

## **Chapter 2. Sex Offense Statute**

### **9.201 SECTION I. SHORT TITLE**

This Statute may be cited as the “Sex Offense Statute” and repeals and replaces WOS 2009-009, or as amended.

(Source: WOS 2018-012, August 15, 2018, Section I)

### **9.202 PURPOSE**

The purpose of this Statute is to set forth the Tribe’s jurisdiction and sovereign right to exercise its power to deem certain acts as criminal and prohibit sexual offenses.

(Source: WOS 2018-012, August 15, 2018, Section II)

### **9.203 DEFINITIONS**

- A.** “Breast” means any portion of the female breast below the top of the areola;
- B.** “Broadcast” means to electronically transmit a visual image with the intent that it be viewed by a person or persons;
- C.** “Capture” with respect to an image, means to videotape, photograph, film, record by any means, or broadcast;
- D.** “Coercion”, for the purposes of this Statute, means any of the following:
  - 1.** the use or threat of force against, abduction of, serious harm to, or physical restraint of an individual;
  - 2.** the use of a plan, pattern, or statement with intent to cause an individual to believe that failure to perform an act will result in the use of force against, abduction of, serious harm to, or physical restraint of an individual;
  - 3.** the abuse or threatened abuse of law or legal process;

4. controlling or threatening to control an individual's access to a controlled substance. "Controlled substance" is defined and described in the Uniform Controlled Substances Act, 21 U.S.C. Section 812, as updated, and any controlled substance defined in that Act that is mixed with or contains any of the following unless use and/or possess is defined or reclassified by federal or Tribal law;
5. the destruction of, taking of, or the threat to destroy or take an individual's identification document or other property;
6. use of debt bondage;
7. the use of an individual's physical or mental impairment, where such impairment has substantial adverse effects on the individual's cognitive or volitional functions;
8. the commission of civil or criminal fraud.

**E.** "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact;

**F.** "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage;

**G.** "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse or sexual contact whether that condition is produced by illness, defect, the influence of a substance or from some other cause;

**H.** "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act;

**I.** "Recklessly" means with respect to a result or to a circumstance described by a statute defining an offense that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of

such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk;

**J.** “Sex” means acts of masturbation, sexual intercourse, or physical contact with a person's genitals, or the condition of human male or female genitals when in a state of sexual stimulation or arousal;

**K.** “Sexual act” means:

1. contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
2. contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
3. the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
4. the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

**L.** “Sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

**M.** “Significant Relationship” means a situation in which the perpetrator is:

1. A person who undertakes the responsibility, professionally or voluntarily, to provide education, health, welfare, or organized recreational activities principally for minors; or

2. A person who in the course of his or her employment supervises minors.

N. “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);

O. “Tribal Court” means the Little Traverse Bay Bands of Odawa Indians Tribal Court;

P. “Tribe” means the Little Traverse Bay Bands of Odawa Indians;

Q. “Under circumstances in which that individual has a reasonable expectation of privacy” means:

1. circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the individual was being captured; or

2. circumstances in which a reasonable person would believe that a private area of the individual would not be visible to the public, regardless of whether that person is in a public or private place.

(Source: WOS 2018-012, August 15, 2018, Section III)

## **9.204 JURISDICTION**

A. Criminal jurisdiction of the Tribe extends to adult LTBB citizens and adult citizens of Federally Recognized Tribes, however, upon motion of the Tribal Prosecutor the Judge has the discretion to try a minor as an adult.

B. The Indian Civil Rights Act (ICRA), 25 U.S.C. Section 1302, was enacted by Congress in 1968. The Tribe’s jurisdiction is limited to punishments that may impose up to a one (1) year jail term and a fine up to \$5,000.00.

C. TLOA, PL 111-211, was enacted by Congress in 2013. The Tribe's jurisdiction is extended to punishments that may impose up three (3) years imprisonment and a fine up to \$15,000.00, up the enactment of a Tribal Council Resolution.

(Source: WOS 2018-012, August 15, 2018, Section IV)

#### **9.205 JUVENILE TRANSFER TO THE ADULT DIVISION OF TRIBAL COURT**

A. If the juvenile is at least sixteen (16) years of age at the time of the offense, the Prosecutor shall have the option of filing the action as a juvenile offender proceeding or as an adult criminal matter. If the juvenile is between the ages of fourteen (14) and sixteen (16) and is alleged to have committed an offense, the Prosecutor may file a petition requesting the Court to transfer the juvenile to the Adult Division of the Court.

