



TITLE 11

THE LOWER ELWHA KLALLAM CODE FOR SEIZURE, IMPOUNDMENT, AND FORFEITURE OF PROPERTY



DN: cn=Trent Crable, o=Lower
Elwha Klallam Tribe, ou=Office
of General Counsel,
email=trent.cable@elwha.nsn.u
s, c=US
Date: 2011.05.06 11:49:55 -07'00'

Title 11
THE LOWER ELWHA KLALLAM CODE
FOR SEIZURE, IMPOUNDMENT, AND FORFEITURE OF PROPERTY

Table of Contents

	<u>Page</u>
§11.1 Legislative Intent.....	1
§11.2 Prior Inconsistent Codes and Ordinances.....	1
§11.3 Authority to Amend.....	1
§11.4 Sovereign Immunity Preserved.....	2
§11.5 Severability.....	2
§11.6 Definitions.....	2
§11.7 Forfeiture of Property Interest.....	5
§11.8 Seizure of Property.....	5
§11.9 Prosecutor Actions After Seizure.....	6
§11.10 Owner's Answer.....	7
§11.11 Defenses.....	7
§11.12 Procedure for Hearing if No Answer.....	8
§11.13 Procedure for Hearing if Answer.....	9
§11.14 Hearing – Disposition of Property.....	9
§11.15 Fees and Costs.....	10

11.1 Legislative Intent

It is the purpose of this title to provide for seizure, impoundment, and forfeiture of vehicles and other property to:

1) Prevent and deter persons from using their property, or allowing their property to be used, in such a manner that facilitates criminal activity on or through the jurisdiction of the Tribe, including the transportation or concealment of:

- a) Illegal controlled substances;
- b) Drug paraphernalia; or
- c) Contraband;

2) Prevent and deter drug use, manufacture, trafficking, and delivery within the jurisdiction of the Tribe;

3) Preserve evidence seized at time of arrest or during a legal search to facilitate prosecution and adjudication of pending criminal, civil, or administrative investigations, and the fair and timely progression and disposition of pending court proceedings; and

4) Provide for removal and disposal of any abandoned, junk, and hulk vehicles that may litter the Reservation and present an eyesore and potential safety or environmental hazard to the Reservation community.

11.2 Prior Inconsistent Codes and Ordinances

Any prior enacted code or ordinance of the Tribe governing impoundment or forfeiture shall to the maximum extent possible be construed so as not to conflict with the provisions of this title. In the case of any conflict the provisions of this title shall control.

11.3 Authority to Amend

The Tribal Council as defined herein is authorized to amend this title as the need may arise in the Council's determination.

11.4 Sovereign Immunity Preserved

The sovereign immunity of the Tribe is not, and shall not be construed to be, waived by this title.

11.5 Severability

If any part of this title or its application to any person or circumstance is held to be invalid, the remainder of this title and its application to other persons or circumstances shall not be affected.

11.6 Definitions

The following definitions are used in this Code:

- 1) Contraband – goods that are illegal to possess in any jurisdiction within 100 miles of the Reservation as well as goods that are legal, in themselves, but which were obtained or distributed illegally or illicitly. Any item of property that has a serial number or other identifying mark that has been defaced or upon which attempts have been made to deface is presumed to be contraband. Drug paraphernalia is presumed to be contraband.
- 2) Controlled Substances – any drug now or in the future listed as a controlled substance in Title 21, CFR Part 1300 (21 CFR §1308), or otherwise defined as a controlled substance under tribal law. Controlled substances shall include any counterfeit of a drug now or in the future listed as a controlled substance in 21 CFR §1308 or otherwise defined as a controlled substance under tribal law.
- 3) Cutting Agent – a chemical or diluent used to dilute a controlled substance in the manufacturing or distribution process. A cutting agent may have a legal purpose as well as an illegal purpose. Evidence that a chemical or diluent is

intended to be used as an illegal cutting agent rather than for a legal purpose includes:

- A. Quantity of the chemical or diluent;
- B. Form of the chemical or diluent;
- C. Whether that chemical or diluent is commonly used as a cutting agent for a particular controlled substance;
- D. Other evidence of drug use, manufacturing, or distribution of controlled substance in close proximity to the chemical or diluent; or
- E. Other indicia of intent, including statements and admissions of the person in possession of the chemical or diluent or any other person in the proximity of the chemical or diluent.

4) Drug Paraphernalia – items that are commonly used to ingest, inhale, inject, package, weigh, or otherwise distribute illegal controlled substances. Drug paraphernalia includes cutting agents. Drug paraphernalia is contraband under this title.

5) Property – property subject to seizure and forfeiture includes aircraft, vehicles, vessels, monies, negotiable instruments, equipment, furniture, tools, houses, trailers, contraband, and illegal or counterfeit illegal substances and their raw materials, products, or byproducts. Trust property is exempt from forfeiture under this title.

