

## Chapter 2.35 TORT CLAIMS

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### **2.35.010 Findings and purpose.**

(1) The Board of Directors finds that the Tulalip Tribes (Tribes) provides governmental services which promote health, safety, welfare and economic security for residents of and visitors to the lands of the Tribes.

(2) The Board of Directors recognizes that the Tribes is immune from suit, except to the extent such immunity is expressly waived, and that Tribal sovereign immunity serves an important function in preserving limited Tribal resources so that the Tribes can continue to provide governmental services which promote health, safety, welfare and economic security for the residents of and visitors to the lands of the Tribes.

(3) The Board of Directors declares that the purpose of this chapter is to establish a limited waiver of Tribal sovereign immunity consistent with the ability of the Tribes to continue (a) to provide governmental services which promote health, safety and economic security for the residents of and visitors to the lands of the Tribes and (b) to provide a remedy to private persons who are injured by negligent or wrongful acts or omissions of the Tribes or its agents, employees or officers. [Ord. 122 § 1, 3-8-2003 (Res. 2003-088)].

### **2.35.020 Definitions.**

(1) “Agent” means any person, whether paid or unpaid, acting on behalf of the Tribes;

(2) “Employee” means any person who is an employee, whether full-time or part-time, permanent or temporary, of the Tribes;

(3) “Injury” means injury to a person, death, or damage to or loss of property of whatever kind, which, if caused by the negligent or wrongful act or omission of a private person would be a tort under Tribal law, applicable Federal law, and, to the extent consistent with Tribal law, substantive tort laws of the State of

Washington in effect as of the date of the ordinance codified in this chapter, regardless of the type or form of action or form of relief sought by the claimant;

(4) "Office of Reservation Attorney" shall mean the department of the Tribes by the same name;

(5) "Officer" or "official" means an officer, whether elected or appointed, whether paid or unpaid, acting on behalf of the Tribes;

(6) "Tribal Court" means the Tribal Courts established pursuant to the Constitution of the Tribes;

(7) "Tribal law" means the Constitution of the Tribes, ordinances and other legislative enactments adopted by the Board of Directors, and common law of the Tribal Court;

(8) "Tribes" means the Tulalip Tribes (the "Tribes"), including but not limited to any branch, office, department, agency, commission, utility, authority, instrumentality, enterprise, corporation (whether chartered under Chapter [15.05](#) TTC or Federal law, but excluding for purposes of this chapter corporations chartered under the law of any state), or other entity of the Tribes. [Ord. 122 § 2, 3-8-2003 (Res. 2003-088)].

#### **2.35.030 Action in Tribal Court.**

An action for monetary damages may be brought in Tribal Court under this chapter against the Tribes by any person for any injury to that person caused (1) by an act or omission by the Tribes or (2) by an act or omission by any agent, employee or officer acting on behalf of the Tribes and within the scope of authority of that agent, employee or officer; provided, that this waiver of sovereign immunity shall be limited as follows: No monetary damages shall be awarded under this section in excess of the limits of insurance maintained by the Tribes to compensate for injury claimed hereunder as set out in TTC [2.35.050](#). [Ord. 122 § 3, 3-8-2003 (Res. 2003-088)].

#### **2.35.040 Procedure for giving notice of claims and filing actions.**

(1) No action may be brought in Tribal Court for monetary damages under this chapter and no claim shall be valid for monetary damages under this chapter 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 as provided in subsection (2) of this section by certified mail return receipt requested to the Secretary of the Tulalip Board of Directors and the Office of Reservation Attorney. 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 also shall be given to the chief executive officer of such Tribal commission, authority, corporation or enterprise.

(2) The written notice required by subsection (1) of this section shall include the following:

(a) 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; and

(b) A concise statement describing the location, conduct, circumstances or other facts which brought about the injury; describing the injury; stating the time and place of injury; stating 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 stating that amount of damages claimed.

(3) To be valid under this chapter, the written notice of claim for monetary damages required by subsection (1) of this section shall have been given no later than 180 days after the act or omission occurred giving 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 of any written notice required by subsection (1) of this section.

