

**SISSETON-WAHPETON OYATE
OF THE LAKE TRAVERSE RESERVATION
CHAPTER 59
TRIBAL EMPLOYMENT RIGHTS ORDINANCE**

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**TITLE 1
GENERAL PROVISIONS**

59-01-01 *Declaration of Policy.*

The Sisseton-Wahpeton Oyate of the Lake Traverse Reservation has a commitment to create employment, business, and training opportunities for members of the Tribe and for other Indians. The goal is to eliminate discrimination as an element of unemployment thereby helping to reduce the poverty and economic dependency of tribal members. To attain this goal the Tribal Council shall require as a matter of Tribal law that all covered employers provide a preference first to qualified Tribal members and then to other Indians in employment and contracting opportunities. A Tribal Employment Rights Commission and Director shall maintain and enforce this employment rights ordinance. It shall be the Commission's mission to enhance our Tribal members' lives and communities through Indian Preference to ensure economic development and self-sufficient opportunities are available through this Ordinance and the TERO Office.

59-01-02 *Legal Authority.*

The Sisseton-Wahpeton Oyate of the Lake Traverse Reservation possesses the inherent sovereign authority to enact this Tribal Employment Rights Ordinance for the benefit of its members and other Indians on the Lake Traverse Reservation. The Tribe possesses the inherent sovereign authority to condition a non-member's presence on Indian lands, including the power to remove the non-member. The Tribe also possesses the inherent sovereign authority to regulate the activities of non-members on Indian lands, to include non-Indian fee lands within the Reservation, (i) who enter consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements; or (ii) when a non-Indian's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.

There is also substantial recognition by the United States Government for Indian preference policies:

(A) Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, *et seq.*) generally prohibits discriminatory practices in several elements of employment based on race, color, religion, sex or national origin. Indian tribes such as the Tribe are entirely exempt from the provisions of Title VII. Additionally, businesses on or near the Reservation, whether owned by the Tribe, a Tribal member, an Indian, or non-Indian may lawfully give preferential treatment to Indians living on or near a reservation pursuant to a publicly announced employment practice.

(B) The Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, *et seq.*) provides that any contract, subcontract, grant, or subgrant authorized by Federal law to an Indian organization or for the benefit of Indians shall require to the greatest extent feasible that (i) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians, (ii) preference in the award of subcontracts and subgrants in connection with the

administration of a Federal contract or grant shall be given to Indian organizations and to Indian-owned economic enterprises, and (iii) all self-determination contracts or any portion of such contract shall be governed by the Tribe's employment or contract preference laws.

59-01-03 *Name and Short Title.*

This Ordinance shall be known and cited as the Tribal Employment Rights Ordinance of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation. The short title of this Ordinance may be referred to as TERO.

59-01-04 *Severability.*

Should any provision set forth in this Ordinance or application thereof to any person or circumstance be held invalid by the Tribal Court of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, this will not affect the full remainder of the provisions or the application of the provisions to another person or circumstance.

59-01-05 *Applicability.*

This Ordinance shall be applicable to all areas within the original exterior boundaries of the Lake Traverse Reservation that are subject to the jurisdiction of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation. This Ordinance shall be applicable to all "covered employers," as defined in TITLE 2 of this Ordinance, as to all employment and all contracts. This Ordinance applies to covered employers regardless of whether their headquarters or principal place of business is on or off the Reservation.

59-01-06 *Effective Date.*

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

TITLE 2 DEFINITIONS

59-02-01 **CERTIFIED COVERED EMPLOYER** - Means any commercial or other business in which (51%) ownership is held by an Indian or Indians, and where more than (51%) Indian or Indians exercise actual management and control, which percentages must first be certified by the TERO Director, as provided in TITLE 6.

59-02-02 **CHAIRPERSON** - Means the Chair of the Tribal Employment Rights Commission.

59-02-03 **COMMERCE** - Means and includes all trades, traffic, architects, distribution, communication, transportation, provisions of services, manufacturing, production, agricultural

production, building maintenance, construction, banking, mining, and energy resource production.

59-02-04 **COMMISSIONER** - Means a member of the Tribal Employment Rights Commission.

59-02-05 **CONFLICT OF INTEREST** - Means the existence of a relationship between a public official or fiduciary and a private interest or private party that may cause the public official to disregard her or his official duties or the relationship improperly influences the public official's decision-making.

59-02-06 **CORE CREWS** - Means a construction superintendent or construction foreman member of a contractor's or subcontractor's crew. All other permanent employees that are in a supervisory or other key position must first be certified as core crew positions by the Director when receiving a compliance plan.

59-02-07 **COVERED EMPLOYER** - Means any employer whose contract, subcontract, or grant is for \$1,000.00 or more or who engages in commerce and employs at least one employee on the Lake Traverse Reservation. A union is considered to be a covered employer or a part of a covered employer. The term covered employer shall include any wholly-owned government business or corporation, an agency, entity or political subdivision of the Tribal government, which includes, without limitation, the Dakota Nation Gaming Enterprise, Dakota Magic Casino, Dakota Sioux Casino, Dakota Connection Casino, the Sisseton-Wahpeton Community College, Tiospa Zina Tribal School, Enemy Swim Tribal School, the Sisseton-Wahpeton Housing Authority, and Dakota Western Corporation. A covered employer includes any independent contractors and subcontractors hired by the Tribe, a tribal program, the Tribe's agencies, entities, political subdivisions, and businesses. The term does not include the Tribal Government or any of its Tribal programs, which includes those programs operated directly by Tribal Council and not separately chartered, organized or incorporated. Evidence indicating that an organization is a tribal program, as opposed to an agency, entity or political subdivision of the Tribal government, is that its employees receive their paychecks directly from the Tribe. The Districts are not a covered employer. All covered employers must register with the TERO office.

59-02-08 **EMPLOYEE** - Means any person currently receiving wages or salary for work performed. The term excludes any person employed in the domestic service of any family or person at his/her home. The term also excludes any person whose employer is not deemed a "covered employer," as that term is defined in this Ordinance.

