U.S. Court of Appeals Docket No. 18-17121

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WINNEMUCCA INDIAN COLONY, et al., Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, ex rel. The Department of the Interior, et al, Defendants

v.

WILLIAM R. BILLS, Intervenor-Defendant,

and

LINDA AYER, et al, Intervenor-Defendants-Appellees

On Appeal from the United States District Court of Nevada

Case No. 3:11-cv-00622 (Honorable Robert C. Jones)

APPELLEE'S RESPONSIVE BRIEF

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I. Appellee's Jurisdictional statement.

The lower Court had jurisdiction to review the lack of agency action by the United States Dept. of the Interior, Bureau of Indian Affairs (BIA), as arbitrary, capricious and unreasonable under the Administrative Procedure Act, 5 U.S.C. § 702 et seq. The Administrative Procedure Act (APA) affords a U.S. District Court review authority to "compel agency action unlawfully withheld or unreasonably delayed," 5 U. S. C. § 706(1) See, *Cntr. for Biological Diversity v. U.S. Dept. of Interior,* 623 F.3d 633 (9th Cir. 2010) See also, *Cobel v. Norton,* 240 F.3d 1081 (D.C. Ct. of Appeals, 2001).

II. Appellee's Issues for Review.

1. Did the lower Court have jurisdiction to review the Agency's failure to act under the provisions of the Administrative Procedure Act?
2. Did the lower Court abuse its discretion in granting comity to Tribal Court decisions?
3. Does this third-party Appellee have standing to appeal this case?

III. Appellee's Statement of the Standard of Review.

The standard applied to review the Agency's acts or failure to act is whether the agency was arbitrary and capricious. See, *Ctr. for Biological Diversity v. U.S. Dept. of Interior,* 623 F.3d 633 (9th Cir. 2010).

If this Court were reviewing the grant of preliminary injunction by the lower court and if the preliminary injunction orders were not moot, then grant of a preliminary injunction would be reviewed for an abuse of discretion by the lower court. "A district court's decision regarding preliminary injunctive relief is subject to 'limited and deferential' review. *Sw.Voter Registration Educ. Project v. Shelley,* 344 F.3d 914, 918 (9th Cir. 2003)(*en banc)*(per curiam). See, also, *Earth Island Institute v. U.S. Forest Service, (Earth Island Institute II,* 442 F.3d 1147, 1156 (9th Cir. 2006)

The Appellate Court reviews the lower Court's recognition of the Tribal Court orders and extending comity to those Orders under the Full Faith and Credit Clause, Article IV of the Constitution of the United States.[1]

[1] A discussion of the application of comity to Tribal Court decisions concludes that comity is properly extended to Tribal Court decisions just as though these were territories of the United States with separate court systems. See, *Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions,"* Craig Smith, 98 Calif. L. Rev. 1393 (2010)

IV. Argument

A. Relevant facts of this case for purpose of appellate review.

After the murder of the Chairman of the Winnemucca Indian Colony in February 2000 on the Colony lands, a dispute over the proper government of the Colony spawned litigation that continues through this appeal. (ER, Vol. I, p. 59, lines 6 – 25; p. 60, lines 1 – 13, 20 -25) The Honorable Larry Hicks directed the Appellees to exhaust all of their administrative remedies in his decision in 2001. (ER, Vol. I, p. 89, lines 10 – 25; p. 90, lines 1-16) In 2008 the Honorable Brian Sandoval determined that the administrative remedies had been exhausted after seven years of hearings and appeals and granted comity to the Minnesota Panel decision which recognized four Council members of the Appellees as the government plus William Bills and no one from the Appellants whatsoever. (ER, Vol. I, p. 40, lines 10 – 25; p. 41, lines 1-4). The Sandoval decision was appealed and affirmed on April 18, 2011. (ER, Vol. I, p 78, lines 1 – 12, 20 – 25)

In May 2011, the Colony Council re-entered its lands to begin work on the smoke shop begun by Glenn Wasson in 2000. (ER, Vol. I, p. 78, lines 14 – 18, p. 79, line 1) Because the BIA attempted to arrest the contractors of the Winnemucca Indian Colony, litigation was again commenced to protect the Winnemucca Indian Colony Council from interference in re-entering its

lands. A Complaint for Injunction was filed on August 29, 2011, by the Winnemucca Indian Colony against the BIA only. (ER., Vol. V, p. 258 and Vol. I, p. 95, lines 6 – 25; p. 96, lines 1-3, 22 – 25)

