that's been  
7 exercised over these other Pueblos?

8 A. In the pre-revolt period, or post revolt?

9 Q. Post revolt.

10 A. In the pre-revolt period -- I'll back up  
11 a little bit -- there had been demands for encomienda  
12 and tribute from Pueblo groups. After the revolt, the  
13 encomienda was never reinstated. It had been  
14 authorized. In fact, Diego de Vargas had been given  
15 an encomienda, but he never instituted it. And so  
16 those kinds of economic demands in terms of forced  
17 labor and tribute were not part of the panorama after  
18 the Pueblo revolt.

19 Q. Was there any other kind of economic  
20 control that's been exercised over those Pueblos?

21 A. Well, there would be an insistence on  
22 funneling trade preferably through trade fairs at  
23 either Bacos or Taos, someplace like that.

24 Q. And that also did not occur at Hopi; is  
25 that correct?

1           A.    I would have to look into whether Hopi  
2 showed up at Taos or not.

3           Q.    If they did show up at Taos, though, it  
4 was of their own volition to trade as opposed to being  
5 funneled there, correct?

6           A.    Yes.

7           Q.    To what extent was the preference for  
8 sedentary Indians developed based on this  
9 Spanish-Pueblo interaction of the Rio Grande Pueblos?

10          A.    The preference for sedentary  
11 agriculturalists, as part of the package, predated the  
12 Spaniards' arrival in New Mexico.

13          Q.    Okay.

14          A.    So they're using a model that was based  
15 on the sedentary agriculturalists of central Mexico,  
16 of the Andean highlands, those groups who had a  
17 political and social arrangement that was really  
18 legible to Spaniards.

19          Q.    Was it modified in any way in the context  
20 of New Mexico, adapted to specifics on the ground  
21 there, or --

22          A.    Well, yes, it was modified. One way  
23 would be something that I talked about earlier, the  
24 Pueblo league, as it became the norm in New Mexico,  
25 was larger than in some other parts of new Spain.

1           Q.    How useful do you see it -- how useful do  
2 you believe it is to use the Spanish-Indian  
3 interaction from the Rio Grande Pueblos as a model for  
4 theoretical application to Hopi?

5           A.    I'm -- I've never tried to do that.  In  
6 other words, that's not what I wrote about in my  
7 report, and --

8           Q.    Well --

9           A.    So what are you asking here?

10          Q.    Well, we're discussing a whole context of  
11 Spanish law and interaction with Indians that's all  
12 really based on the Rio Grande Pueblos and the  
13 Spanish-Indian interaction there.

14                    We're also discussing Hopi and how  
15 Spanish law might apply there in theory, as it wasn't  
16 applied in practice, in fact.

17          A.    Well, I would say in the pre-revolt  
18 period, it was applied both theoretically and  
19 practically.

20          Q.    Post revolt, though.

21          A.    Post revolt.  I would go back to that  
22 matter of perspective.  If you're looking at it from  
23 the perspective of the Spanish crown, Spanish  
24 authorities, and you haven't given up hope that the  
25 Hopis are someday going to come back into the orbit of

1 real control, then it could be a fitting model.

2 I recognize, on the other hand, that if  
3 the Hopis rejected Spanish authority, then, you know,  
4 you have a different perspective that you're dealing  
5 with here.

6 MR. STEUER: I think we're done.

7 MS. WILLARD: Let's go off the record.

8 (Discussion off the record.)

9 EXAMINATION

10 BY MR. MENTOR:

11 Q. Dr. Cutter, my name is Joe Mentor, Jr.,  
12 and I am an attorney for the Hopi Indian tribe. Have  
13 we ever discussed the content of your report?

14 A. No, we haven't.

15 Q. I have some questions about the report;  
16 some I came prepared to ask, and some came to me  
17 during the earlier part of the discussions, so they  
18 probably won't be as well organized as the previous  
19 discussion, so bear with me if I jump around a little  
20 bit.

21 First, though, I'd like to ask you, could  
22 you explain the concept of ritual possession as it was  
23 used in the Spanish colonial period?

24 A. The -- it's a practice rooted in the  
25 Middle Ages as -- especially if you take the Iberian

1 peninsula as sort of an arena for that to take place  
2 as the christian reconquest of the Iberian peninsula  
3 developed. When new areas would become part of the  
4 christian kingdom, there would be a ritual possession  
5 that would be performed, and that would symbolize  
6 formally taking a city or territory.

