

**TITLE 9
INDIAN PREFERENCE IN EMPLOYMENT AND CONTRACTING**

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TITLE 9
INDIAN PREFERENCE IN EMPLOYMENT AND CONTRACTING
(adopted by NPTEC 1/24/06)

CHAPTER 9-1 GENERAL PROVISIONS

§9-1-1 Declaration

The members of the Nez Perce Tribe suffer from economic underdevelopment, unemployment, and poverty. Employment and contracting opportunities for members of the Nez Perce Tribe and their business enterprises within the exterior boundaries of the Nez Perce Reservation directly affect the health and welfare of the Tribe because these opportunities provide the means for members of the Tribe to gain employment, skills, and the dignity that comes with employment and economic well-being.

It is the public policy of the Nez Perce Tribe to promote the economic health and welfare of its members and other Native Americans.

§9-1-2 Purpose

The purpose of this Title is to ensure that economic opportunities for employment and for contracting within lands subject to the jurisdiction of the Nez Perce Tribe are provided to members of the Nez Perce Tribe and other Native Americans and to businesses owned by members of the Nez Perce Tribe or other Native Americans.

§9-1-3 Scope

The Nez Perce Tribe has authority to apply this Title to every contractor and employer within its jurisdiction. The TERO Office shall apply this Title to construction and forestry-related contractors, and, with the approval of NPTEC, the Office may apply this Title to other employers and contractors within the jurisdiction of the Tribe, taking into consideration the size of the employer or contract and the resources available to the Office. (amended 6/13/06)

§9-1-4 Rule of Construction

The provisions of this Title shall be construed to further the stated purpose.

§9-1-5 Definitions

(a) Aggrieved person - An individual or entity of any sort, other than the Director or a member of the Commission, who likely will suffer substantial and particularized injury to a personal or property interest.

(b) Bid shopping - Any practice involving the provision of information to a prospective contractor or subcontractor that a competitor has submitted a lower price than that of the prospective contractor or subcontractor and the offer to such contractor or subcontractor of an opportunity to underbid the competitor.

(c) Business days - Working days, not including Saturdays, Sundays, or federal, state, or tribal holidays.

(d) Business necessity - Essential to proper functioning of an employer's business.

(e) Certified Indian business - An Indian-owned firm that is certified according to the

criteria and procedures in Chapter 9-4.

(f) Commission - The Tribal Employment Rights Commission of the Nez Perce Tribe, as described in §9-1-6 and §9-1-7.

(g) Construction - Excavation for, building of, and finishing out of, structures for public works, commercial, or governmental purposes, including the construction of roads and bridges.

(h) Contracting Entity - The entity, including any person, corporation, business, or governmental entity of any sort, offering a prime contract or a subcontract for construction or for forestry-related services within the Reservation. A contractor offering a subcontract is a “contracting entity.”

(i) Contractor - A firm, joint venture or entity of any sort that bids for or obtains a contract from a contracting entity to perform construction or forestry-related services within the Nez Perce Reservation.

(j) Core crew - Owners, officers, and directors of private employers or contracting entities who are listed in such positions on the annual payroll for a minimum of one year continuously. An employee who is hired on a project by project basis is not considered within the core crew.

(k) Director - The Director of the Tribal Employment Rights Office, as described in §9-1-15.

(l) Employer - Any contracting entity, contractor or subcontractor. (amended 6/13/06)

(m) Indian or Native American - An enrolled member of any federally recognized Indian Tribe. Upon request, applicant will be required to provide certification/identification from the Tribe or BIA Agency Superintendent for the Tribe for which enrollment is claimed.

(n) Indian Tribe - A federally recognized Tribe, band, nation or other organized group or community including any Alaska Native village or regional or village corporations as defined in or established according to the Alaska Native Claims Act.

(o) Joint Venture - An association of two or more persons or firms to carry out a single or limited number of business enterprises for profit, for which purpose they combine their property, money, effects, skills and knowledge.

(p) Key employee - An employee who occupies a supervisory position or one who possesses a specialized skill and who performs a critical function, such that an employer would likely risk financial damage or loss if unable to employ that person.

(q) Near reservation - Within reasonable daily commuting distance of the Reservation.

(r) Nez Perce tribal member - An enrolled member of the Nez Perce Tribe. Upon request, applicant will be required to provide identification from the Nez Perce Tribe or Certification of Indian blood from the BIA Agency Superintendent of the Northern Idaho Agency

- (s) Non-Indian business - A bidder for a contract or subcontract that is not a certified Indian business.
- (t) NPTEC - The Nez Perce Tribal Executive Committee.
- (u) Office - The Tribal Employment Rights Office as described in ' 9-1-15 of this Title.
- (v) Reasonable Price - Any bid from a Certified Indian Business that is within 10% of the lowest bid is deemed a reasonably priced bid.
- (w) Reservation - Land within the exterior boundaries of the Nez Perce Reservation established by the Treaty of June 11, 1863 (14 Stats. 647).
- (x) Subcontractor - A firm, joint venture or entity of any sort that bids for or obtains a subcontract from a contractor to perform construction or forestry-related services within the Nez Perce Reservation.
- (y) Technically Qualified - A potential contractor or subcontractor that possesses the technical qualifications to perform a contract or a subcontract or a discrete part of a contract or subcontract.
- (z) Tribal Court - The Nez Perce Tribal Court.
- (aa) Tribal enterprise - Any enterprise wholly owned and managed by the Nez Perce Tribe.
- (bb) Tribal government - The governmental departments of the Nez Perce Tribe.

§9-1-6 Tribal Employment Rights Commission

The Tribal Employment Rights Commission of the Nez Perce Tribe is established as an administrative agency of the Nez Perce Tribe and shall consist of five (5) members. In the event that a conflict of interest concerning a sitting Commissioner is brought to the Commission's attention or in the event a sitting Commissioner is unable to participate, the NPTEC liaison shall serve for that Commissioner. Commissioners shall serve for staggered terms of three (3) years. They may be removed for cause by majority vote of the NPTEC.

