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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	Case No. 01-15007 Case No. CV-F-00-6153 REC LJO (Eastern District of California) AMENDED OPENING BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Appellant, Bishop Paiute Tribe, is a federally recognized Indian Tribe. The Bishop Paiute Gaming Corporation is a wholly owned tribal corporation, chartered by the Bishop Paiute Tribe. As such, a Corporate Disclosure Statement, pursuant to FED.R.APP.P.26.1 is not required.

JURISDICTION

A. The District Court had jurisdiction over the underlying action pursuant to 28 U.S.C. §§ 1331,1337, 1343(i)(3)(4) in that Plaintiffs/Appellants' (hereinafter "Tribe") claims arose under federal common law dealing with Indian affairs. Article I, Section 8 of the United States Constitution, 18 U.S.C. § 1162, Public Law 280 ("P.L. 280"); 25 U.S.C. § 2701, et. seq. (Indian Gaming Regulatory Act of 1988, hereinafter "IGRA"); 42 U.S.C. §§ 1983 and 1988; and 28 U.S.C. § 1267(a).

B. The Ninth Circuit Court of Appeals has jurisdiction pursuant to Article III Section 2 of the United States Constitution in that this case arises under the laws and Constitution of the United States, and pursuant to 28 U.S.C. § 1291 which provides the Courts of Appeals jurisdiction of all appeals from all final decisions of the District Court of the United States. The District Court granted Defendants/Appellees' Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which resulted in a final appealable judgment.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Does Public Law 280 give states and their political subdivisions jurisdiction to execute search warrants against sovereign tribal governments and their property when neither the Tribe or any of its officials are the subject of a criminal investigation?

B. Was the District Attorney for the County of Inyo, Phillip McDowell (District Attorney) and the Sheriff for the County of Inyo, Daniel Lucas (Sheriff), acting in their official capacity as County of Inyo (County) officials during the time period referred to in the Tribe's complaint?

C. Are the District Attorney and Sheriff entitled to qualified immunity?

D. If the District Attorney and the Sheriff were State officials and protected by the Eleventh Amendment from damages, did the District Court err by not allowing this matter to proceed for declaratory and injunctive relief?

E. Is the State of California by and through the Legislature required to affirmatively assume the jurisdiction provided for by P.L. 280?

F. Does the IGRA preempt the State and its political subdivisions from executing search warrants against tribal property under the facts set out in the complaint?

STATEMENT OF CASE

A. NATURE OF THE CASE

On March 23, 1999, the County, through the District Attorney's Office, obtained and executed a search warrant issued by the Inyo County Superior Court, listing certain personnel records of three individuals, whose records were owned and in the possession and control of the Tribe.

The three individuals were members of the Tribe and were employed in the Tribe's wholly owned gaming facility, located upon the Bishop Paiute Reservation.

The search warrant was executed against the tribal property (personnel records) by the District Attorney, with the assistance of the Sheriff's Department. ER. p. 10-11.

The crux of this litigation is whether the state and/or its political subdivisions have authority under Public Law 280 to execute search warrants against sovereign tribal governments and their tribal property, when neither the tribe nor any of its officials are the subject of a state criminal investigation.

B. COURSE OF PROCEEDINGS

Based on the continuing threat of further violations of Tribal sovereignty by way of search warrant executions, a complaint for declaratory and injunctive relief and damages under 42 U.S.C. § 1983 was filed in the Federal District Court for the

Eastern District of California. The complaint also set out causes of action challenging the application of P.L. 280 in California, based on the failure of proper enabling legislation required to enact P.L. 280 and on a United States Constitutional Tenth Amendment argument. Also, alleged was a preemption argument under IGRA.

The named Defendants, County, District Attorney and Sheriff filed a motion to dismiss under Rule 12 (b)(6), ER. pp. 24-59. The Tribe filed its opposition on October 16, 2000, ER. p. 61, and the Defendants filed their reply thereafter. ER. p. 110.

C. DISPOSITION BELOW

The District Court filed its order and judgment November 27, 2000, dismissing the complaint in its entirety. ER. p. 201. The Tribe filed notice of appeal on December 22, 2000. An extension of fourteen days was granted to file this opening brief. ER. p. 253.

STATEMENT OF FACTS RELEVANT TO THE ISSUES ON REVIEW

The Bishop Paiute Tribe (Tribe) is a federally recognized Indian Tribe located on the Bishop Paiute Reservation, Bishop, California. ER. pp. 6,7. The Tribe is governed by a Tribal Council of five Tribal members elected from its membership. There is no constitution; however, the Tribal Council operates in accordance with Tribal codes, resolutions, written policies and procedures, Tribal custom and Federal laws, where applicable.

The Bishop Paiute Gaming Corporation (Corporation) is a Tribally-chartered corporation wholly owned by the Tribe. The sole purpose of the Corporation is to operate and manage Class II and Class III gaming, pursuant to (IGRA). All gaming is authorized by a Tribal ordinance and Tribal/State Compact (Compact) approved by the Secretary of the Interior. The gaming facility is known as the Paiute Palace Casino, (Casino).

The Tribe, even before the advent of gaming, had strict policies and procedures concerning the confidentiality of employee personnel information. Many of these policies and procedures were taken from the federal and, in some instances, state guidelines. Tribal personnel records can only be obtained by third parties through written authorization provided by the employee.

Under IGRA and the Compact, information of the most confidential level is obtained through background investigations, which are conducted through local county law enforcement agencies and the Federal Bureau of Investigation.

In order to encourage employees' truthfulness and accuracy in providing information for employment purposes, perspective, 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.

Shortly after February 14, 2000, personnel for the Casino received a request for records for three Tribal member Casino employees from the District Attorney's Office. The stated purpose for the records was the County's investigation into alleged welfare fraud. ER. p. 10.

The Tribal attorney responded on February 28, 2000, informing the District Attorney that it was the Tribe's (Casino's) long-standing custom, practice and policy that the information requested would not be provided unless the Tribe was authorized to do so in writing by the employees whose records were being sought. ER. p. 10, ¶ 17.

On March 22, 2000, Leslie Nixon, a peace officer with the District Attorney's Office, executed an affidavit in support of the issuance of a search warrant. ER. p. 136. The affidavit stated that she had reason to believe that certain

personnel records (payroll) for three individuals were in the possession of the Casino. The affidavit stated that the three individuals had received public assistance through the Inyo County Department of Health and Human Services during the period of April 1998 through June 1998.

The contention was that the three individuals had failed to report earned income during that period of time as required by the County. The basis for this belief was that the County had received a report of earnings concerning the three individuals for the same period of time from the State of California Department of Social Services IEBS/Integrated Fraud Detection System. The affidavit failed to advise the Superior Court that the records were tribally owned and in the possession of the Tribe.

The Inyo County Superior Court issued a search warrant on March 23, 2000, which was limited by its terms to the Casino payroll records of the three Casino employees. The warrant was executed by the District Attorney and Sheriff that same day. Deadbolt cutters were used to cut locks off secured facilities used for the storage of confidential personnel records.

In spite of the limited scope of the search warrant, the District Attorney and Sheriff not only seized the personnel records for the three named individuals, but they also seized confidential personnel records of seventy-eight other Casino employees who were not the subject of the criminal investigation. The District Attorney and Sheriff failed to give Casino personnel the opportunity to redact from the seized documents the information not identified by the terms and conditions of the search warrant. Additionally, Casino personnel reiterated to the District Attorney and Sheriff the previous warnings of the Tribe's attorney that they did not have jurisdiction to execute search warrants upon sovereign Tribal governments. ER. p. 11.

Subsequent to July 13, 2000, the Tribe, through its attorney, received correspondence from the District Attorney indicating that the County wished to obtain personnel records for six different Tribal member Casino employees for the period of July 1999 through July of 2000.

In order to accommodate the County, the Tribe's attorney apprised the District Attorney that the Tribe would be willing to accept, as evidence of a release of the information requested, a redacted copy of the last page of the signed county welfare application which indicated that the employment records of individuals applying for benefits were subject to review by county officials. This offer was refused. ER. pp. 234, 241-242.

It was because of the unlawful invasion of Tribal sovereignty of March 23, 2000 and the continued threat of further invasion and erosion of Tribal sovereignty, that the underlying complaint, which is the basis for this appeal, was filed.

SUMMARY OF THE ARGUMENT

First and foremost, the Tribe argues that P.L. 280, under the facts alleged in its complaint, cannot be interpreted as giving states and their political subdivisions jurisdiction over sovereign tribal governments. Specifically, the alleged criminal activity involving three individual tribal members arose off the reservation and there is no suggestion that the Tribal government or its Tribal officials were involved. Thus P.L. 280 is not applicable.

