

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

STOP THE CASINO 101 COALITION,
et al.,

Plaintiffs-Appellants,

v.

KENNETH SALAZAR, Secretary of the
United States 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

**REPLY BRIEF FOR APPELLANTS STOP
THE CASINO 101 COALITION, ET AL.
[CORRECTED]**

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TABLE OF CONTENTS

Page

Table of Authorities	iv
I. INTRODUCTION	1
II. AS THE APPELLEES MOSTLY CONCEDE, THE COMPLAINT AND COGNIZABLE DOCUMENTS BELOW ESTABLISH ARTICLE III INJURY FOR PURPOSES OF A RULE 12(b)(1) MOTION	4
A. THE APPELLEES’ FAILURE TO DISPUTE THE COALITION’S SHOWING CONCEDES IT	4
B. THE POINTS CONCEDED	6
1. This Case Involves the Proposed Acquisition, Not Just Possible Future Actions	6
2. The Controlling Record	7
3. The Coalition Members’ Concrete and Particularized Interests	9
4. The Justiciability of the Claims for Declaratory Relief	10
5. Article III Does Not Insist on Immediate Injury	10
6. Standing Is Supported by Immediate Diminution of Property Value	11
7. Standing Is Supported by Immediate Procedural Injuries	13

III.	THE COURT SHOULD FOLLOW ITS SETTLED POLICY, AND EXPEDITE THIS APPEAL, BY REFUSING TO ENTERTAIN THE ALTERNATIVE ISSUES TENDERED BY THE APPELLEES	16
A.	INTRODUCTION	16
B.	FAIR AND EFFICIENT JUDICIAL ADMINISTRATION	18
C.	THE ISSUES ARE FAR MORE COMPLEX AND FACT-DEPENDENT THAN THE APPELLEES SUGGEST	22
1.	Causation and Redressability	22
2.	Ripeness	23
3.	Violation of the Graton Act’s Criteria for the Site	23
4.	Constitutional Limits on the Acquisition of Federal or Indian Sovereignty over Land Long Held in Private Ownership and under Exclusive State Legal Control	26
a.	Introduction	26
b.	General Limits on Federal Power to Abrogate State Law by Land Acquisition	28
c.	Limits on Federal Power Based on the History of the Land and its Environs	31
d.	Implications for Prudential Standing	36

IV. CONCLUSION 40

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 32

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES	Page
<i>Andersen v. Cumming</i> , 827 F.2d 1303 (9th Cir. 1987)	17
<i>Arizona v. Manypenny</i> , 445 F.Supp. 1123 (D.Ariz. 1977), <i>revd. on other grounds</i> , 672 F.2d 761 (9th Cir. 1982)	30
<i>Artichoke Joe’s Calif. Grand Casino v. Norton</i> , 278 F.Supp.2d 1174 (E.D. Cal. 2003)	38
<i>Artichoke Joe’s Calif. Grand Casino v. Norton</i> , 353 F.3d 712 (9th Cir. 2003), <i>cert denied</i> , 543 U.S. 815 (2004)	33
<i>Assoc. of Data Processing Service Organizations, Inc. v. Camp</i> , 397 U.S. 150 (1970)	10-11
<i>Bagdasarian v. Gragnon</i> , 31 Cal.2d 744 (1948)	12
<i>Bd. of Nat’l Res. of State of Washington v. Brown</i> , 992 F.2d 937 (9th Cir. 1993)	39
<i>Broudo v. Dura Pharmaceuticals, Inc.</i> , 339 F. 3d 933 (9th Cir. 2003)	16-17
<i>Citizens Exposing Truth about Casinos v. Kempthorne</i> , 492 F.3d 460 (D.C. Cir. 2007)	24
<i>Citizens for Better Forestry v. U.S. Dept. of Agriculture</i> , 341 F.3d 961 (9th Cir. 2003)	11, 14, 17
<i>City of Roseville v. Norton</i> , 219 F.Supp.2d 130 (D. D.C. 2002), <i>aff’d</i> , 348 F.3d 1020 (D.C. Cir. 2003)	34, 38
<i>City of Sherrill v. Oneida Indian Nation of N. Y.</i> , 544 U.S. 197 (2005)	27, 31, 32, 35

<i>Construction Indus. Assoc. v. City of Petaluma</i> , 522 F.2d 897 (9th Cir. 1975), <i>cert. denied</i> , 424 U.S. 934 (1976)	12
<i>Coso Energy Developers v. County of Inyo</i> , 122 Cal.App.4th 1512 (4th Dist. 2004)	28
<i>Desert Citizens Against Pollution v. Bisson</i> , 231 F.3d 1172 (9th Cir. 2000)	13
<i>Fort Leavenworth R.R. Co. v. Lowe</i> , 114 U.S. 525 (1885)	28, 30
<i>Gillespie v. City of Indianapolis</i> , 185 F.3d 693 (7th Cir. 1999)	39
<i>Gladstone Realtors v. Village of Bellwood</i> , 441 U.S. 91 (1979)	12
<i>Greater Los Angeles Council of Deafness v. Zolin</i> , 812 F.2d 1103 (9th Cir. 1987)	17
<i>In re Stac Electronics Securities Litig.</i> , 89 F.3d 1399 (9th Cir. 1996), <i>cert. denied</i> , 520 U.S. 1103 (1997)	8
<i>Jones v. Blanas</i> , 393 F.3d 918 (9th Cir. 2004)	17
<i>Kohler v. Inter-Tel Technologies</i> , 244 F.3d 1167 (9th Cir. 2001)	5
<i>Lance v. Coffman</i> , 549 U.S. 437 (2007)	21
<i>Laub v. U.S. Dept. of Interior</i> , 342 F.3d 1080 (9th Cir. 2003)	10, 11, 14
<i>Los Angeles v. Lyons</i> , 461 U.S. 95 (1983)	11
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	10, 11, 13
<i>Maryland Casualty Co. v. Pacific Coal & Oil Co.</i> , 312 U.S. 270 (1941)	10

