

## [Tribe] TORT CLAIMS ACT

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## **PART I - Title Scope and Definitions**

### **§1. Short Title**

This act shall be known and may be cited as the [Tribe] Tort Claims Act.

### **§2. Scope**

This Act governs all tort claims arising out of incidents occurring at a [Tribal gaming enterprise] gaming facility that patrons assert pursuant to the Compact entered pursuant to [Tribe] Resolution #\_\_-\_\_ and the "State-Tribal Gaming Act," Oklahoma Title 3A, § 261 et seq.

### **§ 3. Definitions**

As used in the [Tribe] Tort Claims Act:

- a) "Act" means the [Tribe] Tort Claims Act.
- b) "Claim" or "tort claim" means a claim recognized at law as a private or civil wrong or injury, that is independent of contract, that involves a violation of duty imposed by general law, and that results in a loss to a person or their property as the proximate result of an act or omission of an employee of the tribe or other individual acting for the tribe, except an independent contractor, when that person is acting within the scope of the duties of that person.
- c) "Claimant" means the person that asserts a tort claim which is subject to the provisions of this act.
- d) "Compact" means the "State-Tribal Gaming Act," Oklahoma Statutes Title 3A, § 261 et seq..
- e) "Days" means a business day as specified or provided under tribal law.
- f) "Employee" means an individual employed by the tribe on a full time or part time basis and elected or appointed officers of the

- government or subdivision of the tribe. The term does not include an individual working for the tribe as an independent contractor.
- g) “Gaming facility” means the interior of a building in which compacted games are operated. In the event that buildings are connected or areas of buildings are distinctly separated by walls with doorways or hallways connecting the areas, the distinct areas that do not contain compacted games are not part of the gaming facility. A restroom intended for use by gaming patrons and having the doorway opening onto a gaming facility are part of the gaming facility.
  - h) [“Risk Manager” or “RM”] means the individual who is, or the office of, the [RM], or both, as the context dictates, designated by the Principal Chief to administer the provisions of this act.
  - i) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.
  - j) “Record” means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form.
  - k) “Tribe” means the [enacting Tribe or Nation]. The term includes subdivisions, agencies, sections of tribal management, tribal business enterprises, all elected or appointed officers or members of any tribal governing body, and other individuals designated or authorized to act for any of the above who are acting in good faith within that designation or authority, and all other employees or other individuals except independent contractors acting in good faith within the scope of their duties, whether performing governmental or proprietary functions and whether acting together or singularly.

## **PART II - Liability in Tort**

#### § 4. Claims; exclusive remedy

- (a) The Tribe, as a sovereign and federally recognized Indian tribe, possesses and is legally entitled to sovereign immunity from liability for tort claims whether within the scope of this act or not. By adoption of this act, the Tribe does not waive sovereign immunity in any respect.
- (b) This act provides the exclusive remedy with respect to the tribe for injury, damage, or loss to a person from a tort claim and displaces any other possible remedy regarding a tort claim, whether at general law, by statute, regulation, or ordinance, or otherwise, except as otherwise provided by tribal law.

#### § 5. Obligation of the tribe

- (a) The RM, shall determine the method and means for providing liability insurance pursuant to the provisions of this act.
- (b) The requirement for liability insurance and the purchase of such insurance is not a waiver of the sovereign immunity of the tribe but effectuates the purpose of the tribe to provide an appropriate remedy for claimants who have tort claims within the scope of this act.
- (c) If not self insuring, the tribe may contract at least a B+ or better rated insurance carrier o provide liability insurance coverage on such terms as determined by the circumstances and needs of the tribe.
- (d) The tribe may purchase additional limits of insurance, establish deductible amounts, and establish, as an alternative to acquiring insurance from a source outside the tribe, a self-insurance policy to the extent insurance is required by this act.

## § 6. Extent of liability

The tribe shall acquire and keep in force a liability insurance contract with a registered and solvent insurance company or self-insurance, on behalf of the tribe for the purpose of paying tort claims. The total liability with respect to tort claims within the scope of this act arising out of a single act, accident, or occurrence happening after the effective date of this act may not exceed the [maximum insurance limits in force]. Those limits shall be not less than those required in the Compact.

