

In the Matter Of:  
The Chippewas of Saugeen First Nation et al v.  
Attorney General of Canada

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VOL 46 DAY 46  
September 30, 2019

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Toronto, ON M5K 1A2  
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Court File No. 94-CQ-50872CM

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CHIPPEWAS OF SAUGEEN FIRST NATION, and THE  
CHIPPEWAS OF NAWASH FIRST NATION  
Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA,  
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE  
CORPORATION OF THE COUNTY OF GREY, THE  
CORPORATION OF THE COUNTY OF BRUCE, THE  
CORPORATION OF THE MUNICIPALITY OF NORTHERN  
BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF  
SOUTH BRUCE PENINSULA, THE CORPORATION OF THE  
TOWN OF SAUGEEN SHORES, and THE CORPORATION OF  
THE TOWNSHIP OF GEORGIAN BLUFFS  
Defendants

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and  
SAUGEEN FIRST NATION  
Plaintiffs

- and -

THE, ATTORNEY GENERAL, OF CANADA and HER MAJESTY  
THE QUEEN IN RIGHT OF ONTARIO  
Defendants

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--- This is VOLUME 46 / DAY 46 of the  
transcript of the trial proceedings in the  
above-noted matter, being held at the Superior  
Court of Justice, 330 University Avenue,  
Courtroom 5-1 Toronto, Ontario, on the 30th day  
of September 2019.

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B E F O R E:  
The Honourable Justice Wendy M. Matheson

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A P P E A R A N C E S :

Benjamin Brookwell, Esq., for the Plaintiffs,  
& H.W. Roger Townshend, Esq. the Chippewas of  
Nation, and the  
Chippewas of Nawash  
First Nation.

Michael Beggs, Esq., for the Defendant,  
& Michael McCulloch, Esq., Attorney General  
& Barry Ennis, Esq., of Canada.  
& Alexandra Collizza, Esq.,

David Feliciant, Esq., for the Defendant,  
& Jennifer Le Pan, Esq., Her Majesty the  
& Richard Ogden, Esq. Queen in Right of  
& Julia McRandall, Esq. Ontario.

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1 --- Upon commencing at 10:01 a.m.

10:01:30 2 THE COURT: Morning, Mr. Townshend.

10:01:32 3 MR. TOWNSHEND: Good morning, Your  
10:01:33 4 Honour.

10:01:35 5 THE COURT: Are there preliminary  
10:01:37 6 matters or are we going straight to Mr. Greene?

10:01:41 7 MR. TOWNSHEND: I have a preliminary  
10:01:43 8 matter.

10:01:44 9 THE COURT: All right. Just give me a  
10:01:45 10 moment. Please go ahead.

10:01:54 11 MR. TOWNSHEND: Some further update on  
10:01:55 12 the agreed statements of fact. We have one more  
10:01:59 13 agreed to by now. If I could have document  
10:02:01 14 SC1108, please?

10:02:10 15 While that is coming up, I will just  
10:02:12 16 say what it is. There were five legal actions  
10:02:14 17 commenced in the late 1980s and early 1990s  
10:02:17 18 about the implementation of Treaty 72 which are  
10:02:21 19 inconsistent with the theory of this case, and  
10:02:25 20 we considered them -- well, everyone considered  
10:02:29 21 it to be excessively complex to argue those in  
10:02:32 22 the alternative, so on consent they were stayed  
10:02:35 23 pending the resolution of this action.

10:02:37 24 So this is an agreement of -- agreed  
10:02:40 25 statement of fact regarding that and having

1 various details in following that.

2 So -- I don't need to go through it  
3 all now. I'd just like to have that made an  
4 exhibit.

5 THE COURT: All right. Mr. Registrar,  
6 what's the next exhibit number?

7 THE REGISTRAR: Exhibit Number 4263.

8 THE COURT: 4263?

9 THE REGISTRAR: Correct, Your Honour.

10 EXHIBIT NO. 4263: Agreed statement of  
11 fact re. five legal actions on the  
12 implementation of Treaty 72; Document  
13 SC1108.

14 THE COURT: Now, while we're on the  
15 subject, sir, are there any other  
16 plaintiff-initiated ASFs that are still being  
17 discussed amongst counsel?

18 MR. TOWNSHEND: Yes.

19 THE COURT: And --

20 MR. TOWNSHEND: I wanted to address  
21 another of them right now.

22 THE COURT: Okay. Please go ahead.

23 MR. TOWNSHEND: We had proposed an ASF  
24 about fishing intensity of -- in the recent  
25 past, and we were trying to reach an ASF in



1 relation to that and we have not been able to do  
2 so. So we're proposing to call a witness to  
3 speak to that issue.

4 I was just -- just discussing with my  
5 friends when a suitable day would be.

6 THE COURT: There's certainly some  
7 gaps available.

8 MR. TOWNSHEND: Yes. I was thinking  
9 next week, but the day that I had talked to our  
10 witness about is not available for counsel  
11 opposite. So we're trying to find a -- if we  
12 would -- it can't be next week. We were  
13 thinking October 21, but I'm not sure our  
14 witness is available that week.

15 THE COURT: Was it the 10th you were  
16 talking about?

17 MR. TOWNSHEND: I was proposing the  
18 10th and Ontario counsel is not available that  
19 day.

20 THE COURT: We don't have to deal with  
21 it right now but one idea would be to move the  
22 voir dire to the 10th and do this new witness on  
23 the 11th. Now, you can't respond to that right  
24 now but I just float that for all of you to  
25 consider.

10:04:42 1 MR. TOWNSHEND: If counsel for Ontario  
10:04:43 2 wishes to examine --  
10:04:44 3 THE COURT: Oh, I see.  
10:04:44 4 MR. TOWNSHEND: This witness is not  
10:04:45 5 available either the 10th or the 11th.  
10:04:48 6 THE COURT: Either day. How long is  
10:04:50 7 the witness going to take?  
10:04:53 8 MR. TOWNSHEND: Oh, less than a day.  
10:04:54 9 THE COURT: What about next Wednesday?  
10:04:56 10 MR. TOWNSHEND: I don't know if he's  
10:04:58 11 available. That might be.  
10:04:59 12 THE COURT: Okay. Well, could you  
10:05:00 13 look into that while you're looking into other  
10:05:03 14 options?  
10:05:04 15 MR. TOWNSHEND: Thank you, Your  
10:05:04 16 Honour.  
10:05:05 17 THE COURT: Does this person have to  
10:05:06 18 come in from out of town?  
10:05:08 19 MR. TOWNSHEND: Yes, yes, from Saugeen  
10:05:12 20 Territory.  
10:05:13 21 THE COURT: And everyone knows who it  
10:05:14 22 is? What's this person's name?  
10:05:15 23 MR. TOWNSHEND: His name is Ryan  
10:05:20 24 Lauzon.  
10:05:20 25 THE COURT: L --

10:05:20 1 MR. TOWNSHEND: R-y-a-n.

10:05:20 2 THE COURT: No, his last name.

10:05:20 3 MR. TOWNSHEND: L-a-u-z-o-n.

10:05:27 4 THE COURT: Z-o-n. I'm going to put  
10:05:28 5 down about half a day? All right.

10:05:32 6 And any other things you wish to say  
10:05:34 7 about ASFs, sir?

10:05:39 8 MR. TOWNSHEND: There are a few more  
10:05:40 9 we're still working on, a couple more. We're  
10:05:43 10 waiting for some more information from Canada.  
10:05:46 11 We don't consider them critical, but they could  
10:05:48 12 be helpful regarding the Indian Department  
10:05:53 13 organization, regarding Indian agents, that sort  
10:05:56 14 of thing.

10:05:57 15 And then there are also some ASFs  
10:05:59 16 that one of the defendants proposed.

10:06:02 17 THE COURT: I'm just sort of sticking  
10:06:04 18 with yours at the moment.

10:06:06 19 Canada, when is that information going  
10:06:07 20 to be provided to plaintiffs' counsel?

10:06:08 21 Yes, Mr. Beggs.

10:06:10 22 MR. BEGGS: Sorry, Your Honour, I  
10:06:12 23 would expect --

10:06:14 24 THE COURT: All the way to the front,  
10:06:15 25 sir.

10:06:17 1 MR. BEGGS: Thank you, Your Honour. I  
10:06:18 2 would expect the further information about the  
10:06:21 3 Indian agents to take another week. We have  
10:06:24 4 people trying to make sense of old bureaucratic  
10:06:27 5 documents.

10:06:28 6 But I think the only other one is  
10:06:31 7 Canada's ASF.

10:06:34 8 THE COURT: I'm not talking about  
10:06:35 9 that, sir. Can you please see if your people  
10:06:38 10 can get back to plaintiffs' counsel by Friday?

10:06:43 11 MR. BEGGS: I'll try, Your Honour.

10:06:44 12 THE COURT: All right. I take it  
10:06:47 13 that -- I mean, you haven't asked for any orders  
10:06:54 14 and I don't want the schedule to be held up at  
10:06:57 15 the last minute by these ASFs, Mr. Townshend,  
10:07:00 16 so --

10:07:01 17 MR. TOWNSHEND: That's right.

10:07:02 18 THE COURT: All right. Anything else  
10:07:02 19 you wish to raise at this time?

10:07:05 20 MR. TOWNSHEND: Yes, Your Honour.

10:07:05 21 Last February 12th at a case management  
10:07:08 22 conference you directed the defendants give 90  
10:07:11 23 days' notice if they intended to cross-examine  
10:07:15 24 each other's witnesses. Canada gave some  
10:07:19 25 notice, they wished to cross-examine Dr. Reimer

1 on a couple of topics.

2 I would like the court to set a date  
3 for service of motion materials so that I can  
4 understand the basis for that request and  
5 consider it.

6 THE COURT: Mr. Beggs, are you  
7 speaking to that as well?

8 MR. BEGGS: Yes, Your Honour.

9 Your Honour, I don't believe it's a  
10 matter that motion materials would be necessary  
11 for. We'd be happy to provide any case law in  
12 advance that Mr. Townshend requires.

13 THE COURT: Well, subject to  
14 correction, it's not very complicated.  
15 Obviously if you're aligned in interest you  
16 ordinarily do not get to cross-examine. So you  
17 would have to either elaborate upon some other  
18 test, which I'd be happy to hear about, or  
19 persuade me that on these specific points you  
20 and Ontario are not aligned in interest.

21 In your communication to plaintiffs'  
22 counsel, giving notice, did you expand on your  
23 rationale at all?

24 MR. BEGGS: I think we just identified  
25 which matters we're not aligned in interest

10:08:39 1 with, but we didn't expand on particularly why.

10:08:43 2 THE COURT: Okay. Well, I'm not sure,  
10:08:45 3 Mr. Townshend, that motion material is  
10:08:47 4 necessary; ordinarily it would not be required,  
10:08:49 5 but I do think it would be helpful for you to  
10:08:52 6 have some advance notice of what the rationale  
10:08:56 7 is so that you can prepare to deal with that.

10:09:01 8 It ordinarily would not come up until  
10:09:03 9 after Ontario's cross-examination was -- excuse  
10:09:06 10 me, after Ontario's examination in-chief was  
10:09:09 11 completed, so that's quite some time from now.

10:09:12 12 Mr. Beggs, do you have any objection  
10:09:14 13 to providing a follow-up letter communicating  
10:09:19 14 the gist of the basis upon which you submit you  
10:09:24 15 would be entitled to cross-examine that  
10:09:27 16 defendant's expert witness?

10:09:30 17 MR. BEGGS: No, Your Honour.

10:09:31 18 THE COURT: All right. And when can  
10:09:31 19 you do that, sir?

10:09:36 20 MR. BEGGS: I think we can do that by  
10:09:38 21 Friday, Your Honour.

10:09:39 22 THE COURT: Well, I wouldn't insist on  
10:09:40 23 Friday, but let's say next Friday.

10:09:43 24 And Mr. Townshend, if it unfolds that  
10:09:51 25 you're still mystified about the rationale, you

10:09:54 1 should speak directly to Canada and hopefully  
10:09:56 2 you can work it out.

10:09:59 3 You can, if you wish, at a later date,  
10:10:01 4 make a further request. But it would seem to me  
10:10:05 5 that's the main thing you need.

10:10:08 6 MR. TOWNSHEND: Yes.

10:10:08 7 THE COURT: All right. Okay.

10:10:10 8 MR. TOWNSHEND: Thank you, Your  
10:10:10 9 Honour.

10:10:14 10 THE COURT: Anything else?

10:10:14 11 MR. TOWNSHEND: No, Your Honour.  
10:10:15 12 Mr. Brookwell is calling the next witness.

10:10:18 13 THE COURT: Mr. Brookwell, please go  
10:10:20 14 ahead.

10:10:24 15 MR. BROOKWELL: Your Honour, we'd like  
10:10:25 16 to call Mr. Bruce Greene up to the stand.

10:10:31 17 BRUCE R. GREENE: AFFIRMED.

10:10:34 18 EXAMINATION IN-CHIEF BY MR. BROOKWELL:

10:11:17 19 THE COURT: Now, Mr. Greene, before  
10:11:19 20 counsel begins, this is a very big room and  
10:11:22 21 everyone including the people in the back need  
10:11:24 22 to hear you. And so you need to do two things  
10:11:27 23 to accomplish that. One is you need to keep  
10:11:29 24 your voice up; the other is you need to move  
10:11:32 25 your chair forward to increase the ability of

10:11:34 1 that microphone to catch your voice.

10:11:39 2 And if you just continue to think  
10:11:41 3 about those two things I'm sure we'll be fine.

10:11:44 4 Mr. Brookwell, please go ahead.

10:11:48 5 MR. BROOKWELL: Thank you, Your  
10:11:49 6 Honour. So one preliminary matter, Your Honour,  
10:11:51 7 you asked for the copy of the various cases and  
10:11:53 8 statutes cited throughout Mr. Greene's report.  
10:11:59 9 And I've passed that on to Mr. Registrar.

10:12:03 10 And there's two volumes there. It is  
10:12:06 11 organized in the order of his book of  
10:12:08 12 authority -- or sorry, his table of authorities  
10:12:11 13 in his report. The tabs are organized in that  
10:12:15 14 order. And in the index we've indicated the  
10:12:18 15 existing exhibit numbers as the case law and  
10:12:22 16 statutes were agreed exhibits prior to start of  
10:12:26 17 the trial.

10:12:27 18 There's one document that is not yet  
10:12:30 19 an exhibit. It's a secondary source, "Cohen's  
10:12:35 20 Handbook", but we will be proposing that as an  
10:12:39 21 exhibit in the course of Mr. Greene's  
10:12:42 22 examination. We thought it would be prudent to  
10:12:45 23 include it all in one place so you have all the  
10:12:48 24 materials before you.

10:12:49 25 THE COURT: Just for the record,



1 Mr. Greene is a U.S. lawyer and his report,  
2 which, like other reports in this trial, will  
3 become trial evidence on consent, has cited --  
4 cites many, many, U.S. case authorities and  
5 statutes, and I did make a request that they be  
6 consolidated into one place, and I thank counsel  
7 for organizing that.

8 They have, as you say, already all  
9 been marked as consent exhibits, and you'll deal  
10 with that additional one when you get to it, I'm  
11 sure.

12 Since it's already exhibited it  
13 doesn't need to be marked again, but unless  
14 someone has an objection I would be inclined to  
15 give it a lettered exhibit just to keep track of  
16 the fact that I've been handed these two  
17 volumes. Does any counsel have an objection to  
18 that? No.

19 Mr. Registrar, may the two-volume  
20 collection of the case and statutory authorities  
21 referred to by this gentleman in his report be  
22 the next lettered exhibit.

23 THE REGISTRAR: Lettered Exhibit S-2,  
24 Your Honour.

25 THE COURT: S-2. Thank you,

1 Mr. Registrar.

2 EXHIBIT NO. S-2: Two-volume

3 collection of case and statutory

4 authorities referred to by Mr. Bruce

5 Greene in his report.

6 THE COURT: Please go ahead,

7 Mr. Brookwell.

8 MR. BROOKWELL: I figure I'd just

9 quickly mention, Your Honour, at the break we

10 can provide Mr. Registrar with a PDF copy so

11 that it's in the database.

12 THE COURT: Thank you, sir.

13 BY MR. BROOKWELL:

14 Q. So may I start by having document  
15 SC1102 on the screen, please?

16 Mr. Greene, this document is entitled  
17 "Indian Aboriginal Title in the United States:  
18 Its Origin and Characteristics, and Inclusion of  
19 Navigable Waterways Within its Territory". Is  
20 this your report?

21 A. Yes, it is.

22 Q. Your Honour, I would like to make  
23 this the next exhibit.

24 THE COURT: Yes, Mr. Registrar.

25 THE REGISTRAR: Exhibit Number 4264.

10:14:56 1 EXHIBIT NO. 4264: Mr. Bruce Greene's  
10:14:58 2 report titled "Indian Aboriginal Title  
10:14:58 3 in the United States: Its Origin and  
10:14:58 4 Characteristics, and Inclusion of  
10:14:58 5 Navigable Waterways Within its  
10:14:58 6 Territory"; Document SC1102.

10:14:59 7 THE COURT: All right.

10:15:00 8 BY MR. BROOKWELL:

10:15:02 9 Q. And if we could turn to, first,  
10:15:10 10 the list of authorities, the table of contents,  
10:15:12 11 which I believe starts on page 3? And if we  
10:15:16 12 could scroll to the last entry? Keep going to  
10:15:21 13 the next page. So it's just before the  
10:15:31 14 introduction. It's actually Roman numeral 5  
10:15:34 15 from the table of contents.

10:15:42 16 And you should see on the screen there  
10:15:44 17 before you, Mr. Greene, under the heading  
10:15:47 18 "Treaties" it's listed Felix Cohen, "Cohen's  
10:15:53 19 Handbook of Federal Indian Law", 2012.

10:15:57 20 THE COURT: You mean at the bottom of  
10:15:58 21 the page?

10:15:59 22 MR. BROOKWELL: Yes, that's right.

10:16:00 23 THE COURT: All right.

10:16:00 24 BY MR. BROOKWELL:

10:16:01 25 Q. And can you tell us, first, who

1 Mr. Cohen is?

2 A. Yes, I can. It's listed actually  
3 under "Treatises", as opposed to "treaties".

4 Q. Yes, that's right.

5 A. Felix Cohen is a rather important  
6 figure in federal Indian law in the United  
7 States. He was the associate solicitor for  
8 Indian Affairs under John Collier, who was the  
9 secretary of the interior during essentially the  
10 "New Deal" era under -- when Franklin Delano  
11 Roosevelt was president.

12 And he was very interested in Indian  
13 law. He was a scholar. There had not been any  
14 treatises really prepared on the subject. It  
15 was all case law at the time. And he took it  
16 upon himself to prepare a handbook, which was  
17 originally published I believe in the late  
18 '30s.

19 It was -- the "Handbook", as it's been  
20 called, was then updated after he left the  
21 Department of the Interior, and a second edition  
22 was issued in 1948.

23 And then -- that actual edition was  
24 generally criticized by the Indian bar, I'm  
25 told, and -- because it seemed to take a

10:17:23 1 different view from Cohen and perhaps a bit more  
10:17:26 2 conservative.

10:17:28 3 Then beginning in the -- I believe it  
10:17:33 4 was the '80s, there was a group of academicians,  
10:17:35 5 mostly law school professors and deans, who  
10:17:41 6 decided that the "Handbook" should be updated  
10:17:44 7 yet again, so it was updated a first time and  
10:17:47 8 then the second time it was updated in 2012.

10:17:50 9 And essentially it's what we call in  
10:17:52 10 the United States -- it's a hornbook, it's a  
10:17:54 11 kind of a treatise on federal Indian law. It's  
10:17:56 12 a place where you start often when you're  
10:18:01 13 considering an issue because although it's not  
10:18:05 14 -- it's comprehensive in the sense that it  
10:18:07 15 covers all subjects under Indian law, but it  
10:18:10 16 doesn't go into depth on any particular one, but  
10:18:13 17 it leads you to lots of case authority that you  
10:18:16 18 can then consider as well.

10:18:19 19 Q. Could I have document S9 -- 1942  
10:18:24 20 on the screen, please?

10:18:25 21 A. I would just add one additional  
10:18:27 22 thing. Cohen is -- has been cited favourably  
10:18:30 23 repeatedly by the U.S. Supreme Court in numerous  
10:18:33 24 cases over the years.

10:18:37 25 Q. So, Mr. Greene, up on the screen

1 is the excerpt from "Cohen's Handbook" in your  
2 report.

3 Your Honour, subject to the position  
4 of my friends, I propose to make that the next  
5 exhibit.

6 THE COURT: It is an excerpt from the  
7 "Handbook"?

8 MR. BROOKWELL: Yes, that's correct.

9 THE COURT: Is it a section that you  
10 could identify for --

11 MR. BROOKWELL: Yes, that is section  
12 1.03.

13 THE COURT: Any objections? No.  
14 Mr. Registrar.

15 THE REGISTRAR: Exhibit Number 4265.

16 EXHIBIT NO. 4265: Excerpt from  
17 "Cohen's Handbook of Federal Indian  
18 Law", section 1.03; Document S1942.

19 MR. BROOKWELL: Your Honour, for your  
20 reference, that is tab 62.

21 THE COURT: 4265. Sir, I'm going to  
22 ask you to try to keep your voice up a little  
23 bit more.

24 THE WITNESS: I will work on it, Your  
25 Honour, I apologize.

1 THE COURT: No, you don't have to  
2 apologize just work on it. That sounds good.

3 All right. Please go ahead.

4 BY MR. BROOKWELL:

5 Q. If we could return to SC1102,  
6 which is now Exhibit 4264? And if we could go  
7 to page 45 of the PDF, please?

8 Mr. Greene, this is your resume  
9 attached to your report?

10 A. Correct.

11 Q. Can you tell us where you went to  
12 law school, please?

13 A. Yes, I went to law school at the  
14 University of California, Hastings College of  
15 the Law.

16 Q. And where are you called to  
17 practice law?

18 A. I took the California Bar in 1967  
19 and was admitted that year.

20 I subsequently took the Colorado Bar  
21 in 1976 and was admitted that year.

22 And then I was admitted in a whole  
23 host of federal courts starting with the Supreme  
24 Court, working down through the courts of  
25 appeals and district courts.

