

TITLE 43

TORT CLAIMS ACT

Table of Contents

<u>43.01</u>	<u>GENERAL PROVISIONS</u>	
43.01.01	Purpose.....	1
43.01.02	Enactment	1
43.01.03	Definitions.....	2
43.01.04	Severability	2
43.01.05	Retroactivity.....	3
<u>43.02</u>	<u>SOVEREIGN IMMUNITY</u>	
43.02.01	Limited Waiver of Sovereign Immunity	4
43.02.02	Procedural Requirements for Waiver of Sovereign Immunity	5
43.02.03	No Insurance Purchase Obligation.....	6
<u>43.03</u>	<u>TORT CLAIM PROCEDURES</u>	
43.03.01	Notice of Claim.....	6
43.03.02	Bringing an Action in Tribal Court.....	7
43.03.03	Service of Summons and Complaint.....	7
43.03.04	Statute of Limitations.....	7
<u>43.04</u>	<u>TRIBAL COURT AUTHORITY</u>	
43.04.01	Tribal Court Jurisdiction.....	8
43.04.02	Application of Tort Law	8
43.04.03	Actions Defended by the United States	8
43.04.04	Liability of Individual Agents, Employees or Officers	9
43.04.05	Alternate Remedies	9
43.04.06	Limitation on Awards, Judgments or Orders of Monetary Damages	10

TITLE 43

TORT CLAIMS ACT

43.01 GENERAL PROVISIONS

43.01.01 Findings

The Nisqually Tribal Council finds as follows:

- (a) The Nisqually Tribe provides a broad range of governmental services to promote the health, safety, welfare and economic security of Nisqually community members and others who enter on to Nisqually lands.
- (b) The Nisqually Tribe owns and operates commercial enterprises for the purposes of funding its tribal programs and services.
- (c) As a sovereign government, the Nisqually Tribe is immune from suit, except to the extent such immunity is expressly waived.
- (d) Tribal sovereign immunity serves an important function in preserving limited Tribal resources so that the Tribe can continue to provide its programs and services.
- (e) It is appropriate that the Tribe should provide a limited waiver of sovereign immunity so that persons who are injured because of the negligent action or inaction of the Tribe or its enterprises be allowed to receive the compensation available from any insurance maintained by the Tribe for that purpose.
- (f) The Nisqually Tribal Court is the appropriate forum for anyone seeking to make a claim against the Tribe for damages to their property or injury to their person.

HISTORICAL NOTE

This Title was enacted by Resolution ____-2010, dated March 23, 2010.

43.01.02 Purpose

The purpose of this Title is to provide a remedy for individuals who are injured by negligent acts or omissions of the Tribe or its agents, employees or officers by establishing a limited waiver of Tribal sovereign immunity that is consistent with the Tribe's ability to provide governmental services that promote health, safety and economic security for the residents of and visitors to the lands of the Tribe.

43.01.03 Definitions

The following definitions shall apply to this Title:

- (a) Agent - any person, whether paid or unpaid, acting on behalf of the Tribe;
- (b) Employee - any person who is considered an employee under the Tribe's Personnel Policy, whether full-time or part-time, permanent or temporary;
- (c) Office of the Tribal Attorney - the department of the Tribe by the same name;
- (d) Officer or Official - an officer, whether elected or appointed, whether paid or unpaid, acting on behalf of the Tribe;
- (e) Tort – a negligent or wrongful act or omission of a person or entity that had a legal duty of care, other than a duty arising from contract, the breach of which results in injury to a person, death, or damage to or loss of property;
- (f) Tribal Council – the Nisqually Tribal Council elected pursuant to the Nisqually Tribal Constitution.
- (g) Tribal Court - the court established pursuant to the Tribe's Constitution;
- (h) Tribal Law - the Constitution and By-laws of the Nisqually Tribe, the Nisqually law and order code, any other legislative enactments adopted by the Tribal Council, and the common law of the Tribal Court;
- (i) Tribe - the Nisqually Tribe, including but not limited to any branch, office, department, agency, commission, utility, authority, instrumentality, enterprise, corporation (whether chartered under tribal law or federal law, but excluding for purposes of this Title corporations chartered under the law of any State), or other entity of the Nisqually Tribe.

