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

REPLY BRIEF

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Introduction

While the Ayer Group disagrees with many of the asserted facts by the Wasson Group, the Answering Brief does not address many of the arguments presented by the Ayer Group and thus they have conceded said arguments are correct.

The Answering Brief correctly starts out by stating the Minnesota Panel Order (MPO) has been recognized as the starting document as to who are members of the WIC as well as to who were recognized as being the Colony Council on the particular date the MPO was issued. The Wasson Group focuses on who was recognized as being on the Council on that particular date seventeen (17) years ago, but neglects who were recognized as members of the WIC (i.e. who can run for office and who can vote for who should comprise the government). They also neglect the other portions of the Order that states who is to be enrolled as well as future elections that had been held in accordance with the MPO. Just as they have for many years, the Wasson Group does not want others recognized (knowing they would not be elected to the Council by the rest of the members), so they ignore the portions of the MPO that require election processes so they can keep "self-electing" themselves. This is completely contrary to the decision of the MPO. They simply cannot have it both ways to where the MPO is pointed to for certain propositions, and the rest of the MPO is ignored. This was even pointed out to them by the BIA in a letter. (presented hereinafter)

Incorrect statements

The Wasson Group asserted that the Ayer Group was "included in the decision to appoint a tribal Court to hear their challenges to the membership

decisions and the election of the interim Council." (AB 4)[1] While true, the implication that the Ayer Group ever agreed to the process is a misrepresentation. At no time did this ever occur. Instead, the parties were ordered to participate or the Court would simply pick any judge it wanted for the Court appointed Tribal Court.[2]

> The Court therefore warned the parties that it would select a judge itself if the parties could not quickly agree upon a neutral tribal judge. The Court gave the parties fourteen days to agree upon a judge or propose judges, with seven days thereafter to cross-object. ER Vol I at 14

The Wasson Group Appellees falsely asserts that they have previously been recognized as being the Council when they state:

> 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). (emphasis added) (AB 3)

This is statement is false. The current Council ordered by the District Court ordered to be recognized as the "permanent Council of the Winnemucca

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[1] AB refers to the Answering Brief

[2] The District Court never asked if the parties would be interested in an alternative dispute resolution or if they would be interested in picking another judge as they had done with the MPO. Instead the Court simply stepped into the role of making Tribal decisions and ordered the parties to pick a judge.

Indian Colony" is "Judy Rojo, Misty Morning Dawn Rojo Alverez, Katherine Hasbrouck, Eric Magiera and Thomas Magiera II." ER Vol I at 9. None of these individuals/Appellees were found by the MPO to be on the Council. Additionally, they were not a party in the Interpleader action cited to.

The Answering Brief also asserts alleged facts from their unverified original Complaint. The Wasson Group's asserted unsupported facts in their Answering Brief are not listed in their unverified Amended Complaint (that supersedes and replaces their original Complaint). ER Vol IV, 224-270. Their allegations also substantially changed. As such, it is improper for such allegations to be considered.

Argument

1. Standing was present

The Wasson Group have incorporated their previously filed motion to dismiss into their Answering Brief arguing that the Ayer Group had no standing, but they have not added anything new. As such, the Ayer Group fully incorporates their Opposition to the motion to dismiss (DktEntry 11) into this Reply Brief. As stated in their Opposition, Article III standing was not needed by an *intervenor* if no additional relief was being sought. *Town of Chester v. Laroe Estates, Inc.*, ___ U.S. ___, 137 S. Ct. 1645, 1651, 198 L.Ed.2d 64 (2017). Since the Wasson Group never argued that additional relief was sought, they have conceded that the Ayer Group had standing. The Wasson group also did not argue that there was no standing before this Appellate Court, but out of cautiousness, the Ayer Group also addressed that issue in their Opposition to the motion to dismiss.

2. The election disputes and the BIA issues

The Wasson Group claims it has been trying to get recognition from the BIA for an extended period of time. It is correct that the Wasson Group has been trying to be recognized as the Council and the BIA has not desired to recognize them for valid reasons. As shown in the Opening Brief, the BIA recognized that there are competing interests as to who comprises the Council and it was in the midst of adjudicating those issues when the Wasson Group filed the District Court action. ER Vol IV at 18, ¶ 9.

