NOTICE OF ISSUANCE OF FINAL REGULATIONS

Pursuant to Section 14-1-10(I)(5) of the Pueblo of Laguna Code, the Pueblo of Laguna Gaming Control Board hereby promulgates these final regulation amendments after notice and comment. On May 22, 2018, the Laguna Gaming Control Board issued for comment proposed changes to its Gaming Regulations, primarily to sections 2 through 9, but to other sections as well.

During pre-promulgation consultation, the Board received comments from one commenter, Laguna Development Corporation, including a letter and two sets of specific line comments. The Board addresses those as a single set of comments and refers to LDC simply as the "commenter." The comments posed questions, proposed revisions, and made more general statements. This notice does not address each comment, instead focusing on those comments that either resulted in changes to the proposed regulations or raised a point of interest to the broader community affected by the Board's regulations. The Board did not receive any comments during the 30-day formal comment period, so only LDC's earlier comments are addressed.

This is the second major set of revisions in the Board's ongoing project to review and update its Regulations. The third set, focusing on section 11-15, will follow.

Since these regulation changes, the Board on August 9, 2018 promulgated emergency regulations, effective immediately as of that date, to address concerns raised by the State Gaming Representative that some provisions of the 2015 Compact had not been properly included in tribal law. Accordingly, the Board's final revisions based on the May 22 promulgation, discussed below, are now joined with those emergency regulation revisions and constitute the current, active regulations. Those current regulations are concurrently published on TGRA's website: http://www.lagunapueblo-nsn.gov/TGRA.aspx.

With the publication of notice of these changes in yesterday's *Town Crier*, they are effective today pursuant to Section 703-704 of the Board's regulations. With amendments to Section 703, future promulgations will not require publication in a newspaper before taking effect.

Comments Resulting in Revisions to the May 22, 2018 Proposed Regulations

104(g): The commenter noted language which it found confusing, which has been clarified.

204(a): The commenter suggested adding the word "authorized" before "delegation of authority." The Board accepts the suggestion and makes the existing implication explicit.

204(b): The commenter raised generally and repeatedly its concern that the delegations of authority to the Executive Director are too broad. It stated that the Board has "police powers" and that delegations to the Executive Director should be limited to "ministerial" and management functions.

The Board of course agrees that the Executive Director should not have unfettered discretion. However, as stated more fully immediately below, the duties delegated to the Executive Director are consistent with the Gaming Code, are properly constrained by the Gaming Code and the regulations, and have several important practical benefits. The Board has nevertheless made several modifications after considering the comments.

Two specific provisions of the Gaming Code, coupled with its overall structure, amply support the Board's conclusion that the Pueblo authorized prudent but considerable delegations of authority to the Executive Director. In Section 14-1-2, the definition of Board makes it clear that the Pueblo understood and intended that the TGRA, led by the Executive Director, would play a significant role in carrying out the Board's duties:

> *Board* means the Pueblo of Laguna Gaming Control Board established by the Pueblo, including, unless otherwise dictated by context, the Tribal Gaming Regulatory Authority, the Pueblo governmental agency which reports to the Board and, under the direction of the Board, performs many of the Board's functions.

With respect to the Executive Director specifically, Section 14-1-10(G) states:

> Executive director. The Board may appoint and retain an individual to serve as executive director of the Board to administer and execute its duties and responsibilities hereunder and other staff as the Board may deem necessary to carry out such duties and responsibilities. Unless the Board determines otherwise, the executive director shall be responsible for coordination of the functions with the Commission and other federal, state, Pueblo, and local agencies, as necessary. The Board shall supervise the executive director.

The words used by the Pueblo Council in the Gaming Code – "perform," "administer," and "execute" – regarding the Executive Director's role are not narrow and are not consistent with a simply "ministerial" role. The latter provision gives the Board discretion to delegate to the Executive Director as it "deem[s] necessary." The Board is therefore not persuaded that the Council intended the Executive Director's authority to be limited to simply carrying out Board decisions.