59-02-09 **GOODS** - Means any items of merchandise, supplies, products, raw materials, finished goods, fixtures, services and other movable things of value.

59-02-10 **INDIAN** - Means and includes any member of an Indian Tribe, Band, or other organized group or community, including any Alaska native village or unit defined or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*) and any other Indian persons who are recognized as eligible for the special programs and services provided by

the United States to Indians because of their status as Indians.

59-02-11 **JOINT VENTURE** - Means a joint venture between an Indian certified firm or entity with another entity or entities for special projects in which the Indian certified firm or entity is the managing partner or maintains a controlling interest. The TERO Director shall determine on a case-by-case basis if a joint venture qualifies under this Ordinance.

59-02-12 **LAKE TRAVERSE RESERVATION OR RESERVATION** - Means all land within the exterior boundaries of the Lake Traverse Reservation.

59-02-13 **NOTICE** - Means information concerning a fact that is expressly and actually given to the named party in a written document. For bidding and other public notices, notice may mean publication in the Sota Iya Ye Yapi.

59-02-14 **PERSON** - Means and includes both natural persons and artificial persons. Artificial persons include, but are not limited to, corporations, partnerships, joint ventures, sole proprietorships, associations, unions, trusts, trustees and agents.

59-02-15 **PROBABLE CAUSE** - Means a reasonable ground for belief in certain alleged facts which is more than mere suspicion.

59-02-16 **QUALIFIED** - Means the capability, competence and capacity of a person to perform the requirements and obligations of a job or project. The term qualified does not include a comparison among two or more persons seeking the desired employment position. Determining whether an Indian is qualified does not include comparing the Indian's capabilities and competence with those of the non-Indians. Qualified means a measurement of a person's ability to perform a job not a comparison among each person's abilities.

59-02-17 **REGISTERED COVERED EMPLOYER** - Means a covered employer who has complied with the requirement of registering with the TERO Office, as provided in Section 59-06-01.

59-02-18 **REOCCURRING VIOLATION** - Means a violation that the Commission may penalize on a cumulative daily basis if the covered employer receives written notice of a potential or alleged violation and does not take the steps required by the TERO office to minimize or cure the potential or alleged violation. If a covered employer does not receive written notice of a potential or alleged violation, the violation may still be deemed a reoccurring violation subject to a cumulative daily penalty if a reasonable person would have known that its conduct violated the Tribal Employment Rights Ordinance, the rules or regulations of the Commission, its compliance plan or a guideline issued by the Commission.

59-02-19 **TERO OR ORDINANCE** - Means the Tribal Employment Rights Ordinance.

59-02-20 **TRIBAL MEMBER** - Means any person who is an enrolled member of the

Sisseton-Wahpeton Oyate of the Lake Traverse Reservation as provided by the Tribe's Revised Constitution and Bylaws.

59-02-21 **TRIBAL COUNCIL** - Means the Tribal Council of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation.

**TITLE 3
SCOPE OF INDIAN PREFERENCE**

59-03-01 *Indian Preference*

Indian preference is a political preference granted to qualified enrolled members of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation and Indians who are enrolled members of other Indian tribes.

59-03-02 *Indian Preference In Employment.*

All covered employers for all employment occurring within the exterior boundaries of the Lake Traverse Reservation or on or near the Lake Traverse Reservation shall give preference to qualified Indians in all hiring, promotion, training, layoff, termination, and all other aspects of employment in the following preference order:

(A) All covered employers shall grant first preference to enrolled members of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation;

(B) All covered employers shall grant second preference to all local Indians regardless of tribal affiliation.

Employment discrimination or unequal treatment of tribal members or other Indian is prohibited. Equal treatment in employment includes, without limitation, wage, salary and benefits equality and any other employment action.

59-03-03 *Indian Preference In Contracting and Subcontracting*

All covered employers awarding contracts, subcontracts, grants, or subgrants for goods, services, labor and materials, or any other related purpose where the majority of the work on the contract will occur within the exterior boundaries of the Lake Traverse Reservation shall give preference to certified Indian entities. Indian preference in contracting shall be given the following specific priorities:

(A) All covered employers shall grant first preference to certified Indian-owned entities that are owned by members of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, whose principal place of business is located within the exterior boundaries of the Lake Traverse Reservation;

(B) All covered employers shall grant second preference to certified Indian-owned entities that are owned by members of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, without regard to location of their principal place of business;

(C) All covered employers shall grant third preference to certified Indian-owned entities regardless of tribal affiliation, whose principal place of business is located within the exterior boundaries of the Lake Traverse Reservation;

(D) All covered employers shall grant fourth preference to certified Indian-owned entities regardless of tribal affiliation, and without regard to the location of their principal place of business.

59-03-04 *Indian Preference In Purchasing Goods*

Covered employers, whether in the context of employment or contracting, shall provide Indian preference when purchasing goods, provided that the goods are equal to the quality of goods that the covered employer would normally purchase.

59-03-05 *Hiring and Promotion*

Covered employers shall comply with the Indian preference requirements established in this Ordinance in considering employees for all hiring and promotion opportunities. All hiring actions must be preceded by an advertisement in the Sota Iya Ye Yapi, a conspicuous notice at the covered employer's place of business, which must expressly refer to Indian preference, and contacting the TERO office to obtain information regarding potentially qualified tribal members or Indians seeking employment under Section 59-06-12. However, a certified covered employer is not required to place an advertisement in the Sota Iya Ye Yapi if the certified covered employer employs 10 or fewer employees and instead contacts the TERO office for a list of potential employees. All promotion actions must be preceded by a conspicuous notice at the covered employer's place of business, which must expressly refer to Indian preference, and contacting the TERO office to obtain information regarding potentially qualified tribal members eligible for such promotion. Covered employers shall encourage tribal members and Indians to seek employment opportunities. The covered employer must make sure that all non-Indian applicants and employees have an understanding of the legal requirement of Indian Preference imposed by this Ordinance.