The Wasson Group has routinely refused to follow the MPO that has been recognized by every relevant court. Prior to the present lawsuit and the District Court ordered elections, the Wasson Group refused to recognize the MPO membership list. On October 22, 2002 (just two months after the MPO), the Wasson Group wrote the BIA proclaiming there were only seventeen (17) members of the WIC.[3] ER Vol. II at 169.

The pattern continued and on September 26, 2009, the Wasson Group informed the BIA that they only recognized twenty-six (26) members of the WIC. ER Vol. IV at 140-143.

They did this again with the District Court ordered elections where they 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

[3] The MPO recognized more than seventy-seven (77). ER III at 97.

a few additional individuals (again ignoring the MPO ordered List of 77). Vol. IV at 140-143.

On the other hand, the Ayer/Bills Group has been properly holding elections since the MPO and based on the continued illegal actions of the Wasson Group, the WIC held a recall election. Per the District Court order to recognize an individual as representing the Council, on July 13, 2012, the BIA recognized William Bills as both a proper Council member and the individual to recognize for government-to-government relations. ER Vol. III at 110.

Pursuant to WIC Ordinance 301, Section II, a special general election was conducted on August 18, 2012, where Linda Ayer, Allen Ambler, Laura (Bliss) Ambler, Jim Ayer and Rosemary Thomas were elected (again) to the Council. Vol. II at 116. The election recognized ninety-eight (98) individuals as being members of the WIC and eligible to vote. ER Vol. II at 117-119. The election was certified by William Bills (still a member of the Council and who was not re-called) via a WIC Resolution. ER Vol. II at 120.

Even though this was conducted by Bills (one of the MPO recognized individuals), the District Court refused to consider it since it had already made up its mind that it wanted the Wasson Group to control everything. Thus, the Court improperly inserted itself into internal tribal processes.

The BIA is aware of the many elections over the years, but since the (Ayer Group) WIC Council never requested any U.S. governmental funding or contracts, the BIA never needed a government-to-government relations with the proper (Ayer Group) WIC Council. Based on being aware of the Wasson Group's refusal to follow the MPO, the BIA has refused to recognize the Wasson Group as the Council.

3. Jurisdiction

The U.S. Government is not in the business of deciding inter-tribal elections or who comprises the Council of a Tribe. But that is exactly what the Wasson Group has been asking of the BIA, the IBIA and of the U.S. Courts.

a. **No subject matter jurisdiction existed**

The Wasson Group agreed with the Ayer Group that the BIA must have acted contrary to law for there to have been jurisdiction. As cited in their Answering Brief on page 7, a Court (only) has jurisdiction as to "whether the Secretary violated federal law." *California Valley Miwok Tribe v. Salazar,* 967 F.Supp.2d 84, 92 (D. D.C. 2013).[4] [5] Any such allegation that a legal duty was breached is absent in the case at bar.

In the Opening Brief, the Ayer Group presented that the APA does not itself create subject matter jurisdiction and that the Wasson Group never pled any such subject matter jurisdiction, i.e. a Federal question. In essence, the Wasson Group never pled that the BIA was not doing an act that it was legally required to do. 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). The Wasson Group never addressed this in their Answering Brief and thus conceded that it had not made such a required

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[4] The Wasson Group incorrectly cited to this case as *California Valley Miwok Tribe v. Salazar* at 96***2*** F. Supp.2d 84 (D.C. 2013).

[5] The Plaintiff faction "complains a federal agency has recognized a rogue tribal government in violation of the APA and other federal laws." "Because the question here is whether the Secretary violated federal law, the Court has jurisdiction over this case." 962 F. Supp.2d at 92.

allegation. Instead, the Wasson Group simply focuses on not being recognized under the mistaken belief that mere recognition is a legal obligation of the BIA -- which it is not.

The Amended Complaint never set forth any Federal question. The relief requested in their Amended Complaint never requests the recognition of the Wasson Group for any government-to-government relationship between their purported WIC Council and the U.S. government. The relief requested is: 1) an injunction *prohibiting* the BIA from entering the WIC, 2) an injunction prohibiting the BIA from appointing as the government of the WIC anyone that does not meet the Constitutional requirements of the WIC, 3) a declaratory judgment that the decision of the U.S. that fails to recognize the Wasson Group and the WIC Council is an abuse of discretion, and 4) the failure to remove non-members from the economic businesses of the WIC . . . violates the Non Intercourse Act and is a breach of a trust responsibility.

