Waganakising Odawak

Little Traverse Bay Bands of Odawa Indians

Frank Ettawageshik, Tribal Chairman

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Executive Veto of Tribal Resolution 050408-02
As passed by Tribal Council on May 4, 2008

On May 30, 2008, I vetoed Tribal Resolution 050408-02 *Tribal Prosecutor Responsibilities in State Court Child Welfare Proceedings.* This Resolution was vetoed because it is in conflict with the Constitution, it appears to be illegal to amend a statute with a resolution, and it is unwise to create law that is not codified

I will outline my reasoning on these issues below:

1). The Resolution is in conflict with the Constitution. The fifth "Whereas" misstates the constitutional authority of the Tribal Prosecutor to include all child welfare cases in both Tribal and State court. However, the Constitution only specifically grants the Tribal Prosecutor authority in child welfare cases that arise out of *"violations of Tribal law"* that occur *"within the Tribe's jurisdiction."* All cases in State court involving Little Traverse Tribal children stem from violations of State law, not Tribal law. Additionally, cases not falling within the reservation boundaries are not within the Tribe's jurisdiction until they are transferred to Tribal Court. Therefore, the Constitution does not specifically attribute any authority to the Tribal Prosecutor in State cases and the current Resolution does not reflect clear constitutional intent.

Additionally, the Child Protection Statute further interprets the constitutional provisions regarding authority to act in State court. WOTC 5.106 (D) 2 and 5. These sections say in (D)2 "Intervention: If the notice involves a child who is a citizen, or eligible for citizenship in the Tribe, the Tribal Presenting Officer [Prosecutor] or Tribal Attorney shall forthwith file a notice of intervention, or a motion to intervene if necessary, with the state court" and in (D)5 "Petition for Transfer: Upon receipt of the determination from the Child Welfare Commission the Presenting Officer [Prosecutor] or Tribal Attorney shall forthwith file a Petition to Transfer in the state court and file a copy of the petition in Tribal Court." These provisions extend the prosecutor's authority beyond that provided for in the constitution and simultaneously provide that the "Tribal Attorney" may file a child welfare action in State court. It may well be that the extension of the Tribal Prosecutor's authority is unconstitutional but that has not been raised in any case so far and it is not my intention to raise it further here but only to note that we have considered this question in passing discussion.

On the other hand, WOS 2007-009 Enjinaaknegeng as passed by Tribal Council and signed by the Executive creates the Legal Department and authorizes it to "provide legal services, counsel to, and representation of LTBB on legal matters (including work with subordinate Tribal entities) under the direction and supervision of the Tribal

Chairperson." WOS 2007-009 II (A). This authority has been used extensively to represent the tribe in many Child Welfare cases that have arisen outside of the Tribe's jurisdiction in State courts.

2). It appears to be illegal to amend a statute with a resolution. Allowing a resolution to amend a codified statute directly violates the Legislative Procedures Act and conflicts with the Administrative Procedures Act. This resolution is an attempt to amend current Tribal statutes. For example, the resolution appoints the Tribal prosecutor as the party who may intervene on behalf of the Tribe in State court. However, Tribal law clearly and unambiguously also authorizes the Tribal Attorney to file a notice of intervention or a motion to intervene in State court. According to the Legislative Procedures Act, the proper avenue for amending a statute is the enactment of a superseding statute. Tribal law states that a proposed statute may be new or "involve a revision of an existing statute." WOTC 6.104 (A). Thus, the law clearly states that the way to amend a statute is with the enactment of a brand new statute. Another fact supporting the illegality of this resolution is that it asserts a power not explicitly granted to a resolution. The Administrative Procedures Act, which governs resolutions, does not expressly give Tribal Council the ability to amend current statutes with a resolution. WOTC 6.210. So, allowing a resolution to amend a codified statute affords it power not expressly granted in the Administrative Procedures Act. Therefore, because neither the Legislative Procedures Act nor the Administrative Procedures Act state that an amendment of a statute can be achieved through a resolution, Tribal Resolution 050408-02 conflicts with the law.

