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Hopi LCR Trial -- Eighth Week

The Hopi Little Colorado River water rights trial continued into week eight on October 29, 2018. The Navajo Nation began its case this week, in opposition to the Hopi past and present water claims. They presented only two witnesses, Dr. McCord and Dr. Leeper, but their direct and cross-examination took all week.

In the Past and Present Water trial, the Court will make historical findings of fact as to how the Hopi have used water in the past. One part of the Hopi claim, is that the Hopi have diverted monsoon surface water from the Jeddito, Polacca, Oraibi, Dinebitto and Moenkopi washes for growing corn and other crops. Agriculture, prayer, ceremonies and dances are woven into the Hopi way of life.

As the amount of water that runs through the washes changes each year with the rainfall, it is a difficult task to put a number on how much acre feet of water are used from the washes for agriculture. To arrive at a water number, the Arizona Department of Water Resources (“ADWR”) chose to determine the maximum historical number of acres the Hopi farmed in the past in a single year, and multiply that number by a water duty. A water duty is the amount of water needed by the Hopi to water a field. ADWR, based on historical research after 1848, concluded the highest number of acres farmed by the Hopi in a single year was 9,330 acres in 1961. ADWR concluded that the Hopi was entitled to 10,000-acre feet from the washes for their historical use.

The United States chose to determine a water number by creating a computer model that mimics the hydrological flow of the wash basins. The United States concluded that the highest number of acres farmed by the Hopi in a single

year was 13,000 acres plus in 1954. Running that number of acres through their model, the United States determined the historic maximum surface water use in one year was 18,000-acre feet.

Dr. McCord and Dr. Leeper are experts for the Navajo, and they were called to give their opinion as to the maximum acres farmed by the Hopi in 1954; that is, they were attacking the United States opinion that Hopi had farmed 13,000 plus acres in 1954. They argued that the United States had overstated the acreage, and that the farm acres in 1954 was only 4,000 acres plus. Running a lower acreage number through the government's model resulted in only 10,000-acre feet as a historical maximum of water taken from the washes in any one year.

The Hopi lawyers vigorously cross-examined Dr. Leeper and Dr. McCord. Dr. Leeper and Dr. McCord had reduced the historical acreage by 57% based on a misreading of a 2005 ADWR field survey. They mistakenly concluded that ADWR had found that 57% of Hopi fields were watered by rainfall falling on the field only (no supplemental water from off the field). The ADWR made no such finding, and even the ADWR found over 9,330 acres that were entitled to a water duty.

The Navajo Nation will continue its case on Thursday, Nov. 8 and on Friday, Nov. 9. They intend to call two more witnesses: their mining director and an anthropologist.

One Hopi witness, Dr. Peter Whiteley, was not able to testify earlier because of an unanticipated medical issue. The Court held the Hopi case in chief open until he can testify. He is scheduled for November 26, the Monday after Thanksgiving. With his testimony, the past and present trial should conclude.

This week the Court scheduled closing argument for the morning of December 17 and December 18. The Court gave the Hopi and United States two hours to split between them; and the objectors (Navajo, State Land Department, City of Flagstaff, SRP and the Little Colorado River Association) two and one-half hours between them.

The Court also moved up the pretrial conference on the future trial to the afternoon of December 17. The Court will discuss trial procedures for the December 2019 future water trial.

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