I. INTRODUCTION

This case involves a dispute over which of two competing tribal groups (Bills Group or Wasson Group) is entitled to funds that are acknowledged to belong to the Winnemucca Indian Colony.

The primary argument of the Wasson Group is that they are the proper Tribal government and, therefore, should receive the money that was held at Bank of America. They make this argument even though no court has ever ruled that the current ideation of that group is the Tribal government and only the Federal District Court has ever ruled the Wasson Group is entitled to the bank funds.

However, the case law makes it abundantly clear that the Federal District Court had no jurisdiction to choose a Tribal government. In fact, even the District Court acknowledged this in its April 29, 2008 Order denying the Motion to Alter or Amend Judgment when it stated it wasn't choosing the government, it was simply choosing who got the money. Still, the fact remains that, because there has been no true or final resolution of who is the authorized government of the Winnemucca Indian Colony, it is inappropriate to distribute the funds.

The Wasson Group has made an analysis of the issue of exhausting tribal remedies under Philip Morris USA, Inc. v. King Mountain Tobacco, 569 F.3d 932 (9th Cir. 2009). The analysis was not on point. However, both the Wasson Group

and the district court recognized the requirement of exhausting tribal remedies in a case like this one. See U.S. Bancorp v. Ike, 171 F. Supp. 2d 1133, 1126 (D. Nev. 2001); Brown v. Washoe Housing Authority, 835 F.2d 1327 (10th Cir. 1988); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).

The Wasson brief recognizes that the issue is which of two Tribal court Orders should be recognized, the Swanson order or the Minnesota decision. So, understandably the Wasson brief argues that the Swanson order is defective in many ways and that the Minnesota decision is good for all the opposite reasons. As will be discussed, the Wasson brief substantially misrepresents the contents of various documents.

However, it is most important to note that the Wasson brief has no facts or responsive case law to overcome the basic argument that the Inter-Tribal Court of Appeals of Nevada's (ITCAN) withdrawal of "the mandates of all orders and rulings" reinstates the Swanson order that the Wasson Group originally appealed from. Moreover, the Wasson brief does not answer the charge that the ITCAN withdrawal was without due process. Nor does the Wasson brief answer the charge that the Federal District Court also did not address the two issues of why the Swanson order was to be ignored and the lack of due process in the ITCAN withdrawal.

II. THE ITCAN ORDER OF MAY 7, 2007

At page 3, the Wasson brief correctly recites that, following the Minnesota decision, the Bills Group asked for reconsideration before the ITCAN. The brief then makes a completely incorrect statement as follows: "That body refused to rule and withdrew all its orders in deference to the specially appointed panel that ruled in its absence". First, as previously briefed, it ITCAN did not refuse to rule. In fact, it specifically granted reconsideration ruling that the Minnesota panel was an appellate body whose decision was not final[1] and whose order could be reviewed. See ITCAN Decision and Order of March 19, 2004. In that decision the ITCAN panel also discussed the basis for its jurisdiction at length at pages 6 and 7. This was after extensive briefing.

On September 16, 2004, after further briefing and hearing, the ITCAN, in its Decision on Appeal ordered the parties to participate in the process that would have produced a recognized Tribal government. It was then that the Wasson Group sued the judges, all of whom then refused to take further action in the case. Following that, a new appellate panel was appointed which, without notice to the parties, by order of May 7, 2007, entitled "Per Curiam" withdrew "the mandates of

[1]The Minnesota decision was not final, in part because "Nothing in the agreement between the parties suggests they agreed that any decision by the appointed panel was to be final." See Decision and Order, March 19, 2004, page 6.

all orders and rulings". It is completely incorrect for the Wasson Group to argue that this was done "in deference to the specially appointed panel that ruled in its absence." That statement is absolutely incorrect. To the exact opposite, the language of the ITCAN was, "We recognize that this ruling leaves the issues raised in this and other proceedings uncertain in terms of finality and effect."

This fact also makes two further comments by the Wasson Group misleading. At page 11, the Wasson Group incorrectly says the ITCAN order "stated that it had no jurisdiction over this controversy." First, the ITCAN made no such statement. The quoted sentence is a pure construct by the Wasson brief. Second, since the ITCAN order doesn't use the phrase "this controversy" and because the ITCAN entered its withdrawal without explanation, it is impossible for anyone to say over what the ITCAN ruled it lacked jurisdiction.

