

**TITLE 8 – REGULATORY CODE
PART III –LABOR
CHAPTER 3-1 – EMPLOYMENT**

TABLE OF CONTENTS

SUBCHAPTER A		POLICY DEFINITIONS	
Section 10	Indian Preference Employment and Training Policy		1
Section 20	Federal Law as Basis for Indian Preference.....		1
Section 30	Equal Employment Opportunity		1
Section 40	Tribal Power to Impose Preferential Requirements		2
Section 50	Office of Federal Contract Compliance Program (OFCCP) Regulations		2
Section 60	Definitions		2
SUBCHAPTER B		GENERAL PROVISIONS	
Section 70	Tribal Employment Rights Office.....		4
Section 80	Authority of TERO		4
Section 90	Publication to Bidders.....		4
Section 100	Tribal Departments' and Agencies' Responsibilities		4
Section 110	TERO Responsibilities.....		4
SUBCHAPTER C		EMPLOYMENT PREFERENCE	
Section 120	Scope of Indian Preference in Employment.....		4
Section 130	Specific Indian Preference Obligations of Employers		5
Section 140	Non-Compliance		5
Section 150	Subcontractors		6
Section 160	Employment Procedure.....		6
Section 170	Notification of Job		6
Section 180	Waiver of Notice of TERO		6
Section 190	Violation of Notice of TERO.....		6
Section 200	Employer's Right to a Hearing		6
Section 210	Lay-Offs.....		6
Section 220	Promotion, Career Advancement, Job Enhancement Pay Policies		6
Section 230	Training and Apprenticeship.....		7
Section 240	Part-time, Temporary, Summer and Co-operative Student Employees		7
Section 250	Religious Accommodation.....		7
Section 260	Counseling and Support Programs.....		7
Section 270	Job Qualification Requirements of Employers		8
Section 280	Right of Appeal.....		8
Section 290	Reporting Requirements and On-Site Inspections		8
Section 300	Compliance Plan		8
Section 310	Unions		8
Section 320	Issuance of Regulations		9
SUBCHAPTER D		INDIAN PREFERENCE IN CONTRACTING AND SUBCONTRACTING	
Section 330	Indian Preference on Contracting and Subcontracting.....		9
Section 340	Coverage		9
Section 350	Definitions		10
Section 360	Indian Contract Preference Requirements in Prime Contracts.....		10
Section 370	Indian Preference in Subcontracting		11
Section 380	Responsibilities of TERO		12
SUBCHAPTER E		ADMINISTRATION; ENFORCEMENT; APPEALS	
Section 390	Administration		12
Section 400	Administrative Review		12

Section 410	Informal Resolution	12
Section 420	Hearing	12
Section 430	Sanctions and Penalties	13
Section 440	Individual Complaint Procedures.....	13
Section 450	Retaliation by Employer	14
Section 460	Judicial Review: Appeals Procedure and Jurisdiction	14
Section 470	Enforcement.....	14
Section 480	Effective Date	14

**TITLE 8 – REGULATORY CODE
PART III - LABOR
CHAPTER 3-1—EMPLOYMENT**

*Legislative History: Passed on August 16, 1981 by Tribal Council as TERO Ordinance (Ord. No. 4)
Enabled on September 23, 1981 by Resolution No. C-43-91 to be full force & effect.
Amended and codified on February 16, 2005 by Resolution No. C02-34-05.
Recodified on August 9, 2006 by Resolution No. C08-313-06.
Amended on August 10, 2011 by Resolution No. C08-234-11 and Ord. No. 20-11*

SUBCHAPTER A POLICY LEGAL BASIS; DEFINITIONS

Section 10 Indian Preference Employment and Training Policy (8 PYTC § 3-1-10)

- (A) The Pascua Yaqui Tribe believes that, like natural and human resources, jobs in private and public employment on or near the Reservation is a critical resource of Indian people. The Tribal Council must use its sovereign power to obtain the rightful share of such jobs for Indian people and to eradicate discrimination against Indian people. Indians are entitled to the protection of federal laws which have been adopted to combat employment and economic discrimination and the Pascua Yaqui Tribal Council intends to play an important role in the enforcement of such laws.
- (B) The Tribal Council finds it necessary to establish a Tribal Employment Rights Office (TERO) to increase employment of Indians and to ensure that Indian Preference in employment and training is adhered to.

Section 20 Federal Law as Basis for Indian Preference (8 PYTC § 3-1-20)

The Indian Self-Determination and Education Assistance Act of 1974 (Public Law 93-638), Section 7(b) states:

Any contract, subcontract, grant or subgrant pursuant to this act...or any other act authorizing federal contracts with or grants to Indian organizations or for the benefit of Indians shall require that to the greatest extent feasible:

- (1) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and
- (2) Preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises...”

Section 30 Equal Employment Opportunity (8 PYTC § 3-1-30)

Nothing contained in this Chapter shall violate or undermine federal requirements of Equal Employment Opportunity, namely Title VII of the 1964 Civil Rights Act, the “Office of Federal Contract Compliance Programs” (OFCCP) Compliance of Federal Contract Compliance Program, or Executive Order 11246. Title VII prohibits preferential employment on the basis of race, religion, color, sex or national origin. However, Title VII contains a special exception: Section 30 (i) states: “Nothing contained in this title shall apply to any business or enterprise on or near an Indian Reservation with regard to any publicly announced

employment practice of such business or enterprise under which preferential treatment is given to an individual because he/she is Indian.”