6) Claimant – a claimant is a person or entity with a legal interest in the subject property who does not have actual ownership of the subject property but does have an interest in it due to prior financial arrangement with the property owner, a prior court judgment against the property owner, or other commonly recognized principles of law. Examples of claimants are:

- A. Secured interest creditors,
- B. Non-secured creditors,
- C. Mortgagees,
- D. Lienholders,
- E. Trust Companies,

- F. Licensed Pawnbrokers,
 - G. A person or entity who or which has given the property owner full or partial payment for the property,
 - H. Lessors or lessees.
- 7) Owner – one who is recognized and held responsible by the law as the owner of the property.
 - 8) Hulk Vehicle – any material that is or may have been a motor vehicle, with or without all component parts, that is not self-propelled or capable of carrying persons or property upon a public highway and which material is in such condition that its highest or primary value is its sale or transfer as parts or scrap metal.
 - 9) Illegal Controlled Substance – any substance otherwise defined as a controlled substance under this title: for which the person in possession or control of the controlled substance does not have a valid prescription from a physician licensed in the state of Washington; or that is otherwise not in the lawful possession of a pharmacist licensed in the state of Washington. Illegal Controlled Substance includes marijuana in any form, including one or more plants, regardless whether the person possessing it has a prescription for medical use of marijuana that is recognized by the law of another jurisdiction.
 - 10) Reservation – all lands: owned by the Tribe; held in trust for the Tribe; or held in trust for its members, provided that trust land does not lie within the exterior boundaries of another tribe's reservation.
 - 11) Tribal Council – the Business Committee of the Community Council of the Tribe.
 - 12) Tribe or Tribal – the Lower Elwha Tribal Community, also known as the Lower Elwha Klallam Tribe.
 - 13) Housing authority – the Lower Elwha Housing Authority.
 - 14) 'Knowingly' – a person is presumed to have made reasonable inquiries and investigation into the moral responsibility, character and reputation of any one to whom he sells or loans his vehicle or other property. To that extent, a person who

loans or sells his vehicle or property, will have acted 'knowingly' if the recipient of the property uses it in violation of this title.

11.7 Forfeiture of Property Interest

1) The property interest of the legal owner or owners of record may be forfeit to the Tribe if:

 a) The property was used to unlawfully manufacture, use, possess, store, or transport a controlled substance, paraphernalia, or contraband within or through the jurisdiction of the Tribe;

 b) The property is an abandoned or hulk vehicle that is: an eyesore; a potential environmental hazard; obstructing traffic; a safety hazard to children or others; or otherwise a potential threat to the welfare of the residents of, and visitors to, the Reservation; or

 c) The property is a controlled substance, a counterfeit controlled substance, drug paraphernalia, contraband, an item or substance otherwise banned or illegal under tribal or federal law, or proceeds from the sale or transfer of any of the preceding forms of property.

2) The forfeiture provisions of this title shall not apply to any interest in real property held by the Housing Authority or a partnership in which the authority is a partner, except that the interest that any lessee, renter, or homebuyer of the authority may hold in such interest of the authority or partnership shall be subject to these forfeiture provisions.

11.8 Seizure of Property

1) Seizure without process: Any law enforcement officer of the Tribe may seize property upon probable cause that:

 a) The property has been used to unlawfully store or transport a controlled substance or contraband;

 b) The property is otherwise an illegal controlled substance, drug paraphernalia, contraband, an item or substance otherwise banned or illegal

under tribal or federal law, or proceeds from the sale or transfer of any of the preceding forms of property;

c) The property is an abandoned or hulk vehicle; or

d) The property is evidence in a current or on-going police investigation or court proceeding in Tribal Court or another court.

2) Seizure with process: A tribal law enforcement officer may seize property upon process by the Tribal Court having jurisdiction over the property. Seizure may be conducted under a criminal, civil, or administrative search warrant, in any court proceeding authorized by this title or other tribal law.

11.9 Prosecutor Actions After Seizure or Impoundment

1) Notice of Seizure or Impoundment to Court: Within 10 days after seizure or impoundment of property under provisions of this title, the tribal prosecutor shall file notice of seizure or impoundment with the clerk of the Tribal Court with the following information:

a) Description of property seized or impounded;

b) Owner of property and address of owner, if known;

c) Address where property was seized or impounded;

d) Brief explanation of legal basis for seizure or impoundment of property;

e) Notice of whether the Tribe intends to pursue forfeiture of property;

f) Brief explanation of the future court process in relation to future proceedings regarding the property; and

g) A copy of this title.

2) Notice of Seizure or Impoundment to Property Owner: Within 10 days after seizure or impoundment of property under this title, the tribal prosecutor shall provide the property owner, if known, a copy of the notification of seizure or impoundment provided to the court clerk.

3) Public Notice of Seizure or Impoundment: Within 10 days after seizure or impoundment of property under this title, the tribal prosecutor shall cause the notification of the seizure or impoundment to be posted at the Tribal Center, published in the next issue of the tribal newsletter, and posted on the tribal website for a period of three weeks.

4) Notice of Seizure or Impoundment to the Housing Authority or other tribal agency: Within 10 days after seizure or impoundment under this title, the tribal prosecutor shall provide notification to the housing authority or other appropriate tribal agency if or when the Tribe has any ownership or possessory interest in the property seized or impounded or if seizure or impoundment otherwise implicates a fundamental tribal interest under tribal or federal law.

