Case No. 01-15007

Case decided January 4, 2002. Panel Members: Pregerson, C.J., Rawlinson, C.J., and Weiner, District Judge sitting by designation.

In The
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BISHOP PAIUTE TRIBE, in its official capacity and as a representative of its Tribal members; BISHOP PAIUTE GAMING CORPORATION, d.b.a. the PAIUTE PALACE CASINO,

Plaintiffs—Appellants

vs.

COUNTY OF INYO; PHILLIP McDOWELL, individually and in his official capacity as District Attorney of the County of Inyo; DANIEL LUCAS, individually and in his official capacity as Sheriff of the County of Inyo

Defendants—Appellees

APPEAL FROM THE UNITED STATES DISTRICT FOR THE EASTERN DISTRICT OF CALIFORNIA, CASE NO. CV-F 00-6153 REC/LJO

APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

At the request of the Ninth Circuit Court of Appeals, Plaintiffs/Appellants Bishop Paiute Tribe and the Bishop Paiute Gaming Corporation ("Tribe") hereby file this Response to the Petition for Rehearing En Banc filed on January 24, 2002, by Defendants/Appellees Phillip McDowell, District Attorney, Daniel Lucas, Sheriff, both of Inyo County and the County of Inyo ("County"). Tribe's Motion to obtain an additional seven (7) days to file this Response was granted by the court, providing the Tribe until March 20, 2002, to file this Response.

The County's Petition, which in many respects is no more than a second bite at the briefing apple, erroneously complains that the Panel's opinion conflicts with the United States Supreme Court holding in Nevada v. Hicks, 533 U.S. 353, 121 S. Ct. 2304 (2001). As will be discussed below, the Panel clearly distinguished the factual circumstances of the current case from Hicks, and therefore no conflict exists.

Further, the County's portrayal that the Panel opinion has created sanctuaries or enclaves of criminal lawlessness cannot be further from the truth. At no point has the Tribe suggested, nor did the Panel opine, that the location of the property being sought was decisive. For the purposes of the County's Petition, the issues before the Panel were: (1) Did the execution of a search warrant by the County violate the inherent sovereign right of the Tribe to create legitimate governmental

policies to protect its wholly-owned, confidential Tribal documents; (2) was the sovereign immunity of the Tribe waived with the passage of Public Law 280; and (3) were the District Attorney and Sheriff entitled to qualified immunity?

Under the facts of the current case, the Panel found the inherent sovereignty of the Tribe precluded the County from the execution of a search warrant, seizing wholly-owned tribal records in derogation of a legitimate governmental policy created to protect the integrity of those confidential documents. The Panel also correctly found the sovereign immunity of the Tribe had not been waived with the passage of Public Law 280. Further, the Panel held the District Attorney and Sheriff were not entitled to qualified immunity.

To hold that the Panel's opinion is inconsistent with Hicks would be an assault upon, and would place in question such cases as United States v. James, 980 F.2d 1314 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1992), California v. Quechan Tribe, 595 F.2d 113 (9th Cir. 1979), Elko County Grand Jury v. Siminoe, 109 F.3d 554 (9th Cir. 1997), and Bryan v. Itasca County, 426 U.S. 373 (1976).

THE SUPREME COURT HOLDING IN NEVADA V. HICKS IS NEITHER CONTROLLING NOR PERSUASIVE AS TO THE CURRENT CASE

The County claims that the Panel decision "is contrary to and in conflict with" Hicks. Yet a court confronted with authority that is alleged to be controlling must "parse the precedent in light of the facts presented and the rule announced." Hart v. Massanari, 266 F.3d 1155, 1172 (9th Cir. 2001).

In Hicks, the Supreme Court addressed the jurisdictional limitation of the Fallon Paiute Shoshone Tribe to adjudicate the alleged tortious conduct of state wardens executing a search warrant on an individual Indian on the reservation for evidence of an off-reservation crime, and whether the tribal court had jurisdiction over claims brought under 42 U.S.C. section 1983. See Hicks 533 U.S. at 406, 121 S.Ct. at 2309.

