

# EXHIBIT 12

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

ONEIDA NATION,

Plaintiff,

-vs-

Case No. 16 CV 1217

VILLAGE OF HOBART, WISCONSIN,

Defendant.

Deposition of EMILY GREENWALD, Ph.D.

Wednesday, March 28, 2018

8:53 a.m.

at

von BRIESEN & ROPER, s.c.

411 East Wisconsin Avenue, Suite 1000

Milwaukee, Wisconsin

Reported by: Debbie A. Harnen, R.P.R.

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1 Deposition of EMILY GREENWALD, Ph.D., a  
2 witness in the above-entitled action, taken at the  
3 instance of the Plaintiff, pursuant to the Federal  
4 Rules of Civil Procedure, pursuant to notice, before  
5 Debbie A. Harner, Registered Professional Reporter and  
6 Notary Public in and for the State of Wisconsin, at  
7 von BRIESEN & ROPER, s.c., 411 East Wisconsin Avenue,  
8 Suite 1000, Milwaukee, Wisconsin, on March 28, 2018,  
9 commencing at 8:53 a.m. and concluding at 2:24 p.m.  
10

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ALSO PRESENT: Mr. James Bittorf

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10 (Original exhibits attached to the original transcript;  
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no hard copies or PDFs to Attorney Locklear.)

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1 TRANSCRIPT OF PROCEEDINGS

2 EMILY GREENWALD, Ph.D., called as a

3 witness herein, having been first duly sworn

4 on oath, was examined and testified as

5 follows:

6 EXAMINATION

7 BY MS. LOCKLEAR:

8 Q Good morning. My name is Arlinda Locklear. I

9 represent the Oneida Nation, and I'll be asking

10 you some questions today.

11 Would you please state your name

12 for the record?

13 A Emily Greenwald.

14 Q And Ms. Greenwald, could you -- well, let's start

15 with your educational background and your

16 qualifications. Could you explain for me what

17 your education is and where you got your degrees?

18 A Sure. I have a -- my undergraduate degree in

19 history from Yale University and also my Ph.D. in

20 history from Yale University.

21 Q What was the subject of your Ph.D. dissertation?

22 A It was the 1887 Dawes Act.

23 Q Was it focused on a particular tribe or the Dawes

24 Act in general?

25 A I looked at the Dawes Act -- the formulation of

Page 7

1 the Dawes Act and then at three reservations as

2 case studies.

3 Q Is that what resulted in your published book?

4 A Yes.

5 Q Okay. And at that point, what was your

6 professional experience after you got your Ph.D.?

7 Where did you go then?

8 A I taught for a year at Bowdoin College in Maine,

9 and then I taught at the University of Nebraska in

10 Lincoln.

11 Q What were the courses that you taught, first, at

12 Bowdoin?

13 A Bowdoin, yeah. I can't remember exactly what I

14 taught there.

15 I believe I taught some

16 environmental history, some Native American

17 history, and some history of the American West,

18 but I can't remember the exact courses.

19 Q What was your position there? Were you a

20 full-time professor or an associate professor?

21 A I was in a one-year visiting professor position.

22 Q I see.

23 A So it was full-time, but just a year-long

24 contract.

25 Q And you went from there to where again?

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1 A University of Nebraska.

2 Q What was your position there?

3 A I had a joint appointment in history and ethnics

4 studies, and it was an assistant professor

5 position full-time.

6 Q So were you teaching undergrads then? Was that an

7 undergraduate professor position?

8 A I taught both undergraduates and graduate

9 students.

10 Q Do you remember the coursework that you taught

11 there?

12 A I taught surveys in American history to 1877. I

13 taught Native American history, environmental

14 history, and history of the American West.

15 Q And how long were you there?

16 A Seven years.

17 Q Were you a tenured professor there?

18 A No.

19 Q And you went from there to HRA; is that correct?

20 A Yes.

21 Q Is there a reason why you decided to leave

22 academia?

23 A I didn't get tenure at the University of

24 Nebraska --

25 Q I see.

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1 A -- and I decided to apply for both academic and

2 ultimately nonacademic jobs, and I got the job at

3 Historical Research Associates.

4 Q Can you talk a little bit about what your role is

5 at HRA, how it works there in terms of the

6 research that you do?

7 A Sure. My role there includes both historical

8 research and writing and some administrative

9 responsibilities. I manage the history division,

10 and I'm also now the president and CEO of the

11 company.

12 I generally work with research

13 teams as a project manager, although occasionally

14 I work on somebody else's project providing

15 research support. As a project manager, I'm

16 responsible for overseeing the execution of a

17 project, whatever it may be, and for directing and

18 overseeing the work of any staff working on that

19 project.

20 Q When you say "oversee," could you explain how that

21 works? Are there -- when you're working on a

22 project, are there more than just you involved in

23 it? Is that what that means?

24 A Usually, yes. There are multiple people involved.

25 It depends on the size of the project.

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1 Q And how does that work? Who has what role in that  
2 respect when there's more than one person?  
3 A It varies. As the project manager, I would make  
4 the assignments and direct what people are doing  
5 and spell out the tasks; and then they would  
6 follow through with those tasks and give me back  
7 the results of their work.  
8 Q Specifically in that situation, who was  
9 responsible for writing reports?  
10 A It depends on the project.  
11 For an expert witness engagement  
12 like this one, I'm ultimately responsible for the  
13 report; although I may get some assistance in  
14 drafting sections from other historians.  
15 Q When you're responsible for writing a report, do  
16 you also assume responsibility for the actual  
17 research, collection of documents?  
18 A I usually participate in the research, but I also  
19 get assistance from the -- from colleagues.  
20 Q Who makes the decision on how that research is  
21 conducted then?  
22 A I do.  
23 Q And are you ever in a situation where somebody  
24 else sort of preselects documents for you or do  
25 you make those decisions?

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1 A What do you mean by "preselects"?  
2 Q How do you determine -- when someone goes to a  
3 repository, is that person given direction or do  
4 you sort of just take everything that they produce  
5 to review yourself?  
6 A It's a combination, but I give them direction  
7 about what I'm -- what I'm investigating so they  
8 have some guidelines for what, in the large body  
9 of documents, they might see could be relevant.  
10 Our practice at HRA is to collect  
11 very broadly. So if they can't make a  
12 determination on the spot if something is relevant  
13 or not, they would collect it. So I don't always  
14 review every last document that someone has  
15 collected, but I do my best to review as much of  
16 it as I can.  
17 Q How do you determine what you don't see or review?  
18 A Well, I can -- I can see it all. I -- again, it  
19 varies from project to project. It depends on the  
20 volume of material that we've collected. There  
21 are some situations in which I can't go through  
22 everything myself because of time constraints or  
23 volume.  
24 Q With the administrative roles that you now have  
25 with HRA, are you still able to fulfill all of

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1 your roles as a researcher and writer in the  
2 projects that you manage?  
3 A Yes.  
4 Q How would you estimate you divide your time  
5 between administrative responsibilities and actual  
6 research work?  
7 A I would say it's about a 50/50 split, that about  
8 half of my time is related to administrative and  
9 half of my time is related to project work.  
10 Q And when you're preparing a report in the research  
11 capacity, is there anybody else involved in the  
12 preparation of that report?  
13 A As I mentioned, I might -- I might have some of my  
14 research team, my colleagues, work on sections of  
15 the report.  
16 Q Are there any differences in the nature of  
17 research between the academic profession and the  
18 private sector that you're operating in now?  
19 A There are -- there are definitely differences in  
20 the scope of assignments.  
21 When you're an academic, you can  
22 kind of follow your nose and shape the project as  
23 you go. As a consultant, I usually have specific  
24 tasks, specific questions that my clients are  
25 interested in; and so it's not up to me to say,

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1 Oh, I find this interesting; I'm going to pursue  
2 this.  
3 But I don't want to suggest by that  
4 that I have no control over what I investigate  
5 because my clients are also relying on me to tell  
6 them, well, what is relevant here, what are the  
7 salient repositories and topics that bear on  
8 whatever the issue is.  
9 So another thing that I see as a  
10 difference is that academics are more free to  
11 speculate about things, to hypothesize and not  
12 necessarily have hard evidence to back it up; and  
13 with the work that I generally do as a consultant,  
14 I need to have solid evidence to base it on  
15 especially when I'm working on something for  
16 litigation. I don't just speculate. I work from  
17 what I can prove with the documents.  
18 Q And when you say what you can prove with the  
19 documents, does that mean that your scope of  
20 inquiry must include an examination of documents  
21 that would fall on either side of the question put  
22 to you?  
23 A Yes.  
24 Q So I take it from that you would examine documents  
25 that might support a proposition and documents

4 (Pages 10 - 13)

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1 that might oppose a proposition?

2 A Yes.

3 Q When you do that, what methodology do you use to

4 come to a judgment as to a conclusion?

5 A I review all the evidence that I can get my hands

6 on that bears on the issue; and then I look for

7 patterns where sources may agree with each other,

8 where I can get multiple perspectives on an issue.

9 My primary method is to try to assess as much

10 evidence as I can and determine what's going on

11 there.

12 Q When you do that, do your reports typically

13 reflect that thought process and that relative

14 weighing of documents?

15 A It usually, in a litigation report -- in an expert

16 witness report, I'm usually focusing on the

17 documents that support my -- my opinion there; but

18 I do try to deal with those that don't.

19 I think that it's important for my

20 client to know what documents I've found that

21 don't support the case, and I also want to be able

22 to put in some context documents that are -- that

23 may be at odds with the opinion that I'm

24 articulating.

25 Q As a general proposition, would you consider a

1 report that did not do that less reliable?

2 A Not necessarily.

3 Q Why not?

4 A I think it has to do with the form in which expert

5 witness reports are generally structured and

6 composed, that your goal is to put forward the

7 affirmative case as best you can so you don't

8 necessarily include all of the contradictory

9 evidence.

10 Q So you consider an expert report prepared in the

11 context of litigation to be more of an advocacy

12 piece; is that correct?

13 A Well, it -- I don't -- it depends on what you mean

14 by "advocacy." Would you like to define that?

15 Q Well, you said put your best case forward, so that

16 you don't necessarily deal with all of the

17 negative evidence. That's what I would consider

18 to be an advocacy piece. Is that how you view

19 expert reports?

20 A I don't -- I don't see it as advocacy as -- you

21 know, that I'm becoming an activist for a

22 particular position or agenda.

23 I do understand that in the context

24 of litigation that there are adversarial parties,

25 and each party is trying to put forward a case on

1 a particular position.

2 So I understand that each side's

3 going to have its own experts that will put on a

4 position that is -- that is the -- I'm just going

5 to end there; got nowhere to go with that

6 particular statement.

7 Q So is that different, then, from a document or

8 report or study that you might produce in an

9 academic context? You seem to be distinguishing

10 between preparation of reports for litigation and

11 otherwise.

12 A I don't think academics always deal with contrary

13 evidence either.

14 I'm just saying that in a

15 litigation setting there's an adversarial process

16 at work. That's not usually the case in an

17 academic setting, although sometimes academics are

18 trying to position themselves in opposition to

19 prior academic work; and they're trying to show

20 how their theory is different, better, whatever,

21 than scholarship that's come before.

22 Q So, then, is it fair to say that when you're

23 preparing a report for litigation, that you begin

24 with a proposition that you are attempting to

25 prove?

1 A No.

2 Q Explain that, please.

3 A I begin with the question that I'm investigating,

4 but I do understand what my client's position is

5 on that question.

6 Q But you may, nonetheless, omit certain documents

7 that don't support your client's position in the

8 preparation of a report?

9 A I may not cite them, but I don't omit them. If I

10 was asked to turn over all of the material that I

11 had collected for a case, it would include

12 everything. I wouldn't hide.

13 Q But your report would not necessarily include an

14 analysis of those documents; is that right?

15 A It wouldn't necessarily.

16 Q Okay. Can you roughly estimate how many cases

17 you've worked on in this kind of professional

18 context with HRA, how many reports and sort of

19 historical issues you've investigated?

20 A I can't. I know you have a copy of my resume, so

21 we could --

22 Q Yes, it's substantial.

23 A -- look at that. I've been there for almost 16

24 years doing this kind of work.

25 Usually in any given year, I maybe

Page 18

1 have three to five projects that I'm working on.  
 2 They're not all related to litigation. Some are  
 3 small, some are large. Sometimes it's more than  
 4 that.  
 5 Q So is it fair to say at least a dozen or so such  
 6 cases have been -- you've been involved with a  
 7 dozen or so such cases on one level or another at  
 8 HRA?  
 9 A At least.  
 10 Q Let's talk about this case in particular. You  
 11 write in your reports -- and there are three, as I  
 12 understand them, dated November 15th, 2017,  
 13 December 15th, 2017, and January 15th, 2018; is  
 14 that correct?  
 15 A Yes.  
 16 Q Would you mind if for purposes of this discussion  
 17 I refer to them as your first, second and third  
 18 report rather than the lengthy names which tends  
 19 to get confusing?  
 20 A That's fine.  
 21 Q Thank you.  
 22 So you produced those three reports  
 23 at the request of the Village of Hobart; is that  
 24 correct?  
 25 A Yes.

Page 19

1 Q Did the village make that request to you in  
 2 writing?  
 3 A Not -- no.  
 4 Q Is there a written letter of engagement with the  
 5 village for the production of those reports?  
 6 A I don't recall what form of engagement -- I don't  
 7 think there is.  
 8 Q How did you receive your instructions, then, from  
 9 the village for what you were to produce for them?  
 10 A I worked with Mr. Kowalkowski. I didn't talk  
 11 directly to people at the village.  
 12 Q So as I understand it, you received your  
 13 instructions from counsel for the village as to  
 14 what the substance of your reports should contain?  
 15 A By substance, I would say he was giving me  
 16 direction about what the issues were that they  
 17 were asking me to investigate.  
 18 And in the case of the first  
 19 report, I understand that the judge requested  
 20 that -- or directed that the parties address the  
 21 things for which they bore the burden of proof;  
 22 and so Mr. Kowalkowski gave me some direction  
 23 about what issues that encompassed for the  
 24 village. And then the other two reports were  
 25 responding to reports produced by the Nation's

Page 20

1 experts in some fashion.  
 2 Q So your scope of work on the three reports, your  
 3 understanding of that was developed in  
 4 conversations with Mr. Kowalkowski; is that  
 5 correct?  
 6 A Yes.  
 7 Q Can you describe the research that was done either  
 8 by you or staff at HRA in fulfillment of that  
 9 request?  
 10 A I can't remember everything that we did, but I  
 11 know we collected Commissioner of Indian Affairs  
 12 annual reports, records related to pieces of  
 13 legislation that were at issue.  
 14 We did some archival research in  
 15 the National Archives in Washington, D.C., and I  
 16 can't recall if there were other locations where  
 17 we did archival research; and then we also had a  
 18 body of documents that had been collected  
 19 previously that the attorneys provided.  
 20 Q When you say "we," who was that exactly?  
 21 A I was the project manager, and my colleagues,  
 22 Emily Robideau and Joshua Pollarine -- I will  
 23 spell these later for the court reporter -- were  
 24 the primary historians working under my direction  
 25 on the project.

Page 21

1 I believe that my colleagues in  
 2 Washington, D.C., Derek Gaines and Nick Kryloff,  
 3 also assisted; and my colleague, Morgen Young in  
 4 Portland, also conducted some research for this  
 5 project. That's all I recall at the moment.  
 6 Q Do you recall when this engagement began, when you  
 7 began the work, you and your team?  
 8 A I think we were first hired either sometime in  
 9 early 2017 or it may have been in 2016. I don't  
 10 remember.  
 11 Q And could you estimate roughly how much time  
 12 overall, the size of the research project? Give  
 13 us a sense of how much work was performed.  
 14 A Oh, I couldn't estimate. I would need to look  
 15 back at time sheets to figure that out.  
 16 Q You mentioned that the village -- or that counsel  
 17 for the village, Mr. Kowalkowski, provided  
 18 documents. Could you describe what those were?  
 19 A They had some documents that were collected by a  
 20 prior -- actually, I don't know if he was an  
 21 expert or -- but by a prior historian, James  
 22 Clifton; and that may have been in the '80s. I  
 23 don't know when it was.  
 24 Q Could you estimate the amount -- the volume of the  
 25 research from James Clifton or others from the

6 (Pages 18 - 21)

Page 22

1 village you received?

2 A That was -- apart from those, the only other

3 documents I received from counsel for the village

4 that I can recall were some documents that were

5 used as exhibits in some briefs related to Oneida

6 issues.

7 So the body of documents, the

8 Clifton documents, is pretty extensive. It's not

9 something that I or others went through in full.

10 Q When you say "pretty extensive," could you

11 estimate the number of boxes or give us some other

12 quantitative estimate?

13 A It's -- you know, it's hundreds of document, but

14 I -- I don't know the exact number. They were

15 provided digitally.

16 Q I see.

17 A So I can't estimate them in terms of boxes.

18 Q I see. And when you received those documents, you

19 relied on those -- those appear, in fact, in some

20 of your citations, you cite James Clifton as the

21 source for a document.

22 So is it fair to say that you

23 derived a lot of your information from that

24 collection of documents?

25 A No. I did use some of those documents, but I -- I

Page 23

1 don't know what the relative numbers are of those

2 documents versus documents that we collected

3 independently for this particular case. But yes,

4 I did cite some of them.

5 Q If they were that extensive, could you describe

6 for us how you narrowed it down to the ones you

7 decided to rely on in your report insight?

8 A Generally, the way I use that collection is when I

9 had particular periods of time where I was trying

10 to understand what was going on and I didn't have

11 adequate information in what HRA had collected, I

12 would go into that body of documents to see if I

13 could find anything relevant to the issue I was

14 trying to deal with.

15 I did not go through them

16 systematically. I did an initial assessment to

17 see what was in there, but other than that, it was

18 more selective, trying to fill gaps.

19 Q Did any other members of your HRA team peruse all

20 of those documents and select some out for you?

21 A No one perused all of the documents.

22 One of my colleagues did some

23 research in -- specifically in the documents in

24 the, I guess, early '30s and identified some

25 documents in there that I then reviewed and may

Page 24

1 have used some of them. But that was, I think,

2 the only instance in which anybody was looking at,

3 you know, a chunk of those as a whole.

4 Q But do I understand correctly that these Clifton

5 documents, it was a discrete set of documents --

6 even though provided digitally and not in physical

7 form, it was a discrete collection of documents

8 that came directly from counsel?

9 A Yes.

10 MS. LOCKLEAR: I don't think we've

11 received those in discovery production. We can

12 have a conversation about that afterward.

13 MR. KOWALKOWSKI: To be honest, I'm not

14 sure what you did or did not get in that regard.

15 MS. LOCKLEAR: Okay. We'll talk about

16 that later.

17 BY MS. LOCKLEAR:

18 Q There are also some citations in your reports that

19 have no source cited at all, that just identify a

20 letter by date without a national archive citation

21 or otherwise. Can you tell me where those came

22 from?

23 A I'd have to look at specific ones, but I might not

24 recall. Some of those might be from the Clifton

25 documents; some of them might be documents that

Page 25

1 were exhibits to the briefs that I mentioned that

2 counsel for the village provided.

3 Q You've mentioned those briefs twice. Can you

4 explain for us what role they played in your

5 research? What did these briefs consist of?

6 A These were, I believe, submitted to the court. I

7 don't know in which matter they were, but they

8 were briefs prepared by the village's attorneys.

9 Q Did you receive any particular instructions with

10 regard to the relevancy of those legal briefs in

11 your historical research?

12 A No.

13 Q How did you understand you were to make use of

14 those then?

15 A I was -- my understanding was that they included

16 some historical documents that counsel for the

17 village thought were significant.

18 Q When you began drafting your reports, the three

19 reports that we've referenced, what role did the

20 other team members from HRA play in the actual

21 drafting and finalization of those reports?

22 A My colleagues, Josh Pollarine and Emily Robideau,

23 drafted some text for sections of the report; but

24 I was responsible for finalizing everything.

25 Q Do you recall which sections or which reports they

Page 26

1 may have drafted?

2 A I can look at the reports themselves and probably

3 tell you which ones.

4 I recall that Josh drafted some

5 general overview history for the first section of

6 my first report, and Emily drafted some part of

7 the section that was about fee patenting of

8 allotments under various amendments to the Dawes

9 Act. Emily also assisted with some of the

10 subsequent reports with helping me analyze the

11 reports submitted by the Nation's experts.

12 Q And when you received those drafts, did you, then,

13 proceed to finalize the report? Did you take any

14 steps to double-check the reliability of their

15 work?

16 A I -- I don't -- I don't like to accept things as

17 they are. I read through thoroughly. I make any

18 adjustments that I think are warranted based on

19 the documents themselves. I try to look at every

20 document that's cited to make sure I agree with

21 what a colleague has drafted there.

