

**RESOLUTION OF THE TOHONO O'ODHAM LEGISLATIVE COUNCIL
(Enacting 1 Tohono O'odham Code Chapter 4 "Appointed Officers")**

RESOLUTION NO. 18-072

1 **WHEREAS, the Constitution of the Tohono O'odham Nation vests the Legislative Council**
2 **with all of the Nation's legislative powers, and with the Nation's fiscal powers,**
3 **including the authority "to manage any funds within the exclusive control of the**
4 **Tohono O'odham Nation. . . and to appropriate these funds for the benefit of the**
5 **nation and its members. All expenditures of these funds shall be pursuant to**
6 **appropriations or budgets authorized under resolutions or in accordance with**
7 **ordinances of the Tohono O'odham Council." (Constitution, Article V, Section 1;**
8 **Section VI, Section 1 and 1(d)(2)); and**

9 **WHEREAS, the Legislative Council is required by tribal and federal law and its class III**
10 **gaming compact to ensure the lawful expenditure of all the Nation's gaming**
11 **revenues, including revenues funding the Nation's governmental operations**
12 **(Ordinance for the Regulation of Gaming Activities within the Tohono O'odham**
13 **Nation, Section 302; 25 U.S.C. § 2710(b)(2)(B); Tohono O'odham Nation-State of**
14 **Arizona Gaming Compact, Section 3(aa)(2003)); and**

15 **WHEREAS, the Legislative Council exercises its fiscal and related powers, in part, by**
16 **appropriating funds and approving and monitoring expenditures for the**
17 **operation of the government; approving and amending program and**
18 **department budgets, approving budget modifications, and authorizing the**
19 **compensation of Nation's officials and employees; and**

20 **WHEREAS, the Legislative Council also adopts an administrative plan governing the**
21 **chairperson of the Nation's administration and management of the government**
22 **(Constitution, Article VII, Section 2(a)); and**

23 **WHEREAS, Article VII, Section 2(e) of the Constitution of the Tohono O'odham Nation**
24 **provides that the Nation's**

25 **chairman shall be the chief executive officer of the Tohono O'odham**
26 **Nation and shall exercise the following powers, subject to all express**
27 **limitations contained in this constitution. . . (e) With the approval of the**
28 **Tohono O'odham Council, to appoint the treasurer, and other officers and**
29 **heads of all governmental departments, who shall serve until replaced at**
30 **the request of the chairman.**

31 **(Constitution, Article VII, Section 2(e)); and**

32 **WHEREAS, pursuant to the Council's constitutional authority and Article III, Section 6(B) of**
33 **the Legislative Rules of the Tohono O'odham Legislative Council, the Legislative**
34 **Council committees receive and review the resumes and detailed written**
35 **background investigation reports for the Chairman's appointees to the Nation's**

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Page 2 of 3

1 treasurer, chief administrative officer, Gaming Office executive director,
2 Education Department executive director, and other officers or heads of
3 governmental departments; interview the appointees; and vote on resolutions
4 making appointments to those offices and may approve or disapprove such
5 appointments; and

6 **WHEREAS,** disapproved appointees' exercise of signature authority and the performance of
7 other functions in offices they no longer hold jeopardizes government services
8 that are provided to members; and

9 **WHEREAS,** the continued compensation of disapproved appointees is not justified by the
10 Constitution of the Tohono O'odham Nation, jeopardizes the Nation's financial
11 integrity, and exposes the Nation to a risk of loss; and

12 **WHEREAS,** an unapproved appointee's exercise of the Nation's sovereign powers and
13 authority over Nation's funds and resources without Council approval is
14 likewise unconstitutional; and

15 **WHEREAS,** by Resolution No. 16-311, the Legislative Council addressed disapproved
16 appointees, providing that disapproved appointees could no longer serve in,
17 perform the functions of, or be compensated for serving in the position for
18 which his or her appointment was disapproved, and the constitutionality of
19 Resolution No. 16-311 was upheld by the Judicial Court's December 22, 2016
20 order in *Edward Manuel v. Legislative Council*; and

