

**TERO
Ordinance
and
Regulations
of the
Three
Affiliated
Tribes;
Mandan,
Hidatsa
and
Arikara**

May 8th,

2012

[Per the Formal Approval of the TERO Commission of the Three Affiliated Tribes of the Mandan, Hidatsa and Arikara at a Regular TERO Commission Meeting Held on May 8, 2012. Please find the TERO Ordinance and TERO Regulations of the Three Affiliated Tribes of the Fort Berthold Reservation.]

**By Charles
Foote, TERO
Director**

TRIBAL EMPLOYMENT RIGHTS OFFICE
OF THE THREE AFFILIATED TRIBES
TERO ORDINANCE AND TERO REGULATIONS

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(Approved by TERO Commission 5-8-12)

TITLE I. POLICY AND DEFINITIONS

Section 101: Declaration of Policy

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

Economic insecurity and unemployment are a serious menace to the health, morals and welfare of the Nation. Private employment on the Fort Berthold Reservation is an important resource for Indian people, from which they have been unjustly deprived. Indians have unique and special employment, subcontract and contract rights and are entitled to the protection of the laws that the Federal government has adopted to combat employment discrimination on or near Indian Reservations. The Mandan Hidatsa and Arikara Nation Council therefore declares that in its considered judgement, the public good and welfare of the Nation require the enactment of this measure, under its inherent sovereign and police powers, for the establishment of an employment rights office in order to use and enforce the aforementioned laws and rights, in order to increase employment of Indian workers and businesses and to eradicate employment discrimination within the exterior boundaries of the Fort Berthold Reservation.

Section 102: Definitions

- (A) "Commission" means the Tribal Employment Rights Commission established by the 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.
- (E) "Covered Employer" means any employer employing 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.
- (F) "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.
- (G) "Government Commercial Enterprise" means any activity by the Nation or any subsidiary governmental entity of the Nation, such as a District or Segment
- (H) "Indian" means any member of a federally-recognized tribe.
- (I) "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.
- (J) "Nation" shall mean the Mandan Hidatsa and Arikara Nation.
- (K) "Regulations" shall mean the regulations implementing this Ordinance adopted by the Mandan Hidatsa and Arikara Tribal Employment Rights Commission.
- (L) "Reservation" means the Fort Berthold Reservation and any other lands that are subject to the jurisdiction of the government of the Mandan Hidatsa and Arikara Nation.

(M) "TERO" or "Office" means the Mandan Hidatsa and Arikara Tribal Employment Rights Office.

TITLE II. EMPLOYMENT RIGHTS

Section 201: Coverage

- (a) For purposes of this Title, the term "Covered 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 Mandan Hidatsa and Arikara Housing Authority, Districts, and Segment), and any governmental commercial enterprises of the Nation, its divisions or subsidiary governmental entities, (including casinos) except when the Nation's legal counsel has opined that application of these requirements to that Nation-related entity is specifically preempted or otherwise prohibited by 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 202: Indian Preference in Employment

All Covered 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 203: TERO Hiring Hall

No Covered 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 204: Goals and Timetables

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

Section 205: Job Qualifications and Business Necessity

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

Section 206: Discrimination in Employment Prohibited

(a) Except as provided in this Title in regard to Indian preference, it shall be unlawful for a Covered Employer to fail or refuse to hire, or to discharge, any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or

privileges of employment, including promotion and training, or to engage in any other action that would deprive or tend to deprive any individual of employment opportunities, on the basis of race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibilities, disability, or political affiliation.

- (b) The TERO director is authorized to work cooperatively with Federal, other Indian Nations, state, and local governmental agencies that have responsibility for enforcing the prohibitions on discrimination set out in subsection (a) and shall assist Indians to file and prosecute discrimination complaints with such agencies when the Director determines said complaints have merit and the TERO lacks the full authority to provide complete relief to the complainant.
- (c) Nothing in this Title shall bar a complainant from filing a complaint with the TERO just because he has filed a complaint involving the same matter with another governmental entity. However, in such cases the TERO Director shall seek to coordinate with the other agency(s) in order to promote efficiencies in the processing of the complaints.

Section 207: Unions

Covered Employers with collective bargaining agreements with a union are responsible for informing such unions of this Ordinance and TERO rules and regulations. A Covered 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 208: Apprenticeship Programs

- (a) The Nation's Bureau of Apprenticeship and Training Certified Apprenticeship Program ("Program") is hereby placed under the direction of the TERO Director, who 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, consistent with the requirements of the Program. The 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 Director is taking to maximize the effectiveness of the Program.
- (b) Each Covered Employer that hires employees in crafts that are participating in the Nation's Certified Apprenticeship Program shall employ the maximum number of 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 III. INDIAN PREFERENCE IN CONTRACTING AND SUBCONTRACTING

Section 301: Indian Preference in Contracting

- (a) All Entities awarding contracts or subcontracts for supplies, services, labor and materials in an amount of \$5,000 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; provided that, if the bid submitted by a firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work. 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, (including the Mandan Hidatsa and Arikara Housing Authority, Districts, and Segments) and any governmental commercial enterprises of the Nation or its divisions or subsidiary governmental entities, (including casinos) except when it is determined by the Mandan Hidatsa and Arikara Legal Department that application of these requirements to that entity is specifically prohibited by Federal law. If a Federal Indian contract or subcontract

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 Mandan Hidatsa and Arikara Legal Department that application of these requirements to that entity is specifically prohibited by Federal law.
- (d) Notwithstanding subsections (a), (b) and (c) of this Section, all tribal programs and tribal entities shall give a right of first refusal for the contract to perform any project where the contract is to be awarded by the Tribe, Tribal Program, Tribal Office or any Tribal entity, regardless of the source of funds for that project and contract, to a Tribally-owned firm qualified to perform the work on the project or contract. The Tribal program, office, or entity that is letting the contract on the project shall engage in negotiations with the qualified Tribally-owned contracting firm to negotiate a price and terms of a contract for the work. If good faith negotiations do not result in a contract within thirty days after commencement of negotiations, the Tribal entity letting the contract may put the contract out for competitive bid in a manner consistent with subsections (a). (b) and (c) of this Section.

Section 302: Certification as Indian Preference-Eligible

The Commission shall establish a system for certifying firms as Indian preference and local Indian preference eligible (“Certified Firm”).

TITLE IV. NOTIFICATION OF TERO REQUIREMENTS AND TERO COMPLIANCE PLAN

Section 401: Compliance Plan

All Covered 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 Ordinance and implementing regulations. A Covered Employer or Covered 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 402: 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 prospective Covered Employers and Entities that they are subject to the requirements of this Ordinance.

Section 403: Notice to Proposed Contractors

Any office, division, branch, subsidiary entity, or commercial enterprise of the Nation or any of its subsidiary entities, including the Mandan Hidatsa and Arikara Housing Authority, Districts and Segments, 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 Ordinance.

Section 404: Contract Language Imposing TERO Requirements

Any office, division, branch, subsidiary entity or commercial enterprise of the Nation or any of its subsidiary entities, including the Mandan Hidatsa and Arikara Housing Authority, Districts and Segments, 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 Ordinance 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 Ordinance, 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 405: Model Language

In order to implement the requirements of Section 503 and 504, the 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 Ordinance; 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 Mandan Hidatsa and Arikara 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 406: 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 Covered Employers or Covered 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 Ordinance 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 Mandan Hidatsa and Arikara Legal Department for resolution, whose decision shall be binding on the parties. Pending action by the Mandan Hidatsa and Arikara 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 information on TERO or the Nation's Indian preference requirements without first obtaining approval of said document by the TERO Director.

Section 407: Nation's 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,

including but not limited to the Mandan Hidatsa and Arikara Housing Authority, shall within 90 days of the effective date of this Ordinance, in coordination with the TERO Director and the Nation Attorney General, 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 Mandan Hidatsa and Arikara Legal Department, whose decision shall be binding on the parties.

