



**Waganakising Odawak**  
**Little Traverse Bay Bands of Odawa Indians**  
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February 21, 2014

Re: Veto of Contracts Statute

This memo explains the decision to veto LEG - 125, known as the Contracts Statute.

On January 19, 2014, the Tribal Council passed a proposed statute known as the Contracts Statute. The Contracts Statute, if enacted, would apply "...to all contracts to which the Tribe is a Party." (Section IV. Jurisdiction; page 3). While the statute in its current form may be suitable for some types of contracts, there are two areas of concern which are the basis for this veto.

1. CONSTRUCTION CONTRACTS

Contracts for the construction of various buildings and facilities are among the most significant and expensive contracts to which the Tribe is a Party. These include previous contracts for the construction of the existing Odawa Casino; contracts now under negotiation for redevelopment of the former Victories Casino site; and potential contracts for the future construction of one or more hotels or gaming facilities. It's foreseeable that LTBB may spend millions of dollars on construction in the next 10 to 20 years, and it is important to preserve all available remedies for problems arising from construction.

2. LIMIT ON CONSTRUCTION DEFECT REMEDIES

The proposed Contracts Statute has a specific section dealing with Construction Contracts, beginning at Section XII Remedies, Subsection G, Construction Contracts, on page 21. Under this Subsection G, in the event of a breach by any Builder under any Construction Contract, the Statue would provide a very limited list of remedies, as follows:

- A. If the breach occurred before construction, LTBB could recover the cost to complete construction, plus compensation for delay.
- B. If the breach occurred during construction, LTBB could recover as in A above, but if completion of the building would involve 'economic waste' (which is not defined), damages are limited to the difference between what LTBB received and what LTBB should have received from the builder.
- C. If the builder is late in completing construction, LTBB could recover damages tied to the delay in LTBB's ability to use the property.

Unfortunately, the type of litigation that most commonly arises from Construction Contracts is not for delays in completion of the building, but rather for problems and defects that are discovered by the owner after the building is completed and in use. Depending on the size and complexity of the building, lawsuits seeking damages for defective construction can involve claims for dollar amounts far in excess of the remedies that would be available to LTBB in the proposed draft of the Contracts Statute.

Additionally, while it's true that the terms "Compensatory Damages" and "Consequential Damages" appear in other sections of the proposed Contracts Statute, these terms are not included in the Subsection dealing with Construction Contracts, and there is no indication that Compensatory Damages would be available to LTBB in any construction defect claim. The fact that Compensatory and Consequential Damages don't appear in the section on Construction Contracts would support a builder's argument that these remedies do not apply to the builder's defective construction. Additionally, because the dollar value of claims by LTBB for defective construction could be significant, this area probably warrants a separate section in the statute.

### 3. EMPLOYMENT CONTRACTS

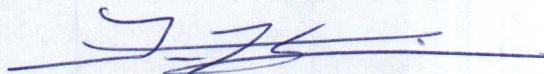
The proposed statute would also apply to any employment contracts to which LTBB is a party. In Section XII. Remedies, Subsection F Employment Contracts, (page 21) the proposed statute limits the remedy for breach by an LTBB contract employee to "*...what it costs the employer to replace the employee.*"

Many employees who are currently under contract to LTBB are in positions of significant responsibility. Some of these employees have access to significant financial resources in various accounts, as well as access to a significant amount of confidential and sensitive information. If an employee were to breach his or her LTBB employment contract in a manner that resulted in financial loss, diversion of tribal assets, or the release or misuse of confidential information, the remedy provided in the statute (i.e., the cost of hiring another employee) would be inadequate to fully compensate LTBB.

Even if LTBB is unlikely to pursue a legal claim against a departing employee, (either because the person has no money or because the negative publicity would be detrimental), it still makes sense as a measure of deterrence to preserve all legal remedies, rather than to unnecessarily limit the available remedies. For these reasons, the section on Employment Contracts should be revised.

In closing, we encourage another look at the Contracts Statute, to address concerns that the statute would unnecessarily limit the remedies available to LTBB in any future claims for employee misconduct, or more significantly, for defective construction.

Respectfully submitted,



Fred Kiogima  
Tribal Chairman

**WAGANAKISING ODAWAK STATUTE  
CONTRACTS**

**SECTION I. SHORT TITLE**

This statute may be cited as the "Contracts Statute."

**SECTION II. PURPOSE**

The purpose of this Statute is to set forth the Tribe's jurisdiction and sovereign rights over contract matters and to set forth contractual rights between parties.