The first request to prohibit the BIA from doing something, by definition, does not invoke some sort of affirmative legal duty of the BIA to enter into government-to-government relationship with the WIC for purposes of federal funding, or anything of the sort. The second request is also a request to prohibit the BIA from taking an action, and thus it too does not invoke a legal obligation of the BIA to perform an act. The third request also fails since it is simply a request to be recognized without putting forth the legal duty that would require the recognition. And the fourth request that the BIA is violating the Non-Intercourse Act also fails. In their Amended Complaint, the Wasson Group pleads that the Act prohibits the BIA from conveying any of the Indian lands without federal consent, and that there has not been any such federal consent. ER Vol. IV at 233, ¶ 35-36. Not only are there no allegations that the BIA has attempted to convey the land to the Ayer Group (or anyone else including the

Wasson Group), but it again does not create any such government-to-government relationship of the BIA with the WIC. Therefore, the entire Amended Complaint never alleged this critical Federal question issue. Additionally, individual Indians may not sue under the Act. See *San Xavier Dev. Auth. V. Charles*, 237 F.3d 1149, 1152 (9th Cir. 2001). Any suit is limited to a Tribe. This Court previously struck down the Wasson Group's attempt to sue under the Act when it denied their appeal and affirmed the District Court in *Magiera v. Norton*, Memorandum, p. 6, Case No. 02-17364 (9th Cir. 2004).

> The Non-Intercourse Act, 25 U.S.C. § 177, cannot serve this purpose here as Plaintiffs (the Wasson Group) do not sue as an Indian tribe. (citations omitted). Id. at p.6

All their Amended Complaint does is set forth unsubstantiated emotional allegations and assume the District Court must have jurisdiction. But absent a Federal question, jurisdiction did not exist. As shown by a case raised in their Answering Brief, "To prevail (under the APA), plaintiffs must show that defendants have refused to prepare an SEIS despite a clear legal duty to do so." *Oregon Natural Resources Council v. U.S. Forest*, 59 F.Supp.2d 1085, 1095 (W.D. Wash. 1999). The Wasson Group has simply not shown any legal duty of the BIA and none of their allegations invokes any duties of the BIA.

b. **No interim recognition was proper**

The Wasson Group wants this Court to believe that an interim recognition of a Council was needed, that the District Court had jurisdiction to order such a recognition, and that the only possible individuals that could be recognized had to be one of the MPO recognized Council members from 17 years ago. Naturally such an assertion is not correct.

The Wasson Group used *Grassrope* to support its belief that a Court simply has jurisdiction when there is a dispute as to who comprises a Council. But the particular dispute in *Grassrope* went beyond claiming the U.S. government should recognize a Council, and instead went to the need for an interim recognition due to the previous and still ongoing governmental contracts with the U.S. that required interaction with someone with the Tribe. Thus, there was a need to recognize an interim individual for government-to-government relations to prevent the disruption of the current ongoing contracts, etc.[6] This is simply not present in the case at bar and there were no allegations of any sort that the WIC needed to continue some sort of U.S. governmental funded operation that was in place. Nor could such an operation be alleged since the WIC has been completely self-sufficient operating on revenue generated from its (the Ayer Group's) Smoke Shop without seeking any U.S. governmental funding.

Thus, this situation at the WIC is different from the facts of *Grassrope* where there had been prior U.S. to Tribal relations and such programs would be interfered with or hindered if there was no interim recognition while the election and Council determinations were being sorted out. Therefore, there was no need for an interim council. It was just a tactic used by the Wasson Group in an attempt to get recognition. This cannot be used to bootstrap the Wasson Group into some sort of Council recognition.

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[6] *Grassrope* found that the failure to recognize an interim individual "jeopardized the continuation of necessary day-to-day services on the reservation." *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983)

c. **Improper recognition**

To the extent that some sort of recognition was required, the District Court improperly inserted its judgment into that of the BIA after the BIA picked Bills to be the representative. After the unfortunate homicide of the Colony's Chairperson, Sharon Wasson (Thomas Wasson's father), the MPO found that Bills as Vice-Chair became the senior member of the Council.

> 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.

Thomas Wasson was simply a Council member at large. The BIA chose to use the Colony's own Council positions and the MPO to determine who it would recognize. This is a reasoned decision and is not arbitrary.

