IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ROBERT FINDLETON,

Plaintiff and Respondent,

v.

COYOTE VALLEY BAND OF, POMO INDIANS

Defendant and Appellant.

Case No. A156459

Superior Court of California, Mendocino County
No. SCUK-CVG-12-59929
Hon. Ann C. Moorman

NOTICE OF MOTION AND MOTION REQUESTING JUDICIAL NOTICE

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Coyote Valley Band of Pomo Indians

CERTIFICATE OF INTERESTED PERSONS AND ENTITIES

The undersigned certifies that there are no interested entities or persons required to be listed under the California Rules of Court, rule 8.208 that the justices should consider in determining whether to disqualify them as provided in rule 8.208(e)(2).

June 30, 2020

By /s/ Little Fawn Boland
Little Fawn Boland
By /s/ Keith Justin Anderson
Keith Justin Anderson

Attorney for Defendant and Appellant
Coyote Valley Band of Pomo Indians

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT, pursuant to California Rules of Court, rules 8.520(g) and 8.252(a), and California Evid. Code §§ 452 and 459, Defendants and Appellants Coyote Valley Band of Pomo Indians hereby moves this Court to take judicial notice of the following true and correct documents, which are attached as Exhibits 1 and 2 and bate stamped as RJN001 to RJN162.

Exhibit 1: The full text and original letter dated May 23, 2019 sent by Sonny J. Elliott, Chairman of the Northern California Intertribal Court System ("NCICS") Judicial Council to Dario Navarro, Esq. (current counsel to Respondent) and copied to Ann Gilmour of the Judicial Council of California.
This appears at RJN001-RJN002.

Exhibit 2: The full text and original Motion for Temporary Restraining Order and Preliminary Injunction dated September 18, 2017, inclusive of exhibits, file stamped by the clerk of the Northern California Intertribal Court System for the Coyote Valley Band of Pomo Indians Tribal Court.

This appears at RJN003-RJN162.

Dated: June 30, 2020

Respectfully submitted,

By /s/ Little Fawn Boland
Little Fawn Boland

By /s/ Keith Justin Anderson
Keith Justin Anderson

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

On September 15, 2017 the Coyote Valley Band of Pomo Indians (Tribe" or "Appellant") filed a suit in the Coyote Valley Tribal Court ("Tribal Court") within the Northern California Intertribal Court System entitled *Coyote Valley Band of Pomo Indians v. American Arbitration Association, et. al.*[1] (Defendant's Opposition to Plaintiff's Proposed Order.) (CT 1104.) The Superior Court subsequently issued sanctions in the amount of $86,457 against the Tribe under Code of Civil Procedure ("CCP") 128.5 to punish it for filing the lawsuit against the American Arbitration Association ("AAA") and Respondent and for an ancillary letter sent to the AAA. (Notice of Entry of Order Granting Plaintiff's Motion for Sanctions ("Sanctions Order").) (CT 1124-1130.) It characterized the suit and the attendant communication as actions or tactics that were taken in bad faith. The lower court also ordered a sanction in the amount of $1,500 pursuant to CCP 177.5 for failure to follow its prior order compelling mediation and /or arbitration. (Sanctions Order.) (CT 1124-1130.)

Upon a party's request, appellate courts have the same power as trial courts to take judicial notice of a matter properly subject to judicial notice. (*See Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875,881.) Further, a reviewing court may take judicial notice of a matter not before the trial court if the matter "is of substantial consequence to the determination of the action." (*People v. Terry* (1974) 38 Cal.App.3d 432, 439; Evid. Code § 459, subds. (a), (c).)

The Tribe respectfully requests this Court to take judicial notice of the two exhibits attached to the Declaration of Little Fawn Boland. Each exhibit is of substantial consequence to the determination of this action because each exhibit aids the Tribe to properly refute various statements made by the Respondent in the Respondent's Brief and

[1] Case number 2017-01103-CO.

[2] The Tribe disputes that there are any active proceedings in the lower court regarding this alleged "fraud on the court," nor have there been since the Respondent's application was denied on May 24, 2019 and it was withdrawn on May 30, 2019.

also corrects an incomplete filing made by the Respondent. Moreover, Respondent refers to topics covered in these documents yet they are not in the appellate record.

Exhibit 1 relates to proceedings occurring after the Sanctions Order that is the subject of this appeal. It is a letter from the Northern California Intertribal Court System to Dario Navarro, current counsel to the Respondent. It was provided by hand to Respondent and Judge Behnke at an *ex parte* hearing held on May 24, 2019 but it does not appear in the Register of Actions. Little Fawn Boland states in her declaration that she believes that the lower court took it under submission. Out of an abundance of caution the document is being submitted through this Request of Judicial Notice, rather than the Motion to Augment, which is being filed concurrently. Based on the address on the letter it appears that it was also mailed directly to counsel for the Respondent on May 23, 2019.

Exhibits 2 is the September 18, 2017 Motion for Temporary Restraining Order and Preliminary Injunction, inclusive of exhibits, file stamped by the clerk of the Northern California Intertribal Court System for the Coyote Valley Band of Pomo Indians Tribal Court. The "Declaration of Colin C. West in Support of Motion for Sanctions and Pursuant to Local Rule 4.1" filed on June 28, 2018 (*see* CT 825-889) has attached as "Exhibit 4" (*see* CT 826, 857-881) the same motion but it is unstamped and the exhibits are not included. As such, the declaration is incomplete. It formed the basis for the Sanctions Order. It contains the communications to and from the AAA prior to the issuance of the sanctions.

More detail about the relevance of Exhibits 1 and 2 and the appropriateness of judicial notice under California Evidence Code sections 452, 453, and 459 are explained below.

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II. THIS COURT SHOULD TAKE JUDICIAL NOTICE OF THE FULL TEXT OF EACH EXHIBIT

A. Letter from NCICS Judicial Council to D. Navarro and Copied to the Judicial Council of California

A true and correct copy of the original letter dated May 23, 2019 sent by Sonny J. Elliott, Chairman of the NCICS Judicial Council to Dario Navarro, Esq. (and copied to Ann Gilmour of the Judicial Council of California) (referred to hereafter as the "NCICS Letter") is attached to the Declaration of Little Fawn Boland as **Exhibit 1**.

On May 22, 2019 the Respondent filed a 177-page document entitled the "Plaintiff's Ex Parte Application for Temporary Restraining Order, Order to Show Cause re Preliminary Injunction, and Order for Expedited Discovery; Memorandum of Points and Authorities; Declarations of Robert Findleton, Dario F. Navarro, and Michael P. Scott; Certification re Notice" and a hearing occurred regarding it on May 24, 2020. (6 CT 1291.) The basis of the hearing was the exact allegations presented in footnote 10 of the Respondent's Brief on page 20-21 regarding an alleged "fraud on the court" by the Tribe and its counsel with regard to the legal status of the Tribal Court. The lower court did not sustain the request and on May 30, 2019 the Respondent formally withdrew the application. (6 CT 1291.)

The Respondent states that a Motion to Dismiss this appeal based on the "disentitlement doctrine" is forthcoming based on the alleged "fraud on the court." (RB 20-21, fn. 10.) The whole of the argument in fn. 10 is part of establishing the "litigation misconduct and its ongoing contumacious violation of the multiple lower court orders." (*Id*.) According to the Respondent, whether the Tribal Court is deserving of respect is "not ripe for review in this appeal as it is still the subject of the factual dispute in the trial court enforcement proceedings."[2] (*Id*.) It is important that a key document that the lower court had before it when it denied the application be part of this record as Respondent has

[2] The Tribe disputes that there are any active proceedings in the lower court regarding this alleged "fraud on the court," nor have there been since the Respondent's application was denied on May 24, 2019 and it was withdrawn on May 30, 2019.

made it a major issue in his argumentation. As such, and in compliance with California Rules of Court rule 8.252(a)(2)(A), the letter is relevant to this appeal because it directly addresses the Respondent's allegations. (RB 20-21 fn. 10).

In *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1192, n. 3, the court held that for judicial notice purposes a federally recognized tribe, a sovereign entity is similar to a state or territory. The Northern California Intertribal Court System is a sovereign consortium court of federally recognized tribes. A letter from its Judicial Council qualifies under *Big Valley* for judicial notice.

Specifically, the existence of the letter (not the parties interpretation of what it signifies) is a fact that is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. The NCICS letter shows the nature of the issue (as opposed to the truth of the allegations). It should be judicially noticed under Evid. Code § 459, subd. (h). Additionally, pursuant to Evid. Code § 452, subd. (c) the NCICS letter is an official act of a judiciary, and under Evid. Code § 452, subd. (d) it is a record from a judiciary. Thus, good cause exists for granting this request as to the NCICS Letter.

B. The Correct Version of the Motion for Temporary Restraining Order and Preliminary Injunction

The September 18, 2017 Motion for Temporary Restraining Order and Preliminary Injunction (referred to hereafter as the "TRO Motion") is already in the "Declaration of Colin C. West in Support of Motion for Sanctions and Pursuant to Local Rule 4.1" filed on June 28, 2018 (*see* CT 825-889) attached as "Exhibit 4" thereto (*see* CT 826, 857-881). However, it is unstamped and the exhibits are not included. As such, what the Respondent submitted it to the lower court, it was incomplete.

The Sanctions Order took issue with a letter which the lower court interpreted as threatening and designed to intimidate. It said, "on September 8, 2017, the Tribe threatened AAA that if it entertained Mr. Findleton's Request for Mediation/Arbitration, it would 'publicize AAA's flippant disregard of tribal law, tribal courts and tribal sovereignty.'" (Sanctions Order.) (CT 1125.) The Respondent's Brief has expanded the

argumentation throughout to cover all communications with the AAA being part of an illicit scheme. But for Respondent's broad-brush arguments, a full record of all letters to and from the AAA before the sanctions were granted would not have been needed. When the Tribe started to go through the Respondent's arguments, the Tribe's counsel realized that the Respondent's Declaration of Colin C. West in Support of Motion for Sanctions and Pursuant to Local Rule 4.1" filed on June 28, 2018 (*see* CT 825-889), "Exhibit 4" thereto (*see* CT 826, 857-881) was incomplete.

Judicial notice of the TRO Motion is appropriate under Evidence Code section 452(h) for facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. While the parties disagree over the argumentation in the TRO Motion the fact of its existence and its contents are not reasonably subject to dispute. Moreover, under *Big Valley*, judicial notice of this filing in the Tribal Court is appropriate under Evid. Code § 452, subd. (d) as a record of a judiciary.

III. CONCLUSION

Based on the foregoing, the Tribe respectfully requests that this Court grant its Motion Requesting Judicial Notice of the documents described herein and attached hereto.

Dated: June 30, 2020

Respectfully submitted,

By /s/ Little Fawn Boland
Little Fawn Boland

By /s/ Keith Justin Anderson
Keith Justin Anderson

COURT OF APPEAL, FIRST APPELLATE DISTRICT

Division Two

STATE OF CALIFORNIA

ROBERT FINDLETON, doing business as Terre Construction and also doing business as On-Site Equipment, Plaintiff and Respondent, v. COYOTE VALLEY BAND OF POMO INDIANS, Defendant and Appellant.	**Court of Appeal No. A156459** **Superior Court No. SCUK CVG 12-59929** **[PROPOSED] ORDER GRANTING MOTION REQUESTING JUDICIAL NOTICE**

Pursuant to California Rules of Court, rules 8.520(g) and 8.252(a), and California Evid. Code §§ 452 and 459, Appellant Coyote Valley Band of Pomo Indians moved this Court to take judicial notice of the following documents, which are attached as Exhibits 1 and 2 and bate stamped as RJN001 to RJN162.

Based on the Declaration of Little Fawn Boland and the Memorandum of Points and Authorities accompanying the Motion Requesting Judicial Notice, we find that there are good and sufficient grounds for granting the relief requested. Accordingly,

Appellant's Motion Requesting Judicial Notice is hereby granted, and IT IS HEREBY ORDERED that the following exhibits are admitted into the appellate record:

Exhibit 1: The full text and original letter dated May 23, 2019 sent by Sonny J. Elliott, Chairman to the Northern California Intertribal Court System ("NCICS") Judicial Council to Dario Navarro, Esq. and copied to Ann Gilmour of the Judicial Council of California.

This appears at RJN001-RJN002.

Exhibit 2: The full text and original Motion for Temporary Restraining Order and Preliminary Injunction dated September 18, 2017, inclusive of exhibits, file stamped by the clerk of the Northern California Intertribal Court System for the Coyote Valley Band of Pomo Indians Tribal Court.

This appears at RJN003-RJN162.

Dated: _____ _____

Judge of the Court of Appeals

DECLARATION OF LITTLE FAWN BOLAND

I, LITTLE FAWN BOLAND, declare as follows:

1. I am an attorney duly licensed to practice in the State of California, and I am one of the attorneys for Appellant, Coyote Valley Band of Pomo Indians and, I am a member in good standing of the State Bar of California. The following stated facts are of my personal knowledge and, if called as a witness to do so, I could and would testify competently to their truth. Matters of information, belief or opinion stated herein I faithfully believe to be accurate.

2. Attached hereto as Exhibit 1 is a true and correct copy of the full text and original letter dated May 23, 2019 sent by Sonny J. Elliott, Chairman and Northern California Intertribal Court System ("NCICS") Judicial Council to Dario Navarro, Esq. and copied to Ann Gilmour of the Judicial Council of California. This appears at RJN001-RJN002. I believe that the lower court admitted it and took it under submission at the May 24, 2019 hearing on the "Plaintiff's Ex Parte Application for Temporary Restraining Order, Order to Show Cause re Preliminary Injunction, and Order for Expedited Discovery; Memorandum of Points and Authorities; Declarations of Robert Findleton, Dario F. Navarro, and Michael P. Scott; Certification re Notice."

3. Attached hereto as Exhibit 2 is the full text and original Motion for Temporary Restraining Order and Preliminary Injunction dated September 18, 2017, inclusive of exhibits, file stamped by the clerk of the Northern California Intertribal Court System for the Coyote Valley Band of Pomo Indians Tribal Court. This appears at RJN003-RJN162.

4. After Respondent raised arguments about the communications with the AAA that went beyond the lower court's concerns with the September 8, 2020 communication to the AAA I started to dig into the appellate record to refute his broad brush statements about the Tribe's alleged litigation misconduct. The communications to and from the AAA are in the exhibits to the TRO Motion. I was previously unaware that the "Declaration of Colin C. West in Support of Motion for Sanctions and Pursuant to

Local Rule 4.1" filed on June 28, 2018 (*see* CT 825-889) which attached the TRO Motion as "Exhibit 4" (*see* CT 826, 857-881) was unstamped and the exhibits were not included.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 30, 2020

By: /s/ *Little Fawn Boland*

Little Fawn Boland (SBN 240181)

Administrative Office
3000 Shanel Road
Hopland, CA 95449
(707) 472-2160

Kristina Kalka, Chief Judge
Michael Gadoua, Court Manager
Dorya Harjo, Court Clerk

May 23, 2019

Dario Navarro, Esq.
Law Offices of Dario Navarro
3655 Memory Lane
South Lake Tahoe, CA 96150-4137

RE: Revocation of Letter Sent May 19, 2019 entitled, '"Differentiating the Northern California Intertribal Court System from the 'Coyote Valley Tribal Court' or the 'Coyote Valley Band of Pomo Indians Tribal Court'"

Dear Mr. Navarro:

The purpose of this letter is to expressly and unequivocally revoke the statements made to you in our letter of May 19, 2019 that the Coyote Valley Tribal Court "is NOT associated, connected or related to the Northern California Intertribal Court System ("NCICS")" and the implication that the Honorable Judge Wiseman misrepresented himself. By this letter, we also hope to clarify that the Coyote Valley Band of Pomo Indians Tribal Court (also referred to as the "Coyote Valley Tribal Court") is a judicial branch within the Northern California Intertribal Court System. Joseph Wiseman is the Chief Judge of the Coyote Valley Tribal Court, and as such is the Chief Judge of one of the three branches within the Northern California Intertribal Court System. His signature block ("Chief Judge, Northern California Intertribal Court System / Coyote Valley Band of Pomo Indians Tribal Court") accurately reflects his title and status within the Northern California Intertribal Court System.

Upon further review, the inquiry in your letter of May 9, 2019 is misleading, and it appears to have been written with that intent. At the time of the Northern California Intertribal Court System's response on May 19, 2019, the Judicial Council understood you to have asked whether Judge Wiseman was Chief Judge of the entire Northern California Intertribal Court System. He is not, and his signature block is consistent with his status within the Northern California Intertribal Court System. The Honorable Kristina Kalka is Chief Judge of the Northern California Intertribal Court System. Again, Judge

Wiseman is Chief Judge of the Coyote Valley Band of Pomo Indians Tribal Court, a member court within the Northern California Intertribal Court System.

Although the letter sent to you May 19, 2019 bears the letterhead of the NCICS, we regretfully relied on staff to inform us of the nature of the questions you asked and the content of our response. Our staff informed us that the purpose of our letter to you would be to correct a clerical error and that you were merely asking whether Judge Wiseman was Chief Judge of the entire Northern California Intertribal Court System and that the response to you was to merely confirm that he is not. Upon reading the letter of May 19, 2019 in full, we now see that it erroneously states that neither Judge Wiseman nor the Coyote Valley Band of Pomo Indians Tribal Court are associated with the Northern California Intertribal

Administrative Office
3000 Shanel Road
Hopland, CA 95449
(707) 472-2160

Kristina Kalka, Chief Judge
Michael Gadoua, Court Manager
Dorya Harjo, Court Clerk

Court System. Both statements are incorrect and we regret the error. We were also unaware of the prior unauthorized verbal statements made to you by our staff.

The Coyote Valley Band of Pomo Indians Tribal Court is one of the founding courts of the Northern California Intertribal Court System and has been a consistent participant for several years. The Northern California Intertribal Court System Rules of Court Procedure and Practice expressly contemplate that member tribes may participate through their local tribal court, which is what the Coyote Valley Band of Pomo Indians does through its tribal court. The NCICS Rules of Court show that each tribe may have its own court within the intertribal court system. Rules 1, 2 and 4 all show that Judge Wiseman's signature block is correct because he is the Chief Judge of the Coyote Valley Tribal Court, which is *part* of the NCICS. Rule 2B says, "These Rules govern all actions *in each Tribal Court that is part of the NCICS* unless otherwise specified by tribal law, code or ordinance." (Emphasis added). Further, Rule 1 says that for the rules; "They are intended to apply to all actions *in each Tribal Court of each Tribe that is part* of the Northern California Intertribal Court System." (Emphasis added). Rule 2C says, "Great weight will be given to relevant prior decisions *of the respective Tribe's Tribal Court*." Finally, Rule 4 says, "Court hearings shall be held in the location designated by each NCICS Member Tribe and will typically be on each Member Tribe's respective tribal land." Consistent with its status within the NCICS, the Coyote Valley Tribal Court operates in accordance with these rules.

Your letter of May 9, 2019 shows that you copied the Judicial Council of California in regard to accusations against Judge Wiseman. This appears to be an attempt to intimidate Judge Wiseman. Judge Wiseman has served both the Coyote Valley

Band of Pomo Indians Tribal Court and the Northern California Intertribal Court System with integrity for many years, and we would never intentionally try to discredit him or suggest he is a dishonest person.

We regret that our staff misinformed us regarding the nature of your inquiries. We hope this letter clarifies the position of the NCICS.

Sincerely,

Sonny J. Elliott, Chairman
Judicial Council of the NCICS

CC: Ms. Ann Gilmour
Judicial Council of California
Administrative Office of Courts
455 Golden Gate Avenue
San Francisco, CA 94102

Email: ann.gilmour@jud.ca.gov

NORTHERN CALIFORNIA INTERTRIBAL COURT SYSTEM FOR: COYOTE VALLEY BAND OF POMO INDIANS STREET AND MAILING ADDRESS: 3000 Shanel Road, Hopland, California 95449 PHONE: 707-472-2100, Ext. 1600	*FOR COURT USE ONLY* FILED SEP 18 2017 Tania Mota CLERK NCICS TRIBAL COURT
Plaintiff/Petitioner: COYOTE VALLEY BAND OF POMO INDIANS Defendant/Respondent: AMERICAN ARBITRATION ASSOCIATION AND ROBERT FINDLETON	
SUMMONS AND NOTICE OF HEARING	CASE NUMBER: 2017-01103-CO

1. NOTICE TO DEFENDANT:
   AMERICAN ARBITRATION ASSOCIATION AND ROBERT FINDLETON

   YOU ARE DIRECTED TO APPEAR at a hearing of the above-entitled case as follows.

2. HEARING INFORMATION:

Date:	OCTOBER 18, 2017	Time:	2:00PM
Place:	7601 N. STATE STREET REDWOOD VALLEY, CA. 95470		

3. You have a right to have an attorney and to have witnesses appear on your behalf at your own expense. If you fail to appear in court, default judgment in the amount of the fine may be entered against you. In addition, if you fail to appear you may be subject to an additional sanction imposed by the court for failure to appear.

4. If you have any questions before the hearing, please contact the Northern California Intertribal Court System Clerk of the Court at: 707-472-2100, Ext. 1600 or in person at the public counter of the Northern California Intertribal Court System Court Clerk, 3000 Shanel Road, Hopland, California 95449, located within the Hopland Band of Pomo Indians Police Department. Court Clerk hours are 8:30-4:00 p.m. Monday through Friday, excluding court holidays.

Tania Mota
TANIA MOTA, Clerk of the Court

SEPTEMBER 18, 2017
Date

ATTORNEY OR PARTY WITHOUT ATTORNEY:	FOR COURT USE ONLY
NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: EMAIL ADDRESS (*Optional*): ATTORNEY FOR (*Name*):	
NORTHERN CALIFORNIA INTERTRIBAL COURT SYSTEM **FOR: COYOTE VALLEY BAND OF POMO INDIANS** MAILING ADDRESS: 3000 Shanel Road, Hopland, California 95449 PHONE: 707-472-2100, Ext. 1600	
Plaintiff/Petitioner: COYOTE VALLEY BAND OF POMO INDIANS Defendant/Respondent: American Arbitration Association and Robert Findleton	
PROOF OF SERVICE—CIVIL	CASE NUMBER: 2017-01103-CO

Check method of service *(only one):*

____ By Personal Service ____ By Mail

____ By Messenger Service ____ By Overnight Delivery

Do not use this form to show service of a summons and complaint or for electronic services

1. At the time of service I was over 18 years of age **and not party to this action.**
2. My residence or business address is:_____
3. On *(date)*:_____ I served the following documents *(specify)*:

4. I served the documents on the person below, as follows:
   a. Name of person served:_____
   b. Business or residential address of person served:_____

5. The documents were served by the following means *(specify)*:
   a. ____ **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 4. (1) For a party represented by an attorney, delivery was made (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in the office between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

CASE NAME: American Arbitration Association and Robert Findleton	CASE NUMBER:2017-01103-CO

5. b. ____ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the person at the address in item 4 and (*specify one):*

(1) ____ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
(2) ____ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (*city and state*):_____

c. ____ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 4. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

d. _____ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. *(A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)*

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date:_____

_____ _____
(TYPE OR PRINT NAME OF DECLARANT) (SIGNATURE OF DECLARANT)

(If item 5d is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

____ **By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the address listed in item 4. (1) For a party represented by an attorney, delivery was made (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in the office between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on *(date)*:

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.
Date:_____

LITTLE FAWN BOLAND (SBN 240181)
KEITH ANDERSON (SBN 282975)
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Attorneys for Petitioner
COYOTE VALLEY BAND OF POMO INDIANS

NORTHERN CALIFORNIA INTERTRIBAL COURT SYSTEM
COYOTE VALLEY TRIBAL COURT

COYOTE VALLEY BAND OF POMO INDIANS, also known as the Shodakai Casino, DOES 1-50, Petitioner, v. AMERICAN ARBITRATION ASSOCIATION, and ROBERT FINDLETON, doing business as Terre Construction and also doing business as On-Site Equipment, Defendant.	**CASE NO. _____** **PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF**

COMES NOW the Coyote Valley Band of Pomo Indians ("Petitioner" or "Tribe"), pursuant to NCICS Rule 7, and respectfully requests the Court issue an order for declaratory and injunctive relief, as detailed further herein. As grounds for its Petition, the Tribe alleges the

following:

INTRODUCTION

1. This is an action for injunctive and declaratory relief by which the Tribe seeks: (1) an order enjoining Defendants American Arbitration Association ("AAA") and Robert Findleton from engaging in mediation and arbitration proceedings regarding a dispute between Mr. Findleton and the Tribe; and (2) a declaration that AAA is without jurisdiction over the underlying dispute and that AAA and Mr. Findleton's actions constitute ongoing violations of Tribal law.
2. The underlying dispute in this matter between the Tribe and Defendant Findleton is related to actions occurring on the Tribe's reservation, pursuant to contracts mandating the application of Tribal law and Tribal jurisdiction.
3. The Defendants have ignored Tribal law, including the order issued by this Court holding that no court has the authority to compel the Tribe to arbitration. AAA and Mr. Findleton are both well aware of this Court's ruling, but continue to disregard it, thus engaging in ongoing violations of Tribal law.
4. The Defendants' ongoing violations of Tribal law are detrimental to the Tribe, tribal sovereignty, well-settled principles of federal Indian law, and the authority of this Court.

JURISDICTION

5. The Court has jurisdiction over the parties and the subject matter pursuant to the Document Embodying the Laws, Customs and Traditions of the Coyote Valley Band of Pomo Indians ("Tribal Constitution") and well-settled principles of Indian law and jurisdictional law.
6. "The Tribal Courts shall exercise jurisdiction over all cases or controversies within the Tribe's jurisdiction . . . that arise under [the] Constitution, from the laws or the Tribe or which is otherwise inherent to the Tribal Courts' sovereignty to hear such cases or

controversies." Tribal Constitution, Art. XIV, Sec. 1. The jurisdiction of the Court extends to all lands and resources within the Coyote Valley Indian Reservation, and all persons within any territory under the jurisdiction of the Tribe. Tribal Constitution, Art. II, Sec. 1.

7. The Court has jurisdiction over Mr. Findleton based on his consensual relationship with the Tribe, which included express consent to Tribal law and Tribal jurisdiction.
8. The Court has jurisdiction over AAA based on its deliberate insertion into a dispute arising out of contracts that are expressly governed by Tribal law and subject to Tribal jurisdiction. AAA's systematic and continuous contacts with the Tribe all arise out of and are connected with activities occurring solely within the reservation of the Tribe.
9. The Court also has jurisdiction over AAA because, in proceeding with arbitration, it has created continuing obligations between itself and the Tribe, and in doing so has manifestly availed itself of the privilege of doing business in the forum where the Tribe resides.
10. AAA is not shielded by arbitral immunity because it is acting in the absence of jurisdiction.
11. The subject matter of this dispute is the ongoing violation of Tribal law. The Court's exercise of jurisdiction over such allegations is appropriate and necessary to protect Tribal self-government.

PARTIES

12. Petitioner Coyote Valley Band of Pomo Indians is a federally recognized Indian tribe with its reservation located in Mendocino County, California.
13. Defendant American Arbitration Association is a large private arbitration company that provides mediation and arbitration services in exchange for a fee. AAA is currently proceeding with mediation (Case # 02-17-0003-3765) and arbitration (Case # 01-17-0003-3765) proceedings between the Tribe and Defendant Findleton.
14. Defendant Robert Findleton is the principal of two companies that entered into contracts

with the Tribe, Terre Construction and On-Site Equipment Rental, to perform on-reservation construction and equipment rental services associated with the development of the Tribe's failed hotel and casino project.

STATEMENT OF FACTS

15. This matter arises from an underlying dispute involving work performed on the Tribe's reservation pursuant to contracts that were negotiated and executed on the Tribe's land, and which are governed by Tribal law and the jurisdiction of the Tribe.

16. In 2007, the Tribe contracted with Mr. Findleton, doing business as Terre Construction and On-Site Equipment Rental, to perform certain construction-related tasks associated with the development of the Tribe's failed hotel and casino project. Mr. Findleton is the principal of both companies.

Relevant Agreements

17. The contracts relevant to this matter are the American Institute of Architects Agreement between the Tribe and Terre Construction ("Construction Agreement"), attached as Exhibit A, and the On-Site Equipment Rental Agreement ("Rental Agreement"), attached as Exhibit B.[1]

18. The Construction Agreement contains provisions stating that it "shall be governed by the law of the Coyote Valley Band of Pomo Indians," that "[i]f a particular issue is not covered by such law, federal law shall govern" and that "[t]he Contractor agrees to the jurisdiction of the Coyote Valley Band of Pomo Indians." Exhibit A at 006 (§ 18.1.2).

19. The Rental Contract does not specify governing law, but it does state that it is "deemed to

[1] All Exhibits are included in the Petitioner's Appendix of Exhibits to Petition for Declaratory and Injunctive Relief and Motion for Temporary Restraining Order and Preliminary Injunction ("Appendix of Exhibits"), filed concurrently with this Petition. Page number citations are to the consecutively-paginated numbers in the Appendix of Exhibits.

have been negotiated and executed within the Coyote Valley Indian Reservation" (Exhibit B at 011 (§ 22.E)) and that state taxes do not apply, but Tribal taxes will be assessed (*Id.* at 010 (§ 21)). These terms lead to the logical conclusion that the contract is governed by Tribal law and subject to Tribal jurisdiction.

20. Both the Construction and Agreement and Rental Agreement contain arbitration clauses stating that the parties agree to arbitrate in accordance with AAA rules. Both agreements also expressly state they do not waive the Tribe's immunity.

21. The Construction Agreement states: "[n]o term or provision in this Agreement shall be construed as a waiver of the sovereign immunity of the Coyote Valley Band of Pomo Indians. The Parties specifically agree that the sovereign immunity of [the] Coyote Valley Band of Pomo Indians shall not be waived for disputes or other matters related to this Agreement." Exhibit A at 005 (§ 9.10.8).

22. The Rental Agreement similarly states: "[n]o term or provision of this Agreement shall be construed as a waiver of sovereign immunity of the Coyote Valley Band of Pomo Indians. The parties specifically agree that the sovereign immunity of the Tribe shall not be waived for disputes or other matters related to this Agreement." Exhibit B at 011 (§ 22.D).

23. A Tribal Council Resolution purporting to waive the Tribe's immunity in regard to the underlying dispute was declared by this Court to be invalid. *See* July 6 Order, attached as Exhibit E.

24. In totality, Mr. Findleton agreed in the Construction Agreement, Rental Agreement and the Tribal Council Resolution to Tribal venue and jurisdiction, Tribal choice of law, situs of the contracts being the Tribe's Reservation, Tribal taxing authority, that the Tribe could repudiate state court jurisdiction over any disputes and that the Tribe was not waiving its sovereign immunity for disputes related to the contracts. Mr. Findleton also

agreed in the contracts to use best efforts to avoid California taxing jurisdiction over the project, and never complained about the Tribe's laws or sovereignty, both of which provide the legal basis for the right of the Tribe to construct the gaming facility and pay Mr. Findleton in the first place.

Underlying Tribal Court Case

25. The Tribal Court considered and ruled on various issues regarding the Tribe and Defendant Findleton in Case No. NCICS-CV-2017-0001-JW.
26. By order dated July 6, 2017, the Court ruled that the state court does not have jurisdiction to order parties to arbitrate and that the Tribe had not waived its sovereign immunity, resulting in no court having jurisdiction to order the parties to arbitrate. Exhibit E at 024.
27. The Court also ruled that it would not grant comity to state court orders regarding this matter "given the lack of state court jurisdiction, as well as the overriding interest in Tribal jurisdiction." *Id.* at 023.
28. After a thorough analysis, the Court held: "[s]imply put, the Tribe failed to waive its sovereign immunity, and neither the state courts, nor this court has the jurisdiction to compel the Tribe to arbitrate." *Id*. at 024.
29. Mr. Findleton was served a copy of the July 6 Order by email from the Tribal Court.
30. AAA received a copy of the July 6 Order from the Tribe on August 22, 2017.

