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The Honorable Susan J.M. Bauman, Mayor
Office of the Mayor
City of Madison
Room 401, City/County Building
Madison, WI 53709

Dear Mayor Bauman:

Our firm is special counsel to the Ho-Chunk Nation ("Nation"). As you are aware, the Nation has entered into an intergovernmental agreement with the City of Madison, under which the City has agreed to provide essential governmental services to the Nation's DeJope gaming facility. Section 28, entitled Governmental Authority, of the Intergovernmental Service and Development Agreement between the City of Madison and the Ho-Chunk Nation ("Intergovernmental Agreement") requires the Nation's counsel to provide an opinion relative to: (1) that the Intergovernmental Agreement has been duly executed on behalf of the Nation; (2) that the execution, delivery, and performance of the Intergovernmental Agreement by the Nation has been duly authorized by all necessary governmental action of the Nation; and (3) that the Intergovernmental Agreement is a legal, valid, and binding obligation of the Nation enforceable by the City against the Nation in accordance with its terms.

This opinion letter is being provided to the City of Madison in compliance with Section 28. The following paragraphs provide the information required by Section 28:

1. Execution of the Documents. By Ho-Chunk Nation Legislature, Resolution No. 8-11-98 C, the Legislature of the Ho-Chunk Nation expressly authorized the President or the Vice President of the Nation to execute the Intergovernmental Agreement. The Intergovernmental Agreement has been executed by the appropriate executive officer of the Nation as

authorized by the Resolution. The Resolution has been certified by Vickie Shisler, Legislative Secretary for the Ho-Chunk Nation and was adopted at a duly convened meeting of the Legislature on August 11, 1998, at which a quorum was present. These documents, taken together, evidence that the Intergovernmental Agreement was properly executed in accordance with the Constitution and laws of the Nation.

2. Authorization. The Nation is a federally recognized Indian Tribe. It has inherent sovereignty and has entered into several treaties with the United States. In modern times, the Nation has organized a Tribal government in accordance with the provisions of the Indian Reorganization Act of 1934, 25 U.S.C. §476. Pursuant to the Indian Reorganization Act, the Nation has adopted a Constitution ("Constitution") which was approved by the Secretary of the Interior on November 1, 1994.

Article V, Section 2, subsection (i) of the Constitution expressly authorizes the Legislature to "negotiate and enter into . . . contracts, and agreements with other governments . . ." In addition, Article V, Section 2, authorizes the Legislature to enact all laws: prohibiting and regulating conduct and imposing penalties upon all persons within the jurisdiction of the Nation; zoning and regulating all lands within the Ho-Chunk Nation; governing law enforcement within the jurisdiction of the Nation and promoting the public health, education, charity, and other services as may contribute to the social advancement of the members of the Ho-Chunk Nation.

Pursuant to this constitutionally vested authority, the Legislature convened a regular meeting on August 11, 1998, at which a quorum of the Legislature was present, and adopted the Resolution, authorizing the President or the Vice-President of the Nation, on behalf of the Nation, to execute the Intergovernmental Agreement.

The above-cited provisions of the Nation's Constitution and the above-cited actions of the Legislature to adopt the Intergovernmental Agreement constitutes sufficient authority for the Nation to execute, deliver, and perform its obligations under the Intergovernmental Agreement.

3. The Intergovernmental Agreement is Enforceable. As you are aware, federally recognized Indian Tribes possess sovereign immunity as an attribute of sovereignty. The common law doctrine of sovereign immunity allows the sovereign to determine how or whether its resources can be reached through legal proceedings. The courts of the United States have recognized that Tribes possess "the common law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 936 U.S. 49, 58 (1978). There are several differences, however, with respect to the sovereignty exercised by an Indian Tribe as opposed to any other federal, state or local government. Like other governments, Tribes can voluntarily waive their sovereign immunity. However, the Courts require that such waivers be "unequivocally expressed." Chemehuevi Indian Tribe v. California State Board of Equalization, 757 F. 2d 1047 (9th Cir. 1985), rev'd on other grounds 474 U.S. 9 (1985).

