

INTRODUCTION AND EXPLANATION OF KEY SECTIONS OF THE MODEL WORKFORCE PROTECTION ACT

PART I – POLICIES AND DEFINITIONS

1. **Applicability of the Ordinance to All Tribal Offices** – The definitions make all of the rights and protections granted by the various Parts of the Ordinance applicable to all employers on the reservation that the Tribe has jurisdiction over, including employees of, or contracts awarded by, the Tribal government, tribal subsidiaries and tribal enterprises such as casinos. The only exception is for Federal and state employees, and direct contracts awarded by Federal and state agencies, since the Tribe does not have jurisdiction over those governments. Experience has shown that when a tribe exempts itself or any of its enterprises from the TERO ordinance, it weakens the TERO program and hurts the Tribe's credibility.

Further, with the additional employment rights being established by this comprehensive workforce Ordinance, it is even more important that the Tribe cover all of its employees. Presently tribal governments and their employees are not subject to Federal or state antidiscrimination in employment laws. If tribes do not fill this vacuum with their own laws, experience indicates that, after enough employees complain to Congress, Congress or the courts will make tribes subject to the Federal laws, thereby diminishing tribal sovereignty and self-determination.

PART II. – UNIFIED STRUCTURE UNDER THE TERO

1. The model Ordinance puts responsibility for enforcing all of the different workforce rights created by the Ordinance under the existing TERO structure by expanding the authority and responsibilities of the Commission and the TERO director. It also uses the existing TERO enforcement system to enforce all of those rights. This approach builds on a proven system and eliminates the need to create any new administrative structures or offices. However, since the TERO structure will be taking on significant new responsibilities, it will need the resources to meet those responsibilities in the form of increased staff, legal services and Commission costs. For this reason, Title II of this Part provides that all TERO fees are to be kept by the TERO, rather than going into the general fund of the Tribe. Without insuring the TERO has the resources to enforce the new rights provided by this Ordinance, those rights could end up being largely meaningless.
2. **Assumption of Federal Indian Preference Authority** – An increasing number of Federal laws involving activities subject to Federal Indian preference requirements give the Tribe the authority to replace the Federal Indian preference rules with those of the TERO. Two examples of such statutes are the Indian Self-Determination Act and the Native American Housing and Self-Determination Act. By and large, TERO ordinances are more effective than the Federal regulations and the TERO is more likely to enforce them strictly than are the Federal agencies. For that reason, Section 2-105 directs that any tribal program that is participating in a Federal program that permits the Tribe to take over that Federal agency's Indian preference enforcement must exercise that option, doing so in cooperation with the TERO.

PART III. – INDIAN PREFERENCE IN EMPLOYMENT CONTRACTING AND SUBCONTRACTING

Title I – Indian Preference in Employment

This Title of the Ordinance imposes the standard TERO Indian employment preference requirements that have been used by tribes for over two decades. However, it does not provide a preference based on tribal affiliation. In *Dawavendewa v. Salt River Project*, the U.S. Court of Appeals for the 9th Circuit held that a TERO ordinance imposing a preference based on tribal affiliation, when applied to a private employer, violated the prohibition on discrimination based on national origin imposed by Title VII of the Civil Rights Act, because the exception for Indian preference in that Act (section 703i), did not authorize a tribal preference, only an Indian preference. However, the Ordinance still ensures that the members of the Tribe on whose reservation the work is occurring will obtain most of the Indian preference jobs. It does so by requiring that, when implementing the Indian preference requirement, the private employers give a first preference to Indians living on and near the Tribe's reservation. Since in most situations, the vast majority of Indians living on and near a reservation are members of that tribe, this provision will ensure that most of the workers hired under the TERO imposed Indian preference laws are tribal members. Yet, it will do so without violating Title VII, since there is nothing in Title VII prohibiting geographic preferences and the courts have upheld preferences based on geographic residency in certain situations, such as the preferences given to inner city residents under HUD's former Model Cities Program. Tribal preference may still be given for jobs in tribal government or tribal enterprises since those entities are not subject to Title VII. If tribes choose that option, the model Ordinance will need to be modified accordingly.

Title II – Indian Contract Preference

- 1. Indian Preference on Contracting Method** – The ordinance provides for Indian contract and subcontract preference to be implemented by limiting bidding to Indian preference certified firms, with award to the lowest bidding Indian firm whose bid is reasonable (with that determination left to the awarding entity). While many other methods have been developed, such as opening bidding to all firms and using a flat 10% differential or a sliding scale differential for Indian firms, experience shows that limiting bidding is not only the most effective way to get Indian firms hired but it avoids the kinds of legal controversies that arise when both Indian and non-Indian firms are both allowed to bid. This is because once a non-Indian firm has gone to the expense of preparing a bid, it is more likely to challenge some aspect of the TERO process when it loses to a higher bidding Indian firm, than it would if it never was eligible to submit a bid. Some Federal agencies will not accept the limited bidding approach for contracts or subcontracts on projected they fund. In such cases, the Federal rule must prevail.
- 2. Certification** – Section 3-202 directs the Commission to establish a system for certifying firms as being eligible for the TERO's Indian contract preference. Weeding out front companies seeking to take improper advantage of the preference is one of the most challenging tasks a TERO faces. Appendix A to the Ordinance is a set of detailed criteria and procedures for evaluating applicants for Indian contract preference certification. However, fronts that try hard enough can often fool even the best set of formal criteria. For that reason, those criteria recommend that the TERO be prepared to go beyond the specific criteria and, using its judgment and experience as a guide, also

apply the following general criterion: “Applying sound management principles, would the firm have been structured in the manner it is, and would the Indian owners have been given the amount of ownership and control they have been given, if there were no Indian preference program in existence? If the reviewing body determines that it has good reason to believe that the firm has been structured (managerially or financially) in a manner that is convoluted or inconsistent with sound business practices in order to enable the firm to qualify for Indian preference certification, the firm should be denied such certification, even if it meets the specific criteria, unless the firm is able to demonstrate beyond a reasonable doubt that it was not structured to manipulate the Indian preference criteria.”

PART IV – UNLAWFUL EMPLOYMENT DISCRIMINATION

Part IV contains the prohibitions on employment discrimination that are found in most state as well as Federal law. These include discrimination based on race and national origin (except for Indian preference), sex, age, marital status, personal appearance, sexual orientation or political affiliation. The provisions also require employers to make reasonable accommodations to persons who are pregnant, disabled or need to observe a religious obligation, so long as such accommodation does not conflict with business necessity. The absence of all of these protections for Indians working on their reservations and for non-Indians working for tribal offices, enterprises or subsidiaries is a gap that has the potential to become a political and public relations problem for tribes, as more and more such employees file complaints and find they have no legal remedy. As indicated above, the experience over the years has made it clear that if tribes do not use their sovereign authority to provide rights that are considered the norm elsewhere in the country, Congress or the courts will step in and impose those rights, often in ways that are not consistent with tribal sovereignty.

PART V. – EMPLOYEE WAGE AND HOUR

Title I of Part V establishes a minimum wage requirement for the reservation, in order to cover those jobs that are not considered to be in interstate commerce and therefore not subject to the Federal Fair Labor Standards Act. Title I pegs the minimum wage and related requirements, such as time and half for overtime, to that Federal Act.

Title II implements new Davis-Bacon Act authority given to tribes by the Native American Housing and Self-Determination Act (NAHASDA). Section 4114(b)(3) of that Act gives tribes the right to set their own minimum wage rates for construction funded under NAHASDA, rather than being bound by the rates established by the Department of Labor (DOL) under the Davis-Bacon Act. Over the years, many tribes have felt that the Davis-Bacon wage rates for their reservations were not appropriate – sometimes because they were too low, sometimes because they were too high. Section 5-202 offers tribes two options. The first Section 5-202 provides that the Tribe is exercising its authority under NAHASDA to set wage rates by simply adopting the rates already established by DOL under the Davis Bacon Act. The second Section 5-202 is for tribes who believe the Davis Bacon rates applicable to their reservations are inappropriate. That optional section directs the TERO Commission, subject to review by the Tribal Council, to set rates different from those established by DOL under the Davis-Bacon Act.

Sections 5-203 and 5-204 exercise certain portions of the authority granted under Section 4114(b)(3) of NAHASDA, authority that it is recommended every tribe exercise, whether they set their own minimum wage or adopt DOL's rates. Section 5-203 establishes special rates for trainees who are not journeymen, which allows a contractor to hire a worker who does not produce at the level of a journeyman at a rate commensurate with his skills. DOL permits this but only if the worker is enrolled in an approved apprenticeship or DOL training program. Section 5-203 permits this wage to be paid to a worker who is not a journeyman so long as the TERO Director has certified that the worker is participating in an approved or informal training program. This provides much broader latitude and recognizes that the vast majority of journeymen got to that level through informal training from friends and family members rather than through participation in a formal trainee program.

PART VI. – FAMILY MEDICAL LEAVE PROTECTION ACT

This Part grants employees subject to the Ordinance the same rights to unpaid leave for family medical problems that are provided under Federal law for employees of businesses engaged in interstate commerce. It requires the employer to reinstate the employee at the end of the leave period, which can be up to ten weeks, and to enable the employee, at his or her own cost, to maintain health insurance and other fringe benefits. The Family Medical Leave Protection Act can serve as a starting point for tribes to address the twin obligations of tribal members – their obligations as employees and their obligations to their tribal culture and religion. Tribes can adapt this Act so it insure tribal members are able to obtain leave for important cultural events, such as ceremonies or funerals, while at the same time putting some limits and providing some certainty to both the employer and the employee, thereby eliminating or at least reducing a source of friction in the workplace on many reservation in regard to the twin obligations discussed above.

PART VII. – OCCUPATIONAL SAFETY AND HEALTH ACT

Under this Part, the Ordinance adopts the Federal Occupational Safety and Health Act (OSHA) and its implementing regulations and standards and makes it applicable to those entities over which the Tribe has jurisdiction. The scope of a tribe's jurisdiction over occupational safety and health is presently uncertain. OSHA makes it clear that it preempts any state laws regulating occupational safety and health and preempts any enforcement authority by a state except under agreements with DOL's division of Occupational Safety and Health, the agency given responsibility for enforcing OSHA.

What is not clear is whether OSHA's preemption applies to tribes. There is decision by the U.S. Court of Appeals for the First Circuit (*Reich v. Mashentucket Sand and Gravel Co.*) in which the Court cites statements by DOL attorneys that OSHA does not preempt tribes because they are not specifically referenced in the OSHA preemption provision. However, subsequent efforts by the Council For Tribal Employment Rights to obtain a policy statement confirming that this is DOL's position have not borne fruit; DOL says it is still studying the issue.

