

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-17121

WINNEMUCCA INDIAN COLONY; et al.,

Plaintiffs - Appellees,

vs.

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

Defendants.

WILLIAM R. BILLS,
rel. The Department of the Interior; et al.,

Intervenor-Defendant.

and

LINDA AYER; et al.,

Intervenors-Defendants-Appellants.

Appeal from the United States District Court
District of Nevada
D.C. No. 3:11-cv-00622-RCJ -CBC

OPENING BRIEF

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Jurisdictional Statement

The Plaintiffs-Appellees' alleged that the District Court had jurisdiction "pursuant to 28 U.S.C. 1296, 1331 and 1346 and 5 U.S.C. § 701 et seq. and 5 U.S.C. § 177 et seq."

Appellants-Intervenors allege that the District Court did not have any jurisdiction in the underlying case.

The basis for this appellate court's jurisdiction is 28 U.S.C. § 1291 in that this is an appeal of a civil case filed in the United States District Court, District of Nevada.

The filing date of the final Order adjudicating the case was October 1, 2018. The Notice of Appeal was timely filed on October 31, 2018.

This appeal is from a final order that disposed of all parties' claims.

Statement of Issues Presented for Review

1. Did the District Court err in finding it had jurisdiction?
2. Did the District Court err by not finding *res judicata* in this matter?
3. Did the District Court err when it ordered the USA defendants (the Bureau of Indian Affairs) to recognize one of two individuals as being the authorized representative of the Winnemucca Indian Colony ("WIC")?
4. Did the District Court err when it ordered a Temporary Restraining Order with no hearing or opportunity for any opposition briefing?
5. Did the District Court err when, after the BIA recognized an individual as an authorized representative of the WIC, the Court found the BIA corrupt and changed the recognition to another individual?

6. Did the District Court err in finding that the BIA is corrupt and that the District Court Judge should appoint himself as the acting regional director sitting in the Western Regional Director's place?"
7. Did the District Court err when it determined who comprises the Winnemucca Indian Colony government?
8. Did the District Court err when it determined who can control and determine the current members of the WIC?
9. Did the District Court err when it ordered that the WIC hold a tribal election?
10. Did the District Court err when it determined who can control, participate in, and determine the outcome of the elections of the WIC?
11. Did the District Court err when it created a Tribal Court to hear any enrollment and election disputes after the District Court ordered elections occurred?
12. In the event of a remand, should this matter be reassigned to a different judge?

Standard of Review

This matter was fully adjudicated with declaratory relief being granted, thus the appropriate review is *de novo*. The issue of whether the court had jurisdiction is also reviewed *de novo*.

Introduction

The controversy before this Court is who comprises the government or Tribal Council of the Winnemucca Indian Colony. For clarity, the Plaintiffs-Appellees will be referred to as the Wasson Group and the Intervenors-

Defendants- Appellants will be referred to as the Ayer Group.¹ The history and what occurred before the District Court is involved, but the issue of whether the District Court had authority to take the actions it did is not.

While the issue of who comprises the government of the Winnemucca Indian Colony (WIC) is an internal tribal decision, the issue of who the U.S. government would recognize for any needed government to government relations is in the purview of the BIA. This matter was still in the middle of being decided by the United States Bureau of Indian Affairs (BIA) and the Interior Board of Indian Appeals (IBIA) when the Wasson Group filed the underlying lawsuit.

Statement of the Case

The Wasson Group requested that the District Court recognize them as the valid council of the WIC – which the District Court did. The District Court erred in determining it had jurisdiction to make any such decision as well as when it ordered a new membership roll be established, new tribal elections to occur and then entered declaratory relief ordering the BIA to recognize Plaintiff/Appellees as the permanent Council of the WIC.

Statement of Facts

A dispute over who governs the Winnemucca Indian Colony (WIC) exists and has existed for many years. Previous to this underlying case, individuals

¹ While the Wasson Group now claims that Mr. Wasson is no longer part of their group, they have been historically referred to as the Wasson Group and cited documents referred to them as such. Additionally, it should be noted that the Wasson Group filed the underlying lawsuit and labeled themselves in the caption as the Winnemucca Indian Colony and the caption was never changed.

claiming to comprise the government of the WIC filed several lawsuits that were eventually appealed to this Appellate Court. As a result of this Court's mediation program, and by way of a stipulation, the parties agreed to create a temporary tribal appellate court and hire three (3) judges to resolve the dispute. Said judges issued a decision. The Decision is commonly referred to as the Minnesota Panel Order (MPO). The MPO has since been recognized as a valid decision by this Appellate Court in Case No. 08-16146. ER Vol. III at 84.

The MPO was entered on August 16, 2002 where it made certain findings as well as ordering certain activities to take place that included ordering that a tribal election occur. Based on a dispute as to who are the members of the WIC to elect a Colony Council, the MPO issued a finding that 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.'" ER Vol. III at 90. This list has become known as the "List of 77 plus." The MPO invalidated the 2000 Council election for violations of Election Ordinance 301, ER Vol. III at 90.

William Bills was the Vice-Chairperson until the passing of Glenn Wasson. The MPO recognized the WIC Council as comprising of Sharon Wasson, Thomas Wasson, William Bills, and Elverine Castro and that a vacancy was created by the death of Thomas Magiera. ER Vol. III at 98. Lucy Lowry was also recognized as a council member by the MPO prior to her death. ER Vol. III at 90.

On April 7, 2000, this MPO recognized council passed "Resolution WN-00-08, approving the new 2000 Membership Roll for the Colony with the names of ninety-eight (98) members." It was passed by Council members William Bills, Elverine Castro, and Lucy Lowry. It added twenty-one (21) specific

people to what was known as the “List of 77” bringing the total membership to 98 individuals and is known as the List of 77 plus. This new list includes the names of all of the Appellants/Intervenor Defendants known as the Ayer Group. ER Vol. II at 59-61, 65.

The Wasson Group recognizes that this list of 98 exists and informed the District Court that they were allowed to use the membership list of what they referred to as a membership of about 99. ER Vol. I at 22.

After the MPO, the dispute between the Ayer Group and the Wasson Group as to who comprised the WIC Council continued. This issue has been presented to the Bureau of Indian Affairs (BIA) and then to the Interior Board of Indian Appeals (IBIA). After the MPO, the Wasson Group attempted to gain recognition as the legitimate Council from the BIA. The BIA refused to recognize the Wasson Group. The Wasson Group sent a letter on October 22, 2002 to the BIA’s Regional Director stating that the WIC only recognizes seventeen (17) members. ER Vol. IV at 138. The BIA’s response was that the Appellate Decision (the MPO) states there are at least seventy-seven members. Id.

Also subsequent to the MPO, the WIC Council and the Tribal members conducted a Recall Election on October 27, 2002 where Sharon Wasson, Thomas Wasson, Elverine Castro, and Andrea Davidson were removed from the WIC Council. ER Vol. II at 33-34. Subsequently Vivian Leyva, Linda Ayer, Charlene Dressler, Clorinda George and Jim Ayer were elected to the Council. Id. at 34. There were no contests to this election including by any members of the Wasson Group. Id.

Based on the Wasson Group appealing a BIA decision refusing to recognize them as the WIC Council, on December 17, 2010, the Interior Board of Indian Appeals (IBIA) entered a decision remanding the issue back to

Western Regional Director. ER Vol. V at 55-63. In said decision, the IBIA noted there were two competing factions claiming to be the WIC Council, specifically the “Wasson” faction and the “Ayer” faction. ER Vol. V at 56. The IBIA decision cites to a previous appeal regarding the composition of the WIC Council, where it was found that the “Ayer group” was an interested party and that the individuals comprising that group include Allen Ambler, Lovelle Brown, Charlene Dressler, Clorinda (Toni) George, and Jim Ayer. ER Vol. V at 56; *Wasson, et al. v. Western Regional Director, Bureau of Indian Affairs*, 42 IBIA 141, 142 (2006) (footnote 3).

