Wes Williams Jr.
Nevada Bar #6864
Law Offices of Wes Williams Jr.
A Professional Corporation
3119 Lake Pasture Rd.
P.O. Box 100
Schurz, Nevada 89427
(775)773-2838
wwilliams@stanfordalumni.org
Attorney for Ayer Group

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WINNEMUCCA INDIAN COLONY, *et al.*, Plaintiffs, UNITED STATES OF AMERICA, *ex rel.* THE DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	Case No.: 3:11-cv-00622-RJC-VPC **AYER GROUP'S MOTION TO INTERVENE**

Comes now Linda Ayer, Allen Ambler, Jim Ayer, Laura Ambler and Cheryl Apperson-Hill, collectively referred to herein as the "Ayer Group," and moves this court for leave to intervene in this action as defendants and to file the attached "Ayer Group's Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and Mandatory Injunction; and Motion to Vacate the Existing Injunction and/or Restraining Order." This motion to intervene is based on Rule 24(a) of the Federal Rules of Civil Procedure that requires a court to allow a party to intervene in an action if the party "claims an interest relating the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties

adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Alternatively, the court may allow a party to intervene if the party has a claim or defense that shares with the main action a common question of law or fact. Fed. R. Civ. P. 24(b).

The Ayer Group has interests regarding the subject of this action and the court's action will necessarily impair and impede the Ayer Group's ability to protect its interests. The Ayer Group has been involved in litigation and administrative actions against the Plaintiffs for over ten years involving many of the same issues raised by the Plaintiffs in this case. Currently an administrative action is pending before the Bureau of Indian Affairs ("BIA") addressing a pending trespass claim asserted by the Plaintiffs against the Ayer Group. The Plaintiffs filed a pleading in that administrative action less than two weeks ago. The Ayer Group has a deadline this week to file a response. In that action, which has been ongoing for a number of years, the Plaintiffs are seeking to be recognized as the council for the Colony and asserting that the Ayer Group is trespassing on Colony lands. The Ayer Group is contesting that claim as the Ayer Group also asserts that it is the legitimate Council for the Colony, and it asserts that collectively and individually the Council has a right to live and conduct business on Colony lands.

While the BIA administrative case was proceeding, the Plaintiffs filed this action seeking injunctive and declaratory relief, as well as moving for preliminary injunctions and restraining orders. Docs 1, 7 & 8. This court entered a temporary restraining order on August 31, 2011 (Doc. 9) that required the BIA to give interim recognition to some person or body of persons as the legitimate representative(s) of the Winnemucca Indian Colony of Nevada and manifest its decision by notice in the docket no later than 5:00 p.m. PDT on September 7, 2011. Doc. 9 at 11. The BIA filed a notice with the court (Doc. 14) that designated Thomas Wasson and William Bills as the interim representatives of the Winnemucca Indian Colony for the limited purpose of carrying out government-to-government relations. These were to include preparation of a voting roll, establishment of an election board and conducting a tribal election to establish a tribal council pursuant to the Colony's Constitution and Bylaws.

The Court held a hearing on the temporary restraining order on September 12, 2011 where, upon information and belief, the court stated that it would issue an order requiring the BIA to recognize the Plaintiffs as the representatives of the Winnemucca Indian Colony. The Plaintiffs and the BIA were ordered to prepare a written order for the court, but that order has not yet been entered.

The Ayer Group was not a party to this action when the court entered the restraining order, and the Ayer Group did not participate in the hearing held on September 12, 2011. However the claims and defenses made by the Ayer Group in the pending administrative action that was initiated by the Plaintiffs are directly affected by the orders entered by the court. The Ayer Group must be allowed to present its case against the Plaintiffs to protect its interests.

Immediately following the hearing on September 12, 2011, Plaintiffs' attorney left a message for the Ayer Group's attorney stating that based on the court decision that day the Plaintiffs expected the Ayer Group to leave the Colony within 48 hours. Apparently Plaintiffs are acting pursuant to their claims that are pending before the BIA where they assert that the Ayer Group is trespassing on Colony lands. The Plaintiffs assert that the Ayer Group has no right to live and work on the Colony, even though members of the Ayer Group have been there for years.

The Ayer Group has significant ties to the Colony, such as owning and/or living in houses on the Colony and operating businesses on the Colony. If they are required to leave the Colony within 48 hours they will lose their homes, jobs and their businesses. They will necessarily be detrimentally harmed.

The Ayer Group must be allowed to intervene in this action because proceeding without them will impair or impede their ability to protect their interests, including their homes, jobs and businesses. Under the court's order, the BIA is apparently required to recognize the Plaintiffs, but the BIA may not be able to protect the Ayer Group's interests. The Ayer Group's claims and defenses raise common issues of fact and law to the issues pending in this case.

Based on the foregoing, the Ayer Group requests that the court enter its order allowing the Ayer Group to intervene as defendants in this action, and allowing them to file in this case the pleading titled "Ayer Group's Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and Mandatory Injunction; and Motion to Vacate the Existing Injunction and/or Restraining Order."

RESPECTFULLY SUBMITTED this 15th day of September 2011.

LAW OFFICES OF WES WILLIAMS JR., A.P.C.

By /s/ Wes Williams Jr.
Wes Williams Jr.
3119 Lake Pasture Road
P.O. Box 100
Schurz, Nevada 89427
Attorney for Ayer Group

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September 2011, I electronically filed the foregoing "**AYER GROUP'S MOTION TO INTERVENE**" with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

Robert Hager
office@hagerhearnelaw.com or rhager@hagerhearnelaw.com

Treva Hearne
thearne@hagerhearnelaw.com

Holly Vance
Assistant United States Attorney
Holly.A.Vance@usdoj.gov

/s/ Wes Williams Jr.
Wes Williams Jr.

VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF HUMBOLDT)

I, Linda Ayer, hereby affirm, under penalty of perjury, that the assertions stated in the pleading titled "Ayer Group's Motion to Intervene" are true and correct to the best of my knowledge and belief.

I further state that I am one of the persons filing this pleading; that I have read the forgoing pleading and know the contents thereof, that the same is true of my own knowledge, except to matters therein stated upon information and belief, and as to those matters I believe them to be true.

