

TITLE 29

Torts Ordinance

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## TITLE 29

### TORTS ORDINANCE

#### Chapter 29.01 General Provisions

##### 29.01.01 Findings and Purpose

The Port Gamble S'Klallam Tribe provides a broad range of governmental services to promote the health, safety, welfare, and economic security of Port Gamble S'Klallam community members and visitors who enter on to Port Gamble S'Klallam lands.

The Port Gamble S'Klallam Tribal Council:

- (a) Recognizes that the Tribe 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 Tribe can continue to provide governmental services which promote the health, safety, welfare, and economic security for Port Gamble S'Klallam Tribe's community members and visitors who enter on to the Port Gamble S'Klallam Tribe's lands; and
- (b) Declares that the purpose of this Title is to establish a limited waiver of Tribal sovereign immunity consistent with the ability of the Tribe to continue:
  - (1) To provide governmental services which promote the health, safety, and economic security of residents and visitors to the Port Gamble S'Klallam Tribe's lands, and
  - (2) To provide a remedy to private persons who are injured by negligent or wrongful acts or omissions of the Tribe or its agents, employees, or officers.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15. Title 29 Torts Ordinance was created to allow the Port Gamble S'Klallam Tribe to waive its sovereign immunity under specific circumstances to allow a tort lawsuit to take place in tribal court. Where a claimant prevails in tribal court, the court may award the claimant up to the maximum of the Tribe's insurance coverage.]

##### 29.01.02 Definitions

Words in this chapter shall have the meaning given to them in this section unless the context clearly indicates another meaning. If the meaning of a word is not clear, the Community Court shall construe the meaning of the word in harmony with the purpose of this chapter.

- (a) "Agent" means any person, whether paid or unpaid, acting on behalf of the Tribe.
- (b) "Employee" means any person hired by the Tribe, whether full-time, part-time, permanent, or temporary, whose wages are subject to reporting by way of IRS for W-2.
- (c) "Officer" of "Official" means an officer, whether elected or appointed, whether paid or unpaid, acting on behalf of the Port Gamble S'Klallam Tribe.
- (d) "Tort" means physical injury to a person, death, or physical 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 that are in effect as of the date of this ordinance, codified in this Title, regardless of the form or type of action or of the form of relief sought by the claimant.
- (e) "Tribal Court" means the court established under the Port Gamble S'Klallam Tribe's Constitution.
- (f) "Tribal law" means the Constitution of Port Gamble S'Klallam Tribe, the Port Gamble S'Klallam Tribe's Law and Order Code, any legislative enactments adopted by the Port Gamble S'Klallam Tribal Council, and the decisions of the Tribal Community Court.
- (g) "Tribe" means the Port Gamble S'Klallam Tribe, including but not limited to any branch, office, department, agency, commission, utility, authority, instrumentality, enterprise, or corporation whether chartered under tribal law or federal law, but excluding for purposes of this Title corporations chartered under the law of any state.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

### 29.01.03 Severability

If the Tribal Court declares any part or parts of this Title to be invalid, then all valid parts that are severable from the invalid part(s) remain in effect. If the Tribal Court declares invalid an application of this Title to any person or circumstance, such invalidity shall not affect application of this Title to any other person or circumstance. The provisions of this Title are declared to be severable.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

#### 29.01.04 Retroactivity

This Title shall be retroactive to claims arising three (3) 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 sixty (60) days after the date of enactment.

to expressly state that it does not amend or repeal any other provision of the Law and Order Code that provides an administrative remedy to any person and that such remedies are presumed to be exclusive.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

### **Chapter 29.02 Sovereign Immunity**

#### 29.02.01 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 are to be adhered to strictly. The Port Gamble S'Klallam Tribe does not make any waiver of any kind 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 Tribe shall exceed the limits of valid and collectible liability insurance policy or policies carried by the Tribe at the time that an act or omission occurs that gives rise to a claim. Deductible amounts within a liability insurance policy shall be included to the extent appropriated and budgeted by the Tribal Council or by any Tribal commission, utility, authority, corporation, or enterprise.

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

(e) In the case of any claim where the claimant alleges that a tort was not caused by the act or omission of the Tribe, but was instead caused by the act or omission of any Tribal commission, utility, authority, corporation, or enterprise, or by any agent, employee, or officer within the scope of their authority of such Tribal commission, utility,

authority, corporation, or enterprise, the claimant may only bring a claim against the Tribal commission, utility, authority, or enterprise that the claimant alleges caused the act or omission. Where the claimant alleges that an employee, agent, or officer of a Tribal commission, utility, authority, or enterprise caused a tort through an act or omission, the claimant may only bring a claim against the Tribal commission, utility, authority, or corporation that is connected to the employee, agent, or officer.