After the initial request for injunction, the Appellants were granted intervention over the objection of the Appellees. (ER, Vol. V., p. 274, Doc. #27; p. 276, Doc. #52) The U.S. District Court then mandated the BIA to recognize an interim government. (ER, Vol. V, p. 272, Doc.# 9) The District Court mandated the recognized interim government, Appellees herein, to re-open the membership process and hold elections. (Vol. V, p. 285, Doc.#151)

After the membership applications were received and decided and the elections were held, the Appellants were included in the decision to appoint a Tribal Court to hear their challenges to the membership decisions and the election of the interim Council. (Vol. I, pp. 14 – 17) The District Court emphasized the need to have a neutral court recognized by all parties for this decades-old dispute so it would finally be resolved. (ER, Vol. I, p. 18 - 20) The Appellants filed challenges and appeared in all phases of the Tribal Court proceedings, including appeal and request for reconsideration. (Supp. ER, pp. 13 - 50)

The Tribal Court and appellate decisions were filed with the lower court for purposes of recognition. (Supp. ER, p. 1-64) The lower court granted comity to those Tribal Court decisions and the case was dismissed. (ER, Vol. I, pp. 1,2) The BIA did not appeal. William Bills did not appeal.

B. Motion to Dismiss.

The Appellees incorporate and reassert the Motion to Dismiss Appeal filed earlier in this matter as if fully set forth herein. (ECF Doc. Entries #7, #12) The Appellees ask that this appeal be dismissed since the Appellants have no standing. Further, Appellees argued in the Motion to Dismiss that even if this Court granted a reversal of the lower Court's decision to grant comity to the Tribal Court decisions, the decisions of the Tribal Courts which were dispository of the claims of the Appellants, would not be reversed. Nothing in the Appellants' opening brief suggests anything that negates the arguments in the Motion to Dismiss.

Just as was predicted by the Motion to Dismiss when it was previously filed, the Appellants merely want to relitigate the arguments they have made and lost over the last twenty years. Once the Appellants became involved in the Tribal Court process, this litigation was able to be finally resolved by a Tribal Court and Inter-Tribal Court of Appeals of Nevada that

was recognized by all parties, those parties included the U.S. Department of the Interior (BIA), the Winnemucca Indian Colony and the Appellants.

C. The issue in the case below was centered on whether the Department of the Interior, Bureau of Indian Affairs, (BIA) as an administrative agency, had acted in a manner that was arbitrary and capricious, which supported the Court's jurisdiction under the Administrative Procedure Act.

The Winnemucca Indian Colony Council, government of a federally recognized Tribe, had been requesting and insisting on recognition of its government for eleven years (ER, Vol. V., pp. 258 – 267) when the District Court in 2011 ordered the BIA to recognize an interim government. (Vol. I, pp. 107 -117) The lower court determined that failing to recognize a government of a federally recognized Tribe for over a decade was an abuse of discretion, a lack of action that deprived the Winnemucca Indian Colony of its sovereignty. The District of Columbia District Court found likewise:

> As the District of Columbia District Court found in 2013, ". . .The district court did have jurisdiction under 28 U.S.C.§1331 to review, pursuant to the APA, the action taken by the [Bureau]in refusing to recognize either tribal council. . . Because the question here is whether the Secretary violated federal law, the Court has jurisdiction over this case." *California Valley Miwok Tribe v. Salazar,* 962 F. Supp.2d 84 (D.C. 2013) at page 92.

The lower Court herein specifically and expressly left questions of interpretation of the Constitution and By-laws, tribal law and membership challenges to the Tribal Courts. The Tribal Court was recommended by the BIA and accepted by all parties. (ER, Vol I, pp. 14 - 17) The Appellants participated fully in the Tribal Court proceedings without objection and without seeking an appeal of the lower Court's order to engage in the Tribal Court process. (Supp. ER, pp. 13 - 30).

The United States Department of the Interior, the real party in interest, did not appeal this decision of the lower court, but instead recognized the Council of the Winnemucca Indian Colony in December 2014 and acknowledged the Tribal Court proceedings. (ER, Vol. I, pp. 4,5) This recognition of this government was made for the purpose of affording all parties a full and fair airing of all challenges before a proper Tribal Court process.