3). It is unwise to create law that is not codified. Tribal Council passed the Legislative Procedures Act ("the Act") to establish a procedure for compiling the laws of the Tribe. WOTC 6.108. The Act has several important goals:

1. It gives notice to Tribal Citizens of changes in the law;
2. It offers Citizens an opportunity to comment on proposed changes in the law;
3. It gives Tribal Council the opportunity to have in-depth discussions about proposed law;
4. It gives Tribal Council the opportunity to offer input on multiple drafts of proposed law; and
5. Most importantly, it allows passed laws to be put together in one Tribal Code ("codified").

Our outstanding system of codified laws is one of the aspects of the LTBB that makes us stand out as a progressive tribal government. Codification makes laws user-friendly and ensures continuity of law. Codification gives our citizens easy access to Tribal law. However, amending a law that has been codified through a resolution totally undermines the benefits created by the Legislative Procedures Act, including codification of law. The result is a confusing legal maze where one is forced to search through not just the Tribal Code but also through Tribal Resolutions to decipher the state of the law. Additionally, because resolutions are not recorded in the Tribal Code, there is the very real danger that over time they may become lost or forgotten. Therefore, it is unwise to

amend current law outside of the Legislative Procedures Act, which is exactly what Tribal Resolution 050408-02 would accomplish if enacted.

4). Other Concerns. Currently, Tribal Law gives the Child Welfare Commission the responsibility to determine whether the Tribe should petition for a transfer of proceedings from the State court to Tribal court based upon the following factors:

> " **a.** The best interest of the child;
> **b.** The best interest of the Tribe;
> **c.** Availability of services for the children and their family; and
> **d.** The prospects for permanent placement for the children."
>
> WOTC 5.106 (4).

If the Commission determines not to recommend transfer and rather recommends that the Tribe's intervention be to monitor the case in State court, the State is still required to follow the placement preferences that are stated in the Federal Indian Child Welfare Act, which preferences include an option for placement preferences as stated by action of the Tribe associated with the case.

This resolution 050408-02 requires that the Prosecutor request transfer apparently without consulting the Commission as required by Tribal law. It also requires this transfer request without considering any extenuating circumstances if the State is recommending placement that doesn't conform to the Tribal Child Protection Statute. A recent case ongoing in California might have been required to be transferred here under the new resolution. That case involved the removal of six children from an LTBB Tribal citizen while she served a six-month sentence in jail. The children range in age from two years to thirteen years old. Only two of the six children were potentially eligible for LTBB enrollment (but subsequently were determined to not be eligible). While we ultimately were not faced with these decisions, this case raised several issues for us to consider. It was extremely difficult for the State to find a home willing and able to take all six children. Under the current resolution, if the state had placed all six children in the non-Indian, non-relative placement, our prosecutor would have been forced to request transfer of the case to Tribal Court. Would we split up the children, or would we try and transfer all six children including four non-Indian children to tribal court? Where would we place all six children? How would we create a case service plan and provide services to an incarcerated Tribal member in California? How would we work on reunifying a mother in California with six children in Michigan? How would we pay for the increased costs associated with litigation and social services occurring in another state? The resolution fails to recognize the complexities of child welfare matters and could eliminate necessary flexibility in reacting to widely diverse and unique situations of each case.

5). Summary. While I am vetoing this resolution, on the other hand I do understand that the intent of this resolution is to protect the welfare of our Indian children and families and to require certain actions by those who are charged with working on Child Welfare cases in State courts. I have two suggestions for action: 1) I have prepared

a redraft of the proposed resolution that is attached to this veto statement for your consideration, and 2) I make the following suggestions for revising our Tribal law to achieve long-term solutions to the issues raised in this resolution:

1) We have administratively addressed the notice concerns in the resolution by requiring that any original notices be sent as required by current Tribal law to the Human Services Department, Child Welfare Director, and that copies be immediately sent to the Prosecutor and to the Legal Department. This could be made as an amendment to Tribal law.

2) If the Tribal Council wishes to require that a transfer request be filed for any State Child Welfare Case in which the State was recommending a foster care or adoptive placement that didn't conform to the placement preferences under the Federal Indian Child Welfare Act or the Waganakising Odawak Tribal Code then it would be a good idea to amend the Child Protection Code to require the Indian Child Welfare Commission to request transfer to Tribal Court in these instances. (This would however still leave the Tribe to address the many questions that were raised by the potential California case that was cited above.)

