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ELEVEN AUTONOMOUS BANDS

Resolution No: 04-07-08
Date: July 26, 2004
Subject: ADOPT TERO ORDINANCE

WHEREAS: The Pit River Tribe is a federally recognized tribe composed of eleven autonomous bands located in Northeastern California since time immemorial, AND;

WHEREAS: The Pit River Tribe is governed by the Pit River Council, the body duly elected under the constitution of the Pit River Tribe, adopted August 16, 1987, and approved by the assistant Secretary of Interior for Indian Affairs, December 3, 1987, AND;

WHEREAS: The Pit River Tribal Council is empowered by Articles VII of the Constitution to enact all ordinances and resolutions which shall be necessary and proper for carrying into effect the council's powers and responsibilities, contract with federal, state, and tribal governments, private enterprises, individuals, and organizations, AND;

WHEREAS: The Pit River Tribal Council has the authority to charter and regulate independent organizations, subordinate organizations, committees and boards of officials of the Tribe and delegate powers, AND;

NOW THEREFORE BE IT RESOLVED, that the TERO Ordinance be adopted by the Pit River Tribal Council.

ATWAMSINI

ASTARAWI

ATSUGEWI

APORIGE

AJUMAWI

HEWISEDAWI

ILLMAWI

ITSATAWI

ROSELEKTE

HAMMAWI

MADESI

PIT RIVER TRIBE
TRIBAL EMPLOYMENT RIGHTS ORDINANCE
STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND
APPLICATION OF INDIAN PREFERENCE

1.0 Short Title and Policy

The short title of this Ordinance shall be the Tribal Employment Rights Ordinance, or TERO. As a guide to the interpretation and application of this Ordinance, the public policy of the Pit River Tribe is declared to be as follows:

Like land, water, and minerals, jobs, subcontracts, leases and contracts on or near the Pit River Reservation are an important resource for Indian people and Indians must use their rights to obtain their rightful share of such opportunities as they become available. Indians have unique employment rights, subcontract and contract rights and the Pit River Tribal Government has the inherent sovereign power to pass laws to implement and enforce those special rights on behalf of Indians. Indians are also entitled to the protection of the laws that the Federal Government has adopted to combat employment discrimination, and tribal governments can and should play a role in the enforcement of those laws. The Pit River Tribe believes it is important to establish an employment rights program and office in order to optimize the aforementioned laws and powers to increase employment of Indian workers and businesses and to eradicate discrimination against Indians.

2.0 Definitions

2.1 "Commission" and "Office" means the Tribal Employment Rights Commission and its office.

2.2 "Council" means the Pit River Tribal Council.

2.3 "Director" means the director of the Tribal Employment Rights Office.

2.4 "Employee" means any person employed for remuneration.

2.5 "Covered Employer" means any person, company, contractor, subcontractor or entity located or engaging in commercial or employment activity on or near the Pit River Reservation, and which employs two or more persons.

2.6 "Entity" means any person, partnership, corporation, joint venture, government, governmental enterprise, or any other natural or artificial person or organization. The term "entity" is intended to be as broad and encompassing as possible to ensure this Ordinance's jurisdiction, and the term shall be so interpreted by the Commission and the courts.

2.7 "Indian" means any member of any federally recognized Tribe, or any person who furnishes documentary proof that he or she is recognized as an Indian by the United States pursuant to its trust responsibility to American Indians.

2.8 "Indian Contractor" shall mean a firm which qualifies for Indian contract preference certification under this Ordinance.

2.9 "Indian Firm" means a firm or business certified by the Commission as eligible for Indian Preference in contracting or subcontracting; provided that Indians hold at least 51% ownership interest in such firm or business and exercise majority management control.

2.10 "On or Near" means either on Pit River Tribal lands or within a reasonable commuting distance of those lands, including the Tribe's ancestral lands constituting the "100 mile square" which was recognized and approved by the Secretary of the Interior on December 12, 1987, and by the Indian Claims Commission in its July 29, 1959 Findings of Fact and Opinion in Docket No. 347.

2.11 "Person" means natural persons, either tribal member or non-tribal member, and foreign and domestic corporations and tribal governments and their political subdivisions.

2.12 "Pit River Reservation" means all those lands held in trust by the United States for the benefit of the Pit River Tribe.

2.13 "TERO" means the Tribal Employment Rights Office, or Tribal Employment Rights Ordinance, depending on the context.

2.14 "Threshold" means a level above which Indian preference will be required as established by:

(a) Job Description;

(b) Interview Committees;

(c) Skills Test;

(d) Request for Proposals, Notice of Funds Availability and License requirements;

(e) Other Written Requirements.

3.0 Establishment of Tribal Employment Rights Commission and Office.

3.1 Establishment and purpose of the Commission.

The Pit River Tribe hereby establishes the Tribal Employment Rights Commission for the purpose of:

- (a) Implementing and enforcing the provisions of this Ordinance in order to promote the employment of the Tribal members;
- (b) Assessing and collecting employment rights fees to pay for the TERO's services and operations, as set forth herein; and
- (c) Providing exclusive and independent investigation and administrative review of actions arising under this Ordinance or other Council enactments and policies regulating employment practices of employers, contractors or subcontractors on or near the Pit River Reservation, or otherwise within the jurisdiction of the Tribe.

4.0 General Powers of the Commission

4.1 Organizational Authority

The Commission may hire staff, obligate funds appropriated by the Council, and secure and obligate funding from Federal, State or other sources to carry out its duties and functions under this Ordinance upon receiving approval of such action from the Council. The Commission is further authorized and directed to adopt and request Council Approval of such regulations as are necessary to enable it to carry out its duties and functions. The Commission shall report directly to the Tribal Council.

4.2 Regulatory Authority

- (a) The Commission shall issue rules, regulations, interpretation of laws, and guidelines for Indian preference necessary to implement this Ordinance. Such rules and regulations shall become effective upon written approval of the Council. The Commission shall take all reasonable steps to insure that the general Reservation community, businesses, contractors, employers or other entities dealing with employment on the Reservation or within the jurisdiction of the Tribe, be on notice of all Indian Preference and employment related laws.
- (b) The Tribal Employment Rights Commission is authorized to certify that an enterprise meets the definition of an Indian firm as set forth herein for the purpose of Indian preference, and for documentation of minority small business contract eligibility or claimed exemptions from State taxation and wage performance bond requirements; provided, however, that certification as provided herein shall not require the Commission to advocate the claims of private individuals and entities before any agency of another government.
- (c) The Commission shall maintain an Indian Skills Bank as a means of providing qualified Indian employees to employers, contractors and subcontractors. The Commission shall also actively recruit and certify Indian firms as eligible for Indian preference in contracting and subcontracting. The Commission may enter into agreements with other entities, such as the California Indian Manpower Corporation,

(d) The Commission shall register off-reservation contractors and subcontractors and employers, approve Indian Preference Plans, and issue work permits.