No court has ever held that states have authority to execute search warrants on tribal governments. The Tribe's sovereign immunity was not expressly or impliedly waived by P.L. 280. The District Court erroneously determined that states and their political subdivisions have authority to execute search warrants against the Tribe and its property.

The County and its representatives' (District Attorney and Sheriff) actions exacted a gross infringement upon the Tribe's right to self-governance.

Alternatively, Tribe contends that County and its representatives are expressly preempted from exerting jurisdiction pursuant to the IGRA.

Second, the California Legislature never formally acted upon the conferral of jurisdiction from the federal government; as such, the State of California improperly assumed jurisdiction pursuant to 18 U.S.C. § 1162.

Third, that the District Attorney and Sheriff for the County were acting in their capacity as County officials; as such, the County cannot avoid liability pursuant to 42 U.S.C.§ 1983.

Fourth, that the District Attorney and Sheriff for the County sued in their personal capacity are not entitled to qualified immunity.

Fifth, the P.L. 280 mandate that California assume criminal jurisdiction within Indian county violates the Tenth Amendment.

THE ARGUMENT

Standard of Review

Dismissals for failure to state a claim pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure are reviewed de novo, McDade v. West, 223 F.3d 1135, 1138 (9th Cir. 2000); Stone v. Travelers Corp., 58 F.3d 434, 436-37 (9th Cir. 1995), as are decisions on qualified immunity in a § 1983 action. Elder v. Holloway, 510 U.S. 510, 114 S. Ct. 1019, 1023 (1994); Neely v. Feinstein, 50 F. 3d 1502, 1507 (9th Cir. 1995). Cases dismissed under Rule 12 (b)(6), require the Court of Appeals to take all allegations of material fact as true and construe the complaint in the light most favorable to the moving party. Estate of Brooks v. U.S., 197 F.3d 1245, 1246 (9th Cir. 1999). The Appellate Court has jurisdiction to review a district court's grant of motion to dismiss under 28 U.S.C. § 1291. DeBoer v. Pennington et al., 206 F.3d 857, 863 (9th Cir. 2000).

1. PUBLIC LAW 280 CANNOT BE INTERPRETED AS GIVING STATES AND THEIR POLITICAL SUBDIVISIONS JURISDICTION OVER SOVEREIGN TRIBAL GOVERNMENTS

A. Public Law 280 is Inapplicable Under the Present Circumstances

The underlying investigation which led to the execution of the search warrant for tribal records was based upon alleged welfare fraud involving three individual tribal members, not the Tribe or any of its officials. The alleged welfare fraud occurred off reservation. The County, acting through the District Attorney and Sheriff, singled out a portion of P.L. 280 "...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 ..." as justification for the execution of the search warrant as to the tribal records. ER. p. 53.

This portion of P.L. 280 cannot be taken out of context, and must be interpreted in light of the entire statute as well as its legislative history. These words are solely intended to give legal effect to the primary goal as expressed in the remainder of the statute: to enable states to exert jurisdiction "...over offenses committed by or against Indians in the areas of Indian country... to the same extent that such State. . . has jurisdiction over offenses committed elsewhere within the State..." 18 U.S.C. § 1162(a).

Nowhere within the statute are states and their political subdivisions given jurisdiction over tribal governments. Nowhere within the statute and its legislative history has the sovereign immunity of tribal governments been expressly or impliedly waived by Congress. See Bryan v. Itasca County, 476 U.S. 877 (1976); State of California v. Quechan Tribe of Indians, 595 F.2d 1153 (9th Cir. 1979).

B. Unless Authorized by Congress, States Do Not Have Authority to Exert Jurisdiction Over Sovereign Tribal Governments When Such Actions are Contrary to a Tribe's Right to Self-Governance

It is a fundamental principle of federal Indian law that, absent express congressional authorization, state laws do not apply on Indian reservations.

Cabazon v. Smith, 34 F. Supp. 2d 1195, 1196 (C.D. Cal. 1998), citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561, 8 L. Ed. 483 (1832); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1973). Tribal sovereignty predates that of the United States government. McClanahan v. Arizona State Tax Comm'n, supra.

When Congress seeks to diminish a tribe's right to be free from state intrusion into their affairs, such intention must clearly be expressed by a "clear and plain statement." Cabazon v. Smith, 34 F. Supp. 2d at 1198, citing Felix S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law*, 224 (1982 ed.). Native American nations retain significant sovereign powers including the inherent right to make laws that govern internal tribal matters. Arizona Public Service Co. v. Environmental Protection Agency, 211 F.3d 1280, 1287 (D.C. Cir. 2000), cert. denied, ___ U.S. ___, 121 S. Ct. 1225 (2001). "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance...in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." Three Affiliated Tribes Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890-91 (1986).

There is no federal law that provides states' jurisdiction to execute search warrants against the property of tribal governments. The only federal statute that addresses state criminal jurisdiction over offenses involving Indians that occur on tribal lands is P.L. 280. As will be discussed below, nothing on the face of the statute provided the County and its representatives jurisdiction specifically over the Tribe. Evidence that states do not have jurisdiction over tribal governments outside of P.L. 280 can be found in the Supreme Court's discussion on the concept of retrocession:

> ...the fact that Congress did not provide for retrocession of jurisdiction lawfully assumed prior to the enactment of Pub.L.280 or

> of jurisdiction assumed after 1968 cannot be attributed to mere oversight or inadvertence. Since Congress was motivated by a desire to shield the Indians from unwanted extensions of jurisdiction over them, there was no need to provide for retrocession in those circumstances because the previously assumed jurisdiction over Indian country was only lawful to the extent that it was consistent with Indian tribal sovereignty and self-government.

Three Affiliated Tribes Fort Berthold Reservation, 476 U.S. at 887, citing Williams v. Lee, 358 U.S. 217 (1959) (emphasis added).

C. Public Law 280 Provides States No Authority to Exert Jurisdiction in a Manner that Erodes a Tribe's Right to Self-Governance

The concept of Indian sovereignty is to serve as a backdrop against which the applicable federal statute must be read. Santa Clara Pueblo v. Martinez, 436 U.S., 49, 60 (1978), citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. at 172. The statutory delegation of jurisdiction by the United States to the States via P.L. 280 has never been interpreted as a grant of jurisdiction to the states over tribal governments. P.L. 280 did not expressly waive the sovereign immunity of tribes. See Bryan v. Itasca County, 476 U.S. 877 (1976) and California v. Quechan Tribe, 595 F.2d 1153 (9th Cir. 1979) . Tribes retain their sovereign status unless unequivocally waived by either the Tribe itself or Congress. Such waiver cannot be implied. Santa Clara Pueblo v. Martinez, supra; United States v. Wheeler, 435 U.S. 313, 323 (1978). Absent a waiver of sovereign immunity, Tribes are immune from process of the court.

P.L. 280 is not ambiguous. Only when a statute is ambiguous on its face are courts to look to the legislative intent of Congress. However, even a review of the legislative history of P.L. 280 clearly identifies its purpose. "The 'primary concern of Congress in enacting P.L. 280...was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.'" Bryan v. Itasca County, 476 U.S. at 376, citing McClanahan,

411 U.S. at 170-171. P.L. 280 represents "an attempt to compromise between wholly abandoning the Indians to the states and maintaining them as federally protected wards, subject only to federal or tribal jurisdiction." Bosclair v. Superior Court of San Diego, 51 Cal. 3d 1140, 1150 (1990), citing Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. Rev. 535, 537 (1975).

> "...Pub. L. 280 was plainly not meant to effect total assimilation. Pub.L. 280 was only one of many types of assimilationist legislation under active consideration in 1953. ...the same Congress that enacted Pub.L. 280 also enacted several termination acts legislation which is cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation. ...there is notably absent any conferral of state jurisdiction over the tribes themselves...courts 'are not obliged in ambiguous instances to strain to implement (an assimilationist) policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'"

Bryan v. Itasca County, 476 U.S. at 389, citing Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975) (emphasis added). The Supreme Court in Bryan reached this conclusion by applying the traditional rule of statutory construction when interpreting federal laws related to Indian rights:

> "...statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians. Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate. . . immunity and allow states to treat Indians as part of the general community."

Bryan v. Itasca County 476 U.S. at 392.

P.L. 280 was passed to benefit Indians in an effort to protect individual Indians from the lack of adequate tribal institutions for law enforcement by providing states the authority to prosecute offenses involving Indian offenders as well as Indian victims. The jurisdictional provisions of P.L. 280 must be

stringently enforced by the courts "consistent with our understanding that the jurisdictional scheme embodied in that Act was the product of a wide-ranging and detailed congressional study." Three Affiliated Tribes of the Fort Berthold Reservation, 476 U.S. at 877.

