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**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.,

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)

**MOTION FOR  
LEAVE TO FILE  
ACCOMPANYING  
*AMICUS CURIAE*  
BRIEF**

\_\_\_\_\_ /

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Three California cities — the City of Petaluma, the City of Sebastopol, and the City of Cloverdale (together, “the cities”) — respectfully move pursuant to Rule 29, Federal Rules of Appellate Procedure, for leave to file the accompanying *amicus curiae* brief in support of a reversal of the judgment below.

The interest of the cities in this matter is direct and substantial. First is their proximity to the proposed site of a large, Las Vegas-style casino resort at issue in this case. The City of Petaluma lies approximately eight miles from the proposed site, the City of Sebastopol also lies eight miles from the proposed site, and the City of Cloverdale is 37 miles away. Thus, the cities themselves, as well as their residents, face a number of adverse consequences from the proposed casino development. Regional effects would include traffic congestion on the Highway 101 corridor, impacts on the seriously constrained regional water supply, an increase in crime, socio-economic problems, and the demand for government provided social services.

//

Second, the cities are all incorporated cities located in Sonoma County, the same county whose general plan and zoning ordinances currently govern the land in question and flatly prohibit the proposed development of a casino. Accordingly, the cities have an immediate and urgent interest in defending the integrity and enforceability of those land use restrictions against the position taken by the appellees in this case: that their proposed acquisition of land in trust for an Indian tribe would sweep away all state and local land use restrictions.

The cities vehemently dispute the appellees' claim that an Indian tribe and/or its business partner can purchase privately owned land within a local jurisdiction, sign it over in trust to the United States, and thereby remove the land from all state and local regulatory control. Whether the project sought is a casino, as in this case, or some other noxious use prohibited under state and local law, exemption of lands newly purchased by Indians from laws which pre-existed the Indians' purchase would deprive residents of their justifiable expectations in the enjoyment of their properties and frustrate state and local governments' efforts effectively to govern.

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The cities' unique interest and perspective on the issues of this case makes their proposed *amicus curiae* brief desirable within the meaning of F.R.A.P. Rule 29(b)(2). Accordingly, they respectfully request the Court's leave to file their accompanying brief.

DATED: November 2, 2009.

Respectfully submitted,

Meyers Nave Riback Silver & Wilson

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## CERTIFICATE OF SERVICE

I hereby certify that, on November 2, 2009, I tried repeatedly and unsuccessfully to electronically file the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Each time I tried, a message appeared informing me that the website was not responding and/or was not available at the time, but to keep checking back for updates. I continued to try to file this document on November 3, 2009, but was not able to do so until now. 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: November 3, 2009

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**IN THE UNITED STATES COURT OF APPEALS  
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N.D. Cal. case no.  
08-cv-2846-SI (San  
Francisco)

Hon. Susan Illston,  
United States District  
Court Judge

**BRIEF FOR *AMICI CURIAE* CITY OF PETALUMA,  
CITY OF SEBASTOPOL, AND CITY OF CLOVERDALE  
IN SUPPORT OF APPELLANTS**

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**STATEMENT OF IDENTITY OF THE *AMICI CURIAE* AND THEIR INTEREST IN THE CASE**

*Amici Curiae* City of Petaluma, City of Sebastopol and City of Cloverdale are all incorporated cities located in Sonoma County, which is where the proposed casino at issue in this case is located. The *Amici Curiae* cities are all concerned about the negative impacts of the casino on their communities, including traffic congestion on the Highway 101 corridor, impacts on the seriously constrained regional water supply, an increase in crime, socio-economic problems, and increased demand for government provided social services. The filing of this brief has been authorized by the city councils of each of the three cities.

**INTRODUCTION**

This case presents an extraordinary situation. The Federal government proposes to accept title to a 254 acre parcel of land in Sonoma County, mostly abutting the City of Rohnert Park, but including 3.68 acres within the City, and to hold the land in trust for the Federated Indians of the Graton Rancheria (“FIGR”). The site is currently owned by private parties, as it has been since 1843, and is currently governed by state law, as it has been since the state was formed. However, the Federal government and FIGR make the remarkable claim that once the land is transferred into trust for FIGR, state law, in particular land use and gambling laws, will no

longer govern the site. FIGR plans to develop a huge casino resort on the land that would *violate* many provisions of existing local land use plans applicable to the site, and the casino will offer Las Vegas-style gambling, *illegal* under California law, in what would be the closest casino to the San Francisco Bay Area.

