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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WINNEMUCCA INDIAN COLONY, THOMAS R. WASSON, CHAIRMAN Plaintiffs, v. UNITED STATES OF AMERICA ex rel. THE DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, WESTERN NEVADA AGENCY, SUPERINTENDENT, and, THE EMPLOYEES, CONTRACTOR AND AGENTS OF THE WESTERN NEVADA AGENCY OF THE BUREAU OF INDIAN AFFAIRS, Defendants.	Case No.: 3:11-cv-00622-RCJ-VPC **MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MANDATORY INJUNCTION**

COMES NOW Plaintiffs, WINNEMUCCA INDIAN COLONY and THOMAS R. WASSON, Chairman, of the WINNEMUCCA INDIAN COLONY, by and through their attorneys of record, HAGER & HEARNE, and respectfully request that this Court enter a temporary restraining order and preliminary injunction to prohibit the Defendants, as hereinafter named, or agents, employees, attorneys, and anyone acting on their behalf,

from entering the lands of the Winnemucca Indian Colony for the purpose of interfering, threatening harassing or otherwise disturbing the Winnemucca Indian Colony and its lawfully elected Council, Thomas R. Wasson, Judy Rojo, Katherine Hasbruk, Misty Morning Dawn Rojo and Eric Magiera and their agents, employees and contractors from taking possession, constructing facilities or interfering with the peaceful enjoyment and possession by the Plaintiffs on the lands consisting of 320 acres located at 1985 Hanson St. and 20 acres located at 322 South St., Winnemucca, Humboldt County, Nevada.

I.

Introduction

A. Plaintiff named above has been prohibited from finishing the construction on their economic development on the 320 acres because of the BIA police.

Plaintiff has now been stopped from completing the construction necessary to rehabilitate the smoke shop on the 320 acre parcel of the Winnemucca Indian Colony. This is the only income producing property now held by the Winnemucca Indian Colony and the government has interfered with the ability of the Colony to support itself and its members. The BIA officers have made the workers leave the lands and not finish the work and the workers will not return until they are assured that they will not be arrested.

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II.

Legal Argument

A. An injunction is appropriate because of the irreparable harm that will be caused to the Plaintiffs due to the loss of the use of their Indian Lands.

1. A temporary restraining order is appropriate to stop the interference, harassment and implication of arrest on the lands of the Colony.

The Plaintiffs have established their right to manage and operate their lands through the Order entered by this Court, the Honorable Brian Sandoval,[1] which gave comity to the decision of the Specially Appointed Appellate Panel of the Winnemucca Indian Colony.[2] The decision of the Honorable Brian Sandoval was affirmed by the Ninth Circuit Court of Appeals[3] which was denied certiorari.[4] Further, the Interior Board of Indian Appeals overturned the decision of the Regional Office that refused to recognize a government on the Winnemucca Indian Colony. [5]

Rule 65(b) of the Federal Rules of Civil Procedure provides that this Court may issue a TRO without notice to the adverse party where "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant. . ." The standards for a Temporary Restraining Order are similar to the standards for a preliminary injunction. *Immigrant Assistance Project of the L.A. County of Fed'n of Labor v. INS*, 306 F.3d 842, 873 (9th Cir. 2002).

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[1] March 6, 2008 Order of Brian Sandoval, Exhibit 1.
[2] August 16, 2000 decision of the Specially Appointed Appellate Panel of the Winnemucca Indian Colony (also referred to as the Minnesota Panel, Exhibit 2)
[3] Exhibit 3, the Ninth Circuit Decision.
[4] Exhibit 4, Denial of Cert. by the United States Supreme Court.
[5] Exhibit 5, Decision of the Interior Board of Indian Appeals.

Injunctive relief is appropriate when the Plaintiff will suffer "irreparable harm" and when the Plaintiff shows "a reasonable probability of success on the merits of its claim." *Number One Rent-a-Car v. Ramada Inns, Inc.,* 587 P.2d 1329, 94 Nev. 779 (1978). In this case, injunctive relief is appropriate because Plaintiffs have been prohibited from continuing economic and construction activity on their own lands based upon the stubborn refusal of the Western Nevada Agency to recognize the Court orders and the order of its own Interior Board of Indian Appeals.

"A preliminary injunction to preserve the status quo is normally available upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy. *Memory Gardens v. Pet Ponderosa,* 898 Nev. 1, 492 P.2d 123 (1972)

The cases best suited to preliminary relief are those in which the important facts are undisputed, and the parties simply disagree about what the legal consequences are of those facts. The court in such a case can take the undisputed facts, apply the law to them, and fairly easily decide which party is likely to prevail.

A party seeking a preliminary injunction must meet a standard which includes: That the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions exist and the balance of hardships tips sharply in its favor. *Cassim v. Bowen,* 824 F. 2d 791, 795 (9th Cir. 1987).

The underlying purpose of a temporary restraining order is "to preserve the status quo and prevent irreparable harm before a preliminary injunction hearing may be held." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439, 94 S.Ct. 1113, 39 L.Ed. 2d 435 (1974); *Reno Air Racing Ass'n v. McCord,* 452 F.3d 1126, 1130-31 (9th Cir. 2006). The Plaintiffs have been working to rehabilitate their smoke shop that sat vacant and unattended since February 22, 2000 and now the BIA has stopped all progress on the construction during the time of year when construction can proceed.

2. **When the Court weighs the irreparable harm to the Plaintiffs, the harm to the Plaintiffs is substantial.**

The second consideration of the court is the weighing of the harm to the Plaintiffs without the injunction versus the harm to the Defendants if the injunction is granted. The harm to the Plaintiffs will be losing the best weather conditions for construction and rehabilitation and the loss of even more of their potential for income to the Colony and its members. There is no harm to the Defendants since they are merely bureaucratic agencies with no personal interest in the lands of the Colony.

More recent cases have clarified the standard for granting a preliminary injunction. The Ninth Circuit further elaborated on the test for a preliminary injunction, thus: "Under Winter,[6] Plaintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction. Id. . . . We hold that the "serious questions" approach survives Winter when applied as part of the four-element Winter test. In other words, "serious questions going to the merits" and a

[6] *Winter v. Natural Resources Defense Council,* 555 U.s. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)

hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test[7] are also met." Alliance for the Wild Rockies et al, v. Cottrell et al, 632 F.3d 1127 (2011)

The Plaintiffs will show that there are serious questions in the that evidence demonstrates that the Defendants have violated the trust relationship, have interfered with the Colony's ability to use its lands by stopping the construction of the smoke shop and other activities on the lands [8] that the Plaintiffs are likely to succeed on the merits of this claim. Plaintiffs will show that all previous court orders recognize their right to enter and manager their Indian lands.

Real property is unique under the laws of the State of Nevada and, therefore, the loss of real property is irreparable harm, particularly when the real property was given to the Plaintiffs by executive order. Hamm v. Arrowcreek Homeowners Assoc., 183 P.3d 895 (Nev. 2008). The lands of the Winnemucca Indian Colony are the lands of a federally recognized Tribe over which the BIA, as the agent of the United States, has a trust responsibility to this Tribe to protect its lands. The Non-Intercourse Act was passed by Congress for the protection of Indian lands and assets, "A. . .no purchase, grant, lease or other conveyance of lands or any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . ." at 25 U.S.C.

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[7] A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. . . ." *". . .Winter*. . requires the plaintiff to make a showing on all four prongs." (Citations omitted) *Alliance for the Wild Rockies v. Cottrell,* at page 1135.
Id. at ----, 129 S.Ct. at 374. *American Trucking Associations, Inc. v. City of Los Angeles,* 559 F.3d 1046, 1052 (9th Cir. 2009).

[8] Exhibit 6, Affidavits of Chairman and workers at the Winnemucca Indian Colony. Affidavit of Thomas R. Wasson, Roger J. Gifford and Carl P Daniels

' 17 (1983). In Golden Hill Pauqussett Tribe of Indians v. Whicker, 39 F.3d 51 (2nd Cir. 1994) the Court noted that the source of the trust relationship was the Non-Intercourse Act.

The Colony's 20 acres and the Colony's 320 acres are held in trust and the Winnemucca Indian Colony is a federally recognized Tribe. Any act or failure to act by the BIA that allows a claim to the lands of the Winnemucca Indian Colony is in violation of the Act. The members of the Winnemucca Indian Colony have been denied the management, control, use and occupation of their lands and assets, which is the very basis of the Act's protection and the source of the trust responsibility of the BIA.

The Plaintiffs will be irreparably harmed by the loss of the use of their lands as they have been for the last eleven years. The Defendants will just have a mere interference with their stubborn refusal to make a decision that their own appellate body and the United States federal courts have directed them is correct and should be done. No adequate remedy at law is available to the Plaintiffs to protect their lands.

1. **The Plaintiffs will Likely Prevail on their claims**

a. The lawful Council of this federally recognized Tribe has been determined.

As stated above, the United States District Court, District of Nevada, the Ninth Circuit Court of Appeals, the United States Supreme Court have and the Interior Board of Indian Appeals has by effect confirmed the Specially Appointed Appellate Panel for the Winnemucca Indian Colony decision that the Council for the Winnemucca Indian Colony is Thomas Wasson, Chairman, Judy Rojo, Katherine Hasbruk, Misty Morning Dawn Rojo and Eric Mageira.

b. The BIA has been asked repeatedly to recognize the lawful government of the Winnemucca Indian Colony and has failed and refused to grant that recognition.

On January 4, 2011, after the decisions made by the Courts and recognizing the stubborn refusal of the Regional Office and the Western Nevada Agency of the BIA to recognize the Council of the Winnemucca Indian Colony, counsel for the Colony again requested that the BIA look for an impartial panel to recognize the government.[9] The Regional Office has refused to designate an impartial panel and refused to hold any briefing or hearing on the issue of recognizing a government for the Winnemucca Indian Colony, but instead has requested briefs on some predetermined trespass issue.[10] On August 11, 2011, counsel for the Winnemucca Indian Colony, made an urgent request to Athena Brown, Superintendent of the Western Nevada Agency, BIA, for assistance in stopping the police officers from interfering with the construction on the 320 acres of the Colony. She failed and refused to answer. [11]

The Winnemucca Indian Colony has appealed the failure of the Western Nevada Agency to recognize a government three times to the Interior Board of Indian Appeals (IBIA) which stayed its hand until the United States District Court issued its decision in March 2008. Finally, the IBIA issued an opinion that allowed the Regional Office one more chance to make a decision in 2009[12] and when that did not occur, the IBIA reversed the Regional Office in 2010. (See, Exhibit 5).

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[9] Exhibit 7, Letters to BIA dated January 4, 2011 and letter dated March 24, 2011.
[10] Exhibit 8, letters from Regional BIA, March 11, 2011 and July 21, 2011.
[11] Exhibit 9, letter sent to Ms. Brown
[12] Exhibit 10, IBIA decision and letter dated March 18, 2010

The Winnemucca has exhausted all administrative remedies. The stubborn refusal of the BIA to recognize the government of the Colony has made all further administrative remedies futile. In a similar analysis, the Ninth Circuit determined that the exhaustion requirement is not a bar to the United States District Court's jurisdiction if the injunctive relief sought will result in irreparable harm. See, *Anderson v. Babbitt,* 230 F.3d 1158, 1163, 1164 (9th Cir. 2000). Further the Ninth Circuit found that if the administrative process would be futile, then further administrative proceedings are not required. *Rabkin v. Bowles,* 143 F.2d 600, 601 (9th Cir. 1944) and *United States v. Smith,* 254 F2d 930, 933 (9th Cir. 1958). Also see, *Hein v. Capitan Grande Band of Diegueno Mission Indians,* 201 F.3d 1256 (9th Cir. 2000).

c. The administrative failure to act to recognize the government of this federally recognized tribe and then the administrative decision to allow the BIA police to interrupt and prohibit the activities of the Colony on its own lands.

As the Ninth Circuit Court of Appeals stated:

[T]he members of the Splinter Group, like all persons, are entitled to a decision that is not "'unlawfully withheld or unreasonably delayed.'' 5 U.S.C. § 706(1). The Splinter Group has been waiting over five years for a determination either that it is a tribe or that is members have some rights to the Barona Group's gaming revenues.

Hein v. Capitan Grande, supra, 201 F.3d at p. 1261.

The Winnemucca Indian Colony has been waiting for a decision since February 22, 2000, when Glenn Wasson was brutally murdered at the Colony Administration building. The Winnemucca Indian Colony has been waiting for a decision since the

December 2000 reversal of the Western Nevada Agency decision that the Council of the Colony was dysfunctional. The Winnemucca Indian Colony has been waiting since the 2002 decision of the Specially Appointed Appellate Panel for the Winnemucca Indian Colony. The Winnemucca Indian Colony has lost four elders that have waited for a resolution of this matter so that they could return to their lands. The Winnemucca Indian Colony has waited for a decision that has been unreasonably delayed.

d. Public Interest Weighs in Favor of the Preliminary Injunction.

Harm to a community has long been recognized as sufficient harm to warrant an injunction. *See, e.g., Funk Jewelry Co. v. State ex rel. La Prade,* 46 Ariz. 348, 357, 50 P.2d 945, 948 (Ariz.1935); *Caribbean Marine Services Co., Inc., supra*, 844 F.2d at 674 ("Our cases have emphasized, however, that when the public interest is involved, it must be a necessary factor in the district court's consideration of whether to grant preliminary injunctive relief."). "The decision whether to grant . . .relief turns also on whether or not the balance of irreparable damage favors issuance of a preliminary injunction, and on relevant public interests." *Friends of the Earth, Inc. v. Coleman,* 518 F.2d 323, 330 (9th Cir. 1975).

Here, the harm to the community in light of the fact that this reservation exists in the midst of Winnemucca, Nevada, without a court, without fire protection, without a government is very real and far more than 'threatened." It is a well-known and highly publicized fact. The fact that the Colony cannot now move forward and establish its economic development and its income stream for the future of its members is far more than "threatened."

That harm is a sufficiently "concrete and particularized" harm, in that the injury will affect the Plaintiff "in a personal and individual way." ***Bates v. United Parcel Service, Inc.*** 511 F.3d 974, 986 (9th Cir. 2007) (finding particularized harm sufficient for injunction where refusal to hire driver was part of a written policy and, thus, likely to

happen again); *see also* ***Fortyune v. Am. Multi-Cinema, Inc****., 364 F.3d 1075, 1081* (9th Cir. 2004). Thus, this court should consider the harm to this Colony, and grant this motion. Moreover, the BIA has no agency justification for the acts of its police officer and no justification for its refusal to recognize a government for this federally recognized Tribe.

4. The Injunction Will Preserve the Status Quo

By its nature, the relief sought by this Motion is a provisional remedy granted before a hearing on the merits to preserve the subject of the controversy in its currently existing condition. *See* ***Doyne v. Saettele***, 112 F.2d 155, 1**60 (8th Cir. 1940); *see also* *Missouri-K.-T. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 188 F.2d 302, 306 (7th Cir. 1951). A preliminary injunction is not an adjudication on the merits. It seeks to preserve the status quo and prevent irreparable loss of rights before judgment. ***Textile Unlimited, Inc. v. A. BMH and Company, Inc***., 240 F.3d 781, 786 (9th Cir.2001). Here the status quo would be the continued work on the rehabilitation of the smoke shop and the entry of the Winnemucca Indian Colony Council and members onto their lands. All factors, therefore, militate in favor of relief.

WHEREFORE FOR THE ABOVE-STATED REASONS, the Plaintiff respectfully requests that the Court enter a temporary restraining order and preliminary injunction that would prohibit the United States through its executive agency the Department of the Interior and the Bureau of Indian Affairs from entering the lands of the Winnemucca Indian Colony for the purpose of prohibiting the construction and economic development activities of the Winnemucca Indian Colony, Thomas Wasson, Chairman or anyone including employees, agents or attorneys, and anyone acting on its behalf, from entering the lands of the Winnemucca Indian Colony for such a purpose or in any other manner interfering with the peaceful enjoyment and possession of the

Plaintiffs by and that no bonds be required of the Plaintiffs because no damages are ascertainable to the Defendants.

DATED this 30th day of August, 2011.

/s/ TREVA J. HEARNE

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EXHIBIT "1"

EXHIBIT "1"

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BANK OF AMERICA, N.A. a Delaware corporation, Plaintiff, v. WILLIAM BILLS; SHARON WASSON; ELVERINE CASTRO; THOMAS W. MAGIERA (deceased); THOMAS R. WASSON; and WINNEMUCCA INDIAN COLONY COUNCIL, Defendants.	3:00-cv-00450-BES-VPC **ORDER**

Currently before this Court are Defendants Winnemucca Indian Colony and Chairman Thomas Wasson's (collectively referred to herein as the "Wasson Group") Motion for Summary Judgment (#147), filed on August 30, 2002, and the Wasson Group's Supplemental Statement in Support of Motion for Summary Judgment, Request for Distribution of Account and Dismissal of Interpleader (#202), filed on May 31, 2007. Defendants Winnemucca Colony Council and Chairman Linda Ayer (collectively referred to herein as the "Bills Group") filed an Opposition (#207) on September 12, 2007. The Bills Group also filed a Motion for Summary Judgment (#207) on September 12, 2007. The Wasson Group filed an Opposition to the Bills Group's Motion for Summary Judgment (#208) and a Motion to Strike (#208) on October 1, 2007. The Bills Group filed an Opposition to Motion to Strike (#209) on November 5, 2007, and a Reply (#210) to the Wasson Group's Opposition to Motion for Summary Judgment on November 8, 2007. The Wasson Group filed a Reply (#212) in support of their Supplemental Motion for Summary Judgment on November 19, 2007.