Covered employers must report the results of all hiring and promotion actions to the TERO office and the Director shall maintain this information in the appropriate database. For all supervisory positions filled by anyone other than a tribal member or Indian, the covered employer shall file a report with the Director stating when the hiring or promotion opportunity was posted, which Tribal members and Indians, if any, applied for the job, the reasons why the Tribal member or Indian was not given the job, and what efforts were made to inform Tribal members and Indians about the opportunity.

59-03-06 *Lay-Offs and Terminations*

All non-Indian employees in the same job classification as a Tribal member or Indian must be subject to a lay-off, reduction in work force, or termination before such adverse action is taken against the Tribal member or Indian. Every lay-off, reduction in work force, or termination must be made in the following order:

1. Non-Indians first,
2. Indians who are not tribal members.
3. Tribal members last.

Further, if a covered employer lays off workers by crews or other groups, all qualified Tribal members or Indians shall be transferred to crews or other groups to be retained so long as non-Indians in the same job classification are employed.

59-03-07 *Bidding Procedure For Covered Employers*

Covered employers must seek competitive bidding on all contracts, subcontracts, purchase of goods, vendors, services, procurement, or grants in an amount of \$1,000.00 or more and provide Indian preference as required by this Ordinance. The covered employer shall publish a request for bids in the Sota Iya Ye Yapi and with the TERO Office. However, a certified covered employer is not required to place an advertisement in the Sota Iya Ye Yapi if the certified covered employer employs 10 or fewer employees and instead contacts the TERO office for a list of potential contractors and/or subcontractors. The request for bids must address in sufficient detail, the following contract-related information:

- (1) the name of the covered employer and the geographical location of the project;
- (2) the general terms and conditions required by the covered employer;
- (3) all special and extraordinary terms, conditions or circumstances that require extra cost, additional expertise or other special qualifications;
- (4) all applicable fees, taxes or licenses must be specified to ensure uniformity in responses;
- (5) delineate the responsibilities and duties retained by the covered employer publishing the request for bids;
- (6) detailed instructions for the organization and content of a responsive proposal;
- (7) the applicable timeline(s);
- (8) the date the bid proposals are due and where the bid proposals must be sent;
- (9) provide whether workers compensation insurance and/or liability insurance is required;
- (10) provide whether a bond, if any, is required;
- (11) registration with the TERO office is required;
- (12) that Indian preference must be provided for all subcontracts and employees as provided in the Tribal Employment Rights Ordinance; and
- (13) any other information relevant to the project.

The TERO Director shall establish and maintain a model request for bids that can be utilized by all covered employers.

59-03-08 *Providing Indian Preference When Reviewing Bids For A Contract or Subcontract*

A covered employer must adhere to the Indian preference requirements applicable to all contracts, as provided in Section 59-03-03. If a certified covered employer originally bids within 10% of the reasonable lowest bid, the certified covered employer shall be awarded the contract or subcontract and the amount of the contract or subcontract shall be the original bid submitted by the certified covered employer. (For example, if a non-certified covered employer submits a reasonable low bid of \$100,000.00 and a certified covered employer submits a reasonable bid of \$105,000.00, then the certified covered employer will receive the contract or subcontract at \$105,000.00). If two or more certified covered employers all submit reasonable low bids within 10% of the reasonable lowest bid, the certified covered employer who submitted the original, lowest bid shall be awarded the contract or subcontract. For a bid to be reasonable it must comply with all the general and specific conditions of the request for bids, as provided in Section 59-03-07. A bid that is consistent with an architecture and engineering estimate is evidence that the bid is a reasonable bid.

**TITLE 4
TRIBAL EMPLOYMENT RIGHTS COMMISSION**

59-04-01 *Creation and Delegation of Authority*

The Sisseton-Wahpeton Oyate of the Lake Traverse Reservation hereby creates and delegates authority to the Tribal Employment Rights Commission to carry out the policies and requirements established by this Ordinance for all employment and contracting within the Reservation.

59-04-02 *Appointment*

The TERO Commission shall consist of seven (7) tribal members appointed or elected by the seven Districts of the Tribe. The Districts shall also appoint or elect an alternative Commission member. A Commissioner shall not consider any matter involving a conflict of interest. The Chair of the Commission shall be the Tribal Council designated to sit on the Commission. The Commission members shall select a Vice-Chair, and Secretary among its members.

59-04-03 *Terms Of Office*

The terms of office for the Commission members shall be four (4) years, but there are no limitations on how many terms a Commission member may serve.

59-04-04 *Removal Of A Commissioner*

The District or Tribal Council may remove a Commissioner only for improper conduct or gross neglect, as defined in the Tribe's Bylaws, after notice and hearing by the District or Tribal Council. The Commission shall notify the District and Tribal Council of a Commissioner's possible improper conduct or gross neglect. Gross neglect includes a Commissioner's failure to attend either three consecutive District meetings or Commission meetings, excluding excused absences.

59-04-05 *Vacancy And Interim Appointment*

If a Commissioner dies, resigns, becomes incapacitated, or is removed from office, the vacancy shall be temporarily filled by the alternate Commissioner designated by the District. The alternate Commissioner shall serve until the vacancy is permanently filled by the District.

59-04-06 *Compensation*

Members of the Commission may receive a stipend, as the budget permits, and shall be reimbursed for any reasonable and documented expenses actually incurred in connection with his or her performance of duties and responsibilities. The Commission may establish a proposed budget delineating the Commission's compensation and training.

59-04-07 *Powers of the Commission.*

The TERO Commission is delegated the following authority, duties and responsibilities:

- (A) To hire, appoint, direct, suspend or remove all TERO office employees, including the Director.
- (B) The Commission possesses the authority to prevent any covered employer from engaging in employment, contracting or other conduct that violates this Ordinance.
- (C) To hold formal hearings, issue notice of the hearing, and call for the required witnesses and documents, according to the hearing procedures set forth in this Ordinance and the rules, regulations and/or guidelines promulgated by the TERO Commission. The Commission may appoint a hearing officer if it deems necessary in extremely complex hearings.
- (D) To impose any penalties and grant any relief as authorized by TITLE 9 of this Ordinance.
- (E) To require any covered employer to undertake necessary corrective actions to come into compliance with the requirements set forth in this Ordinance and the regulations and/or guidelines promulgated by the TERO Commission.