10:21:03 1 Q. And how long have you practiced  
10:21:05 2 law?

10:21:05 3 A. I have practiced law 52 years.  
10:21:10 4 It always surprises me when I say that.

10:21:13 5 Q. And what has -- what kind of law  
10:21:17 6 have you practiced?

10:21:19 7 A. I have practiced federal Indian  
10:21:21 8 law for 49 of those 52 years. My first two  
10:21:25 9 years out of law school I was clerking for a  
10:21:29 10 commissioner on an independent regulatory agency  
10:21:31 11 in Washington, D.C. Then I spent a year in  
10:21:35 12 corporate law in San Francisco and determined  
10:21:38 13 that it was not my calling. It didn't like me  
10:21:42 14 and I didn't like it.

10:21:43 15 And then from that point forward I've  
10:21:44 16 been practicing federal Indian law. I represent  
10:21:48 17 Indian tribes throughout the United States over  
10:21:49 18 the course of that almost 50 years from really  
10:21:53 19 coast to coast.

10:21:59 20 Q. And in your practice what  
10:22:01 21 experience do you have with Aboriginal title in  
10:22:03 22 the United States?

10:22:03 23 A. Well, first, it's kind of a  
10:22:08 24 foundational principle in federal Indian law.  
10:22:10 25 So if you -- even if you don't do anything as an



1 Indian lawyer you learn pretty quickly about  
2 Aboriginal title.

3 But in addition to that I've had a  
4 number of cases, primarily cases we're going to  
5 be discussing here today, United States v.  
6 Michigan, which was in federal court, and People  
7 v. LeBlanc which was in the Michigan Supreme  
8 Court.

9 But it's hard to avoid the subject  
10 generally if you're dealing with treaty rights,  
11 and pretty much that's been my specialty over  
12 the years.

13 Q. And if we scroll down on your  
14 resume toward the end is an entry about "Faith  
15 in Paper". And can you tell us about that item  
16 on your resume?

17 A. Yes. As I'm sure you're all  
18 experiencing in this courtroom, these sorts of  
19 cases tend to be heavily expert witnessed, laden  
20 with expert witnesses.

21 One gentleman that I've collaborated  
22 with as my expert in a couple of cases is  
23 Professor Charles E. Cleland, who is now  
24 professor emeritus for Michigan State  
25 University.

10:23:41 1 His process -- he is also considered  
10:23:43 2 probably the foremost authority on the Indians  
10:23:45 3 of the Upper Great Lakes. His process is one of  
10:23:50 4 preparing historical, ethnohistorical,  
10:23:54 5 archeological, anthropological reports about  
10:23:58 6 tribes, typically in connection with treaty  
10:24:01 7 transactions. And his purpose, generally, is to  
10:24:04 8 try to discern the interests of all of the  
10:24:06 9 parties to that transaction.

10:24:10 10 And in the process of doing that in  
10:24:12 11 various cases in Michigan, Wisconsin and  
10:24:15 12 Minnesota, he would prepare a rather detailed --  
10:24:19 13 a document of reports. As he moved towards the  
10:24:24 14 end of his career, he's now in his 80s and not  
10:24:31 15 doing -- he's writing novels now, but he decided  
10:24:35 16 that all of these reports, which were public  
10:24:37 17 documents because they were filed in litigation,  
10:24:39 18 nonetheless were not being generally circulated.  
10:24:47 19 People didn't know about them.

10:24:48 20 So he decided that he would compile  
10:24:51 21 those reports from a variety of different cases  
10:24:53 22 and publish them in a separate book called  
10:24:56 23 "Faith in Paper".

10:24:57 24 And if you look at the chapters in  
10:24:59 25 "Faith in Paper" they relate obviously to cases

10:25:01 1 that he prepared, for which he prepared his  
10:25:05 2 reports.

10:25:06 3 And he asked lead counsel in the  
10:25:11 4 particular cases if they would prepare some sort  
10:25:13 5 of introduction, some sort of general  
10:25:15 6 description about the case, you know, just  
10:25:18 7 something to set up the reports so that it would  
10:25:21 8 have a little better context.

10:25:24 9 And since I was lead counsel in three  
10:25:27 10 of the cases that he was discussing he asked me  
10:25:34 11 to write those introductions, summaries,  
10:25:37 12 comments, as you will. And so three of those --  
10:25:40 13 of his chapters are entries by me in his book.

10:25:47 14 Q. Could I have document SC1167 on  
10:25:50 15 the screen, please?

10:26:01 16 Your Honour, this is the plaintiffs'  
10:26:02 17 proposed tender for Mr. Greene as:

10:26:05 18 "A U.S. lawyer with experience in  
10:26:07 19 U.S. federal Indian law and capable of  
10:26:10 20 giving opinion evidence concerning the  
10:26:12 21 doctrine of Aboriginal title in U.S.  
10:26:14 22 law and the legal interpretation of  
10:26:16 23 Indian treaties within the United  
10:26:19 24 States."

10:26:19 25 THE COURT: I take it there's no

1 objection?

2 I have a question, sir, for you about  
3 the report.

4 THE WITNESS: Yes, Your Honour.

5 THE COURT: Which I've read in detail.

6 I assume that in your report where you  
7 give an account of historical events that those  
8 historical events are sourced from the legal  
9 decisions upon which you rely, is that correct?

10 THE WITNESS: I would modify that just  
11 slightly to say that the historical accounts  
12 that I refer to are typically reported in the  
13 decisions that -- to which I'm discussing.

14 So I'm not a historian and I have not  
15 done independent historical research. I merely  
16 take what the court has found with respect to  
17 history as it's relevant to the decision and  
18 refer to it.

19 THE COURT: Right. But that was my  
20 question. So I can proceed on the basis that  
21 any factual matters in Exhibit 4264 are your  
22 expression of facts as found in the many  
23 different cases that you rely on in your  
24 opinion?

25 THE WITNESS: Yes, and that's correct.

10:27:30 1 You cannot attribute the factual comments to me  
10:27:33 2 as original material.

10:27:34 3 THE COURT: Thank you for clarifying  
10:27:36 4 that.

10:27:36 5 Now, does any counsel wish to ask this  
10:27:39 6 gentleman any questions arising from my  
10:27:41 7 questions? No. All right.

10:27:43 8 On that basis I am going to accept the  
10:27:48 9 tendered description of the expertise of this  
10:27:51 10 gentleman. And as I think we've done in the  
10:27:56 11 past, we'll mark this written document as a  
10:28:00 12 lettered exhibit, Mr. Registrar.

10:28:03 13 THE REGISTRAR: Lettered Exhibit T-1.

10:28:06 14 EXHIBIT NO. T-1: Tendered description  
10:28:07 15 of Mr. Bruce Greene's expertise;  
10:28:07 16 Document SC1167.

10:28:09 17 THE COURT: Thank you. Please go  
10:28:10 18 ahead, Mr. Brookwell.

10:28:12 19 BY MR. BROOKWELL:

10:28:12 20 Q. Could we return to Mr. Greene's  
10:28:16 21 report on the screen?

10:28:20 22 Before we dive into some further  
10:28:23 23 questions, Mr. Greene, could you help us with  
10:28:27 24 some terminology used in your report? The first  
10:28:30 25 is you refer to "tribe" or "tribes", and can you

1 tell us what you mean by that term?

2 A. Generally in the United States a  
3 tribe is referred to as a -- a tribe is  
4 federally recognized by the government.

5 The term has evolved over time and  
6 it's been used a little differently in the last  
7 century, for example. But generally speaking an  
8 Indian tribe in the United States has federal  
9 recognition, which is to say that the United  
10 States understands that they are an Indian  
11 tribe, and indeed there's a list that is  
12 published, I think every year, listing all of  
13 the federally recognized or also acknowledged,  
14 they use the term synonymously, listing all the  
15 tribes. And there are approximately 550 or so  
16 federally recognized Indian tribes in the United  
17 States.

18 Q. And in your report you also  
19 discuss an 1836 treaty. For some clarity in our  
20 purposes can you tell us to what treaty you  
21 refer to?

22 A. That is the Treaty of Washington  
23 of March 28th, 1836. I believe it's reported in  
24 the status at large as 7 Stat., 491.

25 Q. And a couple of other terms. Can

1 you tell us what an "upland" is?

2 A. "Upland" is sort of a general  
3 term for lands that are not covered by water.

4 Q. And then conversely what's a  
5 "lowland"?

6 A. It would be a submerged land.  
7 And we tend to use those terms interchangeably.  
8 They don't have any distinctive difference.  
9 There's no legal consequence calling it a  
10 lowland versus submerged lands or uplands versus  
11 lands that are not covered with water.

12 Q. And as another kind of overview  
13 question can you tell us generally how U.S.  
14 courts are organized in terms of their  
15 hierarchy?

16 A. Yes, I'd be delighted.  
17 There are three tiers in the federal  
18 system, and I'm learning a little bit about the  
19 Canadian system; I don't really know very much  
20 about it.

21 But the federal system starts with the  
22 district court. Generally every state has a  
23 district, so, for example, there's the United  
24 States District Court for the District of  
25 Colorado.

10:31:03 1                   However, if you are in states where  
10:31:05 2                   there is a larger population there may be  
10:31:08 3                   multiple districts. So, for example, in  
10:31:10 4                   California, which has 40 million people, there  
10:31:13 5                   is a U.S. District Court for the Southern  
10:31:15 6                   District, which is in San Diego; for the Central  
10:31:20 7                   District, which is in Los Angeles; for the  
10:31:22 8                   Eastern District, which is in San Francisco; and  
10:31:24 9                   for the Northern District, which is in -- excuse  
10:31:26 10                  me, Eastern District is Sacramento, Northern  
10:31:31 11                  District is San Francisco.

10:31:32 12                  But it's a court of general  
10:31:35 13                  jurisdiction, so to speak. I mean, it's a trial  
10:31:35 14                  court. It's not -- it's actually not general  
10:31:36 15                  jurisdiction. It's limited jurisdiction. It  
10:31:37 16                  has only the jurisdiction that Congress gave it.

10:31:44 17                  From there each of the district  
10:31:45 18                  courts -- now, we can talk about states, whether  
10:31:47 19                  they have one district or multiple districts --  
10:31:49 20                  is in a circuit.

10:31:50 21                  So there are 11 federal circuits; they  
10:31:53 22                  are geographically organized. The first circuit  
10:31:59 23                  is in Maine and I think New Hampshire,  
10:32:03 24                  Connecticut, or New Hampshire the second  
10:32:06 25                  circuit; a third, et cetera, works down the east



10:32:09 1 coast; the fifth circuit is Florida, over  
10:32:12 2 towards Texas.

10:32:15 3 And so it goes on like that. The  
10:32:17 4 largest one is the ninth circuit, which includes  
10:32:20 5 not only California, Oregon, Arizona,  
10:32:25 6 Washington, Alaska, Hawaii, et cetera. That's  
10:32:28 7 the largest one.

10:32:31 8 They hear matters -- appeals from the  
10:32:33 9 district courts, generally appeals from the  
10:32:35 10 district court to the court of appeals as a  
10:32:38 11 matter of right.

10:32:40 12 The court hears cases in three-judge  
10:32:43 13 panels. And, finally, from there the top court  
10:32:47 14 is the U.S. Supreme Court. It, of course, sits  
10:32:51 15 in Washington, D.C.; it has nine justices; it  
10:32:54 16 has -- there are very few circumstances when you  
10:32:57 17 can go to the Supreme Court as a matter of  
10:33:00 18 right, and those circumstances are seen to be  
10:33:03 19 reducing themselves in terms of practical effect  
10:33:05 20 over the years.

10:33:06 21 So the Supreme Court's jurisdiction is  
10:33:09 22 essentially discretionary. And a litigant that  
10:33:12 23 lost in the court of appeals would petition for  
10:33:14 24 a writ of certiorari to the Supreme Court. If  
10:33:17 25 it's granted the Supreme Court grants the writ

1 to the court of appeals and directs that the  
2 record be submitted to it.

3 So it's a three-tier system.

4 Q. And then another side I'd like  
5 you to help us understand, that was the federal  
6 court, what about state court?

7 A. Each court -- each state, of  
8 course, has its own court system and they tend  
9 to mirror the federal system a bit, but there's  
10 no requirement that they do.

11 The top court -- take my home state of  
12 Colorado, is the Supreme Court, it has, I  
13 believe, five justices, I've never argued there  
14 because most of my cases -- really, virtually  
15 all of my cases are in federal court --

16 Below that is a court of appeals, just  
17 like the Circuit Courts around the country, but  
18 it's just in Colorado. And then there's a  
19 district court, and there's probably 30  
20 districts in Colorado that cover various  
21 geographic areas.

22 And then below the District Court is  
23 the County Court, which hears preliminary  
24 hearings and things and criminal matters and  
25 that sort of thing.

10:34:25 1 Q. And where does an appeal from the  
10:34:27 2 Supreme Court of Colorado go?

10:34:29 3 A. Well, occasionally there is a  
10:34:31 4 petition for certiorari to the Supreme Court  
10:34:38 5 from a State Supreme Court. That does happen.  
10:34:42 6 It doesn't happen often, but it does happen.  
10:34:45 7 There's no reason for it not to, but it doesn't  
10:34:49 8 happen that often.

10:34:50 9 Q. And another general question  
10:34:51 10 about U.S. law, can you tell us in the U.S. how  
10:34:54 11 private property is protected in the law?

10:34:58 12 A. It's protected under the  
10:34:59 13 Constitution. The Fifth Amendment prohibits  
10:35:02 14 taking property without compensation. It's a  
10:35:06 15 fundamental principle in U.S. law. I would be  
10:35:10 16 surprised if it didn't exist in Canada as well,  
10:35:16 17 but I don't know that.

10:35:21 18 Q. I'd like to move now to help us  
10:35:22 19 understand some of the content of your report  
10:35:25 20 and to talk about Aboriginal title.

10:35:27 21 So I'd like to begin with two terms  
10:35:29 22 that are in your report. And what is "original  
10:35:34 23 Indian title" or "Indian right of occupancy"?

10:35:38 24 A. Essentially those are terms for  
10:35:41 25 Indian Aboriginal title. And Aboriginal title

1 is essentially a title that Indians held in the  
2 United States by virtue of the fact that they  
3 were there before there was a United States of  
4 America.

5 Q. And where do those terms come  
6 from?

7 A. The rules essentially governing  
8 Indian Aboriginal title are common law. They  
9 mostly have come from the Supreme Court.  
10 Probably the first time a court addressed the  
11 subject was in a very venerable decision called  
12 Johnson v. McIntosh, which I -- it's just an  
13 interesting decision because it talks about the  
14 early days of the United States before it was  
15 the United States and then shortly after the  
16 United States.

17 There was a lot of competition for  
18 essentially conquering and acquiring land in the  
19 so-called "New World". And so as Johnson v.  
20 McIntosh talks about these various countries  
21 that might acquire some land, whether it's the  
22 French or whether it was the English or whether  
23 it was the fledging American country, all have  
24 essentially the same sorts of rules, which was  
25 that the conquering sovereign essentially took

1 fee title to everything within the territory,  
2 but it was subject to Indian Aboriginal title.  
3 And that title was essentially respected.

4 Q. And if you're able to just look  
5 at the index, Your Honour, I believe that's tab  
6 7, the seventh case down in Mr. Greene's list of  
7 cases -- sorry, I apologize, 12, tab 12.

8 Mr. Greene, can you tell us how  
9 Aboriginal title is established in the United  
10 States?

11 A. Yes, I can. Essentially -- a  
12 tribe, to show that it has Aboriginal title to a  
13 particular territory has to show that it has  
14 been there, it has been there for a long time,  
15 it has continuously used that area and that it  
16 has exclusive use of that area for a long, long  
17 time.

18 It's a factual matter, essentially, to  
19 establish that, the criteria for Aboriginal  
20 title.

21 Q. And what does that include? What  
22 rights does it include?

23 A. I think that the best way to  
24 think about it is that it's very much like a fee  
25 title in the sense that Indian people can use

10:38:35 1 the resources. They can live there, they can  
10:38:37 2 hunt there, they can fish there, they can gather  
10:38:39 3 there, they can make maple syrup, sugar bush as  
10:38:44 4 it's called essentially. But it has one huge  
10:38:48 5 difference from fee title, and that is that the  
10:38:50 6 title can be extinguished at the will of the  
10:38:53 7 United States without compensation. It is a  
10:38:56 8 noncompensable interest.

10:39:00 9 Q. Before we continue on that point  
10:39:02 10 of extinguishment I'd like to ask you about two  
10:39:06 11 other terms that come up in your report, and  
10:39:08 12 that's "recognized" and "unrecognized"  
10:39:12 13 Aboriginal title. What do those terms mean?

10:39:15 14 A. Well, in the progression of  
10:39:17 15 Indian lands I suppose you would say that the  
10:39:20 16 lowest level or the first level, shall we say,  
10:39:23 17 is Indian Aboriginal title, and as I mentioned  
10:39:26 18 it's title that the Indians acquire because they  
10:39:28 19 were there.

10:39:29 20 But at some point the United States  
10:39:31 21 began dealing with the tribes and typically  
10:39:35 22 entered into treaties. And those treaties were  
10:39:39 23 largely -- they're all different in many ways,  
10:39:42 24 and they're all similar in other ways. But  
10:39:44 25 typically there was a cession of land under

10:39:47 1 treaties to the United States, and the Indians  
10:39:49 2 retained lands out of that cession called  
10:39:52 3 "reserves".

10:39:54 4 At that point the title is recognized  
10:39:57 5 title. In other words, the U.S. has confirmed  
10:39:59 6 that there is a title. Now, that's not to the  
10:40:01 7 entire area; it's to the reservation, for  
10:40:06 8 example.

10:40:10 9 Q. So can you help us understand  
10:40:13 10 what are the means by which a tribe can get  
10:40:16 11 recognized title?

10:40:19 12 A. Well, the most common way was  
10:40:22 13 through treaties, although that's not the  
10:40:24 14 exclusive way. And, of course, treaties were  
10:40:27 15 only allowed or negotiated up until 1871 when  
10:40:33 16 Congress passed a law prohibiting the United  
10:40:36 17 States from entering into treaties with Indians,  
10:40:38 18 not because they were through negotiating with  
10:40:42 19 them but because the House of Representatives  
10:40:45 20 had no role in the treaty process, and they were  
10:40:47 21 unhappy about that.

10:40:48 22 The United States took the position  
10:40:50 23 early on that it would treat tribes as somewhat  
10:40:54 24 like foreign nations. They're obviously not the  
10:40:57 25 same, but they decided that when they were

1 negotiating with them they would negotiate a  
2 treaty just as they would negotiate a treaty  
3 with Great Britain or that sort of thing.

4 And those treaties under the  
5 Constitution have to be ratified by the Senate.  
6 So the House finally in 1871 said, well, what  
7 about us? Do we have a role here?

8 So they prohibited treaties, but that  
9 meant that from 1871 forward that these treaties  
10 then and in the future became statutes or  
11 agreements that were confirmed by Congress. And  
12 that was always the way and -- for Congress to  
13 act to recognize title.

14 You know, one modern example may make  
15 some sense. I find examples sometimes helpful  
16 as some of this talk is a bit abstract at times.

17 But Congress can recognize tribes.  
18 There's different ways to be recognized or  
19 acknowledged under federal law as an Indian  
20 tribe. And they can pass statutes saying, you  
21 know, referring to a tribe and saying that  
22 they're hereby acknowledged and entitled to all  
23 of the services that the Bureau of Indian  
24 Affairs offers.

25 And then they'll provide for a



1 reservation area for that tribe. That  
2 reservation area is recognized title. It's  
3 typically in an area of their Aboriginal use,  
4 but it progresses when Congress blesses it, so  
5 to speak, and becomes recognized and therefore  
6 compensable title.

7 Q. So let's return to what you  
8 mentioned earlier about extinguishment. How can  
9 Aboriginal title be extinguished in the United  
10 States?

11 A. Well, it can be extinguished at  
12 the will of the United States. And as I  
13 indicate, and I think Felix Cohen talks about it  
14 as well, the most common way of doing it was  
15 through treaty. And so we're going to talk, I  
16 suppose because I reported about it, about the  
17 1836 treaty in Michigan. That treaty starts off  
18 with describing an area of cession.

19 So the Aboriginal title that's ceded  
20 to the United States is obviously extinguished.  
21 It doesn't exist anymore. And most of the  
22 treaties that you'll see, not all -- there's an  
23 important treaty called the "Treaty of  
24 Greenville" that just guaranteed protection of  
25 the United States.

10:43:26 1 And there's an occasional treaty, I  
10:43:29 2 mentioned, thought about -- there's one dealing  
10:43:31 3 with the Western Shoshone in Nevada that was  
10:43:36 4 just a treaty guaranteeing that the Indians  
10:43:41 5 wouldn't disturb people travelling through  
10:43:43 6 Nevada, but -- and so there was no land cession.  
10:43:46 7 But most treaties involve a land cession, and  
10:43:48 8 that's the most common way to extinguish  
10:43:50 9 Aboriginal title.

10:43:51 10 But it also can be extinguished by  
10:43:55 11 force as the conquering country. That didn't  
10:43:57 12 happen too much, but there's always a unique  
10:44:01 13 circumstance here or there.