> I hereby designate William Bills as the interim representative . … [M]y decision is driven by federal deference to tribal law. Mr. Bills' status as Vice Chairman vests him with authority within the Tribe. Nothing … permits me to ignore the relevant tribal law. ER Vol. III at 110.

The BIA does not commit a clear error of judgment when it can "state a rational connection between the facts found and the decision made." *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1065 (9th Cir. 2004). The arbitrary and capricious standard of review is "highly deferential; the agency's decision is entitled to a presumption of regularity, and we may not substitute our judgment for that of the agency." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (internal citation omitted).

d. **No final agency decision**

In addition to needing a legally required action by the BIA, only a final agency decision is entitled to an APA review action. 5 U.S.C. § 704. The Wasson Group also did not refute that the matter as to who comprised the Council was highly active and being addressed before the BIA and the IBIA, and therefore they conceded there was no final agency decision. Instead, they simply argue (without authority) that the time required to pursue the administrative process was improper and this somehow gave rise to jurisdiction before the District Court without a final administrative decision. In other words, the Wasson Group desired to circumvent the entire administrative process. Additionally, they never presented any legal argument or any legal citations that no final agency decision was needed prior to their lawsuit.

The Wasson Group cites to the *California Valley Miwok* case stating that it affirmed the holding in *Grassrope*. While *California Valley Miwok* did make a single reference to *Grassrope*, it did not actually affirm its holding. With this said, both *Grassrope* and *California Valley Miwok* were cases that were reviewing a *final* agency decision – which is absent in the case at bar.

The Wasson Group next cites to *Ransom v. Babbit* for the proposition that a court can find an agency, such as the BIA, to have acted arbitrarily. *Ransom v. Babbit*, 69 F. Supp.2d 141 (D. D.C. 1999). While true, in that case, the court was also reviewing a final agency decision. Additionally, in *Ransom*, that particular director of the BIA did not "review for themselves the intensely disputed tribal procedures surrounding the adoption of a tribal constitution, in crediting unreasonable decisions of a seemingly invalid tribal court, and in refusing to grant official recognition to the clear will of the Tribe's people with regard to their government." The Court found such actions were arbitrary and capricious. In the case at bar, not only was there no final agency decision, but

there were no allegations (or findings) of alleged facts stating what was arbitrary and capricious about any decision of the BIA, including any final decision. Contrary to the assertion by the Wasson Group, it should also be mentioned that *Ransom* never actually said that "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." (AB, p. 11). What was actually stated was:

> In *Plaintiffs' view*, Defendants Bureau of Indian Affairs ("BIA" or the "Bureau") and the Interior Board of Indian Appeals ("IBIA") have acted contrary to federal law and in an arbitrary and capricious manner. . .. (emphasis added) 69 F. Supp.2d at 142-143.
>
> Moreover, the Court finds untimely and unpersuasive Defendants' belated *attempt to amend their answer*, initiated only at the final stages of briefing in this case. (emphasis added) Id. at 143.

Based on the concession that there was no final agency decision in the case at bar, the District Court simply did not have jurisdiction in this matter.

e. **No futility existed**

While not clear, it appears the Wasson Group argues that the mere passage of time gave the Court jurisdiction. They state, without pointing to the citations, that:

> 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. (AB 6)
>
> and

> [I]n recognition of the Agency's failure to recognize a government of this federally recognized Tribe, identified that jurisdiction was proper over the Agency decision. (AB 12)

What the Court in fact stated was:

> Defendants' invocation of a decade-old and still-ongoing adjudication to establish a failure to exhaust only serves to show that the administrative remedy here is at best inefficacious and at worst futile. (ER 89:19-21)

In the District Court's Order denying the second motion to dismiss, the Court failed to address this argument (that no final order existed) in its entirety.[7] ER Vol. I at 58-71. But the mere passage of time without an analysis as to what had occurred to make the *administrative* process "futile" is not enough.

The passage of time and any "delays" are directly attributable to the Wasson Group themselves, including their failure to actually present a legal issue that the BIA had the ability to decide. This is why the BIA and IBIA had not made any determinations. Additionally, when the Wasson Group does present an issue that the IBIA found should be decided, the Wasson Group refused to follow through with that process and instead filed its District Court action. Not only has the Wasson Group not followed through with the process, they state that they do not want the BIA making any decision and want another method of recognition. (discussed hereinafter). What has administratively occurred is as follows:

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[7] The BIA filed two motions to dismiss. Both argued that the District Court did not have jurisdiction due to current on-going adjudication, the failure to exhaust administrative remedies, and that there was not yet a final agency decision. ER Vol. V at 8; ER Vol. IV at 9.

