

MEMORANDUM

TO: La Plata County Energy Council

FROM: Bob Zahradnik, Operating Director, Southern Ute Indian Tribe Growth Fund

RE: Tribal Employment Rights Ordinance

DATE: June 24, 2009

I. Summary.

In 1993, the Southern Ute Indian Tribal Council initially enacted a Tribal Employment Rights Ordinance (“TERO”), which was substantially amended in 2006 and which mandates that covered employers operating on lands within the Tribe’s jurisdiction grant preferences in employment and contracting to qualified Indians and Indian owned companies. The TERO is administered by the director of the TERO administration office. In response to various complaints raised by tribal members to the Tribal Council, it appears that many oil and gas companies operating on the Southern Ute Indian Reservation are not complying with TERO. This memorandum discusses the TERO and encourages voluntary operator compliance.

II. Tribal Law: Tribal Regulatory Jurisdiction and the Southern Ute Indian Employment Rights Code.

A. Tribal Regulatory Jurisdiction.

The right of tribes to enact preferential hiring regulations (often contained in Tribal Employment Rights Ordinances, or TEROs) is founded on their exclusive regulatory and judicial jurisdiction over the on-reservation activities of their members. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n. 18 (1983). Tribal sovereignty is broadest in the context of civil regulations involving on-reservation activities. *Duro v. Reina*, 462 U.S. 676, 687 (1990). Tribal regulatory authority extends to non-Indians and nonmembers of the tribe when they are in “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Montana v. United States*, 450 U.S. 544, 565 (1981).

B. The Southern Ute Indian Employment Rights Code and its Scope.

The mandatory application of the Tribal Employment Rights Code is limited by the territorial jurisdiction of the Tribe. The Code’s hiring preferences are required “for work performed within the exterior boundaries of the Reservation on land subject to the jurisdiction of the Tribe.” Code § 17-4-101(1). Similarly, contracts to be awarded by a “Covered Employer,” pursuant to which a majority of the work would be performed on land subject to the jurisdiction

of the Tribe, must be awarded in accordance with the Code's contracting preferences. Code § 17-5-101(1). The Code does not apply to off-Reservation activities or to non-Indian activities on privately owned land.

In addition to governing the hiring and contracting practices of tribal and private entities for work to be performed on land subject to the Tribe's jurisdiction, the Code establishes a Tribal Employment Rights Office and a Tribal Employment Rights Commission to oversee implementation of the Code, provides a procedure for certification of Indian Owned Businesses, and provides for enforcement procedures and penalties for violations of the Code. It also imposes a Tribal Employment Rights Fee to fund the Tribal Employment Rights Office and training programs.

For hiring purposes, the Code preference order is as follows:

1. enrolled members of the Southern Ute Indian Tribe;
2. Indians legally married to enrolled members of the Southern Ute Indian Tribe;
3. enrolled members of the Ute Mountain Ute and Northern Ute tribes; and
4. Local Indians (members of any Indian tribe who live on or near the Reservation).

Code § 17-4-106.

For the purposes of contracting for services, the same order of preferences applies to the selection of contractors, with the preference determined by the actual owners of the Indian Owned Businesses. Code § 17-5-103. Indian Owned Businesses that submit bids no more than five percent higher than the lowest bid receive a preference for award of the contract. Code § 17-5-101(2). An Indian Owned Businesses is also entitled, before its bid on a contract can be rejected on the basis of the bid amount, to submit a revised bid that is entitled to preference if within five percent of the lowest bid. Code § 17-5-101(3).

III. Federal Law: Title VII Requirements.

A. Title VII Prohibitions on Discriminatory Hiring.

Title VII of the Equal Employment Opportunities Act prohibits employers from making employment decisions on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a). Employment decisions include hiring, refusing to hire, firing, and setting or changing wages and benefits. The statute also prohibits hostile or abusive practices in the workplace based on race, color, religion, sex or national origin. *Harris v. Forklift Sys.*, 510 U.S. 17 (1993). Discrimination against a person on the basis of his or her relationships with others of a particular race, color, religion, sex or national origin is prohibited, also. *Gresham v. Waffle House, Inc.*, 586 F.Supp. 1442 (N.D. Ga. 1984) (prohibiting discrimination against white woman who married African-American man). "National origin," as used in the statute, refers to the place in which one's ancestors lived, and the Ninth Circuit has held that a private employer's hiring distinction between members of different Indian tribes, by hiring a Navajo instead of a

Hopi for work on the Navajo Nation, constitutes national origin discrimination that is prohibited by the federal law. *Dawavendewa v. Salt River Project Agric. & Power Dist.*, 154 F.3d 1117 (9th Cir. 1998) *cert. denied* 528 U.S. 1098 (2000) (“*Dawavendewa I*”).

