OUTLINE OF DEVELOPMENT AGREEMENT
FOR JOINT VENTURE
BETWEEN TRIBAL ENTITY AND PRIVATE DEVELOPER FOR
POWER PROJECT DEVELOPMENT

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1. Parties: Identify tribal entity, if any, or name of tribe (herein, "Tribal Power Entity" or "TPE") and the private entity (herein, "ABC Power LLC" or "ABC") (each a "Party," and collectively, the "Parties").

2. Project Description: Description of the project that is the subject of the joint development (the "Project"), and background, if applicable, regarding the development activities conducted by either Party that preceded the Development Agreement. (For this outline, the assumed project is a power plant to be located on the tribal land, utilizing tribal resources such as gas or coal reserves, water and land.)

3. Purpose of Agreement: To provide the Parties with definitive responsibilities for development of the Project; identify the funding obligations of each for the Project development; define the rights of each with respect to ownership of the Project; and determine the rights and obligations of each upon termination of the development activities.

4. Development Responsibilities of ABC:

On the assumption that ABC is an experienced developer of projects similar to the Project, it is likely that ABC will have the primary responsibility for the overall development of the Project. Accordingly, ABC will be designated as the Party to perform or cause to be performed all activities with respect to development of the Project not specifically assigned to TPE. Such activities would include the following:

(a) Initial plant design.

(b) Analysis of requirements for federal, state and local permits, preparation of permit applications and environmental studies, processing of permit applications, and acceptance or rejection of permit conditions, subject to TPE’s participation with respect to tribal permits as set forth below.

(c) Negotiation of land and water supply agreements, with assistance of TPE as set forth below.

(d) Negotiation of fuel supply and related transportation agreements.
(e) Market analysis for power sales.

(f) Negotiation of power sales or other offtake agreements.

(g) Negotiation of interconnection and transmission agreements.

(h) Selection and management of external advisors, including but not limited to environmental consultants, financial advisors, tax advisors and legal advisors representing the Project and negotiation of contracts with such persons.

(i) Selection and management of engineering and construction contractors, and negotiation of contracts with such persons.

(j) Community outreach and government relations programs for the Project.

(k) Preparation, management and modification of Project financial projections.

(l) Structuring of the Project's debt arrangements, selection of lenders, and negotiation of agreements for the Project's financing.

(m) Selection of additional equity investors (other than TPE) in the Project and negotiation of agreements with same.

(n) Develop operation and maintenance plans and budgets.

5. Development Responsibilities of TPE:

The development activities of TPE would be focused on the relationship with the tribe and the surrounding community. If there are resource agreements to be entered into with the tribe, such as lease or easement agreements for the land, water or fuel supply agreements, tax arrangements, and/or agreements to give priority to tribal members or businesses for the labor or other business needs of the Project, it is likely that TPE would be instrumental in such arrangements. Accordingly, TPE's development activities would include the following:

(a) Assistance with negotiation of lease or other land use arrangements with the tribe (subject to Federal regulations).

(b) Assistance with negotiation of water and fuel supply arrangements to the extent such resources are controlled by the tribe.

(c) Assistance in the processing of all permits, consents and approvals required to be obtained for the Project from the tribe and the BIA.

(d) Assistance with negotiation of other arrangements with the tribe, including tax and business and labor preference arrangements.

(e) Lead the community outreach programs for the Project.
(f) Monitor any significant obstacles to Project development that arise within the tribe or the local community, and assist in developing strategies to address such obstacles.

(g) Assist ABC in determining local labor availability, labor characteristics and prevailing wage rates.

6. Coordination of Development Activities:
Each Party should agree to coordinate and cooperate with the other on all Project matters in good faith in order to facilitate the development of the Project in an effective and cost efficient manner. In furtherance of this obligation, each Party should be required to assign personnel that have the time and skills to devote to the Party’s assigned responsibilities and to assign a representative who will be the principal interface with the other Party with respect to the Project. The Parties will report to the other, in a form and on timing to be agreed by the Parties on the activities undertaken by each Party in the development of the Project.

7. Development Costs:
The agreement of the Parties with respect to development costs (“Development Costs”) will need to be addressed. If TPE expended funds in development of the Project prior to the execution of the Development Agreement, it might seek reimbursement of these funds from ABC upon execution of the Development Agreement or the right to be reimbursed at the closing of the financing for the construction of the Project (“Financial Closing”). The responsibility of each Party for funding new Development Costs will need to be addressed, including the internal costs for personnel and overhead of each Party during development, and the payments to third parties, such as consultants and advisors, filing fees for permits, etc. It is important for the Parties to agree in advance on a budget for the Development Costs (“Development Budget”), on a mechanism for revisions to the Development Budget and for milestones that must be met for continued funding or other circumstances that can suspend a Party’s obligation to fund, in order to avoid surprises and disagreements between the Parties. The Parties also may agree upon fees to be earned by a Party during Project development to defray its internal costs, and/or success fees to which one or the other or both will be entitled at Financial Closing in order to reward a Party for the financial risk that it has undertaken during the development of the Project.