The Supreme Court initiated its analysis by focusing upon principles of Indian law wholly inapplicable in the present case:

> As to nonmembers ... a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction ... Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in Montana v. United States ... which we have called the 'pathmarking case' on the subject, ... Where nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Id., at 406, 121 S. Ct. at 2309. Hicks is an extension of cases over the past twenty years that have addressed the limitations of a tribe's inherent sovereignty when a tribe exercises jurisdiction over non-members or over non-tribal lands. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Wheeler, 435 U.S. 313 (1978); Montana v. United States, 450 U.S. 544 (1981). This line of cases was the entire focus of the County's Response and were correctly dismissed by the original Panel.

> However, all the cases relied upon by Defendants involve instances where a tribe's sovereignty has been limited after it attempted to exert jurisdiction over non-member Indians or in cases involving attempted exertion of jurisdiction over non-tribal lands. This case involves the Tribe's assertion of jurisdiction over uniquely tribal property (Casino employee records) on tribal land. Thus Defendants' assertion that the Tribe's inherent sovereignty has been lost by implication is not supported by law.

Bishop Paiute Tribe v. County of Inyo, 275 F.3d 893, 901 (2002).

Contrary to the County's assertion, the Panel had the benefit of briefs submitted by the Amicus Curie for the County, the Reply from the Tribe as well as oral arguments where the applicability of Hicks "was extensively presented and argued by the parties," the County's Petition, p. 3, n.1. As the Tribe argued in its Reply, the holding of Hicks should be limited by its facts.

While the Supreme Court did determine that County officials were authorized to execute search warrants on tribal lands, the factual distinctions in the current case render the Hicks analysis seized upon by the County wholly inapplicable.

First, in the current case, the search warrant was executed against the Tribe, not an individual tribal member. Second, the property seized belonged wholly to the Tribe, not an individual tribal member. Third, the property which was the subject of the search warrant were confidential documents seized in complete derogation of a reasonable, legitimate governmental policy designed to protect the confidentiality of those documents, of which the County was apprised. Fourth, the

Tribe possesses sovereign immunity, rendering it immune from the processes of state courts unless immunity is waived either by the Tribe or by Congress. Individual tribal members do not possess such sovereign immunity. Fifth, the County exerted jurisdiction over the Tribe by unlawfully seizing tribal documents in violation of the Fourth Amendment of the United States Constitution. In Hicks, it was the Fallon Paiute-Shoshone Tribe who attempted to assert jurisdiction over individual state officials.

Relying wholly upon the dicta of Hicks, the County asserts that the actions of the Tribe, i.e., protecting wholly-owned, confidential Tribal documents, operates as a "regulation" over the County. To accept the County's assertion would result in a complete assimilation of tribal governments, placing them in complete control of states and their political subdivisions who, on a whim, can seize tribal records and tribal property in complete derogation of legitimate tribal and federal laws and policies by articulating some specious claim of probable cause that the documents sought are "evidence" of criminal activity.[1] See Bryan v. Itasca County, 476 U.S. at 389.

[1] The Court should be aware that the criminal proceedings commenced against the three individual tribal members whose employment records were seized have been dismissed by County's own motion "due to lack of probable cause." See State v. Dewey, Inyo County Superior Court Case Nos. MBCRF01-0027942-002 and 003.

Because Nevada v. Hicks Did not Address the Sovereign Immunity of a Tribal Government, California v. Quechan and Bryan v. Itasca County Still Control, and United States v. James is Still Relevant

At the district court and before the Panel, the County relied solely upon Public Law 280 as providing the County with the authority to execute a search warrant against the Tribe, seizing wholly-owned confidential tribal records. The Tribe argued, and the Panel agreed, that Public Law 280 neither expressly nor impliedly waived the sovereign immunity of the Tribe.