TITLE V. TRIBAL EMPLOYMENT RIGHTS COMMISSION

Section 501: 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 Mandan Hidatsa and Arikara Nation.
- (b) The Commission shall be composed of seven members, one from each Segment nominated by the Council Member from that Segment 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 MHA 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 TERO Commission shall appoint a chairman, vice chairman and secretary/treasurer from within the body of TERO Commissioners; for two year terms on even calendar years.

- (f) The Commissioners shall serve until replaced. The TERO Director shall notify the Mandan Hidatsa and Arikara Nation Chairman of any vacancies within ten working days after he becomes aware of such vacancy.
- (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 502: 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 503: 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 Mandan Hidatsa and Arikara Nation Council, who shall serve at the discretion of the Council, and shall report directly to the Mandan Hidatsa and Arikara Nation Chairman.
- (b) The Council shall have exclusive authority to appoint, direct, suspend and remove the Director. The Council shall perform the annual evaluation of the TERO Director. If at any time the Commission believes the Director is failing to properly carry out his responsibilities, it shall, by formal action, send a communication to that effect to the MHA Chairman.
- (c) The Director shall have such administrative ability, education and training as the Council determines.
- (d) The Director shall have authority to hire staff, to expend funds appropriated by the Tribal Council pursuant to a budget submitted 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 Director shall enforce all decisions and orders duly adopted by the Commission.

Section 504: Intergovernmental Relationships

The Director, is authorized to enter into cooperative relationships with federal employment rights agencies, such as EEOC and OFCCP, in order to eliminate discrimination against Indians on and off the Reservation and to enter into cooperative relationships with federal agencies, such as the BIA, HUD, FHWA and IHS, in order to implement any federal Indian preference employment or contracting requirements as such agency may lawfully delegate to the Tribes.

TITLE VI. EMPLOYMENT RIGHTS FEE

Section 601: Employment Rights Fee

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

- (a) Every covered employer with a construction contract in the sum of \$1,000 or more shall pay a fee of two and one half percent 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 Director may authorize a construction contractor to pay said fee in installments over the course of the contract.
- (b) Every covered employer other than construction contractors, with five (5) or more employees working on the Reservation, or with gross sales on the Reservation of \$1,000 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.

- (c) The fee imposed by subsections (a) and (b) of this Section shall not apply to education, health, religious, governmental, or non-profit employers. It shall apply to contractors employed by such employers.
- (d) Provided that, 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 Mandan Hidatsa and Arikara Housing Authority, Districts, and Segment), and any governmental commercial enterprises of the Nation, its divisions or subsidiary governmental entities, (including casinos) regardless of the source of funds for that contract, shall, as a condition of doing business on the Ft. Berthold 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 MHA 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 Ft. Berthold Reservation until it has executed said form. This provision shall not apply where the Nation's legal counsel has opined that application of these requirements to that tribal entity is specifically preempted or otherwise prohibited by Federal law.

Section 602: 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 general account

of the Nation. Said funds shall be expended 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 603: 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.

TITLE VII. ENFORCEMENT

Section 701: Investigations

- (a) On his own initiative or on the basis of a complaint filed pursuant to this Title, the Director or any field compliance officer designated by the Director may make such public or private investigations within or without the exterior boundaries of the Reservation as the Director deems necessary to insure compliance with this Ordinance, to determine whether any Covered 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) The Director or any field compliance officer designated by the Director may enter the place of business or employment of any Covered Employer or Entity for the purpose of such investigation. The 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 Covered Employer or Entity, review and copy any documents, and carry out any other activity the Director or officer deems necessary to the carrying out of the investigation; provided that, the Director or officer shall comply with the requirements of subsection (d) when reviewing or copying any confidential documents subject to that subsection.
- (c) For the purpose of investigations or hearings which, in the opinion of the Director or the Commission are necessary and proper for the enforcement of this Ordinance, the 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 Director or the Commission deems relevant or material to the inquiry.

- (d) Any state or federal tax records, trade secrets, or privileged or confidential commercial, financial, or employment information subpoenaed pursuant to this section 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 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 702: Complaints

Any individual, group of individuals, business or organization that believes any Covered 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 703), the Director or TERO staff, has violated any requirement imposed by this Ordinance or regulations issued pursuant to it, may file a complaint with the Director, unless the complaint is against the 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 Director to carry out an investigation. The Director shall within 30 days of the date on which a complaint is filed complete an investigation of said complaint unless the Director requests and is granted an extension by the Commission, which shall be for no more than 30 days. If upon investigation, the Director has reason to

believe a violation has occurred, he shall proceed pursuant to the provisions of this Title. Within 15 days after receipt of the complaint, and on a regular basis thereafter, the Director shall provide the complaining party with a written report on the status of the complaint.

Section 703: Complaints Against Offices, Division, Branches, Subsidiary Entities or Commercial Enterprise 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 Mandan Hidatsa Arikara Nation 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 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, at which time the individual, group of individuals, business, or organization may file a complaint with the Director. Upon receiving a complaint that meets the requirements of this Section, the Director shall proceed in the same manner as he would on a complaint filed pursuant to Section 702, except that the 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 704: Resolution of Complaints

- (a) When, after conducting an investigation, whether said investigation was initiated by a complaint filed by a party or was an investigation initiated by the Director, the 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 Director shall so notify the Covered 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. The Director shall seek to achieve an informal settlement of the alleged violation.
- (b) If the Director is unable to achieve an informal settlement, he shall issue a formal notice of non-compliance, which shall also advise the covered 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 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 Director has reason to believe irreparable harm will occur during that period, in which case, the Director may require that compliance occur within fewer than five days.
- (c) 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 Director's

notification to the party charged with a violation, unless an expedited hearing is deemed necessary by the Commission to avoid irreparable harm.

- (d) If a party fails or refuses to comply and does not request a hearing, the Director shall request the Commission Chairman to convene a session of the Commission for the purposes of imposing sanctions on the party.
- (e) Notwithstanding the other provisions of this Section, if the Director has good cause to believe that immediate remedial action is necessary to prevent the irreparable loss of employment, contracting, or subcontracting opportunities for Indians, the 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 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 Director shall request that the Commission Chairman convene a session of the Commission within 48 hours to impose sanctions on the party.

Section 705: Hearing Procedures

- (a) Any hearing held pursuant to this Title shall be conducted by the Commission. The hearing shall be governed by the 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.
- (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 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 706: 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 in an amount not to exceed \$500 per day for each violation;
 - (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 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 707: 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 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 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 Tribal Court has issued a final decision upholding the Commission's decision from which no appeal may be taken, or if no appeal were sought from the decision by the Commission, by the 20th day after the date of the party's receipt of the Commission's order, the party has failed to come into compliance with the decision of the Commission or Court, the 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 708.
- (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 in the matter, including making and entering any order or orders in connection therewith, and the limitations, or conditions to be contained therein.

Section 708: 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 Director believes there is a likelihood the party will remove itself and its property from the jurisdiction of the Nation, the 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 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 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 709: Other Enforcement Authorities

- (a) If at any stage in the enforcement process, the 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, he 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 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 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 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 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 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 710: 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 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 one included in this Ordinance, may have been violated by a party, the 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 Director determines it to be appropriate, assist that agency to investigate and cure the possible violation.

TITLE VIII. MISCELLANEOUS

Section 801: Severability

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

Section 802: Effective Date

This Ordinance shall be effective on the date of its approval by the TERO Commission.

TERO REGULATIONS OF THE THREE AFFILIATED TRIBES

(Approved by TERO Commission 5-8-12)

PART 1.

GENERAL PROVISIONS

1.1 Purpose

The following regulations are issued pursuant to the authority granted to the Mandan Hidatsa and Arikara Employment Rights Office (hereinafter "TERO") by the Mandan Hidatsa and Arikara Tribal Employment Rights Ordinance, which requires preference in contracting and subcontracting to Indian-owned firms by all contract awarding entities operating within the exterior boundaries of the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction.

