

REQUEST FOR PROPOSALS - WITH ADDENDUM:

Removal of Abandoned & Derelict Vessels and Structures in Neah Bay, Washington

Contents

Overview	2
Scope of Work	2
Planning, Removal and Disposal of ADV/Structures	2
Insurance and Liabilities	3
Compliance	3
Permitting and Certifications	3
Closeout	3
Period of Performance	3
Target Locations	3
Funding Availability	4
Eligibility	4
How to Apply	5
Budget Requirements	5
Required Attachments	6
Review Process	6
Evaluation Criteria	6
Application Logistics	7
Review/Proposal Timeline	7
Terms & Conditions	7
Addendum	8
Exhibit 1	10
Exhibit 2	11
Exhibit 3	12

Overview

The National Marine Sanctuary Foundation in partnership with the National Oceanic and Atmospheric Administration (NOAA) Marine Debris Program and the Makah Tribe (collectively the representative agencies) require support for marine salvage work to remove abandoned and derelict vessels (ADVs) and derelict structures, including 16 derelict and sunken vessels and one bridge pontoon, from the Makah Marina and broader Neah Bay in Washington State. Neah Bay, in the Makah Usual and Accustomed Treaty Area (U&A), is a highly productive marine ecosystem that supports productive fisheries in the region. Removal of ADVs and derelict structures supports the holistic restoration of Neah Bay, promoting sustained ecological and economic function.

Scope of Work

Planning, Removal, and Disposal of ADV/Structures

The scope of work shall include all phases of planning, removal, and disposal including (1) pre-removal assessment, (2) removal plan development, (3) mobilization, (4) removal, (5) disposal, and (6) demobilization.

Pre-removal assessment, as used in this contract includes, but is not limited to, use of remotely operated vehicles, technical divers, or other means to assess the conditions of ADVs and structures to support the development of removal plans.

Removal plan development, as used in this contract includes, but is not limited to, collaboration with the Foundation and partners including NOAA and the Makah Tribe to finalize a removal plan. Contractors will be required to create and implement Spill Prevention Containment and Cleanup Plans (SPCC) to prevent releases of hazardous materials.

Mobilization, as used in this contract includes, but is not limited to, the establishment of all onshore and in-water operations.

Removal, as used in this contract includes, but is not limited to, the operations and recovery of identified ADV and derelict structure targets.

Disposal, as used in this contract includes, but is not limited to, any testing, abatement, deconstruction, and disposal of removed ADVs/structures.

Demobilization, as used in this contract includes, but is not limited to, removal of all operations, including equipment and gear, from work locations.

The Contractor shall supply all labor, materials, tooling, engineering, and equipment, required by this document and by the representative agencies referenced herein to complete the work.

Insurance and Liabilities

Contractors will, at their own expense, provide and maintain all necessary insurances during the entire performance of the project and provide certificates of insurance to the Foundation.

Compliance

The Contractor shall follow all directives and regulations outlined by representative agencies and will comply with all applicable Federal and state safety and health standards and regulations applicable to this work, including but not limited to the Occupational Safety and Health (OSHA) Act, 29 U.S.C. 651§ et seq. To the extent the Contractor relies on sub-contractors in executing this work, the Contractor will have sole responsibility for ensuring the sub-contractors are qualified, appropriately trained and outfitted, and comply with all applicable safety and health standards and regulations.

Permitting and Certifications

The Foundation will secure all permits required for conducting the work. The Foundation will confirm with the contractor that permits are in place before work may commence. Applicants must have proper certifications for conducting salvage operations.

Closeout

Documentation of completed work should contain pre- and post-bathymetric survey and/or GIS-linked underwater photography, or other form of underwater imagery. Please specify the proposed method in the proposal.

Provide disposal records that include the name and location of the disposal site, the volume/weight, and scale records.

Period of Performance

Overall period of performance: June 15, 2024 - November 15, 2024. In-water work to commence on July 15, 2024. If work is not completed by August 18, 2024, work must temporarily halt from August 19 - 26 due to cultural activities on the water.

Target Locations

The Makah Marina is within the Makah Tribe's U&A and is located Neah Bay, Washington (48.37, -124.61) at the northwest point of the Olympic Peninsula. The marina is inside a protected area of the bay, located on the northeast portion of the Makah Reservation, just outside the Olympic Coast NMS. Below is a list of targets to be removed.

#	Target	Debris Type	Location	Latitude	Longitude
1	Zebra	Lightered Derelict Vessel	Makah Marina	48.2205	-124.3642
2	Nestucca	Lightered Derelict Vessel	Makah Marina	48.2202	-124.3644
3	Angela Carol	Lightered Derelict Vessel	Makah Marina	48.2203	-124.3645
4	Midnight Charger	Lightered Derelict Vessel	Makah Marina	48.2204	-124.3641
5	Lauri Jean	To Be Lightered Derelict Vessels	Makah Marina	48.2205	-124.3634
6	Valorous	Sunken Vessels	Makah Marina	48.2202	-124.3644
7	Voyageur	Sunken Vessels	Makah Marina	48.2205	-124.3634
8	SticknStay	Sunken Vessels	Makah Marina	48.2206	-124.3642
9	White Eagle	Sunken Vessels	Makah Marina	48.2204	-124.3633
1 0	Unnamed (C-dock) small rec boat	Sunken Vessels	Makah Marina	48.2204	-124.3633
1 1	Pursuit	Sunken Vessels	Makah Marina	48.2206	-124.3642
1 4	Sea Otter	Sunken Vessels	Neah Bay	48.2229	-124.3724
1 5	Windwalker	Sunken Vessels	Neah Bay	48.2227	-124.3723
1 6	Solvang	Sunken Vessels	Neah Bay	48.2202	-124.3723
1 7	I-90 Bridge Pontoon	Derelict Structures	Neah Bay	48.3747	-124.6231

Funding Availability

This will be discussed during the negotiation process. However, funding may not exceed \$6,000,000.

Eligibility

Applicants must have a proven track record of doing similar projects in scope and scale, preferably within Washington State or surrounding areas (such as the Pacific Northwest part of the USA) and must have the technical ability to complete the project within the provided budget.

By submitting an offer in response to this RFP, the offeror certifies that it and its principal officers are not debarred, suspended, or otherwise considered ineligible for an award by the U.S. Government. The Foundation will not award a contract to any firm that is debarred, suspended,

or considered to be ineligible by the U.S. Government.

Applicants must have proper certifications for conducting salvage operations.

How to Apply

The Foundation and the Makah Tribe will host a pre-bid meeting at Makah Marina in Neah Bay, Washington on Tuesday, March 26, 2024, from 1 pm - 3 pm. For more details, please send your intent to apply email to rfp@marinesanctuary.org, by Friday, March 22, 2024.

A proposal can still be submitted, even if the Contractor did not attend the pre-bid meeting.

The National Marine Sanctuary Foundation requires responses to this RFP to be delivered electronically, via email as a pdf file to rfp@marinesanctuary.org.

Please include “Marine Salvage in Neah Bay” in the subject line. Proposals must be received electronically no later than **April 17, 2024 by 11:59 PM Pacific Daylight Time.**

The National Marine Sanctuary Foundation will send a confirmation by email within five business days of receiving your submission that your proposal was received, and all files are accessible.

It is the submitter’s responsibility to ensure that the Foundation receives the proposal prior to the specified closing date.

Proposals should include the following elements:

1. A proposal narrative that includes a description of the company with an explanation of why you are qualified to complete this project, a description of removal operations, resources to be utilized including subcontractors and equipment, project timeline, Spill Prevention Containment and Cleanup Plans (SPCC), and regulatory compliance;
2. A budget proposal by project phase;
3. Two examples of past work; and
4. Three references. Please include their names, email addresses, phone numbers, and in what capacity you worked with them.

Questions regarding the technical requirements of this RFP and questions regarding the administrative requirements of this RFP may be submitted by email to rfp@marinesanctuary.org.

Questions must be submitted in writing; phone calls will not be accepted. Questions and requests for clarification—and the responses thereto—the Foundation believes may be of interest to other offerors will be circulated to all RFP recipients who have indicated an interest in bidding.

Only written answers to questions via email issued by the Foundation will be considered official and carry weight in the RFP process and subsequent evaluation. Any verbal information received from employees or any other entity should not be considered as an official response to any questions regarding this RFP.

Budget Requirements

When budgeting for this proposal, please ensure that you outline the budget for all six phases (Pre-assessment, Workplan, Mobilization, Removal, Disposal, and Demobilization).

Required Attachments

We require the following attachments to complete the proposal:

- Proposal narrative;
- Budget;
- Two examples of past work; and
- Three references. Please include their names, email addresses, phone numbers, and in what capacity you worked with them.

All proposals must also include the following information:

- Company Name;
- Company's Person of Contact (POC) and title;
- The POC's email address;
- Company Address;
- Company Website;
- Company Phone Number; and
- Company Tax ID Number.