The Board also points out that the delegations to the Executive Director are crafted carefully. For example, and perhaps most importantly, the Executive Director cannot suspend or revoke a Gaming License once it is granted. Those decisions are limited to the Board, upon recommendation from the Executive Director. (The Executive Director may summarily suspend a license for prescribed reasons to protect the integrity of gaming, but such summary suspensions result in an expedited hearing process, are necessary, and could not practically be made by the Board in a timely fashion.)

In response to the comments, the Board has fine-tuned the delegations further. For example, the Board agrees that it, not the Executive Director, should make the initial license decision for a Management Contractor based on the Code language, the importance of that decision to the Pueblo and LDC, and the rarity of such applications.

Not only are the delegations tailored, the regulations provide significant guidance to, and constraints on, the Executive Director's decisionmaking. With respect to licensing decisions, for example, subsection 1017(b) contains a list of criteria that result in a mandatory denial of a license application, and many of those criteria are derived directly from NIGC regulations. Most of those criteria are purely objective, and most license denials for applicants who complete their applications are based on those objective criteria. In other words, the Executive Director's role in those instances can in fact be considered "ministerial."

In other instances regarding licensing and otherwise, the Executive Director may exercise discretion. But in those instances, the Board's hearing process is carefully designed to provide timely review by the Board of the Executive Director's decisions (at the request of an aggrieved party).

The Board also notes that the delegation structure preserves the Board's independence as a hearing body, akin to appellate review. If the Board always made decisions in the first instance, it would be more difficult for it to play a meaningful role in the relatively rare instances when the initial decision is challenged.

Also, having the Executive Director make many decisions in the first instance is efficient. For example, most license applications are granted, most license denials are based on mandatory criteria in the Board's and federal regulations, and a very low percentage of denials are challenged in a hearing before the Board. The clear inference is that most licensing decisions do not require the Board's intervention, and the Board's involvement would simply delay the process. The Board generally only meets once a month. The Board sees no reason to build in a delay in the licensing and license action processes. In fact, the Board believes that the delay flowing from its direct involvement in such matters would be detrimental to licensees, LDC, TGRA, and the Board.

Moreover, two Board members have experience with boards or commissions that make initial licensing decisions themselves. They note that in most such instances the board simply becomes a rubber stamp. There is insufficient time, and meetings are too infrequent, to allow for a careful analysis of each decision. In this respect, the Executive Director is better positioned to (promptly) take the time to make a considered decision, especially because he or she knows that each decision may be reviewed by the Board. In contrast, if the board or commission rubber stamps an approval or denial of an application, it has already taken a position. The Board believes that better decisions result if the Board focuses its energies on the close calls – the ones that go to hearing – and that it do so with a clean slate. The current regulatory structure provides for exactly that. One Board member also noted that having the board or commission make the decision in the first instance can politicize the decisionmaking process, an effect the Board certainly wants to avoid.

In summary, the Board takes its role very seriously. Because the regulations largely implement current practice and for the reasons stated above, the Board concludes that the delegations in the regulations published with this notice promote the fair and efficient exercise of the Board's authority. They are consistent with the Gaming Code, promote expeditious and reasoned decisionmaking, but provide for timely review by the Board when appropriate.

204(b)(14)(proposed as (13)): The commenter suggested that it is inappropriate for the Executive Director to be able to rescind or modify his or her own action because it might prevent persons from bringing concerns to the Board's attention, whether by hearing or otherwise. On balance, the Board concludes that allowing the Executive Director to fix mistakes or fine-tune decisions is very important. Should an Executive Director misuse that authority, a person could still proceed with a hearing before the Board if he or she is still aggrieved by the initial decision. Recission or modification by the Executive Director would not necessarily moot the Board's review, as the commenter clearly anticipates. Upon further review of this subsection, however, the Board concludes that the Executive Director should not be able to rescind the grant of a license, once issued. At that point, the appropriate procedure is to take appropriate steps to revoke the license. The subsection has been revised accordingly.

204(b)(20)(proposed as (19)): The commenter also suggested that delegations to TGRA staff under this subsection should be limited to "ministerial" duties. While the Board thinks that word is too narrow, it has already prescribed the limited scope of delegations permitted: the Executive Director must retain the "ultimate" decision for matters "having a significant material effect on a gaming license, the conduct of gaming, the disposition of significant Gaming Revenues, or the employment of TGRA staff."