§9-1-7 Duties and Powers of the Commission

Subject to the provisions of this Title, this code and the Constitution and laws of the Nez Perce Tribe, the following duties and powers shall be exercised by the Commission:

- (a) to promulgate regulations necessary to implement this Title consistent with applicable federal law and with Chapter 2-5 of this Code;
- (b) to meet periodically with the Director to review the Compliance Program policies, performance, allocation of staff personnel and budget and to recommend needed improvements to the Director and/or NPTEC;
- (c) to meet with the Law and Order Subcommittee as necessary as deemed by the Subcommittee or TERC;

- (d) to recommend to NPTEC broad policies and long range programs for the advancement of tribal employment contracting and subcontracting goals;
- (e) to provide for the assembly and distribution of information to the public relating to tribal employment training and opportunities;
- (f) to perform such duties and exercise such powers as from time to time may be conferred by NPTEC;
- (g) to hold hearings, consistent with Chapter 2-5, and issue subpoenas for the appearance of witnesses and the production of documents with respect to such hearings; and
- (h) to perform such other duties and exercise other powers as set forth in this Title.

§9-1-8 Term of Office

- (a) Except for the initial Commission members, all regular Commission members will serve three-year terms. Of the initial Commission members, NPTEC shall appoint one member for a term of one year, two members for a term of two years, and two members for a term of three years.
- (b) Terms shall expire upon the swearing in of newly appointed members.

§9-1-9 Method of Appointment / Vacancies

- (a) NPTEC shall annually appoint persons to fill any Commission vacancies. For all Commission positions, NPTEC shall choose persons capable and willing to perform the duties of the Commission.
- (b) If a Commission member resigns, dies, becomes incapacitated, or is found guilty of a felony or major crime in any court of law, NPTEC shall declare the Commission position vacant. If any Commission member misses two consecutive Commission meetings without a valid excuse, NPTEC, upon petition of the remaining Commissioners, may declare the position vacant. All vacancies shall be filled as soon as possible in accordance with this Section.
- (c) In the event that the number of unfilled Commission vacancies prevents gathering of a quorum for purposes of conducting business or the Commission, NPTEC shall act as the interim Commission until such time as the filling of the Commission vacancies allows for a quorum.

§9-1-10 Commission Officers

- (a) Within ten days after the appointment of the initial Commission members, there shall be an organizational meeting of the Commission to select a Chair. The Chair shall be elected annually thereafter, immediately following the appointment by NPTEC of the new or reappointed Commission members. The Commission shall assign treasurer and secretary duties amongst its members.

§9-1-11 Commission Meetings

- (a) The Commission shall meet when business demands and requires attention. Regular and special meetings shall be called by the Chair.

(b) Any two Commission members may request the Chair, in writing, to schedule a special meeting of the Commission.

(1) If the Chair fails to schedule a meeting within five days after receipt of a written request, any other two Commission members may call such a meeting.

(c) Meetings shall be held in public places and open to the public unless they involve deliberations concerning decisions on alleged violations of this Title or communications with legal counsel.

(d) The Commission shall keep written minutes of its meetings (other than deliberations concerning decisions on alleged violations of this Title) and written or audio transcripts of its hearings.

(e) Public notice of the Commission meetings shall be given three (3) days in advance of the meeting.

§9-1-12 Quorum and Voting

(a) A minimum of three Commission members is required to establish a quorum and conduct Commission business. Any action taken by the Commission must be approved by a majority vote of those Commission members present at a Commission meeting.

(b) Each Commission member shall be entitled to vote on each matter coming properly before the Commission.

§9-1-13 Compensation of Commission Members

(a) Commission members shall serve at the NPTEC established standard wage rates.

(b) NPTEC shall establish prevailing government rates for mileage, per diem, or other costs, consistent with tribal policy, and shall direct the Finance Manager to approve such expenditures; provided that funds are available within the Commissions budget approved by the Commission and ratified by NPTEC.

§9-1-14 Commission Bylaws

The Commission shall adopt bylaws consistent with this Title and subject to the approval of NPTEC.

§9-1-15 Tribal Employment Rights Office and Director

The Tribal Employment Rights Office of the Nez Perce Tribe is established to administer the employment and contracting preferences under this Title and regulations promulgated by the Commission and such programs as the Office may develop in cooperation with the United States Equal Employment Opportunity Commission to promote, education, training, and employment opportunities for Native Americans within businesses on or near the Nez Perce Reservation, consistent with the laws of the Nez Perce Tribe. The Director shall be in charge of the administration of the Office.

§9-1-16 Notification and Responsibility for Compliance

(a) The Tribal Employment Rights Office shall provide a copy of this Title and any regulations promulgated by the Commission to employers, contracting entities, contractors, and subcontractors operating within the Nez Perce Reservation. The Office shall also provide copies of any amendments to this Title or any regulations promulgated by the Commission to employers and contracting entities operating within the Nez Perce Reservation.

(b) Programs, departments, and enterprises of the Nez Perce Tribe that enter into construction contracts within the Nez Perce Reservation shall, in addition to any notification provided by the Office, provide copies of this Title to any contractor or subcontractor.

(c) It is the obligation of every employer, contracting entity, contractor, and subcontractor operating with the Nez Perce Reservation to comply with the provisions of this Title, and any employer, contracting entity, contractor, or subcontractor found to have violated the provisions of this Title shall be subject to sanctions as provided herein.

(d) Prime contractors have an obligation to inform all subcontractors of the requirements of this Title and shall be jointly and severally liable for violations of this Title by their subcontractors.

§9-1-17 Unions

Before any employer subject to a collective bargaining agreement conducts business within the Reservation, it shall obtain a written agreement (in a form substantially similar to a form agreement developed by the Office), stating that the Union will comply with this Title and any regulations promulgated by the Commission. Such agreements shall be registered with the Office. The Office's participation in a written agreement with a union shall not be deemed to constitute official tribal recognition of a union or tribal endorsement of any recruiting activities conducted by a union.

§9-1-18 Announcement of Compliance in Bids and Employment Advertisements

(a) All bid announcements by contracting entities (for prime contracts or for subcontracts) for work within the Reservation shall include a statement that preference will be given to reasonably priced bids from technically qualified certified Indian businesses.

(b) All employment announcements by employers for employment within the Reservation shall include a statement that the employer complies with the tribal employment preference laws of the Nez Perce Tribe and thereby gives hiring preference to members of the Nez Perce Tribe and other Native Americans who meet the minimum qualification for the position.

(c) Every employer within the Reservation shall post a notice in a prominent place that is regularly frequented by employees, stating that the employer complies with the tribal employment preference laws of the Nez Perce Tribe and thereby gives preference with respect to hiring, training, promotions, and reductions in force to members of the Nez Perce Tribe and other Native Americans who meet the minimum qualifications for a job. The notice shall state the name, address and phone number of the Tribal Employment Rights Office for further information.