22 I also am a heavy-handed editor of

23 prose. So I make -- I make it read the way I want

24 it to read from a, you know, narrative craft

25 perspective.

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1 So I normally spend a bit of time

2 with whatever somebody may have drafted to make

3 sure that I am satisfied with its accuracy and

4 its -- you know, that the wording is clear and

5 logical. We also normally put things through a

6 fact-check process before they are submitted.

7 Q Could you describe that? What does that mean in

8 this context?

9 A That I would have one of my colleagues review the

10 quotations and other facts that are drawn from the

11 documents and make sure the citations are correct,

12 make sure that everything is accurate, that I'm

13 not in any way misrepresenting what's in the

14 document.

15 That said, you know, there are

16 occasionally typos and other errors that we miss

17 in the fact-check process.

18 Q In the preparation of the final reports, did

19 counsel for the village have an opportunity to

20 review drafts?

21 A Yes.

22 Q Did you receive any specific instructions from

23 counsel as to what changes should be made in

24 drafts?

25 A I know we discussed the substance of the reports,

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1 but I don't -- I don't recall the specific

2 discussions. I know we had them, but I don't -- I

3 don't recall exactly what we covered.

4 Q So there could have been substantive discussion

5 regarding analysis of documents or conclusions?

6 You just don't recall?

7 A I don't recall exactly what we covered, but I'm

8 sure we talked about the opinions that I was

9 expressing and the subject matter I was covering.

10 Q Was there specific guidance from counsel with

11 regard to documents that should or should not be

12 cited?

13 A There was no specific instruction.

14 Can I just pause for a second to

15 ask -- I know that normally the attorneys have

16 some kind of confidentiality protection. Do we

17 need to consider that here?

18 MR. KOWALKOWSKI: I guess one thing

19 early on in this litigation, we discussed the

20 expert witnesses to some extent in terms of the

21 documentation, I believe. I believe that was

22 involving Paul as well. So in terms of if you're

23 asking her questions of directly what has counsel

24 communicated to you, I would object on work

25 product grounds.

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1 MS. LOCKLEAR: No. The question goes to

2 the preparation of her report and what judgment

3 calls were made by whom with regard to both

4 conclusions and use of historical documents.

5 MR. KOWALKOWSKI: I still object on the

6 grounds of work product.

7 MS. LOCKLEAR: This is her work product,

8 not the attorney's.

9 MR. KOWALKOWSKI: Well, but you're

10 asking specifically about discussions with

11 counsel.

12 MS. LOCKLEAR: I'm asking how she

13 prepared her report and to what extent she

14 received instructions outside of her own judgment

15 with regard to that report.

16 MR. KOWALKOWSKI: And if the question is

17 that limited and that precise, I have no problem

18 with her answering because I know the answer.

19 But as far as if you go beyond that

20 to direct communications, what exactly was said

21 between counsel and her, I'm going to, again,

22 object to the work product privilege.

23 BY MS. LOCKLEAR:

24 Q Could you answer the question, please?

25 A Could we -- could you remind me of the question or

8 (Pages 26 - 29)

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1 read it back?

2 Q The specific question is: Who made judgment calls

3 with respect to either conclusions you made or

4 documents you included or omitted from your

5 report?

6 A I made the ultimate call.

7 Q When you say "ultimate," does that mean there

8 were other people involved in making the judgment

9 call?

10 MR. KOWALKOWSKI: I'd object to the

11 extent it calls for direct communication with

12 counsel, work product.

13 BY THE WITNESS:

14 A I wasn't directed in any fashion what to say.

15 I had conversations about my

16 drafts, and I made the determination how to

17 respond or what to do in relation to those

18 conversations.

19 BY MS. LOCKLEAR:

20 Q And what about inclusion of documents or omission

21 of others? Was that your judgment call solely?

22 MR. KOWALKOWSKI: I'm going to object on

23 the grounds of work product.

24 Again, if you're talking directly

25 about communications with counsel, I don't believe

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1 that's an appropriate inquiry.

2 BY THE WITNESS:

3 A I made the ultimate decision.

4 BY MS. LOCKLEAR:

5 Q As to?

6 A As to what was included or not.

7 Q Okay. Let me ask you about a statement that you

8 make in your first report.

9 At the very beginning you indicate

10 that you are, quote, "still investigating this

11 issue of diminishment." Are you working on

12 another report, by any chance, or is there still

13 research ongoing on this project?

14 A No.

15 Q So as far as you're concerned, the research is

16 concluded, and your reports stand as they stand;

17 is that correct?

18 A Yes.

19 Q Okay. In your experience as a historian,

20 referring to all of the cases that you've worked

21 on at HRA, is it your experience that there's ever

22 a historical record that is all one way or all the

23 other?

24 A Generally not. I have worked on a couple of cases

25 where the evidence was much stronger on one side

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1 than another, but usually there's evidence that

2 cuts both ways.

3 Q In that circumstance, how do you weigh the

4 evidence to come to a conclusion?

5 A I do my best to get as much as I can in front of

6 me and assess what I think to be reliable and

7 where I can find congruence, patterns of, you

8 know, consistency in the documents; but I

9 acknowledge that there may be other evidence

10 that's not consistent.

11 Q When you say "acknowledge," do you mean in your

12 report or are you acknowledging that now as a

13 general proposition?

14 A I acknowledge that now as a general proposition,

15 but I usually do say in my reports -- for example,

16 I think in one of my reports for this matter, I

17 acknowledge that there are documents that use the

18 word "reservation" after a certain point, you

19 know, to talk about the Oneida area, the 1838

20 Treaty area.

21 So I acknowledge that the documents

22 that I'm talking about here that say the

23 reservation cease to exist are not the only ones

24 out there. There are others that refer to a

25 reservation.

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1 Q And in making these judgment calls and weighing

2 evidence, are you obliged to take into account

3 court cases?

4 A I am not obliged, I don't think. But sometimes I

5 do take court cases into account.

6 Q Don't you mention that in a couple of your reports

7 in this case, that you refer to certain court

8 cases?

9 A I do refer to certain court cases.

10 Q So then if there's a Supreme Court decision that

11 clearly says one way or the other on an issue that

12 you're researching, do you consider yourself bound

13 by that?

14 A No.

15 Q Let's start, then, with the Treaty of 1838. This

16 is the principal subject of your second report; is

17 that correct?

18 A I don't think so. It is a subject of my second

19 report, but --

20 Q Okay. A subject of your second report.

21 It's easier to start with

22 chronologically so we're going to start there.

23 A Okay.

24 MS. LOCKLEAR: If you could please mark

25 this.

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1 (Exhibit No. 21 was marked for  
2 identification.)  
3 BY MS. LOCKLEAR:  
4 Q Could you please take a look at this document and  
5 identify it for us for the record? Do you  
6 recognize this?  
7 A Yes. It is the Treaty of February 3rd, 1838.  
8 Q Between whom?  
9 A Between Carey Harris and The First Christian and  
10 Orchard parties of Oneida Indians residing at  
11 Green Bay.  
12 Q Could you take a look at Article 1, please, and  
13 read that for the record?  
14 A "The First Christian and Orchard parties of  
15 Indians cede to the United States all their title  
16 and interest in the land set apart for them in  
17 the first article of the treaty with the  
18 Menominees of February 8th, 1831, and the second  
19 article of the treaty with the same tribe of  
20 October 27th, 1832."  
21 Q And Article 2, as well, please.  
22 A "From the foregoing cession, there shall be  
23 reserved to the said Indians to be held as other  
24 Indian lands are held a tract of land containing  
25 100 acres, for each individual, and the lines of

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1 which shall be so run as to include all their  
2 settlements and improvements in the vicinity of  
3 Green Bay."  
4 Q Just looking at the face of this treaty, does it  
5 appear to you that the treaties referenced in  
6 Article 1 with the Menominees may be relevant to a  
7 construction of this treaty?  
8 A Yes.  
9 Q Did you include that discussion in your reports?  
10 A I believe I mentioned the -- at least the 1831  
11 Treaty.  
12 (Exhibit No. 22 was marked for  
13 identification.)  
14 BY MS. LOCKLEAR:  
15 Q So this would now be Exhibit 22. Do you recognize  
16 this?  
17 A This is part of the treaty of -- I think that says  
18 February 8th, 1831.  
19 Q With whom?  
20 A It's between the United States and the Menominee  
21 Nation.  
22 Q Would you refer, please, to the second page of  
23 this treaty? Let's just be clear. Is it your  
24 understanding this is the treaty that's referenced  
25 in Article 1 of the 1838 Treaty?

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1 A Yes.  
2 Q Thank you.  
3 Page 2 of this treaty, beginning  
4 three lines from the top, would you please read  
5 into the record starting with "They agree"? Do  
6 you see that? It's at the end of the third line.  
7 A Yes. And how far would you like me to go?  
8 Q To the end of "New York Indians."  
9 A Okay. "They agree that such part of the land  
10 described, being within the following boundaries,  
11 as he may direct, may be set apart as a home to  
12 the several tribes of the New York Indians."  
13 Q Now, move down about ten lines in the middle of  
14 the line, the line starts, "President of the  
15 United States." Do you see that line?  
16 A Yes.  
17 Q Would you please read beginning with "The country  
18 hereby ceded"?  
19 A "The country hereby ceded to the United States for  
20 the benefit of New York Indians, contains by  
21 estimation about 500,000 acres and includes all  
22 their improvements on the west side of the Fox  
23 River."  
24 Q And the next sentence as well?  
25 A "As it is intended for a home for the several

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1 tribes of the New York Indians, who may be  
2 residing upon the lands at the expiration of three  
3 years from this date, and for none others, the  
4 President of the United States is hereby empowered  
5 to apportion the lands among the actual occupants  
6 at that time, so as not to assign to any tribe a  
7 greater number of acres than may be equal to 100  
8 for each soul actually settled upon the lands; and  
9 if, at the time of such apportionment, any land  
10 shall remain unoccupied by any tribe of the  
11 New York Indians, such portion as would have  
12 belonged to said Indians, had it been occupied,  
13 shall revert to the United States."  
14 Q Drop down to the last sentence, please, in that  
15 same article beginning "It is distinctly  
16 understood." Read it into the record, if you  
17 would.  
18 A "It is distinctly understood, that the lands  
19 hereby ceded to the United States for the New York  
20 Indians are to be held by those tribes under such  
21 tenure as the Menominee now hold their lands,  
22 subject to such regulations and alteration of  
23 tenure, as Congress and the President of the  
24 United States shall, from time to time, think  
25 proper to adopt."

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1 Q Thank you.

2 So what's your understanding of

3 what's going on in this treaty?

4 MR. KOWALKOWSKI: I'll object as to form

5 given the several different sections that she was

6 asked to read into the record and also based on

7 the fact this is an incomplete document. It does

8 not contain the entire treaty.

9 You can answer if you can.

10 BY THE WITNESS:

11 A In the sections that we looked at here, the

12 government was seeking to negotiate with the

13 Menominee to essentially give up part of their

14 land so that the New York Indians could settle

15 upon it.

16 BY MS. LOCKLEAR:

17 Q The language that you read suggests a particular

18 kind of land tenure, doesn't it?

19 A It says tenures as the -- such tenure as the

20 Menominee Indians now hold their lands.

21 Q Thank you.

22 (Exhibit No. 23 was marked for

23 identification.)

24 BY MS. LOCKLEAR:

25 Q Would you please identify this document for the

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1 record?

2 A This is a treaty of October 27th, 1832, with the

3 Menominees.

4 Q Do you recognize this from the reference to the --

5 in the 1838 Treaty Article 1 that you've

6 previously read into the record?

7 A Yes.

8 Q So you have some familiarity with this treaty?

9 A I have looked at it before.

10 Q Could you describe what you think is going on in

11 this treaty?

12 A I don't recall.

13 Q Would you take a moment, please, then and take a

14 look.

15 A I'm going to get out my reading glasses just in

16 case I need them.

17 Q I would draw your attention specifically to

18 Page 330. It is a lengthy treaty.

19 A To -- I'm sorry. Which page?

20 Q 380.

21 A Okay. Give me a minute here.

22 As you mentioned, this is a fairly

23 lengthy and complex treaty. The section that you

24 called my attention to is also dealing with land

25 from the Menominee holdings to be ceded for

Page 40

1 New York Indians.

2 Q Do you recall from the discussion of the 1838

3 Oneida Treaty that these two treaties together,

4 the one we just read from and this one, were

5 cessions to the United States, one being a

6 500,000-acre and the reference in this that you

7 read in this treaty to 200,000 acres for the

8 purposes of the New York tribes?

9 A I don't want to characterize it in any particular

10 way without more time to review it, but I think

11 that's -- I think that's fair, that these treaties

12 were setting aside -- or they were asking the

13 Menominees to cede some part of their lands so

14 that the New York Indians could move to them and

15 settle upon them.

16 Q Aren't these treaties -- well, scratch that. Let

17 me try this another way.

18 Do you see anything in these

19 treaties that should inform a construction of the

20 land tenure that you read into the record from

21 Article 2 of the 1838 Treaty with Oneida?

22 MR. KOWALKOWSKI: I'll object as to

23 form.

24 BY THE WITNESS:

25 A The Article 2 says, "Held as other Indian lands

Page 41

1 are held"; and I don't see that same language here

2 exactly and did try to investigate what that

3 language meant; and I don't -- I don't know

4 exactly what it meant.

5 BY MS. LOCKLEAR:

6 Q Let's go back and take another look, then, at the

7 1831 Treaty. Do you remember the language that

8 you read into the record from the 1831 Treaty with

9 regard to land tenure?

10 A It said something to the effect of held as the

11 Menominee Indians now hold their lands.

12 Q Do you have any information as to how the

13 Menominee Indians held their land?

14 A I assume -- I don't actually. I don't want to

15 make an assumption here.

16 Q Let me refer you or refresh your memory on this.

17 Do you recall a chart in one of

18 your reports that lists treaties with similar

19 language as that that appeared in the 1838 Oneida

20 Treaty?

21 A Yes.

22 Q Do you recall whether a Menominee reservation or

23 treaty was included in that chart?

24 A I don't recall, but I'd be happy to look at the

25 chart.

11 (Pages 38 - 41)

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1 Q Okay. We'll get to that then. We'll get to that.  
2 One other thing that I forgot to  
3 ask you about with regard to the 1838 Treaty,  
4 could you take another look at that please,  
5 Exhibit 21, and identify for us who the Oneida  
6 signatories are for that treaty?  
7 A Would you like me to read the names?  
8 Q Yep.  
9 A Under First Christians, it says, Henry Powles,  
10 John Denny, alias John Sundown, and Adam Swamp,  
11 and Daniel Bread. Under Orchard, it says Jacob  
12 Cornelius.  
13 Q Thank you.  
14 A Would this be an okay time to take a quick break?  
15 MS. LOCKLEAR: Sure. We can do that.  
16 THE WITNESS: Thank you.  
17 (Recess taken from 9:52 a.m.  
18 until 9:58 a.m.)  
19 BY MS. LOCKLEAR:  
20 Q We were discussing earlier the significance of  
21 Menominee land tenure with respect to the Treaty  
22 of 1838 and Oneida. Do you recall that?  
23 A Yes.  
24 Q Do you remember a chart that appears on Page 10  
25 and 11 of your second report that lists treaties

Page 43

1 with language similar to the Oneida Treaty?  
2 A Yes.  
3 Q If you want to see your report then.  
4 A Yep.  
5 Q Do you have a copy with you?  
6 A No.  
7 (Document tendered to the witness.)  
8 BY MS. LOCKLEAR:  
9 Q Do you recall that?  
10 MR. KOWALKOWSKI: Just so I'm clear,  
11 what's the date of this report?  
12 MR. BITTORF: December 15th.  
13 BY MS. LOCKLEAR:  
14 Q Do you see that it lists the Menominee Treaty of  
15 1854 in here?  
16 A Yes.  
17 Q Are you aware of any Supreme Court decisions that  
18 have described the land tenure of Menominee as  
19 being held in common?  
20 A No.  
21 Q Would that make a difference to your opinion as to  
22 the language as it appears in the Oneida Treaty of  
23 1838?  
24 A I would have to look at it to -- you know, to see  
25 if it had any bearing on my opinion; but generally

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1 speaking, when I form an opinion, I try to do it  
2 from the historical documents in context and  
3 don't -- and if there has been some Supreme Court  
4 decision or some court determination of that, I  
5 would want to take note of it, but it wouldn't  
6 necessarily affect my opinion as a historian about  
7 what the documents of the period say.  
8 Q But you did testify, given the language that  
9 appears in the treaties, that the land tenure of  
10 Menominee would be relevant in determining the  
11 land tenure of Oneida?  
12 MR. KOWALKOWSKI: Objection. Misstates  
13 her testimony.  
14 BY THE WITNESS:  
15 A What I did --  
16 BY MS. LOCKLEAR:  
17 Q She can restate it.  
18 A What I did here was to try to find treaties that  
19 use that same phrase, to be held as Indian lands  
20 are held or in the 1831 Treaty -- yes, it says to  
21 be held as other Indian lands are held, to see if  
22 they shed any light, these treaties themselves  
23 shed any light on what that meant; and I did not  
24 find a conclusive answer.  
25 Q What about the other language you read from the

Page 45

1 1831 Treaty with regard to Menominee tenure?  
2 Shall I refresh your memory?  
3 A No. I know what it is.  
4 What are you asking me about it?  
5 Q The question is: Should that not, then, inform  
6 your construction of the similar language in the  
7 Oneida Treaty?  
8 A Well, it's not the same language. I was looking  
9 for the exact language that we see here or very  
10 similar that says -- I can't remember the exact  
11 phrase, but the same tenure as the Menominees --  
12 yeah.  
13 Q Would you like to reread that sentence?  
14 A Sure.  
15 Q It's exhibit -- it's the 1831 Treaty. Do you have  
16 a copy or you can read it from the marked exhibit?  
17 A I have a copy.  
18 Q It's the last sentence at the end of Article 1 on  
19 Page 320.  
20 A So it says, "Under such tenure as the Menominee  
21 Indians now hold their lands."  
22 Q Yes. So doesn't that make the tenure held by the  
23 Menominee relevant to the construction of the  
24 Treaty of 1838 with Oneida?  
25 A I'm not sure it does.

12 (Pages 42 - 45)

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1 I would need to look more closely  
 2 at this treaty and what was happening here because  
 3 this has to do with a tract of land for the  
 4 New York Indians, and this language is specific to  
 5 that action.  
 6 This, the 1838 Treaty language, is  
 7 different and specific to that treaty. So it's  
 8 not clear to me whether they mean the same thing.  
 9 Q Notwithstanding the language of the 1831 Treaty  
 10 that says it shall be the same land tenure?  
 11 A Well, that is for the -- for the purposes of that  
 12 action in 1831. So it's possible that by saying  
 13 held as other Indian lands are held, that the  
 14 treaty parties were achieving something different.  
 15 I just don't know because I haven't been able to  
 16 find --  
 17 Q You did not take that into account in your report?  
 18 Is that what you're saying?  
 19 A That's not what I'm saying, but I did not -- I did  
 20 not analyze this language in the 1831 Treaty in my  
 21 report.  
 22 Q Do you recall the language in the 1838 Oneida  
 23 Treaty directing the completion of a survey?  
 24 A Vaguely. I can look at the treaty to refresh my  
 25 memory.