BACKGROUND

On August 28, 2000, Plaintiff Bank of America filed a complaint in interpleader to resolve a dispute between various parties as to who had authority to use a bank account opened in the name of "Winnemucca Indian Colony." The suit arose after two tribal factions, each claiming to be the lawful tribal council for the Winnemucca Indian Colony, claimed to be entitled to the funds.

Prior to the filing of the complaint in interpleader, as of February 21, 2000, the members of the Winnemucca Colony Council were Chair Glenn Wasson, Vice Chair William Bills, and members Thomas Wasson, Elverine Castro, and Lucy Lowery. (Report and Recommendation of U.S. Magistrate Judge (#167)). Chair Glenn Wasson died on February 22, 2000. Id. Shortly thereafter, the tribal council split into two factions: (1) Vice Chair William Bills, who claimed to be the acting chair of the tribal council (the Bills Group); and (2) members Thomas Wasson, Elverine Castro, and Lucy Lowery, who claimed to be the majority of the tribal council (the Wasson Group). Id. Each faction maintained that they were the legitimate governing tribal council of the Winnemucca Indian Colony. Id.

On April 7, 2000, William Bills filed a Motion for Emergency Injunctive Relief in the Winnemucca Tribal Court. (Bills Group Motion for Summary Judgment (#207) at Exhibit A). This motion sought an order against the other council members ordering them to cease from interfering with the finances of the colony, and to turn over all bank account information and funds. On January 18, 2001, then-current Tribal Court Judge Kyle Swanson issued an order granting William Bill's motion for emergency relief. In that order, Judge Swanson held that William Bills was "duly seated and Acting Tribal Chairman of the Winnemucca Indian Colony," and that William Bills had the authority to "protect and disburse funds in all bank accounts holding funds by and for the Winnemucca Indian Colony." Id. The order also held that Thomas Wasson, Elverine Castro and Lucy Lowery "were not lawfully elected and do not officially hold the seats of Tribal Council members." Id. The Wasson Group appealed this order to the Inter-Tribal Court of Appeals of Nevada ("Inter-Tribal Court of Appeals") on January 23, 2001. (Bills Group Motion for Summary Judgment (#207) at Exhibit B). The Inter-

Tribal Court of Appeals ordered that a trial be held on the matter. Specifically, the court stated that "there exist several issues which have not been ruled upon and which should have been done prior to appeal." (Opposition to Motion for Summary Judgment (#208) at Exhibit 3). Furthermore, that court noted that "pursuant to stipulation by the parties," a trial would be conducted by "someone agreeable to the parties to conduct said trial." Id.

Trial was heard before *pro tem* Judge Steven Haberfeld. Following the trial, Judge Haberfeld issued an order finding, among other things, that there was no legitimately formed tribal council and ordered an election to establish the council. Both parties appealed Judge Haberfeld's decision. At the time of that appeal, the Inter-Tribal Court of Appeals, which would have normally heard the case, was not functioning because of lack of funds. As such, the parties stipulated to the appointment of a special appellate panel to hear appellate arguments and to issue a binding, non-appealable decision. (Wasson Group Motion for Summary Judgment (#147) at Exhibit 8). The special appellate panel consisted of a panel of judges from the Sioux Nation (the "Minnesota Panel").

The Minnesota Panel issued its decision on August 16, 2002. In its decision, the Minnesota Panel found that the valid tribal council included the following people: Sharon Wasson, Thomas Wasson, William Bills, Elverine Castro and Thomas Magiera until his death. (Wasson Group Motion for Summary Judgment (#147) at Exhibit 8). As such, the panel stated that "all subsequent activities of the Bills Council are found to be unconstitutional and invalid." Id. The panel also ordered that the council "declare a vacancy on the Colony Council because of the death of Thomas Magiera immediately and within 30 days of this order appoint a successor to fill the unexpired term of Thomas Magiera." Id. The Bills Group appealed the decision of the Minnesota Panel after the Inter-Tribal Court of Appeals was refunded.

Despite five more years of litigation, there is still a dispute between the parties as to which members constitute the legitimate tribal council. On May 17, 2007, the Inter-Tribal Court of Appeals issued an order dismissing the case stating that it had no appellate jurisdiction. (Supplemental Statement in Support of Motion for Summary Judgment (#202) at Exhibit 5). As a result, that court stated "we withdraw the mandates of all orders and rulings." Id. Both

sides now argue that the May 17, 2007 order supports their motion for summary judgment. According to the Wasson Group, they are entitled to summary judgment because they have now exhausted all tribal remedies and this Court has jurisdiction to distribute the funds in accordance with the decision of the Minnesota Panel. The Bills Group, on the other hand, argues that they are entitled to summary judgment following the May 17, 2007 order, because that order rendered all litigation before that court null and void and the parties are left with the order issued by Judge Swanson on January 18, 2001, which held that the Bills Group was the legitimate council.

ANALYSIS

A. Subject Matter Jurisdiction

Under Federal Rule of Civil Procedure 12(b)(1), a case will be dismissed if the court lacks the authority to hear and decide the dispute. Lack of subject matter jurisdiction may be raised at any time by any party. In re Kieslich, 258 F.3d 968, 970 (9th Cir. 2001); Intercontinental Travel Mktg., Inc. V. F.D.I.C., 45 F.3d 1278, 1286 (9th Cir. 1994). Additionally, the court may *sua sponte* raise the issue of lack of subject matter jurisdiction and dismiss a case if no subject matter jurisdiction exists. Fed. R. Civ. P. 12(h)(3); Intercontinental Travel, 45 F.3d at 1286.

In this case, the determination of subject matter jurisdiction is important because this dispute relates to the issue of tribal self-government. The Supreme Court has "repeatedly recognized the federal government's longstanding policy of encouraging tribal self-government." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987). "Tribal courts play a vital role in tribal self-government and the federal government has consistently encouraged their development." LaPlante, 480 U.S. at 14. In discussing the holding in National Farmers Union, the Court in LaPlante stated:

> [A]lthough the existence of tribal court jurisdiction presented a federal question within the scope of 28 U.S.C. § 1331, considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court. Promotion of tribal self-government and self-determination required that the tribal court have "the first opportunity to evaluate the factual and legal basis for the challenge" to its jurisdiction.

LaPlante, 480 U.S. at 15 (discussing National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985)). "In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." LaPlante, 480 U.S. at 16.

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 tribal affairs is a fundamental tenet of federal jurisprudence. Plainbull, 957 F.2d at 727. "Tribes maintain broad authority over the conduct of both tribal members and non-members on Indian land." McDonald v. Means, 300 F.3d 1037, 1040 (9th Cir. 2002).

In this case, the Court recognizes the importance of tribal courts in promoting and encouraging tribal sovereignty. As such, the Court agrees that "a federal court should stay its hand until tribal remedies are exhausted and the tribal court has had a full opportunity to determine its own jurisdiction." U.S. ex rel. Kishell v. Turtle Mountain Hous. Auth., 816 F.2d 1273, 1276 (8th Cir. 1987)(citing National Farmer's Union Ins. Co., 471 U.S. at 856). In this case, the tribal court has had a full opportunity to determine its own jurisdiction. This matter has been pending for over seven years. On May 17, 2007, the Inter-Tribal Court of Appeals issued an order dismissing the case for lack of jurisdiction. Based on that order, this Court finds that the parties have exhausted all tribal remedies. Because tribal remedies have been exhausted, this Court has jurisdiction to enter summary judgment and distribute the bank account funds held in interpleader.

B. Summary Judgment

Federal Rule of Civil Procedure 56 provides that 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). Summary judgment is "not warranted if a material issue of fact exists for trial." Ribitzki v.

Canmar Reading & Bates, 111 F.3d 658, 661–62 (9th Cir. 1997). A material fact is one that "might affect the outcome of the suit under the governing law . . . ." Lindahl v. Air France, 930 F.2d 1434, 1436 (9th Cir. 1991) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248–49 (1986)). Further, any dispute regarding a material issue of fact must be genuine— the evidence must be such that "a reasonable jury could return a verdict for the nonmoving party." Id. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial" and summary judgment is proper. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The burden of proving the absence of a genuine issue of material fact lies with the moving party; accordingly, "[t]he evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in the light most favorable to the nonmoving party." Id. (citing Liberty Lobby, 477 U.S. at 255); Martinez v. City of Los Angeles, 141 F.3d 1373, 1378 (9th Cir. 1998). Nevertheless, if the moving party presents evidence that would call for judgment as a matter of law, then the opposing party must show by specific facts the existence of a genuine issue for trial. Liberty Lobby, 477 U.S. at 250; Fed. R. Civ. P. 56(e). To demonstrate a genuine issue of material fact, the nonmoving party "must do more than simply show there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus., 475 U.S. at 586. " If the evidence [proffered by the nonmoving party] is merely colorable, or is not significantly probative, summary judgment may be granted." Liberty Lobby, 477 U.S. at 249–50.

When the parties file cross-motions for summary judgment, as in this case, the court must consider each party's motion separately and determine whether that party is entitled to a judgment under Rule 56. Western Land Exchange Project v. U.S. Bureau of Land Mgmt., 315 F.Supp.2d 1068, 1075 (D. Nev. 2004). Cross-motions for summary judgment do not necessarily mean that there are no disputed issues of material fact, and do not necessarily permit the judge to render judgment in favor of one side or the other. Starsky v. Williams, 512 F.2d 109, 112 (9th Cir.1975). In making these determinations, the court must evaluate the evidence offered in support of each cross-motion. Id. (citing Fair Housing Council of Riverside

County, Inc. v. Riverside Two, 249 F.3d 1132, 1136-37 (9th Cir. 2001)). Applying these principles, the Court now turns to whether summary judgment is warranted in this case.

Both parties believe that no triable issues of fact exist and judgment should be entered in their favor. As noted in the foregoing, the Wasson Group argues that they are entitled to summary judgment and a distribution of the bank account funds according to the decision of the Minnesota Panel. The Bills Group, on the other hand, argues that they are entitled to summary judgment under Judge Swanson's order of January 18, 2001.

"Tribal sovereignty undoubtedly includes the power to establish a court system." Davis v. Muellar, 643 F.2d 521, 525 (8th Cir. 1981). "The tribes derive their adjudicatory power not from Article III, but from their inherent sovereignty as the aboriginal people of this continent, from the vestiges of their once absolute authority over their internal affairs." State of Montana v. Gilham, 133 F.3d 1133, 1136 (9th Cir. 1998). As such, "an Indian tribe has the power, absent some treaty provision or act of congress to the contrary, to enact its own laws for the government of its people, and to establish courts to enforce them." Colliflower v. Garland, 342 F.2d 369, 376 (9th Cir. 1965).

"As a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity." AT & T Corp. v. Coeur d'Alene Tribe, 295 F.3d 899, 903 (9th Cir. 2002). Two circumstances preclude recognition: "when the tribal court either lacked jurisdiction or denied the losing party due process of law." Id. "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." Id. In this case, the parties are asking the Court to enforce two separate judgments arising from the tribal court adjudication. The first is the January 18, 2001 order issued by Judge Swanson recognizing the Bills Group as the legitimate tribal council. The second is the August 16, 2002 decision by the Minnesota Panel which listed the following individuals as the legitimate council: Sharon Wasson, Thomas Wasson, Williams Bills, Elverine Castro and Thomas Magiera until his death.

The Bills Group argues that this Court must enforce the January 18, 2001 order issued by Judge Swanson because the Inter-Tribal Court of Appeals stated in its May 17, 2007 order that "we withdraw the mandates of all orders and rulings." (Bills Group Motion for Summary Judgment (#207) at p. 4). Thus, all previous orders arising from the Inter-Tribal Court of Appeals are withdrawn. Id. The Bills Group argues that this includes the decision by the Minnesota Panel because that decision arose from an appeal of Judge Haberfeld's decision, and, Judge Haberfeld's decision, in turn, was issued after the Inter-Tribal Court of Appeals remanded Judge Swanson's order for trial. As such, according to the Bills Group, because the Inter-Tribal Court of Appeals directed a trial on Judge Swanson's order, and such trial resulted in Judge Haberfeld's order, that branch of litigation is null and void under the Inter-Tribal Court of Appeal's May 17, 2007 order. Id. Thus, the Bills Group argues that the decision of the Minnesota Panel is "without any legal force and effect." Id. at p. 15. The Wasson Group argues that the Court must enforce the Minnesota Panel's order because that decision was rendered by an independent panel created by stipulation of the parties. As such, that panel's decision is not affected by the Inter-Tribal Court of Appeals' order dismissing the case for lack of jurisdiction.

This Court finds that the decision by the Minnesota Panel is controlling in this matter. As noted, the Bills Group argues that the decision of the Minnesota Panel is without force or effect following the Inter-Tribal Court of Appeals' order dismissing the case for lack of jurisdiction. Although the Minnesota Panel was convened following an appeal to the Inter-Tribal Court of Appeals from Judge Swanson's order, the Inter-Tribal Court of Appeals' May 17, 2007 order does not withdraw the decision by that panel. The Minnesota Panel was a specially appointed appellate panel created by stipulation of the parties. The panel was convened specifically to hear appellate arguments and to issue a binding, non-appealable decision. (Wasson Group Motion for Summary Judgment (#147) at Exhibit 8). Moreover, the panel was created at a time when the Inter-Tribal Court of Appeals did not even exist because of lack of funding. As such, the Inter-Tribal Court of Appeals lack of jurisdiction over this case does not affect the jurisdiction of the Minnesota Panel.

In addition, the fact that the Minnesota Panel's decision arose from a trial that had been directed by the Inter-Tribal Court of Appeals does not divest that decision of its legal force and effect. A review of the Inter-Tribal Court of Appeals' order remanding the case for trial shows that the court did not make any substantive decision on the merits of the case. Rather, it simply stated that "several issues have not been ruled upon and which should have been done prior to appeal." That court's order then states that "pursuant to stipulation of the parties" the parties will conduct a trial on such issues. The parties then agreed to have *pro tem* Judge Haberfeld hear their case at the trial level. The parties further stipulated to create a special panel to hear appeals from Judge Haberfeld's decision. As such, those two tribunals were created by stipulation of the parties and are not affected by the Inter-Tribal Court of Appeals' lack of jurisdiction.

Based on the foregoing, this Court finds that the decision by the Minnesota Panel is in full force and effect following the Inter-Tribal Court of Appeals' dismissal for lack of jurisdiction. Under principles of comity, that decision is entitled to enforcement in this Court. As such, the funds of the Bank of America account which have been held in interpleader in this matter will be distributed to the tribal council recognized by the Minnesota Panel's August 16, 2002 order.

CONCLUSION

Based on the foregoing, IT IS ORDERED that the Wasson Group's Motion for Summary Judgment (#147), Supplemental Statement in Support of Motion for Summary Judgment, Request for Distribution of Account and Dismissal of Interpleader (#202) is GRANTED.

IT IS FURTHER ORDERED that the Bills Group Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that all other pending motions are DENIED.

DATED: This 6TH day of March, 2008.

BRIAN SANDOVAL
United States District Judge

EXHIBIT "2"

EXHIBIT "2"

IN THE APPEALS COURT OF THE WINNEMUCCA INDIAN COLONY IN NEVADA
Case No. CV1003 (Lower Court)

Sharon Wasson, Lucy (Wasson) Lowery, et al.,
Appellants,

Vs.

William Bills, Acting Tribal Chairman, et al.
Appellees,

Filed August 16, 2002
Reversed.

Treva J. Hearne, Esq., Zeh, Saint-Aubin, Spoo & Hearne, 575 Forest Street, Suite, 200, Reno, Nevada 89509; and

Donald K. Pope, Esq., 1385 Haskell St., Reno, Nevada 89509.

Considered and decided by Scheffler, Chief Judge, Reding, Associate Judge, and Treuer, Associate Judge.

SYLLABUS

1. The Trial Court's determination of members of the Winnemucca Colony Council is not supported by substantial evidence and does not comport with the Constitution and Bylaws of the Winnemucca Indian Colony in Nevada.

2. The Trial Court's determination of the membership of the Winnemucca Indian Colony is not supported by substantial evidence and does not comport with the Constitution and Bylaws of the Winnemucca Indian Colony.

3. The Trial Court's determination of Tribal Judge is not supported by substantial evidence and does not comport with the Constitution and Bylaws of the Winnemucca Indian Colony.

