

No. 08-16146

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BANK OF AMERICA, N.A., a Delaware Corporation
Plaintiffs

v.

KYLE SWANSON
Defendant

WILLIAM BILLS; WINNEMUCCA COLONY COUNCIL
Defendant/Counter-Claimants/Appellants

SHARON WASSON, *et. al.*
Defendants/Counter-Claimants/ Appellees

On Appeal from United States District Court for the District of Nevada
Case No.: 3:00-CV-00450-RCJ-VPC

APPELLEES' RESPONSIVE BRIEF

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Colony Council***

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I.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Federal District Court has jurisdiction over this matter because the adverse parties had diversity, the Bank of America was a foreign corporation registered in the State of Delaware, and the defendants Sharon Wasson, Thomas Wasson, Elverine Castro, Lucy Lowery, William Bills and Kyle Swanson were all alleged to have been residents of Winnemucca, Nevada.

The venue of this action is properly placed in the District of California pursuant to 28 U.S.C. § 1391 because Plaintiffs' claims arise in the District of Nevada involving a federally recognized Tribe.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this Appeal is properly with the Ninth Circuit Court of Appeals pursuant to Title 28 U.S.C. 41. The Court of Appeals has jurisdiction from final decisions of the District Court pursuant to 28 U.S.C.' 1291.

II.

STATEMENT OF THE CASE

The United States District Court, District of Nevada, after eight years of judiciously waiting for the exhaustion of Tribal remedies which were

exhausted, issued an order recognizing the decision of the specially appointed Appellate Court for the Winnemucca Indian Colony and distributed the bank account of the Winnemucca Indian Colony to its Council. The eight year history of this case is a tragic display of the lack of judicial process available to a small Indian Colony dependent on the United States exercising its trust responsibility through the Bureau of Indian Affairs.

III.

STATEMENT OF THE ISSUES

1. Did the District Court stay its hand and not rule until there was a exhaustion of tribal remedies regarding inherent Tribal matters prior to entering its order?
2. Did the District Court properly extend comity to the final decision of the specially appointed appellate court of the Winnemucca Indian Colony?

IV.

SUMMARY OF ARGUMENT

The District Court may have unnecessarily stayed its hand and waited for the exhaustion of Tribal remedies even though that process took more than eight years, but the Tribal process was sufficiently exhausted when the District Court entered its decision. The District Court appropriately recognized the decision of the specially appointed appellate panel that was

agreed to by all parties pursuant to mediation in the Ninth Circuit Court of Appeals pursuant to an appeal regarding issue in this case before the District Court of Nevada.

The mediation was an attempt to arrive at a global settlement of the disputed governance issues and the interference by the Bureau of Indian Affairs in an internal tribal dispute and all parties, including the appellants herein agreed to the appointment of the specially appointed appellate panel during a time when the BIA had not funded the Inter Tribal Court of Appeals. The specially appointed panel heard the appeal in the regular course after briefing and argument. Then the losing group who unlawfully occupy the Colony refused to recognize the decision and further appealed to the Inter-Tribal Court of Appeals when it was reconstituted and refunded by the BIA. That body refused to rule and withdrew all its orders in deference to the specially appointed panel that ruled in its absence.

V.

ARGUMENT

A. Introduction and brief summary of the facts.

This brief could not begin to encompass the chronology of events (SER 000444 - 000452) in this case that began with the murder/assassination of Glenn Wasson, the Chairman of the Winnemucca

Indian Colony, yet unsolved by federal authorities, at the Administration Building of the Colony on February 22, 2000 (SER 000144 - 000145, 000255, 000444 - 000452)¹. The real beginning of the chaos at the Colony when the Bureau of Indian Affairs (BIA) in 1986 took over the Colony and required that members who qualified for membership according to the Constitution and By-laws be installed as members and as the Business Council. (SER 000070) This required a search for persons who were descended from the 1916 census. (SER 000070) After that search, Glenn Wasson was recognized as Chairman by the BIA in the government to government relationship and served in that capacity until his death. (SER 000147)

When he was brutally murdered at the Administration building in February 2000, the BIA recognized first one chairman, then another within weeks of one another and then finally made an official decision that the government was dysfunctional and refused, after causing complete chaos to assist the Colony further. (SER 000097, 000099, 000101, 000102, 000382, 000383, 000257 - 000262, 000263 - 000267). Although the BIA

¹ Although the Appellants refer to Excerpts of Record (page 9, of their brief), the Appellants provided no Excerpts of Record. The Appellees will refer to its Excerpts of Record as Supplemental Excerpts of Record (SER) as required by the rule, even though they are not, in fact, supplemental.

did not take over the Colony as was done in 1986, by its failure to act, it, instead, allowed persons i.e. William Bills, who is not an Indian², and the others persons who are represented in this appeal as the Bills group who had never been members of the Winnemucca Indian Colony and could not qualify as members, but who had taken over the Colony by force to occupy the lands of the Winnemucca Indian Colony.