§9-1-19 Fee and Fee Administration

(a) Entities Required to Pay Fee. Every contractor with a contract of \$15,000 or more shall pay a one-time fee of 3.5% of the total amount of the contract. (amended by NPTEC 11/8/16)

(b) Payment terms; Adjustments for Work Order Changes. Fees under this section shall be paid to the Nez Perce Tribal government and shall be placed in a special account to be used to meet the operating costs of the Office. For contracts totaling \$350,000 or less, full payment of the fee is due from the contractor or subcontractor prior to commencement of work activity or as agreed to in a Compliance Plan entered into with the Office. For contracts totaling more than \$350,000, no less than 1/2 of the fee must be paid prior to the commencement of the work activity. Work order changes that increase or decrease the value of a contract shall be reported to the Office and the Office will adjust the fee.

(c) Handling fees. Fees under this section that are paid by installment (more than one payment) will incur a reasonable handling fee for each such transaction. The handling fee is non-negotiable.

(d) Rebates. At the discretion of the TERO Director, up to a full rebate of the TERO fee may be given to employers who hire 100% Indian crews.

(e) Revolving Fund. All funds received from TERO fee payments shall go into a revolving fund to be used by the TERO Office to pay for the implementation of this Ordinance.

(f) Sanctions for Failure to Comply. An employer or contractor who fails to pay the required fee shall be subject to the sanctions under this Title.

§9-1-20 Reports and Inspections

All employers, contractors, and subcontractors engaged in any business activity on the Reservation shall submit such reports to the Director or other staff of the Office as requested. The Director or Office staff is authorized to make on-site inspections of employers, contractors and subcontractors during regular business hours in order to monitor compliance with this Title, and may interview any employee on-site so long as such interviews do not interfere with the operations of the business and concern compliance with this Title.

§9-1-21 Compliance Plans and Agreements

Contractors and subcontractors shall enter into written compliance plans and agreements with the Office to ensure compliance with the requirements of this Title.

CHAPTER 9-2 EMPLOYMENT PREFERENCE PROVISIONS**§9-2-1 Employment Preference Requirements**

(a) General Requirement. It shall be a violation of this Title for an employer to fail to hire a member of the Nez Perce Tribe or other Native American residing within or near the Nez Perce Reservation if such individual meets the minimum qualifications of the job.

(b) Preference. Members of the Nez Perce Tribe, who meet the minimum qualifications for a position, shall be hired in preference to any non-members. If no member of

the Nez Perce Tribe who meets the minimum qualifications for a position applies for the position, other Native Americans who meet the minimum qualifications for the position shall be hired in preference to any non-Indians.

(c) Exemptions. It shall not be a violation of this Title for an employer to hire non-members or non-Indians for positions to be held by key employees or core crew or to hire non-members or non-Indians for positions when the Office has granted the employer a waiver on a form approved by the Office.

§9-2-2 Job Qualification Review by the Tribal Employment Rights Office; Burden on Employer to Justify Job Criteria that Serve as Barriers to the Employment of Indians

Prior to posting, announcing, or advertising to fill a position, every employer shall submit a position description with listed minimum job qualifications to the Office for review and approval. Upon submission, the Office shall complete its review, in consultation with the employer, within five (5) business days of receipt. Should the Office disagree with the employers list of minimum qualifications for the position, the Office and the employer shall endeavor to resolve the disagreement.

Should the employer refuse to change the listed minimum requirements for the position and should a listed criterion for the job serve as a barrier to the employment of a member of the Nez Perce Tribe or other Native American, the employer may be subject to liability and sanctions under this Title if the employer cannot prove, by a preponderance of the evidence, that such a criterion is required by business necessity.

§9-2-3 Hiring Hall

(a) General Requirements.

The Office shall maintain a hiring hall, consisting of a data base of all known members of the Nez Perce Tribe and other Native Americans residing within or near the Reservation, who wish to be considered for employment positions within the Reservation. The Office shall use reasonable means to identify such individuals, their job qualifications, and contact information and shall keep such information up-to-date.

Employers may not hire non-Indians (other than key employees or core crew) for any positions without first exhausting the hiring hall maintained by the Office. To exhaust the hiring hall, the employer shall allow the Office a reasonable time to locate Indians with the minimum qualifications so that they may apply for the position.

For the purposes of this section, a reasonable time means three (3) business days for construction jobs and five (5) business days for other jobs, provided however, that the Office may shorten these times upon finding that they may impose an undue burden upon the employer.

(b) Consequences of Failure to Exhaust Hiring Hall.

The Nez Perce Tribe supports tribal members in taking independent initiative to attain employment without over-dependence upon the Office. The Office, however, shall have the authority to remove any individual from a job if: (1) such individual is not a member of the Nez Perce Tribe and a member of the Nez Perce Tribe with the minimum qualifications for the job is

available for the position through the hiring hall or (2) such individual is not an enrolled member or any Indian tribe and a Nez Perce tribal or other Native American with the minimum qualifications for the job is available for the position through the hiring hall. The Office has authority to require every Native American employed within the reservation to file a skills bank application with the office and to provide proof of enrollment in an Indian tribe.

§9-2-4 Layoffs

In all layoffs or reductions in force, employers shall preserve the employment of members of the Nez Perce Tribe (as first priority) and members of other Indian tribes (as second priority) over the employment of non-Indians so long as the individual Nez Perce tribal member or Indian in question holds the minimum qualifications for the position at issue. Employers shall transfer members of the Nez Perce Tribe (as first priority) and members of other Indian tribes (as second priority) to positions that are not being eliminated in a reduction in force if such positions are held by non-Indians and the individual Nez Perce tribal member or Indian in question holds the minimum qualifications for the position at issue.

§9-2-5 Promotions

Employers shall give members of the Nez Perce Tribe (as first priority) and other Native Americans (as second priority) preferential consideration for all promotion opportunities and shall encourage Indians to seek such opportunities.

§9-2-6 Training, Counseling and Support

All employers, as requested by the Office, shall participate in training programs to assist Indians to become qualified in the various job classifications used by the employer. Employers shall cooperate with the Office in providing or accommodating the use of employment counseling or employment support provided by the Nez Perce Tribal government to assist Indians in attaining and retaining employment so long as such cooperation does not interfere with the employers' reasonable job requirements.