4. The Order of Steven Haberfeld, issued on May 9, 2002 is reversed and vacated.

OPINION

Introduction

The Winnemucca Indian Colony (WIC) was created by the federal government of the United States by Executive Order No. 2639 dated June 18, 1917 which set aside 340 acres near the town of Winnemucca, Nevada for the benefit of certain "homeless Indians" in the area. The Indians of the Winnemucca Indian Colony organized under the Indian Reorganization Act of June 18, 1934 (as amended). In December 1970 the Winnemucca Indian Colony adopted a Constitution and Bylaws which were approved by the Assistant Secretary of the Interior on March 5, 1971.

Under the Constitution and Bylaws, the WIC had an operating tribal council and engaged in government-to-government relations with the United States government. As of February 21, 2000, the members of the Winnemucca Colony Council were Chairman Glenn Wasson, Vice Chairman Williams Bills, and members at large Thomas Wasson, Elverine Castro, and Lucy Lowery.

On February 22, 2000, Council Chairman Glenn Wasson was murdered. The events leading to this lawsuit followed the death of Chairman Wasson. The remaining Colony Council split into two factions, both purporting to be the legitimate Colony Council. Each faction took various actions "on behalf of" the Colony. Each faction later held an election and claimed to seat a new council. The governmental chaos in the Colony caused the federal government to declare the Colony to be dysfunctional and to break off government to government relations with it.

Eventually, various lawsuits were filed and the two sides became engaged in litigation to resolve the issues. After a complicated procedural history which is shown in the list of pleadings

in this matter, the trial in this matter was heard before *pro tem* Judge Steven Haberfeld. As stated in his Order dated May 9, 2002, the issues to be resolved by the trial judge were:

1) The names of the members of the Winnemucca Indian Colony who are eligible for enrollment.

2) The identity of the proper and legitimate members of the Business Council of the Winnemucca Indian Colony at the present time.

3) The identity of the Tribal Judge, other than the *pro tem* Judge, legally authorized to hold such office for the Colony at the present time.

Judge Haberfeld's Order dated May 9, 2002, as amended by Order dated May 22, 2002, determined the identity of the legitimate tribal judge, created a membership list for the WIC, and determined that there was no legitimately formed tribal counsel and ordered an election to establish the council. Although the trial court judge recognized that an "Indian tribe's most basic power is the authority to determine its own membership," he determined that in this instance, he was given specific instructions to determine the names of person eligible for enrollment. Therefore, he made specific findings regarding certain persons' eligibility for membership and he established a list of 48 people who "have been placed on the Official Winnemucca Indian Colony Tribal Enrollment List" out of 106 potentially eligible persons.

Both parties appealed the Tribal Judge's decision. Due to lack of funding, the Intertribal Court of Appeals that would normally hear this case is not functioning. The parties, through counsel, stipulated to the appointment of a special appellate panel to hear appellate arguments and to issue a binding, non-appealable decision. The standard of review stipulated by the parties is as follows: *de novo* review of constitutional issues, *de novo* review of legal issues, and "any substantial evidence" review of factual issues.

STATEMENT OF FACTS

The WIC's membership initially included those persons listed on the 1916 census rolls, hereinafter known as the "List of 17". (Exhibits 36 and 84). When the WIC adopted a constitution, the Constitution provided that to be a member of the Colony a person must be at least 1/4 degree Paiute and/or Shoshone Indian blood AND they must be named or descended from person(s) named on the December 9, 1916 census of the Winnemucca Shoshone Indians. Further, no person can be a member of the Winnemucca Indian Colony if they have received money or land as a result of having been enrolled as a member of some other tribe.

In the 1980s, the BIA expressed concern that the membership rolls of the Colony included people who were not eligible for membership under the Constitution. (Exhibit 38b.) In 1994, the Colony adopted Enrollment Ordinance No. 310, which was approved by the Acting Area Director of the Phoenix Area Office of the BIA on July 12, 1994. On February 14, 1998, the WIC adopted a revised membership list which included 77 names (hereinafter known as the "List of 77".) This membership list was accepted by the Colony through their elected Council. The membership list was forwarded to the BIA for verification. The BIA did not approve the membership list because the Colony had not brought individual resolutions for each new member before the Colony Council for approval. (Exhibit 38a.)

As of February 21, 2000, the members of the Winnemucca Colony Council were Chairman Glenn Wasson, Vice Chairman Williams Bills, and members at large Thomas Wasson, Elverine Castro, and Lucy Lowery. On February 22, 2000, Chairman Glenn Wasson was murdered in front of the administration building of the Colony. As the Vice-Chairman, William Bills became the Acting Chairman of the Colony. The Council members thereafter split into two factions, as shown by their subsequent actions. One faction, hereinafter known as the Wasson

Council, included Thomas Wasson, Elverine Castro, and Lucy Lowery. The other faction, hereinafter known as the Bills Council, included only William Bills.

At a meeting on February 28, 2000, the three members of the Wasson Council held a meeting at which they purported to appoint Sharon Wasson as a Council member to fill Glenn Wasson's vacant seat. (Exhibit 7.)

At a Council meeting on March 22, 2000, the seat vacated by Glenn Wasson was declared to be vacant and William Bills was declared to be the Chairman. (Exhibit 10.) By a separate resolution, an Enrollment Committee was established. (Exhibit 10.) Another resolution set a special/emergency meeting date for April 8, 2000 to fill the vacant Council seat.

After the regular Council meeting, three of the four remaining members, Thomas Wasson, Elverine Castro, and Lucy Lowery, held another meeting, the purpose of which was to appoint a replacement for former member Glenn Wasson within thirty (30) days after the seat became vacant, as required by Article V, Section I of the Constitution. They elected Sharon Wasson to the empty seat on the Council. The three members acting at that time also stated their intent to call a special meeting to discuss, among other things, removal of Mr. Williams Bills from the council. (Exhibit 11.)

Article 3, Section II of the Bylaws allows special meetings to be called by a chair or the majority of the Council. The three members acting at this time constituted a majority of the Council. Further, Article V, Section 1 of the Bylaws allows the appointment of another council member "to fill the unexpired term." The Constitution and Bylaws do not specify where Council meetings must be held and they do not specify any notice requirements for special meetings. (Exhibit 1.)

From this point forward, the two groups claiming to be the legitimate council diverged and each group continued to act and take action as if it was the legitimate Colony Council. At a meeting on March 24, 2000, attended by Sharon Wasson, Thomas Wasson, Lucy Lowery, and Elverine Castro, the Wasson Council voted to make Sharon Wasson Acting Chair of the Council while they attempted to address membership issues and removal of Mr. Bills. (Exhibits 11 and 12.) The Wasson Council sent a letter to Mr. Bills informing him of his removal from the position of Chairman and his opportunity to respond to the Council at a meeting on April 8, 2000. (Exhibit 13.) Although there is no proof of service of this letter, Mr. Bills did appear at the April 8, 2000 hearing. There was not a quorum at the meeting. The meeting agenda does not contain an item regarding the removal of Bills and there is no evidence in the record that the removal of Bills was discussed at the April 8, 2000 meeting or that he was given a hearing or opportunity to oppose his removal.

On April 7, 2000, William Bills filed a Motion for Emergency Injunctive Relief in the Winnemucca Tribal Court. (Exhibit 15). This Motion sought an order against the other Council members ordering them to cease from interfering with the finances of the colony, and to turn over all bank account information and funds. On April 17, 2000, then-current Tribal Court Judge Kyle Swanson issued an order granted Bill's motion for emergency relief. (Exhibit 19.) The Wasson Group, through their attorney, filed a Motion to Dismiss the injunction dated April 19, 2000. (Exhibit 20.)

On April 11, 2000, the Wasson Council removed Mr. Bills as the Chair of the Committee and appointed Sharon Wasson Chairman, pursuant to Article VI, Section I of the Constitution. (Exhibit 17.) By Resolution dated April 24, 2000, the Wasson Council attempted to remove William Bills as a Council member. The three signatories on that resolution were Sharon

Wasson, Lucy Lowery, and Thomas Wasson. (Exhibit 21.) However, until at least September 14, 2000, the Wasson Council continued to act as though Mr. Bills was a member of the council, listing him as "absent without excuse" on many Council documents. (Exhibit 38a).

By Resolution dated May 2, 2000, signed by Elverine Castro, Lucy Lowry, Thomas Wasson, and Sharon Wasson, Kyle Swanson was purportedly removed from service as a Tribal Judge. The Resolution indicated that a hearing on the matter would be held on May 13, 2000. (Exhibit 22.) Judge Swanson did not receive a copy of the Resolution regarding his removal until approximately two weeks, later, after the scheduled May 13, 2000 hearing. (Exhibit 25.) It is unclear from the record if the May 13, 2000 hearing took place.

Also on May 2, 2000, the same group of actors appointed Chuck Hartman as associate Judge of the Winnemucca Tribal Court. (Exhibit 23.) On May 23, 2000 this group entered into a Memorandum of Understanding regarding his term and compensation as associate judge. (Exhibit 28.) On August 9, 2000, Judge Hartman issued an Order removing William Bills from all tribal business, recognizing Sharon Wasson as Tribal Chairman, and ordering release of all tribal bank account funds to the Wasson Council. (Exhibit 31.)

William Bills sent correspondence to Judge Swanson dated May 18, 2000, instructing him to sit as Tribal Judge on May 19, 2000. (Exhibit 26.) By Order dated May 19, 2000, Judge Swanson issued his Order for Preliminary Injunction, which essentially gave control of the Colony's finances to Mr. Bills and enjoined the Wasson Group from interfering with the activities of the Enrollment Committee.

On or about June 25, 2000, Council member Lucy Lowery died. On July 13, 2000, Tom Magiera was appointed to the Council to replace Ms. Lowery. (Exhibit 46.) By Resolution dated September 14, 2000, the Wasson Council disenrolled/banished William R. Bills. By

Resolution dated October 16, 2000, the Wasson Council declared the seat vacant and appointed Andrea Davidson to the vacant seat. (Exhibit 47.)

Also on October 16, 2000, the Wasson group brought a Complaint and Motion for Temporary Restraining Order before Judge Hartman. On the same date, Judge Hartman issued a temporary restraining order restraining William Bills from entering the trust lands of the Winnemucca Indian Colony and issued an order to show cause at a hearing on October 31, 2000 why the order should not become permanent. (Exhibit 49.)

From the time of its appointment in March 2000, the Enrollment Committee continued to accept enrollment applications and enroll various people as members in the tribe. Both sides also held Council elections which each claimed to be the legitimate election to seat the legitimate Colony Council. After an election in October 2000, the Wasson Council claimed that its duly elected members were Thomas Wasson, Thomas Magiera, Elverine Castro, Andrea Davidson, and Merlene Magiera. After an election in April 2001, the Bills Council claimed that its members were Allen Ambeler, Linda Ayer, Lovelle Brown, Charlene Dressler, and Lorinda (Toni) George. (Exhibit 64). For various reasons that are outlined in the record, both faction's elections had procedural and due process deficiencies.

On January 18, 2001, Judge Swanson issued an Order for Permanent Injunctive Relief and Restraining order, which found, among other things, that William Bills was the Acting Tribal Chair, that Sharon Wasson was not a Council member, and that the Wasson Council was ordered to refrain from interference or participation in the daily operations of the tribe's smoke shop. (Exhibit 34.) After appeals from Judge Swanson's Order, the parties had a trial before Judge Haberfeld. Both parties appealed Judge Haberfeld's decision and the following opinion results from the appeals of Judge Haberfeld's Order.

Although the following information was not in the record, counsel for the parties informed the Appellate Panel at oral arguments that Thomas Magiera died on June 30, 2002.

ISSUES

I. Whether the Trial Court's Order determining the members of the Winnemucca Colony Council is supported by substantial evidence and comports with the Constitution and Bylaws of the Winnemucca Indian Colony.

II. Whether the Trial Court's Order determining the membership of the Winnemucca Indian Colony is supported by substantial evidence and comports with the Constitution and Bylaws of the Winnemucca Indian Colony.

III. Whether the Trial Court's Order determining the Tribal Judge is supported by substantial evidence and comports with the Constitution and Bylaws of the Winnemucca Indian Colony.

ANALYSIS

Winnemucca Colony Council

A vacancy was properly declared pursuant to Article V, Section I of the Winnemucca Indian Colony of Nevada Constitution (the "Constitution") shortly after the death of Glenn Wasson. William Bills ascended to the Chair position by virtue of being the Vice Chair. This ascension is permitted whenever the Chair is not able to fulfill his responsibilities under the Constitution.

The WIC Constitution at Article V, Section 1 provides that the remaining Colony Council members, after declaring a vacancy, shall appoint a successor to fill the unexpired term. On March 22, 2000 a majority of the Council appointed Sharon Wasson to the Colony Council according to the Constitution. The WIC Constitution at Article III, Section 1 states that a

chairman shall be selected by the Colony Council from within its own members. On April 11, 2000, Sharon Wasson was selected by a majority of the remaining Council members as Chair pursuant to the Constitution.

Article V, Section II of the Constitution provides for removal of members of the Colony Council. The Constitutional provisions for removal were not followed to properly remove Mr. Bills from the Colony Council. A letter marked Exhibit #13 from Sharon Wasson to William Bills gives notice to Mr. Bills of his removal and that a hearing was set for April 8, 2002. The notice was defective in that it did not have an address on its face for Mr. Bills, and there was no evidence of service. Mr. Bills appears to have had knowledge of the April 8th hearing because (1) he filed a legal action in another court the day before and (2) Mr. Bills showed up for the meeting on April 8, 2002, the Wasson group did not prove actual notice. There is considerable case law identifying the difference between actual notice and legal notice.

Mr. Bills, Thomas Wasson and one other Colony Council member were present at the April 8th meeting. Two other Colony Council members' car broke down and they were not in attendance at the meeting. The evidence provided in the record indicated that a number of topics were covered but no action was taken on the removal of Mr. Bills. The attempt to remove Mr. Bills from the Council was procedurally defective, was not completed, and, therefore, is ineffective.

As time went on, Mr. Bills' name continued to appear on official documents and the other council members present would sign their initials that he was absent without an excuse. This evidence shows that even the Wasson Council continued to include Mr. Bills as a Colony Council member and Vice Chair through September of 2000.

On April 13, there was a recall petition date stamped and marked received on April 26th. However, the record does not reflect that the process was ever carried out for a recall of Colony Council members.

The WIC Constitution at Article V directs how a vacancy on the Colony Council is to be filled and Article IV of the WIC Constitution describes a quorum of three as necessary to transact business of the Colony Council. A quorum of the Wasson Council declared a vacancy when Lucy Lowery died. As stated in Exhibit #46 dated July 13, 2000, the Wasson Council declared a vacancy, took nominations and appointed Tom Magiera to the Wasson Council. Article II, Section 2 of the WIC Bylaws requires that each Colony Council member elected or appointed take an oath of office. Mr. Magiera took the oath of office as required by the WIC Constitution.

Exhibit #47 states that Mr. Bills was disenrolled or banished, that there was a vacancy on the Colony Council and that Andrea L. Davidson was appointed to fill the position declared vacant. The contents of Exhibit #49 do not illustrate any due process in trying to disenroll or banish Mr. Bills. There was not an effective disenrollment or banishment of Mr. Bills. Therefore, there was no vacancy on the Wasson Council and Ms. Davidson was not validly appointed to the Wasson Council.

The election of October 28, 2000 was defective for a number of reasons including:

1) the election committee was not valid because only one member was a member of the Colony at the time;

2) there was an altercation which disrupted the process;

3) two of the election committee members were incarcerated; and

4) the polling place was changed at last minute to a different place than posted.

All these incidents resulted in an invalid election on October 28, 2000.

The Court reviewed the Order of Judge Swanson identified as Exhibit #30 dated January 18th, 2001 and information regarding the election proceeding. Judge Swanson exceeded his authority by ignoring the Constitutional election requirements.

On or about January 2001, Mr. Bills appointed an interim Colony Council, known as the Bill's Council in this opinion. The appointment of such a council was invalid and unconstitutional. There is absolutely no provision in the Constitution providing for the appointment of an interim Colony Council. There is no Constitutional provision for a single Council member to appoint any other council members or to act as a Colony Council of one. For foregoing reasons, the Bills' council is invalid.

Membership List

One of the inherent powers of self-government is the power to establish the members or citizens of a particular tribe, nation, band, community or colony. Another power of self-government is to exclude people from the tribe, nation, band or community or colony's territories or lands. The Enrollment Ordinance is clear about how to apply for membership and identifies the appeal for denial of a membership application. The Constitution is silent on how a member loses their membership or how they are excluded from tribal territories or lands. The Enrollment Ordinance is also silent on the process to disenroll someone. The Constitution places great value on due process as illustrated in Article VIII. The Enrollment Ordinance reflects the importance of due process by providing for due process if one's application for membership is denied. It is not the place of the judiciary to carry out an inherent sovereign power to say who the members are of a tribe, nation, band, community or colony. The last known list approved by the validly constituted Colony Council, the body with the authority to declare who the members are of the Colony, was the "list of 77 from 1998."