On August 29, 2011, the Wasson Group was required to submit a Brief with the Western Regional Office of the Bureau of Indian Affairs to justify and provide support documentation for their request for the members of their Council to be recognized as the Colony Council for the Winnemucca Indian Colony. Instead of submitting their Brief by this date, the Wasson Group filed their underlying lawsuit on August 29, 2011. The next day on August 30, 2011, the Wasson Group delivered their Brief to the BIA. ER Vol. V at 222.

In the underlying lawsuit, the Wasson Group never informed the District Court that other individuals were claiming to comprise the WIC Council. Instead the Wasson Group only informed the District Court that the BIA refused to recognize them and that they were the Council of the WIC. ER Vol. V at 258-67.

Multiple motions to dismiss were filed by the USA (BIA) defendants. ER Vol. V at 1-13 and ER Vol. IV at 1-15. Said motions informed the Court that the Ayer Group had a pending claim to be the Council and recognition issues were pending administrative appeal. ER Vol. V at 173, ER Vol. I at 76-92.

On September 15, 2011 the Ayer Group filed a motion to intervene, which was granted on January 10, 2012. ER Vol. V at 167-182; ER Vol. I at 92. In it they claimed to be the proper Council of the WIC. ER Vol. V at 163.

On September 16, 2011, the Court filed an Order granting preliminary injunction stating Wasson and Bills are the last two surviving members of the Council recognized by the MPO and “Wasson represents the will of the Council under the Minnesota Panel’s ruling” until William Bills appears and objects to the Court. The Court ordered counsel for the Wasson Group (Ms. Treva Hearne) to prepare the Order. ER Vol. I at 105.

After Ms. Hearne submitted the proposed Order, the Court rejected it as Ms. Hearne inserted language into it that was not heard or decided, including

“an improper finding on page four that “William Bills is rejected as a ‘legitimate representative(s) of the Winnemucca Indian Colony of Nevada’ as he does not appear to qualify as tribal member based upon the requirements contained in Article II, Section 1 of the Constitution and By-Laws of the Colony” This proposed finding is wrong on several levels. Not only did the Court make no such ruling, it did not even hear argument on the point, much less indicate that it would rule on such a question.” ER Vol. I at 84.

On September 9, 2011, Bryan Bowker (the Western Regional Director for the BIA), executed an Affidavit stating that since 2000, a couple of groups have claimed to comprise the WIC Council, including the “Wasson Group” and the “Ayers Group.” ER Vol. IV at 17.

On January 31, 2012 an Order was entered in favor of Wasson and Bills granting them preliminary injunctive relief in the form of recognition that they are the proper tribal representatives with the Court finding that they were likely to succeed on the merits. ER Vol. I at 74. No hearing was ever conducted on

the merits, nor was the Ayer groups' claim that they were the validly elected Council for the WIC ever addressed.

On July 9, 2012, the District Court ordered the BIA to recognize either Wasson or Bills as the designated Tribal representative. ER Vol. I at 70-71.

On July 16, 2012, the BIA filed notice with the Court that it recognized William Bills as the designated Tribal representative. ER Vol. III at 110. Based on his recognition by the BIA, Bills initiated and conducted a Tribal election on August 16, 2012 wherein the 98 tribal members recognized from Resolution WN-00-08 were allowed to participate and vote. ER Vol. II at 177-119. Linda Ayer, Allen Ambler, Laura (Bliss) Ambler, Rosemary Thomas, and Jim Ayer were elected to the WIC Council in this election. ER Vol. II at 116, 120. There were no contests to this election including by any members of the Wasson Group. Id. The District Court never looked at or considered this election.

On September 4, 2012, the Court held a hearing and stated that the BIA was corrupt or biased in picking William Bills as the tribal representative. ER Vol. I at 49.

On September 25, 2012, the Court entered an Order stating the BIA shall recognize Wasson as the representative of the WIC Council. ER Vol. I at 43.

No post MPO Tribal government actions were ever considered by the Court. Instead the Court stated it required an actual tribal court order for anyone to be recognized as being a Council member or comprising the Council. Vol. I at 84:18-20.

Post MPO WIC governmental decisions existed, including a decision in 2010 by the Winnemucca Tribal Court finding that the "duly elected Winnemucca Indian Colony Council consists of **LAURA (BLISS) AMBLER, LINDA AYER, ALLEN AMBLER, CHERYL APPERSON-HILL, AND CHARLENE DRESSLER.**" (emphasis in original). ER Vol. V at 161.

On May 29, 2013, a Show Cause hearing was held. At the hearing the Ayer Group presented difficulties it was having with the Wasson Group in trying to participate in the Court ordered election. ER Vol. I at 24-26. In it the Court clarifies that the members of the WIC and those that can participate start with the MPO and its list of 77. ER Vol. I at 24.

On June 29, 2013, the Wasson Group held an election. The Election Committee members were Misty Morning Dawn Rojo-Alvarez; Katherine Gertrude Hasbrouck and Judy Rojo. ER Vol. II at 215. These three individuals were listed in the Complaint as comprising the WIC Council and were seeking recognition as such. ER Vol. V at 259. They also ran in (and prevailed in) the Wasson election. ER Vol. II at 218. The Wasson Group Election Committee were all incumbent Council members and candidates, which is a violation of Election Ordinance 301, Section IV. ER Vol. II at 175.

The Wasson Group informed the District Court of their election results on July 22, 2013. ER Vol. II at 211-219.

The Wasson Group only recognized thirty (30) people as being members and eligible to vote. ER Vol. II at 228, 229. Of those 30 people, ten (10) were running for election. ER Vol. II at 217. Only seventeen (17) of the allowed 30 individuals voted. ER Vol. II at 218.

On September 25, 2013, the Court ordered Thomas Wasson to receive new membership applications to the WIC and to “begin with the List of 77, plus members accepted through August 16, 2002” and to delay the constitutionally mandated October election of the WIC Council.² ER Vol. I at 43.

² The Constitution and Bylaw of the WIC, Article IV, Section 2, mandates Colony Council elections be conducted in the month of October in even numbered years. ER Vol. V at 20.

On February 6, 2014, the Ayer Group filed a Status Report for an upcoming status hearing that presented multiple issues of the Wasson Group election including issues raised by Wasson himself. ER Vol. II at 148-156.

On February 10, 2014, the District Court ordered the parties to submit names for a judge to sit on a District Court created tribal court that would determine election disputes. The Court stated that “this Court has no choice but to select a neutral tribal judge for the purposes of the present enrollment and election disputes and will do so if the parties cannot quickly agree upon a neutral tribal judge.” ER Vol. I at 19.

At the status hearing held on February 10, 2014, the Wasson Group informed the Court that the existing Federal Tribal CFR Court could hear the appeal. ER Vol. I at 12.

The Ayer Group never agreed to the process being created by the District Court, but followed the mandate the District Court put on them. The Ayer Group submitted their potential judges list on February 24, 2014 with an update on February 26. ER Vol. II at 121 and 123-27. In it, the Ayer Group specifically requested that the currently existing Tribal Court of Indian Offenses (also known as a Federal CFR court) hear this matter. ER Vol. II at 124. The Wasson Group objected to the CFR Court on the mere basis that a contest to the Wasson Group election had been filed there by the Ayer Group (which was the entire point of needing to pick a judge in the first place).³

³ “We cannot use the CFR judge now that Allen Ambler has filed an action in front of that forum which of course I will be contesting immediately.” ER Vol. II at 259. The action filed was in fact a contest to the Wasson Group’s election. ER Vol. II at 194-208.

After the parties complied with the Court's order of submitting names for judges, the District Court then appointed Mr. Timothy Darrington to be the tribal judge for the District Court created Tribal Court "for the adjudication of any enrollment and election disputes arising out of the enrollment and elections carried out pursuant to this Court's previous orders." ER Vol. I at 17.