7 Q. Why is that important?

8 A. Because it symbolizes the sovereignty,  
9 the authority of the crown in that new territory.

10 Q. Did the Spanish government take ritual  
11 possession of the Hopi villages?

12 A. They did.

13 Q. What other -- what are the indicia of  
14 civil government in colonial New Mexico?

15 A. Excuse me?

16 Q. What are the indicia of -- or some  
17 indicia of civil government in colonial New Mexico?

18 A. Some attributes of government?

19 Q. Yes. What sort of steps -- following  
20 ritual possession, what sort of steps would the  
21 Spanish government take to establish civil government  
22 in that area?

23 A. Well, there were two different  
24 governments, especially in the 16th and 17th  
25 centuries, as envisioned by political theorists. One

1 would be a Republic of Spaniards, Republica de  
2 Espanolas. There would be a Republic of Indians,  
3 Republica de Indios. And both of them had similar but  
4 distinct organs of government.

5           Probably the most commonly talked about  
6 is the town council, the cabildo. And throughout  
7 Spanish America, the crown insisted upon having Indian  
8 communities adopt the model of a cabildo, which is a  
9 town council. And with officials elected by that  
10 community to represent that community, typically they  
11 did so with outsiders; that is, when dealing mostly  
12 with Spanish authorities.

13           Q. Would you say that the -- well, would you  
14 say that the appointment of an alcaldes mayores was  
15 another indication of the establishment of civil  
16 government?

17           A. Yeah. And that is part of the -- part of  
18 the Republica de Espanola system of government. That  
19 is, Spanish authority -- the alcaldes mayores were not  
20 indigenous people. They were not native American.  
21 They were Hispanic.

22           Q. So were alcaldes mayores appointed for  
23 the Hopi province?

24           A. There is evidence that there were  
25 alcaldes mayores appointed. The ones I know of were

1 in the pre-revolt period.

2 Q. So let me ask -- I'll step back for a  
3 second. I forgot to ask this question earlier.

4 I'm understanding that one would refer to  
5 this geographic area during the period of Spanish  
6 control as the kingdom and provinces of New Mexico.

7 A. Yes.

8 Q. Is that an accurate --

9 A. Well, not -- I wouldn't say throughout  
10 the entire colonial period. That was a phrase that  
11 was more typically used in the 16th -- excuse me --  
12 the 17th and first half of the 18th century.

13 Q. Okay. Was the Moqui territory considered  
14 a province of Mexico?

15 A. Of New Mexico?

16 Q. Uh-huh.

17 A. Under that kingdom and provinces, yes.

18 Q. Okay.

19 A. Later on, it would be -- have been  
20 considered perhaps a jurisdiction, like one that maybe  
21 wasn't controlled, but it would be a jurisdiction of  
22 the province of New Mexico.

23 Q. But it always was considered a province  
24 of the --

25 A. A distinct part of colonial New Mexico,

1 yes.

2 Q. Okay. Were there encomenderos appointed  
3 for the Hopi -- for the Moqui province?

4 A. There were.

5 MS. WILLARD: While we're pausing, could  
6 you define, Dr. Cutter, the term that was the subject  
7 of --

8 THE DEPONENT: Encomendero?

9 MS. WILLARD: Yes.

10 THE DEPONENT: That was a person who had  
11 been granted the right to collect tribute from maybe  
12 half a village or an entire village or a couple of  
13 villages. The distribution chain. But he was -- that  
14 was a way of rewarding people who were considered  
15 important in the province. Their right to collect  
16 that. The crown's tribute.

17 Q. (BY MR. MENTOR) Could you explain -- a  
18 word I see in your report is apostate. I've seen that  
19 several places. Could you explain the concept of  
20 apostasy?

21 A. I don't know that I could do that in a  
22 theologically, you know, correct way, but as it was  
23 applied in colonial New Mexico, there were Indians who  
24 rejected Catholicism, who -- typically, you see that  
25 term applied to Indians who tried to get away from

1 colonial control.

2 Q. Is that -- but that's a religious --

3 A. It's a religious -- yeah. In a strict  
4 sense, it's religious. Like a backslider.

5 MS. WILLARD: Dr. Cutter, I'll just  
6 instruct you, let me him finish the question before  
7 you answer.

8 THE DEPONENT: Excuse me.

9 MS. WILLARD: That's okay.

10 Q. (BY MR. MENTOR) Let's talk about the  
11 period after the Pueblo revolt. In your report you  
12 talk about efforts to subjugate the Hopi. Could you  
13 explain what that means to you?

