

TITLE XXX
(30)

T E R O
Ordinance No. 165
(Tribal Employment Rights Office)

Standing Rock Sioux Tribal Code of Justice



Resolution 114-14
Amended
March 4, 2014

Resolution No. 259-96
Amended
October 4, 1996

By
Standing Rock Sioux Tribal Council

ORDINANCE NO. 165

NOW THEREFORE BE IT RESOLVED, that TITLE XXX – TRIBAL EMPLOYMENT AND CONTRACTING RIGHTS [TERO] of the Tribal Code of Justice of the Standing Rock Sioux Tribe, be and the same is hereby amended.

[DOCUMENT ATTACHED – 42 PAGES]

RESOLUTION NO. 114-14

WHEREAS, the Standing Rock Sioux Tribe is an unincorporated Tribe of Indians having accepted the Indian Reorganization Act of June 18, 1934 [48 Stat. 984], with the exception of Section 16; and the recognized governing body of the Tribe is known as the Standing Rock Sioux Tribal Council; and

WHEREAS, the Standing Rock Sioux Tribal Council, pursuant to the amended Constitution of the Standing Rock Sioux Tribe, Article IV, Section 1[c], 1[m], and Article V, are authorized to promote and protect the health, education and general welfare of the members of the Tribe, to engage in any business that will further the economic development of the Tribe and its members, and to propose and enact ordinances, provided they be posted for not less than ten [10] days prior to final adoption by the Tribal Council; and

WHEREAS, on January 16, 2014, the Tribal Council posted, for 30 days, amendments to TITLE XXX – TRIBAL EMPLOYMENT AND CONTRACTING RIGHTS [TERO] of the Standing Rock Sioux Tribal Code of Justice;

NOW THEREFORE BE IT RESOLVED, that pursuant to the power vested in the Standing Rock Sioux Tribal Council under Article IV of the Constitution of the Standing Rock Sioux Tribe, that TITLE XXX – TRIBAL EMPLOYMENT AND CONTRACTING RIGHTS [TERO] of the Code of Justice of the Standing Rock Sioux Tribe, be and the same is hereby amended and replaced with the attached new TITLE XXX – TRIBAL EMPLOYMENT RIGHTS AND CONTRACTING RIGHTS [TERO]; and

BE IT FURTHER RESOLVED, that the Chairman and Secretary of the Tribal Council are hereby authorized and instructed to sign this resolution for and on behalf of the Standing Rock Sioux Tribe.

CERTIFICATION

We, the undersigned, Chairman and Secretary of the Tribal Council of the standing Rock Sioux Tribe, hereby certify that the Tribal Council is composed of (17) members of whom 13 constituting a quorum, were present at a meeting thereof, duly and regularly, called, noticed, and convened and held on this 04th day of MARCH, 2014, and that the foregoing resolution was duly adopted by the affirmative vote of 11 members, with 1 opposing, and with 1 not voting. THE CHAIRMAN'S VOTE IS NOT REQUIRED, EXCEPT IN CASE OF A TIE.

DATED THIS 04th DAY OF MARCH, 2014.

ATTEST:



Adele M. White, Secretary
Standing Rock Sioux Tribe


Dave Archambault II, Chairman
Standing Rock Sioux Tribe

OFFICIAL TRIBAL SEAL]

Meeting Date: 03-04-2014
Motion No. 37

Ordinance No. 165

BE IT RESOLVED, that the Code of Justice of the Standing Rock Sioux Tribe be and the same is hereby amended to add a new Title XXX, Tribal Employment and Contracting Rights, TERO.

Pages i-iii and 1-50 Attached

RESOLUTION NO. 259-96

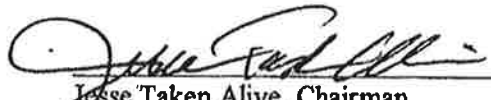
BE IT RESOLVED, that pursuant to the power vested in the Standing Rock Sioux Tribal Council under the Constitution of the Standing Rock Sioux Tribe, the foregoing Ordinance No. 165, amending the Code of Justice of the Standing Rock Sioux Tribe by adding Title XXX, Tribal Employment and Contracting Rights, TERO be and the same is hereby approved.

BE IT FURTHER RESOLVED, that the Chairman and Secretary of the Tribal Council be authorized and instructed to sign this resolution for and on behalf of the Standing Rock Sioux Tribe.

CERTIFICATION

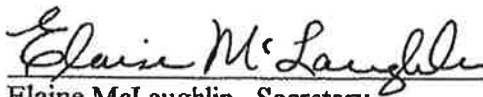
We, the undersigned Chairman and Secretary of the Standing Rock Sioux Tribal Council, do hereby certify that the Tribal Council is composed of 17 members, of whom 12 constituting a quorum, were present at a meeting thereof, duly and regularly called, noticed, convened, and held on the 3rd day of October, 1996, and that the foregoing resolution was duly adopted by the affirmative vote of 9 members, with 2 opposing, and with 1 not voting. The Chairman's vote is not required except in case of a tie.

Dated this 4th day of October, 1996.



Jesse Taken Alive, Chairman
Standing Rock Sioux Tribal Council

ATTEST:



Elaine McLaughlin, Secretary
Standing Rock Sioux Tribal Council

(Official Seal)

TABLE OF CONTENTS

TITLE XXX. TRIBAL EMPLOYMENT AND CONTRACTING RIGHTS

CHAPTER 1. GENERAL PROVISIONS

101. Legislative Findings and Purpose.....1

102. Definitions.....2

103. Scope of Coverage.....4

104. Sovereign Immunity.....4

105. Savings Clause.....4

106. Tribal Employment and Contracting Rights Commission.....5

107. Recusal of Commission Members.....7

108. Powers of the Commission.....8

109. Commission Rules and Regulations.....10

110. Tribal Employment and Contracting Rights Office and Director.....11

111. Employment and Contracting Rights Fees.....11

112. Collection of Fees.....12

113. Reports and Monitoring.....14

114. Complaints.....14

115. Complaint Procedures.....14

116. Investigations.....14

117. Power to Require Testimony and Production of Records.....15

118. Informal Settlement.....15

119. Formal Notice of Alleged Violation and Right to Hearing.....15

120. Bonds and Interim Relief.....16

121. Compliance Hearing.....16

122.	Pre-Hearing Procedures for Compliance Hearings.....	17
123.	Compliance Hearing Procedures.....	18
124.	Decision and Civil Sanctions.....	19
125.	Irreparable Harm.....	20
126.	Appeals.....	21
127.	Enforcement of Commission’s Order.....	22
128.	Attachment.....	22
129.	Confiscation and Sale.....	22

CHAPTER 2. INDIAN PREFERENCE IN EMPLOYMENT

201.	Employment Preference Required.....	23
202.	Priority of Employment Preference.....	23
203.	Employment Preference Compliance Plan.....	24
204.	Tribal Hiring Hall.....	24
205.	TERO Wage Rates.....	24
206.	Permanent and Key Employees.....	25
207.	Work Permits.....	25
208.	Civil Sanctions for Work Permit Violations.....	26
209.	Termination.....	27
210.	Unions.....	27
211.	Training.....	27
212.	Job Qualifications, Personnel Recommendations and Religious Accommodation.....	28
213.	Promotion.....	28
214.	Student Employment.....	28
215.	Retaliation.....	28

216. Counseling and Support Programs.....29

CHAPTER 3. INDIAN PREFERENCE IN CONTRACTING AND SUBCONTRACTING

Subchapter A. Contracting and Subcontracting Preference Requirements

301. Contracting and Subcontracting Preference Required.....29

302. Priority of Contracting and Subcontracting Preference.....30

303. Compliance with Federal Law.....30

304. Contracting and Subcontracting Preference Compliance Plan.....30

305. Responsibility for Compliance.....30

306. Requirements in Contracting.....31

307. Requirements in Subcontracting.....32

308. Responsibility of Evaluating Technical Qualifications and Reasonable Price.....33

309. Operation under the Contract or Subcontract.....34

Subchapter B. Criteria and Procedures for Certifying Firms as Indian Preference Eligible

350. Definitions.....34

351. General Statement of Policy.....34

352. Certification for Indian Contract Preference Certification.....36

353. Certification Procedures.....38

CHAPTER 4. MISCELLANEOUS PROVISIONS

401. Compliance with EPA Ordinance.....40

402. Repeal of Prior Ordinances.....40

TITLE XXX. TRIBAL EMPLOYMENT AND CONTRACTING RIGHTS

CHAPTER 1. GENERAL PROVISIONS

30-101. Legislative Findings and Purpose

The powers to regulate trade and commerce and levy taxes within its Reservation are aspects of the retained sovereignty of an Indian Tribe except where limited or withdrawn by federal authority. The Standing Rock Sioux Tribe is a sovereign Indian Tribe recognized by the United States. Pursuant to the Constitution, the Standing Rock Sioux Tribal Council is the governing body of the Standing Rock Sioux Tribe. This Ordinance is enacted pursuant to the inherent sovereign Tribal powers expressly delegated to the Tribal Council in the Constitution of the Standing Rock Sioux Tribe, for the purpose of requiring Indian preference in employment, training, contracting, subcontracting, and other economic opportunities. In enacting this Ordinance, the Standing Rock Sioux Tribal Council finds as follows:

- (1) Discrimination and other barriers have limited the employment, contracting and other economic opportunities for members of the Standing Rock Sioux Tribe and other Indians, and their businesses, thereby injuring not only the individual Indians but the Tribe as a whole, and hindering the economic development and growth on the Standing Rock Reservation.
- (2) Employment and contracting opportunities in the private sector for Tribal members and other Indian people on the Standing Rock Reservation are opportunities to which Tribal members and other Indian people have unique and special rights under federal and Tribal law. This Ordinance is adopted to protect and enforce those rights.
- (3) Indians are entitled to the protection of the laws that the federal government has adopted to combat employment discrimination, and those laws expressly recognize that Indian preference with respect to employment on and near reservations are authorized. In addition, federal law specifically mandates that federal contracts with, or grants to, Indian organizations, or for the benefit of Indians, require to the greatest extent feasible Indian preference in training, employment, and subcontracting. This Ordinance is adopted to enforce those rights and to enhance them by establishing additional rights under Tribal law.
- (4) This Ordinance imposes employment rights fees to raise revenue for the operation of the Tribal Employment and Contracting Rights Office. The fees are imposed on construction contractors because such contractors pose substantially greater enforcement burdens and costs than other types of employers on the Reservation, because, among other things, construction contractors (a) frequently hire a substantial number of employees for relatively short periods, and (b) frequently are present on the Reservation for only the relatively short duration of their contracts.

