

To: The Tribal Council of Little Traverse Bay Band of Odawa Indians  
From: Regina Gasco Bentley, Tribal Chairperson *RGB*  
Date: September 7, 2018  
RE: Veto Statement of Tribal Chairperson

Today I am exercising my authority to veto under LTBB Const. Art. VII, Section D, cl. 1 the following named statute Odawa Aviation Corporation.

My specific objection is grounded in LTBB Const. Art. VIII, Section C, Cl. 3 of the Little Traverse Bay Bands of Odawa Indians ("LTBB") Constitution which provides that the Executive Branch Chairperson is "to receive, prepare and submit nominations to the Tribal Council for consideration for the appointed position set out in this Constitution or future Tribal statute." The Statutes suffer from the same constitutional defect in that the Executive Branch's authority to nominate is not stated in the Statutes consistent with LTBB Const. Art. VIII, Section C, Cl. 3.

The LTBB Constitution is similar to the US Constitution in creating a "checks and balance" system of governance between the three branches of government. The US Constitution does not specifically designate a checks and balance system, but the LTBB Constitution specifically provides for a separation of functions of the three branches of government and that any single branch of government should not exercise the authority of another branch of government. LTBB Const. Art. VI, Section D.

Under the US Constitution, the checks and balance system on the appointment of principal and inferior officers within the Executive Branch is done by US Const. Art. II, Section 2 which provides that the President "shall nominate, and by and with the advice and consent of the Senate shall appoint... Officers of the United States, whose appointment are not otherwise provided for in which shall be established by law..." See, Gerhardt, Michael, *The Federal Appointment Process a Constitutional and Historical Analysis* (2000). CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey.

In a similar manner, the populating of statutory positions created by Tribal Council appointments are subject to a condition precedent of a nomination by the

Executive Branch under LTBB Const. Art. VIII section C, Cl. 3. Absent a specific nominating process, the establishment of criteria, the procedures to be determined, and the time limits related to the appointment, the Statutes are defective. The nomination process and the lack of a nomination process and the arbitrary appointment authority by statutorily delegating that to the Tribal Council without limitation, is a constitutional violation of the power of the Executive Branch to nominate. LTBB Const. Art. VIII, Sec C., Cl. 3.

The Executive Branch does not object to the creation of appointed positions providing that they are done consistent with the nominating process. This is a two-part process. The Chairperson nominates and the Tribal Council either accepts or rejects the nomination by the appointment process.

The Chairperson is not limiting the right of the Tribal Council to appoint who serves on commissions, boards; the Chairperson is simply saying that the LTBB Constitution provides that the Chairperson nominates potential and prospective appointees in accord with the standards set out by the statute, which standards and qualifications the Tribal Council is free to develop, the nomination and appointment process is consistent with the separation of functions and the checks and balance system of LTBB governance.

The Tribal Council has followed this process in the past; see statutes cited below.

Statute	Plain-text	Nomination/ Appointment Language
Chapter 2- Citizenship Commission, Section 2.204(a)	Members of the Commission shall be Tribal Citizens at least eighteen years of age as <b>nominated by the Executive and appointed by the Tribal Council</b>	Executive Nomination; Tribal Council Appointment
Chapter 2- Citizenship Commission, Section 2.204(f)	In the event a vacancy occurs in the Commission, by virtue of death, resignation or removal, the <b>Tribal Council shall appoint</b> a qualified Tribal Citizen to fill the remaining term of office as <b>nominated by the Executive.</b>	Executive Nomination; Tribal Council Appointment