11.10 Owner's Answer to Notice

Within 20 days after the mailing, or if there is no mailing because the owner is unknown, has no address, or for other good cause, 30 days after the publication, of a notice of seizure or impoundment, the respondent owner of the seized property may file with the clerk of the court a verified answer to the allegation of the use of the property contained in the notice of seizure and of the intended forfeiture proceedings. The answer shall contain either a general denial or a brief description of the defenses asserted by the responding party. Failure to file a verified answer may result in a default order or may otherwise inhibit or restrict an owner's ability to fully defend his interests in further court hearings. A verified answer is one in which the respondent provides his or her signature attesting to the accuracy of the statements in the answer.

11.11 Defenses

1) Property that has been seized under and in accordance with this title is presumed:

- a) to be contraband or an illegal controlled substance;

- b) to have been used as a vehicle, depository, manufacturing facility, or place of concealment for a controlled substance or contraband;
 - c) to be evidence in an ongoing investigation or court proceeding; or
 - d) to be an abandoned or hulk vehicle.
- 2) The presumption set out above may be rebutted by a preponderance of evidence supporting any one of the following defenses:
- a) That the property was not used as a vehicle, depository, or place of concealment for a controlled substance or contraband;
 - b) That the vehicle is not an abandoned or hulk vehicle and the owner is willing and able to pay costs associated with towing, storage, and any other costs associated with seizure and impoundment;
 - c) That the property is not a controlled substance, drug paraphernalia, or contraband under tribal law;
 - d) That the property was not properly seized or impounded or is not evidence in an on-going investigation or court proceeding under this title; or
 - e) That the owner or claimant's interest in the property outweighs the Tribe's interest or need to retain the property for purposes of an ongoing investigation.
- 3) The defense of entrapment may be established by a showing that the design for violation of this title originated in the mind of law enforcement officials or their agents, that the person violating this title or other tribal law was lured or induced to commit the violation, and that he otherwise would not have committed the violation. The defense of entrapment is not established by a showing that law enforcement officials or their agents merely afforded a person an opportunity to commit a violation under this title.

11.12 Procedure for Hearing if No Verified Answer Has Been Timely Filed

If a verified answer to the notice of seizure or impoundment requesting forfeiture is not timely filed in accordance with 11.10 above, the court shall hear evidence upon

the charge that the property should be forfeited to the Tribe under this title, and upon motion shall order the property forfeited to the Tribe.

11.13 Procedure for Hearing if a Verified Answer is Timely Filed

If a verified answer to the notice is timely filed in accordance with 11.10 above, the forfeiture proceedings shall be set for a hearing no later than 30 days of receipt of the verified answer or the date of sentencing if the forfeiture proceedings relate to property that is evidence in an on-going criminal case, whichever date is later.

Notice of the hearing shall be by regular or by certified mail.

11.14 Hearing – Disposition of Property

If it is established by a preponderance of the evidence that the subject property was used by the owner, or the owner knowingly permitted another person to use the property, in violation of this tribal law, the court shall determine whether any claims are entitled to the property or any proceeds therefrom. This determination shall be made by examining evidence that indicates how and to what extent the claimant acquired an interest in the property. The court shall further determine whether it has been established by a preponderance of the evidence that the claimant acted in such a manner as to require forfeiture of her interest under this title.

1) If proof by a preponderance of the evidence does not establish that the property was knowingly used or permitted to be used by the property owner/claimant, the court shall order the property released to the bona fide owner, lienholder, mortgagee, or vendor, if the amount that the owner/claimant is entitled to (through the transaction from which she acquired an interest in the property) is equal to, or more than, the value of the property as of the date of seizure.

2) If the monetary amount owed to a claimant or claimants is less than the value of the property, the property may be sold at a public auction by the tribal police chief after due and proper notice has been given, and the amount owing the

claimant shall be paid from proceeds of the sale. Any remaining proceeds shall become the property of the Tribe.

3) Except as provided in subsection 4, if no such claimant exists, and the confiscating agency wishes to retain the property for its official use, it may do so if authorized by the Tribal Council. If the property is not to be retained, it shall be disposed of by sale, with proceeds tendered to the Tribe, except that illegal substances or counterfeit illegal substances shall be destroyed unless needed for evidentiary purposes and thereafter shall be destroyed. Weapons may be destroyed at the discretion of the tribal police chief.

4) Any interest in real property leased, rented, or being sold by the housing authority, or a partnership in which the housing authority is a partner, that is forfeited under this ordinance shall revert to the housing authority or the partnership, whichever entity holds the interest.

11.15 Fees and Costs for Towing and Storage.

The Lower Elwha Klallam Tribal Chief of Police may set an appropriate schedule for assessing costs of towing and storing vehicles and other large items of property. This schedule shall be posted at the LEKT Police Station. The Chief of Police may also set other requirements as appropriate prior to retrieval of vehicles or other property.