30-102. Definitions. The following definitions apply throughout this Ordinance, except where an inconsistent definition is expressly set forth:

- (1) "Certified firm" means an entity certified, pursuant to Chapter 3, Subchapter B of this Ordinance, as eligible for the preference in the awarding of contracts and subcontracts provided for in Chapter 3, Subchapter A of this Ordinance.
- (2) "Chairman" means the Chairman of the Tribal Employment and Contracting Rights Commission of the Standing Rock Sioux Tribe.
- (3) "Commission" or "TERO Commission" means the Tribal Employment and Contracting Rights Commission of the Standing Rock Sioux Tribe established pursuant to this Ordinance.
- (4) "Commissioner," "TERO Commissioner," "Commission member," or "member of the Commission" means a member of the Tribal Employment and Contracting Rights Commission of the Standing Rock Sioux Tribe.
- (5) "Covered contract" means any contract or subcontract for supplies, services, labor, or materials, in the amount of \$500.00 or more, subject to the jurisdiction of the Standing Rock Sioux Tribe, where the majority of the work on the contract or subcontract will occur within the exterior boundaries of the Standing Rock Reservation.
- (6) "Covered Employer" means any employer subject to the jurisdiction of the Standing Rock Sioux Tribe, employing two or more employees who, during any 30-day period, spend, cumulatively, more than 24 hours performing work within the exterior boundaries of the Standing Rock Sioux Reservation. The federal, state and Standing Rock Tribal governments and their respective agencies and subdivisions are not covered employers. However, contractors or grantees of such governments who otherwise meet this definition are covered employers. Entities chartered by the Standing Rock Sioux Tribe which otherwise meet this definition are covered employers.
- (7) "Covered Entity" means any entity other than the United States, the State of North Dakota, the State of South Dakota and the Standing Rock Sioux Tribe, and their respective agencies and subdivisions. Corporations chartered by the Standing Rock Sioux Tribe are covered entities.
- (8) "Director" means the Director of the Tribal Employment and Contracting Rights Office.
- (9) "Employee" means any person employed for remuneration.
- (10) "Employer" means any person, partnership, corporation, or other entity that employs, for remuneration, two or more employees.

- (11) "Employment within the Standing Rock Reservation" means any position in which the employee spends more than six hours per month performing work within the exterior boundaries of the Standing Rock Reservation.
- (12) "Entity" means any person, partnership, corporation, joint venture, governmental enterprise, receiver, assignee, trustee in bankruptcy, trust, estate, firm, club, company, joint stock company, business trust, municipal corporation, association, society, political entity, any group of individuals acting as a unit, whether mutual cooperative, fraternal, non-profit, or otherwise, or any other natural or artificial person or organization. The term "entity" is intended to be as broad and all-encompassing as possible to ensure this Ordinance's coverage over all employment and contract activities within the jurisdiction of the Standing Rock Sioux Tribe, and the term shall be so interpreted by the Commission and the Courts.
- (13) "Indian" means any individual who is an enrolled member of an Indian Tribe recognized by the United States. "Indian Tribe" includes any Indian, Eskimo, or Aleut Tribe, band, village, community, pueblo, or organization.
- (14) "Local Indian" means any Indian who has resided within the boundaries of the Standing Rock Reservation as defined by the Act of March 2, 1889, 25 Stat. 888, for not less than the preceding 60 days.
- (15) "Reservation" means the Standing Rock Sioux Reservation, including all lands within the exterior boundaries of the Standing Rock Sioux Reservation, regardless of ownership of such lands.
- (16) "Tribal Council" or "Council" means the Standing Rock Sioux Tribal Council, established pursuant to Article III of the Constitution of the Standing Rock Sioux Tribe, as governing body of the Tribe.
- (17) "Tribal Employment and Contracting Rights Office" or "TERO Office" or "TERO" or "Office" means the Tribal Employment and Contracting Rights Office of the Standing Rock Sioux Tribe established pursuant to this Ordinance.
- (18) "Tribal member" or "member" means an individual Indian who is enrolled in the Standing Rock Sioux Tribe.
- (19) "Tribe" means the Standing Rock Sioux Tribe.

Throughout this Ordinance, words in the singular shall include the plural, and words in the plural shall include the singular, unless the context requires otherwise. Throughout this Ordinance, words in one gender shall include the other genders.

30-103. Scope of Coverage. This Ordinance shall apply to all areas within the exterior boundaries of the Standing Rock Sioux Reservation subject to the jurisdiction of the Standing Rock Sioux Tribe. It shall be binding on all covered employers as to all employment within the Standing Rock Sioux Reservation and on all covered entities as to all covered contracts that are subject to the jurisdiction of the Standing Rock Sioux Tribe. Such employers and entities are covered regardless of whether their headquarters or principal place of business is on or off the Reservation, and regardless of whether they were already engaged in commerce on the Reservation prior to the original date of enactment of this Ordinance.

30-104. Sovereign Immunity.

- (1) The Standing Rock Sioux Tribe, and all its constituent parts, agencies, subdivisions, and entities - including the Tribal Employment and Contracting Rights Office, Director, and Commission established pursuant to this Ordinance - are immune from suit in any jurisdiction except to the extent that such immunity has been expressly and unequivocally waived by the Tribe or the United States. Nothing in this Ordinance shall be construed as waiving the sovereign immunity of the Standing Rock Sioux Tribe or any of its constituent parts, agencies, subdivisions, and entities - including but not limited to the Tribal Employment and Contracting Rights Office, Director, and Commission - except that after exhaustion of administrative remedies as provided herein, a party aggrieved by a decision of the Commission may appeal to the Standing Rock Sioux Tribal Court as provided herein. Such appeal shall be for injunctive relief only. Nothing in this Ordinance shall be construed as a waiver of sovereign immunity for any claim for damages. Nothing in this Ordinance, and no enforcement action taken pursuant to it, including the filing of a petition in the Tribal Court, shall constitute a waiver of sovereign immunity, as to any counterclaim, regardless of whether the counterclaim arises out of the same transaction or occurrence, or in any other respect.

30-105. Savings Clause. In the event that any part of this Ordinance shall be found or declared to be invalid, the remaining provisions of this Ordinance shall be unaffected thereby, and shall remain in full force and effect.

30-106. Tribal Employment and Contracting Rights Commission.

(A) There is hereby established the Tribal Employment and Contracting Rights Commission of the Standing Rock Sioux Tribe.

(1) General Constitution of the Commission

(a) Beginning May 1, 2014, the Commission shall consist of nine (9) members comprised as follows: one (1) member from each of the eight (8) Districts of the Standing Rock Sioux Reservation, and one (1) member who shall be a member of the Standing Rock Sioux Tribal Council Judicial Committee.

(b) Prior to May 1, 2014, the Commission shall consist of an interim membership to conduct necessary business until the official Commission may be seated on May 1, 2014. The interim Commission membership prior to May 1, 2014 shall be comprised as follows: six (6) members appointed by the Standing Rock Sioux Tribal Council as follows: one (1) member from each standing committee of the Council; two (2) persons, one (1) of whom shall be the secretary of the Judicial Committee and one (1) who shall be Secretary of the Economics Committee; and one (1) member who shall be the Chairman of the Standing Rock Sioux Tribe, or the Vice-Chairman in the Chairman's absence, who shall preside over all meetings of the Commission held prior to May 1, 2014.

(c) No individual may serve on the Commission if they have previously been convicted of a Tribal, federal or state felony.

(2) The eight (8) members from the respective Districts of the Reservation shall be appointed as follows: each District, through a formal motion and vote at a regularly-called District meeting, shall recommend a person to serve on the Commission. Final appointment shall be achieved upon completion of a background check through the Standing Rock Sioux Tribal Election Department to ensure the nominee is qualified under subsection (1)(c) of this Section, and subsequent Tribal Council ratification of the District's recommendation. The first Commission constituted thusly shall be seated on May 1, 2014 pursuant to such procedures, with terms set forth as follows in order to provide for continuity through the staggering of member terms:

a. Members appointed from the Districts of Porcupine, Fort Yates, Kenel and Wakpala shall serve an initial two (2) year term through April 30, 2016, after which the members appointed from such Districts shall serve terms of four (4) years, with each term expiring on April 30 of the final year of their term; and

- b. Members appointed from the Districts of Cannonball, Bear Soldier, Running Antelope and Rock Creek shall serve terms of four (4) years, with each term expiring on April 30 of the final year of their term.