Next, it is equally inaccurate for the Wasson Group in the center of page 12 to say that the ITCAN "recognized they were not an appellate body that could review the appellate decision already rendered by the Appellate Panel." In fact, the ITCAN did review the Minnesota decision upon reconsideration and entered a different order. The fact reconsideration was granted by a different appellate panel from the one that later decided there was no appellate jurisdiction raises precisely the issue previously briefed of res judicata of jurisdictional issues. This

leads to the last serious misstatement about the ITCAN order, where the Wasson Group says at page 18, "There was an order prior to the dismissal that is alluded to by the District Court and the appellants that had been briefed, argued and an order issued." It is unclear to what the Wasson Group refers.

It is indisputable that, without notice or hearing or briefing, or explanation, the third ideation of the ITCAN panel ruled it had no jurisdiction to take any action. If the Wasson Group wants to suggest a different state of events, it behooves them to set it forth clearly rather than so vaguely.

In withdrawing from jurisdiction, the May 7, 2007 panel of the ITCAN reversed the longstanding decisions of two earlier panels that jurisdiction did exist, each reached after briefing and argument. See ITCAN order of June 29, 2001, where after much heated briefing and oral argument, jurisdiction of the ITCAN was stipulated to. See ITCAN order of March 19, 2004, where after briefing and argument, jurisdiction was ruled to exist by the court.

The withdrawal from jurisdiction without notice and opportunity to be heard violated due process, California Diversified Promotions, Inc v. Musick, 505 F.2d 278 (CA Cal. 1974). Denial of due process is a basis for denying comity, see Comity discussion below. Reversal of the earlier jurisdiction decision violated the principle of res judicata, Ferreirea v. Borja, 93 F.3d 671 (Ca9th 1996) and law of

the case.

Neither group sought further relief from the ITCAN to explain its decision, presumably because each side thought the net result was a victory for themselves. The difference between the two groups is that the case law supports the determination that the Swanson order was rejuvenated by the dismissal of the appeal, while there is no case law to support any argument that the Minnesota decision had any continuing vitality.

The proper steps for further action following the dismissal of an appeal would be to go back to the trial level court which the Bills Group has done. For unexplained reasons the BIA has not responded even though a CFR court nominally exists. That failure, however, does not mean that there are not further remedies that can still be pursued and it certainly does not mean that the District Court has the opportunity, duty or jurisdiction to choose between two conflicting orders on what to do with the funds previously held by the bank, especially where one of the orders (Minnesota decision) never even addresses the bank funds.

III. THE SWANSON ORDER OF JANUARY 18, 2001

The Wasson Group denigrates the validity of the Swanson order throughout their brief with language that "it also violated the due process of the opposing party because no notice was given of the hearing and entry of order and no record

of proceedings was made." (Wasson brief, page 19). "[T]he Order of Kyle Swanson on its face was silent regarding notice because it did not occur and the ITCAN rejected it for review for that reason and because no record of the proceedings had been made." (Brief page 18). These statements are so clearly incorrect, it is hard to understand their source. The Swanson order for the first two and a half pages discusses at length the court's effort to set the case for a hearing at a time consistent with the Wasson Group's and their counsel's ability to appear, that extensions were granted for them, that, instead of complying with the court's request to choose a court date the Wasson Group attempted to fire the judge and tried create a different court of its own with a different judge which had a hearing on the issues already before Judge Swanson in front of their newly appointed judge on exactly the same day, July 31, 2000, the case was heard before Judge Swanson[2].

The Wasson Group knew exactly what it was doing when it was actively trying to sabotage the Swanson court and not appear before it. For this reason, the

[2]At trial before Judge Haberfeld, Exhibit 31 was a copy of the order of the other court reciting that it held an "ex parte" hearing on July 31, 2000 with defendants (Wasson Group) present and the plaintiffs (Bills Group) absent. That Exhibit is also referenced in the Minnesota decision, page 7. The Minnesota decision, at page 18, agreed with Judge Haberfeld that the attempted removal of Judge Swanson and the appointment of another judge "was a reaction to a negative decision issued by Swanson and an attempt to create a Tribal Court more to the liking of the residual [Wasson Group] members". No court has ever held that the appointment of the other judge or any proceeding before him were valid.

Wasson Group's claim that the Swanson order was obtained without due process to them and so cannot have comity must fall on deaf ears.

It is also incorrect for the Wasson Group to say that the ITCAN order of June 29, 2001 remanding the case for a new trial was based on the lack of due process or the lack of a record in the Swanson proceedings. In fact, a review of that order shows nothing of the sort on either of those alleged topics. Instead, the order, after its introduction, says:

> After hearing arguments from Counsel, the Court observed that there exists several issues which have not been ruled upon and which should have been done prior to appeal.

