

**TRIBAL BUSINESS STRUCTURES:  
A GUIDEBOOK ON DIFFERENT STRUCTURES FOR TRIBAL BUSINESS ENTITIES**

SEPTEMBER 14, 2011

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*The goal of the Michigan Economic Development Corporation's tribal business development unit is to be a resource to Michigan's federally recognized Indian tribes in achieving sustainable tribal economies through business diversification, and to build state-tribal relationships that foster business development beyond gaming. Successful business development in Indian country has occurred where there is a legal and organizational structure in place that creates a separation between tribal governments and economic enterprises, insulating governmental assets and politics from business activity, while retaining appropriate oversight and accountability. The following Guidebook is intended to be a resource to tribes pursuing business development.*

## TRIBAL BUSINESS STRUCTURES

In today's economy and gaming landscape, more and more Tribes are beginning to diversify their economic portfolios by creating business structures for tribal businesses beyond gaming. This Guidebook contains a brief overview of the different structures available to Tribes, along with the advantages and disadvantages of each, model tribal codes for business corporations and limited liability companies, model articles of incorporation and articles of organization, including a comprehensive look at each section in the model articles with options for each Tribe to consider as it develops its own codes and articles.

To begin, a Tribe should decide which business structure is most appropriate for its goals and its existing laws. There are several options that a Tribe may find desirable for one reason or another. This Guidebook gives an overview of six different business structures for tribally owned businesses as well as the potential advantages or disadvantages of each structure,<sup>1</sup> including:

- Unincorporated Businesses
- Political Subdivisions
- Section 17 Corporations
- State Law Corporations and Limited Liability Companies
- Tribally Chartered Corporations
- Tribally Chartered Limited Liability Companies

No one structure will work for every Tribe, or even every tribally owned business. Thus, a Tribe may choose a different structure for different ventures in which it is engaging, depending on the particular business needs of each venture. The use of one structure does not preclude the use of another for a different venture. The goals of the Tribe and its business must be the guideposts in organizing a business enterprise. Key considerations should include the importance of forming businesses under tribal law, the importance of isolating the tribal businesses from the political process of the Tribe, the importance of segregating the assets of the Tribe from the business and vice versa (including whether and to what extent the business enjoys the Tribe's sovereign immunity), and the time available and the time required to create the desired structures.

As part of the structure selection process, Tribes should also consider the applicability and impact, if any, of State-Tribe Tax Agreements on any potential business. In Michigan, for example, nine Tribes have negotiated tax agreements with the state on when state taxes will be

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<sup>1</sup> Neither this Guidebook nor the Model Codes address nonprofit tribal corporations or provisions related to corporations or limited liability companies formed outside of tribal law ("foreign corporations" or "foreign companies"). The Tribe may still decide to include these provisions in its Codes or decision-making, but they are beyond the scope of this Guidebook.

paid or will not be paid under certain circumstances, including the payment of income and business taxes. Those Tribes that have not entered into tax agreements have had difficulties determining when, or whether, state taxes apply.<sup>2</sup> The impact of any tax agreements may influence a Tribe's choice of business structure. Selecting the correct structure for the tribal business will impact the Tribe's ability to maximize the potential benefits of the enterprise while still exerting sovereign control over the Tribe's economic development.

#### 1. Unincorporated Businesses

Tribal sovereignty and the right of self-governance inherently include the right to control or participate in business activities. Because Tribes' sovereign powers are not derived from the United States, but from their status as sovereigns, Tribes may exercise their rights to engage in business and commercial activities through their own constitution or codes. In fact, tribal governments often do so through unincorporated businesses. These businesses are not separate, distinct legal entities; rather, they are "economic arms" of the Tribe.

Because unincorporated businesses are not distinct legal entities, they share the same legal characteristics of the tribal government. Thus, an unincorporated entity will share in the Tribe's sovereign immunity from suit. This fact is important as sovereign immunity allows a Tribe to protect the Tribe's ability to self-govern and to protect the Tribe's resources from a judgment, especially because the assets and obligations of an unincorporated tribal entity are usually intermingled with the assets and obligations of the Tribe itself. No person or entity can sue the Tribe or its unincorporated business without a clear waiver of the Tribe's sovereign immunity. Courts have rejected attempts to limit the extension of a Tribe's sovereign immunity to operations by the "economic arm" of the Tribe. The disadvantage to this model, however, is that a Tribe's unincorporated business cannot unilaterally waive the Tribe's sovereign immunity, unless tribal law so provides. Thus, anytime the business enters into a contract, the board or the officers must return to the tribal government to obtain a waiver of sovereign immunity. This process can be time-consuming and burdensome in the business world.

As all tribal officials recognize, a Tribe's sovereign immunity from suit applies to tribal government actions both on and off the reservation and applies in tribal, state, and federal courts. Tribal immunity can only be abrogated through two methods—through an express waiver of the Tribe or through an act of Congress. However, the fact that a Tribe cannot be sued (or an agreement with a Tribe enforced) without a waiver of sovereign immunity is a new concept to many outsiders and creates uncertainty that may intimidate some potential investors. This uncertainty may prevent lenders or prospective investors or partners from entering into contracts with a Tribe unless there is a clear method for the investor or lender to protect its investment. The Tribe can certainly limit the waiver of sovereign immunity—either by limiting the available legal relief, assets, or the enforcement mechanism (e.g., arbitration, courts, mediation). But such decisions directly impact the Tribe's ability to secure financing for its businesses. Many lenders may not extend credit or financing if the agreements are not enforceable through judicial action.

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<sup>2</sup> See, e.g., *Keweenaw Bay Indian Community v Rising*, 569 F.3d 589 (6th Cir. 2009).

While sovereign immunity issues may present concerns for third parties, the interconnectedness of an unincorporated business may allow for such a business to take advantage of the Tribe's authority to issue tax-exempt bonds as well as take advantage of other governmental opportunities such as tax credit bonds to finance the cost of energy projects. In addition, the Department of the Interior makes certain loan programs available to Tribes and Alaska Native groups through its "Indian Affairs Loan Guaranty, Insurance, and Interest Subsidy Program." According to the program's website, "The purpose of the Program is to encourage eligible borrowers to develop viable Indian businesses through conventional lender financing." In addition to loan programs, there are a variety of other financing opportunities available to Tribes, including federal business grants, tax incentives, and reduced land use regulations.<sup>3</sup> These considerations must be a part of the discussion when selecting what type of business structure to adopt.

Another benefit to utilizing unincorporated entities is that they are easily formed because there is no need to form a separate entity. The tribal government or tribal council generally control these entities, but a board of directors or officers may be formed or appointed to run the daily operations of the business. The board or officers in this type of entity are often tribal council members, which means that control of the business is somewhat tied to the tribal political process. This relationship may cause concern for some outsiders given the tenuous and shifting nature inherent in the political process.

Despite the potential negative consequences of having business and politics intertwined, the close relationship does allow unincorporated tribal businesses to take advantage of the Tribe's federal tax treatment. Generally, unincorporated tribal businesses have been treated as exempt from federal income tax. Because the unincorporated business structure is so intertwined with the Tribe itself, the Internal Revenue Service ("IRS") has treated such businesses as they treat the Tribe.<sup>4</sup> Thus, any income earned—whether on or off Indian-owned land—is not subject to federal income tax. To receive such a benefit, however, the unincorporated entity must be operating as an arm of the Tribe (i.e., an alter-ego of the Tribe), not as a separate entity. The IRS does not automatically grant such benefits to an tribal entity. Rather, the IRS examines the following six factors to determine whether an entity qualifies as a governmental instrumentality:

- (1) Whether the organization is used for a government purpose and performs a government function;
- (2) whether performance of its function is on behalf of one or more States or political subdivisions [or Tribe];
- (3) whether there are any private interests involved, or whether the governmental unit involved have the powers and interests of an owner;

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<sup>3</sup> See Incentives for Joint Ventures Between Michigan's Tribes and Non-Indian Businesses (Sept 14, 2011).

<sup>4</sup> See Revenue Ruling 67-284.

(4) whether control and supervision of the organization is vested in public authority or authorities;

(5) if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and

(6) the degree of financial autonomy and the source of its operating expenses.<sup>5</sup>

If the entity satisfies this test, then it will qualify for the same benefits as a Tribe itself and be exempt from federal income tax.

While being completely intertwined with the Tribe gives an unincorporated business the advantage of being exempt from federal income taxes, that same status requires the assets and obligations of the business to be tied to the Tribe and precludes equity ownership by investors outside of the Tribe. An unincorporated tribal business may also be subject to federal approval requirements in other aspects of business as well, including for the leasing of land as well as any contract or agreement that encumbers Indian land for more than 7 years.<sup>6</sup> These factors may or may not be important to the Tribe when considering which business structure to adopt, but should be discussed.

## 2. Political Subdivision

Another potential structure is a political subdivision of the tribal government. This structure is often utilized by Tribes and shares similar attributes of the unincorporated business entity discussed above. Unlike an unincorporated business entity, there is some separation between the political subdivision and the tribal government itself. As a subdivision, however, it is created to fulfill a governmental function and usually is delegated one or more sovereign power of the Tribe. This type of structure is typically controlled by the Tribe and its governing body as well as a separate governing body for the subdivision (i.e., a Board of Directors or other decision-making body). A political subdivision shares in the same sovereign immunity as the Tribe. The Tribe may, in the instrument creating the subdivision, allow for the subdivision to execute limited waivers of sovereign immunity. Such waivers should be very specific as to not waive the immunity of the Tribe itself or require approval from the Tribe's governing body before the subdivision may act. The ability to execute such waivers may provide this structure with some added flexibility that is unavailable with the unincorporated structure.

A political subdivision of a Tribe need not obtain recognition by an outside entity of its status. For a political subdivision to receive federal funding or federal tax benefits, however, the Tribe must follow specific procedures to qualify the entity. Under Revenue Procedure 84-37, the process must begin by securing a letter from the Department of Interior ("DOI") that verifies that the Tribe has delegated a substantial government power to the entity. There are no formal

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<sup>5</sup> See Revenue Ruling 57-128.

<sup>6</sup> See 25 U.S.C. §415; 25 U.S.C. §81.

requirements for the request other than it must demonstrate that the political subdivision has been validly established under tribal law and that the Tribe's governing body has delegated at least one of the following sovereign powers: (1) to tax, (2) of eminent domain, or (3) a police power. Such a determination generally takes at least 90 days. After a DOI determination letter is obtained, the Tribe may file a ruling request from the IRS. This process could take anywhere from 90 to 120 days, if all technical requirements are satisfied. A Tribe should consider this timeline when considering whether to adopt such a structure for business purposes.

The general practice of the IRS is to treat tribal political subdivisions the same as the Tribe for federal income tax purposes.<sup>7</sup> Under Section 7871 of the Internal Revenue Code ("IRC"), there are a number of benefits that are available to Tribes and their recognized political subdivisions, including tax deductions of charitable contributions for income tax purposes, authority to issue tax-exempt bonds for facilities that serve an essential governmental function, and certain governmental exemptions from specific excise taxes. Receiving these benefits, however, is predicated on receiving recognition by the IRS as an entity that has been delegated one or more of the sovereign powers of the Tribe as discussed above. In addition to the tax benefits, political subdivisions also enjoy the benefits of a variety of financing opportunities much like the Tribe. For example, the subdivision may be both the issuer and the borrower in a tax-exempt bond financing. Tax-exempt financing allows a Tribe to issue tax-exempt debt, as long as the proceeds are used in the "exercise of an essential governmental function."<sup>8</sup> The interest income paid to the holders of this debt is not included in the gross income for federal income taxes. This results in lower borrowing costs for the Tribe as compared with traditional interest rates.

The advantages to this type of structure are similar to those of the unincorporated business. There is more certainty, compared to tribally chartered corporations, for federal tax treatment, and possibly state tax treatment as well, and for sovereign immunity purposes. The disadvantages, however, include the time and expense associated with federal agency approvals required to form such an entity and less flexibility than other corporate forms. This type of entity will also be subject to federal approvals in other aspects of business as well, including leading of land as well as any contract or agreement that encumbers Indian land for more than 7 years.<sup>9</sup>

### 3. Section 17 Corporations

Section 17 of the Indian Reorganization Act ("IRA") gives Tribes the power to incorporate what become federally chartered corporations and also the power to waive sovereign immunity, which facilitates business transactions and fosters tribal economic development and independence.<sup>10</sup> There are no specific requirements or procedures detailing how a Section 17

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<sup>7</sup> See PLR 200148038 (Aug 30, 2001).

<sup>8</sup> 26 U.S.C. § 7871.

<sup>9</sup> See 25 U.S.C. § 81.

<sup>10</sup> See 25 U.S.C. § 477; *American Vantage v Table Mountain Rancheria*, 292 F3d 1091 (CA 9, 2002).

corporation should be formed.<sup>11</sup> Thus, there is flexibility in how a Tribe forms a Section 17 corporation and, thus, in the corporate charters.<sup>12</sup> Although this type of corporation is established under the IRA, amendments to the IRA in 1990 provided that Tribes that voted to reject the IRA may also form Section 17 corporations.

The related regulations provide that the Section 17 process begins by submitting a petition to the Secretary of the Department of Interior to issue a corporate charter.<sup>13</sup> Recent Bureau of Indian Affairs practice has allowed for Tribes—whether they have a constitution or not—to submit a petition or pass a tribal resolution for the issuance of a charter. The corporate charter is akin to Articles of Incorporation, although usually with more detail. The corporation must be wholly owned by the Tribe, but is separate and distinct from the tribal government. This requirement precludes any outside ownership. Once a charter is submitted by the Tribe, the BIA will approve it if it is in accordance with the law of the Tribe. After the Tribe approves the charter, or signs the resolution, the documents should be submitted to the local BIA office where the documents will be reviewed to ensure that the submission is complete. Once complete, the documents are forwarded to the regional BIA office for additional review. If the documents are in accordance with tribal and federal law and have the proper approvals, then the regional BIA office will issue an approved Section 17 charter. The Tribe must then ratify the charter to become effective. Once issued, a Section 17 corporate charter cannot be revoked or surrendered except through an act of Congress. It is this lengthy process and rigid rules related to revocation that some Tribes view as a disadvantage to this structure.

Section 17 corporations are usually managed by a Board of Directors that is appointed by the tribal government. The Directors may appoint officers to run the daily business operations, so long as such action is in accordance with the Tribe's corporate charter.

Because Section 17 corporations must be wholly owned by the Tribe, they share the same privileges and immunities as the tribal government, although the corporation's powers may be additionally prescribed by the corporate charter. There has been some debate as to whether Section 17 corporations that have a "sue or be sued" clause, which allows the corporation to be sued in its corporate name, waive the Tribe's sovereign immunity.<sup>14</sup> Courts will engage in a

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<sup>11</sup> See 25 C.F.R. Part 82.

<sup>12</sup> The IRA also provides that a Tribe may organize a Section 16 governing body that exercises powers of self-government. Although Tribes initially had to first organize a Section 16 governing body before they could organize a Section 17 corporation, this is no longer the rule. Tribes can organize a Section 17 corporation regardless of whether it has organized a Section 16 governing body. 25 U.S.C. § 477. These rules and the overlap between some Tribes' two entities have created some confusion in the case law on Section 17 corporations.

<sup>13</sup> See 25 C.F.R. § 83.2.

<sup>14</sup> See *Maryland Cas. Co. v. Citizens National Bank*, 361 F.2d 517 (5th Cir. 1966), cert. denied, 385 U.S. 918 (1966) (holding that the Tribe was immune from liability despite the "sue and be sued" clause); *Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Authority*, 395 F. Supp. 23 (D. Minn. 1996) (holding that the "sue and be sued" clause acted as a waiver).

multi-factor analysis to determine whether such a clause waives immunity, similar to the analysis used to determine whether the entity is acting as an “arm of the Tribe.”<sup>15</sup> The outcome of these debates is obviously vital to Tribes. A waiver of sovereign immunity exposes the Tribe to liability. The IRA does, however, protect a tribal government’s assets from money judgments.<sup>16</sup> Tribal assets remain within the control of the tribal government unless the tribal government specifically transfers the assets or property to the Section 17 corporation.<sup>17</sup> Section 17 corporations also have the authority to convey or lease tribal lands that are assigned to the corporation for a period of 25 years without obtaining approval from the Secretary under Section 81, which allows the tribal government to pledge or assign a security interest in corporate assets.

Section 17 corporations also receive the same tax treatment as the Tribe—a Section 17 corporation is not subject to federal income tax.<sup>18</sup> These are surely advantages to this type of structure. Section 17 also provides for a separation between the business and the tribal government. Section 17 corporations may hold assets or property separately from the tribal government, and the tribal council generally is not involved in the day-to-day business of the corporation. Moreover, Section 17 corporations are not required to obtain approval of the Secretary of Interior to enter into leases or agreements for a term of 25 years. *See* 25 U.S.C. §477; 25 CFR 84.004(b).

A major advantage to a Section 17 corporation is that it may obtain financing without exposing the tribal government’s assets to the risks and liability of borrowing money. Moreover, a Section 17 corporation can act as both the borrower and the issuer in a tax-exempt financing, if all requirements are met. Other than for tax-exempt financing, a Section 17 corporation may avoid invasive financial disclosures of records to the corporation and not the Tribe.

#### 4. State Law Corporations and Limited Liability Companies

A Tribe could also opt to form a corporation under existing state law. The obvious advantage of forming a corporation under a state corporation code or limited liability code is the ease of formation given that states already have detailed codes and processes to form such organizations. The tribally owned corporation would simply need to follow the formation procedures set forth by the state in which they incorporate. For example, in Michigan, the corporation would need to file Articles of Incorporation for corporations or Articles of Organization for limited liability companies.<sup>19</sup> Lenders and potential partners are also familiar with the state laws and state corporations, which may increase their willingness to lend to, or partner with, the Tribe.

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<sup>15</sup> *See Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010).

<sup>16</sup> 25 U.S.C. § 476.

<sup>17</sup> *Id.*

<sup>18</sup> *See* Revenue Ruling 81-295; Revenue Ruling 94-16.

<sup>19</sup> *See* MCL 450.1101 *et seq.*; MCL 450.4101 *et seq.*

Incorporating under state law does not automatically subject the corporation to state regulation for all purposes; this is especially true for on-reservation operations. The Tribe will want to evaluate the specific uses and goals of its business to understand if the Tribe can enjoy some decreased regulations, including land use regulations. Once a tribal corporation goes beyond the Tribe's reservation boundaries, however, the more likely the Tribe will find itself subjected to state regulation. A tribal business incorporated under state law must also be aware of state tax issues. In 1997, for example, the Western District of Michigan held that a corporation incorporated under Michigan law and whose sole shareholder was a member of a Tribe was not exempt from the state business tax. In that case, the Court noted that: "It is possible that a corporation owned by Indian shareholders might be immune from state taxation if it is acting as an equivalent to the Indian tribe itself. For example, a corporation has been held to be entitled to the same sovereign immunity as the Indian Tribe when it is organized under tribal laws; it is controlled by the Tribe; and it is operated for government purposes."<sup>20</sup> Because the Court in this case did not find the corporation to be acting as the Tribe's agent, the Court found that the corporation was subject to the state business tax.<sup>21</sup>

The disadvantages of these structures are (1) the tribal corporation will be formed under state law rather than tribal law, (2) the state law corporations are subject to federal income tax, (3) a tribally owned corporation formed under state law would not be able to partake in the same financing opportunities as in the other forms, and (4) the Tribe's sovereign immunity would be unlikely to be extended to such entities.<sup>22</sup> There may be some circumstances where a Tribe's sovereign immunity remains intact, particularly for projects that exist solely on on-reservation land. The Supreme Court of Colorado recently held that it would conduct a three-part test to determine whether a tribal business was an "arm of the Tribe" in evaluating the relationship between the Tribe and the tribal entity to determine if sovereign immunity applied.<sup>23</sup>

## 5. Tribally Chartered Corporations

An increasingly popular business structure is the tribally chartered corporation. This structure allows Tribes to regulate tribal business under the Tribe's own laws. And, unlike unincorporated entities or political subdivisions, a tribally chartered corporation separates the assets and obligations of the corporation and the decision-making authority from the tribal government. Despite this separation, tribally chartered corporations are still likely to be exempt

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<sup>20</sup> *Baraga Products, Inc. v. Comm'r of Revenue*, 971 F. Supp. 294, 296 (W.D. Mich., 1997).

<sup>21</sup> *Id.* at 297-98.

<sup>22</sup> *See Wright v. CTEC*, 159 Wash. 2d 108 (Wash. 2006) (noting that "a Tribe may waive the immunity of a tribal enterprise by incorporating the enterprise under state law, rather than tribal law.").

<sup>23</sup> *Cash Advance and Preferred Cash Loans v. State of Colorado*, 242 P.3d 1099 (Colo. 2010) (stating the following three factors: "(1) whether the Tribes created the entities pursuant to tribal law; (2) whether the Tribes own and operate the entities; and (3) whether the entities' immunity protects the Tribes' sovereignty"). This decision has been highly criticized, but it does illustrate the risks involved.

from state regulation and may still be immune from taxation. There is some ambiguity as to whether a Tribe's sovereign immunity extends to a tribally owned corporation. To properly structure a tribally chartered corporation, a Tribe will want to adopt a Business Corporation Code that sets forth the requirements of formation and regulation of such entities. A Model Code has been included in this Guidebook in Section III.A. Based on the Tribe's Code, which must be in accordance with the Tribe's constitution and other laws, a corporation may be formed by filing Articles of Incorporation (see Model Articles at Section III.B.). The Model Code and Model Articles are just that—models. Each Tribe will have to evaluate its needs within the Tribe's existing legal framework to determine what will work best for its members.<sup>24</sup>

There are numerous examples of tribally chartered corporations in existence today, including a tribally chartered college, a nonprofit corporation chartered by a Tribe for health and educational services, and a tribally chartered corporation that serves as a holding company for other economic entities. A successful example of this type of entity is Ho-Chunk, Inc., a tribally chartered corporation of the Winnebago Indian Nation. Michigan Tribes are also utilizing this structure. For example, the Little Traverse Bay Band of Ottawa Indians has a tribally chartered corporation named Waganakising Odawa Development, Inc.

To form this type of entity, a Tribe will want to conform to any and all tribal codes and/or laws. While a tribal Business Corporation Code is not required, setting forth the requirements and regulations for corporations under tribal law will make forming tribally chartered corporations, as well as remaining in compliance, easier and more manageable, not only for tribally owned businesses but also for individually owned businesses as well. Not all Tribes adopt detailed codes, but such action is advisable. Once a model code is in place, any new tribal corporation may easily be formed by filing articles of incorporation with the designated tribal official or entity. The articles should be formally approved by the tribal legislative body if the corporation is going to be owned wholly, or in part, by the Tribe. Once filed, the designated official or entity should review the articles and issue a "certificate of incorporation" to the incorporators.

