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Clients and Their Carrier
Partners – The Impact of
Wisconsin's Tribal Gaming
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Defending Native American Clients and Their Carrier Partners – The Impact of Wisconsin’s Tribal Gaming Compacts

by: Daniel Finerty, Lindner & Marsack, S.C., and Adam M. Fitzpatrick, Corneille Law Group, LLC



I. Introduction

When the sovereign, federally-recognized Native American or American Indian tribes entered into separate tribal gaming compacts (“compact(s)”) with the state of Wisconsin (“state” or “Wisconsin”), a *quid pro quo* provided benefits to each of the signatories.¹ In general, the tribes obtained the sole and exclusive right to conduct certain Class II and Class III gaming enterprises in Wisconsin; in turn, each tribe agreed to pay the state of Wisconsin a percentage of gaming revenue realized each year. Most compacts require the state to spend that revenue in certain specific areas that may benefit the tribes, such as economic development initiatives in regions around tribal casinos and promotion of tourism within Wisconsin targeted at tribal tourism. Anyone that has seen an advertisement lauding the tourism opportunities provided by Wisconsin’s nations has seen this compact money put toward this effort. In fact, annual revenue from tribal gaming is estimated at approximately \$1.9 billion dollars (setting aside the pandemic years).²

As part of the *quid pro quo* to gain access to gaming opportunities, tribes were asked to secure liability insurance and a carrier endorsement that limited the carrier from asserting sovereign immunity within a limited amount of required insurance. In doing so, the tribes did not, and have not since,

waived their tribal sovereign immunity. This article examines the background of the compacts, the strong tradition of tribal sovereign immunity in Wisconsin, the compact-based limitation on the assertion of immunity by carriers, and best practices in addressing these issues for defense counsel called upon to defend a tribe.

II. Background

The eleven federally recognized³ sovereign tribes entered into gaming compact agreements with Wisconsin, as authorized by the Indian Gaming Regulatory Act of 1988 (“Act”).⁴ By passing the Act, Congress recognized that tribes had become engaged in or had licensed gaming activities on their own tribal lands as a means of generating tribal revenue. As one of the principal “goal[s] of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government,” the Act sought to clarify regulation of these gaming activities through the Secretary of the Interior, the Interior Department’s Bureau of Indian Affairs (“BIA”), and the various states that did not authorize or later chose to authorize gaming activity.⁵ The Act permitted tribes to conduct certain gaming activities on tribal lands.⁶ While the general content of the compacts are beyond the scope of this article, it suffices to say that, generally, each tribe has committed to and does regulate its own gaming activities, subject to oversight by the National Indian Gaming Commission,⁷ in line with its compact with the state. As such, the Act recognized a role for the states within which these nations were located to determine whether to permit gaming and upon what conditions. To seize this opportunity, Wisconsin-

based tribes began to negotiate with Wisconsin's Department of Administration. Over time, each of the tribes negotiated their own gaming compact in 1991 and 1992.

Each compact specifically disclaims any contractual waiver of sovereign immunity by either the signatory tribe or the state;⁸ however, instead, the compacts contain a provision which requires the tribes to carry liability insurance up to a specified amount between \$250,000 and \$500,000. Further, while the tribes never agreed to waive their sovereign immunity to suit by third-party non-signatories, the compacts required each tribe to secure an endorsement with their chosen carrier which required the carrier to limit any assertion of the tribe's sovereign immunity defense unless and until a certain defined liability limit was reached.

While these provisions could hardly be called a waiver of tribal sovereign immunity, as the standard for showing such a waiver is a very high burden that is addressed below, these provisions require discussion amongst insurance defense practitioners in order to ensure that tribes can be consistently and competently appraised of their obligation to secure insurance as specified, to obtain the carrier endorsement, and to ensure the carriers are aware of the sovereign immunity defense limitation contained within the compacts. With that said, it also bears mentioning that the compacts generally provide that "[t]his Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact;"⁹ thus, tribes and carriers can assert any basis for a motion to dismiss due to service-related or other failures under Chapter 804 at the outset.