14 A. What I was referring to was to bring them  
15 back into the control of the Spanish crown, both  
16 politically and spiritually.

17 Q. So let's talk about those efforts for a  
18 minute. You said that Diego de Vargas reentered the  
19 Hopi country in 1692. What was the result of Diego de  
20 Vargas' expedition?

21 MS. WILLARD: Counsel, could you provide  
22 a page number that you're referencing from the report?

23 MR. MENTOR: I'm sorry. Page 11.

24 MS. WILLARD: Thank you.

25 A. The question was what was the result --

1           Q.    (BY MR. MENTOR) I'm sorry.  So you say  
2   Don Diego de Vargas headed the reconquest and  
3   recolonization of New Mexico from 1692 to 1693 to  
4   underscore Spain's authority, he met with Pueblo  
5   leaders, and with them performed the act of ritual  
6   repossession.

7                    I assume that the act of -- well, let me  
8   just -- let me ask it this way:  Could you explain  
9   what ritual repossession means?

10           A.    Reaffirming that status as subjects of  
11   the crown.

12           Q.    And did the Hopi leaders participate in  
13   that ceremony of ritual repossession?

14           A.    As I indicate on page 11, yes, they did,  
15   except for at Oraibe.

16           Q.    You describe an expedition that took  
17   place under the leadership of Governor Felix Martinez  
18   in 1716.  And you describe the efforts of Governor  
19   Martinez, or the activities of Governor Martinez.  
20   Could you explain the exact purpose of Governor  
21   Martinez's expedition?

22                    MS. WILLARD:  Counsel, could you provide  
23   a page number?

24                    MR. MENTOR:  I'm sorry.  Pages 12 and 13.

25           A.    I believe it was to force them to come to

1 terms with the Spaniards and be reincorporated.

2 Q. (BY MR. MENTOR) Well, as I understood  
3 from your earlier discussion -- well, let me ask this  
4 question: Was the Spanish government still  
5 establishing encomienda during that period?

6 A. By 1716? No.

7 Q. When I see that you describe an account  
8 of his expedition -- of Governor Martinez's  
9 expedition, it appears to me that the strategy was to  
10 lay waste, as it says here -- quote, laying waste to  
11 all the fields and crops they may have, taking from  
12 them their herds, flocks, and horses that they may  
13 thereby feel the rigor of the punishment which they  
14 deserve for their great obstinance."

15 Is it possible that Governor Martinez was  
16 simply extracting punishment, and that this -- that  
17 this expedition was punitive in nature?

18 A. Possible. But my reading of it is that  
19 it's to punish them, of course, but with the purpose  
20 of having them submit to Spanish authority.

21 Q. Did Martinez attempt to establish a point  
22 of alcaides mayores or take any other steps to  
23 reestablish Spanish control, or did he simply punish  
24 them?

25 A. I don't know the answer to that. I don't

1 know what other steps he took.

2 Q. How about any of the other prior  
3 expeditions? The expedition of Governor Rodriguez  
4 Cubero that you describe on page 12, or the expedition  
5 of Governor Francisco Cuervo y Valdes. Were those  
6 accompanied by any effort to establish civil  
7 government in the Hopi villages, or were they simply  
8 military expeditions?

9 A. Military expeditions, much again with the  
10 purpose of trying to reestablish Spanish authority.

11 Q. How would that authority be manifested?

12 A. I'm not quite sure --

13 Q. Well, I mean, we talked earlier about the  
14 indicia of civil government. And I guess I'm  
15 wondering if there were any other -- if any of those  
16 expeditions that I described -- there are three, I  
17 believe, from 1699 through 1716. And those were --  
18 would it be inaccurate to characterize all three of  
19 those as military expeditions?

20 A. No, I don't think it would be inaccurate.

21 Q. And are you aware of any efforts on the  
22 part of the Spanish government, as part of any of  
23 those three expeditions, to establish any form of  
24 civilian -- or civil government over the Hopi  
25 villages?

1           A.    No.

2           Q.    Now, you were discussing earlier this  
3 morning another expedition. I'll have a difficult  
4 time with this name, as well. Fray Juan Sanz de  
5 Lezaun, who opined that the towns are, quote -- this  
6 is on page 15. I'm sorry. "The towns are so  
7 situated, they might soon be taken by siege force."