Executed this 14th day of September, 2011.

Linda Ayer

Subscribed and sworn to before me
this 14th day of September 2011.

Notary Public

AUDREY JONES
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 06-22-14
Certificate No: 10-2982-6

Wes Williams Jr.
Nevada Bar #6864
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A Professional Corporation
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P.O. Box 100
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WINNEMUCCA INDIAN COLONY, *et al.*, Plaintiffs, UNITED STATES OF AMERICA, *ex rel.* THE DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	Case No.: 3:11-cv-00622-RJC-VPC **AYER GROUP'S OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MANDATORY INJUNCTION; AND MOTION TO VACATE THE EXISTING RESTRAINING ORDER AND/OR INJUNCTION**

Comes now Linda Ayer, Allen Ambler, Jim Ayer, Laura Ambler and Cheryl Apperson-Hill, collectively referred to herein as the "Ayer Group," and move this court to vacate any existing injunctions or restraining orders issued in this case. The Ayer Group hereby joins "Defendants' Motion to Vacate Temporary Restraining Order and Opposition to Motion for Preliminary and Mandatory Injunction" (Documents 15 and 16) filed by the defendants United States of America, Department of the Interior Bureau of Indian Affairs, Western Nevada Agency, Superintendent, and the employees, contractors and agents of the Western Nevada Agency of the Bureau of Indian Affairs (collectively "BIA Defendants"). This opposition and motion is supported by the following Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 15th day of September 2011.

LAW OFFICES OF WES WILLIAMS JR., A.P.C.

By /s/ Wes Williams Jr.
Wes Williams Jr.
3119 Lake Pasture Road
P.O. Box 100
Schurz, Nevada 89427
Attorney for Ayer Group

MEMORANDUM OF POINTS AND AUTHORITIES

The BIA Defendants present numerous arguments against this court issuing any restraining order or injunction as requested by Plaintiffs. (Docs. 15 & 16.) The Ayer Group joins and supports those arguments with the following qualification.

The Plaintiffs assert that their employees or agents were rehabilitating a "smokeshop" on the Colony. They imply that this was an existing structure and business of the Colony. In fact, the project is simply an abandoned construction site, which only generously can be considered a "smokeshop." *See* Pictures attached to Verification and Declaration of Linda Ayer attached hereto as Exhibit "A." The Ayer Group is not taking the position that Plaintiffs cannot work on this construction site, and are not weighing in on the actions of the BIA police related to work at the site. The BIA Defendants similarly state that they did not take action to prevent the Plaintiffs from working at the site.

The Ayer Group does dispute this court's jurisdiction to order the BIA to recognize a government for the Winnemucca Indian Colony. This court relied on Judge Sandoval's order that adopted the decision of the "Minnesota Panel." *See Bank of America v. Bills,* 3:00-cv-00450-BES-VPC (Order attached as Exhibit A to BIA Defendants pleading Doc. 17 filed herein). However that decision by Judge Sandoval specifically recognized that "Federal courts do not have jurisdiction to determine tribal governments or to decide issues solely involving intra-tribal politics." Judge Sandoval

Order at 3. The order further states that its decision "did not decide a government for the Winnemucca Indian Colony." *Id.* However at the hearing on September 12, 2011, this court apparently did decide a government for the Winnemucca Indian Colony. As stated in the pleadings filed by the BIA Defendants, this court does not have jurisdiction to take that action.

Based on this court's decision at the hearing on September 12, 2011, the Plaintiffs are taking action to "evict" the Ayer Group from the Colony. Immediately following the hearing, Plaintiffs' attorney left a message for the Ayer Group's attorney stating that the Plaintiffs would give the Ayer Group 48 hours to vacate the Colony. Apparently Plaintiffs are acting pursuant to their claims that are pending before the BIA where they assert that the Ayer Group is trespassing on Colony lands. The Plaintiffs assert that the Ayer Group has no right to live and work on the Colony, even though members of the Ayer Group have been there for years.

The Ayer Group has significant ties to the Colony, such as owning and/or living in houses on the Colony and operating businesses on the Colony. The Ayer Group has operated the Colony's Smokeshop for more than ten years. If they are required to leave the Colony within 48 hours they will lose their homes, jobs and their businesses. They will necessarily be detrimentally harmed.

The injustice resulting from the Court's order is compounded because the very issue of whether anyone is trespassing on Colony lands is pending before the BIA's administrative proceeding. Both the Plaintiffs and the Ayer Group have participated in those proceedings under the belief that it will address any alleged trespass issue. That scenario has now been bypassed by this court's order that the Plaintiffs have construed as giving them the power to determine that the Ayer Group is committing trespass, and further taking action to "evict" the Ayer Group from the Colony.

The Ayer Group has sought for many years to have the disputes between the Ayer Group and the Plaintiffs resolved in the proper Colony forum. While those efforts have been proceeding, the Ayer Group has acted as the governing body of the Colony and has

conducted these activities in the Colony's administration building, as well as operated the Colony's smokeshop. The basis for the Ayer Group's claim to be the governing body of the Colony is described in great detail in the "Motion for Summary Judgment and Opposition to Supplemental Statement and Opposition to Request for Distribution and Dismissal" filed in *Bank of America v. Bills,* Case No. 3:00-cv-00450-RCJ-VPC. Copy attached hereto as Exhibit "B." While the issues raised in that pleading cannot be relitigated in this case, the assertions regarding the internal Colony struggles and the procedural history of the disputes demonstrate that there are continuing issues that need to be resolved by the Colony's own internal processes. These issues cannot be decided by a federal court, and Judge Sandoval acknowledged that his decision did not decide a government for the Winnemucca Indian Colony as that type of decision may only be made by the Colony. *See* Case No. 3:00-cv-00450-BES-VPC, Doc. 215 at 3. This Court has now adopted Judge Sandoval's decision, but simply bypassed Judge Sandoval's stated limitation.

While the Ayer Group has sought for years to work out a solution to this internal Colony dispute with the Plaintiffs, the Plaintiffs have refused every reasonable offer presented. Similar to the orders from various tribunals, the Ayer Group has sought to establish a process to develop a membership roll and thereafter to conduct a new election involving all recognized members of the Colony. To this point, these efforts have not been successful. However the Ayer Group continues to seek a resolution to these disputes so that the Colony can begin a new chapter that does not involved internal strife.