(e) The Commission is authorized and directed to investigate complaints regarding any violation of the provisions of this Ordinance. The Commission may also investigate possible violations on its own initiative.

4.3 Adjudicatory Authority

The Commission may hold hearings on and determine any matter under its authority, including but not limited to hearings for appeals of TERO Director decisions, and hearings necessary for the issuance, modification, and revocation of any permit, license, or assessment authorized hereunder, as well as any adjudicatory hearing regarding violations of the provisions of this Ordinance. The Commission shall develop procedures to govern its hearings, and is authorized to issue compliance orders and to impose civil penalties in the form of fines and sanction.

4.4 Cooperative Agreement with Other Governments

The Commission may negotiate, and upon Council approval, enter into cooperative agreements with agencies of the state and federal government in order to implement the intent of this Ordinance, and to eliminate unlawful discrimination against Indians, and to provide for review of other employment related issues.

4.5 Composition of the Commission and Reimbursement

The Commission shall be composed of five (5) members and one (1) alternate. Three (3) members of the Commission shall be Council members, or Tribal members appointed by the Council, two members selected by the Council shall not be an elected representative of the Tribe and may be a non-tribal member. Each Commissioner shall serve for a term of three years, except two of the first Commissioners appointed by the Council shall serve a term of two (2) years, after which their successors shall serve a term of three (3) years. Commissioners may be removed by the Council at any time for cause, subject to notice and opportunity for a hearing before the Council.

For carrying out their duties, members of the Commission shall be entitled to receive, upon presentation of proper vouchers, such mileage and per diem payments as are in effect for members of the Pit River Tribal Council. Such payments shall be limited by a budget approved by the Pit River Tribal Council.

4.6 Quorums and Vacancies

Decisions of the Commission shall be made by Majority vote. A quorum shall consist of any three (3) of the five (5) Commissioners. When a vacancy occurs in the Commission, the remaining members may exercise all the powers of the Commission until the vacancy is filled.

4.7 Conflicts of Interest

Commissioners may not be employees of the Tribe. Commissioners must abide by the Tribe's Code of Conduct and avoid conflicts of interest. Avoiding conflicts of interests includes being disqualified from any involvement in decisions affecting a Commissioner's personal or financial situation.

4.8 Officers

The officers of the Commission shall be a Chairperson, Vice-Chairperson, Secretary, and Treasurer, all to be selected by the Commission from among its members. The Officers shall be appointed each year by the Commission at its first meeting. All officers shall be members of the Commission. Unless an officer resigns, dies or is removed prior thereto, an officer shall hold office until a successor has been chosen and qualified. Any officer may resign at any time by delivering a written resignation to the Chairperson or Secretary.

4.9 Director Qualifications and Duties

- (a) The Pit River Tribal Council shall have exclusive authority to appoint, direct, suspend, or remove the Director of the TERO Program.
- (b) The Director shall have such administrative ability, education, and training as the Council determines.
- (c) The Director shall have the authority to hire staff, to expend funds appropriated by the Pit River Tribal Council, and to obtain and expend funding from federal, state, or other sources to carry out the purposes of this Ordinance, subject to approval by the Pit River Tribal Council.
- (d) The Director shall propose, recommend, draft, and administer the policies, authorities, and duties authorized by this Ordinance and by the Commission.
- (e) The Director shall have the authority to carry out the day-to-day operations of the TERO, to enforce this Ordinance, to employ and supervise staff for the TERO pursuant to the tribal plan of operations, and such other authority as is convenient or necessary to the efficient administration of this Ordinance.
- (f) The Director shall assist the Commission to propose, adoption, amendment, and rescission of rules, regulations, or guidelines.
- (g) The Director shall assess sanctions and represent the TERO at hearings and appeals before the Commission, the Pit River Tribal Council, and any court or other adjudicatory body.
- (h) The Director shall be the investigating agent for the Commission responsible for investigating, researching, reporting and documenting any information required by the Commission.

5.0 Indian Employment Preference Policy and Procedures

5.1 All covered employers operating within the jurisdiction of the Tribe are required to give preference to qualified Indians in all aspects of employment, including but not limited to, recruitment, hiring, contracting, sub-contracting, overtime, training, transfers, promotions, Summer Youth work, last in layoffs, and first in recalls. No employer shall recruit, hire or otherwise employ any non-Indian for any employment position covered by this Ordinance, unless and until the Commission has been provided reasonable opportunity to furnish written notice to such employer that no qualified Indians are available for such position.

5.2 Applicability

Unless clearly and expressly prohibited by Federal or other Tribal law, this Ordinance shall apply to all employers, including but not limited to: Tribally chartered entities or enterprises; private employers; independent contractors and sub-contractors.

This Ordinance shall not apply to direct employment by the Tribe, federal, state or other governments and subdivisions, non-profit corporations, churches, schools, and small tribal crafts and businesses.

5.3 Covered Position

The Indian employment preference policy of this section shall apply to each and every job classification, skill area, or craft recognized or utilized by an employer, including, but not limited to, administrative, supervisory, and professional classifications.

5.4 Qualified Indians: Employment Criteria

An Indian shall be qualified for employment in a position if he or she meets the threshold requirements for such position, and such Indian shall be accorded the preferences to which he or she is entitled under this Ordinance. No employer may utilize any employment criteria that are not legitimately related to the performance of the position.

5.5 Eligible Indians

All employers, including the Pit River Tribe and its programs, departments, chartered entities, and enterprises shall, for all positions funded by Tribal or Public Law 93-638 contract funds, extend Indian Preference according to the following priorities:

- (a) Members of the Pit River Tribe;
- (b) Descendants and members of a Pit River Tribal household (including non-Indian spouse of Tribal members);
- (c) Other Native Americans; and

(d) Other persons

All covered employers utilizing federally funded or assisted contracts (except PL 93-638 funds) must comply with federal Indian preference requirements in all aspects of employment.

5.6 Notice of Employee Rights

All covered employers subject to this Ordinance shall prominently display a notice to all employees and applicants for employment of their rights under this Ordinance.

5.7 Employer Retaliation Prohibited

It shall be violation of this Ordinance for any covered employer to take any adverse personnel or hiring action or to retaliate in any way, against any person who attempts to exercise rights protected under this Ordinance. Employers found by the Commission, pursuant to an adjudicatory hearing, to have engaged in retaliation shall be subject to appropriated sanctions pursuant to this Ordinance.