The Inter-Tribal Court of Appeals of Nevada heard the appeal and the Request for Rehearing and denied both. (Supplemental ER, 16 - 33) The Inter-Tribal Court of Nevada would have heard the appeal and reconsideration whether it was the CFR Court or the Tribal Court rendering

the opinion since it is now the only Inter-Tribal Court available for appeals of Winnemucca Indian Colony decisions.[2]

It was only after the Tribal Court proceedings were completed that the lower Court granted comity to the Decisions of the Tribal Courts and, by that recognition, concluded the action brought by the Winnemucca Indian Colony against the BIA. The BIA had already recognized the Colony's government two years prior to the lower Court's Final Order. (ER, Vol. I, pp. 4,5) No party, including Appellants herein, filed a challenge of the BIA decision to recognize the Colony's government in December 2014 by any Administrative appeal.

The *California Valley Miwok* case, cited supra, affirms the holding in *Goodface v. Grassrope,* 708 F.2d 335 (8th Cir. 1983). The lower Court in this matter relied heavily upon the holding in *Goodface* because of its similar fact scenario to the case at issue herein:

> We hold that the district court did have jurisdiction under 28 U.S.C.§ 1331 to review, pursuant to the APA, the action taken by

[2] After the Honorable Howard McKibben chastised the BIA for not funding the Inter-Tribal Court of Appeals of Nevada during the period of the Minnesota decision, the BIA has funded the Inter-Tribal Court of Nevada since then.

> the BIA in refusing to recognize either tribal council. At page 338
>
> . . .
>
> We conclude that the District court possessed jurisdiction only to order the BIA to recognize, conditionally, either the new or old council so as to permit the BIA to deal with a single tribal government. That recognition should continue only so long as the dispute remains unresolved by a tribal court." *Goodface,* at pp. 338, 339.

The *Goodface* appellate court expanded its decision to guide its lower court in the determination of who the government of that Tribe should be:

> "Moreover, the district court in deciding which council to recognize as a preliminary matter could, by applying equitable principles, determine that the newly elected council, whose successful election received certification from the tribal election board, should govern in the interim period until the dispute reaches initial resolution by the tribal court." *Goodface,* at page 339.

The lower Court herein, similarly, applied equitable principles in choosing a Council to be recognized as the government of the Colony based upon prior court orders and overwhelming evidence that William Bills was not a Native American Indian. (ER, Vol. 1, p. 40, lines 1 - 7). William Bills was a third-party intervenor separate from the Appellants and has not appealed this matter. The lower Court noted that failure to act by the BIA had deprived the Tribe of its sovereign rights. (ER, Vol.I, pp. 48 & 93 - 117)

Likewise, the D.C. District Court reaffirmed a federal court's jurisdiction to determine when the United States Department of the Interior has acted contrary to federal law:

> Defendants are all agents of the federal government responsible for conducting relations with Indian nations located within the United States. *Ransom v. Babbitt,* 69 F.Supp.2d 141, 143 (U.S.D.C.D.C. 1999).

In the *Ransom* case, the District Court found the decision and justification of the agency in its decision and justification for dealings with the Tribe to be disingenuous, at best, as well as untimely and unpersuasive. (See, *Ransom,* pp 143, 151 – 152) Similarly, the lower court herein disagreed with the decision and justification of the Department of the Interior (BIA) in not choosing a government for over a decade and then choosing one

person from each opposing party to serve as the government, effectively paralyzing the Colony further. (Vol. I, pp. 39 – 44 and 58 – 71)

Since the Agency had made no decision prior to the litigation being filed, the lower Court was not able to examine the record of the Agency decision, but documentation of the Agency's actions were voluminous from the eleven years of litigation that had occurred prior to the Court's first grant of injunctive relief to the Colony.

> "An action to compel an agency (to act) . . .is not a challenge to a final agency decision, but rather an action arising under 5 U.S.C.§ 706(1), to 'compel agency action unlawfully withheld or unreasonably delayed." *Oregon Natural Res. Council Action v. United States Forest Service,* 59 F. Supp.2d 1085, 1095 (W.D.Wash. 1999) In such cases, review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record. *See, Independence Mining Co., Inc. v Babbitt,* 105 F.3d 502, 511 (9th Cir. 1997) *Friends of the Clearwater v. Dombeck,* 222 F.3d 552, 560 (9th Cir. 2000).