Based on the foregoing, the Ayer Group is submitting this motion and opposition to the requests of the Plaintiffs. This court does not have jurisdiction to enter the restraining orders and injunctions requested by Plaintiffs. Therefore the Ayer Group requests that any restraining orders or injunctions entered in this case be vacated.

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RESPECTFULLY SUBMITTED this 15th day of September 2011.

LAW OFFICES OF WES WILLIAMS JR., A.P.C.

By /s/ Wes Williams Jr.
Wes Williams Jr.
3119 Lake Pasture Road
P.O. Box 100
Schurz, Nevada 89427
Attorney for Ayer Group

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September 2011, I electronically filed the foregoing "**Ayer Group's Opposition to Plaintiffs' Motion Temporary Restraining Order and Preliminary Injunction and Mandatory Injunction; and Motion to Vacate the Existing Injunction and/or Restraining Order**" with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

Robert Hager
office@hagerhearnelaw.com or rhager@hagerhearnelaw.com

Treva Hearne
thearne@hagerhearnelaw.com

Holly Vance
Assistant United States Attorney
Holly.A.Vance@usdoj.gov

/s/ Wes Williams Jr.
Wes Williams Jr.

EXHIBIT "A"

Wes Williams Jr.
Nevada Bar #6864
Law Offices of Wes Williams Jr.
A Professional Corporation
3119 Lake Pasture Rd.
P.O. Box 100
Schurz, Nevada 89427
(775)773-2838
wwilliams@stanfordalumni.org
Attorney for Ayer Group

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WINNEMUCCA INDIAN COLONY, *et al.*, Plaintiffs, UNITED STATES OF AMERICA, *ex rel.* THE DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	Case No.: 3:11-cv-00622-RJC-VPC **VERIFICATION AND DECLARATION OF LINDA AYER**

STATE OF NEVADA)
) ss.
COUNTY OF HUMBOLDT)

I, Linda Ayer, hereby affirm, under penalty of perjury, that the assertions stated in the pleading titled "Ayer Group's Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and Mandatory Injunction; and Motion to Vacate the Existing Injunction and/or Restraining Order" are true and correct to the best of my knowledge and belief.

I further state that I am one of the persons filing this pleading; that I have read the forgoing pleading and know the contents thereof, that the same is true of my own knowledge, except to matters therein stated upon information and belief, and as to those

matters I believe them to be true.

I further state that on or about September 7, 2011, I took three pictures of the construction site that the Plaintiffs herein are working on and that they refer to in their pleadings as their "smokeshop." The pictures are attached hereto, and they fairly and accurately show the "smokeshop" as it appeared on or about September 7, 2011.

Executed this 14th day of September, 2011.

Linda Ayer

Linda Ayer

Subscribed and sworn to before me
this 14th day of September 2011.

Laura D. Lecumberry

Notary Public

LAURA D. LECUMBERRY
Notary Public - State of Nevada
Appointment Recorded in Humboldt County
No: 99-37847-9 - Expires September 5, 2015