8                   And then -- let's see. Then in 1780 --  
9 on page 16, you describe another expedition by  
10 Governor Juan Bautista de Anza. And Bautista de Anza  
11 reported, quote, "Today we see at the province of  
12 Moqui in the last stages of its extermination."  
13 That's on page 17.

14                   Does it appear, in your opinion, that the  
15 Spanish government of colonial New Mexico could have  
16 regained the province?

17           A.    From these comments, you mean?

18           Q.    Right.

19           A.    Do I infer that they could have regained  
20 the province?

21           Q.    Or at least that it was their opinion  
22 that they could have regained the province.

23           A.    I think that there were missionaries and  
24 other people who thought from time to time that they  
25 could be drawn back into a real working relationship

1 with the crown.

2 But you have to take into consideration  
3 the context of 18th century New Mexico. There are a  
4 lot of things happening that have nothing do with the  
5 Hopis. So any forces that you might have needed to be  
6 used for other purposes than to bring the Hopi back.

7 Q. But Bautista de Anza arrived in Moqui  
8 with a military expedition. Is that correct?

9 A. That's my understanding, yes.

10 Q. Did he engage in battle with the Hopi?

11 A. I don't believe so.

12 Q. Are you aware of any efforts by governor  
13 Bautista de Anza to inflict any additional punishment  
14 on the Moqui or to establish any form of civil  
15 government over the Moqui?

16 A. No.

17 Q. Okay. I'm going to change subjects here  
18 for just a minute.

19 Early in the report you describe the  
20 early population estimates. Espejo's estimate of --  
21 I'm on page 4. Antonio de Espejo's estimate of 50,000  
22 souls, and Diego Perez de Luxan's estimate of 12,000  
23 Indians.

24 Are these sorts of estimates of -- this  
25 range, is it consistent with other estimates that

1 you're aware of? Would that be, in your opinion, an  
2 accurate estimate or a range of the population of the  
3 Moqui province?

4 A. I don't -- historical demography is not  
5 what I was asked to do, and that is not my field of  
6 expertise. I merely reported those figures to show  
7 that in the opinion of these chroniclers, there was a  
8 sizeable --

9 Q. Sizeable population?

10 A. -- population.

11 Q. Based on the reports from those early --  
12 those early expeditions, would you characterize those  
13 populations as hunter/gatherers?

14 A. No.

15 Q. And is there evidence that you have  
16 encountered that would -- could lead you to believe  
17 that they are -- that they were practicing sedentary  
18 agriculture at the time that they were --

19 A. That was my impression.

20 Q. There was some discussion earlier about  
21 the references to the difficult -- references in the  
22 Spanish reports to the difficulty in finding water  
23 sources. And you mention on page 5 that Perez de  
24 Luxan has seen or reported the presence of very deep  
25 wells, quote/unquote.

1                   Are there other sources of water that are  
2 described in the -- in the reports that you've  
3 reviewed?

4                   A.    Other than wells?

5                   Q.    Yes.  Or let me just -- I'm sorry.  I'm  
6 going to try that one again.

7                   Could you describe the water sources that  
8 are reported in these early reports?

9                   A.    I would infer that most of it is from  
10 precipitation.

11                  Q.    Are there descriptions of springs?

12                  A.    Well, on the middle -- in the middle of  
13 page 6, there is reference to Luxan traveling  
14 southward from Awatovi to a spring that's called  
15 El Ojo Triste.

16                  Q.    Are there other references to springs?

17                  A.    Yeah.  Yes, there are.  There is a  
18 reference to a fountain, a fuente, which can also be  
19 translated as a spring.  And I don't remember offhand  
20 what page that's on.

21                  Q.    When you describe the shortage of  
22 water -- or the scarcity of water in several places of  
23 these reports, you were asked to speculate as to  
24 whether the inability of the Spaniards to find water  
25 would lead them to believe that water is scarce.  Is

1 it also possible to come to the conclusion that the  
2 the Spanish expeditions were not able to find all of  
3 the water sources that were available?

4 A. That's possible.

5 Q. And you were also asked to speculate as  
6 to whether the fact that certain Navajo -- reports of  
7 discussions with Navajo mentioned that places had --  
8 that there were Spanish place names. And you were  
9 asked to speculate as to whether the existence of a  
10 place name indicated a continuous occupancy of a  
11 place. Is it also possible that -- for people to have  
12 a place name for a place they had only visited?

