

RESOLUTION OF THE TOHONO O'ODHAM LEGISLATIVE COUNCIL
(Authorizing Settlement of the Claim asserted by T.L. Roof
& Associates against OCM)

RES. NO. 413-90

1 WHEREAS, by letter of September 14, 1990, T.L. Roof & Associates
2 Construction Co. ("T.L. Roof") submitted to O'odham
3 Construction & Materials Co. ("OCM") a claim for \$86,483
4 arising out of concrete which was supplied by OCM for use
5 in the construction of the Indian Oasis District
6 Administration Building and which allegedly failed to meet
7 project specifications; and

8 WHEREAS, the claim presented by T.L. Roof purportedly represents:
9 (1) the actual costs incurred by T.L. Roof in removing and
10 replacing the allegedly nonconforming concrete supplied
11 by OCM (claimed to be \$52,919); plus (2) delay damages and
12 liquidated damages (\$15,446 and \$14,000, respectively),
13 claimed by T.L. Roof to represent a 28-day delay on the
14 entire project; and (3) an overhead charge (\$4,118); and

15 WHEREAS, by Resolution No. 390-90, the Tohono O'odham Legislative
16 Council authorized and directed the Chairman's Designee
17 and the Attorney General to: (1) initiate discussions
18 with T.L. Roof and other appropriate persons involved in
19 the Indian Oasis School District construction project,
20 with respect to the claim asserted by T.L. Roof against
21 OCM, and (2) to present a recommendation to the Council
22 concerning whether, or to what extent and on what terms,
23 the claim should be settled; and

24 WHEREAS, meetings were held between T.L. Roof, OCM, Chuck
25 Westenburg, Inc. ("Westenburg"), the Chairman's Designee,
26 the Attorney General, and other interested parties, at
27 which time the Attorney General presented the Tohono
28 O'odham Nation's legal position on T.L. Roof's claim and
29 continued performance by OCM under its purported concrete
30 supply agreement with Westenburg; and

31 WHEREAS, Westenburg owes OCM \$42,145 for delivered and accepted
32 concrete and for certain equipment rentals through October

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18, 1990, exclusive of the amount OCM charged Westenburg for the purportedly nonconforming concrete pour; and

WHEREAS, in an attempt to settle this disputed matter, the Attorney General and Chairman's Designee informed the other parties that they would recommend to the Council a settlement on the following terms: Payment to OCM for all outstanding invoices on concrete and equipment rentals, less \$10,867 representing: (a) \$3,505 for certain itemized amounts in T.L. Roof's claim which, had OCM's right to cure the deficiencies been honored, OCM would have subcontracted and paid for out-of-pocket, and (b) 25% of the liquidated and delay damages (\$7,362), and (c) an agreement by OCM to continue to supply concrete for the balance of the project, with a limitation of future liability to removal of deficient concrete and repouring conforming concrete (thereby waiving delay, liquidated and other damages); and

WHEREAS, T.L. Roof rejected this proposal and offered a counter-proposal on the following terms, which represents a reduction of only \$2,643 from their original demand of \$86,483: (1) immediate cash payment of \$70,000 by OCM; (2) that an additional \$14,000 (which represents T.L. Roof's entire claim for liquidated damages) be set aside in escrow and be paid by OCM to the extent of any claim the School District later asserts against T.L. Roof for liquidated damages; and (3) T.L. Roof would waive other damages, not yet asserted, it alleges were suffered as a result of additional subcontractor costs incurred due to purported delays in OCM concrete deliveries; and

WHEREAS, the Nation's officials presented an amendment to their proposal outlined above which would increase the offset to \$32,405, the cost OCM would have incurred had it performed the removal and restoration work (including OCM

1 payroll and other operational expenses in addition to the
2 costs of subcontracting certain tasks); and

3 WHEREAS, T.L. Roof rejected the amended settlement proposal made
4 by the Nation's officials; and

5 WHEREAS, the Chairman's Designee and Attorney General have
6 recommended rejection of T.L. Roof's counter-proposal; and

7 WHEREAS, the Chairman's Designee and the Attorney General have
8 presented recommended terms of a final settlement offer
9 to T.L. Roof and Westenburg, together with a request for
10 authorization to commence litigation in the absence of a
11 settlement; and

12 WHEREAS, OCM is a department of the Nation and the Nation
13 accordingly has a sovereign right to assert OCM's and the
14 Nation's immunity from suit.