The articles should clearly set forth the role of the Tribe in the corporation. Unlike the unincorporated business or the political subdivision, a tribally chartered corporation has a clear separation between the Board of Directors and the tribal government. In this type of corporation, the Board of Directors, who are elected by the Tribe (or shareholders), manage the corporation's business affairs. Directors generally have the following duties and responsibilities: appoint officers, oversee the activities of the corporation, and set compensation for the officers. Officers

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<sup>24</sup> A tribally chartered corporation may be required under state law to register, or take other regulatory steps, with the state as a foreign corporation. In Michigan, for instance, a business formed under laws other than under the law of Michigan must obtain a certificate of authority to transact business in Michigan. See MCL 450.2002 (foreign corporations); MCL 450.5002 (foreign LLCs). For businesses operating under tribal law on tribal lands, whether the state has any authority to mandate registration is questionable, but for a business that conducts business outside of tribal lands in Michigan, registration requirements would likely apply. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (“[A]bsent federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state.”).

run the day-to-day affairs of the corporation. The most important relationship in this model, however, is that between the Board and the tribal government.

There are certain circumstances under which tribally chartered corporations may share in a Tribe's sovereign immunity from suit. Courts use very fact-specific analyses of such corporations to determine whether a particular tribal corporation is immune. No one list can comprehensively describe the test used to make this determination, but some examples illustrate courts' approaches: whether the tribal corporation has the power to bind the Tribe's assets or obligate tribal funds, whether the Tribe and the tribal corporation are intertwined in governing structure, whether the corporation is organized for governmental purposes, or whether the entity is legally separate and distinct from the Tribe. As mentioned above, the closer and more intertwined the corporation is to the Tribe, the more likely a court will find that the corporation shares in the Tribe's sovereign immunity from suit. The more separate the corporation is, however, the more likely that it will not be found to be immune.

The interconnectedness of the tribal corporation and the tribal government will also have an impact on the corporation's tax treatment. Unlike the tax treatment for unincorporated tribal businesses, the IRS has not set clear guidance on how businesses incorporated under tribal law will be treated. The IRS has listed defining the tax treatment of these corporations as a priority for several years, but no guidance has been released as of the date of this Guidebook. Under existing revenue rulings and IRS guidance, there is a question as to how these entities will be treated. There are three options: (1) apply a per se exemption from federal income taxes, like a Section 17 Corporation, (2) apply a per se non-exemption from federal income taxes, like a state-chartered corporation, or (3) apply the IRS's "integral part" test, which exempts from federal income taxes business entities that function as an "integral part" of a Tribe. The "integral part" test does not have any bright-line criteria that a Tribe could follow to create a tax-exempt corporation. The IRS has cited numerous factors as relevant to such a determination, including the level of control that the Tribe has as well as the financial commitment of the Tribe to the entity.<sup>25</sup> The IRS will look at the totality of the circumstances under this test to determine whether or not the entity is an integral part of the Tribe. Because there has been no definitive guidance on this point, there is a risk that a tribally chartered corporation will not receive an exemption from federal income taxes.<sup>26</sup>

The status of tribally chartered corporations under state tax laws may also vary from state to state, with the applicability of state taxes dependent on an analysis under federal case law that can vary greatly depending on the nature of the tax, the tribal corporation, and the locus of the business. In Michigan, for example, nine Tribes have negotiated tax agreements with the state on when state taxes will be paid or will not be paid under certain circumstances, including the payment of income and business taxes. Those Tribes that have not entered into tax agreements

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<sup>25</sup> See PLR 200148020 (Aug 22, 2001) (ruling that a tribally chartered non-profit college was an integral part of the Tribe and therefore exempt); PLR 200031045 (ruling that a tribally chartered gaming authority was an integral part of the Tribe and therefore exempt).

<sup>26</sup> See ITG FAQ #2, available at <http://www.irs.gov/govt/Tribes/article/0,,id=179712,00.html>.

have had difficulties determining when, or whether, state taxes apply.<sup>27</sup> A Tribe will want to ensure that its tribal business structure is the most advantageous structure it can have under state law as well as under federal law.

Given the uncertainty surrounding this type of entity's federal income status, it is also unclear whether these entities may issue tax-exempt bonds. Tribal governments and their political subdivisions are clearly able to issue such bonds. The IRS has even implied that corporations that are integral to the Tribe may be able to issue tax-exempt bonds.<sup>28</sup> Even if the corporation is an integral part of the Tribe, however, the corporation could not use such bonds to fund facilities or other activities that do not serve essential governmental functions. The uncertain nature of these entities may also concern potential investors who are unfamiliar with the Tribe's rules and regulations and immunities. Other financing opportunities exist, however, for such corporations.

Under the Small Business Act of 1958 ("SBA"), for example, tribal corporations certified under Section 8(a) of the SBA may contract with the federal government *without a cap* on the amount of a sole-source contract. Section 8(a) requires, however, that tribal corporate applicants (i.e., the Tribe must own at least 51% of the voting stock and 51% of the aggregate of all classes of stock) be separate and distinct business entities formed under tribal law or state law. The contracting preferences under Section 8(a) are reserved for Tribes that form a separate legal entity that is "for profit" and is susceptible to being sued.<sup>29</sup> Other financing opportunities exist for tribally owned corporations as well, including the Department of Interior's Loan Guaranty, Insurance, and Interest Subsidy Program, the Indian Incentive Program, the Buy Indian Act, and more.

In sum, a tribally chartered corporation is advantageous for several reasons. First, once the framework is in place, a tribal corporation may be easily formed and regulated under the *Tribe's* own rules and regulations. Second, there is true flexibility to tailor the governance structure to accomplish the Tribe's specific business and cultural objectives. Third, there may be possible extensions of the Tribe's tax and sovereign immunity. And, finally, forming a separate legal entity from the Tribe isolates the corporation from the political process and makes it eligible for federal funding opportunities. On the other hand, there is still some uncertainty surrounding this type of entity with regard to the tax immunity and sovereign immunity of these corporations which may give investors concern.

## 6. Tribally Chartered Limited Liability Corporations

A tribally chartered limited liability company ("LLC") offers Tribes another potential structure to utilize. The advantages and disadvantages of this type of structure are similar to those of the tribally chartered corporation. Once a Tribal LLC Code is in place, the ease of

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<sup>27</sup> See, e.g., *Keweenaw Bay Indian Community v Rising*, 569 F.3d 589 (CA 6, 2009).

<sup>28</sup> See PLR 9826005 (June 26, 1998) (ruling that a tribally chartered *non-profit* corporation was not an integral part of the Tribe and therefore could not issue tax-exempt bonds).

<sup>29</sup> See 13 C.F.R. § 124.109.

formation and regulation of any LLC will be attractive for tribal businesses and individually owned businesses alike. This option also allows companies increased flexibility in the management of the business, as explained below. As with the tribally chartered corporations, there is ambiguity in the tax and immunity treatment of a tribally chartered LLC.

A limited liability company must be formed in accordance with the Tribe's LLC Code, generally through a formal filing of articles of organization. Most articles of organization contain limited information. Agreements among the members of the LLC are generally contained in an operating agreement. A tribal LLC code will typically provide that an LLC may be managed in one of two ways: member-managed or manager-managed. In a member-managed LLC, members have equal management rights and decide all ordinary business matters by a majority vote of the members. Each member in this model has all of the duties and responsibilities of a manager as well as all of the liabilities (and limitations on liability) unless the articles of organization state otherwise. This means that each member has the ability to bind the LLC. Of course, the Tribe may decide that the Tribe itself will be the sole member of the LLC. This decision is a business decision that must be made by the Tribe based on the business's needs and objectives. Members in a manager-managed LLC have limited powers while the managers have exclusive management rights and decide all ordinary business decisions by a majority of the managers. It is wise for the Tribe's LLC Code to allow for both options to meet the needs of any new LLC formed under tribal law, especially for joint ventures or individually owned businesses. In a manager-managed LLC, members will still have some role in decisions involving extraordinary decision matters.

The members of an LLC are not personally liable for any obligation of the LLC simply by virtue of being members or even managers. They are responsible, however, for their own acts or omissions or for failure to satisfy their obligations under the operating agreement. Members and managers are also not responsible for the acts or omissions of other members or managers—only their own acts or omissions. This fact makes this structure particularly attractive for some businesses.

#### Considerations on Selection

Of course, which structure a Tribe selects, is highly dependent on (1) the Tribe's existing laws and (2) the Tribe's goals for its business enterprise. Tribes will want to evaluate the importance of several factors as it goes forward with structuring its business entities: (1) sovereign immunity, (2) tax treatment, (3) financial opportunities, and (4) timing and ease of formation.

Sovereign Immunity:

<b>Type of Structure</b>	<b>Sovereign Immunity</b>
Unincorporated Business	Shares in same sovereign immunity as tribal government; waiver must be accomplished under tribal law.
Political Subdivision	Shares in same sovereign immunity as tribal government; waiver must be accomplished under tribal law.
Section 17 Corporation	May share in the Tribe's sovereign immunity under the corporate charter; beware of "sue and be sued" clauses/waivers of sovereign immunity.
State Law Corporations	State law will provide whether or not the entity may sue and be sued; courts may find immunity preserved in certain circumstances.
Tribally Chartered Corporations	Uncertain treatment; the more separate and distinct the entity from the Tribe, the less likely to share in the Tribe's immunity from suit.
Tribal LLC	Uncertain treatment; the more separate and distinct the entity from the Tribe, the less likely to share in the Tribe's immunity from suit.

Federal Tax Treatment (state tax treatment will vary by state):

<b>Type of Structure</b>	<b>Federal Tax Treatment</b>
Unincorporated Business	Exempt from federal income tax.
Political Subdivision	The IRS's practice is to exempt political subdivisions from federal income tax. Must qualify as a "political subdivision"—delegated substantial governmental powers.
Section 17 Corporation	Exempt from federal income tax.
State Law Corporations	Not exempt from federal income tax.
Tribally Chartered Corporations	Tax treatment is uncertain. No IRS Guidance on this issue.
Tribal LLC	Tax treatment is uncertain. No IRS Guidance on this issue.

Financial Opportunities:

<b>Type of Structure</b>	<b>Financial Opportunities</b>
Unincorporated Business	May issue tax-exempt bonds.
Political Subdivision	May issue tax-exempt bonds.
Section 17 Corporation	May issue tax-exempt bonds.
State Law Corporations	Unable to issue tax-exempt bonds.
Tribally Chartered Corporations	Uncertain as to whether or not may issue tax-exempt bonds.
Tribal LLC	Uncertain as to whether or not may issue tax-exempt bonds.

Ease of Formation:

<b>Type of Structure</b>	<b>Ease of Formation</b>
Unincorporated Business	No formation of separate entity required.
Political Subdivision	Fairly easy to form, but requires federal approval to reap benefits under federal law. Must qualify as a “political subdivision”—delegated substantial governmental powers.
Section 17 Corporation	Federal approvals increase the time required for formation; several layers of approval necessary.
State Law Corporations	Easy to form, but under state law.
Tribally Chartered Corporations	Must be formed under tribal law; ease depends on existing legal structures. Once Business Corporation Code is established, formation will be quicker and easier.
Tribal LLC	Must be formed under tribal law; ease depends on existing legal structures. Once Limited Liability Company Code is established, formation will be quicker and easier.

Each Tribe must put great thought into what structures will best suit the needs and objectives of the Tribe, as well as those of the potential businesses. Any decisions must be made in accordance with the existing law of the Tribe, including the Tribe’s Constitution. The following sections in this Guidebook provide examples of a Business Corporation Code and a Limited Liability Code, as well as example Articles of Incorporation and Articles of Organization. These documents are meant to act as examples of types of documents needed to create the structures discussed above. Any Tribe interested in adopting a Business Corporation Code and/or a Limited Liability Code should consult the Tribe’s legal counsel to ensure compliance with existing law.

*This Guide was prepared by R. Lance Boldrey and Courtney F. Kissel of Dykema Gossett PLLC in coordination with the Michigan Economic Development Corporation and is current as of September 14, 2011. This Guide is intended for informational purposes and should not be construed as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned here. Rules of certain state supreme courts may consider this advertising and require us to advise you of such designation.*

# MODEL TRIBAL BUSINESS CORPORATION CODE

A CODE to provide for the creation, organization, and regulation of tribally chartered corporations; to prescribe their duties, rights, powers, immunities and liabilities; and to prescribe penalties for violations of this Code. **[NOTE: THIS CODE SERVES AS AN EXAMPLE CORPORATION CODE. IT IS NOT COMPREHENSIVE AND WILL NOT COMPLY WITH EACH TRIBE'S EXISTING LAWS AND CONSTITUTION. THE TRIBE'S LEGAL COUNSEL SHOULD REVIEW ANY PROPOSED BUSINESS CORPORATION CODE PRIOR TO ITS ADOPTION.]**

## CHAPTER 1 GENERAL PROVISIONS

### **1.1 Short Title.**

This Code shall be known and cited to as “[TRIBE’s] Business Corporation Code.”

### **1.2 Purpose.**

This Code is enacted to provide for the creation, organization, and regulation of corporations under the law of the [TRIBE].

### **1.3 Definitions.**

(1) “Administrator” means the [TRIBAL SECRETARY/OTHER PERSON/ENTITY] authorized by law to administer this Code, or his or her designated representative.

(2) “Articles of incorporation” includes any of the following:

(a) The original articles of incorporation or any other instrument filed or issued under any statute to organize a domestic or foreign corporation, as amended, supplemented, or restated by certificates of amendment, merger, or consolidation or other certificates or instruments filed or issued under any statute.

(b) A special act or charter creating a domestic or foreign corporation, as amended, supplemented, or restated.

(3) “Authorized shares” means shares of all classes that a corporation is authorized to issue.

(4) “Board” means board of directors or other governing board of a corporation.

(5) “Class,” when used with reference to shares, means a category of shares that differs in designation or one or more rights or preferences from another category of shares of the corporation

(6) “Corporation” means a corporation formed under this Code and formed under any other statute of this state for a purpose for which a corporation may be formed under this Code.

(7) “Director” means a member of the board of a corporation.

(8) “Distribution” means a direct or indirect transfer of money or other property, except the corporation's shares, or the incurrence of indebtedness by the corporation to or for the benefit of its shareholders in respect to the corporation's shares. A distribution may be in the form of a dividend, a purchase, redemption or other acquisition of shares, an issuance of indebtedness, or any other declaration or payment to or for the benefit of the shareholders.

(9) “Electronic transmission” or “electronically transmitted” means any form of communication that meets all of the following:

(a) It does not directly involve the physical transmission of paper.

(b) It creates a record that may be retained and retrieved by the recipient.

(c) It may be directly reproduced in paper form by the recipient through an automated process.

(10) “Person” means an individual, a partnership, a domestic or foreign corporation, or any other association, corporation, trust, or legal entity.

(11) “Reservation” means the reservation of the Tribe as is now or hereafter may be recognized by the Secretary of the Interior of the United States of America.

(12) “Shareholder” means a person holding units of proprietary interest in a corporation and is considered to be synonymous with “member” in a nonstock corporation.

(13) “Shares” means the units into which proprietary interests in a corporation are divided and is considered to be synonymous with “membership” in a nonstock corporation.

(14) “Tribe” means the [TRIBE].

(15) “Tribal corporation” means a corporation incorporated under this Code.

(16) “Tribal Council” means the Tribal Council of the [TRIBE].

(17) “Tribal Court” means the Tribal Court of the [TRIBE].

#### **1.4 Applicability of act generally.**

The provisions of this Ordinance shall apply to all corporations organized hereunder or which elect to accept the provisions of this Code.

#### **1.5 Applicability to existing tribal corporations.**

Any tribal corporation that legally existed before the effective date of this Code shall be deemed to be in valid existence and allowed a ninety (90) day grace period from the effective date of this Code to amend or to conform their articles of incorporation in order to comply with the provisions herein.

## **1.6 Applicable law.**

The companies organized and created under this Code shall be subject to this Code, and all other laws of the Tribe. By organizing and creating a corporation under this Code, the corporation and its owners shall be considered to have entered into a consensual relationship with the Tribe and agree to be subject to the full extent of the Tribe's legislative, regulatory and adjudicatory jurisdiction. Unless displaced by particular provisions of this Code or other Tribal law, the principles of law and equity supplement this Code.

## **1.7 Amendment or repeal of Act.**

This Code may be supplemented, altered, amended or repealed in accordance with the Tribal Constitution and every corporation to which this Code applies is bound thereby.

## **1.8 Submission of documents required under the Act; effective date.**

The articles of incorporation shall be delivered to [PERSON/ENTITY]. The [PERSON/ENTITY] shall stamp the articles filed, along with the date, and issue the corporation a Certificate of Incorporation. A document filed under this section is effective at the time it is endorsed unless a subsequent effective time, not later than 90 days after the date of delivery, is set forth in the document. The Certificate of Incorporation shall be conclusive evidence that the corporation has been incorporated under this Code.

## **CHAPTER 2 FORMATION, POWER, DUTIES**

### **2.1 Incorporators.**

One or more [TRIBAL MEMBER/ENROLLED TRIBAL MEMBER], who has attained at least 18 years of age, may be the incorporators of a corporation by signing and filing articles of incorporation for the corporation.

### **2.2 Articles of incorporation; contents.**

The articles of incorporation shall set forth the following information:

- (a) The name of the corporation.
- (b) The purposes for which the corporation is formed. It is a sufficient compliance with this subsection to state that the corporation may engage in any activity within the purposes for which corporations may be formed under the Business Corporation Code, and all activities shall by the statement be considered within the purposes of the corporation, subject to expressed limitations.
- (c) The aggregate number of shares which the corporation has authority to issue.

(d) If a corporation is authorized pursuant to its articles of incorporation to create and issue shares of stock, the articles of incorporation shall also set forth the following:

(1) If the shares are, or are to be, divided into classes, or into classes and series, the designation of each class and series, the number of shares in each class and series, and a statement of the relative rights, preferences and limitations of the shares of each class and series, to the extent that the designations, numbers, relative rights, preferences, and limitations have been determined.

(2) If any class of shares is to be divided into series, a statement of any authority vested in the board to divide the class of shares into series, and to determine or change for any series its designation, number of shares, relative rights, preferences and limitations.

(e) The street address, and the mailing address if different from the street address, of the corporation's initial registered office and the name of the corporation's initial resident agent at that address.

(f) The names and addresses of each incorporator.

(g) The duration of the corporation, which may be perpetual.

### **2.3 Articles of incorporation; permissible provisions.**

The articles of incorporation may contain any provision not inconsistent with this Code or another statute or ordinance of the Tribe, including any of the following:

(a) A provision for management of the business and conduct of the affairs of the corporation, or creating, defining, limiting, or regulating the powers of the corporation, its directors and shareholders, or a class of shareholders.

(b) A provision that under this Code is required or permitted to be set forth in the bylaws.

### **2.4 Articles of incorporation; tribal council approval.**

(1) Whenever a provision of the articles of incorporation is inconsistent with the corporate bylaws, the articles shall be controlling.

(2) If a corporation is to be owned and operated in whole or in part by the [TRIBE], the [TRIBAL COUNCIL/LEGISLATURE] must approve the articles of incorporation by a two-thirds vote.

## **2.5 Corporate name; required words and abbreviations.**

The corporate name of a domestic corporation shall contain the word “corporation,” “company,” “incorporated,” or “limited” or shall contain 1 of the following abbreviations: corp., co., inc., or ltd., with or without periods. The corporate name may be in English or [TRIBE’S LANGUAGE].

## **2.6 Beginning of corporate existence; filing of articles as evidence.**

The corporate existence shall begin on the effective date of the articles of incorporation as provided in section 1.7. Filing is conclusive evidence that all conditions precedent required to be performed under this Code have been fulfilled and that the corporation has been formed under this Code.

## **2.7 Selection of board; adoption of bylaws; first meeting; quorum; election of officers; transaction of business.**

Before or after filing of the articles of incorporation, a majority of the incorporators, at a meeting or by written instrument, shall select a board and may adopt bylaws. On or after the filing date of the articles any member of the board may call the first meeting of the board upon not less than 3 days notice by mail to each director. A majority of the directors constitutes a quorum for the first meeting of the board. At the first meeting, the board may adopt bylaws, elect officers and transact such other business as may come before the meeting.

## **2.8 Adoption, amendment, or repeal of bylaws; contents of bylaws.**

The initial bylaws of a corporation shall be adopted by its incorporators, its shareholders, or its board. The shareholders or the board may amend or repeal the bylaws or adopt new bylaws unless the articles of incorporation or bylaws provide that the power to adopt new bylaws is reserved exclusively to the shareholders or that the bylaws or any particular bylaw shall not be altered or repealed by the board. The bylaws may contain any provision for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.

## **2.9 Registered office and resident agent.**

Each corporation authorized to transact business under this Code shall have and continuously maintain both of the following:

(a) A registered office which may be the same as its place of business.

(b) A corporation [MAY/SHALL] designate in its articles a registered agent. The registered agent may be a natural person residing on the [TRIBAL LAND/RESERVATION], or a tribal corporation. The registered agent must maintain an office that is identical with the registered office.

## **2.10 Changing registered office or resident agent; statement; changing address of registered office.**

(1) A corporation authorized to transact business under this Code may change its registered office or change its resident agent, or both, upon filing a statement with the [TRIBAL SECRETARY/ENTITY]. The statement shall provide all of the following information:

- (a) The corporate name.
- (b) The street address of the corporation's then registered office, and its mailing address if different from its street address.
- (c) If the address of the corporation's registered office is changed, the street address and the mailing address, if different from the street address, to which the registered office is to be changed.
- (d) The name of the corporation's then resident agent.
- (e) If the corporation's resident agent is changed, the name of its successor resident agent.
- (f) That the address of the corporation's registered office and the address of its resident agent, as changed, will be identical.
- (g) That the change was authorized by resolution duly adopted by the corporation's board.

(2) If a resident agent changes its business or residence address to another place, the resident agent may change the address of the registered office of any corporation of which the person is a resident agent by filing a statement as required in subsection (1), except, the statement need only be signed by the resident agent, need not be responsive to subsection (1)(e) or (g), and shall recite that a copy of the statement has been mailed to the corporation.

## **2.11 Resignation of resident agent.**

A resident agent of a corporation may resign by filing a written notice of resignation with the [TRIBAL SECRETARY/CORPORATION PRESIDENT/TRIBAL ENTITY]. The corporation shall promptly appoint a successor resident agent. The appointment of the resigning agent terminates upon appointment of a successor, or upon expiration of 30 days after receipt of the notice by the administrator, whichever first occurs. Upon the resignation becoming effective, the business or residence address of the resigned agent shall no longer be the registered office of the corporation.

## **2.12 Service of process.**

(1) A process, notice, or demand required or permitted by law to be served upon a corporation may be served either upon (1) the registered agent, if one has been identified, of the

corporation named in the articles, or (2) an officer of the corporation, or (3) the [TRIBAL SECRETARY/ENTITY] as provided herein.

[(2) If a corporation has appointed and maintained a registered agent on the [TRIBAL LAND/RESERVATION] but neither its registered agent nor an officer of the corporation can be found at the registered office, or if a corporation fails to appoint or maintain a registered agent and an officer of the corporation cannot be found at the registered office, then the [TRIBAL SECRETARY/ENTITY] shall be the agent of the corporation upon whom the process, notice, or demand may be served. The [TRIBAL SECRETARY/ENTITY] shall immediately forward, by certified mail addressed to the corporation at its registered office, a copy of the process, notice, or demand. Service on the [TRIBAL SECRETARY/ENTITY] is returnable in not less than 30 days notwithstanding a shorter period specified in the process, notice, or demand.]

