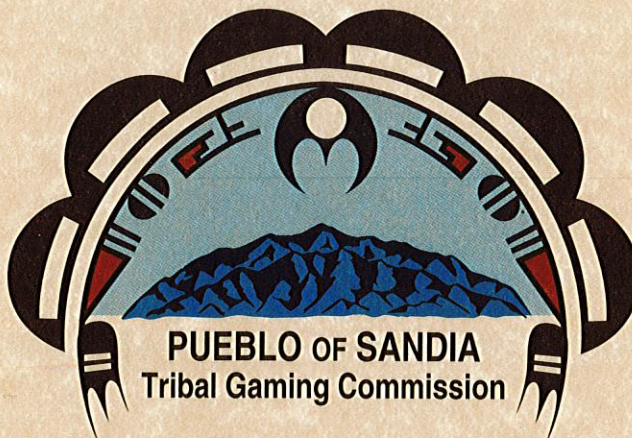


Richard Chissoe
Chairman

Valarie Denetdeel
Vice-Chairperson

Frank L. Chaves
Commissioner



Shawn Aragon
Executive Director

Patrick Giron
Surveillance Manager

Vacant
Commissioner

September 9, 2022

Sequoyah Simermeyer
Honorable Chairman
National Indian Gaming Commission
1849 C Street NW,
Mail Stop #1621
Washington, DC 20240

Re: Pueblo of Sandia comments regarding NIGC proposed rules of August 10, 2022

Dear Chairman Simermeyer,

The Pueblo of Sandia hereby submits comment to the National Indian Gaming Commission (“NIGC”) in response to the Agency’s proposed rule changes, published to the Federal Register on August 10, 2022 after consultation with Tribes. The Pueblo believes these revisions, as proposed, would have an appreciable impact on the Tribe and its gaming enterprise and therefore urges the NIGC to give diligent consideration to the comments provided herein before finalizing its proposed rules.

Revised definition of Key Employee

§ 502.14 Key Employee means:

(a) Any person who performs one or more of the following functions for the gaming operation:

- (1) Bingo caller;
- (2) Counting room supervisor;
- (3) Chief of security;
- (4) Floor manager;
- (5) Pit boss;
- (6) Dealer;
- (7) Croupier;
- (8) Approver of credit;
- (9) Custodian of gaming systems as defined in 25 CFR 547.2 and similar class III systems, gaming cash or gaming cash equivalents, or gaming system records;

(10) Custodian of surveillance systems or surveillance system records.

(b) Any person authorized by the gaming operation for unescorted access to restricted areas designated as restricted areas by the TGRA;

(c) If not otherwise licensed as a key employee or primary management official, the four persons most highly compensated persons by the gaming operation.

(d) Any other employee of the gaming enterprise designated by the Tribe as a key employee in its gaming ordinance.

The Pueblo supports the revised language at *(a)*, with the addition of “*for the gaming operation,*” clarifying key employees as individuals associated with a gaming operation. This revision distinguishes key employees from tribal government employees or tribal officials, unless a tribal employee or official also fulfills one of the enumerated positions or functions for the operation. The Pueblo recognizes this revision as consistent with the Indian Gaming Regulatory Act (“IGRA”), which expressly places the licensure requirement on primary management officials and key employees *of the gaming enterprise*.¹

Furthermore, the Pueblo agrees with the removal of the language found at *(b)* of the current rule, which states, “*If not otherwise included, any other person whose total cash compensation is in excess of \$50,000 per year.*”² We agree that defining a key employee based on a compensation threshold alone, without regard to the specific duties, levels of access, and authorities of a given position, is an unreliable basis for mitigating risk through licensure. Moreover, the significance of a set compensation amount promulgated as a rule will become diminished over time through inflation as it comes to arbitrarily capture more and more individuals in the gaming operation. The Pueblo supports the removal of this language.