Article XII, Section 1, of the Nation's Constitution provides that the "Ho-Chunk Nation shall be immune from suit except to the extent that the Legislature expressly waives its sovereign immunity . . ." The limited waivers of sovereign immunity provided in the Intergovernmental Agreement are unequivocal and contemplate the enforcement of the Agreement in federal or state court. Paragraph 23.2 of the Intergovernmental Agreement expressly provides that either party may "commence an action or counterclaim against the other in the United States District Court for the Western District of Wisconsin or the Wisconsin Circuit Court for Dane County with respect to disputes arising out of or relating to this Agreement." This provision along with the limited waiver of sovereign immunity contained in the paragraph, provides the City with the ability to enforce the Agreement against the Nation in federal or state court, under appropriate circumstances, when there has been a breach by the Nation of the Agreement. These types of waivers have been routinely upheld by the federal courts. See, e.g., Sokaogon Gaming Enterprise Entertainment Corporation v. Tushie-Montgomery Assocs., 86 F. 3d 556 (7th Cir. 1996); Rosebud Sioux Tribe v. Val-U Construction Company of South Dakota, Inc., 50 F. 3d 560 (8th Cir. 1995); and Aubertin v. Colville Confederated Tribes, 466 F. Supp. 430 (E.D. Wash. 1978).

Finally, because the Intergovernmental Agreement is a contract for services relative to Indian lands, it must meet all of the requirements of Title 25 of the United States Code §81 in order to be valid and enforceable. See, e.g., A.K. Management Co., v. San Manuel Band of Mission Indians, 789 F. 2d 785 (9th Cir. 1986); and U.S. ex rel. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc., 734 F. Supp. 455 (W.D. Okla. 1990).

To be valid under Section 81, the Intergovernmental Agreement must: (1) be in writing; (2) be delivered to each party; (3) bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed upon it; (4) contain the names of the parties in interest; (5) state the residency and occupation of the parties; (6) cite the scope of the authority of the Nation to enter into the Agreement; (7) state the time when, and place where the Agreement was entered into; (8) set forth the particular purpose for which the agreement was made; (9) state the special thing or things to be done under the Agreement; and (10) have a fixed term. 25 U.S.C. §81.

First, there is no doubt that the Intergovernmental Agreement is in writing and the parties themselves will make sure that a duplicate of the Agreement is delivered to each of the parties. Second, the Intergovernmental Agreement is being submitted to the Secretary of the Interior for approval. Third, the names of the parties in interest are set forth on page 1 of the Intergovernmental Agreement, the residence and occupation of the parties is set forth on page 34 of the Agreement, and the authority that the Legislature has, on behalf of the Nation, to enter into the Agreement is also set forth on page 1. Fourth, the time when, and place where the Agreement is entered into is set forth on page 1 of the Agreement, the purposes for which the Agreement are entered into are set forth on pages 1 through 4 of the Agreement in the Recitals, and a description of the thing or things to be done under the Agreement by each of the parties is set forth on pages 5 through 33 of the Intergovernmental Agreement. Finally, page 29, paragraph 25, fixes a limited term for the Agreement. Thus, when the Secretary of the Interior approves the Agreement on behalf of the Secretary and

the Commissioner of Indian Affairs, the Agreement will meet all of the requirements of Title 25 of the United States Code, Section 81, and will be enforceable by both the Nation and the City.

If you have any questions regarding this opinion, please feel free to have the City Attorney contact me. At that time I will be happy to answer any questions that the City may have relative to this opinion.

Yours very truly,

LESTER J. MARSTON
Special Counsel to the Ho-Chunk Nation

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cc: Jacob Lonetree, President
Members of the Legislature
Gary Brownell, Attorney General
Jeff DeCora, Legislature Counsel
HO-CHUNK NATION