Plaintiffs, neighbors and property owners near the proposed site, have sued, arguing in part that while Federal law allows gambling on Indian lands which are within a state's borders and under tribal jurisdiction, this land is not under tribal jurisdiction and change of title will not alter that. Plaintiffs argue that Indian sovereignty applies to traditional Indian lands and that absent cession of jurisdiction by the state, state law will continue to govern newly purchased urban sites. The District Court dismissed the complaint on the grounds that plaintiffs lack standing since a casino could not be built without further approvals.

*Amici* include three cities in the region which would suffer negative impacts from the opening of a Las Vegas style casino at the site. *Amici* City of Petaluma, City of Sebastopol, and City of Cloverdale are all incorporated cities located in Sonoma County. Regional effects would include an increase in crime, socio-economic problems, and the demand for government provided social services. *Amici* primarily object to the claim

that an Indian tribe partnered with a business or land developer can purchase land within a local jurisdiction and that purchase alone removes the land from state and local regulatory control. Whether the project sought is a casino, as in this case, or some other noxious use prohibited under state and local law, exemption of lands newly purchased by Indians from laws which pre-existed the Indians' purchase would deprive residents of their justifiable expectations in the enjoyment of their properties and frustrate state and local governments' efforts effectively to govern.

Plaintiffs' standing in this case should be beyond dispute. They seek to protect interests in their homes and land currently secured under state law. State law requires that use of land be tightly governed by local government. Both the County and the City of Rohnert Park are required to adopt General Plans to govern land use within their jurisdictional limits, and any new development must be consistent with these General Plans. The County General Plan designates the subject site for agricultural use. Thus, under controlling local land use law, the project could not be built.

In order to develop the property, the developer would need to obtain a General Plan amendment. This would involve public hearings, notices to residents, and an opportunity to be heard. No one would have a more immediate interest in this project than the plaintiffs. They would suffer

increased noise, increased traffic, and the presence of a massive building project with constant activity on what is now zoned as quiet, peaceful farm lands. Plaintiffs would have rights to oppose any amendment to the General Plan. Further, and perhaps most important, the decision-makers are local elected officials, answerable to the residents and the community.

Just as residents would have rights to oppose a General Plan amendment under state law, residents should have the right to sue here where the Federal government asserts it can unilaterally displace residents' rights under state law simply by purchase of the property. These claims are timely. At present, there are conflicting claims to jurisdiction. Neighbors, businesses and local government depend on land use limits and now face uncertainty, not knowing which law will govern and whether the project will be built. As they consider holding, selling or improving their properties, and as *Amici* local governments consider investments in infrastructure, plaintiffs are entitled to resolution of this dispute at the earliest opportunity. Early resolution is necessary to preserve orderly administration of law and to avoid the prejudice that could result if FIGR were allowed to incur large obligations to purchase the land before the issue were resolved.

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## ARGUMENT

### I. STATE AND LOCAL VOTERS ARE OPPOSED TO CASINO GAMBLING

Like most states in the Union, California prohibits Las Vegas style gambling. The operation of slot machines – where the machine entices players with lights and sounds and the chance of becoming rich but which in fact are programmed to retain a set percentage of revenue – have never been legal in California. As recently as November 2004, California voters, by a margin of over 83%, rejected a proposition to legalize slot machines (Proposition 68). [[http://www.sos.ca.gov/elections/sov/2004\\_general/formatted\\_ballot\\_measures\\_detail.pdf](http://www.sos.ca.gov/elections/sov/2004_general/formatted_ballot_measures_detail.pdf).] Over 88% of voters in Sonoma County voted against Proposition 68. *Id.*

In 2000, voters approved Proposition 1A to allow slot machines on Indian lands. However, the expectation was that Indian gaming would occur only on existing reservations. Indian proponents themselves argued that most “Indians Tribes are located on remote reservations.” See Voter Information Guide, March 7, 2000 Primary Election, p.7 [<http://primary2000.sos.ca.gov/VoterGuide/pdf/1a.pdf>]. FIGR’s 2003 proposal to establish a casino on newly purchased land in Rohnert Park contravenes those expectations.