10:44:03 14 In California, which was obviously --  
10:44:08 15 came into the Union a bit later, the government  
10:44:14 16 entered into 18 treaties with tribes in  
10:44:17 17 California and sent them to the Senate for  
10:44:19 18 confirmation where they promptly got lost in the  
10:44:23 19 Senate archives until 1905 which -- lost in the  
10:44:27 20 sense -- I think they were purposely lost.

10:44:31 21 There's no doubt that Indian  
10:44:33 22 Aboriginal title in California has been  
10:44:36 23 extinguished because the government has acted  
10:44:39 24 quite inconsistent with the notion that they  
10:44:42 25 would continue to retain that title.

10:44:44 1 And, in addition, there were  
10:44:46 2 litigation in the Indian Claims Commission in  
10:44:50 3 which tribes sue the United States. It's a very  
10:44:53 4 specialized statute. I can talk about it if you  
10:44:55 5 want, but typically tribes were seeking to be  
10:44:59 6 compensated for unconscionable takings, and when  
10:45:04 7 they were compensated for those takings their  
10:45:07 8 title was extinguished.

10:45:09 9 Q. Maybe I will ask you then, what  
10:45:14 10 difference is there between that commission and  
10:45:17 11 the courts that you've already described?

10:45:19 12 A. In terms of extinguishing title  
10:45:21 13 there really is no difference, but that court is  
10:45:24 14 really an administrative court. It was a very  
10:45:27 15 limited court.

10:45:28 16 In 1946 Congress passed something  
10:45:32 17 called the "Indian Claims Act", and it was what  
10:45:35 18 I affectionately and without intending  
10:45:38 19 disrespect refer to as sort of a national mea  
10:45:42 20 culpa; you know, we're sorry for what we've done  
10:45:44 21 to the Indians.

10:45:46 22 The jurisdictional grant under the  
10:45:47 23 Indian Claims Act allowed tribes to sue the  
10:45:50 24 United States for all sorts of things that were  
10:45:52 25 otherwise not cognizable before that statute was

1 passed.

2 It only related to claims arising  
3 before 1946, and then claims had to be filed by  
4 1951. After that the Indian Claims Commission  
5 heard those cases. It was an administrative  
6 type tribunal. It was not an article II court  
7 like the U.S. District Court and was under the  
8 supervision of the U.S. Court of Claims, which  
9 is a specialized court that hears claims for  
10 money damages against the United States.

11 And so they heard a lot of tribes  
12 coming in and saying, you know, we ceded a large  
13 territory, and maybe I can use the '36 treaty as  
14 an example again. In that case the Indians did  
15 litigate -- the Odawa and Ojibwe litigated in  
16 the Claims Commission and they said the land  
17 they ceded under the '36 treaty they got  
18 something around 3 cents an acre, and it was  
19 determined in the Claims Commission that the  
20 value of the land was actually closer to 27  
21 cents or something an acre.

22 So they would sue in the court -- in  
23 Indian Claims Commission and claim that they  
24 were entitled to the difference between what  
25 they actually got and what the fair market was

10:47:11 1 and -- but without interest because the Claims  
10:47:16 2 Commission rapidly concluded that the injury to  
10:47:18 3 the Indians occurred at the time of the taking,  
10:47:21 4 and they suffered no injury thereafter for the  
10:47:24 5 next 200 years or whatever.

10:47:27 6 So that body has gone out of  
10:47:30 7 existence, that administrative tribunal because  
10:47:33 8 it had a finite number of cases. But it dealt a  
10:47:36 9 lot with Aboriginal title.

10:47:44 10 Q. So to return a little to  
10:47:46 11 Aboriginal title itself, against whom are  
10:47:50 12 Aboriginal title rights good?

10:47:51 13 A. Generally Aboriginal title rights  
10:47:51 14 are good against all the world except the United  
10:47:53 15 States. So if you were to look at a tribe  
10:47:56 16 exercising its Aboriginal rights, it might be  
10:47:59 17 hunting, it might be fishing, it might be  
10:48:02 18 gathering, it might be trapping, it might be  
10:48:05 19 conducting sugar bush.

10:48:10 20 Aboriginal title is a very  
10:48:11 21 comprehensive kind of title, except for the big  
10:48:16 22 trapdoor through which you fall, which is to say  
10:48:20 23 that it's a noncompensable title so that the  
10:48:24 24 United States can take it whenever it pleases.

10:48:26 25 And the United States can issue

10:48:30 1 patents and that sort of thing to non-Indians  
10:48:33 2 within areas where the Aboriginal title is  
10:48:35 3 unextinguished, and those patents are valid but  
10:48:38 4 they're still subject to the Aboriginal title  
10:48:40 5 until it's extinguished by the United States.

10:48:43 6 So basically the answer is, it's good  
10:48:46 7 as against everybody but the United States.

10:48:52 8 Q. And who can modify it if anyone?

10:48:54 9 A. The United States. And I should  
10:48:55 10 add that land cannot be taken by anybody but the  
10:48:59 11 United States. There's been a long-standing  
10:49:04 12 policy that's actually codified. It's still --  
10:49:06 13 the first statute was, I think, in probably the  
10:49:10 14 early 1800s.

10:49:13 15 It was called an "Indian Trade and  
10:49:15 16 Nonintercourse Acts", and it's still codified in  
10:49:19 17 25 U.S.C. 177, but basically it says that if  
10:49:24 18 there is going to be a transaction where Indian  
10:49:27 19 lands are conveyed, the United States has to be  
10:49:29 20 a party to that transaction.

10:49:31 21 Q. You just mentioned 25 U.S.C.  
10:49:32 22 What is that?

10:49:34 23 A. Oh, excuse me, the laws in the  
10:49:36 24 United States are organized into various codes  
10:49:38 25 by subject, and if you practice Indian law the

1           only thing you know is Title 25 probably. That  
2           contains all of the -- or most of the federal  
3           laws that have been codified.

4                   Now, when they are enacted by Congress  
5           they go into something called the "Stats at  
6           Large", but it's a chronological ordering of  
7           laws passed by Congress, so there's no order to  
8           it.

9                   But then somewhere, somebody, somehow  
10          extracts from the Stats at Large pertinent  
11          things that are important, that are likely to be  
12          used often, cited often, and they get codified  
13          into various codes. And, as I say, Title 25,  
14          which is three volumes by now, two or three  
15          volumes, is entitled "Indians".

16                   Q.    And what does the United States  
17          have to do to modify title?

18                   A.    Well, if it's recognized title  
19          they have to pay for it. And either they get  
20          agreement with the tribe that's affected or --  
21          but they don't need it. They can get Congress  
22          to pass.

23                   There's another very fundamental  
24          principle in federal Indian law, and that is  
25          that Congress has plenary authority over Indian

10:50:51 1 tribes, which is a legal way of saying that they  
10:50:55 2 can pretty much do what they want to do.

10:50:57 3 There is one case that I'm aware of  
10:50:59 4 called Weeks, organized tribe -- I've forgotten  
10:51:03 5 the name of the tribe. But it was a Supreme  
10:51:06 6 Court decision, say, 20 years ago that basically  
10:51:08 7 said that Congress' plenary authority is  
10:51:12 8 generally pretty much unlimited, but it must be  
10:51:17 9 acting consistent with its trust responsibility.

10:51:20 10 And the trust responsibility notion is  
10:51:21 11 that the United States, for example, holds  
10:51:23 12 Indian reservations, the United States holds the  
10:51:26 13 fee of those Indian reservations, but they hold  
10:51:28 14 it for the benefit of an Indian tribe.

10:51:30 15 So tribes have beneficial ownership of  
10:51:32 16 the reservations. The legal title is in the  
10:51:35 17 United States. Congress can do as it sees fit,  
10:51:38 18 including extinguishing Aboriginal title  
10:51:41 19 whenever, changing treaty reservations, but  
10:51:44 20 subject to compensation requirements, and they  
10:51:48 21 must be acting consistent with their trust  
10:51:54 22 responsibility which is, you know, the subject  
10:51:56 23 of things that lawyers argue rather regularly  
10:51:58 24 about.

10:52:01 25 Q. I'd like to move to talk to you



1 about navigable waterways. But just as a  
2 preliminary question, in the U.S. what's the  
3 difference, if any, between Aboriginal title to  
4 land and to land under water?

5 A. There is -- other than the fact  
6 that they're physically different, there's no  
7 particular legal distinction between them.  
8 Tribes' Aboriginal territory typically includes  
9 bodies of water that are navigable, not all of  
10 them, obviously, depending on where they reside.

11 But often, especially in the Upper  
12 Great Lakes, you've got Aboriginal territory  
13 that includes uplands, as we say, and submerged  
14 lands as well. And tribes can have Aboriginal  
15 title over both categories of land and do have  
16 that title.

17 Q. And what process would a tribe  
18 have to go through to have recognized Aboriginal  
19 title to land under water?

20 A. Same as uplands. They would  
21 probably enter into a treaty, and the treaty  
22 would define the reservation area. And if there  
23 was the -- if there was navigable bodies of  
24 water within it, they could be included but they  
25 might not. And that's a whole other subject

10:53:26 1 that deals with the Holt State Bank cases, which  
10:53:31 2 I can get into but I have a feeling it's  
10:53:34 3 premature at this point.

10:53:40 4 Q. No, we can -- maybe let's just  
10:53:41 5 start with Holt State Bank. Can you tell us the  
10:53:43 6 significance of that case?

10:53:44 7 A. Well, there's a series of cases  
10:53:47 8 starting with Holt State Bank, Shively v.  
10:53:48 9 Bowlby, they're cited in my report, that deal  
10:53:52 10 with the issue about whether lands that were set  
10:53:56 11 aside in a reservation were intended to include  
10:54:00 12 the submerged lands if there's a -- if there's a  
10:54:04 13 navigable body of water in that reservation.

10:54:07 14 And the principle that is followed  
10:54:08 15 that was articulated in Holt State Bank is that  
10:54:11 16 when the United States conquered the area, the  
10:54:20 17 United States, it acquired fee title to all the  
10:54:22 18 land, including submerged lands.

10:54:25 19 Holt State Bank says, essentially,  
10:54:28 20 that the United States then holds those  
10:54:31 21 navigable bodies of water in trust for states  
10:54:35 22 when they eventually join the Union. And that's  
10:54:37 23 the doctrine that kind of arose out of what's  
10:54:42 24 called the "equal footing doctrine", the notion  
10:54:44 25 that each state should enter the Union on the

1 same terms as all other states.

2 The presumption, therefore, is that  
3 the beds and banks of navigable waterways are  
4 being held by the United States in trust when  
5 states -- for states when they become states.  
6 And the litigation that has followed in a number  
7 of cases is, well, how do you rebut that  
8 presumption?

9 And often that turns on a statute or a  
10 treaty creating a reservation, and then there is  
11 discussion about whether or not there was intent  
12 on the part of the United States to include the  
13 bed as part of the reservation or just simply  
14 include the navigable body of water within the  
15 boundary of the reservation but not pass title  
16 to the bed of the navigable body of water.

17 Q. What have courts looked at to  
18 determine that intent?

19 A. They looked to tribes' Aboriginal  
20 title, among other things. Obviously they look  
21 to the document that's at issue that purports to  
22 create the reservation, if they can discern what  
23 the -- what the intent of Congress was when it  
24 did it.

25 But it also is typically informed by

10:56:05 1 Aboriginal uses. So, for example, one of the  
10:56:06 2 cases I cite is the Puyallup case out of the  
10:56:08 3 ninth circuit in 1983. And that was sort of an  
10:56:13 4 interesting history. They were -- the Puyallups  
10:56:15 5 live in the Puget Sound area, and they were  
10:56:19 6 signatories to one of the Stevens treaties.  
10:56:23 7 Stevens was Isaac Stevens, Governor Isaac  
10:56:24 8 Stevens of that territory. It was actually  
10:56:26 9 Oregon and Washington at the time.

10:56:28 10 The treaties provided for cessions of  
10:56:30 11 this very valuable land, and Puget Sound was  
10:56:35 12 valuable even in those days, not just today.  
10:56:36 13 And the concept was that the Indians would cede  
10:56:39 14 their Aboriginal territory and they would  
10:56:41 15 retreat to reserves, lands that were in their  
10:56:43 16 Aboriginal territory but were not ceded. And  
10:56:48 17 those treaties preceded statehood for Washington  
10:56:53 18 obviously.

10:56:53 19 Well, the Puyallups got a small  
10:56:56 20 reservation. The treaty provided that they  
10:56:57 21 could leave the reservation to fish in common  
10:57:02 22 with the citizens of the territory, to fish at  
10:57:08 23 their usual and accustomed fishing sites in  
10:57:12 24 common with the citizens of the territory. But  
10:57:12 25 the Puyallup -- so they could go off the

1 reservation to prosecute their traditional way  
2 of life, including commercial operation.

3 But the Puyallups were very unhappy  
4 that they didn't get a portion of the bed of the  
5 navigable waterway because they had -- it was  
6 the mouth of a river, and they used various  
7 kinds of weirs and traps to set to the bottom of  
8 the river. And they didn't have -- they  
9 couldn't do that, and they didn't have access to  
10 the river.

11 So their treaty was amended a few  
12 years later to include this submerged land area.  
13 And then years later they got into a beef with,  
14 I think, the City of Tacoma over who owned title  
15 to that.

16 And so the question was, and this is  
17 traditional Holt State Bank kind of inquiry, we  
18 know that the bed of that stream was being held  
19 in trust by the United States for Washington  
20 when it became a state. The treaties were in  
21 the 1850s, the Stevens Treaties. The State  
22 became a state in 1889, I believe it was.

23 So the question was, did the United  
24 States essentially rebut that presumption that  
25 the bed of that stream was going to go to the

1 State in 1889 by setting aside that stream area  
2 for the Puyallups?

3 And in reaching the conclusion the  
4 ninth circuit did, that they did in fact rebut  
5 the presumption, the ninth circuit looked at  
6 Aboriginal uses to this to determine whether  
7 this would be a logical thing for the United  
8 States to do.

9 And since these were fishing people  
10 and since the whole ecology of the stream area  
11 plus its use was sort of central to the very  
12 identity of practices of the tribe, they  
13 concluded that submerged land was to be included  
14 within the reservation; therefore, the  
15 presumption was rebutted, and therefore in 1889  
16 when Washington became a state it did not  
17 acquire the submerged lands.

18 Q. But there is two Puyallup cases  
19 in your list of authorities. And could you just  
20 remind us which one it is? There's one in 1983  
21 and --

22 A. It's the 1983 decision out of the  
23 ninth circuit. I'm not sure -- I think the  
24 other Puyallup decision is the U.S. Supreme  
25 Court decision. That's -- it involved that same

10:59:33 1 tribe, but it involved a very different issue.

10:59:36 2 It involved the authority of the State  
10:59:37 3 of Washington to regulate treaty fishermen when  
10:59:42 4 they fished commercially in Washington waters.

10:59:46 5 So it would be the 1983, ninth circuit  
10:59:49 6 decision to which I just spoke about.

11:00:04 7 Q. Thank you, Mr. Greene.

11:00:04 8 And, Your Honour, that's tab 25 in the  
11:00:04 9 materials that you have, Exhibit 3852.

11:00:04 10 So you've spoken a little bit about  
11:00:06 11 navigable waterways, but we should clarify, what  
11:00:10 12 is a navigable waterway under U.S. law?

11:00:13 13 A. You know, a navigable waterway  
11:00:19 14 essentially is a waterway that's used for some  
11:00:20 15 sort of commerce. It could be shipping, it  
11:00:22 16 could be fishing, it could be boating of some  
11:00:26 17 sort. And the standard joke in the United  
11:00:28 18 States is that a navigable body of water is a  
11:00:31 19 body of water that will float a Supreme Court  
11:00:34 20 decision.

11:00:35 21 But essentially it's bodies of water  
11:00:38 22 that have some kind of commercial commerce type  
11:00:41 23 of purpose.

11:00:44 24 Q. And in terms of Aboriginal title  
11:00:47 25 when it's a navigable waterway, how is that any

11:00:56 1 different, if at all, to Aboriginal title to a  
11:00:59 2 non-navigable waterway?

11:01:02 3 A. It's not. It's just -- it's not.  
11:01:03 4 It's essentially Aboriginal title extends to  
11:01:07 5 lands and to waters, and if those lands happen  
11:01:09 6 to be navigable that doesn't change anything.

11:01:13 7 Q. In the United States to what  
11:01:15 8 navigable waterways do tribes have recognized  
11:01:18 9 title, if any?

11:01:20 10 A. Well, we just talked about the  
11:01:22 11 Puyallup case, so there -- that was navigable  
11:01:25 12 water and the Puyallups had title to the  
11:01:27 13 streambed. But there's a host of cases that  
11:01:30 14 deal with it. Some of the others I've cited in  
11:01:35 15 here as well.

11:01:36 16 There's the Namen case out of the  
11:01:39 17 ninth circuit in which the tribe owned the south  
11:01:43 18 half of Flathead Lake in Montana, which was  
11:01:47 19 within their reservation boundary, and they also  
11:01:50 20 owned the submerged lands under the lake.

11:01:52 21 There is the Muckleshoot decision,  
11:01:55 22 which is a mirror image of Puyallup, and they're  
11:01:58 23 kind of neighbours in Puget Sound on stacked  
11:02:02 24 river systems.

11:02:05 25 Let's think. Let's see, we talked



11:02:19 1 about Namen, but there are a number of other  
11:02:20 2 circumstances. I've probably cited them. I'm  
11:02:20 3 just not recalling them. But tribes can and do  
11:02:22 4 have title to submerged lands, which began as  
11:02:25 5 Aboriginal title and then got confirmed.

11:02:30 6 Q. And you just named two cases in  
11:02:31 7 your report. I think the first you said was  
11:02:38 8 Namen, is that Confederated Salish and Kootenai  
11:02:44 9 Tribes v. Namen --

11:02:45 10 A. Yes. It's Confederated Salish  
11:02:45 11 and Kootenai Tribes v. Namen. It's a ninth  
11:02:45 12 circuit, 1982 case.

11:02:53 13 I mentioned Muckleshoot, which is  
11:02:57 14 tab -- which is, I guess, document 3853. Am I  
11:02:57 15 doing that right?

11:02:57 16 Q. Yes. Exhibit 3853 is the  
11:03:00 17 Muckleshoot case, tab 19; Namen is tab 7,  
11:03:05 18 Exhibit 3842.

11:03:09 19 A. And there are others. Now,  
11:03:11 20 remember, we're talking about recognized title  
11:03:12 21 and not Aboriginal title at this point. I'm  
11:03:29 22 flipping through my notes to see or the table  
11:03:29 23 index to see -- I have a bad feeling I'm  
11:03:29 24 forgetting something.

11:03:29 25 But it's -- obviously not every

1 reservation includes navigable waterways, but if  
2 they do then, you know, they start as Aboriginal  
3 title, they can get confirmed, and then later on  
4 if a reservation is set aside for them, say, by  
5 treaty then these Holt State Bank issues arise  
6 as to whether that lake bed or riverbed should  
7 have gone to the states upon statehood.

8 Also Montana v. United States is  
9 another one of the Holt State Bank type cases  
10 that I've discussed at some length. And that  
11 dealt with whether the Crow Tribe owned the bed  
12 and banks of the Bighorn River, which ran  
13 through the middle of their reservation. And  
14 the Supreme Court concluded that they did not.

15 So the cases go in a variety of  
16 different ways, but one of the ways that they  
17 try to -- the courts try to inform themselves  
18 about whether the title was intended to go to  
19 the tribe was looking at how the tribe used the  
20 waters at issue.

21 And just as a -- to continue this  
22 discussion for a moment, the Montana v. U.S.  
23 case, the court concluded that the river, which  
24 you think of the Crow Reservation as a big  
25 rectangle and the river running through it, and

11:04:49 1 the court concluded that the even though the  
11:04:51 2 treaty set that area aside and the river ran  
11:04:53 3 through it, it wasn't a part of the -- the bed  
11:04:56 4 wasn't owned by the tribe.

11:04:58 5 And one of the things they said was,  
11:05:00 6 well, you know, the Crow were not dependent upon  
11:05:03 7 the fishery. They were not fish-eating people.  
11:05:06 8 They were buffalo hunters, they -- and so in  
11:05:12 9 trying to figure out what was intended when the  
11:05:14 10 treaty was ratified they looked at those uses.

11:05:18 11 So that's why it's pertinent, the  
11:05:20 12 Aboriginal uses.

11:05:24 13 Q. So if we have a tribe that has  
11:05:27 14 recognized Aboriginal title to a navigable  
11:05:31 15 waterway, what rights do they have?

11:05:42 16 A. Well, again, they have similar  
11:05:43 17 rights as they have to uplands. And one of the  
11:05:46 18 cases that I think is helpful to explain that is  
11:05:48 19 another ninth circuit case called the Namen  
11:05:51 20 decision. And that is -- here, it's number 7,  
11:06:02 21 tab number 7, Exhibit number 3842.

11:06:08 22 An interesting case because it really  
11:06:09 23 illustrates your -- the question that you've  
11:06:12 24 asked. That was the case dealing with the  
11:06:17 25 Flathead Indian Reservation. And there's a

1 large lake, Flathead Lake, in the middle of the  
2 reservation. And the treaty that established  
3 the reservation was quite clear that the  
4 boundary line for the reservation went through  
5 the middle of the lake.

6 And in fact there were no disputes  
7 about whether the lake was within the  
8 reservation or not, and obviously the argument  
9 against it would have been that the boundary  
10 line would have followed the shoreline down and  
11 around and back up to the northern boundary, but  
12 everyone agreed that the boundary included the  
13 lake.

14 But the tribe passed an ordinance in  
15 which it wanted to essentially regulate  
16 non-Indian, fee-owned land within the  
17 reservation, wanted to regulate how its lake bed  
18 would be used. So it wanted to have some  
19 control, regulatory control over docks and piers  
20 and that sort of thing.

