

# **Oneida Tribe of Indians of Wisconsin**

## **BUSINESS COMMITTEE**



Oneidas bringing several hundred bags of corn to Washington's starving army at Valley Forge, after the colonists had consistently refused to aid them.



UGWA DEMOLUM YATEHE  
Because of the help of this Oneida Chief in cementing a friendship between the six nations and the colony of Pennsylvania, a new nation, the United States was made possible.

**P.O. Box 365 • Oneida, WI 54155**  
**Telephone: 920-869-4364 • Fax: 920-869-4040**

RESOLUTION # 12-29-06-A

### ***Approving Financial Services Engagement Letter and Development Agreement and Other Matters in Connection Therewith***

- WHEREAS,** the Oneida Tribe of Indians of Wisconsin is a federally recognized Indian government and a treaty tribe recognized by the laws of the United States, and
- WHEREAS,** the Oneida General Tribal Council is the governing body of the Oneida Tribe of Indians of Wisconsin, and
- WHEREAS,** the Oneida Business Committee has been delegated the authority of Article IV, Section 1 of the Oneida Tribal Constitution by the Oneida General Tribal Council, and
- WHEREAS,** the Oneida Tribe of Indians of Wisconsin (the "Tribe") is a federally recognized Indian government and treaty tribe organized under the Tribe's Constitution and By-Laws (the "Constitution"), adopted on November 14, 1936, and approved by the Secretary of the Interior on December 21, 1936, by virtue of powers inherent in tribal sovereignty and those delegated by the United States of America; and
- WHEREAS,** the Tribe has established, pursuant to its Constitution, a Business Committee made up of elected representatives who act in accordance with the Constitution and with the customs and tradition of the Tribe in furtherance of the day-to-day business of the Tribe; and
- WHEREAS,** the Tribe has delegated to the Business Committee the power to, among other things, manage all economic affairs and enterprises of the Tribe;
- WHEREAS,** the Tribe acquired land in Sullivan County of the State of New York, to be held in trust for the Tribe (the "Land") and on which a casino, hotel and related resort facilities (the "Enterprise") will be constructed and operated;
- WHEREAS,** in order for the Tribe to construct and operate the Enterprise, the Tribe will need, among other things, to obtain a gaming compact with the State of New York or other applicable authority (the "Compact"), to obtain financing to plan, design, construct, equip and furnish the Enterprise (the "Financing"), and to retain professionals

(including, but not limited to, architects, general contractors, designers, accountants and attorneys) to plan, design, construct, equip and furnish the Enterprise;

**WHEREAS,** Power Plant Entertainment New York, LLC, a Delaware limited liability company ("Developer") proposes to act as advisor and agent for the Tribe to assist the Tribe in identifying and acquiring the Land, obtaining the Compact, obtaining the Financing, identifying and retaining Professionals to plan, design, construct, equip and furnish the Enterprise, and in planning, designing, constructing, equipping and furnishing the Enterprise;

**WHEREAS,** the Developer has proposed to render the above-described services and other services related thereto under the terms of a Financial Services Engagement Letter (the "Financial Services Agreement") and a Development Agreement, each between the Tribe and the Developer (collectively, the "Documents");

**WHEREAS,** the original Documents were approved by Oneida Business Committee Resolution # 10-23-06-A and which expire on December 31, 2006; and

**WHEREAS,** the Oneida Business Committee and Developer desire to continue the agreement for an additional time period and have negotiated amendments to the Documents in order to extend the documents for an additional two year period; and

**WHEREAS,** copies of the Documents have been made available to the members of the Business Committee;

**WHEREAS,** the Documents provide that the Developer will advance the amounts needed to obtain the Compact and to enable the development and construction of the Enterprise, up to a maximum of \$11 Million, which advances will be repaid to the Developer;

**WHEREAS,** the Documents provide that, prior to there being Financing, the Tribe will reimburse the Developer for amounts advanced by the Developer as described above, at the rate of 10% of amounts so advanced, but up to a maximum of \$1 Million;

**WHEREAS,** the Documents provide for compensation to the Developer for its services to the Tribe, which compensation includes: 1% of the amount of Financing arranged by the Developer; 7.5% of "Gross Revenue" (as such term is defined in the Development Agreement) from the Enterprise, for seven years following the opening of the Enterprise; and 4% of "Project Costs" (as such term is defined in the Development Agreement); and

**WHEREAS,** the Business Committee has determined that it is in the Tribe's best interest to enter into the Documents; to obtain the Compact; to acquire the Land; to obtain the Financing; to retain Professionals to plan, design, construct, equip and furnish the Enterprise; to plan, design, construct, equip and furnish the Enterprise; to waive its



immunity to suit in the manner provided in the Documents; and to consent to suit as contemplated under the Documents;

**NOW, THEREFORE, BE IT RESOLVED** by the Business Committee, as follows, and in accordance with the requirements of the Sovereign Immunity Ordinance:

*Approval and Authorizations*

The Business Committee hereby authorizes and approves the entry into the amended Documents (and such other documents, certificates, consents and instruments as may be required of the Tribe by the Documents (the "Collateral Documents")) and the transactions contemplated by the Documents and the Collateral Documents, including, but not limited to, the retention of the Developer as the Tribe's advisor and agent, the compensation of the Developer in the amounts set forth in the Documents, the obtaining of the Compact, the acquisition of the Land, the obtaining of the Financing, the retention of Professionals to plan, design, construct, equip and furnish the Enterprise, the planning, design, construction, equipping and furnishing of the Enterprise, and the operation of the Enterprise.

The Business Committee hereby authorizes the waiver of the Tribe's immunity to suit and the consent to suit that are set forth in the Documents in connection with the transactions contemplated by the Documents.

The Business Committee hereby authorizes the Chair and the Vice-Chair to take any and all actions as they, on a joint or individual basis, may deem appropriate or necessary to carry out the foregoing resolutions, including, but not limited to, to make any changes or additions to the Documents or Collateral Documents as they, on a joint or individual basis, may deem appropriate (with their signature thereto to serve as evidence of their approval of such changes or additions), and to execute and deliver the Documents and the Collateral Documents.

This Resolution shall become effective as of the date and time of its passage and approval by the Business Committee.

Passed, adopted and approved this 29<sup>th</sup> day of December, 2006.

**BUSINESS COMMITTEE OF THE ONEIDA TRIBE OF INDIANS OF WISCONSIN**

  
By: Gerald Danforth

Its: Chairman

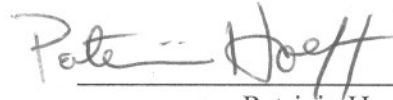
At a regular meeting of the Business Committee of the Oneida Tribe of Indians of Wisconsin, Vince DelaRosa moved for adoption of the foregoing Resolution No. 12-29-06-A and Ed Delgado seconded the motion; on roll call, the following vote was recorded:

Gerald Danforth  
Kathy Hughes  
Patricia Hoeft

Vince DelaRosa  
Ed Delgado

### CERTIFICATION

I, the undersigned, as Secretary fo the Oneida Business Committee, hereby certify that the Oneida Business Committee is composed of 9 members of whom 5 members constitute a quorum. 5 members were present at a meeting duly called, notices and held on the 29th day of December, 2006; that the foregoing resolution was duly adopted at such a meeting by a vote of 4 members for; 0 members against; and 0 members not voting; and that said resolution has not been rescinded or amended in any way.



\_\_\_\_\_  
Patricia Hoeft, Secretary  
Oneida Business Committee

**Power Plant Entertainment New York, LLC  
601 East Pratt Street  
Baltimore Maryland 21202**

**FINANCIAL SERVICES ENGAGEMENT LETTER – AS AMENDED  
DECEMBER 31, 2006**

The Oneida Tribe of Indians of Wisconsin  
Norbert Hill Center; 2nd Floor  
N7210 Seminary Road  
Oneida, Wisconsin 54155

Ladies and Gentlemen:

This engagement letter agreement (this “Agreement”) will confirm the understanding and agreement among Power Plant Entertainment New York, LLC (“Advisor”), a Delaware limited liability company, and The Oneida Tribe of Indians of Wisconsin, a federally recognized Indian tribe (together with each of its successors and assigns, the “Tribe”). We understand that the Tribe proposes to sign an agreement (the “Development Agreement”) with Advisor to develop the Property (as hereinafter defined) located in/near Sullivan County and/or Ulster County, New York. Capitalized terms used herein but not otherwise defined shall have the meanings assigned to them in Section 12 of this Agreement or in the Development Agreement, as applicable.

This Agreement will confirm our agreement with you concerning certain terms and conditions related to the retention of Advisor as financial advisor with respect to all financial matters related to the Project and Financings to pay the costs and expenses associated with the Project. It is a condition precedent to the obligations of Advisor under the Development Agreement that this Agreement shall have been executed by the parties hereto.

1. Retention.

(a) Retention. Subject to subparagraph (e) below, the Tribe hereby confirms that it retains Advisor as financial consultant to perform the services listed in subsection (b) below and to assist the Tribe in obtaining financings for the Project to be applied in full or in part to pay Project Costs or to finance or refinance the revenues from the Project by the Tribe (“Financing”). Except as set forth on Exhibit “B” to the Development Agreement, the Tribe confirms that Advisor does not require any Tribal license, permit or other Tribal approval to perform its services hereunder.

(b) Advisory Services. Advisory services to be performed by Advisor shall include, but shall not be limited to:

(i) assist the Tribe in locating the Financing, the acceptance of which shall be subject to the approval of the Tribe, which approval will not be unreasonably withheld. The loan documents shall be negotiated by Advisor, in consultation with the Tribe, and shall be executed and delivered by the Tribe, provided that the Financing shall

be secured solely by the revenues of the Project and the leasehold estate, if any, created in the Property if requested by a lender and no other assets of the Tribe, the other terms of the Financing are commercially reasonable, the Financing is believed adequate to complete the Project, and there is no legitimate business or legal reason for the Tribe not to execute the loan document. The Tribe acknowledges that Advisor (and its Affiliates) is not a mortgage broker, loan originator, provider of credit support, or broker-dealer and does not intend to provide services that would require a mortgage brokerage license, lending license or broker-dealer license; provided, however, except as set forth in Section 1(a), the Tribe does not represent or warrant whether or not Advisor needs a license under applicable federal or state law to perform its services hereunder;

(ii) assist the Tribe in connection with the evaluation of all Financing proposals for the Project;

(iii) assist the Tribe in maintaining compliance with all Financing agreements and contracts, if any, concerning the Project; and

(iv) assist the Tribe in obtaining the necessary governmental approvals for the Project to be located in or near New York State.

(c) Interim Advances. In order for the development of the Project to continue while the Financing for the Project is being arranged, the Advisor shall advance certain costs of developing the Project as set forth below and otherwise subject to the provisions hereof.

(i) The Tribe acknowledges that Advisor and Affiliates of Advisor have expended, and the parties agree that Advisor and Affiliates of Advisor, jointly and severally, will expend, and hereby agree to and shall expend and advance, all Project Costs incurred and to be incurred during the Pre-Financing Phase, excluding “hard” or construction Project Costs and excluding any interest or principal, in each case, or financing fees, on any Financing, subject to and in accordance with the Pre-Development Budget and the other provisions hereof including, without limitation, the provisions of Section 1(c)(ii), in sufficient amounts of money (but not to exceed the amount set forth in Section 1(c)(ii) herein), to enable the development of the Enterprise and related amenities (“Interim Advances”). Amounts expended which are not provided in, or are in excess of amounts provided in, the Pre-Development Budget, and not otherwise approved by the Development Business Board as an amendment to the Pre-Development Budget, shall not be deemed to be Interim Advances, or reimbursable by the Tribe, and shall be borne by Advisor. Developer shall not add any profit, mark-up or premium on the Interim Advances and shall only pass on to the Tribe Advisor’s actual out-of-pocket costs. By way of example only, Interim Advances shall include, without limitation, amounts expended for architectural drawings, engineering and design studies, marketing studies, “Recoverable Legal Fees” (i.e., legal fees incurred or expended by Advisor or Tribe which are necessary to advance the Project and the furtherance of this Agreement and the goals of the Development Agreement, including without limitation, negotiating Financing and any other agreements with third parties in connection with the Financing or the development of the Project, but excluding Advisor’s or Tribe’s legal fees incurred (A) in preparing and negotiating agreements between the Tribe, on the one hand, and Advisor,

on the other hand, or (B) in connection with any of Advisor's or Tribe's internal or organizational legal needs or advice), Tribe's and Advisor's travel expenses and any other expenses incurred under this Agreement or the Development Agreement. Each of the parties hereto agrees that expenditures of the Advisor and its Affiliates made in accordance with the Pre-Development Budget (including all such costs incurred from and after October 1, 2001) that are itemized on Appendix A attached hereto) are Project Costs and will be included as Interim Advances, either on the Pre-Development Budget or as an attachment thereto and approved in the same manner as the Pre-Development Budget. Notwithstanding the foregoing, the parties further agree that the Advisor shall have the right, but not the obligation, to advance any Project Costs incurred and owing after the Pre-Financing Phase, provided, that, either such advance was requested by the Tribe, or, if not requested by the Tribe, such advance (A) is for Project Costs for which the proceeds of the Financing are not then available for any reason and the Tribe was not willing to advance such funds within 30 days after request by Advisor (on at least as favorable terms to the Project as the Advisor would advance funds) and (B) is otherwise within the limits provided in and shall pay for all or a portion of the items comprising the Approved Budget. Any such advance shall be treated as an Interim Advance.

(ii) The Interim Advances, when added to (and which shall include) amounts expended by Developer under the Development Agreement shall not exceed, in the aggregate, a maximum of \$11,000,000. It is understood that this \$11,000,000 amount includes the amount to be contributed by the Tribe pursuant to Section 1(c)(ix) below.

(iii) In the event this Agreement shall terminate during the Pre-Financing Phase pursuant to Section 8.1(a)(iii), Section 8.1(a)(iv), Section 8.1(a)(v), Section 8.1(a)(vi) or Section 8.1(a)(viii) of the Development Agreement, the Tribe shall not be obligated to reimburse Advisor for any Interim Advances. Advisor will provide a separate accounting for Interim Advances and Project Costs.

(iv) The Tribe shall reimburse Advisor for Interim Advances due in accordance with this Agreement, at the Tribe's sole discretion, from the proceeds of the Financing or at such other times and from such other sources as the Tribe shall determine, and the Tribe may prepay the Interim Advances at any time, provided that any balance of Interim Advances made by Developer during the Pre-Financing Phase and not paid by the first day of the third anniversary of the Enterprise's opening for business to the general public shall be paid in monthly installments commencing on the first day of each calendar quarter from and after said third anniversary, as a Priority Payment from the Available Cash Flow (after payment of the Tribe Minimum Payment). Advisor agrees that its right to receive repayment of Interim Advances is subordinated to the prior payment from the Available Cash Flow of the Tribe Minimum Payment, in accordance with the definition of "Priority Payment."

(v) Notwithstanding the foregoing, reimbursement for Interim Advances made by Advisor after the Pre-Financing Phase in accordance with Section 1(c)(i) above shall be due thirty (30) days after receipt by the Tribe of notice of the expense.

(vi) Unpaid Interim Advances shall accrue interest at the Project Interest Rate commencing from the closing date of the Financing that ends the Pre-Financing Phase, provided that as to Interim Advances made thereafter in accordance with Section 1(c)(i) above, default interest for late payment shall be imposed on day thirty-one (31) after receipt by the Tribe of notice of the expenses and, until paid, the unpaid balance shall earn interest at the lesser of (a) the same interest rate as the highest interest rate charged on the funds borrowed by the Tribe for the Project, plus two percentage points or (b) the prime rate of the Bank of America (or any primary successor thereto), plus two percentage points, or (c) the highest interest rate permitted by the laws of the State of New York (“Default Rate”).

(vii) It is expressly understood and agreed that everything done by Advisor within the scope of its authority hereunder shall be done by the Advisor on behalf of the Tribe, and that any and all obligations, costs or expenses incurred in the performance of its obligations under this Agreement or the Development Agreement (including, without limitation, the Interim Advances) and within the scope of its authority hereunder and under the Development Agreement shall be borne by the Tribe and not by Advisor, except as otherwise specifically provided herein. Subsequent to the Pre-Financing Phase, Advisor shall not be obligated to make any Interim Advances with respect to the Project to, or for the account of, the Tribe, nor shall Advisor be obligated to incur any liability or obligation or do any act or perform any duty hereunder unless the Tribe shall furnish Advisor with the necessary funds for the discharge thereof; *provided*, however that all amounts payable to persons for rendering services to, or as employees of, Advisor, whether by way of compensation, fringe benefits or otherwise, shall be paid by and as an expense of Advisor, except to the extent such services are included as Project Costs on the Approved Budget. As a condition precedent to including such service costs on any budget or otherwise as Project Costs, Advisor shall disclose in writing to the Tribe any persons whose payment or compensation is to be included as Project Costs who are also being compensated in any way by, or who are also rendering services on any basis to, Advisor. It is understood that Advisor will not be reimbursed for any expenses incurred or advanced which are not authorized by this Agreement or the Development Agreement.

(viii) Any request for reimbursement by Advisor pursuant to this Section or pursuant to any other provision of this Agreement shall be delivered to Tribe in such manner and in such form as Tribe reasonably requires, provided that such reimbursement procedures are uniformly required by Tribe in connection with its reimbursement of third parties and provided further that adequate advance notice of such procedures has been furnished to Advisor. In the event that such procedures are unreasonable, not uniformly required or not furnished to Advisor in advance as set forth above, any such request for reimbursement shall be: (a) sent to the Tribe at the address set forth in Section 11, but to the attention of the Tribe’s Treasurer; and (b) in the form of an invoice accompanied by an itemized report listing the specific charges and/or expenses for which reimbursement is sought (and, to the extent requested and practical, shall include specific invoices for such charges). Any request for reimbursement shall be deemed to have been approved by the Tribe unless, within thirty (30) days of its receipt of such invoice, the Tribe notifies Advisor as to any specific charges and/or expenses that the Tribe wishes to dispute or



receive supporting documentation for and provides Advisor with a written request for the supporting documents related to such charges, provided that the Tribe will be deemed to have approved any invoice as to which the Tribe requested supporting documentation thirty days (30) days after receipt of supporting documentation unless the Tribe with reasonable cause objects to the payment of any invoice as not being reimbursable hereunder. Notwithstanding the foregoing, the Tribe shall promptly pay those items contained in the itemized portions of any disputed invoice that the Tribe is not disputing. Nothing in this Section shall negate the requirement that expenditures of Advisor and Advisor's Affiliates which are not provided in a budget approved by the Tribe (such as the Pre-Development Budget) shall not be reimbursed by the Tribe.

(ix) Notwithstanding the above, the Tribe agrees to pay ten percent (10%) of all Interim Advances, regardless of whether or not Financing is obtained. During (and, if applicable, after) the Pre-Financing Phase, Advisor may submit to the Tribe on a monthly basis invoices detailing Interim Advances authorized under this Agreement, and the Tribe shall reimburse Developer ten percent (10%) of such Interim Advances within thirty (30) days following receipt of the invoice and supporting items. The maximum amount of Interim Advances reimbursed by the Tribe pursuant to this Section 1(c)(ix) shall not exceed in the aggregate \$1,000,000, it being understood that the purchase price of the Property shall not be included in such calculation. The procedures set forth in Section 1(c)(viii) regarding invoice submission, review and dispute shall apply to invoices submitted pursuant to this Section 1(c)(ix). In the event that the Tribe fails to pay such amounts, then in addition to any other right and remedies provided for hereunder in the event of a default, all such Interim Advances not so paid to Advisor shall earn interest thereon at the Default Rate from the date such amount was to be paid to the date of actual payment.

(d) Assistance in Syndication. The Tribe agrees to use commercially reasonable efforts to assist Advisor in forming any syndicate or loan group, including preparing disclosure materials, meeting with prospective underwriters, loan purchasers, lenders and/or placement agents and providing such information as Advisor may reasonably request during the course of such process.

(e) Exclusive Financial Arrangement. The Tribe agrees that during the term of the Development Agreement the Tribe and its respective Affiliates, officers, tribal council members, representatives, agents and governmental officials will not directly or indirectly (i) offer any Financing to, or solicit any offer for Financing from, or otherwise contact, approach or negotiate with respect thereto with, any person or persons other than through Advisor, as the same may relate to Financing for the Project or any other Development at the Property, or (ii) borrow, syndicate or attempt to borrow or syndicate, announce or authorize the announcement of the borrowing or syndication of, or engage in discussions concerning the syndication of, any debt facility of the Tribe or any of its Affiliates related to the Project other than through Advisor. Advisor shall notify the Tribe in advance of all meetings and other contacts with lenders or potential lenders, and a Tribal representative shall have the option to be present at all meetings, conference calls, or other personal contacts with lenders or potential lenders. Notwithstanding the above, if Advisor is unable to secure Financings to complete the Project, after equity contributions, the Tribe may attempt to locate Financings to complete the Project.

(f) Advisor Does Not Commit to Provide Full Financing. Notwithstanding anything to the contrary contained herein or any oral representations or assurances previously or subsequently made by the parties hereto, this Agreement does not constitute a commitment by or a legally binding obligation of Advisor or any of its respective Affiliates to act as lender or purchaser of any Financing or to provide any financing, except as provided in paragraph (c) above.

(g) Advisor Assistance Regarding BIA Approval. The Advisor agrees that it will use commercially reasonable efforts to assist and support Tribe in Tribe's efforts to obtain the expeditious approval of BIA with respect to any tenant lease, as applicable, it being understood and agreed that Tribe may from time to time, designate Advisor to act on Tribe's behalf with respect to obtaining such approval.

(h) Other Hotel, Retail and Property Advisory Services. Additional consulting services to be performed by Advisor upon written request of the Tribe shall include, but shall not be limited to, the following:

(i) Assist the Tribe in locating and hiring a hotel, retail or restaurant manager or property management company for any part of the Project (other than with respect to any Gaming operations);

(ii) Assist the Tribe in the hiring of non-Gaming employees (other than employees in Gaming operations);

(iii) Assist the Tribe in maintaining compliance with all leases, agreements and contracts concerning the Project (other than with respect to Gaming operations);

(iv) Assist the Tribe in tenant relations, including but not limited to, advising the Tribe on tenant compliance with leases, agreements and contracts concerning the Project, and advising the Tribe on enforcement of lease and contractual provisions against tenants;

(v) Assist the Tribe in planning and executing renovations and expansions related to the Enterprise;

(vi) Assist the Tribe with marketing strategies and marketing activities related to the Enterprise;

(vii) Assist the Tribe in the production of live music and other entertainment acts; and

(viii) provide such other services as reasonably requested by the Tribe from time to time (other than any services with respect to Gaming operations).

Notwithstanding anything to the contrary contained herein, the Advisor shall not provide, shall not be requested to provide, and shall not be required to provide, any services the provision of which would cause Advisor to become a "manager" within the meaning of IGRA or for this

agreement to become a “management contract” subject to the approval of the NIGC or its chairman. By way of example, but not limitation, (i) the employment of a Gaming manager and all primary management officials at the Gaming facilities shall be solely the decision of Tribe; (ii) neither Advisor nor any of its affiliates and/or subsidiaries shall have any control whatsoever over either the day-to-day operation or overall operation of the Gaming facilities; (iii) whether changes are made to the Gaming facilities once same become operational shall be solely the decision of the Tribe; and (iv) neither Advisor nor any of its affiliates and/or subsidiaries shall act as a consultant on the operations of the Gaming facilities.

Notwithstanding the foregoing, in no event shall any of the additional consulting services set forth in clauses (i) through (viii) above include, directly or indirectly, or in any way relate to, Gaming and/or leasing, managing, renting and/or maintaining the Project, or any portion thereof. Nothing contained herein shall be deemed to prohibit Tribe from obtaining any such additional consulting services from a party other than Advisor or an Affiliate of Advisor. In no event shall Advisor act as, or be requested to act as, a lessor/supplier or vendor to the Project.

2. Advisory Fees and Expenses.

(a) Financing Fees. The Tribe will pay Advisor a fee (each, a “Financing Fee”) for any Financing for the Project arranged by Advisor equal to 1.0% of the aggregate principal amount of such Financing. Such fee is to be paid in immediately available funds at the closing of such Financing. Notwithstanding the above, Advisor acknowledges and agrees that the Tribe may decide to reduce the amount of any Financing by increasing its equity position in the Project (any such increase being referred to herein as an “Equity Increase”). Accordingly, and to the extent of any such Equity Increase, Advisor’s fee for any Financing payable pursuant to this Section shall be calculated on the actual amount of such Financing. If the Advisor is unable to secure enough financing to cover the costs of the Project, Advisor will not be entitled to the 1% financing fee for any additional financing arranged by the Tribe.

(b) Financial Advisory Fee.

(i) In consideration of all of the financial advisory services set forth above, and in consideration of Advisor’s commitment to make the Interim Advances, the Tribe hereby agrees that the fees and repayments set forth in paragraph (a) and Section 1(c) above are insufficient to fully compensate Advisor for the risks in making the Interim Advances and the time and effort spent on financial advisory services and arranging financing. Accordingly, the Tribe agrees to pay a financial advisory fee for the Project (“Financial Advisory Fee”) equal to 7.5% of the Gross Revenue of the Enterprise starting from the first full or partial month that the gaming portion of the Enterprise begins operations, until the 84th month after the date that the Enterprise begins operations. Such fee will be payable on the 15th day of each month for the prior month.

(ii) Annually, within 120 days after the end of each fiscal year, there shall be a so-called “true up” of the amounts payable hereunder based upon the audited financial statements of the Enterprise. The Tribe shall promptly pay Advisor any amounts owing Advisor under each true up, and the Tribe shall be entitled to retain from future payments any amounts overpaid to Advisor in the prior periods or, if requested by

the Tribe, Advisor shall remit any overpayments made or credits due Tribe within 30 days following the last calendar month that this Agreement is in effect. In connection with such true up, the Tribe agrees to provide audited financial statements for the Enterprise within 120 days after the end of each fiscal year during the term of this Agreement.

(iii) Default interest for late payment shall be imposed for each day that such payment is not paid timely until paid, at the Project Interest Rate. Upon reasonable notice, Advisor shall have the right, during normal business hours, to inspect and copy the books and records of the Enterprise in connection with any determination or dispute on the determination of the amount of the Financial Advisory Fee owed hereunder; provided, that all such information shall be subject to the confidentiality provisions hereof.

(c) The Tribe agrees that Advisor has the right to place advertisements in financial and other newspapers and journals at its own expense describing its services to the Tribe, provided that Advisor will submit a copy of any such advertisements to the Tribe for its prior written approval, which approval shall not be unreasonably withheld. Furthermore, the Tribe agrees to include a reference to Advisor's role as financial advisor in any press release announcing the transaction which reference shall be subject to Advisor's reasonable approval.

### 3. Cooperation.

(a) Information. The Tribe agrees that it and its Affiliates, and their respective officers, advisors, representatives, agents and counsel will cooperate with Advisor and provide information reasonably required by Advisor in connection with the offer, sale and placement of, or obtaining commitments for the Financing and providing any other financial services contemplated by this Agreement.

(b) Other Actions of the Tribe. In connection with each Financing contemplated by this Agreement, the Tribe shall assist and cooperate with any lender or underwriter of the applicable Financing by taking such action as may reasonably be required, including, without limitation (i) the execution and granting of a security interest in the leasehold estate in the Property (if required by a lender), the cash flow of the Project and/or any part of the related Enterprise and in any equipment, inventory, accounts, or tangible or intangible property with respect thereto, (ii) the granting of a mortgage and/or leasehold mortgage, as applicable, in connection with the granting of such security interest, (iii) compliance with financial covenants that are typical and customary for the type and nature of such Financing, (iv) obtaining all necessary consents and approvals from the Tribe or any of its Affiliates, as necessary, (v) the obtaining of any governmental consents and approvals, (vi) the imposition of limitations on distributions and/or pledging of any cash flows from the Project to secure repayment of such Financing and (vii) the granting of appropriate limited waivers of sovereign immunity limited to the revenues and assets of the Project.

(c) Tribe's Compliance with Court Orders. In addition to the foregoing, the Tribe agrees to comply with any final court order or ruling by a court of competent jurisdiction that the activities of the Enterprise are not in compliance with law, which order or ruling is not



stayed for a period of more than thirty (30) days or is not subject to any applicable standstill or similar agreement with the applicable legal authority not to enforce such order or ruling (including, without limitation, making any necessary modifications to any Gaming activities and replacing any non-conforming Gaming equipment so that the operations at the Project are in compliance with applicable law).

(d) *Financial Statements.* In connection with each Financing, the Tribe agrees to prepare and deliver, within a reasonable period of time upon request of Advisor, audited financial statements that are prepared in accordance with GAAP, are audited by any “big five” accounting firm or other independent certified public accountant (subject to the reasonable approval of Advisor), and comply with Regulation S-X and all other rules and regulations promulgated by the United States Securities Exchange Commission (the “SEC”) to the extent the Tribe is required to comply with the provisions thereof. The Tribe further agrees, if required to obtain a Financing, to prepare a disclosure document in connection with the Financing that complies with Form S-1 and all other rules and regulations promulgated by the SEC that are referred to in the Form S-1. The Tribe also shall request its auditors to provide customary “comfort letters” and other customary assistance in any such financing. The Tribe agrees that so long as the Financial Advisory Fee has not been paid in full or any part of any Financing is outstanding, that it will prepare regular quarterly financial statements and annual financial statements (as if the applicable Enterprise were a reporting company under the Securities Exchange Act) and shall deliver such financial statements to each of the lenders and Advisor (within the time frame required by such a reporting company).

(e) *Subordination of Advisor’s Fees.* Advisor agrees to subordinate payment of its Financing Fees under Section 2(b) and its Financial Advisory Fee under Section 2(c) to the prior payment of the Tribe Minimum Payment and to the prior payment of regularly scheduled payments of interest and principal due under the Financings for the Project; provided that the Financing shall provide that the Financing Fees and the Financial Advisory Fee shall be payable in full when due hereunder to the extent there is sufficient Available Cash Flow therefor; provided, further, that Advisor will not, and will not be required to subordinate its right to any fees to any refinancing of such Financing used originally to pay Project Costs; provided further that the Tribe agrees to cooperate and assist in such subordination by providing for the fees and payments hereunder payable to the Advisor to be in the cash waterfall and security documents to the lenders of the Tribe in a position subordinated to the Financing, in a form and manner reasonably satisfactory to the Advisor. The Tribe acknowledges that Advisor will not, and will not be required to subordinate its right to any fees to any other financing, loan or other obligation, except as set forth in Section 5.4 of the Development Agreement. In addition, in consideration of the Advisor’s agreement to subordinate its fees as provided above, the Tribe agrees that upon any refinancing or repayment of any Financing as to which Advisor agreed to subordinate, the Tribe will grant a first-priority security interest in the revenues from the Project (less amounts due and payable to the Tribe with respect to the Tribe Minimum Payment) to Advisor to secure Advisor’s right to fees and payments hereunder. In the event that any Financial Advisory Fee or Financing Fee is, in accordance with the provisions of this Section, not paid to Advisor when due and payable (any such amounts being referred to herein as “Deferred Advisor’s Fees”), Advisor shall be paid such Deferred Advisor’s Fee (with interest thereon as set forth herein) as a Priority Payment (after payment of the Tribe Minimum Payment) from the Available Cash Flow. All unpaid Deferred Advisor’s Fees shall accrue interest at the

Project Interest Rate. All unpaid Deferred Advisor's Fees plus interest at the Project Interest Rate shall be paid to Advisor on a quarterly basis to the extent funds are available therefor as set forth above. Except as set forth herein, the Tribe shall promptly repay in full all Deferred Advisor's Fees (with accrued interest as set forth above) upon termination of this Agreement or the Development Agreement for any reason.

