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,	)	**(1) Protestants' Reply to Applicants'**
San Diego Gaming Ventures LLC	)	**Opposition to Protestants' Objection**
Dba: Hollywood Casino Jamul	)	**and Motion to Strike Applicants' Late**
14191 Highway 94	)	**Filed and Improper Rebuttal**
Jamul, CA 91935-3213	)	**Exhibits; (2) Protestants' Opposition**
	)	**to Applicants' Objections to and**
Applicants	)	**Motion to Strike Declaration of**
	)	**Patrick D. Webb in Support of**
	)	**Request for Official and Judicial**
	)	**Notice**

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Jamul Indian Village Development Corporation,	)	**(1) Protestants' Reply to Applicants' Opposition to Protestants' Objection and Motion to Strike Applicants' Late Filed and Improper Rebuttal Exhibits; (2) Protestants' Opposition to Applicants' Objections to and Motion to Strike Declaration of Patrick D. Webb in Support of Request for Official and Judicial Notice`**
San Diego Gaming Ventures LLC	)	
Dba: Hollywood Casino Jamul	)	
14191 Highway 94	)	
Jamul, CA 91935-3213	)	
Applicants	)	
	)	
	)	
	)	
	)	

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: (1) Reply to Protestants' Objection and Motion to Strike Applicants' Late Filed and Improper Rebuttal Exhibits; (2) Protestants' Opposition to Applicants' Objections to and Motion to Strike the Declaration of Patrick D. Webb in Support of Request for Official and Judicial Notice.

1. Applicants' Exhibit 1, Submitted After Closing their Case in Chief, is Not Proper Rebuttal Evidence

Applicants' submission of Exhibit 1 is untimely and inadmissible, because they had a duty to present any evidence on whether the land in question qualifies for gambling in their case

in chief, and they failed to submit any such evidence in their case in chief.[1] Now, they are precluded from submitting evidence ginned up after the fact by the National Indian Gaming Commission (NIGC) Chairman, which doesn't address the issue at hand, and merely authenticates the prior approvals of the gaming ordinances, management contract, and license, all of which are irrelevant and were issued without a proper Indian lands decision by the Secretary of the Interior that the land qualifies for gambling. An Indian lands decision was never made by the Secretary, and can't be performed by the NIGC in any event.

Applicants have no right to submit rebuttal evidence on an issue for which they had the burden of proof in their case in chief, and rested without submitting a Secretary's Indian lands decision, nor a single grant deed, qualifying the land in question for gambling. Applicants have conceded this position, having failed to distinguish, *Latour v. Ford* (1903) 140 Cal. 414, 422; *People v. Robinson* (1960) 179 Cal.App.2d 624, 631; and *Lipman v. Ashburn* (1951) 106 Cal.App.2d 612, 620, all of which hold that it is well settled that a party who has the affirmative may not reserve a portion of her/his evidence until the opposite party has exhausted her/his to negative that offered in the first instance, and if she/he does so, the tribunal will refuse to allow them to come in and make out her/his case after the defendant rests. 24 Cal. Jur. Trial §§ 45, 48.

Protestants are not claiming that Applicants' December 7, 2016 Exhibit 1 is inadmissible because it was created after the November 2016 hearing. Rather, it remains inadmissible because the Applicants had the burden of proof to establish that gambling on the land in question is not a

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[1] Neither Gov. Code §11513(b), or §11515, allow evidence that should have been introduced in the Applicants' case in chief to be introduced in rebuttal or in response to Protestants' Request for Official and Judicial Notice. Moreover, Applicants have failed after more than a reasonable opportunity for more than 18 months from notice of the Protest, and then for another 6 months from Protestants' Request for Official and Judicial Notice, to establish that the land in question is not being admittedly operated as a public gambling nuisance.

public nuisance, and they failed to submit any of the pre-existing attachments to their Exhibit 1, or any evidence whatsoever, that the land qualifies for gambling in their case in chief. Applicants ignore the fact that neither a State Compact, a County Memorandum of Agreement, nor the NIGC's prior approvals of gaming ordinances, management contracts and licenses, have anything to do with the undisputed fact that the Secretary has never made an Indian lands decision as to the land in question, as admitted on the NIGC's website, which fails to list any such decision. https://www.nigc.gov/general-counsel/indian-lands-opinions.

The fact that the record of this protest remains open, in no way authorizes improper rebuttal evidence that should have been introduced in the Applicants' case in chief. ALJ Lewis' off-hand comment that Applicants "can rebut anything you guys brought up," Transcript 186:23-187:3 and 2922:5-10, is certainly not a decision on what is admissible rebuttal evidence, since he continued the hearing indefinitely, and hadn't had the benefit of seeing any evidence proffered in rebuttal, nor did he make a ruling on Protestants' Request for Official and Judicial Notice or their subsequent January 11, 2017 Motion to Strike Late Filed and Improper Rebuttal Exhibits, all of which preclude the admission of Applicants' Exhibit 1 at this time.