The duly appointed Enrollment Committee, appointed by the remaining Council in March, 2000, continued to act on enrollment applications throughout the past two years of chaos. Some membership applications were forwarded to the Council for approval and acted on by the council. There is no evidence in the records that these new membership approvals are defective. Any membership application which was approved by the Wasson Council, or the predecessor WIC Council, shall be added to the valid enrollment list of the Colony.

This Court is aware of the disproportionate number of Shoshone represented on the Colony Council and in the previous enrollment committee and that there are Paiutes who desire to be enrolled and may be eligible under the Constitution but are concerned about potential bias against Paiutes by enrollment committee members. The Colony is ordered to take steps to address this issue.

Tribal Judge

On April 7, 2000, William Bills filed a motion for emergency injunctive relief in the WIC Tribal Court requesting that the Wasson Group be enjoined from interfering with WIC financial matters. Kyle Swanson was the only sitting Judge of the WIC Tribal Court at that time. The Wasson Council had duly appointed him to his position in 1998. (See Exhibit 25). On April 17, 2000, the same day Bills' motion was served on the defendants; Judge Swanson issued an order granting Bills' motion for an emergency injunction. (Exhibit 19).

On May 2, 2000, the Wasson Council passed a resolution immediately removing Judge Swanson from office. (Resolution 5-2000-3, Exhibit 22). The stated grounds for his removal were that he presided over litigation in which a party was a close friend and did not hold hearings at a time and place provided by the WIC Law and Order Code. The resolution provided that a hearing would be held on Swanson's removal on May 13, 2000. It is unclear from the record

whether the removal hearing scheduled May 13, 2000 hearing ever took place. Judge Swanson stated that he did not receive notice of his removal until three days after the scheduled hearing. He clearly was not given a fair hearing and an opportunity to respond to the charges.

Except for the resolution of removal itself, the record below does not establish that a written complaint to the Wasson Council was ever made by anyone against Judge Swanson. The record does support a conclusion that Judge Swanson did not receive notice of the charges made in the resolution for two weeks. His receipt of notice was three days after the scheduled May 13th hearing. Contrary to the clear requirements of the Code sections cited above, Judge Swanson was removed without any notice and prior to any hearing. Other sections of the Code were also violated. Section 1-40-100(b)(4) provides that hearings regarding removal of a judge shall be set at least thirty days but not more than sixty days in advance. Here, the removal hearing was set to take place eleven days after its passage.

The actions taken by the Wasson Council were clearly illegal under the WIC Code. They were also unlawful under the due process requirements of the WIC Constitution and under controlling federal law. Article VIII of the WIC Constitution provides that "No person shall be denied any of the applicable rights or guarantees as provided in Title II of the Civil Rights Act of 1968 (82 Stat. 77). The Federal Indian Civil Rights Act of 1968 (hereinafter ICRA) provides as follows:

> No Indian tribe in exercising powers of self-governmental shall . . . deprive any person of liberty or property without due process of law. 25 U.S.C. 1302(8).

Certainly, Judge Swanson had a property interest in his position as Tribal Judge. It is elementary law that due process generally requires notice and an opportunity to be heard prior to deprivation

of a property interest. Those due process requirements are incorporated into the WIC Code but were not followed by the residual Council.

In her letter to Judge Swanson, Ms. Hearne apparently took the position that Judge Swanson's contract had simply expired. The Code, however, provides that the "Tribal Court shall consist of one Chief Judge and at least one or more Associate Judges" . . . and further that "all judges shall serve for a term of one year and until their successors take office" . . . (Code Sections 1-40-010 and 1-40-050). (Emphasis supplied). Judge Swanson was the only judge serving on the Tribal Court when these events took place. He had held his position for two years. The resolution appointing Chuck Hartman clearly states he was appointed as an associate judge. The only logical conclusion is that Judge Hartman was not appointed as a successor to Judge Swanson and that, therefore, removal based on expiration of Judge Swanson's term is also illegal.

DECISION

Winnemucca Colony Council

I. The Trial Court's determination of members of the Winnemucca Colony Council is not supported by substantial evidence and does not comport with the Constitution and Bylaws of the Winnemucca Indian Colony in Nevada.

Mr. Bills was properly elevated to the position of Chair pursuant to the by-laws of the Winnemucca Indian Colony of Nevada Article I, Section II. Sharon Wasson was properly appointed to the Wasson Council and subsequently properly appointed Chair of the Wasson Council. The Court finds no hearing for removal of Mr. Bills was ever held. We find that the removal of Mr. Bills was defective resulting in the fact that Mr. Bills is still on the tribal council.

There was no recall of Wasson Council members because the recall process was not completed. Mr. Bills continued to serve and continues to serve on the Wasson Council. Tom Magiera was properly appointed to replace Lucy Lowery. After review of the documents, this Court finds there was no proper procedure followed for the disenrollment of Mr. Williams. Therefore, it was inappropriate to declare a vacancy, nominate and appoint Andrea Davidson. The appointment of Andrea Davidson was defective, she is not a member of the Council and Mr. Bills remained and remains as a valid member of the Wasson Council.

The Court finds the Order of Judge Swanson dated January 18, 2001 invalid. The valid Colony Council that has survived to the present includes the following: Sharon Wasson, Thomas Wasson, Williams Bills, Elverine Castro and Thomas Magiera until his death.

Therefore, all subsequent activities of the Bills Council are found to be unconstitutional and invalid. The election held on April 2001 is declared an invalid election and in violation of the Constitution.

If the remaining members of the Colony Council feel it necessary and appropriate to remove Mr. Bills as a member of the Colony Council and/or disenroll Mr. Bills, then the Colony Council must follow the Constitution and By-Laws including proper notice, procedure, and opportunity to be heard at a hearing. The Colony Council has the responsibility and duty to assure that due process is provided for in any ordinance or procedure in compliance with the Constitution in order to avoid any further defective disenrollment or defective removal of a Colony Council member.

The next Colony Council election scheduled pursuant to the Constitution would be October 2002. The Court and the parties have the desire for that election to occur on time. However, the serious situation the Colony faces today results from the chaos which began in February 2000 including the unconstitutional and invalid actions identified by this Court. Because of the need to identify who the Colony members are, the need to draft procedures to identify members and because the Constitution permits all Colony Council members to serve a term of two (2) years or until their successors are duly elected and seated, the October 2002 election shall occur within six months of October 2002.

The desire is for the Colony to definitively identify its members and hold a valid election with the purpose of bringing order to the Colony and making a future again for its members. This huge effort will require a complete and participatory Colony Council and active tribal members. If tribal members choose to be obstruct, uncooperative, petty and selfish, then this Colony will continue in chaos with no hope. The people have to care enough to move forward. The judicial and legal systems can do only so much.

Membership List

II. The Trial Court's determination of the membership of the Winnemucca Indian Colony is not supported by substantial evidence and does not comport with the Constitution and Bylaws of the Winnemucca Indian Colony.

Judge Haberfeld's Order is overturned in its entirety. The "list of 77 from 1998" is the valid list of the members of the Winnemucca Indian Colony of Nevada. Anyone who was added by previous Council or the Wasson Council from 1998 to the present shall be added to the "list of 77 from 1998".

Tribal Judge

III. The Court's determination of Tribal Judge is not supported by substantial evidence and does not comport with the Constitution and Bylaws of the Winnemucca Indian Colony.

We find that Swanson's removal as Tribal Court Judge was improper and illegal under the WIC Law and Order Code. (Hereinafter "Code"). Removal of Judges, Section 1-40-100(b)(1) of the Code provides that "no action will be taken except upon written complaint to the Tribal Council setting forth specific facts which justify removal." Section 1-40-100(b)(2) provides that the "judge shall be immediately notified of the charges against him." The Code further provides that "No judge shall be removed except following a hearing on the complaint and a subsequent decision by the Tribal Council that removal is appropriate." (Code Section 1-40-100(b)(3); (emphasis supplied).

We agree Judge Haberfield's determination that the attempted removal of Judge Swanson and the appointment of Judge Hartman 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 Council members.

We hold that WIC Tribal Court Judge Swanson was not legally removed from office according to the requirements of WIC's laws. He is legally authorized to hold the office of Judge of the WIC Tribal Court.

ORDER

1. The Order of Steven Haberfeld, issued on May 9, 2002, is reversed and vacated.
2. The WIC Colony Council is Sharon Wasson, Thomas Wasson, Williams Bills, Elverine Castro. There is one vacancy created by the death of Thomas Magiera.
3. The WIC Colony Council shall declare a vacancy on the Colony Council because of the death of Thomas Magiera immediately and within 30 days of this order appoint a successor to fill the unexpired term of Thomas Magiera.
4. The WIC Colony Council shall serve until their successors are duly elected and seated or any member is duly disenrolled or banished.
5. The October 2002 election of the WIC shall occur within six months of October 2002.
6. The WIC Colony Council shall set time lines within the next six months of the date of this Order for the following:
    a. amend the enrollment ordinance within 45 days of this order to provide procedures for appealing a denial of an application including due process provisions and to provide procedures to disenroll a member including due process provisions;

b. the enrollment committee shall publish notice and post notice announcing that anyone who wishes to be enrolled should contact them and follow application procedures;

c. the enrollment committee shall publish notice and post notices announcing that anyone who wishes to disenroll someone else should contact them and follow the disenrollment procedures; and

d. the Colony Council shall take every step to assure a tribal election is held within six months of October 2002.

7. The WIC Colony Council shall appoint a validly constituted enrollment committee, if one does not exist, within 10 days of this order. The Court orders the Colony Council to address the real or perceived bias in favor of Shoshone by requiring the following:

a. The Colony Council shall make every attempt to be sure that there are equal numbers of Paiute and Shoshone on the enrollment committee;

b. That any appointment of members are members who have open minds and will look at the facts in front of them without bias for tribal or family or any other political loyalties.

8. The WIC Colony Council shall establish standards reflecting the due process required by the Constitution in denying an application for membership and in disenrolling members. The process for denial of a membership application and the disenrollment of a member shall include:

a. notice of actions to be taken or taken;

b. publish timelines for each process;

c. service of process methods;

d. written reasons for denial of an membership application and disenrollment;

e. hearing and hearing procedures, if any;

f. in disenrollment processes the burden is upon the person bringing or requesting the action of disenrollment; and

g. appeal and appeal procedures including the use of an independent body or court.

9. The WIC Colony Council shall contact the United States Department of Interior Bureau of Indian Affairs office for the last address list for members of the Colony.

Signing for the Appeals Court of the Winnemucca Indian Colony in Nevada:

Date: 8-16-12

Lenor A. Scheffler
Chief Judge

Certified by:

Acting Clerk of Court

EXHIBIT "3"

EXHIBIT "3"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BANK OF AMERICA, N.A., a Delaware corporation,

Plaintiff,

v.

KYLE SWANSON,

Defendant - Appellant,

WILLIAM BILLS; WINNEMUCCA COLONY COUNCIL,

Defendants - Counter-claimants -Appellants,

SHARON WASSON; et al.,

Defendants -Counter-claimants - Appellees.

No. 08-16146

D.C. No. 3:00-cv-004500-RCJ

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Robert C. Jones, District Judge, Presiding
Submitted October 4, 2010**
San Francisco, California

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: FERNANDEZ and SILVERMAN, Circuit Judges, and DUFFY, District Judge.***

Appellants—William Bills and the Winnemucca Colony Council and its Chairman Linda Ayer (the "Bills Group")—appeal from the district court's grant of summary judgment in favor of Appellees—Sharon Wasson and the Winnemucca Indian Colony Council (the "Wasson Group")—awarding the approximately $400,000.00 held in a Bank of America account to Appellees. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

This case began when Winnemucca Indian Colony Council Chairman Glenn Wasson was murdered on February 22, 2000. On August 28, 2000, Bank of America filed a complaint in interpleader pursuant to Rule 22 of the Federal Rules of Civil Procedure to resolve a dispute between the tribal factions as to who had authority to use a bank account opened in the name of "Winnemucca Indian Colony." Years of protracted litigation ensued in tribal and federal courts. Eventually, through participation in the Ninth Circuit's mediation process, on August 1, 2002, the parties stipulated to the appointment of a special appellate panel to hear argument and to issue a binding, non-appealable decision. The special appellate panel consisted of a panel of judges from the Sioux Nation (the "Minnesota Panel").

*** The Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

The Minnesota Panel issued its decision on August 16, 2002 (the "Minnesota Panel Order"). The Minnesota Panel found that the valid tribal council included the following people: Sharon Wasson, Thomas Wasson, William Bills, Elverine Castro, and Thomas Magiera until his death. As such, the panel stated that "all subsequent activities of the Bills Council are found to be unconstitutional and invalid." The Wasson Group moved for summary judgment based on the Minnesota Panel Order on August 30, 2002.

The district court denied the Wasson Group's motion without prejudice and afforded the Bills Group almost five years to further exhaust tribal remedies. During that time, the Inter-Tribal Court of Appeals issued several orders, which are not in the record in full before the district court or on appeal, addressing the issues in this case. However, on May 17, 2007, the Inter-Tribal Court of Appeals, sua sponte, issued an order dismissing the case stating that it had no appellate jurisdiction. The Wasson group renewed its motion for summary judgment based on the Minnesota Panel Order. Concluding that the parties had exhausted their tribal remedies and that the decision of the Minnesota Panel was binding and non-appealable, the district court granted the

Wasson Group's motion for summary judgment and denied the Bills Group's cross motion. This timely appeal followed.[1]

This court reviews a district court's grant of summary judgment de novo. Brodheim v. Cry, 584 F.3d 1262, 1267 (9th Cir. 2009). Generally, the rule of tribal exhaustion requires that federal courts give precedence to tribal courts to determine in the first instance the extent of their own jurisdiction to hear a particular case. See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987); Nat'l Farmers Union Ins. Co. v. Crow, 471 U.S. 845, 856–57 (1985). Federal courts must enforce tribal court decisions under principles of comity, unless "the tribal court either lacked jurisdiction or denied the losing party due process of law." AT&T Corp. v. Coeur D'Alene Tribe, 295 F.3d 899, 904 (9th Cir. 2002). A judge may dismiss a case sua sponte for lack of jurisdiction, but that power is subject to the demands of due process. Cal. Diversified Promotions, Inc. v. Musick, 505 F.2d 278, 280 (9th Cir. 1974). In reviewing a decision to dismiss for lack of jurisdiction sua sponte, the reviewing court must consider, "all of the circumstances . . . in determining whether the absence of notice

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[1] This court asked the parties to brief whether this appeal is timely under Rule 6(a) of the Federal Rules of Civil Procedure. After careful consideration, we conclude that under the version of Rule 6(a)(2) that was in effect at the time that the Bills Group filed its Rule 59(e) motion, the appeal is timely, and, as such, we have jurisdiction to consider it on the merits. See FED. R. CIV. P. 6(a)(2) (effective until Dec.1, 2009) (West 2009).

as to the possibility of dismissal or the failure to hold an adversary hearing renders the dismissal void." Id. (internal quotation marks and citation omitted).

We conclude that the parties exhausted their tribal remedies. The Inter-Tribal Court of Appeals determined that it did not have jurisdiction. Under the circumstances of this case, the parties have been afforded more than due process in both tribal and federal court. And, in any event, the Bills Group waived its due process argument by failing to raise it properly before the district court or offer any excuse for such failure. See Rains v. Flinn (In re Rains), 428 F.3d 893, 902 (9th Cir. 2005). Thus, we recognize the Inter-Tribal Court of Appeals's dismissal based on principles of comity. See Coeur D'Alene Tribe, 295 F.3d at 904.

Further, we agree with the district court to the extent that it recognized the Minnesota Panel Order on principles of comity; however, we do so on slightly different grounds. See Ramirez v. Castro, 365 F.3d 755, 762 (9th Cir. 2004). First, the Wasson Group submitted credible evidence that both parties and the Minnesota Panel considered the Minnesota Panel Order binding and non-appealable. The Bills Group provided no evidence to the contrary. See Rivera v. Nat'l R.R. Passenger Corp., 331 F.3d 1074, 1078 (9th Cir. 2003). Further, the decision rendered by Tribal Judge Swanson that the Bills Group urges this court to enforce is not entitled to recognition as it "is inconsistent with the parties' contractual choice of forum . . . ",

namely the Minnesota Panel. See Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997). Thus, we affirm the district court's judgment recognizing the Minnesota Panel Order.

Finally, as a matter of principle, counsel are reminded that this court has rules that are to be followed. If something is to be relied upon by this court, it must be entered into the record of the trial court and reproduced in the Excerpts of Record as required by 9th Circuit Rule 30-1.3. See 9TH CIR. R. 30-1.3. Rule 28 of the Federal Rules of Appellate Procedure requires parties to support factual allegations with appropriate references to the record. See FED. R. CIV. P. 28. In egregious cases, we have summarily affirmed the trial court's judgment and dismissed the appeal when parties have acted in complete disregard of these rules. See, e.g., Cmty. Commerce Bank v. O'Brien (In re O'Brien), 312 F.3d 1135, 1136 (9th Cir. 2002); N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 (9th Cir. 1997).

