



# Cowlitz Indian Tribe

Tribal Council Ordinance No. 18-03

Short Title: Tort Liability Ordinance

**WHEREAS**, the Cowlitz Indian Tribe is acknowledged as a Sovereign Indian Nation by the United States Government; and

**WHEREAS**, the Tribal Council is the governing body of the Cowlitz Indian Tribe as authorized by the Tribe's Constitution and By-laws; and

**WHEREAS**, The Tribal Council wishes to adopt an ordinance to set forth the terms and conditions under which the Cowlitz Indian Tribe will grant a limited waiver of sovereign immunity solely for injuries occurring within the Tribe's Reservation and trust lands;

**NOW, THEREFORE BE IT ENACTED** by the Tribal Council of the Cowlitz Indian Tribe, the following Ordinance entitled "Cowlitz Indian Tribe Tort Liability Ordinance."

**Section 1. Scope and Applicability.** This Ordinance shall apply to all injuries occurring on Cowlitz Tribal Land.

## **Section 2. Definitions.**

- (A) **Agent** means any person, whether paid or unpaid, when acting during the course of and within the scope of actual authority expressly granted to them by the Tribe
- (B) **Award** means monetary damages which the Tribal Court may determine are payable to compensate for any injury recognized pursuant to this Ordinance.
- (C) **Claim** means a written document, together with supporting information and documentation, submitted by a Claimant pursuant to the procedures and requirements set forth in Section 9 of this Ordinance.
- (D) **Claimant** means a person who submits a Claim under this Ordinance alleging a compensable injury.
- (E) **Compact** means the Tribal-State Class III Gaming Compact between the State of Washington and the Cowlitz Indian Tribe dated June 14, 2014, including any amendments thereto.
- (F) **Cowlitz Tribal Land** includes all lands over which the Cowlitz Indian Tribe exercises jurisdiction, including but not limited to, the Cowlitz Indian Reservation, trust lands, and lands within the federal definition of "Indian country" as set forth in 18 U.S.C. § 1151.
- (G) **Cowlitz Tribal Gaming Authority ("CTGA")** means the unincorporated governmental instrumentality of the Cowlitz Indian Tribe responsible for the management of the Tribe's Gaming Facilities.
- (H) **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. For the purposes of this Ordinance, 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.

- (I) **Days** means all days of a calendar year inclusive of weekdays, weekends, and holidays.
- (J) **Employee** means a part or full-time employee of the Tribe, including, but not limited to, the CTGA.
- (K) **Gaming Facility or Gaming Facilities** means any facility or building in which Class II or Class III Gaming is conducted on Cowlitz Tribal Land.
- (L) **Injury or Injuries** means death, bodily injury to a person, or property damage to or loss of property of whatever kind, occurring on Cowlitz Tribal Land, proximately caused by the negligent or intentional act (as defined by Washington state law) of an Officer, Agent, or Employee of the Tribe or CTGA, who owed a legal duty or care (other than arising from contract) in the course and scope of their employment or performance of official duties. This does not include any negligent or intentional act or omission of a patron of the Gaming Facility or other third party while on Cowlitz Tribal Land.
- (M) **Officer** means an officer, whether elected or appointed, whether paid or unpaid, when acting during the course of and within the scope of their authority granted by the Tribe.
- (N) **Ordinance** means this Cowlitz Indian Tribe Tort Liability Ordinance
- (O) **Tribal Council** means the Cowlitz Tribal Council, the governing body of the Cowlitz Indian Tribe
- (P) **Tribal Court** means the Cowlitz Tribal Court established by the Tribal Court Ordinance.
- (Q) **Tribe** means the Cowlitz Indian Tribe, including but not limited to any agency, commission, authority, instrumentality (CTGA), enterprise, corporation, or other entity of the Cowlitz Indian Tribe.

### **Section 3. Effective Date and Retroactivity.**

(a) This Ordinance shall take effect immediately and shall repeal, supersede, and replace any prior ordinance enacted by the Tribe governing claims for bodily injury, personal injury, or property damage occurring on Cowlitz Tribal Land.

(b) This Ordinance shall be retroactive to all Injuries occurring one year prior to the date of its enactment, provided the time period to bring any Claim arising prior to the date of the enactment of this Ordinance shall begin to run sixty (60) days after the date of this Ordinance's enactment. Any Claim brought after sixty (60) days is time barred.

**Section 4. Governing Law.** All claims under this Ordinance shall be decided in a manner consistent with Washington tort law governing claims for bodily injury or property damage, excluding any Washington law allowing punitive damages, as limited by the Compact and the provisions of this Ordinance. This provision does not constitute general consent to Washington law, nor is it intended as a waiver of the Tribe's sovereign immunity from unconsented suit or legal process.

