No. 10-1011 MAR 1 1 2010

In The
Supreme Court of the United States

WINNEMUCCA COLONY COUNCIL,

Petitioner,

v.

SHARON WASSON and the WINNEMUCCA INDIAN COLONY COUNCIL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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I. RESPONSE TO HISTORY OF PROCEEDINGS RECITED BY THE PETITION FOR WRIT OF CERTIORARI.

The Petition for Writ of Certiorari relies upon a recitation of facts that are not in the record below. The Petitioner's Appendix ("Pet. App.") includes the decision of the Interior Board of Indian Appeals (Pet. App. 8-24) chastising the Regional Office of the BIA for not recognizing a government of this Federally Recognized Tribe which was issued on December 17, 2010, nearly two months after the October 14, 2010 Ninth Circuit Decision. The Petitioner's Appendix also contains letters from Counsel (Pet. App. 185-188) which were not written until well after the Ninth Circuit Decision was issued; thus, Petitioner's Appendix 8-24 and 185-188 should be stricken.[1]

Petitioner's Appendix 47-71, 99-171, 174-179, were also not included in the excerpts of record to the Ninth Circuit and should also be stricken. *Kemp v. Hudgins et al.,* 59 U.S. 530 (1855). Thus, the gratuitous, rambling comments included in Petitioner's History which are unsupported by any record should be disregarded by this court.

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[1] *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 454, 116 S.Ct. 2211, 2232 (1996) (" . . . our power is restricted by the Constitution to the determination of the questions of law arising upon the record."). *Accord, Kirshner v. Uniden Corp. of Am.,* 842 F.2d 1074, 1078 (9th Cir. 1988) (striking portions of excerpts of record that were "neither filed with the district court, considered by the court, nor even before the court when it entered the order that [appellant] now challenges on appeal.").

The relevant history of this case begins with the February 22, 2000 brutal murder (which is yet unsolved by federal authorities) of Glenn Wasson, the Chairman of the Winnemucca Indian Colony, at the Administration Building of the Colony. On that fact, all parties and courts agree. (Petition, page 4, Pet. App. 2, 31) The chronology as set forth in the United States District Court Decision is correct. (Pet. App. 31-34) Bank of America placed the bank account of the Colony into interpleader after two groups claimed that each was the government of the Winnemucca Indian Colony after Glenn Wasson's murder. (Pet. App. 31-33) Then ten years of litigation ensued. (Pet. App. 34)

By late 2000, the members were litigating to prove, on the one hand, their right to assume the government in Tribal Court and litigating the right, on the other hand, to receive the bank account in Federal Court. (Pet. App. 32-34) When the dispute began, an Inter-Tribal Court of Nevada existed, which had been funded by the Bureau of Indian Affairs ("BIA"). (Pet. App. 32) The parties were before the Inter-Tribal Court when they agreed to have a mediator hear the dispute sitting as the Tribal Court because no complete record of any Tribal Court proceeding existed from which the members could properly appeal. (Pet. App. 33) Several weeks of hearing took place. A decision was issued. (Pet. App. 33)

In 2002, at about the same time the decision was rendered by the mediator sitting as the Tribal Court,

one of the other matters in the federal court was appealed to the Ninth Circuit. The parties took it upon themselves, with the help of the Ninth Circuit mediation program, to stipulate to a Court of Appeals consisting of a three judge panel to hear the appeal of the decision rendered by the mediator. (Resp. App. 41, 42 [Supplemental Excerpts of Record, Ninth Circuit Appeal ("SER") 000178]). What is referred to by the United States District Court as the "Minnesota Panel" came from the agreement between the parties pursuant to this mediation at the Ninth Circuit Court of Appeals.[2]

The United States District Court provided a courtroom and the parties argued and briefed the appeal. From that process, the Minnesota Panel issued a decision. (Pet. App. 72-96; Resp. App. 42) Nothing else is relevant or, for that matter, appropriate for consideration since the recitations by the Petitioner are, as stated above, not in the record of this case.

