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IN APACHE COUNTY SUPERIOR COURT  
OF THE STATE OF ARIZONA

Civil No. 6417-201

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DEPOSITION OF: MICHAEL MANUEL BRESCIA, Ph.D.  
March 12, 2012 - Volume I

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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  
MICHAEL MANUEL BRESCIA, Ph.D., was taken on behalf of  
the Hopi Tribe at 999 Eighteenth Street, South  
Terrace, Suite 370, Denver, Colorado 80202, on March  
12, 2012, at 9:25 a.m., before Tina M. Stuhr,  
Registered Professional 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                   (At this time Mr. Mentor and Dr. Kessell  
6 were not present.)

7                   MICHAEL MANUEL BRESCIA, Ph.D.,  
8 having been first duly sworn to state the whole truth,  
9 testified as follows:

10   EXAMINATION

11 BY MS. PORTER:

12                   Q.    Good morning, Dr. Brescia. My name is  
13 Carry Porter, and I'm an attorney representing the  
14 Hopi Tribe, and my colleague, Joe Mentor, will be here  
15 shortly.

16                                   Can you state for the record your full  
17 name and address, please?

18                   A.    Michael Manuel Brescia, and I live in  
19 Tucson, Arizona, although since mid-December, I've  
20 been living in Puebla, Mexico.

21                   Q.    I assume that your attorney has reviewed  
22 with you what's going to take place today, yes?

23                   A.    Yes.

24                   Q.    But just so there won't be any  
25 misunderstanding, I'm just going to describe briefly

1 what's going to happen. The Hopi Tribe is the  
2 claimant in a water adjudication case in Arizona.  
3 Today I'm going to ask -- we're going to ask you some  
4 questions to learn information that might be relevant  
5 to the Hopi Tribe's claim.

6 My questions and your answers will be  
7 taken down by the court reporter. At the conclusion  
8 of questioning, the court reporter will transcribe the  
9 questions and answers into a booklet that will be  
10 known as your deposition and will contain my questions  
11 and your answers. Do you understand that?

12 A. Yes.

13 Q. The court reporter can't take down nods  
14 and shakes of the head, so it's important for you to  
15 answer questions audibly, all right?

16 A. Yes.

17 Q. And then clear yeses and nos, because  
18 um-hums and hum-ums don't translate well. Is that  
19 clear?

20 A. That's clear.

21 Q. When I begin a question, you might know  
22 what I'm going to ask before I finish my question, but  
23 it's easier for the court reporter to get everything  
24 down correctly if you let me finish my question before  
25 you start the answer. Is that -- will you try to do

1 that?

2 A. Yes.

3 Q. Thank you. Have you been deposed before?

4 A. I have.

5 Q. And can you tell me a little bit about  
6 that?

7 A. I was deposed in August of 2009 in the  
8 case of The State of New Mexico versus Abbott, and I  
9 was representing an Acequia association.

10 Q. An Acequia association, what's that?

11 A. It's a mouthful of Manhattans. The full  
12 name is Rio Quemado, Rio Frijoles, Rio en Medio, and  
13 the Santa Cruz Stream Systems Community Ditch  
14 Association.

15 Q. Okay. And what were you asked to --

16 A. I was the -- I was one of the historians  
17 addressing water rights under Spanish and Mexican law.

18 Q. Okay. Excellent. Thank you. So you  
19 understand that you were administered an oath by the  
20 court reporter and are testifying today under penalty  
21 of perjury, correct?

22 A. Yes.

23 Q. And do you understand that your  
24 deposition testimony has the same importance and  
25 significance that it would have if you were testifying

1 in a court before a judge and jury?

2 A. I do.

3 Q. Okay. If you don't understand the  
4 question I ask you, please don't answer it. Instead  
5 of answering the question, please tell me that you  
6 don't understand the question. Will you try and do  
7 that?

8 A. Yes.

9 Q. So if you answer a question, can I assume  
10 that you understood the question and that you were  
11 giving me your best possible answer?

12 A. Yes.

13 Q. Great. Sometimes you'll understand my  
14 question perfectly well, but you're not sure you know  
15 the answer because your answer is a guess. When your  
16 answer is a guess, would you tell me that you're  
17 guessing, please?

18 A. I will.

19 Q. Thank you. After you have answered a  
20 question, you might realize that for one reason or  
21 another you need to change an answer that you've  
22 previously given. If this happens, will you please  
23 just tell me that you need to change an earlier answer  
24 and I'll give you an opportunity to do so?

25 A. I will.

1           Q.    Thank you.  Also, if, after you've  
2    given -- hang on.

3                    If, after you've given your best answer  
4    to a question, if you some time later remember  
5    additional information that's relevant that responds  
6    to that question, if that happens, will you please  
7    tell me that you've remembered additional information  
8    that relates to an earlier question?

9           A.    I will try, yes.

10           Q.    Okay.  Great.  And are you willing and  
11   able to state all of the opinions at this deposition  
12   that you believe you will express at trial?

13           A.    Yes.

14           Q.    Do you realize that you may be prevented  
15   from giving an opinion at trial if you do not disclose  
16   it at this deposition?

17           A.    I am.

18           Q.    Thank you.  This isn't an endurance  
19   contest, so if you find yourself getting tired at any  
20   time during the deposition, please let me know and  
21   we'll talk about taking a break.  Is that all right  
22   with you?

23           A.    Yes, it is.

24           Q.    Great.  Do you have any questions about  
25   what I've covered so far?

1 A. No, I don't.

2 Q. Do you have any questions of any kind  
3 before I begin asking other questions?

4 A. No.

5 Q. Okay. Great.

6 MS. PORTER: So I'd like to go ahead and  
7 introduce Dr. Michael Brescia's CV and have it marked.

8 (Deposition Exhibit 1 was marked.)

9 Q. (BY MS. PORTER) So let's begin with your  
10 CV, which is marked as Exhibit 1. Can you please  
11 describe your current position?

12 A. Okay. My current position, I am an  
13 associate curator of ethnohistory in the Arizona State  
14 Museum at the University of Arizona, and I also have  
15 an affiliation in the Department of History at the  
16 University of Arizona where I am associate professor.

17 Q. And can you tell me a little bit about  
18 what you do as associate curator?

19 A. My -- as a faculty member at the Arizona  
20 State Museum, I have three areas of responsibilities:  
21 Research, teaching, and public outreach.

22 Q. And what areas do you do research in?

23 A. I prepare -- or I conduct research and  
24 prepare publications on the history of Mexico and the  
25 greater Southwest Spanish and Mexican borderlands

1 area.

2 Q. And do you teach in that area as well?

3 A. I also offer classes in Spanish and  
4 Mexican borderlands history, Mexican history, and  
5 North American history.

6 Q. Okay. Thank you. It looks like you also  
7 have a Ph.D. in Latin American history from the  
8 University of Arizona; is that correct?

9 A. That is correct.

10 Q. And what subject was your Ph.D. in?

11 A. I have a Ph.D. in Latin American history  
12 with specialization in the history of Mexico.

13 Q. And your master's degree at the  
14 University of Arizona, is that also in Latin American  
15 history?

16 A. That is correct.

17 Q. Did you write a thesis for either your  
18 Ph.D. or your master's?

19 A. For my Ph.D.

20 Q. And what was the subject of your thesis?

21 A. It was looking at the ecclesiastical  
22 reforms in 17th century Puebla, Mexico.

23 Q. On your CV you refer to colonial Mexico  
24 and colonial Latin America. Does that include modern  
25 day Arizona?

1 A. Yes.

2 Q. Yes. And what time period would you say  
3 your scholarship encompasses?

4 A. Well, my scholarship is broad. I've  
5 conducted research and published things on the  
6 colonial period -- what they call the colonial period  
7 in Mexican history, so from the 16th century to the  
8 early 19th century, but I've also published things  
9 that encompass from the colonial period to modern  
10 times.

11 Q. Does any of the work that you've done  
12 focus on the Hopi people specifically or is it more  
13 general in nature?

14 A. Yeah, general in nature.

15 Q. So I'm going to move on from your  
16 background a little bit and start asking you some sort  
17 of overview questions of your understanding of the  
18 case. Can you tell me, please, when you first heard  
19 about the case?