The Ayer Group presented their election issues to Darrington as instructed. Darrington did not allow the undersigned to represent the Ayer Group and ultimately found that the Court did not have jurisdiction to hear any election disputes.

The Ayer Group then appealed this decision to the Inter-Tribal Court of Appeals as they were instructed by the District Court that it would be the recognized court to hear any appeals from Darrington. ER Vol. I at 17. Said Court upheld that Darrington did not have jurisdiction.

The District Court then finalized the Wasson Group election and on November 19, 2014, the District Court ordered that the "Department of the Interior, Bureau of Indian Affairs, shall recognize as permanent Council of the Winnemucca Indian Colony, Judy Rojo, Misty Morning Dawn Rojo Alvarez, Katherine Hasbrouck, Eric Magiera and Thomas Magiera II as elected in the October 25, 2014, election of the Winnemucca Indian Colony." ER Vol. I at 9.

Summary of Argument

At the heart of this matter is who gets to direct the government of the WIC as well as control who lives on the WIC reservation in Winnemucca, Nevada as that decision is made by who governs the WIC. Plaintiffs' filed a lawsuit asking the District Court to enter an injunction against the BIA so that the BIA will not interfere with actions they want to take on the WIC as well as declaratory relief. The District Court went beyond this request and entered

orders affecting the membership as well as the WIC government, including the Tribe's ability to elect a valid Council. To so do, the District Court exceeded its authority and the District Judge took it upon himself to act in a patriarchal manner and let his personal beliefs dictate the outcome of this matter. The District Court never had jurisdiction to adjudicate any intra-tribal issues, and the issues it did adjudicate were done contrary to the established evidence and legal precedent. The District Court did not have authority to appoint itself as the acting regional director of the Western Region for the BIA, then order a tribal election, and then decide who can control the tribal election including who the members are that can vote in the election as well as be candidates in the election.

Argument

1. The District Court did not have jurisdiction.

Even though the Wasson Group did not raise this allegation, the District Court found that it had jurisdiction over Plaintiffs' claims pursuant to 28 USC §1331 under the Administrative Procedure Act (APA) as articulated in *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir., 1983). ER Vol. I at 73, 88, and 114. "Plaintiffs have properly invoked § 1331." ER Vol. I at 88.

The APA itself does not create jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 107 (1997). The APA is only a cause of action. Jurisdiction is only created if there is a Federal question. 28 U.S.C. Section 1331 bestows upon federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Thus, a Federal question is only invoked in this matter if the BIA was violating a legal

obligation it had to the WIC – which is the threshold question under § 1331 in this matter.

In their Amended Complaint, the Wasson Group only alleged/requested that the Court enter orders that: 1) prohibit the BIA from entering the WIC Indian Reservation; 2) prohibit the BIA from appointing the WIC government as comprising any individual that is not a verified descendent of the 1916 census of the WIC; 3) requiring the BIA to recognize the Wasson Group as the WIC Council; and 4) to remove non-WIC members from the reservation.⁴ ER Vol. IV at 239-40. These requests do not rise to the level of any legal obligation the BIA has to the WIC and the Wasson Group did not make such a showing. The only agency action that can be compelled under the APA is action that is "legally required." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). As such, there was a lack of jurisdiction by the District Court to determine any matter regarding tribal membership and elections.

Additionally, only a final agency decision is entitled to an APA review action. 5 U.S.C. § 704. Since there was no final agency decision, jurisdiction did not exist. “[T]he federal courts may not assert jurisdiction to review agency action until the administrative appeals are complete.” *White Mountain Apache Tribe. Model*, 840 F.2d 675, 677 (9th Cir., 1988).

The fact that an administrative proceeding is currently underway involving the very claims at issue in this litigation deprived this District Court of jurisdiction. Administrative remedies must be exhausted - and a final agency decision issued - before judicial review is appropriate. *See Joint Board of Control v. United States*, 862 F.2d 195, 199 (9th Cir. 1988) ("the federal courts

⁴ In their original Complaint, no APA action or jurisdiction was pled. ER Vol. V at 258-67.

may not assert jurisdiction to review agency action until the administrative appeals are complete"); *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 919 (9th Cir. 1995) (allowing judicial review for "final" agency decisions).

The Court relied upon *Grassrope* for its finding that it had jurisdiction, However, the significant distinction between the facts in *Grassrope* and in this matter are that there was a final agency decision in *Grassrope* where the BIA decided to recognize two governing bodies pending a tribal court decision that would make a determination as to who the correct governing body would be. Due to the court finding jurisdiction, the focus in *Grassrope* went to the merits of an improper decision from the BIA. But it was nonetheless a final agency decision from the BIA.

In the case at bar, there is simply was no final agency decision and the Wasson Group did not allege that there was any final agency decision in its Complaint or in the relevant Amended Complaint. This was not alleged since it was clear that no final agency decision had been made. In a Declaration from the current Regional Director Western Region of the BIA, he states:

The BIA is currently engaged in administrative proceedings to address tribal leadership issues that are identical to those raised in Plaintiffs' Complaint and Motion for Temporary Restraining Order and Preliminary Injunction and Mandatory Injunction ("TRO Motion") in the current lawsuit. When the BIA was notified of the current lawsuit, my office was in the process of responding to an "Order Vacating Decision and Remanding" issued on December 17, 2010, by the IBIA in the latest appeal by appellants, including the named plaintiff in the current lawsuit, Thomas Wasson, *Wasson et. al, v, Acting Western Regional Director*, IBIA 10-050. (TRO Motion, Exhibit 5) In its Remand Order, the IBIA vacated a decision dated December 8, 2009 (Exhibit B) in which the former Western Regional Director stated that he "affirmatively" did not "recognize or acknowledge or certify or approve these individuals ... as

the duly elected officers of the Winnemucca Indian Colony." The IBIA, then remanded the matter back to my office . . . ER Vol. V at 16.

The Order from the IBIA confirms this when it states:

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 . . . ER Vol. V at 56.

When the Wasson Group demanded to know "How have you determined that the 'Ayers' faction is an interested party. The BIA stated that:

The IBIA explicitly mandated that Bureau of Indian Affairs (BIA) "...shall afford the Ayer faction (and any other interested parties) an opportunity to respond" . . . ER Vol. V at 71.

Thus, absent a final agency decision that went to the heart of any legally mandated BIA obligations, the District Court did not have jurisdiction to hear the issues the Wasson Group put before it or to make any determinations. *Grassrope* is simply not applicable.

2. *Res judicata* prevented this matter from being heard.

The Wasson Group has previously requested a District Court to order the BIA to recognize them as the WIC Council. That matter was fully concluded with no such recognition being ordered.

Three elements determine whether the doctrine of *res judicata* applies to bar a claim. There must exist an identity of claims, a final judgment on the merits and privity between the parties. *Tahoe-Sierra Pres. Council v. Tahoe Reg. Planning*, 322 F.3d 1064, 1077-78 (9th Cir., 2003).

The Wasson Group has asserted a claim for relief that the District Court should order the BIA to recognize certain tribal members as the governing body of the Colony. ER Vol. IV at 226. But Wasson asserted that same claim for relief in *Magiera et al. v. Norton et al.*, 3:01-cv-00467-LRH-VPC: “Because of th[e] continuing refusal by the BIA to recognize the government, the Winnemucca Indian Colony filed the Complaint in this matter to require the BIA to recognize the Council.” ER Vol. IV at 187. “The Winnemucca Indian Colony further requests that the Secretary of the Interior be required to recognize the Council of the Winnemucca Indian Colony, as Sharon Wasson, Chairman, Thomas Wasson, Elverine Castro, Andrea Davidson and William Bills” ER Vol. IV at 197. The first element of res judicata is thus met because that “claim for relief” -- asserted in both cases -- is identical. The second element of res judicata is also met because the Court dismissed the complaint in *Magiera* and then issued a final judgment that was appealed to the Ninth Circuit Court of Appeals. ER Vol. IV at 200-215 and 217. Lastly, there is privity between the parties because in *Magiera*, Wasson asserted his claim against the federal government, as is the case here. Because the claim for relief was requesting the District Court to order the BIA to recognize a tribal government, it was barred by the doctrine of res judicata.