<i>McClure v. Life Ins. Co. of N. America</i> , 84 F.3d 1129 (9th Cir. 1996)	18-19
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985)	35
<i>Moss v. U.S. Secret Service</i> , 572 F.3d 962 (9th Cir. 2009)	8
<i>Nance v. Env'l Protection Agency</i> , 645 F.2d 701 (9th Cir. 1981)	39
<i>Neighborhood Action Group v. County of Calaveras</i> , 156 Cal.App.3d 1176 (3rd Dist. 1984)	15
<i>New York v. United States</i> , 505 U.S. 144 (1992)	37, 39
<i>Nuclear Information and Resource Service Center v. Nuclear Regulatory Comm'n</i> , 457 F.3d 941 (9th Cir. 2006)	36-37
<i>Oregon v. Legal Services Corp.</i> , 552 F.3d 965 (9th Cir. 2009)	39
<i>Presidio Golf Club v. Natl. Park Service</i> , 155 F.3d 1153 (9th Cir. 1998)	10, 14
<i>San Francisco Ecology Center v. City and County of San Francisco</i> , 48 Cal.App.3d 584 (1975)	16
<i>Schmier v. U.S. Court of Appeals for the Ninth Circuit</i> , 279 F.3d 817 (9th Cir. 2002)	11
<i>Silas Mason Co. v. Tax Commission of State of Washington</i> , 302 U.S. 186 (1937)	28-30
<i>Societe de Conditionnement En Aluminium v. Hunter Engineering Co., Inc.</i> , 655 F.2d 938 (9th Cir. 1981)	10
<i>Society Hill Towers Owners' Ass'n. v. Rendell</i> , 210 F.3d 168 (3d Cir. 2000)	9
<i>Steel Co. v. Citizens For A Better Environment</i> , 523 U.S. 83 (1998)	21

Surplus Trading Co. v. Cook, 281 U.S. 647 (1930) 30

Tennessee Electric Power Co. v. Tennessee Valley Authority,
306 U.S. 118 (1939) 38-39

TOMAC, Taxpayers of Michigan against Casinos v. Norton,
193 F.Supp. 2d 182 (D. D.C. 2002), *aff'd*, 433 F.3d 852
(D.C. Cir. 2006) 9, 37

Tyler v. Cuomo, 236 F.3d 1124 (9th Cir. 2000) 8

United States v. John, 437 U.S. 634 (1978) 34-35

United States v. Skoien, — F.3d —, 2009 WL 3837316
(7th Cir. Nov. 18, 2009) 39

United States v. McGowan, 302 U.S. 535 (1938) 34

United States v. Sandoval, 231 U.S. 28 (1913) 36

United States v. Varela-Rivera, 279 F.3d 1174 (9th Cr. 2002) 5

Vang v. Nevada, 329 F.3d 1069 (9th Cir. 2003) 5

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 15-16

Williams v. Lee, 358 U.S. 217 (1959) 35

**CONSTITUTIONAL PROVISIONS, STATUTES
AND RULES**

Federal Rules of Appellate Procedure,
Rule 28(b) 4, 5, 6

Federal Rules of Civil Procedure,
Rule 12(b)(1) 1, 4, 23, 24

Title 25, United States Code,	
§ 2710	38-39
§ 2719	28
U.S. Constitution,	
Commerce Clause	33, 40
10th Amendment	43-45

OTHER AUTHORITIES

<i>Cal. Practice Guide: Federal Ninth Circuit Civil</i>	
<i>Appellate Practice</i> (Rutter 2009), ¶ 8-100	5

I.

INTRODUCTION

The opening brief for this group of appellants — the plaintiff coalition and twelve of the fourteen individual plaintiffs (together, “the coalition”) — made a detailed showing of Article III injury based on allegations and cognizable documents below. They cited their personal and concrete interests at stake that distinguish them from the general public. They cited the threat of immediate harm to those interests from the disputed trust acquisition itself — not just an operating casino later on — including immediate diminution of their property values and immediate loss of valuable procedural rights. They also explained how the proposed acquisition itself generated a present and concrete dispute justiciable by declaratory relief. And they demonstrated that Article III does not even *require* immediate injury, though it was sufficiently established for purposes of the Rule 12(b)(1) motions below.

Remarkably, the great bulk of the coalition’s showing has been completely ignored by the government appellees, Bureau of Indian Affairs, et al. (together, “BIA”), and the intervenor-appellee, Federated Indians of

Graton Rancheria (“Federated”). BIA and Federated pursue the same two-pronged strategy: obscuring the coalition’s showing, and inviting the Court to affirm on alternative grounds never decided below.

Both prongs of appellees’ strategy violate this Court’s settled policies. One requires reasoned argument under pain of waiver. (*Post*, pp. 4-5) The other eschews alternative grounds not decided by the district court in the first instance. (*Post*, pp. 16-17) And because the appellees’ briefs fly in the face of *both* policies, there is a particularly just and proper way to grant their request to expedite this appeal. The Court should limit itself to the Article III issue decided below, identify the many points the appellees concede on that issue (*post*, pp. 6-16), and expeditiously reverse the judgment by relying in appropriate part on those concessions.

Among many other reasons to follow that course (*post*, pp. 18-22), the alternative issues proffered by the appellees are far more complex and fact-dependent than they suggest. (*Post*, pp. 22-36) Properly understood, those issues cry out for factual and legal development in the district court in the first instance.

