

CHAPTER 36
TORT CLAIMS

36-1 TITLE, PURPOSE AND DEFINITIONS

36-1.01 Title. This Chapter shall be known as the Kootenai Tribe Tort Claims Act.

36-1.02 Purpose, Limitations, and Applicability

(1) The purpose of this Act is to establish a limited waiver of the Tribe's sovereign immunity from suit and to impose strict procedures under which a person may file an action or claim for monetary damages against the Tribe, its agents, employees and officers. This Act is not intended to be a general waiver of the Tribe's immunity and it shall be narrowly and strictly construed. The limited waiver provided under this Act is conditioned upon the claimant's full and complete compliance with all of the procedures contained in this Act.

(2) The provisions contained in this Chapter shall not limit or alter in any way its authority to enter into contracts containing a clear and unequivocal waiver of the Tribe's sovereign immunity from suit, including provisions for the enforcement thereof. Disputes alleging a breach of contract shall continue to be determined under the principles of contract law.

(3) This Chapter shall not apply to actions or claims arising from the operation and management of the Kootenai River Inn, Casino & Spa.

36-1.03 Definitions. As used in this Chapter, except as may be specifically provided otherwise, the following definitions shall apply.

(1) "Agent" means any person, whether paid or unpaid, when acting during the course of and within the scope of the actual authority expressly granted them by the Tribe.

(2) "Award" means money damages which the Tribal Court determines are payable to compensate for any injury recognized under this Act.

(3) "Claim" means any demand to recover damages from the Tribe, or an employee of the Tribe acting within the course and scope of his or her employment with the Tribe.

(4) "Claimant" means any person seeking compensation under the provisions of this Act.

(5) "Dangerous condition" means a physical aspect of a facility or the use thereof which constitutes an unreasonable risk to human health or safety, which is known to exist or which in the exercise of reasonable care should have been known to exist, and which condition is proximately caused by the negligent acts or omissions of the Tribe in constructing or maintaining such facility. For the purposes of this Act, a dangerous condition should have been known to exist if it is established that the condition had existed for such a period of time and was of such a nature that, in the exercise of reasonable care, such condition and its dangerous character should have been discovered.

A dangerous condition shall not exist solely because the design of any facility is inadequate nor due to the mere existence of wind, water, ice or temperature by itself, or by the mere existence of a natural physical condition. Nothing in this definition shall preclude an accumulation of water, snow or ice from being found to constitute a dangerous condition when the Tribe fails to use existing means available to it for the removal of such accumulation and when the Tribe had notice of such accumulation and reasonable time to act.

(6) "Employee" means a part- or full-time employee or an agent of the Tribe, when acting during the course of and within the scope of their employment. This term includes officers and directors of the Tribe when they are acting to fulfill their duties to the Tribe. This does not include agents or representatives of the United States, State of Idaho or any of their political subdivisions. The term "employee" shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the Tribe.

(7) "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, or, to the extent consistent with Tribal law, laws of the State of Idaho, and which is expressly covered by the Tribe's liability insurance.

(8) "Officer" means an officer, whether elected or appointed, whether paid or unpaid, when acting during the course of and within the scope of their actual authority expressly granted by the Tribe.

36-1.04 Sovereign Immunity Intact. The Tribe's immunity from suit shall remain in full force and effect except to the extent that it is waived by this Act. Members of the Tribal Council shall remain immune from suit for actions taken during the course of and within the scope of their duties as members of the Tribal Council, and nothing contained in this Act shall be construed otherwise.

36-2 LIMITED WAIVER OF SOVEREIGN IMMUNITY FROM SUIT

36-2.01 Forum Limitation. The Tribe may be sued under this Act solely in the Kootenai Tribal Court. Nothing contained in this Act shall be construed as a waiver of the Tribe's immunity from suit in any state, federal or provincial court or another tribe's court.

36-2.02 Instances Waiver Applies.

The Tribe's sovereign immunity from suit is waived in the following instances:

(1) Injuries proximately caused by the negligent acts or omissions of the Tribe.

(2) Injuries proximately caused by the acts or omissions of any agent, employee, or officer acting on behalf of the Tribe and within the scope of authority of that agent, employee or officer.

(3) Injuries proximately caused by the condition of any facility of the Tribe, provided the claimant establishes that the facility was in a dangerous condition.

