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IN APACHE COUNTY SUPERIOR COURT
OF THE STATE OF ARIZONA

Civil No. 6417-201

DEPOSITION OF: JOHN L. KESSELL, Ph.D.
March 13, 2012

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

PURSUANT TO NOTICE, the deposition of
JOHN L. KESSELL, Ph.D., was taken on behalf of the
Navajo Nation at 999 Eighteenth Street, South Terrace,
Suite 370, Denver, Colorado 80202, on March 13, 2012,
at 9:11 a.m., before Tina M. Stuhr, Registered
Professional Reporter and Notary Public within
Colorado.

I N D E X		
1		
2	EXAMINATION OF JOHN L. KESSELL, Ph.D.:	PAGE
	March 13, 2012	
3		
4	By Mr. Steuer	5, 188
5	By Mr. Mentor	167
6	DEPOSITION EXHIBITS:	INITIAL REFERENCE
7	Exhibit 1 "Hopi Land and Water Rights Under	8
8	Spain and Mexico, an Endorsement	
9	of and Supplement to David J. Weber's Report of the Same Title," by Dr. Kessell, April 2010	
10	Exhibit 2 "Hopi Land and Water Rights Under	24
11	Spain and Mexico," by Dr. Weber, March 2009	
12	Exhibit 3 "Barbaros: Spaniards and Their	25
13	Savages in the Age of Enlightenment," by Dr. Weber	
14	Exhibit 4 New Spain's Treaty with the Navajos,	45
15	1819	
16	Exhibit 5 "The Spanish Frontier in North	82
17	America," by Dr. Weber	
18	Exhibit 6 "Pueblos, Spaniards, and the Kingdom	85
19	of New Mexico," by Dr. Kessell	
20	Exhibit 7 "Spain in the Southwest," by	88
21	Dr. Kessell	
22	Exhibit 8 "The Mexican Frontier, 1821-1846,	99
23	The American Southwest Under Mexico," by Dr. Weber	
24	Exhibit 9 Treaty with the Republic of Mexico,	110
25	2/02/1848	
	Exhibit 10 Revised Appendix 1, 2/2012	130
	Exhibit 11 Maps, five pages	161

1	Exhibit 12	Map	179
2	Exhibit 13	Map	179
3	Exhibit 14	Map, four pages	181
4	Exhibit 15	Map	182
5	DEPOSITION EXHIBITS: (Previously Marked)		PAGE
6	(From Dr. Brescia's Deposition)		
7	Exhibit 2	"Hopi Water Rights Under the Treaty of Guadalupe Hidalgo with Special Reference to the Spanish and Mexican Civil Law of Property," by Dr. Brescia, 3/25/2009	171
8			
9			
10	Exhibit 7	Map	162
11	Exhibit 8	"Documentary Evidence for Hopi Agriculture and Water Use in the Spanish and Mexican Periods," by Dr. Cutter, 3/30/2009	168
12			
13			
14	Exhibit 9	Excerpt from "Encyclopedia of the Great Plains," 2004	176
15	Exhibit 10	Spanish Handwritten Document	22
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

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

4 * * * * *

5 JOHN L. KESSELL, 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, Dr. Kessell. My name is
11 Dan Steuer, and I represent the Navajo Nation in this
12 case. Can you state your full name and address for
13 the record?

14 A. John L. Kessell. 174 Windmill Drive,
15 Durango, Colorado 81301.

16 Q. Have you ever had your deposition taken
17 before?

18 A. Yes.

19 Q. So you probably -- and you've sat here
20 through these as well, so you have some idea of how
21 this works. I'm going to ask you some questions. If
22 you don't understand the question, please let me know
23 that and I'll try to explain it better; otherwise, if
24 you answer the question, I'll assume that you have
25 understood it.

1 You also need to make your answers
2 verbal. Nods of the head don't work. And if you need
3 a break for any reason, just let us know and we'll
4 take a break.

5 Now, off the record you had told me that
6 you took a painkiller this morning, so I just want to
7 check with you and make sure you're thinking clearly,
8 your cognitive ability is unaffected; is that correct?

9 A. I believe I'm thinking clearly.

10 Q. Can you tell me about the deposition or
11 depositions that you've had taken before?

12 A. My -- deposition one was taken during
13 the -- one phase of the Indian Claims Commission, and
14 I was retained by the Rodey firm in Albuquerque
15 representing the Navajos in the oil and gas claim, and
16 I was asked to write a report on the creation of the
17 Navajo Tribal Council.

18 Q. And when was that?

19 A. You know, I don't really remember. I
20 think sometime in the '80s.

21 Q. And you said -- the way you worded that,
22 I think, was deposition one. So there were others?

23 A. No. That's the only --

24 Q. That's the only one, all right.

25 A. That's the only one.

1 Q. So this is deposition two, then?

2 A. This is deposition two.

3 Q. Have you been an expert in litigation
4 before, other than that case?

5 A. Only that -- only that case.

6 Q. Did you testify as an expert witness in
7 that case?

8 A. Yes.

9 Q. Now, you said that was on behalf of the
10 Navajo Nation. Have you done any other work for
11 tribes?

12 A. No.

13 Q. What did you do to prepare for today's
14 deposition?

15 A. I looked back over the report I had
16 prepared in endorsement of David Weber's report, and
17 followed certain leads and just looked at some more
18 material, but mainly just reviewed what I had done
19 before.

20 Q. When you said followed some leads and
21 looked at other material, material that was cited in
22 the reports or --

23 A. Material cited in the report.

24 Q. Did you look at -- you mentioned you
25 looked at your report. Did you look at David Weber's

1 report?

2 A. Oh, yes.

3 Q. And the same thing, looked at some of the
4 material that was cited in there?

5 A. Yes.

6 Q. What about Dr. Brescia's or Dr. Cutter's
7 report?

8 A. Both.

9 Q. And also looked -- did you look at some
10 of the materials --

11 A. And also looked at some of the materials
12 they cited.

13 Q. Okay. Did you look at anything else?

14 A. Probably not. Just cited.

15 Q. Okay. Did you meet with the attorneys
16 for the Hopi Tribe to discuss today's deposition and
17 to prepare with them as well?

18 A. Yes.

19 MR. STEUER: I'm going to introduce
20 exhibit -- we're starting anew, I guess, so this is
21 Exhibit 1.

22 (Deposition Exhibit 1 was marked.)

23 Q. (BY MR. STEUER) I'm handing you
24 Exhibit 1 -- or I handed you Exhibit 1, which is
25 entitled, "Hopi Land and Water Rights Under Spain and

1 Mexico, an Endorsement of and Supplement to David J.
2 Weber's Report of the Same Title." This is the report
3 you prepared in this case?

4 A. It is.

5 Q. Can we -- on Page 26, I believe, is where
6 your CV starts, so it's Appendix 3, and it indicates
7 status of Professor Emeritus in the Department of
8 History. Are you currently teaching or --

9 A. I'm not currently teaching.

10 Q. Okay. Do you have any other current
11 employment other than the work on this case?

12 A. No, not paid employment.

13 Q. Okay. Unpaid employment?

14 A. Well, I am working on a project on the
15 mapmaker, Miera y Pacheco.

16 Q. Okay. What is the -- can you tell me
17 about that project?

18 A. Bernardo de Miera y Pacheco --

19 THE DEPONENT: Are you okay with that?

20 THE COURT REPORTER: I'm okay.

21 A. -- a Spaniard who was born in the
22 mountains of Spain in 1713, who immigrated to the New
23 World, married on the Northern Frontier in 1740, then
24 spent the remainder of his life as the most productive
25 religious artist, mapmaker, explorer, militia captain

1 in 18th century New Mexico.

2 Q. And this project, is it just a research
3 project of your own? Is it --

4 A. My own.

5 Q. Towards writing a book or --

6 A. Yes.

7 Q. Okay. And you have a master's from the
8 University of California at Berkeley; is that correct?

9 A. Yes.

10 Q. And that's in Latin American history?

11 A. Yes.

12 Q. Did you write a thesis for that?

13 A. I did.

14 Q. Do you remember the topic?

15 A. Let me correct that. No, I did not write
16 a master's thesis. There was an alternative, doing
17 two seminar papers.

18 Q. And you have a Ph.D. from the University
19 of New Mexico in Southwestern U.S. History?

20 A. Yes.

21 Q. What would you say, as a professional,
22 your areas of expertise are?

23 A. I would say the Spanish colonial
24 southwest and its extension into the Mexican period.

25 Q. Okay. In looking at your publications --

1 and I realize they're selected publications on your
2 CV -- I didn't see anything regarding Spanish law
3 or -- colonial Spanish law or water rights. Would you
4 consider yourself an expert in those fields?

5 A. No, I would not consider myself an expert
6 in Spanish legal or water history. I could cite
7 people I suggest are experts in that field. I do not
8 consider myself an expert.

9 Q. Isn't the subject of your report Spanish
10 colonial law and water rights?

11 A. It -- it is. It is, indeed, and
12 certainly as a part of the colonial southwest, land,
13 water, and law are all part of it. I just do not -- I
14 have not specialized in that. I believe, in a general
15 sense, I'm qualified.

16 Q. Okay. Other than the report that you've
17 written, are any of your publications on these topics
18 Spanish colonial law or water rights?

19 A. Actually, the book I wrote on the Spanish
20 mission church in southern Arizona deals a great deal
21 with their land grant, their -- and their water
22 rights, so it -- it touches almost everything I've
23 done.

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

25 A. From my friend, David Weber.

1 Q. And when was that?

2 A. That was three years ago.

3 Q. And what was the substance of that?

4 A. David had contracted multiple myeloma,
5 and he was getting worse. He feared he would not be
6 in any shape to be deposed, and he asked me if I,
7 indeed, would make myself available to the Hopi
8 lawyers and continue his work. And so it's not
9 something I sought, but I was very close to David
10 Weber and took this on as -- as a favor to him.

11 Q. Okay. Did he discuss the details of the
12 case to see what your opinion was to see if you agreed
13 with him?

14 A. Indeed. Indeed, he did.

15 Q. What is your general understanding of
16 what this case is about?

17 A. My general understanding is that we're
18 working toward acknowledgment of the several Hopi
19 Pueblos as sedentary agricultural communities before
20 and at the arrival of the first Spaniards in 1540.

21 Q. And what's your understanding of the
22 legal theories of this case?

23 A. Could you perhaps be more specific?

24 Q. Well, you've prepared a report in the
25 greater context of a legal proceeding. Do you have

1 any understanding of how your report would be used
2 legally?

3 A. I hope that my report would be used as
4 its written. I was asked to look at the record and
5 convey the history of the Hopi people as part of the
6 Pueblo world, and I have written rather extensively on
7 the Pueblo world, which, in my view, is coterminous
8 with the kingdom and provinces of New Mexico.

9 Q. You're familiar, I presume, with the
10 Treaty of Guadalupe Hidalgo?

11 A. Yes.

12 Q. How do you think that treaty plays a role
13 in this case?

14 A. I believe that it fully recognizes the
15 prior rights of peaceable Mexican residents at that
16 time who were brought into the United States by that
17 treaty.

18 Q. So if the Hopi Tribe could establish that
19 they had prior rights, the treaty would protect those
20 prior rights?

21 A. That is my firm conviction.

22 Q. What specifically were you asked to do in
23 this case?

24 A. I was asked to take over for David Weber.
25 I wouldn't have taken over for just anyone, but there

1 was no one in my field I respected more than David
2 Weber. His research is acknowledged far and wide as
3 deep and profound and right on, so I willingly said I
4 would take over and write an endorsement of his
5 report, and I looked thoroughly at the sources he had
6 used and found little -- virtually nothing to disagree
7 with.

8 Q. You -- after you discussed this
9 assignment with David Weber, did you talk with the
10 Hopi attorneys?

11 A. Oh, sure. Yes.

12 Q. And what did they ask you to do?

13 A. Just exactly that, to endorse -- or to
14 look over and give my weight to his report.

15 Q. Other than those -- that initial
16 discussion with David Weber and the discussion with
17 the Hopi attorneys that you just mentioned, who else
18 have you discussed this case with?

19 A. I have certainly discussed certain areas
20 of the case with the librarians at the University of
21 New Mexico Center for Southwest Research and other
22 colleagues whom I thought could lead me to sources or
23 help me pull my report together.

24 Q. Did you have ongoing discussions with
25 David Weber or did you just take his report and run

1 with it?

2 A. I took his report and ran with it. He
3 supplied me with a number of the sources he had used
4 that I didn't have in my personal library, and we did
5 discuss it and I believe -- oh. I did send him a copy
6 of my finished report, with which he was pleased.

7 Q. Did you have extensive discussions about
8 your report with him or did he just say, oh, no, it
9 looks good?

10 A. Not extensive. He was not in any shape
11 at that point.

12 Q. You mentioned earlier that you did review
13 Dr. Cutter's report, correct?

14 A. Yes.

15 Q. What did you think of his report?

16 A. I thought it was right on and answered
17 the question he was asked, and he did a fine job in
18 extracting from pretty thin documentary material the
19 references to water and the use by the sedentary Hopi
20 Indians of their -- their scarce environment. I
21 thought he did a fine job.

22 Q. Are there areas of his report that you
23 disagreed with? And I can provide you a copy of his
24 report if you'd like.

25 A. Not that I recall.

1 Q. You've obviously mentioned Dr. Weber and
2 your respect for him as a scholar. What do you think
3 of Dr. Cutter as a scholar?

4 A. I think he's a fine scholar.

5 Q. And are you familiar with Dr. Brescia's
6 work?

7 A. Yes.

8 Q. And what do you think of him as a
9 scholar?

10 A. I think he's a fine scholar.

11 Q. Other than your expert report, have you
12 prepared any other documents in connection with this
13 case?

14 A. I have collected some additional maps
15 showing the Province of Moqui as a component part of
16 New Mexico, and I believe those may have been passed
17 out yesterday.

18 Q. So you collected these additional maps.
19 Did you -- were you researching for the Hopi Tribe
20 when you came across these maps?

21 A. Both the Hopi Tribe and my mapmaker,
22 Miera y Pacheco, my project.

23 Q. Other than those maps, which, as I
24 understand it, you didn't actually prepare those maps?

25 A. Oh, no. No.

1 Q. Have you prepared any other documents?

2 A. No.

3 Q. Other than this map -- maps that you've
4 collected that you said was done both for the Hopi
5 Tribe and your own research, have you done any
6 additional work after the -- your report -- production
7 of your report?

8 A. No.

9 Q. Do you intend to do any further work on
10 this case or look at anything else in this case?

11 A. I believe that remains to be seen. I do
12 not know.

13 Q. Have you been instructed to do any
14 additional work on this case at this point?

15 A. Not at this point.

16 Q. Do you think any additional work is
17 warranted by the expert reports in this case?

18 A. I think I could find further sources
19 given time and resources.

20 Q. Do you think those further sources might
21 show something different than what you've already --

22 A. No, I don't think so. I think they would
23 very much reinforce what I have found to this point.

24 Q. You've touched on this a little bit
25 already, but how did you go about endorsing

1 Dr. Weber's report?

2 A. I read it over a number of times, and
3 then began to look at the sources he cited to see if
4 my interpretation was similar, and in every case, I
5 cannot think of an exception, I saw things the way he
6 had seen them. And his report was wonderful as far as
7 a guide to me.

8 I believe he prepared that report years
9 ago and had managed to collect a great deal of
10 material that I, given the short time I had, wouldn't
11 have been able to pull together. So it was mainly
12 looking through his sources and seeing if what he said
13 I concurred with.

14 Q. So you read all the sources that he
15 cited?

16 A. Not all the sources. I consulted most of
17 them, the great majority.

18 Q. Did you do your own independent research
19 in endorsing his report?

20 A. Oh, yes. Yes.

21 Q. The circumstances of this is obviously a
22 little odd, that we have a report by an expert that's
23 not you here, and I wanted to ask you about a few of
24 his publications. Did you read -- have you read
25 Bárbaros?

1 A. I have read and reviewed Bárbaros.

2 Q. And what do you think of that?

3 A. I think it's a superb study.

4 Q. Are there --

5 A. Extremely creative and exceptionally well
6 done.

7 Q. Are there things in that book that you
8 disagreed with?

9 A. Not that I can -- not that I can think
10 of, no. No. Really there -- I'm trying to think of
11 my review.

12 Q. I don't expect you to have an
13 encyclopedic knowledge of his book.

14 A. Sure.

15 Q. I just wanted to know if there were
16 things that stood out to you.

17 Have you read "The Spanish Frontier in
18 North America"?

19 A. I have, indeed. I have reviewed that.

20 Q. And generally speaking, did you think it
21 was a good and accurate history?

22 A. Absolutely. Absolutely. And I had my
23 own chance to write something similar, and I think I
24 was able to show a bit more of the movement from South
25 to North, from New Spain to New Mexico. David didn't

1 really deal much with the background history below the
2 current border between Mexico and the United States.
3 I dugged up some background there that I thought he
4 well could have, but other than that, I applaud his
5 work.

6 Q. And have you read "The Mexican Frontier"?

7 A. I have.

8 Q. And what's your general opinion of that,
9 as well?

10 A. It was one of the very first studies by a
11 North American historian of that short but important
12 transitional period between Mexican independence in
13 1821 and the United States' takeover in 1846 of the
14 Southwest, and it was a pioneering work and is still
15 in print and used.

16 Q. And so generally speaking, you don't --
17 do you have any disagreements that you can recall?

18 A. No. No, I don't.

19 Q. Okay. For this case, did you look at or
20 study Navajo presence and occupancy in the Little
21 Colorado Basin?

22 A. Is that -- will you give me the author?

23 Q. No. No, I'm sorry. I'm sorry. I'm not
24 a -- I shifted gears here. I apologize. I'm not
25 discussing books anymore. I'm asking you did you --

1 for this case did you study the subject of --

2 A. Oh.

3 Q. -- Navajo presence --

4 A. Yes.

5 Q. -- and occupancy in the Little Colorado
6 River Basin?

7 A. Yes, I did.

8 Q. Did you study Navajo water use in the
9 Little Colorado River Basin?

10 A. I found very little on that subject.

11 Q. Did the Hopi Tribe or their attorneys
12 provide you with any materials for your report?

13 A. No, not at all.

14 Q. You've touched on this a little bit
15 already, but can you tell me how you went about
16 preparing your report?

17 A. Further than what we've discussed? I'm
18 not sure what --

19 Q. You spoke a lot about how you endorsed
20 David Weber's report --

21 A. Right.

22 Q. -- but how did you -- you also prepared a
23 report here, so I just want to sort of know what
24 exactly -- and like I said, you have touched upon this
25 some already, but can you just talk about what you

1 did?

2 A. Sure. In some cases, I did additional
3 research and went to the primary sources. An example
4 would be this very document we talked about, and I did
5 that on a number of occasions where Dr. Weber cited a
6 primary source and said what it meant to him and went
7 and looked for myself, and so I did. I looked at a
8 number of primary and secondary sources cited by
9 Dr. Weber.

10 MR. MENTOR: Excuse me just one second.
11 Can we go off the record for one second?

12 MR. STEUER: Sure.

13 (Discussion was had off the record.)

14 Q. (BY MR. STEUER) You were referring in
15 that last answer to Exhibit 10 from Dr. Brescia's
16 deposition, correct?

17 A. Yes.

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

19 A. Yes. Yes, I did. It is my normal way
20 of --

21 Q. And were -- was that draft or drafts
22 reviewed by other people?

23 A. No, definitely not.

24 Q. So the Hopi Tribe's attorneys did not
25 review a draft of your report?

1 A. Now, that I think back, certainly the
2 present attorneys did not, but, yes, I think I did
3 send a draft back to Washington when the Sachse firm
4 was representing -- yes, I did. I did. And I really
5 said, Is this the kind of thing you're thinking of an
6 endorsement? It was a rather strange request, "Will
7 you endorse another scholar's work," and I think their
8 response simply was, "Yes, this is what we want." And
9 I remember asking, "Would it be helpful were I to
10 append several maps?" And they said, "Yes." And so I
11 appended several maps.

12 Q. Did they provide any other comments on
13 your report?

14 A. Not really.

15 Q. Prior to receiving this assignment, how
16 much did you know about Hopi and Navajo history?

17 A. I think -- I think a good bit as part of
18 the general picture of -- they certainly are both key
19 players in the entire colonial and Mexican history of
20 New Mexico, and so, yes, I think I knew a good bit.

21 Q. Had you directly written on either tribe
22 as a subject before?

23 A. I wrote directly on the Navajos for the
24 creation of the Navajo Tribal Council. I wrote
25 another report and it was published on the Navajo

1 Treaty of 1868. And my general works do include
2 numerous references to the Hopis as part of the
3 kingdom and provinces of New Mexico.

4 Q. Can you tell me a little bit about that
5 publication you just mentioned about the Navajo Treaty
6 of 1868?

7 A. That was -- I'm trying to think. It's
8 published in the "Western Historical Quarterly." I
9 wonder -- I don't -- did I cite it?

10 Q. I don't recall seeing it.

11 A. This is selective and I'll bet I didn't,
12 but it was about how the treaty came to pass, how the
13 Navajos were taken to the Bosque Redondo, what an
14 experience that was, how the peace commission came out
15 and negotiated with Navajo leaders like Barboncito,
16 and how the treaty was negotiated and put in place.

17 Q. I'm going to introduce Exhibit 2, which
18 is, "Hopi Land and Water Rights Under Spain and
19 Mexico," by David J. Weber.

20 (Deposition Exhibit 2 was marked.)

21 Q. And this is a copy of the report that you
22 endorsed?

23 A. It -- it is, indeed.

24 Q. And just briefly, on your report -- in
25 your report you had said that you completely endorse

1 and you're in full agreement with his report, and you
2 still are today, correct?

3 A. Yes.

4 Q. On Page 3 of Dr. Weber's report -- and I
5 will just apologize up front, if I occasionally refer
6 to you as the author, because that's normally the way
7 this works.

8 He mentions that the Hopis mingled and
9 resided with other Puebloans. Do you know if the
10 Hopis mingled and resided with other non-Puebloan
11 Indian groups?

12 A. There are references to people to the
13 West called the Cosninas, and I think anthropologists
14 have identified them as Havasupai or one of the Pai
15 tribes, and evidently there was some interchange
16 between the Cosninas and the Moquis, but other than
17 that, I don't know of other non-Pueblo peoples.

18 Q. So, to your knowledge, the Hopis did not
19 mingle and move amongst Navajo?

20 A. Not that I know of.

21 MR. STEUER: I'm going to introduce
22 Exhibit 3, which is selected pages from "Bárbaros:
23 Spaniards and Their Savages In the Age of
24 Enlightenment," by David J. Weber.

25 (Deposition Exhibit 3 was marked.)

1 Q. (BY MR. STEUER) On Page 16, it's the
2 first page after the title Page, Page 16 of the
3 original, about in the middle of the page it says,
4 "Navajos, Athapascans of Apache origin, seem to have
5 absorbed some Pueblos and Paiutes who became Navajos,
6 and the number of Pueblos living among Navajos was so
7 great that one scholar has suggested that Navajos 'may
8 have been Puebloans for part of their history.'"

9 Do you think he was not including Hopi in
10 that description?

11 A. "Pueblos living among Navajos." He
12 doesn't mention Hopis living among Navajos, and I
13 don't know of Hopis living among Navajos. It's
14 certainly true that especially during the period --

15 MR. MENTOR: I'm going to object to this
16 question. I think it's ambiguous because counsel has
17 shown the witness an excerpt from a book in which he's
18 referring to one scholar, but then asked the question
19 regarding the opinion -- I think you used the word
20 "he," and there's a footnote here in the introduction,
21 but there are no footnotes with the document and I
22 don't see how Dr. Kessell can answer the question
23 asking his opinion of another scholar's work without
24 knowing whether counsel is referring to the scholar
25 quoted in the text accompanying footnote 61 or if he's

1 asking that question regarding his opinion of
2 Dr. Weber, so I would like to ask if you would
3 rephrase that question.