302: The commenter stated that any ground for a licensing action "must be related to protecting the integrity of gaming on tribal lands." While the Board believes that the use of the word "suitable" in the introductory paragraph is sufficient, it has added "under the Gaming Code and these regulations" to make it abundantly clear that any action taken under Rule 302 must be tied to a provision of the Gaming Code or the regulations (and by extension federal law and the Compact). The commenter also suggested that subsection 302(b) as drafted was very broad. The Board agrees and has reversed (b) and (c), amending the language of what was (b) to focus simply on whether a Licensee no longer meets the suitability requirements necessary to obtain a license in the first instance.

313(f): In response to a comment, the Board has clarified that TGRA will provide the report to the State Gaming Representative.

404(b)(1): The commenter asked what "applicable law" means, suggesting that the Board might fine someone for failing to pay child support. "Applicable law" is defined in the Section 14-1-2 of the Pueblo Code. For clarity, however, the Board has amended the language. The substitution of "Gaming Code" for "Pueblo Code," discussed below, also addresses this concern.

505: The commenter suggested that TGRA should not process an application if the application and background fees are not paid within a reasonable period, rather than denying the application. The suggestion is not practical. In practice, TGRA often conducts its investigation and processes applications before the fees are paid. If an applicant could simply walk away from his or her application without any consequence, it would pose an administrative and financial burden on TGRA, and ultimately the Pueblo. The commenter also suggested that TGRA should not delay a licensing decision if fees are not paid

because of TGRA's own delay in assessing the fees. That comment is well taken and corresponding language is included.

603: The commenter inquired whether declaratory orders issued by the Board may be appealed to the Pueblo Court. Because of the unique nature of declaratory orders, the Board agrees that the answer is not apparent in existing Code and regulation provisions. Accordingly, the Board has added Section 604, to make the availability of an appeal clear. Because there has never been a request for a declaratory order, there is no precedent. The Board has therefore attempted to envision the situations in which a declaratory might be sought and has included in subsection 604 each of the four categories it identified. The very reason for existence of the declaratory order rule is to allow for early guidance on how LDC or another interested party may comply with the web of Pueblo and federal law on gaming, and with the agreed-upon (and critically important) provisions of the Compact. The intent is to allow a person (most likely LDC) to determine ***in advance*** whether a course of action is permitted. Each subsection therefore is crafted in an attempt to accomplish that goal.

All four subsections allow a petition for reconsideration of a declaratory order, which petition is required before any appeal or further steps addressed in each subsection.

Subsection (a) deals with alleged conflicts between a declaratory order and Pueblo law. In this instance, an appeal is appropriate because the Pueblo Court is the ultimate interpreter of Pueblo law.

Subsection (b) addresses alleged conflicts between a declaratory order and IGRA or NIGC regulation. In such an instance, an appeal to the Pueblo Court would not be appropriate because the Court cannot issue an interpretation that would bind the NIGC specifically or the United States generally. In such an instance, the regulation provides for consultation between the petitioner (most likely LDC) and the Board to determine if it is possible, practicable, and prudent to seek a definitive or clarifying resolution from the NIGC, DOI, or other appropriate person.

Similarly, subsection (c) addresses alleged conflicts between a declaratory order and the Compact. In such a case, the Pueblo is the contracting party with the State, and the Pueblo itself, not its Court, is the appropriate party to determine whether there is a prudent and practical way to resolve the issue in advance with the State. The subsection provides a process for such a consultation with the Pueblo.

In contrast, subsection (d) deals with declaratory orders in which the Board addresses only its own regulations, procedures, and the like, and the petitioner does not allege a conflict with Pueblo law, IGRA, NIGC regulations, or the Compact. If the declaratory order declaratory order is consistent with those other sources, it is within the Board's discretion to interpret its own regulations and the like in a declaratory order. Of course, an actual action taken, as opposed to a declaratory order, presumably could be appealed.

