

**CHAPTER 36. SAN MANUEL GAMING OPERATION EMPLOYMENT CLAIMS ACT<sup>1</sup>**

**SMTC 36.1 Short Title**

This law shall be known as the San Manuel Gaming Operation Employment Claims Act (the “Act”).

**SMTC 36.2 Definitions**

(a) **“Administrative Claim Form”** means the form provided by the Gaming Operation to a Claimant in which the Claimant must provide information relevant to his or her allegation of employment discrimination, harassment, or retaliation.

(b) **“Adverse Employment Action”** means an action taken by the Gaming Operation that materially and negatively affects the compensation, terms, conditions, privileges, responsibilities, or status of employment or potential employment of an Applicant, Employee, or Intern. An Adverse Employment Action shall include, but is not limited to, failure to provide Reasonable Accommodations.

(c) **“Applicant”** means 1) a person who has applied to work for, but has not been hired by, the Gaming Operation through submission of a written or electronic application to the Human Resources Department pursuant to a job announcement distributed or authorized to be distributed by the Human Resources Department, and 2) a person who has applied to work as an intern for the Gaming Operation or in the Gaming Facility pursuant to an internship announcement distributed or authorized to be distributed by the Human Resources Department, whether such internship is paid or unpaid. The term “Applicant” excludes independent contractors, contractors, subcontractors, and outside consultants. Nothing in this Act shall operate or be interpreted to grant to any Applicant a right, privilege, or status of employment with the Gaming Operation or in the Gaming Facility.

(d) **“Claim”** means a written allegation of employment discrimination, harassment, or retaliation arising out of a Claimant’s employment with, in connection with, or relating to the operation of, the Tribe’s Gaming Operation, Gaming Facility or Gaming Activities, filed pursuant to the requirements of this Act. Two or more Claims for, arising out of, in consequence of, in connection with or in any way involving or resulting from a single Adverse Employment Action or act of harassment, or a series of related Adverse Employment Actions or acts of harassment, shall be treated as a single Claim and any monetary recovery for such single Claim shall not exceed any applicable limit of insurance held by the Gaming Operation. A series of related Adverse Employment

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<sup>1</sup> Adopted by the General Council on April 11, 2017.

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Actions or acts of harassment are those that arise out of, are based on, relate to, or are in consequence of the same facts, circumstances, or situations.

(e) **“Claimant”** means an Applicant, Employee, or Intern of the Gaming Operation who alleges that he or she suffered an act or acts of employment discrimination, harassment, or retaliation prohibited by this Act.

(f) **“Claim Notice”** means the notice issued by the Human Resources Department and delivered by personal service or certified mail, return receipt requested, that the Claimant is required within one hundred and eighty (180) calendar days of receipt of such notice to file a Claim commencing the Administrative Claim Process.

(g) **“Compact”** means the Class III Tribal-State Gaming Compact between the Tribe and the State of California executed on or about August 15, 2016, with an effective date of April 10, 2017, which supersedes the prior Tribal-State Gaming Compact executed September 10, 1999 as amended on August 28, 2006, further amended by letter of agreement dated September 25, 2007.

(h) **“Disability”** shall include, but is not limited to:

(1) Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity or requires special education or related services. For purposes of this section, "limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult. "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Having a record or history of a mental or psychological disorder or condition described herein, which is known to the Gaming Operation.

(3) Being regarded or treated by the Gaming Operation as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(4) Being regarded or treated by the Gaming Operation as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described herein.

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- (5) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
- (A) affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; and
  - (B) limits a major life activity. For purposes of this section "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult. "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.
- (6) Any other health impairment not described in this section that requires special education or related services.
- (7) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment which is known to the Gaming Operation.
- (8) Being regarded or treated by the Gaming Operation as having, or having had, any physical condition that makes achievement of a major life activity difficult.
- (9) Being regarded or treated by the Gaming Operation as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability.
- (10) "Disability" does not include sexual or other behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

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(i) **“Employee”** means a person employed by the Gaming Operation, but does not include Applicants, Interns, independent contractors, contractors, subcontractors, or outside consultants.

(j) **“Gaming Activities”** means the Gaming Operation’s Class III Gaming activities authorized by the Compact.

