

Title 03 - Tribal Court

Chapter 08 - Tort Claims

Subchapter I – General Provisions

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Legislative History

Enacted:

Ordinance 357 Enacting an Ordinance Establishing STC Title 3, Chapter 8 – Tort Claims Code (12/15/15), BIA (1/4/16).

Subchapter I – General Provisions

3-08.010 Title.

This Chapter shall be known as the Swinomish Tort Claims Code.

[History] Ord. 357 (12/15/15).

3-08.020 Purpose and Scope.

The general purposes of this Chapter are to:

- (A) establish a fair and efficient legal process, consistent with the resources of the Swinomish Indian Tribal Community, by which a person who is injured by tortious acts or omissions of the Tribe or its officers, employees or agents in the performance of and within the scope of their duties, employment or agency may seek compensation for the injury;

- (B) granting an express and limited waiver of Tribal sovereign immunity in order to implement these legal processes, consistent with the ability of the Tribe to continue to provide essential governmental services which promote the health, safety, economic security and welfare of the members of the Tribe and residents of and visitors to the Swinomish Indian Reservation and other lands of the Tribe.

[History] Ord. 357 (12/15/15).

3-08.030 Authority.

This Chapter is enacted pursuant to Article VI, Sections 1(a), (g), (k), and (l) of the Swinomish Constitution and By-Laws originally ratified by the Tribe on November 16, 1935 and approved by the Secretary of the Interior on January 27, 1936, and as most recently amended on September 7, 1985 , and the inherent sovereign authority of the Swinomish Indian Tribal Community; rights reserved in the Treaty with the Dwamish, Suquamish, etc., (“Treaty of Point Elliott”), 12 Stat. 927 (January 22, 1855), and such other powers as have been delegated to, vested in, or confirmed in the Tribe through the actions of the United States.

[History] Ord. 357 (12/15/15).

3-08.040 Findings.

The Swinomish Indian Senate finds that:

- (A) The Swinomish Indian Tribal Community provides essential governmental services which promote the health, safety, welfare and economic security of members of the Tribe and residents of and visitors to the Swinomish Indian Reservation and to other lands of the Tribe.
- (B) The Senate has consistently recognized, maintained and hereby reaffirms that the Swinomish Indian Tribal Community is immune as a sovereign from unconsented suit, except to the extent such immunity is expressly waived by or pursuant to the express authorization of the Senate, and that this sovereign immunity has always extended, and shall continue to extend, to acts and omissions of its officers, employees and agents in the performance of and within the scope of their duties, employment or agency.
- (C) The sovereign immunity of the Swinomish Indian Tribal Community serves an essential function in preserving limited Tribal resources necessary for the Tribe to govern and provide governmental services.
- (D) The Senate wishes to provide a legal process that is fair, efficient and consistent with Tribal resources for the assertion and resolution of legal claims that may arise in connection with personal injury, property damage or death resulting from tortious acts or omissions of the Tribe, its officers, employees or agents who are carrying out and

authorized to carry out Tribal functions, and to grant a limited waiver of sovereign immunity for resolution of such claims in the legal process established pursuant to this Chapter.

- (E) The Tribe has entered into Self-Governance Compacts pursuant to the provisions of the Indian Self-Determination and Education Assistance Act, Pub.L. 93-638, in accordance with which the Tribe, its officers, employees and agents carry out specific functions of the United States.
- (F) The Federal Tort Claims Act is the exclusive remedy for tort claims arising out of tortious acts or omissions of the Tribe, its officers, employees or agents who are carrying out Federal functions pursuant to Self-Governance Compacts.

[History] Ord. 357 (12/15/15).

3-08.050 Definitions.

For the purposes of this Chapter, unless explicitly stated otherwise, the following definitions shall apply:

- (A) **“Agent”** means any person, whether paid or unpaid, who is authorized to and who is acting on behalf of the Tribe within the scope of his or her authority, including volunteers duly authorized by the Tribe.
- (B) **“Employee”** means any person who is an employee, whether full time or part time, permanent or temporary, of the Tribe and who is acting on behalf of the Tribe within the scope of his or her authority.
- (C) **“Officer”** means an officer of the Senate, authorized pursuant to the Swinomish Constitution and who is acting on behalf of the Tribe within the scope of his or her authority.
- (D) **“Reservation”** means all lands and waters within the exterior boundaries of the Swinomish Indian Reservation.
- (E) **“Senate”** means the Swinomish Indian Senate, the governing body of the Swinomish Indian Tribal Community.
- (F) **“Tribal Court”** or **“Court”** means the Swinomish Tribal Court.
- (G) **“Tribal Law”** means the Constitution of the Tribe, ordinances adopted by the Senate, and common law of the Swinomish Indian Tribal Community as declared by the Swinomish Tribal Court and Swinomish Court of Appeals.
- (H) **“Tribal Police Officer”** means a person employed by the Tribe as an investigative law enforcement officer who is empowered to execute searches, to seize evidence, or to make arrests under Tribal law and who is assigned to work in the Swinomish Police Department.

