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Stephanie Shimazu
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P.O. Box 168024
Sacramento, California 95816-8024

RE: CALIFORNIA-STYLE BLACKJACK REGULATIONS – DRAFT CONCEPT LANGUAGE TO ADDRESS UNLAWFUL GAMES AT COMMERCIAL CARDROOMS

Dear Director Shimazu and Ms. George:

On behalf of the Santa Ynez Band of Chumash Indians and the Rincon Band of Luiseno Indians, we submit the following comments in response to the Bureau of Gambling Control's ("Bureau") January 5, 2021 correspondence to "Stakeholders and Rulemaking List Members" regarding California-Style Blackjack Regulations - Draft Concept Language ("Draft Concept Language") attached thereto.

I. The Draft Concept Language is a positive step, albeit a baby step, that properly reflects the reality that ongoing activities at California's commercial cardrooms are illegal.

As you know, these comments are provided in the context of a decade of efforts by several California Tribes throughout the State to persuade the Bureau and/or the California Gambling Control Commission ("CGCC") to take action against the illegal games offered at California's commercial cardrooms. That decade has been peppered by hearings, meetings, consultations and workshops that have never resulted in concrete action by either the Bureau or the CGCC. The

illegal games wrongfully deprive California Tribes of tens of millions of dollars (and according to the California Gaming Association, two billion dollars) in tribal governmental revenue, and co-opt thousands of jobs that would otherwise be available at properly-regulated tribal casinos.[1] That this new Draft Concept Language regarding the game of blackjack comes at a pre-rulemaking stage, while related "Concept Language" regarding dealer rotation went through several public hearings in 2018 and 2019, only to see no further progress for well over a year, belies any serious intent on behalf of the BGC to end the illegal gaming activity at cardrooms. The Concept Language regarding dealer rotation, together with the Draft Concept Language regarding the game of blackjack, reveal that the BGC is aware that the existing games at commercial cardrooms are illegal, yet nothing concrete or timely is being done to stop them. Hence, the Draft Concept Language is another baby step in the right direction that is welcomed and applauded. Given that this illegal activity by the cardrooms has been allowed for more than a decade, we are hopeful that the Bureau takes swift action in implementing these regulations.

II. Workability Issues.

The proscriptions identified in the Draft Concept Language, if genuinely enforced, should have the effect of ending many, if not all, of the illegal banked games being operated in commercial cardrooms. However, the language suggests that there is a form of game, that is named "California-style blackjack," that can be played lawfully. No doubt the commercial cardrooms will direct their rule writers to finagle a set of rules that skirt the proscriptions set forth in Section 2070 of the Draft Concept Language, and push the edges of the prescriptions set forth in Section 2074, to develop a game that the player perceives as being the same game he/she can play in Las Vegas or at a tribal gaming facility. Moreover, Section 2075 suggests that there are previously "approved" games that may still satisfy the proscriptions in Section 2070. We are not aware of any such games. If there is a previously "approved" game that complies with the Draft Concept Language, the BGC should inform all stakeholders of that fact up front in order to inform more realistic review and assessment of the Draft Concept Language. It is very concerning that Section 2075 has been included in the Draft Concept Language, because we are unaware of any previously-approved games that comply with Section 2070.

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[1] We are in receipt of the comment letter dated January 27, 2021 submitted by Jimmy L. Gutierrez on behalf of the California Cities Gaming Authority (CCGA) and note that it raises concern that the concept language, if enacted and enforced, will cause of loss of business and governmental revenue. CCGA's unlawful business and revenue cannibalizes employment by lawful tribal casino-resorts and cannibalizes tribal governmental revenue. There will not be a "loss" if the regulation is enacted and enforced. Rather, there will be a transfer of jobs and revenue to where it lawfully belongs. Moreover, CCGA's claims of negative impacts are irrelevant to the analysis of whether the variations of "blackjack" games offered in its members' jurisdictions are lawful.

III. The Draft Concept Language remains woefully deficient: it still allows for banked card games to be conducted off of Indian Lands in California.

