TRIBAL EMPLOYMENT RIGHTS ORDINANCE (TERO)

CONFEDERATED TRIBES OF THE WARM SPRINGS INDIAN RESERVATION

February 24, 2015

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TRIBAL EMPLOYMENT RIGHTS OFFICE ORDINANCE

CHAPTER 1: GENERAL PROVISIONS

Section 1.01: TITLE

This Code shall be known as the Tribal Employment Rights Ordinance.

Section 1.02: PURPOSE

The purposes of this Code are:

- A. To prevent employment related discrimination against American Indians;
- B. To ensure compliance with this Code that is intended to give preference in employment, contracting and sub-contracting, and training to American Indians; and
- C. To maximize utilization of Indian workers in all employment opportunities on and near the Warm Springs Indian Reservation.
- D. To ensure the Indian workforce on the Warm Springs Indian Reservation are trained and equipped to enter the workforce and maintain employment of their choosing.

Section 1.03: STATEMENT OF POLICY

The Tribal Council of the Confederated Tribes of the Warm Springs Reservation of Oregon finds that:

- A. Jobs in the private employment sector on and near the Warm Springs Reservation are an important resource for Indians residing on and near the Reservation.
- B. In order to attract private employers to locate on the Warm Springs Reservation, Indians residing on or near the Reservation need to have the training and skills those employers require.
- C. This Code is consistent and supplemental to existing federal and tribal law prohibiting employment discrimination against Indians and providing employment and contract preference to individual Indians and Indian-owned enterprises.
- D. Indian unemployment on the Reservation continues to be a problem of sufficient magnitude to warrant the enactment and implementation of this Code which is designed to improve training and employment opportunities for Indians living on and near the Reservation.

E. Many unemployed Indians on the Reservation may have social barriers to employment such as poor education, substance abuse, the lack of vocational training or the lack of tools and other equipment needed by their preferred vocation that need to be addressed.

Section 1.04: JURISDICTION

- A. This Code shall apply to all Employers and Construction Employers located on or engaged in work on the Reservation as set forth in this Code. This Code shall also apply to ODOT Contractors engaged in work on and near the Reservation as permitted by this Code and applicable federal and state law as identified in the Memorandum of Understanding.
- B. This Code shall not apply to any direct employment by the Tribe, its enterprises or tribally owned corporations, or by federal, state, or other governments; however, construction contractors and subcontractors of these governmental entities shall be subject to the Code.
 - 1. This Code is not intended to pre-empt or interfere with the rights or obligations set forth in the Tribes' Personnel Policies and Procedures, or the personnel manuals of Tribal enterprises now or later established. The employees of the Tribe and Tribal enterprises shall be limited to the rights and remedies provided in the duly adopted manuals or procedures enacted by the Tribe for those employees. This Code shall not apply to or be enforced against Tribal enterprises established and owned by the Tribe. Indian employment preference shall be provided at each Tribal enterprise in personnel manuals developed for each enterprise.
 - 2. Contract disputes between contractors and their subcontractors or their employees are outside the scope or jurisdiction of this Code and are not subject to enforcement, compliance or the issuance of a citation under this Code. Contract disputes shall be resolved through specified contract procedures for such disputes or through a court of competent jurisdiction.

SECTION 1.05: DEFINITIONS

- A. COMMISSION shall mean the Warm Springs Tribal Employment Rights Commission.
- B. COMMISSIONER shall mean a member of the Warm Springs Tribal Employment Rights Commission.
- C. COMMISSION CHAIRPERSON shall mean the Chairperson of the Commission which shall be elected by the Commission on an annual basis. The Chairperson of the Commission shall preside at all meetings of the Commission.
- D. COMPLIANCE AGREEMENT an agreement between a Employer, Construction Employer, or ODOT Contractor and the Tribal Employment Rights Office, setting forth how the employer will meet Indian preference hiring and subcontracting goals and that they will comply with this Code. The Compliance Agreement must be executed prior to

- commencement of any portion of a construction contract or sub-contract within the Reservation, or in the case of an ODOT Contractor, within or near the Reservation.
- E. CORE CREW means the essential, permanent employees of an Employer or Construction Employer. Core Crew employees must have been regular employees of the Employer for at least six (6) months. "Core Crew" requests must be submitted to the Office in writing, showing that each Core Crew member meets these criteria before the start of any project work, and approved by TERO Program Manager.
- F. CONSTRUCTION EMPLOYER shall mean any person, company, contractor, subcontractor, or entity located or engaged in construction work on the Reservation including new construction, remodeling, repair, or maintenance of structures, infrastructure, equipment and support facilities. The term shall include construction contractors and subcontractors of federal, state, county, and other local governments, but shall not include the Tribe, federal, state, or local governments or Tribal enterprises when they are employers.
- G. EMERGENCY RELIEF ORDER shall have the meaning set forth in Section 4.04 of the Code.
- H. EMPLOYER shall mean any person, company, contractor, subcontractor, or entity located on or engaged in work on the Reservation.
- I. ENGAGED IN WORK ON THE RESERVATION an Employer or Construction Employer is "engaged in work on the reservation" if during any portion of a business enterprise or specific project, contract or subcontract, he or any of his employees spends time performing work within the exterior boundaries of the Reservation.
- J. INDIAN shall mean any person enrolled in a federally recognized tribe and recognized by the United States pursuant to its trust responsibility to American Indians.
- K. INDIAN OWNED BUSINESS a business that is at least 51% owned, operated, and controlled by an Indian.
- L. INDIAN PREFERENCE shall mean a preference for enrolled Indians in all aspects of employment, including but not limited to, hiring, training, promotions, layoffs, contracting, and subcontracting for work on or near the Reservation. Qualified, available Indians shall receive an Indian preference in accordance with this code and negotiated Compliance Agreements.
- M. LOCATED ON THE RESERVATION an Employer or Construction Employer is "located on the Reservation" if during any portion of a contract it maintains a temporary or permanent office or facility within the exterior boundaries of the Reservation.
- N. MEMORANDUM OF UNDERSTANDING shall mean the agreement between the Tribe and the Oregon Department of Transportation providing Indian preference in employment for

- Indians on ODOT transportation projects and authorizing the Office to impose a compliance fee on ODOT contractors.
- O. NEAR THE RESERVATION shall mean jobs within 60 miles of the exterior boundaries of the Warm Springs Indian Reservation.
- P. ODOT shall mean the Oregon Department of Transportation.
- Q. ODOT CONTRACTOR shall mean a transportation construction contractor, and all related subcontractors, to ODOT that are subject to the TERO Indian employment and subcontracting preference and Compliance Agreement under the Memorandum of Understanding.
- R. OFFICE shall mean the Warm Springs Tribal Employment Rights Office.
- S. PROGRAM MANAGER shall mean the Program Manager of the Warm Springs Tribal Employment Rights Office.
- T. PROGRAM MANAGER DECISION shall have the meaning set forth in Section 4.03 and 4.05 of the Code.
- U. RESERVATION shall mean the Warm Springs Indian Reservation.
- V. TERO shall mean this Tribal Employment Rights Ordinance.
- W. TRIBE or TRIBAL shall mean the Confederated Tribes of the Warm Springs Indians of Oregon.
- X. TRIBAL COUNCIL shall mean the governing body of the Confederated Tribes of the Warm Springs Indian Reservation.
- Y. TRIBAL COURT shall mean the Warm Springs Tribal Court.
- Z. WORKFORCE DEVELOPMENT shall be the training and employment component of the TERO program.

CHAPTER 2: TRIBAL EMPLOYMENT RIGHTS OFFICE

Section 2.01: PROGRAM MANAGER

The Program Manager of the Tribal Employment Rights Office shall be responsible for administering the provisions of this Code and provide direction, leadership and oversight to Office staff.

Section 2.02: GENERAL AUTHORITIES

The Program Manager shall have the authority to hire staff, to obtain and expend funds from tribal, federal, state, or other sources to carry out the purposes of this Code as provided in the annual budget of the Tribe, to establish Employer, Construction Employer, and ODOT Contractor record-keeping requirements, to implement a workforce development program plan to consult with the Commission on policy issues related to the implementation of this Code, and to take such other actions as are necessary for the fair and vigorous enforcement of this Code. The Program Manager will report TERO activities in the Human Resource Department Annual Work Plan for Tribal Council review.

Section 2.03: SPECIFIC AUTHORITIES

The Program Manager shall have the authority to implement and enforce this code, including but not limited to:

- A. Enter Compliance Agreements with Employers, Construction Employers, and ODOT Contractors;
- B. Investigate violations of and impose penalties on Employers, Construction Employers, and ODOT Contractors who violate the provisions of the Code;
- C. Assist the Commission to develop and promulgate regulations necessary to implement the provisions of this Code;
- D. For purposes of Compliance Agreements, develop and impose numerical hiring goals and timetables that reflect the available Indian labor pool and other employment opportunities for each craft and skill category.
- E. Require Employers, Construction Employers, and ODOT Contractors that have established training or apprentice programs to provide preference to Indians.
- F. Establish and maintain a tribal hiring hall that maintains a record of qualified, employable Indians that is to be used by employers to fill vacancies.
- G. Prohibit any Employer, Construction Employer, and ODOT Contractor from imposing employment qualification criteria that serve as barriers to Indian employment unless it can be demonstrated that such criteria are required by business necessity.
- H. To work cooperatively with other Tribal programs, including, but not limited to, Warm Springs Health & Wellness Center, Department of Children & Family Services, and Education to establish counseling, education and training, substance abuse treatment, and other support programs for Indian workers to assist them in acquiring and retaining employment.