**SECTION III. DEFINITIONS**

- A. "Acceptance"** means a communication made by the offeree to the offeror agreeing to the content of the offer that manifests intent to enter into a contract.
- B. "Consideration"** means some form of legal detriment that reflects a bargained-for-exchange between the parties to a contract.
- C. "Contract"** means a promise or set of promises, the breach or performance of which gives rise to a legally recognized duty.
- D. "Court"** means the courts of the Little Traverse Bay Bands of Odawa Indians.
- E. "Divisible Contract"** means a contract where the performance of each party is divided into two or more parts.
- F. "Merchant"** means a person who regularly deals in goods of the kind.
- G. "Minor"** means a person under the age of 18 years.

- H.** “**Offer**” means a communication made by an offeror to an offeree that manifests intent to enter into a contract.
- I.** “**Offeree**” means the person to whom an offer is made.
- J.** “**Offeror**” means the person who makes an offer.
- K.** “**Promisee**” means the person to whom a promise is made.
- L.** “**Promisor**” means the person who makes a promise.
- M.** “**Signature**” means some symbol, mark or other writing whether by hand or by electronic means is intended by the signor to serve as his or her signature.
- N.** “**Tender**” means the present willingness and ability to perform.
- O.** “**Territorial Jurisdiction of the Little Traverse Bay Bands of Odawa Indians**” means “areas referenced in Public Law 103-324, 25 USC Section 1300k-2(b)(2)(A) as the boundaries of the reservations for the Little Traverse Bay Bands as set out in Article I, paragraphs ‘third and fourth’ of the Treaty of 1855, 11 Stat. 621.” Little Traverse Bay Bands Constitution, Article V(A)(1)(a).
- P.** “**Tribal Citizen**” means an enrolled member of the Little Traverse Bay Bands of Odawa Indians.
- Q.** “**Tribal Court**” means the Little Traverse Bay Bands of Odawa Indians Tribal Court.
- R.** “**Tribe**” means the Little Traverse Bay Bands of Odawa Indians.
- S.** “**Writing**” means some document that identifies the material terms of a contract. A writing can be in any form tangible or electronic.

## SECTION IV. JURISDICTION

The Tribe's jurisdiction under this statute extends to all contracts to which the Tribe is a party, both parties are tribal citizens, or at least one party to the contract is a tribal citizen and the contract is entered into within the territorial jurisdiction of the Tribe.

## SECTION V. STATUTE OF LIMITATIONS

An action for breach of contract must be brought within four years of the breach, otherwise the action is barred.

## SECTION VI. CONTRACT FORMATION

**A. In General.** To form a valid contract there must be an offer, an acceptance, and valid consideration given.

**1. Offer.** An offer creates a power of acceptance in the offeree and a corresponding liability on the part of the offeror.

**a.** For a communication to be an offer, it must contain a promise, undertaking, or commitment to enter into a contract that shows the offeror's intent to contract.

**b.** The offer must be definite and certain as to the identity of the offeree, the subject matter of the offer, and the price to be paid.

**2. Acceptance.** An acceptance is a manifestation of assent to the terms of the offer, through which the offeree exercises the power given by the offeror to create a contract.

**B. Bilateral Contract.** A bilateral contract is formed by a mutual exchange of promises, in which each party is both a promisor and a promisee.

**C. Unilateral Contract.** A unilateral contract is formed only upon the offeror requesting performance, rather than a promise, and full performance by the offeree.

**D. Definiteness of Subject Matter.** The subject matter of a contract must be reasonably certain such that the promise is identifiable.

1. A contract involving the sale of real estate must identify the land, the price to be paid, and the parties to the contract.

2. A contract involving the sale of goods must contain the quantity. It is sufficient if a contract calls for one party to supply all that the party produce or all that the other party requires, so long as the quantity is capable of being determined.

3. A missing contract term does not prevent formation of the contract if it appears under the facts and circumstances that the parties intended to make a contract, and there is a reasonably certain basis for giving a remedy. The Court may supply reasonable terms for those that are missing.

a. If the missing term is price, the Court must use the fair market value or the value currently used in the geographical area and industry involved to determine a reasonable price.

b. For any other missing term in a contract, the Court should look base its determination on the course of dealing between the parties, course of performance between the parties, or industry practice.

**E. Terminating an Offer.** The power of acceptance created by an offer ends when the offer is terminated by revocation, rejection, or by operation of law.

