

**RESOLUTION OF THE  
WHITE MOUNTAIN APACHE TRIBE OF THE  
FORT APACHE INDIAN RESERVATION**

**WHEREAS,** the Tribal Council is advised by the Tribal Attorney that the proposed ordinances attached hereto amend Chapter Three and Chapter Four of the Judicial Code of the White Mountain Apache Tribe to provide a Tort Claims Act; and

**WHEREAS,** pursuant to the Constitution and By-laws of the White Mountain Apache Tribe, the Tribal Council is charged with the duty to protect the health, security and general welfare of the members of the Tribe, to manage the economic affairs of the Tribe, to regulate the use and disposition of and protect and preserve Tribal property; and provide for the maintenance of law and order on the reservation; and

**WHEREAS,** parties may have claims to assert against the White Mountain Apache Tribe and should be provided a forum whereby they may be entitled to redress just claims to which they are entitled under the law and in accordance with the orderly process of the White Mountain Apache Tribe, while at the same time protecting the legitimate public interest of the Tribe and its members and the ability of the Tribal government to function without undue interference; and

**WHEREAS,** the Tribal Council deems it appropriate to provide a process for asserting a claim against the White Mountain Apache Tribe with appropriate limitations on recovery that can be had; and

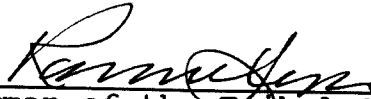
**WHEREAS,** said Tort Claims Act is recommended in the best interest of the White Mountain Apache Tribe; and

**WHEREAS,** the Tribal Council concurs that the attached proposed Tort Claims Act should be posted in each district for a minimum of ten (10) days prior to final enactment by the Tribal Council.

**BE IT RESOLVED** by the Tribal Council of the White Mountain Apache Tribe that it hereby directs the Tribal Council Secretary to post the proposed Tort Claims Act ordinances amending Chapter Three and Chapter Four of the Judicial Code in the form and content attached hereto in each district for a minimum of 10 days as required by the Constitution.

Resolution No. 04-92-117

The foregoing resolution was on April 24, 1992, duly adopted by a vote of seven for and zero against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article V, Section 1 (a) (g) of the Amended Constitution and By-Laws of the Tribe, ratified by the Tribe June 27, 1958 and approved by the Secretary of the Interior on May 29, 1958 pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

  
\_\_\_\_\_  
Chairman of the Tribal Council

  
\_\_\_\_\_  
Secretary of the Tribal Council

RECEIVED

APR 28 1992

FORT APACHE INDIAN AGENCY  
WHITERIVER, ARIZONA

Ordinance No. \_\_\_\_\_

**ORDINANCE OF THE  
WHITE MOUNTAIN APACHE TRIBE OF THE  
FORT APACHE INDIAN RESERVATION**

BE IT ENACTED by the White Mountain Apache Tribal Council in Council Assembled that Chapter Three of the Judicial Code of the White Mountain Apache Tribe is hereby enacted as follows:

**CHAPTER THREE**

**WHITE MOUNTAIN APACHE TRIBE TORT CLAIMS ACT**

**SECTION 3.1 TITLE**

This Chapter shall be known and cited as the White Mountain Apache Tribe Tort Claims Act.

**SECTION 3.2 EFFECTIVE DATE**

The effective date of this ordinance shall be \_\_\_\_\_, 199\_\_. This Ordinance shall affect all lawsuits filed after the effective date. In addition, this Ordinance, except Sections 3.7, 3.8, 3.9 and 3.13, shall affect any lawsuits pending before the Tribal Court which have not proceeded to trial on or before the effective date of this ordinance.

**SECTION 3.3 PURPOSE OF CHAPTER**

The White Mountain Apache Tribe hereby adopts rules of law applicable to tort claims against the White Mountain Apache Tribe. This Chapter codifies existing Tribal law and custom as it applies to civil tort claims against the Tribe.

**SECTION 3.4 AUTHORIZATION FOR SUIT**

The Tribe may be sued in the White Mountain Apache Tribal Court only when explicitly authorized by either (1) ordinance or resolution of the Tribal Council, or (2) applicable federal law.

**SECTION 3.5 LIMITATIONS ON LIABILITY**

A. Except for contracts of insurance issued to the Tribe, as the named insured, any exception to Tribal sovereign immunity and assumption of liability by the Tribe pursuant to this Ordinance does not apply in circumstances where such liability is assumed by any third party, including other governmental bodies or agencies, whether by indemnification

agreement or otherwise.

B. The liability assumed by the Tribe pursuant to this Ordinance shall not extend to any party as a third party beneficiary or otherwise, other than the party(ies) to whom such liability is expressly assumed, and then only to the extent expressly specified.

### SECTION 3.6 DEFINITIONS

As used in this Chapter, the following words and phrases shall have the meanings given to them in this section unless the context clearly indicates otherwise.

