

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STOP THE CASINO 101 COALITION,
et al.,

Plaintiffs-Appellants,

v.

KEN SALAZAR, Secretary of the United
Stated Department of the Interior, et al.,

v.

Defendants-Appellees.

FEDERATED INDIANS OF GRATON
RANCHERIA,

Intervenor-Appellee.

Case nos. 09-16294 and
09-16297 (consolidated)

N.D. Cal. case no.
08-cv-2846-SI (San
Francisco)

Hon. Susan Illston, United
States District Court Judge

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INTRODUCTION

This appeal follows the dismissal of a complaint under Rule 12(b)(1), Fed.R.Civ.P., on the sole ground that the plaintiffs failed to identify any injury sufficient for Article III standing. But the complaint shows they are local residents with personal and concrete interests directly threatened by appellees United States Bureau of Indian Affairs (“BIA”), et al. BIA has issued a decision and legal position that would drastically affect property in their neighborhood. Their complaint satisfies Article III because BIA’s intended action “hits them where they live.” *Society Hill Towers Owners’ Ass’n. v. Rendell*, 210 F.3d 168, 177 (3d Cir. 2000).

The subject matter of the case is a parcel of land in and abutting the City of Rohnert Park, California, close to a busy intersection of Highway 101. As BIA itself confirmed below, the property “consists largely of agricultural land. . . .” (Excerpts of Record [“ER”] 21) That traditional and quiet use, secured by state and local law, personally and concretely benefits each of the local residents who brought this action. They so alleged in great detail. (*Post*, pp. 16-20) But on April 18, 2008, BIA

released a decision threatening to replace this agricultural preserve with a use highly noxious to the residents.

It is undisputed that the land in question has never been an Indian reservation, or owned by any Indians, any time since California's admission as a state. (ER 45-46, ¶ 91) Indeed, the record reveals its current ownership and control by Station Casinos, Inc., a major Las Vegas gambling enterprise. (ER 21) Nonetheless, BIA has issued a final decision to acquire the land in trust for intervenor-appellee Federated Indians of Graton Rancheria ("Federated Indians") (ER 55-61), and has declared that the acquisition would abrogate state and local planning restrictions to pave the way for a Las Vegas-style casino and hotel. (ER 22-23)

BIA's decision and opinion present a concrete, substantial, and immediate legal dispute with the residents. They contend, for example, that the site chosen does not even meet the criteria specified by Congress. (*Post*, pp. 10-12) They also dispute BIA's premise that a federal acquisition of the site would abrogate the state and local laws securing the

present agricultural use of the land and prohibiting the intended gaming there. (*Post*, pp. 13-14)

Nevertheless, the appellees successfully argued below that the merits were immaterial — that no injury satisfying Article III could occur unless and until a casino complex is built, or at least all further approvals and permits are obtained. And that was the only issue the District Court decided below. (ER 4-13) It characterized BIA’s announced acquisition as a mere preliminary step, causing at best “speculative” harm to the residents. (ER 8, ln. 6) The court told them to wait until all the “numerous requirements” had been met for the actual “building of a casino complex on the parcel. . . .” (*Id.*, lns. 27-28)

Settled law belies the appellees’ contention that Article III requires immediate injury. (*Post*, pp. 30-35) In fact, case law supports the residents’ injury-in-fact standing on several counts. First, they exhaustively alleged “concrete and particularized interests,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), directly threatened by BIA’s announced action and position. (*Post*, pp. 35-39) Second, BIA’s announcements frame a present,

concrete, and highly consequential dispute over the legal status of the land and the regulatory regime that would follow, for the difference between federal and state development requirements is profound. (*Post*, pp. 40-43) Finally, even if immediate injury *were* required, this record establishes it for present purposes in the form of procedural injury and diminution of the residents' property values. (*Post*, pp. 43-51)

It bears emphasis, finally, that this lawsuit does not question the wisdom of federal support for Indians or their desire to establish casinos in appropriate places. But Article III permits the local residents in this case to pursue their personal, concrete, and legitimate concerns about BIA's radical designs for their neighborhood. This Court should therefore reverse the judgment and remand for further proceedings.

JURISDICTIONAL STATEMENT

Subject matter jurisdiction below was predicated on 28 U.S.C. §§ 1331 (federal questions), 1346(a)(2) (United States as defendant), and 2201(a) (actual controversy warranting declaratory relief), and 5 U.S.C.

§ 702 (final agency action). In brief, the residents brought this action against relevant departments and officials of the United States seeking appropriate relief concerning a final agency decision to acquire land in trust for the Federated Indians.

The judgment appealed from (ER 3) was final within the meaning of 28 U.S.C. § 1291 and this Court's jurisdiction is predicated on that statute. The district court entered judgment dismissing the operative complaint under Rule 12(b)(1), Fed.R.Civ.P. The judgment disposed of all pending claims between all parties.

The appeal is timely. The district court's separate final judgment was entered on April 21, 2009. (ER 3) The residents submitting this brief filed their notice of appeal on June 18, 2009. (ER 1) It was timely under Rule 4(a)(1)(B) because United States officers and agencies were parties.

ISSUE PRESENTED FOR REVIEW

On motions attacking the residents' complaint under Rule 12(b)(1), Fed.R.Civ.P., for want of an injury satisfying Article III, does the record sufficiently establish "concrete and particularized interests" (*Lujan*) and a justiciable dispute over BIA's intended acquisition of quiet agricultural land near the residents' homes for the purpose of transforming it into a large casino resort?

STATEMENT OF THE CASE

A.