> [t]he United States Supreme Court and the Ninth Circuit have interpreted Public Law 280 to extend jurisdiction to individual Indians and not to Indian tribes ... "there is notably absent any conferral of state jurisdiction over the tribes themselves" ... "neither the express terms of [Public Law 280], nor the Congressional history of the statute, reveal any intention by Congress for it to serve as a waiver of a Tribe's sovereign immunity". Absent a waiver of sovereign immunity, tribes are immune from processes of the court.

Bishop Paiute, 275 F.3d at 901, citing Bryan v. Itasca County, 426 U.S. at 389, and California v. Quechan Tribe of Indians, 595 F.2d at 1156.[2]

The sovereign immunity of a tribal government was not at issue in Hicks. Hicks neither expressly nor impliedly referred to any of the cases relied upon by

[2] The County erroneously states that the holding of Quechan "addressed the right of a tribe to be immune from a civil lawsuit". County's Petition, at p. 12. Quechan specifically held that the grant of criminal jurisdiction to the State of California did not serve as a waiver of a Tribe's sovereign immunity. The County provides no analysis as to why The Panel's reliance on Bryan is erroneous. The Panel correctly found Bryan to be "instructive for interpreting Public Law 280's provision granting criminal jurisdiction." Bishop Paiute, 275 F.3d at 901.

the Panel. There is no evidence that either Bryan or Quechan are no longer valid. This is no mere oversight by the Supreme Court. If indeed it is the intent of the Supreme Court to reverse its previous holding of Bryan, then it is the Supreme Court who must make that determination, and not the Court of Appeals.

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that 'if a precedent of this court has direct application in a case, yet appears to rest on reasons rejected in some other line of decision, the Court of Appeals should follow the case which directly controls, leaving to this court the prerogative of overruling its own decisions.'

Agostini v. Felton, 521 U.S. 203, 237 (1997) (internal citation omitted).

A determination that Hicks has overturned established Ninth Circuit precedent must not be done lightly since its effects are not easily reversed. See Hart v. Massanari, 266 F.3d at 1172.

The Panel also found James as "directly relevant," noting that the Ninth Circuit's previous holding that "the federal government may not pierce the sovereignty of Indian tribes, notwithstanding its constitutionally preemptive authority over Indian affairs, ... carries considerable weight in our review of this case." Bishop Paiute, 275 F.3d at 902.

While it is uncontroverted that Hicks will serve as binding authority upon this circuit, the reach of the Hicks decision must be limited to its facts.

The County's Actions Violated the Tribe's Inherent Tribal Sovereignty

The Panel correctly noted "the Supreme Court has adopted a more categorical approach denying state jurisdiction where states attempt to assert such jurisdiction over a tribe absent a waiver by the tribe or a clear grant of authority by Congress." Bishop Paiute, 275 F.3d at 903, citing Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 458 (1995). See County's argument contra, Petition p. 14.

The Panel recognized that inherent tribal sovereignty includes "not just the Tribe's right to protect the confidentiality of its employee records, but the more fundamental right of the Tribe not to have its policies undermined by the states and their political subdivisions.... We conclude that the execution of a search warrant against the Tribe interferes with 'the right of reservation Indians to make their own laws and be ruled by them.'" Bishop Paiute, 275 F.3d at 902, citing Williams v. Lee, 358 U.S. 217, 220 (1959). Citing to similar federal and state statutes, the Panel found the Tribe's policies concerning the protection of confidential employee records to be a reasonable, legitimate governmental function. Id.

The Panel Correctly Found that Even Under a "Balancing" of Interests Tests, the Tribe's Interests Outweighed the Interests of the County

Although the Panel recognized that the balancing of federal tribal and state interests is erroneous, it noted "even if a balancing test is the appropriate legal framework, the balance of interests favors a ruling for the Tribe." Bishop Paiute,

275 F.3d at 904. The Panel recognized that the tribal interest of enforcing tribal policies regarding employee records "is an act of self-government ... that promote tribal interests." Bishop Paiute, 275 F.3d at 904. Not only is this a legitimate tribal interest, but the federal government has an interest in promoting strong tribal governments. See Bryan v. Itasca County, 426 U.S. at 389.

