



2021 Request for Applications Limited Waiver Information

March 25, 2021

Dear Tribal Governments and Instrumentalities,

The Native American Agriculture Fund (NAAF) is a private charitable trust created by the 2010 settlement of the *Keepseagle v. Vilsack* class-action lawsuit, which alleged that the United States Department of Agriculture (USDA) had discriminated against Native American Farmers and ranchers in loan programs and loan servicing since 1981.

The final settlement agreement called for NAAF's creation to manage and distribute grants to four eligible entities. One of those entity types is state and federally recognized Tribal governments and their instrumentalities. The court-approved Trust Agreement that created NAAF requires Tribal governments to provide a limited waiver of sovereignty immunity. NAAF is a fiduciary and has a duty to protect its funds from fraud or gross mismanagement. For grant purposes, acceptable waivers will be limited to the amount of the grant and to the duration of the grant relationship.

If you plan on applying to a NAAF funding cycle, we encourage you to work with your legal counsel to draft a waiver for NAAF and a resolution for your governing body. Both documents may be pre-approved by NAAF before application at any time throughout the year. Getting your documents pre-approved will save time during the application and post-award period. Finally, beginning in the 2021 funding period, Tribal government and instrumentality applicants will have a hard deadline to provide waivers and resolutions. Failure to submit an executed waiver and accompanying resolution in a timely manner will result in forfeiture of any award amount. We are taking this step to ensure that Tribal governments have the time necessary to complete the project for which funding is provided and to address unnecessary delays in executing grant agreements and providing provided. Delays can shorten the horizon within which you can accomplish your own goals.

Common questions NAAF has received in the past are addressed below:

Q #1: Why do Tribes need to agree to waive immunity?

A: NAAF's Trust Agreement specifically requires a limited waiver of sovereign immunity by any tribal government entity receiving funding.

Q #2: Can I include a choice of venue or law in the waiver?

A: NAAF’s agreement has a section dedicated to both choice of law and venue. NAAF will remove this section to respect Tribal governments and choice of law. However, NAAF will insist on reciprocity. Both parties will leave this section silent. This ultimately allows either party to initiate venue should the need arise.

Q #3: Does a Tribal instrumentality have the authority to waive on behalf of the Tribe.

A: If you are an entity operating as a corporate arm of a Tribe (e.g., a Section 17 Corporation) and have in place authority to waive immunity on behalf of a Tribe or affiliation of multiple Tribes, NAAF needs your incorporation documents as well as the initial resolution approved by at least one of the Tribes you represent. NAAF needs an actual copy of the resolution or a direct link to the code. It is the responsibility of the applicant to provide this information.

Q #4: I turned in the waiver. Why was it not approved?

A: Waivers that are returned usually fail for one of the following reasons: failure to include both a resolution and waiver (we need both); failure to get the document signed or dated; or the inclusion of a choice of venue or law (please leave this area silent).

Q #5: I turned in a waiver last year. Why do I need a new one?

A: Waivers are specific to each project and funding cycle. While the premise may remain the same, the dates and amount of funding received must correlate with each approved funding cycle. Additionally, Youth funding is a separate application from the General RFA, and applicants that are successful in both categories must have a separate waiver for each, citing the time frame for each grant and the amount for each grant. In other words, the waivers must track to the individual grants NAAF provides, both in time period and in funding provided.

The information on the following pages is provided to the potential Grantee for their review and consideration. The DRAFT “Limited Waiver of Sovereign Immunity” provided immediately below is offered to potential Grantees as **draft** language.

The signed documents provided will be included in the Grantee’s records on file with NAAF and must be received by NAAF before the transfer of funds will occur. NAAF exercises strict rules of confidentiality when working with any Tribal data or documents. Grantees are encouraged to complete their applications by using the collaborate tool; this tool will allow grantees to work remotely by inviting other individuals or Tribal departments such as finance or legal departments to collaborate in obtaining required uploads or drafting various sections of the application.

Draft waivers can also be sent to: grants@nativeamericanagriculturefund.org

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Limited Waiver of Sovereign Immunity (DRAFT)

The (Insert Name of the Tribe or Tribal Instrumentality) hereby expressly, unequivocally and irrevocably provides a limited waiver of immunity from suit in any court of competent jurisdiction to enforce or seek relief of any term or provision of the Grant Agreement executed by and between the Native American Agriculture Fund and the (Tribe/Instrumentality). This waiver of immunity includes any action for monetary damages, injunctive relief or declaratory relief, or attorneys' fees. The (Tribe/Instrumentality) agrees that it will not raise sovereign immunity as a defense in any judicial action brought in any venue by the Native American Agriculture Fund to enforce or seek relief of any Grant Agreement term or provision entered into by and between the parties. This limited waiver of sovereign immunity is required under the terms of the Trust Agreement that binds and controls the conduct of business of the Native American Agriculture Fund and is limited to the amount of the grant funding being provided to the (Tribe/Instrumentality) and is limited to the duration of the grant project being funded by the Native American Agriculture Fund.