Review Process

Evaluation Criteria

All applications will be screened for relevance and completeness, and will then be evaluated based on the extent to which they meet the following criteria and how they are weighted:

Technical Criteria - total 75 maximum points:

- Eligibility – as noted above, if the company is not eligible, your proposal will be removed and not graded;
- Geographic background – has worked within the Olympic Coast of Washington or surrounding areas (such as the Pacific northwest part of the USA) *(Total maximum of 15 points)*
 - *Please provide examples of the projects within near proximity*
- Experience– Proven history of executing similar jobs in similar conditions with positive outcomes *(Total maximum of 30 points)*
- Workplan– thoroughness of project narrative, clear and feasible workplan that meets deliverables within required timelines. *(Total maximum of 30 points)*

Financial Criteria- Total of 25 maximum points

- The budget line items and overall pricing for each of the phases *(Total of 25 maximum points)*

Application Logistics

Review/Proposal Timeline

- Submit intent to apply to attend Pre-bid Day: March 22, 2024
- Pre-bid Meeting Day: March 26, 2024
- RFP closes: April 10, 2024
- Review/Negotiation period: April 11 - May 16, 2024
- Estimated Contract Start Date: June 15, 2024

Terms & Conditions

This is a Request for Proposals only. Issuance of this RFP does not in any way obligate the Foundation to make an award or pay for costs incurred by potential offerors in the preparation and submission of an offer. In addition:

- (a) The Foundation may cancel RFP and not award;
- (b) The Foundation may reject any or all responses received;
- (c) Issuance of RFP does not constitute award commitment by The Foundation;
- (d) The Foundation reserves the right to disqualify any offer based on offeror failure to follow RFP instructions;
- (e) The Foundation will not compensate offerors for a response to RFP;
- (f) The Foundation reserves the right to issue an award based on an initial evaluation of offers without further discussion;
- (g) The Foundation may negotiate with short-listed offerors for their best and final offer;
- (h) The Foundation reserves the right to order additional quantities or units with the selected offeror;
- (i) The Foundation may reissue the solicitation or issue formal amendments revising the original RFP specifications and evaluation criteria before or after receipt of proposals;
- (j) The Foundation may modify the specifications without issuing a formal notice to all offerors when the revisions are immaterial to the scope of the RFP;
- (l) The Foundation reserves the right to waive minor proposal deficiencies that can be corrected prior to award determination to promote competition.

ADDENDUM 1

1. Start date clarification for in-water work:
 - a. Vessels in the marina are exempt from in-water work start date and may be lifted prior to July 15. Above water work on I-90 pontoon may begin prior to July 15.
2. Additional information on target locations:
 - a. Exhibit 1: Map of marina slips with sunken and derelict vessels indicated
 - b. Solvang in vicinity of Makah fuel dock
 - c. Sea Otter and Windwalker adjacent to I-90 pontoon

3. The RFPs state that 2 examples of past work should be included in our proposal. Are we limited to 2 examples? Or can we provide more than 2?

Yes, additional past work examples may be provided.

4. Can the Makah Tribe provide any documentation or general information about the sunken vessels in Neah Bay?

See Exhibit 2 for a list of vessels with known additional information.

5. Can the Makah Tribe provide any structural plans for the bridge section?

There are no structural plans for this specific pontoon. Additional known and assumed information is as follows:

- *In location since 1993*
- *Sitting on bottom at 17' – 20'*
- *Assumed tonnage: 2,750*

6. Does National Marine Sanctuary Foundation or Makah Tribe have legal authority to take and dispose of all vessels listed in the RFP?

Yes.

7. In wreck removal operations where hazardous materials are involved, an entity needs to be designated as the generator for purposes of obtaining a temporary EPA ID number. The generator, in our experience is always the entity contracting for the removal. Is National Marine Sanctuary Foundation or the Makah Tribe able to be named as the generator for waste?

It is assumed there are no hazardous materials as the Makah Tribe has been working to lighter, test and abate for hazardous materials.

8. Because the presence and volume of hazardous materials aboard these vessels will remain unknown until after removal actions commence, will Marine Sanctuary be open to proposal/contracting language that allows for material testing and subsequent abatement at a competitively bid cost + arrangement?

The RFP lists vessels that have been "Lightered" and "To Be lightered" and all fuel has been removed from the Valorous. Yes, the Foundation is open to proposal/contracting language that allows for material testing and subsequent abatement.

9. Will the work be subject to Davis Bacon prevailing wages?

The Davis Bacon Act (DBA) is not applicable to this project.

10. Will the work performed in Neah Bay be subject to TARO?

Yes. See Exhibit 3 for TERO (Tribal Employment Rights Ordinance) documents.

11. Should bidders include tax?

The Foundation is not required to collect any taxes, but proposals should include any applicable cost and an explanation of cost in the budget.

12. Is this a prevailing wage project?

See #10.

13. Is there a union signatory mandate or requirement for prime or subcontractors?

No.

EXHIBIT 1

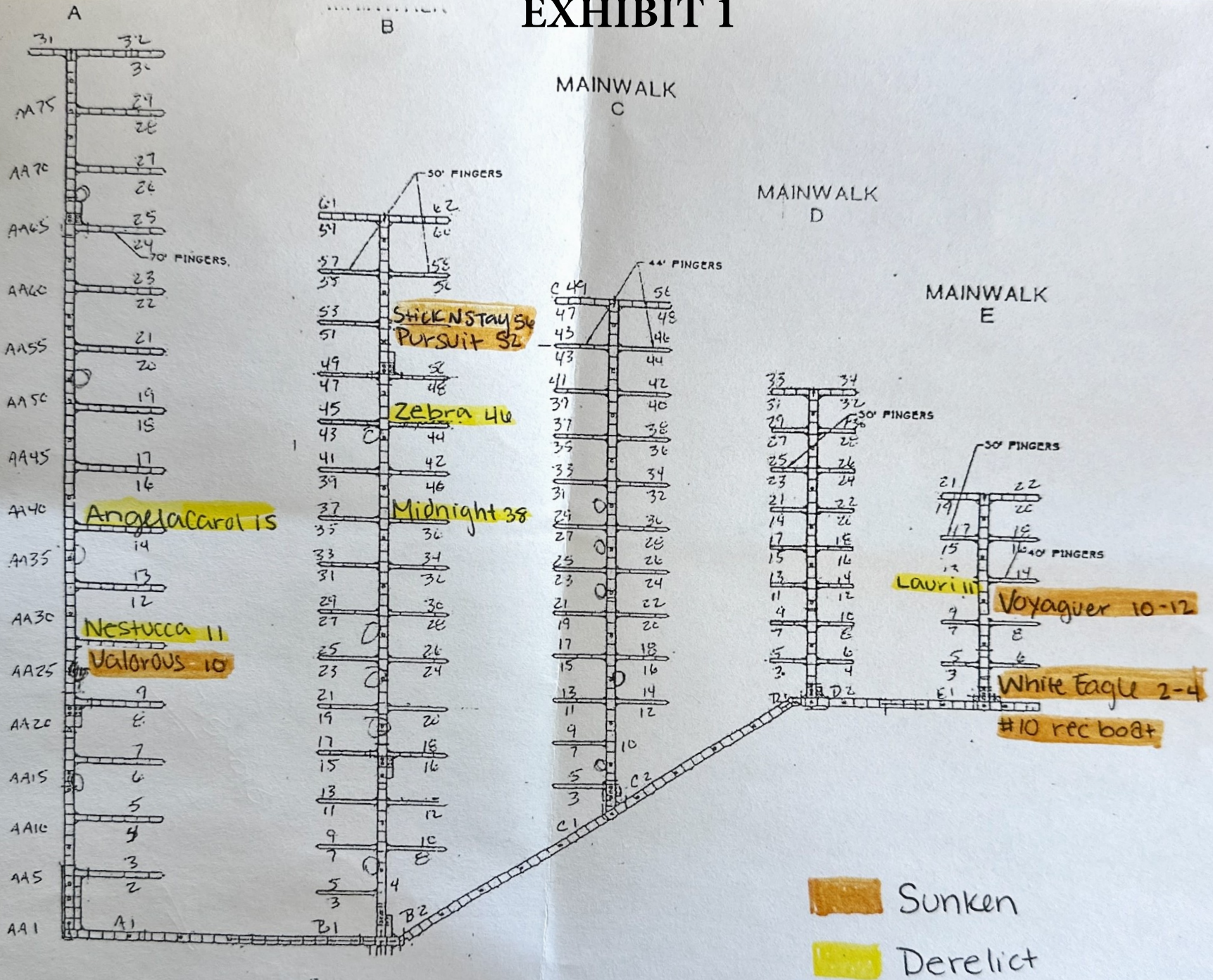


EXHIBIT 2

VESSEL	Yr Build	Length	Gross Ton
ZEBRA	1921	53.6	24
DEADDOCK/UNNAMED RECREATIONAL		28	
STICK-N-STAY	1974	26	
LAURI JEAN	1979	31'	14
WINDWALKER	1999	55.1	17
MIDNIGHT CHARGER	1970	43.4	32
WHITE EAGLE	1930	35.2	13
ANGELA CAROL	1965	69.7	95
NESTUCCA	1946	49.9	39
PURSUIT	1953	54.2	40
VOYAGUER	1990	42	31
VALOROUS	1974	49.9	44
SEA OTTER			
SOLVANG	1969	26.8	7

Exhibit 3

Basic Facts about Makah TERO

What is Makah TERO?

TERO stands for Tribal Employment Rights Ordinance. TERO Ordinances require that all employers who are engaged in work on the reservation give preference to qualified Indians in all aspects of employment, contracting and other business activities. The TERO Office was established and empowered to monitor and enforce the requirements of the Makah Tribal Employment Rights Ordinance.

What is the purpose of the Makah TERO Program?