4 Q. (BY MR. STEUER) I am asking if you
5 believe in this quote here that the reference to
6 Pueblos does not include Hopi?

7 A. It does not say so.

8 Q. Hopis would normally be considered
9 Pueblos to you?

10 A. Yes, they are part of the Pueblo world,
11 but this does not specifically say that they were
12 among those living with the Navajos.

13 Q. And to your knowledge, they are not?

14 A. To my knowledge, they are not.

15 Q. Okay. Returning to your report -- or,
16 excuse me, Dr. Weber's report, on Page 3 he mentions
17 archeological evidence of Hopi occupancy in the Little
18 Colorado River Basin. Do you know whether there is
19 any archeological evidence of ancestral Navajo
20 presence in the Little Colorado River Basin?

21 A. No, not that I'm aware.

22 Q. You're not aware of any evidence?

23 A. No, I'm not. No, I'm not.

24 Q. Do you have any expertise in archeology?

25 A. No. I am not an archeologist.

1 Q. On Page 4 of Dr. Weber's report, the
2 first full paragraph, it says that "The Hopis farmed
3 with remarkable success. They developed
4 drought-resistant varieties of corn, beans, and cotton
5 and techniques for managing water that lessened their
6 dependence on hunting and gathering."

7 What is your expertise on farming
8 techniques in general or Hopi farming techniques?

9 A. It's precious little. I have read the
10 reports of T.J. Ferguson on the agriculture of the
11 Hopi, a great big, thick report with many
12 illustrations of Hopi farming techniques, both their
13 use of water and their development of
14 drought-resistant corn, beans, and other products,
15 but, no, I am not myself an expert.

16 Q. You mentioned T.J. Ferguson's report.
17 Did that report inform you at all in endorsing
18 Dr. Weber's report?

19 A. No. That isn't the -- that wasn't the --
20 it gave me some background, and certainly I agree with
21 this statement of Weber.

22 Q. Did you read any of the other expert
23 reports in this case? I mean, we had discussed the
24 Spanish and Mexican law experts, and I -- I thought I
25 was asking about all of the experts, but it sounds

1 like, from your understanding, I was not. So any of
2 the expert reports in this case?

3 A. I did.

4 Q. And which ones did you read?

5 A. I read Charles Adams' report on the
6 archeological background. I read Peter Whiteley's
7 report, the ethnohistorian, on the ethnohistory of the
8 tribe. I read T.J. Ferguson on tree-ring dating that
9 apparently showed very little evidence of Navajo early
10 on. I read Hannah Samick's report on the U.S. period
11 of Hopi/United States relations, and Dr. Cutter's, of
12 course.

13 Q. Peter Whiteley wrote, I believe, three
14 reports. Did you read all three? Do you recall?

15 A. I read one that was about a hundred pages
16 long and cited previous reports of his that I did not
17 read. I think I read the most recent and most
18 inclusive one.

19 Q. Did you read any of the Navajo Nation
20 expert reports in this case?

21 A. No. Those weren't provided. I would
22 have been very interested.

23 Q. Did you read all of these reports before
24 preparing your report?

25 A. While I was preparing my report.

1 Q. Did they provide anything that led to the
2 opinions in your report?

3 A. Only context, I believe.

4 Q. Returning to this statement on Page 4 of
5 Dr. Weber's report, it says that they developed these
6 drought-resistant varieties of various vegetables and
7 cotton. Do you know how they developed these
8 varieties of crops?

9 A. No, I don't.

10 Q. It also, in that quote, discusses them
11 managing water. Do you know how much water they were
12 using?

13 A. No, I do not know how much water they
14 were using.

15 Q. Do you -- can you tell me what the term
16 "managing water" means?

17 A. I suppose simply making it usable,
18 thinking of such things as clearing out a spring,
19 perhaps making a catchment -- catchments for snow and
20 rainwater precipitation. I would think that's what
21 he's referring to.

22 Q. And not things like canal irrigation of
23 surface -- from surface water?

24 A. I'm not aware of any canal irrigation.

25 Q. On Page 5, the middle paragraph there, it

1 says, ". . . after the coming of Spaniards, and then
2 the arrival of Navajo and Ute raiders, Hopis had moved
3 from their vulnerable village sites below the mesas
4 and relocated atop three mesas on the southern edge of
5 Black Mesa."

6 Do you -- it mentions these -- coming of
7 the Navajo raiders. Do you think that the Navajos
8 occupied and used the Little Colorado River Basin
9 prior to 1848?

10 A. I don't think I know of specific
11 instances.

12 Q. The bottom paragraph of that page says,
13 "Like other Pueblo Indians living in the territory
14 that Mexico ceded to the United States in 1848, then,
15 Hopis had lived in Mexican territory and Mexican laws
16 applied to them." Can you tell me why Mexican law
17 applied to them?

18 A. I believe Mexican law applied to them
19 because it had never been abrogated. It had never
20 been withdrawn.

21 Q. When you say "It had never been
22 withdrawn," that doesn't -- it sort of answers the
23 question of why Mexican law still applied to them, but
24 how does Mexican law apply to them in the first place?

25 A. As a direct inheritance from Spain.

1 Q. And Spanish law?

2 A. And Spanish law, yeah.

3 Q. Moving on to Page 10 of Dr. Weber's
4 report.

5 A. Dr. Which?

6 Q. Dr. Weber's. Same report.

7 A. Okay.

8 Q. At the bottom of the page of the main
9 text you mention -- excuse me, not you, Dr. Weber
10 mentions William Taylor characterizing the
11 relationship as "a special, sometimes preferential
12 status," and I'm wondering if you can tell me, was it
13 truly preferential or is that just a way of saying
14 that Spanish law sought to avoid Indian
15 disenfranchisement?

16 A. I think it was preferential for that very
17 reason, that it sought to head off unfair treatment of
18 the Indians as Indians, and I think it's a reflection
19 of the Spaniards looking at Indians as minors before
20 the law and cutting them slack in very many different
21 areas. And I think that's simply a manifestation of
22 that view within Spanish law that Indians were minors
23 before the law.

24 Q. So that they may not be held to the same
25 standards of proof or -- I'm referring to -- well, let

1 me rephrase that.

2 If an Indian entity, Pueblo tribe, had a
3 claim to water or land that was equal in all respects
4 to a claim of a Spaniard -- and by "equal in all
5 respects" I mean, they both moved to the same place at
6 the same time, it wasn't a preexisting Pueblo village
7 or what have you -- would the Indian be preferred?

8 A. My understanding is, yes, definitely the
9 Indian would be preferred, everything else being
10 equal.

11 Q. Everything else being equal, they both
12 moved in 1800 to a new plot of land and both started
13 farming at the same time, both started irrigating and
14 there wasn't enough water for both of them, neither
15 had a better prior use or need --

16 A. You introduced moving the Indians from
17 somewhere?

18 Q. Right, I'm saying --

19 A. It's not their home?

20 Q. Right, exactly. It's not their home.

21 A. Then I would think that the judge would
22 take both sides into consideration, and there wouldn't
23 be much of a precedent -- I mean preference for the
24 Indians, except that there is in the Spanish mind that
25 idea, that Indians because they are so often taken

1 advantage of by Spaniards, that -- it would play, but
2 much less, I suspect, than were we talking about the
3 Indians' homeland.

4 Q. So based -- the way you said that, it --
5 this preference, then, is to prevent them from being
6 taken advantage of?

7 A. Exactly.

8 Q. Okay. Along those lines, in footnote 11
9 on that very same page where Dr. Weber is discussing
10 Michael Meyer's argument or observations, and he notes
11 that "Meyer observes that 'each example of
12 preferential treatment for Indians can be countered
13 with an example of prejudicial treatment against
14 them.'" And it isn't really clear if Dr. Weber or
15 you -- I guess I'm asking you: Do you disagree with
16 those examples or those observations?

17 A. I did go to the pages referred to, and I
18 do agree with Weber.

19 Q. Okay. What I'm -- I apologize. I may
20 not have made my question clear. I understand -- so
21 when you're saying you're agreeing with Weber, you're
22 agreeing with his following statement, but none of his
23 seven examples relate to water?

24 A. Yes.

25 Q. Okay. What I'm wondering is, is his

1 observation that these -- are his examples
2 incorrect -- are Meyer's examples incorrect? I
3 understand that none of them relate to water and you
4 may disagree with what his examples show in terms of
5 what ultimate conclusions one might reach from them,
6 but are his examples incorrect with respect to the
7 fact that these are examples of preferential
8 treatment, but that there's other examples of
9 prejudicial treatment?

10 A. There certainly are examples of
11 prejudicial treatment.

12 Q. On Page 11 of Dr. Weber's report, in the
13 middle of the main text -- it's all a parenthetical
14 that's italicized, and it says, "Indians who wandered
15 from place to place as nomads or semi-nomads had no
16 discrete piece of land or specific source of water to
17 protect. Hence, the Recopilación is silent on the
18 issue of protecting the lands and waters of
19 nonsedentary Indians like Apaches and Navajos, whom
20 Spaniards regarded as 'savages' -- in contrast to
21 'civilized' village-dwelling Indians like the Hopis."

22 Is it your contention that the Navajos
23 did no farming?

24 A. No, that is not my contention.

25 Q. So --

1 A. I believe they did seasonal farming.

2 Q. Would -- would seasonal farming indicate
3 a discrete piece of land that one needed to protect?

4 A. I suppose from the Navajo standpoint,
5 yes, indeed.

6 Q. And would it also include specific
7 sources of water that one might need to protect?

8 A. It could.

9 Q. So, to your knowledge, are there water
10 sources that the Navajos would have to use on a
11 regular basis?

12 A. In their seasonal migrations, yes, I'm
13 sure that's true.

14 Q. Do you know if they had -- the Navajos
15 had permanent dwelling structures?

16 A. Repeat.

17 Q. Permanent dwelling structures.

18 A. The pueblitos referred to in Navajo
19 country were presumably permanent structures.

20 Q. Do you know of any other examples?

21 A. Some of the -- no, I really -- I really
22 don't know specific examples.

23 Q. Do you know where those pueblitos are?

24 A. They're pretty much scattered over --
25 mostly in the Dinétah, the original traditional Navajo

1 area south of the San Juan River in current
2 northwestern New Mexico.

3 Q. Do you know if any of them are located in
4 the Little Colorado River Basin?

5 A. No, I don't.

6 Q. What does it mean to be a "savage"?

7 A. In the Spanish --

8 Q. In the usage here --

9 A. In the usage here --

10 Q. -- on Page 11.

11 A. -- it was someone who was unrooted, not
12 sedentary, not living in what a European would judge a
13 civilized urban setting.

14 Q. Are there shepherds in Spanish society?

15 A. Oh, yes.

16 Q. Do shepherds live in an urban setting or
17 do they move around?

18 A. Some, indeed, move around.

19 Q. Are they still considered part of Spanish
20 society?

21 A. They are.

22 Q. But Indians who did that, were not?

23 A. Indians who did that were not, and I
24 would suggest in Spanish history, gypsies who did
25 that, whom one might relate to the situation,

1 non-Spanish ethnic peoples in Spain, they were
2 considered Bárbaros as well.

3 Q. How -- the term "savage," obviously, in
4 our modern language has a lot of connotations. How
5 did Spain interact with these savages? Was it always
6 enemies fighting?

7 A. No. I think that the main reaction was,
8 We will civilize them. We will settle them. We will
9 Christianize them, we will make civilized subjects,
10 tax-paying subjects of the Crown out of these peoples.

11 Q. And how did they go about doing that?

12 A. I think a variety of ways, but frequently
13 on the Northern Frontier, a missionary would
14 proceed -- precede the settlers and would make an
15 effort to settle wandering peoples in an area. It
16 could be reversed. You could have a Spanish military
17 presence first with -- always with missionaries on
18 board to, indeed, convert the peoples.

19 So it worked a number of ways, but I
20 think basically the idea was until such people were
21 proven indomitable, that the effort was made to
22 civilize them.

23 Q. Did they -- did the Spanish give these
24 savages gifts?

25 A. Oh, yes. Yes.

1 Q. Did they trade with them?

2 A. Yes.

3 Q. On a regular basis did these things
4 happen, gift giving and trade?

5 A. Yes. Yes.

6 Q. And those things happened regularly with
7 the Navajo?

8 A. Not so regularly because the Navajo
9 proved rather indomitable. There were efforts,
10 indeed, to missionize the Navajo peoples, but they
11 were pretty much rejected by the Navajos.

12 Q. And, yet, there were treaties entered
13 with the Navajos, correct? Spanish treaties with the
14 Navajos.

15 A. Not until the late 18th century. I'm
16 wrong about that. Let me back up.

17 There were what have been probably too
18 formally looked at as treaties. There were certainly
19 agreements with Navajo outfits all through the
20 18th century. There was a period of relative peace
21 between Spaniards and Navajos from the 1720s to the
22 1770s, and during that period, there were certain
23 headmen of certain Navajo outfits, but there were
24 dozens and dozens and dozens. So we're not talking
25 about a collective Navajo Nation, but with members,

1 yes, there were negotiations that have been looked
2 upon as treaties.

3 Q. So when we say -- in this context, in
4 this time period, when we use the term "Navajo," it's
5 not necessarily the entire group of Navajo, it's
6 different?

7 A. No, it is not. It's a very large group
8 speaking a common language, but many, many, many
9 family outfits who are constantly moving and
10 negotiating among themselves. There are times when
11 they fight over areas among themselves.

12 Q. And similarly, I guess, I should ask when
13 we say "Hopi" as one entity, they aren't really one
14 entity at this time period either, are they?

15 A. They are not one entity. They are,
16 though, identifiable, for example, on Spanish maps as
17 located in six or seven distinct sedentary communities
18 and, hence, are part of the Pueblo world.

19 Q. But each individual community has its own
20 government or decision making --

21 A. Has it's own clans and -- yes.

22 Q. On the same page, Page 11, and I believe
23 it's part of footnote 12, it's kind of -- there's a
24 quote in the middle of the footnote area. "It is
25 clear from the whole tenor of the Spanish and Mexican

1 laws, whether in the form of Pueblos or ranchos, that
2 the Indians are entitled in equity and good
3 conscience, and even according to the strict rigor of
4 the laws, to all the lands they have or have had in
5 actual possession for cultivation, pasture, or
6 habitation, when such domain can be ascertained to
7 have had any tolerably well-defined boundaries."

8 Now, just so -- this is a quote from
9 Frederick Hall, I believe. Do you agree with that
10 quote?

11 A. I do.

12 Q. Can you -- what is a "rancho"?

13 A. That's a very slippery term, "rancho,"
14 but it is usually a smaller property than, for
15 example, an estancia, or a hacienda. It's a smaller
16 property. Usually a one-family property, I would say.

17 Q. And it says that -- it talks about "have
18 had an actual possession when that domain can be
19 ascertained to have had any tolerably well-defined
20 boundaries." How -- what exactly does that mean? How
21 well defined do those boundaries need to be?

22 A. By our standards, I suspect the
23 boundaries are always very, very imprecise. In the
24 boundaries of New Mexico, for example, in only one
25 area, the south, is it distinct where the boundary of

1 New Mexico is. The -- when it came to the law and you
2 had two groups disputing land and water, then there
3 needed to be precision, and they used their cordels of
4 50 varas to measure precisely. But in many cases,
5 they're not very precise. It's only when you have a
6 disagreement.

7 Q. So when it says "tolerably well-defined
8 boundaries," that "well-defined" isn't very well
9 defined?

10 A. It's not very well defined.

11 Q. But it has to be lands that they have or
12 had in actual possession for cultivation, pasture, or
13 habitation?

14 A. Let's see here. Yes. Yes, I think so.
15 It's for those reasons.

16 Q. So an entity wouldn't be able to claim,
17 you know, 100 square miles of land if they weren't
18 actually cultivating, using it for pasture or
19 habitation?

20 A. True. True.

21 Q. Is the concept of the Pueblo league sort
22 of a fictional manifestation of this boundary?

23 A. No. The Pueblo league, as applied in New
24 Mexico, is definitely not a fiction.

25 Q. I'm sorry. What I mean is -- the Pueblo

1 league, as I understand it, is a standard that's
2 used --

3 A. Yes.

4 Q. -- to apply to villages --

5 A. Yes.

6 Q. -- to give them a land base, correct?

7 A. Yes.

8 Q. It, then, defines the boundaries of their
9 land base, correct?

10 A. It does.

11 Q. So in that sense, that's what I mean. Is
12 the Pueblo league, essentially, the -- the mechanism
13 to give them these tolerably well-defined boundaries
14 that's discussed in this?

15 A. It is the legislative basis for a minimum
16 amount of land, and it does not have to be set out in
17 a written document. It is simply in the law that as
18 an Indian Pueblo, it's a minimum. That's their
19 minimum. They can well be using and improve their
20 using much more than that 17,000 acres that is a
21 square league, but it -- it definitely does function
22 in New Mexico simply as in the law, and only when
23 challenged would a Pueblo go out and have it measured
24 and recorded.

25 Q. To have land greater than the one league

1 in each direction, you would have to make some
2 demonstration that you were entitled to that larger
3 boundary, correct?

4 A. Yes.

5 Q. If I understand what you just said.

6 Now, you said it's a minimum. Are there
7 circumstances where Pueblos did not get the full
8 league?

9 A. I don't know of any that appealed for a
10 land base who didn't get that amount.

11 Q. Using this -- looking again at this quote
12 that we've been discussing here, did the Navajo have
13 any recognizable boundaries?

14 A. From time to time in documents there are
15 references to imprecise boundaries.

16 Q. I'm not sure what documents you might be
17 referring to. What types of documents?

18 A. Simply the documentary record for the
19 Spanish period.

20 Q. Letters and reports and that type of
21 thing?

22 A. Yes. Yes. Or, for example, diaries of
23 expeditions.

24 Q. Did Spain, as a governmental entity, ever
25 recognize Navajo boundaries?

1 A. I don't believe in any formal way at all.

2 MR. STEUER: Pardon me for a second here.

3 Can you mark this?

4 (Deposition Exhibit 4 was marked.)

5 Q. (BY MR. STEUER) What I've handed you
6 here is a printout of a translation of "New Spain's
7 Treaty with the Navajos of 1819." And I'd like to
8 point you to Page 3 of this printout. Let me
9 backtrack here.

10 Take a little bit of time to look at --
11 let's start at the beginning here. And you're
12 familiar with this 1819 treaty with the Navajos?

13 A. I am.

14 Q. Okay. I would like you to just look at
15 it -- look over it. It's fairly short. You don't
16 have to read the entire thing, but does this appear to
17 be the treaty -- the printout of the treaty?

18 A. It appears to be the treaty.

19 Q. Okay. So on Page 3, Paragraph 12 reads
20 "The line remains established on the old footing
21 without alteration as far as Canyon Largo, the mouth
22 of Chaco Canyon and Bluewater, lands which the
23 livestock of the province has generally reached in
24 past years, in which peace happily reigned, and to
25 which they will arrive now, without passing the set

1 limits."

2 Does that seem to be a recognition by
3 Spain of boundaries of Navajo territory?

4 A. It does indeed.

5 Q. And when it discusses "The line remains
6 established on the old footing," does that read to you
7 as a recognition that this has been a boundary that's
8 been understood before?

9 A. Yes.

10 Q. Can you tell me what you -- what you
11 think this actually describes, how you would read this
12 as a description of the boundary?

13 A. Every time I drive from Durango to
14 Albuquerque, I cross Canyon Largo, and it's up in
15 northwestern New Mexico. Chaco Canyon -- I also pass
16 the road going into Chaco Canyon. I looked up Agua
17 Azul because I wondered if it could possibly be in the
18 drainage of the Little Colorado. It, too, is in New
19 Mexico, and Canyon Largo is very long, and the mouth
20 of Chaco Canyon is pretty specific, and Bluewater is
21 pretty specific, but definitely if we had the -- that
22 wonderful map that the AAA has done on the Indian
23 southwest, we could kind of draw a line to show this.

24 Q. And it would -- it would show a line,
25 correct, not an enclosed area?

1 A. It would show a line, yes.

2 Q. Would you -- is it a north/south line,
3 generally speaking?

4 A. Yes. It -- in my view, it would be more
5 northeast to southwest, more of a diagonal.

6 Q. Would you interpret this description as
7 setting a boundary on one side of the Navajo
8 territory?

9 A. Yes. Yes.

10 Q. Would you -- to your knowledge, are
11 Navajos supposed to stay to the east of this line or
12 to the west of this line?

13 A. They're supposed to stay to the west of
14 the line.

15 Q. So Navajo territory extends west from
16 this line --

17 A. From this line.

18 Q. -- discussed here?

19 A. Yeah.

20 Q. This passage does not describe the
21 western boundary of Navajo territory, does it?

22 A. No.

23 Q. Do you know what the western boundary of
24 Navajo territory was?

25 A. No, I don't. I think that's a very

1 important question.

2 MR. STEUER: Does this seem like a good
3 time for a break?

4 MR. McELROY: Yes.

5 MR. STEUER: Let's take a break.

6 (Recess taken, 10:30 a.m. to 10:48 a.m.)

7 MR. STEUER: Back on the record.

8 Q. (BY MR. STEUER) Can you turn to Page 12
9 of Dr. Weber's report? There's a discussion on
10 Page 12 and 13, and it's also in footnote 18 on
11 Page 13 of sobra rights. Can you explain the
12 implications of this concept in Spanish law?

13 A. Sobra simply means surplus, what's left
14 over. In fact, Spaniards have sobras for supper, what
15 was left over from last night. It's the excess, and
16 frequently in those rare grants that did specify
17 water, they make provision for the use of agua
18 sobrantes, waters that are left over.

19 An example cited by both sides is the
20 case of Taos Pueblo and Arroyo Seco, that the Taos
21 enjoyed the water, but if there was excess water, then
22 the settlers of the community of Arroyo Seco could use
23 it. Sobrante is the water that's not being used.

24 Q. In Dr. Weber's report, he seems to be
25 using it in a slightly different context than that.

1 As I understood it -- and perhaps you can explain to
2 me if my understanding is incorrect. As I understood
3 it, he was using it as an entity would get the rights
4 to the water they were using and to excess, and to the
5 sobra, the surplus. Did I understand that
6 incorrectly?

7 A. I suppose that sobrantes could be
8 temporarily legislated one way or another. It's just
9 that excess, and it could be that someone did get the
10 use of -- of average water, and then sobrantes as
11 well.

12 Q. Let me point you to the language in his
13 report. It starts at the -- the last basic line of
14 Page 12 in the main text, and it says, ". . . its use
15 in Law 18 is clear: Indian communities should have
16 surplus land and water, enough for future as well as
17 present needs."

18 So do you see my -- this doesn't sound at
19 all like the Arroyo Seco example, his usage there.

20 A. I agree, and that apparently is what the
21 law says, and it allows wide interpretation.

22 Q. When you say "wide interpretation," do
23 you mean scholars have wide interpretations of it or
24 wide interpretation by a judge on the ground deciding
25 at the time?

1 A. I think both.

2 Q. How far would this future need extend?

3 A. Without a specific case, I would have no
4 idea. A specific context.

5 Q. Okay. Does this future need, this
6 sobrantes right, would it provide an absolute right to
7 land and water that are currently unused to protect a
8 potential future need even if another user wants to
9 make use of that unappropriated land and water?

10 A. I'm not aware of any case in which they
11 talk about absolute rights to either land or water.

12 Q. Okay. So if an Indian community has
13 these sobrantes rights to meet some future need, and
14 there is land near their community but it's unused,
15 they are not using it, their current needs do not
16 require it, and somebody wants to come in and start
17 farming on that piece of land and start using some of
18 the water that's there that's not being used, would
19 that Indian community be able to expel or seek Spanish
20 law to expel that new user who wants to use that
21 unused land?