20 A. Generally I first heard about the case  
21 when I was in graduate school, just in a very general  
22 way, you know, that there's litigation going on  
23 between indigenous communities in the Little Colorado  
24 River Basin. More specifically, I heard about the  
25 case in January -- early 2006 when Mr. Harry Sachse

1 called me on the phone to ask me some questions about  
2 Hopi and Spanish water rights.

3 Q. And if you'll excuse me, I don't know who  
4 Harry Sachse is. Could you please tell me?

5 A. I believe he was the attorney that was  
6 representing Hopi.

7 Q. Okay. Thank you. I apologize. I'm  
8 relatively new to this case --

9 A. Right.

10 Q. -- so I'm not familiar with the six years  
11 of history.

12 A. Sure.

13 Q. And what did Harry Sachse ask you to do?

14 A. Well, he wanted to talk about Spanish law  
15 and how it theoretically might have applied to the  
16 Hopi.

17 Q. Um-hum. And when did the Navajo contact  
18 you?

19 A. The Navajo, let's see, was the end of  
20 2008. I don't remember. It was November or December,  
21 I believe.

22 Q. And what did the Navajo initially tell  
23 you about the case?

24 A. Well, they said to me that they were  
25 involved in litigation with the Hopi and were seeking

1 an expert in Spanish and Mexican water rights in  
2 assessing indigenous water rights under Spanish and  
3 Mexican law.

4 Q. Did you receive any other information  
5 from the Navajo attorney about the case?

6 A. No.

7 Q. Did you ask the Navajo for any additional  
8 information?

9 A. Well, they were waiting for a disclosure  
10 statement, so we really couldn't talk too much until  
11 the disclosure statement was delivered. So it was  
12 just sort of a very general conversation about Spanish  
13 and Mexican water rights and under -- you know, Hopi  
14 under the Spanish and Mexican water rights, was that  
15 accurate or what was the historical record on that.

16 Q. And when you received the disclosure  
17 statement, did you discuss the case further with the  
18 Navajo?

19 A. Sure. Absolutely. Yeah. I read the  
20 disclosure statement, and they asked for my feedback  
21 on it.

22 Q. Did they ask for anything else?

23 A. No.

24 Q. Okay. So what is your general  
25 understanding of the case between the Hopi and the

1 Navajo?

2 A. Well, at the general level, it's the  
3 general adjudication for all rights to water in the  
4 Little Colorado River system source, and more  
5 specifically, does the Hopi Tribe hold an additional  
6 water right or additional water rights with the  
7 priority date of 1848 under the Treaty of Guadalupe  
8 Hidalgo.

9 Q. Do you have any understanding of the  
10 legal theories underlying the case?

11 A. Well, I think that question is -- I think  
12 the question for me -- that was the question I was  
13 asked to address, so for me that becomes the legal  
14 theory, the larger legal question: Does the Hopi  
15 Tribe hold water rights under the Treaty of Guadalupe  
16 Hidalgo with the date of 1848?

17 Q. Thank you. So will you be offering any  
18 opinions on any other issues or subjects besides  
19 the -- what you just described?

20 A. Well, what I wrote in my reports, that's  
21 the area.

22 Q. So let's move on to your reports. Did  
23 you generate any documents besides your report --  
24 assessment of Weber's report or assessment of  
25 Kessell's report in connection with this case?

1           A.     Just -- yeah, I wrote three reports: One  
2 was based on the disclosure statement, one was an  
3 assessment of Dr. Weber's report, and one was an  
4 assessment of Dr. Kessell's report.

5           Q.     Thank you. Did you make any interim or  
6 draft reports?

7           A.     I did have drafts.

8           Q.     And did you communicate those with the  
9 Navajo attorneys?

10          A.     Yes.

11          Q.     And if so, what involvement did the  
12 attorneys have in drafting your final report?

13          A.     None. They offered editorial comment.

14          Q.     And can you describe the nature of those  
15 comments?

16          A.     Commas. There was grammatical commas  
17 missing here and there, and also the format -- the one  
18 that stands out is the format for citing law cases.

19          Q.     Are there any documents, articles, or  
20 other materials which you uncovered during your  
21 research but which did not form the bases of your  
22 opinion? In other words, did you find some supporting  
23 and some not supporting and choose to exclude --

24          A.     No.

25          Q.     Did you talk with anyone besides the

1 Navajo attorneys in preparation for your deposition?

2 A. No.

3 Q. And you're finished with your research?

4 A. Yes.

5 Q. Okay.

6 A. I haven't been asked to do any additional  
7 research.

8 MS. PORTER: Thank you. This is going to  
9 sound a little bit tedious, but I'd like to have  
10 Dr. Brescia's report entered into the record, please.

11 (Deposition Exhibit 2 was marked.)

12 MR. McELROY: Which report is that?

13 MS. PORTER: This is the one titled,  
14 "Hopi Water Rights Under the Treaty of Guadalupe  
15 Hidalgo with Special Reference to Spanish and Mexican  
16 Civil Law of Property." His first report. Thank you.

17 Q. (BY MS. PORTER) Are the opinions in this  
18 report your final professional opinion?

19 A. Yes.

20 Q. Great.

21 (Deposition Exhibit 3 was marked.)

22 Q. So Exhibit 3 is your report titled, "An  
23 Assessment of Dr. David Weber's Report on Hopi Land  
24 and Water Rights Under Spain and Mexico." Are the  
25 opinions in this report your final and professional

1 opinion?

2 A. Yes.

3 (Deposition Exhibit 4 was marked.)

4 Q. Exhibit 4 is your report titled, "An  
5 Assessment of John Kessell's Report on Hopi Land and  
6 Water Rights Under Spain and Mexico." Are the  
7 opinions in this report your final and professional  
8 opinion?

9 A. Yes.

10 Q. Did you read or otherwise review any of  
11 the other expert witness reports?

12 A. Yes.

13 Q. Which ones?

14 A. I read Dr. Kessell's report, I read  
15 Dr. Weber's report, and I also reviewed Dr. Cutter's  
16 report.

17 Q. Thank you. We'll come back to the other  
18 expert -- we'll come back to the reports in a minute.

19 Just a few more questions. Did you  
20 review any documents when you were preparing for your  
21 deposition?

22 A. What kind of documents do you mean?

23 Q. Well, anything to refresh your memory.

24 A. No. I reviewed my reports.

25 Q. You reviewed your reports -- your three

1 reports?

2 A. My three reports for this deposition.

3 Q. Did you review any notes outside of that  
4 report?

5 A. No. No. I reviewed my three reports,  
6 and I reviewed Dr. Cutter's deposition.

7 MS. PORTER: Okay. Those are all of my  
8 preliminary questions, and so if people don't mind, I  
9 would like to request a break until Joe Mentor gets  
10 here, if that's okay.

11 MR. STEUER: Sure.

12 MR. McELROY: Sure.

13 MS. PORTER: Thank you.

14 (Recess taken, 9:39 a.m. to 10:25 a.m.)

15 EXAMINATION

16 BY MR. MENTOR:

17 Q. Dr. Brescia, my name is Joe Mentor, and  
18 I'm an attorney for the Hopi Tribe, and so I know that  
19 my associate, Ms. Porter, has talked with you about  
20 your background and the events leading up to this  
21 deposition, so I'm going to ask you a little bit about  
22 your report itself.

23 First of all, you have -- you have the  
24 other reports that you've reviewed, is that correct,  
25 for this case?

1 MS. PORTER: He has his three reports.

2 A. I have my three here.

3 Q. (BY MR. MENTOR) And do you have  
4 Dr. Weber's report?

5 A. I don't have it, no.

6 MR. MENTOR: This was entered as an  
7 exhibit, I believe.

8 MS. PORTER: Well, you can enter it now.  
9 (Deposition Exhibit 5 was marked.)

10 Q. (BY MR. MENTOR) Dr. Brescia, I'm going  
11 to hand you exhibit -- what's marked as Exhibit 5, and  
12 this is a report by David J. Weber titled, "Hopi Land  
13 and Water Rights under Spain and Mexico" dated  
14 March 2009. Are you familiar with Dr. Weber's report?

15 A. Yes.

16 Q. Could you tell me -- I'm familiar with  
17 your review of Dr. Weber's report. Can you summarize  
18 the areas in which you agree with Dr. Weber?

19 A. I would say, in a general way, that  
20 Spanish law did not give an exclusive right to waters  
21 to any one party.