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1 Q Feel free.  
 2 A Okay.  
 3 Q Do you recall, then, the language indicating that  
 4 there shall be a survey of the 1838 Treaty?  
 5 A Yes.  
 6 Q Did you locate any such survey in your research?  
 7 A I did not locate a survey of multiple tracts.  
 8 I did not locate a survey of -- the  
 9 survey itself that was conducted after this  
 10 treaty, but there is a -- I think it's an 1844  
 11 township survey or set of township surveys that  
 12 show a survey that was conducted after this  
 13 treaty.  
 14 Q So are you aware of an 1838 Treaty done by Suydam,  
 15 S-u-y-d-a-m?  
 16 A A treaty?  
 17 Q I'm sorry. A survey.  
 18 A I -- I am aware that some kind of survey took  
 19 place, but I haven't seen the survey itself.  
 20 (Exhibit No. 24 was marked for  
 21 identification.)  
 22 BY MS. LOCKLEAR:  
 23 Q Can you read the legend at the bottom of this  
 24 document, please?  
 25 A Only very sketchily. I can read that it says,

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1 "Map of Oneida Reservation." I can't read the  
 2 rest of what's on here. The copy isn't good  
 3 enough.  
 4 Q Can you determine from this document whether there  
 5 are lines representing individual tracts or a  
 6 single tract?  
 7 A The -- I mean, there are different lines on here,  
 8 but they are not -- they do not correspond to  
 9 individual tracts to the best of my ability to  
 10 determine.  
 11 Q Okay. In your second report, you rely upon -- do  
 12 you remember your discussion of an 1838 petition  
 13 signed by individual Oneidas?  
 14 A Yes.  
 15 Q Could you describe for us what you consider the  
 16 import of that document?  
 17 A I believe there were two petitions where  
 18 individuals wanted to cede their hundred-acre  
 19 tracts in order to obtain land west of the  
 20 Mississippi in exchange for lands that they were  
 21 to receive under the 1838 Treaty.  
 22 Q Do you recall whether -- who these individual  
 23 Oneidas were, the identity of them?  
 24 A No.  
 25 Q So you don't recall whether -- any of the names

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1 that you read as signatories to the 1838 Treaty  
 2 appeared on that list of petitioners?  
 3 A No.  
 4 Q Wouldn't that be relevant to determining the  
 5 significance of that document with regard to land  
 6 tenure?  
 7 A Perhaps, but there were plenty of people affected  
 8 by the treaty; and I assumed the signers of the  
 9 petition to also be part of the First Orchard or  
 10 Christian parties. I can't remember exactly  
 11 what -- how they're represented on the document.  
 12 Q Are you aware of any document that actually  
 13 surveyed or otherwise signified an actual  
 14 conveyance of a hundred acres to individual  
 15 Oneidas in 1838?  
 16 A No. There isn't one.  
 17 Q In your second report, you also rely on a December  
 18 1838 unratified treaty. Do you recall that  
 19 discussion?  
 20 A Yes.  
 21 Q Could you explain the significance of that in your  
 22 view?  
 23 A If I recall -- and maybe I should look at that  
 24 point in the report; but if I recall, that  
 25 unratified treaty was designed to accomplish the

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1 kind of exchange that some Oneida individuals had  
 2 requested to exchange hundred-acre parcels in  
 3 Wisconsin for 320-acre tracts elsewhere.  
 4 Q Do you have any information or do you recall the  
 5 identity of those Oneidas compared to the  
 6 signatories of the 1838 Treaty?  
 7 A No.  
 8 Q Would that not be relevant in determining the  
 9 intent of the Oneidas with regard to that  
 10 petition?  
 11 A My answer's the same as for the petition that I  
 12 gave previously, that they -- they were covered by  
 13 the treaty. So I don't...  
 14 Q But whether they negotiated the treaty would not  
 15 be relevant in determining whether those  
 16 individuals' view was an accurate reflection?  
 17 A No.  
 18 Q I see. Okay.  
 19 Did you do any research with regard  
 20 to Congress's view of the land tenure that was set  
 21 aside in the 1838 Oneida Treaty?  
 22 A No.  
 23 Q So you're not aware of an 1871 Act of Congress  
 24 granting a right-of-way across the Oneida  
 25 Reservation?

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1 A I'm not familiar with it.  
 2 Q Would that make a difference in your view if  
 3 Congress had passed a statute indicating common  
 4 land tenure by the Oneida?  
 5 A I would want to see the statute.  
 6 Q Do you have any information regarding a Supreme  
 7 Court decision regarding the land tenure held by  
 8 Oneida under the 1838 Treaty?  
 9 A No.  
 10 Q So you've never heard, then, of the case captioned  
 11 United States versus Cook?  
 12 A No.  
 13 Q If there were a Supreme Court decision that  
 14 indicated that the land tenure held under the 1838  
 15 Treaty was land held in common, would that  
 16 influence your view?  
 17 A When did this decision occur?  
 18 Q 1874.  
 19 A I would certainly consider it.  
 20 Q When we discussed earlier how you go about  
 21 weighing evidence and taking things into account,  
 22 you indicated that it's your job as a historian to  
 23 take into account all evidence on both sides; is  
 24 that correct?  
 25 A Yes.

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1 Q Do you feel as if you took all evidence into  
 2 account to construe the 1838 Treaty as granting  
 3 individual tracts rather than land in common?  
 4 A I did my best to collect documents from the period  
 5 surrounding the treaty which, you know, have  
 6 looked close in time to the treaty itself in  
 7 trying to understand what happened there.  
 8 So that was -- that was how I went  
 9 about trying to answer that question.  
 10 Q Why didn't you take into account the 1887  
 11 instruction to allot the Oneida reservation which  
 12 on its face, cited by you, plainly rejected your  
 13 construction of the 1838 Treaty?  
 14 MR. KOWALKOWSKI: Which document are you  
 15 referring to?  
 16 MS. LOCKLEAR: 1887 letter authorizing  
 17 the allotment of the Oneida Reservation.  
 18 BY THE WITNESS:  
 19 A And my -- if I recall correctly, my reading of  
 20 that was that it was not immediately close in time  
 21 to the treaty itself. So I would certainly  
 22 consider it, but give it less weight.  
 23 BY MS. LOCKLEAR:  
 24 Q Did you explain that in your report?  
 25 A I thought I did.

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1 Q In your initial report with regard to the  
 2 construction of the treaty?  
 3 A I didn't address the construction of the treaty in  
 4 my initial report.  
 5 Q In your initial report regarding the treaty.  
 6 A So in my second --  
 7 Q Which would be your second report, yes.  
 8 A In my second report, I can't recall if I addressed  
 9 it there because I was looking at it in response  
 10 to one of the other experts' reports; and I can't  
 11 remember if it was in my second report or my third  
 12 report.  
 13 Q So is it fair to say, then, that your second  
 14 report, which addresses the bulk of your argument  
 15 with regard to the treaty, is not a comprehensive  
 16 review of the history with regard to the 1838  
 17 Treaty even contemporaneously or otherwise?  
 18 A It is a response to what the Nation's experts said  
 19 about the treaty, and I focused on documents I was  
 20 able to find that were proximate to the treaty  
 21 that immediately surrounded the treaty to try to  
 22 understand what the treaty meant.  
 23 Q Do you have any serious doubt, Dr. Greenwald, that  
 24 Federal officials consistently from 1838 until the  
 25 allotment of the reservation in 1891 considered

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1 the land tenure of the Oneidas to be held in  
 2 common?  
 3 A I acknowledge that they administered the  
 4 reservation as land held in common.  
 5 I do think there are documents in  
 6 the immediate aftermath of the treaty that suggest  
 7 that wasn't the original intent or understanding  
 8 of the treaty provision.  
 9 Q But specifically the view of the BIA with regard  
 10 to land tenure of the reservation it administered,  
 11 as you admit, consistently reflects common land  
 12 tenure, does it not?  
 13 MR. KOWALKOWSKI: Objection. Asked and  
 14 answered.  
 15 BY THE WITNESS:  
 16 A I acknowledge that the BIA regarded the land area  
 17 as being held in common.  
 18 BY MS. LOCKLEAR:  
 19 Q And let me ask you this: If you were correct, if  
 20 your construction of the treaty were correct, why  
 21 was it necessary to allot the reservation in 1891?  
 22 A It never came to pass that the reservation was  
 23 divided up as the original treaty called for or  
 24 that those hundred-acre tracts were assigned to  
 25 individuals. So the land area was never divided

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1 up that way.  
 2 In the 1880s, the Federal  
 3 Government believed that the Oneida were in such a  
 4 condition to be ready for individual land tenure  
 5 and sought to achieve that by applying the Dawes  
 6 Act.  
 7 Q Doesn't that history in and of itself indicate  
 8 that your construction of the 1838 Treaty is  
 9 simply wrong?  
 10 A Not to my mind.  
 11 Q Not to your mind. Okay.  
 12 Let's talk about the General  
 13 Allotment Act then. Let me be clear before we  
 14 begin this discussion. Do you have any doubt that  
 15 the Federal Government viewed the Oneida  
 16 Reservation as held in common at the time it  
 17 allotted it in 1891?  
 18 A No.  
 19 Q Okay. You state in your reports that the  
 20 reservation was abolished by operation of the  
 21 Dawes Act; is that correct?  
 22 A I do think I stated that.  
 23 Q Sometimes you use the word "diminish," and  
 24 sometimes you use the word "disestablish." Could  
 25 you explain what the difference is?

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1 A This has been a tough question for me to address  
 2 because I recognize that there is a distinction;  
 3 but as a historian, I don't know exactly how to  
 4 define it or where it lies.  
 5 I understand disestablishment to  
 6 mean that the reservation ceased to exist, no  
 7 longer existed, and diminishment to mean that the  
 8 boundaries changed so as to encompass a smaller  
 9 area of land.  
 10 And as a historian, I have not been  
 11 able to figure out where that line lies in this  
 12 particular situation. So I'd like to leave that  
 13 one to the court and focus on what I can  
 14 confidently do as a historian, which is present  
 15 the historical evidence.  
 16 Q So does that mean in your mind the historical  
 17 evidence of the two are the same?  
 18 A Not necessarily. I just don't -- I just don't  
 19 know how to apply the distinction between  
 20 diminishment and disestablishment to this  
 21 situation where the original land area was reduced  
 22 to a very small acreage of tribal and individual  
 23 allotted trust lands, and they were scattered; and  
 24 I don't know whether that should be defined as  
 25 diminishment or disestablishment.

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1 I just, as a historian, don't have  
 2 a good -- I don't have my own definition of that.  
 3 I have tried to understand what it means in a  
 4 legal sense; and it just still escapes me in this  
 5 situation how you characterize what happened  
 6 there, whether that constitutes diminishment or  
 7 disestablishment.  
 8 In either case, it's my opinion  
 9 that the outer boundaries of the reservation cease  
 10 to exist and what remained was a small amount of  
 11 scattered trust land.  
 12 Q Well, if it's diminishment, does that not suggest  
 13 that the boundaries, then, are fluid, they come  
 14 and go depending on how much land is in trust?  
 15 A Again, I just -- I just don't -- I don't know how  
 16 the courts apply those terms.  
 17 Q But under your -- as a historian, under your  
 18 analysis, it seems to me this is an important  
 19 distinction because it might affect how the Oneida  
 20 Reservation exists today, whether it was  
 21 disestablished or whether it was diminished.  
 22 Is it your view as a historian that  
 23 the Oneida Reservation does not exist at all today  
 24 or is it your view as a historian that the Oneida  
 25 Reservation exists, but consists of whatever the

15 (Pages 54 - 57)

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1 number of trust lands is?

2 A Again, I just struggle with -- I struggle with

3 this.

4 What I can confidently say as a

5 historian is that the land holding in trust was

6 reduced to small acreage that the Federal

7 Government regarded its jurisdiction over

8 everything else that was not in trust to have

9 ended and the outer boundaries to have been

10 eliminated or the original boundaries to have been

11 eliminated; and yes, it was possible for that

12 trust acreage to change over time. To my

13 understanding as a historian, it did change over

14 time; and especially after the Indian

15 Reorganization Act, the tribe began to reacquire

16 land in trust.

17 Where I struggle as a historian is

18 whether that constitutes a reservation or not. I

19 just don't have a good enough definition or

20 understanding, and I'd like to leave that

21 determination to the judge.

22 Q So do I understand you express no opinion as to

23 whether it's disestablished or whether it's

24 diminished?

25 A My opinion is that one of those things happened.

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1 I just can't determine which -- which of those it

2 is.

3 Q According to your CV, you were a project manager

4 in a case called Nebraska versus Parker; is that

5 correct?

6 A Yes.

7 Q So does that mean you have some familiarity with

8 that case?

9 A Yes.

10 MS. LOCKLEAR: I'd like to mark this for

11 the next document.

12 (Exhibit No. 25 was marked for

13 identification.)

14 BY MS. LOCKLEAR:

15 Q Do you recognize this?

16 A This is the Supreme Court decision in that case,

17 Nebraska versus Parker.

18 Q Could you please turn to Page 3 of this particular

19 publication of the decision. Under II, second

20 paragraph, could you read the first two sentences,

21 please?

22 A "We must determine whether Congress diminished the

23 Oneida" --

24 Q I'm sorry. Second paragraph.

25 A Oh, sorry.

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1 "The framework we employ to

2 determine whether an Indian reservation has been

3 diminished is well settled." Can I skip the

4 references or would you like me to read that?

5 Q You can skip the reference.

6 A Okay. "Only Congress can divest a reservation of

7 its land and diminish its boundaries, and its

8 intent to do so must be clear. To assess whether

9 an Act of Congress diminished a reservation, we

10 start with the statutory text, for the most

11 probative evidence of diminishment is, of course,

12 the statutory language used to open the Indian

13 lands."

14 Q Now, would you turn to the next page, please, and

15 read into the record the first complete sentence

16 on the second line beginning "Common textual

17 indications"?

18 A "Common textual indications of Congress's intent

19 to diminish reservation boundaries include

20 explicit reference to cession or other language

21 evidencing the present and total surrender of all

22 tribal interests or an unconditional commitment

23 from Congress to compensate the Indian tribe for

24 its open land."

25 Q Thank you.

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1 MS. LOCKLEAR: Please mark this

2 document.

3 (Exhibit No. 26 was marked for

4 identification.)

5 BY MS. LOCKLEAR:

6 Q Do you recognize what was just handed to you

7 marked as Exhibit 26?

8 A Yes. This is the 1887 Dawes Act.

9 Q And as I understand your testimony in your report,

10 it's your view that, by operation of this act, the

11 Oneida reservation was either diminished or

12 abolished; is that correct?

13 A I would just enlarge that a little bit, that the

14 operation of the Dawes Act, its amendments, and

15 the 1906 Appropriation Act that authorized fee

16 patents for Oneidas.

17 Q We'll get to those. I understand.

18 A Okay.

19 Q But focusing for the moment on this act, can you

20 identify for us the language in this statute which

21 abolishes reservations?

22 A It doesn't have explicit language to that effect.

23 It calls for a process by which a

24 reservation would be allotted in severalty. The

25 allotments would be fee-patented and would pass

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1 out of trust control. They would become -- they  
2 would fall under state and local jurisdiction.  
3 And then if there was any land remaining, it could  
4 be acquired and opened to settlement by the United  
5 States.  
6 Q And that's the operation in your view that applied  
7 to Oneida to abolish the reservation?  
8 A Yes. That's the process that occurred at the  
9 Oneida reservation.  
10 Q But you find nothing in the statute itself that  
11 explicitly refers to abolition of reservation  
12 boundaries?  
13 A That's correct.  
14 If you look at the legislative  
15 history of the Act, there was a proposed amendment  
16 that said that no reservation should be abolished  
17 without the consent of the tribe essentially --  
18 I'm paraphrasing a little -- and that was  
19 rejected; and so I -- that's part of my  
20 consideration in how I understand the Dawes Act,  
21 as well as other parts of the legislative history  
22 of the Act.  
23 Q Well, sticking with the framework that you just  
24 read from the Nebraska versus Parker decision that  
25 looked for explicit language in the Act itself.

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1 As I understand it, you don't find that language  
2 in the General Allotment Act?  
3 A I don't find explicit language saying that this  
4 shall abolish reservations.  
5 But I do find a process here that  
6 was designed to eliminate reservations; and in my  
7 second report, I situated that in the legislative  
8 history and larger policy context, that shows that  
9 this Act was designed to eliminate reservations.  
10 Q We'll get to those, but sticking for the time  
11 being with the standard that's set out in Nebraska  
12 versus Parker, I understand you to say there is no  
13 explicit language in the General Allotment Act  
14 that abolishes reservations; is that correct?  
15 A Yeah. I believe I've said a couple times now.  
16 Q Is there any language in the General Allotment Act  
17 following, again, the standard from Nebraska  
18 versus Parker, that refers to a cession of land  
19 from Indians to the United States?  
20 A I don't believe so.  
21 Q Okay. You referenced, when you were describing  
22 amendments to the GAA, a 1902 Act?  
23 A You might want to for the record, explain what you  
24 mean by GAA. I know, but I don't know if --  
25 Q General Allotment Act.

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1 MS. LOCKLEAR: Would you mark this,  
2 please?  
3 (Exhibit No. 27 was marked for  
4 identification.)  
5 BY MS. LOCKLEAR:  
6 Q Do you recognize this document?  
7 A This is a 1902 Appropriation Act.  
8 Q Is this the same Appropriation Act you discussed  
9 in your first report?  
10 A I believe so.  
11 Q I refer you to Page 275, which is, as I recall,  
12 the language you discuss in your report.  
13 Can you identify for us in this  
14 statute explicit language authorizing the  
15 abolition of reservations?  
16 A It doesn't have that language.  
17 Q Does it have language -- other language described  
18 in Nebraska versus Parker such as directing a  
19 cession of land from the tribe to the United  
20 States?  
21 A No.  
22 MS. LOCKLEAR: Can you mark this?  
23 (Exhibit No. 28 was marked for  
24 identification.)  
25

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1 BY MS. LOCKLEAR:  
2 Q Do you recall mentioning other amendments to the  
3 General Allotment Act?  
4 A Yes.  
5 Q Did you reference one in 1906?  
6 A Yes.  
7 Q Do you recognize this exhibit?  
8 A This is a part of the 1906 Appropriation Act, and  
9 I wonder if you mean to be talking about the Burke  
10 Act right now.  
11 Q Well, we have that as well. We'll discuss both.  
12 A Okay. Sorry. What's your question?  
13 Q The question is: You relied upon this, as I  
14 recall in your report, as evidence of abolition of  
15 the Oneida Reservation. Can you point to us  
16 explicit language abolishing the Oneida  
17 Reservation in this statute?  
18 A No.  
19 Q Can you report to us or identify for us explicit  
20 language directing a cession of land from the  
21 Oneidas to the United States?  
22 MR. KOWALKOWSKI: I would object to the  
23 extent that Exhibit 28 is not complete. It is a  
24 single page of that 1906 Appropriation Act.  
25 But subject to that objection, you

17 (Pages 62 - 65)

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1 can answer if you can.

2 BY THE WITNESS:

3 A Right. To the best of my recollection elsewhere

4 in the Act, there's no such language.

5 (Exhibit No. 29 was marked for

6 identification.)

7 BY MS. LOCKLEAR:

8 Q Can you identify for us what Exhibit 29 is?

9 A This is a 1906 Act to amend the Dawes Act that is

10 commonly known as the Burke Act.

11 Q Can you locate for us any language in this statute

12 that explicitly abolishes an Indian reservation in

13 general or Oneida in particular?

14 A There is no explicit language to that effect.

15 Q And is there language directing the cession of

16 land from any particular tribe including Oneida or

17 all tribes to the United States?

18 A No.

19 Q Thank you.

20 If these statutes did not

21 explicitly abolish a reservation, explain to us

22 how diminishment or disestablishment occurs as a

23 result of them.

24 A These acts were part of a policy of breaking up

25 reservations; and in the Oneida case, that process

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1 was followed through to its completion. The

2 reservation was fully allotted. The allotments,

3 except for a very small number, were fee-patented

4 and passed out of Federal jurisdiction; and all

5 that remained were small trust holdings either for

6 the tribe or for individual Indians and a couple

7 of -- I believe there were a couple of trust

8 parcels held for the purpose of schools.

9 So these acts had the effect of

10 taking land out of the reservation and out of

11 Federal jurisdiction and making it subject to

12 state and local jurisdiction as the Dawes Act

13 intended.

14 Q When you say had the effect of taking it out of

15 the reservation, is there anything in the Dawes

16 Act that says that? Doesn't the Dawes Act instead

17 refer to title?

18 A If I recall correctly, the Dawes Act authorized

19 the issuance of fee simple patent to allottees

20 after the trust period expired; and then we've

21 looked at a couple of amendments that shortened

22 the original 25-year term called for in the Dawes

23 Act. So it was possible for allottees to receive

24 fee patents earlier.

25 These different acts specified that

Page 68

1 the land, once it was fee-patented, fell -- was

2 subject to taxation. It was no longer trust land,

3 no longer restricted land. I believe the Dawes

4 Act also contains a provision conveying

5 citizenship on allottees, so they cease to be

6 wards of the Federal Government.

7 Initially, according to the Dawes

8 Act, upon receiving allotments, the Burke Act

9 amended that but only for allotments issued going

10 forward. So the Oneida allotments which were

11 issued prior to the Burke Act fell under the Dawes

12 Act provisions where Indians became citizens upon

13 receiving allotments.

14 And then finally, you have -- that

15 1906 Appropriation Act had a section related to

16 the Oneida that specifically gave the Secretary of

17 the Interior the authority to remove restrictions

18 on Oneida allotments and said that they were

19 subject -- I can't remember the exact language,

20 but -- if you don't mind, I'm just going to look

21 back so I get it right.

22 Q Sure.

23 A So the issuance of said patents shall operate as a

24 removal of all restrictions as to the sale,

25 encumbrance, or taxation of the land so patented.

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1 Q Would you please read the whole sentence so that

2 we know what is being patented?