<p>Title III, Elections, Section 3.103(a)</p>	<p>The Election Board shall be <b>nominated by the Chair and appointed by Tribal Council</b> and shall consist of five (5) enrolled Tribal Citizens, eighteen (18) years of age or older who meet the voting eligibility requirements.</p>	<p>Chair Nomination; Tribal Council Appointment</p>
<p>Title III, Elections, Section 3.103(d)</p>	<p>In the event a vacancy occurs on the Election Board by virtue of death, resignation, or removal, the <b>Chair shall nominate and the Tribal Council shall appoint</b> a Tribal Citizen who meets the eligibility requirements for the remainder of the unexpired term.</p>	<p>Chair Nomination; Tribal Council Appointment</p>
<p>Chapter 36, LTBB Waganakising Representative to Michigan Anishnaabeg Cultural Preservation and Repatriation Alliance (MACPRA) and Native American Graves Protection and Repatriation Act (NAGPRA), Section 6.3604(a)</p>	<p>The Representative shall be <b>nominated by the Executive and appointed by a majority vote of Tribal Council.</b></p>	<p>Executive Nomination; Tribal Council Appointment</p>
<p>Chapter 37, Tribal Chair Ambassadorial Capacity and Tribal Representatives, Section 6.3705(a)</p>	<p>The Representative may be appointed for a set term or on a temporary basis. All appointed positions shall be <b>nominated by the Executive and approved by a majority vote of Tribal Council</b> by Certified Motion or in limited cases by Resolution that contains the term of the appointment.</p>	<p>Executive Nomination; Tribal Council Appointment</p>

<p>Chapter 37, Tribal Chair Ambassadorial Capacity and Tribal Representatives, Section 6.3705(f)</p>	<p>If a vacancy occurs or immediate action needs to be taken, then the Executive may nominate him or herself, or a Tribal Council member to fill the representative position on an interim basis.</p>	<p>Executive Nomination only</p>
<p>Chapter 6- Land Use, Building Regulation, and Zoning Staute, Section 10.611(B)(1)</p>	<p>The Board shall consist of three (3) members <b>nominated by the Executive and confirmed by the Tribal Council</b>. To be eligible for appointment a person must be a Tribal Citizen who is at least eighteen (18) years of age and has read all Tribal zoning laws, regulations, policies and procedures. The Board members shall serve three year terms with initial appointments being one member for one year, a second member for two years, and a third for three years to provide for staggered terms.</p>	<p>Executive Nomination; Tribal Council Confirmation</p>
<p>Chapter 11- Liquor and Tobacco Licensing Board Statute, Section 15.1105(D)(1)</p>	<p>The Board shall consist of three (3) members <b>nominated by the Executive and confirmed by the Tribal Council</b>. To be eligible for appointment a person must be a Tribal Citizen who is at least eighteen (18) years of age and is familiar with all Tribal liquor and tobacco laws, regulations, policies and procedures. One Board member will have at least 2 years of experience in law enforcement, legal or judiciary. The Board members shall serve three year terms with initial appointments being one member for one year, a second member for two years, and a third for</p>	<p>Executive Nomination; Tribal Council Confirmation</p>

	three years to provide for staggered terms.	
Chapter 23- Elder's Commission, Section 15.2303	The Tribal Council hereby creates the Elders Commission and it shall be composed of five (5) Commissioners, within the Executive Branch of government <b>nominated by the Executive, appointed by Tribal Council</b> and shall consist of five (5) enrolled Tribal Citizens, eighteen (18) years of age or older.	Executive Nomination; Tribal Council Appointment
Chapter 23- Elder's Commission, Section 15.2303(G)	In the event a vacancy occurs on the Commission a Tribal Citizen who meets the eligibility requirements for the remainder of the unexpired term shall be <b>nominated by the Executive and appointed by Tribal Council</b> for the remainder of the unexpired term.	Executive Nomination; Tribal Council Appointment
Chapter 25- Environmental Appeals Board, Section 15.2503(A)	The Tribal Council hereby creates the Environmental Appeals Board, composed of three (3) Tribal Citizens at least eighteen (18) years of age, <b>nominated by the Executive Branch and appointed by Tribal Council.</b>	Executive Nomination; Tribal Council Appointment

In negotiations between the executive and legislative attorneys to issues raised by this veto, the legislative attorney has made a number of arguments in defense of the lack of nominating language for the Executive Branch in these Statutes. I will briefly address those arguments. First, the legislative attorney argued that appointments are made incident to child protective proceedings. Appointments in the context of child protective proceedings, domestic issues, and conservatorships are not apposite to the present statutes subject to veto because those appointments are done under a contested private LTBB citizen proceeding, not a public civic governmental proceeding. The present Statutes subject to veto are public non-

private proceedings in the allocation of governmental authority and governmental resources owned by the LTBB public at large and those public actions should done by the public process of checks and balances of the nomination and appointment process. Judicial Appointments are directly controlled by LTBB Constitutional provisions and therefore are not subject to a veto. Finally, the Tribal Council appears to argue that the specific constitutional provision (LTBB Const. Art. VII, Section D. cl. 24) should control over the general (LTBB Const. Art. VII, Section D. cl. 16). That is, the statutory authority of the enterprise establishment process authorizes the Tribal Council to ignore the nomination and appointment process. The stretch of that Tribal Council argument is too far. It is possible to honor both provisions of the LTBB Constitution without giving authority of one section to obviate the effect of the other.