Therefore, Protestants agree that Appellants' Exhibit 1 is not rebuttal evidence. Nor is Applicants' Exhibit 1 relevant to the question before this tribunal, since it remains undisputed that the NIGC has made no Indian lands decision, and is precluded by statute from making any Indian lands decision.

"'A tribe may only conduct gaming only on "Indian lands" within its jurisdiction.' 25 U.S.C. 2710(b)(1), (d)(1)(A)(1); *TOMAC, Taxpayers of Mich. Against Casinos v. Norton* (D.C.Cir. 2006) 433 F.3d 852, 865." *Citizens Exposing Truth About Casinos v. Kempthorne* (D.D.C. 2007) 492 F.3d 460, 462. "Indian lands" are defined as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power. 25 U.S.C. 2703(4).

The NIGC's website mirrors that definition and is very clear that gambling is not allowed on land that does not qualify for Indian gambling under the Indian Gaming Regulatory Act (IGRA):

> Indian tribes may only game on Indian lands that are eligible for gaming under the Indian Gaming Regulatory Act. Such lands must meet the definition of "Indian lands" at 25 U.S.C. § 2703, which requires that the land be within the limits of a tribe's reservation, be held in trust by the United States for the benefit of the tribe or its member(s), or that the land be subject to restrictions against alienation by the United States for the benefit of the tribe or its member(s). Additionally, the tribe must have jurisdiction and exercise governmental powers over the gaming site. https://www.nigc.gov/general-counsel/indian-lands-opinions

The NIGC website further lists all recognized tribes that have had an Indian Lands Opinion determined, and Jamul Indian Village (JIV) is not listed there, confirming that the Secretary of the Interior (Secretary) has not made an Indian Lands decision concerning the land in question here. Moreover, the Secretary is the only executive official authorized to make an Indian Lands decision under IGRA.

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."

Following the 2002 Appropriations Act,, the Secretary and the NIGC, which administers IGRA, 25 U.S.C. § 2706(b)(10), by Memorandum of Agreement, agreed that the Secretary is to determine whether a tribe meets one of IGRA's exceptions to the general prohibition of gambling on non-Indian lands. See Mem. of Agreement between the NIGC and the Dept. of the Interior (Feb. 26, 2007). *Citizens Exposing Truth About Casinos v. Kempthorne* (D.D.C. 2007) 492 F.3d 460, 462-63, confirming that where the Secretary has not made an Indian lands decision, gambling remains prohibited, since the land has not yet been determined to qualify for gambling; see also, *City of Roseville v. Norton* (D.C. Cir. 2003) 348 F.3d 1020, 1029, "the authority to determine whether land is a "reservation" was delegated to the Secretary as of the effective date of IGRA. See Pub. L. No. 107-63, § 134 (2001)."

Applicants' Exhibit 1 purports to be, though it has not been authenticated by testimony from anyone from the NIGC, a December 7, 2016 letter to JIV Chairwoman Pinto confirming only the status of the JIV's gaming ordinance and management agreement, the approval of which does not qualify the land for gambling, nor is dependent upon the Secretary having made an Indian lands decision before they can be approved. As the Supreme Court has noted, often ordinances and management contracts are approved long before an Indian lands decision is made, and which decision is often not made until after illegal gambling commences, as here, on land that does not qualify for gambling. *Michigan v. Bay Mills Ind. Cmty.*(2014) 134 S.Ct. 2024, 2035.

Nowhere in the Applicants' Exhibit 1 is the question, as to whether the land qualifies for gambling or not, even addressed. More importantly, the Applicants have submitted no evidence that the Secretary has ever made an Indian lands decision, or proclaimed a reservation under 25

U.S.C. 467, as to the land in question. The undisputed fact that the Secretary has done neither, as confirmed by the NIGC website, precludes the Applicants from meeting their burden of proof in this Protest.

No amount of extraneous agreements with the State or County, whether by Compact or Memorandum of Understanding or otherwise, and no amount of NIGC approvals of proposed gaming ordinances, management contracts or purported gambling licenses, has anything to do with whether an Indian lands decision has ever been made by the Secretary. As Protestants pointed out in their Opening Brief, this is the Catch-22 built into IGRA. As counterintuitive as it may be, there is no requirement in IGRA or its regulations, that the Secretary make an Indian lands decision **before** the NIGC may approve a gaming ordinance, management contract or gambling license, or **before** a State may enter into a Compact with a tribe, conditioned upon a subsequent Indian lands decision that has never been made, as here. See, Applicants' Exhibit A-21, 2016 Compact, ¶18.9(c), page 105.