21 And Namen was a private landowner  
22 on -- he owned fee land on the reservation, and  
23 he had acquired his property interest from an  
24 Indian allotment which went out of a trust  
25 status and then was fee, and it was acquired by

11:07:31 1 him just like any other land would be acquired.

11:07:34 2 But he argued that he was not subject  
11:07:38 3 to the tribe's jurisdiction to regulate his use  
11:07:42 4 of the tribe's land. And the ninth circuit  
11:07:46 5 disagreed with him and said that the tribe was  
11:07:49 6 within its authority to do that. So if they put  
11:07:55 7 things out, a pier out into the lake, they can  
11:07:57 8 do that. If they operate on the lake some sort  
11:08:04 9 of commercial enterprise obviously they can do  
11:08:06 10 that sort of thing.

11:08:08 11 In the case of the Puyallups they had  
11:08:10 12 weirs and different kinds of fishing devices  
11:08:14 13 which attached to the bottom of the navigable  
11:08:17 14 waterway; they could do that.

11:08:19 15 So pretty much you can do what a  
11:08:23 16 landowner would do when the lands are submerged  
11:08:26 17 within your reservation.

11:08:34 18 Q. So how do those rights impact  
11:08:36 19 other users on a navigable waterway?

11:08:38 20 A. Well, all the navigable waterways  
11:08:39 21 come with a navigable servitude. So whatever  
11:08:42 22 you do as the owner of a navigable -- the bed of  
11:08:46 23 a navigable waterway, you can't interrupt or  
11:08:48 24 interfere with the navigable servitude, and  
11:08:52 25 you're always subject to somebody coming and

1 saying what you're doing is interfering.

2 An example might be the Puyallups,  
3 let's say, that we talked about earlier.

4 Perhaps they wanted to construct a dam across  
5 the reservation that would rest on the bottom,  
6 on the stream bottom. If that interfered with  
7 the navigable servitude they couldn't do it.

8 Q. I'd like to shift to some of the  
9 treaties that you discuss in your report. And  
10 if we could start generally, what are some  
11 treaties that deal with ceding lake beds in the  
12 United States?

13 A. Well, of course it's a fertile  
14 area. The Great Lakes is a fertile area for  
15 those kinds of treaties because of the fact that  
16 they're there.

17 So we have a series of treaties along  
18 the Great Lakes where the cession areas, the  
19 areas that are described as the tribes'  
20 Aboriginal title are ceded, and those  
21 cessionaries include lands, uplands and  
22 submerged lands.

23 So I think the first one is the 1807  
24 Treaty of Detroit, which is down in the Thumb  
25 area of Detroit.

11:10:13 1 After that I think the 1819 Treaty  
11:10:16 2 with the Saginaw, which was just a little  
11:10:18 3 further up in Lake Huron, the cessionary was  
11:10:22 4 described as going out into the lakes and to the  
11:10:24 5 international boundary line.

11:10:27 6 Then there of course is the big one,  
11:10:30 7 the 1836 treaty that I litigated for half my  
11:10:35 8 life, it seemed, in the U.S. district court and  
11:10:39 9 the court of appeals and the Supreme Court as  
11:10:41 10 well, and that ceded portions of Lake Huron and  
11:10:46 11 Lake Michigan and -- about half of Lake  
11:10:48 12 Michigan; about 25 percent, I would say, of Lake  
11:10:52 13 Huron; and about half of Lake Superior.

11:10:56 14 And then as you move to the west in  
11:10:59 15 Lake Superior you get to the Treaty of La  
11:11:01 16 Pointe, which is the 1842 treaty of cession.

11:11:06 17 There were essentially two significant  
11:11:10 18 treaties of session in Wisconsin. One was the  
11:11:13 19 '37 treaty, which is an area below the lake; and  
11:11:18 20 then '42 treaty was -- bordered the lake. And  
11:11:21 21 the area of cession in the '42 Treaty of La  
11:11:23 22 Pointe, also like the 1836 treaty of Michigan,  
11:11:26 23 describes the cession area as including the lake  
11:11:30 24 bed.

11:11:33 25 Q. So I think that you've told us

11:11:34 1 in -- you've described those in some detail  
11:11:38 2 geographically. There's a map behind you which  
11:11:43 3 is lettered Exhibit W. Could you perhaps review  
11:11:46 4 for us where the Treaty of Detroit -- what area  
11:11:49 5 that was covering?

11:11:49 6 A. Yes.

11:11:57 7 THE COURT: You're going to need to --

11:11:58 8 THE WITNESS: Take this with me?

11:11:58 9 THE COURT: No, but stand to the left  
11:11:59 10 of the document.

11:12:00 11 THE WITNESS: So that you can see.  
11:12:00 12 Yes, sorry.

11:12:02 13 Well, this is the land area of  
11:12:04 14 Michigan and the Treaty of Detroit, the 1807  
11:12:08 15 treaty was essentially in this area. It  
11:12:11 16 included Lake St. Clair and included some  
11:12:13 17 portion of Lake Huron. I think it also included  
11:12:16 18 some portion of Lake Erie.

11:12:18 19 And then if you move up to the 1819  
11:12:20 20 treaty with the Saginaw, it's in this area, the  
11:12:23 21 area of the Thumb. The modern-day Saginaw  
11:12:27 22 Tribe, Saginaw Tribe of Chippewa is central  
11:12:31 23 Michigan, but the area of cession went out this  
11:12:34 24 way.

11:12:34 25 And then you have the '36 treaty with



11:12:37 1 the Odawa and the Ojibwe that covered portions  
11:12:40 2 of Lake Huron, half of Lake Michigan, half to  
11:12:46 3 the centreline between the two states down to  
11:12:51 4 around Grand Haven, which is about here.

11:12:55 5 And then it included about half of  
11:12:57 6 Lake Superior and went as far about as Marquette  
11:13:07 7 and then followed -- which is right here. So it  
11:13:09 8 was all of this area essentially. And then  
11:13:11 9 followed down through the -- through some  
11:13:15 10 waterways into Lake Michigan.

11:13:17 11 And then the Treaty of La Pointe, the  
11:13:20 12 1842 treaty, dealt with essentially Wisconsin  
11:13:24 13 waters, Lake Superior, so it's the west end of  
11:13:28 14 Lake Superior.

11:13:29 15 BY MR. BROOKWELL:

11:13:33 16 Q. Now, you told us about the tribes  
11:13:34 17 that were involved with these treaties, but as a  
11:13:38 18 point of completion, who is the other party in  
11:13:41 19 these treaties?

11:13:42 20 A. The United States.

11:13:47 21 Q. And in the treaties how was land  
11:13:51 22 under water treated?

11:13:56 23 A. As I say, it's treated  
11:13:58 24 essentially as uplands. And often these  
11:14:03 25 treaties, of course, were negotiated long before

11:14:06 1 there were surveys.

11:14:08 2 For example, Michigan wasn't surveyed  
11:14:12 3 until the late 1840s, as I recall. And there  
11:14:15 4 is one treaty that I litigated under that's in  
11:14:18 5 my resume involving the Keweenaw Bay Indian  
11:14:26 6 Community and the treaty that -- I think it was  
11:14:26 7 the 1854 treaty that set aside their reservation  
11:14:29 8 and said that the government was setting aside  
11:14:31 9 all of the unsold lands in the following  
11:14:38 10 townships, and it mentioned those townships.  
11:14:40 11 And it was able to do that because there had  
11:14:42 12 been a survey.

11:14:43 13 But all the treaties we're talking  
11:14:44 14 about that preceded that had to do with  
11:14:47 15 essentially metes-and-bounds descriptions.

11:14:50 16 So, for example, with the treaty of  
11:14:51 17 1820 with the Sault Ste. Marie Chippewa where  
11:14:54 18 the Indians ceded their rights to the fishing  
11:14:58 19 grounds in the St. Mary's River, I think the  
11:15:00 20 treaty says, Starting at the big rock in the  
11:15:02 21 river. And then it describes a metes-and-bounds  
11:15:05 22 description.

11:15:06 23 And for the '36 treaty it's similarly  
11:15:09 24 a metes-and-bounds type description.

11:15:12 25 And so the submerged lands are

1 described essentially by virtue of the fact that  
2 they're within the boundary of the cession area  
3 as described in the treaty.

4 Q. And these treaties that you've  
5 just discussed, if you could turn to your list  
6 of treaties in your table of contents, if you  
7 could flag for us the tabs that relate to them?

8 A. Yes. So I'm looking on page 4 of  
9 this compendium of documents. And the treaties  
10 that we've been talking about is the November  
11 17, 1807, Treaty of Detroit; the 1819 treaty is  
12 the one below that, that's the Treaty of  
13 Saginaw; the Sault Ste. Marie Treaty in 1820 we  
14 also talked about, that dealt with right at  
15 Sault Ste. Marie where the St. Mary's River  
16 where there was a highly, highly prized fishery  
17 that everybody knew about and wrote about and  
18 painted portraits of Indians fishing there, and  
19 that dealt with navigable -- the St. Mary's  
20 River, which is navigable; then there's the  
21 March 28, 1836, treaty, the next one down.

22 And the 1837 treaty didn't involve the  
23 Great Lakes because it was not -- the cession  
24 area didn't border the Great Lakes, but the one  
25 below that is the Treaty of La Pointe, which

11:16:59 1 we've discussed, 1842, and that dealt with the  
11:17:02 2 Lake Superior Chippewa of Wisconsin and their  
11:17:06 3 treaty ceded lands underlying Lake Superior.

11:17:12 4 And that's it.

11:17:23 5 Q. So for those areas in the waters  
11:17:27 6 that were ceded, what sorts of activities took  
11:17:32 7 place on those waters?

11:17:33 8 A. The principal activity exhibiting  
11:17:37 9 Aboriginal uses and Aboriginal title was  
11:17:41 10 fishing. The Ojibwe and the Odawa, also known  
11:17:44 11 as the "Ottawa" and "Chippewa", were heavily  
11:17:47 12 dependent upon the fishery resource, so they  
11:17:50 13 fished all up and down Lake Michigan, Lake  
11:17:54 14 Superior and Lake Huron.

11:17:59 15 Q. And what rights, if any, did the  
11:18:03 16 treaties address related to water?

11:18:06 17 A. Well, let's take the 1836 treaty  
11:18:10 18 for example. First off, we know the area of  
11:18:15 19 cession included the submerged lands of the  
11:18:18 20 Great Lakes. We know that the Indians were very  
11:18:20 21 heavily dependent upon fishing for subsistence.  
11:18:24 22 We know that the treaty provided them with  
11:18:29 23 barrels, fish barrels and barrels of salt,  
11:18:31 24 because in those days that's how fish were  
11:18:34 25 preserved.

11:18:35 1 So the U.S. was quite aware of that.

11:18:37 2 It was one of the things that the Indians  
11:18:39 3 received in exchange for the land cession.

11:18:41 4 And in addition, article 13th of the  
11:18:44 5 1836 treaty said, the Indians stipulate for the  
11:18:48 6 right to hunt, together with the other usual  
11:18:51 7 privileges of occupancy, until the land was  
11:18:55 8 required for settlement.

11:18:56 9 And as later construed by Judge Fox in  
11:18:59 10 the United States v. Michigan case, article 13th  
11:19:04 11 also confirmed the reserved right to fish.

11:19:06 12 "Hunt" was defined essentially as the  
11:19:10 13 quest of food. It wasn't meant to just be  
11:19:13 14 limited to bear or fox or that sort of thing.

11:19:17 15 So when they stipulated for the right  
11:19:19 16 to hunt that meant the right also to fish, to do  
11:19:22 17 sugar bush and all the things you do, trap and  
11:19:25 18 that sort of thing.

11:19:26 19 And then there were -- there was a  
11:19:29 20 temporal limitation. They had that right even  
11:19:32 21 after the cession, until the land was required  
11:19:34 22 for settlement.

11:19:39 23 Q. And you mention now that some of  
11:19:40 24 these treaties are subject to a court case. So  
11:19:47 25 how did the court describe those rights or

11:19:49 1 interpret those rights?

11:19:51 2 A. Well, I guess I would say the  
11:19:58 3 most pertinent ones are probably People v.  
11:20:02 4 LeBlanc and U.S. v. Michigan because they both  
11:20:06 5 dealt with the same treaties or treaty  
11:20:07 6 primarily, the 1836 treaty.

11:20:10 7 And they looked -- you know, they  
11:20:13 8 looked at the treaty, and there were obvious  
11:20:19 9 indicia in the treaty of the importance of  
11:20:21 10 fishery, which -- fisheries to the Indians,  
11:20:23 11 which I just described.

11:20:25 12 And then we had a number of witnesses,  
11:20:27 13 including Professor Charles Cleland, who  
11:20:31 14 testified about Indian practices; how they  
11:20:33 15 fished, where they fished, when they fished.

11:20:36 16 And he was also -- basically he was an  
11:20:40 17 archeologist, although he had a degree in  
11:20:43 18 anthropology. And he had done a lot of digs  
11:20:46 19 around the Great Lakes and he would find pits,  
11:20:48 20 essentially, I guess you'd say "refuse pits"  
11:20:51 21 where he would find bits of cedar bark nets, he  
11:20:56 22 would find a lot of fish bones that were dumped  
11:20:58 23 and that sort of thing.

11:20:59 24 So the court essentially put together  
11:21:02 25 these facts about the dependence on fish for

11:21:08 1 their survival, together with the treaty itself,  
11:21:12 2 together with treaty -- the notes of the treaty  
11:21:16 3 transactions.

11:21:17 4 Sometimes there are minutes of treaty  
11:21:20 5 transactions. There wasn't minutes of the '36  
11:21:24 6 treaty, but there was still accounts of things  
11:21:26 7 that happened because the treaty was negotiated  
11:21:28 8 in Washington, D.C.

11:21:29 9 And so there were lots of non-Indian  
11:21:32 10 observations. But, of course, the court is  
11:21:34 11 obligated to consider how the Indians understood  
11:21:37 12 the treaty and not just how the non-Indian  
11:21:40 13 treaty commissioners considered it.

11:21:43 14 But putting together the language of  
11:21:45 15 the treaty, the practices of the Indians that  
11:21:48 16 was described by Professor Cleland, the court  
11:21:51 17 concluded that although the tribe ceded their  
11:21:55 18 lands, their uplands, their lands, and their  
11:21:56 19 submerged lands, they retained what is known as  
11:21:59 20 a "usufructuary right" to go -- which is  
11:22:03 21 essentially a use right to go into the Great  
11:22:06 22 Lakes and prosecute their subsistence in  
11:22:10 23 commercial fishery.

11:22:11 24 Q. So those two cases, People v.  
11:22:12 25 LeBlanc and United States v. Michigan, I'd like

1 you to tell us a little bit more about those  
2 cases.

3 And starting with LeBlanc, which is  
4 tab 24, Exhibit 3815 in the compendium, can you  
5 recap for us a kind of concise summary of the  
6 facts of that case?

7 A. Yes, I should point out, if it's  
8 not already obvious, those were my cases. I was  
9 lead counsel and argued the case in the Michigan  
10 Supreme Court in 19 -- I think it was '75. Yes,  
11 '75.

12 And then I was lead counsel for U.S.  
13 v. Michigan starting in '75, and I concluded my  
14 work in U.S. v. Michigan ten years later in  
15 1985. So I know a little bit about those cases,  
16 fortunately, or unfortunately.

17 So LeBlanc was a criminal prosecution.  
18 And LeBlanc was a fellow named "Abe", "Big Abe"  
19 because he was about 6 foot 5 and weighed about  
20 300 pounds.

21 He was a fisherman. He was a Bay  
22 Mills Indian Community member. He was a  
23 respected, regarded member. He'd held some  
24 office in the tribe from time-to-time, but  
25 mostly he was a fisherman. And he believed he



11:23:31 1 had a right to fish under his treaty, and the  
11:23:33 2 State said "no".

11:23:36 3 And indeed the State had prohibited  
11:23:39 4 the use of gill nets, period, because it  
11:23:42 5 interfered with what the State considered to be  
11:23:44 6 its mission, which was to create a vibrant --  
11:23:47 7 economic opportunities for people by having a  
11:23:53 8 vibrant sport fishery.

11:23:56 9 And I can get into a little bit of  
11:23:58 10 this. There was a conflict between the sport  
11:24:00 11 fishery and the commercial fishery because the  
11:24:05 12 gill nets were essentially -- according to the  
11:24:09 13 State, were capturing fish that they shouldn't  
11:24:13 14 be capturing.

11:24:14 15 They were -- they didn't discriminate  
11:24:19 16 amongst species. If the fish swam into a net  
11:24:23 17 that looked kind of like a tennis net it  
11:24:25 18 couldn't back out because it got caught by the  
11:24:27 19 gills. And if the fish met that size it could  
11:24:30 20 be caught whether it should or shouldn't be  
11:24:33 21 caught.

11:24:33 22 The lake trout in Lake Michigan, which  
11:24:35 23 was a very vibrant species for a number of  
11:24:38 24 years, went into decline in the 20th century.  
11:24:43 25 And it was -- had to do with a lot of different

11:24:47 1 factors, some of which were environmental; for  
11:24:48 2 example, sea lamprey invaded the Great Lakes  
11:24:53 3 through ballast waters in boats.

11:24:57 4 And those sea lamprey, which was a  
11:25:02 5 parasitic type of eel, would attach itself to a  
11:25:06 6 lake trout and live on the host fish until it  
11:25:07 7 had drained the host of all of its nutrients,  
11:25:07 8 and then the host fish would die and the lamprey  
11:25:07 9 would find another prey.

11:25:13 10 Well, the State wanted to try to  
11:25:15 11 rehabilitate the lake trout, and the feds wanted  
11:25:18 12 to as well. And they decided that the gill nets  
11:25:20 13 were interfering with that process because the  
11:25:22 14 Indians were catching them.

11:25:25 15 They wanted them to use a different  
11:25:27 16 form of fishing, a trap net, which is a very  
11:25:29 17 different form of gear. It requires much more  
11:25:32 18 capital investment and that sort of thing. And  
11:25:35 19 the Indians had never fished that way. They'd  
11:25:39 20 always fished with gill nets.

11:25:43 21 In addition, the State introduced  
11:25:45 22 salmon, which is a non-Indigenous species  
11:25:47 23 obviously in the Great lakes, they were Pacific  
11:25:48 24 salmon, because they thought sport fishermen  
11:25:54 25 would very much like to catch salmon. And the

1 sport fishermen had their boats and their  
2 downriggers; and they bought gas; and they  
3 stayed at hotels; and they ate meals; and they  
4 generally contributed to the economy of  
5 Michigan.

6 Also, there was another ecological  
7 problem. The alewife went nuts in Michigan  
8 during that time. Alewives are a small fish,  
9 and their -- forage for both lake trout and,  
10 turns out to be, salmon as well.

11 But since the lake trout were dying  
12 out, the alewives were emerging more and more.  
13 And soon there was die-offs on the lakes. No  
14 one paid attention until all of a sudden the  
15 lakeshores began to smell pretty bad.

16 And so to try to essentially sort of  
17 reorder the Great Lakes in the eyes of Michigan  
18 and what Michigan folks thought was in their  
19 best interest, they made fishing with gill nets  
20 illegal, which was sort of the last straw for  
21 Big Abe.

22 So he called the DNR, the Department  
23 of Natural Resources in Michigan and said -- in  
24 1971 and said, I'm going to be fishing in  
25 Pendills Bay, which is a little spot in

11:27:06 1 Whitefish Bay, which is just on the other side  
11:27:09 2 of Sioux, Ontario and obviously Sault Ste.  
11:27:11 3 Marie, Michigan.

11:27:11 4 He said, I'm going to be out there  
11:27:13 5 fishing with gill nets. And they said, well, if  
11:27:15 6 you do, we're going to arrest you. And he said,  
11:27:18 7 well, I'll be there.

11:27:19 8 So he was out fishing; he got cited.  
11:27:19 9 And that case wound it's way through a very low  
11:27:25 10 level in Michigan State court until it worked  
11:27:26 11 its way up into the Michigan Supreme Court.

11:27:29 12 When it got to the Supreme Court I was  
11:27:32 13 just beginning my work on U.S. v. Michigan. I  
11:27:36 14 was a young staff attorney with the Native  
11:27:38 15 Americans Rights Fund, which was a public  
11:27:40 16 interest law firm intended to represent Indian  
11:27:43 17 tribes across the country.

11:27:45 18 I chose to work on U.S. v. Michigan or  
11:27:48 19 I got assigned or both.

11:27:50 20 And while we were pretrying the case,  
11:27:51 21 we didn't try it until 1978, all of a sudden  
11:27:55 22 LeBlanc was in the Michigan Supreme Court.

11:27:57 23 And although the Michigan Supreme  
11:27:59 24 Court decision, however it came out, would not  
11:28:03 25 have bound the federal court -- state court

11:28:06 1 decisions are not precedent in federal court --  
11:28:07 2 but, nonetheless, it seemed to me to be a case  
11:28:16 3 that was important and that I should pay  
11:28:18 4 attention to.

11:28:18 5 So I briefed it and argued it and won  
11:28:20 6 it in 1976. And, basically, it was a blueprint  
11:28:23 7 kind of for U.S. v. Michigan, but it differed  
11:28:27 8 significantly because it only dealt with fishing  
11:28:29 9 in this one particular area.

11:28:31 10 And obviously if you have reserve  
11:28:34 11 rights in an area of cession that's much --  
11:28:38 12 that's all of the waters that I pointed to and  
11:28:40 13 described in Lakes Michigan, Superior and Huron.

11:28:44 14 And if we just continued to litigate  
11:28:47 15 criminally under LeBlanc, number one, it would  
11:28:51 16 have -- assuming we had won, it would have  
11:28:54 17 established the right in that spot and not  
11:28:56 18 throughout the ceded waters.