III. Tribal Sovereign Immunity

"Tribal sovereign immunity is 'a necessary corollary to Indian sovereignty and self-governance.'"¹⁰ "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."¹¹

Like their federal counterparts, Wisconsin courts have also recognized sovereign immunity from suit. "It is well settled that Native American tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers."¹² "... Indian tribes possess common-law sovereign immunity from suit akin to that enjoyed by other sovereigns is part of this Nation's long-standing tradition."¹³ "Like foreign sovereign immunity, 'tribal [sovereign] immunity is a matter of federal law and is not subject to diminution by the States.'"¹⁴ As the Court of Appeals recognized in *Koscielak v. Stockbridge-Munsee Community*, when reaffirming sovereign immunity for tribal businesses:

Tribes must surmount many development challenges, including tribal remoteness, lack of a tax base, capital access barriers, and the paternalistic attitudes of federal policymakers. Because of these barriers ... tribal economic development—often in the form of tribally owned and controlled business—is necessary to generate revenue to support tribal government and services. Tribal immunity promotes this economic development, as well as tribal self-determination and cultural autonomy.^[15]

The Court of Appeals in *Koscielak* also identified the Supreme Court's declaration of tribal immunity in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* as "settled law."¹⁶

"The sovereign immunity of the tribe [also] extends to its business arms."¹⁷ Accordingly, the broad grant of sovereign immunity to the tribes also extends to their business arms such as tribal casinos, gaming operations, convenience stores, and other commercial entities.¹⁸

IV. Immunity Waiver

Like most legal protection from suit, sovereign immunity can be waived. Specifically, Wisconsin

courts have recognized that, “in a state court lawsuit against a tribal entity, sovereign immunity applies unless ‘Congress has authorized the suit or the tribe has waived its immunity.’”¹⁹

However, for there to be a true waiver of sovereign immunity, that waiver cannot be simply implied and cannot be inadvertent; rather, the waiver must be unequivocally expressed.²⁰ “Like a waiver by the United States, an Indian tribe’s waiver of sovereign immunity must be unequivocal.”²¹ Further, if any waiver can be found, that waiver of sovereign immunity is strictly construed in favor of the sovereign.²² Any defense attorney selected by a carrier or third-party administrator to handle defense of a Wisconsin tribe must ensure a working knowledge of tribal sovereign immunity as well as the compact to which that tribe is a party.

V. Tribal Gaming Compacts

For the most part, the 1991-92 compacts explicitly set forth no waiver of sovereign immunity whatsoever by either the state or the tribes to third-parties. “Except as expressly provided in section XIX., neither the State nor the Tribe waive their sovereign immunity, under either state or federal law, by entering into this Compact and no provision of this Compact is intended to constitute a waiver of State or Tribal sovereign immunity.”²³ While a waiver of immunity would not generally be read into the compacts if not asserted, it is common practice for practitioners to specifically insert a provision to counteract any suggestion that waiver may exist or should be implied, even despite the strength of the existing case law noted above.

However, as tribes would be operating casinos and other gaming enterprises open to the public, the state had an interest in seeing there was some protection to injured members of the public. To accomplish that goal, the compacts required each tribe to have some form of liability insurance. Generally, the original compacts provided that a tribe was obligated to “maintain public liability insurance with limits of not less than \$250,000 for any one person and \$4,000,000 for any one

occurrence for personal injury, and \$2,000,000 for any one occurrence for property damage.”²⁴ All the Wisconsin tribal compacts require *at least* \$250,000 in public liability insurance.

To be clear, this language could hardly be called any sort of unequivocal or clear waiver required to establish that a tribe has waived its sovereign immunity.²⁵ It is not. Further, even if this language could arguably provide for any sort of waiver, the fact that a Wisconsin court must strictly construe that alleged waiver of sovereign immunity in favor of the tribe counsels rejection of any implied waiver.²⁶ Rather, the compacts merely provide an obligation to secure and maintain insurance – nothing more.

