Rincon Band of Luiseño Indians

VIA U.S. MAIL AND ELECTRONIC MAIL
BGC_Regulations@doj.ca.gov

October 25, 2023

Yolanda Marlow, Director
Andreia McMillen, Staff Services Manager I
Bureau of Gambling Control
Attention: Regulations
P.O. Box 168024
Sacramento, CA 95816-8024

RE: COMMENTS OF RINCON TRIBE OF LUISEÑO INDIANS TO "CONCEPT LANGUAGE" REGARDING UNLAWFUL GAMES AT COMMERCIAL CARDROOMS

Dear Director Marlow and Staff Services Manager McMillen:

On behalf of the Rincon Tribe of Luiseño Indians ("Rincon Tribe"), I submit the following comments in response to the Bureau of Gambling Control's ("Bureau") request for comments dated September 11, 2023, in the context of the Bureau's proposed concept language (the "Concept Language") regarding "Rotation of Player-Dealer Regulations" and "Blackjack Style Gaming Regulations". Because the underlying issues regarding the two proposals are inextricably intertwined, the Rincon Tribe requests that these comments be considered for each and both of the proposed concepts and the draft Concept Language.

The issue that the proposed Concept Language seeks to address, the current unlawful activity at California's commercial cardrooms, 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 California 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 commercial 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. We continue to hear that no court has addressed the issue of whether the games operated by commercial card rooms, by using "proposition player dealers" and discouraging the use of the term "blackjack," are legal. Such claims are nonsense. The California Supreme Court looks through such smokescreens, and if an entity is taking all that is won, and paying out all that is lost, then it is a banked game in violation of the California Constitution unless played on Indian lands subject to a federally-approved gaming compact or Secretarial Procedures. Thus, there is no circumstance in which a proposition player-dealer can lawfully assume the role of the bank. Thus, there is no version of the banked game that can isolate itself under a label other than "blackjack". Accordingly, the proposed Concept Language is woefully deficient. It is from this clear point of law that the Tribe submits its comments.

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

The Bureau is to be applauded for finally recognizing that the banked games currently being offered by the cardrooms are illegal, but the problem will not be fixed with poorly-designed bandaids, as represented by the Concept Language. Rather, the problem will be truly fixed by enforcing a ban on banked card games at cardrooms.

For decades, California's commercial cardrooms lawfully offered traditional non-banked poker games. Third-party proposition players for many decades served as a useful tool to enhance the entertainment value of such traditional non-banked poker games. The third-party proposition players were paid by the establishment to enhance play at the card table. Now, however, the establishments are paid by the third-party proposition player for the opportunity to bank the game. To equate the two – the establishment paying the proposition to player to enhance the game, with the player paying the establishment for the opportunity to bank the game – is disingenuous and deceitful. They are not the same thing and never will be. The Rincon Tribe has no objection to the concept of continuous and systematic rotation of the dealer position to enhance the entertainment value of traditional non-banked poker games, but there is no version of continuous and systematic rotation of the dealer position that can be used to make an unlawful banked game otherwise lawful.

For decades, with some flagrant abuses, cardrooms have generally avoided using "blackjack" in their promotional vernacular. Instead, the cardrooms have come up with a number of names which strongly suggest the game of blackjack ("California 21" "21" "21 and ½", etc.) and massage the game rules such that the player has the identical experience as playing the traditional game of blackjack. But acknowledgment that "blackjack" is illegal for them to operate does not mean that there are forms of banked games that can be lawfully played so long as they do not meet the definition of blackjack. A banked game by any other name is still a banked game, and therefore illegal if played off of Indian lands.

Rather than promulgating a rule which implies that there is a lawful form of banked gaming, so long as there is continuous and systematic rotation of the player dealer position, and so

long as the game is not "blackjack," the Bureau is better advised to enforce the bright line defined by the California Supreme Court in the *H.E.R.E.* litigation: if an entity is taking all that is won, and paying out all that is lost, then it is a banked game in violation of the California Constitution unless played on Indian lands subject to a federally-approved gaming compact or Secretarial Procedures.

B. The Concept Language Documents both properly reflect the reality that ongoing activities at California's commercial cardrooms are illegal.

As you know, these comments are provided in the context of more than 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) per year in tribal governmental revenue, and wrongly coopt thousands of jobs that would otherwise be available at properly-regulated tribal casinos. Although the Concept Language Documents are mere baby steps in the right direction of correcting the situation, the Bureau's acknowledgment that the games currently being operated by the commercial cardrooms are illegal is welcome and to be applauded.

