TRIBAL EMPLOYMENT RIGHTS ORDINANCE

Title 13

13.0 SHORT TITLE

The short title of this ordinance shall be the Tribal Employment Rights Ordinance, or TERO.

13.1 EFFECT ON PRIOR ENACTMENTS

13.1.1 Repeal. Resolution 91-71A, as amended March 6, 1995, Ordinance No. 2-80, as amended April 27, 1995, the Rules for Hearing Before the TERO Commission, as Amended June 10, 1998, are hereby repealed and shall be of no further force and effect as stated in Section 13.13.1 of this ordinance; provided, however, that any existing agreements or contracts authorized under these now repealed enactments shall remain in effect until such agreements or contracts expire or are terminated; and provided, further, that the TERO Commission established by this Ordinance may terminate any existing Indian preference agreement and issue a permit in conformance with this Ordinance upon notice to the affected party and opportunity for hearing.

13.1.2 Certification of Indian Firms. The TERO Commission is authorized to certify that an enterprise meets the definition of an Indian firm set forth in Section 13.2.4 for purposes of Indian preference, and for documentation of minority small business contract eligibility or claimed exemptions from state taxation and wage performance bond requirements; provided, however, that certification as provided herein shall not oblige the Commission to advocate the claims of private individuals and entities before any agency of another government.

13.1.3 Fair Operating Standards and Dispute Resolution Procedures for Reservation Timber Sales Preserved Pending Approval of Administrative Rules. TERO procedures established for Reservation timber sales under the former MOU between Hoopa Forest Industries and the Bureau of Indian Affairs, and consisting of (1) Exhibit A to TERO Amendment No. 7, May 21, 1987, Fair Operating Standards and Procedures, and (2) the Report of Timber Sale Contract/MOU Work Group, April 15, 1987, including in particular the Contractor-Subcontractor Dispute Procedure, are hereby preserved to the extent that they do not conflict with the substantive provisions of this Ordinance; provided that the TERO Commission established by this Ordinance shall review, revise, and subject to Council approval, reissue these procedures as administrative rules not later than 60 days after the effective date of this Ordinance.

13.2 DEFINITIONS

13.2.1 "Indian" means any member of any federally recognized tribe, or any person who furnishes documentary proof that he or she is recognized as an Indian by the United States

pursuant to its trust responsibility to American Indians.

13.2.2 "Hoopa Reservation" or **"Reservation"** means the Hoopa Valley Indian Reservation as defined under Article III of the Constitution and Bylaws of the Hoopa Valley Tribe.

13.2.3 "Employer" means any person, company, contractor, subcontractor or entity located or engaging in commercial or employment activity within the exterior boundaries of the Hoopa Valley Indian Reservation, and which employs two or more persons.

13.2.4 "Indian Firm" means a firm or business certified by the TERO Commission as eligible for Indian preference in contracting and subcontracting; provided that Indians hold at least 51% ownership interest in such firm or business and exercise majority management control.

13.2.5 "Commission" and **"Office"** mean the Tribal Employment Rights Commission and its Office and the Tribal Office of Employment Relations.

13.2.6 "Council" means the Hoopa Valley Tribal Council.

13.2.7 "Minimum Threshold" means a minimum level that any job applicant shall be required to meet prior to Indian Preference being applied to that job applicant. Criteria to establish a minimum threshold may be established by but are not limited to the following:

1. Job Descriptions;
2. Interview Committees;
3. Skills Tests;
4. RFP's and License Requirements;
5. Other Job Requirements.

13.3 ESTABLISHMENT OF TERO COMMISSION AND OFFICE

13.3.1 Establishment and Purpose of Commission

(A) The Hoopa Valley Tribal Council does hereby establish the Tribal Employment Rights Commission (TERO Commission) for the purposes of implementing and enforcing the Indian Preference provisions of this Ordinance and disseminating information regarding unlawful employment discrimination by State and private employers subject to Title VII of the Civil Rights Act of 1964 who are operating on or near the Hoopa Valley Indian Reservation.