8. Ownership of Project Assets and Work Product:
Ownership of data, information, studies, analyses and reports developed by either Party in the performance of the Project development (“Work Product”) and Project permits during development will need to be addressed. If the Work Product and permits are obtained by one Party, it should be stated that such Work Product or permit will be the property of the Project Company upon its formation or at a specified time and, until then, will be held by an individual Party in trust for the Project Company. The Parties should agree to share Work Product but should also determine whether there is Work Product for which disclosure to third parties (other than Project consultants) should be restricted. If the tribe has the equivalent of a “freedom of information act” or other regulations that would treat any information held by a tribal entity as public information, the Parties will need to determine mechanisms under which they will seek protection for the confidentiality of non-public or proprietary information.
9. Affiliate Contracts: The arrangements for contracts between either of the Parties or their affiliates, on the one hand, and the Project Company, on the other hand, should be described, e.g., by including a requirement that the terms and conditions be negotiated on an arms-length basis and be reflective of market conditions and/or by having the affiliated Party step out of the negotiations.

10. Term of Agreement: The Development Agreement should include a stated term so that termination can occur either automatically or upon notice issued by a Party if successful development does not occur within a stated period of time. If successful development does occur, the Development Agreement would be superseded by a joint ownership agreement (see below).

11. Termination Rights: In addition to a stated term, the Development Agreement should include a specific list of events or circumstances that would allow a Party to terminate the agreement prior to the end of the term. These may include such events or circumstances as the following:

(a) Failure of key milestones to have been met by agreed dates.

(b) Discovery of an impediment to development of the Project that a Party believes is irresolvable.

(c) A Party's determination that even if the Project is successful, it does not want to proceed with the Project.

(d) A Party's failure to perform its material obligations under the agreement (subject to notice and cure periods).

(e) The bankruptcy or insolvency of a Party.

The Development Agreement should address the consequences of any such event or circumstance, including notices that must be given before a Party can exercise a right of termination and the effect of termination on the Parties' rights. In the circumstances described in (a) and (b) above, the Parties may wish to provide for a period of consultation before a Party can terminate to determine if it there are means by which the milestone can be achieved within a reasonable period of time or if there is a way to resolve or avoid the impediment. If there is to be a consultation period, the length of the period should be stated to limit the chance for a dispute over whether a Party has properly exercised its right of termination.

The rights of the Parties upon termination must be clearly addressed. This would include whether one or the other Party has the right to continue development in the absence of the other Party; ownership of Work Product; obligations to assign Project permits and/or contracts to the continuing Party, if any; and obligations of a continuing Party to reimburse the other Party for its unreimbursed Development Costs upon further sale or successful development of the Project.

12. Equity Participation in Project: Although the Development Agreement is intended to cover the period prior to the determination to proceed with construction of the Project and the formation of a formal joint ownership arrangement between the Parties, it would be advisable for the Development Agreement to address the rights that each will have with respect to ownership of the Project. It is likely that an entity (the “Project
A Company") will be formed for the joint ownership of the Project either during development or in any event prior to Financial Closing. The form of joint ownership will depend on a number of factors, including tribal laws and customs, tax considerations, and whether or not there are expected to be additional equity participants in the Project. It is not uncommon to use a limited liability company for such arrangements, formed either under Delaware law or under the law of the state where the Project is to be located.

In circumstances where the Parties are mutually funding the Development Costs and contributing to the development activities, it is likely that the Parties will have equal rights to ownership of the Project Company. On the other hand, if development of the Project is being primarily funded by ABC, the rights of TPE to obtain an equity interest in the Project would be stated, based on the reasonable expectation of the size of the equity share in which TPE is interested and that it will have the capability to fund. Since it is unlikely that lender financing for 100% of the Project construction costs will be available (a debt/equity structure of 70/30 or 80/20 being more likely for a Project financing), TPE will need to be able to fund its contribution toward the equity required for Project construction. Contributions in kind, such as rights to land, water or other tribal resources might substitute for monetary equity contributions, at least in part. In any event, since the right of TPE to obtain an equity interest in the Project or, conversely, the right of ABC to sell a portion of the equity interests to a third party are key Project considerations, these rights should be plainly set forth in the Development Agreement, including the timing and circumstances for the exercise of such rights.

