

STATE OF NORTH CAROLINA

CONTRACTOR'S FEDERAL I.D.

COUNTY OF WAKE

REDACTED

THIS MANAGEMENT AGREEMENT (this "Agreement"), made and entered into this 21st day of May, 2007 (the "Effective Date") by and between Chimney Rock Management, LLC hereinafter referred to as the "CONTRACTOR", and North Carolina Department of Environment and Natural Resources, hereinafter referred to as the "DEPARTMENT", an agency of the State of North Carolina (the "State");

W I T N E S S E T H:

THAT WHEREAS, the CONTRACTOR has submitted to the DEPARTMENT a proposal for the performance of certain technical or professional services, and said proposal constitutes the Management Agreement, for the continued operation of the property commonly known as Chimney Rock Park (the "Park"), which is referred to in, and is a condition precedent to the a) Asset Purchase Agreement between Chimney Rock Company and the Conservation Fund, and of the b) Assignment of Asset Purchase Agreement between the Conservation Fund and the State of North Carolina, both dated as of January 26, 2007; and

WHEREAS, Chimney Rock Park has been operated by the Morse family for more than 100 years with great customer service, safety and cleanliness; the operations have included hiking trails, scenic views, quality access to activities and features, and retail and food/beverage services; and the continued operation by the CONTRACTOR pursuant to terms of the Asset Purchase Agreement for a period of time will make the transition to State ownership as smooth and seamless as possible; and

WHEREAS, the DEPARTMENT desires to enter into this Agreement with the CONTRACTOR to perform the services set out in the proposal;

NOW, THEREFORE, for and in consideration of the mutual promises to each other, as hereinafter set forth, the parties hereto do mutually agree as follows:

1. The CONTRACTOR hereby agrees to perform, in a manner reasonably satisfactory to the DEPARTMENT, services for this management agreement to manage the property commonly known as Chimney Rock Park, following its acquisition by the State, as described in **Attachment A** which is incorporated as part of this Agreement. In the event of any conflict between the terms of **Attachment A** and this Agreement, the Agreement shall govern.

2. The services of the CONTRACTOR are to commence on the Effective Date and shall be undertaken and completed in such sequence as to assure their expeditious completion in the light of the purposes of this Agreement, but in any event, all of the services required hereunder shall be completed by the 31st day of December, 2009 (the "Initial Term"). The parties may by mutual agreement renew this Agreement for up to two (2) additional 12-month periods under the same terms and

conditions (each, a "Renewal Term" and together with the Initial Term being the "Term").

3. The CONTRACTOR hereby agrees to pay an annual license fee to the DEPARTMENT based on the Park's cumulative annual Gross Revenue from January 1 of each year during the Term, calculated according to the following formula:

LICENSE FEE SCHEDULE

<u>Cumulative Annual Gross Revenue</u>		<u>2008</u>	<u>2009</u>	<u>2010</u>
\$ -	to \$4,500,000	5.0%	7.5%	10.0%
\$4,500,001	to \$ no limit	7.5%	10.0%	12.5%

The above license fee shall be paid in four (4) installments. The first quarter installment shall be due by June 30th. The second, third and fourth quarter installments shall be due 45 days following the end of that calendar quarter of the year at issue. For purposes of this Agreement, "Gross Revenue" is defined as the total gross revenue directly related to operation of the Park including internet and mail order sales from admissions, retail, and food & beverage operations; but excluding, however, any amounts not fully collected or reimbursed as a result of rebates, discounts, returns, or similarly uncollected revenue. If the Park's admission fee structure, product offering, or cost structure are substantially altered by revisions to the annual operating plan, a mutually agreeable adjustment to the management fee structure will be made.

4. The CONTRACTOR and the DEPARTMENT will allocate costs as set out below:

(a) The CONTRACTOR will be responsible for normal operations-related costs, consistent with the current level of services provided at the Park other than Capital Improvements or Material Alterations, such as

- i. Fuel costs and utility payments, including those related to water, sewer, electricity, gas, trash removal and waste.
- ii. License fees, permit fees, vehicle tax payments and other fees, including fees for billboard permits, etc.
- iii. Contract expenses and related fees, including costs associated with Otis Elevator. Upon final expiration of the Term all such contracts will be assumed by the State to the extent practicable.
- iv. Necessary equipment, supplies and materials, including vehicle maintenance, inspections and registration. In the event the CONTRACTOR acquires motor vehicles during the Term for use at the Park, the State agrees to acquire such motor vehicles at the end of the Term at their depreciated fair market value.
- v. Cleaning, ordinary repairs and maintenance to buildings and trails. An amount will be budgeted in each operating year and will be described in the annual operating plan. Required repairs of a magnitude not anticipated in the annual operating plan will be approved by the DEPARTMENT in advance, with payment arrangements to be negotiated.