## § 7. Exemptions from liability

The following claims are excluded from coverage pursuant to this act and thus are subject to the sovereign immunity of the tribe: <sup>1</sup>

- (a) a claim arising from an act or omission of a person acting outside of the scope of the duties of the person;
- (b) a claim arising from an act or omission of a person that involves corruption, fraud, assault, battery, false imprisonment or arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, or interference with contract rights;
- (c) a claim seeking damages that are punitive, exemplary, incidental, or consequential;
- (d) a claim resulting from legislative, judicial, quasi-judicial, licensing, or prosecutorial functions, or execution of lawful court orders;
- (e) a claim arising from conduct that involves discretionary functions or duties, including planning and operational decisions based on policy judgment, whether or not a

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<sup>1</sup> This is a list of examples of limitations that have been enacted in other jurisdictions. The enacting Tribe should consider which of these or others are appropriate for the Tribe.

decision was considered, ill-considered, or unconsidered, including negligent hiring and retention, enforcement or lack or enforcement of any law, the grant, delay or denial of a license;

- (f) a claim that is barred by law, or beyond the limit as to amount of any claim imposed by law;
- (g) a claim based on an intentional tort or for strict liability or breach of warranty;
- (h) a claim based on the failure to enforce a law, to perform or the failure to perform an act or service, or to afford adequate protection, if the failure is justified [has a rational basis] under the circumstances then existing;
- (i) a claim arising out of the detention of any goods or merchandise by any law enforcement officer, unless such detention is of a malicious or arbitrary and capricious nature;
- (j) a claim arising out of the imposition or establishment of a quarantine, whether such quarantine relates to persons or property;
- (k) a claim based on attractive nuisance or unauthorized entry on or into property;
- (l) a claim arising out of a plan or design for construction or improvements to public property, including but not limited to public buildings, highways, roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;
- (m) A claim arising out of an injury caused by a dangerous condition on property of the Tribe that was not caused by the negligent or other wrongful conduct of an employee of

the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that the Tribe shall not be liable for the failure to warn of a dangerous condition which is [obvious] or [observable] to one exercising due care;

- (n) a claim based on natural conditions of property;
- (o) a claim arising from a defect in the manufacture or design of a product;
- (p) a claim for any loss covered by any worker's compensation program, or any other applicable tort claims act, or one that is incurred by a person employed by the tribe;
- (q) a claim arising out of any tortious act or omission made subject to the Federal Tort Claims Act 28 U.S.C § 2671 et. seq. by Public Law 101-512, as amended (set out as a note to 25 U.S.C. § 450f;) or per 25 U.S.C. § 450f(d), or by other Federal law. In all such instances, the claimant(s)' exclusive remedy shall be under the Federal Tort Claims Act;
- (r) a claim by an person using [Tribe or Nation] property or facilities for activities not related to tribal business or tribal obligations;
- (s) a claim payable from a collateral source of compensation,
- (t) a claim based on the absence or malfunction of any equipment unless uncorrected within a reasonable time after the absence or malfunction was discovered or should have been discovered;
- (u) a claim for loss due to theft or other criminal act;
- (v) a claim based on an act or omission done in conformance with then current recognized standards;
- (w) a claim for costs or attorneys fees; and,
- (x) any claim arising before the effective date of this act.

Claims occurring prior to this date of the act will continue to be litigated directly in the Tribal District Court.

## § 8. Apportionment of Award

If the amounts finally determined to be payable to multiple claimants exceed the limitations provided in this act, any claimant may apply to the appropriate tribal authority for apportionment to each claimant of a share of the total award as limited. The share apportioned to each claimant shall be in the proportion that the ratio of the award made to that claimant bears to the aggregate awards for all claimants arising out of the single act, accident, or occurrence.