Without a doubt both parties' attorneys signed the agreement for the Minnesota Panel on behalf of their clients. (Pet. App. 33) Any allegations to the contrary are mere excuses for the inability of the Petitioner to face the reality of their loss of this matter from the date of the Minnesota Panel until the

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[2] The Specially Appointed Appellate Panel was generally referred to as the Minnesota Panel because the members of the Panel were from Minnesota. The Specially Appointed Panel consisted of judges from the Sioux Nation. (Pet. App. 33; Resp. App. 42)

date of the filing of this Petition by each and every objective tribunal that has considered these matters.

The Honorable Howard McKibben, United States District Court, District of Nevada, stated that the Minnesota Panel had prepared a well reasoned decision after "a lot of hard work." He also commented that "when parties made an agreement, they needed to abide by that agreement." (Resp. App. 30 [SER 000238])

When Judge McKibben retired to senior status, the interpleader case was assigned to the Honorable Brian Sandoval, who, upon the submission of a Request for Distribution of Account and Dismissal of Interpleader/Supplemental Motion for Summary Judgment issued an opinion on March 6, 2008, distributing the bank account to the Winnemucca Indian Colony, Thomas Wasson, Chairman. After denial of reconsideration, the Bills group appealed Judge Sandoval's decision to the Ninth Circuit, which decision is now the subject of this Petition for Certiorari.

Petitioner appears to raise a criminal defense of ineffective assistance of counsel in this civil matter. This is obvious since newly retained counsel filed a Petition for Panel Rehearing in the Ninth Circuit "in an effort to be afforded the opportunity to rectify these shortcomings and provide the appellate court with a complete and comprehensive record for reconsideration." (Petition, page 10) This is not the

function of a Petition for Panel Rehearing and the Ninth Circuit appropriately denied rehearing.[3]

The truly lamentable aspect of this long litigation is that this matter has continued for over ten years without an enforceable resolution until now. This is a sad commentary on the lack of judicial process available to the small Native American communities of Nevada who must, of economic necessity, depend upon their infrastructure of justice from the Department of the Interior, Bureau of Indian Affairs. The BIA's dissolution of the Inter-Tribal Court of Appeals upon a budgetary whim for over a year during this dispute and the lack of recognition of a government left the United States District Court with the burden of determining how to resolve the interpleader.[4]

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[3] FRAP 35, A party may request a rehearing *en banc* when:

> the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
>
> the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

[4] The District Court recognized that the lack of an appellate court available to the Winnemucca Indian Colony when it was

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Each and every federal judicial body that reviewed this case agreed to extend comity to the Minnesota decision, in its entirety. Thus, notwithstanding the fact that Petitioner has failed to file briefs that comply with the Rules of Court,[5] and

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needed for the review of the Tribal Court decision was a denial of their due process rights. The Honorable Howard McKibben expressed his dismay at the BIA's failures:

> There is one thing that's very troubling to me about all of this. I can't, for the life of me, understand why there wouldn't be adequate funding out there to keep a court of appeals alive and well, so that it can decide these issues. And to the extent the BIA doesn't fund something like that, I think that's a travesty . . .
>
> And to the extent my words mean anything, they should always fund something like that. Everybody has the right to go into court. Everybody has the right to an appellate review. And everybody in the colony should have that right. And they should have as much of a right as anybody else in the United States to come into court and have their grievances resolved. And to the extent the BIA or anybody else disenfranchises somebody from not being able to go and do that – I mean, heaven help us if all the funding is cut off from the courts in this country so people don't have some right to assert and protect their constitutional rights.

(Resp. App. 37, 38 [SER 000341, 000342])

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

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notwithstanding the fact that Petitioner has failed to live up to the agreements that it entered into to resolve this matter, both the United States District Court and the Ninth Circuit Court ignored these breaches of protocol and advocacy and made their decisions based upon well-reasoned considerations of the facts and the law.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. The questions presented in the Petition were never raised or decided in the courts below.

The Petitioner has cited a statutory provision that has not been raised until this appeal. Neither does the statement of the case summarize what, in fact, were the issues in the lower court decisions.

The Petition completely ignores the fact that this Court will not review questions that were not properly

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

Pet. App. 6, 7.

presented to, or decided by, the courts below absent unusual circumstances. *See, e.g., United States v. United Foods, Inc.,* 533 U.S. 405, 417 (2001) (declining to "allow a petitioner to assert new substantive arguments attacking . . . the judgment [below] when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it"); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.")