22 Q. Okay. Any other areas where you agree  
23 with him?

24 A. I would say that's the general sentiment  
25 of agreement.

1 Q. Any other agreements of --

2 A. It's a big report. I would just say,  
3 again, in a general way, that sentiment.

4 Q. Let me ask this question, then: Would  
5 you say that Spanish law would recognize water rights  
6 of Indian groups within the territory of New Mexico?

7 A. If they were under the effective dominion  
8 of the Spanish Empire.

9 Q. Would you say that the Navajo people were  
10 under the effective dominion of the Spanish Empire?

11 A. Well, by the -- I would say the -- by the  
12 end of the colonial period, the late 18th and early  
13 19th centuries, they would fall into that category.

14 Q. When, in your opinion, would the  
15 Navajo -- I'm just going to use the modern term  
16 "Navajo Nation" to refer to Navajo tribal groups  
17 during the colonial period, so -- or I'll use the term  
18 "Navajo." So when would you say that the Navajo came  
19 under the dominion of the Spanish Crown?

20 A. Well, territorially speaking, Spain  
21 exercised authority -- sovereignty and authority over  
22 its share of North America, but specifically over the  
23 Navajo, the late 18th and early 19th century is  
24 when we start seeing increased contact between the two  
25 entities, and there are discussions that take place

1 between the Navajo and the Spanish, treaties that are  
2 signed, lands that are given to the Navajo by the  
3 Spanish.

4 Q. Dr. Brescia, what is the -- could you  
5 explain the concept of ritual possession during the  
6 Spanish colonial period?

7 A. Well, I was not asked to address that in  
8 my report.

9 Q. Well, I'm asking you now, though. Could  
10 you explain that concept?

11 A. Um-hum. Well, generally speaking, it's a  
12 tradition that goes back to medieval Spain and that  
13 Spaniards brought over to the New World when they  
14 would come in and explore and declare lands in the  
15 name of the Spanish king. They would meet with  
16 indigenous peoples and ask them to swear allegiance to  
17 the Monarch.

18 Q. Was the act of ritual possession  
19 necessary to establish territorial sovereignty?

20 A. No.

21 Q. Are you aware of any incidents where any  
22 representative of the Spanish government exercised the  
23 ceremony of ritual possession over any part of the  
24 Hopi territory?

25 A. A ritual?

1 Q. Yes.

2 A. Ritual possession? What historians call  
3 the reconquest of New Mexico, there were episodes  
4 where -- with Diego de Vargas, the Spanish -- the  
5 Spaniard who was entrusted of taking back New Mexico  
6 after the Pueblo revolt, some Hopi going through  
7 ritual possession or repossession.

8 Q. Are you aware of any incidents of  
9 exercise of the -- of the ceremony of ritual  
10 possession prior to -- prior to that time?

11 A. Among the Hopi?

12 Q. Um-hum. Yes.

13 A. Not that I'm aware of. I don't recall.

14 MR. MENTOR: I'm going -- I'd like to  
15 mark this as an exhibit, Exhibit 6.

16 (Deposition Exhibit 6 was marked.)

17 Q. (BY MR. MENTOR) Dr. Brescia, I'm going  
18 to hand you a document marked Exhibit 6. This is a  
19 report by Dr. John Kessell prepared for this case for  
20 the Hopi Tribe, and it's called -- entitled "Hopi Land  
21 and Water Rights Under Spain and New Mexico,  
22 April 2010."

23 A. Thank you.

24 Q. Have you had a chance to review that  
25 report?

1 A. Yes, I have.

2 Q. Have you had a chance to look at the  
3 chronology that was included with Dr. Kessell's  
4 report?

5 A. Yes.

6 Q. And you've -- you say you've reviewed  
7 this chronology?

8 A. Yes, I have.

9 Q. Are you familiar with the expedition of  
10 Pedro de Tovar in 1540 to the Hopi territory?

11 A. I see it stipulated here on Page 12, but  
12 I haven't read -- I haven't read that document.

13 Q. So you're not aware that de Tovar  
14 performed the act of ritual possession?

15 A. Well, I see that Dr. Kessell has  
16 stipulated that that is what's happened.

17 Q. Right. But you were not aware of that  
18 fact?

19 A. No, not until I saw the report. I just  
20 didn't recall it.

21 Q. You saw it today or you saw it --

22 A. No. No. When I read the report for the  
23 first time. I just didn't recall when you asked me  
24 the question.

25 Q. Okay. And you see that again in 1583

1 Antonio de Espejo --

2 A. Um-hum.

3 Q. -- again performed the act of ritual  
4 possession?

5 A. Yes.

6 Q. And in 1598 Juan de Oñate exacted  
7 obedience from the Moqui -- or Hopi?

8 A. Yes.

9 Q. And then as you pointed out -- and I'll  
10 go to Page 13 of the chronology -- that Governor  
11 de Vargas in 1692 also performed the act of ritual  
12 possession?

13 A. Yes.

14 Q. Is there a difference between ritual  
15 possession and ritual repossession?

16 A. Well, I think Dr. Kessell would be the  
17 one to be able to answer how he's using it here. I  
18 guess in a general sense, the word "repossession"  
19 means they had possession, didn't -- they lost it, and  
20 then they're trying to get it back.

21 Q. So -- but as you pointed out, de Vargas  
22 did perform that act of repossession, correct?

23 A. Yes.

24 Q. Okay. Dr. Brescia, did the -- was there  
25 a Province of Moqui within the area that is -- was

1 referred to as the Spanish Kingdom in provinces of New  
2 Mexico?

3 A. It shows up on the maps that Dr. Kessell  
4 included.

5 Q. So you've had a chance to review those  
6 maps?

7 A. I have seen those maps.

8 Q. Do you -- do you have any reason to think  
9 that the Province of Moqui was not included as a  
10 province in the Kingdom of New Mexico?

11 A. No. I think it was a geographical place  
12 name for the map maker.

13 Q. And was the -- do you have any reason to  
14 think that the Spanish colonial government did not  
15 consider the Province of Moqui to be part of the  
16 Kingdom of New Mexico?

17 A. Well, it wanted it to be a part, but they  
18 never -- after the Pueblo revolt of 1680, Spain never  
19 had effective dominion -- was never able to exercise  
20 effective dominion or control over the Moqui.

21 Q. What does that mean, "effective dominion"  
22 and "control"? What do you mean by that?

23 A. To be able to exercise the complete  
24 authority and power of the Spanish Monarch, Spanish  
25 government over territory and peoples.

1           Q.    And how has that territory -- or control  
2 manifested itself?

3           A.    Well, through the whole apparatus of the  
4 Spanish colonial enterprise:  Judicially,  
5 administratively, economically, politically, and  
6 spiritually.

7           Q.    Could you be more specific about the  
8 kinds of -- or the actions that would typically be  
9 taken by the Spanish colonial government to exercise  
10 that control?

11          A.    Well, the institution of -- the  
12 establishment of Spanish institutions, the formation  
13 of indigenous governments under Spanish auspices,  
14 economic relationships, and trade, the establishment  
15 of Catholicism, the establishment -- you know, just in  
16 general, the documentary record will reflect sustained  
17 contact and interaction.

18          Q.    What is "sustained contact"?  What does  
19 that mean?

20          A.    Over time.  Interaction over time.

21          Q.    Is there any set period in which contact  
22 would need to be established, like once a month  
23 perhaps?

24          A.    Well, I mean, just -- "sustained" meaning  
25 it's consistent.  It shows up in the documentary

1 record as something that's consistent and not  
2 something that's fleeting.

3 Q. So this is a subjective term in your  
4 view?

5 A. No. No. I think generally historians  
6 will say about certain indigenous communities in the  
7 province -- or in the Colony of New Spain of what was  
8 considered sustained contact over time and those that  
9 were -- it was contact that was sporadic.

10 Q. I'm still having a difficult time  
11 understanding when you use terms like "sustained" and  
12 "sporadic." Those seem to be subjective in my mind,  
13 and so I'd like you to explain to me if that is, in  
14 fact, true or if there is some objective criteria  
15 you're using to establish or make those conclusions.

16 A. Well, again, just going back to both the  
17 primary sources and the literature written by  
18 historians of what's considered to be meaningful  
19 relationships over time, so some groups had it -- some  
20 indigenous communities had it and some did not.