(B) TANF; Training by TERO Commission. The TERO Commission is hereby authorized to provide basic life/work skills training consistent with the needs of the community and implementation of the Tribal, state, or federal TANF program; to establish a Tribal Employment Rights training center; to enter into agreements with labor unions or other persons or entities to provide work skills training and education opportunities; and to generally provide employment training to members of the Tribe and residents of the Hoopa Valley Indian Reservation

through means deemed appropriate by the Tribal Council.

(C) TERO Tax. The TERO Commission shall be allocated sufficient funds as determined by the Hoopa Valley Tribal Council derived from the TERO Tax as described in Section 13.5 of this Ordinance for implementation, conduct, and fulfillment of the TERO Commission's purposes.

13.3.2 General Powers of the Commission

(A) Organizational Authority. The Commission may hire immediate TERO staff, obligate funds appropriated by the Council, and secure and obligate funding from Federal, State or other sources to carry out its duties and functions under this Ordinance. The Commission is further authorized and directed to adopt such organizational bylaws as are necessary to enable it to carry out its duties and functions under this Ordinance. The Commission shall report directly to the Council. The TERO Commission shall be subject to the Conflict-of-Interest and Nepotism Ordinance of the Hoopa Valley Tribe.

(B) Regulatory Authority.

(1) The Commission shall promulgate rules, regulations, interpretations of law, and guidelines for Indian preference that are necessary to implement this Ordinance. Such rules shall become effective upon Council approval of a resolution adopting said rules. Council approved rules shall be codified in the Revised Code of the Hoopa Valley Tribe, and the Commission shall take other reasonable steps to insure that the general Reservation community is on notice of all Indian preference and applicable employment related laws.

(2) The Commission shall maintain an Indian Skills Bank as a means of providing qualified Indian employees to employers, contractors, and subcontractors. The Commission shall actively recruit Indians for listing in the Skills Bank. The Commission shall also actively recruit and certify Indian firms as eligible for Indian Preference in contracting and sub-contracting.

(3) The Commission is authorized to certify Indian firms, located on or off the Reservation, for purposes of Indian preference, minority small business contract eligibility, exemption from state taxation and wage performance bond requirements, and other purposes. The Commission shall develop administrative rules to implement this authority, which shall include provisions and procedures for revocation of such certifications.

(4) The Commission may register off-reservation contractors and sub-contractors, approve Indian Preference Plans, and issue permits to such contractors according to rules and procedures to be developed, which shall include procedures for revocation of such permits.

(5) The Commission is further authorized and directed to investigate complaints regarding any violation of the provisions of this Ordinance or any other tribal law the

Commission is authorized to enforce; the Commission may also investigate possible violations of this Ordinance if there is reasonable cause to believe a violation of this Ordinance has occurred or is occurring. Neither the Commission or any of its employees shall have the authority to investigate or assist any Hoopa Tribal employee in pursuing any employment related claim not within its authority under this Ordinance.

(C) Adjudicatory Authority

The Commission may hold hearings on and determine any matter under its authority, including but not limited to hearings necessary to the issuance, modification, and revocation of any permit, license, certification, or assessment authorized hereunder, as well as any adjudicatory hearing regarding violations of the provisions of this Ordinance. The Commission shall have no authority or jurisdiction to hear or adjudicate complaints brought by Hoopa Valley Tribal employees that are not specifically authorized under this Ordinance. The Commission shall promulgate simple and fair rules to govern its adjudications, and is authorized to issue compliance orders and impose civil penalties in the form of fines.

(D) Cooperative Agreements with Other Governments

The Commission may negotiate, and upon Council approval, enter into cooperative agreements with agencies of state and federal government in order to implement the intent of this Ordinance and eliminate unlawful discrimination against Indians.

13.3.3 Composition of the Commission

(A) The Commission shall be composed of three (3) members in good standing in the community. Two (2) members of the Commission shall be appointed by the Council in October of even numbered years, each for a term of two (2) years; and one (1) members shall be appointed in odd numbered years, each initially for a term of one (1) year, thereafter being appointed in October of odd-numbered years each for a term of two (2) years. Any member may be removed by the Council at any time for cause, subject to notice and opportunity for a hearing before Council. The Council's decision shall be final. All terms of office shall commence on October 1 of the year position becomes vacant.