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Voters in *Amici* cities are opposed to Las Vegas style gambling on lands in urban areas being purchased by and for Indian tribes. In November 2006, over 79% of Petaluma voters voted against a proposal for an Indian casino just outside its city limits (Measure H).

[[http://www.sos.ca.gov/elections/co\\_city\\_sch\\_elections/city\\_report\\_2006.pdf](http://www.sos.ca.gov/elections/co_city_sch_elections/city_report_2006.pdf)].

Plaintiffs and *Amici* object to the proposed casino for a variety of reasons. Physically, the casino would clash with existing agricultural use of the site and be completely out of place. The proposed casino would be 760,000 square feet, and as such would be the second largest building in the County (after Coddington Mall which is about 800,000 square feet). It would be a massive structure in an area currently designated for sparse construction. It would generate noise, light and activity, disturbing the current tranquility of the area. The project would also include a huge parking lot.

The proposed casino would also cause traffic problems and deplete water supply, two critical infrastructure issues that are evaluated and planned on a regional basis. The casino would generate a great deal of traffic, and would do so 24 hours a day, 365 days a year. With at least 2,000 slot machines, restaurants and a hotel, even at off-peak hours, there

will be hundreds and hundreds of people coming and going, disturbing residents and generating traffic far in excess of road capacity. Further, a disproportionate percentage of the drivers would be drunk, making neighborhood roads much less safe.

Residents and *Amici* share concerns about construction of the casino, both during construction and after. Construction for the project will substantially disrupt the neighborhood. Further, the building would not need to conform to California building codes, fire codes or any other of numerous codes to ensure public health, safety and general welfare.

Residents and *Amici* share concerns about the type of people attracted to the neighborhood by the casino. As opposed to destination casinos which cater to a tourist trade, local casinos cater to a middle and lower income population and often attract gangs, drug use, and crime.

Residents and *Amici* also have concerns about the activity of casino gambling and the socio-economic impacts on the greater community. Casinos generate huge revenues, but these revenues mean less revenues for other dining and entertainment venues in the area. A casino would draw patrons from existing businesses, especially other forms of entertainment such as dramatic theater, movie houses, nightclubs, concert halls, and restaurants. Even book stores and shopping districts can suffer. Small

family owned businesses, like ones found in downtown Petaluma, are most at risk of suffering impacts. These businesses and their entrepreneur owners are often most valued to the community. The casino thus threatens some of the most fragile and most valued businesses in the area.

Casinos often target senior citizens and the poor, and rely on gaming addiction. This increases socio-economic problems, health problems, and other problems in the general area. The result is to increase costs on taxpayers in the general area but also to depress the area in general.

Lastly, casinos can lead to blight. Atlantic City is a good example of this. Another example comes from Connecticut, where a June 2009 report commissioned by the State on the two major Indian casinos in that state highlighted that one negative effect was the increase of sub-standard housing, resulting from the low wage jobs.

[[http://www.ct.gov/dosr/lib/dosr/june\\_24\\_2009\\_spectrum\\_final\\_final\\_report\\_to\\_the\\_state\\_of\\_connecticut.pdf](http://www.ct.gov/dosr/lib/dosr/june_24_2009_spectrum_final_final_report_to_the_state_of_connecticut.pdf). pp. 197-210.]

## **II. CURRENT STATE LAW WOULD PROHIBIT A CASINO PROJECT**

Local residents have strong interests in the continued application of state law to the site which would protect and preserve the character of the site as quiet, agricultural land.

State land use law requires the County to adopt a General Plan setting out goals, objectives and policies to form a comprehensive plan for future physical development in the County. Calif. Govt. Code §65300. The General Plan must include certain specified elements, namely, land use, circulation (traffic), housing supply, conservation, open space, noise and safety, with the goals and policies stated for each element. Govt. §65302. The General Plan must be internally consistent and all actions taken by the County with respect to land use must be consistent with its General Plan. Govt. Code §65860. Thus, the California Supreme Court has called the general plan the “constitution for future development.” *Citizens of Goleta Valley v. Board*, 52 Cal.3d 553 (1990).

The Sonoma County General Plan designates the subject site as Land Extensive Agricultural. <http://www.sonoma-county.org/prmd/gp2020/adopted/fig-lu2g.pdf>. It also designates the site as a community separator.

