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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

CALIFORNIA VALLEY MIWOK TRIBE, a federally-recognized Indian tribe, THE GENERAL COUNCIL, SILVIA BURLEY, RASHEL REZNOR, ANGELICA PAULK, and TRISTIAN WALLACE,

Plaintiffs,

v.

RYAN ZINKE, in his official capacity as U.S. Secretary of Interior, et al.,

Defendants

THE CALIFORNIA VALLEY MIWOK TRIBE, et al.,

Intervenor-Defendants

Case No. 2:16-01345 WBS CKD

INTERVENOR-DEFENDANTS' OPPOSITION AND OBJECTIONS TO PLAINTIFFS' FIRST AND SUPPLEMENTAL REQUESTS FOR JUDICIAL NOTICE

Judge: Hon. William B. Shubb
Date: May 30, 2017
Time: 1:30 p.m.
Courtroom 5

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Intervenor-Defendants request that this Court deny Plaintiffs' Request for Judicial Notice, ECF No. 45, and Supplemental Request for Judicial Notice, ECF No. 48-1 (collectively, the RJNs), in their entirety. The RJNs seek judicial notice of 34 letters, documents, emails, and court filings (the Documents) under Federal Rule of Evidence 201 — which allows the Court to take notice of indisputable facts derived from sources whose accuracy cannot be questioned. The Court should decline to judicially notice any facts based on the Documents because (i) Plaintiffs have not identified any specific facts for which they seek judicial notice; (ii) Plaintiffs improperly seek judicial notice of the truth of matters asserted in the Documents and/or of Plaintiffs' interpretation of the Documents; and (iii) many of the Documents are not relevant to any issue before this Court.

In addition, the majority of the Documents are extra-record evidence that the Court should not consider in reviewing agency action under the Administrative Procedure Act (APA).

II. LEGAL STANDARDS FOR JUDICIAL NOTICE

Under Rule 201, courts may judicially notice facts "not subject to reasonable dispute" because they are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FRE 201(b). "Judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities." *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347 (5th Cir. 1982).

A. The burden of persuasion

A party requesting judicial notice bears the "burden of showing that the items of which they seek judicial notice are not reasonably subject to dispute." *Committee to Protect our Agricultural Water v. Occidental Oil and Gas Corp.*, __ F.Supp.3d __, No. 15-cv-1323, 2017 WL 272215 at *5 (E.D. Cal. Jan. 20, 2017) (denying plaintiffs' request for judicial notice). *See also Wilkins v. Ramirez*, 455 F.Supp.2d 1080, 1112 (S.D. Cal. 2006), citing *In re Tyrone F. Conner Corp.*, 140 B.R. 771, 781 (1992); *In re Am. Apparel, Inc. S'holder Litig.*, 855 F.Supp.2d 1043,

1063 (C.D. Cal. 2012). The requesting party also must show that judicial notice is necessary to the resolution of an issue before the court. *See Teamsters Local 617 Pension & Welfare Funds v. Apollo Grp., Inc.*, 633 F.Supp.2d 763, 776-777 (D. Ariz. 2009), *judgment vacated in part on other grounds*, 690 F.Supp.2d 959 (D. Ariz. 2010) (declining to take judicial notice of another court's order where the party requesting notice does not "offer any insight as to why judicial notice [is] necessary" to the resolution of the case).

A court may properly deny judicial notice where a party fails to make the necessary showing. "It is not incumbent upon the court to sort through the voluminous list of exhibits to determine whether any of the contents are appropriate subjects for judicial notice." *Committee to Protect Our Agricultural Water*, *supra*, 2017 WL 272215 at *5 (*citing Harris v. County of Orange*, 682 F.3d 1126, 1131-1132 (9th Cir. 2012)).

B. Relevance

Judicial notice is improper where facts to be noticed are irrelevant to the issues before the court. *E.g.*, *Del Campo v. Kennedy*, 517 F.3d 1070, 1075 n.7 (9th Cir. 2008) (denying request on irrelevancy grounds); *Trans-Sterling, Inc. v. Bible*, 804 F.2d 525, 528 (9th Cir. 1986) (same).

C. Proper subjects of judicial notice

Judicial notice may be based on various documents, including public records. *See United States v. Ritchie*, 342 F.3d 903, 908-909 (9th Cir. 2003). But, regardless of the source, a court may only take notice of *facts that are beyond dispute* based on the unquestioned accuracy of the documents *as to those facts*. *Id.*; FRE 201(b).

