Case No. 01-15007

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 COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, CASE NO. CV-F 00-6153 REC/LJO

APPELLEES' BRIEF

Paul N. Bruce, County Counsel (081619)
John D. Kirby, Special Legal Counsel (66432)
Office of County Counsel
County of Inyo
224 North Edwards Street
P.O. Box M
Independence, California 93526
(760) 878-0229
(760) 878-2241 fax

Attorneys for Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a), F.R.A.P.

Appellee COUNTY OF INYO is a governmental entity and a political subdivision of the State of California. Appellee PHILLIP McDOWELL is an individual, and is being sued both individually and in his official capacity as the District Attorney of the County of Inyo. Appellee DANIEL LUCAS is also an individual, and is being sued both individually and in his official capacity as the Sheriff of the County of Inyo. Accordingly, no Corporate Disclosure Statement is required for any of appellees pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure.

DATED: June 21, 2001

Paul N. Bruce, County Counsel
John D. Kirby, Special Legal Counsel
Office of County Counsel
County of Inyo
224 North Edwards Street
P.O. Box M
Independence, California 93526
(760) 878-0229
(760) 878-2241 fax

Attorneys for Appellees
COUNTY OF INYO, PHILLIP
McDOWELL and DANIEL LUCAS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other

STATEMENT OF JURISDICTION

Pursuant to Circuit Rule 28-2.2, appellees agree with appellants' statement regarding jurisdiction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

There are twelve primary issues presented for review in this case.[1] These twelve issues are:

1. Whether the inherent sovereignty of an Indian tribe enables the tribe to prevent the execution of a search warrant, issued upon probable cause, when the property to be searched is a commercial gaming casino operated by the Indian tribe upon property owned by the United States in trust for the tribe.

2. Whether the Paiute waived any claim to inherent sovereign immunity in the payroll records being sought by the search warrant, when the Tribe earlier provided the identical payroll information to the State of California

[1] Appellants Bishop Paiute Tribe and the Bishop Paiute Gaming Corporation dba the Paiute Palace Casino list six issues in their Statement of Issues. However, some of those issues themselves, as well as the text and substance of the arguments presented on their behalf, present additional issues. The twelve issues specified in this brief represent a compilation of what appellees understand to be all of the issues presented by Appellants' Opening Brief.

by way of Quarterly Wage and Withholding reports (payroll tax returns). ER 323-328.[2]

3. Whether Public Law 280 (18 U.S.C. § 1162) permits the execution of a search warrant, issued upon probable cause, when the property to be searched is a commercial gaming casino operated by an Indian tribe upon property owned by the United States in trust for the tribe.

4. Whether the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) preempts California from issuing and executing search warrants, when the property to be searched is a commercial gaming casino operated by an Indian tribe located upon property owned by the United States in trust for the tribe.

5. Whether Public Law 280 violates the Tenth Amendment to the United States Constitution.

6. Whether, after the enactment of Public Law 280 in 1953, the California Legislature was required to enact "enabling legislation" in order for the criminal laws of California to have the same force and effect upon Indian lands as they do elsewhere in the State.

7. Whether the payroll records seized in this case [ER 267-321], pursuant to the search warrant exceed the scope of the search warrant.

[2] "ER" connotes Excerpts of Record, followed by the applicable page number(s) of the Excerpts of Record.

8. Whether, in order to present sufficient probable cause for issuance of the search warrant, the Affidavit in Support of and Petition for Search Warrant was required to specifically state that the Paiute Casino was operated by the Paiute.

9. Under the circumstances of this case, whether either or both of the Inyo County District Attorney and Inyo County Sheriff are entitled to qualified immunity when sued in their individual capacities.

10. Under the circumstances of this case, whether either or both of the Inyo County District Attorney and Inyo County Sheriff are entitled to immunity under the Eleventh Amendment when sued in their official capacities.

11. Under the circumstances of this case, whether the County of Inyo may be held liable under 42 U.S.C. 1983 for the acts of the District Attorney, or Sheriff, in obtaining or in executing the search warrant.

12. Whether the Paiute may present an argument that all crimes involved in the investigation which was the subject of the search warrant application must have involved regulatory law, and not criminal law; and if the Paiute are entitled to present such an argument, whether such argument is moot in light of the applicability of California Penal Code Section 487(a), which covers the felony of grand theft, and other applicable Penal Code Sections.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

Appellants are the BISHOP PAIUTE TRIBE, a federally recognized Indian Tribe, and its Tribal-chartered gaming corporation, the BISHOP PAIUTE GAMING CORPORATION, dba the PAIUTE PALACE CASINO (collectively the "Paiute").

On August 4, 2000, the Paiute filed a complaint in the United States District Court for the Eastern District of California against appellees COUNTY OF INYO ("County"), PHILLIP McDOWELL, the District Attorney of the County of Inyo, in both his individual and official capacities ("Mr. McDowell"), and DANIEL LUCAS, the Sheriff of the County of Inyo, also in both his individual and official capacities ("Sheriff Lucas").

The complaint set forth five claims, and sought declaratory relief, injunctive relief, and monetary damages allegedly resulting from laimed violation(s) of the Paiute's civil rights.

The County, Mr. McDowell and Sheriff Lucas were served with the Paiute's complaint in August 2000, and responded by way of a motion to dismiss all claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

The motion to dismiss was heard before the Honorable Robert E. Coyle, Jr., United States District Court Judge, on October 30, 2000, and the matter was taken under submission.

On November 22, 2000, the District Court entered its written Order Granting Defendants' Motion to Dismiss, in its entirety. [ER 201-225]

On November 27, 2000, judgment in favor of the County, Mr. McDowell and Sheriff Lucas was entered. [ER 202]

Appellants timely filed Notice of Appeal on December 22, 2000. [ER 226-227]

B. Statement of Facts

The events which led to the Paiute's District Court complaint involved a search warrant obtained by Leslie Nixon, a California peace officer and investigator with the Inyo County District Attorney's office, and the execution of that search warrant upon the commercial gaming casino known as the Paiute Palace Casino, which is operated by the Paiute. The search warrant sought the payroll records for three casino employees, all of whom are asserted by the Tribe to be Tribal members, for the April-June 1998 calendar quarter.

The search warrant was obtained pursuant to that certain Affidavit in Support of and Petition for Search Warrant No. 427, by Investigator Nixon. [ER 136, 136-A and 137]

Investigator Nixon's Affidavit and Petition was presented to the Superior Court of the State of California, for the County of Inyo, on March 22, 2000. The next day, on March 23, 2000, the Honorable Patrick Canfield, Judge of the Superior Court, issued Search Warrant No. 427. [ER 138-141]

Search Warrant No. 427 stated that the items to be searched for were items which tended to show that a felony had been committed, or that a particular person had committed a felony. The premises to be searched were described in the search warrant as the "Paiute Palace Casino located at 2742 North Sierra Highway 395, Bishop, Inyo County, California."

The specific items to be searched for were described as:

> "Payroll records for Patricia Dewey, date of birth 9-20-59, social security number 556-33-3889; Clifford Dewey, date of birth 11-27-54, social security number 558-98-0356; and Tiyan Hill, date of birth 2-23-79, social security number 571-55-4327 for the period of April 1998 through June 1998."

In her Affidavit, Investigator Nixon informed the Superior Court that she had probable cause to believe that the payroll records above-described constituted evidence, which tended to show that a felony had been committed, or that a particular person had committed a felony. The Affidavit then set forth the facts which caused Investigator Nixon to form that belief, and which constituted the basis upon which the Petition for the search warrant was being submitted.

These facts included without limit that: Patricia Dewey, Clifford Dewey, and Tiyan Hill received Public Assistance through the Inyo County Department of Health and Human Services for the period April-June 1998; that she (Investigator Nixon) had received a report of earnings on Patricia Dewey,

Clifford Dewey and Tiyan Hill, for the period of April-June 1998, from the State of California Department of Social Services IEVS/Integrated Fraud Detection System in April 1999; that she (Investigator Nixon) had been advised by Ms. Bonnie Brown, Eligibility Supervisor for the Inyo County Department of Health and Human Services, that Patricia Dewey, Clifford Dewey and Tiyan Hill, had failed to report the earned income shown on the State of California IEVS/Integrated Fraud Detection System Report, for the period April-June 1998, to the Inyo County Department of Health and Human Services, as required; that she (Investigator Nixon) had been unable to obtain cooperation from the Paiute Palace Casino in obtaining the payroll records for Patricia Dewey, Clifford Dewey and Tiyan Hill for the time period April-June 1998; and that the unreported earned income may have affected their eligibility to receive the Public Assistance which they were receiving in an amount (overpayment) in excess of $400.00.

