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IN THE CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION

CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,
Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,
Defendant-Appellant.

Decision Entered April 22, 1998

[Cite as: 1998 CROW 3]

Before: Glen Birdinground, C.J., Albert L. Gros-Ventre, J., and William C. Watt, J.

ORDER RE. REQUEST FOR JUDICIAL NOTICE

¶1 Now pending before this court are plaintiffs-appellees' Motion to Allow Supplementation of the Record (the "Motion") filed February 3, 1998 pursuant to the court's Final Scheduling Order of January 26, 1998. Plaintiffs-appellees subsequently filed a Request for the Court to take Judicial Notice on February 10, 1998 (the "Request"). The evidence tendered by plaintiffs-appellees is intended to go to the issue of subject matter jurisdiction in light of the Supreme Court's decision in *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997).

¶2 Defendant-appellant Burlington Northern Railroad Company ("BN") opposes both requests on various grounds: that some of the items tendered were already admitted as evidence at trial and are already part of the record on appeal; that introduction of some of the items as evidence was previously rejected by the Tribal Court; that some of the facts are disputed or otherwise do not fall within the types of matters for which judicial notice is proper under Rule 201 of the Federal Rules of Evidence; and that appellees' delay in tendering this evidence is not excusable, and admission at this time would deny its due process rights.

¶3 BN has also requested this court to vacate the oral argument currently scheduled for April 10, 1998, so that it may have sufficient time in advance of oral argument to prepare its Reply Brief following this court's ruling on the appellees' Motion and Request. The court has previously granted that request.

¶4 Rule 11(a) of the Crow Tribal Rules of Civil Procedure provides that the Federal Rules of Evidence, as amended, shall be the rules of evidence applicable to civil actions in the Tribal courts. Thus, Rule 201 of the Federal Rules of Evidence governs judicial notice of adjudicative facts in this case. The types of facts eligible for judicial notice under Rule 201 are those which are "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R Evid. 201(b).

¶5 Judicial notice is mandatory when the court is presented with a proper request. Under Fed. R. Evid. 201(d), "[a] court *shall* take judicial notice if requested by a party and supplied with the necessary information" (emphasis added). To protect due process rights, this requirement is subject to the opposing party's "opportunity to be heard as to the propriety. . . and tenor of the matter noticed." Fed. It Evid. 201(e).

¶6 Rule 201(f) further provides that "[j]udicial notice may be taken at any stage of the proceeding." The Advisory Committee's Note makes it clear that judicial notice may be taken "in the trial court or on appeal." Thus, under Fed. R. Evid. 201, federal appeals courts have taken judicial notice of a variety of public records and reports. *See, e.g., Sinaloa Lake Owners Ass 'n v. City of Simi Valley*, 864 F.2d 1475, 1479 n.2, 1480 (9th Cir. 1989) (in takings case, plaintiffs were required to exhaust state remedies based on state court report showing that delays were not so excessive as to make resort to state court system futile); *United States v. Gonzales*, 442 F.2d 698, 708 n.8 (2d Cir. 1971), *cert. denied*, 404 U.S. 845 (1971) (cocaine theft statistics from federal Bureau of Narcotics); and *Barber v. Ponte*, 772 F.2d 982, 998 (1st Cir. 1985)(en banc), *cert. denied*, 475 U.S. 1050 (1986) (census data noticed even in federal habeas review), *cited in Knox v. Butler*, 884 F.2d 849, 852 n.7 (5th Cir. 1989). Federal appeals courts have also rejected other types of facts for which judicial notice was requested as being too speculative, or if there was no reason for the matter to have been first raised at the point of appellate review. *See Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 776 n.17 (9th Cir. 1985) (lost customers); *Knox v. Butler*, *supra* (census data in federal habeas corpus proceeding).

¶7 In this case, consideration of the appellees' Motion and Request is warranted by the nature of the issue to which the evidence pertains, i.e., subject matter jurisdiction, and the procedural history of this case. Subject matter jurisdiction may be raised at any time, by the parties or the court, and may not be waived by the parties. *See Cripps v. Life Insurance Co. of North America*, 980 F.2d 1261, 1264 (9th Cir. 1992). Moreover, the existence and extent of Tribal Court jurisdiction in a case such as this requires a "careful examination of tribal sovereignty," including "a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985).

¶8 The trial of this case, as well as the Tribal Court's ruling on BN's motion for judgment n.o.v. in 1996, were both completed before the Supreme Court issued its decision in *Strate*. In order to allow this court to fully consider *Strate* while avoiding additional delay that could have resulted from yet another remand, this court in its Revised Order Governing Conduct of Appeal entered June 17, 1997, provided the parties the opportunity to supplement the record with "such public records as they believe are relevant to the jurisdictional inquiry, including but not limited to treaties, statutes, Tribal ordinances and right-of-way documents." Order ¶ 2. In accordance with that order, both parties appended qualifying documents to their principal briefs on appeal, which were filed on December 15, 1997 and January 20, 1998, respectively. The parties do not dispute the propriety of admitting those documents to inform the court's jurisdictional inquiry.

¶9 Thus, BN's objections based on the stage of proceedings and lack of due process are not well founded. However, some of the matters submitted by appellees are not general knowledge, or are conclusory in tenor, and thus do not fall within the criteria of Fed. R. Evid. 201, as adopted by the Crow Rules of Civil Procedure. Now, therefore,

IT IS HEREBY ORDERED that with regard to plaintiffs-appellees' Motion:

(a) DENIED as moot with respect to Exhibits A, B, C, D, G and J, because these materials are already part of the record before this court on appeal;

(b) DENIED as irrelevant with respect to Exhibit E, because a party or its counsel cannot waive subject matter jurisdiction in any event;

(c) DENIED with respect Exhibits F, H and I, because the Tribal Court previously disallowed Eloise Pease's testimony, and plaintiffs-appellees have not cross-appealed that ruling;

(d) DENIED with respect to factual items (1) and (2) stated on page 7 of plaintiffs-appellees' Motion (funeral allowance and other expenses incurred by Tribe), as not falling within the scope of Fed. R. Evid. 201;

(e) GRANTED with respect to factual items (3) and (4) stated on page 7 of plaintiffs-appellees' Motion because they are within the general knowledge of anyone who has a passing familiarity with the ways of the Crow Tribe.

IT IS FURTHER ORDERED with regard to plaintiffs-appellees' Request:

(f) GRANTED with respect to items (1) and (2) in the Request, and the death certificates of Tribal members or descendants attached as Exhibit A, without prejudice as to whether the deaths resulted from any fault or negligence on the part of the railroad;

(g) DENIED with respect to items (3) and (4) on page 3 of the Request, for the same reasons stated in paragraph (d) above, except that judicial notice of Tribal Council Resolution No. 97-01 tendered with appellees' Reply dated March 30, 1998, is GRANTED;

(h) DENIED with respect to items (5) and (6) stated on page 3 of the Request, as duplicative of the items noticed by paragraph (e) above; and

(i) GRANTED with respect to item (7) of the Request, consisting of the reports of the Commissioner of Indian Affairs attached as Exhibit B to the Request, provided that appellees also submit the report for the year 1891 (which is referred to in the 1892 report), or otherwise inform the court if it cannot be provided, on or before April 28, 1998.

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