3. The granting of the initial TRO was improper.

On August 29, 2011, Plaintiffs’ filed their Complaint. On August 30, 2011, Plaintiffs filed both a motion for a temporary restraining order and a motion for preliminary injunction. The very next day on August 31, 2011, the District Court entered a TRO with no hearing or opposition briefing. In that Order, the Court ordered the BIA to recognize a representative for the WIC. ER Vol. I at 117. The Court accepted everything listed in the Complaint as true and

never gave any opportunity for any opposition to be considered despite knowing that other individuals were claiming to comprise the WIC governing body (aka the WIC Council).

In response to the TRO, the BIA filed a motion to vacate and in it the BIA informed the Court that there were several groups (including the Ayer Group) claiming to be the proper WIC Council and that this matter was still pending before the IBIA when Plaintiffs filed their Complaint. ER Vol. V at 184 ¶ 7 and 185 ¶ 9. Specifically, the BIA stated that it was “currently engaged in administrative proceedings to address tribal leadership issues” and that it was involved in the latest appeal of Plaintiffs. ER Vol. V at 185 ¶ 9.

Grassrope was clear in that only a temporary conditional order can be issued by a court pending a final agency determination. It was found that “the district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute.” 708 F.2d at 339. Yet, the District Court was in fact getting involved in the election disputes by not considering all individuals, i.e. the Ayer Group, that have asserted a claim that they comprise the WIC Council, or to hold any hearing or briefing on this issue.

Thus the order of the Court that mandated the BIA to recognize an individual as a Tribal representative was improper as it had not yet determined that the BIA had any legal obligations to the WIC, not to mention that the issue of who should be recognized had still not yet been determined as the matter was just recently remanded from the IBIA and briefing on the matter had commenced.

4. The District Court erred when it entered Orders recognizing Wasson as the WIC representative and then others as the Colony Council.

Instead of this matter being limited to whether a Federal question had been presented to the Court and then whether a temporary representative was required to be recognized by the BIA pending the final decisions of the BIA, this matter turned into decisions being made by the District Court as to who should be the proper permanent WIC Council.

As cited hereinafter, no Federal Court or agency has the authority to decide intratribal issues, such as who comprises the government of a Tribe. But this is what occurred.

5. The District Court exceeded its authority.

In the event this Appellate Court and finds that the District Court had jurisdiction, the District Court exceeded its authority with its decisions and actions, including when it rejected the BIA's decision to recognize Bills (after it ordered the BIA to recognize Wasson or Bills), and then when the District Court removed the BIA's Regional Director and appointed itself as the BIA's Director in this matter.

The law is clearly established that no Court or government agency can get involved with or determine intratribal issues including the results of Tribal elections. *Shenandoah v. US. Dep't of Interior*, 159 F.3d 708, 712-13 (2nd Cir. 1998) (holding that court lacked jurisdiction to determine which member of tribe was proper tribal representative, as question involved purely tribal law); *Wheeler v. US. Dept. of Interior*, 811 F.2d 549, 551 (10th Cir. 1987) ("when a tribal forum exists for resolving a tribal election dispute, the Department [of the Interior] must respect the Tribe's right to self-determination and, thus, has no authority to interfere."); *Ordinance 59 Ass 'n v. Babbitt*, 970 F.Supp. 914, 927

(D. Wyo. 1997) ("unless expressly waived or affected by Congressional enactment, [Indian tribes] have sovereign immunity over intra-tribal disputes such as those involving tribal government and membership"); *Attorney's Process and Investigation Services, Inc. v. Sac and Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 943 (8th Cir. 2010) ("It is plain, then, that whether Walker was properly removed from office and whether he had general authority to act on behalf of the Tribe in a governmental capacity are pure questions of tribal law, beyond the purview of the federal agencies and the federal courts.").

Even the Eight Circuit Court of Appeals (that decided *Grassrope*) firmly states that Courts do not have jurisdiction to determine internal tribal issues.

In cases involving tribal affairs, we exercise section 1331 jurisdiction only when federal law is determinative of the issues involved. *Longie*, 400 F.3d at 589. "Jurisdiction to resolve internal tribal disputes [and] interpret tribal constitutions and laws . . . lies with Indian tribes and not in the district courts." *Meskwaki Casino Litig.*, 340 F.3d at 763. We have characterized election disputes between competing tribal councils as nonjusticiable, intratribal matters. *Id.*; see *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983).

Sac & Fox Tribe v. Bureau of Indian Affairs, 430 F.3d 832, 835 (8th Cir. 2006).

Accordingly, the request that the District Court order the BIA to "recognize" a tribal government should have been dismissed and not considered.⁵

But this is not what occurred in the case at bar. In this matter, the District Court interfered with and determined who comprised the WIC Council in its opinion, and entered orders based on such beliefs. Once the District Court

⁵ The USA defendants filed motions to dismiss based on this issue – which were denied. ER Vol. V at 1-13; ER Vol. IV at 1-15.

learned there were controversies within the Tribe as to who comprised the Council, it was obligated to not get involved, including making the determination that the MPO was the starting point in deciding any tribal controversies. But instead, the Court continued to increase its involvement and enter orders.

The District Court ordered the BIA to recognize a person as a representative of the WIC. Specifically, the Court ordered that the “BIA shall recognize one or more Council members as the government of the Winnemucca Indian Colony until the conclusion of this action.” ER Vol. I at 70. The Court found that William Bills and Thomas Wasson are the only remaining members of the recognized by the MPO. ER Vol. I at 67. The Court also attempted to exert its personal opinion on the BIA in its decision when it stated in its order that the “BIA should keep in mind that Bills appears to reside in San Joaquin, California, from where he likely cannot efficiently govern the Colony, whereas Wasson appears to live on or near the Colony and actively desires to rehabilitate the Colony.” ER Vol. I at 71. Based on the BIA’s extensive involvement with the WIC colony dispute over multiple years and the findings in the MPO, the BIA then chose William Bills over its other given choice of Wasson. ER Vol. III at 109. The BIA reiterated what was contained in the MPO and stated:

Mr. Bills is one of the two surviving members of the last Tribal Council for the Colony with which the BIA had a government-to-government relationship, and the last Vice Chairman selected by the Council, who, in accordance with Bylaws, Article I, Section 2 of the Constitution and Bylaws of the Winnemucca Indian Colony Nevada (March 5, 1971) (Constitution), "shall assume the duties and responsibilities of the chairman in his absence.

ER Vol. III at 110

As expected, the Wasson Group did not like this option and filed a motion for injunctive relief. The Court then held a hearing and asked the BIA to explain why it was choosing Bills and the BIA answered in part that Bills had originally been selected Vice-Chairman and was “the more appropriate choice to serve as an interim representatives.” ER Vol. I at 48. The Court then asked why the BIA was not honoring the (purported) subsequent elections and the BIA stated they were “subject to dispute” and that according to the Minnesota Panel Order, Bills was Vice-Chairman at the time (of Glenn Wasson’s death). Id. at 48-49.

MS. VANCE: No, Your Honor. May I explain the basis for the BIA's selection of Mr. Bills as an interim representative, since I think that is the issue that's squarely on the table?

...

MS. VANCE: Bills was Vice-Chairman at the time Glenn Wasson passed away. And according to the Minnesota --

THE COURT: What? Pardon?

MS. VANCE: Bills was Vice-Chairman --

THE COURT: That's right.

MS. VANCE: -- at the time that Glenn Wasson passed away –
ER Vol. I at 48

The Court then entered an injunction “to bar the Western Agency, BIA from doing anything.” ER Vol. I at 49.