The Draft Concept Language still allows for a "player-dealer" position to bank a game. The reference to the "player-dealer" is particularly troubling. The term is currently not defined, other than the reference in Section 2010 (h) to "Round of play" … "when the player-dealer has won or lost the fixed and limited wager." Accordingly, proposed Section 2010(h) should be revised as follows:

> (h) "Round of play" means a single play through a controlled game, which begins with the placement of wagers and ends when all wagers are settled ~~,or, when the player dealer has won or lost the fixed and limited wager, whichever happens first.~~

Moreover "player-dealer" is used but undefined in the proscriptions set forth in Section 2073, and the prescriptions in Section 2074. Accordingly, an express prohibition of the player-dealer banking the game should be added to Section 2074, as follows:

> (d) The game rules do not provide that the "player-dealer" to win a fixed and limited wager.
> (e) The game rules provide that the player-dealer, if any, deals the cards and otherwise participates in the game in the exact same capacity and manner as any player not dealing the cards.

In other words, the "player-dealer" cannot, under any circumstances, bank the "Round of play."

Banking by any player, including a "third-party proposition player", makes the card game an illegal banked game. Allowing cardrooms to operate banked card games, however the game of "blackjack" is defined, is in direct opposition to the California Constitution. California Constitution Section 19(e) prohibits "casinos of the type currently operating in Nevada and New Jersey." Consistent with that Constitutional prohibition, Penal Code Section 330 forbids, among other things, the play of "any banking or percentage game." In 1997, in the context of the statutory initiative Proposition 5, California Tribes proposed a similar scheme with a "players' pool" serving as the bank. In 1998, the California Supreme Court struck down Proposition 5 because the "players' pool" was deemed "a bank in nature, if not in name" – it is a fund against which the players have a right to bet, the bank takes all that is won and pays out all that is lost, thus violating the anti-casino provision of Section 19(e). That is why the California Tribes, together with Governor Davis, proceeded with Constitutional Proposition 1A in March of 2000. The Tribes had

to convince the people of the State of California to agree to amend the State Constitution to allow for the play of banked card games on Indian Lands. Any card games offered by California cardrooms should be held to the same legal standard.

IV. The appropriate "Draft Concept Language" should create a bright line prohibiting banked card games at cardrooms.

The concept of the traditional third-party proposition player for many decades served as a useful tool to enhance the entertainment value of traditional non-banked poker games. These concepts run into problems when the cardrooms use them to disguise banked card games, but the games being offered remain banked card games despite being disguised. The BGC is to be applauded for finally recognizing that the "blackjack" games being offered by the cardrooms are illegal, but the problem will not truly be fixed until the BGC and CGCC diligently enforce the ban on banked card games at cardrooms. Borrowing the express language used by the California Supreme Court in defining illegal "banked" games, a new subsection should be added at the beginning of Section 2073:

(a) Any card game that allows for a person or entity, including a player-dealer, to pay off all winning wagers and keep all losing wagers, which are variable because the amount of money it will have to pay out, or be able to take in, depending upon whether each of the individual bet is won or lost, is strictly prohibited.

We note that the double-speak contained in CCGA's comment letter of January 27, 2021, suggests that the BGC is constrained from prohibiting games previously approved by BGC and from prohibiting those games similar to, but not identical to, blackjack. These spurious arguments reinforce the need to add the Tribes' proposed language above. We agree with CCGA's premise that regulations that violate state law are rendered void. CCGA's premise that a "controlled game" is lawful assumes that there are forms of blackjack-style games that comply with State law. Perhaps. But there are certainly no banked versions of the game (whether it be banked by the house, player-dealers, or others), that comply with State law, therefore, such games do not lawfully fall within the definition of "controlled game," and any action 'approving' such games are void. CCGA's comments only reinforce the Tribe's point that the bright line established by the California Supreme Court (discussed further below), and reflected in the Tribe's proposed language above, should be included in any new regulations, going forward.