1. **Revocation.** An offeror may revoke his or her offer at any time before the offeree accepts. The offeror's revocation may be communicated to the offeree either directly or indirectly. Indirect communication of the revocation occurs when the offeree receives correct information from a reliable source of act of the offeror that would indicate to a reasonable person that the offeror no longer wishes to make the offer.

a. A revocation by the offeror is effective when it is received by the offeree. The revocation need not be actually read by the offeree. It is sufficient if the revocation is received at the offeree's place of business, home, or otherwise comes to the offeree's attention.

b. **Exceptions.** An offeror's power to revoke his or her offer is limited in the following situations:

i. **Option Contract.** An offeror may not revoke an offer in which the offeree gives consideration for a promise by the offeror not to revoke.

ii. **Detrimental Reliance.** Where the offeror could reasonably expect that the offeree would rely to his or her detriment on the offer; and the offeree does so rely, the offer will be held irrevocable as an option contract for a reasonable length of time.

iii. **Part Performance of Unilateral Contract.** An offer for a unilateral contract becomes irrevocable once performance has begun. Once the offeree has begun performance, he or she has a reasonable time to complete performance, during which time the offer remains irrevocable.

2. **Rejection.** An offeree may terminate an offer by an express rejection or a counteroffer.

a. An express rejection is a statement by the offeree that he or she does not intend to accept the offer; and such statement will terminate the offer.

b. A counteroffer is an offer made by the offeree to the offeror that contains the same subject matter as the original offer, but differs in its terms. A counteroffer serves both as a rejection of the original offer and as a new offer.

c. A rejection is effective when it is received by the offeror.

d. If an offer is rejected, the offeror may restate the same offer and create a new power of acceptance.

**3. Termination by Operation of Law.**

a. If either of the parties dies or is adjudicated insane prior to acceptance, the offer is terminated. It is not necessary that the death or insanity be communicated to the other party. However, if the rules limiting an offeror's power to terminate are applicable (option contract, detrimental reliance, or part performance), death or insanity will not terminate the offer.

b. If the subject matter of the contract is destroyed, the offer is terminated.

c. If the subject matter of the contract becomes illegal, the offer is terminated.

**F. Acceptance of an Offer.** For an offer to be accepted, the offeree must know of the offer and unequivocally accept the offer in the manner requested or by other reasonable means.

1. An acceptance is effective at the moment it is received by the offeror personally or at his usual place of business. Except if the acceptance is by mail or similar means, it is effective at the moment of dispatch so long as the mail is properly addressed and stamped.

2. Any additional or different terms in the response will not constitute an acceptance, and will be a rejection and a counteroffer.

**G. Consideration.** To have valid consideration the promisee must suffer some legal detriment, the detriment must induce the promise, and the promise must induce the detriment.

**SECTION VII. DETERMINING THE TERMS OF A CONTRACT**

**A. General Rules of Construction.**

1. Contracts must be construed as a whole. Specific clauses will be subordinated to the contract's general intent.
2. Words must be construed according to their ordinary meaning, unless it is clearly shown that they were meant to be used in a technical sense.
3. If provisions within the contract appear to be inconsistent, written or typed provisions will prevail over hand written provisions.
4. Ambiguities in a contract are construed against the party preparing the contract, absent evidence of the intention of the parties.

**B. Parol Evidence.**

1. **Parol Evidence Rule.** Where parties have agreed to a written contract as the final expression of their agreement, a prior written or oral agreement, or a contemporaneous oral agreement, cannot be used to vary the terms of the agreement.

a. To determine whether the parties intended the writing as the final expression of their agreement, the Court must consider all of the specific circumstances of the transaction involved, and consider whether similarly situated parties would naturally and normally include the matter sought to be introduced into their writing.

b. Extrinsic evidence may be admitted where it does not seek to vary, contradict, or otherwise include contrary terms to the written agreement. The following may be admitted as extrinsic evidence:

i. where a party asserts that the agreement, although accurately reflected in the writing, never came into being because of a formation defect or a condition precedent; or

ii. where the evidence concerns a collateral matter that is of the type that would naturally be omitted from the written agreement and does not conflict with the written integration.

**C. Modification of Contract Terms.**

1. A final contract cannot be modified unless the modification is supported by new consideration.

2. A written contract may be modified orally. However, if a contract, as modified, falls within the statute of frauds, it must be in writing.

**SECTION VIII. PERFORMANCE OF A CONTRACT**

**A. In General.** A party's basic duty is to substantially perform all that is called for in the contract.

**B. Conditions.** A contract may provide that a party does not have a duty to perform unless some condition is fulfilled.

1. The classification of the condition will determine when a party's duty to perform is triggered. There are three classifications of conditions:

a. A condition precedent is a condition that must occur before an absolute duty of immediate performance arises in the other party.

b. Conditions concurrent are those that are capable of occurring together, and the parties are bound to perform at the same time.

c. A condition subsequent is a condition, the occurrence of which, cuts off an already existing duty of performance.

**2. Express Conditions.** An express condition is an explicit contractual provision that provides that either a party does not have a duty to perform unless some event occurs or fails to occur; or if some event occurs or fails to occur, the obligation of a party to perform one or more of his duties under the contract is suspended or terminated.