11:28:58 19 And, in addition, in the state  
11:29:00 20 criminal proceeding there's much less latitude  
11:29:02 21 to introduce rather detailed expert testimony by  
11:29:06 22 historians and anthropologists.

11:29:09 23 So after winning LeBlanc I turned my  
11:29:11 24 attention to U.S. v. Michigan.

11:29:15 25 Q. And before we return to U.S. v.

1 Michigan, could you maybe just concisely  
2 summarize for us what the court's decision was  
3 in LeBlanc?

4 A. Yes, the court determined that,  
5 yes, indeed the Indians had reserved a use right  
6 to fish commercially and for subsistence  
7 purposes in the Great Lakes, number one.

8 It rejected the State's argument that,  
9 how could they reserve a right to fish in the  
10 ceded waters of the Great Lakes when they didn't  
11 own them? The Michigan Supreme Court said they  
12 had Aboriginal title to them, so they rejected  
13 that argument. And it then went on to look at  
14 the issue of whether the State could regulate.

15 And as I mentioned, there were two  
16 Puyallup decisions in the materials that I  
17 prepared. The one out of the Supreme Court is  
18 called "Puyallup 1"; there were three. There's  
19 a Puyallup trilogy.

20 All of those cases deal with the  
21 authority of a State to regulate a federally  
22 reserved treaty right to fish. And generally --  
23 it was a William O. Douglas opinion, the first  
24 one in 1968.

25 And Bill Douglas, who was from

1 Washington, concluded that, yes, States could  
2 regulate, but it has to be for a legitimate  
3 conservation purpose and it could not  
4 discriminate against the Indians.

5 And more or less the Michigan Supreme  
6 Court adopted that standard. So they said,  
7 there was a right, it had a commercial element  
8 to it as well as subsistence, and it could be  
9 regulated by the State but under the limited  
10 circumstances of Puyallup 1.

11 Q. Your Honour, before we continue  
12 on to the next section, I note the time, it's  
13 11:30, and ask whether this is an appropriate  
14 time for a break.

15 THE COURT: Yes.

16 -- RECESSED AT 11:31 A.M. --

17 -- RESUMED AT 11:53 A.M. --

18 THE COURT: Please go ahead.

19 BY MR. BROOKWELL:

20 Q. Thank you, Your Honour.  
21 Mr. Greene, before we continue with U.S. v.  
22 Michigan I'd like to turn to a map that is in  
23 your report. Can you go to page 49 of the  
24 report and 49 of the PDF, appendix 1 in the  
25 paper report?

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11:55:01 24  
11:55:02 25

A. Uhm-hmm.

THE COURT: Is it the first page of appendix 1 or a later -- ah, yes, sir. It's --

BY MR. BROOKWELL:

Q. The first page.

Can you tell us about this map?

A. Yes. This map began with the Royce map. And there is a Royce map in -- attached to my report. It's the map on the flip side of the map we're looking at now.

Royce maps were maps that were prepared around the 1900s, early 1900s, by the Smithsonian, I believe.

And the Royce maps essentially showed treaty areas of cession throughout the United States. So that was the base map and upon which -- what appears on this map, in addition to the land and water areas, are the reserves under the 1836 treaty. They are the slightly darker coloured boxes and things.

The first one on the lower left in the Lower Peninsula is Manistee, and you can follow it up the coast into the UP, the Upper Peninsula of Michigan.

And the area of cession is shown with



11:55:04 1 a slightly darker line that follows the  
11:55:06 2 metes-and-bounds description in article 1st of  
11:55:09 3 the 1836 treaty. So it extends at Alpena in  
11:55:13 4 Lake Huron, into Lake Huron along the  
11:55:13 5 international line, through the St. Mary's  
11:55:15 6 River, along the international line in Superior.  
11:55:22 7 It follows the international line in Superior  
11:55:26 8 then turns south through the Upper Peninsula  
11:55:30 9 down towards Escanaba and then back into Lake  
11:55:34 10 Michigan.

11:55:35 11 This map was adopted essentially by  
11:55:40 12 the Michigan Supreme Court. It appears, I  
11:55:43 13 believe, in the official report of the Michigan  
11:55:47 14 Supreme Court in connection with the LeBlanc  
11:55:52 15 decision; it was also utilized by Judge Fox in  
11:55:55 16 U.S. v. Michigan as a sort of a little -- kind  
11:55:59 17 of an easier way to get a feel for what went on  
11:56:02 18 in the '36 treaty, what was ceded and what was  
11:56:07 19 reserved.

11:56:10 20 Q. Okay. Let's move then to the  
11:56:11 21 U.S. v. Michigan case. And there's a series of  
11:56:17 22 cases that you've listed in your table of cases.  
11:56:21 23 Can you tell us first which -- what those  
11:56:26 24 decisions are, those three decisions?

11:56:28 25 A. Yes, I can. Those are items 36,

11:56:35 1 37 and 38. So United States v. Michigan was  
11:56:44 2 essentially a trial that related to issues that  
11:56:48 3 were -- the same issues really that were raised  
11:56:52 4 in People v. LeBlanc. And that led to a trial,  
11:56:58 5 a rather lengthy trial, although it doesn't seem  
11:57:01 6 it's very lengthy at all in comparison to what  
11:57:05 7 goes on in Canada in terms of length of trials.

11:57:07 8 But it was about a month-long trial in  
11:57:10 9 front of U.S. District Judge Noel Fox. He  
11:57:12 10 issued an opinion in favour of the tribes' and  
11:57:15 11 the United States' interpretation of the treaty.

11:57:19 12 And his reported decision, which is  
11:57:21 13 double columned in the Federal Supplement, is  
11:57:25 14 about 100 pages long. And it's quite detailed  
11:57:28 15 about the history of the use right and the  
11:57:31 16 history of the tribes and the interest of the  
11:57:33 17 tribes and the interest of the treaty  
11:57:35 18 negotiators and that sort of thing.

11:57:37 19 That was appealed to the sixth  
11:57:40 20 circuit, which is the next opinion, number 37,  
11:57:44 21 and was decided in 1980. The State took that  
11:57:50 22 case up on appeal and the sixth circuit -- you  
11:57:56 23 can never know exactly what they're thinking.  
11:57:58 24 You can see what they've written, but one has a  
11:58:01 25 feeling they were probably overwhelmed by the

11:58:03 1 magnitude of it and just the sheer length of it.

11:58:06 2 But something had changed between the  
11:58:09 3 time that Judge Fox had issued his opinion and  
11:58:12 4 the time that the sixth circuit heard the  
11:58:17 5 appeal. And that was there were some federal  
11:58:20 6 regulations regulating the Indian fishery that  
11:58:23 7 the Interior Department promulgated actually  
11:58:27 8 during the pretrial process leading up to the  
11:58:31 9 trial.

11:58:31 10 So remember this was a case called  
11:58:34 11 United States v. Michigan, so the United States  
11:58:37 12 brought the lawsuit, three tribes -- two tribes  
11:58:41 13 intervened, and the Interior Department decided  
11:58:44 14 in its wisdom that at the time that it was  
11:58:49 15 appropriate to issue some regulations addressing  
11:58:51 16 the fishery; who could fish, when, where,  
11:58:55 17 seasons, gear, that sort of thing.

11:58:59 18 It also buttressed our argument about  
11:59:02 19 the Supremacy Clause, because under the U.S.  
11:59:05 20 Constitution there's a Supremacy Clause that  
11:59:06 21 says that federal law is the supreme law of the  
11:59:10 22 land, and this helped address issues of concern  
11:59:14 23 about whether the exercise of the right would be  
11:59:18 24 properly regulated.

11:59:20 25 The tribes maintained that it had the

1 authority to do that, but obviously the United  
2 States can step in and do whatever it wants.

3 So it issued regulations with respect  
4 to the fishery. We worked with the United  
5 States on that, we were -- we welcomed them.

6 But then something happened, and it  
7 was called an election. And President Reagan  
8 was elected in 1980, had a different view of the  
9 world, I suppose, and allowed the -- his  
10 secretary of the interior, a fellow named James  
11 Watt, as I recall, allowed the regulations to  
12 lapse.

13 So when it got to the sixth circuit  
14 for the first time after Judge Fox's opinion in  
15 1979, the sixth circuit said, well, on the issue  
16 of the state regulation question would it be  
17 different without these federal regulations?

18 And, of course, so the Sixth Circuit  
19 said, we're going to remand it to Judge Fox and  
20 ask him if his opinion had changed in any regard  
21 as a result of the lapsing of those federal  
22 fishing regulations.

23 He concluded that it didn't change his  
24 opinion, so the case went back up to the sixth  
25 circuit, and that's the 653 F second opinion.

12:00:39 1 That's the federal second opinion from the court  
12:00:42 2 of appeals.

12:00:43 3 And they affirmed Judge Fox in all  
12:00:45 4 respects but one, and that was that Judge Fox  
12:00:49 5 had ruled that the tribes, as governments, were  
12:00:52 6 perfectly capable of regulating their fishermen  
12:00:55 7 themselves. You know, no one was trying to  
12:00:57 8 disqualify the State of Michigan for regulating  
12:01:01 9 Michigan fishermen because somehow they might be  
12:01:05 10 biased in favour of their citizens.

12:01:07 11 And, similarly, the tribe was a  
12:01:09 12 government. It had members that had to apply  
12:01:10 13 for licences and had to fish under regulations.  
12:01:13 14 The tribe had -- the tribes had biologists; they  
12:01:18 15 had conservation officers that were on the  
12:01:20 16 water.

12:01:22 17 They were doing all of the functions  
12:01:23 18 that a government would do in regulating a  
12:01:26 19 resource. So he ruled that the tribes could  
12:01:31 20 regulate and the State could not.

12:01:34 21 But that, quite arguably, was  
12:01:39 22 contradicted by Puyallup 1, because recall under  
12:01:46 23 Puyallup 1, which arose in Washington State, the  
12:01:49 24 Supreme Court had ruled that a state could  
12:01:51 25 regulate a federal right so long -- a federal

12:01:54 1 fishing -- treaty fishing right so long as that  
12:01:55 2 regulation was necessary for conservation and it  
12:02:00 3 otherwise not discriminate against the Indians.

12:02:03 4 The discrimination piece was fleshed  
12:02:06 5 out in Puyallup 2, and in that case after -- in  
12:02:11 6 Puyallup 1 the Supreme Court said that the State  
12:02:13 7 can regulate under the conservation and  
12:02:16 8 nondiscriminatory standard. The State said,  
12:02:18 9 okay, well, we'll go ahead and do that. And so  
12:02:20 10 what they said, in order to conserve the  
12:02:23 11 resource on the Puyallup Reservation, we have to  
12:02:28 12 ban gill nets.

12:02:30 13 And of course when it got back to the  
12:02:30 14 Supreme Court -- and they said that wasn't  
12:02:30 15 discrimination. When it got back to the Supreme  
12:02:30 16 Court, the State said, Look, we don't let  
12:02:35 17 anybody use gill nets.

12:02:36 18 And of course the court said, Well,  
12:02:38 19 the only people that are using the gill nets are  
12:02:41 20 the Indians. So that prohibition by the State  
12:02:44 21 of Washington was struck down in Puyallup 2.

12:02:48 22 What the sixth circuit did was it  
12:02:48 23 added a little -- a third standard for  
12:02:48 24 regulation. The regulation had to address a  
12:02:52 25 legitimate conservation need. It had to be

1 nondiscriminatory.

2 But the sixth circuit said something  
3 to the effect, I'm paraphrasing, that the  
4 regulation had to be the least restrictive  
5 alternative. In other words, if there's more  
6 than one way to conserve the resource and not  
7 discriminate against the Indians that is least  
8 restrictive on the treaty right, that's the  
9 choice the State had to make.

10 And so that's the third decision. And  
11 in point of fact, just to kind of complete the  
12 thought, the State has really not regulated the  
13 Indian fishery in Michigan. Instead, there's  
14 been a different approach.

15 After the decision and after the sixth  
16 circuit and after we kept the case out of the  
17 Supreme Court, the tribes entered into an  
18 allocation agreement with the State and with the  
19 United States represented by the Interior  
20 Department. So there was five tribes at that  
21 point, because two other tribes had been --  
22 three other tribes had been acknowledged, and  
23 they intervened in the case.

24 So there was essentially an allocation  
25 agreement in 1985 which addressed the

1 nitty-gritty of prosecuting the fishery. Who  
2 could fish; where they could fish, when they  
3 could, what were the appropriate seasons, were  
4 there limitations on gear, limitations on effort  
5 and all of that sort of thing.

6 So the State opted to go that approach  
7 rather than assert its so-called "Puyallup  
8 rights" to regulate unilaterally. That  
9 agreement in '85 lasted 15 years until 1990.

10 In '85 I stepped out of the case. I  
11 finally calculated the years I'd been involved,  
12 and I thought I could get two and a half Ph.D.'s  
13 if I went back to university, and that was  
14 enough.

15 So the second agreement in 1990 was  
16 negotiated by other lawyers. It was a 20-year  
17 agreement and, funny coincidence, it's expiring  
18 in August of 2020.

19 And so the parties are now sitting  
20 down and negotiating again but I have -- I have  
21 declined to participate. I don't want to spend  
22 another three or five years negotiating an  
23 agreement.

24 I'm pretty much -- I'm not retired but  
25 I'm close, and I find that to be the choice I



12:05:18 1 prefer. So another agreement will be  
12:05:20 2 negotiated. Who knows what it will look like.  
12:05:23 3 There's some different players, some different  
12:05:26 4 tribal leaders, some different attorneys, but I  
12:05:33 5 wish them all well.

12:05:34 6 Q. In reference to the map that's up  
12:05:35 7 on the screen, what areas were at issue in U.S.  
12:05:40 8 v. Michigan?

12:05:41 9 A. The entire area cessioned. So  
12:05:47 10 the Lake Michigan area, the Lake Huron area,  
12:05:49 11 which is relatively small when you look at Lake  
12:05:51 12 Huron as a whole, and Lake Superior.

12:05:54 13 All of those areas were at issue. And  
12:05:57 14 the tribes fished -- it was essentially an  
12:05:59 15 inland shore fishery with the tribes, which is  
12:05:59 16 to say relatively close to shore. But the  
12:06:03 17 tribes fished every place.

12:06:05 18 They fished on Beaver Island and off  
12:06:08 19 of Beaver Island, in Lake Michigan; they fished  
12:06:11 20 in Lake Huron; they fished throughout the ceded  
12:06:15 21 territory.

12:06:17 22 Q. And you've spoken about the piece  
12:06:19 23 on regulation in terms of Judge Fox's decision,  
12:06:22 24 but what else did Judge Fox find in his  
12:06:26 25 decision?

12:06:30 1 A. Well, it's a very lengthy opinion  
12:06:32 2 and he found, of course, that the Indians were  
12:06:36 3 highly dependent upon the resource and that to  
12:06:40 4 reach a conclusion that they had somehow ceded  
12:06:42 5 that without doing so explicitly was just --  
12:06:45 6 didn't make any sense because there was no way  
12:06:47 7 that they would have survived if they had done  
12:06:50 8 that.

12:06:51 9 He looked at article -- so he  
12:06:54 10 concluded that under the theory of the -- how  
12:06:57 11 you look at a treaty, the Indians are the  
12:07:01 12 grantors. They're granting a cession of  
12:07:05 13 Aboriginal territory to the United States. The  
12:07:08 14 United States is the grantee. And under  
12:07:12 15 traditional property law principles, whatever a  
12:07:15 16 grantor doesn't explicitly convey to the  
12:07:18 17 grantee, the grantor retains it.

12:07:21 18 It would be like me granting you a  
12:07:23 19 life estate and some property. Obviously the  
12:07:27 20 reversion would stay with the grantor. And he  
12:07:32 21 construed the treaty that way.

12:07:35 22 He also looked at article 13th of the  
12:07:38 23 treaty, the language we've talked about before,  
12:07:38 24 where the Indians stipulate for the right to  
12:07:41 25 hunt, together with the other usual privileges

1 of occupancy, and concluded that that referred  
2 to not only hunting but fishing and trapping and  
3 gathering.

4 And he indicated that there was  
5 limitation, temporal limitation, until the lands  
6 were required for settlement. He didn't address  
7 that in terms of the uplands because we  
8 bifurcated the case.

9 The case was only concerned with the  
10 Great Lakes. So the question was, what was the  
11 meaning of the treaty vis-a-vis the ceded area  
12 of the Great Lakes?

13 The inland rights were not given up.  
14 They were just to be determined later. And  
15 after Fox rendered his opinion, and after it had  
16 exhausted the appellate process, in the 2000s  
17 we negotiated a consent decree for the inland  
18 hunting, gathering and fishing activities. And  
19 it's a rather thick document, but we didn't have  
20 to litigate about that. We just met  
21 indeterminably until we came to an agreement.

22 There was also an issue, interesting  
23 issue, sub-issue in which the Bay Mills Indian  
24 Community, which is this dark area in the upper  
25 peninsula adjacent to Whitefish Bay, which is on

12:09:02 1 the east end of this map of Lake Superior, this  
12:09:04 2 map that I'm looking at.

12:09:10 3 The Bay Mills had argued that it was  
12:09:12 4 -- that Whitefish Bay was a part of its  
12:09:14 5 reservation. And indeed there was a map, a  
12:09:17 6 historic map -- I think it was a Henry  
12:09:19 7 Schoolcraft map; he was the lead commissioner --  
12:09:22 8 treaty commissioner for the United States --  
12:09:25 9 which showed a rough area of Michigan because it  
12:09:28 10 hadn't been surveyed and no one knew exactly  
12:09:31 11 what everything looked like.

12:09:33 12 But there was a line out into  
12:09:34 13 Whitefish Bay opposite the Bay Mills reservation  
12:09:37 14 that appeared to encompass the Bay, just like a  
12:09:40 15 cession line. And Judge Fox declined to address  
12:09:45 16 that issue. He simply said he didn't think he  
12:09:49 17 needed to do it now, and he might do it at some  
12:09:51 18 other time, but he wasn't going to do it now.

12:09:54 19 He then addressed the issue of state  
12:09:57 20 regulation and looked at Puyallup and Puyallup 1  
12:10:03 21 and 2 and concluded that they didn't apply in  
12:10:10 22 this circumstance.

12:10:12 23 And, you know, you can read the  
12:10:13 24 opinion and reach your own conclusions about it,  
12:10:16 25 but fundamentally what he was saying was that

1 because the treaty language was different  
2 that -- that that did not give rise to a state  
3 right to regulate.

4 Remember the treaty language in the  
5 Stevens Treaties in the Northwest and Washington  
6 primarily reserved in the Indians the right to  
7 fish at their usual and accustomed fishing sites  
8 in common with the citizens of the territory.

9 And it was that in-common-with notion  
10 that led Judge Boldt in the district court in  
11 Washington to conclude that the Indians were  
12 entitled to 50 percent of the available harvest.

13 So Judge Boldt, unlike Judge Michigan  
14 (sic) actually allocated the resource. We did  
15 that in effect with the '85 agreement but not  
16 through a trial.

17 But because the difference -- there  
18 was a difference in treaty language, there was  
19 nothing about an in-common right, Judge Fox  
20 concluded that the State didn't have the  
21 authority to regulate.

22 I guess I would add one last thing, if  
23 I might, and that is that, again, the State  
24 raised the argument that the tribes couldn't  
25 reserve a use right in the Great Lakes because

12:11:31 1 they didn't own the Great Lakes, they didn't  
12:11:31 2 have Aboriginal title to the Great Lakes. And  
12:11:36 3 the judge, Judge Fox rejected that argument,  
12:11:38 4 just as the Michigan Supreme Court rejected it  
12:11:42 5 in People v. LeBlanc.

12:11:45 6 Q. How did the temporal limitation  
12:11:47 7 that you mentioned on harvesting rights apply to  
12:11:50 8 the fishery?

12:11:51 9 A. Well, essentially what Judge Fox  
12:11:56 10 concluded was that although it was obviously  
12:12:01 11 entirely possible to settle land, indeed that  
12:12:03 12 was one of the main purposes for the 1836  
12:12:06 13 treaty, was to cede Aboriginal territory so that  
12:12:10 14 non-Indian advancement could take place and  
12:12:12 15 people could come and live, et cetera.

12:12:15 16 So the notion on the inland portion  
12:12:18 17 was that land was required for settlement when  
12:12:22 18 it was visibly occupied, because Indians didn't  
12:12:26 19 pay a lot of attention to title, they paid more  
12:12:29 20 attention to what they saw.

12:12:31 21 And if there was an interference with  
12:12:34 22 their ability to do something on the land they  
12:12:36 23 knew that -- because there was a house or there  
12:12:38 24 was an area that was farmed and tilled and  
12:12:40 25 irrigated and whatever, that that quite likely

12:12:44 1 was settled.

12:12:46 2 But with respect to the Great Lakes he  
12:12:48 3 concluded that you don't settle the Great Lakes.  
12:12:52 4 And so there was a temporal limitation on the  
12:12:55 5 land right, but there was no limitation on the  
12:12:59 6 fishing right because the Great Lakes could not  
12:13:02 7 be settled within the meaning of article 13th of  
12:13:05 8 the treaty.

12:13:11 9 Q. I'd like to ask you a couple more  
12:13:13 10 questions to help understand the body of law and  
12:13:16 11 the cases you've given evidence on today. And  
12:13:20 12 one of the preliminary questions is, we've  
12:13:25 13 talked a lot about recognized title. If it's  
12:13:27 14 unrecognized title and that land goes from the  
12:13:33 15 United States to a new state, what happens to  
12:13:37 16 title? What happens to the Aboriginal,  
12:13:42 17 unrecognized title?

12:13:44 18 A. Well, if the Aboriginal title has  
12:13:46 19 not been extinguished, it remains unextinguished  
12:13:50 20 even after statehood.

