BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE PROTEST OF:	)	**SAN DIEGO DISTRICT OFFICE**
	)	
Dianne Jacob, County Supervisor, District 2, et al.	)	Case No.: 16084762
Against the Issuance of a License To:	)	OAH No. 2017020457
	)	
Jamul Indian Village Development Corporation,	)	**Protestants' Reply Brief to**
San Diego Gaming Ventures LLC	)	**Applicants' Response to Protestants'**
Dba: Hollywood Casino Jamul	)	**Notice of Briefing re: Request for**
14191 Highway 94	)	**Official Notice**
Jamul, CA 91935-3213	)	
	)	

Protestants, Helen Comer, Steven Comer, Donna Foster, Kevin Foster, Shannon Foster, Veronica Hoban, Robert Jackson, John Munnik, Kathryn Munnik, Theresa Murphy, Michael Murphy, Jocelyn Parker, Mclain Parker, Patrick Parker III, Linnea Peltola, Nadja Pretty, Sean Pretty, Dawn Scialabba, Larry Scialabba, Paul Scripps, Patricia Terry, Gregory Tyree, Kathleen Tyree, Patrick Webb, Debra Webb, Sara White, and Schuyler White ("the Webb Protestants), submit the following Reply Breif to Applicants' Response to Protestants' Notice of Briefing re: Reqeust for Official and Judicial Notice:

1. Applicants Continue to Fail to Meet Their Burden of Proof to Establish that they are not operating a Public Gambling Nuisance on the Land in Question

Contrary to Applicants' mis-characterization, Resp. 2:6-9, Protestants are not challenging the status of the land in question upon which a public gambling nuisance is being operated. It is what it is. Rather, Protestants proclaim the undisputed fact that the Appellants have failed to meet their burden of proof to establish that the Secretary of Interior (Secretary) ever made an Indian lands decision that the land in question qualifies for gambling.

They haven't, and they can't, because the Secretary hasn't made an Indian lands decision that the land in question qualifies for gambling. Nor can he, as a matter of law, since the land has never

been taken in to trust by the Secretary for a tribe under federal jurisdiction in 1934, nor has, or can, the land ever have been proclaimed to be a reservation by the Secretary, for the same reason. 25 U.S.C. §§465, 467; *Carcieri v. Salazar*, 382-83, 388-90, 394-95, 398-99 (2009); *Sandy Lake Band of Miss. Chippewa ("Sandy Lake") v. United States*, 2012 U.S. Dist. LEXIS 63458, *3-4 (D. Minn. 2012); *Littlefield v. DOI*, 2016 WL 4098749 (D. Mass. 2016); 2002 Dept. of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001)25 C.F.R. 151.3.[1]

Protestants' 13 Exhibits, P11, A-M, are self-authenticated, grant deeds, official government documents, Solicitor's opinions and federal court decisions that corroborate the Appellants' inability to meet their burden of proof, because it remains undisputed that the Secretary has never made an Indian lands decision that the land in question qualifies for gambling, and could not make such a decision because the land was never taken into trust by the Secretary for a tribe under federal recognition in 1934, and for that reason also, can never have been proclaimed to be a reservation.

Without the Secretary's Indian lands decision concerning the land in question, it is undisputed that Applicants have failed to meet their burden of proof to demonstrate that gambling on the land is not a public nuisance. Cal. Const. Art. XX, §22; Bus. & Prof. C. 23790; *Coffin v. Alcoholic Bev. Cont. Appeals Bd.* (2006) 139 Cal.App.4th 471, 473; *Kirby v. Alcohol Bev. Cont.*

[1] "No acquisition of land in trust status, including the transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary." 25 C.F.R. 151.3. Here, it is undisputed that the Secretary has never approved taking the land in question into trust. The acceptance of the deed, Ex. P11, D, was not accepted by the Secretary. Moreover, the recitals are not conditions of the grant deed. Cal. Jur. 3d, Deeds, Sec. 191. "This is particularly indicated where the purpose will not inure specifically to the benefit of the grantor and his or her assigns, but is in its nature for the general public, and where there are not other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled." *Id.*; *City of Manhattan Beach v. Superior Court*, 13 Cal.4th 232, 243-244 (1996), quoting *Basin Oil Co. v. City of Inglewood*, 125 Cal. App. 2d 661,664 (1954).