“They are in contempt of this court, of the Ninth Circuit Orders, and every other Order. So, I'm removing this gentleman (Bowker) from any effect of control. I'm not removing the Bureau of Indian Affairs, just that I'm going to give the order instead of him. He will not exercise any discretion, because the only thing I can conclude is that his decision is either corrupt or bias. Therefore, your petitions, until this case concludes,

will reside with me. And my order will order him what to do and/or will, if he refuses to do it, will serve as substitute for his order.

ER Vol. I at 49-50

In essence, I'm going to sit in lieu, and instead of the Western Regional BIA Office and tell him what he needs to do.

ER Vol. I at 54

It was clarified by Mr. McElhinney, the attorney for William Bills, that the selection of Bills by the BIA was only done for a biased reason.

Mr. McElhinney: So to clarify, Your Honor, the selection of Mr. Bills is biased in the Court's opinion?

The Court: Yes.

ER Vol. I at 55

In its Order, the Court did not mention that the BIA was corrupt and biased, but instead stated that its decision amounted to the interpretation of Tribal law – which was not allowed and was impermissible interference into sovereign Indian self governance.” ER Vol. I at 41. The irony is, the Court itself was actively participating in impermissible interference, i.e. it was continuing to proceed and ignore the subsequent elections after the MPO that it had been put on notice of.

Even though it was on notice that the Ayer Group was claiming to be the proper Council and that this matter had been proceeding before the BIA and the IBIA, the Court refused to inquire into what governmental activities, including elections occurred after the MPO. Instead, the Court arbitrarily chose to only look at the now very dated MPO and require the BIA to choose one of two individuals listed in the MPO. The BIA followed the Court’s mandate and had to apply some sort of criteria for a temporary interim recognition. With the BIA being forced to go back to the MPO recognition, the BIA specifically

recognized the MPO and simply acknowledged the authority cited by the MPO. The MPO specifically recognized Bills as the Chairperson of the WIC. It stated:

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 Glen Wasson. William Bills ascended to the Chair position by virtue of being the Vice Chair.

ER Vol. III at 88

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.

ER Vol. III at 95

According to the District Court, the MPO is the last recognized Tribal Court Order regarding election issues. Thus, just as in *Grassrope* where the Court relied upon a tribal election finding, the use of the recognized MPO for a decision by the BIA is proper. While such a decision was contrary to who the District Court clearly indicated it wanted chosen, it was not arbitrary and capricious as it was based on a sound and permissible finding.⁶ But based on the BIA relying upon the MPO, the Court then called the BIA corrupt, refused to recognize the BIA’s choice, and then appointed Thomas Wasson as the Colony’s designated representative with no analysis whatsoever as to why

⁶ If relevant factors are considered and a decision is not clear error, then it is not arbitrary and capricious. *See Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008). Thus, an agencies determination is to be given deference, especially when it has been involved in the matter far longer than a court.

Wasson was superior to Bills (or what governmental activity had occurred after the MPO. ER Vol. I at 43.

It should be noted that the *Grassrope* decision utilized by the District Court found that the court overstepped its boundaries in instructing the BIA who to recognize. Absent the BIA decision being arbitrary and capricious, the District Court had no authority to order the BIA to recognize Wasson, or anyone else.

Although it was necessary to remedy the situation by ordering the BIA to recognize one governing body, the district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute.

708 F.2d at 339

The District Court appointing itself in essence as the acting director of the Western Agency of the BIA and making decisions on behalf of the BIA and now choosing Wasson as the recognized representative of the Tribe is the start of all the significant harm to the WIC. The Court continued to insert itself into the tribal self-governance issues. It next ordered that new elections be held and appointed the Wasson Group as those that were allowed to hold and control the election over objections. The objections and issues were vast. In addition to the Court ignoring the elections that happened since the MPO by the Council recognized by the MPO, the Court allowed the Wasson Group to ignore the main decision of the MPO, i.e. that more than seventy-seven (77) individuals were found to be members of the WIC. The Court recognized that a minimum of 77 individuals were recognized as members, but then allowed the Wasson Group to effectively disenroll those individuals by requiring everyone to re-enroll with the Wasson Group controlling the enrollment process. This resulted in a reduction from the more than 77 to only 30 handpicked by Wasson to vote

for themselves. The significance of this is that only enrolled members of the WIC can run for election to the WIC Council as well as vote. This issue was brought to the Court's attention.

MR. WILLIAMS: And Mr. Wasson, in one of the Affidavits he filed just recently, stated that the Minnesota Panel decision didn't have power to state who were the proper members, so he never recognized that list of 77, or the others that were added to that list.

MR. WILLIAMS: And I guess that's the problem.

THE COURT: So how does that become the problem?
What is the problem?

MR. WILLIAMS: Who should be allowed to vote. And the Ayer Group were on that list, and Mr. Wasson has never recognized them as being Tribal members from the very beginning, never put them on any voters list, never let them run for office, and has never allowed them to participate in any of his elections.

THE COURT: It's Statement of the Enrollment Officer, dated September 26th, '09, and approval of the list by the Council. And it contains a list of Official Tribal Membership Roll, and there are only 26 people on the list. Is that the one that you're criticizing?

MR. WILLIAMS: Yes; that, and every other list that Mr. Wasson's group has put out. I believe at one of the very first hearings, before my clients became parties to this case, Miss Hearne mentioned that there were only 12 members at one point, and that following the Minnesota -- or around the time of the Minnesota Panel decision.

ER Vol. I at 51

As presented, the Court recognized the MPO as the controlling document in order to determine who comprises the WIC Council as well as its members (and thus those that can participate in Tribal governance such as participating in

elections). As stated by the Court, the MPO is specific that:

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 from 77 -- of 77 from 1998. ER Vol. I at 52.

So the way I read that language is the list of 77 is the valid starting point list. Anyone who was added by previous Council, that's prior to this decision, or prior to the list of 77 in 1998, certainly not a Bills Council, or the Wasson Council, from 1998 to the present, shall be added. So we start with the list of 77, that's mandated. No matter what Mr. Thomas Wasson wants, that's mandated. We add to that anyone for which there is official recognition of a prior council to this Minnesota Order, maybe even prior to the 1998 list, or from 1998 to the present, present by the Wasson Council shall be added. ER Vol. I at 52-53.

After appointing Wasson as the WIC recognized representative, the Court gave further recognition to the Wasson Group. The Court wanted a new Tribal election to occur and designated the Wasson Group as the individuals to run and control the election. Specifically, the Court ordered:

that Thomas Wasson: (1) appoint a membership committee that is equal parts Shoshone and Paiute; (2) receive membership applications from all persons desiring membership in the Winnemucca Indian Colony; (3) begin with the List of 77, plus members accepted through August 16, 2002; (4) delay the scheduled election of October 20, 2012 for six months in order for the applications to be reviewed, a membership list to be posted and published, and for any potential member who is refused membership to be given the right to appeal to a neutral and unbiased tribal judge and to the Inter Tribal Court of Appeals of Nevada; and (5) to hold an election after all membership appeals are exhausted.

ER Vol. I at 43-44

While the Ayer Group submits that they have been previously properly recognized as WIC members, they did not want any hinderance or arguments against them being members or participating in the District Court ordered elections, so they attempted to apply/reapply for membership to the Wasson Group since the Wasson Group refused to recognize them as members. The Wasson Group put up interference to their applications including not responding to application requests.⁷ ER Vol. II at 255, ¶ 5. (application requests were made but no application was received).

The Ayer Group was never recognized as members by the Wasson Group nor were they allowed to participate in the Court ordered election in any fashion including voting or running for election as a member of the Council. ER Vol. II at 215-19.

Based on objections by the Ayer Group that the Wasson Group was excluding them (and other WIC members) from being recognized as members of the WIC and preventing them from participating in the elections, the District Court stated that:

My orders all say we start with the Minnesota Panel decision and then we go forward.

But basically we start with the Minnesota Panel's decision on membership and we go forward from there.