- I. To enter into cooperative agreements with federal and state agencies to minimize employment discrimination against Indians both on or near the Reservation, to promote Indian Preference in hiring, training, and contracting and to otherwise ensure compliance with this Code.
- J. Through required payroll reports, from Construction Employers and ODOT Contractors, monitor wage scale and salaries to ensure equitable compensation of Indian workers.
- K. To assess fees on Construction Employers and ODOT Contractors to support the operation of the Office.
- L. To apply for federal funding to provide workforce training opportunities for Indians living on or near the Reservation pursuant to the Indian Employment, Training, and Related Services Demonstration Act of 1992, as amended, Public Law 102-477.
- M. To address the needs of Indian persons living on or near the Reservation that are now unemployed or underemployed and/or dependent on public assistance, through the linkage of employment and vocational training, substance abuse counseling and other needed social services. Specifically, the Office will provide, or facilitate the provision of, special services to enable such Indian persons to receive the education, training, and other medical and social services they need to become productive employees in the workforce. The Program Manager shall carry out these duties as set forth in Chapter 9 of this Code.
- N. Advertise, collect data, investigate, communicate, and make recommendations to the Commission regarding any application or re-certification process on the Indian Owned Business Directory. The Office will ensure each applicant has been reviewed and certified and shall make a recommendation to deny or approve the application to the Commission. The Office will ensure each Indian Owned Business on the Directory will be re-certified every 2 years and update the Commission on an annual basis.

CHAPTER 3: TRIBAL EMPLOYMENT RIGHTS PROGRAM

Section 3.01: SCOPE

All Construction Employers located on or engaged in work on the Reservation shall and ODOT contractors engaged in work on or near the Reservation shall:

- A. Give preference to Indians in hiring, promotion, training and all other aspects of employment, contracting and subcontracting, business opportunities;
- B. Comply with the Compliance Agreement executed under this Code; and
- C. Shall comply with the terms of the Code and its implementation regulations.

Section 3.02. COMPLIANCE AGREEMENT

- A. Each Employer, Construction Employer, and ODOT Contractor shall be required to meet with the Program Manager to negotiate, execute, and comply with a Compliance Agreement which sets forth:
 - 1. The minimum number of Indians that shall be hired for any particular project while the Employer or Construction Employer is located on or engaged in work on the Reservation, or an ODOT Contractor is engaged in work on or near the Reservation, numerical goals and timetables for each craft, skill area, job classification, etc., used by the Employer, Construction Employer or ODOT Contractor including, but not limited to: general labor, skilled, administrative, supervisory, and professional categories;
 - 2. Applicable wage scale provisions, prevailing wage standards, and salary compensation terms that may be applicable to a project or contract under applicable federal or state law, or Tribal law, provided that any Tribal Minimum Wage or Prevailing Wage has been promulgated as provided in Section 3.12 of this Code;
 - 3. Periodic reporting requirements to the Program Manager on the number of Indians employed, a record of persons hired, fired, or promoted during the reporting period, and a statement regarding compliance with the hiring goals set forth in the Compliance Agreement.
 - 4. Preference for training programs where the Employer, Construction Employer or ODOT Contractor has an established program.
 - 5. In the Program Manager's discretion, procedures and remedies for the enforcement and/or violations of the Compliance Agreement or the Code that may vary from the procedures and remedies set forth in this Code.
- B. The numerical goals set forth in the Compliance Agreement shall be based upon surveys conducted by the Program Manager of the available and qualified Indian work force and of projected employment opportunities on or near the Reservation.
 - 1. Compliance Agreements shall be reviewed periodically and revised as necessary to reflect changes in the number of Indians available or changes in Employer, Construction Employer or ODOT Contractor hiring plans.
 - 2. At the Program Manager's discretion, no Employer, Construction Employer or ODOT Contractor shall commence work or site mobilization until a Compliance Agreement has been negotiated and executed.
 - 3. Any violation of an executed Compliance Agreement shall be a violation of this Code.

4. When an Office employee referral to an Employer, Construction Employer or ODOT Contractor is unable to continue working, the Employer, Construction Employer or ODOT Contractor shall immediately notify the Office who shall provide a substitute referral within three (3) business days or notify the Employer, Construction Employer or ODOT Contractor that it has no referrals for the position, after which time the Employer, Construction Employer or ODOT Contractor will be authorized to hire a permanent replacement.

Section 3.03: JOB QUALIFICATIONS AND PERSONNEL REQUIREMENTS

Employer, Construction Employer or ODOT Contractor shall not use qualification criteria or other personnel requirements that serve as barriers to Indian employment unless the Employer, Construction Employer or ODOT Contractor is able to demonstrate that such criteria or requirements are required by business necessity.

Section 3.04: TRIBAL HIRING HALL

The Program Manager shall establish and maintain a hiring hall to assist Employers, Construction Employers and ODOT Contractors and all other employers doing business on the Reservation in placing qualified Indians in job positions.

- A. Construction Employer and ODOT Contractors shall not hire a non-Indian in violation of the Compliance Agreement until the Program Manager has certified within a reasonable time that no qualified Indian is available to fill the vacancy. For purposes of this section, "reasonable time" for construction jobs shall mean that the Program Manager shall have 48 hours from time of notice of manpower needs to locate and refer a qualified Indian.
- B. The Program Manager may waive the 48-hour time period upon a showing by the Construction Employer or ODOT Contractor that such time period imposes an undue burden upon the Construction Employer or ODOT Contractor, the business or the construction project in question

Section 3.05: UNIONS

Construction Employers with collective bargaining agreements with a union are responsible for informing such unions of this Code, its rules and regulations and their Compliance Agreement. ODOT Contractors with collective bargaining agreements with a union are responsible for informing such unions of this Code, the Memorandum of Understanding and their Compliance Agreement. Unions will give absolute preference to Indians in job referrals regardless of which referral list they are on. Temporary work permits will be granted to Indians who do not wish to join a union. Nothing herein shall constitute official tribal recognition of any union or tribal endorsement of any union activities on or near the Warm Springs Indians.

Section 3.06: CONTRACTORS AND SUBCONTRACTORS

Where the general contractor on a project is a Construction Employer, that general contractor shall ensure that all its subcontractors comply with this Code. The general contractor who is a Construction Employer may be held liable for violations of this Code by its subcontractors.

Section 3.07: PREFERENCE IN CONTRACTING AND SUBCONTRACTING

- A. For Construction Employers. Construction Employers located on or engaged in work on the Reservation shall give preference to Indian Owned Businesses in the award of contracts or subcontracts to the extent permitted by applicable law. The Program Manager shall maintain a list of Indian Owned Businesses ("Indian Owned Business Directory") which shall be supplied to Construction Employers and ODOT Contractors upon request. Indian Owned Businesses shall be certified by the Program Manager to ensure that they meet the requirements of such an entity as set forth in section 1.05(I) of this Code. Indian Owned Businesses will submit re-certification applications every two (2) years to remain active.
- B. All other Employers. All other Employers located on the Reservation shall give preference to Indian Owned Businesses in the award of contractor subcontracts to the maximum extent feasible as permitted by federal law and the law, budget, and fiscal policies of the Tribe.

Section 3.08: LAYOFFS

In all layoffs and reductions in force for a Construction Employer and ODOT Contractors, no Indian worker shall be terminated if a non-Indian worker in the same job classification is still employed. The non-Indian shall be terminated first if the Indian possesses threshold qualifications for the job classification. If a Construction Employer or ODOT Contractor lays off workers by crews, all qualified Indian workers shall be transferred to crews to be retained so long as non-Indians in the same job classification are employed elsewhere on the job site, except for non-Indians hired as Core Crew pursuant to negotiated Compliance Agreements.

Section 3.09: PROMOTION

Each Construction Employer and ODOT Contractor shall give Indians preferential consideration for all promotion opportunities and shall encourage Indians to seek such opportunities. For each promotion or supervisory position filled by a non-Indian, the Construction Employer or ODOT Contractor shall file a report with the Program Manager stating what efforts were made to inform Indian workers about the position, what Indians, if any, applied for the position and if an Indian was not chosen, the reasons therefore.

Section 3.10: COMPLIANCE FEES

The Program Manager shall assess and collect a compliance fee as follows:

- A. Every Construction Employer with a construction, renovation, improvement, or expansion contract in the sum of ten thousand dollars (\$10,000) or more shall pay a fee of 2.5 percent of the total amount of the contract. Such fee shall be paid by the Construction Employer prior to commencing work on the Reservation.
- B. The Program Manager may develop a sliding scale fee that reduces the 2.5 percent fee applicable to Construction Employers based upon the Construction Employer meeting Indian Preference goals and Indian Owned Business subcontracting targets, provided that the fee shall not be reduced below 1.5 percent. All TERO compliance fee adjustments must be presented to the Program Manager for approval.
- C. The Program Manager shall be authorized to assess a compliance fee on ODOT Contractors engaged in construction projects on or near the Reservation as may be permitted by the Memorandum of Agreement or federal transportation agency managing the transportation construction project.
- D. Compliance fees shall be used for the Office operating budget. Compliance fees shall be appropriated by the Tribes' annual budget process.
- F. The Program Manager shall be authorized to do the following in connection with the payment of the compliance fee:
 - 1. Permit the employer to pay the compliance fee pursuant to a payment schedule over the lifetime of the project (for on reservation non-ODOT projects only) being constructed, provided that such payment shall be fully paid within twenty years; and
 - 2. Provide credit to Construction Employer (for on reservation non-ODOT projects only) for the payment of the compliance fee when the Construction Employer makes contributions to the Tribal scholarship, vocational training or workforce development programs that are similar to the education and training functions of the Office, or when the Construction Employer establishes and funds an apprenticeship program providing job training for Indians.
- G. The Program Manager shall receive a copy of each compliance fee payment. The Program Manager shall be responsible for collecting the fees and may request that the Commission promulgate such regulations as are necessary to ensure a fair and timely fee collection process. For Construction Employers working on projects that begin off and end on, or begin on and end off the Reservation, will be considered one hundred percent on-Reservation, thus subject to the full compliance fee. However, if fifty percent (50%) or more of the work is off-Reservation, the Program Manager is authorized to negotiate an appropriate compliance fee based upon the percentage of the work performed on the Reservation.