Arbitration Proceedings

31. AAA has engaged in numerous communications with the Tribe and Mr. Findleton, attempting to proceed with mediation and arbitration, allegedly pursuant to the terms of the agreements between the parties and an order issued on April 25, 2017 by the Mendocino County Superior Court compelling mediation and arbitration.
32. On August 17, 2017, AAA sent notice to the Tribe and Mr. Findleton that it re-opened the

arbitration, at the request of Mr. Findleton, because a state court-ordered stay had been lifted. *See* August 17, 2017 AAA Letter, attached as Exhibit F.

33. In response to AAA's decision to re-open the arbitration, the Tribe notified AAA, by letter dated August 22, 2017, that the Tribal Court ruled on the matter and held that the state court did not have jurisdiction to order the Tribe to arbitration, and that the Tribe had not validity waived its sovereign immunity in the Rental Agreement, Construction Agreement, or related documents. *See* August 22, 2017 Letter to AAA, attached as Exhibit G. The Tribe attached a copy of the July 6 Order to the correspondence. *See id*. at 032–042.

34. On August 29, 2017, the AAA acknowledged the Tribe's August 22 letter, and "made an initial administrative determination to proceed with [the] arbitration." *See* August 29, 2017 AAA Letter, attached as Exhibit H. In support of its decision, the AAA pointed to the contract requiring the parties to arbitrate, and the state court order directing "the parties to arbitrate pursuant to the terms of their contract." *Id.* at 043. The AAA disregarded the order of the Tribal Court in favor of the state court order, stating "[w]hile the Tribal Court ruled that the state court did not have jurisdiction over the [Tribe], the Tribal Court did not order a stay of these proceedings. As such, this arbitration will proceed . . . ." *Id*.

35. On August 30, 2017, the Tribe notified the AAA that it would not participate in arbitration, and explained again that "[o]n July 6, 2017, the [Tribal Court] concluded the Superior Court is powerless to compel the Tribe to arbitration, rendering the Superior Court's order meaningless." *See* August 30, 2017 Letter to AAA, attached as Exhibit I. The Tribe further explained that Mr. Findleton "specifically agreed in the contracts that are the subject of this dispute to abide by Tribal law and to subject himself to Tribal jurisdiction. [The Tribe], on the other hand, specifically contracted to avoid dispute resolution in state court and to not be bound by state law." *Id.* at 045.

36. Later on August 30, 2017, the AAA sent a letter advising the Tribe that an administrative call commencing mediation and arbitration proceedings took place in the absence of the Tribe and that the Tribe will be deemed to have agreed to certain terms governing the arbitration if it does not submit further responses to the AAA—including terms recognizing the State Court order as valid. *See* August 30, 2017 AAA Letter, attached as Exhibit J.
37. By letter dated August 31, 2017, the Tribe was notified if it did not consent to mediation, arbitration proceedings would re-commence. *See* August 31, 2017 Letter to AAA, attached as Exhibit K.
38. The Tribe reiterated its previous response in yet another letter, sent to AAA on September 8, 2017. *See* September 8, 2017 Letter to AAA, attached as Exhibit L.
39. By letter dated September 13, 2017, the Tribe again restated its position that it could not lawfully be compelled to arbitrate and included a written response to AAA's proposed terms contained in its August 30, 2017 letter. *See* September 13, 2017 Letter to AAA, attached as Exhibit M. At the time of filing, the Tribe had not yet received a response from AAA.

Defendants' Ongoing Violations of Tribal Law

40. Tribal law, which governs the agreements at issue, is expressed in part through Tribal Court decisions.
41. The Tribal Court made abundantly clear that no court has the authority to order the parties to arbitration, and that the Tribe did not validly waive its sovereign immunity.
42. The Defendants' actions of pursuing and overseeing mediation and arbitration are contrary to and in violation of Tribal law.
43. Mr. Findleton's actions of requesting that AAA re-open arbitration proceedings and participating in those proceedings defy Tribal law, as expressed through this Court's order.

The Order is clear that "neither the state courts, nor this court has the jurisdiction to compel the Tribe to arbitrate." Exhibit E at 024.

44. AAA claims to proceed with arbitration pursuant to the contract terms (*see* Exhibits H, J), but completely disregards the contract terms that mandate the application of Tribal law and Tribal jurisdiction.

45. AAA's actions of proceeding with mediation and arbitration, under the guise of a state court order, are in violation of Tribal law.

46. The ongoing arbitration proceedings invoked by Mr. Findleton and sanctioned by the AAA constitute ongoing harm to the Tribe's sovereignty.

47. AAA rules allow for arbitration to proceed even if a party elects not to participate. The Defendants' violations of Tribal law place the Tribe in the untenable position of being subject to an arbitration award issued against it without benefit of the Tribal processes agreed to by Mr. Findleton in the contracts that are the subject of the underlying dispute, or being forced to submit to a compulsion order from a foreign court that this Court ruled has no jurisdiction over the Tribe.

COUNT I – DECLARATORY JUDGMENT

AAA's Lack of Jurisdiction

48. The Tribe realleges paragraphs 1 through 47 and incorporates them by reference.

49. AAA only has jurisdiction to proceed with mediation and arbitration proceedings pursuant to a valid agreement to arbitrate between parties. A party cannot be subject to binding arbitration without either its prior contractual consent or its contemporaneous consent.

50. This Court ruled that the Tribe did not consent to binding arbitration via prior contract because the Tribe did not waive its sovereign immunity. The Tribe is not consenting to arbitration now.

51. The agreements at issue in this matter are governed by Tribal law, and subject to Tribal jurisdiction. Tribal law, as expressed through this Court's rulings, is clear that the state court does not have jurisdiction to order the parties to arbitrate, and that the Tribe did not validly waive its sovereign immunity to consent to arbitration.
52. Because AAA may only obtain jurisdiction by consent (including consent by a valid court ordered compulsion to adhere to a prior valid contract), and there is no valid consent by the Tribe or valid court order compelling the Tribe to arbitrate, AAA is without jurisdiction over the dispute.

COUNT II – DECLARATORY JUDGMENT

AAA and Findleton's Ongoing Violations of Tribal Law

53. The Tribe realleges paragraphs 1 through 52 and incorporates them by reference.
54. Legal action against a Tribe may not proceed in the absence of a waiver of tribal sovereign immunity. This Court ruled that the Tribe did not lawfully waive its sovereign immunity and thus no valid waiver exists.
55. AAA and Mr. Findleton's actions of attempting to subject the Tribe to arbitration without its valid consent constitute ongoing and continuous violations of Tribal law.

COUNT III – INJUNCTIVE RELIEF

56. The Tribe realleges paragraphs 1 through 55 and incorporates them by reference.
57. The Defendants' actions deny the Tribe its sovereign right to determine the manner in which dispute resolution procedures may lawfully proceed against it, and constitutes ongoing harm to the Tribe.
58. The Tribe is placed in the position of either refusing to participate in AAA proceedings and risking a default award issued against it, or being forced to participate in dispute resolution absent a valid waiver of sovereign immunity and risking the appearance of consent to AAA

proceedings.

59. The only way to address the ongoing violations of Tribal law is through injunctive relief, enjoining the Defendants from subjecting the Tribe to dispute resolution procedures to which it did not validly consent.

PRAYER FOR RELIEF

Based upon the allegations above, the Tribe respectfully prays for an Order of the Court:

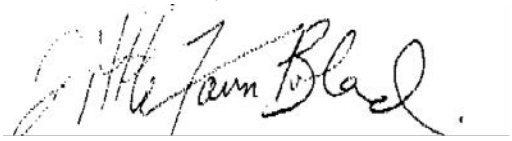
A. Declaring that (i) AAA is without authority to proceed with arbitration over the underlying dispute, and (ii) the Defendants are engaging in ongoing violations of Tribal law.

B. Permanently enjoining AAA from proceeding with mediation (Case # 02-17-0003-3765) and arbitration (Case # 01-17-0003-3765), and permanently enjoining Defendant Findleton from pursuing such claims; and

C. Granting such other and further relief as the Court deems just and proper.

Dated this 15th day of September 2017.

CEIBA LEGAL, LLP

By: 

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NORTHERN CALIFORNIA INTERTRIBAL COURT SYSTEM
COYOTE VALLEY TRIBAL COURT

COYOTE VALLEY BAND OF POMO INDIANS, also known as the Shodakai Casino, DOES 1-50,

Petitioner,

v.

AMERICAN ARBITRATION ASSOCIATION, and ROBERT FINDLETON, doing business as Terre Construction and also doing business as On-Site Equipment,

Defendant.

CASE NO. _____

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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COMES NOW the Coyote Valley Band of Pomo Indians ("Petitioner" or "Tribe"), pursuant to NCICS Rule 10, and respectfully requests the Court issue a temporary restraining order and preliminary injunction, as detailed further herein. As grounds for its motion, the Tribe states the following:

INTRODUCTION

This motion ("Motion") is filed in conjunction with a petition for injunctive and declaratory relief ("Petition") by which the Tribe seeks: (1) an order permanently enjoining Defendants American Arbitration Association ("AAA") and Robert Findleton ("Mr. Findleton") from engaging in mediation and arbitration proceedings regarding a dispute between Mr. Findleton and the Tribe; and (2) a declaration that AAA is without jurisdiction over the underlying dispute and that AAA and Mr. Findleton's actions constitute ongoing violations of Tribal law. The allegations in the Petition are incorporated herein.

Despite this Court's ruling that the arbitration clauses in the contracts between the Tribe and Mr. Findleton are not enforceable, that the Superior Court of Mendocino County ("State Court") is without power to compel the Tribe to arbitration, and that the Tribe has not waived immunity, Mr. Findleton continues to proceed with arbitration and AAA continues to oversee that arbitration. The Tribe currently suffers harm by the Defendants' actions, and additional injury is imminent. Accordingly, preliminary injunctive relief is warranted. A temporary restraining order and preliminary injunction will preserve the status quo and prevent additional irreparable harm to the Tribe until the Court has the opportunity to rule on the merits of the underlying Petition.

BACKGROUND ON AAA

AAA is an unremarkable corporation providing mediation and arbitration services in exchange for a fee. Like many corporations, it offers its services to potential customers through a variety of advertising mediums, including promotional materials that tout its inclusion in "most of

the [construction] industry's standard contracts." Exhibit N at 057.[1] Customers may accept AAA's offer by incorporating its standard mediation or arbitration terms into a contract. Alternatively, potential customers may make a counteroffer whereby they alter the standard terms under which a mediation or arbitration may proceed. AAA assents to a potential customer's counteroffer to facilitate a mediation or arbitration under alternate terms when it accepts money as consideration for such services.

AAA's corporate model most closely resembles companies like Comcast and AT&T. These service providers are regulated by a combination of state, federal and tribal law, and the rules they must follow differ from jurisdiction to jurisdiction, depending on the locations of the customers they serve. When Comcast or AT&T offer services to a person in California, the company must abide by the regulations imposed on it by the state of California. When Comcast or AT&T offer services to a person in Alabama, the company must abide by the regulations imposed on it by the state of Alabama.

The question presented to this Court is whether AAA, another company regulated by the laws of the jurisdiction in which it operates, should be treated materially different.

The answer provided by this Motion is "no."

Although AAA is sometimes referred to as "quasi-judicial," it must submit to the laws of the jurisdictions to which it avails itself. In this sense, when it enters a territory it does so as a sort of "domestic dependent adjudicator." Any jurisdiction it may have over a person is purely a construct of contract, devoid of inherent authority. Unlike state, federal and tribal courts, which derive jurisdiction by a combination of sovereign territory and law, the proverbial "long-arm" of AAA's jurisdiction reaches only as far as a person may agree in contract. Moreover, such

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jurisdiction is necessarily restrained by the limitations placed upon it by the laws of the sovereign in which it operates.

As this Motion will demonstrate, AAA accepted the offer of Mr. Findleton and the Tribe to conduct arbitration and mediation services pursuant to Tribal law; a Tribal court order denied AAA jurisdiction over the Tribe in the pending AAA matter of *Robert Findleton v. Coyote Valley*, AAA Case Number: 01-17-0003-3765 ("Findleton Matter"); and AAA, by accepting the offer of Mr. Findleton and the Tribe (collectively, the "Parties"), availed itself to the jurisdiction of the Tribe and, as such, the jurisdiction of the Tribal Court.

By availing itself to the Tribal Court, AAA presumptively subjects itself to this Court's orders, save some countervailing principle of jurisprudence. The Tribe recognizes that quasi-judicial entities are ordinarily entitled to arbitral immunity, but also that such immunity is not absolute. As the Supreme Court ruled in *Mireles v. Waco* 502 US 9, 12 (1991), immunity may be "overcome" where the adjudicator has acted "in the complete absence of all jurisdiction." This Court has already ruled that the State Court had no jurisdiction to compel the Tribe to participate in an AAA-administrated arbitration. The Tribe now respectfully asks this Court to find that AAA, in relying on the State Court's compulsion order to hear the Findleton Matter, is acting in the complete absence of all jurisdiction. As such, AAA may not be afforded arbitral immunity and must be enjoined from conducting arbitration proceedings without the Tribe's consent.

LEGAL STANDARDS

The purpose of preliminary injunctive relief is to "preserve the status quo and the rights of the parties until a final judgment issues in the cause." *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390 (1981); *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984)). The "status quo,

refers to the legally relevant relationship between the parties before the controversy arose.[2] *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014) (citation omitted).

The Tribe seeks both an immediate temporary restraining order—enjoining the Defendants' actions until the Court holds a hearing to determine whether a preliminary injunction should be issued, and a preliminary injunction—enjoining the Defendants' actions until the Court rules on the merits of the Petition. A court may issue a temporary restraining order before an adverse party has had an opportunity to respond to a motion for preliminary injunction if the requesting party "clearly show[s] that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Fed. R. Civ. Proc. 65(b)(1)(A).

It is well within the authority and discretion of a trial court to grant preliminary injunctive relief. *See, e.g., Tri-State Generation & Trans. Ass'n Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 354 (10th Cir. 1986) ("The issuance or dissolution of a preliminary injunction is within the sound discretion of the trial court and can be set aside only if it is based on an error of law or constitutes an abuse of discretion."). Courts have the authority to grant preliminary injunctive relief even if an arbitration clause exists. As the Ninth Circuit held, "a district court may issue interim injunctive relief on arbitrable claims if interim relief is necessary to preserve the status quo . . . ." *Toyo Tire Holdings of Ams., Inc. v. Cont'l Tire N. Am., Inc.*, 609 F.3d 975, 981 (9th Cir. 2010); *see also Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 894–95 (2d Cir. 2015) ("Where the parties have agreed to arbitrate a dispute, a district court has jurisdiction to issue a preliminary injunction to preserve the status quo pending arbitration.").

To obtain preliminary injunctive relief, a plaintiff must establish that it is (1) likely to

[2] Though disputes between Mr. Findleton and the Tribe have been ongoing for several years, the present controversy, as outlined in the Petition, is the Defendants' ongoing violation of Tribal law (and specifically the Court's July 6 Order). The status quo is thus the legally relevant relationship between the parties following the July 6 Order, *i.e.*, the arbitration clauses are unenforceable, no valid waiver of tribal sovereign immunity exists, and no court has the authority to compel the parties to arbitrate.

succeed on the merits; (2) likely to suffer irreparable injury if preliminary relief is denied; (3) the balance of equities tips in the plaintiff's favor; and (4) and injunction would serve the public interest. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). "The elements of the preliminary injunction test must be balanced, so that a stronger showing of one element may offset a weaker showing of another." *Villegas Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). All of these factors are satisfied in this case, as outlined below.

A. The Tribe is Likely to Succeed on the Merits.

The merits of this case concern whether the Defendants are acting in violation of Tribal law. The Tribe is likely to prevail on the merits because: this Court has jurisdiction over the Defendants and the subject matter; the Defendants are clearly violating Tribal law; and the Court has the authority to grant the relief requested by the Tribe in its Petition. Even so, the Court need not make a full determination of the merits of the case at this stage in the proceedings. It is enough for a plaintiff to raise, "serious questions going to the merits" of the case when it has made a strong showing of all other factors in support of preliminary relief. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).

1. *The Tribal Court Has Jurisdiction over the Parties and Claims*

The Tribal Court is authorized to "exercise jurisdiction over all cases or controversies within the Tribe's jurisdiction . . . that arise under [the] Constitution, from the laws of the Tribe or which is otherwise inherent to the Tribal Courts' sovereignty to hear such cases or controversies." Tribal Constitution, Art. XIV, Sec. 1. The claims at issue in the Petition concern violations of Tribal law, as such law is expressed through Tribal Court orders. This case falls squarely within the Courts' inherent sovereignty to rule upon—it is entirely appropriate and within the Court's authority to determine whether individuals are in violation of its rulings. That is especially true when the Court's rulings are based on the interpretation of contracts negotiated and entered into in

Tribal land, for work to be performed on reservation, and specifically governed by the laws and jurisdiction of the Tribe.

The Court's authority to rule on this subject matter is enhanced by the fact that the underlying contracts at issue contain Mr. Findleton's express consent to Tribal jurisdiction. *See Montana v. United States*, 450 U.S. 544, 565 (1981) (holding that tribes may regulate non-Indians who enter into consensual relationships with the tribe). For the same reasons, the Tribal Court has personal jurisdiction over Mr. Findleton.[3]

The Tribal Court also has jurisdiction over AAA, based on its deliberate insertion into and control over a dispute regarding contracts governed by Tribal law and under the jurisdiction of the Tribe. AAA derives its authority solely from the terms of contracts between parties (*see AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 648–49 (1986)), and here the contracts dictate the application of Tribal law and submission to the jurisdiction of the Tribe. Though AAA is not a party to those contracts, any authority it has derives solely from their terms.

Further, AAA engaged (and engages) in continuous and systematic contacts with the forum, by way of numerous communications sent to the Tribe as the named Respondent in arbitration proceedings. The present litigation arises directly from AAA's decisions as expressed in its written correspondence. The Supreme Court has made clear that this type of interaction is grounds for jurisdiction over a party:

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [the] "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum . . . and the litigation results from alleged injuries that "arise out of or relate to" those activities.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (citations omitted); *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). It is of no importance that AAA representatives

have not been physically present on Tribal land.[4] "So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, [the Supreme Court has] consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King Corp.*, 471 U.S. at 476.

Moreover, AAA's contacts with the Tribe clearly place obligations on the Tribe. *See* Section B, *infra* (discussing AAA correspondence). When a defendant "has created 'continuing obligations' between himself and residents of the forum . . . he manifestly has availed himself of the privilege of conducting business there" and "it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King Corp.*, 471 U.S. at 475–76.

AAA "should have reasonably anticipated that [these] interactions might 'trigger' tribal authority." *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802, 818 (2011). Additionally, the Tribe made it abundantly clear that it would seek appropriate relief in the Tribal Court. *See* Exhibit I at 046 ("[T]he Tribe will seek an appropriate response from the Tribal Court to halt these proceedings."). AAA effectively invited the Tribe to seek such relief, explaining that the decision to proceed with arbitration was based in part on the lack of a stay from the Tribal Court. *See* Exhibit H at 043. These interactions are more than enough for AAA to "reasonably anticipate being haled into" the Tribe's court. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

2. *The Defendants' Actions Constitute Ongoing Violations of Tribal Law*

As alleged in the Petition, this case concerns the Defendants' ongoing violations of Tribal

[3] The Tribal Court has previously engaged in extensive analysis of whether it has jurisdiction over Mr. Findleton, in Case No. NCICS-CV-2017-0001-JW.

[4] Though AAA has not yet been physically present on the reservation, any arbitration would very likely take place on the Tribe's land. AAA practices dictate that the arbitration locale would be the reservation. *See* Construction Industry Arbitration Rules and Procedures, R-12 (amended and effective July 1, 2015).

law, as evidenced through their disregard of this Court's rulings. Pursuant to agreements between the parties, Mr. Findleton filed a claim for arbitration with AAA, and AAA agreed to hear the matter. Mr. Findleton also obtained an order from the State Court compelling the parties to participate in mediation and arbitration. However, the contracts at issue did not authorize State Court jurisdiction or the application of state law, nor did it authorize AAA to accept matters directed to it by the State Court. Moreover, on July 6, 2017, this Court ruled that the State Court does not have jurisdiction to order the Tribe to arbitrate and that the Tribe had not waived its sovereign immunity, resulting in no court having jurisdiction to compel the parties to arbitrate. *See* Exhibit E.

The Defendants' actions of pursuing and overseeing mediation and arbitration are contrary to the July 6 Order. Specifically, the Court ruled that the Tribe did not waive its sovereign immunity and cannot be compelled to arbitrate. Sovereign immunity is not a discretionary doctrine, yet the Defendants are ignoring this Court's order holding the Tribe did not waive its immunity. *See Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047 (9th Cir. 1985) ("[S]overeign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation.") (citation omitted). Despite the July 6 Order, the Defendants continue to proceed with mediation and arbitration, in defiance of the applicable Tribal law.

AAA claims to proceed with arbitration pursuant to contract terms (*see* Exhibits H, J) but completely disregards the express contract terms that mandate the application of Tribal law and Tribal jurisdiction. Were AAA to honor the terms of the contract, it would be required to adhere to Tribal law, including the orders of this Court, which clearly stated that "neither the state court, nor this court has the jurisdiction to compel the Tribe to arbitrate." Exhibit E at 024.

3. *The Court Has the Authority to Grant the Permanent Relief Requested*

The Tribe acknowledges AAA Construction Industry Arbitration Rules, R-49,[5] which states that "[n]either AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration." The same rule also states "[p]arties to an arbitration under these rules shall be deemed to have consented that neither AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules." However, this Court determined in its July 6 Order that the Tribe is not properly a party to the arbitration. Exhibit E at 014, 024. As such, AAA is acting in the absence of the consent necessary to establish an arbitrator's jurisdiction because "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs.*, 475 U.S. at 648.

The Tribe also acknowledges that AAA would ordinarily be protected by the doctrine of arbitral immunity based on AAA's quasi-judicial status. Two significant Supreme Court precedents remove any claims to immunity here.

First, the Tribe requests prospective equitable relief only, which is not prohibited against officials cloaked with immunity for ongoing violations of law. *See Ex Parte Young*, 209 U.S. 123 (1908). As discussed in Section A.2, *supra*, the Tribe presented AAA with a Court order holding the Tribe had not waived its immunity. Lawfully, it has no choice but to recognize the immunity of the Tribe. *Cf. California ex rel. California Dep't of Fish & Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) ("Sovereign immunity involves a right which courts *have no choice*, in the absence of a waiver, but to recognize." (emphasis added)). To proceed otherwise

[5] This citation is to the 2005 version of the Construction Industry Arbitration Rules, the rules in effect at the time the relevant contracts were executed.

constitutes a disregard for well-settled principles of Indian law, and a violation of Tribal law. Quasi-judicial immunity cannot be a shield to a forum's authority to enjoin unlawful activity.[6]

Second, "a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 12 (1991) (citations omitted). This sentiment was echoed by the Ninth Circuit, which explained that "arbitral immunity extends only to those acts taken by arbitrators 'within the scope of their duties and within their jurisdiction.'" *Sacks v. Dietrich*, 663 F.3d 1065, 1069 (9th Cir. 2011) (citation omitted).

AAA is without jurisdiction over the matter by order of this Court, which determined that there was no waiver of sovereign immunity and resultantly no clear agreement to submit to arbitration or to State Court processes to compel arbitration. Arbitrators and sponsoring organizations "derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs.*, 475 U.S. at 648–49 (citation omitted). When a court has ruled that agreements containing arbitration clauses are unenforceable, it is abundantly clear that no agreement exists and any arbitrators to the unenforceable agreement are without jurisdiction. This Court's holding that "neither the state courts, nor this court has the jurisdiction to compel the Tribe to arbitrate" (Exhibit E at 024) conclusively shows a "clear absence of all jurisdiction" prohibiting AAA from proceeding (*Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978) (citation omitted).

Yet, even if the Tribe had waived its sovereign immunity, the plain language of the contracts that are the subject of this dispute alone would deny AAA any authority to proceed without a Tribal Court order. Recalling that AAA derives its authority solely from the terms of contracts between parties (*see AT&T Techs.*, 475 U.S. at 648–49), it is important to identify the

[6] Though some federal courts have held that arbitration organizations should not be subject to suit in matters where their jurisdiction is questioned (*see, e.g., Int'l Med. Group, Inc. v. Am. Arbitration Ass'n*, 312 F.3d 833, 843 (7th Cir.

basic "offer," "assent" and "consideration" made among AAA, Mr. Findleton and the Tribe regarding AAA's involvement in dispute resolution. AAA is the "standard" dispute resolution facilitator included in template AIA construction contracts. *See* Exhibit N; Exhibit O at 119. Their template is readily available on the Internet, and acts as an invitation or "offer" to use AAA's Construction Industry Arbitration Rules.[7] AAA's Construction Industry Arbitration Rules are the default, "pre-packaged" rules under the template AIA contract used by the parties.

The terms of the original offer, as expressed in the Construction Industry Arbitration Rules, would have deemed the Parties to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction. Rule R-49. But rather than accept AAA's original offer, the Parties modified the AIA template contract such that AAA's services would be subject to Tribal law and Tribal jurisdiction, and expressly prohibited the State Court from having any role in compulsion or enforcement of arbitration proceedings. Exhibit E at 019. Moreover, it limited the enforcement of an arbitration to be conducted in accordance with applicable law in any court having competent jurisdiction. *Id*. By doing so, the Parties effectuated a "counteroffer" that replaced state jurisdiction with Tribal jurisdiction. AAA accepted the counteroffer, including the contractual language modifying AAA's standard rules, when it accepted Mr. Findleton's filing fee. *See* Exhibit C.

By accepting the counteroffer, AAA agreed to conduct arbitration pursuant to Tribal law, subject to Tribal jurisdiction. Tribal law, as pronounced by this Court in the July 6 Order, declared the Tribe may not be compelled to arbitration by the State Court because, with or without a waiver, it has no jurisdiction over the Findleton Matter. An arbitrator's jurisdiction is limited to the extent such jurisdiction is agreed to by contract, and the contract at issue here prohibits the AAA from

2002); *New Eng. Cleaning Servs. v. Am. Arbitration Ass'n*, 199 F.3d 542, 546 (1999) none of those cases have alleged ongoing violations of law, as here.

accepting jurisdiction on the basis of a State Court order alone. Nonetheless, a State Court order is the entirety of their claim to jurisdiction. *See* Exhibit F. As such, their claim to jurisdiction is without merit and any claim to arbitral immunity must fail.

4. *At a Minimum, the Tribe Has Shown Serious Questions Going to the Merits*

Though the Tribe is confident that it has shown the likelihood of success on the merits, the Court may properly grant preliminary injunctive relief without a full consideration of the issues raised in the Petition. A "sliding scale" analysis of the preliminary relief factors is appropriate when the moving party alleges serious questions going to the merits of the case, as well as a strong showing on other preliminary relief factors. *See Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012); *Alliance for the Wild Rockies*, 632 F.3d at 1131–32. As detailed below, the Tribe makes a strong showing of all remaining factors, and so balancing is appropriate if the Court is not swayed on the merits of the case at this time.

B. The Tribe Will Suffer Irreparable Injury Without Preliminary Relief.

Irreparable harm is harm "for which there is no adequate legal remedy, such as an award of damages." *Ariz. Dream Act Coal.*, 757 F.3d at 1068. To fulfill this factor, the party requesting preliminary relief "must establish that irreparable harm is *likely*, not just possible." *Alliance for the Wild Rockies*, 632 F.3d at 1131 (emphasis in original) (citing *Winter*, 555 U.S. at 22). The harm that the Tribe has experienced and will continue to be subject to is infringement on tribal sovereignty due to it being compelled to participate in proceedings for which no valid waiver of immunity exists, and for which a foreign court with no jurisdiction over the matter has directed the Tribe to attend. The Tribe is harmed by being forced to choose between forgoing its sovereign right to create and be governed by its own laws, or risk a default award.

[7] A sample AIA contract may be downloaded at: http://aiad8.prod.acquia-sites.com/sites/default/files/2017-04/A201_2017%20sample%20%28002%29.pdf.

Courts consistently hold that infringement on tribal sovereignty and self-governance constitutes irreparable harm for preliminary injunctive relief. *See, e.g.*, *Poarch Band of Creek Indians v. Hildreth*, 656 F.App'x 934, 944 (11th Cir. 2016) (state regulation by means of a tax assessment amounted to an "irreparable violation of tribal sovereignty"); *Ute Indian Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (state's unlawful prosecution of tribal member interfered with tribal sovereignty and district court's denial of preliminary injunction reversed); *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) ("[A]n invasion of tribal sovereignty can constitute irreparable injury.") Specifically, prohibiting "full enforcement of tribal laws" and forcing tribes to participate in dispute resolution proceedings when those forums do not have jurisdiction constitutes irreparable harm. *See Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1171–72 (10th Cir. 1998). This is precisely the situation here: the Defendants' actions prevent the Tribe from adhering to Tribal law and subject the Tribe to dispute resolution forums that are lacking jurisdiction.

In the context of arbitration, one federal district court recently ruled that a temporary restraining order should issue enjoining arbitration, based on the tribal parties' claims that they would "incur substantial inconvenience, unrecoverable expenses, and delay in adjudicating claims in a forum that plainly lacks jurisdiction to hear them." *Dine Dev. Corp. v. Fletcher*, No. 17-0015, at 5 (D.N.M. Mar. 10, 2017) (order granting temporary restraining order). The court determined that such "harms are irreparable, because AAA lacks jurisdiction over the Plaintiffs, and thus any arbitration proceedings would force the Plaintiffs to incur costs and burdens to defend themselves from a suit from which they are immune in the first place." *Id.* at 5–6. The basis for preliminary injunctive relief is even stronger here. Not only is the Tribe subject to inconvenience, expense, and delay in the arbitration proceedings, but the continuance of these proceedings is contrary to the Tribal Court's July 6 Order—yet another infringement on tribal sovereignty.

There is no question that the Defendants' actions are infringing on the Tribe's sovereignty, resulting in irreparable harm to the Tribe. The Tribe has already suffered harm due to the Defendants' ongoing violations of Tribal law. The arbitration proceedings are ongoing, and have continued in the absence of the Tribe. The Tribe is being subject to legal process and proceedings in the absence of both a valid waiver of immunity and enforceable agreement to arbitrate. This is precisely what the doctrine of sovereign immunity is intended to protect. It is difficult to imagine a greater infringement on tribal sovereignty than compelling a tribe to participate in dispute resolution procedures in the absence of a valid waiver of tribal sovereign immunity.

AAA recently re-opened arbitration proceedings, at Mr. Findleton's request, because a state court order staying the proceedings was lifted. *See* Exhibit F. In response to AAA's decision to re-open the arbitration, the Tribe notified AAA, by letter dated August 22, 2017, that the Tribal Court ruled on the matter and held that the State Court did not have jurisdiction to order the Tribe to arbitration, and that the Tribe had not validity waived its sovereign immunity in the relevant contracts or related documents. *See* Exhibit G. The Tribe attached a copy of the July 6 Order to the correspondence. *See id*. at 032–042.