21 **WHEREAS,** the proposed "Appointed Officers" law incorporates the provisions of Resolution
22 No. 16-311, the appointment process within the Legislative Rules, establishes a
23 process and timeframe for the appointment of the treasurer, and officers and
24 heads of governmental departments, requires background investigation
25 reports, and clarifies the amount of time an individual may perform the
26 functions of an appointed officer position without Council approval; and

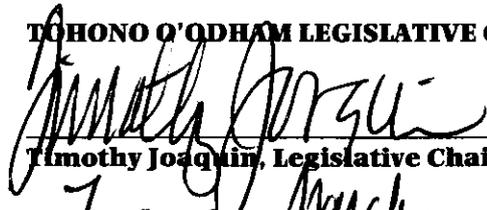
27 **WHEREAS,** the proposed "Appointed Officers" law also provides that disapproved
28 appointees may not be compensated effective on the date of their appointment
29 disapproval; and

30 **WHEREAS,** the Budget and Finance and Rules Committees, in coordination with the
31 Legislative Council officers, recommend enactment of the "Appointed Officers"
32 law.

33 **NOW, THEREFORE, BE IT RESOLVED** that the Tohono O'odham Legislative Council enacts 1
34 Tohono O'odham Code Chapter 4 "Appointed Officers."
35
36

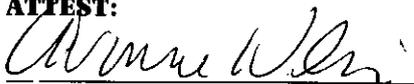
The foregoing Resolution was passed by the Tohono O'odham Legislative Council on the 05TH day of MARCH, 2018 at a meeting at which a quorum was present with a vote of 2,852.9 FOR; 231.7 AGAINST; -0- NOT VOTING; and [04] ABSENT, pursuant to the powers vested in the Council by Article V, Section 1; Article 1; Article VI, Section 1 and 1(a), 1(b), 1(d) and 1(1), and Article VII, Section 2(a),(d),and(e) of the Constitution of the Tohono O'odham Nation, adopted by the Tohono O'odham Nation on January 18, 1986; and approved by the Acting Deputy Assistant Secretary - Indian Affairs (Operations) on March 6, 1986, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat.984).

TOHONO O'ODHAM LEGISLATIVE COUNCIL



Timothy Joaquin, Legislative Chairman
7 day of March, 2018

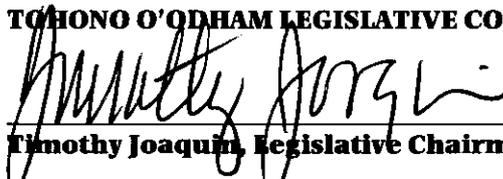
ATTEST:



Evonne Wilson, Legislative Secretary
7 day of March, 2018

Said Resolution was submitted for approval to the office of the Chairman of the Tohono O'odham Nation on the 7 day of March, 2018 at 12:29 o'clock, P .m., pursuant to the provisions of Section 5 of Article VII of the Constitution and will become effective upon his approval or upon his failure to either approve or disapprove it within 48 hours of submittal.

TOHONO O'ODHAM LEGISLATIVE COUNCIL



Timothy Joaquin, Legislative Chairman

APPROVED

on the 9 day of March, 2018

DISAPPROVED

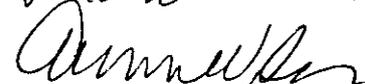
at 12:10 o'clock, P .m.



EDWARD D. MANUEL, CHAIRMAN
TOHONO O'ODHAM NATION

Returned to the Legislative Secretary on the 9 day of

March, 2018, at 12:10 o'clock, P .m.