If an individual is not recommended and appointed to serve from a District prior to the expiration of the previous term, the individual appointed from the District for that previous term shall continue to serve until their successor is formally appointed through the process outlined in this subsection. If a vacancy occurs during a term for any of the Commission seats held by a member appointed from a District, the District shall, through a formal motion and vote at a regularly-called District meeting, make a recommendation for a person to serve for the unexpired portion of the term. Final appointment shall be achieved upon Tribal Council ratification of the District's recommendation. There shall be no term limits for the members appointed from the Districts.

- (3) The member of the Commission from the Standing Rock Sioux Tribal Council Judicial Committee shall be recommended by that Committee to the Tribal Council for ratification and official appointment. That member shall serve a term consistent with their term of office. At the end of their term, or if their Council seat becomes vacant prior to the expiration of their term in office, their replacement shall be recommended and appointed as set forth in this subsection.
- (4) A quorum of the Commission shall consist of five (5) members. All members of the Commission shall have voting rights, except that the Chairman or Acting Chairman of the Commission shall not vote except when necessary to break a tie. Action by the Commission shall be by a majority vote of those Commissioners present and voting.
- (5) The Commission, through respective majority votes as outlined in subsection (4) of this Section, shall select one of its members to serve as Chairman of the Commission and one of its members to serve as Vice-Chairman of the Commission. Whenever the Chairman of the Commission is absent or unavailable, the Vice-Chairman shall serve as Acting Chairman of the Commission. If the Vice-Chairman is also unavailable, the Commission shall designate another of its members to serve as Acting Chairman.
- (6) Any Commission member may be permanently removed from the Commission for cause, following written notice of the grounds for removal, and an opportunity for a hearing, by a two thirds vote of the Tribal Council members voting on the question. Cause shall include, but not be limited to: neglect of duty; misconduct in office; and conviction of a Tribal, federal or state felony. A Commissioner who has unexcused absences for three (3) consecutive District meetings and/or three (3) consecutive TERO meetings shall be deemed to have automatically resigned their position on the Commission. The determination of what constitutes an "excused absence" or "unexcused absence," at what specific time the

resignation is deemed to have occurred, and who shall make such decisions shall be set forth in regulations or policies of the determining body.

- (7) The Tribal Council, the Tribal Chairman, the Commission, TERO, its Director and Tribal employees shall not be liable for monetary damages for its actions taken in their official capacity under this Ordinance.
- (8) It shall be the duty and responsibility of the Commission members appointed from the Districts to report back to their respective Districts on the work of the Commission.
- (9) Additional policies and procedures governing the conduct of the Commission may be promulgated by the Commission and enacted upon final approval of the Tribal Council.
- (10) Nothing in this Title shall provide the Commission with the authority to hire or fire employees or staff of the TERO Office.

30-107. Recusal of Commission Members.

- (1) For the purposes of this section, "immediate family" means brother, sister, son, daughter, mother, father, husband, wife, aunts, uncles, grandparents, step-brother, step-sister, foster parents, half-brother, half-sister, or brother, son, daughter, mother, or father by adoption, including traditional adoption.
- (2) No member of the Commission shall participate in any action or decision by the Commission directly involving himself/herself, or a member of his/her immediate family, or any person, business or other entity of which he/she or a member of his/her immediate family is an employee, or in which he/she or a member of his/her immediate family has a substantial ownership interest, or with which he/she or a member of his/her 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 Commission member or a member of his/her immediate family is a member of the affected class; or
 - (b) Affects the Standing Rock Sioux Tribe, a Tribal enterprise, or a person or entity in a contractual relationship with the Tribe or a Tribal enterprise.

- (4) A Commissioner may voluntarily recuse himself/herself and decline to participate in any action or decision by the Commission when the Commissioner, in his/her discretion believes:
 - (a) That he/she cannot act fairly or without bias; or
 - (b) That there would be an appearance that he/she could not act fairly or without bias.

30-108. Powers of the Commission. The Commission shall be responsible for carrying out the purposes of this Ordinance, and shall have the following powers:

- (1) To promulgate and enforce, and to amend and rescind, such rules, regulations, and guidelines as are necessary to carry out the provisions of this Ordinance, as provided in Section 30-109.
- (2) To require each covered employer or covered entity to submit to the Commission an acceptable compliance plan indicating how it will comply with this Ordinance, before the covered employer or entity may commence work within the exterior boundaries of the Standing Rock Sioux Reservation, or within a reasonable time as ordered by the Commissioner where the covered employer or entity was already engaged in work within the Reservation prior to the effective date of this Ordinance;
- (3) To impose 100% Indian hiring goals and timetables that specify the minimum number of Indians a covered employer must promote or advance, by craft or skill level;
- (4) To require covered employers to establish or participate in such job training programs as the Commission determines necessary in order to increase, as quickly as possible, the pool of qualified Indians available for employment on the Standing Rock Reservation;
- (5) To assist in and monitor the establishment and operation of a Tribal Hiring Hall or skills bank and impose a requirement that no covered employer may hire a non-Indian until the Tribal Hiring Hall or skills bank has certified that no qualified Indian, in accordance with the preference priorities set forth in Section 30-202, is available to fill the vacancy;
- (6) To prohibit covered employers from using job qualifications criteria or other personnel requirements that serve as barriers to Indian employment unless the employer can demonstrate that such criteria or requirements are required by business necessity. In developing regulations to implement this requirement, the Commission may adopt requirements in addition to or in lieu of the federal employment guidelines when necessary to address qualification problems that are unique to Indians or to the Reservation;

- (7) To impose contract and subcontract preference requirements which provide preference to Indian owned firms, and to establish and operate a system for certifying firms as eligible for such preference, as provided in Chapter 3 of this Ordinance;
- (8) To consult with affected employees and to consider their input and recommendations, particularly with respect to the establishment of 100% Indian hiring goals, numerical advancing goals, training programs, and requirements for submission of reports by employers;
- (9) To require covered employers to submit reports and to take all action deemed necessary by the Commission for the fair and rigorous implementation of this Ordinance;
- (10) To enter into cooperative agreements with federal employment and contracting rights agencies such as EEOC and OFCCP to aid in the elimination of discrimination against Indians both on and off the Standing Rock Sioux Reservation, provided that any such agreement must be approved by the Tribal Council prior to taking effect;
- (11) To administer oaths and conduct hearings in accordance with this Ordinance;
- (12) To examine, under oath, either orally or in writing, any person with respect to any matter related to this Ordinance;
- (13) To make, or cause to be made by its agents or employees, an examination or investigation of the place of business of any employer or other entity, during normal business hours, or at any other time agreed to by such employer or entity, or at any time whatsoever pursuant to a search warrant issued by the Tribal Court;
- (14) To expend funds through a budget process, where the Director and Commission prepare a proposed budget, hold any necessary meetings on the budget, and have the same approved by the Tribal Council;
- (15) To delegate to the Director of the Tribal Employment and Contracting Rights Office such duties as it finds necessary, in order to carry out effectively and efficiently the provisions of this Ordinance; provided, that the Commission may not delegate its authority to:
 - (a) Promulgate, amend and rescind rules, regulations, or guidelines; or
 - (b) Conduct hearings and impose sanctions pursuant to Sections 30-119 – 30-125 of this Ordinance; and
- (16) To exercise all other authority delegated to or conferred upon it by law, or as may be reasonably necessary in the administration and/or enforcement of any provisions of this Ordinance.

30-109. Commission Rules and Regulations.

- (1) The Commission shall promulgate and enforce such written rules, regulations and guidelines as are necessary to carry out the provisions of this Ordinance and the orderly performance of the Commission's duties, including but not limited to rules and regulations relating to:
 - (a) Internal operational procedures of the Tribal Employment and Contracting Rights Commission, Office, Director, and staff;
 - (b) Interpretation and application of this Ordinance so as to fully and fairly carry out its provisions;
 - (c) The filing of any reports required by, or necessary to implement, this Ordinance; and
 - (d) The conduct of inspections, investigations, hearings, enforcement actions, and other authorized activities of the Commission.
- (2) Except in cases where the Commission finds that an emergency situation exists:
 - (a) Copies of all proposed rules, regulations, and guidelines shall be transmitted to the Tribal Council, and shall be posted once in a public place on the Reservation and kept in a file in the Tribal Employment and Contracting Rights Office which is open to public inspection during regular business hours, for no less than a 20-day comment period.
 - (b) The Commission shall accept comments from any interested party during the comment period.
 - (c) Final rules, regulations, and guidelines adopted by the Commission shall go into effect upon being approved by the Tribal Council. Upon Tribal Council approval, the rules, regulations, and guidelines shall be posted once in a public place on the Reservation, and the Tribal Court shall take judicial notice of all rules and regulations of the Commission promulgated pursuant to this Code.
- (3) When an emergency situation does exist, the Commission may deviate from the provisions in subsection (2) of this Section to the extent necessary and reasonable under the circumstances, provided that any actions must thereafter be approved and/or ratified by the Tribal Council as soon as possible.

30-110. Tribal Employment and Contracting Rights Office and Director.