On August 29, 2017, AAA acknowledged the Tribe's August 22 letter, and "made an initial administrative determination to proceed with [the] arbitration." Exhibit H at 043. Though AAA framed the decision as "administrative," such decision elevated the decisions of the State Court (which has no jurisdiction over this matter) over the contrary rulings of the Tribal Court (which is vested with jurisdiction pursuant to the contracts and basic Indian law principles). In support of its decision, AAA pointed to the contract requiring the parties to arbitrate, and the State Court order directing "the parties to arbitrate pursuant to the terms of their contract." *Id*. AAA disregarded the order of the Tribal Court in favor of the State Court order, stating "[w]hile the Tribal Court ruled

that the state court did not have jurisdiction over the [Tribe], the Tribal Court did not order a stay of these proceedings. As such, this arbitration will proceed . . . ." *Id.*

On August 30, 2017, the Tribe notified AAA that it would not participate in arbitration, and explained again "[o]n July 6, 2017, the [Tribal Court] concluded the Superior Court is powerless to compel the Tribe to arbitration, rendering the Superior Court's order meaningless." Exhibit I at 045. The Tribe further explained that Mr. Findleton "specifically agreed in the contracts that are the subject of this dispute to abide by Tribal law and to subject himself to Tribal jurisdiction. [The Tribe], on the other hand, specifically contracted to avoid dispute resolution in state court and to not be bound by state law." *Id.*

Later on August 30, 2017, AAA sent a letter advising the Tribe that an administrative call commencing mediation and arbitration proceedings took place in the absence of the Tribe and that the Tribe will be deemed to have agreed to certain terms governing the arbitration if it does not submit further responses to AAA by September 13. Exhibit J at 047. By letter dated August 31, 2017, the Tribe was notified if it did not consent to mediation, arbitration proceedings would re-commence. Exhibit K at 049. The Tribe reiterated its previous response in yet another letter, sent on September 8, 2017. *See* Exhibit L.

The Tribe has already had to spend time, effort, and resources communicating with AAA and seeking to halt the proceedings. If the Defendants are permitted to pursue their current course of action, the injury to the Tribe is sure to continue and increase.

Though the Tribe prepared a written response to AAA's proposed terms (*see* Exhibit M), such responses have had no effect previously and thus arbitration is likely to proceed pursuant to terms that the Tribe has not consented to—including terms recognizing the State Court order as valid. *See* Exhibit J. A preliminary conference call already took place in the absence of the Tribe. *See id.* This harm is only bound to intensify in the absence of injunctive relief. AAA Rules allow

for arbitration to proceed even if a party elects not to participate. AAA Construction Industry Arbitration Rules, R-30 (2005). Due to the demonstrated disregard for well-settled principles of Indian law shown by the Defendants, the Tribe's lack of participation is likely to result in default rendered against the Tribe.

The arbitration proceedings invoked by Mr. Findleton and sanctioned by AAA constitute ongoing harm to the Tribe's sovereignty. The Defendants' violations of Tribal law place the Tribe in the untenable position of being subject to an arbitration award issued against it without benefit of the Tribal processes agreed to by Mr. Findleton in the contracts that are the subject of the underlying dispute, or being forced to submit to a compulsion order from a foreign court that this Court ruled has no jurisdiction over the Tribe. The present and imminent injuries to the Tribe cannot be remedied by monetary damages or any other remedy at law. While some arbitration agreements encompass rules governing emergency relief—such as a preliminary injunction—by and through the arbitrators,[8] such rules are not made part of the agreements at issue in this matter. The only form of relief the Tribe is able to seek is an injunction from this Court.

C. The Balance of Equities Leans in the Tribe's Favor.

In considering the balance of equities, the Court must weigh the respective hardships and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. 7, 24 (citations omitted). This factor takes into account any hardships that will take place, or are likely to take place, during the limited duration of any preliminary relief. The only possible hardship the Defendants will experience if preliminary injunctive relief is granted is further delay of proceedings.

[8] If AAA rules for emergency protection (Rule 39 of the current AAA Construction Rules) are incorporated into an agreement, the parties may pursue temporary restraining orders and preliminary injunctions using procedures very similar to those applicable in courts. These rules were not issued until 2013, and thus do not apply to these arbitration proceedings, which are governed by the 2005 Rules. However, even if the Tribe could pursue action under these rules, it is not a viable remedy because it requires submitting to the arbitration process.

Delay pales in comparison to the irreparable harm of infringement on tribal sovereignty. To be sure, in the absence of preliminary relief, the Defendants will continue subjecting the Tribe to legal process, despite this Court's ruling that there is no valid waiver of sovereign immunity. Sovereign immunity "is 'a necessary corollary to Indian sovereignty and self-governance.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030 (2014) (citation omitted). The Defendants' blatant disregard for this Court's ruling on the question of sovereign immunity is itself more than enough to tilt the scale in the Tribe's favor.

Infringement on tribal sovereignty surely outweighs any delay of arbitration proceedings. *Cf. Poarch Band of Creek Indians*, 656 F.App'x at 944 (harm of invasion of sovereignty by way of state tax assessment outweighs any potential temporary harm that that would result from delayed tax assessment) (citing *Wyandotte Nation*, 443 F.3d at 1256 (harm of invasion of sovereignty outweighs harm of delayed enforcement of gaming laws)).

While AAA likely has business obligations to oversee arbitration proceedings when there is a valid, enforceable agreement to arbitrate, there is no such agreement here. AAA noted that it chose to proceed with the arbitration in part because the Tribal Court had not issued a stay. *See* Exhibit H. This statement indicates that AAA may honor a Tribal Court order temporarily enjoining proceedings. Indeed, AAA has respected such orders when issued by the State Court. *See* Exhibit D at 013 ("Pursuant to the June 13 order, AAA will suspend further administration of this matter until further notice. The parties are requested to advise AAA the outcome of the presently pending court proceedings.")

Likewise, Mr. Findleton is not genuinely harmed by a preliminary stay of the proceedings. Any harm experienced by Mr. Findleton is of his own doing. This Court previously recognized that Mr. Findleton had an obligation to exhaust tribal remedies, but he has chosen not to participate in Tribal Court proceedings. *See* Exhibit E at 017 n.3.

The balance of equities weighs heavily in favor of granting the Tribe's requested preliminary relief. Though this case has undoubtedly been dragging on for much longer than is typical, the fact that legal proceedings have been ongoing for so long only tips the scales in the Tribe's favor because the longstanding litigation reinforces the extent of injury to the Tribe.

D. An Injunction is in the Public Interest.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (citation omitted). This motion presents several public policy issues, most of which have already been addressed by the Court in Case No. NCICS-CV-2017-00010JW.

The Supreme Court has "long recognized and enforced a 'liberal federal policy favoring arbitration agreements.'" *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 83 (2002) (citation omitted). However, this does not mean arbitration should be compelled in the absence of a valid and enforceable arbitration clause. This Court already determined that the particular arbitration provisions are not enforceable. A general policy favoring arbitration does not justify forcing a party that has not validly consented to arbitration to participate in the process against its will.

Moreover, the public policy concerns must take into account that a federally recognized Indian tribe is the party who is being wrongfully compelled to participate in arbitration, and that a Tribal Court held that the Tribe had not validly waived immunity and no court could lawfully compel it to arbitrate. As one federal court stated when considering a preliminary injunction request, "it is reasonable to conclude that enforcing the existing federal statutory and regulatory structure applicable to Indian tribes would serve the public interest." *Poarch Band of Creek Indians*, 656 F.App'x at 934. That statutory and regulatory structure mandates adherence to the Tribal Court's rulings on matters which clearly fall within its jurisdiction.

Adhering to the July 6 Order of the Tribal Court in this matter necessarily means discounting the State Court order compelling arbitration. There are numerous reasons why this does not change the public policy implications for purposes of the instant motion. First, as has been expressed numerous times and recognized by this Court, the State Court does not have jurisdiction over disputes between the Tribe and Mr. Findleton. This is especially true in light of the fact that all relevant events occurred on tribal land. Moreover, the contracts' express terms provide for the application of Tribal law and Tribal jurisdiction, to the exclusion of the state.

Second, this Court already determined that it would not grant comity to the State Court's decisions in part because it would be harmful to the public policy of the Tribe:

> Given the strong policies in favor of tribal self-governance, the acceptance by this court of the decision of the state appellate court would be prejudicial to the Tribe. The Tribe has a strong interest in asserting its own jurisdiction in matters which take place on reservation land, and which concern the interpretation of its laws and Constitution. Federal policy is in accord. *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (discussing federal policy of supporting tribal self-government).
> . . .
>
> This court has the utmost respect for its sister courts, both state and federal. However, given the lack of state court jurisdiction, as well as the overriding interest in Tribal jurisdiction, this court excises its discretion to not grant comity in this instance.

Exhibit E at 023.

Finally, any state public policy does not outweigh the combined tribal and "paramount federal policy that Indians develop . . . strong self government." *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989). Strong tribal self-government is enhanced by adhering to decisions of tribal courts. The State of California does not disagree:

> Tribal justice systems are an essential part of tribal governments and serve to ensure the public health and safety and the political integrity of tribal governments. Traditional tribal justice practices are essential to the maintenance of the culture and identity of tribes.

Judicial Council Comment to Cal. Rules of Court, rule 10.60 (citing 25 U.S.C. § 3601(5)).

The preliminary injunctive relief sought by the Tribe merely preserves the status quo, placing the parties in their respective legal positions as of the issuance of the July 6 Order. Ultimately, the Tribe is requesting adherence to Tribal law. An injunction would prevent the Defendants from continuing to violate Tribal law and is in the public interest.

PRAYER FOR RELIEF

Based upon the allegations above, the Tribe respectfully prays that the Court:

A. Issue a temporary restraining order as soon as possible ordering the Defendants, and all those in active concert or participation with them to refrain immediately from proceeding with mediation and arbitration, to prevent further harm to the Tribe pending a ruling on the requested preliminary injunction.

B. Issue a preliminary injunction ordering the Defendants, and all those in active concert or participation with them to refrain from proceeding with mediation and arbitration; and

C. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted this 15th day of September 2017.

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By: _____

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COYOTE VALLEY BAND OF POMO INDIANS

NORTHERN CALIFORNIA INTERTRIBAL COURT SYSTEM
COYOTE VALLEY TRIBAL COURT

COYOTE VALLEY BAND OF POMO INDIANS, also known as the Shodakai Casino, DOES 1-50,

Petitioner,

v.

AMERICAN ARBITRATION ASSOCIATION, and ROBERT FINDLETON, doing business as Terre Construction and also doing business as On-Site Equipment,

Defendant.

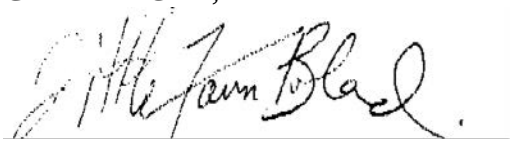
CASE NO. _____

APPENDIX OF EXHIBITS TO PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF AND MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Exhibit No.	Document	Page No.
A	Construction Agreement	001
B	Rental Agreement	009
C	May 17, 2017 Receipt	012
D	June 14, 2017 Letter from AAA to Parties	013
E	July 6, 2017 NCICS Order	014
F	August 17, 2017 Letter from AAA to Parties	025
G	August 22, 2017 Letter from Tribe to AAA	030
H	August 29, 2017 Letter from AAA to Parties	043
I	August 30 Letter from Tribe to AAA	045
J	August 30, 2017 Letter from AAA to Parties	047
K	August 31, 2017 Letter from AAA to Parties	049
L	September 8, 2017 Letter from Tribe to AAA	050
M	September 13, 2017 Letter from Tribe to AAA	052
N	The AAA Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts	054
O	AIA General Conditions of the Contract for Construction	083

Dated this 15th day of September 2017.

CEIBA LEGAL, LLP

By: 

Little Fawn Boland

AIA Document A107™ – 1997

Abbreviated Standard Form of Agreement Between Owner and Contractor for Construction Projects of Limited Scope

[redacted]

AGREEMENT made as of the 4th day of October in the year 2007
(In words, indicate day, month and year)

BETWEEN the Owner:
(Name, address and other information)

Coyote Valley Band of Pomo Indians
P.O. Box 39
7751 N. State Street
Redwood Valley, California 95470

and the Contractor:
(Name, address and other information)

Terre Construction
P.O. Box 1496
Diamond Springs, CA 95619
Phone: (530) 417-2395 Fax: (530) 647-1409
CA License # A 801152
Bond # 1030213

the Project is:
(Name and location)

Improvement/widening of North State Street, relocation of a portion of the existing Bureau of Indian Affairs Road for the purpose of site preparation, and certain infrastructure improvements related to the Owner's construction of a new gaming facility and other ancillary work described in the Project Scope on pages 2 and 3 herein.
Coyote Valley Indian Reservation

the Engineer is:
(Name, address and other information)

EBA Engineering
825 Sonoma Avenue, Suite C
Santa Rosa, California 95404
Phone: (707) 544-0784
Fax: (707) 544-0866

the Project Manager is:

Summit Project Management
8757 West Washington Boulevard
Culver City, California 90332

ADDITIONS AND DELETIONS
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

This Document includes abbreviated General Conditions and should not be used with other general conditions.

This document has been approved and endorsed by The Associated General Contractors of America.

§ 7.3 OWNER'S RIGHT TO CARRY OUT THE WORK

If the Contractor defaults or persistently fails or neglects to carry out the Work in accordance with the Contract Documents, or fails to perform a provision of the Contract, the Owner, after 10 days' written notice to the Contractor and without prejudice to any other remedy the Owner may have, may make good such deficiencies and may deduct the reasonable cost thereof, including Owner's expenses and compensation for the Engineer's services made necessary thereby, from the payment then or thereafter due the Contractor. The Owner's rights herein include termination of this Agreement under Article 19.

ARTICLE 8 CONTRACTOR

§ 8.1 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

§ 8.1.1 Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 7.1.1, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions or inconsistencies in the Contract Documents; however, any errors, omissions or inconsistencies discovered by the Contractor shall be reported promptly to the Engineer and Project Manager as a request for information in such form as the Project Manager may require.

§ 8.1.2 Any design errors or omissions noted by the Contractor during this review shall be reported promptly to the Engineer and Project Manager, but it is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents.

§ 8.2 SUPERVISION AND CONSTRUCTION PROCEDURES

§ 8.2.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall be fully and solely responsible for the jobsite safety thereof unless the Contractor gives timely written notice to the Owner, Engineer and Project Manager that such means, methods, techniques, sequences or procedures may not be safe.

§ 8.2.2 The Contractor shall be responsible to the Owner for negligence, intentional acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

§ 8.3 LABOR AND MATERIALS AND EQUIPMENT RENTAL

(Paragraph deleted)

§ 8.3.1

A. The charge for materials and fixtures is separately stated from the charge for performance of work, overhead and profit ("Installation") as set forth in the pricing structure. In regard to materials and fixtures, the Contractor and subcontractors are sellers of materials as provided in 18 California Administrative Code, Section 1521.

B. The Owner shall pay the Contractor an amount not to exceed the amount set forth in Article 3 for Materials and Fixtures and an amount not to exceed the amount set forth in Article 3 for Performance of work, overhead and profit (Installation).

C. Applications for Payment by the Contractor and subcontractors shall separately state the cost/expense to sublease Equipment, the charge for Materials and Fixtures and the charge for Performance of work, overhead and profit (Installation). The Owner shall directly pay the on-site Equipment Rental Company the cost of the Contractor and subcontractors use/sublease of Equipment. The Contractor's sublease of Equipment from the Owner shall be at the rate set forth in subsection I below. *There shall be no mark up/increase in the Contractor and subcontractor's use/sublease of rented Equipment.*

D. All Materials and Fixtures shall be delivered to the Owner at the Coyote Valley Indian Reservation.

E. Title to Materials and Fixtures shall pass to the Owner upon delivery of said items to the Owner at the Coyote Valley Indian Reservation and the Owner's acceptance of delivery thereat. Title to Materials and Fixtures shall also transfer to the Owner prior to the installation of said items. The Owner's Lessee Rights (or beneficial use of) Rental Equipment shall transfer to the Owner prior to the use of the Equipment during the installation of Materials and Fixtures by the Contractor.

F. The Contractor and subcontractors shall bear the risk of loss of Materials and Fixtures until said items are delivered to the Owner at the Coyote Valley Indian Reservation and the Owner accepts delivery.

G. The Contractor and subcontractors shall comply with other requirements of the Owner to sufficiently document the requirements set forth herein.

H. No state sales tax shall be included in the price of Materials and Fixtures sold by the Contractor or subcontractors to the Owner. No state sales tax shall be included in the price of Equipment leased to the Owner and subleased to the Contractor or subcontractors.

I. The Contractor and subcontractors shall sublease Equipment for the Project from the Owner based upon Rental rates issued prior to bidding (see attached Rental Rate Sheet) and used as consideration and attached to the Contract or sub-contract. To the extent that the cost of renting Equipment is included in the contract sum in the Agreement between the Owner and Contractor, the Owner's cost of leasing Equipment shall be credited to the Owner and deducted from the contract sum. The Owner shall not be responsible for Equipment rental costs/expenses in excess of the cost not to exceed the total Equipment rental cost set forth in Article 3, and the Contractor shall be responsible for costs in excess of said amount. The Contractor and subcontractors shall provide insurance coverage for Equipment subleased from the Tribe to cover damage to said items.

J. Notwithstanding the above subsections, a construction tax ("Tribal Tax") by the Coyote Valley Band of Pomo Indians applies to the project. The Tribal tax rate is 7.75%. The costs/charges not to be exceeded in Article 3 relating to Equipment, Materials and Fixtures include a Tribal Tax rate of 7.75%, and, therefore, said amounts in Article 3 shall not be exceeded unless the Tribal Tax rate is increased in excess of 7.75% and only for the amount in excess of 7.75%.

K. The Contractor shall include the provisions of this Agreement in its agreements with its subcontractors.

§ 8.3.2 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

§ 8.3.3 The Contractor shall deliver, handle, store and install materials in accordance with manufacturers' instructions.

§ 8.3.4 The Contractor may make substitutions only with the consent of the Owner, after evaluation by the Engineer and Project Manager and in accordance with a Change Order.

§ 8.4 WARRANTY

The Contractor warrants to the Owner and Engineer that materials and equipment furnished under the Contract shall be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse not the fault of the Contractor, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation or normal wear and tear and normal usage not caused by the Contractor.

(Paragraph deleted)

§ 8.6 PERMITS, FEES AND NOTICES

§ 8.6.1 Unless otherwise provided in the Contract Documents, the Owner shall secure and pay for applicable building permit(s) and other applicable permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work.

§ 9.7 The Project Manager will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Project Manager will make initial decisions on all claims, disputes and other matters in question between the Owner and Contractor but will not be liable for results of any interpretations or decisions so rendered in good faith.

§ 9.8 The Project Manager's decisions, subject to the Owner's approval, on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

§ 9.9 Duties, responsibilities and limitations of authority of the Project Manager and the Engineer as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor, Project Manager and Engineer. Consent shall not be unreasonably withheld.

§ 9.10 CLAIMS AND DISPUTES

§ 9.10.1 Claims, disputes and other matters in question arising out of or relating to this Contract, including those alleging an error or omission by the Engineer shall be referred initially to the Project Manager for decision. Such matters shall, after initial decision by the Project Manager or 30 days after submission of the matter to the Project Manager, be subject to mediation as a condition precedent to arbitration.

§ 9.10.2 The parties shall endeavor to resolve their disputes by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or the arbitrator.

§ 9.10.3 Arbitration shall be held in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise.

§ 9.10.4 Demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations.

§ 9.10.5 Arbitration shall be conducted by a mutually agreed to private arbitrator selected by the parties. If the parties cannot agree, each will select an arbitrator, then the two arbitrators will select a third. The third arbitrator shall arbitrate the dispute between the parties. Arbitration proceedings shall occur in Mendocino County, California.

§ 9.10.6 No arbitration arising out of or relating to this Agreement shall include, by consolidation, joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent containing a specific reference to this Agreement signed by the Owner, Contractor, and any other person or entity sought to be joined. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by the parties to this Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.

(Paragraph deleted)

§ 9.10.7 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

(Paragraphs deleted)

§ 9.10.8 No term or provision in this Agreement shall be construed as a waiver of the sovereign immunity of the Coyote Valley Band of Pomo Indians. The Parties specifically agree that the sovereign immunity of Coyote Valley Band of Pomo Indians shall not be waived for disputes or other matters related to this Agreement.

ARTICLE 10 SUBCONTRACTORS

§ 10.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site.

§ 10.2 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner and Project Manager through the Project Manager the names of the Subcontractors for each of the principal portions of the Work. The Contractor shall not contract with any Subcontractor to whom the Owner or Project Manager has made reasonable and timely objection.

§ 10.3 Contracts between the Contractor and Subcontractors shall (1) require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by the Contract Documents, assumes toward the Owner, Project Manager and Engineer, and (2) allow the Subcontractor the benefit of all rights, remedies and redress afforded to the Contractor by these Contract Documents.

ARTICLE 11 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

§ 11.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such claim as provided in Section 9.10.

§ 11.2 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's activities with theirs as required by the Contract Documents.

§ 11.3 The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Contractor. The Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

ARTICLE 12 CHANGES IN THE WORK

§ 12.1 The Owner, without invalidating the Contract, may order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly. Such changes in the Work shall be authorized by written Change Order signed by the Owner, Contractor and Engineer, or by written Construction Change Directive signed by the Owner and Engineer.

§ 12.2 The cost or credit to the Owner from a change in the Work shall be determined by mutual agreement of the parties or, in the case of a Construction Change Directive, by the Contractor's cost of labor, material, equipment, and reasonable overhead and profit, subject to Section 8.3.1. However, reasonable overhead and profit shall not exceed ten percent (10%) of the actual costs to perform the Work if the Contractor uses its own forces to perform the Work and if the Work is to be performed by a subcontractor(s), then the allowance for overhead and profit shall not exceed five percent (5%) of actual costs to Contractor and shall not exceed ten percent (10%) of actual costs for the subcontractor(s). Actual costs shall not include overhead and profit of a subcontractor for the work performed. No overhead and profit and no change in the contract sum shall be allowed where the change order is caused by the fault of the Contractor.

§ 12.3 The Engineer will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such

§ 17.2 In addition to the Contractor's obligations under Section 8.4, if, within one year after the date of Substantial Completion of the Work for the entire Project or after the date for commencement of warranties established under Section 14.4.2, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition.

§ 17.3 If the Contractor fails to correct nonconforming Work within a reasonable time, the Owner may correct it in accordance with Section 7.3.

§ 17.4 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work.

§ 17.5 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Article 17.

ARTICLE 18 MISCELLANEOUS PROVISIONS

§ 18.1.1 Neither party to the Contract shall assign the Contract without written consent of the other.

(Paragraph deleted)

§ 18.1.2 The Contract shall be governed by the law of the Coyote Valley Band of Pomo Indians. If a particular issue is not covered by such law, federal law shall govern. The Contractor agrees to the jurisdiction of the Coyote Valley Band of Pomo Indians.

(Paragraph deleted)

§ 18.1.3 This Agreement represents the entire and integrated agreement between the Owner and Contractor and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Contractor.

§ 18.1.4 Nothing contained in the Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Contractor.

§ 18.1.5 All information received by Contractor from the Owner, Project Manager, Engineer or from other sources related to the Project shall be considered nonpublic and confidential including this Agreement. The Contractor shall not disclose any such informationpursuant to this Agreement unless Owner approves disclosure by express written approval. The Owner hereby gives written consent to the Contractor to disclose information related to the design and construction of the Project to the Contractor's subcontractors except that such information does not include non-design/non-construction information.

§ 18.1.6 The Contractor warrants that no person has been employed or retained to solicit this Contract upon an agreement or understanding for a commission, percentage, brokerage, contingent fee or otherwise; and that no member of the Coyote Valley Band of Pomo Indians ("Tribe") or any employee of the Tribe has any interest, financially or otherwise, in the Contractor's business/company. For breach or violation of this warranty, Owner shall have the right to annul this Agreement without liability or at its discretion to deduct from the Contract price or consideration, the full amount of such commission, percentage, brokerage, contingent fee or any other fee.

§ 18.1.7 All documents produced by the Contractor pursuant to this Agreement, including but not limited to hard copies and electronic versions of tracings, drawings, estimates, field notes, investigations, design analysis studies and specifications which are prepared in the performance of this Agreement are to be and remain the property of the Owner and are to be delivered to the Owner upon completion of this Agreement or early termination as provided forth in Article 19

§ 18.1.9 Contractor shall provide to the Owner a copy of the final construction documents showing significant changes in the Work in an AutoCad version suitable to the Owner and shall also provide a blueprint copy as of the As-Build documents to the Owner.

§ 18.1.10 The invalidity or unenforceability of any provision of this Agreement shall not affect or impair the validity of any other provision.

§ 18.1.11 INDIAN PREFERENCE

The Contractor agrees to give preference to Indians who can perform the work required regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation for training and employment opportunities under this contract and, to the extent feasible, consistent with the efficient performance of this contract, training and employment preferences and opportunities shall be provided to Indians regardless of age (subject to existing laws and regulations) sex, religion, or tribal affiliation who are not fully qualified to perform under this contract. The Contractor also agrees to give preference to Indian organizations Indian-owned economic enterprise in the awarding of any subcontracts consistent with the efficient performance of this contract. The Contractor shall maintain such records as are necessity to indicated compliance with this paragraph.

As used in this clause "Indian" means a person who is a member of a federally recognized Indian tribe. If the Contractor has reason to doubt that a person seeking employment preference is an Indian, the Contractor shall grant the preference but shall require the individual within thirty (30) days to provide evidence from the Tribe concerned that the person is a member of that Tribe.

The Contractor agrees to include the provisions of the clause including this paragraph in each subcontractor awarded under this contract.

In the event of non-compliance with this clause, the Contractor's right to proceed may be terminated in whole or in part by the Owner and work completed in a manner determined by the Owner to be in the best interests of the Coyote Valley Band of Pomo Indians.

§ 18.1.12 Notwithstanding any term or provision in this Agreement, the Owner may suspend the work for a period of thirty (30) days without causing an increase in the price of the Agreement and the suspension shall not be deemed a breach of the Agreement. The Owner must provide written notice to the Contractor regarding the suspension of work as set forth herein. Owner shall provide to Contractor sufficient advance notice (minimum of 20 days) for demobilization and remobilization. All demobilization and remobilization costs shall be paid by the Owner, except that such costs shall not exceed Twenty-Eight Thousand Dollars and No/100 ($28,000.00). All monies earned for work in place, material and equipment shall become immediately due and payable by the Owner to the Contractor and/or material/equipment vendors.

§ 18.3 TESTS AND INSPECTIONS

Tests, inspections and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority. Owner shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Engineer and Project Manager timely notice of when and where tests and inspections are to be made so that the Engineer and Project Manager may be present for such procedures. The Owner shall bear costs of tests, inspections or approvals which do not become requirements until after bids are received or negotiations concluded.

§ 18.4 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

As between Owner and Contractor, the statute of limitations for this Agreement shall be ten (10) years from the date of substantial completion of the contract.

(Paragraph deleted)

This Agreement entered into as of the day and year first written above.

OWNER *(Signature)*

John Feliz, Jr., Chairman
(Printed name and title)

CONTRACTOR *(Signature)*

Rob Findleton
(Printed name and title)

Init.

ON-SITE EQUIPMENT
MASTER RENTAL CONTRACT
Terms and Conditions

1. **DEFINITIONS.** "On-Site" means On-Site Equipment, the Lessor of equipment as set forth herein. "Equipment" means equipment identified on the Rental Out Contract from whom the Lessee has rented and shall include any accessories, attachments or other similar items delivered to Lessee, such as air hoses, electric cords, blades, welding cables, liquid fuel tanks and nozzles. "Lessee" means the Coyote Valley Band of Pomo Indians including any representative, agent, officer or employee of Lessee. "On-Site Location" means the site within the Coyote Valley Indian Reservation from which On-Site shall deliver, store and lease equipment to the Lessee. "Rental Period" means the period of time between the "Date Out" and "Date Due In," set forth on the first page of the Rental Out Contract, except that the Rental Period may terminate earlier as provided in Item 17.

2. **AUTHORITY TO SIGN.** Any individual signing this Master Rental Contract represents and warrants that he or she is of legal age, and has the authority and power to sign this Master Rental Contract on their own behalf or for the Lessee.

3. ***DISCLAIMER OF WARRANTIES.*** **On-Site makes no warranties, express or implied, as to the merchantability of the Equipment or its fitness for any particular purpose. There is no warranty that the Equipment is suited for Lessee's intended use, or that it is free from defects. Except as may be specifically set forth in this Master Rental Contract, On-Site disclaims all warranties, either express or implied, made in connection with this rental transaction.**

4. ***INDEMNITY / HOLD HARMLESS / DAMAGES.*** **LIABILITY FOR DAMAGE, INJURY TO EQUIPMENT, PERSONS AND PROPERTY: Lessee assumes the risk of any and all injuries of any kind or nature, including wrongful death, as a result of the use or misuse of the equipment pursuant to this Master Rental Contract. Lessee agrees to hold On-Site and its officers and employees free and harmless from, and to indemnify and defend On-Site against, any and all suits, actions, proceedings, claims, judgments or demands, costs and charges, legal expenses, damages and penalties resulting from injury or damage to any and all persons, including wrongful death, and including employees of Lessee or anyone else, and property damage, in any way arising out of or in any way connected with the Equipment rented hereunder, by any person, including employees of On-Site, whether or not caused in part by the active or passive negligence or other fault of On-Site or its officers or employees indemnified hereunder; provided, however, Lessee's duty hereunder shall not arise if such claims, suites, or liability, injuries or death or other claims or suits, are caused by the negligence, omission or willful misconduct of On-Site or its officers or employees indemnified hereunder. Lessee's obligation here under shall not be limited by the provisions of any workers' compensation act or similar statute. Lessee agrees to pay for any and all damages or loss to Equipment except as provided under the rental protection plan provisions.**

provide that On-Site shall receive not less than 30 days' notice prior to any cancellation of the insurance required hereunder.

19. ASSIGNMENT, LENDING OR SUBLETTING. Lessee may sublease, subrent, or loan the Equipment to contractors and subcontractors hired to work on the Lessee's project to construct a new casino facility and related infrastructure improvements for use of the Equipment primarily on the Coyote Valley Indian Reservation. Lessee shall require all sublessees, subrenters or users of the Equipment to obtain, maintain and pay for (a) insurance against the loss, theft, or damage to the Equipment for the full replacement value thereof, and (b) comprehensive public liability and property damage insurance. Except for the preceding provisions of this Section 18, Lessee shall not sublease, subrent, assign or loan the Equipment without first obtaining the written consent of On-Site, and any such action by Lessee, without On-Site's written consent, shall be void. Lessee agrees to use and keep the Equipment at the job site set forth on the Rental Out Contract unless On-Site approves otherwise in writing.

20. ENTIRE AGREEMENT / ONLY AGREEMENT. This Master Rental Contract represents the entire agreement between the Lessee and On-Site with respect to the Equipment and the rental of the Equipment. There are no oral or other representations or agreement not included herein. None of On-Site's rights or Lessee's rights may be changed and no extension of the terms of this Master Rental Contract may be made except in writing, signed by both On-Site and Lessee. Any use of Lessee's purchase order number on the Rental Out Contract is for Lessee's convenience only. This Master Rental Contract supersedes any purchase order or other Lessee provisions or forms whether sent to or received prior, or subsequent to this Master Rental Contract.