22 A. It would be considered by the judge, but
23 I would think that the non-Indian users would have a
24 very good case, but it would be specific.

25 Q. It would have to depend on the --

1 A. Right.

2 Q. -- all the factors that we're going to
3 get to --

4 A. Right.

5 Q. -- but all the factors that you and
6 Dr. Weber discussed that goes into a particular
7 adjudication?

8 A. Um-hum.

9 Q. Let's turn to Page 14. There's a quote
10 from Felix Cohen, and it's from a chapter, basically,
11 of a series of articles that Cohen wrote. Did you
12 read the chapter that Felix Cohen referenced here?

13 A. I did not.

14 Q. You did not. So you don't know if Cohen
15 mentions a privilege status for Indians or discusses
16 sedentary Indians or anything like that?

17 A. No.

18 Q. On Page 15 of Dr. Weber's report, in the
19 middle paragraph he wrote that "Local officials, like
20 the Crown itself, understood the need to assure that
21 Indians had the means to become productive vassals of
22 the Crown who would produce a surplus of food, pay
23 taxes, support their priest, and serve as a labor
24 pool. Hence, officials saw to it that lands granted
25 to Spaniards did not infringe on Indian lands and thus

1 deprive Indians of the very basis their livelihood."

2 If the protection of water and property
3 rights discussed here was designed to keep these
4 Indians productive, wouldn't Spain have also adopted
5 similar policies to ensure peace and harmony with the
6 indios Bárbaros?

7 A. I believe, yes, but the process of their
8 civilization would have to occur first, and they would
9 have to be settled in a -- a specific area.

10 Q. So a policy that divested those indios
11 Bárbaros of all rights would have been
12 counterproductive to the goals of the Crown, wouldn't
13 it?

14 A. Again, it depends on the situation.
15 There were times when, indeed, the Spaniards would
16 have been very glad to be totally rid of the indios
17 Bárbaros.

18 Q. So returning to this quote and this
19 discussion of the goals of making the Indians
20 productive vassals of the Crown. After 1680, did the
21 Hopis produce a surplus of food for the Crown?

22 A. No.

23 Q. Did they pay taxes?

24 A. No.

25 Q. Did they support Spanish priests?

1 A. No.

2 Q. In fact, they killed them, didn't they,
3 at times?

4 A. They did, indeed.

5 Q. Did they serve as a labor pool?

6 A. There certainly were Hopis who constantly
7 moved, as did Rio Grande Pueblos, back and forth, so
8 in some sense, some of those Hopis who moved to the
9 Rio Grande Valley might, indeed, have been paying
10 taxes, serving as a labor pool, and all of what you
11 said, but in their own country -- in their own homes,
12 no.

13 Q. As a member of the Rio Grande Pueblos,
14 when they were there, they may have done those
15 things --

16 A. Exactly.

17 Q. -- but the Hopi entity did not do these
18 things?

19 A. No.

20 Q. Were there any Spaniards that ever sought
21 to settle anywhere near Hopi?

22 A. The alcalde mayor of Zuni, which is a
23 couple days' ride from Hopi, acted in the
24 18th century as a liaison between the governor in
25 Santa Fe and the Hopi leaders; but in the Hopi

1 Pueblos, no.

2 Q. So no Spaniards sought to settle anywhere
3 near Hopi, did they?

4 A. There was no earthly reason. In that
5 very desolate, difficult environment, no Spaniard
6 could make a living there. The Hopis were pretty much
7 self-sufficient, and it did not leave much room for
8 any Spaniards. Hopis, however, continued, especially
9 after their adoption of sheep, to produce much of the
10 textile -- much of -- much of the textiles for the
11 whole Pueblo world, and that continued right on
12 through into the Mexican period, that they were
13 weaving and producing mantas and ceremonial kilts and
14 other textile production, and that went right on
15 during the entire period after the Pueblo revolt.

16 Q. And they used that -- they traded for
17 those goods?

18 A. They traded for those goods.

19 Q. And the Navajos traded for goods as well,
20 correct? Produced goods and traded goods?

21 A. Do you want to be more specific? What
22 sort of things were the Navajos --

23 Q. I don't know. I'm asking you. You're
24 mentioning that Hopis still produced goods that they
25 used to participate in trade with the eastern

1 Pueblos --

2 A. Um-hum.

3 Q. -- and did the Navajos also produce
4 things --

5 A. Yes.

6 Q. -- that they used in trade --

7 A. Yes.

8 Q. -- with the eastern Pueblos?

9 On Page 16 of Weber's report, he writes
10 at the very top, starting at the end of that first
11 sentence -- or first line, "Meyer also agreed with
12 Taylor's conclusion that land came with the right to
13 subsurface water, which comes from springs and wells."

14 Now, the way that sentence is written,
15 it's not abundantly clear whether Weber agrees with
16 that sentence as well, and, obviously, I can't ask
17 him. In the overall context, it seems like he does.
18 Do you agree with that statement?

19 A. Do I agree with the statement that Meyer
20 also --

21 Q. No. No. With the conclusion that both
22 Meyer and Taylor reached, that land came with the
23 right to subsurface water --

24 A. Yes, I do.

25 Q. -- which comes with springs and wells?

1 Did Spanish law understand and recognize
2 aquifers?

3 A. In a vague way, yes, I believe they did.

4 Q. Can you explain how?

5 A. It's more vague than I can explain. No,
6 but I believe they had some idea of water underground
7 that could be tapped into, but I think very, very --
8 nothing like our understanding of hydrology.

9 Q. Okay. So they didn't understand and
10 account for the fact that my well on my land might
11 impact the well on my neighbor's land and his ability
12 to draw water?

13 A. I believe they did in a very limited
14 sense. They observed that, I think.

15 Q. Do you have any examples that you can
16 point to?

17 A. There's a case in 1724 of the Pueblo San
18 Ildefonso, and this was a case in which Spaniards
19 wanted to use a certain piece of land near a well
20 and -- I mean, a spring and drainage that evidently
21 the Pueblo was not using, but they were only allowed
22 to raise horses there, which would not take the same
23 amount of water as cultivating the land. In 1734,
24 these same Spaniards came back and said, we want to
25 farm it. They were not allowed to do so --

1 Q. With --

2 A. -- because that would affect the water of
3 San Ildefonso Pueblo.

4 Q. But the water that they would have used
5 to farm it was the existing spring, correct?

6 A. Evidently so.

7 Q. Okay.

8 A. Evidently so.

9 Q. So that's -- maybe I didn't phrase my
10 question -- my original question correctly.

11 Are there examples in Spanish law,
12 colonial law, in this time period that recognized that
13 one water user drilling -- not drilling, digging a
14 well on their land could reduce the available water of
15 somebody else's well or spring on that person's land?

16 A. I believe they understood that, but I do
17 not know of a specific case.

18 Q. If each -- let me see. Do you know of a
19 case where there's one -- a property owner who has a
20 spring on their property that -- let me back up.

21 The owner of a piece of land that has a
22 spring located on their land has an absolute right to
23 that spring, correct?

24 A. Yes, um-hum.

25 Q. And the owner of a nearby property who

1 has a spring located on their property has an absolute
2 right to that spring, correct?

3 A. Um-hum.

4 Q. Do you know of any cases where those two
5 rights -- we know in modern hydrology that those
6 springs, if they come from the same aquifer, that
7 extensive use of one might impact the available water
8 on the other. I assume -- do you understand that
9 concept in modern hydrology?

10 A. I understand the concept, but I do not
11 know of a specific case.

12 Q. You don't know of a specific case
13 where --

14 A. No.

15 Q. -- Spanish law recognized any of that?

16 A. No.

17 Q. On Page 17 of Dr. Weber's report, the
18 second full paragraph, first sentence reads, "When
19 Indians and non-Indians quarreled over the use of the
20 same stream or river, local officials sought pragmatic
21 ways to share water and avoid lawsuits."

22 So some form of sharing was the general
23 solution for Pueblo Indians and non-Indians; is that
24 correct?

25 A. Absolutely.

1 Q. Is that not the solution for Pueblo
2 Indians and indios Bárbaros?

3 A. I don't know of such a case.

4 Q. So there's -- there's no cases of -- to
5 an indios Bárbaros group and a Pueblo Indian group --

6 A. Not that I'm aware of.

7 Q. It really goes from sort of Page 17
8 through 19, so we're going to just sort of talk in
9 general on these pages. There's a discussion of the
10 factors that go into determining water rights, and the
11 two I really want to focus on are prior use and need.
12 Can you -- let's start with prior use. Can you
13 explain what this term means as it's used here?

14 A. It was certainly one and a very important
15 factor in determining water use, who was there first,
16 and interestingly, I think Weber makes the point that
17 Indians were very often like los primeros pobladores,
18 the first settlers. They were there first, and I
19 think it's an extremely important point, but not the
20 only point.

21 Q. So it's not the American common law first
22 in time, first in right?

23 A. No.

24 Q. And prior use -- so prior use would not
25 lead to an exclusive right, would it?

1 A. I don't think there is much that would
2 lead to an exclusive right. "Exclusive" and
3 "absolute" are just not concepts or terms that are
4 used.

5 Q. Okay. I'd like to now turn to the
6 concept of need. How -- can you explain how that term
7 was understood at the time?

8 A. Well, I believe it was simply what could
9 be demonstrated if, indeed, there were competitors or
10 someone's right was challenged. The person challenged
11 would need to show that need was -- that they were
12 using/needing the water.

13 Q. And Dr. Weber says -- and this is on
14 Page 19 -- that need encompassed expansion -- a need
15 for expansion, although he does mention that that need
16 had to be balanced against the needs of non-Indians.

17 A. Yes.

18 Q. I have a few questions on this. I guess
19 first would be: If there are competitors there at the
20 time, would the need for expansion be defined more
21 narrowly than --

22 A. I would suspect generally, yes, but it
23 would be definitely case specific.

24 Q. Then I also want to know how -- you know,
25 how expanding do you see this need being used in the

1 Spanish case law?

2 A. I truly don't know how to answer that.

3 Q. Would Spanish law provide a community of
4 10,000 with water for 50,000 people?

5 A. I do not know.

6 Q. Would it provide 160 gallons per day when
7 the current usage was 20 gallons per day?

8 A. Again, it would be a specific situation.
9 I don't have any idea theoretically.

10 Q. In the case law, what types of examples
11 have you seen where a future need has been protected?

12 A. In the case law, at this point, I cannot
13 think of specific cases that protect a future right
14 more than, for example, that minimum that is allowed
15 to the Pueblos regarding land, that there is a minimum
16 protected by law, but specifically I can't think of a
17 case.

18 Q. And by the "minimum," you're referring to
19 like the Pueblo league --

20 A. Yes.

21 Q. -- where they are entitled to that --

22 A. Right.

23 Q. -- minimum land base?

24 A. Right.

25 Q. On Page 19, Dr. Weber writes,

1 "Flexibility, scholars have emphasized, was a hallmark
2 of the Spanish system." Do you agree with that?

3 A. Yes, I do.

4 Q. If flexibility is the hallmark, would you
5 expect a group of indios Bárbaros competitors to get
6 shut out by a rigid application of sedentary Indian
7 preference?

8 A. I don't see anyone classified as indios
9 Bárbaros as a legitimate competitor.

10 Q. So maybe -- I mean, I'm not sure I
11 understand that. You mean you haven't seen examples
12 or do you -- or do you mean that Spanish law would
13 simply not recognize them as competitors?

14 A. They would not be classified as indios
15 Bárbaros if they were recognized as legitimate
16 competitors.

17 Q. What does it take to be a legitimate
18 competitor?

19 A. I suspect someone recognized by the
20 Spanish authorities of the time.

21 Q. Let's return here briefly to the treaty
22 that we looked at earlier --

23 A. Um-hum.

24 Q. -- and we discussed the land base that --
25 this is -- I don't recall what exhibit it is, but --

1 A. 4.

2 Q. 4. On Page 3 of that document, Paragraph
3 12, we discussed the land base that Spain recognized
4 for Navajo. Now, we -- in our discussion we
5 acknowledged that it only established an eastern line
6 and not a western line, but if I remember correctly,
7 you agreed that it established a land base. Would --

8 A. I would not use the word "land base." It
9 did establish a frontier aligned between the two, but
10 I would not say it established a land base, per se,
11 for the Navajo Nation.

12 Q. It established a territory, an area? How
13 would you describe -- I mean, it -- it recognizes
14 Navajo territory, does it not?

15 A. It does. It does. It does, yeah.

16 Q. If a Spaniard wished to move into this
17 general area and start using water, would Navajo not
18 be recognized as a competitor for water in that
19 region?

20 A. I believe they would be recognized as a
21 competitor after this.

22 Q. Let's move to Page 24 of Dr. Weber's
23 report.

24 A. May I just add that the previous
25 statement was totally hypothetical. That if a group

1 of Navajos --

2 Q. Sure.

3 A. Yeah. I just wanted to say that's
4 hypothetical.

5 Q. To your knowledge, there were no
6 circumstances --

7 A. No.

8 Q. -- that brought that before Spanish
9 officials?

10 On Page 24, about the middle of the page,
11 it says, ". . . New Mexico officials who had to
12 resolve water disputes in cases where no specific
13 grant (merced de agua) or prior allocation of water
14 (repartimiento de aguas) had been made, sought to
15 balance the principles of equity and need with the
16 principle of prior rights and special protections to
17 Indian communities."

18 Did the Hopi Tribe ever receive a
19 specific grant or prior allocation of water?

20 A. No, I don't believe they did. They
21 simply were protected by the general, as were all the
22 Pueblos.

23 Q. So this statement, then, would be
24 directly applicable to the Hopi Tribe, right? Because
25 this is talking about how water disputes would be

1 resolved where there was no specific grant or prior
2 allocation of water, correct?

3 A. I'm sorry, which sentence are we at?

4 Q. The one I just read to you. The sentence
5 that starts with "As in New Spain," right about in the
6 middle of the page on Page 24.

7 A. I gotcha. Yes. Yes, I agree with that
8 statement.

9 Q. So --

10 A. "And special protections to Indian
11 communities."

12 Q. So this is -- these were the principles
13 that would apply in a -- if there was a water
14 dispute --

15 A. I believe --

16 Q. -- that the Hopi Tribe was involved in?

17 A. I believe so.

18 Q. In this sentence, is this the context of
19 an Indian community in a dispute with a Spaniard?

20 A. Again, I don't think you can generalize.
21 You need the case, but, yes, I believe always Indians
22 would be given preferred treatment as Indians.

23 Q. Okay. So these principles would apply
24 generally speaking?

25 A. They would, and with an emphasis on

1 "special protections to Indian communities."

2 Q. Sure. Would these principles apply to a
3 dispute between two sedentary Indian communities?

4 A. Yes.

5 Q. Would these principles apply to a dispute
6 between a sedentary community and an indios Bárbaros
7 tribe?

8 A. I'm having trouble picturing the indios
9 Bárbaros being a party to such a case.

10 Q. So there are no examples of indios
11 Bárbaros being a party to a case anywhere that you're
12 aware of?

13 A. Not that I'm aware of.

14 Q. Are there any examples of the Hopi Tribe
15 being a party to any case?

16 A. No. I don't believe there were
17 competitors.

18 Q. So that's -- you're not aware of any Hopi
19 Tribe being involved in a case, correct?

20 A. That's correct.

21 Q. And your reason you believe that they
22 weren't is because there were no competitors?

23 A. Right.

24 Q. At the bottom of Page 24, there's a
25 footnote 55, and it's a quote from Tyler demolishing

1 -- excuse me, it's not a full quote. There's a
2 discussion of Tyler demolishing the Pueblo rights
3 doctrine. Can you explain that a little bit?

4 A. That's sticky because it sounds like the
5 Pueblo league. It has nothing to do with the Pueblo
6 league. This is something that evidently was brought
7 up in California that a Pueblo simply had rights to
8 all water.

9 Q. And Tyler said that's not the case?

10 A. Tyler says that's not the case.

11 Q. And do you agree with Tyler?

12 A. I agree with Tyler.

13 Q. On Page 25 of Dr. Weber's report, this is
14 the first full sentence on that page. "Of equal
15 importance, Pueblo Indians knew how and when to appeal
16 to the Protector of Indians, or to other officials who
17 might best represent their interests as they used the
18 legal system to preserve their land base."

19 Do you include Hopi in this reference to
20 Pueblo Indians?

21 A. Yes.

22 Q. Did the Hopi Tribe ever appeal to the
23 Protector of Indians?

24 A. Not that I know of, and very frequently
25 in New Mexico that position was vacant.

1 Q. As we've discussed just a minute ago, the
2 Hopi Tribe, to your knowledge, never used the legal
3 system at all to preserve their land, did they?

4 A. No, they did not.

5 Q. In the next sentence you [sic] say,
6 "Scholars of New Mexico land and water litigation have
7 also stressed that frontier conditions, including
8 poverty, the difficulty of taking a case to a distant
9 appellate court, the lack of trained lawyers, and the
10 possible lack of some law books, encouraged if not
11 demanded flexibility and compromise in applying the
12 law."

13 First, I guess, again, the way it's
14 worded, I want to make sure you agree with that
15 statement, not just scholars of New Mexico?

16 A. I do.

17 Q. Okay. So given this, principles of
18 application -- I should say, not principles of Spanish
19 law but principles of application of Spanish law on
20 the ground there, if -- if you assume -- if we assume
21 that Navajo were competitors or may have been
22 competitors of Hopi, would it be possible to determine
23 what rights Hopi had without considering Navajo water
24 usage and rights?

25 A. Phrased that way, I don't think so. I

1 think --

2 Q. You would have to consider --

3 A. We'd have to consider it.

4 Q. Page 26. Dr. Weber mentions Dr. Cutter,
5 and I'm just wondering, do you know if Dr. Weber ever
6 discussed this case with Dr. Cutter?

7 A. I do not know.

8 Q. Did you ever discuss this case with
9 Dr. Cutter?

10 A. Only a couple of weeks ago when we were
11 here.

12 Q. On Page 27, the last two sentences in the
13 main -- the body of the text it says, "Flexibility and
14 attention to supply and demand, however, did not mean
15 abandoning basic principles. One of those principles,
16 understood by New Mexico officials from governors to
17 local alcaldes, was that Indian Pueblos dating back to
18 first contact had superior rights to water not just
19 because of their ethnicity but due to their 'prior
20 existence and usage of water.' "

21 Now, if I'm understanding what you've
22 discussed earlier, this doesn't mean that the Hopi
23 Tribe would be entitled to a first in time, first in
24 right to all of the waters in the Little Colorado
25 River Basin, does it?

1 A. No.

2 Q. Does it mean that they should get first
3 in time, first in right to the water that they were
4 using at the time of first contact?

5 A. They should have the right definitely to
6 the water they were using at the time of first contact
7 as an agricultural sedentary community, just as the
8 Pueblos on the Rio Grande would have deserved that
9 same right, and if you want to look at it the way as
10 we mentioned before, they are primeros pobladores,
11 they're the first settlers in the Spanish view of
12 legitimate water users.

13 Q. So would it -- would it change your
14 opinion if ancestral Navajo were in the basin prior to
15 first contact?

16 A. If that, indeed, could be demonstrated
17 archeologically or anthropologically as legitimate
18 users of water, yes.

19 Q. Can you -- I should have written what
20 exhibit it is, the Bárbaros -- the selected passages I
21 have from Bárbaros --

22 A. Oh. I have it here. Here it is.

23 Q. And what exhibit number is that?

24 A. It's probably 3.

25 Q. It's 3. Can you turn to Page 72 of that?

1 About two-thirds of the way down the page --

2 MR. MENTOR: What page is that, I'm
3 sorry?

4 MR. STEUER: Seventy-two. It's
5 page numbered 72. It's not the 72nd page of the
6 document we have here.

7 Q. (BY MR. STEUER) About two-thirds of the
8 way down the page, I'm reading from the paragraph that
9 begins with "Apaches."

10 A. Um-hum.

11 Q. The second sentence of that paragraph
12 says, "Athapascan-speaking peoples linguistically
13 associated with Native peoples in Alaska and Canada,
14 Apaches appear to have established themselves in
15 northern Arizona and New Mexico by the 1400s, if not
16 before."

17 Does that suggest to you that perhaps
18 ancestral Navajo were in the basin prior to first
19 contact?

20 A. Perhaps they were in the basin.

21 Q. And, you know, I just -- this is sort of
22 unrelated to this exact point here, but more related
23 to what we were discussing with Cutter's piece.
24 Generally speaking, when we were talking about these
25 rights and the flexibility and what have you, we're

1 talking about surface water, correct?

2 You've -- let me -- you said before
3 groundwater wells/springs come with the right to the
4 land. So if you have the land, you have the right to
5 the water that's --

6 A. Yes.

7 Q. -- there. So when we're discussing the
8 concepts of flexibility and --

9 A. Um-hum.

10 Q. -- all these other things, attention to
11 supply and demand that Cutter mentions, those are with
12 respect to surface water, correct?

13 A. Yes.

14 Q. On Page 30 of the report -- of
15 Dr. Weber's report -- we can put this aside, Bárbaros,
16 for the time being -- there's a mention, and we've
17 discussed it a little bit already, the
18 four-square-league boundary of the Pueblos. And I
19 don't -- I know we've talked about it in general
20 terms, but I don't know if I've asked you, so I
21 apologize if I have, did that apply to the Hopi Tribe?

22 A. Yes.

23 Q. And how would it apply?

24 A. It is implied as it is with all other
25 Pueblo Indians and not challenged in case law.

1 Q. Okay. Would they -- would the Hopi Tribe
2 possess more land than that four square league?

3 A. Again, that would have to -- that was the
4 minimum, and had there been a case, if they had
5 demonstrated that, indeed, they needed more and were
6 using more, that would have been granted, I believe.

7 Q. So that -- that secondary piece, the
8 more -- more than the four square league, is something
9 that came through an adjudication, correct?

10 A. Yes. In the case of the Pueblos, yes.

11 Q. And when we discuss -- we were mentioning
12 that as a land base. Is that applicable to water as
13 well, they would be entitled to the water on that four
14 square league, and to get more than the water on that
15 four square league, they would have to have an
16 adjudication to determine --

17 A. And to demonstrate, yes.

18 Q. And to demonstrate.

19 On page -- also on Page 30, in the next
20 paragraph, the second sentence says, "Nonetheless, in
21 theory all Indians living in Mexico -- even those
22 hostile to the Mexican state -- remain citizens."

23 And then there's also a statement there
24 at the bottom of the page that's a report of the
25 Mexican president. It's not his words, I believe, but

1 "These Indians were Mexicans 'because they were born
2 and live in the Republic.'" Do you see that?

3 A. (Deponent nodded head up and down.)

4 Q. This -- would this mean that Navajos were
5 citizens of Mexico?

6 A. They were residents of Mexico. Yes, it
7 would. It would imply that all residents of Mexico --
8 although, they did make a distinction with peaceable
9 and warlike, and so --

10 Q. Well, the statement here that Dr. Weber
11 wrote that you've endorsed said, "even those hostile
12 to the Mexican state remain citizens."

13 A. Fair enough.

14 Q. So that --

15 A. So that, yes.

16 Q. -- in theory --

17 A. Yes.

18 Q. -- this statement would apply to Navajo?

19 A. It would apply.

20 Q. There's a statement on Page 31 of
21 Dr. Weber's report that I'm just not sure I
22 understand, and it's about in the middle of the page.
23 It says, "New Mexicans also regarded it as a
24 'necessity'" -- and that's in quotes -- "to make war
25 on Indians like Comanches, Apaches, Navajos, and Utes

1 when members of these tribes raided Mexican
2 settlements."

3 Can you explain that to me a little bit,
4 what exactly you mean -- what exactly you think
5 Dr. Weber means?

6 A. I suspect the necessity was simply to
7 defend themselves against raiding members of those
8 Indian nations alluded to when raiding Mexican
9 settlements.