21 Q. And so you're saying -- your conclusion  
22 is that there were no contacts between Hopi and the  
23 Spanish government; is that what you're saying --

24 A. No.

25 Q. -- after the Pueblo revolt?

1           A.    No.  No contacts?  No, I'm not saying  
2    that.

3           Q.    Okay.  So after de Vargas performs the  
4    act of ritual repossession, would you say that that --  
5    let's just start with 1692.  Would you say that that  
6    act of ritual repossession reestablished a  
7    governmental relationship between Hopi and the Spanish  
8    Crown?

9           A.    No.

10          Q.    Not at all?

11          A.    No.

12          Q.    Even at the moment that it was performed?

13          A.    No.

14          Q.    So it was a meaningless act in your view?

15          A.    It was not meaningful.  That's how I  
16    would put it.

17          Q.    Why was it performed?

18          A.    Well, it was a ceremonial manifestation  
19    of the reconquest of New Mexico that Diego de Vargas  
20    wanted the Pueblos to undertake.

21          Q.    Did -- are you aware of any reports or  
22    any other evidence to suggest that the Hopi did not  
23    participate or cooperate with that act of ritual  
24    repossession?

25          A.    I don't think all the Hopis participated.

1 I think it was just some, but I would have to go back  
2 and review that.

3 Q. You're not aware of any acts of defiance  
4 during the de Vargas expedition or during his  
5 performance of that ritual?

6 A. I don't recall.

7 Q. Are you aware of any circumstances in  
8 which the Spanish colonial government would have  
9 forced the relocation of nonsubjects into the  
10 Kingdom -- into the territorial jurisdiction of the  
11 Kingdom of New Mexico, other than as slaves perhaps?

12 A. Right. Well, in a general way -- I'd  
13 have to go back and review the literature. In a  
14 general way, there were efforts undertaken by the  
15 Spanish Empire in the late colonial period to relocate  
16 Apaches in the establecimientos de paz. So that's an  
17 area of -- or an example of the Spanish Empire moving.

18 Q. Would the Spanish -- did the Spanish  
19 government consider those Apache to be subjects of the  
20 crown?

21 A. No, not subjects of the crown. No.

22 Q. So the Spanish government could then  
23 kidnap nonsubjects and relocate them; is that what  
24 you're saying?

25 A. No, I'm not saying that. They were not

1 considered -- the Apaches were not considered subjects  
2 of the crown, but they were considered entities that  
3 the Spanish Crown had to deal with.

4 Q. I don't understand. What do you mean,  
5 "to deal with"?

6 A. Well, because the Apaches were raiding  
7 both Spanish and indigenous settlements. They posed a  
8 problem to, a challenge to the Spanish Empire, to the  
9 Spanish presence in North America, and at the late  
10 colonial period decisions are made at the leadership  
11 level to try to put an end to the Apache raiding and  
12 they established these so-called peace camps, the  
13 establecimientos de paz, to get the Apache to stay in  
14 one area.

15 Q. So the government of New Spain, you're  
16 saying, did not consider persons within its territory  
17 to be subject to its laws? Or maybe I should rephrase  
18 that question.

19 Would you consider -- would the Spanish  
20 government have considered all those people within its  
21 territorial jurisdiction to be subject to its laws?

22 A. Those that were under its control and  
23 effective dominion, and that was the challenge that  
24 the Apaches posed to the Spanish. They were within  
25 the territorial limits of New Spain, but they were

1 difficult to control.

2 Q. Would the Spanish colonial government  
3 have acquiesced in the presence of persons within its  
4 territorial jurisdiction without asserting or  
5 attempting to assert control over those individuals?

6 A. Well, there's a reality on the ground  
7 that's happening, all right. So instances of where  
8 there are communities within the geographical limits  
9 of the Colony of New Spain that fall within the  
10 geographical limits of the Colony of New Spain but  
11 that are outside the effective dominion and controls  
12 of Spain.

13 Q. As a theoretical matter, would the  
14 government have acquiesced in the presence of  
15 individuals within its territorial jurisdiction that  
16 were not subject to its laws?

17 A. Well, again, I think the response is very  
18 contextual depending on what part of the Spanish  
19 Empire -- what part of New Spain you're talking about  
20 and questions of manpower and resources and what was  
21 considered feasible at the time.

22 Q. Could you give me an example that would  
23 help me to understand this situation where the  
24 government acquiesced in the presence of another -- or  
25 a group of individuals who were not subject to its

1 control?

2 A. Right now, no. Nothing is coming to me.

3 Q. Is the area shown on Dr. Kessell's maps  
4 as the Province of Moqui included in the area  
5 transferred by the United -- or by the government of  
6 Mexico to the United States under the Treaty of  
7 Guadalupe Hidalgo?

8 MR. STEUER: Counsel, if we're going to  
9 discuss the maps, can you --

10 MR. MENTOR: Oh, I'm sorry.

11 MS. PORTER: I left the maps in the hotel  
12 room because we were thinking about using them  
13 tomorrow.

14 MR. MENTOR: Okay. Why don't we -- I'm  
15 sorry. I'll withdraw that question. I -- Dr. Brescia  
16 had seen the maps that were accompanying Dr. Kessell's  
17 report, and what I'd like to do, Counsel, is I will  
18 withhold questions about the maps until after the  
19 lunch break --

20 MR. STEUER: Sure.

21 MR. MENTOR: -- and then we'll get them  
22 and then put them into the record.

23 MR. STEUER: Okay.

24 MR. MENTOR: Thank you. I'm sorry.

25 Q. (BY MR. MENTOR) So I'm aware that you --

1 you share Dr. Weber's view that Spanish law did not  
2 grant exclusive rights to water, and would you -- are  
3 you suggesting that the Spanish colonial -- that  
4 Navajo enjoyed water rights under Spanish law?

5 A. Well, based on the treaties that the  
6 Navajos and the Spanish Empire negotiated at the end  
7 of the 18th and early 19th century, the competent  
8 authority, the Spanish colonial enterprise, did grant  
9 lands to the Navajo.

10 Q. So those -- in your view, that -- could  
11 you be specific about the treaties you're referring  
12 to?

13 A. Yes. Well, there's two that I cite in my  
14 first report. There's a treaty in 1819, and then in  
15 1808, a few years earlier, I mention that the Spanish  
16 ranchers and Navajos clashed over lands given to the  
17 Navajo community by the governor of New Mexico,  
18 Alberto Maynez.

19 Q. Could you tell me where in your report  
20 that you refer to the Governor Maynez in 1808?

21 A. On Page 26, lines three, four, and five.

22 Q. So you're saying that there was a land  
23 grant to the Navajo from Governor Maynez?

24 A. I don't know if it was a formal land  
25 grant. I don't recall. That particular document --

1 although I'd have to go back and review it, that  
2 particular document is more about the clash between  
3 the Spanish and the Navajo over the lands that were  
4 given to the Navajo by the governor.

5 Q. When you say "given to the Navajo by the  
6 governor," you're not aware of a land grant that  
7 granted them, so what do you mean by "given"?

8 A. Well, I haven't seen the land grant  
9 documentation. It's just that the -- in this  
10 particular document, they're referring to lands that  
11 was given to the Navajo by the Spanish -- by the  
12 Spanish governor of New Mexico.

13 Q. Well, that statement implies an  
14 affirmative act or grant by the governor.

15 A. It would seem to suggest so, but, again,  
16 I'd have to go back --

17 Q. Okay.

18 A. -- and look at that document.

19 Q. Which document are you referring to?

20 A. My footnote 45, the Spanish Archives of  
21 New Mexico, Roman numeral I.

22 Q. Did you review that document?

23 A. Yes.

24 Q. Okay.

25 A. I just don't recall the details of it.

1           Q.    Did -- did that action taken to,  
2    quote/unquote, give land to the Navajo community  
3    extend to include any lands within the Little Colorado  
4    River Basin?

5           A.    I don't know.  I don't recall.

6           Q.    So you're not aware that it did?

7           A.    Yeah, I don't remember if there were --  
8    if that particular clash between the Spanish and the  
9    Navajo included a discussion of the boundaries of  
10   those lands.  I just don't recall.

11          Q.    Are you suggesting, then, that the Navajo  
12   Nation did not own or exercise rights over land or  
13   water prior to them being awarded by the Spanish  
14   government?