§9-2-7 Investigations and Complaint Procedures (Employers Other than Tribal Government and Tribal Enterprises)

(a) Application. The section applies to employers other than tribal enterprises and tribal government.

(b) Investigations and Informal Resolutions. The Director shall conduct an investigation of an employer if the Director has reason to believe that the employer has failed to comply with any of the requirements of this Title, the Commission's regulations, or any compliance plan negotiated with the TERO Office; or receives a written complaint from an individual alleging that the employer has violated this Title or said regulations. The investigation may include interviewing witnesses or collecting documents in such manner as the Director sees fit.

The Director shall inform the employer of any charge of violations of this Title or the Commission's regulations and seek to resolve the matter by informal resolution.

(c) Formal Complaints to Commission. Should the Director fail to informally resolve a dispute concerning an employer's compliance with this Title or the Commission's regulations,

the Director may file a written complaint with the Commission, setting forth the alleged violations of the employer with sufficient specificity to allow the employer to respond. If the Director has proceeded upon a complaint by an individual and decides not to proceed further, the individual may file a written complaint with the Commission.

(d) **Commission Hearings.** Upon the filing of a written complaint by the Director or an individual, the Commission shall schedule a hearing with notice to the employer and all interested persons, including any individuals whose jobs may be affected by the outcome of the Commission's proceedings on the Complaint. Unless otherwise provided herein, hearings shall be conducted in compliance with Chapter 2-5. The Commission shall first hear from the Director or the individual proceeding with the Complaint and any witnesses the Director or the individual may choose to present with respect to the Complaint. The Commission shall afford the employer and such interested persons an opportunity to be heard and may ask the parties to submit proposed findings of fact and conclusions of law.

(e) **Written Decisions.** After hearing, the Commission shall issue to the parties a written decision with findings of fact and conclusions of law with respect to the allegations. The Commission may deny or dismiss the complaint, but upon finding a violation of this Title or of the Commission's regulations, the Commission may impose sanctions upon the employer, including:

- (1) Monetary penalties, not to exceed \$500 per violation;
- (2) Suspension of the employer's continued operation until corrective action is taken or a plan for corrective action is developed;
- (3) Termination of the employer's operation;
- (4) Prohibition of the employer from engaging in any future operations on the Reservation.
- (5) A requirement that the employer remove certain workers and/or hire certain workers;
- (6) An award of back pay, employment, promotion, training and/or other relief to Indians who were harmed by the employer's non-compliance;
- (7) A requirement that the employer make such changes in its procedures or policies as is necessary to comply with this Title and the regulations of the Commission.

(f) **Judicial Review.** Any aggrieved person, including a complaining individual or the employer, shall have the right to seek judicial review of any decision of the Commission to the Tribal Court. Unless otherwise provided herein, such judicial review shall proceed in accordance with Chapter 2-5. The Tribal Court shall give deference to the Commission's findings of facts. The Tribal Court may affirm the decision, or it may reverse, vacate, or modify the Commission's decision if the Court determines that the decision involved an abuse of discretion, was unsupported by substantial evidence, was beyond the authority of the Commission, or was otherwise not in accordance with the laws of the Nez Perce Tribe.

(g) **Unions.** Unions may be subject to investigation and complaint procedures under

this section to the same extent as employers covered herein.

§9-2-8 Tribal Preference in Hiring for Tribal Government and Tribal Enterprises
(NPTEC authorized addition of section 6/13/06)

Tribal preference in hiring for tribal government and for tribal enterprises will be applied pursuant to the respective Human Resource Manuals for each entity.

CHAPTER 9-3 CONTRACTING PREFERENCE PROVISIONS

§9-3-1 Preference Requirements for Contracting Entities

(a) General Requirement and Burden Upon Contracting Entity. It shall be a violation of this Title for a contracting entity to award a contract or a subcontract to a non-Indian business unless the contracting entity can demonstrate that for each contract or subcontract it proposes to award to a non-Indian business there is no certified Indian business that is technically qualified and available to perform the work at a reasonable price.

(b) Showing Required for Issuance of Contract or Subcontract to Non-Indian Business. To make such a demonstration, the contracting entity must show, at a minimum that it notified all certified Indian businesses (listed in the register maintained by the Office as performing work of the kind sought to be contracted for by the contracting entity) via certified mail, with sufficient time and sufficient information to make a reasonable bid, and subsequently made reasonable efforts to contact those businesses and that:

- (1) There was no Certified Indian Business performing work of the kind sought by the contracting entity; or
- (2) The Certified Indian Businesses that were available were rejected because they lacked the necessary technical qualifications; or
- (3) Those Certified Indian Businesses that were technically qualified were unreasonable as to price.
- (4) No Certified Indian Businesses were interested in or responded to the solicitation.

(c) Plan Compliance. No contracting entity shall deviate from its written plan in a manner that will diminish the percentage of contracting or subcontracting of certified Indian businesses without obtaining the prior written approval of the Director.

(d) Director Access to Information. Upon demand, any contracting entity shall allow the Director to inspect its records, including pricing and bidding information to allow the Director to confirm that

- (1) the written plan is complied with and
- (2) no contracting entity has engaged in bid shopping.

§9-3-2 Contracting Procedures and Oversight

(a) Contracting entities shall give preference to certified Indian businesses in the award of all contracts and subcontracts.

(b) Contracting entities shall confer with the Office prior to commencing any negotiation of contracts or subcontracts for work within the Reservation and

- (1) Review, in consultation with the Office, the register of certified Indian businesses and
- (2) Issue notifications of contracting or subcontracting opportunities to certified Indian businesses on a form provided by the Office.

(c) A contracting entity may select its contractors in any manner or procedure it chooses, provided that it must consult with the Office and restrict bidding as follows:

- (1) if more than one technically qualified certified Indian business is available to bid, the contracting entity must accept bids from those business, and if a reasonable price cannot be arrived at, the contracting entity may then solicit bids in the ordinary course and
- (2) if there is only one technically qualified certified Indian business available to bid, the contracting entity must, unless otherwise prohibited by federal law, negotiate (in the presence of the Director) with that firm to see if a reasonable bid can be arrived at, and if a reasonable price cannot be arrived at, the contracting entity may solicit bids in the ordinary course.

(d) The contracting entity shall have the sole discretion to determine whether a firm meets the necessary technical qualifications, provided however, that in every instance in which it rejects a certified Indian business as not technically qualified, it must provide the rejected firm with a written explanation for the rejection. The contracting entity shall also have sole discretion to determine what constitutes a reasonable price, provided that it may not reject a certified Indian business on the basis of an unreasonable price and subsequently contract with a non-Indian business at the same or at a higher price.