### **2.13 Formation of corporation for lawful purpose.**

A corporation may be formed under this Code for any lawful purpose, except to engage in a business for which a corporation may be formed under any other tribal law unless that law permits formation under this Code or as prohibited under the [TRIBAL CONSTITUTION].

### **2.14 Corporate powers.**

A corporation, subject to any limitation provided in this Code, in any other law under [TRIBAL LAW], or in its articles of incorporation, shall have power in furtherance of its corporate purposes to do all of the following:

- (a) Have perpetual duration.
- (b) Have a corporate seal, and alter the seal, and use it by causing it or a facsimile to be affixed, impressed, or reproduced in any other manner.
- (c) Adopt, amend, or repeal bylaws, including emergency bylaws, relating to the business of the corporation, the conduct of its affairs, its rights and powers and the rights and powers of its shareholders, directors, or officers.
- (d) Elect or appoint officers, employees, and other agents of the corporation, prescribe their duties, fix their compensation and the compensation of directors, and indemnify corporate directors, officers, employees, and agents.
- (e) Purchase, receive, take by grant, gift, devise, bequest or otherwise, lease, or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with, real or personal property, or an interest in real or personal property, wherever situated.
- (f) Sell, convey, lease, exchange, transfer, or otherwise dispose of, or mortgage or pledge, or create a security interest in any of its property or an interest in its property, wherever situated.

(g) Purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, employ, sell, lend, lease, exchange, transfer or otherwise dispose of, mortgage, pledge, use and otherwise deal in and with, bonds and other obligations, shares or other securities or interests issued by others, whether engaged in similar or different business, governmental, or other activities, including banking corporations or trust companies.

(h) Make contracts, give guarantees and incur liabilities, borrow money at rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of any of its property or an interest in its property, wherever situated. This power shall include the power to give guarantees that are necessary or convenient to the conduct, promotion, or attainment of the business of any of the following corporations, whether or not subject to this Code, and domestic or foreign limited liability companies, and those guarantees shall be considered to be in furtherance of the corporate purposes of the contracting corporation:

(i) All of the outstanding shares or interests of which are owned, directly or indirectly, by the contracting corporation.

(ii) A corporation or limited liability company that owns, directly or indirectly, all of the outstanding shares of the contracting corporation.

(iii) All of the outstanding shares or interests of which are owned, directly or indirectly, by a corporation, whether or not subject to this Code, or a limited liability company that owns, directly or indirectly, all of the outstanding shares of the contracting corporation.

(i) Lend money, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested.

(j) Make donations for any of the following: The public welfare; community fund or hospital; or a charitable, educational, scientific, civic, or similar purpose. A corporation also has the power to provide aid in time of war or other national emergency.

(k) Pay pensions, establish and carry out pension, profit sharing, share bonus, share purchase, share option, savings, thrift and other retirement, incentive and benefit plans, trusts, and provisions for any of its directors, officers, and employees.

(l) Purchase, receive, take, otherwise acquire, own, hold, sell, lend, exchange, transfer, otherwise dispose of, pledge, use and otherwise deal in and with its own shares, bonds, and other securities.

(m) Participate with others in any corporation, partnership, limited partnership, joint venture, or other association of any kind, or in any transaction, undertaking, or agreement which the participating corporation would have power to conduct by itself, whether or not the participation involves sharing or delegation of control with or to others.

(n) Cease its corporate activities and dissolve.

(o) Transact business, carry on its operations, and have offices and exercise the powers granted by this Code in any jurisdiction in or outside the United States.

(p) Sue and be sued, complain and defend its corporate name.

(q) Have and exercise all powers necessary or convenient to effect any purpose for which the corporation is formed.

(r) Participate as a member of any mutual insurance company for purposes of insuring property or activities relative to nuclear facilities owned, operated, constructed, or being constructed by the corporation.

(s) Any corporation which holds an interest in trust land may not encumber that interest without the prior approval of the Tribal Council.

(t) Consent to suit by a corporation shall in no way extend to the Tribe, nor shall a consent to suit by a corporation in any way be deemed a waiver of any of the rights, privileges and immunities of the Tribe.

[CAN PLACE LIMITS ON ANY OF THESE ACTIVITIES TO REQUIRE TRIBAL COUNCIL APPROVAL]

## **2.15 Jurisdiction; no waiver of sovereign immunity.**

To the maximum extent consistent with the due process of law, all corporations formed under this Code and all directors, officers, and shareholders of such corporations shall be subject to the jurisdiction of the [TRIBAL COURT] in all actions which arise out of the acts, omissions, or participation of such persons in connection with the affairs of such corporations; provided, however that this section shall not apply to corporations which are owned in whole or in part by the [TRIBE] or which are controlled by the [TRIBAL COUNCIL/LEGISLATURE], or to the directors or officers of such corporations. This section shall not be construed as a waiver of sovereign immunity.

CHAPTER 3  
CAPITAL STRUCTURE AND CORPORATE FINANCE

**3.1 Issuance and classes of shares; rights, preferences, and limitations.**

(1) A corporation may issue the number of shares authorized in its articles of incorporation. The shares may be all of 1 class or may be divided into 2 or more classes. Each class shall consist of shares having the designations and relative voting, distribution, dividend, liquidation, and other rights, preferences, and limitations, consistent with this Code, as stated in the articles of incorporation. The articles of incorporation may deny, limit, or otherwise prescribe the voting rights and may limit or otherwise prescribe the distribution, dividend, or liquidation rights of shares of any class.

(2) If the shares are divided into 2 or more classes, the shares of each class shall be designated to distinguish them from the shares of the other classes.

(3) Subject to the designations, relative rights, preferences, and limitations applicable to separate series, each share shall be equal to every other share of the same class.

(4) Any of the voting, distribution, liquidation, or other rights, preferences, or limitations of a class or series may be made dependent upon facts or events ascertainable outside of the articles of incorporation or a resolution of the board, if the manner in which the facts or events operate on the rights, preferences, or limitations is set forth in the articles of incorporation or board resolution.

[THE TRIBE MAY CHOSE TO INCLUDE A PROVISION THAT REQUIRES THE TRIBE TO BE THE SOLE SHAREHOLDER OF ANY CORPORATION FORMED UNDER THE CODE.]

**3.2 Class of shares; division and issuance in series; rights and preferences; certificate; amendment eliminating series of shares.**

(1) If provided for in the articles of incorporation, a class of shares may be divided into and issued in series. The shares of each series shall be designated to distinguish them from the shares of the other series and classes.

(2) Any series of any class and the variations in the relative rights and preferences among different series may be prescribed by the articles of incorporation.

(3) If the articles of incorporation authorize the board, to the extent that the articles of incorporation have not established series and prescribed variations in the relative rights and preferences among series, the board may divide any class into series, and, within the limitations set forth in the articles of incorporation, prescribe the relative rights and preferences of the shares of any series.

(4) A certificate containing the resolution of the board establishing and designating the series and prescribing the relative rights and preferences shall be filed, and when filed shall constitute an amendment to the articles of incorporation.

(5) Unless otherwise provided in the articles of incorporation, the board may adopt and file an amendment of the articles of incorporation eliminating a series of shares if there are no outstanding shares of the series, no outstanding shares or bonds convertible into shares of the series, or other rights, options, or warrants issued by the corporation that could require issuing shares of the series.

### **3.3 Issuance or transfer of shares without certificates; statement.**

(1) Unless the articles of incorporation or bylaws provide otherwise, the board may authorize the issuance of some or all of the shares of any or all of its classes or series without certificates. The authorization does not affect shares already represented by certificates until the certificates are surrendered to a corporation.

(2) Within a reasonable time after the issuance or transfer of shares without certificates, the corporation shall send the shareholder a written statement of the information required on certificates under this Code.

### **3.4 Share certificates.**

Except as provided in section 1.25, the shares of a corporation shall be represented by certificates which shall be signed by the chairperson of the board, vice-chairperson of the board, president or a vice-president and which also may be signed by another officer of the corporation. The certificate may be sealed with the seal of the corporation or a facsimile of the seal. The signatures of the officers may be facsimiles. If an officer who has signed or whose facsimile signature has been placed upon a certificate ceases to be an officer before the certificate is issued, it may be issued by the corporation with the same effect as if he or she were the officer at the date of issue.

### **3.5 Liability.**

The [TRIBE] shall be under no obligation to the corporation or the creditors of any corporation which the Tribe incorporates, owns, or operates, in whole or in part, and the Tribe shall not be deemed to have waived any of the Tribe's privileges or immunities if the Tribe incorporates, owns, or operates a corporation, in whole or in part. [MAY WISH TO BE FLEXIBLE].

## **CHAPTER 4 SHAREHOLDERS**

### **4.1 Meetings of shareholders; place.**

Meetings of shareholders may be held at a place within or without the [TRIBAL LAND/RESERVATION] as provided in the bylaws. In the absence of such a provision, meetings shall be held at the registered office or such other place as may be determined by the board.

#### **4.2 Annual meeting of shareholders.**

An annual meeting of shareholders for election of directors and for such other business as may come before the meeting shall be held at a time as provided in the bylaws, unless such action is taken by written consent as provided in the articles of incorporation. Failure to hold the annual meeting at the designated time, or to elect a sufficient number of directors at the meeting or any adjournment thereof, does not affect otherwise valid corporate acts or work a forfeiture or give cause for dissolution of the corporation. If the annual meeting is not held on the date designated therefor, the board shall cause the meeting to be held as soon thereafter as convenient. If the annual meeting is not held for 90 days after the date designated therefor, or if no date has been designated for 15 months after organization of the corporation or after its last annual meeting, the [TRIBAL COURT/TRIBAL COUNCIL], upon application of a shareholder, may summarily order the meeting or the election, or both, to be held at such time and place, upon such notice and for the transaction of such business as may be designated in the order. At any such meeting ordered to be called by the [TRIBAL COURT/TRIBAL COUNCIL], the shareholders present in person or by proxy and having voting powers constitute a quorum for transaction of the business designated in the order.

#### **4.3 Special meeting of shareholders.**

A special meeting of shareholders may be called by the board, or by officers, directors or shareholders as provided in the bylaws. Notwithstanding any such provision, upon application of the holders of not less than 10% of all the shares entitled to vote at a meeting, the [TRIBAL COURT/TRIBAL COUNCIL], for good cause shown, may order a special meeting of shareholders to be called and held at such time and place, upon such notice and for the transaction of such business as may be designated in the order. At any such meeting ordered to be called by the [TRIBAL COURT/TRIBAL COUNCIL], the shareholders present in person or by proxy and having voting powers constitute a quorum for transaction of the business designated in the order.

#### **4.4 Meetings of shareholders; notice; adjournment; result of shareholder's attendance at meeting.**

(1) Except as otherwise provided in this Code, written notice of the time, place if any, and purposes of a meeting of shareholders shall be given not less than 10 nor more than 60 days before the date of the meeting to each shareholder of record entitled to vote at the meeting. Notice may be given personally, by mail, or by electronic transmission. If a shareholder or proxy holder may be present and vote at the meeting by remote communication, the means of remote communication allowed shall be included in the notice.

(2) Unless the corporation has securities registered under section 12 of title I of the securities exchange act of 1934, chapter 404, 48 Stat. 892, 15 U.S.C. 78l, notice of the purposes of a meeting shall include notice of shareholder proposals that are proper subjects for shareholder action and are intended to be presented by shareholders who have notified the corporation in writing of their intention to present the proposals at the meeting. The bylaws may establish reasonable procedures for the submission of proposals to the corporation in advance of the meeting.

(3) If a meeting is adjourned to another time or place, it is not necessary, unless the bylaws otherwise provide, to give notice of the adjourned meeting if the time, and place if any, to which the meeting is adjourned are announced at the meeting at which the adjournment is taken. A shareholder or proxy holder may be present and vote at the adjourned meeting by a means of remote communication if he or she was permitted to be present and vote by that means of remote communication in the original meeting notice. At the adjourned meeting, only business that might have been transacted at the original meeting may be transacted if a notice of the adjourned meeting is not given. If after the adjournment the board fixes a new record date for the adjourned meeting, a notice of the adjourned meeting shall be given to each shareholder of record on the new record date entitled to notice under subsection (1).

(4) A shareholder's attendance at a meeting will result in both of the following:

(a) Waiver of objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting.

(b) Waiver of objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

#### **4.5 Shareholder meeting; quorum.**

(1) Unless a greater or lesser quorum is provided in the articles of incorporation, in a bylaw adopted by the shareholders or incorporators, or in this Code, shares entitled to cast a majority of the votes at a meeting constitute a quorum at the meeting. The shareholders present in person or by proxy at the meeting may continue to do business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum. Whether or not a quorum is present, the meeting may be adjourned by a vote of the shares present.

(2) When the holders of a class or series of shares are entitled to vote separately on an item of business, this section applies in determining the presence of a quorum of the class or series for transaction of the item of business.

#### **4.6 Voting by shareholders.**

(1) Each outstanding share is entitled to 1 vote on each matter submitted to a vote of the shareholders, unless otherwise provided in the articles of incorporation. A vote may be cast either orally or in writing, unless otherwise provided in the bylaws.

(2) Other than the election of directors, if an action is to be taken by vote of the shareholders, it shall be authorized by a majority of the votes cast by the holders of shares entitled to vote on the action, unless a greater vote is required in the articles of incorporation or another section of this Code. Unless otherwise provided in the articles of incorporation, abstaining from a vote or submitting a ballot marked "abstain" with respect to an action is not a vote cast on that action. Unless otherwise provided in the articles, directors shall be elected by a plurality of the votes cast at an election.

#### **4.7 Voting agreements between shareholders; voting trusts; cumulative voting.**

An agreement between 2 or more shareholders, if in writing and signed by the parties, may provide that in exercising voting rights, the shares held by them shall be voted as provided in the agreement, or as they may agree, or as determined in accordance with a procedure agreed upon by them. A voting agreement under this section shall be specifically enforceable.

A shareholder may confer upon a trustee the right to vote or otherwise represent his shares for not to exceed 10 years, by entering into a written voting trust agreement setting forth the terms and conditions of the voting trust, by filing an executed counterpart of the agreement at the registered office of the corporation, and by transferring his shares to the trustee for purposes of the agreement. After filing of the agreement, certificates for shares so transferred shall be surrendered and canceled and new certificates therefor issued to the trustee stating that they are issued under the agreement. In the entry of such ownership in the records of the corporation that fact shall also be noted, and the trustee may vote the transferred shares during the term of the agreement. The filed copy of the voting trust agreement is subject to inspection at any reasonable time by a shareholder or a holder of a beneficial interest in the voting trust, in person or by agent or attorney. Voting trust certificates shall be issued to evidence beneficial interests in the voting trust.

The articles of incorporation may provide that a shareholder entitled to vote at an election for directors may vote, in person or by proxy, the number of shares owned by him for as many persons as there are directors to be elected and for whose election he has a right to vote, or to cumulate his votes by giving 1 candidate as many votes as the number of such directors multiplied by the number of his shares, or by distributing his votes on the same principle among any number of the candidates.

### **CHAPTER 5 DIRECTORS AND OFFICERS**

#### **5.1 Management of corporation; qualifications of director.**

The business and affairs of a corporation shall be managed by or under the direction of its board, except as otherwise provided in this Code or in its articles of incorporation. A director need not be a shareholder of the corporation unless the articles or bylaws so require. The articles or bylaws may prescribe qualifications for directors.

#### **5.2 Number, election, and term of directors; resignation; designation, and compensation.**

(1) The board shall consist of 1 or more members. The number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the articles of incorporation fix the number.

(2) The first board of directors shall hold office until the first annual meeting of shareholders. At the first annual meeting of shareholders and at each annual meeting thereafter, the shareholders shall elect directors to hold office until the succeeding annual meeting, except in case of the classification of directors as permitted by this Code. A director shall hold office for the term for which he or she is elected and until his or her successor is elected and qualified, or

until his or her resignation or removal. A director may resign by written notice to the corporation. The resignation is effective upon its receipt by the corporation or a later time as set forth in the notice of resignation.

### **5.3 Director; duties and authority; reports to Tribal Council.**

(1) All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitations set forth in the articles of incorporation.

(2) [The corporation shall submit annual reports to the Tribal Council concerning the corporation's actions.]

### **5.4 Director or officer; manner of discharging duties; reliance on information, opinions, reports, or statements; action against director or officer; limitations.**

(1) A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:

- (a) In good faith.
- (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
- (c) In a manner he or she reasonably believes to be in the best interests of the corporation.

(2) In discharging his or her duties, a director or officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by any of the following:

- (a) One or more directors, officers, or employees of the corporation, or of a business organization under joint control or common control, whom the director or officer reasonably believes to be reliable and competent in the matters presented.
- (b) Legal counsel, public accountants, engineers, or other persons as to matters the director or officer reasonably believes are within the person's professional or expert competence.
- (c) A committee of the board of which he or she is not a member if the director or officer reasonably believes the committee merits confidence.

(3) A director or officer is not entitled to rely on the information set forth in subsection (2) if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) unwarranted.

(4) An action against a director or officer for failure to perform the duties imposed by this section shall be commenced within 3 years after the cause of action has accrued, or within 2 years after the time when the cause of action is discovered or should reasonably have been discovered, by the complainant, whichever occurs first.

## **5.5 Removal of directors.**

(1) The shareholders may remove 1 or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause. The vote for removal shall be by a majority of shares entitled to vote at an election of directors except that the articles may require a higher vote for removal without cause.

(2) In the case of a corporation having cumulative voting, if less than the entire board is to be removed, no 1 of the directors may be removed if the votes cast against his or her removal would be sufficient to elect him or her if then cumulatively voted at an election of the entire board of directors, or, if there are classes of directors, at an election of the class of directors of which he or she is a part.

(3) If holders of a class or series of stock or of bonds are entitled by the articles to elect 1 or more directors, this section applies, with respect to removal of a director so elected, to the vote of the holders of the outstanding shares of that class or series of stock or the holders of those bonds.

[(4) The [TRIBAL COUNCIL] may remove a director under the following circumstances: upon the filing of a complaint by [BOARD MEMBERS/SHAREHOLDERS/TRIBAL MEMBERS] and a response from the director complained of, the [TRIBAL COUNCIL] shall conduct a hearing to determine whether the Director substantially failed in his or her performance as Director and a majority of the [TRIBAL COUNCIL] voted to remove the Director.

## **5.6 Filling vacancy in board.**

(1) Unless otherwise limited by the articles of incorporation, if a vacancy, including a vacancy resulting from an increase in the number of directors, occurs in a board, the vacancy may be filled as follows:

(a) The shareholders may fill the vacancy.

(b) The board may fill the vacancy.

(c) If the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(2) Unless otherwise provided in the articles, if the holders of any class or classes of stock or series are entitled to elect 1 or more directors to the exclusion of other shareholders, vacancies of that class or classes or series may be filled only by 1 of the following:

(a) By a majority of the directors elected by the holders of that class or classes or series then in office, whether or not those directors constitute a quorum of the board.

(b) By the holders of shares of that class or classes of shares, or series.

(3) Unless otherwise limited by the articles or bylaws, in the case of a corporation the directors of which are divided into classes, any director chosen to fill a vacancy shall hold office until the next election of the class for which the director shall have been chosen, and until his or her successor is elected and qualified.

(4) If because of death, resignation, or other cause, a corporation has no directors in office, an officer, a shareholder, a personal representative, administrator, trustee, or guardian of a shareholder, or other fiduciary entrusted with like responsibility for the person or estate of a shareholder, may call a special meeting of shareholders in accordance with the articles or the bylaws.

(5) A vacancy that will occur at a specific date, by reason of a resignation effective at a later date, may be filled before the vacancy occurs but the newly elected or appointed director may not take office until the vacancy occurs.

#### **5.7 Regular or special meetings of board.**

(1) Regular or special meetings of a board may be held either in or outside of the [TRIBAL LAND/RESERVATION].

(2) A regular meeting may be held with or without notice as prescribed in the bylaws. A special meeting shall be held upon notice as prescribed in the bylaws. A director's attendance at or participation in a meeting waives any required notice to him or her of the meeting unless he or she at the beginning of the meeting, or upon his or her arrival, objects to the meeting or the transacting of business at the meeting and does not thereafter vote for or assent to any action taken at the meeting. Unless required by the bylaws, neither the business to be transacted at, nor the purpose of, a regular or special meeting need be specified in the notice or waiver of notice of the meeting.

(3) Unless otherwise restricted by the articles of incorporation or bylaws, a member of the board or of a committee designated by the board may participate in a meeting by means of conference telephone or other means of remote communication through which all persons participating in the meeting can communicate with the other participants. Participation in a meeting pursuant to this subsection constitutes presence in person at the meeting.

#### **5.8 Quorum; majority vote as constituting action of board.**

(1) A majority of the members of the board then in office, or of the members of a committee of the board, constitutes a quorum for transaction of business, unless the articles of incorporation or bylaws, or in the case of a committee, the board resolution establishing the committee, provide for a larger or smaller number. The vote of the majority of members present at a meeting at which a quorum is present constitutes the action of the board or of the committee,

unless the vote of a larger number is required by this Code, the articles, or the bylaws, or in the case of a committee, the board resolution establishing the committee.

(2) Amendment of the bylaws by the board requires the vote of not less than a majority of the members of the board then in office.

### **5.9 Consent to action of board without meeting.**

Unless prohibited by the articles of incorporation or bylaws, action required or permitted to be taken under authorization voted at a meeting of the board or a committee of the board, may be taken without a meeting if, before or after the action, all members of the board then in office or of the committee consent to the action in writing or by electronic transmission. The written consents shall be filed with the minutes of the proceedings of the board or committee. The consent has the same effect as a vote of the board or committee for all purposes.

### **5.10 Committees; designation by board; membership; absence or disqualification of member; terms.**

(1) Unless otherwise provided in the articles of incorporation or bylaws, the board may designate 1 or more committees, each committee to consist of 1 or more of the directors of the corporation. The board may designate 1 or more directors as alternate members of a committee, who may replace an absent or disqualified member at a meeting of the committee. The bylaws may provide that in the absence or disqualification of a member of a committee, the members thereof present at a meeting and not disqualified from voting, whether or not they constitute a quorum, may unanimously appoint another member of the board to act at the meeting in place of such an absent or disqualified member.

(2) A committee, and each member thereof, shall serve at the pleasure of the board.

### **5.11 Committees; powers and authority; limitations; subcommittees.**

(1) A committee designated pursuant to section 1.43, to the extent provided in a resolution of the board or in the bylaws, may exercise all powers and authority of the board in management of the business and affairs of the corporation. A committee does not have power or authority to do any of the following:

(a) Amend the articles of incorporation, except that a committee may prescribe the relative rights and preferences of the shares of a series pursuant to section 1.24.

(b) Adopt an agreement of merger or share exchange.

(c) Recommend to shareholders the sale, lease, or exchange of all or substantially all of the corporation's property and assets.

(d) Recommend to shareholders a dissolution of the corporation or a revocation of a dissolution.

(e) Amend the bylaws of the corporation.

(f) Fill vacancies in the board.

(2) Unless a resolution of the board, the articles of incorporation, or the bylaws expressly provide the power or authority, a committee does not have the power or authority to declare a distribution or dividend or to authorize the issuance of shares.

(3) Unless otherwise provided in a resolution of the board, the articles of incorporation, or the bylaws, a committee may create 1 or more subcommittees. Each subcommittee shall consist of 1 or more members of the committee. The committee may delegate all or part of its power or authority to a subcommittee.