Section 40 Tribal Power to Impose Preferential Requirements (8 PYTC § 3-1-40)

The U.S. Congress justifies tribal power to impose preferential requirements on the grounds that: “This exemption is consistent with the federal governmental policy of encouraging Indians employment and with the special legal position of Indians.”

Section 50 Office of Federal Contract Compliance Program (OFCCP) Regulations (8 PYTC § 3-1-50)

In January 1977, the OFCCP issued regulations which state: “Work on or near Indian Reservations. It shall not be a violation of the equal opportunity clause for a construction or non-construction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian Reservation. The use of the word “near” would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors and subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of region, sex, or tribal affiliation, and the use of such a preference shall not exempt a contractor from complying with the other requirements contained in this Chapter.”

Section 60 Definitions (8 PYTC § 3-1-60)

- (A) The term "commerce" includes all trade, traffic, distribution, communication, transportation, provision of services, manufacturing, production, agricultural production, building, maintenance, construction, banking, mining, gas and oil production.
- (B) The term "employee" shall include any employee or applicant for employment and shall not be limited to the employees of a particular employer, unless a section of this document explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of unfair labor practices and who has not obtained any other regular and substantially equivalent employment. The term "employee" shall not include any individual employed in the domestic service of any family or person at home or any individual employed by any other person who is not an employer as herein defined.
- (C) The term "employees on the Pascua Yaqui Reservation" shall include employees who, in a non-supervisory or non-managerial position, spend more than one-tenth of their working hours per month or per pay period, whichever is shorter, on the Pascua Yaqui Reservation. This term shall also include employees who, in a supervisory or managerial position, spend more than 1/20 of their working hours per month or per pay period, whichever is shorter, on the Pascua Yaqui Reservation.
- (D) The term "employer" includes but is not limited to, any person who engages in commerce through paid agents or servants, and who hires or contracts for services within the boundaries of the Pascua Yaqui Reservation. The term "employer" includes any person acting as an agent, contractor or subcontractor of an employer, directly or indirectly, but shall not include the United States Government or any wholly-owned corporation of said government. This term shall include, however, independent contractors, subcontractors, grantees and subgrantees of the Federal Government or of wholly-owned government corporations.
- (E) The term “covered employer” includes an employer who employs two or more employees on the Pascua Yaqui Reservation for more than two months or on an intermittent but continuing basis.
- (F) The term "Indian" means:
 - (1) any member of any recognized American Indian tribe now under federal jurisdiction;

- (2) descendants of members who were on June 1, 1934 residing within the boundaries of any Indian Reservation;
 - (3) until January 17, 1981 a descendent of at least one-fourth degree Indian ancestry of a currently federally recognized tribe whose rolls have been closed by an Act of Congress;
 - (4) all others of one-half or more Indian blood of tribes indigenous to the United States, Native Alaskan, Eskimo, or other aboriginal people of Alaska; or
 - (5) direct lineal descendants of enrolled tribal members, recognized by the community as Indian.
- (G) The term "Indian-owned firm or entity" means any commercial, industrial or business activity which is owned by an Indian or Indians or other Indian-owned firm or entity, provided that such Indian ownership constitutes not less than 50% of the enterprise and that control of management affairs of the entity is conducted by Indians.
- (H) The term "Indian Preference" means that Indians (as defined in this section) shall be given absolute preference in all phases of employment, training, contracting, and subcontracting. "Preference" means that in all cases where a qualified Indian or Indian firm is available, the Indian shall be granted preference to a similarly qualified non-Indian person or entity.
- (I) The term "Indian resident" or "resident Indian" means any Indian person, without regard to tribal affiliation, who at the time any work commences on the Reservation by any employer, contractor or subcontractor, has resided on the Pascua Yaqui Reservation for not less than the preceding 60 days.
- (J) The term "non-resident Indian" includes all Indians who are not resident Indians within the definition of this section.
- (K) "Notice" is written notification of apparent or alleged non-compliance or violation. As required to be given by the Tribal Employment Rights Office, notice shall be sufficient as to unnamed parties in an action, all interested person not parties to an action, and in all instances where a specific person is not addressed, if it is posted in a public place in the Tribal Employment Rights Office for not less than five working days and is on file in the Tribal Employment Rights Office open to public inspection.
- (L) "Citation" is written notification of findings of non-compliance or violation and sanctions and/or penalties imposed. Citation shall be sufficient if posted in a public place in the Tribal Employment Rights Office for not less than five working days and placed on file in the office open to public inspection, as stated in definition "Notice" above.
- (M) The term "person" shall include both natural persons and artificial persons, including but not limited to corporations, trusts, partnership, unions, agents, societies, sole proprietorships and estates of decedents.
- (N) The term "union" or "labor union" means any organization of any kind or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

SUBSECTION B GENERAL PROVISIONS

Section 70 Tribal Employment Rights Office (8 PYTC § 3-1-70)

The Pascua Yaqui Tribal Employment Rights Office (TERO) shall be a unit of the Human Resources Department. The Human Resources Department is vested with full supervisory authority in the Human Resources Director who shall report directly to the Tribal Council. The Human Resources Director shall supervise and have authority over the TERO Manager.