- A. Act means acts and omissions.
- B. Assumption of the Risk means knowingly accepting the risks and dangers associated with any act.
- C. Contributory Negligence means the negligence of a plaintiff.
- D. Defendant means the person against whom a claim is made in a lawsuit and includes counterdefendants and crossdefendants.
- E. Duty exists when a person is legally required to conduct himself in a particular manner at the risk that if he does not do so he may be liable to another to whom the duty is owed for injury suffered by such other person.
- F. Fault means the failure to fulfill a legal duty. It includes acts proximately causing or substantively contributing to injury or damages sustained by a person, and includes intentional acts, negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product.
- G. Gross Negligence means conduct which involves negligence plus knowledge of facts which would lead a reasonable person to realize: (1) that the conduct creates an unreasonable risk of physical harm to another or to the actor, and (2) that such risk of physical harm is substantially greater than that which is necessary to make the actor's conduct negligent. Gross negligence of an actor requires a reckless disregard for the safety of the actor or others. See paragraph L Negligence, below.
- H. Injury means the invasion of any legally protected interest of a person or a loss of any kind to a person. Injury includes death, personal injury or other injury to a

person, damage to or loss of property or any other injury that a person may suffer that is actionable and is compensable by the payment of money damages.

I. Intentional Tort means torts where the actor desires to cause the consequences of his act, or where the actor knows or should know that the consequences are substantially certain to result from the act.

J. Invitee means either a public invitee or a business visitor. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

K. Licensee means a person who is allowed to enter or remain on land only because of the possessor's consent.

L. Member means the person who is an enrolled member of the White Mountain Apache Tribe.

M. Negligence means conduct which falls below the standard established by law or custom for the protection of others against unreasonable risk of injury or harm. The standard of conduct to which a person must conform to avoid being negligent is that of a reasonable person under similar circumstances. Negligence includes both acts and omissions.

N. Non-Member means a person who is not a registered member of the White Mountain Apache Tribe.

O. Occurrence means an event, including continuous or repeated exposure to conditions, which results in personal injury, bodily injury, wrongful death or property damage.

P. Person means any individual, partnership, corporation, association, or private organization of any kind other than the White Mountain Apache Tribe.

Q. Plaintiff means a person who makes a claim against another in a lawsuit and includes counterplaintiffs and crossplaintiffs.

R. Possessor of Land means a person who occupies land or who last occupied land with the intent to control it; or a person who is entitled to immediate occupation of the land, so long as no other person is occupying the land. A possessor of land includes an owner including the Tribe, a renter, a lessee, or a squatter.

S. Products Liability means the liability of a manufacturer or seller of a product for damages for bodily injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, installation, preparation, assembly, testing, packaging, labeling, sale, use or consumption of any product; the failure to warn or protect against a danger or hazard in the use or misuse of the product; or the failure to provide property instructions for the use or consumption of any product.

T. Self-Insurance Program means that underlying layer of financial responsibility established by written form in the overlying insurance contracts in force at the time of any occurrence; or such specimen insurance contracts approved and adopted pursuant to the laws of the White Mountain Apache Tribe; or such other self-insurance program which is in force at the time of any occurrence. In no event shall the term "self-insurance program" be construed to mean that the Tribe provides layers of financial responsibility over and beyond layers of financial responsibility established in formal written insurance contracts approved by the Tribe.

U. Strict Liability means liability without fault arising from an abnormally dangerous condition or activity.

V. Torts include intentional torts, negligent torts or torts arising in strict liability. The injury or harm caused by a tortious act must be capable of being compensated by the award of a sum of money to be actionable.

W. Trespasser means a person who enters or remains upon the land of another without permission or right to do so created by the possessor's consent or otherwise.

X. Tribal Employee means a person who is an employee, servant, agent or attorney of the White Mountain Apache Tribe. Tribal Employee also includes elected and appointed officials of the Tribe.

Y. White Mountain Apache Tribe means that federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, (48 STAT. 984) 25 U.S.C. Section 476 et seq. and includes the Tribe, its employees, servants, agents and attorneys, its enterprises, political subdivisions and its funded programs unless such programs would be subject to the Federal Tort Claims Act, 28 U.S.C.A. Section 1346 and related sections.

### SECTION 3.7 LIMITATION OF ACTIONS

A. A civil lawsuit in Tribal Court must be commenced within one (1) year.

B. The time within which a civil lawsuit must be filed shall be counted from the date on which the injury occurred, or when the injury was or reasonably should have been discovered by the injured party.

C. For the purpose of meeting the limitations deadline set in this Rule, a civil suit is commenced when the complaint is filed with the Clerk of the Court.

D. There shall be no tolling of the statute of limitations for any reason, including equitable reasons other than disability of a person as defined by Section 3.8 below. Neither filing a notice of claim as set forth in Section 3.9, below, nor filing a lawsuit in another jurisdiction shall interrupt the running of the statute of limitations.

### **SECTION 3.8 PERSONS UNDER DISABILITY**

If a person entitled to commence an action under this Chapter is at the time the cause of action accrues either under 18 years of age, or of unsound mind or a person who has been judged by the court to be an incompetent person, the period of such disability shall not be deemed a portion of the period limited for commencement of the tort action. Such person shall have the same time after removal of the disability which is allowed to others.