The Pueblo is concerned with the removal of language found at *(a)(4)* of the current rule, which identifies “*Custodian of gaming supplies or cash*” as a key employee.³ While “*Custodian of...gaming cash*” has been included in the proposed language at *(9)* above, “*Custodian of gaming supplies*” has not been likewise restored at *(9)*. Ensuring the integrity of gaming cards, dice, chips, gaming machine ticket paper, bingo paper, and other gaming supplies is universally recognized as critical to the integrity of gaming.⁴ Mitigating the risk of altered or manipulated gaming supplies by licensing as key employees those individuals who handle, access, or maintain custody of gaming supplies is crucial in order for the Pueblo to ensure that gaming remains suitable, fair, legal, and is conducted in a manner that protects the public interest. It is also consistent with suitability standards expressed in IGRA.⁵ For these reasons, the Pueblo believes that the express inclusion of custodians of gaming supplies in the NIGC’s definition of key employee is necessary

¹ 25 U.S.C. § 2710(b)(2)(F)(ii)(I).

² 25 C.F.R. § 502.14(b).

³ *Id.* at *(a)(4)*.

⁴ See NIGC Minimum Internal Control Standards (“MICS”) at §§ 543.8(b)(1-3), 543.9(b), 542.8(b), 542.9(d), 542.12(f), 542.13(n)(10), and 542.14(e).

⁵ 25 U.S.C. § 2710(b)(2)(F).

and proper. We therefore recommend the language at (9) be revised to read, “*Custodian of gaming systems as defined in 25 CFR 547.2 and similar class III systems, gaming cash or gaming cash equivalents, gaming supplies, or gaming system records;*”

The Pueblo is significantly concerned with the NIGC’s proposed revision to (d). Since 2009, the NIGC’s definition of key employee has provided at (d) “*Any other person designated by the tribe as a key employee.*” This provision recognizes a Tribe’s responsibility, as the primary regulatory authority, to rationally assess risk associated with personnel within the gaming operation and the Tribe’s duty to mitigate that risk by determining – appropriate to the Tribe’s unique operation – who must be scrutinized and authorized as a key employee. Accordingly, the provision stipulates that a Tribe may determine key employees to include individuals who may fall outside the scope of (a) – (c).

The NIGC’s proposed revision to (d) reads “*Any other employee of the gaming enterprise designated by the Tribe as a key employee in its gaming ordinance.*” As proposed, this revision would constrain the Pueblo from exercising the discretion provided by (d) unless it undertakes the substantial governmental and administrative burden of revising its gaming ordinance to include each position it deems a key employee outside the scope of (a) – (c). Presumably, the Tribe would now be required to resubmit a revised gaming ordinance to the NIGC for approval each time it creates and designates a new key employee position under (d) of the definition.

The Pueblo takes specific notice that this proposed revision was not included in the NIGC’s “Discussion Draft” of proposed revisions to Sec. 502.14. This Draft was distributed to the Tribes on July 12, 2021 for discussion during the NIGC’s tribal consultation sessions held throughout late 2021 and early 2022, but it made no mention of revising tribal gaming ordinances as a condition of (d). The Pueblo disagrees that the spirit and intent of government-to-government tribal consultation has been satisfied with regard to this proposed rule.

The Pueblo opposes the NIGC’s proposed revision to (d). The Pueblo’s current gaming ordinance, in force for many years, has already been determined by the NIGC to satisfy the statutory requirements set forth in IGRA.⁶ The Pueblo disagrees that it should be obligated to amend its gaming ordinance, incurring the associated cost and administrative burden, in order to exercise the reasonable and proper regulatory discretion that has been provided under the current definition for well over a decade. The Pueblo therefore opposes the proposed revision to (d).

Revised definition of Primary management official [PMO]

§ 502.19 Primary management official means:

(a) Any person having management responsibility for a management contract;

(b) Any person who has authority:

(1) To hire and fire employees of the gaming operation; or

(2) To establish policy for the gaming operation; or

⁶ *Id.* at (b)(2).

- (3) To supervise a key employee of the gaming operation.*
- (c) The chief financial officer or a position with duties similar to a chief financial officer.*
- (d) The general manager or a position with duties similar to a general manager.*
- (e) Any other employed management official of the gaming enterprise designated by the Tribe as a primary management official in its gaming ordinance.*

With regard to the proposed revision found at *(e)* above, adding “*in its gaming ordinance*” to the existing rule, the Pueblo restates its opposition as set forth for Sec. 502.14(d) above.