43.01.04 Severability

- (a) If any part of this Title is declared to be invalid by the Tribal Court, all parts of this Title shall be invalid unless, within ninety (90) days of the judgment of the Tribal Court so declaring, the Tribal Council shall approve a resolution ratifying adoption of this Title without the part declared invalid.
- (b) If application of this Title to any person is declared to be invalid by the Tribal Court, such invalidity shall not affect application of this Title to any other person, which may be given without such invalid application. To these ends, and consistent with this section, the provisions of this Title are declared to be severable.

43.01.05 Retroactivity

This Title shall be retroactive to claims arising three years prior to the date of enactment, provided, that time limitations for filing of claims arising prior to the date of enactment of this Title shall begin to run 60 days after the date of enactment.

43.02 SOVEREIGN IMMUNITY

43.02.01 Limited Waiver of Sovereign Immunity

(a) The sovereign immunity of the Tribe is hereby waived for tort claims brought in accordance with this Title. This waiver is subject to all of the restrictions, limitations and procedures set forth in this Title. This Title is to be strictly construed and all restrictions, limitations and procedures adhered to strictly. No waiver of any kind is made beyond or outside the limitations and restrictions of this Title.

(b) The Tribe consents to suit in the Tribal Court for suits based on tort claims under this Title. The Tribe does not consent to suit in any other forum for such claims and specifically preserves and retains its sovereign immunity to any tort suit in any other forum.

(c) No judgment, order or award pertaining to any claim for monetary damages permitted by the Title shall exceed:

(i) The limits of valid and collectible liability insurance policy or policies carried by the Tribe covering each such claim and in force at the time of such judgment order or award, including deductible amounts, to the extent appropriated or budgeted by the Tribal Council or any Tribal commission, utility, authority, corporation or enterprise, and

(ii) The limits of any coverage provided for each such claim under established claim reserves:

A. appropriated or budgeted by the Tribal Council or any Tribal commission, utility, authority, corporation or enterprise, or

B. otherwise established pursuant to any self-insured liability and/or other Tribal government claims program, approved and adopted by the Tribal Council.

(d) Any judgment, order or award of monetary damages may only be satisfied pursuant to the express terms of the policy or policies of liability insurance or established self-insurance or Tribal government claims program which is or are in effect at the time of such judgment, order or award.

(e) In the case of any claim wherein it is alleged an injury was caused by the act or omission of any Tribal commission, utility, authority or corporation or any agent employee or officer of such Tribal commission, utility, authority or corporation, but not otherwise the act or omission of the Tribe, any judgment, order or award otherwise allowed by this Title may be entered only against such Tribal commission, utility, authority or corporation.

(f) Notwithstanding any other provision of this Title, there shall be no waiver of sovereign immunity as to any claim of injury which is defended by the United States because such claim is deemed a claim against the United States under the Indian Self-Determination and Education Assistance Act, the Federal Tort Claims Act, or any other federal law.

(g) Notwithstanding any other provision of this Title, there shall be no exception to or waiver of sovereign immunity for any claim of monetary damages for any injury alleged to have resulted from any:

(i) Exercise or performance or the failure to exercise or perform a discretionary function or duty or the implementation or failure to implement decisions by the Tribe or any agent employee or officer of the Tribe whether or not the discretion be abused in any such matter;

(ii) Action taken or decision made in good faith and without gross negligence in carrying out the law;

(iii) Any intentional tort, including but not limited to assault battery, false imprisonment, malicious prosecution, abuse of process, libel, slander, defamation, misrepresentation, deceit, interference with contract rights, or interference with prospective economic advantage, except that this provision does not immunize the Tribe for any acts or omissions of investigative or law enforcement officers giving rise to claims for assault battery, false arrest, false imprisonment or malicious prosecution, provided that for purposes of this subsection "investigative or law enforcement officer" means any agent, employee or officer of the Tribe who is empowered to execute searches, to seize evidence, or to make arrests under Tribal law;

(iv) Legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature, such as but not limited to adopting or failing to adopt a law;

(v) Issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke, any-permit, license, certificate, approval or other authorization;

(vi) Termination or reduction of benefits under a Tribal assistance program if the Tribe or any agent, employee or officer of the Tribe is authorized by law, rule

or regulation to determine whether or not such authorization or benefits should be issued, denied, suspended, or revoked;

(vii) Probation, parole, furlough or release from confinement of a prisoner or other detainee or from the terms and conditions or the revocation thereof except upon a showing of gross negligence;

(viii) Any injury or damage caused by an escaping or escaped person or prisoner, a person resisting arrest or by a prisoner to himself or herself, except upon a showing of gross negligence;

