

## TITLE 6 EMPLOYMENT

### CHAPTER 1. TRIBAL EMPLOYMENT RIGHTS

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## **SECTION 1 - DECLARATION OF POLICY**

The Tolowa Dee-ni' Nation believes that it is of crucial importance to create employment and training opportunities for its own members and for other Native Americans, and to attempt to eliminate employment discrimination against Native American people. An integral part of attaining this goal is constituted by the structuring of employment and training opportunities within the ceded territory of the Tolowa Dee-ni' Nation, so as to provide for the hiring of Indians who are qualified and for the training of Indians in those areas in which there is not a sufficient number of qualified Indians to meet the employment opportunities. In addition, the policy of Indian Preference will be implemented and adhered to in contracting and subcontracting, in accordance with the applicable provisions set forth in this Ordinance, in any and all supplementary ordinances, and in any and all rules, regulations, and/or guidelines promulgated by the TERO Commission, in an effort to promote Tribal and individual economic development.

There exists substantial legal support for the policy of Indian Preference in employment in federal statutory and regulatory law, of which the following represent only a few examples.

Title VII of the Civil Rights Act, including Section 703 (l), which makes Indian Preference in employment permissible.

The Indian Self-Determination Act, Section 7(b) of Public Law 93-638 which provides for Indian Preference in employment and training, contracting or subcontracting on all contracts negotiated or let on behalf of an Indian Tribe.

25 C.F.R. 271.44 sets forth the Federal Regulations implementing the provisions of the above-identified section of the Indian Self-Determination Act, requiring, to the greatest extent feasible, that preference is given to Indians in employment and training and to Indian organizations and Indian-owned economic enterprises in the award of contracts and subcontracts.

Executive Order 11246 of the Office of Federal Contract Compliance Programs provides, at 41 C.F.R. 60- 1.5(a) (6), a specific exemption in the context of Indian Preference, as follows:

Work on or near an Indian reservation: it shall not be a violation of the equal opportunity clause for a construction or non-construction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. The use of the word "near" would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors or subcontractors extending such preference shall not, however, discriminate among Indians on

the basis of religion, sex, or tribal affiliation and the use of such a preference shall not excuse a contractor or subcontractor from complying with the other requirements contained in this Section.

E.O. 11246 applies only to employers working under federal contracts.

## **SECTION 2 - SHORT TITLE**

This Ordinance shall be known and cited as the Tolowa Dee-ni' Nation Tribal Employment Rights Ordinance.

## **SECTION 3 - AUTHORITY**

This Ordinance is established by the Tolowa Dee-ni' Nation Tribal Council pursuant to the authority delegated to the Tribal Council by Article IV, Sections 1 & 2 of the Constitution of the Tolowa Dee-ni' Nation.

## **SECTION 4 – JURISDICTION**

The jurisdiction of the Tolowa Dee-ni' Nation to enforce provisions of the TERO Ordinance shall extend within the “Ancestral Territory” of the Rancheria as defined in Article 1, Section 1 thru 3 of the Constitution of the Tolowa Dee-ni' Nation. The definition of Tolowa Dee-ni' Nation's “Ancestral Territory” shall be interchangeable with the definition of the Tolowa Dee-ni' Nation's “Ceded Boundaries” herein.

Additionally, the Tribe retains jurisdiction to enforce provisions of the TERO Ordinance for all projects initiated or taken over by the Tolowa Dee-ni' Nation Housing Department, whether on, or off, the Smith River Rancheria.

## **SECTION 5 - DEFINITION OF TERMS**

For the purposes of this Ordinance, the term

- A. CEDED BOUNDARIES/ANCESTRAL TERRITORY** – are lands within a reservation or aboriginal territory, (as described in the Constitution of the Tolowa Dee-ni' Nation Article 1, Section 1,) that have been lost by a tribe or taken by the United States although tribes retain their rights even if ancestral and ceded lands are no longer within Indian country.
- B. CERTIFIED INDIAN-OWNED FIRM OR ENTITY** - shall mean and include any commercial, industrial, or other business firm or entity in which fifty-one percent (51%) or more of the ownership is held by and fifty-one percent (51%) or more of the actual management and control is exercised by an Indian or Indians which percentages shall be certified by the TERO Commission.

- C. COMMERCE** - shall mean and include all trades, traffic, distribution, communications, and transportation, provisions of services, manufacturing, production, agricultural production, building, maintenance, construction, banking, mining, and energy resources production.
- D. COMMISSION** - shall mean the Tolowa Dee-ni' Nation Tribal Employment Rights Ordinance Commission.
- E. COMMISSIONER** - shall mean a member of the Tolowa Dee-ni' Nation Tribal Employment Rights Ordinance Commission.
- F. CORE EMPLOYEE** – means an employee who performs an essential job function and has been identified as an employee who is vital to the success of the endeavor. (Core Employees should be identified in coordination with the TERO Office so the employer can show proof of past employment as a supervisor or foreman).
- G. COUNCIL** - shall mean the Tribal Council of the Tolowa Dee-ni' Nation.
- H. COVERED EMPLOYER** – means any person, company, contractor, subcontractor, or entity located or engaging in commercial or employment activity within the ceded boundaries of the Tolowa Dee-ni' Nation service area, including the Tolowa Dee-ni' Nation, regardless of where the activity occurs.
- I. DIRECTOR** - shall mean the Tribal Employment Rights Ordinance Officer of the TERO Office.
- J. EMPLOYEE** - shall mean and include any currently working employee, any applicant for employment, and any employee whose work has ceased as a consequence of, or in connection with, any current labor dispute or as a result of unfair labor practices and who has not secured any alternative regular and substantially equivalent employment; however, the term shall not mean and include any individual employed in the domestic services with any family or person at it/his/her home, or any individual employed by any other individual who is not a "covered employer," as such term is defined hereinafter.
- K. INDIAN/NATIVE AMERICAN** - means any person of the United States of America who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs in accordance with 25 U.S.C. 1452(c) and any "Native" as defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601).