Evonne Wilson, Legislative Secretary

ACTION: ENACTING 1 TOHONO O'ODHAM CODE CHAPTER 4 "APPOINTED OFFICERS"

MOVED: COUNCILWOMAN LORETTA LEWIS

SECOND: VICE CHAIRMAN QUINTIN C. LOPEZ

DATE: MARCH 05, 2018

DISTRICT	LEGISLATIVE REPRESENTATIVES	# OF VOTES	FOR	AGAINST	NOT VOTING	ABSENT
SIF OIDAK 235.8	1. MARY LOPEZ ()	117.9	X			
	2. LUCINDA ALLEN (Yolonda Garcia)	117.9	X			
SELLS 527.2	1. ARTHUR WILSON (<i>Absent</i>) (Evelyn Juan Manuel) (<i>Present</i>)	263.6	X			
	2. ADRIANNE TILLER (Idaleen Reyes)	263.6	X			
SCHUK TOAK 185.7	1. ANTHONY J. FRANCISCO JR. (<i>Absent</i>) (Teresa F. Donahue) (<i>Present</i>)	92.85	X			X
	2. QUINTIN C. LOPEZ (Agnes V. Joaquin)	92.85	X			
SAN XAVIER 232.3	1. DANIEL L.A. PRESTON III (Felicia Nunez)	116.15		X		
	2. JANICE FELIX ()	116.15	X			
SAN LUCY 231.1	1. JANA MONTANA (Diana Manuel)	115.55	X			
	2. GLORIA RAMIREZ (Lorraine Eller)	115.55		X		
PISINEMO 225.9	1. CHESTER ANTONE (Caroline D. Garcia)	112.95	X			
	2. MONICA K. MORGAN ()	112.95	X			
HICKIWAN 209.0	1. LOUIS R. LOPEZ (Shirley Molina)	104.5	X			
	2. SANDRA D. ORTEGA ()	104.5	X			X
GU VO 256.9	1. GRACE MANUEL ()	128.45	X			
	2. DALLAS LEWIS (<i>Absent</i>) (Nacho Flores) (<i>Present</i>)	128.45	X			X
GU ACHI 270.9	1. TIMOTHY L. JOAQUIN (Louis L. Johnson)	135.45	X			
	2. LORETTA LEWIS (Victoria Hobbs)	135.45	X			
CHUKUT KUK 337.7	1. BILLMAN LOPEZ (<i>Absent</i>) (Patricia Vicentl) (<i>Present</i>)	168.85	X			
	2. VIVIAN JUAN-SAUNDERS (Juanita Homer)	168.85	X			
BABOQUIVARI 372.1	1. FRANCES MIGUEL (Roberta E. Harvey)	186.05	X			
	2. LEANDER MASE (Francine Schooling)	186.05	X			X
TOTAL		3,084.6	2,852.9	231.7	-0-	[04]

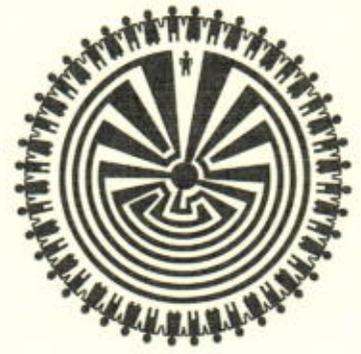


TOHONO O'ODHAM NATION
OFFICE OF THE
CHAIRMAN AND VICE CHAIRMAN

EDWARD D. MANUEL
CHAIRMAN

VERLON M. JOSE
VICE CHAIRMAN

O'ODHAM HA-WE:HEJED
"For the People"



March 9, 2018

HAND DELIVERED AND SENT VIA EMAIL

Tohono O'odham Legislative Council
P.O. Box 837
Sells, Arizona 85634

Re: Executive Veto Justification of Resolution No. 18-072

Hon. Members of the Legislative Council:

The Chairman's office and authority are created and bounded by the Constitution of the Tohono O'odham Nation; as Chairman, I am required to act within its terms as is the Legislative Council. Under the terms of the Constitution, it is my responsibility to veto legislation when I believe that they contain provisions that are unconstitutional.

Resolution No. 18-072 is hereby **VETOED** for the following reason(s):

Resolution No. 18-072 and the "Appointed Officers" ordinance approved therein **VIOLATE** the Constitution of the Tohono O'odham Nation.

The Appointed Officers ordinance violates the Constitution for the following reasons, among others, which I address section by section:

I. Constitutional Issues with Section 4002

Section 4002(B)(1) violates the Nation's Constitution because the Attorney General is an officer of the Nation and, therefore, Council may not exempt the Attorney General from the Nation's appointment requirements. The Nation's Constitution plainly states that the Chairman appoints "the treasurer, and other officers and heads of all governmental departments . . ." See Art. VII § 2(e). The council may not pass an ordinance that limits the Chairman's constitutionally delegated powers as it does here. Under the Constitution, the Chairman has the power to appoint all officers and departmental heads without Council placing limits on the Chairman's appointment powers. Therefore, the ordinance violates the Constitution.