The lower court relied upon previous court decisions in this matter and, in recognition of the Agency's failure to recognize a government of this

federally recognized Tribe, identified that jurisdiction was proper over the Agency decision. The lower court adopted a pattern adopted by the *Ransom* court and the *Goodface* court and ordered the Agency to recognize an interim council that could accept applications for membership.

Then, the lower court allowed Tribal courts to render decisions independently with the Motions filed by the Appellants herein and answered by the Appellees herein. The Tribal courts applied and interpreted Tribal law on the challenges, first filed in Tribal Court and then reviewed by the Inter-Tribal Court of Appeals of Nevada. This is exactly the procedure that would have been employed if the Colony had been a recognized government for the preceding decade. This judgment and process finally ended a nearly two-decade bitter struggle for this Tribe, which has been impoverished by BIA's arbitrary and capricious refusal to recognize its government.

The United States Department of the Interior (BIA) and its agencies that were enjoined by the lower court have not appealed any of the lower court's decisions. The Appellant herein has not argued that the Court did not have jurisdiction to review an administrative agency's act or failure to act under the Administrative Procedure Act.

D. Appellants have attempted to appeal the grant of preliminary injunctions which were moot at the time of the Final Order.

On August 31, 2011, the lower Court granted a temporary restraining order against the BIA which was not appealed. (ER, Vol. I, pp. 107-117) On September 16, 2011, the lower Court granted a preliminary injunction against the BIA which was not appealed. (ER., Vol. V, p. 273, Doc.# 19) On January 31, 2012, the lower Court entered an Order of Injunction against the BIA which was mandatory in nature, but, like the preceding injunctive relief, temporary, until Tribal processes could be carried out and until all challenges to Tribal membership and election issues were exhausted. (ER, Vol. V., p. 276, Doc. #49, #52, #57)

The District Court was sensitive to the fact that it could not decide an intratribal dispute. *See, Sac & Fox Tribe of Mississippi in Iowa v. Bear,* 258 F. Supp.2d 938 (N.D. Iowa 2003). After more than a decade of the Appellant's not recognizing the Appellee's courts and BIA failing to recognize a government of this federally recognized Tribe, a mandate to all the parties was the only means by which this small Colony was able to regain its sovereignty and enter its lands.

On July 20, 2012, the BIA and all parties were ordered to appear in front of the District Court to hear the mandate of the District Court. (Vol. V., p.

281, Doc. 119). On September 25, 2012, the lower court again entered a temporary Order of Mandate against the BIA and the Winnemucca Indian Colony, the Petitioners therein and Appellees herein, to begin the Tribal membership process. (ER., Vol. I, pp. 93 – 106.) This Order was not appealed nor was an objection filed by any party. All objections now made by the Appellants were fully briefed and argued before the Tribal Courts.

On December 14, 2014, the BIA recognized the Winnemucca Indian Colony's government for the purpose of government to government relations which was clarified on December 30, 2014:

> The United States and Intervenors (Appellants herein) have separately asked the Court to amend the Order (of December 1, 2014) that any challenges must first be taken to Tribal Judge Timothy Shane Darrington, and that the newly recognized members of the Council were not "permanent," but subject to any challenges brought before Judge Darrington, and then to the ITCAN. (The Inter-Tribal Court of Nevada) The Court agrees and will amend the order. . . (ER, Vol. I, p. 7, lines 17 – 21)

On October 1, 2018, the lower Court entered its final Order which rendered moot all previous Orders including all preliminary and mandatory

injunctions. The final Order granted comity to the decisions of the Tribal courts. The final Order was not appealed by the BIA.

The preliminary injunctions requiring the BIA to recognize a government for the purpose of resolving the challenges to membership and elections through a Tribal Court process were rendered moot when the Tribal Court processes were complete. None of the preliminary or mandatory injunction Orders had been appealed previously. The decision of the BIA to recognize the government of the Winnemucca Indian Colony was not appealed through administrative procedure.