13 A. It's certainly possible.

14 Q. So could you explain the difference  
15 between Indios domesticos and Indios barbaros?

16 A. The best -- I think the clearest  
17 explanation is subject and non-subject Indians in the  
18 context of New Mexico.

19 Q. Were the Spanish successful at  
20 identifying the various groups of Indios barbaros  
21 within their territory?

22 A. I think it depends on the period we're  
23 looking at. In the early period, in the 16th century  
24 and probably well into the 17th -- although, there's a  
25 problem with the 17th century documentation -- maybe

1 not so -- it's not so clear who they're referring to.

2 Certainly in the 18th century, there  
3 is -- the nomenclature matches, you know, an  
4 identification that is consistent over decades.

5 Q. Are you familiar with any reports that  
6 distinguish between Ute bands and southern Paiutes,  
7 for example?

8 A. I am not aware of that. You're talking  
9 about documents from colonial New Mexico?

10 Q. Yes.

11 A. I'm not aware of that.

12 Q. On page 18, you were asked a question  
13 about whether, in yet another military expedition,  
14 Governor Jose Antonio Vizcarra had scouted First Mesa  
15 in search of Navajo livestock. Did he find Navajo  
16 livestock there?

17 A. According to the report, he didn't.

18 Q. You were asked earlier whether the Hopi  
19 practiced irrigated agriculture. And you described  
20 the irrigation systems of the Rio Grande Pueblo. What  
21 was the term you used for that?

22 A. Acequia. A-c-e-q-u-i-a.

23 Q. Isn't it true that an acequia system  
24 depends upon the availability of surface water?

25 A. Yes.

1 Q. What was the purpose of establishing a  
2 Pueblo league?

3 A. To protect indigenous communities from  
4 trespass, mostly by Spaniards.

5 Q. Would it have been necessary, during  
6 the -- at any time during the colonial period, to  
7 establish Pueblo leagues for the Hopi villages with  
8 that purpose in mind?

9 A. Doubtful.

10 Q. I'd like to talk about Spanish water law  
11 during the colonial period for just a moment. Is a  
12 merced necessary to establish a water right under  
13 Spanish colonial law?

14 A. You're referring to a merced de aguas?

15 Q. I believe so.

16 A. Because any kind of grant is a merced.  
17 So you're referring to a merced de aguas. Was that  
18 necessary?

19 Q. Yes.

20 A. No.

21 Q. Is prior use a recognized -- is prior use  
22 recognized under Spanish law?

23 A. It's one of the elements, yes, that is  
24 recognized.

25 Q. I'd like to go back to what appears to be

1 a difference of interpretation between Dr. Weber's  
2 report and Dr. Brescia's report.

3 On page 18 of Dr. Weber's report --

4 MS. WILLARD: To clarify for the record,  
5 Dr. Cutter, what is the exhibit number of Dr. Weber's  
6 report?

7 THE WITNESS: Exhibit 3.

8 Q. (BY MR. MENTOR) He quotes an article from  
9 Professor William Taylor that describes Professor  
10 Taylor's review of a number of cases of water  
11 litigation. And are you familiar with Professor  
12 Taylor's report, or with his article?

13 A. This particular article? Can we check to  
14 see what article he's referring to here?

15 (The deponent perused the exhibit.)

16 Okay. Land and Water Rights and the Vice  
17 Royalty of New Spain.

18 Q. Yes, I believe so. It's a 1975 article.

19 A. Okay. I am familiar with that.

20 Q. And --

21 MS. WILLARD: Excuse me, Counsel. Can  
22 you clarify which Taylor article we're talking about?  
23 The reason I ask is, in footnote 27 on page 16 of the  
24 Weber report, it says, "Taylor 1975." And that name  
25 of that report is different than what Dr. Cutter just

1 read. So I just want to make sure that we're talking  
2 about -- we're all talking about the same Taylor  
3 report.

4 MR. MENTOR: I'm referring to the 1975  
5 report. And if you'll give me just a minute.

6 A. I believe that's an article. Right?

7 Q. (BY MR. MENTOR) Yes. It was -- the title  
8 of the article is, Land and Water Rights in the Vice  
9 Royalty of New Spain by William B. Taylor. It was  
10 published in the New Mexico Historical Review in 1975.

