

SOUTHERN UTE INDIAN TRIBE

EMPLOYMENT RIGHTS CODE

TITLE 17

ARTICLE 1. GENERAL PROVISIONS AND PURPOSE

17-1-101. Title.

This Code shall be known as the Southern Ute Tribal Employment Rights Code.

17-1-102. Purpose.

The purpose of this Code is to promote the employment of Indians, in accordance with federal law, on or near the Southern Ute Indian Reservation; to provide for Indian preference in employment in accordance with federal law; to assist employers, contractors and subcontractors in the fair employment of Indians on or near the Reservation; to provide a contracting preference for Indian owned business; to prevent discrimination against Indians in the employment practices of employers within the jurisdiction of the Tribe; and to establish a Tribal Employment Rights Commission and Office to further these objectives.

17-1-102. Definitions.

(1) "Commission" means the Southern Ute Indian Tribal Employment Rights Commission.

(2) "Contract" or "Contracts" means all contracts and subcontracts, including but not limited to, contracts for supplies, services and equipment.

(3) "Contractor" means an individual, corporation, association, partnership or other business entity performing work pursuant to contracts or subcontracts.

(4) "Covered Employer" means an Employer doing business within the exterior boundaries of the Reservation on land subject to the jurisdiction

of the Tribe, who employs, for wages, five or more persons. The term "Covered Employer" excludes federal, state and county governmental entities, but includes the Tribe, except as otherwise provided herein.

(5) "Employee" means any person employed for remuneration.

(6) "Employer" means an individual, corporation, association, partnership or other business entity and includes any person who engages in business through paid agents or employees or who engages in business through contracts or subcontracts.

(7) "Indian" means a person who is an enrolled member of a federally recognized Indian Tribe.

(8) "Indian Owned Business" means any commercial, industrial, or other business in which fifty-one percent (51%) or more of the ownership is held by and fifty-one percent (51%) or more of the actual management and control is exercised by an Indian or Indians and which is so certified in accordance with Article 6 herein.

(9) "Local Indian" means an Indian residing on or near the Reservation, who has so resided for not less than six (6) months prior to commencement of, or application for, employment with a Covered Employer. "Near the reservation" means within reasonable commuting distance.

(10) "Person" means both natural persons and artificial persons, including but not limited to, corporations, partnerships, unions, societies, sole proprietorships, joint ventures and trusts.

(11) "Qualified Indian Applicant" means an Indian applicant for employment who is capable of performing the requirements of the position as established by the Employer; provided, however, that such established requirements may not include non-job related qualifications which have a discriminatory impact on Indian applicants.

(12) "Reservation" means the Southern Ute Indian Reservation.

(13) "TERO" means the Tribal Employment Rights Office.

(14) "Tribal Council" means the Tribal Council of the Southern Ute Indian Tribe.

(15) "Tribal Court" means the Southern Ute Tribal Court.

(16) "Tribe" means the Southern Ute Indian Tribe.

(17) "Union" means an organization, combination or association in which employees participate or by which employees are represented and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours or other terms and conditions of employment.

ARTICLE 2. TRIBAL EMPLOYMENT RIGHTS OFFICE

17-2-101. Establishment.

TERO is hereby created as an office of the Tribe, responsible for the implementation and enforcement of the provisions of this Code.

17-2-102. Functions.

TERO shall have the following responsibilities:

(1) To implement the established rules and regulations governing the activities of TERO.

(2) To assist Indian applicants with job counseling and referrals to training programs.

(3) To cooperate with federal agencies to enforce federal anti-discrimination statutes, eliminate hiring discrimination against Indians, and enforce federal Indian preference requirements;

(4) To process requests by Employers for Indian Employees.

(5) To receive, process and investigate informal complaints regarding employment discrimination.

(6) To issue probationary certifications and to make recommendations to the Commission concerning final certification of businesses as Indian Owned Businesses.

