

WSDOT TERO FAQ

In the interest of mutual respect and in keeping with the principles of the Centennial Accord, Washington State Department of Transportation (WSDOT) and Tribal Employment Rights Office (TERO) staff developed the following FAQ for WSDOT projects located on reservations or tribal trust lands. The answers below represent our current practice and understanding. This is for information purposes only and should not be construed as new WSDOT or tribal policy. It is also important to note that each TERO law and office is unique. You should reach out to an individual TERO office to ensure you accurately understand their requirements and process. The intended audience is WSDOT and tribal TERO employees and other interested parties.

GENERAL

1. What is TERO?

TERO stands for Tribal Employment Rights Ordinance or Office. TEROs are developed and administered by federally-recognized Tribes under their inherent sovereign authority. TERO Ordinances require that all covered employers, who are engaged in operating a business or performing work on reservation create opportunities and give preference to qualified Indians in all aspects of employment including contracting and other business activities. TERO Offices are established and empowered to assist, monitor and enforce the requirements of the tribal employment rights ordinance or code.

2. Do all Tribes have a TERO program?

No. A federally-recognized tribe as an inherent sovereign will vary in the application of strategies and policies to protect the employment rights of their tribal workforce.

3. What is the extent of TERO jurisdiction?

Federally-recognized tribes, through their sovereign status, apply TERO to covered employers operating within the exterior boundaries of the reservations as legally defined by treaty or legislation as well as within off-reservation trust lands. "Covered employers" is generally defined as any individual, business, company, entity, contractor or sub-contractor employing one or more persons. Some Tribes require TERO compliance for projects funded by the Tribe, regardless of their location.

4. Are any WSDOT projects exempt from TERO?

Yes. Projects that use existing agency forces and that are conducted within WSDOT ROW are not subject to TERO. The most common example of this is maintenance projects utilizing existing WSDOT employees.

5. How is TERO applied?

In two ways: Through TERO Workforce Provisions, and TERO fees or tax.

6. TERO Workforce Provisions

Tribal TERO laws apply to employers and contractors operating on reservations and/or tribal trust lands and require the use of the TERO workforce for all referrals and jobs, require application of preference in employment, training and provides employers/contractors with access to the TERO workforce and skills list. Many TERO Ordinances include a preference for tribal contractors.

The Federal Highway Administration (FHWA) operates under the United States Code (USC) that does not allow a preference in contracting or subcontracting, though it does allow a hiring preference. The Bureau of Indian Affairs (BIA) and Federal Lands Highways operate under the Federal Acquisition Regulations (FAR), which does allow a preference for contracting and subcontracting. In some cases, Tribes can transfer their FHWA funding to the BIA for administration.

7. Tribal TERO tax / fees

Federally-recognized tribes have the authority to regulate and tax commerce within the boundaries of reservations and tribal trust lands and, therefore can apply TERO Tax on construction jobs within the boundaries of reservations and trust lands. Tribes generally use the revenues to support tribal workforce programs, client skills training, support services, contractor support, TERO staffing and initiatives. The payment of TERO fees is determined prior to commencement of work.

8. What is Indian / Native American Preference?

Indian preference (sometimes also referred to as Native American Preference) entitles citizens of federally-recognized tribes to first consideration for employment, training, contracting and subcontracting and business opportunities that exist on reservations. The application of such a preference on projects “near reservations” is dependent upon state law.

There are no federal laws that prohibit Indian Preference. In fact, 23 USC 140(d) expressly permits, but does not require, a state to enact laws providing for such a preference, which may extend Indian Preference to projects “near a reservation.”

Tribes are exempt from Title VII of the Civil Rights Act and several other employment laws. Numerous court cases have upheld this exemption (see *Morton v. Mancari*). Additionally, court rulings have held that Indian preference is a political preference and not a racial preference and therefore does not violate the dictates of federal employment law.

9. What is Tribal Preference?

Tribal preference entitles members of a specific federally-recognized tribe to first consideration in employment, training, contracting and subcontracting. Whereas *Indian* Preference is permitted on FHWA-funded transportation projects, *Tribal* preference is not.

10. What is the different between Tribal Preference and Indian Preference?

Tribal Preference is when preference is given to a member of a specific federally-recognized Tribe; Indian Preference is when preference is given for being a citizen of any federally-recognized Tribe, Band, or Village.

