

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA)	
and)	No. 01cv00072-MV-WPL
STATE OF NEW MEXICO, ex rel. STATE)	
ENGINEER,)	ZUNI RIVER BASIN
Plaintiffs,)	ADJUDICATION
v.)	
)	Subfile No. ZRB-2-0014
A & R PRODUCTIONS, et al.)	
Defendants.)	
_____)	

**UNITED STATES’ AND STATE OF NEW MEXICO’S JOINT RESPONSE TO
EDWARD J. BAWOLEK’S AND SUZAN J. BAWOLEK’S MOTION REQUESTING
JUDICIAL NOTICE**

Plaintiffs the United States of America (“United States”) and the State of New Mexico (“State”) respond to *Edward J. Bawolek and Suzan J. Bawolek Motion Requesting Judicial Notice* (Doc. 2969) (“Motion”) and requests that the Court deny the Motion.

INTRODUCTION

In the Motion, Defendants Edward J. and Suzan J. Bawolek (“the Bawoleks”) ask the Court to take judicial notice of the following facts and materials:

1. that New Mexico Department of Game and Fish issued a press release and in so doing its Director Jim Lane made the statement “Anytime a rancher provides water for his cattle, there will be wildlife that benefit from that water, also;”¹
2. that the New Mexico Department of Agriculture hosts an Internet website titled “Details on How New Mexico Ranchers Can Apply for Water Delivery Assistance to Benefit Wildlife” and that informs ranchers how they can apply for financial assistance to offset the delivery cost of livestock water that is consumed by wildlife;²

¹ At the time the material was reviewed by undersigned counsel on June 28, 2014, the website address provided by the Bawoleks for the first alleged fact did not link to the described press release or a statement made by Mr. Lane. The United States and the State do not necessarily dispute that such material may have previously appeared on the Internet as the Motion describes.

² At the time the material was reviewed by undersigned counsel on June 28, 2014, the website address provided by the Bawoleks for the second alleged fact had material added to it since the Motion was filed. Currently, the website describes the financial assistance previously described had been committed and that no additional funds were in fact available.

3. that a form used by the New Mexico Department of Agriculture for ranchers to apply for water delivery assistance includes the statement:

Criteria for participation in this initiative:

1. *Primary purpose of water delivery is for use by wildlife within land user's operating unit.*
2. *Secondary purpose may be for land user's livestock;*³

and

4. that in its Amended Complaint (Doc. 222) ("Amended Complaint"), the United States asserted the water rights claim "For livestock- and wildlife-watering purposes ... an appropriative water right under New Mexico state law in an amount based on the amount of water beneficially used."⁴

Motion at 2-3.

The Bawoleks' assert that the facts and material from the three websites and the partial quote from the Amended Complaint qualify for judicial notice. The Bawoleks do not provide any reasoning supporting the relevance of each item listed. Further, the Motion does not provide any reasoning why the alleged facts and material qualify for judicial notice. Even if the facts were relevant, which the United States and the State do not believe they are, they do not meet the requirements for judicial notice.

ARGUMENT

³ At the time the material was reviewed by undersigned counsel on June 28, 2014, the website address provided by the Bawoleks for the third alleged fact did not link to the word processor document described. The United States and the State do not necessarily dispute that such material may have previously appeared on the Internet as the Motion describes.

⁴ The full statement in the Amended Complaint states:

For livestock-and wildlife-watering purposes and for other purposes ponds, tanks, wells, and other water-control structures and devices have been constructed or installed on certain tracts of the federally owned public land administered by the Bureau of Land Management. For each such pond, tank, well, or other water-control structure or device, the United States claims an appropriative water right under New Mexico state law in an amount based on the amount of water beneficially used.

Id. at para., 21.

The Bawoleks rely upon Fed. R. Evid. 201 and ask this Court to take judicial notice of the substance of a broad range of alleged facts from three websites and a partial quote from a claim asserted by the United States.