15          A.    Can you repeat the question, please?

16          Q.    Are you suggesting that absent a specific  
17   grant by the Spanish government, that the Navajo did  
18   not enjoy rights to land or water?

19          A.    No.

20          Q.    So you're suggesting, then, that those  
21   rights could have existed prior to 1808?

22          A.    Well, what I'm suggesting is that from  
23   the Spanish perspective, all right, these lands given  
24   to the Navajo now are formalized and recognized under  
25   Spanish law.  Prior to that -- prior to this

1 particular -- well, I'd have to review the document  
2 again. I'm not saying the Navajos didn't have land  
3 and water. I'm saying in the recognition of Spain of  
4 those lands and water.

5 Q. I'm not sure I understood what you just  
6 said. Could you repeat that answer, please?

7 A. Um-hum. Let's see. I'm not suggesting  
8 that the Navajos didn't have land and water from their  
9 perspective, from the indigenous perspective of  
10 farming and agriculture and pastoral activities. I'm  
11 just suggesting that they're being formalized and  
12 recognized by the Spanish Crown.

13 Q. So it is possible that they could have  
14 existed prior to a grant of -- a specific grant?

15 A. Well, as I wrote in my reports, there's a  
16 general sensibility to Spanish jurisprudence that  
17 recognized that indigenous peoples had a land base  
18 before the arrival of Spaniards to the New World.

19 Q. In other words, a grant -- specific land  
20 grant is not necessary under Spanish law to establish  
21 water or land rights?

22 A. Well, that answer is much more complex.  
23 When you're dealing -- it depends on what entity  
24 you're talking about and when you're discussing it and  
25 what time period, you know.

1           Q.    Well, okay.  So let's start with 1807,  
2   and the people that we're talking about are Navajo.  
3   So would it have been necessary for the crown to have  
4   specifically granted rights to land or water for the  
5   Navajo to have enjoyed those rights to land or water?

6           A.    Well, under Spanish law, yes.

7           Q.    So, in other words, the date of first  
8   origin of Navajo water rights is 1808?

9           A.    I'd have to give sort of a qualified  
10   answer.  I'd have to go back and look at the formal  
11   peace treaty of 1786 that I mentioned in my report on  
12   Page 25.

13          Q.    Dr. Brescia, did you bring a copy of that  
14   1786 treaty with you to this deposition?

15          A.    No.  No, I didn't.

16          Q.    Did you bring a copy of the document that  
17   is referred to in the footnote on page -- in footnote  
18   45?

19          A.    No.

20                MR. MENTOR:  Can we go off the record for  
21   just a second?

22                MR. STEUER:  Sure.

23                (Discussion was had off the record.)

24          Q.    (BY MR. MENTOR)  So, Dr. Brescia, you  
25   refer to three documents in your report that might

1 define the nature and extent of Navajo water rights  
2 under the Spanish colonial government; is that  
3 correct?

4 A. I would phrase it that those documents  
5 can tell us more about the relationship between the  
6 Spanish and Navajo and the concession of lands from  
7 the Spanish to the Navajo.

8 Q. And those would be a formal peace treaty  
9 in 1786 that you referred to on Page 25 --

10 A. Right.

11 Q. -- as, one, a land grant by interim  
12 Governor Maynez to the Navajo in 1808; is that  
13 correct?

14 A. Well, again, I'd have to review that  
15 document. I don't want to call it a land grant  
16 because the way I have it phrased in my report, I'm  
17 citing a document that the Spanish and the Navajo are  
18 fighting over lands given to the Navajos by the  
19 interim governor.

20 Q. So I'm confused as to what kind of  
21 document this is.

22 A. Yeah, I'd have to go back and review it.

23 Q. So you don't remember at all what --

24 A. I don't -- well, it's certainly  
25 discussing the clash, and whether the document was

1 initiated by the Spanish or the Navajos, I'd have to  
2 go back and look at it.

3 Q. And that document is -- a citation for  
4 that document is in footnote 45 on Page 26 of your  
5 report, correct?

6 A. That's correct.

7 Q. And then you cite to a treaty in 1819  
8 between the Spanish government and Navajo, which is  
9 referred to in a publication by Dr. Weber, which is  
10 cited on footnote 44 -- 43 and 44?

11 A. Well, the footnote 44 refers to the 1819  
12 treaty between the Navajos and the Spanish, and  
13 footnote 43 refers to Dr. Weber mentioning the peace  
14 treaty in 1786.

15 Q. How do you use the abbreviation i-b-i-d?

16 A. Ibid. Ibid means -- for footnote 44,  
17 ibid means it's Dr. Weber's book Bárbaros, but a  
18 different page number.

19 Q. So, in other words, the document that  
20 the -- the citation to the Navajo treaty of 1819 is a  
21 citation to a secondary source?

22 A. That is correct.

23 Q. Did you review the treaty itself?

24 A. No.

25 Q. Did you review the peace treaty of 1786?

1 A. No.

2 Q. Did you review the document that you cite  
3 in footnote 45?

4 A. I have looked at it, yes.

5 Q. So in making the statements about the  
6 peace treaty in 1786 and the peace treaty in 1819, you  
7 did not refer to or consult any primary source  
8 materials for those conclusions?

9 A. That is correct.

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

12 THE DEPONENT: Okay.

13 (Recess taken, 11:14 a.m. to 11:20 a.m.)

14 Q. (BY MR. MENTOR) Okay. Dr. Brescia, in  
15 your report, I'd like to turn to Pages 7 and 8.

16 A. Which report?

17 Q. I'm sorry. Your report dated 2009, which  
18 is exhibit -- which one would it be, your main report?

19 A. Oh, the main one?

20 Q. Yes.

21 A. Exhibit 2.

22 Q. May I see that just a second? Yes,  
23 Exhibit 2.

24 You are referring to a document, the name  
25 of which begins with Libro and on -- I'm going to use

1 the English numbers, Libro -- on Page 8, Libro 4,  
2 Titulo 12, and Ley 5.

3 A. Okay.

4 Q. What is that referring to?

5 A. That's referring to a section of the  
6 Recopilación de las leyes de Indias.

7 Q. And could you explain what that document  
8 is?

9 A. It's a compilation of all the laws that  
10 were issued or promulgated for the Spanish Empire  
11 between the 16th century and the time of the  
12 publication of that code.

13 Q. And did that code govern the exercise of  
14 sovereignty by the Spanish territorial government of  
15 New Mexico?

16 A. It did address the issue of sovereignty.

17 Q. Could you explain that portion of the  
18 code that is referred to on Page 8 in the first  
19 paragraph?

20 A. I'm sorry, can you repeat the question?

21 Q. Could you explain that portion of the  
22 code referred to on Page 8?

23 A. Okay. Well, it's a recognition that  
24 shows up in the Recopilación de las leyes, that the  
25 Spanish Monarchy, the sovereign over North America --

1 it's a recognition by part of the Spanish -- on the  
2 part of the Spanish Monarchy that indigenous peoples  
3 held land before the arrival of the Spanish, and that  
4 royal authorities were to allow the indigenous peoples  
5 to retain such lands for themselves. And as I wrote  
6 in my report, it's not a specific land grant, but it  
7 reflects the crown's sovereign ability to define and  
8 determine the nature and scope of property ownership.

9 Q. So it would be possible, then, for an  
10 Indian group to -- or indigenous group to hold title  
11 to land under Spanish law without an explicit grant?

12 A. That is correct.

13 Q. And so that would suggest to me that the  
14 treaty of 1786 and the grant, or whatever it was, in  
15 1808 and the treaty in 1819 that we discussed for  
16 Navajo were not necessarily the only source of a  
17 recognition of Navajo rights to land?

18 A. I would say that it is a Spanish  
19 recognition and a Spanish granting of lands -- giving  
20 lands -- I'd have to look at the documents to see the  
21 terminology used -- to the Navajo.

22 Q. Did you review those documents in -- the  
23 primary -- the code itself when you prepared this  
24 summary of the code?

25 A. Yes.

1 Q. So what is tierras de pan llevar?

2 A. Tierras de pan llevar, they were  
3 irrigated lands.

4 MR. STEUER: Are you referring to a  
5 specific passage in his report, Counsel?

6 MR. MENTOR: I could. Let's see. I'll  
7 have to find it.

8 A. Page 4.

9 Q. (BY MR. MENTOR) On Page 4, and also on  
10 Page 3, I think, there is a discussion. So, I'm  
11 sorry, could you repeat your answer?