SUMMARY OF THE PROCEEDINGS

BIA released the decision in question on April 18, 2008 (ER 55) and noticed it in the Federal Register on May 7, 2008. (ER 45, ¶ 89) The residents and their association, Stop the Casino 101 Coalition (together, "the residents"), timely filed their original complaint on June 6, 2008 (Docket #1), although the operative pleading for present purposes is their first amended complaint ("the complaint") filed on January 29, 2008. (ER

26) Named as defendants are BIA, the Secretary of the Interior, and other relevant officials (together, “BIA”). The Federated Indians intervened as a defendant on December 15, 2008 (Docket #36), without objection by the residents. (Docket #31)

In brief, the complaint attacks BIA’s decision under the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.*, and seeks appropriate declaratory and injunctive relief, on two basic grounds. First, it challenges the intended acquisition on the basis that the targeted land does not meet criteria set forth in the relevant statute, the Graton Rancheria Restoration Act, 25 U.S.C. §§ 1300n-1 *et seq.* (ER 47-48) Second, the complaint challenges the *effect* of the acquisition asserted by BIA and the other appellees: that it would pave the way for the intended casino development and gaming activities. The residents contend the acquisition would have neither effect, because it would leave intact the state and local planning and zoning laws barring the development and the state laws barring the intended gaming. (ER 48-50)

On February 20, 2009, the federal defendants and the Federated Indians filed separate motions to dismiss the complaint. (Docket ## 50-51) Under Rule 12(b)(1), they argued that the residents lacked Article III standing, prudential standing, and a ripe controversy. Under Rule 12(b)(6), they attacked the merits of the residents' claims.

On April 21, 2009, United States District Court Judge Susan Illston entered a 10-page order granting the two motions under Rule 12(b)(1) alone, and on the sole ground of failure to establish any Article III injury in fact. (ER 4-13) A separate final judgment was entered the same day. (ER 3)

B.

THE SUBSTANTIVE ISSUES

This section briefly summarizes the substantive issues of the case as context for the Article III issue presented on appeal.

1.

The Graton Act

The Graton Rancheria Restoration Act, 25 U.S.C. §§ 1300n-1 *et seq.* (“the Graton Act”), enacted in 2000, provides that the Federated Indians qualify for “restoration” as a tribe and the federal benefits that typically follow. 25 U.S.C. § 1300n-2. The complaint below, however, raises substantial questions about the pertinent history and its bearing on the casino project in dispute. (ER 40-46, ¶¶ 64-92)

The Graton Act also authorizes a land acquisition in trust for the Federated Indians, but subject to specified criteria:

Upon application by the Tribe, the Secretary shall accept into trust for the benefit of the Tribe any real property located in Marin or Sonoma County, California, for the benefit of the Tribe after the property is conveyed or otherwise transferred to the Secretary and if, at the time of such conveyance or transfer, there are no adverse legal claims to such property, including outstanding liens, mortgages, or taxes. (25 U.S.C. § 1300n-3, subd.(a))

2.

The Residents' Contention that the Act Does Not Authorize this Acquisition

The residents' first substantive argument is that the land BIA targeted for acquisition does not meet the Graton Act's criteria. For example, the record below suggests that "adverse legal claims" would, in fact, exist "at the time of such conveyance or transfer." *Id.*

First, BIA documents below state that adverse legal claims within the meaning of the Graton Act include "potential environmental claims" or "liability." (ER 53 & 61; alleged at ER 19, ¶ 77) And another BIA document, an October 2007 regional report adduced by the appellees (ER 15-25), identifies a number of situations raising potential environmental claims involving the chosen site.¹ Although BIA's April 2008 decision includes a legal conclusion dismissing all those concerns (ER 61), only its

¹ The report cites septic tanks "creat[ing] issues with microbiological and secondary water quality standards" (ER 21); sixteen near-by leaking underground storage tank sites included on the "Cortese list" maintained by the California Department of Toxic Substances Control (ER 22); and "structures on site" posing a risk of "asbestos materials and lead based paint." (ER 21-22)

prior statement of the relevant facts may and should be considered for Rule 12(b)(1) purposes. (*Post*, pp. 15-16)

Second, the record reveals *existing* adverse legal claims on the property. The complaint alleges recorded “Williamson Act” contracts under Cal. Gov’t. Code §§ 51200 *et seq.*, whereby owners agree to maintain the agricultural use of their land for periods of time. (ER 45, ¶ 85) However, the October 2007 BIA report adduced below identifies other recorded interests as well, noted as “exceptions” on BIA’s title examination. (ER 23) Among those are:

property . . . subject to the Rohnert Park Redevelopment Plan recorded with the County of Sonoma in accordance with the Community Redevelopment Law of the State of California. [and] property . . . subject to a Declaration of Restrictions . . . recorded by the Rohnert Business Park Associates . . . [which] sets forth conditions, covenant and restrictions on the property in order to effectuate the Rohnert Park Redevelopment Plan for the Rohnert Park Redevelopment Project” (ER 22)

The same BIA report contends that those interests do not violate the Graton Act condition because the acquisition would *extinguish* them:

[*When* the property is taken into trust by the United States, provisions of § 33000 of California [Health & Safety Code], the Rohnert Park Redevelopment Plan, and the Declaration [of Restrictions] *will* not apply. These exceptions to title accordingly do not constitute adverse legal claims that would prevent acquisition. . . . (ER 22-23; italics added)

But the residents believe an interest exists “at the time” of an acquisition, as specified by the Graton Act, if the interest would only be extinguished by the acquisition itself. Moreover, the residents dispute BIA’s contention that this acquisition *would* extinguish any interest protected by state law.

3.

The Residents’ Contention that Congress Did Not Authorize Preemption of State Law

The residents also question whether the Graton Act was intended to authorize a casino project where, as here, it would require preemption of state and local laws. As alleged in the complaint, the Federated Indians assured Congress they were “foregoing the right to conduct gambling, and . . . did not want to develop the land for casinos.” (ER 39, ¶ 56) And the pertinent House Committee Report “made clear that Congress did not intend that placement of property into trust would preempt State law. The

Committee wrote: ‘This bill is not intended to preempt any State, local, or tribal law.’ House Report 106-677, p. 3.” (*Id.*) Nor is there any contrary intimation in the Graton Act itself.

4.

