

APPENDIX B

Sovereign Immunity, Insurance, and other Risk Management

- A. Sovereign Immunity of the State. The state has partially waived its sovereign immunity by statute or contract, quasi-contract, and personal injury claims under AS 09.50.250.
- B. Confidentiality Remedy. (Tribe) and DHSS recognize that any non-authorized disclosure of confidential information shall create a rebuttable presumption of irreparable harm to the disclosing party and to those whose confidential information is disclosed. (Tribe) and DHSS agree that either party may go to court solely for injunctive relief against a party receiving information under this Agreement, except to the extent the receiving party is otherwise entitled to the information under state or federal law.
- C. Liability under this Agreement. DHSS may require (Tribe) to provide a limited waiver of sovereign immunity from suits as provided in this section. The extent to which a waiver is required shall depend on the risk of claims against the State and the risk of harm to third parties as a result of the assumption of Agreement activities. The requirement of a waiver, including the scope of a waiver, shall also consider whether the activities listed are subject to the Federal Tort Claims Act ("FTCA") or insurance, as more fully described below.
 - a. Federal Torts Claims Act. Tribal Title IV-E Partners who have entered agreements with the United States pursuant to the Indian Self-Determination and Education Assistance Act, Public Law 93-638 ("ISDEAA Agreement"), and have assumed responsibility of social services, ICWA, and other child welfare related programs, services, functions, and activities formerly provided by the federal government in such an agreement are deemed to be the federal government for purposes of tort claims and (Tribe)'s employees are considered employees of the federal government for purposes of FTCA and its applicability to claims arising from the performance of (Tribe)'s ISDEAA Agreement. This status is not changed by the source of the funds used by (Tribe) to administer the programs, services, functions, and activities or pay the employee's salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the contractor. See 25 U.S.C. §§ 5321 (c) (d), 1638c, & 1680c; Section 314 of Public Law 101-512; 25 C.F.R. Part 900 Subpart M. It is the intention of (Tribe) and DHSS to avoid assuming liability for claims that are rightfully deemed to be against the federal government to manage risk associated with claims that might arise under this Agreement.
 - b. Insurance. Depending on the risks arising from the services provided under this Agreement, (Tribe) may also be required to purchase gap insurance as a condition of participation in the Agreement. If (Tribe) has an ISDEAA Agreement as described above, that shall be considered in determining the amount of insurance required. If (Tribe) does not have an ISDEAA Agreement as described above, insurance shall be required. If insurance is required the policy shall acknowledge that the insurer shall not assert (Tribe)'s Defense of sovereign immunity for claims for bodily injury, personal

injury, wrongful death, and property damage up to the limits of the policy. To the extent the risk assessed by DHSS is greater than the insurance policy limits, (Tribe) may be required to sign a limited waiver to cover the difference between the risk assessed and the policy limit.

- c. Limited Waivers. (Tribe) shall be required to waive sovereign immunity for claims for the recoupment of funds in the event of fraud, misappropriation, or failure to provide the services under the related Agreement. Further, depending on the risks arising from the Services provided under this Agreement, if (Tribe) chooses to purchase an insurance policy with limits that are below the level of risk assessed by DHSS, (Tribe) may be required to waive sovereign immunity for claims for money damages arising from its performance of services under this Agreement up to the level of risk assessed by DHSS and not covered by (Tribe)'s insurance policy. No waiver of sovereign immunity shall extend to the levy of any judgment, lien, attachment, or encumbrance upon any real property of (Tribe).
- d. Cooperation and Counterclaims. In addition to the above provisions, the Agreement shall provide that all parties may go to court for the purpose of:
 - i. Ensuring performance of obligations assumed under the Agreement;
 - ii. Ensuring (Tribe)'s cooperation regarding litigation arising under the Agreement;
 - iii. Allowing DHSS to assert counterclaims against (Tribe) for claims arising out of or related to the Agreement, in the event (Tribe) initiates legal action; and
 - iv. Ensuring coordination of FTCA claims and defenses and insurance coverage as provided in the Agreement.
- D. Interpretation. The parties agree that no word, phrase, sentence, paragraph, or section, in whole or in part, separate or together, contained in this Agreement may be interpreted, other than expressly provided in this provision, as an express or implied waiver generally of the sovereign immunity of (Tribe).
- E. Legal Costs and Fees. DHSS and (Tribe) shall each bear its own legal expenses, including costs and attorney's fees.