

Overview of Indian Preferences in Hiring, TERO and State-Tribal Education Compacting

Prepared for the Alaska Federation of Natives

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“Indian preference” in hiring is an aspect of contemporary federal Indian policy utilized by federal agencies during hiring efforts; it is also used by many Native communities. There are two ways that Indian preference can apply: (1) preference in employment for hiring a Native person; and (2) preference for contracting with a Native-owned business. Indian preference in hiring helps ensure that Native people are playing an active role in the federal government’s efforts to carry out its trust responsibilities for Native people. Indian preference also helps empower Native people and Native communities.

In addition, and as further discussed below, a tribal government or Alaska Native Village has the inherent authority to enact a Tribal Employment Rights Ordinance of Office (“TERO”), which requires non-federal businesses operating within tribal/village jurisdiction to apply an Indian preference in all areas of employment, contracting, and other business activities.

Some frequently asked questions regarding Indian preference, TEROs, and Alaska-specific issues—including compacting of education—are discussed in further detail below.

Indian Preference in Hiring

As noted above, Indian preference in hiring refers to the policy that allows American Indian and Alaska Native individuals to receive preference when applying for open positions within specific federal agencies.¹ It also refers to the federal contracting policy for preferential employment of Native individuals for available job opportunities on or near a reservation.² The federal government also gives preference to Native-owned businesses for contract procurement for specific federal contracts if the businesses qualify under federal regulations.³

The Supreme Court has long acknowledged that Native people have a distinct legal status in the United States. Because of this legal status, Native people have a unique legal right of preference in employment and business related to the furtherance of Native self-government. In *Morton v. Mancari*,⁴ for example, the Supreme Court upheld the Bureau of Indian Affairs’ (“BIA”) hiring preference, reasoning that it furthers Native self-governance because the BIA administers federal programs in Native communities. The Supreme Court stated:

[t]he purpose of these [Indian] preferences, as variously expressed in the [Indian Reorganization Act’s] legislative history, has been to give Indians a greater participation in their own self-government; to further the government’s trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.⁵

¹ See, e.g. *Indian Preference*, BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/jobs/Indian_Preference.

² 41 C.F.R. § 60-1.5(a)(7).

³ See e.g., Buy Indian Act, codified at 25 U.S.C. § 47 et seq.; Sections 7(j)(10) and 8(a) of the Small Business Act, 15 U.S.C. §§ 636(j)(10) and 637(a).

⁴ 417 U.S. 535 (1974).

⁵ *Id.* at 541-42.

The federal government's employment preference for Native people has existed since as early as 1834.⁶ The Indian Reorganization Act of 1934⁷ and other federal statutes⁸ allow certain American Indian and Alaska Native applicants to receive preference over non-Native applicants when applying to certain federal jobs. For example, for employment with the BIA or Indian Health Service, an applicant is eligible for Indian preference if the individual is: (a) a member of a federally recognized Indian tribe; (b) a descendant of a member who was residing within the present boundaries of any Indian reservation on June 1, 1934; (c) an Alaska Native; or (d) possesses one-half degree Indian blood derived from tribes that are indigenous to the U.S.⁹ If an applicant claims Indian preference, the individual is generally required to submit verification of eligibility for Indian preference.¹⁰

Certain employers also have the authority to proactively extend an Indian preference in hiring when working on or near a tribal/village. Section 703(i) of Title VII of the Civil Rights Act of 1964 provides an exception to Title VII's general nondiscrimination principles allowing certain employers to exercise an Indian employment preference if the employer meets three conditions: (1) the employer must be located on or near an Indian reservation, (2) the employer's preference for Indians must be publicly announced, and (3) the individual to whom preferential treatment is accorded must be an Indian living on or near a reservation.¹¹ While neither Section 703(i) nor any other section of the Act defines the terms "Indian reservation" or "near," "near a reservation" is generally interpreted as a reasonable commuting distance from the reservation.¹²

Indian preference can also extend to Indian-owned and controlled businesses because the profits generated by Indian-owned and controlled businesses contribute to the economic stability of Native communities. For example, under the Buy Indian Act of 1910, Indian-owned and controlled businesses can receive preference when bidding for certain federal contracts.¹³ Section 8(a) of the Small Business Act also makes small businesses owned by "economically disadvantaged Indian Tribes" eligible for the Small Business Administration's 8(a) Business Development Program and its corresponding federal contracting benefits.¹⁴

⁶ See Kevin N. Anderson, *Indian Employment Preference: Legal Foundations and Limitations*, 15 TULSA L. REV. 733 (1980).