Assuming a tribe complies with this insurance provision and maintains the required level of insurance specified under its compact, that does not mean that anyone allegedly injured at a Wisconsin-based tribal casino can simply present proof of an injury and secure ready access to insurance proceeds without any objection. That is certainly not true, especially since the compacts not only reassert the tribe’s immunity²⁷ but also do not disturb, in any way, the allocation of jurisdiction under Wisconsin law.²⁸ Arguably, the jurisdiction sections of the compacts noted above require any plaintiff wishing to sue a tribe, its casino entity, and its carrier partner, to initiate suit against them within the statute of limitations, to sue the correct tribal entities, to substitute within a permissible timeframe if misnomer occurred, to substitute the proper name of any “ABC Insurance Company” identified in the complaint within the statutory timeframe prior to the expiration of the limitations period or any extension provided by Wisconsin case law, to provide effective service of process upon the entities sued, and to follow all the other obligations to initiate suit under Chapter 802. Wisconsin defense attorneys know these defenses well and, to be clear, the tribal compacts do not lessen or mitigate these obligations placed upon plaintiffs wishing to sue in Wisconsin.

While an additional section arguably expands the reach of the insurance requirement, that section also

does not waive tribal sovereign immunity. Instead, their carrier partner is required, by virtue of entering into an insurance contract with its Wisconsin-based tribe, to promise not to assert tribal sovereign immunity up to the specified amount.²⁹ The compacts provide that a tribe's "insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity" up to the limits that are specified.³⁰

Several issues appear clear from this language. First, the sovereign immunity of the tribes themselves is not compromised or impacted whatsoever. Second, while a tribe's insurance carrier is obligated by virtue of Wisconsin law to not assert any sovereign immunity argument that could otherwise be made by virtue of its privity of contract and insuring agreement with a sovereign tribal entity, the defense limitation only applies up to a certain amount. The chart below highlights the language of each compact regarding the allocation of civil jurisdiction, required insurance amounts, and the required endorsement limitation. Third, again, while the insurance carrier's ability to initially assert a sovereign immunity defense by virtue of its privity of contract with a tribe may be limited, regardless of the propriety of doing so, its ability to assert any other existing dispositive defenses under Chapter 804 of the Wisconsin Statutes or Rule 12 of the Federal Rules of Civil Procedure are not limited in any way. To the contrary, these defenses not only are available to a carrier required to defend a tribe but are highlighted by the very language of the compacts themselves which provides that the compacts do not change the allocation of civil jurisdiction among federal, state, and tribal courts.³¹ In this way, more specifically, the compacts do not interfere with or replace, in any sense, the obligation upon a plaintiff to effectively obtain personal jurisdiction over any sued defendants through effective service of process. Fourth, there are no existing Wisconsin Supreme Court or Court of Appeals decisions which interpret or apply this language to a given situation and, as such, the limitation upon a carrier's assertion of the sovereign immunity defense has not been tested in court. That leaves room for practitioners handling defense of tribes to ensure that a proper

reading and interpretation of the tribal compacts is provided which ensures tribal immunity and holds plaintiffs to their obligations to, among other things, effect proper service of process, sue the correct tribal entities, and discover and substitute the appropriate carrier. Fifth, the simple fact that an amount of insurance may be available does not equate to *assumed* liability; rather, the same substantive defenses available to carriers under Wisconsin law require the plaintiff to carry the burden of proof at trial. A reasoned analysis of all procedural and substantive defenses is essential to ensuring the tripartite relationship between counsel, the tribe, and the carrier remains strong and a solid defense strategy can be agreed to and employed at the earliest possible stage.

