

Original Enactment Date: August 19, 2010
Subject: Limited Waiver of Siletz Tribal Sovereign Immunity

LIMITED WAIVER OF SILETZ TRIBAL SOVEREIGN IMMUNITY
Siletz Tribal Code § 2.250

§ 2.250 **PURPOSE AND INTENT**

The Confederated Tribes of Siletz Indians of Oregon, also referred to as the Siletz Tribe, is a sovereign Indian Nation comprised of many different bands and tribes of Indians who were confederated on the Siletz or Coast Reservation beginning in 1855. The Siletz Tribe possesses the same inherent sovereignty and sovereign authority as other nations. The United States of America, in the exercise of its trust responsibility to preserve and protect sovereign tribal nations, recognizes, acknowledges, and protects the principle of tribal sovereign immunity.

The principle of tribal sovereign immunity is well established and long recognized in federal policy and in federal judicial decisions, legislative enactments, and in administrative regulations, policies and decisions. Tribal sovereign immunity exists both on and off reservation, and extends to the Tribe itself, to agencies, arms, entities and enterprises of the Tribe as well as to employees, officers, agents acting on behalf of the Siletz Tribe and within the scope of their authority. Under the principle of tribal sovereign immunity, the Siletz Tribe, its agencies, arms, entities and enterprises and its employees, officers and agents cannot be sued in any court without the Siletz Tribe's express consent, or if the Congress of the United States has enacted specific legislation expressly waiving the sovereign immunity of Indian tribes in certain instances.

Preservation and recognition of the principle of tribal sovereign immunity is necessary to the functioning of the Siletz Tribe and its agencies, arms, entities and enterprises, and to preserve scarce tribal assets and to ensure that tribal assets, to the greatest extent possible, are preserved for programs and services that will benefit the tribal membership and their families. The Tribal Council also recognizes, however, that the limited waiver of the Tribe's sovereign immunity is necessary to conduct tribal governmental business and to engage in contracts and agreements with non-tribal governments, persons, entities or enterprises that will further the objectives and goals of the Tribe because, without a valid waiver of tribal sovereign immunity, agreements and contracts entered into by the Tribe cannot be enforced by the non-tribal contracting party. Waiver of the Siletz Tribe's sovereign immunity for specific transactions is an exercise of the

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Tribe's sovereign authority because only sovereign nations possess the authority to waive their sovereign immunity. The Siletz Tribe has a critical interest in approving limited waivers of its sovereign immunity and in ensuring that companies, governments and other entities who contract with the Tribe have the right to exercise the contractual remedies they have bargained for.

§ 2.251 DEFINITIONS

- (a) **“Tribe”** for purposes of this Ordinance refers to the Confederated Tribes of Siletz Indians of Oregon, and to the agencies, entities, arms and enterprises of the Tribe, as appropriate, either together or separately.
- (b) **“Sovereign Immunity”** or **“Immunity”** as used in this Ordinance means the immunity from suit or other action of the Tribe and/or its agencies, arms, entities, enterprises, including employees, officers and agents of the Tribe.
- (c) **“Officer”** as used in the Ordinance includes the Tribal Council of the Siletz Tribe and senior management of the Tribe and its agencies, arms, entities or enterprises.
- (d) **“Resolution”** for purposes of this Ordinance shall mean a Resolution passed by the Siletz Tribal Council, or, in the case of an action waiving sovereign immunity as set out in this Ordinance by an agency, entity, arm, enterprise or Officer of the Tribe, shall mean an equivalent written action by such agency, entity, arm, enterprise or Officer.

§2.252 WHO IS PROTECTED BY THE TRIBE’S SOVEREIGN IMMUNITY

The sovereign immunity of the Siletz Tribe extends to the Tribe, to tribal agencies, enterprises, arms or entities of the Tribe, and to officers, employees and agents of the Tribe acting within their scope of authority. The sovereign immunity of the Siletz Tribe may only be waived as provided in this Ordinance. The Tribe's immunity from suit extends to tribal employees, Officers and agents of the Tribe, both from suit or action and from legal process or procedure associated with any suit or action, for actions taken by tribal employees, agents and Officers as part of their job responsibilities and within the scope of their authority.