12 A. Yeah. Tierras de pan llevar generally  
13 means irrigated lands, irrigable lands. It's language  
14 that strongly implies a water right.

15 Q. Would a water right necessarily have been  
16 specifically granted as part of a tierras de pan  
17 llevar?

18 A. No. You don't need -- if the land grant  
19 documentation stipulates that the land that was being  
20 granted is a tierras de pan llevar, you did not need  
21 an additional water grant or authorization to use  
22 surface water.

23 MR. MENTOR: I'd like to go off the  
24 record just for a second.

25 (Discussion was had off the record, and a

1 lunch recess was taken, 11:29 a.m. to 1:19 p.m.)

2 (At this time Dr. Kessell was present.)

3 Q. (BY MR. MENTOR) Dr. Brescia, I'm going  
4 to show you a map that I'd like to mark as Exhibit 7.

5 (Deposition Exhibit 7 was marked.)

6 Q. Dr. Brescia, have you seen this map  
7 before?

8 A. The one I have in my hand?

9 Q. Yes.

10 A. Was this part of the -- Dr. Kessell's  
11 appendix?

12 Q. No, it was not.

13 A. I don't recall if I've seen it or not.

14 Q. Okay. Do you see the date on the -- in  
15 the legend?

16 A. Yes. "Noviembre 18 de 1769."

17 Q. In your view, is this map a relatively  
18 accurate reflection of the territory of New Mexico?  
19 And when I say "relatively accurate," I mean relative  
20 to the time period in which it was created.

21 A. Well, I'm not an expert in colonial  
22 cartography, so I don't feel qualified to speak to its  
23 geographical accurateness -- accuracy. It seems like  
24 it came out of the inspection of Marqués de Rubí, his  
25 inspection of the Northern Frontier in the

1 18th century.

2 Q. And do you see in the top center of the  
3 map an area referred to as the "Provincia De Moovi"?

4 A. Yes, I do see that.

5 Q. And in your opinion, is that a  
6 reflection -- is that a representation of the -- of  
7 the Hopi territory within the Province of New Mexico?

8 A. Well, I'm not sure. It does say  
9 "Provincia De," and then underneath the word  
10 "Provincia," a little bit further to the left, there's  
11 the word "Moovi," but below that in bigger letters is  
12 "Nabajo." So my first --

13 Q. And --

14 A. As a historian, although not an expert in  
15 cartography, I would want to ask, myself, of the  
16 source is that "Provincia De Moovi" or "Provincia De  
17 Nabajo?"

18 Q. And do you see what appear to be  
19 representations of villages --

20 A. Yes.

21 Q. -- under the --

22 A. Under --

23 Q. -- phrase "Moovi"?

24 A. Yes.

25 Q. And are those -- what would you say those

1 are -- those represent?

2 A. They seem to represent Hopi mesas.

3 Q. And is the area shown on this map within  
4 the territory of the Kingdom of New Mexico?

5 A. The wording that I can make out is  
6 "Provincia De Nuevo Mexico."

7 Q. Is that an area that the Spanish  
8 government considered to be included within the  
9 territory of New Mexico?

10 A. Which -- I'm sorry, which territory?

11 Q. The area represented on this map.

12 MR. STEUER: Counsel, are you referring  
13 to a specific area or the whole map?

14 MR. MENTOR: I'm referring to the area  
15 that could either be labeled "Provincia De Nabajo" or  
16 the "Provincia De Moovi."

17 A. Well, again, I'm not an expert on  
18 cartography. It's kind of hard to tell. They're  
19 using the same words "Provincia De," "Provincia De."  
20 It's certainly a geographical designation, the Moovi  
21 and the Navajo.

22 Q. (BY MR. MENTOR) Let me maybe ask this in  
23 a little more direct way. Were the Hopi villages  
24 included within the territory of New Mexico?

25 A. Well, it depends on what time period

1 we're talking about in any meaningful way. The map  
2 dated here 1769 is showing Moovi listed as a  
3 geographical designation as part of this map of the  
4 far Northern Frontier of New Spain. There's a larger  
5 historical context, too, that's important.

6 Q. Okay.

7 A. In other words, designation on a map  
8 doesn't necessarily translate into being -- having an  
9 effective and meaningful relationship with the Spanish  
10 Empire.

11 Q. Was the territory of the Little Colorado  
12 River Drainage part of the area that was ceded to the  
13 United States under the Treaty of Guadalupe Hidalgo?

14 A. Yes. It is my understanding that it is.

15 Q. Was that area coterminus with the area  
16 that was part of the Spanish territory of New Spain or  
17 New Mexico?

18 A. I don't think I understand what the word  
19 "coterminus" means.

20 Q. Is the area that was ceded by Mexico to  
21 the United States included in the territory that was  
22 part of the Spanish territory of New Mexico prior to  
23 Mexican independence?

24 A. Yes, I believe so.

25 Q. So are you aware of any time or any

1 occasion in which the Mexican government ever ceded  
2 any territorial jurisdiction prior to the -- from  
3 its -- time of its independence to the Treaty of  
4 Guadalupe Hidalgo?

5 A. Ceded this part on the map?

6 Q. Any part of its territory.

7 A. Would you repeat the question, please?

8 Q. Are you aware of any incident or  
9 occurrence in which the Republic of Mexico ceded any  
10 territory within its boundaries prior to the signing  
11 of the Treaty of Guadalupe Hidalgo?

12 A. Well, in 1836, Mexico lost Texas.

13 Q. Was the area of the Little Colorado River  
14 Basin part of the territory of Texas?

15 A. No.

16 Q. Are you aware of any incident or  
17 occurrence in which the Kingdom of Spain relinquished  
18 or ceded any part of the territory of New Spain to any  
19 other -- any other country?

20 A. In 1819, Spain ceded Florida to the  
21 United States in the Adams-Onís Treaty.

22 Q. And was the territory included in the  
23 Little Colorado River Drainage considered a part of  
24 Florida?

25 A. No.

1                   MR. MENTOR: Let's go off the record for  
2 just a second.

3                   (Discussion was had off the record.)

4                   Q.    (BY MR. MENTOR) So, Dr. Kessell [sic],  
5 you're not -- I'm sorry.

6                   Dr. Brescia, you're not aware of any  
7 action by Spain or New Mexico ever to relinquish  
8 sovereignty over the area included within the Little  
9 Colorado Drainage?

10                  A.    No. In fact, in my report I say Spain  
11 never relinquished its sovereignty over North  
12 America -- its portion of North America.

13                  Q.    Okay. Dr. Brescia, did you have an  
14 opportunity to review Dr. Cutter's report?

15                  A.    I did.

16                  Q.    Is it included in the exhibits?

17                  A.    No, it's not in here.

18                  (Deposition Exhibit 8 was marked.)

19                  MR. MENTOR: Do you need copies of  
20 Cutter's --

21                  MR. STEUER: I do not.

22                  MR. MENTOR: You don't have it?

23                  MR. STEUER: I do not need a copy.

24                  MR. MENTOR: Okay.

25                  Q.    (BY MR. MENTOR) Dr. Brescia, I'm going

1 to show you what is now marked as Exhibit 8, which is  
2 a report prepared by Dr. Charles R. Cutter entitled,  
3 "Documentary Evidence for Hopi Agriculture and Water  
4 Use in the Spanish and Mexican Periods," dated  
5 March 30, 2009.

6 I'm going to ask you to go to Page 6, and  
7 Dr. Cutter is referring to a -- an expedition led by  
8 Antonio de Espejo in 1582 and 1583. Are you familiar  
9 with that expedition?

10 A. Just in a very general way.

11 Q. Dr. Cutter is referring to an act of  
12 ritual possession at the Hopi village of Oraibi and he  
13 says, quote, The act of possession took place at  
14 Oraibe, as at the other Hopi villages that Espejo's  
15 group visited, a ceremony that the Europeans construed  
16 as creating a binding political relationship between  
17 the Spanish Crown and its native subjects, period,  
18 close quote.

19 Would you agree with that  
20 characterization of the act of ritual possession?

21 A. No. I didn't -- I don't think it created  
22 a binding political relationship between the Spanish  
23 Crown and the Hopi.