(B) Decisions of the TERO Commission shall be made by a majority vote. A quorum shall consist of any two of the three Commission members.

(C) Any Commission member shall be disqualified from any involvement in decisions affecting the tribal department or entity with which he or she is employed or volunteers their time to that department.

(D) The Commission shall have authority to designate a panel of alternates who may serve in place of a disqualified Commissioner, as required to proceed with any hearing or review provided for in this Ordinance.

13.3.4 Powers of the TERO Director

The TERO Director shall have those powers delegated by the Commission as it deems necessary to carry out this Ordinance. The Director shall be the investigating agent for the Commission responsible for investigating, researching, reporting and documenting any relevant information required by the Commission. The Director shall report directly to the Commission.

13.4 INDIAN EMPLOYMENT PREFERENCE POLICY AND PROCEDURES

All employers shall extend a preference to qualified Indians, as provided herein, in all aspects of employment, including but not limited to recruitment, hiring, promotion, lateral transfers, retentions, training, contracting, and subcontracting. No employer may recruit, hire, or otherwise employ any non-Indian for any employment position covered by this Ordinance; unless and until the TERO Commission has furnished written notice to such employer that no qualified Indians are available for such position.

13.4.1 Applicability

Unless clearly and expressly prohibited by federal and other tribal laws or Council action, this Ordinance shall apply to all employers, including but not limited to: The Council and all its programs, departments, and chartered entities or enterprises; private employers and independent contractors and subcontractors, including those performing work for the Council, the State of California, or the United States.

13.4.2 Covered Positions

The Indian Employment Preference Policy of this section shall apply to each and every job classification, skill area, or craft recognized or utilized by an employer, including administrative, supervisory, and professional classifications.

13.4.3 Qualified Indians; Employment Criteria

An Indian shall be qualified for employment in a position if he or she meets the minimum threshold requirements for such position, and such Indian shall be accorded the preferences to which he or she is entitled under this Ordinance. No employer may utilize any employment criterion that is not legitimately related to the performance of the position.

13.4.4 Eligible Indians

(A) Hoopa Valley Tribe and its Entities and private employers contracting with the Tribe. The Hoopa Valley Tribe and its programs, departments, chartered entities and enterprises, and private employers contracting with the Tribe, shall extend a preference to qualified Indians according to the following priorities:

(1) Enrolled members of the Hoopa Valley Tribe;

(2) Indian spouses of enrolled members of the Hoopa Valley Tribe;

(3) Indians residing within the exterior boundaries of the Hoopa Valley Indian Reservation.

(4) Indians not residing within the exterior boundaries of the Hoopa Valley Indian Reservation.

If this section conflicts with any applicable federal laws or regulations, the Hoopa Valley Tribe and its programs, departments and chartered entities and enterprises, and private employers contracting with the Tribe shall extend Indian preferences according to the requirement of said federal laws and regulations.

(B) Private Employers Not Contracting with the Hoopa Valley Tribe: Private employers not contracting with the Hoopa Valley Tribe and doing business within the exterior boundaries of the Hoopa Valley Indian Reservation shall not be subject to the priority requirements of Section 13.4.4(A), but shall extend a preference to qualified Indians residing on or near the exterior boundaries of the Hoopa Valley Indian Reservation. Private employers operating under contracts with the Hoopa Valley Tribe shall be required to provide Indian Preference according to the requirements of § 13.4.4(A).

13.4.5 Notice of Employee Rights. All employers subject to this Ordinance shall prominently display a notice to all employees and applicants for employment of their rights under this Ordinance.