On October 28, 2002, the BIA wrote the Wasson Group stating that they were not following the MPO with their purported elections.

> 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*. . . . [T]t 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. (emphasis added)
>
> ER Vol. V at 134

On November 6, 2002, the IBIA dismissed an "appeal" of the Wasson Group for not following its Order.

> The Board ordered Appellants to either furnish a copy of a decision issued by the Regional Director or show that they have followed the procedures in 25 C.F.R. § 2.8. The Board's order stated that failure to furnish a decision or make a showing under 25 C.F.R. § 2.8 by October 21, 2002, would result in dismissal of this appeal.
>
> *Appellants have not responded*. Therefore, . . . this appeal is docketed and dismissed. (emphasis added). *Wasson, et al. v. Western Regional Director, Bureau of Indian Affairs*, 38 IBIA 205 (2002)

A dismissal based on the Wasson Group not following procedure and ignoring an Order from the IBIA does not make the process futile.

On December 2, 2002, the Wasson Group filed another appeal with the IBIA. Based on the decision being appealed referencing current (pre-MPO) Federal litigation, the IBIA stated that:

> If the Board were to retain jurisdiction here, it would stay proceedings in this appeal until the Federal court case has been concluded.[8]
>
> Under the circumstances, however, the Board finds that this appeal should be dismissed without prejudice. A dismissal at this time will give the parties freedom, once the Federal court case has been concluded, to proceed on the basis of the situation as it then exists, rather than await action by the Board on a Regional Director's decision which, by then, may well have been overtaken by events. *Wasson, et al. v. Western Regional Director, Bureau of Indian Affairs,* 38 IBIA 255, 256 (2002)

The IBIA recognizing that they are a subordinate tribunal to a U.S. District Court and deciding to either stay or dismiss a proceeding until such litigation has concluded does not equate to requesting relief from them upon conclusion of such litigation futile.[9] Instead, the IBIA was trying to let the

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[8] Referring to *Magiera v. Norton*, CV-N-01-0467-LRH-VCP before the U.S. District Court of Nevada – which denied the Wasson Group a preliminary injunction and which was ultimately appealed by the Wasson Group to this Ninth Circuit Court of Appeals (Case No. 02-17364). The appeal of the Wasson Group was denied with a finding that they had not complied with or exhausted their BIA administrative remedies.

[9] All decisions of the IBIA are subject to judicial review in a United States District Court. Thus, the IBIA is subordinate and must follow any decision of such a court. See 5 U.S. Code §§ 703 and 704.

Additionally, due to being subordinate, the IBIA must recognize and follow all District Court Orders, including the Order that the BIA is obligated to recognize Bills, certain elections, or council members.

Federal action that was started by the Wasson Group conclude so that it could incorporate any such decisions into its findings.

On August 19, 2003, the Wasson group filed another appeal with the Board seeking review of a July 11, 2003 decision of the Acting Western Regional Director declining to contract with the Wasson group. Again, the Wasson Group refused to follow proper procedure and appeal was dismissed for being untimely.

> Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1 and 25 C.F.R. § 900.159, the Nation's (Wasson Group's) request for an extension of time in which to file a notice of appeal is denied. Accordingly, the Regional Director's July 11, 2003, decision is final for the Department of the Interior. *Wasson, et al. v. Western Regional Director, Bureau of Indian Affairs,* 39 IBIA 174, 179 (2003).

The failure of the Wasson Group to follow established rules does not make the administrative process itself futile.