1.2 Dissemination

The obligation of all employers to comply with Tribal Employment and Contract rights requirements shall be made known to all existing and future entities. All bid announcements issued by any tribal, Federal, state or other private or public entity shall contain a statement that the successful bidder will be obligated to comply with these Regulations and that a bidder may contact the TERO to obtain additional information. Those tribal and other offices responsible for issuing business permits for the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction or otherwise engaged in activities involving contact with prospective employers on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction shall be responsible for informing such prospective employers of their obligations under these Regulations.

1.3 Definitions

- (a) "Certified Firm" means a firm that is certified as an Indian owned and controlled firm pursuant to the terms and procedures provided for in these Regulations.
- (b) "Commercial Enterprise" means any activity by the Nation or of the federal or state governments that is not a traditional government function as defined by the Internal Revenue Service.
- (c) "Covered Employer" means any employer employing two or more employees who during any 20-day period, spend, cumulatively, 16 or more hours performing work within the exterior boundaries of the lands on which the Mandan Hidatsa and Arikara Nation has jurisdiction.
- (d) "Employee" means any person employed for remuneration.
- (e) "Employer" means any person, partnership, corporation or other entity that employs, for wages, two or more employees.
- (f) "Entity" means any person, partnership, corporation joint venture, government, governmental enterprise, or any other natural or artificial person or organization including the Nation. 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.
- (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 lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction or has lived near the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction for no fewer than 60 days prior to asserting a right granted by this Ordinance.
- (i) "Nation" means the Mandan Hidatsa and Arikara Nation
- (j) "Near the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction" means an Indian who resides at a location which is within a reasonable daily commuting distance of the job site at issue.

- (k) "Non-local Indian" means a member of a federally-recognized tribe who does not live on or near the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction.
- (l) "Reservation" shall mean those lands on which the Mandan Hidatsa and Arikara Nation has jurisdiction.
- (m) "TERO" means the Mandan Hidatsa and Arikara Tribal Employment Rights Office

1.4 Coverage

(a) Employment

These employment preference regulations shall apply to any employer who employs two or more employees, who during any 20-day period spend, cumulatively, 16 or more hours performing work within the exterior boundaries of the lands on which the Mandan Hidatsa and Arikara Nation has jurisdiction. However, they shall not apply to any direct employment by the Mandan Hidatsa and Arikara Nation, the federal government, the State governments, or the subdivisions of such governments. It shall apply to all contractors or grantees of such governments and to all commercial enterprises operated by such governments.

(b) Contracting and Subcontracting

The contract and subcontract preference requirements of these regulations shall apply to any entity that awards one or more contracts and/or subcontracts for supplies, services, labor, or materials, the total amount of which exceeds \$5,000, so long as the majority of the work shall occur on the reservation or the majority of the supplies or materials shall be used on the reservation. However, these requirements shall not apply to the award of any contract where the award is made directly by the State, a subdivision of the State, or the Federal government. The regulations shall apply in the award of subcontracts by entities which have received such direct contracts from the State or Federal government. They shall also apply to the award of any contract by the Mandan Hidatsa and Arikara Nation, its subdivisions, commercial enterprises, and other entities of the Nation.

(c) Employment Rights Fee

The employment rights fees of 2 and 1/2 % shall apply to any covered employer.

1.5 Submission of Compliance Plans

Each covered employer or entity intending to engage in business activity on the lands on which the Mandan Hidatsa and Arikara Nation has jurisdiction, prior to the time it commences work on the reservation, must submit a contracting, subcontracting, employment, and/or training plan to the TERO. No new employer or entity may commence work on the lands on which the Mandan Hidatsa and Arikara Nation has jurisdiction until it has met with the TERO and developed an acceptable plan for meeting its obligations under these Regulations. A covered employer or entity that fails to submit an acceptable plan in a timely manner shall be in violation of the TERO Code and subject to fines and other sanctions pursuant to Title VII of that Code.

(a) Employment and Training Plan

The employment and training plan shall show the number of man-hours, by craft and skill category, needed on the project. The employer or entity shall also identify those persons it wishes to have approved as permanent and key employees (see subsection 2.1(b) of the Regulations) and shall provide all data needed by the TERO to verify the status of those employees. As provided in Section 2.1, all non permanent key positions shall be filled with local Indians unless the TERO has determined that there is no qualified Indian available for that position. The plan shall also describe how the employer will participate in the Nation's training programs.

(b) Contracting and Subcontracting Compliance Plans

Each covered entity intending to engage in business activity on the reservation, prior to the time it commences work on the reservation, must submit a contracting and subcontracting plan to the TERO. No new entity may commence work on the lands over which the Mandan, Hidatsa and Arikara Nation has jurisdiction until it has met with the TERO and developed an acceptable plan for meeting its obligations under these Regulations. A covered entity that fails to submit an acceptable plan in a timely manner shall be in violation of the TERO Ordinance and subject to fines and other sanctions pursuant to Title VII of that Code.

The contracting and subcontracting plan shall indicate all contracts and subcontracts that will be entered into by such entity on said project and the projected dollar amounts thereof. If

the entity has already selected a firm to perform any contract or subcontract work, it shall list the name of that firm and indicate whether or not it is a firm certified as Indian preference eligible by the TERO. If it is not a certified firm, the entity shall further indicate why any technically qualified and certified firm, if any, that registered with the TERO was not selected. The plan shall also indicate how the entity intends to comply with Part 3 of these regulations when awarding all contracts and subcontracts not yet awarded at the time the plan is submitted.

PART 2.

INDIAN PREFERENCE IN EMPLOYMENT AND TRAINING

2.1 Hiring

(a) Tribal Hiring Hall

An employer may recruit and hire workers from whatever sources are available to him and by whatever process he so chooses, provided that except as provided in subsection (b) he may not employ a non-local Indian or non-Indian until he has given the Tribal Employment Rights Office 72 hours to locate and refer a qualified local Indian. However, in cases where a worker is needed in a shorter period of time, the employer may so request from the TERO and said request shall be granted so long as the employer can demonstrate that need exists. The TERO Director may enter into agreements with contractors providing that all hiring shall be done through the TERO.

Where an employer or the TERO cannot locate a qualified local Indian, they shall make a best faith effort to locate, refer and hire an Indian who does not qualify as a local Indian, but who is a member of a federally-recognized tribe.

(b) Permanent and Key Employees

Prior to commencing work on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction, a prospective employer and all subcontractors shall identify key regular, permanent employees. Such employees may be employed on the project whether or not they are local Indians. A regular, permanent employee is one who is and has been on the employer's or subcontractor's annual payroll, or is the owner of the firm (as against one who is hired on a project-by-project basis). A key employee is one who is in a top supervisory position or who performs a critical function such that a employer would risk likely financial damage or loss if that task were assigned to a person unknown to the employer. The fact that an employee had worked for the employer on previous projects shall not qualify that employee as a regular, permanent employee; provided, that exceptions for superintendents and other key personnel who are not permanent, regular employees may be granted by the TERO Director on a case-by-case basis. Any employer or subcontractor which fills vacant employment positions in its

organization immediately prior to undertaking work pursuant to a contract to take place on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction shall set forth evidence acceptable to the TERO Director that its actions were not intended to circumvent these requirements. Upon its approval of each key, regular, permanent employee requested by the employer, the TERO shall issue a permit to that worker.

(c) Sanctions

Any non-local Indian found to be employed by the covered employer who was hired in violation of the requirements of these Regulations shall be summarily removed from the job and the employer shall be subject to such additional sanctions as the Commission may impose. In imposing sanctions under this section, the Commission shall consider such factors as:

1. was the violation intentional?
2. did the employer act quickly to remove the employee at issue?
3. has the employer been cited for other work permit violations in the past?

(d) Termination

No local Indian worker shall be terminated so long as a non-local Indian or non-Indian worker in the same craft is still employed. The non-Indians shall be terminated first, and then non-local Indians so long as the Indian or local Indian meets the threshold qualifications for the job. Further, if the employer lays off by crews, qualified local Indians shall be transferred to crews that will be retained, so long as there are non-local Indians or non-Indians in the same craft employed on the crews that are to be retained.