13.4.6 Employer Retaliation Prohibited. It shall be violation of this Ordinance for any employer to take any adverse personnel or hiring action, or to retaliate in any way, against any person who attempts to enforce the requirements under this Ordinance. Employers found by the Commission, pursuant to an adjudicatory hearing, to have engaged in retaliation shall be subject to appropriate sanctions to be imposed by the Commission. The Commission may in its discretion either hold a hearing or file action in Tribal Court to review an allegation of unlawful retaliation. The Tribal Court is authorized to issue temporary injunctions for enforcement of this provision to prevent unlawful conduct.

13.5 ESTABLISHMENT OF TERO TAX AND FEES

There is hereby established a TERO tax to be paid to the Hoopa Valley Tribal Council by each prime contractor, and by each employer operating within the exterior boundaries of the Hoopa Reservation, whose total contract or annual gross revenues is $1,000.00 or more. The tax shall be equivalent to three percent (3%) of the total gross value of any contract performed within the Reservation or of the total annual gross revenues. The TERO tax may be paid in incremental payments, subject to the prior written approval of the Tribal Council. The proceeds of the tax shall be used in implementing this Ordinance. The Hoopa Valley Tribal Council shall authorize the appropriate amounts of the TERO Tax to be utilized by the TERO Commission according to proof of budgetary needs provided by the department. The TERO tax shall be governed under guidelines approved by the Tribal Fiscal Department. A contractor or employer failing to pay the TERO Tax shall be subject to sanctions imposed by the Commission. The

Hoopa Valley Tribal Council when it determines to be in the interests of the Hoopa Valley Tribe, reserves the right to waive TERO Taxes and Fees for any contract or contracts, and further, may approve a waiver schedule consistent with the objectives of this Ordinance, that is implemented directly by the TERO Office and that establishes tax adjustments to not less than one percent (1%).

13.6 SPECIAL REQUIREMENTS FOR CONTRACTORS AND SUBCONTRACTORS

The requirements of this Section apply to all employers engaging in commercial or employment activities within the Reservation pursuant to public or private contract. If this section's contracting requirements conflict with applicable federal law or regulations, the applicable federal laws or regulations shall supersede this section.

13.6.1 Certification by Commission

Any contractor or subcontractor claiming eligibility for Indian preference under this title shall submit documentation acceptable to the Commission, pursuant to its authority under Section 13.3.2 (B)(3), that is an Indian firm as defined in Section 13.2.4.

13.6.2 Indian Preference Plan

Each contractor shall include in its bid an Indian Preference plan for the master contract and any subcontracts. The plan shall indicate the name of the proposed subcontractor, whether it is an Indian-owned firm and if not, information on the good faith steps taken to identify Indian firms for the subcontract. A contractor may not refuse to employ an Indian subcontractor for the reason of price so long as the Indian firm's price is within five percent (5%) of the lowest bid, calculated by multiplying the lowest bid by 105%. A contractor may not refuse to employ an Indian subcontractor for the reason that a non-Indian firm is more qualified so long as the Indian firm satisfies the threshold requirements for technical qualifications.

13.6.3 Failure to Submit Indian Preference Plan

An apparent successful bidder who fails to submit an Indian preference plan prior to award of the contract shall be considered a non-responsive bidder for the purpose of awarding the contract.

13.6.4 Amendments to Plan

If awarded the bid, the contractor may not deviate from the plan or add or delete any existing new subcontracts or subcontractors without the written consent of the Contracting Officer or his designee and notice to the Commission. Any amendments to the Indian Preference Plan must be in writing and approved prior to the date of implementation.

13.6.5 Bid Shopping Prohibited

A contractor is prohibited from engaging in bid shopping as a means of avoiding its Indian subcontract preference obligations. Bid shopping is defined as any practice which a

bidder or contractor informs a prospective subcontractor that it will receive a subcontract only if it offers a price lower than that proposed by another firm.

13.7 JOB CATEGORIES

Employers or subcontractors employed by a primary contractor under one or more contracts totaling at least $10,000 shall not participate in more than one area of the overall project for which such employer or subcontractor is employed. A superintendent or any person in a similar capacity employed by the primary contractor shall not be employed in any other aspect of said project.

13.7.1 Identification of Key Employees; Hiring Requirements

(A) Contractors/employers shall be required to hire and maintain as many TERO / Native American preference employees as apply for and are qualified for each craft or skill.