6.0 Establishment of Tribal Employment Rights Office Fees

6.1 There is hereby established a Tribal Employment Rights Fee to be paid to the Commission by each prime contractor, and each covered employer operating within any area of Pit River Tribal Jurisdiction, whose total contract or annual gross revenues is \$2,500.00 or more. The fee shall be equivalent to three percent (3%) of the total gross value of any contract initiated within the Pit River Reservation or three percent (3%) of the total annual gross revenues of businesses within the Pit River Reservation.

The total TERO fees shall either be deducted from the first payment made to Contractor at the beginning of the contract or paid in incremental payments to coincide with the contractual payment schedule, or as otherwise negotiated between the TERO and the employer.

The proceeds of the fees shall be placed in a separate account for use in implementing this Ordinance, or other purpose approved by the Commission and the Council and shall be administered and governed under guidelines approved by the Tribal Fiscal Department. A contractor or employer failing to pay the Tribal Employment Rights Office Fees shall be subject to sanctions, pursuant to this Ordinance.

7.0 Special Requirements for Contractor and Subcontractors

7.1 The requirements of this Section apply to all employers engaging in commercial or employment activities within the Reservation, pursuant to public or private contract.

7.2 Certification by Commission

Any contractor or sub-contractor claiming eligibility for Indian preference under this title shall submit documentation acceptable to the Commission that it is an Indian firm as defined herein.

7.3 Indian Preference Plan

Each contractor shall include in its bid, an Indian Preference plan for the master contract and any subcontracts. The plan shall indicate the name of the proposed subcontractor, whether the subcontractor is an Indian-owned firm and if not, information on the good faith steps taken to identify Indian firms for the subcontract.

7.4 Failure to submit Indian Preference Plan

An apparent successful bidder who fails to submit an Indian preference plan prior to award of the contract may be considered a non-responsive bidder for the purpose of awarding the contract.

7.5 Amendments to Plan

If awarded the bid, the contractor shall not deviate from the plan or add or delete any existing new subcontract or subcontractors without the written consent of the Commission or its Office. Any amendments to the Indian Preference Plan must be in writing and approved prior to the date of implementation.

7.6 Bid Shopping Prohibited

A contractor is prohibited from engaging in bid shopping as a means of avoiding its Indian subcontract preference obligation. Bid shopping is defined as any practice in which a bidder or contractor informs a prospective subcontractor that it will receive a subcontract only if it offers a price lower than that proposed by another firm.

7.7 Unions

Any covered employer who has a collective bargaining agreement with one or more unions shall obtain written agreement from such union(s) stating that the union shall comply with Indian preference laws, and with this Ordinance and rules, regulations and guidelines of the Pit River Tribe. Such agreement shall be subject to the approval of the Director.

8.0 Job Categories

8.1 Identification of Regular, Permanent Employees

Prospective contractors and bidders shall identify regular, permanent employees, including those of subcontractors, in the bid package. Such employees may be on the project whether or not they are Indian. A regular, permanent employee is one who is and has been on the contractor's or subcontractor's annual payroll for six (6) months prior to the Request for Proposal, or is an owner of the firm. The fact that an individual has worked for the contractor on previous projects shall not of itself qualify that individual as a regular, permanent employee. Exceptions for superintendents and other key personnel may be granted by the Commission on a case by case basis.

It shall be evidence creating a rebuttal presumption that any contractor or sub-contractor filling vacant employment positions in its organization immediately prior to undertaking work pursuant to a contract on the Pit River Reservation that such actions were intended to circumvent the provisions of this Ordinance, and upon request from the Commission or its Office, such contractor or sub-contractor shall provide evidence acceptable to the Commission rebutting said presumption. The Commission may impose sanctions for violation of this section, and such sanctions may include cancellation of the contract or subcontract as well as fines and penalties.

8.2 Lay Offs

No Indian worker shall be laid off as long as a non-Indian worker in the same craft or position is still employed or as long as the Indian meets the threshold qualification for the job, unless such non-Indian has been employed for more than ninety (90) days longer than such Indian. If the contractor lays off by crews, qualified Indians shall be transferred to any crew that will be retained, as long as there are non-Indians in the same craft or position employed elsewhere on the Reservation under the same contract.

8.3 Reporting Requirements

Each employer shall submit annual reports to the Commission on a form provided indicating the number of employees including a separate tally of Indians it has on its workforce, hires, fires and other information as may be identified on the form. An employer who fails to submit annual reports shall be subject to sanctions, as provided herein.

9.0 Implementation

9.1 In implementing the requirements of this Ordinance, the Commission or its Office may:

- (a) Require employers to establish or participate in such training programs as the Commission determines necessary in order to increase the pool of qualified Indians on and near the Pit River Reservation. Such training programs when required shall be noted in the Request for Proposal and shall be included in the bid package. If required training programs are not included in the bid package, the Commission shall give due consideration to the increase in cost, if any for providing the program.
- (b) Attend or monitor all job interviews as a non-voting participant.
- (c) Prohibit an employer from establishing extraneous qualification criteria or other requirements that serves as barriers to Indian employment.
- (d) Enter into agreements, subject to approval by the Council, with unions and other employers to insure compliance with this Ordinance.

- (e) Require employers to give preference in the award of contracts and subcontracts to certified Indian owned firms and businesses.
- (f) Establish programs to provide counseling and support to Indian workers to assist them in retaining employment. Employers may be required to participate in and/or cooperate with such support and counseling programs.
- (g) Issue permits for the implementation of the provisions of this Ordinance and other agreements entered into under the authority of this Ordinance.

10.0 Enforcement by Tribal Employment Rights Office Commission.

10.1 In implementing this Ordinance the Director, Commission and its Office, in addition to all other powers contained in this Ordinance, shall have the following powers of enforcement.

(a) **Investigation and Monitoring** To investigate and monitor complaints, concerns and inquires regarding Indian preference and other employment related concerns. The Director or a field compliance officer may enter, during business hours, the place of business or employment of any employer for the purpose of such reports as the Director deems necessary to monitor compliance with the requirements of this Ordinance or any rule of order hereunder.

(b) **Issue Notice of Non-Compliance and Compliance Orders.** To issue notices of non-compliance with this Ordinance or other rules, regulations or policies within its jurisdiction, and to issue such orders as reasonably necessary to remedy the non-compliance.

(c) **Power to Require Testimony & Production of Records.**

For the purpose of investigations or hearings which, in the opinion of the Commission, are necessary and proper for the enforcement of this Ordinance, the Commission may administer oaths or affirmation, subpoena witnesses, take evidence, and require, by citation, the production of books, papers, contracts, agreements, or other documents, records or information which the Commission deems relevant or material to the inquiry.