Section 3.11: ON SITE INSPECTIONS

The Program Manager shall have the authority to make on-site inspections during regular working hours in order to monitor compliance with this Code and the applicable Compliance Agreement by a Construction Employer or ODOT Contractor. The Program Manager and any authorized Office staff shall have the right to inspect and copy all relevant records of a Construction Employer or ODOT Contractor, of any signatory union or subcontractor of a Construction Employer or ODOT Contractor, and shall have the right to speak to workers and to conduct an investigation on the job site. All information collected by the Program Manager and/or Office staff shall be kept confidential unless disclosure is necessary or ordered as part of any federal or tribal judicial or administrative proceeding.

Section 3.12: TRIBAL MINIMUM OR PREVAILING WAGE

- A. The Program Manager may promulgate a Tribal Minimum Wage or Prevailing Wage as provided in this Section. Such Tribal Minimum or Prevailing Wage shall only apply to Construction Employers. A Tribal Minimum or Prevailing Wage established under this subsection may be included in a Compliance Agreement pursuant to Section 3.02 of this Code.
- B. Definitions. For purposes of this Section, the terms "Minimum Wage" and "Prevailing Wage" are defined as follows:
 - 1. Minimum Wage: Shall mean the lowest wage that the Construction Employer can pay any employee, which Minimum Wage shall not be less than the federal minimum wage;
 - 2. Prevailing Wage: Shall mean the lowest wage that a Construction Employer can pay any employee by trade or craft. A Prevailing Wage need not limit or put a cap on all employees in a particular craft or trade.
- C. If the Program Manager elects to promulgate a proposed Minimum Wage or Prevailing Wage, the following factors shall be taken into consideration:
 - 1. The prevailing wage for each job classification in the Oregon or Washington wage classifications;
 - 2. The prevailing wages established by other Northwest Indian tribes;
 - 3. The number of Indian persons living on or near the Reservation with the particular craft or trade skills:
 - 4. The Reservation unemployment rate especially the unemployment rate for the particular craft or trade;
 - 5. Local labor and market conditions;

- 6. The potential impact of the Prevailing Wage to attract businesses or Construction Employers to do business on the Warm Springs Indians; and
- 7. The potential impact of the Prevailing Wage in raising the costs of Tribal facilities.
- D. The draft Minimum or Prevailing Wage shall be published in the Spilyay Tymoo with notice of the comment opportunity and comment deadline date and distributed to all Tribal governmental departments, enterprises, and to persons or entities that are known to the Office that could be impacted by such a proposal for review and comment. The record shall be kept open for at least sixty (60) days to permit comments to be submitted.
- E. Within thirty (30) days of the closing of the record for comments, the Program Director shall either prepare a draft Minimum or Prevailing Wage, submit the proposed Minimum or Prevailing Wage to the Commission for its approval, or shall withdraw the proposal.
- F. Upon receipt of Commission approval, the draft Minimum or Prevailing Wage shall be submitted to the Tribal Council for approval. The Minimum or Prevailing Wage shall become final upon Tribal Council approval of the Minimum or Prevailing Wage.

CHAPTER 4:VIOLATION PROCEDURES

Section 4.01: INVESTIGATION BY THE PROGRAM MANAGER

Whenever a violation of this Code or a Compliance Agreement has been alleged and is brought to the attention of the Program Manager, the Program Manager shall ensure a prompt and thorough investigation of the alleged violation. The Program Manager shall seek to achieve an informal settlement of the alleged violation, with a written report of findings provided to the Commission.

Section 4.02: ISSUANCE OF CITATION

- A. If the Program Manager determines that a violation of the Code or a Compliance Agreement exists, and an informal settlement cannot be achieved, the Program Manager shall issue a warning to the Employer, Construction Employer or ODOT Contractor. This warning shall specify the nature of the violation and direct that the violation be corrected within three (3) days or sooner where warranted.
- B. If the violation is not corrected within the time specified, the Program Manager shall issue a citation to the Employer, Construction Employer or ODOT Contractor which shall:
 - 1. Be in writing and in the name of the Confederated Tribes of the Warm Springs Indian Reservation;
 - 2. State the name of the violator;

- 3. Bear the signature of the Program Manager or the authorized representative;
- 4. State the name and section number of the Code provision or Compliance Agreement violated;
- 5. State a brief summary of facts constituting the violation; and
- 6. State a time and place the Construction Employer or ODOT Contractor must appear to answer to the violation at a Program Manager hearing.

Section 4.03: PROGRAM MANAGER HEARING

Any Employer, Construction Employer or ODOT Contractor that receives a citation shall be entitled to a hearing before the Program Manager no later than ten (10) working days after receipt of a citation. Hearing procedures shall comply with the requirements of due process, but will not be bound by the formal rules of evidence. The Employer, Construction Employer or ODOT Contractor shall be entitled to present evidence and to call witnesses to demonstrate that it has complied with the requirements of this Code or Compliance Agreement or that it made its best effort to do so and therefore should not be subject to sanctions. On the basis of evidence presented at the hearing, and the information collected by the Office, the Program Manager shall determine whether or not the Employer, Construction Employer or ODOT Contractor complied with this Code. If the Employer, Construction Employer or ODOT Contractor fails to attend the hearing set before the Program Manager, the Program Manager shall base its determination on the facts before the Program Manager. If the Program Manager determines that the Employer, Construction Employer or ODOT Contractor is out of compliance and has not made a best effort to comply, the Program Manager shall impose one or more of the sanctions provided for in this Code, as appropriate, and shall order the Employer, Construction Employer or ODOT Contractor to take such corrective action as is necessary to remedy any harm done to the Tribe or individual Indians caused by the non-compliance. The Program Manager shall send written notice of its decision ("Program Manager Decision") to all parties within ten (10) days after its decision in the matter.

Section 4.04: EMERGENCY RELIEF

When the Program Manager determines that a violation has occurred that is of a critical nature requiring immediate remedial action, the Program Manager may issue a citation without delay, stating sanctions to be placed on the offending Employer, Construction Employer or ODOT Contractor ("Emergency Relief Order"). The Employer, Construction Employer or ODOT Contractor shall have the right to appeal the Emergency Relief Order and any imposition of emergency sanctions to the Commission. The Commission shall schedule a hearing on any appeal of an Emergency Relief Order within seven (7) working days.

Section 4.05: INDIVIDUAL COMPLAINT PROCEDURE

A. Any Indian who believes that an Employer, Construction Employer or ODOT Contractor has failed to comply with this Code or applicable Compliance Agreement, or who believes that

they have been discriminated against by an Employer, Construction Employer or ODOT Contractor because they are Indian, may file a complaint with the Office. The complainant shall be responsible for providing the Office with evidence of the discriminatory practices. Upon receipt of a complaint supported by sufficient evidence of discrimination against an Indian complainant, the Office shall conduct an investigation of the charge, which shall include interviews of the project manager for the Employer, Construction Employer or ODOT Contractor and any person(s) allegedly responsible for the discriminatory conduct, and shall attempt to achieve an informal settlement of the matter. If voluntary conciliation cannot be achieved, the Program Manager shall hold a hearing on the matter, shall make a determination on the validity of the charge, and shall issue a Program Management Decision as is necessary to make whole any Indian who is harmed by the Employer's, Construction Employer's or ODOT Contractor's non-compliance or discriminatory behavior. The Program Management Decision shall be in writing and shall be sent to all parties within seven (7) working days.

B. In conducting the hearing, the Program Manager shall have the same powers, and shall be bound by the same hearing requirements as provided in Sections 4.03, 4.04 and 4.06 of this Chapter.

Section 4.06: APPEALS OF PROGRAM MANAGER DECISIONS

- A. The following my file an appeal:
 - 1. A party;
 - 2. Any person adversely affected by a Program Manager Decision or Emergency Relief Order; and
 - 3. A person entitled to notice and to whom no notice was mailed.
- B. Program Manager Decisions or Emergency Relief Orders not timely appealed as set forth in WSTC Sections 4.03, 4.04, 4.05(A), and 7.01 shall be final agency orders subject to enforcement by any legal means, including in Warm Springs Tribal Court.

CHAPTER 5. PENALTIES AND ENFORCEMENT

Section 5.01: PENALTIES FOR VIOLATION

- A. Employer, Construction Employer, or ODOT Contractor who violates this Code or a Compliance Agreement shall be subject to penalties including, but not limited to:
 - 1. Denial of the right to commence or continue business on the Reservation;
 - 2. Suspension of operations on the Reservation for Employers or Construction Employers or on or near the Reservation for ODOT Contractors;
 - 3. Payment of back pay and/or damages to compensate any injured party;

- 4. An order to summarily remove employees hired in violation of this Code or a Compliance Agreement;
- 5. Imposition of monetary civil penalties pursuant to a schedule of penalties promulgated by the Commission, which penalties shall take into consideration the severity of the violation, whether any other penalty pursuant to this section was imposed and whether the person or entity that is subject to the fine has any prior history of violating this Code; or
- 6. An order specifying requirements for employment, promotion, and training Indians injured by the violation.