POSTED

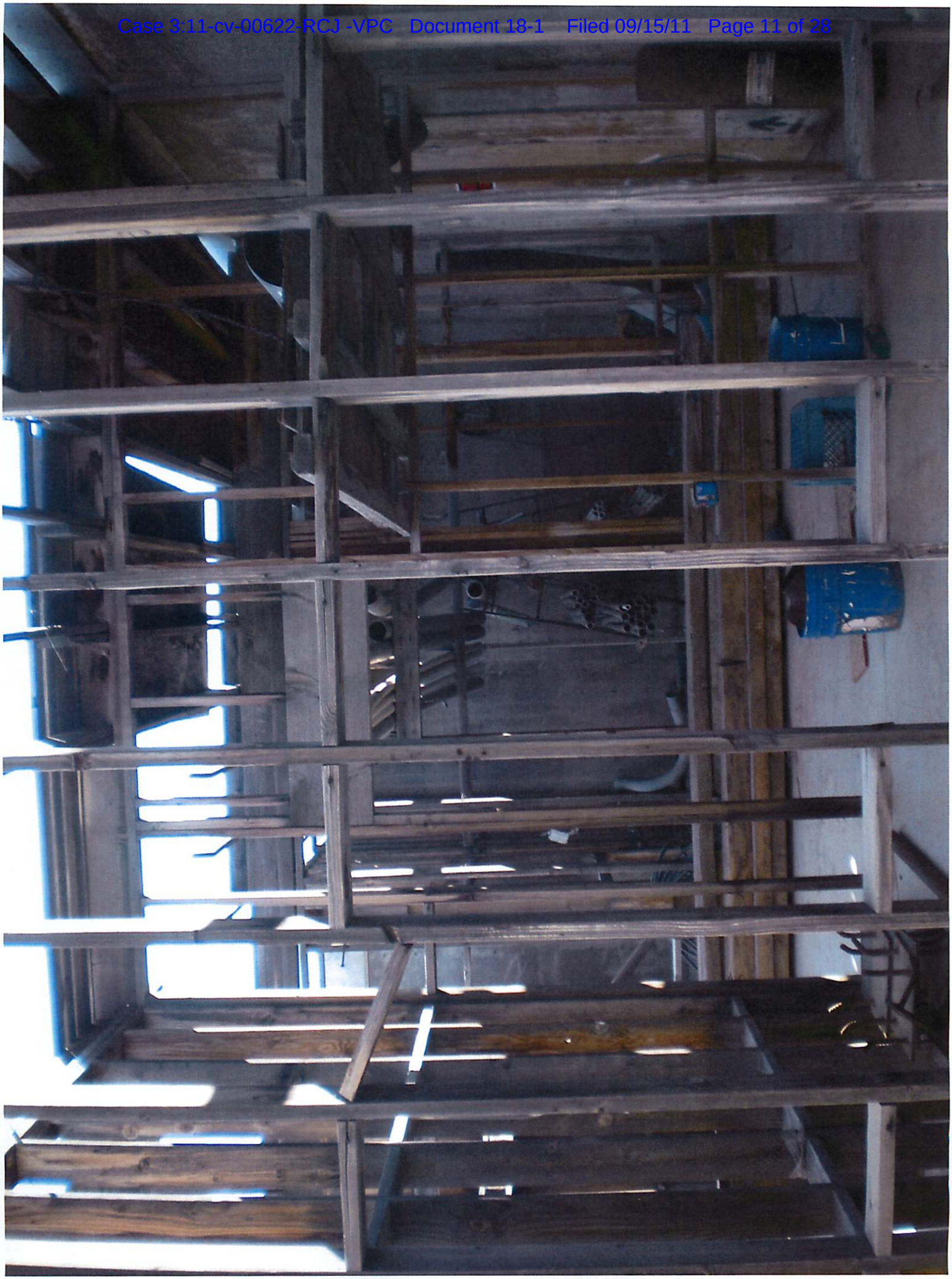

EXHIBIT "B"

Donald K. Pope
Nevada State Bar #1294
1188 California Ave.
Reno, NV 89509
(775) 329-7899
Attorney for William Bills and
the Winnemucca Colony Council

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BANK OF AMERICA, N.A. a Delaware corporation, Plaintiff, vs WILLIAM BILLS, et al., Defendants. And related actions.	Case No. CV-N-00-450-HDM (VPC)

MOTION FOR SUMMARY JUDGMENT
AND
OPPOSITION TO SUPPLEMENTAL STATEMENT
AND
OPPOSITION TO REQUEST FOR DISTRIBUTION AND DISMISSAL

This is a motion for Summary Judgment by the Winnemucca Colony Council[1] (Bills Group) under FRCP 56. Further, this pleading is the Opposition of the Bills Group to that pleading filed May 31, 2007 by the Wasson Group entitled 'Supplemental Statement In Support Of Motion For Summary Judgment, Request For Distribution Of Account And Dismissal Of Interpleader", (hereafter Supplemental Statement). The Wasson Group's Supplemental Statement is a renewal of a summary judgment motion they made several years ago.

This Motion For Summary Judgment and this Opposition is based on the Points and Authorities set forth below and all pleadings and Orders on file in this case. As an Opposition,

[1] The Winnemucca Colony Council is currently comprised of Linda Ayer, Chairman, Charlene Dressler, Vice-Chairman, Jimmie Ayer, Member, Clorinda (Toni) George, Member and one vacancy.

this pleading is late and is accompanied by a Motion To Permit Late Filing.

POINTS & AUTHORITIES

I. Procedural History[2]

Plaintiff, Bank of America, filed this interpleader action based upon conflicting claims as to who has authority to use an account opened in the name of "Winnemucca Indian Colony". This dispute arises because two tribal factions claim to be the lawful Tribal Council entitled to the Bank of America funds.

Each group of defendants made various cross claims and counterclaims against the other within the interpleader action, all of which were dismissed without prejudice for lack of subject matter jurisdiction in the Report and Recommendation of U.S. Magistrate filed February 12, 2003, (hereafter, Magistrate's Report). Additionally, the Wasson Group made a motion for summary judgment arguing that they were the Tribal Council under various tribal court decisions and that they should have summary judgment for control of the funds. The motion of the Wasson Group was denied as premature by the Magistrate's Report filed February 13, 2003 at page 11 lines 3-10 on the grounds that "A resolution of who constitutes the Tribal Council is a matter of internal tribal controversy between tribal members. ... An intra-tribal controversy is not something the federal court is able to decide. U.S. Bancorp v. Ike, 171 F.Supp.2d 1122 (D.Nev.2001). Thus, policies of tribal self-government and self-determination require that this court abstain from making any rulings relating to the Tribal Council members." The Bills Group argued that the issue of who was the recognized Tribal Council had not been finally determined in a tribal forum and that this court had to await the exhaustion of tribal remedies. This court agreed and denied the Wasson Group's motion for summary judgment as premature and stayed proceedings in this case pending tribal exhaustion. See Magistrate's Report filed February 13,

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[2] Substantial portions of this section and others are verbatim or paraphrased from the Report and Recommendation, pages 1 - 6) of the U.S. Magistrate Judge in this case filed February 12, 2003 and from the Report and Recommendation of the U.S. Magistrate Judge filed February 13, 2003, page 10, footnote 1. References in the Magistrate's Report to earlier documents in this case are omitted as are quotation marks.

2003, page 17.

Now, there are additional tribal court orders and other proceedings which the Wasson Group once again claims finalize matters in their favor and which the Bills Group argues do not. The Bills Group instead argues that this matter is now governed by the order of January 18, 2001 entitled Order For Permanent Injunctive Relief and Restraining Order which determines that the Winnemucca Colony Council (the Bills Group) is the governing body of the Winnemucca Indian Colony and is entitled to summary judgment in this matter.

II. Factual Background[3]

As of February 21, 2000, the members of the Winnemucca Colony Council ("tribal council:) were Chairman, Glenn Wasson, Vice-Chairman William Bills, and members Thomas Wasson, Elverine Castro and Lucy Lowery. Glenn Wasson was murdered on February 22, 2000. Shortly thereafter the Tribal Council split into two factions: 1) Vice-Chairman William Bills who claimed to be the acting Chairman of the Tribal Council. The Bills Group was later designated "Winnemucca Colony Council" by this court's order on July 1, 2002);[4] and 2) Thomas Wasson, Elverine Castro, and Lucy Lowery, who claimed to be the majority of the Tribal Council (the Wasson Group was later designated "Winnemucca Indian Colony Council" by this court's order on July 1, 2002). Each faction maintains that they are the legitimate governing Tribal Council of the Winnemucca Indian Colony and has purported to take various actions on behalf of the Council, including holding subsequent elections resulting in their current membership who carry these claims forward.

The tribal court case deciding who constitutes the Tribal Council was decided by Tribal Judge Kyle Swanson in his order of January 18, 2001, (Exhibit A) from which the Wasson Group took an appeal to the Inter-Tribal Court of Appeals of Nevada (ITCAN) on January 23, 2001,

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[3] See Footnote 2

[4] On July 1, 2002, docket item #138, an Order was entered joining Allen Ambler, Linda Ayer, Lovelle Brown, Charlene Dressler and Clorinda A. (Toni) George to this lawsuit as named parties.