**a.** Where an express condition provides that a party will pay or perform only if satisfied with the other party's performance, the promisor is not under a duty to pay unless he or she is satisfied.

**i.** If the subject matter of the contract involves mechanical fitness, utility or marketability, the condition of satisfaction is fulfilled by a performance that would satisfy a reasonable person.

**ii.** If the subject matter of the contract involves personal taste or personal judgment, a condition of satisfaction is fulfilled only if the promisor is personally satisfied. However, the promisor's dissatisfaction must be given honestly and in good faith.

**iii.** In construction contracts where the condition is based on the satisfaction of a third party, that person must be actually satisfied, but is required to act honestly and in good faith.

**3. Implied Conditions.** An implied condition exists in a contract that although does not explicitly state the condition, there exists some relevant event that must occur before the performance of one or both parties come due.

**a.** There may be an implied condition of performance that the duty of each party to render performance is conditions on the other party either rendering his performance or making a tender of his performance.

**b.** There is an implied condition of cooperation; the obligation of one party to render performance is impliedly conditioned on the other party's cooperation in that performance.

**4. Order of Performance.** If the contract is unclear as to who is to render performance first, the following rules apply.

**a.** If both performances can be rendered at the same time, they are impliedly concurrent. Therefore, absent a valid legal excuse, each party must first tender his own performance if he or she wishes to put the other under a duty of immediate performance resulting in breach if he fails to perform.

**b.** If one party's performance requires an extensive period of time to complete and the other party only has a duty to pay or to complete another act that takes minimal time, the party whose performance is going to take the longest, must perform first.

**C. Excuse of Conditions.**

**1.** If a party having a duty of performance that is subject to a condition prevents the condition from occurring, the condition is excused if such prevention is wrongful.

**2.** An actual breach of the contract when performance is due will excuse the duty of counter-performance if the breach is material.

**3.** A condition may be excused if there is a prospective inability or unwillingness to perform by one party. This occurs when a party has reasonable grounds to believe that the other party will be unable or unwilling to perform when performance is due. The innocent party may suspend his or her own performance until he she receives adequate assurances that performance will be forthcoming. If no assurances are received, the innocent party may treat this failure to provide assurances as a breach, and the innocent party will be excused.

**4.** The condition of complete performance may be excused if the party has rendered substantial performance and the breach was not made in bad faith. This is only applicable in the case of an implied condition.

5. In the case of a divisible contract, where a party performs one unit of the contract, he or she is entitled to the agreed-on equivalent for that unit even if he or she fails to perform the other units.

6. A condition may be excused when a party indicates that he or she is waiving a condition before it is to happen, or waiving some performance before it is to be rendered, and the person addressed detrimentally relies on the waiver.

**D. Discharging Contractual Duties.** A party's duties under a contract may be discharged under the following circumstances.

1. **Performance.** A full and complete performance under the contract discharges a party's duties under the contract.

2. **Tender.** A good faith tender of performance made in accordance with contractual terms discharges a party's duties under the contract.

3. **Occurrence of Condition Subsequent.** An occurrence of a condition subsequent discharges a party's duties under the contract.

4. **Illegality.** If the subject matter of the contract becomes illegal due to a subsequently enacted law or other governmental act the party's duties under the contract are discharged.

5. **Impossibility.** The occurrence of an unanticipated or extraordinary event that makes performing the contract impossible may discharge the party's duties if such duties are objectively impossible to perform.

a. The impossibility must be objective, meaning that the duties could not be performed by anyone.

b. If the performance to be rendered under the contract becomes only partially impossible, the duty may be discharged only to that extent.

c. The death or physical incapacity of a party will not render the contract impossible, unless the party who is now deceased or incapacitated was a person necessary to effectuate the contract.

6. **Frustration.** The occurrence of a supervening act or event that frustrates the purpose of the contract may discharge duties under the contract. Frustration exists if the purpose of the contract becomes valueless and the supervening act was not the fault of the party seeking the discharge.

7. **Rescission.** A mutual rescission of the contract by the parties by express agreement and including consideration will discharge the duties of each.

a. A rescission may be made orally, unless the contract is within the statute of frauds.

b. Unilateral rescission may only be granted if the party seeking the rescission has adequate legal grounds, including claims of mistake, misrepresentation, duress, or failure of consideration.