Although the County had an interest in investigating potential welfare fraud, the Panel identified less intrusive alternatives that existed for the County to protect its interests:

> Most clearly, the County could have followed the Tribe's policies as to confidential tribal records and allowed the Tribe to seek consent from the three employees before disclosing their files. The Tribe also offered to accept, as evidence of a release of the records, a redacted copy of the last page of the welfare application that clearly indicates that employment records for individuals seeking public assistance were subject to review by county officials. However, the District Attorney refused this offer. The Tribe also contends that the County already had evidence of the alleged welfare fraud in its possession. Finally, Defendants had authority, under Public Law 280, to execute a search warrant against the individual tribal members. Such a search would likely uncover relevant documents. The District Attorney's interest in receiving this information through the processes of the court is no basis to chip away at the Tribe's sovereign status.

Bishop Paiute, 275 F.3d at 905.

THE TRIBE STATED A CAUSE OF ACTION PURSUANT TO 42 U.S.C. SECTION 1983

The Panel had correctly concluded that "the execution of a search warrant beyond a county officer's jurisdiction [violates the Fourth Amendment and is therefore] actionable under section 1983." Bishop Paiute, 275 F.3d at 912.

In the eleventh hour, the County now raises for the first time through its Petition that the Tribe's complaint "will not support a Section 1983 claims," and therefore the District Attorney and Sheriff are entitled to qualified immunity. County's Petition, p. 16.

The County's dislike of the Panel's decision does not convert the issue into one of exceptional importance under this Court's rules. Fed. R. App. P 35(a)(2). The Panel's decision properly employs the appropriate legal standards to analyze the individual defendants' entitlement to qualified immunity. Bishop Paiute, 275 F.3d at 910-911. The Panel was required to do no more.

The County attempts to diminish the Tribe's Fourth Amendment rights against unlawful searches and seizure by characterizing the County's actions as an interference or impairment of the Tribe's right to self-governance, thus not a protected interest under Section 1983. The County's argument is premised largely upon Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989), a case which the Panel clearly distinguished from the factual circumstances here.

In Hoopa Valley, the district court granted declaratory relief in favor of the Tribe on the issue of the authority of the state of California to assess a timber yield tax, but denied the tribe's request for attorney's fees under sections 1983 and 1988. The Ninth Circuit explained that because the tribe's claim was not founded upon the United States Constitution or any federal statutes, the infringement upon tribal sovereignty by the State of California did not support a section 1983 action. Id. at 661-663.

Unlike Hoopa Valley, the Tribe's complaint specifically alleged that the search and seizure violated plaintiffs' Fourth Amendment rights, and sought compensation under section 1983 (ER 9-10, 14-15, 21). The Fourth Amendment supports a federal claim brought pursuant to section 1983. Cf. Brower v. County of Inyo, 489 U.S. 593, 599-600 (1989). Indian tribes have been recognized as "other persons" entitled to sue under section 1983. Fallone Paiute-Shoshone Tribe v. City of Fallon, 174 F. Supp. 2d 1088, 1092 (D.C. Nev., 2001), citing Native Village of Venetie IRA Council v. State of Alaska, 155 F.3d 1150, 1152 n.1 (9th Cir. 1998). The word "person" in section 1983 has also long been defined to include a corporation, (see Reuter v. Skipper, 4 F.3d 716, 719-720 (9th Cir. 1993)), and a corporation has legally protected Fourth Amendment rights. (Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-392 (1920)).

The Fourth Amendment was designed to protect liberty, privacy and possessory interests against arbitrary intrusion by the government, and was intended to serve as a restraint upon the activities of the government. 1 David Rudstein et al., Criminal Constitutional Law, section 2.01 (2001). Seizure of business records and other "papers" in the Fourth Amendment sense involves intrusion into the privacy of the records' repository. McDonald v. United States, 335 U.S. 451, 453-456 (1948). Thus, the Tribe has raised a legally cognizable section 1983 claim as a result of the County acting outside of its jurisdiction and in violation of the Fourth Amendment.