(d) **Hearings** To hold such hearings as may be necessary to resolve complaints and hear concerns regarding matters covered under this Ordinance.

(e) **Enforcement** When, after conducting an investigation initiated by either a complaint or a self-initiated investigation, the Director has reason to believe a violation of this Ordinance or regulations issued pursuant to it has occurred, the Director shall notify the covered employer or entity in writing specifying the alleged violations. The Director may withhold the name(s) of the complaining party only if there is clear and convincing reason to believe such party shall be subject to retaliation. The Director shall seek to achieve an informal settlement of

the alleged violation. If no informal settlement is reached, the Director shall issue a formal Notice of Noncompliance, which shall also advise the covered employer or entity of all rights to appeal the Notice.

11.0 Complaints

Any person, group of persons, or organization including any employee of the TERO that believes any covered employer or entity, has violated any requirements imposed by this Ordinance or regulations adopted under it may file a complaint with the TERO. The Complaint shall be in writing, shall be signed under oath by the Complainant, and shall provide such information as is necessary to enable the Director to carry out an investigation. The Director shall investigate every complaint filed. If upon investigation, the Director has reason to believe a violation of this Ordinance or regulations adopted under it has occurred, and the TERO has jurisdiction over the complaint, the Director shall proceed with enforcement. Within 20 days after receipt of the complaint, and on a regular basis thereafter, the Director shall provide the complaining party with a written report on the status of the complaint.

12.0 Appeals

12.1 Decisions of the Director may be appealed to the Commission. Decisions of the Commission may be appealed to The Tribal Council, or to a Tribal Court later established or under contract or agreement with the Tribe. The Tribal Council (or Court) is hereby authorized to hear and dispose of appeals brought under this section.

CERTIFICATION

The undersigned Tribal Chairperson of the Pit River Tribe hereby certifies that the foregoing **PIT RIVER TRIBE TRIBAL EMPLOYMENT RIGHTS ORDINANCE** is a true and correct copy of the **TRIBAL EMPLOYMENT RIGHTS ORDINANCE** that was approved by a vote conducted on the _____ day of _____, 2004; was duly adopted by a vote of ____ For, ____ Opposed, ____ Abstentions.

This **TRIBAL EMPLOYMENT RIGHTS ORDINANCE** has not been rescinded or amended in any way. The Tribal Council is comprised of _____ members of which _____ voted.

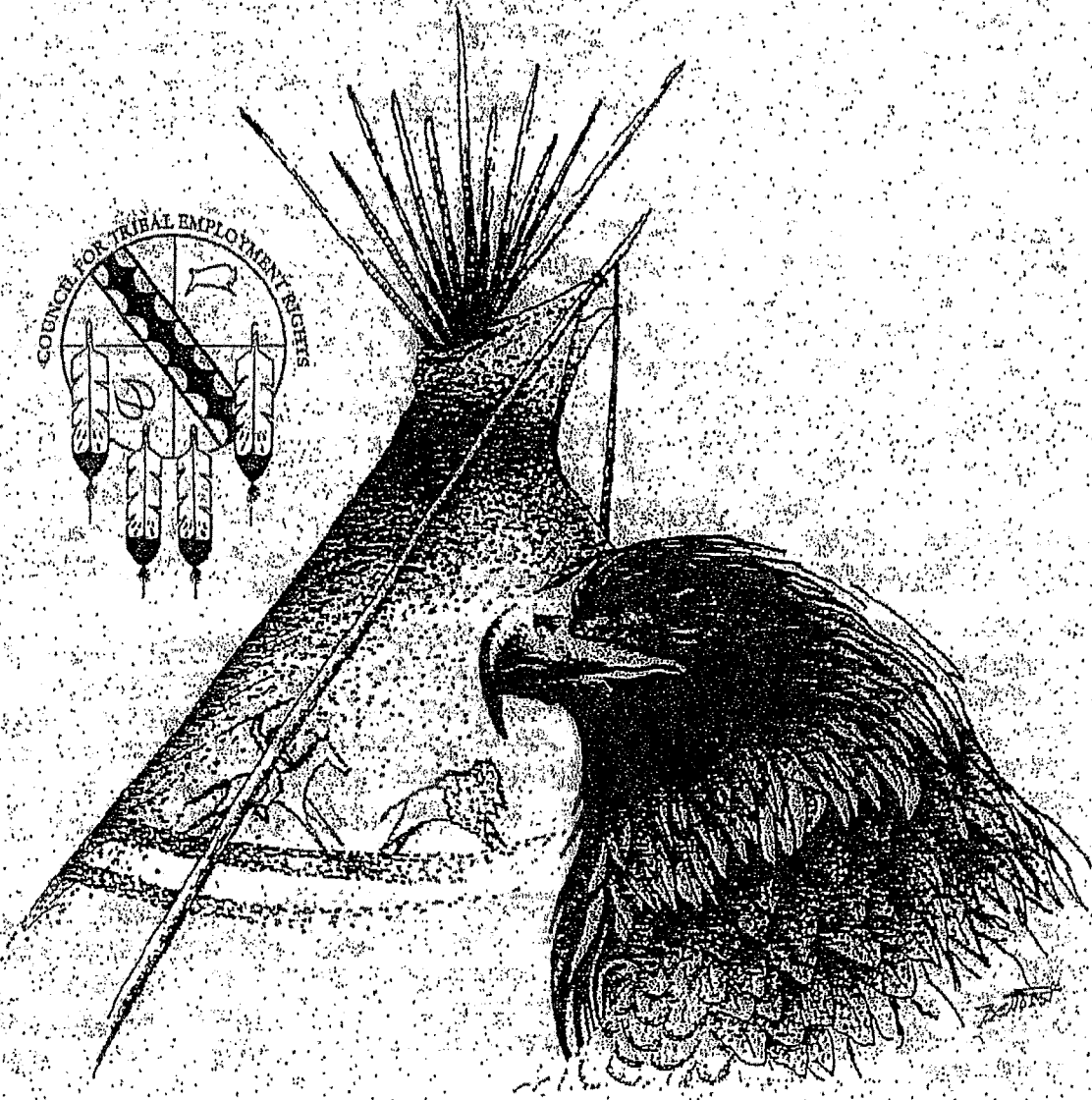
Date: _____

Tribal Chairperson

ATTEST:

Secretary, Pit River Tribal Council

TRIBAL EMPLOYMENT RIGHTS ORDINANCE & THE TERO PROGRAM



QUICK REFERENCE GUIDE

TERO QUICK REFERENCE GUIDE

Indian Tribes, as sovereigns have the sovereign authority to regulate and control the employment practices of all employers conducting business on their reservations. This power enables Tribal Governments to require that all contractors operating within their jurisdiction to provide Indian preference in employment, contracting and subcontracting.