8. **Novation.** A valid novation will serve to discharge the old contract, if the following requirements are met:

a. a previous valid contract exists; and

b. all the parties are in agreement as to the new contract;

9. **Partial Modification.** If the parties subsequently modify part of the contract, the modification serves to discharge those terms of the original contract that are subject to the modification. However, it will not serve to discharge the entire contract. To receive a partial discharge by modification, the following must be met:

a. the modifying agreement must have been mutually assented to; and

b. there must be consideration for the modification, however it is sufficient consideration that each party limits his or her rights to enforce the original contract as is;

**10. Accord and Satisfaction.** An accord is an agreement where one party to an existing contract agrees to accept, in lieu of the performance that he or she is supposed to receive from the other party to the existing contract, some other, different performance. The satisfaction is the performance of the accord agreement; and will discharge the duties under both contracts.

**11. Lapse.** Where the duty of each party is a condition concurrent to the other's duty, if on the set day for performance, if neither party performs, neither is in breach and their contractual obligations lapse.

## **SECTION IX. TERMINATION OF CONTRACT**

**A. In General.** A contract may terminate upon the completion of performance by all parties.

**B. Mutual Agreement.** The parties to a contract may terminate the contract between them by mutual agreement for any reason.

**C. Breach.** A contract may terminate upon a breach by one of the parties as set out in Section X of this Statute.

## **SECTION X. BREACH OF CONTRACT**

**A. In General.** A breach occurs when the promisor is under an absolute duty to perform; and this absolute duty of performance has not been discharged.

**B. Effect of Breach.**

1. The effect of a breach depends on the materiality of it. To determine whether a breach is minor or material, the Tribal Court must look to the following factors.

- a. the extent to which the non-breaching party will receive substantially the benefit he or she could have anticipated from full performance;
- b. the extent to which the non-breaching party may be adequately compensated in damages;
- c. the extent to which the breaching party has already performed or made preparations to perform;
- d. the extent to which the breaching party will suffer hardship by termination of the contract;
- e. the extent to which the breaching party acted negligently or willfully in his or her failing to perform; and
- f. the extent to which the breaching party will perform the remainder of the contract.

2. **Minor Breach.** A breach is minor if the obligee gains the substantial benefit of his or her bargain despite the obligor's defective performance. Minor breaches may include, but are not limited to, delays in performance or small deficiencies in the quality or quantity of performance when precision is not critical. The non-breaching party may have a remedy, but will not relieve his or her duty of performance under the contract.

3. **Material Breach.** A breach is material if the obligee does not receive the substantial benefit of the bargain as a result of failure to perform or defective performance. The non-breaching party is discharged from his or her duty to perform and has an immediate right to all remedies.

4. **Minor Breach Coupled with Unwillingness to Perform.** When the breach is minor and coupled with an unwillingness to perform by the breaching party, the non-

breaching party may treat this as a material breach. The non-breaching party is discharged from his or her duty to perform and has a right to all remedies.

**5. Material Breach of Divisible Contract.** When the breach is material, but the breaching party has substantially performed a divisible part of the contract, the breaching party may recover for his or her substantial performance, but not under the whole contract.

## SECTION XI. DEFENSES

### A. Defenses to Formation.

**1. Lack of Mutual Assent.** If both parties entering into the contract are mistaken about existing facts relating to the agreement, the contract is voidable. The adversely affected party may void the contract if:

- a. the mistake concerns a basic assumption on which the contract is made;
- b. the mistake has a material effect on the agreed-upon exchange; and
- c. the party seeking avoidance did not assume the risk of the mistake.

**2. Mistake in Transmission.** Where there is a mistake in the transmission of an offer or acceptance by an intermediary, the message as transmitted is operative unless the other party knew or should have known of the mistake.

**3. Ambiguity.** When a contract contains language that has at least two possible meanings, the following rules apply:

- a. **Neither Party Aware.** Where there is an ambiguity in the contract that neither party was aware of at the time of contracting, there is no contract unless both parties intended the same meaning.

**b. Both Parties Aware.** Where both of the parties were aware of the ambiguity at the time of contracting, there is no contract unless both parties in fact intended the same meaning.

**c. One Party Aware.** Where one party was aware of the ambiguity and the other party was not at the time of contracting, a contract will be enforced according to the intention of the party who was unaware of the ambiguity.

**4. Misrepresentation.** Where one party makes a false assertion intended to induce a party to enter into a contract, the contract is voidable if the innocent party justifiably relied on the fraudulent misrepresentation.

**5. Lack of Consideration.** If the promises exchanged at the formation stage lack the elements of bargain or legal detriment, the contract is void.

**6. Illegality.** If either the consideration or the subject matter of the contract is illegal under the Constitution or laws of the Little Traverse Bay Bands of Odawa Indians, the contract is void. However, a party may not invoke illegality as a defense if that party knew of the illegal nature of the consideration or subject matter of the contract.

**B. Defenses Based on Lack of Capacity.**

**1. Legal Incapacity to Contract.** If a person is legally incapable of incurring binding contractual obligations, timely assertion of this defense by a promisor makes the contract voidable at his or her election.