11. Are all TERO requirements and fees/taxes the same?

No. Each tribe is a unique sovereign government. While there is much in common between tribes, each is diverse in its own community culture, needs, values, and priorities. Each tribe therefore makes its own legislative decisions to meet their own set of wants and needs.

Please contact the individual TERO Office to learn more about their TERO requirements.

12. Who is empowered to speak for the Tribe on TERO Issues?

Each Tribe is unique. Some TERO Officers report to a TERO Commission that is appointed by their Tribal Council. Generally speaking, the TERO Officer is empowered by their Tribal Council to apply and enforce the TERO Ordinance. When in doubt, ask the TERO Officer who within the Tribe has the authority to make a specific decision.

13. What is the WSDOT / TERO Team?

The WSDOT / TERO team is comprised of tribal and state officials who are committed to open communication and working together to enhance employment opportunities for Native Americans through the Washington State Department of Transportation and transportation projects. The team looks for ways to improve communication, coordination and cooperation.

- **Who Participates?**
 - Tribal officials and TERO Officers
 - Staff from WSDOT Office of Equal Opportunity, Construction Office and Intergovernmental and Tribal Relations Office.
 - Staff from Office of Minority and Women Owned Businesses (OMWBE)
 - Staff from Labor and Industries (L&I)
 - Other interested parties including representatives from unions and labor.

- **How often do they meet?**
 - The WSDOT / TERO team meets quarterly. The meetings are held in various locations around the state.

- **Who are the key contacts at WSDOT, and what are their roles?**
 - **Office of Equal Opportunity (OEO)**
 - Director (360) 705-7091
Reporting to the Secretary of Transportation, provides statewide direction of department programs relating to external civil rights programs that include: Disadvantaged Business Enterprises (DBE) Minority/Women Business Enterprises (MWBE), Small Business Enterprises (SBE), Equal Employment Opportunity (EEO) Contract Compliance, On-The-Job Training (OJT), Support Services, Tribal Employment Rights Ordinance (TERO) and Title VI.
 - External Civil Rights Manager (360) 705-7086
Responsible for fostering equal opportunity in procurement contracting and service delivery through the administration of various equal opportunity

programs (which are guided by federal and state civil rights laws, regulations and various department policies).

- DBE Supervisor (360) 705-7010
Ensures a level playing field and foster equal opportunity for firms owned and operated by disadvantaged business enterprises on USDOT-assisted contracts and procurements.
- Title VI Coordinator (360) 705-7082
Ensures all management, staff, contractors, local agencies, and service beneficiaries are aware of the provisions of Title VI and the responsibilities associated with Title VI of the Civil Rights Act of 1964.
- EEO Officer (206) 768-5899
Ensures all region construction projects meet multi-modal federal transportation agency requirements. EEO Officers are responsible for planning all government-to-government activities related to WSDOT / TERO on a regional basis.
- **Construction**
 - Planning and designing future projects:
WSDOT has six regional offices around the state that are the most knowledgeable because they are in control of the work
 - For Local/regional communications contact the person listed for Project Development. They will answer your question or route you to the correct person.
 - Issues related to construction contracts:
 - Every contract lists the project engineer responsible for the administration of the contract. That is the person representing WSDOT as the owner of the contract.
 - If you need to escalate a project issue or you want to discuss a region-wide issue, contact the person in that region who is listed on the website as responsible for construction.
 - The State Construction Engineer is the person responsible for Statewide highway construction communications.
 - information related to further escalation of project issues
 - information related to statewide contract administration policy and procedures
- **Tribal Liaison**
 - The WSDOT HQ Tribal Liaison reports to the Secretary of Transportation and serves as a point of contact for tribes within WSDOT, helps develop agency policy and participates in quarterly TERO Team meetings.
 - In addition to the HQ Tribal Liaison, WSDOT regions and some offices have their own Liaison or Coordinator (assigned from existing staff).