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

These designations would severely limit land uses to agricultural or open space uses, and would not allow the proposed casino project.

The goals, objectives and policies in the General Plan further serve to block the proposed development. The Open Space and Resource

Element sets out policies to preserve community separators (OSRC-1.1 and 1.2) and to avoid commercial or industrial uses in community separators (OSCR 1b and 1c). The Land Use Element sets out an objective to retain low intensities of use in community separators (LU-5). The Agricultural Resources Element sets policies to limit intrusion of urban development into agricultural areas (AR-2.1) and an objective to avoid conversion of agricultural lands to commercial uses (AR-3.1).

Policies in the General Plan governing traffic and water use also would prevent development of the site as a casino. The Circulation and Transit Element of the General Plan requires that the County “maintain Level of Service D or better at all roadway intersections.” Objective CT-3.2. Evaluation of the need for expansion of Highway 101 considers potential buildout under the duly adopted General Plans governing land use in the area. A proposal such as the FIGR casino, which is a far more intense use than allowed the County General Plan, undermines the region’s ability to effectively plan its transportation needs.

The Land Use and Water Resources Elements of the General Plan adopts policies to protect groundwater supplies from being overdrafted, an issue residents have raised. The region’s cities and special districts have contractual agreements to meet the water needs under each of the

applicable General Plans, and FIGR's proposal to draw additional water contravenes that planning.

The only way to obtain approval of the casino project would require amendment of all the applicable provisions of the General Plan. This would involve notice to residents, hearings, and a right for residents to be heard. Government Code §§65351, 65353, 65355, 65356, and 65358. Further, it would require compliance with the California Environmental Quality Act, involving studies of environmental impacts. Public Resources Code §21000 et seq. Perhaps most important, this would involve a decision by local elected officials, answerable to the voters, balancing the goals of the community as a whole against the individual desires of the Federated Indians and their partner Station Casinos.

State law also prohibits Nevada-style gaming and that law protects residents from the negative impacts of a casino such as proposed. State law outright prohibits the type of gambling sought by FIGR. Penal Code §§330a, 330b, and 330.1 prohibit the operation of slot machines. Penal Code §330 prohibits the conduct of banking games such as 21. Further, in 1984, voters enacted a Constitutional amendment prohibiting "casinos of the type currently operating in Nevada and New Jersey." Cal. Constitution, Art. IV, Sec. 19(e).

### **III. FEDERAL LAW PROVIDES PLAINTIFFS NO SUBSTITUTE FOR STATE PROTECTIONS**

In contrast to California law which prohibits Class III gaming on all lands governed by California, the Federal Indian Gaming Regulatory Act (“IGRA”) (25 USC §§2701-2719) allows gambling on Indian lands under Indian jurisdiction. IGRA would require FIGR to obtain certain approvals to construct the project, but IGRA’s main purpose is to foster Indian economic development, not to protect the greater community. These approvals are detailed below.

First, if the Indian group plans to employ an outside management company to run the casino, which FIGR do, IGRA would require the Chairman of the NIGC to approve the agreement with the management company. 25 USC §2711. This is easily obtained and does not involve consideration of community impacts.

Approval of a management agreement would trigger application of the National Environmental Protection Act. NEPA is essentially procedural, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1981), and provides substantially less protection of environmental interests than CEQA under state law. *San Francisco Ecology Center v. CCSF*, 48 Cal.App.3d 584, 590 (1975).

Second, IGRA would require FIGR to obtain approval of a gaming ordinance. 25 USC §2710. This also is easily obtained, and does not involve consideration of impacts on the neighboring community.

Third, IGRA would require FIGR to obtain a determination from the BIA that the site qualified for an exemption from the prohibition against gaming on lands acquired after the passage of IGRA. 25 USC §2719.

Section 2719(a) prohibits gaming on lands acquired after IGRA's enactment, and subsection (b) contains the relevant exceptions. Although one of the available exceptions does require evaluation of detriment to the community ((b)(1)(A)), on July 26, 2005, FIGR submitted a request to the NIGC for a determination that the site would qualify for a different exception, namely, as restored lands for a restored tribe under (b)(1)(B)(iii). That exemption does not review community impacts.