(7) To establish and maintain a skills bank to assist Employers by referring Qualified Indian Applicants for available job positions.

(8) To file complaints with the Commission as set forth herein.

(9) To coordinate with the Personnel/Human Resource Departments of the Tribe, the Growth Fund and Casino, as well as the Tribal Higher Education Department to determine and address training needs for tribal members and Indian Owned Businesses.

(10) To take such other actions as are necessary to achieve the purposes and objectives of this Code; provided, however, that no significant new program or component of a program shall be introduced, or program or component of a program significantly expanded, without prior approval of the Tribal Council.

17-2-103. Director.

The Director of TERO shall be hired in accordance with Southern Ute Tribal Personnel Policies and Procedures. The TERO Director shall have the following responsibilities:

(1) To administer all TERO programs.

(2) To hire TERO employees pursuant to the Southern Ute Tribal Personnel Policy and Procedures.

(3) To process Indian Owned Business applications and issue probationary certifications when the applicants meet the requirements set forth in Article 6.

(4) To obtain funds from federal, state, or other sources to carry out the purposes of TERO.

(5) To present to the Tribal Council such reports as the Tribal Council may require, including reports on TERO's activities on at least a quarterly basis.

(6) To assist Covered Employers in pursuing whatever corrective actions are necessary for such Covered Employers to come into compliance with the requirements set forth in this Code and/or any and all rules and regulations promulgated by the Commission.

(7) To promulgate such rules and regulations as may be necessary to effectuate the purposes of this Code; provided, however, that no significant new rule or regulation shall be implemented without prior approval of the Tribal Council.

ARTICLE 3. TRIBAL EMPLOYMENT RIGHTS COMMISSION

17-3-101. Establishment of Commission.

(1) The Commission is hereby established to carry out the powers and duties set forth herein.

(2) Commission members shall be appointed by the Tribal Council and shall serve until resignation or replacement. The membership shall be composed of the following:

(a) A person with knowledge and experience in the regulation of Tribal gaming;

(b) A person with knowledge and experience in Tribal energy resource development;

(c) A person with knowledge and experience in Tribal economic development on the Reservation.

(d) Two tribal members at-large who are not currently employed by the Tribal government or the Growth Fund and who not own or operate a certified Indian Owned Business.

(3) The Chairman of the Commission shall be designated by the Commission and shall preside over all meetings of the Commission. The Commission Chairman shall be entitled to vote on all matters before the Commission the same as other members.

(4) Three members of the Commission shall constitute a quorum.

(5) Commission members shall disqualify themselves from proceedings in cases which present a conflict of interest.

(6) When a Commissioner has been disqualified with regard to a matter before the Commission, the Chairman of the Commission with the concurrence of the Tribal Chairman may appoint an alternate with similar qualifications to serve as a Commissioner for that particular matter.

(7) Commissioners who are not otherwise compensated by the tribe by contract or employment shall be compensated at the same daily rate as Gaming Commissioners.

17-3-102. Term of Appointment of Commissioners.

Commissioners shall be appointed to three (3) year staggered terms; provided, however, that each Commissioner shall serve until reappointed or a successor is appointed.

17-3-103. Removal.

A Commissioner may be removed by a majority vote of the Tribal Council for neglect of duty, failure to attend meetings or other good cause demonstrating a Commissioner's unfitness for continued service.

17-3-104. Powers of the Commission.

The Commission shall have the following responsibilities:

(1) To establish and implement rules and regulations governing all activities and procedures of the Commission, subject to the prior approval of the Tribal Council.

(2) To review and hold hearings on formal complaints of employment discrimination and review TERO applicant qualification decisions.

(3) To issue final certifications to those businesses qualifying as Indian Owned Businesses.

(4) To impose any sanctions and grant any relief authorized by this Code.

(5) To take such other actions and engage in such other activities as are necessary to achieve the purposes and objectives inherent in the policy of Indian preference in employment and contracting.