24 Q. What, in your opinion, was the purpose of  
25 that ceremony?

1           A.    A ceremonial -- I would characterize it  
2    as a ceremonial manifestation of Spanish sovereignty,  
3    but it was not a requirement for Spain to exercise its  
4    sovereignty.

5           Q.    So Spain could have exercised sovereignty  
6    without the act of ritual possession?

7           A.    And it did.

8           Q.    According to Dr. Cutter -- I'm reading  
9    from Page 9 of his report -- "Efforts to evangelize  
10   among the Hopi, which began in earnest in 1629 . . ."  
11   And then later he says, "Spanish intrusion" -- on  
12   Page 10 he says, "Spanish intrusion into the area in  
13   the seventeenth century was limited mainly to  
14   religious personnel and an occasional alcalde mayor."

15                    Are you aware of any other efforts prior  
16   to 1680 by the Spanish to impose civil government over  
17   the Hopi villages?

18           A.    Before 1680?

19           Q.    Yes.

20           A.    Not that I can recall.

21           Q.    Dr. Cutter discusses the history of Hopi  
22   and Spanish relations after the Pueblo revolt of 1680  
23   starting on Page 11. He indicates that Hopi people  
24   killed the missionaries who were assigned to their  
25   villages.

1 MR. STEUER: Are you still on page --

2 A. What part?

3 MR. STEUER: -- 10?

4 Q. (BY MR. MENTOR) Page 11 at the top.

5 A. Top of Page 11.

6 Q. "The Hopi peoples joined in this  
7 rebellion against Spanish Rule. Like other Pueblo  
8 groups, they killed the missionaries assigned to their  
9 villages and destroyed most vestiges of Spanish  
10 authority, including the books and manuscripts of the  
11 religious," period.

12 Are you aware of any representatives of  
13 the Spanish government who were present or who were  
14 killed during the Pueblo revolt in the Hopi villages?

15 A. Well, Franciscan missionaries.

16 Q. Right. Any representatives of the civil  
17 government?

18 A. I don't know.

19 Q. So you're not aware of any?

20 A. I'm not aware of any.

21 Q. What efforts did the Spanish government  
22 undertake specifically to restore Spanish governmental  
23 authority over the Hopi villages after 1680?

24 A. Well, apart from the ritual of  
25 repossession that you mentioned earlier in the

1 deposition, there's no sustained effort on the part of  
2 the Spanish to bring the Hopi back in nor was there  
3 any sustained effort on the part of the Hopi to be a  
4 part of the Spanish Empire.

5 Q. But the Spanish never relinquished their  
6 sovereignty over the Hopi territory?

7 A. Yeah. Spain -- as I wrote in my report,  
8 Spain never considered itself relinquishing  
9 sovereignty over North America -- the part of North  
10 America that it --

11 Q. But Spain never made any effort to  
12 reassert its civil governance over the Hopi villages?

13 A. No. There doesn't seem to be any  
14 sustained effort at all.

15 Q. Okay. Are you familiar with the  
16 expedition of Governor Félix Martínez in 1716 to the  
17 Hopi villages?

18 A. In which year?

19 Q. 1716.

20 A. Just in a general way.

21 Q. And would you say that Martínez -- on  
22 Page 13, Dr. Cutter quotes Governor Martínez  
23 describing his own battle plan to -- against the --  
24 quote, against the said Apostate Moquinos and other  
25 rebellious nations found with them, the [sic] which

1 shall consist in laying waste all the fields and crops  
2 they may have, taking from them their herds, flocks  
3 and horses, that they may thereby feel the rigor of  
4 the punishment which they deserve for their great  
5 obstinacy, period, close quote. Then he goes on to  
6 say, "Martínez carried out his promise."

7                   Is that description of his expedition  
8 consistent with your understanding of the expedition  
9 and the purpose for it?

10                  A. I just have a general understanding of  
11 it. I haven't spent any time researching it or  
12 interpreting it.

13                  Q. So would you -- could you form an opinion  
14 that this was a punitive expedition?

15                  A. I would rather have -- I would like to  
16 have more context before I come up with an  
17 interpretive statement.

18                  Q. But you're not aware of any efforts by  
19 Governor Martínez to establish any civil government in  
20 the Hopi villages following this expedition?

21                  A. I'm not aware of any, no.

22                  Q. Dr. Cutter continues describing Governor  
23 Martínez's orders to his troops "to wreak havoc on the  
24 crops and fields belonging to 'Mosonavi' and  
25 'Jongopavi.'" And then to "destroy the fields and

1 bean and squash patches as far as [they were] able to  
2 do" -- this is on Page 14 -- "which was" accompanied  
3 -- "accomplished by the entire army and Christian  
4 Indians, the said Apostates looking on from the  
5 peñoles of Gualpi, Mosonavi, and Jongopavi," period,  
6 close quote.

7 Do -- he then goes on to report that  
8 "Governor Martínez ordered other fields along the road  
9 to be likewise laid to waste," and then he says,  
10 "Satisfied that the," quote, "apostate Moqui," close  
11 quote, and other rebels had been punished, Governor  
12 Félix Martínez's force returned to the colony's  
13 heartland," period.

14 Do any of the actions described and  
15 attributed to Governor Martínez indicate to you any  
16 intention to establish civil government over the Hopi  
17 villages?

18 A. I would say at first reading -- my first  
19 reading of -- I mean, I read the report, but reading  
20 it now for the deposition, I don't see effort to  
21 establish -- again, at first reading, I don't see an  
22 effort to establish civil government.

23 Q. Okay. Let's jump ahead to 1780, and  
24 there is a description in Dr. Cutter's report starting  
25 on Page 16 of the -- of an expedition by Governor Juan

1     Bautista de Anza, and are you familiar with the 1780  
2     Bautista de Anza expedition?

3             A.     Just in a general way.

4             Q.     Dr. Cutter quotes Governor Bautista  
5     de Anza as saying, on Page 17, quote, Today we see it,  
6     bracket, the province of Moqui, close bracket, in the  
7     last stages of its extermination, period.

8                     Does it appear from this -- I mean, it  
9     appears to me from this description that the Hopi were  
10    not much in a position to resist any effort by the  
11    Spanish to reassert governmental control.  Would that  
12    be --

13                    MR. STEUER:  Is that a question?

14             Q.     (BY MR. MENTOR)  Would that be your  
15    observation?

16             A.     No.  For me to give an observation, I  
17    would have to have more primary source context, and  
18    also I'd have to do a little bit more reading in the  
19    secondary literature before I would come to a more  
20    definitive statement.  In other words, there's just  
21    not enough here for me to --

22             Q.     And you have read this report?

23             A.     Yes.

24             Q.     Okay.  And you say you would need a  
25    reference to primary source materials, is that --

1           A.    Well, I think to give a more complete  
2    answer, yeah, I would want more context.

3           Q.    There are other areas in your own report  
4    where you did not refer to primary source materials to  
5    make conclusions.  Is that -- can you explain why you  
6    would need those here and not for those areas that you  
7    described?

8           A.    Well, in -- for example, in my report  
9    where I rely on Dr. Weber's published book, I looked  
10   at that as -- and there's also questions of efficiency  
11   of time of how do I get to an archive, how do I look  
12   for things, what's published, who's publishing it,  
13   where is it being published, to make those kinds of  
14   decisions.

15          Q.    Okay.  Dr. Brescia, in your list of  
16   publications there was a -- what appears to be a book  
17   review in a publication called "Encyclopedia of the  
18   Great Plains," edited by David Wishart and published  
19   in 2004.

20          A.    It's not a book review.  It's an essay  
21   and an encyclopedia entry.

22                MR. MENTOR:  Okay.  I'd like to refer to  
23   this.  Can I have it marked as an exhibit, please?

24                        (Deposition Exhibit 9 was marked.)

25          Q.    (BY MR. MENTOR)  Dr. Brescia, in your

1 encyclopedia entry, in the second-to-the-last  
2 paragraph, in the second sentence you refer to seven  
3 principles used by judges to adjudicate water  
4 disputes.

5 A. Yes.

6 Q. Could you explain those seven principles?

7 A. Well, the seven principles come from the  
8 case law as seen and interpreted by the late  
9 Dr. Michael C. Meyer, and basically it's looking at  
10 the case law over the whole span of the colonial  
11 period and seeing what did judges -- what criteria did  
12 judges employ to come to dispute resolution, how did  
13 they adjudicate water disputes.

