In the United States Court of Federal Claims

No. 99-550 L
(into which has been consolidated No. 00-169 L)
(E-Filed: September 21, 2010)

THE OSAGE TRIBE OF INDIANS OF OKLAHOMA, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Judicial Notice of Adjudicative Facts

ORDER

Pursuant to Rule 201 of the Federal Rules of Evidence, the court has the authority to take judicial notice of an adjudicative fact that is "not subject to reasonable dispute" such that it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Such sources include encyclopedias, textbooks, and dictionaries. See Werk v. Parker, 249 U.S. 130, 132-133 (1919) (holding that the Circuit Court of Appeals "was justified in taking judicial notice of facts that appeared so abundantly from standard works accessible in every considerable library" including "the British Encyclopedia . . . [and] the Standard Dictionary of 1894"); B.V.D. Licensing Corp. v. Body Action Design, Inc., 846 F.2d 727, 728 (Fed. Cir. 1988) (stating that courts may consult dictionaries and encyclopedias when taking judicial notice of facts); Urbanek v. United States, 731 F.2d 870, 873 n.3 (Fed. Cir. 1984) (taking judicial notice of accounting texts to determine proper accounting practice); United States v. Moscini, 19 C.C.P.A. 144, 147 (1931) ("[T]he courts, in determining the common meaning of a term, may accept or reject evidence of such meaning and may, as an aid, consult the dictionaries, lexicons, and written authorities as to such common meaning.").

The court may take judicial notice sua sponte but should give the parties notice and an opportunity to be heard. See Fed. R. Evid. 201(c), (e); Fed. R. Evid. 201(e) advisory committee's note ("An adversely affected party may learn in advance that judicial notice is in contemplation . . . through an advance indication by the judge."); Norman v.

Housing Auth. of City of Montgomery, 836 F.2d 1292, 1304 (11th Cir. 1988) ("Where the court does take such judicial notice on its own motion, a party is entitled to be heard on the matter if he so requests."); United States v. Mentz, 840 F.2d 315, 322 (6th Cir. 1988) (stating that before a court takes judicial notice, the court should "identify the fact it is noticing, and its justification for doing so" (internal quotation marks omitted)). Accordingly, the court notifies the parties of the following:

> (1) The court has consulted B.S. Everitt, The Cambridge Dictionary of Statistics (2d ed. 2002) to define the term "outlier" and to determine the meaning of the "Extreme Studentized Deviate Test."
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> (2) The court has consulted Graham Upton & Ian Cook, A Dictionary of Statistics (2d ed. rev. 2008) to define the term "outlier" and to determine the meaning of the "Grubb's Test" or "Grubbs' Rule."
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> (3) The court has consulted Yadolah Dodge, The Oxford Dictionary of Statistical Terms (2003) to determine the meaning of the "Grubb's Test" or "Grubbs' Rule" and the "Extreme Studentized Deviate Test."

Moreover, "[c]ourts have the power to judicially recognize their own records of prior litigation closely related to the present case. Although not required to take judicial notice, courts often recognize part of the record in the same proceeding or in an earlier stage of the same controversy." Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 201.12[3] (Joseph M. McLaughlin ed., 2d ed. 2010); see Gilmore v. City of Montgomery, 417 U.S. 556, 568 n.8 (1974) (notice by district court of evidence of defendant's discriminatory activities presented in prior case before same judge); Young v. Selsky, 41 F.3d 47, 50-51 (2d Cir. 1994) (notice by circuit court of defendant's prior testimony in related proceedings); Brown v. Lippard, 472 F.3d 384, 387 (5th Cir. 2006) (notice by trial court of existence of testimony in earlier dismissed action); United States v. Estep, 760 F.2d 1060, 1063 (10th Cir. 1985) (notice by district court of transcript of criminal trial that preceded hearing on motion for return of property). The court notifies the parties of the following:

> (4) The court notices the following Tranche One trial testimony of Mr. Charles Hurlburt:
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> Defendant's Counsel: To the best of your recollection when did companies start offering bonuses?
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> Mr. Hurlburt: [The Osage Agency] began seeing a great deal of competition in . . . about 1988, '89, '90 . . . . After the calamitous price fall in '86 and '87 prices kind of edged back up slowly. We saw companies that

would provide extra service. We saw companies that just wanted to just pay extra for the oil.

2006 Trial Transcript 1056:24-1057:9.

If either party objects to the court's use of judicial notice, it shall file a Motion Requesting an Opportunity to be Heard (Motion to be Heard) at or before 5:00 p.m. Eastern Daylight Time on Monday, September 27, 2010. See Chen v. Metro. Ins. & Annuity Co., 907 F.2d 566, 569-570 (5th Cir. 1990) (requiring a party challenging propriety of judicial notice to file a motion requesting an opportunity to be heard). If any Motion to be Heard is filed, the court will schedule briefing and responsive briefing on the Motion to be Heard.

The parties are urged to contact the court at any time when they believe the involvement of the court will help to secure the just, speedy and inexpensive determination of this action. See Rules of the Court of Federal Claims 1.

IT IS SO ORDERED.

s/ Emily C. Hewitt
EMILY C. HEWITT
Chief Judge