(e) It shall be unlawful for any contractor or bidder to engage in bid shopping, and any contractor found to have engaged in bid shopping shall be prohibited from engaging in work on the Reservation or, if engaged in work, shall be liable for up to treble damages for any losses suffered by a certified Indian business as a result of the contractors bid shopping practices.

§9-3-3 Investigations and Complaint Procedures

(a) Investigations and Informal Resolutions. The Director shall conduct an investigation of a contracting entity if the Director has reason to believe that it has failed to comply with any of the requirements of this Title or the Commission's regulations or receives a written complaint from a certified Indian business alleging that the contracting entity has violated this Title or said regulations. The investigation may include interviewing witnesses or collecting documents in such manner as the Director sees fit.

The Director shall inform the contracting entity of any charge of violations of this Title or the Commission's regulations and seek to resolve the matter by informal resolution.

(b) Formal Complaints to Commission. Should the Director fail to informally resolve a dispute concerning a contracting entity's compliance with this Title or the Commission's regulations, the Director may file a written complaint with the Commission, setting forth the

alleged violations of the contracting entity with sufficient specificity to allow the employer to respond. If the Director has proceeded upon a complaint by a certified Indian business and decides not to proceed further, the certified Indian business may file a written complaint with the Commission.

(c) **Commission Hearings.** Upon the filing of a written complaint by the Director or a certified Indian business, the Commission shall schedule a hearing with notice to the contracting entity and all interested parties, including other contractors or subcontractors that may be affected by the outcome of the Commission's proceedings on the Complaint. Unless otherwise provided herein, hearings shall be conducted in compliance with Chapter 2-5. The Commission shall first hear from the Director or the certified Indian business making the Complaint and any witnesses the Director, or the certified Indian business may choose to present with respect to the Complaint. The Commission shall afford the contracting entity and such interested parties an opportunity to be heard and may ask the parties to submit proposed findings of fact and conclusions of law.

(d) **Written Decisions.** After hearing, the Commission shall issue to the parties a written decision with findings of fact and conclusions of law with respect to the allegations. The Commission may deny or dismiss the complaint, but upon finding a violation of this Title or of the Commission's regulations, the Commission may impose sanctions upon the employer, including:

- (1) A civil monetary sanction not to exceed \$500.00 per violation. Each day a party is found to be out of compliance with this Title may be considered as a separate violation.
- (2) Suspension or termination of a contracting entity's authorization to engage in business activity on the Reservation; Provided that, the contracting entity shall be given a reasonable time to remove its equipment and other property it may have on the Reservation and to arrange with another firm for assumption of any contractual obligation it has.
- (3) Prohibit the contracting entity from engaging in future business activity on the Reservation for a specified period or permanently.
- (4) Provide monetary or other compensatory relief to the Tribe or certified Indian business or other entity which was harmed by the contracting entity's noncompliance with this Title.

(e) **Judicial Review.** The Director, the contracting entity, or other party shall have the right to seek judicial review of any decision of the Commission to the Tribal Court. Unless otherwise provided herein, such judicial review shall proceed in accordance with Chapter 2-5. The Tribal Court shall give deference to the Commission's findings of facts. The Tribal Court may affirm the decision, or it may reverse, vacate, or modify the Commission's decision if the Court determines that the decision involved an abuse of discretion, was unsupported by substantial evidence, was beyond the authority of the Commission, or was otherwise not in accordance with the law of the Nez Perce Tribe.

(f) **Exemption.** The Nez Perce Tribe and tribal enterprises shall be exempt from investigations and complaint procedures under this section.

**CHAPTER 9-4 CERTIFICATION PROCEDURES FOR CERTIFIED
INDIAN BUSINESSES**

§9-4-1 Criteria for Certification

A business may be certified as a certified Indian business by satisfying the criteria set forth in this section.

(a) **Ownership.** The firm must be 51% or more Indian-owned. The applicant must demonstrate the following:

- (1) **Formal Ownership.** That an Indian or Indians own(s) 51% or more of the partnership, corporation, or other arrangement for which the application is being submitted. Such ownership must be embodied in the firm's organic documents, such as its stock ownership or partnership agreement. Ownership includes (i) financial ownership i.e., the Indian(s) own(s) 51% or more of the firm's assets upon dissolution, and will receive 51% or more of the profits; and (ii) control i.e., the Indian(s)' 51% or more ownership provides him or her with a majority of voting rights or other decisional authority and that all decisions of the firm are to be made by a majority vote except where otherwise required by law.
- (2) **Value.** The Indian owner(s) provided real value for his or her 51% or more ownership by providing capital, equipment, real property, or similar assets commensurate with the value of his or her ownership share. It will not be considered "real value" if the Indian(s) purchased his or her ownership share, directly or indirectly, through a promissory note, the ultimate creditor of which is the non-Indian owner of the firm or an immediate relation thereof, of any similar arrangement, unless a convincing showing can be made that the Indian owner(s) brought such special skills, marketing connections, or similar benefits to the firm that there is a good reason to believe the arrangement would have been entered into even if there were not an Indian preference program in existence.

Where the Indian participant can demonstrate that he or she could not pay good value for his or her 51% or more Indian ownership because the normal capital sources were closed to him or her because he or she is an Indian, that person may satisfy this requirement by demonstrating further that he or she expended his or her capital-raising capability as far as possible, such that the Indian participant clearly is at risk in the business in relationship to his or her means.

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

(b) **Management Control.** The firm must be under significant Indian management

and control. The firm must be able to demonstrate that:

- (1) Unitary firms (Non-joint Ventures). One or more of the Indian owners must be substantially involved, as a senior level official, in the day-to-day management of the firm as his or her primary employment activity. The Indian owner does not have to be Chief Executive Officer. However, he or she must, through prior experience or training, have substantial occupational ties to the area of business in which the firm is engaged such that he or she: (i) is qualified to serve in the senior level position; and (ii) is sufficiently knowledgeable about the firms activities to be accountable to the tribe for the firms activities.

This provision may be waived when (i) the firm is 100% Indian owned and the Chief Executive Officer is the spouse and/or parent of the owner(s) the family lives on or near the Reservation, and the majority of employees are Indian: or (ii) the firm is modeled on a publicly-held corporation such that it is owned, the Chief Executive Officer and the highest salaried employee in the firm is/are Indian and a majority of the employees are Indian.