(k) **“Gaming Facility”** means any building in which Gaming Activities or any Gaming Operations occur, or in which business records, receipts, or funds of the Gaming Operation are maintained (excluding offsite facilities primarily dedicated to storage of those records and financial institutions), and all rooms, buildings, and areas, including hotels, parking lots, and walkways, a principal purpose of which is to serve the activities of the Gaming Operation and Facility rather than providing them with an incidental benefit.

(l) **“Gaming Operation”** means the business enterprise that offers and operates Gaming Activities, whether exclusively or otherwise.

(m) **“Human Resources Department”** means the Human Resources Department which serves the Gaming Operation.

(n) **“Intern”** means a person who works for the Gaming Operation or in the Gaming Facility as an intern, whether such internship is paid or unpaid. Nothing in this Act shall entitle an Intern to any financial, health, or other benefits or employment status or position not expressly set forth in the terms and conditions of such internship.

(o) **“JAMS Arbitration”** means arbitration before the JAMS Optional Arbitration Appeals Panel pursuant to SMTC 36.7.

(p) **“Reasonable Accommodation”** includes either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities;

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

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(q) **“San Manuel Tribal Court”** means the tribal court of the San Manuel Band of Mission Indians.

(r) **“Sexual Harassment”** means any unwelcome advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature that:

(1) is made an explicit term or condition of employment;

(2) is used as the basis of any employment decision, including any Adverse Employment Action; or

(3) creates a work environment that is intimidating, hostile, or offensive.

(s) **“Tribal Appellate Court”** means the Appellate Court of the San Manuel Tribal Court.

(t) **“Tribal Gaming Agency”** means the San Manuel Gaming Commission.

(u) **“Tribal Trial Court”** means the Trial Court of the San Manuel Tribal Court.

(v) **“Tribe”** means the San Manuel Band of Mission Indians.

(w) **“Undue Hardship”** means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed;

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility;

(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities;

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity; and

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(5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.

(x) **“Written Decision”** means the decision reduced to written form by the Human Resources Department regarding its decision to accept or deny a Claim.

### **SMTC 36.3 General Provisions**

36.3.1 Purpose. The purpose of the Act is to prohibit illegal employment discrimination, harassment, and retaliation against Applicants, Employees, and Interns.

36.3.2 Policy. The Tribe’s policy is to prohibit discrimination and harassment in connection with the employment of persons who work for, or apply to work for, the Gaming Operation or in the Gaming Facility on the basis of race, color, religion, ancestry, national origin, gender, marital status, medical condition, sexual orientation, age, or disability, and to prohibit retaliation against persons who oppose employment discrimination or harassment or participate in proceedings pursuant to this Act.

36.3.3 Exclusive Remedy. The Tribe, in order to effectuate and support the policy described above, seeks to establish a fair process for the resolution of allegations of employment discrimination, harassment, and retaliation. The process set forth in this Act shall be the sole and exclusive remedy available to Applicants, Employees, and Interns for the resolution of Claims of employment discrimination, harassment, and retaliation.

### **SMTC 36.4 Prohibition Against Employment Discrimination, Harassment, and Retaliation**

36.4.1 Discrimination. It shall be an unlawful employment practice for the Gaming Operation to discriminate in connection with the employment of persons who work for, or apply to work for, the Gaming Operation or in a Gaming Facility on the basis of race, color, religion, ancestry, national origin, gender, marital status, medical condition, sexual orientation, age, or disability.

- a. Adverse Employment Action. Acts of discrimination in connection with employment shall include any Adverse Employment Action taken by the Gaming Operation against an Applicant, Employee, or Intern on the basis of race, color, religion, ancestry, national origin, gender, marital status, medical condition, sexual orientation, age, or disability.
- b. Exceptions. Notwithstanding the prohibitions set forth in SMTC 36.4.1, the Gaming Operation may not incur liability under this Act for the following actions:

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- 1) Refusing to hire an Applicant or discharging an Employee or Intern with a Disability where the Applicant, Employee, or Intern, because of his or her Disability, is unable to perform his or her essential job duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.
- 2) Failing to accommodate an Applicant, Employee, or Intern if said accommodation produces an undue hardship to the Gaming Operation.
- 3) Reasonably regulating, for reasons of supervision, safety, security, or morale, the employment of spouses in the same department, division, or facility, consistent with rules and regulations adopted by the Gaming Operation and the Tribal Gaming Agency.
- 4) Using veteran status as a positive factor in Applicant, Employee, or Intern selection or giving special consideration to Vietnam-era veterans.
- 5) Refusing to employ an Applicant because of his or her age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the Gaming Operation, the Tribe, or any of the Tribe's entities or instrumentalities, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute prohibited employment discrimination, harassment, or retaliation.
- 6) Providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the person becomes eligible for Medicare or other governmental health benefits.
- 7) Inquiring into the ability of an Applicant to perform job-related functions and responding to an Applicant's request for reasonable accommodation.
- 8) Requiring a medical or psychological examination or making a medical or psychological inquiry of an Applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering Employees in the same job classification are subject to the same examination or inquiry.

