

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

11/9/2020

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

S. Ortega

Deputy

FILED: 11/13/2020

In re:
Contested Case No. 6417-203

In re: the General Adjudication
of All Rights to Use Water in the
Little Colorado River System and Source

In re: Trial to Court

MINUTE ENTRY

Courtroom: CCB 301

9:01 a.m. Trial to the Court continues from November 9, 2020.

The following attorneys and parties appear via GoToMeeting:

- Colin Campbell, Grace Rebling, Phillip Londen and Payslie Bowman for the Hopi Tribe
- Vanessa Boyd Willard, Cody McBride, Emmi Blades, and Rebecca Ross for the United States Department of Justice, Indian Resources Section
- Sarah Foley for the United States Department of the Interior
- Brian J. Heiserman, David A. Brown, Lauren J. Caster, Bradley J. Pew for LCR Coalition
- Mark A. McGinnis and Hannah Woner for the Salt River Project
- Carrie J. Brennan and Kevin Crestin for the Arizona State Land Department
- Lee A. Storey, Sara Ransom, Alexandra Arboleda, and Ethan B. Minkin for the City of Flagstaff
- Jeffrey S. Leonard, Judith M. Dworkin, Evan F. Hiller, and Kathryn Hoover for the Navajo Nation

Court Reporter, Luz Franco, is present. Due to technical issues, the proceeding is not digitally recorded.

The Court informs counsel of the technical issues with the recording system.

Mr. Campbell informs the Court of his clients' status and requests that the trial recess and continue after the Thanksgiving holiday.

9:03 a.m. Court stands at recess.

9:29 a.m. Court reconvenes with respective counsel present.

Court Reporter, Luz Franco, is present and a record of the proceeding is also made digitally.

Mr. Campbell states that he is not prepared to move forward with trial today.

Discussion is held between Court and counsel regarding the trial schedule moving forward.

Based on the discussion held and for the reasons set forth on the record,

IT IS ORDERED that Hopi Tribe's case will resume on **November 30, 2020** and continue through **December 2, 2020**.

IT IS FURTHER ORDERED that Navajo Nation will begin its case on **December 3, 2020**.

9:40 a.m. Court stands at recess until **Monday, November 30, 2020 at 9:00 a.m.**

LATER:

Scheduling:

The Navajo Nation shall submit a calendar on or by **November 30, 2020**, that shows the order of the witnesses beginning November 30, 2020 through the remainder of the trial. Trial will be held on the days currently scheduled in December 2020. After the break beginning on December 23, 2020, trial shall resume on January 11, 2021, as presently scheduled.

With the exception of January 15, 2021, upon mutual agreement of all parties, trial may be conducted Monday through Friday in January 2021 and February 2021. In the absence of an agreement by all of the parties, trial will continue to be held on Monday through Thursday. No trial will be scheduled on February 1 or February 2, but trial will occur during that week on February 3 through February 5.

Hopi Tribe’s Motion to Take Judicial Notice of Claims Related to Energy Projects at Black Mesa by the Navajo Nation and the United States in Case No. CV 6417-300 (“Motion”)

The Hopi Tribe initially requested judicial notice of the claims made by the United States, and joined by the Navajo Nation, *In re Navajo Nation*, CV 6417-300 for federal reserved water rights for the following amounts and purposes:

- a. 780 afy for ‘Surface Mine-Coal Extraction’
- b. 3,800 afy for ‘Coal to Gasification/Liquefaction’
- c. 6,500 afy for ‘Coal-Fire Power Generation’
- d. 2,440 afy for ‘Concentrated Solar Power Generation’

Motion at 4.

In its Reply, the Hopi Tribe requested judicial notice of the more general statement that on “October 7, 2020, the United States as trustee for the Navajo Nation, and the Navajo Nation filed Amended Statements of Claimant asserting claims to water for coal projects at areas included Black Mesa.” The Hopi Tribe’s Reply in Support of its Motion to Take Judicial Notice of Claims Related to Energy Projects at Black Mesa by the Navajo Nation and United States in Case No. 6417-300 at 4 (filed October 30, 2020) (“Reply”).

The Hopi Tribe argues that facts found in court records may be the subject of judicial notice. Motion at 5. The case law does support the general proposition that judicial notice may be taken of facts found in the court records. *See In re Sabino R.*, 198 Ariz. 424, 10 P.3d 1211 (App. 2000); *State v. Rushing*, 156 Ariz. 1, 4, 749 P.2d 910, 913 (1988). Judicial notice also may be taken of pleadings and judgments entered in prior cases. It is appropriate to judicially notice prior court records involving the same parties when the defense of *res judicata* is raised in a later case. *Stewart v. Phoenix Nat. Bank*, 49 Ariz. 34, 39, 64 P.2d 101, 104 (1937); *see also, Regan v. First Nat. Bank*, 55 Ariz. 320, 327, 101 P.2d 214, 217 (1940). The rule, however, is not absolute. Simply because information can be found in a court file does not make it the proper subject of judicial notice. For example, judicial notice may not be taken of the truth of testimony in another action. *State v. Lynch*, 115 Ariz. 19, 22, 562 P.2d 1386, 1389 (App. 1977).