Here, the Bills Group did not include an Excerpts of Record with their opening brief. The Bills Group's opening brief lacks appropriate record citations. Had the Wasson Group not filed a Supplemental Excerpts of Record, we would have to scour the district court record for the decisions appealed from and other pertinent portions of the record. Even in the district court record, many of the exhibits, including vital tribal court rulings, were submitted only in part. For example, the Bills Group only

submitted three selective pages of the Inter-Tribal Court of Appeals's March 19, 2004 decision on the jurisdiction of the Minnesota Panel, and no party provided that decision in its excerpts of record to this court. Due to the complete disrespect for the rules of this court and the rule of law, we seriously considered summarily dismissing this appeal. However, on the unique facts of this case, we concluded that the clients should not be punished for the failings of their attorneys.

To the extent that the Bills Group made arguments not directly addressed in this opinion, having been fully considered by this court, we conclude that they completely lack merit.

AFFIRMED.

EXHIBIT "4"

EXHIBIT "4"

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

April 18, 2011

Clerk
United States Court of Appeals for the Ninth
Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Winnemucca Colony Council
v. Sharon Wasson, et al.
No. 10-1011
(Your No. 08-16146)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

EXHIBIT "5"

EXHIBIT "5"

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

SHARON WASSON, THOMAS WASSON, WILLIAM BILLS, JUDY ROJO, AND ELVERINE CASTRO, Appellants,	)	Order Vacating Decision and Remanding
v.	)	
	)	Docket No. IBIA 10-050
ACTING WESTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	December 17, 2010

Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo, and Elverine Castro, in their capacity as Members of the Winnemucca Indian Colony Council (Colony Council or Council) and as individuals (Appellants), appealed to the Board of Indian Appeals (Board) from a December 8, 2009, decision (Decision) by the Acting Western Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director's decision was issued after the Board instructed the Regional Director to issue a decision in response to Appellants' request for recognition as the Colony Council, the elected governing officials of the Winnemucca Indian Colony of Nevada (Tribe or Colony). Appellants' request for recognition was made in connection with their allegation that Tribal lands were being occupied without the Tribe's permission and that BIA had an obligation to respond to the trespass. *See Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo, and Elverine Castro v. Western Regional Director*, 50 IBIA 342, 352 (2009) (*Wasson V*).

The Regional Director's decision, in response to the Board's order, consists in substance of a single paragraph stating two unexplained conclusions.[1] First, the Regional Director stated that "based on the information currently available, I hereby affirmatively do not recognize or acknowledge or certify or approve these individuals, identified in [Appellants'] February 26, 2007 request as the duly elected officers of the Winnemucca Indian Colony." Decision at 1. The Decision provides no reasoning for this conclusion and

[1] The Decision consists of a one-paragraph introduction, one paragraph announcing the Regional Director's conclusions, and three paragraphs providing appeal rights.

refers to no evidence or "currently available" information that was considered or evaluated in reaching this conclusion. Second, the Regional Director stated — also without explanation — that there was no source of authority under which BIA has an affirmative obligation to decide whether to recognize any individuals as the Tribe's leaders and that such action by BIA could be seen as an intrusion into tribal sovereignty. *See id.* The Decision does not mention Appellants' allegation of trespass on tribal lands.

We vacate the Decision and remand the matter for further proceedings because the Decision contains no reasoned analysis nor an identification or discussion of any evidence upon which the Regional Director relied or purported to rely in making his decision not to recognize Appellants as the Colony Council. It is not even clear whether, by stating that he "affirmatively" did not recognize Appellants as the Colony Council, the Regional Director intended to determine that Appellants had not demonstrated that *they* were entitled to be so recognized, or whether the Regional Director intended to determine only that he was not required to decide whether to recognize *any individuals* as the Tribe's leadership, and thus was "affirmatively" not recognizing Appellants in that context. What is clear is that the Regional Director did not comply with the Board's order to address Appellants' request for recognition in the context of their trespass allegation. The Board's prior order required, and Appellants were entitled to, a substantive decision explaining why the Regional Director was declining to recognize them as the Tribe's leaders or, in the alternative, explaining why a decision by BIA regarding tribal leadership was not required in order for BIA to respond to Appellants' allegations of trespass on tribal lands.

Background

The protracted history of the governance dispute within the Tribe, and BIA's obligation, or lack of an obligation, to make a decision about which individuals to recognize as the Tribe's leadership for government-to-government purposes, has been recounted in previous Board decisions and need not be repeated here. *See Wasson V*, 50 IBIA at 344-50; *Wasson v. Western Regional Director*, 42 IBIA 141, 141-152 (2006) (*Wasson IV*).[2] The Tribe has two competing factions, currently referred to as the "Wasson" faction, represented by Appellants, or possibly by their claimed successors in office, and the "Ayer" faction (formerly referred to as the "Bills group" and "Leyva group"). *See id.* at 142 n.3. For several years, BIA has not recognized either or any faction as constituting the Colony Council or as representing the Tribe for government-to-government purposes.

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[2] *See also Wasson v. Acting Western Regional Director*, 39 IBIA 174 (2003) (*Wasson III*); *Wasson v. Western Regional Director*, 38 IBIA 255 (2002) (*Wasson II*); and *Wasson v. Western Regional Director*, 38 IBIA 205 (2002) (*Wasson I*).

In *Wasson IV*, the Board affirmed a decision by the Regional Director not to recognize the Wasson faction as the Colony's Council. We did so because the appellants in that case failed to identify any federal purpose for which recognition of a Council was required. 42 IBIA at 154. In addition, the Board affirmed the Regional Director's conclusion in that case that the Wasson faction had not exhausted tribal remedies for determining the identity of the legitimate Council. *See id.* At the time *Wasson IV* was decided, the two factions were involved in several tribal processes for resolving the dispute over the Colony Council. In addition, both tribal factions had been joined in an interpleader action brought by the Bank of America, in which the court also recognized that several tribal processes on the issue were pending, including one in which the factions had stipulated to the appointment of a special appellate panel of tribal judges (the "Minnesota Panel") to issue a binding, non-appealable decision to resolve the dispute. *See id.* at 146, 154; *Bank of America, N.A. v. Bills* (*Bank of America I*), No. 3:00-cv-00450-BES-VPC, 2008 WL 682399, at *2 (D. Nev. Mar. 6, 2008).

In *Wasson V*, based on Appellants' allegation of trespass on tribal lands, the Board concluded that Appellants *had (*in contrast to *Wasson IV)* satisfied their burden to show that their request to be recognized was ripe for a decision by BIA on the merits. *Wasson V* was an appeal from inaction, *see* 25 C.F.R. § 2.8, and the Board specifically rejected the Regional Director's assertion that "he need not issue any decision because there is no need for Federal recognition of a tribal government for purposes of the government-to-government relationship." *Wasson V*, 50 IBIA at 352. In rejecting that assertion, the Board found that Appellants' allegation that tribal lands were being illegally occupied constituted a claim that was sufficient to refute the Regional Director's argument, in the context of a § 2.8 appeal, that he did not need to take any action or issue a decision addressing the merits of Appellants' request.

In *Wasson V*, the Board also noted developments in the *Bank of America* litigation, specifically the district court's decision. *See* 50 IBIA at 350. In its decision, the district court concluded that tribal remedies had been exhausted. Applying the rule that federal courts must recognize and enforce tribal court judgments under principles of comity, the court found that the decision of the Minnesota Panel was controlling. *Bank of America I*, 2008 WL 682399, at *5-6. The Minnesota Panel had concluded in 2002 that the members of the Colony Council consisted of Sharon Wasson, Thomas Wasson, William Bills, and Elverine Castro, plus one vacancy, for which the Panel had ordered the Council to appoint a successor to fill the unexpired term. *See id.* at *2; *Wasson IV*, 42 IBIA at 146. At the time *Wasson V* was issued, the Ayer (then "Bills") faction had appealed the district court's decision and the Regional Director argued that the court's decision was not determinative.

See Wasson V, 50 IBIA at 350. Because *Wasson V* was an appeal from inaction, which does not encompass the underlying merits, the Board only noted, but did not further discuss, the *Bank of America I* decision.[3]

As noted earlier, in response to the Board's directive to issue a decision on the merits addressing Appellants' request for recognition, the Regional Director issued, in substance, a single conclusory paragraph, stating that he did not recognize Appellants "based on the information currently available" and that he was not required to recognize any tribal leaders for the Colony. When Appellants filed this appeal, the Board ordered the Regional Director to show cause why the Board should not summarily vacate the Decision and remand the matter. Order For Regional Director to Show Cause (OSC), Mar. 18, 2010. In the OSC, the Board noted that the Decision did not "provide any fact-based analysis to support a decision not to recognize either Appellants[] or anyone else as constituting the political leadership of the Tribe, whether on an interim basis or otherwise, for government-to-government purposes." OSC at 3. The Board also noted that "it would seem that an allegation of trespass on tribal lands by a group claiming to be the Tribe's leadership might well require a decision by BIA whether or not it recognizes the group as the Tribe's leadership, for government-to-government, or trustee-to-beneficiary, purposes." *Id.* n.3.

Responding to the Board's OSC, and defending his one-paragraph decision against summary vacatur, the Regional Director filed a 20-page brief. In his response, the Regional Director seeks affirmance of his decision, arguing that (1) the Decision complied with the Board's instructions in *Wasson V* because the Board did not direct BIA how to decide the matter, but only ordered him to decide whether to accept or reject Appellants' claim that they constitute the Colony Council, and the Decision is supported by substantial evidence; (2) because Appellants do not identify the identity of the alleged trespassers or the location of the alleged trespass, BIA is unable to determine whether any acts of trespass or improper occupation of Colony lands is occurring; (3) BIA may not get involved in a tribal leadership dispute unless there is no tribal forum that can resolve the dispute; and (4) an evaluation of Appellants' trespass allegations might require BIA to decide who is or is not a member of the Colony, which would impermissibly intrude on internal tribal affairs.

None of the Regional Director's arguments convince us that his Decision should be sustained. We address each argument in turn.

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[3] Recently, the U.S. Court of Appeals for the Ninth Circuit affirmed *Bank of America I*. *See Bank of America N.A. v. Swanson*, No. 08-16146, 2010 WL 4025788 (9th Cir. Oct. 14, 2010) (*Bank of America II*).

First, while we agree that *Wasson V* did not direct BIA how to decide the issue of whether or not to recognize Appellants as the Colony Council, it does not follow that a Decision summarily rejecting Appellants' request, with no explanation, analysis, or discussion of the evidence, either complied with the Board's directive or can be sustained. The Regional Director fails to identify, either in his Decision or in his response to the OSC, the evidence or law upon which he purportedly relied in refusing to recognize Appellants, on an interim basis or otherwise, as the Colony Council, in light of the trespass allegations. Although there is evidence in the record to support a determination that Elverine Castro cannot be considered a member of the Colony Council — she died in 2007 — we are unable to determine what evidence the Regional Director relies upon as "substantial evidence" to support his decision with respect to the remaining Appellants. In some cases, evidence in the administrative record that is relevant to reasoning in a BIA decision may be identified on appeal; a decision need not exhaustively identify in detail all of the evidence relied upon. In the present case, however, the lack of reasoning in the Decision largely precludes us from determining what evidence might provide support for the Decision. Moreover, because the Regional Director issued the Decision without providing the parties with any opportunity to provide more current information, or supplemental arguments — despite the fact that Appellants' request for action dated back to 2007 — the Regional Director's assertion that his decision is based on information "currently available" is questionable.[4]

Second, we reject the Regional Director's argument that Appellants' failure to identify the alleged trespassers and the location of the alleged trespass provides us with a basis to uphold his Decision. As a threshold matter, we note that the Decision does not even address the trespass issue, and thus there is no evidence that the Regional Director actually considered a failure by Appellants to identify the alleged trespassers or to identify the location of the alleged trespass as relevant. If he did, he did not provide Appellants with an opportunity to submit additional information. Moreover, even on appeal, the Regional

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[4] The original administrative record submitted to the Board by the Regional Director, and certified by him as containing all documents utilized in the Decision, consisted of three documents: (1) a copy of the Board's January 28, 2010, pre-docketing notice; (2) a copy of the Regional Director's December 8, 2009, decision and cover sheet for faxing the decision to Appellants' counsel; and (3) a copy of Appellant's November 16, 2007, notice of appeal for their previous appeal to the Board. Only in response to the Board's OSC did the Regional Director submit documents from the record developed in the previous proceedings, as required by 43 C.F.R. § 4.335(a). Thus, it is far from clear whether the Regional Director even reviewed the previous record of proceedings before issuing the Decision.

Director has not explained why BIA's duty to investigate alleged trespass on Indian trust lands is dependent upon the complaining party providing the identity of the alleged trespassers.

Possession of Indian trust land may only occur pursuant to lawful authority. *See, e.g.*, 25 C.F.R. § 162.104 (When is a lease needed to authorize possession of Indian Land?). If a lease is required, and possession is taken without a lease by a party other than an Indian landowner, BIA "will treat the unauthorized use as a trespass." *Id.* § 162.106(a). Even if a lease is not required, there must be some other basis for finding lawful occupancy of Indian trust land. The Regional Director argues that Appellants' allegations of occupancy of tribal lands by "non-Indians" and "non-members" are overly vague and that Appellants failed to identify with specificity which lands they were referring to. That may have been grounds for the Regional Director to have demanded that Appellants provide additional information, but it does not, without more, provide us with a basis to affirm a decision that ignored the trespass allegation altogether — particularly in light of our directive in *Wasson V* and BIA's trusteeship of tribal trust lands.

Third, while the Regional Director devotes a substantial portion of his argument to a discussion of cases in which courts and the Board have counseled against BIA unnecessarily intruding in internal tribal government disputes, he fails to explain how those principles are applicable in the specific factual context presented by this case. We have no quarrel with the Regional Director's general statements, in the abstract, and we agree, as we held in *Wasson IV*, that recognition of tribal government officials is not required if it is not needed for government-to-government purposes. *See also George v. Eastern Regional Director*, 49 IBIA 164, 186-87 (2009), and cases cited therein. But the allegation of trespass on tribal lands in the present case would appear to require at least some inquiry and decision by BIA, which may or may not require a determination that the group making the allegation is the Tribe's Council. Moreover, with respect to principles of deference to tribal processes, the Regional Director fails to address the *Bank of America I* decision, which the Board noted in *Wasson V* as potentially relevant and which has now been affirmed by the court of appeals.

Fourth, the Regional Director attempts to defend his Decision by arguing that an investigation of Appellants' trespass allegation might entangle BIA in an internal membership dispute, and impermissibly require BIA to decide whether certain individuals are members of the Tribe. But the Regional Director cites no federal or tribal law that grants general authority, or specific permission, for individual members of the Tribe to take possession of the Tribe's lands. Thus, the Regional Director has not explained how a member-nonmember distinction is even legally relevant to Appellants' trespass allegation.

And even if it is relevant, it does not necessarily follow that BIA is automatically precluded, as the Regional Director suggests, from making a decision to address Appellants' trespass allegation.[5]

In summary, Appellants, purporting to constitute the Colony Council, alleged that trespass was occurring on tribal lands. Faced with that allegation, the Regional Director has not explained, either in his Decision or on appeal, why BIA was not required to decide, *and explain the basis for a decision*, (1) that Appellants do not constitute the Colony Council and do not represent the Tribe, and thus regardless of whether or how BIA acts upon the allegations, BIA owes no duty to Appellants;[6] (2) that Appellants do constitute the Colony Council and do represent the Tribe; (3) that, whether or not Appellants constitute the Colony Council and represent the Tribe, there is no trespass occurring because the individuals occupying the Tribe's lands are doing so under the authority of federal or tribal law unrelated to permissive use that is dependent upon deciding who constitutes the lawful Colony Council; or (4) that some other response by BIA to the trespass allegation is appropriate.

As noted above, it may be possible for the Regional Director to address Appellants' trespass allegation without having to decide whether Appellants' faction should be considered, on an interim basis or otherwise, as representing the Tribe as landowner.[7] But

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[5] If a trespass determination is dependent upon a finding of an individual's tribal membership status, and if that membership status is disputed, BIA may well have a certain degree of discretion in deciding whether to make a BIA determination of the individual's status for purposes of protecting trust property against trespass, or deciding whether to take enforcement action pending the Tribe's resolution of a membership issue.

[6] A determination of whether Appellants constitute the Colony Council could also be relevant, for example, if certain use or occupancy is dependent upon permission from the Colony Council.

[7] The caption of Appellants' Notice of Appeal identifies Appellants as "Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo and Elverine Castro, in their capacity as Members of the Winnemucca Indian Colony Council and as individuals," but the appeal itself purports to request relief on behalf of the Tribe, *see* Notice of Appeal at 10, and it identifies a different composition of the Colony Council elsewhere in the Notice of Appeal, *see id.* at 9. Moreover, Appellants acknowledge that Elverine Castro was no longer living when they filed this appeal with the Board. Under the circumstances, we leave it for the

(continued...)

if the Regional Director is required to make a recognition decision for purposes of the trustee-beneficiary relationship or for government-to-government purposes, he must address *Bank of America II* decision, as well as any recent elections purportedly held by the Tribe.[8] Considering the time that has elapsed since Appellants made their request for action to the Regional Director, it not sufficient for the Regional Director to summarily decide the matter, on remand, without affording Appellants and interested parties an opportunity to identify the current basis for their claims relating to the trespass allegation or to the tribal leadership issue.