- (1) The Director of the Tribal Employment and Contracting Rights Office shall be hired by the Tribal Council. The Director shall have primary responsibility for day-to-day oversight of the operation of the Tribal Employment and Contracting Rights Office and its employees, and shall represent the Office in enforcement hearings before the Commission. The Director shall on a monthly basis report directly to the Commission and the Judicial Committee of the Tribal Council, and shall be subject to immediate supervision by the Tribal Chairperson.
- (2) The Director shall have authority: to supervise staff in accordance with the Standing Rock Sioux Tribe Personnel Policies and Procedures, and to expend, subject to prior approval by the Tribal Council, funding from federal, state, or other sources to carry out the purposes of this Ordinance, and in compliance with the Tribe's financial management policies and procedures.
- (3) The Director shall administer the policies, authorities, and duties prescribed for him/her in this Ordinance, and such other duties as may be delegated to him/her by the Commission pursuant to Section 30-108(18).

30-111. Employment and Contracting Rights Fees

- (1) In order to raise revenue for the operation of the Tribal Employment and Contracting Rights Office and Commission, an employment and contracting rights fee is hereby imposed as follows:
 - (a) With respect to each construction contract of \$500.00 or more on the Standing Rock Sioux Reservation, the construction contractor shall pay a onetime fee of 2.5% of the total amount of the contract, plus a fee of 2.5% of any increases in the contract amount. If a contractor initially enters into a construction contract of less than \$500.00, but subsequent increases result in a total contract amount of \$500.00 or more, the fee shall apply to the total contract amount, including increases.
 - (b) The primary liability for the fee imposed by this section shall lie with the prime contractor, except where the Tribe is the prime contractor in which case the subcontractor shall be liable. A subcontractor shall be subject to the fee on his subcontract only to the extent that the prime contractor has failed to pay the fee on the prime contract under which the subcontract is issued.
 - (c) If the Commission determines that an entity has broken what would normally be one construction project into multiple contracts, for the purpose, in whole or in part, of evading the fee imposed by this section, all of the entity's contractors shall be liable for the fee,

notwithstanding the fact that their individual contracts may be for contract amounts of less than \$500.00.

(d) For purposes of this section, construction contractors include without limitation those enumerated in the Standard Industrial Classification Manual of 1972, prepared by the Statistical Policy Division of the Office of the President, under: Building Construction – General Contractors and Operative Builders (Major Group 15); Construction Other Than Building Construction – General Contractors (Major Group 16); Construction – Special Trade Contractors (Major Group 17).

(2) The fee provided for in Section 30-111 is due and shall be paid in full by the contractor prior to commencing work on the Reservation, unless other arrangements are agreed to by the Commission.

Immediately upon becoming aware that a contractor subject to the fee is intending to engage in work on the Reservation, the Director shall mail to the contractor, by registered mail: a notice informing the contractor of the nature and purpose of the fee; the percentage; the specified amount due, if known; the date due; and the possible consequences if the contractor fails to comply. Said notice shall be accompanied by a formal notice of fees due. Failure to receive the notice shall not relieve the contractor of his obligation to pay the fee.

(3) The Director shall be responsible for collecting all employment and contracting rights fees pursuant to any rules and regulations that may be adopted by the Commission.

(4) All fees shall be paid to the Standing Rock Sioux Tribal Finance Officer and shall be credited to the Tribal Employment and Contracting Rights Office account of the Standing Rock Sioux Tribe.

(5) Any contractor who fails to pay the fee imposed by this section shall be subject to the remedial actions provided for in this chapter.

30-112. Collection of Fees.

(1) If the contractor fails to pay the fee by the day it commences work on the Reservation, interest shall begin accruing on that date at the rate of 18% per annum, compounded daily. Further, as soon as possible following the day on which the contractor commences work, the Director shall send a notice to the contractor 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 contractor commenced work, the Director shall file a formal charge of non-compliance, and shall schedule a Commission hearing to be held

within five (5) days or as soon thereafter as the Commission can meet, and shall inform the contractor of the scheduled hearing.

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

- (a) Impose penalties of up to 10% of the amount due; and
- (b) Petition the Tribal Court to uphold the decision of the Commission and to enforce it through confiscation proceedings as provided for in Section 30-129 of this 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 Sections 30-120 and 30-128 of this Ordinance, notwithstanding the above procedures.

- (2) The Director, in his or her discretion, may, upon receipt of a written request, authorize a contractor to pay the required fee in installments over the course of the contract, when:

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

The decision whether to authorize an alternative arrangement - which, if allowed, shall be in writing - shall rest solely within the discretion of the Director and is not appealable to the Commission or the Courts.

The contractor shall pay interest at 12% per annum, compounded daily, on all amounts paid after the day he commences work on the Reservation, when paying under this alternative arrangement. The Director is authorized to terminate any alternative payment arrangement authorized under this subsection (2) and to declare such fees immediately due and payable on the day following the date on which any installment payment is not timely made.

- (3) The fee collected from the contractor pursuant to this section shall be increased in accordance with any increase in the contract amount as follows:

- (a) The contractor shall be liable for the payment of fees on each contract amount increase to the same extent he is liable for payment of the fee on the original contract amount. Fee payments attributable to contract amount increases are due and shall be paid on the date the contractor is notified of the allowance of such increase. Interest on unpaid fees due under this subsection (3) shall be computed in the same manner as interest on unpaid fees attributable to the original contract amount under subsection (1) of this section.

- (b) The Director may authorize the contractor to pay the fee required under this subsection (3) in installments as provided in subsection (2) of this section.

30-113. Reports and Monitoring. All entities engaged in any aspect of business activity on the Reservation shall submit reports and such other information as are requested by the Tribal Employment and Contracting Rights Office. Employees of the Office shall have the right to make on-site inspections during regular work hours, or as otherwise authorized pursuant to Section 30-108(15), in order to monitor an entity's compliance with these regulations. Employees of the Office shall have the right to inspect and copy all relevant records of an entity and of the entity's signatory unions and/or subcontracts, to speak with workers on the jobsite, and to engage in similar investigatory activities. All information collected by the Office shall be kept confidential, unless disclosure is required during a hearing or appeal as provided for in these regulations.

30-114. Complaints.

- (1) 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 they have been discriminated against by any employer or any other entity because they are Indian, may file a complaint with the Director. Persons may file whether or not they can show they were personally harmed by the entity's non-compliance.
- (2) Non-Compliance by the Tribal Employment and Contracting Rights Office or Commission. 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 Office or Commission is in violation of this Ordinance, the rules, regulations or guidelines of the Commission, the Standing Rock Sioux Tribal Code of Justice, or federal law or regulations, may file a complaint with the Director. Persons may file whether or not they can show they were personally harmed by the action of the Office or Commission.

30-115. Complaint Procedures. All complaints filed pursuant to Section 30-114 shall be in writing and shall provide such information as is necessary to enable the Director to carry out an investigation. Within twenty 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.

30-116. Investigations. On his own initiative or pursuant to a complaint, the Director or any field compliance officer designated by the Director shall make such public or private investigations as he or

the Commission deems necessary to determine whether any covered employer or other entity has violated any provision of this Ordinance, or any rule, regulation, guideline, or order hereunder, or to aid in prescribing rules, regulations and guidelines hereunder. The Director or his delegate may enter, during business hours or as otherwise authorized pursuant to Section 30-108(14), the place of business or employment of any entity for the purpose of such investigations, and may require the covered employer or entity to submit such reports as he deems necessary to monitor compliance with the requirements of this Ordinance or any rule, regulation, guideline or order hereunder.

30-117. Power to Require Testimony and Production of Records. 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, a Commissioner, the Director, or any field compliance officer designated by the Director may administer oaths or affirmations, take evidence, and seek an order of the Tribal Court to require, by citation, the production of books, papers, contracts, agreements or other documents, records or information to the inquiry.

30-118. Informal Settlement. When, after conducting an investigation initiated by a complaint pursuant to Section 30-116, or upon the Director's own initiative, the Director has reason to believe a violation of this Ordinance - or rules, regulations, guidelines or orders issued pursuant to it - has occurred, the Director shall notify the covered employer or entity in writing, specifying the alleged violations. He may withhold the name(s) of the complaining party if he has reason to believe such party shall be subject to retaliation. If the covered employer or entity so notified is a contractor, notice shall also be provided to the entity which let the contract. If the covered employer so notified is a subcontractor, notice shall also be provided to both the entity that let the prime contractor and the contractor that let the subcontract. In either case, the entities receiving such notice, if within the jurisdiction of the Tribe, shall be parties to all further negotiations, hearings, and appeals. The Director shall seek to achieve an informal settlement of the alleged violation.

30-119. Formal Notice of Alleged Violation and Right to Hearing. If the Director, pursuant to Section 30-118, is unable to achieve an informal settlement of the alleged violation, he shall issue a formal notice of alleged violation, which shall also advise the covered employer or entity of the covered employer or entity's right to request a compliance 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 (5) 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 he may require that compliance occur within fewer than five (5) days. If the party fails or refuses to comply, he may request

a compliance hearing before the Commission, which shall be held no sooner than five (5) days and no later than 30 days after the date for compliance set forth in the Director's notification to the party charged of a violation, unless the Commission finds an expedited hearing is necessary to avoid irreparable harm. If a party fails or refuses to comply and does not request a hearing, the Commission may proceed pursuant to Section 30-124.

30-120. Bonds and Interim Relief.