The Residents’ Constitutional Challenge to the Intended Gaming Activities

Finally, even assuming the Graton Act was intended to authorize *any* preemption of state and local law, the residents question the constitutionality of such an authorization as applied here. The targeted land has been in private hands since California’s admission as a state (ER 46, lns. 1-4), yet BIA is relying on the simple expedient of a private trust conveyance without California’s consent. A number of courts have agreed with *Coso Energy Developers v. County of Inyo*, 122 Cal.App.4th 1512, 1520 (4th Dist. 2004), that there are only three ways to acquire the requisite federal sovereignty over state land: “(1) by purchase or donation of property with the consent of the state as provided in the United States Constitution (U.S. Const., art. I, § 8, cl. 17. . .); (2) by a reservation of jurisdiction by the United States upon the admission of the state into the union (*Fort Leavenworth [R.R. Co. v. Lowe]*, 114 U.S. 525 (1885), . . . at pp.

526-527. . .); and (3) the state's cession, together with the United States acceptance, of such jurisdiction (*id.* at p. 539. . .).”

While the Commerce Clause broadly confers authority over Indian affairs, the residents believe it is too slim a reed to support divestment of state jurisdiction over newly purchased land without state consent. *See, e.g., Alden v. Maine*, 527 U.S. 706, 732 (1999), holding that “Article I powers delegated to Congress” do not *ipso facto* authorize curtailments of traditional aspects of state sovereignty. Moreover, this case presents the situation this Court expressly excluded from its holding in *Artichoke Joe’s Calif. Grand Casino v. Norton*, 353 F.3d 712, 735, n. 16 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004): “lands that are purchased specifically for the purpose of conducting class III gaming activities. . . .”

The foregoing summary of the substantive issues is sufficient for present purposes. We turn now to the allegations and documents supporting the residents’ injury in fact under Article III.

**STATEMENT OF FACTS: THE ALLEGATIONS
AND OFFICIAL DOCUMENTS SUPPORTING THE
RESIDENTS' ARTICLE III INJURY**

A.

**INTRODUCTION: IDENTIFYING THE
CONTROLLING FACTS**

“For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000), quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975). And “reasonable inferences” from the factual allegations must also be considered. *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009), discussing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, — U.S.—, 129 S.Ct. 1937 (2009). (See further discussion *post*, pp. 36-37.)

Finally, two kinds of documents may be considered along with the allegations and inferences. First, *Tyler* held that “we may consider facts contained in documents attached to the complaint.” *Id.* Second, the court

may also consider documents adduced by a moving party, without converting the 12(b)(1) motion to a summary judgment motion, but only to the extent they present facts judicially noticeable or otherwise of unquestionable authenticity. *In re Stac Electronics Securities Litig.*, 89 F.3d 1399, 1405, n. 4 (9th Circ. 1996), *cert. denied*, 520 U.S. 1103 (1997). Here, the BIA documents cited in this brief contain statements meeting those criteria: official positions having legal and factual consequences for the residents, and reliable factual recitations of environmental concerns and title exceptions relevant to the “adverse legal claims” issue.

B.

THE RESIDENTS’ CONCRETE AND PARTICULARIZED INTERESTS AT RISK

The residents’ complaint contains detailed allegations about their personal interests threatened by the BIA’s plans. By way of introduction, the residents allege they are “citizens who live near the Property, own land or businesses near the Property, or have other interests directly affected by [the Federated Indians’s] proposed use of the Property. . . .” (ER 30, ¶ 15) That use, they allege:

would cause substantial harm to the natural environment and the City of Rohnert Park through water contamination, increased flooding, traffic congestion and air pollution, and the degradation of public spaces and roads, and would therefore cause severe social, economic, and quality-of-life impacts on the area and its residents. (ER 31, lns. 1-4)

The residents also alleged their common “interests in safe roads and neighborhoods, a clean and sustainable water supply, and cities that are free from crime and blight. . . .” (ER 35, ¶ 31)

The complaint backs up the foregoing allegations with four pages of plaintiff-specific allegations. (ER 31-34) Typical are those about the first named plaintiff, Mr. Robert Aherne:

He resides. . . approximately three miles from the Property. He has lived at this location for seven years. Mr. Aherne will suffer injury from the proposed casino project due to the increased traffic congestion, crime and noise, air and water pollution associated with casino operations. He may also suffer economic injury depreciation in the value of his property. (ER 31, ¶ 16)

The allegations about the other plaintiffs presenting this brief can be summarized as follows:

- Plaintiff Amy Boyd lives only 1.5 miles from the proposed casino site, depends on a well she owns, and her only access roads will serve as the main secondary routes to the proposed casino project even though they are unsafe. Moreover, she is threatened with economic injury because the casino would degrade and deplete her water supply. (ER 31, ¶ 17)

- Plaintiff Lisa Catelani has lived for 18 years only 2.5 miles from the site, and values the “family-friendly neighborhood” the casino would destroy. (ER 31, ¶ 18) She will also suffer harm to her quality of life due to the drastic increase in traffic congestion and noise pollution associated with the pending casino project. (*Id.*)

- Plaintiffs Michael Erickson and Michael Healy singled out the increased traffic congestion and risk of accidents on Highway 101. (ER 32, ¶¶ 20-21)

- Plaintiff Linda Long owns a home and a separate condominium just opposite the highway from the site. She “chose to settle in Rohnert Park because it is a quiet, family-friendly neighborhood.” (ER 32, ¶ 22) She also values the open space and tranquility for her daily walks, and alleges that the proposed casino will diminish that enjoyment and inflict

other harms associated with traffic congestion. She also cites the prospect of economic injury in the form of diminished property value. (ER 32-33, ¶ 22)

- Plaintiff Lisa McElroy, whose water supply depends on a shallow well, cites environmental and economic injury because the proposed casino would diminish local groundwater supplies, increasing her pumping costs and potentially causing her well to run dry. She also cites injuries from increased flooding, traffic congestion, noise pollution, and water and air contamination. (ER 33, ¶ 23)

- Plaintiff Pam Miller raises sheep, chickens and geese on her property near the site, and also runs a home-based construction business and maintains a landscaped garden. She, too, cites environmental and economic injury from the proposed casino because it will deplete the groundwater supply from her well and increase pumping costs. She also cites injury to her quality of life from increased flooding, traffic congestion, noise pollution, and water and air contamination. (ER 33, ¶ 24)

- Plaintiff Marilee Montgomery has lived for 14 years less than one mile from the site. She “chose this sparsely populated and rural neighborhood because she wanted a peaceful and natural place to live.”