Section 5.02: MONETARY FINES

The maximum monetary penalty that may be imposed for a violation is five hundred dollars (\$500). For purposes of the imposition of penalties determined by the Court or sanction by the Program Manager, each day during which a violation exists shall constitute a separate violation.

Section 5:03: ENFORCEMENT

- A. The Program Manager shall be entitled to pursue the enforcement of any final agency order under this Code by any legal means, including Tribal Court enforcement.
- B. Costs associated with the enforcement of final agency orders issued pursuant to this Code shall be assessed against the Employer, Construction Employer, or ODOT Contractor that is out of compliance. These may include, but are not limited to: document reproduction costs, filing fees, attorney fees and costs incurred by the Tribe or the Project Manager or Commission related to securing enforcement of the order.
- C. Employers or Construction Employers that do not comply with the provisions of this Code, and leave the Reservation before enforcement orders are issued or penalties are imposed and collected or an enforcement order is issued by the Commission or the Court, shall be denied the right of contracting or doing further business on the Reservation.

CHAPTER 6: TRIBAL EMPLOYMENT RIGHTS OFFICE COMMISSION

Section 6.01: ESTABLISHMENT

The Tribal Employment Rights Office Commission ("Commission") is hereby established to perform the duties and responsibilities set forth in this Code.

A. Membership - the Commission shall be comprised of 5 members appointed by the Tribal Council. The members shall hold office for a period of 1 and 2 years, terms to be determined by the Tribal Council. There is no limitation on the number of terms a member may serve.

- B. Qualification any Indian 18 years and older who works or resides on the Reservation is qualified to be appointed to the Commission.
- C. Commission Chairperson the Commission shall elect annually a Chairperson from its membership. The Chairperson shall preside at all meetings of the Commission and shall be authorized to sign required documents in accordance with the powers of the Commission.
- D. Duties and Powers the Commission shall be responsible for conducting hearings on tribal employment rights matters in accordance with this Code. In addition to all specific powers set forth in this Code, the Commission shall also have the following powers:
 - 1. Review contractor applications to certify that applicant is eligible for inclusion on Indian Owned Business Directory.
 - 2. Certify On-The-Job training hours as recorded by Office staff for Tribal Apprenticeship Programs.
 - 3. The Commission may conduct on-site visits if such visits are a part of their investigation for the decision making process for appeals.
 - 4. Develop procedures necessary to implement the provisions of this Code that are consistent with this Code.
 - 5. Conduct an annual review of the Code.
- E. The Commission will hold regular meetings at 1:30 pm, on the first and third Tuesday of every month. Times and procedures for hearings will be set as necessary, when an appeal is filed on a sanction or decision of the Program Manager. The Commission shall attempt whenever possible to execute its powers by consensus. If a consensus cannot be achieved, the affirmative vote of a majority of the 5 Commissioners shall be required to take Commission action. The Chairperson shall be entitled to vote on any decision or action. All written agreements or plans, directives, complaints, and appeals which the Commission authorized or required to issue or file, shall bear the signature of at least 2 Commissioners. The Commission will not supervise Tribal Employment Rights and Workforce Development personnel.

CHAPTER 7. COMMISSION APPEALS AND HEARINGS

Section 7.01: FILING AN APPEAL

A. Program Manager Decisions and Emergency Relief Orders may be appealed to the Commission.

- B. To initiate an appeal, the person or entity appealing a sanction or decision of the Program Manager shall:
 - 1. File a completed notice of appeal on a form prescribed by the Commission along with an appeal fee established independently by the Commission.
 - 2. The notice of appeal and appeal fee must be received at the Commission office no later than 5:00 PM on the ninth (9th) day following mailing of the decision.
 - 3. The notice of appeal shall be accompanied by a written statement of appeal describing the nature of the Program Manager's action or decision being appealed, summarizing the factual and legal basis for the appeal and identifying the relief requested and by a copy of the Program Manager's written decision, if any.
 - 4. In the circumstance of an appeal by a party who was entitled to notice but did not receive notice, the notice of appeal and appeal fee must be received by the Commission no later than 5:00 PM on the twentieth (20th) day following mailing of the decision.

Section 7.02: SCHEDULING APPEAL HEARING

Upon receipt of an appeal that has been timely filed, the Commission shall establish a hearing date, time, and place and shall notify in writing the appealing party and the Program Manager. Each party shall be responsible for ensuring that their witnesses attend the hearing. A hearing on an appeal of a grant of emergency relief pursuant to Section 4.04 of this Code shall be scheduled within seven (7) working days of the filing of the appeal. All other hearings shall be scheduled as soon as possible.

Section 7.03: REQUEST TO RESCHEDULE COMMISSION HEARING

Upon receipt of a request by a party to a Commission appeal hearing requesting the rescheduling of a Commission hearing, the Commission shall promptly rule on such request and immediately notify the parties of its decision.

Section 7.04: COMMISSION HEARING PARTICIPANTS

Only the party filing the appeal, the Program Manager and the witnesses that may be called by the parties in the hearing may attend the hearing. The Commission shall be responsible for maintaining an administrative record of the proceedings including providing for audio recording of the hearing or other appropriate recording of the hearing. Both the appealing party and the Program Manager may be represented by counsel at the hearing.

Section 7.05: HEARING PROCEDURE

- A. Hearing procedures shall comply with the requirements of due process, but will not be bound by the formal rules of evidence.
- B. Both parties will be afforded the opportunity to present written arguments and opening statements with respect to what they intend to present to the Commission. Following opening statements, first the appellant and then the Program Manager may present witnesses and evidence in support of their position on the issues being appealed.
- C. The Commission Chairperson or his/her Commission delegate will preside over the hearing and will take whatever action is necessary to ensure an equitable and expeditious hearing. Parties will abide by the presiding official's rulings. The Chairperson may limit the number of witnesses when testimony would be unduly repetitious, and exclude any person from the hearing for contemptuous or inappropriate misbehavior that obstructs the hearing.

Section 7.06: COMMISSION DECISION

- A. The Commission will render a written decision and order ("Order") within ten (10) working days from the date of the hearing. Such decision shall include a statement of facts and a statement of legal authority on which the decision is based. Orders shall be delivered to the party for whom the hearing was held and shall include information and instructions for appealing the decisions pursuant to WSTC 8.01.
- B. Orders not appealed to the Court of Appeals as set forth by WSTC 203.100 within thirty (30) days of the date of the Order shall be considered final agency orders of the Commission and subject to enforcement by any legal means, including Warm Springs Tribal Court.

Section 7.07: COMMISSION TRAINING

The Commission will be afforded annual training on hearing procedures and decision making techniques.

CHAPTER 8: TRIBAL COURT ENFORCEMENT AND JUDICIAL REVIEW

Section 8.01: APPEALS OF COMMISSION DECISIONS

- A. Any party to the Commission proceeding under Chapter 7 may appeal an Order of the Commission.
- B. The Warm Springs Court of Appeals ("Court of Appeals"), established pursuant to WSTC Chapter 203, is hereby granted exclusive jurisdiction to hear appeals from Orders of the Commission and shall act as the final reviewing body for an Order of the Commission under this ordinance.

- C. All notices of appeal and proceedings shall follow the established rules of the Court of Appeals.
- D. The Court of Appeals shall initiate an expedited review procedure and shall issue decisions on appeals of Commission Final Orders within 45 days of the filing of the notice of appeal.

Section 8.02: TRIBAL COURT ENFORCEMENT OF FINAL AGENCY ORDERS

The Tribal Courts are hereby conferred exclusive jurisdiction and shall have the authority to issue any order, enter any judgment or take any action necessary to enforce any final agency order under this ordinance including without limitation the authority to assess and collect civil penalties, to enjoin or mandate actions to enforce the provisions of this Code, and to provide any other relief the Tribal Court deems lawful and equitable; provided that nothing in this Code shall be construed as a waiver of the sovereign immunity of the Confederated Tribes. Accordingly, nothing in this Code shall be construed as any authority for a claim for money damages against the Tribe, the Office or Tribal officials and employees acting pursuant to their authority under this Code.

CHAPTER 9: WORKFORCE DEVELOPMENT

Section 9.01: AUTHORIZATION

The Program Manager shall prepare for Tribal Council approval of a Workforce Development Plan pursuant to the Indian Employment, Training and Related Services Demonstration Act of 1992, 25 U.S.C. §3404 et seq. The Plan shall be submitted to the Department of Interior for its review, approval and funding. The Plan shall be developed by the Program Manager in consultation with the Tribal Secretary-Treasurer/CEO, the Tribal Human Resources Director, the Warm Springs Health & Wellness Chief Executive Officer, and the Directors of the Department of Children and Family Services, and the Department of Education.

Section 9.02: WORKFORCE DEVELOPMENT PLAN

The Workforce Development Plan shall, at a minimum, include the following elements:

- A. Identification of the members of the Tribe and other enrolled Indians living on the Reservation between the ages of 18 and 65 who are either unemployed or underemployed;
- B. The employment opportunities for members of the Tribe and enrolled Indians within the Reservation, including a listing of each enterprise, the types and number of employment positions available;
- C. The education, vocational training, scholarships, and other training opportunities that might be available to increase the job skills of Indians living on the Reservation;

- D. Identification of the employment obstacles experienced by unemployed and underemployed Indians residing on the Reservation;
- E. Description of Tribal government departments, programs, and services that are available to address the obstacles preventing employment by Reservation Indians;
- F. A comprehensive strategy to address and remove the employment obstacles experienced by Reservation Indians, the utilization of Tribal departments, programs, and services to address these obstacles and the education, training and employment opportunities available for Indians:
- G. Additional funding and personnel needed to implement the Plan; and
- H. Means to provide incentives for Indian persons to receive the services, education, or training needed to remove employment obstacles and seek gainful employment, which may include the removal of governmental benefits in the event that able bodied persons are unwilling to participate in Workforce Development programs or services to enable the participant to gain employment or, if such services or training have been provided, to pursue such employment.