As individuals, Indian people have unique and special employment rights. They have a right to preference in employment under tribal and several critical federal laws. Also, as citizens of the United States, tribal people, as are all Americans, are protected by all anti-discrimination related laws adopted by Congress. Additionally, as minorities and members of a protected class, Indian people are covered under affirmative action for employment purposes. This set of employment rights provide Indian people with more protection than all other Americans and entitles them to a large share of jobs and business opportunities on and near their reservations.

Within the past four decades, Tribal governments have made tremendous strides in identifying and protecting the rights, resources and opportunities of their people. Tribes are effectively exercising self-governance to protect their water, timber, hunting, fishing and gaming rights in order to garner maximum economic returns and opportunities from the use of their resources.

This type of effective advocacy is being brought to the protection and assertion of Indian and Native Employment and contracting rights by approximately 300 Tribal and Alaska Native village governments that have established Tribal Employment Rights Ordinances and TERO enforcement programs.

Tribal/Native governments have the authority to enact the strongest employment and contracting laws in the nation. Whether employers are mining tribal resources, building federally funded or federally assisted roads, houses, dams, clinics, schools, etc., or operating casinos, factories, or other businesses (tribal or private), a tribal government

can use its sovereign powers to require maximum employment of Indian people.

However, history shows that only by officially passing a tribal law imposing Indian preference requirements and only by establishing an office within the tribe to enforce the law will Indian people truly benefit from their special entitlements.

A vigorous Indian preference program should be the cornerstone of a tribal employment and contracting program. Passing a law is not enough, tribal governments must develop comprehensive compliance and enforcement strategies that includes the three following elements:

- Laws and guidelines that impose specific requirements on employers that regulate their employment practices and ensure that they meet their legal obligations to provide preference in recruiting, hiring, training, promotions and all aspects of employment.
- An administrative system that monitors an employer's performance to guarantee strict compliance with tribal preference requirements.
- An enforcement system that imposes fines and other sanctions on employers who fail to comply with the letter and spirit of the law.

MOST ASKED QUESTIONS

WHAT IS TERO?

TERO stands for Tribal Employment Rights Ordinance or Office. TERO Ordinances require that all employers who are engaged in operating a business on reservations give preference to qualified Indians in all aspects of employment, contracting and other business activities. TERO Offices were established and empowered to monitor and enforce the requirements of the tribal employment rights ordinance.

WHY WAS THE TERO ORDINANCE ENACTED?

- To address the deplorable rate of poverty, unemployment and underemployment that exists among native people living on reservations.
- To eliminate discriminatory and other historical barriers tribal members face while seeking employment and business opportunities on or near reservations.
- To ensure that tribal members receive their rightful entitlements as intended under the concept of Indian preference.

WHAT IS THE PURPOSE OF THE TERO PROGRAM?

The primary purpose of the TERO program is to enforce tribal law in order to insure that Indian/Alaska Native people gain their rightful share to employment, training, contracting, subcontracting, and all other economic opportunities on and near reservations or native villages.

WHAT DOES THE TERO ORDINANCE DO?

The TERO ordinance:

- SETS CONDITIONS: Mandates the tribal requirements for Indian preference that all covered employers must comply with in order to be eligible to perform work on reservations.
- ESTABLISHES AUTHORITY: Empowers the TERO Commission & Staff with sufficient authority to fully enforce all provisions of TERO ordinance.

▪ ASSIGNS RESPONSIBILITY: Delineates the duties and responsibilities of TERO staff and commission.

▪ 3.

▪ EMPOSES SANCTIONS FOR VIOLATIONS: Clearly spells out penalties employers may face for violations of tribal law.

▪ PROVIDES DUE PROCESS OF LAW: It provides principles of legal fairness to all parties involved in compliance or violation dispute issue.

WHAT IS INDIAN PREFERENCE?

Indian preference a unique legal right tribal members have that entitles them to first consideration to all employment, training, contracting and subcontracting and business opportunities that exist on and in some cases near reservations.

ARE INDIAN PREFERENCE AND TERO NEW CONCEPTS?

No. Indian preference first appeared in Federal regulations in 1834. The first major Indian preference legislation passed by Congress was the Buy Indian Act of 1910 which has figured prominently in most subsequent, related legislation since then, e.g. the Indian Education Self determination and Education Assistant Act of 1974 and the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Tribal Employment Rights Ordinances (TEROs) were initially founded in late 1976 and early 1977. Today there are almost 300 Tribes and Alaska Native Villages covered by TERO ordinances.

DOES INDIAN PREFERENCE VIOLATE FEDERAL EMPLOYMENT LAW?

There are no federal laws which prohibit Indian Preference. Tribes are exempt from Title VII of the Civil Rights Act and several other federal employment laws. Numerous court cases have upheld this exemption (see Morton v. Mancari). Additionally, court rulings have indicated that Indian preference is a political preference and not a racial preference and as such do not violate the dictates of federal employment law.

IS TRIBAL PREFERENCE LEGAL?

Tribal preference is not allowed on federal/state contracts or in private employer situations. Many tribes have tribal/village preference provisions in their TERO ordinances which are not consistent federal law and are therefore not allowed on any federally funded or assisted contracts. Tribes can however, apply tribal preference in all aspects of employment to their own business enterprises and construction projects. Tribal preference is also allowed on tribal Public Law 93-638 contracts.

WHAT IS THE LEGAL BASIS FOR TERO?

A Tribes authority to enact and enforce an Indian/Native employment preference law is grounded in its inherent sovereign status. This legal doctrine is the most basic principle of Indian law and is supported by a host of Supreme Court decisions. Inherent sovereign powers derive from the principle that certain powers do not necessarily come from delegated powers granted by express acts of Congress, but are inherent powers of a limited sovereign that have never been taken away. Tribes have a basic relationship with the federal government as sovereign powers. This is recognized in both treaties and federal statutes. The sovereignty of tribes has been limited from time to time by treaties and federal legislation, however, what has not been expressly limited remains within tribal sovereignty. As sovereigns, tribes have the power to regulate business, levy taxes and establish the terms and conditions for Indian preference in employment/contracting on reservations.

A full and accurate explanation of Tribal sovereignty is found in Felix S. Cohen's Handbook of Federal Indian Law. Also, see appendix for other supporting legal decisions on this issue.

WHAT IS THE EXTENT OF TERO JURISDICTION?

TERO has jurisdiction over all employers operating within the exterior boundaries of the reservation as legally defined by treaty or legislation including ceded lands, territories, and lands where jurisdiction has not been extinguished.