(b) The DEPARTMENT will be responsible for Material Alterations related to alterations, improvements or disposal of property, buildings, equipment, or fixtures. For purposes of this Agreement, "Material Alterations" are defined as any unplanned but necessary capital improvements or repairs to the Park which either (i) cost \$1,500 or more in the aggregate or (ii) have a useful life in excess of three (3) years. Any such Material Alteration made or arranged to be made by the CONTRACTOR must be pre-approved by the DEPARTMENT's Contract Administrator.

(c) The DEPARTMENT shall be responsible for any Capital Improvements related to the Park infrastructure including, but not limited to buildings, water, sewer, and road, for which funding is available. For purposes of this Agreement, "Capital Improvements" are defined as any planned capital improvements or repairs as proposed in the annual operating plan or annual budget. For the avoidance of doubt, those maintenance and repairs that are proposed in the 2007 operating plan attached hereto and made a part of this Agreement shall be deemed "Capital Improvements." The State shall use its reasonable best efforts not to disrupt normal commercial operations of the Park when making any such Capital Improvements or Material Alterations.

5. The CONTRACTOR shall be considered to be an independent contractor and as such shall be wholly responsible for the work to be performed and for the supervision of its employees. The CONTRACTOR represents that it has, or will secure at its own expense, all personnel required in performing the services under this Agreement. Such employees shall not be employees of, or have any individual contractual relationship with the DEPARTMENT.

6. Each party submits notices, questions and correspondence to the other party's Contract Administrator. The name, post office address, street address, telephone number, fax number, and email address of the parties' initial Contract Administrators are set out below. Either party may change the name, post office address, street address, telephone number or email address of its Contract Administrator by giving timely written notice to the other party.

Department Contract Administrator:

IF DELIVERED BY US POSTAL SERVICE	IF DELIVERED BY ANY OTHER MEANS
Tom Jackson, West District Superintendent NCDENR, Division of Parks and Recreation 159 Inland Sea Lane Troutman, NC 28166-7631 (704) 528-6514 Fax: (704) 528-5623 Tom.Jackson@ncmail.net	Tom Jackson, West District Superintendent NCDENR, Division of Parks and Recreation 159 Inland Sea Lane Troutman, NC 28166-7631

Contractor Contract Administrator:

IF DELIVERED BY US POSTAL SERVICE	IF DELIVERED BY ANY OTHER MEANS
Will Crook Chimney Rock Management, LLC PO Box 39 Chimney Rock, NC 28720	Will Crook Chimney Rock Management, LLC US 64 / 74A Chimney Rock, NC 28720

7. The CONTRACTOR shall not substitute key personnel assigned to the performance of this Agreement without prior approval by the DEPARTMENT's Contract Administrator. The following individuals, for the times specified, are designated the CONTRACTOR's key personnel for purposes of this Agreement:

- Todd Morse, through December 31, 2007
- Mary Jaeger-Gale, through Term
- Jennifer Hensley, through Term
- Will Crook, through Term

8. None of the work to be performed under this Agreement which involves the specialized skill or expertise of the CONTRACTOR or its key personnel shall be subcontracted without prior approval of the Contract Administrator. In the event the CONTRACTOR subcontracts for any or all of the services or activities covered by this Agreement: (a) the CONTRACTOR is not relieved of any of the duties and responsibilities provided in this Agreement; (b) the subcontractor agrees to abide by the standards contained herein or to provide such information as to allow the CONTRACTOR to comply with these standards; and (c) the subcontractor agrees to allow state and federal authorized representatives access to any records pertinent to its role as a subcontractor.

