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### **Hopi LCR Trial -- Ninth Week**

The Hopi Little Colorado River water rights trial continued into week nine in two days of testimony on November 8 and November 9, 2018. The Navajo Nation finished its case this week, calling Akmar Zaman, head of its Department of Mining, and Dr. Gilpin, an anthropologist.

Peabody Coal Company buys water from both the Hopi Tribe and the Navajo Nation to operate the coal mine. Prior to 2005, it used approximately 4,000 acre feet (af) a year. Three quarters of that amount was used for a coal slurry pipeline to the Mohave Generating Station on the Arizona/California border. The Mohave Generating Station shut down in 2004, and, since, then, Peabody uses about 1,200 af of water a year.

There are 8 active wells that Peabody drilled to obtain water. Seven (7) of the eight (8) wells are on Navajo land and Navajo Partitioned land. One well is located on Hopi land. Regardless of where the wells are located, after 1987 Peabody has paid an equal amount for the water to both Hopi and Navajo.

In the past and present water trial, the Court has been asked to allocate the water that Peabody has used between the Hopi Tribe and the Navajo. The major parties have proposed different ways to allocate past water use. The federal government has asked to allocate based upon title to the land on which the mine is located. This would split the past water use approximately 30% to Hopi and 70% to Navajo. So, for example, if present use is 1200 af, then Hopi will be allocated 360 af (1200 times .30 equals 360 af).

Hopi claims that the past water use should be allocated 50/50, reflecting the actual water payments made by Peabody since 1987. The water comes from the N Aquifer a common resource between Hopi and Navajo, and the payment reflects the actual negotiated agreement between the parties. A 50/50 split also mirrors the split of coal royalties on the Partitioned lands.

The Navajo Nation claim is that it should get 7/8<sup>th</sup> of the water based upon the location of seven wells on Navajo land. This would give Hopi about 12.5% of the past water use. Alternatively, the Navajo Nation claim an allocation should be made based on coal sales or coal production. Coal royalties on the Partitioned land is split 50/50 between Hopi and Navajo; but coal royalties on solely Navajo land are paid 100% to Navajo. Using coal production in 1982, the highest past use of water for the coal mine, Navajo asks for an allocation of 88% of the water to Navajo and 12% to Hopi.

Mr. Zaman was called to testify about coal sales and coal production. In cross-examination, the Hopi lawyers pointed out that coal sales and production vary from year to year, resulting in the split of royalties varying from year to year. In 1987, as Peabody had mined more and more from the Navajo sole mine property because the royalty rate was less there, the parties negotiated a new agreement giving Hopi an additional payment for the disproportionate share of the mining, equal water payments, and a promise that Peabody would level things out in the future. After 1987, the Hopi percentage of the coal sales and production increased into the 30% to 40% range, with a high of 43%.

Dr. Gilpin was called as an anthropologist to rebut Hopi testimony from Dr. Charles Adams. Dr. Adams testified that the historical past high population for the Hopi Tribe was about 12,000 at the time before the Spanish contact in 1540. Utilizing that population number and multiplying the population by 2.5 acres (the amount of farm acres need to feed one Hopi in historical time), an anthropologist can estimate the past use of water from the Northern Washes needed for farming.

Dr. Gilpin testified that, in his opinion, the highest population of the Hopi was 8,000 in 1300. Relying upon a study of Southwestern population from 1200 to 1600, Dr. Gilpin pointed out that the high point for population in the Southwest rose to a peak in 1300, and gradually declined to 1600.

Anthropologists rely upon the counting of rooms in ancient Pueblos to estimate population. They use as a standard 1 to 2 people per room. This is not an exact science as all pueblos have not been excavated and counted, estimating rooms in a three-story Pueblo that has collapsed is difficult, and size and households must be estimated.

In cross examining Dr. Gilpin, the Hopi lawyers brought out that Dr. Gilpin had not done any study himself on the issue of population. He had simply decided to follow one anthropological report over another anthropological report written by Dr. Adams. While in general Native American population declined in the Southwest between 1300 and 1600, Dr. Adams contends that Hopi population grew and then remained steady until shortly before the Spanish contact. Hopi grew due to population aggregation and migration.

The sole remaining witness in the past and present trial is Dr. Whiteley, who was not able to testify in October due to a medical emergency. He will testify on Monday, November 26. The opposition has moved to exclude him claiming he has no new evidence to present that the Court has not already heard. That issue will be decided the week of November 19.

Closing argument for the Hopi Tribe and federal government is still scheduled for the morning and now afternoon of December 17, and December 18 for the Navajo and other objectors. This week the Court gave the Hopi and United States additional time: one and ½ hours of Hopi, and one hour for the federal government. The objectors (Navajo, State Land Department, City of Flagstaff, SRP and the Little Colorado River Association) have two and one-half hours between them.

The Court also kept 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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