(f) Manner of Operation. The Tribe agrees that so long as this Agreement is in effect or that fees are owing to Advisor that (i) to the extent permitted by applicable law and the Compact, it will continuously operate the Project in a first class manner consistent with operations of competitive facilities, (ii) it will maintain the Project in good repair, condition and in accordance with all requirements of applicable law, leases or contracts, including the standards of any franchisor or licensor of the Project or any portion thereof, (iii) it will not materially reduce or close any significant operation of the Enterprise, except when commercially reasonable and prudent to do so, or in order to comply with any applicable legal requirement, and (iv) it will operate the Enterprise in compliance with all applicable legal requirements, including all health and safety requirements.

(g) Advisor's Assistance in Selecting a Hotel Manager. The Tribe agrees that so long as this Agreement is in effect or that there are fees owing to the Advisor hereunder or under the Development Agreement, and provided that the hotel management, maintenance and operations are separate and apart from the Gaming to be conducted on the Property, the Tribe shall appoint a hotel manager selected by Tribe with the assistance of Advisor and otherwise subject to Advisor's prior written consent, which will not be unreasonably withheld.

(h) Insurance. The Tribe shall maintain, the cost of which shall be payable from (i) Financing proceeds during construction or (ii) operating revenues generated by the Enterprise, adequate property insurance with respect to the Property, including flood, earthquake, vandalism, malicious mischief and such other insurable hazards as, under good insurance practices, from time to time are insured against for other property, buildings and uses similar to the that contemplated by each Project. The amount of such insurance shall not be less than 100% of the replacement cost value of the improvements on the Property. The amount of the liability policy shall be at least \$10 million per occurrence with an overall umbrella limit of at least \$100 Million. The Tribe shall maintain business interruption insurance sufficient to cover the interest of the lenders under the Financing and the interest of the Advisor and the Developer under this Agreement and the Development Agreement. All policies of insurance required by this Agreement (i) shall be issued by an insurer with a claims paying ability rating of not less than "AA" (or the equivalent) by Standard & Poor's and one other rating agency or A:X or better as to claims paying ability by AM Best, (ii) shall name Advisor, for the benefit of Advisor, as an additional named insured, (iii) shall be maintained throughout the term of this Agreement without cost to Advisor, (iv) shall contain such provisions as Advisor deems reasonably necessary or desirable to protect its interest (including, without limitation, endorsements providing that neither the Tribe, Advisor nor any other party shall be a co-insurer under said policies and that Advisor shall receive at least thirty (30) days prior written notice of any modification, reduction or cancellation), (v) shall contain a waiver of subrogation against Advisor and (vi) shall be reasonably satisfactory in form and substance to Advisor and reasonably approved by Advisor as to amounts, form, risk coverage, deductibles, loss payees and insureds. The Tribe shall pay the premiums for such policies as the same become due and



payable. Copies of said policies, certified as true and correct by the Tribe, or insurance certificates thereof with evidence of payment, shall be delivered to Advisor. Not later than fifteen (15) business days prior to the expiration date of each of the policies, the Tribe will deliver to Advisor satisfactory evidence of the renewal of each policy in accordance with the terms of this Agreement.

(i) Casualty.

(A) If the Property or the improvements thereon shall be damaged or destroyed, in whole or in part, by fire or other casualty, the Tribe shall give prompt notice thereof to Advisor. Within a reasonable period of time thereafter, the Tribe shall apply all insurance proceeds received therefrom to the repair, restoration or replacement of any damaged or destroyed property and/or improvements.

(B) The Tribe hereby covenants and agrees that, in the event the Property is acquired, Tribe shall (1) take no action reasonably likely to cause the United States to refuse to accept the Property in trust or to cause the termination or failure of any such trust; (2) not cause any lien, claim, encumbrance, or pledge to be filed against or otherwise encumber the Property except as approved by the United States and by the terms of the Financing; and (3) not cause any lien, claim, encumbrance or pledge to be filed against or otherwise encumber any of the revenues, cash flow or profits from any of the businesses on the Property, except as approved by the United States and by the terms of the Financing, and except pursuant to the Development Agreement and this Agreement.

(j) Cooperation with Advisor Financing. In order to provide the Interim Advances, the capability to provide a portion of the Financing by the Advisor (no commitment for which is provided hereunder and which Financing would be the subject of separate definitive agreements between Tribe and Advisor, neither of whom have agreed at this time to any such Financing) and otherwise to provide financing to the Advisor, the Advisor may determine to enter into financing transactions secured by its rights to fees and payments from the Tribe hereunder (an "Advisor Financing"). The Tribe agrees to cooperate with any Advisor Financing by providing to the lenders or holders of the Advisor Financing, the financial statements and other information and auditor comfort letters and assistance provided for in Section 3(d) above and by providing other customary assistance reasonably requested by Advisor; provided that Tribe shall not be responsible for payment of any Advisor Financing other than making payments of fees and payments required hereunder.

4. Tribal Taxes; Compliance with Tribal Law; Amendments to Tribal Gaming Ordinance.

(a) Tribal Taxes. The Tribe warrants and agrees that neither it nor any agent, agency, Affiliate or representative of the Tribe will impose any taxes, fees, assessments, or other charges of any nature whatsoever on payments of any kind to Advisor or to any lender furnishing financing for the Project or for the operation of the Enterprise, or on the revenues therefrom or on the Financing Fees, as set forth in Section 2, the Development Fees or any other fees;

provided, however, the Tribe may assess against the Gaming enterprise license fees reflecting direct, actual and reasonable regulatory costs incurred by the Tribe. The Tribe further warrants and agrees that neither it nor any agent, agency, Affiliate or representative of the Tribe will impose any taxes, fees, assessment or other charges of any nature whatsoever on the salaries or benefits, or dividends or distributions paid to, any of Advisor's managers, partners, members, stockholders, officer, directors, or employees or affiliates, or any of the employees of the Enterprise or any contractors, subcontractors or consultants engaged pursuant to this Agreement. If any such tax, fee, assessment or other charge is in fact levied, imposed, or collected except as expressly provided above, the Tribe shall reimburse Advisor or the affected managers, partners, members, stockholders, officers, directors, employees or affiliates or any contractors, subcontractors or consultants for the full value and dollar for dollar of such tax, fee, assessment or other charge.

(b) Compliance with Tribal Law. Advisor shall comply in all material respects with all present and future statutes, regulations and ordinances of the Tribe, provided that, except as required by state or federal law, the Tribe shall take no action and adopt no statute or ordinance that would (a) increase Advisor's obligations hereunder; (b) result in a reduction in the amount of the Financing Fees as set forth in Section 2, Development Fees or other fees or reimbursement or other amounts payable to Advisor hereunder absent any such statute, regulation or ordinance thereto; or (c) prejudice or adversely affect Advisor's rights under this Agreement or that would violate the Indian Civil Rights Act (25 U.S.C. §§ 1301-1303).

(c) Tribe's Amendments to Tribal Gaming Ordinance. The Tribe covenants that any amendments made to any Tribal Ordinance applicable to the Enterprise or Advisor will be a legitimate effort to ensure that the Tribal Ordinance complies with applicable law and that Gaming and other operations are conducted in a manner that adequately protects the environment, the public health and safety, or the integrity of the Enterprise. Subject to the provisions of Section 7.5 of the Development Agreement, in the event the Tribe shall adopt an amendment to one or more Tribal Ordinances that results in (a) an increase of Advisor's obligations hereunder; (b) a reduction in the amount of the Financing Fee or reimbursement of other amounts payable to Advisor hereunder; or (c) a material adverse effect on Advisor's rights under this Agreement, the Development Agreement, or any other document executed by the parties related thereto, the Tribe shall compensate the Advisor for any and all actual costs or losses associated with (a), (b), or (c) above. The Tribe shall give Advisor notice and a copy of the full text of any proposed amendment to the Tribal Ordinance at least thirty (30) days before any such amendment is considered by the Tribe, but failure to give such notice shall not affect the validity or enforceability of such amendment.

(d) Advisor's Assistance in Obtaining Permits and Authorizations.

(i) The Advisor agrees that it will use its commercially reasonable efforts to assist and support Tribe in obtaining any necessary federal, state, county or local application, registration, permit, authorization, filing, or approval required in connection with the Financing, including, without limitation, in connection with any security interest or the issuance and sale of any securities (the "Non-Tribal Governmental Approvals").

(ii) Tribe shall apply for and obtain in consultation with Advisor, all Non-Tribal Governmental Approvals. The Tribe agrees to make all necessary filings and applications for all Non-Tribal Governmental Approvals in connection with Financings approved by the Tribe.

(iii) Tribe and Advisor shall consult to determine the government-to-government agreements prior to applying for and obtaining permits and authorization and such government-to-government authorizations and agreements shall be the responsibility of the Tribe with the assistance of the Advisor.

(e) Tribal Ordinances Related to Permits and Authorizations. The Tribe agrees that it will not pass any Tribal Ordinance requiring any license or permit of Advisor, or any lender, banker, underwriter, investment banker, placement agent or broker or any other professional in connection with the Financing. This provision shall not serve to negate the need for Advisor or any other professional and others to comply with any Tribal Ordinances, rules, codes or regulations, which are in existence as of the Effective Date and which are attached to the Development Agreement as Exhibit B, nor shall this provision serve to abrogate the same.

(f) Tribe To Grant Limited Waiver of Sovereign Immunity. The Tribe hereby agrees that the Tribe will, in good faith, grant reasonable limited waivers of sovereign immunity to any of the parties (including, without limitation, any underwriter, broker, placement agent, bank, lender or assignee of a lender) in connection with the Financing; provided that no such waiver of sovereign immunity shall exceed the scope or limitation of the waiver of sovereign immunity contained in Section 10. The Tribe acknowledges that such waivers are necessary and agrees to provide such parties with a reasonable means of dispute resolution in a federal, state or commercial arbitration forum.

5. Confidentiality. Except as required by applicable law, any information provided by Advisor or by the Tribe or their agents pursuant to this Agreement (“Confidential Information”) may not be disclosed publicly in any manner by the receiving party without Advisor’s or the Tribe’s, as the case may be, prior written approval and will be treated as confidential, provided that the information disclosed without the receiving party’s authority by its shareholders or members shall not be attributable to such party unless such party failed to take steps to ensure that such shareholders or members were made aware of the confidentiality of the Confidential Information and to admonish such persons against such disclosure. Except as required by applicable law, any reference to Advisor, the Tribe or any of their affiliates in this Agreement may not be disclosed publicly in any manner without such party’s prior approval, and this Agreement and its contents will be treated by the Advisor and the Tribe as confidential. In addition to the above exceptions, the Advisor or the Tribe may disclose any information deemed confidential hereunder (i) in order to comply with the rules of any relevant stock exchange or the requirement of any lender providing the Financing; (ii) in order to comply with any order or decree of a court or other governmental authority having jurisdiction over such disclosing party; (iii) on a “need to know” basis to persons within or outside such party, such as its attorneys, accountants, financial advisors and other consultants provided such recipients are made aware of and agree to be bound by the provisions of this Section; or (iv) after such information has become publicly available without breach of this Agreement.

6. Indemnification.

(a) The Tribe, with respect to clauses (i) and (ii) below and Advisor, with respect to clause (ii) below hereby agree to indemnify and hold harmless each other and each of its respective members, and each of their respective officers, directors, partners, trustees, employees, Affiliates, members, advisors, counsel and agents (each, an “indemnified person”) from and against any and all losses, claims, damages and liabilities to which any indemnified person may become subject (i) arising out of or based upon any untrue statement or alleged untrue statement of a material fact contained in any preliminary offering memorandum, offering memorandum or any other similar disclosure document or in any amendment or supplement thereto, any omission or alleged omission to state in any preliminary offering memorandum, offering memorandum or any other similar disclosure document or in any amendment or supplement thereto any material fact required to be stated therein or necessary to make the statements therein not misleading; (ii) arising in any manner out of or in connection with the transactions contemplated by this Agreement and shall reimburse each indemnified person promptly for any legal or other expenses reasonably incurred by it in connection with investigating, preparing to defend or defending, or providing evidence in or preparing to serve or serving as a witness with respect to, any lawsuits, investigations, claims or other proceedings arising in any manner out of or in connection with the transactions contemplated by this Agreement (including, without limitation, in connection with the enforcement of the indemnification obligations set forth herein); or (iii) arising from any breach of any representation, warranty, covenant or agreement hereunder; *provided, however*, that no indemnified person shall be entitled to indemnity (A) under clause (i) above in respect of any loss, claim, damage, liability or expense resulting directly from any information concerning either party furnished to the other specifically for inclusion in the above-described documents or (B) under clause (ii) above in respect of any loss, claim, damage, liability or expense to the extent that it is finally judicially determined that such loss, claim, damage, liability or expense resulted directly from the gross negligence or willful misconduct of such indemnified person. No indemnified person shall be liable for any damages arising from the use by unauthorized persons of information or other materials sent through electronic, telecommunications or other information transmission systems that are intercepted by such persons.

(b) The Tribe and Advisor further agree that neither, without the other’s prior written consent, which consent will not be unreasonably withheld, will enter into any settlement of a lawsuit, claim or other proceeding arising out of the transactions contemplated by this Agreement unless such settlement includes an explicit and unconditional release from the party bringing such lawsuit, claim or other proceeding of all indemnified persons.

(c) In case any action or proceeding shall be instituted involving any indemnified person for which indemnification is to be sought hereunder by such indemnified person, then such indemnified person shall promptly notify the Tribe or the Advisor, as applicable, of the commencement of any action or proceeding; provided, however, that the failure so to notify the Tribe or the Advisor, as applicable shall not relieve the other party from any liability that it may have to such indemnified person pursuant to this Section unless the indemnitor shall have been materially prejudiced by such failure, or from any liability that the Tribe may have to such indemnified person other than pursuant to this Section. Notwithstanding the above, following such notification, the indemnitor may elect in writing to assume the defense



of such action or proceeding, and, upon such election, the indemnitor shall not be liable for any legal costs subsequently incurred by such indemnified person (other than reasonable costs of investigation and providing evidence) in connection therewith, unless (i) the indemnitor has failed to provide counsel reasonably satisfactory to such indemnified person in a timely manner, (ii) counsel provided by the indemnitor reasonably determines that its representation of such indemnified person would present it with a conflict of interest or (iii) the indemnified person reasonably determines that there may be legal defenses available to it which are different from or in addition to those available to the indemnitor. In connection with any one action or proceeding, the indemnitor shall not be responsible for the fees and expenses of more than one separate law firm (in addition to local counsel) for all indemnified persons.

(d) The Tribe and Advisor agree that if any indemnification or reimbursement sought pursuant to this Section is judicially determined to be unavailable for a reason other than as set forth in the proviso at the end of the first paragraph of this Section, then, whether or not Advisor is the indemnified person, the Tribe, on the one hand, and Advisor, on the other hand, shall contribute to the losses, claims, damages, liabilities and expenses for which such indemnification or reimbursement is held unavailable (i) in such proportion as is appropriate to reflect the relative benefits to the Tribe, on the one hand, and Advisor, on the other hand, in connection with the transactions to which such indemnification or reimbursement relates, or (ii) if the allocation provided by clause (i) above is judicially determined not to be permitted, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (i) but also the relative faults of the Tribe, on the one hand, and Advisor, on the other hand, as well as any other equitable considerations; *provided, however*, that in no event shall the amount to be contributed by Advisor pursuant to this paragraph exceed the amount of the fees actually received by Advisor in connection with the transactions contemplated by this Agreement.

(e) Notwithstanding the above, neither party hereto shall have a right of indemnification with respect to any fines or penalties that may be imposed by any federal agency should this Agreement, the Development Agreement, or such other agreement that the parties may enter into relevant to each of the Project or Property, be determined to be a management contract by the NIGC, or any successor agency, under IGRA.

(f) The provisions of this Section 6 shall survive the expiration or earlier termination of this Agreement.

## 7. Termination.

(a) This Agreement may be terminated without liability or continuing obligations (except as provided below) (i) by the Tribe, 60 days after written notice in the event of any continuing breach by Advisor of its material agreements contained herein, provided that, if Advisor has commenced to cure such default within such 60 day period and such default is not reasonably susceptible of cure within such sixty day period, then Advisor shall have an additional period of time to cure such default so long as Advisor is diligently and continuously pursuing such cure, (ii) by the Tribe at any time after all financial advisory and other fees hereunder have been paid for the full period required hereunder, (iii) by the Tribe if the Development Agreement is terminated for any reason other than pursuant to Section 8.1(a)(ii) thereof, (iv) by Advisor upon written notice to the Tribe, 60 days after written notice in the event

of any continuing breach by the Tribe of its material agreements contained herein with respect to the Project, provided that, if the Tribe has commenced to cure such default within such 60 day period and such default is not reasonably susceptible of cure within such sixty day period, then the Tribe shall have an additional period of time to cure such default so long as the Tribe is diligently and continuously pursuing such cure or (v) by Advisor if the Development Agreement is terminated pursuant to Section 8.1(a)(ii), (iv) or (v) thereof; provided, however, that in all cases, the parties' agreements relating to confidentiality contained in Section 5 hereof will, in each case, continue in the event of any such termination in accordance with their terms.

(b) If this Agreement expires or is terminated after the closing and funding of the Financing that enables the completion of the Pre-Financing Phase, then the Tribe shall be obligated to continue to pay the Interim Advances that have not been repaid and the Financial Advisory Fee for the Project in accordance with the provisions of Section 1(c) and Section 2(b), respectively (including, but not limited to, provisions relating to the timing (after the third anniversary of the opening of the Enterprise) and priority (subordinated to the Tribe Minimum Payment) of such reimbursement), unless after the Pre-Financing Phase this Agreement is terminated pursuant to Section 7(a)(i) above, in which event all Interim Advances required to be paid pursuant to Section 1(c) shall be payable by wire transfer of same day funds within three business days of written demand, accompanied by an itemized invoice of the type described in Section 1(c)(viii) hereof provided that the Tribe may dispute such invoice and request further documentation as provided in Section 1(c)(viii). Any dispute with respect to the withheld sums shall be resolved in accordance with Section 10.

(c) If this Agreement is terminated, whether during or after the Pre-Financing Phase, pursuant to Section 7(a)(iv) above or Section 8.1(a)(vii) of the Development Agreement, all Interim Advances required to be paid pursuant to Section 1(c) hereof shall be payable by wire transfer of same day funds within three business days of written demand, accompanied by an itemized invoice of the type described in Section 1(c)(viii) hereof provided that the Tribe may dispute such invoice and request further documentation as provided in Section 1(c)(viii). Any dispute with respect to the withheld sums shall be resolved in accordance with Section 10.

(d) If this Agreement is terminated pursuant to Section 7(a)(i) above, the Tribe shall pay Advisor the Financing Fees which were earned prior to the date of termination but remained unpaid as of the date of termination, all of which amounts shall be payable by wire transfer of immediately available funds on the date of such termination.

(e) If this Agreement is terminated because the Development Agreement is terminated pursuant to Section 8.1(a)(iv) thereof because Gaming is prohibited, but subsequently Gaming is again conducted on the Property, then the payment of the Financial Advisory Fee shall resume as if tolled during the period when Gaming was not conducted.

(f) Notwithstanding the above, the parties hereto acknowledge and agree that this Agreement may not be terminated for so long as the Development Agreement remains in full force.

8. Survival; Assignment. The provisions of this Agreement relating to the payment of fees and expenses, and the agreements relating to confidentiality and the provisions of



Sections 9, 10 and 11 below shall survive the expiration or termination of this Agreement (including any extensions hereof). Neither party may assign any of their respective rights, or be relieved of any of their respective obligations, hereunder without the prior written consent of the other in each instance provided that Advisor may assign its rights to fees or payments under this Agreement without the Tribe's consent and the Tribe agrees to acknowledge, if requested, that Advisor has granted a security interest in its rights to any of the fees and payments hereunder to any creditor of Advisor and the Tribe agrees to make reasonable provisions to ensure that such creditor has a similar security interest in such fees and payments (including, without limitation, making direct payments to such creditor upon appropriate instructions from Advisor) as the Advisor had at the time of assignment.

9. Choice of Law; Waiver of Jury Trial. This Agreement shall be governed by and construed in accordance with the laws of the State of New York. The Tribe hereby waives, to the fullest extent permitted by applicable law, any right to trial by jury with respect to any action or proceeding arising out of or relating to this Agreement.

10. Waiver of Sovereign Immunity; Disputes and Remedies; Arbitration.

(a) Limited Waiver Of Sovereign Immunity.

(i) Retention of Sovereign Immunity. By executing this Agreement, the Tribe does not waive, limit or modify its sovereign immunity from unconsented suit or judicial litigation, except as provided in this Section.

(ii) Scope of Waiver. Subject to the provisions of this Section, the Tribe hereby expressly and irrevocably grants to Advisor and other Persons within the scope of this Section, a limited waiver of its sovereign immunity from unconsented suit or judicial litigation and consents to suit in accordance with this Section.

(iii) Procedural Requirements. The Tribe's limited waiver of its sovereign immunity as to unconsented suit or judicial litigation is effective if, and only if, each and every one of the following conditions is met:

(1) The claim is made by a party designated under subsection (iv) hereof, and not by any other Person, corporation, tribe or entity, whatsoever;

(2) The claim alleges a default or breach, in each case after applicable notice and cure period, if any, by the Tribe of one or more of the specific obligations or duties expressly assumed by the Tribe under the terms of this Agreement;

(3) The claim seeks:

(A) some specific action, or discontinuance of some action, by the Tribe to bring the Tribe into full compliance with the duties and obligations expressly assumed by the Tribe under this Agreement; or

(B) money damages for noncompliance with the terms and provisions of this Agreement; provided, however, that the property, assets or funds specifically pledged and assigned to satisfy any judgment obtained against the Tribe under this Agreement shall be limited to the revenues from the Project and any successor businesses or enterprises.

(4) The claim is made in a detailed written statement to the Tribe, stating the specific action or discontinuance of action by the Tribe that would cure the alleged default, breach or non-performance, as the case may be, or the sum of money claimed to be due and owing from the Tribe, as applicable, to Advisor by reason of such specific default, breach or non-performance, provided the Tribe shall have sixty (60) calendar days to cure such default, breach or non-performance or to make such payment before judicial proceedings may be instituted, as provided herein, and further, provided that the requirements of this Section are first adhered to prior to initiating any judicial proceedings.

(5) Time Period. With respect to any claim authorized in this Section, initial suit, as authorized herein, shall be commenced within three years after the later of the date that the claim accrues or is discovered upon the exercise of due diligence, or such claim shall be forever barred. The waiver granted herein shall commence on the Effective Date and shall continue for three years following the date of the termination of this Agreement, except that the waiver shall remain effective for any proceedings then pending, and all appeals therefrom.

(6) Recipient of Waiver. The recipients of the benefit of this waiver of sovereign immunity are limited to Advisor, its members, its successors and assigns, and any and all Persons covered by the indemnification provisions hereof; as to such latter persons, this waiver extends only to the enforcement of any rights to indemnification by the Tribe, and to no other actions or persons.

(7) Governing Law/Enforcement. The Tribe consents to the jurisdiction of, to be sued in and to accept and be bound by any order or judgment of the United States District Court for the Southern District of New York or the Judicial Circuit Court in and for the County where the Property is located, and any federal or state court having appellate jurisdiction thereover, consistent with the terms and provisions of this Section. The Tribe and Advisor agree that any dispute arising under the provisions of this Section shall be resolved by the United States District Court for the Southern District of New York or, if such United States District Court cannot hear or refuses to hear such dispute, by the Judicial Circuit Court for the Circuit in and for the County where the Property is located. If such Judicial Circuit Court cannot hear or refuses to hear such dispute, then such dispute shall be resolved by binding arbitration as set forth in Section 10(a)(ix). It is the parties' intention that the availability of arbitration shall not be a reason for the above-referenced courts to refuse jurisdiction over a dispute that arises under the provisions of this Section 10.

(A) The Tribe hereby expressly and irrevocably waives:

(a) its rights to have any dispute, controversy, suit, action or proceeding arising under this Agreement heard in any other forum whether or not such forum now exists or is hereafter created including, without limitation, any Tribal court or other tribunal, forum, council or adjudicative body of the Tribe (each a "Tribal Forum");

(1) any claim or right which it may possess to the exercise of jurisdiction by, any Tribal Forum, including, without limitation, any determination that any Tribal Forum has jurisdiction over any such dispute, controversy, suit, action or proceeding or jurisdiction to determine the scope of such Tribal Forum's jurisdiction;

(2) any requirement which may exist for exhaustion of any remedies available in any Tribal Forum prior to the commencement of any dispute, controversy, suit, action or proceeding in any state or federal court even if any such Tribal Forum would have concurrent jurisdiction over any such dispute, controversy, suit, action or proceeding but for such waiver;

(3) its sovereign immunity as to an action by Advisor and its successors and assigns in the United States District Court for the Southern District of New York or the Judicial Circuit Court in and for the County where the Property is located, and in the federal or state courts having appellate jurisdiction thereover, seeking injunctive and/or declaratory relief against the Tribe based upon an attempt by the Tribe to revoke its waiver of its sovereign immunity or other waivers granted under this Section; and

(4) its sovereign immunity from a judgment or order (including any appellate judgment or order) and post judgment proceedings supplemental thereto consistent with the terms and provisions of this Section, which is final because either the time for appeal thereof has expired or the judgment or order is issued by a court having final appellate jurisdiction over the matter.

(B) Without in any way limiting the generality of the foregoing, the Tribe expressly authorizes any governmental authorities who have the right and duty under applicable law to take any action authorized or ordered by any court, including to take such action as entering onto the Property to give effect to any judgment or order entered, subject to this Section.

(C) Assets Pledged to Satisfy Enforcement Proceedings.

Except with respect to damages arising under the indemnification provisions of this Agreement up to an aggregate of Ten Million Dollars (\$10,000,000), and the termination provisions of this Agreement (such damages as it relates to the termination provisions herein shall be limited to an amount equal to the aggregate of the Cash Fee, Interim Advances, and any earned but unpaid Development and Financing Fees), the only assets, including lands which the United States holds in trust for the Tribe, which shall be available, and which are thus specifically pledged and assigned hereby, to satisfy any enforcement proceedings or judgment or post judgment supplemental proceedings, including, without limitation, execution upon judgment in connection with this Agreement shall be limited to revenues from the Property, the Project and any successor businesses and enterprises. Notwithstanding any provision of this Agreement or the Development Agreement to the contrary, the Tribe shall have one (1) year to satisfy any obligation arising under this Agreement or the Development Agreement, if, under this Agreement or the Development Agreement, recourse for such obligation may be had by Developer to any assets of the Tribe other than the revenues from the Property, the Project and any successor businesses and enterprises on the Property. Such one (1) year period shall commence on the date that such obligation would otherwise become due and owing under this Agreement or the Development Agreement.

(D) Limitation Upon Enforcement. Except with respect to damages arising under the indemnification and termination provisions of this Agreement awarded against the Tribe, damages awarded against the Tribe shall be satisfied solely from assets specified in this Section and shall not constitute a lien upon or be collectible from any other income or assets of the Tribe, except with the written consent of the Tribe.

(E) Expenses of Judicial Enforcement. Except as ordered by a court of competent jurisdiction, all parties shall bear their own costs, except that the prevailing party shall be reimbursed all attorneys' fees, in connection with any judicial proceedings or arbitration authorized under this Agreement. The parties expressly agree that this provision shall survive the termination, for any reason, or expiration of this Agreement.

(iv) Guaranty of the Tribe. The Tribe covenants and agrees that the Tribe's limited waiver of sovereign immunity and other waivers contained in this Section are irrevocable and the Tribe agrees not to revoke or limit, in whole or in part, the Tribe's limited waiver of sovereign immunity or other waivers contained in this Section. In addition to the foregoing, the Tribe covenants and agrees to prohibit each and every Tribal Forum (whether now or hereafter existing) from exercising jurisdiction over any dispute, controversy, suit, action or proceeding in connection with, relating to or arising under this Agreement and other agreements authorized by the Tribe with respect hereto.

In the event that the Tribe (w) revokes, limits or attempts to revoke or limit, (x) takes any action which is inconsistent with the waivers granted in this Section, (y) fails to submit to the jurisdiction of the State or federal courts as provided herein, or (z) breaches its obligation to prohibit each Tribal Forum from exercising jurisdiction as aforesaid parties, the parties expressly recognize and agree that there remains no adequate remedy at law available to Advisor, and that Advisor will be irreparably injured. The Tribe hereby consents to the entry of appropriate injunctive relief, consistent with the terms and conditions of this Agreement. In any such event, Advisor may immediately seek judicial injunctive relief as provided in this Section without first complying with any of the prerequisites contained in this Section and the Tribe consents to the entry of appropriate injunctive relief, consistent with the terms and conditions of this Agreement. Any action seeking injunctive relief under this Section shall be brought in the United States District Court for the Southern District of New York or the Judicial Circuit Court for the Circuit in and for the County where the Property is located, or any successor thereto, and the Tribe expressly consents to the jurisdiction of, and agrees to be bound by any order or judgment of such District Court or Circuit Court, and any federal or state Court with appellate jurisdiction thereover.

(b) Dispute Resolution.

(i) Exclusive. With the exception of disputes involving attempts to revoke or further limit the waiver of the tribal sovereign immunity granted hereunder, any disagreement or dispute between Advisor and the Tribe as to the interpretation, enforcement or breach of this Agreement, or the parties' rights and obligations hereunder, shall be resolved pursuant to this Section.

(ii) Meet and Confer. Subject to the terms and provisions of this Agreement, any disagreement or dispute between the parties as to the interpretation, enforcement or breach of this Agreement, or the parties' rights or obligations thereunder, shall be resolved whenever possible by meeting and conferring. Either party may request such a meeting by giving notice to the other. The notice provided for in this Section shall specify a time and a location in the County where the Property is located for the requested meeting, provided, however, that the requested meeting shall not take place upon less than forty-eight (48) hours notice. The party requesting the meeting may commence litigation in either the United States District Court for the Southern District of New York or the Judicial Circuit Court for the Circuit in and for the County where the Property is located (or any successor thereto), pursuant to and in accordance with the provisions set forth above at any time after the scheduled time for the meeting, provided, however, that the party requesting the meeting may not commence litigation if such party failed to appear at the time and place set forth in the notice. If either court may hear the matter, the parties hereby agree that they prefer, and that they shall not oppose, federal court jurisdiction over any such matter. In the event the venues indicated above are improper or unavailable for any reason, then the parties shall cooperate, and not oppose efforts, to set the matter in the venues closest to those indicated. In addition, in the event that the Development Business Board or the Tribe and the Advisor are unable to agree on a matter as to which a decision or business judgment is necessary for the completion of the Project and this Agreement provides that the agreement or consent of the



Development Business Board or the Tribe is required for such decision or business judgment, the parties agree to resolve such decision or business judgment whenever possible by meeting and conferring. Either party may request such a meeting by giving notice to the other. The notice provided for in this Section shall specify a time and a location in the County where the Property is located, or the requested meeting, provided, however, that the requested meeting shall not take place upon less than forty-eight (48) hours notice. If, however, the parties are unable to reach a decision that is satisfactory to both parties, then either party may request that the matter be submitted to a binding arbitration.

(iii) Binding Arbitration.

(A) If, and only if, a dispute arises between the parties over a matter for which the Tribe has provided a limited waiver of immunity under this Agreement (the “Dispute”), and that, for legal reasons, the Dispute cannot be heard (or is refused to be heard) by the United States District Court or the New York State Judicial Circuit Court, then either party may request binding arbitration of a Dispute in accordance with the procedures set forth herein and the Tribe hereby expressly, unequivocally waives its sovereign immunity with respect thereto as otherwise provided in this Section. To initiate binding arbitration of a Dispute, a party shall notify the other party in writing. The Dispute shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment on the award rendered by the arbitrator may be entered in any court. One arbitrator shall preside and shall be selected by the American Arbitration Association. Nothing herein shall be construed as requiring arbitration to determine whether there has been a breach or a default hereunder or any consequences thereof.

