

TRIBAL CODE

CHAPTER 44:

**WAIVER OF TRIBAL IMMUNITIES AND JURISDICTION
IN COMMERCIAL TRANSACTIONS**

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HISTORY NOTE:

Current Ordinance:

Adopted by Tribal Resolution No. 8-11-92-C, August 11, 1992, effective immediately.

Reenacted as part of the Tribal Code July 5, 1995, Resolution no. 95-89.

Amendments:

Amended November 7, 2001, deleting existing '44.108 and enacting new '44.108 by Tribal Resolution 2001-160.

Amended November 8, 2000, to add '44.108 and make other changes, Tribal Resolution No. 2000-149

TRIBAL CODE

CHAPTER 44:

WAIVER OF TRIBAL IMMUNITIES AND JURISDICTION IN COMMERCIAL TRANSACTIONS

44.101 Purpose and Authority.

The purpose of this Chapter is to provide for the waiver of Tribal Court jurisdiction and sovereign immunity in those commercial transactions for which such waiver is necessary and beneficial to the Tribe. This Chapter is enacted pursuant to the authority contained in Article VII, Section 1(d), (g), (k), (l), (m), and (n) of the Tribal Constitution.

44.102 Findings and Declarations.

The Board of Directors hereby finds and declares that:

(1) The Tribe and Tribal members benefit from commercial transactions conducted within the mainstream of the local and national economy, and the Tribe has become increasingly successful and sophisticated in such commercial transactions.

(2) Tribal sovereign immunity, an aspect of Tribal sovereignty, is an important protection for Tribal assets and resources, but it can at times be an impediment to commercial transactions. Many potential business partners of the Tribe are reluctant to enter into contracts unless Tribal sovereign immunity is waived, thereby allowing recourse in the event of tribal default or breach of contract. The Tribe finds it necessary and desirable to waive its sovereign immunity from time to time in a prudent and limited manner in order to consummate business transactions of benefit to the Tribe and its members.

(3) Federal courts, spurred by recent decisions of the United States Supreme Court, have been enforcing a requirement that a party exhaust its Tribal Court remedies for actions against the Tribe or Tribal members arising on the reservation before availing themselves of federal or state court. As with Tribal sovereign immunity, however, many potential business partners are reluctant to enter commercial transactions with the Tribe if they believe their remedy upon breach or default is limited to Tribal Court. Because of this reluctance, the Tribe finds it necessary and desirable from time to time to waive Tribal Court jurisdiction over particular commercial transactions.

(4) The Tribe has the authority to waive its sovereign immunity, provided it does so knowingly in express terms. Likewise, the Tribe has the constitutional authority to define the jurisdiction of the Tribal Court, and it can waive Tribal Court jurisdiction in a way that is

contractually binding in the future if it does so in clear and unmistakable terms. The Tribe possesses the necessary experience, expertise and sophistication to determine when such waivers are in the best interests of the Tribe.

(5) The Tribe has chartered and will continue to charter subordinate Tribal entities, such as the Housing Authority and the Economic Development Commission, which function autonomously for the most part within their spheres of authority. These Tribal entities are of economic benefit to the Tribe and often have need of authority to waive their own immunity to facilitate commercial transactions.

(6) Any waiver of Tribal Court jurisdiction or sovereign immunity made pursuant to this Chapter is hereby declared to be in the best interests of the Tribe and its members. Such waiver does not infringe upon Tribal sovereignty, but instead is an affirmative expression and exercise of such sovereignty.

44.103 Definitions.

As used in this Chapter:

(1) "Board of Directors" means the Board of Directors of the Tribe, the Tribe's governing body duly elected pursuant to the Tribal Constitution.

(2) "Charter" means the organic document of a Tribal entity, and includes the Housing Authority Ordinance, Tribal Code Chapter 90, the Gaming Authority Charter, Tribal Code Chapter 94, and the Economic Development Commission Charter, Tribal Code Chapter 40, and any approved articles of incorporation.