11 MS. WILLARD: Okay. Thank you for the  
12 clarification.

13 Q. (BY MR. MENTOR) And, Dr. Cutter, you said  
14 you are familiar with this article and the --

15 A. I read it years ago, yes.

16 Q. And Dr. Weber quotes Taylor as saying, on  
17 the bottom of page 18 in his report, "Prior use was a  
18 type of superior right, but it did not usually serve  
19 to establish exclusive rights for the oldest user,  
20 especially if there were surplus waters."

21 Do you agree with that characterization  
22 of Spanish law?

23 A. Generally speaking, yeah, I would.

24 Q. Okay. So let me go to Dr. Brescia's  
25 report on page 16.

1 MS. WILLARD: And again, Dr. Cutter, for  
2 purposes of the record, what is the exhibit number  
3 you're looking at?

4 THE DEPONENT: Exhibit 2.

5 MS. WILLARD: Thank you.

6 Q. (BY MR. MENTOR) On pages 16 and 17,  
7 Dr. Brescia says, "Prior use could not sustain a claim  
8 to an exclusive right to use all of the water,  
9 especially in arid regions or in times of scarcity."

10 A. Where on the page are you?

11 Q. I'm at the bottom of page 16 and the top  
12 of page 17.

13 A. I see that, yes.

14 Q. So what's your opinion? Is it -- is the  
15 requirement to share a -- is the requirement for a  
16 prior user to share a water source a requirement in  
17 times of scarcity or in times of surplus?

18 A. What I gather from both those passages is  
19 that there is a judicial will to share resources. And  
20 both authors in these reports say that -- come back to  
21 the same underlying notion that there is no kind of  
22 exclusivity based on a prior use.

23 And your question, as I understand it,  
24 is, does that only apply in times of surplus or in  
25 times of scarcity. I think that is case specific, I

1 think, in the -- whatever -- if there were -- and if a  
2 formal Departamento de Aguas, where it was laid out  
3 what the apportionment would be, then it would be  
4 adjudicated that way. But in general terms, you share  
5 the scarcity as well as the surplus.

6 Q. Prior use, however, still plays a role in  
7 the allocation of water; is that correct?

8 A. Yes.

9 Q. And earlier you stated that the Spanish  
10 colonial judicial system might also favor a claim of  
11 Indios domesticos over the claim of Indios barbaros.  
12 Is that possible?

13 A. That -- that's my understanding of how  
14 things might play out. But we don't have any specific  
15 cases where that happens.

16 Q. You mentioned -- back to your report --  
17 on page 10 that a Father Nicholas Martinez opined in  
18 1664 that travelers to and from Hopi country did so at  
19 great peril. Those are your words, not his. Is that  
20 right?

21 A. That's my paraphrasing of what he had to  
22 say.

23 Q. Okay. So do we know anything about where  
24 specifically within the Hopi country he was referring  
25 to?

1           A.    I believe that he was talking about  
2    Awatovi, or Awatovi.

3           Q.    Between?

4           A.    Between Aguico, which is a Zunian Pueblo.

5           Q.    Okay.  Between Zunian and Awatovi.

6                    Was that -- do you know if that area was  
7    occupied by Hopi, that -- between Zuni and Awatovi,  
8    during that period?

9           A.    I don't know.

10          Q.    Is it possible that other Indians could  
11    have occupied -- or could have been present in that  
12    area?

13          A.    It's possible.

14          Q.    Are you familiar with a visitation by  
15    Francisco Garces in 1776?

16          A.    I'm aware of Garces and his journey, but  
17    I neglected that document.

18          Q.    Did he survive that journey?

19          A.    I don't know.

20          Q.    Were there other travelers individually  
21    or in small groups that passed through this area from  
22    the time of the Pueblo revolt until the Mexican  
23    independence?

24          A.    Is this based on my report or --

25          Q.    Any report -- any visitations by

1 Franciscans or any other non --

2 A. I believe that Dr. Kessell provided some  
3 information that would shed light on that.

4 Q. Okay. Are you familiar with a visit by  
5 Hopi elders to Zuni in 1747 that -- the purpose of  
6 which was to meet with Spanish authorities?

7 A. Are you referring to a section of  
8 Dr. Weber's report?

9 Q. I believe that's where I came across  
10 that?

11 MR. MENTOR: Can we take a break for a  
12 minute?

13 (Recess taken, 2:22 p.m. to 2:28 p.m.)