(e) Unions

An employer or subcontractor who has a collective bargaining agreement with one or more labor unions must obtain written agreements from said unions indicating that they will comply with these Indian preference requirements. Specifically, the contractor may make initial job referral requests to the union. However, if the union does not have a qualified local Indian worker on any of its out-of-work lists, the union shall contact the TERO. If the TERO can identify a qualified local Indian worker, that worker shall be referred through the union

hiring hall to the job site. The union may not refer a non-local Indian or non-Indian until it has so contacted the TERO. Before referring the non-local Indian or non-Indian to the job site, the union shall request and the TERO shall issue a work permit for that worker.

No Indian worker shall be required to travel to a site off the reservation to be processed by the union hiring hall. Such processing shall be done on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction or by telephone or mail.

Any Indian worker who does not wish to become a member of the union shall be granted a temporary permit for the duration of the project. Said worker shall pay all union dues but shall not be required to pay an initiation fee.

2.2 Training

All employers, as requested by the TERO, shall participate in training programs to assist Indians become qualified in the various job classifications used by the employer. Employers engaged in construction shall participate in the Tribe's BAT certified training program or a union apprenticeship program. All trainees or apprentices shall be local Indians. Where an employer is not presently participating in a union apprenticeship program, the Tribe shall make a best effort to bear the costs of such training programs, but employers may also be required to bear part of the cost. Employers with collective bargaining agreements with unions may use union apprenticeship programs so long as they obtain agreement from the unions to use only Indian apprentices on the project.

2.3 Job Qualifications, Personnel Requirements and Religious Accommodations

An employer may not use any job qualification criteria or personnel requirements which serve as barriers to the employment of Indians and which are not required by business necessity. The burden shall be on the TERO to demonstrate that criterion or personnel requirement is a barrier to Indian employment. The burden will then be on the employer to demonstrate that such criterion or requirement is required by business necessity. If the employer fails to meet this burden, he will be required to eliminate the criterion or personnel requirement at issue. Employers shall also make reasonable accommodation to the religious beliefs of Indian workers. In implementing these requirements, the TERO shall be guided by the principles established by

the EEOC Guidelines. However, the TERO reserves the right to go beyond the EEOC principles in order to address employment barriers that are unique to Indians.

Where the TERO and employer are unable to reach agreement on the matters covered in this section, a hearing shall be held, as provided for in these Regulations. The TERO Director shall make a determination on the issues and shall order such actions as he deems necessary to bring the employer into compliance with this section. The employer may appeal the decision of the TERO Director under the procedures provided for in Part 5 of these regulations.

2.4 Promotion

The employer shall give local Indians preferential consideration for all promotion opportunities and shall encourage local Indians to seek such opportunities. For all supervisory positions filled by non-local Indians or non-Indians, the employer shall file a report with the TERO stating which local Indians, if any, applied for the job, the reasons why they were not given the job, and what efforts were made to inform local Indian workers about the job opportunity.

2.5 Summer Students

Local Indians shall be given preference in the hiring of summer student help. The employer shall make every effort to promote after-school, summer, and vacation employment for Indian youth.

2.6 Retaliation

No employer shall punish, terminate, harass, or otherwise retaliate against any employee or other person who has exercised his or her rights under the TERO Ordinance or has assisted another to do so. Further, any employer who harasses or abuses an employee of the TERO who is carrying out official duties under this Ordinance shall be summarily removed from the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction. An employer shall be responsible for the actions of all of its employees, supervisory or otherwise, and for the actions of its subcontractors and their employees in regard to the prohibitions in this section.

2.7 Counseling and Support Programs

The TERO, in conjunction with other tribal and Federal offices, will provide counseling and other support services to Indians employed by covered employers to assist such Indians retain employment. Employers shall be required to cooperate with such counseling and support services.

PART 3.
INDIAN PREFERENCE IN
CONTRACTING AND SUBCONTRACTING

3.1 Entity Obligations

(a) Generally

Every entity engaged in any business activity within the reservation, including, but not limited to, construction, minerals development, supplies, service, and retail, shall give preference to firms certified by the Tribe under Part 4 of these Regulations in any contract or subcontract to be awarded by it so long as 50% or more of said contract or subcontract is to be performed on the reservation and so long as there are certified firms that are technically qualified and willing to perform the work at a reasonable price, as defined by section 3.5 of this Part. If the entity determines that certified firms lack the qualifications to perform all of the work required under a contract or subcontract, the entity shall make a good faith effort to divide the work required into small portions so that the certified firms can qualify for a portion of the work.

(b) Order of Preference

The following order of preference shall apply in the award of contracts and subcontracts:

1. Competition in the award of all contracts and subcontracts shall be limited to firms that have been certified as Indian firms by the TERO; provided that, if the bid submitted by a responsive and responsible firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work and its price is reasonable.
2. If only one responsive and responsible Indian certified firm is available, the awarding entity shall negotiate with said firm and award to it if its price is reasonable and it is technically qualified to perform the work.
3. If the awarding entity determines, through a review of the list of certified firms that there are no certified firms with the technical qualifications to perform the work, it

may, with the approval of the TERO director, award the contract through a full and open competition; provided that, if the bid submitted by a responsive and responsible firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work.

(c) Notice to TERO and to Certified Firms

Any entity planning to issue a bid, request for proposal, or other action leading to the employment of a contractor who would be covered by this Ordinance and regulations shall notify the TERO of its plans no fewer than twenty days prior to issuing notice to bidders or other potential contractors. The entity shall also obtain from the TERO a list of Indian preference certified firms and shall send a copy of the bid notice or other notice setting out the contract opportunity to each Indian preference certified firm engaged in the field of commerce in which the contract work will take place. The TERO shall identify such firms according to the order of preference set out in subsection (b) of this section. An entity that fails to comply with this requirement shall be subject to the sanctions set out in Article VII of the TERO Ordinance.

(d) Proviso

Provided, that if any requirement of these Regulations is inconsistent with the requirements of a Federal law or regulation, the latter shall take precedence. As used in these Regulations, the terms "contract" and "subcontract" apply to all contracts, including, but not limited to, contracts for construction, supplies, services, and equipment, regardless of tier.

3.2 Preference on Contracts and Subcontracts Involving Oil and Gas Exploration, Production, and Ancillary Services

(a) Order of Preference

“Qualified Indian Contractors” that are 100% owned and controlled by enrolled members of the Three Affiliated Tribes shall have first preference on all contracts and subcontracts in connection with oil and gas exploration, production, and ancillary services. (The term “Qualified Indian Contractors” is as defined in the TERO Ordinance and Regulations.) All entities engaged

in activities in connection with oil and gas exploration, production, and ancillary services, when awarding contracts or subcontracts that are subject to this section shall:

1. Review the TERO list of qualified Indian Contractors to determine if there is one or more of the Three Affiliated Tribes is registered with the TERO.
2. If there is more than one such firm described in subparagraph 1, the entity awarding the contract or subcontract shall limit bidding to such firms and award to the firm that meets the awarding entity's qualification regarding technical capability and price. Bids shall be opened in the TERO office with a TERO Employee present to observe the bid opening.
3. The decision on technical qualification and reasonable price shall rest solely with the awarding entity unless the TERO determines the awarding entity is improperly using those criteria to circumvent its obligations under the TERO Ordinance.
4. If no technically qualified firm offers a price that the awarding entity considers reasonable, the awarding entity shall seek to negotiate a reasonable price with the technically qualified firm that offered the lowest price.
5. The awarding entity may not reject a firm defined in subparagraph 1 on the basis of price and then award to a firm that is not 100% owned and controlled by a member of the Three Affiliated Tribes at a higher price.