Throughout the entire ten year litigation in federal court, Petitioner never raised the issues regarding "sovereign immunity" or "trust responsibility" which they now seek to bring before this Court under 25 U.S.C. § 450. As noted above, in the District Court Petitioner argued repeatedly that the decision issued by the Minnesota Panel – a court to which Petitioner expressly stipulated – was incorrectly decided.[6] Then, after the May 7, 2007 Inter-Tribal Court of Appeals order dismissing the case due to a lack of appellate jurisdiction, Petitioner affirmatively argued that it was "entitled to summary judgment

[6] The closest Petitioner ever came to raising any type of jurisdictional argument was in its Motion for Reconsideration of the District Court's Order, when it argued that a 25 CFR § 11.100 court should hear the matter. (Pet. App. 26-27) However, the District Court correctly noted that 25 CFR § 11.104(b) specifically excluded from such a court's jurisdiction "an election dispute or . . . any internal tribal government dispute." (Pet. App. 27-28)

following the May 7, 2007 order, because that order rendered all litigation before [the Minnesota Panel] null and void. . . ." (Pet. App. 34) Both the U.S. District Court and the Ninth Circuit soundly rejected this argument.

At no time prior to filing the Petition for Writ of Certiorari did Petitioner argue that the federal courts were "interjecting" themselves into the "fray of competing tribal factions . . . in contradiction to policies of self-determination and self-governance under 25 U.S.C. § 450n." To the contrary, Petitioner actively *sought* relief from both the Federal District and Federal Appellate Courts. It was only when Petitioner lost on appeal that it seized on these entirely new arguments in its Petition for Writ of Certiorari.

A "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of the questions presented in the petition," *Oklahoma City v. Tuttle,* 471 U.S. 808, 816 (1985). The Court should decline to accept Certiorari where the issues presented have not been properly preserved below.

B. The Ninth Circuit's affirmance of the United States District Court decision was decided correctly.

On March 6, 2008, when the decision granting summary judgment was entered by the United States District Court, District of Nevada, the Court had retained the interpled funds of the Winnemucca

Indian Colony since July 2000. The Court waited patiently for the tribal processes to be exhausted. In a well-reasoned opinion in 2003, the Magistrate for the District Court required that tribal processes be further exhausted, even though the parties had agreed by stipulation to an appeal and agreed to abide by it.[7] That ninety days stretched into five years.

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[7] When the "occupation group (who no longer included William Bills)" failed to abide by the decision, the Magistrate expressed her regret but allowed a further attempt at exhaustion, stating:

> When the court received the stipulated Court of Appeals decision, it seemed as though parties had settled, and that the wait to disburse the money was over. However, despite all of the time and money spent by the parties, it appears that they are determined to prolong this process. The Bills group has challenged the subject matter jurisdiction of the stipulated Court even though the Bills group fully participated in the negotiations to have the appeal heard before that forum. After the stipulated Court of Appeals rendered an unfavorable decision to the Bills group and after payment of $30,847.32 to the stipulated Court of Appeals for its services, the Bills group now raises for the first time the issue of subject matter jurisdiction. Under the doctrine of tribal exhaustion, federal courts must "stay their hand" until tribal courts have had the opportunity to determine their own jurisdiction. . . . Despite the fact that the court is reluctant to extend this case any longer, in the interests of tribal self-determination and self-government, the court will stay these proceedings for ninety days. . . .

Order, Magistrate Valerie Cooke, Dated 2/13/03. (Resp. App. 55, 56 [SER, page 00186, lines 12-22])

"Tribal jurisdiction cases are not easily encapsulated, nor do they lend themselves to simplified analysis. The Supreme Court itself observed that questions of jurisdiction over Indians and Indian country are a complex patchwork of federal, state and trial law."[8] There are two potential sources of tribal jurisdiction: a tribe's inherent sovereignty and congressional statutory grant.[9] Neither of these issues were pled or used as a defense to the federal court's jurisdiction in interpleader in this case. In fact, the only argument was that the complete exhaustion of Tribal remedies had not occurred because the BIA had in 2003 again funded the Inter-Tribal Court of Appeals of Nevada. In an abundance of respect for Tribal processes and deference to the Tribal court system and because the ultimate question was the determination of the proper recipient of the bank account on behalf of the Tribe, the District Court found that the issue of who was the proper council and membership of the Colony was inherently one over which the Tribal Court had jurisdiction. (Pet. App. 35-37; Resp. App. 55, 56)

Rather than ninety more days of Tribal exhaustion as anticipated by the Magistrate in the Order of February 13, 2003, the Bills' group was given five more years of Tribal exhaustion which included at least two appellate orders, with the final one stating

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[8] *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.,* 569 F.3d 932, 936, 937 (9th Cir. 2009) citing *Duro v. Reina,* 495 U.S. 676, 680 n.1, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990).