The County's challenge of the Tribe's ability to sustain a cause of action pursuant to 42 U.S.C. section 1983 contains a curious assertion that the full court must remedy the Panel's "incorrect recitation of California law." County's Petition, at 16-17. The County relies upon on People v. Fleming, 29 Cal.3d 698 (1981), as supporting its claim that the Panel was "incorrect," but fails to explain what this has to do with its challenge of the Panel's holding regarding qualified immunity. Regardless, the County's reliance on Fleming is misplaced.

Fleming held that a county magistrate could issue a search warrant to a county peace officer that could be executed it in another county. Fleming, 29 Cal.3d at 707. Location of service of process has never been at issue in the current case. The County's jurisdiction is limited as it relates to the sovereign status of the

governmental entity it seeks to execute process upon. See Elko County Grand Jury v. Simone, 109 F.3d 554 (9th Cir. Cal. 1997); Sycuan Band of Mission Indians v. Roache, 788 F. Supp. 1498, 1506 (S.D. Cal. 1992), aff'd, 54 F.3d 535 (9th Cir. 1994). With respect to tribal governments, federal, not state, law defines the jurisdictional limitation of state governments, and any jurisdiction the County has over Indian country is only lawful to the extent that it is "consistent with Indian tribal sovereignty and self-government." Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g., 476 U.S. 877, 887 (1986).

The Panel's Ruling on the Issue of Qualified Immunity was Sound

For the first time, the County has made an effort to address James by challenging the Panel's determination that the individual defendants were not entitled to qualified immunity. The County claims the Panel's analysis of qualified immunity "is erroneous," and that the Panel's holding creates "inconsistent results" by citing to three cases that "would be confusing enough to a peace officer on the street." County's Petition, p. 18.

However, an officer whose subjective state of mind is confusion over the law is not a reasonable officer for the purposes of qualified immunity. Cf. Harlow v. Fitzgerald, 457 U.S. 800, 814-818 (1982); United States v. Baker, 894 F.2d 1144, 1148 (10th Cir.1990).

The Panel correctly held, under the holdings in James and Sycuan Band that the County violated clearly established law by executing the warrant, and that a reasonable county officer would have been aware his conduct was unlawful. Bishop Paiute, 275 F.3d at 912.

At the outset of its qualified immunity analysis, the Panel correctly quotes relevant Supreme Court authority: "In order for a right to be 'clearly established' its 'contours must be sufficiently clear that [at the time of the alleged conduct] a reasonable officer would understand that what he is doing violates that right." Id., at 911, citing Anderson v. Creighton, 483 U.S. 635 (1987).

As discussed above, in addition to James and Sycuan Band, the cases within this circuit regarding Public Law 280 clearly establish that the conferral of criminal jurisdiction to the state did not waive the sovereign immunity of the Tribe. See Bryan v. Itasca County, 426 U.S. at 389; see also Quechan, 595 F.2d at 1156. Therefore, The County's "inconsistent results" argument erroneously fails to examine the legal "contours" established in earlier decisional law when addressing entitlement to qualified immunity as it relates to the execution of search warrants against sovereign tribal governments.

Set against the backdrop of Bryan and Quechan, the Panel's decision correctly points to James and Sycuan Band. These cases further delineated the contours of the law by which the County should have relied upon. Thus, the

Panel's decision correctly finds that the law was sufficiently clear to be deemed "clearly established law" for the purposes of the instant qualified immunity analysis. Bishop Paiute, 275 F.3d at 911-912.