- L. INDIAN PREFERENCE** – preference to Indians living on or within a commutable distance of the Nation with respect to employment, training, contracting and subcontracting by Covered Employers or Entities.
- M. INDIAN TRIBE** - means any Indian tribe, band, group, pueblo, or community, including native villages and native groups as defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601), which is recognized by the Federal Government as eligible for services from BIA in accordance with 25 U.S.C. 1452 (c).
- N. LOCATED ON OR NEAR THE Tolowa Dee-ni' Nation** – means located within what a reasonable, prudent person would construe as the normal commuting distance from a location off the Nation within the ceded boundaries of the Tolowa Dee-ni' Nation as defined in Article 1, Section 1 thru 3 of the Constitution of the Tolowa Dee-ni' Nation (60 Miles).
- O. NOTICE** - as required to be given to unnamed parties to an action and to all interested persons not parties to an action, and in all instances where in a specific person is not addressed shall be sufficient if such notice is published in a news publication serving the geographic area of the Tolowa Dee-ni' Nation and posted in a public place within the ceded boundaries of the Nation.
- P. PERSON** - shall mean and include both natural persons and artificial persons, including but not limited to, corporation, partnerships, joint ventures, sole proprietorships, associations, union, trust, trustees, and agents.
- Q. Qualified and Qualified to Contract** - a demonstrated ability to perform the requirements of an employment position or the terms of a contract and may include evaluation of prior performances, safety records, prior or pending litigation or complaints regarding performance, financial stability, or similar factors which are directly relevant to a potential employee or contractor's ability to perform satisfactorily.
- R. QUALIFIED INDIAN** – means an Indian/Native American who is qualified and who meets or exceeds the minimum requirements for a position as determined by the job requirements. No employer may utilize any employment criteria not legitimately related to the performance of the position.
- S. Nation** – means the Federally Recognized Tribe of the Tolowa Dee-ni' Nation, operating under the authority of the Tolowa Dee-ni' Nation Constitution.

- T. Tolowa Dee-ni' Nation** – means all lands within the jurisdiction of the Tolowa Dee-ni' Nation; and any lands outside the exterior territory of the Tolowa Dee-ni' Nation subsequently acquired, or put into federal trust, for the Rancheria including the service area of the Tolowa Dee-ni' Nation as identified by the Bureau of Indian Affairs.
- U. Tolowa Dee-ni' Nation BUSINESS OR FIRM** – means a firm or business certified by the TERO Office as eligible for Indian Preference in contracting and subcontracting; providing that the Tolowa Dee-ni' Nation Tribal Member holds at least (51%) ownership interest in such a firm or business and exercise majority management control. Verification of proof of ownership shall be provided to the TERO prior to the issuance of any TERO Permit.
- V. TERO** - shall mean the Tolowa Dee-ni' Nation Tribal Employment Rights Ordinance, or the Tolowa Dee-ni' Nation Tribal Employment Rights Office, depending on the context.
- W. THRESHOLD QUALIFICATIONS** – shall mean those qualifications above which Indian preference will be required as established by job descriptions, interview committees, skills tests, requests for proposals, notice of funds availability, license requirements, or other written requirements. **No covered employer may utilize any employment criteria not legitimately related to the performance of the position.**
- X. TRIBAL PREFERENCE** - preference in employment, training, contracting and subcontracting given by the Tolowa Dee-ni' Nation, acting as a Covered Employer or Covered Entity, in the following order:  
 When a position is funded entirely by non-Federal dollars, the following order of hiring preference shall apply:
- (a) Tolowa Dee-ni' Nation Tribal Members;
  - (b) Spouses of Tolowa Dee-ni' Nation Tribal Members;
    - (i) Non-native Spouses shall be given a preference in hiring only
  - (c) Native Americans;
  - (d) Current TDN/L7C employees;
  - (e) All other individuals

When a position is funded in whole or in part by Federal dollars, the following order of hiring preference shall apply:

- (a) Native Americans enrolled in Federally Recognized Tribes;

(b) All other individuals.

- Y. UNION OR LABOR ORGANIZATION** - shall mean any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

## **SECTION 6 - TERO OFFICE**

The TERO Office shall be vested with the general authority to implement the policy of Indian Preference in employment and in contracting as established and approved by the Tribal Council. The TERO Office shall have the specific duty and responsibility of engaging in the daily implementation of the provisions set forth in this Ordinance, in any and all supplementary ordinances, and in any and all rules and regulations, and/or guidelines promulgated by the TERO Commission.