### 13. Rights of Equity Participants in the Project Company:

The Development Agreement also may include an outline of the key provisions that will be set forth in the joint ownership agreement such as the "limited liability company operating agreement". For example, it may specify that a management committee or board of directors will be formed, and provide for the voting representation that each Party will have on such governing body, either pursuant to each Party's equity share or on some other basis negotiated by the Parties. Issues to be considered for joint ownership agreement include:

(a) the capital structure of the Project Company;
(b) the obligations of each participant for initial equity contributions for the Project;
(c) additional funding obligations, if any, as capital needs of the Project arise from time to time;
(d) rights of other parties upon a party's failure to fund required equity contributions;
(e) the mechanics of Project Company decision making, including matters that will be delegated to the professional staff and those that will require a simple majority vote, supermajority vote and/or unanimous agreement of the equity participants;
(f) allocations of profits and losses;
agreements with respect to tax matters and tax elections (particularly important if the parties choose for the Project Company to be taxed as a partnership);

the timing of cash distributions to the equity participants;

limitations on and/or consent rights or rights of first refusal with respect to the transfer of equity interests;

events that will constitute the default of an equity owner and the remedies for such default;

dissolution of the Project Company and end of term considerations; and

dispute resolution, and if necessary, a mechanism for resolving deadlocks on major decisions.

14. Assignment Rights: The rights of a Party to assign its rights or obligations under the Development Agreement should be covered and any exclusions to the requirement to obtain consent to transfer (e.g., to an affiliate) should be stated.

15. Nature of Relationship: The Development Agreement should state that it does not create a partnership or joint venture or similar arrangement between the Parties, that neither will be deemed to be an agent or representative of the other Party, and that neither Party shall have the authority to assume or create any obligation of the other Party or to bind the other Party without that Party's consent.

16. Compliance with Law: The Parties should agree to adhere to all laws, including tribal laws, applicable to the Parties or the Project during the development of the Project.

17. Governing Law: Governing law is likely to be controversial issue for the Parties to resolve. TPE will likely desire that the Development Agreement be governed by its laws, while a private entity such as ABC will prefer the laws of a jurisdiction with which it has familiarity and for which there can be predictability through access to the laws and precedents. If the laws of the tribe are highly developed and the determinations of its courts are readily accessible by non-tribal members, TPE will have greater success at arguing for the tribal laws to govern the contract. However, it would not be surprising for ABC to desire that the agreement be governed by the laws of a state with a well developed body of commercial law, such as the laws of the State of New York, which is often specified for complex and costly commercial ventures. (See Section 5-1401 of the New York General Obligations Law which provides for such choice of law.) Bear in mind that although the Development Agreement may set a precedent for the Parties' negotiation of other arrangements, it is feasible for the Development Agreement and joint ownership agreement to have a different governing law than the arrangements that involve the use of tribal resources such as land, fuel or water.

18. Dispute Resolution: A mechanism for resolving disputes and claims under the Development Agreement should be specified. While the efficacy of arbitration is a heavily debated topic, it might be a useful middle ground for the Parties as opposed to
trying to reach agreement on whether the tribal courts or state or federal courts will be used for dispute resolution.

19. Waiver of Sovereign Immunity: ABC is likely to request that TPE waive its sovereign immunity in light of the commercial nature of the Development Agreement and related joint ownership agreement, at least insofar as such waiver is necessary to preserve a Party's rights to pursue the agreed upon dispute resolution mechanism.

20. Miscellaneous: The Development Agreement will contain other customary provisions as mutually agreed between TPE and ABC, such as confidentiality, public statements, representations and warranties of the Parties, indemnification, notices, maintenance of records pertaining to development costs and audit rights, amendments, waivers, severability, execution in counterparts, and other miscellaneous terms.
# POWER PURCHASE AGREEMENT ESSENTIALS

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This outline is a list of the essential provisions for a typical long term power purchase agreement ("PPA") between a utility company ("Utility") and a private developer of a power project ("Owner"). It assumes that the power purchase is being made from a single plant owned by Owner (the "Unit"), i.e., not from a system of projects owned by Owner. This outline also assumes that the Unit has not yet been constructed. This list is more applicable to a fossil fuel plant than a renewable energy source, such as a wind or solar plant. Different considerations, some of which are discussed below, will apply to a renewable energy plant in light of the variable nature of the resource and other factors.

1. **Contract Capacity:**  
   The amount of the capacity of the Unit to which the Utility is entitled, stated either as a percentage of the gross or net capacity of the Unit or a specific amount of megawatts ("MW"). The Utility will have the right to energy and other products of the Unit, such as ancillary services, equal to its Contract Capacity. For a renewable energy project, the Utility also will want to be able to claim the renewable energy credits or equivalent associated with the Contract Capacity.