**a. Contracts of Minors.** A contract entered into between a minor and an adult is voidable by the minor, but is binding on the adult.

**i.** The minor may choose to disaffirm a contract any time before, or shortly after, reaching the age of 18. If the minor chooses to disaffirm, the minor must return anything received under the contract that still remains at the time of disaffirmance.

ii. A minor may affirm the contract upon reaching the age of 18 either expressly or by failing to disaffirm the contract within a reasonable time after reaching the age of 18.

iii. **Exception.** A minor is liable for the reasonable value of any necessities furnished to him or her.

b. **Mental Incapacity.** A person whose mental capacity is so deficient that he or she is incapable of understanding the nature and significance of a contract may disaffirm when lucid or by his or her legal representative.

i. Such person may affirm the contract during a lucid interval or upon complete recovery.

ii. **Exception.** A mentally incompetent person is liable for the reasonable value of any necessities furnished to him or her.

c. **Intoxication.** The defense of intoxication is only available if the person is so intoxicated that he or she does not understand the nature and significance of the contract, and the other party knew or had reason to know of the intoxication.

i. An intoxicated person may affirm the contract upon recovery.

ii. **Exception.** An intoxicated person is liable for the reasonable value of any necessities furnished to him or her.

2. **Duress and Undue Influence.** Contracts induced by duress or undue influence are voidable and may be rescinded as long as not affirmed.

a. **Duress.** Duress occurs when:

i. a party is physically forced to sign a contract against his or her will; or

ii. a party's assent to a contract is induced by an improper threat by the other party that leaves the victim no reasonable alternative.

b. **Undue Influence.** Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relationship between them is justified in assuming that the person will not act in a manner inconsistent with his or her welfare.

**C. Defenses to Enforcement.**

1. **Statute of Frauds.** If a contract falls within the statute of frauds, it must be evidenced by a writing containing material terms and signed by the parties sought to be bound. If the statute of frauds is not raised as a defense, it is waived. The following contracts fall within the statute of frauds.

a. A promise by an executor or administrator to pay the estate's debts out of his or her own personal funds must be evidenced by a writing.

b. Suretyship promises, i.e., a promise to pay the debt of another, must be evidenced by a writing. The promise must be to pay the debt of another upon default of that other person, and the promise must be made to the creditor.

c. A promise in consideration of marriage must be evidenced by a writing. The promise can be to do or refrain from doing something if the parties marry, or it may be a promise to induce marriage by offering something of value.

d. A promise creating an interest in land must be evidenced by a writing. Such promises include: the sale of real property; leases for more than one year; easements for more than one year; fixtures; minerals or structures to be severed by the buyer; and mortgages.

e. A promise that by its terms cannot be performed within one year from the date of the contract must be evidenced by a writing. However, the contract will

not come within the statute of frauds if it is possible to complete within one year, regardless of whether performance actually occurs within one year.

f. A contract for the sale of goods for a price of \$1,000.00 or more must, in general, be evidenced by a writing.

2. **Unconscionability.** The Court may refuse to enforce a provision or an entire contract to avoid unfair terms because of unfair surprise or unequal bargaining power.

a. Inconspicuous risk-shifting provisions such as the following are unconscionable: confession of judgment clauses; disclaimer of warranty provisions; and add-on clauses subjecting all of the property purchased from a seller to a repossession if a newly purchased item is not paid for.

b. A clause is unconscionable and unenforceable if the signer is unable to procure necessary goods from any other seller without agreeing to a similar provision, thus leaving the signer without a choice.

c. An exculpatory clause releasing a contracting party from liability for his own intentional wrongful acts is unconscionable.

## SECTION XII. REMEDIES

A. **Specific Performance.** If the monetary damages are inadequate, the non-breaching party may seek specific performance. Specific performance is an order by the Tribal Court ordering the breaching party to perform or face contempt charges. Specific performance should only be granted in cases where the subject matter of the contract is rare or unique, such that monetary damages will not put the non-breaching party in as good a position as performance would have because there is no available substitute.

B. **Compensatory Damages.** Compensatory damages should be granted for the purpose of putting the non-breaching party where he or she would have been had the promise been performed.

1. Expectation damages are those that reflect the expected benefit of the contract. Damages should be sufficient for the non-breaching party to purchase substitute performance.

2. Reliance damages are appropriate when the non-breaching party's damages are too speculative to measure. The non-breaching party may recover the cost of his or her performance, and are designed to put him or her in the same position as if the contract had never been formed.

3. Consequential damages consist of losses resulting from the breach that any reasonable person would have foreseen would occur from a breach at the time of entry into the contract.