(B) Either party, before or during any arbitration, may apply to a court having jurisdiction for a temporary restraining order or preliminary injunction where such relief is necessary to protect its interests pending completion of the dispute resolution proceedings.

(C) Neither party may disclose the existence or results of any arbitration hereunder, which shall be considered confidential to the parties, without the prior written consent of both parties except:

(1) with the express prior written consent of the other party, which consent shall not be unreasonably withheld;

(2) as required by applicable law, the rules of any relevant stock exchange or requirement of any lender, by order or decree of a court or other governmental authority having jurisdiction over such party, or in connection with such party’s enforcement of any rights it may have at law or in equity;



(3) on a “need to know” basis to persons within or outside such party’s organization, such as attorneys, accountants, bankers, financial advisors and other consultants; or

(4) after such information has become publicly available without breach of this Agreement.

(D) The arbitrator may not disclose the existence or results of any arbitration hereunder without the prior written consent of both parties, except as required by applicable law, or on a “need to know” basis to persons within the arbitrator’s organization, or after such information has become publicly available without breach of this provision.

(E) In the event of arbitration, the prevailing party shall be entitled to all of its costs, including reasonable attorney’s fees, from the nonprevailing party.

(F) The arbitration shall take place at a location in an agreed city in New York or such other place as the parties may jointly agree. The parties and the arbitrators shall maintain strict confidentiality with respect to the arbitration, except as provided above. The arbitrator shall render an award within forty-five (45) days from the conclusion of the arbitration.

(G) The decision of the arbitrator shall be final and binding and enforced with the same force and effect as a decree of a court having competent jurisdiction. For this purpose, should the losing party in any arbitration proceeding pursuant to this Section refuse to abide by the decision of the arbitrator, the prevailing party may apply to the United States District Court or the New York State Judicial Circuit Court to compel enforcement of the arbitrator’s award resulting from binding arbitration and each party hereto consents to the jurisdiction of each such court for this purpose. If either court may hear the matter, the parties hereby state that they prefer, and shall not oppose, federal court. The Tribe hereby expressly and irrevocably waives its sovereign immunity with respect to the entry of judgment on, and enforcement of, such award by such courts.

(c) Litigation Assistance. Tribe agrees to provide necessary assistance to Advisor (e.g. assistance in responding to subpoenas, making available appropriate personnel, providing reasonably requested documentation concerning the Enterprise) in the event that Advisor is a plaintiff or defendant in any litigation or proceeding arising out of or in connection with the Enterprise without waiving the sovereign immunity of the Tribe.

11. Authority Representations and Warranties.

Mutual Representations. Each of Advisor and the Tribe represents and warrants to the other that as of the date hereof with respect to itself:

(a) Legal Status. The representing party is duly organized and validly existing in good standing under the applicable laws of Delaware, in the case of Advisor, and under the Federal Laws of the United States of America, in the case of the Tribe, and is qualified to do business in and is in good standing in all jurisdictions where such qualification is necessary, with full power, right, authority and legal capacity to enter into this Agreement and the other documents contemplated hereby and engage in the transactions contemplated hereby.

(b) Power; Authorization; Enforceable Obligations. The execution, delivery and performance of this Agreement and the other documents and transactions contemplated hereby by the representing party, and the consummation of the transactions contemplated thereby: (i) have been duly authorized by all requisite actions; (ii) have been approved or consented to by all of their respective constituent entities whose approval or consent is required to be obtained; (iii) do not require the approval or consent of any governmental authority having jurisdiction over any of the representing party except as may be provided in this Agreement; (iv) do not and will not constitute a violation of, or default under, the governing instruments of the representing party or any applicable requirement of a governmental authority; (v) will not contravene any court or administrative order or ruling applicable to the representing party, or any mortgage, indenture, agreement, commitment or instrument to which the representing party is a party or by which it or its assets are bound, nor will they create or cause to be created any mortgage, lien, encumbrance, or charge against the assets of the representing party; and (vi) is not subject to any recall, revocation or petition procedure to which any representing party may be subject.

(c) Legal Obligation. This Agreement is the legal, valid, binding and enforceable obligation of the representing party, as applicable, and this Agreement does not violate or conflict with any applicable federal or state law or any Tribal Law (in the case of Advisor, as to which Advisor has knowledge of) and is not subject to any right of rescission, set-off, counterclaim or defense, including the defense of usury.

12. Miscellaneous.

(a) This Agreement may be executed in one or more counterparts, each of which will be deemed an original, but all of which taken together will constitute one and the same instrument.

(b) This Agreement sets forth the entire understanding of the parties hereto as to the scope of the engagement and Advisor's obligations thereunder. This Agreement shall supersede all prior understandings and proposals, whether written or oral, between Advisor and the Tribe relating to any financing or the transactions contemplated hereby. This Agreement shall be in addition to the agreements of the parties contained in the Development Agreement or any subsequent additional agreements entered into by the parties in writing. The canon of interpretation of agreements with Indians or the tribes that provides that ambiguities in the

agreement are to be interpreted in favor of the Indians or the tribes shall not apply to this Agreement. The parties agree that the terms and conditions of this agreement are the result of negotiations between the parties and that this Agreement shall not be construed in favor of or against any party by reason of the extent to which any party or its professional advisors participated in the preparation of this Agreement.

(c) This Agreement has been and is made solely for the benefit of the parties hereto, indemnified persons, and their respective successors and assigns, and nothing in this Agreement, expressed or implied, is intended to confer or does confer on any other person or entity any rights or remedies under or by reason of this Agreement or the covenants of the parties contained herein. The Tribe is entering into this Agreement freely and voluntarily, and shall enter into all documents required to be entered into pursuant to this Agreement, after full consultation with legal, financial, and other counsel of their choosing. One or more responsible officers of the Tribe has read this Agreement and discussed it with such legal, financial and other counsel. The Tribe understands this Agreement and the risk inherent in it, and significance of it.

(d) The Tribe acknowledge that Advisor and its Affiliates have other clients and as such from time to time may effect transactions for their own account or the account of others, and hold long or short positions in debt or equity securities or loans of companies that may be the subject of the transactions contemplated by this Agreement. The Tribe hereby waives and releases, to the fullest extent permitted by law, but, to the extent applicable, subject to the requirements set forth in subparagraph (h) below, to any claims the Tribe may have with respect to any conflict of interest arising from such transactions, activities, investments or holdings, or arising from the failure to bring such transactions, activities, investments or holdings to your attention. Nothing in this Section 12(d) shall negate the Developer's obligations under Article 9 of the Development Agreement.

(e) The Tribe acknowledges that the Advisor is not a registered broker-dealer, mortgage broker, or mortgage lender and will not provide services that would require a mortgage brokerage license, lender's license, broker-dealer registration or license.

(f) The Advisor agrees to cooperate with the Tribe as may be necessary to obtain consents and approvals from any federal, state or local agency, including, without limitation, obtaining an opinion from the NIGC that this Agreement is not a "management agreement" or create a "proprietary interest" within the meaning of IGRA and from the Bureau of Indian Affairs of the Department of the Interior that this Agreement does not require approval under Title 25, Section 81 or any other provision of federal law. The Tribe and Advisor further agree to amend, modify or reform this Agreement, as may be necessary to obtain such approvals and opinions, or to comply with federal and applicable laws, without termination of or modification to any of the economic terms hereto. This clause (f) shall survive the expiration or earlier termination of this Agreement.

(g) If for any reason any provision of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

(h) Prior to the effectiveness of this Agreement, the Tribe shall deliver to Advisor legal opinions, in form and substance reasonably acceptable to Advisor, confirming to Advisor that this Agreement is a valid, binding and enforceable obligation of the Tribe and that the Tribe has all necessary power and authority to execute and deliver this Agreement.

(i) The Advisor and its affiliates shall not be restricted in its ability to enter into business relationships with the Tribe's Tribal members, the Tribe members, employees, officers, directors, or others with relationships with the Tribe. Advisor and its Affiliates have other businesses and business investments. Nothing herein shall be deemed to prevent Advisor, its members, its principals or any Affiliate from having any business relationship or investment in other Gaming, hospitality or retail businesses without the Tribe or to enter into any investment with or without Tribal participation (provided that Advisor agrees that, so long as Advisor is the Developer under the Development Agreement, Advisor has those obligations set forth in Article 9 of the Development Agreement). Advisor agrees that neither it nor any of its members or Affiliates will enter into any business relationship or investment with an officer or executive of the Tribe, or any the Tribe member, employee, or other Tribal member, or Affiliate of any of the same, unless it first fully discloses, in writing to the Tribe, the details of such investment or business relationship and the Tribe provides its prior written consent to the investment or business relationship.

(j) (a) The Tribe agrees that with respect to any claim or action that it may have against Advisor under this Agreement, such claim or action shall be commenced within three years after the later of the date that the claim or action accrues or the date that it is discovered upon the exercise of due diligence, or such claim is waived and released by the Tribe and shall be forever barred.

(b) Advisor agrees that upon receipt of final payment, and Advisor shall so certify, that all claims of payment against the Tribe have been satisfied.

(c) The Tribe agrees at any time and from time to time, as may be reasonable, but not more than twice in any twelve (12) month period, upon not less than twenty (20) days' prior notice by Advisor to execute, acknowledge and deliver to Advisor a statement in writing certifying that (i) this Agreement is unmodified and in full force and effect (or if there shall have been modifications that the same is in full force and effect as modified and stating the modifications); (ii) the dates to which the Financial Advisory Fee has been paid, (iii) stating whether or not to the best knowledge of the Tribe, after due inquiry, Advisor is in default in the performance of any covenant, agreement or condition contained in this Agreement and to the best knowledge of the Tribe, after due inquiry no facts or circumstances exist that, with the passage of time or the giving of notice or both, would constitute a default under this Agreement (and, if so, specifying each such default of which the Tribe may have knowledge, after due inquiry), provided that no such certification shall prohibit the Tribe from asserting default in regards to actions that have occurred before the issuance of a requested certification of which the Tribe had no knowledge when the certification was issued; (iv) identification of then-ascertainable dates relevant to this Agreement but not expressly set forth in the text of this Agreement; and (v) the Tribe is not, to the best of its knowledge, after due inquiry, entitled to any defenses, offsets, claims, counterclaims or rights or recoupment against its obligations under this Agreement, provided that, no such certification shall prohibit or otherwise waive defenses,

offsets, claims, counterclaims or rights or recoupments in regards to actions that have occurred before the issuance of a requested certification of which the Tribe had no knowledge when the certification was issued. Such statement may be relied upon by a third party providing financing to Advisor or a prospective third party which provide financing to Advisor.

(k) The Tribe shall designate a representative who shall be authorized to give all directions, consents, approvals, waivers or other acknowledgements under this Agreement on the part of the Tribe and the Advisor shall be entitled to rely on, and the Tribe agrees to be bound by, any direction, consent, approval, waiver or other acknowledgement given by such representative, unless prior to the time such direction, consent, approval, waiver or other acknowledgement is given, the Tribe gives written notice to Advisor that such representative has been changed. Advisor shall not be required to rely on and may refuse accept directions, consents, approvals, waivers or other acknowledgements from any other party, even if such party has apparent or actual authority for the Tribe. The Tribe, and only the Tribe, shall be entitled to change the Tribal representative at any time upon 5 days written notice to the Advisor, provided that the Tribe must appoint a replacement representative upon such removal of the prior representative or promptly in the event of death or disability of such representative. Advisor may ask for, and receive, reasonable evidence of such change or appointment and shall be entitled to rely on such evidence provided to it. The Tribe hereby appoints William Gollnick as its initial representative under this Agreement.

(l) Notices. Any notice required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given to the applicable party (i) on the date of hand delivery with signed receipt, or (ii) on the business day immediately following transmittal to Federal Express or other nationally recognized overnight commercial courier with signed receipt; in any case addressed to the address of the applicable party set forth below, or such other address as such party may hereafter specify by notice to the other in accordance with the notice procedures described in this paragraph. The parties also designate the following persons as agents for receipt of service of process:

if to the Tribe:

The Oneida Tribe of Indians of Wisconsin  
Norbert Hill Center; 2nd Floor  
N7210 Seminary Road  
Oneida, Wisconsin 54155  
Attn: Chairperson

with a copy to:

Oneida Law Office  
N7210 Seminary Road  
P.O. Box 109  
Oneida, Wisconsin 54155  
Attention: Chief Counsel

if to Advisor:

Power Plant Entertainment New York, LLC  
c/o The Cordish Company  
601 East Pratt Street, Sixth Floor  
Baltimore, Maryland 21202  
Attention: Joseph Weinberg



Power Plant Entertainment New York, LLC  
c/o The Cordish Company  
601 East Pratt Street, Sixth Floor  
Baltimore, Maryland 21202  
Attention: General Counsel

with a copy to:

Latham & Watkins LLP  
885 Third Avenue  
New York, New York 10022  
Attention: James I. Hisiger, Esq.

(m) Whenever the consent or approval of any party under this Agreement is required, such consent or approval shall not be unreasonably withheld, conditioned or delayed, unless specifically provided otherwise. Further, whenever any provision of this agreement requires the exercise of “reasonable” consent, judgment or efforts, or “commercially reasonable” efforts, the standard for such reasonableness of commercial reasonableness shall be conduct consistent with the actions of a prudent commercial business person or prudent commercial owner of a gaming facility substantially similar to those existing at the Enterprise. The parties agree that the fundamental purpose of this Agreement is for the Advisor to raise financing to Develop the Project on the Property in accordance with the Approved Concept Program with respect thereto so that the Tribe will have an operating Enterprise. The parties each agree to deal with the other party in all matters under this Agreement in good faith and fair dealing with the goal of this fundamental purpose. Each party agrees to cooperate with the other party, not to frustrate or interfere with the other party’s efforts to achieve this fundamental purpose and to use all commercially reasonable efforts towards achieving this fundamental purpose.

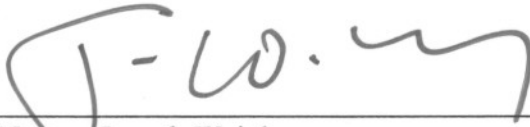
13. Defined Terms. (a) Capitalized terms shall have the meanings set forth in the Development Agreement unless otherwise expressly provided for in this Agreement. (b) The following terms shall have the meanings hereinafter set forth, except as otherwise expressly provided or unless the context otherwise requires:

“Agreement” shall mean this engagement letter agreement together with all schedules and exhibits hereto.

Please confirm that the foregoing is in accordance with your understanding by signing and returning to Advisor the enclosed duplicate of this Agreement.

Sincerely yours,

POWER PLANT ENTERTAINMENT NEW  
YORK, LLC, a Delaware limited liability company

By:   
Name: Joseph Weinberg  
Title: Authorized Signatory

Accepted and agreed to as  
of the date of the First amendment above written:

THE ONEIDA TRIBE OF INDIANS OF WISCONSIN

By:   
Name:  
Title:

Appendix A  
Advisor's Costs Prior to Effective Date of Agreement

**Exhibit A**  
**Advisor's Costs Prior to Effective Date**

|                           |            |
|---------------------------|------------|
| Expenses                  | \$ 58,650  |
| 3rd Party Consulting Fees | \$ 860,422 |
| Total Expenses            | \$ 919,072 |

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DEVELOPMENT AGREEMENT

Between

THE ONEIDA TRIBE OF INDIANS OF WISCONSIN

And

POWER PLANT ENTERTAINMENT NEW YORK, LLC

Dated as of January 28, 2003

FIRST AMENDMENT – DECEMBER 31, 2006

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## DEVELOPMENT AGREEMENT

This Development Agreement has been entered into as of January 28, 2003 and as amended on December 31, 2006 (hereinafter the "Effective Date") by and between THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, a federally recognized Indian tribe (together with its permitted successors and assigns, the "Tribe"), and POWER PLANT ENTERTAINMENT NEW YORK, LLC, a Delaware limited liability company (together with its permitted successors and assigns, the "Developer").

### RECITALS

- A. The Tribe is a federally recognized Indian tribe with a reservation located in Wisconsin, but with historic ties and claims to land within the State of New York. The Tribe has acquired certain Property (as hereinafter defined) and may acquire other property located in/near Ulster County and/or Sullivan County, New York to be held in trust for the benefit of the Tribe by the United States of America.
- B. Consistent with the Tribe's goals and congressional policies of Tribal self-sufficiency, and pursuant to federal and New York law that expressly provides for such development, the Tribe desires to obtain a tribal-state compact with the State of New York that provides for gaming on a portion of the Property and develop and improve the Property by building new gaming facilities, restaurants, entertainment, retail establishments and hotels on the Property.
- C. The Tribe has determined that it would be in its best interest to retain a developer with appropriate experience and expertise for the planning, designing, development, construction, and furnishing of the improvements to the Property.
- D. Developer has represented to the Tribe that it and those affiliated with or those employed by it have the requisite experience and expertise in the planning, designing, development, construction, and furnishing of large commercial projects.
- E. Accordingly, the Tribe desires to retain, on an exclusive basis, the services of Developer to plan, design, develop, construct and furnish any improvements on the Property during the term of this Agreement and Developer desires to so act, all in accordance with and otherwise subject to the provisions of this Agreement.

**NOW, THEREFORE**, in consideration of the payment of Ten and 00/100 Dollars (\$10.00) and the mutual covenants, conditions and promises herein contained and other good and valuable consideration, the receipt and legal sufficiency of which are expressly acknowledged, the Tribe and Developer hereby agree as follows:

### **ARTICLE 1. DEFINITIONS**

**1.1 Defined Terms.** The following terms shall have the meanings hereinafter set forth, except as otherwise expressly provided or unless the context otherwise requires:



“Acceptance Notice“ shall have the meaning set forth in Section 9.2.

“Additional Development Fee“ shall have the meaning set forth in Section 6.2.

“Advisor“ shall mean the party designated as such in the Financial Services Engagement Letter.

“Affiliate“ shall mean, with respect to a specified Person, any other Person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with the specified Person. For the purpose of this definition, “control” means the ability to directly or indirectly, by voting securities, partnership or member interests, contract or otherwise, direct or cause the direction of the policies or management of the specified Person.

“Affiliate Transaction“ shall have the meaning set forth in Section 3.5.

“Agreement“ shall mean this Development Agreement together with all schedules and exhibits hereto.

“Alternate Transaction“ shall have the meaning set forth in Section 9.3.

“Approved Budget“ shall have the meaning set forth in Section 2.5(a).

“Approved Concept Program“ shall have the meaning set forth in Section 2.4(a).

“Approved Plan“ shall mean the Approved Budget and the Approved Concept Program for the Property described in Sections 2.4 and 2.5 as the same may be modified pursuant to Sections 2.4 and 2.5.

“Architect“ shall mean the duly licensed professional employed pursuant to Section 2.3 of this Agreement.

“Architect Agreement“ shall have the meaning set forth in Section 2.3(a).

“Available Cash Flow“ shall mean, with respect to the Project, the amount by which all Gross Revenues for the period in question exceeds Operating Expenses for such period, without duplication.

“Board“ means the Development Business Board.

“Budget“ shall have the meaning set forth in Section 2.5(a).

“Bureau of Indian Affairs“ or “BIA“ shall mean the Bureau of Indian Affairs under the Department of the Interior of the United States of America.

“Cash Fee“ shall have the meaning set forth in Section 8.1(b)(iii).

“Closing Date“ shall have the meaning set forth in Section 9.2.

“Compact“ shall mean any Tribal-State compact (as defined in IGRA), and any amendments or modifications thereto, entered into between the Tribe and the State of New York to govern Gaming on the Property pursuant to IGRA or such other Compact or instrument as may be substituted therefor under IGRA so long as such other compact or instrument complies with the laws of the State of New York or such other superceding laws that apply to Gaming at the Property.

“Competitive Facility“ shall mean any of the following that is owned, leased and/or operated by the Tribe or Developer or an Affiliate of the Tribe or Developer: (i) any Gaming operation within Sullivan and/or Ulster Counties, New York; (ii) any hotel, motel or inn within 5 miles of the Property, or (iii) any retail operation that is within 1,000 feet of the boundaries of the Property and that is competitive with, or is of the same general type as, the retail facilities of the Enterprise, whether existing or proposed to be opened at any time during the term of the Agreement.

“Concept Program“ shall have the meaning set forth in Section 2.4(a).

“Confidential Information“ shall have the meaning set forth in Section 10.20.

“Construction Agreement“ shall have the meaning set forth in Section 3.2.

“Construction Budget“ shall have the meaning set forth in Section 2.5(a).

“Contract Documents“ shall have the meaning set forth in Section 3.2.

“Deferred Developer’s Fees“ shall have the meaning set forth in Section 5.4(b).

“Design Budget“ shall have the meaning set forth in Section 2.5(a).

“Develop“ and words of similar import such as “Development“ shall mean any activity to plan, design, construct, renovate, refurbish or furnish any improvements on the Property other than maintenance, repairs and refurbishment done in the ordinary course of business that does not constitute a substantive change or upgrade of the Enterprise.

“Developer“ shall have the meaning set forth in the Preamble.

“Development Agreements“ shall have the meaning set forth in Section 9.2.

“Development Business Board“ shall mean the committee established pursuant to Section 2.2 hereof.

“Development Fee“ shall have the meaning set forth in Section 5.2.

“Dispute“ shall have the meaning set forth in Section 8.2(b)(iii)(1).

“Effective Date“ shall have the meaning set forth in the Preamble.

“Enterprise“ shall mean any commercial enterprise, existing at any time on or after the Effective Date on the Property, including, without limitation, all Gaming, and all related

commercial activities in support of such commercial enterprise, including, without limitation, marketing or promotion activities and transportation activities.

“Exclusive Period“ shall have the meaning set forth in Section 2.1(a).

“Facility“ shall mean the buildings, improvements, and fixtures, now or hereafter located on the Property that is the part of the Enterprise or infrastructure in support of the Enterprise.

“FF&E Budget“ shall have the meaning set forth in Section 2.5(a).

“Financial Advisory Fee“ shall have the meaning set forth in Section 2(b)(i) of the Financial Services Engagement Letter.

“Financial Services Engagement Letter“ shall mean the financial services engagement letter, dated as of January 28, 2003 and amended as of the date hereof, between Power Plant Entertainment New York, LLC, as advisor, and the Tribe, as such agreement may be modified or amended from time to time.

“Financing“ shall have the meaning set forth in Section 1(a) of the Financial Services Engagement Letter.

“Financing Fee“ shall have the meaning set forth in Section 2(a) of the Financial Services Engagement Letter.

“Force Majeure Event“ shall have the meaning set forth in Section 10.21.

“GAAP“ shall mean generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other entity as have been approved by a significant segment of the accounting profession.

“Gaming“ shall mean any and all activities that is or was defined as Class II or Class III Gaming under IGRA and any gaming activity authorized under any Compact.

“General Contractor“ shall have the meaning set forth in Section 3.1.

“Gross Revenues“ shall mean, for any period, the gross revenues from all sources of whatever nature arising from or out of or in connection with or generated by, directly or indirectly, the ownership and operations of the Enterprise during such period, including proceeds of any business interruption insurance, casualty insurance and other insurance proceeds to the extent not applied to restoration of the Project or repayment of debt but only to the extent required thereby. Provided that, Gross Revenues shall be further defined in regards to gross gaming revenue as the net win from gaming activities, which is the difference between gaming wins and losses before deducting costs and expenses.

“IGRA” shall mean the Indian Gaming Regulatory Act of 1988, PL 100-497; 25 U.S.C. § 2701 et seq. as it may, from time to time, be amended.

“Independent Financial Advisor” shall mean an accounting, appraisal or investment banking firm of nationally recognized standing that is, in the judgment of the Development Business Board, (i) qualified to perform the task for which it has been engaged and (ii) disinterested and independent with respect to the Tribe and Developer.

“Interim Advances” shall have the meaning set forth in Section 1(c)(i) of the Financial Services Engagement Letter.

“Legal Requirements” shall mean singularly and collectively, any Compact, IGRA, all Tribal Ordinances, including, without limitation, any Tribal Gaming Ordinance, and all other applicable federal and New York laws, rules and regulations.

“Material Budget Amendment” shall have the meaning set forth in Section 2.5(b).

“Material Concept Amendment” shall have the meaning set forth in Section 2.4(b).

“NEPA” shall have the meaning set forth in Section 2.7(a).

“National Indian Gaming Commission” or “NIGC” shall mean the commission established pursuant to 25 U.S.C. § 2704.

“Non-Tribal Governmental Approvals” shall have the meaning set forth in Section 7.4(a).

“Offer Period” shall have the meaning set forth in Section 9.2.

“Offering Party” shall have the meaning set forth in Section 9.2.

“Operating Expenses” shall mean with respect to the Project or a Competitive Facility of the Tribe, as the case may be,

(1) bona fide reasonable expenses directly related, incurred and paid in good faith by the Tribe in connection with the operation of the Project for the period in question and shall be limited to the actual cost of goods or services sold, wages, utility expenses, insurance costs, maintenance costs, sales or other similar taxes actually paid (including, without limitation, bona fide taxes imposed by the Tribe and bona fide regulatory expenses paid to Tribal gaming authorities, to the extent permitted under Section 7.1 herein), interest payments on Financings, and other directly related bona fide, reasonable business expenses directly related, incurred and paid in good faith by the Tribe in connection with the operation of the Project for the period in question;

(2) plus, with respect to Gaming, amounts paid out by the Tribe to third parties as winnings or paid for prizes to third parties; amounts paid to the State of New York or any subdivision thereof as a result of or pursuant to any Compact and/or any

sums that might be required to be paid to any Federal or state governmental entity as a result of the Compact to the extent actually paid (or amounts paid by Advisor as a result of or pursuant to the Compact to the extent the Tribe has reimbursed Advisor therefor pursuant to the provisions of Section 1(c)(iv) of the Financial Services Engagement Letter);

(3) plus a reserve for the replacement expense each recording period equivalent to one percent (1%) of gross project revenues in the first year of operations. The reserve for replacement will increase to two percent (2%) of gross revenues in year two of operations and three percent (3%) of gross revenue in year three of operations through the balance of the effective life of the Project, provided that the reserve for replacement balance shall not exceed nine percent (9%) of the recorded book value of the Project's asset base at any given time; and

(4) shall not include (a) depreciation, amortization or any other non-cash expense or item; (b) charitable contributions; (c) third party management fees paid for the management of the Gaming operations of either the Project; (d) except for amounts paid to the Tribe's gaming authorities as provided for in clause (1) hereof, any tax or fee assessed by and/or paid to the Tribe and/or any subdivision, affiliate or agency of the Tribe, and/or any entity directly or indirectly owned or controlled by the Tribe, except to the extent that the same would constitute a bona fide expense directly incurred in good faith in connection with the operation of the Project (by way of example, but not limitation, expenses paid by the Project to the Tribe, or a subdivision, affiliate or agency of it for gaming monitoring or utilities shall not be excluded from the calculation of Operating Expenses, provided such fee is reasonable and bona fide, and reflects the actual cost to the Tribe for providing the same); (e) capital costs, items and expenses (provided, however, a capital cost or expense that is bona fide, and directly incurred by the Tribe after the Project has been completed and opened to the public that is intended to increase the gross revenue of the Project or reduce the Operating Expenses of the Project may be considered an Operating Expense, but such cost or expense shall be amortized over the reasonable useful life of same (based upon the then current amortization schedule utilized by the United States Internal Revenue Service for such type of capital cost) and during each period only the amortized portion applicable for such period shall be included in Operating Expenses for such period); (f) in connection with any Financing, principal payment, amortization of financing fees, debt discount or other non-cash interest expense items, any prepayment or repayment fees or penalties, penalties, default interest above the rate otherwise in effect, fees and expenses payable to the lender or its counsel or any agents, or any "gross up" or increased interest as a result of any indemnification, change in law or reserve requirements, tax or withholding requirements, breach of any representation, warranty or covenant or any change in taxability of any of the Financings; or (g) any payment to Tribal members other than reasonable compensation or consideration for goods or services directly related to the day-to-day operation of the Project.

(5) Developer shall be entitled to review the annual budget for the Project, and comment on said budget prior to its approval by the Tribe. Such budget shall be



prepared by the Tribe and shall be in accordance with the definitions and requirements set forth in this Agreement.

“Person“ shall mean any individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization, government or any agency or political subdivision thereof or any other entity.

“Plans and Specifications“ shall have the meaning set forth in Section 2.6.

“Pre-Development Budget“ shall have the meaning set forth in Section 2.1(e).

“Pre-Development Goals“ shall have the meaning set forth in Section 2.1(a)(i).

“Pre-Development Phase“ shall mean the period of time that starts on the Effective Date and ends upon the Tribe’s and the State of New York’s execution and delivery of a Compact permitting gaming at the Property, not to extend past December 31, 2008.

“Pre-Financing Phase“ shall mean the period of time that starts on January 28, 2003 and ends upon the closing of the Financing and availability to the Tribe of funds therefrom that permits completion of the Project.

“Present Value of the Financial Services Fee“ shall have the meaning set forth in Section 8.1(b)(ii).

“Priority Payment“ shall mean a payment from the Available Cash Flow after the Tribe Minimum Payments.

“Professionals“ shall have the meaning set forth in Section 2.3(b).

“Project“ shall mean the portion of the Enterprise associated with the Property, constructed, improved and put into service after the date of this Agreement.

“Project Costs“ shall mean the sum of: (1) all so-called “hard” and “soft” costs incurred in planning, developing, designing, constructing, equipping and furnishing any part of the Project, including all associated fees and expenses of professionals and Recoverable Legal Fees; (2) all financing fees and expenses including, without limitation, interest payments and any scheduled principal payments on debt incurred to pay Project Costs to the extent that the principal has been applied to the construction of the Project or acquisition of the Property; and (3) repayment of any and all mortgages, encumbrances or liens on the Property. Notwithstanding anything herein to the contrary, for the purposes of calculating the Development Fee or Additional Development Fee, Project Costs shall not include the Cash Fee, Development Fee, Additional Development Fee, Financing Fee, Financial Advisory Fee, or any other fee paid to Developer, Advisor or any of their Affiliates, or any interest thereon.

“Project Interest Rate“ shall mean, for the period of such calculation, the effective rate of interest payable by the Tribe with respect to all debt incurred by the Tribe in connection with the Project and the Enterprise, calculated as follows: the quotient of (1) the amount of all

interest payable with respect to all such debt during such period, divided by (2) the total principal amount of all such outstanding debt during such period.

“Property” shall mean the land located in or near Ulster and/or Sullivan County, New York designated by the Development Business Board, together with such other land which may be added thereto, or in substitution thereof, or otherwise designated by the Development Business Board in connection with the Project.

“Receiving Party” shall have the meaning set forth in Section 9.2.

“Recoverable Legal Fees” shall have the meaning set forth in Section 1(c)(i) of the Financial Services Engagement Letter.

“ROFR” shall have the meaning set forth in Section 9.1(a).

“ROFR Notice” shall have the meaning set forth in Section 9.2.

“ROFR Period” shall have the meaning set forth in Section 9.1(a).

“SEQRA” shall have the meaning set forth in Section 2.7(a).

“SPA” shall have the meaning set forth in Section 2.8.

“Successor Developer” shall mean any Person, other than Developer, that undertakes or proposes to undertake any activity to Develop the Property or any part of the Property.

“Tribal Forum” shall have the meaning set forth in Section 8.2(a)(v)(A)(1).

“Tribal Gaming Ordinances” shall mean all Tribal Ordinances related to or concerning Gaming.

“Tribal Ordinances” shall mean all applicable laws, rules and regulations of the Tribe.