3) I do not believe that we can assign the Prosecutor to be the sole Presenting Office for Child Welfare Cases in all courts. The Prosecutor clearly has this authority in Tribal Court. We have currently extended this authority to include State Courts but have prudently also included the Tribal Attorney. This provision gives the Tribe flexibility in its ability to respond quickly and may assist in this response in a case of potential conflict of interest.

Due to the concerns laid out above I issued a veto for this resolution but I would be receptive to further discussions and potential legislative actions on this issue.

Prepared and signed May 31, 2008

Frank Ettawageshik, Tribal Chairman

Attachment: Proposed Redraft of Resolution for consideration

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
7500 Odawa Circle
Harbor Springs, MI 49740

TRIBAL RESOLUTION # xxxxxx-xx
Indian Child Welfare Proceedings in State Court Cases

VETOED

WHEREAS the Waganakising Odawak Nation, known as the Little Traverse Bay Bands of Odawa Indians, and its citizens are vested with inherent sovereignty and right to self-governance;

WHEREAS the Little Traverse Bay Bands of Odawa Indians is a federally recognized Indian Tribe under Public Law 103-324, and is a party to numerous Treaties with the United States the most recent of which being the Treaty of Washington of March 28, 1836 (7 Stat. 491) and the Treaty of Detroit of 1855 (11 Stat. 621);

WHEREAS the Little Traverse Bay Bands of Odawa Indians Tribal Council is the elected legislative body of the Tribe;

WHEREAS in accordance with the Little Traverse Bay Bands of Odawa Indians Constitution, the Tribal Council is to provide by law for the jurisdiction of the Tribe over Indian Child Welfare matters;

WHEREAS in accordance with the Little Traverse Bay Bands of Odawa Indians Constitution and Tribal Laws the Tribal Prosecutor, acting as the Tribal Presenting Officer, or Tribal Attorney are to represent the Tribe in State court Child Welfare cases pursuant to WOTC 5.106 (D) 2 and 5;

WHEREAS the Indian Child Welfare Act (ICWA) was passed by the United States Congress in 1978 in response to the dramatically high number of Indian children being removed from their homes and placed for adoption by both public and private agencies and placed with non-Indian foster and adoptive homes and institutions;

WHEREAS the intent of Congress under ICWA was to "promote the stability and security of Indian Tribes and families" (25 U.S.C. § 1902);

WHEREAS the following are the Tribal placement preferences for Tribal children under WOTC 5.114 (A), listed in order of preference:

- Citizens of the child's Tribal extended family;
- Citizens of the child's non-Tribal extended family;
- An Indian family of the same tribe as the child, which is approved by the Commission or an Indian family otherwise authorized by law to provide care for the child;
- A facility operated by a licensed child welfare services agency or an Indian tribal facility; or
- Any other suitable placement which meets the standards for shelter care facilities established by the Tribe;

THEREFORE, BE IT RESOLVED, that all notices received by the Tribe for State Court Child Welfare proceedings shall be forwarded to the Tribal Social Services Department as required by WOTC 5.106 (D)1, with copies sent immediately to the Tribal Prosecutor and the Legal Department;

BE IT FURTHER RESOLVED, that the Presenting Officer or Tribal Attorney shall assert the rights of the Tribe in State Court Child Welfare proceedings and advocate for the best interests of the Tribe by promoting the stability and security of the Little Traverse Bay Bands of Odawa Indians and its families;

BE IT FURTHER RESOLVED, that the Tribe will protect and promote the rights of the Tribe and its families by advocating for family unification AND that all placements of Little Traverse Bay Bands Tribal Children in foster care or adoptive placements be in accordance to the Tribal preferences for placement in WOTC 5.114 (A);

BE IT FURTHER RESOLVED, that the Little Traverse Bay Bands of Odawa Indians shall intervene in all State Court Child Welfare proceedings involving Little Traverse Bay Bands of Odawa Indians citizens or children eligible for citizenship in accordance with the provisions in WOTC 5.106;

BE IT FURTHER RESOLVED, that the Tribe communicates to the State court in each case to which the Tribe intervenes of the placement preferences adopted as Tribal law at WOTC 5.114 (A) and that these preferences are in compliance with the Tribal option for preferences under the Federal Indian Child Welfare Act;

BE IT FINALLY RESOLVED, that exceptions to this resolution shall be reported immediately to Tribal Council in writing.