For the relevant purposes here, the rule provides:

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Fed R. Evid. 201. As articulated in the rule, the purpose of taking judicial notice of a fact is to dispense with a party's need to introduce evidence to prove a fact. However, judicial recognition of a fact is not simply an expedient substitute for a party's obligation to present evidence that is subject to cross-examination and rebuttal. As explained in the notes to the rule, "[w]ith respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. . . . The rule proceeds upon the theory that these considerations call for dispensing with traditional methods of proof only in clear cases."

Advisory Committed Note to Subdivision (b) (quotation omitted to Prof. Kenneth Davis' law review article *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364 (1942)).

Consistent with the limited nature of judicially noticed facts, a court has the discretion to determine if the alleged facts are necessary to recognize "the truth of certain facts, which from their nature are not properly the subject of testimony, or which are universally regarded as established by common knowledge." *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 895 (10th Cir. 1994). The effect of taking a judicial notice is directing a verdict against a party to the fact noticed. *United States v. Boyd*, 289 F.3d 1254, 1258 (10th Cir. 2002). Once a court takes

judicial notice, it removes the ability to present rebuttal evidence, cross-examination, and arguments on the alleged facts. *Id.*

The United States and the State recognized that the Bawoleks may attempt to introduce the facts and material described at the appropriate time when the Court addresses the evidentiary foundation of the Bawoleks' water rights claims. Nevertheless, the facts and materials presented by the Bawoleks are not appropriate for judicial notice. The normal course of evidentiary procedure is for a party to establish the relevance of facts, to lay sufficient foundation for the evidence establishing such facts, and to otherwise meet the rules of admissibility for introducing such evidence. Were the Court to take judicial notice of the facts and materials identified by the Bawoleks as requested, such action would wholly circumvent the Bawoleks' requirement to establish relevant, disputed facts through the normal course of evidentiary procedure. The United States and the State maintain their right to challenge the facts and materials both in content and in the context they are given. No justification exists to deny the United States and the State the ability to challenge the facts and materials alleged in the Motion.

Further, with respect to the relevance of the facts and materials described, other than identifying the existence of the basic differences between what the United States and the State would recognize and what the Bawoleks assert as a water right (quantity and purpose), the parties and the Court have not identified any legal or factual issues in contention between the parties. In the Motion, the Bawoleks have articulated no basis for the relevance of any of the alleged facts and the United States and State are left simply guessing at the purpose(s) of establishing the facts and materials alleged. Without establishing a relevant basis for the facts and materials, the Court has no basis to take judicial notice of these facts and materials in this subfile action.

Finally, the facts and materials described in the Motion are not those of which judicial notice should be taken under any circumstance. With respect to the first three fact/materials presented, the Bawoleks are asking the Court to take judicial notice of unsworn, out of court statements derived from the Internet and attributed to personnel of the State. Although the Bawoleks may ultimately establish the relevance of such material and lay the appropriate foundation for the introduction of such material in this proceeding, the substance of such material is hardly that which is “generally known within the trial court's territorial jurisdiction” or which “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *See* Fed. R. Evid. 201(b). What is well-established, both in this proceeding and in other proceedings before this Court, is that statements of state and federal government agencies and personnel are readily and frequently subject to challenge - even by the United States and the State. With respect to claims previously made by the United States or any party in any pleading, the substance of such a claim is simply that – a claim - not a fact of which the Court should consider established and take judicial notice. *See also Tal v. Hogan*, 453 F.3d 1264, n.24 (10th Cir. 2006) (judicial notice can be taken of a courts own records without requiring the court to take judicial notice of the truth of the publicly filed facts).

CONCLUSION

For the reasons articulated above, the Court should deny the Motion.

Dated: August 4, 2014

Electronically Filed
/s/ Andrew “Guss” Guarino

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 4, 2014, I filed the foregoing UNITED STATES' AND STATE OF NEW MEXICO'S JOINT RESPONSE TO EDWARD J. BAWOLEK'S AND SUZAN J. BAWOLEK'S MOTION REQUESTING JUDICIAL NOTICE electronically through the CM/ECF system, which caused CM/ECF participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Andrew "Guss" Guarino
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