21. SALES TAX. Because the Coyote Valley Band of Pomo Indians, a federally recognized Indian tribe, is the lessee of the Equipment for use on the Coyote Valley Indian Reservation state taxes including local government taxes do not apply to the lease of said equipment and shall not be included in Equipment rental/lease price or otherwise charged to Lessee. California Administrative Code, Title 18, Section 1616. However, the Coyote Valley Band of Pomo Indians will impose a construction tax or similar tax on Equipment subleased, subrented or otherwise used by the entities identified in Section 18 above.

22. OTHER PROVISIONS.

A. Any failure of On-Site to insist upon strict performance by Lessee of any terms and conditions of this Master Rental Contract shall not be construed as a waiver of On-Site's right to demand strict compliance.

B. Lessee agrees to pay all reasonable costs of collection, arbitration, attorneys' fees and other expenses incurred by On-Site in the collection of any charges due under this Master Rental Contract or in connection with the enforcement of its terms subject to an arbitrator's award of fees and costs to Lessee as the prevailing party in a dispute as set fort subsection D below.

C. Lessee shall pay the rental charge(s) without any offsets, deductions or claims.

D. Arbitration. Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise

Demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations. Except for a sublessee of Equipment as identified in Section 18 above, no arbitration arising out of or relating to this Agreement shall include, by consolidation, joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent containing a specific reference to this Agreement signed by the On-Site and Lessee, and any other person or entity sought to be joined. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by the parties to this Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. The prevailing party shall be entitled to reasonable attorneys' fees and costs. No term or provision in this Agreement shall be construed as a waiver of the sovereign immunity of the Coyote Valley Band of Pomo Indians. The Parties specifically agree that the sovereign immunity of Coyote Valley Band of Pomo Indians shall not be waived for disputes or other matters related to this Agreement.

E. Situs of Agreement: This contract shall be deemed to have been negotiated and executed within the Coyote Valley Indian Reservation.

23. CRIMINAL WARNING: The use of false identification to obtain Equipment or the failure to return the Equipment by the end of the Rental Period may be considered a theft subject to criminal prosecution pursuant to applicable criminal or penal code provisions.

24. SUBLEASE INTENT: On-Site Equipment authorizes the Lessee to sublease, subrent or loan the Equipment to the parties set forth in Section 18 above for the purpose stated therein.

Lessor:
On-Site Equipment: _____ Date signed: 11-7-07

Rob Findleton
P.O. Box 734
Somerset, CA 95684

Lessee: _____ Date Signed: 11/7/07
Signature

Coyote Valley Band of Pomo Indians
Name Printed

John Feliz, Jr., Chairman
Title

FILING CONFIRMATION - Please print a copy for your records.

AAA Case : 01-17-0002-9028

A case manager will be assigned to this case and will be in contact.

Basic Filing Information

Robert Findleton ; 530.647.1445 ; rfindleton@terrecon.net ; mediation ; n/a.

Filing Fee Charged $250.00

Case filled on May 17, 2017 at 18:53 Eastern Daylight Time

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Michael Powell
Vice President
725 South Figueroa Street, Suite 400
Los Angeles, CA 90017
Telephone: (213)362-1900

June 14, 2017

Timothy Pemberton, Esq.
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Michael V. Brady, Esq.
Brady & Vinding
400 Capitol Mall
Suite 2640
Sacramento, CA 95814
Via Email to: mbrady@bradyvinding.com

Case Number: 01-17-0003-3765

Robert Findleton
-vs-
Coyote Valley Band of Pomo Indians

Dear Parties:

This will acknowledge receipt of the enclosed court order dated June 13, 2017, staying the court's prior order of April 25, 2017 pursuant to which the above-referenced matter was filed. Pursuant to the June 13 order, the AAA will suspend further administration of this matter until further notice. The parties are requested to advise the AAA the outcome of the presently pending court proceedings.

Please disregard all dates and deadlines identified in my letter of June 13, 2017. Any conferences or response deadlines referenced therein will be rescheduled should the stay be lifted. Please note, however, that the Refund Schedule for the Initial Filing Fee paid by Claimant will continue to run. As a reminder, for purposes of calculating refunds under the refund schedule (available here), the date of filing for this matter was June 9, 2017.

If you have any questions, do not hesitate to contact me.

Sincerely,

/s/
Cristina Ryan
Director of ADR Services
Direct Dial: (213)457-2035
Email: CristinaRyan@adr.org

NORTHERN CALIFORNIA INTERTRIBAL COURT SYSTEM

IN AND FOR THE COYOTE VALLEY TRIBAL COURT

ROBERT FINDLETON, doing business as Terre Construction, and also doing business as On-Site Equipment,

Plaintiff/Respondent,

v.

COYOTE VALLEY BAND OF POMO INDIANS,

Defendant/Petitioner.

Case No.: NCICS-CV-2017-0001-JW

OPINION

FILED
JUL 06 2017
CLERK
NCICS TRIBAL COURT

Opinion by Joseph J. Wiseman, CJ.

I. Introduction

Every day in courtrooms around the country disputes are heard and cases decided. Usually, they involve mundane issues that affect only the litigants and the matters are dispatched with fairly quickly. And that is how it should be in a society founded on the premise of equal justice accessible to all. But sometimes a case presents complex, vexing issues, the resolution of which can have consequences far beyond the immediate parties. This is such a case.

What started out as an unremarkable contract dispute between an Indian tribe and a construction contractor has morphed into a legal vortex that raises questions of comity, contractual interpretation, tribal constitutional law, and fundamental fairness. However, at its core, this case deals with the question of whether the tribe waived its sovereign immunity subjecting it to binding arbitration. The answer, in this court's opinion, is no.[1]

[1] The court must decide three distinct but related issues: (1) whether comity should be given to the State Court's decision in *Findleton v. Coyote Valley Band of Pomo Indians*, 1 Cal. App. 5th 1194 (1st Dist. 2016); (2) whether the Tribe validly waived their sovereign immunity to allow enforcement of the arbitration agreements in this court or any other court; and 3) if the Tribe did

II. Relevant Facts[2]

A. Agreements Leading to The Dispute

In 2007, Robert Findleton, dba Terre Construction ("Findleton"), agreed to undertake a construction project for the Coyote Valley Band of Pomo Indians (the "Tribe") related to the construction of a casino and hotel.

On June 2, 2007, the General Council of the Tribe passed Resolution No. 07-01, which stated that the General Council "hereby delegates to the Tribal Council authority to waive on a limited basis the sovereign immunity of the Tribe in contracts of the Tribe approved by the Tribal Council ... as determined necessary by the Tribal Council for the financing and development of the Project." Presumably, this resolution was passed as a first step in securing Findleton's commitment to complete the project.

Findleton and the Tribe signed their first contract for the work in October 2007 ("Construction Agreement"). The Construction Agreement provided that "[a]rbitration shall be held in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise." It also stated that "[t]he foregoing agreement to arbitrate ... shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof," and that "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

Immediately following the arbitration provisions, the Construction Agreement stated: "No term or provision in this Agreement shall be construed as a waiver of the sovereign immunity of the Coyote Valley Band of Pomo Indians. The Parties specifically agree that the sovereign immunity of Coyote Valley Band of Pomo Indians shall not be waived for disputes or other matters related to this Agreement." The Construction Agreement also contained a choice-of-law provision stating that it "shall be governed by the law of the Coyote Valley Band of Pomo Indians," that "[i]f a particular issue is not covered by such law, federal law shall govern" and that "[t]he Contractor agrees to the jurisdiction of the Coyote Valley Band of Pomo Indians."

In November 2007, the parties entered into a second contract (the "Rental Contract"). The Rental Contract, like the Construction Agreement, contained a provision mandating arbitration "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise." The Rental Contract also provided for enforcement "in accordance with applicable law in any court having jurisdiction thereof," and stated the arbitrator's award would be final and enforceable in court. And, finally, it

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effectively waive its sovereign immunity, whether Findleton was required to exhaust his administrative remedies under the Tribe's Claims Procedure before attempting judicial enforcement of the arbitration agreement.

[2] The facts of this case have been extensively discussed elsewhere, and this court will simply refer to those that are directly germane to the issues at hand.

stated that "[t]he Parties specifically agree that the sovereign immunity of Coyote Valley Band of Pomo Indians shall not be waived for disputes or other matters related to this Agreement.

On March 1, 2008, the General Council passed Resolution No. 08-01. This Resolution reaffirmed the General Council's intent to delegate the power of sovereign immunity. It also ratified and approved all of the contracts related to the project, specifically including all waivers of sovereign immunity of the Tribe in such contracts.

Sometime thereafter, work was suspended on the project due to the Tribe's financial difficulties. Findleton ultimately presented the Tribe with an amendment (the "Third Amendment to Agreement") that contained provisions relating to the continuation of work and the method of payment. It also included a request that the Tribe agree to a limited waiver of sovereign immunity. On August 20, 2008, the Tribe signed the Third Amendment, and passed Resolution No. CV-08-20-08-03. This resolution stated that pursuant to the previously adopted General Council Resolution 08-01—authorizing the Tribal Council to waive the Tribe's sovereign immunity on a limited basis in contracts related to development and financing of a new gaming and resort facility and related infrastructure and utilities—the Tribal Council was waiving sovereign immunity as between the Tribe and Terre Construction. The waiver was limited to arbitration of disputes in order to avoid litigation in state court, and recourse was limited to casino assets and not to assets owned by individual members of the Tribe.

B. California State Court Proceedings

The Tribe failed to pay Findleton, and on March 23, 2012, Findleton filed a petition to compel and enforce mediation and arbitration in Superior Court of Mendocino County. On April 20, 2012, the Tribe filed a motion to quash the proceedings, arguing that the court did not have jurisdiction. The Superior Court granted the Tribe's motion on May 19, 2012.

On July 29, 2016, in *Findleton v. Coyote Valley Band of Pomo Indians*, 1 Cal. App. 5th 1194 (1st Dist. 2016), the California Court of Appeals reversed the decision. The appellate court held that the by passing a series of Resolutions by floor vote, the Tribe waived sovereign immunity to judicial enforcement of the arbitration agreement. The appellate court remanded the case back to state Superior Court for further proceedings. The Superior Court has since issued several orders, including an order on attorney fees; an order on a demurrer; and an order granting Findleton's Motion to Compel Mediation/Arbitration.

The Tribe filed a petition for writ of mandate and requested a stay of the state court proceedings. The Court of Appeal issued a stay on June 13, 2017. Findleton filed a response to the petition on June 27, 2017. The Tribe's reply is due July 14, 2017.

C. Procedural History in Tribal Court.

On January 20, 2017, the Tribe requested that this court accept review of the Findleton case. On January 26, 2017, this court granted the motion without prejudice to allow Findleton to file a motion contesting the court's jurisdiction. The court also scheduled a status conference for

February 9, 2017. On February 6, 2017, the court issued an Amended Memorandum Decision explaining its reasons for accepting jurisdiction over the dispute.

Findleton filed his motion to dismiss on February 8, 2017, and the next day the court held a status conference. Findleton failed to appear. The Tribe responded to Findleton's motion on March 9, 2017, and the court issued its written decision denying the motion on March 23, 2017. In its decision, the court noted the need to hold oral arguments to clarify certain issues raised in both Findleton's motion and the Tribe's response.

The court held another status conference on April 12, 2017 and, again, Findleton failed to appear. Oral arguments were eventually held on June 28, 2017 without Findleton's participation.[3]

III. Discussion and Analysis

A. The Nature and Scope of Comity.

The first issue this court must address is whether comity should be given to the state Court of Appeal decision in *Findleton v. Coyote Valley Band of Pomo Indians*, 1 Cal. App. 5th 1194 (1st Dist. 2016). The doctrine of comity instructs that courts will mutually recognize each other's legislative, executive, and judicial acts out of deference, mutuality, and respect. *See Seminole Tribe of Fla. v. Florida* 517 U.S. 44 (1996); Erwin Chemerinsky, *Federal Jurisdiction*, 39-40, n.28 (5th Ed. 2007) (defining comity as "the courtesy or consideration that one jurisdiction gives by enforcing the laws of another, granted out of respect and deference rather than obligation.") "At bottom, comity is about one sovereign respecting the dignity of another." *Michigan v. Bay Millis Indian Community*, 134 S. Ct. 2024, 2047, ___ U.S. ___ (2014) (Thomas, J., dissenting). The doctrine of comity is not a rule of law, but rather is grounded in equitable considerations of respect, goodwill, cooperation, and harmony among courts. *See Danforth v. Minnesota*, 552 U.S. 264, 278-280 (2007); *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 444 (S.D.N.Y. 2002).

As a general rule, federal and state courts must recognize and enforce tribal court judgments under principles of comity. *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002) (citing *Wilson v. Marchington*, 127 F.3d 805, 809-10 (9th Cir. 1997)). There are exceptions, but, generally, comity should be withheld "'only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.'" *Marchington*, 127 F.3d at 809. While there are a number of situations which may arise that weigh against applying comity, courts generally agree that two circumstances preclude recognition: when a court either (1) lacked jurisdiction or (2) denied the losing party due process of law. *AT&T*, 295 F.3d at 903 (citing *Marchington*, 127 F.3d at 810); *see also* Cal. Code of Civ. Proc. § 1716(b) and (c).

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[3] In spite of being ordered to do so, Findleton failed to file any brief in support of oral arguments, or appear when the case was initially called on June 22, 2017. In fact, other than filing his motion to dismiss, Findleton has failed to file any additional pleadings, follow court orders, or communicate in any way with the court or its staff. Findleton's conduct raises the question whether he has adequately exhausted his tribal court remedies, and the court believes he has not.

With these general principles of comity as a backdrop, the Rules of Court for the Northern California Intertribal Court System provide guidance for when the court must decide whether to recognize the judgments of foreign courts. Rule 19(J)(2) states that judges are provided "full and total discretion regarding [the] matter and shall be guided by the best interests of the Tribe(s) and the parties." *See* NCICS Rule 19(J)(2).

B. Since the Agreements Were Ambiguous, the Tribe Did Not Waive Its Sovereign Immunity, And The State Courts Lacked Jurisdiction Over This Dispute.

Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)). "Among the core aspects of sovereignty that tribes possess . . . is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Michigan v. Bay Mills Indian Community*, 134 S. Ct. at 2030 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

It is also settled law that a waiver of sovereign immunity cannot be implied but must be "unequivocally expressed." *Warburton/Buttner*, 103 Cal. App. 4th at 1182 (internal quotations omitted) (quoting *Santa Clara Pueblo*, 436 U.S. at 58). In other words, to relinquish its immunity, a tribe's waiver must be "clear." *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citing *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). The reasons for this rule is simple: sovereign immunity is the immutable lifeblood of modern Indian nations, and a touchstone of self-government. Cf. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. at 2030 ("That immunity, we have explained, is 'a necessary corollary to Indian sovereignty and self-governance'") (citing *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890 (1986)); *see generally*, Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (2005). Hence, any purported waiver of sovereign immunity "must be liberally construed in favor of the [Tribe] and all doubtful expressions therein resolved in favor of the [Tribe]." *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521 (5th Cir. 1966). And "[c]ourts construe waivers of a tribe's immunity strictly and hold a strong presumption against them." *California Parking Services, Inc. v. Soboba Band of Luiseño Indians*, 197 Cal. App. 4th 814, 820 (2011).

In examining the scope of a waiver of tribal sovereign immunity, courts look to (a) the grants of jurisdiction, (b) choice of law, (c) the circumstances in which the contract was made, and most importantly, (d) any express limitations on the waiver. *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 (2001); *Oglala Sioux Tribe v. C & W Enters.*, 542 F.3d 224, 232 (8th Cir. 2008); *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 1194 (1st Dist. 2005).

"[S]overeign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation." *Warburton/Buttner v. Superior Court* 103 Cal. App. 4th 1170, 1188 (4th Dist. 2002) (internal quotations omitted) (quoting *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58). Rather, it is a purely jurisdictional question. *Id.* Courts must look at the explicit provisions of the Tribal law, such as the Tribal Constitution and ordinances which "expressly set forth how, when, through whom, and under what circumstances the []

Tribe may voluntarily waive its immunity." *Sanderlin v. Seminole Tribe* 243 F.3d 1282, 1288 (11th Cir. 2001).[4]

In this case, sovereign immunity cannot be found to have been waived in the Construction Agreement or the Rental Agreement signed by the parties, since the waiver is not clear and unambiguous. Although the agreement to arbitrate is clear, the provisions immediately following those clauses state "[n]o term or provision in this Agreement shall be construed as a waiver of the sovereign immunity of the [Tribe]" and "[t]he Parties specifically agree that the sovereign immunity of [the Tribe] shall not be waived for disputes or other matters related to this Agreement." These disclaimers render the meaning of the agreements ambiguous in regard to waiving sovereign immunity.

In *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 (2001), which dealt with construction that took place off site of a tribal reservation, the Supreme Court examined that the arbitration clause, the waiver of sovereign immunity to "any court with jurisdiction," and the choice of law clause designating Oklahoma law. In combination, the Court found that these three factors indicated that an Oklahoma state court would be a court with jurisdiction to enforce the arbitration clause.

This case is decidedly different. Here, the Construction Agreement stated that "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." It also specifically stated that jurisdiction was with the Tribe. *Findleton v. Coyote Valley Band of Pomo Indians*, 1 Cal. App. 5th 1194, 1199 (1st Dist. 2016) ("[t]he Contractor agrees to the jurisdiction of the Coyote Valley Band of Pomo Indians.") Similarly, there is no grant of any state jurisdiction, either expressly or impliedly through a choice of law clause. Instead, the arbitration was to be under the AAA, with the choice of law being tribal or federal. Moreover, all of the activities covered by the agreements were to occur on tribal land. The Rental Contract also allowed enforcement in any court with jurisdiction, but did not state any specific jurisdiction or choice of law.

It was abundantly clear from the various Agreements that the state court was not to have jurisdiction. Given the complete lack of either jurisdiction or choice of law granted to the state of California, the reservation of choice of law and jurisdiction to the Tribe, as well the express statement that the Tribe wished to avoid state courts, there is no support for finding that the state had jurisdiction in this matter. Nor is there anything else in the record to suggest that the parties agreed to state court jurisdiction in the event of a dispute. Instead, the Tribe clearly stated that it

[4] The Court declines to apply *Smith v. Hopland Band of Pomo Indians,* 95 Cal. App. 4th 1 (1st Dist. 2002). In *Smith*, the California appellate court found that a contract entered into by one member of the tribe and approved by a Tribal resolution was sufficient to waive sovereign immunity, despite the fact that the Tribal Constitution required an ordinance to be passed for such a waiver to be valid. Such a decision ignores the requirement that sovereign immunity only be waived with the Tribe's authority to do so. Instead, this Court will follow *Sanderlin,* 243 F.3d at 1288, and will not ignore the Tribe's Constitution, which lays out in what circumstances sovereign immunity may be waived.

did not want state jurisdiction.[5] According to the Agreements, the only forums that arguable could have jurisdiction to enforce the arbitration agreement under the relevant factors above are the Tribal Court and possibly the federal courts.

In sum, the language in the Agreements referring to a waiver of sovereign immunity is hopelessly ambiguous, and when viewed through the lens of the precedents requiring waivers to be unequivocal, utterly fails to confer jurisdiction on the state courts to enforce the arbitration clause. But that is not the end of the analysis. Because a waiver of tribal sovereign immunity can be gleaned from other documents associated with the contractual language, this court must analyze the Resolutions the Tribe passed in order to determine if a valid waiver occurred.

C. The Resolutions Did Not Conform to The Tribe's Constitution, And, Therefore, Did Not Constitute a Valid Waiver of The Tribe's Sovereign Immunity.

Courts look to the terms of a waiver of sovereign immunity to understand its scope. Documents in addition to the waiver itself can inform the scope of the waiver, and conditional limitations need not appear in the same document as the waiver. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.* 207 F.3d 21 (1st Cir. 2000) (tribal ordinance and contract read in conjunction to determine existence, effect and scope of waiver). Moreover, waivers of sovereign immunity do not have to be accomplished strictly through contract; they may be done through other means approved of by Tribal law. *Sanderlin*, 243 F.3d at 1288. The question then becomes whether Resolution CV-08-20-08-03 was a valid waiver of sovereign immunity in light of the Tribe's Constitution?

With all questions of interpretation, one starts with the text of the document. "The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent." *Barnhart v. Sigmon Coal Co.* 534 U.S. 438, 450 (2002) (internal quotations and citations removed). And "[a]ll language and terms should be used in accordance with their common or ordinary usage and meaning." *Morales v. TWA*, 504 U.S. 374, 394 (1992). In addition, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain* (1992) 503 U.S. 249, 253-254 (citations removed). And finally, "'[i]t cannot be presumed that any clause in [a] Constitution is intended to be without effect.'" *Griswold v. Connecticut* (1965) 381 U.S. 479, 490-491 (quoting *Marbury* v. *Madison* (1803) 5 U.S. 137, 174). "In interpreting the Constitution, 'real effect should be given to all the words it uses." *Id.* (quoting *Myers* v. *United States* (1926) 272 U.S. 52, 151). With these admonitions in mind, we turn to the Tribe's

[5] In his motion to this court to dismiss for lack of jurisdiction, Findleton also argued that California Code of Civil Procedure sections 1293 and 1287 support his argument. Plaintiff's reliance on these California Codes is misplaced, since these sections assume the making of the agreement in the State of California, as opposed to tribal land, or consent of the parties to state court jurisdiction.

Constitution.

According to Article IV, the Tribe's government is divided into three branches: the General Council, the Tribal Council, and the Tribal Judiciary. Art. IV, sec. 1. Section 3 of Article IV says that "[t]he General Council shall exercise all *powers of self-government* through the initiative, referendum, repeal and recall provisions specified in Articles XI, XII, and XIII of this Document." Art. IV, sec. 3 (emphasis added). That section goes on to say "[t]he Tribal Council shall exercise, concurrent with the General Council, all powers delegated to it by the General Council, and otherwise vested in the Tribal Council by this Document." *Id.*

In turn, Article V, sec. 6, entitled "Powers of the General Council," spells out the specific powers *exclusively* reserved to the General Council. They include the power to waive the Tribe's immunity from suit. *See* Art. V, sec. 6, c.6. Section 6 also includes the following curious, but relevant, language: "No exercise of these powers by the Tribal Council or by any other agency or officer of the Band shall be effective unless the General Council has given its consent to such action in accordance with Article VII of this Document." *Id.* Section 6 ends with: "All powers that are not expressly mentioned in this Document or which are not *expressly* delegated *in this Document* by the General Council to the Tribal Council or any other officer or agency of the Band, shall not be abridged but shall be reserved to the General Council" (emphasis added).

Starting from the assumption that the drafters understood the meaning of the words used, when read together Articles IV and V spell out the powers that reside exclusively with the General Council, which include the power to waive the Tribe's sovereign immunity. Although Article IV permits the Tribal Council to exercise certain enumerated and delegated powers concurrently with the General Council, the *prospective* waiver of tribal sovereign immunity is not one of them. Waiver of sovereign immunity is not a "power that is expressly delegated in [the] Document by the General Council to the Tribal Council." In other words, there is nothing in the Constitution that legally permits the General Council to *delegate* to the Tribal Council the power to waive the Tribe's sovereign immunity prospectively.

It is true that Article VII, section 1, is an express delegation from the General Council to the Tribal Council of certain enumerated powers; however, the list does not include the power to *prospectively* waive the Tribe's immunity from suit. And although that section does delegate to the Tribal Council the power to manage Tribal business affairs (subsection d); and promote the Tribe's economic development, including "engag[ing] in business activities and projects which promote the economic well-being of the Band and its members" (subsection j), those delegations do not include, expressly or by implication, the power to waive sovereign immunity prospectively. Such a waiver, which is a core example of the exercise of self-government, is reserved exclusively to the General Council.

How then can the Tribe's sovereign immunity be lawfully waived? Although the Constitution uses the phase "prior approval" in the context of a waiver of sovereign immunity only in reference to the Tribal Council waiving it in defense of a lawsuit, the common-sense reading of Art. IV, sec. 3—describing the General Council's powers, and reiterating that it "shall exercise its powers" related to self-governance by the initiative, referendum, repeal and recall procedures—leads to the inescapable conclusion that these four methods are how the drafters intended the

General Council to undertake these powers, and, of these for, only the referendum provides the realistic opportunity for obtaining the prior consent of the General Council before exercising the powers of self-government.[6]

The referendum procedure is outlined in Article XII. That process can be started when at least one-third of the members of the General Council sign a petition demanding a referendum or repeal of any proposed or enacted tribal law or any action taken by Tribal Council. *See* Art. XII, sec. 1. It can also be started by any three members of the Tribal Council who request a referendum or repeal on any *proposal* or enacted tribal law or any action undertaken by the Tribal Council by calling a special meeting of the General Council. *See* Art. XII, sec. 2. A referendum under section 1 requires a general or special election within twenty days after the petition is received by the Tribal Secretary, and requires the vote of a majority of the members of the General Council, provided that at least fifty members of the General Council are present and cast their vote.

A referendum under section 2, on the other hand, requires the calling of a special meeting of the General Council within thirty days after the three Tribal Council members make the request, and requires the majority vote of the General Council to pass.

Here, neither Resolution CV-08-20-08-03, nor any of the other related resolutions that preceded were approved by the General Council through the referendum process. Instead, they were approved by a mere floor vote of the General Council. Hence, whether these Resolutions are viewed as delegations to the Tribal Council to permitting it to waive the Tribe's sovereign immunity, or direct waivers of such immunity, they failed to comply with the Constitution, and, therefore, are invalid.[7]

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[6] There is one bend in the constitutional text that must be navigated. As noted above, Article V, section 6.c., spells out the powers exclusively reserved to the General Council, which includes the ability to waive the Tribe's sovereign immunity. Yet, that same paragraph appears to permit the *Tribal* Council to exercise any of the powers exclusively reserved to the General Council after consent in accordance with Article XII. Assuming (without deciding) that section 6.c. authorizes the General Council to delegate any of its exclusively reserved powers to the Tribal Council, consent still must be obtained by way of initiative, referendum, repeal, or recall. Complicating the analysis is Article VII, section 1, subsection q, which delegates to the Tribal Council the power "[t]o assert as a defense to lawsuits against the Band the sovereign immunity of the Band; except that no waiver of sovereign immunity can be made by the Tribal Council without prior approval of the General Council." But this delegation is different. It permits the Tribal Council to *waive* sovereign immunity *after* the Tribe is sued; not before.

[7] The Tribe contends that obtaining waivers of sovereign immunity by a floor vote is illogical for another reason. Because they can occur at any meeting with notice or warning, and merely require a member to make a motion, have it seconded, and receive a majority vote of the members then present, matters of self-government, including waivers of sovereign immunity, may be vitiated on a whim, without the deliberate, noticed process of a referendum. The Court agrees with this view, and declines to undo a constitutional process designed to avoid the pernicious effects of rash, uninformed decision-making.

D. Even if the Resolutions Were Valid, the State Courts Have No Jurisdiction

In its attempt to waive sovereign immunity in this case, the Tribe specifically stated in Resolution CV-08-20-08-03 that the waiver was limited to arbitration of disputes in order to avoid litigation in state court. Therefore, the question is, assuming the Resolution was a valid exercise of self-government, did it limit state court jurisdiction to compel arbitration?

Express limitations contained in immunity waivers are to be given great weight. In *Oglala Sioux Tribe v. C & W Enters.*, 542 F.3d 224, 232 (8th Cir. 2008), the arbitration agreement referred to the AAA rules, and permitted the award to be entered and enforced "in any federal or state court having jurisdiction thereof." The court expressly noted that in doing so, the Tribe did not give "any express limitation imposed by the Tribe on its consent to suit." In probably the broadest interpretation, the court in *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 1194 (1st Dist. 2005) interpreted the "in any court of jurisdiction" to allow state court enforcement, relying on *C & L*'s similar language; but notably there was no limit on state jurisdiction in that case either. In contrast, in *California Parking Services, Inc. v. Soboba Band of Luiseno Indians* 197 Cal. App. 4th 814 (2011), a California court found that a tribe did not waive its immunity for an action to compel arbitration, where the arbitration clause expressly disallowed state court jurisdiction.

Here, in contrast, the Resolution specifically stated the waiver was limited to arbitration in order to avoid litigation is state court. This limitation is entitled to great weight, *Oglala Sioux Tribe v. C&W Enters., supra,* and, and combined with the terms of the related Agreements, clearly indicate that the parties intended to avoid state court jurisdiction over any dispute.

D. The State Court Ruling Is Prejudicial to the Tribe

Given the strong policies in favor of tribal self-governance, the acceptance by this court of the decision of the state appellate court would be prejudicial to the Tribe. The Tribe has a strong interest in asserting its own jurisdiction in matters which take place on reservation land, and which concern the interpretation of its laws and Constitution. Federal policy is in accord. *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987) (discussing federal policy of supporting tribal self-government).

Moreover, there is a concern that the state court's decision interpreting the Tribe's Constitution may have lasting and unintended effects on the Tribe. That decision, using process of elimination, determined that the "only" way for the Tribal Council to obtain consent under the Constitution was by floor vote. There is a concern that this holding may pigeonhole the Tribe, forcing it to either accept this interpretation, amend the Constitution, or ignore the decision to the detriment of future parties looking for guidance.

This court has the utmost respect for its sister courts, both state and federal. However, given the lack of state court jurisdiction, as well as the overriding interest in Tribal jurisdiction, this court exercises its discretion to not grant comity in this instance. Hence, it is not bound by the state appellate court's decision and will not follow it.

IV. Conclusion

This court's decision will not bridge the troubled waters of this case, nor is it likely to cause the litigation to end anytime soon. Perhaps, then, it can only serve as a reminder to tribes to tack closely to the requirements of their Constitutions at all times, or face the perils of expensive, time-consuming, and uncertain litigation. Yet, what comes next and how much time, expense and aggravation the parties will endure to prevail has no bearing on this court's decision. Simply put, the Tribe failed to properly waive its sovereign immunity, and neither the state courts, nor this court has the jurisdiction to compel the Tribe to arbitrate.

Since the Tribe did not waive sovereign immunity, the court need not address the issue of whether Findleton failed to exhaust his administrative remedies by filing a timely claim with the Tribal Council.

Dated: July 6, 2017

JOSEPH J. WISEMAN
Chief Judge, Northern California Intertribal Court System

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

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Case Number: 01-17-0003-3765

Robert Findleton
-vs-
Coyote Valley Band of Pomo Indians

Dear Parties:

The above referenced matter was initially filed with the AAA on June 9, 2017 and was closed shortly thereafter following the issuance of an order to stay by the Court of Appeals. We understand that the stay has been lifted and the parties ordered to arbitrate. Upon the request of Claimant, this case has been re-opened and shall proceed.

Please note that any answering statement, counterclaim, or objection to Claimant's requested locale should be filed within 14 days from the date of this letter. Please review the Rules and the enclosed Arbitration Information Sheet regarding the locale of hearings.

An administrative conference call has been scheduled for **Thursday, August 24, 2017 at 11:00AM (PDT)**. The purpose of the administrative conference is to organize and expedite the arbitration, explore administrative details, establish an efficient means of selecting an arbitrator, and to address other appropriate concerns of the parties. At the time of the call, the parties are asked to dial in by using the following telephone number and participant code:

Toll-Free Access Number: 888-537-7715
Participant code: 34554046#

Please let me know immediately if you have a conflict with the date and time provided. If so, please also provide at least two alternate dates/times for consideration.

The parties' attention is also directed to my letter of June 9, 2017, setting forth the various rule sets which may apply to this matter. The issue of which rule set will apply will be discussed during the administrative call.