In California v. Quechan Tribe, the State of California relied upon 18 U.S.C. § 1162 as authority to seek judgment against the Quechan Tribe so that the State could apply its fish and game laws to non-Indians on the reservation even though the Tribe had in place its own fish and game permit process. In dismissing the suit, the Ninth Circuit held that:

> Neither the express terms of 18 U.S.C. § 1162 nor the Congressional history of the statute, reveal any intention by Congress for it to serve as a waiver of the Tribe's sovereign immunity.

California v. Quechan Tribe, 595 F.2d at 1156. The Bryan analysis of 28 U.S.C. § 1360 and the Quechan Tribe analysis of 18 U.S.C. § 1162 are clearly applicable to the present case, and support the Tribe's position that P.L. 280 did not give states or its political subdivisions jurisdiction to execute search warrants against sovereign tribal governments.

D. United States v. James is Directly on Point

The District Court attempted to distinguish the underlying facts in United States v. James 980 F.2d 1314 (9th Cir. 1992), from the facts in the present case and incorrectly concluded that the Ninth Circuit decision in James did not control. Tribe contends that the analysis employed in James leads to the inevitable conclusion that neither the states nor its political subdivisions have the authority to execute a search warrant against the Tribe and its property.

In James, the Indian Defendant was being prosecuted by the federal government for the crime of rape against another Indian pursuant to the grant of jurisdiction provided by Congress to the federal government via the Indian Major Crimes Act, 18 U.S.C. § 1153. Defendant sought records in the possession of the

Quinault Indian Nations' Department of Social and Health Services related to the victim's alleged alcohol and drug problems. The Ninth Circuit affirmed the District Court's quashing of a subpoena duces tecum directed at the Quinault Tribe, finding that the grant of jurisdiction to the federal government pursuant to 18 U.S.C. § 1153 did not act as a waiver of the Tribe's sovereign immunity.

> By making individual Indians subject to federal prosecution for certain crimes, Congress did not address implicitly, much less explicitly, the amenability of the tribes to the process of the court in which the prosecution is commenced. Thus, we conclude that the Quinault Tribe was possessed of tribal immunity at the time the subpoena was served, unless the immunity had been waived. . . The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim. The issues are wholly distinct (citing United States v. Nordic Village, Inc., 503 U.S. 20, ___, 112 S. Ct., 1011, 1017). . . Thus, the mere fact that a statute, 18 U.S.C. § 1153(a), grants jurisdiction to a federal court does not automatically abrogate the Indian tribe's sovereign immunity.

United States v. James, 980 F.2d at 1319 (emphasis added). Tribe contends that if the Ninth Circuit finds no authority for the federal government to obtain tribal documents via subpoena, surely the state government and its political subdivisions shall have no greater authority by way of a search.

The District Court distinguished the facts here from James on two grounds: First, the District Court noted that in James, ". . . the tribe was a third party and was not directly involved in the criminal prosecution." ER. p. 221. To the contrary, there is no distinction since the Tribe in the present case is also a third party not directly involved in a criminal prosecution. The Tribe is simply in possession of documents that allegedly implicate individual tribal members of welfare fraud.

Second, the District Court distinguished the facts in James by noting that the Quinault Tribe:

> ...asserted sovereign immunity to protect the Native American victim and to foster confidence in the tribe's Social and Health Services. In the present case, plaintiffs' claim of sovereign immunity advances the Tribe's right to self-governance, but does so, at the expense of the state's interest in preventing welfare fraud.[1]

ER. p. 221. Again, there is no distinction between the circumstances here and in James. Both cases identify identical interests of a Tribe protecting its right to self-governance. In James, the Quinault Tribe was concerned about releasing confidential records related to a victim of a sexual assault concerning her problems of alcohol and drug abuse. Although the Ninth Circuit recognized these documents as "possibly relevant" to the defense of the Defendant, the court held the Quinault Tribe's status as a "domestic dependent nation" did not subject them to the jurisdiction of the federal courts. Simply because a "statute . . . grants jurisdiction to a federal court does not automatically abrogate the Indian tribe's sovereign immunity." United States v. James, 980 F.2d at 1319.

In the present case, the Tribe protects the privacy of employment records of all of its employees, regardless of whether or not they are members of the Tribe[2]. The distinction between employment records and counseling records is of little consequence, particularly in light of the state (or in James, the federal) interest asserted. In James, the tribal documents arguably could have assisted an individual in his defense of the crime of rape. Obviously the federal government is interested in convicting only those who are legitimately guilty. The Ninth Circuit did not

[1] Contrary to the District Court's assertion, the County's actions were not taken in the course of their efforts to "prevent" welfare fraud, but instead were allegedly taken in their effort to "investigate" possible welfare fraud.

[2] It's noteworthy that County's own social services departments are prohibited from releasing information regarding its welfare recipients within its possession to their own law enforcement agencies unless certain conditions are met. See Cal. Welf. & Inst. Code § 10850.3. (Request must be "in writing" and must specify that an arrest warrant has been issued as to the applicant or recipient, and the request must come from the "head of the law enforcement agency.")

view this as a federal interest that was so compelling as to overthrow the Quinault Tribe's inherent right to self-governance.

Personnel records are the property of and are in the custody and control of the employer, not the employees. Bd. of Trustees, Calaveras Unified School Dist. v. Leach, 258 Cal. App. 2d 281, 288 (1968). The concern of the Tribe to maintain the privacy interests of its casino employees is a valid interest, deserving of protection that would be abrogated as a result of Tribes being forced to acquiesce to the demands of the County and District Attorney to turn over confidential, tribal documents.

More importantly, at issue is not just the Tribe's right to protect the confidential information of its employees, but the overarching interest of protecting its inherent sovereign right to establish reasonable policies and rules regarding the protection of those records and not have those policies and rules usurped by states and their political subdivisions.

E. The District Court Erroneously Employed a "Balancing" Test

In spite of the lack of an affirmative or implied waiver of tribal immunity by Congress, the District Court choose to "balance" the interests of the Tribe's right to self-governance and sovereign immunity with the State's interest of "a fair and uniform application of California's criminal law". ER. p. 221. The Court concluded: "...the tribe's sovereign immunity does not prohibit the execution of the search warrant against the tribe and its property". Id.

However, the "balancing" tests that have been devised by Supreme Court decisions throughout the years have only come into play when the actions attempted by the state address non-Indians engaged in activities on the reservation. When state actions directly impact an Indian Tribe, a more categorical approach is to be followed: Absent cession of jurisdiction or other federal statute permitting states to assert jurisdiction, states are without power to assert jurisdiction over

Tribes. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995), citing Bryan v. Itasca County. Only when the "legal incidence" of the state action falls upon non-Indians does the balancing of tribal, federal and state interest occur, and only when the state action places a "minimal burden" upon a Tribe can the State action be permitted. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. at 459.

Here, federal and tribal interests are contrary to the state's interest, since enforcement of the state's laws diminishes the Tribe's sovereign immunity which the District Court found has not been expressly nor impliedly repealed by P.L. 280.

F. Even Under a "Balancing Test", County's Actions Exact an Unconstitutional Infringement Upon the Tribe's Right to Self-Governance

The District Court correctly noted that the Supreme Court has refused to establish an inflexible "per se" rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent. ER. pp. 18-19, citing California v. Cabazon Band of Mission Indians, 480 U.S. at 214-215. However, the Cabazon decision must be limited to its facts, since what was at issue there involved a state burden on tribal Indians "in the context of their dealing with non-Indians, since the question was whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservation." California v. Cabazon, 480 U.S. at 216 (emphasis added).

No court has held that states may assert jurisdiction directly over the tribal government itself, and "...absent governing Acts of Congress, a State may not act in a manner that infringed on the right to reservation Indians to make their own laws and be ruled by them." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-332 (1983). In the present case, the issues exclusively involve tribal interests and tribal governments.

Nevertheless, the District Court concluded that the Tribe's sovereign immunity does not prohibit the execution of a search warrant against the Tribe and its property. This ignores the fact that a Tribe retains its inherent right to create its own laws and be governed by them, and the County's interest in asserting its jurisdiction in the manner at issue here is in total defiance of this right.

There is no dispute that the concept of sovereign immunity as a defense is jurisdictional. Witkin, California Procedure 4th ed., Jurisdiction § 91, p. 626 (1996), and "[A]lthough a court may have jurisdiction in the fundamental sense of jurisdiction of the subject matter and the parties, it does not have unlimited power to act in the case." Witkin, California Procedure 4th ed., Jurisdiction, § 276, p. 840, citing Abelleria v. Dist. Court of Appeal, 17 Cal. 2d 280, 288 (1941).