Conclusion

The Regional Director's Decision failed to comply with the Board's directive in *Wasson V*, and contains no reasoned analysis nor an identification or discussion of any evidence upon which the Regional Director relied or purported to rely in making his decision not to recognize Appellants as the Colony Council, in the context of Appellants' allegation that trespass was occurring on tribal lands. Therefore, we vacate the Decision and remand the matter. On remand, the Regional Director shall afford Appellants an

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[7](...continued)
remand proceedings for Appellants, or their purported successors in office, to clarify in whose names and in what capacities they request action by BIA, and we leave it for the Regional Director to address such issues, as appropriate, in a decision.

[8] On December 10, 2010, the Board received a copy of a memorandum from the Western Nevada Agency Superintendent to the Regional Director, informing the Regional Director of the election held by Appellants' faction, and also noting that the pendency of Appellants' appeal to the Board precluded BIA from taking action to decide whether or not to recognize that election. In addition, on December 6, 2010, the Board received a brief from the Ayer faction. The Ayer faction's brief was submitted without leave from the Board and outside the time period allowed for any briefing. For that reason, the Board declines to consider the Ayer faction's brief, except for the limited purposes of noting that each faction apparently recently has held competing elections. The Ayer faction's brief does not address *Bank of America II*, which presumably is binding on both factions.

The present appeal is limited to reviewing the Regional Director's Decision that was made in the context of Appellants' trespass allegation. It is unclear whether there are separate matters that would now require BIA to make a tribal government recognition decision, either for trustee-beneficiary or government-to-government purposes, on an interim basis or otherwise. Although our order of vacatur and remand pertains to the Decision, the return of jurisdiction to BIA allows it to consider and decide other issues, as appropriate.

opportunity to submit supplemental briefing and evidence relevant to Appellants' trespass allegation, and shall afford the Ayer faction (and any other interested parties) an opportunity to respond.[9]

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the Regional Director's December 8, 2009, Decision and remands the matter for further proceedings consistent with this order.

I concur:

Steven K. Linscheid
Chief Administrative Judge

Debora G. Luther
Administrative Judge

[9] In light of the passage of time since Appellants made the trespass allegation, it is unclear whether this issue may be moot. We leave that issue for BIA to determine in the first instance, on remand, after affording all interested parties an opportunity for briefing.

Sharon Wasson, Thomas Wasson,
William Bills, Judy Rojo, and Elverine Castro
v. Acting Western Regional Director, BIA
Docket No. IBIA 10-050
Order Vacating Decision and Remanding
Issued December 17, 2010
52 IBIA 353

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401 West Washington St., SPC 44
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EXHIBIT “6”

EXHIBIT “6”

Position of Thomas R. Wasson, Chairman Winnemucca Indian Colony
A federally recognized tribe

This submission coincides with the affidavits of Roger Gifford and Carl Daniels.

Recent history of Winnemucca Indian Colony (wic) the last quarter of 2010, The Supreme Court of The United States, issued a decision upholding the 9Th circuit decision in our favor. The Wasson group.

Throughout this year, I have gone to BIA regional office in Carson City at least three times, we have left phone calls, in both offices (Carson BIA and Phoenix BIA).

The purpose of these contacts, is to have the BIA, uphold the decision of the Supreme Court. For us to restore peace, on colony lands, in accord with the local jurisdictions.

In the early beginning, year 2000. The BIA would state, once this court makes a decision, we will recognize, and that was done, we "wasson faction", were found to be in the right. The BIA did not coincide with that decision so they did not recognize us. After that it was this court and that court, and always in our favor. Now we are at Supreme Court level, Supposedly The Highest Court in the land. And still the BIA does not recognize the Wasson group. This political gesture states "we are greater than supreme court.

The problem lies here. The U.S. Judicial Branch has made a decision, that we are the council. When we indicate that we wish to execute our tribal constitutional rights, the BIA officers, indicate that we will be arrested for being criminals. Please note, that we were arrested in 2002, that court found the officers guilty of wrongful arrest.

It is my opinion, that the BIA, that has anything to do with Winnemucca Indian Colony, be removed completely from any decision or recognition factor, bearing to the tribe. The BIA has had a bad reputation of being trustees to federally recognized indians. Especially us.

August 27, 11

Thomas R. Wasson, Chairman WIC date

img035.jpg

I, Roger Gifford declare the following to be true and correct, on or about May 20th several police came to the Winnemucca Colony located at 1985 Hanson Street.

Their concern was our presence. They came to see if we were vandalizing the property, after discussion they indicated they knew they had no authority to take action on tribal land anyhow.

Two hours later a BIA agent named McMillan came and told us we were trespassing and asked us who authorized our presence, I told him that Tribal Chairman Wasson, had directed us to Clean and Asses the condition of the Colonies Smoke shop Site.

He took My identification and proceeded to his vehicle, I told him that I was going to contact Chairman Wasson and have him Speak directly to him regarding the situation regarding authorization.

I gave agent McMillan my phone, he Spoke with the Chairman and concluded by waiting for the chairman's arrival and discussion ensued about the recent status of control conferred by the district court and the Supremes refusal to hear the case.

There were no further indications that there was not authorization by Chairman Wasson regarding our presence. We remained for several more days, and completed the assessment.

On a Sunday evening I believe, July 31st at 10:03 PM another BIA agent (Hermes) approached us in the Colonies building lower level stating that "he had received a call of vandals taking copper pipe and having a torch on the site. I explained that the improvements would indicate otherwise. I asked him if he had read the April, 2011 decision from the Federal district court, he said he did not care because; he did not receive orders from the district court, His supervisor directs him, he was not told there was a change.

He stated the no person has authority to do anything on the site, the tribes had not voted to elect representatives and, even if "their" (the other faction) smoke-shop were to burn down tonight it could not be rebuilt because no-one is in charge.

He could force us to leave however he would not, I told him I would Call the Chairman, he said "there is no Chairman" at that time, Chairman Wasson called me, and I let the agent speak to Chairman Wasson.

After the call, Agent Hermes left, I went to sleep, awoke the next morning and vacated as ordered.

I Roger Gifford, Declare under penalties of perjury, the statements are true and correct.

Roger J. Gifford

8/29/2011

img036.jpg

I, Carl P. Daniels, declare the following statements to be true and correct:

I was authorized Tom Wasson,(representative of Winnemucca Indian Colony) Along with my friend Roger Gifford in the spring of 2011. We worked on the tribe's land located at 1985 Hanson street Winnemucca, Nevada. The building is unfinished. We started cleanup. A fire was started to burn some weeds. Roger is a volunteer firefighter, there were water, and shovels. I had no concern. An officer showed up and started talking to Roger. I went back to work cleaning up.

The first week in August we finished work one night. When it was my turn to take a shower. I went upstairs, when an officer came out of the darkness and wanted to know what I was doing. He asked for my name and left. After my shower, I went downstairs to prepare for bed. The time around 10:00/10:30. That's when a BIA officer walked in on us in the building without announcing himself. He took our information, and then told us that we were not supposed to be there. Further stating the Bureau of Indian Affairs did not recognize any tribal authority on the property we were working on. He stated that we would be allowed to stay until the next morning. We left the next morning.

I Carl P Daniels, Declare under penalties of perjury, the statements are true and correct.

Carl P Daniels
8/29/2011

EXHIBIT "7"

EXHIBIT "7"

HAGER & HEARNE

Attorneys at Law

Robert R. Hager, Esq.
Treva J. Hearne, Esq.*

245 E. Liberty Street, Suite 110
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(775) 329-5800-Telephone
(775) 329-5819-Facsimile

January 4, 2011

Mr. Dan Bowen, Regional Director
United States Department of the Interior
Bureau of Indian Affairs
Western Regional office
2600North Central Avenue
Phoenix, Arizona 85004

RE: RECOGNITION OF WINNEMUCCA INDIAN COLONY TRIBAL COUNCIL

Dear Mr. Bowen:

My clients have asked me to contact you now that the IBIA has rendered its opinion and directed that a consideration of recognition of the Council of the Winnemucca Indian Colony commence. As stated to you before, my clients believe that your office is prejudiced, misinformed and unable to make an objective and fair decision.

Your letter of December 3, 2010, illustrates this inherent prejudice and lack of objective analysis of the decision before you:

1. "Since 2000 WIC has struggled with an intra-tribal dispute. . ." (Letter, page 1) This is not an intra tribal dispute because the persons occupying the Colony lands have never been members of the Winnemucca Indian Colony when the Council was recognized, not ever. Only one person applied for membership, Charlene Dressler (aka Miller), who was denied for lack of information and she did not appeal her denial.

2. "WIC's own tribal courts and tribal appeals courts have found that both factions have taken actions that are inconsistent with its Constitution and Bylaws." By this statement you are equating a few technical mistakes which my clients cured by reinstating Kyle Swanson and William Bills to the occupation of the Colony lands by non members and non Indians taking the trust lands and the only money generating Tribal asset and occupying the lands to engage in unlawful activity, i.e. selling illegal drugs. This doesn't include the potential murder of Glenn Wasson, which, of course, the federal government has still not resolved. For you to make the

sweeping statement that both sides have made mistakes is inconceivable. William Bills, while recognized by the Western Nevada Agency, actually cut off the utilities to the Colony and excluded the other Council members from the Colony lands. Such a statement that any of these acts are equivalent reveals your prejudice and, my clients believe, your attempt to cover up the mistakes and/or corruption of the Western Nevada Agency.

3. "Both factions have resisted resolution of the WIC's intra-tribal disputes for the last ten years by filing at least 18 separate actions or appeals before the tribal court, the Inter-Tribal Court of Appeals, a stipulated tribal appeals court, the federal district court of Nevada, the Ninth Circuit Court of Appeals, and the Interior Board of Indian Appeals." From the beginning BIA has insisted that my clients resolve the issues by negotiating with persons who they believe are involved in the murder of Glenn Wasson and who now occupy their lands unlawfully. Is that what you are suggesting should have been done? If so, then this, again, reflects the inherent prejudice of your position and that you should not be making this decision.

Or, is your suggestion that my clients should have just taken all this into their own hands and become involved in violence just as the Ambler group has? Senator Reid's local office in Reno recommended that they wait and see who the last group standing is before they become involved. Is this how we narrow the Native American population to manageable numbers?

Or are you stating that federal courts making determinations in these matters affecting Indian Tribes is just an unnecessary exercise? My clients believe that you have implied that seeking answers to this legal problem should be punished.

4. "We continue to maintain, however, that such a resolution will not occur by means of an order or decision from any tribunal, tribal, state, or Federal, and that attempts at achieving a judicial resolution of this difficult political issue are futile. . ." This shows that the BIA has no intention of respecting the judgment of the federal courts that have been given all the information and have considered it and made findings and a ruling. This demonstrates the inherent prejudice of your agency and your lack of respect for the judiciary. As we have stated on many occasions, simply closing down the smoke shop on the 20 acres will discourage further occupation of the 20 acres. My clients have no intention of making anyone leave the 20 acres if they actually live there.

For the reasons stated above and because of the unlawful and continual refusal of the Western Regional Office to recognize the government of a federally recognized Tribe, we again ask that no one from your agency or the Western Nevada Agency participate in the decision, but that an objective, knowledgeable, reasonable panel of three members of another Tribe or agency that has absolutely no relationship to your agency be appointed to make this decision. If you have any questions, please feel free to contact me directly at 775-329-5800.

VERY TRULY YOURS,

TREVA J. HEARNE

Enc. Letter from BIA Regional Director, December 3, 2010.

cc: Tracie Stevens, Indian Affairs, Office of the Assistant Secretary (202-208-5320)
Katherine L. Zebell, Deputy Director Office of Tribal Affairs (202-514-9078)
E. Sequoyah Simermeyer, Indian Affairs UD Office of the Assistant Secretary (202-208-5320)
Christopher B. Chaney, US Department of Justice (202-514-9078)
Wendy L. Helgemo, Esq., Committee on Indian Affairs (202-228-2589)
John Harte, Committee on Indian Affairs (202-228-2589)
Sonja D. Overholser, Esq., Office of the Solicitor (602-364-7885)
Senator Harry Reid's Office, (202-224-7327); (775-883-1980); (702-388-5030)
Mr. Larry Echohawk, Director, Bureau of Indian Affairs *202-501-1516*

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WESTERN REGIONAL OFFICE
2600 North Central Avenue
Phoenix, Arizona 85004

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:
Tribal Government Services

DEC 03 2010

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Ms. Treva J. Hearne
Hager & Hearne
245 E. Liberty Street, Suite 110
Reno, Nevada 89501

Dear Ms. Hearne:

We are in receipt of your letters dated October 15 and November 10, 2010, addressed to Mr. Larry Echohawk, Assistant Secretary-Indian Affairs. This office has been asked to respond directly to you. You have requested that the Bureau of Indian Affairs recognize your clients as the Business Council of the Winnemucca Indian Colony ("WIC"). You also provided a copy of the Ninth Circuit's *Memorandum*, dated October 14, 2010, in the matter of *Bank of America, N.A., v. Swanson, et. al,* No. 08-16146, (Ninth Circuit Court of Appeals), (hereinafter, "Ninth Circuit's Memorandum").

We are aware that since 2000, the WIC has struggled with an intra-tribal dispute about which individuals constitute the lawful tribal council. *Wasson, et. al. v Western Regional Director, Bureau of Indian Affairs ("Wasson IV")*, 42 IBIA 141, 142 (IBIA 1/24/06); *Wasson, et. al. v. Western Regional* Director, *Bureau of Indian Affairs ("Wasson V")*, 50 IBIA 342, 344-345 (IBIA 11/19/09). *See also, Bank of America, N.A., v. Bills, et. al.*, 3:00 CV-00450-BES-VPC, Order, pg. 2, lines 4-15 and pg. 3, lines 24-25 (D Nev. 3/6/2008); Ninth Circuit's Memorandum; *Wasson., et. al., v. Bills*, CV1003, *Opinion*, pp. 2, 4-5, 6 (Appeals Court of the Winnemucca Indian Colony in Nevada, before Scheffler, Chief Judge, Reding, Associate Judge, and Treuer, Associate Judge, known as the "Minnesota Panel", 8/16/02). We are also aware that WIC struggles with an intra-tribal dispute about tribal membership. *Wasson IV*, 42 IBIA at 145 (n. 6) (IBIA 1/24/06). *And see, Wasson, et. al., v. Bills*, CV1003, *Opinion*, pp. 12-13, (Appeals Court of the Winnemucca Indian Colony in Nevada, before the Minnesota Panel, 8/16/02); *"Notice of Appeal"*, dated November 16, 2007, pages 3 and 8 in *Wasson V*, IBIA 08-28-A.

WIC's own tribal courts and tribal appeals courts have found that both factions have taken actions that are inconsistent with its Constitution and Bylaws. For example, the Minnesota Panel found that the "Wasson Council" improperly removed Judge Swanson from the tribal court (pg. 14); improperly attempted to remove William Bills from the tribal council (pg. 10, 16); later improperly attempted to "disenroll" or "banish" William Bills from tribal membership (pg. 11, 16); and found the "Wasson Council's" election of October 28, 2000 defective (pg. 8, 11). The same Panel found that William Bills improperly appointed an Interim Colony Council (pg. 12), and that all subsequent activities of the "Bills Council" were unconstitutional and invalid, including the "Bills Council's" election in April, 2001 (pg. 16). *Wasson, et. al., v. Bills*, CV1003, Opinion, pp. 12-13, (Appeals Court of the Winnemucca Indian Colony in Nevada, before the Minnesota

Panel, 8/16/02). Both factions have resisted resolution of the WIC's intra-tribal disputes for the last ten years by filing at least 18 separate actions or appeals before the tribal court, the Inter-Tribal Court of Appeals ("ITCN"), a stipulated tribal appeals court, the federal district court of Nevada, the Ninth Circuit Court of Appeals, and the Interior Board of Indian Appeals ("Board"). Much of this litigation is described in the Board's summary of litigation in *Wasson IV,* 42 IBIA 143 through 152.

As you know, Federal statute specifies that the Federal government publish annually a list of Federally acknowledged Indian Tribes, 25 U.S.C. § 479a, *et.seq.*, and 25 C.F.R. Part 83 provides regulatory procedures for petitioning for acknowledgment "...that certain American Indian groups exist as tribes. 25 C.F.R. §83.2. Federal statute also specifies how the Federal government may conduct a federal election in which an Indian Tribe may adopt a Constitution or amendments to its Constitution, 25 U.S.C. §476, *et. seq.*. There is no Federal statute or regulation that requires the Federal government to "recognize" a particular tribal council. In fact, citing substantial federal court and administrative precedents, the Board has stated that the Bureau of Indian Affairs ("BIA") should not become involved in intra-tribal disputes.

