

RESOLUTION OF THE TOHONO O'ODHAM LEGISLATIVE COUNCIL
(Approving a Limited Waiver of the Tohono O'odham Utility Authority's Sovereign
Immunity for the Purpose of Enabling Participation in any Power Purchase
Agreement or Other Agreement Negotiated by Southwest Public Power
Agency, Inc. ("SPPA") on behalf of SPPA Participants)

RESOLUTION NO. 22-184

1 **WHEREAS,** the Tohono O'odham Nation ("Nation") is a federally recognized Indian tribe,
2 organized pursuant to Section 16 of the Indian Reorganization Act of June 18,
3 1934 (48 Stat. 984; 25 U.S.C. § 476), which exercises sovereignty over its members,
4 its enterprises, and its lands; and

5 **WHEREAS,** the Constitution of the Tohono O'odham Nation vests the Legislative Council with
6 the authority to "authorize, charter and regulate public or private corporations
7 and associations whether organized for profit, or for non-profit or charitable
8 purposes" and "to promote, protect and provide for public health, peace, morals,
9 education and general welfare of the Tohono O'odham Nation and its members"
10 (Constitution, Article VI, Section 1(e) and Section 1(c)(2)); and

11 **WHEREAS,** the Second Restated Plan of Operation of the Tohono O'odham Utility Authority
12 ("TOUA Plan of Operation"), which is the currently effective organizing document
13 for the Tohono O'odham Utility Authority ("TOUA") and which is codified at 24
14 Tohono O'odham Code Chapter 1, was adopted by Legislative Council Resolution
15 No. 91-175; and

16 **WHEREAS,** TOUA's purposes, as stated in the TOUA Plan of Operation, include furnishing
17 electric services within the Tohono O'odham Nation; and

18 **WHEREAS,** TOUA does not presently generate electricity and all electricity supplied to TOUA
19 customers must be purchased through purchase power agreements; and

20 **WHEREAS,** the Southwest Public Power Agency, Inc. ("SPPA") is a joint action agency
21 authorized by Arizona state law, for the purpose of giving participating publicly
22 owned, not-for-profit electric utilities a mechanism to jointly manage and
23 dispatch their power resources and pursue affordable power supply
24 opportunities for the customers they serve; and

25 **WHEREAS,** SPPA manages through a formal pool all or most of its participants' power
26 resources, and when necessary, SPPA facilitates the negotiation of new purchase
27 power agreements to supply additional energy needed to meet SPPA participants'
28 customers' loads; and

29 **WHEREAS,** on February 15, 2022 and by Resolution No. 22-051, the Legislative Council did
30 approve a limited waiver of TOUA's sovereign immunity for the purpose of
31 enabling TOUA to participate in the Amended and Restated Administration and

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1 **Scheduling Agreement ("Administration Agreement") entered into by and among**
2 **SPPA and the Southwest Public Power Resources Group Participants in the**
3 **Sempra Power Purchase Agreement ("SPPA Participants"); and**
4 **WHEREAS,** **the Administration Agreement is currently the primary guiding agreement**
5 **among SPPA and the SPPA Participants regarding scheduling and administration**
6 **of the SPPA Participant's energy; and**
7 **WHEREAS,** **the purpose of the Administration Agreement is to provide for certain agency**
8 **services, sharing of information and coordination of activities of the SPPA**
9 **Participants with respect to their participation in certain separate power**
10 **purchase agreements, the Firm Energy from which is contributed to the pool**
11 **administered and scheduled by SPPA; and**
12 **WHEREAS,** **the Administration Agreement includes a Dispute Resolution provision that,**
13 **among other things, requires that all tribes and tribal parties to the Agreement**
14 **agree to irrevocably waive sovereign immunity for the purposes of: (i) any action**
15 **or arbitration arising out of or pertaining to the Administration Agreement, (ii)**
16 **enforcing arbitration under the Administration Agreement, and (iii) enforcing**
17 **any arbitration award rendered in an arbitration pursuant to the Administration**
18 **Agreement; and**
19 **WHEREAS,** **the Administration Agreement also includes an Indemnification provision,**
20 **which provides mutual indemnification covenants between SPPA and TOUA; and**
21 **WHEREAS,** **SPPA is aware of and respects tribal sovereignty, and the Administration**
22 **Agreement conditions participation of tribal SPPA participants upon the**
23 **provision of a resolution that waives tribal sovereign immunity for the limited**
24 **purposes of any action or arbitration arising out of the Administration**
25 **Agreement or enforcing the Administration Agreement, and such resolution**
26 **must come from either (a) the governing body of the Tribal Participant or (b) the**
27 **governing body of the Indian Tribe, Nation or Community; and**
28 **WHEREAS,** **as the need for Firm Energy grows, both for TOUA and other SPPA participants, it**
29 **is envisioned that the SPPA participants will continue to request, and SPPA will**
30 **continue to pursue and negotiate on behalf of SPPA participants, power purchase**
31 **agreements and other agreements for contribution of resources to the pool**
32 **administered and scheduled by SPPA; and**