3 A I'm sorry. I read the wrong sentence.

4 It's removal of all restrictions as

5 to the sale, taxation, and alienation of the land

6 so patented, so -- okay. The whole sentence says

7 that the Secretary of the Interior be and is

8 hereby authorized -- oh, sorry -- and he is hereby

9 authorized, in his discretion, to issue a

10 patent-in-fee to any Indian of the Oneida

11 Reservation in Wisconsin for the lands heretofore

12 allotted him, and the issuance of such patent

13 shall operate as a removal of all restrictions as

14 to the sale, taxation, and alienation of the land

15 so patented.

16 Q So is it your testimony, then, that this statute

17 mandated the immediate issuance of fee patents to

18 all Oneida allottees?

19 A No.

20 Q Do you read this to leave discretion in the

21 Secretary?

22 A Yes.

23 Q Do you know if, in fact, immediately following

24 this statute all Oneidas received immediate fee

25 patents?

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1 A I don't believe they did.

2 Q Let's take these concepts that you just

3 identified, then, one at a time. We're going to

4 start, first, with removing restrictions on land.

5 Do you remember in your discussion

6 of the meaning of reservation in your report,

7 No. 2, your second report, you quote an excerpt

8 from the 2012 edition of Cohen's handbook of

9 Federal Indian law?

10 A I do remember that. I don't remember exactly

11 where in my report that is.

12 Q Page 4 of your second report.

13 A Thank you.

14 MS. LOCKLEAR: We're going to mark this.

15 (Exhibit No. 30 was marked for

16 identification.)

17 BY MS. LOCKLEAR:

18 Q Do you recognize this document that we just marked

19 as Exhibit 30 as the citation in your report?

20 A Yes.

21 Q Would you please read the first sentence under

22 caption "Reservations"?

23 A "The first subsection of the Indian country

24 definition includes," quote, "all land within the

25 limits of any Indian reservation under the

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1 jurisdiction of the United States Government,

2 notwithstanding the issuance of any patent and

3 including rights-of-way running through the

4 reservation," end quote.

5 Q Doesn't this language flatly contradict your

6 understanding of the General Allotment Act as

7 altering reservation boundaries by changing

8 title?

9 A My understanding of this definition of Indian

10 country is that it relates to a 1948 statute, so

11 something that transpired long after the Dawes

12 Act.

13 So my role as a historian is to

14 look at the Dawes Act and these amendments in

15 their own time and what they were seeking to

16 achieve. So this reflects a later act of

17 Congress regarding where criminal jurisdiction

18 applied.

19 Q Do you recall your discussion in your report of

20 the case Solem versus Bartlett by the Supreme

21 Court?

22 A I believe I mentioned that case and the factors

23 that the Supreme Court -- I'm trying to find the

24 right word -- articulated regarding situations

25 where there are surplus land acts and whether they

Page 72

1 diminished reservations.

2 (Exhibit No. 31 was marked for

3 identification.)

4 BY MS. LOCKLEAR:

5 Q Do you recognize Exhibit No. 31?

6 A It is the Supreme Court decision in Solem versus

7 Bartlett.

8 Q Could you turn to Page 473, please, of this

9 particular copy of the decision and read into the

10 record the first complete sentence beginning at

11 the top of the page, "The first and governing"?

12 I'm sorry. 473 is the internal

13 citation. It's Page 3 in this copy.

14 A "The first and governing principle is that only

15 Congress can divest a reservation of its land and

16 diminish its boundaries."

17 Q And the next sentence too, please.

18 A "Once a block of land is set aside for an Indian

19 reservation and no matter what happens to the

20 title of individual plots within the area, the

21 entire block retains its reservation status until

22 Congress explicitly indicates otherwise."

23 Q Do you recall the date of the particular surplus

24 lands act that was being construed by the Supreme

25 Court in this case?

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1 A No.

2 Q Do you want to take a moment to examine that? If

3 you look at the beginning, it will give you the

4 date; the first page, the first line of the

5 decision, in fact.

6 A I'm looking there, and it refers to a May 29th,

7 1908, Act of Congress that opened the land to

8 settlement.

9 Q And do you recall what statute the Supreme Court

10 relied on in that case to reach its conclusion in

11 part?

12 A No.

13 Q If you'll look at Footnote 1 of the decision,

14 you'll find the Indian country statute that you

15 previously read into the record. Can you locate

16 that?

17 A Can you give me -- okay. I see the footnote. It

18 says, Indian country is defined in 18 U.S.C.

19 Section 1151. Would you like me to continue?

20 Q No. That's fine.

21 So isn't it correct that the

22 Supreme Court construed the 1948 Indian country

23 statute to determine the effect of a 1908 surplus

24 lands act?

25 A I don't want to represent what the Supreme Court

19 (Pages 70 - 73)

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1 did. I'm -- I have seen this decision before, but  
 2 I haven't read it in detail.  
 3 Q Let me ask it another way then.  
 4 If you were to come across a  
 5 Supreme Court decision that indicated the 1948  
 6 Indian country statute applies to determine the  
 7 effect of prior acts of Congress, would that  
 8 affect your interpretation of the Dawes Act?  
 9 MR. KOWALKOWSKI: Object as to form. It  
 10 calls for a legal conclusion.  
 11 MS. LOCKLEAR: She has made legal  
 12 conclusions all throughout her report. I think  
 13 she has held herself out as qualified to do so.  
 14 MR. KOWALKOWSKI: Well, I --  
 15 THE WITNESS: How have I made legal  
 16 conclusions? I'd be interested in knowing just  
 17 because I try to make conclusions as a historian.  
 18 BY MS. LOCKLEAR:  
 19 Q We'll get to the Big Sheep case that you discuss  
 20 later, but for right now, would you please just  
 21 answer this question?  
 22 MR. KOWALKOWSKI: Well, same objection  
 23 for the record that in her role as a historian, it  
 24 is not her job to make the legal conclusions.  
 25 It's ultimately the responsibility of the Court

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1 based upon the historic record as depicted by an  
 2 expert.  
 3 I mean, subject to the objection,  
 4 if you can answer, you can try.  
 5 BY THE WITNESS:  
 6 A I'm not attempting to make any kind of legal  
 7 conclusion; and in fact, I'm trying to look at the  
 8 history in its own time, on its own terms; and I  
 9 recognize that at later points in time, legal  
 10 precedents have been set.  
 11 As a historian, I don't -- I don't  
 12 always understand exactly what they mean or how a  
 13 court would apply them to the history that I am  
 14 looking at for a particular case. So this doesn't  
 15 change my way of thinking about what happened  
 16 historically.  
 17 BY MS. LOCKLEAR:  
 18 Q Nonetheless, you persist in your view that the  
 19 1948 Indian country statute does not apply?  
 20 MR. KOWALKOWSKI: Objection. Misstates  
 21 her testimony.  
 22 MS. LOCKLEAR: She can correct me.  
 23 BY THE WITNESS:  
 24 A Does not apply to what?  
 25

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1 BY MS. LOCKLEAR:  
 2 Q You indicated that the 1948 statute, as I recall  
 3 you testified, it does not apply to this case  
 4 because it was adopted in 1948, and we're  
 5 construing a statute before that year.  
 6 A I didn't say it doesn't apply to this case. I'd  
 7 leave that to the judge to determine.  
 8 But I am arguing that at the point  
 9 in time that I was investigating, that statute did  
 10 not exist; and so the understanding was different  
 11 from what it is now.  
 12 Q Okay. Let's move on, then, to other cases you do  
 13 discuss, staying with this topic of the change in  
 14 title affecting the boundaries of the reservation.  
 15 MS. LOCKLEAR: Could you mark this,  
 16 please?  
 17 (Exhibit No. 32 was marked for  
 18 identification.)  
 19 BY MS. LOCKLEAR:  
 20 Q Do you recognize this document?  
 21 A Yes. It is a listing of some cases and sections  
 22 of the U.S. Code under Title 25.  
 23 Q Do you recall your discussion of this case? And  
 24 could you explain -- or this document, and explain  
 25 its significance to you?

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1 A Can we look at the part in my report where I  
 2 mentioned it?  
 3 Q Certainly.  
 4 A Can you help me find that?  
 5 Q Yes, your first report, Page 29.  
 6 A I don't have a copy of that.  
 7 Q There's Page 29.  
 8 A Okay. I'm sorry. Repeat the question.  
 9 Q What did you consider the significance of this  
 10 document?  
 11 A This document was giving some legal guidance to  
 12 the -- to the employees of the Office of Indian  
 13 Affairs regarding the status of Indians who had  
 14 obtained allotments in fee, and it said that -- it  
 15 summarized the decision.  
 16 It said, "An Indian who has  
 17 obtained patent-in-fee to his allotment not only  
 18 is a citizen of the United States but has all the  
 19 rights, privileges and immunities of citizens of  
 20 the United States and is subject to the civil and  
 21 criminal laws of the state. He is no longer a  
 22 ward of the government."  
 23 Q So you do cite cases from time to time, rely upon  
 24 legal analyses from time to time?  
 25 A I do cite cases from time to time.

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1 In this instance, I'm pointing out  
2 that this summary of that case -- which I did not  
3 read myself; I'm just taking note of this -- as a  
4 historical document that offered guidance to  
5 employees of the Bureau of Indian Affairs or  
6 Office of Indian Affairs, its predecessor name as  
7 it says at the top of the document, about the  
8 status of Indians. So this reflects the  
9 understanding of the Bureau of Indian affairs and  
10 the Department of the Interior about the effect of  
11 that decision. I'm not drawing a legal conclusion  
12 about it.  
13 Q Did you investigate, in fact, whether what had  
14 happened in subsequent litigation to any of the  
15 cases cited in this memo?  
16 A No.  
17 Q What is the first case that's listed there?  
18 A In Re: Celestine.  
19 Q And can you read me the citation for that?  
20 A 114 Fed 551.  
21 Q And the year?  
22 A 1902.  
23 (Exhibit No. 33 was marked for  
24 identification.)  
25

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1 BY MS. LOCKLEAR:  
2 Q Could you read the caption of Exhibit 33 into the  
3 record, please?  
4 A 215 U.S. 278 (1909), United States v. Celestine.  
5 Q And could you please turn to Page 3 of this  
6 particular copy of the court's decision and read  
7 into the record, if you would, please, the three  
8 sentences that begin as the second full paragraph,  
9 "It is not disputed that the lands" at the top of  
10 the page?  
11 A Okay. This is quoting another decision, it  
12 appears.  
13 "It is not disputed that the lands  
14 are part of those set apart as the Puyallup  
15 Reservation and that the reservation has not been  
16 directly revoked, but it has contended that the  
17 allotment of the lands in severalty, and  
18 afterwards making the Indians citizens,  
19 necessarily had the effect to revoke the  
20 reservation."  
21 Q And continue on, please, next two sentences as  
22 well.  
23 A "There is plausibility in the argument, and it  
24 needs to be carefully considered. It is clear  
25 that the allotment alone could not have this

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1 effect" -- I'll omit the citation -- "and  
2 citizenship can only have it if citizenship is  
3 consistent [sic] with the existence of a  
4 reservation. It is not necessarily so."  
5 Q Could you please repeat that last -- second to the  
6 last sentence? Because I think you misread one  
7 word.  
8 A Okay.  
9 Q "It is clear that."  
10 A "It is clear that the allotment alone could not  
11 have this effect, and citizenship can only have it  
12 if citizenship is inconsistent with the existence  
13 of a reservation."  
14 Q Thank you.  
15 So isn't this, in effect, the  
16 Supreme Court overruling the case that was relied  
17 on in the document you cited stating a rule that's  
18 flatly inconsistent with your view?  
19 MR. KOWALKOWSKI: Object. Calls for a  
20 legal conclusion.  
21 BY THE WITNESS:  
22 A I don't -- I don't quite track what's being said  
23 there. I'm going to go back to Exhibit 32 to see  
24 what this says about it.  
25 The understanding of this Act, if I

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1 were to treat this the same way that I treated  
2 the -- this document, Exhibit 32, for the purposes  
3 of the Big Sheep decision, this document says of  
4 Celestine, "The general rule is that an Indian  
5 born within the U.S., to whom an allotment of land  
6 in severalty has been made pursuant to law,  
7 becomes a citizen of the United States" -- or  
8 sorry -- "of the U.S., with all the rights,  
9 privileges, and immunities of such, among which is  
10 the right to sue in any proper forum, Federal or  
11 state, and thereafter the government is relieved  
12 from the duty of representing him in suits  
13 involving his personal or domestic rights."  
14 So that's the piece of it that I  
15 would have been looking at; and I don't think that  
16 contradicts or overrules the statement about Big  
17 Sheep in this same document.  
18 BY MS. LOCKLEAR:  
19 Q The question, though, is whether or not the  
20 Supreme Court's consideration of that same case on  
21 appeal overrules your reliance on that?  
22 MR. KOWALKOWSKI: Object as to form and  
23 also calls for a legal conclusion.  
24 BY THE WITNESS:  
25 A This -- I'm using this document, Exhibit 32, as it

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1 stands; and it doesn't include the same section --  
 2 the same language or statement that you asked me  
 3 to read out of this Celestine 1909 Supreme Court  
 4 decision.  
 5 So in terms of how the Bureau of  
 6 Indian Affairs at the time was taking that into  
 7 consideration, I don't know. It's not reflected  
 8 here in this document.  
 9 BY MS. LOCKLEAR:  
 10 Q Let me ask you this then. Is the language that  
 11 you read from the 1909 Supreme Court decision  
 12 inconsistent with the view that's stated in that  
 13 document?  
 14 MR. KOWALKOWSKI: Same objection.  
 15 BY THE WITNESS:  
 16 A So the statement here, which is quoting from an  
 17 appeals court decision, I don't know how it's  
 18 being used in the larger context of this decision.  
 19 So I don't want to say anything conclusive. I'm  
 20 not comfortable saying anything conclusive about  
 21 this.  
 22 BY MS. LOCKLEAR:  
 23 Q Okay. So you persist in your view, then, that  
 24 citizenship is inconsistent with continued  
 25 wardship on a reservation?

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1 A At the point in time that we are discussing --  
 2 that I am discussing in my report.  
 3 Q What's the date, again, of the Celestine decision?  
 4 A This is 1909.  
 5 Q So doesn't that flatly contradict your statement  
 6 that in the early 20th century, citizenship was  
 7 deemed inconsistent with continued wardship?  
 8 A I -- I'm not -- wait. Sorry. Say that again.  
 9 Q Your statement that at the early 20th century,  
 10 citizenship was deemed inconsistent with continued  
 11 wardship directly contradicts the Supreme Court  
 12 statement in 1909?  
 13 A I don't -- I don't see how it does.  
 14 Q Let me read again to you the sentence, "It is  
 15 clear that the allotment alone could not have this  
 16 effect, and citizenship can only have it if  
 17 citizenship is inconsistent with the existence of  
 18 a reservation. It is not necessarily so."  
 19 A That doesn't -- that doesn't offer a statement  
 20 about whether citizenship and wardship are  
 21 incompatible or compatible.  
 22 It's my understanding as a  
 23 historian that until 1924, Federal Government  
 24 considered wardship to be inconsistent with  
 25 citizenship in the case of Native Americans. They

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1 had to initially -- strike that. I don't have a  
 2 complete thought to express there.  
 3 Q Okay. So we'll just let the Supreme Court  
 4 decision speak for itself then.  
 5 So assuming for the sake of  
 6 argument, then, that your theory of  
 7 disestablishment and construction of the General  
 8 Allotment Act has not been repudiated by the  
 9 Supreme Court, could you explain for us exactly  
 10 when either diminishment or disestablishment  
 11 occurred at Oneida? I can't come up with a date  
 12 out of your reports.  
 13 A I don't have an exact date, but as I explained in  
 14 my reports, I understand this to be a process of  
 15 allotment in severalty, fee patenting, and then  
 16 ultimately a lot of those fee-patented lands were  
 17 alienated.  
 18 To me, based on the historical  
 19 context, the important part of that is the fee  
 20 patenting of the allotted land, so taking them out  
 21 of the trust. And for the Oneida -- first of all,  
 22 virtually all of the land was allotted; and  
 23 virtually all of it, then, passed out of trust  
 24 status by 1927, which was when the last action  
 25 extending the trust period on the small number of

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1 allotments occurred. So it's my opinion that this  
 2 process was complete in the 1920s.  
 3 Q In the 1920s?  
 4 A Yes.  
 5 Q Can we be a little more precise with the language  
 6 at various times with regard to allotment? You  
 7 say fully allotted, virtually all allotted.  
 8 A Every -- by -- okay. Every person who is entitled  
 9 to receive an allotment did; and that took up the  
 10 entirety of the reservation with the exception of  
 11 some -- as I understand it, some very small tracts  
 12 of land that were set aside for the purpose of  
 13 schools.  
 14 So after this whole process was  
 15 completed, all of -- virtually all of the land,  
 16 except for this very small amount, had been  
 17 allotted. There were some cases in which the  
 18 allotments were deemed to be incorrect or some --  
 19 maybe they were assigned to somebody ineligible or  
 20 maybe the same person received two allotments. So  
 21 there were few of those that reverted back to the  
 22 tribe; and then there were that small number of  
 23 allotments that remained in trust as of 1927,  
 24 though the restrictions may have been removed on  
 25 some of those later.

22 (Pages 82 - 85)

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1 In 1934, the Indian Reorganization  
 2 Act ended the process of allotting and fee  
 3 patenting lands to Indians, although it was still  
 4 possible for an allottee to ask for his or her  
 5 restrictions to be removed after that date.  
 6 Q Let's stick with that first issue first, the  
 7 question of allotment.  
 8 So as I understand what you're  
 9 saying, technically at the time of allotment,  
 10 there were acres that remained on the Oneida  
 11 Reservation that were unallotted?  
 12 A Yes. It's my understanding there's a small amount  
 13 of acreage that remained unallotted.  
 14 Q Let's take the second issue then, and that is the  
 15 existence of the trust patents as of the adoption  
 16 of the IRA in 1934.  
 17 Technically, isn't it correct that  
 18 35 allotments remained in trust by virtue of  
 19 executive orders at the time of the IRA?  
 20 A I need to refresh my memory regarding the numbers  
 21 here that remained at the time of those executive  
 22 orders, if you'll give me a moment.  
 23 Q Sure.  
 24 A I don't have the specific number here. Wait.  
 25 Hold on. Here we go.

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1 So the 1927 executive order  
 2 extended the trust period on 21 allotments, and I  
 3 don't know how many those still remained in trust  
 4 in 1934.  
 5 Q Do you have an opinion on how many acres that  
 6 might have been?  
 7 A I don't know, but given that the allotments were  
 8 either 90 or 45 acres each, depending on the  
 9 status of the individual, it would have been --  
 10 let's see; I have to do some math here -- it would  
 11 have been less than 2,000 acres, but I don't know  
 12 the amount.  
 13 Q Okay. So do we agree, then, as I think you state  
 14 in your report, that as of the beginning of the  
 15 20th century, the Oneida Reservation was  
 16 administered as an Indian reservation?  
 17 A I'm sorry. At what point in time are we talking  
 18 about?  
 19 Q Well, you say the turn of the century. So I  
 20 assume --  
 21 A Okay. Yes.  
 22 Q -- 1900.  
 23 A Yes.  
 24 Q By whom was it administered as such?  
 25 A By the Federal Government.

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1 Q Specifically?  
 2 A The Bureau of Indian Affairs.  
 3 Q So let's look at those then.  
 4 (Exhibit No. 34 was marked for  
 5 identification.)  
 6 BY MS. LOCKLEAR:  
 7 Q As I recall, you testified that annual reports of  
 8 the Commissioner of Indian Affairs were one of the  
 9 basic documents you examined in coming to your  
 10 opinions in this case; is that correct?  
 11 A Yes.  
 12 Q Could you identify Exhibit No. 34, please?  
 13 A This is an excerpt of the Annual Report of the  
 14 Commissioner of Indian Affairs for 1902.  
 15 Q Would you read the first two sentences -- well,  
 16 first of all, read the caption of this particular  
 17 report for the record.  
 18 A This is "Report of School Superintendent in Charge  
 19 of Oneida Indians."  
 20 Q And just skip down to the bottom and tell us who  
 21 the signatory is.  
 22 A Joseph Hart.  
 23 Q Identified as?  
 24 A Superintendent.  
 25 Q Would you please read the first two sentence of

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1 this report into the record.  
 2 A "Sir, I have the honor to submit my third annual  
 3 report for the Oneida Indian school and  
 4 reservation. This reservation contains  
 5 65,400 acres lying between the counties of Brown  
 6 and Outagamie."  
 7 Q So this reflects the Federal Government's  
 8 understanding that they are administering the  
 9 entire reservation, allotted and unallotted, as of  
 10 1900, and this one is 1902; is that correct?  
 11 A I think that's correct.  
 12 Q Thank you.  
 13 MS. LOCKLEAR: Mark this, please.  
 14 (Exhibit No. 35 was marked for  
 15 identification.)  
 16 BY MS. LOCKLEAR:  
 17 Q Could you please examine exhibit marked 35 and  
 18 identify it for the record?  
 19 A It is an excerpt of the Annual Report of the  
 20 Commissioner of Indian Affairs for 1903, and it's  
 21 the section that is the Report of Superintendent  
 22 Hart.  
 23 Q Could you read for us the first sentence of the  
 24 document and then the first sentence of the second  
 25 full paragraph?