> As an initial matter, it is well established that tribal governance disputes are to be resolved by tribal procedures, not by the federal government. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978); Fisher v. District Court, 424 U.S. 382, 386-89 (1976); Smith v. Babbitt, 100 F.3d 556, 559 (8th Cir. 1996); Wheeler v. US. Dept. of the Interior, Board of Indian Affairs, 811 F.2d 549 (10th Cir. 1987). Federal interference in internal tribal affairs would interfere with powers of self-governance conferred on tribes by the federal government, would subject disputes arising on reservations among reservation Indians to a forum other than the one they established for themselves, and would risk conflicting adjudications and diminish the tribal courts' authority. See, Fisher, 424 U.S. at 387-88. Thus, the Board has ruled that neither BIA nor the Board should generally decide disputes; that are intra-tribal in nature. See, e.g., Cahto Tribe of the Laytonville Rancheria v. Pacific Regional Director, 38 IBIA 244, 249 (2002); Carrigan v. Acting Eastern Oklahoma Area Director, 36 IBIA 87, 88 (2001); John v. Acting Eastern Area Director, 29 IBIA 275, 277-78 (1996).

Wasson IV, 42 IBIA at 157. This is especially true when one faction in an intra-tribal leadership dispute seeks "recognition" from the federal government without a specific purpose for the conduct of any specific BIA function or program involving the distribution of appropriated Federal funds. "Absent the identification of any particular right to or need for the establishment of a government-to-government relationship with a tribal council, BIA has no duty to act on such a request." *Wasson IV,* 42 IBIA at 153-154. Case law dictates that BIA is only required to temporarily recognize some tribal entity with which it will establish a government-to-government relationship in emergency situations, as an interim measure, while tribal processes are underway. *Wasson IV,* 42 IBIA at 158. For these reasons, the Board has previously affirmed the Western Regional Director's decision declining to recognize your clients as the WIC's council. "As we have already concluded, however, Appellants' March 28 and April 13, 2005 requests for recognition provided no reason for BIA to address the question of the Colony's proper governing body. Appellants thus did not identify any federal responsibility to the tribe that would require the establishment of an interim government-to-government relationship." *Wasson IV,* 42 IBIA at 158. We provided additional explanation and authorities consistent with these precedents in our recent *Response to Order for Regional Director to Show Cause,*

submitted to the Board on or about April 9, 2010 in *Wasson, et. al., v. Western Regional Director ("Wasson VI")*, IBIA 10-050, which we incorporate herein.

Upon a new appeal dated November 16, 2007, the Board ordered the Western Regional Director to "...issue a decision either accepting or rejecting, on the available record, Appellants' claim that they constitute the Council and are entitled to be recognized as such." *Wasson V*, 50 IBIA at 352. The Western Regional Director complied with this Order, and on December 8, 2009, issued a decision in which he "...affirmatively do[es] not recognize or acknowledge or certify or approve these individuals, identified in your February 26, 2007 request, as the duly elected officers of the Winnemucca Indian Colony." You appealed this decision to the Board on or about January 14, 2010 *Wasson VI*, and that administrative appeal currently remains pending before the Board. In response to your recent submittal of the Ninth Circuit Memorandum, the Board wrote: "With respect to Appellant's supplemental submission, the Board does not presently believe that any additional briefing on the Ninth Circuit's decision is necessary, but will advise the parties if it is later determined that further briefing on the decision is warranted." *Wasson VI*, *"Order Concerning Supplemental Submission and Status Order"*, October 21, 2010.

The Ninth Circuit Memorandum affirmed the District Court's summary judgment awarding approximately $400,000.00 held in a Bank of America account to the "Wasson Group." The District Court issued its summary judgment in two parts. In the first part, the *Order* dated 3/6/08, the District Court framed the issue before it as a choice for giving full force and effect, under principles of comity to one of "...two separate judgments arising from the tribal court adjudication." pp. 7-8. Given this choice, the District Court decided to give full force and effect to the decision of the Minnesota Panel for purposes of awarding the funds of the Bank of America account. *Order*, pg. 9. In the second part of the District Court's ruling, the Order dated 4/29/2008, the District Court clarified its prior Order by stating it was enforcing a tribal court decision under principles of comity, but the Court "did not decide a government for the Winnemucca Indian Colony." pg. 3, lines 20-26. Since the Ninth Circuit Memorandum affirmed the District Court's disposition, it, likewise "...did not decide a government for the Winnemucca Indian Colony."

Your October 15 letter does not indicate any new legal authority by which you believe the Federal government is now required to "recognize" your clients as the Business Council of the WIC. Nor does your letter indicate any substantial change in circumstances or emergency situation that might now require the Federal government to temporarily "recognize" your clients as the tribal council for the WIC with which it will establish a government-to-government relationship as an interim measure while tribal processes are underway to resolve the WIC's intra-tribal leadership and membership disputes. For the foregoing reasons, we decline to grant your request, as stated in your October 15 letter.

Despite our present response, it is our sincerest desire to see the intra-tribal disputes for the WIC resolved. We continue to maintain, however, that such a resolution will not occur by means of an order or decision from any tribunal, tribal, state, or Federal, and that attempts at achieving a judicial resolution of this difficult political issue are futile when these decisions are not respected by both factions. As the Minnesota Panel stated:

> The desire is for the Colony to definitively identify its members and hold a valid election with the purpose of bringing order to the Colony and making a future again for its members. This huge effort will require a complete

> and participatory Colony Council and active tribal members. If tribal members choose to be obstruct[ionist], uncooperative, petty and selfish, then this Colony will continue in chaos with no hope. The people have to care enough to move forward. The judicial and legal systems can do only so much.

Order, dated August 16, 2002, pg. 17. Although we believe the law prohibits the Federal government from becoming involved in intra-tribal disputes absent exigent circumstances, we wish to extend the expression of our desire to assist the WIC in resolving these issues in any manner that we are legally and lawfully able to employ. To this end, if you require further assistance, or wish to speak with anyone, please contact Ms. Donna Peterson, Acting Regional Operations Officer, at (602) 379-6786.

Sincerely,

Regional Director

cc: Phoenix Field Solicitor
Attn: Sonia Overholser
Superintendent, Western Nevada Agency
Don Pope
Deputy Director, Office of Indian Services

HAGER & HEARNE

Attorneys at Law

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(775) 329-5819-Facsimile

March 24, 2011

Mr. Bryan Bowker, Regional Director
United States Department of the Interior
Bureau of Indian Affairs
Western Regional Office
2600North Central Avenue
Phoenix, Arizona 85004

RE: RECOGNITION OF WINNEMUCCA INDIAN COLONY TRIBAL COUNCIL

Dear Mr. Bowker:

You state in your letter that your understanding of the mandate from the Interior Board of Indian Appeals is to explore the trespass on the Winnemucca Indian Colony. The decision expressly states as follows:

> **We (IBIA) vacate the Decision** (of the Regional Office not to recognize a government of the Winnemucca Indian Colony) **and remand the matter for further proceedings because the Decision contains no reasoned analysis nor an identification or discussion of any evidence upon which the Regional Director relied or purported to rely in making his decision not to recognize Appellants as the Colony Council. . . .What is clear is that the Regional Director did not comply with the Board's order to address the *Appellants' request for recognition in the context of their trespass allegation.***

Thus, when read in context, we are astounded that the Regional Director believes that a briefing of the issue of trespass was the sole issue brought to the Regional Director for decision. The March 11, 2011 letter finally written to the counsel for the Winnemucca Indian Colony after the December 17, 2010 Order of the IBIA demonstrates the inherent bias and prejudice consistently demonstrated by the Regional Office against this Colony and its right to have a recognized government. It would be obvious to any objective forum that the only way to determine if there is a trespass is if the Colony Council is recognized and that recognition then makes obvious a trespass on the lands of the Winnemucca Indian Colony by non-members. The Ninth Circuit decision clearly states that the Decision of the Minnesota Panel is controlling. The members of the Winnemucca Indian Colony have faithfully abided by the Constitution and by-laws of the Colony and submitted their election results each year to the BIA accordingly.

You have failed to respond to our request for an objective, impartial panel of BIA as far removed from the Phoenix Regional Office and the Western Nevada Agency of the BIA as possible. My clients made this request to alleviate the Western Regional Office of any further involvement in this matter and to what they perceive to be a complete lack of fairness and the obvious lack of good faith in the continual stalling of a decision and recognition of a Council. Would you please respond to this request as by this letter, that request is being made once again. Why do you believe that your office and agency is not biased and prejudiced against deciding this matter fairly. Moreover, what is the possible harm of transferring this decision to a totally impartial body when the appearance of unfairness is an issue.

My clients ask you this question: How have you determined that the "Ayers" faction is an interested party. If several persons claim to be the Winnemucca Indian Colony for a time period, then are they simply deemed "interested." We are at a loss to understand what the definition of this term is, as you have used it adopted, no doubt, from the IBIA Order, for an "interested party."

My clients believe, based upon history of this matter, that the only body that will enforce the law and require the BIA to stop delaying this matter and require the BIA to finally provide an objective and impartial decision is the United States District Court. My clients believe this because you refuse to recognize them as the government of the Winnemucca Indian Colony immediately based upon more information than any one Colony has ever been required to produce ever.

The history of the Colony is important at this juncture. In 1986, the Western Nevada Agency of the BIA took over the Colony and placed the smoke shop in trusteeship because the Council consisted of persons who were not lawfully members according to the Constitution. At that time, a membership request was published in the paper. In 1990 a membership was determined lawful by the BIA which consisted of Glenn Wasson and 15 other persons of which the present persons claiming to be the government of the Winnemucca Indian Colony are descended. The BIA reinstated the government of the Colony and this government began managing the assets of the Colony. In the year 2000 Glenn Wasson was murdered on the Colony grounds and since that date, the BIA seems to have no memory of what preceded that the BIA insisted happen. In other words, the BIA has a convenient institutional memory. Now, you as Regional Director are asking the same questions that have been briefed for the last ten years. What more do you possibly need to know to make a decision on recognition of a government. The answer is nothing.

My clients have sought a meeting with you for the last week and been told varying stories about your whereabouts and availability. If you refuse to meet with them, please advise them honestly.

My clients are presently inhabiting and building an economic base on the 320 acres of the Winnemucca Indian Colony. This is an official notice that if the BIA refuses to monitor and provide law enforcement and a part of that property is destroyed or one member injured by the violence of the occupation group that you refer to as the "Ayers faction," the Winnemucca Indian Colony and its families hold the BIA absolutely responsible.

In response to your request for a listing of interested parties, of which we are unsure of the definition, we submit the following list as those who have listened to this story and have followed up with us regarding the progress of the Colony.

Tracie Stevens, Indian Affairs, Office of the Assistant Secretary (202-208-5320)
Katherine L. Zebell, Deputy Director Office of Tribal Affairs (202-514-9078)
E. Sequoyah Simermeyer, Indian Affairs UD Office of the Assistant Secretary (202-208-5320)
Christopher B. Chaney, US Department of Justice (202-514-9078)
Wendy L. Helgemo, Esq., Committee on Indian Affairs (202-228-2589)
John Harte, Committee on Indian Affairs (202-228-2589)
Sonja D. Overholser, Esq., Office of the Solicitor (602-364-7885)
Senator Harry Reid's Office, (202-224-7327); (775-883-1980); (702-388-5030)
Mr. Larry Echohawk, Director, Bureau of Indian Affairs *202-501-1516*

VERY TRULY YOURS,

TREVA J. HEARNE

TJH/jrs

cc: Tracie Stevens, Indian Affairs, Office of the Assistant Secretary (202-208-5320)
Katherine L. Zebell, Deputy Director Office of Tribal Affairs (202-514-9078)
E. Sequoyah Simermeyer, Indian Affairs UD Office of the Assistant Secretary (202-208-5320)
Christopher B. Chaney, US Department of Justice (202-514-9078)
Wendy L. Helgemo, Esq., Committee on Indian Affairs (202-228-2589)
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Sonja D. Overholser, Esq., Office of the Solicitor (602-364-7885)
Senator Harry Reid's Office, (202-224-7327); (775-883-1980); (702-388-5030)
Mr. Larry Echohawk, Director, Bureau of Indian Affairs *202-501-1516*

EXHIBIT "8"

EXHIBIT "8"

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WESTERN REGIONAL OFFICE
2600 North Central Avenue
Phoenix, Arizona 85004

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:
Branch of Tribal Government Services
MS 360

MAR 11 2011

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Ms. Treva Hearne
Hager & Hearne
245 East Liberty Street, Suite 110
Reno, Nevada 89501

Dear Ms. Hearne:

We have received your letter of February 1, 2011, in which you propose a timeline within which you would require the Bureau of Indian Affairs (BIA) to respond pursuant to the Remand Order, issued December 17, 2010, by the Interior Board of Indian Affairs (IBIA) in Docket Number IBIA 10-050. In your letter, you state: "We believe that if there is no response after ninety days that the Business Council, Thomas Wasson, Chairman is automatically recognized as the government of this federally recognized Indian Tribe, the Winnemucca Indian Colony. That default recognition would occur on March 17, 2011."

We disagree with your conclusion that "default recognition," such as you describe, would occur within any specified time pursuant to the Remand Order. The IBIA neither specified a time frame for its Remand Order, nor specified that any particular outcome should, or would occur as a consequence of the Remand. In its December 17 Order, the IBIA remanded your appeal back to the BIA for the singular purpose of "…afford[ing] Appellants an opportunity to submit supplemental briefing and evidence relevant to Appellants' trespass allegation, and shall afford the Ayer faction (and any other interested parties) an opportunity to respond." The Remand Order does nothing more than give all interested parties an additional opportunity to provide relevant briefing and evidence to the BIA for its review and consideration. The IBIA did not order the BIA to arrive at any particular conclusion as a result of its additional review and consideration.

To this end, BIA proposes the following: Please identify, with names and addresses, and legal representatives, if any, of any other "interested parties" of which you or your clients may be aware, as contemplated in the IBIA's Remand Order. The BIA must receive this information no later than the close of business, March 25, 2011. BIA will include these interested parties in any additional actions in compliance with the Remand Order. BIA intends to include William Bills

and Linda Ayers, as we are aware that they may be interested parties for the purposes of IBIA's Remand Order.

By March 31, 2011, BIA will provide you, and all other interested parties with a "Mailing List" for purposes of fulfilling the mandates of the Remand Order. Within 20 working days from receipt of this "Mailing List", please provide to the BIA any relevant briefing and evidence upon which you rely to support your allegations of trespass for BIA's consideration. Provide a full copy of any briefing and evidence which you submit to BIA to all other interested parties listed in the "Mailing List."

Upon the receipt of your briefing and evidence, the "Ayers faction" and all other interested parties, will be advised by certified mail-return receipt to provide to BIA their response to your allegations of trespass. These interested parties will have 20 working days from receipt of notice to submit their responses. Any interested party must also provide a full copy of any briefing and evidence submitted to BIA to you, and all other interested parties listed in the mailing list.

Upon the completion of the time frame for the interested parties to submit their responses, BIA will review the materials submitted and provide its response in compliance with the Remand Order no later than sixty days.

Should you have any questions regarding these timeframes, please contact Ms. Donna Peterson, Acting Regional Tribal Operations Officer, at (602) 379-6786.

Sincerely,

(Sgd) Bryan L. Bowker

Regional Director

Enclosure

cc: Phoenix Field Solicitor
Attn: Sonia Overholser
Superintendent, Western Nevada Agency
Deputy Director, Office of Indian Services
William Bills via Certified Mail-Return Receipt No. 7004 0750 0001 3248 7376
Linda Ayers via Certified Mail-Return Receipt No. 7004 0750 0001 3248 7383
Don Pope via Certified Mail-Return Receipt No. 7004 0750 0001 3248 7390
Mitchell Wright via Certified Mail-Return Receipt No. 7004 0750 0001 3248 7406

Certified Mail-Return Receipt No. 7004 0750 0001 3248 7369

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WESTERN REGIONAL OFFICE
2600 North Central Avenue
Phoenix, Arizona 85004

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:
Branch of Tribal Government Services
MS 360

JUL 21 2011

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Ms. Treva Hearne
Hager & Hearne
245 East Liberty Street, Suite 110
Reno, Nevada 89501

Dear Ms. Hearne:

We wrote in our June 2, 2011, letter to you that we would notify you once we were prepared to receive your supplemental evidence and briefing consistent with the December 17, 2010, Remand Order (Remand Order) issued by the Interior Board of Indian Appeals (IBIA). Since we have now had the opportunity to finalize the list of interested parties, as required by the Remand Order and are now prepared to initiate the process by which we, and the interested parties, will each receive the "supplemental briefing and evidence relevant to Appellants' trespass allegations," as directed by IBIA in the Remand Order. We are enclosing your copy of the final list of interested parties, as well as another copy of the Remand Order.