Her only access street, Wilfred Avenue, runs right along the edge of the proposed casino site. She also cites injury from noise and air pollution and increased traffic congestion. (ER 33, ¶ 25)

- Plaintiff Jamie Wallace, residing only 3 miles from the site, likewise chose to live in Rohnert Park “because it is a family-friendly community. . . .” She cites injury because the casino would “drastically and permanently change the rural character of her community, and increase traffic congestion and crime.” She also cites the prospect of diminution of her property value. (ER 34, ¶ 27)

- Finally, plaintiffs Rev. Chip Worthington and his wife, Linda Worthington, who live three miles from the site, allege injury from increased crime, traffic congestion, and noise pollution. In addition, Rev. Worthington cites injury to the Rohnert Park Assemblies of God Church where he serves as Pastor. It lies on a street prone to flooding in heavy rainfall, so the “the local general plan and zoning prohibit large-scale parking lots and structures in the area. If the casino facility is built on the proposed site, it will result in the diversion of rainwater from the natural flood plain onto local streets, flooding the church’s street and impeding public access to the church.” (ER 34, ¶¶ 28-29)

C.

THE CONCRETE AND IMMEDIATE LEGAL DISPUTE

The record establishes that BIA's intended acquisition, without more, presents a concrete, immediate, and substantial legal dispute with the residents affecting their personal interests as just summarized. To begin with, BIA's October 2007 BIA report (ER 16-25) states that the intended acquisition in trust, without more, would abrogate all "California zoning laws. . . ." (ER 22) But the residents dispute that the acquisition, with such drastic effects claimed by BIA, is even authorized by the Graton Act because of the presence of adverse legal claims. So the first level of this dispute is whether the acquisition may even take place.

The second level of the dispute involves the legal effect of the acquisition even if it were to go forward. The residents respectfully disagree with BIA's position that the acquisition would abrogate state and local planning law and state anti-gaming laws (Cal. Penal Code §§ 330, 330a & 330b) barring the proposed casino development. The residents contend that a private trust conveyance would not divest California's jurisdiction over this newly purchased land, under California's sovereignty

at all times since its admission, without its consent as prescribed by the United States Constitution. (*Ante*, pp. 13-14)

Finally, the residents dispute BIA's position that the acquisition requires no prior review under two pertinent federal statutes, the Indian Gaming Regulatory Act, 25 U.S.C. § 2719 ("IGRA"), or the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). We address this aspect of the case in the following section.

D.

THE PROCEDURAL INJURIES TO THE RESIDENTS' INTERESTS

The record establishes that the residents' personal interests, as summarized previously, are threatened with immediate procedural injury within the meaning of applicable case law. (*Post*, pp. 43-48) As one allegation below aptly summarized, BIA's announced acquisition and legal position threaten to "deprive[] plaintiffs of the ability to protect their rights and their communities." (ER 35, ¶ 31)

First, BIA's April 2008 decision announces its intent to consummate this acquisition without the ordinary prior review required by NEPA. As BIA explained: "[a]lthough NEPA compliance is generally required on [Indian] trust acquisitions . . . , NEPA compliance is not required in this instance since the acquisition . . . is explicitly mandated by [the Graton Act]." (ER 60)

But the residents contend the proposed acquisition *violates* the Graton Act (*ante*, pp. 9-12), so it can hardly justify a denial of a prior NEPA review. Moreover, the associated procedural injury is substantial. The residents are threatened with a lost opportunity to challenge the acquisition itself — with the radical effect BIA ascribes to it — in a review for NEPA compliance. No future NEPA review, as touted below, can afford the same opportunity.

Second, BIA's April 2008 decision states that the acquisition will proceed without the ordinary prior review for gaming eligibility under IGRA, on the same premise that the acquisition was mandated by the Graton Act. (ER 60) But the residents dispute that premise for IGRA

purposes, too, and their associated procedural injury is unique and substantial for the same reason cited as to NEPA. Here, too, BIA is threatening the residents with a lost opportunity to stop the acquisition altogether — by demonstrating, for example, that gaming on the targeted site would be “detrimental to the surrounding community” 25 U.S.C. § 2719(b)(1)(A), or that IGRA’s “restoration of lands” provision, *id.*, subd. (b)(1)(B)(iii), does not apply. (See pertinent allegations at ER 40-46.) The lost opportunity to advance such arguments before the acquisition, in an attempt to prevent it, is a significant procedural injury given BIA’s position about its legal effect.

Finally, the October 2007 BIA report (ER 16-25) confirms the residents’ allegation of a lost opportunity to participate in *local* reviews that the casino proposal would otherwise face. The residents allege, for example, that “[d]evelopment of the proposed complex would be inconsistent with numerous provisions of the Sonoma County General Plan and, absent amendment of that Plan and its zoning regulations, would not be allowed.” (ER 46, ¶ 92) Yet BIA’s report states that the

acquisition would abrogate all state and local planning laws. The report even cites BIA's published regulation to that effect:

a zoning provision . . . is not applicable to property held in trust by the United States pursuant to 25 CFR § 1.4, and the Secretary [of the Interior] has not adopted California zoning laws with respect to property held in trust by the United States. (ER 22)

Accordingly, the record establishes BIA's threat to deprive the residents of a legally guaranteed and powerful voice against any such amendments and more favorable environmental reviews. (*Post*, pp. 46-48) The decision-makers would be local officials appropriately responsive to their local constituents. According to BIA, however, the decision-makers would be federal agencies that champion Indian casinos. In short, BIA's position would tilt the playing field 180 degrees in a hostile direction.

E.