(B) Notwithstanding subsection A, above, Contractors/employers may hire key employees to fill not more than 25% of the workforce.

(1) Prior to commencing work on the Hoopa Valley Indian Reservation the prospective employer, contractor and sub-contractors shall identify key, regular and permanent employees. The TERO Office and contractor/employer in possession of past employment records documenting employment of past supervisors or foreman shall coordinate on certifying eligibility for treatment of employees as a key employee.

(2) A key employee is one who is in a top supervisory position or performs a critical function such that an employer would risk likely financial damage or loss if that task were assigned to a person unknown to the employer. A key employee has been on the employers' or contractors' annual payroll for a period of one year continuously in a supervisory capacity, or is an owner of the firm. An employee who is hired on a project-by-project basis shall not be considered a key employee.

13.7.2 Lay-Offs

No Indian Worker shall be laid off as long as a non-Indian worker in the same craft is still employed, not as long as the Indian meets threshold qualifications for the job, unless such non-Indian has been employed for more than 90 days longer than such Indian. If the contractor lays off by crews, qualified Indians shall be transferred to any crew that will be retained, as long as there are non-Indians in the same craft employed elsewhere on the Reservation under the same contract.

13.7.3 Existing Contracts, Employers

Any existing contracts or other work presently operating under an agreement with the Tribal Employment Rights Office will continue under the same written guidelines and rules. Each employer shall provide to the Commission a list of employees and their Indian affiliation, if any, as part of the implementation of this Ordinance.

13.7.4 Reporting Requirements

Each employer shall submit monthly reports to the Commission on a form provided indicating the number of employees, including a separate tally of Indians, it has on its work force, monthly hires and fires, and other information as may be identified on the form. An employer who fails to submit monthly reports shall be subject to sanctions provided under this Ordinance.

13.8 IMPLEMENTATION

In implementing the requirements of this Ordinance, the Commission may:

13.8.1 Numerical Hiring Goals

Impose numerical hiring goals and timetables that specify the minimum number of Indians an employer must hire.

13.8.2 Training Programs

Require employers to establish or participate in such training programs as the Commission determines necessary in order to increase the pool of qualified Indians on the Hoopa Reservation. Such training programs must have prior approval from the Contracting Officer and should preferably be included in the bid package. If training programs are not included in the bid package, the Commission shall give due consideration to the increase in cost, if any, for preforming the program.

13.8.3 Attend and monitor all job interviews as a non-voting participant.

13.8.4 Prohibit an employer from establishing extraneous qualification criteria or other requirements that serve as barriers to Indian employment.

13.8.5 Enter into agreements, subject to approval by the Hoopa Tribal Council, with unions and other employers to insure compliance with this Ordinance.

13.8.6 Require employers to give preference in the award of contracts and subcontracts to Indian-owned firms and businesses.

13.8.7 Establish programs to provide counseling and support to Indian Workers to assist them to retain employment. Employers may be required to participate in and/or cooperate with such

support and counseling programs.

13.8.8 Issue Permits

Issue permits for implementation and provisions of this Ordinance and other agreements entered into under the authority of this Ordinance.

13.9 ENFORCEMENT BY TERO COMMISSION

In implementing this Ordinance the Commission shall have the following powers of enforcement:

13.9.1 Investigation, Monitoring

To investigate and monitor complaints, concern, and inquiries regarding Indian preference.

13.9.2 Issue Notices of Non-Compliance and Compliance Orders

To issue notices of non-compliance orders with the Indian preference provisions of this Ordinance and other applicable provisions of this Ordinance.

13.9.3 Citations, Subpoenas, and Penalties

To issue citations and subpoenas to employers regarding violations of the Indian preference provisions of this Ordinance, and to impose such civil penalties, including fines, as may be reasonably necessary to remedy the consequences of a violation of the Indian preference provisions this Ordinance or to deter future violations.

13.9.4 Hearings

To hold such hearings as may be necessary to resolve complaints enforce the provisions of this Ordinance, and hear concerns regarding issues pursuant to the Commission's authority under this Ordinance.