VI. Best Practices

Insurance defense practitioners in Wisconsin may never be called upon to defend a tribe related to an accident; however, if called upon to do so, it is important to keep several critical best practices in mind. First, upon being assigned, counsel should ensure a working awareness of the tribe's background, language, history, and tribal sovereign immunity to ensure that appropriate respect is shown in all dealings to the tribe and its history in line with the best our profession represents. Second, counsel should ensure that a thorough review of tribe's gaming compact (and any amendments) and its relevant provisions that may govern an insured dispute are reviewed in advance of any substantive discussions with the client or with opposing counsel. Third, counsel should request all liability policies that may apply to an incident to ensure that the applicable tribal compact requirements have been followed and, if any questions may exist, that such questions are addressed and discussed with the tribe's leadership. Fourth, the sovereign immunity assertion limitation that applies must be discussed with the tribe and the carrier to ensure a full understanding of the parties' relative position – there is no limitation on the tribe's assertion of immunity; however, the carrier's assertion may be limited going forward. Fifth, evidence of procedural and substantive defenses must be preserved and

gathered along with any witness statements. Sixth, counsel should review the progress of the matter to date. What, if any, tribal entity has been named? Which entity was served? Who was served? In what county was the tribe sued? This background should be gathered to ensure that procedural and other defenses can be initially considered to bring an end to any litigation. For example, if the tribe was sued in federal court based on diversity of citizenship and amount in controversy under 28 U.S.C. § 1332, a motion to dismiss should be considered as tribes are not “citizens.”³² Even in the unlikely event the tribe has fully waived sovereign immunity, such a waiver does not resolve the question of subject matter or personal jurisdiction over both the tribe and its carrier.³³

VII. Conclusion

Like other public and private sector clients, Wisconsin tribes and their insurance partners need competent defense counsel to thoughtfully defend their interests. For tribes, sovereign immunity is, and always should be, front and center of any defense strategy. However, as the compacts make clear by reaffirming civil jurisdiction, tribes are entitled to all the same procedural and substantive defenses that a Wisconsin-based bar, hardware store, or car dealership would be able to assert in defense of a case filed in circuit court. In this way, tribes are like any other Wisconsin-based entities entitled to the same rights to service of process and other rights along with sovereign immunity. As counsel would do with any other Wisconsin-based client and its carrier, these defenses should be considered and, if a reasonably grounded procedural defenses can be asserted, the defenses should be pressed to resolution.

Tribal Compacts and Amendments **Assertion of Immunity Defense Limitation Upon Carriers**

Tribe	Allocation of Jurisdiction	Required Insurance Amount	Carrier Limitation
Bad River Band of Lake Superior Chippewa ³⁴	Article XVIII. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain general liability insurance for bodily injury and property damage with combined limits of at least \$4,000,000 per individual or occurrence. The requirements of this section are not intended to permit causes of action for injuries outside the coverage of the general liability insurance required by this section.	Article XIX. B. The Tribe’s insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Forest County Potawatomi Community of Wisconsin ³⁵	Article XVIII. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than \$250,000 for any one person and \$4,000,000 for any one occurrence for personal injury, and \$2,000,000 for any one occurrence for property damage.	Article XIX. B. The Tribe’s insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Ho-Chunk Nation ³⁶ (formerly known as the Wisconsin Winnebago Tribe)	Article XIX. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact	Article XX. A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than \$250,000 for any one person and \$4,000,000 for any one occurrence for personal injury, and \$2,000,000 for any one occurrence for property damage.	Article XX. B. The Tribe’s insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.