To cite just one example here, the coalition’s basic constitutional contention is not that BIA’s mere acquisition of *title* to the disputed land would exceed its constitutional authority. Rather, the contention is that a mere acquisition of title would not confer federal or Indian *sovereignty* over this land — *i.e.*, power sufficient to abrogate state and local laws at odds with the proposed casino resort — because nothing in the Constitution confers *that* power. (*Post*, pp. 26-36) Yet Federated, for example, argues that “[t]he mere transfer of land ownership to the United States does not create an injury.” (Federated AB 18) As this brief will demonstrate, there is much more to this case than a “mere transfer of land ownership.”

In sum, the appellees’ “answering” briefs not only fail to answer. Their very strategy of evading the Article III issue strongly supports an expedited reversal on that ground alone.

II.

AS THE APPELLEES MOSTLY CONCEDE, THE COMPLAINT AND COGNIZABLE DOCUMENTS BELOW ESTABLISH ARTICLE III INJURY FOR PURPOSES OF A RULE 12(b)(1) MOTION

A.

THE APPELLEES' FAILURE TO DISPUTE THE COALITION'S SHOWING CONCEDES IT

Appellees have the same duty as appellants to present reasoned arguments in their brief. Fed.R.App.P., Rule 28(b). Moreover, this Court applies the same consequence for a violation of that duty: a waiver of the point not argued. That is why a leading Ninth Circuit practice guide warns appellees to “be careful to ensure [their brief] contains all the necessary points, including adequate responses to assertions made in the opening brief.” Goelz, et al., *Cal. Practice Guide: Federal Ninth Circuit Civil Appellate Practice* (Rutter 2009), ¶ 8-100. BIA and Federated have ignored that warning at their peril.

In light of Rule 28(b), and the obvious value of *responsive* briefing, this Court has a policy that “[i]ssues raised in a brief which are not supported by argument are deemed abandoned.” *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1182 (9th Cir. 2001). While *Kohler* involved an appellant, this Court has applied the same rule to appellees — including government appellees. For example, *Vang v. Nevada*, 329 F.3d 1069 (9th Cir. 2003), reversed a judgment because the government’s brief as appellee did not address a critical issue. It “did not explain” a waiver problem that the appellant had briefed. *Id.* at 1073. For that reason, this Court decided to “hold the [appellee] to its waiver and thus reverse the district court’s decision. . . .” *Id.* Similarly, because the United States’ brief as appellee in *United States v. Varela-Rivera*, 279 F.3d 1174 (9th Cir. 2002), “did not argue that [an evidentiary] error was harmless,” this Court held that the government had “waived the argument.” *Id.* at 1180.

As the coalition will now demonstrate, BIA and Federated have failed to address, and therefore conceded, the great bulk of the coalition’s showing of Article III injury.

B.

THE POINTS CONCEDED

1.

**This Case Involves the Proposed Acquisition,
Not Just Possible Future Actions**

The coalition said it clearly and often: their complaint centers on the proposed acquisition itself. It claims the acquisition would be unlawful because the targeted land does not meet the criteria laid down by Congress. (AOB 10-12) It disputes BIA's official pronouncement that the acquisition, assuming it did go forward, would abrogate all the "California zoning laws" currently restricting the land (AOB 21, quoting BIA report at Coalition ER 22) or California's anti-gaming laws. (AOB 21-22) It claims Congress did not even intend to preempt such laws, and any such intent would exceed Congress's power given the history of the land in question. (AOB 12-14)

Those are the contentions that shape the Article III issue before this Court. But the appellees attempt to evade them. Instead of *answering* the

coalition's showing about the acquisition issues, they ignore that showing and insist the case involves nothing but the possible future.¹

Indeed, Federated does this so brazenly it well illustrates the evasion common to both briefs. It opens its brief by depicting "two separate processes" that will purportedly "assist [the Court] in getting a handle on the issues. . . ." (Federated AB 1-2) But neither "process" contains the slightest reference to the legality or legal effect of the proposed acquisition. Both appellees' obvious hope is evade those issues and, with them, the coalition's entire showing of Article III injury. That is not how answering briefs are supposed to answer.

2.

The Controlling Record

Nor does either appellee contest the coalition's definition of the controlling record. (AOB 15-16) They concede, therefore, that it consists

¹ Illustrative is Federated's claim that "the entire case is premised on injuries alleged to flow from authorization of gaming and the construction of a casino." (Federated AB 15) And BIA likewise claims the coalition alleges injury "based solely on the possibility of the Tribe eventually operating a casino on the Property. . . ." (BIA AB 18)

of (1) factual allegations in the complaint; (2) reasonable inferences therefrom; (3) both to be “construed in favor of” the coalition, *Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000); (4) facts contained in documents attached to the complaint; and (5) any facts in documents adduced by the appellees below *if* those facts are judicially noticeable or of unquestionable authenticity.

For example, both appellees ignore the coalition’s authority limiting reliance on opposing parties’ papers. *In re Stac Electronics Securities Litig.*, 89 F.3d 1399, 1405, n. 4 (9th Cir. 1996), *cert. denied*, 520 U.S. 1103 (1997). Yet they flatly violate that authority by relying on declarations, self-serving resolutions, self-serving legal findings, and other matters not cognizable on this appeal. Nor do they mention the coalition’s showing (at AOB 36-37) that its allegations satisfy current pleading standards under *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009).

3.

The Coalition Members' Concrete and Particularized Interests

Neither appellee contests the coalition's showing that it alleged concrete and particularized interests in the fate of the land in question — interests that differentiate the coalition and its members from the general public or general opponents of casinos. (Coalition AOB at 16-20) Instead, the appellees merely argue that those interests are not threatened *immediately* enough to satisfy Article III.

This brief addresses the immediacy question separately. (*Post*, pp. 10-11) Here, though, it is critical to recognize the appellees' concession that the interests alleged below are *concrete and particularized* enough to satisfy Article III. They do not even address the coalition's showing to that effect based on *Society Hill Towers Owners' Ass'n. v. Rendell*, 210 F.3d 168, 177 (3d Cir. 2000), and *TOMAC, Taxpayers of Michigan against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006). Only Federated even bothers to mention those cases (AB 18-19), but says only that *Society Hill* involved environmental impact assessments and might support standing in some other case. That is hardly an answer to the coalition's showing.