ARTICLE 4. INDIAN PREFERENCE IN EMPLOYMENT

17-4-101. Preference Policy.

(1) Every Covered Employer is required to give employment preference in accordance with this Code in hiring, promotion, lay-off and training for work performed within the exterior boundaries of the Reservation on land subject to the jurisdiction of the Tribe.

(2) A Covered Employer shall include and specify a Southern Ute Indian employment preference policy statement in all job announcements and advertisements covered by this Code.

(3) If any requirement of this Code is inconsistent with applicable requirements of federal law or regulations, the latter shall take precedence. When contracting with any federal agency, the term "Indian preference" may be substituted for "Southern Ute Indian preference" if required by federal law.

17-4-102. Hiring.

(1) A Covered Employer may not hire a non-Indian for work on land subject to the jurisdiction of the Tribe until the Covered Employer has given TERO a reasonable time to locate a Qualified Indian Applicant or to communicate to the Covered Employer that no Qualified Indian Applicant is available to fill the job.

(2) For purposes of this section, "reasonable time" shall be defined as follows:

(a) For construction jobs, TERO shall have 72 hours to refer a Qualified Indian Applicant;

(b) For all other kinds of employment, TERO shall have five (5) working days to refer a Qualified Indian Applicant.

(c) TERO may reduce these time periods if they would impose an undue burden upon the Covered Employer or if emergencies threatening life, property or environment justify such a reduction.

(3) A Covered Employer may set the requirements for employee hiring; provided, however, that such requirements may not include non-job related qualifications which have a discriminatory impact on Indian applicants.

(4) Every Covered Employer shall establish written necessary qualifications for each position in their work force, subject to the jurisdiction of TERO, a copy of which shall be provided to the TERO and to all applicants at the time they express an interest in such position.

(5) If TERO has reason to believe that any Covered Employer is setting discriminatory job qualifications, it shall first attempt to meet with the Covered Employer and resolve the matter informally. If such informal contact is unsuccessful, the TERO may file a complaint against the Covered Employer pursuant to § 17-9-101 hereof.

(6) A Covered Employer may recruit and hire employees or trainees from whatever source and by whatever process the Covered Employer chooses; however, the Covered Employer must notify TERO and provide a list of employees hired.

(7) A Covered Employer shall advertise and announce all job vacancies in at least one newspaper and one radio station serving the Reservation; provided, however, that a Covered Employer does not have the

foregoing obligations in the event a Southern Ute, who is a current employee, is selected for the employment opportunity.

17-4-103. Promotions.

(1) Each Covered Employer must give preference to Qualified Indian Applicants in all promotion opportunities. Such preference shall be in accordance with § 17-4-106.

(2) Covered Employers shall provide adequate advance notice of promotion opportunities to their current Indian employees.

17-4-104. Lay-Offs.

(1) Each Covered Employer must accord preferential protection to Indians against lay-off and reductions in work force. Such preference shall be in accordance with § 17-4-106.

(2) No Covered Employer may lay-off or terminate an Indian employee as a result of lay-off or reduction in work force if a non-Indian employee in the same job classification and with the same seniority is still employed.

17-4-105. Training.

Each Covered Employer must give preference to Qualified Indian Applicants in existing training or apprenticeship programs. Every Covered Employer with a training program shall employ the maximum number of Indian trainees for available positions in such program.

17-4-106. Priority of Employment Preference.

The employment preference provided for in this Code shall follow the following priorities:

(1) First preference shall be given to enrolled members of the Southern Ute Indian Tribe.

(2) Second preference shall be given to Indians who are legally married to enrolled members of the Southern Ute Indian Tribe.

(3) Third preference shall be given to enrolled members of the Ute Mountain Ute and Northern Ute tribes.

(4) Fourth preference shall be given to Local Indians.

17-4-107. Collective Bargaining Agreements.