Lac Courte Oreilles Band of Lake Superior Chippewa ³⁷	Article XVIII. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain general liability insurance with limits of not less than \$250,000 for any one person and \$4,000,000 for any one occurrence for personal injury, and \$2,000,000 for any one occurrence for property damage. The requirements of this section are not intended to permit causes of action for injuries outside the coverage of the general liability insurance required by this section.	Article XIX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Lac du Flambeau Band of Lake Superior Chippewa ³⁸	Article XVIII. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than \$250,000 for any one person and \$4,000,000 for any one occurrence for personal injury, and \$2,000,000 for any one occurrence for property damage.	Article XIX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Menominee Tribe of Indians of Wisconsin ³⁹	Article XIX. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XX. A. During the term of this Compact, the Tribe shall maintain general liability insurance with limits of not less than \$250,000 for any one person and \$4,000,000 for any one occurrence for personal injury, and \$2,000,000 for any one occurrence of property damage. The requirements of this section are not intended to permit causes of action for injuries outside the coverage of the general liability insurance required by this Section.	Article XX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Oneida Nation ⁴⁰	Article XIX. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XX. A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than \$250,000 for any one person and \$4,000,000 for any one occurrence for personal injury, and \$2,000,000 for any one occurrence for property damage.	Article XX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Red Cliff Band of Lake Superior Chippewa ⁴¹	Article XVIII. A. This Compact does not change. the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain general liability insurance for bodily injury and property damage with combined limits of at least \$4,000,000 per individual or occurrence. The requirements of this section are not intended to permit causes of action for injuries outside the coverage of the general liability insurance required by this section.	Article XIX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Sokaogon Chippewa Community (Mole Lake Chippewa) ⁴²	Article XVIII. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain general liability insurance for bodily injury and property damage with combined limits of not less than \$250,000 for any one person and \$4,000,000 for any one occurrence for personal injury, and \$2,000,000 for any one occurrence for property damage. The requirements of this section are not intended to permit causes of action for injuries outside the coverage of the general liability insurance required by this section.	Article XIX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.

St. Croix Chippewa Indians of Wisconsin ⁴³	Article XIX. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XX. A. During the term of this Compact, the Tribe shall maintain general liability insurance with limits of not less than \$250,000 for any one person and \$4,000,000 for any one occurrence for personal injury, and \$2,000,000 for any one occurrence for property damage. The requirements of this section are not intended to permit causes of action for injuries outside the coverage of the general liability insurance required by this section.	Article XX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Stockbridge-Munsee Band - Mohican Nation ⁴⁴	Article XVIII. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than \$250,000 for any one person and \$4,000,000 for any one occurrence for personal injury; and \$2,000,000 for any one occurrence for property damage.	Article XIX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.

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Adam M. Fitzpatrick (University of Minnesota Law School, 2014) is a Partner with Corneille Law Group, LLC in Madison, Wisconsin where he defends medical malpractice claims, nursing home and long-term care litigation matters, alleged abuse and neglect and related claims against providers, and a wide range of general liability defense cases, including personal injury, large construction losses including construction defect and delay matters, product liability claims, premises liability and insurance coverage matters. Most recently, Adam successfully completed a rigorous application and testing process to achieve Board Certification as a civil practice advocate from the National Board of Trial Advocacy (NBTA), a distinction only achieved by approximately three percent of attorneys.

References

- 1 The eleven tribes include: The Bad River Band of Lake Superior Chippewa; The Forest County Potawatomi Community of Wisconsin; The Ho-Chunk Nation; The Lac Courte Oreilles Band of Lake Superior Chippewa; The Lac du Flambeau Band of Lake Superior Chippewa; The Menominee Tribe of Indians of Wisconsin; The Oneida Nation; The Red Cliff Band of Lake Superior Chippewa; The Sokaogon Chippewa Community (Mole Lake Chippewa); The St. Croix Chippewa Indians of Wisconsin; and the Stockbridge-Munsee Band - Mohican Nation. While great respect is due, in word and in deed, to every tribal nation, this group of 11 sovereign entities located is what is now Wisconsin will be referred to, for ease of reference, as "tribes" or "nations." All the compacts, amendments, and memoranda of understanding