## § 9. Assignment

- (a) A tort claim shall not be assignable. In the event any assignment of the tort claim is made in violation of this Section or the Compact, or any person other than the patron claiming the injury becomes a party to any action hereunder, this consent shall be deemed revoked for all purposes.
- (b) Notwithstanding §9.(a), consent to suit shall not be revoked if an action on a tort claim is filed by
  - (1) a court appointed representative of a claimant's estate,
  - (2) an indispensable party, or
  - (3) a health provider or other party subrogated to the claimant's rights by virtue of any insurance policy; provided, that nothing herein is intended to, or shall constitute a consent to suit against the enterprise as to such party except to the extent such party's claim is:
    - i. in lieu of and identical to the claim that would have been made by the claimant directly but for the appointment of said representative or indispensable party, and participation of such other party is in lieu of and not in addition to pursuit of the claim by the patron, and
    - ii. the claim of such other party would have been subject to a consent to suit hereunder if it had been made by the claimant directly.



### **PART III - Procedure**

#### § 10. Tort Claim Procedure

- (a) In order to be entitled to a remedy pursuant to this act, a person who is injured, damaged or otherwise suffers loss and asserts a tort claim must pursue the claim in the form and manner prescribed in this act.
- (b) By filing a tort claim pursuant to this act a claimant consents to the jurisdiction of the tribe and is subject to all the civil and criminal laws of the tribe.
- (c) A tort claim shall be styled as “In re Tort Claim of (Name of Claimant).”
- (d) Any claim filed pursuant to the provisions of this act is not a claim against either the tribe or the insurance carrier for the tribe.
- (e) The [RM] shall accept all tort claims made pursuant to this act and within the limits outlined by this act, the Compact, and other tribal law including the tribal Constitution, customs, traditions, and all published regulations.
- (f) To initiate a tort claim under this act, it must be received in record form by the office of the [RM], or the [Tribe] Gaming Commission, within one year after the act, accident, or occurrence that gave rise to it. The office receiving a claim shall record the time and date received and insure that the other office has also received the claim. Failure to timely file the claim is grounds for denying the claim and loss of any rights granted a claimant pursuant to the provisions of this act. Provided that a tort claim notice filed more than 90 days, but

within one year, after the event shall be deemed to be timely filed, but any judgment thereon shall be reduced by ten percent (10%).

- (g) The [RM] shall assign a unique numerical designation of the claim and forward the claim to the insurance carrier within 48 hours after the claim is filed.
- (h) The enterprise shall promptly review, investigate, and make a determination regarding the tort claim. Any portion of a tort claim which is unresolved shall be deemed denied if the enterprise fails to notify the claimant in writing of its approval within 90 days of the filing date, unless the parties by written agreement extend the date by which a denial shall be deemed issued if no other action is taken. There shall be no limit on the number of written agreements for extensions, provided that no written agreement for extension shall be valid unless signed by the claimant and an authorized representative of the enterprise.
- (i) At any time after filing a Claim but before the denial of a claim, or within 180 days after denial of a claim, the claimant may request Arbitration pursuant to § 14 by sending notice to the RM.

## § 12. Notice

- (a) A person or office “receives” a notice or notification when it comes to that person’s or office’s attention or it is duly delivered in a form reasonable under the circumstances at a location held out by that person or office or at a location known to be the place for receipt of communications of the type.
- (b) Notice, notification and knowledge received by a person or office is effective for a particular purpose from the time it is brought to the attention of the individual responsible for the matter involved and, in any event, from the time it would have been brought to that individual’s attention if the person or office had exercised due diligence by having reasonable routines for communicating significant information to the

individual responsible for the matter involved and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the person or the office to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the matter involved and that it would be materially affected by the information.

- (c) A person "sends" a notice or notification to another person or office by taking steps that are reasonably required to inform the other person or office in ordinary course, whether or not the other person or office actually comes to know of it.