What ensued was eight years of litigation and inaction by the BIA leaving the Colony without a government. This has resulted in the ten year occupation of the Colony by persons who were never members and, in part, were not even Native American. This case is the result of the failure of the United States through the Bureau of Indian Affairs to fulfil its trust responsibility to the small Indian Colony established in 1917, 1918, and 1928 by Executive Orders of Woodrow Wilson setting aside the lands for the homeless Western Shoshone.(SER 000082 - 000086, SER 000385)

However, after the bank account was placed in interpleader in the United States District Court, District of Nevada, and, after the dismissal of Kyle Swanson was appealed, this Court's mediation group convened the Wasson Council and the occupation group and the result was all parties,

² Proof by certified birth certificate filed in the Tribal and District Court in argument on other mothers proved that William Bills was adopted and his biological parents were Filipino.

but for the Bureau of Indian Affairs, agreeing that an appeal of the Tribal Court decision by a specially appointed Tribal Court³ could be appealed and all parties would abide by the decision regarding the appropriate members of the Colony Council. (SER 000149) The specially appointed panel consisted of the chief judge of the Sioux Nation who was also a licensed attorney in a law firm in Minnesota.(000165) She was to pick the other members of the panel who were also attorneys and Tribal judges. (SER 000149) Both the Wasson Council and the occupation group briefed the matter and made oral argument to the Panel which convened in a courtroom at the federal district court in Reno, Nevada, by special accommodation of the District Court in order to exhibit the Tribal remedies and rendered an opinion. (SER 000111 - 000132) The decision of the Panel was adopted by the Tribal Court for the Winnemucca Indian Colony. (SER 000169 - 000174)

The Honorable Howard McKibben found that the panel had prepared a well reasoned decision after a lot of work. (SER 000238, lines 21 - 25, 000240, lines 22 - 25, 000241, lines 1 - 3) When Judge McKibben retired

³ The Specially Appointed Appellate Panel was generally referred to as the Minnesota Panel because the matters of the Panel were from Minnesota. The occupation group attempted to act as though this disqualified the group because of its origin; however, the Inter-Tribal Court of Nevada had panel members from Colorado, Arizona, and Washington because of the limited pool of available Tribal Judges.

to senior status (000277), the case was assigned to the Honorable Brian Sandoval, who, upon the submission of a Request for Distribution of Account and Dismissal of Interpleader/Supplemental Motion for Summary Judgment (Docket No. 202), issued an opinion on March 6, 2008, distributing the bank account to the Winnemucca Indian Colony, Thomas Wasson, Chairman. (SER 000480- 000488) The occupation group appealed.

The United States District Court, District of Nevada, has retained the funds of the Winnemucca Indian Colony since July 2000. The Court waited patiently for the tribal processes to be exhausted. In a well-reasoned opinion, (SER 000176 - 000192) the Magistrate required that tribal processes be exhausted, even though the parties had agreed by stipulation to an appeal and agreed to abide by it. (SER 000186, lines 13 - 20) When the “occupation group (who no longer included William Bills)” failed to abide by the decision, the Magistrate expressed her regret but allowed a further attempt at exhaustion, stating:

When the court received the stipulated Court of Appeals decision, it seemed as though parties had settled, and that the wait to disburse the money was over. However, despite all of the time and money spent by the parties, it appears that they

are determined to prolong this process. The Bills group has challenged the subject matter jurisdiction of the stipulated Court even though the Bills group fully participated in the negotiations to have the appeal heard before that forum. After the stipulated Court of Appeals rendered an unfavorable decision to the Bills group and after payment of \$30,847.32 to the stipulated Court of Appeals for its services, the Bills group now raises for the first time the issue of subject matter jurisdiction. . .Despite the fact that the court is reluctant to extend this case any longer, in the interests of tribal self-determination and self-government, the court will stay these proceedings for ninety days. . .” Dated 2/13/03. (SER 000186, lines 13 - 22; 000190, lines 19 - 23)

The Order being appealed sets out a summary of the facts that is both succinct and relevant to the decision of the court. (SER480 - 00488) The appellants have not disputed those facts. In fact, the appellants have submitted a brief in this matter that references no facts supported by the record, but merely a rambling narrative with no citation to any record at all, and, for that reason, should be given no weight by this Court in its determination. The District Court supported its decision with law and fact

and the decision should be affirmed.