C. Process: Déjà vu all over again.

We are no further along than we were at end of 2019. And that was after a decade of repetitive meetings, consultations, promises, and no meaningful enforcement action. The Bureau's September 11, 2023 cover letters make it clear that rule-making has yet to begin, and that the current notice and comment dance is just a pre-curser to a more formal process in the distant future. Meanwhile, the illegal gaming at California's commercial cardrooms continues. In 2018 and 2019, we went through this process with public hearings and written comments regarding a very similar proposal for player dealer rotation, and with a parallel effort at CGCC directed at the deceptive advertising of "blackjack." The Bureau held seven public hearings around the State beginning on October 23, 2018 and ending on December 18, 2019. Notably, the written comments and the recordings of the public hearings have now been deleted from the Bureau's web page. Further, it appears that little or no consideration was given to the prior comments, as reflected in the "new" draft Concept Language. The Rincon Tribe respectfully requests that the prior comments be re-posted and included in the record regarding the "new" proposed language, and the Rincon Tribe further requests that the Bureau take those prior comments into consideration. Moreover, the Rincon Tribe respectfully requests that the Bureau adopt a short timeline to initiate and close the formal process, and stick by that timeline. Since every new State Administration uses the change as an excuse to further delay any action, the Rincon Tribe encourages the Bonta Administration to finish what it has now, finally and belatedly, started.

The Rincon Tribe remains skeptical that the "new" Concept Language, circulated in a context which makes it clear that no formal process has been initiated, is yet again just kicking the can down. To continue this tactic, while now acknowledging that the games as currently being

played at the commercial cardrooms are illegal, is to embrace a policy of willful blindness. At some point, which has long since passed, the Bureau is complicit in the illegal activity. The Bureau's job is to enforce the law, not to endlessly talk about it.

D. 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.

The Rincon Tribe notes that the Concept Language regarding player-dealer rotation differs slightly from the language circulated in 2019, by replacing an obligation to offer rotation with a provision that requires rotation at least every 40 minutes, or the table is shut down. Although this change seems to acknowledge the deficiency in the prior language, it is still fraught with problems, even if properly enforced. For example, the cardrooms can minimize the impact of the rule by having a constant rotation of open tables such that every five minutes, a few tables close while new tables open up, so that each table stays live for 40 minutes. Notably, the draft Concept Language does not include a provision that a closed table must remain closed, even for a limited period of time. Instead of coming up with a set of rules that is fraught with circumvention issues, the Bureau is better advised to adopt a bright line of no banked games.

The Rincon Tribe acknowledges that the Bureau's proposed rule regarding blackjack is a notable improvement over the CGCC's effort because it goes after the game itself, rather than the manner in which the game is advertised. That being said, the Rincon Tribe still encourages the CGCC to move forward with efforts to strengthen enforcement against deceptive advertising[1]. The draft Concept Language does appear to provide a comprehensive definition, consistent with industry standards, and does appear to target most ways in which card rooms currently and fraudulently distinguish the game, BUT the proposed language that there is a permissible blackjack variation must be rejected – it would result in the regulation which recognizes that a version of a banked card game is permissible. The Bureau is better advised to adopt a bright line of no banked games.

[1] Addressing "blackjack" is clearly an area where the line between Bureau jurisdiction and CGCC jurisdiction is blurred. The Rincon Tribe requests as explanation as to where the two agencies see the line drawn, and how/whether the two agencies are coordinating efforts for consistency

E. Ending on a positive note – the Rincon Tribe does acknowledge that the draft Concept Language, if adopted and enforced, would result in a material improvement over the status quo.

The Rincon Tribe does applaud the draft Concept Language as a significant, yet redundant, concession that the cardrooms' current operation of the games is illegal. The reality is that if these concepts go into effect AND ARE ENFORCED, the cardrooms will have to undergo major changes in the play of their games that will likely differentiate the player's experience such that the wrongful cannibalization of tribal games will be seriously reduced. The Rincon Tribe expects to hear the same stale arguments from the cardrooms that the rule changes will put thousands out of work – that is incorrect – those impacted employees are encouraged to continue the same jobs, but as tribal employees at lawfully operated and well-regulated tribal casinos. If the Concept Language is adopted and enforced, perhaps the resulting change in the market will minimize the need for further improvement. That said, the proposed Concept Language represents a woefully deficient baby-step in the correct direction. The Bureau is better advised to adopt a bright line of no banked games.

Sincerely yours,

RINCON BAND OF LUISEÑO INDIANS

Bo Mazzetti
Tribal Chairman