

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

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

REPLY BRIEF IN SUPPORT OF MOTION REQUESTING JUDICIAL NOTICE

Edward J. Bawolek and Suzan J. Bawolek (hereinafter the “Bawoleks”), defendants *pro se* in Subfile ZRB-2-0014 of the above-captioned matter, hereby submit this Reply Brief in Support of their pending motion (hereinafter the “Request”, [Doc. 2969]) seeking Judicial Notice of certain adjudicative facts. This reply brief responds to the answer brief jointly filed by the United States of America (the “USA”) and the State of New Mexico *ex rel.* State Engineer (the “OSE”) [Doc. 2978, hereinafter the "Joint Response"]. The foregoing parties are collectively referred to as the “Plaintiffs.”

INTRODUCTION

The Joint Response alleges in the footnotes on Pg. 1 that the website address associated with the first alleged fact of the Request did not link to the information as described. The

Bawoleks respectfully traverse the Plaintiffs' allegation without belief that the Plaintiffs' intended to mislead the Court: On the filing date for this Reply Brief, the website in question is still active and displaying the information cited by the Bawoleks. By way of explanation, and for the benefit of the Court, the Bawoleks hypothesize that hyperlink information embedded in the Request may have been corrupted in the process of conversion into the required file format and subsequent uploading into the CM/ECF system. The website address as provided and written by the Bawoleks is correct, but an attempt to invoke automatic loading into a web browser by "point and click" might fail depending upon the specifics of the user's software. The Court, Plaintiffs, and other interested parties may convince themselves of the veracity of the website address by typing it directly into a web browser (e.g., through "cut and paste"), said address again being:

http://www.wildlife.state.nm.us/publications/press_releases/documents/2013/062823droughtrelief.html

In the alternative, the Bawoleks have utilized a website called TinyURL.com to generate a simplified, i.e., shortened website address, said web address being:

<http://tinyurl.com/p7l45rh>

Entry of the website address immediately supra will produce an automatic redirection of a web browser to the longer website address.

Plaintiffs appear to have significantly confused their facts and the cited material with respect to the second citation made by the Bawoleks in their Request: In footnote 2 of the Joint

Response, Pg. 1, Plaintiffs state that on June 28, 2014 they reviewed the material cited in the Bawoleks' Request, and further allege that the website cited had material added to it since the Bawoleks' Request was filed. This cannot be true as the Bawoleks' Request was filed on July 3, 2014 *after the time Plaintiffs' allegedly reviewed the website*. Further, the Bawoleks again traverse Plaintiffs' allegation that the website has been altered since the Request was filed: The Bawoleks again reviewed the information at the website address provided, and cannot identify any deviations from the screenshot of the website as provided in Attachment A, Pg. 2 to their Request [Doc. 2969-1]. In fact, close examination of said screenshot shows the Plaintiffs' alleged "addition" immediately below the highlighted title; specifically an entry dated June 28 stating that funds for the water for wildlife program had been committed. Presumably, the Plaintiffs have misstated the date of their review, referencing the June 28 date unintentionally. The Bawoleks' position is that this is irrelevant in any circumstance: First, the website information at the address provided is (as of the date of this Reply) unchanged from the screenshot presented in the Bawoleks' Request. Second, the alleged additional information is of no consequence as it has no relevance to the facts cited by the Bawoleks in their Request, and is not included as part of their Request.