(ix) Any decision made by the Tribe or any agent, employee or officer of the Tribe in the implementation of the Indian Child Welfare Act or other laws respecting the placement or supervision of minors or incompetent persons;

(x) Any claim based upon an act or omission of any agent, employee or officer of the Tribe exercising due care, in the execution of any statute, rule or regulation, whether or not such statute, rule or regulation be valid;

(xi) Any claim based on the assessment or collection of any tax or the detention of any goods or merchandise by any law enforcement officer;

(xii) Claims for on-the-job injuries that are covered by workmen's compensation;

(xiii) Claims related to unemployment compensation or employment decisions; and

(xiv) Claims for breach of contract, rather than tort claims.

(xv) The enumeration of the above immunities shall not be construed to waive any other immunities nor to assume any liabilities except as explicitly provided by the Title.

43.02.02 Procedural Requirements for Waiver of Sovereign Immunity

(a) The procedures and standards for giving notice of claims and commencing actions in Tribal Court in this Title are integral parts of the limited waiver of sovereign immunity provided by this Title and shall be strictly construed.

(b) A tort claim for monetary damages against the Tribe shall be forever barred unless written notice of the claim is presented to the Tribe and an action for monetary damages relating to any such claim is commenced in Tribal Court in compliance with this Title.

43.02.03 No Insurance Purchase Obligation

Nothing in this Title is intended to, nor shall it be construed to, impose any obligation on the Tribe to purchase or maintain liability insurance at any time or in any amount.

43.03 TORT CLAIM PROCEDURE

43.03.01 Notice of Claim

(a) No action may be brought in Tribal Court for monetary damages under this Title and no claim shall be valid for monetary damages under this Title unless the person who claims to have suffered an injury shall, prior to the filing of any court action, send a written notice of the claim for monetary damages by certified mail return receipt requested to the Secretary of the Nisqually Tribal Council and the Office of the Tribal Attorney.

(b) In the case of any claim wherein it is alleged an injury was caused by the act or omission of any Tribal commission, authority, corporation or enterprise or any agent, employee or officer of such Tribal commission, authority, corporation or enterprise, the written notice required by this section shall also be given to the chief executive officer of such Tribal commission, authority, corporation or enterprise.

(c) The written notice required by this section shall include the following:

(i) The name and current address and telephone number of the claimant and the name and current address and telephone number of the claimant's attorney, if any;

(ii) A concise statement of the factual basis of the claim, including the date, time, place and circumstances of the act, omission or condition that is alleged to have brought about the injury;

(iii) A description of the nature and extent of the injury claimed to have been suffered;

(iv) The name of any Tribal employee involved, if known, and the name, address and telephone number, if known, of any other person involved or who has knowledge of the conduct, circumstances, facts or injury; and

(v) The amount of monetary damages requested.

(d) To be valid under this Title, the written notice of claim for monetary damages required by this section shall have been given no later than one hundred and eighty (180) days after the act or omission occurred that gave rise to the injury. The written notice of

claim for monetary damages shall be conclusively deemed given and effective as of the date of the last postmark.

43.03.02 Bringing an Action in Tribal Court

- (a) No action for monetary damages may be brought under this Title until the expiration of sixty (60) days after the notice required by section 43.03.01 is given.
- (b) No action against the Nisqually Tribe under the Title shall be accepted for filing by the Tribal Court unless the claimant at the same time files proof of compliance with the notice requirements of Section 43.03.01.
- (c) No action for monetary damages shall be instituted under this Title for a sum in excess of the amount set forth in the written notice of claim required by Section 43.03.01, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time the notice was given or upon allegation and proof of intervening facts relating to the amount of the claim.

43.03.03 Service of Summons and Complaint

- (a) Any person filing an action for money damages against the Tribe under this Title shall cause a copy of the complaint and summons to be served upon the Secretary of the Nisqually Tribal Council, the Office of the Tribal Attorney, and, in the case of a claim involving an act or omission of any Tribal commission, authority, corporation or enterprise, or any agent employee or office of any Tribal commission, authority, corporation or enterprise, then also upon the chairman or chief executive officer of such Tribal commission, authority, corporation or enterprise.
- (b) Service of the complaint and summons shall be completed within the time for service of a complaint and summons under rules generally applicable to actions filed in Tribal Court.
- (c) In any action against the Tribe under this Title, the Tribe shall have not less than sixty (60) days after receipt of the complaint and summons, and such other time as the Tribal Court may allow, to file an answer or other responsive pleading or motion. No default judgment may be entered against the Tribe under this Title.