10 Q. Okay. The very next sentence in the
11 report states that "They," and I -- I'm not sure if
12 that means the New Mexican government. Perhaps if it
13 doesn't, you can tell me. "They continued to treat
14 most of the Pueblos as distinctive communities within
15 the New Mexico polity."

16 First of all, the statement says "most of
17 the Pueblos." Can you explain why? What Pueblos
18 would not be included in that?

19 A. I have no idea why it's phrased that way.
20 I would think that all the Pueblos were considered
21 distinctive communities, and interestingly enough, as
22 compact communities, they were more conspicuous than
23 any other community and the law did favor communities,
24 and by this time, Hispanic residents were very much
25 divided and spread out, but the Pueblos were such

1 distinct individual communities that -- but I see no
2 reason to leave any of them out.

3 Q. Now, again, returning to the way that
4 this sentence is worded, "They continued to treat most
5 of the Pueblos as distinctive communities." Did they
6 treat Hopis in any fashion at all during the Mexican
7 period?

8 A. I believe, again, only in the sense of
9 continuing -- continuing trade and the continual
10 migration of peoples between the Rio Grande and the
11 Hopi Pueblos.

12 Q. But there was no official contact or
13 treatment of Hopis during the Mexican period?

14 A. No, I don't think there was.

15 Q. On Page 33, right smack in the middle of
16 the page there's a sentence -- the last sentence of
17 that paragraph, "Water rights of communities remained
18 senior to those of individuals, the principles of
19 equity and need continued to operate, and local
20 authorities continued to regard Pueblo Indians as
21 holding a superior right to water based on aboriginal
22 usage, or priority."

23 Now, if their -- if the competitors --
24 this sort of discusses a competitor of a community
25 versus an individual. If the competitors were two

1 communities, one wouldn't have a -- there wouldn't be
2 a Spanish law preference for one community over
3 another, would there?

4 A. What sort of communities are we speaking
5 of?

6 Q. Well, we can run through the choices. I
7 know you've already said that if it was a Pueblo
8 community and an Indian -- I mean, a Pueblo community
9 and a non-Indian community, that the Pueblos were
10 regarded as senior in the sense that they were there
11 first, correct?

12 A. Um-hum. This seems to be only
13 replying -- applying to Pueblo communities, right?

14 Q. What if both communities involved were
15 both using the water from long prior to the
16 adjudication? What principles -- how would that --

17 A. I, again, think it would be decided only
18 case specifically, and all those factors would come
19 into play: Prior use, need, availability, all of
20 that.

21 Q. And turning to Page 34, we've discussed
22 this a good bit already, so I just want to briefly
23 touch on this. This is a discussion of the Arroyo
24 Seco and the Taos Pueblo. So even in this
25 circumstance where you had a later arriving community

1 or a group of users to -- as a competitor to a Pueblo
2 that was the first -- regarded as the first ones
3 there, the Pueblo did not receive a complete right to
4 all the water, correct?

5 A. No. The sobrante figure, but, you know,
6 I went and read the case closely, and it appeared to
7 me that if it were a wretchedly dry year, that the
8 Arroyo Seco people were just out of luck. There were
9 no sobrantes, and I don't know if that's considered an
10 absolute right, but if nature played that trick and
11 there were no sobrantes, that they would have no
12 water. And I was curious because both sides talk
13 about that case, so I went to it and looked at it, and
14 that was my interpretation.

15 Q. So you -- well, let's read the last
16 sentence in this paragraph on this page where it
17 discusses that ". . . the town council took need into
18 account by awarding the Hispanic community of Arroyo
19 Seco a specific measure of water from the Lucero when
20 the river flowed abundantly, and proportionately less
21 water when the flow was weak."

22 Are you --

23 A. But when there's no flow beyond what Taos
24 Pueblo was using, there's no water for those folks.

25 Q. So you disagree with the implications of

1 Dr. Weber's statement here?

2 A. I just don't think he carried it to that
3 extreme, and that extreme wasn't, one hoped, likely.

4 Q. On Page 36, and it is footnote 95, and
5 it's -- it's really almost towards the bottom of that
6 footnote. It's the fourth line up. It starts with
7 "An attempt in the 1750s." Do you see that?

8 A. Page 36?

9 Q. Page 36. It's the fourth line up from
10 the very bottom of the page.

11 A. Gotcha.

12 Q. "An attempt in the 1750s by Hispanics to
13 settle in the valley of New Mexico's Puerco River, for
14 example, fizzled in the 1770s in the face of Navajo
15 resistance."

16 Do you know if the Puerco River is in the
17 Little Colorado River Basin?

18 A. It is not.

19 Q. Where is the Puerco River?

20 A. The Puerco River is in the drainage of
21 the Rio Grande Valley. The Puerco is a tributary of
22 the Rio Grande, and this is all east of the present
23 Arizona/New Mexico line, about 150 miles east of the
24 Hopi Pueblos, east of the basin.

25 Q. Are you aware of any other river with the

1 same name?

2 A. There are three.

3 Q. And is any of them in the Little Colorado
4 River Basin?

5 A. There is one. There is one. Doesn't it
6 come in there, Winslow or something? We're speaking
7 of the real Puerco of the east, but there are two
8 others. One's a little short one on the Chama.
9 Another one is definitely in the basin of the --

10 Q. And you've looked at the source
11 materials --

12 A. Absolutely.

13 Q. -- and know that this is in reference of
14 that other --

15 A. Yes. Yes.

16 Q. Okay. On Page 37 you mention Vargas
17 retaking possession of the Hopi Pueblos, and I gather
18 that -- from the discussions that we've heard already
19 that this is an important event to you?

20 A. Yes. Yes. It's the ritual repossession
21 of the kingdom and provinces of New Mexico after the
22 Pueblo revolt.

23 Q. And is it this event that is part of --
24 or is the reason that you believe that Hopi was part
25 of the -- well, let me -- let me backtrack.

1 On Page 12 of your report -- this is at
2 the beginning of your chronology, and I'm not going to
3 discuss the whole chronology right now.

4 A. Thank you.

5 Q. We'll get to it, but you discuss that the
6 chronology is demonstrate -- is to demonstrate that
7 "As far as Spain and Mexico were concerned, the Hopi
8 towns remained a constituent province of the Spanish
9 and Mexican polity of New Mexico."

10 A. Yes.

11 Q. So is this ritual possession by Vargas
12 the sort of beginning of that --

13 A. In other words, a reaffirmation of those
14 earlier.

15 Q. Okay. But that's the part -- or the
16 original ones that he, then, reaffirmed are part of --
17 are the beginning of what made them a constituent
18 province of the Spanish and Mexican polity --

19 A. Yes.

20 Q. And do you think that the Hopis were
21 independent of Spain and Mexico?

22 A. I have written as much figuratively, that
23 after the Pueblo revolt, many saw themselves as
24 independent, and yet time and again their leaders,
25 when it suited them, would say we're just like we were

1 before the revolt. We are subjects of the Crown, and
2 so I think in some theoretical sense, you might be
3 able to say they are independent almost more because
4 of geography than of politics because they keep
5 reaffirming as they do here -- or as the Spaniards do
6 here that they are -- they are seen as rebellious but
7 peaceable and still, though, a member of -- still a
8 component part of New Mexico.

9 (Deposition Exhibit 5 was marked.)

10 Q. What I handed you is Exhibit 5, which is
11 selected portions of "The Spanish Frontier in North
12 America," by David Weber.

13 MR. MENTOR: Can I just go off for just a
14 second?

15 (Discussion was had off the record.)

16 Q. (BY MR. STEUER) On Page 116 of this
17 document -- and, again, when I use the page numbers,
18 it's the actual page number that's listed on that
19 page. It's not a 116-page document here. It's down
20 towards the bottom. Dr. Weber writes, "Hopis, for
21 example, submitted to missionaries in 1629, but
22 regained their independence in 1680."

23 Do you -- did you find that on the page
24 there?

25 A. I see it.

1 Q. Do you find that inconsistent with what
2 you said?

3 A. I would refine this statement, and I
4 don't think it's accurate to say that they refused
5 thereafter to permit a missionary to remain among them
6 for short periods. They welcomed friars, and some
7 spent as much as several months with them, and as I
8 say, their leaders at the same time were saying, We
9 are still subjects. We are still vassals, but as I
10 said, figuratively speaking, they do regain a degree
11 of independence.

12 Q. Okay. If you could turn the page, it's
13 Page 133, but I believe it's the very next page in the
14 handout here. And it's the middle paragraph, the very
15 beginning of that paragraph, and it reads,
16 "Occasionally rebellions brought lasting independence
17 for Natives." And he references "isolated groups such
18 as Hopis," and I'm not going to try to pronounce that
19 next one, "revolted and retained their liberty through
20 Spanish inadvertence."

21 And, again, do you see that as
22 inconsistent with your position?

23 A. Where are we on the page?

24 Q. It's the middle paragraph, the very
25 beginning of the middle paragraph that begins with

1 "Occasionally."

2 A. Oh, okay.

3 Q. The first two sentences.

4 A. Again, I would simply say figuratively
5 speaking, they did gain a certain degree of
6 independence, and curiously -- no, it's not this one.
7 Curiously, I looked in Weber's *Bárbaros*, in the index,
8 to see if the Hopis are even mentioned, and they're
9 not. There's no -- or at least the index didn't.

10 Q. Well, let me ask you about that. Is
11 it -- is it sort of -- the way you brought that up
12 makes it sound like it's an either/or, either you're a
13 part of the Spanish Empire or you're *Bárbaros*.

14 A. No, it's much more subtle than that.

15 Q. Because my understanding is *Bárbaros* is
16 the non-village dwelling Indians; is that correct?

17 A. The -- yes.

18 Q. So the significance of Hopis not being in
19 the index of *Bárbaros* is that they were village
20 dwelling?

21 A. Yes.

22 Q. And if you'll flip the page to the next
23 page, which is Page 140, and this -- Dr. Weber is
24 discussing Vargas' campaign to reassert Spanish
25 control over all of the rebellious communities. And

1 he says, "The isolated Hopis retained their
2 independence throughout the next century."

3 A. In the same sense as the previous
4 statements.

5 Q. And let's go -- it's Page 304. It's at
6 least one or two pages past that. And it's the last
7 line above that Roman numeral I in discussing ". . .
8 the isolated Hopis, who never resubmitted to Spanish
9 rule after the great revolt of 1680."

10 MR. MENTOR: Can you -- off the record
11 here.

12 (Discussion was had off the record.)

13 Q. (BY MR. STEUER) The text accompanying
14 footnote 9 on Page 304 where it says, ". . . the
15 isolated Hopis, who never resubmitted to Spanish rule
16 after the great revolt of 1680." Do you see that as
17 inconsistent?

18 A. They don't submit formally, but time and
19 time again their leaders say, We are still as we were
20 before the great rebellion. We are subjects of the
21 Crown. They want protection mainly from nonsedentary
22 peoples who surround them.

23 (Deposition Exhibit 6 was marked.)

24 (Discussion was had off the record.)

25 Q. So Exhibit 6 is "Pueblos, Spaniards, and

1 the Kingdom of New Mexico" and selected pages. This
2 is -- you are the author of this book, correct?

3 A. Yes.

4 Q. And Page 167. Near the bottom of the
5 page the paragraph that begins with "Dealing with,"
6 and the passage I'm interested in is in that sentence,
7 it says, ". . . the geographically isolated Hopis had
8 done what most subjected peoples dreamed of, but few
9 accomplished in the 17th century. They had
10 successfully thrown off European colonizers."

11 And this is, as I understand it,
12 referring to the period after Vargas had actually been
13 there, which he was there in 1692 --

14 A. No. This refers to -- they're like the
15 rest of the Pueblos, throwing off Spanish rule with
16 the Pueblo revolt for those 12 years, then Vargas
17 tries to reconquer them, but he was denied.

18 Q. Can you take some time to read it,
19 because I don't think that that's what -- that's
20 referring to 1680.

21 A. Okay. Let's see. I stand corrected. I
22 see that this does fall after I've discussed Vargas'
23 recolonization.

24 Q. So after Vargas did the repossession, you
25 still discuss them as having thrown off European

1 colonizers?

2 A. I do in a figurative sense. In other
3 words, they are now dealing on their own terms and
4 they can say, Yes, we are members and not be
5 necessarily consistent, but, yes, in that sense,
6 figuratively they have.

7 Q. And the very next sentence, "Given time
8 and chance, Diego de Vargas believed he could
9 reconquer the Hopis, but he was denied both." Why
10 would one need to reconquer one's own subjects?

11 A. Because they had rebelled. I prefer to
12 use the term "recolonized," but most people talk about
13 Vargas' reconquest of New Mexico, the whole works.

14 Q. And in that sense, he was unsuccessful
15 when it came to Hopi?

16 A. When it came to Hopi, he was.

17 Q. And, again, on page -- the very next page
18 of this handout here -- this exhibit, it's Pages 170
19 and 171. It starts with the very last sentence that
20 begins on Page 170 and carries over to 171. And I
21 believe it's discussing Vargas' successor --

22 A. Um-hum.

23 Q. -- and it says, "The Spanish governor's
24 ill-considered expedition during the summer of 1701 to
25 punish the Hopis for their destruction of Awátovi,

1 however, failed ignominiously, serving only to affirm
2 Hopi independence."

3 And you would view that still consistent
4 with the --

5 A. With their figurative independence, yes.

6 Q. I have just a little more on this line,
7 and then I will let all these hungry souls go to
8 lunch.

9 (Deposition Exhibit 7 was marked.)

10 Q. Exhibit 7 is "Spain in the Southwest,"
11 which is also a book written by you, correct?

12 A. Good grief. Yes. Yes.

13 Q. And I'll -- I don't want to belabor the
14 point too much, so let's go to Page 276, and I
15 apologize. It's upside down.

16 MR. DEENY: How does that happen?

17 MR. STEUER: You'd have to ask our
18 receptionist.

19 Q. (BY MR. STEUER) And it's in the middle
20 of the page about -- and it's a little above footnote
21 28. I don't know if that references the entire
22 paragraph or not, but it's part of that paragraph, and
23 it's referring to Crespo, and can you just tell me
24 real briefly who Crespo was?

25 A. Crespo -- Francisco Antonio Crespo was

1 governor of Sonora -- the Province of Sonora at the
2 time.

3 Q. And there's a suggestion in the middle of
4 that paragraph that he -- Crespo asked somebody else,
5 "Why not conquer the Hopis momentarily?" And, again,
6 we're not talking about Vargas' reconquest of New
7 Mexico here anymore, and I'm just wondering, again,
8 you said that Hopi was a constituent province and
9 "conquer" is not a word that's often used over a
10 constituent province, but you still see that as
11 consistent with your earlier statements?

12 A. At this particular time they were talking
13 bringing the Hopis down from their mesas for their own
14 good to the land below, and they did use the word
15 "conquest," and that is inconsistent with a
16 constituent province, but they did at this particular
17 period use the term "conquer," meaning to bring them
18 down from their mesas.

19 Q. And this will be the last one, and then
20 we can take a break here. The very last page,
21 Page 277, but it's right side up this time, so you may
22 have to do a little flipping around to get to it. And
23 the very -- the paragraph at the top discusses
24 Escalante's "preferred method of bringing
25 non-Christian peoples into the fold was friendly

1 persuasion." And it goes on to say that the Hopis,
2 since 1680, had "maintained a haughty independence,
3 accepting visits, aid, and offers of alliance from
4 Spaniards only when it suited their purposes."

5 A. Um-hum.

6 Q. So you've discussed how they've gone to
7 Spain at times, and you used that -- you've used that
8 as an example of how they were a part of constituent
9 province, but it was only when they had a specific
10 reason for doing so, correct? It was not just to
11 submit to the Spanish Crown?

12 A. That is how it appears, that they swore
13 loyalty when it was convenient.

14 Q. Do you -- on that level, do you see that
15 as significantly different than Navajo's relationship
16 with Spain, that when it suited them, they accepted
17 gifts or traded or what have you, signed treaties, and
18 when it didn't suit them, they didn't do those things?

19 A. I think that is fair to say.

20 Q. And the third paragraph down, it's about
21 three-fifths -- two-fifths of the way down the page,
22 it begins with "The Franciscan," and I have to read it
23 because I actually like this line very much.

24 A. Okay.

25 Q. "The Franciscan might as well have called

1 for a gentle, soaking rain" in terms of getting the
2 Hopis to resubmit, and does that line indicate that
3 Spain could have brought them back to the fold but
4 chose not to, or does it indicate that Spain was
5 unable to bring them back to the fold?

6 A. I believe it indicates that they did not
7 have a compelling reason to bring them back, but they
8 continually year after year tried by the least
9 expensive way to bring them back, and that is sending
10 Franciscans out there. Sometimes they were supported
11 by soldiers, sometimes not, and the friars often went
12 out and there were Hopis who said, Yes, we want to
13 return to the fold, but we're afraid of our leaders.
14 And then at other times they actually brought hundreds
15 of people living in the Hopi Pueblos back and
16 reestablished them in the Rio Grande Valley.

17 So I think the missionary effort was
18 frustrated, but it was consistent, and there really
19 wasn't a compelling reason from the sense of Spanish
20 presence in that particular challenged environment.

21 Q. Now, you mentioned in that description
22 that at times when these Franciscans went there, that
23 certain Hopis said, Yes, we would like to come back to
24 the fold but that the Hopi leaders said no. So my
25 question is: As a governmental body, as a polity, the

1 Hopis rejected them, correct, rejected these
2 Franciscan missionaries?

3 A. Some Hopis did, some didn't.

4 Q. Acting as a governmental body, some Hopis
5 did not reject them?

6 A. Some Hopis did not reject and several
7 times one finds in the documents -- for example, at
8 Sandia Pueblo when it was refounded in 1748, mostly
9 with Tiwas that had been brought back from the Hopi
10 provinces, that it mentions an Oraibi cacequi, an
11 Oraibi leader, which indicates factionalism among the
12 leadership, so it is inconsistent and there is
13 factionalism.

14 MR. STEUER: All right. We can break for
15 lunch here.

16 (Lunch recess taken, 12:14 p.m. to
17 1:35 p.m.)

18 Q. (BY MR. STEUER) Dr. Kessell, if you
19 could turn to Page 38 of Dr. Weber's report, and the
20 second sentence of that paragraph that begins, "In the
21 1700s," it reads, "Following Vargas' re-conquest of
22 New Mexico, Hopis had welcomed Pueblo refugees from
23 the Rio Grande who found there a safe haven far from
24 Spaniards and thereby enhanced the Hopis' ability to
25 resist Spanish force."

1 Did any Hopis migrate away during this
2 time period?

3 A. Away from --

4 Q. Away from Hopi.

5 A. -- their home land?

6 Q. Yeah.

7 A. I think individual Hopis show up in the
8 record as traders, but as migrants, I don't think so.

9 Q. So you're unaware of around 1700 or in
10 this -- you know, give or take a few years from 1700,
11 of Hopis going to, say, Navajo and joining Navajo?

12 A. No, I've never heard of Hopis joining the
13 Navajo.

14 Q. On Page 39 -- the sentence starts on
15 Page 38, and it says, ". . . as a result of increased
16 raiding by Navajo and Apache made the Hopi in reality,
17 if not in the eyes of the Spanish government, the
18 independent nation that they had asked to become."

19 And I know we've covered that subject a
20 good bit already, so what Dr. Weber goes on to say is
21 Spanish law viewed them as subjects under rebellion --
22 who happened to be in rebellion -- this is in the
23 subsequent paragraph, I'm sorry, on the same page, 39.
24 And that Spanish law required that ". . . Indian
25 rebels be brought back 'to our royal service with

1 gentleness and peace, without war, robbery, or
2 deaths.'"

3 And why, then, were there so many
4 military expeditions against the Hopi, then, given
5 that they should have been brought back with
6 gentleness and peace?

7 A. I'm aware of only three, and certainly
8 the theory always was that they be brought back by
9 peaceable means, but in the case of resistance, often
10 that was ignored.

11 Q. You said -- so when you said you're aware
12 of only three, three military expeditions?

13 A. Yes.

14 Q. Because on the previous page Dr. Weber
15 says, "Spaniards had sent a number of military
16 expeditions against the Hopis." So by "a number," you
17 think he was referring to three?

18 A. I believe so. Vargas -- I wasn't
19 counting Vargas.

20 Q. Okay.

21 A. I was counting --

22 Q. In this --

23 A. I'm just trying to think back.

24 Q. Well, the quote on Page 38, it says, "In
25 the 1700s," so that wouldn't encompass Vargas

1 either --

2 A. No.

3 Q. -- because he was --

4 A. No.

5 Q. -- in the 1600s.

6 A. No.

7 Q. So, to your knowledge, you can only
8 remember three military expeditions against the Hopi?

9 A. Those are the ones I can think of at the
10 present. I don't know of others.

11 Q. If a group is in rebellion, can it really
12 be said that Spanish law applies to them?

13 A. Evidently so. They certainly believed
14 so, and as Father Vélez de Escalante put it, while in
15 rebellion, they are still subjects of the Spanish
16 Crown. So they were having it both ways.

17 Q. Does Spanish law have -- did it have a
18 law against, say, murder? Was murder illegal?

19 A. Oh, I -- yes. Yes.

20 Q. So if there had been a murder at Hopi,
21 was Spanish law going to come to bear on the murderer?

22 A. It well could have. It well could have.
23 I don't know of a case.

24 Q. But -- so in practice, as far as you're
25 aware, it would not have, it did not?

1 A. In practice after 1680, no, I don't know
2 of a case.

3 Q. I want to call to your attention --
4 interesting choice of words by me -- Page 39, footnote
5 105. And it's -- I don't really know. It's kind of
6 in the middle of that footnote, and it indicates that
7 a certain source was -- it says, "Called to my
8 attention by Peter Whiteley." And do you -- do you
9 know anything about this particular communication?

10 A. Oh. I remember I was fascinated by this
11 case in 1700 that a group of Hopis came to Santa Fe to
12 negotiate with the governor, and I did look up the
13 Spanish.

14 Q. I'm not actually asking about the case --

15 A. Sure.

16 Q. -- itself. I'm asking about the
17 communication between Dr. Weber and Peter Whiteley.
18 Do you know --

19 A. I have --

20 Q. -- anything about that?

21 A. -- no idea that they communicated.

22 Q. Okay. Have you had any communications
23 with Peter Whiteley?

24 A. No. I don't know him. I'd like to meet
25 him.

1 Q. So he hasn't called anything to your
2 attention?

3 A. He's called nothing to my attention.

4 Q. When you -- I'm going to return to
5 something we talked about much earlier, just real
6 briefly. You had mentioned that you had read -- you
7 mentioned a number of the expert reports that you had
8 read, not just the Spanish and Mexican law ones, but
9 the other Hopi Tribe expert reports. Who gave you
10 those reports?

11 A. Those were provided to me by Harry Sachse
12 of the Sonosky firm. They sent me a big box that had
13 these reports.

14 Q. On Page 40 of your report -- of
15 Dr. Weber's report, excuse me, he describes a trip by
16 Anza to Hopi country, and it says, ". . . in response
17 to an apparent plea by 40 Hopi families to rescue them
18 from the drought and escort them eastward through
19 Navajo country," and then he describes they were
20 killed before he could get there. Do you know where
21 they were killed?