In the nomination and appointment process, nominations, in accord with the standards set up by the legislature, is not difficult to implement and the Tribal Council should strive to write law that conforms with both all provisions of the LTBB Constitution. Article VII D. 16 and the mirror provision Article VIII D. 24.

Nothing in the specific text of the LTBB Constitution precludes the Chairperson from making nominations in matters related to economic issues. There is no limitation on the Chairperson's nomination power just as there is no limitation on the Tribal Council's appointment power; however, both the nomination and appointment process are written in a coordinated fashion that honors the separation of functions and checks and balances of the LTBB Constitution.

Finally, the Tribal Council appears to argue that the enterprise activity is unique and therefore the nomination and appointment process is not necessary. The language of the LTBB Constitution does not contain a concrete distinction between governmental and enterprise affairs. Corporations can be both governmentally focused and business focused. A plain reading of the LTBB Constitutional text does not include such a demarcation as business vs. governmental.

In summary, this veto recognizes that LTBB as a government is subject to checks and balances based on the separation of functions and the general and specific LTBB Constitutional provisions that allocate power and duties between the branches. See:

## ARTICLE VI. ORGANIZATION OF THE GOVERNMENT

## B. Branches of Government

The government of the Little Traverse Bay Bands of Odawa Indians shall be composed of three (3) branches: Tribal Council (Legislative), Tribal Chairperson (Executive), and Tribal Court (Judicial).

## D. Separation of Functions

No branch of the government shall exercise the powers, duties or functions delegated to another branch.

## ARTICLE VII. TRIBAL COUNCIL

### D Powers of the Tribal Council

16. Establish committees, commissions, and boards, and approve appointments as presented by the Executive. The Tribal Council shall develop laws setting out qualifications for appointees and ensuring that the Tribal membership is given reasonable notification of available positions.

24. To provide by statute for the management of any and all economic affairs and enterprises of the Little Traverse Bay Bands of Odawa Indians that will further the economic development of the Tribe or its members. Such statutes will delegate management responsibilities to Tribally chartered corporations or other subordinate Tribal entities, or where appropriate, to the Executive Branch.

## ARTICLE VIII. EXECUTIVE

### C. Powers and Duties of Executive

3. To receive, prepare and submit nominations to the Tribal Council for consideration for the appointed positions set out in this Constitution or future Tribal statute.

**WAGANAKISING ODAWAK STATUTE 2018-\_\_\_\_\_**  
**ODAWA AVIATION CORPORATION**

**SECTION I. PURPOSE AND TITLE**

**A. Purpose.** The Little Traverse Bay Bands of Odawa Indians (the “Tribe”) exercises powers of self-government over its Citizens and territory. In accordance with Article VII (D) (4), the purpose of this Statute is to govern the issuance of the Little Traverse Bay Bands of Odawa Indians charter of incorporation for economic purpose, to provide for the management of the non-gaming, economic affairs and to delegate such management to a Tribally chartered corporation in accordance with Article VII (D) (24) and regulate such tribally chartered corporation activities in accordance with Article VII (D) (4).

**B. Short Title.** This Statute shall be known and cited as the “Odawa Aviation Corporation Statute.”

**SECTION II. DEFINITIONS**

**A.** *“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).

**B.** *“Tribe”* or *“LTBB”* means the Little Traverse Bay Bands of Odawa Indians.

**C.** *“Tribal Constitution”* means the Little Traverse Bay Bands of Odawa Indians Constitution as adopted by its membership on February 1, 2005.

**D.** *“Tribal Council”* means the elected body of nine (9) Tribal members of Little Traverse Bay Bands of Odawa Indians with duties found in the Tribal Constitution Article VII. “Tribal Council”.