(3) "Tribal Entity" means any entity created and owned by the Tribe for economic or governmental purposes and any entity which is controlled by the Board of Directors. For purposes of this Chapter, an entity shall be deemed to be controlled by the Board of Directors if a majority of the persons serving on the body which governs the entity are chosen by the Board of Directors or are required to be members of the Board of Directors. Entities governed by this Chapter include, but are not limited to, the Housing Authority, the Gaming Authority, the Economic Development Commission, and other organizations entitled or denominated 'authority,' 'enterprise,' 'corporation,' 'agency,' 'commission,' or terms of like import; provided, however, that committees of the Board of Directors shall not be deemed Tribal entities for purposes of this Chapter. For purposes of this Chapter, corporations, partnerships, limited liability companies, or similar entities formed under the laws of any State shall not be Tribal entities; provided, that this provision shall not affect the sovereign immunity of the Tribe with regard to any such State entity;

(4) "Tribal Court" means the Sault Ste. Marie Chippewa Tribal Court established by Tribal Code Chapter 80.

(5) "Tribe" means the Sault Ste. Marie Tribe of Chippewa Indians.

44.104 Sovereign Immunity of Tribe.

The sovereign immunity of the Tribe, including sovereign immunity from suit in any state, federal or tribal court, is hereby expressly reaffirmed unless such immunity is waived in accordance with '44.105 or '44.108. A "sue and be sued" clause or other authorization for a Tribal entity to waive its own sovereign immunity shall not constitute authorization for waiver of the immunity of the Tribe itself. Except for a charter provision expressly authorizing a Tribal entity to waive the sovereign immunity of the Tribe itself, such as that contained in the Economic Development Commission Charter, Tribal Code '40.108, nothing in a Tribal entity charter shall be deemed or construed to be a waiver of the sovereign immunity of the Tribe or the consent of the Tribe to suit in any forum.

44.105 Waiver of Sovereign Immunity of Tribe.

(1) The sovereign immunity of the Tribe may be waived:

(a) by resolution of the Board of Directors expressly waiving the sovereign immunity of the Tribe and consenting to suit against the Tribe in any forum designated in the resolution; provided, that such waiver shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds of the Tribe subject to the waiver, court having jurisdiction and applicable law. Such waiver shall be strictly construed and shall be effective only to the extent expressly provided and shall be subject to any conditions or limitations set forth in the resolution; or

(b) by a Tribal entity exercising authority expressly delegated to such entity in its charter or specially by resolution of the Board of Directors; provided, that such waiver shall be made in strict conformity with the provisions of the charter or resolution governing such delegation.

(2) No express waiver of sovereign immunity by resolution shall be deemed a consent to the levy of any judgment, lien or attachment upon property of the Tribe other than the property specifically pledged, assigned or identified in the resolution.

44.106 Sovereign Immunity of Tribal Entity.

A Tribal entity is endowed by federal law and the provisions of this Chapter with all the privileges and immunities of the Tribe, except as specifically limited in the charter of

the Tribal entity. This includes sovereign immunity from suit in any state, federal or tribal court.

44.107 Waiver of Sovereign Immunity by Tribal Entity.

(1) The sovereign immunity of a Tribal entity may be waived:

(a) by a "sue and be sued" clause or other express waiver in the charter of the Tribal entity; or

(b) by express resolution of the governing body of the Tribal entity.

(2) Waivers of sovereign immunity by resolution shall be granted only when necessary to secure a substantial advantage or benefit to the Tribal entity or the Tribe. Waivers of sovereign immunity by resolution shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds of the Tribal entity subject to the waiver, court having jurisdiction and applicable law.

(3) Neither a "sue and be sued" clause nor an express waiver of sovereign immunity by resolution of the Tribal entity shall be deemed a consent to the levy of any judgment, lien or attachment upon the property of the Tribal entity other than the property specifically pledged, assigned or identified in the resolution, or of any property of the Tribe.

44.108 Waiver of Sovereign Immunity for Proprietary Contracts.

(1) Notwithstanding any other provision of this Chapter, Tribal Code '40.108, '94.111, or '94.120, the Tribe hereby waives its sovereign immunity, as well as the sovereign immunity of the Sault Ste. Marie Tribe Economic Development Commission and the Kewadin Casinos Gaming Authority, for any claim sounding in contract brought in accordance with this section, provided:

(a) The claim arises from an express, written contract signed by all parties to the contract;

(b) The claim is brought by a party to the contract or a party expressly made a third-party beneficiary under the terms of the contract;

(c) The contract was entered into by the Sault Ste. Marie Tribe Economic Development Commission; a Tribal Business Enterprise, as defined in '40.115, subordinate to the Sault Ste. Marie Tribe Economic Development Commission; the Kewadin Casinos Gaming Authority; or a Licensed Gaming Establishment, as defined in '42.220, operated by the Kewadin Gaming Casinos Authority; and

(d) The contract was entered into in the performance of a proprietary function, which means any activity conducted primarily for the purpose of producing a pecuniary profit for the Tribe, the Sault Ste. Marie Tribe Economic Development Commission, or the Kewadin Casinos Gaming Authority excluding, however, any activity normally supported by a government unit by taxes or fees.