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1 **WHEREAS,** as evidenced by the terms and conditions of the Amended and Restated Power
2 **Purchase Agreement with Mesquite Power, LLC (which was negotiated by SPPA**
3 **and for which, on February 15, 2022 and by Resolution No. 22-050, the Legislative**
4 **Council did approve a limited waiver of the Tohono O'odham Utility Authority's**
5 **sovereign immunity for the purpose of enabling TOUA to participate in the**
6 **agreement), when SPPA negotiates purchase power agreements for the SPPA**
7 **participants, the dispute resolution and indemnification provisions are**
8 **substantially similar to the provisions of the Administration Agreement; and**

9 **WHEREAS,** it would benefit TOUA during any subsequent SPPA negotiations of purchase
10 **power agreements if TOUA could have a resolution that grants a waiver of TOUA's**
11 **sovereign immunity for any power purchase agreement or other agreement**
12 **negotiated by SPPA if that waiver is consistent with the waivers provided for the**
13 **Administration Agreement; and**

14 **WHEREAS,** the Legislative Commerce Committee has reviewed this request and TOUA's
15 **proposal, and recommends that it is in the best interests of the Nation to approve**
16 **a limited waiver of TOUA's sovereign immunity for any power purchase**
17 **agreement or other agreement negotiated by SPPA if that waiver is consistent**
18 **with the waivers provided for the Administration Agreement so that TOUA may**
19 **timely enter into and participate in such negotiations.**

20 **NOW, THEREFORE, BE IT RESOLVED that the Tohono O'odham Legislative Council approves a**
21 **limited waiver of sovereign immunity of the TOUA in favor of any provider of**
22 **power and for any power purchase agreement or other agreement negotiated by**
23 **Southwest Public Power Agency, Inc., and TOUA may enter into such agreement,**
24 **provided that such limited waiver is consistent and in accordance with, and**
25 **subject to the following limitations, which are substantially similar to the**
26 **provisions of the Amended and Restated Administration and Scheduling**
27 **Agreement By and Among Southwest Public Power Agency, Inc. and Southwest**
28 **Public Power Resources Group Participants, and provided that nothing in this**
29 **resolution shall be construed as a waiver of the Nation's sovereign immunity:**

- 30 1. TOUA may irrevocably waive TOUA's sovereign immunity for the limited
31 purposes of any action or arbitration (a) arising out of or pertaining to the
32 agreement, (b) enforcing any agreement to arbitrate a dispute pursuant to

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the agreement, and (c) enforcing any arbitration award rendered in arbitration.

2. TOUA may agree that it will not raise failure to exhaust federal administrative or tribal administrative or judicial remedies as a defense to any action brought pursuant to the agreement.
3. TOUA's waivers authorized herein shall be limited to actions filed in the United States District Court for the District of Arizona, and appropriate appellate review, if and to the extent that jurisdiction is otherwise proper in those courts. If jurisdiction is not proper in the above listed courts, then such waivers shall extend to actions filed in the courts of the State of Arizona and appropriate appellate review of such courts. If such federal and state courts are finally determined not to have jurisdiction over such action, then the waivers shall extend to actions filed in any court of competent jurisdiction. With respect to actions filed as specified above in a court of the State of Arizona, venue shall be exclusively in the Maricopa County, Arizona Superior Court.
4. The remedies rendered in any arbitration or litigation shall be limited to specific performance of the agreement or money damages, provided that, the court or arbitrator shall have the authority to order execution against only (a) any assets or revenues of TOUA, including without limitation all revenues of TOUA, excluding all realty owned by the Tohono O'odham Nation upon which any assets of TOUA are located, and (b) proceeds of any applicable insurance policies maintained by TOUA. In no instance shall any enforcement be allowed against any assets of the Tohono O'odham Nation.
5. This resolution may be deemed the authorizing resolution for such a limited waiver of sovereign immunity, provided that the TOUA Management Board (a) determines by a vote that any waivers of sovereign immunity in the agreement are consistent with the limitations of this resolution, and (b) approves TOUA's entry into the agreement consistent with the TOUA Plan of Operation.