Appeals Bd. (1968) 261 Cal.App.2d 119, 126; *Yu v. Alcoholic Beverage Control Appeals Board* (*Yu*)(1992) 3 Cal.App.4th 286, 296; *Parente v. State Board of Equalization* (*Parente*) (1934) 1 Cal.App.2d 238; *Harris v Alcoholic Bev. Con. Appeals Bd.* (*Harris*) (1963) 212 Cal.app.2d 106, 119-120; *Morell v. Dept. of Alcohoic Bev. Control* (*Morell*) (1962) 204 Cal.App.2d 504, 514.

As noted in Protestants' June 9, 2017 Reply on the Motion to Strike Applicants' Exhibit 1, in 2001, Congress clarified that only the Secretary is authorized under IGRA to determine whether specific land qualifies for gambling for purposes of IGRA under 25 U.S.C. 2701 et seq. See 2002 Dept. of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001) ("Appropriations Act"). "Section 134, Clarification of the Secretary of the Interior's Authority under Sections 2701-2721 of Title 25, United States Code, provides: The authority to determine whether a specific area of land is a 'reservation' for purposes of sections 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988." *Citizens Exposing Truth About Casinos v. Kempthorne* (D.D.C. 2007) 492 F.3d 460, 462-63; *City of Roseville v. Norton* (D.C. Cir. 2003) 348 F.3d 1020, 1029.

It is undisputed that the Secretary has not made an Indian lands decision that the land in question qualifies for gambling. See, the NIGC's list of Indian lands decisions, which does not list the land in question. https://www.nigc.gov/general-counsel/indian-lands-opinions.

Applicants do not, and cannot, deny that: "The holder of a liquor license has the affirmative duty to make sure that the licensed premises are not used in violation of the law and the knowledge and acts of his employees are imputable to the licensee." *Morell* at 514. Nor do they deny that California Penal Code section 11225, provides that: "Every building or place used for the purpose of illegal gambling...is a nuisance which shall be enjoined, abated and prevented, and for which damages may be recovered, whether it is a public or private nuisance."

Nor do Applicants deny the United States' admission that the land in question is neither a reservation or trust lands over which a federally recognized tribe in 1934 has lawfully exercised governmental power. Exs., P11, D, E, F, and I. Protestants agree that it does not require any sifting or muddling to see that Applicants have failed to meet their burden of proof, as they have failed to produce any Indian lands decision by the Secretary, nor a single grant deed, qualifying the property for gambling under 25 U.S.C. §§ 2703 and 2710.

Therefore, the Applicants continue to have no right to have a liquor license issued because gambling on the Premises constitutes a *per se* public nuisance, would be contrary to public welfare or morals, and would tend to create a law enforcement problem in violation of Cal. Const. Art. XX, §22, and Bus. & Prof. Code 23958.

2. Applicants Continue to Misrepresent the Prior Non-Binding Dismissals Without Prejudice, Where the Courts had No Jurisdiction over the Merits

Contrary to Applicants' continuing blatant misrepresentations, Resp. 2:15-3:9, there has never been a decision on the merits in any of the prior litigation that the land in question qualifies for gambling. Applicants fail to acknowledge, let alone refute, that all of the prior referenced decisions, were dismissals without prejudice, where the courts had no jurisdiction over the merits, and were precluded from reaching any decision as to whether the Secretary had ever made an Indian lands decision regarding the land in question, due to an absent indispensable party. See, Protestants' January 11, 2017 Reply Brief at 28-38, addressing each of the improperly cited: *Rosales v. United States ("Rosales VII"), Rosales v. United States ("Rosales X"),* and *Jamul Action Comm. V. Chaudhuri,* all of which involved non-binding dismissals without prejudice, where the courts had no jurisdiction over the merits due to the absence of an indispensable party, and never found that the

land in question qualified for gambling.[2]