In fact, as the U.S. Supreme Court found in *Michigan v. Bay Mills Ind. Cmty.*(2014) 134 S.Ct. 2024, 2035, the Secretary's decision on the merits as to whether the land qualifies for Indian gambling is often postponed until the commencement of illegal gambling on unqualified property, when it stated:

> And if Bay Mills went ahead anyway, [and operated an illegal casino] Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. See §432.220; see also §600.3801(1)(a) (West 2013) (designating illegal gambling facilities as public nuisances)....In short (and contrary to the dissent's unsupported assertion, see *post,* at 11), the panoply of tools Michigan can use to enforce its law on its own lands–no less than the suit it could bring on Indian lands under §2710(d)(7)(A)(ii) –can shutter, quickly and permanently, an illegal casino. *Bay Mills*, 134 S. Ct. 2024, 2035.

Hence, it is the Applicants' sleight of hand that must be watched carefully to discern that

the hand is often quicker than the eye, and that here, the Applicants have not introduced any admissible evidence on the very question as to whether an Indian lands decision had been made, and certainly have not introduced any Indian lands decision by the Secretary, nor any proclamation by the Secretary of a reservation on the land in question.

As Protestants have previously pointed out, and as remarkable and astonishing as it may be to an administrative law judge, who may never have had to determine whether an Indian lands decision has been previously made by the Secretary, this is the first tribunal to have jurisdiction to determine whether an Indian lands decision was ever made in regard to the land in question. As set out in Protestants' Opening Brief, and undenied by the Applicants, no prior tribunal has had jurisdiction to determine the merits of whether the Secretary ever made an Indian lands decision, let alone had jurisdiction to decide the ultimate facts, which only the Secretary is authorized to determine, concerning the undisputed fact that the land in question was never taken into trust by the Secretary for a tribe under federal jurisdiction in 1934, pursuant to 25 U.S.C. 465, and because of that, nor was it ever subsequently proclaimed to be a reservation under 25, U.S.C. 467.

The Applicants silently concede that there has never been a decision on the merits as to whether an Indian lands decision had been made by the Secretary, as to the land in question, since the courts in the prior actions were explicitly found not to have jurisdiction to decide the merits, because of an absent necessary and indispensable party.

Here, there is no absent, necessary and indispensable party to the Protest. The Applicants have petitioned the ABC, and now by delegation the OAH, to exercise their jurisdiction over whether the Applicants qualify for the issuance of a liquor license on land that doesn't qualify for gambling and constitutes a public nuisance. Moreover, the Applicants also silently concede that

they have the burden of proof to establish that they are not operating a public gambling nuisance on land that does not qualify for gambling.

They have had that burden since they filed their Application on September 28, 2015. They were then put on notice of Protestants' protest that the land doesn't qualify for gambling on October 26, 2015. They rested their case over a year later on November 17, 2016, without introducing any evidence that the land qualifies for gambling, and facing indisputable grant deeds, which must be both officially and judicially noticed, and which were authenticated by their recorders, and which establish that the land in question has never been held in trust by the Secretary for any tribe under federal recognition in 1934, nor has it ever been proclaimed to be a reservation by the Secretary. Now, after 18 months further notice, that they have the burden of proof on this issue, Applicants complain that they haven't had sufficient notice to prove their case, when, in fact, the reality is that they can't meet their burden of proof, because the Secretary has never lawfully taken the land in question into trust for a tribe under federal recognition in 1934, nor, more importantly, the land in question has never been proclaimed to be a reservation under 25 U.S.C. 467 for the same reason.

Contrary to Applicants' misrepresentation, this tribunal is not being asked to make an Indian Lands decision with regard to the land in question. Rather, it merely has to find that no such Indian Lands decision has ever been rendered by the Secretary of the Interior, and absent such a determination, the Applicants haven't exhausted their administrative remedies, and cannot meet their burden of proof to establish that gambling on the land in question is not a public nuisance, since granting a liquor license to a public nuisance remains prohibited by the Cal. Constitution and Bus. & Prof. Code §§ 23790, 23950, and 23958. This is a burden Applicants have not met, nor can they meet, because it just isn't true.

Moreover, this tribunal is not asked to decide, nor need it decide, the status of the JIV. It is what it is. This tribunal merely need determine what the Applicants have failed to prove. Protestants need not have this tribunal make, nor have they asked this tribunal to make, any determination as to the current status of the JIV. Protestants merely ask this tribunal to determine that the Applicants haven't met their burden of proof to timely establish that the land qualifies for gambling.

They have not. There is no proclamation of any reservation on the property in question by the Secretary. Nor can there be, since there is no evidence that the land in question was ever lawfully taken into trust by the Secretary for a tribe under federal jurisdiction in 1934. Hence, the absence of any evidence establishing either fact, means that Applicants have not met their burden of proof under 25 U.S.C. 2703 to establish that the land in question is not operating a public nuisance for which a liquor license is prohibited under the Cal. Constitution and the Bus. & Prof. Code.