ER Vol. I at 24.

⁷ The Wasson Group did not simply let someone apply using a copied blank application that was sent to someone else, they actually required that an application request be made prior to them sending a specific application to an individual.

She (Council representative) doesn't have any right to remove somebody from the roll

ER Vol. I at 25.

While the Court found that the List of 77, plus must be used, the Court nevertheless allowed the Wasson Group to run the election as well as control it and disregard the List of 77 plus.

When the Ayer Group objected, the Court responded by stating it understood that this was going to be a one-sided council, but the elections would all work out over time and that this was necessary as the election dispute has resulted in turmoil. Thus, the Court is stepping on the Tribe's sovereignty and taking over.

And I recognize that before the appellate court can complete all of their duties, that may be a one-sided council, I recognize that, but it has to be that way. But it can be corrected in the long run, maybe a year later, we just have to have patience after everyone is fairly admitted or not admitted for an enrollment based upon an impartial tribal, not federal, tribal judge's decision.

And a partial reason for this partial impairment of your sovereignty is the following. You are a conquered nation. I am obligated to respect your sovereignty and your right to enter into treaties with the United States, but you are a conquered nation, and one thing I do not have to tolerate is a lack of peace on the tribal land.

In other words, if you can't resolve your problem through normal tribal, sovereign processes, I will solve the problem to the extent it impairs the peace because you are a conquered nation, okay?

ER Vol. I at 27

The lack of peace the Court was referring to is when the Court entered an Order that the Wasson Group was not to “**eject other parties from the South Street Smoke Shop**” (ER Vol. I at 75 emphasis in original), but then the Wasson Group came onto the reservation under a threat of force and took

permanent control of the Tribal Administration Building as well as the Ayer Group's Smoke Shop.⁸ While a Smoke Shop employee locked herself in the Smoke Shop to call for help, the Wasson Group attacked and tried to gain entry by using an axe and a crow bar. ER Vol. III at 75. So, the Wasson Group creates the turmoil and reaps the benefit of it by getting to be a one-sided Council.

The end result is that the Court set up the Wasson Group to control the election who only allowed thirty (30) individuals to vote as well as controlling who was on the election voters list and ballot. ER Vol. II at 228-229. Out of these individuals, only seventeen (17) actually voted. ER Vol. II at 218. And out of those, ten (10) were running for election. ER Vol. II at 218. These are in essence the exact same twenty-six (26) individuals that the Wasson Group presented to the BIA in 2009 claiming to be the only members of the WIC plus a few additional individuals (again ignoring the MPO ordered List of 77). Vol. IV at 140-143. In other words, the Wasson Group was given an opportunity to expand their supporters and expel any detractors to ensure a victory in the Court ordered election and thwarted any other individuals from participating.

This is what the Ayer Group had been complaining about, and is exactly what the Wasson Group had been doing over the years. This is in part why the BIA has not recognized the Wasson Group as the WIC Council. It simply would not follow the MPO and instead, decided to start acting on their own outside of the Tribal parameters and then start claiming to be the Council. This is shown by a letter from the BIA to the Wasson Group where it states the

⁸ The Ayer Group filed a Motion to Show Cause stating that the Court previously ordered the Wasson Group to not eject the Ayer Group from the Smoke Shop, but this request was not acted upon. ER Vol. III at 73-78.

Wasson is only recognizing seventeen (17) individuals as being members of the WIC despite the MPO stating there are seventy-seven, plus.

Your attorney's October 22, 2002 letter, at page 1, asserts that the Colony consists of seventeen members. I note that the Appellate (MPO) Decision, at page 12, states that the last known list of members approved by the validly constituted Colony Council identified seventy-seven members of the Colony. I bring this matter to your attention for two reasons. First, if the Colony Council brings to the Bureau of Indian Affairs a proper application, such as a Public Law 93-638 application, for Federal action, the anomaly between seventeen and seventy-seven members may become an issue. Second, it appears incongruous for you to contend that the Appellate Decision correctly reflects the facts and the legal conclusions contained therein and, at the same time, to reject or ignore parts of the Appellate Decision.

ER Vol. V at 134

This was brought to the Court's attention as well as other issues in the Status Report the Ayer Group filed with the Court. ER Vol. II at 148-155. This Report also showed that Plaintiff Thomas Wasson himself disagreed with how the election was conducted and filed a contest to the election disputing the validity of the election, the validity of the eligibility of the council members, and the validity of the enrollment process. ER Vol. II at 160-166. Wasson claimed multiple election violations - many of which the Ayer Group has previously complained of and informed this Court of.⁹ As presented to the

⁹ Wasson's letter also complains of other wrongdoings by the other plaintiffs in addition to election proceedings such as Plaintiff's attorney never picking up the papers that this Court ordered returned to the Ayer Group when the Wasson Group entered the Administration and South Street Smoke Shop building (which the District Court Order and removed all of the evidence and documents the Ayer Group had).

Court in the Status Report, these include:

1. Individuals running in the election were on both the enrollment as well as the election committee - which violates the Winnemucca Indian Colony (WIC) Election Ordinance 301, Section 4a. These individuals are Judy Rojo, Misty Rojo-Alvarez and Katherine Hasbrouck.

2. Wasson also declares that Judy Rojo, Misty Rojo-Alvarez and Katherine Hasbrouck (who apparently comprised the entire Election Committee) are not performing their duties and are not following the Tribe's Constitution and By-Laws.

3. Wasson now admitted that the email address as well as the post office box address Plaintiffs used for membership and election purposes (which this Court listed in its Order as the contact address and for publication purposes) "were inoperable for certain time."

ER Vol. II at 150-51.

Thus, the Wasson Group knowingly gave this Court an invalid address without any reason to believe it was valid. The Ayer Group relied upon the address representation and then raised the difficulties to the District Court that the given address created in being allowed to participate in the election - which Wasson is now conceding to.

Morris: . . . I do have an issue of . . . requests for applications being returned, as well as applications . . .

"Ayer lost access to documents with names and addresses of Ayer-friendly persons who maybe eligible for enrollment, and despite this Court's clear order at the last show cause hearing (and Attorney Hearne's representation that the documents were in "secure boxes" and her promise to comply with the Court's turn-over order), Attorney Hearne has given Attorney Williams only one two-inch binder of membership applications. She has failed to turn over various Indian Census records, Certificates of Indian Blood Decree, and birth certificates that were in other black binders."

The Court: This address that was published, do you have any evidence that anybody sent an application ... that was returned unreceived?

Morris: I do have evidence . . .

Morris: I do have evidence that people have requested applications and have not received it.

Morris: Mr, Ambler sent it to the address that was published in the paper.

Morris: Unless he receives it, he can't file for it. The applications are not being –

ER Vol. I at 29-32.

In addition to Plaintiff Wasson's allegations of an improper election, the Ayer Group brought to the Court their own allegations of election illegalities. The other issues were also presented in the same Status Report and include:

1. Plaintiffs refusing to allow more than 75% the members recognized by the Minnesota Panel Order to vote;
2. Plaintiffs refusing to enroll additional eligible members and make a determination on the applications that were returned to the Council and Committee.
3. Plaintiffs not following the election ordinances and using illegal procedures that only benefited them, such as using their Ordinance found to be improper by this Court (Ordinance 310a).
4. Plaintiffs have refused to act on previously received valid election recall petitions as required by the WIC Ordinance 301, Section VI(b)(2).
5. Just two months after the Minnesota Panel Order, Plaintiffs wrote the BIA on October 22, 2002 stating that there were only 17

members of the WIC. (Exhibit 3). Plaintiffs then attempted to hold their own self-appointed election on October 26, 2002 where they only allowed 12 people (out of their 17 membership list) to vote. The BIA's Regional Director properly refused to recognize the purported self-election in 2002 where the BIA informed plaintiffs and Wasson that their membership list of 17 does not follow the Minnesota Panel Order and therefore could not be recognized. This becomes an issue in the current election not only because plaintiffs are still intentionally ignoring the election requirements (since they would otherwise not be elected if the remaining members of the Minnesota Panel were allowed to vote), but because it affects which individuals can even initiate an election as the current plaintiffs keep trying to bootstrapping themselves into the Council from previous illegal Council actions where the proper Council to initiate and hold elections were those members elected in the Recall Election.