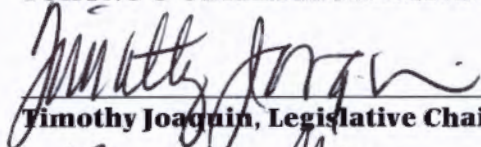
RESOLUTION NO. 22-184

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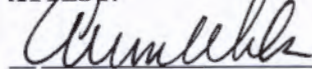
The foregoing Resolution was passed by the Tohono O'odham Legislative Council on the 13TH day of MAY, 2022 at a meeting at which a quorum was present with a vote of 2,661.5 FOR; -0- AGAINST; 556.5[02] NOT VOTING; and [04] ABSENT, pursuant to the powers vested in the Council by, Article VI, Section 1(e) and Section 1(c)(2) 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
17 day of May, 2022

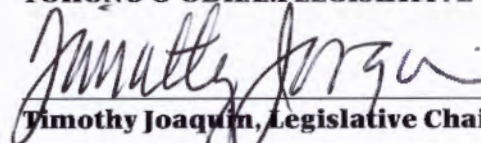
ATTEST:



Evonne Wilson, Legislative Secretary
15 day of May, 2022

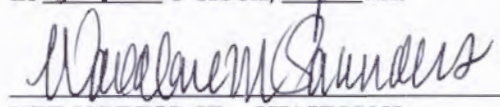
Said Resolution was submitted for approval to the office of the Chairman of the Tohono O'odham Nation on the 17 day of May, 2022 at 9:49 o'clock, a.m., pursuant to the provisions of Section 5 of Article VII of the Constitution and will become effective upon his approval or upon his failure to either approve or disapprove it within 48 hours of submittal.

TOHONO O'ODHAM LEGISLATIVE COUNCIL



Timothy Joaquin, Legislative Chairman

APPROVED
 DISAPPROVED

on the 17th day of May, 2022
at 3:05 o'clock, p.m.


NED NORRIS, JR., CHAIRMAN
TOHONO O'ODHAM NATION

RESOLUTION NO. 22-184

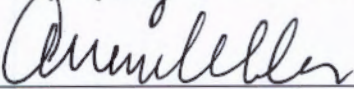
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Returned to the Legislative Secretary on the 17 day of

May, 2022, at 3:47 o'clock, p.m.



Evonne Wilson, Legislative Secretary

ACTION: APPROVING A LIMITED WAIVER OF THE TOHONO O'ODHAM UTILITY AUTHORITY'S SOVEREIGN IMMUNITY FOR THE PURPOSE OF ENABLING PARTICIPATION IN ANY POWER PURCHASE AGREEMENT OR OTHER AGREEMENT NEGOTIATED BY SOUTHWEST PUBLIC POWER AGENCY, INC. ("SPPA") ON BEHALF OF SPPA PARTICIPANTS

MOVED: COUNCILWOMAN GRACE MANUEL

SECOND: COUNCILWOMAN JANICE FELIX

DATE: MAY 13, 2022

DISTRICT	LEGISLATIVE REPRESENTATIVES	# OF VOTES	FOR	AGAINST	NOT VOTING	ABSENT
SIF OIDAK 245.6	1. MARY LOPEZ (Ann M. Garcia)	122.8	X			
	2. LUCINDA ALLEN (Francis Homewytewa)	122.8	X		X	
SELLS 556.5	1. ARTHUR WILSON ()	278.25			X	X
	2. EVELYN JUAN-MANUEL (Arvada Liston)	278.25			X	
SCHUK TOAK 190.5	1. TERESA F. DONAHUE (Alberta Espinoza)	95.25	X			
	2. DELISA M. RAMON (Sharon A. Francisco)	95.25	X			
SAN XAVIER 242.6	1. DANIEL L.A. PRESTON III (Racheal Vilson-Stoner)	121.3	X			
	2. JANICE FELIX (Adam P. Andrews)	121.3	X			
SAN LUCY 243.8	1. JANA MONTANA (Lorraine M. Eller)	121.9	X			
	2. ROGER MANUEL (Christina Andrews)	121.9	X			X
PISINEMO 232.7	1. MARIETTA MARTIN ()	116.35	X			
	2. EDWARD D. MANUEL (Monica Morgan)	116.35	X			
HICKIWAN 216.6	1. LOUIS R. LOPEZ ()	108.3	X			
	2. DELMA M. GARCIA ()	108.3	X			
GU VO 270.7	1. GRACE MANUEL ()	135.35	X			
	2. CYNTHIA SAAVEDRA (Dallas Lewis)	135.35	X			
GU ACHI 278.5	1. TIMOTHY L. JOAQUIN ()	139.25	X			
	2. VICTORIA HOBBS (Tonya L. Joaquin)	139.25	X			
CHUKUT KUK 351.6	1. MARLAKAY HENRY (Billman Lopez)	175.8	X			X
	2. VIVIAN JUAN-SAUNDERS (Cornelius Antone)	175.8	X			
BABOQUIVARI 388.9	1. ALBERTA J. RAY (<i>Absent</i>) (Frances G. Antone) (<i>Present</i>)	194.45	X			X
	2. LEANDER MASE (Francine Schooling)	194.45	X			
	TOTAL	3,218.0	2,661.5	-0-	556.5[02]	[05]