> In considering mootness, we ask 'whether granting a present determination of the issues offered will have some effect in the real world." *Rio Grande Silvery Minnow v Bureau of Reclamation,* 601 F.3d 1096, 1110 (10th Cir. 2010). Thus, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, we must dismiss the case rather than issue an advisory opinion." *Stevenson v. Blytheville Sch. Dist. No. 5,* 762 F.3d 765, 768 (8th Cir. 2014). . . ". . ..(the appeal taken from the grant of a preliminary injunction), the appeal is moot 'where the effective time period of the injunction has passed,"

Stevenson, 762 F.3d at 768. *Fleming v Guiterrez,* 785 F.3d 422, 445 (10th Cir. 2015)

The BIA has recognized the Colony government for over five years now. The Tribal processes to challenge the membership and election process have been exhausted with full participation by the Appellants herein. Reversing the lower Court's grant of comity to the Tribal Court judgments will not void those decisions. The Appellant has nothing to gain in this appeal of the preliminary injunctions ordered by the lower court since the Final Order of the lower Court rendered all such injunctions moot. This negates Issues 3 – 11 as stated by the Appellants. The Appellants are simply attempting to re-litigate the issues tried before the Tribal Courts which the lower Court refused to hear out of respect for the Tribal process.

Issue 11 of the Appellants' issues should simply be stricken because it states that the District Court created a Tribal Court which is incorrect. The Court appointed a Tribal Judge who already existed and was recommended by the BIA to hear the challenges to membership and the election processes. (ER, Vol. I, p. 14 - 17) "The United States has proposed Judge Timothy Shane Darrington of the Shoshone Paiute Tribe on the Duck Valley Indian Reservation in Weiser, Idaho. Ayer (Appellants herein) does not

object to Judge Darrington noting that he is a licensed attorney and the Chief Judge for the Duck Valley Tribal Court. (Vol. I, p. 14, lines 22 – 25)

E. The U.S. District Court followed precedent by granting comity to the Tribal Court decisions.

"As a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity." *Wilson v. Marchington,* 127 F.3d 805, 810 (9th Cir. 1997) "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." *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 19, 107 St.Ct. 971, 94 L.Ed.2d 10 (1987) "The principal of comity also underlies the requirement of tribal court exhaustion." *(citations omitted) Sarei v. Rio Tinto, PLC,* 550 F.3d 822, 828 (9th Cir. 2008) "Exhaustion reflects the fact that Indian tribes retain attributes of sovereignty over both their members and their territory." *Sarei* at page 829. "But, because tribal court jurisdiction is plausible, principles of comity require us to give the tribal courts a full opportunity to determine their own jurisdiction in the first instance." *Elliot v. White Mountain Apache Tribal Court,* 566 F.3d 842, 850, 851 (9th Cir. 2009).

On October 1, 2018, after seven more years of litigation in the struggle by this small Colony in Nevada to have its government recognized, eighteen years of litigation altogether by that date, the District Court extended comity to the Tribal Court decision, the decision of the Inter-Tribal Court of Nevada on appeal and on reconsideration:

> The Court acknowledges the authoritative rulings of the Tribal Court in matters WIC-CV-14-001 and WIC-CV-14-002, on remand dated 06/27/2016 and the relevant affirmation by the Inter-Tribal Court of Appeals in matter ITCN/AC-CV-15-11, dated 04/11/10 and 2/24/16, and extends comity to these Tribal Court rulings in the present action before this Court. This is the final Order in this cause and this matter is, therefore, dismissed. (ER, Vol. I, p. 2, lines 2 -7).

This final Order is the only appealable matter in this case. The lower Court had jurisdiction to find an agency action arbitrary and capricious, which it did, and the lower Court had jurisdiction to recognize the decisions of the Tribal Courts by comity, which it did.

The Appellants cannot argue deprival of due process after participating in all phases of the Tribal Court process and they have not. The Appellants, likewise, cannot argue that this process was not the usual

process for membership and election challenges and, moreover, still exists for any future challenges and they have not. In fact, the only other court available for these Tribal processes, the CFR Court of Indian Offenses, has recognized the Tribal Court decisions adopted as a result of this litigation and deferred to them. (Supp. ER, pp. 36 – 50)

V. Conclusion.

The Winnemucca Indian Colony respectfully requests that this appeal be dismissed or that the final order of the District Court be affirmed and that this extended nightmare of government non-recognition of this federally recognized Tribe be concluded. The government of the Winnemucca Indian Colony is presently recognized and has begun the task of rebuilding its Colony after twenty years of non-recognition and deprivation of governmental funding and economic development. Truly, a small Colony with a miniscule land base was deprived of its sovereign existence without government recognition. The government has acquiesced in the decision of the District Court by not appealing the decision that it was arbitrary and capricious, this Court can now affirm that litigation on these matters is done.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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