Section 9.03: TRAINING

- A. The Program Manager shall identify training programs necessary in order to increase the pool of qualified Indians for employment on the Reservation.
- B. The Program Manager may initiate and sponsor training programs for employers to participate in, or the Program Manager may work with employers to establish and sponsor their own training programs to assist Indians to become qualified in the various job classifications used by employers.
- C. The ratio of Indian trainees to fully qualified workers shall be negotiated as part of the Compliance Agreement. For construction projects, the number of Indian trainees shall be no less than the minimum ratio established by the Department of Labor.

Section 9.04: INTER-DEPARTMENTAL PARTICIPATION AND COOPERATION

Removing employment obstacles experienced by Reservation Indians will require the participation and cooperation by all Tribal departments and enterprises. While the Program Manager is charged with developing and implementing the Workforce Development Plan, all Tribal department directors and enterprise managers shall cooperate in the implementation of the Plan to the fullest extent practicable.

Section 9.05: REPORTING

The Program Manager shall report quarterly to the Trustees on the status of and progress in developing and implementing the Workforce Development Plan. Such reporting shall include information on the following:

- A. Status of development of Workforce Development Plan;
- B. Status of Department of Interior of Workforce Development Plan;
- C. Amount of federal funding received, expended, and available for the implementation of the Workforce Development Plan;
- D. Number of Indian persons receiving services or training pursuant to Workforce Development Plan:
- E. Number of Indian persons who, after receiving Workforce Development services or training, have been employed;
- F. A discussion of problems encountered in addressing employment obstacles experienced by Reservation Indians under the Workforce Development Plan.

SPECIAL PROVISION

INDIAN PREFERENCE IN EMPLOYMENT ON FEDERAL-AID HIGHWAY PROJECTS ON AND NEAR INDIAN RESERVATIONS

January 1, 2019

PURPOSE

The purpose of this Special Provision is to outline the Indian Employment Preference requirements and procedures to be followed by The Confederated Tribes of Warm Springs (CTWS), the Oregon Department of Transportation (ODOT), and all Contractors or subcontractors engaged in highway construction work that is under contract with ODOT on federal-aid highway projects that are located on and near the Warm Springs Indian Reservation.

BACKGROUND

The Surface Transportation Assistance Act (as reauthorized in 1987), the Intermodal Surface Transportation Efficiency Act of 1991, the Moving Ahead for Progress in the 21st Century Act of 2012 and the Fixing America's Surface Transportation Act of 2015, permit Indian Preference employment goals on the Federal-Aid highway projects located on or near Indian reservations. Section 140(d) of the United States Code, Title 23 provides, "States may implement a preference for employment of Indians on projects carried out under this title near Indian reservation."

AUTHORITY

ODOT acknowledges the inherent sovereign authority of the CTWS to promulgate and enforce the Tribal Employment Rights Ordinance ("TERO Ordinance") within the boundaries of the Warm Springs Indian Reservation and acknowledges Title 23, Section 140(d) of the USC.

The current TERO Ordinance of the CTWS and its compliance requirements and procedures are incorporated herein and made part of this Special Provision.

ODOT and CTWS entered into a Memorandum of Understanding (MOU) to implement TERO Ordinance provisions into ODOT contracts.

APPLICABILITY

Eligible projects for Indian employment preference consideration under this Special Provision are those projects which are on or near Indian Reservation Roads or on the

Warm Springs Reservation. Roads "near" Warm Springs Indian Reservation are defined by mileposts as shown on Exhibit A attached to the MOU.

ELIGIBLE EMPLOYEES

All Indians are eligible for Indian preference without regard to Tribal affiliation or place of enrollment. However, recruiting efforts will be targeted toward those living on or near the Warm Springs Indian Reservation.

Employers with collective bargaining agreements with a union are responsible for informing such unions of this requirement.

INDIAN EMPLOYMENT PREFERENCE GOAL

The Indian Employment Preference goal is indicated in the project Special Provisions.

Classifications for Indian Employment Preference goal consideration are:

Carpenter
Laborer
Equipment Operator
Cement Masons
Truck Drivers
Electricians
Ironworkers

Classification shall be according to requirements for certified payrolls.

Indian Employment Preference goals will apply to total project work hours and will not be applied individually to the Contractor and subcontractors. Indian Employment Preference goals do not apply to number of persons employed at any given period of time.

Indian Employment Preference goals are for the Contractor's work force who are other than core crew members. A Contractor's core crew is composed of full-time employed individuals necessary to satisfy his/her reasonable needs for supervisory or special experienced personnel to assure an efficient execution of the contract work. Indian employees of the Contractor shall be included in the core crew, regardless of job function, to avoid the unintended results of having a Contractor lay-off or terminate an Indian employee to hire another under this provision.

In setting the Indian Employment Preference goals, consideration has been given to the availability of skilled and unskilled Indian workers, the type of work to be performed, the Contractor's employment requirements, the need for new hires, and unemployment rates prevailing among non-Indians. Consideration has also been given to the employment goals for minorities and women established for the area by the U.S.

Department of Labor's Office of Federal Contract Compliance Programs pursuant to Chapter 41, Code of Federal Regulations, Part 60-4.

The Indian Employment Preference goals may only be changed by ODOT after consultation with the CTWS and the Contractor, and after consideration of the good faith efforts of the Contractor together with the ability of the CTWS to refer workers in numbers and in time for the Contractor to meet the Indian Employment Preference goals and to perform the work.

If the CTWS is unable to provide sufficient qualified or qualifiable applicants to meet the Indian Employment Preference goal within 48 hours of the placement of a job order by the Contractor, the Contractor, ensuring nondiscrimination and providing equal employment opportunity, may recruit from other sources off the Warm Springs Indian Reservation. The Contractor shall give full consideration to all qualified job applicants referred by the CTWS. The Contractor is not required to employ any applicant who, in the Contractor's opinion, is not qualified to perform the classification of work required.

FRINGE BENEFITS

All fringe benefits for Indian workers referred by the Tribal Employment Rights Office of the CTWS shall be paid in cash. Indian workers who are union members will have the option of fringe benefits in cash or paid into a bonafide plan or program. However, this does not change any agreements between Indian union members and their respective unions.

PRECONSTRUCTION CONFERENCE

The preconstruction conference will be the forum for finalizing all compliance agreements and requirements between the CTWS and the Contractor and subcontractor(s) and to answer any questions regarding the Indian Employment Preference goal and applicable Special Provisions.

MANDATORY TERO WORKSHOP

The Tribal Employment Rights Office of the CTWS agrees to conduct mandatory prebid quarterly TERO Code/MOU workshops, and shall issue certificates of completion to those Contractors who sign in, attend, and participate. Contractors must have a certificate in order to be eligible to bid on ODOT Contracts that require compliance with these TERO Code/MOU requirements. The certificate will be good for 3 years.

COMPLIANCE

The State will follow normal contract compliance procedures to effect compliance. The State may elect to invite the CTWS to assist their monitoring efforts in all or any part of its compliance process. The State will review the Contractor's employment practices

and take appropriate enforcement actions when the goal is not reached after consideration of good faith efforts. See attached "ON-SITE WORKFORCE AFFIRMATIVE ACTION REQUIREMENTS FOR WOMEN AND MINORITIES ON FEDERAL AID CONTRACTS" or contact the Tribal Employment Rights Office for sanctions that may be imposed for failure to meet these goals.

COMPLIANCE FEE

The Contractor shall pay the compliance fee directly to the TERO before beginning work subject to this Special Provision. Use the Contract Amount to calculate the compliance fee. See Section 5 of the MOU for percentages.

MEMORANDUM OF UNDERSTANDING BETWEEN

STATE OF OREGON DEPARTMENT OF TRANSPORTATION And THE CONFEDERATED TRIBES OF THE WARM SPRINGS INDIAN RESERVATION

THIS AGREEMENT, hereinafter "Agreement" or "MOU," is made and entered into by and between the STATE OF OREGON, acting by and through the Oregon Department of Transportation (ODOT or State); and the CONFEDERATED TRIBES OF THE WARM SPRINGS INDIAN RESERVATION (CTWS or Tribe), acting by and through its elected officials and the Tribal Employment Rights Office (TERO), hereinafter individually referred to as "Party" and collectively referred to as the "Parties." The Agreement pertains to cooperation between the Parties to apply the Indian Employment Preference to Federal-Aid highway projects (also "federally funded projects") taking place on or near the Warm Springs Indian Reservation.

RECITALS

Oregon Revised Statutes (ORS) 190.110 et seq. grants authority to state agencies to enter into agreements with an American Indian tribe or an agency of an American Indian tribe for the performance of any or all functions and activities that a party to the agreement, its officers, or agents have the authority to perform.

CTWS has the inherent sovereign authority to promulgate and enforce the Tribal Employment Rights Office Ordinance ("Ordinance") within the boundaries of the Warm Springs Indian Reservation ("Reservation").

The Surface Transportation Assistance Act (as reauthorized in 1987), the Intermodal Surface Transportation Efficiency Act of 1991, the Moving Ahead for Progress in the 21st Century Act of 2012, and the Fixing America's Surface Transportation Act of 2015, permit Indian Preference employment goals on Federal-Aid highway projects located on or near Indian reservations. Section 140(d) of the United States Code, Title 23 provides, "States may implement a preference for employment of Indians on projects carried out under this title near Indian reservation."