(4) No action for monetary damages may be brought under this chapter until the expiration of 60 days after the last notice required by subsection (1) of this section is given. Any action for monetary damages under this chapter must be filed with the Tribal Court within 270 days of the act or omission occurred which gave rise to the injury. No action against the Tribes under this chapter shall be accepted for filing by any Tribal Judge unless the claimant at the same time files proof of compliance with subsections (1) through (3) of this section. No action for monetary damages shall be instituted under this chapter for a sum in excess of the amount set forth in the written notice of claim required by subsection (1) of this section, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time notice required by subsection (1) of this section is deemed given in accordance with subsection (3) of this section or upon allegation and proof of intervening facts relating to the amount of the claim.

(5) Any person filing an action for money damages against the Tribes under this chapter shall cause a copy of the complaint and summons to be served upon the Secretary of the Board of Directors, Office of Reservation 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. Service of the complaint and summons as required by this subsection shall be completed within the time for service of a complaint and summons under rules generally applicable to actions filed in Tribal Court.

(6) In any action against the Tribes under this chapter, the Tribes shall have not less than 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 Tribes under this chapter. [Ord. 122 § 4, 3-8-2003 (Res. 2003-088)].

#### **2.35.050 Limitations on waiver of sovereign immunity.**

(1) No judgment, order or award pertaining to any claim for monetary damages permitted by this chapter shall exceed:

(a) The limits of valid and collectible liability insurance policy or policies carried by the Tribes 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 Board of Directors or any Tribal commission, utility, authority, corporation or enterprise; and

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

(i) Appropriated or budgeted by the Board of Directors or any Tribal commission, utility, authority, corporation or enterprise; or

(ii) Otherwise established pursuant to any self-insured liability and/or other Tribal government claims program, approved and adopted pursuant to Tribal law. 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 Tribes as defined in this chapter, any judgment, order or award otherwise allowed by this chapter may be entered only against such Tribal commission, utility, authority or corporation.

(2) Any such 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.

(3) Notwithstanding any other provision of this chapter, 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. Upon certification by the Office of Reservation 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. Upon such tender of the claim to the United States, the claimant shall have a duty to comply with all procedures necessary for the United States to determine if such claim is covered under the Federal Tort Claims Act or other Federal law, including, but not limited to, filing an administrative tort claim in accordance with applicable Federal law. 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. 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 claimant has complied with Federal Tort Claims Act administrative procedures and the United States has declined to assume defense of the claim of injury.

(4) Notwithstanding any other provision of this chapter, 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:

- (a) 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 Tribes or any agent, employee or officer of the Tribes whether or not the discretion be abused in any such matter;
- (b) Action taken or decision made in good faith and without gross negligence in carrying out the law;
- (c) 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 Tribes 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 Tribes who is empowered to execute searches, to seize evidence, or to make arrests under Tribal law;
- (d) 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;
- (e) 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;
- (f) Termination or reduction of benefits under a Tribal assistance program if the Tribes or any agent, employee or officer of the Tribes is authorized by law, rule or regulation to determine whether or not such authorization or benefits should be issued, denied, suspended, or revoked;
- (g) 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;
- (h) 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;
- (i) Any decision made by the Tribes or any agent, employee or officer of the Tribes in the implementation of the Indian Child Welfare Act or other laws respecting the placement or supervision of minors or incompetent persons;
- (j) Any claim based upon an act or omission of any agent, employee or officer of the Tribes exercising due care in the execution of any statute, rule or regulation, whether or not such statute, rule or regulation be valid;
- (k) Any claim based on the assessment or collection of any tax or the detention of any goods or merchandise by any law enforcement officer; and

(l) Floods, floodwaters, flood fighting activities, flood control structures, levees, dikes, drainage systems and other features or structures whose purpose is, in whole or in part, to control flooding or water levels, including those contained in conservation projects, and all related activities including construction, improvement, repair and maintenance activities.

(m) 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 this chapter.

(5) The procedures and standards for giving notice of claims and commencing actions in Tribal Court provided in TTC [2.35.040](#) are integral parts of the limited waiver of sovereign immunity provided by this chapter and shall be strictly construed. A tort claim for monetary damages against the Tribes shall be forever barred unless written notice of the claim is presented to the Tribes and an action for monetary damages relating to any such claim is commenced in Tribal Court in compliance with TTC [2.35.040](#).