B. The District Court recognized the importance of tribal courts and their sovereignty and stayed its hand until the tribal remedies were completely exhausted.

The Winnemucca Indian Colony had a bank account deposited with the Bank of America. It is undisputed that the Bank of America was not on tribal lands nor was it a tribal corporation. Diversity of citizenship was alleged to support jurisdiction in the United States District Court based upon the foreign corporation status of the Bank of America and the defendants all alleged to be residents of the State of Nevada.

The Tribal Court did not have jurisdiction over this interpleader action regarding the fund of the Bank of America since the Tribal Court of the Winnemucca Indian Colony was a court of limited jurisdiction over the acts of Indians that occur on the reservation. “. . . the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”⁴ “The jurisdiction of tribal courts does not extend beyond tribal boundaries.”⁵ The fact is that the bank account existed off the reservation.

⁴ ***Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.***, 569 F.3d 932, 937 (9th Cir. 2009) citing ***Montana v. United States***, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)

⁵ ***Id.***, at page 938, citing

“Tribal jurisdiction cases are not easily encapsulated, nor do they lend themselves to simplified analysis. The Supreme Court itself observed that questions of jurisdiction over Indians and Indian country are a complex patchwork of federal, state and tribal law.”⁶ This Court gave direction for determining if the Tribal Court had jurisdiction by first looking to the nonmember status of the bank.⁷

There are two potential sources of tribal jurisdiction: a tribe’s inherent sovereignty and congressional statutory grant.⁸ Neither of these were pled or used as a defense to the federal court’s jurisdiction. Thus, if the Tribal Court had no colorable jurisdiction over this matter, then exhaustion of tribal remedies was not required.

However, in deference to the Tribal court system and because the ultimate question was the determination of the proper recipient of the bank account on behalf of the Tribe, the Magistrate found that the issue was inherently one over which the Tribal Court had jurisdiction. The District Court adopted the Magistrate’s opinion that the Court would stay its hand

⁶ ***Philip Morris USA, Inc. V. King Mountain Tobacco Co., Inc.***, 569 F.3d 932, 936, 937 (9th Cir. 2009) citing ***Duro v. Reina***, 495 U.S. 676, 680n.1, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990)

⁷ See, ***Id.***, at page 937, citing ***Plains Commerce Bank v. Long Family Land & Cattle Co.***, –U.S.–, 128 S.Ct. 2709, 171 L.Ed. 2d 457 (2008)

⁸ ***Philip Morris USA, Inc.***, cited *supra*, at page 937

until Tribal remedies were exhausted on the question of who was the proper council to receive the account. (SER 000193)

The District Court was deferential to the Tribal Court process even while it recognized the disingenuousness of the occupation group who refused to abide by the decision of the panel after, through counsel, they had signed the agreement in the 9th Circuit mediation. (SER 000149 - 000151, 000153, 000159, 000164, 000165) The Magistrate lamented the failure of the group to abide by their agreement but allowed a further appeal to the reconstituted Inter-Tribal Court of Appeals of Nevada which, once again, the BIA had funded.

In its final decision, the Inter-Tribal Court of Appeals of Nevada stated that it had no jurisdiction over this controversy. (SER 000344 - 000347, 000368) Left with no further means of appeal, the occupation group desperately submitted the theory to the District Court that without a decision from the Inter Tribal Court, all intervening decisions were rendered of no effect thus leaving William Bills, who no longer existed in this case, as the Chairman. This argument was made without legal basis and without factual support to the District Court and the occupation group now makes that argument to this Court without support of law or fact.

On the contrary the Tribal exhaustion occurred exactly as the District

Court recited in its Order. (SER 000480, lines 16 - 28) Rather than ninety more days of Tribal exhaustion, the occupation group were given four more years of Tribal exhaustion which included at least two appellate orders, with the final one stating that the Inter-Tribal Court of Nevada had no jurisdiction over the matter. (SER 000426) There is no Tribal “Supreme Court”, there is no further Tribal remedy available after the Specially Appointed Appellate Panel of the Winnemucca Indian Colony and the Inter-Tribal Court of Nevada. There simply is no further Tribal process to exhaust.