### **5.12 Officers of corporation; election or appointment; holding 2 or more offices; authority and duties.**

(1) The officers of a corporation shall consist of a president, secretary, treasurer, and, if desired, a chairman of the board, 1 or more vice-presidents, and such other officers as may be prescribed by the bylaws or determined by the board. Unless otherwise provided in the articles of incorporation or bylaws, the officers shall be elected or appointed by the board.

(2) Two or more offices may be held by the same person but an officer shall not execute, acknowledge or verify an instrument in more than 1 capacity if the instrument is required by law or the articles or bylaws to be executed, acknowledged or verified by 2 or more officers.

(3) An officer elected or appointed as herein provided shall hold office for the term for which he is elected or appointed and until his successor is elected or appointed and qualified, or until his resignation or removal.

(4) An officer, as between himself and other officers and the corporation, has such authority and shall perform such duties in the management of the corporation as may be provided in the bylaws, or as may be determined by resolution of the board not inconsistent with the bylaws.

### **5.13 Removal or resignation of officers; contract rights.**

(1) An officer elected or appointed by the board may be removed by the board with or without cause. An officer elected by the shareholders may be removed, with or without cause, only by vote of the shareholders, but his authority to act as an officer may be suspended by the board for cause.

(2) The removal of an officer shall be without prejudice to his contract rights, if any. The election or appointment of an officer does not of itself create contract rights.

(3) An officer may resign by written notice to the corporation. The resignation is effective upon its receipt by the corporation or at a subsequent time specified in the notice of resignation.

#### **5.14 Liability of directors for corporate actions; liability of shareholders accepting or receiving share dividend or distribution.**

(1) Directors who vote for, or concur in, any of the following corporate actions are jointly and severally liable to the corporation for the benefit of its creditors or shareholders, to the extent of any legally recoverable injury suffered by its creditors or shareholders as a result of the action but not to exceed the difference between the amount paid or distributed and the amount that lawfully could have been paid or distributed:

- (a) Declaration of a share dividend or distribution to shareholders contrary to this Code or contrary to any restriction in the articles of incorporation.
- (b) Distribution to shareholders during or after dissolution of the corporation without paying or providing for debts, obligations, and liabilities of the corporation as required under this Code.
- (c) Making a loan to a director, officer, or employee of the corporation or of a subsidiary of the corporation contrary to this Code.

(2) A director is not liable under this section if he or she has complied with section 1.38.

(3) A shareholder who accepts or receives a share dividend or distribution with knowledge of facts indicating it is contrary to this Code, or any restriction in the articles of incorporation, is liable to the corporation for the amount accepted or received in excess of the shareholder's share of the amount that lawfully could have been distributed.

#### **5.15 Interest of director or officer in transaction; compensation of directors.**

(1) A transaction in which a director or officer is determined to have an interest shall not, because of the interest, be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, if the person interested in the transaction establishes any of the following:

- (a) The transaction was fair to the corporation at the time entered into.
- (b) The material facts of the transaction and the director's or officer's interest were disclosed or known to the board, a committee of the board, or the independent director or directors, and the board, committee, or independent director or directors authorized, approved, or ratified the transaction.
- (c) The material facts of the transaction and the director's or officer's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction.

(2) For purposes of subsection (1)(b), a transaction is authorized, approved, or ratified if it received the affirmative vote of the majority of the directors on the board or the committee

who had no interest in the transaction, though less than a quorum, or all independent directors who had no interest in the transaction. The presence of, or a vote cast by, a director with an interest in the transaction does not affect the validity of the action taken under subsection (1)(b).

(3) For purposes of subsection (1)(c), a transaction is authorized, approved, or ratified if it received the majority of votes cast by the holders of shares who did not have an interest in the transaction. A majority of the shares held by shareholders who did not have an interest in the transaction constitutes a quorum for the purpose of taking action under subsection (1)(c).

(4) Satisfying the requirements of subsection (1) does not preclude other claims relating to a transaction in which a director or officer is determined to have an interest. Those claims shall be evaluated under principles of law applicable to a transaction in which a director or officer does not have an interest.

(5) The board, by affirmative vote of a majority of directors in office and irrespective of any personal interest of any of them, may establish reasonable compensation of directors for services to the corporation as directors or officers, but approval of the shareholders is required if the articles of incorporation, bylaws, or another provision of this Code requires that approval. Transactions pertaining to the compensation of directors for services to the corporation as directors or officers shall not be enjoined, set aside, or give rise to an award of damages or other sanctions in a proceeding by a shareholder or by or in the right of the corporation unless it is shown that the compensation was unreasonable at the time established.

#### **5.16 Indemnification generally.**

A corporation has the power to indemnify a person who was or is a party or is threatened to be made a party to a threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal, other than an action by or in the right of the corporation, by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, whether for profit or not, against expenses, including attorneys' fees, judgments, penalties, fines, and amounts paid in settlement actually and reasonably incurred by him or her in connection with the action, suit, or proceeding, if the person acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation or its shareholders, and with respect to a criminal action or proceeding, if the person had no reasonable cause to believe his or her conduct was unlawful. The termination of an action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, does not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the corporation or its shareholders, and, with respect to a criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful.

CHAPTER 6  
AMENDMENTS TO ARTICLES OF INCORPORATION

**6.1 Powers to amend.**

General power of amendment.

A corporation may amend its articles of incorporation if the amendment contains only provisions that might lawfully be contained in original articles of incorporation filed at the time of making the amendment.

Specific powers of amendment.

Without limiting the general power of amendment, a corporation may amend its articles of incorporation to do any of the following:

- (a) Change its corporate name.
- (b) Enlarge, limit, or otherwise change its corporate purposes or powers.
- (c) Change the duration of the corporation.
- (d) Increase or decrease the aggregate number of shares, or shares of any class or series of any class, which the corporation has authority to issue.
- (e) Exchange, classify, reclassify, or cancel any of its issued or unissued shares.
- (f) Change the designation of any of its issued or unissued shares, and change the preferences, limitations, and relative rights in respect of any of its issued or unissued shares.
- (g) Change the issued or unissued shares of any class or series into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.
- (h) Create new classes or series of shares having rights and preferences superior or inferior to, or equal with, the issued or unissued shares of any class or series then authorized.
- (i) Cancel or otherwise affect the right of the holders of the shares of any class or series to receive dividends that have accrued but have not been declared.
- (j) Divide any class of issued or unissued shares into series and fix the designations of the series and the preferences, limitations, and relative rights of the shares of the series.

(k) Authorize the board to divide authorized but unissued shares of any class into series and fix the designations and number of shares of the series and the preferences, limitations, and relative rights of the shares of the series.

(l) Authorize the board to fix or change the designation, number of, preferences, limitations, or relative rights of the shares of an established series the shares of which have not been issued.

(m) Revoke, diminish, or enlarge the authority of the board to take any action set forth in subdivisions (k) and (l).

(n) Limit, deny, or grant to shareholders of a class the preemptive right to acquire shares of the corporation.

(o) Change its registered office or change its resident agent.

(p) Strike out, change, or add any provision for management of the business and conduct of the affairs of the corporation, or creating, defining, limiting, and regulating the powers of the corporation, its directors and shareholders, or any class of shareholders, including any provision that under this Code is required or permitted to be set forth in the bylaws.

## **6.2 Articles of incorporation; amendment procedure.**

(1) Before the first meeting of the board, the incorporators may amend the articles of incorporation by filing a certificate of amendment that is signed by a majority of the incorporators that sets forth the amendment and certifying that the amendment is adopted by unanimous consent of the incorporators.

(2) Unless the articles of incorporation provide otherwise, the board may adopt 1 or more of the following amendments to the corporation's articles of incorporation without shareholder action:

(a) Extend the duration of the corporation if it was incorporated at a time when limited duration was required by law.

(b) Delete the names and addresses of the initial directors.

(c) Delete the name and address of the initial resident agent or registered office, if a statement of change is on file with the [PERSON/ENTITY].

(d) Change each issued and unissued authorized share of an outstanding class into a greater number of whole shares if the corporation has only shares of that class outstanding.

(e) Change the corporate name by substituting the word “corporation,” “incorporated,” “company,” “limited,” or the abbreviation “corp.,” “inc.,” “co.,” or “ltd.,” for a similar word or abbreviation in the corporate name, or by adding, deleting, or changing a geographical attribution for the corporate name.

(f) Any other change expressly permitted by this Code to be made without shareholder action.

(3) Other amendments of the articles of incorporation, except as otherwise provided in this Code, shall be proposed by the board and approved by the shareholders as provided in this section. The board may condition its submission of the amendment to the shareholders on any basis.

(4) Notice of a meeting setting forth the proposed amendment or a summary of the changes to be effected by the proposed amendment shall be given to each shareholder of record entitled to vote on the proposed amendment within the time and in the manner provided in this Code for giving notice of meetings of shareholders.

(5) At the meeting, a vote of shareholders entitled to vote shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of a majority of the outstanding shares entitled to vote on the proposed amendment and, in addition, if any class or series of shares is entitled to vote on the proposed amendment as a class, the affirmative vote of a majority of the outstanding shares of that class or series. The voting requirements of this section are subject to any higher voting requirements provided in this Code for specific amendments or provided in the articles of incorporation.

(6) Any number of amendments may be acted upon at 1 meeting.

(7) Upon adoption of an amendment, a certificate of amendment shall be filed as with [PERSON/ENTITY] that sets forth the amendment and certifies that it was adopted by the board of directors.

[CAN ALSO REQUIRE TRIBAL COUNCIL APPROVAL FOR ALL AMENDMENTS]

## CHAPTER 7 DISSOLUTION

### 7.1 **Methods of dissolution.**

(1) A corporation may be dissolved in any of the following ways:

(a) Automatically by expiration of a period of duration to which the corporation is limited by its articles of incorporation.

(b) By action of the incorporators or directors under section 1.54.

- (c) By action of the board and the shareholders under section 1.55.
- (d) Pursuant to a shareholder agreement, effected by filing a certificate of dissolution with [PERSON/ENTITY] stating the name of the corporation and that the corporation dissolved pursuant to a shareholder agreement.
- (e) By a judgment of the [TRIBAL COURT] in an action brought under this Code or otherwise.
- (f) By action of the [TRIBAL COUNCIL] brought under section 1.56.
- (g) Automatically for failure to file an annual report or pay the filing fee.

(2) A corporation whose assets have been wholly disposed of under court order in receivership or bankruptcy proceedings may be summarily dissolved by order of the court having jurisdiction of the proceedings. A copy of the order shall be filed by the [CLERK OF THE TRIBAL COURT] with the [PERSON/ENTITY].

## **7.2 Conditions to dissolution by incorporators or directors; certificate of dissolution.**

(1) A corporation may be dissolved by action of its incorporators or directors, if the corporation complies with all of the following conditions:

- (a) Has not commenced business.
- (b) Has not issued any shares.
- (c) Has no debts or other liabilities.
- (d) Has received no payments on subscriptions for its shares, or, if it has received payments, has returned them to those entitled thereto, less any part thereof disbursed for expenses.

(2) The dissolution of the corporation shall be effected by a majority of the incorporators or directors, executing and filing a certificate of dissolution stating:

- (a) The name of the corporation.
- (b) That the corporation has not commenced business and has issued no shares, and has no debts or other liabilities.
- (c) That the corporation has received no payments on subscriptions to its shares, or, if it has received payments, has returned them to those entitled thereto, less any part thereof disbursed for expenses.
- (d) That a majority of the incorporators or directors have elected that the corporation be dissolved.

### **7.3 Dissolution by action of board and shareholders; certificate of dissolution.**

(1) A corporation may be dissolved by action of its board and shareholders as provided in this section.

(2) A corporation's board may propose dissolution for action by the shareholders.

(3) The board must recommend dissolution to the shareholders unless the board determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders.

(4) The board may condition its submission of the proposal for dissolution on any basis.

(5) The proposed dissolution shall be submitted for approval at a meeting of shareholders. Notice shall be given to each shareholder of record whether or not entitled to vote at the meeting within the time and in the manner as provided in this Code for the giving of notice of meetings of shareholders, and shall state that a purpose of the meeting is to vote on dissolution of the corporation.

(6) At the meeting a vote of shareholders shall be taken on the proposed dissolution. The dissolution shall be approved upon receiving the affirmative vote of the holders of a majority of the outstanding shares of the corporation entitled to vote thereon.

(7) If the dissolution is approved, it shall be effected by the execution and filing of a certificate of dissolution on behalf of the corporation, setting forth all of the following:

- (a) The name of the corporation.
- (b) The date and place of the meeting of shareholders approving the dissolution.
- (c) A statement that dissolution was proposed and approved by the requisite vote of the board and shareholders.

### **7.4 Dissolution by the [TRIBAL COUNCIL].**

(1) A corporation may be dissolved involuntarily by a decree of the [TRIBAL COURT] in an action filed by the [TRIBAL COUNCIL] when it is established that:

- (a) The articles and certificate of incorporation were procured through fraud;
- (b) The corporation was incorporated for a purpose not permitted under this Code;
- (c) The corporation failed to comply with the requirements under this Code to incorporate;

- (d) The corporation has flagrantly violated a provision of this Code, or has violated a provision of this Code more than once, or has violated more than one provision of this Code; or
- (e) The corporation has acted, or failed to act, in a manner that constitutes surrender or abandonment of the corporate franchise, privileges, or enterprise.

(2) An action shall not be commenced under this section until 30 days after notice to the corporation by the Tribal Council of the reason for the filing of the action. If the reason for filing the action is an act that the corporation has done, or omitted to do, and the act or omission may be corrected by an amendment of the articles or bylaws or by performance of or abstention from the act, the Tribal Council shall give the corporation 30 additional days in which to effect the correction before filing the action.

**7.5 Certificate of dissolution; filing; time of effectiveness; conditions; date stamp as evidence.**

(1) A certificate of dissolution filed with the administrator is effective at the time the certificate is first received by the administrator, not the date of filing, if all of the following are met:

- (a) The dissolution is pursuant to a shareholder agreement or is commenced under section 1.55.
- (b) The certificate does not set forth a subsequent effective time, not later than 90 days after the date the certificate is received by the administrator.

(2) For purposes of subsection (1), the administrator's date stamp on the certificate of dissolution is evidence of the date the administrator received the certificate. If there are multiple date stamps on the certificate, the earliest date stamp is evidence of the date the administrator first received the certificate.

**7.6 Renewal of corporate existence; manner.**

A corporation whose term has expired may renew its corporate existence in the following manner:

- (a) The board shall adopt a resolution that the corporate existence be renewed. The proposed renewal shall be submitted for approval at a meeting of shareholders. Notice shall be given to each shareholder of record entitled to vote at the meeting within the time and in the manner provided in this Code for the giving of notice of meetings of shareholders, and shall state that a purpose of the meeting is to vote on the renewal of corporate existence.
- (b) At the meeting a vote of shareholders entitled to vote on the renewal shall be taken on the proposed renewal which shall be adopted upon

receiving the affirmative vote of holders of a majority of the outstanding shares.

(c) If renewal of the corporate existence is approved, a certificate of renewal shall be executed and filed on behalf of the corporation, setting forth all of the following:

(i) The name of the corporation.

(ii) The date and place of the meeting of shareholders approving the renewal of existence.

(iii) A statement that renewal was approved by the requisite vote of directors and shareholders.

(iv) The duration of the corporation if other than perpetual.

#### **7.7 Occurrences dissolving corporation.**

A corporation is dissolved when any of the following occurs:

(a) The period of duration stated in the corporation's articles of incorporation expires.

(b) A certificate of dissolution is filed under this Code.

(c) A judgment of forfeiture of corporate franchises or of dissolution is entered by the Tribal Court and a copy of a judicial order of dissolution shall be forwarded promptly to the administrator by the receiver or other person designated by the court.

(d) Failure to file an annual report or pay an annual filing fee.

#### **7.8 Corporate existence continued for purpose of winding up affairs.**

Except as the Tribal Court may otherwise direct, a dissolved corporation shall continue its corporate existence but shall not carry on business except for the purpose of winding up its affairs by:

(a) Collecting its assets.

(b) Selling or otherwise transferring, with or without security, assets which are not to be distributed in kind to its shareholders.

(c) Paying its debts and other liabilities.

(d) Doing all other acts incident to liquidation of its business and affairs.

## **7.9 Functions of dissolved corporation and its officers, directors, and shareholders continued.**

Subject to section 1.60 and except as otherwise provided by court order, a dissolved corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred. Without limiting the generality of this section:

- (a) The directors of the corporation are not deemed to be trustees of its assets and shall be held to no greater standard of conduct than that prescribed by section 1.38.
- (b) Title to the corporation's assets remains in the corporation until transferred by it in the corporate name.
- (c) The dissolution does not change quorum or voting requirements for the board or shareholders, and does not alter provisions regarding election, appointment, resignation or removal of, or filling vacancies among, directors or officers, or provisions regarding amendment or repeal of bylaws or adoption of new bylaws.
- (d) Shares may be transferred.
- (e) The corporation may sue and be sued in its corporate name and process may issue by and against the corporation in the same manner as if dissolution had not occurred.
- (f) An action brought against the corporation before its dissolution does not abate because of the dissolution.

## **7.10 Notice to existing claimants of dissolution; contents; notice as recognition of validity of claim; conditions barring claim; "existing claim" defined; effective date of notice.**

(1) The dissolved corporation may notify its existing claimants in writing of the dissolution at any time after the effective date of the dissolution. The written notice shall include all of the following:

- (a) A description of the information that must be included in a claim. The corporation may demand sufficient information to permit it to make a reasonable judgment whether the claim should be accepted or rejected.
- (b) A mailing address where a claim may be sent.
- (c) The deadline, which may not be less than 6 months from the effective date of the written notice, by which the dissolved corporation must receive the claim.
- (d) A statement that the claim will be barred if not received by the deadline.

(2) The giving of notice described above does not constitute recognition that a person to whom the notice is directed has a valid claim against the corporation.

(3) A claim against the dissolved corporation is barred if either of the following applies:

(a) If a claimant who was given written notice under subsection (1) does not deliver the claim to the dissolved corporation by the deadline.

(b) If a claimant whose claim was rejected by a written notice of rejection by the dissolved corporation does not commence a proceeding to enforce the claim within 90 days from the effective date of the written notice of rejection.

(4) For purposes of this section and section 1.63, “existing claim” means any claim or right against the corporation, liquidated or unliquidated. It does not mean a contingent liability or a claim based on an event occurring after the effective date of dissolution.

(5) For purposes of this section, the effective date of the written notice is the earliest of the following:

(a) The date it is received.

(b) Five days after its deposit in the United States mail, as evidenced by the postmark, if it is mailed postpaid and correctly addressed.

(c) The date shown on the return receipt, if the notice is sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

#### **7.11 Publication of notice of dissolution; requirements; claimants commencing proceedings within 1 year of notice.**

(1) A dissolved corporation may also publish notice of dissolution at any time after the effective date of dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(2) The notice must be in accord with both of the following:

(a) Be published 1 time in a newspaper of general circulation in the county where the dissolved corporation’s principal office or on the [TRIBAL LANDS/RESERVATION].

(b) State that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within 1 year after the publication date of the newspaper notice.

(3) If the dissolved corporation publishes a newspaper notice in accordance with subsection (2), the claim of each of the following claimants is barred unless the claimant

commences a proceeding to enforce the claim against the dissolved corporation within 1 year after the publication date of the newspaper notice:

- (a) A claimant who did not receive written notice under section 1.62.
- (b) A claimant whose claim was timely sent to the dissolved corporation but not acted on.
- (c) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(4) Notwithstanding subsection (3), a claimant having an existing claim known to the corporation at the time of publication in accordance with subsection (2) and who did not receive written notice under section 1.62 is not barred from commencing a proceeding until 6 months after the claimant has actual notice of the dissolution.

#### **7.12 Provision for debts, obligations, and liabilities; distribution of remaining assets.**

Before making a distribution of assets to shareholders in dissolution, a corporation shall pay or make provision for its debts, obligations, and liabilities. Compliance with this section requires that, to the extent that a reasonable estimate is possible, provision be made for those debts, obligations, and liabilities anticipated to arise after the effective date of dissolution. Provision need not be made for any debt, obligation, or liability that is or is reasonably anticipated to be barred under section 1.62 or 1.63. The fact that corporate assets are insufficient to satisfy claims arising after a dissolution does not create a presumption that the corporation has failed to comply with this section. Adequate provision is deemed to have been made for any debt, obligation, or liability of the corporation if payment has been assumed or guaranteed in good faith by 1 or more financially responsible corporations, persons, or the United States government or agency of the United States government, and the provision, including the financial responsibility of the corporations or other persons, was determined in good faith and with reasonable care by the board to be adequate. After payment or adequate provision has been made for the corporation's debts, obligations, or liabilities, the remaining assets shall be distributed, except as otherwise provided in this section, in cash, in kind, or both in cash and in kind, to shareholders according to their respective rights and interests. A shareholder beneficially owning less than 5% of the outstanding shares may be paid in cash only, even if a shareholder beneficially owning 5% or more of the outstanding shares receives a distribution in kind, if the ownership of all shareholders receiving cash instead of distributions in kind without their written consent does not exceed 10% of all outstanding shares.

## CHAPTER 8 SOVEREIGN IMMUNITY

### **8.1 Sovereign immunity.**

By the adoption of this Code, the Tribe does not waive its sovereign immunity or consent to suit in any court, federal tribal or state, and neither the adoption of this Code, nor the incorporation of any corporation hereunder, shall by itself be construed to be a waiver of the sovereign immunity of the Tribe or a consent to suit against the Tribe in any such court.

CHAPTER 9  
WHOLLY OWNED TRIBAL CORPORATIONS

**9.1 Scope.**

This chapter applies to all tribal corporations wholly owned by the Tribe, whether directly or as a subsidiary of another tribal corporation wholly owned by the Tribe, as provided in this chapter.

**9.2 Directly owned corporations; indirectly owned corporations; consent.**

(1) The consent of the Tribal Council shall be required prior to the incorporation under this Code of any corporation to be wholly owned by the Tribe. For this purpose, the incorporator shall file with the Tribal Secretary, when the incorporator files the articles of incorporation of a corporation to be wholly owned by the Tribe, a certified copy of a resolution of the Tribal Council authorizing the formation of the corporation.

(2) The consent of the board of directors of the corporation wholly owned by the Tribe shall be required prior to the incorporation under this Code of a subsidiary corporation to be wholly owned by a parent corporation that is wholly owned by the Tribe. For this purpose, the incorporator shall file with the Tribal Secretary, when the incorporator files the articles of incorporation of a subsidiary corporation to be wholly owned by a parent corporation that is wholly owned by the Tribe, a certified copy of a resolution of the board of the parent corporation authorizing the formation of the subsidiary corporation.

(3) The articles of a corporation wholly owned, directly or indirectly, by the Tribe and subject to the provisions of this chapter shall expressly so state and when accepting the articles for filing, the administrator shall note that the corporation is governed by the provisions of this Code applicable to wholly owned tribal corporations.

**9.3 Special powers, privileges, and immunities.**

The special powers, privileges and immunities described in this section shall be available to a corporation wholly owned, directly or indirectly, by the Tribe.