22 A. I do not.

23 Q. Do you have any -- any general idea, was
24 it near Santa Fe? Was it near Hopi?

25 A. I trust it was somewhere west of the

1 Hispanic area --

2 Q. Okay.

3 A. -- of the Rio Grande Valley. I don't
4 know where.

5 Q. But you don't know if it was in the
6 Little Colorado River Basin or not?

7 A. No, I don't. Don't know.

8 Q. At this time period, do you know where
9 Navajo country was?

10 A. Only, I would say, vaguely.

11 Q. If you could turn to Exhibit 7, it's
12 "Spain in the Southwest." It's a few pages of your
13 book. And it's the very last page of this exhibit.
14 And you're discussing a military expedition against
15 Navajo, and I realize it's a little bit after the time
16 period that we were just in. This is 1805. And you
17 describe -- you describe this, "A force from Sonora
18 had penetrated" -- excuse me, I should go back. It's
19 in the middle of the page. There is no footnote to
20 direct you to, but it's in the paragraph that begins
21 with "Navajos." It's actually the second sentence
22 there. ". . . a force from Sonora had penetrated
23 Canyon de Chelly, the very heartland of Navajo
24 country . . ."

25 So Navajo country -- Canyon de Chelly was

1 in the heartland of Navajo country, correct?

2 A. I refer to that more psychologically than
3 geographically. Canyon de Chelly was considered --

4 Q. So do you know where --

5 A. -- Navajo country.

6 Q. Do you know where it was in Navajo
7 country?

8 A. I really don't know where it was. I know
9 it was unquestionably Navajo.

10 (Deposition Exhibit 8 was marked.)

11 Q. What I've just had marked as Exhibit 8 is
12 "The Mexican Frontier, 1821 to 1846," and it's a book
13 written by David Weber. Are you familiar with this
14 book?

15 A. Yes. Yes, I am familiar. I'm sorry they
16 didn't put the year of its publication on the title
17 page --

18 Q. And --

19 A. -- because it's fairly old.

20 Q. -- if we can turn to Page 120, and it's
21 about a third of the way down the page, the line that
22 begins with "José Antonio Vizcarra."

23 A. Gotcha.

24 Q. "José Antonio Vizcarra put 1500 men in
25 the field for 74 days taking them to the awesome

1 Canyon de Chelly in the heart of Navajo country and on
2 to the Hopi villages."

3 So, again, do you know -- this is a
4 little bit later, but do you think that this is a
5 psychological reference or --

6 A. I believe so. This is -- this is where
7 you will find Navajos. This is the heartland.

8 Q. And in -- this would be 1823. Do you
9 know in 1823 -- the last question was 1805. Do you
10 know in 1823 where Navajo country was --

11 A. No.

12 Q. -- where Canyon de Chelly was --

13 A. Oh.

14 Q. -- in respect to the greater Navajo
15 country?

16 A. In respect to the greater Navajo country,
17 no, but there is no question that this was considered
18 the heart of the Navajo Nation and an attack on it was
19 an attack considered -- no more hurtful or damaging
20 attack could be made on the Navajos, invading Canyon
21 de Chelly.

22 Q. Given that, would it seem that Canyon de
23 Chelly, given what you just described, would be on the
24 very western edge of Navajo country?

25 A. I don't know. It could be on the very

1 western edge.

2 Q. Let's turn to Page 41 of Dr. Weber's
3 report. And the first full sentence on that page that
4 reads -- begins with "In the late 1700s, Spanish
5 officials signed treaties with other Indians in New
6 Mexico, including Navajos and Comanches, which brought
7 those independent people under Spanish dominion . . ."
8 And it continues on and it recognizes the autonomy
9 that they enjoyed, in fact.

10 What does it mean to be brought under
11 Spanish dominion?

12 A. In the case of these tribes, and he could
13 have included the Utes in that, the Comanches were the
14 most important of those tribes as far as Spaniards
15 were concerned. Comanches had threatened the very
16 life of Rio Grande, New Mexico, and in 1786 Juan
17 Bautista de Anza was able to make a treaty of peace
18 and alliance with the Comanches, and part of that --
19 connected parts of that were also to make peace with
20 the Utes, the Navajos, and the Jicarilla Apaches.

21 For a brief time, at the end of the
22 18th century, those were considered the four allied
23 tribes, and it didn't -- with the Comanches, it lasted
24 well into the 19th century.

25 Q. Okay. Allies doesn't -- isn't the same

1 as being under Spanish dominion, is it?

2 A. Certainly they maintained a degree of
3 independence, but there were a number of details of
4 those treaties. The Spaniards recognized leaders of
5 those nations, went to the extent of dressing them as
6 Spaniards, giving them -- I could just see some of
7 these people in their three-cornered hats and with
8 Spanish swords and Spanish attire. There were trades
9 of actually Spaniards going out and living with the
10 Comanches as official interpreters, and some Comanches
11 living in Santa Fe being schooled by the Spanish.

12 There were many aspects to these
13 treaties, and I don't think it's too much of a stretch
14 to say they were under Spanish dominion, at least
15 during the time that these treaties were holding.

16 Q. I'm still not sure that you've told me
17 what being under Spanish dominion means. That's
18 really what I want to know. I understand that you're
19 saying that you agree with this statement that they
20 were under Spanish dominion --

21 A. Yes.

22 Q. -- but I'm not sure what being under
23 Spanish dominion means.

24 A. Well, part of that diplomacy -- and at
25 the same time they were receiving formal gifts. There

1 was a fund for providing gifts to these allied tribes
2 under Spanish dominion, and so there were several
3 aspects of this, but I would say, at least in this
4 context, yes, they were under Spanish dominion. They
5 could break away at any time and did, but at this
6 point I would say, yes.

7 Q. Okay. Well, let me -- I apologize. I'm
8 still not -- I'm still not sure I understand the
9 answer to my question, which is -- so let's take it
10 away from the context of these particular tribes.
11 What does being under Spanish dominion mean in a
12 general sense?

13 A. Probably in some sense have -- in some
14 ritual sense have sworn obedience, to have
15 acknowledged Spanish hegemony.

16 Q. And that description would apply?

17 A. That would apply, yeah.

18 Q. And is that significantly different than
19 the act of ritual possession?

20 A. I would say the result is not that
21 different.

22 Q. So in practice, in effect, they're more
23 or less the same thing; would you agree with that?

24 A. Yes, um-hum.

25 Q. So with -- let's turn -- let's discuss

1 the act of ritual possession. Does it matter, in
2 terms of its significance, if the subject party
3 doesn't believe in it?

4 A. That would be very hard to determine I
5 would think. How would we know if they believed in it
6 or not and to what degree they understood it?

7 Q. So does it matter if they understood it?

8 A. Probably not.

9 Q. Does it matter if they don't subsequently
10 act in accordance with it?

11 A. Yes, that matters.

12 Q. How does that matter?

13 A. Well, if they don't act in accordance
14 with it -- and what would be an example of not acting
15 in accordance with it?

16 Q. Rejecting Spanish authority in all
17 sorts -- or in whatever ways you can tell me that
18 would matter. What ways would matter?

19 A. Well, I suppose continued armed
20 resistance, military resistance would certainly
21 constitute a breaking of that -- of that bond.

22 Q. Are there any other -- is it just armed
23 resistance or --

24 A. I think that's very hard to determine.

25 Q. But nonetheless, the act of possession

1 doesn't last in perpetuity if, say, armed resistance
2 happens?

3 A. I think isolated examples of armed
4 resistance of some faction of a group would not break
5 it. If the whole group somehow went to war against
6 Spain, yes, that would be break it.

7 Q. Is that why Vargas went around doing the
8 act of possession in 1692?

9 A. Yes.

10 Q. Do you know if Oraibi or leaders from
11 Oraibi went through the act of possession in 1692 with
12 Vargas?

13 A. Say that again. I'm sorry.

14 Q. Do you know if the village of Oraibi or
15 their representatives went through the act of
16 repossession with Vargas?

17 A. I don't know whether their
18 representatives did, but Vargas turned back before
19 Oraibi because of drought and lack of water, but so
20 frequently representatives from many Pueblos gathered
21 at one place and took the oath at the same time.

22 Q. Do you have an opinion on whether, by
23 going through the act of repossession in 1692, the
24 Hopi intended to become subjects of the Crown under
25 Spanish rule?

1 A. It's very difficult to know what they
2 intended. They certainly went through the act.

3 Q. Now, before you've said that Hopis tended
4 to do whatever suited them, their purposes, at the
5 time. Is it possible that they figured, let's make
6 Vargas happy, we'll go through this and he'll leave?

7 A. That's entirely possible.

8 Q. If you could turn to Exhibit 6, it's
9 "Pueblo Spaniards and the Kingdom of New Mexico." I
10 think I might have that reference wrong. Bear with me
11 for a moment. I'll move on and see if I can find it
12 during a break. I apologize for that.

13 You mentioned briefly earlier in my
14 questions about dominion, that being under Spanish
15 dominion was effectively the same as going through the
16 ritual act of possession.

17 A. Yes, following from the act of
18 possession.

19 Q. So until such time as there's an armed
20 rebellion that maybe breaks that chain; is that
21 correct?

22 A. Yes.

23 Q. So would -- wouldn't Navajos sit in more
24 or less the same position as Hopis in the sense that
25 Hopis went through the ritual act of possession,

1 Navajos accepted Spanish dominion via treaty?

2 A. Yes. Yes.

3 Q. Dr. Weber's report on Page 41, footnote
4 111, which is at the very bottom of the page, you
5 discuss Escalante's travels from Zuni to Hopi.

6 A. Um-hum.

7 Q. Do you know if he encountered any Navajos
8 on this expedition?

9 A. Gosh, I've read his diary. Frankly, I
10 don't recall at the moment.

11 Q. Okay. On Page 42 of Dr. Weber's
12 report -- and I just want to make sure on page -- the
13 footnote 114, which, again, references Peter Whiteley
14 calling to Dr. Weber's attention the clause in this
15 Navajo treaty, it's my understanding from what you
16 said earlier, and I just want to confirm this, that
17 you are unaware of any communications between them and
18 don't know the substance of that and haven't had any
19 discussions with Dr. Whiteley yourself?

20 A. I am unaware of any such communication.

21 Q. Page 43 of Dr. Weber's report, the second
22 sentence discussing the Hopis under Mexico, it says,
23 ". . . they were on the other side of a sea of
24 Navajos." Do you know where that sea of Navajos was?

25 A. I don't.

1 Q. Do you know what they were doing?

2 A. I would suspect they were raising sheep
3 and migrating seasonally divided into various family
4 outfits.

5 Q. Farming? Were they farming?

6 A. I think seasonally, yes, they were,
7 indeed, but I don't know of any definite references to
8 even seasonal Navajo farming beyond the drainage of
9 the river of the east -- the Puerco River of the east.
10 I don't know of any specific references to Navajo
11 farming in the drainage of the Little Colorado.

12 Q. There isn't a lot of documentation --

13 A. No.

14 Q. -- of what was happening out there in the
15 Little Colorado River Basin, is there?

16 A. (Deponent shook head from side to side.)

17 MR. McELROY: We need that answer.

18 Q. (BY MR. STEUER) We need a verbal answer.

19 A. Oh. No. No, there is not a lot of
20 documentation on the Little Colorado River Basin.

21 Q. Is it safe to assume that wherever the
22 sea of Navajos was and whatever they were doing, they
23 were using water?

24 A. Yes, I would certainly suspect.

25 Q. Would you turn to Page 50 of Dr. Weber's

1 report? And the second sentence of that paragraph
2 says, "Like other Pueblos, and in contrast to Indians
3 who did not dwell in permanent villages, Hopis had
4 rights to land and water."

5 And are you saying that Indians who did
6 not dwell in permanent villages could not possess
7 rights to land and water?

8 A. Again, that would have to be specific
9 cases. I believe the Pueblos, per se, by implied
10 right enjoyed those, and it's not to say that others
11 could not have, but I don't know specifics.

12 Q. So the distinction is that it's implied
13 for the Pueblos, and these nonpermanent
14 village-dwelling Indians would have to demonstrate --

15 A. Yes.

16 Q. -- a use?

17 A. Yes. Yes.

18 Q. Would you turn to Page 53 of Dr. Weber's
19 report? The very last paragraph, there's a discussion
20 of General Stephen Watts Kearny, and then there's --
21 the last sentence is what I am confused by, and it
22 says, "The Treaty of Guadalupe Hidalgo had devoted an
23 Article XI to the 'savage tribes,' whose incursions
24 into Mexico the United States promised to contain, and
25 made it clear that the 'savage tribes' were not among

1 the Mexicans whose property it promised to protect."

2 And my question is: Who made it clear?

3 Is it -- is this statement saying that the treaty

4 itself makes it clear, or is it saying that this

5 General Stephen Watts Kearny said that? I'm not sure

6 who's saying that.

7 A. I would want to look and read Article XI.

8 Q. Absolutely.

9 A. I don't know. I know the United States
10 made the foolish assertion that it would control the
11 wild tribes and the raiding. Whether it made clear
12 that savage tribes were not among -- I suspect that's
13 implied, that if there are people who you are going to
14 subdue, that they would not automatically have
15 property that you would protect.

16 (Deposition Exhibit 9 was marked.)

17 Q. Exhibit 9 that I've handed you, it says,
18 "Treaty of Peace, Friendship, Limits, and Settlement
19 with the Republic of Mexico," and it's generally known
20 as the Treaty of Guadalupe Hidalgo.

21 A. Yep.

22 Q. And I believe the article is on Page 930
23 of this exhibit, if you want to take a moment to read
24 that.

25 Did you see -- so returning to the

1 question: Is there anything in there that says
2 that -- that makes it clear that savage tribes were
3 not among the Mexicans whose property was protected?

4 A. No, I do not see that implied. It says,
5 "The United States will control such savage tribes."

6 MR. STEUER: We can take a break here for
7 just a -- I don't need a long break. Ten minutes.

8 MR. MENTOR: Okay.

9 (Recess taken, 2:15 p.m. to 2:34 p.m.)

10 MR. STEUER: Back on the record.

11 (At this time Ms. Porter was not
12 present.)

13 Q. (BY MR. STEUER) Dr. Kessell, we can turn
14 now to your report, which should make you happy.

15 A. Uh-oh.

16 Q. I believe it's Exhibit 1, if I'm not
17 mistaken. And Page 1 of your report. You -- in the
18 middle paragraph -- at the very beginning of the
19 second paragraph there it says, "Each Pueblo
20 community, home to a few hundred or as many as 2,000
21 or more residents . . ."

22 Do you know how many people were living
23 at Hopi during the colonial period?

24 A. There are several estimates. I believe
25 one of the first expeditions, the Espejo expedition,

1 wildly estimated 50,000 people. I think more
2 accurately -- for example, in 1745, a friar who spent
3 some time out there estimated that there were almost
4 11,000 -- 10,000 something, 10,800 something, and that
5 was 1845.

6 Thirty years later in 18- -- I hope I
7 said 1745. In 1775, Father Vélez de Escalante
8 estimated that there were something over 8,000. When
9 the United States occupied New Mexico in 1846, the
10 first governor of occupied New Mexico, Charles Bent,
11 estimated that the population was under 3,000. So it
12 did vary over the period considerably.

13 Q. And your knowledge of the population is
14 just based upon these various estimates that you
15 described --

16 A. Exactly.

17 Q. -- in the documentary record?

18 A. Yes.

19 Q. Do you have any opinion or know how many
20 Navajo may have been living in the Little Colorado
21 River Basin during any of this time period?

22 A. No, I really don't, as far as specifics.
23 I recall that the impression from the 18th century
24 is that there were -- in the 1700s, there were very
25 few, surprisingly few, for the impact they had, but I

1 believe they did, indeed, increase considerably, but I
2 don't have any figures.

3 Q. And a seminomadic people, such as the
4 Navajo, it would be much more difficult to assess
5 their population, wouldn't it?

6 A. Definitely.

7 Q. On Page 2 of your report, it's the last
8 paragraph, the second sentence reads, "But because no
9 competing users -- Spanish or Indian -- ever
10 challenged the Hopis for their land or water during
11 the colonial period, no specific legal instruments
12 were required."

13 What do you base this statement on? Let
14 me backtrack. I'm not asking about the "no specific
15 legal instruments" part of the statement. I'm asking
16 about what do you base the statement that there were
17 "no competing users that ever challenged the Hopis for
18 their land or water during the colonial period"?

19 A. Because such competing users don't appear
20 in the documentary record, as far as I know.

21 Q. So if there had been a competing user but
22 nobody documented it, nobody went to the authorities
23 of Spain, you would not see such documentation,
24 correct?

25 A. I would not.

1 Q. Do you know if Navajo was ever a
2 competing user in the Little Colorado River Basin?

3 A. I know that's a key question, and I don't
4 know that -- I don't know anything to base -- I don't
5 know of any evidence of the Navajos as competing
6 agricultural competitors.

7 Q. Is there evidence of them competing in
8 other ways than agricultural?

9 A. By "agricultural," I'm including
10 pastural.

11 Q. Okay. The next -- it's a couple of
12 sentences after that in the same paragraph you write,
13 "Had competitors appeared, the Hopis, just as other
14 more vulnerable Pueblos to the east, would have relied
15 on the weight of Spanish legal tradition . . ." And
16 you use the 1819 event as your example of this.

17 So I just want to make sure that I
18 understand this. Is it your contention that because
19 in 1819 the Hopis sought Spanish legal assistance for
20 Navajo incursions on them, and did not seek Spanish
21 legal assistance or military assistance at any point
22 in time prior to that, that that must have been the
23 very first time that Navajos were competitors for
24 their land and water resources?

25 A. Not at all. Not at all. I'm not basing

1 it on 1819. I'm basing it on the documentation up to
2 that, that there were -- there's no evidence --
3 documentary evidence of competitors beforehand, and an
4 indication of how Spaniards might have responded is
5 this 1819 evidence.

6 Q. We've discussed already in numerous
7 times -- in numerous examples of their functional
8 independence, if you will, from Spanish control, the
9 Hopi's functional independence. Isn't it quite
10 possible that there was competition or sharing that
11 was going on there and nobody sought Spanish
12 assistance for a number of reasons?

13 A. I think that's entirely possible.

14 Q. In 1819, Hopis sought military
15 protection, correct --

16 A. (Deponent nodded head up and down.)

17 Q. -- not legal assistance?

18 A. Yes, military protection. They appealed
19 to Governor Facundo Melgares of New Mexico for
20 military protection. It was particularly bad at that
21 time, and the governor actually thought that there
22 might be a chance of establishing a Spanish mission
23 among the Hopis at that particular time in 1819 that
24 didn't come to pass, but there was definite
25 communication between the Hopis and the governor in

1 Santa Fe.

2 Q. And in the resulting 1819 treaty with the
3 Navajos -- Spanish treaty with the Navajos, that was a
4 result of Hopis coming to ask for military assistance,
5 both Hopi and Navajo rights and property were
6 recognized, correct?

7 A. I'm trying to think of the treaty.

8 Q. We have it as an exhibit --

9 A. Exactly.

10 Q. -- if you'd like to refer to it. It's
11 Exhibit 4.

12 A. Exactly. And yes is the answer to that
13 question, the rights of both were considered.

14 Q. And recognized?

15 A. And recognized. But I would add that
16 that's not property rights, per se, that a sedentary
17 community would have had implied. I don't believe you
18 can imply by the rights that a certain territory is
19 where one would expect to find Navajos, and that's
20 what the treaty speaks to but not property rights.

21 Q. Well, let's turn to the treaty. That
22 doesn't seem consistent with what you said earlier
23 about Paragraph 12 -- or Article XII of the treaty,
24 that it just recognized where one might find Navajo.

25 A. Yeah. That's -- it is recognized that

1 the line between the two peoples remains the same.

2 Q. Which -- that's more than just this is
3 where you're going to find them, isn't it?

4 A. Yes, but it stops short of saying
5 property rights in the sense of a grant of land, which
6 is implied for sedentary peoples but not for unused --
7 nonsedentary peoples.

8 Q. So it's not a grant of land, but from
9 what we've discussed earlier, it's Navajo accepting
10 Spanish dominion, which is, as you said, more or less
11 the same as the act of ritual possession, it's a
12 recognition of Navajo territory --

13 A. Um-hum.

14 Q. -- where Navajo is free to live
15 peaceably. Are you saying that if there were
16 competitors in that land, that Navajo would not have
17 rights recognized?

18 (At this time Mr. Deeny left the room.)

19 A. I actually was thinking at the time of
20 the 1808 proceedings that we've talked about, and that
21 the governor of New Mexico, Alberto Maynez, clearly
22 says that a mere permission for the Navajos to plant
23 in the Puerco River Drainage does not mean royal
24 property rights, and he lays that out. It does not
25 mean royal property rights.

1 Q. And that's separate from a treaty that
2 the government of Spain has signed with Navajo where
3 Navajo has accepted Spanish dominion?

4 A. No, it's not separate at all. I think
5 it's simply their license, which was renewable and
6 usually between a Spanish official and a particular
7 Navajo outfit that they could have that kind of a
8 permission to harvest what they planted and -- but
9 that this does not constitute royal possession.

10 Q. Can you look at Article XVII?

11 A. I'm reading it. It says, "They will
12 tranquilly cultivate their lands and enjoy the fruits
13 of their labors in abundance," and that is by special
14 license.

15 Q. And "They will enjoy the energetic
16 protection of the Monarch of Spain."

17 A. Yes.

18 Q. And that's just a license revocable at
19 any time --

20 A. Yes.

21 Q. -- and not a property right?

22 A. Yes.

23 Q. If you could turn to Exhibit 3 briefly,
24 Bárbaros.

25 A. Ah.

1 Q. On Page 192 of Exhibit 3 --

2 MR. MENTOR: Counsel, can I ask which
3 exhibit are you referring to? I'm sorry.

4 MR. STEUER: Exhibit 3, Bárbaros.

5 Q. (BY MR. STEUER) And I just want to
6 point --

7 MR. MENTOR: I'm sorry, can you take just
8 a second here. You're bouncing all over the place and
9 I'm trying to keep up. So Exhibit 3, Bárbaros. Where
10 were you?

11 MR. STEUER: I haven't said yet.

12 MR. MENTOR: Okay.

13 Q. (BY MR. STEUER) About a third of the way
14 down on the page, there's a list --

15 MR. MENTOR: On which page, Counsel?

16 MR. STEUER: 192.

17 MR. MENTOR: Thank you.

18 MR. STEUER: I thought you already had
19 that, I'm sorry, because I said that three times
20 already.

21 MR. MENTOR: Okay.

22 Q. (BY MR. STEUER) About a third of the way
23 down the page there is a list of what appears to be a
24 number of indios Bárbaros, the Apaches, Comanches, I
25 don't know how to pronounce the next one, Araucanians,

1 Chiriguanos. Do you see where I'm talking?
2 A. 192?
3 Q. 192.
4 A. Ah. Okay.
5 Q. It's the first paragraph. It says, "Like
6 nomads."
7 A. "Like nomads." Gotcha.
8 Q. And it's just a list of what are -- it
9 appears to be a list of indios Bárbaros; is that
10 correct?
11 A. Right. Um-hum.
12 Q. So do you see that?
13 A. Um-hum.
14 Q. Are you familiar with the Chiriguanos?
15 A. Not intimately.
16 Q. Are they indios Bárbaros, do you know
17 that much?
18 A. I believe they are, as are the
19 Araucanians, which are in southern Chile.
20 Q. If you could turn now to -- this page is
21 out of order, I apologize. It's Page 220, but it's
22 the very last page of the exhibit.
23 A. Okay.
24 Q. And this is -- it's towards the bottom of
25 that first paragraph.

1 A. Um-hum.

2 Q. And it says, "Rather than acknowledge
3 Chiriguanos' rights to land, as Spanish policy
4 required," and then goes on to where they asserted
5 Spanish rights over that land. What Spanish policy
6 requires recognition of indios Bárbaros' rights to
7 land?

8 A. I want to find out who the Chiriguanos
9 were and what the circumstances were. I have no idea
10 if their case is comparable to the Navajos. I don't
11 know who they are, quite frankly.

12 Q. Okay. As indios Bárbaros, they would not
13 have a land grant, would they?

14 A. Not as indios Bárbaros, but if they were,
15 indeed, converted, they certainly could then enjoy all
16 the rights.

17 Q. But a treaty that takes them under
18 Spanish dominion and recognizes territory and all that
19 and says Spain will protect them and allow them the
20 use of that land, that couldn't give them rights to
21 land?