36-2.03 Limitations of Waiver. Notwithstanding any other provisions, there shall be no exception to the sovereign immunity of Tribal entities, officials, employees or agents from claims for injury or damages alleged to have been sustained by:

(1) Policy decisions or the exercise of discretion made by a Tribal official, employee or agent in the exercise of judgment or discretion vested in the entity or individual;

(2) A decision made in good faith and without gross negligence in carrying out the law, except that this provision does not immunize a Tribal entity, officer, employee or agent for liability for 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 adopting or failure to adopt a law or by failing to enforce 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, order or similar authorization, nor by the termination or reduction of benefits under a Tribal assistance program if the Tribal entity, officer, employee or agent is authorized by law to determine whether or not such authorization or benefits should be issued, denied, suspended or revoked;

(5) 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;

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

(7) 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;

(8) 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 is valid;

(9) Claim based on the assessment or collection of any tax, or the detention of any goods or merchandise by a law enforcement officer.

(10) 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.

The enumeration of the above immunities shall not be construed to waive any other immunities or to assume any liability except as explicitly provided in this Act.

36-2.04 No Waiver if Liability Assumed by Others.

(1) Except for contracts of insurance issued to the Tribe as named insured, any exception to the immunity of the Tribe and assumption of liability under this Act does not apply in circumstances in which such liability has been or is hereafter assumed by third parties, including any other governmental body or agency, whether by indemnification or hold harmless agreement or otherwise.

(2) There shall be no waiver of sovereign immunity as to any claim or injury which is defended by the United States under the Indian Self-Determination and Education Assistance Act, the Federal Tort Claims Act, or any other federal law.

- (a) Upon certification by the Tribal Legal Department 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.

36-2.05 No Third Party Beneficiaries. The liability assumed by the Tribe under this Act shall not extend to any party or parties as third party beneficiary or otherwise, other than the party or parties to whom such liability is expressly assumed, and then only to the extent, circumstances and conditions specified thereby.

36-2.06 Workers and Unemployment Compensation Claims Excepted. Notwithstanding any other provision, there shall be no waiver of sovereign immunity under this Act for claims relating to workers' compensation, unemployment compensation, or claims or actions relating to employment decisions.

36-3 LIMITATIONS ON AWARDS, CLAIMS AND DAMAGES

36-3.01 Limitations on Awards. No judgment, order or award pertaining to any claim for monetary damages permitted by this Act shall be for more than the lesser of:

(1) The sum of \$250,000 for each individual claimant, but not exceeding the sum of \$1,000,000 for each accident or occurrence; or

(2) The limits of a valid and collectible liability insurance policy or policies carried by the Tribe covering such claim and in force at the time of such judgment, including deductible amounts to the extent appropriated by the Tribal Council, nor than for more than the amount of coverage provided for such claim under established claim reserves as appropriated by the Tribal Council or otherwise established pursuant to any self-insured liability or other Tribal government claims program approved and adopted pursuant to Tribal law and which are in effect at the time of such judgment order or award or special appropriation.

36-3.02 Any judgment, order or award issued pursuant to this Chapter may only be satisfied pursuant to the express provisions of the policy or policies of liability insurance or established self-insured or government claims program of the Tribe that are in effect at the time of each such judgment or award of special appropriation.

36-3.03 Unless allowed and recoverable under the Tribe's liability insurance or self-insurance plan, costs and attorney fees shall not be awarded against the Tribe.

36-3.04 Claims and Damages Limited.

(1) No rule of law imposing absolute or strict liability against the Tribe, its agents, employees or officers shall be applied in any action or claim for injuries under this Act.

(2) No award or other judgment imposing punitive or exemplary damages, or attorney fees, shall be applied against the Tribe, its agents, employees or officers in any action or claim for injuries under this Act

(3) No award for loss of consortium shall be applied against the Tribe, its agents, employees or officers in any action or claim for injuries under this Act.

(4) No award for pain and suffering or mental anguish shall be applied against the Tribe, its agents, employees or officers, except where such award does not exceed fifty percent (50%) of the actual damages sustained, and provided that any such award does not exceed the limits of the liability insurance policy of the Tribe applicable to the underlying action or claim.

36-4 ACTIONS OUTSIDE THE SCOPE OF AUTHORITY

36-4.01 This Act does not immunize agents, employees or officers of the Tribe from individual liability for the full measure of the recovery applicable to a claimant, if it is established that their conduct exceeded the scope of employment or authority. Claims for individual liability arising out of conduct which is found to exceed the scope of employment or authority that arise on the Kootenai Indian Reservation or otherwise within the jurisdiction of the Tribe shall be heard only in the Tribal Court.

36-4.02 If the Tribal Court determines that the injuries claimed for an act or omission of an agent, employee or officer were willful and wanton or otherwise outside the scope of employment or authority, the Tribe may request and the Court may order the individual defendant(s) named in the claim to reimburse the Tribe for costs and attorney fees which may have been incurred in the defense of the defendant(s).

36-5 NOTICE OF CLAIM

36-5.01 (1) Any person desiring to institute suit against the Tribe or any officer, employee or agent

of the Tribe as authorized by this Act shall, as a jurisdictional condition precedent to institution of such suit, provide notice to the Chairperson of the Tribal Council, Director of the Finance Department and Tribal Attorney General.