- (I) **“Tribe” or “Tribal Community”** means the Swinomish Indian Tribal Community, a federal recognized Indian Tribe organized pursuant to Section Sixteen of the Indian Reorganization Act of 1934, and includes but is not limited to any office, department, agency, commission, utility, authority, enterprise, program or other entity of the Tribe (whether chartered or otherwise established under Tribal law or practice, but excludes for purposes of this Chapter the Swinomish Housing Authority, Swinomish Fish Company, entities that have a separate legal existence and that are not subdivisions of the Tribe, and corporations or other legal entities established under the law of any State).

[History] Ord. 357 (12/15/15).

3-08.060 Limited Waiver of Tribal Sovereign Immunity.

- (A) An action for monetary damages pursuant to this Chapter may be brought in Tribal Court, and only in Tribal Court, against the Swinomish Indian Tribal Community in its own name by a person for injury to that person or to that person’s property caused:

- (1) by a tortious act or omission of the Tribe, or
- (2) by a tortious act or omission of any officer, employee, or agent acting on behalf of the Tribe and acting within the scope of his or her duties, employment or authority,

and the Tribe hereby waives its sovereign immunity to such an action, subject to and limited by the limitations, requirements, procedures and provisions of this Chapter.

- (B) In any action brought pursuant to Subsection (A) of this Section 3-08.060, the Tribe shall be liable in the same manner and to the same extent as a private individual under like circumstances, subject and limited by to the limitations, requirements, procedures and provisions of this Chapter.
- (C) With respect to any claim under this Chapter, the Tribe shall be entitled to any defense other than Tribal sovereign immunity, including but not limited to defenses based upon judicial or legislative immunity, which otherwise would have been available to the officer, employee or agent of the Tribe whose tortious act or omission gave rise to the claim, as well as any other defenses to which the Tribe, the officer, employee or agent of the Tribe is entitled.
- (D) The amount of any judgment or settlement under this Chapter shall not exceed the amount of funds that are actually available, payable by and collectible from the Tribe’s liability insurers pursuant to the Tribe’s valid liability insurance policy or policies which are in force and applicable to the asserted claim, including deductible amounts to the extent appropriated, budgeted or otherwise approved by the Senate.

The amount of any such judgment or settlement is expressly limited to the amount of insurance actually available under individual and aggregate annual policy limit amounts of such insurance policy or policies plus any appropriated, budgeted or approved deductible amounts.

- (E) The Tribe waives sovereign immunity only to the extent set forth in this Section and subject to and limited by all limitations, requirements, procedures and provisions of this Chapter. The Tribe otherwise expressly maintains and reaffirms its sovereign immunity from all unconsented suit, including but not limited to suit in any other court than the Tribal Court.

[History] Ord. 357 (12/15/15).

3-08.070 Limitations on Waiver of Sovereign Immunity.

The waiver of sovereign immunity in Section 3-08.060 is subject to and limited as set out in this Chapter, including but not limited to this Section 3-08.070. The Tribe hereby expressly maintains and reaffirms its sovereign immunity to any claim that exceeds the limits or restrictions set out in this Chapter. Any ambiguity regarding the waiver of sovereign immunity contained in this Chapter shall be resolved in favor of preserving and reaffirming the Tribe's sovereign immunity.

- (A) No judgment, order, award or settlement pertaining to any claim for monetary damages permitted by and pursuant to this Chapter shall be for more than the amount of funds that are actually available, payable by and collectible from the Tribe's liability insurers pursuant to the Tribe's valid liability insurance policy or policies which are in force and applicable to the asserted claim, including deductible amounts to the extent appropriated, budgeted or otherwise approved by the Senate. The amount of any such judgment or settlement is expressly limited to the amount of insurance actually available under individual and aggregate annual policy limit amounts of such insurance policy or policies plus any appropriated, budgeted or approved deductible amounts.
- (B) Any judgment, order, award or settlement of monetary damages pursuant to this Chapter may only be satisfied from the applicable policy or policies of liability insurance that are valid and in force at the time of such judgment, order, award or settlement, pursuant to the express terms of such policy or policies, and from deductible amounts to the extent appropriated, budgeted or otherwise approved by the Senate.
- (C) The Tribe's waiver of immunity in this Chapter specifically excludes the following, for which the Tribe explicitly maintains and reaffirms its immunity:
 - (1) claims or actions for punitive or exemplary damages;
 - (2) prejudgment interest;
 - (3) claims or actions for attorneys' fees.