12:13:51 21 So the United States would still have  
12:13:52 22 to extinguish it in some way, and mostly it did  
12:13:56 23 that through treaties, but it didn't have to do  
12:13:59 24 that before -- necessarily before statehood. It  
12:14:03 25 often worked out that way because statehood

1 followed, obviously, a lot of settlement and  
2 development, so to speak.

3 And so it was a natural sort of thing  
4 to extinguish title before statehood, but it  
5 didn't have to do that. And if it didn't the  
6 Aboriginal title would remain unextinguished  
7 until it was subsequently extinguished.

8 Q. So in that circumstance who would  
9 have title to the land or land under water?

10 A. Well, I think for the land it's  
11 relatively simple. If it's unextinguished the  
12 United States can still grant, you know,  
13 homestead rights and all of that sort of thing,  
14 but there would still be an unextinguished  
15 Indian title; and there's likely to be some sort  
16 of conflict and so they try to avoid that.

17 With respect to the submerged lands,  
18 the navigable lands, that gets you all back into  
19 the Holt State Bank, Shively v. Bowlby line of  
20 cases where you're now looking at -- well, we  
21 could use the example of Michigan, I suppose.

22 The treaty was in 1836 and Michigan  
23 became a state in 1837. So in 1836 there was  
24 this large cession of land and water, so there  
25 weren't really any issues at that point about



12:15:37 1 what happened to the navigable beds -- the beds  
12:15:40 2 of the navigable bodies of water.

12:15:43 3 In 1837 they passed to the State under  
12:15:47 4 the Holt State Bank presumption, which was that  
12:15:50 5 the United States was holding title to the  
12:15:56 6 navigable waterways in trust for the State when  
12:15:57 7 it became a state.

12:15:59 8 Where the complications arise is where  
12:16:02 9 there's some kind of confirmed title, ratified  
12:16:05 10 title through the treaty, which arguably extends  
12:16:09 11 out into a water body. And we've talked about  
12:16:12 12 some of those cases, Puyallup, Muckleshoot,  
12:16:16 13 Namon, Montana v. U.S. All of those are in the  
12:16:20 14 index.

12:16:20 15 And that dealt with the question of  
12:16:23 16 ownership of the bed of a navigable body of  
12:16:27 17 water. And that turned on the issue of whether  
12:16:31 18 in the treaty, for example, the United States  
12:16:33 19 had done something to include that body of water  
12:16:36 20 within the reservation, thereby rebutting the  
12:16:39 21 presumption that the title to the lake bed would  
12:16:42 22 pass to the State upon statehood.

12:16:45 23 Q. If we stay with your example of  
12:16:47 24 the 1836 treaty, what would have been the status  
12:16:55 25 of the lake bed if there was no treaty before

12:16:59 1 statehood?

12:17:04 2 A. If there was no treaty before  
12:17:05 3 statehood the submerged lands would have fit  
12:17:09 4 within the Holt State Bank presumption and  
12:17:12 5 passed to the State upon statehood.

12:17:20 6 And with the treaty it essentially  
12:17:21 7 worked out the same way, only the Aboriginal  
12:17:25 8 title was extinguished. Under your first  
12:17:28 9 question it would have been unextinguished.

12:17:30 10 Q. And if we return to the map  
12:17:31 11 that's on the screen, this is the context of the  
12:17:34 12 1836 treaty, what's the importance, if any, of  
12:17:41 13 the international boundary line?

12:17:43 14 A. Well, the boundary line was part  
12:17:46 15 of the metes-and-bounds description for the area  
12:17:48 16 of cession. So it was very important because it  
12:17:55 17 defined -- I mean, essentially everything within  
12:18:01 18 that line was part of the tribe's Aboriginal  
12:18:05 19 territory. And so if you're going to cede  
12:18:09 20 something, you have to identify what you're  
12:18:11 21 ceding.

12:18:11 22 And as I mentioned, in those days most  
12:18:13 23 of the cessions throughout that part of the  
12:18:15 24 country were metes-and-bounds descriptions  
12:18:17 25 because they hadn't surveyed the area.

12:18:21 1 They did know generally where the  
12:18:23 2 boundary was, although I think there was some  
12:18:26 3 disputes about that as well. But the line --  
12:18:30 4 the international line identified the northern  
12:18:32 5 and northwestern reaches of the Aboriginal title  
12:18:39 6 of the Odawa and Ojibwe Nation, as they were  
12:18:44 7 referred to in that treaty.

12:18:58 8 Q. Just one moment, Your Honour.

12:18:59 9 Thank you, Mr. Greene. Those are my  
12:19:01 10 questions.

12:19:02 11 THE COURT: Okay. Counsel for Canada?

12:19:10 12 MR. McCULLOCH: Your Honour, if we may  
12:19:12 13 have a few minutes just to hook up computers and  
12:19:15 14 things like that? Thank you.

12:19:20 15 THE COURT: Do you want a break, or do  
12:19:25 16 you just want to rustle around? Do you need a  
12:19:27 17 break, or can you just rustle around and do it?

12:19:30 18 MR. McCULLOCH: I think I can rustle  
12:19:31 19 around and do it.

12:19:32 20 THE COURT: All right. I have a  
12:19:35 21 question for Mr. Townshend, so why don't I ask  
12:19:38 22 him while you're getting your stuff organized.

12:19:44 23 Since you're standing up at the  
12:19:44 24 podium, sir, I had overlooked an administrative  
12:19:48 25 matter this morning which we can do while

12:19:50 1 counsel is getting ready.

12:19:53 2 Sir, I was going over the materials  
12:19:55 3 that the plaintiffs' counsel provided to me at  
12:19:57 4 the outset of the trial, and I came across a  
12:19:59 5 report prepared by Mr. Morin, who is not on the  
12:20:03 6 witness list. So I assume from that that I --  
12:20:07 7 that gentleman is not going to be called.

12:20:10 8 MR. TOWNSHEND: He will be a reply  
12:20:11 9 witness.

12:20:12 10 THE COURT: He's a reply witness, a  
12:20:13 11 potential -- you mean a potential reply witness?

12:20:20 12 MR. TOWNSHEND: Well, we had discussed  
12:20:21 13 this earlier that he was replying to a part of  
12:20:24 14 Professor Beaulieu's report, and because it was  
12:20:27 15 in question about whether that part would be  
12:20:28 16 admissible we talked about having that to be a  
12:20:31 17 reply witness. And that was agreed to by  
12:20:34 18 Canada.

12:20:34 19 THE COURT: Thank you for reminding me  
12:20:36 20 about that. I wanted to ask what the situation  
12:20:38 21 was with respect to that gentleman.

12:20:40 22 I think they're almost ready.

12:20:53 23 MR. McCULLOCH: Your Honour, I think  
12:20:54 24 we need the other type of plug.

12:22:17 25 Your Honour, I have shared with my

12:22:18 1 friends copies of this document. It's a case  
12:22:20 2 from the U.S. Supreme Court, Propeller Genesee  
12:22:21 3 Chief. I will be making reference to it.

12:23:10 4 CROSS-EXAMINATION BY MR. MCCULLOCH:

12:23:14 5 Q. It is still morning, Mr. Greene.  
12:23:14 6 Good morning.

12:23:15 7 A. Good morning.

12:23:15 8 Q. I'm Michael McCulloch, and I will  
12:23:17 9 be asking you some questions on behalf of  
12:23:19 10 Canada. And as soon as possible I hope to be  
12:23:26 11 putting to you Exhibit 4264, which, of course,  
12:23:29 12 is your report.

12:23:31 13 THE COURT: The gentleman may have it  
12:23:33 14 in front of him.

12:23:33 15 Do you, sir? Your report?

12:23:43 16 THE WITNESS: I do have it.

12:23:45 17 THE COURT: All right. So it's up to  
12:23:45 18 you, sir, but you could proceed unless you want  
12:23:45 19 to wait until it can show on the computer  
12:23:57 20 screen.

12:24:05 21 MR. McCULLOCH: My main concern is  
12:24:05 22 that being able to see it might be of use to --

12:24:06 23 THE COURT: Yes, of course.

12:24:06 24 MR. McCULLOCH: -- people attending  
12:24:07 25 court.

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THE COURT: Yes.

BY MR. MCCULLOCH:

Q. Just so that you can be warned in advance, we'll be going to page 3 of your report, which is page 9 of the PDF.

Well, since you have it in front of you --

THE COURT: Sometimes that requires a restart of some kind.

BY MR. MCCULLOCH:

Q. I believe in your report you identify Johnson v. McIntosh?

A. Yes.

Q. As the foundational case, as confirmed by subsequent decisions by Chief Justice John Marshall, and in particular Worcester -- do the Americans say "Worcester" or "Worcester"?

A. They say Worcester v. Georgia -- they do.

Q. Yes.

A. They don't say "Worcestor" [ph].

THE COURT: We're still not having any luck, sir. I'm happy to give you a short technical break.

12:25:47 1 MR. McCULLOCH: I think that might be  
12:25:48 2 appreciated.

12:25:50 3 THE COURT: Things always don't work  
12:25:50 4 when you're sitting and waiting for them. So  
12:25:50 5 what we're going to do is take a break. I'm  
12:25:52 6 going to just wait until my staff advises me  
12:25:56 7 that it's working again. If you could stay  
12:25:59 8 where you are, sir, I'm sure it won't be too  
12:26:02 9 long.

12:26:02 10 THE WITNESS: That's fine, Your  
12:26:02 11 Honour, thank you.

12:26:27 12 -- RECESSED AT 12:26 P.M. --

12:26:27 13 -- RESUMED AT 12:32 P.M. --

12:32:45 14 BY MR. MCCULLOCH:

12:32:46 15 Q. And in fact we are now on page 4,  
12:32:49 16 the part of the quotation that I mentioned.  
12:32:54 17 Chief Justice Marshall commented that "they",  
12:32:58 18 being the Indians:

12:33:00 19 "[...] were admitted to be the  
12:33:01 20 rightful occupants of the soil, with a  
12:33:03 21 legal as well as just claim to retain  
12:33:05 22 possession of it, and to use it  
12:33:08 23 according to their own discretion; but  
12:33:11 24 their rights to complete sovereignty,  
12:33:13 25 as independent nations, were

1 necessarily diminished [...]"

2 You'd agree that it's an important

3 part of what we've been calling American Indian

4 law that Indigenous peoples continue to have

5 sovereignty, but it is a diminished sovereignty

6 as domestic nations?

7 A. I agree with that, yes.

8 Q. And I don't think I need to take

9 you to Worcester v. Georgia where it elaborates

10 on your point that from the point of view of

11 American Indian law treaties with Indigenous

12 peoples are closely akin to treaties with

13 foreign nations?

14 A. Correct.

15 Q. And one last detail, the date of

16 Johnson v. McIntosh is 1824, is that correct?

17 A. Yes, it is.

18 Q. I'd now ask you to turn to your

19 copy of Propeller Genesee Chief v. Fitzhugh.

20 Counsel have advised me that you've had an

21 opportunity to review this case, is that

22 correct?

23 A. That is correct.

24 Q. Now I'm going to ask you -- be

25 asking you some questions specifically about



12:34:37 1 pages 9 through 12 of the judgment. Would you  
12:34:40 2 like to review those pages, or are you  
12:34:44 3 comfortable enough with them that I can proceed?

12:34:48 4 A. If I just could take a moment? I  
12:34:50 5 got this case Friday and read it, but I wouldn't  
12:34:53 6 mind taking a quick look. Nine through 12?

12:34:57 7 Q. Yeah. To be more precise,  
12:35:05 8 starting at the paragraph, left-hand column,  
12:35:08 9 fourth paragraph down, "If this law..."

12:35:10 10 A. Got it.

12:35:28 11 THE COURT: Just while the witness is  
12:35:29 12 doing that, sir, is it your intention to mark  
12:35:31 13 this as an exhibit?

12:35:34 14 MR. McCULLOCH: Yes, Your Honour.  
12:35:34 15 It's -- currently it's SC1161, and I ask that it  
12:35:43 16 be entered as an exhibit. Genesee Chief v.  
12:35:52 17 Fitzhugh. I could explain, Your Honour, that I  
12:35:53 18 am entering it as a historical document, not as  
12:35:56 19 a piece of case law.

12:35:57 20 THE COURT: Well, it's a report of a  
12:36:00 21 decision of the U.S. Supreme Court, so how is it  
12:36:03 22 not case law?

12:36:04 23 MR. McCULLOCH: In that we are using  
12:36:05 24 it for the purposes of legal history, not for  
12:36:09 25 legal argument.

12:36:11 1 THE COURT: Well, legal argument  
12:36:12 2 doesn't get entered as an exhibit at all, so  
12:36:15 3 maybe it's a distinction that doesn't matter  
12:36:18 4 here.

12:36:19 5 Mr. Registrar, what is the next  
12:36:20 6 exhibit?

12:36:21 7 THE REGISTRAR: Exhibit Number 4266.  
12:36:23 8 EXHIBIT NO. 4266: Propeller Genesee  
12:36:25 9 Chief v. Fitzhugh case; Document  
12:36:25 10 SC1161.

12:36:27 11 THE WITNESS: Rather than sitting here  
12:36:28 12 and reading it through, why don't you ask me  
12:36:30 13 your questions, and if I can refer to it -- if I  
12:36:33 14 need to I'll ask.

12:36:35 15 BY MR. MCCULLOCH:

12:36:35 16 Q. In this case the Supreme Court  
12:36:37 17 admits it's changing the law?

12:36:42 18 A. I believe that's right.

12:36:43 19 Q. The previous law, as established  
12:36:47 20 in such cases from the 1820s as Thomas  
12:36:51 21 Jefferson, had adopted the British definition of  
12:36:55 22 public waters as being title, correct?

12:37:02 23 A. Title lands, yes, that's correct.

12:37:03 24 Q. Title. And the Supreme Court  
12:37:06 25 here, the U.S. Supreme Court here is realizing

12:37:13 1 that makes no sense when you're talking about a  
12:37:16 2 United States with steamboats where the Great  
12:37:20 3 Lakes are being developed, that in essence title  
12:37:23 4 was a description that had turned into a  
12:37:29 5 definition, correct?

12:37:30 6 A. I believe that is correct, yes.

12:37:31 7 Q. And the Supreme Court wanted to  
12:37:33 8 change that so that things like the Great Lakes  
12:37:39 9 became public waters?

12:37:40 10 A. I believe that is correct also.

12:37:42 11 Q. And you would agree that the  
12:37:53 12 decision was made in 1852?

12:37:56 13 A. That's correct.

12:38:01 14 Q. Now I'd like to take you to page  
12:38:02 15 1 of your report, which is page 7 of the PDF.  
12:38:05 16 Now, paragraph 6, this is a list of treaties  
12:38:36 17 that the plaintiffs' counsel asked you to  
12:38:38 18 consider, is that correct?

12:38:40 19 A. That is correct.

12:38:41 20 Q. And indeed it is taken, to your  
12:38:44 21 knowledge, from the Statement of Claim?

12:38:48 22 A. Well, I'm not really sure where  
12:38:52 23 it was taken from, but I was asked to look at  
12:38:54 24 those treaties by counsel for the First Nations.

12:38:58 25 Q. Now, let's start at the top.

12:38:59 1 Treaty of Detroit, William Hull's Treaty, that's  
12:39:04 2 1807, correct?  
12:39:06 3 A. That is, yes.  
12:39:07 4 Q. And therefore it predates Johnson  
12:39:08 5 v. McIntosh?  
12:39:12 6 A. Correct.  
12:39:12 7 Q. And it predates Genesee Chief?  
12:39:18 8 A. It predates anything before 1852.  
12:39:21 9 Q. I need to get this into the  
12:39:24 10 record. I'm sorry if it's going to seem very  
12:39:26 11 self-evident.  
12:39:28 12 A. That's okay.  
12:39:28 13 Q. Yes. And going down, the Treaty  
12:39:29 14 of Saginaw, that predates Johnson v. McIntosh?  
12:39:33 15 A. That's correct, it's 1819.  
12:39:35 16 Q. And it predates Genesee Chief?  
12:39:51 17 A. Yes.  
12:39:52 18 Q. And we're at Sault Ste. Marie  
12:39:53 19 Treaty, that's 1820, correct?  
12:39:54 20 A. Correct.  
12:39:54 21 Q. And that predates Johnson v.  
12:39:57 22 McIntosh?  
12:39:59 23 A. Correct, I believe. '24, is  
12:40:00 24 Johnson, yes.  
12:40:01 25 Q. And that predates Genesee Chief,

12:40:04 1  
12:40:04 2  
12:40:05 3  
12:40:07 4  
12:40:12 5  
12:40:13 6  
12:40:14 7  
12:40:15 8  
12:40:16 9  
12:40:27 10  
12:40:30 11  
12:40:32 12  
12:40:40 13  
12:40:41 14  
12:40:43 15  
12:40:45 16  
12:40:50 17  
12:40:55 18  
12:40:55 19  
12:40:56 20  
12:40:56 21  
12:40:56 22  
12:40:57 23  
12:41:00 24  
12:41:00 25

correct?

A. Correct.

Q. And finally, the Treaty of La  
Pointe, 1842, that predates Genesee Chief,  
correct?

A. Correct.

Q. Those are my question, Your  
Honour.

THE COURT: All right.

Counsel for Ontario, if you need a few  
minutes, I would be, looking at the time, open  
to a request for that.

MS. McRANDALL: Your Honour, I am  
prepared to begin, but it may be more efficient  
if we were to possibly take the lunch break a  
bit early. Based on the testimony this morning,  
I believe I could shorten my cross-examination  
in some ways. But I do recognize it's earlier  
than normal.

THE COURT: I said at the outset of  
this trial that I wasn't going to be persuaded  
by that argument, but this morning, counsel, I  
am persuaded by that argument.

MS. McRANDALL: Thank you, Your  
Honour.

12:41:00 1 THE COURT: We're going to stop early  
12:41:01 2 for lunch.  
12:41:03 3 Sir, as an experienced litigator you  
12:41:07 4 will, no doubt, be familiar with the severe  
12:41:10 5 constraints that apply to you as a witness under  
12:41:12 6 cross-examination, which, among other things,  
12:41:17 7 means that you can discuss these matters with no  
12:41:19 8 one. And I like to remind expert witnesses,  
12:41:22 9 that includes self-initiated inquiries, research  
12:41:27 10 or searches to answer questions that may have  
12:41:31 11 crossed your mind this morning, for example.  
12:41:33 12 So I'm sure you're familiar with all  
12:41:36 13 of that, sir?  
12:41:37 14 THE WITNESS: It's a little different  
12:41:38 15 in the United States, but I understand what  
12:41:39 16 you're saying, Your Honour.  
12:41:41 17 THE COURT: All right. So that  
12:41:42 18 applies as of now. Because we're running a  
12:41:44 19 little early, I'm going to stop early for lunch.  
12:41:47 20 We'll resume at 2:15.  
12:41:50 21 And I have permitted, you know,  
12:41:53 22 witnesses to organize lunches with plaintiffs'  
12:41:56 23 counsel with confidence that they will strictly  
12:42:00 24 adhere to those restrictions on which you can  
12:42:03 25 talk.

12:42:04 1 It used to be that you could talk  
12:42:06 2 about basketball, sir, earlier in the trial, but  
12:42:09 3 it's too late for that. You'll have to find  
12:42:11 4 some other topic. Hockey just started.  
12:42:13 5 And so we'll resume at 2:15.  
12:42:17 6 -- RECESSED AT 12:42 P.M. --  
12:42:17 7 -- RESUMED AT 2:16 P.M. --  
02:16:56 8 THE COURT: Please go ahead, counsel.  
02:16:58 9 MS. McRANDALL: Thank you, Your  
02:16:58 10 Honour.  
02:16:59 11 CROSS-EXAMINATION BY MS. MCRANDALL:  
02:17:04 12 Q. Good afternoon, Mr. Greene.  
02:17:04 13 A. Good afternoon.  
02:17:04 14 Q. I'm Julia McRandall. I'm one of  
02:17:04 15 the counsel for Ontario.  
02:17:04 16 So just as a matter of pinning down  
02:17:06 17 some terminology first, the terms "Indians" and  
02:17:08 18 "Indian tribes" are used generally in U.S. law,  
02:17:11 19 correct?  
02:17:11 20 A. Correct, they are.  
02:17:13 21 Q. But sometimes the term "Native  
02:17:14 22 American" or "Native American tribes" would be  
02:17:17 23 used?  
02:17:17 24 A. Yes, also.  
02:17:21 25 Q. And just one last point on

02:17:24 1 terminology, and this is just to avoid any  
02:17:24 2 confusion, if I'm asking you a question about  
02:17:26 3 Aboriginal title, that will of course be in U.S.  
02:17:28 4 law, not in the Canadian legal sense.

02:17:30 5 A. Thank goodness.

02:17:35 6 Q. So I think you mentioned this  
02:17:36 7 earlier briefly, but you were one of the  
02:17:39 8 attorneys at the Native American Rights Fund for  
02:17:41 9 some years?

02:17:42 10 A. Correct, I was one of the  
02:17:43 11 founding attorneys.

02:17:47 12 Q. And most of the clients you've  
02:17:48 13 represented have been Native American tribes or  
02:17:51 14 other organizations, correct?

02:17:52 15 A. Correct.

02:17:58 16 Q. You spoke earlier a bit about the  
02:18:00 17 differences between recognized title and  
02:18:01 18 Aboriginal title or original Indian title.

02:18:05 19 One of the questions in your report  
02:18:07 20 was to answer, did the United States, in  
02:18:09 21 negotiating the Treaty of Washington of 1836  
02:18:13 22 recognize the Aboriginal title of the Ottawa and  
02:18:16 23 Chippewa to at least certain waters of the Great  
02:18:18 24 Lakes?

02:18:19 25 And your answer was, "yes".



02:18:21 1 So just to be clear, you were not  
02:18:23 2 expressing the opinion there that the tribes in  
02:18:27 3 question had recognized title as opposed to  
02:18:29 4 Aboriginal title?