9. The CONTRACTOR shall comply with all laws, ordinances, codes, rules, regulations, and licensing requirements that are applicable to the conduct of its business, including those of federal, state, and local agencies having jurisdiction and/or authority; provided, however, any costs or expenses in connection with Material Alterations or Capital Improvements, as such terms are defined in Section 4, required or requested by the DEPARTMENT pursuant to this Section 9 shall be borne by the DEPARTMENT.

10. The CONTRACTOR shall take affirmative action in complying with all federal and state requirements concerning fair employment and employment of people with disabilities, and concerning the treatment of all employees without regard to discrimination by reason of race, color, religion, sex, national origin, or disability; provided, however, any costs or expenses in connection with Material Alterations or Capital Improvements, as such terms are defined in Section 4,

required or requested by the DEPARTMENT pursuant to this Section 10 shall be borne by the DEPARTMENT.

11. This Agreement may be terminated as follows:

(a) by either party upon thirty (30) days written notice in the event of material breach by the other party, when such breach is not remedied following sixty (60) day written notice by the party alleging breach;

(b) by either party at the end of the Initial Term or any Renewal Term, provided the party wishing to terminate provides ninety (90) days written notice to the other party of its intention not to renew the Agreement at such time; or

(c) by the CONTRACTOR, in the event that attendance at the Park for any consecutive three (3) month period declines by 20% or more from the prior year's attendance for the same three (3) month period ("Economic Force Majeure"), provided the CONTRACTOR notifies the DEPARTMENT within ten (10) business days following the first monthly attendance decline of 20% or more. In the event that the CONTRACTOR notifies the State of a monthly attendance decline of 20% or more, the parties shall cooperate in good faith to negotiate revisions to the Agreement (including adjustment of the license fee payable to the State by the CONTRACTOR) to account for the anticipated Economic Force Majeure. During such negotiations, the DEPARTMENT may request proposals, accept bids, negotiate and take other actions to avoid closure of the Park, but shall not enter into another contract or other agreement (written or oral) unless the CONTRACTOR terminates this Agreement as provided herein due to Economic Force Majeure. If the parties are unable to renegotiate the Agreement to both parties mutual satisfaction by the time the full three (3) months have passed which constitute an Economic Force Majeure, the CONTRACTOR shall be permitted to terminate the Agreement at which point the DEPARTMENT shall be permitted to enter into another contract or agreement to replace the CONTRACTOR.

Upon termination of this Agreement for any reason, all finished and unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports prepared by the CONTRACTOR to fulfill this Agreement (other than any such materials which are confidential or proprietary to the CONTRACTOR or which otherwise constitute trade secrets) shall, at the option of the DEPARTMENT become the DEPARTMENT's property. In addition, the DEPARTMENT agrees to create a transition plan with the CONTRACTOR including:

- Honoring of annual passes for the holders of those passes at the date of termination through the end of their pass term,
- Disposition of retail inventories – allow for a sell-off period, and
- Planning for changeover of any and all marketing materials.

12. The parties to this Agreement agree and understand that the payment by the State of any sums specified in this Agreement is dependent and contingent upon and subject to the appropriation, allocation and availability of funds for this purpose to the DEPARTMENT.

13. The CONTRACTOR shall hold and save the State, its officers, agents, and employees, harmless from liability of any kind, including all claims and losses, with the exception of consequential, accruing or resulting to any other person, firm or corporation furnishing or supplying work, services, materials, or supplies in connection with the performance of this Agreement, and from any and all claims and losses accruing or resulting to any person, firm, or corporation that may be injured or damaged by the CONTRACTOR in the performance of this Agreement and that are attributable to the negligence or intentionally tortuous acts of the CONTRACTOR; provided that the CONTRACTOR is notified in writing within 30 days that the State has knowledge of such claims. The CONTRACTOR represents and warrants that it shall make no claim of any kind or nature against the State's agents who are involved in the delivery or processing of CONTRACTOR goods to the State. The representation and warranty in the preceding sentence shall survive the termination or expiration of this contract.

14. The DEPARTMENT may, from time to time, request changes in the scope of the services of the CONTRACTOR to be performed under this Agreement. Such changes which are mutually agreed upon by and between the CONTRACTOR and the DEPARTMENT, shall be incorporated in written amendments to this Agreement.

