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

MOTION BY APPELLEES COUNTY OF INYO, PHILLIP McDOWELL (DISTRICT ATTORNEY), AND DAN LUCAS (SHERIFF), FOR LEAVE TO FILE REPLY TO APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC [WITH REPLY ATTACHED]

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

MOTION BEING MADE

Appellees COUNTY OF INYO, Inyo County District Attorney PHILLIP McDOWELL, and Inyo County Sheriff DAN LUCAS, move for leave to file the attached short Reply to the Response of appellants (or Corrected Response if the Court permits the late-submitted Corrected Response to be filed as appellants have requested) to the Petition for Rehearing En Banc now pending.

The Reply is a concise 6 pages, and points out the incorrectness and invalidity of the major premise upon which appellants have built and submitted their entire Response. It is respectfully submitted that the Reply will aid the Court in identifying the primary legal issue in this case, and in reaching its decision on rehearing the subject case en banc.

DATED: April 11, 2002

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

Case No. 01-15007

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

In The

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

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

REPLY BY APPELLEES TO APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC

Paul N. Bruce, County Counsel (081619)
John D. Kirby, Special Legal Counsel (66432)
Office of the 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY TO APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC

I. PRIMARY LEGAL ISSUE MADE CLEAR.

Appellants' Response makes it clear that the primary legal issue in this case is as follows:

> When there is probable cause to believe that evidence of an off-reservation violation of State criminal law is either located on tribal owned property (e.g., an Indian gaming casino), or is itself tribal owned property (e.g., records of a tribal business activity, tribal owned motorhome or other tribal vehicle, tribal owned weapon, tribal owned video or audio tape, etc.), and a State judge issues a search warrant for such property, after adhering to Fourth Amendment protections, then:
>
> 1. Does the law allow State law enforcement officers to honor the search warrant, search for the property identified in the warrant as evidence of off-reservation State crime, and seize the items described; or
>
> 2. Does the Indian tribe which owns the property being searched, or searched for, have the authority to regulate or prohibit State law enforcement officers from executing the search warrant for evidence of the off-reservation State crime?

II. BECAUSE THE MAJOR PREMISE OF THE TRIBE'S RESPONSE AND THE PANEL'S DECISION IS INVALID, THE PANEL'S DECISION IS INCORRECT.

The major premise of appellants' response, and the major premise upon which the panel's decision rests, is that the refusal to turn over the tribal

property described in the search warrant -- casino payroll records -- is an act that is unrelated to and of no concern to the State or other nonmembers of the Tribe. As such, argues the Tribe (and the Panel has incorrectly held), the sovereignty of the Tribe is retained in the matter, and the sovereign immunity of the Tribe that derives from that retained sovereignty may therefore be asserted. Therefore, states the Panel, the analysis and holdings of ***United States v. Wheeler***, 435 U.S. 313 (1978), ***Montana v. United States***, 450 U.S. 544 (1981), and ***Nevada v. Hicks***, 533 U.S.353 (2001), are not applicable. (See Tribe's Response, pages 3-4; and ***Bishop Paiute Tribe v. County of Inyo, et al.***, 275 F.3d 893, 901).

However, a review of the matter shows that the Tribe's and the Panel's major premise is invalid and incorrect, because the State, as well as its non-tribal citizens, clearly have an interest in being protected from, and in the prosecution of, off-reservation violations of State criminal laws – the commission of crime off the reservation in the communities of this State. In fact, this interest has been found by the Supreme Court to be a considerable interest.

This was so held in ***Nevada v. Hicks***, 533 U.S.353 (2001), where the Supreme Court stated:

> "Indian tribes' regulatory authority over non-members is governed by the principles set forth in *Montana v. United States*, 450 U.S.

544, 101 S.Ct. 1245, 67 L.Ed. 2d 493 (1981), which we have called the "pathmarking case" on the subject, *Strate* [v.A-1 Contractors, 520 U.S. 528 (1997)], *supra*, at 445, 117 S.Ct 1404. (*Nevada v. Hicks*, supra, 2309)

. . .

"Where non-members are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government, or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation.' Id., at 564, 101 S.Ct 1245 (footnote omitted)." (*Nevada v. Hicks*, supra, 2309-2310)

. . .