The primary purpose of the Makah TERO Program is to enforce tribally enacted Indian Preference law to ensure that Indian/Alaska Native people gain their rightful share to employment, training, contracting, subcontracting, and business opportunities on or near the reservation. The TERO Office was established and empowered to monitor and enforce the requirements of the tribal employment rights ordinance. The Makah Tribal Council Ordinance No. 32-B is known as the "Makah Employment and Contracting Rights Act of 2004". Resolution No. 116-22 Date Enacted: 11/14/2022 Amended Title to Makah Tribal Employment Rights Ordinance.

1. To address the deplorable rate of poverty, unemployment and underemployment that exists among Native people living on the reservation.
2. To eliminate discriminatory and other historical barriers tribal members face while seeking employment and business opportunities on or near the reservation.
3. To ensure that tribal members receive their rightful entitlement as intended and required under the Tribal and federal Indian preference employment law.

What is the legal basis for TERO?

A Tribe's authority to enact and enforce an Indian/Native employment reference law is grounded in its inherent sovereign status. This legal doctrine is the most basic principal of Indian law and is supported by a host of Supreme Court decision. Inherent sovereign powers derive from the principal that certain powers do not necessarily come from delegated powers granted by express acts of Congress, but are inherent powers of a limited sovereign that has been taken away. Tribes have basic relationship with the federal government as sovereign powers. This is recognized in both treaties and federal statutes. The sovereignty of tribes has been limited from time to time by treaties and federal legislation; however, what has not been expressly limited remains within tribal sovereignty.

What does the TERO Ordinance do?

- 1. SETS CONDITIONS:** Mandates the tribal requirements for Indian preference that is all covered employers must comply with in order to be eligible to perform work on the reservation.
- 2. ESTABLISHES AUTHORITY:** Empowers the TERO Staff with sufficient authority to fully enforce all provisions of the TERO Ordinance.
- 3. DELINEATES PENALTIES FOR VIOLATIONS:** Clearly spells out penalties employers may face for violations of tribal law.

Preference in Employment and Contracting

What is Indian preference?

Indian preference is a unique legal right that tribal members have that entitles them to first consideration to all employment, training, contracting and subcontracting and business opportunities that exist on the reservation.

What is the extent of TERO jurisdiction?

TERO has jurisdiction over all employers operating within the exterior boundaries of the reservation as legally defined by treaty or legislation.

What is the enforcement approach to TERO?

Most of today's TERO programs utilize a pro-active approach to enforcement. TERO staff attempt to use education and synergistic partnering principles in order to prevent violations of tribal laws and generally try to create mutually beneficial relations with reservation employers.

What are the basic TERO requirements?

Below are several specific examples employers are required to comply with:

Submit an acceptable Compliance Plan detailing the steps they will take to ensure compliance with the TERO requirements. TERO Compliance Plans are closely fashioned after those used by OFCCCP for affirmative action compliance.

Utilize the TERO skills bank for all referrals and consider Indian/Native applicants before interviewing or hiring non-Indian/Natives.

Agree to hire no less than a specific number of Indians/Natives applicants 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 which may act as barriers to Indian/Native employment. EEOC Guidelines on legal BFOQs are used by TEROs.

Agree to acknowledge and respect tribal religious beliefs and cultural differences and to cooperate with TERO to provide reasonable accommodations.

All contractors claiming preference must file for certification as Indian Owned Business.

What are the sanctions for violation of MECRO/TERO?

Violation of TERO requirements may result in severe sanctions. It is determined that employers have willfully violated TERO requirements, tribes have the power to:

- Deny such party the right to commence business on the reservation.
- Impose a civil fine.
- Terminate or suspend such party's operations and deny them from doing further business within the reservation or village.
- Order the removal of unlawfully hired non-Natives and take action to ensure future compliance. It can also order the back payment of lost wages to aggrieved Natives.
- Terminate or suspend such party's operation and deny them from doing further business on the reservation.

Can TERO requirements be waived?

Yes, but it is not recommended. Some ordinances contain a provision for waivers to be granted by the Tribal Council in certain critical situations.

Waiver of preference requirements or fees can seriously effect the integrity of the TERO Ordinance and the tribal government itself.

TERO FEES

Section 5.1 Fee

For Contracts of \$100,000 or more shall pay a one-time fee of two percent (2%) of the total amount of the contract, plus a fee of 2% of any increase in the contract amount.

For Contracts under \$100, 000.00 the fee assessed will be (1%) of the total contract plus a fee of 1% of any increase in the contract amount. Contracts under \$10,000.00 the fee assessed will be \$50.00 with the exception of Enrolled Makah Tribal Members. Contracts under \$500.00 the fee assessed will be \$5.00 with the exception of Enrolled Makah Tribal Members.

The Contractor prior to commencing work on the Reservation shall pay the fee provided for in the Makah Tribal Employment Rights Ordinance. However, where good cause is shown, the Director may authorize Contractor to pay the fee in installments over the course of contract.

Are TERO fees/taxes legal?

Yes. Tribal authority to tax is equal to that of any other government. Taxation is a basic right of a sovereign government. The fees/taxes are a valuable source for financing the operation of the Makah Tribal Employment Rights Office and to contribute to community education, trainings and employment related expenses.

RESOLUTION NO.: 116-22

DATE ENACTED: 11/14/2022

SUBJECT MATTER:

Amend title of the Makah Employment and Contracting Rights Act (MECRA) to Makah Tribal Employment Rights Ordinance (TERO)

RESOLUTION NUMBER 116-22 OF THE MAKAH TRIBAL COUNCIL

WHEREAS, the Makah Tribal Council is the governing body of the Makah Indian Tribe of the Makah Indian Reservation, Washington, by authority of the Constitution and By-Laws of the Makah Indian Tribe as approved on May 16, 1936, by the Secretary of the Interior; and

WHEREAS, by Resolution 48-80 the Makah Tribal Council adopted Ordinance No. 32-B relating to Employment Rights which was approved by the Department of the Interior; and

WHEREAS, jobs in private employment on or near the Makah Indian Reservation are an important resource of the Makah Tribe and its local residents, and Congress and the federal courts have upheld special Indian employment rights under certain circumstances; and

WHEREAS, federal law and Article VI, Sections 1 (e), (g) and (i) of the Makah Constitution authorize enactment of a Makah Employment and Contracting Rights, subject to review by the Secretary of the Interior; and

WHEREAS, the Tribal Council has reviewed the recommended updated to the Makah Employment and Contracting Rights Act (MECRA), last revised September 13, 2004 by resolution 123-04, and has determined that it is in the best interests of the Makah Indian Tribe to amend the title;

NOW, THEREFORE, BE IT RESOLVED that the Makah Tribal Council hereby promulgates and amends the title of the Makah Employment and Contracting Rights Act of 2004 to Makah Tribal Employment Rights Ordinance.

BE IT FURTHER RESOLVED, that the amendment to Makah Tribal Employment and Contracting Rights Ordinance shall take immediate effect upon approval of this resolution.

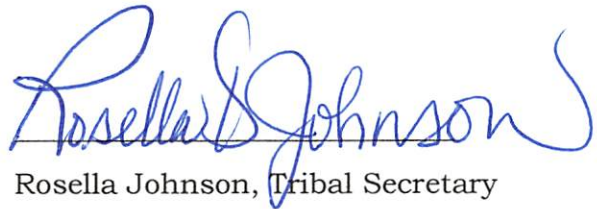
MAKAH TRIBAL COUNCIL



Timothy J. Greene, Sr.,
Chairman

CERTIFICATION

The foregoing resolution was adopted at a regular meeting held on November 14, 2022 at which a quorum was present and was adopted by a vote of 4 FOR and 0 AGAINST, the Chairman, or in his absence the Vice Chairman, being authorized to sign the resolution.



Rosella Johnson, Tribal Secretary

MAKAH TRIBAL EMPLOYMENT RIGHTS ORDINANCE
Relating to Employment and Contracting Rights of
Members of the Makah Indian Tribe

TABLE OF CONTENTS

1.	General Provisions and Purposes	1
1.1.	Title	1
1.2.	Findings	1
1.3.	Application of the Ordinance	1
1.4.	Effective Date	2
2.	Definitions	2
3.	Tribal Employment Rights Office	4
3.1.	Director	4
3.2.	Powers of the Director	4
3.3.	Duties of Director	5
4.	Tribal Employment Rights Program	6
4.1.	Order of Preference in Employment	6
4.2.	Compliance Agreements	6
4.3.	Establishing Numerical Hiring Goals	7
4.4.	Job Qualifications and Personnel Requirements	8
4.5.	Training	8
4.6.	Preferred Employee Hiring Hall	9
4.7.	Counseling and Support Programs	10
4.8.	Preference in Contracting and Subcontracting	10
4.9.	Lay-offs, Transfers, and Reinstatements	10
4.10.	Promotion, Supervisory Positions	11
4.11.	Summer Students	11
5.	Fees	11
5.1.	Contractors and Subcontractors	11
5.2.	Other Employers	11
5.3.	Notice of Fees	11
5.4.	Payment of Fees	11
5.5.	Accounting and Rebates	12
6.	Compliance by Unions	12
6.1.	Union Agreements Required	12
6.2.	Contents of Union Agreements	12
7.	Enforcement	13
7.1.	Dispute Resolution	13

8.	Complaint Procedure	14
	8.1. Individual Complaints Procedure	14
	8.2. Relief	14
9.	Judicial Review	14
	9.1. Tribal Court Proceedings	14
10.	Remedies and Sanctions	15
11.	Notice of Ordinance	15
	11.1. Employers, Contractors, Subcontractors	15
	11.2. Tribal Agencies	16
12.	Inspections	16
	12.1. Site Inspections	16
	12.2. Records Inspections	16
13.	Sovereign Immunity	16

1. General Provisions and Purposes

1.1. **Title.** This Ordinance shall be known as the Tribal Employment Rights Ordinance.