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- 9) Requiring any examinations or inquiries that it can show to be job related and consistent with business necessity. The Gaming Operation may conduct voluntary medical examinations, including voluntary medical histories, which are part of an Employee health program available to Employees at that worksite.
- 10) Failing to accommodate an Applicant's, Employee's or Intern's religious dress practice or religious grooming practice if the accommodation requires segregation of the individual from other Applicants, Employees, Interns or the public.
- 11) Failing to provide a Reasonable Accommodation if such Accommodation would result in a violation of this Act.
- 12) Providing a hiring and promotion preference to qualified Native American persons pursuant to Chapter 31 of the San Manuel Tribal Code, the Native American Preference Ordinance.

36.4.2 Harassment. It shall be an unlawful employment practice for an Employee or Intern to harass an Applicant, Employee, or Intern, or for the Gaming Operation to encourage, tolerate, or otherwise fail to take reasonable measures to address such harassment. For purposes of this subdivision, harassment includes, but is not limited to, Sexual Harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.

36.4.3 Retaliation. It shall be an unlawful employment practice for the Gaming Operation to take any Adverse Employment Action in retaliation against an Applicant, Employee, or Intern because he or she has opposed any practices forbidden by this Act or has participated in any proceeding brought pursuant to this Act.

### **SMTC 36.5 Dispute Resolution Process**

36.5.1 Statute of Limitations. A Claimant shall have one (1) year from the date that an alleged act of employment discrimination, harassment, or retaliation occurred to file a written notice with the Human Resources Department of the alleged action. Failure to provide such written notice within the required timeframe shall operate as a waiver of the right to seek redress of any Claim arising from the alleged act or acts of employment discrimination, harassment, or retaliation.

36.5.2 Claim Notice. Upon notice that a Claimant alleges to have suffered employment discrimination, harassment, or retaliation, the Human Resources Department shall provide a Claim Notice to Claimant by personal service or certified mail, return receipt

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requested, that the Claimant is required within one-hundred eighty (180) calendar days of receipt of the Claim Notice to file a Claim in order to proceed with the Administrative Claim Process, and that Claimant may, if dissatisfied with the Written Decision of the Human Resources Department, request review in the San Manuel Tribal Court.

**36.5.3 Administrative Claim Process.** Claims must be made in writing and must be filed with the Human Resources Department by the Claimant within one hundred and eighty (180) calendar days of receipt of the Claim Notice.

**36.5.4 Contents of a Claim.** A Claim shall contain the following:

- 1) the Claimant's name and address, and the name and address of the Claimant's attorney, if any;
- 2) a concise statement of the facts giving rise to the Claim, including the date(s), time(s), place(s), and circumstances of the act(s) or omission(s) giving rise to the alleged employment discrimination, harassment, or retaliation;
- 3) a concise statement of the nature and the extent of the employment discrimination, harassment, or retaliation the Claimant alleges to have suffered;
- 4) a statement of the relief requested;
- 5) the name(s) of any Gaming Operation Employee(s) to which the alleged employment discrimination, harassment, or retaliation was reported; and
- 6) copies of documentation supporting the Claim.

**36.5.5 Notice of Defective Claim.** If the Claim is defective for failure to include any of the required documentation, the Human Resources Department shall deliver written notice to the Claimant describing such defect(s). The Claimant must cure any defects contained in the notice within 1) fourteen (14) calendar days of receipt of the notice of defective Claim, or 2) one hundred and eighty (180) calendar days of receipt of the Claim Notice. Failure to timely correct a defective claim may be grounds for denial of the Claim by the Human Resources Department.

**36.5.6 Request for Additional Information.** The Human Resources Department may request additional relevant information at any time including, without limitation, any materials they may deem necessary to evaluate or settle the Claim.