“Tribe” shall mean Oneida Tribe of Indians of Wisconsin, a federally recognized Indian tribe.

“Tribe Minimum Payment” shall have the meaning set forth in Section 5.3.

**1.2 Accounting Terms.** Unless otherwise indicated, all accounting terms (whether or not such terms are indicated with initial capital letters) shall have their respective meanings in accordance with GAAP, consistently applied.

**1.3 Recitals.** The recitals set forth above are true and correct and are incorporated herein by reference.

**ARTICLE 2.**  
**APPOINTMENT OF DEVELOPER;**  
**DEVELOPMENT BUSINESS BOARD; DESIGN**

**2.1 Appointment of Developer; Exclusive Rights of Development.**

(a) Pursuant to the terms of this Agreement, the Tribe hereby appoints Developer as its agent and grants to Developer the exclusive right to (i) carry out any and all pre-development activities that are necessary in order to commence development of the Project, including, without limitation, (x) the identification, and facilitating the Tribe's acquisition, of the Property, (y) assisting the Tribe in having the Property taken into trust by the United States of America for the benefit of the Tribe for Gaming purposes, and (z) assisting the Tribe in obtaining a Compact acceptable to the Tribe (collectively, the "Pre-Development Goals"); and (ii) plan, design, develop, construct and furnish any improvements with respect to the Project, for a term commencing on the date of this Agreement and ending upon the expiration date set forth in Section 8.1, unless earlier terminated pursuant to the terms of this Agreement (the "Exclusive Period"). Subject to the other provisions of this Agreement, in connection with its appointment as agent during the Exclusive Period as provided above, Developer's services shall include, subject to the limitations set forth herein, advancing all funds necessary to retain consultants expert in accomplishing various items encompassed by the Pre-Development Goals and providing advice with regard to the accomplishment of the Pre-Development Goals. During the Exclusive Period, the Tribe shall not directly or indirectly designate or appoint (or cause to be designated or appointed) any other person or entity to act as a Successor Developer with respect to the Project and shall not directly or indirectly Develop or act as a Successor Developer with respect to the Project except pursuant to the express provisions of this Agreement. In addition, from the date of this Agreement until all Financings have been repaid, the Tribe and Developer shall not directly or indirectly build, develop or own any Competitive Facilities or hold any interest in any Competitive Facilities; provided, however, notwithstanding the above provision, at such time that there is a strong likelihood that the Tribe will obtain a Compact acceptable to the Tribe, then Developer may build, develop or own one or more Gaming operation located in Sullivan and/or Ulster Counties, New York, as long as (i) such Gaming operation is not within 50 miles of the Property, and (ii) Developer shall give advance written notice to the Tribe of Developer's intent to build, develop or own such Gaming operation.

(b) Developer recognizes that the Tribe is entering into this Agreement based on the Developer's representations that it is experienced and has certain expertise in respect of the Project. The parties hereto shall act in good faith and fair dealing in carrying out their respective obligations hereunder and Developer agrees to use commercially reasonable efforts and to devote such time and effort as may be commercially reasonable to perform its obligations hereunder. Without limiting the foregoing, Developer shall keep the Tribe apprised on a current basis of any material information about the Developer's progress in performing its services hereunder. Each of the Tribe and Developer will keep the other informed of any material information about the Project that comes into its possession.

(c) The Tribe recognizes and acknowledges that the Developer has the expertise to identify, and shall be responsible for identifying federal, state and local governmental agencies and officials in connection with the development of the Project; provided that Developer will

negotiate (at the request of the Tribe, with the assistance of the Tribe) any agreement with such federal, state or local governmental agencies and officials that binds or purports to bind the Tribe but which shall be required to be expressly approved by the Tribe in writing, which approval shall not be unreasonably withheld. The Developer shall give prior notice to the Tribe of any such meetings with local governmental agencies and officials and provide the Tribe a reasonable opportunity to send a representative to any such meeting. The Developer will consult with the Tribe as to strategy or direction of such meetings and shall keep the Tribe apprised on a current basis with respect to such meetings as set forth in Section 2.1(b).

(d) Subject to the terms of this Agreement including, without limitation, the provisions of Section 2.2 hereof, as exclusive developer of the Project, Developer shall exclusively be responsible for (i) assisting the Tribe with procurement of all federal, state and local governmental approvals necessary to construct, equip and operate the Enterprise, as well as identify and acquire rights in and to the Property, (ii) selecting, negotiating with, securing the performance of, cooperating with and supervising architects, interior designers, engineers, construction managers, contractors, subcontractors, project consultants, and marketing and leasing consultants; (iii) purchasing equipment, materials and supplies in connection with the development and construction of the Project; and (iv) preparing plans for the purposes of securing bids. Developer shall have access to the Property in order to supervise all on-site persons employed in the construction and development of the Project and shall have the right to give such access to all professionals and contractors. Without limiting the foregoing, Developer shall keep the Development Business Board apprised of any material information regarding the Pre-Development Goals and about the construction and development of the Project. The Tribe will also keep Developer informed of any material information about the construction and development of the Property and shall promptly notify Developer in the event that the Tribe or any representative or agent of the Tribe holds or otherwise engages in discussions with any third party with respect to any development on the Property or any Competitive Facility outside the scope of this Agreement and/or the Approved Plan.

(e) As promptly as practicable but in no event later than 60 days following the Effective Date or as may be further extended in settlement agreements regarding land claims that the Tribe may enter into, the Developer, with subsequent approval of the plan of action and budget by the Development Business Board, shall prepare and submit to the Tribe a written plan of action and a budget for accomplishing the Pre-Development Goals which plan of action and budget shall specify, in reasonable detail, the timing and costs anticipated in order to accomplish the Pre-Development Goals. Once such plan and budget have been approved by the Tribe, such plan and budget shall be the "Pre-Development Budget," and shall be followed by the Developer unless the Development Business Board agrees, in writing, to alter the Pre-Development Budget.

(f) The Tribe hereby covenants and agrees that, in the event the Property is acquired, Tribe shall (i) take no action reasonably likely to cause the United States to refuse to accept the Property in trust or to cause the termination or failure of any such trust; (ii) not cause any lien, claim, encumbrance, or pledge to be filed against or otherwise encumber the Property except as approved by the United States and by the terms of the Financing; and (iii) not cause any lien, claim, encumbrance or pledge to be filed against or otherwise encumber any of the revenues, cash flow or profits from any of the businesses on the Property, except as approved by the United

States and by the terms of the Financing, and except pursuant to the Financial Services Engagement Letter and this Agreement.

## **2.2 Development Business Board.**

(a) On or prior to the Effective Date, the Tribe shall establish the Development Business Board. The Development Business Board shall have the rights, obligations and powers set forth in this Agreement. The Development Business Board shall be a committee consisting of six (6) representatives, four of whom are appointed by the Tribe and two of whom are appointed by Developer. The parties hereto acknowledge and agree that the initial representatives of the Development Business Board shall be David Cordish and Joseph Weinberg for the Developer and Oneida Enterprise Development Authority shall identify, by resolution adopted by the OEDA Board, four members of the OEDA to act as representatives for the Tribe one of which shall be identified as authorized to have the necessary authority to approve actions identified in Section 3.4 and shall be available full time to carry out such responsibilities. Either party hereto may change its representatives to the Development Business Board at any time, provided that any such change complies with this Section, and that notice is provided to the other party in accordance with the provisions of Section 10.5. Each party shall be entitled to request and receive from the other party reasonable evidence that the Person(s) designated as members of the Development Business Board have been duly appointed.

(b) The parties shall cooperate in setting meeting schedules for the Development Business Board in advance of each calendar quarter during the term hereof, at a frequency of at least one meeting every month. Meetings may be in person or by telephone conference, but all members of the Development Business Board shall be given a reasonable opportunity to attend such meetings. In addition to the regularly scheduled meetings, any two or more representatives of the Development Business Board shall have authority to call a special meeting of the Development Business Board on seven (7) days written notice to the other representatives that comprise the Development Business Board on such date. Except as otherwise expressly provided in this Agreement, in order to be effective, any action of the Development Business Board must be (i) the result of agreement by at least three members of the Development Business Board appointed by the Tribe and one member of the Development Business Board appointed by the Developer, or their respective designees, and (ii) by a vote taken at a duly scheduled or called meeting of the Development Business Board; provided, however, that any request for a vote, approval or consent shall be deemed to have been approved if the Development Business Board has not acted on such request within fourteen (14) days of the date of the meeting of the Development Business Board at which such vote or consent to a specific proposal or matter was presented, provided that each member of the Development Business Board has been provided with all of the materials any of them reasonably deems necessary to consider the matter presented before voting; the fourteen (14) day period shall not start to run until all such materials reasonably requested have been provided. For the purposes of the preceding sentence, the Development Business Board shall have "acted" (a) with respect to a vote, approval or consent requested by Developer, if, during such fourteen-day period, the Board shall have held a meeting (which was a regularly scheduled meeting, or a special meeting called pursuant to seven days' written notice), and at least three of the Board members appointed by the Tribe (or their designees) attended the meeting and voted (or abstained from voting by reason of a conflict of interest) on such request at the meeting and (b) with respect to a vote, approval or consent



requested by Tribe, if, during such fourteen-day period, the Board shall have held a meeting (which was a regularly scheduled meeting, or a special meeting called pursuant to seven days' written notice), and at least one of the Board members appointed by Developer (or its designee) attended the meeting and voted (or abstained from voting by reason of conflict of interest) on such request at the meeting. In the event the vote, consent or approval is requested by Developer, Developer shall cause its two representatives to the Development Business Board to timely call the special meeting so that the meeting shall take place within the fourteen-day period. In the event the vote, consent or approval is requested by the Tribe, the Tribe shall cause its four representatives to the Development Business Board to timely call the special meeting so that the meeting shall take place within the fourteen-day period. The parties hereby agree to ensure that their respective representatives to the Development Business Board shall cooperate fully and shall try to reach agreement or compromise on all matters before the Development Business Board. In the event such agreement cannot be reached, the applicable action shall be determined in the manner provided in Section 8.2.

(c) The Tribe and Developer may designate a proxy of a named representative to the Development Business Board to act in the absence of such member, provided that such designation be in writing by, in the case of the Tribe, its Chairman, or in the case of Developer, the person designated as the managing member, and that notice of such designation be provided pursuant to Section 10.5 of this Agreement. Such designee shall have the full power and authority to act, vote or consent on behalf of such member.

### **2.3 Employment of Architect and Other Professionals.**

(a) Within 30 days after the earliest to occur of (i) commencement of construction of the Project, (ii) Tribe's and the State of New York's execution and delivery of a Compact permitting gaming at the Property, (iii) consummation of the Financing, or (iv) transfer of the Property to the United States in trust for the benefit of the Tribe, Developer shall provide the primary direction in the selection of an architect (the "Architect") with demonstrated experience in designing and constructing gaming facilities (except as otherwise may be agreed to by the Development Business Board) for the purposes of designing the Project and performing certain other services in connection with the construction and development of the Project. The agreement with the Architect (the "Architect Agreement") shall be prepared by Developer, in consultation with the Development Business Board and approved by the Development Business Board within 60 days following the earliest to occur of the four events enumerated above. The Tribe shall enter into the Architect Agreement provided that the fees and expenses associated with the retention of the Architect shall be within the reasonable guidelines set by the Board and that there is no legitimate business reason or legal reason for the Tribe not to engage the Architect. The Tribe shall assign to Developer its responsibilities under any architectural and/or other engineering agreements, including, without limitation, the Architect Agreement, in order to allow Developer, on behalf of the Tribe, to supervise, direct, control, and administer the duties and activities and functions of the Architect under such agreements in accordance with the Approved Plan.

(b) Subject to the provisions hereof, Developer shall be the primary party responsible for identifying for approval and authorization by the Development Business Board other professionals, such as interior design architects, consulting engineers or other professionals

("Professionals") as Developer deems appropriate and consistent with the Approved Plan in connection with the design, construction and development of the Project. Developer shall be authorized to negotiate with, and engage such other Professionals upon approval by the Development Business Board, and the Tribe shall enter into agreements with such other Professionals selected by Developer and approved by the Development Business Board on similar terms, provided that the fees and expenses associated with the retention of such Professionals are within the Approved Budget and such services are reasonably necessary or within the scope of the Approved Plan, and provided further that there is no legitimate business reason for the Tribe not to engage, or applicable law that shall prohibit the Tribe from engaging, the Professional selected by Developer and approved by the Development Business Board or agree to the terms of the proposed engagement. The Tribe shall assign to Developer its responsibilities under any such agreements with such Professionals in order to allow Developer, on behalf of the Tribe, to supervise, direct, control and administer the duties and activities of such Professional under such agreements.

(c) Notwithstanding the above, Developer shall not have the authority, unless otherwise specifically granted by the Tribe in writing, to initiate any litigation, arbitration or other dispute resolution mechanism on behalf of the Tribe; settle any claim brought against the Tribe; execute any release or other document which would serve to release or compromise any claim or rights of the Tribe; or waive the Tribe's sovereign immunity. Developer's powers with respect to the Architect or other Professionals shall be subject to the oversight authority of the Development Business Board.

(d) The Tribe hereby agrees that the Tribe shall, in good faith, grant reasonable limited waivers of sovereign immunity to any of the parties (including, without limitation, the Architect and the Professionals) contracted with in connection with the Development of the Project; provided that no such waiver of sovereign immunity shall exceed the scope or limitation of the waiver of sovereign immunity contained in Section 8.2. The Tribe acknowledges that such waivers are necessary and agrees to provide such parties with a reasonable means of dispute resolution in a federal, state or commercial arbitration forum.

## **2.4 Concept Design and Design Documents.**

(a) Within 90 days of the effective date of the Architect Agreement, Developer shall designate a plan (the "Concept Program") for the design of the Project, including, but not limited to, a concept program which shall set forth Developer's and the Tribe's objectives, overall schedule requirements, major design criteria, design theme, general facility size, space requirements, amenities, special uses, special equipment and site requirements. The Concept Program shall be submitted to the Development Business Board and it can only be approved or changed upon approval by the Development Business Board. The Concept Program with respect to the Property as last approved (as may be modified pursuant to this Section) shall be referred to as the "Approved Concept Program"; provided, however, until such time as a Concept Program has been so approved by the Development Business Board, "Approved Concept Program" shall mean the then current Concept Program of Developer not yet approved. Thereafter, on an as-needed basis, Developer shall provide to the Development Business Board a report for approval which sets forth in reasonable detail any changes in the Approved Concept Program, together

with any changes to the Plans and Specifications and the Approved Budget, if any, prior to the implementation of any changes.

(b) Subject to the terms hereof, during the term of this Agreement, Developer shall review the Approved Concept Program and may revise the Approved Concept Program from time-to-time, as necessary, to reflect any unpredicted changes, changed circumstances or events or as necessary to balance the Approved Budget for the Project or to provide that the Project Costs do not exceed the available financing for the Project. Developer shall be allowed to make such modifications without approval of the Development Business Board, provided that Developer shall not make any such modification that (i) increases the Approved Budget for the Project which may result in a Material Budget Amendment, (ii) changes the overall theme or brand name of the casino or hotel at the Property (other than as required due to termination of rights by a licensor or franchiser), or (iii) make any change that would cause the Project to violate applicable law or regulation (any of the foregoing clauses "i", "ii" or "iii" a "Material Concept Amendment"). The written consent of the Development Business Board is necessary to approve any proposed Material Concept Amendment. Developer shall give the Development Business Board prior written notice of any proposed Material Concept Amendment.

(c) Based upon the Approved Concept Program and the Approved Budget, Developer shall cause the Architect to prepare schematic design documents consisting of drawings and other documents illustrating the scale and relationship of the proposed Project and its components. Developer shall also cause the Architect to prepare for Developer's review design development documents consisting of drawings and other documents to fix and describe the size and character of the Enterprise as to architectural, structural, mechanical and electrical systems, materials and such other elements as may be appropriate. Further, Architect shall advise the Development Business Board regarding any preliminary estimates of construction costs.

## **2.5 Design, Construction and FF&E Budgets.**

(a) Within 90 days of the effective date of the Architect Agreement, Developer, with the assistance and input of the Architect, shall establish a preliminary budget for design (the "Design Budget"), a preliminary budget for construction (the "Construction Budget"), and a preliminary budget for the furnishing and equipping ("FF&E Budget") for the Project (the Design Budget, Construction Budget and FF&E Budget, collectively, shall be referred to as the "Budget"). The Budget shall be submitted to the Development Business Board for approval by a vote of its members in accordance with the provisions hereof. The Budget as last approved by the Development Business Board and, as may be modified pursuant to this Section 2.5 for the Project, shall be referred to as the "Approved Budget"; provided, however, that until such time as a Budget has been so approved by the Development Business Board, "Approved Budget" shall mean the then current Budget not yet approved.

(b) Subject to the terms of this paragraph, during the term of this Agreement, Developer shall review the Approved Budget for the Property and may revise the Approved Budget from time-to-time, as necessary, to reflect any unpredicted or unforeseeable changes, variables or events or to include significant, additional, unanticipated items of expense. Developer shall be allowed to reallocate part or all of the amount budgeted with respect to any line item to another line item and to make such other modifications to the Approved Budget as

Developer deems necessary, unless (i) such modifications taken as a whole causes the total Budget to exceed the total amount of the Approved Budget and will cause a deviation of more than 10% of Project Costs from the amount set forth in the Approved Budget; (ii) such modifications result in a fundamental change in the Concept Program described in Section 2.4 above or the theme of the Enterprise; or (iii) such modifications result in a material decrease in the projected cash flow of the Project (any of the foregoing clauses “i” through “iii” a “Material Budget Amendment”). All proposed Material Budget Amendments shall require the written approval of the Development Business Board. Developer shall give the Development Business Board prior written notice of a proposed Material Budget Amendment.

(c) The Tribe acknowledges that the Approved Budget is intended only to be a reasonable estimate of the construction and development costs and expenses. Developer shall not be deemed to have made any guarantee, warranty or representation whatsoever in connection with the Budget.

**2.6 Plans and Specifications.** Based upon the design development documents prepared pursuant to Section 2.4 above and the Budget, Developer shall cause the Architect and other Professionals to prepare certain construction documents consisting of detailed drawings, plans and specifications setting forth the general requirements for construction of the Project (collectively, the “Plans and Specifications”). During the term of this Agreement, Developer shall have the right to make modifications to the Plans and Specifications without the consent of the Development Business Board or the Tribe provided that such changes (a) are otherwise consistent with the Approved Concept Program; (b) do not lead to a Material Concept Amendment; (c) do not result in a Material Budget Amendment; and (d) do not have a material adverse economic effect on the projected cash flow of the Project, taken as a whole.

**2.7 Compliance with Construction Standards, Environmental Laws and Regulations.**

(a) The Project shall be designed and constructed so as to adequately protect the environment and the public health and safety, including, without limitation, complying with applicable law. The design, construction and maintenance of the Project shall, except to the extent a particular requirement or requirements have been waived in writing by the Tribe, meet all minimum standards under the Tribe’s ordinances, codes and regulations in existence on the date hereof and attached hereto as Exhibit B, and to the extent not inconsistent with the same, all applicable New York state or county building codes, fire codes and safety and traffic requirements that are applicable generally (but excluding planning, zoning and land use laws, ordinances, regulations and requirements or any requirement that is intended to be specific to the Project) that would be imposed on the Project by existing New York or federal statutes or regulations that would be applicable if the Project were located outside of the jurisdictional boundaries of the Tribe, even though those requirements may not apply within the Tribe’s jurisdictional boundaries. In addition, those mitigation steps specified in any phase I or phase II environmental assessments conducted with respect to the Property on behalf of the Tribe or required under the National Environmental Policy Act (“NEPA”) and/or the State Environmental Quality Review Act (“SEQRA”) shall be taken. The Tribe shall be responsible for and shall, if required by law, certify to appropriate governmental agencies its compliance with NEPA and SEQRA and all other applicable environmental laws and regulations. Nothing in this subsection shall grant to the State of New York or any political subdivision thereof any jurisdiction



(including, but not limited to, jurisdiction regarding zoning or land use) over the Property or the development and management of the Enterprise.

(b) As of the Effective Date, the Tribe hereby represents and warrants that there are no Tribal ordinances, Tribal laws or Tribal regulations that would require the Developer to obtain any license, qualification or other Tribal governmental approval to act as Developer hereunder, or to perform all of Developer's obligations hereunder (other than as set forth in Exhibit B).

**2.8 Acquisition of Property.** As one of the services to be performed hereunder by Developer, Developer assisted the Tribe in acquiring the Property. Developer, as agent for the Tribe negotiated a sale purchase agreement (the "SPA") pursuant to which the Tribe acquired the Property for conveyance to the United States in trust for the Tribe's benefit.

### **ARTICLE 3. CONSTRUCTION**

**3.1 Proposal Review; Selection of Contractors and Subcontractors.** Developer, in consultation with the Development Business Board, shall solicit and conduct a review of proposals for the construction of the Project and Developer shall, with approval of the Development Business Board, negotiate and award a construction management agreement and/or construction contract with a construction manager or contractor (the "General Contractor"). The General Contractor shall be properly licensed in the State of New York and shall furnish a payment and performance bond satisfactory to the Development Business Board to cover the construction for which such contractor or construction manager was retained. In addition, the General Contractor shall be required to use commercially reasonable efforts to give and to cause subcontractors to give a hiring preference, to the extent permitted by law, pursuant to the Tribe's employment preference policies, to qualified members of the Tribe and other Native Americans that have appropriate experience and skill.

**3.2 Contracts.** Developer shall negotiate, in consultation with the Development Business Board, and prepare on behalf of the Tribe a construction management agreement, project management and/or construction contract with the General Contractor (the "Construction Agreement") and related contracts and subcontracts for the construction and development of the Project (collectively, the "Contract Documents"). Upon selection of the General Contractor as set forth in Section 3.1, the Tribe shall enter into the Contract Documents, as applicable; provided that the Contract Documents are consistent with the Approved Plan and the Approved Budget and there is no legitimate business reason or legal reason for the Tribe not to engage the Contractor selected by the Developer or agree to the terms of the Contract Documents; and provided further that (i) either the Financing has been obtained or, if the Financing has not yet been obtained, the Contract Documents do not commit the Tribe to pay the General Contractor an amount greater than that which is available from the Developer or do not commit the Tribe to pay any amounts to the General Contractor until the Financing has been obtained and (ii) the Contract Documents having a value in excess of \$1,000,000 have been approved by the Development Business Board. Developer shall furnish to the Development Business Board drafts of any Contract Document for which the approval of the Development Business Board is required under clause (ii) of the preceding sentence in substantially final form not less than five

(5) days prior to the date on which the approval of the Development Business Board is required by Developer. All Contract Documents shall be prepared and negotiated by Developer, in consultation with the Development Business Board, and the Tribe's counsel shall be given a reasonable opportunity to review and propose revisions to such Contract Documents. The Contract Documents shall expressly provide that (a) all work shall be done in accordance with the Plans and Specifications; (b) construction of the Project shall commence promptly following the obtaining of financing and the granting of all approvals necessary to commence such work; (c) any contractor, subcontractor, consultant and/or construction manager shall exert good commercial efforts to complete construction prior to the completion date specified in the applicable Contract Document; and (d) the terms thereof shall not obligate the Tribe nor cause Tribe to be obligated for unnecessary sales tax and other impositions as to which Tribe may be immune or exempt because of its status as an Indian tribe or the Project's location on trust lands. The Contract Documents shall also provide for adequate insurance, appropriate lien waivers, and for construction schedules pursuant to which milestones are to be accomplished, progress payments are to be made and late penalties may be assessed all as determined by Developer in its reasonable discretion. The Contract Documents shall also contain such provisions for the protection of the Tribe as the Tribe shall deem appropriate. The Tribe shall compensate the General Contractor, any other contractors, subcontractors and consultants selected by Developer (and approved by the Development Business Board to the extent provided herein) for construction of the Project from its proceeds from the Financings. In addition, by its execution of this Agreement, the Tribe hereby acknowledges, ratifies and approves all future subcontracts entered into by the General Contractor in accordance with the provisions hereof and the Construction Agreement, to the extent described and otherwise provided for therein. Developer shall have authority to enter into the aforementioned Contract Documents and all other ancillary or miscellaneous contracts related thereto with respect to the Project provided that (i) the costs of such Contract Documents are within the line items allocated for such costs in the Approved Budget, as the Approved Budget may be modified pursuant to Section 2.5 and (ii) Financing has been obtained or, if the Financing has not yet been obtained, such Contract Documents do not commit the Tribe to pay the General Contractor and/or the applicable subcontractor an amount greater than that which is available from the Developer or do not commit the Tribe to pay any amounts to the General Contractor and/or the applicable subcontractor until the Financing has been obtained.

### **3.3 Construction Administration.**

(a) The Tribe hereby designates Developer as its agent and Developer shall be responsible for all Contract Documents and construction management administration during the construction phase of the Project. Developer shall act as the Tribe's designated representative and shall have full power and complete authority and duty to act on behalf of the Tribe in connection with any Contract Documents subject to the approval of the Development Business Board as provided herein. Developer shall have complete control and charge of any persons performing work on site on the Project. Developer shall interpret and decide on matters concerning the performance of the General Contractor, any other contractor, subcontractor and/or consultant and the requirements of the Contract Documents. Developer shall have the authority to reject work that does not conform to the Contract Documents or the Plans and Specifications and to approve payments. Developer shall conduct inspections to determine the date or dates of substantial completion and the date of final completion of the Project. Developer



shall observe and evaluate or authorize the evaluation of work performed, the review of applications for payment for submission to the Tribe and the review and certification of the amounts due the General Contractor, any other contractors, subcontractors or consultants.

(b) Notwithstanding the foregoing, Developer shall not have the authority, unless otherwise specifically granted by the Tribe in writing, to initiate any litigation, arbitration or other dispute resolution mechanism on behalf of the Tribe; settle any claim brought against the Tribe; execute any release or other document which would serve to release or compromise any claim or right of the Tribe; or waive the Tribe's sovereign immunity.

(c) Anything contained in this Section to the contrary notwithstanding, nothing herein shall prohibit the Tribe (or its agents or contractors hired by it at its expense) from inspecting the work performed on the Project and, in connection therewith, Developer shall permit such persons to have access to the Property at all reasonable times on reasonable notice and as otherwise required by the Contract Documents. In addition, the Tribe shall only be required to agree to the jurisdiction of any state or local governmental agency in connection with any Contract Document to the same extent as the waivers set forth in Section 8.2.

**3.4 Progress Payments.** To the extent available from the Financings and otherwise pursuant to the terms thereof (which terms shall include, inter alia, preparation and delivery of requisition orders, lien waivers and certificates by the Architect required by the lender(s) providing the Financings), the Tribe shall cooperate with the parties thereto in connection with the advance thereof for progress payments for construction performed by the General Contractor or any other contractors, subcontractors or consultants on a periodic basis as directed and approved by Developer, a representative identified by resolution of OEDA, and the Architect.

**3.5 Affiliate Contracts.** No contracts for the supply of goods or services to the Project shall be entered into with parties affiliated with Developer or its members, managers, officers or directors other than with respect to the Financial Services Engagement Letter (an "Affiliate Transaction") unless (a) such Affiliate Transaction is on terms that are no less favorable than those that would have been obtained in a comparable transaction with an unrelated Person, (b) Developer delivers to the Tribe (i) with respect to any Affiliate Transaction involving aggregate payments in excess of Two Million Dollars (\$2,000,000), a resolution adopted by the disinterested member of Developer approving such Affiliate Transaction and an officers' certificate certifying that such Affiliate Transaction complies with clause (a) above and (ii) with respect to any Affiliate Transaction involving aggregate payments in excess of Five Million Dollars (\$5,000,000), a written opinion as to the fairness to the Tribe from a financial point of view, issued by an independent financial advisor with assets in excess of One Billion Dollars (\$1,000,000,000) or from a nationally recognized independent accounting firm and (c) such Affiliate Transaction is unanimously approved by the Development Business Board and, to the extent applicable, the requirements of Section 10.17 have been complied with.

**ARTICLE 4.**  
**FURNITURE, TRADE FIXTURES AND EQUIPMENT;**  
**INSURANCE AND CASUALTY**

**4.1 Selection of Furniture, Trade Fixtures and Equipment.** Developer shall arrange for the procurement of furniture, trade fixtures, equipment and furnishings on purchase or lease terms as may be approved by the Development Business Board, but in no event shall such purchase terms or lease terms exceed the line items in the Approved Budget therefor. Developer agrees to employ the Tribe's bidding policies (to the extent permitted by law and to the extent Developer has been apprised thereof) and otherwise employ good business practices and, where appropriate, competitive bidding. Notwithstanding the above, Developer shall obtain the Development Business Board's prior written approval before (i) procuring any Gaming or Gaming related equipment or such other items that may be regulated under any applicable Tribal, Federal or State gaming law, ordinance or regulation; or (ii) entering into a purchase or lease transaction with a vendor that must be licensed by the Tribe or subject to a background check pursuant to any applicable Tribal, Federal or State gaming law, ordinance or regulation. The approval of any Gaming related equipment and financing thereof shall be in the Tribe's sole and absolute discretion.

**4.2 Insurance and Casualty.**

(a) The Tribe shall maintain, the cost of which shall be payable from (i) financing proceeds during construction or (ii) operating revenues generated by the Enterprise, adequate liability and property insurance with respect to the Property, including a property insurance policy with coverage for flood, earthquake, vandalism, malicious mischief and such other insurable hazards as, under good insurance practices, from time to time are insured against for other property, buildings and uses similar to that contemplated by the Project. The amount of such insurance shall not be less than 100% of the replacement cost value of the improvements on the Property. The amount of the liability policy shall be at least \$10 million per occurrence with an overall umbrella limit of at least \$100 million. All policies of insurance required by this Agreement (i) shall be issued by an insurer with a claims paying ability rating of not less than "AA" (or the equivalent) by Standard & Poors' and one other rating agency or A:X or better as to claims paying ability by AM Best, (ii) shall name Developer, for the benefit of Developer, as an additional insured, (iii) shall be maintained throughout the term of this Agreement without cost to Developer, (iv) shall contain such provisions as Developer deems reasonably necessary or desirable to protect its interest (including, without limitation, endorsements providing that neither the Tribe, Developer nor any other party shall be a co-insurer under said policies and that Developer shall receive at least thirty (30) days prior written notice of any modification, reduction or cancellation), (v) shall contain a waiver of subrogation against Developer and (vi) shall be reasonably satisfactory in form and substance to Developer and reasonably approved by Developer as to amounts, form, risk coverage, deductibles, loss payees and insureds. Copies of said policies, certified as true and correct by the Tribe, or insurance certificates thereof, shall be delivered to Developer. Not later than fifteen (15) business days prior to the expiration date of each of the policies, the Tribe will deliver to Developer satisfactory evidence of the renewal of each policy in accordance with the terms of this Agreement.

(b) If the Property or the improvements thereon shall be damaged or destroyed, in whole or in part, by fire or other casualty, the Tribe shall give prompt notice thereof to Developer. Within a reasonable period of time thereafter, the Tribe shall apply all insurance proceeds received therefrom to the repair, restoration or replacement of any damaged or destroyed Property or improvements, as applicable.

## ARTICLE 5. FUNDING REQUIREMENTS OF DEVELOPMENT

### **5.1 Advancing of Project Costs by Developer; Reimbursement by the Tribe.**

(a) Developer agrees to cause Advisor to fulfill its obligations under the Financial Services Engagement Letter to advance certain Project Costs as and when specified therein, and subject to repayment thereunder.