Fourth, if the Indian group wants to conduct Class III gaming, IGRA would require it to negotiate a compact with the State to govern this activity. (25 USC §2710(d)). The state would be under an obligation to negotiate in good faith, and the Indian group could sue to impose a compact on the State. The Governor has the right to negotiate the compact, and there is no requirement that he consider community impacts. Cal. Govt. Code §12012.25(d). Although Governor Schwarzenegger has

indicated he will look for community support before entering a compact, the next Governor need not. Also, although years ago, there was a clear difference between Class II and Class III games, that line has become blurred in recent years. Thus, in the East Bay, the Lytton operate machines that have the look and feel of slot machines and offer the same gaming experience, but which the Lytton claim qualify as Class II bingo games. These machines appear to generate similar revenue to Class III slot machines. Therefore, it is possible FIGR may choose to forego a compact and to operate a Class II facility.

**IV. IF TRIBES CAN CONVERT ANY LAND INTO INDIAN LAND, THE NINTH CIRCUIT'S JUSTIFICATION OF PROPOSITION 1A IS INVALIDATED**

As noted above, when voters approved Proposition 1A, they thought casinos would be in remote, rural locations. The less accessible a casino is, the less often someone will visit it. Nevada has a symbiotic relationship with California because the distance controls and limits gaming. Similarly with Indian casinos, the impacts of a casino in a rural area is much less than one in proximity to urban areas.

In *Artichoke Joe's v. Norton*, 353 F.3d 712 (9th Cir. 2003), the Ninth Circuit held that the state's allowance of Las Vegas gambling only on Indian lands did not violate Equal Protection guarantees because it was

rationally related to the state's desires to limit gambling. It held that the "state is free to enact legislation that accords different treatment to different localities." This holding assumed that Indians lands were by nature restricted to certain locations and could not be moved. The court continued in this vein, "By restricting large-scale gambling enterprises to **carefully limited locations**, California furthers its purpose of ensuring that such gaming activities 'are free from criminal and other undesirable elements.'" 353 F.3d at 740 (emphasis added).

In this case, the facts do not support the court's reasoning in upholding Proposition 1A. FIGR is seeking to obtain new lands, which have been under state jurisdiction, and unilaterally to divest the state of its jurisdiction. FIGR seeks lands in a location of their choosing. In fact, FIGR Chairman Greg Sarris publicly acknowledged (on KSRO) that he had looked at 48 sites all along the 101 corridor from Santa Rosa down to San Rafael before choosing to pursue this site. This is not a case of the state carefully limiting the location of casino gambling. To the contrary, neither the state, not the local *Amici* jurisdictions, had any say in this decision. Thus, this would contravene the justification of Proposition 1A.

In *Artichoke Joe's*, the court did "not decide whether lands that are purchased specifically for the purpose of conducting class III gaming

activities are “Indian lands” within the meaning of IGRA.” 353 F.3d at 735, n.16. That is the very issue in this case. IGRA allows Class II and Class III gaming only on Indian lands “under the jurisdiction of the tribe.” 25 USC sections 2710(b) and (d). The lands at issue in this case are not under tribal jurisdiction. They have been under state jurisdiction since the state was admitted into the Union, and remain under state jurisdiction. Thus IGRA does not allow gaming on these lands.

## **V. PLAINTIFFS HAVE STANDING**

The lower court ruled that plaintiffs lacked standing because they would not be injured if the Federal government took the land into trust. The basis of the court’s ruling was that FIGR still need to obtain other approvals and thus whether FIGR would build a casino was speculative. This misses the whole issue – whether those approvals will be governed by state law or by Federal law. It also ignores the fact that conflicting claims to jurisdiction need to be resolved at the earliest opportunity in order to promote the orderly administration of law and to avoid prejudice to either party.

### **A. Plaintiffs’ Standing Should Be Beyond Dispute**

Plaintiffs have substantial interests in this dispute. Policies adopted by the Sonoma County General Plan protect their interests in maintaining a

quiet area. These policies were formed based on community desires after decision makers melded compatible interests and balanced incompatible ones to derive a comprehensive plan for the county. This allows for better compatibility between parcels and efficient allocation of public resources. The tribe attempts an end-run around local government.