⁷ 25 U.S.C. § 472 (1976) ("The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions").

⁸ See, e.g., 25 U.S.C. §§ 5116-5117 (Standards for Indians appointed to Indian Office).

⁹ See *Indian Preference*, BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/jobs/Indian_Preference; The IHS Indian Preference Policy Health Manual, Chapter 3 – Indian Health Manual, <https://www.ihs.gov/ihtm/pc/part-7/p7c3/>

¹⁰ See, e.g., Native Americans, USA JOBS, <https://www.usajobs.gov/Help/working-in-government/unique-hiring-paths/native-americans/#required-documents>.

¹¹ 42 U.S.C. § 2000e-2(i) (1982); see, e.g., the Department of Labor's regulations defining the obligations of federal contractors and subcontractors provides that "[i]t 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 in connection with employment opportunities on or near an Indian reservation." 41 C.F.R. 60-1.5(a)(7).

¹² POLICY STATEMENT ON INDIAN PREFERENCE UNDER TITLE VII, EEOC-CVG-1988-9 (1988); see also 41 C.F.R. § 60-1.5(a)(7).

¹³ See 48 C.F.R. § 1401.301-80

¹⁴ Codified at 15 U.S.C. § 637(a)(4)(A)(i).

Tribal Employment Rights Ordinances (TEROs)

The Supreme Court has recognized the inherent sovereignty of tribal nations since the establishment of the U.S.¹⁵ As part of this inherent sovereignty, tribal governments, and Alaska Native Villages have the inherent right to pass employment rights ordinances that require Native and non-Native businesses that are working within tribal/village jurisdiction to extend an Indian preference to employment and business contracts.

Today, there are almost 300 tribes and Alaska Native Villages that exercise their inherent sovereignty by enacting TEROs. Generally, covered employers operating a business within a tribal/village jurisdiction are required to provide Indian preference in employment, training, contracting, subcontracting and all other aspects of employment. For example, covered employers under a TERO may be required to:

- Submit an acceptable compliance plan detailing the steps they will take to ensure compliance with the TERO requirements.
- Utilize a tribe's TERO skills bank for all referrals and consider Indian applicants before interviewing or hiring non-Indians.
- Agree to hire no less than a specific number of Indians in each job classification and cooperate (where feasible) with tribal training programs to hire a certain number of trainees.
- Eliminate all extraneous job qualification criteria or personnel requirements that may act as barriers to Indian employment.
- Agree to acknowledge and respect tribal religious beliefs and cultural differences and to cooperate with a tribe's TERO office to provide reasonable accommodations.

Most tribes and villages that have enacted TEROs have also established TERO offices to monitor and enforce their TEROs.¹⁶ A tribe may broadly define "Employer" under its TERO. For example, the Tanana Chiefs Council's TERO template defines "Employer" as "*any* person, government, company, contractor, subcontractor or other entity located or engaged in work in and around [tribe/village] employing two or more persons."¹⁷ Therefore, under this TERO, any employer that employs two or more persons in or near that tribe/village is subject to the TERO.

Efforts to Engage in Compacting for Education in Alaska

A compact is a negotiated agreement between tribes and a state and/or the federal government that sets forth the terms and conditions of the relationship. Unlike contracts, compacts

¹⁵ See, e.g., *Worcester v. Georgia*, 31 U.S. 515 (1832); *Talton v. Mayes*, 163 U.S. 376 (1896); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("[U]ntil Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status").

¹⁶ See *TERO FAQ*, COUNCIL FOR TRIBAL EMPLOYMENT RIGHTS, <https://cter-tero.org/tero-faq/#1>.

¹⁷ Tanana Chiefs Council Model TERO Code, <https://publicdocushare.tananachiefs.org/docushare/dsweb/Get/Document-3531/tero%20ordinance.pdf> (emphasis added).

may set political policies for the state and tribes “and therefore have inherent value even beyond their stated goals.”¹⁸

In recent years, the State of Alaska has endeavored to begin to utilizing compacting of education to better service the educational needs of its Alaska Native students. Under such new self-governance compacts, tribes may partner with the State of Alaska and/or the federal government for the delivery of education, assuming the responsibility (and receiving the associated funding) to carry out educational programs, functions, services, and activities the State or federal government otherwise would be obligated to provide. Ideally, a tribal compact would formally recognize the tribal entity’s authority to oversee certain K-12 public schools. Because an education compact is a government-to-government operational agreement for education, it serves more of the inherent sovereignty purpose than a school in which Native teachers are funded and hired by the state.