- (1) If the party notified pursuant to Section 30-119 requests a compliance hearing, and the Director has good cause to believe that there is a danger that the party requesting the hearing will remove itself or its property from the jurisdiction of the Tribe prior to the hearing, he may seek an order of the Tribal Court to require the party to post a bond with the Commission in an amount sufficient to cover possible monetary damages that may be assessed against the party at the hearing.
- (2) For the purpose of this Section, "good cause" includes, but is not limited to, the following circumstances:
 - (a) The party has no permanent place of business on the Standing Rock Sioux Reservation; the amount of the sanctions exceeds or likely will exceed \$1,000; and the project on which the party is employed will be substantially completed within 60 days, such that it may be difficult to locate property of the party on the Reservation that would be available for attachment or confiscation if the party fails to pay any sanction imposed on it; and/or
 - (b) The party has failed to comply with an order of the Commission or the Tribal Court in the past, and the entity has engaged in behavior that demonstrates a blatant disregard for the authority and requirements of the Commission, such that the Director or the Commission has good reason to believe the entity will not comply with the orders of the Commission or the Tribal Court.
- (3) If the party fails or refuses to post the bond, the Commission may proceed pursuant to Section 30-124. The Director may also petition the Standing Rock Sioux Tribal Court for such interim and injunctive relief as may be appropriate to protect the rights of the Commission and other parties during the pendency of the complaint and hearing proceedings, as provided in Section 30-125.

30-121. Compliance Hearing. The compliance hearing provided in Section 30-119 shall be conducted by the Commission, pursuant to Sections 30-122 and 30-123 and such rules of practice and procedure as may be adopted by the Commission. The Commission shall not be bound by technical rules of evidence in the conduct of hearings under this Ordinance, and no informality in any aspect of

the proceeding, such as the manner of taking testimony, shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission. No stenographic record of the proceedings and testimony shall be required except upon arrangement by, and at the cost of, the party charged with the violation.

30-122. Pre-Hearing Procedures for Compliance Hearings.

- (1) Review of 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 Director by scheduling a visit to the Office during regular working hours at any point after receiving notice of the alleged violation. The Director shall have the right to provide the respondent a copy of the file where any confidential information in the file has been redacted. The redactions shall be made as narrowly as possible to achieve the dual goals of providing the respondent with all necessary information while maintaining the privacy of confidential information. The original, unaltered file shall be retained by the Office.
- (2) List of Witnesses. At least 10 days prior to the hearing (or as soon as possible if the hearing is to be held within 10 days of the 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. The list shall indicate any witnesses that must be subpoenaed. The Director shall then submit the list to the Tribal Court which may issue the subpoenas.
- (3) 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.
- (4) Subpoena of Documents and Things. At least 10 days prior the hearing (or as soon as possible if the hearing is to be held within 10 days of the notice) the respondent shall provide the Director with a list of items it wishes to have subpoenaed and the relevant items listed. The Director shall submit the list to the Tribal Court which may issue subpoenas. Any disputes shall be brought to the Chairman of the Commission who shall resolve such disputes.
- (5) 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 jointly 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.

30-123. Compliance Hearing Procedures.

- (1) Presiding Officer. As presiding officer, the Chairman of the Tribal Employment and Contracting Rights Commission shall control the proceedings, and shall take whatever action is necessary to ensure an equitable, orderly, and expeditious hearing. Parties shall abide by the presiding officer's rulings. The presiding official has the authority, among others, to: administer oaths or affirmations; regulate the course of the hearing; rule on offers of proof; limit the number of witnesses when testimony would be unduly repetitious; and exclude any person from the hearing for contemptuous conduct or misbehavior that obstructs the hearing.
- (2) Director. The Director shall represent the Tribal Employment and Contracting Rights Office in all hearings before the Commission, even if the hearing is on a charge that was initiated by a complaint filed by a private individual.
- (3) Respondent. The respondent shall be present for the entire hearing and he/she shall represent himself/herself, or his/her representative (other than an attorney) shall represent him/her, during the proceedings.
- (4) Attorneys. Either party may have an attorney present as an advisor.
- (5) Recordings of the Hearing. The Commission shall have the hearing recorded in full and shall retain the recording for no less than one (1) year after the hearing. The respondent shall also be permitted to record the hearing.
- (6) Prohibition against Reprisals. All parties shall have a right to testify on their own behalf, without reprisal.
- (7) Starting Time. The hearing shall be opened promptly at the time specified by the Commission.
- (8) Opening Statements. Both parties will be afforded the opportunity to present opening statements with respect to what they intend to prove at the hearing.
- (9) Order of Proceeding. The Director will present the Office's case first.
- (10) Examination and Cross-Examination of Witnesses. Both parties may subpoena and examine friendly and hostile witnesses and may cross-examine such witnesses. However, no harassment or efforts to intimate 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.

(11)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 maintain control of the hearing.

(12)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 to the Commission, at least ten (10) days in advance of the hearing, a request to allow such testimony and a written explanation for the non-appearance of the witness. Permission for the allowance of written testimony in lieu of in-person testimony may be granted by a majority vote of the Commission upon a finding that there is a satisfactory reason for the non-appearance, that there is a good faith basis to believe the testimony is reliable and cannot otherwise be obtained, and that due process rights will not be violated by allowing such written testimony. Even if the Commission finds the written testimony is allowable under the above-enumerated factors, the opposing party shall be given the opportunity to serve the non-appearing witness with interrogatories after having the opportunity to review the written testimony to be admitted. If such interrogatories are served, the initially-requested written testimony shall only be admitted if the non-appearing witness completes and returns the interrogatories served by the opposing party, and both the written testimony and interrogatories must be simultaneously admitted into evidence.

(13)Closing Statement. Both parties will be afforded the opportunity to make closing statements.

(14)Audience. Enforcement hearings shall be open to the public, unless the parties agree that the hearing shall be closed.

30-124. Decision and Civil Sanctions. If, after notice and hearing as provided for herein, the Commission determines that the alleged violation or violations have occurred and that the party charged has no adequate defense in law or fact, or after notice and without hearing, if no hearing is requested, or if the party fails to post any bond required pursuant to Section 30-120, the Commission may impose any or all of the following sanctions and any other sanctions authorized by this Ordinance:

- (a) Deny the right of such party to conduct any further business within the exterior boundaries of the Standing Rock Sioux Reservation;
- (b) Suspend such party's operation within the exterior boundaries of the Standing Rock Sioux Reservation;

- (c) Terminate such party's operation within the exterior boundaries of Standing Rock Sioux Reservation;
- (d) Deny the right of such party to conduct any further business within the exterior boundaries of the Standing Rock Sioux Reservation;
- (e) Impose a monetary civil penalty on such party of up to \$500.00 for each violation. Each day during which a violation exists shall constitute a separate violation;
- (f) Order such party to make payment of back pay or other damages to any aggrieved Indian or aggrieved Indian-preference certified firm;
- (g) Order such party to dismiss any employees hired in violation of the Tribe's employment rights requirements; and
- (h) Order such 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 25 U.S.C. §§ 1301 et seq.

The Commission's decision shall be in writing and shall be served on the charged party by registered mail or in person no later than 30 days after the close of the compliance 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, and the Tribal Court may grant, such injunctive or other 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.

30-125. Irreparable Harm.

A finding of irreparable harm, such that the Director, pursuant to Section 30-120, or the Commission, pursuant to Section 30-124, may petition the Court for injunctive relief, shall be based upon a showing that damage will occur that cannot be adequately remedied through the payment of monetary damages. Such a showing includes, but is not limited to, the following:

- (1) That a contractor or subcontractor is about to or has begun work on a contract or subcontract entered into in violation of the provisions of this Ordinance or Commission rules, regulations or guidelines requiring contract or subcontract preference, when there are one or more Indian firms available to perform the contract or subcontract. In this circumstance it may be impossible to measure in monetary terms the damages suffered by an Indian firm's failure to obtain a contract or subcontract;

- (2) That an entity, or its subcontractor(s), is about to or has hired four (4) or more persons in violation of the provisions of this Ordinance or Commission rules, regulations or guidelines requiring Indian employment preference, and there are Indians available to fill those positions. In this circumstance 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 back pay difficult to achieve; and/or
- (3) That an entity refuses to submit a preference plan in the time required and indicates through word or action that it intends to disregard the requirements imposed by this Ordinance or Commission rules, regulations, or guidelines.

30-126. Appeals.

- (1) An appeal to the Tribal Court may be taken from any final order of the Commission by any party adversely affected thereby, except as otherwise expressly provided in this Ordinance. The appeal must be filed no later than 20 days after the party receives a copy of the Commission's decision. 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. The appeal shall be taken by filing a written notice of appeal with the Tribal Court, and delivering a copy to the Director, within 20 days after the date on which the party received a copy of the Commission's decision. The notice of appeal shall:
 - (a) Set forth the order from which appeal is taken;
 - (b) Specify the grounds upon which reversal or modification of order is sought; and
 - (c) Be signed by appellant.
- (2) The Tribal Court may, for good cause shown, issue a stay of the order of the Commission pending the determination on the merits by the Tribal Court. The Director may petition and, for good cause shown, as provided in Section 30-120, the Court may order the party taking an 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 the order is upheld by the Court.
- (3) If the order of the Commission is reversed or modified, the Court shall by its mandate specifically direct the Commission as to what further action shall be taken by the Commission in the matter, including the making and entering of any order or orders in connection therewith, and the limitations, or conditions, to be contained therein.

30-127. Enforcement of Commission's Order.

If the Commission's order is upheld by the Tribal Court on appeal, or if no appeal is sought within 20 days from the date of the respondent's receipt of the Commission's order, the Commission may petition the Tribal Court and the Court shall grant such orders as are necessary and appropriate to enforce the orders of the Commission and the sanctions imposed by it.

30-128. Attachment.