### **SECTION 3.9 TORT CLAIMS PROCEDURES; 270 DAY NOTICE REQUIREMENT.**

A. Any person who has a claim against the White Mountain Apache Tribe as authorized by this Chapter or otherwise shall file notice of such claim with the Tribal Chairman and the Tribal Attorney as provided by Rule 4(D)(6), White Mountain Apache Tribal Rules of Civil Procedure within 270 days after the cause of action accrues. This notice requirement is jurisdictional and any claim which is not filed within 270 days after the cause of action accrued is barred and no action may be maintained except upon a showing of excusable neglect if the action is brought within the otherwise applicable period of limitations.

B. Such notices shall state the name of each prospective plaintiff, the identity of each prospective defendant, the nature of all claims, a specific description of the claimed injury and the related money damages accruing from such injury, the relief which will be sought, and the correct name, address and telephone number of each prospective plaintiff's attorney or spokesman, if any.

C. A notice of claim against the Tribe or a Tribal Employee filed pursuant to this section is deemed denied, sixty (60) days after the filing of the notice unless the

claimant is advised of the denial in writing before the expiration of the sixty (60) day period.

D. No cause of action shall be accepted for filing against the Tribe or any Tribal Employee unless the plaintiff(s) has filed proof of compliance with this section.

E. In any action against the Tribe or a Tribal Employee, the time for responding to the valid service of any Summons and Complaint shall be sixty (60) days; to valid service of any motion, not less than thirty (30) days; and to the valid service of any order to show cause, not less than thirty (30) days. Any claim against the Tribe or any Tribal Employee is deemed generally denied sixty (60) days after valid service of the Summons and Complaint, unless the plaintiff(s) or the plaintiff'(s) attorney filing the Complaint is advised of acceptance or of a specific or otherwise limited denial in writing or by responsive pleading filed before the expiration of sixty (60) days, and any such claim such otherwise proceed in the same manner as upon the filing of a general denial of the allegations of the Complaint. These time periods shall not be shortened by Rule of Court or judicial order, but shall be extended by any longer period provided by other applicable law, rule or order of the Court.

F. Any person filing a Complaint against the Tribe or a Tribal Employee shall serve a copy of the Summons and Complaint upon the Tribal Chairman and the Tribal Attorney as provided by Rule 4(D)(6), White Mountain Apache Tribe Rules of Civil Procedure, in addition to any other named defendants served pursuant to applicable rules of the White Mountain Apache Tribe Rules of Civil Procedure.

G. In any action in which any claim is asserted against the Tribe or a Tribal Employee, upon written demand of the Tribal Attorney made at or before the time of answering, and sent to the opposing party and filed with the Court where the action is pending, the place of trial of any such action shall be changed to the White Mountain Apache Tribal Court.

H. Notwithstanding subsection A, a person under 18 years of age, or of unsound mind or a person who has been judged by a court to be an incompetent person shall file a claim within 270 days after the disability ceases.

### SECTION 3.10 TRIBAL GOVERNMENT LIABILITY

Notwithstanding any other provisions of this Chapter, there shall be no exception to the sovereign immunity of the Tribe or Tribal Employees and neither the Tribe nor a Tribal Employee shall be liable for personal injury, wrongful death



or property damage alleged to have been caused by or sustained by:

A. Policy decisions or the exercise of discretion vested in the Tribe or a Tribal Employee;

B. Any decision made in good faith and without gross negligence in carrying out the law;

C. Executive, judicial, legislative or administrative action or inaction including but not limited to the adoption or failure to adopt a law or policy, or enforcement or the failure to enforce a law;

D. Issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;

E. Refusal, termination or reduction of benefits under any Tribal assistance program if the Tribe or Tribal Employee is authorized to determine whether or not such benefits should be issued, denied, terminated or reduced;

F. Failure to make an arrest or failure to retain an arrested person in custody;

G. Any escaping or escaped person or prisoner, a person resisting arrest, or injury by a prisoner to himself or herself, or to any other prisoner, except upon a showing of specific intent to cause the injury or harm;

H. Probation, parole, furlough or release from confinement of a prisoner or from the terms and conditions of his probation, parole, furlough or release from confinement, or from the revocation of his probation, parole, furlough or release from confinement except upon a showing of specific intent to cause the injury or harm;

I. Failure to discover violations of any provision of law requiring inspections of property;

J. Failure to respond to a fire or to provide fire fighting services or protection;

K. Failure to respond to medical emergencies or to provide emergency medical services;

L. Acts of Tribal Employees who have been determined by a Court to be guilty of a criminal offense;

M. Discretionary determinations of whether to seek or

provide the resources necessary to purchase equipment, to construct or maintain facilities, roads or the like, to hire personnel, or to provide governmental services of any kind;

N. Plans or designs for construction, maintenance or improvement of Tribally, federally or state owned, controlled or maintained rights-of-way, easements, highways, roads, streets and bridges;

O. Under any theory of Products Liability.

P. The Tribe shall not be vicariously liable for injuries or damages resulting from any act of a Tribal Employee unless the Tribal Employee is personally liable. Notwithstanding the foregoing, the Tribe shall not be vicariously liable for the acts of Tribal Employees who act without Tribal authorization or whose acts are otherwise outside or beyond the course and scope of the Tribal Employee's authority or employment.