The $400.00 figure is the threshold figure for the felony of grand theft, a violation of California Penal Code Section 487(a).

The unreported earned income shown by the California Department of Social Services IVES/Integrated Fraud Detection System Report was from the Paiute Palace Casino. ER 266. The search warrant being sought was for the payroll records from the Paiute Palace Casino for the three named individuals, for the subject period of April-June 1998.

Search Warrant No. 427 was subsequently issued on March 23, 2000, by Judge Canfield; and on that same day, the search warrant was served upon the Paiute Palace Casino. Only the payroll records identified in Search Warrant No. 427 were seized. ER 263-329.

The payroll records which were seized consisted of two types. The first type of record consisted of time card entries, payroll registers and payroll check registers for the three subject individuals, for the three-month period of April-June 1998. Each page of these records contained a specific entry of payroll information for at least one of the three subject individuals for the relevant time period. ER 267-321.

The second type of record consisted of quarterly payroll tax information which the Paiute had earlier submitted to the State of California in the form of California State Quarterly Wage and Withholding Reports. Once again, each page of the Quarterly Wage and Withholding Reports contained an entry for at least one of the three subjects, namely Patricia Dewey, Clifford Dewey or Tiyan Hill, for the relevant time period. ER 323-328.

The Paiute had voluntarily provided this information and these Quarterly Reports to the State in order to participate in, and for it and its employees to benefit from, the California state program for unemployment compensation benefits, and the California state program for unemployment compensation disability benefits. ER 176.

In order to participate in these programs, the Paiute had also agreed to comply with the provisions of California Unemployment Insurance Code, and had also consented to the jurisdiction of state agencies charged with the enforcement of that Code, and of the courts of the State of California for purposes of enforcement. ER 176.

Regarding physical force, the only force which the Paiute allege was employed during the execution of the search warrant was the use of a bolt cutter to cut the locks that were securing the storage shed where the payroll records were being stored. ER 11 and 203. The Paiute had declined to provide the key to these locks when asked.

SUMMARY OF THE ARGUMENT

A. Positions Advanced by the Paiute.

The underlying premise of the Paiute's attack on the District Court's ruling is that because it is an Indian tribe, the Paiute have inherent sovereignty which renders it and its property immune from search pursuant to a search warrant. Should the Paiute fail in their advancement of this first position, then the Paiute claim that:

- The execution of the search warrant, upon its commercial gaming casino property, for the payroll records of the three subject individuals, is not permitted by Public Law 280 (18 U.S.C. § 1162);

- If there was any authority for issuance and execution of the search warrant pursuant to Public Law 280, then such authority was preempted and withdrawn by the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.);
- Public Law 280 violates the Tenth Amendment to the United States Constitution;
- Public Law 280 has no effect in California because, in order to have effect, the California Legislature was first required to enact "enabling legislation" so stating, and it did not do so; and
- The payroll records obtained pursuant to the search warrant exceeded the scope of the search warrant.

Depending upon the rulings of the Court, there are several additional issues which may be relevant, and these are described in the "Statement of Issues" section of this brief.

B. Summary of Argument.

The following is a summary of the argument presented by the County of Inyo, Mr. McDowell, and Sheriff Lucas:

(1) The District Court was correct in ruling that there is no inherent sovereignty which bars the execution of the search warrant.

The Paiute vociferously assert that the principle of inherent sovereignty enables them to bar the execution of the search warrant upon their casino

property. However, the Paiute do not attempt to explain the principle of inherent sovereignty, nor do they attempt to explain how the principle is deemed to apply in this case.

When one does examine the principle of inherent sovereignty, in accordance with the rulings and explanation of the United States Supreme Court, it becomes clear that inherent sovereignty does not operate to bar the execution of the search warrant.

This principle of inherent sovereignty was most recently addressed by the Supreme Court, less than four weeks ago, on May 29, 2001, in the case of ***Atkinson Trading Co., Inc. v. Shirley, et al.***, Case No. 00-454, 532 U.S. _____ (2001). In ***Atkinson,*** the Court recited with approval its previous holding that Indian tribes have "lost many of the attributes of sovereignty." ***Atkinson,*** supra, Opinion of the Court, page 3. The Court also recited with approval its prior holdings in ***United States v. Wheeler***, 435 U.S. 313 (1978), and in ***Montana v. United States***, 450 U.S. 544 (1981), regarding inherent sovereignty and its limitations. **Atkinson,** supra, Opinion of the Court, page 4.

The principle of inherent sovereignty and its limitations is explained at length in ***Montana v. United States***, supra, and the same is discussed more fully below in the Argument section of this brief.

(2) Even if inherent sovereignty could bar the execution of the search warrant, any inherent sovereignty of the Paiute was waived when the Paiute earlier and voluntarily provided the payroll information to the State of California.

This was done when the Paiute voluntarily filed, with the State of California, its Quarterly Wage and Withholding Report with regard to the payroll records of the three subject individuals. ER 323-328.

(3) The District Court was also correct in granting defendants/appellees' motion to dismiss because, in enacting Public Law 280, Congress has expressly provided that California has jurisdiction to apply its criminal laws upon Indian land, which includes the casino property, and Congress has also provided that when so applied, such laws have the same force and effect as elsewhere within California.

In Public Law 280, Congress expressly provided that the criminal laws of California would have the same force and effect within Indian country as they have elsewhere within the State. In this case, the Superior Court's issuance of a search warrant was pursuant to California Penal Code §§ 1528 and 1524, and other applicable provisions of the California Penal Code. This was in direct implementation of the authority of the federal statute (Public Law 280).

The claim of the Paiute that Public Law 280 is limited only to offenses committed by or against Indians in Indian country, is unsupported by law, and is untenable.

This is because Public Law 280 itself also repealed both the federal General Crimes Act, and the federal Major Crimes Act, regarding the previously existing federal criminal jurisdiction upon Indian land within California (as well as within the other states affected by Public Law 280). Congress did this by way of 18 U.S.C. 1162(c), which provided that 18 U.S.C. 1152 (the federal General Crimes Act), and 18 U.S.C. 1153 (the federal Major Crimes Act), were made inapplicable within the Indian country of California and the other affected states.

(4) The District Court was correct in its ruling that the Indian Gaming Regulatory Act ("IGRA") does not preempt Public Law 280 because, by its own provisions, the IGRA applies only to gaming, and does not apply to non-gaming or general crimes.

The claim of the Paiute that the Indian Gaming Regulatory Act ("IGRA") preempts Public Law 280 and the issuance or execution of the search warrant upon its property is dispelled by the very terms of the IGRA itself. Contrary to the claim of the Paiute, and as was found by the District Court, the IGRA is limited by its own terms to gaming regulation. 25 U.S.C. 2702, et seq.

The search warrant in this case was in connection with the investigation of crimes which included, but are not necessarily limited to, California state felonies of grand theft (California Penal Code § 487(a)), perjury (California Penal Code § 118), and welfare fraud (California Welfare and Institutions Code § 10980). The IGRA was never intended to, and by its terms does not, operate to bar or preempt, and substitute itself as, the criminal law applicable to such crimes, nor for that matter with regard to other general or major crimes such as murder, robbery, assault, etc.

(5) The District Court was correct in its ruling that Public Law 280 does not violate the Tenth Amendment because Public Law 280 does not mandate the implementation of a federally enacted program or federally enacted statutory scheme.

With regard to the Paiute's claim that Public Law 280 is unconstitutional in that it violates the Tenth Amendment, the contrary ruling of the District Court was correct. Nothing in Public Law 280 constitutes an attempt by Congress to mandate that California or the other affected states implement a federally enacted program or federal statutory scheme. Instead, Public Law 280 allows California and the other affected States to impose their own State criminal laws upon, and to exert their own police power over, the Indian lands within their boundaries.