- (1) If, at any stage in the enforcement process, the Commission 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 Employment Contracting Rights Fees that are owed by that party pursuant to any outstanding order of the Commission or Court, or which may be owed if the charges set out in any outstanding notice of violations are upheld, the Commission may petition the Tribal Court pursuant to the rules and procedures of the Court to attach and hold sufficient property of the party to secure compliance or for such other relief as is necessary and appropriate to protect the rights of the Commission and/or other affected parties.
- (2) Grounds upon which the Commission may petition the Tribal Court to attach and hold property include, but are not limited to, the following:
 - (a) The entity has refused or failed to post a bond after being so ordered to do, as provided in this Ordinance;
 - (b) The Commission has good reason to believe the entity will remove itself or its property from the Reservation before the Commission can complete its efforts 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.

30-129. Confiscation and Sale. If, 21 days after the date on which respondent received a copy of the decision by the Commission pursuant to Section 30-124, no appeal has been filed, or 30 days after a decision by the Court on an appeal pursuant to Section 30-126 from a decision by the Commission, the respondent has failed to pay monetary damages imposed on it or has otherwise failed to comply with an order of the Commission or the Court, the Commission may petition the Court to order an official or

employee of the TERO, accompanied by a law enforcement officer of the Tribe or Bureau of Indian Affairs, to confiscate, and hold for such sale, such property of that respondent as is necessary to ensure payment of said monetary damages or to otherwise achieve compliance. The petition shall be accompanied by a list of property belonging to that respondent which the Commission has reason to believe is within the jurisdiction of the Tribal 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 an official or employee of the TERO Office, accompanied by a law enforcement officer of the Tribe or the Bureau of Indian Affairs, to confiscate and hold such property, or as much as is then available. The official or employee of the TERO Office shall deliver, in-person or by certified mail, a notice to the party informing it of the confiscation and of its right to redeem the confiscated property by coming into compliance with the order outstanding against it. If, 30 days after confiscation, the party has not come into compliance, the confiscated property shall be subject to sale, and the proceeds shall be used to pay any outstanding monetary damages imposed against the party by the Commission or the Court, and all costs incurred by the Court, TERO Office, and police in the confiscation and sale. Any proceeds remaining after all such monetary damages have been paid shall be returned to the party.

CHAPTER 2. INDIAN PREFERENCE IN EMPLOYMENT

30-201. Employment Preference Required. All covered employers, for all positions involving employment within the Standing Rock Reservation, shall give preference to qualified Indians in the order of priority set forth in Section 30-202, in all hiring, promotion, training, layoffs, and all other aspects of employment. Such employers shall comply with all other applicable rules, regulations, guidelines, and orders of the Tribal Employment and Contracting Rights Commission. The requirements of this Chapter shall not apply to any direct employment by the federal, state or Standing Rock Sioux Tribal governments or their agencies, subdivisions, but shall apply to all contractors or grantees of such governments who meet the definition of covered employer in Section 30-102 and to all entities chartered by the Standing Rock Sioux Tribe that meet the definition of covered employer in Section 30-102.

30-202. Priority of Employment Preference.

- (1) Except as provided in subsection (2) of this section, the employment preference provided for in this Chapter shall be given according to the following priority: first preference to enrolled members of the Standing Rock Sioux Tribe (“Tribal members”); second preference to local Indians who are not members of the Standing Rock Sioux Tribe; third preference to other Indians; and fourth to all other applicants.

- (2) In any instance in which applicable federal law or regulations prohibit a preference based upon membership in a particular Tribe, the employment preference provided for in this Chapter shall be given according to the following priority, instead of the priority in subsection (1) of this section: first preference to local Indians; second preference to other Indians; and third to all other applicants.

30-203. Employment Preference Compliance Plan.

Every covered employer must submit an acceptable employment preference compliance plan to the Tribal Employment Rights and Contracting Rights Office (“Office”). No new employer may commence work on the Reservation until it has met with the Director or his delegate and developed an acceptable plan for meeting its obligations under this Ordinance. The employment preference compliance plan shall show the number of man hours, by craft and skill category, needed on the project. The employer shall also identify those persons it wishes to have approved as permanent and key employees (see Section 30-205). The plan shall also describe how the employer will participate in the Tribe’s training programs.

30-204. Tribal Hiring Hall. A covered employer may recruit and hire workers from whatever sources are available to him and by whatever process he so chooses; provided, that except as allowed by Sec. 205, he may only employ a Tribal member (or local Indian in cases where federal law or regulations prohibit preference based on membership in a particular Tribe) until they have given the Tribal Employment and Contracting Rights Office 72 hours to locate and refer a qualified Tribal member (or local Indian). However, in cases where a worker is needed in a shorter period of time, the employer may request from the Office a reduction of the 72 hour waiting period, and said request shall be granted so long as the employer can demonstrate that the need exists.

Where the employer or the Office cannot locate a qualified STANDING ROCK Tribal member or local Indian, they shall make a best faith effort to locate, refer and hire an Indian who is not a Tribal member or does not qualify as a local Indian, but who is a member of another Tribe.

30-205. TERO Wage Rates. The TERO Commission sets the minimum wage rates for work for the Standing Rock Sioux Tribe unless higher wage rates are set under the Davis Bacon Act, in which event the Davis-Bacon wage rates control. In the event of conflict, the higher of the TERO wage rates, or the Davis-Bacon wage rates now or hereafter or previously set by the Department of Labor, shall control.

30-206. Permanent and Key Employees. Prior to commencing work on the Reservation, a prospective covered employer (including contractors or subcontractors) shall identify key, regular, permanent employees. Such employees may be employed on the project whether or not they are Tribal members or local Indians. A regular, permanent employee is one who is and has been on the employer's or subcontractor's annual payroll, or is an owner of the firm (in contrast with 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 an 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 Director on a case-by-case basis. Any covered employer which fills vacant employment positions in its organization immediately prior to undertaking work on the Reservation shall set forth evidence acceptable to the Director that his/her actions were not intended to circumvent these requirements. The Office shall issue a permit to each key or key regular permanent employee that it approves.

30-207. Work Permits.

- (1) No person who is not a Standing Rock Tribal member shall be employed by a covered employer until he has obtained a work permit from the Office.
- (2) Work permits shall be granted under the following circumstances:
 - (a) To all key regular permanent employees listed in the employer's preference plan who are certified by the Director as meeting the criteria for key and regular permanent employees. Upon approving the plan, the Office shall issue work permits to the approved key regular permanent employees.
 - (b) To all local Indians referred to the employer by the Office pursuant to Section 30-204.
 - (c) To all local Indians hired by the employer in any instance in which applicable federal law or regulations prohibit a preference based on membership in a particular Tribe.
 - (d) To local Indians, non-local Indians, or non-Indians hired after the employer has asked the Office to locate and refer a qualified Tribal member or local Indian and the Office has been unable to do so within the time provided by this Ordinance. When the Office has been unable to locate and refer a Tribal member or local non-Indian within the time provided, the employer shall request and the Office shall issue such work permits.

- (e) To a person employed by a covered employer where the person is employed on the Reservation in a permanent position and he began his employment before the original effective date of this Ordinance.
 - (f) To an owner of an entity that is a covered employer, where such owner will be performing work for his entity. Prior to commencing work, such person shall demonstrate that he is a legitimate owner of the entity and shall request a work permit. Upon the Director's finding that the person is a legitimate owner, the Office shall issue the person a work permit.
 - (g) To such other persons that the Commission determines are entitled to a permit.
- (3) Emergency hire provision: Under extreme circumstances where an employee is needed to fill a vacancy during off business hours when the TERO is unavailable, the employer will be allowed to hire employees necessary to meet the emergency for a maximum of three days or until TERO can be notified of the circumstances and approve the individual or dispatch another Preferred Employee.

Emergency hires will be limited by the Director and will be allowed on a case-by-case basis. Any abuse concerning this provision will result in sanctions as given in Section 30-208.

30-208. Civil Sanctions for Work Permit Violations.

- (1) Except as provided in subsection (2), any non-member of the Standing Rock Sioux Tribe who does not have a valid work permit and is found to be employed by a covered employer shall be summarily removed from the job, and the employer shall be subject to such additional sanctions as may be provided in this Ordinance. In levying such sanctions, the Commission shall consider such factors as whether:
 - (a) The violation was unintentional;
 - (b) The employer acted quickly to remove the employee at issue; and
 - (c) The employer has not been cited for other work permit violations in the past.
- (2) Subsection (1) shall not apply if (a) applicable federal law or regulations prohibit the covered employer from complying with a preference based on membership in a particular Tribe, and (b) the employee is a local Indian, and (c) the employee properly applies for and receives a work permit.

30-209. Termination. The preference priorities set forth in Section 30-202 shall be observed in terminating employment. Thus, within particular craft or position classification, so long as the remaining workers meet the threshold qualifications for the position, the order of termination shall be as follows: non-Indians who are not members of the Standing Rock Sioux Tribe, then local Indians who are not members of the Tribe, prior to termination of a Tribal member. Provided, that in any instance in which applicable federal law or regulation prohibits a preference based on membership in a particular Tribe, the order of termination shall be as follows: first, non-Indians, and then non-local Indians regardless of the Tribe of which they are a member, before local Indians are terminated. Further, if the employer lays off by crews, transfer of workers entitled to preference in accordance with Section 30-202 shall be made between crews, so that the foregoing order of termination is observed.