As a result, there are two possible situations regarding tribal OSHA authority. One is that tribal regulation of occupation and safety and health is not preempted by OSHA, such that tribes do have jurisdiction, concurrent with DOL, over the regulation and enforcement of occupational safety and

health matters in regard to employers subject to the Tribe's jurisdiction. The other possibility is that DOL will conclude that OSHA does preempt tribal regulation in this area, such that a tribe's authority to regulate is limited to those employees employed by the tribe, its subsidiaries and its enterprises (because OSHA does not apply to tribal governments). Until DOL makes a decision, tribes will remain in a state of uncertainty on this issue.

This Ordinance takes the position that OSHA does not preempt tribal authority and that tribes have the power to regulate occupational safety and health over all employers subject to the tribe's jurisdiction. This Part implements the Tribe's authority by adopting as tribal law all of the standards and regulations DOL has established under OSHA, so the requirements that employers will have to meet will be the same for DOL and the Tribe. While the standards will be identical, assertion of tribal jurisdiction in this area is important because having such jurisdiction will enable the TERO to enforce those requirements, and not have to rely on DOL officials or their delegates for enforcement. Experience has shown that given the remoteness of many reservations, DOL enforcement is not as thorough as it needs to be, such that concurrent TERO enforcement is needed to effectively protect the health and safety of employees on the reservation. For this reason it is recommended that TEROs whose tribes have adopted this Ordinance enforce the occupational safety and health requirements unless and until prohibited by DOL or a court. TERO staff will need to be trained in OSHA requirements to effectively implement this Part. The Council for Tribal employment Rights is presently working with DOL's Office of Occupational health and Safety on training programs for TEROs (though DOL does not concede that the TEROS have enforcement authority).

However, if DOL or the courts rule that tribes lack such authority, there is still an important role for TEROs to play. Since TERO staff is out at the job sites regularly, if trained, they are in a better position to identify occupational safety and health problem than are DOL officials who appear periodically at best. By developing relationships with the local DOL officials, the TEROs can make those officials aware of possible problems and help them correct them as quickly as possible.

PART VIII. – FREEDOM TO WORK WITHOUT JOINING A UNION

The National Labor Relations Act (NLRA) permits states to adopt laws prohibiting any union-management agreement from requiring that all employees of that employer join the union. Such laws, which have been adopted by a minority of the states, are called Right-to-Work laws. Until recently, it was unclear whether tribes had a right to adopt such laws. This issue was resolved by the U.S Court of Appeals for the Tenth Circuit, in *National Labor Relations Board v. San Juan Pueblo*, holding that a tribe may adopt a right-to-work ordinance just as a state can. PART VIII puts this authority to work for the Tribe. Each tribe needs to evaluate its policies and relationships with unions in its area and then determine if it wishes to adopt this Part. If it is adopted, no employee can be required to join a union, pay union dues or pay into union fringe benefit funds. On the other side, it provides that an employer may not prohibit an employee from joining a union or refuse to hire a person because he or she is a member of a union.

PART IX. – ENFORCEMENT

This Part sets out a comprehensive and extensive set of provisions for enforcing all of the Parts of the Ordinance. The provisions are based on 28 years of experience enforcing TERO requirements and seeks to plug the holes that have emerged over the years as TEROs have enforce their ordinances.

**MODEL TRIBE/NATION
WORKFORCE PROTECTION ORDINANCE**

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PART I. POLICY AND DEFINITIONS

Section 1-101: Declaration of Policy

As a guide to the interpretation and application of this Ordinance, the public policy of the _____ Nation (hereinafter "the Nation") is declared to be as follows:

Economic insecurity and unemployment are a serious menace to the health and welfare of the Nation. Like land, water, and minerals, employment on the _____

Reservation is an important resource that must be protected and promoted. Indians have unique and special employment, subcontract and contract rights. All workers subject to the Nation's jurisdiction are entitled to a workforce environment that is free of employment discrimination, that protects their health and safety, and that provides them with the same rights and protections available to employees located outside the Reservation. The Nation's Council therefore declares that in its considered judgment, the public good and welfare of the Nation require the enactment of this Workforce Protection Ordinance, under its inherent sovereign and police powers, in order to increase employment of Indian workers and businesses within the exterior boundaries of the _____ Reservation and to protect the workforce rights of Indian and non-Indian workers subject to the jurisdiction of the Nation.

Section 1-102: Definitions

The following definitions shall apply to all Parts under this Ordinance unless specifically indicated otherwise in that Part:

- (a) "Commission" means the Tribal Employment Rights Commission established by this Ordinance.
- (b) "Day" means a work day, which excludes Saturdays, Sundays, and Federal holidays.

- (c) "Employee" means any person employed for remuneration.
- (d) "Employer" means any person, partnership, corporation, or other entity that employs, for wages two or more employees who during any 20-day period, spend, cumulatively, 16 or more hours performing work within the exterior boundaries of the Reservation.
- (e) "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 the Ordinance's coverage over all employment and contract activities within the Nation's jurisdiction and the term shall be so interpreted by the Commission and the Courts.
- (f) "Government Commercial Enterprise" means any business activity, for-profit company, or enterprise owned by the Nation or any subsidiary governmental entity of the Nation, such as a District or Segment, regardless of how such business activity is legally structured.
- (g) "Indian" means any member of a federally-recognized tribe.
- (h) "Local Indian" means any member of a federally-recognized tribe who has resided within the exterior boundaries of the Reservation or within reasonable commuting distance of the Reservation for at least 60 days prior to asserting a right granted by this Ordinance.
- (i) "Nation" shall mean the _____ Nation.
- (j) "Nation's Government" shall mean all offices of the Nation carrying out governmental activities, all subsidiary entities of the Nation, including the _____ Housing Authority, and all district, segment or other local governmental entities of the Nation
- (k) "Regulations" shall mean the regulations implementing this Ordinance adopted by the _____ Tribal Employment Rights Commission.

- (l) "Reservation" means the _____ Reservation and any other lands that are subject to the jurisdiction of the government of the _____ Nation.
- (m) "TERO" or "Office" means the _____ Tribal Employment Rights Office.
- (n) "TERO Director" means the TERO Director of the Tribal Employment Rights Office appointed pursuant to the provisions of Part II of this Ordinance.

Section 1-103: Severability

If for any circumstance, provisions or sections of this Act are held invalid by the appropriate court of jurisdiction, the remainder of this Act and other provisions or sections will not be affected in the application of the Act to any person, Employer and others covered by the Ordinance.

Section 1-104: Effective Date

This Ordinance shall be effective thirty (30) days from the date of its approval by the Tribal Council.

**PART II. TRIBAL EMPLOYMENT RIGHTS COMMISSION AND EMPLOYMENT
RIGHTS FEE**

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TITLE I: TRIBAL EMPLOYMENT RIGHTS COMMISSION

TITLE II: EMPLOYMENT RIGHTS FEE

TITLE I: TRIBAL EMPLOYMENT RIGHTS COMMISSION

Section 2-101: Commission; Members, Qualifications, Compensation, Quorum

- (a) There is hereby created the Tribal Employment Rights Commission (“Commission”), which shall be an independent commission of the Nation, reporting directly to the Chairman of the Nation.
- (b) The Commission shall be composed of seven members, one from each District, nominated by the Council Member from that District and one nominated by the Tribal Chairman, all of whom shall be approved by the Tribal Council. The individuals nominated and approved shall meet the ethical and prior history requirements established for judges in the Nation’s court system and shall have experience or expertise in one or more of the following areas:
 - (1) Business;
 - (2) Financial management;
 - (3) Construction;
 - (4) Employment Training; or
 - (5) Law.
- (c) Commissioners shall be appointed for a term of three years; provided that, the appointments to the Commission shall be made in such a manner that their terms shall be staggered, so that the terms of no more than two Commissioners shall terminate in any year.
- (d) The Tribal Council may remove a member of the Commission for inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

- (e) The Tribal Chairman shall designate one of the members of the Commission as chairman and one as vice chairman.
- (f) The Commissioners shall serve until replaced. The TERO Director shall notify the Nation's Chairman of any vacancies within ten working days after he becomes aware of such vacancy. Vacancies shall be filled in the same manner used to select the predecessor in that position.
- (g) 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 Commissioners of the Nation or for officers or committee members of the Council.
- (h) A majority of the Commission shall constitute a quorum to transact business. When a vacancy occurs in the Commission, the remaining members may exercise all the powers of the Commission until the vacancy is filled.
- (i) Recusal of Commission Members:
 - (1) For purposes of this section, "immediate family" means brother, sister, son, daughter, mother, father, husband, wife, step-brother, step-sister, half-brother, half-sister, or brother, sister, son, daughter, mother or father by adoption.
 - (2) No member of the Commission shall participate in any action or decision by the Commission directly involving himself, or a member of his immediate family, or any person, business or other entity of which he or a member of his immediate family is an employee, or in which he or a member of his immediate family has a substantial ownership interest, or with which he or a member of his immediate family has a substantial contractual relationship.

- (3) Nothing in this section shall preclude a Commissioner from participating in any action or decision by the Commission which:
 - (a) Generally affects a class of persons, regardless of whether the Commissioner or a member of his immediate family is a member of the affected class;
 - (b) Affects the Nation, a Nation enterprise, or a person or entity in a contractual relationship with the Nation or a Nation enterprise, regardless of whether the Commissioner is a member of the Nation.
- (4) A Commissioner may voluntarily recuse himself and decline to participate in any action or decision by the Commission when the Commissioner, in his discretion, believes:
 - (a) that he cannot act fairly or without bias; or
 - (b) that there would be an appearance that he could not act fairly or without bias.

Section 2-102: Powers of the Commission

The Commission has the full power, jurisdiction, and authority to:

- (a) Take all actions necessary and appropriate to implement the provisions of this Ordinance.
- (b) Formulate, adopt, amend and rescind rules, regulations and guidelines necessary to carry out the provisions of this Ordinance. Except when an emergency exists, the Commission shall provide the public with a reasonable time for comment before promulgating any final regulations.
- (c) Conduct hearings in accordance with such rules of practice and procedure as may be adopted by the Commission, and to order any relief or sanctions authorized by this

Ordinance, and to petition the Nation's Court for such orders as are necessary and appropriate to enforce the decisions of the Commission and any sanctions imposed by the Commission.