1.2. **Findings.** The Tribal Council finds:

1.2.1. That employment discrimination against Indians and other local residents persists on and near the Reservation despite a large number of Indian and non-Indian owned businesses employing skilled and non-skilled workers on and near the Reservation;

1.2.2. That contracts, subcontracts, and jobs in private employment on or near the Reservation are an important resource to which Indians living on or near the Reservation have unique employment rights under federal and tribal law;

1.2.3. That many families living on or near the Reservation include both Indian and non-Indian local residents, whose collective contracting and employment benefit their families and the Reservation community;

1.2.4. That contracting and employment preferences may lawfully be accorded to local residents, and that the Makah Indian Reservation is an appropriate geographical area, the inhabitants of which can properly be designated as local residents for the purposes of this Ordinance;

1.2.5. That the Tribal Councils duty to implement and protect the unique employment rights of Indians, as well as the health and welfare of the Reservation, necessitates enactment of a Tribal Employment Rights Office, which establishes a Tribal Employment Rights Office Program (Program) and an Employment and a Tribal Employment Rights Office (Office) to achieve its goals and policies; and

1.2.6. The Tribal Council shall appropriate such tribal funds as are necessary and available to establish training programs to prepare Preferred Employees for job opportunities developed pursuant to this TERO/Ordinance and the Program.

1.3. **Application of TERO.**

1.3 .1. **Employers.** TERO shall apply to all Employers located on or engaged in work on the Reservation, and to all facilities of such Employer located near the Reservation.

1.3.2. **Preferences to Be Given By Employers.** All Employers shall give preference to Indians in hiring, promotion, transfer, reinstatement, reduction in force, training and all other aspects of employment, contracting and subcontracting, and business opportunities, and shall at all times comply with the terms of this Ordinance and its implementing regulations and any Compliance Agreement executed under TERO.

1.3.3. **Duty of Contractors and Subcontractors of Employees.** The preference requirements contained in this Ordinance shall be binding on all Contractors and Subcontractors of Employers, regardless of tier, and shall be deemed a part of all resulting subcontract specifications. Each Employer shall have the initial and primary responsibility for ensuring that all Contractors and Subcontractors comply with the requirements of this Ordinance, and both the Employer and its Contractors or Subcontractors shall be subject to sanctions provided herein for violation of this TERO if the Contractor or Subcontractor fails to comply.

1.3.4. **Contract Disputes Excluded.** Contract disputes (excluding a Compliance Agreement or Union Agreement under this Ordinance) are contractual and are not within the scope of this Ordinance and shall not be cause for Contractor or Subcontractor shutdown. Contract disputes shall be resolved through specified contract procedures for such disputes or through a court of competent jurisdiction.

1.3.5. **Severability of Provisions.** If any provision of this Ordinance, or its application to any person or circumstance is held invalid, the remainder of the Ordinance, or the application of the provision to other persons or circumstances is not affected.

1.4. **Effective Date.** This Ordinance shall be effective from the date of its approval by the Secretary of the Interior or the Secretary's duly authorized representative.

2. **Definitions**

- 2.1. "Tribal Council" means the Makah Indian Tribal Council.
- 2.2. "Ordinance" means this Tribal Employment Rights Ordinance.
- 2.3. "TERO" means Tribal Employment Rights Ordinance.
- 2.4. "Compliance Agreement" means a certification signed by an Employer and the Director that sets forth how the Employer will meet preference hiring goals and establishes that the Employer will comply fully with this Ordinance. A Compliance Agreement must be executed prior to commencement of any portion of the contract or subcontract with the Employer.
- 2.5. "Director" means the Director of the Tribal Employment Rights Office and Program
- 2.6. "EEOC" means the Equal Employment Opportunity Commission of the United States.
- 2.7. "Employer" means any person or entity located or engaged in any work, contract, or subcontract within the Reservation and that employs two or more persons. The term "Employer" does not include the United States or any of its agencies, or the Makah Indian Tribe. The term "Employer" does not include the state of Washington or any

agency of the state of Washington while directly performing work on state lands within the Reservation. The term "Employer" includes all other governments and governmental agencies, including agencies, entities, and enterprises of the Tribe, and all Contractors and Subcontractors of any government or governmental agency.

- 2.8. "Engaged in Work on the Reservation." An Employer is engaged in work on the Reservation if, during any portion of a business enterprise or any project, contract, or subcontract, the Employer or any of the Employers Employees spend a substantial amount of time performing work within the exterior boundaries of the Reservation on a continuing basis. The term includes Employers who are engaged in the operation of any charter boat business on the reservation, including all charter boats that use any dock, pier, or marina facility on the Reservation. The term does not include work performed on the Reservation at the request of or for the benefit of individual tribal members on real property or improvements in which the member has an interest where the Employer employs three or less employees.
- 2.9. "Entity" means any person, partnership, corporation, joint venture, government, governmental enterprise, or any other natural or artificial person or organization. The term "Entity" is intended to be as broad and encompassing as possible to ensure the Ordinance's coverage overall employment and contract activities within the jurisdiction of the Tribe.
- 2.10. "FEPC" means the Fair Employment Practices Commission of the United States.
- 2.11. "Indian" means a person who is a member of an Indian tribe.
- 2.12. "Indian Tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act 43 U.S. Code § 1601 which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
- 2.13. "Indian-Owned Business" means a business entity that is at least 51 % owned and controlled by Indians.
- 2.14. "Local Resident" means a person who has been residing on or near the Makah Indian Reservation for at least six months prior to the date of hire.
- 2.15. "Located on the Reservation" means any business enterprise or operation, or any project, contract, or subcontract, in which an Employer maintains a temporary or permanent office, facility, business property, or equipment within the exterior boundaries of the Reservation.

- 2.16. "Near the Reservation" means within reasonable daily commuting distance of the Reservation.
- 2.17. "OFCCCP" means the Office of Federal Contract Compliance Programs of the United States.
- 2.18. "Preferred Employee" means a person entitled to a preference in employment under this Ordinance.
- 2.19. "Program" means the Tribal Employment Rights Program.
- 2.20. "Reservation" means the Makah Indian Reservation established by the Treaty of January 31, 1855, and includes all lands, water, airspace, and rights-of-way, without regard to the issuance of any patent, within the exterior boundaries of such Reservation, as now or hereafter existing, and all other lands in which the Tribe holds an interest, wherever located.
- 2.21. "Secretary" means the Secretary of the Interior or his duly authorized representative.
- 2.22. "State land" means land owned by the state of Washington in fee, including rights-of-ways to which title is vested exclusively in the state of Washington.
- 2.23. "Temporary office or facility" shall mean a modular, or housing type structure, or trailer located on the Reservation for one day or more.
- 2.24. "Tribe" means the Makah Indian Tribe.

3. **Tribal Employment Rights Office**

- 3.1. **Director Appointment and Reporting Requirements.** The Director of the Tribal Employment Rights Office shall be appointed by the Tribal Council and shall report to the General Manager or such other person as the Tribal Council shall designate at such time and in such manner as the General Manager shall require. The Director shall prepare and submit to the Tribal Council written quarterly reports describing the activities and progress of the program on March 15, June 15, September 15, and December 15 of every year.
- 3.2. **Powers of the Director.** The Director shall have the power:
 - 3.2.1. To establish rules and regulations governing all activities of the Program; provided that before any rules or regulations become effective, they must first be approved by the Tribal Council;
 - 3.2.2. To expend funds appropriated by the Tribal Council for the Program pursuant to an annual budget prepared by the Director and approved by the Tribal Council;
 - 3.2.3. To obtain funding from federal, state, or other sources to supplement Tribal Council appropriations;

- 3.2.4. To impose numerical hiring goals and timetables specifying the minimum number of Preferred Employees that an Employer must hire by position, craft, skill level, or other reasonable employment-related criterion;
 - 3.2.5. To require Employers to establish or participate in such training programs as the Director deems reasonably necessary to increase the pool of Preferred Employees eligible for employment;
 - 3.2.6. To establish and administer a tribal hiring hall;
 - 3.2.7. To require that Employers may hire non-Preferred Employees only after the tribal hiring hall has certified that qualified Preferred Employees are unavailable to fill vacant employment positions;
 - 3.2.8. To prohibit Employers from using job qualification criteria or personnel requirements that bar Preferred Employees from employment unless such criteria or requirements are required by business necessity. The Director may adopt EEOC guidelines or may adopt additional requirements to eliminate employment barriers unique to Preferred Employees and the Reservation;
 - 3.2.9. To enter into binding agreements with unions to ensure union compliance with this Ordinance;
 - 3.2.10. To require that Employers give preference to tribal and other Indian-owned businesses in the award of contracts and subcontracts pursuant to this Ordinance;
 - 3.2.11. To establish counseling programs to assist Preferred Employees to obtain and retain employment;
 - 3.2.12. To require Employers to submit reports and take all other actions under this Ordinance deemed necessary by the Director for the fair and vigorous implementation and enforcement of this Ordinance;
 - 3.2.13. To enter into cooperative agreements with federal employment rights agencies such as EEOC and OFCCP to eliminate discrimination against Indians on and near the Reservation
 - 3.2.14. To take such other actions as are necessary to achieve the purposes and objectives of the Program established by this Ordinance; and
 - 3.2.15. In exercising the above-specified power, the Director shall have the discretion to implement certain powers only or to apply one or more such powers to limited classes of employers.
- 3.3. **Duties of Director.** The Director shall administer the Program in accordance with this Ordinance and any amendments as may hereafter be duly enacted by the Tribal Council.

