

TRIBAL CODE

CHAPTER 66

PROTECTION AND MANAGEMENT OF ARCHAEOLOGICAL, HISTORICAL,
AND CULTURAL PROPERTIES AND CULTURAL RESOURCES

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HISTORY NOTE:

Adopted October 25, 1993, Resolution No. 340(93), effective immediately.

November 13, 1995, Resolution No. 442(95) Archaeology Procedure incorporated in appendix #1, and Resolution No. 441(95) Requirements for Certification of Tribal Archaeology Para-Professionals.

Current Ordinance:

October 9, 2000, Resolution No. 595(00) rewritten in its entirety, effective one day following adoption by the Lac du Flambeau Tribal Council.

TRIBAL CODE

CHAPTER 66

PROTECTION AND MANAGEMENT OF ARCHAEOLOGICAL, HISTORICAL, AND CULTURAL PROPERTIES AND CULTURAL RESOURCES

CHAPTER I: GENERAL PROVISIONS

66.101 Title.

Protection and Management of Archaeological, Historical, and Cultural Properties and Cultural Resources.

66.102 Purpose.

The purpose of this code is to engage in a comprehensive program of historic preservation to promote the protection and conservation of such archaeological, historical and cultural properties and resources located within the exterior boundaries of the Lac du Flambeau Indian Reservation for the preservation, education, and enrichment of the members of the Lac du Flambeau Band of Lake Superior Chippewas (hereinafter "Tribe") and such others as the Tribe shall permit.

66.103 Authority.

This code is enacted pursuant to Article VI, Section 1(a), Section 1(I) and Section 1(n) of the Tribe's Constitution.

66.104 Effective Date.

This code shall take effect on the day following adoption by the Lac du Flambeau Tribal Council.

66.105 Abrogation and Greater Restrictions.

Where this code imposes greater restrictions than those contained in other Tribal Ordinances, Codes, or Resolutions as well as relevant Federal Laws and Regulations, this Code shall govern. Other Federal laws and regulations that apply to Tribal Lands administered by the BIA, but may be superseded by this Code include: National Historic Preservation Act of 1966, as amended (NHPA), 16 U.S.C. 470(1988); Archaeological and Historic Preservation Act of 1974, 16 U.S.C. 469; National Environmental Policy Act (NEPA), 42 U.S.C. 4321 (1988); 36 C.F.R. Part 800: Protection of Historic Properties; American Indian Religious Freedom Act

(AIRFA), 42 U.S.C. 1996 (1988); Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. 3001; Archaeological Resources Protection Act of 1979, as amended (ARPA), 16 U.S.C. 470; and Executive Order 13007. This Code shall not effect the application of separate actions occurring under State or Federal laws.

66.106 Interpretation.

In the interpretation and application of the provisions of this code, said provisions shall be held to be minimum requirements, and shall be liberally construed in favor of the Tribe and shall not be deemed a limitation or repeal of any other Tribal power or authority.

66.107 Non-Liability.

If any section, provision, or portion of this ordinance is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this ordinance shall not be effected thereby. The Tribe declares there is no liability on the part of the Tribe, its agencies, or employees, for damages that may occur as a result of reliance upon the conformance with this code.

66.108 Sovereign Immunity.

This code shall not be construed as a waiver, limited or otherwise, of the Tribe's sovereign immunity.

66.109 Applicability.

This Code shall apply to all individuals, activities, and property within the exterior boundaries of the Lac du Flambeau Indian Reservation.

66.110 Definitions.

(1) "Allotted Lands" means land owned by an individual Indian(s) which is either held in trust by the United States or is subject to a statutory restriction on alienation.

(2) "BIA-MAO" means the Bureau of Indian Affairs - Minneapolis Area Office.

(3) "Burial Site" means any place of interment, by any means, natural or a physically prepared location, whether originally below, on, or above the surface of the earth, where human remains or associated funerary objects are deposited, as part of the death rites or ceremonies of a culture.