B. No juvenile under the age of fourteen (14) years of age shall be charged as an adult for violations under this Statute.

(Source: WOS 2018-012, August 15, 2018, Section V)

#### **9.206 VICTIM'S PAST BEHAVIOR**

A. In order to convict a person of any offense defined in this Statute it shall not be necessary that the testimony of the alleged victim be corroborated.

B. Evidence of the victim's past sexual behavior including but not limited to: the victim's marital history, divorce history, or general reputation for promiscuity, non-chastity, or sexual mores contrary to tribal community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as follows:

1. The perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

2. The Tribal Court shall hold a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

3. Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the Prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing concerning such evidence.

(Source: WOS 2018-012, August 15, 2018, Section VI)

### **9.207 DEFENSES TO PROSECUTION**

A. In any prosecution in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

B. In any prosecution in which the offense depends on the victim's age, it is not a defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be; provided, that it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified based upon declarations as to age by the alleged victim.

(Source: WOS 2018-012, August 15, 2018, Section VII)

### **9.208 *Reserved***

### **9.209 STATUTE OF LIMITATIONS**

A. A prosecution for an offense under this Statute must be commenced within five (5) years after commission of the offense.

B. The set time period begins when the victim, if a child, turns eighteen years of age.

C. Time spent outside of the Tribal jurisdiction shall not be counted toward the statute of limitations to begin prosecution.

(Source: WOS 2018-012, August 15, 2018, Section IX)

## **9.210 OFFENSES**

**A. Criminal Sexual Conduct** is a crime that is punishable up to the Tribe's maximum jurisdiction and is a felony. A person is guilty of criminal sexual conduct if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

1. That other person is under 13 years of age.
2. That other person is at least 13 but less than 16 years of age and any of the following:
  - a. The actor is a member of the same household as the victim.
  - b. The actor is related to the victim by blood or affinity to the fourth degree.
  - c. The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.
  - d. The actor is a teacher, substitute teacher, or administrator, employee, volunteer or a contractual service provider of a school, school district, or intermediate school district in which that other person is enrolled and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.
  - e. The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home in which that other person is a resident, and the sexual penetration occurs during the period of that other person's residency.

3. Sexual penetration occurs under circumstances involving the commission of any other felony.
4. The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.
5. The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration.
6. The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
7. That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:
  8. The actor is related to the victim by blood or affinity to the fourth degree.
  9. The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

**A. Child Molestation** is a crime that is punishable up to the Tribe's maximum jurisdiction and is a felony. A person is guilty of the offense of Child Molestation when the person has, or knowingly causes:

1. another person under the age of eighteen (18) to have, sexual contact with another who is at least twelve (12) years old but less than fourteen (14) years old and the perpetrator is at least thirty-six (36) months older than the victim.
2. another person under the age of eighteen (18) to have, sexual contact with another who is at least fourteen (14) years old but less than sixteen (16) years old and not married to the perpetrator and the perpetrator is at least forty-eight (48) months older than the victim.

3. another person under the age of eighteen (18) to have sexual contact with another who is less than twelve years old (12) and the perpetrator is at least thirty-six (36) months older than the victim.

**B. Sexual Misconduct with a Child** is a crime that is punishable up to the Tribe's maximum jurisdiction and is a felony. A person is guilty of the offense of Sexual Misconduct with a Child when the person has, or knowingly causes:

1. another person under the age of eighteen (18) to have, sexual contact with another person who is at least sixteen (16) years old but less than eighteen (18) years old and not married to the perpetrator, if the perpetrator is at least sixty (60) months older than the victim, is in a significant relationship to the victim, and abuses that relationship in order to engage in or cause another person under the age of eighteen (18) to engage in sexual contact with the victim; or

2. another person under the age of eighteen (18) to have, sexual intercourse with another person who is at least sixteen (16) years old but less than eighteen (18) years old and not married to the perpetrator, if the perpetrator is at least sixty (60) months older than the victim, is in a significant relationship to the victim, and abuses that relationship in order to engage in or cause another person under the age of eighteen (18) to engage in sexual intercourse with the victim.

**C. Indecent Exposure** is a crime that is punishable up to the Tribe's maximum jurisdiction and is a felony. A person is guilty of the offense of Indecent Exposure if he or she knowingly or recklessly exposes his or her genitals or anus or she exposes her breast or breasts and another person is present or is reckless about whether such other person may be present and would be offended or alarmed by the act. Unless it is under circumstances in which that individual has a reasonable expectation of privacy. The provisions of this section shall apply regardless of whether the person violates the section in person or via the Internet or other electronic means.