6. The Colony Council elected in the Recall Election (the Lyva-Ayer Council) conducted a full and proper election on October 31, 2004 where the full membership validated by the Minnesota Panel was allowed to participate and vote (including the current plaintiffs). Successor Colony Council members have conducted elections that include the full membership and have governed the Winnemucca Indian Colony for the following decade. These elections are relevant since they impact who the Council was during the elections and therefore who could initiate the actual elections and their processes, including whether the voting was limited to less than 20 individuals from the Wasson Council or whether the entire membership from the Minnesota Panel could participate. If the Lyva-Ayer Council successor elections are found to be valid, then the Wasson Council's bootstrapping ability has been broken and they are divested of any claim to be council members since that date.

7. The Wasson Group filed numerous appeals to Interior Board of Indian Appeals ("IBIA") to appeal the decision of the Western Regional Director refusing to recognize the Council members after conducting the invalid elections where the Wasson Group refused to recognize or the Minnesota Panel Order and instead only allowed 12 friends to participate. Based on the evidence it was presented, the IBIA has dismissed most of the appeals and upheld the decision of the Regional Director. The basis for the IBIA decisions will impact any current election decision.

8. Pursuant to WIC Ordinance 301, Section II, a special general election was held on conducted on August 16, 2012 pursuant to the July 13, 2012 BIA recognition of William Bills where Linda Ayer, Allen Ambler, Laura (Bliss) Ambler, Jim Ayer and Rosemary Thomas were elected. (doc#110, page 3) See also Exhibit 1, ¶ 5. The election was not contested, protested or grieved including by the Wasson Group. Id. at ¶ 5.

9. Pre-election appeals regarding the limited voter's list prepared by the Wasson Group were submitted pursuant to WIC Ordinance 301, but the Wasson Group to date has failed to address the appeals in any fashion. Id. at ¶ 6.

10. As stated by Wasson to the BIA, their Group violated WIC Ordinance 301, Section 4(a) when the Wasson Election Committee was comprised of either incumbent council members or candidates. This admission by Wasson himself needs to be analyzed by the tribal court to determine the validity of the 2013 election held by the Wasson Group.

11. Outsiders not part of the Election Committee were allowed to participate in ballot counting. WIC Ordinance 301, Section IV d(3) restricts the counting and recording of the ballots to the Election Committee members, but Mr. Daryl Crawford (who was not a tribal member or on the Election Committee) was the individual that actually read the absentee ballots that was recorded by Katherine Hasbrouck. (doc#190-4, p. 5).

12. There were numerous contests, protests and grievances submitted to the Wasson Group's Election Committee regarding the disenfranchisement of approximately seventy-five percent (75%) of the current members, violations to Ordinance 301 and the Constitution and Bylaws. (Exhibit 5) See also Exhibit 1, ¶ 7. The Wasson Group Council and Election Committee has failed to answer any of the contests to the election. Id. Because of the many disputes filed, all of these need to be heard and decided by the tribal court.

ER Vol. II at 152-154.

After the Wasson Group informed the Court of their election results (including that only 30 people were eligible to vote), the District Court took the position that even though the Court set up the election parameters, that any objection to the way in which it occurred must go to a Tribal Court. The Court

then ordered the parties to either pick a mutual judge “to adjudicate enrollment and election issues as the Court had demanded” or to submit names of individuals if they are unable to do so. ER Vol. I at 19:1-3; 20. Even though it was pointed out to the Court that a tribal court did exist (a court commonly known as a CFR Court), the District Court self-created a Tribal Court and required that any election disputes be heard before that court.¹⁰ The Court ordered the parties to submit names of potential individuals to act as a tribal judge. ER Vol. I at 20.

The Ayer Group did as ordered. Included in the Ayer Group’s submission was its request to use the operating CFR Tribal Court as it was a Federally recognized Tribal Court. ER Vol. II at 125. The Wasson Group acknowledged the existence of the CFR Court and even previously informed the District Court that misdemeanors occurring on the WIC “go to the CFR Court.” ER Vol. I at 23. The Wasson Group then argued that the Ayer Group “are not members of the Winnemucca Indian Colony” (which was the entire dispute), and that they “have no standing in the CFR Court of the Winnemucca Indian Colony.” ER Vol. II at 140. The District Court refused to allow the CFR Court to hear any membership or election disputes and proceeded with appointing its own Tribal Court.

The District Court then appointed Timothy Darrington to be the District Court’s Tribal judge. The Ayer Group took their membership and election dispute to Darrington as ordered only to have him order that he did not have jurisdiction to hear the matter. The District Court then decided that the Wasson

¹⁰ A Federal Tribal Court known as a CFR Court (since it is created by 25 C.F.R. Part 11) existed and should have been allowed to hear the WIC issues.

election was proper and entered an Order that certain individuals were now the permanent council of the WIC.

IT IS HEREBY ORDERED as follows:

The Department of the Interior, Bureau of Indian Affairs, shall recognize as permanent Council of the Winnemucca Indian Colony, Judy Rojo, Misty Morning Dawn Rojo Alvarez, Katherine Hasbrouck, Eric Magiera and Thomas Magiera II as elected in the October 25, 2014, election of the Winnemucca Indian Colony.

ER Vol. I at 9.

As discussed, the District Court kept impermissibly interfering in the WIC governance, including creating election process and tribal court processes. Based on these grossly impermissible actions, the Court Orders recognizing certain individuals as either temporary or permanent council members, and any orders infringing on the status quo prior to the filing of this action, and/or invalidating any decisions issued by the BIA in their capacity as an agency of the Executive Branch should be reversed.

6. This matter should be reassigned if remanded.

The Ayer Group submits that based on the foregoing and the way in which the District Court Judge handled this matter, that it should be reassigned to a different judge in the event this matter is remanded.

As has been discussed by this Appellate Court on several occasions, Judge Jones routinely shows animosity towards government officials and agencies (as well as Indian Tribes), and this behavior continues today.

A dispassionate observer would conclude that the district judge harbored animus toward the federal agencies. Unfortunately, the judge's bias and prejudice are a matter of public record. On the first day of the 21-day trial, the judge stated: "the Bureau of Land Management, you come in

with the standard arrogant, arbitrary, capricious attitude that I recognize in many of these cases."

United States v. Estate of Hage, 810 F.3d 712, 722 (9th Cir., 2016).

The judge's statements in this case reflect both pre-judgment of the merits and bias against the federal agencies. Judge Jones' improper treatment of government officials and his improper statements about federal agencies were the subject of *United States v. United States District Court (In re United States)*, 791 F.3d 945 (9th Cir.2015). See *La Raza*, 800 F.3d at 1046 (looking to the conduct and statements of the district judge in other cases, when deciding whether to remand for reassignment).

Id. at 723

Just as in *Black Rock City, LLC v. Pershing Cnty. Bd. of Comm'rs*, Case No. 14-15221, p. 3 (9th Cir., 2016) where a reassignment was ordered due to Judge Jones' actions including mocking counsel, Judge Jones was not willing to listen to issues and informed the undersigned that he would only be given another 30 seconds when the undersigned was trying to inform the judge that he was not understanding something, i.e. that the question the judge was asking did not make sense given the circumstances.

MR. MORRIS: I also need to bring to this Court's attention there are issues with the notices put out by Mr. Wasson. There have been multiple different addresses given to request an application.

The notice published in the newspaper, if you only went by the newspaper, says write us here in Winnemucca. It also says go to our website. You go to the website, and it's a completely different address. You get the instructions, you get still another address.

I think the individuals need to be aware of where to actually request an application and where to send it.