4.

**The Justiciability of the Claims
for Declaratory Relief**

Neither appellee even *mentions* the coalition's factual and legal showing that its requests for declaratory relief satisfy Article III. (AOB 16-20 [interests threatened], 21-22 [concrete and present dispute]; AOB 31-32 & 40-43 [legal showing]) Nor does either brief mention the coalition's authorities to that effect, *Societe de Conditionnement En Aluminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938 (9th Cir.1981), and *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941).

5.

**Article III Does Not Insist on
Immediate Injury**

Likewise ignored is the coalition's detailed showing (AOB 30-35) that Article III does not insist on immediate injury, citing *Assoc. of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Societe de Conditionnement En Aluminium, supra*, 655 F.2d 938; *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080 (9th Cir. 2003); *Presidio Golf Club v. Natl. Park Service*, 155 F.3d 1153 (9th Cir. 1998); *Lujan v. Defenders of Wildlife*, 504

U.S. 555 (1992); and *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961 (9th Cir. 2003).

BIA ignores every one of those authorities, including *Laub*'s direct holding 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). Federated ignores most of those cases, too, citing only *Camp* and *Lujan* but only on other issues.

BIA does cite two inapposite cases, *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817 (9th Cir. 2002) (challenge to court's citation policy), and *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (fear of choking by police), but provides not a word attempting to explain how they trump the coalition's contrary argument and authorities. That is no answer either.

6.

Standing Is Supported by Immediate Diminution of Property Value

Even if Article III *did* insist on immediate injury, the appellees concede the coalition's showing of two forms of such injury: first, an

immediate diminution of property value from the acquisition itself.

Neither appellee mentions the coalition's legal showing that injury of that kind qualifies under Article III (AOB 49-50), or the cases cited for that proposition, *Construction Indus. Assoc. v. City of Petaluma*, 522 F.2d 897, 904 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976), and *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).

Nor does either appellee mention the coalition's *factual* showing of immediate value diminution from the acquisition itself, with a detailed analysis of the relevant allegations, inferences, and cognizable documents below. (AOB 16-20 [property and other interests], 25-28 [injury to property values]) For example, they ignore the coalition's showing, based on *Bagdasarian v. Gragnon*, 31 Cal.2d 744 (1948), that present property value always reflects good or bad prospects affecting the use of the property. (AOB 50-51)

7.

**Standing Is Supported by Immediate
Procedural Injuries**

Finally, and independently, the appellees effectively concede the coalition's showing of immediate procedural injury from the subject acquisition. At the outset, they ignore the coalition's showing that a deprivation of an entire body of procedural rights, whether conferred by federal or state law, qualifies as a plausible claim of procedural injury for present purposes. (AOB 43-45) Ignoring the coalition's authorities as well — *Lujan, supra*, 504 U.S. 555, and *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000) — the appellees simply assert that the more familiar situation, an agency's violation of its own procedural rules, is the *only* situation cognizable as procedural injury under Article III. That is no answer to the coalition's contrary showing.

Nor does it avail BIA to mischaracterize that showing as a bid for Article III standing based on procedural complaints divorced from any concrete, particularized interests. (BIA AB 31-32) The coalition repeatedly embraced the concrete-interest requirement, as in the first paragraph of its argument on procedural injury. (AOB 43-44) There,

quoting *Citizens for Better Forestry, supra*, 341 F.3d 961 at 969, the coalition argued:

“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.”

BIA has grossly mischaracterized the coalition’s position.

Nor does either appellee dispute, or even mention, the coalition’s showing (AOB 32-34) that, in procedural injury cases, “the requirements of immediacy of the threatened harm are relaxed.” *Laub v. U.S. Dept. of Interior, supra*, 342 F.3d 1080, 1087. The appellees likewise ignore the coalition’s citation of *Presidio Golf Club v. Natl. Park Service*, 155 F.3d 1153 (9th Cir. 1998) on this point.

BIA alone addresses the coalition’s showing of injury from the deprivation of *pre-acquisition* reviews of the intended trust acquisition under two federal statutes, NEPA and IGRA. (AOB 23-24) But BIA’s only response is to misstate the record again, claiming the coalition is presenting this theory for the first time on appeal. (BIA AB 32) In fact,

BIA's own brief (at p. 9) quotes most of the following language in the complaint:

Plaintiffs have also suffered procedural injury . . . because they have been denied the opportunity to comment on the impacts of the casino project pursuant to the procedures normally required for discretionary trust acquisitions. (Coalition ER at 35, lns. 4-7)

That is precisely the point argued in the coalition's opening brief. And Federated grossly mischaracterizes it as a contention that "Interior should have been the agency to prepare the EIS." (Federated AB 16, n. 12)²

Finally, neither appellee disputes, or even mentions, the coalition's detailed showing that the acquisition threatens to abrogate highly valuable procedural rights under state law. (AOB 24-25 [pertinent facts] & 46-48 [legal analysis]) In typical fashion, the appellees ignore every case the coalition cited on this issue, including *Neighborhood Action Group v. County of Calaveras*, 156 Cal.App.3d 1176 (3rd Dist. 1984); *Village of Belle Terre v.*

² Contrary to BIA's related argument, the complaint seeks appropriate relief: setting aside the acquisition for violation of the Graton Act. That would sweep away BIA's "mandatory acquisition" rationale for dispensing with pre-acquisition reviews under NEPA and IGRA.

Boraas, 416 U.S. 1 (1974); and *San Francisco Ecology Center v. City and County of San Francisco*, 48 Cal.App.3d 584 (1975).