- (D) Notwithstanding any other provision of this Chapter, there is no waiver of Tribal sovereign immunity as to any claim which is presented or tendered to and defended by the United States on the basis that 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.
- (1) Upon notice satisfactory to the Tribal Court 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.
 - (2) 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.
 - (3) The stay shall be dissolved and an order directing that the action or proceeding on the claim shall continue shall be entered by the Tribal Court, after notice and a hearing, upon receipt of notice satisfactory to the Tribal Court that the United States has declined to assume defense of the claim.
- (E) Notwithstanding any other provision of this Chapter, nothing in this Chapter waives or may be construed to waive Tribal sovereign immunity for any claim for monetary damages for any injury alleged to have resulted from any:
- (1) Exercise or performance or the failure to exercise or perform a discretionary function or duty of the Tribe or of an officer or employee of the Tribe, whether or not the discretion be abused in any such matter;
 - (2) 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 exclusion from this Chapter's limited waiver of sovereign immunity does not apply as to any acts or omissions of Tribal Police Officers giving rise to claims for assault, battery, false arrest, false imprisonment or malicious prosecution;
 - (3) 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;
 - (4) Issuance, denial, suspension, revocation of, or the imposition of conditions upon, or the failure or refusal to issue, deny, suspend, revoke or impose conditions upon, any permit, license, certificate, approval or other authorization;
 - (5) Termination or reduction of benefits under a Tribal assistance program if the Tribe or any officer, employee or agent of the Tribe is authorized by law, rule, regulation, Senate resolution or Tribal policy or practice to determine whether

or not such benefits should be issued, denied, suspended, or revoked;

- (6) 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;
- (7) Any injury or damage caused by an escaping or escaped person or prisoner, a person resisting arrest or by a prisoner or detainee to himself or herself, except upon a showing of gross negligence;
- (8) Any decision made by the Tribe or any officer, employee or agent of the Tribe in the implementation of Federal, Washington, Tribal or other laws respecting the removal, protection, placement or supervision of minors or incompetent persons, except upon a showing of gross negligence;
- (9) Any claim based upon an act or omission of any officer, employee or agent of the Tribe exercising due care, in the execution of any statute, rule, regulation, Senate resolution, Tribal policy or practice, whether or not such statute, rule, regulation, Senate resolution or Tribal policy or practice be valid;
- (10) Any claim based on the valuation of property for purposes of taxation, the assessment or collection of any tax;
- (11) Any claim arising in respect of the detention of any vehicle or other property by a Tribal Police Officer, except that this exclusion from this Chapter's limited waiver of sovereign immunity does not apply as to any claim based on injury or loss of a vehicle or other property while in the possession of a Tribal Police Officer if:
 - (a) the property was seized for the purpose of forfeiture under any provision of Tribal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
 - (b) the interest of the claimant was not forfeited;
 - (c) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
 - (d) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a criminal forfeiture law.
- (12) Any claim for damages caused by the imposition or establishment of a quarantine by the Tribe; and
- (13) 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.

- (F) The requirements and procedures for giving notice of claims and commencing actions in Tribal Court provided in this Chapter are integral parts of the limited waiver of sovereign immunity provided by this Chapter, and shall be strictly and narrowly construed. 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 strict compliance with this Chapter.
- (G) Notwithstanding any other provision of this Chapter, nothing in this Chapter may be construed to be a waiver of sovereign immunity for claims relating to workers' compensation, but this Subsection is not intended to and shall not bar any person from pursuing any remedies that may be provided by and in accordance with otherwise applicable Tribal law relating to workers' compensation claims.

[History] Ord. 357 (12/15/15).

3-08.080 Mandatory and Exclusive Procedure for Giving Notice of Claims and Filing Actions.