Under this analysis, the County would have the authority to prosecute individuals for the crime of welfare fraud, since they have jurisdiction over the subject matter and the individual parties[3]. However, the sovereign immunity of the Tribe acts as a limitation of the district attorney and the court's jurisdiction over the Tribe. Witkin, California Criminal Law, Jurisdiction and Venue, § 1828 at 2165 (2d ed. 1996). Since the County would have no jurisdiction to prosecute the Tribe for violations of state law, they are without authority to act. See Sycuan v. Roache, 788 F. Supp. 1498, 1507 (S.D. Cal. 1992), aff'd., 38 F.3d 402 (9th Cir. 1994), amended, reh'g. denied 54 F.3d 535 (9th Cir. 1994).

G. The Tribe's Sovereign Status Requires County Officials to Honor Tribal Laws and Policies

In the absence of an express waiver of the Tribe's sovereign status, principles of comity and reciprocity require states and their political subdivisions to honor established tribal policies and laws when those laws are passed in the

[3] The County had authority to prosecute individual Indians for this offense regardless of P.L. 280, since the alleged offense occurred off the reservation, and thus was within their jurisdiction.

course of the Tribe's inherent right to self-governance. Reich v. Great Lakes Indian Fish and Wildlife Comm'n, 4 F.3d 490, 494-495 (7th Cir. 1993); Nevada v. Hicks, 196 F.3d 1020 (9th Cir. 2000). (States must honor tribal procedures regarding the execution of search warrants on tribal lands); Arizona ex rel. Merrill v. Turtle, 413 F.2d 683, 685 (9th Cir. 1969) (A state's right to exercise jurisdiction by extraditing residents are limited when such exercise of jurisdiction conflicts with the jurisdiction of a Tribe's rights that are essential to a tribe's right to self-government); Tracy v. Superior Court, 168 Ariz. 23, 37 (Ariz. 1991). (States must comply with Reciprocal Uniform Act to Secure Attendance of Witness from Without a State in Criminal Proceedings to secure attendance of witness in a state court proceeding where a tribe has adopted the Act); see also Epstein v. New York, 157 So. 2d 705, 707 (Fla. App. 1963), and People v. Superior Court of Kern County, 224 Cal. App. 3d 1405 (1990).

The Tribe advised the District Attorney of its policy as it relates to confidential tribal records. The Tribe also advised the District Attorney that it would be willing to accept as evidence of a release of the records a redacted copy of the last page of the welfare application that clearly indicated that employment records for individuals seeking public assistance were subject to review by county officials. The District Attorney chose to ignore not only the Tribe's time-established policy, but also the well-reasoned proposed resolution of the conflict between the County's demand and the Tribe's policy. The District Attorney instead exacted a gross violation of the Tribe's right to establish its own laws.

The distinction between the burdens imposed upon Tribe's by issuances of subpoenas versus search warrant is of little consequence, since both act as a burden not authorized by Congress. See Reich v. Great Lakes Indian Fish and Wildlife Comm'n, 4 F.3d at 455; California v. Quechan Tribe, supra; North Sea Products v. Clipper Seafood Co., 92 Wn.2d 236 (1979) (Writs of garnishment are not

enforceable against tribes since the court lacked both personal and subject matter jurisdiction over the Tribe).

H. County and Its Officials Have Other Means to Obtain the Information Demanded of the Tribe

The District Court's contention that County's lack of jurisdiction over the government of the Tribe would result in a void in the County's ability to conduct law enforcement activities on the Reservation is not supported by the law or facts.

While the sovereign immunity of the Tribe extends to its officials acting in their official capacity, tribal immunity is not a bar to actions against individuals when their conduct is determined to be outside the scope of a tribe's sovereign powers. Puyallup Tribe v. Dep't of Game, State of Washington, 433 U.S. 165, 172-173 (1977); Now v. Quinault Indian Nation, 709 F.2d 1319, 1321-1322 (9th Cir. 1983); Swift Transportation Inc. v. John, 546 F. Supp. 1185, 1188 (D. Ariz. 1982). If the actions of a tribal official do not further a legitimate tribal law or policy, that individual would not be protected by the Tribe's sovereign immunity.

The Tribe contends that if the individual tribal members were guilty of the crime of welfare fraud, the County already had evidence of such a crime within their own possession. ER. pp. 136A-137.

A decision that the sovereign immunity of Tribe precludes the County from being able to execute search warrants against the Tribe under the circumstances here will not result in the County having a "right" to enforce criminal laws, but no "remedy" or means to do so. The Supreme Court has concluded that even when the sovereign status of a tribe prohibits states from pursuing the most effective remedy, adequate alternatives do exist.

In addition to the alternatives identified above, and in the furtherance of the principles of comity and reciprocity discussed above, County/State have the ability to enter into mutually satisfactory agreements with Tribes to obtain the requested information. See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian

Tribe, 498 U.S. 505, 514 (1995); Benally v. Marcum, 553 P.2d 1270 (N.M. 1976) (states cannot circumvent an established tribal extradition procedure, although states can enter into a mutually agreed upon extradition compact that addresses both state and tribal interests).

Evidence of such agreements can be found here in California in the form of state laws which outline the agreement between states and tribes establishing jurisdictional guidelines (See Cal. Fish & Game Code §§ 1400, 1600) and most recently the Tribal-State compact executed between the State of California and the Tribe, which defines the jurisdictional authority of the State, which is the only means by which the State of California has jurisdiction over the Tribal casino, as discussed below. ER. pp. 142-200.

I. IGRA Expressly Preempts States and Their Political Subdivisions from Exerting Jurisdiction Over the Tribe's Casino Operation

In the alternative, the Tribe argues that IGRA has expressly preempted the State and its political subdivisions from enforcing any provision of P.L. 280 upon the Tribe and its gaming operation, ER. pp.11-14. The District Court held: "[B]ecause the investigation and search warrant deal with a state felony rather than whether a casino game is illegal under state law, there is no IGRA preemption". ER. p. 21. This finding is contrary to various court's interpretation over the past decade where IGRA has been found to have "extraordinary preemptive power" Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536, 545 (8th Cir. 1996).

This extraordinary preemptive power is underscored not only by the comprehensive regulations promulgated under the statute, but the scope of the negotiated agreement between the State of California and the Tribe as memorialized with the Compact. ER, pp. 142-200; see also Tamiani Partners, Ltd. v. Miccosukee Tribe of Indians, 63 F.3d 1030 (11th Cir. 1995); Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994); Great Western Casinos v. Morongo Band of Mission Indians, 74 Cal. App. 4th 1407 (1999).

The Compact was formally executed on September 23, 1999, but by its terms was not in effect until May 16, 2000. Therefore, jurisdiction obtained by the State by and through the compact was not in effect at the time of the execution of the search warrant in question.

The Compact gave the State jurisdiction in areas that have nothing to do with the regulation of Class III gaming, showing that conferrals of jurisdiction by agreement pursuant to IGRA are not limited to regulatory matters. Tribe agreed to create ordinances regarding tort claims [Sec. 10.2(d)], food and beverage standards [Sec. 10.2(a)], water quality standards [Sec. 10.2(b)], building and safety standards [Sec. 10.2(c)], occupational health and safety standards [Sec. 10.2(e)], discrimination standards [Sec. 10.2 (g)], workers compensation insurance, Sec. 10.3(a)] unemployment insurance [Sec. 10.3(b)], agreements to withhold state taxes [Sec. 10.3(c)], adoption of a labor agreement [Sec. 10.7], and ordinances addressing off-reservation environmental impacts [Sec. 10.8]. ER pp. 174-77.

These subjects addressed by the Compact provide the State jurisdiction which it did not previously have. See Middletown Rancheria v. Workers' Compensation Appeals Bd., 60 Cal. App. 4th 1340 (1998) (State has no jurisdiction over tribe for purposes of enforcing California workers' compensation laws); National Labor Relations Bd. v. Pueblo of San Juan, 228 F.3d 1195 (10th Cir. 2000) (Tribal governments are exempt from the NLRA); EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989) (Tribes are exempt from Title VII of the Civil Rights Act, as well as the ADEA).

The right to inspect and obtain copies of papers in the possession of the Tribe is limited to members of the State Gaming Agency [Sec. 7.4.3(a)]. ER. p. 166. Section 6.4.3(b)(ii) of the Compact provides for the State and the Tribe to negotiate and agree upon "protocols for release to other law enforcement agencies of information obtained during the course of background investigations". ER.

p. 167. As such, not only are County officials precluded from exerting jurisdiction over the Tribe and the tribal records related to the Casino, State Gaming Agency officials are limited by the terms of the compact as to how they can access these records, and for what purpose.