(F) To take legal action as necessary to enforce any part of this Ordinance.

(G) To work with federal agencies whose regulations provide for Indian Preference in employment contracting, and to coordinate the respective Indian Preference requirements and monitoring efforts to the greatest extent possible, and to recommend to the Tribal Council cooperative agreements for such purposes.

(H) To establish rules, regulations and guidelines deemed necessary to carry out the provisions in this Ordinance, including rules governing the activities and procedures of the TERO Commission.

59-04-08 *Confidentiality.*

All information, documentation, records, and other written materials pertaining to a covered employer maintained on file in the TERO office shall be kept confidential. TERO Commissioners, the TERO Director and all TERO staff shall comply with this confidentiality requirement. This confidential information shall include, without limitation, Indian preference certification applications, all financial records including accounts receivable and payable, tax records, corporate and other business organic documents, resumes, and financial documents. No person other than TERO Commissioners, the Director, and authorized TERO staff shall have access to this confidential information, except an authorized representative or agent of a covered employer who shall have the limited right to access all information pertaining to such covered employer for the limited purpose of viewing or photocopying such information at the TERO Office. No information shall be removed from the TERO Office by any covered employer or its agent/representative.

TITLE 5 TERO DIRECTOR

59-05-01 *TERO Director.*

The supervisory authority over TERO staff is delegated to the TERO Director. The Director shall report directly to the TERO Commission and Tribal Council. The Director shall possess the requisite education, training, management ability, and administrative ability to run the TERO program, as determined by the TERO Commission.

59-05-02 *Powers and Duties of the Director.*

In order to execute the Tribe's TERO Ordinance, the TERO Director shall have the following authority, duties and responsibilities:

(A) To prepare line item budgets for the operation of the TERO program.

(B) To supervise expenditures of the TERO program.

(C) To prosecute before the TERO Commission any claims of noncompliance with this Ordinance, a Compliance Plan, and the rules, regulations and/or guidelines promulgated by the TERO Commission.

(D) To develop and maintain a plan for distribution of this Ordinance, any supplementary ordinances, and the rules, regulations and/or guidelines, established by the TERO Commission, to all covered employers.

(E) To ensure compliance by covered employers with any reporting requirements as prescribed by this Ordinance, supplementary ordinances, a Compliance Plan, or rules, regulations and/or guidelines established by the TERO Commission.

(F) To negotiate with representatives of a covered employer to resolve any disputes, with the consent of all parties, regarding the requirements set forth in this Ordinance, the Compliance Plan, supplementary ordinances or rules, regulations and/or guidelines established by the TERO Commission.

(G) To inspect all information contained in books and records maintained by any covered employer relevant to ensure continued compliance with the requirements set forth in this Ordinance, a supplementary ordinance, a compliance plan, or rules, regulations, and/or guidelines established by the TERO Commission.

(H) To monitor Compliance Plans and adherence to the requirements set forth in this Ordinance, a supplementary ordinance or, rules, regulations and/or guidelines set by the TERO Commission.

(I) Conduct on-site inspections anytime during the actual operation of the business of any covered employer, and speak with any contractors, subcontractors, or on-site employees if such conversation does not unreasonably interfere with operation of the business.

(J) To review applications for Indian preference certification and qualifications, conduct all necessary or required investigations in relation to any applicant's certification and qualifications.

(K) Develop and maintain in an updated certification register setting forth the names and addresses of covered employers certified for Indian preference by the TERO Commission. The certification register shall also include any identification of the respective areas of work in which such businesses are considered qualified.

(L) To initiate proceedings for probation, suspension or revocation of an Indian Preference certification or qualifications of a business.

(M) To develop and maintain a plan for distribution of the certification register to all covered employers and to future covered employers.

(N) To secure additional funding from alternative sources (e.g., federal and/or state funding source, private and public agencies) if the Director obtains the consent of the TERO Commission.

(O) To establish and maintain a list of tribal members and Indians seeking employment. Assist covered employers to utilize such list when providing Indian preference to fill employment positions.

(P) To enforce the minimum numerical hiring goal and timetables for the number of qualified Indians a covered employer must have employed on its workforce, during any year, by skill area or job classification.

(Q) To prohibit covered employers from instituting or utilizing job qualification criteria, personnel requirements, or written or informal policies or practices that, in effect, serve as barriers to employment of Indians or contracting with certified Indian businesses, unless they can establish that business necessity requires such criteria, requirements, policies or practices.

(R) The TERO Director shall be responsible for the collection of all TERO fees in a timely manner, pursuant to this Ordinance and the rules and regulations that may be adopted by the Commission.

(S) To issue orders enjoining further performance, such as a cease and desist order, to preserve the status quo of potential TERO violations. The Commission must concur with the Director's order before the Director's order is valid and enforceable.

(T) The Director shall maintain a list of all covered employers registered with the TERO office.

(U) The Director shall maintain a database of information pertaining to all hiring and promotion actions and any information pertaining to the qualifications of a contractor or subcontractor, which can be utilized by covered employers when determining whether a contractor or subcontractor is qualified for a particular job.

TITLE 6 OBLIGATIONS OF COVERED EMPLOYERS

59-06-01 *Registering With The TERO Office And Compliance With Tribal Law.*

Covered employers shall register with the TERO Office by filling out the registration form prescribed by the Commission. Covered employers shall comply with applicable Tribal law, this Ordinance, the rules, regulations, guidelines, and orders of the Commission, and their Compliance Plan. Covered employers that violate this Ordinance, any rule, regulation, guideline, or order, or their Compliance Plan may be subject to penalties imposed by the Commission pursuant to TITLE 9.