15. Any information, data, instruments, documents studies or reports given to or prepared or assembled by the CONTRACTOR under this Agreement may be published by the CONTRACTOR or its employees, or distributed by the CONTRACTOR to any other individual or organization. Prior to entering into an agreement to publish, or prior to publishing, the CONTRACTOR or its employees shall give the DEPARTMENT a reasonable opportunity to review any such proposed publication to ensure consistency with State policies and for the purpose of determining if the DEPARTMENT wishes to be given credit for its funding role in the preparation of any such information, data, instruments, documents, studies, or reports. If the DEPARTMENT determines that it wishes to be given credit, then CONTRACTOR shall take all reasonable steps to assure that credit is given by the publisher. Otherwise, the CONTRACTOR may proceed to enter into any agreement to publish, or may publish, but shall not acknowledge any participation by the DEPARTMENT.

16. The CONTRACTOR shall use its reasonable best efforts to ensure that all publications produced as a result of this Agreement are printed double-sided on recycled paper.

17. Upon the entering of a judgment of bankruptcy or insolvency by or against the CONTRACTOR, the DEPARTMENT may terminate this Agreement for cause.

18. Neither party shall be deemed to be in default of its obligations hereunder if and so long as it is prevented from performing such obligations by any act of war, hostile foreign action, flooding, landslides, wind, Economic Force Majeure (as defined above), terrorism, nuclear explosion, riot, strikes, civil insurrection, earthquake, hurricane, tornado, or other catastrophic natural event or act of God.

19. The CONTRACTOR shall not assign or transfer any interest in this Agreement.

20. The place of this Agreement, its situs and forum, shall be Wake County, North Carolina, where all matters, whether sounding in contract or tort, relating to its validity, construction, interpretation and enforcement shall be determined.

21. The State Auditor shall have access to persons and records as a result of all contracts and grants entered into by State agencies or political subdivisions in accordance with General Statute 147-64.7. The CONTRACTOR shall retain all records for a period of three years following completion of the Agreement. Each of the parties, consistent with the North Carolina Public Records Act, Chapter 132 of the North Carolina General Statutes, shall use their reasonable best efforts to keep the terms of this Agreement confidential and shall notify the other party prior to any distribution or publication to any third parties.

IN WITNESS WHEREOF, the CONTRACTOR and the DEPARTMENT have executed this Management Agreement in four originals, one (1) of which is retained by the CONTRACTOR and three (3) of which are retained by the DEPARTMENT, the day and year first above written.

CHIMNEY ROCK MANAGEMENT, LLC

**NORTH CAROLINA DEPARTMENT
OF ENVIRONMENT AND NATURAL
RESOURCES**

William G. Ross, Jr., Secretary

By:

Name: Todd B. Morse

Title: President

By:

Name: June W. Michaux

Title: Deputy Director, State Property
Office

WITNESS:

WITNESS:

Julie K. Latta
Signature

Jim Walter
Signature

ORIGINAL

ATTACHMENT A

SCOPE OF WORK

OPERATION OF VISITOR FACILITIES AT CHIMNEY ROCK PARK

Terms used herein and not otherwise defined herein shall have the meanings set forth in the Agreement.

1. The CONTRACTOR shall operate the public facilities within the Chimney Rock Section of Chimney Rock State Park through the Initial Term. It is the intention of both the DEPARTMENT and the CONTRACTOR that the facilities will operate in a manner that is consistent with the current operations of the Park including controlling access to the Park by charging an admission fee.
2. Employees of the State's Division of Parks & Recreation ("DPR") may enter the Park, and all of its buildings, trails, and other facilities, at any time as needed in the performance of their duties, without payment of any admission fees; provided however DPR employees shall conduct themselves so as not to disrupt normal commercial operations of the Park.
3. Operation of the Park will conform to an annual operating plan, which is attached to and made a part of this Agreement (as such operating plan may be amended from time to time). The operating plan will include the following:
 - a listing of admission fee structure.
 - hours of operation.
 - marketing plan, which will include:
 - an advertising plan
 - a promotions / PR plan
 - education / special event offering summary
 - customer service training / expectations
 - a summary financial plan / revenue plan / budget.
 - an overview of maintenance / repair activities.
 - an overview of any changes to be made from prior years in the retail / food and beverage segments of the Park's operations.