Challenges to zoning decisions often come from neighbors. In general, no one is more immediately impacted by a project than the neighbors. That is true here. If the project were built, neighbors would be affected by having a massive project in their neighborhood. They would be affected by the increase in traffic, including an increase in drunk driving on their streets. And they would be affected by all the noise and activity on what is now zoned as quiet, peaceful farm lands. This would have significant negative impacts on their quality of life, not to mention the values of their homes and properties, and so they are the ones most likely to invest in expensive litigation to stop the project.

Just as neighbors would have a right under state law to enforce the General Plan, so they should have rights to challenge the Federal government's attempt here to illegally dispossess them of these state rights altogether. Thus, in *Taxpayers of Michigan Against Casinos (TOMAC) v. Norton*, 193 F.Supp.2d 182 (DDC 2002), the court upheld the standing of

neighbors to challenge a land into trust decision by BIA for a casino project, writing, “TOMAC members are precisely the type of plaintiffs who could be expected to police these interests.”

**B. The Issue is Ripe**

The plaintiffs’ claim is ripe and is not dependent of future approvals. In fact, the whole dispute is over which set of approvals apply – those required by state law or those required by IGRA. The two sets of approvals are very different and resolution of which set applies should be determined up front, not after the Federal government issues approvals.

This is necessary for the orderly administration of law. Just as jurisdiction is resolved in court cases at the earliest opportunity in order to avoid unnecessary expense and to promote justice, *Rowland v. County of Sonoma*, 220 Cal.App.3d 331, 335 (1990), so here resolution of the dispute avoids unnecessary government expense and promotes justice. It also avoids prejudice to either party that could result if resolution were delayed until after FIGR incurred substantial financial obligations due to the transfer of title from Station Casinos. The residents are entitled to know which sovereign has what control as they decide on whether they want to hold their properties, make improvements, or sell. The value of a piece of land is usually determined by the use allowed. If Federal law will govern

the site, and FIGR can develop a casino, the land has much more value than if state law applies, and the land must remain agricultural. FIGR is purchasing the land under assumptions that it will obtain sovereignty over the site. If FIGR is allowed to purchase the land based on these authorities, it might claim vested rights, prejudice, acquiescence, laches and other defenses to any later claim. In order to avoid such claims, the dispute must be resolved now.

In *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F.Supp.2d 295 (WDNY 2007), the court held that jurisdiction is a “critical threshold” issue that should be determined at the earliest opportunity. That rule should apply here. Although the Ninth Circuit did not apply that rule in *North County Community Alliance v. Salazar*, 573 F.3d 738 (9th Cir. 2009), this case is very different. For one, it involves a financial transaction. Determining jurisdiction later would be like allowing developers to buy land that has no zoning and then trying to impose zoning controls after the fact.

In that regard, we note that under the BIA’s own internal procedures, applications to take land into trust for development of a casino are not supposed to be approved unless the BIA first determines that gaming will not be prohibited under section 2719. As discussed above, Section 2719

prohibits gaming on all lands acquired after October 17, 1988, the date IGRA was passed, subject to a number of exceptions. Private regulations that have been in effect since 1994 require such a prior determination where the tribe proceeds under subsection (b)(1)(B). See Checklist for Gaming Acquisitions, September 2007, Procedural Step E (p. 2), Part II (p. 6) [“All applications for the trust acquisition of land intended for gaming must be processed with Section 20 considerations in mind.”], and Part 2, II.A (p. 7). [“When the application indicates that the proposed acquisition falls within one of these exceptions, the Regional Director must provide documentation that the particular exception is applicable to the case.”] [<http://www.bia.gov/idc/groups/public/documents/text/idc-001904.pdf>]

### **C. Standing in Cases Seeking Declaratory Judgment Depends on Whether the Controversy Has Sufficient Immediacy**

Plaintiffs seek declaratory judgment that after the proposed purchase the land will continue to be governed by state plenary law, contrary to the claims of the Federal government and the Indian group. The Declaratory Judgment Act applies to “a case of actual controversy.” 28 U.S.C. §2201. The “actual controversy” requirement of the Act is the same as the “case or controversy” requirement of Article III of the Constitution. *Aetna Life Ins. Co. V. Haworth*, 300 U.S. 227, 239-40 (1937). “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.” *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). “[T]he declaratory judgment procedure [can] be used to obtain advanced rulings on matters that would be addressed in a future case of actual controversy.” *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, n.7 (2007).