6. If there is only one firm described in subparagraph 1 on the TERO list of Qualified Indian Contractors, the awarding entity shall negotiate with said firm and make award to it if it meets the awarding entity's qualifications regarding technical capability and price. The decision on technical qualification and reasonable price shall rest solely with the awarding entity, unless the TERO determines the awarding entity is improperly using those criteria to circumvent its obligations under the TERO Ordinance.
7. If there are no firms described in subparagraph 1 on the TERO list of Qualified Indian Contractors, the awarding entity shall follow the process as set out above, except that bidding shall be limited to Qualified Indian Contractors that are 51% or more owned and controlled by enrolled members of the Three Affiliated Tribes and registered with the TERO as having the necessary technical capability to perform the work in the general area that is the subject of the contract or subcontract.
8. If there are no firms described in subparagraphs 1 or 7 of this Subsection on the TERO list, or if the awarding entity followed the process set out in this subsection and was unable to find a firm that had the technical capability or that offered a reasonable price, it may Then go to non-enrolled members members of federal recognized tribes and finally to non-indian firms.

9. The term “reasonable price” as used in this subsection shall mean as a general rule, a price that is within 10% of the amount the awarding entity has estimated it would spend on that contract or subcontract. And the term “reasonable price” shall also mean a price that is within 2.0% of the amount the awarding entity has estimated it would spend on a vendor contract or subcontract.

10. Notwithstanding the requirements set out in paragraphs 1 through 9 of this Subsection, if an awarding entity:

- a.** Has entered into a contractor or subcontract with a Qualified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes after complying with the procedure set out in this Subsection; and
- b.** The awarding entity wishes to use that Qualified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes on subsequent contracts or subcontracts involving work in the same general business area as the initial contract or subcontract;
- c.** 2.5% For Vendors.

Then the awarding entity, after verifying with the TERO that the firm remains certified as a Qualified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes, may enter into one or more subsequent contracts or subcontracts with that Qualified Indian

Firm that is 100% owned by one or more members of the Three Affiliated Tribes without first following the procedures set out in paragraphs 1 through 9 of this Subsection. The awarding firm shall send notice of the award of each subsequent contract(s) or subcontract(s) to the TERO within 20 days of its execution. The notice shall set out the name of the Qualified Indian Firm, the general business area of the contract or subcontract, the dollar amount, and the duration.

(b) Obligations of Qualified Indian Contractors

1. To be eligible for preference pursuant to Subsections 3.2(a)(1) or (7), a firm must be registered with the TERO as capable in the general business area in which the awarding entity is seeking a contractor or subcontractor. The TERO has established categories of business areas for oil and gas related activity (e.g., trucking, mud, Allottees signatures). To obtain registration in a category, a firm must demonstrate it has the experience or staff that are capable and equipment need to perform in that business area (herein after called "Fitness") and that the Indian owner(s) upon whom certification is based has the experience or staff that are capable and/or education to effectively manage a company engaged in that area of work. If a firm lacks such experience, capability, or equipment in a business area, it will need to obtain the experience or capability on work that is not subject to the TERO's Indian contract and subcontract preference program before it will be listed in that business area. Proof of Fitness in a category shall include:

- a. Detailed list of current inventory and/or copies of current equipment leases and proof of payment.
 - b. Copies of all necessary certification and licenses of employees including but not limited to driver's license and adequate liability insurance.
 - c. The Indian Owner Must Show Proof that He or She has the experience or staff within his company who have the knowledge to engage in that business area.
 - d. Resumes of all key employees.
 - e. Must reveal financial records if requested by TERO.
 - f. A new company shall have 1 year probation to prove viability of company and provide references before they receive Permanent TERO Certified Indian Contractors listing status.
2. In evaluating whether a firm is a Qualified Indian Contractor and whether a firm is qualified to perform work in a particular business area, the TERO will evaluate whether the structure, finances equipment arrangements, management and other factors are ones that are consistent with normal and customary business practices in that business area. TERO will reject any firm whose factors indicate the firm's structure is so atypical for a business in that area that it is likely the firm was created to or is seeking work in a business area in order primarily to take advantage of Indian preference and not as firm that has the potential to be a successful Indian business over the long term in

general or in that business area. For example, a firm that relies inordinately on leased equipment and contract employees will not be certified. A firm whose sole experience is in gathering Allottees signatures will not be certified for Indian preference for a trucking contract.

(c) Performance of Work by the Qualified Indian Firm

1. On any contract or subcontract received by a Qualified Indian Firm as a result of a preference provided by this Ordinance, the Qualified Indian Firm must perform no less than 51% of work with its own employees. 51% of the work is defined as “51% of the total amount of the contract, minus the cost of equipment and supplies, shall be expended on employees of the Qualified Indian firm.”
2. On any contract or subcontract received by a Qualified Indian Firm as a result of a preference provided by this Ordinance, the Qualified Indian Firm must either own at least 51% of the equipment or have an equipment lease arrangement that is normal and customary in that business area.

(d) Joint Venture Agreements, 51% Indian Ownership, and Memberships

1. Any firm whose qualifications rely in any significant manner on a joint venture or mentorship with a non-Qualified Indian Contractor or on the qualifications of a non-Indian owning 49% or less of the firm must meet the following requirements in order to obtain or retain certification as a Qualified Indian Contractor:
 - a. The Firm must submit a plan demonstrating that at the end of three Indian preference contracts or three years, whichever comes first, that

it has made progress toward ownership and that the total buyout occurs within 10 years.

- b. For firms reliant on mentorships or joint venture relationships with non-Indian firms:
 - i. The firm shall, submit copies of any mentorship, joint venture or partnership agreement the firm is relying on to demonstrate its capability to work in a particular area.
 - ii. Must show proof that the partnership includes off reservation work or projects.
- c. Any Qualified Indian Contractor that fails to meet these requirements shall be notified by the TERO that its certification as a Qualified Indian Contractor will be withdrawn. The notification shall specify which requirement(s) the firm failed to meet and the information the TERO relied on to make its determination. The firm shall have ten days to request a hearing before the TERO Commission at which it will be given an opportunity to demonstrate that the decision of the TERO was incorrect.
- d. Any Qualified Indian Contractor who fails to meet the conditions set out in the contract or subcontract it was awarded pursuant to these Indian preference requirements, such as failure to perform, or that abandons the job before completion, shall:
 - i. Lose its eligibility to bid as a Qualified Indian Contractor or any contract or subcontract for a period of six months; and

- ii. Be reinstated as a Qualified Indian Contractor only upon reapplying and demonstrating that it has corrected the problems that led to its loss of eligibility. The decision to reinstate a contractor shall be at the discretion of the TERO Commission.

(e) Obligation of Awarding Entity

An entity awarding a contract or subcontract to a Qualified Indian Contractor pursuant to these Regulations shall:

1. Provide mentoring the Qualified Indian Contractor to assist it succeed on the contract or subcontract. The Awarding Entity shall submit to the TERO its mentoring plan within 10 days after the Qualified Indian Contractor begins work.
2. Inform the TERO within 15 working days if a Qualified Indian Contractor failed to perform on a contract or subcontract, abandoned the contract or subcontract, or engaged in any other actions that may constitute ground for the Qualified Indian Contractor to have its certification withdrawn or suspended, with specific information so that the TERO may exercise its responsibilities under subsection 3.2(d)(1)d of these Regulations.
3. At the end of the contract or subcontract, provide the Qualified Indian Contractor's performance on that contract or subcontract, with a copy to the TERO. The evaluation shall contain sufficient specificity to enable the Qualified Indian Contractor to determine how it can improve its performance in the future.

3.2 (f) *Subcontracting*

A tribally controlled company or a 51%/49% may sub-contract, but must first contact all 100% owned firms and then the 51%/49% firms to see if they can do the work before bringing a non-Indian subcontractor. The Company must provide however evidence that 100% and 51%/49% firms were first of all contacted via written correspondence.

3.3 Requirements in Contracting

Preference shall be given to Indian certified firms in the award of all contracts. An entity may select its contractor in any manner or procedure it so chooses. Provided that:

(a) Competitive Award

(1) If the entity uses competitive bidding or proposals, competition shall be limited to certified firms. If the entity is unsure if there are any qualified certified firms, it may first publish a prior invitation for certified firms to submit a Statement of Intent to respond to such a limited advertisement when published and to furnish, with the Statement of Intent, evidence sufficient to establish their technical qualifications, provided that, if the bid submitted by a firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work.