[9] *Philip Morris USA, Inc.,* cited supra, at page 937.

that the Inter-Tribal Court of Nevada had no jurisdiction over the matter. (Pet. App. 37) There is no Tribal "Supreme Court," there is no further Tribal remedy available after the Specially Appointed Appellate Panel of the Winnemucca Indian Colony (Minnesota Panel) issued its Order and the Inter-Tribal Court of Nevada dismissed any further appeal for lack of jurisdiction.

The District Court did "stay its hand," until Tribal remedies were exhausted on the question of who composed the proper Council to receive the account, stating that the Court recognized the "importance of tribal courts in promoting and encouraging tribal sovereignty." The Court, however, determined that "In this case, the tribal court has had a full opportunity to determine its own jurisdiction. This matter has been pending for over seven years." Only when the Inter-Tribal Court of Appeals entered an Order dismissing the case for lack of jurisdiction, did the United States District Court go forward and correctly determined that "the parties had exhausted all tribal remedies." (Pet. App. 36, 37)

The District Court was deferential to the Tribal Court process, even while it recognized the disingenuousness of the Bills' group who refused to abide by the decision of the Minnesota Panel after their counsel had signed the stipulated agreement in the Ninth Circuit mediation on their behalf. The Tribal exhaustion occurred exactly as the District Court recited in its Order in that the Magistrate allowed a further appeal to the reconstituted Inter-Tribal Court of

Appeals of Nevada which, once again, the BIA had funded by the end of 2003 (Pet. App. 34). The Inter-Tribal Court of Appeals of Nevada determined that it had no jurisdiction, all Tribal remedies were exhausted (Pet. App. 34). This agreed with the holding in *Kishell v. Turtle Mountain Housing Authority,* 816 F.2d 1273, 1276 (8th Cir. 1987). The Ninth Circuit affirmed the District Court by concluding that the parties had exhausted their tribal remedies and added that "the parties have been afforded more than due process in both tribal and federal court." (Pet. App. 5)

The United States District Court recognized the Minnesota Panel decision on grounds of comity.[10] (Pet. App. 5) The concept of comity for Tribal Court decisions is well accepted by Federal Courts.[11] In further support of the District Court's decision, the Ninth Circuit added that recognizing the decision of the Minnesota Panel was appropriate because to

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[10] "Comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard . . . to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot,* 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895). "As a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity." *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002).

[11] *LECG, LLC v. Seneca Nation of Indians,* 518 F.Supp.2d 274 (U.S.D.C. Fed. 2007); *Kerr-McGee Corp. v. Farley,* 115 F.3d 1498 (10th Cir. 1998); *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21 (1st Cir. 2000); *Bird v. Glacier Elec. Coop., Inc.,* 255 F.3d 1136 (9th Cir. 2001).

recognize any other decision offered by the Bills group "is inconsistent with the parties' contractual choice of forum." (Pet. App. 5)

Exhaustion of Tribal remedies and extending comity to a Tribal Court decision were the only two issues brought before the United States District Court. Likewise, these were the issues argued before the Ninth Circuit Court of Appeals. Both issues were addressed by both courts. The issues are resolved, concluded, and decided correctly and this Petition for Writ of Certiorari should be denied.

III. CONCLUSION

The Petition for Certiorari should be denied because it raises issues not preserved in the United States District Court and the Ninth Circuit Court below. The Petition should be denied because, after waiting patiently for an elongated Tribal Court process, the United States District Court and the Ninth Circuit were convinced that the Tribal processes had been exhausted and only then, did both Courts follow the accepted federal law of comity in recognizing the decision of the Specially Appointed Court

of Appeals of the Winnemucca Indian Colony, the Minnesota Panel.

Respectfully submitted,

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