THE THREAT OF DIMINUTION OF PROPERTY VALUES

Finally, the record establishes that the acquisition, as BIA construes it, threatens immediate as well as future diminution of property value.

Although some residents allege future diminution from an actual casino, the complaint reasonably implies immediate diminution of value for all the residents.²

To begin with, the complaint alleges that all residents enjoy “benefit[s] from California laws which set limits on land use and development. . . .” (ER 27, ¶ 4) The allegations previously reviewed in this brief spell out those benefits in detail, and generate a reasonable inference that the benefits are contributing to the residents’ property values. Prospective buyers pay more for such benefits.

Next, the complaint expressly ties these benefits to state and local laws. BIA’s intended use of the land is “inconsistent with numerous provisions of the Sonoma County General Plan and, absent amendment of that Plan and its zoning regulations, would not be allowed.” (ER 46, ¶ 92)

² To the extent the residents are developing this or other points beyond the briefing below, it is permissible because the points are squarely presented by the record below, and are “pure issue[s] of law, and . . . consideration of [them] will not prejudice” the appellees. *Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1443 (9th Cir. 1997), *cert. denied*, 523 U.S. 1112 (1998).

Thus, the complaint reasonably implies that the benefits the residents enjoy now, and prospective buyers *would* enjoy, are secured by state and local planning restrictions and state law prohibiting the gaming intended.³

Finally, all residents allege that the acquisition, as construed by BIA, would immediately “strip[] the Coalition and its members of the protection of California’s laws regulating land and water use and development and forbidding Nevada-style gambling, contrary to plaintiffs’ justifiable expectations.” (ER 30, ¶ 15; see also ER 27, ¶ 4 [“plaintiffs’ settled expectations as residents and business owners in the area would be disrupted”].) The complaint thus reasonably implies that the residents’ “justifiable” and “settled” expectations include the continued protection of their property values by applicable state and local law, subject only to amendments by the ordinary prescribed methods. (See argument on this point, *post*, p. 39.)

³ Although the planning restrictions are duplicated to some extent by the Williamson Act contracts under Cal. Gov’t. Code §§ 51200 *et seq.*, such contracts do not compare to state and local planning and zoning restrictions. Property owners are free to let Williamson Act contracts expire or seek their cancellation. (ER 45, ¶ 85)

This aspect of the record establishes a threat of immediate value diminution in two ways. First is the loss of an agricultural preserve *guaranteed* as such by existing state and local laws. The housing market could no longer take it for granted. Prospective buyers of the residents' homes or businesses could not count on the benefits the residents enjoy now, and prices would decrease accordingly.

Second, the residents face a threat of immediate value diminution from the prospect of a casino resort taking over. BIA's own documents below confirm that the acquisition is a major step towards a casino. Although ultimate construction is not certain, the *prospect* of construction, with its harmful effects on the residents' environs, would reduce the market value of their properties. Good or bad prospects are never certain, but they always determine present market value. (*Post*, pp. 50-51)

SUMMARY OF ARGUMENT

Case law belies the appellees' fundamental premise that Article III requires a threat of immediate injury. *Assoc. of Data Processing Service*

Organizations, Inc. v. Camp, 397 U.S. 150 (1970), relied on possible future competitive injury, and *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080 (9th Cir. 2003), relied on possible future water shortages and economic consequences. Other cases are in accord.

Here, the allegations meet current pleading standards, *Moss v. U.S. Secret Service, supra*, 572 F.3d 962, as well as the injury-in-fact tests of concrete and particularized interests, *Lujan v. Defenders of Wildlife, supra*, 504 U.S. 555; *Society Hill Towers, supra*, 210 F.3d 168, and a justiciable controversy affecting those interests. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941). In addition, the record further supports Article III standing with procedural injuries, *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961 (9th Cir. 2003), and diminution of property value. *Construction Indus. Assoc. v. City of Petaluma*, 522 F.2d 897, 904 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

ARGUMENT

I.

ARTICLE III DOES NOT REQUIRE A THREAT OF IMMEDIATE INJURY

“We review questions of standing de novo.” *Tyler v. Cuomo, supra*, 236 F.3d 1124, 1131. Here, the Court should begin by rejecting the major premise of the judgment below: that Article III requires immediate injury from BIA’s intended acquisition. While the record below does establish a threat of immediate procedural injury and diminution of property value, case law does not require such immediacy.

At the outset, the appellees’ insistence on immediacy runs afoul of the fundamental purpose and flexibility of Article III. As stated in *Assoc. of Data Processing Service Organizations, supra*, 397 U.S. 150, 151-152:

Generalizations about standing to sue are largely worthless as such. . . . (I)n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an

adversary context and in a form historically viewed as capable of judicial resolution. (Cit. and quots. omitted)

But *Camp* did not merely state general principles. It upheld Article III injury-in-fact standing to challenge an administrative ruling without any showing of immediate injury from it. *Camp* cited the petitioners' "alleg[ations] that competition by national banks in the business of providing data processing services *might entail some future loss of profits* for the petitioners," and that only one bank so far "was performing or preparing to perform" such services. *Id.* at 152 (italics added). Hardly an immediate injury.

Nor is immediate injury required to maintain a declaratory relief action. This Court held in *Societe de Conditionnement En Aluminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938, 942 (9th Cir.1981), that "[t]he 'actual controversy' requirement of the [Declaratory Judgment] Act is the same as the 'case or controversy' requirement of Article III. . . ." Not surprisingly, then, this Court no more required immediate injury than *Camp* did:

Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Id.* at 942, quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (emphasis added).

The appellees' thesis is even more untenable in cases alleging procedural injury. Indeed, this Court flatly rejected that thesis when, just a few years ago, the Interior Department advanced it in *Laub v. U.S. Dept. of Interior*, *supra*, 342 F.3d 1080.⁴ *Laub* answered that “when, as here, a procedural violation is the injury alleged, the requirements of immediacy of the threatened harm are relaxed.” *Id.* at 1087. *Laub* stated that “the possibility of *future* injury may be sufficient to confer standing on plaintiffs; *threatened* injury constitutes ‘injury in fact.’” *Id.* at 1086-1087 (italics added).