#### § 13. Tort Claim Notice Form

The RM shall publish a form for tort claims to be used when filing. Such forms shall be available to the public at all gaming locations. In addition to any other information reasonably requested by the RM, the following information must be provided for a tort claim:

- (a) Full legal name, contact information, Social Security number and Driver's License number of claimant
- (b) Notice of where and how to file tort claims
- (c) Details of the occurrence
- (d) Identity of agent, if any
- (e) Damages claimed
- (f) Notarized signature of claimant

#### § 14. Arbitration:

- (a) Judicial proceedings to resolve a tort claim shall be by arbitration pursuant to this Section and the [Tribe] Arbitration Act.
- (b) Request for Arbitration
  - (1) Within 10 days from the receipt of notice of a Request for Arbitration by the RM, the RM shall contact the Claimant

using the information on the Tort Claim Notice Form, or the Attorney for the Claimant if represented. The parties shall begin selecting an arbitrator.

- (2) A single arbitrator from a list of qualified arbitrators maintained by the [Tribe] Supreme Court may be mutually agreed upon by the claimant and the RM. If an arbitrator cannot be selected from the list the parties may agree on any other arbitrator. If the parties cannot agree upon an arbitrator within [45] days from the date that the request for Arbitration is sent, then the Clerk of the Supreme Court shall randomly select an arbitrator from the list pursuant to procedures adopted by the Supreme Court.
- (3) The Claimant's right to be heard is contingent upon compliance with all requirements of this act, including filing deadlines provided herein.
- (4) In furtherance of the [Tribe]'s policy to simplify and expedite claims under this Act, arbitrators and courts shall give deference to unrepresented Claimants by excusing honest, non-material or correctable mistakes. Filing deadlines are deemed to be material and non-correctable for purposes of this paragraph.

(c) Arbitration Costs

- (1) Subject to paragraph (2), the cost of arbitration shall be paid by the tribal enterprise.
- (2) If the arbitrator determines that the claim or defense is frivolous, some or all of the prevailing party's attorney fees and costs of arbitration may be borne by the non-prevailing party claimant as determined by the arbitrator.

§ 15 Arbitration Record

(a) The Arbitrator shall compile a record, for purposes of appeal of an arbitration award to the District Court, that shall include:

- (1) The case file, including all documents, pleadings, motions, and intermediate rulings;
- (2) Evidence received or considered at the arbitration proceeding;
- (3) A statement of matters officially noticed;
- (4) Questions and offers of proof, objections, and rulings thereon;
- (5) Proposed findings and exceptions;
- (6) The final arbitration decision appealed, and any other decision, opinion, or report entered by the arbitrator presiding over the hearing; and
- (7) All other evidence or data submitted to the arbitrator in connection with consideration of the case, provided all parties have had access to such evidence.
- (8) Arbitration proceedings shall be recorded by audio and may also be recorded by video at the option of the arbitrator. Such recordings shall be maintained for such time so as to protect the record through judicial review. Copies of the recordings shall be provided by the arbitrator at the request of any party to the proceeding. Costs of copying the recordings shall be borne by the party requesting the copy. For judicial review, recordings of an individual proceeding, as certified by the arbitrator, may be submitted to the District Court by the arbitrator

as part of the record of the proceedings under review without transcription unless otherwise required to be transcribed by the Court.

#### §16 Request for Appeal

- (a) Within 30 days of receipt of the final arbitration decision either party may file a request for appeal pursuant to the [Tribe] Arbitration Act.
- (b) Within thirty (30) days of the filing of the arbitration appeal, the arbitrator shall compile and transmit to the District Court the original or a certified copy of the record of the proceeding under review. By stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the Court for the additional costs resulting therefrom. The Court may require or permit subsequent corrections or additions to the record when deemed desirable.
- (c) The review shall be conducted by the District Court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the arbitrator pursuant to Sections 23 or 24 of the [Tribe] Arbitration Act which are not shown in the record, testimony thereon may be taken by the Court.
- (d) In addition to the grounds stated in the [Tribe] Arbitration Act §23(a), the Court may vacate an arbitration award if the findings of fact are clearly erroneous.

#### **§17. Provisions as cumulative**

The provisions of this act shall be cumulative to existing law.

#### **§18. Severability**

If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

**§19. Effective Date**

This act shall become effective [60 days after its passage] in accordance with the [Tribe] Constitution. Nothing in this act shall be construed to affect any claim arising before the effective date of this act, provided that any claim arising before the effective date of this act may be resolved pursuant to this act upon written request of the plaintiff.