**D. Indecent Exposure to a Child** is a crime that is punishable up to the Tribe's maximum jurisdiction and is a felony. A person is guilty of the offense of Indecent Exposure if he or she knowingly and purposefully exposes his or her genitals or anus or she exposes her breast or breasts and another person under the age of fifteen (15), unless it is under circumstances in which that individual has a reasonable expectation of privacy. The provisions of this section

shall apply regardless of whether the person violates the section in person or via the Internet or other electronic means.

**E. Public Sexual Indecency** is a crime that is punishable up to the Tribe's maximum jurisdiction and is a felony. A person commits the offense of Public Sexual Indecency by intentionally or knowingly engaging in any of the following acts, if another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act:

1. An act of sexual contact.
2. An act of oral sexual contact.
3. An act of sexual intercourse.
4. An act involving contact between the person's mouth, vulva or genitals and the anus or genitals of an animal.

The provisions of this section shall apply regardless of whether the person violates the section in person or via the Internet or other electronic means.

**F. Prostitution and Child Prostitution** see WOS Human Trafficking Statute

**G. Sexual Exposure of a Child** is a crime that is punishable up to the Tribe's maximum jurisdiction and is a felony. A person is guilty of the offense of Sexual Exposure of a Child when a person knowingly:

1. exposes his or her genitals to a child less than fifteen (15) years of age under circumstances in which he or she knows that his or her conduct is likely to cause affront or alarm to the child;
2. exposes his or her genitals to a child less than (15) fifteen years of age for the purpose of arousing or gratifying the sexual desire of any person, including the child; or

3. coerces or induces a child less than fifteen (15) years of age to expose the child's genitals for the purpose of arousing or gratifying the sexual desire of any person, including the child.

The provisions of this section shall apply regardless of whether the person violates the section in person or via the Internet or other electronic means.

**H. Sexual Abuse of a Child** is a crime that is punishable up to the Tribe's maximum jurisdiction and is a felony. A person is guilty of the offense of Sexual Abuse of a Child when a person:

1. knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct, actual or simulated;
2. knowingly capture by photographs, films, videotapes, develops or duplicates the photographs, films, or videotapes, or records a child engaging in sexual conduct, actual or simulated;
3. knowingly, by any means of communication, including electronic communication, persuades, entices, counsels, or procures a child under sixteen (16) years of age or a person the offender believes to be a child under sixteen (16) years of age to engage in sexual conduct, actual or simulated;
4. knowingly processes, develops, prints, publishes, transports, distributes, broadcasts, sells, exhibits, or advertises any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;
5. knowingly possesses any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;
6. possesses with intent to sell any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated; or

7. finances any of the activities, knowing that the activity is of the nature described as Sexual Abuse of a Child.

**I. Visual Representation of a Sexual Act involving a Child** is a crime that is punishable up to the Tribe's maximum jurisdiction and is a felony. A person commits the offense of Visual Representation of a Sexual Act involving a Child when a person attempts, conspires or knowingly possesses, produces, reproduces, distributes, broadcast, receives, or has the intent to distribute or broadcast, a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that:

1. depicts a minor engaging in sexually explicit conduct and is obscene, or
2. depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, and such depiction lacks serious literary, artistic, political, or scientific value.

**J. Incest** is a crime that is punishable up to the Tribe's maximum jurisdiction and is a felony. A person commits the offense of Incest when a person knowingly marries a person who is biologically related to the following persons:

1. Parent and child;
2. Grandparent and grandchild;
3. Brother and sister, or half-brother and half-sister;
4. Uncle and niece, or aunt and nephew; or
5. Cousins in the first degree.

(Source: WOS 2018-012, August 15, 2018, Section X)

**9.211 through 9.229 Reserved**

**9.230 SEVERABILITY**

If any section, subsection, paragraph, sentence, phrase or portion of this Statute is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

(Source: WOS 2018-012, August 15, 2018, Section XXX)

### **9.231 EFFECTIVE DATE**

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

(Source: WOS 2018-012, August 15, 2018, Section XXXI)

### **9.232 OTHER RELATED STATUTES**

See Crimes Statute; Criminal Conduct and Protection Statute; Sex Offense Statute; Sex Offender Registration and Notification Statute; Felony Defined Statute; Domestic Violence Statute; Victim's Rights Statute; Personal Protection Orders and No Contact Orders and Violations of Protective Order; or as may be amended.

(Source: WOS 2018-012, August 15, 2018, Section XXXII)