22 A. At least in -- at the time and place it
23 appears that Spaniards were willing to give the
24 Navajos license, but it did not constitute royal
25 possession.

1 Q. Now, you used as that example the 1808 --

2 A. Yeah.

3 Q. -- discussion. That is 11 years prior --

4 A. Right.

5 Q. -- to the 1819 treaty, is it not?

6 A. Yes. I'm assuming the same policy holds.

7 Q. Was the same circumstance -- were the
8 circumstances on the grounds different?

9 A. Not that I know. Not that I know.

10 Q. On Page 3 of your report, this is
11 going -- so back to Exhibit 1. In that first full
12 paragraph, you say, ". . . the Treaty of Guadalupe
13 Hidalgo honored the right to every kind of property
14 belonging to peaceable Mexican citizens, which
15 included the Hopi Indians." Did that not include
16 Navajo?

17 A. I think it well could include Navajo.

18 Q. On Page 5 of your report, the last
19 sentence of that first paragraph just -- you say here,
20 "When non-Indians and Indians contended for the same
21 stream or river water," and then you list "in the
22 interest of equity and the public good, decided the
23 matter based on" four factors, "availability, prior
24 use, needs, and safeguarding of Indian communities."

25 I just want to make clear, that list of

1 factors and the equity and the public good, that would
2 apply to other types of competitors?

3 A. Yes.

4 Q. So not just when you have a non-Indian
5 and Indian community --

6 A. No. Oh, no.

7 Q. We can skip to Page 10 of your report.
8 In the first full paragraph you're discussing
9 Dr. Brescia's concern regarding use of the Aamodt
10 case, and in that last sentence you say, "In reality,
11 Weber refers not at all to the judicial proceedings of
12 Aamodt, but only to the historical research generated
13 by the case." Is there really a distinction to be
14 made there?

15 A. Well, he is referring not to the
16 proceedings of the case, but to the reports introduced
17 by the experts.

18 Q. Right. Wouldn't relying on the research
19 and reports performed in furtherance of that case be
20 relying on that case? I mean, you're not relying on
21 the judge's opinion --

22 A. Right, nor the proceedings.

23 Q. -- you're relying on the historical
24 research?

25 A. No. I believe the historical research

1 generated by it could be used independent of the
2 proceedings or findings of the long-running Aamodt
3 case.

4 Q. Was -- did you interpret Dr. Brescia's
5 concern as it was done in the Aamodt case, so,
6 therefore, it can't apply anywhere but the Aamodt
7 case? Is that how you interpreted his concern?

8 A. I believe I interpreted it as it's not
9 appropriate to apply what relates to the Rio Grande
10 Pueblos to the Hopi Pueblos.

11 Q. And you disagree with that?

12 A. Yes, I do disagree with that. I see them
13 as part of the continuing cultural Pueblo world.

14 Q. On Page 11 of your report, the first
15 sentence of the first -- the full paragraph on that
16 page you write, ". . . Brescia reiterates his argument
17 that 'the Hopis remained outside the effective control
18 of the Spanish colonial enterprise.'"

19 Now, would you characterize your opinion
20 as agreeing with that statement but disagreeing on
21 what that means for Hopi rights, or would you just
22 flat out disagree with his statement?

23 A. I would say the Hopis did remain part of
24 the Pueblo world and the government of -- the
25 entity -- the polity of New Mexico.

1 Q. So you would say that they are not
2 independent?

3 A. Again, we get back to that figurative use
4 of independence, and, no, as far as Spain is
5 concerned, they're not independent. They're -- as
6 Father Escalante kept saying, they are rebels but
7 still vassals of his majesty.

8 Q. Okay. I'm not asking about what Spain
9 thought here. This statement says, ". . . Hopis
10 remained outside the effective control of the Spanish
11 colonial enterprise," and you have numerous statements
12 and Dr. Weber has numerous statements that say Hopis
13 were independent, "haughty independence" was a word
14 that was used. Wouldn't those all say that they were
15 outside the effective control of the Spanish colonial
16 enterprise?

17 A. My view is that had the Spanish
18 government decided that it should reassert what you
19 might call effective control, there was no reason for
20 that. There was no economic or political reason, that
21 the Hopis were peaceable, they weren't any threat to
22 Spain. There they were out there, but still part of
23 the -- of the Pueblo world and, hence, Spanish/New
24 Mexico.

25 Q. You say there was no reason for Spain to

1 try to assert control, and, yet, didn't Spain try to
2 on numerous occasions?

3 A. On several occasions, yes, but
4 halfheartedly. Had there been, indeed, mercury in the
5 Sierra Azul, which was rumored up until the time of
6 Vargas -- and that presumably is out in the area of
7 the Little Colorado Basin. Had there been mercury
8 there, that would have constituted a reason to
9 maintain effective everyday control of the area.
10 There was no such reason, and hence, I feel that Spain
11 really had no need to assert effective domination.

12 Q. So they tried, but halfheartedly, I
13 think, is the words you used to describe --

14 A. Yes.

15 Q. And had they really wanted to, they could
16 have?

17 A. Yes.

18 Q. And because of that, you believe that
19 they were within -- the Hopis were within the orbit of
20 the Spanish Empire?

21 A. Yes.

22 Q. Again, on Page 11, the second sentence of
23 that same paragraph, "Again, he tilts -- in the
24 Navajo's behalf -- at the notion of a monopoly of
25 natural resources, then resorts to his own

1 hypothetical. Without documenting any such
2 initiative" -- actually, I'll stop.

3 Let's just discuss that first sentence.
4 So I read this as a criticism of Dr. Brescia sort of
5 setting up a strawman of monopoly of natural
6 resources. Is that a fair characterization of what
7 you're saying?

8 A. That is the way I interpreted it, and I
9 see nothing elsewhere in the record that the Hopis or
10 anyone else was wanting a monopoly of natural
11 resources for exclusive use. I just don't see that,
12 and for that reason, it appeared to me as a strawman.

13 Q. Do you know the quantity of water claimed
14 by the Hopi Tribe in this case?

15 A. I have no idea.

16 Q. Do you know whether the Hopi Tribe has
17 claimed a superior priority for all of this claimed
18 water against all other users?

19 A. No, I didn't know it for a fact, but I
20 suspect that the Hopi Tribe definitely has the best
21 claim to prior use of water in that basin as existing
22 sedentary agricultural peoples.

23 Q. But you don't know the quantity that they
24 claim --

25 A. I do not.

1 Q. -- as part of that?

2 A. No.

3 Q. Let's go to the next sentence of that
4 paragraph. "Without documenting any such initiative,
5 he argues that 'Spanish efforts to transform the
6 Navajos into a completely sedentary society would have
7 been meaningless if the intent was to deny them water
8 and give it all to other Indians in the region.'"

9 And then you go on to say, "In theory, he
10 is absolutely right. Indeed had Spaniards intended
11 such a transformation of the Navajos -- of which they
12 repeatedly despaired -- they would never have given
13 all available water to anyone else."

14 I'm not sure I completely understand what
15 you're saying. Are you saying that there was no
16 effort to transform the Navajos to a sedentary
17 society?

18 A. Yes. Yes, and particularly the effort in
19 1750 and --

20 Q. When you say "yes," you're saying yes,
21 there was an effort?

22 A. Yes, there was an effort.

23 Q. Okay.

24 A. Specifically in about 1750. The
25 Franciscans attempted to -- found a mission at

1 Seboyeta, which is not far from Laguna Pueblo. It's
2 north. And the effort failed, but my point is I don't
3 think the Spaniards ever expected they could trans the
4 Navajo -- transform the Navajos into a completely
5 sedentary society. Yes, they tried, but if, indeed,
6 they had, Spain would never have denied the Navajos
7 water, never at all. That would have been totally
8 counter to an effort to found a mission.

9 So, yes, I believe they would, indeed,
10 theoretically have had those rights had that -- had
11 they been transformed into sedentary peoples.

12 Q. And you also said earlier that even had
13 they not been transformed, but had they been a
14 competing user, that they could have had rights even
15 as a --

16 A. Yes. Yes.

17 Q. Okay. Let's turn to Appendix 1.

18 A. May I make a correction to the record as
19 we look at Appendix 1?

20 Q. Sure.

21 A. I did not remember that -- after I had
22 submitted this report the first time around, since
23 then and since I was retained to continue this work, I
24 have -- along with gathering maps which I did mention,
25 I have done a revised chronology, which is,

1 essentially, the same, but I've added quite a bit of
2 material to this chronology. So when you asked me,
3 Have you done anything in addition, I hadn't even
4 thought of that, but I have -- I have done a revised
5 chronology.

6 MR. STEUER: Can we take a short break?

7 MR. MENTOR: Yes.

8 (Recess taken, 3:12 p.m. to 3:29 p.m.)

9 MR. STEUER: Back on the record.

10 We were just given a document by counsel
11 for the Hopi Tribe, and we reserve the right to object
12 to this document and reserve the right to file a
13 supplemental report if needed, but for the interest of
14 expediency since we're here, we're going to do our
15 best to ask you some questions about this.

16 So if you could label this as the next
17 exhibit.

18 (Deposition Exhibit 10 was marked.)

19 Q. (BY MR. STEUER) Dr. Kessell, this is a
20 revised Appendix 1 chronology to your report; is that
21 correct?

22 A. It is.

23 Q. And how did this report come about, this
24 revised chronology?

25 A. Actually, I began to revise it as I

1 prepared for this deposition, and I should add, I
2 deleted nothing from the previous one. What is added
3 is added in bold type, and it was really more for my
4 information as I prepared for this, and I was unaware
5 that I should have -- I didn't think it could be
6 entered into evidence.

7 Q. So when you answered before or near the
8 beginning when I had asked if you had done anything
9 more and you said you hadn't --

10 A. I was in error.

11 Q. -- you were in error and you had done
12 this?

13 A. I had done this. I had also collected
14 the maps, and that's what occurred to me this morning.

15 Q. Were you asked to prepare this by
16 counsel --

17 A. No.

18 Q. -- for the Hopi Tribe?

19 So you just independently did more
20 research into this chronology, revised this, and then
21 informed counsel that you had a revised chronology?

22 A. Yes.

23 Q. And that's how this came about?

24 A. Yes.

25 Q. Do you know -- well, when did you discuss

1 this with counsel about having a revised chronology?

2 A. I'm not sure. I've been working on it
3 right up until probably a couple weeks ago, and I'm
4 sure I mentioned it, but I don't know in any formal
5 sense if I did. It was just preparing for the
6 deposition.

7 Q. So also when I asked you what you had
8 done to prepare for the deposition and you said looked
9 at your reports and looked at the other reports, that,
10 too, was in error, you had been doing independent
11 research to prepare for the deposition; is that
12 correct?

13 A. Yes.

14 Q. Do you have your contract and scope of
15 work with you that you have with the Hopi Tribe?

16 A. No, I do not.

17 Q. I think I heard you say earlier about
18 re-signing up or something along those lines. Did you
19 have a new contract for this work or did you have just
20 one contract that you signed with the Hopi Tribe long
21 ago?

22 A. I signed one long ago that terminated on
23 December 31, 2011, and whenever I turned this report
24 in, I did virtually nothing else, and as far as I was
25 concerned, everything had gone dormant, and then when

1 the new counsel contacted me, I think first rather
2 informally in September last year, I still was
3 technically under contract with the tribe. I do -- I
4 understand I have a new contract.

5 Q. Since I don't have those in front of me,
6 I'll just ask you: Is there any substantive
7 difference between your previous contract and this new
8 contract?

9 A. Not that I know of, except I have lowered
10 my hourly fee.

11 Q. Okay. Does the new contract refer to
12 this new work that you've done?

13 A. It must presume it. No, I don't know
14 what the new contract . . .

15 Q. I will -- except where I indicate, I will
16 generally be referring to your revised chronology,
17 Exhibit 10, except, as I said, where I have some
18 questions about the difference between the two.

19 A. Okay.

20 Q. How did you go about compiling this
21 chronology?

22 A. Just in truly looking at my original
23 report and trying to become more informed about --

24 Q. Well, let me backtrack. I'm asking about
25 the whole chronology, how you went about doing both --

1 I mean, the original and then how you went about
2 supplementing it.

3 A. I remember suggesting to the previous
4 counsel perhaps -- I mean, Weber's report is so
5 exceptionally good, what possibly could I do except
6 rubber stamp Weber's report. I said, "Could I
7 possibly do a Hopi/Spanish chronology, would that be
8 of use?" And they said, "Yes," and then I started
9 compiling this.

10 Q. And how did you go about compiling it?

11 A. Looking both at primary and secondary
12 sources and just looking back over the entire Spanish
13 colonial and Mexican periods with an eye to Hopi
14 relations.

15 Q. And how did you go about adding to it in
16 this recent work?

17 A. Simply the same way. I was reviewing
18 materials and added -- for example, this 1808
19 document, I had seen it, and I think in my original
20 one I may have mentioned it or not, but did go to the
21 original document and look at that, and just continual
22 research on the topic of Hopi/Spanish relations led to
23 additions.

24 Q. And did you use the expert reports in
25 some cases to lead you to new sources?

1 A. I think I had done that previously.
2 These probably come after that.

3 Q. Okay. Did you -- when you say you sort
4 of continued what you had started with the other one,
5 does that suggest that your first report was
6 incomplete, that there were sources you didn't check
7 or didn't check thoroughly enough?

8 A. It's why I entitled my original appendix
9 "Partial Hopi, Spanish, Mexican Chronology" because it
10 can always be added to. And back to your previous
11 question, I look right down here, in 1583, I say
12 Cutter report, so, yes, I was looking at other expert
13 reports at the same time.

14 Q. And to the best of your knowledge, as
15 this revised appendix stands, is this the complete
16 list of documentary contacts between Hopi and Spanish
17 representatives during this time period?

18 A. By no way. Given more time, I could keep
19 it up.

20 Q. Okay. In this -- Page 1, the 1583 entry
21 that you just mentioned, you indicate the Querechos.
22 Do you know who the Querechos were?

23 A. No, I do not know who the Querechos were.
24 They were evidently also called serranos, mountain
25 people, and I don't think the anthropologists agree.

1 They have several suggestions, among which, of course,
2 are Navajos, ancestral Navajos.

3 Q. I'm going to skip most of this pre-revolt
4 period and go to the bottom of Page 1680 -- I mean,
5 bottom of Page 2, excuse me. 1680 is the date
6 reference, and that's a date reference for the Pueblo
7 revolt and you've added in bold additional
8 information.

9 A. Um-hum.

10 Q. This additional information you've added,
11 it's not really a contact, is it?

12 A. Well, it implies continued contact, and I
13 knew about this source, Laurie Diane Webster, and
14 it's, in essence, her Ph.D. dissertation, but I have
15 not previously had a chance to look at it, but it so
16 plainly reveals the continued Hopi presence in the
17 trade and commerce of the Pueblo world, and
18 particularly graphically her map on her Figure 1016,
19 which I don't have here, but it shows the Pueblo world
20 and it shows the trade routes and all, and it connects
21 the Hopi Pueblos and the Rio Grande Pueblos.

22 Q. Again, my question is: It's not really a
23 contact in its chronology, it's more --

24 A. Exactly. It's not a specific --

25 Q. -- support that might have been included

1 in your primary report?

2 A. Precisely.

3 Q. Okay. On Page 3, the 1693 contact, and
4 that starts with "Vargas suggests," this isn't really
5 a contact with Hopi, is it? It's a suggestion about
6 Hopi, but it's not a contact with Hopi, correct?

7 A. It is a suggestion about Hopi.

8 Q. But it's not a contact with Hopi?

9 A. No, it's not a definite contact. No, it
10 isn't.

11 Q. And then you have a number of entries
12 about Awátovi.

13 A. Yes.

14 Q. There's a 1699 entry, a 1700 entry, a
15 1700 to 1701 entry.

16 A. Um-hum.

17 Q. Now, these -- let me back up. I meant to
18 ask a question that I did not ask. At the beginning
19 of this chronology in both your new one and your
20 original one, you say that this chronology is intended
21 to -- or it illustrates "their almost constant
22 contact," and that basically leads you to the
23 conclusion that "As far as Spain and Mexico were
24 concerned, the Hopi towns remained a constituent
25 province of the Spanish and Mexican polity of New

1 Mexico." These contacts are supposed to demonstrate
2 that fact, correct?

3 A. Yes.

4 Q. Okay. Okay. Returning to Page 3 and the
5 Awátovi contacts. There's numerous contacts with the
6 Awátovi, and it culminates in the destruction of
7 Awátovi, and then a failed punitive mission from Spain
8 regarding the destruction of Awátovi. And I'm just
9 wondering how the destruction of Awátovi and a failed
10 punitive mission are evidence of the kind of contact
11 that demonstrate that they were a constituent
12 province.

13 A. Well, if Spain had totally turned its
14 back and no longer considered the Hopi Pueblos part of
15 New Mexico, why would they have bothered?

16 Q. Well, that's not -- that's a question,
17 not an answer.

18 A. I do have --

19 MR. MENTOR: Counsel, I'm objecting to
20 that question. That was a rhetorical question, as I
21 understood it. I think he did answer your question.

22 MR. STEUER: I'd like to hear him say it
23 affirmatively, please.

24 A. I believe had Spain not wished to
25 continue any relationship after the reconquest with

1 the Hopi Pueblos, the destruction of Awátovi would
2 have made no difference to them, but they were still
3 involved in Hopi affairs and -- for that reason.

4 Q. (BY MR. STEUER) Before you spoke of the
5 kind of thing that would destroy a ritual possession
6 and the meaning of ritual possession, which would be
7 armed resistance. Would the destruction of Awátovi
8 and the mission that they attempted to set up in
9 Awátovi be the kind of armed resistance that would
10 serve to destroy ritual possession?

11 A. That was one faction of Hopis against
12 another faction of Hopis.

13 Q. So there were no Spanish --

14 A. No.

15 Q. -- missionaries involved in Awátovi?

16 A. No. They had withdrawn.

17 Q. On the 1705 entry that is in bold --

18 A. Um-hum.

19 Q. -- this does not appear to be a -- does
20 not appear to be a contact with Hopi; is that correct?

21 A. No. And perhaps we should clarify that
22 we need to look at "contact" much more broadly, and
23 I'm talking about events in the area that presumably
24 we're discussing, the Navajo and Hopi areas.

25 Q. So this is not a contact designed to show

1 that they were a constituent province of --

2 A. No, but it does show, indeed, where the
3 Spaniards thought the Navajo Dinétah was at this
4 particular time.

5 Q. Dr. Kessell, you had said earlier --
6 stated earlier that all of your additions to the
7 appendix were in bold; is that correct?

8 A. I thought I put them in bold.

9 Q. I would like to point you to the first
10 1706 entry at the bottom of Page 3, and I will also
11 say that it appears that you have a different version
12 than the version that I was given. Because you're
13 looking at --

14 A. Okay. I brought this one with me.

15 Q. So, then, you were not looking at the
16 actual formal exhibit when you were examining that,
17 correct?

18 A. I guess I wasn't, but I am now.

19 Q. Okay. So that has the exhibit number,
20 the one you're looking at now, label on the front?

21 A. It does. Forgive me. I didn't realize I
22 was with a different copy.

23 Q. So at the bottom of Page 3 -- that's
24 Exhibit 1. That's your report.

25 A. Oh, that's the old one.

1 Q. This is -- Exhibit 10 is what it should
2 be.

3 A. You know, I don't have a copy of that
4 one. Oh, here it is. Okay. Page 3.

5 Q. Page 3.

6 A. Gotcha.

7 Q. The bottom of Page 3 --

8 A. Yes.

9 Q. -- the first 1706 entry.

10 A. Yes.

11 Q. Now, if you could also look at your
12 report, which is Exhibit 1, on Page 14 of your report.
13 Is that first 1706 entry that says "Governor Francisco
14 Cuervo y Valdés sends . . ." and goes on, is that on
15 your report, Page 14?

16 A. No. I seem to have erred there. I think
17 the information is all there. I seem not to have
18 bolded that particular thing.

19 Q. And regarding that entry, the part that's
20 not in bold does not appear to be a contact with Hopi;
21 is that correct?

22 A. That is correct, and I think it goes to
23 show, too, that Zuni was considered the contact point
24 between Santa Fe and the Hopi Pueblos.

25 Q. How does that show that?

1 A. Simply -- I guess it doesn't show it
2 directly, but certainly any mention of Zuni during
3 this period is worth including in this because the
4 alcalde mayor did serve as liaison with the Hopis.

5 Q. So is it now your contention that
6 contacts with Zuni were as good as contact with Hopi?

7 A. No. No, I'm not saying that.

8 Q. Okay. I guess I'm -- can you explain
9 more why the Zuni contacts are valuable in showing
10 that Hopi is a constituent province?

11 A. I would cite, for example, my original
12 1747 entry that Hopis -- a large delegation of Hopis
13 come to Zuni to meet the Spanish leader of a joint
14 expedition into the area and proclaim that they
15 already were completely loyal even as before their
16 rebellion. They came to meet the Spaniards at Zuni.

17 Q. Is that because Zuni is more or less on
18 the way, so to speak, between the two locations?

19 A. Zuni is on the way, yes.

20 Q. But it doesn't mean that the contacts
21 with Zuni necessarily have anything to do with Hopi?

22 A. Not all the contacts have to do with
23 Hopi.

24 Q. On Page 4 of the new appendix, the
25 second -- the second entry from the top, the second

1 1707 entry, is not in and of itself a contact with
2 Hopi, is it?

3 A. Well, it's a report that the Hopis have
4 sent a cross to Zuni as a sign of peace. Again,
5 they're using Zuni as the contact point.

6 Q. It's a cross that Hopi sent to Zuni as a
7 sign of peace with Zuni?

8 A. No. A sign of -- that the Hopis are
9 requesting peace with the Spaniards.

10 Q. Okay. A little bit further down the
11 page, the 1718 entry. This isn't really a contact
12 with Hopi, is it?

13 A. It -- they're asking for a license to
14 visit Hopi.

15 Q. I understand that, but that's not a
16 contact between the Spanish government and Hopi, is
17 it?

18 A. No. No, it isn't. It isn't.

19 Q. The next entry, the 1723 entry, isn't
20 actually a contact with Hopi, is it?

21 A. No, it's not.

22 Q. The 1729 entry further down the page,
23 that isn't actually a contact with Hopi, is it?

24 A. No. I think we could talk about contacts
25 and references, and this is a reference to -- to Hopi.

1 Q. The reason I'm asking is because I asked
2 you before, based upon your introductory paragraphs to
3 this appendix, that this appendix was designed to show
4 the kind of constant contact that demonstrates that
5 they are a constituent province. So I understand
6 that, obviously, there are some references to Hopis,
7 but they're not the kinds of contacts that you are
8 intending this appendix to be.

9 A. (Deponent nodded head up and down.)

10 MR. McELROY: You need something besides
11 a nod of the head.

12 Q. (BY MR. STEUER) Is that correct?

13 MR. McELROY: Verbal.

14 A. Yes, that is correct. That is correct.

15 Q. (BY MR. STEUER) And the second 1730
16 entry, the Francisco Álvarez Barreiro, that too is not
17 a contact with Hopi; is that correct?

18 A. No, it's not a contact. It lists Hopis
19 as Pueblos of New Mexico.

20 Q. The 1731 entry there, that, too, is not a
21 contact with Hopi, is it?

22 A. Well, the Isletas fleeing from the Rio
23 Grande Pueblo to Moqui would seem to me it would be a
24 contact.

25 Q. It is Puebloans fleeing --

1 A. Um-hum.

2 Q. -- from one location --

3 A. To the Moquis.

4 Q. -- to the Hopis. It's not a contact
5 between any representative of the Spanish government
6 entity at all with Hopi, is it?