The CONTRACTOR will submit any proposed revisions to the previous year's annual operating plan for approval to DPR by December 31. The plan, as proposed to be revised, will be reviewed by DPR and approved, with such changes as the CONTRACTOR and DPR shall mutually agree upon, by February 15 of the following year. The annual operating plan will also include a pro forma budget of any requested Capital Improvements or Material Alterations at the Park to be paid for by the State.

Portions of the operating plan may be treated as confidential trade secret

information, pursuant to the N.C.G.S. 132-1.2 and N.C.G.S. 66-152, upon the mutual agreement of the parties.

4. Staff will be employed at the discretion of the CONTRACTOR as necessary to accomplish the requirements of the Agreement. Positions may be increased or decreased as needed. All day to day management decisions regarding the operation of the Park will be made by the CONTRACTOR, using its sole but reasonable business discretion, in accordance with the annual operating plan approved by DPR. The CONTRACTOR will have use of all existing buildings, trails, furnishings, vehicles and equipment for operating the Park. Unless state law, safety policies, or the need to avoid adverse environmental effects require otherwise, during the Term the State will not cause any material changes to the policies or operations of the Park, including existing policies regarding rock climbing. Unless state law requires otherwise, the State shall not prohibit and shall take such actions as may be reasonably required to allow (a) continued alcohol sales at the Park; and (b) a non-denominational Easter church service, in each instance in accordance with the past practices of the Park. The CONTRACTOR also reserves the right to continue to receive revenue from movie, television or other film production or similar licensing at the Park in accordance with past practices.
5. The CONTRACTOR will collect fees from Park visitors for the use of the facilities and for goods and services obtained therein, in accordance with the annual operating plan. All profits and losses of the Park shall be for the account of the CONTRACTOR. The CONTRACTOR and its representatives will have full right of access to the Park to enter and manage it substantially as currently conducted.
6. Initially, the property will be known as "Chimney Rock Park" and will continue to be branded and marketed using existing logos and promotional materials using such name. The parties have agreed upon a transitional plan to begin during calendar year 2008 incorporating the name "State" into the marketing and promotion of the Park. Signs, brochures, documents, items for sale, and other entities bearing the name "Chimney Rock Park" may be used until depleted. New documents, items or entities designed or created during the Term of this Agreement shall bear the name "Chimney Rock State Park" or such other name as the parties may mutually agree. The State hereby grants to the CONTRACTOR an irrevocable, royalty-free, and perpetual license to use the name "Chimney Rock Park" and "Chimney Rock State Park" during the Term of this Agreement.
7. The CONTRACTOR may design, produce, maintain and disseminate electronic and/or printed marketing materials on the services and facilities provided at Chimney Rock State Park, as described in the annual operating plan. Following discussions with the CONTRACTOR, however, DPR may in its sole but reasonable discretion require the cessation of marketing activities found to be inconsistent with DPR authorities or not to be in the public interest.

8. The CONTRACTOR will take out and maintain at its expense liability insurance with a combined single limitation of \$1,000,000 against claims for damage to property and personal injury, including accidental death, arising from operations under this Agreement. The CONTRACTOR shall report any visitor or worker injury, law enforcement incident, medical emergency, or similar event to the DEPARTMENT within ten (10) working days or a time frame agreed upon between the Contract Administrators.
9. The CONTRACTOR will maintain records and prepare reports in accordance with DPR instructions, detailing expenses incurred, receipts collected, and deposits made. The CONTRACTOR will keep books and records in accordance with GAAP and consistent with the historical past practices of the Park. DPR has the right to inspect the records at reasonable times within the normal hours of operation on reasonable notice so as not to disrupt business operations.
10. The CONTRACTOR has the authority to close the Park or any and/or all of the facilities in the Park for reasons of public health and safety. DPR has the authority to close any and/or all of the facilities in the Park for reasons of public health and safety, protection of natural resources, or other operational reasons deemed appropriate and necessary by the Park Superintendent or his / her designee. For closures outside the control of the CONTRACTOR, the State shall reimburse the CONTRACTOR for all fixed costs and expenses incurred in connection with Park operations during the period of such shut-down (including all payroll expenses), based upon comparisons with the fixed costs and expenses of the previous year during the same time period.
11. During the Term the parties will cooperate in good faith to resolve any disputes between the parties. The CONTRACTOR shall be responsible for handling any customer complaints received during the Term that are received by the CONTRACTOR.

CONFIDENTIAL – NOT FOR DISTRIBUTION

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