14 Q. (BY MR. MENTOR) I'm going to refer to  
15 Dr. Kessell's report, which is marked as Exhibit --

16 A. 4.

17 Q. -- 4. And the chronology -- let me ask  
18 this question: Dr. Cutter, are you familiar with the  
19 chronology included in that report?

20 A. I looked it over, yes.

21 Q. And the chronology on page 15 refers to  
22 Father Menchero's campaign. And Dr. Kessell quotes an  
23 early article he wrote to say that this campaign was  
24 an utter failure and had, as a purpose, the  
25 reconversion of the province of Moqui. Are you

1 familiar with this campaign?

2 A. I read that article.

3 Q. So was there any action taken by Hopi to  
4 prevent the campaign from venturing out from Zuni?

5 A. As I remember the article, I don't  
6 believe so.

7 Q. So it was as a result of attacks from  
8 Indios barbaros that prevented the campaign from  
9 moving forward, not from the Hopi?

10 A. Correct.

11 Q. And also there were a delegation of Hopi  
12 that professed their loyalty to the Spaniards  
13 participating in the campaign?

14 A. I am reading what is here. And it seems  
15 to suggest that, but I don't remember --

16 Q. So you haven't read any of the primary  
17 source material that --

18 A. Not for that, no.

19 Q. One other -- I've just got sort of two  
20 last lines of questions. One is, have you seen --  
21 Dr. Kessell references various maps prepared of the  
22 province of New Mexico. Are you familiar with any  
23 maps of the -- of New Mexico from this period from,  
24 say -- up to the point of Mexican independence?

25 A. Yes. I'm familiar with the ones that he

1 mentions in his report.

2 Q. And do you share his conclusion that  
3 those maps continue to show the Provincia del Moqui as  
4 part of Spanish to Mexico?

5 A. Well, that's subject to interpretation.  
6 Because they also have Provincia de Navajo.

7 Q. But they do show Provincia de Moqui?

8 A. Yes.

9 Q. You don't discuss in your report the  
10 events leading up to a treaty between Spain and -- a  
11 treaty with Navajo in 1819.

12 A. I do not.

13 Q. Are you familiar with that treaty?

14 A. I would have to go back and reread the  
15 literature about that.

16 Q. How about any of the events leading up to  
17 that signing of the treaty? No?

18 A. No.

19 MR. MENTOR: I think that's all the  
20 questions I have. Thank you.

21 THE WITNESS: You're welcome.

22 MR. DEENY: None.

23 MR. STEUER: I have a few follow-up  
24 questions.

25

1

EXAMINATION

2 BY MR. STEUER:

3 Q. Dr. Cutter, Mr. Mentor asked you about  
4 attributes of civil government -- Spanish civil  
5 government. And I wanted to ask you a few more  
6 questions about that.

7 If I understood correctly, you said Spain  
8 required a town council of these civil governments?

9 A. Yes. Uh-huh. Known as cabillo.

10 Q. Did the Hopi Tribe have a town council?

11 A. I'm not aware of that. It would -- it  
12 would seem likely in the pre-revolt period that they  
13 did.

14 Q. Post revolt?

15 A. Doubtful. That's not to say that they  
16 didn't have their own internal government, which I  
17 don't know if they had.

18 Q. And you also mentioned the alcaldes  
19 mayores?

20 A. Uh-huh.

21 Q. And that was a Spanish authority; is that  
22 correct?

23 A. Yes.

24 Q. And you said that -- if I heard  
25 correctly -- there was one appointed for Hopi

1 pre-revolt. Was there one appointed for Hopi post  
2 revolt?

3 A. To me, the evidence isn't clear. I know  
4 that some alcaldes went periodically out to Hopi. But  
5 it seems that they are alcaldes mayores of the  
6 jurisdiction of Zuni.

7 Q. You also discussed the encomendero; is  
8 that correct?

9 A. Yes.

10 Q. And that was somebody appointed to  
11 collect money, tribute?

12 A. Tribute, typically in the form of greens  
13 or cloth, whatever the fruits of the land was.

14 Q. And was there one appointed for Hopi post  
15 revolt?

16 A. Not to my knowledge.

17 Q. On page 11 and 12 of your report,  
18 Mr. Mentor was asking you about the act of possession  
19 or repossession in this context. And that was a --  
20 was that a necessary component of Spain stating its  
21 authority over --

22 A. I believe, especially at this critical  
23 juncture, the late 17th, early 18th century, it was.  
24 That was still in the political imagination that --  
25 and, actually, I called it act of repossession, but

1 it's really an act of obedience. I mean, if you look  
2 at the documents, he'll talk about the first obedience  
3 taking at such-and-such a moment, so --

4 Q. Okay. You said that they did not perform  
5 this act of repossession or obedience, if you will, at  
6 Oraibe. Is that correct?