7 A. No, it's not.

8 Q. In fact, isn't someone fleeing to Hopi to
9 avoid Spanish abuse a sign that Hopi is beyond Spanish
10 control?

11 A. Hopi is seen by some Rio Grande Pueblos
12 as a site of temporary refuge because they're out --
13 they're geographically so far removed.

14 Q. That Spain isn't going to reach you if
15 you're at Hopi; is that correct?

16 A. That's probably -- that's certainly what
17 they believed.

18 Q. This 1744 entry on Page 5, that describes
19 17 men and 20 women baptized, and it says "They were
20 born in Moqui." Are they people who came there to get
21 baptized and then returned to Hopi or were they just
22 born in Hopi?

23 A. That isn't revealed in the document, but,
24 again, it's people from Moqui now in the Rio Grande
25 Valley. I mean, it has nothing to do with Spanish

1 officials. You're right.

2 Q. Okay. The 1745 entry -- the second 1745
3 entry, the contact is described in the previous entry;
4 is that correct? And this is just a later description
5 by the person who had the contact in the previous
6 entry?

7 A. I believe that's true. It's probably
8 based on his previous visit with those other people.
9 Although he may go back. He may go back. Very
10 active, Carlos Delgado.

11 Q. In 1748 -- your first 1748 entry
12 regarding the refounding of Sandia, these are people
13 who have left Hopi, correct?

14 A. Um-hum.

15 Q. And it's not actually a contact with an
16 existing government of Hopi?

17 A. No. It simply further shows the almost
18 constant migration back and forth.

19 Q. What were the reasons for migration back
20 and forth?

21 A. I think there were very, very many
22 reasons: Obviously, trade, ceremonial contact.
23 People were definitely related and did go to visit
24 family, continue -- there are a number of references
25 to Moquis or people who have previously taken refuge

1 in Moqui leaving because of the strictness of the
2 Oraibi leaders. They wanted to get away from them.

3 On the Pueblo side, very frequently, the
4 alcalde mayors, the district officers were accused of
5 abusing their charges, and so the abuse thing worked
6 both ways. It was pretty much a constant moving back
7 and forth.

8 Q. Your second 1748 entry, Captain José de
9 Berroterán, that's not a contact with Hopi, is it?

10 A. That is not a contact with Hopi. Well
11 pronounced incidentally.

12 Q. Thank you. I'm trying.

13 The next entry, the Menchero map entry --

14 A. Um-hum.

15 Q. -- that, too, is not a contact with Hopi,
16 is it?

17 A. Not a contact, but it surely shows all
18 those numbered Pueblos as part of New Mexico.

19 Q. Dr. Kessell, you have two entries here
20 for 1750 at the bottom of that page --

21 A. Um-hum.

22 Q. -- and if you could refer to your report
23 between Pages 15 and 16, are those entries on your
24 report, your existing -- the original Appendix 1?

25 A. Are which?

1 Q. These two entries on your new appendix --

2 A. Um-hum.

3 Q. -- the two 1750 entries that are not in
4 bold, are they on your original report?

5 A. No, they're not. They should be in bold.

6 Q. And both of those entries on your new
7 report, both 1750 entries, are they contacts of
8 Spanish government with Hopi?

9 A. No.

10 MR. MENTOR: Can I ask a question off the
11 record for a second, please?

12 MR. STEUER: Yes.

13 (Discussion was had off the record.)

14 Q. (BY MR. STEUER) On Page 6 of your new
15 appendix --

16 A. I would suggest that those two somehow --
17 I remember them being on the original one. It's
18 probably an electronic slip on my part, but, you're
19 right, they're not on this one. I thought they were.

20 Q. On Page 6 of your new appendix --

21 A. Yes.

22 Q. -- the 1756 entry, the second one on the
23 page --

24 A. Um-hum.

25 Q. -- is that a contact with the Spanish

1 government?

2 A. No.

3 Q. Do you know anything more about that
4 baptism or what that describes?

5 A. No, I really don't, but it's just, again,
6 indicative that here are these Moquis in Santa Fe
7 choosing to be baptized.

8 Q. The 1758 entry, the entry about Pacheco,
9 he traveled to Hopi, correct?

10 A. Yes.

11 Q. Did he travel there multiple times or
12 just once?

13 A. Once recorded here. He, however, had
14 made wide ranging trips, which are reflected on his
15 maps, which are the most accurate 18th century maps
16 of New Mexico, almost the only maps of New Mexico.

17 Q. So the 1760 entry where you describe
18 another Pacheco map, that does not actually involve
19 travel to Hopi?

20 A. No.

21 Q. The next 1760 entry that's in bold, that
22 is just a report and not a contact with Hopi; is that
23 correct?

24 A. That's just a report and not a contact.

25 Q. The 1771 entry describing a map with

1 Hopi -- with Moqui labeled, is that a contact with
2 Hopi?

3 A. No.

4 Q. The 1775 entry, the first one -- and
5 there's a lot of stuff in there.

6 A. Um-hum.

7 Q. If I'm understanding, it's -- you're
8 describing Escalante's trip to Hopi; is that correct?

9 A. I am.

10 Q. Did he receive a welcoming reception
11 there?

12 A. He received a mixed reception, and
13 actually, he was so shocked by seeing some Hopi
14 ceremonials that this prudish Franciscan fled on his
15 own. He was not driven out. He just was aghast at
16 what he saw.

17 Q. Do you know if he drew any conclusions
18 about how to deal with Hopi after being so shocked,
19 aghast?

20 A. He did. He suggested that the Hopis be
21 brought down from their mesa tops by force for their
22 own good, as he perceived it, but that was vetoed by
23 New Mexico's governor.

24 Q. The next 1775 entry is not really a
25 contact with Hopi, is it?

1 A. Not a contact. Reference to the previous
2 visit.

3 Q. The next entry here about Francisco
4 Garcés, on Page 6 of your report, if you could look at
5 Page 16 -- I mean, Page 6 of your new appendix. If
6 you could look at Page 16 of your report and tell me
7 if that entry is in there.

8 A. It's not. This is mystifying to me. I
9 thought it was included in the original.

10 Q. You say that the Hopis showed him no
11 courtesy. It was a little more than that, wasn't it?

12 A. He arrived on July 3, 1776, and was
13 traveling alone and he had come all the way from
14 California, believe it or not, across the Colorado
15 River, all the way across the Southwest. He arrived
16 at Hopi, and he wasn't even allowed a shelter. And so
17 writing a quick letter to the friar at Zuni -- what he
18 was trying to demonstrate was an overland route from
19 California to New Mexico. He wrote a quick note to
20 the friar, Franciscan at Zuni, and turned back the way
21 he came.

22 I don't know whether in this -- yes,
23 you'll see something in my revised 1780 entry. When
24 Governor Anza got there, he was made to believe that
25 the Hopis now repented from having shown no respect to

1 Father Garcés and felt that they were suffering their
2 three calamities: Famine, Navajo deprivations, and
3 drought because they had been unkind to Garcés and
4 said now the Hopis eulogize Garcés.

5 Q. Was he -- when you say he left and
6 returned the way he came, did he leave fearing for his
7 life?

8 A. He doesn't say that.

9 Q. If you could turn very quick -- find "The
10 Spanish Frontier in North America," it's Exhibit 5,
11 and turn to Page 254. It's the second-to-the-last
12 page in the exhibit. Towards the bottom of that very
13 first paragraph, Dr. Weber writes, "Garcés rode out of
14 the Pueblo fearing for his life."

15 A. I do not know on what Dr. Weber bases
16 that.

17 Q. Okay. The 1778 entry, you just mentioned
18 another Pacheco map. That is not a contact with Hopi,
19 is it?

20 A. That is not a contact.

21 Q. The next entry, the 1779 Anza entry is
22 not a contact with Hopi, is it?

23 A. Not a contact.

24 Q. And then the next entry that sent the
25 Hopis fleeing is another of your description of the --

1 A. Interchange.

2 Q. -- inter-Pueblo interchange --

3 A. Yes.

4 Q. -- but not a contact with Hopi?

5 A. Not a contact.

6 Q. The next entry, the 1780 García entry,
7 can you tell me a little bit about it? Does that mean
8 he went to Hopi and got these --

9 A. He did go to Hopi and bring those 77 who
10 wanted to leave, and then later reports that the
11 number of such emigrants had risen to 150.

12 Q. In the next 1780 entry, the Anza
13 expedition to Moqui, and so you're saying he basically
14 brought gifts to Hopi but didn't reconvert them; is
15 that a fair characterization?

16 A. That is a fair characterization.

17 Q. Does that sound somewhat similar to the
18 gift-giving strategy employed by the Spanish
19 government with indios Bárbaros?

20 A. Yes. They gave gifts as broadly as they
21 thought would be effective.

22 Q. The next entry, the 1780 entry map,
23 that's not a contact, is it?

24 A. Not a contact.

25 Q. The next entry, Croix, Croix

1 (pronouncing) --

2 A. No.

3 Q. -- that's not a contact with Hopi, is it?
4 1781?

5 A. No.

6 Q. And the next entry, the 1782, Morfi
7 description, is that a contact with Hopi?

8 A. No.

9 Q. And now we're on Page 8 of your new
10 appendix.

11 A. Um-hum.

12 Q. And that first entry, the Anza treaty
13 with the Navajos, which we've touched on briefly in
14 another context, this is not a contact with Hopi, is
15 it?

16 A. No, it's not. I believe, however, there
17 were Hopi representatives at that treaty, not --
18 that's not a contact either, but I think Hopis
19 figured --

20 Q. Is there some evidence in the documentary
21 record that demonstrates that or how do you believe
22 that?

23 A. I -- I'm remembering that, but probably
24 should not have opened my mouth.

25 Q. Okay. The next entry, the 1789 entry,

1 I'm not really sure what that entry is saying.

2 A. Again, it's illustrating the contact
3 between the Hopis and the Rio Grande Pueblos. It's
4 not a contact.

5 Q. And that entry, which is not in bold, is
6 that entry on --

7 A. Oh, good grief.

8 Q. -- Page 17 of your report?

9 A. It isn't.

10 Q. Okay. The next entry, the 1796 entry, is
11 that a contact with Hopi?

12 A. No.

13 Q. The next entry, is that a contact with
14 Hopi?

15 A. No.

16 Q. And is that contact -- or is that entry
17 on your report? It is not bolded on your new
18 appendix.

19 A. I will take your word -- oh. 179-? No.

20 Q. Okay. It is not. The next entry, the
21 next 1799 entry, is that a contact with Hopi?

22 A. No.

23 Q. And in the bold below that, you have more
24 information. Is this all from the Adams report?

25 A. I'm not sure which.

1 Q. The second 1799 entry --

2 A. Oh.

3 Q. -- the Cortés entry, there's bolded text
4 below.

5 A. I see. Yes, that -- that statement that
6 ". . . they're no farther west than the Defiance
7 Plateau," I did rely on the Adams report for that.

8 Q. The next entry, 1801 entry, is that a
9 contact with Hopi?

10 A. No, it is not.

11 Q. The next entry, the 1805 entry, is that a
12 contact with Hopi?

13 A. No.

14 Q. Is the next entry, the 1808 entry, a
15 contact with Hopi?

16 A. No.

17 Q. Is the next entry, Pino's report, is that
18 a contact?

19 A. No.

20 Q. And regarding that 1810 entry, what does
21 this say to you about Hopi control of the land and
22 resources around them?

23 A. It says that they are hard pressed to
24 maintain their -- control of their area. It's
25 probably one of the reasons that they do not want to

1 break their relations with Spain. They want
2 protection.

3 Q. Would it indicate that they were
4 competitors in the Little Colorado River Basin for the
5 land and resources?

6 A. They certainly -- yes. Not agricultural
7 competitors, but certainly there were people attacking
8 and raiding them.

9 Q. So all that tells you is attacks and
10 raids?

11 A. (Deponent nodded head up and down.)

12 Q. If that was going on in 1810, why did it
13 take them nine years to go seek Spanish assistance?

14 A. I truly do not know. Again, this is a
15 partial chronology. Perhaps with more time, I can
16 fill in some more areas, but thank goodness I didn't,
17 right?

18 Q. The next series of entries -- there's
19 three 1819 entries.

20 A. Um-hum.

21 Q. This is all -- all of these three entries
22 are relating to the same event, aren't they?

23 A. They are.

24 Q. So would it be fair to say they represent
25 one contact?

1 A. They represent one contact.

2 Q. And, Dr. Kessell, looking at your new
3 appendix, between Pages 8 and 9, it appears that
4 you've deleted an entry.

5 A. I did?

6 Q. An 1821 entry that's on Page 17, where
7 Mexico becomes independent from Spain.

8 A. It seems that I did.

9 Q. I would have, of course, asked you if
10 that was a contact with Hopi, but I will spare you
11 that question at this point.

12 A. Thank you.

13 Q. And the 1823 entry about the Hopi aiding
14 Governor Vizcarra's campaign, the additional
15 information that's in bold, that just comes from the
16 Cutter report, correct?

17 A. It does.

18 Q. The 1824 entry about the treaty with the
19 Navajos, that's not a contact with Hopi, is it?

20 A. That's not a contact with Hopi.

21 Q. The 1827 entry, mountain man Bill
22 Williams, who is that?

23 A. Oh, one of the leading so-called mountain
24 men, the fur trappers of the American West who, in the
25 1820s, were pushing in to --

1 Q. So he's not even a citizen of Spain,
2 right?

3 A. No, but he pops through, and evidently
4 his diary does say he spent time among the Hopis.

5 Q. And the 1829 entry about the New Mexican
6 trader, is that a contact of Spain or Mexico with
7 Hopi?

8 A. No.

9 Q. The 1834 entry --

10 A. No.

11 Q. And the 1846 entry of Charles Bent, is
12 that a contact with Hopi?

13 A. No, it's not a specific contact.

14 Q. It's just a report?

15 A. It includes the Moquis as Pueblo Indians
16 of New Mexico.

17 Q. And, again, it appears that in your
18 original report on Page 17 and Page 18, there were two
19 entries for it. The 1848 entry for the Treaty of
20 Guadalupe Hidalgo, does that appear on your new
21 appendix?

22 A. Don't tell me I left -- no, it does not.

23 Q. I'm going to skip the ones that are after
24 the Treaty of Guadalupe Hidalgo.

25 MR. MENTOR: Counsel, I'm going to ask

1 for a short recess here while you -- unless you're
2 almost done.

3 MR. STEUER: Sure. I'm close, but let's
4 take a recess. That's a good idea.

5 (Recess taken, 4:30 p.m. to 4:35 p.m.)

6 Q. (BY MR. STEUER) Dr. Kessell, I just have
7 a few questions left for you. This one is going to be
8 kind of out of the blue, I suppose, but was Spanish
9 enslavement of Navajos in the early 19th century one
10 reason for continued hostility between the Navajos and
11 Spain?

12 A. I believe it was.

13 Q. Was it a reason that Navajos encroached
14 on the Hopi plan, was Spain pushing Navajos onto
15 Hopi's land?

16 A. It certainly was a reason they encroached
17 on New Mexico to the east, and all of these treaties
18 talk about exchange of captives, and so, yes, it
19 figures highly. I don't know specifically about
20 enslavement of Hopis, per se, but it surely must have
21 taken place.

22 Q. I wasn't asking about enslavement of
23 Hopis. I was asking about whether Navajos were pushed
24 in that direction, in part, because of Spain --
25 attacks of Spain and Spanish enslavement of Navajos.

1 A. I think that enslavement works both ways
2 along the entire frontier and human beings became --
3 captives became a trade item between the Hispanos and
4 Navajos.

5 MR. STEUER: So this is the next exhibit.

6 (Deposition Exhibit 11 was marked.)

7 Q. (BY MR. STEUER) And Exhibit 11 are the
8 best representations we could get of the copy -- of
9 the maps that were included in your report.

10 A. Yeah.

11 Q. Does that -- do these look like the maps
12 that you're familiar with?

13 A. Yes, they do.

14 Q. Maps 3A and 3B, are those just blown-up
15 versions of Map 3? Is what they are supposed to be?
16 Map 3 is very hard to read.

17 A. Map 3, I think in my original report,
18 was -- yes, it was --

19 Q. Map 3 is the last map here, so if you
20 keep going, you'll see there's Map 3A and 3B and then
21 Map 3.

22 A. Oh, 3. Yes. Yes. Map 3 is the entire
23 thing. These others are --

24 Q. Okay. So they're the same map,
25 essentially?

1 A. They're the same map. The same map,
2 1778.

3 Q. What is the significance of these maps to
4 you in the context of your report?

5 A. To me the significance of the maps are
6 that consistently they show the Province of Moqui as a
7 component part of New Mexico. They almost invariably
8 show the symbol for Pueblos and label the several Hopi
9 Pueblos. The Province of Navajo is quite generally
10 blank or showing domed residences as semisedentary. I
11 think they simply graphically show the situation.

12 Q. But Navajo is represented on these maps,
13 is it not?

14 A. Navajo is represented on all of them.

15 Q. As the Province of Navajo?

16 A. Province of Navajo. As on this first
17 one, you'll notice the Province of Navajo is No. 64,
18 and if you'll notice, No. 56 is Province of Moqui, and
19 then 57, 58, 59, 60, 61, 62, 63, Oraibi, they are all
20 listed Hopi Pueblos.

21 Q. And I'm going to turn -- it was Exhibit 7
22 from yesterday's deposition of Dr. Brescia --

23 A. Yes.

24 Q. -- the southern map. When did you
25 discover this map?

1 A. I think I discovered this map a month
2 ago.

3 Q. And how and why did you discover it?

4 A. Looking for maps of 18th century New
5 Mexico.

6 Q. So you were looking for the purposes of
7 this case and your report?

8 A. As much for the biography I'm writing of
9 the New Mexico mapmaker Miera y Pacheco, but, yes, for
10 both.

11 Q. For both. And why -- and this map is not
12 in your original report; is that correct?

13 A. This map I did not know of its existence
14 when I wrote the original report, and I consider this
15 one a very interesting one because it reflects a map
16 done ten years before by Miera y Pacheco who was
17 specifically commissioned by the governor of New
18 Mexico to survey the road, and map the road to and map
19 the Province of Moqui, and the little tents that still
20 appear here -- do you see those Navajo -- there are
21 five little red tents starting over to the right, and
22 those mark the road to Moqui, and all the Moqui
23 Pueblos are listed and shown with the same symbol as
24 the Rio Grande Pueblos.

25 Q. So those "tents," as you called them, do

1 they represent settlements of any kind?

2 A. No, they don't. They do represent -- at
3 least the Ojo Resan Joseph is the Saint Joseph Spring,
4 and so two of them show springs.

5 Q. And what does the legend say those tents
6 mean?

7 A. The legend doesn't even refer to those
8 tents. It's -- oh, does it? Oh. Is there a --
9 "Rancherias de Gentiles," those are different tents,
10 and I think it was when Miera's map was copied in
11 Madrid, they didn't know what these little tents
12 meant, and so I don't think -- on the legend it does
13 say "Rancherias de Gentiles," heathen rancherias.

14 Q. Settlements?

15 A. Settlements, heathen settlements. And
16 then those little tents, there were no settlements
17 where those are shown.

18 Q. So you think the legend is incorrect; is
19 that what you're suggesting?

20 A. Correct. I think they're including those
21 tents. I can't see that there's any distinction
22 between the little one in the legend and the ones on
23 the map, but mainly to show the labeled Moqui Pueblos.

24 Q. But now this -- we'll keep calling them
25 tents here that you believe are used to denote the way

1 to Moqui --

2 A. The road to Hopi.

3 Q. The road to Hopi, how do you -- what
4 leads you to conclude that the legend is incorrect and
5 that's what they represent?

6 A. The original maps from 1759, ten years
7 earlier, which were the result of the governor's order
8 to Miera to go out and map.

9 Q. So they show where these tents are but
10 show it differently or describe them differently; is
11 that what you're saying?

12 A. These simply show the sites at which
13 Miera's group camped, and I suspect they are meant to
14 show that's where one camps if one wants to go to
15 Moqui.

16 Q. Elsewhere on the map there's a bunch of
17 these little tents -- we'll keep using that
18 terminology -- that there's a -- sort of directly
19 south from these five that you mentioned, there's a
20 couple right next to each other --

21 A. Yes.

22 Q. -- that are not part of any line of tents
23 that would show a way to somewhere. Over on the
24 eastern edge of the map --

25 A. Right.

1 Q. -- there's a bunch of tents in various
2 places that don't seem to be showing a road. There's
3 four tents bunched together, five tents bunched
4 together.

5 A. Yes.

6 Q. Are those different types of tents?

7 A. They are different. They are indicating
8 heathen rancherias, and the two that you point
9 directly to below are on the Rio de San Francisco,
10 which flows into the Jila, and those would represent
11 Jila Apaches. Let's see. What has he said? Apaches
12 Mesculeros is what he says. Apache Mesculeros, those
13 out on the plains, Apaches Carlanas. So they are on
14 there for a different purpose.

15 Q. Okay. So all of those tents represent
16 settlements, these tents near Hopi do not?

17 A. (Deponent nodded head up and down.)

18 Q. That's your opinion?

19 A. That is my opinion, and on the 1769 map
20 you do have domed settlements that Miera in his legend
21 says are nomadic people or semisedentary.

22 Q. Now, this map around the Moquian villages
23 says "Provincia de" and then directly below it, a good
24 way it says "Navajo," and directly below it but to the
25 left in a smaller type it says "Moovi." Do you have

1 an opinion as to whether "Provincia de" goes with
2 Moovi or Navajo?

3 A. I think it goes with both.

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

5 (Discussion was had off the record.)

6 EXAMINATION

7 BY MR. MENTOR:

8 Q. Dr. Kessell, I'm going to ask you some
9 questions that came to mind during your discussion
10 with counsel for Navajo, and so I'm going to roughly
11 follow the order in which those questions were asked
12 of you.

13 My first question has to do with your
14 area of expertise. What -- when we use that phrase
15 "expert," what does that mean to you?

16 A. One who is well versed in a particular
17 subject.

18 Q. And is that an absolute thing or a
19 relative term?

20 A. I would think it's relative.

21 Q. So do you consider the subjects that are
22 within your report that -- the matters discussed in
23 your report and the matters discussed in the
24 questioning of you today as within your area of
25 expertise?

1 A. I believe so.

2 Q. You -- I'd like to just refer briefly to
3 Dr. Cutter's report, which is exhibit --

4 MR. STEUER: I did not mark Dr. Cutter's
5 report as an exhibit.

6 MR. McELROY: It was marked as Exhibit 8
7 in Dr. Brescia's deposition.

8 MR. MENTOR: Are you okay with me
9 referring to that as an exhibit in Dr. Brescia -- did
10 we introduce that yesterday? So it was Exhibit 8 in
11 Dr. Brescia's report?

12 MR. McELROY: That's what my notes say.

13 Q. (BY MR. MENTOR) Okay. Dr. Kessell,
14 you're familiar with Dr. Cutter's report and you were
15 asked if you agree with it earlier today. Do you --
16 do you agree with the conclusion that -- or with his
17 observation, Dr. Cutter's observation that --

18 MR. STEUER: Counsel, I do think we need
19 to pull his report out if you're going to ask him
20 specific questions. I think we need to get the
21 exhibit out and have it in front of Dr. Kessell.

22 (Discussion was had off the record.)

23 Q. (BY MR. MENTOR) Dr. Kessell, I'm
24 referring to Page 2 of Dr. Cutter's report where he
25 says, "The Hopi peoples never again fell to Spanish

1 or, later, Mexican authorities but, rather, maintained
2 their political independence." Would you agree with
3 that statement?

4 A. No. I would definitely qualify that
5 statement, and I have no idea what he means by "fell
6 to Spanish or Mexican authority." Because I believe
7 that Spanish and Mexican authority were unbroken.