4. **Tribal Employment Rights Program.**

4.1. **Order of Preference in Employment.** Whenever an Employer is required by this Ordinance to give preference in employment, such preference shall be given to the following persons in the following enumerated order:

4.1.1. Indians who reside on or near the Reservation;

4.1.2. Other Indians;

4.1.3. Non-Indians who contribute to the financial support of an Indian household that includes one or more resident Indians.

4.1.4. Other persons who reside on or near the Reservation.

4.2. **Compliance Agreements.**

4.2.1. No Employer who intends to engage in temporary business on the Reservation shall commence work on the Reservation until a Compliance Agreement has been negotiated and signed by both the Director and the authorized representative of the Employer. An Employer who has established a permanent place of business on the Reservation shall negotiate and execute a Compliance Agreement within 30 days from the date that the Employer receives notification from the Director that a Compliance Agreement is required.

4.2.2. Each Employer shall be required to meet with the Director or his or her designee and negotiate and execute a Compliance Agreement that sets forth:

4.2.2.1. The minimum number of Preferred Employees that the Employer shall hire during any year that the Employer is located or engaged in work on the Reservation;

4.2.2.2. Numerical goals and timetables to reach such goals for each craft, skill area, job classification, etc., used by the Employer including, but not limited to, general labor, skilled, administrative, supervisory and professional categories. These goals shall be established as described in subsection 4.3.

4.2.2.3. Wage scale provisions and salary compensation terms;

4.2.2.4. Pursuant to the provisions of Section 4.5.3, the ratio of Preferred Employee trainees to fully qualified workers shall be negotiated as part of the Compliance Agreement. For construction projects, the number of Preferred Employee trainees shall be no less than the minimum ratio established by the Department of Labor;

4.2.2.5. Periodic reporting requirements that the Employer shall provide to the Director as required under this Ordinance;

4.2.2.6. The Employers commitment to give preference when contracting and subcontracting as required by this Ordinance;

4.2.2. 7. The Employers commitment to cooperate with the Director regarding counseling and support programs as required by this Ordinance; and

4.2.2.8. The Employers commitment to comply with requirements governing layoffs, promotions, transfers, reinstatements, and hiring of students as required by this Ordinance.

4.2.3. The Director shall review each Compliance Agreement at least once each year and, with the Employer, shall revise the Agreement as necessary to reflect changes in the number of Preferred Employees available for employment, projected employment opportunities, changes in Employer hiring plans, or other changes in relevant information or circumstance.

4.2.4. Any violation of an executed Compliance Agreement shall be a violation of this Ordinance, which shall be subject to enforcement by the Director under the provisions of this Ordinance.

4.3. Establishing Numerical Hiring Goals.

4.3.1. Surveys. The numerical goals set forth in a Compliance Agreement shall be based upon surveys conducted by or for the Director of the available Indian work force and of projected employment opportunities on the Reservation.

4.3.2. Goals. The goals described in this Ordinance shall be expressed in terms of man-hours of employment as a percentage of the total man-hours worked by the Employers work force in each job classification involved.

4.3.3. New Employers. For each new Employer on the Reservation, the hiring goals shall be established for the entire work force. The Employer shall meet with the Director as soon as possible before starting work and shall furnish the Director with a precise list of the number and kinds of Employees the Employer expects to employ. The Director shall set specific goals and timetables for the Employer after considering any special factors or circumstances that the Employer presents.

4.3.4. Existing Employers. The hiring goals for existing Employers on the Reservation shall be a percentage of the new Employees expected to be employed during the ensuing year by the Employer, as determined by the Director under the provisions of this Ordinance.

4.3.5. Annual Review, Monthly Reports. For both new and existing Employers, the hiring goals shall be reviewed by the Director at least once each year and shall be revised as necessary to reflect changes in the number of Preferred Employees available for employment, projected employment opportunities, changes in Employer hiring plans, or other changes in relevant information or circumstance. Each Employer shall submit a monthly report to the Director on a form provided by the Director that indicates the number of Preferred Employees in the Employers work force, an assessment of the Employers compliance with the Employers Compliance Agreement executed pursuant to Section 4.2, all persons hired or fired during the month, the job positions involved, and such other information as may be required by the Director.

4.4. Job Qualifications and Personnel Requirements.

4.4.1. Employment Criteria. It shall be a violation of this Ordinance for an Employer to use job qualification criteria or personnel requirements to bar Preferred Employees from employment, unless such criteria or requirements are required by business necessity.

4.4.2. Burden of Proof. The Director shall bear the initial burden of proving that a job qualification criterion or personnel requirement is not required by business necessity.

4.4.3. Action by the Director. Upon prima facie evidence that a job qualification or personnel criterion is not required by business necessity, the Employer shall bear the burden of proving that it is. If the burden is not met, the Employer will be required to eliminate the job qualification criterion or personnel requirement at issue.

4.4.4. Religious Accommodation. Every Employer shall make a reasonable accommodation to the religious beliefs of Preferred Employees.

4.4.5. EEOC Guidelines. In implementing this section, the Director shall be guided by principles established by EEOC guidelines, particularly 29 C.F.R. Parts 1604-1607, as amended, but the Director may impose additional requirements beyond those established by the EEOC in order to eliminate employment barriers unique to Preferred Employees and the Reservation.

4.4.6. Dispute Procedure. If an Employer and the Director are unable to agree on the requirements of this subsection, the Director may invoke the procedures provided in Section 7 of this Ordinance.

4.5. Training.

- 4.5.1. Training Programs. The Director shall identify and facilitate training programs necessary to assist the maximum number of preferred persons to become qualified in various job qualifications used by Employers. The Director shall establish a construction-work trainee program and obtain certification for the program from the Department of Labor or other agency, as appropriate.
- 4.5.2. Employer Training Programs. The Director may initiate and sponsor training programs for specific Employers, or the Director may work with Employers to establish and sponsor their own training programs, to assist the maximum number of Preferred Employee trainees to become qualified in the various job classifications used by the Employers.
- 4.5.3. Trainee Ratios. The Director shall set the ratio of Preferred Employee trainees to fully qualified workers, consistent with the business necessity for each Employer or Employer classification. The ratio of Preferred Employee trainees to fully qualified workers shall be negotiated as part of the Compliance Agreement. For construction projects, the number of Preferred Employee trainees shall be no less than the minimum ratio established by the Department of Labor.
- 4.5.4. Employers Subject to Collective Bargaining Agreements. Every Employer with a collective bargaining agreement with a union shall be required to obtain agreement from the union to establish an advanced journeyman upgrade and apprenticeship program.

4.6. Preferred Employee Hiring Hall.

- 4.6.1. Tribal Hiring Hall. The Director shall establish and administer a tribal hiring hall to assist the Director and Employers in placing Preferred Employees in available job positions.
- 4.6.2. Drug Testing of Preferred Employees. Before a Preferred Employee can be placed on the hiring hall list, a Preferred Employee must submit to pre-employment drug testing under the rules and procedures established by the Drug and Alcohol Free Workplace Act of 2002. Any person who tests positive on such pre-employment drug test shall be automatically barred from the Preferred Employee list for six months from the date of testing. A refusal to submit to pre-employment drug testing under this Section shall be treated as a positive test result.
- 4.6.3. Non-Acceptance of Referral. The name of any person who refuses to accept an employment referral from the hiring hall list, shall be moved to the end of the list.

4.6.4. Preferred Employee Referrals. An Employer may recruit and hire workers from whatever sources are available and by whatever process the Employer chooses, provided that an Employer may not hire a non-Preferred Employee until the Employer has given the Director a reasonable time to locate a qualified Preferred Employee and the tribal hiring hall has certified that a qualified Preferred Employee is not available to fill the vacant job position. For purpose of this Section, A reasonable time” shall be defined as follows:

4.6.4.1. Construction Employment. For construction jobs, the Director shall have 48 hours to locate and an additional 12 hours to refer a qualified Preferred Employee; 4.6.4.2. Other Employment. For all other kinds of employment, the Director shall have five working days to locate and refer a qualified Preferred Employee. The Director may reduce these time periods upon a showing by the Employer that such time periods impose an undue burden upon the Employer.

4.6.5. Non-Acceptance of Referral. The name of any person who refuses to accept an employment referral from the hiring hall list, shall be moved to the end of the list.

4.6.6. Exemption. An Employer subject to a collective bargaining agreement with a union shall be exempt from the requirements of this Section if the union agrees to place on its referral list all names supplied to it by the Director and to refer Preferred Employees on a priority basis. If any union fails to comply with an agreement to refer Preferred Employees to an Employer, the Director shall require the Employer to comply with the referral provisions of this Section.

4.6.7. Violations. If any Employer employs a non-Preferred Employee in a job in violation of this Section, the Employer shall be required by the Director to remove the Employee summarily and shall be subject to the sanctions provided in Section 10 of this Ordinance.