* * *

In sum, the first prong of the appellees' strategy, effectively ignoring the coalition's showing, amounts to a concession of that showing. And we now demonstrate that the second prong of their strategy, a bid to affirm on alternative grounds, is equally unavailing.

III.

**THE COURT SHOULD FOLLOW ITS SETTLED POLICY,
AND EXPEDITE THIS APPEAL, BY REFUSING TO
ENTERTAIN THE ALTERNATIVE ISSUES TENDERED
BY THE APPELLEES**

A.

INTRODUCTION

The appellees' strategy flies in the face of another settled policy of this Court. As stated in *Broudo v. Dura Pharmaceuticals, Inc.*, 339 F.3d 933, 941 (9th Cir. 2003):

While *Dura* is correct that we *may* affirm the district court’s judgment on a different ground, we need not do so. Indeed, we usually do not. See *Andersen v. Cumming*, 827 F.2d 1303, 1305 (9th Cir.1987) (stating “[o]rdinarily we will not decide an issue that was not addressed by the district court”) (citing *Greater Los Angeles Council of Deafness v. Zolin*, 812 F.2d 1103, 1107 (9th Cir.1987)). We decline *Dura*’s invitation for this reason. (Original italics)³

Accord, *Citizens for Better Forestry*, *supra*, 341 F.3d 961, 978 (“[w]e do not reach the merits of Citizens’ appeal on their motion for injunctive relief, however, because the district court did not reach the merits of the motion”); and *Jones v. Blanas*, 393 F.3d 918, 936 (9th Cir. 2004).

There are a number of reasons to follow that policy here. We first identify concerns about fair and efficient judicial administration, then explain that the issues themselves are far more complex and less one-sided than the appellees suggest.

³ *Broudo* was reversed on unrelated grounds in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).

B.

FAIR AND EFFICIENT JUDICIAL ADMINISTRATION

To begin with, the coalition properly relied on the Court's settled policy by limiting its opening brief to the Article III issue decided below. It deliberately summarized the substantive issues of the case only as background. (Coalition AOB 8-14) Accordingly, it should not be forced to rely on a reply brief to address the many complex issues tendered by the appellees. Both the coalition and the Court would be disadvantaged by such truncated briefing.⁴

Second, the alternative issues tendered by the appellees are not "purely legal" within the meaning of *n v. Life Ins. Co. of N. America*, 84 F.3d 1129, 1133 (9th Cir. 1996), a case Federated materially miscites. Its quotation (Federated AB at 22, n. 16) omits the very circumstance *McClure*

⁴ Two separately represented appellants did argue the merits but only "out of an abundance of caution" because the district court briefly addressed the merits. (Egger/Soares AOB at 5, n. 4) The coalition, however, believes there is much simpler answer to that aspect of the decision below. The court erred by *considering* the merits as a predicate for its ruling on standing. *Warth v. Seldin*, 422 U.S. 490, 500 (1975), held that "standing in no way depends on the merits of the plaintiff's contention. . . ." Rather, "the question of standing is whether the litigant is entitled to have the court *decide* the merits. . . ." *Id.* at 498; italics added.

relied on in deciding to reach an alternative ground. The material facts were all *stipulated*. *Id.* at 1133-1134.

The opposite is true here, and Federated's own brief so confirms. Here, as below, Federated not only *departs* from the allegations controlling this appeal but *contradicts* them. At the heart of this case, for example, is the history of the land in dispute and of Federated itself. Thus, Federated makes factual assertions in its brief about "[t]he Tribe's aboriginal territory" etc. (Federated AB at 5) But the complaint below alleged to the contrary: for example, that Federated "has no prior connection" to the land in question, that "no one lived" on it when originally designated as the rancheria in question, and that subsequent residents "never organized as a tribe." (Coalition Excerpts of Record ["ER"] at 28:20, 41:14, 41:18) Because these and other issues require factual development,⁵ they do not even begin to justify an exception from this Court's policy on alternative grounds.

⁵ Federated also makes factual arguments about legislative history (Federated AB at 5, n. 4), related administrative proceedings (*id.* at 7, n. 7), and promises of future administrative proceedings (*id.* at 24) and "further refine[ment]" of its development plans. (*Id.* at 25)

Federated's bid for an exception should also be denied because of its violation of basic rules governing Rule 12(b)(1) motions and, therefore, this appeal. Its key factual assertions about "[t]he Tribe's aboriginal territory" and so forth (Federated AB at 5) rely on a self-serving declaration it filed in support of its motion to intervene below. (Egger's ER, Doc. 16) Citations like that counsel against any special dispensation from this Court's policy on alternative grounds.

BIA's brief highlights still another reason to adhere to that policy. It asks this Court to perform substantial extra work by analyzing complex merits issues in the first instance, but then says all that extra work would go for naught if the Court's analysis of those issues pointed to a ruling in favor of the coalition:

To the extent . . . Plaintiffs seek an affirmative determination by this Court that their claims have merit, that would not be proper because Plaintiffs did not move for summary judgment and the issue briefed in the district court was whether Plaintiffs failed to state a claim. (BIA AB at 47, n. 9)

Adherence to this Court's policy on alternative grounds would avoid the marked inefficiency of examining complex issues under that limitation.

Moreover, the appellees have only themselves to blame for the present posture of this case. They filed Rule 12(b)(1) motions instead of waiting a short while until summary judgment motions were ripe, and invited the erroneous ruling on their motions below by so emphatically urging a lack of Article III injury. For both reasons, the appellees have only themselves to blame for an appeal limited to that issue.

Nor is this Court under any compulsion to decide the additional jurisdictional issues the appellees tender. Although federal appellate courts must touch all jurisdictional bases before deciding the *merits* of a case, *Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 93-102 (1998), they need not do so merely to vacate an erroneous jurisdictional ruling by the district court. *Lance v. Coffman*, 549 U.S. 437, 439, n. * (2007) (per curiam).