Section 2-103: TERO Director; Qualification; Staff; Duties

- (a) There shall be a TERO Director, who shall serve as the chief executive officer of the TERO, who shall be appointed by the Nation Council, who shall serve at the discretion of the Council, and who shall report directly to the Nation's Chairman.
- (b) The Nation's Chairman shall have exclusive authority to suspend and remove the TERO Director. The Chairman of the Commission shall participate in an advisory capacity in the annual evaluation of the TERO Director. If at any time the Commission believes the TERO Director is failing to properly carry out his responsibilities, it shall, by formal action, send a communication to that effect to the Nation's Chairman.
- (c) The TERO Director shall have such administrative ability, education and training as the Council determines.
- (d) The TERO Director shall have authority to hire staff, to expend funds appropriated by the Nation Council pursuant to a budget submitted by the TERO Director to the Council, and to expend funding from federal, state or other sources to carry out the purposes of this Ordinance, subject to the approval of the Council.
- (e) The TERO Director shall enforce all decisions and orders duly adopted by the Commission.

Section 2-104: Intergovernmental Relationships

The TERO Director, is authorized to enter into cooperative relationships with federal employment rights agencies, such as EEOC, OSHA and OFCCP, in order to protect and promote

the workforce rights of Indians on and off the Reservation and to enter into cooperative relationships with federal agencies, such as the BIA, HUD, DOL FHWA and IHS, in order to implement any federal employment or other workforce rights, authorities, or requirements as such agency may lawfully delegate to tribes.

Section 2-105: TERO Assumption of Federal Indian Preference Enforcement

If the Federal laws or regulations governing any program administered by any office, division, branch, subsidiary entity or commercial enterprise of the Nation or any of its subsidiary entities authorize a tribe's Indian preference requirements to replace, or permit a tribe to obtain delegated authority to assume responsibility for enforcing, Indian preference requirements established by Federal law or regulations and enforced by a Federal agency, said office, division, branch, subsidiary entity or commercial enterprise of the Nation or any of its subsidiary entities, shall within 90 days of the effective date of this Ordinance, in coordination with the TERO Director and the Nation Legal Department, apply for such delegated or replacement authority and request that such delegated or replacement authority be vested in the TERO. Any disputes regarding the implementation of this Section shall be submitted to the Nation Legal Department, whose decision shall be binding on the parties.

TITLE II: EMPLOYMENT RIGHTS FEE

Section 2-201: Employment Rights Fee

An employment rights fee, to raise revenue for the operation of the TERO, is imposed as follows:

- (a) Every Employer or Entity with a construction contract in the amount of \$1,000 or more shall pay a fee of two and one half percent (2½%) of the total amount of the contract. Such fee shall be paid by the Employer or Entity prior to commencing work on the Reservation. However, where good cause is shown, the TERO Director may authorize a construction contractor to pay said fee in installments over the course of the contract.
- (b) Notwithstanding the provisions of Subsection 2-105(a), a construction contractor awarded a contract by the Nation's government, including all branches, offices and divisions, all subsidiary governmental entities of the Nation (including the Housing Authority, and Districts) and any governmental commercial enterprises of the Nation, (including casinos) regardless of the source of funds for that contract, shall, as a condition of doing business on the Reservation, grant its consent to the tribal entity awarding the contract to deduct the amount of the TERO fee from the total amount due the contractor under the contract and to pay said amount directly to the TERO prior to the commencement of work under the contract. Prior to making said deduction, the tribal entity awarding the contract shall provide the contractor with a form prepared by the TERO, in which the contractor grants its consent to the deduction of the TERO fee from the amount it is entitled to receive from the tribal entity, as provided for above. A contractor

shall not be permitted to commence work on the Reservation until it has executed said form. This provision shall not apply where the Nation's Legal Department has opined that application of these requirements to that tribal entity is specifically preempted or otherwise prohibited by Federal law.

- (c) Every Employer other than construction contractors, with five (5) or more employees working on the Reservation, or with gross sales on the Reservation of \$10,000 or more, shall pay a quarterly fee of two and one half percent of his quarterly payroll for employees working on the Reservation, which shall be paid within 30 days after the end of each quarter;
- (d) The fee imposed by subsections (a) (b) and (c) of this Section shall not apply to education, health, religious, governmental, or non-profit employers. It shall apply to contractors employed by such employers.

Section 2-202: Fee Collection and Expenditure

The fee shall be collected by the TERO Director pursuant to the regulations of the Commission. The fee shall be paid over to the Nation's Treasurer and shall be credited to the TERO account. Said funds shall be expended solely by the TERO, pursuant to budgets duly approved by the Tribal Council, to carry out the purposes of this Ordinance, including the administration of the Nation's Bureau of Apprenticeship and Training certified apprenticeship training program.

Section 2-203: Monthly Statements

The Tribal Treasurer shall provide the TERO Director with a monthly statement that provides the following information:

- (a) The total amount of money that was in the fees account at the beginning of the month;

- (b) The fees paid into the account during the month, itemized by the name of the payer, the amount paid, and the date of payment.
- (c) The amount withdrawn from the account during the month; and
- (d) The balance in the account at the end of the month.

PART III. INDIAN PREFERENCE IN EMPLOYMENT AND CONTRACTING ACT

TITLE I INDIAN PREFERENCE IN EMPLOYMENT

**TITLE II INDIAN PREFERENCE IN CONTRACTING AND
SUBCONTRACTING**

TITLE III NOTIFICATION AND COMPLIANCE PLAN REQUIREMENTS

TITLE I. INDIAN PREFERENCE IN EMPLOYMENT

Section 3-101: Coverage

- (a) For purposes of this Title, the term “Employer” shall include all private employers subject to the Nation’s jurisdiction, the Nation’s government, including all branches and divisions, all subsidiary governmental entities of the Nation (including the Housing Authority, Districts, and other local governmental entities of the Nation), and any governmental commercial enterprises of the Nation, its divisions or subsidiaries, (including casinos) except when the Nation Legal Department has opined that application of these requirements to that Nation-related entity is specifically preempted or otherwise prohibited by laws of the Nation or Federal law.
- (b) The requirements set out in this Title shall not apply to any direct employment by the Federal or State government or their subdivisions. It shall apply to all contractors or grantees of such governments and to all commercial enterprises operated by such governments so long as they are subject to the jurisdiction of the Nation.

Section 3-102: Indian Preference in Employment

All Employers, for all employment that is subject to the jurisdiction of the Nation, shall give preference to qualified Indians, with the first preference to local Indians, in all hiring, promotion, training, lay-offs, and all other aspects of employment. Such Employers shall comply with the rules, regulations, guidelines and orders of the Tribal Employment Rights Office which set forth the specific obligations of Employers in regard to Indian preference and local Indian preference.

Section 3-103: TERO Hiring Hall

No Employer shall employ a non-local Indian or a non-Indian without first providing the TERO with no less than 72 hours to locate and refer a qualified local Indian; provided that, the

Commission may, by regulation, provide for a period of less than 72 hours when required by business necessity.

Section 3-104: Goals and Timetables

All Employers shall comply with the goals and timetables established by the TERO specifying the minimum number or percentage of Indians an Employer must hire, by craft or skill level.

Section 3-105: Job Qualifications and Business Necessity

No Employer shall use any job qualification criteria or other personnel requirements that serve as barriers to Indian preference in employment, as determined by the TERO, unless the Employer can demonstrate that such criteria or requirements are required by business necessity.

Section 3-106: Unions

Employers with collective bargaining agreements with a union are responsible for informing said union of this Ordinance and TERO rules and regulations. An Employer shall obtain a written agreement, acceptable to the TERO Director, from each union with which it has a collective bargaining agreement providing that:

- (a) the union will give absolute preference to local Indians in job referrals regardless of the position of said local Indians on any referral list the union may keep;
- (b) the union will grant Temporary Work Permits to any local Indian who does not wish to join a union; and
- (c) the union will agree to the Employer paying the fringe benefits in cash to any local Indian who is not a union member and who chooses not to participate in the union's fringe benefit programs.

No union agreement shall supercede the requirements of this Ordinance and its implementing Regulations. Nothing herein shall constitute official recognition by the Nation of any union or the Nation's endorsement of any union activities on the Reservation.

Section 3-107: Apprenticeship Programs

- (a) The TERO Director shall, within 90 days after the effective date of this Ordinance, prepare and begin to implement a plan for promoting the development of the maximum number of local Indian journeymen as quickly as possible, through the development or upgrading of a Bureau of Apprenticeship and Training Certified Apprenticeship Program or similar program that will permit trainees to be employed on Davis-Bacon covered projects and be paid trainee wages. The TERO Director shall provide the Tribal Council with an annual report on the apprenticeship program, including the number of local Indian journeymen in each craft, the status of each local Indian in the Program, the number of local Indians who have dropped out of the Program during the past year, and the steps the TERO Director is taking to maximize the effectiveness of the Program.
- (b) Each Employer that hires employees in crafts that are participating in the Nation's Certified Apprenticeship Program shall employ the maximum number of trainees or apprentices required by that Program and shall otherwise cooperate in full with said Program in order to promote the development of local Indian journeymen.

**TITLE II. INDIAN PREFERENCE IN CONTRACTING AND
SUBCONTRACTING**

Section 3-201: Indian Preference in Contracting

- (a) All Entities awarding contracts or subcontracts for supplies, services, labor and materials in an amount of \$10,000 or more where the majority of the work on the contract or subcontract will occur within the jurisdiction of the Nation, shall give preference in contracting and subcontracting to qualified firms that are certified by the TERO as 51% or more Indian-owned and controlled. Where the contractor or subcontractor is selected through a competitive process, the awarding entity shall limit competition to Indian certified firms. The Commission shall issue regulations providing guidance on the implementation of this requirement and for implementation of Indian preference when the awarding entity uses a method other than competition to select a contractor or subcontractor.
- (b) The requirements set out in this Title shall apply to contracts awarded directly by the Nation, its branches, divisions and all subsidiary governmental entities of the Nation, and any governmental commercial enterprises of the Nation or its divisions or subsidiaries, (including casinos), except when it is determined by the Nation's Legal Department that application of these requirements to that entity is specifically prohibited by Federal law. If a Federal Indian contract or subcontract preference requirement applies and is in conflict with the requirements of this Ordinance, the Federal requirements shall apply.
- (c) The requirements set out in this Title shall not apply to contracts awarded by the federal or state government or their subdivisions. They shall apply to all subcontracts awarded

by a federal or state direct contractor or grantee that is subject to the jurisdiction of the Nation, whether or not the prime contract was subject to these requirements, except when it is determined by the Nation's Legal Department that application of these requirements to that entity is specifically prohibited by Federal law.

Section 3-202: Certification as Indian Preference-Eligible

The Commission shall establish a system for certifying firms as Indian preference and local Indian preference eligible ("Certified Firm"). Said system shall include detailed provisions to insure that front companies that are not truly 51% or more owned and controlled by Indians are not granted Indian preference certification.