- (A) Any person who claims to have suffered an injury as a result of a tortious act or omission by any Tribal officer, employee, or agent acting on behalf of the Tribe and within the scope of his or her duties, employment or authority, and who wishes to seek compensation for such a claimed injury must send a written notice of a claim for monetary damages as provided in Subsection (B) below by certified mail, return receipt requested, to the Chair of the Senate with a copy sent by certified mail, return receipt requested, to the Director of the Office of Tribal Attorney.
- (B) The written notice required by Subsection (A) must include the following:
 - (1) The name, current address, and telephone number of the claimant, and the name, current address, and telephone number of the claimant's attorney, if any.
 - (2) A statement describing the act or omission claimed to have brought about injury, which must include:
 - (a) the date and time when the injury occurred,
 - (b) the place where the injury occurred,
 - (c) the date, time, place, nature and circumstances of the tortious act(s) or omission(s) alleged to have caused the injury,
 - (d) the names of any Tribal officer, employee or agent claimed to have been involved, or who may have knowledge of the facts giving rise to the injury, setting forth the nature of their involvement or knowledge, and

- (e) the names, addresses and phone numbers of any other persons involved or who may have knowledge of the facts, setting forth the nature of their involvement or knowledge.
 - (3) A concise statement of the nature and the extent of the injury claimed to have been suffered, including submission of documentation substantiating the injury claimed such as medical reports or repair records.
 - (4) A statement of the amount of damages that is being requested, including submission of documentation substantiating the damages claimed such as medical or repair bills or employment wage records.
 - (5) All claims must be verified as true and correct and signed by the individual making the claim and by the claimant's attorney, if any.
 - (6) When the notice is one for wrongful death due to a tortious act or omission, the notice may be presented and signed by the personal representative, surviving spouse or domestic partner, or next of kin of the deceased, provided that the notice is accompanied by documentation of the relationship to the decedent.
- (C) The notice required by this Section shall be valid only if:
- (1) It is given to the required parties in accordance with Subsection (A) no later than one hundred and eighty (180) days after the injury or the tortious act or omission allegedly occurred giving rise to the claimed injury, whichever is later; and
 - (2) It contains all of the information required in Subsection (B).
- (D) The notice required by this Section shall be deemed given and effective as of the date of the postmark on an envelope transmitting all of the information required by Subsections (A) and (B). If the required information is provided in more than one mailing, the notice shall be deemed given and effective as of the date of the latest postmark on the envelopes.
- (E) No action for monetary damages may be brought under this Chapter until the earliest of:
- (1) the expiration of ninety (90) days after the date of the last postmark on an envelope or envelopes transmitting the notice required by this Section; or
 - (2) the date of a written decision denying the claim that is issued by the Tribe or an insurer on behalf of the Tribe.
- (F) 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 timely notice has been given in accordance with this Section.

- (G) Any action for monetary damages under this Chapter must be filed with the Tribal Court within one year of the date on which the injury or the tortious act or omission allegedly occurred giving rise to the claimed injury, whichever is later. No action against the Tribe under the Chapter shall be deemed to have been timely filed with the Tribal Court unless the claimant includes in or attaches to the complaint proof of compliance with the notice requirements of this Section.
- (H) 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 this Section except where the increased amount is based upon newly discovered evidence that was not reasonably discoverable at the time notice required by this Section was given or upon allegation and proof of intervening facts relating to the amount of the claim.
- (I) Any person filing an action for money damages against the Tribe under this Chapter shall cause a copy of the complaint and summons to be served in accordance with STC 3-02.090.
- (J) In any action against the Tribe under this Chapter, the Tribe shall have not less than thirty (30) days after service of the complaint and summons, and such additional time as the Tribal Court may allow for good cause shown, to file an answer or other responsive pleading or motion. No default judgment may be entered against the Tribe under this Chapter.

[History] Ord. 357 (12/15/15).

3-08.090 Applicable Law.

- (A) Tribal law and applicable Federal law shall apply and shall govern all claims and actions brought under this Chapter, except as provided in subsection (B).
- (B) If there is no applicable Tribal or Federal law, the law of the State of Washington may be consulted in resolution of claims asserted pursuant to this Chapter, but Washington law is not binding upon the Tribal Court.

[History] Ord. 357 (12/15/15).

3-08.100 Tribal Remedies and Trial by the Court.

- (A) All cases or controversies arising under the terms and provisions of this Chapter shall be heard only in the Swinomish Tribal Court, and only as provided in this Chapter.
- (B) All actions commenced under this Chapter shall be tried and decided by a Judge of the Tribal Court without a jury.

[History] Ord. 357 (12/15/15).

3-08.110 Exclusiveness of Remedy and Extinguishment and Preservation of Certain Claims, Actions and Defenses.