**36.5.7 Investigation of a Claim.** Upon receipt of a Claim filed pursuant to this Section, the Human Resources Department shall fully investigate the Claim to determine its validity and shall attempt in good faith to resolve the Claim.

**36.5.8 Issuance of Written Decision.** Within thirty (30) calendar days of the Claim

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filing date, unless the parties agree in writing to a longer period, the Human Resources Department shall issue a Written Decision to the Claimant setting forth the facts relevant to the Claim and the reasons for the Department's acceptance or denial of the Claim. If no Written Decision is issued within thirty (30) calendar days of the Claim filing date and no extension has been granted to the Human Resources Department by the Claimant, the Claim will be deemed to have been denied. If the Human Resources Department determines the Claim should be accepted, it shall also include in the Written Decision an offer to resolve the Claim.

**36.5.9 Tribal Trial Court Review.** Claimant may submit a petition, in the format required by the Tribal Court's rules and procedures, for review of the Claim to the Tribal Trial Court within thirty (30) calendar days of Claimant's receipt of the Written Decision or, in the event of the Human Resources Department's failure to issue a Written Decision within the required timeframe, within thirty (30) days of the deemed denial of a claim. Claimant must serve a copy of the petition upon the Human Resources Department within thirty (30) calendar days of filing the petition.

- a. **Mediation.** The Tribal Trial Court may at any time prior to a hearing order the parties to attempt to resolve the Claim in mediation, during which time the Tribal Trial Court proceedings may be stayed.
- b. **Tribal Trial Court Hearing.** Within sixty (60) calendar days of the filing of the petition for review of the Claim, the Tribal Trial Court shall conduct a hearing at which the Claimant and the Gaming Operation may be represented by counsel. Proceedings before the Tribal Trial Court shall be conducted according to the following procedures:
  - 1) Resolution of a Claim brought to the Tribal Trial Court will be at no cost to the Claimant (excluding the Claimant's attorney's fees, if any).
  - 2) The Tribal Trial Court may award monetary relief for a Claim only up to the limits of an applicable insurance policy held by the Gaming Operation and shall have no authority to award punitive damages regardless of the outcome of the proceeding. The Tribal Trial Court may also award declaratory, injunctive, or equitable relief.
  - 3) All Tribal Trial Court hearings will be governed by the San Manuel Rules of Civil Procedure.
  - 4) A court reporter will be present, at the Gaming Operation's expense, and will create a record of the proceedings.

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- 5) The Human Resources Department or its designee may provide testimony as to the reason for the denial of the Claim, and the evidence and reasons upon which such denial was based.
- 6) The Claimant and any person(s) named by the Claimant as allegedly violating the policy against employment discrimination, harassment, or retaliation may be compelled by the Tribal Court to attend the hearing and present testimony in accordance with the San Manuel Rules of Civil Procedure or any other applicable Tribal law.
- 7) In resolving the issues presented in a case, the Tribal Court shall look to and give weight as precedent to the following mandatory authorities in the following order:
  - i. This Act;
  - ii. Other applicable laws of the Tribe;
  - iii. Common law of the Tribal Court; and
  - iv. Customs, traditions, and generally accepted practices of the Tribe.
- 8) If an issue cannot be resolved by reliance on mandatory authorities, the Tribal Trial Court may look to the following sources as persuasive authority only (in no particular order):
  - i. Common law of other tribes;
  - ii. Federal common law;
  - iii. Common law of the State of California; and/or
  - iv. Common law of other states.
- 9) The Tribal Trial Court shall, within sixty (60) calendar days of the hearing, unless the parties mutually agree on a longer period, issue a written ruling indicating its determination of liability under the Act. The Tribal Trial Court shall immediately serve the Written Decision upon the Claimant and the Gaming Operation.