Finally, in order to assist the AAA in providing you with arbitrators free from conflicts, a Checklist for Conflicts must be completed to list those witnesses you expect to present, as well as any persons or entities with an interest

in these proceedings. This document should not be shared between the parties. The Checklist for Conflicts is due within fourteen days from the date of this letter. Please complete your Checklist for Conflicts online via AAA WebFile. The AAA will receive notice of your online submission. You are also able to update your Checklist for Conflicts at any time.

If you have a WebFile account, you should see this case listed when you log in. If you do not see the case number when you login, please contact the undersigned. If you do not have a WebFile account, please email a request for a registration code to: customerservice@adr.org and they will send you an email with the code and instructions for registering for immediate case access.

Sincerely,

/s/
Cristina Ryan
Director of ADR Services
Direct Dial: (213)457-2035
Email: CristinaRyan@adr.org

Enclosure

Cc:
Robert Findleton

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Arbitration Information Sheet

This document provides information about your upcoming arbitration and the expectations concerning each party's conduct throughout the process. Please save this information sheet so that you may refer to it throughout the arbitration.

Administrative Conference

The AAA may conduct an Administrative Conference with the parties to discuss issues that will assist the AAA in administering the case as efficiently as possible. This is also a good time for the parties to discuss ways to conduct the arbitration to meet their specific needs. Please be prepared to discuss the following:

- Estimates on the expected duration of the case;
- Number of arbitrators/party-appointed arbitrator provision;
- Method of appointment of arbitrators, if applicable;
- Your views on the qualifications of the arbitrators to be proposed;
- The possibility of submitting this dispute to mediation;
- The handling of extension requests;
- Means of communication between the AAA and the parties;
- The possibility of utilizing a documents only process.

Exchange of Correspondence and Documents

It is also important to note that the parties must exchange copies of all correspondence during the course of the arbitration. The two exceptions are the Checklist for Conflicts mentioned above and the party's arbitrator ranking list, which you will receive further information on during the course of the arbitrator appointment process. The parties only need to send copies of documents, such as discovery, to the AAA if the document is to be transmitted to the arbitrator for a determination.

Communications with Arbitrator

It is very important that parties do not engage in any ex-parte communications with the arbitrator. So as to minimize the potential of such communications, this case will be administered by facilitating the exchange of appropriate written documents through the AAA. To ensure the proper handling of all case-related documents, the parties are asked not to submit correspondence directly to the arbitrator.

Correspondence should be submitted to your primary contact for transmittal to the arbitrator, copying the other party.

Timeliness of Filings

Please pay particular attention to response dates included on any correspondence sent to you by the AAA. Untimely filings or responses will not be considered by the AAA. Therefore, if you need an extension to any deadline, please contact the other party to reach an agreement. In the event you are unable to agree, the AAA or the arbitrator will determine if an extension will be granted.

International Arbitrations

If either party believes a matter involves an arbitration agreement between parties from different countries or otherwise has an international nexus that may give rise to unique issues, please let the AAA know within fifteen days. The International Centre for Dispute Resolution (ICDR, www.ICDR.org) is a Division of the AAA that administers international arbitrations worldwide, including in the US. The ICDR is available for assistance in any arbitration handled by the AAA, or, alternatively, can administer the case, if both parties agree. The AAA can also apply its Supplementary Procedures for International Arbitration under any of its Rules. The Supplementary Procedures are available on either www.ADR.org or www.ICDR.org.

Locale of the Arbitration

The parties may agree to a locale for the arbitration. This agreement can be made in the parties' agreement or contract, or when the arbitration is submitted to the AAA. The AAA will place the arbitration within the agreed upon locale.

If the parties' contract or agreement does not specify a locale and the parties cannot agree on a locale, the AAA's Rules empower the AAA to determine the final locale. In these circumstances, the Claimant will generally request that the hearing be held in a specific locale. If the Respondent fails to file an objection to the locale requested by the Claimant within 14 calendar days after the notice of the request has been sent to the Respondent by the AAA, the AAA will confirm the locale requested by the Claimant is agreeable.

When a locale objection is filed, each party is requested to submit written statements regarding its reasons for preferring a specific locale. In preparing their written statements, the parties are asked by the administrator to address the following issues:

- Location of parties & attorneys;
- Location of witness and documents;
- Location of records;
- If construction, location of site, place or materials and the necessity of an on-site inspection;
- Consideration of relative difficulty in traveling and cost to the parties;
- Place of performance of contract;
- Place of previous court actions;
- Location of most appropriate panel;
- Any other reasonable arguments that might affect the locale determination.

AAA WebFile

We encourage the parties to visit our website to learn more about how to file and manage your cases online. As part of our administrative service, AAA's WebFile allows parties to perform a variety of case related activities, including:

- File additional claims;
- Complete and update the Checklist for Conflicts form;
- View invoices and submit payment;
- Merge forms that auto-populate with case and party information;
- Share and manage documents;
- Strike and rank listed neutrals;
- Review case status or hearing dates and times.

AAA WebFile provides flexibility because it allows you to work online as your schedule permits - day or night.

Cases originally filed in the traditional offline manner can also be viewed and managed online. If the case does not show up when you log in, you may request access to the case through WebFile. Your request will be processed within 24 hours after review.

Refund Schedule

The AAA has a refund schedule in the administrative fee section of the Rules. After 60 days of the AAA's receipt of the Demand or the appointment of the arbitrator the filing fees are non-refundable. The AAA will only refund filing fees as outlined in the Rules and does not refund neutral costs incurred when parties settle their dispute or withdraw their claims. Case service Final fees are fully refundable if the parties provide at least 24 hours' notice prior to the hearing.

Revised October 2016

COYOTE VALLEY
Band of Pomo Indians

August 22, 2017

Cristina Ryan
Director of ADR Services
American Arbitration Association
725 South Figueroa Street, Suite 400
Los Angeles, CA 90017

Transmitted via Electronic Mail

Re: Notice of Non-Appearance for August 24, 2017 Administrative Conference Call in *Robert Findleton v. Coyote Valley Band of Pomo Indians* Arbitration (Case # 01-17-0003-3765)

Dear Ms. Ryan:

I am writing to you on behalf of the Coyote Valley Band of Pomo Indians ("***Tribe***"), party to this dispute, to notify you that we will not be participating in the administrative conference call for the above-captioned case scheduled on August 24, 2017. Mr. Findleton's filing for arbitration at this time is wholly improper based on the procedural posture of this case, including the following:

(i) Pursuant to agreements negotiated and executed by Mr. Findleton, the Northern California Intertribal Court System ("Tribal Court") has jurisdiction over this case and found that the Tribe did not waive its sovereign immunity from suit. Accordingly, the Tribal Court decision means there is no State Court jurisdiction over this suit and any related order issued from the State Courts is not binding on the Tribe. (Please find the Tribal Court's Opinion attached.)

(ii) The Tribe intends to file a petition for review to the California Supreme Court addressing the State Court's improper assertion of jurisdiction no later than August 24, 2017 in which we will also make a request for a stay of this proceeding. We will provide a copy upon its filing on August 24, 2017. Until the Supreme Court denies review, there is an active proceeding that must be taken into account by the AAA. If they accept review then it could be years before the California Supreme Court reaches a conclusion.

(iii) The Tribe has a pending appeal of the attorney fee and costs award (filed May 31, 2017 with Case No. A150444) granted in the underlying case arguing first that the State Court lacked jurisdiction over the case and second that, assuming *arguendo* that there was a waiver of sovereign immunity, that the State Court ruling does not reach

one of the agreements at issue. A ruling on this appeal could either lead to the Court of Appeals finding no jurisdiction over the case by the State Courts or could vastly narrow the pending issues to just those related to one of the agreements.

Given the above, the case should be dismissed per the Tribal Court order or because the arbitration is wholly premature given the two pending State Court processes.

Please do not hesitate to contact me or the Tribe's attorney, Little Fawn Boland at littlefawn@ceibalegal.com or (415) 939-7797, if you have any questions or concerns.

Sincerely,

Michael Hunter
Chairman

NORTHERN CALIFORNIA INTERTRIBAL COURT SYSTEM

IN AND FOR THE COYOTE VALLEY TRIBAL COURT

ROBERT FINDLETON, doing business as Terre Construction, and also doing business as On-Site Equipment,

Plaintiff/Respondent,

v.

COYOTE VALLEY BAND OF POMO INDIANS,

Defendant/Petitioner.

Case No.: NCICS-CV-2017-0001-JW

OPINION

FILED
JUL 06 2017
CLERK
NCICS TRIBAL COURT

Opinion by Joseph J. Wiseman, CJ.

I. Introduction

Every day in courtrooms around the country disputes are heard and cases decided. Usually, they involve mundane issues that affect only the litigants and the matters are dispatched with fairly quickly. And that is how it should be in a society founded on the premise of equal justice accessible to all. But sometimes a case presents complex, vexing issues, the resolution of which can have consequences far beyond the immediate parties. This is such a case.

What started out as an unremarkable contract dispute between an Indian tribe and a construction contractor has morphed into a legal vortex that raises questions of comity, contractual interpretation, tribal constitutional law, and fundamental fairness. However, at its core, this case deals with the question of whether the tribe waived its sovereign immunity subjecting it to binding arbitration. The answer, in this court's opinion, is no.[1]

[1] The court must decide three distinct but related issues: (1) whether comity should be given to the State Court's decision in *Findleton v. Coyote Valley Band of Pomo Indians*, 1 Cal. App. 5th 1194 (1st Dist. 2016); (2) whether the Tribe validly waived their sovereign immunity to allow enforcement of the arbitration agreements in this court or any other court; and 3) if the Tribe did

II. Relevant Facts[2]

A. Agreements Leading to The Dispute

In 2007, Robert Findleton, dba Terre Construction ("Findleton"), agreed to undertake a construction project for the Coyote Valley Band of Pomo Indians (the "Tribe") related to the construction of a casino and hotel.

On June 2, 2007, the General Council of the Tribe passed Resolution No. 07-01, which stated that the General Council "hereby delegates to the Tribal Council authority to waive on a limited basis the sovereign immunity of the Tribe in contracts of the Tribe approved by the Tribal Council ... as determined necessary by the Tribal Council for the financing and development of the Project." Presumably, this resolution was passed as a first step in securing Findleton's commitment to complete the project.

Findleton and the Tribe signed their first contract for the work in October 2007 ("Construction Agreement"). The Construction Agreement provided that "[a]rbitration shall be held in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise." It also stated that "[t]he foregoing agreement to arbitrate ... shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof," and that "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

Immediately following the arbitration provisions, the Construction Agreement stated: "No term or provision in this Agreement shall be construed as a waiver of the sovereign immunity of the Coyote Valley Band of Pomo Indians. The Parties specifically agree that the sovereign immunity of Coyote Valley Band of Pomo Indians shall not be waived for disputes or other matters related to this Agreement." The Construction Agreement also contained a choice-of-law provision stating that it "shall be governed by the law of the Coyote Valley Band of Pomo Indians," that "[i]f a particular issue is not covered by such law, federal law shall govern" and that "[t]he Contractor agrees to the jurisdiction of the Coyote Valley Band of Pomo Indians."

In November 2007, the parties entered into a second contract (the "Rental Contract"). The Rental Contract, like the Construction Agreement, contained a provision mandating arbitration "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise." The Rental Contract also provided for enforcement "in accordance with applicable law in any court having jurisdiction thereof," and stated the arbitrator's award would be final and enforceable in court. And, finally, it

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effectively waive its sovereign immunity, whether Findleton was required to exhaust his administrative remedies under the Tribe's Claims Procedure before attempting judicial enforcement of the arbitration agreement.

[2] The facts of this case have been extensively discussed elsewhere, and this court will simply refer to those that are directly germane to the issues at hand.

stated that "[t]he Parties specifically agree that the sovereign immunity of Coyote Valley Band of Pomo Indians shall not be waived for disputes or other matters related to this Agreement.

On March 1, 2008, the General Council passed Resolution No. 08-01. This Resolution reaffirmed the General Council's intent to delegate the power of sovereign immunity. It also ratified and approved all of the contracts related to the project, specifically including all waivers of sovereign immunity of the Tribe in such contracts.

Sometime thereafter, work was suspended on the project due to the Tribe's financial difficulties. Findleton ultimately presented the Tribe with an amendment (the "Third Amendment to Agreement") that contained provisions relating to the continuation of work and the method of payment. It also included a request that the Tribe agree to a limited waiver of sovereign immunity. On August 20, 2008, the Tribe signed the Third Amendment, and passed Resolution No. CV-08-20-08-03. This resolution stated that pursuant to the previously adopted General Council Resolution 08-01—authorizing the Tribal Council to waive the Tribe's sovereign immunity on a limited basis in contracts related to development and financing of a new gaming and resort facility and related infrastructure and utilities—the Tribal Council was waiving sovereign immunity as between the Tribe and Terre Construction. The waiver was limited to arbitration of disputes in order to avoid litigation in state court, and recourse was limited to casino assets and not to assets owned by individual members of the Tribe.

B. California State Court Proceedings

The Tribe failed to pay Findleton, and on March 23, 2012, Findleton filed a petition to compel and enforce mediation and arbitration in Superior Court of Mendocino County. On April 20, 2012, the Tribe filed a motion to quash the proceedings, arguing that the court did not have jurisdiction. The Superior Court granted the Tribe's motion on May 19, 2012.

On July 29, 2016, in *Findleton v. Coyote Valley Band of Pomo Indians*, 1 Cal. App. 5th 1194 (1st Dist. 2016), the California Court of Appeals reversed the decision. The appellate court held that the by passing a series of Resolutions by floor vote, the Tribe waived sovereign immunity to judicial enforcement of the arbitration agreement. The appellate court remanded the case back to state Superior Court for further proceedings. The Superior Court has since issued several orders, including an order on attorney fees; an order on a demurrer; and an order granting Findleton's Motion to Compel Mediation/Arbitration.

The Tribe filed a petition for writ of mandate and requested a stay of the state court proceedings. The Court of Appeal issued a stay on June 13, 2017. Findleton filed a response to the petition on June 27, 2017. The Tribe's reply is due July 14, 2017.

C. Procedural History in Tribal Court.

On January 20, 2017, the Tribe requested that this court accept review of the Findleton case. On January 26, 2017, this court granted the motion without prejudice to allow Findleton to file a motion contesting the court's jurisdiction. The court also scheduled a status conference for

February 9, 2017. On February 6, 2017, the court issued an Amended Memorandum Decision explaining its reasons for accepting jurisdiction over the dispute.

Findleton filed his motion to dismiss on February 8, 2017, and the next day the court held a status conference. Findleton failed to appear. The Tribe responded to Findleton's motion on March 9, 2017, and the court issued its written decision denying the motion on March 23, 2017. In its decision, the court noted the need to hold oral arguments to clarify certain issues raised in both Findleton's motion and the Tribe's response.

The court held another status conference on April 12, 2017 and, again, Findleton failed to appear. Oral arguments were eventually held on June 28, 2017 without Findleton's participation.[3]

III. Discussion and Analysis

A. The Nature and Scope of Comity.

The first issue this court must address is whether comity should be given to the state Court of Appeal decision in *Findleton v. Coyote Valley Band of Pomo Indians*, 1 Cal. App. 5th 1194 (1st Dist. 2016). The doctrine of comity instructs that courts will mutually recognize each other's legislative, executive, and judicial acts out of deference, mutuality, and respect. *See Seminole Tribe of Fla. v. Florida* 517 U.S. 44 (1996); Erwin Chemerinsky, *Federal Jurisdiction*, 39-40, n.28 (5th Ed. 2007) (defining comity as "the courtesy or consideration that one jurisdiction gives by enforcing the laws of another, granted out of respect and deference rather than obligation.") "At bottom, comity is about one sovereign respecting the dignity of another." *Michigan v. Bay Millis Indian Community*, 134 S. Ct. 2024, 2047, ___ U.S. ___ (2014) (Thomas, J., dissenting). The doctrine of comity is not a rule of law, but rather is grounded in equitable considerations of respect, goodwill, cooperation, and harmony among courts. *See Danforth v. Minnesota*, 552 U.S. 264, 278-280 (2007); *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 444 (S.D.N.Y. 2002).

As a general rule, federal and state courts must recognize and enforce tribal court judgments under principles of comity. *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002) (citing *Wilson v. Marchington*, 127 F.3d 805, 809-10 (9th Cir. 1997)). There are exceptions, but, generally, comity should be withheld "'only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.'" *Marchington*, 127 F.3d at 809. While there are a number of situations which may arise that weigh against applying comity, courts generally agree that two circumstances preclude recognition: when a court either (1) lacked jurisdiction or (2) denied the losing party due process of law. *AT&T*, 295 F.3d at 903 (citing *Marchington*, 127 F.3d at 810); *see also* Cal. Code of Civ. Proc. § 1716(b) and (c).

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[3] In spite of being ordered to do so, Findleton failed to file any brief in support of oral arguments, or appear when the case was initially called on June 22, 2017. In fact, other than filing his motion to dismiss, Findleton has failed to file any additional pleadings, follow court orders, or communicate in any way with the court or its staff. Findleton's conduct raises the question whether he has adequately exhausted his tribal court remedies, and the court believes he has not.

With these general principles of comity as a backdrop, the Rules of Court for the Northern California Intertribal Court System provide guidance for when the court must decide whether to recognize the judgments of foreign courts. Rule 19(J)(2) states that judges are provided "full and total discretion regarding [the] matter and shall be guided by the best interests of the Tribe(s) and the parties." *See* NCICS Rule 19(J)(2).

B. Since the Agreements Were Ambiguous, the Tribe Did Not Waive Its Sovereign Immunity, And The State Courts Lacked Jurisdiction Over This Dispute.

Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)). "Among the core aspects of sovereignty that tribes possess . . . is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Michigan v. Bay Mills Indian Community*, 134 S. Ct. at 2030 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

It is also settled law that a waiver of sovereign immunity cannot be implied but must be "unequivocally expressed." *Warburton/Buttner*, 103 Cal. App. 4th at 1182 (internal quotations omitted) (quoting *Santa Clara Pueblo*, 436 U.S. at 58). In other words, to relinquish its immunity, a tribe's waiver must be "clear." *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citing *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). The reasons for this rule is simple: sovereign immunity is the immutable lifeblood of modern Indian nations, and a touchstone of self-government. Cf. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. at 2030 ("That immunity, we have explained, is 'a necessary corollary to Indian sovereignty and self-governance'") (citing *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890 (1986)); *see generally*, Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (2005). Hence, any purported waiver of sovereign immunity "must be liberally construed in favor of the [Tribe] and all doubtful expressions therein resolved in favor of the [Tribe]." *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521 (5th Cir. 1966). And "[c]ourts construe waivers of a tribe's immunity strictly and hold a strong presumption against them." *California Parking Services, Inc. v. Soboba Band of Luiseño Indians*, 197 Cal. App. 4th 814, 820 (2011).

In examining the scope of a waiver of tribal sovereign immunity, courts look to (a) the grants of jurisdiction, (b) choice of law, (c) the circumstances in which the contract was made, and most importantly, (d) any express limitations on the waiver. *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 (2001); *Oglala Sioux Tribe v. C & W Enters.*, 542 F.3d 224, 232 (8th Cir. 2008); *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 1194 (1st Dist. 2005).

"[S]overeign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation." *Warburton/Buttner v. Superior Court* 103 Cal. App. 4th 1170, 1188 (4th Dist. 2002) (internal quotations omitted) (quoting *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58). Rather, it is a purely jurisdictional question. *Id.* Courts must look at the explicit provisions of the Tribal law, such as the Tribal Constitution and ordinances which "expressly set forth how, when, through whom, and under what circumstances the []

Tribe may voluntarily waive its immunity." *Sanderlin v. Seminole Tribe* 243 F.3d 1282, 1288 (11th Cir. 2001).[4]

In this case, sovereign immunity cannot be found to have been waived in the Construction Agreement or the Rental Agreement signed by the parties, since the waiver is not clear and unambiguous. Although the agreement to arbitrate is clear, the provisions immediately following those clauses state "[n]o term or provision in this Agreement shall be construed as a waiver of the sovereign immunity of the [Tribe]" and "[t]he Parties specifically agree that the sovereign immunity of [the Tribe] shall not be waived for disputes or other matters related to this Agreement." These disclaimers render the meaning of the agreements ambiguous in regard to waiving sovereign immunity.

In *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 (2001), which dealt with construction that took place off site of a tribal reservation, the Supreme Court examined that the arbitration clause, the waiver of sovereign immunity to "any court with jurisdiction," and the choice of law clause designating Oklahoma law. In combination, the Court found that these three factors indicated that an Oklahoma state court would be a court with jurisdiction to enforce the arbitration clause.

This case is decidedly different. Here, the Construction Agreement stated that "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." It also specifically stated that jurisdiction was with the Tribe. *Findleton v. Coyote Valley Band of Pomo Indians*, 1 Cal. App. 5th 1194, 1199 (1st Dist. 2016) ("[t]he Contractor agrees to the jurisdiction of the Coyote Valley Band of Pomo Indians.") Similarly, there is no grant of any state jurisdiction, either expressly or impliedly through a choice of law clause. Instead, the arbitration was to be under the AAA, with the choice of law being tribal or federal. Moreover, all of the activities covered by the agreements were to occur on tribal land. The Rental Contract also allowed enforcement in any court with jurisdiction, but did not state any specific jurisdiction or choice of law.

It was abundantly clear from the various Agreements that the state court was not to have jurisdiction. Given the complete lack of either jurisdiction or choice of law granted to the state of California, the reservation of choice of law and jurisdiction to the Tribe, as well the express statement that the Tribe wished to avoid state courts, there is no support for finding that the state had jurisdiction in this matter. Nor is there anything else in the record to suggest that the parties agreed to state court jurisdiction in the event of a dispute. Instead, the Tribe clearly stated that it

[4] The Court declines to apply *Smith v. Hopland Band of Pomo Indians,* 95 Cal. App. 4th 1 (1st Dist. 2002). In *Smith*, the California appellate court found that a contract entered into by one member of the tribe and approved by a Tribal resolution was sufficient to waive sovereign immunity, despite the fact that the Tribal Constitution required an ordinance to be passed for such a waiver to be valid. Such a decision ignores the requirement that sovereign immunity only be waived with the Tribe's authority to do so. Instead, this Court will follow *Sanderlin,* 243 F.3d at 1288, and will not ignore the Tribe's Constitution, which lays out in what circumstances sovereign immunity may be waived.

did not want state jurisdiction.[5] According to the Agreements, the only forums that arguable could have jurisdiction to enforce the arbitration agreement under the relevant factors above are the Tribal Court and possibly the federal courts.

In sum, the language in the Agreements referring to a waiver of sovereign immunity is hopelessly ambiguous, and when viewed through the lens of the precedents requiring waivers to be unequivocal, utterly fails to confer jurisdiction on the state courts to enforce the arbitration clause. But that is not the end of the analysis. Because a waiver of tribal sovereign immunity can be gleaned from other documents associated with the contractual language, this court must analyze the Resolutions the Tribe passed in order to determine if a valid waiver occurred.

C. The Resolutions Did Not Conform to The Tribe's Constitution, And, Therefore, Did Not Constitute a Valid Waiver of The Tribe's Sovereign Immunity.

Courts look to the terms of a waiver of sovereign immunity to understand its scope. Documents in addition to the waiver itself can inform the scope of the waiver, and conditional limitations need not appear in the same document as the waiver. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.* 207 F.3d 21 (1st Cir. 2000) (tribal ordinance and contract read in conjunction to determine existence, effect and scope of waiver). Moreover, waivers of sovereign immunity do not have to be accomplished strictly through contract; they may be done through other means approved of by Tribal law. *Sanderlin*, 243 F.3d at 1288. The question then becomes whether Resolution CV-08-20-08-03 was a valid waiver of sovereign immunity in light of the Tribe's Constitution?

With all questions of interpretation, one starts with the text of the document. "The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent." *Barnhart v. Sigmon Coal Co.* 534 U.S. 438, 450 (2002) (internal quotations and citations removed). And "[a]ll language and terms should be used in accordance with their common or ordinary usage and meaning." *Morales v. TWA*, 504 U.S. 374, 394 (1992). In addition, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain* (1992) 503 U.S. 249, 253-254 (citations removed). And finally, "'[i]t cannot be presumed that any clause in [a] Constitution is intended to be without effect.'" *Griswold v. Connecticut* (1965) 381 U.S. 479, 490-491 (quoting *Marbury* v. *Madison* (1803) 5 U.S. 137, 174). "In interpreting the Constitution, 'real effect should be given to all the words it uses." *Id.* (quoting *Myers* v. *United States* (1926) 272 U.S. 52, 151). With these admonitions in mind, we turn to the Tribe's

[5] In his motion to this court to dismiss for lack of jurisdiction, Findleton also argued that California Code of Civil Procedure sections 1293 and 1287 support his argument. Plaintiff's reliance on these California Codes is misplaced, since these sections assume the making of the agreement in the State of California, as opposed to tribal land, or consent of the parties to state court jurisdiction.

Constitution.

According to Article IV, the Tribe's government is divided into three branches: the General Council, the Tribal Council, and the Tribal Judiciary. Art. IV, sec. 1. Section 3 of Article IV says that "[t]he General Council shall exercise all *powers of self-government* through the initiative, referendum, repeal and recall provisions specified in Articles XI, XII, and XIII of this Document." Art. IV, sec. 3 (emphasis added). That section goes on to say "[t]he Tribal Council shall exercise, concurrent with the General Council, all powers delegated to it by the General Council, and otherwise vested in the Tribal Council by this Document." *Id.*

In turn, Article V, sec. 6, entitled "Powers of the General Council," spells out the specific powers *exclusively* reserved to the General Council. They include the power to waive the Tribe's immunity from suit. *See* Art. V, sec. 6, c.6. Section 6 also includes the following curious, but relevant, language: "No exercise of these powers by the Tribal Council or by any other agency or officer of the Band shall be effective unless the General Council has given its consent to such action in accordance with Article VII of this Document." *Id.* Section 6 ends with: "All powers that are not expressly mentioned in this Document or which are not *expressly* delegated *in this Document* by the General Council to the Tribal Council or any other officer or agency of the Band, shall not be abridged but shall be reserved to the General Council" (emphasis added).

Starting from the assumption that the drafters understood the meaning of the words used, when read together Articles IV and V spell out the powers that reside exclusively with the General Council, which include the power to waive the Tribe's sovereign immunity. Although Article IV permits the Tribal Council to exercise certain enumerated and delegated powers concurrently with the General Council, the *prospective* waiver of tribal sovereign immunity is not one of them. Waiver of sovereign immunity is not a "power that is expressly delegated in [the] Document by the General Council to the Tribal Council." In other words, there is nothing in the Constitution that legally permits the General Council to *delegate* to the Tribal Council the power to waive the Tribe's sovereign immunity prospectively.

It is true that Article VII, section 1, is an express delegation from the General Council to the Tribal Council of certain enumerated powers; however, the list does not include the power to *prospectively* waive the Tribe's immunity from suit. And although that section does delegate to the Tribal Council the power to manage Tribal business affairs (subsection d); and promote the Tribe's economic development, including "engag[ing] in business activities and projects which promote the economic well-being of the Band and its members" (subsection j), those delegations do not include, expressly or by implication, the power to waive sovereign immunity prospectively. Such a waiver, which is a core example of the exercise of self-government, is reserved exclusively to the General Council.

How then can the Tribe's sovereign immunity be lawfully waived? Although the Constitution uses the phase "prior approval" in the context of a waiver of sovereign immunity only in reference to the Tribal Council waiving it in defense of a lawsuit, the common-sense reading of Art. IV, sec. 3—describing the General Council's powers, and reiterating that it "shall exercise its powers" related to self-governance by the initiative, referendum, repeal and recall procedures—leads to the inescapable conclusion that these four methods are how the drafters intended the

General Council to undertake these powers, and, of these for, only the referendum provides the realistic opportunity for obtaining the prior consent of the General Council before exercising the powers of self-government.[6]

The referendum procedure is outlined in Article XII. That process can be started when at least one-third of the members of the General Council sign a petition demanding a referendum or repeal of any proposed or enacted tribal law or any action taken by Tribal Council. *See* Art. XII, sec. 1. It can also be started by any three members of the Tribal Council who request a referendum or repeal on any *proposal* or enacted tribal law or any action undertaken by the Tribal Council by calling a special meeting of the General Council. *See* Art. XII, sec. 2. A referendum under section 1 requires a general or special election within twenty days after the petition is received by the Tribal Secretary, and requires the vote of a majority of the members of the General Council, provided that at least fifty members of the General Council are present and cast their vote.

A referendum under section 2, on the other hand, requires the calling of a special meeting of the General Council within thirty days after the three Tribal Council members make the request, and requires the majority vote of the General Council to pass.

Here, neither Resolution CV-08-20-08-03, nor any of the other related resolutions that preceded were approved by the General Council through the referendum process. Instead, they were approved by a mere floor vote of the General Council. Hence, whether these Resolutions are viewed as delegations to the Tribal Council to permitting it to waive the Tribe's sovereign immunity, or direct waivers of such immunity, they failed to comply with the Constitution, and, therefore, are invalid.[7]

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[6] There is one bend in the constitutional text that must be navigated. As noted above, Article V, section 6.c., spells out the powers exclusively reserved to the General Council, which includes the ability to waive the Tribe's sovereign immunity. Yet, that same paragraph appears to permit the *Tribal* Council to exercise any of the powers exclusively reserved to the General Council after consent in accordance with Article XII. Assuming (without deciding) that section 6.c. authorizes the General Council to delegate any of its exclusively reserved powers to the Tribal Council, consent still must be obtained by way of initiative, referendum, repeal, or recall. Complicating the analysis is Article VII, section 1, subsection q, which delegates to the Tribal Council the power "[t]o assert as a defense to lawsuits against the Band the sovereign immunity of the Band; except that no waiver of sovereign immunity can be made by the Tribal Council without prior approval of the General Council." But this delegation is different. It permits the Tribal Council to *waive* sovereign immunity *after* the Tribe is sued; not before.

[7] The Tribe contends that obtaining waivers of sovereign immunity by a floor vote is illogical for another reason. Because they can occur at any meeting with notice or warning, and merely require a member to make a motion, have it seconded, and receive a majority vote of the members then present, matters of self-government, including waivers of sovereign immunity, may be vitiated on a whim, without the deliberate, noticed process of a referendum. The Court agrees with this view, and declines to undo a constitutional process designed to avoid the pernicious effects of rash, uninformed decision-making.

D. Even if the Resolutions Were Valid, the State Courts Have No Jurisdiction

In its attempt to waive sovereign immunity in this case, the Tribe specifically stated in Resolution CV-08-20-08-03 that the waiver was limited to arbitration of disputes in order to avoid litigation in state court. Therefore, the question is, assuming the Resolution was a valid exercise of self-government, did it limit state court jurisdiction to compel arbitration?

Express limitations contained in immunity waivers are to be given great weight. In *Oglala Sioux Tribe v. C & W Enters.*, 542 F.3d 224, 232 (8th Cir. 2008), the arbitration agreement referred to the AAA rules, and permitted the award to be entered and enforced "in any federal or state court having jurisdiction thereof." The court expressly noted that in doing so, the Tribe did not give "any express limitation imposed by the Tribe on its consent to suit." In probably the broadest interpretation, the court in *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 1194 (1st Dist. 2005) interpreted the "in any court of jurisdiction" to allow state court enforcement, relying on *C & L*'s similar language; but notably there was no limit on state jurisdiction in that case either. In contrast, in *California Parking Services, Inc. v. Soboba Band of Luiseno Indians* 197 Cal. App. 4th 814 (2011), a California court found that a tribe did not waive its immunity for an action to compel arbitration, where the arbitration clause expressly disallowed state court jurisdiction.