803. The commenter suggested that it would be a conflict of interest for the Executive Director to be designated as the hearing officer in any matter. While that is not necessarily the case and the Board would not appoint the Executive Director if it were, the Board has considered the utility of having the

Executive Director among the pool of potential hearing officers and has concluded that the Executive Director should be removed.

1009 and 1227: The commenter expressed concern that the Board's approval authority of drug and alcohol testing policies was unfettered and that the regulations should reference industry standards. While the Board does not believe that it would abuse the discretion to approve unreasonable regulations, it has added a reference to industry standards in Section 1227. The commenter also pointed out that test results are not provided directly to the Board by the testing agency. That point is well taken and an appropriate revision has been made.

1223: The 2015 Compact, specifically Section 4(B)(19) and the related portions of the Appendix, changed the structure for regulation of complimentaries. The Board expressly adopts 25 C.F.R. § 542.17 as the primary control for the provision of complimentaries, and provides a structure for the preparation and implementation of the required written policies and procedures.

Other Revisions

General: In a number of instances in the proposed Regulations, the Board inadvertently referred to the "Pueblo Code" rather than the "Gaming Code," which is a defined term and limited to Chapter 14-1 of the Pueblo Code. "Gaming Code" will be used.

General: Various corrections have been made to references to section or subsection numbers that have changed.

General: AFDC has been changed to TANF to reflect the change in the name of the federal assistance program.

Responses to Comments Not Resulting in Revisions

104(d): The commenter inquired whether LDC can conduct charitable gaming. LDC is "[an]other Pueblo entit[y]" and therefore may conduct charitable gaming, under Pueblo law so long as it comports with other applicable law and the Compact. The commenter also inquired whether charitable gaming is Class I. Generally, the answer is "no" unless the charitable gaming qualifies as a "social game[] solely for prizes of minimal value" or a traditional Indian game under IGRA, the Pueblo Code, NIGC regulations, and these regulations.

104(r) and (t): The commenter suggested that these definitions should include an express reference to Pueblo Lands. However, both definitions expressly apply only to "Gaming Activity," the definition of which is restricted to Pueblo Lands.

303: The commenter stated that Section 303 is confusing because Section 304 makes it appear that a hearing may optional. The Board believes that the confusion revolves around Section 304, which permits the Executive Director to engage in "informal consultation" in an attempt to "resolve an enforcement matter satisfactorily without a hearing." The Board believes that it is clear, however, that the Executive Director cannot mandate a result under Section 304 and that unless the Licensee is

"satisfied" with any outcome of informal consultation, the Licensee can still proceed to a hearing. In fact, the Board could still hold a hearing regardless of the results of informal consultation, although it seems unlikely that it would do so if TGRA and the Licensee are both satisfied with the outcome.

310: The commenter stated only "pre-suspension due process concerns" with respect to this section generally. Section 310(a) makes it clear that TGRA must have "reasonable grounds" to believe that a Licensee has either committed an act in violation of the IGRA, the Gaming Code, these regulations, or other "applicable law" (which is defined in the Code) "deliberately, willfully, or with material recklessness," committed a felony, or poses an immediate threat to "public health, safety, or welfare." These grounds are specific enough to constrain the use of summary suspensions appropriately.

The commenter also stated that expanding the time for a hearing from 30 to 45 days is "anything but expeditious." The Board is changing the ***maximum*** time to 45 days because of practical concerns that have arisen in the past. Licensees have failed to respond to notices, have been unavailable for a hearing, and have otherwise placed TGRA and the Board in a position where meeting the 30-day requirement has been exceedingly difficult. The Board and TGRA are committed to not being the cause for such a delay except in the most unusual circumstances.

902: The commenter asked whether gifts of participation in a golf tournament or show tickets would violate this section. The answer depends on context, and all Licensees and Applicants are urged to take advantage of the section's invitation to contact TGRA for a case-by-case analysis.

1106: The commenter asked why "patron" is used in some places in the regulations while "visitor" is used in others. "Visitor" is in fact only used in Section 1022(c), which involves implementation of the requirements of Section 8 of the Compact dealing with "Protection of Visitors." Arguably, some "visitors" may not be "patrons," but in most instances the terms are likely to be interchangeable. The Board sees value in using the terms in a manner consistent with the Compact.