With respect to the remainder of Plaintiffs' Introduction and following Argument, the Bawoleks respond as follows:

I. The Bawoleks' Request is Relevant.

Plaintiffs argue on Pg. 2 of the Joint Response that the Request should be denied because the alleged facts cited by the Bawoleks have not been shown to be relevant. Further, on Pg. 4 of the Joint Response, Plaintiffs state "the parties and the Court have not identified any legal or

factual issues in contention between the parties." In response, the Bawoleks allege that said statement cannot be reconciled with other statements made by Plaintiffs to this Court and to the Bawoleks throughout this Action:

1. If there are no legal or factual issues in contention, the Bawoleks question the Plaintiffs' basis for this Action. Plaintiffs' statement could be interpreted as implying that no actual controversy exists between Plaintiffs and the Bawoleks. If this is the case, the Bawoleks do not understand why they were joined Defendants in this Action.
2. In failed attempts to reach a mutually acceptable agreement between the Plaintiffs and the Bawoleks concerning the Bawoleks' water rights as apply to this Action, the Bawoleks have been unable to persuade the Plaintiffs as to the Bawoleks claimed beneficial use of water to support wildlife. The Bawoleks have been provided varying explanations for Plaintiffs' position and have understood Plaintiffs' explanation for refusal to recognize the Bawoleks' claim as sometimes being based on:
 - a. Plaintiffs' refusal to recognize any use of water for wildlife as a beneficial use, as a matter of law.
 - b. Plaintiffs' refusal to recognize any use of water for wildlife as a beneficial use, by any person or entity, under any circumstance, as a matter of discretion belonging to the State Engineer.
 - c. Plaintiffs' belief that the Bawoleks have failed to demonstrate a beneficial use of water for the benefit of wildlife.

In contrast to Plaintiffs' statement that " the parties ... have not identified any legal or factual issues in contention ..." the Bawoleks allege that usage and recognition of beneficial use of water for wildlife is of significant importance in any actual controversy between Plaintiffs and the Bawoleks, and is at the heart of the substantial disagreement as to the quantity of water to which the Bawoleks are entitled based on historical beneficial use. Given Plaintiffs' variable explanations for refusing to recognize the Bawoleks' beneficial use of water to support wildlife, the Bawoleks cannot answer with absolute specificity Plaintiff's demand for relevance concerning the cited material: Plaintiffs' continually shifting positions may encompass matters of law, or may be more specifically focused on adjudicative facts specific to this Subfile. However, the Bawoleks contend that all of the internet materials cited are relevant to the Bawoleks' claim of beneficial application of water for wildlife: They either speak to the issue of whether water for wildlife is a valid and recognized beneficial use, whether the State Engineer has implicitly or explicitly recognized water for wildlife as a beneficial use in the past (cited facts 1-3 in the Request), or they are relevant to addressing the issue as what quantity of water is appropriate to recognize when said water is applied to wildlife watering (cited fact 4 in the Request). Further, cited fact 4 in the Request is potentially relevant to judicial estoppel, depending upon the Plaintiffs' specific objections to the Bawoleks claim.

II. The cited facts are appropriate for notice.

The Plaintiffs characterize the Bawoleks' Request as asking "...this Court to take judicial notice of a broad range of alleged facts from three websites..." (Joint Response at Pg. 3). The alleged facts in question are anything but broad; rather, the Bawoleks' request is highly focused and directed and limited in nature. The Bawoleks are not simply asking the Court to take notice

of a website's existence or to make some vague interpretation of a website's content. Rather, the Bawoleks' Request is directed to brief and specific statements made on websites maintained by governmental agencies within New Mexico. Thus, the alleged facts clearly meet the requirements of Fed. R. Evid. 201(b): Since they originate from governmental agencies operating within and for New Mexico, they most certainly are "known within the trial courts territorial jurisdiction" and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Notwithstanding the Plaintiffs' difficulties with access to the cited website addresses as discussed in the Joint Response Introduction, the cited materials can be easily viewed by commonly available means for accessing the Internet.

