



# Sisseton-Wahpeton Oyate

LAKE TRAVERSE RESERVATION

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## TRIBAL COUNCIL RESOLUTION NO. SWO-10-023

### **The Sovereign Immunity of the Tribe and its Entities under Tribal Law**

**WHEREAS,** The Sisseton-Wahpeton Oyate is organized under a Constitution and By-laws adopted by the members of the Tribe on August 1-2, 1966, and approved by the Commissioner of Indian Affairs on August 25, 1966, and last amended effective November 15, 2006; and,

**WHEREAS,** The Constitution ARTICLE III, Section 1, states that, the Sisseton-Wahpeton Oyate shall be governed by a Council, and ARTICLE VII, Section 1, states that, the Council shall have the following powers: (a) to represent the Tribe in all negotiations with Federal, State and local governments; (b) to acquire, own, use, manage, lease and otherwise encumber and to dispose of Tribal property, both real and personal, wherever situated; (c) to engage in any business that will further the economic development of the Tribe and its Members, and to use Tribal funds or other resources for such purposes; (d) to make rules governing the relationship of the members of the Tribe, to Tribal property, and to one another as members of the Tribe; (f) to deposit Tribal funds to the credit of the Tribe, without limitations of the amount in any account; (g) to take any action by ordinance, resolution, or otherwise which are reasonably necessary through committees, boards, agents or otherwise, to carry into effect the for-going purposes; (h) to promote public health, education, charity, and such other services as may contribute to the social advancement of the members of the Sisseton-Wahpeton Oyate; (i) adopt resolutions regulating the procedures of the Tribal Council, its officials and committees in the conduct of Tribal Affairs; and,

**WHEREAS,** The Sisseton-Wahpeton Oyate has long maintained a written Tribal law establishing that the Tribe possesses sovereign immunity from suit, which is set forth in § 33-02-01, Civil Matters; and,

**WHEREAS,** The Tribal Court has had little difficulty in determining which Tribal entities, organizations, programs, committees, boards, and corporations are entitled to share in the Tribe's sovereign immunity from suit; and,

**WHEREAS,** The Sisseton-Wahpeton Oyate possesses the power to create a corporation and confer its immunity on the corporation; and,

- WHEREAS,** The Sisseton-Wahpeton Oyate's Constitution, at Art. VII, § I, cl. (c), empowers its Tribal Council to "engage in any business that will further the economic development of the Tribe and its members, and to use tribal funds or other resources for such purposes"; and,
- WHEREAS,** The Sisseton-Wahpeton Oyate's Constitution, at Art. VII, § I, cl. (j)(i), provides that the Tribal Council may delegate its authority; and,
- WHEREAS,** The Sisseton-Wahpeton Oyate's Constitution, at Art. VII, § I, cl. (g), also empowers the Tribal Council to "take any action by ordinance, resolution, or otherwise which are reasonably necessary through committees, boards, agents or otherwise, to carry into effect the fore-going purposes"; and,
- WHEREAS,** The Tribal Council has exercised these powers, and others, by incorporating and conferring its sovereign immunity from suit upon SWST Fuel, Inc.; and,
- WHEREAS,** SWST Fuel, Inc. has been named as one of the defendants in a lawsuit filed in the Sisseton-Wahpeton Oyate Tribal Court, brought by the Estate of D.F. Jr and the Estate of T.C.L., Case No.'s C-06-118-084 & C-07-021-151; and,
- WHEREAS,** The Tribal Council, on behalf of the Sisseton-Wahpeton Oyate, purchased a business then known as Dakota Sioux Propane, Inc., a South Dakota corporation, in 2002 for a significant sum, which was funded exclusively with Tribal revenues; and,
- WHEREAS,** The propane company, since re-organized as SWST Fuel, Inc., serves several government functions for the Sisseton-Wahpeton Oyate, such as providing heating fuel to Tribal members and when possible providing welfare assistance to the elderly; and,
- WHEREAS,** Due to the policies and actions of the federal government the Tribe's land base and tax base has been severely reduced and the Tribe is forced to look to other revenue sources to fund the Tribal government and ultimately provide services to Tribal members; and,
- WHEREAS,** The Northern Plains Intertribal Court of Appeals recently considered "a question of law" pertaining to Fuel Inc., which is "whether a corporation organized under the laws of the Tribe is entitled to sovereign immunity on account of the corporation being wholly owned by the Tribe and the Tribe having conferred upon the corporation of such immunity."; and,