Here, in contrast, the Resolution specifically stated the waiver was limited to arbitration in order to avoid litigation is state court. This limitation is entitled to great weight, *Oglala Sioux Tribe v. C&W Enters., supra,* and, and combined with the terms of the related Agreements, clearly indicate that the parties intended to avoid state court jurisdiction over any dispute.

D. The State Court Ruling Is Prejudicial to the Tribe

Given the strong policies in favor of tribal self-governance, the acceptance by this court of the decision of the state appellate court would be prejudicial to the Tribe. The Tribe has a strong interest in asserting its own jurisdiction in matters which take place on reservation land, and which concern the interpretation of its laws and Constitution. Federal policy is in accord. *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987) (discussing federal policy of supporting tribal self-government).

Moreover, there is a concern that the state court's decision interpreting the Tribe's Constitution may have lasting and unintended effects on the Tribe. That decision, using process of elimination, determined that the "only" way for the Tribal Council to obtain consent under the Constitution was by floor vote. There is a concern that this holding may pigeonhole the Tribe, forcing it to either accept this interpretation, amend the Constitution, or ignore the decision to the detriment of future parties looking for guidance.

This court has the utmost respect for its sister courts, both state and federal. However, given the lack of state court jurisdiction, as well as the overriding interest in Tribal jurisdiction, this court exercises its discretion to not grant comity in this instance. Hence, it is not bound by the state appellate court's decision and will not follow it.

IV. Conclusion

This court's decision will not bridge the troubled waters of this case, nor is it likely to cause the litigation to end anytime soon. Perhaps, then, it can only serve as a reminder to tribes to tack closely to the requirements of their Constitutions at all times, or face the perils of expensive, time-consuming, and uncertain litigation. Yet, what comes next and how much time, expense and aggravation the parties will endure to prevail has no bearing on this court's decision. Simply put, the Tribe failed to properly waive its sovereign immunity, and neither the state courts, nor this court has the jurisdiction to compel the Tribe to arbitrate.

Since the Tribe did not waive sovereign immunity, the court need not address the issue of whether Findleton failed to exhaust his administrative remedies by filing a timely claim with the Tribal Council.

Dated: July 6, 2017

JOSEPH J. WISEMAN
Chief Judge, Northern California Intertribal Court System

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

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August 29, 2017

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Case Number: 01-17-0003-3765

Robert Findleton
-vs-
Coyote Valley Band of Pomo Indians

Dear Parties:

On August 22, 2017, the AAA received a letter from Respondent seeking dismissal of this arbitration and attaching a ruling of the Northern California Intertribal Court System. Since that time, the AAA received a copy of Respondent's Petition for Review to the California Supreme Court, including a request to stay this arbitration, as well as a copy of the Supreme Court's Order denying the petition and denying the request for a stay.

At this time, the AAA has made an initial administrative determination to proceed with this arbitration. Not only has Claimant identified a contract requiring the parties to arbitrate before the AAA, a state court has ordered the parties to arbitrate pursuant to the terms of their contract. While the Tribal Court ruled that the state court did not have jurisdiction over the Respondent, the Tribal Court did not order a stay of these proceedings. As such, this arbitration will proceed, subject to Respondent's right to raise the issue of jurisdiction with the arbitrator, once appointed.

Please be reminded that an administrative conference is scheduled for tomorrow **August 30, 2017 at 10:00AM (PDT),** prior notice of which was provided to the parties last week. Please dial into the conference using the following telephone number and access code:

Telephone: **888-537-7715**
Access Code: **34554046**

If you have any questions or concerns, you may raise them during the conference or you may contact me directly, at your convenience.

Sincerely,

/s/
Cristina Ryan
Director of ADR Services
Direct Dial: (213)457-2035
Email: CristinaRyan@adr.org

cc:
Robert Findleton
Maggie Barnes

COYOTE VALLEY
Band of Pomo Indians

August 30, 2017

Cristina Ryan
Director of ADR Services
American Arbitration Association
725 South Figueroa Street, Suite 400
Los Angeles, CA 90017

Transmitted via Electronic Mail

Re: Notice of Non-Appearance for August 30, 2017 Administrative Conference Call in *Robert Findleton v. Coyote Valley Band of Pomo Indians* Arbitration (Case # 01-17-0003-3765)

Dear Ms. Ryan:

I am writing to you on behalf of the Coyote Valley Band of Pomo Indians ("***Respondent***" or "***Tribe***"), party to this dispute, to notify you that we will not be participating in the administrative conference call for the above-captioned case scheduled today, August 30, 2017.

On April 24, 2017, the Superior Court of the State of California, County of Mendocino, ordered Robert Findleton ("***Claimant***") and Respondent to mediate in accordance with the American Arbitration Association ("***AAA***") Construction Industry Rules of Mediation, and to arbitrate in accordance with the same rules should the mediation be unsuccessful.

On July 6, 2017, the Northern California Intertribal Court ("***Tribal Court***") concluded the Superior Court is powerless to compel the Tribe to arbitration, rendering the Superior Court's order meaningless.

On August 28, 2017, the Supreme Court of California denied Respondent's petition for review of the Superior Court's decision. However, this denial has no effect on the Tribal Court's ruling.

At this time, the courts of two sovereign governments have rendered diametrically opposed decisions. Claimant specifically agreed in the contracts that are the subject of this dispute to abide by Tribal law and to subject himself to Tribal jurisdiction. Respondent, on the other hand, specifically contracted to avoid dispute resolution in state court and to not be bound by state law.

While Respondent is not convinced a stay issued by the Tribal Court is necessary given the definitive legal conclusions drawn in its decision, we nonetheless appreciate AAA's recognition

of the Tribal Court's authority in this matter. As such, the Tribe will seek an appropriate response from the Tribal Court to halt these proceedings.

We will not be attending today's call out of an abundance of caution. We do not want any participation to be viewed by the AAA as acceptance by the Tribe of AAA's jurisdiction over this suit.

Sincerely,

Michael Hunter
Chairman

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

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August 30, 2017

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Case Number: 01-17-0003-3765

Robert Findleton
-vs-
Coyote Valley Band of Pomo Indians

Dear Parties:

This will confirm a telephone call on today's date with Timothy Pemberton, Esq., Robert Findleton and Maggie Barnes for Claimant,[1] wherein the following matters were discussed.

In accordance with Rule R-10 (Mediation), the terms of the parties' contract, and the order of the state court, Claimant has requested mediation through the AAA. Having already filed for arbitration, there is no additional filing fee for this service. Further information, including a deadline by which Respondent may reply to the request for mediation, shall follow later this week under separate cover.

During the pendency of the mediation, this arbitration shall be stayed. If the mediation is unsuccessful, or should Respondent otherwise refuse to participate in the mediation, the arbitration shall proceed and the following will apply. Please be advised that **Respondent shall be deemed to have agreed to the following absent a response to the contrary on or before September 13, 2017.**

Applicable Rules: Pursuant to the terms of the parties' arbitration provision, the AAA shall apply the 2005 version of the Construction Industry Arbitration Rules.

Locale: Pursuant to terms of the parties' arbitration provision and the order of the state court, the arbitration hearing shall be held in Mendocino County, CA.

Arbitrator Selection: Immediately upon the lifting of the stay, the AAA will issue a list of ten names from which the parties are to select a single arbitrator. Further instructions in accordance with the terms of the parties' agreement and the order of the state court will be provided together with the list. At the request of Claimant, the list shall include arbitrators experienced with construction disputes. Any additional requests for arbitrator

qualifications should be submitted to the AAA no later than September 13, 2017.

Please do not hesitate to contact me should you have any questions.

Sincerely,

/s/
Cristina Ryan
Director of ADR Services
Direct Dial: (213)457-2035
Email: CristinaRyan@adr.org

Cc:
Robert Findleton
Maggie Barnes

[1] Prior to the start of the call, Respondent had advised the AAA that it would not be participating in the conference on the grounds that it does not believe the AAA has jurisdiction over this matter.

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August 31, 2017

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Case Number: 02-17-0003-3765

Robert Findleton
-and-
Coyote Valley Band of Pomo Indians

Dear Parties:

This will acknowledge receipt on August 30, 2017 of a Request for Mediation between the above-named parties.

The mediation will be administered under the Association's *Commercial Arbitration Rules and Mediation Procedures*, amended and effective October 1, 2013. A copy of the Procedures may be downloaded from the Mediation section of our Commercial Rules at www.adr.org. As noted in prior correspondence, the arbitration between the parties has been stayed pending the completion of this mediation.

In light of Respondent's non-appearance in the related arbitration (Case # 01-17-0003-3765), we ask that the Respondent advise the undersigned no later than Friday, September 8, 2017 whether they will agree to participate in this mediation. If Respondent does agree to participate, the undersigned will issue a list of names from which the parties will select one mediator. If Respondent does not agree to participate, the stay of the arbitration shall be lifted and the arbitration shall re-commence without further notice. **Failure to reply on or before Friday, September 8, 2017 shall be deemed a refusal to participate in this mediation.**

Please contact me if you have any questions or whenever I may be of assistance.

Sincerely,

/s/
Cristina Ryan
Director of ADR Services
Direct Dial: (213)457-2035
Email: CristinaRyan@adr.org

cc: Robert Findleton; Maggie Barnes

COYOTE VALLEY
Band of Pomo Indians

September 8, 2017

Cristina Ryan
Director of ADR Services
American Arbitration Association
725 South Figueroa Street, Suite 400
Los Angeles, CA 90017

Transmitted via Electronic Mail

Re: Notice of Non-Participation in Mediation in *Robert Findleton v. Coyote Valley Band of Pomo Indians* (Case # 02-17-0003-3765)

Dear Ms. Ryan:

I am writing to you on behalf of the Coyote Valley Band of Pomo Indians ("Respondent" or "Tribe"), party to this dispute, to notify you that we will not be participating in mediation of the above-captioned case and to reiterate our position that the American Arbitration Association ("AAA") lacks authority to hear this case.

On April 24, 2017, the Superior Court of the State of California, County of Mendocino, ordered Robert Findleton ("Claimant") and Respondent to mediate in accordance with the AAA Construction Industry Rules of Mediation, and to arbitrate in accordance with the same rules should the mediation be unsuccessful.

On July 6, 2017, the Northern California Intertribal Court ("Tribal Court") concluded the Superior Court is powerless to compel the Tribe to arbitration, rendering the Superior Court's order meaningless.

On August 28, 2017, the Supreme Court of California denied Respondent's petition for review of the Superior Court's decision. However, this denial has no effect on the Tribal Court's ruling.

At this time, the courts of two sovereign governments have rendered diametrically opposed decisions. The AAA is picking one court order over another. Claimant specifically agreed in the contracts that are the subject of this dispute to abide by Tribal law and to subject himself to Tribal jurisdiction. Respondent, on the other hand, specifically contracted to avoid dispute resolution in state court and to not be bound by state law.

Similarly, the AAA availed itself of the laws and jurisdiction of the Coyote Valley Band of Pomo Indians. By proceeding in this manner the AAA is violating a valid order of the Tribal Court which has also has jurisdiction over the AAA.

Please be aware that if you continue to attempt to assert jurisdiction in this matter, we will be obligated to publicize AAA's flippant disregard of tribal law, tribal courts and tribal sovereignty.

Sincerely,

Michael Hunter
Chairman

COYOTE VALLEY
Band of Pomo Indians

September 13, 2017

Cristina Ryan
Director of ADR Services
American Arbitration Association
725 South Figueroa Street, Suite 400
Los Angeles, CA 90017

Transmitted via Electronic Mail

Re: Notice of Non-Participation in Arbitration and Objection to Terms in *Robert Findleton v. Coyote Valley Band of Pomo Indians* (Case # 01-17-0003-3765)

Dear Ms. Ryan:

I am writing to you on behalf of the Coyote Valley Band of Pomo Indians ("Respondent" or "Tribe"), party to this dispute, to notify you once again that we will not be participating in arbitration of the above-captioned case and to reiterate our position that the American Arbitration Association ("AAA") lacks authority to hear this case. Additionally, the Tribe finds it necessary to express its position on some of the issues raised in your letter dated August 30, 2017.

The August 30 letter states that the locale of arbitration shall be in Mendocino County, CA "[p]ursuant to the terms of the parties' arbitration provision and *the order of the state court*" (emphasis added). Additionally, the letter explains that "[f]urther instructions in accordance with the terms of the parties' agreement and *the order of the state court* will be provided" (emphasis added). On July 6, 2017, the Northern California Intertribal Court ("Tribal Court") concluded the Superior Court is powerless to compel the Tribe to arbitration, rendering the Superior Court's order meaningless. The Tribe reiterates its position that it cannot be compelled to arbitrate. Further, it will not be deemed to have consented to any terms in the attached letter that imply the Superior Court's order is valid.

Claimant specifically agreed in the contracts that are the subject of this dispute to abide by Tribal law and to subject himself to Tribal jurisdiction. Respondent, on the other hand, specifically contracted to avoid dispute resolution in state court and to not be bound by state law. The Tribal Court's order holding that the Tribe has not waived immunity and the Superior Court does not have the authority to compel the Tribe to arbitrate cannot be ignored.

If or when the Tribe is compelled to arbitrate by a court with jurisdiction over the matter, it would insist that the locale of the arbitration be the reservation of the Tribe, which is located in Mendocino County. The reservation is appropriate for resolving disputes arising out of agreements that were negotiated and executed on the Tribe's reservation, for work to be performed on the reservation, and which call for the application of Tribal law and jurisdiction

of the Tribe. The Tribe understands the AAA's practice in determining locale is to consider factors such as the proximity to the actual project site, potential impact on the local community, whether a party may provide existing meeting space at no charge, and where witnesses are located. Under the facts of this matter, these factors all lead to a conclusion that the reservation, and not Ukiah or Willits or elsewhere in Mendocino County would be the appropriate locale were there to be an order compelling arbitration applicable to the Tribe.

Additionally, if the Tribe were lawfully compelled to arbitrate by a court with jurisdiction over the Tribe it would be of the utmost importance that any arbitrator be well-versed in federal Indian law. The long and harrowing procedural history in this matter demonstrates that bedrock principles of Indian law are at stake.

Once again, we will not be participating in mediation of this dispute due to the AAA's lack of authority over the dispute. Due to the ongoing disregard of the Tribal Court's order, the Tribe is compelled to take legal action. Subsequently pleadings will be filed in the Tribal Court, seeking to enjoin actions by the AAA and Robert Findleton that constitute ongoing violations of Tribal law.

Sincerely,

Michael Hunter
Chairman

The AAA® Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts

Revised July 1, 2015

AMERICAN ARBITRATION ASSOCIATION®

Available online at **adr.org/construction**

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The AAA® Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts

Why Alternative Dispute Resolution (ADR) for Construction Disputes?

The typical construction project is complex and lengthy, and given these variables, disputes among parties often occur. The cost and duration of disputes can be lessened significantly—and potential disputes often prevented entirely—through judicious planning of how disputes will be handled should they arise. The number of details considered in advance is directly proportional to the amount of control parties can exert over the management of the resolution process when and if necessary.

Contrary to litigation, alternative dispute resolution (ADR) allows parties the ability to plan early for possible disputes and the flexibility to customize the most time- and cost-effective resolution process for their case. This is accomplished by inserting an ADR clause in the dispute resolution section of the construction contract spelling out the terms of the resolution process agreed to by both parties. Even if a project is underway and bound by an existing contract when a dispute arises, parties still can use ADR to their advantage.

Parties want to have control over the management of any dispute that might arise. The best way to ensure this is to write an alternative dispute resolution clause into your original contract, or, if you are in the dispute, to submit your case to ADR.

Arbitration is a private, informal process by which all parties agree, in writing, to submit their disputes to one or more impartial persons authorized to resolve the controversy by rendering a final and binding award. It is widely used in the construction industry; most of the industry's standard contracts—those of the American Institute of Architects (AIA), ConcensusDocs and Engineers Joint Contract Documents Committee (EJCDC)—contain ADR provisions, and many of them incorporate arbitration as a means by which to resolve disputes.

These standard provisions state simply that disputes will be settled by arbitration in accordance with specifically outlined procedures, such as those found in the *American Arbitration Association® (AAA) Construction Industry Arbitration Rules and Mediation Procedures*. This standard clause is sufficient for many of the disputes that can arise during the course of a construction project. However, seldom does "one size fit all" and due to the complexity, costs, materials, technology and other specific requirements of some projects, a simple arbitration clause may not be enough for the particular needs of every case.

Why the American Arbitration Association?

Time-tested Rules and Procedures

Since its founding in 1926, the AAA has revised and refined its *Arbitration Rules and Procedures*. These *Construction Rules*—especially when combined with the expertise of AAA case management—offer parties simple, time-tested means of resolving disputes. The major benefits of using the *AAA Construction Industry Arbitration Rules and Mediation Procedures* are:

- Parties have a written agreement to resolve disputes using rules reviewed by the *National Construction Dispute Resolution Committee (NCDRC),* which is comprised of members representing major construction industry organizations. These rules reflect current law and are referred to in most major construction industry contract document guidelines.
- Flexible rules may be varied by mutual agreement of the parties based upon the needs of the case.
- A panel of impartial, knowledgeable and experienced arbitrators and mediators, made up of professionals with a wide range of expertise including but not limited to architects, engineers, contractors, subcontractors and lawyers with specific construction backgrounds.
- Awards are final, binding and enforceable in a court.

Four Tracks Specific to the Type of Case

The *AAA Construction Industry Arbitration Rules and Mediation Procedures* provides four tracks for the management of cases (more details are provided later in this guide).

- *Fast Track*—for cases involving claims of less than $100,000
- *Regular Track*—for cases involving claims between the ranges of $100,000-$1,000,000
- *Large, Complex Track*—for cases involving claims in excess of $1,000,000

- *Resolution of Disputes through Document Submission*—for cases where oral hearings are waived

Specialized Knowledge to Customize Clauses

Parties or their counsel may desire to augment the standard clause with additional provisions tailored to the particular nature of their project. The AAA is instrumental in assisting drafters with information on what issues and what procedures may benefit the parties to the contract and what ultimately will be the right procedure for a successful outcome of the project and the resolution of any disputes.

These issues include selection of the arbitrator(s), scope of discovery, duration of the arbitration proceeding, assessment of attorneys' fees, awards and remedies and international provisions, along with many others detailed in this guide.

Developed in conjunction with the *National Construction Dispute Resolution Committee*, the *AAA Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts* is designed to lead parties and counsel toward clear options for different and effective ways to structure and to conduct an alternative dispute resolution procedure.

For further information about the AAA, the *AAA Construction Industry Arbitration Rules and Mediation Procedures* or AAA Case Management services, please feel free to contact one of our local regional offices' customer service at (1.800.778.7879) or visit us on our website at www.adr.org. Please also feel free to utilize the AAA online ClauseBuilder® Tool available at www.clausebuilder.org.

Pre-Contract Stage: Designing the ADR Clause

The standard arbitration clause suggested by the American Arbitration Association addresses many basic drafting questions by incorporating the *AAA Construction Industry Arbitration Rules and Mediation Procedures.* This simple approach has proven highly effective in hundreds of thousands of disputes. Standard clauses also may be used for negotiation, mediation, and Dispute Resolution Boards (DRBs). The AAA can assist parties and their counsel in drafting clauses and outlining procedures for other forms of ADR such as partnering, on-site panelists and other procedures that may be a more effective fit to resolve an individual case.

Standard Clauses

Basic Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

The standard arbitration clause also may be supplemented with references to the *AAA Procedures for Large, Complex Construction Disputes* or *Fast Track Procedures.* These additional clauses, which are discussed in the following section entitled *Supplemental Clauses*, may be added to the basic arbitration clause to specify things such as the make-up of the panel, limited discovery, type of award, preliminary relief, depositions, and a host of other options so that the final clause fits the parties and the contract.

The Rules contain a *Fast Track* arbitration system for cases involving claims of less than $100,000; enhancements to the *Regular Track Rules* (claims between $100,000 to $1,000,000); and a *Large, Complex Construction Case Track* for use in cases involving claims in excess of $1,000,000.

Copies of the Association's Rules may be viewed on its website at **www.adr.org**.

See Appendix A for details discussing the benefits of incorporating the AAA Construction Industry Arbitration Rules into your contract.

Basic Mediation Clause

If parties wish to adopt mediation as part of their contractual dispute settlement procedure, they can include the following mediation clause for use either alone or in conjunction with a standard arbitration provision and may also provide that the requirement of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation process.

> *If a dispute arises out of or relates to this contract or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures before resorting to arbitration. If a party fails to respond to a written request for mediation within 30 days after service or fails to participate in any scheduled mediation conference, that party shall be deemed to have waived its right to mediate the issue in dispute.*

Step Mediation-Arbitration Clause

Parties also have the option of including a "step" mediation-arbitration clause into their contracts. A dispute resolution hybrid, the clause provides first for mediation and then, if the dispute is not resolved within a specified time frame, the remaining matters are resolved by arbitration.

> *Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by mediation under the Construction Industry Mediation Procedures of the American Arbitration Association. If a party fails to respond to a written request for mediation within 30 days after service or fails to participate in any scheduled mediation conference, that party shall be deemed to have waived its right to mediate the issues in dispute. If the mediation does not result in settlement of the dispute within 30 days after the initial mediation conference or if a party has waived its right to mediate any issues in dispute, then any unresolved controversy or claim arising out of or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Large, Complex Cases

Key elements of the *Large, Complex Case (LCC)* framework contained within the *AAA Construction Industry Arbitration Rules* are:

- A select panel of arbitrators that meet rigorous qualifications criteria and who have been trained in effective case management techniques.
- As with all *AAA Procedures, LCC Procedures* provide flexibility so that parties can resolve disputes efficiently.
- Case management by specialized AAA administrative teams assigned to these cases.
- A reasoned award.

Unless the parties agree otherwise, the *Large, Complex Case* framework is mandatory for all claims of $1,000,000 or more, although parties are free to agree to use the *LCC Procedures* in other disputes.

LCC Procedures provide for an early administrative conference with the AAA and a preliminary hearing with the arbitrator(s). (See Sections L of the Rules.) Documentary exchanges and other essential exchanges of information are facilitated. The Procedures also provide that a statement of reasons may accompany the award if requested by the parties. The Procedures are meant to supplement the applicable rules that the parties have agreed to use and include the possibility of the use of mediation to resolve some or all issues at an early stage.

Parties can provide for future application of *LCC Procedures* by including the following arbitration clause in their contract.

> *Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration administered by the American Arbitration Association under its Procedures for Large, Complex Construction Disputes, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Mediation-Arbitration

A clause may provide first for mediation under the *AAA Mediation Rules*. If the mediation is unsuccessful, the mediator could be authorized to resolve the dispute under the *AAA Arbitration Rules* in a process sometimes referred to as "Med-Arb."

A procedure whereby the same individual(s) serving as mediator(s) become(s) arbitrator(s) when the mediation fails is not recommended except in unusual circumstances. This is because it could inhibit the candor that should characterize the mediation process and/or it could convey evidence, legal points or settlement positions *ex parte*, improperly influencing the arbitrator(s).

For a sample of a med-arb clause, please see the "step" mediation-arbitration clause in this guide.

Dispute Resolution Boards

A Dispute Resolution Board provides a prompt, rational, impartial review of disputes by mutually accepted experts, which frequently results in substantial cost savings and can eliminate years of wasted time and energy in litigation. *DRB Procedures* may be made a part of construction contract documents.

The contract should contain a paragraph reflecting the agreement to establish the DRB. The text of the actual procedures also should be physically incorporated into the general conditions or supplementary conditions of the contract for construction wherever possible and practical, and documents such as the invitation to bidders or the request for proposals should mention that the formation of a DRB is contemplated. The *DRB Procedures* should be coordinated with the other dispute resolution procedures required by the contract documents.

Suggested language for incorporating *DRB Procedures* in a contract is as follows:

> *The parties shall impanel a Dispute Resolution Board of [one] [three] member(s), in accordance with the Dispute Resolution Board Guide Specifications of the American Arbitration Association. The DRB, in close consultation with all interested parties, will assist and recommend the resolution of any disputes, claims, and other controversies that might arise among the parties.*

The AAA provides *Dispute Resolution Board Guide Specifications* and *DRB Operating Procedures.*

Optional Detailed Clauses

The standard AAA construction arbitration clause in a contract usually is sufficient to secure a smooth resolution process. However, providing for specific issues in advance—over and beyond the standard clause—will streamline the process later on if a dispute arises. If parties determine exactly how details particular to the nature of their transaction or relationship will be handled, they will exercise more control over the process, ensuring a more cost-effective proceeding.

Some disputes require a more detailed ADR clause, and drafters must take care to ensure that the clause meets the parties' needs adequately. An inappropriate ADR clause may result in delay, expense and inconvenience. If disagreements arise over the meaning of the clause, it is often because it failed to properly address the particular needs of the parties. Every party to a construction contract should carefully consider its dispute resolution needs before the contract is completed. In order to fully understand the implications of any ADR clause, parties should consult experienced legal counsel for advice and guidance.

The following is a list of options that, although not exhaustive, highlights some of the issues to consider in drafting, adopting or recommending a dispute resolution process.

- Selection of Arbitrator(s)
- Locale Provisions
- Governing Law
- Conditions Precedent to Arbitration
- Consolidation/Joinder
- Discovery
- Duration of Arbitration Proceeding
- Awards/Remedies
- Assessment of Attorneys' Fees
- Form and Scope of the Award
- Confidentiality
- Appeal of Construction Arbitration Awards
- Statute of Limitations
- International Provisions

Selection of Arbitrator(s)

How many arbitrators?

The parties may agree to have one arbitrator or three (which increases the cost and duration of the process). Cases heard under the *Fast Track Procedures* will be heard by one arbitrator, unless the parties specify a panel of three. Cases heard under the *Regular Track Procedures* will be heard by one arbitrator unless the parties specify a panel of three. If parties disagree on the number of arbitrators, the AAA shall consider the contentions of each side and make a final determination (see Section R-18 of the Rules). When there is a disagreement over the number of arbitrators on LCC cases, Section L-3 requires that three arbitrators shall be appointed.

How are arbitrators selected?

Under the *AAA Arbitration Rules,* arbitrators usually are selected using a listing process. The AAA case manager presents each party with a list of proposed arbitrators who are experienced in the subject matter involved in the dispute. For parties selecting the expedited *Fast Track,* the list contains fewer arbitrators to facilitate faster selection. Often the AAA case manager will conduct a conference call with the parties and/or counsel to ascertain the preferred qualifications of potential arbitrators, such as desired construction occupations (i.e., architect, engineer, contractor, subcontractor) or expertise in specific subject matter, geographical considerations or even compensation rates.

Within a specified number of days, each side must strike any unacceptable names, number the remaining names in order of preference and return the list to the AAA. The case manager then invites panelists to serve from the names remaining on the list, in the designated order of mutual preference.

When the dispute requires a panel of three arbitrators, Section R-14(e) requires that the parties first attempt to agree on the professional backgrounds of the composition of the panel. The case manager will work with the parties to craft an agreement so as to achieve the composition which best suits the needs of each dispute. If the parties are unable to reach an agreement, the AAA shall make the determination, taking into account each party's stated preferences.

Sample clauses providing for specific qualifications of arbitrator(s) are set forth below:

The arbitrator(s) shall be a civil engineer.

or

The arbitrator(s) shall be a practicing attorney specializing in construction law.

or

A balanced panel of three arbitrators, such as one consisting of one contractor, one design professional, and one construction attorney.

or

In the event any claim exceeds [$1 million], exclusive of interest and attorneys' fees, the dispute shall be heard and determined by three arbitrators consisting of persons qualified in [civil engineering, construction management, construction law, mechanical engineering, etc.] or [one contractor, one design professional and one construction attorney].

Locale Provisions

Parties might want to add language specifying the place of the arbitration. The choice of the proper place to arbitrate is most important because the place of arbitration generally implies a choice of the applicable procedural law, which in turn affects questions of arbitrability, procedure, court intervention and enforcement.

In specifying a locale, parties should consider: (1) the convenience of the location and how it affects the availability of witnesses, local counsel, transportation, hotels, meeting facilities, court reporters; (2) the available pool of qualified arbitrators within the geographical area and (3) the applicable procedural and substantive law. An example of locale provisions that might appear in an arbitration clause follows:

The place of arbitration shall be [city], [state], or [country(1)].

(1) See International Provisions

Procedures establishing the locale of the hearing are set forth in the *Construction Industry Arbitration Rules* in Section R-12.

Governing Law

It is common for parties to specify the law that will govern the contract and/or the arbitration proceedings. Some examples follow:

This agreement shall be governed by and interpreted in accordance with the laws of the State of [specify(2)]. The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The Federal Arbitration Act (Title 9 US Code) shall govern the interpretation and enforcement of the arbitration clause in this agreement.

or

Disputes under this clause shall be resolved by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.

or

This contract shall be governed by the laws of the State of [specify(2)].

(2) Parties should be mindful of state laws regarding choice of law rules governing construction projects.

Conditions Precedent to Arbitration

Under an agreement of the parties, satisfaction of specified conditions may be required before a dispute is ready for arbitration. Examples of such conditions precedent include written notification of claims within a fixed period of time and exhaustion of other contractually established procedures, such as submission of claims to an architect or engineer. These kinds of provisions may, however, be a source of delay and may require linkage with a statute of limitations waiver (see below). An example of a "condition precedent" clause follows:

If a dispute arises from or relates to this contract, the parties agree that upon request of either party, they will seek the advice of [a mutually selected engineer] and try in good faith to settle the dispute within 30 days of that request, following which either party may submit the matter to mediation under the Construction Mediation Procedures of the American Arbitration Association. If the matter is not resolved within 60 days after initiation of mediation, either party shall demand arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules.

Consolidation/Joinder

The *AAA Construction Industry Arbitration Rules* has procedures for consolidation and joinder (See Section R-7).

Where there are multiple parties with disputes arising from the same transaction, complications often can be reduced by the consolidation of all disputes. Since arbitration is a process based on voluntary contractual participation, parties may not be required to arbitrate a dispute without their consent.

Standard industry documents may provide procedures for consolidation or joinder of additional parties to a dispute. When this language is present in a document, those procedures should be followed.

However, parties can provide for the consolidation of two or more separate arbitrations into a single proceeding or permit the joinder of a third party into an arbitration. In a construction dispute, consolidated proceedings may eliminate the need for duplicative presentations of claims and avoid the possibility of conflicting rulings from different panels of arbitrators. However, consolidating claims might be a source of delay and expense. An example of language that can be included in an arbitration clause follows:

> *The owner, the contractor, and all subcontractors, specialty contractors, material suppliers, engineers, designers, architects, construction lenders, bonding companies and other parties concerned with the construction of the structure are bound, each to each other, by this arbitration clause, provided that they have signed this contract or a contract that incorporates this contract by reference or signed any other agreement to be bound by this arbitration clause. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement. If more than one arbitration is begun under any such agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator(s) selected in the first filed of such proceedings shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before that (those) arbitrator(s).*

Discovery

Discovery is the process by which information is exchanged between the parties. This process includes exchange of documents and depositions of persons who have knowledge of the dispute. Often, expert witnesses are hired to investigate and explain the more difficult and complex elements of the dispute and to provide opinions regarding causes, repairs and costs. The results of the investigation are typically provided during the discovery process.