Subject to the requirements provided below, please submit any supplemental briefing and evidence relevant to your allegations of trespass to our office within thirty days (30) of your receipt of this letter. Since IBIA directed that "the Ayer faction (and any other interested parties)" should have an opportunity to respond, you must simultaneously send a complete copy of any supplemental briefing and evidence that you submit to our office to each of the interested parties as well. To avoid unnecessary delay or confusion, we recommend that you provide some demonstration, such as your certification, that each of the interested parties received a complete copy of any supplemental briefing or evidence that you submit to our office. We will not consider any supplemental briefing or evidence that you have not demonstrated was provided to each of the interested parties so that they may have the opportunity to respond. In the interest of fairness to you and each of the interested parties, unless we request additional information or further clarification, we will not accept any supplemental briefing or evidence relevant to Appellants' allegations of trespass after 45 days after the certified return receipt date of this letter.

Each of the interested parties may respond to any supplemental briefing and evidence that you submit to our office within two weeks after they receive it from you. In fairness to all parties, each of the interested parties who wishes to respond should send you a copy of any response or information that is submitted to us. We will not consider any response or information that the interested party has not demonstrated has also been provided to you.

Because you have already submitted substantive arguments to our office in your correspondence with our office related to the Remand Order, we have enclosed a complete set of correspondence that has been written by you and the BIA for the benefit of the interested parties. We will accept any response to this set correspondence by the interested parties when we receive their response to the supplemental briefing and evidence that you will be submitting to us.

The BIA will not presume to limit the supplemental briefing and evidence relevant to Appellants' claim of trespass, but we defer to the purpose of the supplemental briefing and evidence as explained by IBIA in the Remand Order. The BIA, however, will take this opportunity to remind you, and the interested parties, of some points highlighted in the Remand Order. For example, in its Remand Order the IBIA emphasized that Appellants must "....clarify in whose names and in what capacities they request action by BIA..." (52 IBIA 359-360, fn. 7). The IBIA also noted that since Appellants' request for action was submitted to the BIA on February 26, 2007, Appellants should provide "more current information," (52 IBIA 357) and "identify the current basis for their claims relating to the trespass allegation or to the tribal leadership issue." (52 IBIA 360). Finally, we note that the Remand Order explicitly acknowledged that the vagueness of Appellants' prior allegations relevant to trespass is a basis for requiring that Appellants provide additional information. (52 IBIA 358). In light of the foregoing, BIA will be particularly interested in supplemental briefing or evidence addressing the following questions:

1. Identification of the names of the individuals and in what capacity they request action by the BIA.
2. The current basis for your claims relating to the trespass allegation and to the tribal leadership issue.
3. A specific description of the land, or property, that you allege is being possessed without authorization sufficient to allow BIA to respond to your allegations, or to initiate an investigation if the BIA determines that an investigation is merited.
4. The ownership status, as supported by credible and reliable evidence, of the land, or property, that you allege is being possessed without authorization. For example, is the land or property tribal trust land, tribal trust property, individual trust property, etc.?
5. If you are alleging that the land, or property, being possessed without authorization is tribal trust land or property, please provide the specific legal basis for the United States' trust title, or any documentation or other evidence that the United States currently holds the land or property in trust for the Winnemucca Indian Colony.
6. A specific identification of the individual(s) whom you allege are possessing the land or property described above without authorization, sufficient to allow BIA to respond to your allegations, or initiate an investigation if it feels an investigation is merited.
7. The membership status of the individual(s) whom you allege are possessing the land or property described above without authorization, and the legal or factual basis for your description of the membership status of these individuals.

8. Other specific information, such as relevant dates of alleged possession without authorization, specific acts of possession without authorization, or other information sufficient to allow BIA to respond to your allegations, or initiate an investigation if it feels an investigation is merited.
9. The specific statute(s), regulation(s) or cases upon which you premise your allegation that BIA is required to "recognize" Appellants' as the Tribal Council for the Winnemucca Indian Colony.

In its Remand Order, the Board also provided a brief legal explanation for trespass on Indian Lands.

> Possession of Indian trust land may only occur pursuant to lawful authority. *See, e.g.*, 25 C.F.R. § 162.104 (When is a lease needed to authorize possession of Indian Land?). If a lease is required, and possession is taken without a lease by a party other than an Indian landowner, BIA "will treat the unauthorized use as a trespass." *Id.* § 162.106(a). Even if a lease is not required, there must be some other basis for finding lawful occupancy of Indian trust land. 52 IBIA 358.

Should have any questions, please contact Ms. Donna Peterson, Acting Tribal Operations Officer, at (602) 379-6786.

Sincerely,

Regional Director

Enclosures:

1. December 17, 2010, "Remand Order"
2. January 4, 2011, Correspondence from Treva Hearne to Regional Director
3. February 1, 2011, Correspondence from Treva Hearne to Regional Director
4. March 11, 2011, Correspondence from Regional Director to Treva Hearne
5. March 24, 2011, Correspondence from Treva Hearn to Regional Director
6. April 11, 2011, Correspondence from Regional Director to Treva Hearne
7. April 12, 2011, Correspondence from Treva Hearne to Regional Director
8. May 17, 2011, Correspondence from Treva Hearne to Regional Director
9. June 2, 2011, Correspondence from Regional Director to Treva Hearne
10. Final List of Interested Parties

cc: Office of the Field Solicitor w/copies of enclosures
Attn: Sonia Overholser
List of Interested Parties w/copies of enclosures

INTERIOR BOARD OF INDIAN APPEALS

Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo, and Elverine Castro v.
Acting Western Regional Director, Bureau of Indian Affairs

52 IBIA 353 (12/17/2010)

Related Board cases:
38 IBIA 205
38 IBIA 255
39 IBIA 174
42 IBIA 141
50 IBIA 342

EXHIBIT "9"

EXHIBIT "9"

HAGER & HEARNE

Attorneys at Law

Robert R. Hager, Esq.*
Treva J. Hearne, Esq.**

245 E. Liberty St., #110, Reno, Nevada 89501
(775) 329-5800-Telephone
(775) 329-5819-Facsimile

URGENT INQUIRY

August 10, 2011

Via Facsimile (775) 887-3531

Athena Brown, Superintendent
Western Nevada Agency, Bureau of Indian Affairs
311 E. Washington St.
Carson City, Nevada 89701

Re: Winnemucca Indian Colony

Dear Ms. Brown:

On Sunday, August 6, 2011, construction workers were finishing some work at the Winnemucca Indian Colony and were told to leave by BIA police officers. They were told that they may or may not be able to return to complete the work.

Could you please state the basis of the orders from the BIA police officers. They claimed to be checking with their superior, that being you, to determine if they could continue work on the Indian Colony lands. Please state why they were interrupted in their work, why they were cautioned about returning to their work.

Since my clients, the Winnemucca Indian Colony as recognized by the Ninth Circuit Court of Appeals and the Federal District Court is now constructing on their own property, could you please state that they are safe to return. Can you please confirm that you have advised the BIA police that my clients and their contractors will not be harassed or arrested while working on the Colony lands.

Sincerely,

Treva J. Hearne, Esq.
Attorney for Winnemuca Indian Colony

Thomas Wasson, Chairman
Winnemucca Indian Colony

** Also admitted in Colorado*
*** Also admitted in California and Missouri*

****
*** FAX TX REPORT ***
****

TRANSMISSION OK

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DESTINATION ADDRESS	8873531
PSWD/SUBADDRESS	
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RESULT	OK

HAGER & HEARNE

Attorneys at Law

Robert R. Hager, Esq.*
Treva J. Hearne, Esq.**

245 E. Liberty St., #110, Reno, Nevada 89501
(775) 329-5800-Telephone
(775) 329-5819-Facsimile

URGENT INQUIRY

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Sincerely

EXHIBIT "10"

EXHIBIT "10"

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

SHARON WASSON, THOMAS WASSON, WILLIAM BILLS, JUDY ROJO, AND ELVERINE CASTRO, Appellants, v. ACTING WESTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	Order for Regional Director to Show Cause Docket No. IBIA 10-50 March 18, 2010

On January 14, 2010, the Board of Indian Appeals (Board) received a notice of appeal from Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo, and Elverine Castro, in their capacity as Members of the Winnemucca Indian Colony Council and as individuals (Appellants), through Treva J. Hearne, Esq. Appellants appeal to the Board from a December 8, 2009, decision by the Acting Western Regional Director, Bureau of Indian Affairs (Regional Director; BIA), in which the Regional Director declined to recognize Appellants as constituting the governing council of the Winnemucca Indian Colony of Nevada (Tribe), for purposes of government-to-government relations between BIA and the Tribe. The Regional Director's decision was issued in response to the Board's November 19, 2009, decision in *Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo, and Elverine Castro v. Western Regional Director*, 50 IBIA 342 (2009) (Order Remanding Matter to Regional Director With Instructions to Issue Decision on the Merits).

Pursuant to 43 C.F.R. § 4.336, on February 3, 2010, the appeal was assigned the above case name and docket number, which should be cited in all future correspondence or inquiries regarding the matter.

On February 25, 2010, the Board received the administrative record from the Regional Director for this latest appeal, including a table of contents (copy enclosed for non-Federal parties).

As explained below, there is an obvious deficiency in the administrative record submitted by the Regional Director. There also appears to be an equally obvious substantive deficiency in the Regional Director's decision. Thus, before proceeding further

with the appeal, the Board will order the Regional Director to show cause why his decision should not be summarily vacated and the matter remanded for a properly considered, reasoned, and supported decision on the merits of Appellants' request.

The administrative record submitted by the Regional Director consists of three documents: (1) a copy of the Board's January 28, 2010, pre-docketing notice; (2) a copy of the Regional Director's December 8, 2009, decision and cover sheet for faxing the decision to Appellants' counsel; and (3) a copy of Appellant's November 16, 2007, notice of appeal for their previous appeal to the Board.

The Board's regulations require, in relevant part, that the record from the Regional Director "shall include, without limitation, . . . all original documents, petitions, or applications by which the proceeding was initiated; all supplemental documents which set forth claims of interested parties; and all documents upon which all previous decisions were based." 43 C.F.R. § 4.335(a). Thus, the clear language of the regulations requires that the administrative record submitted by the Regional Director must consist of the entire previous record that was developed in response to Appellants' request, which necessarily includes the full record from the proceedings that culminated in the Board's November 19, 2009, order for the Regional Director to issue a decision on the merits of Appellants' request. As noted above, the record submitted by the Regional Director consists of only three documents, and notably missing is the record from the previous proceedings. Moreover, it appears that the Regional Director issued his decision without even waiting to receive the complete record of the prior proceedings.[1]

Turning to the Regional Director's decision, the Board notes that, in substance, it consists of a single paragraph. The paragraph begins by stating that the Regional Director "affirmatively" does not recognize Appellants as the duly elected officers of the Tribe. The Regional Director then asserts, broadly, that BIA has no legal obligation to decide who BIA will recognize as the political leadership of a tribe, with whom BIA will deal for government-to-government purposes.[2] According to the Regional Director, to do so could

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[1] The Board's records indicate that the record from the appeal decided at 50 IBIA 342 was returned to the Regional Director on December 18, 2009.

[2] The Regional Director's decision is both brief and confusing, framing the issue as whether BIA must "recognize or acknowledge or certify or approve lists of individuals elected as tribal leaders in tribal elections." Decision at 1. The Board understands Appellants' request to be much more straightforward: to be recognized as the elected leadership of the Tribe for

(continued...)

be seen as an intrusion by BIA into tribal sovereignty. The decision does not address the fact that, in order to carry on a government-to-government relationship with an Indian tribe, BIA necessarily must identify the individual or individuals with whom it will deal as the representative(s) or leadership of the tribe. *See Wells v. Acting Aberdeen Area Director*, 24 IBIA 142, 145 (1993).

Nor does the decision provide any fact-based analysis to support a decision not to recognize either Appellants' or anyone else as constituting the political leadership of the Tribe, whether on an interim basis or otherwise, for government-to-government purposes. The Board has recognized that recognition of tribal leadership by BIA is not required in the abstract. *See George v. Eastern Regional Director*, 49 IBIA 164, 186 (2009); *Wasson v. Western Regional Director*, 42 IBIA 141, 158 (2006). But the Board's most recent decision concerning the dispute over the Tribe's government specifically found that Appellants had stated allegations sufficient to place their request outside of the abstract, and thus sufficient (at least on a prima facie basis) to require a decision by BIA on the merits. The Regional Director's subsequent decision fails even to address, much less refute, the factual allegations forming the basis for Appellants' assertion that a recognition decision is necessary.[3]

In summary, the Regional Director's December 8, 2009, decision lacks any discernable legal or factual reasoning, accompanied by appropriately supported legal or factual findings.

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[2](...continued)
purposes of carrying on the government-to-government relationship with the Federal government.

[3] Appellants contended that BIA's failure to make a decision about whom it will deal with as the Tribe's leaders has resulted in illegal occupation of tribal lands. Assuming that BIA does, in fact, hold lands in trust for the Tribe, it would seem that an allegation of trespass on tribal lands by a group claiming to be the Tribe's leadership might well require a decision by BIA whether or not it recognizes the group as the Tribe's leadership, for government-to-government, or trustee-to-beneficiary, purposes. In their notice of appeal, Appellants contend that BIA has "recogniz[ed] a non-Indian as Chairman and allowed nonmembers to remain in control of Colony lands." Notice of Appeal at 8. The Regional Director's decision does not state that BIA recognizes other individuals as the Tribe's political leaders or governing council as the basis for rejecting Appellants' request to be recognized as the Tribe's council.

On or before April 2, 2010, the Regional Director is ordered to show cause why the Board should not summarily vacate his decision and remand the matter for further consideration.

Steven K. Linscheid
Chief Administrative Judge

Enclosure (for non-Federal parties)

Distribution: See attached list.

ADMINISTRATIVE RECORD

TABLE OF CONTENTS

1. January 28, 2010, Pre-Docketing Notice, Order for Appellants to Serve Interested Parties, and Order for Administrative Record.

2. December 8, 2009, Regional Director's Decision to not recognize or acknowledge or certify or approve the individuals identified in the Appellants' February 26, 2007, request as the duly elected officers of the Winnemucca Indian Colony.

3. Appellant's November 16, 2007, "APPEAL FROM THE FAILURE OF THE REGIONAL OFFICE TO RESPOND TO THE REQUEST OF THE WINNEMUCCA INDIAN COLONY AND APPEAL FROM THE FAILURE OF THE REGIONAL OFFICE TO PERFORM ITS DUTY AND RECOGNIZE THE CONCIL OF A FEDERALLY RECOGNIZED TRIBE" (with eight attachments).

Distribution: IBIA 10-050

Treva J. Hearne Esq.
Hager and Hearne
for Sharon Wasson, et al.
245 E. Liberty, Ste. 110
Reno, NV 89512

Donald K. Pope Esq.
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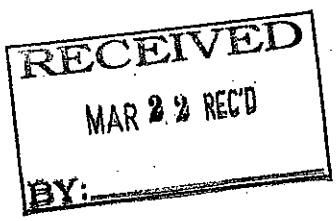
Superintendent
Western Nevada Agency
Bureau of Indian Affairs
311 East Washington Street
Carson City, NV 89701

Western Regional Director
Bureau of Indian Affairs
400 N. 5th Street
2 AZ Center, 12th Floor
Phoenix, AZ 85004
BY CERTIFIED MAIL

Sonia D. Overholser Esq.
Office of the Field Solicitor
U.S. Dept. of the Interior
401 West Washington St., SPC 44
Phoenix, AZ 85003-2151



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Treva J. Hearne, NV State Bar No. 4450
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thearne@hagerhearnelaw.com
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WINNEMUCCA INDIAN COLONY, THOMAS R. WASSON, CHAIRMAN Plaintiffs, v. UNITED STATES OF AMERICA ex rel. THE DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, WESTERN NEVADA AGENCY, SUPERINTENDENT, and, THE EMPLOYEES, CONTRACTOR AND AGENTS OF THE WESTERN NEVADA AGENCY OF THE BUREAU OF INDIAN AFFAIRS, Defendants.	Case No.: 3:11-cv-00622-RCJ-VPC **[PROPOSED] ORDER UPON PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MANDATORY INJUNCTION**

The Court having read the Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and Mandatory Injunction, filed by Plaintiffs on _____, and good cause appearing for granting the Plaintiffs' Motion,

IT IS HEREBY ORDERED as follows:

That Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction, is granted and prohibits Defendants above-named or agents, employees, attorneys, and anyone acting on their behalf from entering the lands of the Winnemucca Indian Colony for the purpose of interfering, threatening, harassing, or otherwise disturbing the Winnemucca Indian Colony and its lawfully elected Counsel, Thomas R. Wasson, Judy Rojo, Katherine Hasbruk, Misty Morning Dawn Rojo and Eric Mageira and their agents, employees and contractors from taking possession, constructing facilities or interfering with the peaceful enjoyment and possession by the Plaintiffs on the land consisting of 320 acres located at 1985 Hanson St. and 20 acres located at 322 South St., Winnemucca, Humboldt County, Nevada.

This temporary restraining order shall remain in effect until _____.

The Hearing on the Motion for Temporary Restraining Order and Preliminary Injunction shall be held at on _____ at _____.

DATED this _____ day of _____, 2011.

_____
DISTRICT COURT JUDGE