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CROWELL LAW OFFICE
Tribal Advocacy Group

December 18, 2019

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Re: Comments of Santa Ynez Band of Chumash Indians and Rincon Band of Luiseno Indians for December 18, 2019 Public Regarding "Concept Language" Regarding 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") request for comments in the context of the Bureau's public hearings over part of 2018 and all of 2019 addressing unlawful cardroom gaming activities. Specifically, in the context of the December 18, 2019 hearing, we submit the following comments to the "Concept Language" circulated by the Bureau in advance of the hearing.

I. The Concept Language is a positive step in that it 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 Tribes throughout the State to persuade the Bureau and/or the 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. The illegal games wrongly deprive the California Tribes of tens of millions of dollars (and according to the California Gaming Association, two billion dollars) in tribal governmental revenue, and coopt thousands of jobs that would otherwise be available at properly-regulated tribal casinos. Although the Concept Language is a baby step in the right direction of correcting the situation, it is welcome and to be applauded.

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II. The workability/enforceability of the Concept Language is doubtful.

The efforts to ensure that there is a systematic and continuous rotation (and by "continuous", we mean "continuously" or "without break") are embedded in the Concept Language. Yet to be properly implemented, each and every table will need to be properly monitored and audited for compliance. The cardrooms have a long track record of skirting the law, not only with dealer rotations, but with illegal advertising and non-compliance with FINCEN's money laundering regulations, all in addition to offering banked card games. Any rule along the lines proposed will be another empty process without the controls (including proper video surveillance immediately accessible to state regulators) required to document cardroom activities, followed up with serious, frequent and detailed forensic auditing to ensure compliance.

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

The Concept Language still allows for the player-dealer rotation scheme currently being utilized in California cardrooms to survive. Banking even a single hand of a card game makes that an illegal banked game. Banking by a "third-party proposition player" makes the card game an illegal banked game as well. Allowing cardrooms to operate banked card games, however frequently and systematically the dealer position rotates, 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 statutory Proposition 5, the 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" banked card games were still banked card games, thus violating Section 19(e). That is why the Tribes, together with Governor Davis, worked to pass 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. The California cardrooms should be held to the same standard.

IV. The appropriate "Concept Language" would create a bright line of no banked card games at cardrooms.

The concept of continuous and systematic rotation of the dealer position could enhance the entertainment value of traditional non-banked poker games. 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 Bureau is to be applauded for finally recognizing that the banked games being offered by the cardrooms are illegal, but the problem will not be fixed with a poorly-designed band aid as represented by the "Concept Language." Rather, the problem will be truly fixed by enforcing a ban on banked card games at cardrooms.

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 Five. Proposition Five, a statutory 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.

Before the ink was dry on the certification of the successful passage of Proposition Five, 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 Five'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 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 exempt 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. Before the ink was dry on 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 commericial cardrooms believe that the prohibition should be interpreted in one manner when Tribes argue that their games are not house banked, and in another manner when commercial, for-profit entities make the same argument.

Respectfully submitted.

/s/
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on behalf of
The Santa Ynez Band of Chumash Indians, and
The Rincon Band of Luiseno Indians