13.9.5 File and Defend Cases in Tribal Court

To bring or defend a complaint or other pleading in Tribal Court for enforcement of the Indian preference provisions of this Ordinance, against any employer within the exterior boundaries of the Hoopa Reservation.

13.10 TRIBAL COURT

Appeals of decisions of the TERO Commission may be filed under the rules of the Tribal

Court. The Tribal Court is hereby authorized to hear and dispose of appeals from final decisions from TERO Commission hearings. Any appeal from a final decision of the TERO Commission must be filed within twenty (20) calendar days after the date of receipt of the TERO Commission's decision. Any decisions not appealed within the required time frame shall become final and the Tribal Court shall have no jurisdiction to hear the appeal..

13.11 LEGAL REPRESENTATION

In carrying out its responsibilities under this Title, the Commission shall consult a legal counsel of its choosing subject to the approval of the Council. Any legal counsel chosen must be admitted in good standing to practice law in the state of California and the Hoopa Valley Tribal Court bar.

13.12 PRINCIPLES OF CONSTRUCTION; SEVERABILITY; SOVEREIGN IMMUNITY PRESERVED

13.12.1 This Ordinance is remedial legislation intended to rectify the long-standing problem of severe under-employment of Hoopa tribal members and other Indians living in the Reservation community. Accordingly, it is to be construed liberally to achieve its purposes. Doubtful issues are to be resolved in favor of a right of any party to obtain administrative review.

13.12.2 If any part of this Ordinance is found to be invalid for any reason, it is the intent of the Council that the remaining provisions remain in force to the maximum extent possible, and that they continue to be construed according to the provisions of this Section.

13.12.3 Nothing in this Ordinance is to be construed as a waiver of the Tribe's sovereign immunity from unconsented lawsuit, nor as consent by the Tribe to bring an action against the Tribe, its officers, or any of its departments or entities.

13.13 EFFECT OF AMENDMENTS ON PRIOR TERO LEGISLATURE AND PENDING CASES

13.13.1 Prior TERO enactments or Rules: Resolution 91-71A, as amended March 6, 1995, Ordinance No. 2-80, as amended April 27, 1995 are repealed and shall have no further force and effect. The Rules for Hearings Before the TERO Commission, as amended June 10, 1998 shall be permitted to be used where they are consistent with the language of this statute by providing uniform rules for hearings when they are authorized under this ordinance. Under no circumstances shall those present rules be considered authority for the TERO Commission to hear employment related grievances other than which is authorized under this statute. The TERO Commission under the authority granted by §13.3.2(C) shall draft new Rules Before Hearings to effect the most recent amendments to this Ordinance.

13.13.2 All current employee grievances that are not related to termination where the TERO Commission has not issued a final decision shall be dismissed. An employee termination case

that has been appealed to the TERO Commission prior to the date of the Tribal Council transferring employee termination grievances to Tribal Court shall be heard by the TERO Commission. However, all employee termination cases regardless of whether they are pending before the TERO Commission or before the Tribal Court shall be subject to the requirements of 1 H.V.T.C. § 1.1.04(F) AS IT RELATEES TO THE Hoopa Valley Tribe's limited waiver of sovereign immunity.

CERTIFICATION

I, the undersigned, as Chairman of the Hoopa Valley Tribal Council, do hereby certify: that the Hoopa Valley Tribal Council is composed of eight members, of which eight (8) were present, constituting a quorum, at a Regular Meeting thereof, duly and regularly called, noticed, convened, and held this 17th day of May, 2012; that this Ordinance was adopted at said meeting by a vote of seven (7) FOR and none (0) AGAINST; and that since its adoptions this Ordinance has not been altered, rescinded, or amended in any way.

DATED THIS 17TH DAY OF MAY, 2012.

_____, CHAIRMAN
HOOPA VALLEY TRIBAL COUNCIL

ATTEST:

Darryl A Miller, EXECUTIVE SECRETARY
HOOPA VALLEY TRIBAL COUNCIL