**TITLE III. NOTIFICATION OF TERO REQUIREMENTS AND TERO
COMPLIANCE PLAN REQUIREMENTS**

Section 3-301: Compliance Plan

All Employers and all Entities subject to this Ordinance shall, no less than twenty days prior to commencing business on the Reservation, prepare a plan, acceptable to the TERO Director, setting out how the Employer or Entity shall comply with the requirements of this Title on Indian employment and contract preference and implementing regulations. An Employer or Entity already present on the Reservation on the effective date of this Ordinance that has not prepared a Compliance Plan acceptable to the TERO Director, shall come into compliance with the requirements of this section within 60 days of the effective date of this Ordinance.

Section 3-302: Signs at Reservation Ports of Entry

The TERO Director shall cause to be erected next to each paved road at the point at which it enters the Reservation, a sign informing the public that Employers and Entities are required to comply with the requirements of this Title.

Section 3-303: Notice to Proposed Contractors

Any office, division, branch, subsidiary entity, or commercial enterprise of the Nation or any of its subsidiary entities, when issuing a notice of a proposed contract to be awarded by it or a notice involving a proposed lease, right-of-way agreement, or notice of any other proposed action that will create new employment or subcontracting opportunities on the Reservation, shall include provisions in the notice that fully inform the prospective contractor or other entity about the requirements established by the Title.

Section 3-304: Contract Language Imposing TERO Indian Preference Requirements

Any office, division, branch, subsidiary entity or commercial enterprise of the Nation or any of its subsidiary entities, when awarding a contract, lease, right-of-way or entering into any other legal agreement with a Party that will create new employment or subcontracting opportunities on the Reservation, shall include provisions that impose the requirements of this Title on the contractor, lessee, right-of-way grantee, or other Party, such that the legal document will fully bind the Party to comply with the requirements of this Title, notwithstanding any future decision by a court that has the effect of eliminating, reducing, or putting into question the Nation's authority to impose the requirements of this Ordinance on said contractor pursuant to the sovereign authority of the Nation.

Section 3-305: Model Language

In order to implement the requirements of Section 3-303 and 3-304 TERO Director shall prepare and provide to the offices, divisions, branches, subsidiary entities and commercial enterprises of the Nation and its subsidiary entities:

- (a) model language that shall be included in the notice to prospective contractors, lessees, rights-of-way grantee, or other parties who will be engaged in activity that will create new subcontracting or employment opportunities on the Reservation, informing them of the requirements established by this Title; and
- (b) model language to be included in each contract, lease, right-of-way agreement, or other legal document issued by that office, division, branch, subsidiary entity or commercial enterprise of the Nation and its subsidiary entity, imposing the requirements set out in this Ordinance as terms of the contract, lease, right-of-way agreement or other legal agreement being entered into with the Party that will be

engaged in activity that will lead to the creation of subcontracting or employment opportunities on the Reservation.

The TERO Director shall submit the proposed model language to the Nation Legal Department for its approval prior to distributing the language to the offices, branches, divisions, subsidiary entities and commercial enterprises of the Nation and its subsidiary entities, as provided for in this Section.

Section 3-306: TERO Approval of Contracts Awarded by Nation Entities

- (a) Each office, division, branch, subsidiary entity or commercial enterprise of the Nation or any of its subsidiary entities, prior to issuing notice of a contract to prospective contractors or issuing any other notice to prospective Employers or Entities that will lead to the creation of employment, contracting or subcontracting opportunities on the Reservation, and prior to awarding a contract or entering into any other agreement that will lead to the creation of employment, contracting, or subcontracting opportunities on the Reservation, shall submit the proposed notice or contract to the TERO Director for his approval. The TERO Director shall indicate his approval by signing his name at a place provided for TERO approval on the document at issue.
- (b) Any contract awarded or agreement entered into by an office, division, branch, subsidiary entity or commercial enterprise of the Nation or any of its subsidiary entities that is subject to the requirements of this Title and which has not received the prior approval of the TERO Director shall be voidable at the option of the TERO Director. Any disputes between the TERO Director and the office, division, branch, subsidiary entity or commercial enterprise of the Nation or any of its subsidiary entities regarding appropriate contract language or other disputes arising under this Section shall be submitted to the

Nation's Legal Department for resolution, whose decision shall be binding on the parties.

Pending action by Nation's Legal Department, the TERO direction may petition the Tribal Courts to enjoin, and, upon good cause shown, said Courts shall enjoin, the issuance or award of any contract or the initiation of any other activity by an office, division, branch, subsidiary entity or commercial enterprise of the Nation or any of its subsidiary entities that will create employment, contracting, or subcontracting opportunities on the Reservation and that fails to comply with the requirements of this Ordinance.

- (c) No employee of the Nation shall disseminate any written information on TERO or the Nation's Indian preference requirements without first obtaining the TERO Director's approval of said document.

PART IV. ACT PROHIBITING EMPLOYMENT DISCRIMINATION BASED ON RACE, SEX, AGE, DISABILITY, RELIGION OR NATIONAL ORIGIN

Section 4-101: Prohibitions

Except in furtherance of the provisions requiring employment preference to Native Americans set out in Part III of this Ordinance, or when based upon a bona fide occupational qualification, it shall be unlawful to do any of the following acts, wholly or partially for a discriminatory reason based on the actual or perceived; race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, or political affiliation of any individual:

- (a) By an Employer – To fail or refuse to hire, or to discharge, any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms and condition, or privileges of employment, including promotion, to discriminate in recruiting individuals for employment, or to limit, segregate, or classify his or her employees in any way which would tend to deprive them of employment opportunities;
- (b) By a labor organization – to exclude or to expel from its membership, or otherwise to discriminate against, any individual, or to classify, or fail or refuse to refer for employment any individual in any way, which would deprive such individual of employment opportunities, or would limit such employment opportunities, or otherwise adversely affect his or her status as an employee or as an applicant for employment;
- (c) By an Employer or a labor organization – To discriminate against any individual in admission to or the employment in, any program established to provide training or retraining, including on-the-job training.

Section 4-102: Religious Accommodation

It shall be an unlawful discriminatory practice for an Employer to refuse to make a reasonable accommodation for an employee's religious observance by such actions as permitting the employee to make up work time lost due to such observance, unless such an accommodation would cause the Employer undue hardship. An accommodation would cause an Employer undue hardship when it would cause the Employer to incur more than *de minimis* costs.

Section 4-103: Discrimination Based on Pregnancy

Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and this requirement shall include but not be limited to a requirement that an employer must treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees.

Section 4-104: Discrimination Based on Disability

- (a) It shall be unlawful for an Employer or labor organization to discriminate in any aspect of employment against a qualified individual with a disability because of that disability; provided that, Employers may use qualification standards, tests or selection criteria that have been shown to be job-related and consistent with business necessity and such performance cannot be accomplished by reasonable accommodation. Provided further, nothing in this section shall prohibit an Employer from refusing to hire or from discharging an individual with a disability, if the individual, because of the disability, is unable to perform the duties or to perform the duties in a manner that would endanger the

health and safety of the individual or others or is unable to be at, remain at, or go to or from the place where the duties of employment are to be performed.

- (b) For purposes of this Section, the term “qualified individual with a disability” shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the Employer acts on the basis of such use.
- (c) Nothing in Paragraph 4-104(b) shall be construed to exclude as a qualified individual with a disability an individual who is engaging in or who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or who has otherwise been rehabilitated successfully and is no longer engaging in such use.
- (d) It shall not be a violation of this section for an Employer to hold an employee who engages in the illegal use of drugs or excessive use of alcohol to the same qualification standards for employment or job performance and behavior to which that Employer holds other employees, even if any unsatisfactory performance or behavior is related to the drug or alcohol use of the employee; provided that an Employer shall make reasonable accommodation to alcohol or drug user who is seeking treatment.

Section 4-105 Harassment (including Sexual Harassment)

- (a) It shall be unlawful employment discrimination to subject an employee or applicant to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature as well as unwelcome comments, jokes, acts, and other verbal or physical conduct related to race, color, national origin, religion, age, or disability when:

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
 - (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
 - (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.
- (b) An Employer is responsible for the acts of workplace harassment of its supervisory and non-supervisory employees where the Employer, or its agents or supervisory employees, knew or should have known of the conduct. An Employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action upon learning of the harassment.

PART V. EMPLOYEE WAGE AND HOUR ACT

TITLE I MINIMUM WAGE

Section 5-101: Minimum Wage

Any employer who, in any workweek, is engaged in commerce or the production of goods for commerce, shall be paid an hourly wage of not less than \$_____ per hour. Such wage may be changed by vote of the Tribal Council.

Section 5-102: Maximum Hours

No employer shall employ any of its employees for a workweek longer than forty (40) hours unless such employee receives compensation for the employee's employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which the employee is employed.

Section 5-103: Exemptions

The provisions in subsection 5-101 and 5-102 shall not apply with respect to any employee employed in a bona fide executive, administrative, or professional capacity, or any other exemption category outlined in the Federal Fair Labor Standards Act of 1938, Title 29 of the United States Ordinance, section 201 *et seq.*, as amended and regulations concerning that Act promulgated by the U.S. Department of Labor.

Section 5-104: Private Right of Action

Any individual aggrieved under this section may seek retroactive payment of unpaid minimum wages or unpaid overtime compensation against an employer pursuant to the Enforcement provisions set out in Part IX of this Ordinance.

Section 5-105: Statute of Limitations

Any action to secure unpaid minimum wages or unpaid overtime compensation must be commenced within two years after the date on which such wages or overtime compensation should have been included in an employee's paycheck.

Section 5-106: Guidance

For the purposes of interpreting and enforcing this section only, the TERO Commission and the Tribal Court may look to the Federal Fair Labor Standards Act and regulations there under as well as relevant case law for guidance, provided however, that nothing in this section 13 shall be construed as an adoption by the Tribe of the Fair Labor Standards Act of 1938, Title 29 of the United States Ordinance, sections 201 *et seq.*

**TITLE II MINIMUM WAGE RATES ON PROJECTS SUBJECT TO THE
FEDERAL DAVIS-BACON ACT**

**Section 5-201: Assertion of Tribal Authority over Wage Determinations on Certain
Housing Construction Projects**

Through this Title, the Nation hereby asserts the authority granted to tribal governments by Title I, section 104 of P.L. 104-33 (25 U.S. C. 4114(b)(3)) to establish prevailing wage rates, in lieu of those established by the U.S. Secretary of Labor, for laborers and mechanics employed in the development of affordable housing under the Native American Housing Assistance and Self-Determination Act.

Section 5-202: [OPTION ONE] Wage Determinations

Except as provided in Sections 5-203 and 5-204, the wages to be paid laborers and mechanics employed in the development of affordable housing under the Native American Housing Assistance and Self-Determination Act shall be not less than those required by the U.S. Secretary of Labor under the Davis-Bacon Act (40 U.S.C. 3142, et seq.) for the locality in which the work is to be performed.