**SECTION III. CREATION OF THE ODAWA AVIATION CORPORATE CHARTER**

A. A tribally chartered corporation is authorized by this Statute and shall be named the "Odawa Aviation, Inc." The organization is recognized by the approval of the tribal corporation charter; "Odawa Aviation, Inc." by Tribal Council.

B. The tribally chartered corporation, Aviation Inc., shall be managed by a board of three (3) to five (5) members selected and appointed by majority vote of Tribal Council.

**SECTION IV. SCOPE OF ACTIVITIES**

A. The Odawa Aviation, Inc. is created as a tribally chartered corporation that creates jobs in the area of economic development and general business.

B. The Odawa Aviation, Inc. is authorized to create operating subsidiaries in accordance with tribal law, provided that they have prior approval by Tribal Council.

C. The Corporation will provide Tribal Council an annual report and audited financial statements.

D. The Corporation will submit an annual development plan to the Tribal Council for approval.

**SECTION V. MANAGEMENT; STRUCTURE AND FUNCTION**

A. The Odawa Aviation, Inc. shall have sole authority and responsibility for managing the Odawa Aviation, Inc. and related Aviation projects, in accordance with the policies, Statutes, Resolutions, regulations as approved by Tribal Council.

B. The Odawa Aviation, Inc. shall abide by all tribal and federal laws and regulations as may be applicable.

C. It is the duty of the Odawa Aviation, Inc. to protect assets of the Tribe and generate revenues and jobs.

#### **SECTION VI. REPORTING TO TRIBAL COUNCIL**

In order to regulate, the Odawa Aviation, Inc. shall provide to Tribal Council a monthly report for the Corporation and all subsidiaries; and shall report quarterly at the regularly scheduled Tribal Council Meetings or such special meetings as requested by the Tribal Council, or as requested the following:

- A. Annual operating plan;
- B. Financial performance measures;
- C. Audits, whether internal or external;
- D. Financial records or statements;
- E. Tribal Council may request reports regarding all aspects of the Odawa Aviation, Inc.;
- F. Monthly profit and loss statement of all non-gaming enterprises, joint ventures and investments.

#### **SECTION VII. FINANCING OF THE ODAWA AVIATION, INC. AND ACTIVITIES**

- A. The annual budget for the Odawa Aviation, Inc. shall be approved by Tribal Council in accordance with an approval process as designated by the Tribal Council.
- B. Tribal Council approval is required for borrowing of funds. The Odawa Aviation, Inc. is not authorized to enter into financing approval without prior ratification by the Tribal Council.

#### **SECTION VIII. SAVING 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, ordinances or statutes 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.

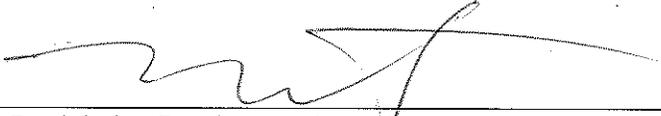
**SECTION IX. EFFECTIVE DATE**

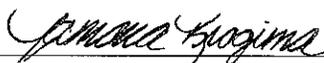
Effective upon signature of the Executive or thirty (30) days from Tribal Council approval whichever comes first or if the Executive vetoes the legislation, then upon Tribal Council override of the veto.

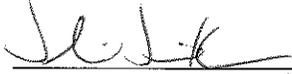
**CERTIFICATION**

As the Tribal Council Legislative Leader and Tribal Council Secretary, we certify that this Statute was duly adopted by the Tribal Council of the Little Traverse Bay Bands of Odawa Indians at a regular meeting of the Tribal Council held on August 9, 2018 at which a quorum was present, by a vote of 8 in favor, 0 opposed, 0 abstentions, and 1 absent as recorded by this roll call:

	In Favor	Opposed	Abstained	Absent
Frank Bernard				X
David Harrington	X			
Dexter McNamara	X			
Emily Proctor	X			
Julie Shananaquet	X			
Shanna Wemigwase	X			
Marcella R. Reyes	X			
Tamara Kiogima	X			
Fred Harrington, Jr.	X			

Date: 8.9.18   
 Legislative Leader, Fred Harrington, Jr.

Date: 8.10.18   
 Tribal Council Secretary, Tamara Kiogima

Received by the Executive Office on 8-10-18 by 

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 Councils in this action of the Tribal Council.

Date: 9-7-18   
 Regina Gasco, Tribal Chairperson

**VETO**