Section 80 Authority of TERO (8 PYTC § 3-1-80)

- (A) The TERO Manager shall have authority to hire staff, expend funds appropriated by the Tribal Council, obtain and expend funding from federal, state or other resources to carry out the purposes of the TERO.
- (B) The TERO Manager shall have authority to issue rules, regulations and guidelines to implement the employment and contracting rights requirements imposed by this chapter, to hold compliance hearings, to subpoena witnesses and documents, to require employers to submit records, to issue cease and desist and related orders, through its own office or through the Tribal Court, to petition Tribal Court for removal orders, to conduct site monitoring on employer premises, to interview employees throughout the Reservation at any time, to examine employer records and documents on the Reservation and to take such other actions as are necessary for the fair and vigorous implementation of this chapter.
- (C) The TERO Manager may appoint another person to serve as Tribal Employment Rights Officer for the conduct of any hearing

Section 90 Publication to Bidders (8 PYTC § 3-1-90)

The obligation of all employers to comply with this chapter shall be made known to all existing and future employers, contractors and subcontractors. All bid announcements issued by any tribal, federal, state or other private or public entity for the benefit or use of Pascua Yaqui Indians shall contain a statement that the successful bidder will be obligated by tribal law to comply with this chapter and that a bidder or potential bidder may contact the TERO to obtain additional information.

Section 100 Tribal Departments' and Agencies' Responsibilities (8 PYTC § 3-1-100)

Those departments responsible for issuing business licenses or contracts or subcontracts or otherwise engaged in activities involving contact with prospective employers or contractors on the Reservation shall be responsible for informing such prospective employers or contractors of their obligations under this chapter.

Section 110 TERO Responsibilities (8 PYTC § 3-1-110)

Within one month of the effective date of this chapter and for each amendment thereto, the TERO shall send copies of this chapter to every employer and contractor/subcontractor presently operating on the Reservation. It shall be the responsibility of the TERO to send copies of any future revisions to the chapter to all Tribal departments and agencies as described in Section 100 of this chapter.

SUBCHAPTER C EMPLOYMENT PREFERENCE

Section 120 Scope of Indian Preference in Employment (8 PYTC § 3-1-120)

- (A) All existing and future covered employers operating within the boundaries of the Pascua Yaqui Reservation are required to give absolute preference to qualified Indians in all phases of employment and training (including recruitment, advertising of jobs, hiring, upgrading, promotion, transfer, rate of pay, layoff or termination and selection for training or apprenticeship). Indian preference means that if a qualified Indian is available, he or she will be given preference over a qualified non-Indian in any phase of employment. All jobs which exist within the boundaries of the Reservation, permanent, temporary, contracted or subcontracted are subject to Indian preference.
- (B) All covered employers and agencies shall comply with the rules, regulations and guidelines of the TERO with regard to Indian Preference.

Section 130 Specific Indian Preference Obligations of Employers (8 PYTC § 3-1-130)

- (A) The TERO shall establish the minimum number or percentage of Indian persons that each employer must employ in its work force during any year that its employees work on the Reservation. The goals set shall be based on knowledge of the available Indian labor pool and projected employment opportunities.
- (B) The employer shall meet with the TERO before it actually begins work on the reservation and immediately after a contract is signed.
- (C) For existing employers, Indian preference employment goals shall be reviewed by the TERO at least annually and revised as necessary to reflect changes in the Indian work force available and in the employer's hiring plans.
- (D) Each employer shall submit reports to the TERO with a frequency established by the TERO, indicating number of Indian and non-Indian employees, hires, terminations, layoffs, promotions, pay increases, reprimands, how close the employer is to meeting its goals and such other information as the TERO requests. An employer who fails to submit these reports in a timely manner shall be subject to the sanctions provided for in Subchapter E of this chapter.
- (E) Each employer shall meet its minimum goals for the employment of Indians or shall demonstrate by written and other evidence that it has made every possible effort to meet its goals, including actively recruiting Indians on and off the Reservation, interviewing and if necessary skill testing Indian applicants, providing trainee positions if no qualified Indians are available, posting public notices for job opportunities and other actions which indicate the employer has made every possible effort.

Section 140 Non-Compliance (8 PYTC § 3-1-140)

- (A) The TERO shall have authority to issue a notice of non-compliance when, based on reports, observations or other evidence, reason exists to believe the employer is not meeting or making every effort to meet its goals for Indian preference. Before issuing citations for non-compliance, however, the TERO will make every reasonable effort to resolve the non-compliance by informal means.
- (B) Upon receipt of such notice, an employer shall be entitled to a hearing as provided in Subchapter E of this chapter. The burden shall be on the TERO to demonstrate that an employer has failed or is failing to meet its goals or abide by the chapter or TERO Guidelines. The burden shall then shift to the employer to demonstrate that it has made every possible effort to meet its goals or come into

compliance with the regulations. An employer who is found to be out of compliance because it failed or failing to meet its goals and commitments to the TERO and who is unable to demonstrate by evidence that it made every possible effort to do so, shall be subject to remedial actions and sanctions provided for in Subchapter E.