Section 5-202: [OPTION TWO] Wage Determinations

The TERO Commission is hereby authorized to determine the prevailing wage rates for each craft of laborers and mechanics that are employed on projects developed under the authority of the Native American Housing Assistance and Self-Determination Act. Said wage rates shall be binding all Employers engage in projects authorized pursuant to that Act. Provided that, prior to establishing prevailing wage rates, the Commission shall consult with the Nation's Housing Authority and shall hold no fewer than one public hearing. Further provided, that any wage rates determined by the Commission shall not become final until they

have been submitted to the Tribal Council and, after 90 days, the Tribal Council has not adopted a resolution rejecting the wage determinations.

Section 5-203 Wages Determination for Trainees

- (a) An Employer engaged in a project subject to this Title (a project under the Native American Housing and Self-Determination Act) may pay laborers and mechanics who are not certified as journeymen at the wage rate established by the U.S. Department of Labor Davis-Bacon Wage Determination for a trainee at that skill level, or, if the employee's skill level has not been rated, a wage that is no less than three-fifths of the minimum wage for a journeyman in that craft as determined by the U.S. Secretary of Labor under the Davis-Bacon Act (40 U.S.C. 3142, et seq.) for the locality in which the work is to be performed, (including any fringe benefit amounts that are included in said wage determination by the Secretary) if the TERO Director has certified that said employee is participating in a formal or informal training program that will lead to journeyman status.
- (b) Each Employer shall employ one trainee for every three journeymen the Employer employs in that craft on that project.

Section 5-204: Fringe Benefits

An employee shall have the option of electing to receive any amounts included for fringe benefits in a prevailing wage, whether said determination was made by the U.S. Secretary of Labor pursuant to the Davis Bacon Act or by the Nation pursuant to Sections 5-201 through 5-203 of this Title, in the form of a direct cash payment that is to be included in the employee's paycheck. Each Employer shall offer said option to each employee at the time he or she is first employed.

PART VI FAMILY MEDICAL LEAVE PROTECTION ACT

Section 6-101: Family Medical Leave Protection

(a) Family medical leave requirement. Every employee who has been employed by the same employer for 12 consecutive months is entitled to up to 10 consecutive work weeks of family medical leave in any 2 years. The following conditions apply to family medical leave granted under this section:

- (1) The employee must give at least 30 days' notice of the intended date upon which family medical leave will commence and terminate, unless prevented by medical emergency from giving that notice;
- (2) The employer may require certification from a physician to verify the amount of leave requested by the employee, except that an employee who in good faith relies on treatment by prayer or spiritual means, in accordance with the tenets of a recognized religious or spiritual practice, may submit certification from an accredited practitioner of those healing methods; and
- (3) The employer and employee may negotiate for more or less leave, but both parties must agree.

Family medical leave granted under this subchapter may consist of unpaid leave. If an employer provides paid family medical leave for fewer than 10 weeks, the additional weeks of leave added to attain the total of 10 weeks required may be unpaid.

(b) Employee benefits protection.

- (1) Restoration. Any employee who exercises the right to family medical leave under this section, upon expiration of the leave, is entitled to be restored by the

employer to the position held by the employee when the leave commenced or to a position with equivalent seniority status, employee benefits, pay and other terms and conditions of employment. This subsection does not apply if the employer proves that the employee was not restored as provided in this subsection because of conditions unrelated to the employee's exercise of rights under this section.

(2) Maintenance of employee benefits. During any family medical leave taken under this subchapter, the employer shall make it possible for employees to continue their employee benefits at the employee's expense. The employer and employee may negotiate for the employer to maintain benefits at the employer's expense for the duration of the leave.

(c) Effect on existing employee benefits.

(1) Benefit accrual. The taking of family medical leave under this section shall not result in the loss of any employee benefit accrued before the date on which the leave commenced.

(2) Contract rights. Nothing in this subchapter may be construed to affect or diminish the contract rights or seniority status of any other employee of any employer covered by this subchapter.

PART VII OCCUPATIONAL SAFETY AND HEALTH ACT

Section 7-101: Duties of Employers and Employees

- (a) Each Employer shall:
 - (1) Furnish employees with a place and condition of employment that is free from recognized hazards that may cause or are likely to cause death or serious physical harm to the employees;
 - (2) Comply with all occupational safety and health rules promulgated or adopted by the Nation pursuant to this Part.
- (b) Each employee shall comply with all occupational safety and health rules promulgated or adopted by this Part that are applicable to the actions and conduct of the employee.

Section 7-102: Adoption of the Rules of the Federal Occupational Safety and Health Administration

The rules and regulations of the Occupational Safety and Health Administration (OSHA) of the United States Department of Labor, including all future rules or amendments to existing rules, promulgated pursuant to the authority granted to OSHA by the Occupational Safety and Health Act of 1975, (29 U.S.C. sections 651 et. seq.) are hereby adopted by the Nation to the full extent of the Nation's authority and apply to all Employers within the jurisdiction of the Nation.

Section 7-103: Enforcement

- (a) The TERO Director is authorized to enforce the rules adopted by Section 7-102, pursuant to the Enforcement provisions set out at Part IX of this Ordinance to the extent his or her authority has not been preempted by Federal law.
- (b) For those Employers over whom the TERO Director's authority to enforce the requirements of this Part has been preempted by Federal law, for those employers located

within the boundaries of the Reservation that are not subject to the jurisdiction of the Nation, and for those employers located outside the boundaries of the Reservation that employ a significant number of tribal members, the TERO Director shall work cooperatively with Federal and state officials responsible for enforcing occupational safety and health requirements over such Employers to insure the maximum enforcement of such requirements in regard to such Employers.

PART VIII FREEDOM TO WORK WITHOUT JOINING A UNION ACT

Section 8-101: Policy

It is hereby declared to be the public policy of the Nation that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organizations.

Section 8-102: Agreements Declared Unlawful

Any agreement between any Employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for the Employer, or whereby such membership is made a condition of employment, continuation of employment, promotion or any other benefits by such Employer is hereby declared to be against public policy and illegal.

Section 8-103: Employees Not Required to Join a Union

No person shall be required by an Employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such Employer.

Section 8-104: Employees May Not be Prohibited From Joining a Union

No person shall be required by an Employer to abstain or refrain from membership in, or holding office in, any labor union or labor organization as a condition of employment or continuation of employment.

Section 8-105: Employees Shall Not be Required to Pay Union Dues

No Employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to a labor union or labor organization.

Section 8-106: Payment of Fringe Benefits

Any Employer who is subject to a collective bargaining agreement that requires it to pay monies for fringe benefits for its employees into a union fund, such as health and pension funds, shall offer any employee who is not a union member the option of receiving directly, in each paycheck, the amount that would otherwise have been placed into the union fund on behalf of that employee.

PART IX. ENFORCEMENT

Section 9-101: Applicability

The enforcement provisions set out in this Part shall be used to enforce the requirements set out in each of the Parts of this Ordinance, unless a specific enforcement provision is contained in a particular part, in which case the latter provision shall take priority.

Section 9-102: Investigations

- (a) On his own initiative or on the basis of a complaint filed pursuant to any provision contained in this Ordinance, the TERO Director or any field compliance officer designated by the TERO Director may make such public or private investigations within or without the exterior boundaries of the Reservation as the TERO Director deems necessary to insure compliance with that provision, to determine whether any Employer or Entity has violated any provision of this Ordinance or its implementing regulations, or to aid in prescribing rules, regulations or policies hereunder.
- (b) Separate from acting on any complaint filed, the TERO Director shall conduct regular compliance reviews to insure all Employers and Entities are complying with the requirements of this Ordinance.
- (c) The TERO Director or any field compliance officer designated by the TERO Director may enter the place of business or employment of any Employer or Entity for the purpose of such investigation or compliance review. The TERO Director officer may, at said place of business or employment, in a manner consistent with good safety practices and with the orderly operation of the business activity, interview any employee or agent of the Employer or Entity, review and copy any documents, and carry out any other activity the TERO Director or officer deems necessary to the carrying out of the investigation or

compliance review; provided that, the TERO Director or officer shall comply with the requirements of subsection (e) when reviewing or copying any confidential documents subject to that subsection.

- (d) For the purpose of investigations, compliance reviews, or hearings which, in the opinion of the TERO Director or the Commission are necessary and proper for the enforcement of this Ordinance, the TERO Director or the Commission chairman may administer oaths or affirmations, subpoena witnesses, take evidence, and require, by citation, the production of books, papers, contracts, agreements, or other documents records or information which the TERO Director or the Commission deems relevant or material to the inquiry.
- (e) Any state or federal tax records, trade secrets, or privileged or confidential commercial, financial, or employment information subpoenaed or otherwise obtained pursuant to the provisions of this Ordinance or used in a compliance hearing or subsequent appeal to the Tribal Court, shall be confidential records of the Commission or the Court, shall not be opened to public inspection, shall be used only by the TERO Director, the Commission, parties to a Compliance Hearing or subsequent appeal to Court, and the Court, and shall be used in a manner that, to the maximum extent possible consistent with the requirements of fairness to the parties, protects the confidentiality of the documents.

Section 9-103: Complaints

Any individual, group of individuals, business or organization that believes any Employer or Entity, (with the exception of any office, division, subsidiary entity or commercial enterprise of the Nation or any of its subsidiary entities, which are subject to the complaint provisions set out in Section 9-104), the TERO Director or TERO staff, has violated any requirement imposed by any Part of this Ordinance or regulations issued pursuant to it, may file a complaint with the

TERO Director, unless the complaint is against the TERO Director, in which case the complaint shall be filed directly with the Commission Chairman. The complaint shall be in writing and shall provide such information as is necessary to enable the TERO Director or Commission to carry out an investigation. The TERO Director shall, within 30 days of the date on which a complaint is filed, complete an investigation of said complaint unless the TERO Director requests and is granted an extension by the Commission, which shall be for no more than 30 days. If upon investigation, the TERO Director has reason to believe a violation has occurred, he shall proceed pursuant to the provisions of this Part. Within 15 days after receipt of the complaint, and on a regular basis thereafter, the TERO Director shall provide the complaining Party with a written report on the status of the complaint. If the complaint is against the TERO Director or TERO staff, the Commission shall appoint an independent Party to conduct the investigation and to carry out the responsibilities given to the TERO Director by this Part.