Q. Tribal volunteers acting within the course and scope of their authority or employment shall have the same degree of responsibility for their acts and enjoy the same immunities and defenses as Tribal Employees.

R. In addition to the immunity and defenses provided by this Chapter, the Tribe shall be entitled to any defense which would be available to the Tribe if it was a private entity or to a Tribal member if he/she were a non-member.

S. Nothing in this section shall immunize a Tribal Employee from individual liability for the full measure of recovery applicable to a person if it is established that the Tribal Employee's conduct was outside the scope of his authority or employment and that there is no Tribal insurance coverage available.

T. The enumeration of the above immunities shall not be construed to waive any other immunities, nor to assume any liability except as explicitly provided in this Chapter.

### SECTION 3.11 SUITS FOR PERFORMANCE OF DUTIES

Any Tribal Employee except members of the Tribal Council may be sued in the White Mountain Apache Tribal Court to compel him/her to perform his/her duties and responsibilities under the laws of the Tribe.

A. Relief awarded by the Tribal Court under this section shall be limited to declaratory or prospective mandamus or injunctive relief in accordance with the express provisions of the laws of the Tribe establishing the

responsibility for such performance. Such relief shall not include money damages.

B. No relief may be provided under this section without actual notice to the defendant(s), nor before the time provided in this Chapter for answering complaints, motions, or orders to show cause.

### **SECTION 3.12 LIMITATIONS ON FORUM, DAMAGES AND CLAIMS FOR RELIEF**

The Tribe may be sued only in the White Mountain Apache Tribal Court and only with respect to claimed damages which are within the express coverage, and not excluded from coverage, by either commercial liability insurance contracts carried by the Tribe or an established Tribal self-insurance program, approved and adopted pursuant to the laws of the White Mountain Apache Tribe. All claims are further subject to the following provisions and limitations:

A. No judgment, order or award pertaining to any permitted claim under this Chapter shall be for more than the lesser of:

1. The sum of \$250,000 for each individual claimant, but not exceeding the sum of \$500,000 for each accident or occurrence, or \$200,000 for wrongful death; or

2. The limits of valid and collectable liability insurance policies carried by the Tribe covering such claim or occurrence including such deductible amounts to the extent appropriated by the Tribal Council, nor for more than the amount of coverage provided for each such claim or occurrence under established claim reserves as appropriated by the Tribal Council or otherwise established pursuant to any self-insured claims program of the Tribal Government, approved and adopted pursuant to the laws of the Tribe.

B. Any such judgment, order or award may only be satisfied pursuant to the express provisions of the policy(ies) of liability insurance or established self-insurance program of the Tribe which is in effect at the time of the claim or occurrence.

### **SECTION 3.13 COSTS**

A. Costs shall be awarded to the successful party in any tort action except as otherwise provided in this section.

B. Costs of suit shall not be awarded against the White

Mountain Apache Tribe or against any Tribal Employee who was acting within the course and scope of his employment.

C. Costs shall include the reasonable amounts of money actually expended by a party including:

1. Costs of filing and service of process.
2. Costs of preserving testimony including depositions and video depositions.
3. Actual reasonable costs of travel and lodging for necessary witnesses who actually appear and testify at trial.
4. Expert witness fees.
5. Reasonable attorneys' fees.
6. Any other actual costs reasonably and necessarily incurred by a party.

D. Costs shall not include attorneys fees in any action where the prevailing party is a party to a Contingency Fee Agreement.

E. The amount of costs awarded to a successful party shall be modified in accordance with Rule 68, White Mountain Apache Tribe Rules of Civil Procedure, when invoked and applicable.

F. No person shall be jailed because he is unable to pay costs awarded against him.

#### **SECTION 3.14 PUNITIVE AND EXEMPLARY DAMAGES; BAD FAITH DAMAGES**

A. Neither the Tribe, nor a Tribal Employee acting within the scope of his employment, shall be liable for punitive or exemplary damages, or for damages arising from the tort of bad faith.

#### **SECTION 3.15 NEGLIGENCE PER SE; VIOLATION OF ORDINANCE**

A. A person who violates any Tribal ordinance, regulation or other published law governing the conduct of a person is negligent per se whether or not such person has actual knowledge of such Tribal ordinance or law. A person's ignorance of such Tribal ordinance or law shall not be a defense.

## COMPARATIVE NEGLIGENCE

### SECTION 3.101 COMPARATIVE NEGLIGENCE

In all lawsuits involving the Tribe or a Tribal Employee, the provisions of Chapter 4, Comparative Negligence, Section 4.101 et seq. shall apply.

## PREMISES LIABILITY

### SECTION 3.201 PREMISES LIABILITY

In all lawsuits involving the Tribe or a Tribal Employee, the provisions of Chapter 4, Premises Liability, Section 4.201 et seq. shall apply.

## WRONGFUL DEATH

### SECTION 3.301 WRONGFUL DEATH

In all lawsuits involving the Tribe or a Tribal Employee, the provisions of Chapter 4, Section 4.301 et seq. shall apply.