- for each can be found online at <https://doa.wi.gov/Pages/AboutDOATribalCompactsAndAmendments.aspx> (last visited May 27, 2022).
- 2 See <https://doa.wi.gov/Gaming/TribalNetWinSummary.pdf> (last visited June 3, 2022).
 - 3 To be federally recognized, a tribe is specifically recognized within federal law and in the Federal Register. As an example, the Sokaogon Chippewa Community (Mole Lake Chippewa) is a federally recognized Indian tribe organized pursuant to federal law. See, e.g., 25 U.S.C. § 476; FED. REG., Vol. 84, No. 22 (Friday, Feb. 1, 2019), at p. 1203. Obtaining federal recognition is necessary to gain access to federal financial support provided to certain tribes such as health care and other services. Only one Wisconsin tribe, the Brothertown Nation, “is not recognized by the state or federal government.” <https://wisconsinfirstnations.org/frequently-asked-questions/#q1> (last visited May 27, 2022).
 - 4 25 U.S.C. § 2701 *et seq.*
 - 5 25 U.S.C. §§ 2701(4), (5).
 - 6 The Act’s approval of Class II and Class III gaming activities can be found in §§ 2710 (b), (d). Class I gaming is not regulated under the Act but may be regulated by the state. 25 U.S.C. § 2710(c).
 - 7 *Id.*, § 2706 (b); see also *Id.*, § 20704.
 - 8 The compacts do, to some extent, contain a very limited waiver to both the state and each tribe in order to permit enforcement of compact-based promises; however, there is no waiver by either a tribe or the state with regard to claims by third-parties. See n. 23, *infra*.
 - 9 Section XIX.(A) (“Civil Jurisdiction”), WISCONSIN WINNEBAGO TRIBE AND STATE OF WISCONSIN GAMING COMPACT OF 1992 (“HO-CHUNK COMPACT”); Section XVIII (A.) (“Allocation of Jurisdiction”), FOREST COUNTY POTAWATOMI COMMUNITY OF WISCONSIN AND STATE OF WISCONSIN GAMING COMPACT OF 1992 (“POTAWATOMI COMPACT”). Note that, in November 1994, with the passage of the CONSTITUTION OF THE HO-CHUNK NATION, the Tribe officially changed its name from Wisconsin Winnebago Tribe to the Ho-Chunk Nation, owing to its origin as the People of the Big Voice. <https://ho-chunknation.com/wisconsin-winnebago-fades-into-history-as-signing-of-the-new-constitution-brings-on-the-ho-chunk-nation/> (last visited May 27, 2022); <https://wisconsinfirstnations.org/ho-chunk-nation/> (last visited May 27, 2022).
 - 10 *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 928 (7th Cir. 2008) (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 894 (1986)).
 - 11 *Id.* (quoting *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)).
 - 12 *C&B Invs. v. Wis. Winnebago Health Dept.*, 198 Wis. 2d 105, 108, 542 N.W.2d 168 (Ct. App. 1995); see also *Harris v. Lake of the Torches Resort & Casino*, App. No. 2014AP1692, 363 Wis. 2d 656, 862 N.W.2d 903 (Table) (Ct. App. 2015) (unpublished).
 - 13 *Koscielak v. Stockbridge-Munsee Comm.*, 2012 WI App 30, ¶ 7, 340 Wis. 2d 409, 811 N.W.2d 451.
 - 14 *Id.* ¶ 7 (quoting *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998)).
 - 15 *Id.* ¶ 15 (internal citation and quotations omitted).
 - 16 *Id.* ¶ 16 (quoting *Kiowa*, 523 U.S. at 756, 759-60).
 - 17 *C&B Invs.*, 198 Wis.2d at 108-09 (citing *Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 670-71 (8th Cir. 1986) (Native American housing authority possessed attributes of sovereign immunity)); see also *Koscielak*, 340 Wis. 2d 409, ¶ 9.
 - 18 See *C&B Invs.*, 198 Wis. 2d at 108-09; *Koscielak*, 340 Wis. 2d 409, ¶ 9; see also *Kiowa*, 523 U.S. at 754-55 (noting no distinction for immunity purposes between governmental and commercial activities of a tribe).
 - 19 *Koscielak*, 340 Wis. 2d 409, ¶ 8 (quoting *Kiowa*, 523 U.S. at 754).
 - 20 *C&B Invs.*, 198 Wis. 2d at 108-112.
 - 21 *Schilling v. Wis. Dept. of Natural Resources*, 298 F.Supp.2d 800, 804 (W.D. Wis. 2003) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978) (“It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.”)).
 - 22 *Orff v. U.S.*, 545 U.S. 596, 601–02 (2005).
 - 23 HO-CHUNK COMPACT Section XXIV (A.). Despite that seemingly clear refusal to waive immunity to suit, the state and the tribes agreed that “both the State and the Tribe agree that suit to enforce any provision of this Compact may be brought in federal court by either the State or the Tribe against any official or employee of either the State or the Tribe. Said suit may be brought for any violation of the terms of this Compact or violation of any applicable state or federal law,” limited to “prospective declaratory or injunctive” relief only. *Id.*, Section XXIV (C.). So, it is somewhat clear, considering this language, that the only state and the tribe can sue each other for compact enforcement in certain circumstances.
 - 24 HO-CHUNK COMPACT, Section XX (A.); POTAWATOMI COMPACT, Section XIX (A.).
 - 25 See *C&B Invs.*, 198 Wis. 2d at 108-112.
 - 26 See *Orff*, 545 U.S. at 601–02.
 - 27 HO-CHUNK COMPACT Section XXIV (A.).
 - 28 HO-CHUNK COMPACT, Section XIX.(A); POTAWATOMI COMPACT, Section XVIII (A.).
 - 29 This obligation presumably is based upon a belief, mistaken or not, that a carrier which insures a tribe or any other tribal-owned entity could assert the tribe’s sovereign immunity by virtue of its privity of contract with the tribe for its own benefit.
 - 30 HO-CHUNK COMPACT, Section XX (B.); POTAWATOMI COMPACT, Section XIX (B.).
 - 31 HO-CHUNK COMPACT, Section XIX.(A); POTAWATOMI COMPACT, Section XVIII (A.).
 - 32 “It is well established that the Indian tribe itself-the constitutional tribe-is a ‘stateless entity’ that is never subject to federal diversity jurisdiction. A federal court cannot hear a case in which an Indian tribe is a party unless there is another basis for subject matter jurisdiction, such as federal