Here, there is a clear controversy, whether or not the Federal Government and FIGR obtain sovereignty over the site merely by taking title to it. The claim has much immediacy, as the dispute currently affects residents and property owners.

Once FIGR has beneficial title, consideration of this issue would be prejudiced by their financial commitment. If plaintiffs are precluded from bringing this lawsuit now, this creates a Catch-22. This is contrary to purpose of the Declaratory Judgment Act which provides persons to impending dispute to obtain relief before being put to jeopardy. See *Societe de Conditionnement en Aluminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938 (9th 1981).

## **VI. THE STATE RETAINS JURISDICTION OVER LANDS PURCHASED BY OR FOR INDIANS UNTIL IT CEDES SUCH JURISDICTION**

The issue in this case is whether purchase by a subsidiary of Station Casinos, and transfer to the United States in trust for the Graton, would on its own, and without any cession of jurisdiction by the state, be enough to remove the lands from state jurisdiction. That cannot be the law.<sup>1</sup>

The general rule is that a state has complete jurisdiction over the land within its exterior boundaries. *United States v. McBratney*, 104 U.S. 621 (1881). There are only three exceptions which result in the United States Government obtaining primary jurisdiction over land within a state's borders. The first exception applies where on admission of the state into the Union, the Federal government reserves jurisdiction over the particular site. Second, the Federal Government can purchase lands under the Enclaves Clause of the United States Constitution and can obtain exclusive jurisdiction with the consent of the state. Third, the state can cede partial jurisdiction over land already owned by the Federal government. *State of Arizona v. Manypenny*, 445 F.Supp. 1123, 1125 (D. Ariz. 1977); *Kelly v. Lockheed Martin Services Group*, 25 F.Supp.2d 1, 3 (D. Puerto Rico 1998);

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<sup>1</sup> This issue would similarly apply where Indians obtain legal title but subject to a restriction against alienation under 25 USC §177.

*Coso Energy Developers v. County of Inyo*, 122 Cal.App.4th 1512 (2004); *Wagner v. Montana*, 270 Mont. 26, 889 P.2d 1189, 1190 (1995); *Arizona v. Vaughn*, 163 Ariz. 200, 786 P.2d 1051, 1054 (1989); *Oklahoma v. Cline*, 322 P.2d 208, 212 (Okla. Ct. App. 1958). *See also* “Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within States.” In Part II, Chapter III, in a section entitled “Three Methods for Federal Acquisition of Jurisdiction,” 91 C.J.S., United States §9.

None of the three exceptions apply here. The site was in private hands when the state was created, and is currently under state jurisdiction. So the first exception does not apply. The state has not been requested to cede exclusive or partial jurisdiction over the subject parcel, and has not done so, so the second and third exceptions do not apply. These three methods are the only ways in which the Federal Government can obtain jurisdiction over state lands, and none of them apply here.

The *Manypenny* case is exactly on point. An immigration officer was charged under state law with a crime on federal land. The exact location was on either the National Monument or the Papago Indian Reservation. The court held that the Federal government did not have jurisdiction over either location because it had neither reserved jurisdiction

when it admitted the state nor obtained cession from the state. Similarly here, the State of California has not ceded jurisdiction over this location.

In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Supreme Court held that a tribe's reservation land which was sold by the tribe 200 years ago and then recently repurchased by them would not revert back to tribal sovereignty. By passage of time, the long-standing assumption of jurisdiction by the state, the inaction of the tribe, the lack of an Indian population, and the settled expectations of the residents and landowners in and around the area and of state and local governments, the tribe lost its sovereignty.

In this case, the tribe never had sovereignty over this site. If settled expectations of residents and state and local governments precluded land within a former reservation from claims of Indian sovereignty when repurchased by the tribe in *City of Sherrill*, all the more so in Rohnert Park where this land was never part of an Indian reservation, and where recognition of Indian sovereignty would be inconsistent with the settled expectations of residents, businesses, and state and local governments.

In fact, when the rancheria existed, there was no recognized tribe and the residents of the rancheria never had sovereignty over the rancheria. When Congress approved distribution of the rancheria land to the Indian

residents in 1958, the Senate Report acknowledged that the residents had never organized as a tribe either formally under the Indian Reorganization Act or informally. Senate Report No. 1874, 85<sup>th</sup> Congress, 2d Session, p. 24 [“The group is not organized, either formally or informally.”]