23 (Pages 86 - 89)

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1 A You mean the first sentence under report of school  
 2 superintendent?  
 3 Q Yes.  
 4 A "Sir, I have the honor to submit my fourth annual  
 5 report for the Oneida Indian school and  
 6 reservation." And then -- what else?  
 7 Q The second paragraph beginning "Farming  
 8 continues."  
 9 A "Farming continues to be the principal occupation,  
 10 but there is room for improvement in methods and  
 11 for a large increase in the acreage under  
 12 cultivation."  
 13 Q Next sentence, too, please.  
 14 A "The total area is 65,400 acres, of which  
 15 7,000 acres are under cultivation."  
 16 Q Doesn't this indicate that the Federal Government  
 17 considers the entire reservation to be under its  
 18 jurisdiction?  
 19 A I think it does. The only thing I'd note here is  
 20 that it does say there are a couple of land sales  
 21 under one of the amendments to the Dawes Act.  
 22 Q Thank you.  
 23 So we have established a consensus,  
 24 then, that at least as of 1902, 1903, the Federal  
 25 Government was administering in full size the

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1 original reservation for the Oneida Indians,  
 2 correct?  
 3 A I don't know exactly what Hart thought of those  
 4 couple of tracts that had been sold, but I --  
 5 Q Did he except those from the acreage total that he  
 6 gave at the beginning of his report as the Oneida  
 7 Reservation?  
 8 A No.  
 9 Q So your testimony is that somehow between 1920 and  
 10 1930, this agreed-upon status for the Oneida  
 11 Reservation changed?  
 12 A So by agreed-upon status, I'm not sure exactly  
 13 what you mean; but it is my opinion that during  
 14 the first couple of decades of the 20th century,  
 15 the status changed.  
 16 Q Okay. At Page 28 of your first report, you give  
 17 the closest date that I could identify as to the  
 18 tipping point. You argue that there was a general  
 19 consensus of Federal officials that the  
 20 reservation had ceased to exist by or after 1918;  
 21 is that correct?  
 22 A I'm trying to find exactly what you're referring  
 23 to. So I'm looking at Page 28, and I said, "The  
 24 historical record contains some statements that  
 25 the Oneida Reservation still existed, but the

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1 general consensus of Federal officials was that  
 2 the reservation had ceased to exist." I didn't  
 3 say by a certain date.  
 4 Q What's the caption of that chapter?  
 5 A Well, the title of this section is "Jurisdiction  
 6 over Oneida lands after 1918"; but this is the  
 7 summary of the whole section.  
 8 Q So is it fair to say that appears to be a critical  
 9 period in your analysis?  
 10 A After 1918?  
 11 Q Yes.  
 12 A Yes, but this is after -- yes.  
 13 Q How did you go about establishing this Federal  
 14 consensus then?  
 15 A I looked at correspondence from the period and  
 16 other documents to see how the Federal officials  
 17 were expressing their understanding of the land  
 18 area; and they were generally expressing the  
 19 opinion that the land that had left trust was no  
 20 longer under their jurisdiction and that, by the  
 21 1930s, the reservation no longer existed. The  
 22 Indians were no longer wards of the Federal  
 23 Government, and they were -- they and their lands  
 24 were subject to state and local jurisdiction  
 25 unless they were still held in trust.

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1 Q Well, your statement in your report's a little  
 2 more direct than that. It says, "The general  
 3 consensus of Federal officials was that the  
 4 reservation had ceased to exist."  
 5 A Yes.  
 6 Q So I assume, then, that annual reports of the  
 7 Commissioner of Indian Affairs and agents would be  
 8 relevant documents to consider?  
 9 A Yes. Can I just add a -- I don't know what to  
 10 say -- a further clarification that I'm talking  
 11 there about the outer boundaries of the  
 12 reservation ceasing to exist.  
 13 So as we've discussed before, I  
 14 have struggled with whether that means there is no  
 15 reservation, period. You know, the reservation  
 16 has been completely disestablished or perhaps  
 17 there is still a diminished reservation after all  
 18 of these things transpired.  
 19 Q So do you want to alter, then, the statement in  
 20 your report? Do you want to qualify that?  
 21 A I'd like to qualify it by adding the outer  
 22 boundaries. So the general consensus of Federal  
 23 officials was that the outer boundaries of the  
 24 reservation had ceased to exist.  
 25 Q Okay. With that, then we'll take a look at some

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1 reports.  
 2 (Exhibit No. 36 was marked for  
 3 identification.)  
 4 BY MS. LOCKLEAR:  
 5 Q The document that was just marked for you as  
 6 Exhibit 36, could you please identify that?  
 7 A This is part of the report of the Commissioner  
 8 of -- or sorry, yeah -- report of the Commissioner  
 9 of Indian Affairs for the fiscal year ended, I  
 10 think that probably means June 30th, 1921, but the  
 11 date is a little unclear.  
 12 Q Could you turn to the first page of the document,  
 13 which is page number -- identified in the document  
 14 as Page No. 41 and identify that for the record?  
 15 A It says, "Statistical Tables. Table 1, Indian  
 16 Population of the United States."  
 17 Q Could you please turn, then, to Page 48 of this  
 18 document? What is the caption for the first  
 19 column in this table?  
 20 A "State superintendencies and tribes."  
 21 Q Do you see an entry under that column for  
 22 Wisconsin?  
 23 A Yes.  
 24 Q And do you see an entry under Wisconsin for  
 25 Keshena School?

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1 A Yes.  
 2 Q Do you see an entry under Keshena School for  
 3 Oneida?  
 4 A Yes.  
 5 Q Could you read those numbers for us, please? Just  
 6 the first, total population, first column  
 7 identified as total population.  
 8 A It says total population 2,657, it looks like.  
 9 There's also a note number here,  
 10 and I'm having trouble telling if that's a 2 or a  
 11 3. So 2 says 1920 census, and 3 says noncitizens,  
 12 and I don't know which of those.  
 13 Q So is it fair to conclude from this document that  
 14 the BIA considered 2,657 Oneidas to be under  
 15 Federal jurisdiction?  
 16 A No. It just is giving a population figure for the  
 17 tribe.  
 18 Q Would you tell us, again, what the statistical  
 19 table is?  
 20 A Indian Population of the United States.  
 21 Q Are these not the classic statements of Indians  
 22 subject to the BIA's jurisdiction, and it  
 23 identifies that as such in Column 1?  
 24 A Well, it says -- Column 1 says, "State  
 25 Superintendencies and Tribes."

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1 Q Yes.  
 2 A Right. But it's not -- that's just giving a  
 3 category. This is not, to the best of my  
 4 knowledge, trying to do anything more than just  
 5 give population. It's not explicitly making a  
 6 determination between those under Federal  
 7 jurisdiction and those not.  
 8 Q So it's your testimony, then, that the BIA is  
 9 identifying Indians who are not under its  
 10 jurisdiction?  
 11 A It may be. It's just giving population figures  
 12 without distinguishing.  
 13 Q Okay. We'll accept that.  
 14 MS. LOCKLEAR: Mark this.  
 15 (Exhibit No. 37 was marked for  
 16 identification.)  
 17 BY THE WITNESS:  
 18 A I just want to point out one small thing here,  
 19 that there is a -- underneath the heading on  
 20 Page 41, it says that "Figures are compiled from  
 21 reports of Indian school superintendents  
 22 supplemented by information from the 1920 census  
 23 for localities in which no Indian office  
 24 representative is located."  
 25 So that may explain that notation

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1 of 1920 census if, in fact, that's a 2 attached to  
 2 the Oneida population figure.  
 3 BY MS. LOCKLEAR:  
 4 Q Unfortunately, we do not have a cover page for  
 5 this document. Can you identify it nonetheless,  
 6 Exhibit No. 37?  
 7 A It is also a Table of Indian Population of the  
 8 United States similar to what we just looked at,  
 9 and someone has -- it says June 30th, 1922.  
 10 Q Do you see the column that reads "State  
 11 Superintendencies and Tribes"?  
 12 A Yes.  
 13 Q Could you scroll down to the state of Wisconsin?  
 14 A Yes.  
 15 Q Do you see an entry for Oneida Reservation -  
 16 Oneida?  
 17 A Yes.  
 18 Q Is there a population figure given there?  
 19 A Yes.  
 20 Q What is that number?  
 21 A It's a little hard to read, but it looks like  
 22 2,657.  
 23 Q So is it fair to conclude that the BIA considered  
 24 2,657 Oneidas under Federal jurisdiction?  
 25 A Not necessarily. And I'd note that this is the

25 (Pages 94 - 97)

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1 same figure that's in the 1921 report. So there's  
 2 been no change.  
 3 I think -- it's hard to tell if  
 4 there's an annotation there also to the 1920  
 5 census, but I think it's just reporting population  
 6 as of 1920.  
 7 Q You're generally familiar with these annual  
 8 reports; is that correct?  
 9 A Yes.  
 10 Q Do not these annual reports typically conclude --  
 11 include a table that lists Indians who are subject  
 12 to Federal jurisdiction?  
 13 A They -- I've seen a lot of these tables like we're  
 14 looking at here, but I've never understood them to  
 15 be specific to Indians under Federal jurisdiction;  
 16 and these do say Indian population of the United  
 17 States, not Indians subject to Federal  
 18 jurisdiction.  
 19 Q Do you know of any reason why the Bureau of Indian  
 20 Affairs would list Indians otherwise that are not  
 21 subject to their jurisdiction?  
 22 A I think the Bureau of Indian Affairs was  
 23 interested generally in the --  
 24 Q I see.  
 25 A -- the subject of Indians whether or not they were

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1 under their jurisdiction, and you do find agents  
 2 reporting on people that they did not think they  
 3 had jurisdiction over.  
 4 So I don't -- I don't think there's  
 5 anything to indicate that this necessarily is  
 6 limited to Indians under Federal jurisdiction in  
 7 these tables.  
 8 Q So you want to stick with that?  
 9 A I do.  
 10 Q That doesn't strike you as an unlikely  
 11 interpretation of a document by the Bureau of  
 12 Indian Affairs?  
 13 A Not at all.  
 14 Q Okay. We're going to do another one.  
 15 MR. KOWALKOWSKI: Could we maybe take a  
 16 break? We've been going for another hour and a  
 17 half.  
 18 MS. LOCKLEAR: Sure.  
 19 MR. KOWALKOWSKI: Maybe do one more  
 20 stretch before lunch.  
 21 MS. LOCKLEAR: Okay.  
 22 (Recess taken from 11:31 a.m.  
 23 until 11:37 a.m.)  
 24 (Exhibit No. 38 was marked for  
 25 identification.)

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1 BY MS. LOCKLEAR:  
 2 Q We just marked Exhibit 38. Could you please  
 3 identify this for the record?  
 4 A This says, "Extracts from the Annual Report of the  
 5 Secretary of the Interior Fiscal Year 1928  
 6 relating to the Bureau of Indian Affairs."  
 7 Q And turn to the excerpt that's included at  
 8 Page 44. Would you read what appears in the first  
 9 column?  
 10 A States, "State, jurisdiction, subdivision and  
 11 tribes."  
 12 Q Do you see a listing for Wisconsin?  
 13 A Yes.  
 14 Q Under Wisconsin, do you see a listing for Keshena?  
 15 A Yes.  
 16 Q What appears under Keshena?  
 17 A "Menominee Reservation (Menominee), Oneida  
 18 Reservation (Oneida), and Stockbridge Reservation  
 19 (Stockbridge and Munsee)."  
 20 Q Could you give us the figure for the Oneida  
 21 Reservation?  
 22 A 2,976.  
 23 Q Does this indicate to you that the BIA considered  
 24 2,976 Oneidas to be under Federal jurisdiction?  
 25 A As we've discussed before, my understanding is

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1 this table is reporting population; and it doesn't  
 2 explicitly indicate whether Indians are under  
 3 Federal jurisdiction or not.  
 4 (Exhibit No. 39 was marked for  
 5 identification.)  
 6 BY MS. LOCKLEAR:  
 7 Q Would you please identify this document for the  
 8 record?  
 9 A It's the Annual Report of the Commissioner of  
 10 Indian Affairs for the fiscal year ended  
 11 June 30th, 1930.  
 12 Q And could you turn to Page 35, the first page  
 13 after the title page in this document, and  
 14 identify what Table 2 is for us, please?  
 15 A "Indian Population in Continental United States  
 16 Enumerated at Federal Agencies According to Tribe,  
 17 Sex, and Residence, April 1, 1930."  
 18 Q And could you turn to Page 50 in this document,  
 19 please? Do you see a listing under Wisconsin?  
 20 A Yes.  
 21 Q Do you see Oneida Reservation under Keshena  
 22 agency?  
 23 A Yes.  
 24 Q Could you please give us the figure there that's  
 25 listed for Oneida Reservation?

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1 A 3,046.

2 Q Does this not suggest to you that the BIA

3 considered those Indians to be on the reservation

4 under its jurisdiction?

5 A Again, this is a population figure.

6 Can you repeat her question?

7 (Record read as requested.)

8 BY THE WITNESS:

9 A Just to add to what I said, I'd note that this

10 table also breaks down residing at jurisdiction

11 where enrolled, residing at another jurisdiction,

12 and residing elsewhere. So there are some

13 different categories here.

14 BY MS. LOCKLEAR:

15 Q Okay. Thank you.

16 She may not have answered the last

17 question with regard to --

18 A You asked whether they were under Federal --

19 Q Whether that identified that number of Indians

20 under Federal jurisdiction on the Oneida

21 Reservation.

22 A And my answer was that the table is representing

23 population, not necessarily Indians under Federal

24 jurisdiction. And then I just wanted to clarify

25 that it broke them down into different categories

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1 of residence.

2 (Exhibit No. 40 was marked for

3 identification.)

4 BY MS. LOCKLEAR:

5 Q And we just marked another document, Exhibit

6 No. 40. Would you please identify this for the

7 record?

8 A This is the Annual Report of the Commissioner of

9 Indian Affairs for the fiscal year ended

10 June 30th, 1931.

11 Q Could you turn to the first page after the title

12 page and identify what Table 2 is please?

13 A Again, it's Indian Population in the Continental

14 United States.

15 Q Complete the rest of the caption.

16 A I'll read the whole caption.

17 "Indian Population in Continental

18 United States enumerated at Federal Agencies

19 According to Tribe, Sex, and Residence, April 1,

20 1931."

21 Q Thank you.

22 And please turn to Page 56 of this

23 document; it's the last page. Do you see a

24 listing for Wisconsin?

25 A Yes.

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1 Q Under Keshena agency, do you see a listing for

2 Oneida Reservation?

3 A Yes.

4 Q Could you read the total population figure there,

5 please?

6 A 3,078.

7 Q Is this not evidence that the BIA considered 3,078

8 Oneidas on the reservation to be under its

9 jurisdiction?

10 A My answer is the same as before, that this is a

11 population figure, and it doesn't distinguish

12 between Federal jurisdiction or outside of Federal

13 jurisdiction.

14 MS. LOCKLEAR: For this next document, I

15 only have one copy with the appendix included, so

16 we're going to make this to be the official court

17 copy. So after you mark it, would you please let

18 her look at it, and then we'll make sure you keep

19 it. Here is a partial copy.

20 MR. KOWALKOWSKI: And so what is

21 missing? The one-page appendix?

22 MS. LOCKLEAR: Yes. It's introductory

23 language at the beginning.

24 (Exhibit No. 41 was marked for

25 identification.)

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1 BY MS. LOCKLEAR:

2 Q Could you please identify this document for the

3 record, please?

4 A This is the Annual Report of the Commissioner of

5 Indian Affairs for fiscal year ended June 30th,

6 1932.

7 Q And could you turn to Page 1 under the stamped

8 copy and read the first sentence under "Appendix,"

9 please, for the record?

10 A "An Indian, as defined by the Indian service,

11 includes any person of Indian blood who, through

12 wardship, treaty, or inheritance, has acquired

13 certain rights."

14 Q With that, could you turn to the first substantive

15 page and identify what Table 2 is? It's Page 34.

16 Table 2 begins on Page 34.

17 A "Indian Population in the Continental United

18 States Enumerated at Federal Agencies According to

19 Tribe, Sex, and Residence, April 1, 1932."

20 Q And could you turn to Page 55?

21 A Could I take just a minute to read a little bit

22 more of this appendix?

23 Q Sure.

24 A Okay.

25 Q Then could you turn to Page 55, the last page?

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1 A Yes.

2 Q Did you see a listing under Wisconsin?

3 A Yes.

4 Q Do you see a listing for the Oneida Reservation?

5 A Yes.

6 Q Would you identify that number for us, please?

7 A 3,123.

8 Q So Indians as defined by this document in the

9 appendix with the cover page, does this not

10 indicate to you that the BIA considered those

11 Indians under Federal jurisdiction on the Oneida

12 Reservation?

13 A It doesn't indicate that they necessarily

14 considered them under jurisdiction.

15 It says here in this appendix

16 that -- essentially that this enumeration is

17 including anyone who has some kind of tribal or

18 inheritance rights; and the -- in the Oneida

19 situation, that could be -- the Federal Government

20 was administering a perpetual annuity under the

21 1794 Treaty; and that gave it a reason for

22 tracking eligible recipients of that, that

23 annuity, since it was divided per capita rather

24 than being given in a lump sum to the Oneida as a

25 whole.

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1 And so the way I read this

2 description in the appendix, that that might be a

3 situation causing the Federal Government to track

4 population regardless of whether or not they were

5 under Federal jurisdiction.

6 Q Let's go back to that first sentence again. You

7 omitted the word "through wardship." Does that

8 not appear in the first sentence?

9 A It says, "Through wardship, treaty, or inheritance

10 has acquired certain rights."

11 Q And is there anything in the document that makes

12 the distinction about Oneida that you suggest,

13 anything on the face of the document?

14 A No.

15 Q Okay. Thank you.

16 (Exhibit No. 42 was marked for

17 identification.)

18 BY MS. LOCKLEAR:

19 Q Would you please identify for us what exhibit

20 marked No. 42 is?

21 A It doesn't have a cover page, but it appears to

22 be, again, an appendix page and then a table of

23 Indian population; and there's a heading on the

24 pages with the table that says Report of the

25 Secretary of the Interior 1934.

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1 Q Referring to the first page on the appendix, could

2 you read the first sentence into the record,

3 please?

4 A "An Indian, as defined by the Indian Service,

5 includes any person of Indian blood who, through

6 wardship, treaty, or inheritance, has acquired

7 certain rights."

8 Q And could you read the first page of -- identify

9 the table that is marked as Table 1, please?

10 A Indian Population in Continental United States

11 Enumerated at Federal Agencies According to Tribe,

12 Sex, and Residence, April 1 -- and I think that's

13 1934.

14 Q And could you please turn to Page 153, the last

15 page in the document? Do you see a listing for

16 Wisconsin?

17 A Yes.

18 Q Do you see a listing for Oneida Reservation?

19 A Yes.

20 Q Could you please read the total population for

21 Oneida Reservation?

22 A 2,992.

23 Q Well, that's the Oneida population. It appears

24 there are others resident with them.

25 A Oh, sorry. Oh, boy.

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1 That figure is a little hard to

2 read. It may be 3,228.

3 Q Does this document not indicate to you that those

4 Indians residing on the Oneida Reservation were

5 considered under Federal jurisdiction by the BIA?

6 A No. My answer is the same as before.

7 Q Do you see anything on the face of this document

8 that distinguishes Oneidas as you suggested before

9 in your last answer?

10 A No.

11 Q Okay. Thank you.

12 MS. LOCKLEAR: Mark this.

13 (Exhibit No. 43 was marked for

14 identification.)

15 BY MS. LOCKLEAR:

16 Q Could you please identify for the record document

17 marked Exhibit 43?

18 A Report of the Commissioner of Indian Affairs for

19 the fiscal year ended June 30th, 1920.

20 Q Could you turn to the first page, please? What is

21 the caption for Table 6?