The absence of such evidence also validates and corroborates the law cited in Protestants' Hearing Briefs establishing that the Applicants have no standing to seek a liquor license for property in which they have no right, title or interest. At best, the evidence submitted establishes that the Applicants are subsidiary corporations of Penn National, that have no ownership interest in the property in question, and have been retained to manage the public gambling nuisance on the property. Applicants have submitted no evidence or authority with which to challenge Protestants' undisputed proof that the land was never taken into trust by the Secretary for a tribe under federal recognition in 1934, and has never been proclaimed to be a reservation for the same reason, and hence, does not qualify for gambling under IGRA.

This is clearly within this tribunal and the ABC's jurisdiction to decide this Protest. To

refuse to exercise the jurisdiction granted in this instance, and sought to be exercised by the Applicants, would be a reversible abuse of discretion. A tribunal may not arbitrarily abdicate its jurisdiction and refuse to make a decision on the merits, without being compelled pursuant to C.C.P. 1085 to exercise its jurisdiction. *Cahill v. Sup. Ct.* (1904) 145 Cal. 42, 46-48; *Sampsell v. Sup. Ct.* (1948) 32 Cal.2d 763, 770-71; *Weber v. Sup. Ct.* (1960) 53 Cal.2d 403, 406; *Katenkamp v. Sup. Ct.* (1940) 16 Cal.2d 696, 698.

2. Protestants' Request for Official and Judicial Notice Remains Timely and All Objections thereto Have Been Waived

As noted above, Applicants have had more than a reasonable opportunity over the last 6 months to refute the officially noticed matters by evidence or by written or oral presentation of authority under Gov. Code §11515. Moreover, it is Applicants' claim that Protestants' Request for Official and Judicial Note is untimely, that is baseless.[2]

Applicants fail to deny, and therefore also silently concede, that where Applicants, as here, have failed to put on evidence in their case in chief that the land in question is not being

[2] As is Applicants' false, defamatory and out of context, suggestions that Protestants' counsel engages in improper litigation tactics. There was no such finding in *Stefani v Geyman*, SDSC Case No.2013-56029, where there was no evidence that Plaintiff could have notified the court any earlier, and was merely equitably compelled to pay Defendant's costs for having to reserve third party trial witnesses, when Plaintiff's expert was unexpectedly hospitalized and trial continued. Similarly, there were no sanctions awarded in *Rosales v Townsend* SD Cal 97-769, where the case was voluntarily dismissed without prejudice, after transfer from Central District where the Defendant resided. Similarly, there was no finding, nor authority for the proposition that Plaintiffs' claims that a half-blood community of Indians were not a recognized tribe under the I.R.A. were frivolous in *Rosales v. CALTRANS* 2016 WL 124647, which was also dismissed without prejudice for lack of an indispensable party. Finally, *Rosales v. United States*, 89 Fed. Cl. 565, further evidences 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, 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 they are derisively referred to as unsuccessful by those who refused to allow the merits to be determined.

operated as a public gambling nuisance, Protestants have no obligation to put on any evidence to establish their protest, since the Applicants admit they are operating a gambling casino on the property in question. Protestants could have rested their case in chief on their protest alone.

Furthermore, Protestants had no duty to provide advance warning of their request for judicial notice, which certainly would not have been prudent, until the Applicants rested their case in chief, without putting on any evidence as to the very question of the operation of a public gambling nuisance on the property.

Moreover, it is the Applicants themselves that caused Protestants to await the closure of their case in chief before requesting official notice. It is the Applicants that failed to produce any evidence that the land in question had been taken into trust for a tribe under federal recognition in 1934, or had ever been proclaimed a reservation, in response to Protestants' original request for production of documents. So, when no such responsive documents were produced, Protestants were well within their rights to wait until the close of Applicants' case in chief before requesting official and judicial notice of Exhibits P11 A-M.

Therefore, Protestants had every right to request official notice under Gov. Code §11515 of self-authenticating, notarized grant deeds, officially executed governmental documents produced in response to FOIA requests, and undisputed decisions of the DOI Solicitor and federal courts, at the close of Applicants' case in chief, since those documents further demonstrate that Applicants can't meet their burden of proof on this protest, because the land in question does not qualify for gambling, since it was never taken into trust by the Secretary for a tribe under federal recognition in 1934, and has never been proclaimed to be a reservation.

Having lawfully exercised their right to request official notice at the closure of the Applicants' case in chief, Protestants and Administrative Law Judge Lewis provided more than a

reasonable opportunity for Applicants to refute the officially noticeable matters, since this protest was indefinitely continued, and Applicants have had more than 6 months to challenge Protestants' exhibits, and still cannot refute the self-authentication of these official governmental records, which is undeniable and undisputed by Applicants.

Hence, the fact that Protestants' mail service of their request and copies of Exhibits P11 A-M were not received until the Applicants rested their case in chief on November 17, 2016, is the red-herring in this proceeding. Applicants waived any objection as to the timeliness of Protestants' request by filing their first opposition on December 20, 2016, and this, their second opposition, on May 26, 2017. *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1035, "fil[ing] an opposition to the motion, thereby waiv[ed] any objection to timely service."