43.03.04 Statute of Limitations

Any action for monetary damages under this Title must be filed with the Tribal Court within three hundred and sixty-five (365) days of the act or omission occurred which gave rise to the injury.

43.04 TRIBAL COURT AUTHORITY

43.04.01 Tribal Court Jurisdiction

(a) An action for monetary damages may be brought in Tribal Court under this Title against the Nisqually Tribe by any person for any injury to that person caused by: (i) an act or omission by the Tribe; or (ii) an act or omission by any agent, employee or officer acting on behalf of the Nisqually Tribe and within the scope of authority of that agent, employee or officer; provided, that this waiver of sovereign immunity shall be subject to the limitations described in this Title.

(b) The Tribal Court shall have jurisdiction over all suits arising under this Title. Such suits shall be conducted pursuant to the general rules of civil procedure established by the Nisqually Law and Order Code to the extent that such rules are not inconsistent with the provisions of this Title.

(c) All actions commenced under this Title shall be tried by a Judge of the Tribal Court without a jury.

43.04.02 Application of Tort Law

In determining whether an action constitutes a tort, the Court shall look to Tribal law, applicable federal law, and, to the extent consistent with Tribal law, substantive tort laws of the State of Washington.

43.04.03 Actions Defended by the United States

(a) Upon certification by the Office of Tribal Attorney that defense of any claim of injury has been tendered to the United States, any action or proceeding on such claim shall be stayed by order of the Tribal Court without bond.

(b) The action or proceeding in Tribal Court shall be dismissed, after notice to the parties and opportunity for a hearing, upon receipt of notice satisfactory to the Tribal Court that the United States has assumed defense of the claim of injury.

(c) The stay shall be dissolved and an order directing further proceedings in the action or proceeding on the claim of injury shall be entered by the Tribal Court, after notice and hearing thereon, upon receipt of notice satisfactory to the Tribal Court that the United States has declined to assume defense of the claim of injury.

43.04.04 Liability of Individual Agents, Employees or Officers

(a) Any liability for monetary damages assumed by the Tribe for the acts or omissions of any agent, employee or officer of the Tribe under this Title shall be the exclusive remedy available to any person who suffers an injury caused by an agent, employee or officer of the Tribe. Any claim for monetary damages assumed by the Tribe which otherwise would lie against an agent, employee or officer of the Tribe, except for this Title is forever extinguished in favor of the remedy established and limited by this Title, whether or not the person in whose favor such remedy is created exercises the right to timely present written notice of any claim and commence an action for an injury in Tribal Court under this Title.

(b) This Title expressly preserves defenses of qualified or absolute immunity to actions for monetary damages against agents, employees or officers of the Tribe in their individual capacities. The defenses preserved include, but are not limited to, absolute legislative and judicial immunities, qualified and absolute executive immunities, and their derivatives, which were recognized in the common law and elaborated by federal courts in cases alleging violations of federal law.

(c) Except as described in this section, this Title does not extinguish individual liability for monetary damages of or immunize any agent, employee or officer of the Tribe for an injury if it is established that liability for the act or omission of such agent, employee or officer is not assumed by the Tribe under this Title and that such act or omission was outside the scope of authority of the agent, employee or officer.

(d) Volunteers duly authorized by the Tribe to act as agents, employees or officers of the Tribe shall have the same immunities under this Title as other agents, employees and officers of the Tribe.

43.04.05 Alternate Remedies

A person who suffers an injury as a result of a tort by the Tribe or an agent, employee or officer acting on behalf of the Tribe may not use procedures other than those established in this Title to seek monetary damages, even if another remedy may be provided by another provision of Tribal law of general application. Notwithstanding the foregoing, this Title shall not bar any person from pursuing remedies in accordance with otherwise applicable law for claims relating to:

- (a) Worker's compensation;
- (b) Unemployment compensation; or
- (c) Employment decisions.

43.04.06 Limitation on Awards, Judgments or Orders of Monetary Damages

(a) No award, judgment or order shall be made under this Title: (i) based on strict or absolute liability; (ii) for punitive or exemplary damages; (iii) for prejudgment interest; or, (iv) attorneys' fees.

(b) No award, judgment or order shall be made under this Title for pain and suffering or mental anguish and suffering or like claims in an amount greater than two hundred thousand dollars (\$200,000) for each injury.