(b) It is expressly understood and agreed that everything done by Developer within the scope of its authority hereunder or the Financial Services Engagement Letter shall be done by Developer on behalf of the Tribe, and that any and all obligations, costs or expenses incurred in the performance of its obligations under this Agreement or the Financial Services Engagement Letter (including, without limitation, the Interim Advances) and within the scope of its authority hereunder and under the Financial Services Engagement Letter shall be borne by the Tribe and not by Developer, except as otherwise specifically provided herein. Subsequent to the Pre-Financing Phase, Developer shall not be obligated to make any Interim Advances with respect to the Project to, or for the account of, the Tribe, nor shall the Developer be obligated to incur any liability or obligation or do any act or perform any duty hereunder unless the Tribe shall furnish Developer with the necessary funds for the discharge thereof; provided, however, that all amounts payable to persons for rendering services to, or as employees of, Developer, whether by way of compensation, fringe benefits or otherwise, shall be paid by and as an expense of Developer, except to the extent such services are included as Project Costs on the Approved Budget. As a condition precedent to including such service costs on any budget or otherwise as Project Costs, Developer shall disclose in writing to the Tribe any persons whose payment or compensation is to be included as Project Costs who are also being compensated in any way by, or who are also rendering services on any basis to, Developer. It is understood that Developer will not be reimbursed for any expenses incurred or advanced which are not authorized by this Agreement or against which Developer is obligated to indemnify the Tribe pursuant to Section 8.4. The Tribe acknowledges that certain extraordinary compensation payable to key consultants may be necessary and/or desirable and that such compensation, subject to the sole approval of the Tribe, shall be payable by the Tribe and not the Developer. Unless the Tribe agrees to such payment, the Tribe's refusal to pay such key consultant shall not be deemed a breach of this Agreement.

**5.2 Development Fee.** As compensation for all of the services to be performed hereunder by Developer, the Tribe agrees to pay to Developer and Developer agrees to accept payment for the performance of its services under this Agreement, a developer's fee ("Development Fee") equal to four percent (4%) of total Project Costs, which Development Fee shall be earned monthly as such Project Costs are incurred, but shall be payable as follows: (i) the earned but unpaid Development Fees for the Project shall be paid from the proceeds upon closing of the Financing

for the Project and release of funds to the Tribe for such purposes, and (ii) thereafter if not fully paid, paid monthly from the proceeds of the Financing for the Project plus interest at the Project Interest Rate. The terms and provisions with respect to the payment of the Development Fee may not be amended without the prior written consent of Developer.

**5.3 Tribe Minimum Payment.** Anything to the contrary contained herein notwithstanding, from and after the date on which the Enterprise is open to the general public, the Tribe shall be entitled to a monthly payment equal to the lesser of (a) Available Cash Flow for the immediately preceding calendar month and (b) \$2,000,000 (such lesser amount being referred to herein as the "Tribe Minimum Payment"). Developer agrees that its right to receive repayment for Interim Advances is subordinated to the prior payment of the Tribe Minimum Payment, in accordance with the definition of "Priority Payment" and the terms of the Financial Services Engagement Letter.

**5.4 Subordination of Developer's Fees.**

(a) **Subordination.** Developer agrees to subordinate its Development Fee under Section 5.2 and its Additional Development Fee under Section 6.2 to the prior payment of any then due and owing Tribe Minimum Payment. If required under the Financing, Developer agrees to subordinate its Development Fee under Section 5.2 and its Additional Development Fee under Section 6.2 to the payment of regularly scheduled payments of interest and principal due under the Financings for the Project; provided that the Financing shall provide that the fees payable under Section 5.2 and Section 6.2 for the Project shall be payable in full when due hereunder and, provided, further, that Developer shall not, and shall not be required to subordinate its right to any fees to any refinancing of such Financing used originally to pay Project Costs. The Tribe acknowledges that Developer shall not, and shall not be required to subordinate its right to any fees to any other financing, loan or other obligation, except as set forth in Section 3(e) of the Financial Services Engagement Letter. In addition, in consideration of the Developer's agreement to subordinate its fees as provided above, the Tribe agrees that upon any refinancing or repayment of any Financing as to which Developer agreed to subordinate, the Tribe will grant a first-priority security interest in the revenues from the Project (less amounts due and payable to the Tribe with respect to the Tribe Minimum Payment) to Developer to secure Developer's right to fees and payments hereunder.

(b) **Deferred Fees.** In the event that the Development Fee or Additional Development Fee is, in accordance with the provisions of Section 5.4(a), not paid to Developer when due and payable (any such amounts being referred to herein as "Deferred Developer's Fees"), Developer shall be paid such Deferred Developer's Fees (with interest thereon as set forth herein) as a Priority Payment from the Available Cash Flow. All unpaid Deferred Developer's Fees shall accrue interest at the Project Interest Rate. All unpaid Deferred Developer's Fees shall be paid to Developer on a quarterly basis to the extent funds are available therefor as set forth above. Except as set forth herein, the Tribe shall promptly repay in full all Deferred Developer's Fees (with accrued interest as set forth above) upon termination of this Agreement or the Financial Services Engagement Letter for any reason.



**ARTICLE 6.  
FUTURE DEVELOPMENT**

**6.1 Project Expansion.** If during the term of this Agreement, the parties hereto elect to expand the casino facilities, replace the facilities developed as part of the Project with a larger facility and/or develop related structures to further enhance the Project, then the following provisions of this Agreement shall apply mutatis mutandis: Section 2.3, Section 2.4, Section 2.5, Section 2.6, Section 2.7, Section 3.1, Section 3.2, Section 3.3, Section 5.1(a), and Section 5.1(b).

**6.2 Project Developer's Fee.** As compensation for all of the services to be performed with respect to the expansion of the Project by Developer in accordance with section 6.1 above, the Tribe agrees to pay to Developer and Developer agrees to accept payment for the performance of its services under this Agreement, a developer's fee ("Additional Development Fee") equal to four percent (4%) of total Project Costs for such expansion, additional facilities and improvements, which Additional Development Fee shall be earned monthly as such Project Costs are incurred, but shall be payable as follows: (i) the earned but unpaid Additional Development Fee for the Project shall be paid from the proceeds of the Financing for the Project, and (ii) thereafter if not fully paid, paid monthly from the proceeds of the Financing for the Project plus interest at the Project Interest Rate. The terms and provisions with respect to the payment of the Additional Development Fee may not be amended without the prior written consent of Developer.

**ARTICLE 7.  
TRIBAL TAXES; COMPLIANCE WITH TRIBAL LAW;  
AMENDMENTS TO TRIBAL GAMING ORDINANCE;  
OTHER TRIBAL ORDINANCES**

**7.1 Tribal Taxes.** The Tribe warrants and agrees that neither it nor any agent, agency, Affiliate or representative of the Tribe will impose any taxes, fees, assessments, or other charges of any nature whatsoever on payments of any kind to Developer or to any lender furnishing financing for the Project or for the operation of the Enterprise, or on the revenues therefrom or on the Development Fees as described in Section 5.2, Financing Fees or other fees due and payable to Developer hereunder or to Advisor under the Financial Services Engagement Letter; provided, however, the Tribe may assess against the Gaming enterprise license fees reflecting direct, actual and reasonable regulatory costs incurred by the Tribe. The Tribe further warrants and agrees that neither it nor any agent, agency, Affiliate or representative of the Tribe will impose any taxes, fees, assessments or other charges of any nature whatsoever on the salaries or benefits, or dividends or distributions paid to, any of Developer's managers, partners, members, stockholders, officers, directors, or employees or affiliates, or any of the employees of the Enterprise or any contractors, subcontractors or consultants engaged pursuant to this Agreement. If any such tax, fee, assessment or other charge not reflecting direct, actual and reasonable regulatory costs incurred by the Tribe is in fact levied, imposed, or collected, the Tribe shall reimburse Developer or the affected managers, partners, members, stockholders, officers, directors, employees or affiliates or any contractors, subcontractors or consultants, as applicable, for the full value and dollar for dollar of such tax, fee, assessment or other charge.

**7.2 Compliance with Tribal Law.** Developer shall comply in all material respects with all present and future statutes, regulations and ordinances of the Tribe, provided that, except as required by state or federal law, and subject to the provisions of Section 7.5 the Tribe shall take no action and adopt no statute or ordinance that would (a) increase Developer's obligations hereunder; (b) result in a reduction in the amount of the Development Fees, Financing Fees, or other fees or reimbursement or other amounts payable to Developer hereunder or to Advisor under the Financial Services Engagement Letter absent any such statute, regulation or ordinance; or (c) prejudice or adversely affect Developer's rights under this Agreement or that would violate the Indian Civil Rights Act (25 U.S.C. §§ 1301-1302).

**7.3 Tribe's Amendments to Tribal Gaming Ordinance.** The Tribe covenants that any amendments made to any Tribal Ordinance applicable to the Enterprise or Developer will be a legitimate effort to ensure that the Ordinance complies with applicable law and that Gaming and other operations are conducted in a manner that adequately protects the environment, the public health and safety, or the integrity of the Enterprise. Subject to the provisions of Section 7.5, in the event the Tribe shall adopt an amendment to one or more Tribal Ordinances that results in (a) an increase of Developer's obligations hereunder; (b) a reduction in the amount of the Development Fee or reimbursement of other amounts payable to Developer hereunder or to Advisor under the Financial Services Engagement Letter; or (c) a material adverse effect on Developer's rights under this Agreement, the Financial Services Engagement Letter, or any other document executed by the parties related thereto, the Tribe shall compensate the Developer for any actual costs or losses associated with (a), (b), or (c) above. The Tribe shall give Developer notice and a copy of the full text of any proposed amendment to the Tribal Ordinance at least thirty (30) days before any such amendment is considered by the Tribe, but failure to give such notice shall not affect the validity or enforceability of such amendment.

**7.4 Developer's Assistance in Obtaining Permits and Authorizations.**

(a) The Developer agrees that it will use commercially reasonable efforts to assist and support Tribe in obtaining any necessary federal, state, county or local application, registration, permit, authorization, filing, or approval required in connection with the Development of the Property, including, without limitation, in connection with sewer and utilities, traffic planning, an environmental impact assessment or infrastructure improvements, and ingress and egress to and from the Property (the "Non-Tribal Governmental Approvals").

(b) Developer shall have the right to apply for and obtain, on behalf of the Tribe, and after authorization by the Tribe, which authorization shall not be unreasonably withheld, all Non-Tribal Governmental Approvals.

(c) The Developer and Tribe will consult to determine the government-to-government agreements prior to applying for and obtaining permits and authorization and such government-to-government authorizations and agreements shall be the responsibility of the Tribe with the assistance of the Developer.

**7.5 Tribal Ordinances Related to Permits and Authorizations.** The Tribe agrees that it will not pass any Tribal Ordinance requiring any license or permit of Developer, the Architect, the General Contractor or any other Professional, or in connection with the Development or



construction of the Enterprise, except that the Tribe may pass reasonable health, building and safety ordinances that are no more onerous, and would not increase the expense of the Project to an extent greater, than the comparable health and safety regulation or law that would be in effect if the Property was not land held in trust by the United States for the Tribe. This provision shall not serve to negate the need for the Developer, Architect, General Contractor, Professionals and others to comply with any Tribal Ordinances, rules, codes or regulations which are in existence as of the Effective Date and are attached hereto as Exhibit B; nor shall this provision serve to abrogate the same. Provided that, the Tribe may require reasonable background checks or other investigations necessary to comply with gaming or procurement requirements of the Tribe (subject to the provisions of this Agreement and the Financial Services Engagement Letter) or federal agencies, or with financing requirements.

## **ARTICLE 8. DEFAULT, TERMINATION, DISPUTES, AND INDEMNIFICATION**

### **8.1 Termination**

(a) This Agreement shall terminate if there shall not have been a Compact permitting Gaming on the Property by the end of the Pre-Development Phase. If said Compact is executed and delivered, or otherwise becomes effective, before the end of the Pre-Development Phase, then this Agreement shall terminate on the seventh (7<sup>th</sup>) anniversary of the opening of the Enterprise or upon such earlier date by action taken or authorized by the Tribe or by the Developer as follows:

(i) By mutual written consent of the Tribe (by action of the Tribe on the part of the Tribe) and Developer;

(ii) By Developer for any material breach or the failure to perform any material duty or obligation by the Tribe (A) under this Agreement or (B) under the Financial Services Engagement Letter, in each case, within sixty days after the Tribe's receipt of any notice from Developer of the Tribe's material breach and default and its failure to cure such default; provided that, if the Tribe has commenced to cure such default within such sixty day period and such default is not reasonably susceptible of cure within such sixty day period, then the Tribe shall have an additional period of time to cure such default so long as the Tribe is diligently and continuously pursuing such cure;

(iii) By the Tribe: (A) for any material breach or the failure to perform any material duty or obligation by Developer (1) under this Agreement; or (2) under the Financial Services Engagement Letter, in each case within sixty days after Developer's receipt of any notice from the Tribe of Developer's material breach and default and its failure to cure such default; provided that, if Developer has commenced to cure such default within such sixty day period and such default is not reasonably susceptible of cure within such sixty day period, then Developer shall have an additional period of time to cure such default so long as Developer is diligently and continuously pursuing such cure; or (B) in the event that Developer, any Affiliate of Developer, or any Person in control of an Affiliate of Developer shall be charged (by criminal complaint) with, indicted for or

convicted of, or shall enter a plea of guilty or nolo contendere for, any fraud, gaming related offense, or crime involving moral turpitude or punishable by imprisonment;

(iv) By either the Tribe or Developer if any federal or state entity (but not a Tribal entity) shall have issued an order, decree or ruling or taken any other action with respect to the Project (which order, decree, ruling or other action the parties shall have used their commercially reasonable efforts to resist, resolve or lift, as applicable) permanently restraining, enjoining or otherwise prohibiting the material components of the transactions contemplated by this Agreement or prohibiting conduct of all Gaming on the Property, and such order, decree, ruling or other action shall have become final and nonappealable;

(v) By Developer during the Pre-Financing Phase, upon written notice to the Tribe if the Developer (A) concludes in good faith that the Project is not commercially feasible or practicable from a development or operational point of view, or (B) concludes in good faith that the Project is not susceptible of producing adequate financial returns to Developer or to parties providing Financing, or (C) for any reason deems it advisable to submit this Agreement or the Financial Services Engagement Letter to the BIA or the NIGC for assurances that this Agreement or the Financial Services Engagement Letter does not require the consent or approval of the BIA or the NIGC and Developer does not receive assurances satisfactory to Developer within a reasonable period of time thereafter;

(vi) By the Tribe, in the event; (A) Developer (1) becomes insolvent; (2) applies for, consents to, or acquiesces in the appointment of a trustee, custodian or receiver for Developer or any of its property; (3) admits in writing that it is unable to pay its debts generally; (4) files a petition in any bankruptcy, reorganization, debt arrangement or other proceeding under any bankruptcy or insolvency law, or any dissolution or liquidation proceeding; or (5) makes an assignment for the benefit of creditors; (B) there is an order, decree or judgment approving a petition filed against Developer seeking a reorganization, arrangement, composition or similar relief under federal bankruptcy law or other applicable law of the United States, or any state thereof, or there is an appointment, without the consent of Developer, of a receiver, trustee or liquidator of all or a substantial part of the property of Developer, and same shall not be vacated, or shall not be stayed on appeal or otherwise, or shall not have otherwise ceased to continue in effect, within ninety (90) days of such filing; or (C) a final, non-appealable judgment or decree for money damages or for a fine or penalty is entered against Developer and same is not paid and discharged or stayed within sixty (60) days thereafter and, when aggregated with all other such judgments or decrees that have remained unpaid and undischarged or unstayed for such period, is in excess of \$1,000,000; and in any of such events, Developer is unable to perform its obligations hereunder.

(vii) By the Tribe, in the event the Tribe elects, in its discretion, that it does not desire to pursue the Pre Development Goals and the development of a gaming facility in the State of New York.

(viii) By the Tribe, in the event Developer executes an agreement, in violation of this Agreement, with another Native American tribe to develop a gaming facility in Sullivan and/or Ulster Counties, New York.

(b) The effect of such termination shall be as follows:

(i) In the event of termination of this Agreement pursuant to Section 8.1(a)(i), then in addition to such other payments and obligations as the Tribe and Developer may agree to make to each other, the Tribe shall upon the effective date of such termination reimburse Developer for any Interim Advances and for any Development Fees earned but unpaid as of the date of termination.

(ii) In the event of termination of this Agreement by the Tribe pursuant to Section 8.1(a)(iii), 8.1 (a)(iv), or 8.1(a)(vi), or by the Developer pursuant to Section 8.1(a)(v), this Agreement shall become null and void and there shall be further no liability or obligation on the part of the Tribe or Developer or their respective officers or members, provided (A) if the Tribe terminated this Agreement after the Pre-Financing Phase pursuant to Section 8.1(a)(iii)(A), the Tribe shall be obligated to repay Interim Advances as set forth in Section 7 of the Financial Services Engagement Letter.

(iii) In the event that this Agreement is terminated by the Tribe pursuant to Section 8.1(a)(vii), this Agreement shall forthwith become null and void and there shall be no liability or obligation on the part of the Tribe or Developer or their respective officers and members hereunder, except the Tribe shall be obligated to repay Interim Advances pursuant to Section 7 of the Financial Services Engagement Letter and the Tribe upon the effective date of such termination shall pay the Developer a sum equal to Ten Million Dollars (\$10,000,000) (such Ten Million Dollars amount being referred to herein as the “Cash Fee”); provided, however, that if within 24 months of any termination, the Tribe Develops or appoints or enters into any agreement with any Successor Developer that contemplates a Development at the Property that is similar to the Project contemplated hereby or involves Gaming operations, the Tribe shall immediately pay to Developer an additional amount equal to the difference between the “Present Value of the Financial Services Fee” (as set forth below) and the Cash Fee previously paid. The “Present Value of the Financial Services Fee” shall be the discounted present value of 15% of the projected Available Cash Flow of the facilities proposed to be developed by the Tribe and/or Successor Developer, for the 180 month period after Gaming is first projected to be conducted in such facilities, calculated using GAAP and the applicable terms in this Agreement, and using the financial projections last used to obtain or attempt to obtain financing for such facilities and using a discount rate equal to the weighted average interest rate of the financings in such projections. The parties hereto agree that the Cash Fee contemplated hereby is a reasonable estimate of the damages likely to be suffered by Developer in connection with such a termination, that such Cash Fee constitutes liquidated damages and not a penalty and such Cash Fee when paid will be in exchange for full relief and discharge of any and all obligations of the Tribe for any breach by the Tribe of its covenants and agreements set forth in this Agreement.

(iv) In the event of a termination of this Agreement after the Pre-Financing Phase by the Tribe pursuant to Section 8.1(a)(viii), this Agreement shall become null and void and there shall be no liability or obligation on the part of the Tribe or Developer or their respective officers and members hereunder, except Developer, upon the effective date of such termination, shall pay the Tribe Ten Million Dollars (\$10,000,000). In the event of a termination of this Agreement during the Pre-Financing Phase by the Tribe pursuant to Section 8.1(a)(viii), this Agreement shall become null and void and there shall be no liability or obligation on the part of the Tribe or Developer or their respective officers and members hereunder, except Developer, on the effective date of such termination shall pay the Tribe an amount equal to the discounted present value of 15% of the projected available cash flow of the facilities proposed to be developed by Developer and such other Native American tribe, for the 180-month period after gaming is first projected to be conducted at such facilities. Available cash flow of such other Native American tribe's facilities shall be calculated using: GAAP and the terms in this Agreement that are applicable to "Available Cash Flow" hereunder (and references to the Tribe in such terms shall be deemed to be references to such other Native American Tribe); the financial projects last used to obtain or attempt to obtain financing for such facilities; and a discount rate equal to the weighted average interested rate of the financings in such projections. The parties hereto agree that the payment provided for in this Section 8.1(b)(iv) is a reasonable estimate of the damages likely to be suffered by the Tribe in connection with such termination, that such payment constitutes liquidated damages and not a penalty and such payment when made will be in exchange for full relief and discharge of any and all obligations of Developer for any breach by Developer of its covenants and agreements set forth in this Agreement.

(v) In the event this Agreement is terminated during the Pre-Financing Phase by the Developer pursuant to Section 8.1(a)(ii), this Agreement shall become null and void and there shall be no liability or obligation on the part of the Tribe or Developer or their respective officers and members hereunder, except the Tribe shall be obligated to repay Interim Advances pursuant to the provisions of Section 7 of the Financial Services Engagement Letter, and the Tribe upon the effective date of such termination shall pay Developer any Development Fee earned by unpaid and shall pay Developer the Cash Fee. In the event this Agreement is germinated after the Pre-Financing Phase by the Developer pursuant to Section 8.1(a)(ii), this Agreement shall become null and void and there shall be no liability or obligation on the part of the Tribe or Developer or their respective officers and members hereunder, except the Tribe shall be obligated to repay Interim Advances and to pay the Financial Advisory Fee pursuant to the provisions of Section 2 of the Financial Services Engagement Letter, and the Tribe upon the effective date of such termination shall pay Developer any Development Fee earned by unpaid. The parties hereto agree that the payment provided for in this Section 8.1(b)(v) is a reasonable estimate of the damages likely to be suffered by Developer in connection with such a termination, that such payment constitutes liquidated damages and not a penalty and such payment when made will be in exchange for full relief and discharge of any and all obligations of the Tribe for any breach by the Tribe of its covenants and agreements set forth in this Agreement.



(vi) In the event that this Agreement is terminated by the Tribe pursuant to Section 8.1(a)(ix), this Agreement shall forthwith become null and void and there shall be no liability or obligation on the part of the Tribe or Developer or their respective officers and members hereunder, except the Tribe shall be obligated to repay Interim Advances pursuant to the provisions of Section 7 of the Financial Services Engagement Letter and to pay the Cash Fee; provided however, that if such termination occurs after March 30, 2003, the Tribe shall additionally be obligated to pay Developer a sum equal to the amount that was reasonably projected to have been earned by Developer as the Development Fee and the Financing Fee under this Agreement and the Financial Services Engagement Letter, respectively, had the Project been developed by Developer; and provided further, that if within 24 months of such termination, the Tribe Develops or appoints or enters into any agreement with any governmental body or Successor Developer that contemplates a Development in Sullivan or Ulster Counties, New York, that is similar to the Project contemplated hereby or involves Gaming operations and is to be owned and/or controlled by the Tribe, the Tribe shall immediately pay to Developer an additional amount equal to the difference between the "Present Value of the Financial Services Fee" (as defined below) and the Cash Fee previously paid. The "Present Value of the Financial Services Fee" shall be the discounted present value of 15% of the projected Available Cash Flow of the facilities proposed to be developed by the Tribe and/or Successor Developer, for the 180 month period after Gaming is first projected to be conducted at such facilities, calculated using GAAP and the applicable terms of this Agreement, using the financial projections last used to obtain or attempt to obtain financing for such facilities and using a discount rate equal to the weighted average interest rate of the financing in such projections. The parties hereto agree that the Cash Fee contemplated hereby (and, if applicable, the additional payments provided for above) is a reasonable estimate of the damages likely to be suffered by Developer in connection with such a termination, that such Cash Fee (and, if applicable, the additional payments provided for above) constitutes liquidated damages and not a penalty and such Cash Fee (and, if applicable, the additional payment provided for above) when paid will be in exchange for full relief and discharge of any and all obligations of the Tribe for any breach by the Tribe of its covenants and agreements set forth in this Agreement.

(vii) Anything contained in this agreement to the contrary notwithstanding, the Tribe shall have no obligation to pay any Interim Advances if this Agreement is terminated during the Pre-Financing Phase pursuant to Section 8.1(a)(iii), (iv), (v), (vi), or (viii).

## **8.2 Waiver of Sovereign Immunity; Disputes and Remedies; Arbitration.**

### **(a) Limited Waiver Of Sovereign Immunity.**

(i) Retention of Sovereign Immunity. By executing this Agreement, the Tribe does not waive, limit or modify its sovereign immunity from unconsented suit or judicial litigation, except as provided in this Section 8.2.

(ii) Scope of Waiver. Subject to the provisions of this Section 8.2, the Tribe hereby expressly and irrevocably grants to Developer and other Persons within the scope

of this Section 8.2, a limited waiver of its sovereign immunity from unconsented suit or judicial litigation and consents to suit in accordance with this Section 8.2.

(iii) Procedural Requirements. The Tribe's limited waiver of its sovereign immunity as to unconsented suit or judicial litigation is effective if, and only if, each and every one of the following conditions is met:

(1) The claim is made by a party designated under subsection (iv) hereof, and not by any other Person, corporation, tribe or entity, whatsoever;

(2) The claim alleges a default or breach (in each case after applicable notice and cure, if any) by the Tribe of one or more of the specific obligations or duties expressly assumed by the Tribe under the terms of this Agreement;

(3) The claim seeks:

(A) some specific action, or discontinuance of some action, by the Tribe to bring the Tribe into full compliance with the duties and obligations expressly assumed by the Tribe under this Agreement; or

(B) money damages for noncompliance with the terms and provisions of this Agreement; provided, however, that the property, assets or funds specifically pledged and assigned to satisfy any judgment obtained against the Tribe under this Agreement shall be limited to the revenues from the Project and any successor businesses or enterprises.

(4) The claim is made in a detailed written statement to the Tribe, stating the specific action or discontinuance of action by the Tribe that would cure the alleged default, breach or non-performance, as the case may be, or the sum of money claimed to be due and owing from the Tribe, as applicable, to Developer by reason of such specific default, breach or non-performance, and the Tribe shall have sixty (60) calendar days to cure such default or breach or non-performance or to make such payment before judicial proceedings may be instituted, provided further that the requirements of Section 8.2(b) are first adhered to prior to initiating any judicial proceedings.

(5) Time Period. With respect to any claim authorized in this Section, initial suit, as authorized herein, shall be commenced within three years after the later of the date that the claim accrues or is discovered upon the exercise of due diligence, or such claim shall be forever barred. The waiver granted herein shall commence on the Effective Date and shall continue for three years following the date of the termination of this Agreement, except that the waiver shall remain effective for any proceedings then pending, and all appeals therefrom.

(iv) Recipient of Waiver. The recipients of the benefit of this waiver of sovereign immunity are limited to Developer, its members, its successors and assigns, and any and all Persons covered by the indemnification provisions hereof; as to such



latter persons, this waiver extends only to the enforcement of any rights to indemnification by the Tribe, and to no other actions or persons.

(v) Governing Law/Enforcement. Tribe consents to the jurisdiction of, to be sued in and to accept and be bound by any order or judgment of the United States District Court for the Southern District of New York or the Judicial Circuit Court in and for the County where the Property is located, and any federal or state court having appellate jurisdiction thereover, consistent with the terms and provisions of this Section 8.2. The Tribe and Developer agree that any dispute arising under the provisions of this Section 8.2 (a) shall be resolved by the United States District Court for the Southern District of New York or, if such United States District Court cannot hear or refuses to hear such dispute, by the Judicial Circuit Court for the Circuit in and for the County where the Property is located. If such Judicial Circuit Court cannot hear or refuses to hear such dispute, then such dispute shall be resolved by binding arbitration as set forth in Section 8.2(b)(iii). It is the parties' intention that the availability of arbitration shall not be a reason for the above-referenced courts to refuse jurisdiction over a dispute that arises under the provisions of this Section 8.2.

(A) Tribe hereby expressly and irrevocably waives:

(i) its rights to have any dispute, controversy, suit, action or proceeding arising under this Agreement heard in any other forum whether or not such forum now exists or is hereafter created including, without limitation, any Tribal court or other tribunal, forum, council or adjudicative body of the Tribe (each a "Tribal Forum");

(ii) any claim or right which it may possess to the exercise of jurisdiction by, any Tribal Forum, including, without limitation, any determination that any Tribal Forum has jurisdiction over any such dispute, controversy, suit, action or proceeding or jurisdiction to determine the scope of such Tribal Forum's jurisdiction;

(iii) any requirement which may exist for exhaustion of any remedies available in any Tribal Forum prior to the commencement of any dispute, controversy, suit, action or proceeding in any state or federal court even if any such Tribal Forum would have concurrent jurisdiction over any such dispute, controversy, suit, action or proceeding but for such waiver;

(iv) its sovereign immunity as to an action by Developer and its successors and assigns in the United States District Court for the Southern District of New York or the Judicial Circuit Court in and for the County where the Property is located, and in the federal or state courts having appellate jurisdiction thereover, seeking injunctive and/or declaratory relief against the Tribe based

upon an attempt by the Tribe to revoke its waiver of its sovereign immunity or other waivers granted under this Section 8.2; and

(v) its sovereign immunity from a judgment or order (including any appellate judgment or order) and post judgment proceedings supplemental thereto consistent with the terms and provisions of this Section, which is final because either the time for appeal thereof has expired or the judgment or the order is issued by a court having final appellate jurisdiction over the matter.

(B) Without in any way limiting the generality of the foregoing, the Tribe expressly authorizes any governmental authorities who have the right and duty under applicable law to take any action authorized or ordered by any court, including, without limitation, to take such action as entering onto the Property, to give effect to any judgment or order entered, subject to this Section 8.2.

(C) Assets Pledged to Satisfy Enforcement Proceedings. Except with respect to damages arising under the indemnification provisions of this Agreement up to an aggregate of Ten Million Dollars (\$10,000,000), and the termination provisions of this Agreement (such damages as it relates to the termination provisions herein shall be limited to an amount equal to the aggregate of the Cash Fee, Interim Advances, and any earned but unpaid Development and Financing Fees), the only assets, including lands which the United States holds in trust for the Tribe, which shall be available, and which are thus specifically pledged and assigned hereby, to satisfy any enforcement proceedings or judgment or post judgment supplemental proceedings, including, without limitation, execution upon judgment in connection with this Agreement shall be limited to revenues from the Property, the Project and any successor businesses and enterprises on the Property. Notwithstanding any provision of this Agreement or the Financial Services Engagement Letter to the contrary, the Tribe shall have one (1) year to satisfy any obligation arising under this Agreement or the Financial Services Engagement Letter, if, under this Agreement or the Financial Services Engagement Letter, recourse for such obligation may be had by Developer to any assets of the Tribe other than the revenues from the Property, the Project and any successor businesses and enterprises on the Property. Such one (1) year period shall commence on the date that such obligation would otherwise become due and owing under this Agreement or the Financial Services Engagement Letter.

(D) Limitation Upon Enforcement. Except with respect to damages arising under the indemnification provisions of this Agreement awarded against the Tribe, damages awarded against the Tribe shall be satisfied solely from assets specified in this Section and shall not

constitute a lien upon or be collectible from any other income or assets of the Tribe, except with the written consent of the Tribe.

(E) Expenses of Judicial Enforcement. Except as ordered by a court of competent jurisdiction, all parties shall bear their own costs, except that the prevailing party shall be reimbursed all attorneys' fees, in connection with any judicial proceedings or arbitration authorized under this Agreement. The parties expressly agree that this provision shall survive the termination, for any reason, or expiration of this Agreement.

(vi) Guaranty of Tribe. The Tribe covenants and agrees that the Tribe's limited waiver of sovereign immunity and other waivers contained in this Section 8.2 are irrevocable and the Tribe agrees not to revoke or limit, in whole or in part, the Tribe's limited waiver of sovereign immunity or other waivers contained in this Section 8.2. In addition to the foregoing, the Tribe covenants and agrees to prohibit each and every Tribal Forum (whether now or hereafter existing) from exercising jurisdiction over any dispute, controversy, suit, action or proceeding in connection with, relating to or arising under this Agreement and other agreements authorized by the Tribe with respect hereto. In the event that the Tribe (w) revokes, limits or attempts to revoke or limit, (x) takes any action which is inconsistent with the waivers granted in this Section 8.2, (y) fails to submit to the jurisdiction of the State or federal courts as provided herein, or (z) breaches its obligation to prohibit each Tribal Forum from exercising jurisdiction as aforesaid, the parties expressly recognize and agree that there remains no adequate remedy at law available to Developer, and that Developer will be irreparably injured. The Tribe hereby consents to the entry of appropriate injunctive relief, consistent with the terms and conditions of this Agreement. In any such event, Developer may immediately seek judicial injunctive relief as provided in this Section 8.2 without first complying with any of the prerequisites contained in this Section 8.2 and the Tribe consents to the entry of appropriate injunctive relief, consistent with the terms and conditions of this Agreement. Any action seeking injunctive relief under this Section 8.2 shall be brought in the United States District Court for the Southern District of New York or the Circuit Court for the Southern Judicial Circuit in and for the County where the Property is located, or any successor thereto, and the Tribe expressly consents to the jurisdiction of, and agrees to be bound by any order or judgment of such District Court or Circuit Court, and any federal or state Court with appellate jurisdiction thereover.