(1) Jurisdictional and tax immunities. All of the rights, privileges and immunities of the Tribe concerning federal, state, or local taxes, regulations and jurisdiction are hereby conferred on all tribal corporations wholly owned, directly or indirectly, by the Tribe to the same extent that the Tribe would have such rights, privileges and immunities if it engaged in the activities undertaken by the corporation. Absent consent by the corporation, a corporation wholly owned, directly or indirectly, by the Tribe shall not be subject to taxation by the Tribe, except to the extent that such taxation is necessary and reasonably appropriate to compensate the Tribe for services provided to the corporation by the Tribe.

(2) Sovereign Immunity. The sovereign immunity of the Tribe is hereby conferred on all tribal corporations wholly owned, directly or indirectly, by the Tribe. A corporation wholly owned, directly or indirectly, by the Tribe shall have the power to sue and is authorized to

consent to be sued in the court, and in all other courts of competent jurisdiction, provided, however, that:

(a) no such consent to suit shall be effective against the corporation unless such consent is:

(i) explicit,

(ii) contained in a written contract or commercial document to which the corporation is a party, and

(iii) specifically approved by the board of directors of the corporation, and

(b) any recovery against such corporation shall be limited to the assets of the corporation. Any consent to suit may be limited to the court or courts in which suit may be brought, to the matters that may be made the subject of the suit and to the assets or revenues of the corporation against which any judgment may be executed.

#### **9.4 Liability of Tribe as a shareholder.**

Neither the Tribe nor any member of the Tribal Council shall be under any obligation to a corporation wholly owned, directly or indirectly, by the Tribe or to the creditors of any such corporation and the Tribe shall not be deemed to have waived any of the Tribe's privileges or immunities if the Tribe incorporates, owns or operates a corporation, directly or indirectly.

### CHAPTER 10 SEVERABILITY; PENALTIES

#### **10.1 Severability.**

If the court shall adjudge to be invalid or unconstitutional any clause, sentence, paragraph, section, article or part of this Code, such judgment or decree shall not affect, impair, invalidate or nullify the remainder of this Code, but the effect thereof shall be confined to the clause, sentence, paragraph, section, article or part of this Code as adjudged to be invalid or unconstitutional.

#### **10.2 Penalties.**

The Tribal Court shall have the authority to determine, apply and enforce appropriate remedies and penalties, including, but not limited to, civil fines, for violations of this Code, or of the articles of incorporation or bylaws of any corporation formed pursuant to this Code. The remedies available to corporations and their shareholders, shall include declaratory and injunctive relief, and special writs of mandamus, to compel actions necessary to secure the rights, obligations or privileges of such parties, whether or not those rights, obligations or privileges arise under this Code. A prevailing plaintiff in any action shall be awarded costs and reasonable attorneys fees.

If it appears at any stage of a proceeding in the court that the Tribe is, or is likely to be, interested therein, or that it is a matter of general public interest, the court shall order that a copy of the complaint or petition be served upon the Tribal Council in the same manner prescribed for serving a summons in a civil action. The Tribal Council shall intervene in a proceeding when the Tribal Council determines that the public interest requires it, whether or not the Tribal Council has been served.

## EXPLANATION OF MODEL ARTICLES OF INCORPORATION

“Articles of incorporation” is the term used to refer to a corporation’s organizing instrument. Section III.B. contains an example of drafted articles of incorporation and is discussed in detail in this section. Any version of the articles of incorporation must conform with the Tribe’s constitution, business code, and other applicable law. Thus, no one model will apply equally to each Tribe. This Guide, instead, offers an example of articles of incorporation for a tribally chartered corporation and walks through potential options for each section provided in the model articles.

I. *Name.* The Articles of Incorporation should state the name of the corporation. The name of the corporation under a tribally chartered corporation may be anything the Tribe so chooses, so long as the name chosen complies with the Tribe’s Business Corporation Code and other tribal law.

II. *Purpose.* The Articles should state the corporate purposes of the tribal corporation. Michigan law provides that a business corporation may make a general statement that “the corporation is formed to engage in an activity within the purposes for which a corporation may be organized” under the State Corporations Act. MCL 450.1202(b). Michigan Nonprofit corporations cannot, however, make such a general statement. They must state the corporate purposes with specificity. MCL 450.2202(b). The manner by which the Tribe decides to state the corporate purposes is within the discretion of the Tribe, as permitted by the Tribe’s statute or business code.

III. *Definitions.* This section may be very fluid and should contain definitions for all relevant terms contained in the Articles of Incorporation.

IV. *Jurisdiction.* This Article is used to define the jurisdiction in which the Articles shall apply. This is an example of a permissive article that is not required, but the Tribe may decide to include it if the Tribe wishes to state with specificity where the articles shall apply.

V. *Duration.* The Tribe may chose the duration of the corporation, including a perpetual duration. The Model Business Corporation Code provides that the Articles must state the duration of the corporation, which may be perpetual.

VI. *Principal Place of Business; Resident Agent.* The Articles should contain the principal place of business for the corporation. The principal place of business could be located within the Tribe’s territorial jurisdiction. The Tribe may include in its Business Corporation Code whether the corporation must have its principal place of business within the Tribe’s territorial jurisdiction or not as well as whether the resident agent’s residence must be within the Tribe’s territorial jurisdiction. Regardless of the Tribe’s decision on this point, the Articles must comply with the Tribe’s Business Corporation Code. The Articles should also state the street address of the corporation’s registered office and the mailing address, if it is different, as well as the corporation’s resident agent at that address.

VII. *Corporate Powers; Directors; Officers.* This section is of the utmost importance for tribally chartered corporations. The Tribe will need to decide how to structure the division of

authority between the corporation and the Tribal Council and Executive Branch of the Tribe. As discussed above in Section II.E., an advantage of tribally chartered corporations is that the day-to-day operations of the corporation can be free from the effects of the political process. Thus, granting the Board the authority to manage the corporation is vital to this model's success. Again, this article should align with the Tribe's Business Corporation Code, which should detail the separation of duties between the tribal government and the Board.

The Tribe has flexibility in its Articles as to what duties it assigns to the Board versus any duties or oversight granted to the Tribe. Generally, the Board of Directors has some degree of autonomy from the elected leadership within the Tribe. Granting too much autonomy, however, may reduce the likelihood that the corporation may be able to share the same immunity from suit as the Tribe itself. In the Tribe's Business Corporation Code or in the articles of incorporation, the Tribe may want to address the qualifications necessary to become a Director, including tribal membership, business experience, or other criteria.

The Tribe may also want to allow the Board to appoint officers to run the daily operations of the corporation, while the Board oversees and governs the corporation. The details of the structure are left to the Tribe to decide. The Model Articles of Incorporation have the Board of Directors as the decision-makers for the corporation, with an option to appoint officers to handle daily activity.

Finally, the Tribe will also want to address how to—and who has the authority to—remove Directors. There are several options that a tribal corporation could choose for its articles. The power to remove could lie entirely with the Tribal Council. The power could be divided between the Board and the Tribal Council, or the Executive Branch of the Tribe could be involved. The Model Articles attempt to strike a balance by providing that a majority of the Board may remove a Board member, with or without cause and that a majority of the Tribal Council may remove a Board member, for cause, after notice and a hearing. This structure attempts to limit any pressure that the political process may place on tribal corporations by requiring that the Tribal Council follow an established procedure and only be allowed to remove a Director for cause. The discretionary decisions to remove reside with the remaining Board members.

VIII. *Bylaws.* The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation. If there is any inconsistency between the two, then the articles shall prevail. Generally, the initial bylaws of the corporation shall be adopted by the initial incorporators, the shareholders, or the Board. Subsequent amendments or repeals of the bylaws may be made by the shareholders, the Tribe, or by the Board, unless the articles or bylaws specifically provide otherwise.

IX. *Immunities of the Corporation.* This article is also very important to the Tribe and to the corporation. This article extends the Tribe's rights, privileges, and immunities related to federal, state, and local taxes, regulation, and jurisdiction. There is some debate, as discussed above, as to the tax treatment of tribally chartered corporations, but the IRS has not yet issued any guidance stating that entities like this will not receive the same tax treatment as a Tribe. This article also allows the Tribe to extend its sovereign immunity to the corporation. There may

also be some issues with this action, *see above*, but this article is important to protect the corporation from suit. The corporation, under this article, will be able to waive sovereign immunity, to an extent, without returning to the Tribal Council each time it signs a new contract. Also vitally important in this article is that the Tribe limit its liability and potential waiver of immunity in the articles by distinguishing itself from the corporation.

X. *Authorized Shares.* This article should describe the number of authorized shares of stock, if any. It should also address how dividends will be paid.

XI. *Incorporators.* The Articles should state the names and addresses of all the incorporators.

XII. *Approval and Amendment.* This is a permissible article, but not required. The Business Corporation Code should set forth the procedure for approving and amending the articles, but this may be included in the articles as well.

XIII. *Effective Date.* This provision should align the Tribe's Business Corporation Code as well as the Tribe's Constitution and other law.

MODEL ARTICLES OF INCORPORATION FOR  
A TRIBALLY CHARTERED CORPORATION

**ARTICLE I. NAME OF THE CORPORATION**

Section 1.01. The name of the corporation is [NAME].

**ARTICLE II. PURPOSE OF THE CORPORATION**

Section 2.01. The purposes for which the corporation is organized are to engage in any lawful act or activity for which corporations may be organized under the [TRIBE’S] Business Corporation Act.

**ARTICLE III. DEFINITIONS**

The following definitions shall apply to this Code:

Section 3.01. “*Articles*” means these Articles of Incorporation.

Section 3.02. “*Board of Directors*” or “*Board*” means the Board of Directors of the Corporation.

Section 3.03. “*Bylaws*” means the bylaws of the Corporation, which may be adopted under Article VIII.

Section 3.04. “*Corporation*” means the [NAME].

Section 3.05. “*Director(s)*” means a member of the Board.

Section 3.06. “*Tribal Constitution*” means the [TRIBE’S CONSTITUTION].

Section 3.07. “*Tribal Council*” means the tribal council of the [TRIBE].

Section 3.08. “*Tribe*” means [TRIBE].

**ARTICLE IV. JURISDICTION**

Section 4.01. The provisions of these Articles of Incorporation shall apply to the fullest extent of the sovereign jurisdiction of the [TRIBE], as authorized by the Tribal Constitution, [ANY OTHER APPLICABLE LAW], and applicable federal law. The provisions of these Articles of Incorporation shall apply to and be in conformity with all agreements and other cooperative arrangements entered into by the [TRIBE] designed to ensure economic self-sufficiency for the [TRIBE].

**ARTICLE V. DURATION**

Section 5.01. The term of existence of the Corporation shall be perpetual.

**ARTICLE VI. PRINCIPAL PLACE OF BUSINESS; RESIDENT AGENT**

Section 6.01. The Corporation’s principal office for the transaction of business shall be within the [TRIBAL BOUNDARIES] in the State of Michigan. The Corporation may have other offices, either within or without the [TRIBE’S] boundaries as needed.

Section 6.02. The name of the resident agent is [NAME].

Section 6.03. The street address of the location of the registered office is [ADDRESS].

Section 6.04. The mailing address of the registered office if different than above is [ADDRESS].

**ARTICLE VII. CORPORATE POWERS, DIRECTORS, OFFICERS**

Section 7.01. Manner of Exercising Corporate Powers. The corporate powers of the Corporation are to be exercised by the Board of Directors. Matters to be voted on by the Board shall be approved if a majority of the Directors present (in person by proxy) at a meeting of the Directors vote in favor of such action.

Upon written notice of the time and place and purpose or purposes of any special meeting, any of the Directors, in between regular meetings of the Board, may consent in writing to any specific action to be taken by the Corporation which, if approved by a majority of the Directors at such special meeting, including those consenting in writing, shall be valid as a corporate action as though authorized at a regular meeting of the Board of Directors. The minutes of such approval and actions shall be fully recorded, each written consent shall be made a part thereof, and such minutes and written consent shall be reviewed at the next regular meeting of the Board of Directors.

Section 7.02. Initial Board of Directors. The initial Board of Directors shall consist of [NUMBER] of Directors. The names and addresses and terms of the initial Board of Directors are as follows:

**Director’s Name/Address**

**Date of Term Expiration**

Upon the selection of the initial Board, the Tribal Council [OR EXECUTIVE] shall stagger the terms of the initial Directors, by lot, so that one Director will serve an initial term of one year, [NUMBER] Directors will serve an initial term of two years, and [NUMBER] Directors will serve an initial term of three years.

Section 7.03. Directors. The Board of Directors shall consist of no less than [NUMBER] Directors and no more than [NUMBER] Directors. A Director shall be selected by

the [TRIBAL COUNCIL/EXECUTIVE/TRIBAL COUNCIL AND THE EXECUTIVE]. At least [NUMBER] Director of the Corporation shall be a member of the Tribal Council. At least [NUMBER] Director shall be a member of the [TRIBE], but not be a member of the Tribal Council. [NUMBER] Directors shall be persons experienced in business and/or financial management and need not be a member of the Tribe. All Directors shall hold office for a period of [NUMBER] years and shall continue to serve until their successors are duly selected and qualified. Terms of Directors shall be staggered so that one-third of the Directors shall be selected each calendar year.

Section 7.04. Quorum of Directors. A majority of the Directors holding office at the time of a meeting of the Board shall constitute a quorum for the transaction of any business.

Section 7.05. Filling Vacancies. Vacancies on the Board of Directors shall be filled by the [TRIBAL COUNCIL OR EXECUTIVE].

Section 7.06. Resignation; Removal. Any Director may resign from office at any time by providing written notice to the Corporation. A Director may be removed, with or without cause, by an affirmative vote of the majority of other Directors. The Tribal Council may also initiate removal proceedings to remove one or more Directors, for cause, if, after notice and a hearing are provided to the Directors at whom removal proceedings are directed, a majority of the Tribal Council determines that the Director(s) specifically and substantially failed to perform his or her duties as Director.

Section 7.07. Officers. The Board may appoint the following officers: a President, Vice-President, Secretary, and Treasurer. The President and the Vice-President shall be Tribal members. The Board may appoint other officers as it deems necessary to achieve the Corporation's purposes. The Board shall appoint the officers at each annual meeting, unless the Board specifies a different time for such appointment. Officers shall serve until the next annual meeting and until his or her successor assumes office. Officers may resign by delivering written notice to the President or to the Board. A resignation shall be effective upon receipt, unless otherwise provided by the terms thereof. The Board may remove an officer, with or without cause. The Board may provide for the duties of an officer in the Bylaws of the Corporation, or as by resolution of the Board that is not inconsistent with the bylaws.

## **ARTICLE VIII. BYLAWS**

Section 8.01. The Board of Directors, at any regular or special meeting, is authorized to adopt, alter, amend, or repeal Bylaws and to adopt new Bylaws not inconsistent with the applicable law or these Articles of Incorporation, by an affirmative vote of a majority of the Directors.

## **ARTICLE IX. OPERATIONAL REQUIREMENTS**

Section 9.01. Assets of the Corporation. All assets acquired by the Corporation shall belong to the Corporation as a distinct corporate enterprise of the Tribe.

Section 9.02. Fiscal Year. The fiscal year of the Corporation shall be [calendar year/determined by the Board].

Section 9.03. Books and records. The Corporation shall maintain, at its principal place of business, all financial books and records, all minutes of the Board meetings, and all other material books, records, documents, correspondence, and contracts. All such materials shall be made available, at a reasonable time, for inspection and copying by the Tribal Council, any duly authorized representative of the Tribal Council, or any Director.

Section 9.04. Report to Tribal Council. Within 60 days of the close of the Corporation's fiscal year, the Corporation shall prepare and deliver to the Tribal Council an annual report and audited financial statement, including a balance sheet and a statement of income and expenses, including comparative figures from the preceding fiscal year.

**ARTICLE X. IMMUNITIES OF THE CORPORATION [This Article presents an example of one possible manner of addressing immunity issues. Tribal legal counsel should ensure that any immunity issues addressed in the Code or in the Articles complies with the tribe's constitution].**

Section 10.01. Jurisdictional Immunity of the Corporation. The [TRIBE] confers on the Corporation all of the Tribe's rights, privileges, and immunities concerning federal, state, and local taxes, regulation, and jurisdiction, to the same extent that the Tribe has such rights, privileges, and immunities, if it engaged in the business of the Corporation.

Section 10.02. Sovereign Immunity of the Corporation. The [TRIBE] confers on the Corporation sovereign immunity from suit to the same extent that the Tribe would have such immunity if the Tribe engaged directly in the business of the Corporation. The Corporation shall have the power to sue and is authorized to consent to be sued in the [TRIBE'S COURT] or another court of competent jurisdiction; provided, however, that such consent shall be explicit, in a written contract or commercial document to which the Corporation is a party, the Board of Directors specifically approved the written instrument, and any recovery against the Corporation shall be limited to the assets of the Corporation.

Consent to suit may be limited to the court or courts in which suit may be brought, to the matters that may be made the subject of the suit, and to the assets or revenues of the Corporation against which any judgment may be executed. The Corporation's consent to suit shall in no way extend to, or be deemed a waiver of, the Tribe's rights, privileges, and immunities. The Tribe shall not be liable for the payment or performance of any of the obligations of the Corporation, and no recourse shall be had against any assets or revenues of the Tribe in order to satisfy the obligations of the Corporation. The sovereign immunity of the Corporation shall not extend to actions against the Corporation by the Tribe.

**ARTICLE XI. AUTHORIZED SHARES**

Section 11.01. The Corporation shall be authorized to issue [NUMBER] shares, which shall be held by the [TRIBE] pursuant to the [TRIBE'S] Business Corporation Code.

Section 11.02. Dividends shall be paid in accordance with the Business Corporation Code.

**ARTICLE XII. INCORPORATORS**

Section 12.01. The names of the incorporators and their respective places of residence are as follows:

<b>NAME</b>	<b>RESIDENCE</b>
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**ARTICLE XIII. APPROVAL AND AMENDMENT**

Section 13.01. Approval of Articles. These Articles of Incorporation shall be issued and become effective upon their adoption by the Tribal Council in accordance with the Tribe's Business Corporation Code.

Section 13.02. Amendment of Articles. The Board of Directors of the Corporation may, by [Majority] vote, amend these Articles, provided that any amendment is ratified by the Tribal Council.

**ARTICLE XIV. EFFECTIVE DATE.**

The effective date of these Articles is [DATE].

## MODEL TRIBAL LIMITED LIABILITY COMPANY CODE

A CODE for the organization and regulation of limited liability companies; to prescribe their duties, rights, powers, immunities, and liabilities; and to prescribe penalties for violations of this Code. **[NOTE: THIS CODE SERVES AS AN EXAMPLE LIMITED LIABILITY COMPANY CODE. IT IS NOT COMPREHENSIVE AND WILL NOT COMPLY WITH EACH TRIBE'S EXISTING LAWS AND CONSTITUTION. THE TRIBE'S LEGAL COUNSEL SHOULD REVIEW ANY PROPOSED CODE PRIOR TO ITS ADOPTION.]**

### CHAPTER 1 GENERAL PROVISIONS

#### **1.1 Short Title.**

This Code shall be known and cited to as “[TRIBE’S] Limited Liability Company Code.”

#### **1.2 Definitions.**

(1) “Administrator” means the [TRIBAL SECRETARY/OTHER PERSON/ENTITY] authorized by law to administer this Code, or his or her designated representative.

(2) “Articles of organization” means the original documents filed to organize a limited liability company, as amended or restated by certificates of correction, amendment, or merger, by restated articles, or by other instruments filed or issued under any statute.

(3) “Constituent” means a party to a plan of merger, including the survivor.

(4) “Contribution” means anything of value that a person contributes to the limited liability company as a prerequisite for, or in connection with, membership, including cash, property, services performed, or a promissory note or other binding obligation to contribute cash or property, or to perform services.

(5) “Corporation” means any of the following:

(a) A corporation formed under the [TRIBE’S] Business Corporation Code.

(b) A corporation formed under another statute of the Tribe for a purpose for which a corporation may be formed under the business corporation act.

(6) “Distribution” means a direct or indirect transfer of money or other property or the incurrance of indebtedness by a limited liability company to or for the benefit of its members or assignees of its members in respect of the members' membership interests.

(7) “Electronic transmission” or “electronically transmitted” means any form of communication that meets all of the following:

(a) It does not directly involve the physical transmission of paper.

(b) It creates a record that may be retained and retrieved by the recipient.

(c) It may be directly reproduced in paper form by the recipient through an automated process.

(8) “Limited liability company” or “Company” means an entity that is an unincorporated membership organization formed under this Code.

(9) “Majority in interest” means a majority of votes as allocated by an operating agreement, or by the statute in the absence of an allocation by operating agreement, and held by members entitled to vote on a matter submitted for a vote by members.

(10) “Manager” or “managers” means a person or persons designated to manage the limited liability company pursuant to a provision in the articles of organization stating that the business is to be managed by or under the authority of managers.

(11) “Member” or “Owner” means a Person that is a member of a limited liability company or has ownership interest in a limited liability company.

(12) “Membership interest” or “interest” means a member’s rights in the limited liability company, including, but not limited to, any right to receive distributions of the limited liability company’s assets and any right to vote or participate in management.

(13) “Operating agreement” means a written agreement by the member of a limited liability company that has 1 member, or between all of the members of a limited liability company that has more than 1 member, pertaining to the affairs of the limited liability company and the conduct of its business. The term includes any provision in the articles of organization pertaining to the affairs of the limited liability company and the conduct of its business.

(14) “Organizer(s)” means the person(s) or entity(ies) which signs and delivers the Articles of Organization for filing to the administrator.

(15) “Person” means an individual, partnership, limited liability company, trust, custodian, estate, association, corporation, governmental entity, or any other legal entity.

(16) “Services in a learned profession” means services rendered by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at-law.

(17) “Surviving company,” “surviving entity,” or “survivor” means the constituent that survives a merger, as identified in the certificate of merger.

(18) “Tribe” means the [TRIBE].

(19) “Tribal corporation” means a corporation incorporated under the Tribe’s Business Corporation Code.

(20) “Tribal Council” means the Tribal Council of the [TRIBE].

(21) “Tribal Court” means the Tribal Court of the [TRIBE].

(22) “Tribal Entity” includes the Tribe, the Tribal Council, a general partnership, limited partnership, a limited liability company, a trust, an estate, an association, a corporation, a program, a department, an administrative agency or any other legal, commercial or governmental entity of the Tribe.

(23) “Vote” means an affirmative vote, approval, or consent.

### **1.3 Sovereign Immunity.**

By the adoption of this Code, the Tribe does not waive its sovereign immunity or consent to suit in any court, federal, tribal or state, and neither the adoption of this Code, nor the incorporation of any limited liability company hereunder, shall by itself be construed to be a waiver of the sovereign immunity of the Tribe or a consent to suit against the Tribe in any court

### **1.4 Applicable Law.**

The companies organized and created under this Code shall be subject to this Code, and all other laws of the Tribe. By organizing and creating a company under this Code, the company and its owners shall be considered to have entered into a consensual relationship with the Tribe and agree to be subject to the full extent of the Tribe’s legislative, regulatory and adjudicatory jurisdiction.

### **1.5 Documents; signatures; requirements.**

(1) One or more persons organizing a limited liability company shall sign the original articles of organization as organizers. The articles shall state the names of the organizers beneath or opposite their signatures.