59-06-02 *Compliance Plan Established Prior To Work.*

A covered employer who intends to do any business within the exterior boundaries of the Lake Traverse Reservation shall not commence the conduct of such business until the covered employer receives and signs a Compliance Plan approved by the Director. A covered employer shall meet with the TERO Director each time a contract is awarded for a pre-construction meeting, prior to the start of work, to discuss the Compliance Plan. At the initial pre-construction meeting, the covered employer shall also be given a copy of this Ordinance. The Compliance Plan shall be signed after consultation with the TERO Director and before commencement of the work contemplated by the covered employer. A covered employer who commences work before attending a pre-construction meeting with the Director to establish a compliance plan may be subject to penalties imposed by the Commission.

59-06-03 *Contents of Compliance Plan*

The contents of a compliance plan, at a minimum, shall include the following:

- (A) The duration of the Compliance Plan, shall not exceed the duration of a contract;
- (B) The applicable TERO fees;
- (C) Whether the reporting obligations of Section 59-06-05 shall be weekly or monthly;
- (D) The core crew shall be identified;
- (E) The covered employer must meet the 70% minimum numerical hiring goal, as defined in this Ordinance, unless the Director determines that special circumstances permit a permanent or temporary departure from the minimum numerical goal;
- (F) A precise list of Indian preference employees by craft, skill or trade expected to be employed;
- (G) A precise list of the total number of employees by craft, skill or trade;
- (H) The scope and duration of the covered employer's efforts to train and provide apprenticeship programs for tribal members;
- (I) TERO certification, if the covered employer desires to be treated as a business eligible for Indian preference, pursuant to Section 59-06-11;
- (J) The scope and duration of the covered employer's efforts to cure any real or perceived deficiencies in a tribal member's or Indian's job performance; and
- (K) An acknowledgment that the covered employer registered with the TERO Office pursuant to Section 59-06-01.

59-06-04 *Maintaining and Enforcing the Compliance Plan*

(A) The Director shall meet weekly or at least monthly with each covered employer to review the Compliance Plan. The Director may revise the Compliance Plan at any time when necessary to reflect changes in the number of qualified Indians available, changes in the covered employer's core crew, changes in the covered employer's number of employees, or changes in the contract requiring a higher or lower TERO fee. The Director or a Compliance officer must ensure the covered employer fulfills the requirements of the Compliance Plan. The Director must notify the covered employer of any revisions to the Compliance Plan.

(B) If a covered employer fails or refuses to comply with the Compliance Plan, such non-compliance shall be deemed a violation of this Ordinance and subject to penalties provided for in TITLE 9 of this Ordinance.

(C) In any hearing before the Commission where the issue is the covered employer's conduct under a Compliance Plan, the burden of proof shall be on the covered employer to demonstrate conformation to the Compliance Plan.

59-06-05 *Filing of Reports*

Covered Employers shall file continuous reports with the Director containing such information and documentation as the Director or Commission should request and/or file the requisite report forms furnished by the Director. The Director shall determine whether the reports should be provided weekly or monthly. The reports shall include, at a minimum, the following information:

- (A) Total number of employees by craft, skill or trade;
- (B) Total number of Indian employees by craft, skill or trade;
- (C) All employee actions taken during the week immediately preceding the report;
- (D) Weekly payroll records; and
- (E) Any other information specified by the Director and reasonably necessary in monitoring the covered employer's efforts to abide by the Ordinance, Compliance Plan, and the regulations, rules or guidelines of the Commission.

59-06-06 *On-Site Inspections*

The TERO Commission, the TERO Director, and authorized TERO employees shall have the right to conduct periodic on-site inspections of any covered employer at any time in order to monitor compliance by the covered employer with the requirements set forth by this Ordinance, the Compliance Plan, applicable Tribal law, any and all rules, regulations, guidelines, and/or Orders of the TERO Commission. During an on-site inspection TERO authorities shall have the right to speak with any covered employer, contractor, subcontractor, or employee, so long as the conversation does not substantially interfere with the operation of business. Additionally, TERO authorities shall have the right to inspect and photocopy any and all information, documentation, records, and other written materials that are not deemed by the TERO Commission to be confidential for valid business purposes. All such information inspected by TERO authorities shall remain confidential.

59-06-07 *Recognition Of Freedom Of Religion*

A covered employer shall respect and make reasonable accommodations for the religious beliefs, traditions, and practices of Indian employees and owners of Indian firms certified under this Ordinance.

59-06-08 *Training and Apprenticeship Programs*

Covered employers are required to establish and maintain job training or apprenticeship programs to help Indian employees become qualified in the various craft or skill areas of job classifications used by the covered employer.

59-06-09 *Criteria for Indian Preference Contractor Certification.*

To receive Certification as a business eligible for Indian preference, an applicant must satisfy the ownership and management criteria:

(A) Ownership. The firm must be 51% or more Indian owned. The applicant must demonstrate all of the following:

1. Formal ownership. That an Indian or Indians own(s) 51% or more of the firm. Such ownership must be embodied in the firm's organic documents such as its stock or partnership agreement.
2. Value. The Indian owner(s) provided real value for their 51% or more ownership by providing capital, equipment, real property, or similar assets commensurate with the value of his/her ownership share.
3. Profits. The Indian owner(s) receive 51% or more of all profits.

(B) Management Control. The firm must be under significant Indian Management Control. The firm must be able to demonstrate one of the following:

1. One or more of the Indian owners must be substantially involved, as a senior level official, in the day-to-day management of the firm as his/her primary objective.
2. A joint venture must demonstrate that the Indian firm is the controlling partner in the joint venture.

59-06-10 *Application for Certification and Qualifications.*

All businesses, including joint ventures, seeking Certification as a business eligible for Indian preference shall submit a completed application to the TERO Director on a form approved by the TERO Commission. The TERO Director shall review the application, request such additional information as she/he believes appropriate, make a determination to approve or disapprove

consistent with this Ordinance, and notify the business of the decision. The applicant must be registered with the TERO office, pursuant to Section 59-06-01, and the TERO Director shall not approve an application until the applicant registers with the TERO office. The Director shall also determine what type of work the business is qualified to perform.