> It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion. [Citations.] This rule applies even when no notice was given at all. [Citations.] *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697.

Moreover, Protestants' service of the request was complete upon the November 14, 2016 mailing under C.C.P. 1013. There simply is no evidence of any prejudice to Applicants in their ability after such a reasonable opportunity for more than 6 months to refute Protestants' request for official notice of such undeniably self-authenticated governmental records.

3. Protestants' Exhibits P11, A-M Are Self-Authenticated, Non-Hearsay Government Records Which Must Be Officially and Judicially Noticed

Applicants ignore the fact that Protestants' Exhibits P11 A-M were authenticated in the January 11, 2017 Declaration of Patrick D. Webb, based upon his personal knowledge of the documents authenticity under Evidence Code 1401. "'A document is authenticated when: (a) sufficient evidence has been produced to sustain a finding that the document is what it purports

to be, or (b) the establishment of such facts by any other means provided by law.' Evid. Code 1400-01; *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321." *The Luckman Partnersip, Inc. v. Sup. Ct.* (2010) 184 Cal.App.4th 30, 34, finding that counsel's declaration "that he had personal knowledge that the documents attached to his declaration were [what they purported to be] was sufficient to show that [they] were what they purported to be." There, as here, "these relevant facts were admissible and undisputed, and should have been considered." *Id*. Furthermore, a declaration from counsel regarding these documents would be sufficient to establish authentication, as well as foundation and personal knowledge. Evid. Code, §§ 403, 702, 1420; see also *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1527.

Moreover, "[a]s long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility... *McAllister v. George* (1977) 73 Cal.App.3d 258, 263,...invoice...was authenticated by its contents." *Jazayeri* at 321. "[T]here are many ways correspondence can be authenticated, including by its content (Evid. Code, § 1421) and by the fact that it was a reply." *Jazayeri*, at p. 320.

Jazayeri, as here, also found that the proffered documents were authenticated by the government's production in reply to FOIA requests. "First, Jazayeri testified that...they were received in response to a FOIA request to the [government]...[O]fficial U.S. government documents obtained through FOIA request and authenticated by the party who received them [are] admissible." *Id*., at 320. Here, Protestants' counsel has testified that Exhibit P11, E, the 2000 email from BIA's Carmen Facio to Nacy Pierskalla, stating that the BIA has no record of the land in question being known as the Jamul Village, Exhibit P11, G, the 1981 JIV Constitution, and Exhibit P11, I, the July 1, 1993 BIA letter to Raymond Hunter, were all

received in response to FOIA requests to the U.S. government. Webb Decl. ¶¶ 6, 8, 10. "Official publication obtained through subpoena or FOIA request is 'self-authenticating.' Jazayeri's testimony that the [documents] submitted as exhibits and offered for the truth of the matters stated were received from the USDA FOIA office in response to her request was sufficient to authenticate them." *Jazayeri*, at 320, citing *Williams v. Long* (D. Md. 2008) 585 F.Supp.2d 679, 690.

Moreover, Protestants' Exhibits P11, A, C, D, and J, are self-authenticated grant deeds and a regularly printed newspaper article, all of which are presumed to be authentic. *Jacobson v. Gourley* (2000) 83 Cal.App.4th 1331, 1334."A notarized deed is one example of a 'self-authenticating' writing. Hence, a notarized deed is presumed to be authentic. The effect is to shift the burden of producing evidence to the party opposing the writing. Absent controverting evidence, the trier of fact must find the writing authentic." *Id*.

"Where a presumption applies, the trier of fact is required to find that the writing is authentic unless the requisite contrary showing is made. [Citations.]" Cal. Law Revision Com. com, 29B Pt. 4, West's Ann. Evid. Code (1995 ed.) foll. § 1400, p. 440. This includes regularly published newspapers; printed material, purporting to be a regularly published newspaper or publication, is presumed to be authentic. Evid. C. § 645.1; *Civil Trials and Evidence* (Rutter 2016-17) 8:368.

Examples of other such self-authenticating writings are "acknowledged writings," e.g., deeds, mortgages, grants of easements; Evid. C. § 1451; see *Bernd v. Fong Eu* (1979) 100 CalApp.3d 511, 517, —notary who signs certificate of acknowledgment is vested with task of verifying authenticity of signature; documents bearing the seal of a public entity; documents bearing an official or corporate signature; "ancient writings," defined as a writing that is over 30

years old and with certain other indicia of reliability, Evid. C. § 643; regularly published newspapers, and "[p]rinted representations of computer information." *Cal. Practice Guide: Civil Trials and Evidence* (The Rutter Group 2008) 8:360, p. 8C-27 and 8:361-8:368.1, pp. 8C-27-8C-30. An "acknowledged writing" is a document stating a person appeared before a notary (or other specified official) and acknowledged that the signature appearing on the document is that person's signature. See Civ.C. § 1185; *Transamerica Title Ins. Co. v. Green* (1970) 11 CalApp.3d 693, 700.