The facts in this case contravene another basic tenet of Indian sovereignty, the Indians existence as a separate community. One basis of the recognition of Indian sovereignty from the start has been that an Indian community exists as a separate, distinct political community. In the first case to recognize Indian sovereignty, Chief Justice Marshall wrote, “The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights...” *Worcester v. Georgia*, 31 U.S. 515, 557 (1832). He further justified Indian sovereignty based on the fact that Indian territory was “completely separated from that of the states.” The separateness of Indian communities became a primary justification for tribal sovereignty in *United States v. Kagama*, 118 U.S. 375, 381-82 (1886) which described the Indians “as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but **as a separate people**, with the power of regulating their internal and social relations, and thus far not brought under the laws of the

Union or of the state within whose limits they resided.” (Emphasis added.)

Recitation of the Indian’s separateness became a mantra of the court in the 1970s and 80s in numerous cases concerning Indian sovereignty.

*McClanahan v. Arizona State Tax Comm.*, 411 U.S. 164, 168-73 (1973);  
*United States v. Mazurie*, 419 U.S. 544 (1975); *United States v. Antelope*,  
430 U.S. 641 (1977); *United States v. Wheeler*, 435 U.S. 313, 322 (1978);  
*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980);  
*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

The subject parcel does not and will not form in any way a separate political community. It is in the middle of a commercial area, almost adjacent to Highway 101. The location was chosen so the casino would be accessible to the general population. It will be served by the same utilities, the same roads and the same emergency services which now exist and which serve the whole community. This is not an attempt to establish a separate tribal community, but is just an end run around government regulation. It should not be condoned.

No Congressional Act purports to alter the sovereignty of this parcel. The Graton Rancheria Restoration Act does not. Nor does IGRA. IGRA limits Indian gaming to Indian lands “within such Tribe’s jurisdiction.” 2710(b)(1) and (b)(2), and (d)(1)(A)(I) and (ii). The Supreme Court has

written, “Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.” *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1998). The qualifier applies to cases like this where the state has jurisdiction over land that is later purchased by the tribe. *New York v. Shinnecock Indian Nation*, 523 F.Supp.2d 185 (EDNY 2007). A BIA regulation provides that no laws or any state or subdivision thereof limiting zoning or governing development of land shall be applicable to any land held under an agreement with an Indian tribe in trust by the United States. 25 CFR 1.4. While that might have been true of Indian lands held in 1965, when the regulation was adopted, it would not be true under the particular facts of this case where the land is a small parcel, it has been under state sovereignty, it is being purchased on the open market by or for the tribe, and the state is not ceding its sovereignty to the Federal government. Nor does BIA have authority to divest the state of jurisdiction.

## **CONCLUSION**

In this case, existing state and local law governing the site limits use to agricultural uses, and this benefits numerous residents in the area who enjoy open space, low density, and quiet areas. Development of a massive building complex, as now proposed, would not be allowed, much less a Las

Vegas style casino. Residents and businesses have invested in the area based on these expectations. Now the Federal government and FIGR have asserted that they can purchase title and automatically remove the site from subjection to California law. This is an abuse of Federal law and an abuse of California law which grants Indians a monopoly over Las Vegas gambling on Indian lands. It poses an immediate threat to residents who are entitled to immediate resolution of the dispute created and further entitled to a declaration preserving their rights in state and local land use laws.

DATED: November 2, 2009.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1,**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1,

I certify that this Brief of *Amici Curiae* is prepared in a proportionately spaced typeface using a 14 point Times New Roman font and contains 5,867 words.

Dated this 2<sup>nd</sup> day of November, 2009.

Meyers Nave Riback Silver & Wilson

By:     s/ Eric W. Danly      
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### **CERTIFICATE OF SERVICE**

I hereby certify that, on November 2, 2009, I tried repeatedly and unsuccessfully to electronically file 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. Each time I tried, a message appeared informing me that the website was not responding and/or was not available at the time, but to keep checking back for updates. I continued to try to file this document on November 3, 2009, but was not able to do so until now. 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: November 3, 2009

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