- (2) Joint Ventures. 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 business when no certified Indian business is available.

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

- (1) History of the firm. Whether the history of the firm provides reason to believe it was established primarily to take advantage of this Title, and in particular whether the firm, or key factors in the firm originally were associated with a non-Indian business that gained little business value in terms of capital, expertise, equipment, etc., by adding ownership or by merging with a Certified Indian business.
- (2) Employees:
 - (A) Whether key non-Indian employees of the applicant are former employees of a non- Indian business with which the certified Indian business is or has been affiliated, through a joint venture or other arrangement, such that there is reason to believe the non-Indian business is controlling the applicant.
 - (B) 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.
 - (C) Relative Experience and Resources

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

§9-4-2 Certification Procedures (4/8/08)

(a) Application for Certification. A firm seeking certification as a certified Indian business shall submit a completed application to the TERO Office on a form provided by the Office. Office staff shall be available to assist a firm in filling out the application.

(b) Director Assessment and Recommendation. Utilizing the criteria set forth in §9-4-1, the Director shall provide a written analysis and recommendation to the Tribal Employment Rights Commission (TERC). The Director shall provide the analysis and recommendation within 21 days of receiving a complete application and shall have discretion to request additional information from the applicant. The Director's analysis and recommendation shall be made available to the applicant, and TERC, but shall otherwise be kept confidential.

(c) Commission Disposition. The Commission shall review the Director's analysis and recommendation and allow the applicant to submit additional information or explanation with respect to the governing criteria for certification. The Commission may grant or deny the certification or request further information prior to making a disposition.

(d) Commission Re-Hearing of Denial. Any application for certification that is denied by the TERC may be re-heard by TERC at the applicant's request. Upon such request in writing, the TERC shall direct the TERO Director and Applicant to submit any new information and shall conduct a re-hearing.

(e) Judicial Review. The Commission's decision under subsection (d) shall be considered final agency action, and subject to review by the Tribal Court by an aggrieved person pursuant to Chapter 2-5.

§9-4-3 Certification Grades

(a) Probationary Certification. An applicant granted certification shall be issued a one year probationary certificate. During that period the Director 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 firm shall provide the Director information and documents upon request.

(b) Final Certification. At the end of the probationary period the Director shall either:

- (1) Grant full certification
- (2) Continue the probationary period for up to six (6) months;
- (3) Deny certification

§9-4-4 Withdrawal of Certification

(a) Director Decision. The Director may withdraw or suspend the certification of any firm if, upon investigation, the Director has probable cause to believe that the criteria set forth in section §9-1-26 no longer are being met by a firm. The Director shall provide the firm with a written notification of any such withdraw, setting forth the facts and reasons for the withdrawal.

(b) Commission Review. Any firm subject to a withdrawal of certification by the Director may seek review of the Director's decision by the Commission. The Commission shall review the Director's decision and allow the firm to submit additional information or explanation with respect to the governing criteria for certification. The Commission may affirm the decision of the Director, reverse the Director's decision, or vacate the Director's decision and order further investigation, or issue other orders as it may deem appropriate, including suspension of the certificate for up to one year, putting the firm on probation, or ordering that corrective action be taken within a fixed period.

(c) Judicial Review. The Commission's decision under subsection (b) shall be considered final agency action, and subject to review by the Tribal Court by an aggrieved person pursuant to Chapter 2-5.

(d) Consequences of Certification Withdrawal. A firm that has had its certification withdrawn may not reapply for a period of one year.

§9-4-5 Annual and Other Reports

Each certified Indian business 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 Indian business, on the anniversary of its receipt of permanent certification, shall update the information provided to the Office. Failure to provide such information shall constitute ground for withdrawal of certification.

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**TITLE 9
INDIAN PREFERENCE IN EMPLOYMENT AND CONTRACTING**

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ADMINISTRATION (TOSHA)**

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CHAPTER 9-5
TRIBAL OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION (TOSHA)
(Chapter adopted by NPTEC 4/8/14)

§9-5-1 Purpose and Definitions

(a) The purpose of Chapter 9-5 is to assure as far as possible safe and healthful working conditions for every working person on the Nez Perce Reservation, to preserve human resources and reduce lost production, wage loss, medical expenses and human suffering that is created by occupational injury and disease. To accomplish this purpose the TOSHA was enacted to:

- (1) encourage employers and employees to reduce the number of occupational safety and health hazards;
- (2) authorize the establishment of occupational and safety standards for all employments;
- (3) provide a program under the TOSHA Compliance and Safety Inspection Office to enforce all laws, regulations and standards adopted for the protection of life, safety and health of employees, and in doing so provide for inspections and enforcement actions upon places of employment that the TOSHA Office reasonably believes to be unsafe; and
- (4) establish appropriate reporting procedures, and
- (5) provide for training and education of employers, contractors and employees to assist in preventing occupational injury and disease.

Given the importance of worker safety in the work place, it is the purpose of this part to provide a means for the adequate administration of working conditions, safety and health matters, complaints, investigations, enforcement, settlement reconciliation and appeals.

(b) As used in this part:

- (1) "Owner" means every person having ownership, control or custody of any place of employment or of the construction, repair or maintenance of any place of employment;
- (2) "Place of employment" includes every place, whether fixed or movable or moving, whether indoors or out or underground, and the premises and structures appurtenant thereto, where either temporarily or permanently an employee works or is intended to work; and every place where there is carried on any process, operation or activity related, either directly or indirectly, to an employer's industry, trade, business or occupation, including labor site, wherever located, provided by an employer for employees or by another person engaged in providing living quarters or shelters for employees;
- (3) "Employer" is defined at § 9-1-5(1).

§9-5-2 Scope

The Nez Perce Tribe has the authority to apply this Part to every contractor and employer (hereinafter collectively referred to as "employer") within its jurisdiction. The TERO office shall apply this Chapter to construction and forestry-related contractors, and, with the permission of NPTEC, TERO may apply this Chapter to other employers and contractors within the jurisdiction of the Nez Perce Tribe. This Part shall not apply to any of the Nez Perce Tribal entities, with the exception of the Nez Perce Construction Management Group and any Tribal or Tribal Enterprise Executive Director when the Executive Director is responsible for the management of a construction or remodeling project costing more than fifteen thousand dollars (\$15,000.00).