4.6.8. Emergency Hires. Emergency hires to fill positions vacated by a Preferred Employee when the tribal hiring hall is closed, such as holidays and weekends, are permitted; however, such hires shall be for a maximum of three days, and the Employer shall comply with the provisions of this Section following the expiration of the three-day hire.

4.6.9. Disclaimer of Liability. In making referrals of Preferred Employees from the tribal hiring hall under this Section, neither the Tribe nor any employee, officer, or agent of the Tribe shall be liable to any Employer or other third party, or to the Preferred Employee for any claims, complaints, damages, injury, or other claim arising from such referral or employment.

4. 7. **Counseling and Support Programs.** The Director will establish counseling and other support programs to assist Preferred Employees to obtain and retain employment. Every Employer shall be required to cooperate with the Director regarding such counseling and support programs.
- 4.8. **Preference in Contracting and Subcontracting.** Every Employer shall give preference in the award of any contract or subcontract to Indian-owned businesses. The Director shall maintain a list of Indian-owned businesses, which shall be supplied to the Employers for their use.
- 4.9. **Lay-offs, Transfers, and Reinstatements.** In all lay-offs and reductions in force, no Preferred Employee shall be terminated if a non-Preferred Employee in the same job classification is still employed. The non-Preferred Employee must first be terminated if the Preferred Employee possesses the threshold qualifications for the job classification. If an Employer lays-off workers by crews, all qualified Preferred Employees shall be transferred to crews to be retained so long as non-Preferred Employees in the same job classifications are employed elsewhere on the job site. Preference shall also be afforded to transfers and reinstatements.
- 4.10. **Promotion, Supervisory Positions.** Every Employer shall give Preferred Employees preferential consideration for all promotion opportunities and shall encourage Preferred Employees to seek such opportunities. For every supervisory position filled by a non-Preferred Employee, the Employer shall file a report with the Director stating what efforts were made to inform Preferred Employees about the position, what Preferred Employees, if any, applied for the position, and the reasons why each Preferred Employee was not hired for the position.
- 4.11. **Summer Students.** Every Employer shall give students who qualify as Preferred Employees preferential consideration for summer student placement. The Employer shall make every effort to promote after-school, summer, and vacation employment for Preferred Employee students.

5. **Fees.**

- 5.1. **Contractors and Subcontractors.** Every Contractor or Subcontractor with a contract of \$100,000 or more shall pay a one-time fee of two percent (2%) of the total amount of the contract, plus a fee of 2% of any increase in the contract amount. Contractors or Subcontractors with a contract of less \$10,000 to \$99,999 shall pay a one-time fee of one percent (1 %), plus a fee of 1 % of any increase in the contract amount. If the initial contract is less than \$100,000, but is subsequently increased to \$100,000 or more, the fee shall increase to two percent (2%) of the full contract amount. Contractors or Subcontractors with a contract of \$500 to \$9,999 shall pay a one-time fee of \$50 with the exception of Enrolled Makah Tribal Members.

Contractors or Subcontractors with a contract of less than \$500 shall pay a one-time fee of \$5 with the exception of Enrolled Makah Tribal Members.

- 5.2. **Other Employers.** Every Employer, other than a Contractor or Subcontractor with a contract of \$100,000 or more, with an annual payroll of \$10,000 or more, shall pay an annual fee of one percent (1 %) of the Employers annual payroll. This fee may be waived by the Director only for bona fide education, health, or non-profit Employers.
 - 5.3. **Notice of Fees.** All announcements, RFP's or other requests or notices for competitive bids or proposals, and all sole source contract notices or announcements shall include a notice of the TERO fee provisions set forth herein.
 - 5.4. **Payment of Fees.** The Contractor prior to commencing work on the Reservation shall pay the fee provided for in this Ordinance. However, where good cause is shown, the Director may authorize the Contractor to pay the fee in installments over the course of the contract.
 - 5.5. **Accounting and Rebates.** The Director may rebate all or some of the TERO fees, in his or her discretion, if the Director finds that a Contractor, Subcontractor, or Employer is in full compliance with TERO. In such case, the Director shall make a written record of the rebate decision and support. Employment rights fees shall be paid to the Tribe and placed in a special TERO account to be used by the Director as part of the annual TERO budget, as determined by the Tribal Council. The Director shall be responsible for collecting the fees and for establishing rules and regulations necessary to ensure fair and timely collection. The Director is authorized to develop regulations to rebate all or portion of employment rights fees paid by an Employer who is found to be in full compliance with the requirements imposed by this Ordinance or is making a substantial effort to train and employ Preferred Employees.
6. **Compliance by Unions.**
- 6.1. **Union Agreements Required.** Every union with a collective bargaining agreement with an Employer shall enter into a written agreement with the Director (A Union Agreement) providing that the union will comply with this Ordinance and all rules, regulations, and orders of the Director. Until such agreement is filed with the Director, the Employer may not commence work on the Reservation.
 - 6.2. **Contents of Union Agreements.** Every Union Agreement must provide:
 - 6.2.1. **Preferred Employee Preference.** The union will give preference to Preferred Employees in job referrals regardless of which union referral list they are on.

- 6.2.2. Cooperation with Director. The union will cooperate with the Director in implementing and enforcing this Ordinance.
- 6.2.3. Registration of Preferred Employees. The union will establish a procedure for Preferred Employees to register for job referral lists by telephone, mail, or other convenient means.
- 6.2.4. Training Programs. The union will establish a-journeyman upgrade and advanced apprenticeship-training programs.
- 6.2.5. A Blanketing-In of Preferred Employees. The union will permit, but not require, any Preferred Employee who qualifies for journeyman status to join the union.
- 6.2.6. Temporary Work Permits. The union will grant temporary work permits to Preferred Employees who do not wish to join the union.
- 6.2.7. Model Union Agreement. The Director will provide a model Union Agreement for use by all unions that have collective bargaining agreements with an Employer.
- 6.2.8. Recognition of Unions. Nothing herein nor any action of the Director under this Ordinance shall constitute tribal recognition of any union or tribal endorsement of any union activities on the Reservation

7. **Enforcement.**

- 7.1. **Dispute Resolution.** The following procedures shall apply in the order set forth below:
 - 7.1.1. Hearing Officer. The Tribal Council shall designate two or more persons to serve as TERO Hearing Officers for the purpose of conducting hearings under this Ordinance. If the Hearing Officers are not Employees of the Tribe, they shall be entitled to compensation on an hourly or other basis and at a rate to be determined by the Tribal Council. No person who has any direct or indirect interest in the outcome or subject matter of a dispute or enforcement action shall serve as a Hearing Officer in such dispute or matter.
 - 7.1.2. Informal Resolution. If the Director determines that an Employer, Contractor, Subcontractor, or union has failed to comply with any agreement entered into under this Ordinance, including any Compliance or Union Agreement hereunder, or has failed to comply with any provision of this Ordinance or any rules, regulations, or orders of the Director under this Ordinance, the Director will first attempt to achieve an informal settlement of the matter.
 - 7.1.3. Service of Complaint. If an informal settlement cannot be reached within a reasonable time, the Director shall file an administrative complaint with the Hearing Officer against such

party. Within five business days of filing the complaint, the Director shall cause all parties to be served with the complaint. Service of the complaint shall be made under the same rules and procedures in every respect as apply to service of a civil complaint in Makah Tribal Court.

7.1.4. Response. A party shall have five business days in which to file and serve on the Director and all other parties a response to the complaint.

7.1.5. Hearing. The Hearing Officer shall schedule a hearing no sooner than 20 calendar days following service of the response to the complaint on all parties. All parties shall receive at least five-business days' notice of hearing.

7.1.6. Hearing Procedures. The party and the Director may present briefs and evidence and cross-examine witnesses at the hearing, using as guidance the civil procedures established in the Makah Law and Order Code and by the Tribal Court, and where gaps exist, by the federal district courts. The Hearing Officer shall, no later than 14 working days after the hearing, issue a decision that shall include findings of fact and conclusions of law. The Director may, after consultation with the Tribes general manager, the Tribal Council, and the Tribe's attorneys, enforce the Hearing Officer's decision in Tribal Court, whereupon the opposing party shall be entitled to raise any defenses recognized under tribal or federal law.

8. **Complaint Procedure.**

8.1. **Individual Complaints Procedure.** Any Employee, Employer, union, or other person who believes that any person or entity has failed to comply with any Agreement entered into under this Ordinance, or any provision of this Ordinance, or any rules, regulations, or orders of the Director made under this Ordinance, may file a written complaint with the Director describing the alleged violation and setting forth all relevant facts in support of the allegations in the complaint. The Director shall investigate the allegations of the complaint, including interviews with the complaining parties and all other persons with knowledge or information of the matter, and, if the Director determines that a failure to comply has occurred, the Director shall invoke the hearing proceedings set forth in Section 7 of this Ordinance. In such proceeding, the complaining party shall not be a necessary party, but may be a witness as determined necessary by the Director. Such hearing action shall be brought only in the name of the Makah Indian Tribe. Nothing in this Ordinance shall be construed to create a private right of action for an individual to invoke the procedures of Section 7 or otherwise to bring a private enforcement action under this Ordinance. The Director shall have discretionary authority to deny

a complaint or to bring such enforcement action, as the Director deems necessary or desirable under the facts and circumstances of each case consistent with the purpose and intent of this Ordinance.

