



**STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL**

KRIS W. KOBACH
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

June 10, 2025

ATTORNEY GENERAL OPINION NO. 2025-12

The Honorable Dan Osman
State Representative, 48th District
State Capitol, Room 451-S
300 SW 10th St.
Topeka, Kansas 66612

Re: State Departments; Public Officers and Employees—State Historical Society—State Historical Society; Acquisition and Disposition of Property

Synopsis: A recent bill in the Kansas House of Representatives—2025 House Bill 2384—would authorize the Kansas State Historical Society to transfer the Shawnee Indian Mission in Fairway to the Shawnee Tribe. Certain restrictions would be included in the deeds and conveyances. If the Mission were transferred to the Tribe, then the restrictions could be enforced against the Tribe if it clearly and unequivocally waived its sovereign immunity. Cited herein: K.S.A. 75-2701; K.S.A. 75-2756.

* * *

Dear Representative Osman:

As State Representative for the 48th District, you ask whether restrictions on the use of the Shawnee Indian Mission in Fairway could be enforced if the Kansas State Historical Society transferred the Mission to the Shawnee Tribe, a federally

recognized Native American tribe.¹ Your inquiry is based on 2025 House Bill 2384,² which would authorize such a transfer with certain restrictions (e.g., prohibiting using the Mission for gaming, requiring a historical preservation easement).³ We believe the restrictions would be enforceable against the Tribe if the Tribe clearly and unequivocally waived its sovereign immunity with respect to these restrictions.

Federally recognized tribes are sovereign entities that possess immunity against suits in both federal and state court.⁴ Their immunity is quite broad; it covers conduct on and off tribal land, including conduct related to contracts,⁵ and it bars suits brought by the States.⁶ The only two avenues through which this immunity may be overcome are (1) abrogation by Congress and (2) waiver by a tribe.⁷ To be effective, a tribal waiver “‘must be unequivocally expressed’ rather than implied.”⁸

HB 2384 provides that the Society may only transfer the Mission to the Tribe pursuant to deeds and conveyances that are “reviewed and approved” by the Attorney General and that, among other things, “contain restrictive covenants prohibiting any gaming or gambling activities.” The bill further asserts that the Tribe “agrees” to certain conditions, including that the Mission “shall not be used as a casino or other gaming facility.” HB 2384 does not address tribal sovereign immunity.

If the Tribe accepts the Mission without waiving sovereign immunity, then the Tribe could invoke its immunity in response to suits over its use of the Mission. HB 2384—like any other state legislative measure—cannot unilaterally waive the Tribe’s immunity; only Congress and the Tribe may remove this impediment to

¹ Should a transfer occur, the property’s eventual status under federal law is uncertain. Accordingly, we focus on the heart of your question: the enforceability of the restrictions against the Tribe itself.

² The Committee on Federal and State Affairs has held a hearing on the bill, which has not received a vote. See Kan. Legislature, *HB 2384*, <https://perma.cc/PSK5-P4H2> (last accessed June 4, 2025).

³ If authorized, the Society may transfer the Mission to the Tribe. See K.S.A. 75-2701(a); see also K.S.A. 75-2756 (authorizing the Society to transfer the Shawnee Indian Cemetery to the Tribe).

⁴ *Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1151–52 (10th Cir. 2011).

⁵ See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998); *Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1148 (10th Cir. 2012).

⁶ See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014) (“[T]ribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals.”).

⁷ *Nanomantube*, 631 F.3d at 1152; see also *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008) (recognizing tribal immunity “may only be overcome in one of two ways”). Although there is a common-law “immovable-property exception” to sovereign immunity, the Supreme Court has not yet found that it extends to tribes and, in any event, the exception would likely not apply in a suit to enforce the restrictions because title to the Mission would not be in direct dispute. See generally *Cayuga Indian Nation of N.Y. v. Seneca County*, 978 F.3d 829, 834–40 (2d Cir. 2020) (discussing exception and its inapplicability to tax foreclosure actions against tribe).

⁸ *Nanomantube*, 631 F.3d at 1152 (quoting *Native Am. Distrib.*, 546 F.3d at 1293); see also Conf. of W. Att’ys Gen., *American Indian Law Deskbook* § 7:18 (May 2024 update) (“As a general matter, contractual waivers of tribal sovereign immunity should be as explicit as possible.”).

suit.⁹ And even if the Tribe agreed to the terms in the bill, at most that would amount to an “implied waiver” of sovereign immunity—which is no waiver at all.¹⁰

Although the bill requires that the deeds and conveyances contain certain restrictions, there is no requirement that the Tribe waive its immunity from suits designed to enforce these restrictions. Of course, a waiver could still be obtained during the process through which the deeds and conveyances are formulated. HB 2384 vests the Attorney General with discretion to approve the deeds and conveyances, which could be conditioned on a valid waiver.¹¹ Otherwise, the restrictions would be rendered meaningless were the Mission to be transferred.

Ultimately, if the Society transfers the Mission to the Tribe without obtaining a valid waiver of sovereign immunity, then the Tribe could invoke its immunity in response to suits over its use of the property.¹²

⁹ See *Native Am. Distrib.*, 546 F.3d at 1293.

¹⁰ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (“It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.” (quotation marks omitted)); *Nanomantube*, 631 F.3d at 1153 (holding that “a tribe’s agreement to comply with [federal anti-discrimination law], without more,” is not “an unequivocal waiver of tribal sovereign immunity”); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (finding that although statements by a tribe in its job application and employee handbook “might imply a willingness to submit to federal lawsuits,” there was no waiver because “waivers of tribal sovereign immunity may not be implied”); Lorenzo E. Gudino, *Who, What, Where, and How: The Fundamental Elements for Contracts Implicating Tribal Sovereign Immunity*, 2022 Wis. L. Rev. 239, 249 (2022) (“[A] tribe’s voluntary consent to enter into a contract does not implicitly waive tribal sovereign immunity.”).

¹¹ Depending on how the transfer is handled, such a waiver may require a “resolution of the . . . Tribe’s Business Committee” and approval “by the Chairman.” Shawnee Legis. Acts § 10.20.020(B) (2025) (available at <https://perma.cc/J7RP-234C>).

¹² As previously noted, we focus on the enforceability of the restrictions against the Tribe itself given the uncertainty over the Mission’s eventual status (*i.e.*, whether it would be taken into trust). That said, there may still be other avenues through which restrictions could be enforced. The Supreme Court has recognized that “tribal immunity does not bar [lawsuits by States] for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct,” and also that in certain circumstances, States may be able to use other tools to enforce their laws. See *Bay Mills Indian Cmty.*, 572 U.S. at 795–96. But, of course, the most straightforward method for ensuring enforcement is obtaining a waiver of sovereign immunity. See *id.* at 796.

Sincerely,

/s/ Kris W. Kobach

Kris W. Kobach
Attorney General

/s/ Adam T. Steinhilber

Adam T. Steinhilber
Assistant Solicitor General