The TERO Director shall have supervisory authority over the staff of the TERO Office. The Director shall prepare line item budgets, based upon any and all sources of funding for the operation of the TERO Office, and shall oversee the expenditures of funds there from, and may prosecute before the Commission, any and all claims of noncompliance with this Ordinance with any and all supplementary ordinances, or with any and all rules, regulations and/or guidelines promulgated by the Commission.

The TERO Director, in conjunction with the staff within the Office, shall have the following authority, duties, and responsibilities:

- A.** To develop and maintain in updated status a register setting forth the names of Indian-owned firms certified for Indian Preference by the Commission, together with an identification of the respective areas of work in which such firms are considered qualified.
- B.** To develop and maintain a plan for the dissemination of this Ordinance, of any and all supplementary ordinances, and of any and all rules, regulation, and/or guidelines promulgated by the Commission, to all covered employers and to all governmental entities letting contracts within the ceded boundaries of the Tolowa Dee-ni' Nation.
- C.** To ensure compliance by covered employers with any and all reporting requirements as prescribed by this Ordinance, in any and all supplementary ordinances, and by any and all rules, regulations, and/or guidelines promulgated by the Commission.

- D.** To enter into formal negotiations with representatives of any covered employer in an effort to resolve, on an informal, voluntary basis, any claim of noncompliance with the requirements set forth in this Ordinance, in any and all supplementary ordinances, and in any and all rules, regulations, and/or guidelines promulgated by the Commission.
- E.** To inspect any and all non-privileged information set forth in the books and records maintained by any covered employer for the purpose of ensuring continued compliance thereby with the requirements set forth in this Ordinance, in any and all supplementary ordinances, and in any and all rules, regulations, and/or guidelines promulgated by the Commission.
- F.** To conduct on-site inspections at any time during the actual operation of the business of any covered employer for the purpose of monitoring, compliance with the requirements set forth in this Ordinance, in any and all supplementary ordinances, and in any and all rules, regulations, and/or guidelines promulgated by the Commission, and to speak with any contractor, subcontractor, or employee on-site, so long as such conversation does not interfere with the operation of the business.
- G.** To initiate proceedings before the Commission for the purpose of suspending or revoking the Indian Preference Certification of a firm when changed circumstances so warrant.
- H.** To monitor and ensure the collection from covered employers of the appropriate TERO Fees for the purpose of providing fiscal support for the operation of the TERO Office.
- I.** To secure additional funding from alternative sources (e.g. federal and/or state funding sources, private foundations, and public agencies), if necessary for the continued adequate functioning of the TERO Office.
- J.** To implement and maintain a “Skills Bank” from which covered employers shall select and employ qualified Indians to fill employment positions.
- K.** To require covered employers to establish and maintain job training or apprenticeship programs for the purpose of assisting Indians to become qualified in the various crafts skill areas, or job classifications used by such employers and increasing the pool of Indians qualified to engage in the various employment positions available on or near the Tolowa Dee-ni’ Nation.
- L.** To prohibit covered employers from instituting and utilizing job qualification criteria and/or personnel requirements, which, in effect, serve as barriers to employment of Indians, unless such criteria and/or requirements can be demonstrated to be required by business necessity.

- M.** To enter into negotiated agreements with labor unions for the purpose of ensuring union compliance with the requirements set forth in this Ordinance, in any and all supplementary ordinances, and in any and all rules, regulations, and/or guidelines promulgated by the Commission.
- N.** To assume the full power and authority of the TERO Commission in emergency situations or under exigent circumstances (e.g., immediate action must be taken and/or a decision made so as to prevent further substantial harm resulting from certain noncompliance or it is impossible to secure a quorum of the members of the Commission); provided, however, that any such action taken and/or decision made by the TERO Director shall be deemed temporary, pending review thereof and a determination thereon by the Commission within a period not to exceed thirty (30) days from the date on which such action was taken and/or decision made.
- O.** To take such other actions and engage in such other activities as are deemed necessary to achieve the purposes and objections inherent in the policy of Indian Preference in employment and in contracting.

## **SECTION 7 - TRIBAL EMPLOYMENT RIGHTS COMMISSION**

As the governing body of the Tolowa Dee-ni' Nation, the Tribal Council hereby delegates to the TERO Commission the appropriate authority and power to implement the federally recognized policy of Indian Preference in employment and in contracting, and in sub-contracting.

The Commission shall be composed of five (5) members. A minimum of three (3) members of the Commission shall be Tribal Members with one (1) of them being a Council Member. All members of the Commission shall be appointed by the Tribal Council with three members serving a term of two (2) years; and two (2) members serving in odd numbered years, each initially for a term of one (1) year. The Tribal Council may remove any member at any time for cause subject to notice and opportunity for a hearing before the Tribal Council.

All members of the Commission will comply with the Tolowa Dee-ni' Nation's Standing Committee Policy.

The TERO Commission shall be vested with the general authority in regulating employment practices of the Tribes, entities or enterprises or other employers or contractors/subcontractors within the ceded territory of the Tolowa Dee-ni' Nation. The Commission shall have the following specific authority, duties, and responsibilities:

- A.** To establish and implement rules and regulations governing all activities and procedures of the Commission.