question jurisdiction.” Graham Safty, “Federal Diversity Jurisdiction and American Indian Tribal Corporations,” *U. of Chi. Law Rev.*, Vol. 79.4 (Fall 2012), *available online at* <https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/08%20Safty%20CMT.pdf> (last visited June 16, 2022).

- ³³ *Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation*, 495 F.3d 1017, 1020 (8th Cir. 2007) (“Even if an Indian tribe waives its sovereign immunity, such a waiver does not automatically confer jurisdiction on federal courts.”); *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986) (“Mere consent to be sued, even consent to be sued in a particular court, does not alone confer jurisdiction upon that court to hear a case if that court would not otherwise have jurisdiction over the suit.”).
- ³⁴ <https://doa.wi.gov/Pages/AboutDOA/Bad-River-Band-of-Lake-Superior-Chippewa.aspx>.
- ³⁵ <https://doa.wi.gov/Pages/AboutDOA/Forest-County-Potawatomi-Community-of-Wisconsin.aspx>.

- ³⁶ <https://doa.wi.gov/Pages/AboutDOA/Ho-ChunkNation.aspx>.
- ³⁷ <https://doa.wi.gov/Pages/AboutDOA/Lac-Courte-Orielles-Band-of-Lake-Superior-Chippewa.aspx>.
- ³⁸ <https://doa.wi.gov/Pages/AboutDOA/Lac-du-Flambeau-Band-of-Lake-Superior-Chippewa.aspx>.
- ³⁹ <https://doa.wi.gov/Pages/AboutDOA/Menominee-Tribe-of-Indians-of-Wisconsin.aspx>.
- ⁴⁰ <https://doa.wi.gov/Pages/AboutDOA/Oneida-Tribe-of-Indians-of-Wisconsin.aspx>.
- ⁴¹ <https://doa.wi.gov/Pages/AboutDOA/Red-Cliff-Band-of-Lake-Superior-Chippewa.aspx>.
- ⁴² <https://doa.wi.gov/Pages/AboutDOA/Sokaogon-Chippewa-Community-Mole-Lake-Chippewas.aspx>.
- ⁴³ <https://doa.wi.gov/Pages/AboutDOA/St.-Croix-Chippewa-Indians-of-Wisconsin.aspx>.
- ⁴⁴ <https://doa.wi.gov/Pages/AboutDOA/Stockbridge-Munsee-Band---Mohican-Nation.aspx>.