On September 16, 2004, the Inter-Tribal Court of Appeals of Nevada determined that none of the elections purportedly held since February 2000 were valid and *reinstated the Council in place at that time*.[10] (emphasis added) *Wasson, et al. v. Western Regional Director, Bureau of Indian Affairs*, 42 IBIA 141, 149 (2006). It ordered the Council in existence in February 2000 to submit an enrollment list to the Inter-Tribal Court within 30 days, recognizing that two separate lists were likely to be submitted. The Inter-Tribal Court would then

[10] This is the same Inter-Tribal Court of Appeals that the Wasson Group is stating comity must be given to it.

take necessary steps to finalize the membership list and oversee the holding of an election. 42 IBIA 141 at 150 (2006). The Bills/Ayer Group complied, but instead of complying, the Wasson Group instead filed a lawsuit against the Inter-Tribal Court on October 15, 2004. *Wasson v. Inter-Tribal Court of Appeals of Nevada*, No. CV-N-04-573-HDM (VPC). The Bills/Ayer Group was not a party to this lawsuit.

In 2006, the IBIA ruled against the Wasson Group again in consolidated appeals. The tribunal stated:

> The Board dismissed the 2002 appeal to await the conclusion of proceedings in Magiera v. Norton, which was on appeal to the Ninth Circuit. See Wasson, 38 IBIA at 256. The appeal in Magiera was still pending on March 9, 2004, when the Regional Director decided that it was premature to determine whether to recognize the Wasson group as the Colony's Council. The Magiera appeal was not resolved until September 2, 2004, when the Ninth Circuit affirmed the District Court's dismissal of the case. Thus, the ruling in the Board's December 24, 2002 order applies equally here, and on that basis, the Board rejects the Wasson group's appeal of the Regional Director's March 9, 2004 decision.
>
> In addition, the Regional Director declined to act on the application because the Regional Director determined that the application was incomplete and not filed in accordance with regulations. *Appellants do not contest this determination and thus fail to satisfy their burden to prove error in the Regional Director's decision. This failure provides a separate and independent basis for the Board to affirm the March 9, 2004 decision of the Regional Director*. (emphasis added)
>
> The second (consolidated) appeal may also be easily disposed of. Appellant's March 28, 2005 request for recognition as the Colony Council *is fatally flawed because it does not to seek recognition for the purpose of the conduct of any specified BIA function or program.* Absent the identification of any particular right to or need for the establishment of a government-to-government relationship with a tribal council, BIA has no duty to act on such a request. (emphasis added)

42 IBIA 141, 153-54 (2006)

The IBIA went on further to perform a *Grassrope's* analysis. The Board stated:

> [T]he Board has held that "[t]he issuance of an interim determination of tribal leadership should be considered an unusual action to be undertaken only in emergency situations." (citations omitted)
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> 42 IBIA 141, 158 (2006)

> Appellants argue that BIA's determination not to recognize them for the purposes of contracting under ISDA was arbitrary and capricious in the absence of any BIA policy regarding how to determine such recognition. This argument fails because Appellants did not submit an application for a self-determination contract with their March 28, 2005 request for recognition as the legitimate Council.
>
> 42 IBIA 141, 158 (footnote 18) (2006)

> As we have already concluded, however, Appellants' March 28 and April 13, 2005 requests for recognition provided no reason for BIA to address the question of the Colony's proper governing body. *Appellants thus did not identify any federal responsibility to the tribe that would require the establishment of an interim government-to-government relationship*. (emphasis added) 42 IBIA 141, 158 (2006)

The finding that the Wasson Group never presented any legal basis for the U.S. to recognize a Tribal Council (just as in the case at bar) and an appropriate finding of such a fact does not make any administrative proceeding futile. Instead it makes it a correct ruling.

In their next appeal, the Wasson Group again appealed based on the BIA failing to recognize them as the Council based on the BIA asserting it did not have enough information to determine if the Wasson Group was the Council. In this appeal, the Wasson Group alleged that the BIA had all the information it needed. The IBIA remanded back to the BIA stating that this time the Wasson

Group's allegations showed an arguable duty to make a determination for government-to-government relationship purposes. The IBIA acknowledged that the Wasson Group would more than likely not provide any more information, and if not, for the BIA to make a determination based upon what it had.

> Given Appellants' insistence that no further proof is needed and *concomitant unwillingness* to provide any additional information, no purpose would be served by allowing the Regional Director to await the submission of further proof, which apparently will not be forthcoming. We therefore remand the matter to the Regional Director with instructions to issue a decision on the merits of Appellants' recognition request based on the information currently available. As noted earlier, we express no opinion on the merits of Appellants' request. (emphasis added)

> Therefore, . . . the Board remands the matter to the Regional Director with instructions to issue a decision on the merits of Appellants' request for recognition as the governing entity of the Colony. *Wasson, et al. v. Western Regional Director, Bureau of Indian Affairs,* 50 IBIA 342, 351 (2009)

A remand to consider the evidence as presented (whether limited or not) does not make any administrative proceeding futile. In fact, it was the decision the Wasson Group desired.