Tribe contends that the only jurisdiction that the State has over the Tribe's Casino is specified within the Compact.

2. THE DISTRICT COURT ERRED IN DETERMINING THE CALIFORNIA LAW DID NOT REQUIRE THE CALIFORNIA LEGISLATURE TO AFFIRMATIVELY ASSUME JURISDICTION PURSUANT TO P.L. 280

The California Legislature, which is the policy making body of the State, failed to affirmatively assume jurisdiction conferred by P.L. 280 as required by State law. ER. pp. 14-21. The District Court summarily dismissed this argument by stating: "[S]ince there are no cases to the contrary after fifty years, the court concludes that Public Law 280 is enforceable by the executive branch without need of an enabling act". ER. pp. 22-23.

It is improper for courts to look the other way simply because legislation that has been in place for an extended period of time has never been subject to constitutional challenges. See New York v. United States, 505 U.S. 144, 182 (1992). The legislative history of P.L. 280 indicates that when Congress reviewed state laws to determine if assumption of jurisdiction pursuant to P.L. 280 required affirmative action by state legislatures, all that was addressed were express prohibitions that precluded a state from asserting jurisdiction over Indian lands.[4]

There is no evidence that California as a state or territory ever asserted jurisdiction over Indian lands until the passage of P.L. 280 in 1953. Assumption of

[4] After 1889, Congress required all states entering the Union to disclaim jurisdiction over Indian lands within its exterior boundaries. California was admitted in 1850. Stephen Pevar, *The Rights of Indians and Tribes: The Basic ACLU Guide to Indian and Tribal Rights*, 2d, p. 114 (1992)

jurisdiction as proscribed by P.L. 280 was a drastic shift in the policy of the State of California that was never addressed by its policy making body: the California Legislature.

Article IV, Section 1 of the California Constitution vests the legislative power of the State in the Legislature. Methodist Hosp. v. Saylor, 5 Cal. 3d 685, 691 (1971); Legislature v. Eu, 54 Cal. 3d 492, 501 (1991). Under California law, it is within the Legislature' constitutional authority to establish California's policy as it relates to the assumption of jurisdiction as provided by P.L. 280.

The concept that the Legislature serves as the ultimate policymaker for the state is the basic tenant to the principle of separation of powers. "The basic precept is the belief that the legislature as the most representative organ of government should settle insofar as possible controverted issues of policy and that it must determine crucial issues whenever it has the time, information and competence to deal with them". Salmon Trollers Marketing Ass'n v. Fullerton, 124 Cal. App. 3d 291, 299 (1981).

There was no consideration by the California Legislature of the ramifications and consequences of assuming the federal government's mandate of civil and criminal jurisdiction, and the Executive and Judicial Branches of the California government assumed jurisdiction with no input from the policy making branch of the government in violation of the Separation of Powers Clause. See Cal. Const. art. III, § 3.

3. THE FEDERAL GOVERNMENT'S MANDATE THAT CALIFORNIA ASSUME JURISDICTION PURSUANT TO P.L. 280 VIOLATES THE TENTH AMENDMENT

The District Court held there was no violation of the Tenth Amendment because:

> ...there is no implementation of a federal government scheme here. There is no attempt by Congress to mandate that the state assist in the enforcement of a federal statutory scheme such as in Printz v.

> United States, . . . or to require the state legislature enact one of three laws proposed by the federal government as in New York v. United States . . . Rather, Public Law 280 allows California to impose its own state criminal law. Here, Congress is simply allowing California to exert its police power over the Indian lands within its boundaries.

ER. p. 224. Criminal jurisdiction over offenses involving Indians that occurred on federal-tribal lands was exclusively within the federal government's purview prior to the passage of P.L. 280. Jurisdiction over Indians on trust land was an exclusive federal governmental obligation and financial burden that Congress mandated states to assume by and through P.L. 280.

The federal government's power over Indian affairs is derived from their power to regulate commerce with Indian tribes (U.S. Const. art. I § 8, cl. 3), the treaty-making power (U.S. Const. art. II, § 2 cl. 2) and the corollary power to implement treaties by legislation, the power over federal property (U.S. Const. art. IV § 3, cl. 2) and the power to admit new states (art. IV, § 3 cl.1) and inferentially to prescribe the terms of such admission, and the power to make expenditures for the general welfare (art. I, § 8, cl. 1). See Felix Cohen, *Handbook of Federal Indian Law*, chpt. 5 (1982 ed.). The federal government retained this plenary power over tribes except where expressly delegated to states by Congress. Criminal jurisdiction on Indian lands was a result of an exclusive federal scheme in which prior to the passage of P.L. 280 the State of California had no roll.

The United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. Since the federal government had previously asserted jurisdiction over Indian lands pursuant to the powers delegated by the Constitution, the Tribe questions what would have been the United States' response had the State of California refused to assume the fiscal and administrative burden that came with the conferral of jurisdiction pursuant to P.L. 280. See Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction*

over Reservation Indians, 22 UCLA L. Rev. 535, 542-544 (1975). Had the State balked, the federal government would have had no other option but to re-institute the exclusive federal scheme that had been in place prior to the passage of P.L. 280 and reacquire federal criminal jurisdiction.

The holding in United States v. Burch, 169 F.3d 666 (10th Cir. 1999), should be given limited authority, since the focus of the Tenth Circuit Court of Appeals was not on the jurisdictional limits of P.L. 280, but instead addressed questions of jurisdiction pursuant to P.L. 98-290, and whether the State of Colorado took the necessary steps to assume jurisdiction over Indians in Indian country pursuant to 25 U.S.C. § 1321(a).

In Burch, the court addressed P.L. 98-290, which codified an agreement negotiated between the Southern Ute Indian Tribe, the State of Colorado and other local governments allowing the state to assume criminal and civil jurisdiction over offenses committed within the boundaries of the town of Ignacio, Burch, at 669. The fact that the conferral of jurisdiction by Congress was a result of a negotiated agreement between the State of Colorado, tribes and local governments distinguishes the circumstance in Burch from the circumstances here.

Likewise, the holding in People v. Miranda, 106 Cal. App. 3d 504 (1980), should be given limited authority since the Fourth District Court of Appeals for California focused entirely upon court decisions rendered in other states. The Court in Miranda recognized that Congress' focus was on state constitutions and statutes that expressly prohibited states from assuming jurisdiction in Indian Country. However, simply because a state's constitution or statutes do not expressly prohibit assumption of jurisdiction does not mean that they can automatically assume jurisdiction without the policy making branch of the government affirmatively assuming jurisdiction.

4. THE DISTRICT ATTORNEY AND SHERIFF WERE ACTING AS COUNTY OFFICIALS WHEN OBTAINING AND EXECUTING THE SEARCH WARRANT AGAINST THE TRIBE

In ascertaining whether a governmental agency is an arm of the state, the Ninth Circuit articulated two guiding principles:

> First, [The Supreme Court] cautioned against employing a 'categorical, all or nothing' approach. . .Rather we are to inquire 'whether governmental officials are final policymakers for the local government in a particular area or on a particular issue.' Second, although the question of municipal liability under section 1983 is one of federal law, 'our inquiry is dependent on an analysis of state law.' That is, 'our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law.'

Streit v. County of Los Angeles, 236 F.3d 552, 559-560 (9th Cir. 2001), citing McMillian v. Monroe County, 520 U.S. 781 (1997).

Tribe contends that the District Court erroneously found District Attorney and Sheriff to be state officials, and upon review of the functions performed here, District Attorney and Sheriff were acting in their capacity as county officials.

A. Attorney General Oversight and Supervision of County Officials Does Not Convert Them Into Actors of the State

The District Court relied upon various provision of the California Constitution and statutory law that provides the Attorney General authority to oversee as well as direct the acts of sheriffs and district attorneys as justification for its determination that the District Attorney and Sheriff were acting as state officials. ER. pp. 208-210. To the contrary, Attorney General oversight does not alter the identity of district attorneys and sheriffs as county officials. Brewster v. County of Shasta, 112 F. Supp. 2d 1185, 1190 (E.D. Cal. 2000). Mere oversight by state officials does not convert the actions of law enforcement personnel into actions of the state.

Such an interpretation of state law would lead to the absurd conclusion that "...all local law enforcement agencies in California [would be] immune from prosecution for civil rights violations and emasculate Monell which preserves section 1983 liability against local governments." Roe v. County of Lake, 107 F. Supp. 2d 1146, 1151 (N.D. Cal. 2000); McDade v. West, 223 F.3d 1135, 1139 (9th Cir. 2000). A determination of whether an official is acting for the State or County, "is dependent on an analysis of state law based on the state's constitution, statutes and case law." McMillian v. Monroe County, 520 U.S. at 785.