Even though self-authenticated, Protestants' Exhibits P11, A, B, D, F and J, have also been certified by the San Diego County Recorder to be true and correct copies of the documents on file with the San Diego County Recorder. The original certifications of these documents will be filed with the Office of Administrative Hearings in San Diego, and directed to Administrative Law Judge Berg for filing in this protest.

Jazayeri v. Mao, also dispenses with Applicants' erroneous hearsay objection to Exhibit P11, A-M, finding the proffered documents were authenticated, official and business records, and the operative documents establishing the fraud perpetrated by the opposing parties. There, the court found: "Documents not offered for the truth of the matter asserted are, by definition, not hearsay. [citation omitted] Where 'the very fact in controversy is whether certain things were said or done and not whether these things were true or false, in these cases the words or acts are admissible not as hearsay, but as original evidence.' 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, §31, p. 714, quoting *People v. Henry* (1948) 86 Cal.App.2d 785, 789. For example, documents containing operative facts, such as the words forming an agreement, are not hearsay...The operative facts rule also applies in an action for fraud." *Jazayeri* at 316.

Here, Exhibits P11, A, the 1912 original grant deed transferring the Indian cemetery to

the Catholic Diocese, Exhibit P11, B, the 1931 Recorded Map of the Survey of Rancho Jamul, Exhibit P11, D, the 1978 Daley grant deed of the land in question to the United States, Exhibit P11, E, the 2000 BIA email, Exhibit P11, F, the July 13, 1991 Record of Survey Map, Exhibit P11, G, the 1981 JIV Constitution, Exhibit P11, H, the Solicitor's Opinions of the Dept. Of the Interior, Exhibit P11, I, the 1993 BIA letter to Raymond Hunter, Exhibit P11, J, the 1982 Catholic Diocese grant deed of a portion of the cemetery to the United States, Exhibit P11, K, Application and Permit for Disposition of Human Remains, Exhibit P11, L and M, Decisions of the U.S. District Court for the Eastern District of California, in *Ione Band of Miwok Indians v. Burris*, No. Civ. S-90-993, are all self-authenticated, official and business records, constituting the operative documents that establish that the land in question has never been taken into trust by the Secretary for a tribe under federal jurisdiction in 1934, and for that reason also, has not been, and cannot have ever been, proclaimed to be a reservation.

"This is a typical example of the nonhearsay use of an extrajudicial statement 'to prove, as relevant to a disputed fact in an action, that the hearer obtained certain information by hearing the statement and, believing such information to be true, acted in conformity with such belief.' *Holland v. Union Pacific Railroad Co.* (2007) 154Cal.App.4th 940, 947." *Jazayeri* at 316-17.

Moreover, Evidence Code 1280 makes admissible a writing that records an act, condition or event if "'(a) The writing was made by and within the scope of duty of a public employee; (b) The writing was made at or near the time of the act, condition, or event; and (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.' This exception to the hearsay rule is based on the presumption that public officers properly perform their official duties." *Jazayeri* at 317.

"'When it is a part of the duty of a public officer to make a statement as to a fact coming

within his official cognizance, the great probability is that he does his duty and makes a correct statement...It is the influence of the official duty, broadly considered, which is taken as the sufficient element of trustworthiness, justifying the acceptance of the hearsay statement.' 5 Wigmore, Evidence (Chadbourn rev. ed. 1974) §1632, p.618." *Fisk v. Dept. of Motor Vehicles* (1981) 127 Cal.App.3d 72, 78-79.

There is a separate statutory presumption "that official duty has been regularly performed." Evid. C. § 664. The presumption that public officials regularly performed their duties, unless rebutted, establishes the foundational requirement that there has been compliance with statutory and regulatory standards. From that, it may be inferred that the records are reliable. *Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 144; see *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1232.

"The object of the section 1280 hearsay exception is to eliminate the calling of each witness involved in preparation of the record and substitute the record of the transaction instead. [citations] Accordingly, for the exception to apply, it is not necessary that the person making the entry have personal knowledge of the transaction...the trustworthiness requirement...is established by a showing that the written report is based upon the observations of public employees who have a *duty* to observe the facts and report and record them correctly." *Jazayeri* at 317-18. There, as here, "that [the proffered documents] fall within the official records exception to the hearsay rule is beyond dispute." *Id*., at 318. "Moreover, unlike the business records exception, the official records exception does not require 'the custodian or other qualified witness' to testify in order to establish admissibility as an official record. (Compare §1280 with §1271.)" *Id*., at 319.