22 A "Area of Indian Lands June 30th, 1920."

23 Q And what does the first column state?

24 A "States and reservations."

25 Q Did you see a listing for Oneida under Wisconsin?

<p style="text-align: right;">Page 110</p> <p>1 A Yes.</p> <p>2 Q Could you please read the numbers and identify</p> <p>3 them as they appear in the columns?</p> <p>4 A It says, "Number of allotments, 1,504."</p> <p>5 Area in Acres is broken into three</p> <p>6 columns. First is allotted, it says 6,500 --</p> <p>7 sorry -- 65,466; unallotted, nothing; and total,</p> <p>8 65,466.</p> <p>9 Q Does this not suggest to you that the BIA, as of</p> <p>10 1920, considered the entire reservation allotted,</p> <p>11 notwithstanding to be subject to Federal</p> <p>12 jurisdiction under the Oneida Reservation?</p> <p>13 A It just says, "Area of Indian Lands." It does not</p> <p>14 say anything about jurisdiction.</p> <p>15 Q So it's your testimony, then, that the BIA is</p> <p>16 stating areas not under its jurisdiction?</p> <p>17 A It could be.</p> <p>18 Q Okay.</p> <p>19 MS. LOCKLEAR: I'm at a good stopping</p> <p>20 place if it's convenient for you guys to take a</p> <p>21 real quick lunch break now as we move into a</p> <p>22 different set of documents.</p> <p>23 MR. KOWALKOWSKI: That's fine.</p> <p>24 (Lunch recess taken at 11:53 a.m.)</p> <p>25</p>	<p style="text-align: right;">Page 112</p> <p>1 Keshena School, Tribe: Oneida."</p> <p>2 Q And then the next column. What's the caption of</p> <p>3 the next column?</p> <p>4 A It says, "Area unallotted."</p> <p>5 Q Is there a number there for Oneida?</p> <p>6 A Yes. 151.</p> <p>7 Q And then what is the caption of the next column?</p> <p>8 A "Treaties, laws, or other authorities relating to</p> <p>9 reserves."</p> <p>10 Q Could you read the entry there next to Oneida?</p> <p>11 A "Treaty of February 3rd, 1838, Volume 7 Page 566.</p> <p>12 65,428.13 acres allotted to 1,502 Indians;</p> <p>13 remainder 84.08 acres, reserved for school</p> <p>14 purposes; 6 double allotments canceled containing</p> <p>15 151 acres." Then in parentheses "(See 5013-1912).</p> <p>16 Trust period on 35 allotments extended 19 years,</p> <p>17 executive order, May 24, 1918."</p> <p>18 Q Thank you. Doesn't that suggest to you that, as</p> <p>19 of this date, which is 1920, the BIA considered</p> <p>20 the full extent of the Oneida Reservation to be</p> <p>21 under Federal jurisdiction?</p> <p>22 A No.</p> <p>23 Q Why not?</p> <p>24 A This is reporting on the area unallotted, the area</p> <p>25 allotted, and some additional land reserved for</p>
<p style="text-align: right;">Page 111</p> <p>1 AFTERNOON SESSION</p> <p>2 (12:34 p.m.)</p> <p>3 BY MS. LOCKLEAR:</p> <p>4 Q Before we move on, I'd like to go back to Exhibit</p> <p>5 No. 43 for one more item, if you would please pull</p> <p>6 that up again. And just to refresh your memory,</p> <p>7 what is this?</p> <p>8 A This is some tables from the Commissioner of</p> <p>9 Indian Affairs reports for the year ending</p> <p>10 June 30th, 1920.</p> <p>11 Q Thank you. And could you turn to the last page,</p> <p>12 Page 103? Could you read the caption for Table 7,</p> <p>13 please?</p> <p>14 A "General Data for each Indian Reservation to</p> <p>15 June 30th, 1920 - continued."</p> <p>16 Q What does the first column say?</p> <p>17 A "Name of reservation and tribe."</p> <p>18 Q And go down towards the bottom of the page under</p> <p>19 Wisconsin. Do you see a listing for Oneida?</p> <p>20 A Yes.</p> <p>21 Q Would you read that listing, please?</p> <p>22 A All right. So you mean the part that is in the</p> <p>23 right-hand column?</p> <p>24 Q Name of reservation and tribe, under the column.</p> <p>25 A "Oneida," and then it says underneath that "Under</p>	<p style="text-align: right;">Page 113</p> <p>1 school purposes.</p> <p>2 It doesn't say what's under Federal</p> <p>3 jurisdiction specifically, but I would take it to</p> <p>4 be the 35 allotments in trust, the school land,</p> <p>5 and the 151 acres unallotted.</p> <p>6 Q Would you repeat the caption for Column 1, please?</p> <p>7 A "Name of reservation and tribe."</p> <p>8 Q And is there anything that makes the distinction</p> <p>9 that you just suggested on the face of this</p> <p>10 document?</p> <p>11 A That makes which distinction?</p> <p>12 Q The distinction you just suggested.</p> <p>13 A And I'm just asking which distinction because I</p> <p>14 just gave you --</p> <p>15 Q You said you would take --</p> <p>16 MS. LOCKLEAR: Would you please read</p> <p>17 back her answer?</p> <p>18 (Record read as requested.)</p> <p>19 BY MS. LOCKLEAR:</p> <p>20 Q Does the document on its face make the distinction</p> <p>21 between the allotted land and the reserved school</p> <p>22 lands and the unallotted land that you suggested?</p> <p>23 A Yes.</p> <p>24 Q And how does it do that?</p> <p>25 A It lists the acreage that's allotted, it lists the</p>

1 acreage that's unallotted, and it lists the  
 2 acreage reserved for schools.  
 3 Q All as one, as comprising the Oneida reservation,  
 4 correct?  
 5 A Well, under the heading "Oneida Reservation."  
 6 Q Thank you.  
 7 In that document, it references  
 8 executive orders extending allotments. Are you  
 9 familiar with those on the Oneida Reservation?  
 10 A It refers to a 1918 executive order.  
 11 (Exhibit No. 44 was marked for  
 12 identification.)  
 13 BY MS. LOCKLEAR:  
 14 Q Could you identify this document for the record,  
 15 please?  
 16 A It is an excerpt from Charles Kappler's Indian  
 17 Affairs, Laws and Treaties Volume IV; and it  
 18 contains some executive orders.  
 19 Q On Page 1052, do you see an executive order dated  
 20 May 19, 1917?  
 21 A Yes.  
 22 Q Could you tell me what that refers to?  
 23 A This is extending for a year the trust period on  
 24 allotments that were about to expire with the  
 25 exception of those listed.

1 Q And which reservation or where were these  
 2 allotments?  
 3 A On the Oneida Reservation.  
 4 Q And beginning at the bottom of that same page and  
 5 carrying over to the next page, do you see an  
 6 executive order dated May 4, 1918?  
 7 A Yes.  
 8 Q Could you identify what that is?  
 9 A As you said, it's an executive order from 1918.  
 10 It is extending the trust period for nine years on  
 11 the listed allotments.  
 12 Q And would you read into the record the language at  
 13 the beginning of that particular executive order,  
 14 "It is hereby ordered"?  
 15 A "It is hereby ordered, under the authority  
 16 contained in Section 5 of the Act of February 8th,  
 17 1887, (24 Stat. 388), that the trust period on the  
 18 following allotments made to Indians on the  
 19 Oneida Reservation in Wisconsin, which trust  
 20 period expires June 12, 1918, be, and is hereby,  
 21 extended for a period of nine years from said  
 22 date."  
 23 Q Doesn't that language suggest to you that the  
 24 president is distinguishing between the geographic  
 25 extent of the reservation and the trust allotments

1 themselves?  
 2 A I'm not quite following.  
 3 Q I refer you specifically to the language "On the  
 4 following allotments made to Indians on the Oneida  
 5 Reservation."  
 6 A So you're asking whether by "on the Oneida  
 7 Reservation," he means that all of that land  
 8 remained in trust?  
 9 Q No. I'm asking you whether he's indicating that  
 10 there is a distinction between the trust parcels  
 11 that are being extended and the reservation. They  
 12 are on the reservation?  
 13 A He does say they are on the reservation.  
 14 Q What does that indicate to you, if anything?  
 15 A That these were historically part of the Oneida  
 16 Reservation.  
 17 Q Does it say that on the face of the document?  
 18 Does it say "historic"?  
 19 A No.  
 20 Q Okay. And turn to Page 1056 in this document,  
 21 please. Do you see an executive order dated  
 22 March 1, 1927?  
 23 A Yes.  
 24 Q Could you identify that one?  
 25 A It is an executive order extending the trust

1 period on allotments listed for a period of ten  
 2 years.  
 3 Q And what's the caption of this executive order?  
 4 A "Oneida Reservation."  
 5 Q Does this not suggest to you that the president  
 6 considered these trust allotments to be distinct  
 7 from the Oneida Reservation itself?  
 8 A I don't -- I really don't understand what you mean  
 9 by "distinct from." I guess no. These were --  
 10 these were --  
 11 Q They were on or of the reservation as opposed to  
 12 are the reservation, which you've argued.  
 13 A Okay. I think I see what you mean.  
 14 So this is just saying these were  
 15 allotments made to Indians of the Oneida  
 16 Reservation.  
 17 Q You don't attach any significance to the use of  
 18 the term "Oneida Reservation"?  
 19 A I don't -- I don't believe that, in using that  
 20 phrase, that the president was necessarily  
 21 considering the reservation to be the entirety of  
 22 what was initially surveyed after the 1838 Treaty.  
 23 But it does not have anything on its face to say  
 24 one way or the other.  
 25 Q Is there any indication that it does not refer to

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1 the Oneida Reservation as has been defined in the  
 2 1920 and other reports that we've been through?  
 3 A First of all, I don't know that you and I would  
 4 see those reports the same way; but I acknowledge  
 5 that many documents refer to the Oneida  
 6 Reservation.  
 7 They don't explicitly say what that  
 8 consisted of, but Federal officials frequently  
 9 use the phrase "Oneida Reservation" in documents.  
 10 So I don't attach any particular significance to  
 11 it.  
 12 Q We agreed at one point in your testimony, I think,  
 13 that as of 1900, the term "Oneida Reservation" was  
 14 used commonly by Federal officials to extend to  
 15 the full extent of the 1838 reservation; is that  
 16 correct?  
 17 A I'm not sure exactly what we said then, but I  
 18 think what I said or what I intended to say was  
 19 that I believe that the entire extent -- the  
 20 Federal Government regarded that entire extent of  
 21 65,000 acres as being under Federal jurisdiction  
 22 at the turn of the century.  
 23 Q And having walked through annual reports for that  
 24 key period in review, do you see any indication in  
 25 those Federal documents that alters the term

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1 "Oneida Reservation"?  
 2 A You mean -- by "alters," do you mean that  
 3 indicates that the Oneida Reservation was less --  
 4 smaller in extent?  
 5 Q Yes.  
 6 A And which reports?  
 7 Q The ones that we've just walked through from the  
 8 Annual Reports of the Commissioner of Indian  
 9 Affairs.  
 10 A We walked through a bunch of them, and we looked  
 11 at several early ones that I would agree indicate  
 12 that the Federal Government still considered that  
 13 whole area to be under its jurisdiction.  
 14 But then we walked through a bunch  
 15 of other reports, and I don't -- I would not  
 16 necessarily agree to all those. We looked at a  
 17 bunch of population reports; and I said that  
 18 doesn't, to me, automatically indicate that  
 19 everybody was under Federal jurisdiction. And  
 20 then we looked at one later report, I think from  
 21 1920 was the last one.  
 22 So anyhow, I have lost sight of the  
 23 question. I apologize.  
 24 MS. LOCKLEAR: Could you repeat the  
 25 question?

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1 (Record read as requested.)  
 2 BY THE WITNESS:  
 3 A I don't see anything in these documents that tells  
 4 me one way or the other what the Federal  
 5 Government considered to be under its jurisdiction  
 6 at later points in time.  
 7 I mean, these executive orders that  
 8 we just looked at do indicate that only a certain  
 9 number of allotments remained in trust. I'm  
 10 sorry. You were asking about the annual report.  
 11 So I'll put that aside.  
 12 BY MS. LOCKLEAR:  
 13 Q As well as the --  
 14 A Okay.  
 15 Q -- the compilation of the record.  
 16 A So you're asking whether any of these documents --  
 17 Q As a body.  
 18 A As a body, whether they indicate that the extent  
 19 of the Oneida Reservation changed?  
 20 Q Yes.  
 21 A I can't answer that question just based on these  
 22 documents because they don't all go -- they don't  
 23 all clearly address that point, but the executive  
 24 orders do indicate that the number of allotments  
 25 in trust changed over time. So that -- the amount

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1 of trust land changed. We also looked at one that  
 2 showed only 151 acres remaining unallotted and  
 3 84 acres held in trust for schools.  
 4 Q Acres that were nonetheless counted into the total  
 5 acreage of the reservation?  
 6 A They were counted as the total, but we don't know  
 7 if they were talking about the original  
 8 reservation. Some of these reports traced the --  
 9 here was the acreage of the original reservation,  
 10 and here's what happened to it.  
 11 This report that we looked at  
 12 doesn't say one way or another what it was  
 13 tracking. So I won't -- I don't know that it's  
 14 convincing proof of the position I have taken, but  
 15 I also don't see it as convincing proof of the  
 16 position that you're taking now, that that annual  
 17 report shows that the reservation did not change  
 18 in size.  
 19 Q As I recall, you testified earlier that you  
 20 acknowledged that your client bears the burden of  
 21 proof on this issue on disestablishment or  
 22 diminishment?  
 23 A Yes.  
 24 Q So how would you view ambiguity, then, given that  
 25 burden of proof?

<p style="text-align: right;">Page 122</p> <p>1 A The --</p> <p>2 MR. KOWALKOWSKI: Object. Calls for a</p> <p>3 legal conclusion.</p> <p>4 BY THE WITNESS:</p> <p>5 A The documents that we've looked at here are not</p> <p>6 the only ones out there. So I've looked at more</p> <p>7 than just these annual reports to try to</p> <p>8 understand what was going on.</p> <p>9 So if these documents don't clearly</p> <p>10 say one way or the other, then there are other</p> <p>11 documents to turn to which I have cited in my</p> <p>12 reports.</p> <p>13 BY MS. LOCKLEAR:</p> <p>14 Q Here's what seems just remarkable to me, though,</p> <p>15 Dr. Greenwald. We've established that there's a</p> <p>16 long history from 1838 forward where the Oneida</p> <p>17 Reservation had a very clear meaning to the</p> <p>18 Federal officials who exercised the jurisdiction</p> <p>19 over the Oneidas, and yet you find somehow there</p> <p>20 is a change in the geographic extent of that.</p> <p>21 Even though the same term is used and even though</p> <p>22 it's not identified as a change, it has</p> <p>23 nonetheless changed in your view.</p> <p>24 A I think --</p> <p>25 Q Doesn't that seem unlikely to you?</p>	<p style="text-align: right;">Page 124</p> <p>1 disestablished.</p> <p>2 Q And given the burden of proof that the Village of</p> <p>3 Hobart bears on the issue, you find that a mixed</p> <p>4 record is sufficient to support disestablishment?</p> <p>5 MR. KOWALKOWSKI: I object. Misstates</p> <p>6 testimony. Also calls for a legal conclusion.</p> <p>7 BY THE WITNESS:</p> <p>8 A I think the historical record is adequate to make</p> <p>9 a strong case that the reservation boundaries</p> <p>10 cease to exist.</p> <p>11 BY MS. LOCKLEAR:</p> <p>12 Q Okay. You don't dispute that the tribe adopted or</p> <p>13 accepted the application of the Indian</p> <p>14 Reorganization Act by vote on the reservation, do</p> <p>15 you?</p> <p>16 A No. I don't dispute that.</p> <p>17 Q And you don't dispute that the tribe took steps to</p> <p>18 organize under an IRA constitution?</p> <p>19 A I don't dispute that.</p> <p>20 Q Do you see any indication one way or the other</p> <p>21 from the record with regard to that constitution</p> <p>22 that bears on this question of disestablishment?</p> <p>23 A The section of the constitution that deals with</p> <p>24 the extent -- I can't remember exactly what it</p> <p>25 says, but it looks like you have the document in</p>
<p style="text-align: right;">Page 123</p> <p>1 A I think there are documents that identify a</p> <p>2 change.</p> <p>3 Q Federal documents?</p> <p>4 A There are a number of letters from Federal agents</p> <p>5 that talk about the fact that the reservation has</p> <p>6 ceased to exist or they refer to the former</p> <p>7 reservation or they talk about the fact that the</p> <p>8 land allotted and fee patented was no longer under</p> <p>9 Federal jurisdiction and that the Indians are no</p> <p>10 longer wards.</p> <p>11 So those are also part of the</p> <p>12 historical record, and those are the ones that I</p> <p>13 have relied on and cited in my report for my</p> <p>14 position.</p> <p>15 Q So at a minimum, would you agree that there is a</p> <p>16 mixed record in this case?</p> <p>17 A There is a mixed record in that the term "Oneida</p> <p>18 Reservation" is used frequently in documents that</p> <p>19 don't attach it to a specific extent; and there</p> <p>20 are documents that appear to reflect an</p> <p>21 understanding that the entire extent still existed</p> <p>22 along with the documents that I've been talking</p> <p>23 about that indicate that the reservation</p> <p>24 boundaries cease to exist and that the reservation</p> <p>25 shrank in extent or perhaps altogether was</p>	<p style="text-align: right;">Page 125</p> <p>1 front of you.</p> <p>2 The section of it that I think</p> <p>3 deals with where the tribe -- where the tribe's</p> <p>4 authority applies -- I can't recall what wording</p> <p>5 is used -- has some language in it that was</p> <p>6 changed during the process of developing the</p> <p>7 constitution that is not clear on its face what it</p> <p>8 means.</p> <p>9 MS. LOCKLEAR: Let's just go straight to</p> <p>10 that document. If you would mark that, please.</p> <p>11 (Exhibit No. 45 was marked for</p> <p>12 identification.)</p> <p>13 BY MS. LOCKLEAR:</p> <p>14 Q Do you recognize this document?</p> <p>15 A Yeah. It's not a great copy, but this is -- it</p> <p>16 says a draft dated December 14th. I can't read</p> <p>17 the year, 19-something; and I can't read the first</p> <p>18 word, and then it says, "of Oneida constitution."</p> <p>19 Q Criticisms of Wisconsin Oneida Constitution</p> <p>20 perhaps?</p> <p>21 A Yes.</p> <p>22 Q In your prior testimony, were you referring to</p> <p>23 paragraph numbered 2 in this document, Article 1,</p> <p>24 Territory?</p> <p>25 A Yes.</p>

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1 Q Take a look at that, and explain to me, if you  
 2 would, what you would consider the significance of  
 3 that.  
 4 A It's a little fuzzy, but I think I've got it. I'm  
 5 sorry. What was your question?  
 6 Q Explain to me the significance of this language in  
 7 your view with regard to the disestablishment or  
 8 diminishment issue.  
 9 A This section of the document explains why this  
 10 author -- it says assistant solicitor -- was  
 11 concerned about the way the original draft  
 12 constitution was worded in terms of the  
 13 territory.  
 14 Q Your view of the significance of the language  
 15 here? That was the question.  
 16 A Sorry. Which -- I was trying to explain why I  
 17 thought this was significant.  
 18 But is there particular language  
 19 that you wanted me to --  
 20 Q You discussed it in your report numbered three,  
 21 and that's what I'm trying to get.  
 22 A Okay. Right.  
 23 Q So do you recall your discussion of this language?  
 24 A Yes. I mean, I recall discussing the language in  
 25 the tribe's constitution and how it changed in

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1 response to the concerns of the Federal Government  
 2 that the language was problematic.  
 3 So this is -- this section of the  
 4 document is explaining why the assistant solicitor  
 5 thought it was problematic.  
 6 Q How do you understand that problem to be? What do  
 7 you understand it to be?  
 8 A The problem is that the assistant solicitor  
 9 thought "original Oneida Reservation," as defined  
 10 in the Treaty of February 3rd, 1838, was  
 11 potentially going to be confusing because the  
 12 original reservation, as he saw it, was  
 13 established by the Treaty of October 27th, 1832;  
 14 and he says even in Wisconsin -- sorry -- I mean,  
 15 he's making a reference to the fact that the  
 16 Oneida were first in New York, although he doesn't  
 17 say that explicitly. And then he says, even in  
 18 Wisconsin that treaty is not -- does not define  
 19 the original reservation.  
 20 Q Do you recall your discussion in your third report  
 21 indicating that by referring to the diminution of  
 22 the reservation, he was therefore defining the  
 23 reservation for purposes of the constitution to be  
 24 limited to trust land?  
 25 A Did I say that?