The State Attorney General has direct "...supervision over every district attorney and sheriff and over such law enforcement officers as may be designated by law..." art. V, section 13, and "whenever he deems it necessary in the public interest [the State Attorney General] shall direct the activities of any sheriff relative to the investigation or detection of crime within the jurisdiction of the sheriff..." Cal. Gov't Code § 12560 (emphasis added). This provision of state law gives the Attorney General discretion to command county officials to act, and the purpose of this oversight was to "...'address the lack of organization of our law enforcement agencies' by providing coordination and supervision by the Attorney General '[w]ithout curtailing the rights of local self government.'" Roe v. County of Lake, 107 F. Supp. 2d at 1150 (citing argument in Favor of Proposition 4 by Earl Warren, District Attorney of Alameda County, 1934 General Election Ballot Pamphlet).

However, constitutional oversight does not "contemplate absolute control and direction of such officials. Especially is this true as to sheriffs and district attorneys. . . nothing in [section 21 of article V] that indicates any intention to depart from the general scheme of state government by counties . . ." People v. Brophy, 49 Cal. App. 2d 15, 28 (1942). The Attorney General's power of supervision is a result of California counties being political subdivisions of the

state, and has never been held to preclude suits against counties and their officials. Brewster. Contrary to the discretionary oversight of the Attorney General, the boards of supervisors of each county are mandated by state law to oversee the official conduct of all county officers, including sheriffs and district attorney, so long as board oversight does not obstruct their investigative and prosecutorial functions. Cal. Gov't Code § 25303; Brewster, supra. This board oversight of the conduct of county officers is not limited to solely monitoring their fiscal conduct. See Dibb v. County of San Diego, 8 Cal. 4th 1200, 1209 (1994).

B. County Officials, Acting Pursuant to a Court-Issued Warrant, Does not Convert Them into State Actors

The District Court concluded that when sheriffs and district attorneys execute warrants in their law enforcement capacity they "act at the bequest of the superior court, which issued the search warrant", thus making them actors of the state. ER. p. 213. The Tribe can find no case law that supports the court's conclusion. To the contrary, the United States Supreme Court has held that simply because a judicial officer approves a warrant, a law enforcement officer is not automatically shielded from § 1983 liability. Malley v. Briggs, 475 U.S. 335, 345-46 (1986).

The District Court further concluded that the actions of the District Attorney and Sheriff were state actions because the "search warrant was obtained and executed in furtherance of state law to prevent welfare fraud". ER. p. 213. This conclusion is incorrect since all laws which sheriffs and district attorneys enforce are derived from state law and all counties are political subdivisions of the state. See Cal. Const. art. XI, Section 1(a); Cal. Gov't Code § 23000 et seq, (county governments); Cal. Gov't Code § 50001 et seq. (local agencies).

C. Sheriff was Acting as a County Officer

As discussed below, sheriffs are the final policy makers of their respective counties when acting in their law enforcement capacity. However, the District

Court concluded that the Sheriff's actions were similar to the actions identified within Hawkins v. Comparet-Cassani, 33 F. Supp. 2d 1244 (C.D. Cal. 1999) (internal citations omitted) and Boakye-Yiadom v. City and County of San Francisco, 1999 WL 638260 (N. D. Cal. 1999), thus making him an actor of the state here. ER. p. 213. Under the McMillan approach, reliance on these cases was not well-founded, since the execution of a search warrant by a sheriff at the direction of a district attorney who is acting in his investigative capacity is not analogous to a sheriff providing security to the courtrooms of the State of California.

The Sheriff was not providing security to the Superior Courts of California. Instead, he was assisting in the execution of a search warrant at the behest of the District Attorney for the County against a sovereign tribal government in the course of his investigation of potential welfare fraud. ER. pp. 10, 136A. To conclude that the execution of a search warrant is identical to providing security to the state courts would eliminate all liability for sheriffs acting in their investigative capacity so long as they are armed with a search warrant, contrary to McMillan.

Sheriffs are identified by the California Constitution to be county officials. See Cal. Const. art. XI, § 1(b). The Board of Supervisors for the County of Inyo is mandated by state law to "supervise the official conduct of all county officers." Cal. Gov't Code § 25303; Pitchess v. Superior Court, 2 Cal. App. 3d 653, 657 (1969). Although Government Code § 25303 precludes a Board of Supervisors from obstructing a district attorney and sheriff in its investigative and prosecutorial functions, nothing within state law precludes a board of supervisors from directing district attorneys and sheriffs to act, so long as the board's directives do not obstruct their respective roles.

In distinguishing the laws of the State of California from the law of the State of Alabama (McMillan) regarding sheriffs, the Ninth Circuit has stated:

> ...the California Constitution does not list sheriffs as part of 'the state executive department'. Instead, Article XI, section 1(b) of the California Constitution designates sheriffs as county officers. . . Indeed, '[n]ot only does the California Constitution lack the provisions most important to the Supreme Court's decision in McMillian, its provisions read much like those of the Alabama Constitution prior to that State's determined effort to clarify that sheriffs were acting for the State when exercising their law enforcement functions.' . . . Thus, under the California Constitution, [the Los Angeles Sheriffs Department] is generally a county, not state, agency.

Streit v. County of Los Angeles, 236 F.3d at 561. The legislative history of Article XI clearly states that the purpose of the constitutional amendments was to assure "...all of the people in each of fifty-eight counties of this state that their chief law enforcement officer at the county level, the sheriff, will continue to be directly answerable to them through the election process". Roe v. County of Lake, 107 F. Supp. 2d at 1149.

In California, sheriffs are designated as the chief law enforcement officer of the county in which they are elected and reside. Cal. Const. art. XI, §§ 1,2, [Cal. Gov't Code § 24000(b)]. They are required to have their offices at the county seat with the other county officers, (Cal. Gov't Code § 24250), and their services are contracted out by the counties, not the state (Cal. Gov't Code § 53069.8). Authority to impeach a sheriff resides with the county grand jury (Cal. Gov't Code § 3060).

Sheriffs are defined and regulated as county employees, and are elected within and by the county (Cal. Gov't Code § 24205). Sheriffs are required to attend upon and obey state courts only within their jurisdiction (Cal. Gov't Code § 26603), and their salaries are set by the county board of supervisors (Cal. Gov't Code § 25300). Even though sheriffs are elected by the people in their county (Cal. Gov't Code § 24009), their positions can become appointive rather than elective by their county board of supervisors if the change of such office is

presented and approved by the voters of the county. Cal. Gov't Code § 24009(b). A sheriff's duties can be consolidated with the duties of certain other county offices. Cal. Govt. Code § 24304. In applying the guiding principles identified by the Ninth Circuit in Streit, the Sheriff was acting as a county rather than state official for purposes of § 1983 liability.

D. The District Attorney was Acting as a County Officer

Like the Sheriff, the District Attorney is the final policy maker for the County when he is acting in his law enforcement capacity investigating allegations of welfare fraud, Pitts v. County of Kern, 18 Cal. 4th 340, 362 (1997); Weiner v. San Diego County, 210 F.3d 1025, 1031 (9th Cir. 2000). There is no dispute that district attorneys when prosecuting crimes are acting on behalf of the state. Pitchess v. Superior Court, 2 Cal. App. 3d at 657. The District Court erroneously concluded that district attorneys are state officers "...for the purpose of investigating and proceeding with criminal prosecutions". ER. p. 211.[5]

The District Court concluded that pursuant to Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) and Weiner, the District Attorney was acting in his "official capacity as a state official when the District Attorney's office obtained a search warrant in connection with the welfare fraud investigation", concluding that he is not a "person for purposes of section 1983 liability". ER. p. 214.

In Pitts v. County of Kern, the California Supreme Court clearly identified that district attorneys perform dual roles:

> [H]e is at once the law officer of the county and the public prosecutor. While in the former capacity he represents the county and is largely subordinate to, and under the control of, the board of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the authority and in the name of the people of the state.

[5] This finding contradicts the District Court's ruling that the District Attorney was not afforded absolute immunity, since the District Attorney's office filed for the search warrant during an investigation into welfare fraud. ER p. 215

Pitts v. County of Kern, 18 Cal. 4th at 360; See also County of Modoc v. Spencer & Rakker et al., 103 Cal. 498, 500 (1894). "When preparing to prosecute and when prosecuting criminal violations of state law, a district attorney represents the state and is not a policy maker for the county." Pitts, supra at 362. However, when he is acting as a law enforcement official, subject to the control of the board of supervisors, he is a county official.