Official signatures are presumed to be genuine and authorized if it purports to be the

signature, affixed in his or her official capacity, of a public employee of any state, federal or local government or public entity, or a notary public. Evid. C. § 1453-54; see *People v. Flaxman* (1977) 74 Cal.App.3d Supp. 16, 21-22; *People v. Smith* (1981) 118 Cal.App.3d Supp. 7, 10. The presumption furnishes evidence sufficient to sustain a finding that the official record on which it appears is what its proponent claims it to be. Evid. C. § 1400(a). Or, put differently, the presumption that public officials regularly perform their duties gives rise to an inference that official records are reliable. *Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 144. For example, a California Highway Patrol Officer's signature on a Department of Motor Vehicles form, apparently affixed in his or her official capacity, is presumed to be genuine and authorized. Given this presumption, it furnishes sufficient evidence to authenticate the DMV form to which it is attached, absent contrary evidence. *Poland v. Department of Motor Vehicles* (1995) 34 Cal.App.4th 1128, 1135.

Evidence Code 1271 also permits admission of Exhibits P11, A, B, D, E, F, G, I, J, and K, as official "business records to establish the truth of the matters contained therein if: (a) The writing was made in the regular course of a business; (b) The writing was made at or near the time of the act, condition, or event; (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and (d) the sources of information and method and time of preparation were such as to indicate its trustworthiness."

"So long as the person who originally feeds the information into the process [has] firsthand knowledge the evidence can qualify as a business record. [citations] It is not necessary that the person making the entry [on a business record] have personal knowledge of the transaction...Nor need the individual with personal knowledge testify; the rule permits any 'qualified witness' to establish the conditions of admissibility. 1 Witkin, Cal. Evidence, Hearsay,

¶242, p. 960 [citations] It is the object of the business records statutes to eliminate the necessity of calling each witness, and to substitute the record of the transaction, or event. The witness need not have been present at every transaction to establish the business records exception; he or she need only be familiar with the procedures followed, which Jazayeri, [like Webb here] clearly was." *Jazayeri* at322.

"[A]ny 'qualified witness' who is knowledgeable about the documents may lay the foundation for introduction of business records–the witness need not be the custodian or the person who created the record." *People v. Hovarter* (2008) 44 Cal.4th 983, 1012. "Many business records are prepared through the activities of several persons, and one employee may report facts he or she knows to a second employee, who then records those facts in the regular course of business. [citations] So long as the person who originally feeds the information into the process [has] firsthand knowledge, the evidence can still qualify as a business record." *Id*. Here, as in *Jazayeri*, the means by which Exhibits P11, A, B, D, E, F, G, H, I, J, K, L, and M, "was sufficiently established by witnesses with firsthand knowledge of the process [of recording grant deeds, obtaining official FOIA records, and decisions of the DOI Solicitor and federal courts] to qualify the evidence for admission under section 1271."

Protestants' Exhibits P11, D, E, G, H, I, and J, were also "prepared by the opposing party [and] are not subject to exclusion under the hearsay rule, because they are admissions. 'Admissions of a party...are received to prove the truth of the assertions, i.e., they constitute affirmative or substantive evidence that the jury or court may believe as against other evidence, including the party's own contrary testimony on the stand.' 1 Witkin, Cal. Evidence, Hearsay, ¶91, p. 794." *Jazayeri* at 325. Here, as Applicants' footnote attests, Protestants were adverse to the United States, when these official government admissions were produced in response to

FOIA requests and in discovery in prior litigation. Hence they are admissible for the truth of the matters asserted therein. *Jazayeri* at 325.

"The hearsay rule does not bar evidence offered against a party who has admitted the truth of the hearsay statement." *People v. Hayes* (199) 21 Cal.4th 1211, 1257. [A] writing may be authenticated by evidence that: (a) the party against whom it is offered has at any time admitted its authenticity; or (b) the writing has been acted upon as authentic by the party against whom it is offered." Having produced Exhibits P11, D, E, G, H, I, and J, in response to FOIA and document requests in the prior litigation, the government has not only authenticated these exhibits, but admitted the truth of the matters stated therein.

Here again, Applicants fail to address, let alone distinguish Protestants' authority for the taking of official and judicial notice of Exhibits P11, A-M. Govt. C. 11515; Evid. C. 452(a), (c), (g) and (h), and 453-4; *Linda Vista Village San Diego HOA v. Tecolote Investors, Inc.* (2015) 234 Cal.App.4th 166, 185, taking judicial notice of the dispositve recorded title documents; *Alfaro v. Comm. Housing Imprv. System* (2009) 171 Cal.App.4th 1356, 1367, fn. 8; *B&P Dev. Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 960; including the government's notices of actions taken by the BIA and DOI, Exs. P-11, E, G, H, I, K, Evid. C. 452 (a), and (c); *United States v. Mercantil Distribuidora, SA*, 45 C.C.P.A. 20, 1957 WL 8296, *25, fn. 2 (Cust. & Pat. App. 1957), taking judicial notice of a government notice of an order of the Bureau of Animal Industry; and *Westergaard Berg-Johnsen Co. v. United States*, 27 C.C.P.A. 207, 211 (Cust. & Pat. App. 1939) taking judicial notice of a report of the commission; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 298 (1933), taking judicial notice of the government's notice of the acts of its Commission; and 44 U.S.C. 1507, "The contents of the Federal Register shall be judicially noticed..."