The Inter-Tribal Court recognized that they were not an appellate body that could review the appellate decision already rendered by the Appellate Panel. The District Court recognized that the lack of an appellate court available to the Winnemucca Indian Colony needed it for the review of the Tribal Court decision was a denial of their due process rights. The Honorable Howard McKibben expressed his dismay at the BIA’s failures:

there is one thing that’s very troubling to me about all of this. I can’t, for the life of me, understand why there wouldn’t be adequate funding out there to keep a court of appeals alive and well, so that it can decide these issues. And to the extent the BIA doesn’t fund something like that, I think that’s a travesty.. .

And to the extent my words mean anything, they should always fund something like that. Everybody has the right to go into court. Everybody has the right to an appellate review. And everybody in the colony should have that right. And they should have as much of a right as anybody else in the United States to come into court and have their grievances resolved. And to the extent the BIA or body else disenfranchises somebody from from not being able to go and do that – I mean, heaven help us if all the funding is cutoff from the courts in this country so people don't have some right to assert and protect their constitutional rights.” (SER 000341, lines 4 - 9, 16 - 25 and 000342, lines 1,2)

The Appellant's argument that the Appellate Panel's decision should be ignored because the Inter-Tribal Court determined it had no further jurisdiction has no merit. The District Court had been involved in this matter since 2000 and knew and recognized the entire Tribal process that took place.

The facts support the decision of the Specially Appointed Appellate Panel. The last recognized Council of the Winnemucca Indian Colony on the day after the murder of Glenn Wasson was Thomas Wasson, Elverine

Castro, Lucy Lowery and William Bills. The Constitution of the Winnemucca Indian Colony provides in Article IV, Section 1 that No business shall be transacted by the council unless a quorum of three (3) council members is present. (SER 000391) Based on the Constitution alone, the William Bills group had no authority, no right to conduct business and could not bestow upon themselves what the occupation group deems their “inherited right through Bills.” The Minnesota Panel recognized this and recognized that orderly business affairs requires the strict application of the law. What the BIA had fostered with its failure to recognize a Council was legitimizing lawless chaos and a flagrant disregard of the law which resulted in the unlawful occupation of the Winnemucca Indian Colony.

Finally, the exhaustion of all Tribal remedies has resulted in the conclusion that the Council in office the day after the murder of Glenn Wasson, is the lawful Council. The Order of Kyle Swanson was rejected when the Inter-Tribal Court of Nevada was still constituted in 2001 because Swanson had ruled without notice to the opposing parties and without a record for review thus a Tribal Court Judge was stipulated to by the parties. (SER 000006, SER 000395 - 000397) The decision of this Tribal Court was appealed to the Specially Appointed Panel and a decision rendered in the

regular course of judicial process.

The strained argument of the appellants should be rejected. The District Court deferred to allow the Tribal Court to make the decision of the issue inherent to the Tribe. That process was exhausted and the District Court properly adopted the decision of the Specially Appointed Appellate Court. The District Court's opinion should be affirmed.

C. The District Court properly extended comity to the decision of the Appellate Panel of the Winnemucca Indian Colony on an issue integral to the sovereignty of the Tribe, the Council who should receive the distribution of the account on behalf of the Tribe.

“Comity is the recognition which one nation allows within its territory to the legislative executive or judicial acts of another nation, having due regard . . .to the rights of its own citizens, or of other persons who are under the protection of its laws.”⁹ There are limitations to the application of comity. If the foreign government decision is inconsistent with the policies underlying comity, then to recognize it would “legitimize the aberration” of

⁹ *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed.95 (1895)

justice as we know it in the United States.¹⁰

The District Court was given arguments to determine which decision should be extended comity, the decision of a Tribal Judge that was rejected by the Inter-Tribal Appeals of Nevada in 2001 by review or the actual appellate review of a decision by a Tribal Judge after many days of evidentiary hearing. The District Court recognized that the resolution of this matter once and for all would be the recognition of one of those decisions. The laws governing decisions of Federal Courts on whether comity is available¹¹ exist for the very purpose of guiding the District Court on the adoption of decisions by the Tribal Courts. To finally end the interpleader by recognition of the decision of the Specially Appointed Panel was well within its jurisdiction and with nothing pending or available for further tribal processes in this matter, the District Court properly extended comity to the appellate decision and terminated this litigation. The termination of this litigation will return the Tribe's funds to it for use by the membership instead of laying in wait for an unknown resolution that evades definition as suggested by the Appellants.