(6) The District Court was correct in its ruling that California is not required to enact enabling legislation prior to it having the right to apply its inherent police power and its criminal laws to Indian land, as permitted by Public Law 280, and California law so provides.

As to the Paiute's claim that Public Law 280 cannot become effective in California unless and until the California Legislature enacts "enabling legislation" regarding the same, the California case of ***People v. Miranda*** (1980) 106 Cal.App.3d 504, 506, is precisely on point, and is contrary to the claim of the Paiute.

In ***Miranda,*** the California Court of Appeals stated that:

> "It was not required that California enact some form of enabling legislation to assume jurisdiction before the terms of 18 United States Code Annotated section 1162 became effective in this State." ***Miranda,*** *supra*, p. 506.

The Tenth Circuit case of ***United States v. Burch***, 169 F.3d 666, 670-671 (10th Cir. 1999), is consistent with, and cites with approval, the case of ***People v. Miranda***, *supra.*

(7) The District Court was correct in finding that the payroll records obtained pursuant to the search warrant are within the scope of the warrant, because each individual page contains the name and information regarding one of the three specifically named subjects of the search warrant.

Regarding the payroll records actually obtained in this case, each page of those records contains the identity of, and payroll information regarding, at least one of the three persons whose payroll records are the subject of the search warrant. Accordingly, the District Court was correct in finding that each of the documents seized was within the scope of the search warrant.

The claim of the Paiute, that they should have been allowed to redact, or cut out, certain portions of the records being sought, is unsupported in the law. To allow such obliteration or destruction of records by the possessor of them, as they are being seized pursuant to a search warrant, would allow an unprecedented opportunity for the possessor of the items being seized to engage in obstruction of the search warrant process and the destruction of evidence.

(8) The District Court was correct in finding that there was no requirement to specifically include, in the search warrant application, a statement that the Paiute Casino was operated by the Paiute.

(9) The Inyo County District Attorney and the Inyo County Sheriff are entitled to qualified immunity, when sued in their individual capacities, even if the Court should find that for one of the reasons claimed by the Paiute, the search warrant was unlawful.

This is because any conduct in executing the subject search warrant was not clearly unlawful pursuant to then existing establised law.

(10) The District Attorney and Sheriff are entitled to immunity when sued in their official capacities, because they were serving as State officers enforcing State law.

Accordingly, they are immune from suit in federal court, just as is the State of California, pursuant to the Eleventh Amendment to the United States Constitution.

(11) The County of Inyo is not liable under 42 U.S.C. 1983 for the acts of either the District Attorney, or the Sheriff, in obtaining or executing the subject search warrant, for all of the reasons set forth above.

Further, there is no *respondeat superior* liability with regard to the County and the conduct of either the District Attorney or the Sheriff.

(12) The Paiute have failed to raise the issue regarding whether the felonies set forth in the California Welfare and Institutions Code are felonies involving "regulatory" and not criminal law.

The Paiute did not raise this issue or present such an argument in the District Court, nor did they brief the issue or present an argument on the issue in their opening brief. It is therefore waived.

Further, even if the Paiute were entitled to present such an argument, it is moot in light of the applicability of California Penal Code Statutes to the conduct being investigated. This included without limit the crime of grand theft under California Penal Code Section 487(a), which is a felony.

ARGUMENT

I. STANDARD OF REVIEW.

The Court of Appeals reviews, *de novo*, the

in granting the motion to dismiss by the County, M

Lucas, pursuant to Rule 12(b)(6) of the Federal Rule

II. THE PAIUTE HAVE MADE INCORRECT LAW WHICH WOULD LEAD TO THE ES[illegible] OF AN INCORRECT FRAMEWORK FOR THE DECISION IN THIS CASE.

A. Incorrect assertions of law.

In the opening sections of the Argument portion of their brief, the Paiute have made incorrect assertions of law which would lead to the establishment of an incorrect framework for the decision in this case.

One of these incorrect assertions of law – a critical one – is made on page 10 of the Paiute's opening brief, where the Paiute assert that:

> "Tribes retain their sovereign status unless unequivocally waived by either the Tribe itself or Congress. Such waiver cannot be implied."

This is not a correct statement of the law. The Supreme Court has made it clear that Indian tribes have only limited sovereignty, and that such sovereignty can be lost in a number of ways. These include (1) loss by treaty, (2) loss by statute enacted by Congress, and (3) loss by implication as a necessary result of the dependent status of the tribes.

In ***United States v. Wheeler***, 435 U.S. 313 (1978), the Supreme Court stated:

> "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' ***United States v. Kagama,*** *supra*, 118 U.S., at 381, 6 S.Ct., at 1112. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others." ***United States v. Wheeler***, 435 U.S. 313, 323 (1978). (Emphasis added.)
>
> "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." ***United States v. Wheeler***, 435 U.S. 313, 323 (1978). (Emphasis added.)
>
> "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by [1] treaty or [2] statute, or [3] by implication as a necessary result of their dependent status. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L.Ed.2d 209." ***United States v. Wheeler***, 435 U.S. 313 (1978). (Emphasis added.)

Thus, as is seen by the Supreme Court's decision in ***Wheeler,*** *supra*, and in ***Oliphant v. Suquamish Indian Tribe***, *supra*, the Paiute's position that there can be no implied waiver, or loss, of sovereignty is not correct. Sovereignty is lost by implication as a necessary result of the dependent status of Indian tribes within

United States territorial jurisdiction. ***Wheeler***, *supra*, 323; ***Montana v. United States, et al.***, 450 U.S. 544, 564 (1981).

The Paiute make another incorrect assertion of law which, again, would lead to the establishment of an incorrect framework for deciding this case. This incorrect assertion is also in the opening sections of the Argument portion of the Paiute's brief, at page 8, where the Paiute assert that:

> "It is a fundamental principle of federal Indian law that, absent express congressional authorization, state laws do not apply on Indian reservations." (Emphasis added.)

Again, the Paiute are not correct, for as the Supreme Court has stated:

> "Our cases ... have not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." ***California v. Cabazon Band of Mission Indians***, 480 U.S. 202 (1987). (Emphasis added.)

Thus, the framework for decision proposed by the Paiute is incorrect. The correct framework is set forth immediately following.

B. The correct framework for decision.

The correct framework for the decision in this case involves an examination of the principle of retained inherent sovereignty of Indian tribes, an examination of the limitations on that retained

inherent sovereignty, and the application of the principle of retained inherent sovereignty to the facts of this case.

When one undertakes that examination and application, it becomes clear that the Paiute do not possess retained inherent sovereignty which enables them to bar the execution of the search warrant, and that the decision of the District Court was correct.

III. THE DISTRICT COURT WAS CORRECT IN RULING THAT THERE IS NO RETAINED INHERENT SOVEREIGNTY WHICH BARS THE EXECUTION OF THE SEARCH WARRANT.

A. Inherent sovereignty of Indian tribes is limited.

The Paiute assert that inherent sovereignty enables them to bar the execution of the search warrant upon their casino property. The Paiute do not, however, attempt to explain the principle of inherent sovereignty, nor do they attempt to explain how it is deemed to apply to bar the execution of the search warrant.

When the principle of inherent sovereignty is examined, in accordance with the rulings and explanation of the United States Supreme Court, it is seen that the extent of any inherent sovereignty is clearly and substantially limited in scope, and that the Paiute to not retain any inherent sovereignty which enables them to bar the execution of the search warrant for payroll records.

The principle of inherent sovereignty has been discussed at length and explained by the United States Supreme Court in several cases within the past

quarter century. These include without limit ***United States v. Wheeler***, 435 U.S. 313 (1978), ***Montana v. United States, et al.***, 450 U.S. 544 (1981), and most recently in the the less than four-week old case of ***Atkinson Trading, et al. v. Shirley, et al.***, 523 U.S. _____ (2001), decided May 29, 2001, case No. 00-454.

In ***Atkinson***, at pages 3-5 of the Opinion of the Court, the Supreme Court discusses its past decisions involving the "retained or inherent sovereignty" of Indian tribes, which decisions date back to 1810, and cites with approval its holdings on this subject as set forth in ***Fletcher v. Peck***, 6 Cranch 87, 147 U.S. 87, 147; ***United States v. Wheeler***, *supra*, and ***Montana v. United States***, *supra*.