- **Who are the key contacts within Tribal TERO Offices, and what are their roles?**
The descriptions below are general. Each Tribe may structure their administration differently. Contact information for individual TEROs can be located on WSDOT’s website at <http://www.wsdot.wa.gov/tribal/TribalContacts.htm> or the Council for Tribal Employment Rights (CTER) website at <http://www.councilfortribalemploymentrights.org/wp/>
 - TERO Director
 - Oversees, directs and leads the TERO Program and staff.
 - Researches, develops, and implements best practices to improve the program.
 - Compliance Officer
 - Ensures employers / contractors are compliant with TERO Policies or Codes.
 - Collects fees required for performing work on Reservation.
 - Investigates and settles disputes and/or complaints.
 - Dispatch
 - Places TERO clients with employers / contractors performing work within or around reservation.
 - Client Services
 - Facilitates training opportunities for Native American workers.
 - Disperses funds to TERO clients for training, education, safety and work clothing.
 - TERO Commission
 - Serves as the quasi-judicial and regulatory authority delegated with the enforcement of the provisions of the TERO Code and other Native Preference Codes or Policies.
 - Implementation of the TERO judicial process.
 - Overall guidance to the TERO program.

PROJECT CONTRACTS

14. Where can you find information about:

- Upcoming Bids?
 - All future and advertised contract information is available through the WSDOT Ad and Award website at <http://www.wsdot.wa.gov/biz/contaa/> under ***“Advance Schedule of Contracts”*** in the left navigation
- Which contractor was awarded a contract?
 - Ad and Award will note bid results and contract awards at: <http://www.wsdot.wa.gov/biz/contaa/>
 - Once under contract: <http://www.wsdot.wa.gov/business/construction/projectreports>
Lookup by Project Engineer, Region, Route or contract number under “Active Projects”

15. How are TERO requirements incorporated into a WSDOT contract?

- WSDOT’s Standard Specification requires the Contractor to contact the listed TERO officer prior to bidding and comply with any tribal laws or taxes that apply. The contractor is solely responsible for compliance with all tribal laws and the payment of all taxes and TERO fees associated with work performed where TERO applies.
- For the bidding process, the contract provides a geographical breakdown of items of work within the reservation boundary for purposes of enabling the contractor to determine the value of the work subject to TERO. This allows them to include the TERO cost in their bid.
- The contract provides a tribal point of contact for TERO.

16. What is a TERO compliance plan?

Tribal TERO offices work directly with contractors on a compliance plan that covers individual tribal workforce laws, policies, and TERO requirements. Compliance Agreements/Plans require approval from the TERO staff before work can begin. Usually, the signed compliance plan submitted to the Tribal TERO office ensures protection for the TERO workforce from job qualifications and requirements that create barriers for TERO workers, agreements from unions to comply with TERO, and to provide reasonable accommodation for cultural differences and beliefs. The compliance plan also covers penalties for violation of TERO laws that may include fines and sanctions.

COMPLIANCE / ENFORCEMENT

17. Who is responsible for enforcing TERO?

As sovereign nations, Tribes are responsible for enforcing their laws, including TERO. Tribal ordinances, state Revised Code of Washington (RCW) and federal code of federal regulations (CFR) are laws that the contractor must comply with, and failure to do so is a violation of the contract as well as of the law itself. As the project owner, WSDOT wants to ensure our contractors comply with all applicable laws. However, WSDOT does not have the power to interpret application, negotiate or enforce the law itself. That must be done by the party empowered and trained to do so; such as Department of Revenue, Washington State Patrol, Inspector General or the Tribe in the case of TERO.

If a TERO determines that a WSDOT contractor is out of compliance, they should contact the Project Engineer. WSDOT can work with the TERO or escalate the issue to their Assistant State Construction Engineer to help bring the contractor in compliance. The Project Engineer can also provide guidance on how to lien the job to make sure the TERO tax is paid prior to closing the contract.

18. What are the sanctions for violation of TERO?

Violation of TERO requirements may result in sanctions by the Tribe. Such sanctions are typically set forth in the TERO itself. If it is determined that employers have violated TERO requirements, tribes have the power to:

- Deny such party the right to commence business within the reservation/village.

- Impose a civil fine on such party typically ranging from \$500 to \$5000 per each violation, per person, per day.
- Terminate or suspend such party's operation 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.
- File a lien on the contract's bond to ensure that TERO fees are paid before the job is closed out.
- Lock out a project and / or confiscate equipment if TERO fees are not paid.

Retaliation against employees is strictly prohibited and can subject the contractor to further sanctions.

19. Can the WSDOT pay the TERO fee directly to the tribe?

No. WSDOT does not have the authority to collect taxes for another jurisdiction. This is similar to other taxes by other jurisdictions including state taxes, which must be collected by the Department of Revenue. Since the tribes' primary goal is to employ tribal members, the best way to do that is to negotiate and develop a relationship directly with the contractors.