Exhibit B, Notice of Appeal, (only pages 1, 5, and 10 sufficient to identify the document are included).

This appeal has now been dismissed by an order of the Inter-Tribal Court of Appeals of Nevada filed May 17, 2007 entitled, "Per Curiam" (Exhibit C) which expressly stated:

> This matter is before this Court on its own motion to revisit the granting of jurisdiction. It is apparent that jurisdiction was improvidently assumed. Accordingly, **we withdraw the mandates of all orders and rulings.** We recognize that **this ruling leaves the issues raised in this and other proceedings uncertain in terms of finality and effect.** Nevertheless, this court may proceed no further once it is determined there is no appellate jurisdiction. (Emphasis added).

It is this order that each of the competing groups use as a gateway to argue that they are now the recognized government.

During the six years intervening between the appeal and its dismissal, there were a large number of court orders and proceedings arising from the ITCAN appeal. They are all now withdrawn. These orders and other items are not represented by Exhibits at the present time in order to avoid burdens of excessive size. Many of them have been provided before and all of them can be provided again should further analysis of them become important. They are described in Exhibit D.

III. Summary Judgment Standard[5]

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P.56 (c). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party. Zoslaw v. MCA Distr. Corp., 693 F.2d 870, 883 (9th Cir. 1982). For this purpose, the material lodged by the moving party must be viewed in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the non-moving party must show by specific facts the existence of a

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[5] See Footnote 2.

genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

IV. Tribal Self Government[6]

The federal government has a long-standing policy to encourage tribal self-determination and self-government. Wellman v. Chevron U.S. A., Inc.,815 F.2d 577, 578 (9th Cir. 1987) (citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987); National Farmers Union Ins Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985)). In Tillett v. Hodel, the court held "the issues of the alleged misuse of tribal funds and the effectiveness of the recall are clearly intra-tribal disputes involving only Indian parties... the matter is an internal political issue to be resolved by the Kiowa Tribe." Tillet v. Hodel, 730 F.Supp. 381 (W.D. Okl. 1990).

The Ninth Circuit found that it is "deeply rooted" in Supreme Court precedent that federal courts must afford tribal courts deference "concerning activities occurring on reservation land." U.S. v. Plainbull, 957 F.2d 724, 727 (9th Cir. 1992) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)). Deference to tribal courts concerning intra-tribal affairs or internal matters is a fundamental tenet of federal jurisprudence. Plainbull 957 F.2d at 727: see also U.S. Bancorp v. Ike, 171 F. Supp. 2d 1122, 1125 (D.Nev. 2001) (holding that a tribal election dispute was solely a matter of tribal law and the federal court had no jurisdiction to determine which group was the governing body of the tribe.

V. Issues Before The Court[7]

The sole issue in this case is which parties are entitled to the Bank of America funds. This case was limited to one issue by the District Court's minute order of August 2, 2001 (#97) and by this court's order of February 12, 2003 dismissing all cross-claims and counter-claims (#167).

VI. Issues Not Before The Court[8]

Although this court has jurisdiction over the interpleader case, this court does not have

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[6] See Footnote 2

[7] See Footnote 2

[8] See Footnote 2

jurisdiction to decide the dispute over who the members of the Tribal Council are. U.S. Bancorp v. Ike, 171 F.Supp.2d 1122, 1125 (D. Nev.2001). Deciding the question of who constitutes the tribal government is solely a matter of tribal law. *Id.*

In the Magistrates' Report of February 13, 2003, the court at page 10, Footnote 1, noted other issues it was not deciding as follows:

> The court would like to note the issues it will not be addressing, despite the many arguments the parties have made to this court. First, this court will not resolve issues of the WIC membership list. Allegations of due process violations and illegal exclusion from the WIC are not within this court's jurisdiction under the law of the case (#90). Second, this court will not address which judge is the official tribal court judge. Third, this court will not resolve whether the many elections held by the different groups during this long process are legal under WIC constitution. Finally, this court will not address whether the parties are complying with the August 16, 2002 decision by the stipulated Court of Appeals. None of these issues is presently before the court under the law of this case (#90). All of these issues are matters of internal tribal law and this court cannot decide such conflicts. If the parties need redress for any of the above grievances, they must go to the tribal court for relief.

VII. Current Status

After discussing the issues that were and were not before this court, the Magistrate's Report recommended that proceedings in this case be stayed pending tribal exhaustion, which was done by the order of March 13, 2003. Docket items 171 and 172.

Following the stay, the parties had proceedings before the ITCAN. Whether tribal remedies have been exhausted is somewhat problematic.[9] Ultimately, the Wasson Group's

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[9] The Wasson Group made wrongful efforts to terminate the tribal process. Moreover, now that the Wasson tribal appeal at the ITCAN has been dismissed, each group could seek more remedies at the trial level to clarify their status as the governing body. The Wasson Group strove to sabotage the tribal process by suing the appellate judges and then by getting an appellate judge to enter into a stipulation with the Wasson Group about how the appellate case would be decided, Exhibit D, items 17 and 18. Later, when those appellate judges refused to participate further at the ITCAN and their replacements had taken the bench, the Wasson Group strove to have the appellate case dismissed on the grounds that is was their appeal and they could dismiss unilaterally, Exhibit D, item 30. This approach violated FRCP 42. It violated Nevada Rule of Appellate Procedure 42 which, pursuant to the Winnemucca Law & Order Code (LOC) 1-30-031, can provide guidance for any matter not covered by the Winnemucca LOC.

appeal before the ITCAN was dismissed on May 17, 2007, Exhibit C, because the court, sua sponte, decided that it did not have jurisdiction. The Order specifically states that it withdrew the "mandates of all orders and rulings". The question is, where does that leave matters before this court?

VIII. The Effect Of A Dismissal Of An Appeal

The effect of a dismissal is exactly as the ITCAN judges declared. It withdraws the mandate of all orders and rulings. "A dismissal for want of prosecution will remit the cause to the lower court in the same condition as before the appeal was taken; and the lower court will then be free to take appropriate action to prevent itself from being used as an instrument in illegality". Newman v. Moyers. 253 U.S. 182, 186, 64 L.Ed 849, 40 S.Ct. 478 (1919). In other words, it is as if no appeal was ever taken and all intervening orders of the appellate court and everything derived from them are as if they had never been.