### SECTION 3.303 MEASURE OF DAMAGES; NONLIABILITY FOR DEBTS OF DECEDENT

In an action for wrongful death, the trier of fact (Court or jury) shall give such damages as it deems fair and just for injury to the surviving parties resulting from the death, and taking into consideration any mitigating or aggravating circumstances. The amount recovered in such action shall not be subject to debts or liabilities of the deceased, unless the action is brought on behalf of the decedent's estate. In no event shall an award in a wrongful death action exceed \$200,000.

## SEVERABILITY

### SECTION 3.401 SEVERABILITY

In the event that any section of this Chapter shall be ruled by a court of competent jurisdiction to be invalid or unconstitutional, the remainder of this Chapter shall continue in full force and effect.

**DRAFT**

4-23-92

Ordinance No. \_\_\_\_\_

**ORDINANCE OF THE  
WHITE MOUNTAIN APACHE TRIBE OF THE  
FORT APACHE INDIAN RESERVATION**

BE IT ENACTED by the White Mountain Apache Tribal Council in Council Assembled that Chapter Four of the Judicial Code of the White Mountain Apache Tribe is hereby enacted as follows:

**CHAPTER FOUR**

**GENERAL LAW OF TORTS ACT**

**SECTION 4.1 TITLE**

This Chapter shall be known and cited as the General Law of Torts Act.

**SECTION 4.2 EFFECTIVE DATE**

The effective date of this ordinance shall be \_\_\_\_\_, 199\_\_\_. This Ordinance shall affect all lawsuits filed after the effective date. In addition, this Ordinance, except Sections 4.5, 4.6 and 4.8, shall affect any lawsuits pending before the Tribal Court which have not proceeded to trial on or before the effective date of this ordinance.

**SECTION 4.3 PURPOSE OF CHAPTER**

The White Mountain Apache Tribe hereby adopts rules of law applicable to tort claims against persons other than the White Mountain Apache Tribe and Tribal Employees as set forth in Chapter 3, Judicial Code of the White Mountain Apache Tribe. This Chapter codifies existing Tribal law and custom as it applies to civil tort claims.

**SECTION 4.4 DEFINITIONS**

As used in this Chapter, the following words and phrases shall have the meanings given to them in this section unless the context clearly indicates otherwise.

- A. Act means acts and omissions.
- B. Assumption of the Risk means knowingly accepting the risks and dangers associated with any act.
- C. Contributory Negligence means the negligence of a plaintiff.

D. Defendant means the person against whom a claim is made in a lawsuit and includes counterdefendants and crossdefendants.

E. Duty exists when a person is legally required to conduct himself in a particular manner at the risk that if he does not do so he may be liable to another to whom the duty is owed for injury suffered by such other person.

F. Fault means the failure to fulfill a legal duty. It includes acts proximately causing or substantively contributing to injury or damages sustained by a person, and includes intentional acts, negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product.

G. Gross Negligence means conduct which involves negligence plus knowledge of facts which would lead a reasonable person to realize: (1) that the conduct creates an unreasonable risk of physical harm to another or to the actor, and (2) that such risk of physical harm is substantially greater than that which is necessary to make the actor's conduct negligent. Gross negligence of an actor requires a reckless disregard for the safety of the actor or others. See paragraph L Negligence, below.

H. Injury means the invasion of any legally protected interest of a person or a loss of any kind to a person. Injury includes death, personal injury or other injury to a person, damage to or loss of property or any other injury that a person may suffer that is actionable and is compensable by the payment of money damages.

I. Intentional Tort means torts where the actor desires to cause the consequences of his act, or where the actor knows or should know that the consequences are substantially certain to result from the act.

J. Invitee means either a public invitee or a business visitor. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

K. Licensee means a person who is allowed to enter or remain on land only because of the possessor's consent.

L. Negligence means conduct which falls below the standard established by law or custom for the protection of

others against unreasonable risk of injury or harm. The standard of conduct to which a person must conform to avoid being negligent is that of a reasonable person under similar circumstances. Negligence includes both acts and omissions.

M. Person means any individual, partnership, corporation, association, or private organization of any kind other than the White Mountain Apache Tribe.

N. Plaintiff means a person who makes a claim against another in a lawsuit and includes counterplaintiffs and crossplaintiffs.

O. Possessor of Land means a person who occupies land or who last occupied land with the intent to control it; or a person who is entitled to immediate occupation of the land, so long as no other person is occupying the land. A possessor of land includes an owner including the Tribe, a renter, a lessee, or a squatter.

P. Products Liability means the liability of a manufacturer or seller of a product for damages for bodily injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, installation, preparation, assembly, testing, packaging, labeling, sale, use or consumption of any product; the failure to warn or protect against a danger or hazard in the use or misuse of the product; or the failure to provide property instructions for the use or consumption of any product.

Q. Strict Liability means liability without fault arising from an abnormally dangerous condition or activity.

R. Torts includes intentional torts, negligent torts or torts arising in strict liability. The injury or harm caused by a tortious act must be capable of being compensated by the award of a sum of money to be actionable.

S. Trespasser means a person who enters or remains upon the land of another without permission or right to do so created by the possessor's consent or otherwise.