(6) Notwithstanding any other provision of this chapter, there shall be no waiver of sovereign immunity under this chapter for claims relating to workers' compensation, unemployment compensation, or claims or actions relating to employment decisions.

(7) Notwithstanding any other provision of this chapter, there shall be no waiver of sovereign immunity under this chapter for claims relating to participation in or viewing of any recreational activities, which shall include but not be limited to the use of any lands, waters, structures, buildings, ballparks, skateparks, machinery, equipment, or other premises for recreational activities which include, but are not limited to, ball sports, harvesting of fuel wood, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, aviation activities including but not limited to the operation of airplanes, ultra-light airplanes, hang-gliders, parachutes and paragliders, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, kayaking, canoeing, rafting, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, whether or not such activities are supervised, or whether or not a fee is charged for such recreational activity. [Res. 2017-137; Res. 2016-165; Res. 2012-07; Ord. 122 § 5, 3-8-2003 (Res. 2003-088)].

#### **2.35.060 Trial of actions.**

All actions commenced under this chapter shall be tried by a Judge of the Tribal Court without a jury.

(1) Any liability for monetary damages assumed by the Tribes for the acts or omissions of any agent, employee or officer of the Tribes under this chapter shall be the exclusive remedy available to any person who suffers an injury caused by an agent, employee or officer of the Tribes. Any claim for monetary damages assumed by the Tribes which otherwise would lie against an agent, employee or officer of the Tribes, except for this chapter, is forever extinguished in favor of the remedy established and limited by this chapter, 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 chapter.

(2) This chapter expressly preserves defenses of qualified or absolute immunity to actions for monetary damages against agents, employees or officers of the Tribes in their individual capacities. By way of illustration rather than limitation, the defenses preserved by this chapter include 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. Except for the foregoing, this chapter does not extinguish individual liability for monetary damages of or immunize any agent, employee or officer of the Tribes 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 Tribes under this chapter and that such act or omission was outside the scope of authority of the agent, employee or officer. Notwithstanding the foregoing, any action for individual liability of any agent, employee or officer of the Tribes which is founded on an act or omission in excess of the authority of such agent, employee or officer shall be heard only in Tribal Court.

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

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

(4) Volunteers duly authorized by the Tribes or an agent, employee or officer of the Tribes shall have the same immunities under this chapter as agents, employees and officers of the Tribes. [Ord. 122 § 6, 3-8-2003 (Res. 2003-088)].

#### **2.35.070 Limitation on awards, judgments or orders of monetary damages.**

No award, judgment or order shall be made under this chapter: (1) based on strict or absolute liability; (2) for punitive or exemplary damages; (3) for prejudgment interest; or (4) attorneys fees. No award, judgment or order shall be made under this chapter for pain and suffering or mental anguish and suffering or like claims in an amount greater than \$200,000 for each injury. [Ord. 122 § 7, 3-8-2003 (Res. 2003-088)].

#### **2.35.080 Severability.**

If any part of this chapter is declared to be invalid by the Tribal Court, all parts of this chapter shall be invalid unless, within 90 days of the judgment of the Tribal Court so declaring, the Board of Directors shall approve a resolution ratifying adoption of this chapter without the part declared invalid. If application of this chapter to any person is declared to be invalid by the Tribal Court, such invalidity shall not affect application of this chapter to any other person, which may be given without such invalid application. To

these ends, and consistent with this section, the provisions of this chapter are declared to be severable. [Ord. 122 § 8, 3-8-2003 (Res. 2003-088)].

**2.35.090 Applicable law.**  

Tribal law, applicable Federal law, and, to the extent adopted by TTC [2.35.020](#)(3), Washington substantive tort law shall apply and shall govern all claims and actions brought under this chapter. [Ord. 122 § 9, 3-8-2003 (Res. 2003-088)].

**2.35.100 Retroactivity.**  

This chapter 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 chapter shall begin to run 60 days after the date of enactment and approval by the Superintendent of the Puget Sound Agency of the Bureau of Indian Affairs of this chapter. [Ord. 122 § 10, 3-8-2003 (Res. 2003-088)].