Section 150 Subcontractors (8 PYTC § 3-1-150)

The Indian preference requirements contained in this chapter shall be binding on all subcontractors of covered employers, regardless of their size and shall be deemed a part of all resulting subcontract specifications. The primary employer or contractor shall have the initial and primary responsibility for ensuring that all its subcontractors comply with these requirements. The TERO is authorized to impose sanctions and penalties on the primary employer as well as on the subcontractor if the subcontractor fails to comply.

Section 160 Employment Procedures (8 PYTC § 3-1-160)

The employer may use whatever employment process it chooses, provided a non-Indian person will not be hired if there is a similarly qualified Indian available. The employer may obtain qualified Indian referrals from the TERO and other sources. The employer is cautioned to thoroughly check the documentation of Indian blood of any potential employee not referred by the TERO to ensure that the person is qualified as defined in Section 60 of this chapter. In all cases, the employer is required to notify the TERO and post in the TERO office all jobs planned for a project. Except for key personnel of the employer (which must be identified in the TERO/Employer Agreement signed before commencement of work), all jobs existing or planned to exist on the Reservation are subject to Indian preference requirements.

Section 170 Notification of Jobs (8 PYTC § 3-1-170)

Each employer is required to notify the TERO a reasonable time ahead of all planned employment on the Reservation. For the purposes of this requirement "reasonable time" is defined as: (a) for construction jobs, the TERO shall have 49 working hours' notice to locate plus 12 hours to refer a qualified Indian; (b) for all non-construction jobs, the TERO shall have five working days' notice to refer qualified Indians.

Section 180 Waiver of Notice to TERO (8 PYTC § 3-1-180)

The TERO will consider waivers of requirement for advance notification stated in Section 170 for specific individual jobs, upon a showing by the employer that such time period imposes an undue burden on employer. Proof of undue burden rests with the employer.

Section 190 Violation of Notice to TERO (8 PYTC § 3-1-190)

Any job not first cleared through the TERO shall be subject to suspension by TERO Manager. The employer shall be subject to a fine as proved in Subchapter E.

Section 200 Employer's Right to a Hearing (8 PYTC § 3-1-200)

Any employer cited for violation of Section 190 has the right to a hearing and appeal in accordance with subchapter E.

Section 210 Lay-Offs (8 PYTC § 3-1-210)

In all layoffs or reductions in force, no Indian worker shall be terminated or laid off if a non-Indian worker is still employed in the same craft or job classification. Non-Indians shall be terminated first as long as an Indian employee meets the threshold qualifications for the job. Further, if the employer lays off by crews, qualified Indians shall be transferred to crews that will be retained so long as there are non-Indians in the same craft or job classification employed elsewhere on the Reservation.

**Section 220 Promotion, Career Advancement, Job Enhancement, Pay Policies
(8 PYTC § 3-1-220)**

Employers shall give Indians preferential consideration for all promotional opportunities, career advancement/enhancement opportunities or programs, specialized or general training opportunities, employee or management development activities, etc. Each employer shall adopt goals and timetables each year to develop Indian employees for positions in each job classification/category (for example, manager/official, professional, office/clerical, skilled craft, technician and service worker).

Section 230 Training and Apprenticeship (8 PYTC § 3-1-230)

- (A) All employers, as requested by the TERO, shall participate in existing and planned training programs to assist Indians in becoming qualified for job classifications used by the employer. In cases where there is an inadequate pool of qualified Indians to fill certain job categories, the employer may be required to institute formal classroom and/or on the job training programs to fulfill this obligation.
- (B) Construction employers shall employ the maximum number of Yaqui apprentices or trainees allowable under Federal law or, in the absence of federal guidelines, according to the guidelines set forth by the TERO.
- (C) To the extent they are available, all trainees or apprentices employed by an employer on the Reservation shall be Indian people referred through the TERO.

**Section 240 Part-Time, Temporary, Summer and Co-Operative Student Employees
(8 PYTC § 3-1-240)**

- (A) Opportunities for part-time, temporary, summer and co-operative student employment shall be reserved for Indians. The TERO will work in conjunction with employers to locate and refer qualified candidates.
- (B) Employers are further encouraged to make every effort to promote after-school, summer and vacation employment for Indian youth.

Section 250 Religious Accommodation (8 PYTC § 3-1-250)

- (A) Employers shall make accommodations to the religious beliefs and practices of Indian workers in accordance with Public Law 95-341, "American Indian Religious Freedom", and tribal custom.
- (B) Employers should be aware that Indians of various tribes practice different religions, both traditional Indian religions and modern American religions. Therefore, the specific religious practices of an Indian employee may vary from any other Indian employee. Employers are advised to contact the TERO in all instances where an Indian employee has requested special accommodation to his/her religious beliefs, to request counsel in determining that the request is both necessary and reasonable.