(4) “Cultural Committee” means that committee established by the Tribal Council under Resolution No. 54 (91) on February 25, 1991.

(5) “Duly Authorized Law Enforcement Official” means any Tribal Law Enforcement Personnel.

(6) “Field Archaeology” means the study of the traces of human culture by means of controlled, systematic surveying, digging, sampling, excavating, or removing objects.

(7) “George W. Brown Jr. Ojibwe Museum and Cultural Center” means the official Museum and curation facility of the Tribe and the Lac du Flambeau Historical Society.

(8) “Funerary Objects” means objects, that as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later.

(9) “Historic Properties” means any prehistoric or historic site, district, structure, object, or remains, significant to the prehistory, history, architecture, archaeology, culture, or religions of the Tribe, the State, and the Nation. Historic properties are generally greater than 50 years in age.

(10) “Historic Preservation” means the research, protection, restoration, and rehabilitation of historic properties.

(11) “Human Remains” includes any part of a deceased human being in any stage of decomposition.

(12) “Indian “ means, unless otherwise specified, a member of an Indian tribe or any other person on the Reservation who is recognized by the community as an Indian, including a Canadian Indian or Alaskan or Hawaiian native.

(13) “Individual” means an individual, both Tribal and non-Tribal, trust, firm, joint stock company, corporation (including a governmental operation) partnership, association, tribe, state, municipality, commission, political subdivision of a state or the Tribe, or any interstate body and shall include each department agency and instrumentality of the United States.

(14) “Qualified Archaeologist” means any person who meets the Secretary of Interior’s standards for archaeologist: a graduate degree in archaeology, anthropology or a closely related field and at least one-full year of full-time professional experience or equivalent specialized training in archaeological or physical anthropological research, administration or management, at least four

months of supervised field and analytical experience in general North American archaeology or physical anthropology and a demonstrated ability to carry research to completion.

(15) "Reservation" means the geographical area within the external boundaries of the Lac du Flambeau Chippewa Reservation, as surveyed and reserved pursuant to Article 1, Clause 3d, of the Treaty of September 30, 1854, 10 Stat. 1109.

(16) "Sacred Site" means any specific, discrete, narrowly delineated location that is identified as sacred by virtue of its established religious significance or ceremonial use.

(17) "Traditional Cultural Property" means a place eligible for inclusion in the Tribal, State or National Register because of its association with cultural practices or beliefs of a community that is rooted in that community's history and are important in maintaining the continuing cultural identity of the community.

(18) "Tribal Archaeology Para-Professional" means a tribal member that has undergone formal training in basic archaeological field methods and has maintained the minimum annual requirements.

(19) "Tribal Council" means the governing body of the Lac du Flambeau Band of Lake Superior Chippewa Indians.

(20) "Tribal Court" means the Lac du Flambeau Tribal Court.

(21) "THPO" means the Tribal Historic Preservation Office composed of the Tribal Historic Preservation Officer and staff.

(22) "Tribal Historic Preservation Office" means the official appointed by the Tribal Council or his or her representative.

(23) "Tribal Land" means all land which is held in trust by the United States for the benefit of the Tribe or a member of the Tribe, such land being within the exterior boundary of the reservation as defined in subsection (15).

(24) "Tribal Member" means a person enrolled in the Tribe.

(25) "Tribe" means the Lac du Flambeau Band of Lake Superior Indians.

(26) "Undertaking" includes any project, activity, or program and any of its elements that may have potential to affect an historic property, burial site, human remains, sacred site or traditional cultural property and includes construction,

rehabilitation, planning, repair projects, land clearing, licenses, and permits for buildings, roads and development.