Ultimately, though, the Court should adhere to its settled policy because it would expedite this appeal as all parties have requested. The extra issues tendered by the appellees would require extra work and extra

time to decide. The proper way to expedite this appeal is to limit it to the issue the district court decided and the coalition accordingly briefed.⁶

C.

**THE ISSUES THEMSELVES COUNSEL
AGAINST AN EXCEPTION**

1.

Causation and Redressability

Federated's argument on the causation issue under Article III (AB 16-17) relies on the same evasive foundations as its argument on injury: that standing always requires immediate injury, that no such injury appears below, and that the acquisition itself has no conceivable causal connection to any other form of injury alleged below. This reply brief has already commented on each those propositions.

BIA does not argue causation, but we have already commented on its redressability argument limited to the pre-acquisition reviews under

⁶ Having relied on this Court's policy, however, the coalition requests an opportunity to file a supplemental brief in the unlikely event the Court decides to address any alternative issues.

federal law. (*Ante*, p. 15, n. 2) Neither appellee, though, suggests the coalition can gain no meaningful relief in this case. On the contrary, it is asking the court to protect their concrete interests by blocking the proposed acquisition and declare that, in any event, the acquisition would not permit the anticipated casino project.

2.

Ripeness

Federated submits a lengthy argument on ripeness (AB 22-26), but it suffers from the same flaws as its arguments on injury and ripeness. Here, too, Federated forgets that the coalition’s case centers on the legality and legal effect of the proposed acquisition of title, not just the possible future operation of a casino. (BIA makes no argument on ripeness.)

3.

**Violation of the Graton Act’s
Criteria for the Site**

Both appellees’ arguments on the “no adverse claims” requirement of the Graton Act ignore major points in the coalition’s opening brief. On the issue of prudential standing, for example, BIA argues that the

coalition’s only alleged harms in this case are “from a casino” — not the acquisition — and therefore “are not within the zone of interests” of the Graton Act. (BIA AB 36; see also Federated AB 22) But that entire argument is evasive. The harm that *is* alleged below stems directly from the acquisition, because the record establishes for Rule 12(b)1) purposes that it violates the Graton Act’s site criteria.

Similarly, both appellees ignore the coalition’s showing of its lost opportunity to challenge the *acquisition* under IGRA — not just some future gaming permit — on the grounds that gaming at this site would be “detrimental to the surrounding community.” (AOB 24, citing 25 U.S.C. § 2719(b)(1)(A)) *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007), expressly approved prudential standing for a claim like the coalition’s.⁷

⁷ “Citizens’s claim is sufficiently congruent with congressional purpose because it seeks to enforce the provision that Congress included regarding affected communities. . . . Inclusion of this provision demonstrates that Congress could not have intended to preclude efforts to enforce it, even if enforcement might prevent a landless tribe from gaining the benefits of IGRA.” 492 F.3d at 464-465.

Even more remarkably, the appellees ignore the entirety of the coalition's brief showing that the proposed acquisition *does* violate the Graton Act because of numerous "adverse legal claims" burdening the property. (AOB 10-12) There is no need to repeat that showing here, but its total evasion by the appellees vividly confirms the impropriety of a decision on this issue on the limited basis they propose.

It is telling, moreover, how inconsistently they treat different recorded interests cited by the coalition. They insist the Williamson Act contracts would survive the acquisition. But they forget BIA's pre-litigation position that other recorded interests would *not* survive, including the Rohnert Park Redevelopment Plan and an associated declaration of restrictions. (Coalition AOB 11, citing ER 22) The appellees offer no rationale for that arbitrary distinction.

4.

**Constitutional Limits Regarding Land
Long Held in Private Ownership and
under Exclusive State Legal Control**

a.

Introduction

It is essential to recall the relief sought by the First Claim for Relief below: a declaration that “the State of California would retain plenary jurisdiction over the Property *even if the Secretary were to take title to the Property* in trust for [Federated] and the land became part of [Federated’s]reservation. In particular, plaintiffs contend that the Property would remain subject to California land use and water law, and penal law prohibitions against casino gambling.” (ER 46-47, ¶ 96; italics added; see also ER 46, ¶ 99.) The appellees, however, contend that “the Property *would no longer be subject to state jurisdiction*, and that [Federated] could construct a large casino . . . without having to observe the limits of California law and conduct casino gambling at the site despite California’s prohibitions against those activities.” (*Id.*, ¶ 97, italics added)

Thus, the constitutional issue so framed is not limited to the acquisition of title to land in trust for an Indian tribe. The issue is the *effect* of such an acquisition, especially given the particular history of the land in question and its environs. As the Supreme Court recently recognized in *City of Sherrill*, 544 U.S. 197, 202, “acquisition of title” is a question distinct from acquisition of Indian “sovereignty.”

As applied here, the issue is whether, under the Graton Act, BIA’s acquisition of title to land governed by state and local land use and anti-gaming laws since California was admitted to the Union would, as the appellees contend, effectuate a change in sovereignty displacing those state and local laws without California’s consent. Moreover, the purported change in sovereignty would be for the benefit of a newly recognized Indian tribe that, as must be assumed on this appeal, “has no prior connection” to this land. (ER 28, ln. 20)

These issues are complex, and the appellees have failed to demonstrate that *any* state and local laws would be abrogated by a trust acquisition under these circumstances, let alone the particular state and

local laws at issue here. And the coalition's position finds support in two separate lines of authority we now address.

b.

**General Limits on Federal Power To
Abrogate State Law by Land Acquisition**

As the coalition pointed out originally (AOB 13-14), state law cannot be abrogated by the federal government's mere acquisition of land through private purchase or condemnation. As held in *Coso Energy Developers v. County of Inyo*, 122 Cal.App.4th 1512, 1520 (4th Dist. 2004), 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. . .).”