Section 260 Counseling and Support Programs (8 PYTC § 3-1-260)

- (A) The TERO and other Tribal and federal departments will provide counseling and other support services to Indians employed on and off the Reservation. Employers are advised to cooperate with such counseling and support services, since most are aimed toward assisting the employee in retaining employment.
- (B) The Equal Employment Opportunity Commission (EEOC) contracts with the TERO to protect Indian employment rights. Therefore, the TERO not only represents the Tribe's laws but also those of the Federal Government.

- (C) The TERO staff is available to assist both employees and employers in improving communications and avoiding discrimination complaints or formal charges.

Section 270 Job Qualification Requirements of Employers (8 PYTC § 3-1-270)

- (A) A employer may use no job qualification criteria or personnel requirements that serve as a barrier to the employment of Indians or that has an adverse impact on Indians as a group or as individuals. The exception is a Bona Fide Occupational Qualification as defined by the EEOC.
- (B) The burden shall be on the TERO to demonstrate that a criteria or personnel requirement is a barrier to Indian employment. The burden will then shift to the employer to demonstrate that (a) a criteria or personnel requirement is not a barrier to Indian employment or (b) such criteria or requirement is a valid requirement of the job.
- (C) If the employer fails to meet this burden, the employer will be required to eliminate the criteria or requirement at issue.

Section 280 Right of Appeal (8 PYTC § 3-1-280)

Where the TERO and employer are unable to reach agreement on the matters covered in Section 270 the employer is entitled to a hearing as provided in Subchapter E. The employer may appeal the TERO's decisions as provided in Subchapter E.

Section 290 Reporting Requirements and On-Site Inspections (8 PYTC § 3-1-290)

- (A) Employers shall submit reports and such other information as are requested by the TERO. Failure to do so may result in the levying of sanctions as provided in Subchapter E.
- (B) Employees of the TERO shall have the right to make on-site inspections during regular working hours in order to monitor an employer's compliance. TERO shall have the authority to inspect and copy all relevant records of an employer, of an employer's signatory unions or subcontractors, to speak with employees on the job site, and to engage in similar investigatory activities. Employers operating on the Pascua Yaqui Reservation shall not have authority to prevent, prohibit or restrict said activities by TERO employees.

All information and documentation collected by the TERO shall be kept confidential unless disclosure is required during a hearing or appeal as provided in Subchapter E of this chapter.

Section 300 Compliance Plan (8 PYTC § 3-1-300)

No employer may commence work on the Pascua Yaqui Reservation until it has signed a TERO/Employer Agreement and provided an acceptable Indian Preference Plan for meeting its obligations under this chapter.

Section 310 Unions (8 PYTC § 3-1-310)

- (A) Employers shall be responsible for obtaining agreement from all signatory unions stating that the union will comply with the Tribe's TERO requirements before the employer will be permitted to commence work on the Reservation. Such agreements shall be subject to approval of the TERO.
- (B) Unions must agree to:
 - (1) give absolute preference to qualified Indians in referrals, regardless of which union referral list they are on;

- (2) cooperate with TERO hiring and employment procedures;
 - (3) establish a mechanism so that Indians are not required to travel on a regular basis to retain their place on union lists. (This could involve phone or mail registration or a union sub-office on the Reservation, for example);
 - (4) indenture and refer only qualified Indian apprentices to employers;
 - (5) remove all barriers to entry into the union for Indians who are qualified for journey person status and wish to join the union;
 - (6) grant temporary work permits to Indians who do not wish to join the union; and
 - (7) meet such other requirements as the TERO may deem necessary to fulfill the employer's Indian preference obligations.
- (C) The model union/TERO/employer agreement provided at the end of this document is by reference incorporated as part of this chapter. The TERO's participation in a written agreement with a union in no way constitutes official tribal recognition of the union or tribal endorsement of any recruiting activities conducted by the union.
- (D) If a union fails to meet its obligations under this chapter, the TERO has authority to require the employer to accept other Indian referrals. The TERO will cooperate and work in conjunction with union hiring halls to ensure that the requirements of the employer, the union and TERO are met.

Section 320 Issuance of Regulations (8 PYTC § 3-1-320)

In issuing rules, regulations and guidelines, the TERO shall be guided by the policy and standards enumerated throughout this chapter and by any such further resolutions as the Tribal Council may issue. The TERO shall insure that all rules, regulations and guidelines issued provide due process.

SUBCHAPTER D INDIAN PREFERENCE IN CONTRACTING AND SUBCONTRACTING

Section 330 Indian Preference on Contracting and Subcontracting (8 PYTC § 3-1-330)

- (A) All covered employers and state and local governments operating on the Reservation or for the benefit of the Yaqui Indians shall give preference in the award of contracts, subcontracts, grants and subgrants to tribally owned and other Indian owned businesses. Federal agencies are not subject to this chapter, since they are covered by federal laws governing Indian preference.
- (B) The TERO shall maintain a list of Indian-owned businesses, and all employers shall make use of the list to contact Indian-owned businesses and invite their participation in contracting and subcontracting, regardless of size or amount of contract. Employers shall be required to provide documented evidence of their efforts to carry out Indian preference in contracting and subcontracting. Subchapter C provides detailed regulations on this matter.