CHAPTER II: TRIBAL HISTORIC PRESERVATION OFFICE

66.201 Tribal Historic Preservation Office.

(A) A Tribal Historic Preservation Office (THPO) shall be established to increase efforts in locating, documenting, and evaluating historic properties. This information shall provide a record of the past for future generations and shall be incorporated as a chapter in the Integrated Resource Management Plan (IRMP) of the Lac du Flambeau Band of the Lake Superior Chippewa Indians. Information on historic properties recorded in the ceded territory shall also be collected, evaluated, and recorded.

(B) The THPO shall develop a file of identified historic properties within the exterior boundaries of the Lac du Flambeau Indian Reservation. This file shall also contain an inventory of areas that have been investigated and found not to contain historic properties, burial sites, sacred sites or traditional cultural properties. The Tribal Historic Preservation Officer shall be solely responsible for the active collection and cataloging of known historic properties, surveyed areas, and the locations of potential archaeological sites.

(C) The Tribal Historic Preservation Officer is responsible for the issuance of "Permits to Proceed With An Undertaking On Lands Within The Reservation" (Permit to Proceed).

66.202 Repository for Cultural Materials Removed and Recovered from Tribal and Allotted Lands.

The George W. Brown Jr. Ojibwe Museum and Cultural Center shall be the permanent repository for cultural materials discovered on Tribal and allotted land. Access to the use of collections for educational and research purposes shall be controlled by the Board of Directors of the George W. Brown Jr. Ojibwe Museum and Cultural Center under policies and procedures developed by the Board and the Tribal Cultural Committee. These policies and procedures shall be developed within six months of the adoption of this code, and shall be approved by the Tribal Council.

CHAPTER III: BURIAL SITES AND TREATMENT OF HUMAN REMAINS

66.301 Non-disturbance of Burial Sites, Human Remains, and Funerary Objects.

No individual shall knowingly excavate or damage a burial site, human remains or funerary objects. No individual may intentionally cause or permit the disturbance of a burial site or established buffer zone surrounding a burial site. Further, an individual shall immediately notify the Tribal Historic Preservation Officer if the person knows of or has reasonable grounds to believe that a burial site or established buffer zone is being disturbed contrary to this subchapter.

66.302 Permitted Removal and Disturbance to Burial Sites, Human Remains, and Funerary Objects.

a) Only in the extreme cases of unavoidable destruction, natural exposure or accidental discovery may burial sites, human remains or funerary objects be approved for intentional disturbance. When disturbance is found to be necessary, or has already occurred, Tribal Spiritual Leaders, the Tribal Historic Preservation Officer, the Cultural Committee, the Tribal Council and the individuals approved to conduct the excavation or exposure will agree to a procedure in writing by which the disturbance shall be mitigated.

b) At all times during the process of disturbing any human remains, the Tribal Historic Preservation Officer or his or her designee appointed by the Cultural Committee shall be on hand to assist and ensure that the parties employed to remove or expose any human remains or grave goods implement the written procedure as required in section 66.302(a).

66.303 Scientific Analysis and Reburial. (*Procedure to be developed by THPO and Tribal Cultural Committee and submitted at a later date*).

CHAPTER IV: PERMITS TO PROCEED WITH AN UNDERTAKING ON LAND WITHIN THE RESERVATION

66.401 Requirements.

Prior to beginning any undertaking on land within the reservation, all individuals shall have a signed Permit to Proceed from the Tribal Historic Preservation Officer.

66.402 Procedures for Obtaining a Permit to Proceed.

- (1) Submission of Application for Permit to Proceed.

During the planning stage of all undertakings on land within the reservation, all individuals, shall complete and submit an application form for a Permit to Proceed. Permits to Proceed can only be issued by the Tribal Historic Preservation Officer. The Tribal Historic Preservation Officer shall review the application, and

determine, following a review of the THPO files covering that area, if a field investigation will be required. The Tribal Historic Preservation Officer shall notify the applicant in writing within thirty (30) days if a field investigation is required. If no field investigation is required, the Tribal Historic Preservation Officer shall either issue the Permit to Proceed or notify the applicant in writing of the reasons for permit denial.