- WHEREAS,** In considering this question, the Northern Plains Intertribal Court of Appeals reversed the Tribal Court's sound determination that Fuel Inc. is immune from suit and remanded the case to the Tribal Court for further consideration consistent with its determination; and,
- WHEREAS,** The Northern Plains Intertribal Court of Appeals last year determined that Fuel Inc. will only share in the Tribe's sovereign immunity from suit if the Tribal Court determines that it is an arm of the Tribe and not a separate corporation based upon 11 factors developed by the Colorado Court of Appeals; and,
- WHEREAS,** When enacting the Articles of Incorporation for Fuel Inc. in 2001 the Tribal Council there took great care in ensuring that this legal question was addressed in detail and that there would be no doubt that, under Tribal law, Fuel Inc. would share in the Tribe's sovereign immunity from suit. The Articles adopted by the Tribal Council in 2001 were adopted pursuant to a motion at a duly noticed Tribal Council meeting; and,
- WHEREAS,** Tribal sovereign immunity is primarily a judicial doctrine in the federal forum; and,
- WHEREAS,** The Tribal Court has likewise taken the lead in developing tribal sovereign immunity in the Tribal Court and the Tribal Council has thus far spoken on the subject primarily through the Tribal Code of Laws, charters, articles, and other organization documents for a Tribal entity; and,
- WHEREAS,** The United States Supreme Court has acknowledged that Congress may alter the limits of tribal sovereign immunity through explicit legislation, subject to Constitutional limitations, and is best situated to weigh and accommodate the competing policy concerns and interests; and,
- WHEREAS,** Like Federal common law, judicial decisions issued by the SWO Tribal Court or the Northern Plains Intertribal Court of Appeals are subject to revision or amendment by legislation enacted by the Tribal Council; and,
- WHEREAS,** The 11 factors recently adopted by the Northern Plains Intertribal Court of Appeals cannot apply when the Tribal Council has expressly conferred its immunity upon an entity of the Tribe; and,
- WHEREAS,** The Tribal Council previously understood that where it explicitly and expressly endowed an entity of the Tribe with its immunity that such Council action was sufficient for a court of law, especially a Tribal Court construing Tribal law, to determine that the tribal entity was immune from suit in Tribal Court.



**NOW THEREFORE BE IT RESOLVED**, that the Ruling by the Northern Plains Intertribal Court of Appeals in the decision titled Estate of D.F. Jr. v. SWST Fuel, Inc., Case No. CV-18-18-07 (July 24, 2009) which set forth the 11 factors relating to the Tribe's sovereign immunity from suit is reversed and overturned and hereby declared to be irrelevant to the question of whether an entity of the Sisseton-Wahpeton Oyate shares in the Tribe's sovereign immunity from suit; and,

**BE IT FURTHER RESOLVED**, when determining whether an entity shares in the Tribe's immunity from suit, the courts of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, including its appellate courts, shall determine whether the Tribal Council has delegated or otherwise conveyed the Tribe's sovereign immunity upon the Tribal entity; and,

**FINALLY BE IT RESOLVED**, should a Tribal Court be unable to determine whether the Tribal Council delegated or otherwise conveyed its sovereign immunity upon an entity, or when Council has taken no action, the Tribal Court shall generously construe the breadth and scope of the sovereign immunity of the Tribe and its entities and determine that the entity shares in the Tribe's immunity from suit when (1) the entity reports to the Tribal Council or the General Council, or (2) receives funding directly or indirectly from the Tribe, including federal funds through the Tribe, or (3) consists of Tribal employees, or (4) is chartered, sponsored, or organized by the Tribe.


## CERTIFICATION

*We, the Undersigned duly elected Tribal Chairman and Tribal Secretary of the Sisseton-Wahpeton Oyate Tribal Council, do hereby certify that the above resolution was duly adopted by the Sisseton-Wahpeton Oyate Tribal Council, which is composed of 10 members (representing a total of 15 Tribal Council weighted votes and two Executive Committee votes for a total of 17 votes) of whom 10 constituting a quorum, were present at a Tribal Council meeting, duly noticed, called, convened and held at the TiWakan Tio Tipi, Agency Village, South Dakota, March 16, 2010, by a vote of 17 for, 0 opposed, 0 abstained, 0 absent from vote, 0 not voting, and that said Resolution has not be rescinded or amended in any way.*

Dated this 17<sup>th</sup> day of March, 2010.

  
Michael I. Selvage, Sr., Tribal Chairman  
Sisseton-Wahpeton Oyate

ATTEST:

  
Delbert Hopkins, Jr., Tribal Secretary  
Sisseton-Wahpeton Oyate

Original copy to: SWO Tribal Court

cc: SWO Legal Counsel