59-06-11 *Minimum Numerical Employment Requirement*

A covered employer's minimum numerical employment requirement is seventy percent (70%) tribal members and Indian employees out of all persons employed by a covered employer, unless the Director determines that special circumstances permit a permanent or temporary departure from the minimum numerical goal. The Director's permanent or temporary departure shall not be lower than 50%.

59-06-12 *List Of Tribal Members and Indians Seeking Employment*

The TERO office shall establish a list of all tribal members and Indians seeking employment. The TERO office shall maintain the list by including each person's qualifications and experience and shall be made available to all covered employers. In addition to complying with the Indian preference requirements provided in Title 3, a covered employer must contact the TERO office, prior to hiring a non-Indian, to determine whether a tribal member or Indian is potentially qualified for an employment position. A covered employer shall not hire a non-Indian until the TERO office determines whether a tribal member or Indian is potentially qualified for an employment position. A covered employer may only hire a non-Indian after the TERO office informs the covered employer that a qualified tribal member or Indian is unavailable to apply for the employment position. When providing a covered employer with the name(s) of potentially qualified tribal members or Indians, the TERO office is only determining that the tribal member or Indian is potentially qualified and must receive an opportunity to demonstrate her or his qualifications to perform the employment position as required by covered employer's job description.

59-06-13 *Barriers To The Employment Of Qualified Tribal Members Or Indians*

Covered employers are prohibited from instituting or utilizing job qualification criteria, personnel requirements, or written or informal policies or practices that, in effect, serve as barriers to employment of tribal members or Indians or contracting with certified Indian businesses, unless the covered employer can establish that business necessity requires such criteria, requirements, policies or practices. The covered employer shall have the burden of demonstrating that a qualification criteria, requirement, policy or practice is required by business necessity. If the covered employer fails to meet this burden, the covered employer must eliminate such qualification criteria, requirements, policies or practices and may be subject to the penalties provided in Title 9.

59-06-14 *Retaliation*

No covered employer shall terminate, suspend, punish, harass, or otherwise retaliate against any employee or other person who has exercised her or his rights under this Ordinance or has assisted another person in exercising such rights. Violations of this Section shall result in the imposition of penalties listed in Title 9.

**TITLE 7
EMPLOYMENT AND CONTRACTING RIGHTS FEE**

59-07-01 *Employment and Contracting Rights Fee.*

Prior to commencement of work on the Reservation, the covered employer shall pay all fees provided in this Ordinance. The covered employer may require by written contract that the general contractor pay the applicable TERO fees. An employment and contracting rights fee shall be imposed upon covered employers in order to raise revenue for the operation of the TERO program. The covered employer is liable for the employment and contracting rights fee and must include such a fee in the solicitation of bids.

59-07-02 *Covered Employers And Contracting Fees*

For each contract, regardless of the amount, a fee of 3% of the total contract shall be assessed. The fee of 3% shall apply to the total final contract amount which shall include all subsequent increases. The liability for the fee imposed by this Section lies with the general contractor. A subcontractor shall not be liable for the contracting fee, unless the subcontractor agrees in writing to pay only its portion of the 3% contracting fee applicable to the general contractor.

59-07-03 *Covered Employers and Employment Fees*

Covered employers shall pay a fee of one and a half percent of the covered employer's payroll. This fee shall be paid quarterly. Tribal non-profit entities, which include, without limitation, the Sisseton-Wahpeton Community College, Tiospa Zina Tribal School and Enemy Swin Tribal School and other non-profit entities are exempt from paying the employment fee.

59-07-04 *Payment of Fee and Petition For Payment of Fee in Installments*

Where good cause is shown to the satisfaction of the TERO Director, the covered employer may be allowed to pay the fee in installments. The Director may authorize the covered employer to pay a minimum of one-half of the TERO fee prior to commencement of work on the Reservation, and pay the remaining one half of the TERO fee when half of the project is complete. Any covered employer or contractor who fails to pay the fee imposed shall be subject to the penalties provided under TITLE 9.

59-07-05 *Collection and Deposit of Fee.*

The TERO Director shall be responsible for the collection of all TERO fees in a timely manner.

The Director shall immediately notify any delinquent party of the fee, the percentage, the specific amount due, if known, the date due, and the possible consequences if the contractor fails to comply. The Director's written notice shall clearly reference the amount of fee due, the basis for the fee and the due date. However, failure to receive the notice shall not relieve the covered employer of its obligation to pay the fee. If the Director or Commission has reasonable cause to believe that a covered employer may flee the Commission's jurisdiction before the fee is collected, the Commission may utilize the provisions in Titles Nine and/or Ten, Confiscation and Sale, notwithstanding the above procedures. The Director shall deposit all fees with the Tribe in accordance with the Tribal Financial Management System, identified as a separate line item of the appropriate TERO account. TERO may only utilize the fees in accordance with the budgets approved by the TERO Commission and the Tribal Council.

TITLE 8 COMPLAINT AND HEARING PROCEDURE

59-08-01 *Exhaustion Of Available Remedies*

Any person who has been harmed by an alleged violation of this Ordinance, the rules, regulations and/or guidelines promulgated by the TERO Commission, or the covered employer's Compliance Plan, has occurred must first exhaust the available remedies established by the covered employer, such as a grievance process. If the covered employer has not established any remedies available to aggrieved employees, then a person may file a written complaint under Section 59-08-03. This legal requirement is not applicable to contracts or subcontracts.

59-08-02 *Statute of Limitations*

After exhausting the available remedies established by the covered employer under Section 59-08-01 a person must file a written complaint under Section 59-08-03 within 60 days after the completion of the available remedies established by the covered employer. If the covered employer has not established any remedies available to aggrieved employees or if the alleged violation relates to a contract or subcontract, then a person must file a written complaint under Section 59-08-03 within 60 days of the most recent occurrence of the conduct underlying that person's complaint. A covered employer's inaction will not operate to initiate this statute of limitations when a person is waiting for notice or action from a covered employer. The applicable statute of limitations is applicable to all alleged TERO violations. This statute of limitations operates to deprive the Commission of jurisdiction to hear and determine a written complaint filed beyond the applicable 60 day requirement.