8.2. **Relief.** The Hearing Officer shall order such relief as shall be just and equitable under the circumstances including declaratory or injunctive relief. However, in no event shall the Hearing Officer or the Tribal Court award monetary damages against the Tribe, the Director, or any agent, officer, or employee of the Tribe.

9. **Judicial Review.** Any person, including the Director, aggrieved by a final decision of a Hearing Officer or of the Director, may, after exhausting all administrative remedies set forth under this Ordinance and applicable law, file a petition for judicial review in Makah Tribal Court seeking judicial review of such decision. Any petition for judicial review brought by any person other than the Director shall name as the respondent the Director or the Hearing Officer, as the case may be, in their official capacity only. The Makah Indian Tribe shall not be a named respondent in any judicial review proceeding brought pursuant to this Ordinance. The Director may only bring a petition for judicial review after consulting with or receiving the approval of the Makah Tribal Council and such approval shall be in writing and included with the petition filed by the Director. Tribal Council approval and proof thereof is jurisdictional and failure to obtain such approval shall result in dismissal of the petition by the Tribal Court.

9.1. **Tribal Court Proceedings.** The applicable sections of the Makah Law and Order Code shall govern any action brought in Tribal Court under this Ordinance. In case of any conflict between the provisions of this Ordinance and the provisions of the Makah Law and Order Code, the express provisions of this Ordinance shall control. All notice and service shall comply with the notice and service requirements applicable in tribal court.

10. **Remedies and Sanctions.** In any enforcement action brought by the Director, the following remedies and sanctions may be ordered:

10.1. Prohibit the commencement or continuation of work or business within the Reservation;

10.2. Suspend all operations within the Reservation;

10.3. Order back pay to injured Preferred Employees;

10.4. Order removal of Employees hired in violation of this Ordinance;

10.5. Impose civil fines, to a maximum of \$500 for each violation. Each day during which a violation continues shall constitute a separate violation;

10.6. Enjoin the person or entity from engaging in any future activities within the Reservation;

10.7. Require employment, promotion, and training of Preferred Employees injured by the violation;

- 10.8. Require that the parties amend or rescind the Compliance Agreement or Union Agreement or declare the Compliance Agreement or Union Agreement null and void; or
- 10.9. Impose any other order or remedy deemed reasonable and necessary to alleviate, eliminate, or compensate for any violation.
- 10.10 The remedies and sanctions set forth in Sections 10.1 through 10.9 above are not exclusive, and other appropriate remedies or sanctions may be fashioned by the Director in the Directors discretion consistent with the provisions of this Ordinance.

11. **Notice of Ordinance.**

- 11.1. **Employers, Contractors, Subcontractors.** The Director shall provide written notice to all Employers, Contractors, and Subcontractors conducting business within or near the Reservation of this Ordinance and all amendments thereto, and shall provide a copy of this Ordinance and all amendments to all such Employers. All announcements issued by any private or public person or entity for contracting, subcontracting, or employment, except where exempted under this Ordinance, shall contain a statement that the Employer, Contractor, or Subcontractor will be obligated to comply with this Ordinance, an executed Compliance Agreement or Union Agreement, and all rules, regulations and orders of the Director made under this Ordinance.
- 11.2. **Tribal Agencies.** All Tribal agencies responsible for issuing business permits for on-Reservation activities or otherwise engaged in activities involving contact with prospective Employers on the Reservation shall advise such persons or entities of their obligations under this Ordinance.

12. **Inspections.**

- 12.1. **Site Inspections.** The Director shall have the right to make on-site inspections during regular working hours in order to monitor any Employers compliance with this Ordinance and rules, regulations, and orders of the Director.
- 12.2. **Records Inspections.** The Director shall have the right to inspect and copy all relevant records of any Employer, and of any signatory union, or Subcontractor of any Employer, and shall have the right to speak to Employees and conduct investigations at an Employers place of business or work site.

13. **Sovereign Immunity.**

Nothing in this Ordinance or any action taken by the Director or the Tribal Employment Rights Office or the Tribe pursuant to this Ordinance or in furtherance of the purposes or intent of this Ordinance, including the bringing of any enforcement action, appeal, hearing, judicial review, or any action of a Hearing Officer under this Ordinance shall be deemed to be a waiver of the sovereign immunity of the Makah Indian Tribe, its officers, agents, and employees in any court, forum, or proceeding by any person or entity pursuant to any tribal, federal, or state law.



MAKAH TRIBE

P.O. BOX 115 • NEAH BAY, WA 98357 • 360-645-2201



The Makah Tribe is an equal opportunity employer.

Makah Tribal Employment Rights Office

Rose Jimmicum, TERO Director

880 6th Street, P.O. Box 115

Neah Bay WA, 98357

(360) 645-3101 & (360) 645-3114

EMAIL: rosalee.jimmicum@makah.com

Tribal Employment Rights Ordinance

COMPLIANCE AGREEMENT FOR CONTRACTORS/SUB-CONTRACTORS

I. Compliance Agreement

CONTRACTORS: No Employer who intends to engage in temporary business on the Reservation shall commence work on the Reservation until a Compliance Agreement has been negotiated and signed by both the Director and the authorized representative of the Employer. The signed agreement by an Employer and the Director sets forth how the Employer will meet preference hiring goals and establishes that the Employer will comply fully with TERO Ordinance. A Compliance Agreement must be executed prior to commencement of any portion of the contract or subcontract with the Employer.

TERO PRE-CONSTRUCTION MEETING

A TERO Pre-Construction Meeting is required to provide each contractor and their supervisory personnel an orientation on the TERO requirements and procedures. The Prime/General Contractor shall be responsible for contacting the Makah Tribal Employment Rights Office to schedule the meeting and for providing notification of meeting date and time to their subcontractors.

Contractors shall not commence or continue work on the reservation until an acceptable **AGREEMENT** implementing their obligations under this **Ordinance** has been approved by the **Director** of the **Makah Tribal Employment Rights Office**.

Project Name:	Site Location:
Contracting Agency & Officer:	Phone:
Address:	
Prime Contractor:	Email & Phone:
Company Representative:	Email & Phone:

Makah &/or Native Owned Business:	If Yes Tribal Affiliation:
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Yes or No:	
State Industrial Insurance & Date Received:	If No Name of Insurance:
Yes or No: Date:	
Subcontractor:	Phone & Email
Address:	

Scope of Work to be Performed: Attach Document if Necessary	Start Date:

II. CONTRACT FEES:

Contractors and Subcontractors- Every Contractor or Subcontractor with a contract of \$100,000 or more shall pay a one-time fee of two percent (2%) of the total amount of the contract, plus a fee of 2% of any increase in the contract amount. Contractors or Subcontractors with a contract of \$10,000 to \$99,999 shall pay a one-time fee of one percent (1%), plus a fee of 1% of any increase in the contract amount. If the initial contract is less than \$100,000, but is subsequently increased to \$100,000 or more, the fee shall increase to two percent (2%) of the full contract amount. Contractors or Subcontractors with a contract of \$500 to \$9,999 shall pay a one-time fee of \$50. Contractors or Subcontractors with a contract of less than \$500 shall pay a one-time fee of \$5.

III. COMPLIANCE AGREEMENT

Contract Amount:	TERO Administrative Fee: (lump sum payment)
\$	\$
Approved:	Disapproved:
Amount:	Dated:
Check Number: #	
Date Received by Finance:	Date Received by TERO:
Amendment # 1:	Amendment # 2:
TERO Director Review & Signature:	Date:

Personal Clearance Request for TERO Approval

IV. TERO HIRING

NEW EMPLOYERS:

For each new employer on the reservation the hiring goals shall be established for the entire workforce. The Employer shall meet with the Director as soon as possible before starting work and shall furnish the Director with a precise list of the number and kinds of Employees the Employer expects to employ. The Director shall set specific goals and timetables for the Employer after considering any special factors or circumstances that the Employer presents.

PREFERENCES TO BE GIVEN BY EMPLOYERS:

All Employers shall give preference to Indians in hiring, promotion, transfer, reinstatement, reduction in force, training and all other aspects of employment, contracting and subcontracting, and business opportunities, and shall at all times comply with the terms of this Ordinance and its implementing regulations and any Compliance Agreement executed under this Ordinance.

EMPLOYMENT CRITERIA:

It shall be a violation of the TERO Ordinance for an employer to use job qualification criteria or personnel requirements to bar Preferred Employees from employment, unless such criteria or requirements are required by business necessity.

FOR ALL TERO APPROVED NON-INDIAN PREFERENCE EMPLOYEES DESIGNATED FOR EMPLOYMENT ON THIS CONTRACT/PROJECT, THE PRIMARY CONTRACTOR OR SUBCONTRACTOR SHALL BE REQUIRED TO OBTAIN DIRECTOR APPROVAL PRIOR TO ANY FURTHER EMPLOYMENT ACTIVITIES BEYOND THE SCOPE OF THIS COMPLIANCE AGREEMENT.