(1) Any Covered Employer who has a collective bargaining agreement with one or more Unions shall comply with the Article 4 preferences with respect to hiring.

(2) Covered Employers subject to collective bargaining agreements are exempt from Article 4, Sections 103 through 105, for only those employment positions covered by such agreements.

ARTICLE 5. PREFERENCE IN CONTRACTING AND SUBCONTRACTING

17-5-101. Contract Preference Policy.

(1) All Covered Employers awarding contracts shall give preference to Indian Owned Businesses technically qualified to perform the work required and shall utilize competitive bid procedures in accordance with this Article when the majority of the work under the contract will occur on land within the jurisdiction of the Tribe.

(2) If an Indian Owned Business participates in the bidding process, then the contracting entity shall give preference to such bidder if the Indian Owned Business' initial bid or resubmitted bid is no more than 5% higher than the lowest bid received.

(3) Before a Covered Employer can reject an Indian Owned Business on the basis of its bid, it must offer the Indian Owned Business a single opportunity to resubmit a revised bid. In requesting and/or receiving revised bids from Indian Owned Businesses, the Covered Employer shall not, in any circumstance, disclose any other bids received.

17-5-102. Determination of Technical Qualifications.

(1) All Covered Employers awarding contracts under this Article shall have the discretion to determine technical qualifications. However, if the entity determines that there are no Indian Owned Businesses that are technically qualified, the entity must provide to each Indian Owned Business it rejects a written description of areas in which it believes the firm is weak and steps it could take to upgrade its qualifications. A Covered Employer may also be required to cooperate in establishing a tribal member or Indian Owned Business training program, coordinated with and fully funded by the TERO Office.

(2) If a Covered Employer determines that an Indian Owned Business lacks the technical qualifications to perform all of the work required under the proposed contract, the Employer shall make a good faith effort to divide the scope of work requirement into small contracts or components so that the Indian Owned Business can qualify for a portion of the work or provide good reason, in writing, supporting why the contract cannot be so divided.

(3) If an Indian Owned Business disqualified on technical qualification grounds believes that the disqualification was the result of an improper effort by the entity awarding the contract to circumvent its preference responsibilities under this Article, it may file a complaint pursuant to § 17-9-102.

17-5-103. Priority of Contract Preference.

The Indian contract preference provided for in this Code shall be given in the following priority:

(1) First preference shall be given to Indian Owned Businesses controlled by enrolled members of the Southern Ute Indian Tribe.

(2) Second preference shall be given to Indian Owned Businesses controlled by Indians who are legally married to enrolled members of the Southern Ute Indian Tribe.

(3) Third preference shall be given to Indian Owned Businesses controlled by enrolled members of the Ute Mountain Ute and Northern Ute tribes.

(4) Forth preference shall be given to Indian Owned Businesses controlled by Local Indians.

(5) In the event that there are two or more businesses entitled to preference within any of the above-listed categories, a 100% Indian Owned Business shall be given preference over a less than 100% Indian Owned Business, and an Indian Owned Business located within the exterior boundaries of the Reservation shall be given preference over an Indian Owned Business located off the Reservation.

17-5-104. Applicability.

(1) These bid award procedures shall not apply to the award of contracts by federal, state and county and municipal governmental entities, but shall apply to the Tribe, unless explicitly waived pursuant to Article 12.

(2) When a Tribal department, division, or enterprise selects a contractor other than in accordance with the priorities listed in §17-5-103, it must indicate the steps taken to award the contract in accordance with those priorities and the reasons for its selection when submitting a contract to the Tribal Council for approval.

ARTICLE 6. CERTIFICATION OF INDIAN OWNED BUSINESSES

An applicant for certification as an Indian Owned Business must satisfy all of the criteria prescribed under this Article.

17-6-101. Ownership.

(1) Formal ownership.

(a) The applicant must demonstrate that an Indian or Indians own(s) Fifty-one Percent (51%) or more of the partnership, corporation, joint venture, or other business arrangement for which certification is sought.