Illustrative is *Silas Mason Co. v. Tax Commission of State of Washington*, 302 U.S. 186, 197-210 (1937). As part of the New Deal Public Works

program, the federal government acquired land by both purchase and condemnation to construct a dam and hydro-electric power plant on the Columbia River, in an obvious exercise of Commerce Clause power. Nonetheless, the Supreme Court held that the land remained subject to state occupational taxes. Indeed, *Silas Mason* applied the very distinction the coalition relies on: that Congress's authority to undertake that enterprise, or acquire the lands necessary to do so, was "distinct" from the "[t]he question of exclusive territorial jurisdiction" over the land. *Id.* at 197.

Directly pertinent here, *Silas Mason* also held that the federal government did not possess exclusive jurisdiction over a portion of the land it had dedicated to the dam project that the United States was already holding in trust for Indians, even though the United States already had title to those lands. *Id.* at 209-10. The Court reasoned that, "with respect to such lands exclusive legislative authority would be obtained by the United States only through cession by the State." *Id.*

Silas Mason also cited one of the very cases BIA cites here (AB at 60), *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930). And that case confirms the coalition’s precise point: that “the usual Indian reservation” is “[a] typical illustration” of the principle that federal “ownership [of land] and use without more do not withdraw the lands from the jurisdiction of the state.” *Surplus Trading*, 281 U.S. at 650-51); *see also*, *Arizona v. Manypenny*, 445 F. Supp. 1123, 1125-26 (D.Ariz. 1977) (holding that state had criminal jurisdiction over Indian reservation because federal government did not obtain exclusive jurisdiction by any of three recognized means), *revd. on other grounds*, 672 F.2d 761 (9th Cir. 1982).

No more availing is BIA’s related argument that the federal eminent domain power would suffice to oust state jurisdiction. (AB 59-60) *Silas Mason* holds otherwise. And the very case BIA cites for this proposition, *Fort Leavenworth, supra*, states that, when “lands are acquired in any other way by the United States within the limits of a state than by purchase with her consent the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits,”

except to the extent that buildings erected on the land are used as an “instrumentalit[y] for the execution of [the federal government’s] power.”

c.

Limits on Federal Power Based on the History of the Land and its Environs

Beyond the foregoing general limits on federal power, additional limits may derive from the history of the particular land in question and the interests and expectations of neighboring landowners typified by the coalition in this case. For purposes of this appeal, it is undisputed that the land at issue has been in private ownership at all times since the admission of California to the Union, subject to exclusive regulatory control by that State, and with private citizens in surrounding areas building up concrete interests and justifiable expectations over time that the use of this land in their neighborhood will *continue* to be subject to exclusive California regulatory control. *City of Sherrill*.

As the coalition alleged below (ER 47, ¶ 98), this long history militates strongly against the abrogation of state and local regulatory law by a mere trust acquisition at this late date. And a case the coalition cited

on the standing issue in their opening brief, *City of Sherrill*, also confirms that the coalition's position on the merits deserves full development in the district court in the first instance.

City of Sherrill rejected a federally recognized Indian tribe's attempt to revive its sovereignty over former tribal lands, long since subject to state and local jurisdiction, by privately re-purchasing the lands. Here, by contrast, the complaint questions whether Federated has *any* sovereignty to revive, whether over the land at issue or any other. But even ignoring that issue, *City of Sherrill*'s rejection of the re-purchasing strategy rings no less true for Federated's reliance on a federal trust acquisition: "[w]hen a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are paramount." *Id.* at 218. Among other things, the Court criticized the prospect of freeing the re-purchased land from "local zoning or other regulatory controls that protect all landowners in the area." *Id.* at 220; *see also, id.* at 227 (Stevens, J., dissenting) ("the balance of interests obviously supports the retention of state jurisdiction in this sphere" in light of the particular geographical configuration). *City of Sherrill* thus raises serious

doubt whether, in the present case, the federal government's mere acquisition of title could inflict such disruptive effects.⁸

As noted in the coalition's opening brief (at 14), this Court appeared to draw a similar distinction in *Artichoke Joe's Calif. Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004), when discussing the reach of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710. The Court observed that the Class III gaming operations at issue there were "located on Indian reservations or Indian trust lands. Thus, we need not and do 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." *Id.* at 735, n. 16. The present case involves precisely the latter situation: land lacking the *historical* connection to

⁸ Although the Court suggested that a federal trust acquisition would "provide the proper avenue for [the tribe] to reestablish sovereign authority" over the territory in question (*id.* at 221), that statement was *dictum*. It did not address, much less purport to decide, any of the limits on federal power that the coalition asserts in this case.

Indians that the terms “Indian reservations or Indian trust lands,” *id.*, suggest.⁹

Finally, the appellees’ Supreme Court cases do not support their position that the issues are so clear-cut in their favor that this Court could properly rely on them as alternative grounds. For example:

- *United States v. McGowan*, 302 U.S. 535 (1938), involved the exercise of federal jurisdiction under a federal forfeiture statute that “did not deprive the state of Nevada over its sovereignty over the area in question.” *Id.* at 539. Further, *McGowan* did not involve an exercise of Indian sovereignty that could have interfered with concrete interests and settled expectations of neighboring landowners.