(b) Dispute Resolution.

(i) Exclusive. With the exception of disputes involving attempts to revoke or further limit the waiver of the tribal sovereign immunity granted hereunder, any disagreement or dispute between Developer and the Tribe as to the interpretation, enforcement or breach of this Agreement, or the parties' rights and obligations hereunder, shall be resolved pursuant to this Section 8.2(b).

(ii) Meet and Confer. Subject to the terms and provisions of this Agreement, any disagreement or dispute between the parties as to the interpretation, enforcement or breach of this Agreement, or the parties' rights or obligations thereunder, shall be

resolved whenever possible by meeting and conferring. Either party may request such a meeting by giving notice to the other. The notice provided for in this Section 8.2 shall specify a time and a location in the County where the Property is located for the requested meeting, provided, however, that the requested meeting shall not take place upon less than forty-eight (48) hours notice. The party requesting the meeting may commence litigation in either the United States District Court for the Southern District of New York or the Circuit Court for the Judicial Circuit in and for the County where the Property is located (or any successor thereto), pursuant to and in accordance with the provisions set forth above at any time after the scheduled time for the meeting, provided, however, that the party requesting the meeting may not commence litigation if such party failed to appear at the time and place set forth in the notice. If either court may hear the matter, the parties hereby agree that they prefer, and that they shall not oppose, federal court jurisdiction over any such matter. In the event the venues indicated above are improper or unavailable for any reason, then the parties shall cooperate, and not oppose efforts, to set the matter in the venues closest to those indicated. In addition, in the event that the Development Business Board or the Tribe and the Developer are unable to agree on a matter as to which a decision or business judgment is necessary for the completion of the Project and this Agreement provides that the agreement or consent of the Development Business Board is required for such decision or business judgment, the parties agree to resolve such decision or business judgment whenever possible by meeting and conferring. Either party may request such a meeting by giving notice to the other. The notice provided for in this Section 8.2 shall specify a time and a location in the County where the Property is located for the requested meeting, provided, however, that the requested meeting shall not take place upon less than forty-eight (48) hours notice. If, however, the parties are unable to reach a decision that is satisfactory to both parties, then either party may request that the matter be submitted to a binding arbitration.

(iii) Binding Arbitration.

(1) If, and only if, a dispute arises between the parties over a matter for which the Tribe has provided a limited waiver of immunity under this Agreement (the "Dispute"), and that, for legal reasons, the Dispute cannot be heard (or is refused to be heard) by the United States District Court or the New York State Judicial Circuit Court, then either party may request binding arbitration of a Dispute in accordance with the procedures set forth herein and the Tribe hereby expressly, unequivocally waives its sovereign immunity with respect thereto as otherwise provided in this Section 8.2. To initiate binding arbitration of a Dispute, a party shall notify the other party in writing. The Dispute shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment on the award rendered by the arbitrator may be entered in any court. One arbitrator shall preside and shall be selected by the American Arbitration Association. Nothing contained herein shall be construed as requiring arbitration to determine whether there has been a breach or a default hereunder or any consequences thereof.

(2) Either party, before or during any arbitration, may apply to a court having jurisdiction for a temporary restraining order or preliminary injunction

where such relief is necessary to protect its interests pending completion of the dispute resolution proceedings.

(3) Neither party nor the arbitrator may disclose the existence or results of any arbitration hereunder, which shall be considered confidential to the parties, without the prior written consent of both parties except:

(A) with the express prior written consent of the other party, which consent shall not be unreasonably withheld;

(B) as required by applicable law, the rules of any relevant stock exchange or requirement of any lender, by order or decree of a court or other governmental authority having jurisdiction over such party, or in connection with such party's enforcement of any rights it may have at law or in equity;

(C) on a "need to know" basis to persons within or outside such party's organization, such as attorneys, accountants, bankers, financial advisors and other consultants; or

(D) after such information has become publicly available without breach of this Agreement.

(4) The arbitrator may not disclose the existence or results of any arbitration hereunder without the prior written consent of both parties, except as required by applicable law, or on a "need to know" basis to persons within the arbitrator's organization, or after such information has become publicly available without breach of this provision.

(5) In the event of arbitration, the prevailing party shall be entitled to all of its costs, including reasonable attorney's fees, from the nonprevailing party.

(6) The arbitration shall take place at a location in an agreed City in New York or such other place as the parties may jointly agree. The parties and the arbitrators shall maintain strict confidentiality with respect to the arbitration, except for as provided above. The arbitrator shall render an award within forty-five (45) days from the conclusion of the arbitration.

(7) The decision of the arbitrator shall be final and binding and enforced with the same force and effect as a decree of a court having competent jurisdiction. For this purpose, should the losing party in any arbitration proceeding pursuant to this Section 8.2 refuse to abide by the decision of the arbitrator, the prevailing party may apply to the United States District Court or the New York State Judicial Circuit Court to compel enforcement of the arbitrator's award resulting from binding arbitration and each party hereto consents to the jurisdiction of each such court for this purpose. If either court may hear the matter, the parties hereby state that they prefer, and shall not oppose, federal court. The Tribe hereby expressly and irrevocably waives its sovereign immunity



with respect to the entry of judgment on, and enforcement of, such award by such courts.

(c) **Litigation Assistance.** Tribe agrees to provide necessary assistance to Advisor (e.g. assistance in responding to subpoenas, making available appropriate personnel, providing reasonably requested documentation concerning the Enterprise) in the event that Advisor is a plaintiff or defendant in any litigation or proceeding arising out of or in connection with the Enterprise without waiving the sovereign immunity of the Tribe.

**8.3 Defense.** Except for disputes between the Tribe and Developer, Developer shall bring and/or defend and/or settle any claim or legal action brought against Developer, and the Tribe, to the extent requested by the Tribe, in connection with or arising in connection with the construction and development of the Project; provided, however, that all costs associated with such defense of the Tribe shall be borne by the Tribe and any such costs paid by Developer shall be reimbursed in accordance with Section 5.1 unless Developer is obligated to indemnify the Tribe in respect of such claim or legal action pursuant to Section 8.4. Developer will be indemnified for the costs it incurs in its own defense, to the extent that it can be indemnified, in accordance with the provisions of Section 8.4. Developer shall, when requested by the Tribe to defend the Tribe, at the Tribe's expense, retain and supervise legal counsel, accountants and other such professionals, consultants and specialists as Developer deems appropriate to defend and/or settle any such claim or cause of action. The Development Business Board shall supervise any legal action or lawsuit that poses a substantial risk to the development, construction or operation of the Project with notice to, and appropriate consultation with the Tribe. Except as otherwise expressly stated herein, nothing contained herein is a grant to Developer of the right to waive the sovereign immunity of the Tribe.

**8.4 Indemnity.**

(a) The Tribe shall indemnify Developer, and any member, employee or officer of the Developer, and any Affiliate of Developer, and their respective members, officers, directors, agents, affiliates and employees against and hold them harmless from any claims, liability, damages, costs and expenses (including reasonable attorneys' fees and expenses) sustained or incurred by them, or any of them, arising directly or indirectly, in whole or in part, with respect to any liability arising from Developer's relationship with the Property and/or the Project pursuant to this Agreement or any action or omission by Developer within the scope of its duties or authority hereunder, unless such claim, liability, damage, cost or expense was caused by the gross negligence, willful misconduct, or fraud of Developer or such Affiliate or any of their shareholders, members, officers, directors, agents, affiliates or employees.

(b) Developer shall indemnify the Tribe and its members, officers, agents, Affiliates and employees against and hold them harmless from any claims, liability, damages, costs and expenses (including reasonable attorneys' fees and expenses) sustained or incurred by them or any of them, to the extent arising directly or indirectly, in whole or in part, out of the gross negligence, willful misconduct or fraud of Developer or any of its shareholders, officers, directors, agents, affiliates or employees, in connection with this Agreement or Developer's work or services hereunder.

(c) Notwithstanding the above, neither party shall have a right of indemnification with respect to any fines or penalties that may be imposed by any federal agency should this Agreement, the Financial Services Engagement Letter, or such other agreement that the parties may enter into relevant to the Project or Property, be determined to be a management contract by the NIGC, or any successor agency, under IGRA.

**8.5 Limitation of Liability.** Neither the Tribe nor any officer, officeholder, employee, agent, representative or member of the Tribe, as such, shall have any personal liability for obligations of the Tribe under this Agreement or for any claim based on, in respect of, or by reason of, such obligations or their creation. The Tribe also acknowledges and agrees that no member, nor any officer, office holder, employee, agent, representative, manager or member of any such member of Developer shall have any personal liability for the obligations of Developer under this Agreement or for any claim based on, in respect of, or by reason of, such obligations or their creation.

**8.6 Tribe's Rights upon Developer's Default or Breach.** Neither the providing for a specific remedy or method of calculating damages for the Developer, without a corresponding right or remedy for the Tribe, nor any other provision of this Agreement, shall be deemed to abrogate any right that the Tribe may have to pursue any claim, either at law or in equity, that the Tribe may have against the Developer for breach of this Agreement or the failure of the Developer to perform any duty or obligation owed Tribe with respect to the Project; provided that the Tribe first complies with the requirements of Section 8.2.

## **ARTICLE 9. RIGHT OF FIRST REFUSAL**

### **9.1 Right of First Refusal.**

(a) The Tribe and Developer agree that during the full Term hereof and for 48 months after the earlier termination hereof, at any time, and from time to time during such periods (in either event, the "ROFR Period"), neither the Tribe, on the one hand, nor Developer and/or an Affiliate of Developer, on the other hand, shall enter into an Alternate Transaction (hereinafter defined) with any third party unless the other party has been given a right of first refusal (a "ROFR"), in accordance with the procedures outlined below, to enter into such transaction.

**9.2 Enforcement.** If at any time during the ROFR Period, the Tribe, or Developer and/or an Affiliate of Developer, receives from a third party a proposal, offer, submission or inquiry for an Alternate Transaction which the Tribe, or Developer and/or an Affiliate of Developer, as the case may be (the "Offering Party"), in good faith, intends to pursue, the Offering Party shall send the other party (the "Receiving Party") notice of same together with the terms and provisions thereof (the "ROFR Notice") and Receiving Party shall have a period of sixty (60) days thereafter to elect to enter into the Alternate Transaction with the Offering Party on the same terms as those set forth in the ROFR Notice (the "Offer Period"). If Receiving Party desires to enter into the Alternate Transaction, then Receiving Party shall deliver written notice to such effect (the "Acceptance Notice") within the Offer Period. The Acceptance Notice shall set forth the date for entering into documents and agreements providing for the Alternate Transaction (the "Development Agreements"), which shall be no earlier than thirty (30) days and

no later than ninety (90) days after Receiving Party delivers the Acceptance Notice. The actual date is referred to as the “Closing Date“. On the Closing Date, the parties hereto shall execute, acknowledge and deliver to each other the Development Agreements. If Receiving Party shall not exercise its right to enter into the Alternate Transaction described in the ROFR Notice within the Offer Period, said ROFR shall cease to exist with respect to such Alternate Transaction and the Offering Party shall be free to pursue such Alternate Transaction with such third party on the terms set forth in the ROFR Notice. In the event the terms of the Alternate Transaction subsequently change in any respect from the terms set forth in the ROFR Notice previously sent to Receiving Party, such revised terms shall be deemed a different Alternate Transaction and Receiving Party shall have a new ROFR with respect to such Alternate Transaction, in accordance with the terms of this Section. Receiving Party’s failure to exercise its ROFR with respect to any Alternate Transaction shall have no effect on Receiving Party’s ROFR with respect to any other Alternate Transaction proposed during the ROFR period.

**9.3 Alternate Transaction.** For purposes hereof, an “Alternate Transaction“ shall mean any development, operation, maintenance or management of a project including office building, retail and/or entertainment establishment, hotel, casino, or other multi-use facility, or any purchase, merger, consolidation, change in organizational form, spin-off, split-off, sale of equity interests, or other similar transaction, in, or within 15 miles of the borders of, Ulster County or Sullivan County in the State of New York.

## **ARTICLE 10. MISCELLANEOUS PROVISIONS**

**10.1 Government Savings Clause.** Each of the parties agrees to execute, deliver and, if necessary, record any and all additional instruments, certifications, amendments, modifications and other documents as may be required by the United States Department of the Interior, Bureau of Indian Affairs, the office of the Field Solicitor, the NIGC, or any other applicable statute, rule or regulation in order to effectuate, complete, perfect, continue or preserve the respective rights, obligations, liens and interests of the parties hereto to the fullest extent permitted by law or otherwise intended by this Agreement; provided, that any such additional instrument, certification, amendment, modification or other document shall not materially change the respective rights, remedies or obligations of the Tribe or Developer under this Agreement or any other agreement or document related hereto. In the event that any consent or approval is necessary to preserve the rights of any of the parties herein and such consent or approval is not obtained or is not obtainable, the parties agree to reform this Agreement to the extent necessary to preserve the economic benefits of this Agreement and to preserve the rights of all the parties hereunder without such consent or approval.

**10.2 Third Party Beneficiary.** This Agreement is exclusively for the benefit of the parties hereto and it may not be enforced by any party other than the parties to this Agreement and, solely for the purposes of Section 8.4, the parties named therein, and shall not give rise to liability to any third party other than as provided in Section 8.4 and the authorized successors and assigns of the parties hereto.



**10.6 No Waiver.** No consent or waiver, express or implied, by either party to any breach or default by the other party in the performance of any of the obligations or conditions of this Agreement or any related agreement shall be construed to be a consent to or waiver of any other breach or default by such party. Failure on the part of a party to complain of any act or failure to act by the other party, or failure to declare the other party in default, irrespective of how long such failure continues, shall not constitute a waiver of the rights of such party.

**10.7 Estoppel Certificate.** The Tribe agrees at any time and from time to time (as may be reasonable) upon not less than twenty (20) days' prior notice by Developer to execute, and may not be requested more than twice in any 12 month period, acknowledge and deliver to Developer a statement in writing certifying that (i) this Agreement is unmodified and in full force and effect (or if there shall have been modifications that the same is in full force and effect as modified and stating the modifications); (ii) the dates to which the Development Fee has been paid, (iii) stating whether or not to the best knowledge of the Tribe, after due inquiry, Developer is in default in the performance of any covenant, agreement or condition contained in this Agreement and to the best knowledge of the Tribe, after due inquiry no facts or circumstances exist that, with the passage of time or the giving of notice or both, would constitute a default under this Agreement (and, if so, specifying each such default of which the Tribe may have knowledge, after due inquiry), provided that no such certification shall prohibit the Tribe from asserting default in regards to actions that have occurred before the issuance of a requested certification of which the Tribe had no knowledge when the certification was issued; (iv) identification of the then-ascertainable dates relevant to this Agreement but not expressly set forth in the text of this Agreement; and (v) the Tribe is not, to the best of its knowledge, after due inquiry, entitled to any defenses, offsets, claims, counterclaims or rights or recoupment against its obligations under this Agreement, provided that, no such certification shall prohibit or otherwise waive defenses, offsets, claims, counterclaims or rights or recoupments in regards to actions that have occurred before the issuance of a requested certification of which the Tribe had no knowledge when the certification was issued. Such statement may be relied upon by a third party providing financing to Developer or a prospective third party which may provide financing to Developer.

**10.8 Governing Law.** This agreement shall be interpreted and construed in accordance with the internal laws of the State of New York without giving effect to the conflict of laws principles thereof.

**10.9 Successors and Assigns.** The benefits and obligations of this Agreement shall inure to and be binding upon the parties hereto and their respective permitted successors and assigns. All proposed assignees shall agree to be bound by the terms and conditions of this Agreement. Neither party may assign this Agreement or their rights and obligations hereunder without the prior written consent of the other, such consent not to be unreasonably withheld. No assignment authorized hereunder shall be effective until all applicable legal requirements are met.

**10.10 Article and Section Headings; Interpretation of Agreement.** Article and section headings contained in this Agreement are for ease of reference only and shall not affect the interpretational meaning of this Agreement. The canon of interpretation of agreements with Indians or tribes that provides that ambiguities in the agreement are to be interpreted in favor of the Indians or tribes shall not apply to this Agreement. The parties agree that the terms and conditions of this Agreement are the result of negotiations between the parties and that this



Agreement shall not be construed in favor of or against any party by reason of the extent to which any party or its professional advisors participated in the preparation of this Agreement.

**10.11 Parties in Interest.** This Agreement shall inure to the benefit of and be binding upon the parties, their respective successors, heirs, permitted assigns and legal representatives.

**10.12 Severability.** If any of the terms and provisions hereof shall be held invalid or unenforceable, such invalidity or unenforceability shall not affect any of the other terms or provisions hereof.

**10.13 Exhibits.** All exhibits described in this Agreement shall be deemed to be incorporated herein by reference and made a part of this Agreement.

**10.14 Entire Agreement.** This Agreement, and the Financial Services Engagement Letter, together with the exhibits thereto, constitute the entire agreement between Developer and the Tribe with respect to the development, construction and financing of the Project and supersedes all written or oral agreements, understandings, representations, negotiations and correspondence between the parties. This Agreement shall not be supplemented, amended or modified by any course of dealing, course of performance or uses or trade and may only be amended or modified by a written instrument duly executed by officers of the parties hereto.

**10.15 Counterparts.** This Agreement may be executed simultaneously in any number of counterparts. Each counterpart shall be deemed to be an original, and all such counterparts shall constitute one and the same instrument.

**10.16 Reasonableness; Duty of Good Faith.**

(a) Whenever the consent or approval of any party under this Agreement is required, such consent or approval shall not be unreasonably withheld, conditioned or delayed, unless specifically provided otherwise. Further, whenever any provision of this agreement requires the exercise of "reasonable" consent, judgment, efforts, or "commercially reasonable" efforts the standard for such reasonableness shall be conduct consistent with the actions of a prudent commercial business person or prudent commercial owner of a gaming facility substantially similar to those existing or as contemplated at the Enterprise.

(b) The parties agree that the fundamental purpose of this Agreement is for the Developer to develop the Project on the Property in accordance with the Approved Concept Program so that the Tribe will have an operating Enterprise. The parties each agree to deal with the other party in all matters under this Agreement in good faith with the goal of this fundamental purpose. Each party agrees to cooperate with the other party, not to frustrate or interfere with the other party's efforts to achieve this fundamental purpose and to use all commercially reasonable efforts towards achieving this fundamental purpose.

**10.17 Enforceability Opinion.** On the Effective Date, the Tribe shall deliver to Developer the legal opinion of the Tribe's counsel in the form attached hereto as Exhibit C.

**10.18 Other Relationships, Disclosure of Certain Transactions, Future Projects.** The Developer and its Affiliates shall not be restricted in its ability to enter into business

relationships with the Tribe's Business Committee members, Tribe members, employees, officers, directors, or others with relationships with the Tribe. The Developer and its Affiliates have other businesses and business investments. Nothing herein shall be deemed to prevent the Developer, its members, its principals or any affiliate from having any business relationship or investment in other gaming, hospitality or retail businesses without the Tribe or to enter into other investments with or without Tribal participation; provided that Developer will not develop any Competitive Facility without the written consent of the Tribe and provided Developer is in compliance with the requirements of Article 9. The Developer agrees that neither it nor any of its members or affiliates will enter into any business relationship or investment with an officer or executive of the Tribe, or any Tribe member, employee, or other Tribal member, or affiliate of any of the same, unless it first fully discloses, in writing to the Tribe, the details of such investment or business relationship and the Tribe provides its prior written consent to the investment or business relationship. Notwithstanding the foregoing, in consideration for the covenants and agreements contained herein and in order to assist the Tribe in attaining its goal of Tribal self-sufficiency, the parties agree, until such time that the Financial Services Engagement Letter expires or is earlier terminated and to the extent permitted by applicable law and agreements entered into prior to the Effective Date, to explore additional opportunities in real estate development and finance together so as to create additional potential sources of revenue for the Tribe and its members.

#### **10.19 Statute of Limitations.**

(a) The Tribe agrees that with respect to any claim or action that it may have against Developer under this Agreement, such claim or action shall be commenced within the later of three years after the claim or action accrues or is discovered upon the exercise of due diligence, or such claim is waived and released by the Tribe and shall be forever barred.

(b) Developer agrees that upon receipt of the final payment, and shall be required to so certify, that all claims of payment against the Tribe have been satisfied.

**10.20 Tribal Representative.** The Tribe shall designate a representative (or, in the case of the Development Business Board, four (4) representatives) who shall be authorized to transmit all of the Tribe's directions, consents, approvals, waivers or other acknowledgements under this Agreement on the part of the Tribe and Developer shall be entitled to rely on, and the Tribe agrees to be bound by, any direction, consent, approval, waiver or other acknowledgement given by such representative, unless prior to the time such direction, consent, approval, waiver or other acknowledgement is given, the Tribe gives written notice to Developer that such representative has been changed. The Developer shall not be required to rely on and may refuse to accept directions, consents, approvals, waivers or other acknowledgements from any other party, even if such party has apparent or actual authority for the Tribe. The Tribe, and only the Tribe, shall be entitled to change the Tribal representative at any time upon 5 days written notice to Developer, provided that the Tribe must appoint a replacement representative upon such removal of the prior representative or promptly in the event of death or disability of such representative. Developer may ask for, and receive, reasonable evidence of such change or appointment and shall be entitled to rely on such evidence provided to it. The Tribe hereby appoints William Gollnick as its initial representative under this Agreement.

**10.21 Confidentiality.** Except as required by applicable law, any information, plans and specifications or concepts related to the Development of the Project provided by Developer or provided by the Tribe or their respective agents and Affiliates pursuant to this Agreement (“Confidential Information“) may not be disclosed publicly in any manner by the receiving party without the other party’s prior written approval and will be treated as confidential, provided that information disclosed without the receiving party’s authority by its shareholders or members shall not be attributable to such party unless such party failed to take steps to make such shareholders or members aware of the confidentiality of the Confidential Information and to admonish such persons against such disclosure. Except as required by applicable law, any reference to Developer, the Tribe or any of their respective Affiliates may not be disclosed publicly in any manner without such party’s prior approval, and this Agreement and its contents will be treated by the Tribe and the Developer as confidential. In addition to the above exceptions, the Tribe or the Developer, as the case may be, may disclose any information deemed confidential hereunder (i) in order to comply with the rules of any relevant stock exchange or the requirement of any lender; (ii) in order to comply with any order or decree of a court or other governmental authority having jurisdiction over the party making the disclosure; (iii) on a “need to know” basis to persons within or outside such party, such as its attorneys, accountants, financial advisors and other consultants provided such recipients are made aware of and agree to be bound by the provisions of this Section; or (iv) after such information has become publicly available without breach of this Agreement.

**10.22 Force Majeure.** Developer and Tribe shall be excused for delays to the extent the same result from a Force Majeure Event. For purposes of this Section, “Force Majeure Event“ means an event that causes a delay in performance hereunder or affects any other term of this Agreement, due to (a) acts of God, (b) fire, (c) storms, hurricanes, tornadoes or other severe weather, (d) riot, (e) acts of the public enemy, (f) accident in shipping or transportation, (g) strikes, lockouts or other labor disputes, (h) failure by governmental authorities without justifiable cause to process permit applications or requests, upon due application therefor, within the time-frame pursuant to which such governmental authorities customarily process such applications or requests, but excluding delay to the extent caused by the party claiming to be affected thereby in requesting such permit, (i) the adoption or enactment of any law, statute, ordinance or regulation not in effect as of the Effective Date or adoption of any interpretation of any law, statute, ordinance or regulation not in effect as of the Effective Date (including by way of judicial decision) or any change in any law, statute, ordinance or regulation after the Effective Date or any change in interpretation of any law, statute, ordinance or regulation after the Effective Date (including by way of judicial decision) or (j) any other event that is beyond the reasonable control of the party affected thereby. Developer and the Tribe shall in good faith extend any construction schedule, opening date or any other applicable deadline for a reasonable period of time to take into account delay caused by any Force Majeure Event.

SIGNATURES COMMENCE ON FOLLOWING PAGE.

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement on the day and year first above written.

**The Oneida Tribe of Indians of Wisconsin**

By: 

**POWER PLANT ENTERTAINMENT NEW YORK, LLC**, a Delaware limited liability company


By:   
Joseph Weinberg  
Authorized Signatory

EXHIBIT A

PROPERTY DESCRIPTION

[See Attached.]



**EXHIBIT A**

ALL that tract or parcel of land situate in the Town of Mamakating and Village of Wurtsboro, County of Sullivan and State of New York, being more particularly bounded and described as follows:

BEGINNING at a monument found on the northerly bounds of County Road #172 (Taking Parcel #11B), said monument being on the easterly bounds of lands of The Wurtsboro Hills Sullivan County Camp Site Co., Inc., as shown on filed map #56 in the Sullivan County Clerk's Office and runs thence along the approximate northerly bounds of County Road #172 the following (7) courses and distances: 1.) S69"-51' E, 47.80 feet to a monument found; 2.) S44"-45' E, 214.05 feet to a monument found; 3.) S35"-21' E, 490.20 feet to a monument found; 4.) S10"-01' E, 262.00 feet; 5.) S39"-10' E, 116.70 feet to an iron pin set; 6.) S15"-46' E, 508.01 feet; and 7.) S11"-42' E, 226.64 feet to a point; thence N 43"-41' E leaving said road bounds and running along the westerly bounds of lands of Davis (D.L. 1644, P.427) 83.00 feet to an iron pin found; thence S57"-42' E continuing along the lands of Davis 356.24 feet to an iron pin set in the base of a twin dead 30-inch pine tree found; thence S27"-19' E, 262.33 feet to a blazed 48 inch 4 prong oak tree found on the southerly side of a stonewall; thence along the bounds of lands of Schultz (D.L. 1594, P. 462 and D.L. 2170, P.648) the following (5) courses and distances: 1.) S37"-35' E, 164.01 feet to a 30-inch dead oak tree; 2.) S36"-18' E, 283.50 feet to a capped iron pin found in a pile of stones; 3.) N45"-30' E, 100.95 feet to a capped iron pin found in a pile of stones; 4.) S58"-35' E, 321.03 feet to a point; and 5.) S50"-50' E, 34.40 feet to a point beneath an electric line; thence N26"-43' E, 486.53 feet and N28"-46' E, 1,285.13 feet along the center of said electric line evidencing the westerly bounds of lands of Hiller (D.L 1913, P. 321) and Hartill (D.L. 2325, P. 376) to an iron pin found; thence S3"-24' E crossing a 60.00 feet wide right of way 112.44 feet to an iron pin found in a pile of stones; thence N28"-13' E along the easterly bounds of said 60.00 feet wide right of way and continuing along lands of Hartill 238.11 feet to an iron pine found in a pile of stones on the southerly bounds of Willsie Valley Road (Town Road #63); thence N35"-54' W, 38.17 feet and N7"-15' W, 35.94 feet along the southerly bounds of said road to an iron pipe found at the base of a utility pole; thence S67"-08' W along the easterly bounds of lands of Stull (D.L. 1834, P.22) 101.63 feet to a 16-inch pine tree found; thence N11"-56' W along the southerly bounds of Stull 235.65 feet to a wood post found in a pile of stones; thence N73"-04' W along the southerly bounds of lands of Rothausser (D.L 1051, P.14) and Stampf (D.L. 1022, P.301) 2,619.49 feet to a stone on end found in a pile of stones; thence S40"-51' W along the easterly bounds of lands of the Wurtsboro Hills Sullivan County Camp Site Co., Inc. 279.97 feet to the point or place of beginning.

**CONTAINING** 84.99 Acres of land as surveyed by Robert T. Lounsbury, L.S., of Liberty, New York

**BEING** and intending to be the same premises conveyed to Upstate Land, LLC by deed dated <sup>August</sup> ~~April~~ 19, 2003 and recorded in Liber No. 2628 page 334 in the Sullivan County Clerk's Office.

**SUBJECT** to Electric Company, Telephone Company, and Public Highway Easements of record.

**ALSO SUBJECT** to a right of way 60.00 feet in width lying easterly of the above mentioned electric line and running southerly from Willsie Valley Road as described in D.L. 1904, P543.

## "Schedule A"

all  
THAT TRACT OR PARCEL OF LAND situate in the Town of Mamakating, County of Sullivan, State of New York and being a portion of the premises known as Blue Paradise as conveyed in a deed from Louis Kozakoff to Ralph Benson dated October 31st, 1969 and being more particularly described as follows:

Beginning in the center of the Sullivan County Highway, formerly state Route 17, at a point 632 feet southeasterly as measured along the said center of the county road from the easterly side of the bridge abutment directly under the center of said road and running thence through the Ralph Benson lands North 45°30' East 175 feet to a six inch oak tree blazed and marked by an iron pipe at the down hill base of the tree, said tree is standing just below an old haul road. Thence running South 56°45' East along the side hill 345 feet to a thirty inch diameter twin pine tree blazed and marked by an iron pipe at it's base; thence South 28°30' East 259 feet to a forty eight inch four pronged oak tree blazed and marked by a pipe at its lower base; thence down off the hill South 23° West through an eight inch tree, blazed, near the stream and on a total of 386 feet to the center of the said Sullivan County Highway, formerly Route 17; thence up along the center of the said highway the following bearings and distances: North 38°15' West 210 feet, North 32°30' West 248 feet and North 25° West 297 feet to the place of beginning.

Being the same premises conveyed from Margaret Ruggiero to Frank Davis and Catherine Davis in deed dated 5-3-93 and recorded in the Sullivan County Clerk's Office on 5-10-93 in Liber 1664 at page 427

EXHIBIT B

TRIBAL ORDINANCES

Chapter 57, Oneida Indian Preference Law (attached)

Chapter 200, Tribal Environmental Quality Review (attached)

**Chapter 57**  
**ONEIDA INDIAN PREFERENCE LAW**  
**Yukwat<sup>^</sup>nhas Ukwehu=w#Kayani<sup>^</sup>hsla**  
**Laws concerning the hiring of the Oneida People**

|        |  |       |                                  |
|--------|--|-------|----------------------------------|
| 57.1-1 | Purpose and Policy                     | 57.9  | Indian Preference in Contracting |
| 57.2-1 | Adoption, Amendment, Repeal            | 57.10 | Labor Unions                     |
| 57.3-1 | Definitions                            | 57.11 | Bidding                          |
| 57.4-1 | General                                | 57.12 | Retaliation                      |
| 57.5-1 | Certification of Indian Owned Business | 57.13 | Layoffs                          |
| 57.6-1 | Brokers, Agents                        | 57.14 | Violations of This Law           |
| 57.7-1 | Skills Bank                            |       |                                  |
| 57.8-1 | License Commission                     |       |                                  |

57.1-1. **Purpose And Policy.** The purpose of this law is:

- (a) to give Indians a greater participation in self-government and;
- (b) to further the government's trust obligation; and

57.1-2. The Oneida Tribe of Indians of Wisconsin has the inherent sovereign power to pass laws to implement and enforce the special rights and protections adopted by the legislated laws of the federal government on behalf of Indians. Such laws include, the United States laws authorizing Indian preference such as the 1964 Civil Rights Act, Executive Order 11246, the Indian Civil Rights Act of 1968, Title VII, 42 U.S.C.A. Sec. 2000e-2(I) and 25 U.S.C.A. Sec. 47.