Nor, as a matter of law, could any of these courts find that the land in question qualifies for gambling, without the Secretary first having exhausted administrative remedies and made such a decision, particularly since there is no evidence that the land was taken into trust by the Secretary for a tribe under federal recognition in 1934, nor any evidence or authority that the land could be proclaimed to be a reservation by the Secretary, without having been taken into trust for a tribe under federal recognition in 1934. 25 U.S.C. §§465, 467; *Carcieri v. Salazar*, 382-83, 388-90, 394-95, 398-99 (2009); *Sandy Lake Band of Miss. Chippewa ("Sandy Lake") v. United States*, 2012 U.S. Dist. LEXIS 63458, *3-4 (D. Minn. 2012); *Littlefield v. DOI*, 2016 WL 4098749 (D. Mass. 2016); 2002 Dept. of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001); see also, Protestants' Opening Brief 7-46; 25 C.F.R. 151.3.

It would be an extraordinary abuse of discretion for this tribunal to rely upon any of the nonbinding *dicta* referenced by the Applicants, where the courts had no jurisdiction to decide the merits, and where their *dicta* was wrong, now having been superceded by the United States Supreme Court in *Carcieri v. Salazar*, *supra*. These opinions were wrong, and have no binding effect, having been made without prejudice and without jurisdiction to decide the merits as to whether the land qualifies for gambling. F.R.C.P. Rule 41[3]; *Barker v. Hull* (1987) 191 Cal.App.3d 221, 224; *United States v. BaslerTurbo-67 Conversion DC-3 Air*, 1996 U.S. LEXIS 4685, *7-8 (9th Cir. 1996);

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[2] The Applicants now cite one more example of nonbinding *dicta* from *Rosales v. United States ("Rosales IX")* 2007 WL 4233060 (S.D. Cal. 2007), which they also know was dismissed without prejudice for lack of jurisdiction to reach the merits due to a lack of an indispensable party, even where mistakenly delineated with prejudice. *Costello v. United States*, 365 U.S. 265, 286-87 (1961).

[3] Involuntary dismissals after a motion to dismiss by the defendant"for lack of jurisdiction, improper venue and failure to join a party under Rule 19," are not adjudications on the merits. F.R.C.P. Rule 41.

Frankfort Digital Servs. v. Kistler, 477 F3d. 1117, 1123 (9th Cir. 2007); *Clark v. Bear Stearns & Co*., 966 F.2d 1318, 1321 (9th Cir. 1992); *Costello v. United States*, 365 U.S. 265, 286-87 (1961); *United States v. Hatter*, 532 U.S. 557, 566, (2001); *Wilson v. Bittick*, 63 Cal.2d 30, 35-36 (1965); *Followay Productions Inc. v. Maurer*, 603 F.2d 72, 76 (9th Cir. 1979); *Dredge Corp. v. Penny*, 338 F.2d 456, 463 (9th Cir. 1964); *Univ. of Pittsburgh v. Varian Medical Systems, Inc.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009), citing *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866), *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1284 (10th Cir. 2012), and 18A Charles A. Wright, *Federal Practice and Procedure* § 4438 (2d ed. 1987); none of which Applicants can or do deny.

As set forth in Protestants' January 11, 2017 Reply Brief, and their June 9, 2017 Reply to the Motion to Strike Applicants' Exhibit 1, *Rosales v. United States* (*"Rosales X"*), 89 Fed. Cl. 565 (Fed. Cl. 2009), makes Protestants' point here, that this is the first tribunal to have jurisdiction to decide the merits of the fact that the Secretary has never determined that the land in question qualifies for gambling. Here, the Applicants have the burden of proof on this issue, and there is no absent necessary or indispensable party, as there was in all of the referenced prior litigation, none of which could be decided on the merits, which is the only reason these decisions are derisively referred to as unsuccessful by those who refuse to allow the merits to be determined.

Here, the Applicants cannot be licensed, because they have the burden of proof, and when the truth of the merits is finally decided, the land in question does not qualify for gambling, because the Secretary has never made an Indian lands decision, and couldn't, because the land was never taken in trust by the Secretary for a tribe under federal recognition in 1934, and the land was never proclaimed to be a reservation by the Secretary.