USDOT Notice 4720.7 states,

In off reservation situations, [Tribal Employment Rights Offices] can bill contractors at an agreed upon rate for services rendered, i.e., recruitment, employee referral and related supportive services. The proceeds are used by the tribes to develop and maintain skills banks, to fund job referral, counseling, liaison, and other services and activities related to the employment and training of Indians.

In the event there is a change in federal law, regulation or guidance applicable to this MOU, or that the Federal Highway Administration changes its interpretations of these laws and

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regulations, such change will automatically apply to the MOU from the date of the adoption or publication.

ODOT recognizes that jobs in the private employment sector on and near the Reservation are an important resource for Indians residing on or near the reservation.

ODOT considers the availability of a pool of skilled and trained workers in heavy highway construction trades to be beneficial to Federal-Aid highway projects on or near the Reservation.

The purpose of this Agreement is to establish procedures to be followed by both Parties to aid in ensuring that:

- (1) when contractors are performing work on Federal-Aid highway projects under an ODOT contract on the Warm Springs Indian Reservation, the contractors comply with the Ordinance.
- (2) when contractors are performing work on ODOT MOU Contracts, as defined herein, the contractors comply with the Ordinance that existed at the time this MOU was entered into and as set forth in this MOU.

Parties enter into this agreement in the spirit of partnership, transparency and communication. In the event problems arise with Contractors under this MOU, both parties agree that it is in the best interest of their ongoing partnership to proactively consult and confer with each other on proposed solutions for the mutual benefit of their separate and combined goals.

This MOU amends and replaces a prior MOU between the parties which took effect on March 2, 2017.

NOW THEREFORE in consideration of the mutual understandings and agreements herein set forth, CTWS and ODOT enter into the following Agreement:

1. EFFECTIVE DATE AND DURATION.

The term of this Agreement shall begin on the date all required signatures are obtained and shall remain in effect for five (5) years, unless earlier terminated per Section 9.

2. **DEFINITIONS.**

- 2.1. Compliance Agreement or MOU Compliance Agreement An agreement between a Contractor and TERO, setting forth how the contractor will meet the Indian preference in hiring and other obligations under the Ordinance. The form for this agreement is attached as Exhibit B.
- **2.2.** Contractor Any contractor engaged in highway construction project with ODOT subject to this MOU.

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- **2.3.** CTGR/CTWS TERO Boundary Overlap Region that is within both the CTGR MOU TERO Boundary and CTWS MOU TERO Boundary, as identified in Exhibit C.
- 2.4. Federal-Aid highway project Projects that occur on Federal-Aid highway that are funded under USC Title 23. Federal-Aid highway projects may be eligible for Indian Preference in Employment if they are on or near the Reservation, per USDOT Notice 4207.7.
- 2.5. Indian Any person enrolled in a federally recognized tribe.
- **2.6.** Indian Preference in Employment Preference for Indians in all aspects of employment, including but not limited to, hiring, training, promotions, layoffs, contracting and subcontracting for work in whole or in part within MOU TERO Boundary.
- 2.7. MOU TERO Boundary Region of land near reservation boundary, as identified on map attached as Exhibit A. "Outside the MOU TERO Boundary" refers to the region that is neither within the MOU TERO Boundary nor the reservation.
- 2.8. ODOT MOU Contract Contract for work on a Federal-Aid highway between ODOT and a contractor for work in whole or in part within MOU TERO Boundary that by agreement of the Parties, is subject to this MOU and the Indian Preference in Employment. ODOT will require that the Contractor enter into the Compliance Agreement as a condition of award of the ODOT MOU Contract.
- 2.9. On-Reservation Contract Contract for work on a Federal-Aid highway between ODOT and a contractor for work on the Warm Springs Indian Reservation. As a condition of award of the On-Reservation Contract, ODOT will require that the Contractor agree to comply with the Ordinance and enter into the Compliance Agreement. If a contract occurs in part on the Reservation and in part within the MOU TERO Boundary, only the portion of the work on the Reservation is subject to the Ordinance and respective compliance agreement.
- **2.10. Reservation** the Warm Springs Indian Reservation.
- **2.11. TERO Ordinance or Ordinance** Tribal Employment Rights Ordinance, adopted February 24, 2015.

3. ON-RESERVATION CONTRACTS.

The State acknowledges the inherent sovereign authority of CTWS to assess and collect the Compliance Fees set forth in the Ordinance, Part III (e)(6) for On-Reservation contracts.

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ODOT agrees that a condition of award of contract for these On-Reservation Contracts is that Contractor agrees to be subject to the TERO Ordinance and execute the Compliance Agreement. ODOT will include a copy of the Ordinance and the Compliance Agreement template in the contract documents for such projects.

4. ODOT MOU CONTRACTS.

4.1. Selection

ODOT and TERO will work together to identify projects eligible under this MOU to promote and support Indian employment on federally funded projects. ODOT will share the State Transportation Improvement Program (STIP) with the TERO and identify those projects that are Federal-Aid highway projects that are on Reservation or otherwise within the MOU TERO Boundary (TERO eligible projects).

ODOT and TERO will meet annually each spring to mutually decide which TERO eligible projects will be subject to this MOU and the Indian Preference in Employment as well as any specific project workforce training and needs, project schedule, bid documents (applicable deadlines, Compliance Agreement template and applicable Ordinance amendments), scope, and duration.

Parties may also discuss fee-supported training activities, goal setting process, reporting summaries, and challenges or successes in contractor compliance, such as participation and performance of contractors under respective compliance agreements.

ODOT shall notify TERO of any TERO eligible projects that come up after the parties' annual meeting. At CTWS's election, such projects shall become subject to this MOU and contractor will be required to enter into a compliance agreement with TERO as a condition of the ODOT MOU Contract. To the extent a TERO eligible project lies within the CTGR/CTWS TERO Boundary Overlap, the selection process outlined in 4.2 shall apply; provided, however, that the Tribe which selected first during a given year shall have the second selection of any TERO eligible projects within the Boundary Overlap that come up later that year.

4.2. Projects in the MOU TERO Boundary Overlap

The Confederated Tribes of the Grand Ronde (CTGR) MOU TERO Boundary and the Confederated Tribes of Warm Springs (CTWS) MOU TERO Boundary overlap as indicated in Exhibit C hereto (CTGR/CTWS TERO Overlap). Each MOU TERO boundary is established to define "near reservation" and is based solely on a reasonable commuting distance from a tribe's reservation (approximately 60 miles). The boundary is established with no relation to tribal historic or ceded lands. For this reason, MOU TERO boundaries among Oregon tribes may overlap.

In order to provide for the efficient and equitable distribution of the opportunity to participate in Federal-Aid highway projects within the CTGR/CTWS TERO Overlap, should it exist beyond 2018, the following project identification and selection process will be used:

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- 1. ODOT shall provide a list of the planned Federal-Aid highway projects, if any, that fall within the CTGR/CTWS TERO Overlap to the CTGR and CTWS TERO Programs on a yearly basis;
- 2. ODOT, CTGR TERO and CTWS TERO shall meet annually in or around March of each year to determine which TERO Program shall administer and set the Indian preference goals for which eligible projects within the CTGR/CTWS TERO Overlap;
- 3. During the annual meeting, CTGR TERO and CTWS TERO shall take turns selecting TERO eligible projects within the CTGR/CTWS TERO Overlap to administer, with CTWS selecting first in odd numbered years and CTGR selecting first in even numbered years;
- 4. The selection process will continue until all eligible projects within the CTGR/CTWS TERO overlap have been selected or one or both TEROs indicate they are unable to administer additional projects.
- 5. CTGR and CTWS will jointly provide notes of the results of this selection to ODOT.

In the event CTGR selects, but is subsequently unable or unwilling to administer, an eligible project within the MOU TERO Boundary, CTWS shall have the option to administer the project, to the extent it does not interfere with ODOT procurement or contract administration.

4.3. Goal Setting

TERO shall analyze each project selected to become an ODOT MOU Contract to establish an accomplishable hiring goal. The established goal shall be based on an assessment of workforce availability and worker skill needs for the project.

Eligible employees for goals include all Indians without regard to tribal affiliation or place of enrollment. However, TERO recruiting efforts shall be targeted towards those living on or near the CTWS.

Hiring goals apply to employees in job classifications for heavy highway construction trades, including but not limited to carpenter, laborer, equipment operator, cement mason, truck driver, electrician, and ironworker.

4.4. MOU Compliance Agreement

TERO agrees to meet with each Contractor awarded an ODOT MOU Contract to develop a numerical hiring goal for each eligible job craft which shall be used on the contract. TERO will formalize the hiring goals using the MOU Compliance Agreement form, attached as Exhibit B. This includes numerical hiring goals and timetables for each craft, skill area, job classification, etc., as a percentage of total hours worked on the project, used by the Contractor. This Compliance Agreement form may be revised from time to time by mutual consent of the parties, without formal amendment to this MOU.

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ODOT agrees that a condition to award of an ODOT MOU Contract will be that the contractor executes a MOU Compliance Agreement.

4.5. Mandatory MOU Workshop

TERO agrees to conduct mandatory pre-bid quarterly TERO/MOU workshops, and shall issue certificates of completion to those Contractors who sign in, attend, and participate. ODOT agrees to make a good faith effort to participate in such workshops. TERO agrees that the certificate shall be valid for three (3) years from the date of the workshop.