- (A) An action for monetary damages pursuant to this Chapter brought in Tribal Court against the Swinomish Indian Tribal Community in its own name by a person for injury to that person or to that person's property caused by a tortious act or omission of the Tribe, or by a tortious act or omission of any officer, employee, or agent acting on behalf of the Tribe and acting within the scope of his or her duties, employment or authority, shall be the exclusive remedy available to any person who suffers an injury caused by such an officer, employee or agent of the Tribe. Any claim for monetary damages allowed by this Chapter, which otherwise would lie against an officer, employee or agent of the Tribes, is forever extinguished and replaced by the exclusive remedy established and limited by this Chapter, whether or not the person claiming injury exercises the right to timely present written notice of any claim and to timely commence an action for damages in Tribal Court under this Chapter.
- (B) In addition to the preservation and reaffirmation of the Tribe's sovereign immunity, except as it may be expressly waived by this Chapter, this Chapter expressly preserves any qualified or absolute immunity to actions for monetary damages against officers, employees or agents of the Tribe in their individual capacities including, by way of illustration and not limitation, absolute legislative and judicial immunities, qualified and absolute executive immunities, and their derivatives, which were recognized in the common law and have been elaborated in decisions 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 officer, employee or agent of the Tribe for an injury if it is established that liability for the act or omission of such officer, employee or agent is not assumed by the Tribe under this Chapter or the United States under the Federal Tort Claims Act and that such act or omission was outside the scope of authority of the officer, employee or agent. Notwithstanding the foregoing, any action for individual liability of any officer, employee or agent of the Tribe which is founded on an act or omission in excess of the authority of such officer, employee or agent shall be heard only in Tribal Court.
- (C) A person who suffers an injury as a result of a tortious act or omission of the Tribe or an officer, employee or agent acting on behalf of the Tribe for which the Tribe's sovereign immunity is waived by this Chapter may not use procedures other than those established in this Chapter to seek monetary damages.
- (D) The judgment in an action under this Chapter shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the officer, employee or agent of the Tribe whose act or omission gave rise to the claim.
- (E) Volunteers duly authorized by the Tribe, an officer or employee of the Tribe, shall have the same immunities under this Chapter as officers, employees or agents of the Tribe.

[History] Ord. 357 (12/15/15).

3-08.120 Limitation on Awards, Judgments, Orders or Settlements of Monetary Damages.

No award, judgment, order or settlement shall be made under this Chapter except for, and only for, those for which immunity has been expressly waived by this Chapter.

[History] Ord. 357 (12/15/15).

3-08.130 Time and Finality.

- (A) All time periods set forth in this Chapter shall be calculated in accordance with STC Subsections 3-02.100(A) and (B), “Computation and Extension of Time”, of the Swinomish Rules of Civil Procedure.
- (B) If a decision of the Tribal Court is not appealed within the time period set forth in the Swinomish Tribal Code, and in accordance with 03-04.040 “Notice of Appeal” of the Swinomish Rules of Appellate Procedure, then that decision is final and conclusive, and is not subject to further review.

[History] Ord. 357 (12/15/15).

Subchapter II– Repealer, Severability and Effective Date

3-08.150 Repealer.

[Reserved]

[History] Ord. 357 (12/15/15).

3-08.160 Severability.

- (A) If any section, clause, sentence, provision or part of this Chapter is declared to be invalid by the Tribal Court or Swinomish Tribal Court of Appeals, all other parts of this Chapter shall be invalid unless, within ninety (90) days of the date such declaration of invalidity becomes final, the Senate shall approve a resolution ratifying adoption of this Chapter without the part that was declared invalid.
- (B) If application of this Chapter to any person is declared to be invalid by the Tribal Court or Swinomish Tribal Court of Appeals, such invalidity shall not affect application of this Chapter to any other person, to the extent that the Chapter may be validly given such other application. To these ends and to the extent consistent with this Subsection (B), the provisions of this Chapter are declared to be severable.

[History] Ord. 357 (12/15/15).

3-08.170 Effective Date.

This Chapter shall take effect immediately upon approval by the Secretary of the Interior. Notwithstanding the provisions of Subsections 3-08.080 (C) and (G), any claim that has accrued no more than 180 days prior to the effective date of this Chapter shall not be barred for failure to comply with Sections 3-08.080 (C) and (G) if notice otherwise in compliance with Section 3-08.080 is provided within 180 days of the effective date of this Chapter, and if an action for monetary damages for such claim otherwise in compliance with this Chapter is filed with the Tribal Court within one year of the effective date of this Chapter.

[History] Ord. 357 (12/15/15).