Section 340 Coverage (8 PYTC § 3-1-340)

- (A) These rules and regulations apply to all construction and non-construction contracts and subcontracts involving work to take place "on or near the Pascua Yaqui Reservation." A contract or subcontract taking place "on or near the Yaqui Reservation" means 50% or more of the work under contract or subcontract is to be performed within daily commuting distance of the Yaqui Reservation.

- (B) Indian contract preference requirements set out in Subchapter C, Sections 360 and 370 of this chapter shall apply to:
 - (1) All contracts and subcontracts which are federally funded.
 - (2) All contracts and subcontracts which are non-direct federal or federally funded contracts.
 - (3) All contracts and subcontracts which are for the benefit of Indians and which therefore are covered by Section 7(b) of the Indian Education and Self Determination Act (P.L. 93-638).
 - (4) All contracts and subcontracts “on or near the Pascua Yaqui Reservation.”

Section 350 Definitions (8 PYTC § 3-1-350)

- (A) "Indian Contractor" is a contractor that is 51% or more Indian owned and controlled. The TERO reserves the right to require such proof as it deems necessary to substantiate that a firm actually is 51% or more Indian owned and controlled.
- (B) "For the Benefit of Indians" is work to be performed under a federal or federally funded contract for the benefit of Indians if the benefits provided to Indians are in addition to any incidental benefits which might accrue to the general public.
- (C) "Prime Contractor" is the prime construction, forestry, mining or other contractor on a project. This is the entity responsible for the entire project.
- (D) "Subcontract" is any contract let by a prime contractor or its subcontractors for supplies, services, or work on prime contracts, regardless of tier.
- (E) "On or Near the Reservation" means that 50% or more of the work under contract or subcontract is to be performed within the boundaries of the Yaqui Reservation or within daily commuting distance of the Reservation.
- (F) "Direct Federal Contract" is a contract let by a Federal agency directly to a prime contractor.
- (G) "Federally Funded Contracts" is one in which the Federal Government has contracted or granted funds to an entity which, in turn, lets the prime contract.

Section 360 Indian Contract Preference Requirements in Prime Contracts (8 PYTC § 3-1-360)

Each entity (including Tribal Agencies, State or Local Government, Indian Organization, Private Corporation, Association, Partnership, Individual Enterprise, Tribal Enterprise, or other) letting contracts for construction, mining forestry, services, supplies or other work on the Yaqui Reservation shall comply with the following requirements when letting prime contracts.

- (A) The entity shall obtain from the Pascua Yaqui TERO the source list of Indian contractors and subcontractors.
- (B) The entity shall send summaries of the proposed prime contract to Indian firms on that list to determine if any Indian contractor is interested in and qualified to bid on the proposed prime contract.
- (C) If more than one Indian firm expresses an interest in the contract and is qualified to perform it, the entity shall restrict competition to those Indian firms.

- (D) If the entity letting the contract determines that no Indian firm is interested in or qualified to perform the contract, the entity may let the bid on an open and competitive basis and award the contract in such a manner as it so chooses without regard to this section of the rules and regulations.
- (E) If only one Indian firm expresses an interest in the contract and is qualified to perform it, the entity shall determine if that Indian firm is capable of performing the contract within the fiscal limitations. Based on this information, the entity may elect to award the contract to the Indian firm or, in the case of limited fiscal capability of the Indian firm, may let the bid on an open and competitive basis, considering the bid of the Indian firm along with other non-Indian firms, so long as equitable and complete cost negotiations have taken place.
- (F) The entity letting the contract shall be responsible for making the determination whether or not an interested Indian firm is qualified to perform the work. However, the TERO reserves the right to require documentation from the entity supporting its conclusion that an Indian firm is not qualified to perform the work.
- (G) The entity letting the contract shall be responsible in all cases for reviewing the proposed contract to explore the possibility of dividing the work into components or sub-components such that a larger number of Indian contractors and subcontractors would be qualified to perform the work.
- (H) All subcontract let by the prime contractor shall require formal bid advertising and opening procedures and shall be bound by Section 370, Indian Preference in Subcontracting.
- (I) The entity letting the contract or subcontract shall require a format as to acceptable compliance with this chapter.

Section 370 Indian Preference in Subcontracting (8 PYTC § 3-1-370)