The mere existence of a public record does not mean that all facts asserted within that record are subject to judicial notice. For example, a court may rely on the indisputable *existence* of a public record "to show . . . that a judicial proceeding occurred or that a document was filed in another court case." *Hurd v. Garcia*, 454 F.Supp.2d 1032, 1054-1055 (S.D. Cal. 2006), *overruled on other grounds by Albino v. Boca*, 747 F.3d 1162 (9th Cir. 2004) (*citing Wyatt v. Terhune*, 315 F.3d 1108, 1114 & n.5 (9th Cir. 2003)). But it may not rely on the same document to notice "the truth of the facts recited therein" if they are reasonably subject to dispute. *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (quotation marks and citation omitted). Likewise,

even if the accuracy of a public record or other document is unquestioned, a court "may not take judicial notice of one party's opinion of how [the document] should be interpreted." *United States v. Southern Cal. Edison Co.*, 300 F.Supp.2d 964, 974 (E.D. Cal. 2004).

D. Limitation on extra-record evidence

The APA limits judicial review of agency action to the administrative record considered by the agency, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978), "not some new record made initially in the reviewing court," *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985) (quotation marks and citation omitted). In an APA review case, the "court is not required to resolve any facts;" its role is to "determine whether or not as a matter of law the evidence *in the administrative record* permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS,* 753 F.2d 766, 769 (9th Cir. 1985) (italics added). The Ninth Circuit recognizes only four narrow exceptions to this rule. *Southwest Ctr. For Biological Diversity v. United States Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996). Before a court will even consider admitting extra-record evidence under one of these exceptions, the plaintiff must show that the existing administrative record is inadequate for the court to perform its task. *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988).

Judicial notice provides a way to establish facts related to a case without complying with the usual procedures for introducing evidence, such as witness testimony. FRE 201, Advisory Committee Note to Part (a). It should not be used to circumvent restrictions on the court's consideration of new evidence in record-review cases such as this one, where the admissibility of extra-record evidence is strictly limited. *C.f. United States v. Ritchie*, 342 F.3d 903, 908-909 (9th Cir. 2003) (holding that district court could not take judicial notice of exhibits submitted by a party for purposes of a Rule 12(b)(6) motion to dismiss, without converting the motion to dismiss into a motion for summary judgment).

III. ARGUMENT

Plaintiffs have failed to meet their burden of showing that any fact is a proper subject of judicial notice by this Court under Rule 201. Even if Plaintiffs could establish that the Documents contain specific facts that are relevant and are beyond reasonable dispute, they have not shown it

is necessary or appropriate for this Court to consider any such extra-record evidence in its review of the December 2015 Bureau of Indian Affairs decision (2015 Decision) that Plaintiffs challenge in this case.

A. Plaintiffs have failed to show that judicial notice is proper.

Each paragraph of the RJNs offers a cursory citation to FRE 201 and recites, without explanation, that one of the Documents is relevant to one of Plaintiffs' many arguments. This effort does not meet Plaintiffs' burden under FRE 201.

1. Plaintiffs have not identified any facts.

Plaintiffs fail to identify a single fact for which they seek judicial notice, much less to show that any fact "is not subject to reasonable dispute." FRE 201. On this basis alone, the court should deny Plaintiffs' RJNs in their entirety. See *Committee to Protect Our Agricultural Water*, *supra*, 2017 WL 272215 at *5, *citing Harris v. County of Orange*, 682 F.3d 1126, 1131-1132 (9th Cir. 2012).

Even if this Court were inclined to sift through Plaintiffs' 200-plus pages of summary judgment and opposition briefs in an attempt to determine what facts Plaintiffs seek notice of, the effort would be futile. Plaintiffs' summary judgment brief and opposition briefs cite to only 11 of the 34 Documents included in the RJNs — the remaining 23 Documents are included for no apparent purpose. *See* ECF Nos. 44-1, 48, 49.

2. Plaintiffs have not shown that any of the Documents establish any facts beyond reasonable dispute.

Because Plaintiffs have not identified the facts of which they seek judicial notice, they have necessarily failed to show that any such facts are beyond reasonable dispute, as required by Rule 201. Even a brief review of the Documents shows that Plaintiffs could not meet their burden if they tried (which they have not).

RJN Documents 5, 10-12, 14-23, 28, and 31-33 consist of private correspondence, summaries of conversations purportedly wiretapped by agents of the Burleys, unauthenticated documents of unknown provenance, and correspondence from Plaintiffs' attorneys to agency officials, all of which Plaintiffs inexplicably characterize as "public records." ECF No. 45,

1 *passim*. These Documents have none of the indicia of trustworthiness that characterize public
2 records — they were not prepared by any public official, they were not issued subject to any legal
3 authority or public process, and nothing about them suggests their "accuracy cannot reasonably be
4 questioned," FRE 201(b).[1] This Court should not take notice of any facts based on these
5 Documents.