After the remand, based on the information provided by the Wasson Group, the BIA refused to recognize them.

> [T]he Regional Director stated that "based on the information currently available, I hereby affirmatively do not recognize or acknowledge or certify or approve these individuals . . . request as the duly elected officers of the Winnemucca Indian Colony." *Wasson, et al. v. Western Regional Director, Bureau of Indian Affairs,* 52 IBIA 353 (2010)

This decision led to the latest appeal. In its decision, the IBIA continued to recognize that both the Wasson Group and the Ayer Group were two competing factions claiming to comprise the Council.

> The Tribe has two competing factions, currently referred to as the "Wasson" faction, represented by Appellants, or possibly by their claimed successors in office, and *the "Ayer" faction (formerly referred to as the "Bills group" and "Leyva group"*). For several years, BIA has not recognized either or any faction as constituting the Colony Council or as representing the Tribe for government-to-government purposes. (emphasis added) 52 IBIA 353, 354 (2010)

Without deciding whether they should be meritorious, the IBIA vacated and remanded the decision since it did not contain an analysis for the refusal to recognize the Wasson Group. The IBIA also specifically noted that the Ayer Group should be considered in any future determinations.[11]

> The Regional Director's Decision . . . contains no reasoned analysis nor an identification or discussion of any evidence upon which the Regional Director relied or purported to rely in making his decision not to recognize Appellants as the Colony Council . . .. Therefore, we vacate the Decision and remand the matter. On remand, the Regional Director shall afford Appellants an opportunity to submit supplemental briefing and evidence . . ., *and shall afford the Ayer faction* (and any other interested parties) *an opportunity to respond*. (emphasis added) 52 IBIA 353, 360-61 (2010)

[11] The WIC Colony had been running self-sufficiently with the proper Ayer Group Council, and based on this self-sufficiency, the Ayer Group had never previously sought any government-to-government relations recognition as they were not requesting any government assistance.

A remand to issue a decision with an analysis is not a futile process -- futility meaning that nothing could be gained from permitting further administrative proceedings. *Anderson v. Ba*bbitt, 230 F.3d 1158, 1164 (9th Cir. 2000) (internal citation omitted). The remand and opportunity to present additional evidence with all interested parties gives the IBIA the information it needs to determine the appropriateness of any BIA decision, including whether the Ayer Group ever had a claim (if not then the Wasson Group should prevail). Such an analysis would require the BIA to consider all relevant facts (if any had been missed) and it would allow the Wasson Group to either be justified in it being recognized, or it would give the Wasson Group the ability to present to the IBIA any error in such a decision.

After the above decision, on January 4, 2011, the Wasson Group wrote the BIA, but stated that it *did not want* the BIA to make any decision.

> [W]e again ask that no one from your agency or the Western Nevada Agency participate in the decision, but that . . . members of another Tribe . . . make this decision. ER Vol. IV at 49.

This again shows the non-cooperation from the Wasson group and the refusal to properly and in good faith participate in the administrative process. Their refusal does not equate to the administrative process actually being futile.

After the BIA requested information on possible interested parties (per the decision in 52 IBIA 353 (2010)) (ER Vol IV at 67) that the Wasson Group may be aware of, the Wasson Group flippantly replied by listing: 1) the Senate Committee on Indian Affairs, Washington, D.C., 2) Senator Harry Reid, 3) Loretta Tuell, Staff Director of the Council for Indian Affairs, etc. (ER Vol IV at 76). This again shows the Wasson Group's refusal to participate in the Administrative Process.

At the direction of the IBIA upon the remand, the BIA was in the process of taking administrative action to recognize a government for the WIC. ER Vol. IV at 18, ¶ 9. After resolving the dispute regarding "interested parties", the BIA issued a letter on July 21, 2011 to schedule briefing. ER Vol. IV at 35. The letter stated that the Wasson Group was to submit any additional evidence as well as any supplemental briefing "within thirty days (30) of your receipt of this (July 21, 2011) letter." ER Vol. IV at 35.