Nor do Applicants deny that judicial notice is also properly taken of proceedings and pleadings in other courts or administrative agencies. *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 498 F.3d 1031, 1039 n. 2 (9th Cir.2007); *United States v. Rodriquez*, 229 Fed. Appx. 547, 549, fn. 4 (9th Cir. 2007); *Holder v. Holder*, 305 F.3d 854, 866 (9th Cir.2002); *In re American Continental/Lincoln Sav. & Loan Sec. Litig.*, 102 F.3d 1524, 1537 (9th Cir.1996), judicial notice may be taken of publicly available records and transcripts from judicial proceedings "in related or underlying cases which have a direct relation to the matters at issue," *rev' d on other grounds sub nom. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998); *Mullis v. United States Bankruptcy Court for Dist. of Nev.*, 828 F.2d 1385,1388 (9th Cir. 1987). See also, *Norgart v. Upjohn Co.* (1999) 21 Cal. 4th 383, 408, taking judicial notice that a "controversy" had arisen in the popular press, *People v. Hardy* (1992) 2 Cal. 4th 86, 174, fn. 24, taking judicial notice "of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute" found in newspaper articles, and *People v. Jurado* (1981) 115 Cal. App. 3d 470, 482, same. None of which Applicants have denied, nor can they in good faith deny.

4. Official and Judicial Notice of Protestants' Exhibits P11, A-M Will Not Cause Undue Consumption of Time

Like most things in life, perception is in the eye of the beholder. Contrary to Applicants' unsupported objection, taking official and judicial notice of Protestants' 13 documents, Exhibits P11, A-M, takes no time at all. Just as the playing of a tape recording presented no undue consumption of time in *People v. Miles* (1984) 153 Cal.App.3d 652, 200 Cal.Rptr. 553, 556, and where the proffered evidence entailed no undue consumption of time and went to the very heart of the case, in *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App. 4th 563, 576.

As noted herein, all but the San Diego Union newspaper article, are self-authenticated, official government records of undeniable and notarized grant deeds, DOI Solicitor's and federal court decisions and government admissions. After more than 18 months in which to refute Protestants' Protest that the land in question does not qualify for gambling, Applicants have failed to refute any of these documents. Hence, Protestants are entitled to have them officially and judicially noticed under Govt. Code 11515.

The only suggestion of any undue consumption of time was by the Applicants in erroneously arguing at the November 17, 2016 hearing that they want weeks of testimony to rebut the authenticity of these documents. However, as noted above, they have no right to submit rebuttal evidence on an issue for which they had the burden of proof in their case in chief, and rested without submitting a single grant deed, or more importantly, a Secretary's Indian land decision, qualifying the land in question for gambling.

Moreover, Applicants have produced no admissible evidence of any proper challenge to Protestants' Exhibits P11, A-M. Given that the Applicants have had more than 6 months to challenge these documents, and have nothing to offer but their erroneous objections as to their undeniable authenticity, foundation, and undisputed proof that the land in question has never been taken into trust for a tribe under federal recognition in 1934, and has never been proclaimed, nor can it be proclaimed, to be a reservation for the same reason, their objection as to consumption of time has no substantive merit and must be overruled.

Conclusion

For all of these reasons, and those stated in Protestants' January 11, 2017 Reply Brief to Applicants' Opposition to Request for Official and Judicial Notice, Protestants are entitled to have Exhibits P11, A-M, officially and judicially noticed to establish the undeniable and

undisputed fact that the Applicants have failed to meet their burden of proof to establish that the land in question is not being operated as a public gambling nuisance, since there is no evidence that the land was taken into trust by the Secretary for a tribe under federal recognition in 1934, or that the land has ever been, or could ever be, proclaimed to be a reservation for the same reason.

Dated: June 9, 2017

WEBB & CAREY APC

/s/ Patrick D. Webb
Patrick D. Webb
Attorneys for Webb Protestants

DECLARATION OF SERVICE

I, the undersigned, certify as follows:

I am a citizen of the United States, a resident of the County of San Diego, State of California, over the age of eighteen years, and not a party to the within action.

I am employed by **WEBB & CAREY**, 402 West Broadway, Ste, 1230, San Diego, California 92101. On April 28, 2017, I served the within:

Protestants' Notice of Briefing re: Request for Official Notice

upon the following parties interested in said action by email service at the following addresses:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 28, 2017, at San Diego, California.

/s/Patrick D. Webb
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