The judgement below becomes res judicata. See U.S. v Munsingwear, 178 F.2d 204 (8th Cir 1949) at 209:

> We cannot accept the theory that the conclusiveness of the judgment of the [lower court] was affected by the reason given by this court for the dismissal of the appeal from that judgment. Appeals are dismissed on many grounds, some due to the fault of the appellants and some to circumstances beyond their control. . . . When the appeal is dismissed, the judgment, . . . , becomes final and conclusive as between the parties with respect to all issues actually tried and determined.

What this means for this case is that the parties are left with the Order of Judge Kyle Swanson of January 18, 2001 as if it had never been appealed and that is the controlling document on the status of this case. All the Orders of the ITCAN described in Exhibit D and everything derived from them and all the actions of the parties caused by the original appeal are as if they never occurred. This includes the two orders of the ITCAN in which it assumed jurisdiction. This includes the order of the ITCAN sending the case back for more trial. This includes the appeal of that trial to the Minnesota panel. It includes the lawsuit filed by the Wasson Group against the ITCAN judges saying one of their orders was illegal. It includes the ex-parte so called "Stipulation" that was an out growth of that lawsuit.

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IX. The Swanson Order And Its Rulings

The Swanson order filed January 18, 2001 was entitled Order For Permanent Injunctive Relief and Restraining Order. (Exhibit A). The case was originally brought by William Bills, acting Tribal Chairman for Winnemucca Indian Colony and et. al against the Wasson Group as it was then constituted and calling itself the Business Council of the Western Band of the Western Shoshone.

In that Order, on page 4 at Finding of Fact # 14, the court found, "That the Tribal Council election of October, 1998, for the Winnemucca Indian Colony was not held in accordance with the Winnemucca Tribal Election Ordinance and therefore, defendants Thomas Wasson, Elverine Castro and Lucy (Wasson) Lowery were not lawfully elected and do not officially hold the seats of Tribal Council members." Finding #17 declares that Sharon Wasson is not a Tribal Council member.

As its first conclusion of law, the court stated, "The Court adopts the findings of fact as set forth above as its conclusions of law."

In accordance with its third and fourth Conclusions of Law, the court ordered in paragraph #2, "Plaintiff William Bills is the acting Tribal Chairman until such time as an enrollment list and list of eligible voters is approved and certified and a valid election is then held in accordance with the Constitution and By-Laws and the Election Ordinance of this Tribe."

In paragraph 3, the court ordered, "William Bills is the sole person to have access to all funds and all bank accounts holding funds by and for the Winnemucca Indian Colony, including but not limited to all accounts in the Bank of America which include accounts numbered 690040043," and two other accounts. The account just named is the same account that is the subject of this interpleader action. See original Complaint by Bank of America. In paragraph 5 of its Order, the court ruled that, "Defendants are enjoined and prohibited from having access to or use of any tribal bank accounts, including those located at Bank of America."

In paragraph 9, the court ordered that, "Defendant Sharon Wasson is not a member of the Tribal Council.

The Wasson Group now identifies itself as Thomas Wasson, William Bills, Elverine

Castro, Sharon Wasson, and Judy Rojo. The Wasson Group, without any explanation, now claims that William Bills is a part of their group. Perhaps that is because the Minnesota panel, whose decision is wiped out by the dismissal of the ITCAN appeal, stated that William Bills had never been properly removed from the Council by the Wasson Group. Be that as it may, the point remains that all the persons currently claiming to be members of the Wasson Group were explicitly ruled by Judge Swanson as not members of the Council or derive their claims as replacements for people ruled as not members of the Council.

X. Status of William Bills

The Swanson Order specifically recognizes William Bills as the Acting Tribal Chairman and authorized to carry forward with the government by creating an enrollment list and conducting an election. Mr. Bills did those things, as described below, and this court recognized his replacement by newly elected members of the Council who, by order of this court, on July 1, 2002, were made named parties to this case denominating them the "Winnemucca Colony Council" for the purposes of this litigation and referring to them as the Bills Group for convenience. See Docket Item #39.

As noted in the Magistrate's Reports of February of 12 and 13, 2003, it is not the place of this court to rule on tribal elections. U.S. Bankcorp v. Ike, *supra*. Nevertheless, there is submitted here the documentation to show that the enrollment and election process were carried out and concluded by William Bills, as ordered by Tribal Judge Swanson.

Attached as Exhibit E is Resolution WN-00-05 of the Winnemucca Tribal Council dated March 22, 2000 which was the last meeting of the full membership of the Winnemucca Indian Colony governing body before it split into two groups. This resolution created the Enrollment Committee to establish a new membership list. From that list, an election was held on April 28, 2001.

Exhibit F is entitled, Documented Eligible Voters List, and contains the names of the persons for whom the enrollment committee had been able find records authenticating membership. There was an additional voter's list (Exhibit G) which is entitled, Undocumented Voters List, for persons who had been carried on the membership list of the Tribe for whom no

membership application records were found. Nevertheless, these persons were considered eligible to vote in the election of April 28, 2001. The Wasson Group members are listed on the Undocumented Voter's List but none of them came to vote as evidenced by the absence of their signatures on the voter's list. This was because the Wasson Group boycotted the election, having conducted an election of their own.

Exhibit H is the "Official Count Sheet" for the election held April 28, 2001 signed by the three members of the Election Committee and the independent monitor.[10]

It is important to note that William Bills did not stand for re-election in this election that was conducted while he was the Acting Chairman under Judge Swanson's Order. However, William Bills did perform his official function by certifying the Oath Of Office signed by each of the five candidates who had been elected. See Exhibit I bearing the signature of each person elected and bearing the signature of William Bills as Acting Chairman and one of the members of the Election Committee. See Exhibit N, Affidavit of Charlene Dressler attesting to the legitimacy of the documents in Exhibits E - I.