(b) Such Indian ownership must be embodied in the firm's organic documents.

(c) The Indian ownership must have a majority of the voting rights or employ a decisional mechanism for making all decisions of the applicant business.

(d) The Indian ownership must be entitled to receive at least a majority of the business' assets upon dissolution.

(2) Value.

To obtain a majority ownership of the business, the Indian ownership must have provided real value, such as capital, equipment, real property, or similar assets, commensurate with the value of the ownership share. Purchase of the Indian ownership through a promissory note, the holder of which is the non-Indian owner of the business or an immediate relation thereof or through any similar arrangement is not real value unless: a) the applicant makes a convincing showing that the Indian ownership brought special skills or similar benefits to the business; and b) that there is good reason to believe the arrangement would have been entered into even if there were no Indian preference program in existence.

(3) Profits.

The Indian ownership must be entitled to receive at least Fifty-one Percent (51%) of all business profits. If the non-Indian ownership is entitled to a share of the profits greater than 50%, under whatever agreement or arrangement, including but not limited to management fees, equipment rental fees, or bonuses tied to profits, certification will be denied.

17-6-102. Management Control.

(1) The business must demonstrate that one or more of the Indian owners is substantially involved as a senior level official in the day-to-day management of the business as his primary employment activity. Although the Indian owner does not have to be the Chief Executive Officer, he must, through prior experience or training, have substantial occupational ties to the business and therefore be qualified to serve in a senior level position. He

must also be sufficiently knowledgeable about the business to be accountable to the Tribe for the business' activities.

(2) Any joint venture applicant must also demonstrate that the Indian business is, in fact, the controlling partner in the joint venture; that the Indian partner has the experience and expertise to manage the entire operation; and the non-Indian partner is providing specialized resources or expertise to the joint venture and is not, in fact, the manager.

17-6-103. Integrity of Structure.

The applicant must show that the business was not established primarily to take advantage of Indian preference. In evaluating the applicant, TERO shall consider the factors set out below and shall exercise broad discretion in applying these criteria in order to preserve the integrity of the Indian preference program:

(1) Whether the history of the firm demonstrates it was established primarily to take advantage of the Indian preference program, particularly in cases where the firm was originally a non-Indian owned business, or associated with a non-Indian owned business, which gained little in terms of capital, expertise, and equipment by adding Indian ownership by or merging with the Indian business.

(2) Whether key non-Indian employees of the applicant are former employees of a non-Indian firm with which the Indian firm is or has been affiliated, through a joint venture or other arrangement, such that there is reason to believe the non-Indian firm is controlling the applicant.

(3) Whether the experience, expertise and resources of the non-Indian partner(s) are so much greater than those of the Indian ownership that there is little sound business reason for the non-Indian ownership to accept a junior role in the business other than to be able to take advantage of the Indian preference program.

17-6-104. Types of Certification.

(1) Probationary Certification.

Probationary certification shall be granted for up to six-months. During the probationary period, TERO staff shall monitor the business' activities to ensure that the business is operating consistent with the description in its application. During the probationary period, the business shall provide to TERO such information and documents as necessary to evaluate the business operation.

(2) Final Certification.

At the end of the probationary period, the Commission shall take action to:

- (a) grant full certification;
 - (b) continue the probationary period for up to six (6) months;
- or
- (c) deny certification.

17-6-105. Certification Procedures.

(1) Application. The applicant shall submit to TERO a completed application, on forms provided by TERO, accompanied by an application processing fee as established by the Commission.

(2) Certification Determinations.

(a) Within thirty (30) days after receipt of a completed application and the processing fee, TERO shall review the application and request such additional information as it believes appropriate, conduct any required investigations, and conduct the analysis necessary to make a determination on probationary certification.

(b) Computation of the 30 day period shall be stayed for the time a new request for additional information is outstanding, and the Director of TERO may extend the processing period by an additional