(f) Notwithstanding any other provision of this Title, there shall be no exception to or waiver of the Tribe's sovereign immunity as to any tort claim that 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 the Tribe's sovereign immunity for any claim for monetary damages for any tort alleged to have resulted from any:

- (1) Action taken or decision made in good faith and without gross negligence in carrying out the law;
- (2) Intentional tort, including but not limited to assault, false imprisonment, malicious prosecution, abuse of process, libel, slander, defamation, misrepresentation, deceit, interference with contract rights, or interference with prospective economic advantage;
- (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, or revocation of, or the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval or other authorization;
- (5) 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 such authorization or benefits should be issued, denied, suspended, or revoked;
- (6) Probation, 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) Injury or damage caused by an escaping or escaped person or prisoner, or a person resisting arrest except upon a showing of gross negligence;
- (8) Decision made by the Tribe or any agent, employee, or officer of the Tribe in the implementation of any laws respecting the placement or supervision of minors or incompetent persons;
- (9) 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 such statute, rule, or regulation is currently valid;
- (10) Claim based on the assessment or collection of any tax or the seizure and detention of any goods or merchandise by any law enforcement officer;
- (11) Claims for on-the-job injuries that are covered by workmen's compensation;
- (12) Claims related to unemployment compensation or employment decisions; and
- (13) Claims for breach of contract rather than tort claims.

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 Tribe by law or pursuant to a contract to which the Tribe is a party.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

#### 29.02.02 Procedural Requirements for Waiver of Sovereign Immunity

The procedures and standard for giving notice of claims and commencing actions in Tribal Court under this Title are integral parts of the limited waiver of sovereign immunity provided by this Title and shall be strictly 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 compliance with this Title.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

#### 29.02.03 No Insurance Purchase Obligation

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

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

### **Chapter 29.03 Tort Claims in Tribal Court**

#### 29.03.01 Notice of Claims

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 a tort 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 Port Gamble S'Klallam Tribal Council and to the Office of the Tribal Attorney.

The written notice shall include the following:

- (a) 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;
- (b) 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 tort;
- (c) A description of the nature and extent of the injury claimed to have been suffered;
- (d) The name of any Tribal employee, agent, or official involved, if known, and the name, address, and telephone number, if known, of any other person involved or who has knowledge of the circumstances, facts, or injury; and
- (e) The amount of monetary damages requested.

In the case of any claim where the claimant alleges a tort was caused by the act or omission of any Tribal authority, corporation, or enterprise, the written notice required by this Section shall also be given to the chief executive officer of such Tribal authority, corporation, or enterprise.

To be valid under this Title, the written notice of claim for monetary damages required by this Section must be given no later than one hundred and eighty (180) calendar days after the act or omission occurred that gave rise to the tort claim. The written notice of claim for monetary damages shall be conclusively deemed given and effective as

of the date of the postmark on the written notice that the claimant sends by certified mail. Claimant must send the written notice with a return receipt request and provide proof of such return receipt.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

### 29.03.02 Action in Tribal Court

(a) An action for monetary damages may be brought in Tribal Court under this Title against the Tribe by any person for any tort to that person caused:

(1) By an act or omission of the Tribe, or

(2) By an act or omission of any Tribal agent, employee, or officer acting on behalf of the Tribe and within the scope of authority of that agent, employee, or officer, or

(3) By an act or omission of any Tribal commission, utility, authority, or corporation, or by any agent, employee, or officer acting within their scope of authority, of such Tribal commission, utility, authority, or corporation, or

(4) By an act or omission of any Tribal agent, employee, or officer acting on behalf of the Tribe and within his/her scope of authority who is named in a claim in his/her individual capacity.

This waiver of sovereign immunity shall be limited as follows:

No monetary damages shall be awarded under this Title in excess of the limits of insurance that the Tribe maintains and that is in effect on the date of the occurrence of the act or omission that gave rise to the claim.

(b) No action for monetary damages may be brought under this Title until the expiration of sixty (60) days after the claimant gives the written notice required by Section 29.03.01.

(c) The Tribal Court shall not accept any action for filing against the Port Gamble S'Klallam Tribe under this Title unless the claimant at the same time files proof of compliance with the notice requirements of Section 29.03.01.

(d) 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 29.03.01, 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.