The point is, William Bills, as the Acting Chairman, conducted an election to reconstitute the government of the Winnemucca Indian Colony after it fell apart. He did this in his official role as the Vice-Chairman, who became the Acting Chairman after the former chairman was killed. He did it as the Acting Chairman under the order of Judge Swanson who arranged for the reconstitution of the tribal government after the judge declared that the memberships of Thomas Wasson, Elverine Castro, Lucy Lowery and Sharon Wasson were not proper. Mr. Bills acted under the authority of the tribal judge.[11]

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[10] One of the Election Committee members signing the official count sheet is Louella Brown, who is not the same as the candidate, Lovelle Brown.

[11] No one can dispute that, when William Bills filed the lawsuit which resulted in the Swanson order, Judge Swanson was the only judge of the Winnemucca Indian Colony Tribal Court. The Wasson Group claims to have fired Judge Swanson before he entered his final order and claims that they appointed their own judge who ruled differently. No

There have been subsequent elections and the current membership of the Winnemucca Colony Council is described in Footnote 1 above. The point of presenting these documents is to show that William Bills has not maintained an active role in the tribal government and that the proper persons to whom the Bank of America funds should be distributed are the current Winnemucca Colony Council.

XI. This Court Must Enforce the Swanson Order

As a matter of comity, this court must enforce the Swanson Order. See AT&T Corp. v. Couer D'Alene Tribe, 295 F.3d 899 (9th Cir 2002) which said at 903-904.

> Unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court. See *Iowa 94 L.Ed.2d 10 (1987)*. Unless a federal court determines that the Tribal Court lacked jurisdiction. . . proper deference to the tribal court system preclusion re-litigation of issues. . . resolved in the Tribal Courts.

XII. Status of the Stipulation

A. The Stipulation No Longer Exists

One of the two documents relied on by the Wasson Group in its claim for recognition is the so called "Stipulation" (Exhibit J) received by the federal court on December 20th in the litigation by the Wasson Group against the ITCAN judges. The problems with the creation of that document and its purported meaning will be discussed below. First, however, it is important to establish, under the law, that the document has no meaning or existence whatsoever.

The Wasson Group sued the judges of the ITCAN in federal court in Case No. CV-N-04-573-HDM (VPC) because the Wasson Group did not like the order of the ITCAN of September 16, 2004 instructing both the Wasson Group and the Bills Group to submit their proposed membership list to the ITCAN for final determination of membership issues. On December 10, 2004, Judge McKibben suggested a way to resolve the matter. On December 20, 2004, a

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court has ever held that Judge Swanson was not the legitimate judge of the Winnemucca Indian Colony. Even the Minnesota panel, whose decision is now a nullity, ruled that Judge Swanson was not properly removed. Accordingly, the Swanson Order of January 18, 2001 is the controlling decision on how the Winnemucca Indian Colony was to reconstitute itself.

"Stipulation" was "received" by the federal court, being an alleged agreement between the Wasson Group and a judge of the ITCAN.

Whatever the problems with the "Stipulation", the document has completely ceased to exist with the dismissal of the federal case against the judges.

It is text book law, admitting of no relevant exceptions, that the dismissal of a lawsuit annuls all orders, rulings or judgments previously made. See 11 ALR 2d 1407 (3) stating, "The general rule is that in the absence of statute, and where the answer seeks no affirmative relief, a dismissal, discontinuance or non-suit, leaves the situation as if the suit had never been filed and carries down with it previous rulings and orders in the case. The federal cases there cited are Coleman v. Hudson River Bridge Co. (1862, CC NY), 5 Blatch 56, affd without op Albany Bridge Case 17 L.Ed 878; Wilson & Co. v Freemont Cake & Meal Co. (1949, DC Neb) 83 F Supp 900; Maryland Casualty Co. v. Latham (1930, CA 5th Tex) 41 F 2d 312; Bryan v. Smith (1949, CA7th Ind) 174 F2d 212.

A willfull dismissal terminates the action for all time. Cook v. Stewart McKee & Co. (1945) 68 Cal App2d 758, 157 P.2d 868. "By the discontinuance of an action not only are all further proceedings therein arrested, but what has been done therein is also annulled, so that the action is as if it never had been". Radin v. Harper (1946) 82 NYS 2d 121;

The above citations are from the ALR article. The article goes on to cite Hileman Cole Co. v. Phoenix Coal Co.,(1925) 6 Pa D & C 633 as follows:

> As a general rule a discontinuance or dismissal is a final decision of that action as against all claims made by it. A dismissal carries down the previous proceedings and orders in the action and there remains no cause pending in which a third party may be permitted to intervene or which the defendant may thereafter file an answer or plea nor has the defendant have the right to have the case reinstated ... .

Thus, it is indisputable that the "Stipulation" has no existence either as a stipulation in the federal court or as a court order of any kind. Thus, it has no meaning whatsoever in determining that the Wasson Group is the governing body of the Winnemucca Indian Colony. The "Stipulation" means nothing by way of recognition by the federal court and it means nothing by way of recognition by the ITCAN. The "Stipulation" simply does not exist.

B. The Stipulation Never Had A Clear Validity or Status

The "Stipulation" was created between the Wasson Group and one of the ITCAN judges in the midst of litigation by the Wasson Group against those judges. The document recites that it was "according to the directions" of Judge McKibben. The document has the heading and case number of the federal court case of Wasson Group against the judges. However, it is only "received" by the federal court, not filed. The document is signed by William Kockenmeister who at that time was one of the judges of the ITCAN who had been sued and under his name are the words, "Representative and counsel for the Inter-Tribal Court of Appeals". However, there is nothing recited in the document that Judge Kockenmeister had consulted with his other judges before signing the Stipulation or that he was authorized by the other judges or the ITCAN to sign the document on behalf of the court as a whole. Further, there are no affidavits presented providing any background to give the document any authenticity on those issues.

The "Stipulation" is not signed by the federal judge to make it an order of the court. The minutes of the December 10, 2004 hearing (Exhibit K) before the federal court on that matter do not refer the proposed document as an order of the federal court.