14 So just title is one principle. In other  
15 words, did you have title to the land? Did you have a  
16 piece of paper? Prior use, as I wrote here, not to be  
17 confused with prior preparation in the common law.  
18 When were you using the water would be -- you know,  
19 for how long you were using the water, that was one  
20 element that was taken into account. Need, an  
21 important principle, who needs the water? Who are the  
22 competitors in the region? Legal right, did you have  
23 a legal right to the water based on -- there could be  
24 a bunch of criteria. Intent, what was your intent to  
25 use the water. Noninjury to third party, that was the

1 Spanish jurisprudence way of looking at competitors in  
2 the area, particularly in a desert region. And equity  
3 in the common good, which are also important. Looking  
4 at the larger picture of social tranquility and  
5 harmony, and sort of keeping good relations on the far  
6 Northern Frontier.

7 Q. Could you elaborate on prior use as one  
8 of those principles? What does that mean?

9 A. I was referring to my first report that I  
10 wrote, Page 16, about the principle of prior use. We  
11 should not confuse it with common law understandings  
12 of first-in-time -- I'm on Page 16 -- first-in-time,  
13 first-in-right feature. I make and argue that because  
14 when you look at the case law -- well, the statutory  
15 law and the case law and Spanish jurisprudence or the  
16 Spanish colonial period, a first in time, first in  
17 right was antithetical to a system that sought equity  
18 in the common good in regions where there were scarce  
19 resources.

20 So when you see prior use in the  
21 documentation where code law comes up, it's usually  
22 antelación or uso previo, and it was one of several  
23 variables or principles that Spanish authorities took  
24 into account when they adjudicated water rights.

25 You know, there was a recognition that

1 beneficial prior use of a water source was certainly  
2 important in making a determination, but it never  
3 privileged that first-in-time, first-in-right  
4 argument. So, in other words, prior use should not be  
5 seen as synonymous with first in time, first in right.

6 Q. Meaning the right to use water to the  
7 exclusion of other --

8 A. Of others, right.

9 Q. Okay.

10 A. And I wrote in my report that "Prior use  
11 was not synonymous with oldest use; it did not  
12 necessarily convey a better right; and it did not mean  
13 that whoever had used a water source first necessarily  
14 enjoyed a superior right or was entitled to continuing  
15 use without taking into account the needs of others."  
16 So even that last part, "the needs of others," brings  
17 in another element of those seven principles, "need."  
18 So there was a bunch of principles that Spanish  
19 authorities took into account when determining water  
20 rights or adjudicating disputes.

21 Q. So you've gone to some length to explain  
22 what it doesn't mean, but I still don't understand  
23 what you think it does mean. Could you try again to  
24 explain that?

25 A. Well, literally the word "prior use," you

1 know, who was using the water -- in the parties  
2 involved, who was using the water first.

3 Q. And what significance would that have?

4 A. Well, it would be one element taken into  
5 account of -- by the judge, when did that entity  
6 arrive at the place and start using -- putting the  
7 surface water -- we're talking about surface water,  
8 put the surface water to beneficial use.

9 Q. In the encyclopedia article, you indicate  
10 that "Spanish water law survives today" because of --  
11 "in the United States because of the Treaty of  
12 Guadalupe Hidalgo." What do you mean by that?

13 A. Well, in that particular case -- or in  
14 that particular passage of the article, I'm referring  
15 to Article VIII of the Treaty of Guadalupe Hidalgo  
16 that says that property -- that the United States  
17 would respect -- or the property of every kind would  
18 be enviably respected by the United States.

19 Q. When you say "property of every kind,"  
20 is -- does that include rights that do not arise from  
21 an explicit grant?

22 A. Well, I would put it this way: When I  
23 say rights -- "property of every kind," I was thinking  
24 specifically -- or I am thinking specifically about  
25 de próprio la perfecta, de próprio imperfecta, and

1 there's also use of fructory property rights, too,  
2 that Spanish civil law property acknowledged.

3 Q. And those are rights that are -- that  
4 aren't necessarily arising from an explicit grant?

5 A. That's true.

6 Q. Okay. Would a person holding a right to  
7 be protected under Article VIII necessarily be a  
8 person eligible for U.S. citizenship at the time the  
9 treaty was executed?

10 A. Well, let me put my response this way --  
11 let me try to think back to my report. After Mexico  
12 achieved its independence from Spain in 1821, it  
13 afforded citizenship to Indian communities. At the  
14 time of the American invasion of Mexico and subsequent  
15 Treaty of Guadalupe Hidalgo, that citizenship of  
16 Native Americans, to my understanding, did not  
17 transfer over. So Indians -- Native Americans did not  
18 become citizens of the United States until 1924.

19 So the question of citizenship is a more  
20 complicated one; whereas, for the Hispanic community  
21 citizenship -- they eventually did become citizens of  
22 the United States.

23 Q. Are you aware of any rights granted to  
24 Indian communities by the Spanish or Mexican  
25 governments that have been protected under Article

1 VIII of the treaty?

2 A. Well, for example, the eastern Pueblos of  
3 the Rio Grande, most of them -- most of them did not  
4 have land grants. So that's an example of -- but the  
5 treaty protects their water right -- their land and  
6 water.

7 MR. MENTOR: Okay. I'd like to just take  
8 a break for a second and see if we can't find those  
9 documents.

10 (Recess taken, 2:08 p.m. to 2:46 p.m.)

11 (Deposition Exhibit 10 was marked.)

12 Q. (BY MR. MENTOR) Dr. Brescia, I have  
13 asked the court reporter to mark a document as  
14 Exhibit 10 that is a photocopy of notes taken that are  
15 in Spanish that are copies of documents that are  
16 included in the Spanish archives of New Mexico, which  
17 I -- I would like to know if these documents are the  
18 documents that you refer to in footnote 45 in your  
19 report.

20 And given the extensive nature of these  
21 documents and the fact they are written in cursive and  
22 antique Spanish, I realize that could be a request  
23 that you would need additional time in order to be  
24 able to authenticate. And so, if you would be willing  
25 to look at these tonight and, through counsel for

1 Navajo, provide an answer to my question whether these  
2 are the documents that you referred to in your report.  
3 Would that be okay with you?

4 A. I'm fine with that.

5 MR. MENTOR: Counsel, that's all right  
6 with you?

7 MR. McELROY: That's fine.

8 MR. STEUER: Yes.

9 MR. MENTOR: Then I have no further  
10 questions. Thank you very much for your time.

11 THE DEPONENT: Thank you.

12 MR. STEUER: Vanessa, do you want to ask  
13 any questions of Dr. Brescia?

14 MS. WILLARD: No, thank you.

15 MR. STEUER: Scott?

16 MR. DEENY: No, thank you.

17 WHEREUPON, the within proceedings were  
18 adjourned at the approximate hour of 2:49 p.m. on the  
19 12th day of March, 2012.

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25

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

6 Amendments attached ( ) Yes ( ) No

7

8

9 \_\_\_\_\_  
 MICHAEL MANUEL BRESCIA, Ph.D.

10

11 The signature above of MICHAEL MANUEL  
 12 BRESCIA, Ph.D., was subscribed and sworn to before me  
 13 in the county of \_\_\_\_\_, state of  
 14 \_\_\_\_\_, this \_\_\_\_\_ day of  
 15 \_\_\_\_\_, 2012.

16

17

18 \_\_\_\_\_  
 19 Notary Public  
 My commission expires

20

21

22

23

24

25 Water Rights/Little Colorado River, 03/12/12 (ts)

MICHAEL MANUEL BRESCIA, Ph.D.

66

REPORTER'S CERTIFICATE

STATE OF COLORADO )  
 ) ss.  
CITY AND COUNTY OF DOUGLAS )

I, TINA M. STUHR, Registered Professional Reporter and Notary Public, State of Colorado, do hereby certify that previous to the commencement of the examination, the said MICHAEL MANUEL BRESCIA, Ph.D., was duly sworn by me to testify to the truth in relation to the matters in controversy between the parties hereto; that the said deposition was taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form; that the foregoing is a true transcript of the questions asked, testimony given, and proceedings had.

I further certify that I am not employed by, related to, nor counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature this 26th day of March, 2012.

My commission expires July 28, 2013.

Reading and Signing was requested.

Reading and Signing was waived.

Reading and Signing is not required.