In 2022, the State of Alaska enacted legislation authorizing the state to negotiate and enter into compacts with federally recognized tribes and tribal organizations to establish demonstration state-tribal education compact schools.¹⁹ Five tribes have been selected for “demonstration state-tribal education compacts” with the State—the Iñupiat Community of the Arctic Slope (“ICAS”), Central Council Tlingit & Haida Indian Tribes of Alaska, Ketchikan Indian Community, King Island Native Community, and Knik Tribe.²⁰ Of these five tribes, Central Council Tlingit & Haida Indian Tribes of Alaska have a publicly-available TERO that is available online. The remaining tribes may have TEROs, but this would need to be confirmed with the tribes directly. The tribes’ TEROs would likely apply to any school that is located within the tribe/village’s jurisdiction that employs two or more people.

Frequently Asked Questions Regarding Indian Preference, TERO, and State-Tribal Education Compact (STEC) Schools

1. Are there any differences with whether Indian preference or TERO applies when state, federal, or private funds are involved?

There are a number of factors related to Indian preference applicability, including the location of the entity within tribal/village jurisdiction and whether there are specific limitations governing the federal funds. If federal funds are involved, there are some federal programs that specifically allow for Indian preference. If state or private funds are involved and the school operates within tribal/village jurisdiction, it is possible that, under the specific TERO ordinance, the tribe/village may be able to require the school to apply Indian preference for hiring Native staff and teachers.

2. Can a tribe/village limit compacted school enrollment to Native students when the planned number of total students is limited by physical space or number of teachers?

¹⁸ Intergovernmental Compacts in Native American Law: Models for Expanded Usage, 112 Harv. L. Rev. 922, 924 (1999).

¹⁹ See Alaska State Senate Bill 34, AS 01.10.070(c), <https://www.akleg.gov/PDF/32/Bills/SB0034Z.PDF>.

²⁰ <https://education.alaska.gov/compacting>.

Although Indian preference generally applies for employment and contracting purposes, a tribe/village could prioritize enrollment of its members and siblings of already enrolled students in a compacted school if capacity is limited. For example, the Puyallup Tribe of Indians' education compact with the State of Washington reads, "if capacity is insufficient to enroll all students who apply, the School may prioritize the enrollment of Puyallup Tribe members and siblings of already enrolled students."²¹ The Quileute Tribe, Franks Landing Indian Community, and Yakama Nation's education compacts with the State of Washington include the same enrollment policy.²²

In the case of Alaska's development of a state-tribal compact school or program, the State of Alaska has indicated that it intends for the school or program to be open to all students, consistent with the State constitution, but it is not clear how that intent would be coordinated with a Native preference.

3. Does Indian preference apply to advisory board membership?

Indian preference could apply to advisory board memberships. For example, certain federal advisory boards, including the Bureau of Indian Education's Advisory Board for Exceptional Education, are bound by Indian preference under the Indian Reorganization Act of 1934.²³ The applicability of Indian preference to advisory board membership could depend on the specific tribe/village's TERO.

4. What defines tribal jurisdiction in Alaska communities?

Tribal jurisdiction in Alaska is complex due to the unique way aboriginal land claims were settled for Alaska Native tribes. "Indian country" is a statutorily defined term that refers to property where tribes and the federal government have jurisdiction, and generally applies to most Lower 48 tribes.²⁴ The U.S. Supreme Court has held that land in Alaska that has been conveyed pursuant to the Alaska Native Claims Settlement Act ("ANCSA")²⁵ is not a part of the definition of Indian country.²⁶ Both the U.S. Supreme Court and the Alaska Supreme Court have acknowledged that, even in the absence of land defined as Indian country in Alaska, Alaska Native tribes still have inherent authority over activities that affect the political integrity of the tribe, economic security, health and welfare of the tribe, and those who enter into consensual relationships with the tribe.²⁷ However, the extent of Alaska tribal jurisdiction remains unclear, and it will likely be defined by

²¹ *State Tribal Education Compact Between the Washington State Superintendent of Public Instruction, Chief Leschi Schools, and Puyallup Tribe of Indians*, WASHINGTON OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, https://www.k12.wa.us/sites/default/files/public/indianed/pubdocs/State_Tribal_Ed_Compact_Between_WA_State_Chief_Leschi_Puyallup_%282019compliant%29.pdf.

²² *See State-Tribal Education Compact Schools (STEC's)*, WASHINGTON OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, <https://www.k12.wa.us/student-success/access-opportunity-education/native-education/state-tribal-education-compact-schools-stecs>.