The question is at what point does a District Attorney's investigation evolve into "preparation to prosecute"? One district court within the Ninth Circuit's jurisdiction has concluded:

> [T]he initiation of a prosecution commences with the filing of a criminal complaint" and that "...actions taken by prosecutors in their investigative or administrative functions do not entitle the prosecutor to absolute immunity, but should be measured against the standards of qualified immunity.

Maxfield v. Thomas, 557 F. Supp. 1123, 1128 (D. Idaho, 1983), citing Imbler v. Patchman, 424 U.S. 409 (1976). Although the focus of the court in Maxfield was the issue of qualified versus absolute immunity, the court held that the drafting, obtaining and execution of search warrants after the filing of the criminal complaint constituted an initiation of a prosecution, leading to the conclusion that actions taken by district attorneys prior to the initiation of a prosecution are actions in their capacity as law enforcement officials, thus rendering their actions taken as county officials. Maxfield v. Thomas, 557 F. Supp. 1123 at 1129.

Given that the search warrant was executed against the Tribe, who clearly was not the subject of a criminal prosecution makes the acts of the District Attorney inherently an investigation rather than an initiation of a prosecution.

If this Court were to accept the District Court's interpretation, all district attorney investigations would be preparations to prosecute, thus a district attorney would always be a state official and never be liable for violations pursuant to

§ 1983. The Ninth Circuit in Weiner recognized that DA's are county officers for some purposes. See also County of Modoc, 103 Cal. 498, 500 (1894).

District attorneys in California are designated constitutionally and by statute as county, not state, officers. Cal. Const., art. XI, § 1, subd. (b); Gov't Code § 24000(a). They are elected by the people within their county (Cal. Gov't Code § 24009), and their compensation is established by the county board of supervisors (Cal. Gov't Code § 25300). Their duties can be consolidated with the duties of certain other county offices (Cal. Gov't Code § 24304), providing further evidence that district attorneys are primarily county officials.

Under the guiding principles identified in Streit, the District Attorney was acting in his capacity as a county official when acting in his investigative, law enforcement capacity.

E. The District Attorney Was Furthering the Interest of Inyo County Department of Health and Human Services by Conducting an Investigation on Its Behalf

At all times relevant, the District Attorney and Sheriff were acting at the behest of the Department of Health and Human Services for the County of Inyo, a County agency charged by state law with the responsibility of implementing social welfare programs. ER. pp. 10-11, 136-A. However, the District Court held:

> [n]otwithstanding the fact that the County is responsible for the investigation of applications for Aid to Families with Dependent Children (AFDC) under Cal. Wel. & Inst. Code § 18491 and the administration of AFDC programs pursuant to Cal. Wel. & Inst. Code § 18470, the court finds the search warrant was obtained and executed in furtherance of state law to prevent welfare fraud.

ER p. 213. This ignores the fact that the County's Department of Health and Human Services (Department) is wholly responsible under California law for the administration of the laws related to public assistance, including the investigation of overpayments which may or may not be the result of fraudulent activities.

The administration of public social services is "declared to be a county function and the responsibility therefore rests upon the boards of supervisors in the respective counties...". Cal. Welf. & Inst. Code § 10800. The evidence which triggered these events was derived from Social Services IEVS/Integrated Fraud Detection System. ER. P. 136-A. State law provides that suits to recover overpayments of benefits are to be brought "...by the county counsel unless the board of supervisors delegates such duty to the district attorney by ordinance or resolution". Cal. Welf. & Inst. Code § 11004(l).

The Department is identified as a County Department pursuant to Cal. Welf. & Inst. Code § 10058, and as a local agency pursuant to Cal. Gov't Code § 50001. The Department is funded by state grants made to counties "to provide . . . reasonable support and maintenance for needy and dependent families and persons", Cal. Welf. & Inst. Code § 10001(a), as well as matching county funds. Cal. Welf. & Inst. Code § 10100. The administration of public social services is a county function, and the responsibility for administering social services "...rests upon the board of supervisors". Cal. Welf. & Inst. Code § 10800.

The Department has the power and authority in connection with its investigations to "issue subpoenas for ... the production of papers ..." Cal. Gov't Code § 11181. Furthermore, the head of the department of social services has the authority to delegate the power to conduct investigations or hearings on issues surrounding social services. Cal. Gov't Code § 11183.

Since the District Attorney was acting at the behest of the County Department in an investigative capacity, he was acting in his capacity as a county, and not state, official.

F. Even If the Court Determines that District Attorney and Sheriff Were Actors of the States, the Litigation Should be Allowed to Proceed

Even if the court rules that the District Attorney and Sheriff were acting in their representative capacity as officers of the State, this litigation should be allowed to proceed as to declaratory and injunctive relief available under federal law. Actions can be maintained against state officials in their official capacity:

> Since the Supreme Court's decision in Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908), courts have recognized an exception to the Eleventh Amendment bar for suits for prospective declaratory relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law.

Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1045 (9th Cir. Sept. 11, 2000), cert. denied, 2001 WL 99429 (April 2, 2001); See also, Doe v. Lawrence Livermore Nat'l Lab, 131 F.3d 836, 839 (9th Cir. 1997).

Equitable relief is available to prevent County from exerting jurisdiction in a manner that violates federal and tribal law. Tribe's complaint falls squarely within the parameters of the Ex Parte Young exception to 11th Amendment immunity. Accordingly, if the court accepts that the District Attorney and Sheriff are agents of the State, leave should be afforded the Tribe to amend the pleadings to make the same claims against them in their capacity as officials of the State.

5. THE DISTRICT ATTORNEY AND SHERIFF ARE NOT ENTITLED TO QUALIFIED IMMUNITY

A. Test for Determining Qualified Immunity

The District Court correctly held that the District Attorney was not entitled to absolute immunity since his actions were taken in the course of his investigation into welfare fraud rather than in his prosecution for the crime of welfare fraud.[6]

[6] The court finding this to be an "investigation" rather than a "prosecution" is further evidence that the District Attorney and Sheriff were acting in their capacity as county, law enforcement officials rather than state, prosecutorial officials.

However, the Court erroneously concluded that the District Attorney was entitled to qualified immunity since "California's policy does not conflict with Public Law 280, which allows the state and thus the District Attorney to impose California criminal law on tribal lands". ER. p. 217.

When a public official asserts qualified immunity, courts are to employ a two-part analysis. First, the court must determine whether the officials have violated a right that is clearly established and stated with particularity. Collins v. Jordan, 110 F.3d 1363, 1369 (9th Cir. 1997), citing Alexander v. County of Los Angeles, 64 F.3d 1315, 1319 (9th Cir. 1995). This is not to say that the action in question must have previously been held to be unlawful, but that in light of pre-existing law the unlawfulness must be apparent. DeBoer v. Pennington, et al., 206 F.3d 857, 864-65 (9th Cir. 2000).

Second, the court is to consider whether under the facts alleged, a reasonable official could have believed that his conduct was lawful. Collins; Act Up!/Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993); DeBoer v. Pennington, supra. The relevant inquiry is "...whether a reasonable government official could have believed his conduct was lawful, in light of clearly established law and the information he possessed." Barlow v. Ground et al. 943 F.2d 1132, 1139 (9th Cir. 1991), citing Thorsted v. Kelly, 858 F.2d 571, 573 (9th Cir. 1988) (emphasis added). If genuine issues of material facts are raised as to whether the seizure violated Fourth Amendment principles that were clearly established at the time, then that is a question for a jury to decide. Id. Section 1983 liability may arise when the conduct of the official falls short of "objective reasonableness". Malley v. Briggs, 475 U.S. 335 (1986), citing Harlow v. Fitzgerald, 457 U.S. 800 (1982).

The objective, good faith determination is dependent upon the information possessed by the particular officer engaged in the search. United States v. Baker,

894 F.2d 1144, 1148 (10th Cir. 1990), citing Anderson v. Creighton, 484 U.S. 635, 641 (1987).

B. Under the Two-Part Analysis, the District Attorney and Sheriff Should be Denied the Defense of Qualified Immunity

As discussed above, P.L. 280 on its face as well as it's legislative history fails to disclose any intent by Congress to diminish the sovereignty of tribal governments by making them subject to the jurisdiction of the political subdivisions of the state. Case law further establishes that the Tribe's inherent sovereign right to self-governance and to be free from state interference has not been diminished either by P.L. 280 or any other federal statute.