Discovery is one of the most expensive and time-consuming portions of the arbitration process and it often is desirable to control the amount and scope of discovery through a clause in the contract. In addition, the process can be limited by agreement of the parties at any time up to and including the preliminary hearing.

Under the *Construction Industry Arbitration Rules* (Rule-24 – Pre-Hearing Exchange and Production of Information), arbitrators are authorized to direct the exchange of documents and witness lists.

Generally arbitrators prefer to hear and be able to question witnesses at a hearing rather than rely on deposition testimony. There are circumstances where depositions are the most expedient method of obtaining information, for example, if the parties anticipate the need for distant witnesses or witnesses who may be incapacitated and who would not be able to testify except through depositions. In these cases, the arbitrator(s) normally will either travel to the locale of the witness or require a deposition.

In most cases, it is desirable to limit the amount of additional discovery. Sample language providing for such discovery is set forth below:

> *At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator(s) deem(s) such additional discovery relevant and appropriate. Depositions shall be limited to a maximum of [three] per party, limited to [three] hours each and shall be held within 30 days of the making of a request. Additional depositions may be scheduled only with the permission of the arbitrator(s), and for good cause shown. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.*
>
> or

The discovery process shall be limited by the following: 1. Where the dispute is less than $1,000,000, there shall be no discovery other than exchange of documents. 2. In disputes of $1,000,000 or more, discovery shall be limited to the number and length of depositions as determined by the arbitrator(s). All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.

or

Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of all relevant documents. There shall be no other discovery allowed.

or

The discovery process shall be in accordance with the AAA Construction Industry Arbitration Rules. There shall be no deviation.

Duration of Arbitration Proceeding

Parties can specify the amount of time that the arbitration will take, from filing to award. *Fast Track* cases generally are heard in one day and the award issued within 14 days of the closing of hearing.

While *AAA Construction Industry Arbitration Rules* normally provide for an award within 30 days of the closing of the hearing, parties sometimes underscore their wish for an expedited result in the arbitration clause, holding that there will be an award within a specified number of months of the notice of intention to arbitrate and that the arbitrator(s) must agree to the time constraints before accepting appointment.

Sample language is set forth below.

The award shall be made within _____ months of the filing of the notice of intention to arbitrate, and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. The parties shall allow the arbitrator appropriate time for drafting the award as per Rule 43. However, this time limit may be extended by agreement of the parties and the arbitrator(s), if necessary.

or

The arbitration hearings shall be concluded within _____ months of the filing of the notice of intention to arbitrate and the award shall be made within 30 days thereafter. However, this time limit may be extended by agreement of the parties and the arbitrator(s). The arbitrator(s) shall agree to comply with this schedule before accepting appointment.

or

Time is of the essence in dispute resolution. Arbitration hearings shall take place within 90 days of filing and awards issued within 120 days. Arbitrator(s) shall agree to these limits prior to accepting appointment.

Awards and Remedies

Under a broad arbitration clause and the *Construction Industry Arbitration Rules,* the arbitrator(s) may grant "any remedy or relief that the arbitrator(s) deems just and equitable" within the scope of the parties' agreement. Some parties object to the clause as being overly broad and believe this could lead to "excessive" or "runaway" awards. To allay this fear, the parties may wish to include a clause limiting the scope or value of the award. Sometimes parties want to include or exclude certain specific awards or remedies, either in the contract or stipulated by the parties at any time before or during the preliminary hearing.

Examples of clauses dealing with awards and remedies follow:

The arbitrator(s) will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute.

or

In no event shall an award exceed the amount of the claim by either party.

or

The award shall be limited to the amount either claimed or counterclaimed. There shall be no punitive or consequential damages.

or

Any award shall be limited to monetary damages and shall include no injunction order for specific performance or direction to any party other than the direction to pay a monetary amount.

or

If the arbitrator(s) find(s) liability, liquidated damages shall be awarded in the amount of $ _____ per day.

or

Any monetary award shall include pre-award interest at the rate of _____ % from the time of the act or acts giving rise to the award.

Assessment of Attorneys' Fees

While the case is active, the *AAA Rules* generally provide that the administrative fees be borne as incurred and that the arbitrator(s)'s compensation be allocated equally between the parties. The Rules, except for international cases, are silent concerning attorneys' fees, but this can be modified by agreement of the parties. The *AAA Rules* give the arbitrator the authority to reassess the allocation of administrative and arbitrator fees and expenses (see Section R-48) unless the parties address fees and expenses in the arbitration clause.

Some typical language dealing with fees and expenses follows:

The prevailing party[3], as determined by the arbitrator shall be entitled to an award of reasonable attorney fees.

or

The arbitrator(s) shall award to the prevailing party[3], if any, as determined by the arbitrator(s), all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrator(s)' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees and attorneys' fees.

or

Each party shall bear its own costs and expenses and an equal share of the arbitrator(s) and administrative fees of arbitration.

or

The arbitrator(s) may determine how the costs and expenses of the arbitration shall be allocated between the parties, but they shall not award attorneys' fees.

(3) State law may define prevailing party—check your local state laws.

Form and Scope of the Award

The *AAA Construction Industry Arbitration Rules* provide that the arbitrator will include a concise written financial breakdown of the amount awarded. In addition, if there are non-monetary claims, the arbitrator shall also provide a line-item disposition of any such claims (see section R-47).

In domestic construction cases, arbitrator(s) usually will not write a reasoned opinion explaining their award unless requested to do so by all parties or if the award is for a complex case (see L-5).

While some take the position that reasoned opinions detract from finality if they facilitate post-arbitration and resort to the courts, parties sometimes desire such opinions, particularly in *Large, Complex Cases* or as already provided by most applicable rules in international disputes. Since full-blown written opinions will add cost to the process, arbitrators and parties should utilize the preliminary hearing process to discuss what specific portions of the award may need more than a breakdown of numbers. This affords the parties the benefits of some reasoning (which may be helpful for insurance purposes or in cases involving public projects) without the expense of a more formal legal opinion.

Parties may wish to include some form of reasoned opinion in their contract language, such as the following:

A reasoned award may add considerably to the cost of arbitration.

> *The award of the arbitrator(s) shall be accompanied by a reasoned opinion.*
>
> or
>
> *The award shall be in writing, shall be signed by a majority of the arbitrator(s), and shall include a statement setting forth the reasons for the disposition of any claim.*
>
> or
>
> *The award shall include findings of fact [and conclusions of law].*
>
> or
>
> *The award shall include a breakdown as to specific claims.*

Confidentiality

While the AAA and arbitrator(s) adhere to certain standards concerning the privacy or confidentiality of the hearings (see the *AAA-ABA Code of Ethics for Arbitrator(s) in Commercial Disputes*, Canon VI), parties might wish to impose limits on themselves as to how much information regarding the dispute may be disclosed outside the hearing. For example:

> *Except as may be required by law, neither a party nor an arbitrator(s) may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.*

The preceding language could also be modified to restrict only disclosure of certain information (e.g., trade secrets).

Appeal of Construction Arbitration Awards

Appeal procedures are not necessary in most cases, and careful review of the necessity for an appeal process should be done during the contract negotiation phase.

The objective of arbitration is a fair, fast and expert result that is achieved economically. Consistent with this goal, an arbitration award traditionally will be set aside by a court only where narrowly defined statutory grounds exist. Sometimes, however, the parties may desire a more comprehensive appeal of an arbitration award within the arbitral process. The AAA has included clauses for appellate arbitration in its *Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts* for a number of years. In addition, parties have developed their own processes and standards for conducting these proceedings. In order to provide for an easier, more standardized process, the AAA has developed *Optional Appellate Arbitration Rules*.

The *Optional Appellate Arbitration Rules* provide for an appeal to an appellate arbitral panel that would apply a standard of review greater than that allowed by existing federal and state statutes. The *Appellate Rules* anticipate an appellate process that can be completed in about three months, while giving both sides adequate time to submit appellate briefs. The Rules permit review of errors of law that are material and prejudicial, and determinations of fact that are clearly erroneous.

Utilization of these Rules is predicated upon agreement of the parties. The right to appeal an arbitration proceeding is a matter of contract. A party may not unilaterally appeal an arbitration award under these rules absent agreement with the other party(s). The following sample language provides for such appellate review assuming a standard arbitration clause is already in place:

> *"Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA Optional Appellate Arbitration Rules ("Appellate Rules"); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as defined by Rule A-3 of the Appellate Rules, by filing a Notice of Appeal with any AAA office. Following the appeal process the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof."*

Statute of Limitations

Parties may wish to consider whether the applicable statute of limitations will be tolled (i.e., the clock is stopped) for the duration of mediation proceedings and can refer to the following language:

> *The requirements of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended until thirty (30) days after the mediator or one of the parties declares an impasse.*

International Provisions

When dealing with disputes involving parties from different countries, it is desirable to specify means and methods of dispute resolution in the contract. Given the wide variety of laws, customs and procedures, specific definition of the dispute resolution process is highly recommended. Where the parties have not provided for the law applicable to the substance of the dispute, the *International Arbitration Rules* from the AAA's International Centre for Dispute Resolution® (ICDR®) contain specific guidelines for arbitrator(s) regarding applicable law.

Parties might wish to specify that the arbitrator(s) should or should not be a national or citizen of a particular country. The following examples can be added to the arbitration clause to deal with this concern.

The arbitrator(s) shall be a national of [country(4)].

or

The arbitrator(s) shall not be a national of either [country A(4)] or [country B(4)].

or

The arbitrator(s) shall not be of the nationality of either of the parties.

In matters involving multilingual parties, the arbitration agreement often specifies the language in which the arbitration will be conducted. Examples follow:

The language(s) of the arbitration shall be [specify].

or

The arbitration shall be conducted in the language in which the contract was written.

Such arbitration clauses could also deal with selection and cost allocation of an interpreter.

(4) In international contracts, parties should consider the importance of the applicability of a convention providing for recognition and enforcement of arbitral agreements and awards and the arbitration regime at the chosen site.

Post-Contract Stage: Using ADR for Existing Disputes

If a dispute occurs on a project with underlying contact documents that do not provide for AAA administration, parties still can choose to have the case decided by means other than litigation. If the parties wish to enter into an arbitration or mediation proceeding for an existing dispute, they may use the following clause and complete a *Submission to Dispute Resolution* form.

Construction Dispute Mediation Submission Clause:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures (the clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, the tolling of the statute of limitations, pre-dispute resolution step clause with time frames and any other item of concern to the parties). If a party fails to participate in any scheduled mediation conference, that party shall be deemed to have waived its right to mediate the issues in dispute.

Construction Dispute Arbitration Submission Clause:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules the following controversy: (cite briefly). We further agree that the controversy be submitted to [one] [three] arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, and that a judgment of any court having jurisdiction may be entered on the award.

Large, Complex Construction Dispute Submission Clause:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Procedures for Large, Complex Construction Disputes the following controversy [describe briefly]. Judgment of any court having jurisdiction may be entered on the award.

Conclusion

The best way for parties and their advocates to maintain control over managing any disputes that might arise as a construction project evolves is to write an alternative dispute resolution clause into the original contract.

When writing a dispute resolution clause, it is important to keep in mind the following key point:

- The purpose of an ADR clause is to resolve disputes, not to create them.

An inappropriate ADR clause may result in delay, expense and inconvenience. Disagreements arising over the meaning of the clause can be minimized if it properly addresses the particular needs of the parties.

Although every dispute is unique, the *AAA Construction Industry Arbitration Rules and Mediation Procedures* (as well as our other construction ADR services) provide parties with significant flexibility to address many special needs, all within a time-tested structure and usually without the need for a more complex ADR clause.

Some disputes may require a more detailed ADR clause, however, and every party to a construction contract should carefully consider its dispute resolution needs before the contract is completed. In order to fully understand the implication of any ADR clause, parties should consult experienced legal counsel for advice and guidance.

The American Arbitration Association has over 80 years of experience in providing ADR services and guidance. The use of standard, straightforward AAA language may help parties avoid difficulties and result in a more efficient and effective ADR process.

If you would like further assistance with the process of drafting your clause, or if you have questions about any section of this Guide, please feel free to contact a local AAA regional office, call customer service at 1.800.778.7879 or visit the AAA website at www.adr.org.

Appendix A

Benefits of Using the AAA Standard Construction Industry Arbitration Clause

- Makes clear that all disputes are arbitrable. Thus, it minimizes dilatory court actions to avoid the arbitration process.
- Allows arbitrators to deal with questions of their own jurisdiction and arbitrability.
- Is self-enforcing. Arbitration can continue despite an objection from a party, unless the proceedings are stayed by court order or by agreement of the parties.
- Provides a complete set of Rules and Procedures. This eliminates the need to spell out dozens of procedural matters in the parties' agreement.
- Provides for the selection of a specialized, impartial panel. Arbitrator(s) are selected by the parties from a screened and trained pool of available experts. Under the *AAA Rules*, a procedure is available to disqualify any arbitrator (see Sections R-3, R-14 to R-20, F-5 and L-3).
- Provides for the settlement of disputes over the locale of proceedings. When the parties disagree, locale determinations are made by the AAA as the administrator, precluding the need for intervention by a court (see Section R-12).
- Makes possible administrative conferences. An administrative conference with the parties' representatives and AAA case management to expedite the arbitration proceedings is available when appropriate (see Section R-11).
- Makes available preliminary hearings. A preliminary hearing can be arranged in construction cases of any size to specify the issues to be resolved, clarify claims and counterclaims, provide for a pre-hearing exchange of information and consider other matters that will expedite the arbitration proceedings (see Section R-23).
- Makes mediation available. Mediation conferences can be arranged to facilitate a voluntary settlement without additional administrative cost to the parties (see Section M and Section R-10).
- Establishes time limits to ensure prompt resolution for all disputes. In particular, time limits are established for the rendering of awards (see Sections R-46 and F-12).
- Allows the parties to amend claims with simple notice requirements and provide for arbitrator consent to changes made after a certain time period to prevent abuse of claim changes (see Section R-6).
- Provides a mechanism to hear requests to consolidate or join claims (see Section R-7).
- Provides for AAA administrative assistance to the arbitrator(s) and the parties. To protect neutrality and avoid unilateral contact, most rules provide for the AAA to channel communications between the parties and the arbitrator(s). An AAA case manager also provides guidance to help ensure prompt conclusion of a proceeding (see Section R-21).

- Establishes a procedure for serving notices. Notices may be served by regular mail, addressed to the party or its representative at the last known address. Additionally, the AAA and the parties may use email, facsimile transmission or other written forms of electronic communication to give the notices required by the Rules (see Section R-44).
- Gives the arbitrator(s) the power to decide matters equitably and to fashion appropriate relief, unless otherwise provided. The arbitrator(s) is empowered to grant any remedy or relief that the arbitrator(s) deems just and equitable and within the scope of the agreement of the parties, including specific performance (see Section R-38).
- Provides a remedy when parties attempt to abuse the process by failing to attend hearings or make required deposits. A hearing may be held in the absence of a party who has been given due notice. Thus, a party cannot avoid an award by refusing to appear (see Section R-32, R-58 and R-59).
- Provides for enforcement of the award. The award can be enforced in any court having jurisdiction, with only limited statutory grounds for resisting the award. If, in a domestic transaction, as distinguished from an international one, the parties desire that the arbitration clause be final, binding and enforceable, it is essential that the clause contain an "entry of judgment" provision such as that found in the standard arbitration clause ("and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof") (see Section R-54).
- Provides two Procedures specifically designed to address the resolution needs of cases both larger and smaller than average: the *Large, Complex Construction Dispute Procedures* for claims in excess of $1,000,000 and the *Fast Track Procedures* for claims of no more than $100,000 (see Sections L and F).

Appendix B

Checklist for Drafting Construction Clauses

When drafting, adopting or recommending a dispute resolution clause in a construction contract, parties or their attorneys need to give thought to the following areas:

- ❒ Does the clause cover all disputes or only certain, specific type of disputes?
- ❒ Should the clause have other ADR options such as early panel evaluation, mediation and then arbitration?
- ❒ Should one or three arbitrators handle the dispute?
  In considering this, remember to consider the cost and time that is involved when there are three arbitrators serving.
- ❒ Are there special circumstances involved in the project? If yes, does the arbitrator need to have specific expertise in a given area of construction and, if so, consider having your contract specify such expertise.
- ❒ Consider whether or not the clause should contain information on the specific location for the hearings. Note that the *Construction Rules* Section R-12 will apply regarding the determination of the location of the hearings.
- ❒ Should the AAA's *Procedures for Large, Complex Case Disputes* (*Construction Rules* Section L) be included in this contract?
  What about the *Fast Track Procedures* (*Construction Rules* Section F)?
- ❒ Consider adding time frames into the clause to deal with time limits as it relates to discovery or hearing and consider how much is necessary.
- ❒ What are the expectations for the final award?
  Should there be specific language that states a reasoned award will be rendered by the arbitrator or a standard award with a specific breakdown including all claims considered on the case?

AIA® Document A201™ – 2017

General Conditions of the Contract for Construction

for the following PROJECT:
(Name and location or address)

THE OWNER:
(Name, legal status and address)

THE ARCHITECT:
(Name, legal status and address)

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

For guidance in modifying this document to include supplementary conditions, see AIA Document A503™, Guide for Supplementary Conditions.

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ARTICLE 1 GENERAL PROVISIONS

§ 1.1 Basic Definitions

§ 1.1.1 The Contract Documents

The Contract Documents are enumerated in the Agreement between the Owner and Contractor (hereinafter the Agreement) and consist of the Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement, and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive, or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Contractor's bid or proposal, or portions of Addenda relating to bidding or proposal requirements.

§ 1.1.2 The Contract

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Contractor and the Architect or the Architect's consultants, (2) between the Owner and a Subcontractor or a Sub-subcontractor, (3) between the Owner and the Architect or the Architect's consultants, or (4) between any persons or entities other than the Owner and the Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

§ 1.1.3 The Work

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment, and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

§ 1.1.4 The Project

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner and by Separate Contractors.

§ 1.1.5 The Drawings

The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules, and diagrams.

§ 1.1.6 The Specifications

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

§ 1.1.7 Instruments of Service

Instruments of Service are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Architect and the Architect's consultants under their respective professional services agreements. Instruments of Service may include, without limitation, studies, surveys, models, sketches, drawings, specifications, and other similar materials.

§ 1.1.8 Initial Decision Maker

The Initial Decision Maker is the person identified in the Agreement to render initial decisions on Claims in accordance with Section 15.2. The Initial Decision Maker shall not show partiality to the Owner or Contractor and shall not be liable for results of interpretations or decisions rendered in good faith.

§ 1.2 Correlation and Intent of the Contract Documents

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

§ 1.2.1.1 The invalidity of any provision of the Contract Documents shall not invalidate the Contract or its remaining

provisions. If it is determined that any provision of the Contract Documents violates any law, or is otherwise invalid or unenforceable, then that provision shall be revised to the extent necessary to make that provision legal and enforceable. In such case the Contract Documents shall be construed, to the fullest extent permitted by law, to give effect to the parties' intentions and purposes in executing the Contract.

§ 1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

§ 1.2.3 Unless otherwise stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

§ 1.3 Capitalization

Terms capitalized in these General Conditions include those that are (1) specifically defined, (2) the titles of numbered articles, or (3) the titles of other documents published by the American Institute of Architects.

§ 1.4 Interpretation

In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

§ 1.5 Ownership and Use of Drawings, Specifications, and Other Instruments of Service

§ 1.5.1 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and retain all common law, statutory, and other reserved rights in their Instruments of Service, including copyrights. The Contractor, Subcontractors, Sub-subcontractors, and suppliers shall not own or claim a copyright in the Instruments of Service. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with the Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' reserved rights.

§ 1.5.2 The Contractor, Subcontractors, Sub-subcontractors, and suppliers are authorized to use and reproduce the Instruments of Service provided to them, subject to any protocols established pursuant to Sections 1.7 and 1.8, solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. The Contractor, Subcontractors, Sub-subcontractors, and suppliers may not use the Instruments of Service on other projects or for additions to the Project outside the scope of the Work without the specific written consent of the Owner, Architect, and the Architect's consultants.

§ 1.6 Notice

§ 1.6.1 Except as otherwise provided in Section 1.6.2, where the Contract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed and shall be deemed to have been duly served if delivered in person, by mail, by courier, or by electronic transmission if a method for electronic transmission is set forth in the Agreement.

§ 1.6.2 Notice of Claims as provided in Section 15.1.3 shall be provided in writing and shall be deemed to have been duly served only if delivered to the designated representative of the party to whom the notice is addressed by certified or registered mail, or by courier providing proof of delivery.

§ 1.7 Digital Data Use and Transmission

The parties shall agree upon protocols governing the transmission and use of Instruments of Service or any other information or documentation in digital form. The parties will use AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, to establish the protocols for the development, use, transmission, and exchange of digital data.

§ 1.8 Building Information Models Use and Reliance

Any use of, or reliance on, all or a portion of a building information model without agreement to protocols governing the use of, and reliance on, the information contained in the model and without having those protocols set forth in AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, and the requisite AIA Document G202™–2013, Project Building Information Modeling Protocol Form, shall be at the using or relying party's sole risk and without liability to the other party and its contractors or consultants, the authors of, or contributors to, the building

information model, and each of their agents and employees.

ARTICLE 2 OWNER

§ 2.1 General

§ 2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Section 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

§ 2.1.2 The Owner shall furnish to the Contractor, within fifteen days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of, or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

§ 2.2 Evidence of the Owner's Financial Arrangements

§ 2.2.1 Prior to commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. The Contractor shall have no obligation to commence the Work until the Owner provides such evidence. If commencement of the Work is delayed under this Section 2.2.1, the Contract Time shall be extended appropriately.

§ 2.2.2 Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract only if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor's request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.

§ 2.2.3 After the Owner furnishes evidence of financial arrangements under this Section 2.2, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

§ 2.2.4 Where the Owner has designated information furnished under this Section 2.2 as "confidential," the Contractor shall keep the information confidential and shall not disclose it to any other person. However, the Contractor may disclose "confidential" information, after seven (7) days' notice to the Owner, where disclosure is required by law, including a subpoena or other form of compulsory legal process issued by a court or governmental entity, or by court or arbitrator(s) order. The Contractor may also disclose "confidential" information to its employees, consultants, sureties, Subcontractors and their employees, Sub-subcontractors, and others who need to know the content of such information solely and exclusively for the Project and who agree to maintain the confidentiality of such information.

§ 2.3 Information and Services Required of the Owner

§ 2.3.1 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

§ 2.3.2 The Owner shall retain an architect lawfully licensed to practice architecture, or an entity lawfully practicing architecture, in the jurisdiction where the Project is located. That person or entity is identified as the Architect in the Agreement and is referred to throughout the Contract Documents as if singular in number.

§ 2.3.3 If the employment of the Architect terminates, the Owner shall employ a successor to whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the Architect.

§ 2.3.4 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the

site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

§ 2.3.5 The Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Contractor's performance of the Work with reasonable promptness after receiving the Contractor's written request for such information or services.

§ 2.3.6 Unless otherwise provided in the Contract Documents, the Owner shall furnish to the Contractor one copy of the Contract Documents for purposes of making reproductions pursuant to Section 1.5.2.

§ 2.4 Owner's Right to Stop the Work

If the Contractor fails to correct Work that is not in accordance with the requirements of the Contract Documents as required by Section 12.2 or repeatedly fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Section 6.1.3.

§ 2.5 Owner's Right to Carry Out the Work

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ten-day period after receipt of notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such default or neglect. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect and the Architect may, pursuant to Section 9.5.1, withhold or nullify a Certificate for Payment in whole or in part, to the extent reasonably necessary to reimburse the Owner for the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect, or failure. If current and future payments are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner. If the Contractor disagrees with the actions of the Owner or the Architect, or the amounts claimed as costs to the Owner, the Contractor may file a Claim pursuant to Article 15.

ARTICLE 3 CONTRACTOR

§ 3.1 General

§ 3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. The Contractor shall designate in writing a representative who shall have express authority to bind the Contractor with respect to all matters under this Contract. The term "Contractor" means the Contractor or the Contractor's authorized representative.

§ 3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents.

§ 3.1.3 The Contractor shall not be relieved of its obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons or entities other than the Contractor.

§ 3.2 Review of Contract Documents and Field Conditions by Contractor

§ 3.2.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed, and correlated personal observations with requirements of the Contract Documents.

§ 3.2.2 Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.3.4, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's

capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.

§ 3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.

§ 3.2.4 If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall submit Claims as provided in Article 15. If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner, subject to Section 15.1.7, as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities.

§ 3.3 Supervision and Construction Procedures

§ 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences, or procedures, the Contractor shall evaluate the jobsite safety thereof and shall be solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely notice to the Owner and Architect, and shall propose alternative means, methods, techniques, sequences, or procedures. The Architect shall evaluate the proposed alternative solely for conformance with the design intent for the completed construction. Unless the Architect objects to the Contractor's proposed alternative, the Contractor shall perform the Work using its alternative means, methods, techniques, sequences, or procedures.

§ 3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors.

§ 3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

§ 3.4 Labor and Materials

§ 3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

§ 3.4.2 Except in the case of minor changes in the Work approved by the Architect in accordance with Section 3.12.8 or ordered by the Architect in accordance with Section 7.4, the Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order or Construction Change Directive.

§ 3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

§ 3.5 Warranty

§ 3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes

remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

§ 3.5.2 All material, equipment, or other special warranties required by the Contract Documents shall be issued in the name of the Owner, or shall be transferable to the Owner, and shall commence in accordance with Section 9.8.4.

§ 3.6 Taxes

The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

§ 3.7 Permits, Fees, Notices and Compliance with Laws

§ 3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit as well as for other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded.

§ 3.7.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work.

§ 3.7.3 If the Contractor performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

§ 3.7.4 Concealed or Unknown Conditions

If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 14 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend that an equitable adjustment be made in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may submit a Claim as provided in Article 15.

§ 3.7.5 If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.

§ 3.8 Allowances

§ 3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

§ 3.8.2 Unless otherwise provided in the Contract Documents,

.1 allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

.2 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit, and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances; and

.3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Section 3.8.2.1 and (2) changes in Contractor's costs under Section 3.8.2.2.

§ 3.8.3 Materials and equipment under an allowance shall be selected by the Owner with reasonable promptness.

§ 3.9 Superintendent

§ 3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor.

§ 3.9.2 The Contractor, as soon as practicable after award of the Contract, shall notify the Owner and Architect of the name and qualifications of a proposed superintendent. Within 14 days of receipt of the information, the Architect may notify the Contractor, stating whether the Owner or the Architect (1) has reasonable objection to the proposed superintendent or (2) requires additional time for review. Failure of the Architect to provide notice within the 14-day period shall constitute notice of no reasonable objection.

§ 3.9.3 The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner's consent, which shall not unreasonably be withheld or delayed.

§ 3.10 Contractor's Construction and Submittal Schedules

§ 3.10.1 The Contractor, promptly after being awarded the Contract, shall submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall contain detail appropriate for the Project, including (1) the date of commencement of the Work, interim schedule milestone dates, and the date of Substantial Completion; (2) an apportionment of the Work by construction activity; and (3) the time required for completion of each portion of the Work. The schedule shall provide for the orderly progression of the Work to completion and shall not exceed time limits current under the Contract Documents. The schedule shall be revised at appropriate intervals as required by the conditions of the Work and Project.

§ 3.10.2 The Contractor, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, shall submit a submittal schedule for the Architect's approval. The Architect's approval shall not be unreasonably delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Architect reasonable time to review submittals. If the Contractor fails to submit a submittal schedule, or fails to provide submittals in accordance with the approved submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.

§ 3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.

§ 3.11 Documents and Samples at the Site

The Contractor shall make available, at the Project site, the Contract Documents, including Change Orders, Construction Change Directives, and other Modifications, in good order and marked currently to indicate field changes and selections made during construction, and the approved Shop Drawings, Product Data, Samples, and similar required submittals. These shall be in electronic form or paper copy, available to the Architect and Owner, and delivered to the Architect for submittal to the Owner upon completion of the Work as a record of the Work as constructed.

§ 3.12 Shop Drawings, Product Data and Samples

§ 3.12.1 Shop Drawings are drawings, diagrams, schedules, and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier, or distributor to illustrate some portion of the Work.

§ 3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams, and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

§ 3.12.3 Samples are physical examples that illustrate materials, equipment, or workmanship, and establish standards by which the Work will be judged.

§ 3.12.4 Shop Drawings, Product Data, Samples, and similar submittals are not Contract Documents. Their purpose is to demonstrate how the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals. Review by the Architect is subject to the limitations of Section 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals that are not required by the Contract Documents may be returned by the Architect without action.

§ 3.12.5 The Contractor shall review for compliance with the Contract Documents, approve, and submit to the Architect, Shop Drawings, Product Data, Samples, and similar submittals required by the Contract Documents, in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of Separate Contractors.

§ 3.12.6 By submitting Shop Drawings, Product Data, Samples, and similar submittals, the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

§ 3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples, or similar submittals, until the respective submittal has been approved by the Architect.

§ 3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from the requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples, or similar submittals, unless the Contractor has specifically notified the Architect of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples, or similar submittals, by the Architect's approval thereof.

§ 3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples, or similar submittals, to revisions other than those requested by the Architect on previous submittals. In the absence of such notice, the Architect's approval of a resubmission shall not apply to such revisions.

§ 3.12.10 The Contractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences, and procedures. The Contractor shall not be required to provide professional services in violation of applicable law.

§ 3.12.10.1 If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. The Contractor shall cause such services or certifications to be provided by an appropriately licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional. Shop Drawings, and other submittals related to the Work, designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy and accuracy of the services, certifications, and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor the performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review and approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

§ 3.12.10.2 If the Contract Documents require the Contractor's design professional to certify that the Work has been performed in accordance with the design criteria, the Contractor shall furnish such certifications to the Architect at the

time and in the form specified by the Architect.

§ 3.13 Use of Site
The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, lawful orders of public authorities, and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

§ 3.14 Cutting and Patching
§ 3.14.1 The Contractor shall be responsible for cutting, fitting, or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting, or patching shall be restored to the condition existing prior to the cutting, fitting, or patching, unless otherwise required by the Contract Documents.

§ 3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or Separate Contractors by cutting, patching, or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter construction by the Owner or a Separate Contractor except with written consent of the Owner and of the Separate Contractor. Consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold, from the Owner or a Separate Contractor, its consent to cutting or otherwise altering the Work.

§ 3.15 Cleaning Up
§ 3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials and rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery, and surplus materials from and about the Project.

§ 3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the Owner shall be entitled to reimbursement from the Contractor.

§ 3.16 Access to Work
The Contractor shall provide the Owner and Architect with access to the Work in preparation and progress wherever located.

§ 3.17 Royalties, Patents and Copyrights
The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for defense or loss when a particular design, process, or product of a particular manufacturer or manufacturers is required by the Contract Documents, or where the copyright violations are contained in Drawings, Specifications, or other documents prepared by the Owner or Architect. However, if an infringement of a copyright or patent is discovered by, or made known to, the Contractor, the Contractor shall be responsible for the loss unless the information is promptly furnished to the Architect.

§ 3.18 Indemnification
§ 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

§ 3.18.2 In claims against any person or entity indemnified under this Section 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation, or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

ARTICLE 4 ARCHITECT

§ 4.1 General

§ 4.1.1 The Architect is the person or entity retained by the Owner pursuant to Section 2.3.2 and identified as such in the Agreement.

§ 4.1.2 Duties, responsibilities, and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified, or extended without written consent of the Owner, Contractor, and Architect. Consent shall not be unreasonably withheld.