¹⁰ ***Dependable Highway Express, Inc. v. Navigators Ins. Co.***, 498 F.3d 1059 (9th Cir. 2007)

¹¹ ***E.J. Gallo Winery v. Licores S.A.***, 446 F.3d 984 (9th Cir. 2006)

Historically, the notion of comity has been utilized in the enforcement or recognition of Tribal Court decisions by federal courts. “. . .[F]ederal courts may not re-adjudicate questions - whether of federal, state or tribal law - already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason.”¹² Restatement (Third) § 482 provides: (2) a court in the United States need not recognize a judgment of a court of a foreign state if: (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend; (c) the judgment was obtained by fraud; (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought; (e) the judgment conflicts with another final judgment that is entitled to recognition; or (f) the proceeding in the foreign country was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.¹³

These guidelines applied to the two decisions before the District Court affirmatively supported the District Court’s decision to recognize the

¹² ***AT&T Corp. v. Coeur D’Alene Tribe***, 295 F.3d 899, 904 (9th Cir. 2002)

¹³ ***Wilson v. Marchington***, 127 F.3d 805, 810, 811 (9th Cir. 1997) wherein the 9th Circuit interpreted the principles of comity in applying them to a Tribal Court judgment.

panel decision for all the reasons stated by the Honorable Howard McKibben, the reasons stated by Magistrate Cooke and for reasons based upon fairness and the jurisprudence of the United States Federal District Court. Notice and a right to be heard are important issues and the Order of Kyle Swanson on its face was silent regarding notice because it did not occur and the Inter-Tribal Court rejected it for review for that reason and because no record of the proceedings had been made. The Minnesota panel had briefing, everyone present, the Tribal Law & Order Code cited and analyzed on the face of the Order.

The District Court reconsidered its order upon the motion of the occupation group and rejected all its unsupported arguments.(000489 - 000492) The arguments regarding the lack of due process before the Inter-Tribal Court of Appeals prior to its dismissal of the matter are simply not true. 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. The Inter Tribal Court of Appeals simply determined after the record was made and a decision issued, that it had no further jurisdiction on this issue. The Appellees hesitate to refer to this since there is absolutely no documentation in the record by the Appellants before the District Court and, again, is just the unsupported conversation by

Appellants in their brief.

The arguments regarding the CFR Court were answered adequately since the CFR Court by the admission of the Appellants didn't exist at the time of any of the decisions rendered in the Tribal process in this matter and, moreover, didn't respond to any filings by the appellants, thus, and, other than the discussion of the CFR court being completely unsupported by any facts and outside the record before the District Court, it is another red herring interjected by appellees. The District Court should be affirmed.

VI.

Conclusion

The Appellants suggest a result that would adopt a decision of a Tribal Court (Swanson) that not only violated the Constitution and By-laws of the Winnemucca Indian Colony, to allow one person who no longer exists at the Colony to reconstitute the Colony without a quorum, but 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 the proceedings was made.

The Appellees have made every attempt to decipher the arguments made by the Appellants. The arguments are unsupported, vague and incoherent, but to the extent that the Appellees have understood the basis

of this appeal, the District Court's decision was based upon a complete and satisfactory exhaustion of Tribal remedies. Those Tribal remedies comported with due process, participation by the parties, notice, and a review of the issues decided in the lower court, all in compliance with the directives by this Court for extending comity to a Tribal Court decision. The District Court decision should be affirmed.

Dated this 29th day of January, 2010.

HAGER & HEARNE

/s/ Treva J. Hearne
TREVA J. HEARNE, SBN #4450
Attorney for the Appellees

VII.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P 32(a)(7)(C) and the Ninth Circuit Rules 32-1, the attached responsive brief is:

1. Proportionately spaced with a typeface of 14 points or more, in Georgia font, generated in the WordPerfect 12 word processing software, and contains approximately 4536 words and 492 lines.

DATED this 29th day of January 2010.

HAGER & HEARNE

/s/ Treva J. Hearne
TREVA J. HEARNE, ESQ.
Attorney for the Appellees

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of the law offices of HAGER & HEARNE, 245 E. Liberty Street, Ste. 110, Reno, NV 89501, and that on this date, I placed a true and correct copy of the foregoing document(s), described as follows: APPELLEES' RESPONSIVE BRIEF and SUPPLEMENTAL EXCERPTS OF RECORD on the party(s) set forth below by:

 X Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

 Personal delivery via Bootleg Messenger Service

 Facsimile (FAX) to: _____

 Federal Express or other overnight delivery.

 X E-filing pursuant to 9th Circuit Court of Appeals Electronic Filing Procedures.

Addressed as follows:

Donald K. Pope, Esq.
1188 California Avenue
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DATED this 29th day of January, 2010.

/s/ Jill Smith