(2) Field Investigation.

All areas within the Reservation boundaries that will undergo earth disturbing activities, not specifically excluded below (66.404), and not previously subjected to a field investigation, shall be subject to a review process to determine the presence or absence of historic properties, burial sites, sacred sites or traditional cultural properties. The review consists of the following:

A) File Search - Pre-Field Investigations

THPO staff will check files and maps recording the locations of identified historic properties, burial sites, sacred site and traditional cultural properties, as well as the locations of areas previously investigated. Additional information may be sought from tribal elders and other individuals if deemed necessary in areas identified as highly sensitive.

B) Field Archaeology

The project area presented in the permit application will be investigated by a qualified archaeologist to record and describe any historic properties. Archaeological investigations are dependent on weather and ground conditions.

(3) Permit Contingencies.

Based upon the results of the field investigation, the Tribal Historic Preservation Officer will determine whether or not a Permit to Proceed will be granted. Within fourteen (14) days of the completion of the field investigation, the Tribal Historic Preservation Officer shall issue one of the following three documents:

A) a Permit to Proceed with no contingencies.

B) a Permit to Proceed with contingencies.

C) a letter denying a Permit to Proceed stating that the project may not proceed according to the plans presented by the applicant. The

applicant may resubmit a new application based upon changes made in consultation with the THPO which would remove or minimize any impacts to historic properties.

66.403 Appeal of Denied Permits to Proceed.

An applicant may appeal any denied permits by requesting a hearing before the Tribal Council. The request must be made in writing within fourteen (14) of the permit denial. A determination from the Tribal Council shall be final.

66.404 Lands within the Reservation, Excluded from Pre-Field and Field Archaeology Investigations.

The Tribal Historic Preservation Officer may permit the following areas to be excluded from field archaeology investigations:

(a) Activities that are excluded from pre-field and field investigations:

1. Gardening, in general, in pre-existing gardens, or new garden construction;
2. Projects less than 1 square meter in size (i.e. digging post holes, planting trees, bushes, etc.);
3. Maintenance activities including but not limited to: basic road maintenance, grading, snowplowing;
4. Any areas that has previously undergone an archaeological survey and has been permitted with no contingencies;
5. Projects that will not have ground disturbing effects; i.e. mowing lawn, winter logging activity on frozen grounds.

(b) Activities that, at the discretion of the Tribal Historic Preservation Officer, may be excluded from field archaeology investigations, but may require a pre-field archaeological investigation:

1. Swampy areas or areas with mucky soils;
2. Locations directly on steep slopes which would prohibit construction of historic or prehistoric dwellings or settlements;
3. Areas already disturbed by a depth greater than three (3) feet (i.e. gravel pits);
4. Emergency situations (septic replacement, etc.);
5. Hazardous conditions that jeopardize the safety of Tribal Historic Preservation Office staff or individuals.

66.405 Payment for Field Archaeology Surveys of Tribal Lands Leased by Tribal Members.

Required field archaeology surveys of Tribal members shall be paid for by the Tribe. All other surveys, including projects receiving funding from federal agencies and other entities shall not be paid for by the Tribe; unless, otherwise and previously approved by the Tribal Council.

CHAPTER V: PERMITS TO CONDUCT ARCHAEOLOGICAL INVESTIGATIONS

66.501 Tribal Permit to Conduct Archaeological Investigations.

All individuals intending to conduct archaeological investigations or engaging in the excavation or removal of archaeological materials from historic properties on lands within the reservation must have a “Permit to Conduct Archaeological Investigations” signed by the Tribal Historic Preservation Officer and must satisfy the requirements of a qualified archaeologist. In addition to requesting and acquiring a Permit to Conduct Archaeological Investigations, the individual(s) must follow the process outlined in Chapter IV of this code titled “Permits to Proceed with an Undertaking on Land within the Reservation.” Agencies applying for a tribal permit must have at least one individual in the field who satisfies the requirements for a qualified archaeologist.