WHAT ARE THE CHARACTERISTICS OF TERO?

The core characteristics of the program provide additional and valuable insights into why the law and enforcement program are needed and applied. The following are three vital characteristics of TERO.

- TERO is a true act of self-determination. The decision to enact a Tribal employment rights ordinance is based on each individual tribes needs and priorities.
- TERO programs are action orientated. TERO's are no-nonsense, hands-on, result orientated compliance programs.
- TEROs are systematically structured programs. Key elements of the structure include:
 - **LEGAL FRAMEWORK:** TERO utilizes a sound and comprehensive framework that encompasses the use of Tribal, Federal and/or State employment law.
 - **ADMINISTRATIVE STRUCTURE:** TEROs have a well developed administrative structure and enforcement process.
 - **SYNERGISTIC PARTNERING:** TERO programs apply synergistic partnering principles in relationships with employers to the greatest extent possible.

WHAT IS THE ENFORCEMENT APPROACH OF TERO?

Most of today's TEROs take a pro-active approach to enforcement. TERO officers use education and synergistic partnering principles in order to prevent violations of tribal law as well as create mutually beneficial relationships with reservation employers.

WHAT ARE THE BASIC TERO REQUIREMENTS?

All covered employers operating a business within tribal/village jurisdiction are required to provide Indian and Native preference in employment, training, contracting, sub-contracting and in all other aspects of employment. Below are several specific examples employers are required to comply with. Employers must:

- Submit an acceptable compliance plan detailing the steps they will take to ensure compliance with the TERO requirements. * Note: TERO compliance plans are closely fashioned after those used by OFCCP for affirmative action compliance.

- Utilize the TERO skills bank for all referrals and consider Indian/Native applicants before interviewing or hiring non-Indian/Natives.
- Agree to hire no less than a specific number of Indians/Natives in each job classification and cooperate (where feasible) with tribal training programs to hire a certain number of trainees.
- Eliminate all extraneous job qualification criteria or personnel requirements which may act as barriers to Indian/Native employment. EEOC guidelines on legal BFOQs are used by TEROs.
- All employers who have collective bargaining agreements with one or more unions, must secure a written agreement from them indicating they will comply with TERO.
- Agree to acknowledge and respect tribal religious beliefs and cultural differences and to cooperate with TERO to provide fair reasonable accommodations.

ARE THERE EXEMPTIONS TO TERO REQUIREMENTS?

Yes. There are several exemptions. Most TERO ordinances exempt direct employment by the Tribe, Federal, State or other governments and their subdivisions, non-profit corporations, churches, schools etc. However, all contractors regardless of the source of funding are covered by the TERO requirements. At the individual level, the only exemption allowed is for the employers "core crew or key person" which is defined as:

"a member of a contractor's or subcontractor's crew who is a regular, permanent employee and is a supervisor or other key position such that the employer would face a serious financial loss if that position were filled by a person who had not previously worked for the contractor"

WHAT ARE THE SANCTIONS FOR VIOLATION OF TERO?

Violation of TERO requirements may result in severe sanctions. If it is determined that employers have willfully violated TERO requirements, tribes have the power to:

- Deny such party the right to commence business within the reservation/village.

- Impose a civil fine on such party ranging from \$500 To \$5000. per violation.
- Terminate or suspend such party's operation and deny them from doing further business within the reservation or village.
- Order the removal of unlawfully hired non-Natives and take action to ensure future compliance.
- Order the back payment of lost wages to aggrieved Natives.

CAN TERO REQUIREMENTS BE WAIVED?

Yes. Most ordinances contained a provision for waivers to be granted on a project specific basis by the tribal government. Neither the TERO director or the Commission can waive any provision of the ordinance unless authorized by the Tribal Council.

ARE EMPLOYERS PROTECTED AGAINST UNFAIR CHARGES?

Yes. Employers are entitled to due process of law. Their rights are protected by both provisions included in the TERO ordinance and by the enforcement process and procedures use by TERO officers to ensure employer compliance. Both TERO officers and commissions are well trained to investigate and utilize the facts and merits of the case before taking action against an employer. The TERO investigative process is designed to weed out frivolous and capricious charges brought on against employers.

CAN SANCTIONS IMPOSED BY THE COMMISSION BE APPEALED?

Yes. Sanctions imposed on employers by the Commission can be appealed in tribal court. Tribal court decisions can be appealed to federal district courts.

ARE TERO FEES/TAXES IMPOSED ON COVERED EMPLOYERS?

Most tribes impose a TERO fee on all employers doing business on reservations. The fees collected by the TERO are used to finance operational costs and program services. Services include: recruiting, referrals, screening, job counseling, orientations, employee support services,

compliance, charge processing, investigations and community awareness education sessions. It is not clear if Native Village governments can impose a fee on employers, but many federal agencies have negotiated special contracts with TEROs for the services listed above. The average TERO fee is 2.5%.

ARE TERO AND OTHER TRIBAL FEES/TAXES LEGAL?

Yes. Tribal authority to tax is equal to that of any other government. Taxation, licenses and other fees are a valuable source for financing tribal governmental operations. TERO programs have the unique ability to generate their own operating income, as well as contribute to the general fund of the Tribe.

ARE ALL TERO REQUIREMENTS AND FEES/TAXES THE SAME?

No. There are over 550 (federally recognized) independent tribal nations throughout the United States. While there is much in common between tribes, each is diverse in its own community culture, needs, values, and priorities. Each tribe therefore makes its own legislative decisions to meet their own set of wants and needs.

WILL TERO TAXES/FEES INCREASE COST OF PROJECTS?

No. TERO fees range from $\frac{1}{2}$ of 1% to 4% with a national average of about 2.5%. The much lower Tribal taxes/fees preempt other taxes on tribal reservation projects and often result in a substantial savings to contractors; most states taxes for example are in the 6-10% range.

WILL TERO INTERRUPT THE DAILY OPERATIONS OF EMPLOYERS?