Judicial notice of a given fact is based on a finding that the fact requires no further evidentiary proof because it is so notoriously true as to be subject to no reasonable dispute. *State v. McGuire*, 124 Ariz. 64, 66, 601 P.2d 1348, 1349 (App. 1978); *State v. Lynch*, 115 Ariz. 19, 21, 562 P.2d 1386, 1388 (App. 1977); *Phelps Dodge Corp. v. Ford*, 68 Ariz. 190, 196, 203 P.2d 633, 638 (1949) (a fact about which a court may take judicial notice must be indisputable.). The LCR argues that there is no fact is at issue to be judicially noticed because the Hopi Tribe seeks judicial notice of unadjudicated claims. A claim for water rights that has not been adjudicated certainly does not qualify as an undisputed fact similar to facts that the courts have judicially noticed such as a birthdate or probation status. *In re Sabino R.*, *supra*; *State v. Rushing*, *supra*.

Judicial notice of a document that contains statements about facts that are in dispute is inappropriate. *Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 432 F. Supp. 3d 1070, 1081 (D. Ariz. 2020) (denied judicial notice of a 2008 Arizona Auditor General Office report because the document contained disputed statements about the matter at issue). Here, a factual dispute exists about the feasibility of the coal projects proposed in the Black Mesa area. City of Flagstaff's Opposition to the Hopi Tribe's Motion to Take Judicial Notice of Claims Related to Energy Project at Black Mesa by the Navajo Nation and the United States in Case No. CV 6417-300 at 3 (filed October 26, 2020). Accordingly, the Statement of Claimant filed in another case effectively asserting the feasibility of coal-based project in the same area in which the Hopi Tribe proposes coal projects cannot be judicially noticed.

The Hopi Tribe argues that it does not seek judicial notice of the feasibility of the projects proposed for the Navajo Reservation; instead, it simply seeks judicial notice be taken of the fact that the Amended Statement of Claimant contains claims for water for coal projects in the Black Mesa area. Reply at 2. Thus, at issue is the validity of the distinction the Hopi Tribe draws between judicial notice of the filing of a claim and judicial notice of the substance of the claim. A situation where the Court took judicial notice of pleadings for a determination unrelated to the merits of the allegations in those pleadings can be found in *In the Matter of Edward Ronwin*, 139 Ariz. 576, 680 P.2d 107. In that case, the Court examined pleadings filed by Ronwin in federal court actions as part of its decision in state court about whether Ronwin was mentally fit to practice law. It concluded that the number and tenor of the pleadings supported a finding that Ronwin would not be admitted to the bar. *Id.* at 582, 680 P.2d 113 (“Lawyers in the various proceedings are accused of having committed perjury, of suborning witnesses, making fraudulent allegations and engaging in a conspiracy against Ronwin. Ronwin's counsel in a previous case is accused of having joined the conspiracy to violate Ronwin's rights. A list of these accusations could go on ad infinitum.”).

This case is not similar to *Ronwin*, because the “fact” to be judicially noticed is not the existence of the claim, but the substance of the claim. The Hopi Tribe acknowledges that it views the specific claims for water rights on the Navajo Reservation as support for the factual finding in this case of the “reasonable feasibility of the future Hopi projects.” Motion at 3. Effectively, it seeks to use judicial notice to induce reliance on a disputed fact contained in the claim, i.e., the feasibility of coal projects in the Black Mesa area. Accordingly, judicial notice of the claims is inappropriate. *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) *overruled on other ground by Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir 2002) (“But the court did more than take judicial notice of *undisputed* matters of public record. The court took judicial notice of *disputed* facts stated in public records.) *See also Smith v. Internal Revenue Serv.*, 168 F. Supp. 3d 1221, 1225 (D. Ariz. 2016), *aff'd sub nom. Smith v. United States Internal Revenue Serv.*, 692 Fed. Appx. 883 (9th Cir. 2017) (“the Court may not take notice of disputed matters [citation omitted] and must use “extreme caution” in taking notice of adjudicative facts.)

The Hopi Tribe also argues that the Amended Statements of Claimant should be judicially noticed due to its anticipatory concern about the resolution of the claims for federal reserved water rights in *In re Navajo Nation*. It states that there must be a

recognition that the United States, acting as a fiduciary for both tribes, has a duty to support the economic development of the tribes and that the tribes hold undivided interest in the coal on the partitioned lands. Reply at 4. Judicial notice of the claims cannot be based on either of these arguments because these arguments do not address the applicable test that requires, among other elements, a fact that is not in dispute.

IT IS FURTHER ORDERED denying Hopi Tribe's Motion to Take Judicial Notice of Claims Related to Energy Projects at Black Mesa by the Navajo Nation and the United States in Case No. CV 6417-300

A copy of the minute entry will be sent to all parties on the Court approved mailing list.