**Section 5. Insurance.** The Tribe shall maintain in full force and effect a policy of commercial general liability insurance in the amount no less than ten million dollars (\$10,000,000) per occurrence for bodily injury, property damage, and personal injury (as those terms are defined in the policy) arising out of, connected with, or resulting from activities undertaken by or services provided by the Tribe on Cowlitz Tribal Land.

### **Section 6. Limited Waiver of Tribal Sovereign Immunity.**

(a) The Tribe hereby waives its sovereign immunity for all Injuries up to the limits of the commercial general liability insurance policy specified in Section 5 of this Ordinance. The Tribe, including but not limited to any agency, commission, authority, instrumentality, enterprise, corporation, or other entity of the Tribe are entitled to protection under the doctrine of sovereign immunity for any acts related to

Injuries that may due to incidents that may occur on Cowlitz Tribal Land. The Tribe hereby waives sovereign immunity only to the extent set forth in this Section. 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 Ordinance shall be construed otherwise.

(b) This Ordinance waives sovereign immunity (as limited in subsection (a) of this Section) only up to the limits of the commercial general liability insurance policy referenced herein for bodily injury, property damages and personal injury (as those terms are defined in the policy) and only to the extent such Injuries are covered under the applicable commercial general liability policy of the Tribe or CTGA.

(c) Nothing contained in this Ordinance shall be construed as a waiver of the Tribe's immunity from suit in any state or federal court.

(d) The sovereign immunity of the Tribe is waived in accordance with this Section only in the following instances:

(1) Injuries proximately caused by the negligent acts or omissions of the Tribe, its Agents, Employees, or Officers occurring on Cowlitz Tribal Land;

(2) Injuries proximately caused by the condition of any facility or building of the Tribe on Cowlitz Tribal Land, provided the Claimant establishes that the facility or building was in a Dangerous Condition.

(e) Unless otherwise specified explicitly and clearly in this Ordinance, nothing herein shall be construed to be a general waiver of the Tribe's sovereign immunity.

#### **Section 7. Limitations on Awards.**

Notwithstanding any other provision of this Ordinance:

(a) 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 Ordinance.

(b) No award or other judgment imposing punitive or exemplary damages, attorneys' fees, or pre-judgment interest shall be applied against the Tribe, its Agents, Employees, or Officers in any action or claim for injuries under this Ordinance.

(c) 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 Ordinance.

(d) 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 50 percent of the actual damages sustained, or five hundred thousand dollars (\$500,000), whichever is less, and further provided that any such award does not exceed the limits of the commercial liability insurance policy of the Tribe applicable to the underlying action or claim without regard to any deductible amount contained in the insurance policy referenced in Section 5.

#### **Section 8. Actions Outside the Scope of Employment or Authority.**

(a) This Ordinance 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 and which arise within the exterior boundaries of the Cowlitz Tribal Land shall be heard only in the Tribal Court.

(b) If the Tribal Court determines that the injuries claimed from 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 Tribal 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).

**Section 9. Procedure and Time Period for Filing Claims – Written Notice Required.**

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(a) No action may be brought in Tribal Court under this Ordinance unless the person who claims to have suffered an injury first sends written notice of the claim to:

Director of Legal  
Cowlitz Tribal Gaming Authority  
One Cowlitz Way  
Ridgefield, WA 98642.

The notice shall be sent by certified mail, return receipt requested. If the action or claim alleges the injury was caused by the act or omission of an Agent, Employee, or Officer of the Tribe, the written notice required by this Section shall also be given to the Agent, Employee, or Officer.

(b) The notice required by subsection (a) of this Section 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 which 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 the extent of the injury claimed to have been suffered, including submission of relevant medical reports; and

(4) A statement of the amount of damages that is being requested.

(c) The notice required by subsection (a) of this section shall be valid only if:

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

(2) It contains all of the information required in subsection (b) of this Section.

(d) The notice shall be deemed given and effective as of the date of the last postmark of any written notice required by subsection (a) of this Section.

(e) No action may be brought in Tribal Court under this Ordinance until the expiration of ninety (90) days after the date of the last notice required by subsection (a) of this Section is given.

(f) No action may be brought in Tribal Court under this Ordinance for damages in excess of the amount set forth in the written notice of claim required by subsection (a) of this Section. Damages sought in excess of the amount stated in the written notice of 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.

(g) Any person filing an action in Tribal Court for money damages under this Ordinance shall cause a copy of the complaint be served upon:

Cowlitz Indian Tribe  
Legal Counsel  
1055 9<sup>th</sup> Ave.,  
Longview WA 98632

If the action alleges a claim involving an act or omission of a Tribal commission, board, authority, corporation, or enterprise, service of the complaint shall also be given to the chairperson or chief executive officer of such commission, board, authority, corporation, or enterprise.