The exclusive remedy for a tort claim is in the PGST Tribal Court, subject to limits of insurance coverage, with the insurance purchased either by the Tribe or by any Tribal commission, utility, authority, or corporation.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

#### 29.03.03 Service of Summons and Complaint

(a) Any person filing an action for money damages against the Tribe under this Title shall ensure that a copy of the complaint and summons is served upon the Tribal Council, the Office of the Tribal Attorney, and, in the case of a claim involving an act or omission of any Tribal authority, corporation, or enterprise, then also upon the chairman or chief executive officer of such Tribal authority, corporation, or enterprise.

(b) The claimant must complete service of the complaint and summons within the time required under the rules generally applicable to actions filed in Tribal Court and as governed by or consistent with the general rules of civil procedure established by Title 3 of the Port Gamble S'Klallam Law and Order Code.

(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.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

#### 29.03.04 Statute of Limitations

Any action for monetary damages under this Title must be filed with the Tribal Court within two hundred and seventy (270) calendar days of the act or omission that occurred which gave rise to the tort.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

#### 29.03.05 Exhaustion of Administrative Remedies

This Title does not amend or repeal any other provision of the Port Gamble S'Klallam Law and Order Code that provides an administrative remedy to any person. Such remedies are presumed to be exclusive. Where administrative remedies are required, such remedies must be exhausted before a claimant may file under this Title.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

## Chapter 29.04 Tribal Court Authority

### 29.04.01 Tribal Court Jurisdiction

(a) An action for monetary damages may be brought in Tribal Court under this Title against the Port Gamble S'Klallam Tribe by any person for any tort to that person caused by:

- (1) An act or omission by the Tribe; or
- (2) An act or omission by any agent, employee, or officer acting on behalf of the Port Gamble S'Klallam Tribe and within the scope of authority of that agent, employee, or officer; or
- (3) An act or omission of any Tribal commission, utility, authority, or corporation or any agent, employee, or officer acting within the scope of their authority for such Tribal commission, utility, authority, or corporation;

Provided that this waiver of sovereign immunity shall be subject to the limitations described in this Title.

(b) The Tribal Court shall have exclusive jurisdiction over all suits arising under this Title. Such suits shall be conducted under the general rules of civil procedure established by Title 3 of the Port Gamble S'Klallam 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.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

### 29.04.02 Applicable Law

In determining whether an action constitutes a tort, the Court shall look to the law of the Port Gamble S'Klallam Tribe, applicable federal law, and to the extent consistent with the law of the Port Gamble S'Klallam Tribe, substantive tort laws of the State of Washington.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

### 29.04.03 Actions Defended by the United States

The Tribal Court shall order a stay without bond of any tort claim where the Tribe has requested that the United States assume the defense of the claim under the Federal Tort Claims Act.

Upon receipt of notice that is satisfactory to the Tribal Court that the

United States has assumed defense of the tort claim, the Tribal Court shall issue notice to the parties and shall dismiss the action or proceeding.

Upon receipt of notice that is satisfactory to the Tribal Court that the United States has declined to assume defense of the tort claim, the Tribal Court shall dissolve the stay and issue an order directing further proceedings in the action or proceeding on the tort claim.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

#### 29.04.04 Liability of Individual Agents, Employees, or Officers

Any liability for monetary damages for 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 a tort caused by an agent, employee, or officer of the Tribe. The remedy that this Title establishes and limits extinguishes any other claim for monetary damages, regardless of whether the person in whose favor such remedy is created exercises the right to timely present written notice of any claim and commences an action for a tort in Tribal Court under this Title.

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 include, but are not limited to, absolute legislative and judicial immunities, qualified and absolute executive immunities, and any derivatives, which are recognized in common law and elaborated by federal courts in cases alleging violations of federal law.

Except as described in this section, this Title does not immunize or extinguish individual liability for monetary damages of any agent, employee, or officer of the Tribe against a tort claim if it is established that liability for the act or omission of such agent, employee, or officer exceeded or was outside the scope of employment or authority of the agent, employee, or officer. Claims for individual liability arising from acts or omissions that occur within the Tribe's jurisdiction that are found to exceed or be outside the scope of authority of a Tribal agent, employee, or officer shall be filed only in the Tribal Court.

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.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

#### 29.04.05 Alternate Remedies

A person who suffers an injury as a result of an act or omission of the

Tribe or of 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. However, 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.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]

#### 29.04.06 Limitations on Awards, Judgments, or Orders of Monetary Damages

No award, judgment, or order shall be made under this Title:

- (a) Based on strict or absolute liability;
- (b) For punitive or exemplary damages;
- (c) For prejudgment interest;
- (d) For attorney's fees; or
- (e) 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.

[HIST: Source - Resolution No. 15-A-169, passed 12/9/15.]