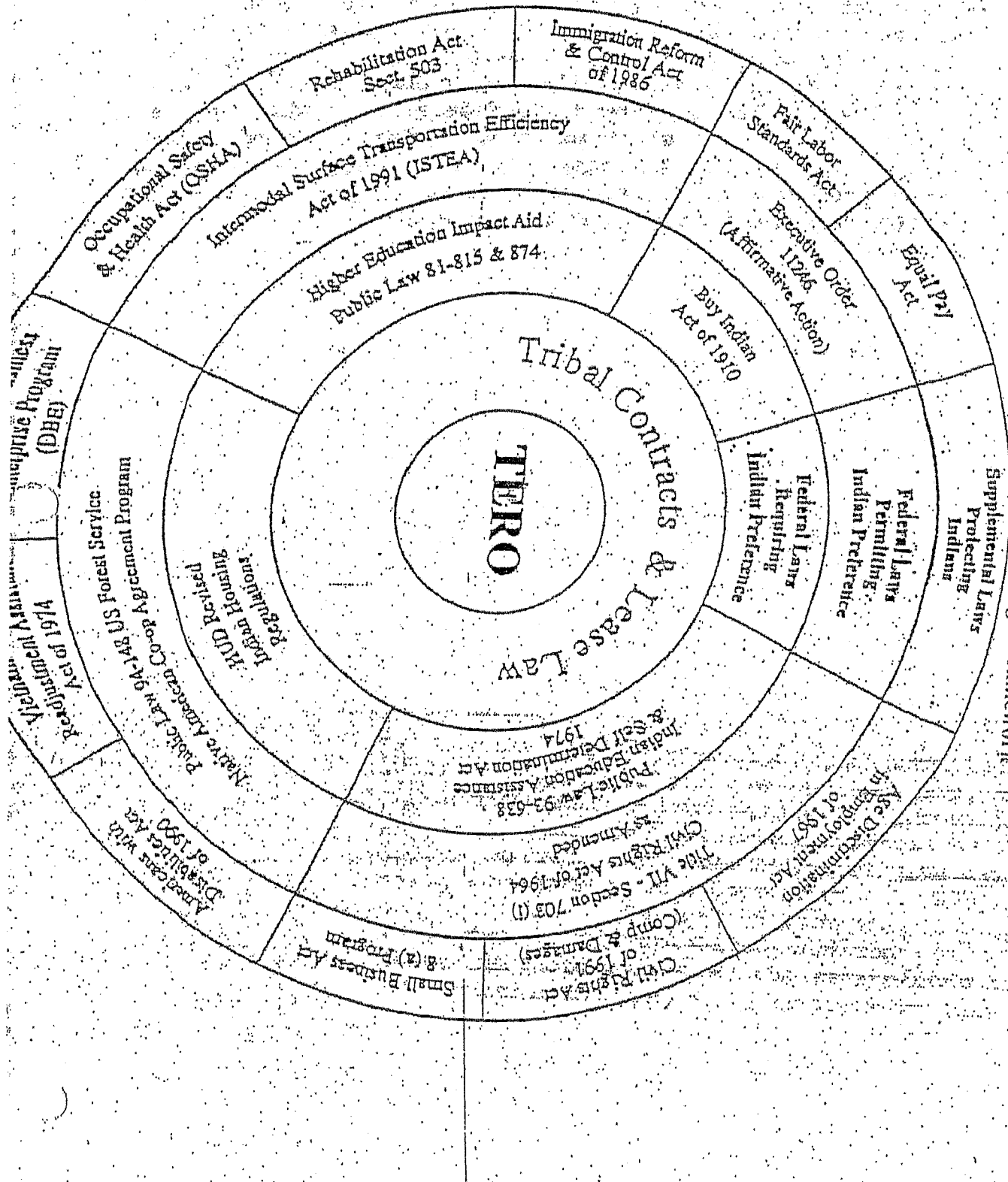
No. Since TEROs practice proactive enforcement, the compliance plans signed by the TERO and employer prior to the commencement of work generally prevents disputes. Most TERO ordinances provide for compliance and enforcement visits to work-sites during normal business hours but not to the detriment of operations. A TERO sanction of an employer for violations of the law could cause delay or shut-down of an employers operations, but note, that this would only occur in the most severe circumstances and only in strict accordance with the process of Tribal law.

WHAT OTHER LEGAL OR OTHER MECHANISMS ARE USED
BY TERO PROGRAMS TO ENSURE COMPLIANCE?

TERO programs use a variety of legal tools to ensure that Indian/Native people receive their rightful share of employment and other economic opportunities both on and near reservations and villages. The two illustrations that follow show the various legal tools used by TERO officers. The circle illustration lists laws that range from tribal Indian preference to federal laws which protect against unlawful discrimination. The second chart illustration gives the basic federal laws which permit Indian preference and include special initiatives between the TERO and the federal enforcement agency.

Council for Tribal Employment Rights

TERO/Indian Preference Legal Framework



QUICK REFERENCE GUIDE TO INDIAN PREFERENCE UNDER TRIBAL AND FEDERAL LAW REGULATIONS

LAWS & REGULATIONS	TIERO ORDINANCES	TITLE VII CIVIL RIGHTS ACT	EXECUTIVE ORDER 111246 & AMENDMENTS	TRANSPORTATION EQUITY ACT
GENERAL PROVISIONS	Requires Indian preference in all aspects of employment contractor/subcontracting employment on reservation	Prohibits discrimination in all aspects of employment on the basis of race, color, religion, national origin and sex.	Prohibits discrimination in all aspects of employment on the basis of race, color, religion, national origin, sex (EO 11375), age (EO 11344) and handicapped (EO 11914)	Prohibits discrimination in all aspects of employment on the basis of race, color, religion, national origin and sex.
INDIAN PREFERENCE	Requires contractors to submit all acceptable compliance plan describing how Indian preference will be met.	Section 703(d) permits Indian preference on or near reservation; exempts Tribes from Title VII coverage.	Permits Indian preferences within reasonable commuting distance from reservation. Prohibits Tribal of religious preference.	Permits Indian preference on or near reservations. Allowed States to implement Indian preference.
COVERAGE	All employees operating within the boundaries of a reservation. Federal/State government agencies exempt.	All employees with 15 or more employees.	All Federally assisted programs. Contracts of \$10,000 require EEO statement, contracts of \$50,000 and 50 employees require an Affirmative Action Plan.	All Federal-aid highway construction projects.
ENFORCEMENT AUTHORITY	Tribal Employment Rights Office and Commissions.	The Equal Employment Opportunity Commission EEOC-funded TERO Offices.	Title Office of Federal Contract Compliance programs within the Department of Labor.	Federal Highway Administration and its field offices.
SPECIAL INDIAN EMPLOYMENT INITIATIVES	Special Indian employment initiatives include tribal workforce utilization plans to better prepare and qualify Tribal workforce to meet industrial demand. Tribal workforce employment program to insure better job readiness and individual employee development.	EEOC contract with 68 TEROs providing them with the authority to initiate Title VII discrimination charges, negotiate Indian preference agreements, settle employment disputes; provide education. EEOC provides specialized training, support services and technical assistance involving Title VII enforcement.	Instituted and agency initiative that strongly encourages Federal contractors to increase Indian hiring goals; provides specialized training, technical assistance to TERO programs and support to TERO programs.	HEWVA instituted goal to work toward increasing Indians in highway construction. Under initiative HEWVA provides training, technical assistance, and provide services to Tribes and contractors in order to help them meet hiring goals.