V. Background

The Tribes' perspective should be viewed in the context of California's fairly recent history regarding tribal gaming. The United States Supreme Court in 1987 ruled in favor of two California Tribes in litigation brought by the State of California, holding that Tribes have always had the sovereign right to offer and regulate gaming on their Indian Lands. *California v. Cabazon Band of Mission Indians*, (1987) 480 U.S. 202. The United States Congress, in 1988, codified the *Cabazon* decision with the passage of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq. The Wilson Administration, however, thwarted the efforts of California Tribes to secure gaming compacts under IGRA by refusing to negotiate compacts in good faith, and instead, asserted Eleventh Amendment immunity, which the United States Supreme Court ruled in 1996 could not be abrogated by Congress in the passage of IGRA, preventing Tribes from exercising the remedies intended by Congress. *Seminole Tribe v. Florida,* (1996) 517 U.S. 44. Frustrated with the Wilson Administration's recalcitrance, most California Tribes unified in a coalition to take the matter directly to the citizens of California, which in 1997 resulted in the successful passage of Proposition 5. Proposition 5, a statutory initiative rather than a constitutional amendment, included a provision that expressly authorized banked blackjack by means of the Tribes maintaining a trust fund on behalf of the players, into which losing wagers were collected, and out of which winning wagers were paid. *Hotel Emps. & Restaurant Emps. Int'l Union v. Davis ("H.E.R.E.")*, (1999) 21 Cal. 4th 585, 600.[2]

Before the ink was dry on the certification of the successful passage of Proposition 5, legal actions were brought against it in California state courts, resulting in the California State Supreme Court's 1999 *H.E.R.E.* decision. The Tribes and the Davis Administration unsuccessfully argued that Proposition 5's blackjack game did not violate the State Constitution's prohibition of "casinos of the type currently operating in Nevada and New Jersey", Cal. Const. art. IV, § 19(e). In its decision, the California Supreme Court reasoned:

> We conclude the card games in question are . . . banking games. . . [A]s in other banking games, the tribe, through the prize pool, simply "pays off all winning wagers and keeps

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[2] It is ironic that the CCGA cites to the *H.E.R.E.* decision in its January 27, 2021 comment letter for the proposition that "[I]t is established that all card games that are not prohibited by statute are permitted; and that Penal Code section 330 sets forth the only card games that are prohibited." That is a false and deliberately misleading reading of the case. As discussed above, citing directly, the language of the California Supreme Court, regardless of statute or regulation, all banked card games (except those offered by Tribes on Indian lands) are prohibited because they violate the proscriptions in the California Constitution Art. IV, § 19(e). We welcome CCGA's acknowledgement of the decision and its applicability. But CCGA's interpretation is 180 degrees opposite of the H.E.R.E.'s true and correct holding.

> all losing wagers," which are variable "because the amount of money" it "will have to pay out," or be able to take in, "depends upon whether each of the individual bets is won or lost. . . That the tribe must pay all winners, and collect from all losers through a fund that is styled a "players' pool" is immaterial: the players' pool is a bank in nature if not in name. It is a "fund against which everybody has a right to bet, the bank ... taking all that is won, and paying out all that is lost. . . A California card room or card club was not permitted to offer gaming activities in the form of. . . banking games, whether or not played with cards. . ."

H.E.R.E., 21 Cal. 4th at 606-608. Confronted with the State Constitutional prohibition, now clarified by the California Supreme Court, the Davis Administration, with the support of most of California's Tribes, worked with the State Legislature to place Proposition 1A on the ballot in the spring of 2000, in order to amend the State Constitution to lift the Constitutional prohibition only on tribal lands. Proposition 1A was passed by a resounding majority. *Flynt v. California Gambling Control Comm'n*, (2002) 104 Cal. App. 4th 1125, 1128. Immediately upon the certification of the successful passage of Proposition 1A, California's cardrooms filed yet another legal challenge, this time arguing unsuccessfully that the State could not amend the Constitution in a manner that benefitted only the Tribes. *Artichoke Joe's Grand California Casino v. Norton*, (9th Cir 2003) 353 F.3d 712. See also, *Flynt,* 104 Cal. App. 4th at 1137.

Despite the clear statements from both the California State Supreme Court and the Ninth Circuit Court of Appeals, the commercial cardrooms continue to offer games that clearly violate the State Constitution's prohibition of "casinos of the type currently operating in Nevada and New Jersey." Apparently, California's commercial cardrooms believe that the prohibition should be interpreted in one manner when Indian Tribes argue that their games are not banked games, and in another manner when commercial, for-profit entities make the same argument.

Respectfully submitted,

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