T. Tribal Employee means a person who is an employee, servant, agent or attorney of the White Mountain Apache Tribe. Tribal Employee also includes elected and appointed officials of the Tribe and Tribal volunteers.

U. White Mountain Apache Tribe means that federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, (48 STAT. 984) 25 U.S.C. Section 476 et seq. and includes the Tribe, its employees, servants, agents and attorneys, its enterprises,



political subdivisions and its funded programs unless such programs would be subject to the Federal Tort Claims Act, 28 U.S.C.A. Section 1346 and related sections.

#### **SECTION 4.5 LIMITATION OF ACTIONS**

A. A civil lawsuit in Tribal Court must be commenced within one (1) year.

B. The time within which a civil lawsuit must be filed shall be counted from the date on which the injury occurred, or when the injury was or reasonably should have been discovered by the injured party.

C. For the purpose of meeting the limitations deadline set in this Rule, a civil suit is commenced when the complaint is filed with the Clerk of the Court.

D. There shall be no tolling of the statute of limitations for any reason, including equitable reasons other than disability of a person as defined by Section 4.6 below. Neither filing a notice of claim as set forth in Chapter Three, Section 3.9, White Mountain Apache Tribe Judicial Code nor filing a lawsuit in another jurisdiction shall interrupt the running of the statute of limitations.

#### **SECTION 4.6 PERSONS UNDER DISABILITY**

If a person entitled to commence an action under this Chapter is at the time the cause of action accrues either under 18 years of age, or of unsound mind or a person who has been judged by the court to be an incompetent person, the period of such disability shall not be deemed a portion of the period limited for commencement of the tort action. Such person shall have the same time after removal of the disability which is allowed to others.

#### **SECTION 4.7 SERVICE OF SUMMONS; VENUE**

Service of the summons and complaint in an action authorized in Section 4.5 shall be made pursuant to the White Mountain Apache Tribe Rules of Civil Procedure.

#### **SECTION 4.8 COSTS**

A. Costs shall be awarded to the successful party in any tort action except as provided herein.

B. Costs shall include the reasonable amounts of money actually expended or owed by a party including:

1. Costs of filing and service of process.
2. Costs of preserving testimony including depositions and video depositions.
3. Actual reasonable costs of travel and lodging for necessary witnesses who actually appear and testify at trial.
4. Expert witness fees.
5. Reasonable attorneys' fees.
6. Any other actual costs reasonably and necessarily incurred by a party.

C. Costs shall not include attorneys fees in any action where the prevailing party is a party to a Contingency Fee Agreement.

D. The amount of costs awarded to a successful party shall be modified in accordance with Rule 68, White Mountain Apache Tribe Rules of Civil Procedure, when invoked and applicable.

E. The Court may use its discretion in awarding costs under this Rule and may consider any or all of the following when awarding costs to a successful party:

1. The reasonableness and necessity of the cost.
2. The relative abilities of the parties to pay costs.
3. The relative merits of each party's position.
4. The good faith or bad faith efforts of each party in pursuing the action, including the cooperation or non-cooperation of a party in the pre-litigation, discovery and trial phases of the action.
5. Any other facts the court deems relevant in assessing costs.

F. No person shall be jailed because he is unable to pay costs awarded against him.

#### SECTION 4.9 NEGLIGENCE PER SE; VIOLATION OF ORDINANCE

A person who violates any Tribal ordinance, regulation or other published law governing the conduct of a person is negligent per se whether or not such person has actual knowledge of such Tribal ordinance or law. A person's

ignorance of such Tribal ordinance or law shall not be a defense.

### COMPARATIVE NEGLIGENCE

#### SECTION 4.101 COMPARATIVE NEGLIGENCE

A. Contributory negligence shall not bar a recovery in any tort action by any person or his legal representative to recover damages for negligence resulting in injury or harm to a person or property, provided that the contributory negligence of said person is not more than fifty percent (50%) of the total fault. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.

B. Assumption of the risk shall not bar a recovery in any tort action by any person or his legal representative to recover damages for negligence resulting in injury or harm to a person or property, provided that the assumption of the risk of said person is not more than fifty percent (50%) of the total fault. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.

C. In the event that a person's contributory negligence or assumption or risk is more than fifty percent (50%) of the total fault, then that person shall not recover.

D. The court may, and when requested by any party shall:

1. If a jury trial:

a. direct the jury to find separate special verdicts determining the total amount of damages and the percentage of fault attributable to each actor whether or not a party; and

b. inform the jury of the consequences of its determination of the percentages of fault; and

c. inform the jury that in the event that it finds that a plaintiff's contributory negligence or assumption of the risk is more than fifty percent (50%) of the total fault then that person shall not recover and its verdict must be for the defense.

2. If a trial to the court without a jury: make special findings of fact, determining the total amount of damages and the percentages of fault attributable to each

actor whether or not a party. In the event the court finds that a plaintiff's contributory negligence or assumption of the risk is more than fifty percent (50%) of the total fault then that person shall not recover and its finding must be for the defense.

**SECTION 4.102 PRO RATA SHARES**

In determining the pro rata share of tortfeasors in the entire liability:

1. Their relative degrees of fault shall be the basis for allocations.
2. If equity requires, the collective liability of some as a group may constitute a single share.