VETOED

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
7500 Odawa Circle
Harbor Springs, MI 49740

TRIBAL RESOLUTION # 050408-02

Tribal Prosecutor Responsibilities in State Court Child Welfare Proceedings

VETOED

WHEREAS the Waganakising Odawak is a nation of citizens with inherent sovereignty and right to self-governance;

WHEREAS the Little Traverse Bay Bands of Odawa Indians is a federally recognized Indian Tribe under Public Law 103-324, and is a party to numerous Treaties with the United States the most recent of which being the Treaty of Washington of March 28, 1836 (7 Stat. 491) and the Treaty of Detroit of 1855 (11 Stat. 621);

WHEREAS the Little Traverse Bay Bands of Odawa Indians Tribal Council is the elected legislative body of the Tribe;

WHEREAS in accordance with the Little Traverse Bay Bands of Odawa Indians Constitution, the Tribal Council is to provide by law for the jurisdiction of the Tribe over Indian Child Welfare matters;

WHEREAS in accordance with the Little Traverse Bay Bands of Odawa Indians Constitution the Tribal Prosecutor is the attorney for the Tribe responsible to appear before all courts in "any and all child welfare cases";

WHEREAS the Indian Child Welfare Act was passed by the United State Congress in 1978 in response to the dramatically high number of Indian children being removed from their homes and placed for adoption by both public and private agencies and placed with non-Indian foster and adoptive homes and institutions;

WHEREAS the intent of Congress under ICWA was to "to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902);

WHEREAS the following is the Tribal placement preferences for Tribal children:

- Citizens of the child's Tribal extended family;
- Citizens of the child's non-Tribal extended family;
- An Indian family of the same tribe as the child, which is approved by the Commission or an Indian family otherwise authorized by law to provide care for the child;
- A facility operated by a licensed child welfare services agency or an Indian tribal facility; or
- Any other suitable placement which meets the standards for shelter care facilities established by the Tribe;

THEREFORE, BE IT RESOLVED all notices received by the Tribe for State Court Child Welfare proceedings, as required by the Indian Child Welfare Act, shall be immediately forwarded to the Tribal Prosecutor.

FURTHER BE IT RESOLVED that the Tribal Prosecutor, as the attorney for the Tribe, shall assert the rights of the Tribe in State Court Child Welfare proceedings and advocate for the best interests of the Tribe by promoting the stability and security of the Little Traverse Bay Bands of Odawa Indians Tribe and its families.

FURTHER BE IT RESOLVED the Tribe, through its Tribal Prosecutor will protect and promote the rights of the Tribe and its families by advocating for family unification AND all placements of Little Traverse Bay Bands Tribal children be in accordance to the Tribal preference for child placement.

FURTHER BE IT RESOLVED that the Little Traverse Bay Bands of Odawa Indians, through its Tribal Prosecutor shall intervene in all State Court Child Welfare proceedings on behalf of the Tribe and shall request a transfer to Tribal Court if placement of Tribal Children does not conform to the Tribe's placement preferences.

FINALLY BE IT RESOLVED that any exceptions to this resolution shall be reported immediately to Tribal Council in writing.

VETOED

CERTIFICATION

As Tribal Council Legislative Leader and Tribal Council Secretary, we certify that this Resolution 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 _May 4, 2008_ 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
Fred Harrington, Jr.	X			
Melvin L. Kiogima	X			
Dexter McNamara	X			
Marvin Mulholland	X			
Shirley Oldman				X
Alice Yellowbank	X			
Gerald V. Chingwa	X			
Regina Gasco Bentley	X			
Beatrice A. Law	X			

Date: 5/4/08

Beatrice A. Law, Legislative Leader

Date: 5-4-08

Regina Gasco Bentley, Secretary

Received by the Executive Office on 5-5-08 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 concurs in this action of the Tribal Council.

Date: 5-31-2008

Frank Ettawageshik, Tribal Chairperson

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