- (A) Prior to the letting of any contract to be performed on the Pascua Yaqui Reservation, whether that contract is a direct federal contract, a federally funded contract or a non-federal contract, the TERO shall be contacted by the awarding entity to establish the portion of work that shall be performed by Indian contractors and subcontractors. The TERO may establish a percentage of work in terms of total subcontracting dollars to be awarded to Indian firms, based on: availability of Indian subcontractors, nature of work to be performed, requisite skills to perform the work, and such other factors as may be recommended by the entity letting the contract and accepted by the TERO. Before setting requirements, the TERO shall meet with the entity letting the contract to inform it of the proportion it is proposing and to explain how it reached its conclusions. The TERO shall provide the entity letting the contract with a copy of this chapter, a memo setting forth the proportion of work to be performed by Indian contractors and a list of Indian contractors available to perform subcontract work on the contract.
- (B) All federal and non-federal contracts shall require that the agency letting the contract include in its bid offering material which sets forth Indian preference requirements and appropriate listings of Indian contracts or subcontracts.
- (C) The entity letting the prime contract shall require every bidder to submit, as part of its bid, a plan describing how it will satisfy the Indian subcontractor utilization requirement established by the TERO. A bid that fails to contain a satisfactory Indian subcontractor utilization plan shall be considered a non-qualifying bid, because it violates this chapter.
- (D) The successful prime contractor selected by the entity letting the contract shall be free to select its subcontractors in whatever manner it so chooses and to make its own determination on qualifications and reasonableness in price. However, a successful contractor who fails to meet the requirements for utilization of Indian subcontractors shall be required to demonstrate to the TERO that good cause exists for its failure to meet said requirements. If it fails to demonstrate good

cause, it shall be subject to one or more of the sanctions set forth in this chapter, pursuant to the procedures and appeals processes set forth in subchapter E.

- (E) Prime contractors shall be encouraged to explore the possibility of dividing their subcontracts into components or sub-components that would enable the maximum number of Indian contractors and subcontractors to apply.

Section 380 Responsibilities of the TERO (8 PYTC § 3-1-380)

- (A) The TERO shall develop and keep updated a list of Indian contractors available to perform work on or near the Yaqui Reservation. The list shall include information on the areas in which these Indian contractors consider themselves qualified to work and their present availability to the extent known. The TERO shall coordinate with the Bureau of Indian Affairs, Indian Health Service, Indian Housing Authority, Council for Tribal Employment Rights, Department of Defense, and other agencies that maintain Indian contractor source lists.
- (B) The TERO shall work closely with the federal agencies which have regulations requiring Indian contract preference (Bureau of Indian Affairs, Indian Health Service, Indian Housing Authority, Office of Federal Contract Compliance Programs, and others) to seek to coordinate their requirements, monitoring efforts and sanctioning activities to the extent feasible.
- (C) Within available resources, the TERO shall provide advice and counseling to Indian contractors located on or near the Pascua Yaqui Reservation on the ways and means to improve their capability and qualifications; assist them in obtaining bonding; assist them in understanding the nature of federal procurement processes and requirements; assist them in locating other resources for technical assistance in the field; and shall carry out such other activities as will promote the development of Indian enterprises on other contracts on the Pascua Yaqui Reservation.
- (D) The TERO shall take steps to ensure that all federal and non-federal agencies or entities letting contractors on the Pascua Yaqui Reservation have notice of this chapter and its requirements.

SUBCHAPTER E ADMINISTRATION; ENFORCEMENT; APPEALS

Section 390 Administration (8 PYTC § 3-1-390)

The Administration of this chapter is vested in the Pascua Yaqui Tribal Council and shall be exercised by the Tribe's Tribal Employment Rights Office. The authority and duties of the TERO Manager are as set forth in Subchapter B, Sections 80 and 110.

Section 400 Administrative Review (8 PYTC § 3-1-400)

If an employer appears to be out of compliance with the laws, rules, regulations or guidelines on Indian preference, the TERO shall take remedial action to correct the problem.

Section 410 Informal Resolution (8 PYTC § 3-1-410)

If the TERO has reason to believe an employer has failed to comply with any part of the chapter, the TERO shall notify the employer in writing, specifying the alleged violation and scheduling a meeting to resolved the issue. If after discussion, the employer refuses to come into compliance, the TERO shall issue a formal citation stating the sanctions provided for in Subchapter E, Section 430.

Section 420 Hearing (8 PYTC § 3-1-420)

- (A) The employer shall then be entitled to a hearing before the TERO to present evidence and call witnesses to demonstrate that it has complied with the requirements of the chapter or has made every possible effort to do so.
- (B) The TERO shall have the right to subpoena witnesses and documents, to put witnesses under oath, to present evidence in the Tribe's behalf, and to take such other steps as are necessary to ensure a fair and complete hearing on the issues.
- (C) On the basis of the evidence presented at the hearing and the information collected, the TERO shall determine whether or not the employer is in compliance or has made every possible effort to comply.
- (D) The TERO, if it finds the employer out of compliance, shall issue a formal decision, imposing one or more of the sanctions provided for, as appropriate, and shall order the employer to take such corrective action as is necessary to remedy any harm done to the tribe or to individual Indians by the employer's non-compliance. The TERO shall send copies of the decision to the Tribal Judge and Council Officers.

Section 430 Sanctions and Penalties (8 PYTC § 3-1-430)

In the event an employer is found out of compliance with the requirements of this chapter, the TERO shall be authorized to impose any or all of the following sanctions or penalties, after considering such mitigating factors as the employer's efforts to comply and its efforts to remedy any harm done to the tribe or to individual Indians by its non-compliance:

- (A) Monetary fines not to exceed \$500 per day per violation.
- (B) Suspension of employer's operations until corrective action is taken or a plan for corrective action developed.
- (C) Termination of employer's operations.
- (D) Prohibition of employer from engaging in any future operations on the Pascua Yaqui Reservation.
- (E) Order to remove and/or hire certain employees.
- (F) Provision by employer of back pay, employment, promotion, training and/or other relief to individual Indians.
- (G) Order to employer to make such changes in its procedures or policies as is necessary to comply with this chapter.
- (H) The TERO shall obtain a Pascua Yaqui Tribal Court Order to enforce injunction and removal orders. All other orders of the TERO are self-executing.