(2) If the entity fails to receive any Statement of Intent from a technically qualified certified firm, it may, after so notifying the TERO, advertise for bids or proposals without limiting competition to certified firms and may award to the low bidder, provided that, if the bid submitted by a firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work.

(3) If only one certified firm submits a bid or Statement of Intent, the entity (unless otherwise prohibited by federal law or regulation) shall enter into negotiations with that firm for a period not to exceed ten days and shall award the contract to that firm so long as the firm is technically qualified and is willing to perform the work at a reasonable price as defined in section 3.5 of this Part.

(b) Negotiated Award

If the entity selects its contractor through negotiations or other informal process, it may not enter into a contract with a non-certified firms unless it has contacted every certified firm in the relevant field and has determined that there is no certified firm available that is technically qualified to perform the work required at a reasonable price as defined in section 3.5.

So long as a certified firm meets the minimum threshold qualifications, no non-certified firm may be selected.

(c) Sole Source Negotiations with Tribal Contracting Firms by Tribal Entities and Programs

Notwithstanding subsections (a), (b) and (c) of this Section, all tribal programs and tribal entities shall give a right of first refusal for the work on any project funded by tribal or Tribal entity dollars and/or PL 93-638 funds to a Tribally-owned contracting firm qualified to perform the work on the project. The Tribal program or entity that is letting the contract on the project shall engage in negotiations with the qualified Tribally-owned contracting firm to negotiate a price and terms of a contract for the work. If good faith negotiations do not result in a contract within thirty days after commencement of negotiations, the Tribal entity letting the contract may put the contract out for competitive bid in a manner consistent with subsections (a), (b) and (c) of this Section.

3.4 Requirements in Subcontracting

(a) General Requirements

Preference shall be given in the award of all subcontracts to certified firms. The contractor may select its subcontractor in any manner it so chooses. Provided that:

If the contractor uses competitive bidding or proposals, competition shall be limited to certified firms and award shall be made to the responsive and responsible firm submitting the lowest bid if its price is reasonable; provided that, if the bid submitted by a firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work. If the contractor is unsure if there are any qualified certified firms, it may first publish a prior invitation for certified firms to submit a Statement of Intent to respond to such a limited advertisement when published and to furnish, with the Statement of Intent, evidence sufficient to establish their technical qualifications. If the contractor fails to receive any Statement of Intent from a technically qualified firm, it may, after so notifying the TERO, advertise for bids or proposals without limiting competition to certified firms and may award to the low bid; provided that, if the bid submitted by a firm owned by a

member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work. If only one certified firm submits a bid or Statement of Intent, the contractor shall enter into negotiations with that firm and shall award the contract to that firm so long as the firm is technically qualified and is willing to perform the work at a reasonable price as defined in section 3.5.

If the contractor selects its subcontractor through negotiations or other informal process, it may not enter into a contract with a non-certified firm unless it has contacted every certified firm in the relevant field and has determined that there is not a certified firm available that is technically qualified to perform the work required at a reasonable price as defined in section 3.5. So long as a certified firm meets the minimum threshold qualifications, no non-certified firm may be selected.

(b) Special Requirements

Entities awarding construction contracts shall comply with the following special requirements in the award of subcontracts:

(1) The bid notice shall require that each bidder submit, as part of its bid, an Indian subcontract plan showing, for each subcontract it intends to enter into, the name of the firm, whether it is or is not certified, and, if not certified, why the contractor did not select a certified firm, and the projected subcontract price, as provided for in Part 1, section 1.3(b). (Since, pursuant to that section a contractor will not be permitted to commence work on the reservation unless it has an approved subcontracting plan, it is in the contract awarding entity's self-interest to declare as nonresponsive or nonresponsible any bidder who fails to submit a satisfactory plan.) The subcontract price information for each bidder shall be made available to the TERO and shall be used to ensure that a contractor has not engaged in bid shopping as a means to discourage certified firms or to force them to accept a subcontract at an unreasonably low price.

(2) It shall be illegal for any contractor or bidder to engage in bid shopping. Bid shopping is defined as any practice involving or comparable to the contacting of different subcontracting firms, informing them that a competitor has underbid them, but offering them an opportunity to underbid the competitor. Any contractor found to have engaged in bid shopping shall be prohibited from engaging in work on the reservation or, if engaged in work, shall be

liable for treble damages for any losses suffered by a certified firm as a result of the contractor's bid shopping practices. The TERO reserves the right to require any contractor to demonstrate that a reasonable relationship exists between the dollar amount of a proposed subcontract and the reasonable costs of supplies, materials, and labor.

(3) The contractor shall not be prohibited from requiring that a subcontractor provide some form of security. However, if a subcontractor bonding requirement has been imposed and an Indian firm is unable to obtain a bond, the prime contractor must permit the Indian subcontractor to provide another adequate form of security. A list of acceptable bonding alternatives is provided here:

- a. No bond required on amounts of \$25,000;
- b. Surety bonds;
- c. Cash bonds -- to 25% -- held in escrow by tribal attorney or bank;
- d. Increased retainers -- 25% instead of normal;
- e. Letter of credit -- 100%;
- f. Letter of credit -- 10% -- with cash monitoring system;
- g. Cash monitoring system;
- h. Other options to be considered as they arise. The final decision on whether an alternative form of security is sufficient shall rest with the TERO.

(4) If it is determined that there is no certified firm available qualified to perform a particular subcontract because the subcontract is too large for the capacity of any one certified firm, the contractor shall make a good faith effort to divide that subcontract into smaller pieces so that several certified firms may qualify and perform the work.

(c) Technical Assistance to Indian Subcontractors

The prime contractor shall develop and submit and implement a plan to assist Indian subcontractors to develop and improve their technical and managerial capabilities.

3.5 Responsibility for Evaluating Technical Qualifications and Reasonable Price

(a) Technical Qualifications

The entity and its contractors and subcontractors shall have the discretion to determine technical qualifications. However, if the entity determines that there are no certified firms that are technically qualified, the entity must provide to each certified firm it rejects a description, in writing, of areas in which it believes the firm is weak and steps it could take to upgrade its qualifications.

If a certified firm that was disqualified on the grounds of technical qualification believes that the disqualification was the result of an improper effort by an entity, contractor, or subcontractor, to circumvent its preference responsibilities under these Regulations, it may file a complaint with the TERO. Said complaint shall be filed within 20 days after the firm was notified of its non-qualification. The burden shall be on the complaining firm to demonstrate that (a) it is qualified, and (b) its disqualification was the result of an effort to circumvent these Regulations. If after a hearing, as provided for in Part 5, section 5.3, the complaint is found to be valid, the TERO Director shall impose such sanctions as he deems appropriate, including punitive damages.

(b) Reasonable Price

An entity may use any process it so chooses for determining what constitutes a reasonable price including, but not limited to, competitive bidding (open or closed), private negotiations, or the establishment of a prototype cost ceiling before bidding or negotiations commence. However, before an entity may reject all certified firms on the basis of price, it must offer one or more of the certified firms an opportunity to negotiate price. If there is only one technically qualified certified firm, an entity must enter into negotiations on price with such firm and must contract with that firm if a reasonable price can be negotiated. No entity may reject a certified firm on the grounds that the price is not reasonable and subsequently contract with a non-certified firm at the same or higher price. Any contract modification executed between an entity and a non-certified firm during the course of a project which results in a higher price to the firm will be subject to review by the TERO to assure that the modification in price is justified and not a circumvention of this section. Any entity found to have violated this requirement by such circumvention shall be liable for treble damages for any losses suffered by a certified firm as a result of the entity's actions.

3.6 Operation of the Contract or Subcontract

Once an entity enters into a contract with a certified firm, the TERO will not intervene in any way in the relationship between the parties unless a certified firm demonstrates that action taken against it is intended primarily to circumvent the requirements of these Regulations.