§ 4.2 Administration of the Contract

§ 4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents and will be an Owner's representative during construction until the date the Architect issues the final Certificate for Payment. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

§ 4.2.2 The Architect will visit the site at intervals appropriate to the stage of construction, or as otherwise agreed with the Owner, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents.

§ 4.2.3 On the basis of the site visits, the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and promptly report to the Owner (1) known deviations from the Contract Documents, (2) known deviations from the most recent construction schedule submitted by the Contractor, and (3) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of, and will not be responsible for acts or omissions of, the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

§ 4.2.4 Communications

The Owner and Contractor shall include the Architect in all communications that relate to or affect the Architect's services or professional responsibilities. The Owner shall promptly notify the Architect of the substance of any direct communications between the Owner and the Contractor otherwise relating to the Project. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and suppliers shall be through the Contractor. Communications by and with Separate Contractors shall be through the Owner. The Contract Documents may specify other communication protocols.

§ 4.2.5 Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

§ 4.2.6 The Architect has authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Sections 13.4.2 and 13.4.3, whether or not the Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 4.2.7 The Architect will review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data, and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under

Sections 3.3, 3.5, and 3.12. The Architect's review shall not constitute approval of safety precautions or of any construction means, methods, techniques, sequences, or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

§ 4.2.8 The Architect will prepare Change Orders and Construction Change Directives, and may order minor changes in the Work as provided in Section 7.4. The Architect will investigate and make determinations and recommendations regarding concealed and unknown conditions as provided in Section 3.7.4.

§ 4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion; issue Certificates of Substantial Completion pursuant to Section 9.8; receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor pursuant to Section 9.10; and issue a final Certificate for Payment pursuant to Section 9.10.

§ 4.2.10 If the Owner and Architect agree, the Architect will provide one or more Project representatives to assist in carrying out the Architect's responsibilities at the site. The Owner shall notify the Contractor of any change in the duties, responsibilities and limitations of authority of the Project representatives.

§ 4.2.11 The Architect will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

§ 4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of, and reasonably inferable from, the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either, and will not be liable for results of interpretations or decisions rendered in good faith.

§ 4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

§ 4.2.14 The Architect will review and respond to requests for information about the Contract Documents. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If appropriate, the Architect will prepare and issue supplemental Drawings and Specifications in response to the requests for information.

ARTICLE 5 SUBCONTRACTORS

§ 5.1 Definitions

§ 5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a Separate Contractor or the subcontractors of a Separate Contractor.

§ 5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

§ 5.2 Award of Subcontracts and Other Contracts for Portions of the Work

§ 5.2.1 Unless otherwise stated in the Contract Documents, the Contractor, as soon as practicable after award of the Contract, shall notify the Owner and Architect of the persons or entities proposed for each principal portion of the Work, including those who are to furnish materials or equipment fabricated to a special design. Within 14 days of receipt of the information, the Architect may notify the Contractor whether the Owner or the Architect (1) has reasonable objection to any such proposed person or entity or (2) requires additional time for review. Failure of the Architect to provide notice within the 14-day period shall constitute notice of no reasonable objection.

§ 5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

§ 5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the

Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

§ 5.2.4 The Contractor shall not substitute a Subcontractor, person, or entity for one previously selected if the Owner or Architect makes reasonable objection to such substitution.

§ 5.3 Subcontractual Relations

By appropriate written agreement, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work that the Contractor, by these Contract Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies, and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement that may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

§ 5.4 Contingent Assignment of Subcontracts

§ 5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner, provided that

.1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Contractor; and

.2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

When the Owner accepts the assignment of a subcontract agreement, the Owner assumes the Contractor's rights and obligations under the subcontract.

§ 5.4.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

§ 5.4.3 Upon assignment to the Owner under this Section 5.4, the Owner may further assign the subcontract to a successor contractor or other entity. If the Owner assigns the subcontract to a successor contractor or other entity, the Owner shall nevertheless remain legally responsible for all of the successor contractor's obligations under the subcontract.

ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

§ 6.1 Owner's Right to Perform Construction and to Award Separate Contracts

§ 6.1.1 The term "Separate Contractor(s)" shall mean other contractors retained by the Owner under separate agreements. The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and with Separate Contractors retained under Conditions of the Contract substantially similar to those of this Contract, including those provisions of the Conditions of the Contract related to insurance and waiver of subrogation.

§ 6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

§ 6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each Separate

Contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with any Separate Contractors and the Owner in reviewing their construction schedules. The Contractor shall make any revisions to its construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, Separate Contractors, and the Owner until subsequently revised.

§ 6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces or with Separate Contractors, the Owner or its Separate Contractors shall have the same obligations and rights that the Contractor has under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6, and Articles 10, 11, and 12.

§ 6.2 Mutual Responsibility

§ 6.2.1 The Contractor shall afford the Owner and Separate Contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

§ 6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a Separate Contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly notify the Architect of apparent discrepancies or defects in the construction or operations by the Owner or Separate Contractor that would render it unsuitable for proper execution and results of the Contractor's Work. Failure of the Contractor to notify the Architect of apparent discrepancies or defects prior to proceeding with the Work shall constitute an acknowledgment that the Owner's or Separate Contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work. The Contractor shall not be responsible for discrepancies or defects in the construction or operations by the Owner or Separate Contractor that are not apparent.

§ 6.2.3 The Contractor shall reimburse the Owner for costs the Owner incurs that are payable to a Separate Contractor because of the Contractor's delays, improperly timed activities or defective construction. The Owner shall be responsible to the Contractor for costs the Contractor incurs because of a Separate Contractor's delays, improperly timed activities, damage to the Work or defective construction.

§ 6.2.4 The Contractor shall promptly remedy damage that the Contractor wrongfully causes to completed or partially completed construction or to property of the Owner or Separate Contractor as provided in Section 10.2.5.

§ 6.2.5 The Owner and each Separate Contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Section 3.14.

§ 6.3 Owner's Right to Clean Up

If a dispute arises among the Contractor, Separate Contractors, and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

ARTICLE 7 CHANGES IN THE WORK

§ 7.1 General

§ 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§ 7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor, and Architect. A Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor. An order for a minor change in the Work may be issued by the Architect alone.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents. The Contractor shall proceed promptly with changes in the Work, unless otherwise provided in the Change Order, Construction Change Directive, or order for a minor change in the Work.

§ 7.2 Change Orders

§ 7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor, and Architect stating their agreement upon all of the following:

.1 The change in the Work;
.2 The amount of the adjustment, if any, in the Contract Sum; and
.3 The extent of the adjustment, if any, in the Contract Time.

§ 7.3 Construction Change Directives

§ 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions, or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

§ 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

.1 Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
.2 Unit prices stated in the Contract Documents or subsequently agreed upon;
.3 Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
.4 As provided in Section 7.3.4.

§ 7.3.4 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect shall determine the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.4 shall be limited to the following:

.1 Costs of labor, including applicable payroll taxes, fringe benefits required by agreement or custom, workers' compensation insurance, and other employee costs approved by the Architect;
.2 Costs of materials, supplies, and equipment, including cost of transportation, whether incorporated or consumed;
.3 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
.4 Costs of premiums for all bonds and insurance, permit fees, and sales, use, or similar taxes, directly related to the change; and
.5 Costs of supervision and field office personnel directly attributable to the change.

§ 7.3.5 If the Contractor disagrees with the adjustment in the Contract Time, the Contractor may make a Claim in accordance with applicable provisions of Article 15.

§ 7.3.6 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

§ 7.3.7 A Construction Change Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.8 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 7.3.9 Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The

Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified. The Architect's interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.

§ 7.3.10 When the Owner and Contractor agree with a determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and the Architect will prepare a Change Order. Change Orders may be issued for all or any part of a Construction Change Directive.

§ 7.4 Minor Changes in the Work

The Architect may order minor changes in the Work that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time. The Architect's order for minor changes shall be in writing. If the Contractor believes that the proposed minor change in the Work will affect the Contract Sum or Contract Time, the Contractor shall notify the Architect and shall not proceed to implement the change in the Work. If the Contractor performs the Work set forth in the Architect's order for a minor change without prior notice to the Architect that such change will affect the Contract Sum or Contract Time, the Contractor waives any adjustment to the Contract Sum or extension of the Contract Time.

ARTICLE 8 TIME

§ 8.1 Definitions

§ 8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

§ 8.1.2 The date of commencement of the Work is the date established in the Agreement.

§ 8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Section 9.8.

§ 8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

§ 8.2 Progress and Completion

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

§ 8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, commence the Work prior to the effective date of insurance required to be furnished by the Contractor and Owner.

§ 8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

ARTICLE 9 PAYMENTS AND COMPLETION

§ 9.1 Contract Sum

§ 9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable

by the Owner to the Contractor for performance of the Work under the Contract Documents.

§ 9.1.2 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed so that application of such unit prices to the actual quantities causes substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

§ 9.2 Schedule of Values

Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit a schedule of values to the Architect before the first Application for Payment, allocating the entire Contract Sum to the various portions of the Work. The schedule of values shall be prepared in the form, and supported by the data to substantiate its accuracy, required by the Architect. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment. Any changes to the schedule of values shall be submitted to the Architect and supported by such data to substantiate its accuracy as the Architect may require, and unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's subsequent Applications for Payment.

§ 9.3 Applications for Payment

§ 9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment prepared in accordance with the schedule of values, if required under Section 9.2, for completed portions of the Work. The application shall be notarized, if required, and supported by all data substantiating the Contractor's right to payment that the Owner or Architect require, such as copies of requisitions, and releases and waivers of liens from Subcontractors and suppliers, and shall reflect retainage if provided for in the Contract Documents.

§ 9.3.1.1 As provided in Section 7.3.9, such applications may include requests for payment on account of changes in the Work that have been properly authorized by Construction Change Directives, or by interim determinations of the Architect, but not yet included in Change Orders.

§ 9.3.1.2 Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay a Subcontractor or supplier, unless such Work has been performed by others whom the Contractor intends to pay.

§ 9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage, and transportation to the site, for such materials and equipment stored off the site.

§ 9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information, and belief, be free and clear of liens, claims, security interests, or encumbrances, in favor of the Contractor, Subcontractors, suppliers, or other persons or entities that provided labor, materials, and equipment relating to the Work.

§ 9.4 Certificates for Payment

§ 9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either (1) issue to the Owner a Certificate for Payment in the full amount of the Application for Payment, with a copy to the Contractor; or (2) issue to the Owner a Certificate for Payment for such amount as the Architect determines is properly due, and notify the Contractor and Owner of the Architect's reasons for withholding certification in part as provided in Section 9.5.1; or (3) withhold certification of the entire Application for Payment, and notify the Contractor and Owner of the Architect's reason for withholding certification in whole as provided in Section 9.5.1.

§ 9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data in the Application for Payment, that, to the best of the Architect's knowledge, information, and belief, the Work has progressed to the point indicated, the quality of the Work is in accordance with the Contract Documents, and that the Contractor is entitled to payment in the amount certified. The

foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion, and to specific qualifications expressed by the Architect. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work; (2) reviewed construction means, methods, techniques, sequences, or procedures; (3) reviewed copies of requisitions received from Subcontractors and suppliers and other data requested by the Owner to substantiate the Contractor's right to payment; or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

§ 9.5 Decisions to Withhold Certification

§ 9.5.1 The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Section 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Section 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of

.1 defective Work not remedied;
.2 third party claims filed or reasonable evidence indicating probable filing of such claims, unless security acceptable to the Owner is provided by the Contractor;
.3 failure of the Contractor to make payments properly to Subcontractors or suppliers for labor, materials or equipment;
.4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
.5 damage to the Owner or a Separate Contractor;
.6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
.7 repeated failure to carry out the Work in accordance with the Contract Documents.

§ 9.5.2 When either party disputes the Architect's decision regarding a Certificate for Payment under Section 9.5.1, in whole or in part, that party may submit a Claim in accordance with Article 15.

§ 9.5.3 When the reasons for withholding certification are removed, certification will be made for amounts previously withheld.

§ 9.5.4 If the Architect withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or supplier to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered. If the Owner makes payments by joint check, the Owner shall notify the Architect and the Contractor shall reflect such payment on its next Application for Payment.

§ 9.6 Progress Payments

§ 9.6.1 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect.

§ 9.6.2 The Contractor shall pay each Subcontractor, no later than seven days after receipt of payment from the Owner, the amount to which the Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

§ 9.6.3 The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.

§ 9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors and suppliers

to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay, or to see to the payment of money to, a Subcontractor or supplier, except as may otherwise be required by law.

§ 9.6.5 The Contractor's payments to suppliers shall be treated in a manner similar to that provided in Sections 9.6.2, 9.6.3 and 9.6.4.

§ 9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

§ 9.6.7 Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors or provided by suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, create any fiduciary liability or tort liability on the part of the Contractor for breach of trust, or entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.

§ 9.6.8 Provided the Owner has fulfilled its payment obligations under the Contract Documents, the Contractor shall defend and indemnify the Owner from all loss, liability, damage or expense, including reasonable attorney's fees and litigation expenses, arising out of any lien claim or other claim for payment by any Subcontractor or supplier of any tier. Upon receipt of notice of a lien claim or other claim for payment, the Owner shall notify the Contractor. If approved by the applicable court, when required, the Contractor may substitute a surety bond for the property against which the lien or other claim for payment has been asserted.

§ 9.7 Failure of Payment

If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents, the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided for in the Contract Documents.

§ 9.8 Substantial Completion

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

§ 9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

§ 9.8.3 Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.

§ 9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion; establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance; and fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

§ 9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in the Certificate. Upon such acceptance, and consent of surety if any, the Owner shall make payment of retainage applying to the Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

§ 9.9 Partial Occupancy or Use

§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

§ 9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor, and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

§ 9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

§ 9.10 Final Completion and Final Payment

§ 9.10.1 Upon receipt of the Contractor's notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection. When the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

§ 9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect, (3) a written statement that the Contractor knows of no reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment, (5) documentation of any special warranties, such as manufacturers' warranties or specific Subcontractor warranties, and (6) if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts and releases and waivers of liens, claims, security interests, or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien, claim, security interest, or encumbrance. If a lien, claim, security interest, or encumbrance remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging the lien, claim, security interest, or encumbrance, including all costs and reasonable attorneys' fees.

§ 9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed, corrected, and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of the surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not

constitute a waiver of Claims.

§ 9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from

.1 liens, Claims, security interests, or encumbrances arising out of the Contract and unsettled;
.2 failure of the Work to comply with the requirements of the Contract Documents;
.3 terms of special warranties required by the Contract Documents; or
.4 audits performed by the Owner, if permitted by the Contract Documents, after final payment.

§ 9.10.5 Acceptance of final payment by the Contractor, a Subcontractor, or a supplier, shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

§ 10.1 Safety Precautions and Programs

The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract.

§ 10.2 Safety of Persons and Property

§ 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury, or loss to

.1 employees on the Work and other persons who may be affected thereby;
.2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody, or control of the Contractor, a Subcontractor, or a Sub-subcontractor; and
.3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation, or replacement in the course of construction.

§ 10.2.2 The Contractor shall comply with, and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities, bearing on safety of persons or property or their protection from damage, injury, or loss.

§ 10.2.3 The Contractor shall implement, erect, and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards; promulgating safety regulations; and notifying the owners and users of adjacent sites and utilities of the safeguards.

§ 10.2.4 When use or storage of explosives or other hazardous materials or equipment, or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

§ 10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.2 and 10.2.1.3. The Contractor may make a Claim for the cost to remedy the damage or loss to the extent such damage or loss is attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.18.

§ 10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

§ 10.2.7 The Contractor shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.

§ 10.2.8 Injury or Damage to Person or Property
If either party suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, notice of the injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

§ 10.3 Hazardous Materials and Substances
§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials or substances. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and notify the Owner and Architect of the condition.

§ 10.3.2 Upon receipt of the Contractor's notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of the material or substance or who are to perform the task of removal or safe containment of the material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable additional costs of shutdown, delay, and start-up.

§ 10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), except to the extent that such damage, loss, or expense is due to the fault or negligence of the party seeking indemnity.

§ 10.3.4 The Owner shall not be responsible under this Section 10.3 for hazardous materials or substances the Contractor brings to the site unless such materials or substances are required by the Contract Documents. The Owner shall be responsible for hazardous materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances.

§ 10.3.5 The Contractor shall reimburse the Owner for the cost and expense the Owner incurs (1) for remediation of hazardous materials or substances the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

§ 10.3.6 If, without negligence on the part of the Contractor, the Contractor is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall reimburse the Contractor for all cost and expense thereby incurred.

§ 10.4 Emergencies
In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury, or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

ARTICLE 11 INSURANCE AND BONDS
§ 11.1 Contractor's Insurance and Bonds
§ 11.1.1 The Contractor shall purchase and maintain insurance of the types and limits of liability, containing the

endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Contractor shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located. The Owner, Architect, and Architect's consultants shall be named as additional insureds under the Contractor's commercial general liability policy or as otherwise described in the Contract Documents.

§ 11.1.2 The Contractor shall provide surety bonds of the types, for such penal sums, and subject to such terms and conditions as required by the Contract Documents. The Contractor shall purchase and maintain the required bonds from a company or companies lawfully authorized to issue surety bonds in the jurisdiction where the Project is located.

§ 11.1.3 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

§ 11.1.4 Notice of Cancellation or Expiration of Contractor's Required Insurance. Within three (3) business days of the date the Contractor becomes aware of an impending or actual cancellation or expiration of any insurance required by the Contract Documents, the Contractor shall provide notice to the Owner of such impending or actual cancellation or expiration. Upon receipt of notice from the Contractor, the Owner shall, unless the lapse in coverage arises from an act or omission of the Owner, have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by the Contractor. The furnishing of notice by the Contractor shall not relieve the Contractor of any contractual obligation to provide any required coverage.

§ 11.2 Owner's Insurance

§ 11.2.1 The Owner shall purchase and maintain insurance of the types and limits of liability, containing the endorsements, and subject to the terms and conditions, as described in the Agreement or elsewhere in the Contract Documents. The Owner shall purchase and maintain the required insurance from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located.

§ 11.2.2 Failure to Purchase Required Property Insurance. If the Owner fails to purchase and maintain the required property insurance, with all of the coverages and in the amounts described in the Agreement or elsewhere in the Contract Documents, the Owner shall inform the Contractor in writing prior to commencement of the Work. Upon receipt of notice from the Owner, the Contractor may delay commencement of the Work and may obtain insurance that will protect the interests of the Contractor, Subcontractors, and Sub-Subcontractors in the Work. When the failure to provide coverage has been cured or resolved, the Contract Sum and Contract Time shall be equitably adjusted. In the event the Owner fails to procure coverage, the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent the loss to the Owner would have been covered by the insurance to have been procured by the Owner. The cost of the insurance shall be charged to the Owner by a Change Order. If the Owner does not provide written notice, and the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain the required insurance, the Owner shall reimburse the Contractor for all reasonable costs and damages attributable thereto.

§ 11.2.3 Notice of Cancellation or Expiration of Owner's Required Property Insurance. Within three (3) business days of the date the Owner becomes aware of an impending or actual cancellation or expiration of any property insurance required by the Contract Documents, the Owner shall provide notice to the Contractor of such impending or actual cancellation or expiration. Unless the lapse in coverage arises from an act or omission of the Contractor: (1) the Contractor, upon receipt of notice from the Owner, shall have the right to stop the Work until the lapse in coverage has been cured by the procurement of replacement coverage by either the Owner or the Contractor; (2) the Contract Time and Contract Sum shall be equitably adjusted; and (3) the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent any loss to the Owner would have been covered by the insurance had it not expired or been cancelled. If the Contractor purchases replacement coverage, the cost of the insurance shall be charged to the Owner by an appropriate Change Order. The furnishing of notice by the Owner shall not relieve the Owner of any contractual obligation to provide required insurance.

§ 11.3 Waivers of Subrogation

§ 11.3.1 The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other; (2) the Architect and Architect's consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire, or other causes of loss, to the extent those losses are covered by property insurance required by the Agreement or other property insurance applicable to the Project, except such rights as they have to proceeds of such insurance. The

Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect's consultants, Separate Contractors, subcontractors, and sub-subcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this section 11.3.1 shall not prohibit this waiver of subrogation. This waiver of subrogation shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property.

§ 11.3.2 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, to the extent permissible by such policies, the Owner waives all rights in accordance with the terms of Section 11.3.1 for damages caused by fire or other causes of loss covered by this separate property insurance.

§ 11.4 Loss of Use, Business Interruption, and Delay in Completion Insurance

The Owner, at the Owner's option, may purchase and maintain insurance that will protect the Owner against loss of use of the Owner's property, or the inability to conduct normal operations, due to fire or other causes of loss. The Owner waives all rights of action against the Contractor and Architect for loss of use of the Owner's property, due to fire or other hazards however caused.

§11.5 Adjustment and Settlement of Insured Loss

§ 11.5.1 A loss insured under the property insurance required by the Agreement shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.5.2. The Owner shall pay the Architect and Contractor their just shares of insurance proceeds received by the Owner, and by appropriate agreements the Architect and Contractor shall make payments to their consultants and Subcontractors in similar manner.

§ 11.5.2 Prior to settlement of an insured loss, the Owner shall notify the Contractor of the terms of the proposed settlement as well as the proposed allocation of the insurance proceeds. The Contractor shall have 14 days from receipt of notice to object to the proposed settlement or allocation of the proceeds. If the Contractor does not object, the Owner shall settle the loss and the Contractor shall be bound by the settlement and allocation. Upon receipt, the Owner shall deposit the insurance proceeds in a separate account and make the appropriate distributions. Thereafter, if no other agreement is made or the Owner does not terminate the Contract for convenience, the Owner and Contractor shall execute a Change Order for reconstruction of the damaged or destroyed Work in the amount allocated for that purpose. If the Contractor timely objects to either the terms of the proposed settlement or the allocation of the proceeds, the Owner may proceed to settle the insured loss, and any dispute between the Owner and Contractor arising out of the settlement or allocation of the proceeds shall be resolved pursuant to Article 15. Pending resolution of any dispute, the Owner may issue a Construction Change Directive for the reconstruction of the damaged or destroyed Work.

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

§ 12.1 Uncovering of Work

§ 12.1.1 If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if requested in writing by the Architect, be uncovered for the Architect's examination and be replaced at the Contractor's expense without change in the Contract Time.

§ 12.1.2 If a portion of the Work has been covered that the Architect has not specifically requested to examine prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, the Contractor shall be entitled to an equitable adjustment to the Contract Sum and Contract Time as may be appropriate. If such Work is not in accordance with the Contract Documents, the costs of uncovering the Work, and the cost of correction, shall be at the Contractor's expense.

§ 12.2 Correction of Work

§ 12.2.1 Before Substantial Completion

The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, discovered before Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the

Contractor's expense.

§ 12.2.2 After Substantial Completion

§ 12.2.2.1 In addition to the Contractor's obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of notice from the Owner to do so, unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.5.

§ 12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.

§ 12.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Section 12.2.

§ 12.2.3 The Contractor shall remove from the site portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

§ 12.2.4 The Contractor shall bear the cost of correcting destroyed or damaged construction of the Owner or Separate Contractors, whether completed or partially completed, caused by the Contractor's correction or removal of Work that is not in accordance with the requirements of the Contract Documents.

§ 12.2.5 Nothing contained in this Section 12.2 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents. Establishment of the one-year period for correction of Work as described in Section 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

§ 12.3 Acceptance of Nonconforming Work

If the Owner prefers to accept Work that is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

ARTICLE 13 MISCELLANEOUS PROVISIONS

§ 13.1 Governing Law

The Contract shall be governed by the law of the place where the Project is located, excluding that jurisdiction's choice of law rules. If the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 15.4.

§ 13.2 Successors and Assigns

§ 13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns, and legal representatives to covenants, agreements, and obligations contained in the Contract Documents. Except as provided in Section 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

§ 13.2.2 The Owner may, without consent of the Contractor, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate the assignment.

§ 13.3 Rights and Remedies

§ 13.3.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law.

§ 13.3.2 No action or failure to act by the Owner, Architect, or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed upon in writing.

§ 13.4 Tests and Inspections

§ 13.4.1 Tests, inspections, and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules, and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections, and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections, and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. The Owner shall bear costs of tests, inspections, or approvals that do not become requirements until after bids are received or negotiations concluded. The Owner shall directly arrange and pay for tests, inspections, or approvals where building codes or applicable laws or regulations so require.

§ 13.4.2 If the Architect, Owner, or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection, or approval not included under Section 13.4.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection, or approval, by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Section 13.4.3, shall be at the Owner's expense.

§ 13.4.3 If procedures for testing, inspection, or approval under Sections 13.4.1 and 13.4.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure, including those of repeated procedures and compensation for the Architect's services and expenses, shall be at the Contractor's expense.

§ 13.4.4 Required certificates of testing, inspection, or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

§ 13.4.5 If the Architect is to observe tests, inspections, or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

§ 13.4.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

§ 13.5 Interest

Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at the rate the parties agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons:

.1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;

.2 An act of government, such as a declaration of national emergency, that requires all Work to be stopped;

.3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or

.4 The Owner has failed to furnish to the Contractor reasonable evidence as required by Section 2.2.

§ 14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, repeated suspensions, delays, or interruptions of the entire Work by the Owner as described in Section 14.3, constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, as well as reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination.

§ 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, or their agents or employees or any other persons or entities performing portions of the Work because the Owner has repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3.

§ 14.2 Termination by the Owner for Cause

§ 14.2.1 The Owner may terminate the Contract if the Contractor

.1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

.2 fails to make payment to Subcontractors or suppliers in accordance with the respective agreements between the Contractor and the Subcontractors or Suppliers;

.3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or

.4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

§ 14.2.2 When any of the reasons described in Section 14.2.1 exist, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may, without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

.1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;

.2 Accept assignment of subcontracts pursuant to Section 5.4; and

.3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 14.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

§ 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Initial Decision Maker, upon application, and this obligation for payment shall survive termination of the Contract.

§ 14.3 Suspension by the Owner for Convenience

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work, in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay, or interruption under Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

.1 that performance is, was, or would have been, so suspended, delayed, or interrupted, by another cause for which the Contractor is responsible; or

.2 that an equitable adjustment is made or denied under another provision of the Contract.

§ 14.4 Termination by the Owner for Convenience

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of notice from the Owner of such termination for the Owner's convenience, the Contractor shall

.1 cease operations as directed by the Owner in the notice;

.2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and

.3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work properly executed; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.

ARTICLE 15 CLAIMS AND DISPUTES

§ 15.1 Claims

§ 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose liquidated damages in accordance with the Contract Documents.

§ 15.1.2 Time Limits on Claims

The Owner and Contractor shall commence all Claims and causes of action against the other and arising out of or related to the Contract, whether in contract, tort, breach of warranty or otherwise, in accordance with the requirements of the binding dispute resolution method selected in the Agreement and within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all Claims and causes of action not commenced in accordance with this Section 15.1.2.

§ 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 15.1.3.2 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party. In such event, no decision by the Initial Decision Maker is required.

§ 15.1.4 Continuing Contract Performance

§ 15.1.4.1 Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

§ 15.1.4.2 The Contract Sum and Contract Time shall be adjusted in accordance with the Initial Decision Maker's decision, subject to the right of either party to proceed in accordance with this Article 15. The Architect will issue Certificates for Payment in accordance with the decision of the Initial Decision Maker.

§ 15.1.5 Claims for Additional Cost

If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

§ 15.1.6 Claims for Additional Time

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section

15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

§ 15.1.6.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.

§ 15.1.7 Waiver of Claims for Consequential Damages

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit, except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.7 shall be deemed to preclude assessment of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

§ 15.2 Initial Decision

§ 15.2.1 Claims, excluding those where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2 or arising under Sections 10.3, 10.4, and 11.5, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim. If an initial decision has not been rendered within 30 days after the Claim has been referred to the Initial Decision Maker, the party asserting the Claim may demand mediation and binding dispute resolution without a decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.

§ 15.2.2 The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.

§ 15.2.3 In evaluating Claims, the Initial Decision Maker may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Initial Decision Maker in rendering a decision. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner's expense.

§ 15.2.4 If the Initial Decision Maker requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of the request, and shall either (1) provide a response on the requested supporting data, (2) advise the Initial Decision Maker when the response or supporting data will be furnished, or (3) advise the Initial Decision Maker that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Initial Decision Maker will either reject or approve the Claim in whole or in part.

§ 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

§ 15.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1.

§ 15.2.6.1 Either party may, within 30 days from the date of receipt of an initial decision, demand in writing that the other party file for mediation. If such a demand is made and the party receiving the demand fails to file for mediation within 30 days after receipt thereof, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

§ 15.2.7 In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

§ 15.2.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

§ 15.3 Mediation

§ 15.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract, except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.7, shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 15.3.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 15.3.2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

§ 15.3.3 Either party may, within 30 days from the date that mediation has been concluded without resolution of the dispute or 60 days after mediation has been demanded without resolution of the dispute, demand in writing that the other party file for binding dispute resolution. If such a demand is made and the party receiving the demand fails to file for binding dispute resolution within 60 days after receipt thereof, then both parties waive their rights to binding dispute resolution proceedings with respect to the initial decision.

§ 15.3.4 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

§ 15.4 Arbitration

§ 15.4.1 If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. The Arbitration shall be conducted in the place where the Project is located, unless another location is mutually agreed upon. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

§ 15.4.1.1 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

§ 15.4.2 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

§ 15.4.3 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly

consented to by parties to the Agreement, shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

§ 15.4.4 Consolidation or Joinder

§ 15.4.4.1 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 15.4.4.2 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 15.4.4.3 The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as those of the Owner and Contractor under this Agreement.

APP-009E

PROOF OF ELECTRONIC SERVICE (Court of Appeal)	
Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form.	
Case Name: FINDLETON V. COYOTE VALLEY BAND OF POMO INDIANS Court of Appeal Case Number: A156459 Superior Court Case Number: SCUK CVG 12-259929	

1. At the time of service I was at least 18 years of age.
2. a. My ☐ residence ☒ business address is *(specify)*:
   CEIBA LEGAL, 35 MILLER AVE. NO. 143, MILL VALLEY, CA 94941
   b. My electronic service address is *(specify):* LITTLEFAWN@CEIBALEGAL.COM
3. I electronically served the following documents *(exact titles):*
   NOTICE OF MOTION AND MOTION REQUESTING JUDICIAL NOTICE; DECLARATION OF LITTLE FAWN BOLAND IN SUPPORT OF MOTION REQUESTING JUDICIAL NOTICE; PROPOSED ORDER
4. I electronically served the documents listed in 3. as follows:
   a. Name of person served: D. NAVARRO, T. GEDE, T. PEMBERTON, M. SCOTT
   On behalf of *(name or names of parties represented, if person served is an attorney)*:
   ROBERT FINDLETON
   b. Electronic service address of person served: navdar@gmail.com, tom.gede@morganlewis.com, manzanita@gbis.com, empeescottesquire@gmail.com
   c. On *(date):* June 30, 2020
   ☐ The documents listed in 3. were served electronically on the persons and in the manner described in an attachment *(write "APP-009E, Item 4" at the top of the page).*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: June 30, 2020

LITTLE FAWN BOLAND
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

▶ _____
(SIGNATURE OF PERSON COMPLETING THIS FORM)

Form Approved for Optional Use
Judicial Council of California
APP-009E [New January 1, 2017]

PROOF OF ELECTRONIC SERVICE
(Court of Appeal)

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