**Section 9-104: Complaints Against Offices, Divisions, Branches, Subsidiary Entities
 or Commercial Enterprises of the Nation or of any of the Nation's
 Subsidiary Entities**

Any individual who believes any office, division, branch, subsidiary entity or commercial enterprise of the Nation's Government or any of its subsidiary entities has violated any requirements imposed by this Ordinance or regulation issued pursuant to it regarding employment may file a complaint with the TERO Director only after he has either:

- (a) filed a complaint with, and exhausted the administrative remedies provided by, that office, division, branch, subsidiary entity, or commercial enterprise of the Nation or of any of the Nation's subsidiary entities, or

- (b) filed a complaint and 60 days have passed since he filed said complaint and no meaningful action has been taken on the complaint by that office, division, subsidiary entity, or commercial enterprise of the Nation or of any of the Nation's subsidiary entities, whichever comes first. Upon receiving a complaint that meets the requirements of this Section, the TERO Director shall proceed in the same manner as he would on a complaint filed pursuant to Section 9-103, except that the TERO Director and the Commission shall give careful consideration to any written decision on the complaint issued by the office, division, branch, subsidiary entity or commercial enterprise of the Nation or any of the Nation's subsidiary entities that is the subject of the complaint.

Section 9-105: Resolution of Complaints

- (a) When, after conducting an investigation or compliance review, whether initiated by a complaint filed by a Party or an investigation or compliance review initiated by the TERO Director, the TERO Director has reasonable cause to believe a violation of this Ordinance or regulations issued pursuant to it has occurred, (including a failure on the part of a Party to comply with a subpoena or other request during the investigation phase) the TERO Director shall so notify the Employer or Entity in writing, delivered by registered mail, specifying the alleged violations. However, he may withhold the name(s) of the complaining Party if he has reason to believe such Party shall be subject to retaliation.
- (b) The TERO Director shall make a good faith effort to achieve an informal settlement of the alleged violation by meeting with the Employer or Entity and taking such other actions as are appropriate.

- (c) If the TERO Director is unable to achieve an informal settlement, he shall issue a formal notice of non-compliance, which shall also advise the Employer or Entity of his right to request a hearing. The formal notice shall set out the nature of the alleged violation and the steps that must be taken to come into compliance. It shall provide the Employer or Entity (hereinafter the "Party") with a reasonable time, which in no event shall be less than five days from the date of receipt of such notice, to comply, unless the TERO Director has reason to believe irreparable harm will occur during that period, in which case, the TERO Director may require that compliance occur within fewer than five days.
- (d) If the Party fails or refuses to comply, as provided for in the formal notice, the Party may request a hearing before the Commission, which shall be held no sooner than five days and no later than 30 days after the date for compliance set forth in the formal notice, unless an expedited hearing is deemed necessary by the Commission to avoid irreparable harm or is requested by the Party and good cause is shown.
- (e) If a Party fails or refuses to comply and does not request a hearing, the TERO Director shall request the Commission Chairman to convene a session of the Commission for the purposes of imposing sanctions on the Party.
- (f) Notwithstanding the other provisions of this Section, if the TERO Director has good cause to believe that immediate remedial action is necessary to prevent irreparable harm, which shall include but not be limited to loss of employment, contracting, or subcontracting opportunities or dangers to employees from unsafe practices, the TERO Director may require that the Party come into compliance immediately or that the Party immediately enter into a written agreement to come into compliance pursuant to a schedule acceptable to the TERO Director. In such cases, if the Party fails or refuses to

comply and requests a hearing, the hearing shall be held within 48 hours after the Party has received notification of the hearing schedule. If the Party fails or refuses to comply but does not request a hearing, the TERO Director shall request that the Commission Chairman convene a session of the Commission within 48 hours to impose sanctions on the Party and provide for enforcement of TERO Director's directive.

Section 9-106: Hearing Procedures

- (a) Any hearing held pursuant to this Title shall be conducted by the Commission. The hearing shall be governed by rules of practice and procedure which shall be adopted by the Commission. The Commission may consider any evidence which it deems relevant to the hearing. The Commission shall not be bound by technical rules of evidence in the conduct of hearings under this Ordinance, and no informality in any proceeding, as in the manner of taking testimony, shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission. A tape recording shall be made of each hearing. No stenographic record of the proceedings and testimony shall be required except upon arrangement by, and at the cost of the Party charged.
- (b) The TERO Director shall prosecute the alleged violation on behalf of the TERO. For the hearing and during all stages of the procedures provided for in this Title, the TERO Director shall be represented by the Nation's Legal Department. If the Party is an office or subsidiary of the Tribal Government, it shall be the responsibility of that entity to obtain counsel, if it so chooses, from a source other than the Nation's Legal Department.
- (c) During the hearing phase of the enforcement process, to avoid a conflict of interest between the Commission, which shall sit as an impartial judicial body, and the TERO Director who shall act as the prosecutor, the Commission shall establish such procedures

and safeguards to ensure the due process rights of all parties are protected and that there is no improper contact or communication between the Commission and the TERO Director.

- (d) If the Commission requires legal assistance during the hearing process or at any other phase of the enforcement process and it would be a conflict of interest for the Nation's Legal Department to provide such representation, the Commission shall retain its own legal counsel from a source other than the Nation's Legal Department.

Section 9-107: Sanctions

- (a) If, after a hearing, the Commission determines that the alleged violation of this Ordinance or regulations has occurred and that the Party charged has no adequate defense in law or fact, or if a Party were issued a formal complaint and failed to request a hearing, the Commission may:
 - (1) Deny such Party the right to commence business on the Reservation;
 - (2) Suspend such Party's business activity within the Indian Reservation;
 - (3) Terminate such Party's business activity within the Reservation;
 - (4) Deny the right of such Party to conduct any further business within the Reservation;
 - (5) Impose a civil fine on such Party.
 - (6) Order such Party to make payment of back pay or other damages to any aggrieved Party;
 - (7) Order such Party to dismiss any employees hired in violation of the Tribes' employment right requirements;

- (8) Order the Tribal Treasurer to reimburse any Party who improperly paid a TERO fee or overpaid said fee, but no interest shall be paid in such cases.
 - (9) Order the Party to take such other action as is necessary to ensure compliance with this Ordinance or to remedy any harm caused by a violation of this Ordinance, consistent with the requirements of the laws of the Nation and the Indian Civil Rights Act, 25 U.S.C. 1301 et seq.
- (b) The Commission's decision shall be in writing, shall be served on the charged Party by registered mail or in person by an employee of the TERO no later than thirty days after the close of the hearing, or within ten days after the Commission session to impose sanctions where a Party has not requested a hearing. Where the Party's failure to comply immediately with the Commission's orders may cause irreparable harm, the TERO Director may move the Tribal Court, and the Court shall grant, such injunctive relief as is necessary to preserve the rights of the beneficiaries of this Ordinance, pending the Party's appeal or expiration of the time for appeal.

Section 9-108: Appeals

- (a) An appeal to the Tribal Court may be taken from any final order of the Commission by any Party adversely affected thereby, including a complainant. Said appeal must be filed with the Tribal Court, with a copy to the TERO Director and any other Party to the proceeding, no later than 20 days after the Party receives a copy of the Commission's decision.
- (b) The notice of appeal shall:
 - (1) Set forth the order from which appeal is taken.
 - (2) Specify the grounds upon which reversal or modification of the order is sought.

- (3) Be signed by the appellant or his legal representative.
 - (4) Comply with any other requirements for actions filed in the Tribal Court established by that Court.
- (c) Except as provided elsewhere in this Title, the order of the Commission shall abate pending the determination of the Tribal Court. However, the TERO Director may petition and, for good cause shown, the Court may order the Party filing the appeal to post a bond sufficient to cover monetary damages that the Commission assessed against the Party or to assure the Party's compliance with other sanctions or remedial actions imposed by the Commission's Order if that Order is upheld by the Court.
- (d) If a complainant files an appeal of a decision by the Commission, the Commission may choose not to be a Party to the appeal. If the Commission chooses not to be a Party in such a situation, the TERO Director shall so notify the Court and the other parties.
- (e) The Tribal Court shall uphold the decision of the Commission unless it is demonstrated that the decision of the Commission is arbitrary, capricious or in excess of the authority of the Commission.
- (f) If, by the 20th day after the Party's receipt of either:
- (1) Notice of a decision by the Commission from which no appeal to the Tribal Court is taken, or
 - (2) Notice of a final decision of the Tribal Court upholding the Commission's decision from which no appeal to the Tribal Appellate Court is taken, the Party has failed to come into compliance with the decision of the Commission or Court, the TERO Director shall petition the Court and the Court shall grant such orders as are necessary and appropriate to enforce the orders of the Commission or Court

and the sanctions imposed by them, including confiscation and sale as provided for in Section 9-109.

- (g) If the order of the Commission is reversed or modified, the Court shall by its mandate specifically direct the Commission as to further action the Commission shall take in the matter, including making and entering any order or orders in connection therewith, and the limitations, or conditions to be contained therein.

Section 9-109: Confiscation and Sale

If a Party has failed to pay monetary damages imposed on it or otherwise failed to comply with an order of the Commission or the Court, and the TERO Director believes there is a likelihood the Party will remove itself and its property from the jurisdiction of the Nation, the TERO Director may petition the Nation's Court to order the Nation's police to confiscate, and hold for sale, such property of the Party as is necessary to ensure payment of said monetary damage order or to otherwise achieve compliance with the order of the Commission or the Court. Said petition shall be accompanied by a list of property belonging to the Party which the TERO Director has reason to believe is within the jurisdiction of the Court, the value of which approximates the amount of monetary damages at issue. If the Court finds the petition to be valid, it shall order the Nation's police to confiscate and hold said property or as much as is available. The Nation's police shall deliver in person or by certified mail, a notice to the Party informing it of the confiscation and of its right to redeem said property by coming into compliance with the order outstanding against it. If 30 days after confiscation the Party has not come into compliance, the Court shall order the police to sell said property and use the proceeds to pay, in the following order of priority, any outstanding monetary damages imposed by the Commission or Court and

all costs incurred by the Court and police in the confiscation and sale. Any proceeds remaining shall be returned to the Party.

Section 9-110: Other Enforcement Authorities

- (a) If at any stage in the enforcement process, the TERO Director has reason to believe there is a danger that a Party will remove itself or its property from the jurisdiction of the Tribal Court, such that the Commission or the Court will not be able to collect monetary damages or TERO fees that are (1) owed by that Party pursuant to any outstanding order of the Commission or Court, or (2) which may be owed if the charges set out in any outstanding notice of violations are upheld, the TERO Director may, in his discretion, require the Party to post a bond with the Commission in an amount sufficient to cover possible monetary damages that may be or have been assessed against the Party . If the Party fails or refuses to post said bond, the TERO Director may petition the Nation's Court for such interim and injunctive relief as is appropriate to protect the rights of the TERO and other parties during the pendency of the complaint and hearing proceedings.
- (b) If the TERO Director believes that irreparable loss of employment, contracting, or subcontracting opportunities will occur pending a hearing requested by a Party, pending a session of the Commission where a Party has failed to request a hearing, pending action by the Tribal Court, or at any other stage of the process provided for in this Title, the TERO Director may petition the Tribal Courts to temporarily enjoin such actions of the Party as may be necessary to prevent the irreparable loss. Upon a showing by the TERO Director of probable cause of success on the merits and irreparable injury, the Court shall grant the requested injunction for such period as may be necessary to prevent the irreparable loss.