Neither the District Attorney or Sheriff identify in their moving papers any pre-existing case law they relied upon to support their actions of obtaining and executing a search warrant upon the property of the Tribe. To the contrary, the Supreme Court in Bryan v. Itasca County and the Ninth Circuit in California v. Quechan Tribe have made it clear that P.L. 280 did not waive the sovereign immunity of the Tribe.

The fact that the District Attorney was advised by the Tribe that P.L. 280 did not waive the Tribe's sovereign immunity is further evidence that he could not possess a reasonable, good faith belief that his actions were constitutional. The District Attorney was not only apprised of the Tribe's long-standing policy and tradition of not disclosing employee records unless authorized by the employee to do so, but also of the Tribe's willingness to provide the requested information subject to receipt of the information in the possession of the County which would constitute a release of information under tribal law.

Since an official's subjective good faith is a question of fact that requires resolution by a jury, it should rarely be decided by motions to dismiss. See Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982). Since the defense of qualified immunity does not preclude further discovery in an action, Rhodes v. Alameda County

Sheriff's Dep't, ___ F.Supp.2d ____, 1999 U.S. Dist. Lexis 11466 (N.D. Cal. 1998), the District Court's finding of qualified immunity was premature in light of the limited information available at the early stage of the proceedings.

C. The District Attorney's Failure to Provide the Magistrate with Critical Information Regarding the Nature and Ownership of the Property Sought Precludes a Finding of Qualified Immunity

The Tribe challenged the District Attorney's assertion of qualified immunity on the grounds that the District Attorney withheld material facts from the Magistrate who issued the search warrant. ER. p. 34-35. Specifically, the District Attorney failed to apprise the magistrate that the "Paiute Palace Casino" is a wholly owned and operated business of the Bishop Paiute Tribal government, the place to be searched was located on federal/tribal lands, and the documents sought were in the possession of and solely owned by the Tribe. The District Attorney also failed to identify for the Magistrate where their jurisdictional authority to obtain and execute the search warrant was derived from.

Search warrants, even if they are founded upon probable cause, when issued beyond the issuing state court's jurisdiction, are void ab initio, regardless of whether they have been authorized by the magistrate. United States v. Baker, 894 F.2d 1144, 1148 (10th Cir. 1990). The District Court dismissed District Attorney's failure to inform the court of these material jurisdictional facts as "...not troubling because the magistrate should have considered this when he issued the search warrant". ER. p.16. The District Court's circular logic is erroneous since a magistrate cannot consider information that was never provided to him.

Judicial deception may not be employed to obtain a warrant. Franks v. Delaware, 438 U.S. 154, 155-156 (1978). The shield of qualified immunity is lost when an officer disregards the truth and employs judicial deception by omitting material facts from the affidavit. Liston v. County of Riverside, 120 F.3d 965, 973

(9th Cir. 1997). The Tribe contends that, had the Magistrate been provided the omitted information, he would have refused to issue the warrant.

While threshold questions regarding the materiality of the omitted information are to be addressed by the court, the determination of whether the information was intentionally or recklessly omitted is left for the trier of fact. Id., at p. 974. Therefore, the District Court's finding of qualified immunity should be reversed.

D. Since "Probable Cause" was Lacking in the Affidavit Supplied for the Search Warrant, District Attorney and Sheriff's Claim of Qualified Immunity Must Fail

For a valid warrant to issue, the affidavit supporting the application for the warrant must identify that "...there is probable cause to believe that an offense has been committed and that the defendant has committed it...", Fed. R. Crim. P. 4, Salmon v. Schwarz, 948 F.2d 1131, 1136 (10th Cir. 1991), citing Wong Sun v. United States, 371 U.S. 471, 481 n.9 (1963); Malley v. Briggs, 475 U.S. at 344-45, citing United States v. Leon, 468 U.S. 897, 922-23, 23 (1984).

The "objective reasonableness" inquiry courts are to employ to determine if an officer is entitled to qualified immunity "...is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." Marks v. Clarke et al., 102 F.3d 1012, 1026 1026 (9th Cir. 1997), citing Malley v. Briggs, 475 U.S. at 345; Barlow v. Ground et al., 943 F.2d 1132, 1139-40 (9th Cir. 1991). Qualified immunity is denied when the affidavit that supported the warrant lacks any indicia of probable cause and when genuine issues of material facts exist. Marks v. Clarke et al., 102 F.3d 1012, at 1025.

Tribe alleges in its complaint (ER. p. 21), and its Response to the Motion to Dismiss (ER. p. 79, n. 8), that there was not probable cause to obtain and execute the search warrant in question. The Affidavit submitted in the application of the

search warrant states that the evidence sought "...tends to show a felony has been committed or tends to show that a particular person has committed a felony...The reporting of the earned income by Patricia Dewey, Clifford Dewey and Tiyan Hill could have affected their eligibility to receive Public Assistance, and this may have resulted in an overpayment in excess of $400.00". ER. pp. 136-137 (emphasis added).

These assertions are speculative at best, and fail to meet the basic requirement that a reasonable person would reasonably believe that a crime had been committed. The affidavit and warrant were so lacking in any indicia of probable cause the District Attorney could not have reasonably relied upon the validity of the warrant it possessed. A determination of whether probable cause exists is generally a question for the jury. Wallis v. Spencer et al., 202 F.3d 1126, (9th Cir. 2000); Kennedy v. Los Angeles Police Dep't, 901 F.2d 702 (9th Cir. 1989), citing McKenzie v. Lamb, 738 F.2d 1005, 1008 (9th Cir. 1984). As such, the decision of the District Court should be reversed.

E. As to Sheriff

Contrary to the District Court's finding, the warrant was not facially valid because it failed to provide critical information. ER. p. 217. Since the affidavit was lacking evidence of probable cause, the Sheriff's reliance upon the warrant was not reasonable. See prior argument under D above.

F. As to District Attorney and Sheriff

The court held that even though the payroll records seized went beyond the scope of the records sought as defined by the warrant "execution of the search warrant was within the warrant's scope because each page contained at least one reference to the employees that were under investigation". ER. p. 217. This ignores the fact that the District Attorney and Sheriff refused to provide the opportunity to redact the unnecessary portions of the records seized. As such, the

seizure of documents was over-broad and in violation of the established law as it relates to unnecessary search and seizures.

Upon discovery that there were records for seventy-eight "other" individuals included with the items listed in the warrant, the District Attorney and Sheriff should have either obtained a search warrant broader in scope, allowed redaction, or complied with the Tribe's policies and procedures for obtaining personnel information. See Mena v. City of Simi Valley, 226 F.3d 1031, 1039 (9th Cir. 2000).

G. The County is not Affected by Qualified Immunity

Absolute and qualified immunity possessed by officers sued in their personal capacity are not available to a municipality under § 1983. Wallis v. Spencer et al., 202 F.3d 1126, 1144 (9th Cir. 2000); Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163, 166 (1993). If this court finds that the District Attorney and Sheriff are entitled to qualified immunity, suit against the County should be allowed to proceed, since the County may still be liable under Monell v. New York Dep't of Social Services, 436 U.S. 658 (1978) if the trial court finds there to be a custom of conducting unlawful searches. Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989).

CONCLUSION

This case is not about a recalcitrant party who jealously attempts to guard its possessions. It is about government-to-government relationships and how sovereign political entities interact. It is about one political entity attempting to usurp the sovereign authority of another. The United States Congress is the only source of authority that can create the legal vehicle necessary to establish the authority/jurisdiction that County officials are seeking. P.L. 280 is not that vehicle. So sayeth unequivocally Bryan, Quechan and James.

The rationale of McMillan, Streit and Roe establish that the District Attorney and Sheriff were acting as arms of the County under the factual content of the underlying complaint. The National Congress of American Indians (NCAI) will be requesting this Court's permission to file an amicus curiae brief.

The Tribe endorses the concept advanced by the NCAI that the underlying statute in question (welfare) was in fact regulatory in nature and not a criminal/prohibitory statute, thus falling within the California v. Cabazon, 480 U.S. 202, rationale. With the Court's permission, the Tribe would incorporate the arguments of NCAI within this brief.

This Court is requested to reverse the judgment of the District Court and to award Tribe costs of appeal.

Respectfully submitted this 30th day of April, 2001.

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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 13,477 words.

Dated: April 30, 2001

Anna S. Kimber

STATEMENT OF RELATED CASES

(Circuit Rule 28-2.6)

Appellants are unaware of related cases pending in this Court.

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 May 1, 2001, 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:

AMENDED OPENING BRIEF OF APPELLANTS

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

Paul N. Bruce, County Council
John D. Kirby, Special Legal Council
224 N. Edwards
Post Office Box M
Independence, CA 93526

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 May 1, 2001, at San Diego, California.

_____
Rosa Rivas