The document does not say that it will be presented to the ITCAN and become an order of the ITCAN. In fact, the document has never been presented to the ITCAN much less affirmed by the ITCAN in any way. However, the "Stipulation" was clearly intended by Judge McKibben to be taken back to the ITCAN for confirmation. At the hearing, December 10, 2004, (Exhibit L, transcript page 30), the court said in speaking to the Wasson Group and the ITCAN judge, "Well, could I have you go back then to the Inter-Tribal Court of Appeals and request that they re-open the matter and allow you, on your Stipulation, to proceed as I have just outlined it for you? Would you be willing to do that?" Mr. Hager responded, "Yes, we would your Honor." The court then asked the same question of Judge Kockenmeister who responded, "We have no problem. If they would be stipulating with the other, quote, competing factor in this matter, we don't have a problem with that." In spite of its promise, the Wasson Group never took the matter back to the ITCAN.

On March 9, 2005, Judge McKibben conducted a status conference to discuss the

meaning of the "Stipulation" and to dismiss the case against the judges. Judge Kockenmeister did not attend and James Underwood, the Administrative Justice of the ITCAN sought clarification.

Judge McKibben explained at the outset of that meeting that it was his intention to dismiss the case without prejudice. "And my thought on that was if there were problems encountered with respect to the stipulated agreement in the case, that the parties could always file another action to deal with whatever legal and factual issues arose as a result of the stipulated agreement ... (Exhibit M, Transcript of telephonic status conference, March 9, 2005, pages 2-3).

After some discussion about the procedure Judge McKibben hoped would be followed, Judge McKibben then referred to the "Stipulation" as a "Order" at page 9 of the transcript; "The order of the Court is modified ... ." The court then dismissed the case without prejudice saying on page 10, "The order is modified, prior to dismissal".

C. The "Stipulation" Was Invalid As A Violation Of Due Process

The Stipulation was fatally defective from the inception. The entire process by which the "Stipulation" was obtained was such an egregious violation of the rights of due process held by the Bills Group that the document could never have any validity at all. The lawsuit was filed by the Wasson Group against the judges of the ITCAN while the ITCAN was conducting hearings on the case between the Wasson Group and the Bills Group, the lawsuit constitutes nothing but the most egregious form of ritualized ex-parte communication between the Wasson Group and the ITCAN judge that can be imagined.

The Bills Group was never served with a copy of the lawsuit. The Bills Group was never named as a defendant. The Bills Group was never interpled by the ITCAN judges. The federal judge never suggested that the Bills Group be interpled.

The ITCAN had entered an order about how it was going to proceed with determining a membership list and then conducting an election. It is inconceivable that there could have been a private meeting between the Wasson Group and the ITCAN judges that the ITCAN would agree to reverse its order and set up a different procedure. How much more so was it improper for the Wasson Group to sue the judges and then enter into a stipulation which the Wasson Group now

argues essentially was an agreement to vacate the outstanding ITCAN order and enter a different one in their favor. Even if that is what the Wasson Group thinks the "Stipulation" amounted to, the ITCAN never took that step nor did the Wasson Group ever take the Stipulation before the ITCAN and ask that it be entered as an order of that court.

D. Conclusion Regarding The "Stipulation"

All the problems described above are resolved by two things: first the "Stipulation" itself is a nullity because the federal lawsuit of which it was a part has been dismissed. Second, the "Stipulation" is a nullity because it was an outgrowth of the original ITCAN appeal filed by the Wasson Group and that appeal has been dismissed, which also carries down and makes a nullity of everything that happened within the framework of the appeal.

XIII. Status Of The Decision Of The Minnesota Panel

The second document the Wasson Group relies on is the decision of the Minnesota panel. However, the law discussed above demonstrates conclusively that the decision of the Minnesota panel is also without any legal force and effect. It was an intermediate event arising as a result of the Wasson Group's original appeal to the ITCAN. See Exhibit D, paragraphs 5, 6, 7 and 13 as follows: The ITCAN originally took jurisdiction and ordered the matter back to trial. After trial in front of Judge Haberfeld, the case was appealed to the Minnesota panel. Application was made to the ITCAN for reconsideration of the decision of the Minnesota panel. The ITCAN took jurisdiction regarding reconsideration and set the decision of the Minnesota panel aside. That, by itself, removed any validity from the decision of the Minnesota panel. Further, when the ITCAN ultimately dismissed the entire appeal for lack of jurisdiction, it expressly withdrew the mandates of all orders and rulings. Under Newman v. Moyers, 253 U.S. 182 (1919) a dismissal remits a case to the lower court in the same condition as if no appeal had been taken.

XIV. CONCLUSION

This dismissal of the Wasson Group's original appeal of the Kyle Swanson order of January 18, 2001 vitiates all the intervening pleadings between the parties before the ITCAN and all proceedings that derive from it. The Wasson Group claims that it is entitled to be recognized as the governing body based on two documents both of which have their roots in the Wasson

Group's original ITCAN appeal. One document is the decision of the Minnesota panel which was first nullified by the ITCAN on a Petition for Re-Hearing and is now nullified by the dismissal of all proceedings arising from the appeal. The other document is the "Stipulation" entered in federal litigation against the ITCAN judges. That litigation arose out of the ITCAN appeal and resulted only in the "Stipulation" which was designed to govern further proceedings before the ITCAN. That document dies not only because of the dismissal of the ITCAN appeal but also because of the dismissal of the federal proceedings that gave it birth.

By contrast, the dismissal of the ITCAN appeal of the Wasson Group as a matter of law re-instates the Swanson order of January 18, 2001 as the controlling order between the parties. That order specifically recognized William Bills as the Acting Tribal Chairman and authorized him to conduct an enrollment and an election to reconstitute the government. That order specifically said that the Wasson Group were not members of the Tribal Council. Under the authority of that order, an enrollment and an election was conducted. William Bills did not run for office but certified the persons who were elected. Subsequent elections have produced the current group known as the Winnemucca Colony Council and they are the governing body of the Winnemucca Indian Colony. Pursuant to the express language of the Swanson order, they are entitled to the funds that were at the Bank of America that are currently held by this court.

Date_____, 2007

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Donald K. Pope
Nevada State Bar # 1294
1188 California Ave.
Reno, NV 89509
(775) 329-7899
Attorney for the Winnemucca Colony Council (Bills Group)