30-210. Unions. A covered employer who has a collective bargaining agreement with one or more labor unions must obtain a written agreement from each such union indicating that it will comply with these Indian preference requirements. Specifically, the employer may make initial job referral requests to the union. However, if the union does not have a qualified Tribal member (or a qualified local Indian when applicable federal law or regulations prohibit preference based on membership in a particular Tribe) on any of its out-of-work lists, the union shall contact the Office. If the Office can identify a qualified Tribal member (or local Indian), that worker shall be referred through the union hiring hall to the job site. Until the union has so contacted the Office, the union may only refer a Tribal member (or local Indian when federal law or regulations prohibit preference based on membership in a particular Tribe). Before referring the non-Tribal member, non-local Indian, or non-Indian to the job's site, the union shall request and the Office 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 in person on the Reservation, 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. Such worker shall not pay union dues and shall not be required to pay an initiation fee, but have the benefits added into their wages.

30-211. Training. All covered employers, as requested by the Office, shall participate in training programs to assist Indians in becoming qualified in the various job classifications used by the employer. Employers engaged in construction shall participate in a Tribe's certified training program or a union apprenticeship program. All trainees or apprentices shall be Tribal members or 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 such costs. 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.

30-212. Job Qualifications, Personnel Recommendations and Religious Accommodation.

A covered employer may not use any job qualification criteria or personnel requirements which serve as barrier to the employment of Indians and which are not required by business necessity. In any action challenging such job qualification criteria or personnel requirements, the burden shall be on the Director or his delegate to demonstrate that a criterion or personnel requirement is a barrier to Indian employment. The burden shall then be on the employer to demonstrate that such criterion or requirement is required by business necessity. Employers shall also make reasonable cultural accommodation to the religious beliefs and traditions of Indian workers. In implementing these requirements, the Director or his delegate shall be guided by the principles established by the Equal Employment Opportunity Commission Guidelines, particularly 29 C.F.R. Parts 1604 through 1607. However, the Director or his delegate reserves the right to go beyond the EEOC principles in order to address employment barriers that are unique to Indians.

Where the Director or his delegate and the employer are unable to reach agreement on the matters covered in this section, the Director shall seek an informal settlement as provided in Section 30-118. If an informal settlement is not reached the 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, as provided in Section 30-119. The employer may then pursue his hearing and appeal rights, as set forth in Sections 30-119 – 30-129.

30-213. Promotion. Covered employers shall comply with the preference priorities set forth in Sec. 202 in considering employees for all promotion opportunities and shall encourage Tribal members and local Indians to seek such opportunities. For all supervisory positions filled by anyone other than a Tribal member (a local Indian in instance where federal law or regulations prohibit preference based on membership in a particular Tribe), the employer shall file a report with the Office stating which Tribal members (or local Indians), if any, applied for the job, the reasons why they were not given the job, and what efforts were made to inform Tribal member employees (or local Indian employees) about the opportunity.

30-214. Student Employment. Employers shall make every effort to promote after-school, weekend, and vacation employment for Indian youth. Covered employers shall give preference in the hiring of student help in accordance with the preference priorities set forth in Sec. 202.

30-215. Retaliation. No employer shall punish, terminate, harass, or otherwise retaliate against any employee or other person who has exercised his rights under this Ordinance or has assisted another

in doing so. Further, any employer who harasses or abuses an employee of the Office who is carrying out official duties under this Ordinance shall be subject to removal from the Reservation pursuant to the Tribe's Exclusion Ordinance. An employer shall be responsible for the actions of all of its employees, supervisory or otherwise, and for the actions of its contractors and subcontractors and their employees in regard to the prohibitions contained in this section.

30-216. Counseling and Support Programs. The Office, 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 in retaining employment. Employers shall be required to cooperate with such counseling and support services.

CHAPTER 3. INDIAN PREFERENCE IN CONTRACTING AND SUBCONTRACTING

Subchapter A. Contracting and Subcontracting Preference Requirements

30-301. Contracting and Subcontracting Preference Required.

Every covered entity awarding any contract or subcontract, in an amount of \$500.00 or more, where the majority of the work on the contract or subcontract will occur within the exterior boundaries of the Standing Rock Sioux Reservation, including but not limited to contracts or subcontracts for supplies, services, labor, and materials, shall give preference in contracting and subcontracting to qualified entities that are certified by the Commission as 100% Indian owned, operated, managed and controlled, so long as there are certified firms that are technically qualified and willing to perform the work at a reasonable price, as defined in Section 30-308. These requirements shall not apply to the award of contracts by the federal, state, or Standing Rock Sioux Tribal governments, or any agencies and subdivisions thereof, but shall apply to all contractors and grantees of the federal, state, or Tribal governments or their agencies and subdivisions thereof, with respect to all subcontracts awarded by such contractors or grantees, and to entities chartered by the Standing Rock Sioux Tribe. If the covered 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 so that certified firms can qualify for at least a portion. A list of firms certified as Indian preference eligible by the Commission may be obtained from the Tribal Employment and Contracting Rights Office ("Office").

30-302. Priority of Contracting and Subcontracting Preference.

First preference shall be given to Indian preference certified firms, certified by the Commission pursuant to Subchapter B of this Chapter as being 100% owned, operated, managed and controlled by Indians. Second preference shall be given to Indian preference certified firms that are 51 percent or more Indian owner, operated, managed and controlled by Indians. If no Indian preference certified firms are available, Indian/non-Indian joint ventures approved by the Commission shall be given preference over wholly non-Indian owned firms or wholly non-Indian joint ventures.

30-303. Compliance with Federal Law. If any requirement of this Chapter is inconsistent with applicable requirements of federal law or regulations, the latter shall take precedence.

30-304. Contracting and Subcontracting Preference Compliance Plan.

Every covered entity, contractor, and subcontractor intending to engage in a business activity on the Reservation must, prior to the time it commences work on the Reservation, submit a contracting and subcontracting compliance plan to the Office. No covered entity, contractor or subcontractor may commence work on the Reservation until it has met with the Director or his/her delegate and has developed an acceptable plan for meeting its obligations under these regulations. The contracting and subcontracting plan shall indicate all contracts that will be entered into by the entity and projected dollar amounts thereof. If the entity has already scheduled 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 Commission pursuant to Subchapter B of this Chapter. If it is not a certified firm, the entity shall further indicate why each certified firm, if any, registered with the Office, that was technically qualified to perform the work, was not selected. The plan shall also indicate how the entity intends to comply with this Chapter when awarding contracts and subcontracts not yet awarded at the time the plan is submitted.

30-305. Responsibility for Compliance. The covered entity letting the contract shall be responsible for the compliance by all its contractors and subcontractors with these regulations; provided, that if the entity letting the contract is the United States, the State, the Tribe, or an agency or subdivision thereof, the prime contractor shall be responsible for such compliance.

- (1) Construction. The entity awarding the construction contract shall be responsible for compliance with the requirement that preference be given in the award of the prime contract and for ensuring that the prime contractor is in compliance with the requirement that preference be given in the selection of subcontractors; provided, that when the prime contract is awarded directly by the United States, the State, or the Tribe, or any agency or subdivision thereof, the

prime contractor shall be the responsible entity; and provided further, that pursuant to Section 30-303, where the entity is an Indian Housing Authority (IHA), it shall not be subject to any monetary sanctions provided in this Ordinance or in the rules, regulations and guidelines of the Commission, and shall be exempt from any requirements of these regulations that are inconsistent with the Department of Housing and Urban Development's Indian preference regulations.

The Tribe shall not be liable for any losses incurred by the entity letting the prime contract because it has entered into a contract with a prime contractor which, because of its failure to provide adequate proof that it will fully comply with the subcontract preference requirements of this Chapter (e.g., through the submission of an acceptable subcontractor plan as required by Section 30-304), is not permitted to commence work on the Reservation.

- (2) Natural Resources Development (Oil, Gas, Hard Rock Minerals, Timber, etc.). The entity obtained the authorization from the Tribe or other landowner to engage in development activities on the reservation shall be responsible for compliance with these regulations by all of its contractors and subcontractors.

30-306. Requirements in Contracting. Preference shall be given to certified firms in the award of all covered contracts. An entity may select its contractor in any manner or procedure it so chooses; provided that:

- (1) Competitive Award. If the entity uses competitive bidding or proposals, competition shall be limited to certified firms, as provided herein. 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. If the entity fails to receive any Statement of Intent from a technically qualified certified firm, it may, after so notifying the Office, advertise for bids or proposals without limiting competition to certified firms, and may award the contract to the low bidder. If only one certified firm submits a bid or Statement of Intent, the entity (unless otherwise prohibited by federal law or regulations) 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 30-308.
- (2) 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 firm 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 at a reasonable price as defined in Section 30-308. So long as a certified firm meets the minimum threshold qualifications and the reasonable price requirement, no non-certified firm may be selected.

30-307. Requirements in Subcontracting.

- (1) General Requirements. Preference shall be given to certified firms in the award of all covered subcontracts. The contractor may select its subcontractors in any manner it so chooses; provided that:

If the contractor uses competitive bidding or proposals, competition shall be limited to certified firms as provided herein. 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 Office, advertise for bids or proposals without limiting competition to certified firms, and may award the subcontract to the low bidder. 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 subcontract 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 30-308.

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 30-308. So long as a certified firm meets the minimum threshold qualifications and the reasonable price requirement, no non-certified firm may be selected to perform the work.