(2) Any document other than original articles of organization required or permitted to be filed under this Code that this Code requires be executed on behalf of the limited liability company shall be signed by a manager of the company if management is vested in 1 or more managers, by at least 1 member if management remains in the members, or by any authorized agent of the company.

(3) A person may sign a document under this section as an authorized agent of a limited liability company. If the authorization is pursuant to a power of attorney, the power of attorney authorizing the signing of the document by the person need not be sworn to, verified, acknowledged, or filed with the administrator. A document signed by a person under this subsection as an authorized agent of a limited liability company shall state the capacity of the person signing the document.

### **1.6 Documents; filing; delivery; endorsement; returning copy; inspection by public; copies admissible in evidence; effective date; form; fees.**

(1) A document required or permitted to be filed under this Code shall be submitted by delivering the document to the administrator together with the fees and accompanying

documents required by law. The administrator may establish a procedure for accepting delivery of a document submitted under this subsection by facsimile or other electronic transmission.

(2) If a document submitted under subsection (1) substantially conforms to the requirements of this Code, the administrator shall endorse upon it the word “filed” with his or her official title and the date of receipt and of filing and shall file and index the document or a photostatic, micrographic, photographic, optical disc media, or other reproduced copy in his or her office. If requested at the time of the delivery of the document to his or her office, the administrator shall include the hour of filing in the endorsement on the document.

(3) The administrator shall return a copy of a document filed under subsection (2), or, at his or her discretion, the original, to the person who submitted it for filing. The administrator shall mark the filing date on the copy or original before returning it or, if the document was submitted by electronic mail or over the Internet, may provide proof of the filing date to the person who submitted the document for filing in another manner determined by the administrator.

(4) The records and files of the administrator relating to limited liability companies shall be open to reasonable inspection by the public. The administrator may maintain the records or files either in their original form or in a photostatic, micrographic, photographic, optical disc media, or other reproduced form.

(5) The administrator may make copies of any documents filed under this Code or any predecessor act by a photostatic, micrographic, photographic, optical disc media, or other process, and may destroy the originals of the copied documents. A photostatic, micrographic, photographic, optical disc media, or other reproduced copy certified by the administrator, including a copy sent by facsimile or other electronic transmission, is considered an original for all purposes and is admissible in evidence in like manner as an original.

(6) A document filed under subsection (2) is effective at the time it is endorsed unless a subsequent effective time is set forth in the document that is not later than 90 days after the date of delivery.

(7) The administrator may require that a person submit a document described in subsection (1) on a form prescribed by the administrator.

(8) The administrator shall charge 1 of the following nonrefundable fees if expedited filing of a document by the administrator is requested and the administrator shall retain the revenue collected under this subsection and the department shall use it to carry out its duties required by law:

(a) For any filing that a person requests the administrator to complete within 1 hour on the same day as the day of the request, \$1,000.00. The department may establish a deadline by which a person must submit a request for filing under this subdivision.

(b) For any filing that a person requests the administrator to complete within 2 hours on the same day as the day of the request, \$500.00. The

department may establish a deadline by which a person must submit a request for filing under this subdivision.

(c) Except for a filing request under subdivision (a) or (b), for the filing of any formation or qualification document that a person requests the administrator to complete on the same day as the day of the request, \$100.00. The department may establish a deadline by which a person must submit a request for filing under this subdivision.

(d) Except for a filing request under subdivision (a) or (b), for the filing of any other document concerning a limited liability company that a person requests the administrator to complete on the same day as the day of the request, \$200.00. The administrator may establish a deadline by which a person must submit a request for filing under this subdivision.

(e) For the filing of any formation or qualification document that a person requests the administrator to complete within 24 hours of the time the administrator receives the request, \$50.00.

(f) For the filing of any other document concerning an existing limited liability company that a person requests the administrator to complete within 24 hours of the time the administrator receives the request, \$100.00.

### **1.7 Failure to promptly file document; notice of refusal to file; judicial review.**

(1) If the administrator fails promptly to file a document submitted for filing under this Code, the administrator, within 10 days after receipt from the person submitting the document for filing of a written request for the filing of the document, shall give to that person written notice of the refusal to file that states the reasons for the failure to file the document. If the document was originally submitted by electronic transmission, the administrator may give the written notice by electronic transmission.

(2) A person may seek judicial review of the administrator's decision from the Tribal Court.

### **1.8 Documents; inaccurate record or defective execution; certificate of correction; filing; signature; contents; effective date of corrected document.**

(1) If a document relating to a limited liability company filed with the administrator under this Code was at the time of filing an inaccurate record of the action referred to in the document, or was defectively or erroneously executed, or was electronically transmitted and the electronic transmission was defective, the document may be corrected by filing with the administrator a certificate of correction on behalf of the company.

(2) The certificate shall be signed as provided by this Code in the same manner as required for the document being corrected.

(3) The certificate shall set forth the name of the company, the date the document to be corrected was filed by the administrator, the provision in the document as it should have originally appeared, and if the execution was defective, the proper execution.

(4) The corrected document is effective in its corrected form as of its original filing date except as to a person who relied upon the inaccurate portion of the document and was as a result of the inaccurate portion of the document adversely affected by the correction.

## CHAPTER 2

### **2.1 Limited liability company; purpose.**

A limited liability company may be formed under this Code for any lawful purpose for which a corporation or a partnership could be formed, except as otherwise provided by law. A limited liability company formed to provide services in a learned profession, or more than 1 learned profession, shall comply with the tribe's learned profession code.

### **2.2 Limited liability company; formation; filing as evidence that all conditions performed; exception; duration.**

(1) One or more persons, who may or may not become members, may be the organizers of a limited liability company by filing executed articles of organization.

(2) The existence of the limited liability company begins on the effective date of the articles of organization under section 2.6. Filing is conclusive evidence that all conditions precedent required to be performed under this Code are fulfilled and that the company is formed under this Code. The maximum duration of the limited liability company is perpetual unless otherwise provided in the articles of organization.

### **2.3 Tribe as Owner.**

(1) The Tribe shall form or become an Owner of a Tribally owned limited liability company formed under this Code only upon approval of such action by the Tribal Council.

(2) If the Tribe or a Tribal Entity is an Owner of an limited liability company formed under this Code, any action which the Tribe is required or permitted to take with respect to any vote, approval, consent, appointment, direction, or other matter shall be taken in accordance with the Tribal Council's procedures and resolutions or, as to actions related to the managers of a manager-managed limited liability company, as stated in the limited liability company's Operating Agreement approved by the Tribal Council.

(3) If the Tribe is the sole Owner of an limited liability company formed under this Code, such Tribally owned limited liability company shall possess all of the privileges and immunities of the Tribe, including the Tribe's sovereign immunity from suit except to the extent otherwise provided in its operating agreement.

(4) If the Tribe or a Tribal Entity is an Owner with a Majority in Interest in an limited liability company formed under this Code, such limited liability company may possess the

privileges and immunities of the Tribe, including sovereign immunity from suit, to the extent allowed by Federal law, this Code or the limited liability company's Operating Agreement.

(5) In no event shall any manager not an Owner of an limited liability company in which the Tribe is an Owner, bind the Tribe in any manner; provided that the Tribe's interest as an Owner may be bound by manager or Owner actions as stated in this Code and the operating agreement of the limited liability company.

(6) Nothing contained in this Code shall be construed as creating any liability or waiving of sovereign immunity of the Tribe in any manner; provided that the assets of the limited liability company in which the Tribe holds an interest may be subject to liabilities and claims unless otherwise provided herein. In no event shall any action taken by the Tribe as Owner concerning the exercise of any right or privilege or discharge of any duty with respect to an interest in an limited liability company be construed as a waiver of immunity or creation of a liability on the part of the Tribe separate and apart from its interests as an Owner of the limited liability company.

(7) For all Tribally owned limited liability companies, the additional provisions of Chapter 9 of this Code shall apply.

## **2.4 Articles of organization; contents.**

(1) The articles of organization shall contain all of the following:

- (a) The name of the limited liability company.
- (b) The purposes for which the limited liability company is formed. It is sufficient to state substantially, alone or with specifically enumerated purposes, that the limited liability company may engage in any activity for which limited liability companies may be formed under this Code.
- (c) The street address, and the mailing address if different from the street address, of the limited liability company's initial registered office and the name of its initial resident agent at that address.
- (d) If the business of the limited liability company is to be managed by managers, a statement that the business is to be managed by or under the authority of managers.
- (e) The maximum duration of the limited liability company, if other than perpetual.

(2) The articles of organization may contain any provision not inconsistent with this Code or another statute of this state, including any provision that is required or permitted to be in an operating agreement under this Code.

(3) The articles of organization need not set out the powers of the limited liability company as described in section 2.20.

## **2.5 Limited liability company; name; requirements; rights.**

(1) The name of a limited liability company shall contain the words “limited liability company,” or the abbreviation “L.L.C.” or “L.C.,” with or without periods or other punctuation.

(2) The name of a limited liability company formed under or subject to this Code shall conform to all of the following:

(a) Shall not contain a word or phrase, or abbreviation or derivative of a word or phrase, that indicates or implies that the company is formed for a purpose other than the purpose or purposes permitted by its articles of organization.

(b) Shall not contain the word “corporation” or “incorporated” or the abbreviation “corp.” or “inc.”.

(c) Shall distinguish the name in the records in the office of the administrator from all of the following:

(i) The name of a limited liability company.

(ii) The name of a corporation subject to the business corporation code.

(iii) A name reserved, registered, or assumed under this Code, under the business corporation code.

(d) Shall not contain a word or phrase, an abbreviation, or derivative of a word or phrase, the use of which is prohibited or restricted by any other statute of this state.

(3) The fact that a limited liability company name complies with this section does not create substantive rights to the use of the name.

## **2.6 Reserving right to use of name; application; transfer of right.**

(1) A person may reserve the right to use of a limited liability company name by executing and filing with the administrator an application to reserve the name. If the administrator finds that the name is available for use, the administrator shall reserve it for exclusive use of the applicant for a period expiring at the end of the sixth full calendar month following the month in which the application was filed.

(2) The right to exclusive use of a reserved name may be transferred to another person by filing a notice of the transfer, executed by the applicant for whom the name was reserved, and stating the name and address of the transferee.

**2.7 Transacting business under assumed name; certificate; effective period; extension; notice of expiration; rights not created; same name assumed in partnership or joint venture; transfer of assumed name to survivor; use of name by surviving company; assumed name of converted company; certificate of conversion.**

(1) A limited liability company may transact business under an assumed name or names other than its name as set forth in its articles of organization or certificate of authority, if not precluded from use of the assumed name or names under this Code, by filing a certificate stating the true name of the company and the assumed name or names under which business is to be transacted.

(2) A certificate of assumed name is effective, unless terminated by filing a certificate of termination or by the dissolution or withdrawal of the company, for a period expiring on December 31 of the fifth full calendar year following the year in which the certificate of assumed name was filed. The certificate of assumed name may be extended for additional consecutive periods of 5 full calendar years each by filing a similar certificate of assumed name not earlier than 90 days before the expiration of the initial or any subsequent 5-year period.

(3) The administrator shall notify a limited liability company of the impending expiration of a certificate of assumed name not later than 90 days before the expiration of the initial or any subsequent 5-year period described in subsection (2).

(4) Filing a certificate of assumed name under this section does not create substantive rights to the use of a particular assumed name.

(5) The same name may be assumed by 2 or more limited liability companies or by 1 or more limited liability companies and 1 or more corporations, limited partnerships, or other enterprises participating together in a partnership or joint venture. Each participating limited liability company shall file a certificate of assumed name under this section.

(6) A limited liability company participating in a merger, or any other entity participating in a merger under chapter 8, may transfer to the survivor the use of an assumed name for which a certificate of assumed name is on file with the administrator before the merger, if the transfer of the assumed name is noted in the certificate of merger as provided in chapter 8, or other applicable statute. The use of an assumed name transferred under this subsection may continue for the remaining effective period of the certificate of assumed name on file before the merger and the survivor may terminate or extend the certificate in accordance with subsection (2).

(7) A limited liability company surviving a merger may use as an assumed name the name of a merging limited liability company, or the name of any other entity participating in the merger under chapter 8, by filing a certificate of assumed name under subsection (1) or by providing for the use of the assumed name in the certificate of merger. The surviving limited liability company may also file a certificate of assumed name under subsection (1) or provide in the certificate of merger for the use of an assumed name of a merging entity not transferred pursuant to subsection (6). A provision in the certificate of merger pursuant to this subsection is treated as a new certificate of assumed name.

## **2.8 Maintaining registered office and resident agent; service of process, notice, or demand; appointment of agent; annual statement; service of process by mail.**

(1) Each limited liability company authorized to transact business in the [TRIBAL LAND/RESERVATION] shall have and continuously maintain in this state both of the following:

(a) A registered office that may, but need not be, the same as its place of business. [COULD REQUIRE TO BE WITHIN TERRITORIAL JURISDICTION]

(b) A resident agent. The resident agent may be either an individual resident in this [TRIBAL LAND/RESERVATION] whose business office or residence is identical with the registered office or any of the following having a business office identical with the registered office:

(i) A corporation.

(ii) A limited liability company.

(2) The resident agent appointed by a limited liability company is an agent of the company upon whom any process, notice, or demand required or permitted by law to be served upon the company may be served.

(3) A limited liability company authorized to transact business under this Code shall file with the administrator an annual statement executed as provided in section 2.16 containing the name of its resident agent and the address of its registered office in this state. The statement shall be filed not later than February 15 of each year, except that a limited liability company formed after September 30 need not file a statement on the February 15 immediately succeeding its formation or authorization.

(4) If a limited liability company fails to appoint or maintain an agent for service of process, or the agent for service of process cannot be found or served through the exercise of reasonable diligence, service of process may be made by delivering or mailing by registered mail to the administrator a summons and copy of the complaint.

## **2.9 Certificate of good standing.**

(1) Except as provided in this section, from the effective date of the articles of organization as provided in section 2.6 until dissolution for a limited liability company, a limited liability company is entitled to issuance by the administrator, upon request, of a certificate of good standing. A certificate of good standing issued to a limited liability company shall state that it has been validly organized as a limited liability company, that it is validly in existence under the laws of this state, and that it has satisfied its annual filing obligations.

(2) If a limited liability company authorized to transact business in this state fails to file an annual statement required by section 2.16 for 2 consecutive years, the administrator shall notify the company of the consequences of the failure to file under subsection (3).

(3) If a limited liability company does not file all annual statements it has failed to file, and the applicable fees, within 60 days after the administrator's notice under subsection (2) is sent, the limited liability company is not in good standing. A limited liability company that is not in good standing is not entitled to issuance by the administrator of a certificate of good standing described in subsection (1), the name of the company is available for use by another entity filing with the administrator, and the administrator shall not accept for filing any document submitted by the limited liability company other than a certificate of restoration of good standing provided for in subsection (4). A limited liability company that is not in good standing remains in existence and may continue to transact business in this state.

(4) A limited liability company authorized to transact business in this state that is not in good standing under subsection (3) may file a certificate of restoration of good standing, accompanied by the annual statements and fees for all of the years for which they were not filed and paid, and the fee for filing the certificate of restoration of good standing. The certificate shall include all of the following:

(a) The name of the limited liability company at the time it ceased to be in good standing. If that name is not available when the certificate of restoration of good standing is filed, the limited liability company shall select a new name that complies with section 2.13. The new name shall be the name of the limited liability company.

(b) The name of the limited liability company's current resident agent and the address of the current registered office in this state.

(c) A statement that the certificate is accompanied by the annual statements and applicable fees for all of the years for which statements were not filed and fees were not paid.

## **2.10 Resident agent; resignation; notice; appointment of successor; termination of appointment.**

(1) A resident agent of a limited liability company may resign as agent upon filing a written notice of resignation with the administrator and with a member or manager of the limited liability company.

(2) The company shall promptly appoint a successor resident agent.

(3) The appointment of the resigning agent terminates 30 days after the date the notice is filed with the administrator or upon the appointment of a successor, whichever occurs first.

## **2.11 Changing registered office or resident agent; statement; filing; contents; changing business or residence address of resident agent.**

(1) A limited liability company authorized to transact business under this Code may change its registered office or resident agent, or both, upon filing with the administrator a statement executed and setting forth all of the following:

- (a) The name of the limited liability company.
- (b) The address of its then registered office and the new address if the registered office is to be changed.
- (c) The name of its then resident agent and the name of the successor if the resident agent is to be changed.
- (d) A statement that the address of the registered office and the address of the resident agent are identical.
- (e) A statement that the change was authorized in accordance with an operating agreement, or, if not provided for in an operating agreement, by affirmative vote of a majority of the members voting in accordance with section 2.47 or managers voting in accordance with section 2.48.

(2) If a resident agent changes its business or residence address to another place within this state, the resident agent may change the address of the registered office of the limited liability company of which the person is a resident agent by filing a statement as required in subsection (1) and mailing a copy of the statement to the limited liability company. The statement need only to be signed by the resident agent and need not contain the statement required by subsection (1)(e).

## **2.12 Limited liability company; powers.**

Subject to the limitations provided in this Code, any other statute of the tribe, or its articles of organization, a limited liability company has all powers necessary or convenient to effect any purpose for which the company is formed, including all powers granted to corporations in the business corporation code, including to consent to be sued, complain and defend in its name; provided, however, that if an limited liability company is Tribally owned, or wholly owned by another entity which itself is wholly owned by the Tribe, it shall be entitled to and shall enjoy the Tribe's sovereign immunity from suit unless the operating agreement otherwise provides.

## **2.13 Validity of action or transfer of property; asserting lack of capacity or power.**

An act of a limited liability company and a transfer of real or personal property to or by a limited liability company, otherwise lawful, is not invalid because the company was without capacity or power to do the act or make or receive the transfer, except that the lack of capacity or power may be asserted in any of the following:

- (a) In an action by a member against the company to enjoin the doing of an act or the transfer of real or personal property by or to the company.
- (b) In an action by or in the right of the company to procure a judgment in its favor against an incumbent or former member or manager of the company for loss or damage due to an unauthorized act of that member or manager.

(c) In an action or special proceeding by the attorney general to dissolve the company or to enjoin it from the transaction of unauthorized business.

**2.14 Registered office or principal place of business; documents required to be kept.**

A limited liability company shall keep at its registered office or principal place of business all of the following:

(a) A current list of the full name and last known address of each member and manager.

(b) A copy of the articles or restated articles of organization, together with any amendments to the articles.

(c) Copies of the limited liability company's federal, state, and local tax returns and reports, if any, for the 3 most recent years.

(d) Copies of any financial statements of the limited liability company for the 3 most recent years.

(e) Copies of operating agreements.

(f) Copies of records that would enable a member to determine the members' relative shares of the limited liability company's distributions and the members' relative voting rights.

**2.15 Conflict between articles of organization and operating agreement.**

If there is a conflict between the articles of organization and an operating agreement of a limited liability company, the articles of organization shall control.

**2.16 Operating agreement unenforceable.**

An operating agreement of a limited liability company that has 1 member is not unenforceable because only 1 person is a party to the operating agreement.

**2.17 Limited liability company; powers.**

Except as otherwise provided in an operating agreement, a limited liability company may do any of the following:

(a) Indemnify, hold harmless, and defend a member, manager, or other person from and against any and all losses, expenses, claims, and demands sustained by that person, except that the company may not indemnify a person for conduct described in section 2.41(a), (b), or (c).

(b) Purchase and maintain insurance on behalf of a member, manager, or other person against any liability or expense asserted against or incurred by that person, whether or not the company may indemnify that person under subdivision (a).

## **2.18 Liability to third parties.**

The debts, obligations, and liabilities of an limited liability company, whether arising in contract, tort, or otherwise, shall be solely the debts, obligations, and liabilities of the limited liability company. Except as otherwise specifically provided in this Code, an Owner or manager of an limited liability company is not personally liable for any debt, obligation, or liability of an limited liability company, as defined in the operating agreement.

## CHAPTER 3

### **3.1 Members; contribution.**

(1) A contribution of a member to a limited liability company may consist of any tangible or intangible property or benefit to the company, including cash, property, services performed, promissory notes, contracts for services to be performed, or other binding obligation to contribute cash or property or to perform services.

(2) A contribution of an obligation to contribute cash or property or to perform services may be in exchange for a present membership interest or for a future membership interest, including a future profits interest, as provided in an operating agreement.

### **3.2 Promise by member to contribute; enforcement; obligation to perform; rights of company; compromising obligation; enforcement by creditor of original member's obligation.**

(1) A promise by a member to contribute to the limited liability company is not enforceable unless the promise is in writing and signed by the member.

(2) Unless otherwise provided in an operating agreement, a member is obligated to the limited liability company to perform any enforceable promise to contribute cash or property or to perform services, even if the member is unable to perform because of death, disability, or other reason. If a member does not make the required contribution of property or services, the member is obligated, at the option of the limited liability company, to contribute cash equal to that portion of value of the stated contribution that is not made.

(3) The rights of the limited liability company under subsection (2) are in addition to any other rights that the limited liability company may have under an operating agreement or applicable law.

(4) Unless otherwise provided in an operating agreement, a member's obligation to make a contribution or to return money or other property paid or distributed in violation of this Code may be compromised only upon the unanimous vote of the members of the limited liability

company entitled to vote. Notwithstanding a compromise of a member's obligation, a creditor of a limited liability company who extends credit or otherwise acts in reliance on the member's obligation after the member signs a writing that reflects the obligation and before the amendment of the writing to reflect the compromise may enforce the member's original obligation.

### **3.3 Distribution of assets; allocation; manner; basis.**

(1) Distributions of cash or other assets of a limited liability company shall be allocated among the members and among classes of members in the manner provided in an operating agreement. If an operating agreement does not provide for an allocation, distributions shall be allocated as follows:

(a) Prior to the effective date of this Code, on the basis of the value, as stated in the records the limited liability company is required to keep or as determined by any other reasonable method, of the contributions made by each member to the extent that the contributions have been received by the limited liability company and have not been returned.

(b) After the effective date of this Code, except as otherwise provided in subsection (2), in equal shares to all members. A membership interest held by 2 or more persons, whether as fiduciaries, members of a partnership, tenants in common, joint tenants, tenants by the entirety, or otherwise, is considered as held by 1 member for an allocation under this subdivision.

(2) If a limited liability company in existence before the effective date of this Code allocated distributions on the basis of subsection (1)(a), the limited liability company shall continue to allocate distributions pursuant to subsection (1)(a) until the allocation is changed by an operating agreement.

### **3.4 Distribution; conditions for receiving.**

(1) Except as otherwise provided in this Code and subject to subsection (2), a member is entitled to receive a distribution from a limited liability company before the withdrawal of the member from the limited liability company or before the dissolution and winding up of the limited liability company to the extent and at the times or upon the happening of the events specified in an operating agreement.

(2) If an operating agreement does not address a member's right to receive a distribution before the withdrawal of the member from the limited liability company or before the dissolution and winding up of the limited liability company, the unanimous approval of the members is required for any distribution to that member.

### **3.5 Distributions to withdrawing member.**

Until the effective date of withdrawal, a withdrawing member shall share in any distribution made in accordance with section 2.30. An operating agreement may provide for an additional distribution to a withdrawing member. If a provision in an operating agreement

permits withdrawal but is silent on an additional withdrawal distribution, a member withdrawing in accordance with the operating agreement is entitled to receive as a distribution, within a reasonable time after withdrawal, the fair value of the member's interest in the limited liability company as of the date of withdrawal based upon the member's share of distributions as determined under section 2.29.