- (c) When irreparable harm will occur before a matter can be brought before the Tribal Courts, the Commission is authorized to issue such cease and desist or related orders as may be necessary to enforce the requirements of this Ordinance. The Nation's police are hereby expressly authorized and directed to enforce such cease and desist or related orders as may from time to time be properly issued by the Commission. Such orders do not require a judicial decree or order to render them enforceable. The police shall not be civilly liable for enforcing such orders so long as the order is signed by the Chairman of the Commission as a duly authorized order of the Commission. The Commission shall seek a Court order as quickly as possible. The Court may dissolve the cease and desist order or may order such injunctive or other relief to replace the cease and desist order as it deems appropriate.
- (d) In addition to the procedure and remedies provided for in this Ordinance, the TERO Director is authorized to petition the Tribal Courts under any other appropriate provision of the laws and ordinances of the Nation as is necessary to effect implementation of and compliance with this Ordinance.

Section 9-111: Monitoring and Coordination in Regard to Other Nation, Federal and State Laws

If, when carrying out inspections at work sites or otherwise carrying out their responsibilities under this Ordinance, the TERO Director or TERO compliance officers have reason to believe that a requirement of a Nation, Federal, state or local law, ordinance or regulation, other than the ones included in this Ordinance, may have been violated by a Party, the TERO Director is authorized to document such possible violation, to report it to the appropriate enforcement

agency, and, to the extent that resources permit and the TERO Director determines it to be appropriate, assist that agency to investigate and cure the possible violation.

APPENDIX A CRITERIA AND PROCEDURES FOR
CERTIFYING FIRMS AS INDIAN PREFERENCE ELIGIBLE

1 General Statement of Policy

Pursuant to its sovereign authority, the _____ Nation (hereinafter, "the Tribe) has imposed Indian contract preference requirements as one tool for promoting the economic development of the Reservation. When used properly, Indian preference in contracting can assist in the development of Indian businesses and thereby assist the Tribe and its members to achieve economic self-sufficiency. However, if the preference is abused, it will undermine this development and discredit the preference tool. Because of this, it is the policy of the Tribe to require that an applicant for Indian contract preference certification provide rigorous proof that it is a legitimate Indian-owned and controlled firm.

In evaluating an applicant, a number of specific criteria will apply. These criteria are set out in section 4.2, the criteria section, of this Part. However, experience has shown that persons interested in abusing the Indian preference program are able to structure firms to get around most specific criteria. Therefore, in addition to applying the specific criteria, the reviewing body for the Tribe will evaluate a firm under the following general criterion: applying sound management principles, would the firm have been structured in the manner it is, and would the Indian owners have been given the amount of ownership and control they have been given, if there were no Indian preference program in existence? If the reviewing body determines that it has good reason to believe that the firm has been structured (managerially or financially) in a manner that is convoluted or inconsistent with sound business practices in order to enable the firm to qualify for Indian preference certification, the firm will be denied such certification, even if it meets the specific criteria, unless the firm is able to demonstrate beyond a reasonable doubt that it was not structured to manipulate the Indian preference criteria.

The specific criteria also require that the ownership, control, and management arrangements of a firm make sense from a sound business perspective. The Indian owners must own and control 51% or more of the firm. One primary consideration in applying this criterion is whether the Indian owner's contribution to the firm is appropriately related to the extent of ownership given them such that sound business practice would justify their assigned share were Indian preference not a consideration. For example, assume the Indian owner paid for his 51%

share through a promissory note to the non-Indian owners. In the ordinary course of business, such a transaction would not occur unless the new owner brought something of value, such as managerial or technical expertise, capital and equipment, or marketing opportunities. (The ability to qualify for Indian preference is not considered such a marketing opportunity.)

Therefore, such an arrangement would be denied Indian preference certification unless some other sound business reason for the arrangement could be demonstrated. Where an Indian can demonstrate that he or she was unable to provide good value for his or her 51% share because the usual sources of capital were closed off to him or her because he or she was an Indian, that person shall be required to demonstrate that he or she extended his or her capital-raising ability as far as possible -- such that he or she is "at risk" in a significant way -- e.g., mortgaged a house or vehicle.

The Indian owner(s) must be directly involved in the firm's management. While it is not required that the Indian owner(s) be the Chief Operating Officer of the firm, at least one of the Indian owners will have to be involved in the day-to-day operations of the firm on a full-time basis and in a senior level position. The Indian person(s) in this position must have the experience or expertise in the area of business the firm is engaged in (or in management generally) to make the senior level role a legitimate one. The Indian owner(s) must also have sufficient knowledge about the firm to be accountable for the firm's activities.

Certification will not be granted to a firm where one or more of the Indian owners are not involved in the day-to-day operations of the firm in the manner described above. There is virtually no benefit to the Indian community from such passive ownership, other than profits to the owners. It could take several years for a firm to show a profit, if one in fact materializes. Yet, during that time, the non-Indian managers can benefit at the expense of the Indian community. The limited benefits to the Indian owner(s) do not justify this risk. One of two exceptions to this rule is that certification will be granted to 100% Indian-owned firms where the manager of the business is a non-Indian spouse of an Indian and the family lives on or near the reservation. No effort will be made to distinguish between the value contributed by a non-Indian spouse versus the Indian spouse. The family's contribution will be treated as an undivided unit. The second exception is for a more "public corporation," defined as one that is owned by 10 or more persons, 70% of which is Indian-owned, and where the Chief Executive Officer is an Indian.

Joint ventures will not be granted certification as Indian preference firms, except in exceptional circumstances where it is clear that the Indian-owned firm has the capability to manage the project and the non-Indian joint venture partner is involved to provide certain technical, bonding, financing or other specialty capability. The TERO will certify Indian-owned companies that have entered into legitimate management contracts with non-Indian firms to assist the Indian firm develop its management and technical capability.

Such rigorous criteria, giving substantial discretion to the reviewing body, are necessary and appropriate for the Indian contract preference program. Neither the Tribe nor the Indian community benefits from the establishment of "bogus" Indian firms, while the certification of such firms undercuts the credibility of the Tribe's Indian preference program. An Indian firm or individual that is unable, on its own, to qualify as the prime contractor on a large project has other options open to it besides participating in the development of a bogus firm. For example, he or she can seek work at the subcontractor or employee level and benefit from the Tribe's requirement that preference be given to Indian subcontractors and employees.

The procedural requirements for certification provide that applications shall be reviewed by the Director of the Tribe's Tribal Employment Rights Office (TERO), who shall request any additional information it believes appropriate. It will then submit the application, along with its recommended findings, to the TERO Commission. The Commission shall review the application and findings, interview the principals of the firm, request additional information as appropriate, and then make a determination on whether certification should be granted. The firm will have a right of appeal to the Tribal Court, which shall reverse the decision only if it finds that the decision was arbitrary or capricious.

A firm shall first receive a probationary certification, to be made final at the end of one year; or a longer period where the Commission believes such is necessary. The TERO Office shall have the right, at any time, either on their own initiative or upon the filing of a complaint by any party, to conduct an investigation of a firm to determine if its certification should be suspended or withdrawn. The TERO Office shall require new applications from firms that had been certified by the Tribe prior to the adoption of these criteria. If it is determined that a firm does not qualify under the new criteria, the firm will be given four months to come into

compliance with the new criteria. If it fails to do so by the end of that period, its certification shall be withdrawn.

2 Criteria for Indian Contract Preference Certification

To receive certification as a firm eligible for Indian preference, an applicant must satisfy all of the criteria set out in this section.

(a) Ownership

The firm must be 51% or more Indian-owned. The applicant must demonstrate the following:

1. Formal Ownership. That an Indian or Indians own(s) 51% or more of the partnership, corporation, or other arrangement for which the application is being submitted. Such ownership must be embodied in the firm's organic documents, such as its stock ownership or partnership agreement. Ownership includes:

- a. financial ownership -- i.e., the Indian(s) owns 51% or more of the assets and equipment, will receive 51% or more of the firm's assets upon dissolution, and will receive 51% or more of the profits; and
- b. control -- i.e., the Indian(s) 51% or more ownership provides him or her with a majority of voting rights or other decisional authority and that all decisions of the firm are to be made by a majority vote except where otherwise required by law.

2. Value. The Indian owner(s) provided real value for his or her 51% or more ownership by providing capital, equipment, real property, or similar assets commensurate with the value of his or her ownership share. It will not be considered "real value" if the Indian(s) purchased his or her ownership share, directly or indirectly, through a promissory note, the ultimate creditor of which is the non-Indian owner of the firm or an immediate relation thereof, or any similar arrangement, unless a convincing showing can be made that the Indian owner(s) brought such special skills, marketing connections, or similar benefits to the firm that there is a good reason to believe the arrangement would have been entered into even if there were not an Indian preference program in existence. Where the Indian participant can demonstrate that he or she could not pay good value for his or her 51% or more Indian ownership because the normal capital sources were closed to him or her because he or she

is an Indian, that person may satisfy this requirement by demonstrating further that he or she extended his or her capital-raising capability as far as possible, such that the Indian participant clearly is at risk in the business in relationship to his or her means.

3. Profit. The Indian owner(s) will receive 51% or more of all profits. If there is any provision that gives the non-Indian owner a greater share of the profits, in whatever form and under whatever name, such as through management fees, equipment rental fees, or bonuses tied to profits, certification will be denied. Salary scales will be reviewed to ensure the relative salaries being paid Indian and non-Indian owners are consistent with the skills of the parties and are not being used to circumvent the requirement that Indian owners receive 51% or more of the profits.

(b) Management Control

The firm must be under significant Indian management and control. The firm must be able to demonstrate that:

1. One or more of the Indian owners must be substantially involved, as a senior level official, in the day-to-day management of the firm as his or her primary employment activity. The Indian owner does not have to be the "Chief Executive Officer." However, he or she must, through prior experience or training, have substantial occupational ties to the area of business in which the firm is engaged such that he or she is qualified to serve in the senior level position and is sufficiently knowledgeable about the firm's activities to be accountable to the Tribe for the firm's activities. This provision may be waived when:

a. the firm is 100% Indian owned and the Chief Executive Officer is the spouse and/or parent of the owner(s), the family lives on or near the reservation, and the majority of employees are Indian;
or

b. the firm is modeled on a publicly-held corporation such that it is owned by 10 or more persons, is at least 70% Indian-owned, the Chief Executive Officer and the highest-salaried employee in the firm is/are Indian, and a majority of the employees are Indian.