- B.** To issue rules, regulations, and guidelines deemed necessary to fully implement the provisions set forth in this Ordinance and those set forth in any and all supplementary ordinances.
- C.** To meet with the TERO Director and staff members on a monthly basis for the purpose of securing updates relative to the operation of the TERO Office.
- D.** To hold formal hearings, issue notices thereof, and subpoena witnesses and documents in accordance with the hearing procedures set forth in this Ordinance, in any and all supplementary ordinances, and in any and all rules, regulations, and/or guidelines promulgated by the Commission.
- E.** To impose any sanctions and grant any relief as authorized and prescribed by this Ordinance and by any and all supplementary ordinances.
- F.** To require any covered employer to pursue whatever corrective actions are deemed necessary for such employer to come into compliance with the requirements set forth in this Ordinance, in any and all supplementary ordinances, and in any and all rules, regulations, and/or guidelines promulgated by the Commission.
- G.** To take such other actions and engage in such other activities as are deemed necessary to achieve the purposes and objectives inherent in the policy of Indian Preference in employment and in contracting.

Decisions of the Commission shall be made by a majority vote. A quorum shall consist of any three of the five Commission Members. Any Commission Member who is also on the staff of the Smith River Rancheria or its entities shall be disqualified from any involvement in decision affecting the Tribal Department or entity with which he or she is employed.

In the event that, at any hearing before the Commission, the members of the Commission should determine that a potential conflict of interest exists between a member or members of such body and a hearing participant or participants, any such member or members of the Commission shall be disqualified from any participation in such hearing and shall not be present.

## **SECTION 8 - APPLICABILITY**

The provisions set forth in this Ordinance shall apply to any and all lands situated within the ceded boundaries of the Tolowa Dee-ni' Nation, as defined in Article I, Section 1, of the Constitution of the Tolowa Dee-ni' Nation and to such other lands, within or without such territory, as have been or may be hereafter included

within and subject to the jurisdiction of the Tolowa Dee-ni' Nation under any law of the United States, except as otherwise provided by law.

Unless specifically prohibited by Federal or Tolowa Dee-ni' Nation Tribal Law, this Ordinance shall apply to all employers, including but not limited to: the Tolowa Dee-ni' Nation's programs, departments, entities, enterprises, private employers, independent contractors/subcontractors, including those performing work for the Tribal Council, the State of California, or the United States.

All employers shall extend an employment preference to qualified Indians as provided in Section 10, in all aspects of employment, including but not limited to recruitment, hiring, promotion, lateral transfers, retentions, training, contracting, and subcontracting. No employer may recruit, hire, or otherwise employ any non-Indian for any employment position covered by this Ordinance; unless and until the TERO Director has furnished a written notice to such employer that no qualified Indians are available for such position.

## **SECTION 9 – COVERAGE**

The Tolowa Dee-ni' Nation's Indian Employment Preference Policy shall apply to every job classification, skill area, or craft recognized or utilized by an employer, including administrative, supervisory, and professional classifications.

An employer shall not use employment criteria that would unreasonably exclude qualified Indians from being hired. Criteria not clearly related to job performance are strictly prohibited. If an Indian meets the threshold qualifications for a position, or if an Indian could meet or exceed those requirements with reasonable training, the employer shall hire such Indian in preference to non-Indians, even if the non-Indian appears more qualified.

To the extent allowed by law, the Tolowa Dee-ni' Nation and its entities shall extend a preference in hiring according to the following priorities:

Federal law recognizes the inherent authority of the Tolowa Dee-ni' Nation to exercise an employment preference for its own members and other Native Americans. This is often referred to as "Indian Preference".

Accordingly, preference in all aspects of employment with the Tribe will be given first to "Native Americans," namely qualified members of a federally recognized Tribe. This preference is for the furthering of goals of self-determination and employment opportunities for all Native Americans. The Tribe values the contributions of its non-tribal employees and welcomes interest in employment from all people.

## **SECTION 10 - SCOPE OF INDIAN OR TRIBAL PREFERENCE**

The requirements set forth in this Ordinance are binding on all covered employers, contractors, and subcontractors and will be considered a part of resulting subcontract specifications. The employer bears the primary responsibility for compliance with the requirements of this Ordinance, and for ensuring that all contractors/subcontractors similarly comply.

All covered employers, contractors, subcontractors will be subject to the penalties provided herein for non-compliance with the terms and requirements of this Ordinance. All employers, contractors, subcontractors will include in their contracts clauses acknowledging the equal opportunity and Indian Preference requirements contained in this Ordinance. Except the Tribe acting as a covered employer (who will follow either Tribal or Indian Preference, depending upon the funding source), the following is the order in which covered employers will comply with Indian Preference:

- A.** All covered employers shall grant preference to Qualified Indians living on or near the reservation, without regard to tribal affiliation, over non-Indians in hiring, promotion, training and all other elements of employment. Potential employees shall have their employment history evaluated by the TERO Director to determine if Indian Preference shall be applied with respect to employment by the Tribe as a covered employer.
- B.** All covered employers shall grant preference to certified Indian-owned firms, whose principal places of business are located within the ceded boundaries of the Tolowa Dee-ni' nation, without regard to tribal affiliation, over certified Indian-owned firms whose principal places of business are located without such ceded boundaries, in awarding contracts and subcontracts.
- C.** All covered employers shall grant preference to certified Indian-owned firms, without regard to the location of their respective principal places of business, over non-certified firms with some Indian ownership, in awarding contracts and subcontracts.
- D.** All covered employers shall grant preference to non-certified firms with some Indian ownership, without regard to the location of their respective principal places of business, over non-Indian-owned firms, in awarding contracts and subcontracts.
- E.** No Indian worker shall be laid off as long as a non-Indian worker in the same job classification is still employed or, not as long as such Indian meets the threshold qualifications for the job unless such non-Indian has been employed by same company for more than one (1) year longer than such Indian. If the contractor lays off by crews, qualified Indians shall be

transferred to any crew that will be retained, as long as there are non-Indians in the same job classification employed elsewhere on the Rancheria under the same contract.

## **SECTION 11 – SKILLS BANK**

The TERO Director shall, in cooperation with other Tribal Departments, establish and administer a data bank of Tolowa Dee-ni' Nation Tribal Members and other Indians seeking employment. This data bank shall be called the "Skills Bank," and will list all available workers, their respective skill, qualifications, and include documentation of training or other special qualifications and/or needs. The TERO Director shall create a Skills Bank Form for Tolowa Dee-ni' Nation Tribal Members and other Indians seeking employment to complete in order to apply to become part of the Skills Bank.

No employer may hire non-Indians until a reasonable time for referral, as defined in this subsection, has elapsed or the TERO Office has certified in writing, that no qualified Indians are available to fill the particular job openings.

"Reasonable Time for Referral" for purposes of this Ordinance means:

- A.** For construction jobs: The Director will locate and refer qualified Indians within 72 working hours of the date & time of receiving the initial notice of available opening from the employer.
- B.** All other jobs: The Director has five (5) working days from the date of receipt from the initial notice of an available opening to locate and refer qualified Indians to jobs.

The Director may agree to waive or modify these requirements if there is a clear indication that the time limits would impose an undue burden on the project.

## **SECTION 12 – PREFERENCE IN EMPLOYMENT CONTRACTING/ SUBCONTRACTING**

Contingent on funding source requirements, all covered employers shall give preference first to Tolowa Dee-ni' Nation-owned businesses or firms and second to Indian-owned businesses or firms in the award of any contract or subcontract. In order to qualify under TERO as an Indian owned firm, the business must at least be 51% Indian majority management control. The Director will register and maintain a list of both Tolowa Dee-ni' Nation and Indian owned business or firms.

For the purpose of establishing eligibility for Indian Preference in contracting and subcontracting, the Director is authorized to actively recruit and certify Indian firms, whether located within or outside the Tolowa Dee-ni' Nation. Any Contractor wishing to claim Indian Preference with TERO must complete a

“Contractors Qualification Questionnaire for Indian Preference” for contracting with the Tolowa Dee-ni’ Nation. Once certified by the Director as either a Tolowa Dee-ni’ Nation owned business or Indian firm, applicants will be placed on a bidder’s eligibility list.

Contingent on funding requirements, preference in contracting and subcontracting shall be awarded first to Tolowa Dee-ni’ Nation Tribal Members. For example, if a non-Indian or a non-Tolowa Dee-ni’ Nation Tribal Member submits the lowest bid, and a Tolowa Dee-ni’ Nation Tribal Member or Tolowa Dee-ni’ Nation owned business submits a bid that is within five percent (5%) of the non-Tribal Member bidder, the Tolowa Dee-ni’ Nation Tribal Member or tribal firm shall be provided the opportunity to match any bids within five percent (5%). The contract shall be awarded to the Tolowa Dee-ni’ Nation Member or business.

### **SECTION 13 – TRAINING**

Employers may be required under this Ordinance to participate, or assign interested Indians living on or near the reservation and other Indians to participate in training programs designed to assist in becoming qualified in those occupations or job categories specific to the respective employer.

In the event the requirements of this Ordinance create conflict with any union’s seniority rights, the Director shall have the authority to negotiate such ratios with a respective employer/contractor.

### **SECTION 14 – TERO PERMIT PROCESS**

The TERO Director will only issue permits to employers conducting work either within the ceded boundaries of the Tolowa Dee-ni’ Nation, or on tribally funded projects, whether on or off the Tolowa Dee-ni’ Nation and its Bureau of Indian Affairs designated service area that comply with the following terms and conditions:

- A.** Once a contractor/subcontractor has been awarded the job, A TERO Permit Application & Labor Force Projection Form must be filled out entirely by the contractor/subcontractor and returned to the TERO Office within five (5) business days upon receiving them before starting any work.
- B.** If applicable, the TERO Office will then refer to the Skills Bank for any qualified applicants needed to fill any job openings that the awarded contractor/subcontractor may have for that contract.
- C.** Once the TERO Permit Application & Labor Force Projection Form have been received and it has been determined that all the required information has been filled out correctly, a TERO Permit will then be issued to the

awarded contractor/subcontractor. This permit must be signed off by both the TERO Director and the contractor/subcontractor before any work commences.