§ 2.253 SCOPE OF WAIVER OF TRIBAL SOVEREIGN IMMUNITY

- (a) **Who May Waive Tribe’s Sovereign Immunity.** The power and authority to waive the Siletz Tribe's sovereign immunity resides exclusively in the first instance with the Siletz Tribal Council. The Siletz Tribal Council, by Ordinance or Resolution, may delegate in part its authority to waive immunity to specific agencies, arms, entities or enterprises of the Tribe, or to specific Officers of the Tribe. Such delegation of authority to waive the Tribe's sovereign immunity is expressly limited to the terms of

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the written delegation, and any purported waiver of tribal sovereign immunity in excess of the expressly delegated authority shall be void and of no legal effect. Any waiver of sovereign immunity by a tribal agency, entity, arm or enterprise shall not be a waiver of the sovereign immunity of the Siletz Tribe or of any other entity, arm, enterprise or agency of the Tribe.

(b) Scope of Waiver of the Tribe's Sovereign Immunity. Any waiver of the Tribe's sovereign immunity shall, unless otherwise provided for specifically by Ordinance or Resolution, be a "limited" waiver. For purposes of this Ordinance, "limited" means that each waiver of sovereign immunity shall be limited to the amount of a contract or agreement in which the waiver is incorporated, and perhaps also to costs, expenses and attorney fees directly related to that agreement. As an alternative, the Tribe's waiver of sovereign immunity shall be limited to specifically pledged assets or resources of the Tribe, identified specifically in writing and included in the contract or agreement, and in the Tribal Council Resolution waiving the Tribe's sovereign immunity. General waivers of the Tribe's sovereign immunity are disfavored. In the event a general waiver of the Tribe's sovereign immunity is authorized in a specific transaction, the Resolution authorizing such waiver must specify how such general waiver will work in conjunction with any limited waivers of the Tribe's sovereign immunity that may already be in existence. Any waivers of sovereign immunity shall be time limited, as set out in the contract or agreement and in the Resolution authorizing such waiver. No waiver of sovereign immunity by the Tribe shall include punitive or non-economic damages. Attorney fees, costs and expenses shall be included in a waiver of sovereign immunity by the Tribe only if specifically included in the contract or agreement containing the waiver, and included in the Resolution approving the waiver. The Tribe's sovereign immunity shall not be waived in favor of any third party, and any waiver of the Tribe's sovereign immunity does not confer any benefits or rights on any third party or person, except as specifically set out in the contract or agreement waiving sovereign immunity and in the Resolution approving such waiver.

(c) Immunity of Tribal Officers, Employees and Agents. Tribal employees, Officers and agents shall be generally immune from suit while acting within the scope of their authority, and while carrying out their job responsibilities, to the same extent as the Siletz Tribe. Any action or suit commenced against the Tribe under a waiver of sovereign immunity approved pursuant to this Ordinance shall be brought only against the Tribe, agency, entity, arm or enterprise entering into the waiver, and shall not be brought against Officers, employees or agents of the Tribe carrying out a particular contract or agreement. No action or suit shall be brought or maintained against tribal employees, Officers or agents in their individual capacity, for actions taken as part of their job responsibilities and within the scope of their authority.

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(d) Writing. All waivers of the Tribe’s sovereign immunity must be in writing and properly approved by the appropriate tribal body, agency, entity, arm or enterprise of the Tribe to be valid and effective.

§ 2.254 WAIVER OF TRIBAL SOVEREIGN IMMUNITY IN TRIBAL ORDINANCES

Tribal sovereign immunity may be waived or authorized by Tribal Ordinance, as specifically set forth therein and subject to any limits or restrictions set out therein. As non-exclusive examples of waiver of tribal sovereign immunity in Tribal ordinances, the following examples are noted:

- (1) Article IV, Section 2 of the Siletz Constitution states that the authority of the Siletz Tribal Court includes “the power to review and overturn tribal legislative and executive actions for violations of [the Siletz] Constitution or of the Federal Indian Civil Rights Act of 1968”;
- (2) The Siletz Torts and Indian Civil Rights Act Ordinance, § 3.200 et seq., authorizes tort claims actions against the Tribe in specific instances, to the extent of available insurance coverage.