As explained in ***Atkinson, Wheeler*** and ***Montana***, *supra*, and as is also explained in the other Supreme Court cases cited therein, the principle of retained inherent sovereignty applicable to Indian tribes, and what it includes and excludes, is as follows:

> "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty'... Their incorporation within the territory of the United States and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." ***United States v. Wheeler***, 435 U.S. 313, 323 (1978). (Emphasis added.)

> "By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others." ***United States v. Wheeler***, *supra*, 323. (Emphasis added.)

"The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." ***United States v. Wheeler***, *supra*, 323. (Emphasis added.)

"In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by [1] treaty or [2] statute, or [3] by implication as a necessary result of their dependent status. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L.Ed.2d 209." ***United States v. Wheeler***, *supra*, 323. (Emphasis added.)

"These limitations [of sovereignty] rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." ***Atkinson Trading Co., Inc. v. Shirley***, 532 U.S. _____ (2001), at p. 5 of the Opinion of the Court; ***United States v. Wheeler***, *supra*, 326; ***Montana v. United States***, *supra*, 564. (Emphasis added.)

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe. ***Montana v. United States***, *supra*, 564; ***United States v. Wheeler***, *supra*, 326. (Emphasis added.)

"Although physically within the territory of the United States and subject to ultimate federal control, [Indian tribes] ... remain 'a separate people, with the power of regulating their internal and social relations.' ***United States v. Kagama***, supra, 118 U.S., at 381-382...." ***United States v. Wheeler***, *supra*, 322 (Emphasis added.)

"... 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. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 ...; United States v. Kagama, 118 U.S. 375, 381-382...." ***Montana v. United States***, *supra*, 564. (Emphasis added.)

"... The powers of self-government [of Indian tribes] ...involve *only the relations among members of a tribe*." ***Montana v. United States***, *supra*, 564 (Emphasis by Court); ***United States v. Wheeler***, *supra*, 326.

"... Any exercise of the powers of self-government, as in all other matters, ... remains subject to ultimate federal control." ***United States v. Wheeler***, *supra*, 327.

"Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government." ***Oliphant v. Suquamish Indian Tribe, et al.***, 435 U.S. 191, 208 (1978). (Emphasis added.)

"... the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers inconsistent with their status." ***Oliphant v. Suquamish Indian Tribe, et al.***, *supra*, 208 (1978). (Emphasis added.)

> "Indian reservations are 'a part of the territory of the United States.' [Citation.] Indian tribes 'hold and occupy [the reservations] with the assent of the United States and under their authority.' [Citation.] Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." ***Oliphant v. Suquamish Indian Tribe, et al.***, *supra,* 208-209 (1978). (Emphasis added.)

When applying the foregoing explanations and principles of inherent sovereignty to the question in this case, which is whether the Paiute have retained inherent sovereignty to enable them to bar the execution of a search warrant for evidence pertaining to crimes against the people of the United States, and the State of California, it respectfully becomes clear that the Paiute have no such retained inherent sovereignty.

To hold otherwise would be to allow the tribe to exercise a power that is in clear conflict with the interests of the overriding sovereignty of the United States, and its people, including the people of the State of California.

It would also create geographical areas (United States property, held in trust for Indian tribes) where evidence of criminal enterprise, be in theft, crimes against person, murder, or any other of a myriad of criminal enterprises, may rest with impunity, subject only to the desires of whoever happens to then be members of the governing tribal council of the tribe which occupies the United

States trust property where the evidence of the criminal enterprise is then residing.

B. There is no retained inherent sovereignty which enables the Paiute to bar the execution of the search warrant.

The claim of the Paiute is that the execution of the search warrant in this case constitutes an "unconstitutional infringement upon the Tribes right to self-governance." [Appellants' Opening Brief, page 16.]

The argument which the Paiute present in support of this asserted infringement is (1) that "enforcement of the state's laws diminishes the Tribe's sovereign immunity which the District Court found has not been expressly or impliedly repealed by P.L. 280" [Appellants' Opening Brief, page 16], and (2) that the Paiute, as an Indian tribe, "retains its inherent right to create its own laws and be governed by them, and [that] the County's interest in asserting its jurisdiction in the manner at issue here is in total defiance of this right." [Appellants' Opening Brief, page 17.]

The only application of facts to this argument of alleged unconstitutional infringement upon the right to self-governance appears to be the proposition, at page 4 of Appellants' Opening Brief, that:

> "In order to encourage employees' truthfulness and accuracy in providing information for employment purposes, perspective (sic), current and past employees must have confidence that their personnel records will be secure. Without a gaming license, an individual

> cannot be employed in any lawfully operated gaming operation in California or elsewhere in the United States. As such, an employee's personnel file must be given the same sanctity and security as an employer would give to other important assets."

The tribe fails to indicate how the execution of the search warrant for payroll records of the three subject individuals will affect the ability of the tribe to govern itself, or somehow affect the willingness of Indian or other employees to be truthful and accurate in providing information for employment purposes, or affect the rights or ability of a prospective, current or past employee to obtain or retain a gaming license.

(This is all the more puzzling when it is understood that the information being sought – the payroll and wage records for Patricia Dewey, Clifford Dewey, and Tiyan Hill – had already been supplied to the State of California by way of Quarterly Wage and Withholding Reports. Unfortunately, these reports, which the Paiute provided to the State, would appear likely to be inadmissible hearsay in any prosecution; thus the need for confirming the information that the State had provided in its IEVS/Integrated Fraud Detection System Report, and obtaining admissible business records.)

In any event, there not only does not appear to be any unconstitutional infringement on the right to self-governance, there does not appear to be any infringement at all. The customary inconvenience of having to produce these business records, pursuant to a search warrant, is nothing more than that – the

regular and customary inconvenience that would accompany the service on any business for similar payroll records.

On the other hand, to enable the Paiute to bar the execution of the search warrant, pursuant to a claim of inherent sovereignty, would conflict with the interests of the overriding sovereignty of the United States and California to enforce the criminal laws of the State, which include without limit grand theft under Penal Code Section 487(a), perjury under Penal Code Section 118, and welfare fraud under Welfare and Institutions Code Section 10980. Such a conflict with the interests of the overriding sovereignty is not permitted per ***Oliphant v. Suquamish Indian Tribe***, *supra*.

Additionally, to enable the Paiute to bar execution of the search warrant would be to allow action by the tribe that is inconsistent with the dependent status of Indian tribes, and this is proscribed per ***Oliphant v. Suquamish Indian Tribe***, *supra, and* ***United States v. Wheeler***, *supra.*

Further, allowing the tribe to bar execution of the search warrant would also enable the tribe to independently determine its external relations, or otherwise involve the relations between an Indian tribe and non-members of the tribe, and this is proscribed per ***Atkinson Trading Co., United States v. Wheeler, and Montana v. United States***, *supra*.

Finally, to enable the Paiute to bar execution of the search warrant would violate the principle of retained inherent sovereignty, in that such action would

involve the exercise a power (barring California's execution of a search warrant) other than the power to regulate only the tribe's own internal and social relations, and this in not permitted per ***United States v. Kagama***, *supra,* ***and United States v. Wheeler***, *supra.*

By way of the principles of retained inherent sovereignty, and all of the foregoing, the District Court was correct in ruling that the execution of the search warrant, seeking the payroll records of casino employees who were obtaining Public Assistance moneys from the people of the State of California, and who were under investigation for commission of one or more felonies (including without limit grand theft in violation of California Penal Code § 487(a), perjury in violation of California Penal Code § 118, and welfare fraud in violation of Welfare and Institutions Code § 10980) due to failing to report earned income from the Paiute Casino, was not barred by the Paiute's claim of sovereignty.

This is especially true when the Paiute tribe itself voluntarily entered into a relationship with the State of California, on behalf of its tribal members and employees of the Paiute Casino, to obtain for itself, its tribal members and employees, the benefits of participation in the California state program for unemployment compensation benefits, and also the California state program for unemployment compensation disability benefits. These circumstances show that the attempted declaration by the Paiute, that it is immune from search for

the subject payroll records, is an action that clearly affects the tribe's external relations with the people of the State of California, its government, taxpayers, and agencies. The Paiute's attempt to bar the search warrant is thus not an exercise of a power that involves "only the relations among members of a tribe."