3. The State Compact Does Not Authorize Gambling Where There is No Indian Lands Decision by the Secretary

The State Compact does not authorize gambling on the land in question, where there is no Indian lands decision by the Secretary. App. Exhibit A-21. Applicants blatantly misrepresent the terms of the Compact. Resp. 3:12. It does not vest the JIV with any authority to establish a casino on any land that does not qualify for gambling, particularly where there has been no Indian lands decision by the Secretary.

The State Compact is expressly conditioned upon a final, non-appealable, factual adjudication on the merits, that the Secretary has made an Indian lands decision that the land upon which the JIV seeks to gamble, qualifies for Indian gambling under IGRA. 25 U.S.C. 2710(d); 1999 Compact, Sec. 15.6; 2015 Compact, Sec. 18.9, App. Exhibit A-21. See for e.g., *Stand Up for California v. California*, F069302, (Slip Opin. 5th DCA, 12-12-2016), *certified for publication,* (J. Detjen, concurring) at 9 and 44. Since there has been no Indian lands decision by the Secretary, the Compact remains unenforceable due to the failure of its express condition, until such time as the express condition is met by the Secretary.

4. This Tribunal Has Been Delegated the ABC Department's Jurisdiction to Decide Whether the Applicants have met their Burden of Proof to show that They are Not Operating a Public Gambling Nuisance on the Land in Question

Contrary to Applicants' erroneous assertion, Protestants do not seek to have this tribunal independently decide the status of the land in question. Rather, this tribunal need only find that it is undisputed that the Secretary has never made an Indian lands decision regarding the land in question. Even though it is also undisputed that if the Secretary were to make an Indian lands decision, the land would not qualify for gambling, because the land was never taken into trust by the Secretary for a tribe under federal recognition in 1934, and the land can never been proclaimed to be a reservation because it has never been taken into trust by the Secretary for a tribe under federal recognition in 1934, this tribunal need only decide that the Appellants haven't met their burden of proof to establish that gambling on the land in question is not a public nuisance.

Similarly, this tribunal is not asked to question, overrule or decide whether the State has determined whether the land qualifies for gambling, because it is undisputed that neither the State, nor this tribunal, has any authority to make such an Indian lands decision, and neither has, in fact, made any such Indian lands decision. As noted above, in 2001, Congress clarified that only the Secretary is authorized under IGRA to determine whether specific land qualifies for gambling for purposes of IGRA under 25 U.S.C. 2701 et seq. See 2002 Dept. of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001) ("Appropriations Act").

Therefore, Applicants' citation of *Rosales v. State of California* SDSC Case No. GIC878709 and *Boisclair v. Sup. Ct.* (1990) 51 Cal.3d 1140, are inapposite, as this tribunal is not being asked to adjudicate "the ownership or right to possession of Indian property." It is undisputed that the United States is the title holder of the property in question. Rather, this tribunal need only decide that the Secretary, who is the only authorized federal agent to make an Indian lands decision, has, in fact, not made such a decision with regard to the land in question, and therefore, the Applicants haven't met their burden to prove that they are not operating a public gambling nuisance on the land in question.

Contrary to Applicants' misrepresentation, Resp. 4:12, all of the courts and the federal agencies are bound by IGRA and its clarification by Congress in 2001 that only the Secretary can make an Indian lands decision as to whether the land in question qualifies for gambling. 2002 Dept. of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43. As noted above, the NIGC December 7, 2016 letter is irrelevant on this issue, since it does not, and cannot by law, establish that the land in question qualifies for gambling, since there is no Indian lands decision by the Secretary.

Conclusion

Protestants agree that the law and the record are clear. Without an Indian lands decision by the Secretary that the land qualifies for gambling, Appellants can't meet their burden to prove that they are not operating a public gambling nuisance on the property in question. Their application for a liquor license therefore must be denied, until such time as they can prove that they are not operating a public gambling nuisance on the property.

Though the present application must be denied at this time, and no Type 47 on sale liquor license or interim operating permit may lawfully be used on the Premises, the Applicants may refile their application in one year pursuant to Bus. & Prof. C. 24013.5, if they have then exhausted their administrative remedies under 25 C.F.R. 83 and 151 et seq., and can then meet their burden of proof under Bus. & Prof. C. 23790, 23950, and 23958.

Dated: June 9, 2017

WEBB & CAREY APC

/s/ Patrick D. Webb
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