THE TERO ORDINANCE

INTRODUCTION:

Indian/Native preference is the law on most Tribal/Native reservations and villages in America today. Tribal Employment Rights Ordinances (TERO's) enacted by Tribal governments are designed to ensure that tribal members receive their rightful share of employment, business and other economic opportunities that exist on reservations and in villages. TERO employment protection ordinances also seek to eliminate or reduce unlawful discrimination that occurs both on and near reservations.

In order to ensure full employer compliance of tribal employment law, Tribal Councils established and empowered TERO programs to enforce all provisions of the law. The TERO Ordinance is the core of a comprehensive legal framework that is utilized by the TERO program to maximize its effectiveness.

The TERO legal framework is comprised of and utilizes three major bodies of law including:

- Tribal Law (THE TERO ORDINANCE)
- Federal Employment Law (Indian Preference/EEO/Affirmative Action)
- Contract Law

BASIC TERO REQUIREMENTS:

All covered employers operating within the jurisdiction of Tribal governments are required by law to give preference to qualified Indians in all aspects of the following:

- Employment
- Overtime
- Training
- Transfers
- Promotions
- Summer Youth work
- Last in layoffs
- 1st in recalls
- Contracting
- Subcontracting

Preference in the purchase of materials, products, and services are also covered in the TERO preference provisions.

EXEMPTIONS:

There are several exemptions to the TERO ordinance. These exemptions include the following:

- Federal Agencies
- State and Local Governments
- Most Tribal Governments exempt themselves from TERO. (Exemptions to Tribal business enterprises/industries is optional at the discretion of the Tribal Council).
- Some Non-Profits (Schools, Churches, etc.)
- Core Crew Employees or Key Persons (See Definitions).
- Generally small tribal crafts and business are not covered by TERO.

THE TERO COMPLIANCE PLAN:

The compliance plan is crucial to successful implementation of the TERO Ordinance. It is perhaps the most effective legal mechanism used by TERO programs to ensure that all covered entities are in compliance with the provisions of the Ordinance. The compliance plan is a detailed written document that sets forth the specific steps employers will take to meet their Indian/Native employment and contracting preference responsibilities. Most compliance plans include a requirement that employers must use the TERO skills bank for recruiting, hiring (except for core crew) and subcontracting purposes. The TERO skills bank contains an up to date listing of the tribes available workforce and certified Indian contractors. Among requirements found in most compliance plans are:

- The employers legal responsibilities
- Cultural/Religious accommodations
- Wage rates and certified payroll requirements
- Fees/Tax and collection schedules
- Conditions for union compliance & Special negotiated agreements

THE TERO FEES/TAXES:

Most tribes have enacted a TERO fee or tax that is designed to cover the cost of operating the TERO program as well as costs associated with the many services the program provides to both employers and the tribal community. Below are a few samples of services provided by the TERO:

- Recruiting, Screening, Referrals
- Compliance, Investigations, Charge Processing
- Job Counseling, Coaching, Supportive Services
- Community, Employer and Federal/State Agencies Awareness Education and T/A.

TERO fees or taxes range anywhere from .05 to 5%. The current national average fee/tax is 2%. A TERO fee/tax would most probably face serious challenge in Alaska. However, TEROs may be able to negotiate service agreements with the funding agencies to provide the services listed above.

THE ENFORCEMENT PROCESS

Most TERO officers take a proactive approach towards enforcement. They try to prevent compliance violations before they happen by providing education, information, and technical assistance to reservation employers and federal/states agencies. The use of these strategies has proven to be very successful and has resulted in voluntary or cooperative compliance. It must be noted, that charge processing, sanctions against employers, court actions and other harsh measures are only used by TEROs as a last resort. If however, flagrant violations of the ordinance, and/or willful disregard for the rights of an Indian or Native worker does occur, the TERO program has the legal means to take immediate corrective action. * The TERO enforcement process and proactive compliance strategies are closely fashioned after methods and guidelines developed and used by EEOC and OFCCP.

THE TERO COMMISSION & STAFF:

The TERO commission was established by Tribal Councils to insure that all employers are in full compliance with the law. Tribal Councils have vested the commissions with broad powers and authorities in order to enable them to effectively accomplish the intent of the ordinance. TERO Commissioners are appointed to by the Tribal Council. The day to day administration of the TERO program is the responsibility of the TERO staff. TERO staff are sufficiently empowered, knowledgeable and usually well trained in the field of employment rights and enforcement methods. A detailed description of the powers, responsibilities, and duties of both the commission and

staff can be found in the model ordinance located in the appendix of this section.

PENALTIES FOR NON-COMPLIANCE:

Penalties for non-compliance of TERO requirements or unlawful violations of Indian employment rights can be very severe. Employers who willfully and maliciously violate tribal employment law can face costly and time consuming penalties. Employers who break the tribal law may be:

- Required to pay fines ranging from 500 to 5,000 per violation.
- Denied the right to do business on the reservation and have their contracts, permits or licenses suspended or terminated.
- Forced to remove unlawfully hired non-Indians from the workplace.
- Ordered to pay compensatory and punitive damages to Indians affected by unlawful actions.

Damage settlements or sanctions may include:

- Reinstatement
- Back Pay
- Front Pay
- Promotions, etc.

**See Title VII in section II for guidelines on remedies.*

Note: It should be clearly understood that rigid and harsh enforcement of the law should be only be utilized by TEROs as a last resort. The use of penalties to ensure compliance almost always results in undesirable win/lose or lose/lose solutions.

FILING A TERO CHARGE:

A TERO charge can be filed by an aggrieved Indian person, someone acting on behalf of the aggrieved person, the TERO staff and/or members of the TERO commission. Indian contractors, subcontractors and businesses may also file charges with the TERO office. All charges must be submitted in writing and in a timely manner. Most TEROs use EEOC guidelines for charge processing. Both Indians and non-Indians may file charges, against the actions of the TERO office, with the TERO commission should they feel the staff acted beyond its authority.

APPEALS:

Findings and sanctions by the TERO Commission may be appealed to tribal Court.

EEOC/TERO Contracts:

The U.S. Equal Employment Opportunity Commission has entered into contracts with over 65 tribal TERO programs. Under these contracts TEROs have the legal authority to initiate the processing of federal charges against employers who unlawfully violate the anti-discrimination provisions covered under Title VII of the Civil Rights Act. Special note, There is only one TERO/EEOC contract in Alaska at this time. EEOC has determined that the existence of reservation lands is vital to agreements between them and Alaska tribes.