The Siletz Tribal Court Rules and Procedures Ordinance, § 3.001 et seq., does not create or confer any substantive rights, and does not waive the sovereign immunity of the Siletz Tribe or any agency, entity, arm, or enterprise of the Tribe, and does not waive the sovereign immunity of any employee, Officer, or agent of the Tribe carrying out his or her job responsibilities and acting within the scope of his or her employment.

§ 2.255 FORM OF WAIVER OF TRIBAL SOVEREIGN IMMUNITY

Any waiver of the sovereign immunity of the Tribe must be in writing to be valid and effective. The actual waiver of sovereign immunity must be set forth with specificity in the contract or agreement waiving immunity, and the Resolution approving the waiver of sovereign immunity must specifically refer to the waiver and its details, or in the alternative, the Resolution may refer to the contract or agreement containing the waiver of sovereign immunity that is being approved, with the contract or agreement attached to the Resolution. No particular form of waiver is required to waive the Tribe’s sovereign immunity, except that a waiver of the Tribe’s sovereign immunity must be express, must use the words in any sequence “waiver of sovereign immunity,” and must be set out in detail. Waivers of the Tribe’s sovereign immunity shall be narrowly construed by the Siletz Tribal Court or other court having jurisdiction to interpret a purported waiver of sovereign immunity by the Tribe, and the burden of proof shall lie with the party advocating the existence of a waiver.

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§ 2.256 FORUM FOR WAIVER OF TRIBAL SOVEREIGN IMMUNITY

The Tribe shall waive its sovereign immunity only in favor of the Siletz Tribal Court or other appropriate tribal forum, unless expressly provided for otherwise in the contract or agreement waiving the Tribe’s sovereign immunity and, in the Resolution, approving such waiver. Despite any provision to the contrary, unless a contract or agreement expressly prohibits tribal court jurisdiction for the resolution of any matter arising under the contract or agreement, or allows tribal court jurisdiction for any matter arising under the contract or agreement only with the express consent of the non-tribal contracting party, the Siletz Tribal Court shall have special jurisdiction to determine whether the Siletz Tribe has validly waived its sovereign immunity in any contract or agreement. Except as provided for in this Ordinance or in another tribal Ordinance, no suit or action shall be allowed or maintained in any forum, whether Tribal, State or Federal, except as may be specifically authorized in accordance with the specific terms and provisions of a waiver of sovereign immunity granted in accordance with this Ordinance.

§ 2.257 LEGAL OPINION

The Tribe, any tribal agency, entity, arm, or enterprise may request the opinion of tribal legal counsel as to whether a particular contract or agreement waives the sovereign immunity of the Tribe, and to what extent. The opinion of tribal legal counsel under this section may be subject to attorney-client or attorney work product privilege, unless tribal legal opinion is specifically required as part of a contract or agreement.

§ 2.258 REGISTRY

To the extent feasible, the Tribe and each tribal agency, entity, arm and enterprise of the Tribe shall keep a registry of all active waivers of tribal sovereign immunity.

§ 2.259 CLARIFYING FOR TRIBALLY FORMED COMPANIES (NO TRIBAL IMMUNITY)

An entity formed, constituted or registered under the laws of CTSI which is not itself a tribally owned or chartered corporation, either per 25 U.S.C. 477 of the Indian Reorganization Act, or organized as a “state chartered tribal corporation,” and in which CTSI has no share of ownership, is not afforded tribal sovereign immunity by this Ordinance. This Limited Waiver of Sovereign Immunity Ordinance (§§ 2.250 – 2.258) do not extend, apply to or confer any jurisdictional immunity over such a “non-tribal” entity, formed under CTSI Ordinance, unless that entity is owned in whole or in part by CTSI or by any agency, entity, arm, or enterprise which is owned in whole or in part by CTSI.