B. The Indian Tribe Exemption from Title VII

There are two separate and distinct exemptions in Title VII, both of which are designed to promote Indian economic interests. *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373, 376 (10th Cir. 1986) (noting that the two exceptions in Title VII “serve different and complementary purposes”). First, the statute specifically exempts “an Indian tribe” from the definition of “employer,” which means that Indian tribes are not covered by the requirements of Title VII. 42 U.S.C. § 2000e(b). Secondly, the statute exempts “any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice . . . under which preferential treatment is given to any individual because he is an Indian living on or near a reservation.” 42 U.S.C. § 2000e-2(i). This exemption, referred to in this memo as the “on or near reservation exemption,” has particular applicability to the subject of this memo.

In an opinion issued after the 1964 enactment of the Indian tribe exemption in Title VII, the United States Supreme Court held that federal statutory employment preferences for Indians are constitutional. *Morton v. Mancari*, 417 U.S. 535 (1974). The Court held that preferences for Indians are not “invidious racial discrimination” that violate the Fifth Amendment to the Constitution. *Id.* at 551. Instead, the Court stated that membership in an Indian tribe has more in common with a political affiliation than with a racial classification, and that, in some cases, employers may constitutionally give hiring preferences based on political affiliations. *Id.* at 551-54. Despite the Supreme Court’s holding that Indian preferences are constitutional, preferences in hiring and contracting given to Indians by private employers can still face challenges under Title VII itself. *See, e.g., Dawavendewa I*, 154 F.3d 1117.

C. The “on or near” reservation exemption from Title VII.

Title VII exempts “any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice . . . under which preferential treatment is given to any individual because he is an Indian living on or near a reservation.” 42 U.S.C. § 2000e-2(i); *National Labor Relations Bd. v. Pueblo of San Juan*, 280 F.3d 1278 (10th Cir. 2000). Distances of eight to ten miles from a reservation have been held to satisfy the “on or near” requirement, although this is not a “bright line” rule. *Livingston v. Ewing*, 601 F.2d 1110, 1115 (10th Cir. 1979). The EEOC defines “near” as “being located within reasonable commuting distance.” *Compliance Manual*, § 2-III(4)(b)(ii).

The Ninth Circuit has held that, with respect to private employers, the on or near reservation exemption is limited to preferences between Indians and non-Indians and private employers may not prefer members of one tribe over another. *Dawavendewa I*, 154 F.3d 1117.

The *Dawavendewa I* decision has been criticized by commentators, who state that the decision “seems at odds with the Supreme Court’s jurisprudence distinguishing discrimination based on citizenship from discrimination based on national origin, and disregards the Court’s preference for classifications that are political rather than racial.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 21.02[5][c] at 1302 (2005). Despite the Ninth Circuit’s preliminary ruling in favor of Mr. Dawavendewa, in *Dawavendewa II* the Ninth Circuit upheld dismissal of Mr. Dawavendewa’s case because the Navajo Nation would be an indispensable party in a suit against Salt River Project arising from the application of Navajo preference; however, the Navajo Nation could not be joined because it had not waived its immunity from suit. *Dawavendewa II*, 276 F.3d at 1163. Another federal appellate court, the Fourth Circuit Court of Appeals, also dismissed a case with facts very similar to *Dawavendewa I* on the grounds that the tribe was an indispensable party that could not be joined. *Yashenko v. Harrah’s NC Casino Co., LLC*, 2006 WL 1098803 (4th Cir.).

D. Hiring and contracting or sub-contracting for services fall under similar principles.

Many statutes and court opinions make no distinction between hiring employees and entering into contracts for services in regard to Indian preference. *See, e.g., Colorado Constr. Corp. v. United States*, 57 Fed. Cl. 648 (2003) (upholding BIA preference for Indian Economic Enterprises in bidding on services contract solicitation); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1312 (9th Cir. 1990) (noting that Secretary of Interior approved TERO preferring “Indians” for purposes of “employment, contracting, and subcontracting”); *Alaska Chapter, Assoc. Gen’l Contractors v. Pierce*, 694 F.2d 1162, 1170 (9th Cir.1982) (upholding private employer’s preference for Indian-owned businesses in awarding building contracts). While Title VII expressly recognizes an exemption for hiring, it does not expressly cover the making and enforcement of contracts. Nonetheless, based on precedent, it appears likely that the two would be equated for purposes of applying the Title VII exemption in furtherance of tribal economic development.

IV. Conclusions.

The Tribe and the oil and gas industry have established mutually beneficial long-term relationships related to on-Reservation development. TERO reflects a strong political determination that individual Indians and their companies should be afforded the opportunity to become successful through employment and contracting for services related to development of the Tribe’s resources. We hope that the information provided in this memo will assist the industry in honoring the policy reflected in TERO.