The BIA would have had a maximum of sixty (60) days to submit a decision in accordance with 25 CFR § 2.8(b). A final decision on which group the BIA was going to give recognition as the governing body for the WIC would have been issued in a matter of months.

Instead of complying and seeing the administrative process through, knowing that the Ayer Group was going to be considered by the BIA and probably recognized as the proper Council, the Wasson Group did not file any briefing with the BIA within the 30 days and instead filed the case at bar with the District Court on August 29, 2011. Not only did the Wasson Group fail to exhaust their administrative remedies, they abandoned them by failing to follow the processes.

The BIA is not in the business of refusing to interact with proper and appropriate Councils. Instead, they are in the business of recognizing properly elected individuals as opposed to rouge individuals acting outside of the Tribe's Constitution and procedures. However, the BIA must consider the will of the Colony overall, and not just a request from a group trying to exclude members that have already been found to be proper (under the MPO).

> [T]he Department of the Interior also has the responsibility to ensure that organized tribes are representative of potential membership., *Cal. Valley*

> *Miwok Tribe v. Zinke*, docket no. 17-16321 (9th Cir. 2018) (citing *Aguayo v. Jewell*, 827 F.3d 1213, 1226 (9th Cir. 2016)).
>
> In *California Valley Miwok Tribe*, the plaintiff and a very small group of supporters went "rogue" and created a new constitution that was not supported by the majority of the tribe. *Id.* at 1267. The Secretary declined to approve the constitution. The D.C. Circuit held that the Secretary reasonably exercised its discretion because the constitution did not "reflect majoritarian values." *Aguayo v. Jewell*, 827 F.3d 1213, 1228 (9th Cir. 2016) (citing *California Valley Miwok Tribe*, 515 F.3d 1262, 1267–68 (D.C. Cir. 2008))

4. Comity

The Wasson Group argues that the District Court properly granted Comity to Tribal Court orders purporting to hold that the Wasson Group was the Council. Such an assertion is disingenuous and ludicrous. Two tribal court orders simply deferred to what the District Court had already done. The CFR Tribal Court that was cited to was in fact simply deferring to the District Court finding (which shows the degree of damage the District Court has done in this matter).

> The issues giving rise to the Complaint … are moot as settled by the Orders of the United States District Court, District of Nevada (Reno), styled Civil Case No.: 3:11-cv-00622-RCJ-VPX . . ..
>
> Supp. ER at both 45 and 49[12]

The District Court created tribal court stated:

> BASED UPON the arguments . . . this Court CANNOT find jurisdiction is appropriate in this matter. (emphasis in original) Supp. ER at 13

[12] Supp. ER refers to the Wasson Group's Supplemental Excerpts of Record.

In essence, the Tribal Courts refused to interfere with the District Court or change any of its rulings. Comity is merely the recognition of another decision and for such a recognition, it must have some sort of substance to them – which is absent in these filings.

5. *Res Judicata*

The Wasson Group never argued against *res judicata* being applicable, and therefore they have conceded on this issue.

6. Reassignment

The Wasson Group also did not argue against this matter being reassigned in the event of a remand and has conceded on this issue too.

7. Appeals

The Wasson Group argues that the Ayer Group did not appeal the BIA following the direct order from the District Court to recognize Wasson instead of Bills, and to recognize the Wasson Group as being the proper Council of the WIC. The BIA had no choice but to follow the District Court orders. When the BIA decided to recognize Bills, the District Court ruled the BIA was corrupt and then ordered it to recognize Wasson. In essence, the Wasson Group is suggesting that the Ayer Group should appeal the U.S. District Court order to the IBIA – which is subordinate to the District Court and has no authority to overturn the District Court. The Wasson Group has not cited to any legal authority for this proposition and thus it fails. The Ayer Group has properly appealed to this Ninth Circuit Court of Appeals -- which has jurisdiction to determine appeals regarding the orders of the District Court.

Conclusion

This Court should reverse all orders entered and find that no jurisdiction existed to issue any of the orders it did.

Dated this 16th day of January, 2020.

/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 6,976 words.

Dated this 16th day of January, 2020.

/s Brian Morris
Brian Morris, Esq.

CERTIFICATE OF SERVICE

I certify that on the 16th day of January, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the email address of the following on record with the Ninth Circuit Court of Appeals:

TREVA HEARNE

/s Brian Morris
Brian Morris, Esq.