SUPERIOR COURT OF ARIZONA
APACHE COUNTY

10/22/2020

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD HARRIS

S. Ortega

Deputy

FILED: 10/28/2020

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 the Court

MINUTE ENTRY

Courtroom: CCB 301

1:34 a.m. Trial to the Court continues from October 21, 2020.

The following attorneys and parties appear telephonically via the Court's bridge line. Colin Campbell, Phillip Londen, and Payslie Bowman for the Hopi Tribe; Brian J. Heiserman, David A. Brown, Lauren J. Caster, and Bradley J. Pew for LCR Coalition; Mark A. McGinnis for the Salt River Project; Carrie J. Brennan and Kevin Crestin for the Arizona State Land Department; Lee A. Storey for the City of Flagstaff; and Jeffrey S. Leonard and Evan F. Hiller for the Navajo Nation.

A record of the proceedings is made digitally in lieu of a court reporter.

Due to the technical issues experienced today throughout the County, the Court does not have access to GoToMeeting or the internet, and access to email is very erratic.

1:40 p.m. Rebecca Ross for the United States Department of Justice, Indian Resources Section appears.

Court and counsel discuss the trial schedule, and it is agreed by all parties that trial will resume on **Monday, October 26, 2020 at 9:00 a.m.**, and Mr. Hensen's testimony will be rescheduled to November 16, 2020.

1:47 p.m. Matter concludes.

LATER

Hopi Tribe's Motion to Take Judicial Notice re (1) SRP's Residential Flood Irrigation Program and (2) Arizona's Community Gardens

The Hopi Tribe claims a federal reserved water right to pump 9,471 acre feet of groundwater each year beginning at some point in the future to allow twenty five percent of the members of the Hopi Tribe to irrigate 0.8 acre plots of land on the Hopi Reservation to grow corn and other vegetables. The Hopi Tribe's Seventh Amended Statement of Claimant at 35 (June 15, 2020). The stated purpose for the development of irrigated plots is to allow the Hopi Tribe to "maintain its agricultural heritage and ceremonial life." *Id*. at 36. During trial, the Hopi Tribe's expert identified three additional reasons for the development of the irrigation project: climate change, future population growth, and the declining level of the water table of the aquifer that supports the springs. Testimony of Dale Whittington, October 20, 2020.

The day before trial began, the Hopi Tribe filed a motion requesting judicial notice of 13 facts and attached approximately two hundred pages of documents that it represented are publicly available from websites maintained by Salt River Project Agricultural Improvement and Power District ("SRP") and Arizona Department of Health Services ("AZDHS"). The facts concern water provided by SRP to certain residential areas in the metropolitan Phoenix area to irrigate lawns, plants, and trees. The facts from the Arizona Department of Health Services provide general information about community gardens reliant on water from SRP, municipal services, and reclaimed water and the benefits of creating and maintaining those gardens. A community garden in this context is a garden area consisting of subdivided plots tended by individuals. Arizona Sustainable Community Garden Resource Guide, attached as Exhibit 35 to the *Hopi Tribe's Motion at 6*. An example of a community garden is shown in *figure* 1.

Figure 1. Picture of a community garden included in the Arizona Sustainable Community Garden Resource Guide

Judicial notice may be taken of adjudicative facts or legislative facts. Adjudicative facts are "facts about the particular event which gave rise to the lawsuit and, like all adjudicative facts, they helped explain who did what, when, where, how, and with what motive and intent." 2 McCormick On Evidence § 328 (8th ed.). For example, in a case involving a fatal heart attack, the court distinguished the question of whether the deceased's heart attack was caused by his customary work activities from the question whether a heart attack can be caused by customary work activities in its explanation of facts subject to judicial notice. *Aguiar v. Industrial Comm'n of Arizona*, 165 Ariz. 172, 176, 797 P.2d 711, 715 (App. 1990). It classified the former question as an adjudicative fact and the latter as a legislative fact.

The Hopi Tribe contends its facts are adjudicative facts because SRP is a party in this case. The Hopi Tribe's Reply in Support of Its Motion to take Judicial Notice, filed October 9, 2020 at 4 ("Reply"). Establishing that "facts" relate to a party in the case is not a sufficient showing to support judicial notice. The facts for which judicial notice can be taken must also relate to "the particular events that gave rise to the lawsuit." 2 McCormick On Evid. § 328 (8th ed.); *see also Aguiar v. Industrial Comm'n of Arizona, supra.* This case, however, does not concern surface and groundwater water provided by SRP under state law to a certain residential neighborhoods in the Phoenix metropolitan area for improved landscaping. Instead, this case concerns groundwater that the Hopi Tribe claims a right to pump under federal law to irrigate plots of land on the Hopi Reservation for historical and religious reasons. None of the 10 facts concerning SRP are adjudicative facts governed by Rule 201, Arizona Rules of Evidence.