(c) Integrity of Structure

There must be good reason to believe that the firm was not established solely or primarily to take advantage of the Indian preference program. In evaluating an applicant under this criterion the TERO will consider the factors set out below. The TERO shall exercise broad discretion in applying these criteria in order to preserve the integrity of the Indian preference program and in questionable cases shall deny certification.

1. History of the Firm

Whether the history of the firm provides reason to believe it was established primarily to take advantage of the Indian preference program, and in particular whether the firm, a portion of the firm, or key actors in the firm originally were associated with a non-Indian owned business that gained little of business value in terms of capital, expertise, equipment, etc., by adding ownership or by merging with an Indian firm.

2. Employees

Whether key non-Indian employees of the applicant are former employees of a non-Indian firm with which the Indian firm is or has been affiliated, through a joint venture or other arrangement, such that there is reason to believe the non-Indian firm is controlling the applicant.

Whether Indians are employed in all or most of the positions for which qualified Indians are available. A high percentage of non-Indian employees in such positions will provide reason to believe the firm was established primarily to benefit non-Indians.

3. Relative Experience and Resources

Whether the experience, expertise, resources, etc., of the non-Indian partner(s) is so much greater than that of the Indian(s) that there is little sound business reason for the non-Indian to accept a junior role in the firm other than to be able to take advantage of the Indian preference program.

(d) Brokers

Brokers will be certified only if they are dealers who own, operate, or maintain a store, warehouse, or other establishment in which the commodities being supplied are bought, kept in stock, and sold to the public in the usual course of business; Provided, that this requirement shall not apply where the applicant demonstrates that it is customary and usual in the area of trade for a broker/dealer not to maintain an establishment and to keep the commodities in stock.

(e) Manufacturing Companies

In determining whether or not a manufacturing firm is 51% Indian-owned and controlled, the Commission shall be guided by the Small Business Administration Standard Operating Procedures on certifying firms as eligible for the 8(a) program.

3 Certification Procedures

(a) Application for Certification

A firm seeking certification as an Indian preference eligible firm shall submit a completed application (see Appendix at the end of this Part) to the TERO on a form provided by the TERO Office. (Application forms may be obtained at the TERO office.) The TERO director will be available to assist a firm fill out the application. Within 21 days after receipt of a completed application, the TERO Director shall review the application, request such additional information as he believes appropriate (computation of the 21-day period shall be stayed during the time any request for additional information is outstanding), conduct such investigations as it deems appropriate, and submit an analysis and recommended disposition to the Commission. Copies of the analysis and recommended disposition shall be kept confidential and shall not be made available to the applicant or any other party. When it is so required, the TERO Office may extend the processing period by an additional 21 days, by sending notification of the extension to the applicant by registered mail. Within 15 days of receipt of the TERO's analysis and recommended disposition, the Commission shall hold a hearing on the application, posting notice of the hearing time at the Tribal Office, the Agency, and the TERO Office at least five days prior to the hearing. Only the Indian principal(s) of the firm shall be present at the hearing. In addition, any other party wishing to present information to the Commission shall be entitled to do so, by requesting, no less than one day prior to the hearing, an opportunity to participate. A party may not be represented by counsel. Hearings shall be conducted as provided for in the TERO Hearing Procedures.

(b) Probationary Certification

An applicant granted certification shall be issued a one-year probationary certificate. During that period, the TERO Office shall monitor the firm's activities to ensure that the firm is operating in the manner described in its application. During the probationary period,

the TERO Office shall have the right to request and receive such information and documents as they deem appropriate.

(c) Final Certification

At the end of the probationary period the Commission, after receiving recommendations from the TERO Director, shall either:

1. grant full certification;
2. continue the probationary period for up to six months; or
3. deny certification.

(d) Withdrawal of Certification

From the information provided in reports required by sections 3.3(f) and 5.1, on the basis of a written grievance filed by any other firm or person, or on its own initiative, the TERO may initiate proceedings to withdraw or suspend the certification of any firm. The TERO director shall prepare an analysis and recommended disposition for the Commission and shall send the firm notice, by registered mail, that its certification is being examined, along with the grounds therefor. The Commission shall then set a date for a hearing, which shall be held within 21 days after it receives the analysis and recommended disposition from the TERO. At the hearing, the TERO Director shall present the case for suspension or withdrawal, and the hearing shall be conducted as set out in section 5.2. After the hearing, the Commission may:

1. withdraw certification;
2. suspend certification for up to one year;
3. put the firm on probation; and/or
4. order that corrective action be taken within a fixed period. A firm that has had its certification withdrawn may not reapply for a period of one year.

(e) Firms Certified Prior to the Adoption of These Criteria

Each firm holding Indian preference certification from the Tribe prior to the effective date of these Regulations shall submit an application required under these criteria to the TERO within 30 days after the effective date of these Regulations. If the TERO determines the firm qualifies under these new criteria, it shall, within 21 days of receipt of the application, so

recommend to the Commission, which, unless it has grounds to act to the contrary, shall, without the requirement of a public hearing, issue a new certificate within 30 days of receipt of the TERO's recommendation. If the TERO has reason to believe the firm does not qualify, it shall prepare an analysis of the reasons therefore along with its recommended disposition. The analysis shall be submitted to the Commission within 21 days after receipt of the application. Should the TERO require additional information from the firm, computation of the 21-day period shall be stayed by the Commission for a reasonable time to permit such information to be provided. The Commission, after providing the firm an opportunity for a hearing as provided in Part IX of the Workforce Protection Act, which shall be held within 15 days after receipt of the TERO's findings, shall:

1. grant the firm a new certification; or
2. determine that the firm is not in compliance. If the Commission determines that the firm is not in compliance, it shall provide the reasons therefore. The firm shall then have 15 days from the date of the decision to demonstrate to the Commission that it has made such changes as are necessary to come into compliance. If at the end of the 15-day period the firm has failed to come into compliance, its certificate shall be withdrawn. A copy of the withdrawal notice shall be sent to the firm.

(f) Change in Status and Annual Reports

Each certified firm shall report to the TERO, in writing, any changes in its ownership or control status within 60 days after such changes have occurred. Each certified firm, on the anniversary of its receipt of permanent certification, shall update the information provided in its initial application on an Annual Report form provided by the TERO. Failure to provide information pursuant to these requirements shall constitute grounds for withdrawal of certification.

APPLICATION FOR CERTIFICATION AS AN INDIAN PREFERENCE FIRM

1. FIRM IDENTIFICATION

Name of Firm (exactly as you want it to appear on all documents):

Address:

Telephone:

Date of Submission:

Single Business: _____ Joint Venture:

Contact Person:

Address:

Telephone (Bus.): _____ Home:

Type of Business (list all areas of business in which firm intends to engage):

Federal Identification Number:

Number of Employees: _____ Number of Indian Employees:

Year Business was established:

2. OWNERSHIP

A. Type of Ownership (check one):

Sole Proprietorship

Partnership (attach copy of any partnership agreement with all amendments since creation of partnership.)

Corporation (attach copy of the Certificate of Incorporation, Articles of Incorporation, and Bylaws, including all amendments since creation of the corporation.)

B. Percent of Indian Ownership: _____

C. Provide for each Indian owner, name, address, tribal affiliation, enrollment number, percent of ownership, amount of investment in the firm, method of investment (cash, equipment, loan or promissory note indicating who the loan is from), percent of voting control and position in the firm.

D. List for each non-Indian owner, name, address, percent of ownership, amount of investment in firm, method of investment (cash, equipment, loan or promissory note indicating who the loan or note is from), percent of voting control, position in firm, name of all other firms in which the owner holds or has within the past year held an ownership interest (other than publicly-held corporations and similar ownerships solely for investment) or a management position.

E. List any management fee, equipment rental, bonuses or other arrangements that will provide payment to non-Indian owners beyond their share of profits and salaries, as indicated above.

- F. Describe or attach any stock options or other ownership options that are outstanding and any agreements between owners or between owners and third parties which restrict ownership or control of Indian owners.

- G. Identify any owner or management official of the named company who is or has been an employee of another company that has an ownership interest in or a present business relationship with the name company; present business relationships include shared space, equipment, financing, or employees as well as both companies having some of the same owners.

- H. Indicate if this company or other companies with any of the same officers have previously received or been denied certification or participation as an Indian preference firm and describe the circumstances. Indicate the name of the certifying authority and the date of such certification or denial.

3. MANAGEMENT

- A. Provide for each owner of more than 5% interest, all senior management personnel and members of the Board of Directors the following:
 - 1. Name, address and Social Security Number. If Indian, Tribe an enrollment number.

 - 2. Present position (description of all duties).

3. Previous business experience.
 4. Previous work experience in areas in which firm intends to engage.
 5. Other previous work experience.
 6. Education and training.
 7. Other jobs presently held.
- B. Control of Company. Identify by name, race, sex and title in company those individuals (owners and non-owners) who are responsible for day-to-day management, including, but not limited to, those with prime responsibility for:
1. Financial decisions.
 2. Management decisions, such as:
 - a. Marketing and sales;
 - b. Hiring and firing;
 - c. Purchase of major equipment of supplies;
 - d. Supervision of field personnel.

4. CAPITAL AND EQUIPMENT

- A. Equipment. List all equipment (costing \$300 or more when new).

<u>QUANTITY</u>	<u>DESCRIPTION</u>	<u>PRICE</u>	<u>HOW</u>
		<u>OBTAINED</u>	
		(Book Value)	(purchased, provided by owner, etc.)

B. Capital

1. Attach a current balance sheet.
2. Identify amount and source of original and present capital (e.g., contributed by owner, bank loan, if loan, indicate name(s) of those legally bound to repay if other than organization).

C. Additional Submissions

Each applicant must submit with this application the following:

1. Lists of officers, principal stockholders, and directors, with post office addresses and number of shares held by each.
2. A sworn statement of the proper officer showing:
 - a. The total number of shares of the capital stock actually issued and the amount of cash paid into the treasury on each share sold; or, if paid in property, the kind, quantity and value of the same per share.
 - b. Of the stock sold, how much remains unpaid and subject to assessment.
 - c. The amount of cash the company has in its treasury and elsewhere.
 - d. The property, exclusive of cash, owned by the company and its value.
 - e. The total indebtedness of the company and the

nature of its obligations.

5. CERTIFICATION

I hereby certify that the information provided in this application is true and complete to the best of my knowledge and belief. I further hereby certify that I have read the applicable ordinances, regulations, criteria and procedures of the _____ Nation and do hereby submit to the jurisdiction provided for therein.

Name of Firm:

By:

(Signature of Authorized Official)

Name (type or print):

Title (type or print):