⁴ “The Federal Defendants assert that Plaintiffs are unable to show they will likely suffer immediate injury or identify specific tangible actions that will immediately be taken under the PEIS/PEIR that will cause damage to them. This, they argue, indicates that Plaintiffs are unable to establish injury in fact.” *Id.* at 1086-1087.

The foregoing language is neither *dictum* nor distinguishable. The specific allegations *Laub* deemed sufficient are irreconcilable with the appellees' thesis that immediate injury is required:

The proposed implementation of CALFED's program would result in significant negative impacts on the environmental and economic health of the properties farmed by Laub and Jacobsen. [It] would directly result in shortages of water supply. . . . [It] would ultimately result in the potential loss of Laub's and Jacobsen's farming operations, jobs, and related services. . . . ¶] . . . [It] . . . would ultimately result in the potential loss of Sheely's farming operations, jobs, and related services. And, . . . [it] would jeopardize Sheely's entire livelihood by preventing him from having access to an adequate, reliable, affordable water supply of good quality. *Id.* at 1085-1086 (emphasis added).

Presidio Golf Club v. Natl. Park Service, 155 F.3d 1153 (9th Cir. 1998),

likewise upheld Article III injury-in-fact standing because:

[i]t is likely . . . that once the new public clubhouse is completed, the Club will lose more members. . . . Once most of the facilities are available at the new clubhouse [proposed by the Park Service], many more members may wish to stop paying private club membership dues. Such additional membership losses could well prove fatal to the Club, and

constitute a future injury-in-fact that is fairly traceable to the Park Service's alleged procedural violations. *Id.* at 1160 (emphasis added)

To the same effect is *Lujan v. Defenders of Wildlife, supra*, 504 U.S. 555, a leading authority on Article III procedural injury. Moreover, *Lujan's* language is directly relevant here:

[U]nder our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. *Id.* at 572, n. 7.

The residents are in exactly the same position. They live near the site for proposed construction of a casino resort, and they have standing even though they cannot establish with certainty that the procedural rights threatened by BIA would enable them to stop the casino or reduce its harm to them.

Finally, this Court has rejected the appellees' immediate-injury thesis another way, too. *Citizens for Better Forestry, supra*, 341 F.3d 961, 975, held

that “environmental plaintiffs have standing to challenge not only site-specific plans, but also higher-level, programmatic rules that impose or remove requirements on site-specific plans.” So here. BIA’s decision is a “higher-level” pronouncement that, as BIA construes it, would immediately and profoundly change the rules governing the development and use of the targeted land, and threaten the residents’ particularized interests as previously shown. Accordingly, they need not wait for site-specific plans to establish Article III standing.

II.

**PLAINTIFFS’ DETAILED ALLEGATIONS OF
CONCRETE AND PARTICULARIZED INTERESTS
SATISFY THE INJURY-IN-FACT TEST**

There is no need to repeat the residents’ detailed allegations of interests threatened by BIA’s decision and legal position. (*Ante*, pp. 16-20) We can readily demonstrate that those allegations satisfy both the Supreme Court’s recent pleading cases and the injury-in-fact test.

A.

THE COMPLAINT SATISFIES CURRENT PLEADING STANDARDS

At the outset, this Court clarified the status of federal pleading law only three months ago, in *Moss v. U.S. Secret Service, supra*, 572 F.3d 962.

First, it explained that *Bell Atlantic Corp. v. Twombly, supra*, 550 U.S. 544:

cautioned that it was not outright overruling . . . the foundational “notice pleading” case . . . but explained that [its] oft-cited maxim that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,” . . . read literally, set the bar too low. . . . [¶] At the same time, the Court appeared to signal that *Twombly* should not be read as effecting a sea change in the law of pleadings. 572 F.3d 968.

Moss also explained how *Ashcroft v. Iqbal, supra*, 129 S.Ct. 1937, subsequently clarified *Twombly*. The latter had merely rejected “bare assertions. . . amount[ing] to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim. . . .” *Moss* at 572 F.3d 969 (cits. omitted) In addition, *Iqbal* clarified *Twombly*’s plausibility standard, which is satisfied if “the plaintiff pleads factual content that

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (cits. omitted)

Finally, *Moss* summarized *Twombly* and *Iqbal* as follows: “for a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.* (cits. omitted)

The complaint below easily satisfies those tests. The pertinent allegations provide detailed factual content and reasonable inferences establishing Article III injury under the following case law.

B.

THE COMPLAINT SATISFIES THE INJURY-IN-FACT TEST

Society Hill Towers, supra, 210 F.3d 168, a decision cited with approval by *Shanks v. Dressel*, 540 F.3d 1082, 1090, n. 9 (9th Cir. 2008), held that local residents satisfied the Article III injury test because a proposed federal project — still far from construction — “hits them where they live.” 210 F.3d 177. The Third Circuit’s analysis is directly in point here:

[the] Residents live in the Society Hill area, and enjoy the amenities of th[at] historic district. . . . The Residents' claims all arise from their assertion that the project . . . will increase traffic, pollution, and noise in the Society Hill area where they live. . . . [and] will have a detrimental effect on the ambiance of their historic neighborhood . . . and that it will decrease their property values.

* * *

If the Residents do not have standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that anyone would have standing. . . . [¶] [They] have alleged concrete and particularized injury in the form of increased traffic, pollution, and noise that will detrimentally impact the ambiance of their historic neighborhood and their ability to use and enjoy the Penn's Landing waterfront. . . . *Id.* at 176-177.

The same principles and result obtained in a recent case involving another BIA-proposed acquisition in trust to develop an Indian casino. *TOMAC, Taxpayers of Michigan against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006), held there was “no serious question” about local residents’ Article III standing, expressly endorsing the district court’s analysis of that issue. *Id.* at 860. The district court held, in pertinent part:

TOMAC members [live] immediately adjacent to a specific development project that will significantly and permanently alter the physical environment of their neighborhood. They are more like the landowner adjacent to the dam described in *Lujan* . . . and they have sufficiently demonstrated a geographic nexus to [the] asserted environmental injury. 193 F.Supp.2d 182, 187 (D.C. D.C 2002) (cit. and quotes omitted).