2. **Delivery Term:**  
   The number of years during which the purchase and sale of the power will take place, likely stated as a period of time following the commercial operation date of the Unit.

3. **Conditions Precedent:**  
   Events that must occur before the parties are bound to the purchase and sale obligations, e.g., receipt by Owner of all required permits, execution of necessary project agreements and the receipt of loans for the project and receipt by the Utility of the approval of its public utility commission for entry into the PPA.

4. **Expected COD:**  
   The expected commercial operation date ("COD") for the Unit.

5. **Remedies for Failure to Meet Milestones or Agreed COD:**  
   The Utility is likely to want to monitor the progress of development of the Unit, including by the establishment of milestones that must be met by agreed dates. The remedy for failure to achieve milestones by such dates might be an obligation to provide cure plans, financial penalties and/or a right to terminate the PPA. The remedy for failure to meet the agreed COD would include liquidated damages or "cover" damages (i.e., the cost of replacement power) and/or a right to terminate if there is substantial delay in achieving commercial operation of the Unit.

6. **Payments:**  
   The payments may be structured as (a) a fixed capacity charge covering fixed costs such as capital costs and other costs that do not vary with the output of the Unit, and an energy charge covering fuel and the costs of operations and maintenance that vary with the output of the Unit or (b) an all-in charge based on the quantity of energy (MWh) delivered. (Note:...
in a “tolling” arrangement, the Utility would supply the fuel at its own expense. In a renewable energy project, there would be no fuel.) A portion of the fixed charge may be subject to escalation. Payments are typically due on a monthly basis. The capacity of the Unit is likely to be subject to periodic testing (e.g., once per year), with the capacity payment subject to adjustment prospectively following the test.

7. Failure to Maintain Agreed Availability or Heat Rate: The PPA will contain remedies if the capacity of the Unit for which the Utility has contracted is not available to it for an agreed number of hours during a year or other period of time, such as a summer peak season. This is referred to as the “availability” of the Unit, or sometimes as a “capacity factor”. Since the Utility will need to obtain electric power from other sources to meet the demands of its customers, the PPA is likely to include a financial remedy in the form of liquidated damages or a reduction in the capacity charge if the agreed availability is not met. Additionally, if the Unit has a higher heat rate (i.e., it burns more fuel per unit of output—relevant only to a fossil fuel plant), remedies in the form of liquidated damages are likely to be assessed to cover the excess cost of the fuel. If the Unit fails to meet the agreed availability or heat rate over an extended period of time, or the Unit varies considerably from the guaranteed levels, termination of the PPA is also a potential remedy.

8. Delivery Point: The PPA will specify where the delivery of energy will occur. Title and risk of loss to the energy typically pass at the delivery point.

9. Scheduling: The PPA will contain provisions for the scheduling of energy deliveries, including advance notifications which may or may not be binding on the parties. Typically, the Utility will also have input into the schedule on which maintenance that will require the Unit to be shut down can occur. If the Utility is taking the entire output of the Unit, it may require the installation of equipment that will enable the Utility to automatically control the output of the Unit.

10. Force Majeure: The PPA will address the circumstances that will excuse each Party's performance obligation under the PPA. The definition of force majeure, whether or not the occurrence of a force majeure event affecting the Unit’s output will excuse the Utility’s obligation to pay the capacity charge, and the right of a party to terminate if a force majeure continues for a specified period of time are all heavily debated issues in the negotiation of a PPA.

11. Events of Default; Remedies: The PPA will identify the events that constitute a default by a party and the remedies for default, including termination of the agreement. The PPA may contain provisions for the payment of liquidated damages upon termination for default or a party may seek its remedies pursuant to the agreed dispute resolution provisions. Depending on the needs of the Utility, the PPA may contain provisions granting the Utility the right to purchase the Unit for a favorable price if the PPA is terminated for Owner’s default.

12. Changes in Law: A long term PPA is likely to include provisions addressing changes in law that affect the costs of ownership or operation of the Unit, or that will
necessitate an investment in new equipment for the Unit. Owner will want the ability to pass these additional costs on to the Utility through changes in the capacity charge or otherwise; the Utility will want to limit its exposure to such costs, perhaps through a right to terminate the agreement if the new charges will exceed an agreed amount. In the case of a fossil fuel plant, a change in law provision will be particularly important in light of expected legislation to address greenhouse gases.

13. Credit Support: Guarantees, letters of credit or other credit support for a party’s payment obligations may be required.

14. Additional Terms: The PPA will contain other provisions such as metering of output, payment disputes, assignment rights, indemnities, insurance obligations, waiver of consequential damages, limitations on liability, confidentiality, audit rights, governing law, dispute resolution and other miscellaneous terms.