IV. EVEN IF INHERENT SOVEREIGNTY COULD BAR THE EXECUTION OF THE SEARCH WARRANT, ANY INHERENT SOVEREIGNTY WAS WAIVED WHEN THE PAIUTE EARLIER, AND VOLUNTARILY, DISCLOSED THE PAYROLL INFORMATION TO THE STATE OF CALIFORNIA.

In the Tribal State Compact between the State of California and the Paiute [ER 142-200], California and the Paiute entered into an agreement which provided that the Paiute and its commercial gaming casino will:

> "Participate in the State's program for providing unemployment compensation benefits and unemployment compensation disability benefits with respect to employees employed at the Gaming Facility, including compliance with provisions of the California Unemployment Insurance Code, and the Tribe consents to the jurisdiction of the state agencies charged with the enforcement of that Code and of the courts of the State of California for purposes of enforcement." (ER 176)

Pursuant to that agreement, or otherwise voluntarily, and prior to the obtaining and execution of the search warrant, the Paiute submitted to the State of California quarterly wage and withholding reports covering the three subjects of the search warrant, namely, Patricia Dewey, Clifford Dewey, and Tiyan Hill. ER 323-328.

These voluntary quarterly wage and withholding reports voluntarily provided to the State of California the payroll information being sought by the search warrant. As such, the Paiute waived, prior to obtaining or execution of the search warrant, any claim of retained inherent sovereign immunity to the records and information being sought by the search warrant.

V. THE DISTRICT COURT WAS CORRECT IN RULING THAT PUBLIC LAW 280 PERMITS, AND DOES NOT BAR, THE EXECUTION OF THE SEARCH WARRANT.

18 U.S.C. 1162 is, of course, commonly referred to as "Public Law 280." It consists of three sub-sections, specifically 1162(a), 1162(b), and 1162(c).

18 U.S.C. 1162(a) provides that each of six-listed states shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed (in California this is within the entire state), and further provides that the criminal laws of each such state shall have the same force and effect within Indian country as they have elsewhere within the state.

Specifically, § 42 U.S.C. 1162(a) provides:

> "Each of the States ... listed in the following table will have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State ... to the same extent as such State ... has jurisdiction over offenses committed elsewhere within the State ..., and the criminal laws of such State ... shall have the same force and effect within such Indian country as they have elsewhere within the State ...:
>
> "'California ... all Indian country within the State.'"

Section 1162(b) contains provisions making it clear that nothing in § 1162 authorizes alienation, commerce or taxation of real or personal property, nor deprive the Indians or Indian tribes of any right or privilege with respect to hunting, trapping or fishing, etc. Section 1162(b) is not applicable in this case.

However, § 1162(c) is directly applicable, in that by § 1162(c), the federal General Crimes Act, set forth at 42 U.S.C. 1152, and the federal Major Crimes Act, set forth at U.S.C. 1153, were specifically withdrawn within the areas of Indian country listed in § 1162(a). This area included, again, all of California.

Thus, by operation of § 1162 (Public Law 280), Congress divested the federal government of criminal jurisdiction within the Indian lands of California, and conferred such jurisdiction on California. The federal government was, and is, thus left without criminal jurisdiction under the General Crimes Act and Major Crimes Act.

In the case now before this Court, the Superior Court of the State of California issued a search warrant with regard to the investigation of felony offenses, directing a search of the property upon which the Paiute Casino is located. That property is owned by the United States in trust for the Paiute. ER 329-343.

The search was to be conducted for specifically described property, namely, payroll records of Patricia Dewey, Clifford Dewey and Tiyan Hill, for a specific period of time, that being April-June 1998.

The argument by the Paiute is, with respect to the application of Public Law 280, twofold.

First, the Paiute claim that by virtue of its inherent sovereignty, it is immune from search on casino property. This argument was addressed in Section III above.

The Paiute also claim, however, that the second part of 42 U.S.C. 1162(a), which provides that "the criminal laws of [California] shall have the same force and effect within such Indian country as they have elsewhere within the State", should be limited in its applicability only to cases involving offenses committed by or against Indians in the areas of Indian country.

Such a limited interpretation is not consistent with the common reading of the language of the statute.

Further, such a limited applicability would also lead to a result which, when one considers the effect of § 1162(c) – which was to withdraw the jurisdiction of the federal General Crimes Act and federal Major Crimes Act – would be untenable, and one which the Courts clearly should not attribute to Congress as its intent, absent a specific statement of such intent.

The untenable result would be that there would exist no authority, either state or federal, providing the right to investigate by utilization of the search warrant process, or obtain evidence of or pertaining to crimes by way of the search warrant, if the crime was committed by an Indian off the reservation, but where evidence of the criminal activity was located upon the reservation. HICKS

Thus, under the Paiute's strained interpretation of § 1162, neither California nor the federal government (since it has no jurisdiction to prosecute given the withdrawal of the General and Major Crimes Acts) would have the power to utilize the search warrant process to obtain evidence of a crime (for instance, murder) committed by an Indian outside of Indian country (for instance, committed in the City of Bishop, California), if the evidence of that murder (i.e., the body), or evidence identifying the person who committed the murder, was located upon the reservation (that is, in Indian country). Further, if a "murder weapon" utilized to commit a murder, by an Indian, outside of the reservation, was located within Indian country (the reservation), then under the Paiute's interpretation of the limited applicability of Public Law 280, California and its law enforcement personnel (the only sovereign with jurisdiction to prosecute) would be barred from executing a search warrant for the body, or the murder weapon, because the body or murder weapon were located in Indian country, and the murder was committed not on the reservation, but in the City. HICKS

This interpretation by the Paiute, attributing such an intent to Congress, is untenable, unwarranted, and there is no authority for doing so.

The District Court was correct in finding that Public Law 280 does not restrict the execution of a search warrant, where there is evidence is of a crime committed against the people of the State of California (theft), and where such evidence is located within Indian country.

Public Law 280 represents an express enactment of Congress authorizing the exercise of such jurisdiction, and is made pursuant to the plenary power of Congress to enact laws which affect Indian sovereignty.

VI. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE INDIAN GAMING REGULATORY ACT DOES NOT PREEMPT CALIFORNIA FROM ISSUING AND EXECUTING THE SEARCH WARRANT FOR PAYROLL RECORDS.

The Indian Gaming Regulatory Act ("IGRA") is set forth at 25 U.S.C. 2701 et seq., and the Paiute assert that the IGRA preempts California from exercising any rights under Public Law 280 with respect to its commercial gambling casino known as the Paiute Palace.

The District Court held, however, that the IGRA did not preempt Public Law 280. Once again, the District Court is correct. The IGRA, by its very terms, applies only to the conduct of gaming.

In 25 U.S.C. 2702, Congress specifically declared that it was the purpose of the IGRA to provide a statutory basis for the operation of gaming by Indian

tribes, to provide a statutory basis for the regulation of gaming by Indian tribes adequate to shield it from organized crime and other corrupting influences, and to further declare that the establishment of an independent federal regulatory authority for gaming on Indian lands was necessary to meet congressional concerns regarding gaming. The IGRA then established, within the Department of the Interior, the commission known as the National Indian Gaming Commission. 25 U.S.C. § 2704.

The IGRA also provided numerous other statutory provisions for the supervision of gaming, and at § 2716, the IGRA made it clear that the National Indian Gaming Commission shall, when information it receives pursuant to the Act indicates a violation of either Federal, State, or tribal statutes, ordinances or resolutions, provide such information to the appropriate law enforcement officials.

Specifically, 25 U.S.C. 2716(b) provides:

> "**Provisions to law enforcement officials.** The Commission shall, when such information indicates a violation of Federal, State, or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials."

All of the foregoing makes it clear that the IGRA concerns gaming only, and does not address itself to the preempting or enforcement of other federal or state laws.

Further, it is a generally recognized rule of construction and legislative interpretation that, in order for one statute or law to preempt another, it must expressly so state. Otherwise, the statutes are to be read so as to give effect to each, and in interpreting legislation, the Court's "task is to give effect to the will of Congress." ***Negonsott v. Samuels***, 507 U.S. 99, 104 (1993).