6 Even if the Documents were public records, only the existence of the records would be a
7 proper subject of judicial notice; it would not be appropriate for this Court to take judicial notice
8 of the truth of the matters asserted therein, or of Plaintiffs' interpretation of the Documents, as
9 Plaintiffs seek. *See Lee*, *supra*, 250 F.3d at 690; *Southern Cal. Edison Co.*, *supra*, 300 F.Supp.2d
10 at 974. For example, Plaintiffs offer "The Will and Testament of Yakima K. Dixie" (RJN Exh. 5)
11 to support their inference that Dixie was aware of a potential claim against the BIA for
12 recognizing the 1998 General Council. Opp. to Int. MSJ, ECF No. 49, at 41. They cite a *Los*
13 *Angeles Times* article (RJN No. 11) in an attempt to show that Dixie was the last member of the
14 Tribe in 1999. Opp. to Int. MSJ at 24. These inferences and factual assertions could not be
15 established beyond "reasonable dispute," FRE 201(b), even if the accuracy of these Documents
16 were established — which it is not.

17 Documents 1-4, 6-9, 13, 24-27, 29-30 and 34 are court filings, decisions and records of
18 public agencies, correspondence from public agencies, and the like, which might generally be
19 characterized as public records. *See* ECF No. 45. While some of these Documents are apparently
20 offered to show that the proceedings in question occurred (*e.g.*, RJN Exh. 1, motion to dismiss
21 Burley appeal in *Miwok III*), others are offered for the impermissible purpose of establishing the
22 truth of their contents or supporting Plaintiffs' interpretation of the Documents.

23 For example, Plaintiffs seek notice of RJN Exh. 7, "Letter from BIA to Burley accepting
24 new name for publication," not to show that the BIA changed the name of the Tribe in the Federal

25

26 [1] Plaintiffs have mischaracterized several of these Documents. For example, Plaintiffs describe
Document No. 28 as a "corporate filing record of 'Friends of Yakima, Inc.'" ECF No. 45,
27 para. 28. In reality, the Document appears to be a printout of a page from a website called
"corporationwiki" containing uncorroborated statements about "Friends of Yakima." ECF No. 45,
28 Exh. 28.

Register, but to support Plaintiffs' *interpretation* of that fact as demonstrating federal recognition of the Burleys' General Council. Opp. to Fed. MSJ, ECF No. 48, at 41-42. They seek judicial notice of the deposition testimony of Yakima Dixie (RJN Exh. 29) not to show the deposition occurred, but to establish the truth of statements made by Mr. Dixie. *See* Opp. to Int. MSJ at 63-64. They seek judicial notice of a probation officer's report (RJN Exh. 34) to establish the truth of allegations recounted in the report. Opp. to Int. MSJ at 65.

These are not proper subjects of judicial notice. To the extent this Court takes any notice of these Documents, it should only notice the Documents' existence or the occurrence of the proceedings they reflect. *Lee*, *supra*, 250 F.3d at 690; *Southern Cal. Edison Co.*, *supra*, 300 F.Supp.2d at 974. "The truth of the [Documents'] contents, and the inferences properly drawn from them . . . is not a proper subject of judicial notice under Rule 201." *Patel v. Parnes*, 253 F.R.D. 531, 546 (C.D. Cal. 2008).

United States v. Ritchie — Plaintiffs' chief source of authority for their RJN — confirms this. 342 F.3d 903. *Ritchie* acknowledged that a court "may take judicial notice of some public records, including the records and reports of administrative bodies," but refused to judicially notice facts contained in records of the U.S. Drug Enforcement Agency — an administrative agency — because they were subject to reasonable dispute. *Id.* at 909 (quotation marks and citation omitted). *See also Pina v. Henderson*, 752 F.2d 47, 50 (2d Cir. 1985) (holding that the existence and content of a police report are not properly the subject of judicial notice).

3. Plaintiffs have not shown the relevance of their requests for judicial notice.

Plaintiffs' RJNs should be denied for the additional reason that Plaintiffs have not shown any of their requests for judicial notice is relevant. The only issue properly before this Court is whether the 2015 Decision was arbitrary, capricious, an abuse of discretion, or not in accordance with law. 5 U.S.C. § 706(2)(A). Yet Plaintiffs, by their own account, seek judicial notice in support of their arguments on issues unrelated to the validity of the 2015 Decision.