### **3.6 Distributions; demand, acceptance, and receipt of distribution; form.**

Except as provided in an operating agreement, a member, regardless of the nature of the member's contribution, has no right to demand and receive a distribution from a limited liability company in any form other than cash, and a member may not be compelled to accept from a limited liability company a distribution of an asset in kind to the extent that the percentage of the asset distributed to the member exceeds a percentage of that asset that is equal to the percentage in which the member shares in distributions from the limited liability company.

### **3.7 Distributions prohibited under certain situations; exceptions; effect of distribution under subsection (1); remedies available; future payments to withdrawing members; effect of subsection (1) on third party; asserting legal or equitable rights.**

(1) Except as otherwise provided in subsection (5), a distribution shall not be made if, after giving the distribution effect, 1 or more of the following situations would occur:

(a) The limited liability company would not be able to pay its debts as they become due in the usual course of business.

(b) The limited liability company's total assets would be less than the sum of its total liabilities plus, unless an operating agreement provides otherwise, the amount that would be needed, if the limited liability company were to be dissolved at the time of the distribution, to satisfy the preferential rights of other members upon dissolution that are superior to the rights of the member or members receiving the distribution.

(2) The limited liability company may base a determination that a distribution is not prohibited under subsection (1) on financial statements prepared on the basis of accounting practices and principles that are reasonable under the circumstances, on a fair valuation, or on another method that is reasonable under the circumstances.

(3) The effect of a distribution under subsection (1) is measured at the following times:

(a) Except as provided in subsection (5), in the case of a distribution to a withdrawing member, as of the earlier of the date money or other property is transferred or debt incurred by the limited liability company, or the date the member ceases to be a member.

(b) In the case of any other distribution of indebtedness, as of the date the indebtedness is authorized if distribution occurs within 120 days after the date of

authorization, or the date the indebtedness is distributed if it occurs more than 120 days after the date of authorization.

(c) In all other cases, as of the date the distribution is authorized if the payment occurs within 120 days after the date of authorization, or the date the payment is made if it occurs more than 120 days after the date of authorization.

(4) At the time a member becomes entitled to receive a distribution, the member has the status of, and is entitled to all remedies available to, a creditor of the limited liability company with respect to the distribution. A company's indebtedness to a member incurred by reason of a distribution made in accordance with this section is at parity with the company's indebtedness to its general, unsecured creditors except as otherwise agreed.

(5) If the limited liability company distributes an obligation to make future payments to a withdrawing member, and distribution of the obligation would otherwise be prohibited under subsection (1) at the time it is made, the company may issue the obligation and the following apply:

(a) The portion of the obligation that could have been distributed without violating subsection (1) is indebtedness to the withdrawing member under subsection (4).

(b) All of the following apply to the portion of the obligation that exceeds the amount of the obligation that is indebtedness to the withdrawing member under subdivision (a):

(i) At any time prior to the due date of the obligation, payments of principal and interest may be made as a distribution to the extent that a distribution may then be made under this section.

(ii) At any time on or after the due date, the obligation to pay principal and interest is considered distributed and treated as indebtedness described in subsection (4) to the extent that a distribution may then be made under this section.

(c) Unless otherwise provided in an agreement with the withdrawing member, the obligation is considered a liability or debt for purposes of determining whether distributions other than payments on the obligation may be made under this section, except for purposes of determining whether distributions may be made to members having preferential rights superior to the rights of the withdrawing member.

(6) The enforceability of a guaranty or other undertaking by a third party relating to a distribution is not affected by the prohibition of the distribution under subsection (1).

(7) If a claim is made to recover a distribution made contrary to subsection (1) or if a violation of subsection (1) is raised as a defense to a claim based upon a distribution, this section does not prevent the person receiving the distribution from asserting a right of rescission or other legal or equitable rights.

### **3.8 Distribution; violating operating agreement; liability of members or managers; presumption of assent; knowledge of violation; contribution; commencement of proceeding.**

(1) A member or manager that votes for or assents to a distribution in violation of an operating agreement or section 2.33 is personally liable, jointly and severally, to the limited liability company for the amount of the distribution that exceeds what could have been distributed without violating the operating agreement or section 2.33 if it is established that the member or manager did not comply with section 2.38.

(2) For purposes of liability under subsection (1), a member or manager entitled to participate in a decision to make a distribution is presumed to have assented to a distribution unless the member or manager does 1 of the following:

(a) Votes against the distribution.

(b) Files a written dissent with the limited liability company within a reasonable time after the member or manager has knowledge of the decision.

(3) A member that accepts or receives a distribution with knowledge of facts indicating it is in violation of an operating agreement or section 2.33 is liable to the limited liability company for the amount the member accepts or receives that exceeds the member's share of the amount that could have been distributed without violating section 2.33 or the operating agreement.

(4) Each member or manager held liable under subsection (1) for an unlawful distribution is entitled to contribution from each other member or manager who could be held liable under subsection (1) or (3). The contribution of a person held liable under both subsections (1) and (3) shall not exceed the person's liability under either subsection (1) or (3), whichever is greater.

(5) A proceeding under this section is barred unless it is commenced within 2 years after the date on which the effect of the distribution is measured under section 2.33.

## CHAPTER 4

### **4.1 Management vested in members.**

Unless the articles of organization state that the business of the limited liability company is to be managed by 1 or more managers, the business of the limited liability company shall be managed by the members, subject to any provision in an operating agreement restricting or enlarging the management rights and duties of any member or group of members. If management is vested in the members, both of the following apply:

(a) The members are considered managers for purposes of applying this Code, including section 2.40 regarding the agency authority of managers, unless the context clearly requires otherwise.

(b) The members have, and are subject to, all duties and liabilities of managers and to all limitations on liability and indemnification rights of managers.

#### **4.2 Managers; delegation; qualifications; number; notice of delegation.**

(1) The articles of organization may provide that the business of the limited liability company shall be managed by or under the authority of 1 or more managers. The delegation of the management of a limited liability company to managers is subject to any provision in the articles of organization or in an operating agreement restricting or enlarging the management rights and duties of any manager or group of managers.

(2) An operating agreement may prescribe qualifications for managers, including a requirement that the managers be members.

(3) The number of managers shall be specified in or fixed in accordance with an operating agreement.

(4) If the articles of organization delegate management of a limited liability company to managers, the articles of organization constitute notice to third parties that managers, not members, have the agency authority described in section 2.40.

#### **4.3 Managers; selection; vote; removal; notice.**

(1) A vote of a majority in interest of the members entitled to vote in accordance with section 502(1) is required to select 1 or more managers to fill initial positions or vacancies.

(2) The members may remove 1 or more managers with or without cause unless an operating agreement provides that managers may be removed only for cause.

(3) The members may remove a manager for cause only at a meeting called expressly for that purpose, and the manager shall have reasonable advance notice of the allegations against that manager and an opportunity to be heard at the meeting.

#### **4.4 Managers; duties; action for failure to perform duties.**

(1) A manager shall discharge the duties of manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company.

(2) In discharging the manager's duties, a manager may rely on information, opinions, reports, or statements, including, but not limited to, financial statements or other financial data, if prepared or presented by any of the following:

(a) One or more other managers or members or employees of the limited liability company whom the manager reasonably believes to be reliable and competent in the matter presented.

(b) Legal counsel, public accountants, engineers, or other persons as to matters the manager reasonably believes are within the person's professional or expert competence.

(c) A committee of managers of which the manager is not a member if the manager reasonably believes the committee merits confidence.

(3) A manager is not entitled to rely on the information, opinions, reports, or statements described in subsection (2) if the manager has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) unwarranted.

(4) A manager is not liable for an action taken as a manager or the failure to take an action if the manager performs the duties of the manager's office in compliance with this section.

(5) Except as otherwise provided in an operating agreement or by vote of the members pursuant to section 2.45(4) and (7), a manager shall account to the limited liability company and hold as trustee for it any profit or benefit derived by the manager from any transaction connected with the conduct or winding up of the limited liability company or from any personal use by the manager of its property.

(6) An action against a manager for failure to perform the duties imposed by this Code shall be commenced within 3 years after the cause of action has accrued or within 2 years after the cause of action is discovered or should reasonably have been discovered by the complainant, whichever occurs first.

#### **4.5 Managers; voting requirements.**

(1) Except as otherwise provided in the articles of organization or an operating agreement, voting by managers shall be as provided in this section.

(2) If management of a limited liability company is delegated to managers under section 402 and the limited liability company has more than 1 manager, each manager has 1 vote and the vote of a majority of all managers is required to decide or resolve any difference on any matter connected with carrying on the business of the limited liability company that is within the scope of the managers' authority.

(3) If management of a limited liability company remains in the members, section 2.45 applies to voting by the members.

#### **4.6 Manager as agent.**

A manager is an agent of the limited liability company for the purpose of its business, and the act of a manager, including the execution in the limited liability company name of any

instrument, that apparently carries on in the usual way the business of the limited liability company of which the manager is a manager binds the limited liability company, unless both of the following apply:

(a) The manager does not have the authority to act for the limited liability company in that particular matter.

(b) The person with whom the manager is dealing has actual knowledge that the manager lacks authority to act or the articles of organization or this Code establishes that the manager lacks authority to act.

#### **4.7 Managers; eliminating or limiting liability; exceptions.**

A provision in the articles of organization or an operating agreement may eliminate or limit the monetary liability of a manager to the limited liability company or its members for breach of any duty established in section 2.38, except that the provision does not eliminate or limit the liability of a manager for any of the following:

(a) The receipt of a financial benefit to which the manager is not entitled.

(b) Liability under section 2.34.

(c) A knowing violation of law.

(d) An act or omission occurring before the date when the provision becomes effective.

#### **4.8 Manager or agent with interest in company; effect; majority vote by members with no interest in transaction; claims.**

(1) Except as otherwise provided in an operating agreement, a transaction in which a manager or agent of a limited liability company is determined to have an interest shall not, because of the interest, be enjoined, be set aside, or give rise to an award of damages or other sanctions, in a proceeding by a member or by or in the right of the company, if the manager or agent interested in the transaction establishes any of the following:

(a) The transaction was fair to the company at the time entered into.

(b) The material facts of the transaction and the manager's or agent's interest were disclosed or known to the managers and the managers authorized, approved, or ratified the transaction.

(c) The material facts of the transaction and the manager's or agent's interest were disclosed or known to the members entitled to vote and they authorized, approved, or ratified the transaction.

(2) Except as otherwise provided in the articles of organization or an operating agreement, a transaction is authorized, approved, or ratified for purposes of subsection (1)(b) if it receives the affirmative vote of a majority of the managers that have no interest in the transaction. The presence of, or a vote cast by, a manager with an interest in the transaction does not affect the validity of an action taken under subsection (1)(b).

(3) Except as otherwise provided in the articles of organization or an operating agreement, a transaction is authorized, approved, or ratified for purposes of subsection (1)(c) if it receives a majority of votes cast by the members entitled to vote that do not have an interest in the transaction.

(4) Satisfying the requirements of subsection (1) does not preclude other claims relating to a transaction in which a manager or agent is determined to have an interest. Those claims shall be evaluated under principles of law applicable to a transaction in which a similarly situated person does not have an interest.

## CHAPTER 5

### **5.1 Members; admission; liability for acts, debts, or obligations.**

(1) A person may be admitted as a member of a limited liability company in connection with the formation of the limited liability company in any of the following ways:

(a) If an operating agreement includes requirements for admission, by complying with those requirements.

(b) If an operating agreement does not include requirements for admission, if either of the following are met:

(i) The person signs the initial operating agreement.

(ii) The person's status as a member is reflected in the records, tax filings, or other written statements of the limited liability company.

(c) In any manner established in a written agreement of the members.

(2) A person may be admitted as a member of a limited liability company after the formation of the limited liability company in any of the following ways:

(a) If the person is acquiring a membership interest directly from the limited liability company, by complying with the provisions of an operating agreement prescribing the requirements for admission or, in the absence of provisions prescribing the requirements for admission in an operating agreement, upon the unanimous vote of the members entitled to vote.

(b) If the person is an assignee of a membership interest.

(c) If the person is becoming a member of a surviving limited liability company as the result of a merger or conversion approved under this Code, as provided in the plan of merger or plan of conversion.

(3) A limited liability company may admit a person as a member that does not make a contribution or incur an obligation to make a contribution to the limited liability company.

(4) Unless otherwise provided by law or in an operating agreement, a person that is a member or manager, or both, of a limited liability company is not liable for the acts, debts, or obligations of the limited liability company.

## **5.2 Members; voting rights.**

(1) An operating agreement may establish and allocate the voting rights of members and may provide that certain members or groups of members have only limited or no voting rights. If an operating agreement does not address voting rights, votes are allocated as follows:

(a) Before the effective date of this Code, the members of a limited liability company shall vote in proportion to their shares of distributions of the company, as determined under section 2.29.

(b) After the effective of this Code, except as otherwise provided in subsection (2), each member of a limited liability company has 1 vote. For purposes of this subdivision, a membership interest held by 2 or more persons, whether as fiduciaries, members of a partnership, tenants in common, joint tenants, tenants by the entirety, or otherwise, is considered held by 1 member.

(2) If a limited liability company in existence before the effective date of this Code allocated votes on the basis of subsection (1)(a), the company shall continue to allocate votes pursuant to subsection (1)(a) until the allocation is changed by an operating agreement.

(3) If a membership interest that has voting rights is held by 2 or more persons, whether as fiduciaries, members of a partnership, tenants in common, joint tenants, tenants by the entirety, or otherwise, the voting of the interest shall be in accordance with the instrument or order appointing them or creating the relationship if a copy of that instrument or order is furnished to the limited liability company. If an instrument or order is not furnished to the limited liability company, 1 of the following applies to the voting of that membership interest:

(a) If an operating agreement applies to the voting of the membership interest, the vote shall be in accordance with that operating agreement.

(b) If an operating agreement does not apply to the voting of the membership interest and only 1 of the persons that hold the membership interest votes, that person's vote determines the voting of the membership interest.

(c) If an operating agreement does not apply to the voting of the membership interest and 2 or more of the persons that hold the membership interest vote, the vote of a majority determines the voting of the membership interest, and if there

is no majority, the voting of the membership interest is divided among those voting.

(4) Only members of a limited liability company, and not its managers, may authorize the following actions:

- (a) The dissolution of the limited liability company under section 2.50(c).
- (b) Merger of the limited liability company under chapter 8.
- (c) An amendment to the articles of organization.

(5) Except as otherwise provided in the articles of organization or an operating agreement, members have the voting rights provided in section 2.42 regarding transactions in which a manager or agent has an interest.

(6) Unless otherwise provided in an operating agreement, the sale, exchange, lease, or other transfer of all or substantially all of the assets of a limited liability company, other than in the ordinary course of business, may be authorized only by a vote of the members entitled to vote.

(7) The articles of organization or an operating agreement may provide for additional voting rights of members of the limited liability company.

(8) Unless the vote of a greater percentage of the voting interest of members is required by this act, the articles of organization, or an operating agreement, a vote of a majority in interest of the members entitled to vote is required to approve any matter submitted for a vote of the members.

### **5.3 Withdrawal of member; distribution; expulsion.**

(1) A member may withdraw from a limited liability company only as provided in an operating agreement. A member withdrawing pursuant to an operating agreement may become entitled to a withdrawal distribution as described in section 2.31.

(2) An operating agreement may provide for the expulsion of a member or for other events the occurrence of which will result in a person ceasing to be a member of the limited liability company.

## CHAPTER 6

### **6.1 Articles of organization; amendment.**

A limited liability company may amend its articles of organization if the amendment contains only provisions that might lawfully be contained in original articles of organization filed at the time the amendment is made.

### **6.2 Articles of organization; conditions requiring amendment.**

A limited liability company shall amend its articles of organization if any of the following occur:

- (a) A change in the name of the limited liability company.
- (b) A change in the purposes of the limited liability company.
- (c) A change to or from the management of the limited liability company by managers.
- (d) A change in the maximum duration of the limited liability company.

(e) A statement in the articles of organization has become false or erroneous, except that a change in registered office or resident agent may be made as provided for in this Code.

### **6.3 Articles of organization; certificate of amendment; filing; contents.**

The articles of organization are amended by filing a certificate of amendment signed as provided in section 2.5 that contains all of the following:

- (a) The name of the limited liability company.
- (b) The date of filing of its original articles of organization.
- (c) The entire article or articles being amended, or the section or sections being amended if the article being amended is divided into identified sections.
- (d) A statement that the amendment or amendments were approved by the unanimous vote of all of the members entitled to vote or by a majority in interest if an operating agreement authorizes amendment of the articles of organization by majority vote.

[CAN REQUIRE TRIBAL COUNCIL APPROVAL FOR ALL AMENDMENTS]

## CHAPTER 7

### **7.1 Dissociation.**

(1) A person ceases to be an owner of an limited liability company upon the simultaneous occurrence of and at the same time of any of the following events:

- (a) The owner withdraws by voluntary act.
- (b) The owner is removed as an owner in accordance with the operating agreement or this Code.
- (c) Unless otherwise provided in the operating agreement or by the written consent of all owners at the time of the event, the owner does any of the following:

- (i) Makes an assignment for the benefit of the creditors.
- (ii) Files a petition in bankruptcy.
- (iii) Becomes the subject of an order for relief under the federal bankruptcy laws or state or tribal insolvency laws.
- (iv) Fails to gain dismissal of any federal bankruptcy or state or tribal insolvency proceeding within 120 days of commencement of an involuntary proceeding.

(d) Unless provided in the operating agreement or by the written consent of all Owners, if the owner is an individual, either of the following occurs:

- (i) The owner's death.
- (ii) The entry of an order by a court of competent jurisdiction adjudicating the owner incompetent to manage the owner's person or estate.

(e) Unless otherwise provided in the operating agreement or by written agreement or by the written consent of all owners at the time, if the owner is a trust, corporation, partnership, or limited liability company upon liquidation, dissolution, or termination.

(2) The owners may provide in the operating agreement for other events the occurrence of which result in a person ceasing to be an owner of the limited liability company.

(3) Unless the operating agreement provides that an owner does not have the power to withdraw by voluntary act from an limited liability company, the owner may do so at any time by giving written notice to the other owners or as provided in the operating agreement. If the owner has the power to withdraw but the withdrawal is a breach of the operating agreement, the limited liability company may offset the damages against the amount otherwise distributable to the owner, in addition to pursuing any remedies provided for in the operating agreement or otherwise available under applicable law.

## **7.2 Dissolution; winding up.**

A limited liability company is dissolved and its affairs shall be wound up when the first of the following occurs:

- (a) Automatically, if a time specified in the articles of organization is reached.
- (b) If a vote of the members or other event specified in the articles of organization or in an operating agreement takes place.
- (c) The members entitled to vote unanimously vote for dissolution.

(d) Automatically, if a decree of judicial dissolution is entered.

(e) A majority of the organizers of the limited liability company vote for dissolution, if the limited liability company has not commenced business; has not issued any membership interests; has no debts or other liabilities; and has not received any payments, or has returned any payments it has received after deducting any amount disbursed for payment of expenses, for subscriptions for its membership interests.

### **7.3 Dissolution by judicial decree.**

(1) In a proceeding by or for an owner, the Tribal Court or court of competent jurisdiction may order dissolution of an limited liability company if any of the following is established:

(a) That it is not reasonably practicable to carry on the business of the limited liability company.

(b) That the limited liability company is not acting in conformity with its operating agreement.

(c) That one or more managers are acting or will act in a manner that is illegal, oppressive, or fraudulent.

(d) That one or more owners in control of the limited liability company are acting or will act in a manner that is illegal, oppressive, or fraudulent.

(e) That limited liability company assets are being misapplied or wasted.

(2) If the Tribe is an owner of the limited liability company, any action under this Section must be brought in the Tribal Court, unless explicitly otherwise provided in the operating agreement. Nothing in this Section may be construed as a waiver of the Tribe's sovereign immunity from suit, and any waiver thereof must be provided explicitly in the limited liability company's operating agreement.

### **7.4 Certificate of dissolution; filing; contents.**

(1) When it begins winding up its affairs, a limited liability company that dissolves under section 2.50(b) or (c) shall execute a certificate of dissolution as provided in section 2.5 and file the certificate with the administrator. The certificate of dissolution shall contain all of the following:

(a) The name of the limited liability company.

(b) The reason for the dissolution.

(c) The effective date of the dissolution if later than the date of filing of the certificate of dissolution.

(2) When it begins winding up its affairs, a limited liability company that dissolves under section 2.50(e) shall execute a certificate of dissolution as provided in section 2.5 and file the certificate with the administrator. The certificate of dissolution shall contain all of the following:

- (a) The name of the limited liability company.
- (b) A statement that includes all of the following:
  - (i) That the limited liability company has not commenced business, has not issued any membership interests, and has no debts or other liabilities.
  - (ii) That the limited liability company has not received any payments, or has returned any payments it has received after deducting any amount disbursed for payment of expenses, for subscriptions for its membership interests.
  - (iii) That a majority of the organizers of the limited liability company have approved the dissolution.

## **7.5 Winding up.**

(1) A dissolved limited liability company continues its legal existence but may not carry on any business except that which is appropriate to wind up and liquidate its business.

(2) Unless otherwise provided in its operating agreement:

- (a) The business of the limited liability company may be wound up by any of the following:
  - (i) The owners or managers who have authority to manage the limited liability company before dissolution.
  - (ii) In a judicial dissolution, the person(s) designated by the Tribal Court or court of competent jurisdiction.
- (b) The persons winding up the business of the limited liability company may do all of the following in the name of and on behalf of the limited liability company:
  - (i) Collect its assets.
  - (ii) Prosecute and defend suits.
  - (iii) Take any action necessary to settle and close the business of the limited liability company.
  - (iv) Dispose of and transfer the property of the limited liability company.

(v) Discharge or make provision for discharging the liabilities of the limited liability company.

(vi) Distribute to the owners any remaining assets of the limited liability company.

(3) Dissolution of a limited liability company does not do any of the following:

(a) Transfer title to the limited liability company's property.

(b) Prevent transfer of all or part of an owner's interest.

(c) Prevent commencement of a civil, criminal, administrative, or investigatory proceeding by or against the limited liability company.

(d) Abate or suspend a civil, criminal, administrative, or investigatory proceeding pending by or against the limited liability company at the time of dissolution.

(e) Terminate the authority of the registered agent of the limited liability company.

(f) Alter the limited liability of an owner.

**7.6 Dissolution; notice to existing claimants; contents; validity of claim not recognized; claims barred under certain conditions; "existing claim" defined; effective date of notice.**

(1) The dissolved limited liability company may notify its existing claimants in writing of the dissolution at any time after the effective date of the dissolution. The written notice shall include all of the following:

(a) A description of the information that must be included in a claim. The limited liability company may demand sufficient information to permit it to make a reasonable judgment whether the claim should be accepted or rejected.

(b) A mailing address where a claim may be sent.

(c) The deadline, which may not be less than 6 months after the effective date of the written notice, by which the dissolved limited liability company must receive the claim.

(d) A statement that the claim will be barred if not received by the deadline.

(2) The giving of notice provided for in subsection (1) does not constitute recognition that a person to whom the notice is directed has a valid claim against the limited liability company.