With respect to the Bawoleks' Request (cited fact 4) referencing the Plaintiffs' amended complaint, the Plaintiffs argue on Pg. 5 of the Joint Response "...the substance of a claim is simply that - a claim - not a fact of which the Court should consider established and take judicial notice." The Bawoleks allow that Plaintiffs' claims are still pending before this Court. However, the Plaintiffs' argument fails to address judicial estoppel as it potentially applies in this instance. Given that the Bawoleks have the burden to prove their claims for beneficial use, the standard for that proof should be consistent, not varying according to the whims of the Plaintiffs. Failure to consider the Plaintiffs' claims as they apply in the matter instant potentially damages the integrity of this Court by ceding to the Plaintiffs a continually varying authority to decide what constitutes evidence and how the law should be applied in this adjudication. The Bawoleks' Request is not requiring the Court to decide on the underlying truth behind Plaintiffs' claim, but rather to note specific aspects of said claim in light of a potential for judicial estoppel.

III. The Bawoleks' Request is Timely.

The Plaintiffs argue that the Bawoleks' Request is not timely and that "... the Bawoleks may attempt to introduce the facts and material described at the appropriate time..." (Joint Response at Pg. 4).

The Plaintiffs' own allegations¹ that the cited website facts have changed or disappeared underscores the appropriateness of judicial notice at this time. Given the ephemeral nature of internet materials, and the relevance of these facts as demonstrated supra, to delay their introduction would unfairly prejudice the Bawoleks' defense: The cited website materials existed at the time of the Bawoleks' Request, and they continue to exist as of the date this Reply Brief is being filed. If the Bawoleks are required to wait until trial to introduce the referenced facts, they may disappear or become altered. This would require the Bawoleks to retain the services of a forensic expert in the field of information technology and potentially to depose a number of persons not contemplated in the Initial Disclosures. Both of these activities would involve significant effort and expense by the Defendants with no significant change to the final status of the evidence. Plaintiffs' attempts to delay introduction of this material is therefore at variance with Fed.R.Civ.P. 1 which requires "just, speedy, and inexpensive determination of every action and proceeding."

Further insofar as the Bawoleks have demonstrated supra that the cited facts are relevant and do meet the requirements of Fed. R. Evid. 201(b), said facts are appropriate for introduction at this time as Fed. R. Evid. 201(e) provides that judicial notice may be taken "at any stage of the proceeding." Indeed, the potential for loss of evidence as argued by both Plaintiffs and the

¹ Plaintiffs allegations of changes to the cited materials have been traversed supra, but the Bawoleks nonetheless agree that website content is potentially subject to change

Bawoleks means that time is of the essence in the matter instant, further justifying judicial notice for said website facts.

IV. The cited facts are self-authenticating, as they originate from government sources.

The Plaintiffs characterize the Bawoleks' Request as "...asking the Court to take Judicial notice of unsworn, out of court statements derived from the Internet..." This argument is fundamentally flawed, as it places the cited facts into a general category of Internet information having a dubious and unverifiable nature.² To this argument, the Bawoleks respond that the cited website information originates from governmental sources, and is therefore presumed to be self-authenticating under Fed. R. Evid. 902(5), which provides that "A book, pamphlet, or other publication purporting to be issued by a public authority" requires no extrinsic evidence of authenticity in order to be admitted. The Bawoleks argue that the website facts cited do originate from public authorities, and comprise an "other publication" as contemplated by the Rule. No oath or other affirmation is required. The origin of the cited facts is easily verified by virtual of the website addresses, and said veracity far surpasses the Plaintiffs' characterization as "attributed to personnel of the State."

² A running joke on the Internet has Abraham Lincoln quoted as saying "Don't believe everything you read on the internet."

CONCLUSION

The Plaintiffs' Joint Response contains factual errors and mischaracterizations with respect to the cited website facts in the Bawoleks' Request. Further, the analysis supra shows that Plaintiffs' arguments are fundamentally flawed and that to deny the Bawoleks' Request would potentially place evidence at risk and prejudice the Bawoleks' defense. For reasons articulated, the Bawoleks pray this Court to grant their Motion Requesting Judicial Notice.

Dated August 10, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 10, 2014, I filed the foregoing REPLY BRIEF IN SUPPORT OF 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.

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