3.7 Maintenance of Indian Preference Status

If a certified Indian firm receives a contract or subcontract award on the basis of Indian preference as provided for in this Part, it shall maintain its certification throughout the entire period of the contract. If, as a result of changes in the firm's ownership or control during the period of the contract, the firm no longer qualifies as a certified firm, the TERO reserves the right to take such action against the firm as it deems appropriate to preserve the purposes of these Regulations.

PART 4.

CRITERIA AND PROCEDURES FOR

CERTIFYING FIRMS AS INDIAN PREFERENCE ELIGIBLE

4.1 General Statement of Policy

Pursuant to its sovereign authority, the Mandan Hidatsa and Arikara 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 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.

4.2 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.

The Certified Indian Contractor shall determine qualified and responsive subcontractors they deem to be qualified and or contractible within their 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.

The Certified Indian Contractor shall determine offers for employment they deem to be qualified or employable within their firm.

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.

4.3 Certification Procedures

(a) Application for Certification

A firm seeking certification as an Indian preference eligible firm shall submit a completed application 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 section 5.2, 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.

PART 5.

TERO FEES

5.1 Provision for Collection of Fees

Except as provided in Section 2, all fees are due and shall be paid in full by any covered employer prior to his or her commencing work on the reservation, unless other arrangements are agreed to, in writing, by the Director.

Immediately upon becoming aware that a covered employer is intending to engage in work on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction, the Director shall mail to said employer by registered mail, a notice informing him of the nature and the purpose of the fee, the percentage, the specific amount due, if known, the date due, and the possible consequences if the employer fails to comply. Said notice shall be accompanied by a formal notice of fees due.

If the employer fails to pay the fee by the day it commences work on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction, interest shall begin accruing on that date at the rate of 10% per annum. Further, following the day on which the employer commences work, the Director shall send a notice to the employer by registered mail, informing him that his payment is overdue and of the consequences that will result if the fee is not paid immediately.

If the fee is not paid by the 15th day after the employer commenced work, the Director shall file a formal charge of non-compliance, and shall schedule a Commission hearing to be held in five days or as soon thereafter as the Commission can meet, and shall inform the employer of the scheduled hearing.

At the hearing, to be held whether or not the employer attends, the Commission shall determine whether or not the employer has failed to comply. If it finds non-compliance, it shall:

- (a) Impose penalties of up to 10% of the amount due.

- (b) Petition the Tribal Court to uphold the decision of the Commission and to enforce it through confiscation proceedings as provided for in Section 16 of the Ordinance.

Where the Director or Commission has reasonable cause to believe that an employer will flee the jurisdiction before the procedures set out above can be completed, they may apply any of the procedures provided for in Section 15 of the Ordinance, notwithstanding the above procedures.

5.2 Employers with a Permanent Place of Business on the Lands Over Which the Mandan Hidatsa and Arikara Nation Has Jurisdiction

An employer that the Director determines will have a permanent place of business on the reservation shall pay the fee pursuant to the following procedures:

- (a) On April 15, July 15, October 15, and January 15, the employer shall submit, on a form provided by the Director, information showing his total payroll for the previous quarter, accompanied by a check for an amount equal to 1/2 of 1% of the payroll for that quarter.
- (b) The Director, upon receipt of a written request, may authorize, in writing, an employer to submit the information and payments on a quarterly schedule other than the one set out in subsection "a", when doing so would make the schedule compatible with the employer's fiscal year structure.
- (c) An employer covered by this section shall be subject to the same interest, penalty and enforcement requirements and deadlines as those established in section 1. The Director shall send said employers appropriate notices and forms.

5.3 Alternative Arrangement

The Director, in his discretion, may, upon receipt of a written request, authorize an employer to pay the required fees in installments over the course for the year or the contract, as appropriate, when:

- (a) The total annual fee exceeds \$10,000, and
- (b) The employer demonstrates hardship or other good cause.

The decision to authorize an alternative arrangement, which shall be in writing, shall rest solely with the TERO Director and may not be appealed to the Commission or the Courts.

The employer shall pay interest, at the prime rate, on all amounts paid after the day he commences work on the reservation when paying under an alternative arrangement.

PART 6.

ADMINISTRATIVE PROCEDURES

6.1 Reports and Monitoring

All entities engaged in any aspect of business activity on the reservation shall submit reports and such other information as is requested by the TERO. Employees of the TERO shall have the right to make on-site inspections during regular working hours in order to monitor an entity's compliance with these Regulations. Employees of the TERO shall have the right to inspect and copy all relevant records of an entity, of the entity's signatory unions or subcontracts, to speak with workers on the job site, and to engage in similar investigatory activities. All information collected by the TERO shall be kept confidential, unless disclosure is required during a hearing or appeal as provided for in these Regulations.

6.2 Individual Complaint Procedures

(a) Non-Compliance by an Entity

Any Indian, group of Indians, representatives of a class of Indians, certified firm, group of certified firms, or other person or entity who believes that an entity has failed to comply with these Regulations, or who believes that they have been discriminated against by a covered entity because they are Indian may file a complaint with the TERO. Persons may file whether or not they can show that they were personally harmed by the entity's non-compliance.

(b) Non-Compliance by the TERO

Any entity, group of entities, non-certified firms, group of non-certified firms, non-Indian worker, group of non-Indian workers or other person or entity who believes that an action of the TERO office under these Regulations is in violation of these Regulations, the Mandan Hidatsa and Arikara Nation Code, or Federal law or regulation may file a complaint with the TERO. Persons may file whether or not they can show they were personally harmed by the TERO's action.

6.3 Compliance and Hearing Procedures

(a) Informal Settlement

If, based on a complaint filed pursuant to Section 5.2 or on its own information, the TERO has reason to believe that an entity covered by these Regulations has failed to comply with any of these requirements, the TERO shall so notify the entity in writing, specifying the alleged violation(s). If the party so notified is a contractor or subcontractor, notice shall also be provided to the entity holding the permit or authorization under which the contractor or subcontractor is operating, and such entity shall be a party to all further negotiations, hearings, and appeals. The TERO shall then conduct an investigation of the charge and shall attempt to achieve an informal settlement of the matter. If voluntary conciliation cannot be achieved and the Director has reasonable cause to believe a party has violated the Ordinance or Regulations, he shall issue a formal notice of non-compliance to the party and shall proceed with the enforcement procedures as set out in Title VII of the Ordinance.

(b) Procedures for Hearing

All hearings before the Commission shall be governed by the Due Process Hearing Procedures at Part 7 of these Regulations.

6.4 Sanctions

The Commission may impose any or all of the following sanctions where it finds a violation of Ordinance or Regulations, pursuant to the procedures set out in Title VII of the Ordinance. If after the hearing, the Commission determines that the violation alleged in subsection (a) occurred and that the party charged has no adequate defense in law or fact, or if no hearing is requested, the Commission may:

- (a) Deny such party the right to commence business on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction;
- (b) Impose a civil fine on such party in an amount not to exceed \$500 for each violation;
- (c) Suspend such party's operation on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction;

- (d) Terminate such party's operation on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction;
- (e) Deny the right of such party to conduct any further business on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction;
- (f) Order such party to make payment of back pay to any aggrieved Indian;
- (g) Order such party to dismiss any employees hired in violation of the Tribe's employment rights requirements.
- (h) 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.

The Commission's decision shall be in writing, shall be served on the charged party by registered mail or in person and shall be submitted no later than thirty days after the close of the hearing. Where the party's failure to comply immediately with the Commission's orders may cause irreparable harm, the Commission may move the Tribal Court for, and the Tribal Court shall grant, such injunctive relief as necessary to preserve the rights of the beneficiaries of this ordinance, pending the party's appeal or expiration of the time for appeal.

6.5 Appeals

Any entity or complaining party shall have the right to appeal any decision of the Commission to the Tribal Court, pursuant to the procedures set out in Title VII of the Ordinance.