§9-5-3 Employers to Provide Safe Workplace

(a) Every employer shall furnish employment and a place of employment which are safe and healthful for employees therein, and shall furnish and use such devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably necessary to render such employment and place of employment safe and healthful, and shall do every other thing reasonably necessary to protect the life, safety and health of such employees.

(b) No employer or owner shall construct or cause to be constructed or maintained any place of employment that is unsafe or detrimental to health.

(c) No person shall remove, displace, damage, destroy or carry off any safety device or safeguard furnished, except for repair or replacement, and provide for use in any employment of place of employment, or interfere in any way with the use thereof by any other person, or interfere with the use of any method or process adopted for the protection of any employee in such employment or place of employment.

§9-5-4 Duty to Comply

Every employer, owner, employee and other person conducting work within the jurisdiction of the Nez Perce Tribe Reservation and subject to this Chapter shall obey and comply with every requirement of every order, decision, direction, standard, rule or regulation made or prescribed by the TOSHA Office relating to or affecting safety and health in employment or place of employment, and shall do everything necessary or proper in order to secure compliance with and observance of such order, decision, direction, standard, rule or regulation.

§9-5-5 Jurisdiction of TOSHA Office

(a) The TOSHA Safety Inspection Officer is vested with full power and jurisdiction over, and shall have such supervision of, every employment and place of employment on the Nez Perce Tribe Reservation as provided in this Chapter and as may be necessary to enforce and administer all laws, regulations, rules, standards and order requiring such employment and place of employment to be safe and healthful. The TOSHA shall not apply to those employees and employers exempted in the Nez Perce Tribe Law & Order Code.

(b) The TERO Director, as supervisor of the TOSHA Safety Inspection Officer, may assist and assume the duties of the TOSHA Officer in the event that the position is vacant, the

Officer is absent, or a situation exists that requires assistance from the TERO Director.

§9-5-6 Federal Standards as Guidance

(a) The TOSHA Officer may adopt by reference and use certain federal standards as guidance to assist it in fulfilling the duties and responsibilities and implementing the intent of this Part to protect safety and health in employment.

(b) The following federal standards are adopted by reference for use and guidance by the TOSHA Office as minimum requirements, provided however, that nothing in this Part shall be construed as providing any jurisdiction over these matters by the United States Department of Labor, and the standards are as follows:

- (1) 29 C.F.R. Part 1910;
- (2) 29 C.F.R. Part 1926 Construction Industry;
- (3) 29 C.F.R. Part 1928 Agricultural;
- (4) Federal Safety Plan

§9-5-7 Safety Plans

(a) All employers subject to this Chapter engaged in construction activities shall have a safety plan in place before construction activities begin, are responsible for assuring that its employees comply with its provisions. Supervisors and employees must be aware of their responsibilities under the applicable safety plans. This may be accomplished by distributing the safety plan to supervisors and employees and/or holding safety meetings that address the responsibilities of each supervisor and employee.

(b) The TOSHA Officer shall notify all employers actively engaged in construction activities that they are required to develop Safety Plans for each construction site consistent with the Tribal safety standards.

(c) Safety Plans must be submitted to the TOSHA Officer prior to commencement of construction activities and no later than ten (10) business days of issuance of a work permit. A copy of the Safety Plan will be maintained by the TOSHA Officer.

§9-5-8 Citation and Order to Correct Unsafe Conditions

(a) Under the Nez Perce Tribal Law & Order Code the TOSHA Officer is responsible for ensuring compliance with applicable Tribal and federal laws, codes and regulations and protect the safety of the workplace, and exercise authority necessary to perform the duties assigned in the Nez Perce Tribal Law & Order Code. The Officer shall investigate and issue necessary directives and orders to enforce the Nez Perce Tribal Law & Order Code.

(b) In addition to the complaints and enforcement alternatives in the Nez Perce Tribal Law & Order Code, whenever the TOSHA Officer has reason to believe, after an inspection or investigation, that any employer or place of employment is unsafe or detrimental to health or that the practices, means, methods, operations or processes employed or used in connection therewith are unsafe or detrimental to health, or do not afford adequate protection to life, safety and health of employee, the TOSHA Officer shall issue such citation and order as may be necessary to

render such employment or place of employment safe and protect the life, safety and health of employees therein. The TOSHA Officer may direct that such additions, repairs, improvements or changes be made, and such devices and safeguards be furnished, provided and used, as are reasonably required to render such employment or place of employment safe and healthful, in the manner and within the time specified in the order.

§9-5-9 Rulemaking and Enforcement Authority

The TOSHA Officer may, by general or special orders, or by regulations, rules or otherwise:

(a) Declare and prescribe what devices, safeguards, or other means of protection and what methods, processes, or work practices will be adapted to render every employment and place of employment safe and healthful.

(b) Fix reasonable standards and prescribe and enforce reasonable orders for the adoption, installation, use and maintenance of devices, safeguards and other means of protection, and other methods, processes and work practices, including, but not limited to, work practices qualifications for equipment, materials and activities requiring special competence, to be as nearly uniform as possible, as may be necessary to carry out all laws and regulations relative to the protection of the life, safety and health of employees.

(c) Fix and order reasonable standards for the construction, repair and maintenance of places of employment and equipment that will render them safe and healthful.

(d) Require the performance of any other act that the protection of the life, safety and health of employees in employments and places of employment may demand.

§9-5-10 Notice of Violation to Employer, Complaints to TOSHA Officer, Protection of Complaining Employee

(a) Every employee of an employer subject to this Chapter should notify the employer of any violation of law, regulation or standard relating to safety and health in the place of employment when the violation comes to the attention of the employee.

(b) However, any employee of an employer subject to this Chapter may notice or file a complaint with the TOSHA Office of any violation of law, regulation or standard relating to safety and health in the place of employment, whether or not the employee also notifies the employer.

(c) Upon receiving any employee complaint in writing, the TOSHA Officer shall make inquiries, inspection and investigations that the Officer considers reasonable and appropriate. When an employee has complained in writing of an alleged violation and no resulting citation is issued to the employer by the TOSHA Officer, the Officer shall furnish to the employee a statement of reasons for the decision.

(d) The TOSHA Officer shall provide a copy of the notice or complaint to the employer no later than the time of inspection, provided that the TOSHA Officer shall keep confidential the identity of any employee who requests protection in writing. When a request has been made neither the written complaint from the employee or any memorandum or documents containing the identity of a complainant may be disclosed. The TOSHA Officer shall establish procedures for keeping confidential the identity of the complaining employee.