8 Q. He -- Dr. Cutter uses the term
9 "subjugate" when referring to activities of Spanish
10 punitive expeditions after the Pueblo revolt of 1680.
11 It refers specifically to Page 12 in the text with
12 footnote 21. Is the term -- is that, in your opinion,
13 a technical term or a term of precision? On Page 12.

14 A. ". . . likewise failed to subjugate the
15 Hopi." Again, I don't know how he's using the term
16 "subjugate." It's certainly not a technical term.

17 Q. Okay. When you stated that you updated
18 your chronology, was that update intended for your
19 personal reference or was it intended to replace the
20 appendix that is included in your 2009 report?

21 A. It was intended for my personal
22 reference.

23 Q. How long ago did you write that report?

24 A. The original report?

25 Q. Yes.

1 A. Isn't it dated? I think it's April of --
2 let's see. April 2010.

3 Q. And would you consider yourself a student
4 of the history of the Spanish colonial southwest?

5 A. I most certainly would, and that's a
6 never-ending designation, "student of."

7 Q. So you do not -- do you believe that you
8 know everything there is to know about the history of
9 that region in that period?

10 A. I do not presume to know everything there
11 is to know about that period.

12 Q. So are you in the habit of taking notes
13 as you review material that you previously have
14 studied or new material?

15 A. I am in the habit of taking notes.

16 Q. Have you -- did the -- to your knowledge,
17 did the Kingdom of Spain sign treaties with its own
18 subjects?

19 A. Did -- would you repeat the question?

20 Q. Did the Kingdom of Spain sign treaties
21 with its own subjects?

22 A. No, not to my knowledge.

23 Q. Your -- you discussed the Recopilación,
24 and specifically there was a discussion of Libro
25 cuatro, Titulo doce, Ley cinco.

1 MR. STEUER: Are you referencing a
2 particular page on one of the reports?

3 MR. MENTOR: Let's go back to -- I
4 believe there are numerous references to that section
5 of the Recopilación, but I believe that the
6 discussion -- I'm going to refer back to Dr. Weber's
7 report.

8 Q. (BY MR. MENTOR) There are two references
9 to it I'd like to call to your attention, one is in
10 Dr. Weber's report on Page 11, and the other is in
11 Dr. Brescia's report, I believe, on Page 8.

12 MR. STEUER: Dr. Brescia's report is
13 Exhibit 2 from yesterday's deposition. And what page
14 was it on on Dr. Brescia's report?

15 MR. MENTOR: Page 8.

16 Q. (BY MR. MENTOR) Would you say that this
17 law would apply to Pueblo water rights in the absence
18 of a specific grant?

19 A. I would, indeed, say that the section of
20 Recopilación would, indeed, refer to implied rights to
21 sedentary Indians.

22 Q. You indicated during your deposition
23 previously that you were asked if the Hopi Tribe
24 resorted to legal authority to preserve its land base.
25 Would you consider the governor of the territory to be

1 legal authority?

2 A. Indeed. The governor would be sitting in
3 place of the Crown in New Mexico.

4 Q. In your report you describe a request of
5 the Hopi Tribe -- of the Hopi people to -- for
6 assistance in their defense from Navajo incursions.

7 MR. STEUER: What page are you referring
8 to, Counsel?

9 MR. MENTOR: I'm going to refer to
10 Page 17 in the chronology.

11 Q. (BY MR. MENTOR) Did certain Hopi Indians
12 request Spanish protection from the governor of the
13 New Mexico territory?

14 A. Where on Page 17?

15 Q. I'm just referring to the chronology
16 entries under 1819.

17 A. Yes, they did. In 1819, five Hopi
18 leaders come to Zuni requesting Spanish protection
19 against the Navajos.

20 Q. Was there, during the Spanish colonial
21 period, a unified Hopi tribal government?

22 A. There was no unified tribal government
23 during the Spanish or Mexican period.

24 Q. What was the primary unit of government
25 in Hopi territory?

1 A. I believe it would be the so-called
2 outfit of family grouping that could ally with others
3 or go their separate way. I'm not an anthropologist,
4 but I believe that's the term they use.

5 Q. Could one leader speak for all of the
6 Hopi villages?

7 A. Probably not. A leader might profess to.

8 Q. Could one leader speak for all of the
9 eastern Pueblos?

10 A. No.

11 Q. Would all the Rio Grande Pueblos given --
12 or to the extent that the Rio Grande Pueblos were
13 recognized in a Pueblo league, were each Pueblo given
14 a league or was -- were they collectively given one
15 league?

16 A. Each Pueblo was entitled to a league -- a
17 square league as a minimum land base.

18 Q. So, in your opinion, if the Spanish
19 government recognized Pueblo leagues -- a league or
20 leagues in the Hopi territory, would each village be
21 recognized in a Pueblo league?

22 A. Presumably each village would have
23 enjoyed that minimum land base had they requested it.
24 I believe it's implied.

25 MR. MENTOR: Can I go off the record for

1 just one second?

2 (Discussion was had off the record.)

3 Q. (BY MR. MENTOR) Dr. Kessell, I'd like to
4 refer to Exhibit 7 in your deposition to Page 277.
5 There is quite a discussion on that page about the
6 visit of Father Vélez de Escalante. Was Father
7 Escalante a government official?

8 A. He was not a government official.

9 Q. What was his purpose for visiting the
10 Hopi villages?

11 A. He was a missionary at Zuni Pueblo, and
12 he hoped to reconvert, as had many other friars, the
13 Hopi to the Christian faith.

14 Q. I asked you earlier if the Kingdom of
15 Spain was in the practice of signing treaties with its
16 own citizens -- with its own subjects. I'm going to
17 refer back to Dr. Weber's report on Page 39 where
18 Dr. Weber states in the first full paragraph that
19 ". . . the Hopis were indeed Spanish subjects 'in the
20 eyes of the Spanish government,'" and then -- that's
21 part of a sentence, and then in footnote 105, which
22 accompanies that text, there is quite a discussion
23 about an effort made by one of the cacique from Oraibi
24 who attempted to negotiate a treaty with the
25 territorial governor but was refused.

1 There is a discussion in that footnote
2 about the reasons why his effort was refused. Could
3 you -- could you read that footnote and tell me if
4 you -- if, in your opinion, that is an accurate
5 characterization of the attitude of the Spanish
6 colonial government towards the practice of entering
7 peace treaties?

8 A. I believe Governor Rodríguez Cubero had
9 little patience negotiating with the Moquis who seemed
10 to be dictating, and he was not looking upon them
11 as -- of another power. They were still, in his view,
12 subjects of the Spanish Crown.

13 Q. And on Page 41 in the middle of the first
14 full paragraph, Dr. Weber states, quote, One did not
15 sign treaties with one's vassals, close quote. In
16 your opinion is that an accurate reflection of Spain's
17 policy toward treaty making?

18 A. I believe it is.

19 Q. Then how would you explain the treaties
20 of 1786 and 1819 signed by the Spanish government with
21 the Navajo?

22 A. They were considering them nonsubjects;
23 as the Utes, the Jicarilla Apaches, and the Comanches.

24 Q. There was some discussion of the Treaty
25 of Guadalupe Hidalgo which -- a copy of which is

1 included in the record as exhibit --

2 MR. STEUER: As Exhibit 9.

3 Q. (BY MR. MENTOR) Exhibit 9.

4 A. Nine?

5 Q. Yes. Article IX of the treaty is a
6 commitment by the United States Government to forcibly
7 restrain savage tribes whose, quote -- quote, whose
8 incursions within the territory of Mexico would be
9 prejudicial in the extreme.

10 A. Is that not Article XI?

11 Q. I'm sorry, did I say -- I meant Article
12 XI. Are you familiar with that article of the treaty?

13 A. I am.

14 Q. Do -- are you aware of any incursions by
15 Hopi in -- into the territory of Mexico?

16 A. I am unaware of any Hopi incursions into
17 Mexican territory.

18 Q. So, in your opinion, would Article XI of
19 the treaty be intended in any way to apply to the
20 Hopi?

21 A. It would not, in my opinion, apply to the
22 Hopi.

23 Q. I'd like to refer to the 1819 treaty
24 between Spain and the Navajo, which is --

25 A. No. 4.

1 Q. -- Exhibit 4. Could you read Article XVI
2 of the treaty?

3 A. Article XVI. "They will respect the
4 persons and property of the Moqui Pueblos because this
5 government takes them under the protection of its
6 amiable sovereign in whose shadow they have been
7 placed. Agreed."

8 Q. Do you -- you were directed earlier to
9 review Article XII of the treaty.

10 A. That is correct.

11 Q. Does the term "property of Navajo" occur
12 in that -- in Article XII?

13 A. It does not.

14 Q. Does -- do -- is there any provision in
15 the treaty comparable to Article XVI that applies to
16 Navajo property or the protection thereof?

17 A. No, there is not.

18 Q. Are you aware of any incident or any
19 occurrence where a group of indigenous people referred
20 to as indios Bárbaros by the Mexican -- or by the
21 Spanish government have attempted to appear in a
22 Spanish court?

23 A. I'm not aware of any group categorized as
24 indios Bárbaros appearing in Spanish courts.

25 Q. I'm going to present to you a series of

1 maps, and I'd like you to review these maps and tell
2 me what these represent or where they came from.

3 And --

4 MR. STEUER: Just as before, we're not
5 waiving any objection to the introduction of these
6 maps, and we're not waiving any right to supplement
7 our reports since having been introduced.

8 Q. (BY MR. MENTOR) Dr. Kessell, you
9 previously indicated that you are an active scholar.

10 A. Yes, I previously did.

11 Q. And that you have conducted independent
12 research since the time that -- since 2009 when you
13 wrote your report for this case?

14 A. I'm sorry, I didn't understand the
15 question.

16 Q. Have you continued to conduct independent
17 research since you wrote your report in 2009?

18 A. Yes, I have continued to conduct
19 independent research.

20 Q. And did you -- are you -- you earlier
21 indicated that you are in the process of writing a
22 book about a mapmaker in the Spanish colonial period.

23 A. I am.

24 Q. So I'd like to show you a series of maps.

25 MR. MENTOR: I'd like to mark this as

1 Exhibit 12.

2 (Deposition Exhibit 12 was marked.)

3 Q. (BY MR. MENTOR) Can you describe this
4 map?

5 A. This map is commonly called Father
6 Menchero's map, and the author is somewhat in doubt.
7 In the book you mentioned I'm writing, I suggest that
8 perhaps Bernardo Miera y Pacheco, the mapmaker, had a
9 hand in this map because the 1747 expedition on which
10 he went as a mapmaker was also called Father
11 Menchero's Campaign, so both of them were there, both
12 of them were present at Zuni in 1747 when the Hopi
13 delegation came to assure Spaniards of the Hopi's
14 continued allegiance.

15 Q. Okay. Could you tell me where you found
16 this map?

17 A. This map I copied from a copy at the
18 University of New Mexico Center for Southwest
19 Research. The original was presumably destroyed in
20 World War II, in Berlin.

21 Q. I'm going to show you another map that
22 I'd like to have marked as an exhibit.

23 (Deposition Exhibit 13 was marked.)

24 Q. Dr. Kessell, could you describe this map
25 and explain where it came from?

1 A. This map dated approximately 1758 is the
2 earliest known Miera y Pacheco map of New Mexico. It
3 was drawn in conjunction with the visitation or
4 inspection of Governor Marín del Valle in 1758.

5 Q. Could you explain where you came across
6 this map?

7 A. Excuse me?

8 Q. Could you explain where you came across
9 this map, where you found it?

10 A. This map has been stolen since 1950 from
11 the national archive in Mexico City. I had access to
12 some very poor photocopies of sections of this map,
13 and I, with the help of an illustrator, reconstructed
14 this map, and I tell about that in the appendix to
15 Kiva, Cross, and Crown.

16 Q. And that is another publication of yours;
17 is that correct?

18 A. Yes. 1979, National Park Service.

19 MS. WILLARD: Can we go off the record
20 for just a second?

21 MR. MENTOR: Sure.

22 (Discussion was had off the record.)

23 Q. (BY MR. MENTOR) I'm going to show you a
24 map that consists of four separate pages that are
25 marked parts one through four, and I'd like to have

1 these marked as Exhibit 14.

2 (Deposition Exhibit 14 was marked.)

3 Q. Dr. Kessell, could you describe the map
4 shown as Exhibit 14?

5 A. This map is also by Bernardo Miera y
6 Pacheco. The original resides in the British museum
7 in London. It was drawn in Chihuahua in the year
8 1778, and it depicts the expedition of Fathers
9 Domínguez and Escalante in 1776 in their remarkable
10 exploration around the present four corners of the
11 southwest. It shows much territory never mapped
12 before by Spaniards, but also at the same time
13 northern New Mexico. It extends as far as present
14 Utah Lake in the north and shows meticulously with a
15 little symbol every campsite on that five-month
16 exploration.

17 Q. Can you tell us where you found this map?

18 A. I, again, consulted a copy in the UNM
19 Center for Southwest Research, which had, indeed, been
20 copied from the original in London.

21 Q. Is the first page of Exhibit 14 the same
22 map as is included with your report as Map 3, Detail
23 A?

24 A. Yes, it is.

25 Q. And is the third page of Exhibit 14 the

1 same map as is included with your report as Map 3,
2 Detail B?

3 A. Yes.

4 Q. While we're on the subject of the maps in
5 your report, is the map which we've marked as
6 Exhibit 13 the same as the map marked as Map 2 in your
7 report?

8 A. It is.

9 (At this time Ms. Willard left the room.)

10 Q. Okay. I'd like to show you one final
11 map.

12 MR. MENTOR: I'd like to have this marked
13 as Exhibit 15.

14 (Deposition Exhibit 15 was marked.)

15 Q. (BY MR. MENTOR) Could you explain the
16 significance of this map and tell us where it came
17 from?

18 A. This map is also by Bernardo Miera y
19 Pacheco. He doesn't date it, but it's probably 1759
20 done on commission of the governor at the time,
21 Governor Marín Del Valle, and it shows the route to
22 the Province of Moqui. It shows the labeled Pueblos
23 of Moqui. He depicts -- he draws a Hopi male. He
24 draws a Hopi maiden with her characteristic hair
25 swirls. He draws another Hopi girl holding a snake.

1 So this was in response to the governor's request to
2 map the Province of Moqui.

3 On this map the campsites are clearly
4 depicted in red and are, indeed, tents, but they're
5 depicted in red and the other tents shown for the
6 non-sedentary people are depicted differently.

7 MR. STEUER: I have to ask a question,
8 when you say they're "depicted in red," are they
9 depicted in red on the map that you're looking at?

10 THE DEPONENT: They are not depicted.

11 MR. STEUER: I just wanted to make sure
12 that I was looking at the same thing you are.

13 THE DEPONENT: It's late, but not that
14 late.

15 Q. (BY MR. MENTOR) Okay. That's fine.

16 A. Okay.

17 Q. Did --

18 A. The original of this map, incidentally,
19 is in the Museo del Virreinato, the Museum of the
20 Viceroyalty in Mexico City.

21 Q. When you were questioned about the
22 chronology that accompanies your report and also a
23 subsequent -- a revised version of that chronology
24 that you prepared in anticipation of your deposition,
25 you were asked numerous questions regarding whether

1 there -- a contact -- I mean, an entry on that
2 chronology represented a contact with Hopi, and I'm
3 not going to drag you through every single one of
4 those questions again. I'm just going to ask you one
5 question that applies to all of those and that is:
6 Would it be safe to say that a reference to Hopi
7 indicates, just as a general proposition, some contact
8 with Hopi?

9 A. I would agree to that.

10 Q. Okay. Having said that, I do have a few
11 questions on individual entries, but only a few.

12 There was a reference to the alcalde
13 mayor of Zuni. Let me just -- let me rephrase that
14 question.

15 Just a general proposition, during the
16 early part of the 18th century, did the alcalde
17 mayor of Zuni have jurisdiction over the Hopi
18 villages?

19 A. I don't think formal jurisdiction, but he
20 certainly was the closest Spanish official and acted
21 as liaison with the Hopi.

22 Q. Did any of the entries in your revised
23 chronology contradict any of the entries in your -- in
24 the chronology in your report?

25 A. I don't believe any of the subsequent

1 entries contradict earlier entries, but supplement the
2 earlier entries.

3 Q. Other than an entry from 1821 that
4 deleted the note that Mexico became independent from
5 Spain and the entry from 1848 indicating that the
6 United States and Mexico signed the Treaty of
7 Guadalupe Hidalgo, are there any other entries in the
8 chronology from your report that were excluded from
9 the revised chronology?

10 A. I don't recall so, and I am still
11 mystified by why I took independence and the treaty
12 out.

13 Q. You were asked earlier a question whether
14 the Spanish enslavement of Navajo was a reason for the
15 continued hostility of Navajo. Did -- were there
16 occasions where Navajo enslaved Spanish settlers
17 during the colonial period?

18 A. Very frequently.

19 Q. Did Navajo individuals steal livestock
20 from Hispanic settlements in the province?

21 A. They most certainly did.

22 Q. Did Navajo raid Hispanic communities?

23 A. They did.

24 Q. Did they raid Pueblo communities?

25 A. They did.

1 Q. The maps that I showed you as Exhibits 12
2 through 15 and two maps that were shown to you
3 previously all show the Province of Moqui; is that
4 correct?

5 A. They all show the Province of Moqui.

6 Q. Do any of those maps show the Hopi
7 villages in a manner -- do any of those maps show the
8 Hopi villages outside of the territory of the -- of
9 the New Mexico -- or the kingdom and provinces of New
10 Mexico?

11 A. No. They're all -- all the maps show the
12 Hopi Pueblos as part of colonial New Mexico.

13 Q. Did Spain ever cede any part of its
14 territory in the western hemisphere except in the face
15 of overwhelming military force?

16 A. I don't think Spain did willingly -- what
17 was the word?

18 Q. Cede.

19 A. Cede. They did not cede authority
20 over --

21 Q. Any territory?

22 A. No, I don't think any territory, but you
23 made the exception of overwhelming --

24 Q. Except in the face of overwhelming
25 military force.

1 A. No, I don't.

2 Q. Did the Spanish government, during any of
3 its colonial history in the western hemisphere,
4 overwhelm or defeat militarily an indigenous group
5 that was larger than the -- even the largest
6 population estimate of the Hopi villages?

7 A. Did any indigenous group --

8 Q. Did the Spanish government -- for
9 example -- let me ask it this way: Was the population
10 of the Inca Empire greater than the largest population
11 estimate that you've seen of the Hopi villages?

12 A. Hugely so.

13 Q. How about the Aztec Empire?

14 A. Equally.

15 Q. So given its colonial experience in
16 Mexico and in Peru, would it be safe to say that the
17 Kingdom of Spain had within its control sufficient
18 military force at any time to overwhelm the Hopi
19 villages?

20 A. At any point, I believe that Spanish
21 forces, had they wished to, could have overwhelmed the
22 Hopi Pueblos.

23 MR. MENTOR: Okay. Thank you,
24 Dr. Kessell. I have no further questions.

25 MR. STEUER: I have just a few to follow

1 up on. I'm sorry. Are you okay?

2 THE COURT REPORTER: I'm fine.

3 MR. STEUER: It won't be very long.

4 EXAMINATION

5 BY MR. STEUER:

6 Q. If you could go back to Exhibit 4, it's
7 the 1819 treaty.

8 A. Got it.

9 Q. And if you could turn to page -- I think
10 it's Page 3 of the report -- of the treaty, and look
11 at Article XVII towards the bottom. And if you could
12 read -- take a moment to just read that real quickly.

13 A. Read it silently or read it out loud?

14 Q. You can read it silently.

15 Do you see the part on the very last line
16 "desiring their happiness as a superior government"?

17 A. I do.

18 Q. Does this article indicate Navajo
19 acceptance of Spain as its authority?

20 A. In this case, it did, indeed.

21 Q. Then I have a quick question about the
22 maps. All of these maps that you indicate show the
23 Hopi Pueblos, the Province of Moqui, they also show
24 the Province of Navajo; is that correct?

25 A. They also show the Province of Navajo.

1 There is one distinction, that within the Province of
2 Moqui there are labeled Pueblos. Most of these maps
3 show the Province of Navajo as blank.

4 Q. In this -- in these maps that show the
5 Province of Moqui and the Province of Navajo, both of
6 those are within the boundaries of the Spanish Empire,
7 are they not?

8 A. I believe they are.

9 Q. Do you have any estimate as to the Navajo
10 population during any part of the colonial period?

11 A. I really don't. Not with any accuracy.

12 Q. Even understanding that, do you have any
13 reason to believe that Spain did not have sufficient
14 military force to overwhelm the Navajo had they wished
15 to make that a priority?

16 A. I -- because of the nature of the
17 semisedentary Navajo, they probably did not have means
18 to subjugate the Navajo people. They might have gone
19 after one or two outfits, but not likely in that vast
20 area could they have subdued the Navajo Nation.

21 Q. Well, "subdued" is one term. Defeated --

22 A. Defeated -- couldn't have defeated them.

23 Q. They couldn't have defeated them?

24 A. I don't think so.

25 Q. Yet they could have driven them out to

1 the point that they were no longer there, couldn't
2 they have?

3 A. I don't think so. I mean -- and the same
4 would apply to the Utes, the Jicarilla Apaches, the
5 Comanches. No, they just didn't have the means to do
6 that.

7 Q. Even if they had brought the entire force
8 of the Spanish Empire to bear on that region?

9 A. That changes the game plan. I'm sure if
10 they had unlimited forces, they could have eventually
11 done so.

12 Q. So if they made it their top priority --

13 A. Exactly.

14 Q. -- they could have done so?

15 A. Yes. I think so, yes. Yes.

16 MR. STEUER: I don't have any further
17 questions.

18 MR. McELROY: Let's talk for a minute.

19 MR. STEUER: Okay. Off the record.

20 (Recess taken, 5:57 p.m. to 6:01 p.m.)

21 Q. (BY MR. STEUER) I just have a couple
22 more questions. It's Exhibit 14, and it's the second
23 map. This -- earlier I understood you to say that
24 most of these maps show nothing in the area of the
25 Province of Navajo, and this map here does show some

1 little settlement-type things. What do those
2 indicate?

3 A. You have found the one exception to what
4 I said before. This is the only map I know of that
5 has any geographical distinctions of places, and there
6 are three: Chegui, Chusca, and Chaca. They're all on
7 this map.

8 Q. And then on Exhibit 13, there also are
9 some little settlement-like things around Provincia de
10 Navajo here as well, aren't there? Sorry. I don't
11 know the proper term to call them other than "things."

12 A. And he frequently -- Miera -- indicates
13 over here on the legend, those little domed huts are
14 labeled indios Gentiles, heathen Indians, and, yes,
15 they're -- he often shows that, but the one time --
16 the only map of these 18th century maps that I know
17 of that have place names within Moqui is that -- I
18 mean, within the Province of Navajo is that 1778 Miera
19 map that you just showed me.

20 Q. But both of these, the one with the place
21 names and this one, they indicate some recognition
22 that there were people living in the Province of
23 Navajo, don't they?

24 A. Absolutely.

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

1 THE DEPONENT: Okay.

2 WHEREUPON, the within proceedings were
3 concluded at the approximate hour of 6:04 p.m. on the
4 13th day of March, 2012.

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1 I, JOHN L. KESSELL, 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

9 _____
 JOHN L. KESSELL, Ph.D.

10

11 The signature above of JOHN L. KESSELL,
 12 Ph.D., was subscribed and sworn to before me in the
 13 county of _____, state of
 14 _____, this _____ day of
 15 _____, 2012.

16
 17

18 _____
 Notary Public
 My commission expires

19
 20
 21

22
 23

24

25 Water Rights/Little Colorado River, 03/13/12 (ts)

JOHN L. KESSELL, Ph.D.

194

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 JOHN L. KESSELL, 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 27th 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.