Plaintiffs request that the Court take judicial notice of Documents 1-2 and 8-9 "to show that Plaintiffs could not appeal the U.S. District Court's summary judgment order [in *Miwok III*]

remanding to the AS–IA." Whether Plaintiffs were able to appeal the court order remanding an earlier decision to the BIA for reconsideration has no bearing on whether the BIA's 2015 Decision was arbitrary or capricious. Further, the Documents do not show that Plaintiffs could not appeal; they only show they chose not to appeal.

Plaintiffs seek judicial notice of Documents 3-7 and 10-33 on the grounds that these Documents are "relevant on the issue of Plaintiffs' statute of limitations argument." The federal statute of limitations in question only applies to "civil action[s] commenced against the United States," not to decisions by agency officials. 28 U.S.C. § 2401(a). In any case, Plaintiffs' 10-word explanation as to 29 separate requests for judicial notice impermissibly asks this Court to "sort through the voluminous list of exhibits to determine whether any of the contents are appropriate subjects for judicial notice." *Committee to Protect Our Agricultural Water*, *supra*, 2017 WL 272215, at *5. *See also Teamsters Local 617*, *supra*, 633 F.Supp.2d at 776-777 (denying judicial notice where party did not "offer any insight as to why judicial notice … [was] necessary").

Plaintiffs claim Document 34 is relevant to explain why Plaintiffs' attorney threatened to kill Yakima Dixie and to support Plaintiffs' claims that Dixie lied about whether he resigned as chairperson of the 1998 General Council. ECF No. 48-1, p. 2. Neither issue is relevant to the validity of the 2015 Decision. The Decision determined that the BIA would not recognize the 1998 General Council because it was adopted without the participation or consent of the Tribal community — not because Dixie said that the Burleys forged his resignation as chairperson of the Council. (AR-2017-1401.)

B. Plaintiffs may not introduce extra-record evidence in the guise of a request for judicial notice.

Plaintiffs' RJNs improperly attempt to augment the administrative record in this case without showing that one of the four narrow exceptions for allowing extra-record evidence applies. *Southwest Ctr. For Biological Diversity*, *supra*, 100 F.3d at 1450. All but five of the

34 Documents are outside of the administrative record prepared by federal Defendants.[2] Plaintiffs have not even tried to show that the existing record is inadequate or that consideration of these 29 Documents is necessary; their requests should be denied on that basis alone. *See Animal Defense Council*, *supra*, 840 F.2d at 1437.[3]

In addition, the Court should deny Plaintiffs' RJNs because, to the extent they seek to augment the administrative record with the 29 new Documents, they are untimely. This Court's scheduling order required the parties to submit any motion to augment the administrative record by February 6, 2017. ECF No. 41, pp 2-3. Plaintiffs filed the RJNs on March 3, 2017 and April 3, 2017, respectively. Plaintiffs have not identified any extenuating circumstances to explain their late submission of extra-record materials.

Intervenors note that Plaintiffs also filed a separate Declaration of Manuel Corrales, ECF No. 44-2, containing a total of 46 exhibits. Of those, 34 exhibits consist of the Documents contained in the RJNs, and the remaining 12 are documents already contained in the administrative record. Plaintiffs offered no explanation for submitting these 388 pages of duplicative documents. As to the exhibits that are already included in the administrative record, the declaration is unnecessary and duplicative, and the Court should strike the exhibits from the record on that basis. To the extent the declaration seeks to augment the administrative record with the remaining documents, the Court should strike the documents for the reasons given above: Plaintiffs have failed to show that consideration of extra-record evidence is necessary, and their attempt to augment the record is untimely.

IV. CONCLUSION

Each of Plaintiffs' 34 requests for judicial notice fails to meet the requirements of Rule 201 and should be denied on that basis. Even if the requests satisfied the requirements of Rule 201, the Court should deny them as to the 29 Documents that consist of extra-record evidence, because

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[2] The five Documents already in the administrative record are numbers 1, 8, 29, 31 and 32.

[3] Several of the Documents did not even exist when the 2015 Decision was issued and thus could not have been considered in reaching the Decision. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978). ECF No. 45, Exh. No. 25, 26, 30.

Plaintiffs have not shown that consideration of such evidence is necessary or proper. Intervenors also request that the Court decline to consider the arguments in Plaintiffs' briefs that rely on the inadmissible extra-record evidence.

Dated: April 26, 2017

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By /s/ James F. Rusk
JAMES F. RUSK

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2017, I electronically filed the foregoing Intervenor-Defendants' Opposition and Objections to Plaintiffs' First and Supplemental Requests for Judicial Notice with the Clerk of the Court by using the CM/ECF system, which will provide service to all counsel of record.

Respectfully submitted,

/s/ James F. Rusk
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