**SECTION 4.103 JOINT AND SEVERAL LIABILITY ABOLISHED; EXCEPTIONS; APPORTIONMENT OF DEGREES OF FAULT; DEFINITIONS**

A. In any action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be entered against the defendant for that amount. To determine the amount of judgment to be entered against each defendant, the trier of fact shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant's fault, and that amount is the maximum recoverable against that defendant.

B. In assessing percentages of fault the trier of fact (Court or jury) shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been named as a party to the suit. Negligence or fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice before trial that a nonparty was wholly or partially at fault. Assessments of percentages of fault for nonparties are used only as a means for accurately determining the total fault. Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action against the nonparty.

C. The relative degrees of fault of the claimant, and the relative degrees of fault of all defendants and nonparties, shall be determined and apportioned as a whole at one time by the trier of fact. If two or more claimants have independent claims, a separate determination and apportionment

of the relative degrees of fault of the respective parties, and any nonparties at fault, shall be made with respect to each of the independent claims.

D. The liability of each defendant is several only and joint and several liability only applies if more than one person was acting in concert or if a person was acting as an agent, employee, or servant of another.

#### SECTION 4.104 RIGHT OF CONTRIBUTION

A. A right of contribution shall only be available:

1. Where more than one person was acting in concert; or

2. Toxic waste tort cases.

B. If two or more persons become jointly and severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

C. No tortfeasor shall be compelled to make contribution beyond his own pro rata share of the entire liability.

D. There shall be no right of contribution against the Tribe or a Tribal Employee acting within the course and scope of his employment.

E. There shall be no right of contribution in favor of any tortfeasor who the trier of fact finds was grossly negligent or who had intentionally, willfully or wantonly caused or contributed to the injury.

F. A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury is not extinguished by the settlement whether or not the amount paid in the settlement is in excess of what was his pro rata share or what is reasonable. Conversely, a tortfeasor who fails to enter into a settlement with a claimant shall not be entitled to a setoff or credit for settlement sums paid or promised to a claimant by a settling tortfeasor whether or not the total amounts paid to the claimant in such circumstances exceeds the total verdict or what was reasonable.

G. Nothing in this section shall be construed to impair any right of indemnity or subrogation under existing law. If one tortfeasor is entitled to indemnity from another, the

right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from any obligee for any portion of his indemnity obligation

H. This section shall not create a right of contribution against any employer or other person who has paid or who is liable for workmen's compensation in connection with an injury or death, unless the employer or other person is subject to direct suit.

#### **SECTION 4.105 CONTRIBUTION; ENFORCEMENT**

A. Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

B. If a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one defendant against other judgment defendants by motion on notice to all parties to the action.

C. If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within six (6) months after the judgment has become final by lapse of time for appeal or after final appellate review.

D. If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, the right of contribution is barred unless:

1. The tortfeasor has discharged by payment the common liability applicable to the claimant's right of action and has commenced an action for contribution within six (6) months after payment.

2. The tortfeasor agreed while the action is pending against him to discharge the common liability and has within six (6) months after the agreement paid the liability and commenced an action for contribution.

E. The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair a right of contribution.

F. The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death is binding as among the defendants in determining their right of contribution. If the claimant's case is tried, the trier of fact shall apportion and determine the respective degrees of fault of the defendants to the action.

**SECTION 4.106 SETTLEMENT, RELEASE OR COVENANT NOT TO SUE**

If a settlement release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death both of the following apply:

1. It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide.
2. It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.
3. A tortfeasor who fails to enter into a settlement with a claimant is not entitled to a setoff or credit for settlement sums paid or promised to a claimant by a settling tortfeasor.

**SECTION 4.107 TREATMENT OF COUNTERCLAIMS AND CROSSCLAIMS**

A counterclaim or crossclaim for injury to person or property or for wrongful death shall be treated as an independent claim for purposes of Section 4.103. A claim and counterclaim shall be setoff against each other unless otherwise agreed by both parties, or ordered by the court in the interests of justice.

**SECTION 4.108 SCOPE OF CONTRIBUTION AND COMPARATIVE NEGLIGENCE**

A. If an action involves claims for relief alleging both negligence and strict liability in tort, comparative negligence shall be applied to the negligence and strict liability claims, and the reduction in damages under Section 4.103 shall be applied to the damages awarded against all defendants.

B. Among two or more persons strictly liable in tort, the relative degree of fault of each is the degree to which each contributed to the defect causing injury to the claimant.

C. In the event that a claimant acts intentionally or is grossly negligent, that claimant shall be presumed to be one hundred percent (100%) at fault for the injury or harm and

shall not recover.

D. In the event that a claimant and one or more defendant acted intentionally or were grossly negligent, the relative degree of fault is the degree to which those persons who acted intentionally or were grossly negligent contributed to the injury or harm. This section shall not apply to the Tribe, or its employees acting within the scope of their employment.