²³ 25 U.S.C. § 472 (1976).

²⁴ *See generally*, 18 U.S.C. § 1151; *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998); *see also* Lisa Jaeger, Tanana Chiefs Conference, *Tribal Jurisdiction – Exercised by Alaska Tribal Courts*, https://thorpe.law.ou.edu/AKtribalct/chapter_two.html.

²⁵ Codified at 43 U.S.C. § 1601 et seq.

²⁶ *Id.*

²⁷ *See John v. Baker*, 982 P. 2d 738 (Alaska 1999); *Montana v. United States*, 450 U.S. 544 (1981).

litigation and perhaps further legislation in the future.²⁸ Although some jurisdictional questions for Alaska Native tribes and villages may be unresolved, they still have the sovereign authority to establish TEROs for employers that are operating within their jurisdiction.

5. *Would a building, or portion of a building, used by a tribe for a school or school program – if the building is not owned by the tribe – be considered within the tribe’s jurisdiction for purposes of TERO applicability?*

If the building is located in or near a tribal village (even if the building is not owned by the tribe) then it may be subject to the tribe’s TERO.²⁹ The Tanana Chiefs Council’s model TERO defines “in or near” as “employment of any sort in the village itself, or within reasonable commuting distance of the village.”³⁰ The specific tribe/village’s TERO should be consulted to determine its applicability. If the building is not owned by the tribe and is not located in or near tribal or village lands, then it is unlikely that a TERO would apply.

6. *Could a tribe’s TERO ordinance apply to any tribal school programs serving any of its tribal members even though the tribal members are located in a city, borough, or elsewhere in the State?*

See answer to question number five above. A school program that serves tribal members is not determinative of whether a tribe’s TERO applies—TERO application is based on whether an employer is hiring within a tribe’s jurisdiction. A tribe’s TERO will most likely apply to a school program that is being implemented in or near a tribal village and employs two or more persons. If a tribal school program serves tribal members that are located in a city or borough that is not in or near a tribal village, then a tribe’s TERO would not apply.

7. *Do tribal organizations or tribal consortiums have TEROs?*

Some tribal organizations or consortiums have TEROs. The Tanana Chiefs Conference is a tribal consortium, and it has a Tribal Employment Rights Office that assists its member villages with implementing their own TEROs.³¹ In addition, the Association of Village Council Presidents and the Bristol Bay Native Association also have TEROs.³²

²⁸ See Lisa Jaeger, Tanana Chiefs Conference, *supra* n.25. (“Alaska tribes have achieved federal and state recognition of their tribal status, and some clarification of their jurisdiction, but the extent of tribal jurisdiction in Alaska is not yet clear and will likely be the subject of state and federal court cases for years to come. . . . [the] [r]ecognition and exercise of tribal jurisdiction in Alaska is focused more on the health and welfare of tribal members, than on a territorial area.”).

²⁹ See, e.g., Tanana Chiefs Council Model TERO Code, <https://publicdocushare.tananachiefs.org/docushare/dsweb/Get/Document-3531/tero%20ordinance.pdf> (emphasis added).

³⁰ *Id.*

³¹ Tanana Chiefs Conference TERO Website, <https://www.tananachiefs.org/services/job-training/tero/>

³² United States Fish & Wildlife Service Employee Desk Guide on Working Effectively with Alaska Native Tribes and Organizations, https://www.acf.hhs.gov/sites/default/files/documents/ana/native_affairs_desk_guide_fws.pdf.

8. *Is there anything in the State of Alaska’s recent summary judgment request regarding the establishment of Indian Country that might have broader impact and play into tribal compacts?*

A case pending before the U.S. District Court for the District Court of Alaska, *State of Alaska v. Newland*,³³ could impact Alaska Native jurisdiction. The Central Council of the Tlingit and Haida Indian Tribes of Alaska petitioned the Department of the Interior to place a small parcel of land in downtown Juneau into trust. The State of Alaska challenged that petition, arguing that the U.S. Department of the Interior does not have the authority to place land into trust for the benefit of Alaska Native tribes. The outcome of this case could impact the authority of Alaska Native communities to extend territorial jurisdiction, but it would not impact Alaska Native communities’ exercise of jurisdiction through non-territorial means. Alaska Native tribes could still exercise membership-based jurisdiction over tribal members and entities that enter into consensual relationships with a tribe.

³³ *State of Alaska v. Newland*, 3:23-cv-00007-SLG (D. Alaska Apr. 12, 2023).