59-08-03 *Complaint Procedure*

Any person who has been harmed by an alleged violation of this Ordinance, the rules, regulations and/or guidelines promulgated by the TERO Commission, or the covered employer's Compliance Plan, has occurred may file a written complaint with the TERO Director. Upon receipt of a written complaint, the TERO Director shall conduct an investigation of the matters alleged in the complaint and serve written notice of the alleged violation to the person or entity named in the complaint. The covered employer shall cooperate with the Director's investigation. The covered employer's official response to the written complaint must be provided to the Director within 30 days of the covered employer's receipt of the complaint from the Director. The covered employer's official response must include any and all defenses that the covered employer intends to assert. The covered employer may request the Commission to allow additional time to provide the Director with its official response. In its sole discretion, the Commission may only provide the covered employer with a maximum of 15 additional days.

59-08-04 *Informal Settlement*

After reviewing the covered employer's official response, if the Director determines there is probable cause to believe the allegation(s) is well-founded, the Director shall first attempt to achieve a voluntary, informal solution to the matter through negotiation between parties. The Director must make the probable cause determination and finalize all attempts for an informal settlement within 90 days of receipt of the written complaint. If the parties do not reach an informal settlement, the TERO Director shall notify the TERO Commission and request that it set a date for a formal hearing on the matter. Upon receipt of the request, the TERO Commission shall set a hearing date. If the Director finds that there is no probable cause to believe the allegation(s) is well-founded, then the Director may dismiss the allegation. The Director's decision to dismiss the allegation may be appealed by filing a written request with the TERO Commission.

59-08-05 *Serving Notice of a Hearing.*

The TERO Commission shall serve written notice of the hearing, including the date, time and location to:

- (A) The person or entity against whom the allegation has been made;
- (B) The complainant;
- (C) The TERO Director; and
- (D) Any other identified interested person(s).

59-08-06 *Contents of the Notice of a Hearing.*

The notice of a hearing shall advise each party of:

- (A) The nature of the hearing;
- (B) The right to be present and participate in the hearing;
- (C) The right to present witness testimony and documentary evidence, and the right to cross-examine witnesses;
- (D) The right to be represented by counsel at his or her own expense;
- (E) The right of the complainant to request assistance, not including legal assistance, at the hearing that will be provided by the TERO staff.

59-08-07 *Conflict of Interest.*

If at any hearing before the TERO Commission, the Commission determines that an actual or potential conflict of interest exists between any member of the Commission and a hearing participant, the conflict shall disqualify such member or members of the Commission from participation in such hearings.

59-08-08 *Rules of Procedure.*

The Commission on its own initiative or at the request of any person notified of a Commission hearing, may call identified witnesses to appear, and subpoena documents and/or records necessary for the hearing. The following Rules of Procedure shall be followed at all hearings conducted by the Commission:

- (A) Each notified party shall have the right to be present and participate in the hearing;

- (B) Each notified party shall have the right to present relevant sworn testimony and documentary evidence;
- (C) Each notified party shall have the right to call witnesses on his or her own behalf and to cross examine witnesses called by any other hearing participant;
- (D) Each notified party shall have the right to be represented by counsel at his or her own expense;
- (E) The Chairman shall preside over the proceedings;
- (F) Formal rules of evidence need not be observed, but the Commission shall act to ascertain the facts in a reasonable and orderly fashion. Any evidence submitted to the Commission for consideration shall exclude hearsay, innuendo and personal attacks;
- (G) The Commission shall record the hearing by utilizing a reliable audiotape recorder;
- (H) The proceedings may be recessed and continued at the discretion of the Commission;
- (I) At the conclusion of the proceedings, the Commission may either render an immediate decision or take the matter under advisement and issue its decision and order no later than seven days from the conclusion of the hearing; and
- (J) The written decision and order, setting forth specific findings, shall be sent to the complainant and respondent. Should the Commission determine that the person or entity against whom charges were brought failed to comply with any requirements set forth in this Ordinance, and/or any rule, regulation or guideline promulgated by the TERO Commission, the Commission may impose one or more penalties set forth in TITLE 9 of this Ordinance, and may order that such person take corrective action to remedy any harm caused by the non-compliance issue.

**TITLE 9
PENALTIES**

59-09-01 *Possible Penalties for a Covered Employer's Violations*

The Commission, in its discretion, may impose any of the following penalties, or a combination thereof, provided that the severity of the penalty correlates to the severity of the offense.

(A) Imposition of a civil monetary fine of \$0 to \$5,000.00, per violation. The Commission possesses the discretion to impose cumulative daily penalties if the violation is a reoccurring violation, as defined in Section 59-02-18.

(B) Suspension or termination of the covered employer's current privilege of conducting business on the Lake Traverse Reservation, provided that a reasonable time period be allowed to remove equipment and personal property from the Lake Traverse Reservation.

(C) Prohibition from conducting future business on the Lake Traverse Reservation for a period of time.

(D) Monetary or other appropriate relief for damages to compensate any individual harmed because of the violation.

(E) Termination by the covered employer of any individuals hired in contravention of any TERO requirements concerning Indian preference in the selection and hiring, training or advancement of employees.

(F) The employment, promotion, and/or training by the covered employer of any Indian individuals adversely affected by the noncompliance with any TERO requirements concerning Indian preference in employment opportunities.

(G) Require changes in the covered employer's policies and procedures necessary to comply with the requirements of this Ordinance.

59-09-02 *Collection and Deposit of Fines.*

The TERO Director shall be responsible for the collection of all TERO fines in a timely manner. The Director shall deposit all fines with the Tribe in accordance with the Tribal financial management system, identified as a separate line item of the appropriate TERO account. The TERO office may only utilize the fines in accordance with the budgets approved by the TERO Commission and the Tribal Council.