7 A. Correct.

8 Q. So Oraibe never took the necessary  
9 prerequisites to be part of a Spanish colonial  
10 enterprise?

11 A. I know that moving -- using, by analogy,  
12 the central Pueblos, not every Pueblo was entered to  
13 do this act of first possession and then obedience.  
14 And sometimes representatives would be summoned from  
15 other Pueblos to arrive at a particular Pueblo and  
16 take part in it.

17 And I'm not -- I don't know whether some  
18 representative from Oraibe might have been present at  
19 the other acts of obedience.

20 Q. So they may or may not have participated?

21 A. They may or may not. What we do know is  
22 that Vargas didn't go to a particular Pueblo.

23 Q. With respect to the topic of prior use  
24 and how that plays a role in water determinations,  
25 does prior use equal an expanded future use?

1           A.    There is always flexibility built into  
2   the Spanish legal system, including water rights and  
3   usage.  In the context of those times, should a Pueblo  
4   go through a demographic boon, more people there, they  
5   need more water, I think it does imply a right to use  
6   the water necessary to sustain itself as a community.

7           Q.    Would that come up in the context of a  
8   future adjudication, or was it some use that was  
9   protected against another water user in that moment in  
10  time?

11          A.    Once again, you really have to get on the  
12  ground to see how things are playing out, because the  
13  Spanish legal system was very much based on  
14  contingency, and the needs of the moment compromise  
15  flexibility.

16                But I think what you're asking -- and you  
17  can correct me if I'm wrong -- is, would greater use  
18  be to the detriment of another, say, individual or  
19  another community, a Hispanic community or Pueblo  
20  community?

21          Q.    Right.  Current -- current use versus a  
22  greater expanded use.

23          A.    I think, once again, that person  
24  probably -- or that community would have established  
25  some right to use the water that would be recognized

1 in any adjudication.

2 Q. There's also been some discussion of  
3 favoring prior use, favoring sedentary communities.  
4 Favoring doesn't mean exclusive use, does it?

5 A. Not at all.

6 Q. Can you expand upon that a little bit?

7 A. It -- well, it's a pretty straightforward  
8 question. No, it's not an exclusive use.

9 MR. STEUER: I think we're done.

10 MR. MENTOR: Can I just ask -- I'll make  
11 it really short.

12 EXAMINATION

13 BY MR. MENTOR:

14 Q. Is an alcaldes mayores appointed by the  
15 Spanish government, or is it self-appointed?

16 A. No. It's appointed by the governor of  
17 the province.

18 Q. And was the encomendero system -- I  
19 thought you said when I was asking questions that that  
20 system had been discontinued after the revolt. Is  
21 that correct?

22 A. Yes.

23 MR. MENTOR: That's all the questions I  
24 have. Thank you.

25 MS. WILLARD: Scott?

1 MR. DEENY: No.

2 MS. WILLARD: Scott?

3 MR. McELROY: No.

4 WHEREUPON, the within proceedings were  
5 concluded at the approximate hour of 2:42 p.m. on the  
6 28th day of February, 2012.

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1 I, CHARLES R. CUTTER, Ph.D., do hereby  
 2 certify that I have read the above and foregoing  
 3 deposition and that the same is a true and accurate  
 4 transcription of my testimony, except for attached  
 5 amendments, if any.

6 Amendments attached ( ) Yes ( ) No

7

8

\_\_\_\_\_  
 CHARLES R. CUTTER, Ph.D.

9

10

11

12 The signature above of CHARLES R. CUTTER,  
 13 Ph.D., was subscribed and sworn to before me in the  
 14 county of \_\_\_\_\_, state of Colorado, this  
 15 \_\_\_\_\_ day of \_\_\_\_\_, 2012.

16

\_\_\_\_\_  
 Notary Public  
 My commission expires

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25 Water Rights/Little Colorado River 2/28/12 (sz)