- (2) Special Requirements for Construction Subcontracting. All entities awarding construction contracts shall comply with the following special requirements in the award of subcontracts:
- (a) The bid notice shall require that each bidder submit, as part of its bid, a subcontract plan as provided for in Sec. 304. The subcontract price information for each bidder shall be made available to the Office 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.
- (b) It shall be illegal for any contractor or bidder to engage in prohibited activities under subsection (2)(a) of this Section on the Reservation. Any contractor or bidder who commits such practices 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 Office 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.

- (c) 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. Acceptable bonding alternatives include: no bond required on amounts up to \$25,000; surety bonds; cash bonds up to 25% held in escrow by a bank; increased retainers up to 25% instead of normal; letter of credit for 100%; letter of credit for 10% with cash monitoring system; cash monitoring system; or any other options which may be considered as they arise. The final decision on whether an alternative form of security is sufficient shall rest with the Commission.
- (d) If it is determined that there is no certified available and qualified firm able 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 to perform the work.

30-308. Responsibility of Evaluating Technical Qualifications and Reasonable Price.

- (1) Technical Qualifications. The covered entity and its contractors and subcontractors shall have the discretion to determine technical qualifications. 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 deficient and steps it could take to upgrade its qualifications.

If a certified firm that was disqualified on the grounds of technical qualifications believes that the disqualification was the result of an improper effort by an entity, contractor, or subcontractor, to circumvent its preference responsibilities under this Ordinance, the credited firm may file a complaint with the Director. The 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 it is qualified and that its disqualification was the result of an effort to circumvent this Ordinance. The complaint and subsequent proceedings shall be governed by Sections 30-114 – 30-129.

- (2) 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. Before an entity may reject all technically qualified certified firms on the basis of price, it must enter into price negotiations with one or more such firms and must contract with one such firm if a reasonable price can be negotiated. If there is only one technically qualified certified firm, an entity must enter into price negotiations 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, will be subject to review by the Office 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.

30-309. Operation under the Contract or Subcontract. Once an entity enters into a contract or subcontract with a certified firm, the Office will not intervene in any way in the relationship between the parties unless a certified firm demonstrates that action taken against it was intended primarily to circumvent the requirements of this Ordinance.

Subchapter B. Criteria and Procedures for Certifying Firms as Indian Preference Eligible

30-350. Definitions. For the purpose of this Subchapter, "Indian owner" means one or more Indian owners, and "non-Indian owner" means one or more non-Indian owners.

30-351. General Statement of Policy. The Indian contract preference requirements of this Ordinance are 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 30-352. 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 Commission shall 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 owner have been given the amount of ownership and control he received, if there were no Indian preference program in existence? If the Commission 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 require that the ownership, operation, control, and management arrangements of a firm make sense from a sound business perspective. The Indian owner must own and control 100% of the firm to be certified for first preference, or 51% or more for second preference. One primary consideration in applying this criterion will be what the Indian owner brought to the firm in consideration for the extent of ownership given, and whether sound business practice would justify giving such an ownership share were Indian preference not a consideration. For example, assume the Indian owner paid for his firm through a promissory note to the previous non-Indian owner. 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 market opportunity.) Therefore, such an arrangement would preclude Indian preference certification unless some other sound business reason for the arrangement could be demonstrated. Where an Indian owner can demonstrate that he was unable to provide good value for his firm because the usual sources of capital were closed off to them because of being an Indian, that person shall be required to demonstrate that they extended a capital-raising ability as far as possible, such that they are "at risk" in a significant way – for instance, by mortgaging a house or vehicle.

For the firm to qualify for certification, the Indian owner must be directly involved in the firm's management. While it is not required that the Indian owner be Chief Operating Officer of the firm, the Indian owner 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 owner 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 must also have sufficient knowledge about the firm to be accountable for the firm's activities.

There is virtually no benefit to the Indian community from 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 do not justify the risk.

Joint venture will not be granted certification as Indian preference firms. However, an Indian/non-Indian joint venture will be given preference over a non-Indian firm if there is no certified Indian preference unitary firm available and qualified.

Such rigorous criteria, giving substantial discretion to the reviewing body, are necessary and appropriate, for the Indian community does not benefit from the establishment of "bogus" Indian firms, and the certification of such firms undercuts the creditability 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, the firm or individual 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 application shall be reviewed by the staff of the Tribal Employment and Contracting Rights Office, which shall request any additional information it believes appropriate. It will then submit the application, along with its recommended findings, to the 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 the right of appeal to the Tribal Court, as provided in Chapter 1 of this Ordinance. The Tribal Court 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 Office and the Commission 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.

30-352. Certification for Indian Contract Preference Certification. To receive certification as a firm eligible for Indian contracting and subcontracting preference, an applicant must satisfy all of the criteria set out in this section.

(1) **Ownership.** The firm must be 100% Indian owned for first preference and 51% or more Indian owned for second preference. The applicant must demonstrate the following:

(a) Formal Ownership. That one or more Indians own the required percentage 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.

(b) Value. That the Indian owner provided real value for his ownership by providing capital, equipment, real property, or similar assets commensurate with the value of their ownership share. It will not be considered "real value" if the Indian purchased his ownership share, directly or indirectly, through a promissory note, the ultimate creditor of which is a previous 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 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 owner can demonstrate that he could not pay real value for Indian ownership because the normal capital sources were closed to them because of being Indian that he/she extended their capital raising capability as far as possible, such

that the Indian participant clearly is at risk in the business in relationship to their means, it shall be a factor which weighs in favor of certification.

- (c) Profit. That the Indian owner will receive 100% of all profits for first preference and 51% or more of all profits for second preference. If there is any provision that gives a non-Indian 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 owners and non-Indian managers are consistent with the skills of the parties and are not being used to circumvent the requirement that the Indian owner receives the required percentage of the profits.

(2) Management and Control.

- (a) The firm must be under significant Indian management and control. The firm must be able to demonstrate one or more Indian owners are substantially involved, as a senior level official, in the day-to-day management of the firm as their primary employment activity. The Indian owner must have, through prior experience or training, substantial occupational ties to the area of business in which the firm is engaged such that they are qualified to serve in the senior level position and is sufficiently knowledgeable about the firm's activities.
- (b) No joint ventures will be certified. However, an Indian/non-Indian joint venture that otherwise satisfies the requirements of these criteria shall be given preference over wholly non-Indian firms when no certified Indian firm is available.

(3) 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. The Commission should consider:

- (a) 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 changing ownership or by merging with an Indian firm;
- (b) Employees. Where key non-Indian employees of the applicant are former employees of the 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; and 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; and

(c) Relative Experience and Resources. Whether the experience, expertise, resources, etc., of a previous non-Indian owner who now is in a management position with the firm, is so much greater than that of the Indian owner that there is little sound business reason for the non-Indian manager to accept a junior role in the firm other than to be able to take advantage of the Indian preference program.

(4) 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 firm demonstrates that it is customary and usual in the trade for a broker/dealer not to maintain an establishment and to keep the commodities in stock.

30-353. Certification Procedures.

(1) Application for Certification. A firm seeking certification as an Indian preference eligible firm shall submit a completed application to the Office a form which may be obtained at the Office. Office staff will be available to assist a firm in filling out the application. Within 21 days after receipt of a completed application, the staff shall review the application, request such additional information as it believes appropriate, conduct such investigations as it deems appropriate, and submit an analysis and recommended disposition to the Commission. After being provided copies of the analysis and recommended disposition, the Commission shall hold a hearing on the application, posting notice of the hearing time at the Tribal Office, another public place on the Reservation, and the Tribal Employment and Contracting Rights Office at least five days prior to the hearing. Only the Indian owner of the firm shall be present at the hearing; provided, that 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 Sections 30-121 – 30-123 to the extent those sections are not inconsistent with this section.

(2) Probationary Certification. An applicant granted certification shall be issued a one-year probationary certification. During that period, the TERO Office staff and the Commission 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 Office and the Commission shall have the right to request and receive such information and documents as they deem appropriate.

(3) Final Certification. At the end of the probationary period, the Commission, after receiving recommendations from the Office staff, shall either:

(a) Grant full certification;

(b) Continue the probationary period for up to six months; or

(c) Deny certification.

(4) Withdrawal or Suspension of Certification. Whether during probationary certification or after final certification, and from the information provided in reports required by this Ordinance and any rules, regulations, and guidelines of the Commission, on the basis of a written grievance filed by any other firm or person, or on its own initiative, the Office may initiate proceedings to withdraw or suspend the certification of any firm. The Office shall prepare an analysis and recommend disposition for the Commission and shall send the firm notice, by registered mail, that its certification is being examined, along with the grounds therefore. 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 Office. At the hearing, the Director and Office staff shall present the case for suspension or withdrawal, and the hearing shall be conducted as set out in Sections 30-121 – 30-123. After the hearing, the Commission may:

(a) Withdraw certification;

(b) Suspend certification for up to one year;

(c) Put the firm on probation; and/or

(d) 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.

(5) Change in Status and Annual Reports. Each certified firm shall report to the Office, 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 Office. Failure to provide information pursuant to these requirements shall constitute grounds for withdrawal of certification.

CHAPTER 4. MISCELLANEOUS PROVISIONS

30-401. Compliance with EPA Ordinance.

The Standing Rock Sioux Tribe has an Environmental Code in place which shall be applied to every project within the exterior boundaries of the Reservation.

30-402. Repeal of Prior Ordinances.

Ordinance No. 97 (TERO), Ordinance No. 112 (Privilege of Operating Construction Business Tax) and all other ordinances, resolutions, and Tribal Council actions inconsistent with the provisions of this Ordinance are hereby repealed.