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1 Q If I could get your --  
 2 A You said it's in my third report?  
 3 Q Yes.  
 4 A I don't have my third report in front of me.  
 5 Q If you would look, please, at Pages 9 and 10 of  
 6 your third report.  
 7 A Thank you.  
 8 Q Your discussion of the constitution begins on  
 9 Page 9, and you conclude that on Page 10 with  
 10 "Instead, it is my opinion that present confines  
 11 means whatever land remained in trust for the  
 12 tribe or individual allottees in 1936."  
 13 A I wasn't relying on this document, to the best of  
 14 my recollection, to make that argument.  
 15 Q The document is cited by you in your Footnote 40  
 16 in that discussion?  
 17 A Right. But this language that you were pointing  
 18 to, the -- represents a diminution of the  
 19 reservation, I wasn't relying specifically on that  
 20 language, you know; and I was talking about a  
 21 document that had been cited, which is this one, I  
 22 believe.  
 23 Q So what we're trying to ascertain here is whether  
 24 there's anything on this document that appears to  
 25 limit it to trust land.

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1 A No.  
 2 Q No?  
 3 A No, there's nothing in this document that appears  
 4 to limit the original -- the Oneida Reservation to  
 5 trust land.  
 6 (Exhibit No. 46 was marked for  
 7 identification.)  
 8 BY MS. LOCKLEAR:  
 9 Q Do you recognize the document marked as  
 10 Exhibit 46?  
 11 A Yes. It's a letter from Assistant Commissioner of  
 12 Indian Affairs, William Zimmerman, to the chairman  
 13 of the Constitutional Committee, he says, which  
 14 was the Oneida Constitutional Committee.  
 15 Q And this is another document that you cite in your  
 16 report number three, correct?  
 17 A Yes.  
 18 Q Do you see anything in this document that suggests  
 19 that reservation was intended to refer only to  
 20 trust land?  
 21 A Oh, he says, "In order to avoid confusion, it is  
 22 suggested that the jurisdiction of the tribe shall  
 23 extend to the territory within the present  
 24 confines of the Oneida Reservation and that all  
 25 references to the various treaties should be

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1 omitted."

2 That's the language that I am

3 relying on, but I don't -- I don't know exactly

4 what "present confines of the Oneida Reservation"

5 meant. He doesn't define it. But that's what I

6 am using. That language is -- and the subsequent

7 change made to the language in the constitution to

8 "present confines" is what I'm relying on for my

9 argument that it meant the land remaining in

10 trust.

11 Q And is there anything, in fact, in the BIA's

12 consideration that indicates that anywhere? Isn't

13 this language from Paragraph 2 intended to be a

14 resolution of the problem identified in the last

15 document we saw?

16 A Yes.

17 Q So the diminution is, in fact, a reduction from

18 the 1832 to the 1838 Treaty, no reference at all

19 to trust land; is that correct?

20 A As I understand it, the ambiguity to be resolved

21 was what was the original reservation.

22 What I don't understand is, then,

23 why wouldn't it say just the reservation as

24 defined in the Treaty of February 3rd, 1838. It

25 was changed even more than that to extend to the

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1 territory within the present confines of the

2 Oneida Reservation.

3 Q But didn't we just ascertain from the last

4 document what the nature of the confusion was, the

5 nature, that being the distinction between the

6 1832 and the 1838 boundaries?

7 A Yes.

8 Q Then why wouldn't the resolution of that problem

9 relate to a choice between those and have nothing

10 to do with trust land?

11 A It could have.

12 Q It could have?

13 A Yes.

14 Q Thank you.

15 Do you recall the discussion in the

16 Edmunds and Hoxie reports regarding the practice

17 of the Bureau of Indian Affairs of placing land in

18 the trust for the tribe after the adoption of the

19 IRA?

20 A I don't recall specifically what they said, but I

21 know that occurred.

22 Q Well, you criticized them for it in your report.

23 Do you recall what your alternative explanation of

24 those events was?

25 A Would you like to point me to a specific spot in

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1 my report?

2 Q Yes. This is within report number two, Page 41,

3 the paragraph beginning "In 1934 as part of the

4 Indian new deal."

5 A Okay.

6 Q So what was your criticism?

7 A My criticism is that it appeared that Hoxie was

8 suggesting that that land was restored to the

9 tribe, and my reading of that same document that

10 said the lands were distributed to Indians

11 suggested that it was put into trust for

12 individuals rather than for the tribe.

13 (Exhibit No. 47 was marked for

14 identification.)

15 BY MS. LOCKLEAR:

16 Q Your reading of those events, in fact, is

17 completely erroneous, isn't it?

18 A What leads you to say that?

19 Q Let's take a look at this document that's marked

20 Exhibit No. 47. Could you please identify this

21 for the record?

22 A It's a letter from J.M. Stewart to the Secretary

23 of the Interior dated March 1st, 1937.

24 Q Would you please read into the record the final

25 paragraph beginning, "It is respectfully

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1 requested"?

2 A "It is respectfully requested that the papers

3 herewith be referred to the Solicitor for

4 examination and an opinion as to their sufficiency

5 to vest valid title to the lands described therein

6 in the United States of America, in trust for the

7 Oneida Indians of Wisconsin, which is the

8 designation these Indians have adopted according

9 to their constitution and bylaws approved by the

10 department December 21, 1936."

11 Q Doesn't this suggest to you that land was being

12 placed in trust for the tribe and not individuals?

13 A I don't dispute that land was placed into trust

14 for the tribe.

15 I'm just looking at the source --

16 the particular source that Hoxie cited, which I

17 don't have in front of me right now; but I don't

18 dispute that the United States took land in trust

19 for the tribe under the Indian Reorganization Act.

20 (Exhibit No. 48 was marked for

21 identification.)

22 BY MS. LOCKLEAR:

23 Q Could you identify for the record what document

24 marked No. 48 is?

25 A This is a letter from J.M. Stewart to the

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1 Secretary of the Interior dated September 9th,  
2 1939.  
3 Q Would you read the first sentence, please?  
4 A "Transmitted herewith are ten options and related  
5 papers covering 206.9 acres of land proposed to be  
6 acquired for approximately \$5,920, for the benefit  
7 of the Oneida Tribe of Indians of Wisconsin."  
8 Q Again, plainly indicating that the United States  
9 is acquiring trust land for its tribe; is that  
10 correct?  
11 A That appears to be the case, yes.  
12 Q And would you drop down to the next paragraph,  
13 please, and read into the record the first  
14 sentence of that paragraph?  
15 A "Nine of the enclosed options cover Indian-owned  
16 fee patent lands on the Oneida Reservation which  
17 are in danger of being lost by the Indians for  
18 delinquent taxes and other indebtedness."  
19 Q Isn't that a pretty clear indication that  
20 Indian-owned fee patent lands were considered to  
21 be part of the reservation?  
22 A My reading of the larger body of documents related  
23 to how this term "Oneida Reservation" was used is  
24 that it was often used as a geographic designation  
25 that -- without indicating any particular status,

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1 any particular legal status for the entire body of  
2 land; but there are other documents where the  
3 Federal Government says the reservation doesn't  
4 exist, the lands that are fee patented are not  
5 under Federal jurisdiction. And so I don't think  
6 that these passing references to "on the Oneida  
7 Reservation" are determinative of the question.  
8 Q In your opinion, is it even possible, then, that  
9 fee patent land would be -- remain in the  
10 geographic boundaries of an extant reservation?  
11 A Yes, it is possible.  
12 Q And how would you propose that they identify that  
13 if not by the designation, in capped letters,  
14 "Oneida Reservation"?  
15 A How would they? I think they would say it the  
16 same way, whichever understanding they had of  
17 whether this fee-patented land was outside of  
18 Federal jurisdiction or still part --  
19 Q No, no.  
20 A -- of the reservation.  
21 Q Pardon me. The question is not jurisdiction. The  
22 question is within the boundaries of the  
23 reservation.  
24 A Again, I think that they would have said it the  
25 same -- the same way either way because they're

Page 136

1 using the Oneida Reservation as a geographic  
2 designation for the full extent that was surveyed  
3 after the 1838 Treaty.  
4 Q I don't understand. I'm missing something.  
5 Is it your position that it's  
6 possible for fee-patented land to remain within  
7 the boundaries of an extant reservation?  
8 A Yes.  
9 Q How, then, would you expect that reservation to be  
10 designated other than by its name?  
11 A I don't -- in that case -- I'm not sure what  
12 you're asking.  
13 I think they might have used the  
14 reservation name regardless of the situation.  
15 Although in some cases, they said former  
16 reservation or distinguished original reservation  
17 from the current status if they understood the  
18 reservation to have changed. I'm speaking just in  
19 general. But that was also what happened in the  
20 Oneida case.  
21 Q So I take it, then, from your answer that it's  
22 possible that by use of the term "Oneida  
23 Reservation" in this context, they did indeed  
24 intend to refer to existing reservation  
25 boundaries?

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1 A In this particular case, I don't think that's what  
2 they meant.  
3 Q Why is that?  
4 A Because of the whole historical record that I have  
5 looked at where various Federal officials in this  
6 period were talking about the former reservation  
7 and were only treating the trust land as being  
8 under Federal or tribal jurisdiction.  
9 But I am aware of other situations  
10 where there was fee land inside extant reservation  
11 boundaries.  
12 Q I had understood from your testimony earlier that  
13 there were, in fact, documents in the case of  
14 Oneida that indicated that, that we have a mixed  
15 record here; sometimes there's use of the term  
16 "Oneida Reservation" that does indeed refer to the  
17 exterior boundaries of the 1838 reservation.  
18 A There are some. I don't see this as explicitly  
19 one of them.  
20 Q Why not?  
21 A Because this is just referring to the Oneida  
22 Reservation in passing and is not addressing the  
23 question of whether its original boundaries were  
24 still intact.  
25 Q So you're suggesting that to have import, every

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1 use of the term "Oneida Reservation" will have to  
 2 have a footnote drop saying that, By this term, we  
 3 mean to refer to the full extent of the boundaries  
 4 of the 1838 Treaty? Is that what you suggest?  
 5 A No, no. But if you look at the documents where  
 6 someone was specifically addressing these kinds of  
 7 questions, they distinguish between the original  
 8 extent of the reservation and the current status,  
 9 which many of them said was the reservation  
 10 doesn't exist.  
 11 So I'm distinguishing between  
 12 documents that just refer in passing to a  
 13 geographical area and others that are more  
 14 directly trying to grapple with the question of  
 15 what has become of the reservation.  
 16 So I see them as -- you know,  
 17 they're both out there, but I attach more  
 18 significance to documents where they're directly  
 19 trying to address the question of who has  
 20 jurisdiction, the question of whether the Indians  
 21 or citizens or wards; and this -- this document  
 22 doesn't directly deal with that.  
 23 Q So it has no significance to you that they  
 24 continued to use the same term that had been used  
 25 historically to refer to those boundaries without

Page 139

1 making the distinction that you just suggested,  
 2 that it's meaningless?  
 3 A I don't think it's meaningless, but I think it's  
 4 perfectly understandable that that is the way they  
 5 refer to this area.  
 6 Q Perhaps because they believe the reservation  
 7 continued to exist? Is that possible?  
 8 A Yeah. I think there were people who did believe  
 9 the reservation continued to exist. I don't think  
 10 the Federal officials did.  
 11 (Exhibit No. 49 was marked for  
 12 identification.)  
 13 BY MS. LOCKLEAR:  
 14 Q Could you identify for the record what's just been  
 15 handed to you and marked as Exhibit 49, please?  
 16 A It says on the last page that it is Report of  
 17 Field Trip by George Hendrix and Peter Walz,  
 18 W-a-l-z, to the Oneida Reservation October 1956.  
 19 Q Have you seen this document before?  
 20 A I believe I have.  
 21 Q Do you recall what you had to say about this  
 22 document in your report?  
 23 A No, I don't.  
 24 Q The discussion is in your third report on Page 15,  
 25 first full paragraph.

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1 You pretty much dismissed this  
 2 report based on the first sentence -- two  
 3 sentences that appear in it; is that correct?  
 4 A I didn't dismiss the report at all.  
 5 I just say that Kiel failed to note  
 6 that this report has some statements that are  
 7 contradictory to the argument that he was making.  
 8 Q And you rely solely on those two first sentences;  
 9 is that not correct?  
 10 A The first two sentences?  
 11 Q Particularly with reference to original Oneida  
 12 Reservation and --  
 13 A Oh, sorry. I'm looking at the wrong page.  
 14 That's definitely one part of this  
 15 document that I think runs counter to what he's  
 16 saying about it. I think there may be other  
 17 parts, but I can't recall. So if you'd like, I  
 18 can take some time and look this over.  
 19 Q We're going to walk through this just for a bit  
 20 because it does appear to me that perhaps you  
 21 didn't read the entire document. There are  
 22 multiple references to reservation.  
 23 Let's look at the first sentence of  
 24 the next paragraph, "Within the exterior  
 25 boundaries of the reservation, there are two

Page 141

1 highways."  
 2 The next paragraph, "Well-tended  
 3 farmlands of non-Indians surround every block of  
 4 trust land on the Reservation."  
 5 The next page, the first sentence,  
 6 "The group on the reservation consists of 348  
 7 families with 373 school children. About  
 8 20 percent of the people who live on the  
 9 reservation do not live on trust land."  
 10 Three paragraphs later, "The tribal  
 11 council of this reservation," referring to people  
 12 born on the reservation.  
 13 The next paragraph, "The Oneidas  
 14 who do not live on the reservation."  
 15 The next page --  
 16 A Sorry. Can you tell me what page we're on now?  
 17 Q It's Bates number 751.  
 18 A Okay. There are two pages with the same Bates  
 19 number in here.  
 20 Q Sorry; bad copy.  
 21 A It got me off a little bit.  
 22 Q Fourth full paragraph, first sentence, "All of the  
 23 land on the Oneida Reservation."  
 24 Next paragraph, first sentence,  
 25 "There are two government-owned buildings on this

Page 142

1 reservation."

2 Next paragraph, first sentence,

3 "The Bureau of Indian Affairs has no road program

4 on this reservation."

5 Doesn't this seem to represent to

6 you a pretty consistent view that they're talking

7 about the entire reservation here? And there are

8 others.

9 A I don't think they're attaching any legal

10 significance to it, but they're using "the

11 reservation" to refer to the original

12 reservation. So -- may I take a little time to

13 look at this?

14 Q Certainly.

15 A I've taken just a quick read through here, and

16 there's a lot of information in this document.

17 But I'd just point out that there is one other use

18 of the term "original reservation" on the second

19 page of the document. It's Bates-stamped with the

20 number ending 11749. It's the last sentence on

21 the page.

22 So this document does have a couple

23 spots where it refers to the original reservation

24 boundaries; and so that, to me, indicates that use

25 of the term "on the reservation" or "of the

Page 143

1 reservation" is not necessarily meant to imply or

2 assert that those original reservation boundaries

3 remained intact.

4 Q Including the language, did you get so far towards

5 the end where on Bates number Page 754, it says,

6 "There are about a dozen trust tracts scattered

7 throughout the reservation consisting of parcels

8 of from 20 to 400 acres"?

9 Doesn't that suggest a very clear

10 distinction between the existence of trust land as

11 well as the continued existence of the

12 reservation?

13 A If we put the word "original" in front of

14 reservation here, which I think the -- those two

15 uses early in the document suggest there's a

16 possibility for how this person was using the term

17 "reservation" to mean the original boundaries,

18 that would run the opposite of what you're

19 suggesting.

20 Q But the word "original" does not appear there,

21 does it? And in fact, doesn't the document use

22 the term "reservation" much more often than it

23 uses the term "original reservation"?

24 A It does use the unmodified word "reservation" much

25 more often.

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1 I only initially spot two uses of

2 the word "original," but I still think those are

3 significant. I think they do provide some reason

4 to understand this document as not necessarily

5 implying that the original boundaries remained

6 intact.

7 Q You cited -- when you first began your discussion

8 of this document, you referred to the report,

9 which this constitutes, of a field trip to the

10 Oneida Reservation. Why would they have done a

11 field trip to report on land that was not

12 reservation and then have so much discussion of

13 it?

14 A They were reporting on the general status of the

15 Oneida people and lands.

16 Q That's not what it says. It says "Oneida

17 Reservation," doesn't it?

18 A Again -- yeah, it does.

19 But again, it could be referring to

20 just the geographic area of the original Oneida

21 Reservation, so...

22 Q You seem determined to come to a particular

23 construction of this document based on a minority

24 usage of a particular term, and that suggests a

25 tortured construction of a document that on its

Page 145

1 face indicates the existence of the reservation,

2 doesn't it?

3 A I don't think so. And I'm sorry if this makes you

4 angry.

5 Q No, I'm not angry.

6 A Well, your tone is a bit angry.

7 Q Incredulous.

8 A Well, okay. But I think the Nation's experts have

9 tortured some documents.

10 All I'm saying about this document

11 is that it has a couple of references to the

12 original reservation; and to me, that indicates

13 that this document -- that the people who wrote

14 this document could have been using the term

15 "Oneida Reservation" to mean the geographical area

16 defined by those original boundaries.

17 Q And so you're not prepared to draw a construction

18 of this document based on the majority usage of

19 the term?

20 A I'm telling you that, to me, the majority usage of

21 the term is colored by the fact that "original" is

22 also used in front of that term.

23 Q Okay. Let's turn now to your interpretation of

24 the events leading to the creation of the towns of

25 Hobart and Oneida. Do you recall where that

Page 146

1 discussion takes place? That's in your first  
 2 report, Page 23, I think.  
 3 (Exhibit No. 50 was marked for  
 4 identification.)  
 5 BY MS. LOCKLEAR:  
 6 Q Do you remember that discussion in your report?  
 7 A Yes.  
 8 Q What was your interpretation of those events?  
 9 A That the state authorized the organization of the  
 10 towns of Hobart and Oneida, and they were  
 11 organized. After their organization, questions  
 12 arose periodically about whether the organization  
 13 of those towns was legal or not, and I can't  
 14 remember -- I can't remember exactly what I  
 15 addressed here.  
 16 Q Is the purpose of this discussion -- do you  
 17 surmise from this that these two local  
 18 governments created by the state were intended to  
 19 supplant or replace the government of the Oneida  
 20 Reservation?  
 21 A My understanding is that the fact that the  
 22 reservation had been allotted gave -- well, sorry.  
 23 I take that back.  
 24 I do think that the state  
 25 authorized the creation of these towns and

Page 147

1 intended for them to have jurisdiction over fee  
 2 lands within their boundaries.  
 3 Q Could you refer to the document that we just  
 4 marked, Exhibit No. 50? Do you recognize this?  
 5 A Yes.  
 6 Q Could you identify it for the record, please?  
 7 A It's an act to create two townships in Brown and  
 8 Outagamie Counties from the territory now embraced  
 9 within the Oneida Reservation in said counties.  
 10 Q And is there anything, in fact, in this statute,  
 11 which is the one that you cite in your report as  
 12 authorizing the creation of the towns, that  
 13 refers to fee land, trust land or any other  
 14 distinction?  
 15 A There's nothing that says that explicitly, no.  
 16 Q And to the contrary, doesn't this statute appear  
 17 to assume the existence of the Oneida Reservation  
 18 by defining the location of the towns by reference  
 19 to those exterior boundaries?  
 20 A It does.  
 21 Q Okay. Thank you.  
 22 And then you reference a debate  
 23 about the legality. Do you recall that in your  
 24 report, the legality of the townships?  
 25 A I recall that the question of whether the

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1 townships were legal came up; and I have something  
 2 in my report about -- in 1909 an investigation  
 3 about the legality by the supervisor of Indian  
 4 schools. I see you have that document here.  
 5 Q And is this the same document, then, that you're  
 6 discussing in your report?  
 7 A Yes. It's a document I'm discussing on Page 24 of  
 8 my first report.  
 9 Q And in your report, what do you surmise from this  
 10 document or do you think it indicates?  
 11 A This is based on what I said in my report, and I  
 12 haven't looked, again, at the document.  
 13 But what I said in the report was  
 14 that Davis looked into the question of whether the  
 15 organization of these towns was legal; and he said  
 16 basically that it -- it is legal or if it isn't  
 17 legal, it could easily be made legal; and so he  
 18 believed it to be, you know, an action that the  
 19 tribe couldn't undo.  
 20 Q And do you imply in your discussion of the report  
 21 that there's something in his analysis that  
 22 indicates that the reservation no longer exists,  
 23 that, in fact, these towns supplanted the  
 24 reservation?  
 25 A I don't think I said anything to that effect in my

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1 report.  
 2 I have a quote from him that is at  
 3 the top of Page 25 and leading into that from  
 4 Page 24, "Davis also noted that the Federal  
 5 Government could not prevent the state from  
 6 organizing town governments or collecting taxes on  
 7 lands sold or patented."  
 8 (Exhibit No. 51 was marked for  
 9 identification.)  
 10 BY MS. LOCKLEAR:  
 11 Q Well, in fact, doesn't that report indicate the  
 12 continued existence of the Oneida Reservation?  
 13 A I'll take a look -- you mean this document?  
 14 Q Yes.  
 15 A Okay. That's marked Exhibit 51?  
 16 Q Yes.  
 17 A Okay. I've taken a quick look through here. Can  
 18 you remind me of your question?  
 19 Q Doesn't this document, in fact, support the  
 20 continued existence of the Oneida Reservation?  
 21 A How -- can you be a little more specific? Is  
 22 there some particular part of it you're looking  
 23 at?  
 24 Q Yes. I refer you to Page 2, first full paragraph,  
 25 where it says, "At first it seemed to me that

Page 150

1 there might be a Federal question in the matter of  
 2 whether the state could go ahead and organize  
 3 municipal territory included in an Indian  
 4 reservation where no formal opening of surplus  
 5 lands or obliteration of reservation boundaries  
 6 had ever taken place."  
 7 A Yes. I would agree with your understanding of  
 8 that, that he's -- he's suggesting that the  
 9 reservation still existed.  
 10 Q So we can't really draw any conclusion from his  
 11 consideration of the organization of the towns of  
 12 Hobart and Oneida indicating that the reservation  
 13 no longer exists, can we?  
 14 A I'm sorry. Would you repeat that?  
 15 (Record read as requested.)  
 16 BY THE WITNESS:  
 17 A I'm sorry. I'm finding that question confusing.  
 18 BY MS. LOCKLEAR:  
 19 Q It's not very articulate. Let me try again.  
 20 There's nothing in this document  
 21 that indicates that the formation of the towns of  
 22 Hobart and Oneida indicated or resulted in the  
 23 obliteration of the reservation; is that correct?  
 24 A That's correct.  
 25 Q Okay. Thank you.