Finally, the Paiute claim that the Tribal-State Compact [ER 142-200] somehow supports their position that the IGRA preempts the application of Public Law 280 with regard to the execution of a search warrant. However, the very Tribal-State Compact referred to by the Paiute contains the following provision, at Section 8.2:

> "**State Civil and Criminal Jurisdiction**. Nothing in this Gaming Compact affects the civil or criminal jurisdiction of the State under Public Law 280 (18 U.S.C. § 1162; 28 U.S.C. 1360) or IGRA, to the extent applicable. In addition, criminal jurisdiction to enforce state gambling laws is transferred to the State pursuant to 18 U.S.C. § 1166(d) …."

By way of all the foregoing, it is clear that the IGRA does not preempt the applicability of Public Law 280 to non-gaming crimes such as murder, robbery, theft, etc.

VII. THE DISTRICT COURT WAS CORRECT IN RULING THAT PUBLIC LAW 280 DOES NOT VIOLATE THE TENTH AMENDMENT.

The Tenth Amendment prohibits Congress from compelling the States to enact or enforce a federal regulatory program. ***Printz v. United States***, 521 U.S. 898, 902 (1997).

As the District Court held, however, Public Law 280 does not mandate the implementation of a federal program or federal statutory scheme. Instead, Public Law 280 allows California and the other affected States to impose their own criminal laws upon, and to exert their own police power over, the Indian lands within their boundaries.

This same effect, of Public Law 280, was cited by the Tenth Circuit Court of Appeals in the case of ***United States v. Burch***, 169 F.3d 666, 670-671 (10th Cir. 1999).

In ***Burch***, the Tenth Circuit stated that the effect of Public Law 280 was the cession of criminal jurisdiction to a state, and that thereafter "federal law no longer preempts the state's exercise of its inherent police power over all persons within its border. . . ." Thus, Public Law 280 restored to the states their right to exercise their inherent police power.

There is nothing in Public Law 280 that mandates the States to enforce a federal statutory scheme, or which mandates the implementation of a federal program. Accordingly, Public Law 280 does not violate the Tenth Amendment.

VIII. THE DISTRICT COURT WAS CORRECT IN RULING THAT CALIFORNIA WAS NOT REQUIRED TO ENACT "ENABLING LEGISLATION" IN ORDER FOR PUBLIC LAW 280 TO APPLY IN CALIFORNIA.

The Paiute next assert that Public Law 280 has no effect in California because the California Legislature has not enacted "enabling legislation" accepting the jurisdiction permitted by Public Law 280.

The Paiute's position is contrary to existing California State law on the subject. In ***People v. Miranda*** (1980) 106 Cal.App.3d 504, 506, the California Court of Appeal addressed the point and stated:

> ". . . It was not required that California enact some form of enabling legislation to assume jurisdiction before the terms of 18 United States Code Annotated Section 1162 [Public Law 280] became effective in this State."

Plaintiffs' position is also directly contrary to a lengthy discussion of the issue in ***United States v. Burch***, 169 F.3d 666, 670-671 (10th Cir. 1999), where the Tenth Circuit Court of Appeals stated that a direct Congressional grant of jurisdiction, over Indian country, does not require any further action to vest the State with jurisdiction unless the State's law itself prevents the State from exercising such jurisdiction.

The Tenth Circuit then cited ***People v. Miranda***, 106 Cal.App.3d 504, *supra*, and California as an example of a state which held that the Congressional grant of jurisdiction under Public Law 280, over Indian country, vests the jurisdiction without requiring the State to enact enabling legislation.

Further, whether or not the California Constitution requires the California Legislature to enact enabling legislation is an issue involving the interpretation of the California Constitution. It does not involve a federal constitutional question (as to whether or not the California Constitution requires such enabling legislation). As such, and as a principle of federal law, federal courts are to accept the interpretation of California courts on the subject. As Ninth Circuit Court of Appeals has stated, in ***Tom v. Sutton***, 533 F.2d 1101, 1106:

> ". . . In defining the purpose, scope and operative effect of a state's constitution, federal courts should accept the interpretation of the courts of that state unless there are federal constitutional questions involved. *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967); *Reed v. Rhay*, 323 F.2d 498 (9th Cir. 1963), cert. denied 377 U.S. 917. . . ."

Accordingly, the District Court was correct in holding that the California Legislature was not required to enact enabling legislation before the provisions of Public Law 280 would become effective in California.

IX. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE PAYROLL RECORDS OBTAINED PURSUANT TO THE SEARCH WARRANT ARE WITHIN THE SCOPE OF THE SEARCH WARRANT.

The only argument raised by the Paiute in the District Court pertaining to the propriety of the search warrant, was that when the individual pages of payroll records, containing the specific name and payroll information for the three subjects were seized, the names and information of other employees (78

other employees, according to the Paiute) were also listed on the pages seized. Thus, assert the Paiute, the records obtained were outside of the scope of the warrant.

In order to refute this claim of records being seized that were outside of the scope of the search warrant, the County, Mr. McDowell and Sheriff Lucas submitted each page of the records seized to the District Court for its review, and the District Court took judicial notice of them. ER 267-328; 206-207.

Upon reviewing the records seized, the District Court held that the records were not outside of the scope of the warrant "because each page contained at least one reference to the employees that were under investigation." ER 217.

The only way to have further limited the scope of the records seized would have been to cut out names on the individual pages of records (thus destroying records and original evidence), or by somehow "blacking out" or otherwise allowing either the Paiute or the peace officer serving the warrant to obliterate portions of the records being seized.

The law provides for neither option; and to allow same would be to invite disagreement, controversy and destruction of evidence, at the scene. No case or statutory law allows this. In fact, the requirement that the property be particularly described in the warrant is designed to eliminate arbitrary decision

making when the documents are being seized. See ***Marron v. United States***, 275 U.S. 192, 196 (1927).

X. THE DISTRICT COURT WAS CORRECT IN RULING THAT THERE WAS NO REQUIREMENT THAT THE APPLICATION FOR THE SEARCH WARRANT SPECIFICALLY STATE THAT THE PAIUTE CASINO WAS OPERATED BY THE PAIUTE.

In the District Court, the only argument raised by the Paiute that the search warrant was not issued on probable cause was that Investigator Nixon had not stated in her Affidavit that the Paiute Palace Casino was owned and operated by the Paiute Indian Tribe, and the place to be searched was located on federal land held in trust for the Paiute.

First, as is addressed above, the fact that the records were in the possession of the Paiute on the casino property did not invalidate the search warrant, in the first place. Thus, whether or not the Affidavit of Investigator Nixon specifically stated this is moot.

Additionally, it is a matter of generalized knowledge in California that gaming casino's are only operated by Indian tribes, and as such, the magistrate issuing the warrant had judicial notice of such status of the Paiute Casino. Further, the very name and identity of the place to be searched was specifically set forth in the warrant as the "Paiute Palace Casino." The magistrate had judicial notice where the records were located, and that the Paiute Casino was operated by the Paiute Indians.

In California, pursuant to Evidence Code Section 451(f), judicial notice may be taken of "Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute."

Accordingly, the fact that Investigator Nixon did not specifically state in the application for the search warrant that the Paiute Casino was operated by the Paiute does not make the search warrant invalid due to the omission.

XI. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE DISTRICT ATTORNEY AND SHERIFF ARE ENTITLED TO QUALIFIED IMMUNITY IF, FOR SOME REASON, THE OBTAINING AND EXECUTION OF THE SEARCH WARRANT WAS UNLAWFUL.

The District Court was correct in ruling that the District Attorney and Sheriff are entitled to qualified immunity.

At the time of the execution of the search warrant, the law regarding qualified immunity was set forth in ***Harlow v. Fitzgerald*** (1982) 457 U.S. 800, 818, and in ***Anderson v. Creighton*** (1987) 483 U.S. 635, 640; and as of June 18, 2001, the law regarding qualified immunity is as set forth ***in Saucier v. Katz, et al.***, 2001 DJDAR 6137, Supreme Court Case No. 99-1977. Under either of the two analyses, Mr. McDowell and Sheriff Lucas are entitled to qualified immunity.