(h) A defendant in any action brought pursuant to this Ordinance, whether for monetary damages or prospective declaratory, mandamus, injunctive, or other extraordinary relief, 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.

(i) The time periods for filing a notice of claim for monetary damages and for commencing an action in Tribal Court for monetary damages under this Ordinance do not apply in a suit for prospective declaratory, mandamus, injunctive, or other extraordinary relief against the Tribe or its Agents, Employees, or Officers.

**Section 10. Exhaustion of Tribal Dispute Process.** Upon notice of Claim required in Section 9 of this Ordinance, The Director of Legal shall cause the claim to be submitted to the Tribe's applicable insurer. If the Tort Claim is rejected by the insurer or the parties have reached an impasse as to the dollar value of a settlement of a Claim, the Claim may only then be taken to the Cowlitz Tribal Court; provided all jurisdictional prerequisites set forth in this Ordinance have been satisfied.

**Section 11. Limitations on Waiver of Sovereign Immunity.**

(a) No judgment, order, or award pertaining to any claim for monetary damages permitted by this Ordinance shall be for more than the limits of a valid and collectible commercial liability insurance policy or policies carried by the Tribe covering each such claim. To be valid and collectible, the liability insurance policy referenced in Section 5 must have been in effect at the time the alleged injury occurred.

(b) Notwithstanding any other provision of this Ordinance, there shall be no waiver of sovereign immunity as to any claim of 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. Upon certification by the Cowlitz Indian Tribe's Legal Counsel 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. 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 United States has declined to assume defense of the claim of Injury.

(d) The procedures and standards for giving notice of claims to the Tribe under this Ordinance are integral parts of the limited waiver of sovereign immunity provided by this Ordinance, and shall be strictly and narrowly construed. A Claim for monetary damages against the Tribe shall be forever barred unless written notice of the Claim has been given pursuant to the requirements contained in this Ordinance, and is commenced in Tribal Court in accordance with the provisions of the Tribe's Court Ordinance.

(e) Neither execution nor attachment shall issue against the Tribe in any claim for injury or proceedings initiated under this Ordinance.

**Section 12. Bench Trial of Actions and Appeals.** The procedures for bench trials and appeals commenced pursuant to this Ordinance are set forth in the Tribe's Court Ordinance. All trials commenced under this Ordinance shall be tried by a Judge of the Tribal Court without a jury.

**Section 13. Extinguishment and Preservation of Certain Claims, Actions and Defenses.**

(a) Any liability for monetary damages assumed by the Tribe for the acts or omissions of any Agent, Employee, or Officer of the Tribe under this Ordinance shall be the exclusive remedy available to any person who suffers an injury caused by an Agent, Employee, or Officer of the Tribe. Any claim for monetary damages assumed by the Tribe which otherwise would lie against an Agent, Employee, or Officer of the Tribe except for this Ordinance is forever extinguished in favor of the remedy established and limited by this Ordinance, 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 Ordinance.

(b) This Ordinance 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 Ordinance 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.

(c) 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 Ordinance to seek monetary damages, even if another remedy may be provided by another provision of Tribal law of general application. Notwithstanding the foregoing, this Ordinance shall not bar any person from pursuing remedies in accordance with otherwise applicable law for claims relating to worker's compensation, unemployment compensation, or employee disciplinary actions taken pursuant to applicable Tribal personnel policies and procedures.

(d) Volunteers duly authorized by the Tribe or an Agent, Employee, or Officer of the Tribe shall have the same immunities under this Ordinance as Agents, Employees, or Officers of the Tribe.

**Section 14. Severability.** If any part of this Ordinance is invalidated by the Tribal Court, all valid parts that are severable from the invalid part remain in effect. If a part of this Ordinance is invalid in one or more of its applications, that part remains in effect in all valid applications that are severable from the invalid applications

**Section 15. Miscellaneous.**

(a) In construing this Ordinance, the present tense includes the past and future tenses, and the future tense includes the present tense.

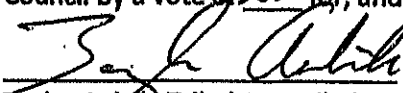
(b) When reference is made to any portion of this Ordinance, the reference shall apply to all amendments made hereafter.

(c) All of the Tribe's acts or other laws inconsistent with this Ordinance are hereby repealed. To the extent that this Ordinance provides other procedures or limitations than in any other Tribal law governing Claims against the Tribe, its Agents, Employees, or Officers, this Ordinance shall govern.

(d) Section headings shall be used only for reference to format and not in construing this Ordinance

**-CERTIFICATION-**

The foregoing Ordinance was adopted on April 07, 2018, at a duly called meeting of the Cowlitz Tribal Council by a vote of 21 for, and 0 against, and 0 abstaining.

  
Taylor Aalvik, Tribal Council Chair

  
Randy Russell, Tribal Council Secretary