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1 Do you remember in -- actually, I'm  
 2 not sure which of your reports at this point. Do  
 3 you remember relying on the case captioned United  
 4 States versus Hall?  
 5 A I do remember citing to that case. I don't  
 6 remember where. Perhaps in my first report.  
 7 Q Do you remember your analysis of that and the  
 8 conclusions you drew from that case?  
 9 A I don't -- I don't remember.  
 10 I remember taking note of the fact  
 11 that a judge in that case had -- I believe a judge  
 12 in that case had said that the reservation no  
 13 longer existed, but I can't remember exactly what  
 14 I said about it.  
 15 Q It's hard to ask you about reliance on that  
 16 without running afoul of legal conclusions here  
 17 since it is a case, and you relied upon it.  
 18 Did you do any analysis of the  
 19 decision itself to understand the basis for that  
 20 decision?  
 21 A No.  
 22 Q So as far as you're aware, if the decision had  
 23 been overruled by a Supreme Court decision, for  
 24 example, you would not be aware of that?  
 25 A I -- I'm -- right. I'm not aware of what the

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1 subsequent fate of that decision was.  
 2 Have you found the spot in my  
 3 report where I mentioned it?  
 4 Q No.  
 5 A I -- I believe I treated it like I would other  
 6 historical documents, that I was using it to  
 7 explain what the understanding was at that time.  
 8 And I think that one was 1909 -- I can't recall.  
 9 Q Yes.  
 10 A So, you know, at the time that was what the  
 11 understanding was of the reservation according to  
 12 that court, that judge; and right now, again, I  
 13 can't recall exactly where I referred to that.  
 14 Q Would it affect your reliance on that case if you  
 15 had evidence that the decision was just wrong for  
 16 legal reasons?  
 17 A This is a tough one for me because I'm a  
 18 historian, not a lawyer.  
 19 So if the legal -- yeah. I guess  
 20 if the -- if legally it was wrong, I would take  
 21 that into consideration; and I would not put so  
 22 much weight on it.  
 23 Q Okay. And do you remember relying on another case  
 24 called Stevens versus County of Brown?  
 25 A I also remember citing that case; and again, I

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1 think it was probably in my first report, but I  
 2 can't right now remember where.  
 3 Q Do you want to look for that? We can take a  
 4 moment for you to do that. I don't have a  
 5 citation as to where it is either.  
 6 Try Page 26 in your initial report,  
 7 report number one.  
 8 A Okay. On 27 I have a couple of footnotes to that  
 9 case. Okay. Yes, the discussion starts on  
 10 Page 26.  
 11 Q And you note what that case is about in your  
 12 discussion. Could you please put into the record  
 13 what that -- what the thrust of the case -- what  
 14 the issue was?  
 15 A Yeah. The members of the Oneida tribe were suing  
 16 the counties for recovery of property taxes.  
 17 Q I'm just curious. Can you tell me how you came  
 18 across this case? Because it's an unpublished  
 19 decision. Where did you locate this?  
 20 A I don't recall where I got it. It may have been  
 21 one of the documents that counsel for the village  
 22 provided me.  
 23 Q I see. Going back to the case itself, so do you  
 24 understand this to be a case involving the  
 25 abolition or the disestablishment of the

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1 reservation?

2 MR. KOWALKOWSKI: I'm going to object to

3 the extent it calls for a legal conclusion.

4 BY THE WITNESS:

5 A Okay. I think I've refamiliarized myself.

6 What was the question again? I

7 know Mr. Kowalkowski had an objection to it, but

8 I'll try to answer.

9 BY MS. LOCKLEAR:

10 Q Is it your understanding that this case is about

11 abolition or disestablishment of the Oneida

12 Reservation?

13 A My understanding is that the judge ruled that the

14 Dawes Act had discontinued the reservation.

15 Q When you say "ruled," that's a legal term of art.

16 A Made a decision. I mean...

17 Q He actually made a decision that the land was

18 taxable; is that correct?

19 A I don't -- I don't recall.

20 Q I think that's what you -- isn't that what you

21 testified the case was about?

22 A Yes. But -- I don't recall, but that -- sorry.

23 Let me just read this quotation I have here.

24 So it looks to me like he

25 determined that the taxes couldn't be recovered

Page 155

1 and that the counties had a right to tax.

2 Q And the General Allotment Act pretty plainly so

3 states, right?

4 A Yes.

5 Q Without any reference to reservation boundaries?

6 A I believe that's correct.

7 Q So isn't it fair to characterize the comment that

8 the judge made, as Dr. Kiel did, as a passing

9 commentary on the boundaries and not necessarily a

10 full-blown analysis?

11 MR. KOWALKOWSKI: I just object to the

12 extent it calls for a legal conclusion.

13 BY THE WITNESS:

14 A I'd have to look at this in the context of the

15 full decision, but I'm quoting it here as evidence

16 that this judge believed that the Dawes Act

17 resulted in discontinuance of the reservation.

18 MS. LOCKLEAR: Could we take a short

19 break? I want to confer with co-counsel for a

20 moment.

21 (Recess taken from 1:56 p.m.

22 until 2:05 p.m.)

23 BY MS. LOCKLEAR:

24 Q Can we go back just for a moment to a statement

25 you made a few minutes ago? I want to make sure I

Page 156

1 understand it.

2 As I understood your testimony, you

3 said that it's possible for fee patent land to

4 remain within the boundaries of an extant

5 reservation; is that correct?

6 A Yes.

7 Q Okay. Could you describe for us how you

8 distinguish that case from Oneida?

9 A I know that there are various reservations that

10 have fee-patented land where the exterior

11 boundaries still exist.

12 I don't -- I don't know

13 specifically how each of those situations arose

14 from a historical perspective; but I believe in

15 general they're a bit different from what happened

16 on the Oneida Reservation where the reservation

17 was allotted in its entirety or virtually in its

18 entirety, and then the trust restrictions were

19 removed on all but a small amount of land.

20 So I think that the set of

21 circumstances -- the set of historical

22 circumstance at Oneida is different from these

23 other situations. So that's how I would

24 distinguish.

25 Q So is it fair to say, then, that you view Oneida

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1 as de facto disestablishment?

2 MR. KOWALKOWSKI: Object to the extent

3 it calls for a legal conclusion.

4 BY THE WITNESS:

5 A Would you explain what you mean by "de facto"?

6 BY MS. LOCKLEAR:

7 Q Yes. It occurs as a matter of fact in the absence

8 of an express act of Congress directing it.

9 A As we've discussed before, it's my opinion that

10 the Dawes Act, its amendments and the 1906

11 Appropriation Act, while they did not contain the

12 explicit language as we established previously,

13 that they said the reservation no longer exists.

14 They still reflect Congress's

15 intent for reservations, and the Oneida

16 Reservation in particular, to be allotted

17 fee-patented and cease to exist. So this

18 situation stands out as a rare instance that I'm

19 aware of where the Dawes Act was basically carried

20 out to its intended conclusion.

21 In other cases where these kinds of

22 issues have come up, there's been some kind of

23 subsequent piece of legislation related to the

24 opening of surplus lands; and since there is no

25 surplus land here, there's no such act.

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1 So we have, instead, the Dawes  
2 Act itself, its amendments and the 1906  
3 Appropriation Act to reflect what Congress's  
4 intent was here.  
5 Q So does that suggest, then, that this occurs  
6 possibly only on small reservations that would  
7 have been fully or close to fully allotted?  
8 A I don't want to generalize because I think that  
9 every reservation is different. Everyone has a  
10 different history.  
11 In this case, because the  
12 reservation was so small that there was no surplus  
13 land, I think its outcome was different from  
14 one -- from a much larger reservation where there  
15 was a lot of surplus land.  
16 Q But I take it, then, that you would agree that  
17 there is no language on the face of the General  
18 Allotment Act that makes such a distinction?  
19 A Correct.  
20 Q Okay. One last document here.  
21 Do you remember your discussion of  
22 the 1984 Attorney General's opinion regarding  
23 Oneida? Wisconsin Attorney General's opinion.  
24 A Yes.  
25 MS. LOCKLEAR: Would you mark this

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1 document, please?  
2 (Exhibit No. 52 was marked for  
3 identification.)  
4 BY MS. LOCKLEAR:  
5 Q As I recall, you were fairly dismissive of this,  
6 quoting the final passage in its conclusion  
7 indicating that there may be some ambiguity in the  
8 conclusion reached there.  
9 How do you read this decision in  
10 total?  
11 A First, I don't -- I don't think I was dismissive  
12 of it. Let me remind myself what I said.  
13 Q I think it's in your report number one.  
14 A I don't think it was in the first report, but I  
15 can't remember which report was -- oh, it's in the  
16 third report.  
17 Q Yes, beginning on Page 15.  
18 A So I did not dismiss this document. I just called  
19 attention to the final paragraph of it.  
20 Q So you don't disagree that the Wisconsin Attorney  
21 General reached a considered opinion that the  
22 Oneida Reservation has not been disestablished?  
23 A I agree that she reached an opinion that it was  
24 not disestablished.  
25 Q And, in fact, doesn't this opinion reject every

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1 major premise in support of disestablishment that  
2 you've identified in your reports?  
3 A I can't recall exactly what it covers and how  
4 they correspond to my report. It's a lengthy  
5 document, and I'm guessing you don't want me to  
6 read it.  
7 Q Read the whole thing, no. We'll see if we can't  
8 shorten this a bit.  
9 I draw your attention to Bates  
10 number page 224, internal pagination Page 10.  
11 A Okay.  
12 Q The first paragraph reads, "The reservation was  
13 established by the Treaty of February 3, 1838.  
14 The Oneidas relinquished all interests in lands  
15 previously acquired or reserved, reserving to the  
16 said Indians," and then it quotes the treaty, the  
17 language we're familiar with.  
18 It goes on to say, "In 1838 there  
19 were 654 Oneida Indians in Wisconsin. The treaty  
20 reserved 65,400 acres of land for the tribe."  
21 Doesn't this appear to you to be a  
22 reading of the 1838 Treaty that the land was held  
23 in common by the tribe?  
24 A I believe that's how she's reading the treaty,  
25 yes.

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1 Q And then you've argued in your reports that  
2 allotment can -- alone can result in  
3 disestablishment. Once trust patents expire  
4 and/or fee patents are issued, I think as you  
5 described it on the Oneida Reservation, it was  
6 fully allotted and fee patents were acquired, that  
7 that in itself is sufficient to support  
8 disestablishment or at least a factor?  
9 A Yes. I think it is a factor; and again, I  
10 hesitate on this question of diminishment or  
11 disestablishment, but yes, I think that's a factor  
12 that should be considered.  
13 Q And isn't it true that the Attorney General, in  
14 her opinion, considered and explicitly rejected  
15 that? I draw your attention to Bates page 226,  
16 internal pagination Page 12, first two sentences  
17 read, "The court in Seymour, therefore,  
18 established the principle for subsequent  
19 reservation disestablishment cases that  
20 reservation boundaries are not diminished solely  
21 by the transfer of trust land to fee title  
22 ownership. Under the reasoning of Seymour, the  
23 Wisconsin Oneida Reservation was not  
24 disestablished by the transfer of trust land to  
25 fee title ownership."

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1           So that rejects that premise of  
2   your argument; is that correct?  
3 A   Yes.  
4 Q   And finally, doesn't the opinion also reject your  
5   analysis that somehow the boundaries of the  
6   reservation became altered to constitute nothing  
7   more than existing trust land?  
8 A   I can't recall. I mean, in the passage we just  
9   looked at, she referred to disestablishment. So I  
10   can't recall what she had to say about the  
11   prospect of diminishment.  
12 Q   First full paragraph on page, internal pagination  
13   Page 2, Bates number 216 -- I think that's a typo  
14   on my part. I think that probably should be  
15   Page 12. Let me check that.  
16           I'm sorry. Page Bates number 215,  
17   internal Page 1, bottom of the page, it reads, "In  
18   1948, however, Congress drastically changed the  
19   rule for determining jurisdiction over Indian  
20   country by enacting 18 U.S.C. Section 1151(a).  
21   Contrary to premising state, Federal and tribal  
22   jurisdiction on land title, jurisdiction is now  
23   based upon reservation boundaries. Section  
24   1151(a) includes within the definition of Indian  
25   country all lands within the limits of an Indian

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1   reservation notwithstanding the issuance of any  
2   patents."  
3           And as I recall, you disputed the  
4   applicability of this statute to Oneida?  
5 A   I didn't dispute that it -- I don't recall  
6   disputing that it was applicable to this case, but  
7   in terms of how I was trying to understand what  
8   occurred, which predates this legislation, I was  
9   trying to, as a historian, explain the  
10   understandings in the 1920s and '30s.  
11           So what sense the judge makes of  
12   Section 1151, I'm not sure; but I'm not saying  
13   that it doesn't -- that it doesn't apply somehow.  
14 Q   Finally, doesn't the Attorney General's report  
15   reject the possibility that the 1903 creation of  
16   the towns of Hobart and Oneida could have somehow  
17   affected reservation boundaries?  
18 A   Would you like to direct me to a point?  
19 Q   Internal pagination Page 31. This refers to the  
20   document we discussed earlier, the 1903 annual  
21   report, the sentence that reads, first full  
22   paragraph, "The 1903 report is significant because  
23   it indicates that the Federal Government continued  
24   to recognize the reservation status of all the  
25   land located within the original boundaries,

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1   (65,400 acres) despite the establishment of  
2   townships within its exterior boundaries and  
3   Oneida Indians' participation in local elections."  
4           So it's a pretty clear repudiation  
5   of your theories with regard to disestablishment;  
6   is that correct?  
7           MR. KOWALKOWSKI: Objection. Calls for  
8   a legal conclusion.  
9 BY THE WITNESS:  
10 A   Sorry. I'm just looking through the documents  
11   quickly for something.  
12           I agree that she disagrees with the  
13   perspective I have on the historical events.  
14 BY MS. LOCKLEAR:  
15 Q   Well, can I just ask in closing here if there are  
16   any of your conclusions that you would like to  
17   alter or reconsider based on any of the documents  
18   or discussion we've had today?  
19 A   No.  
20 Q   So you're prepared to stand by, carrying the  
21   burden of proof, the mixed record as we've  
22   acknowledged exists that is inconsistent with the  
23   Supreme Court decisions and stand by your  
24   conclusions?  
25           MR. KOWALKOWSKI: I'll object to the

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1   extent that misstates her testimony; also calls  
2   for a legal conclusion.  
3 BY MS. LOCKLEAR:  
4 Q   You can answer the question.  
5 A   I stand by the opinions that I have articulated in  
6   these reports.  
7 Q   Except as qualified? You did qualify one?  
8 A   I qualified one.  
9           MS. LOCKLEAR: Okay. There is one  
10   discussion unrelated to questions. We're done  
11   here unless you want to visit with her about  
12   something.  
13           But we wanted to put on the record  
14   a concern about the existence of documents that we  
15   haven't seen. Dr. Greenwald has testified that  
16   she had a substantial body of documents that she  
17   obtained from the village that were identified, I  
18   think, as Clifton documents --  
19           THE WITNESS: Yes.  
20           MS. LOCKLEAR: -- that were not  
21   produced.  
22           In addition, she says that there  
23   were documents that they located in their own  
24   research that are not necessarily cited in her  
25   report, but that were taken into consideration by

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1 her; and I think we're entitled to see those as  
2 well.  
3 MR. KOWALKOWSKI: Let me ask about the  
4 second one, documents they located in their own  
5 research? Do you mean the village?  
6 MS. LOCKLEAR: HRA located in their  
7 independent research.  
8 MR. KOWALKOWSKI: That were not  
9 referenced or produced?  
10 MS. LOCKLEAR: Yes.  
11 MR. KOWALKOWSKI: As to those, do you  
12 know which ones we're talking about more  
13 specifically?  
14 MS. LOCKLEAR: Well, I don't because we  
15 don't know what they are.  
16 MR. KOWALKOWSKI: I didn't know if --  
17 yeah, if you thought there was something very  
18 specific that you're referencing or in a more  
19 general sense.  
20 MS. LOCKLEAR: Well, no.  
21 As we understand it, I mean, it's  
22 an unknown universe to us because she  
23 apparently -- she and her associates considered  
24 documents that they found in their research, but  
25 were not cited in her report. And so they were

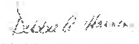
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1 obviously considered by her, and we're entitled to  
2 see those. We don't know what they are obviously.  
3 MR. KOWALKOWSKI: I understand your  
4 question.  
5 So those documents as well as the  
6 Clifton documents are the ones you're wishing for  
7 us to produce?  
8 MS. LOCKLEAR: Yes.  
9 MS. HOGEN: Basically, what we need is  
10 anything that they considered; and so far, I think  
11 all we have are the documents that were actually  
12 cited in the report.  
13 MS. LOCKLEAR: That's right.  
14 MR. KOWALKOWSKI: Okay. Your concern is  
15 noted. I'll try and get back to you by Friday at  
16 the latest if there's any objection to producing  
17 them.  
18 MS. LOCKLEAR: Our understanding is it  
19 should be relatively simple, particularly with the  
20 Clifton documents because she obtained those in  
21 digitized form.  
22 MR. KOWALKOWSKI: Noted.  
23 MS. LOCKLEAR: So production should be  
24 relatively simple of those.  
25 MR. KOWALKOWSKI: Okay. I will confer

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1 with co-counsel, and we'll try and get back to you  
2 by Friday.  
3 MS. LOCKLEAR: Okay.  
4 MR. KOWALKOWSKI: I am out next week.  
5 So I'm afraid if I don't do it by then, there  
6 would be an extended delay.  
7 MS. LOCKLEAR: Okay. We have nothing  
8 further.  
9 MR. KOWALKOWSKI: I have no questions.  
10 MS. LOCKLEAR: Thank you very much.  
11 THE COURT REPORTER: And did you want  
12 the same order as yesterday?  
13 MS. LOCKLEAR: Yes.  
14 THE COURT REPORTER: And  
15 Mr. Kowalkowski, did you want a copy of the  
16 transcript?  
17 MR. KOWALKOWSKI: Yes.  
18 (Proceedings concluded at 2:24 p.m.)  
19  
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1 STATE OF WISCONSIN )  
2 ) SS:  
3 COUNTY OF MILWAUKEE )  
4 I, Debbie A. Harnen, a Registered  
5 Professional Reporter and Notary Public in and for the  
6 State of Wisconsin, do hereby certify that the  
7 deposition of EMILY GREENWALD, Ph.D., was reported by  
8 me and reduced to writing under my personal direction.  
9 I further certify that said deposition  
10 was taken at von BRIESEN & ROPER, s.c., 411 East  
11 Wisconsin Avenue, Suite 1000, Milwaukee, Wisconsin, on  
12 March 28, 2018, commencing at 8:53 a.m. and concluding  
13 at 2:24 p.m.  
14 I further certify that I am not a relative  
15 or employee or attorney or counsel of any of the  
16 parties, or a relative or employee of such attorney or  
17 counsel, or financially interested directly or  
18 indirectly in this action.  
19 In witness whereof, I have hereunto set my  
20 hand and affixed my seal of office at Milwaukee,  
21 Wisconsin, on March 29, 2018.  
22  
23   
24 Debbie A. Harnen - Notary Public  
25 In and for the State of Wisconsin  
My Commission Expires: July 27, 2018.