57.1-3. The Oneida Tribe of Indians of Wisconsin believes it is important to establish an Indian Preference Department in order to use the aforementioned laws and powers to increase employment of Oneida Indian workers and Indian-owned businesses.

57.1-4. The Oneida Tribe of Indians of Wisconsin recognizes the need to maximize economic benefits derived by the increased economy on the Oneida Reservation and commits itself to undertaking reasonable efforts, through information monitoring and reporting, to insure that all businesses utilize the labor force of the Oneida Tribe of Indians of Wisconsin and other Indian Tribes.

57.1-5. The Oneida Tribe of Indians of Wisconsin recognizes the need to maximize economic benefits derived by the increased economy on the Oneida Reservation and desires to achieve this purpose by affording Indian-owned businesses the maximum opportunity to supply materials and services in the direct and indirect performance of all contracts.

**57.2-1. Adoption, Amendment, Repeal.** This Law is adopted by the Oneida Business Committee and is effective 30 calendar days from the date of adoption.

57.2-2. This Law may be amended pursuant to the procedures set out in the Oneida Administrative Procedures Act by the Oneida Business Committee or the Oneida General Tribal Council.

57.2-3. Should a provision of this law or the application thereof to any person or circumstances be held as invalid, such invalidity shall not affect other provisions of this Law which are considered to have legal force without the invalid portions.

57.2-4. All other Oneida laws, policies, regulations, rules, resolutions, motions and all other



similar actions which are inconsistent with this Law are hereby repealed unless specifically re-enacted after adoption of this Law. Such superseding action shall specifically include:

- (a) 4-30-85-A
- (b) 2-1-91-B
  
- (c) 5-19-93-B
- (d) 6-23-93-A
- (e) 6-15-94-D
- (f) 7-11-94-D

57.2-5. Adoption of this law does not waive the sovereign immunity of the Oneida Tribe of Wisconsin of Indians of Wisconsin.

57.2-8. Authority for implementing, monitoring, and enforcing this Indian Preference Law is delegated to the Indian Preference Department of the Oneida Compliance Division as well as the authority to create the appropriate regulations to implement and carry out the responsibilities set forth in this Law.

**57.3-1. Definitions.** This Article shall govern the definitions of words and phrases used within this Law. All words not defined herein shall be used in their ordinary and everyday sense.

57.3-2. "Agent" means one who acts relative to a fiduciary relationship to another, as, a person expressly authorized or implied to be authorized to represent a company in the transaction of business of the company.

57.3-3. "Appeals Commission" means the Oneida Appeals Commission.

57.3-4. "Broker" means an intermediary acting in the procurement of business for both parties; an independent contractor employed to negotiate business between a buyer and seller for compensation.

57.3-5. "Compliance Division" means that division within the Oneida tribal administration with the purpose of ensuring adherence to laws, ordinances, policies and procedures Oneida Tribe of Indians of Wisconsin.

57.3-6. "Indian Preference Department" means that department of the Compliance Division with the purpose of implementing, certifying and enforcing Indian preference laws of the Oneida Tribe of Indians of Wisconsin.

57.3-7. "Commission" means the License Commission which is the body empowered by the Oneida government to conduct hearings in disputed licensing and Indian preference matters and impose sanctions in matters of non-compliance with Indian preference laws.

57.3-8. "Core work crew" means the minimum amount of the trade contractor's management and/or trade skill employees, not including apprentices or trainees, who are essential to start up and continuing work on a project.

57.3-9 "Covered entity" means any employer employing two or more employees engaged in any aspect of business activity pursuant to a contract entered into with the Oneida Tribe.

57.3-10. "Employee" means any person employed for remuneration.

57.3-11. "Employer" means any person, partnership, corporation or other entity that employs, for

wages, two or more employees.

57.3-12. "Entity" means any person, Indian or non-Indian, sole proprietor, partnership, corporation, joint venture, franchise, governmental enterprise, or any other natural or artificial person or organization. The term "entity" is intended to be as broad and encompassing as possible to ensure the jurisdiction of the Oneida Indian Preference Law.

57.3-13. "Indian" means any enrolled member of a federally recognized Indian Tribe.

57.3-14. "Indian-owned Business" means a for-profit business which is majority owned, managed and 51% minimal share of the net profits distributed to Indians and is certified as Indian preference eligible by the Indian Preference Department. An Indian-owned business shall include, but is not limited to, a sole proprietorship, partnership, corporation, joint venture, or franchise.

57.3-15. "Key Employee" means one who is in a top supervisory position or who performs a critical function such that an employer would risk likely financial damage or loss if that task were assigned to a person unknown to the employer.

57.3-16. "Qualified Indian Trades Worker" means those skilled workers qualified to perform services for which the person is trained.

57.3-17. "Rider I" means the Rider to Construction Contracts, Qualified Indian Trades Worker Policy; Indian Owned Business Requirements Policy, resolution #BC-4-3-96-A and technical amendments in resolution #BC-5-22-96-A.

57.3-18. "Skills Bank" means a list of qualified Indian trades workers with qualifications and dates of availability and exclusive referral source under this Law, located within the Indian Preference Department.

57.3-19. "Oneida Tribe" means the Oneida Tribe of Indians of Wisconsin.

**57.4-1. General. Certification.** Issuance of a certificate under this Law does not convey any comment regarding the ability of a business or person to perform the work for which Indian preference certification was given. Approval and presentation of an Indian preference certification under this Law, confer only the recognition of, or ownership by, a person meeting the definition of an Indian owned business or qualified Indian trades worker within this Law and thus able to partake of Indian preference laws.

57.4-2. Application of Law. Indian preference as set out in this Law shall be applied to all contracts entered into by the Oneida Tribe. All businesses on or near the Oneida Reservation that have a contract with the Oneida Tribe must utilize the Skills Bank to obtain employees or the listing of certified businesses for subcontracting. All other businesses on or near the Oneida Reservation may utilize Indian preference for their employment and contract needs.

57.4-3. Certification. Certification for Indian preference shall be granted by the Indian Preference Department to those Indian-owned businesses, and qualified Indian trade workers who qualify in accordance with the Indian Preference criteria, which includes, but is not limited to, the requirements for the average qualifications of all persons and entities within a given employment or business field, taking into account the skill, abilities and experience required within a given classification. A one time waiver of these requirements may be granted by the Indian Preference Department according to the adopted regulations.

57.4-4. Applicants seeking certification as an Indian preference eligible entity, or a trades worker

seeking placement in the Skills Bank shall submit a completed application on a form provided by the Indian Preference Department.

57.4-5. Information received from an applicant for certification will be kept at the Indian Preference Department. An applicant's file information may be subject to audit for governmental purposes as used at a hearing as evidence in a disputed matter. With these exceptions, no information received will otherwise release to any person or agent without the written consent of the applicant except where obligated by tribal or federal law.

57.4-6. Certification of a qualified Indian trades worker as determined by the Indian Preference Department will include placing the applicant's name in the Skills Bank for referral by the Indian Preference Department.

57.4-7. The Indian Preference Department shall review the application and findings, interview principals of the entity, request additional information as appropriate, and then make a determination on whether certification should be granted.

57.4-8. Probationary Certification. An Indian-owned business or qualified Indian trades worker shall receive a probationary certification to be made final at the end of one year; or a longer period, not to exceed two years, if so determined by the Indian Preference Department for reasonable and just cause as identified and set out in regulations.

57.4-9. During the probationary period, the Indian Preference Department shall monitor the activities of the Indian-owned businesses or qualified Indian trades workers and shall have the right to request and receive such information and documents as deemed appropriate to ensure the Indian-owned business or qualified Indian trades worker is operating in a manner described in its certification application and as it relates to the Indian preference criteria.

57.4-10. At the end of the probationary period, the Indian Preference Department shall either

- (a) grant full certification;
- (b) continue the probationary period for up to six months; or
- (c) deny certification.

57.4-11. Decertification: Withdrawal or Suspension of Certification or Removal from the Skills Bank. After investigation, if the Indian Preference Department is satisfied that an Indian-owned business or qualified Indian trades worker, has violated or is in non-compliance with Indian preference laws, the Indian Preference Department shall notify a covered entity of removal of certification of a qualified Indian trades worker, withdraw or suspend the certification of the Indian-owned business or remove the qualified Indian trades worker's name from the Skills Bank.

57.4-12. The Indian Preference Department shall prepare a report consisting of an analysis and recommended disposition for the Commission which may include a report regarding noncompliance by a tribal employee or tribal department.

57.4-13. The Indian Preference Department shall notify the certified Indian-owned business or qualified Indian trades worker by registered mail that its certification is being examined specifying the alleged violations along with the grounds therefore. The Indian Preference Department may withhold the name of the complaining party if there is reason to believe such party may be subject to retaliation.

57.4-14. The Indian Preference Department shall seek to achieve an informal settlement of the alleged violations. If the Indian Preference Department is unable to do so, the Indian Preference



Department may temporarily withdraw certification for non-compliance with Indian preference laws. The temporary withdrawal of an entity's Indian preference certification by the Indian Preference Department may be for no longer than thirty days after which the certification shall be reinstated if no further decision has been made by the Commission. A formal notice of noncompliance or withdrawal of certification shall be issued, which shall also advise the Indian-owned business or qualified Indian trades worker of their right to be present at the hearing.

57.4-15. An Indian-owned business or qualified Indian trades worker that has had their certification withdrawn may not reapply for a period of one year.

57.4-16. If a certification has been denied or withdrawn, an Indian-owned business or a qualified Indian trades worker may appeal the decision to the Commission in writing within 30 days of receiving the notice of denial, or withdrawal of certification, stating with specificity why the Indian-owned business or qualified Indian trades worker is in compliance with the Indian preference laws, the procedural errors or errors in law, and how the finding, denial or withdrawal has harmed the appellant. Pursuant to the procedural process in the Oneida Administrative Procedures Act or as identified in regulations promulgated pursuant to this law, the Commission shall make a determination, in writing, regarding compliance or certification. This decision may be appealed to the Oneida Appeals Commission.

57.4-17. The Commission shall notify the Indian-owned business or qualified Indian trades worker of the decision by delivering by certified mail a written copy of the decision.

57.4-18. Employees of the Oneida Tribe that fail to comply with the requirement of this law will be given notice of their noncompliance and a reasonable time to cure. Of the preceding actions result in continued noncompliance with the Indian preference laws, the Indian Preference Department may file a complaint with the Commission for a decision and a penalty to be determined on a case by a case basis by the Commission.

**57.5-1. Certification of Indian-owned Business.** This Article shall identify criteria for the identification of Indian-owned businesses. The Indian Preference Department may set forth additional criteria within regulations to more clearly develop and define the criteria set forth herein.

57.5-. An applicant for Indian-owned business certification must provide proof of financial responsibility such as an adequate line of credit, contributions of sufficient working capital, bonding, or insurance.

57.5-3. An applicant for Indian-owned business certification must provide proof to the Indian Preference Department that it is a legitimate Indian-owned and controlled entity. The applicant must demonstrate that an Indian(s) owns and controls 51% or more of the entity. Such ownership shall be embodied in the entity's organizational documents, such as, but not limited to, the documents of incorporation, stock ownership, or partnership agreement. Ownership and control includes:

- (a) financial ownership; the Indian(s) owns 51% or more of the assets and equipment, will receive 51% or more of the entity's assets upon dissolution, and will receive 51% or more of the profits; and
- (b) control; the Indian's 51% or more ownership provides him or her with a majority of

voting rights or other decisional authority and that all decisions of the entity are to be made by a majority vote.

57.5-4. An Indian owner must be directly involved in the applicant's management. It is not required that the Indian owner(s) be the chief operating officer of the entity, however, at least one of the Indian owner(s) will have to be involved in the day-to-day operations of the entity on a full time basis and in a senior level position. Certification will not be granted to an entity where one or more of the Indian owners are not involved in the day-to-day operations of the business in the manner described above.

57.5-5. The Indian Preference Department shall set forth criteria in regulations which shall assist in identifying an Indian owner's involvement in the management of the business. Provided that, identification of management involvement does not indicate a determination or opinion regarding the activities of the entity.

57.5-6. Procedures for certification of an Indian-owned business will be pursuant to this Article and any additional criteria set forth by the Indian Preference Department in regulations promulgated to implement this law. This should include, but is not limited to the following:

- (a) An application for certification with the specific criteria information such as a Tribal enrollment card, proof of ownership, financial responsibility or insurance, etc., will be completed and submitted to the Indian Preference Department.
- (b) The applicant must sign and submit the appropriate Indian preference certification forms.
- (c) The Indian Preference Department will review the application and attachments and interview the applicant, and any request additional information.
- (d) The Indian Preference Department will makes its determination for certification or probationary certification within thirty days of receiving the application.
- (e) The applicant's name is entered into the Indian Preference Department's data-base and Certified Indian-Owned Business list, which is undated annually.
- (f) The certificate is sent to the applicant.
- (g) The applicant may request a hearing by the Commission if the Indian Preference Department denies or withdraws certification.
- (h) The Commission will conduct a hearing within ten (10) working days of receipt of the appeal.
- (i) The applicant may appeal the Commission's decision to the Oneida Appeals Commission.
- (j) The certification must be renewed yearly. Renewal notices will be sent out by the Indian Preference Department, however, the responsibility for renewal is upon the entity.

57.5-7. Certification of joint ventures will be limited to the extent of the Indian preference criteria relative to verification of one of the owner's status as an Indian, and proof of 51% ownership. A 50-50% certified joint venture will be given preference over non-Indian businesses only when no Indian-owned business is available.

57.5-8. If the Indian Preference Department has determined that the Indian-owned business is within Indian preference compliance, it may grant a new certification; or if the Indian Preference Department determines that the Indian-owned business shall be so notified and be given 60 days



to cure the non-compliance. The Indian Preference Department shall examine the application and evidence of subsequent compliance and make its decision to either grant probationary certification or withdraw the certificate. A copy of the decision of the Indian Preference Department shall be sent to the Indian-owned business.

57.5-9. Each covered entity engaged in business activity shall be responsible for compliance of all its contractors and subcontractors with this Law.

57.5-10. *Change in Status and Annual Reports.* Each Indian-owned business shall report to the Indian Preference Department in writing, of any changes in ownership, or control status within 60 days of the occurrence.

57.5-11. Each Indian-owned business shall, on the anniversary of its receipt of permanent certification, update the information provided in its initial application on an annual report form provided by the Indian Preference Department. Failure to provide information pursuant to these requirements shall constitute grounds for non-renewal of certification.

57.5-12. If the Indian Preference Department receives a complaint that an Indian-owned business is operating in a manner that is harmful to the health, safety, or welfare of the Oneida Tribe or the Oneida community, the Indian Preference Department shall refer the complaint to the appropriate tribal department for investigation.

**57.6-1. Brokers, Agents.** A broker will be certified as Indian-owned businesses only if they are dealers who own, operate or maintain a store, warehouse or other establishment in which the commodities being supplied are bought, kept in stock and sold to the public in the usual course of business; provided that this requirement shall not apply where the applicant demonstrates that it is not customary and usual in the area of the trade in question for a broker not to maintain an establishment and to keep commodities in stock.

57.6-2. To qualify as an Indian-owned business, the broker must provide conclusive evidence that the broker is an independent contractor and not an agent of a non-Indian owned business. He must provide proof that he owes no fiduciary responsibility or has no fixed or permanent relationship to any one company. He must hold himself out for employment to the public generally and that the employment is that of being a special agent for a single client.

57.6-3. Agents who are an employees of a non-Indian owned business or who merely represents a company, such as an insurance agent or real estate agent for a non-Indian-owned business, will not be given certification as an Indian-owned business.

**57.7-1. Skills Bank.** Certification for qualified Indian trades workers shall be granted by the Indian Preference Department pursuant to the requirements of the Department's criteria set out in Article IV of this law, Section III(A) of Rider I, and in the criteria of the Indian Preference Department. Taking into account the wide range of skills, abilities and experience required within a given classification, a determination for certification as a qualified Indian trades worker will be made by the Indian Preference Department based upon the criterion required by all persons employed in any given trade or occupation, including, but not limited to, the average standard, training, education and/or licensing needs of the employment field applied for.

57.7-2. Qualified Indian trades workers will be placed in the Skills Bank for referrals.

57.7-3. The name of a qualified Indian trades worker may be removed from the Skills Bank by the Indian Preference Department for reasons of non-compliance with this law.

57.7-4. The Indian Preference Department shall notify the qualified Indian trades worker in writing of the removal of his name from the Skills Bank, the specific violation alleged, the requirements for compliance with Indian preference laws for reinstatement in the Skills Bank and the qualified Indian trades worker's right to a hearing by the Commission upon request.

57.7-5. If the qualified Indian trades worker does not respond to the notification within thirty (30) days, the qualified Indian trades worker's name shall be remain removed from the Skills Bank for no less than ninety (90) days.

57.7-6. Within thirty days of receiving the notice of removal, the qualified Indian trades worker may request a hearing by the Commission for reinstatement in the Skills Bank. The hearing will be held pursuant to the rules of the Administrative Procedure Act.

57.7-7. A qualified Indian trades worker whose name has been removed from the Skills Bank may apply for recertification by the Indian Preference Department within one year after removal.

57.7-8. The Skills Bank will maintain a list of qualified Indian trades workers with qualifications and dates of availability.

**57.8-1. License Commission.** There is hereby created a License Commission which shall consist of six members who shall be appointed by the Oneida Business Committee for terms of three years.

57.8-2. The Commission shall be responsible for:

- (a) Reviewing regulations developed by the Indian Preference Department prior to submission for adoption;
- (b) Presiding over hearings of disputed issues of Indian Preference Law and hold hearings as required by this Law;
- (c) Interpreting this Law and enforcing regulations promulgated by this Law;
- (d) Writing decisions regarding disputes of Indian preference compliance pursuant to the evidence presented at the hearings; and
- (e) Holding regularly scheduled meetings to review the laws and policies relative to this Law.

57.8-3. The Oneida Appeals Commission shall be the hearing body for disputes until such time as the Commission is empowered by the Oneida Business Committee.

### **57.9 Indian Preference in Contracting.**

57.9-1. All entities of the Oneida Tribe, which include but are not limited to programs, enterprises and other subdivisions of the Oneida Tribe awarding contracts or subcontracts for goods or services with the Oneida Tribe where the majority of the work, service or goods are performed or provided on or near the Oneida Reservation, shall give preference in contracting and subcontracting to Indian-owned businesses, awarded in the following priority:

- (a) Members of the Oneida Tribe of Indians of Wisconsin
- (b) Spouses of enrolled members of the Oneida Tribe of Indians of Wisconsin
- (c) Members of other federally-recognized Indian tribes.

57.9-2. Contract References.

(a) All contracts entered into by the Oneida Tribe, a tribal agency, or an Oneida member-owned business or other vendor shall specifically stipulate that compliance with the Indian Preference Law, as amended, is required, and violation thereof may be deemed a substantial breach. All such contracts shall have a copy of the Indian Preference Law attached, and shall contain an Acknowledgment Clause below the execution lines of the contract, which shall be separately executed by the contractor, said clause to read as follows:

"The undersigned has read the copy of the Oneida Indian Preference Law attached hereto, understands its provisions and their bearing on the contractor's rights and responsibilities, and agrees that such provisions shall govern the contractor's performance of the contract."

(b) All construction contracts entered into by an Oneida member-owned business or other vendor, shall have the Rider I for Construction Contracts attached.

57.9-3. Non-compliance with any term of Rider I for Construction Contracts shall constitute a breach of the contract. (See Rider I, "Qualified Indian Trades Workers Policy" section VII., and "Indian Owned Business Requirements Policy" section VII.) After giving notice of a violation to the non-compliant party and a reasonable time for response, the Indian Preference Department may, at its discretion, initiate the investigation process as required under this law in section 14, "Violations of This Law" and may recommend to the Tribal contracting department that it suspend the contract during the pendency of the investigation. Suspension of the contract shall require the concurrence of the Tribal contracting department.

57.9-4. Subsection 4-18 of the Indian Preference Law shall control for any violations of this article by employees of the Tribe.

57.9-5. Employees of the Oneida Tribe of Indians of Wisconsin hired through the Oneida Human Resources Department or as a contracted employee of the Tribe shall follow the Blue Book or other duly enacted policies of the Tribe that guide employment requirements in regard to Indian Preference. However, employees of the Tribe, in the execution of their employment duties are required to follow the procedures of this law in contracting and bidding procedures for the Tribe.

**57.10 Labor Unions**

57.10-1. Qualified Indian trades workers shall not be required to be affiliated with organized labor for employment under this law within the exterior boundaries of the Oneida Reservation. However, such worker shall not be eligible for the benefits of a union contract, other than wage scales, unless he/she elects to join the union.

**57.11 Bidding**

57.11-1. Construction and other contracts awarded by and for the Tribe in an amount exceeding \$1,000 shall include Indian preference priority by applying an Indian preference

percentage discount to Indian-owned businesses submitting bids for the project. The awarding authority shall determine contract awards by utilizing the percentage guidelines below, subtracting the corresponding percentage(s) from preferred bids for such contracts.

57.11-2. The Indian Preference percentage to be applied to Indian-owned businesses' preferred bids for non-construction contracts shall be 5% across the board. The Indian Preference percentage guidelines to be applied to Indian-owned businesses preferred bids for a construction contract are as follows:

- (a) 10% of the first \$50,000 segment of a bid.
- (b) plus 9% of the next \$50,000 segment of a bid.
- (c) plus 8% of the next \$100,000 segment of a bid.
- (d) plus 7% of the next \$100,000 segment of a bid.
- (e) plus 6% of the next \$100,000 segment of a bid.
- (f) plus 5% of the next \$100,000 segment of a bid.
- (g) plus 4% of the next \$500,000 segment of a bid
- (h) plus 2% of the next \$1,000,000 segment of a bid
- (i) plus 1% of any further amount over \$2,000,000

57.11-3. Contractors receiving contracts pursuant to Section 10.1 above shall provide the opportunity to bid for subcontracting work to all Indian-preference certified businesses in that field, shall obtain a list of all such certified businesses from the Indian Preference Department, and shall notify each such business, by certified mail, of the opportunity to bid.

### **57.12 Retaliation**

57.12-1. No person, employer or other entity shall punish, terminate, or harass any employee or other person in retaliation for that person's exercise of his or her rights under the this law.

57.12-2. If a complaint has been filed with the Indian Preference Department citing retaliation for exercising or attempting to exercise Indian Preference rights, the Indian Preference Department shall initiate an investigation of the complaint. If a violation of this section is found, the complainant may file a complaint with the Oneida Appeals Commission, along with the Indian Preference Department's information and recommendation.

57.12-3. The Oneida Appeals Commission shall determine the facts in the matter based upon the evidence presented at a hearing, and such remedy, if any, as may be appropriate.

### **57.13 Layoffs**

57.13-1. Under a contract entered into with the Oneida Tribe, no qualified Indian trades worker with at least minimum skills for the job shall be terminated or laid off for workforce reduction purposes so long as a non-Indian in the same craft with similar skills remains employed. This requirement is for the contract period only, and does not include the core work group.

57.13-2. If a complaint has been filed with the Indian Preference Department citing a violation of Section 13-1, the Indian Preference may initiate an investigation of the complaint. If a violation is



found, the Indian Preference Department may begin informal resolution or arbitration as required by Section 14-2 (B)(1) or Section 14-2 (B)(2) of this Law. Thereafter, if a resolution is not reached, the complainant or the Indian Preference Department may file a complaint with the Oneida Appeals Commission pursuant to Section 14-3, and the Oneida Appeals Commission may impose those remedies as in Section 14-4.

57.13-3. If the Oneida Appeals Commission determines that there has been a violation of 13-1 by the contractor, the Indian trades worker shall be reinstated in his/her position at the previous wage.

57.13-4. Lay-offs in this section do not apply to employees of the Tribe hired through the Human Resources Department or otherwise contracted by the Tribe as a Tribal employee; this section is applicable to outside contractors and independent contractors.

#### **57.14. Violations of This Law**

57.14-1. Complaints of Violation. Any individual aggrieved by what he/she believes to be a violation of this law, or of any regulation or policy issued pursuant to this law, may file a complaint with the Indian Preference Department. The complaint must be in writing and provide such information as is necessary to enable the Indian Preference Department to carry out an investigation.

57.14-2. Investigations. The Indian Preference Department shall have the authority to conduct an investigation of a written complaint that alleges specific violations of this law. Said investigation shall include, but not be limited to, the following: the qualifications of the contractor; the qualifications of the contractor's employees and subcontractors, if any; the qualifications of the aggrieved individual; the circumstances surrounding the alleged violation; the contract; and such other facts as are pertinent to the complaint. Wherever possible, the written complaint should provide such facts as would aid the Department to carry out its investigation. The information collected shall be kept confidential until the hearing or appeal on the matter, but any report or recommendation prepared by the Department for use at the hearing shall be promptly released to the aggrieved person and alleged violator.

(a) Sequence of Events after an investigation of a complaint by the Indian Preference Department, if the Department reasonably believes that there is sufficient evidence of a genuine and material issue of non-compliance with this law:

(1) Informal Resolution: The Indian Preference Department shall attempt an informal resolution by contacting the Tribal contracting party and other parties to the contract, and then meeting with the parties in attempt to resolve the conflict informally and satisfactorily to all the parties.

(A) If an informal resolution to the issue of non-compliance with this law is reached, that resolution shall be in writing and signed by all parties in interest.

(B) The issue shall then remain in abeyance for the term of the



contract during which time all parties shall comply with the terms of the informal resolution.

(C) Breach of the terms of the informal resolution by any of the parties may be a cause of action for litigation within the tribal jurisdiction for non-compliance with this law.

(2) Arbitration: If a contract between the Tribe and non-compliant party has an arbitration clause, the issue of resolution will be pursued under the rules and regulations of arbitration and the parties shall be bound by the decisions of the arbiter(s).

57.14-3. Determination of Violation and Filing of a Complaint. The Indian Preference Department may file a complaint with the Oneida Appeals Commission for an original hearing if the Department reasonably believes that there is sufficient evidence of a genuine and material issue of non-compliance with this law or the regulations or policies issued pursuant to this law, and (1) an attempt to resolve the alleged non-compliance has failed through informal resolution, arbitration, or dispute or termination provisions, or (2) a party has refused to participate in an informal resolution process, or to cooperate in good faith.

57.14-4. Injunction. The Indian Preference Department may, after consulting with the tribal contracting party and attempting resolution, request an injunction from the Appeals Commission suspending the terms of the contract during the pendency of the litigation and preventing further payment to the contractors.

(a) The Appeals Commission may order a 10 day injunction during which time a preliminary decision will be made by the Appeals Commission whether or not there is just cause to prove a violation of an Indian Preference Law or Rider I.

(b) If the Appeals Commission determines that there exists a finding of just cause to reasonably believe that a violation of the Indian Preference Law or Rider I has occurred, the Appeals Commission may extend the injunction for the pendency of the litigation and until a final decision has been rendered.

(c) If the Appeals Commission determines that there is no just cause to reasonably believe that a violation of an Indian Preference law or Rider I has been established, the Appeals Commission may lift the injunction, dismiss the case, and/or order a remedy to the prevailing party as the Commission deems fair and just.

57.14-5. If the Oneida Appeals Commission determines that a violation of this law has occurred, the remedies imposed upon the violator may include:

(a) Denial of Indian preference certification

- (b) Suspension or termination of certification.
- (c) Withdrawal of tribal license and denial of the right to conduct further business with the Oneida Tribe.
- (d) Imposition of a civil forfeiture not to exceed \$5,000 for each violation
- (e) Specific performance to and for the aggrieved party.
- (f) Other action necessary to ensure compliance with this law and to remedy any harm caused by a violation of this law.

57.14.6. Conflict of Laws. Should a conflict or ambiguity arise between this law and/or the interpretation of this law as compared to Rider I or any other previously enacted Indian Preference Laws, policies or procedures, this law will control.

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Adopted - BC-07-29-98-B  
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**RIDER I TO CONSTRUCTION CONTRACTS  
QUALIFIED INDIAN TRADES WORKER POLICY  
INDIAN OWNED BUSINESS REQUIREMENTS POLICY**

**QUALIFIED INDIAN TRADES WORKER POLICY**

**I. PURPOSE**

The Oneida Nation recognizes the need to maximize economic benefit derived by the increased construction on the Oneida Reservation and commits itself to undertaking reasonable efforts, through information monitoring and reporting, to insure that all trade contractors, regardless of tier, engaged in construction agreements utilize the labor force of the Oneida Nation and other Indian nations.

**II. GOAL**

The goal of the Oneida Nation is to achieve the target objective of 100% participation of Qualified Indian Trades Workers, regardless of tier, in construction within the boundaries of the Oneida Reservation. This goal will be achieved by the "Qualified Indian Trades Workers Policy."

**III. DEFINITIONS**

The following definitions will govern the terms of this policy.

- A. "Qualified Indian Trades Worker" - Any individual who is an enrolled member of the Oneida Nation in Wisconsin, a spouse of an enrolled member of the Oneida Nation in Wisconsin, or an enrolled member of another American Indian Tribe, with the skills, experience, reliability and availability necessary to satisfactorily perform the service for which said individual is retained. Said referral of "Qualified Indian Trades Worker" shall be made according to the following priorities:
1. Enrolled members of the Oneida Nation in Wisconsin.
  2. Spouses of enrolled members of the Oneida Nation in Wisconsin.
  3. Enrolled members of other American Indian Tribes.
- B. "Trade Contractor" - All persons or entities who bid for or are awarded contracts for the supply of materials or services pursuant to this construction agreement, including all persons or entities who enter into any tier contracts.
- C. "Construction Manager/General Contractor" - The entity which holds a contract with owner and who possess the expertise to perform the required construction services. The entity will have the distinct contractual responsibility for full performance of all "Rider I" requirements.
- D. "Core Work Crew" - The minimum amount of Trade Contractor's management and/or trade skill employees, not including apprentices or trainees, who are essential to start up and continuing work on a construction project.
- E. "Skills Bank" - The Oneida Nation Skills Bank currently located at 3759 W. Mason Street, Oneida, Wisconsin 54155 (414) 496-7897. Contact person: Oneida Preference Department Administrative Assistant.

#### IV. AUTHORITY

The Oneida Compliance Division has the power and authority to monitor the Construction Manager/General Contractor, to insure that all Trade Contractors, regardless of tier, enlist the maximum employment of "Qualified Indian Trades Workers," regardless of tier, in accordance with the following conditions, requirements and procedures with target objective of one hundred percent (100%) participation of "Qualified Indian Trades Workers" for the duration of the construction contract.

#### V. CONDITION OF TRADE CONTRACTS

Each Trade Contractor, as a condition to the receipt of every construction contract of any type, and consistent with the employment requirements of said Trade Contractor, will commit itself to the maximum employment in terms of positions, wages, and hours commensurate to the qualification of each "Qualified Indian Trades Worker" referred. In no event will the mere absence of affiliation with organized labor disqualify a "Qualified Indian Trades Worker" so referred, from employment where that "Qualified Indian Trades Worker" is otherwise qualified.