In witness whereof, the Native American Agriculture Fund and the (Tribe/Instrumentality) have caused this agreement to be duly executed as of the date of the authorizing resolution or legislation by the [Tribe]. Additionally, the [Tribe] warrants that this agreement is executed by the (insert the title of the appropriate Tribe/Instrumentality official), who is duly authorized to execute and bind the [Tribe] here who has affixed his/her signature signifying assent to their agreement and has affixed his/her signature hereto, as of the date and year referenced below.

[INSERT Tribal/Instrumentality Signature Blocks/Date and Sign]

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RESOLUTION # _____ (DRAFT)

A RESOLUTION APPROVING THE LIMITED WAIVER OF SOVEREIGN IMMUNITY, AND PROVIDING AN INDEPENDENT WAIVER OF SOVEREIGN IMMUNITY IN THE SAME FORM, BETWEEN THE (INSERT TRIBE'S NAME, OR INSTRUMENTALITY OF THE TRIBE'S NAME) AND THE NATIVE AMERICAN AGRICULTURE FUND (NAAF), PROVIDED FOR THE SOLE PURPOSE OF COMPLYING WITH NAAF'S REQUIREMENTS FOR A LIMITED WAIVER OF SOVEREIGN IMMUNITY IN ORDER TO SUPPORT EXECUTION OF A GRANT AGREEMENT BETWEEN NAAF AND (INSERT TRIBE'S NAME).

WHEREAS, the (Insert Tribe's Name) is a federally recognized Tribe of American Indians with (insert the source of the Tribe's authority to carry out its functions as a government); and

WHEREAS, the (Insert Tribe's Name) has sovereign powers that are inherent in Tribal tradition, derived from a history of organized self-governance since time immemorial, and recognized by treaties with the United States and recognized in the Constitution of the United States; and

WHEREAS, (insert here the section of applicable Tribal law from which the powers of the Tribal government are derived and/or explicitly discussed and also discuss the source of the executive and legislative power of the Tribal government as it relates to the offices that will execute the Grant Agreement and this Resolution); and

WHEREAS, the Legislature of the (Insert Tribal name) has authorized the Executive Branch of (insert Tribe's name) to enter into a legally binding agreement, and to sign all documents on behalf of the (insert Tribal name), including the Grant Agreement between the Native American Agriculture Fund (NAAF) and the (insert Tribe's name) in the amount of \$ _____, including but not limited to the Limited Waiver of Sovereign Immunity contained therein.

NOW, THEREFORE BE IT RESOLVED BY THE LEGISLATURE OF THE (INSERT TRIBE'S NAME) that a Resolution authorizing the (insert Tribe's name) to enter into an irrevocable Limited Waiver of Sovereign Immunity in the amount of \$ _____, and the Executive Offices of the (insert Tribe's name) are hereby authorized to execute said Limited Waiver of Sovereign Immunity on behalf of the (insert Tribe's name) in a form substantially as follows, and to provide herein an independent, irrevocable Limited Waiver of Sovereign Immunity on the same basis for the same purpose as follows, IS HEREBY APPROVED.

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Limited Waiver of Sovereign Immunity

Limited Waiver of Sovereign Immunity. Nothing herein shall be deemed to be a general waiver of the (insert Tribe’s name) immunity from suit, except that the (insert Tribe’s name) hereby provides an irrevocable limited waiver of sovereign immunity in the amount of \$_____, and consents to suit, enforcement, and collection of judgement and award, injunction, specific performance or declaratory relief, as to any right, obligation or duty arising out of or under the Grant Agreement. The purpose of this explicit waiver of tribal sovereign immunity is to allow NAAF to enter into the Grant Agreement whereby NAAF will transfer grant funds in the amount of \$_____ to (insert Tribal name). The (insert name of Tribe) understands that NAAF is not allowed to enter into any Grant Agreement with (insert name of Tribe) without the limited waiver of sovereign immunity described herein, as per the terms of the Trust Agreement under which NAAF is created and is authorized to conduct all business related to its purpose and mission. The (Tribe) understands that NAAF would not enter into this Grant Agreement without this limited waiver of sovereign immunity. NAAF is governed under its Trust Agreement which explicitly requires that all tribes and tribal instrumentalities are required to grant a limited waiver of sovereign immunity to NAAF in order to enter into the Grant Agreement that governs transfer of grant funds to the (Tribe) in furtherance of NAAF’s charitable and educational mission. It is expressly understood and agreed that regardless of any court that may hear any dispute or suit arising out of any or relating to the Grant Agreement shall be governed by and construed in accordance with the laws of applicable courts. The waiver that is described in this document shall inure to the benefit of NAAF and each other entity entitled to the benefits of this Grant Agreement. NAAF shall have and be entitled to all available legal and equitable remedies.

CERTIFICATION

The Legislature of the (Tribe) hereby certifies that the above is a true and correct copy of Resolution #_____, as approved on the _____ day of _____, 2020, with _____ voting for, _____ opposed, _____ absent and _____ abstaining.

Secretary/Treasurer

Executive Approval:

(signature)

_____ *Approved*

_____ *Disapproved*

(Chairperson/President/Chief/Governor)
(Name of Chairperson/President/Chief/Governor)