The County never raised at either the district court or on appeal any relevant case law, but simply asserted they were entitled to qualified immunity because "the asserted right being violated was not clearly established." (ER 49, 126; County's Response Brief, p. 44) Indeed, its responsive brief before the Panel cited only four cases (Harlow v. Fitzgerald, 457 U.S. 800 (1982); Anderson v. Creighton, 483 U.S. 635 (1987); Saucier v. Katz, 533 U.S. 194 (2001); and People v. Fleming, 29 Cal.3d 698 (1981)) (County's Response at p.p. 43-46). None of these cases relied upon by the County involved law enforcement officers seizing tribally-owned confidential records or exerting jurisdiction over tribal governments.

In contrast, the Tribe not only argued the applicability of James at the district court and on appeal, but also the applicability of Bryan, Quechan and Sycuan Band. For whatever reason, the County chose not to brief any of these cases that the Panel correctly held to be applicable here.

The County now seeks rehearing to dispute the application of James to the Panel's decision regarding qualified immunity. The County should not now be heard to complain that the Panel's decision relies heavily on established circuit precedent. The County's current argument still avoids discussing the contours of

established law in relevant cases, instead looking to "inconsistent results" of cases that it much belatedly wishes to call to the full court's attention. Nevertheless, the Tribe briefly discusses the County's belatedly cited cases and explains why the County's argument lacks merit.

Crow Tribe of Indians v. Raciot, 87 F.3d 1039 (9th Cir. 1996) is clearly distinguishable. Even though state officials were involved, the search warrant was obtained and executed against the Crow Tribe by the federal government, issued by a federal magistrate, for violations of federal gaming laws. Furthermore, any jurisdiction the State of Montana possessed was derived from the tribal-state compact executed between the tribe and the state in March, 1993. See Sycuan Band, 54 F.3d at 538, citing 18 U.S.C. section 1166(d).

In United States v. Snowden, 879 F. Supp. 1054 (D.C Oregon 1995), and United States v. Velarde, 40 F. Supp. 2d 1314 (D.C. New Mexico 1999), both district courts did engage in an erroneous balancing of tribal and individual interests by determining there had been some type of waiver of sovereign immunity.

However, both Snowden and Velarde can be distinguished on several critical levels. First, both cases involve a subpoena versus the obviously more intrusive process of a search warrant. Second, the waiver of sovereign immunity was implied to the deference of the federal governmental interests, whose plenary

power over tribal governments is well established. Moreover, the courts in Snowden and Velarde found the respective defendants' due process rights to a fair trial were implicated in the potential release of documents to them. This is a contention that the County cannot make here, as it lacks standing to assert the rights of any criminal defendant in the context of the current case. Furthermore, in both cases the federal government apparently had no other means to obtain the documents at issue.

Based on the specific facts of the current case, it must be concluded that the reliance on James by the Panel was well-founded. In light of clearly established principles governing state intrusions into sovereign tribal functions, The County defendants, as a matter of law, could not reasonably have believed that the execution of a search warrant against the Bishop Paiute Tribe was lawful. See Anderson v. Creighton, 483 U.S. at 641.

CONCLUSION

Based upon the arguments raised above, the Tribe believes the County's request for the extraordinary relief of a rehearing en banc should be denied. The original Panel's decision is not in conflict with previous Ninth Circuit and Supreme Court decisions. and the County has failed to raise any issues of exceptional importance that need be decided by an en banc panel of the Ninth Circuit Court of Appeals.

March 20, 2002

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND
CIRCUIT RULE 32-1 FOR
CASE NUMBER 01-15007

I certify that pursuant to FED. R. APP. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief complies with FED. R. APP. P. 32 (a)(7)(B) because this brief complies with FED. R. APP. P. 32 (a)(7)(A) and is a principal brief proportionately spaced, has a typeface of 14 points or more and contains 4126 words.

Dated: March 20, 2002

Anna S. Kimber

PROOF OF SERVICE BY MAIL

I am employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 701 "B" Street, 13th Floor, San Diego, California 92101-8194. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On March 20, 2002, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within documents:

APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC

in a sealed envelope, postage fully paid, addressed as follows:

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Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 20, 2002, at San Diego, California.

_____

Rosa Dyer