In ***Harlow v. Fitzgerald*** (1982) 457 U.S. 800, 818, 102 S.Ct. 2727, it was held that government officials who perform discretionary functions are "shielded from liability for civil damages insofar as their conduct does not

violate clearly established statutory or constitutional rights of which a reasonable person would have known." This is referred to as qualified immunity. Stated another way, an official is entitled to qualified immunity if, at the time of the alleged violation, the asserted right being violated was not clearly established. ***Harlow v. Fitzgerald***, *supra*, p. 818.

In order to determine whether or not the right which was allegedly violated by the public official was clearly established, the Supreme Court has held that courts are to look at the particular factual circumstances surrounding the incident. ***Anderson v. Creighton*** (1987) 483 U.S. 635, 640, 107 S.Ct. 3034. As the Court held in ***Anderson***, the extent of the right allegedly violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." ***Anderson v. Creighton***, *supra*, p. 640.

In the case now before the Court, the conduct of petitioning a Superior Court Judge for a search warrant covering property owned by the United States, and upon which an Indian tribe has a business activity (a casino) is not something which preexisting law clearly holds to be unlawful and a violation of civil rights. In fact, Public Law 280 (18 U.S.C. 1162) provides for state criminal jurisdiction, as well as the applicability of state criminal laws, to such property, with the same force and effect as such laws have elsewhere within California.

In California, the petitioning for and issuance of search warrants is governed by California Penal Code § 1528, which is, of course, a criminal law of the State of California. Pursuant to 18 U.S.C. 1162, this criminal law has the same force and effect within Indian country as it has elsewhere within the State.

Neither in their complaint nor in their opening brief have the Paiute asserted positions of clearly established law which hold that the petitioning for, and service of, search warrants upon Public Law 280 property is unlawful.

Further, the other positions being advanced by the Paiute, that Public Law 280 is preempted in its entirety by the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), that California has no jurisdiction under Public Law 280 because the California Legislature has not accepted such jurisdiction, and that Public Law 280 is unconstitutional under the Tenth Amendment to the United States Constitution, are novel and certainly do not represent law that is clearly established, at the minimum.

It should be noted that it is long established by the California Supreme Court that California magistrates have authority to issue search warrants to peace officers in his/her county to search anywhere in the state. ***People v. Fleming*** (1981) 29 Cal.3d 698, 703-706, 175 Cal.Rptr. 604.

Finally, in ***Saucier v. Katz***, supra, the test for qualified immunity is explained as being a two-part, or two-inquiry, test. The first part, or inquiry, is whether a constitutional right would have been violated on the facts alleged.

Next, assuming that the violation is established, the question as to whether the constitutional right was clearly established must be considered, and in so doing, the dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. Under this test, as well, any conduct alleged to have been committed by either District Attorney McDowell or Sheriff Lucas is entitled to qualified immunity.

Accordingly, under either test, Mr. McDowell and Sheriff Lucas are entitled to qualified immunity.

XII. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE DISTRICT ATTORNEY AND SHERIFF ARE ENTITLED TO IMMUNITY UNDER THE ELEVENTH AMENDMENT WHEN SUED IN THEIR OFFICIAL CAPACITIES.

The District Court was also correct in finding that Mr. McDowell and Sheriff Lucas were entitled to immunity when sued in their official capacities, because they were acting as State officers enforcing State law, and they thus are immune from suit under the Eleventh Amendment to the United States Constitution.

We need only address this immunity issue, of course, if for some reason the Court finds that the execution of the search warrant was unlawful. When we do address this immunity, however, we do so under *McMillian v. Monroe County, Alabama* 520 U.S. 781 (1997), 117 S.Ct. 1734; ***Pitts v. County of Kern*** (1988) 17 Cal.4th 340, 70 Cal.Rptr.2d 823; ***County of Los Angeles v. Superior***

Court (Peters, Real Party in Interest) (1998) 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860; and ***Streit v. County of Los Angeles***, 236 F.3d 552 (9th Cir. 2001).

In ***McMillian v. Monroe County,*** *supra*, the U.S. Supreme Court addressed the duties of an Alabama Sheriff, and held that when executing his law enforcement duties in the course of a criminal investigation, the Sheriff represented the State, and not the county in which he acted as the law enforcement official. Therefore, the Court held that neither the Sheriff nor the county was liable for allegedly unconstitutional actions that the Sheriff took when executing his law enforcement duties. ***McMillian v. Monroe County,*** *supra*, p. 793. The Supreme Court also held that whether the Sheriff of a particular State is representing the State, or the county, in performing his duties, is a matter of State law. ***McMillian v. Monroe County***, *supra*, pp. 785-796.

Subsequently, the California Supreme Court addressed the issue of county liability with respect to actions of State officers in ***Pitts v. County of Kern*** (1998) 17 Cal.4th 340. In ***Pitts***, the Supreme Court recited the history of claims under 42 U.S.C. 1983, specifically acknowledged the Supreme Court's statement in ***McMillian*** that the question of whether or not a particular official is a policymaker for a county (and as such imposes liability on the county for his/her actions in violation of 42 U.S.C. 1983) is dependent upon an analysis of

state law, not fact. ***McMillian v. Monroe County***, *supra*, 520 U.S. at p. 785-786 [117 S.Ct. at pp. 1736-1737].

The California Supreme Court then went through a lengthy analysis of California state law, as to whether or not a California District Attorney represented the State, or the county, when preparing to prosecute and when prosecuting criminal violations of state law, and also whether or not a California District Attorney was the policymaker for a county when he establishes policy or trains employees in these areas. The California Supreme Court held, in both instances, that a California District Attorney was not acting as a county policymaker, in light of his constitutional and statutory duties, and that he was instead acting on behalf of the State. ***Pitts v. County of Kern***, *supra*, p. 362, also p. 366.

Accordingly, the California Supreme Court held that a county is not liable under 42 U.S.C. 1983 for the alleged wrongful conduct of a California District Attorney in these areas.

Subsequently, the same analysis was applied to California Sheriffs in ***County of Los Angeles v. Superior Court (Rebecca Peters, Real Party in Interest)*** (1998) 68 Cal.App.4th 1166. In that case, and again after an extensive analysis of ***McMillian v. Monroe County***, *supra*, as well as of ***Pitts v. County of Kern***, *supra*, the Court found, as a matter of law, that a county and its board of supervisors not only has no duty, but also no right to control the operation of

the sheriff's office. ***County of Los Angeles v. Superior Court (Peters)***, *supra*, p. 1175-1176.

The Court of Appeal specifically cited, among other California constitutional and statutory law, that California Government Code § 25303:

". . . shall not be construed to affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and the district attorney of a county. The board of supervisors shall not obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney of a county." California Government Code § 25303; ***County of Los Angeles v. Superior Court (Peters)***, supra, page 1175.

The Court then concluded by finding that a California sheriff, when performing law enforcement duties, acted not as a policymaker on behalf of the county, but rather as a State officer. As such, the county which employed the sheriff was not liable for any alleged civil rights violation of the sheriff under 42 U.S.C. 1983. ***County of Los Angeles v. Superior Court (Peters)***, *supra*, p. 1178.

Turning to the case now before this Court, plaintiffs Bishop Paiute Tribe and the Paiute Palace Casino allege that the County of Inyo, as well as Mr. McDowell, the District Attorney, and Sheriff Lucas are liable under 42 U.S.C. 1983 for the acts of the District Attorney, and Sheriff, in petitioning the Superior Court for a search warrant, obtaining the warrant from a Superior Court Judge, and in executing that warrant, all in connection with the investigation of State felonies. These include without limit Penal Code § 118

(perjury) and Penal Code § 487(a) (grand theft), and Welfare and Institutions Code § 10980(c)(2) (knowingly making false statements to obtain aid).

The cases of ***McMillian v. Monroe County***, *supra*, ***Pitts v. County of Kern***, *supra*, and ***County of Los Angeles v. Superior Court***, *supra*, control, and there is no 42 U.S.C. 1983 liability upon the County of Inyo for the acts of the District Attorney and Sheriff in the official performance of their prosecutorial, investigative and law enforcement duties in this regard, nor upon the District Attorney or Sheriff themselves. They are also entitled to immunity, because they were acting as State Officers, and the Eleventh Amendment precludes suit against them.