- *United States v. John*, 437 U.S. 634 (1978), held that a federal criminal statute governing certain offenses committed on an Indian reservation preempted state criminal laws on the same subject, and was a valid exercise of Congress’s authority under the Indian Commerce Clause

⁹ The coalition’s concerns were not addressed in *Carciere v. Kempthorne*, 497 F.3d 15, 39-41 (1st Cir. 2007) (en banc), *rev’d sub nom. Carciere v. Salazar* 129 S.Ct. 1058 (2009) or *City of Roseville v. Norton*, 219 F.Supp.2d 130 (D.D.C. 2002), *aff’d*, 348 F.3d 1020 (D.C. Cir. 2003).

given the “elaborate history” of the relations between the tribe and the federal government (*id.* at 651-53) which in no way resembles the history alleged here. (ER 41-43, ¶¶ 60-72)

- *Williams v. Lee*, 358 U.S. 217 (1959), held that principles of Indian sovereignty precluded Arizona state courts from adjudicating an action by a non-Indian for collection of a debt incurred by an Indian on the reservation. But on statehood, Arizona had disclaimed any rights or title to “lands lying within [its] boundaries owned or held by any Indian or Indian tribes,” in favor of exclusive federal control. *See*, Act of June 20, 1910, ch. 310, 36 Stat. 557, 558-559, § 2; Procl. by Pres. of U.S.A., Feb. 14, 1912; 37 Stat. 1728; Ariz. Const. art. xx, § 4.

- *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), held that members of an Indian tribe residing on a reservation in Montana were exempt from certain state taxes because Congress had not authorized the tax. But, again, Montana had agreed that “all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States . . . ,” Mont. Const. art. i, and the case “concerned land the Indians had continuously occupied.” *City of Sherrill*, 544 U.S. at 216, n.10.

- Finally, *United States v. Sandoval*, 231 U.S. 28 (1913), upheld a federal criminal conviction for selling liquor on Indian pueblo lands in New Mexico, concluding that it did not infringe on state sovereignty. But New Mexico had agreed, as a condition of statehood, that the lands then owned or occupied by the Pueblo Indians would remain “Indian country.” *Id.* at 36-37.

d.

Implications for Prudential Standing

A proper understanding of the foregoing issues goes a long way towards a proper understanding of the associated question of prudential standing. In the first place, the coalition members are undoubtedly within the zone of interests protected by the state and local regulatory laws as to which their complaint seeks declaratory relief. (ER 47, ¶ 99) Nor do the appellees contend otherwise; they simply ignore that circumstance.

Thus, the coalition is not asserting the rights of third parties as the appellees argue, but their *own* rights — *i.e.*, to continue to enjoy the protection of these state and local laws. *See, Nuclear Information and*

Resource Service v. Nuclear Regulatory Comm'n, 457 F.3d 941, 950 (9th Cir. 2006) (discussing elements of prudential standing under the APA); *cf.* *Tomac v. Norton*, 193 F.Supp.2d 182, 190 (D.D.C. 2002) (organization comprised in part of residents who live adjacent to site of proposed Indian casino “are precisely the type of plaintiffs who could be expected to police” interests that are regulated by substantive federal law governing consideration of effects on surrounding communities and potential land use conflicts), *aff'd*, 433 F.3d 852, 860 (D.C. Cir. 2006).

Were that alone not enough, to the extent the complaint below may be said to implicate the Tenth Amendment, in simplest terms it would just reflect the proposition that none of the federal government’s enumerated constitutional powers authorizes the abrogation of these state and local regulatory laws by mere trust acquisition. *See, New York v. United States*, 505 U.S. 144, 156-157 (1992) (explaining why the Tenth Amendment, as a restraint on the power of Congress, “is essentially a tautology”). The appellees cite no case holding that the coalition lacks prudential standing to contend that, under the balance of federal and state power struck by the

federal Constitution, these state and local laws *remain in force* notwithstanding BIA's intended acquisition.

For example, *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), did not involve a challenge to the assertion of federal power that was claimed to abrogate state or local law. *But see id.* at 142 (dictum). Neither did *Artichoke Joe's California Grand Casino v. Norton*, 278 F.Supp.2d 1174, 1181 (E.D. Cal. 2003).

The exception is *City of Roseville v. Norton*, *supra*, F.Supp.2d 130, but the scope of the laws threatened with displacement in that case was far more limited than those threatened here. There, a tribe had “agreed, among other things, to work within the general and community plans, zoning ordinances and design guidelines that would have applied to a private development,” and also agreed “to comply with the California Environmental Quality Act. . .” *Id.* at 136. Moreover, *City of Roseville* acknowledges that case law addressing prudential standing to challenge the assertion of federal power under the 10th Amendment is “at best, unsettled.” *Id.* at 147.

Many Circuits have relied on *Tennessee Electric Power* as dispositive. But more modern Supreme Court jurisprudence teaches that “[f]ederalism does not exist to protect states ‘as abstract political entities’; rather, the division of authority between the states and the federal government exists to protect individuals.” *Bd. of Nat’l Res. of State of Washington v. Brown*, 992 F.2d 937, 946 (9th Cir. 1993) (citing *New York v. United States*, *supra*, 505 U.S. 144, 181).

Hence, there is authority that individuals do possess standing to challenge federal law under the Tenth Amendment. *See, Gillespie v. City of Indianapolis*, 185 F.3d 693, 703-04 (7th Cir. 1999), *abrogated on other grounds, United States v. Skoien*, — F.3d —, 2009 WL 3837316 (7th Cir. Nov. 18, 2009). Although this Court has expressed doubt about that proposition in dicta (*Oregon v. Legal Services Corp.*, 552 F.3d 965, 972 (9th Cir. 2009); *Nance v. Env’l Protection Agency*, 645 F.2d 701, 716 (9th Cir. 1981)), it has not squarely decided the question.

These issues, too, in other words, deserve full briefing and consideration by the district court in the first instance.

IV.

CONCLUSION

For all the foregoing reasons, and those set forth in its opening brief, the coalition respectfully requests the Court to reverse the judgment and remand for further proceedings the Court deems appropriate.

DATED: December 30, 2009

Respectfully submitted,

BIEN & SUMMERS

By: s/ ELLIOT L. BIEN

By: s/ AMY E. MARGOLIN

**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 6,952 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: December 30, 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: December 30, 2009

s/ ELLIOT L. BIEN