20. Who can I contact if a contractor is discriminating against Indian workers?

If an individual or TERO Office believes that Indian workers are/were treated with discriminatory practices they can seek assistance from the list below. It is important that complaints are made in a timely manner so they can be addressed. Retaliation is strictly prohibited and shall subject the contractor to sanctions by the Tribe and/or other agencies.

- The TERO Department: The TERO Office can conduct an investigation and facilitate conversations with the Contractor and WSDOT.
- Project Engineer: Every contract lists the project engineer responsible for administration of the contract. That is the person representing WSDOT as the owner of the contract.
- OEO Title VI: Responsible for investigations of alleged discrimination based on race, color, national origin or sex, as it relates to the provision of benefits and services on federally funded projects or by the recipients of federal funds. Title VI jurisdiction also covers issues of discrimination in the Disadvantaged Business Enterprise (DBE) program as well as Environmental Justice and Limited English Proficiency activities.
- Equal Employment Office Commission (EEOC): Responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits.
- If the employee is an apprentice, they can seek assistance from their apprenticeship coordinator.

SUPPORT SERVICES & RESOURCES

21. What support services does WSDOT offer?

- On The Job Training Support Services (OJT SS): The core task of the On the Job Training Support Services (OJT SS) Program is to assist minorities and females who desire to work and/or have a career in the construction trades by providing them gateways and paths to employment in the construction trades.

The OJT SS Unit is responsible for assisting contractors in finding qualified minorities and females to meet identified workforce shortages and for identifying paths and gateways to entry-level apprenticeship and trainee programs for individuals desiring to go into the construction trades. The program also assists with job placement for minorities and females already qualified in specific construction trades.

- For additional information on this program please go to the OEO website at www.wsdot.wa.gov/equalopportunity

Disadvantaged Business Enterprises Support Services: Disadvantaged Business Enterprise (DBE) Support Services is a federally funded program designed to help those DBEs wishing to work on WSDOT highway projects.

For additional information on this program, please go to the OEO website at www.wsdot.wa.gov/equalopportunity

- Apprenticeship Program
State law requires WSDOT to include a requirement in all projects to utilize apprentices at 15% of the total labor hours. Providing tribal members for employment who also qualify as apprentice participation is attractive to the contractor and encourages continued employment.
- Equal Employment Opportunities (EEO)
Federal law requires the contractor to hire minorities and women provided it is demonstrated that there is a corresponding underutilization in that class of work/trade. Tribal members that are hired that fill an EEO need are more attractive to the contractor and have a better chance of continued employment.
- Federal Training opportunities
On larger federally funded projects, training hours may be assigned depending upon the training opportunities presented by the project. Training hours are intended to enhance the utilization of women and minorities by providing targeted employment opportunities. Depending upon the specifics of the project, tribal members may be able to take advantage of training opportunities.

22. The Council for Tribal Employment Rights (CTER) is a community based Indian owned and operated non-profit organization that is comprised of and represents the interests of over 300 Tribal and Alaska Native Villages that are covered by employment rights ordinances. The organization provides direct on-site training and Technical assistance. Included among the training programs CTER offers are: Introduction to Basic TERO, Management and Operation of TERO Program, TERO Commission Training, Charge Investigation, Indian Preference in Employment/Contracting, Federal Law & Indian Preference, Sexual Harassment, Tribal workforce Utilization & Empowerment, Youth Motivation & Entrepreneurship, and Cultural Synergy-Beyond Diversity.

For additional information, please visit their website at www.councilfortribalemploymentrights.org

23. The Native Procurement Technical Assistance Center (Native PTAC) helps individual and tribally owned Native firms to become more successful in contracting with federal, state and local governments. They do this by providing one-to-one assistance with government certifications and registrations, interpretation of solicitations, bid/proposal reviews, marketing advice, and contract performance support for designated socio-economic programs.

For additional information, please visit their website at www.nativeptac.org

24. Office of Minority Women Business Enterprise (OMWBE) – Certification – The OMWBE certifies women and minorities owned firms for participation in State/Federally funded projects.

For additional information, or to find more information about how to become a certified firm, please see their website at www.omwbe.wa.gov