There is absolutely nothing in that language which reflects an acknowlegement that the Wasson Group did not have full opportunity to participate in the Swanson proceedings nor anything about the lack of a record, nor anything to challenge Judge Swanson's extensive findings and conclusions.

Rather, the case was sent back to address the underlying issues of who are the proper members of the Colony and who was the proper government. This was to resolve the long standing claims of the members of the Bills Group and other people similarly situated that they had been wrongfully excluded from membership and governance in the Tribe.

One of the points to be made is that until the Federal District court ruled

about who should have the money that was in the bank account, the only court that ever dealt directly or indirectly with the issue of the bank funds was the Tribal court in the order issued by Judge Swanson. That order gave authority to William Bills over the bank account and to reconstitute the government. The judge made that order knowing fully well what the Constitution required. The Wasson Group's argument that the order was inconsistent with the Constitution completely ignores the role of a court in resolving issues. The court gave the authority to William Bills to reconstitute the government. When that election was properly held and William Bills did not run again for office, then the authority of the Council to control the Tribe's funds came upon the shoulders of the persons elected. Following the succeeding elections, those people are today the Bills Group.

IV. COMITY

The issue of comity is that it was incorrect for the District Court to grant comity to the Minnesota decision when there is no case law in support of the court's analysis while the case law does support granting comity to the Swanson order. The District Court has said that, by choosing to grant comity to one order or another, it is not choosing a Tribal government but instead is simply deciding who gets the money. However, the Bills Group thinks that analysis is far too

facile. The Wasson Group also recognizes that as the real effect the District Court's decision when at page 16, in discussing which of the two orders should get comity, the Wasson Group says, "The District Court recognized that the resolution of this matter, once and for all, would be the recognition of one of those decisions." However, it was not the job of the district court to resolve the matter of tribal government.

Moreover, it didn't happen. The Wasson Group has not been recognized by anybody but itself as the proper government. As recently as November 19, 2009, the Interior Board of Indian Appeals (IBIA), in IBIA No. 08-28-A, denied the fifth appeal of the Wasson Group concerning the recognition issue and remanded the issue to the Western Regional Director of the Bureau of Indian Affairs (Phoenix, AZ) for a decision on the merits. On December 8, 2009, the Regional Director, once again, issued his decision denying the Wasson Group recognition and as of January 14, 2010, the Wasson Group has once again filed an IBIA appeal. See Statement of Related Cases and Excerpt of Records.

The fact is, neither the Minnesota decision nor any of the other court orders created a recognized government. Instead, they each established a process for creating a new membership list and conducting an election that hopefully the BIA would recognize. The ruling by the BIA and the IBIA on each occasion has been

that so no such process has been successfully completed.

The Wasson Group, at page 17, citing Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997) and quoting from a footnote, discusses standards to use when to not grant comity. The body of that case at page 810 synthesizes the "traditional elements of comity with the special requirements of Indian law" to come up with two mandatory rules where comity cannot be granted and five discretionary rules where the court may decline to grant comity. Applicable here is one rule from each category.

In the mandatory category is the rule that "federal courts must neither recognize nor enforce tribal judgments if: (2) the defendant was not afforded due process of law."

The Bills Group was denied due process when the ITCAN, without notice, or hearing or briefing or explanation of its reasoning withdrew its jurisdiction on May 7, 2007. First there was denial of any participation in that decision itself. Second, the withdrawal of "the mandates of all orders and rulings" presumably withdrew the ITCAN decision reconsidering the Minnesota decision - leaving the Bills Group with no place to go for reconsideration of the Minnesota decision. There is no court anywhere that does not have some avenue for that possibility. For the totality of circumstances to produce that result is a denial of due process.

A reader may query why we are discussing comity as to the ITCAN withdrawal, when the case otherwise appears to be about choosing between the Swanson order and the Minnesota decision. The answer is simple. Before the district court could reach the issue of choosing between those two rulings, the district court, implicitly, had to decide to grant recognition to the ITCAN decision that it had no jurisdiction. Based on the denial of due process, no such recognition should have been granted.

In the discretionary category is the rule that the "federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances: (2) the judgment conflicts with another final judgment that is entitled to recognition."

That is exactly the situation here. The Swanson order is a final judgment. It is entitled to recognition. After the ITCAN withdrawal, the Swanson order is entitled to res judicata operative status. None of these truths is vitiated by the arguments that the parties agreed to the Minnesota panel and participated fully before it. Also, if one accepts the ITCAN withdrawal, then ultimately there was no avenue for reconsideration of the Minnesota decision - a denial of due process which prohibits the Minnesota decision from receiving recognition.