(e) It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because the employee or prospective employee has:

- (1) Opposed any practice forbidden by law, regulations or standards; or
- (2) Made any complaint or instituted any proceeding under the Nez Perce Tribal Law & Order Code, its regulations and standards or any law providing for the safety and health of employees, or has testified or is about to testify in any such proceeding.

§9-5-11 Inspection of Places of Employment; Denial of Access, Warrants

(a) In order to carry out the purposes of the Worker Protection Ordinance, its regulations and standards or other laws enacted for the protection of health and safety of employees, the TOSHA Officer, upon appropriate credentials to the owner, employer or agent in charge, is authorized:

- (1) To enter without delay and at reasonable times any place of employment subject to the provisions of this Chapter; and
- (2) To inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place or employment and all related conditions, structures, machines, devices, equipment and materials therein, and to question privately the owner, employer, agents or employees.

(b) No person shall give an owner, employer, agent or employee advance notice of any inspection to be conducted under the Nez Perce Tribal Law & Order Code of any place of employment without authority from the TOSHA Officer.

(c) Except in the case of any emergency, or of a place of employment subject to the provisions of this Chapter and open to the public, if the TOSHA Officer is denied access to any place of employment for the purpose of an inspection or investigation, such inspection or investigation shall not be conducted without an inspection warrant or without such other authority as a court may grant in an appropriate civil proceeding.

(d) A representative of the employer and a representative authorized by the employee of the employer shall be given an opportunity to accompany the TOSHA Director during the inspection of any place of employment for the purpose of aiding such inspection. When there is no employee representative, the TOSHA Officer may consult with a reasonable number of employees concerning matters of safety and health in the work place.

§9-5-12 Citation for Safety or Health Standard Violation; Effect of Failure to Correct

(a) If the TOSHA Officer, TERO Director or authorized representative has reason to believe, after inspection or investigation of a place of employment, that an employer subject to the provisions of this Chapter has violated any Tribal or federal occupational safety or health law, regulation, standard or order, the Officer or TERO Director shall with reasonable promptness issue to such employer a citation, and notice of proposed civil penalty, if any, to be assessed under the this Chapter, and fix a reasonable time for correction of the alleged violation.

(b) Each citation and notice required under subsection (a) of this section shall be in writing, shall be mailed to or served upon the employer or registered agent of the employer, and shall contain:

- (1) The date and place of the alleged violations;
- (2) A plain statement of the facts upon which the citation is based;
- (3) A reference to the law, regulation, rule, standard or order relied upon;
- (4) The amount, if any, of the proposed civil penalty;
- (5) The time, if any, fixed for the correction of the alleged violation;
- (6) Notice of the employer's right to contest the citation, the proposed civil penalty and the period of time fixed for correction of the alleged violation;
- (7) Notice of any affected employer's right to contest the period of time for correction of the alleged violation; and
- (8) Notice of any affected employee's right to contest the period of time fixed for correction of the alleged violation.

(c) If the TOSHA Officer has reason to believe that an employer subject to the provisions of this Chapter has failed to correct a violation within the period of time fixed for correction, or within the time fixed in a subsequent order granting an extension of time to correct the violation, the Officer shall consider such failure as a separate and continuing violation and shall issue a citation and notice of proposed civil penalty, if any, to be assessed.

(d) Each citation and notice, or copies thereof, issued under the Nez Perce Tribal Law & Order Code shall be posted by the employer, immediately upon receipt in a conspicuous manner in a sufficient number of locations in the place or places of employment to reasonably inform employees of such citation and notice.

(e) No citation or notice of proposed civil penalty may be issued under this section after the expiration of 180 days following start of the inspection or investigation, but this shall not prevent the issuance, at any time, of an order to correct that violation or the issuance of a citation for a subsequent violation.

§9-5-13 Conciliation; Contesting Violations; Hearing

(a) Upon issuance of a citation, civil penalty or correction order, the employer and TOSHA Officer may attempt to achieve voluntary compliance and remedy the violation by settlement conference or conciliation. Mitigation may include, but is not limited to:

- (1) agreement to change its procedures;
- (2) where possible, reversing the action that is the subject of the complaint;
- (3) recommending disciplinary action against employees responsible for the causing the violation; or

- (4) correct safety or health hazard or violation.

Conciliation conferences shall be considered confidential, and the contents of these discussions shall not be used as evidence in any hearing unless the parties agree. If settlement is reached, the agreement shall be reduced to writing and signed by the parties. Any conciliation agreement may be made public if the parties agree.

(b) If the employer and TOSHA Officer cannot mitigate the violation, the TOSHA Officer shall issue a formal noncompliance order, which shall advise the employer or noncompliant entity of all rights to appeal the order. An employer may contest a citation, a proposed assessment of civil penalty and the period of time fixed for correction of a violation, or any of these, by filing with the TOSHA Office, within twenty (20) days after receipt of the noncompliance order, a written request for a hearing before the TERO Commission. Such a request need not be in any particular form, but shall specify the alleged violation that is contested and the grounds upon which the employer considers the citation or proposed penalty or correction period unjust or unlawful.

(c) An affected employee may contest the time fixed for correction of a violation by filing with the TOSHA Office, within twenty (20) days after the receipt by the employer of the citation, notice or offer which fixes such time for correction, a written request for a hearing before the TERO Commission. Such a request need not be in any particular form, but shall specify the violation in question and the grounds upon which the employee considers the correction period to be unreasonable.

(d) The hearing before the TERO Commission shall be set within ten (10) business days from the date of receipt of the request of a hearing and not later than thirty (30) calendar days after the date for compliance set forth in the citation notice, unless an expedited hearing is deemed necessary by the TERO Commission to avoid irreparable harm.

(e) If a request for hearing is not filed, the citation, penalty assessed and time fixed for correction of the violation shall be a final order of the TOSHA Office and shall not be subject to review by any agency or court, and such order shall be immediately enforceable.

(f) Where an employer contests, in good faith and not solely for delay or avoidance of penalties, the period of time fixed for correction of a non-serious violation, such period of time shall not run between the date the request for the hearing is filed and the date the order of the TOSHA office becomes final by operation of law or on appeal.

(g) Service. Service of any documents under this part shall be sufficient if accomplished by personal delivery or electronic mail with a return receipt to any Tribal entity or the complainant, and by regular mail to any non-Tribal entity or individuals.