02:18:31 5 A. Well, in fact, before the treaty  
02:18:35 6 they -- that's all that they would have, would  
02:18:37 7 be Aboriginal title.

02:18:40 8 Q. Right. You were using  
02:18:41 9 "recognized" there in the less formal sense?

02:18:44 10 A. I believe so. The big difference  
02:18:45 11 of course is that Aboriginal title is  
02:18:48 12 extinguishable as a matter of right and not --  
02:18:50 13 it's a noncompensable interest, whereas  
02:18:55 14 recognized title is a compensable title.

02:18:57 15 THE COURT: Sir, can you keep your  
02:18:57 16 voice up, please?

02:18:57 17 THE WITNESS: Yes. Sorry. I will  
02:18:57 18 work on it.

02:18:57 19 BY MS. MCRANDALL:

02:19:04 20 Q. And it is possible for a Native  
02:19:05 21 American tribe to have recognized title to land  
02:19:09 22 that was not part of their traditional  
02:19:11 23 territory, correct?

02:19:12 24 A. Correct. It doesn't happen very  
02:19:23 25 often, but it's possible.

02:19:26 1 Q. You have acted before for the  
02:19:27 2 Menominee Indian Tribe of Wisconsin, is that  
02:19:31 3 correct?

02:19:32 4 A. I have.

02:19:32 5 Q. The Menominee are an  
02:19:35 6 Algonquian-speaking people, correct?

02:19:51 7 A. I am not certain of that. They  
02:19:52 8 might be. I'm not certain of that.

02:19:52 9 Q. Are you familiar with the  
02:19:53 10 Menominee Treaty of 1831, sometimes called the  
02:19:53 11 "Green Bay Treaty"?

02:19:55 12 A. I am.

02:19:56 13 Q. I'd like to take you to a copy of  
02:19:57 14 that treaty, and that's Exhibit 994. I won't  
02:20:10 15 read all of this out loud but at the beginning  
02:20:13 16 it says:

02:20:15 17 "The Menomonee Treaty of Indians  
02:20:18 18 by their delegates in council, this  
02:20:18 19 day, define the boundaries of their  
02:20:18 20 country as follows, to wit; [...]"

02:20:20 21 And then it continues. And if you'd  
02:20:22 22 like to read this, you can just scroll down and  
02:20:24 23 when you indicate...

02:20:36 24 A. Is it possible to have a paper  
02:20:40 25 version of that?

02:20:44 1 Q. I'm sorry, I don't think we have  
02:20:44 2 a paper copy, but we can -- can we zoom in?

02:20:45 3 A. And so do I have control over --

02:20:48 4 Q. No, but if you'd like -- if you  
02:20:49 5 indicate when you want us to scroll down, we'll  
02:20:51 6 move it.

02:20:51 7 A. Okay. Fine, fine, thank you.

02:21:12 8 THE COURT: And did you want the  
02:21:13 9 witness to read over the treaty or -- I'm not  
02:21:14 10 sure he's --

02:21:17 11 MS. McRANDALL: Yes, sorry.

02:21:19 12 BY MS. MCRANDALL:

02:21:20 13 Q. Can you please read over that,  
02:21:21 14 Mr. Greene?

02:21:22 15 A. (Witness reading the document.)  
02:21:22 16 Thank you. Could you scroll a bit  
02:21:22 17 more?

02:22:16 18 Perhaps if you ask me a question, I  
02:22:18 19 can save us some time.

02:22:20 20 Q. The first article, it describes a  
02:22:21 21 cession of about 500,000 acres of land near  
02:22:25 22 Green Bay that might be set aside for a group  
02:22:27 23 that's referred to as the "New York Indians", is  
02:22:29 24 that correct?

02:22:30 25 A. That's correct.

02:22:30 1 Q. And if we could scroll down  
02:22:32 2 please to the third article, which is on page  
02:22:40 3 320?

02:23:05 4 A. (Witness reading the document).  
02:23:05 5 A bit more, thank you. Yes.

02:23:06 6 Q. Do you agree that the territorial  
02:23:10 7 cession here describes approximately the Door  
02:23:14 8 Peninsula and a bit further south in present-day  
02:23:16 9 Wisconsin?

02:23:18 10 A. I believe that's correct. I  
02:23:19 11 haven't looked a map lately, but I believe that  
02:23:22 12 is correct.

02:23:23 13 Q. Okay. Well, actually, I can take  
02:23:24 14 you to a map. Can we turn to Appendix B of your  
02:23:27 15 report? And your report is Exhibit 4264, for  
02:23:30 16 the record. To the Wisconsin 1 Royce map.

02:23:37 17 A. Yes.

02:23:56 18 Q. I think it's the next page.  
02:23:57 19 Scroll down a bit, please.

02:23:59 20 So is the cession that was described  
02:24:03 21 the pinkish area that's labelled "160"?

02:24:08 22 A. It may be. I'm not absolutely  
02:24:10 23 certain.

02:24:13 24 There were two treaties of cession of  
02:24:15 25 the Menominee in 1831 and 1836. And I obviously

02:24:20 1 represented the Menominee Tribe in some  
02:24:23 2 litigation over these treaties. But it's been  
02:24:26 3 since the late 1990s, so some of the details  
02:24:28 4 of the map I've forgotten, but there were two  
02:24:31 5 treaties of cession.

02:24:32 6 Q. Okay. Thank you. You agree that  
02:24:33 7 this treaty did not include a cession of water  
02:24:35 8 or submerged land in Green Bay or Lake Michigan,  
02:24:38 9 correct?

02:24:38 10 A. I don't think so. But there  
02:24:40 11 was -- at one point there was some discussion, I  
02:24:43 12 thought, in the metes and bounds in which a line  
02:24:45 13 went across Green Bay, but I'm not certain of  
02:24:49 14 that right now.

02:24:52 15 Q. In the 1831 treaty?

02:24:55 16 A. It might have been -- either 1831  
02:24:58 17 or 1836.

02:25:00 18 Q. Can we go back, please, to the  
02:25:02 19 1831 treaty? And perhaps you can check if that  
02:25:06 20 metes-and-bounds issue appeared in that?

02:25:37 21 A. It appears from this description  
02:25:38 22 in article 3rd that it did not include a cession  
02:25:42 23 of Green Bay.

02:25:55 24 Q. And I think you just indicated  
02:25:56 25 that you're also familiar with the Menominee

02:25:58 1 Treaty of 1836?

02:26:00 2 A. Correct.

02:26:01 3 Q. I'd like to take you to document  
02:26:02 4 SC1105. And is this a copy of the Menominee  
02:26:22 5 Treaty of 1836?

02:26:24 6 A. It appears to be, yes.

02:26:26 7 Q. Your Honour, may this be entered  
02:26:27 8 as an exhibit?

02:26:31 9 THE COURT: Yes. Mr. Registrar.

02:26:33 10 THE REGISTRAR: Exhibit Number 4267.  
02:26:42 11 EXHIBIT NO. 4267: Copy of the  
02:26:44 12 Menominee Treaty of 1836; Document  
02:26:44 13 SC1105.

02:26:45 14 BY MS. MCRANDALL:

02:26:46 15 Q. Thank you.  
02:26:46 16 Now I'll ask you a question about the  
02:26:47 17 article, and then you can take your time, as  
02:26:49 18 you'd like, to read the article in its entirety.

02:26:52 19 A. Thank you.

02:26:52 20 Q. Would you agree that the  
02:26:54 21 territorial cession here describes approximately  
02:26:56 22 lands along the western shore of Lake Michigan?  
02:27:08 23 I'm sorry, the western shore of Green Bay?

02:28:06 24 A. (Witness reading the document.)  
02:28:06 25 Could you scroll? Thank you. I would

02:28:07 1 say that that appears to be correct. It's  
02:28:13 2 always helpful if you have a map that coincides  
02:28:16 3 with the treaty cession, but it appears that  
02:28:19 4 that's correct.

02:28:20 5 Q. Thank you. Would you agree that  
02:28:21 6 this treaty did not include a cession of water  
02:28:24 7 or submerged land in Green Bay or Lake Michigan?

02:28:27 8 A. To the best of my recollection,  
02:28:29 9 it did not.

02:28:32 10 Q. To the best of your recollection  
02:28:34 11 and from reading the treaty now?

02:28:36 12 A. Well, you know, when you read a  
02:28:38 13 metes-and-bounds description it's a bit of a  
02:28:44 14 puzzle at times. But I did handle this  
02:28:47 15 litigation. As I mentioned, it was quite a  
02:28:49 16 number of years ago, but as I recall there were  
02:28:51 17 no arguments about essentially Great Lakes  
02:28:53 18 fishing, including Green Bay. It was  
02:28:56 19 essentially hunting and fishing on uplands.

02:29:00 20 Q. Thank you. Are you familiar with  
02:29:10 21 the Treaty with the Chippewa of 1829?

02:29:17 22 A. No, not unless you further  
02:29:19 23 identify it.

02:29:20 24 Q. I think it is also sometimes  
02:29:22 25 called the "Second Treaty of Prairie du Chien".

02:29:28 1 A. Prairie du Chien. No, I'm not  
02:29:30 2 familiar with that.

02:29:31 3 Q. You're familiar with many other  
02:29:32 4 treaties around the same time period though with  
02:29:35 5 the Anishinaabe?

02:29:36 6 A. Yes, I am.

02:29:36 7 Q. And their legal interpretation?

02:29:38 8 A. Yes, I am.

02:29:39 9 Q. I'd like to show you a copy of  
02:29:40 10 that treaty. It's Exhibit 965, and article 1  
02:29:57 11 begins on page 297 near the bottom. And  
02:30:09 12 similarly I'll ask you a question about it, and  
02:30:11 13 then you can take your time to read it.

02:30:13 14 A. Okay, thank you.

02:30:15 15 Q. Would you agree that the cession  
02:30:17 16 describes generally an area along the  
02:30:19 17 southwestern shore of Lake Michigan?

02:31:37 18 A. (Witness reading the document.)

02:31:37 19 Can you scroll down just a bit?

02:31:37 20 Maybe we're done with that article.

02:31:37 21 Q. I think article 1 concludes on  
02:31:37 22 page 298.

02:31:37 23 A. Again, with the usual admonition  
02:31:38 24 that these metes-and-bounds descriptions are a  
02:31:41 25 little scary to understand on paper without it



02:31:44 1 being depicted on a map, it does appear to be on  
02:31:46 2 the west side of Lake Michigan, if that was your  
02:31:50 3 question.

02:31:51 4 Q. Yes. Would you agree that this  
02:31:52 5 treaty did not include a cession of water or  
02:31:58 6 submerged lands under Lake Michigan?

02:32:01 7 A. It doesn't appear to.

02:32:06 8 Q. So one of the cases you discussed  
02:32:08 9 in your report and this morning was the People  
02:32:11 10 v. LeBlanc case. That's one of the cases that  
02:32:18 11 addresses the 1836 Treaty of Washington. So  
02:32:21 12 article 1 of the 1836 treaty refers to the  
02:32:23 13 Treaty of Chicago of the 29th of August, 1821.  
02:32:27 14 Do you recall that?

02:32:30 15 A. I don't recall it but it doesn't  
02:32:32 16 surprise me.

02:32:33 17 Q. Okay. Are you familiar with that  
02:32:35 18 treaty?

02:32:35 19 A. The 1821 treaty?

02:32:37 20 Q. Yes.

02:32:38 21 A. No, not unless I could take a  
02:32:40 22 look at it. But, no, it doesn't ring a bell to  
02:32:43 23 me.

02:32:44 24 Q. Okay. Well, let's take a look at  
02:32:45 25 it. I'd like to take you to document SC1104. I

02:32:49 1 think it's also sometimes known as the "Treaty  
02:33:10 2 of Chicago of 1821". Are you familiar with this  
02:33:16 3 treaty?

02:33:16 4 A. The 1820 -- no, no, not  
02:33:17 5 particularly. Sometimes treaties are mentioned  
02:33:18 6 in the metes-and-bounds description because each  
02:33:21 7 of them have their own metes-and-bounds  
02:33:23 8 description, and sometimes it's easier to refer  
02:33:25 9 to a previous treaty that had a cessionary  
02:33:29 10 described.

02:33:30 11 And they use that as a point of  
02:33:31 12 departure for the metes-and-bounds description  
02:33:33 13 in the treaty they're discussing. Sometimes  
02:33:35 14 that happens. But I don't know that treaty.

02:33:41 15 Q. Your Honour, nonetheless, may  
02:33:43 16 this be marked as an exhibit?

02:33:47 17 THE COURT: Yes, and there's no  
02:33:48 18 objection. Mr. Registrar.

02:33:50 19 THE REGISTRAR: Exhibit Number 4268.

02:33:52 20 EXHIBIT NO. 4268: The Treaty of  
02:33:52 21 Chicago, 1821; Document SC1104.

02:34:03 22 THE COURT: Thank you.

02:34:04 23 BY MS. MCRANDALL:

02:34:05 24 Q. And, again, I'll ask you the  
02:34:06 25 question and then give you a chance to read.

02:34:07 1 Would you agree that the territorial cession  
02:34:10 2 here describes generally an area along the  
02:34:12 3 southeastern coast of Lake Michigan and inland?

02:34:23 4 A. It looks that way. I can't be  
02:34:25 5 precise about that, but it does appear that it  
02:34:28 6 does.

02:34:28 7 Q. Okay. And in fairness to you, I  
02:34:30 8 think there's a bit more of article 1 on the  
02:34:34 9 next page.

02:34:57 10 A. And the question remains?

02:34:59 11 Q. Is it generally describing the  
02:35:00 12 area along the southeastern coast of Lake  
02:35:02 13 Michigan?

02:35:03 14 A. I think so, I think so. I can't  
02:35:05 15 say absolutely, but I think so.

02:35:09 16 Q. In case it's of assistance, could  
02:35:11 17 we pull up your report again, which is Exhibit  
02:35:14 18 4264, to the Michigan 1 Royce map, which is in  
02:35:21 19 appendix B?

02:35:22 20 Now is this the area -- or  
02:35:30 21 approximately the area labelled "117"?

02:35:33 22 A. I think so, again, but I'm not  
02:35:35 23 absolutely certain. I believe it is.

02:35:37 24 Q. So that's south of area 205, if  
02:35:39 25 we could scroll up a bit?

02:35:41 1 A. Correct.

02:35:42 2 Q. Which is the area ceded in the  
02:35:43 3 Treaty of Washington of 1836?

02:35:46 4 A. Correct.

02:35:52 5 Q. So do you agree that the treaty  
02:35:53 6 we just looked at, the Treaty of Chicago of 1821  
02:35:57 7 did not include a cession of water or submerged  
02:36:00 8 land under Lake Michigan?

02:36:01 9 A. I think that is correct. I can't  
02:36:03 10 absolutely be certain, but I think that is  
02:36:05 11 correct.

02:36:07 12 Q. Are you familiar with the Treaty  
02:36:08 13 of Chicago of 1833? And that also had the  
02:36:14 14 Chippewa, Ottawa and Potawatomi as parties.

02:36:18 15 A. No.

02:36:24 16 Q. So I'd like to take you to  
02:36:26 17 Exhibit 1045. So this is the Treaty of Chicago,  
02:36:36 18 1833, also called, as it's labelled here, "The  
02:36:42 19 Treaty with the Chippewa, 1833".

02:36:45 20 So the first article is short this  
02:36:47 21 time. So article 1st:

02:36:50 22 "The said United Nation of  
02:36:52 23 Chippewa, Ottawa, and Potawatamie  
02:36:53 24 Indians, cede to the United States all  
02:36:53 25 their land, along the western shore of

02:36:59 1 Lake Michigan, and between this Lake  
02:37:00 2 and the land ceded to the United  
02:37:03 3 States by the Winnebago Nation, at the  
02:37:05 4 treaty of Fort Armstrong made on the  
02:37:09 5 15th of September 1832 - bounded on  
02:37:11 6 the north by the country lately ceded  
02:37:15 7 by the Menominees, and on the south by  
02:37:17 8 the country ceded at the Treaty of  
02:37:21 9 Prairie du Chien made on the 29th  
02:37:23 10 July, 1829, supposed to contain about  
02:37:26 11 5 millions of acres [...]"  
02:37:27 12 Mr. Greene, do you agree that the  
02:37:29 13 cession generally describes an area along the  
02:37:33 14 western shore of Lake Michigan?  
02:37:35 15 A. I believe that's right.  
02:37:36 16 Q. And do you agree that this treaty  
02:37:37 17 did not include a cession of water or submerged  
02:37:41 18 lands in Lake Michigan?  
02:37:43 19 A. It does not appear to, no.  
02:37:54 20 Q. So in your report you discussed  
02:37:55 21 the Treaty of Washington of 1836, the Treaty of  
02:37:58 22 Detroit of 1807, the Treaty of Saginaw of 1819,  
02:38:03 23 the Sault Ste. Marie Treaty of 1820 and the  
02:38:06 24 Treaty of La Pointe at 1842.  
02:38:10 25 So all of these treaties expressly

02:38:12 1 described a boundary on or intersecting with or  
02:38:16 2 to the international border between the United  
02:38:18 3 States and what is now Canada, is that correct?

02:38:21 4 A. Correct.

02:38:25 5 Q. Now, in preparing your report you  
02:38:26 6 considered those five treaties as well as the  
02:38:28 7 Treaty of Greenville of 1795, the Treaty with  
02:38:32 8 the Chippewa of 1837, and the Treaty with the  
02:38:35 9 Mississippi, Pillager --

02:38:43 10 A. Pillager.

02:38:43 11 Q. Pillager. Thank you. And Lake  
02:38:44 12 Winnibigoshish bands of Chippewa Indians of  
02:38:49 13 1855, correct?

02:38:50 14 A. Correct.

02:38:51 15 Q. Did you consider any other  
02:38:52 16 treaties from the Great Lake region in preparing  
02:38:54 17 your report?

02:38:55 18 A. No.

02:39:07 19 Q. So one of the cases that you  
02:39:08 20 described in your report was the Ottawa Tribe of  
02:39:12 21 Oklahoma case?

02:39:13 22 A. Yes.

02:39:13 23 Q. For the record, the district  
02:39:14 24 court's decision of that is Exhibit 3912, which  
02:39:18 25 is tab 21 I believe.

02:39:22 1 So the district court was deciding  
02:39:24 2 motion for summary judgment, correct?  
02:39:26 3 A. I believe that's correct.  
02:39:31 4 Q. And the district court found,  
02:39:33 5 when they were interpreting the -- when he was  
02:39:34 6 interpreting the Treaty of Greenville that the  
02:39:36 7 United States retained control and ownership of  
02:39:38 8 Lake Erie, correct?  
02:39:45 9 A. You know what, I guess I would  
02:39:47 10 say I have to read through this again, but I --  
02:39:51 11 Q. I believe it's at page 981.  
02:39:53 12 Perhaps we can also pull up Exhibit 3912 to  
02:40:39 13 display?  
02:41:20 14 A. (Witness reading the document.)  
02:41:21 15 Yes, it does say on 981 that the  
02:41:25 16 United States did not convey Lake Erie stopping  
02:41:27 17 the grant at the shoreline.  
02:41:30 18 Q. Thank you. And in this decision  
02:41:33 19 the district court did not make a finding that  
02:41:35 20 the Ottawa had exclusively occupied those  
02:41:38 21 portions of Lake Huron and Lake Erie prior to  
02:41:42 22 the Treaty of Detroit, did they?  
02:41:46 23 A. You know what, I recall about  
02:41:48 24 this case -- I think that's correct. What I  
02:41:54 25 recall mostly about this case is that their

02:41:56 1 conclusion that there was essentially an  
02:41:58 2 abandonment of whatever rights existed when the  
02:42:02 3 Ottawa were removed west.

02:42:04 4 So some of the detail about what they  
02:42:06 5 did or didn't own essentially wasn't as  
02:42:09 6 important since the -- as I recall, the  
02:42:12 7 conclusion of the court relied on this notion of  
02:42:14 8 abandonment.

02:42:19 9 It may say that in there, I don't  
02:42:20 10 know. And if you want me to spend the time to  
02:42:23 11 read it, I can, but I believe it was an issue --  
02:42:24 12 as I say, it was a question of abandonment.

02:42:29 13 They were coming back trying to resurrect the  
02:42:31 14 right to do something in a territory that they  
02:42:33 15 claimed was unceded and, therefore, they  
02:42:37 16 couldn't have done that.

02:42:39 17 And the court ultimately concluded  
02:42:40 18 that since they had been removed west they had  
02:42:43 19 abandoned whatever rights they may have had of  
02:42:46 20 that in their Aboriginal territory.

02:42:49 21 Q. And the U.S. Court of Appeal,  
02:42:50 22 sixth circuit, affirmed the district court?  
02:42:55 23 That's Exhibit 3914, which I believe is tab 22.

02:43:06 24 A. Yes, this is Ottawa Tribe v.  
02:43:13 25 Logan. That's correct.



02:43:23 1 Q. I'm sorry, so the court of appeal  
02:43:25 2 affirmed the district court?

02:43:26 3 A. I believe that's correct. Yes,  
02:43:28 4 it did.

02:43:31 5 Q. Another case that you mentioned  
02:43:32 6 in your report was Williams v. Chicago?

02:43:39 7 A. Yes.

02:43:40 8 Q. So in that case the complainants  
02:43:42 9 asserted that the Potawatomi had unextinguished  
02:43:48 10 Aboriginal title to some lands near Chicago,  
02:43:50 11 correct?