Here the Swanson order was issued by the Tribal court that existed before

the two groups ever separated, by the judge who was sitting validly before the two groups ever separated, in a case in which the Wasson Group indisputably had notice and opportunity to be heard but chose instead to not participate and create their own court and conduct their own proceedings.

In this case, the district court chose to give recognition to the Minnesota decision for no reason other than the fact that the parties agreed to that tribunal's existence and participated there. The same could also be said of the ITCAN.

V. THERE ARE ADDITIONAL REMEDIES THAT CAN AND SHOULD BE PURSUED

The Wasson brief bewails that this matter has taken 8 years but whatever the reason for that time, and whatever problems it may have caused, the fact remains that the decision should be made properly in a Tribal forum. It is simply beyond the authority of the District Court to have done so. There are at least three additional remedies that can be exhausted.

First, the ITCAN can be asked to reconvene itself and clarify and hopefully correct its order declaring it had no jurisdiction. If it fails to do so, it can obviously be sued in the Federal District Court since the Wasson Group did that earlier when it decided it didn't like the ITCAN order setting aside the Minnesota decision. This is precisely the process that was directed in U.S. Bankcorp v. Ike,

171 F.Supp. 2d 1122, 127 (D.Nev. 2001).

Second, either side can pursue the matter before the 25 CFR court. The Winnemucca Indian Colony has specific statutes that allow membership and governance issues to be decided by its courts. It is customary following the end of an appeal for further proceedings to be held at the trial level. The fact that the BIA apparently did nothing to follow up on the pleadings that were presented for filing in the CFR court is not conclusive. Any failure of the BIA to cause the court to be in a position to act can be pursued administratively or by litigation with the BIA. This process is also directed in U.S Bancorp, *supra*, 1127.

Third, but probably first in time, the Bills Group can present itself and its history of elections and the finality of the Swanson order to the BIA and seek recognition similar to the Wasson Group's six IBIA appeals. The Bills Group has made at least one application for recognition and recalls that its denial was based on the BIA's opinion that since the two groups were, at that time, still litigating in Tribal forums, it was inappropriate for the BIA to recognize either group. At the present time, since the Wasson Group takes the position that there is no litigation going on before the ITCAN or the CFR court, then it is entirely possible that the BIA would take the same position and recognize the Bills Group on the basis of the supremacy of the Swanson order.

VI. CONCLUSION

Regardless of the long and convoluted history of this situation, one thing is clear: the disputes between the parties as to who are the members and who is the legitimate government, have not been resolved with any finality in a Tribal forum. These are matters solely within the jurisdiction of the Tribe and until they are resolved, it is inappropriate for a Federal court to distribute the funds that clearly belong to the Winnemucca Indian Colony by the artifice of the court saying it is not deciding who is the government, but is merely deciding who gets the money.

Until and unless some group can achieve recognition and expect to have some stability as a government, without litigating over that issue, it is simply improper for the money to be distributed to any particular group of individuals. To do so, places the money in the hands of one group or another without any certainty that the money will be in proper hands or used for the proper purposes.

It is requested that this court either rule that the funds be distributed to the Bills Group as the proper group to have them under the Swanson order or else that the funds be retained by the court until there is a recognized Tribal government.

Date: February 9, 2010 /s/Donald K. Pope

PROOF OF SERVICE

The ***APPELLANTS REPLY BRIEF***

was served by the person who signed below on the person(s) indicated below on the date of: _____.

by mailing ***XX***

by certified mail _____

by return receipt requested _____

by faxing ***XX***

by hand delivery _____

Treva Hearne
Attorney At Law
910 Parr Blvd.
Suite 8
Reno, NV 89512

Date: February 9, 2010 /s/Donald K. Pope

STATEMENT OF RELATED CASES

Before and during this appeal, there have been and are pending proceedings before the Interior Board of Indian Appeals that involve the parties and issues that are before this Circuit Court.

These are not "related cases" within the meaning of Rule 28-2.6 but so clearly raise the same issues (recognition of a government of the Winnemucca Indian Colony) that they are listed here. Recent proceedings will be included in Appellants' Excerpt of the Record.

1) IBIA 08-28-A, Order Remanding, November 19, 2009, Sharon Wasson v. Western Regional Director.

2) Letter of December 8, 2009, to Treva Hearne from Western Regional Director.

3) IBIA Docket No. (Not yet assigned) Pre docketing Notice of January 28, 2010. Sharon Wasson v. Acting Western Region Director.

Date: February 9, 2010 /s/Donald K. Pope