15 NOW, THEREFORE, BE IT RESOLVED that:

- 16 1. The Tohono O'odham Legislative Council hereby rejects
17 T.L. Roof's counter-proposal for settlement described
18 above.
- 19 2. The Tohono O'odham Legislative Council hereby
20 authorizes and direct the Chairman's Designee to
21 notify Westenburg in writing, with a copy to T.L.
22 Roof, that OCM's purported concrete supply agreement
23 with Westenburg is cancelled and terminated for
24 failure of Westenburg to pay for delivered and
25 accepted concrete and equipment rentals.
- 26 3. The Tohono O'odham Legislative Council hereby
27 authorizes the Chairman's Designee and the Attorney
28 General to present to T.L. Roof and Westenburg the
29 following offer of settlement of all of OCM's alleged
30 liability, present and future, with respect to the
31 supply of concrete by OCM on the Indian Oasis School
32 District construction project:
 - a. Subject to offset under paragraph b below, payment
by OCM to T.L. Roof of \$42,289 consisting of: (1)
\$32,405, which represents the cost OCM would have
incurred if it had removed and replaced the non-
conforming concrete; plus (2) \$7,362, which
represents seven days of delay and liquidated
damages (\$3,862 and \$3,500, respectively); plus
(3) \$2,522, which represents the 5% overhead cost
incurred by T.L. Roof as a result of having to
remove and replace the nonconforming concrete,
calculated on \$50,436 -- the claimed amount of
T.L. Roof's actual cost of performing the removal
and restoration work (\$52,919) less the \$2,483
which T.L. Roof has acknowledged was incorrectly
included in the \$52,919 figure.

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- b. Offset the \$42,289 payment to T.L. Roof against the \$42,145 amount owed to OCM for concrete delivered to and accepted by Westenburg, together with equipment rentals by Westenburg (the last related invoice for concrete and equipment bearing a date of October 18, 1990), leaving a net payment of \$144 to T.L. Roof.
- c. A release executed by T.L. Roof and Westenburg, which, releases OCM from all present or future claims, including but not limited to any claim for delay damages, arising out of OCM's purported agreement to supply concrete to Westenburg, any concrete delivered pursuant to the agreement, any work performed by OCM pursuant to the concrete supply agreement, or any failure of OCM to timely deliver the requested concrete.
- d. An offer to hold this settlement proposal open for 10 days following receipt of the proposal by T.L. Roof and Westenburg.

4. In the event the above-described settlement proposal is not accepted by T.L. Roof and Westenburg, the Tohono O'odham Legislative Council hereby authorizes the Chairman's Designee and the Attorney General to: (1) commence an action in the Tribal Court of the Tohono O'odham Nation against Westenburg for failure to pay OCM for the concrete and equipment rentals; (2) further make a claim, as appropriate, against the surety which gave the payment bond on the School District construction project; (3) assert the defense of sovereign immunity in the event a claim is made against OCM or the Tohono O'odham Nation by T.L. Roof or others arising out of the construction project, whether such claim is made in a tribal, state or federal forum; and (4) take such other actions as may be appropriate to protect the interests of the Nation in connection with any litigation related to the claim.

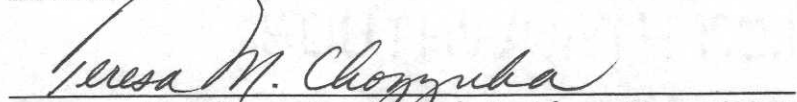
The foregoing Resolution was passed by the Tohono O'odham Council on the 9th. day of November, 1990 at a meeting at which a quorum was present with a vote of 1,444.0 for; 280.0 against; -0- not voting; 02 absent, pursuant to the powers vested in the Council by Section 1 (f) of Article VI of the Constitution 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


 Edward D. Manuel, Legislative Chairman

9th day of November, 1990.