66.502 ARPA Permits for Non-Tribal Members.

Any individual intending to conduct archaeological investigations or engaging in excavation or removal of archaeological materials from historic properties on federal, tribal or allotted lands, that is not a tribal member, must have a valid ARPA permit signed by the Area Director on the BIA-MAO as required in 25 CFR 262.4. This permit is in addition to the permit required in Section 66.501.

66.503 Permits to Conduct Field Archaeology on State Land Within the Exterior Boundaries of the Reservation.

Any individual wishing to conduct field archaeology on state land within the exterior boundaries of the reservation shall in addition to the requirements under this code, contact the Office of the State Archaeologist of Wisconsin to determine the need and process of applying for a state permit or license to conduct field archaeology as encouraged in State Statute 44.47(4)(b). This permit is in addition to the permit required in Section 66.501.

66.504 Requirements of Qualified Archaeologist.

Archaeological surveys shall be completed by an archaeologist meeting the Department of Interior’s Standards for Archaeologists, or by a Tribal Archaeology Para-Professional under the supervision of a qualified archaeologist.

CHAPTER VI: ENFORCEMENT AND PENALTIES

66.601 Enforcement by Duly Authorized Law Enforcement Officer.

The duly authorized law enforcement officer shall have the responsibility and authority to enforce and implement the provisions of this code, which includes issuing citations.

66.602 Criminal Penalties.

Any person who violates, counsels, procures, solicits, or employs any other person to violate any prohibition, or fails to follow the above stated procedures, shall, upon conviction, be fined not to exceed \$1,000 or imprisoned for not to exceed twelve (12) months, or both. Such person may also be subject to the civil penalties provided for in this code. Criminal penalties shall not be effective until the Tribe has the procedures in place to accommodate criminal proceedings.

66.603 Civil Penalties.

Any person violating the provisions of this chapter commits a civil infraction punishable by fine or exclusion from the reservation. The infraction shall be punishable by fine of not to exceed \$1,000. The trial of any such infraction shall be by the Lac du Flambeau Tribal Court and the prosecution shall have the burden of proving the alleged infraction by a preponderance of the evidence. Penalties cannot be suspended or waived.

66.604 Civil Damages.

Any person violating the provisions of this chapter shall be liable to the Tribe for civil damages to be assessed by the Tribal Court after a hearing. "Civil Damages" shall be interpreted liberally by the Tribal Court to include, but not limited to, the following:

- (1) Costs of restoration of the damaged site;
- (2) Costs associated with the enforcement of the provision of this Chapter;
- (3) Costs associated with mitigation of protected historic properties, burial sites, sacred sites or traditional cultural properties, including reburial;
- (4) Costs associated with documentation, testing, and evaluation of the damaged site in order to assess the character of the site.

66.605 Forfeiture of Contraband.

All remains from historic properties, burial sites, sacred sites or traditional cultural properties obtained in violation of the provisions of this Chapter shall be deemed contraband and forfeited to the Tribe after a hearing in Tribal Court.

66.606 Seizure of Security.

At the discretion of the duly appointed law enforcement officer, the officer may seize such property in the possession of the defendant as the officer deems reasonably necessary to secure payment of any fine or civil damages which may be levied upon the defendant upon conviction of the infraction of crime. The officer shall, at the time of seizure, give to the defendant a receipt accurately describing the item seized. The officer shall further advise the defendant of his right to post security.

66.607 Removal from Reservation.

The duly authorized law enforcement official may, at his or her discretion, remove any individual found committing a violation of this Chapter, by escorting, or ensuring the departure of, such individual from the Reservation. This provision does not apply to those individuals residing on the Reservation, those individuals employed by the Tribe, or those individuals employed by the federal or state government who are assigned to the Reservation.