- D.** Inclusion of an Indian Preference Plan (TERO Permit Application) for the prime general contract and any subcontract(s) in each and every bid packet(s) submitted.
- 1.** The name of the proposed subcontractor(s); and
  - 2.** whether it is an Indian-owned firm and, if not, information on the good faith steps taken to identify Indian firms for the subcontract.

The employer shall agree to comply with the requirements and procedures for the selection of contractors/subcontractors, and recruitment of viable Indian applicants pursuant to this Ordinance and through the TERO Office. The employer understands that it is required to comply with the Smith River Rancheria's TERO and all the requirements regarding "Indian Preference".

The TERO Labor Force Projection Form constitutes an agreement between the Tolowa Dee-ni' Nation TERO and any employer engaging in commerce and employment pursuant to this Ordinance.

#### **SECTION 15 – FAILURE TO SUBMIT INDIAN PREFERENCE/TERO LABOR FORCE PROJECTION**

A successful bidder who fails to submit an Indian Preference/TERO Labor Force Projection Form shall be considered a non-responsive bidder for the purpose of awarding the contract and will be disqualified.

#### **SECTION 16 – AMENDMENTS TO PLAN**

If awarded the contract, the prime contractor can neither amend nor deviate from the Indian Preference Plan (TERO Permit Application), nor add or delete any subcontracts or subcontractors without:

- A.** Written consent from the prime contractor or his/her designee; and
- B.** written notice to the Tolowa Dee-ni' Nation TERO at least ten (10) business days prior to the date of the anticipated change; and
- C.** has written authorization to proceed with the proposed amendments from the Director prior to the date of implementation.

## **SECTION 17 – BID SHOPPING**

A contractor is prohibited from engaging in “bid shopping” as a means of avoiding its Indian Preference obligations with regards to subcontracts. “Bid shopping” is the use of a low bid already received by a general contractor to pressure other subcontractors into submitting even lower bids.

## **SECTION 18 – THE Tolowa Dee-ni’ Nation TERO FEE**

Pursuant to their Constitutional and federally recognized power and authority, the Tolowa Dee-ni’ Nation hereby imposes a TERO Fee on certain covered employers, for the partial purpose of deriving a source of revenue for the administration and operation of the TERO Office, an instrumentality and agency of the Tolowa Dee-ni’ Nation.

Covered employers with a construction/consultant contract must pay a TERO Fee of the total gross amount of the contract as stated in the Tribe’s Professional Service Contract.

As of the date of enactment of this Ordinance, the TERO fee shall be two and a half percent (2.5%) of the total gross amount of the contract. The Tribal Council may, at its discretion, modify the percentage of the TERO fee without amending this Ordinance, as long as it provides 30 written days’ notice to the contractor(s) of the modified TERO fee percentage amount.

## **SECTION 19 – METHOD OF PAYMENT FOR TERO FEE**

The TERO Director shall be responsible for collecting all TERO Fees from covered employers. The TERO Fee shall be paid to the Tolowa Dee-ni’ Nation; and shall be credited to the account of the Tolowa Dee-ni’ Nation TERO for use in implementing this Ordinance; and shall be governed by guidelines approved by the Tolowa Dee-ni’ Nation Tribal Council.

The TERO Fee may be paid in incremental payments, subject to prior approval of the Tolowa Dee-ni’ Nation TERO Office and by the Nation’s Finance Department with a written agreement in a form acceptable to it. The agreement to make incremental payments shall be affixed to the contract to which the TERO Fee applies.

Any covered employer that fails to pay the TERO Fee pursuant to the terms set forth in this Ordinance shall be subject to sanctions set forth in Section 21 herein. All TERO Fees shall be made payable to the Tolowa Dee-ni’ Nation TERO and forwarded to the following address:

Tolowa Dee-ni' Nation TERO  
C/O Finance Department  
140 Rowdy Creek Road  
Smith River, Ca 95567  
**ATTN: Chief Financial Office**

## **SECTION 20 - COMPLAINT AND HEARING PROCEDURE**

Any person, including covered employers, employees, contractors, subcontractors, and the TERO Director, who believes that any other person has failed to comply with any requirements set forth in this Ordinance, in any and all supplementary ordinances, or in any and all rules, regulations and/or guidelines promulgated by the TERO Commission, shall file a written complaint with the TERO Office, whether or not such complaint can demonstrate that he/she/it has suffered personal harm as a result of the alleged noncompliance.

Upon the filing of any such complaint, the Director shall forthwith direct written notice of the alleged noncompliance to the person against whom the allegation of noncompliance has been made. Within a period of seven (7) days (exclusive of weekends and legal holidays) from the date of receipt of such notice, the person against whom the complaint has been filed and the Director and/or staff shall attempt to achieve a voluntary, informal resolution of the matter through negotiation. In the event that no such resolution has been achieved at the termination of such seven (7) day period, the Director shall forthwith notify the Commission and request that it set a date for a formal hearing on the matter within a period of thirty (30) days from the date of such notification.