(2) The notices required by Section 36-5.01 shall be sent by certified mail, return receipt requested to the addresses of each of the required recipients. The notice shall be deemed given and effective as of the date of the last postmark of any written notice required by subsection (1) of this section.

36-5.02 The notice shall contain 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; and

(2) A concise statement describing the conduct, circumstances or other facts that brought about the injury. The statement must include the date and time when the injury occurred, the place where the injury occurred, the names of any Tribal agent, employee or officer involved, or who have knowledge of the facts giving rise to the injury, and the names, addresses and phone numbers, if known, of any other persons involved or who have knowledge of the facts; and

(3) A concise statement of the nature and extent of the injury claimed to have been suffered, including submission of relevant medical reports; and

(4) A statement of the amount of damages requested.

36-5.03 The notice required by section 36-5.01 shall be valid only if:

(1) It is given to the required parties no later than 180 days after the act or omission occurred giving rise to the injury; and

(2) It contains all of the information required in Section 36-5.02.

36-6 ACTION IN TRIBAL COURT

36-6.01 (1) No action may be brought in the Tribal Court until the expiration of 90 days after the date of the last notice required by Section 36-5.01 is given.

(2) No action brought under this Act shall be accepted for filing by any Tribal Judge unless the claimant at the same time files proof of compliance with Section 36-5.

an action for an injury in Tribal Court under this Act.

36-6.02 No action may be brought in Tribal Court under this Act for damages in excess of the amount set forth in the written notice of claim required by Section 36-5.02(4). Damages sought in excess of the amount stated in the written notice of the claim may be awarded by the Tribal Court only if the claimant proves the increased amount is based upon evidence not reasonably discoverable at the time the notice was given, or upon proof of intervening facts relating to the amount of the claim.

36-6.03 Any person filing an action in Tribal Court for money damages under this Act shall cause a copy of the complaint and summons to be served upon the Chairperson of the Tribal Council and the Tribal Attorney General.

36-6.04 A defendant in any action brought pursuant to this Act, whether for monetary damages or prospective declaratory, mandamus, injunctive or other extraordinary relief, 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 Tribe under this Act.

36-6.05 All actions commenced under this Act shall be tried by a Judge of the Tribal Court without a jury.

36-7 EXTINGUISHMENT OF CLAIMS

36-7.01 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 Act shall be the exclusive remedy available to any person who suffers an injury caused by an agent, employee or officer of the Tribe.

36-7.02 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 Act is forever extinguished in favor of the remedy established and limited by this Act, 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

36-8 PRESERVATION OF CERTAIN CLAIMS, ACTIONS AND DEFENSES

36-8.01 (1) This Act 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. By way of illustration rather than limitation, the defenses preserved by this Act include absolute legislative and judicial immunities, qualified and absolute executive immunities, and their derivatives, that were recognized in the common law and elaborated by federal courts in cases alleging violations of federal law.

(2) Except for the foregoing, this Act does not extinguish individual liability for monetary damages 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 Act and that such act or omission was outside the scope of authority of the agent, employee or officer of the Tribe. Notwithstanding the foregoing, any action for individual liability of any agent, employee or officer of the Tribe that is founded on an act or omission in excess of the authority of such agent, employee or officer shall be heard only in the Tribal Court.

36-8.02 A person who suffers an injury as a result of an act or omission of the Tribe or an agent, employee or officer acting on behalf of the Tribe may not use procedures other than those established in this Act to see monetary damages, even if another remedy may be provided by another provision of Tribal law of general application. Notwithstanding the foregoing, this Act shall not bar any person from pursuing remedies in accordance with otherwise applicable law for claims relating to workers' compensation, unemployment compensation, or employee disciplinary actions taken pursuant to the Personnel Act or other applicable law.

36-8.03 Volunteers duly authorized by the Tribe or an agent, employee or officer of the Tribe shall have the same immunities under this Act as agents, employees and officers of the Tribe.

36-9 SEVERABILITY

36-9.01 If any part of this Act is invalidated by the Tribal Court, all parts of this Act shall be invalid unless, within 90 days of the judgment of the Tribal Court so declaring, the Tribal Council shall

ratify adoption of this Act without the part declared invalid. If application of this Act to any person is declared invalid by the Tribal Court, such invalidity shall not affect application of this Act to any other person, which may be given without such invalid application. To these ends, and consistent with this section, the provisions of this Act are declared to be severable.

36-10 APPLICABLE LAW

36-10.01 Tribal law, applicable federal law, and to the extent not inconsistent with Tribal law, Idaho substantive tort law, shall govern all claims and actions brought under this Act.