Section 4002(B)(5) violates the Nation's Constitution because members of boards or committees serve in the same role or function as "officers and heads of all governmental departments,"

which require that they are appointed by the Chairman. Members of boards or committees are officers of the Nation and, therefore, Council may not exempt members of boards or committees from the Nation's constitutional appointment requirements. The Nation's Constitution plainly states that the Chairman appoints "the treasurer, and other officers and heads of all governmental departments . . ." See Art. VII § 2(e). Council may not pass an ordinance that limits the Chairman's constitutionally delegated powers as it does here. Under the Constitution, the Chairman has the power to appoint all officers and departmental heads without limitation from Council. Therefore, the ordinance violates the Constitution.

Section 4002(C) violates the Nation's Constitution because Legislative Council unlawfully expands the Constitutional limits on who is subject to appointment. The Nation's Constitution clearly states that the Chairman appoints "officers and heads of all governmental departments . . ." See Art. VII § 2(e). Therefore, under the Constitution, only (1) officers, and (2) department heads are subject to being "appointed." However, Council's ordinance illegally expands the constitutional definition of who may be appointed to include not only departments but all executive branch programs, and other major organizational units. Legislative Council may not change or redefine constitutional requirements without first amending the Nation's Constitution, which requires a vote by the people. Therefore, the ordinance violates the Constitution.

II. Constitutional Issues with Section 4003

Section 4003(B) violates the Nation's Constitution because the ordinance requires that the Executive Branch share a nominee's personally identifiable information with the Legislative Council in violation of applicable federal privacy laws. It is a violation of several federal privacy laws for the Executive Branch to openly share with the Legislative Branch a background investigation report that contains a nominee's personally identifiable information. Personally identifiable information includes information such as employment, education and salary history, credit reports, criminal records, and other types of background information. It is important to note that these privacy laws involve not only how one may "use" personally identifiable information, but often more importantly, how that information is initially obtained or accessed. The policies contained in the Tohono O'odham Nation Personnel Policies Manual ensure that the Nation complies with federal law. As written, the "Appointed Officers" ordinance requires that the Executive Branch violate applicable federal privacy laws. Therefore, the ordinance violates the Constitution.

The Office of Human Resources has the responsibility to screen all potential officer and department head nominees. All nominees undergo a comprehensive pre-employment background investigation per the Tohono O'odham Nation Personnel Policies Manual, adopted by Executive Order No. 99-01. The Nation's Office of Human Resources conducts background checks on all potential nominees for appointment to ensure that individuals who join the Nation's workforce are qualified, have potential to be productive and successful, and have honestly presented their qualifications. Because of the legal implications of these processes, Human Resources coordinates the collection and conducts the screening of all such information. Nominations are contingent on the successful completion of all applicable background investigations. The

Chairman and Vice- Chairman—as elected officials—are the only executive branch personnel expressly exempt from these policies.

Subsection 4003(F) violates the Nation’s Constitution because Council’s ordinance allows for a nominee to serve in a position without having received Legislative Council’s approval and the Chairman’s formal appointment. The appointment process is a three-part process: (1) Chairman nominates an individual for an officer or department head position, (2) Council approves the nomination, and (3) the Chairman formally appoints the approved nominee. Council does not approve an appointed officer’s appointment; Council approves the Chairman’s nomination. The Chairman makes the final decision on whether to appoint a nominee that received Council’s approval. Therefore, the ordinance violates the Constitution.

III. Constitutional Issues with Section 4004

Section 4004(A) violates the Nation’s Constitution for two reasons: (1) it provides that the “Legislative Council shall approve an appointed officer’s appointment by resolution,” and (2) that Legislative Council’s approval is effective during the remainder of the chairperson’s term of office.”