TITLE 10
APPEALS PROCEDURE

59-10-01 *Tribal Court Jurisdiction*

The Tribal Court of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation shall have jurisdiction over appeals taken from decisions and orders issued by the Commission pursuant to TITLE 8 of this Ordinance. An appeal to the Tribal Court may be taken from any final order of the Commission by any party adversely affected thereby. The appeal must be filed no later than twenty (20) days after the party receives a copy of the Commission's decision. The Tribal Court shall require all parties to exhaust the proceedings and remedies available before the Commission. The Tribal Court shall also have jurisdiction to grant such orders as are necessary and appropriate to enforce the orders of the Commission and the penalties imposed by it.

59-10-02 *Standard of Review*

The Tribal Court shall uphold the decision of the Commission unless it finds that the decision of the Commission is arbitrary, capricious or in excess of the authority of the Commission. The covered employer bears the burden of proving that the Commission's decision is arbitrary, capricious or in excess of the Commission's authority.

59-10-03 *Notice of Appeal*

The appeal shall be taken by filing a written notice of appeal with the Tribal Court, serving a copy on the Director within twenty (20) days after the date of the entry of the order. The notice of appeal shall:

1. Provide the Commission's decision and order which is the subject of the appeal;
2. Specify the grounds justifying reversal or modification of the order; and
3. Be signed by appellant.

59-10-04 *Petition For Bond*

The Director may petition and, for good cause shown, the Court may order the party requesting a hearing 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 penalties or remedial actions imposed by the Commission's order if that order is upheld by the court.

The Commission may petition the Tribal Court and the Court may issue such orders as are necessary and appropriate to enforce the orders and/or penalties of the Commission and/or the Court. The Commission may petition and the Tribal Court may order the confiscation and/or sale of a covered employer's property. Nothing in this Section shall provide the Tribal Court with jurisdiction to maintain or enforce this Section against a tribal member, a tribal entity or any organization or business owned or managed by a tribal member.

If the Court determines that a covered employer is not complying with an order and/or penalty of the Commission and/or the Court, then the Court may order Tribal Police to confiscate and hold the specifically-described property. The Tribal Police shall deliver in person or by certified mail, a notice to the covered employer. The notice shall inform the covered employer of the pending confiscation and of the right to prevent such confiscation by coming into compliance with the order and/or penalty being enforced. The covered employer shall have 15 days to initiate compliance and execute a schedule setting forth how the covered employer will achieve complete compliance. If the covered employer party has not come into compliance within 15 days, the Court shall order the police to confiscate and sell said property and use the proceeds to pay any outstanding fines imposed by the Commission and all costs incurred by the Commission, the Court and the police in filing, maintaining and enforcing the confiscation and sale. Any excess proceeds shall be returned to the party.

The Court's order on appeal shall be final, or if no appeal is filed within twenty (20) days from the date of party's receipt of the Commission's order, the Commission's order shall be final. If the Tribal Court reverses or modifies an order of the Commission, the Court shall specifically direct the Commission to comply with such reversal or modification.

**TITLE 11
PUBLICATION OF ORDINANCE**

It is the obligation of all covered employers to adhere to the Compliance Plan, comply with the requirements set forth in this Ordinance and any rules, regulations, and/or guidelines promulgated by the TERO Commission. It shall be the duty and responsibility of the TERO staff to cause the publication of such requirements. The TERO staff shall send copies of this Ordinance, and any supplementary ordinances enacted by the Tribal Council and any rules, regulations and/or guidelines promulgated by the TERO Commission to all Government agencies and wholly-owned Government corporations intending to undertake projects at sites on Lake Traverse Reservation. In addition, the TERO staff shall continuously maintain a sufficient number of copies of all ordinances, rules, regulations and/or guidelines for distribution to any person who requests them. The TERO staff shall take all necessary action to ensure that all bid announcements issued by federal, state, and tribal agencies include the applicable requirements set forth in all TERO ordinances, rules, regulations and/or guidelines.

**TITLE 12
HARASSMENT**

No person, including any representative or agent of a covered employer, contractor, subcontractor, employee or certified Indian-owned firm, will attempt to or, in fact, harass, intimidate, or retaliate against any member of the TERO staff or any member of the TERO Commission. Should such conduct continue after receipt of a written warning by the TERO Commission, the TERO Commission shall set a date for a formal hearing. Such hearings shall be conducted according to the Rules of Procedure prescribed by and set forth in TITLE 8 of this Ordinance. Should the TERO Commission determine that the covered employers did violate the prohibition against harassment, intimidation or retaliation, the Commission may impose any combination of the penalties set forth in TITLE 9 of this Ordinance.

**TITLE 13
REGULATIONS**

All regulations intended to carry out the provisions set forth in this Ordinance issued, by the TERO Commission following the effective date of this Ordinance, shall be subject to review and comments by interested persons residing within the Lake Traverse Reservation. In issuing any such regulations, the TERO Commission will recognize and comply with the following minimum procedures:

(A) The Commission shall publish proposed regulations in the Sota Iya Ye Yapi, and written comments will be solicited.

(B) All interested persons may submit written comments to the TERO office, within twenty (20) days from the date of publication in the Sota Iya Ye Yapi.

(C) The Commission shall review and discuss any written comments submitted. The Commission, upon its final review of the proposed rules and regulations, and along with any changes made therein based upon any written comments, shall formally approve and adopt the same, at which time such rules and regulations shall become effective.

**TITLE 14
SOVEREIGN IMMUNITY**

As a tribal agency providing critical government services, the Tribal Employment Rights program, including the Director and the Commission (collectively referred to as TERO in this paragraph), shall share in the Tribe's sovereign immunity from suit. Only the Tribal Council of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation may expressly authorize a limited waiver of TERO's sovereign immunity from suit, provided, however, that such waiver must be express and unequivocal and evidenced by a duly enacted resolution by the Tribal Council for that purpose only. A resolution of the Tribal Council which expressly and unequivocally authorizes a limited waiver for an explicit purpose shall not be deemed a waiver

for any other purpose. Any limited waiver enacted by the Tribal Council pursuant to the authorization granted by this provision shall not extend to the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation or any of its departments, agencies, or entities. The Sisseton-Wahpeton Oyate of the Lake Traverse Reservation shall not be liable for the debts or obligations of TERO, except in so far as it may hereafter expressly obligate itself in writing.