4. **Certainty Requirement.** The non-breaching party has the burden to prove to the Tribal Court his or her damages to a reasonable certainty.

**C. Nominal Damages.** Nominal damages may be awarded where a breach is proven but no actual loss is proven.

**D. Liquidated Damages.** Parties to a contract may stipulate what damages are to be paid in the event of a breach. Such liquidated damages, or a liquidated damages clause, are enforceable by the Tribal Court only if in an amount that is reasonable in view of the actual or anticipated harm caused by the breach. To be enforceable, the non-breaching party must prove:

1. that damages for a contractual breach were difficult to estimate or ascertain at the time the contract was formed; and

2. that the amount agreed on was a reasonable forecast of compensatory damages in the case of breach.

**E. Contracts for the Sale of Land.** Damages must be measured by the difference between the contract price and the fair market value of the land.

**F. Employment Contracts.**

1. **Breach by Employer.** The standard measure of damages is the full contract price, regardless of when the breach occurs, less any amount already paid under the contract.
2. **Breach by Employee.** The employer is entitled to an amount equal to what it costs the employer to replace the employee.

**G. Construction Contracts.**

1. **Breach by Owner.**

- a. If the breach occurs before construction started, the builder is entitled to the profits he or she would have derived from the contract.
- b. If the breach occurs during construction, the builder is entitled to the profits he or she would have derived from the contract and any expenses incurred up until the date of breach.
- c. If the breach occurs after construction was completed, the builder is entitled to full contract price.

2. **Breach by Builder.**

- a. If the breach occurs before construction, the owner is entitled to the cost above the contract price to complete the construction plus reasonable compensation for delay in performance.
- b. If the breach occurs during construction, the owner is entitled to the same as if the breach occurred before construction. However, if completion would involve economic waste, the measure of damages will be the difference between the value of what the owner would have received if the builder had properly performed and the value of what the owner actually received.

c. If the builder completes performance, but performance is late, the owner may recover damages for any loss incurred by not being able to use the property when performance was due.

**H. Restitution.** Restitution is available where one party has conferred a benefit on the other with the expectation of being compensated. The measure of restitution is measured by the benefit conferred in order to prevent unjust enrichment of the party receiving the benefit.

**I. Rescission.** The grounds for rescission must have occurred either before or at the time the contract was entered into. Such grounds include:

1. mutual mistake of a material fact ;
2. unilateral mistake if the other party knew or should have known of the mistake;
3. unilateral mistake if hardship by the mistaken party is so extreme it outweighs the other party's expectations under the contract;
4. misrepresentation of fact or law by either party as to a material factor in the negotiations that was relied upon; and
5. any other grounds including duress, undue influence, illegality, lack of capacity or failure of consideration.

**J. Reformation.** Where the written contract between the parties contains a clerical error or otherwise fails to reflect the actual intent of the parties, the Tribal Court may reform the contract so that it accurately reflects the intent of the parties.

**K. Mutual Agreement.** The parties to a contract are free to negotiate their own remedies before entering into the contract. Additionally, where there is a breach or termination of the contract the parties are free to negotiate appropriate remedies at the time of the breach or termination.

## SECTION XIII. THIRD PARTIES TO THE CONTRACT

### A. Third Party Beneficiaries.

#### 1. Categories of Third Party Beneficiaries.

a. Intended beneficiaries are third parties that have rights under a contract they are not a party to. A person is an intended beneficiary if he or she is expressly designated in the contract, performance is to be made directly to that person, or otherwise has rights under the contract.

i. Creditor beneficiaries are intended beneficiaries where the promisee's purpose is to discharge an obligation owed to the creditor beneficiary.

ii. Donee beneficiaries are intended beneficiaries where the purpose is to confer a gift on the donee beneficiary.

b. Incidental beneficiaries are third parties that receive a benefit under a contract, but have no rights under the contract.

2. **Vesting of Rights.** Intended beneficiaries may only enforce a contract when their rights have vested. The rights of intended beneficiaries vest when:

a. manifests assent to the promise in a manner invited or requested by the parties;

b. brings suit to enforce the promise; or

c. materially changes position in justifiable reliance on the promise.

d. **Exception.** An intended beneficiary may enforce a contract prior to his or her rights vesting when the promisee tells the beneficiary of the contract and

should foresee reliance by the beneficiary, and the beneficiary reasonably relies to his or her detriment.

**B. Assignment of Rights under a Contract.**

1. In general, all contractual rights may be assigned. However, an assignment is barred under the following circumstances:

- a. if the assignment would substantially change the obligor's duty;
- b. if the assignment would substantially alter the obligor's risk;
- c. if the assignment is prohibited by the laws of the Little Traverse Bay Bands of Odawa Indians or other law; or
- d. if the contract contains an express provision that prohibits and makes void all assignments.