6.6 Bonds

The Director may require an entity to post a bond with the Commission pending a hearing before the Commission, pursuant to Title VII of the Ordinance, and may petition the Court to require an employer to post a bond pending an appeal to the Court from a decision of the Commission, pursuant to Title VII of the Ordinance, upon making a written finding that any of the conditions set out below exists. The entity:

- (a) has no permanent place of business on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction; and

- (b) the amount of the sanctions exceeds or likely will exceed \$1,000; and
- (c) the project on which the entity is employed will be substantially completed within 60 days, such that it may be difficult to locate property of said employer on the reservation that would be available for attachment or confiscation if the entity fails to pay any sanction imposed on it; or
- (d) the entity has failed to comply with an order of the Commission or the Courts in the past, and the employer has engaged in behavior that demonstrates a blatant disregard for the authority and requirements of the Commission, such that the Director or Commission has good reason to believe the entity will not comply with the orders of the Commission or the Court.

6.7 Attachment

The Commission may petition the Court for attachment of property of an entity, pursuant to Section 16B, when it finds that any one of the conditions set out below exists:

- (a) An entity has refused or failed to post a bond after being so order to do so by the Director, Commission, or Court, as provided in Section 6.6 of this part; or
- (b) The Commission has good reason to believe the entity will remove itself or its property from the reservation before it can complete its effort to require the entity to post a bond; or
- (c) The entity has demonstrated, through its behavior an intent to disregard the requirements and orders of the Director, Commission or Court.

6.8 Irreparable Harm

A finding of irreparable harm, such that the Director, pursuant the Title VII of the Ordinance, or the Commission pursuant to Title VII, may petition the Court for injunctive relief, shall be made only upon a showing that damage will occur than cannot be adequately remedied through the payment of monetary damages. Such a showing shall include but is not limited to the following:

- (a) That a contractor or subcontractor is about to or has begun work on a contract or subcontractor entered into in violation of the provisions of the Ordinance or

regulations requiring contract or subcontract preference, when there are one or more Indian firms available to perform said contract or subcontract, since it is impossible to measure in monetary terms the damages suffered by an Indian firm's failure to obtain a contract or subcontract.

- (b) An entity or its subcontractors is about to or has hired four or more persons in violation of the provisions of the Ordinance or Regulations requiring Indian employment preference, and there are Indians available to fill those positions, since it is difficult to identify the specific Indians who would fill those positions once the number of positions at issue is four or greater, making the payment of payback difficult to achieve.
- (c) An entity refuses to submit a preference plan in the time required and indicates through words or action that it intends to disregard the requirement imposed by the Ordinance and Regulations.

PART 7.

DUE PROCESS HEARING PROCEDURES

7.1 Pre-Hearing Procedures

(a) Review of TERO Files

The respondent (the employer or entity against whom a charge has been filed) shall have the right to review the case file of the TERO Director (the Director) by scheduling a visit to the TERO office during regular working hours at any point after receiving notice of a hearing. However, the Director shall have the right to "sanitize" any portion of the file to protect confidential information. The file shall be sanitized in a manner that causes the loss of the least amount of relevant information from the files.

(b) List of Witnesses

Ten (10) days prior to the hearing (or as soon as possible if the hearing is to be held within ten (10) days after notice.) the respondent and the Director shall submit to the Commission Chairman a list of witnesses each intends to call at the hearing, the approximate length of their testimony, and the subject matter and relevance of their testimony. It shall indicate any witnesses that must be subpoenaed. The Director shall then issue the subpoenas.

(c) Pre-Hearing Interviews of Witnesses

The respondent and the Director shall have the right to interview the witnesses of the other party, prior to hearing. The Director's witnesses shall be interviewed in the presence of the Director or his delegate. The respondent's witnesses shall be interviewed under such reasonable conditions as are established by the respondent. Either party may appeal to the Chairman of the Commission if cooperation is not forthcoming on this matter and the Chairman is empowered to require such steps as are necessary to resolve the problem.

(d) Subpoenas of Documents and Things

The respondent shall, no later than 10 days prior to the hearing (or as soon as possible if the hearing is noticed less than ten (10) days before the hearing) provide the Director with a list of items it wishes to have subpoenaed and the relevance of each. The Director shall

subpoena all relevant items listed as well as items needed by the Director. Any disputes shall be brought to the Chairman of the Commission who shall resolve such disputes.

(e) Postponements

Any request for a postponement of the hearing must be submitted in writing to the Chairman of the Commission no fewer than three (3) days prior to the hearing. However, if the Director and respondent mutually submit a request for a postponement because there is a possibility of settling the matter, the request for a postponement may be submitted at any time.

7.2 Conduct of the Hearing

(a) Presiding Officer

As presiding official, the Chairman of the Tribal Employment Rights Commission will control the proceedings. He or she will take whatever action is necessary to insure an equitable, orderly, and expeditious hearing. Parties will abide by the presiding official's rulings.

The presiding official has the authority, among others, to:

1. administer oaths or affirmations;
2. regulate the course of the hearing;
3. rule on offers of proof;
4. limit the number of witnesses when testimony would be unduly repetitious; and
5. exclude any person from the hearing for contemptuous conduct or misbehavior that obstructs the hearing.

(b) Director

The TERO Director shall represent the TERO on all charges filed by it, even if the charge was initiated by a complaint filed by a private individual.

(c) Respondent

The respondent shall be present for the entire hearing and he or his representative (other than an attorney) shall represent him during the proceedings.

(d) Attorneys

Either party may have an attorney present as an advisor. However, the attorney may not make any presentations, cross-examine witnesses or address the Commission.

(e) Recording of the Hearing

The Commission shall have the hearing tape recorded in full and shall retain the tape(s) for no less than one (1) year after the hearing. The respondent shall also be permitted to tape the hearing.

(f) Prohibition Against Reprisals

All parties shall have a right to testify on their own behalf, without fear of reprisal.

(g) Starting Time

The hearing shall be opened promptly at the time specified by the Commission.

(h) Opening Statements

Both parties will be afforded the opportunity to present opening statements with respect to what they intend to prove at the hearing.

(i) Order of Proceeding

The Director will present the TERO's case first.

(j) Examination and Cross Examination of Witnesses

Both parties may subpoena and examine friendly and hostile witnesses. Both parties may examine and cross-examine witnesses. However, no harassment or efforts to intimidate witnesses shall be permitted. The Commission members may examine witnesses at any point in their testimony. The testimony of all witnesses shall be under oath or affirmation.

(k) Irrelevant Testimony

Parties may object to clearly irrelevant material, but technical objections to testimony as used in a Court of law will not be entertained. The Commission shall prohibit any testimony that it deems clearly irrelevant in order to keep control of the hearing.

(l) Written Testimony

Written testimony will be admitted into evidence during the hearing only when a witness cannot appear in person. When a party wishes to use the written testimony of a witness who cannot appear, the party must submit, in advance of the hearing, a written explanation for

the non-appearance of the witness to the Tribal Business Preference Commission. If the Commission is satisfied with the explanation, the party will obtain the testimony by means of an interrogatory. When, for reasons satisfactory to the Commission, an interrogatory cannot be used, an affidavit or a deposition from the witness may be used. A signed, but, unsworn statement will be admitted into evidence only under unusual circumstances and when the Commission is satisfied that the testimony cannot be obtained otherwise.

(m) Closing Statement

Closing statements for each party will be permitted. The Director shall proceed first.

(n) Audience

The hearing shall be open to the public. However, the Commission may remove any person who disrupts the hearing or behaves in an inappropriate manner.

7.3 The Decision

The decision shall be in writing and issued within 30 days after the hearing. The decision shall consist of the following parts, in the following order:

- (a) The facts,
- (b) The finding of violation or no violation on each charge filed by the Director, along with the legal and factual basis for the finding,
- (c) The orders and/or sanctions imposed, if any,
- (d) Information on the respondent's right to appeal,
- (e) Information on the authority of the Commission to act if the party fails to comply with its orders or fails to appeal, and
- (f) The injunctive relief or bonding requirements, if any, that the Commission will seek from the Court pending the completion of the appeal if an appeal is filed, or the running of the time for the appeal if no appeal is filed.