02:43:51 12 A. That's correct. Those were lands  
02:43:52 13 that were essentially reclaimed well after the  
02:43:54 14 treaty. And since the treaty in that case, I'm  
02:43:57 15 not sure which one it was, showed that the area  
02:44:01 16 of cession followed the shoreline, this Ottawa  
02:44:08 17 Tribe that had subsequently been removed said  
02:44:11 18 that when the land in the lake was reclaimed it  
02:44:14 19 was not part of their cessionary because their  
02:44:18 20 cessionary ended at the shoreline. And they  
02:44:20 21 sought to do something on that land going  
02:44:22 22 forward, and the court declined their argument.

02:44:26 23 Q. So this -- the litigation arose  
02:44:29 24 sometime after the claim -- that the land was  
02:44:31 25 reclaimed, not while it was still submerged?

02:44:33 1 A. Yes. This is a 2009 case, so  
02:44:36 2 somewhere prior to that time the land  
02:44:40 3 "resurfaced". And since the Ottawa claimed that  
02:44:43 4 their -- they had never ceded that land, that  
02:44:47 5 they still had an unextinguished Aboriginal  
02:44:52 6 interest in that land.

02:45:05 7 Q. On page 29 of your report you  
02:45:08 8 quoted a paragraph from the decision. And then  
02:45:16 9 you stated:

02:45:16 10 "Thus, the Supreme Court  
02:45:17 11 concluded that whatever rights were  
02:45:19 12 reserved or retained by the  
02:45:20 13 Pottawatomie were abandoned when the  
02:45:23 14 Pottawatomie were removed. But  
02:45:26 15 subsumed within that conclusion was  
02:45:27 16 that the Pottawatomie indeed had  
02:45:27 17 Aboriginal title to some portion of  
02:45:29 18 Lake Michigan, which is and was a  
02:45:34 19 navigable body of water. There was no  
02:45:35 20 dispute regarding whether the  
02:45:35 21 Pottawatomie had abandoned the  
02:45:36 22 underwater portion of Lake Michigan at  
02:45:39 23 issue in the litigation. In order to  
02:45:40 24 abandon its Aboriginal claim to that  
02:45:44 25 underwater area, the Pottawattomie

02:45:45 1 would have had to have previously  
02:45:47 2 owned these navigable bottom lands, a  
02:45:50 3 conclusion implicitly confirmed by the  
02:45:52 4 Supreme Court in the Williams  
02:45:54 5 decision."

02:45:56 6 A. Correct.

02:46:02 7 Q. But there was no finding by the  
02:46:03 8 court in Williams that the Potawatomi had  
02:46:07 9 exclusively occupied the portion of Lake  
02:46:11 10 Michigan in question?

02:46:13 11 A. That's correct. But they didn't  
02:46:14 12 need to really get to that issue because of  
02:46:15 13 their conclusion about the abandonment; but,  
02:46:18 14 yes, there is no explicit finding of that.

02:46:37 15 Q. I'd like to take you to your  
02:46:39 16 report again, which is Exhibit 4264, to page 10.

02:46:58 17 A. Yes.

02:46:58 18 Q. So beginning at page 10, if you  
02:47:01 19 can scroll up a bit, you described several cases  
02:47:04 20 from the 1980s in which the Ninth Circuit Court  
02:47:08 21 of Appeal found that the United States intended  
02:47:09 22 to include title to a riverbed or a lake bed in  
02:47:12 23 the establishment of a reservation.

02:47:15 24 So when you're referring to that  
02:47:17 25 you're referring to recognized title, correct?

02:47:20 1 A. Correct.

02:47:22 2 Q. So the issue in those cases was  
02:47:24 3 whether the United States intended to convey the  
02:47:27 4 bed in question prior to statehood?

02:47:30 5 A. Correct.

02:47:30 6 Q. It was not whether the tribe  
02:47:32 7 actually exclusively and continuously occupied  
02:47:35 8 the area?

02:47:36 9 A. No, what I think I said in my  
02:47:39 10 report was that in order to ascertain the intent  
02:47:44 11 of the United States in setting aside a  
02:47:46 12 reservation the court looks to the intent of  
02:47:54 13 Congress in the treaty or the intent of the  
02:47:58 14 Senate in the treaty.

02:48:00 15 And they look elsewhere too. And they  
02:48:02 16 are informed by the uses that a tribe might have  
02:48:06 17 made of the submerged lands that are at issue.  
02:48:12 18 And those uses typically are Aboriginal uses,  
02:48:16 19 although -- yes, they typically are, but they  
02:48:19 20 don't make a specific finding about Aboriginal  
02:48:22 21 title specifically, and they didn't in this case  
02:48:25 22 I don't believe.

02:48:30 23 Q. If there's a case where the U.S.  
02:48:31 24 is not found to have conveyed title then the  
02:48:33 25 presumption applies that the beds of the

02:48:37 1 navigable waterways belong to the State, subject  
02:48:40 2 to the federal power to control waters for the  
02:48:44 3 purposes of navigation and foreign commerce,  
02:48:48 4 correct?

02:48:48 5 A. Correct.

02:48:49 6 Q. So proof of original Indian title  
02:48:49 7 or Aboriginal title to dry land doesn't require  
02:48:52 8 that kind of rebuttal?

02:48:53 9 A. No, it does not because there's  
02:48:56 10 no suggestion that the same -- the Shively v.  
02:48:59 11 Bowlby rule applies the same way for lands,  
02:49:06 12 uplands.

02:49:08 13 Q. So these cases from the 1980s  
02:49:10 14 that are discussed in your report, those cases  
02:49:13 15 dealt with reservation lands?

02:49:18 16 A. Correct. Those kinds of cases  
02:49:19 17 can only arise in the context of recognized or  
02:49:22 18 confirmed title, not in the context of  
02:49:25 19 Aboriginal title.

02:49:35 20 Q. So one of the sources that you  
02:49:36 21 cited in your report and that you discussed  
02:49:37 22 earlier today was the 2012 edition of "Cohen's  
02:49:40 23 Handbook of Federal Indian Law"?

02:49:43 24 A. Yes.

02:49:44 25 Q. And I think you described the

02:49:44 1 book as comprehensive on U.S. Indian law and  
02:49:47 2 that it has been favourably cited by the U.S.  
02:49:51 3 Supreme Court?

02:49:52 4 A. It has been favourably cited by  
02:49:54 5 the Supreme Court and it is a hornbook, so to  
02:49:58 6 speak, a textbook. So as such it covers a lot  
02:50:01 7 of territory in relatively few pages, all things  
02:50:08 8 considered.

02:50:09 9 Q. It's an authoritative text on --

02:50:12 10 A. Definitely, and the Supreme Court  
02:50:13 11 has relied on it a number of times, cited it  
02:50:19 12 many times. It's a beginning place to look  
02:50:21 13 really for most issues relating to Indian law.

02:50:23 14 Q. I'd like to take you to an  
02:50:24 15 excerpt from that book, which is SC1107. It's  
02:50:27 16 is a different excerpt from the one that  
02:50:29 17 Mr. Brookwell referred to.

02:50:36 18 And this is, in particular, sections  
02:50:38 19 15.04 and 15.05.

02:50:42 20 Your Honour, may this be entered as an  
02:50:45 21 exhibit?

02:50:47 22 THE COURT: Mr. Registrar.

02:50:48 23 THE REGISTRAR: Exhibit Number 4269.

02:50:49 24 EXHIBIT NO. 4269: Excerpt from

02:50:52 25 "Cohen's Handbook of Federal Indian

02:50:52 1 Law", sections 15.04 and 15.05;  
02:50:52 2 Document SC1107.  
02:50:56 3 BY MS. MCRANDALL:  
02:50:57 4 Q. On page 999, so subsection 2 is  
02:51:05 5 entitled "Possession and Exercise of  
02:51:09 6 Sovereignty: Original Indian Title", and then  
02:51:09 7 there's a description for the next few pages.  
02:51:12 8 If we could just scroll to page 1003?  
02:51:23 9 A. To 1030, did you say?  
02:51:25 10 Q. Three.  
02:51:26 11 A. Three.  
02:51:26 12 Q. Sorry, I was just scrolling on  
02:51:27 13 the screen. The first full paragraph.  
02:51:42 14 A. "While refusing"?  
02:51:44 15 Q. Yes. So the fourth line from the  
02:51:45 16 top reads:  
02:51:46 17 "Moreover, these cases recognize  
02:51:48 18 tribes' sovereignty over their lands  
02:51:50 19 by asserting that tribal members and  
02:51:52 20 others who acquired lands from the  
02:51:54 21 tribe were subject to tribal law."  
02:51:56 22 Do you agree with Cohen's statement?  
02:52:06 23 A. Generally I think that's correct,  
02:52:07 24 citing Johnson v. McIntosh.  
02:52:12 25 Q. Let's scroll down so that we can

02:52:13 1 see the footnote. Yes. And at the bottom of  
02:52:27 2 the page, the last sentence:

02:52:30 3 "While continuing vigilantly to  
02:52:30 4 protect Indian title from incursions  
02:52:30 5 by third parties, the Supreme Court  
02:52:35 6 stressed this language regarding  
02:52:37 7 occupancy to hold that original Indian  
02:52:39 8 title is not a property interest  
02:52:40 9 protected by the Fifth Amendment,  
02:52:43 10 taking this clause from uncompensated  
02:52:46 11 confiscation by the federal  
02:52:47 12 government."

02:52:49 13 So that applies only to Aboriginal  
02:52:51 14 title, not to recognized title, correct?

02:52:53 15 A. That is correct.

02:52:58 16 Q. And continuing on from the third  
02:53:02 17 line from the top of page 1004:

02:53:06 18 "The court also later crafted an  
02:53:08 19 important exception to tribal  
02:53:09 20 ownership by ruling that Indian title  
02:53:11 21 does not include navigable waterways  
02:53:13 22 within tribal boundaries, unless the  
02:53:15 23 United States clearly recognized  
02:53:18 24 tribal ownership prior to statehood,  
02:53:19 25 or the local state does so



02:53:21 1 thereafter."

02:53:22 2 Do you agree with that statement?

02:53:24 3 A. Well, I agree with that

02:53:26 4 statement. If we're talking about tribal

02:53:33 5 ownership we're not talking about Aboriginal

02:53:37 6 title, we're talking about confirmed title.

02:53:48 7 Indeed the footnote 33 cites the Holt State Bank

02:53:52 8 case so --

02:53:53 9 Q. So you read that as Cohen

02:53:55 10 discussing recognized title, not --

02:53:57 11 A. In that sentence. He doesn't

02:53:59 12 necessarily say "recognized". He talks about

02:54:01 13 Indian title, but if you look at the footnote

02:54:03 14 and understand that Indian title in that

02:54:05 15 sentence is talking about confirmed title, yes,

02:54:07 16 I agree with that statement.

02:54:22 17 Q. And now I'd like to turn to page

02:54:24 18 1019. It's near the bottom. It reads:

02:54:34 19 "The general rules concerning

02:54:35 20 ownership of lands underlying

02:54:37 21 waterways were developed in cases that

02:54:39 22 did not involve Indian reservations

02:54:42 23 set apart during the territorial

02:54:44 24 period. When navigable watercourses

02:54:46 25 are within or on the boundaries of

02:54:46 1 Indian reservations, the courts have  
02:54:46 2 sometimes applied Indian law  
02:54:49 3 principles to affirm tribal rights to  
02:54:52 4 the underlying lands and sometimes  
02:54:54 5 held that title to those lands vested  
02:54:55 6 in the states. These cases represent  
02:54:58 7 a tension between foundational  
02:55:00 8 principles of Indian law and doctrines  
02:55:02 9 that generally regulate the relations  
02:55:04 10 between the states and the federal  
02:55:05 11 government in the non-Indian context."

02:55:10 12 A. Correct.

02:55:18 13 Q. So you would agree with Cohen  
02:55:19 14 that there is that tension in U.S. law?

02:55:21 15 A. Yes, clearly, because the  
02:55:23 16 conflict is between whether the United States in  
02:55:25 17 exercising its authority over -- plenary  
02:55:29 18 authority over Indian tribes essentially did  
02:55:31 19 something that wound up depriving the State of  
02:55:37 20 title to submerged lands, so there is tension in  
02:55:39 21 that context.

02:55:51 22 Q. And you agree that that tension  
02:55:52 23 hasn't been resolved definitively by the Supreme  
02:55:55 24 Court?

02:55:58 25 A. Well, I think the principles have

02:56:03 1           been resolved for sure, starting with Shively v.  
02:56:05 2           Bowlby, but you have to apply those principles  
02:56:11 3           to a set of facts.

02:56:13 4                     And, as we've seen, there's two very  
02:56:14 5           good examples of the Supreme Court reaching kind  
02:56:17 6           of opposite conclusions; one is the Montana v.  
02:56:23 7           United States with respect to the title of the  
02:56:26 8           Bighorn River, and the other is Choctaw Nation  
02:56:30 9           v. Oklahoma concerning title to a lake bed --  
02:56:33 10          not a lake bed, a riverbed going through the  
02:56:36 11          reservation in Oklahoma.

02:56:38 12                     And the reasoning in those two cases  
02:56:43 13          is quite contradictory. In one case they found  
02:56:46 14          in Montana that the tribe did not obtain title  
02:56:50 15          to the bed of the Bighorn River, and in the case  
02:56:54 16          in Oklahoma they found that they did.

02:56:56 17                     And they were about ten years apart.  
02:56:58 18          And if you look at them side-by-side you kind of  
02:57:01 19          scratch your head a little bit and say, gee, I  
02:57:03 20          wonder if this was decided by two entirely  
02:57:06 21          different courts.

02:57:06 22                     Q.     So it would be fair to say that  
02:57:08 23          that tension persists?

02:57:10 24                     A.     Well, there's some -- there are  
02:57:11 25          times when there's litigation over that subject,

02:57:14 1 and when there is, sure. Because in the Crow  
02:57:16 2 Tribe -- Montana v. United States, which  
02:57:24 3 involved the Crow Tribe, the State of Montana  
02:57:27 4 had stocked the Bighorn River with a lot of  
02:57:31 5 fish, trout, I believe, and it was kind of a  
02:57:34 6 prized fishery. And that was a stretch that ran  
02:57:37 7 through the Crow Reservation.

02:57:40 8 Crows wanted to exclude all  
02:57:42 9 non-Indians from their reservation, whether  
02:57:45 10 those individuals were on tribal land or whether  
02:57:49 11 they were on fee lands within the reservation  
02:57:54 12 boundary.

02:57:55 13 And the tribe also argued that it had  
02:57:57 14 a right to do what it was doing on the Bighorn  
02:57:59 15 River because it owned the riverbed. Well, then  
02:58:01 16 of course the State was upset about that because  
02:58:03 17 they felt that the tribe hadn't contributed to  
02:58:05 18 that prized fishery, and the tribe had not  
02:58:08 19 relied on that fishery as a -- in -- way back in  
02:58:12 20 their early days for subsistence.

02:58:15 21 So now they were asserting that they  
02:58:17 22 owned it, and they wanted to essentially impinge  
02:58:20 23 upon the State's program of trying to recover  
02:58:23 24 that river and make it a prized fishery for  
02:58:25 25 sportsmen.

02:58:26 1 So, yes, there was tension there for  
02:58:28 2 sure. And that I believe was in 1981.

02:58:33 3 Q. There is no case law in the  
02:58:34 4 United States recognizing that a tribe today has  
02:58:38 5 Aboriginal title or original Indian title to the  
02:58:45 6 lake bed of one of the Great Lakes or a portion  
02:58:47 7 of the Great Lakes that is unextinguished, is  
02:58:50 8 there?

02:58:51 9 A. So let me see if I understand  
02:58:52 10 your question. Is there unextinguished  
02:58:57 11 Aboriginal title in the beds of any of the Great  
02:58:59 12 Lakes in favour of any particular tribe.

02:59:04 13 Q. Has there ever been case law that  
02:59:06 14 has recognized that?

02:59:07 15 A. I don't believe so. But I don't  
02:59:09 16 believe -- yeah, there hasn't been much  
02:59:12 17 challenge to unextinguished Aboriginal title, a  
02:59:15 18 couple of cases that have, one is the Logan case  
02:59:18 19 which we just talked about, which is a much  
02:59:21 20 later case, interesting case.

02:59:22 21 And then I think the other is  
02:59:24 22 Williams, which we talked about, which was I  
02:59:27 23 believe 1917 or something like that. So that's  
02:59:30 24 correct.

02:59:32 25 Q. Can I just have a moment, Your

02:59:33 1 Honour?

02:59:55 2 Thank you. Those are all my

02:59:56 3 questions.

02:59:58 4 A. Thank you.

02:59:59 5 THE COURT: Any re-examination?

03:00:02 6 MR. BROOKWELL: Yes, Your Honour.

03:00:03 7 RE-EXAMINATION BY MR. BROOKWELL:

03:00:19 8 Q. Mr. Greene, counsel for Canada,

03:00:22 9 Mr. McCulloch, asked you about the Propeller and

03:00:23 10 Genesee case. How does that case relate to the

03:00:31 11 analysis of Aboriginal title in the United

03:00:33 12 States?

03:00:34 13 A. I'm confused about that. I'm not

03:00:37 14 sure that it does relate. It's an interesting

03:00:39 15 case, but I don't see its pertinence.

03:00:47 16 I found it interesting because I

03:00:48 17 thought that the dialogue between the majority

03:00:51 18 opinion and the dissent could have happened

03:00:53 19 today.

03:00:54 20 The majority was taking a position on

03:00:57 21 the 1789 statute and saying that because

03:01:00 22 technology and times and inventions and things

03:01:03 23 have changed that you had to interpret the case

03:01:07 24 as the time that you were deciding it and take

03:01:10 25 into consideration these changes.

03:01:11 1 And the dissent said, no, I'm -- I  
03:01:14 2 believe in limited government, and I believe  
03:01:16 3 that if there's going to be that kind of a  
03:01:18 4 change you have to go back and amend the  
03:01:20 5 Constitution, or something to that effect.

03:01:22 6 And I kind of looked at it and thought  
03:01:23 7 to myself, well, you know, we could see that  
03:01:27 8 today, you know, in Scalia, in dissent if he was  
03:01:31 9 still alive and majority saying, limited  
03:01:35 10 construction of a case versus a more expansive  
03:01:37 11 or progressive discussion of a case.

03:01:40 12 Q. I have a question for you from  
03:01:49 13 Ms. McRandall's questions, and I wonder if my  
03:01:51 14 friends can save us from having to plug in the  
03:01:52 15 computer on our end and pull back up Exhibit  
03:01:53 16 994?

03:01:54 17 A. Menominee Treaty.

03:01:54 18 Q. This is the Menominee Treaty of  
03:02:08 19 1831. And if we could scroll down just a little  
03:02:11 20 bit so we can see the first paragraph? That's  
03:02:14 21 great.

03:02:14 22 And if you look at line number 9,  
03:02:20 23 beginning with, "[...] beginning at the mouth of  
03:02:24 24 the Fox River, thence [...]"?

03:02:27 25 A. Hold on for a second. "Thence

03:02:38 1 westerly"?

03:02:39 2 Q. Yes, and if you can read to  
03:02:41 3 yourself that section?

03:02:56 4 A. Just the one phrase?

03:02:59 5 " [...] thence westerly, on the  
03:03:00 6 highlands between the Lake Superior  
03:03:00 7 and Green Bay, to the upper forks of  
03:03:02 8 the Menomonee River [...]"

03:03:07 9 Q. Yes. And geographically what  
03:03:09 10 boundary is being described here?

03:03:18 11 A. I guess I'm a little bit confused  
03:03:20 12 when you say "what boundary". It appears that  
03:03:23 13 the boundary -- whatever the -- the  
03:03:23 14 metes-and-bounds description is crossing water.

03:03:25 15 So I don't know how you could get from  
03:03:29 16 the highlands on Lake Superior and Green Bay to  
03:03:32 17 the upper forks of the Menominee River, because  
03:03:34 18 the Menominee River is on the other side of --  
03:03:36 19 and somewhat north of Green Bay.

03:03:41 20 So that would modify what I had said  
03:03:43 21 on cross-examination in terms of whether or not  
03:03:47 22 it crossed a water body and therefore included  
03:03:51 23 that water body within the area of cession or  
03:03:55 24 the area of the territory that they describe as  
03:04:00 25 theirs.



03:04:01 1 Q. Maybe just as a point of  
03:04:02 2 clarification, in the top, right corner there is  
03:04:05 3 small text beside that article and referred to  
03:04:09 4 "Boundaries of Menominee country". What does  
03:04:13 5 that mean?

03:04:14 6 A. That article, now that I'm  
03:04:17 7 focusing on it more, described the territory,  
03:04:22 8 the Menominee territory.

03:04:30 9 Q. No further questions, Your  
03:04:31 10 Honour.

03:04:31 11 THE COURT: Thank you, sir, that  
03:04:32 12 concludes your testimony. You can step down.

03:04:35 13 THE WITNESS: Thank you, thank you,  
03:04:36 14 Your Honour.

03:04:42 15 THE COURT: Mr. Townshend.

03:04:44 16 MR. TOWNSHEND: Yes, our next witness  
03:04:45 17 will be Professor Harring. He will be ready  
03:04:49 18 tomorrow morning.

03:04:51 19 THE COURT: All right. That's  
03:04:51 20 helpful. Adjourned until tomorrow morning at  
03:04:54 21 10:00 o'clock.

22 -- Whereupon the proceedings were  
23 adjourned at 3:04 p.m.  
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REPORTER'S CERTIFICATE

I, HELEN MARTINEAU, CSR, Certified  
Shorthand Reporter, certify;

That the foregoing proceedings were  
taken before me at the time and place therein  
set forth;

That the testimony of the witness and  
all objections made at the time of the  
examination were recorded stenographically by me  
[Note: Not all quotes have been verified  
against source document, but transcribed as  
read into the record];

That the foregoing is a true and  
accurate transcript of my shorthand notes so  
taken. Dated this 15th day of October 2019.



PER: HELEN MARTINEAU  
CERTIFIED SHORTHAND REPORTER

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