2. The effect of an assignment is to establish privity of contract between the obligor and the assignee while extinguishing privity between the obligor and assignor. The assignee then replaces the assignor as the real party in interest, and that person alone is entitled to performance under the contract.

3. Assignments need not be in writing unless the assignment is one of the following:

- a. assignment of wages;
- b. assignments of interests in land; and
- c. assignments intended as security interests under Article 9 of the Uniform Commercial Code, as adopted by the Tribe, and any similar law that may amend or replace it.

4. Assignments for value are irrevocable. An assignment for value exists if it is

- a. done for consideration; or
- b. taken as security for or payment of a preexisting debt.

5. Gratuitous assignments are generally revocable. However, they become irrevocable if the obligor has already performed or grounds for estoppel exist. Such an assignment may be revoked in the following ways:

- a. death of the assignor;
- b. bankruptcy of the assignor;
- c. notice of revocation communicated by the assignor to either the assignee or the obligor;
- d. the assignor takes performance directly from the obligor; or
- e. subsequent assignment of the same right by the assignor to another person.

**6. Rights and Liabilities of the Parties.**

- a. The assignee may enforce his or her rights against the obligor directly, but may be subject to any defenses that the obligor had against the assignor. However, the obligor may not assert unrelated defenses against the assignee.
- b. The assignor impliedly warrants to an assignee for value that:
  - i. the assignor has the right to make the assignment;
  - ii. the right exists and is not subject to limitations or defenses other than those stated or apparent at the time of the assignment; and
  - iii. the assignor will do nothing to defeat or impair the assigned right.

**C. Delegation of Duties under a Contract.**

1. In general, all contractual duties may be delegated to a third person. However, duties may not be delegated under the following circumstances:

- a. where the duties involve personal judgment and skill;
- b. where a special trust has been reposed in the delegator;
- c. where the performance by the delegate will materially change the obligee's expectancy under the contract; or
- d. where the contract restricts either party's rights to delegate duties.

2. No formalities are required to have effective delegations, except that the delegator must manifest a present intention to make the delegation.

**3. Rights and Liabilities of the Parties.**

- a. The obligee must accept performance from the delegate of all duties that may be delegated.
- b. The delegator remains liable on the contract, even where the delegate expressly assumes the duties.
- c. The delegate is not liable if there is a mere delegation. However, where the delegate assumes the duties of the delegator and the promise is supported by consideration, the delegate may be subject to liability together with the delegator.

**D. Novation.** Novation substitutes a new party for an original party to the contract. It requires the assent of all parties and completely releases the original party.

**SECTION IX. SAVINGS CLAUSE**

In the event that any phrase, provision, part, paragraph, subsection or section of this statute is found by a court of competent jurisdiction to violate the Constitution, laws or ordinances of the Little Traverse Bay Bands of Odawa Indians, such phrase, provision, part, paragraph, subsection or section shall be considered to stand alone and to be deleted from this statute, the entirety of the balance of the statute to remain in full and binding force and effect.

**SECTION X. EFFECTIVE DATE**

Effective upon signature of the Executive or shall be deemed enacted if not expressly vetoed by the Executive within thirty (30) days of submission. The Tribal Council may, by an affirmative vote of seven (7) members of the Tribal Council, override a veto by the Executive.

**CERTIFICATION**

As the Tribal Council Legislative Leader and Tribal Council Secretary, we certify that this Statute was duly passed by the Tribal Council of the Little Traverse Bay Bands of Odawa Indians at a regular meeting of the Tribal Council held on January 19, 2014 at which a quorum was present, by a vote of 9 in favor, 0 opposed, 0 abstentions, and 0 absent as recorded by this roll call:

	In Favor	Opposed	Abstained	Absent
Bill A. Denemy	X			
John W. Keshick III	X			
Beatrice A. Law	X			
Michael J. Naganashe	X			
Aaron Otto	X			
Winnay Wemigwase	X			
Marcella R. Reyes	X			
Julia A. Shananaquet	X			
Regina Gasco Bentley	X			

Date: 1-24-14 Regina Gasco Bentley  
 Legislative Leader Gasco Bentley

Date: 1-24-14 Julia Shananaquet  
 Secretary Shananaquet

Received by the Executive Office on 1-24-14 by Rosa Fay

Pursuant to Article VII, Section D, Subsection 1 of the Little Traverse Bay Bands of Odawa Indians Constitution adopted on February 1, 2005 the Executive concurs in this action of the Tribal Council.

Date: 2/21/14 Fred Klogima  
 Fred Klogima, Tribal Chairperson

**VETO**