Section 440 Individual Complaint Procedures (8 PYTC § 3-1-440)

- (A) Any Indian, group of Indians, or representatives of a class of Indians who believes that any employer has failed to comply with this chapter or who believes that an Indian has been discriminated against by any covered employer, may file a complaint with the TERO. Persons may file a complaint whether or not they can show that they were personally harmed by the employer's non-compliance.

- (B) Upon receipt of such a complaint, the TERO shall conduct an investigation of the charge and shall attempt to achieve an informal settlement of the matter. If voluntary conciliation cannot be achieved, the TERO shall hold a hearing on the matter, shall make a determination on the validity of the charge, and shall order such relief as is deemed necessary to restore the rights or repair the damages to any Indian who was harmed by the employer's non-compliance or discriminatory behavior. The TERO's decision shall be sent to all parties in writing within 30 calendar days of the initial receipt of the complaint.

Section 450 Retaliation by Employer (8 PYTC § 3-1-450)

The employer is prohibited from taking any retaliatory action against an employee who has filed a complaint of non-compliance or discrimination with the TERO. Such actions will be deemed serious violations of this chapter. Retaliatory actions may include, but are not limited to, termination of employment, demotion, suspension, reprimand, withdrawal of benefits or privileges, layoff, etc. Further, the TERO is authorized to obtain from the Tribal Court a temporary injunction to prevent any harm or further harm caused by an employer, union or person's retaliatory actions.

Section 460 Judicial Review: Appeals Procedure and Jurisdiction (8 PYTC § 3-1-460)

- (A) Any person or entity aggrieved by an order of the TERO may file an appeal with the Pascua Yaqui Tribal Court, asking that the order be modified or set aside in whole or in part. An appeal must be filed within 20 calendar days after receipt of notice of the TERO's decision. The TERO Manager shall represent the interests of the Tribe during appeal. A copy of the appeal shall be sent by the Tribal Court Clerk to the TERO Manager upon receipt.
- (B) Upon filing of the appeal, the Tribal Court shall have exclusive jurisdiction to affirm, modify or set aside such order, in whole or in part, so far as it is applicable to the petitioner. Findings of fact by the Tribal Court, when supported by substantial evidence, shall be conclusive. No objection to the order of the TERO shall be considered by the Tribal Court unless such objections have been urged before the TERO Manager or unless reasonable grounds are established.

Section 470 Enforcement (8 PYTC § 3-1-470)

- (A) The Pascua Yaqui Tribal Court is vested with jurisdiction over every person and entity engaging or continuing in business activity on or near the Pascua Yaqui Reservation and with jurisdiction to hear and determine any challenge to the validity of this chapter either generally or as applied to any person or entity.
- (B) The Tribal Court is vested with jurisdiction to issue removal, restraining or other legal orders affecting any person or entity transacting business on or near the Pascua Yaqui Reservation and to direct the Tribal Police to carry out any such orders.

Section 480 Effective Date (8 PYTC § 3-1-480)

This chapter shall take effect upon enactment by the Pascua Yaqui Tribal Council and conditions imposed by this chapter shall become binding upon every covered person and entity performing work on the Reservation after August 16, 1984.

DISPOSITION TABLE

Former Section	New Section
Article One	Subchapter A
Section 1101	Section 10
Section 1102	Section 20
Section 1103	Section 30
Section 1104	Section 40
Section 1105	Section 50
Section 1106	Section 60
Article Two	Subchapter B
Section 1201	Section 70
Section 1202	Section 80
Section 1203	Section 90
Section 1204	Section 100
Section 1205	Section 110
Section 1206	
Article Two	Subchapter C
Section 1207	Section 120
Section 1208	Section 130
Section 1209	Section 140
Section 1210	Section 150
Section 1211	Section 160
Section 1212	Section 170
Section 1213	Section 180
Section 1214	Section 190
Section 1215	Section 200
Section 1216	Section 210
Section 1217	Section 220
Section 1218	Section 230
Section 1219	Section 240
Section 1220	Section 250
Section 1221	Section 260
Section 1222	Section 270
Section 1223	Section 280
Section 1224	Section 290
Section 1225	Section 300
Section 1226	Section 310
Section 1227	Section 320
Article Four	Subchapter D
Section 1401	Section 340
Section 1402	Section 350
Section 1403	Section 360
Section 1404	Section 370
Section 1405	Section 380

Former Section	New Section
Article Five	Subchapter E
Section 1501	Section 390
Section 1301	Section 400
Section 1302	Section 410
Section 1303	Section 420
Section 1304	Section 430
Section 1305	Section 440
Section 1306	Section 450
Section 1307	Section 460
Section 1502	Section 470
Section 1503	Section 480