#### **SECTION 4.109 NEGLIGENT ENTRUSTMENT**

A person who supplies directly or through a third person a motor vehicle or other chattel for the use of another whom the person knows or has reason to know to be likely, because of said person's youth, inexperience, incompetence, impairment, or otherwise, to use it in a manner involving unreasonable risk of physical harm to said person or others, is subject to liability for the injury or harm resulting.

#### **PREMISES LIABILITY**

#### **SECTION 4.201 LIABILITY FOR CONDITION AND USE OF LAND**

The purpose of this section is to outline the duties owed by a possessor of land to trespassers, licensees and invitees. There shall be no other classification or subclassification of a person who enters or remains on land.

#### **SECTION 4.202 DUTY TO TRESPASSERS**

A possessor of land shall not be liable to any trespasser for any injury or harm to that trespasser except where the possessor intentionally injures such trespasser.

#### **SECTION 4.203 DUTY TO LICENSEE**

A. A possessor of land is subject to liability to licensees for injury to harm caused to them by the possessor's failure to carry on his activities with reasonable care for their safety if, but only if:

1. The danger is not open and obvious, or
2. The possessor should reasonably expect that the licensee will not discover or realize the danger, and the licensee does not know or have reason to know of the possessor's activities and of the risks involved.



B. A possessor of land is subject to liability for injury or harm caused to a licensee by a condition on the land if, but only if:

1. The provisions of Section 4.205 do not apply, and
2. The possessor actually knows of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should reasonably expect that they will not discover or realize the danger, and
3. The possessor fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition or of the risk involved, and
4. The condition is not open or obvious and the licensee does not know or have reason to know of the condition or the risk involved.

#### SECTION 4.204 DUTY TO INVITEES

A. A possessor of land is subject to liability to his invitees for injury or harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if:

1. The danger is not open and obvious, or
2. The possessor should reasonably expect that the invitee will not discover or realize the danger, and the invitee does not know or have reason to know of the possessor's activities and of the risks involved.

B. A possessor of land is subject to liability for injury or harm caused to an invitee by a condition on the land if, but only if:

1. The provisions of Section 4.205 do not apply, and
2. The possessor fails to exercise reasonable care to protect invitees against the danger if, but only if: (a) he knows or by the exercise of reasonable care would discover the condition, and should reasonably realize that it involves an unreasonable risk of harm to invitees, and (b) the possessor should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it.

C. A possessor of land is not subject to liability for injury or harm to his invitees if the activities or the condition on the land is open and obvious.

**SECTION 4.205 DUTY OF OWNER, LESSEE OR OCCUPANT OF PREMISES TO RECREATIONAL USERS; LIABILITY; DEFINITIONS**

A. Notwithstanding any other section of this Chapter, an owner, lessee or other occupant of premises does not:

1. Owe any duty to a recreational user to keep the premises safe for such use.
2. Extend any assurance to a recreational user through the act of giving permission to enter the premises that the premises are safe for such entry or use.
3. Incur liability for any injury to persons or property caused by any act of a recreational user.

B. As used in this section:

1. "Owner, Lessee or Other Occupant" includes the Tribe.
2. "Premises" means water courses, lakes, agricultural, range, mining, forest land, natural land, and any other similar land which the Tribe or any other person makes available to recreational users, with or without a permit, along with any buildings or other structures on such lands.
3. "Recreational user" means a person to whom permission has been granted or implied with or without the payment of an admission fee or other consideration to enter upon premises to hunt, fish, trap, camp, hike, ride, swim or engage in other similar recreational pursuits.

**WRONGFUL DEATH**

**SECTION 4.301 WRONGFUL DEATH; LIABILITY**

When the death of a person is caused by the fault of another, which fault would allow the person to bring an action for damages, if death had not occurred; then an action for damages may be brought by the appropriate person as set forth in Section 4.302.

**SECTION 4.302 PARTIES PLAINTIFF; RECOVERY; DISTRIBUTION**

A. An action for wrongful death shall be brought by and in the name of the surviving husband or wife or the personal

representative of the deceased person for and on behalf of the surviving husband or wife, children or parents, or if none of these survive, on behalf of the decedent's estate.

B. Either parent may maintain the action for death of a child, and a guardian for death of his ward.

C. The amount recovered in an action for wrongful death shall be distributed to the parties provided for in subsection A in proportion to their damages, and if recovery is on behalf of the decedent's estate the amount shall be an asset of the estate.

D. The term "personal representative" means any person lawfully appointed by the White Mountain Apache Tribal Court to bring any action for wrongful death.

**SECTION 4.303 MEASURE OF DAMAGES; NONLIABILITY FOR DEBTS OF DECEDENT**

In an action for wrongful death, the trier of fact (Court or jury) shall give such damages as it deems fair and just for injury to the surviving parties resulting from the death, and taking into consideration any mitigating or aggravating circumstances. The amount recovered in such action shall not be subject to debts or liabilities of the deceased, unless the action is brought on behalf of the decedent's estate. In no event shall an award in a wrongful death action exceed \$200,000.

**SEVERABILITY**

**SECTION 4.401 SEVERABILITY**

In the event that any section of this Chapter shall be ruled by a court of competent jurisdiction to be invalid or unconstitutional, the remainder of this Chapter shall continue in full force and effect.