Project Supervisor:	Years with Employer:	Tribal Affiliation & # if Any:
Foreman:	Years with Employer:	Tribal Affiliation & # if Any:
Key Employee # 1:	Years with Employer:	Tribal Affiliation & # if Any:
Key Employee # 2:	Years with Employer:	Tribal Affiliation & # if Any:
Key Employee # 3:	Years with Employer:	Tribal Affiliation & # if Any:
Key Employee # 4:	Years with Employer:	Tribal Affiliation & # if Any:
Key Employee # 5:	Years with Employer:	Tribal Affiliation & # if Any:

Notes:

TERO Notice to Proceed

- I. **TERO approval of Compliance AGREEMENT and Official Notice to Proceed**
- II. This Compliance Agreement has been reviewed and found to be fully *acceptable* on behalf of the Makah Tribal Employment Rights Office, and has thus been granted this notice to proceed; dated this _____ day of _____ 20__.

By signing this document, the covered employer agrees to maintain compliance with Makah Tribal Employment Rights Ordinance, and all rules and regulations of TERO.

Contractor/Subcontractor Representative Signature

Date

TERO Director Approval

Date

NOTED AMENDMENTS:

OR

- III. **TERO Disapproval of the employer/contractor Compliance Agreement official notice to proceed is withheld. Contractor/Employer is not authorized to proceed and start work until an approved Compliance Agreement is obtained with the Makah Tribal Employment Rights Office.**

This Compliance Agreement has been reviewed and found to be unacceptable on behalf of the Makah Tribal Employment Rights Office for the following reason(s):

- 1. _____
- 2. _____
- 3. _____

TERO REQUIREMENTS TO BRING AGREEMENT INTO COMPLIANCE:

- A. _____
- B. _____
- C. _____

Rosalee Jimmicum
TERO Director

Signature

Date

Subcontractors List Submitted for TERO Approval

COMPLIANCE AGREEMENT:

Contracting and Subcontracting AGREEMENT: A required contracting and subcontracting AGREEMENT shall be submitted by the employer/prime contractor to the Makah Tribal Employment Rights Office for review and approval at least **TWO WEEKS PRIOR TO START UP**. Prime contractors/employers shall make timely and reasonable efforts to meet with the Director or his/her designee to identify, negotiate and execute a Compliance Agreement that sets forth:

- a) The minimum number of Preferred Employees that the Employer shall hire during any year that the Employer is located or engaged in work on the Reservation.
- b) Numerical goals and timetables to reach such goals for each craft, skill area, job classification used by the Employer including but not limited to, general labor, skilled, administrative, supervisory, and professional categories.
- c) Wages Scale Provisions and Salary Compensation Terms.
- d) The Ratio or Preferred Employee Trainees.
- e) Periodic Reporting Requirements.
- f) Employer's commitment to give preference when contracting or subcontracting as required by the Ordinance.
- g) The Employers commitment to cooperate with the Director regarding counseling and support programs as required by the Ordinance.
- h) The Employers commitment to comply with requirements governing layoffs, promotions, transfers, reinstatements and hiring of students required by the Ordinance.

An Employer may recruit and hire workers from whatever sources are available and by whatever process the Employer chooses, provided that an Employer may not hire a non-Preferred Employee until the Employer has given the Director a reasonable time to locate a qualified Preferred Employee and the tribal hiring hall has certified that a qualified Preferred Employee is not available to fill the vacant job position.

INDIAN PREFERENCE ON THE AWARD OF CONTRACTS AND SUBCONTRACTS

Preference in Contracting and Subcontracting, every Employer shall give preference in the award of any contract or subcontract to Indian-owned businesses. The Director maintains a list of Indian-owned businesses, which will be supplied to the Employers for their use.

DUTY OF CONTRACTORS AND SUBCONTRACTORS OF EMPLOYEES

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The preference requirements contained in this Ordinance shall be binding on all Contractors and Subcontractors of Employers, regardless of tier, and shall be deemed a part of all resulting subcontract specifications. Each Employer shall have the initial and primary responsibility for ensuring that all

Contractors and Subcontractors comply with the requirements of this Act, and both the Employer and its Contractors or Subcontractors shall be subject to sanctions provided herein for violation of this Ordinance if the Contractor or Subcontractor fails to comply.

Contractor's (subs) will not receive the required TERO NOTICE TO PROCEED without a TERO approved Compliance Agreement, and without demonstration of good faith efforts to enforce Indian preference in sub-contracting.

This section should be reviewed in its entirety, as it is very comprehensive in the legal definition outlining the requirements as obligated by the entity in the award process for any and all subcontracting to be performed on this project.

TERO TRAINING:

- (a) As a part of a compliance agreement, or pursuant to request or orders from the Director to initiate and or sponsor training programs for specific Employers, or the Director may work with Employers to establish and sponsor their own training programs, to assist the maximum number of Preferred Employee trainees to become qualified in the various job classifications used by the employer.
- (b) Union Agreements Required. Every union with a collective bargaining agreement with an Employer shall enter into a written agreement with the Director a Union Agreement providing that the union will comply with this Ordinance and all rules, regulations, and orders of the Director. Until such agreement is filed with the Director, the Employer may not commence work on the Reservation.
- (c) The Director shall set the ratio of Preferred Employee trainees to fully qualified workers, consistent with the business necessity for each Employer or Employer classification. The ratio of Preferred Employee trainees to fully qualified workers shall be negotiated as part of the Compliance Agreement. For construction projects, the number of Preferred Employee trainees shall be no less than the minimum ratio established by the Department of Labor.
- (d) Employers Subject to Collective Bargaining Agreements. Every Employer with a collective bargaining agreement with a union shall be required to obtain agreement from the union to establish an advanced journeyman upgrade and apprenticeship program.

EACH CONTRACTOR SHALL REVIEW TERO CERTIFIED LIST IN AN EFFORT TO EFFECTIVELY ADMINISTER TO INDIAN PREFERENCE IN CONTRACTING AND SUBCONTRACTING.

All **subcontractors**, are subject, and shall administer to the same Compliance Agreements requirements as well as the Indian preference in hiring obligations as they are so recognized by the Prime Contractor on this Compliance Agreement. It shall be the Prime/General Contractor's responsibility to provide copies of this TERO Ordinance and Agreement form to all their subcontractors and suppliers. All Subcontractors must secure an approved TERO Compliance Agreement prior to the commencement of any portion of work activity they will be involved in. The Prime and all Subcontractors will be required to attend a TERO Pre-construction meeting prior to the beginning of work.

Subcontractor List

Company Name # 1:	Company Representative:
Email:	Phone #:
Scope of Work:	Start Date:
Contract Amount:	Indian Preference Y or N?
Company Name # 2:	Company Representative:
Email:	Phone #:
Scope of Work:	Start Date:
Contract Amount:	Indian Preference Y or N?
Company Name # 3:	Company Representative:
Email:	Phone #:
Scope of Work:	Start Date:
Contract Amount:	Indian Preference Y or N?
Company Name # 4:	Company Representative:
Email:	Phone #:
Scope of Work:	Start Date:
Contract Amount:	Indian Preference Y or N?
Company Name # 5:	Company Representative:
Email:	Phone #:
Scope of Work:	Start Date:
Contract Amount:	Indian Preference Y or N?

Request for Rental Equipment

An Indian preference policy on ALL rental equipment will be maintained where applicable. All Indian preference rental bids will be considered acceptable if the qualified supplier is within the controllable estimate. The controllable estimate shall be derived from the obtaining of three (3) at random bids procured from independent supplies with computation of these bids to equate out to an average. The Makah Tribal Employment Rights Office maintains a list of Indian preference business Certified rental equipment that is available to assist you with the timely completion of your project.

Request for Product or Supplies

Equipment Requested:	Requestor:	Quantity:

An Indian preference policy on ALL products and supplies will be maintained where applicable. *(Buy Indian Act)* All “Buy Indian Products” will be considered acceptable if the qualified supplier is within the controllable estimate. The controllable estimate shall be derived from the obtaining of three (3) random bids procured from independent suppliers with computation of these bids to equate out to an average. The Makah Tribal Employment Rights Office maintains a list of Indian-owned suppliers, vendors, manufacturing, repair and maintenance firms that shall be utilized at every opportunity by the contractor/subcontractor during the administration of this contract and all activities there. Contractors/employers are required to obtain and utilize Indian suppliers, vendors, etc.

Date Received & Signature

CONTRACTOR/EMPLOYER EMPLOYEE REFERRAL AND/OR WORKFORCE REQUEST TO MAKAH TRIBAL EMPLOYMENT RIGHTS OFFICE
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A **FIFTY-ONE PERCENT (51%) MINIMUM** of the seasonal, temporary, or project employees for this project/contract must be Indian preference in origin. This is the **minimum requirement criterion**; should the Makah Tribal Employment Rights Office available to the contractor **QUALIFIED** Indian preference employees, then up to and including, one hundred percent (100%) of this workforce is expected to be hired. **51-100% of project/contract workers are expected to be Indian preference** in accordance with worker availability.

To complete the contract commitments to the Equal Employment Opportunity Commission (E.E.O.C.); the following information is to be provided by your firm. Provide specific requirement(s) for the Indian preference employees to the TERO Hiring Hall.

IF INDIAN PREFERENCE EMPLOYEE PREFERRED FOR HIRE OR RECALL; PROVIDE NAME AND POSITION

****If employee is non-Indian, put N/A (and/or their race) in the Tribal Affiliation column. Employers and contractors are reminded that all project non-core employee positions are reserved for TERO Indian preference measures, and that non-Indians may not fill those positions until the Makah Tribal Employment Rights Office has certified that there are no available qualified Indians for each position.***

Classification/Skill	# of Employees Needed	Date Needed By	Tribal Affiliation (Y,N)