36.5.10 Tribal Appellate Court Review.

- a. Either party shall have thirty (30) calendar days from the date the Written Decision of the Tribal Trial Court is personally delivered or mailed to file a petition for review with the Tribal Appellate Court. Such petition shall be served by the filing party upon the other party within thirty (30) calendar days of the filing date. If the request for review by the Tribal Appellate Court is not timely submitted, then the matter will be concluded, the ruling of the Tribal Trial Court shall be final and binding, and all parties will be barred from seeking any further review of or redress for the same act or acts of alleged employment discrimination, harassment, or retaliation.
- b. Within fourteen (14) calendar days of the filing of the petition for review, the Tribal Appellate Court shall send notice of the hearing date to the parties and their legal counsel, if any. The hearing date shall commence no later than sixty (60) calendar days from the date the notice is issued by the Tribal Appellate Court, unless the parties mutually agree on a longer period.
- c. The hearing before the Tribal Appellate Court will be conducted pursuant to the following procedures:
  - (i) The Gaming Operation shall bear all costs and expenses of the Tribal Appellate Court (other than Claimant's attorney fees, if any, and any filing fees) regardless of the outcome.
  - (ii) The hearing will not be a de novo review, but will be based solely upon the record developed in the Tribal Trial Court proceeding.
  - (iii) The Tribal Appellate Court shall vacate, reverse, or modify a judgment of the Tribal Trial Court upon finding that:
    - (a) The Tribal Trial Court erred as a matter of law in a way that materially affected the outcome of the case; or
    - (b) The judgment is unsupported by the record taken as a whole.
  - (iv) The Tribal Appellate Court shall have no authority to award punitive damages, attorney's fees, costs or other fees regardless of the outcome of the proceeding.

- (v) The Tribal Appellate Court shall issue its final Written Decision within a reasonable time after the conclusion of the hearing.

**SMTC 36.6 Limitations on Damages**

36.6.1 No Damages in Excess of Insurance Policy. In no event shall any award of damages be applied for or made under this Act in excess of the limits of the Gaming Operation's insurance policy covering such claims. No tribal or Gaming Operation assets, excluding proceeds of the insurance policy, may be the subject of, or used to satisfy, an award of damages under this Act in excess of the deductible amount of said policy.

36.6.2 No Punitive Damages. No punitive or exemplary damages may be awarded in any Claim under this Act under any circumstances whatsoever.

**SMTC 36.7 Contingent JAMS Appellate Rights**

If the San Manuel Tribal Court is not available or ceases to operate, disputed Claims under this Act shall be resolved by a JAMS arbitrator pursuant to the procedures for the JAMS Optional Arbitration Appeal Procedure set forth in Section 10 of the Compact. In this event, the Written Decision (and any exhibits referenced therein) and Claimant's Contents of Claim shall constitute the Record as defined in the JAMS Optional Arbitration Appeal Procedure. In the event such JAMS Optional Arbitration Appeal Procedure becomes effective due to the unavailability or cessation of the San Manuel Tribal Court, a Claimant must first exhaust the Administrative Claim Process as set forth in SMTC 36.5.3–36.5.8 before he or she shall be entitled to pursue arbitration appeal under this Section.

**SMTC 36.8 Limited Waiver of Sovereign Immunity**

36.8.1 The Tribe grants a limited waiver of its right to assert sovereign immunity only with respect to the San Manuel Tribal Court's jurisdiction to adjudicate Claims filed pursuant to this Act but only up to the limits of the applicable insurance policy. In the event the San Manuel Tribal Court becomes unavailable or ceases to operate pursuant to SMTC 36.7, the Tribe's limited waiver of sovereign immunity shall apply to the JAMS Optional Arbitration Appeal Procedure.

36.8.2 Such limited waiver shall not be deemed to waive the sovereign immunity of the Tribe with respect to any assets of the Tribe or the Gaming Operation beyond the limits of the applicable insurance policy, nor shall it apply to, or permit claims or actions of any type against the Tribe, other Tribal entities, agencies, departments, or instrumentalities, any individual members of the General Council, the Gaming Commission, the Business Committee, all Tribal officials, officers, Employees, contractors, agents, or Interns of the Gaming Operation or the Tribe for actions taken during the course and within the scope of their official duties without regard to the policy making, discretionary, or ministerial nature of their duties.

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36.8.3 Neither the Business Committee, the Gaming Operation, the Gaming Commission, nor any official, officer, or Employee thereof shall be authorized, and shall not attempt, to otherwise waive the Tribe's sovereign immunity for Claims arising under this Act.

### **SMTC 36.9 Amendments**

This Act, or any section herein, may be amended only by a majority vote of the General Council. Any such amendment shall be consistent with Section 12.3(f) of the Compact.

### **SMTC 36.10 Severability**

If any part of this Act is found to be void and/or without legal effect, the remainder of this Act shall continue to remain in full force and effect, as though such part had not been contained therein.

### **SMTC 36.11 Effective Date**

This Act shall become effective on April 11, 2017.