#### VI. PROVISIONS

The following is understood to enlist the maximum employment of "Qualified Indian Trades Workers" under this contract:

- A. For the purposes of employment on a project, the Oneida Compliance Officer and each Trade Contractor, regardless of tier, will negotiate the designated members of the Trade Contractors Core Work Crew.
- B. Current prevailing wage basis will be as denoted in the Project Manual and determined by the Compliance Division.
- C. Achieve a participation goal of utilizing all qualified and available "Qualified Indian Trades Workers", with target objective of one hundred percent (100%) participation.
- D. "Qualified Indian Trades Workers" will not be required to be affiliated with organized labor.
- E. Preference for "Qualified Indian Trades Workers" will be made according to the following priorities:
  1. Enrolled members of the Oneida Nation in Wisconsin.
  2. Spouses of enrolled members of the Oneida Nation in Wisconsin.
  3. Enrolled members of other American Indian Tribes.
- F. All bidders must provide specific written documentation as to how participation by "Qualified Indian Trades Workers" will be achieved at the time of the post bid confirmation conference.
- G. Preference is required on every segment of a construction project, including but not limited to, construction labor and/or professional services.
- H. The Skills Bank will maintain a list of "Qualified Indian Trades Workers" with qualifications and dates of availability. Notification of positions to be filled under this policy requirements are to be made directly to the Skills Bank. The Skills Bank is the exclusive referral source, and such referrals will be made on an official Skills Bank work-order form.



- J. Post Bid Conference and Award - If the Trade Contractor's bid is deemed to have the potential of being the lowest responsible bid, the Trade Contractor will attend a post bid confirmation conference with the Project Team and the Oneida Compliance Officer. At this conference, the Trade Contractor is required to:
1. Provide and have confirmed the Trade Contractor's Core Work Crew as defined in Section III, Paragraph D.
  2. Identify each "Qualified Indian Trades Worker" who the Trade Contractor intends to utilize in order to comply with the requirements of this policy.
  3. Provide supportive documentation that the Trade Contractor has made positive contact with the Compliance Office contact and the Skills Bank contact as follows:
    - a. Provide evidence of intention to comply with the "Qualified Indian Trades Worker" requirements of this policy.
    - b. Raise relevant questions regarding the stipulated terms, conditions, procedures, provisions or interpretations/ clarifications of this policy.
- K. If the Trade Contractor is confirmed the lowest responsible bidder prior to the award of a specific contract for construction services, the Project Team and the Oneida Compliance Officer will request and approve the ratio of specific "Qualified Indian Trades Workers" on Attachment I, which is to be utilized in the construction project.
- L. Compliance monitoring and reporting requirements for the hiring of "Qualified Indian Trades Workers" will be:
1. Compliance with this policy will be monitored by the Oneida Compliance Division. The Oneida Compliance Officer is the sole contact between the Construction Manager/General Contractor or Trade Contractors, regardless of tier, and the "Qualified Indian Trades Workers" utilized for the construction project.
  2. Written reports required by this policy will be filed by all Trade Contractors, regardless of tier, to the Construction Manager/ Contractor at the regularly scheduled weekly project meeting and at each successive meeting thereafter, for the duration of construction project involvement. Said reports will be submitted in the following format:
    - a. The Trade Contractor will submit a written "Weekly Manpower Report Form" (Attachment I), which confirms the total number of "Qualified Indian Trades Workers" employed by the Trade Contractor, Tribal Affiliation, Oneida Roll Number., etc.
    - b. The Trade Contractor will submit written "Certified Payroll Forms "WH-347 & WH-348" (Attachment II), which verifies total hours, rate of pay, etc., for all employees (including "Qualified Indian Trades Workers") being employed by the Trade Contractor by construction project.
- M. In the event that a dispute may arise concerning "Qualified Indian Trades Workers" regarding, but not limited to the following:
1. the compliance obligations of the Construction Manager/General Contractor specific Trade Contractor; or

2. qualification or performance of a "Qualified Indian Trades Worker;" or
3. concerning the position, wages, hours or conditions under which employment was undertaken, or interpretations of this policy.

The Construction Manager/General Contractor or specific Trade Contractor will cooperate in good faith with the Oneida Compliance Officer toward a mutually satisfactory resolution of the dispute.

- N. The "Qualified Indian Trades Worker" requirements, after thorough review by the Oneida Compliance Officer, may be waived for a specific Trade Contractor. The Oneida Compliance Officer will weigh the following circumstances in the request to waive the "Qualified Indian Trades Worker" requirements:

1. where consultant construction services are available from only a single source, as documented to the satisfaction of the Oneida Compliance Officer and that there are reasonable grounds for non-compliance with the requirements of this policy; or
2. where an emergency requires the immediate procurement of services, provided that the proposed source of the service is currently prequalified to do business with the Oneida Nation and does not have a prior breach of "Rider I" requirements; or
3. where the Trade Contractor, regardless of tier, will do no work on the project site;
4. where a small percentage of the Trade Contractor's work is done on the project site; or
5. where the Trade Contractor made a significant and documented good faith effort to achieve compliance or can demonstrate to the satisfaction of the Oneida Compliance Officer that compliance is not practical for reasons other than pricing.

If the Trade Contractor waiver is justified as reasonable by the Oneida Compliance Officer, the Trade Contractor will be required to implement a written work plan with the assistance and approval of the Oneida Compliance Officer as to how the "Qualified Indian Trades Worker" policy is to be met by methods other than previously described in this document.

- O. All firms requiring further clarification of the "Qualified Indian Trades Worker" requirements of this policy and/or assistance in complying with this policy should contact the Oneida Compliance Officer for the Oneida Nation in Wisconsin.

## **VII. BREACH OF POLICY**

Failure to follow this "Indian Trade Workers" policy will be considered a breach of contract and will be enforceable as set forth by the terms of the original construction contract for a breach of contract.

### **INDIAN OWNED BUSINESS REQUIREMENTS POLICY**

#### **I. PURPOSE**

The Oneida Nation recognizes the need to maximize economic benefit derived by the

increased construction on the Oneida Reservation and desires to achieve this purpose by affording "Indian-Owned Businesses" the maximum opportunity to supply materials and services in the direct and indirect performance of all contracts and executed construction agreements, consistent with contractual standards and specifications.

**II. GOAL**

The goal of the Oneida Nation is to achieve the target objective of one hundred percent (100%) participation of Indian Owned Businesses in construction within the boundaries of the Oneida Reservation. This goal will be achieved by the "Indian-Owned Business Policy."

**III. DEFINITIONS**

"Indian-Owned Business" - A for profit business which is majority-owned, managed and 51% minimal share of the net profits distributed to "American Indians" and is certified as Indian Preference eligible by the Compliance Division of the Oneida Nation in Wisconsin.

**IV. AUTHORITY**

The Oneida Compliance Division has the authority and power to monitor Construction Manager/General Contractor, as well as all Trade Contractors, regardless of tier, to insure maximum use of "Indian-Owned Business" for services and/or supplies and materials, in accordance with the following conditions, requirements and procedures with target objectives of one hundred percent (100%) participation of "Indian-Owned Business" for the duration of the construction contract.

**V. CONDITION OF TRADE CONTRACTS**

Each Trade Contractor, as a condition to the receipt of every construction contract of any type, will commit itself to the maximum use of "Indian-Owned Business" in procurement of services and/or supplies and materials.

**VI. PROVISIONS**

The following is understood to enlist the maximum use of "Indian Owned Business" under this contract:

- A. For the purposes of use of services and/or supplies and materials on the project, the Oneida Compliance Officer and each Trade Contractor, regardless of tier, will monitor the use of services and/or supplies and materials procured from "Indian-Owned Business" for achievement of the goal of utilization of all qualified and available Indian-owned businesses", with target objectives of one hundred percent (100%) participation.
- B. An "Indian-Owned Business" is not required to be affiliated with organized labor.
- C. Preference for project business opportunities will be given to the following "Indian-Owned Business" who is certified by the Oneida Compliance Division.
  1. Indian Individuals (sole proprietor)
  2. Indian Partnerships
  3. Indian Corporations
  4. Joint ventures that utilize qualified "Indian-Owned Business"

- D. Preference requires that all bidders must include documentation showing solicitation to at least one available "Indian-Owned Business" with their bid and specific written documentation as to how participation by "Indian-Owned Business" will be achieved at the time of the post-bid interview.
- E. Participation as well as Preference shall be required on each segment of the project including, but not limited to:
1. Construction (supply labor and materials)
  2. Construction Supplies (supply materials)
  3. Professional Services
- F. The Preference percentage is based on a sliding scale inversely to the contract amount. The lowest apparent bid is compared to the lowest qualified "Indian-Owned Business" bid:
1. If the "Indian-Owned Business" bid amount is less than the total of the apparent low bid, adding in the Preference adjustment, then Preference is invoked and the contract is awarded to the "Indian-Owned Business."
  2. If none of the "Indian-Owned Business" bids fall within the Preference range, the contract then goes to the lowest responsible bidder.
- G. If the Owner approves alterations or additions to the work, and an "Indian-Owned Business" is affected, the Trade Contractor will involve the affected "Indian-Owned Business" in all changes to the Trade Contractor's work in a manner consistent with the original contract.
- H. A Trade Contractor can only count towards "Indian-Owned Business" participation, those dollars which are expended with Indian-owned businesses who have been certified by the Oneida Compliance Division.
- J. The objective of maximum participation of "Indian-Owned Business" under this contract may be achieved by one, or a combination of, the methods described below:
1. Joint Venture Agreement - The Trade Contractor may utilize an "Indian-Owned Business" with a Joint Venture Agreement for the construction or professional services required on the project. The Joint Venture Agreement must be pre-approved/certified by the Oneida Compliance Division.
  2. Negotiated Contract - The Trade Contractor may utilize an "Indian-Owned Business" as a subcontractor on a negotiated contract basis.
  3. Competitive Bidding - The Trade Contractor may utilize an "Indian-Owned Business," as a subcontractor who has submitted the lowest responsible bid. Should an "Indian-Owned Business" come within the established Preference percentages of the lowest responsible bid, the Owner retains the right to invite such "Indian-Owned Business" to participate in the construction project at the actual additional cost incurred.
  4. Solicitation Documentation - In the event that the Trade Contractor anticipates that it will be unable to meet the objectives of this agreement by any of the three (3) methods listed above, then the Trade Contractor is required to solicit the involvement of "Indian-Owned Business" by certified letters, as described below, allowing those businesses adequate time to develop and submit bid proposals. A list of current Indian-owned businesses

is maintained by the Oneida Compliance Division.

- a. Solicitation Letters - Each Trade Contractor will send letters by certified mail to a minimum of six (6) Indian-owned businesses in order to ascertain their interests and availability to participate as either Trade Contractor and/or vendor for services and/or supplies and materials. In the event that mail solicitation is not feasible due to time constraints, bidders may solicit proposals from that business by facsimile, confirmed by certified mail. Documentation will include copies of all certified letters and documentation of other efforts to solicit bids from "Indian-Owned Business" and such copies must be submitted to the Oneida Compliance Division upon request.
- b. Response - If the certified letters do not result in responses from fifty percent (50%) of those Indian-owned businesses to which letters were sent, the Trade Contractor must solicit responses by telephone or personal interview until responses are received from at least fifty percent (50%). A "response" for the purpose of this section, will include a proposal by the Trade Contractor along with the "Indian-Owned Business" for a: (1) joint venture; (2) negotiated contract; (3) competitive bid; or (4) a written reply by same "Indian-Owned Business," that no proposal will be submitted.

K. Compliance with "Indian-Owned Business" requirements are:

1. Monitored by the Oneida Compliance Officer who will be the sole contact between the Construction Manager/General Contractor or Trade Contractors, regardless of tier, and the "Indian-Owned Business" utilized pursuant to this policy.
2. Reports by all Trade Contractors, regardless of tier, to the Construction Manager/General Contractor at the time and/or interval requested below for the duration of project involvement, in the following format and/or procedures:
  - a. Letters of Intent - When an "Indian-Owned Business" is utilized, the Trade Contractor will be required to submit copies of executed letters of intent to the Construction Manager/General Contractor. Such letter will set forth the type and scope of the work to be performed by the "Indian-Owned Business" along with the estimated dollar amount of the contract. Copies of such letters must be submitted to the Oneida Compliance Division upon request.
  - b. Utilization of Indian-Owned Business Form - The Trade Contractor must complete the "Utilization of "Indian-Owned Business Form" (Attachment III), which includes the total dollar amount of "Indian-Owned Business" involvement.
  - c. Monthly Reports - The Trade Contractor must submit monthly, "The Indian-Owned Business Report" (Attachment IV), with each payment request to enable the Construction Manager/General Contractor to monitor and enforce the "Indian-Owned Business" policy as well as



any lower tier Trade Contractor commitments, showing the work category, description of work, "Indian-Owned Business" Sub-Contractor/Supplier's name and contact person, contract amount, percentage completed and amount paid to date.

- M. In the event that a dispute may arise concerning "Indian-Owned Business" regarding, but not limited to the following:
1. the Compliance obligations of the Construction Manager/General Contractor or specific Trade Contractor; or
  2. qualifications or performance of an "Indian-Owned Business;" or
  3. contract, wages, certification or interpretations of this policy.
- The Construction Manager/General Contractor of specific Trade Contractor, will cooperate in good faith with the Oneida Compliance Officer toward a mutually satisfactory resolution of the dispute.
- N. The "Indian-Owned Business" requirements, after thorough review by the Oneida Compliance Division, may be waived for a specific Trade Contractor. The Oneida Compliance Officer will weigh the following circumstances in the request to waive the "Indian-Owned Business" requirements:
1. where services and/or materials and supplies are available from only a single source, as documented to the satisfaction of the Oneida Compliance Officer, that there are reasonable grounds for non-compliance with the requirements of this policy; or
  2. where an emergency requires the immediate procurement of services and/or materials and supplies, provided that the proposed source of the materials, supplies or service, is currently prequalified to do business with the Oneida Nation and does not have a prior breach of "Rider I" requirements; or
  3. where the Trade Contractor has made a significant and documented good faith effort to achieve compliance or can demonstrate to the satisfaction of the Oneida Compliance Officer that compliance is not practical for reasons other than pricing.
- If the Trade Contractor waiver is deemed justified as reasonable by the Oneida Compliance Officer, the Trade Contractor will be required to implement a written work plan with the assistance and approval of the Oneida Compliance Officer as to how the "Indian-Owned Business" requirements will be met by methods other than previously described in this document.
- O. All firms requiring further clarification of the "Indian-Owned Business" requirements and/or assistance in complying with this policy should contact the Compliance Division Officer for the Oneida Nation in Wisconsin.

## **VII. BREACH OF POLICY**

Failure to follow this "Indian-Owned Business" policy will be considered a breach of contract and will be enforceable as set forth by the terms of the original construction contract for a breach of contract.

*End.*

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Adopted - BC-6-10-98-D

Adopted - BC-5-22-96-A

Adopted - BC-4-3-96-A

See Also

BC-6-15-94-A

BC-2-1-91-B

**CHAPTER 200**  
**TRIBAL ENVIRONMENTAL QUALITY REVIEW**

200.1. Purpose.

200.2. Adoption, Amendment, Applicability and Repeal

200.3. Definitions

200.4. Tribal Findings and Declaration.

200.5. Preparation of Environmental Impact Statement

200.6. Rules and Regulations

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**200.1. Purpose.**

200.1-1. It is the purpose of this law to declare a Tribal policy with regard to construction, reconstruction, rehabilitation, expansion, demolition or other physical alteration (other than routine maintenance or repair or changes necessary to conform to building or fire codes) on its lands in Sullivan County which will encourage productive and enjoyable harmony between the people and their environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and important community resources.

**200.2. Adoption, Amendment, Applicability and Repeal.**

200.2-1. This law is adopted under the authority of the Constitution of the Oneida Tribe of Indians of Wisconsin by Oneida Business Committee Resolution # 12-02-05-D.

200.2-2. This law may be amended, or repealed, by the Oneida Business Committee or by the Oneida General Tribal Council.

200.2-3. The applicability of the provisions of this law shall be limited to the Sullivan County lands of the Tribe as identified in the Tribe's Land Claim Settlement Agreement with New York State.

200.2-4. Should a provision of this law or the application of this law be held as invalid, such invalidity shall not effect other provisions of this law.

200.2-5. Any law, policy, regulation, rule, resolution or motion, or portion thereof, which directly conflicts with the provisions of this law is hereby repealed to the extent that it is inconsistent with or is contrary to this law.

200.2-6. Should the Land Claim Settlement with the State of New York fail to culminate this law shall be automatically repealed.

200.2-7. This law is adopted under authority of the Constitution of the Oneida Tribe of Indians of Wisconsin.

**200.3. Definitions.**

200.3-1. Unless the context otherwise requires, the definitions in this section shall govern the construction of the following terms as used in this law:

(a) "Agency" means the Oneida Environmental Health and Safety Department.

(b) "Actions" is limited to construction, reconstruction, rehabilitation, expansion, demolition or other physical alteration of the project site (other than routine maintenance or repair or changes necessary to conform to building or fire codes)

(c) "Environment" means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.

(d) "Environmental impact statement" means a detailed statement setting forth the matters specified in section 200.5. It includes any comments on a draft environmental statement which are received pursuant to section 200.5, and the agency's response to such comments, to the extent that such comments raise issues not adequately resolved in the draft environmental statement.

(e) "Draft environmental impact statement" means a preliminary statement prepared pursuant to section 200.5.

(f) "Sullivan County lands" means those lands located in Sullivan County identified in the Land Claim Settlement with the State of New York that shall be held in trust by the United States for the benefit of the Tribe for Class III gaming and related purposes.

(g) "Tribe" means the Oneida Tribe of Indians of Wisconsin.

#### **200.4. Tribal Findings and Declaration.**

200.4-1. The Tribe finds and declares that with regard to its lands in Sullivan County:

(a) The maintenance of a quality environment for the people that at all times is healthful and pleasing to the senses and intellect of people now and in the future is a matter of Tribal concern.

(b) Every citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment.

(c) There is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people, including their enjoyment of the natural resources.

(d) Enhancement of human and community resources depends on a quality physical environment.

(e) The capacity of the environment is limited, and it is the intent of the Tribe that it take immediate steps to identify any critical thresholds for the health and safety of the people and take all coordinated actions necessary to prevent such thresholds from being reached.

(f) It is the intent of the Tribe that, to the fullest extent possible, the policies, statutes, regulations, and ordinances of the Tribe should be interpreted and administered on its Sullivan County lands in accordance with the policies set forth in this law. However, the provisions of this law do not change the jurisdiction between or among the Agency.

(g) It is the intent of the Tribe that the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy. Social, economic, and environmental factors shall be considered together in reaching decisions on proposed activities of construction, reconstruction, rehabilitation, expansion, demolition or other physical alteration of the Sullivan County lands (other than routine maintenance or repair or changes necessary to conform to building or fire codes).

(h) It is the intent of the Tribe that the Tribe and its agencies conduct their construction, reconstruction, rehabilitation, expansion, demolition or other physical alteration activities (other than routine maintenance or repair or changes necessary to conform to building or fire codes) on its Sullivan County lands with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

(i) It is the intent of the Tribe that the Tribe and its agencies which regulate construction, reconstruction, rehabilitation, expansion, demolition or other physical alteration activities

(other than routine maintenance or repair or changes necessary to conform to building or fire codes) of individuals, corporations, and public agencies on the Tribe's Sullivan County lands which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage.

#### **200.5. Preparation of Environmental Impact Statement.**

200.5-1. The Tribe and its agencies shall use all practicable means to realize the policies and goals set forth in this law, and shall act and choose alternatives which, consistent with the purposes for which the land is to be held in trust, social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

200.5-2. The Agency shall prepare, or cause to be prepared by contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment. Such a statement shall include a detailed statement setting forth the following:

- (a) a description of the proposed action and its environmental setting;
- (b) the environmental impact of the proposed action including short-term and long-term effects;
- (c) any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (d) alternatives to the proposed action;
- (e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;
- (f) mitigation measures proposed to minimize the environmental impact;
- (g) the growth-inducing aspects of the proposed action, where applicable and significant;
- (h) effects of the proposed action on the use and conservation of energy resources, where applicable and significant;
- (i) effects of proposed action on solid waste management where applicable and significant; and
- (j) effects of any proposed action on, and its consistency with, the comprehensive management plan of the special groundwater protection area program, as implemented by the New York commissioner pursuant to article fifty-five of New York's Environmental Conservation Law; and
- (j) such other information consistent with the purposes of this law as may be prescribed in guidelines issued by the Tribe pursuant to section 200.6.

200.5-3. The environmental impact statement shall also include copies or a summary of the substantive comments received by the Agency and the Agency's response to such comments. The purpose of an environmental impact statement is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action. Such statement should be clearly written in a concise manner capable of being read and understood by the public, should deal with the specific significant environmental impacts which can be reasonably anticipated and should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts.



200.5-4. The Agency may require an applicant to submit an environmental report to assist the Agency in carrying out its responsibilities, including the initial determination and, (where the applicant does not prepare the environmental impact statement), the preparation of an environmental impact statement under this law. The Agency may request such other information from an applicant necessary for the review of environmental impacts. Notwithstanding any use of outside resources or work, agencies or the Tribe shall make its own independent judgment of the scope, contents and adequacy of an environmental impact statement.

200.5-5. As early as possible in the formulation of a proposal for an action, the responsible the Agency shall make an initial determination whether an environmental impact statement need be prepared for the action.

200.5-6. With respect to actions involving the issuance to an applicant of a permit or other entitlement, the Agency shall notify the applicant in writing of its initial determination specifying therein the basis for such determination. Notice of the initial determination along with appropriate supporting findings on Agency actions shall be kept on file in the main office of the Agency for public inspection.

200.5-7. If the Agency determines that such statement is required, the Agency or the applicant at its option shall prepare or cause to be prepared a draft environmental impact statement. If the applicant does not exercise the option to prepare such statement, the Agency shall prepare it, cause it to be prepared, or terminate its review of the proposed action. Such statement shall describe the proposed action and reasonable alternatives to the action, and briefly discuss, on the basis of information then available, the remaining items required to be submitted. The purpose of a draft environmental statement is to relate environmental considerations to the inception of the planning process, to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the Agency in the decision making process in determining the environmental consequences of the proposed action. The draft statement should resemble in form and content the environmental impact statement to be prepared after comments have been received; however, the length and detail of the draft environmental statement will necessarily reflect the preliminary nature of the proposal and the early stage at which it is prepared.

200.5-8. For any action for which the Agency determines that such statement is not required and which would take place in a special groundwater protection area, as defined in section 200.5-14(a) law, the Agency shall show how such action would or would not be consistent with the comprehensive management plan of the special groundwater protection program, as implemented by the State commissioner pursuant to article fifty-five of New York law.

200.5-9. The draft statement shall be filed with the Agency and shall be circulated to federal, state, regional and local agencies having an interest in the proposed action and to interested members of the public for comment, as may be prescribed by the Tribe pursuant to section 200.6.

200.5-10. After the filing of a draft environmental impact statement the Agency shall determine whether or not to conduct a public hearing on the environmental impact of the proposed action. If the Agency determines to hold such a hearing, it shall commence the hearing within sixty days of the filing and unless the proposed action is withdrawn from consideration shall prepare the environmental impact statement within forty-five days after the close of the hearing, except as otherwise provided. The need for such a hearing shall be determined in accordance with procedures adopted by the Tribe pursuant to section 200.6. If no hearing is held, the Agency

shall prepare and make available the environmental impact statement within sixty days after the filing of the draft, except as otherwise provided.

200.5-11. Notwithstanding the specified time periods established by this law, the Agency shall vary the times so established herein for preparation, review and public hearings to coordinate the environmental review process with other procedures relating to review and approval of an action. An application for a permit or authorization for an action upon which a draft environmental impact statement is determined to be required shall not be complete until such draft statement has been filed and accepted by the Agency as satisfactory with respect to scope, content and adequacy for purposes of paragraph four of this section.

Commencing upon such acceptance, the environmental impact statement process shall run concurrently with other procedures relating to the review and approval of the action so long as reasonable time is provided for preparation, review and public hearings with respect to the draft environmental impact statement.

200.5-12. To the extent as may be prescribed by the Tribe pursuant to section 200.6, the environmental impact statement prepared together with the comments of public and federal agencies and members of the public, shall be filed with the Agency and made available to the public prior to acting on the proposal which is the subject of the environmental impact statement.

200.5-13. When the Agency decides to carry out or approve an action on the Sullivan County lands which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and that consistent with the purposes for which the land is to be held in trust, social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided.

200.5-14. An environmental impact statement shall be prepared for any action found to have a significant impact on the special groundwater protection area.

(a) The "special groundwater protection area" shall mean recharge watershed area within a designated sole source area contained within counties having a population of one million or more which is particularly important for the maintenance of large volumes of high quality groundwater for long periods of time.

(b) Such statement shall meet the requirements of the most detailed environmental impact statement required by this section or by any such rule or regulation promulgated pursuant to this section.

## **200.6. Rules and Regulations.**

200.6-1. As consistent with this law, the Tribe shall adopt rules and regulations consistent with 6 NYCRR Part 617 implementing the provisions of this law as applicable.

200.6-2. The rules and regulations adopted by the Tribe specifically shall include:

(a) Definition of terms used in this law;

(b) Criteria for determining whether or not a proposed action may have a significant effect on the environment, taking into account social and economic factors to be considered in determining the significance of an environmental effect;

(c) Identification on the basis of such criteria of:

(1) Actions or classes of actions that are likely to require preparation of environmental impact statements;

(2) Actions or classes of actions which have been determined not to have a significant effect on the environment and which do not require environmental

impact statements under this law. In adopting the rules and regulations, the Agency shall make a finding that each action or class of actions identified does not have a significant effect on the environment;

(d) Typical associated environmental effects, and methods for assessing such effects, of actions determined to be likely to require preparation of environmental impact statements;

(e) Provision for the filing and circulation of draft environmental impact statements pursuant to section 200.5-5, and environmental impact statements pursuant to section 200.5-12;

(f) Scope, content, filing and availability of findings required to be made pursuant to section 200.5-13;

(g) Form and content of and level of detail required for an environmental impact statement; and

(h) Procedures for obtaining comments on draft environmental impact statements, holding hearings, providing public notice of Agency decisions with respect to preparation of a draft environmental statement; and for such other matters as may be needed to assure effective participation by the public and efficient and expeditious administration of the law.

(i) A model assessment form to be used during the initial review to assist the Agency in its responsibilities under this law.

200.6-3. The Tribe shall, in accordance with Tribal law, adopt and publish such additional procedures as may be necessary for the implementation by them of this law.

*End.*

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Adopted BC#12-02-05-D

**EXHIBIT C**  
**ENFORCEABILITY OPINION**

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January 2, 2007

Power Plant Entertainment  
New York, LLC  
c/o The Cordish Company  
601 East Pratt Street  
Sixth Floor  
Baltimore, Maryland 21202

Re: Financial Services Engagement Letter dated January 28, 2003 ("Financial Services Agreement") and as amended on December 29, 2006, between the Oneida Tribe of Indians of Wisconsin (the "Tribe") and Power Plant Entertainment New York, LLC ("Developer"), and Development Agreement dated January 28, 2003 ("Development Agreement") and as amended on December 29, 2006, between the Tribe and Developer

Ladies and Gentlemen:

We are counsel for the Tribe and in that capacity have participated in the preparation, execution and delivery of the amendments to the Financial Services Agreement and the Development Agreement (collectively, the "Documents"). Capitalized terms not defined in this letter have the meanings ascribed to them in the Development Agreement. For purposes of this opinion, we have reviewed such documents and made such other investigations as we have deemed appropriate. We have also examined, among other documents, the following:

- a. The Constitution and By-Laws of the Tribe;
- b. Resolution No. 10-23-02-A, adopted by the Oneida Business Committee of the Tribe (the "Business Committee") on October 23, 2002 (the "Tribal Resolution"); and
- c. Resolution No. 12-69, adopted by the General Tribal Council (as defined in the Constitution and By-Laws of the Tribe) on July 7, 1969 (the "Delegation of Powers Resolution").

In rendering the following opinions, we have, with your consent, relied upon the following assumptions:



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- a. each party to the Documents (other than the Tribe) is duly organized and is validly existing and in good standing in its jurisdiction of organization;
- b. each party to any Document (other than the Tribe) has full power and authority to execute, deliver and perform its obligations under such Document, and each Document has been duly authorized by all necessary action on such party's part and has been duly executed and duly delivered by it;
- c. each natural person executing a Document or any other document referred to herein is legally competent to do so;
- d. each document submitted to us for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures (other than on behalf of the Tribe) on each such document are genuine;
- e. there has not been any mutual mistake of fact or misunderstanding, fraud, duress or undue influence; and
- f. there are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement or qualify the terms of any Document.

Based on and subject to the foregoing, we express the following opinions:

1. The Tribe is a federally recognized Indian tribe, organized under its Constitution and By-Laws.
2. The Tribe has full power and authority to enter into the Documents and to perform its obligations thereunder.
3. The Business Committee is a duly elected body of the Tribe that is empowered, under the Constitution, By-Laws, and other laws, rules, regulations and ordinances of the Tribe ("Oneida Tribal Law"), to manage the governmental and economic affairs of the Tribe, including, but not limited to, authorizing and contracting for the transactions and Tribal obligations contemplated by the Documents. While the Business Committee's actions are subject to review by the General Tribal Council, pursuant to Oneida Tribal Law, the Business Committee is empowered and authorized to act on, and bind the Tribe in respect of, a specific matter if, following a duly noticed and held meeting of the General Tribal Council, the General Tribal Council failed to act on such matter. A meeting of the General Tribal Council to approve the transactions contemplated by, and to enter into, the Documents was duly noticed and held, the General Tribal Council failed to act on the matter, and the Business Committee duly adopted the Resolution # BC-10-23-02-A which adopted the Documents. In the event the General Tribal Council elected to review the Business Committee's decision to approve the transactions contemplated by, and to enter into, the Documents, the Tribe remains bound by the terms and provisions of the Documents,

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including, specifically, Article 8 of the Development Agreement and Section 7 of the Financial Services Agreement.

4. The Business Committee has reviewed the original document and the proposed amendments and has duly adopted the amended documents in accordance with the laws of the Oneida Tribe.
5. The execution and delivery of and performance with respect to each of the Documents has been duly authorized by all necessary action of the Business Committee and has been duly executed and delivered by the Tribe and constitutes the valid and binding obligation of the Tribe under Oneida Tribal Law, enforceable in accordance with its terms.
6. The execution and delivery by the Tribe of the Documents, and the performance by the Tribe of its obligations thereunder will not (a) conflict with or result in any violation of Oneida Tribal Law, or (b) violate or conflict with, or result in a breach of, any agreement or instrument, or any order, writ, injunction or decree of any court, administrative agency or governmental authority, by which the Tribe or its properties are bound.
7. The Tribe is not a party to any pending action or proceeding that may adversely affect the transactions contemplated by the Documents or that may have a material adverse effect on the Tribe.
8. The Documents state that they are to be construed in accordance with and governed by the substantive laws of the State of New York. Such choice of law does not violate or conflict with the Constitution or By-Laws of the Tribe or any provision of Oneida Tribal Law.
9. No consent, approval, authorization or order of, or declaration or filing with, any Oneida tribal governmental authority is required for the execution, delivery, or performance by the Tribe of the Documents, and the consummation of the transactions contemplated thereby or the enforceability thereof.
10. The provisions of Section 8.2 of the Development Agreement and Section 10 of the Financial Services Agreement constitute a valid, enforceable and irrevocable (a) waiver to the limited extent described therein of the sovereign immunity of the Tribe and (b) consent to the jurisdiction of the courts and to the other dispute resolution procedures specified therein, and such waivers and consents have been executed in accordance with the Sovereign Immunity Ordinance of the Tribe.

This opinion letter is based as to matters of law solely on Oneida Tribal Law (which includes the Constitution and By-Laws of the Tribe).

This letter speaks as of the date hereof. We disclaim any obligation to provide you with any subsequent opinion or advice by reason of any future changes or events, which may affect or alter any opinion rendered herein.

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This opinion is rendered pursuant to your request and is intended solely for your benefit in connection with the Documents. This opinion is not to be furnished, quoted, or referred, to any other party or to any governmental agency or used for any other purpose without our prior written consent.

Sincerely,



ONEIDA LAW OFFICE

Jo Anne House  
Chief Counsel