ODOT will require Contractors to obtain a valid certificate of completion issued by TERO in order to be eligible to bid for an ODOT MOU Contract.

4.6. Pre-Construction Conference

Pre-construction conferences for contractors of projects that are subject to this MOU shall be held on or at location near the Reservation. At the pre-construction conference TERO and ODOT shall be available to provide a detailed explanation of, and answer questions about, the provisions of the Ordinance, if applicable, and Indian Preference goals. The pre-construction conference shall be the forum for finalizing all compliance agreements and requirements between TERO and the Contractor and Subcontractor(s) and answering any questions on Indian Preference and applicable special contract provisions.

4.7. Specialty and Service Provider Contractor Exclusion

All specialty and service provider contractors who are not required by ODOT to have a full subcontract will be exempt from entering into a compliance agreement with TERO.

5. MOU COMPLIANCE FEE.

5.1. Compliance Fee Calculation

Parties agree that TERO may assess a Compliance Fee on ODOT MOU Contracts. The MOU Compliance Fee for an ODOT MOU Contract is the percentage of the total cost of the project, as set forth below:

Contract Value	Fee % allowed		
\$1 to \$500,000	1.00%		
\$500,001 to \$999,999	0.75%		
\$1,000,000 to \$1,999,999	0.50%		
\$2,000,000 to full contract value	0.25%		

When a Federal-Aid highway project results in a contract that occurs both on the Reservation and within the MOU TERO Boundary, the portion of work on the Reservation is subject to the fee percentage established in the Ordinance and the portion of the work that is within the MOU TERO Boundary is subject to the MOU Compliance Fee.

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5.2. Reporting

Parties agree that the Compliance Fees paid under this Agreement are to be used by the TERO to develop and maintain a TERO Program including a Tribal Hiring Hall, to fund job referral, conduct screening, career counseling, liaison representation, training, and apprenticeship.

TERO will provide a Tribal Hiring Hall referral report (Referral Report) on a monthly basis to ODOT Office of Civil Rights. Each Referral Report will provide the following data:

- month and year of report submitted,
- names of TERO employee referrals,
- dates referred,
- contractors referred to,
- trades,
- last four digits of employees' social security number,
- notation if registered apprentice, and
- active or terminated dates.

TERO will provide to ODOT quarterly reports summarizing Compliance Fee-supported activities (Quarterly Fee Report) within thirty (30) days after the completion of each quarter of CTUIR's fiscal year. Reports will provide the following data:

- total compliance fees collected,
- number of Tribal Hiring Hall referrals,
- trade breakout of referrals,
- gender breakout of referrals,
- · support activities such as screening, orientations, counseling, trainings, and
- other activities supported with Compliance Fees collected under this Agreement.

The parties agree to consult within thirty (30) days of any failure to deliver the Quarterly Fee Report in a timely manner.

ODOT, through its Office of Civil Rights, shall provide TERO with, at a minimum, a copy of the "TERO Project Employment" report, or its future equivalent, on a monthly basis.

6. NOTICES; ADMINISTRATORS.

6.1. Notice. Except as otherwise expressly provided in this Agreement, any communications between the Parties hereto or notices to be given hereunder shall be given in writing by email, personal delivery, facsimile, or mailing the same, postage prepaid, to ODOT or CTWS at the address, number or email address set forth in this Agreement. Any communication or notice so addressed and mailed shall be effective five (5) days after mailing. Any communication or notice delivered by facsimile shall be effective on the day the transmitting machine generates a receipt of the successful transmission, if transmission was during

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normal business hours, or on the next business day, if transmission was outside normal business hours of the recipient. To be effective, any notice transmitted by facsimile must be confirmed by telephone notice to the other party's Administrator in Section 6.3. Any communication or notice given by personal delivery shall be effective when actually delivered. Any communication or notice given by email shall be effective upon the sender's receipt of confirmation generated by the recipient's email system that the notice has been received by the recipient's email system.

- 6.2. Service. All notices required or authorized to be served on either Party shall be served by first class mail to Party's Administrator in Section 6.3.
- **6.3.** Administrators for this Agreement are:

ODOT	CTWS
ODOT IGA#	CTWS#
Administrator: Angela Crain	Administrator:
Title: Manager, Office of Civil Rights	Title:
Address:	Address:
3930 Fairview Industrial Dr., SE M-S 32	
Salem, OR 97302	Phone:
Phone: 503-986-4353	Email:
Email: angela.m.crain@odot.state.or.us	

Parties may make changes to the specified Administrators in this section, and such changes shall constitute contract administration for purposes of this Agreement. Parties will provide notification to each other of any such change in writing, and changed shall be effective without the necessity of a formal amendment to this Agreement.

7. CHOICE OF LAWS.

This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon. In no event shall anything be construed as a waiver by either party of any form of defense or immunity, whether sovereign immunity, governmental immunity, Tribal immunity, immunity based on the eleventh amendment to the Constitution of the United States or otherwise, from any Claim or from the jurisdiction of any court.

8. AMENDMENTS.

This Agreement may be amended by mutual agreement of both parties, but only to the extent permitted by applicable statutes and administrative rules. No amendment to this Agreement shall be effective unless it is in writing signed by the Parties and all approvals required by applicable law have been obtained.

In the event CTWS amends its Ordinance before the expiration of this Agreement, the parties agree to confer regarding any necessary amendments to this Agreement.

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9. TERMINATION.

- **9.1.** This agreement shall remain in effect for five years, unless one of the following events occurs:
 - 9.1.1. This Agreement is terminated by written agreement of both parties
 - **9.1.2.** Either party serves the other with notice of termination at least 30 days prior to proposed termination.
 - **9.1.3.** If federal or state laws, regulations, or guidelines are modified or interpreted in such a way that either the work under this Agreement is prohibited from paying for such work from the planned funding source.
- 9.2. In the event the parties terminate this Agreement and there is on-going work on a project within the MOU TERO Boundary or Reservation, the parties agree that ODOT may enter the project site and finish work by whatever method ODOT deems expedient.
- 9.3. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination.

10. REPRESENTATIONS AND WARRANTIES OF THE PARTIES.

- 10.1. The CTWS represents and warrants to ODOT that (1) the CTWS has the power and authority to enter into and perform this Agreement, (2) this Agreement, when executed and delivered, shall be a valid and binding obligation of the CTWS enforceable in accordance with its terms, (3) the person executing this Agreement on behalf of the CTWS has the necessary authority to execute this Agreement for and on behalf of the CTWS.
- 10.2. ODOT represents and warrants that (1) ODOT has the power and authority to enter into and perform this Agreement, and that (2) this Agreement, when executed and delivered, shall be a valid and binding obligation of the State of Oregon enforceable in accordance with its terms.

11. COUNTERPARTS.

This Agreement may be executed in two or more counterparts, by facsimile or otherwise, each of which is an original, and all of which together are deemed one and the same instrument, notwithstanding that all parties are not signatories to the same counterpart

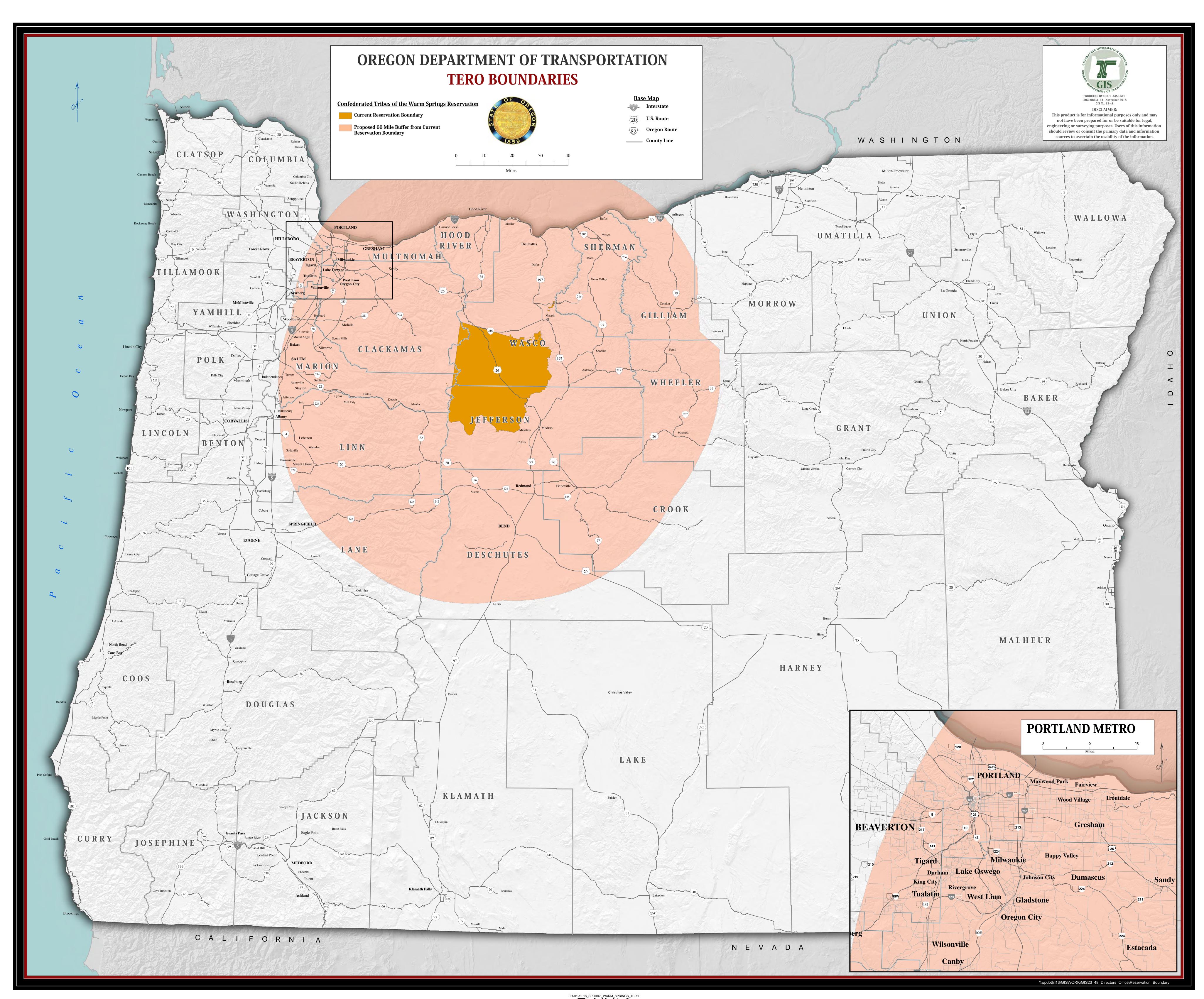
12. NONAPPROPRIATION.