The Pueblo is concerned with the proposed addition of *(b)(3)*, defining as a PMO “*Any person who has authority...to supervise a key employee of the gaming operation.*” This standard is overly broad and would capture many positions that are generally not considered “management” and are not licensed by the Pueblo as PMOs. It would include, for example, front-line, non-salaried supervisors, dual-rate employees (those whose duties shift from employee to supervisor based on staffing needs), and even designated team leaders. None of these individuals hold duties or authorities that even approach what is generally understood to be management, let alone *primary* management. The proposed language at *(b)(3)*, when viewed in the context of the other criteria in the definition, stands apart as both vague and overly broad. The inclusion of *(b)(3)* would, in fact, render all other criteria in the definition unnecessary because the other criteria, by virtue of the duties and authorities described, are individuals who supervise key employees. By this rationale, the definition of PMO could simply read “*Any person who has authority to supervise a key employee of the gaming operation*” and have the same effect as the proposed definition above. The standard would capture so many individuals within the gaming operation that the regulatory and functional distinction of a Primary Management Official would become essentially meaningless. We do not believe this is the NIGC’s intent. The Pueblo therefore recommends that *(b)(3)* be removed from the proposed definition.

Additionally, the Pueblo is concerned that, without qualifying the rule more specifically, some criteria in the definition could be construed to apply to tribal officials. We believe the proposed rule should reflect that the definition does not intend to encompass tribal officials, unless a tribal official also holds an applicable management position for the gaming enterprise. The Pueblo therefore recommends that the NIGC revise the definition to reflect this limitation – perhaps similar to the proposed revision at Sec. 502.14(a) – or provide a clear and unambiguous statement to this effect in the preamble of the final rule publication.

New definition of Gaming Enterprise

§ 502.25 Gaming Enterprise means the entities through which a Tribe conducts, regulates, and secures gaming on Indian lands within such Tribe's jurisdiction pursuant to the Indian Gaming Regulatory Act.

The Pueblo is somewhat concerned that the proposed definition includes “*entities through which a Tribe...regulates...gaming*” as a possible component of a tribal gaming enterprise. It is widely

understood within the gaming industry that the entity responsible for regulating gaming must be independent of the gaming enterprise. The NIGC has issued multiple agency bulletins over the years describing the independence of Tribal Gaming Regulatory Authorities (“TGRAs”) as crucial to the effective regulation of gaming. As recently as July of 2022, the NIGC published a bulletin emphasizing “*Effective regulatory oversight requires functional separation between regulating and operating the gaming operation.*”⁷ It therefore seems inconsistent with longstanding doctrine that the NIGC would propose a definition that suggests it may be acceptable or proper to situate a TGRA within the structure of a gaming enterprise.

However, the Pueblo notes that the NIGC states in its commentary for the proposed rule that it chose to include “*regulates*” in the proposed definition in order to accommodate a Tribe that may elect to license its regulatory staff as key employees under the proposed Sec. 502.14(d). The proposed definition of key employee would require a licensee to perform functions “*for the gaming operation.*” Thus, as the NIGC explains, including “*regulates*” in the proposed definition of gaming enterprise will establish an avenue for a Tribe to license its regulatory staff under the rule, should it wish to do so. The Pueblo therefore recommends that the NIGC provide a clear and unambiguous statement to this affect in the preamble of the final rule publication.

New definition of Tribal Gaming Regulatory Authority (TGRA)

§ 502.26 Tribal Gaming Regulatory Authority (TGRA) *means the governmental entity authorized by Tribal law to regulate gaming conducted pursuant to the Indian Gaming Regulatory Act.*

The Pueblo agrees with the proposed definition of TGRA; specifically that it identifies a TGRA as a tribal government agency operating under the authority of tribal law and IGRA. The Pueblo supports the promulgation of the new definition as proposed.

The Pueblo of Sandia appreciates the opportunity to provide comment to the NIGC on the proposed rule changes set forth above. We thank the NIGC for its kind and diligent attention and we ask the Commission to carefully weigh the impact these rule changes will have on the Pueblo and its ability to effectively regulate its gaming enterprise.

Sincerely,



Richard Chisoe
Chairman
Sandia Tribal Gaming Commission

⁷ See NIGC Bulletin No. 2022-5, July 12, 2022.

Cc: Stuart Paisano, Governor
Felix L. Chaves, Lt. Governor
Donald Avila, War Chief
Clarence Sanchez, Lt. War Chief
Steffani Cochran, General Counsel
Shannon Montoya, Tribal Administration Manager