"In *Strate*, we explained that what is necessary to protect tribal self-government and control internal relations can be understood by looking at the examples of tribal power to which *Montana* referred: tribes have authority '[to punish tribal offenders], to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members,' 520 U.S., at 459 (brackets in original), quoting *Montana, supra*, at 564, 101 S.Ct. 12454." (*Nevada v. Hicks*, supra, 2311)

. . .

"Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. (*Nevada v. Hicks*, supra, 2311)

. . .

"We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process [search warrants] related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations – to 'the right to make laws and be ruled by them.' The **State's interest in execution of process is considerable**, and even when it relates to Indian-fee lands it no more impairs the tribe's self-

government than federal enforcement of federal law impairs state government." (*Nevada vs. Hicks*, supra, 2313; emphasis added)

Independent analysis leads to the same result. Clearly the State and its nontribal citizens have an interest in ensuring that violations of the State's criminal laws – off-reservation crimes committed in the non-reservation communities of this State – are investigated and prosecuted. In the instant case, clearly the State and its citizens have an interest in ensuing that welfare monies are not stolen or fraudulently obtained by theft or deceit, to the harm and detriment of others who are deserving of the funds. Further, no one can seriously disagree with the statement that one the most basic functions of a State is to provide protection of its citizens from crime. Thus, the State and its nontribal (as well as tribal) citizens have a clear, basic and unquestionable interest in the pursuit of evidence of crimes committed off the reservation, and in the prosecution of those crimes.

As such, the major premise of the Tribe's argument, and the major premise of the Panel's decision, is invalid. Accordingly, the *Montana* analysis and line of cases, including *Nevada v. Hicks*, is applicable, and the sovereignty of the Tribe is divested with regard the its claimed sovereign right to prohibit the execution of a search warrant for evidence of off-reservation crime.

III. THE FOREGOING DOES NOT LEAVE THE TRIBE AT THE MERCY OF UNMITIGATED STATE INTERVENTION; FOR AS THE SUPREME COURT ALSO HELD IN HICKS, THE TRIBE CLEARLY RETAINS THE PROTECTIONS GUARANTEED BY FEDERAL CONSTITUTIONAL AND STATUTORY LAWS, TO WHICH THE LAW ENFORCEMENT OFFICERS ARE FULLY SUBJECT.

Any fear that the execution of search warrants on or against tribal property might be an invitation to the State to engage in, or open the door to, unmitigated intervention in tribal self-government or the control of internal relations was dispelled by the Supreme Court in *Hicks,* supra, at pages 2316-2317, where the Supreme Court addressed the matter and stated:

> "That the actions of these state officers cannot threaten or affect those interests is guaranteed by the limitations of federal constitutional and statutory law to which the officers are fully subject. . . Moreover, even where the issue is whether the officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- and state-law rights." (*Hicks,* supra, at pages 2316-2317)

Accordingly, the Fourth Amendment protections of the Tribe and its members against unreasonable searches and seizures, the Civil Rights protection of the Tribe and its members under 42 U.S.C. 1942, and all of the

other federal and state protections against improper law enforcement officer conduct remain in full force and effect.

IV. CONCLUSION.

The major premise and position of the Tribe, and of the Panel's decision, that protecting casino payroll records from search is an act that is of no concern to the State or other nontribal members, is false. The Supreme Court has held that the interest of the State is considerable. The *Montana* analysis is indeed applicable, and as has been established in *Hicks*, supra, because there is such an interest, any claimed sovereignty has been divested from the Tribe.

This does not mean that the Tribe is to be subjected to unmitigated intervention into its activities by the State, in that all Constitutional, Civil Rights, and other federal and state law guarantees against improper law enforcement activity remains in full force.

DATED: April 11, 2002

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

PROOF OF SERVICE BY MAIL

I am employed in the County of Inyo, over the age of 18 years and not a party to the within entitled action. My business address in the County of Inyo is 224 North Edwards, P.O. Box M, Independence, California 93526.

On April 11, 2002, I served the foregoing document described as:

MOTION BY APPELLEES COUNTY OF INYO, PHILLIP McDOWELL (DISTRICT ATTORNEY), AND DAN LUCAS (SHERIFF), FOR LEAVE TO FILE REPLY TO APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC [WITH REPLY ATTACHED]

on all parties in said action, by causing a true copy thereof to be transmitted in a sealed envelope, to each party/attorney shown below, 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.

[X] FEDERAL I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

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

Dated: April 11, 2002

_____
JOHN D. KIRBY