Upon its receipt of such request for hearing, the Commission shall forthwith direct to (1) the person against whom the allegation of noncompliance has been made, (2) the complainant, (3) the Director, and (4) any and all other identified interested person, written notice of such hearing, wherein is set forth the date, time, and location of such hearing. In addition, such notice shall advise each interested person of (1) the nature of the hearing, (2) the right to be present at and participate in the hearing, (3) the right to present the testimony of witnesses and documentary evidence and to cross-examine witnesses, and (4) the right to be represented by counsel at his/her/its own expense. On its own initiative, or upon the request of any person so notified of such hearing, the Commission shall subpoena identified witnesses and documents and/or records. Within its discretion, the Commission may direct that the Director assist the complainant in the presentation of his/her/its claim of noncompliance.

At all hearings before the TERO Commission, the following rules of procedure shall be recognized and adhered to:

- A.** Each notified interested person shall have the right to be present at and participate in the hearing.

- B.** Each such person shall have the right to present relevant sworn testimony and documentary evidence.
- C.** Each such person shall have the right to call witnesses on his/her/its own behalf and to cross-examine witnesses called by any other hearing participant.
- D.** Each such person shall have the right to be represented by counsel at his/her/its own expense.
- E.** The Chairman of the Commission or a member thereof appointed by the Chairman shall preside over the proceedings.
- F.** Neither the formal rules of evidence nor any formal rules of procedure need be observed, but the Commission shall proceed to ascertain the facts inherent in the matter in a reasonable and orderly manner.
- G.** A complete transcript of the proceedings shall be made and maintained by the Commission.
- H.** The proceedings may be continued at the discretion of the Commission, should it deem such action advisable.
- I.** Any matter to be proven must be done so to the satisfaction of the Commission by a preponderance of the evidence.
- J.** At the termination of the proceedings, the Commission, within its discretion, may either render an immediate determination or take the matter under advisement and issue its decision no later than thirty (30) days (exclusive of weekends and legal holidays) from the date of the hearing.

Within a period not to exceed thirty (30) days from the date of the hearing, the Commission shall issue its written decision and order, setting forth the specific ground therefore and shall direct a copy thereof to each notified interested person who was present at and participated in the hearing. Should the Commission determine that the person against whom the complaint was brought did fail to comply with any requirement(s) set forth in this Ordinance, in any and all supplementary ordinances, or in any and all rules, regulations, and/or guidelines promulgated by the Commission, the Commission shall impose one or a combination of the sanctions set forth in Section 21 of this Ordinance and may order such person to take such corrective actions as are deemed necessary to remedy any harm caused by the noncompliance at issue. The decision of the Commission may be appealed to the Tribal Court in writing, within twenty (20) days of issuance of the Commission's decision.

## **SECTION 21 - SANCTIONS**

Any one or combination of the following sanctions will be imposed by the TERO Commission upon its determination that a person has failed to comply with any requirements set forth in this Ordinance, in any and all supplementary ordinances, and in any and all rules, regulations, and/or guidelines promulgated by the Commission.

- A.** Imposition of a civil monetary fine not to exceed the amount of one thousand Dollars (\$1,000.00) per violation. Each day on which a person has been determined to have been out of compliance with any TERO requirements shall constitute a separate violation.
- B.** Suspension or termination of the person's current conduct of business within the ceded boundaries of the Tolowa Dee-ni' Nation, provided that such person be granted a reasonable period of time during which to remove its equipment and other property located on the Rancheria and to arrange with another person the assumption of any of its outstanding contractual obligations.
- C.** Prohibition of the person's engaging in the future conduct of business within the territory of the Nation for a definite or indefinite period.
- D.** Provision of monetary or other appropriate relief as and for damages to compensate any person harmed as a result of the noncompliance at issue.
- E.** Order the immediate termination by the covered employer of any individual(s) hired in contravention of any TERO requirements relative to Indian Preference in the selection and hiring of employees.
- F.** Order the immediate revocation of any contract(s) and/or subcontract(s) entered into by the covered employer in contravention of any TERO requirements relative to Indian Preference in contracting and subcontracting.
- G.** Order the award of a contract or subcontract by a covered employer to any qualified Indian-owned firm adversely affected by the noncompliance with any TERO requirements relative to Indian Preference in contracting and subcontracting.
- H.** Order the award of back pay by the covered employer to any Indian individuals adversely affected by the noncompliance with any TERO requirements, relative to Indian Preference in employment opportunities.

- I. Order the covered employer to make such changes in its policies, procedures, and/or conduct as are deemed necessary for the purpose of securing compliance with any TERO requirements.
- J. Such other or further relief and/or sanctions as the Commission should deem just and proper.

## **SECTION 22 - PUBLICATION OF ORDINANCE**

The obligation of all covered employers to fully comply with the requirements set forth in this Ordinance, in any and all supplementary ordinances, and in any and all rules, regulations, and/or guidelines promulgated by the Commission, shall be made known to all covered employers doing business within the ceded territory of the Tolowa Dee-ni' Nation whether currently or in the future. It shall be the duty and responsibility of the staff of the TERO Office to cause the publication of such requirements to be performed to the extent as prescribed herein.

The TERO Office shall direct copies of this Ordinance, of any and all supplementary ordinances, and of any and all rules, regulations, and/or guidelines promulgated by the Commission, upon formal adoption thereof by the Tribal Council, to all covered employers intending to undertake projects within the ceded territory of the Tolowa Dee-ni' Nation. In addition, the TERO Office will continuously maintain in its files a sufficient number of copies of all such ordinances, rules, regulations, and/or guidelines for dissemination to any person who should request copies thereof.