(3) A claim against the dissolved limited liability company is barred if either of the following applies:

(a) If a claimant who was given written notice under subsection (1) does not deliver the claim to the dissolved limited liability company by the deadline.

(b) If a claimant whose claim was rejected by a written notice of rejection by the dissolved limited liability company does not commence a proceeding to enforce the claim within 90 days after the effective date of the written notice of rejection.

(4) For purposes of this section, “existing claim” means any claim or right against the limited liability company, liquidated or unliquidated. “Existing claim” does not mean a contingent liability or a claim based on an event occurring after the effective date of dissolution.

(5) For purposes of this section, the effective date of the written notice is the earliest of the following:

(a) The date it is received.

(b) Five days after its deposit in the United States mail, as evidenced by the postmark, if it is mailed postpaid and correctly addressed.

(c) The date shown on the return receipt, if the notice is sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

**7.7 Dissolution; publication of notice; requirements; commencing proceeding to enforce claims; claimants with known existing claims not receiving notice.**

(1) A dissolved limited liability company may also publish notice of dissolution and request that persons with claims against the company present them in accordance with the notice.

(2) The notice shall be in accord with all the following:

(a) Be published 1 time in a newspaper of general circulation in the county in which the dissolved limited liability company’s principal place of business, or if none in this state, its registered office, is or was located.

(b) Describe the information that must be included in a claim and provide a mailing address where the claim may be sent. The limited liability company may demand sufficient information to permit it to make a reasonable judgment whether the claim should be accepted or rejected.

(c) State that a claim against the limited liability company will be barred unless a proceeding to enforce the claim is commenced within 1 year after the publication date of the newspaper notice.

(3) If the dissolved limited liability company publishes a newspaper notice in accordance with subsection (2), the claim of each of the following claimants is barred unless the claimant

commences a proceeding to enforce the claim against the dissolved company within 1 year after the publication date of the newspaper:

- (a) A claimant who did not receive written notice under section 2.54.
- (b) A claimant whose claim was timely sent to the dissolved limited liability company but not acted on.
- (c) A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(4) Notwithstanding subsection (3), a claimant having an existing claim known to the limited liability company at the time of publication in accordance with subsection (2) and who did not receive written notice under section 2.54 is not barred from suit until 6 months after the claimant has actual notice of the dissolution.

## **7.8 Winding up; distribution of assets.**

Upon the winding up of an limited liability company, the assets shall be distributed in the following order:

- (1) To creditors, including to the extent permitted by law, owners, and former owners in satisfaction of liabilities of the limited liability company.
- (2) Unless otherwise provided in the operating agreement, to owners and former owners in satisfaction of liabilities for distributions under this Code.
- (3) Unless otherwise provided in the operating agreement, to owners and former owners first for the return of their contributions in proportion to their respective values and, thereafter, in proportion to their respective rights to share in distributions from the limited liability company before dissolution.

## CHAPTER 8

### **8.1 Merger.**

(1) Unless otherwise provided in its organizational documents, one or more limited liability companies formed under this Code may merge with or into one or more limited liability companies as provided in the plan of merger.

(2) Interests or shares in a limited liability company that is a party to a merger may be exchanged for or converted into cash, property, obligations, or interest in the surviving limited liability company.

### **8.2 Approval of merger.**

(1) Unless otherwise provided in the operating agreement, a limited liability company that is a party to a proposed merger shall approve the plan of merger by an affirmative vote by all of the owners.

(2) Unless otherwise provided in the operating agreement, the manager or managers of a limited liability company may not approve a merger without also obtaining the approval of the limited liability company's owners under subsection (1), above.

(3) All other Constituents shall approve the merger in the manner and by the vote required by the laws applicable to the Constituents and their respective organizational documents.

(4) Each Constituent shall have any rights to abandon the merger as provided for in the plan of merger or in the laws applicable to the Constituent or its organizational documents.

(5) Upon approval of a merger, the Constituent shall notify its owners, shareholders, and all others that have an ownership interest in it of the approval and of the effective date of the merger.

### **8.3 Plan of merger.**

Each limited liability company shall enter into a plan of merger to be approved under section 2.58.

### **8.4 Articles of merger.**

(1) The surviving limited liability company shall deliver to the administrator articles of merger, executed by each party to the plan of merger, that include all of the following:

- (a) The name and state or jurisdiction of organization for each Constituent.
- (b) The plan of merger.
- (c) The name of the surviving or resulting limited liability company.
- (d) A statement as to whether the management of the surviving limited liability company will be reserved to its owners or vested in one or more managers.
- (e) The delayed effective date of the merger, if applicable.
- (f) A statement as to whether the surviving limited liability company is tribally owned.
- (g) If tribally owned, a statement as to whether the surviving limited liability company enjoys the Tribe's sovereign immunity.

(2) A merger takes effect upon the effective date of the articles of merger.

### **8.5 Effect of merger.**

A merger has the following effects:

(1) The Constituent must become a single entity, which shall be the entity designated in the plan of merger as the surviving limited liability company.

(2) Each Constituent, except the surviving limited liability company, ceases to exist.

(3) The surviving limited liability company possesses all of the rights, privileges, immunities, and powers of each merged Constituent and is subject to all of the restrictions, disabilities, and duties of each merged Constituent.

(4) All property and all debts, including contributions, and each interest belonging to or owed to each of the Constituents are vested in the surviving limited liability company without further act.

(5) Title to all real estate and any interest in real estate, vested in any Constituent, does not revert and is not in any way impaired because of the merger.

(6) The surviving limited liability company has all the liabilities and obligations of each of the Constituents and any claim existing or action or proceedings pending by or against any merged Constituent may be prosecuted as if the merger had not taken place, or the surviving limited liability company may be substituted in the action.

(7) The rights of creditors and any liens on the property of any Constituent survive the merger.

(8) The interests in a Constituent that are to be converted or exchanged into interest, cash, obligations, or other property under the terms of the plan of merger are converted and the former interest holders are entitled only to the rights provided in the plan of merger of the rights otherwise provided by law.

(9) The Articles of Organization of the surviving limited liability company is amended to the extent provided in the articles of merger.

## **8.6 Right to object.**

Unless otherwise provided in the operating agreement, upon receipt of the notice required by Section 2.54(5), an owner who did not vote in favor of the merger may, within twenty (20) days after the date of the notice, voluntarily dissociate from the limited liability company under Section 2.33(3) and receive fair value for the owner's limited liability company interest.

## **CHAPTER 9 WHOLLY OWNED LIMITED LIABILITY COMPANIES**

### **9.1 Tribally owned companies; reports.**

There are hereby authorized to be created limited liability companies wholly owned by the Tribe, with the Tribe as the sole owner. Tribally owned limited liability companies shall be created by a duly adopted resolution of the Tribal Council. The organizer shall file in accordance with this Code. When the organizer files the Articles of Organization and the operating agreement of a Tribally owned limited liability company, a certified copy of the resolution authorizing the formation of the limited liability company and approving the articles shall be included. Tribally owned limited liability company's shall be considered to be instrumentalities of the Tribe. [A Tribally owned limited liability company shall file annual reports with the Tribal Council concerning the company's actions/plans/objectives.]

## **9.2 Tribally owned subsidiary.**

There are hereby authorized to be created by resolution of the Board of Directors of a Tribally owned limited liability company or of a Tribal Corporation, or of a wholly owned subsidiary of such a Tribally owned limited liability company or Tribal Corporation, subsidiary limited liability company's to be wholly owned by the parent Tribally owned limited liability company or parent Tribal Corporation, which shall be instrumentalities of the Tribe. The organizer of such a Tribally owned subsidiary limited liability company shall file in accordance with this Code. When the organizer files the Articles of Organization and the Operating Agreement of the Tribally owned subsidiary limited liability company, a certified copy of a resolution of the Board of Directors of the parent Tribally owned limited liability company or parent Tribal Corporation authorizing the formation of the subsidiary limited liability company and approving the articles shall be included.

## **9.3 Privileges and Immunities.**

The limited liability companies established under this chapter shall be considered to be instrumentalities of the Tribe, and their officers and employees considered officers and employees of the Tribe, created for the purpose of carrying out authorities and responsibilities of the Tribal Council for economic development of the Tribe and the advancement of its tribal Owners. Such limited liability company's, their directors, officers and employees shall, therefore, be entitled to all of the privileges and immunities enjoyed by the Tribe, including but not limited to immunities from suit in Federal, State and Tribal courts and from Federal, State, and local taxation or regulation.

## **9.4 Ownership.**

(1) No ownership interest in any limited liability company in which the Tribe is an owner may be alienated unless approved by the Tribal Council. Further, no ownership interest in any Tribally owned subsidiary limited liability company may be alienated unless approved by a duly adopted resolution of the Board of Directors of the parent Tribally owned limited liability company or parent Tribal Corporation.

(2) All interests in any Tribally owned limited liability company shall be held by and for a Tribe, or in the case of a wholly owned subsidiary limited liability company, by the parent Tribally owned limited liability company or parent Tribal Corporation. No individual member of the Tribe shall have any personal ownership interest in any limited liability company organized

under this Part, whether by virtue of such person's status as a member of a Tribe, as an officer of a Tribe's Government, or otherwise.

### **9.5 Nontribal Partners.**

Any limited liability company created pursuant to this Part, including subsidiary limited liability company's, may form or own interests or shares in partnerships, corporations, or other limited liability companies with other governmental or non-governmental entities or persons under the laws of the Tribe or any other jurisdiction ("Project Companies"); provided, however, that the partial ownership interest in such Project Companies shall not diminish or affect the privileges and immunities of the Tribally owned limited liability company's or Tribally owned subsidiary limited liability company's created pursuant to this Part.

### **9.6 Waiver of Sovereign Immunity.**

The limited liability companies established under this chapter may only waive the privileges and immunities granted under Section 2.65 in the following manner:

(1) The limited liability company may specifically grant limited waivers of its immunity from suit and consent to be sued in Tribal Court or another court of competent jurisdiction or consent to binding arbitration pursuant to the procedures and authorities set forth in the limited liability company's Operating Agreement; provided, however, that

(a) any such waiver or consent to suit granted pursuant to the limited liability company's Operating Agreement shall in no way extend to any action against the Tribe, nor shall it in any way be deemed a waiver of any of the rights, privileges and immunities of the Tribe;

(b) any recovery against the limited liability company shall be limited to the assets of the limited liability company (or such portion of the limited liability company's assets as further limited by the waiver or consent) and the Tribe shall not be liable for the payment or performance of any of the obligations of the limited liability company, and no recourse shall be had against any assets or revenues of the Tribe in order to satisfy the obligations of the limited liability company; including assets of the Tribe leased, loaned, or assigned to the limited liability company for its use, without transfer of title, and

(c) any waiver of the limited liability company's immunities granted pursuant to the limited liability company's Operating Agreement shall be further limited or conditioned by the terms of such waiver.

(2) The sovereign immunity of the limited liability company shall not extend to actions against the limited liability company by the Tribe acting as Owner, or, in the case of a subsidiary limited liability company created pursuant to this Part, by the parent limited liability company acting as Owner.

(3) The limited liability company must follow the method mandated above.

## EXPLANATION OF MODEL ARTICLES OF ORGANIZATION

“Articles of organization” is the term used to refer to a limited liability company’s organizing instrument. Section IV.B. provides an example of drafted articles of organization and is discussed in detail in this section. Any version of the articles of organization must conform with the Tribe’s constitution, limited liability code, and other applicable law. Thus, no one model will apply equally to each Tribe. This Guide, instead, offers an example of articles of organization for a tribally chartered LLC and walks through potential options for each section provided in the model articles.

I. *Name.* The Articles of Organization should state the name of the company. The name of the company may be anything the Tribe so chooses, so long as the name chosen complies with the Tribe’s Limited Liability Code and other tribal law.

II. *Purpose.* The Articles should state the business purposes of the tribal company. The purpose listed in the Articles must comply with all tribal law, including the Tribe’s Limited Liability Code.

III. *Definitions.* This section may be very fluid and should contain definitions for all relevant terms contained in the Articles of Organization.

IV. *Jurisdiction.* This Article is used to define the jurisdiction in which the Articles shall apply. This is an example of a permissive article that is not required, but the Tribe may decide to include it to state with specificity where the articles shall apply.

V. *Duration.* The Tribe may chose the duration of the company, including a perpetual duration. If the time of the LLC is limited (e.g., the LLC was created for a short-term specific purpose), then the duration should be set forth in the Articles.

VI. *Registered Office; Resident Agent.* The Articles should contain the registered office for the corporation. The registered office could be located within the Tribe’s territorial jurisdiction. The Tribe may include in its Limited Liability Code whether the company must have its principal place of business within the Tribe’s territorial jurisdiction or not, as well as whether the resident agent’s residence must be within the Tribe’s territorial jurisdiction. Regardless of the Tribe’s decision on this point, the Articles must comply with its Limited Liability Code. The Articles should also state the street address of the company’s registered office and the mailing address, if it is different, as well as the corporation’s resident agent at that address. Michigan, as an example, requires LLCs to maintain a registered office and a resident agent within the state. MCL 450.4207(1).

VII. *Members.* This is an optional provision in which the organizer(s) may list the members of the LLC. The Tribe may decide that the Tribe is the sole member of the LLC and may state so in the Articles.

VIII. *Managers.* Generally under Michigan state law, and in the Model Articles of Organization, an LLC must state in the Articles if the LLC is going to be a manager-managed LLC. In fact, under state law, this is the only way to elect such management for an LLC. See

MCL 450.4203. The reason for this requirement is to put creditors on notice that the power and authority to act on behalf of the LLC lies with the individual managers of the LLC. In a member-managed LLC, each member has the authority to bind the LLC. If there are a large number of members, then a manager-managed LLC may be a better choice.

IX. *Operational Requirements.* This optional section states explicitly that the assets of the LLC are separate and distinct from the assets of the Tribe. This section may be a double-edged sword. It may protect tribal assets from suit, but it may also make a court less inclined to extend the Tribe's sovereign immunity or tax treatment to the LLC. The decision to include this section will be based on the LLC's goals and objectives.

X. *Immunities of the Company.* This article is also very important to the Tribe and to the company. This article extends the Tribe's rights, privileges, and immunities related to federal, state, and local taxes, regulation, and jurisdiction. There is some debate, as discussed above, as to the tax treatment of tribally chartered limited liability companies, but the IRS has not yet issued any guidance stating that entities like this will not receive the same tax treatment as a Tribe. This article also allows the Tribe to extend its sovereign immunity to the company. There may also be some issues with this action, *see above*, but this article is important to protect the company from suit. The company, under this article, will be able to waive sovereign immunity, to an extent, without returning to the Tribal Council each time it signs a new contract. Also vitally important in this article is that the Tribe limit its liability and potential waiver of immunity in the articles by distinguishing itself from the company.

XI. *Approval and Amendment.* This is a permissible article, but not required. The Limited Liability Code should set forth the procedure for approving and amending the articles, but this may be included in the articles as well.

XII. *Effective Date.* This provision should align the Tribe's Limited Liability Code as well as the Tribe's Constitution and other law.

MODEL ARTICLES OF ORGANIZATION FOR  
A TRIBALLY CHARTERED LLC

**ARTICLE I. NAME OF THE COMPANY**

Section 1.01. The name of the limited liability company is [NAME].

**ARTICLE II. PURPOSE OF THE COMPANY**

Section 2.01. The purpose or purposes for which the limited liability company is formed is to engage in any activity within the purposes for which a limited liability company may be formed under the [TRIBE's] Limited Liability Company Code.

**ARTICLE III. DEFINITIONS**

The following definitions shall apply to this Code:

Section 3.01. “*Articles*” means these Articles of Organization.

Section 3.02. “*Company*” means the [NAME].

Section 3.03. “*Manager*” or “*managers*” means a person or persons designated to manage the limited liability company pursuant to a provision in the articles of organization stating that the business is to be managed by or under the authority of managers.

Section 3.04. “*Member*” or “*Owner*” means a person that is a member of a limited liability company or has ownership interest in a limited liability company.

Section 3.05. “*Operating Agreement*” means a written agreement by the member of a limited liability company that has 1 member, or between all of the members of a limited liability company that has more than 1 member, pertaining to the affairs of the limited liability company and the conduct of its business. The term includes any provision in the articles of organization pertaining to the affairs of the limited liability company and the conduct of its business.

Section 3.06. “*Organizer(s)*” means the person(s) or entity(ies) which signs and delivers the Articles of Organization for filing to the administrator.

Section 3.07. “*Tribal Constitution*” means the [TRIBE’S CONSTITUTION].

Section 3.08. “*Tribal Council*” means the tribal council of the [TRIBE].

Section 3.09. “*Tribe*” means [TRIBE].

**ARTICLE IV. JURISDICTION**

Section 4.01. The provisions of these Articles of Organization shall apply to the fullest extent of the sovereign jurisdiction of the [TRIBE], as authorized by the Tribal Constitution, [ANY OTHER APPLICABLE LAW], and applicable federal law. The provisions of these

Articles of Organization shall apply to and be in conformity with all agreements and other cooperative arrangements entered into by the [TRIBE] designed to ensure economic self-sufficiency for the [TRIBE].

**ARTICLE V. DURATION**

Section 5.01. The term of existence of the Company shall be perpetual.

**ARTICLE VI. REGISTERED OFFICE; RESIDENT AGENT**

Section 6.01. The Company's registered office for the transaction of business shall be within the [TRIBAL BOUNDARIES] in the State of Michigan. The Company may have other offices, either within or without the [TRIBE'S] boundaries as needed.

Section 6.02. The name of the resident agent is [NAME].

Section 6.03. The street address of the location of the registered office is [ADDRESS].

Section 6.04. The mailing address of the registered office if different than above is [ADDRESS].

**ARTICLE VII. MEMBERS**

The members of the Company shall consist of its initial organizers (as indicated on Exhibit A) and such other individuals as may hereafter be designated by the Company. The initial organizers shall govern the Company and may name up to [NUMBER] additional members to be added to the governing body of the Company. A member of the Company may resign from the Company at any time and shall be subject to removal, at the discretion of the Company at any time. The governing body may designate categories of membership for those who make contributions to, or are supportive of, the Company. [OR "The [TRIBE] shall be the sole member of the Company."]

**ARTICLE VIII. MANAGEMENT**

Section 8.01. Manager-Managed. The limited liability company shall be managed by or under the authority of one or more managers.

Section 8.02. Procedures. The Company may establish from time to time procedures for its day-to-day operations consistent with these Articles of Organization and applicable laws and regulations.

Section 8.03. Officers. The Managers may appoint the following officers: a President, Vice-President, Secretary, and Treasurer. The President and the Vice-President shall be Tribal members. The Managers may appoint other officers as it deems necessary to achieve the Company's purposes. The Managers shall appoint the officers at each annual meeting, unless the Managers specifies a different time for such appointment. Officers shall serve until the next annual meeting and until his or her successor assumes office. Officers may resign by delivering written notice to the President or to the Managers. A resignation shall be effective upon receipt,

unless otherwise provided by the terms thereof. The Managers may remove an officer, with or without cause.

## **ARTICLE IX. OPERATIONAL REQUIREMENTS**

Section 9.01. Assets of the Company. All assets acquired by the Company shall belong to the Company as a distinct corporate enterprise of the Tribe.

Section 9.02. Fiscal Year. The fiscal year of the Company shall be [calendar year/determined by the Managers].

Section 9.03. Books and records. The Company shall maintain, at its principal place of business, all financial books and records, all minutes of the meetings, and all other material books, records, documents, correspondence, and contracts. All such materials shall be made available, at a reasonable time, for inspection and copying by the Tribal Council, any duly authorized representative of the Tribal Council, or any Manager.

Section 9.04. Report to Tribal Council. Within 60 days of the close of the Company's fiscal year, the Company shall prepare and deliver to the Tribal Council an annual report and audited financial statement, including a balance sheet and a statement of income and expenses, including comparative figures from the preceding fiscal year.

## **ARTICLE X. IMMUNITIES OF THE COMPANY [This Article presents an example of one possible manner of addressing immunity issues. Tribal legal counsel should ensure that any immunity issues addressed in the Code or in the Articles comply with the Tribe's Constitution].**

Section 10.01. Jurisdictional Immunity of the Company. The [TRIBE] confers on the Company all of the Tribe's rights, privileges, and immunities concerning federal, state, and local taxes, regulation, and jurisdiction, to the same extent that the Tribe has such rights, privileges, and immunities, if it engaged in the business of the Company.

Section 10.02. Sovereign Immunity of the Company. The [TRIBE] confers on the Company sovereign immunity from suit to the same extent that the Tribe would have such immunity if the Tribe engaged directly in the business of the Company. The Company shall have the power to sue and is authorized to consent to be sued in the [TRIBAL COURT] or another court of competent jurisdiction; provided, however, that such consent shall be explicit, in a written contract or commercial document to which the Company is a party, the Managing Members specifically approved the written instrument, and any recovery against the Company shall be limited to the assets of the Company.

Consent to suit may be limited to the court or courts in which suit may be brought, to the matters that may be made the subject of the suit, and to the assets or revenues of the Company against which any judgment may be executed. The Company's consent to suit shall in no way extend to, or be deemed a waiver of, the Tribe's rights, privileges, and immunities. The Tribe shall not be liable for the payment or performance of any of the obligations of the Company, and no recourse shall be had against any assets or revenues of the Tribe in order to satisfy the obligations of the Company. The sovereign immunity of the Company shall not extend to

actions against the Company by the Tribe. The Company shall have the power to sue and to grant limited waivers of its immunity from suit and consent to suit in the Tribal Court or another court of competent jurisdiction; provided, however,

(a) Any such waiver or consent to suit granted pursuant to the Articles of Organization shall in no way extend to any action against the [TRIBE], nor shall it in any way be deemed a waiver of any of the rights, privileges and immunities of the [TRIBE];

(b) Any recovery against the Company shall be limited to the assets of the Company (or such portion of the Company's assets as further limited by the waiver or consent), and the [TRIBE] shall not be liable for the payment or performance of any of the obligations of the Company, and no recourse shall be had against any assets or revenues of the [TRIBE] in order to satisfy the obligations of the Company; including assets of the [TRIBE] for its use, without transfer of title;

(c) Any waiver of the Company's immunities granted pursuant to the Company's Articles shall be further limited or conditioned by the terms of such waiver;

(d) Any waiver may be granted by a resolution of the members for the specific purpose of granting a waiver, the language must be explicit, and the waiver must be in a written contract or commercial document to which the Company is a party;

(e) Waivers of sovereign immunity may be granted only when necessary to secure a substantial advantage or benefit to the tribal entity of [TRIBE]; and

(f) Waivers of sovereign immunity must be specific and limited as to duration, grantee, transaction, property or funds of the tribal entity subject to the waiver, court having jurisdiction and applicable law.

The sovereign immunity of the Company shall not extend to actions against the Company by the [TRIBE].

## **ARTICLE XI. APPROVAL AND AMENDMENT**

Section 11.01. Approval of Articles. These Articles of Organization shall be issued and become effective upon their adoption by the Tribal Council in accordance with the Tribe's Limited Liability Company Code.

Section 11.02. Amendment of Articles. The Members of the Company may, by [Majority] vote, amend these Articles, provided that any amendment is ratified by the Tribal Council.

## **ARTICLE XII. EFFECTIVE DATE**

The effective date of these Articles is [DATE].