Nothing in this Agreement is to be construed as permitting any violation of Article XI, section 7 of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the State of Oregon.

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CONFEDERATED TRIBES OF THE WARM SPRINGS INDIAN RESERVATION	STATE OF OREGON, by and through its DEPARTMENT OF TRANSPORTATION
By E. Aust Con J Name: Title:	By Name: Matthew L. Garrett Title: Director
Date 12/10/18	Date 12-14-18.
•	APPROVED AS TO LEGAL SUFFICIENCY
	By Karen E. Clevering Karen E, Clevering Assistant Attorney General
	Date 12/13/18

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01-01-19 18_SP00043_WARM_SPRINGS_TERO

Tribal Employment Rights Office

Confederated Tribes of the Warm Springs Indian Reservation Oregon Department of Transportation Compliance Agreement

Project Name:	
Contractor:	
The CTWS Tribal Employment Rights Office and	, through its
representative	, have entered into an agreement as result of their
company being awarded a contractor for the	
Federal- Aid Highway project.	

The Confederated Tribes of the Warm Springs Indian Reservation, through the Tribal Employment Rights Office (TERO), and the State of Oregon Department of Transportation (ODOT) have executed a Memorandum of Understanding (MOU) to establish procedures confirming that all provisions of the Tribal Employment Rights Office code, and the "Indian Preference" stipulations of the Federal-Aid Highway projects are achieved. Contractor employers in Federal Aid-Highway construction projects located within the Warm Springs reservation boundaries and projects located near the reservation boundaries agree to the following procedures established within the Memorandum of Understanding.

The State acknowledges the inherent sovereign authority of the CTWS to assess and collect the compliance fees describe in the TERO code and this MOU. The agreement between the Warm Springs Tribes and the Oregon Department of Transportation stipulates Indian preference in employment for Indians on ODOT transportation projects and authorizing the TERO office to impose a compliance fees on ODOT contractors. The on-reservation fee assessed on the ODOT projects shall be consistent with the established fee for TERO projects within the reservation boundary defined in the TERO code, presently at 2.5%.

Therefore, the parties agree as follows:

Compliance Agreement: an agreement between construction contractor, subcontractor, and the Tribal Employment Rights Office, setting forth how the employer will meet Indian preference hiring, subcontracting goals, fees, and compliance with the Warm Springs TERO code. The compliance agreement must be executed prior to commencement of any portion of a construction contract or subcontract within the reservation.

Contractor: where the general contractor on the project is a construction employer, that general contractor shall ensure that all its subcontractors comply with this code. The general contractor who is a construction employer may be held liable for violations of this code by its subcontractors.

Compliance Fees: All ODOT federal aid projects that have a project work scope within the reservation boundary are subject to the on-reservation fees established with the TERO code. For projects that contain work both on and off reservation, a fee calculation shall be made — on

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EXHIBIT B — MOU COMPLIANCE AGREEMENT

reservation portion is subject to on reservation fee percentage and off reservation portion is subject to off reservation fee percentage.

It is agreed the U.S DOT notice N4720.7 states, for **"Off Reservation situations"** TERO may bill projects at an agreed rate for services. This rate shall be as follows:

Contract value off reservation	Fees % allowed		
within MOU TERO boundary.			
• First \$500,000	1.00 %		
 Next \$500,000 	0.75%		
 Next \$1,000,000 -2,000,000 	0.50%		
Remaining contract value	0.25%		
(\$2,000,000 to full contract value)			

MOU TERO boundary extends approximately 60 miles from the exterior reservation boundary.

Compliance Fees (on-reservation): every construction employer with a construction, renovation, improvement, or expansion contract in the sum of ten thousand dollars (\$10,000) or more shall pay a fee of 2.5% percent of the total amount of the contract. Such fees shall be paid by the Construction employer prior to commencing work on the reservation.

Mandatory TERO workshop: The Warm Springs TERO program will conduct quarterly contract certification workshops. TERO will issue certificates of completion to those contractors who complete the workshop. All contractors must have a certificate in order to be eligible to bid on ODOT contracts. The certificate shall be good for 3 years.

Warm Springs TERO contract certification workshop fees:

- A) \$650 Advanced registration: early registration fee 1st participant / \$75 for additional attendee
- B) \$750 Registration fee at the door for 1st participant / \$125 for additional attendee
- C) \$1,200 special workshop fee 1st participant / \$225 for additional attendee

Numerical Goal Setting: TERO will analyze each project and establish an Indian preference hiring goal. The established goal shall be based on an assessment of workforce availability and worker skill needs for a given project. TERO agrees to meet with each contractor awarded a highway project contract to develop a numerical goal for each job craft which will be used on the project. Each contractor awarded a highway project contract with an Indian preference goal shall be responsible for informing all their subcontractors of these MOU requirements.

Hiring Goals: TERO reserves the right to negotiate for any position listed on the compliance agreement hiring goals application in order to meet the prescribed employment goals. All labor, training, or apprentice positions will be filled by Indian workers referred by the TERO program. Any non-Indian found to be working on the project who has not been approved by TERO and in accordance with the Warm Springs TERO code will constitute non-compliance and in violation of this agreement.

Contractor Specific Obligations Contract: A contractor or subcontractor conducting business on or near the Warm Springs reservation specific obligations under the TERO code. These obligations include the

EXHIBIT B — MOU COMPLIANCE AGREEMENT

following: list of all positions on this project; core crew list and rational; trade union involved on project; report all job vacancies; on-site inspections; and provide copies of certified weekly payroll reports. Any violation of an executed Compliance Agreement shall be a violation of the Warm Springs TERO code.

Failure to comply with the TERO Compliance Agreement shall be deemed a violation of a binding contract and shall be subject to penalties as prescribed in chapter V, penalties and enforcement of the CTWS TERO code.

No contract work will begin until all applicable agreements are signed.

Contractor Representative	Date
Title	
Tribal Employment Rights Representative	Date
Tibal Elliployment Rights Representative	Date
Title	

TRIBAL EMPLOYMENT RIGHTS OFFICE

Confederated Tribes of the Warm Springs Indian Reservation

COMPLIANCE AGREEMENT

HIRING GOALS

Project Name:				
Employer				
TERO Representative Approval:)ate:	
Employer Approval:			Date:	
Positions	# of Each	# of Indians	%	Wage Rate
IUIALS				

TERO reserves the right to negotiate for any positions listed above in order to meet the prescribed employment goals. This attachment supplements the TERO Compliance Agreement in which the Employer agrees to meet their obligation pursuant to the CTWS Tribal Employment Rights Code.

CONTRACTOR'S SPECIFIC OBLIGATIONS

As a contractor/subcontractor conducting business on or near the Warm Springs Indian Reservation,

your specific obligations under the Tribal Employment Rights Code and this contract include the Following:

- 1. Provide TERO with a precise listing of positions you will use on this project from the superintendent on down, and the number of each craft. These positions will be negotiated for as well as any Core Crew requested:
- 2. Core Crew requests must be in writing with rationale for each. The listing of positions and the Core Crew requested must be submitted to TERO at least three (3) days prior to a required preconstruction meeting with TERO staff or start-up of the project. Core Crew must have been on the Company payroll for at least six (6) months in order to qualify as Core Crew.
- 3. Inform TERO of all signatory trade unions to be involved in the project. TERO obligations have priority over union obligations by a contractor signatory to any trade unions. However, TERO will consider Indian workers of the trade unions in order for contractors to meet their hiring goals.
- 4. Notify TERO of all job vacancies. All available Indian applicants shall be considered first before any non-Indians are considered for employment and training. If no qualified Indians are available, TERO will provide a consent form to waive this obligation;
- 5. Employees referred by the TERO program will have preference in retention of employment from the beginning to the end of the project. Inform TERO of any lay-offs.
- 6. Before any TERO referral is terminated from the project you must inform TERO immediately to allow for informal counseling;
- 7. Allow on-site inspections by TERO representatives;
- 8. Provide copies of certified weekly payroll reports to the TERO program after each pay period as specified in the TERO Compliance Agreement;
- 9. No work on the scheduled program will begin until all applicable agreements are signed. Failure to sign the required agreements shall serve as just cause for the contractor/subcontractor to be subject to sanction(s) as prescribed in the TERO Compliance Agreement and CTWS TERO Code.

EXHIBIT B — MOU COMPLIANCE AGREEMENT

I acknowledge that I have read and that I understand abide by these obligations in their entirety.	I the specific obligations as set forth above. I agree to
Employer Representative	Date
Company	•
TERO Representative	Date