The court noted, for example, that the plaintiffs' homes "are at risk of injury from a 24-hour-a-day casino attracting 4.5 million customers per year." *Id.* at 187. So here.

Finally, the Supreme Court recently cited local interests like those alleged here as grounds to reject Indian sovereignty over land once owned by Indians but recently repurchased by them. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 220 (2005), held that a contrary holding "would adversely affect landowners neighboring the tribal patches." Among other things, the Court sought to preclude "a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *Id.*

No more need be said. The complaint below amply establishes concrete and particularized interests required to satisfy the injury test under Article III.

III.

THE RECORD SUFFICIENTLY ESTABLISHES A JUSTICIABLE CONTROVERSY

In addition to the personal interests alleged in the complaint, allegations and BIA documents adduced below establish a justiciable controversy affecting those interests. BIA's announced acquisition and legal position have immediate and concrete significance to the residents no matter how many future approvals and permits may be required before actual casino construction could begin.

We have previously cited the holding in *Citizens for Better Forestry, supra*, 341 F.3d 961, 975, that "environmental plaintiffs have standing to challenge not only site-specific plans, but also higher-level, programmatic rules that impose or remove requirements on site-specific plans." So here.

While BIA's April 2008 decision is not a site-specific plan, it is nonetheless a "higher-level" determination that, according to BIA, would "impose or remove requirements on site-specific plans." *Citizens for Better Forestry*.

BIA has already determined that this acquisition would eliminate all state and local requirements otherwise governing a site-specific plan, and that there was no requirement of a pre-acquisition NEPA compliance review or IGRA review for gaming eligibility. But the residents dispute those positions. They contend that (1) the site does not comply with the Graton Act and therefore may not even be acquired; (2) BIA had no right to dispense with prior NEPA or IGRA review on the premise that the Graton Act "mandates" the acquisition; and (3), in any event, the acquisition would leave all applicable state and local planning and anti-gaming restrictions intact, flatly prohibiting the development and use contemplated by the appellees. In other words, these disputed issues have immediate and profound consequences for the status and regulation of the affected land. The residents have every right to a resolution of those issues now, as Article III permits.

Also instructive is this Court's decision in *Artichoke Joe's*, *supra*, 353 F.3d 712, which summarily but fully endorsed the district court's published decision that the plaintiffs met the injury-in-fact requirement to seek declaratory relief as to existing Indian gaming compacts in California. 216 F.Supp.2d 1084 (E.D. Cal. 2002). This Court held that "[w]e agree with the district court's cogent application of U.S. Supreme Court precedent regarding constitutional standing. . . ." 353 F.3d at 719, n. 9.

The gaming compacts at issue in *Artichoke Joe's* were a significant step towards an Indian casino but not the final step, and the final step was far from certain. The plaintiffs were "California card clubs and charities" complaining that compacts approved by the California Governor "placed [them] at a competitive disadvantage." 216 F.Supp.2d 1090. But there was no claim or finding of any immediate or certain injury from the compacts themselves. On the contrary, the district court's opinion confirmed that a compact hardly guarantees an operating casino. Only "[t]hirty-nine of the 62 tribes with compacts currently operate casinos with slot machines." *Id.* at 1084. Nevertheless, the district court held that the

plaintiffs had “properly alleged an injury in fact which could merit declaratory relief under the Declaratory Judgment Act.” *Id.* at 1102.

So here. There is sufficient injury and controversy for Article III purposes even though steps still remain before a casino could be built or opened.

IV.

THE RECORD SUFFICIENTLY ESTABLISHES PROCEDURAL INJURY

For present purposes under Rule 12(b)(1), the record need only establish a plausible claim of procedural injury. *Moss, supra*, 572 F.3d at 969. Yet this record establishes deprivations of both federal and state procedural rights satisfying this Court’s test in *Citizens for Better Forestry, supra*, 341 F.3d 961, 969: “the procedures in question are designed to protect some threatened concrete interest of [the plaintiff] that is the ultimate basis of his standing,” plus a “reasonable probability of the challenged action’s threat to [his or her] concrete interest.” (Cits. and

quots. omitted) That is true of all three procedural injuries cited in this brief: the residents' lost opportunity to participate in (1) a pre-acquisition review for NEPA compliance, (2) a pre-acquisition review for gaming eligibility under IGRA; and (3) local planning and zoning reviews that this casino proposal would require if BIA's announced acquisition and legal position were upheld.

True, these claims do not involve discrete federal procedural requirements as in more typical cases of procedural standing. But the procedural injury threatened here is much more fundamental. It is the deprivation of entire *categories* of procedural rights.

Nor is the concept of procedural injury so crimped as to exclude this worst case, an injury so basic and consequential it could easily be characterized as substantive. *Lujan*, for example, stated that "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right," 504 U.S. 576, rejecting a distinction between statutory and constitutional rights. Similarly, the Administrative Procedure Act confers standing in broad terms for "[a] person suffering legal wrong

because of agency action. . . .” 5 U.S.C. § 702(a). Again, the nature and source of the “legal wrong” are immaterial. And here, BIA is *threatening* procedural injuries even if the issuance of that threat was not tainted by a procedural violation. Finally, *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1177 (9th Cir. 2000), upheld standing to complain of environmental injury without any allegation of “noncompliance with an environmental statute or regulation.” That is because “standing is a highly case-specific endeavor, turning on the precise allegations of the parties seeking relief.” *Id.*

The first two procedural injuries in this case are all but conceded for present purposes. BIA’s own decision below states that, “[a]lthough NEPA compliance is generally required on [Indian] trust acquisitions . . . , NEPA compliance is not required in this instance since the acquisition . . . is explicitly mandated. . . .” (ER 60) We doubt the appellees will argue that “NEPA compliance” is a meaningless exercise.