(2) Notwithstanding '44.108(1), the Tribe shall not be subject to suit under this section for:

- (a) Suits based upon contracts entered into before November 8, 2000.
- (b) Any claim sounding in tort, as that term is defined in Tribal Code '85.103(3).
- (3) Any claim arising from or based upon employment
- (4) Any claim founded upon a provision of:
 - (1) A constitution, statute, or regulation of the United States or any State;
 - (2) A code or ordinance of the Tribe or of any local unit of government; or
 - (3) The Constitution and Bylaws of the Tribe.
- (5) Any claim for exemplary, punitive, or consequential damages.
- (6) Any suit based upon a contract not entered into in the performance of a proprietary function, including without limitation contracts relating to governmental functions or internal services.
- (7) Any suit based upon a contract which contains provisions concerning sovereign immunity and consent to suit. For any such contract, the contractual provisions relating to sovereign immunity shall supersede the application of this section.

(3) The waiver extends solely to funds contained in the Sault Ste. Marie Tribe Economic Development Commission accounts, as defined in Tribal Code '40.110(1) or

Kewadin Casinos Gaming Authority accounts, as described in '94.113(4)(w), as applicable.

(4) The waiver of sovereign immunity contained in this section shall not apply to any claim unless notice of the claim has been presented to the Tribe in writing within 180 days after such claim accrue, or within 90 days after the claim has been discovered or should have been discovered in the exercise of reasonable diligence, whichever is later. Notice shall be served personally, by certified mail, return receipt requested, or by any other courier or delivery service for which a return receipt is obtained, upon the Board of Directors Secretary, Sault Ste. Marie Tribe of Chippewa Indians, 523 Ashmun Street, Sault Ste. Marie, Michigan 49783. The notice shall identify the contract upon which the complaint is based, the nature of the claim, and the relief requested. Service of a suit based upon the claim shall satisfy the notice requirement.

(5) The Tribe, the Sault Ste. Marie Tribe Economic Development Commission, and the Kewadin Casinos Gaming Authority consent to suit in any court of competence jurisdiction for suits based upon contract claims arising under this section; provided, that this consent shall not preclude objection to venue, forum non conveniens, or subject matter jurisdiction.

44.109 Waiver of Tribal Court Jurisdiction.

(1) The Board of Directors may waive by resolution the jurisdiction of the Tribal Court over any claim or cause of action which arises out of a commercial transaction involving the Tribe, a Tribal entity, or a Tribal member, if all of the following conditions are met:

- (a) the commercial transaction is specifically identified in the resolution; and
- (b) the resolution contains factual findings supporting the conclusions that:
 - (i) the waiver is in the best interests of the Tribe, the Tribal entity or the Tribal member; and
 - (ii) the transaction could not be consummated without such waiver.

(2) Any waiver of Tribal court jurisdiction made in a accordance with this section shall be presumed to contain a waiver of Tribal court jurisdiction in clear and unmistakable terms and shall not continue an infringement upon Tribal sovereignty.

44.110 Vesting of Contractual Rights.

Any waiver of sovereign immunity or of Tribal Court jurisdiction by resolution as provided in this Chapter may be incorporated in the contract documents governing the transaction involved. When so incorporated, it is the intent and purpose of the Tribe that there is created a vested contractual right to the waiver which cannot be impaired or abrogated by the later repeal or amendment of this Chapter or of the resolution creating the right. The repeal or amendment of this Chapter or of any resolution containing a waiver of sovereign immunity or Tribal Court jurisdiction adopted in conformity with this Chapter, or any other Tribal action inconsistent with the waiver shall not repeal, modify, abrogate or impair any provision of a contract containing a waiver of sovereign immunity or Tribal Court jurisdiction incorporated in such contract pursuant to this section.

44.111 Applicability and Effective Date.

This Chapter shall take effect immediately upon its enactment by resolution of the Board of Directors. It shall have prospective application only and shall not apply to or limit any waiver made by the Tribe or a Tribal entity acting within the scope of its authority prior to the effective date of this Chapter.