ATTEST:


 Teresa M. Choyguha, Legislative Secretary
9th day of November, 1990.

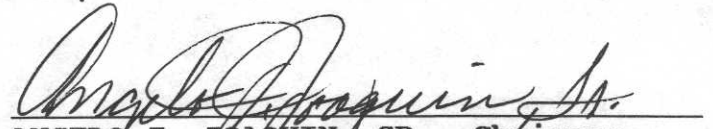
1 Said Resolution was submitted for approval to the office of the
Chairman of the Tohono O'odham Nation on the 13th day of
2 November, 19 90, at 6:57 o'clock, P.M.,
3 pursuant to the provisions of Section 5 of Article VII of the
Constitution and will become effective upon his approval or upon
4 his failure to either approve or disapprove it within 48 hours of
submittal.

5 TOHONO O'ODHAM LEGISLATIVE COUNCIL

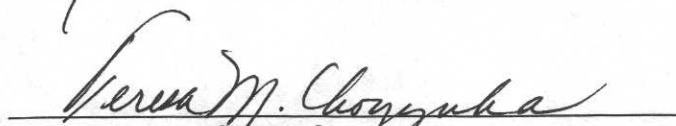
6 
7 Edward D. Manuel, Legislative Chairman

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9 [X] APPROVED) on the 13 day of Nov., 1990.

10 [] DISAPPROVED) at 12:34 o'clock, P.M.

11 
12 ANGELO J. JOAQUIN, SR., Chairman
13 TOHONO O'ODHAM NATION

14 Returned to the Legislative Secretary on the 13th day of
15 November, 19 90, at 4:45 o'clock, P.M.

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17 Teresa M. Choyguha
18 Legislative Secretary

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MOVED: Joanne C. Preston

SUBJECT: Authorizing Settlement of the

SECOND: Eugene Enis

Claim asserted by T.L. Roof & Assoc.

DATE: November 09, 1990

against OCM

RESOLUTION NO. 413-90

DISTRICTS	REPRESENTATIVES	# OF VOTES	FOR	AGAINST	NOT VOTING	ABSENT
BABOQUIVARI 229.0	1. Earl A. Francisco (Kenneth Chico, Sr.) 2. Joann Garcia (Frances Miguel)	114.5 114.5	X X			
CHUKUT KUK 163.0	1. Rosita Ruiz (Rosemary Lopez) 2. Kenneth G. Williams (Harriet Toro)	81.5 81.5	X X			X
GU ACHI 166.0	1. Percy Lopez () 2. Alex J. Ramon (Fernando Joaquin)	83.0 83.0		X X		
GU VO 114.0	1. Cross Antone (Juan Joe Cipriano) 2. Virgil Lewis (Michael Flores)	57.0 57.0		X X		
HICKIWAN 125.0	1. Lloyd Francisco (Billy C. Manuel) 2. Lenora Montana ()	62.5 62.5	X X			X
PISINEMO 119.0	1. Johnson Jose () 2. Edward Manuel (Alex Antone)	59.5 59.5	X X			
SAN LUCY 106.0	1. Albert Manuel, Jr. (Max P. Jose) 2. John Reno ()	53.0 53.0	X X			
SAN XAVIER 127.0	1. Eugene Enis. Sr. (Michael Rios) 2. Joanne C. Preston (Carmelita Mattias)	63.5 63.5	X X			
SCHUK TOAK 107.0	1. JoAnn Francisco (David Valenzuela Sr.) 2. Joseph Juan (Frances Francisco)	53.5 53.5	X X			
SELLS 310.0	1. Joseph T. Joaquin (Larry Garcia) 2. Andrew Patricio (Daniel Lopez)	155.0 155.0	X X			
SIF OIDAK 158.0	1. Mary Ann Antone (Nina Jose) 2. Willard Juan, Sr. (Melissa Gregorio)	79.0 79.0	X X			
	TOTAL	1,724.0	1,444.0	280.0	-0-	02

**PASSED VOTES