The remaining three facts concerning AZDHS are not adjudicative because AZDHS is not a party to this case. Community gardens supplied by municipal, reclaimed and SRP water described in the AZDHS documents are not the subject of this case. The source of water for the irrigation project here is not supplied by municipal water, reclaimed water or water provided by SRP. The Hopi Tribe's expert, Dr. Whittington, specifically testified that the municipal system could not be expected to provide sufficient water to irrigate almost an acre of land planted primarily with corn. The Hopi Tribe provided no representation or evidence that the crops would be irrigated with reclaimed water. It also appears that the community gardens described by AZDHS have more in common with the approximately 10' x 10' gardens that Dr. Whittington testified that some Hopi members have established near their homes and for which they use municipal water. Dr. Whittington specifically distinguished the 100 square foot gardens from and testified that they could not be substituted for the irrigated plots intended to provide two pickups of corn.

The Hopi Tribe also contends that the 13 facts are properly the subject of judicial notice because they are derived from documents of a political subdivision of the state or a state agency. In support of its position, it cites to the court's decision to take judicial notice of official action taken by the State Land Department that resulted in the prohibition of the construction of irrigation wells. *Jarvis v. State Land Dept. City of Tucson*, 104Ariz. 527, 530, 456 P.2d 385, 388 (1969), *modified sub nom. Jarvis v. State Land Dept*., 106 Ariz. 506,479 P.2d 169 (1970), and *modified sub nom. Jarvis v. State Land Dept*., 113 Ariz. 230, 550 P.2d 227 (1976). It makes no argument that any of the 13 statements are official actions. Instead, they are descriptive statements about SRP's program and AZDHS' activities to encourage the development of community gardens.

Legislative facts about which judicial notice may be taken are defined as "established truths, facts or pronouncements that do not change from case to case." *Kenyon v. Hammer*, 142 Ariz. 69, 84, 688 P.2d 961, 976 (1984). As examples of judicial notice taken of established truths, and the Arizona court have taken judicial notice of published standards of inventory of the Phoenix Police Department (*State v. Rojers*, 216 Ariz. 555, 560, ¶ 26, 169 P.3d 651,656 (App. 2007) and civil air regulations. *Brandes v. Mitterling*, 67 Ariz. 349,354, 196 P.2d 464, 467 (1948). The Hopi Tribe's request does not fit within this class of cases. It states that the facts related to SRP "are not necessarily offered for their truth," and requests judicial notice of the statements to establish how SRP describes its program and its use of water. Reply at 5. The naked fact that SRP uses certain words or statements to describe a program provided more than 200 miles from the Hopi Reservation has no relevance to this case that concerns rights to water for use on the Hopi Reservation. Thus, judicial notice will not be taken of facts 1-10. *See State v. Corrales*. 131 Ariz. 471, 641 P.2d 1315 (1982)

The remaining three facts are taken from AZDHS's materials about the sources of water used for community gardens of a limited size and recitations of the possible benefits of community gardens. The sources of water available to the community gardens described by AZDHS are not relevant to the Hopi Tribe's claim to groundwater for its irrigation project. The relevance of the remaining two facts with their lists of generalized benefits that may result from the creation of community gardens in urban areas such as "developing cross-culture connections," "neighborhood revelation," and "increasing surrounding property values," is unclear. The Hopi Tribe have specifically identified general and specific purposes for its irrigation project unique to it and to Hopi Reservation. In addition, the existence of array of benefits attributable to the establishment of a community garden do not rise to the level of established truths that are more typically the subject of judicial notice. *State v. Rojers, supra*; *Brandes v. Mitterling, supra; Schering Corp. v. Cotlow*, 94 Ariz. 365, 370,385 P.2d 234,238 (1963) (judicial notice of the invention of the telephone). Accordingly, judicial notice will not be taken of sociological and health benefits that may result from the development of a community garden as contemplated by AZDHS.

IT IS ORDERED denying the Hopi Tribe's Motion to Take Judicial Notice re (1) SRP's Residential Flood Irrigation Program and (2) Arizona's Community Gardens

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