## **SECTION 23 - ON-SITE INSPECTIONS**

The TERO Director, the staff members within the TERO Office, and the members of the Commission shall have the right to conduct periodic on-site inspections at any time during the actual operation of the business of any covered employer, in order to monitor compliance by such employer with the requirements set forth in this Ordinance, in any and all supplementary ordinances, and in any and all rules, regulations, and/or guidelines promulgated by the Commission, and with any order issued by the Commission. During the period of any such on-site inspection, such TERO personnel and officials shall have the right to speak with any contractor, subcontractor, or employee working on the site, so long as such conversation does not interfere with the operation of the business. In addition, such TERO personnel and officials shall have the right to inspect any and all records and other written materials maintained on-site by a covered employer, which cannot be deemed confidential for valid business purposes.

## **SECTION 24 – TERO COMPLIANCE**

As of the effective date of this Ordinance, no new covered employer may commence work on the Tolowa Dee-ni' Nation service area without consulting

with the Nation through its TERO Office, and filing an acceptable Indian Preference Plan and a TERO Labor Force Projection Plan.

A successful bidder who fails to submit an Indian Preference/TERO Labor Force Projection Form prior to the award of the contract shall be considered a non-responsive bidder for the purpose of awarding the contract and will be disqualified.

## **SECTION 25 - UNION AGREEMENTS**

A covered employer, who intends to enter into a collective bargaining agreement with a labor union, shall ensure that such agreement includes Indian Preference requirements set forth in this Ordinance, in any and all supplementary ordinances, in any and all rules, regulations, and/or guidelines promulgated by the Commission. Any such collective bargaining agreement shall be subject to the approval of the TERO Director, so as to ensure that such agreement satisfies the extent of this Section.

Nothing provided in this Ordinance, nor does any activity authorized by the Tribal Council or the Tolowa Dee-ni' Nation TERO constitute official tribal recognition of any particular union. The utilization of any such union shall not be construed as an endorsement of any particular union activities on the Tolowa Dee-ni' Nation or its contiguous lands.

## **SECTION 26 - RECOGNITION OF FREEDOM OF RELIGION**

A covered employer shall make any reasonable modifications in the operation of its business for the purpose of accommodating the religious beliefs, traditions, and practices of Indian employees and Indian-owned firms in accordance with any relevant guidelines which may be promulgated by the Commission.

## **SECTION 27 - HARASSMENT**

No person, including any representative or agent of a covered employer, contractor, subcontractor, or certified Indian-owned firm, shall attempt to or, in fact, harass, intimidate, or retaliate against the Director or any member of the staff within the TERO Office, or any member of the TERO Commission. Should any person be deemed by the Director to have violated such prohibition against harassment, intimidation, and retaliation, the Director shall forthwith direct to such person's employer, by certified mail, a formal written warning, wherein is set forth a full description of the nature of the alleged harassment, intimidation, and/or retaliation, and a clear admonition that such conduct shall forthwith be discontinued. Should such conduct continue subsequent to the receipt by such employer of the written warning, the Director shall forthwith notify the Commission of the matter and request that a set date for a formal hearing thereon. Any such hearing shall be conducted in accordance with the rules of

procedure prescribed by and set forth in Section 20 of this Ordinance. Should the Commission determine that such employer did violate the prohibition against harassment, intimidation, and retaliation, the Commission shall impose against the employer, depending upon the degree of severity of such conduct, any one or combination of the sanctions prescribed by and set forth in Section 21 of this Ordinance.

#### **SECTION 28 - SEVERABILITY**

Should any provision set forth in this Ordinance, or the application thereof to any person or circumstance, be held invalid by a court of competent jurisdiction the full remainder of such provision, or the application of the provision to another person or circumstance, shall not be affected thereby.

#### **SECTION 29 - COVERAGE**

This Ordinance shall be applicable to all "covered employers" (as such term is defined in Section 9 herein), whether such person is doing business within the ceded boundaries of the Tolowa Dee-ni' Nation at the time of the effective date hereof or will be so doing business subsequent thereto.

#### **SECTION 30 - EFFECTIVE DATE**

This Ordinance shall be in full force and effect as of the date of the formal approval and adoption hereof by the Tribal Council.

#### **SECTION 31 – SOVEREIGN IMMUNITY**

Nothing in the enactment, contents, administration, or enforcement of this Ordinance is intended to, nor shall waive the Sovereign Immunity from unconsented suit of the Tolowa Dee-ni' Nation, its officers, officials, employees, or agents acting within the course and scope of their official duties of authority, including, but not limited, to the following:

- A.** Taking legal action against any person to enforce or otherwise further the purpose of this Ordinance;
- B.** defending legal action taken by another person to invalidate all or a portion of this Ordinance, or any actions taken under the authority of this Ordinance, for any failure to act under this Ordinance; or
- C.** acting to enforce any penalties or sanctions under this Ordinance.

## **LEGISLATIVE HISTORY**

This Chapter was originally adopted as the Tribal Employment Rights Ordinance (TERO) on January 11, 2005 (Ordinance No. 05-01). The TERO Ordinance was amended by the Tribal Council on May 22, 2007; and again on September 9, 2014.