And another point, on the –

THE COURT: Well, they are aware. You're just saying it's confusing, there's three addresses.

MR. MORRIS: One, my understanding, which is in the Wells Fargo building, and I did receive a list just this morning of the tenants, they're

not listed as a tenant. So this address, which is on the website --

THE COURT: What's the address?

MR. MORRIS: It is 200 South Virginia Street, 8th floor.

THE COURT: Did anybody make a request to that address that has never been complied with?

THE COURT: Then why are you raising this issue then?

MR. MORRIS: Because I do have an issue of applications being -- or requests for applications being returned, as well as applications, raising it, if I may, because --

THE COURT: *No, no, I'm not going to let you just go all over the map.* I can't respond to questions that are all over the map. Do you understand that?

MR. MORRIS: Yes, sir.

THE COURT: You know, *I'm just disgruntled with present counsel.* I'm sorry, I don't know how to respond to that kind of objection. I don't know how to respond to it. So unless you make it concrete, it's just not within my jurisdiction, I'm not going to entertain it.

MR. MORRIS: Well, I believe it is within what you've said, and I'm explaining the rationale --

THE COURT: What is?

MR. MORRIS: The issue I just raised with the notice.

THE COURT: That there's confusing addresses.

MR. MORRIS: What it does, your Honor, if they're not correct, which at least we have one being shown as being not correct, other individuals that had the opportunity to apply for membership and to vote as to who is

going to be on this council that's the backbone of the --

THE COURT: One question.

MR. MORRIS: Yes.

THE COURT: This address that was published, do you have any evidence that anybody sent an application, a request for an application to that address that was returned unreceived?

MR. MORRIS: I do have evidence that --

THE COURT: Yes or no.

MR. MORRIS: You're asking a slightly different question, if I may just change it just a little.

THE COURT: No, you may not because *my patience is gone*, and I have other things on calendar. *This is your last 30 seconds*.

MR. MORRIS: The notice was to request an application and actually receive it. I do have evidence that people have requested applications and have not received it, yes.

THE COURT: Okay. And who?

MR. MORRIS: Mr. Allen Ambler for one, and then the --

THE COURT: Who? Where? He sent an address to me? Did he send a request to the one on the website?

MR. MORRIS: No, Mr. --

THE COURT: Did he send it to his own address?

MR. MORRIS: Mr. Ambler sent it to the address that was published in the paper.

THE COURT: The website. And that – the website address.

MR. MORRIS: No, your Honor.

THE COURT: No, no, the publication in the paper.

MR. MORRIS: Correct.

THE COURT: *What address? You're using your time, your 30 seconds is just about gone.*

MR. MORRIS: It's the Winnemucca location. I don't remember the address.

THE COURT: And for Mr. Ambler.

MR. MORRIS: That is correct.

THE COURT: So he didn't receive an application, and he didn't file one by May 28th.

MR. MORRIS: Unless he receives it, he can't file for it. The applications are not being --

THE COURT: *Your time is gone*, I'm sorry, this objection is overruled.
(emphasis added) ER Vol. I at 28-32

The Court's response of being disgruntled with the undersigned as well as not wanting to listen to the issues is in addition to Judge Jones stating that the Tribe was a conquered nation and that he would do in essence what he wanted to do.

And a partial reason for this partial impairment of your sovereignty is the following. You are a conquered nation. . . . In other words, if you can't resolve your problem through normal tribal, sovereign processes, I will solve the problem . . .

ER Vol. I at 27

This Appellate Court has also had to reassign prior cases of Judge Jones involving Indian Tribes and the BIA – again showing a pattern of bias against Federal agencies such as the BIA.

We reluctantly conclude that reassignment is appropriate here because we believe (1) that Judge Jones would have substantial difficulty putting out of his mind previously expressed views about the federal government and its attorneys, and (2) that reassignment will preserve the appearance of justice. *See United States v. Estate of Hage*, 810 F.3d 712, 722 (9th Cir. 2016) (holding that Judge Jones "harbored animus toward the federal agencies" and that "the judge's bias and prejudgment are a matter of public record"); *Nat'l Council of La Raza*, 800 F.3d at 1046; *In re United States*, 791 F.3d at 958 (concluding that Judge Jones' exclusion of federal government attorneys appeared to be based on his personal hostility to

federal government policies and officials).

United States v. Walker River Irrigation Dist., 890 F.3d 1161, 1173 (9th Cir., 2018)¹¹

In this matter, based on the conduct of Judge Jones, it is respectfully submitted that this matter should be reassigned in the event of a remand if for no reason other than to maintain and preserve the appearance of justice. See *United States v. Quach*, 302 F.3d 1096, 1103-04 (9th Cir. 2002).

We reassign only in rare and extraordinary circumstances, such as when the district court has exhibited personal bias or when reassignment is

¹¹ It should be noted that the original counsel for the Ayer Group in this matter (Wes Williams Jr.) was also counsel for the Walker River Paiute Tribe in that matter.

advisable to maintain the appearance of justice.

Nat'l Council of La Raza v. Cegavske, 800 F.3d 1032, 1045 (9th Cir. 2015) (citations and internal quotation marks omitted).

In this matter, Judge Jones has exhibited personal bias that unfortunately warrants a reassignment.

Conclusion, Concluding Arguments, and Relief Sought

In addition to incorrectly not finding *res judicata* and finding that it had jurisdiction to determine a matter when it had not been presented with a Federal question and absent a final administrative order to review, the Court also inserted itself into Tribal government issues contrary to established law that these issues are to be left to the Tribes themselves. This resulted in impermissible orders being entered that incorrectly found that the BIA was required to recognize an individual as an authorized representative of the WIC; that the BIA is only allowed to consider the MPO in determining that individual; that the BIA acted arbitrarily and capriciously when it chose Bills; that the MPO is the only document controlling who is to be recognized; that following the MPO no governmental decisions are to be considered; that only the Court could order an election to be held that it would recognize; that the Court could choose who would control the election; that the Court could require any membership and election disputes to go before a Tribal Court that it created; and that the Court could then determine who the permanent council of the WIC consists of and order the BIA to recognize these individuals. These relevant aspects of these Orders should be reversed. These Orders include ECF No. 9 as it ordered the BIA to recognize an individual as a tribal representative, ECF No. 19 as it entered a preliminary injunction, ECF No. 52 as it stated the Court will directly intervene in the tribal dispute, ECF No. 57 as it is a preliminary

injunction order the recognition of individuals, ECF No. 105 as it ordered the BIA to pick either Wasson or Bills as a tribal representative, ECF No. 151 as it orders a new election and that Wasson is recognized as the tribal representative, ECF No.'s 161 and 164 as the order publication for tribal election purposes, ECF No. 204 as it ordered the parties to submit names for the Court selection of a tribal judge, ECF No. 213 that selected a tribal judge whose decision would be appealed to an appellate venue of the Courts' choosing, ECF No.'s 231 and 242 as they ordered who the WIC Council comprised of and who would determine tribal disputes, ECF No. 256 that recognizes individuals as the WIC Council, and ECF No. 303 that recognizes tribal court rulings from the court appointed tribal court.

Additionally, for the reasons stated, in the event of a remand, this matter should be reassigned to a different Judge.

Dated this 21st day of October, 2019.

/s/ Brian Morris
Brian Morris, Esq.

STATEMENT OF RELATED CASES

There are no current pending cases that are related to this appeal.

Dated this 21st day of October, 2019.

/s Brian Morris
Brian Morris, Esq.

CERTIFICATE OF COMPLIANCE FOR CASE NUMBER 18-17121

I certify that this brief is in conformance with the type specifications set forth at Fed.R.App.P. 32(a)(5) and is conformance with the length specifications set forth at Fed.R.App.P. 32(a)(7)(B) as it has a typeface of 14 points and contains 12,719 words.

Dated this 21st day of October, 2019.

/s Brian Morris
Brian Morris, Esq.