Reason (1) violates the Nation’s Constitution because it gives Council the power to appoint officers and department heads; however, the Constitution expressly delegates this power to the Chairman, and, with Council’s approval, the **Chairman appoints** the “treasurer and other officers and heads of all governmental departments.” The appointment process is a three-part process: (1) Chairman nominates an individual for an officer or department head position, (2) Council approves the nomination, and (3) the Chairman appoints the approved nominee. The Constitution only allows for Council to “approve” of a nominee—not to “appoint” officers and department heads. Therefore, the ordinance violates the Constitution.

Reason (2) violates the Nation’s Constitution because the ordinance says that Council’s approval is only “effective during the remainder of the chairperson’s term of office.” However, the Nation’s Constitution plainly states that appointees “shall serve until replaced at the request of the chairman.” See Art. VII § 2(e). Meaning, an appointee serves in his or her position until replaced by that same chairman or by a chairman later elected. Council’s approval is valid for as long as that appointee continues to serve in his or her position—appointees from the previous administration (i.e., holdovers) will continue to serve in those positions pending the appointment of a successor, if any. Therefore, the ordinance violates the Constitution.

Section 4004(B) violates the Nation’s Constitution because it requires that appointees be re-appointed whenever a chairman is “elected or re-elected.” However, the Nation’s Constitution plainly states that appointees “shall serve until replaced at the request of the chairman.” See Constitution, Art. VII § 2(e). This means that an appointee serves in his or her position until replaced by that same chairman or by a chairman later elected. Nominees should not hold office or serve in their selected positions until officially appointed—appointees from the previous administration (i.e., holdovers) will continue to serve in those positions pending the appointment of a successor.

IV. Constitutional Issues with Section 4005

Section 4005(A) violates the Nation’s Constitution because it gives Council the power to appoint officers and department heads; however, the Constitution expressly delegates this power to the Chairman, and, with Council’s approval, the **Chairman appoints** the “treasurer and other officers and heads of all governmental departments.” The appointment process is a three-part process: (1) Chairman nominates an individual for an officer or department head position, (2) Council approves the nomination, and (3) the Chairman appoints the approved nominee. The Constitution only allows for Council to “approve” of a nominee—not to “appoint” officers and department heads. Therefore, the ordinance violates the Constitution.

Section 4005(B), as written, requires further clarification because it makes no distinction between the appointment process that is applicable to a formal “nominee” for an officer or department head position and a person simply acting in an “interim” or “acting” status in an officer or department head position while a nominee is being sought or a nomination is being contemplated. This distinction between roles is extremely important because vacancies in officer or executive director positions are extremely disruptive to Executive Branch operations and are the main cause of instability in department operations. Officers and executive directors fill valuable roles in any administration by providing management, guidance, and direction to their offices and departments.

To remedy any confusion with this **Section 4005(B)**, any new ordinance must address the difference in the appointment process between a formal “nominee” for an officer or department head position and a person acting in an “interim” or “acting” status, or both. Persons acting in an “interim” or “acting” role may or may not have been formally nominated by the Chairman to fill that chosen position. Sometimes, a person in an “interim” or “acting” role is simply directed to fill that officer or department head position until another’s formal nomination may be made; however, in that situation, a person in an “interim” or “acting” role would not require Legislative Council approval because they are not being formally nominated for the position as an officer or department head. As written, the Council’s ordinance does not make any distinction between the two nor does it address situations where a person may be placed in an “interim” or “acting” role. This constitutional issue can be easily remedied by adding language or a provision to an ordinance that allows for a person to act in an “interim” or “acting” status while a nomination is being sought or is pending approval, but the ordinance does not make such a distinction. Further revisions must be made to any appointive officers ordinance to address these differences.

As stated in the Special Counsel’s March 6, 2018 letter to your legislative attorneys regarding the creation of an appointive officers ordinance, I remain committed to discussions with Legislative Council to devise a fair and equitable compromise that will position the Nation’s government to best serve the interests of the O’odham.

Respectfully,



Edward D. Manuel
Chairman

Cc: Verlon M. Jose, Vice-Chairman
Wendell R. Matt, Special Counsel