Suits against State officials, in their official capacity, are considered suits against the State. ***Will v. Michigan Dept. of State Police***, *supra*, p. 71. The Eleventh Amendment to the United States Constitution bars suits in federal court against the States, and accordingly, in that Mr. McDowell and Sheriff Lucas were, with regard to any conduct attributed to them in the complaint, acting as State officials, a suit against either of them in his official capacity is a suit against the State. It is thus barred by the Eleventh Amendment. ***Leer v. Murphy***, 844 F.2d 628 (9th Cir. 1988).

Finally, the recent case of ***Streit v. County of Los Angeles***, *supra*, under these circumstances, leads to the same result. Here, both the District Attorney's office and the Sheriff's Department were acting in their official law

enforcement, investigation or prosecutorial functions, with regard to any of the conduct alleged against them, and not in an administrative capacity. They were acting as State officers, and are immune from suit under the Eleventh Amendment. ***Streit***, *supra*, 566.

XIII. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE COUNTY OF INYO IS NOT LIABLE FOR THE ACTS OF EITHER THE DISTRICT ATTORNEY OR THE SHERIFF.

Pursuant to the analysis and authorities set forth in Sections III through V above, and Sections IX through XII above, the County of Inyo has no liability for the acts of either District Attorney McDowell or Sheriff Lucas.

Additionally, the County of Inyo has no liability for the acts of either District Attorney McDowell or Sheriff Lucas because there is no *respondeat superior* or vicarious liability in 42 U.S.C. 1983 actions. ***Monell v. New York City Dept. of Social Services***, 436 U.S. 658, 694 (1978); ***Pembaur v. Cincinnati***, 475 U.S. 469, 479 (1986).

XIV. THE PAIUTE HAVE FAILED TO RAISE AN ISSUE REGARDING WHETHER ALL CRIMES WITHIN THE CONDUCT ALLEGED IN THE APPLICATION FOR THE SEARCH WARRANT INVOLVE REGULATORY AND NOT CRIMINAL LAW.

On the last page of Appellants' Opening Brief, in the Conclusion Section, the Paiute attempt to present, for the first time, the position that the criminal conduct being investigated dealt only with a welfare statute, and that such statute was regulatory in nature, and not criminal in nature.

This argument was not raised in the District Court, and it is being mentioned for the first time here. Accordingly, the issue has been waived by the Paiute, in that issues raised for the first time on appeal are ordinarily deemed waived and not considered. ***Parks School of Business, Inc. v. Symington,*** 51 f.3d 1480, 1488, fn. 4 (9th Cir.1995); ***Ecological Rights Found. V. Pacific Lumber Co.***, 230 F.3d 1141, 1154 (9th Cir. 2000).

Further, in order to adequately raise an issue, the matter must be "specifically and distinctly" raised and argued in the brief. ***Officers for Justice v. Civil Service Comm'n,*** 970 F.2d 721, 726 (9th Cir. 1992). And issues which are raised in a brief but not supported by argument are deemed abandoned. ***Pierce v. Multnomah Co.***, 76 F.3d 1031, 1037, fn.3 (9th Cir. 1993).

Accordingly, because the Paiute did not raise this argument in the District Court, and for the other reasons set forth above, the issue is deemed waived and abandoned.

XV. RESPONSE TO OTHER ISSUES ADVANCED BY THE PAIUTE.

A. Re Paiute argument that they were willing to release the payroll records if last page of signed Public Assistance/welfare benefits application were delivered to tribe.

At page 18 of the Paiute's opening brief, the Paiute argue that they offered a "well-reasoned proposed resolution to the conflict" regarding production of the payroll records. This proposal was that, as evidence of its

employee's consent to produce the records, the District Attorney should deliver to the Paiute the last page of the signed Public Assistance/welfare application for each employee, so long as this page clearly indicated that the payroll records for the employee were subject to review by appropriate officials.

First, law enforcement need not negotiate for the records that are an appropriate subject for search warrant. Additionally, California Welfare and Institutions Code Section 10850 protects the information regarding Public Assistance/welfare recipients, including their identity, and to provide the information requested by the Paiute would expose the District Attorney and other officials to civil liability. The proper method for obtaining the records was either by way of the consent of the possessor of the records (the Paiute), or by search warrant. Having failed to obtain the consent of the Paiute, the District Attorney then properly sought the subject search warrant.

B. Re the Paiute's claim that the search warrant failed to establish probable cause.

At page 39 of their brief, the Paiute claim for the first time on appeal that the application for the search warrant had defects other than failing to advise the magistrate that the property to be searched was a casino or other property of an Indian tribe. The Paiute's claim that they had raised this earlier is in error. It was not argued in the District Court [see Transcript, ER 229-252], and to the best knowledge of the undersigned was not addressed in any brief by the Paiute.

For the reasons set forth in Section IV above, this issue is not properly raised on appeal, and is deemed, therefore, waived and abandoned.

In any event, the search warrant was issued by the appropriate magistrate, and was facially valid.

CONCLUSION

The major thrust of all of the Paiute's arguments is its claim that because it is a federally recognized Indian tribe, it stands in a position of comity to the government of the United States, and California, with regard to the matters before the Court, and must be treated as an equal sovereign with regard these matters.

This is not the case. The Paiute possess only the power to regulate their own internal and social relations; and any exercise of any power at all must be consistent with the tribe's dependent status, which is subordinate to that of the United States. It may not exercise any power to determine its external relations. And perhaps most importantly, it may not exercise even its limited power to regulate its own internal and social relations, under the guise of self-government or otherwise, where to do so would conflict with the interests of its overriding sovereign.

Accordingly, the Paiute have no retained inherent sovereign right to bar the execution of the search warrant in this case; and the ruling of the District

Court so holding, as well as the Court's related rulings as set forth in its Order granting the FRCP Rule 12(b)(6) motion herein, should be affirmed.

DATED: June 21, 2001

Respectfully submitted,

Paul N. Bruce, County Counsel
John D. Kirby, Special Legal Counsel
Office of County Counsel
County of Inyo

By _____
JOHN D. KIRBY

Attorneys for Defendants-Appellees
COUNTY OF INYO, PHILLIP
McDOWELL and DAN LUCAS

2PAIUTE:\brief

CERTIFICATION OF COMPLIANCE
TO F.R.A.P. 32(a)(7)(C)
AND CIRCUIT RULE 32-1
FOR CASE NUMBER 01-15007

I certify that pursuant to F.R.A.P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 12,740 words.

Dated: June 21, 2001

_____
JOHN D. KIRBY

STATEMENT OF RELATED CASES

[Circuit Rule 28-2.6]

Appellees are unaware of any related cases pending in this Court.

CERTIFICATE OF MAILING/DISPATCH

Pursuant to F.R.A.P. 25(a)(2)(B)

I hereby certify that On June 21, 2001, the original and fifteen (15) copies of the APPELLEES' BRIEF were sent, via first class mail, postage prepaid, or otherwise dispatched via a third party commercial carrier for delivery within three calendar days, to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94110-3939.

DATED: June 21, 2001

JOHN D. KIRBY

PROOF OF SERVICE BY MAIL

State of California, County of San Diego

I am employed in the County of San Diego, over the age of 18 years and not a party to the within entitled action. My business address is 9747 Business Park Avenue, San Diego, California 92131.

On June 21, 2001, I served the foregoing document described as: APPELLEES' BRIEF on all parties in said action, by causing a true copy(ies) thereof to be transmitted in a sealed envelope, addressed as shown below,

Anna S. Kimber, Esq. — Attorneys for Appellants
Littler Mendelson, P.C.
701 "B" Street, 13th Floor
San Diego, CA 92101-8194

Ralph R. LePera, Esq. — Attorneys for Appellants
Law Offices of Ralph R. LePera
P.O. Box 1819
Bishop, CA 93515

[X] (By Mail) I personally deposited said envelope(s) with the United States Postal Service at San Diego, California, with first class postage thereon fully prepaid.

[ ] (By Mail) I deposited such envelope(s) in the mail at San Diego, California. I am readily familiar with the practice in this office whereby the mail, after being placed in a designated area, is given the appropriate first class postage and is deposited with the U.S. Postal Service on that same day.

[X] FEDERAL I declare that I am a member of the Bar of this Court.

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

Dated: June 21, 2001

JOHN D. KIRBY