Similarly, they will be hard pressed to explain away BIA’s official statement that the intended acquisition is not subject to prior review under

IGRA for gaming eligibility. (ER 60) The residents' lost opportunity to participate in that review, and potentially head off the entire acquisition and its threat to their interests as BIA conceives it, is another substantial procedural injury.

The third type of procedural injury is not conceded below but also passes muster under Rule 12(b)(1). The residents are facing the loss of powerful opportunities to stop or mitigate the casino proposal under procedures guaranteed by state and local law. BIA's sweeping pronouncement that "California zoning laws" do not apply to "property held in trust by the United States" (ER 22) threatens grave procedural injury to the residents.

California law requires every county to adopt a comprehensive general plan governing future development. Cal. Gov't. Code § 65300. It is the "constitution" for planning, *Neighborhood Action Group v. County of Calaveras* 156 Cal.App.3d 1176, 1183 (3rd Dist. 1984), because every zoning or other land-use decision by the county must conform to its general plan. Cal. Gov't. Code § 65860. And here, the applicable Sonoma

County general plan designates the targeted site as agricultural land,
<http://www.sonoma-county.org/prmd/gp2020/adopted/fig-lu2g.pdf>,
and most is also designated as a community separator.

<http://www.sonoma-county.org/prmd/gp2020/adopted/fig-osrc5g.pdf>.

As alleged below, a major casino resort would be fundamentally at odds with Sonoma County's general plan and therefore flatly prohibited. (ER 46, ¶ 92) Accordingly, proponents of this project would have to begin by seeking amendments to the general plan, and state law would require notice to the residents, hearings, and a right for the residents to be heard. Cal. Gov't. Code §§ 65351, 65353, 65355, 65356, and 65358. And those amendment proceedings would come before local elected officials appropriately responsive to their local constituents.

Moreover, the local officials would be endowed with broad authority to reject or drastically curtail the proposed development to protect the quality of life in the local community. As held in the leading case of *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974):

The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

In sum, anyone proposing to despoil this unique agricultural preserve in an urban setting, threatening local residents with a number of quality-of-life and other injuries, would face a heavy burden under state and local law. And state law also mandates environmental review more favorable to such residents than a federal review under NEPA. As explained in *San Francisco Ecology Center v. City and County of San Francisco*, 48 Cal.App.3d 584, 590 (1975):

[t]he federal government is required only to give “appropriate consideration” to environmental values [while] [t]he state statute [CEQA], on the other hand, suggests that environmental protection is of paramount concern. A sense of urgency is conveyed in several provisions of the statute.

In sum, BIA’s announced acquisition and legal position threaten the residents with procedural injury of several different kinds.

V.

THE RECORD SUFFICIENTLY ESTABLISHES DIMINUTION OF PROPERTY VALUE

It is axiomatic, finally, that a threat of diminished property value satisfies the injury requirement of Article III. This brief has already cited the Third Circuit's reliance on that factor in *Society Hill Towers, supra*, 210 F.3d 168, 177 (quoted *ante*, p. 38). Similarly, *Construction Indus. Assoc. v. City of Petaluma, supra*, 522 F.2d 897, 904, held that property owners' allegations of an "adverse[] affect [on] the value and marketability of their land for residential uses . . . [were] sufficient to show that they have a personal stake in the outcome of the controversy."

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979), is instructive. It held that a complaint of racial steering, "[i]n addition to claiming the loss of social and professional benefits to the individual respondents, . . . fairly can be read as alleging economic injury to them as well. The most obvious source of such harm would be an absolute or relative diminution in value of the individual respondents' homes." *Id.* at

115. *Gladstone* explained that “[t]he adverse consequences attendant upon a ‘changing’ neighborhood can be profound. If petitioners’ steering practices significantly reduce the total number of buyers in the Bellwood housing market, prices may be deflected downward.” *Id.* at 110. Finally, *Gladstone* foreshadowed *Society Hill Towers* by relying on threatened injury to an entire neighborhood. *Id.* at 113-114.

Here, too, the residents’ complaint “fairly can be read” (*Gladstone*) to allege a threat of diminution in value. And not only from the intended casino construction, but from the intended acquisition itself as BIA construes its effects. The record establishes that the acquisition, so construed, would diminish property value by eliminating the state and local guarantee of a continued agricultural preserve absent appropriate amendments, and by threatening to replace it with a use highly noxious to the local environment.

Nor can the appellees fairly complain that the prospect of a huge casino in the residents’ neighborhood is immaterial to their property values. Every market considers prospects every day. The leading case of

Bagdasarian v. Gragnon, 31 Cal.2d 744 (1948), for example, held that the “[m]arket value of a growing fruit crop as of a particular date may properly be determined by considering the *probable* yield of the crop and its *probable* market price per unit when it is to be harvested and sold, less the cost of producing and marketing.” *Id.* at 755 (italics added). No more need be said.

CONCLUSION

For all the reasons stated in this brief, the judgment should be reversed and the matter remanded for further proceedings.

DATED: October 26, 2009

Respectfully submitted,

BIEN & SUMMERS

By: s/ ELLIOT L. BIEN

**CERTIFICATE OF COMPLIANCE
WITH F.R.A.P. RULE 32(a)**

This brief complies with the type-volume limitation of Rule 32(a)(7)(B)(1), Federal Rules of Appellate Procedure, because it contains 8,704 words, excluding the parts of the brief the Rule exempts from that limitation.

The brief also complies with the typeface and type style requirements of Rule 32(a)(5) and (6) because it is prepared in a proportionally spaced typeface using WordPerfect X4 with a 14-point Calisto MT serif font.

DATED: October 26, 2009

s/ ELLIOT L. BIEN

CERTIFICATE OF SERVICE

I hereby certify that, on the date stated below, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: October 26, 2009

s/ ELLIOT L. BIEN

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I hereby certify that these appellants are aware of no related cases as described in that Rule.

DATED: October 26, 2009

s/ ELLIOT L. BIEN