STATE OF NORTH DAKOTA		IN DISTRICT COURT
COUNTY OF MOUNTRAIL		NORTHWEST JUDICIAL DISTRICT
Dakota Petroleum Transport Solutions, LLC, Plaintiff, vs. TJMD, LLP, Rugged West Services LLC, and JT Trucking, LLC, Defendants.	)	Civil No. 31-2013-CV-00055

Copies of Selected Authorities Cited in Dakota Petroleum's Response Brief to TJMD's Motion to Dismiss

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sponte, at any time during the pendency of the action, even on appeal.[4] Nevertheless, the question of jurisdiction should be considered by the court before it looks at other matters involved in the case,[5] such as whether the parties are entitled to a jury trial.[6] It may, and must, do this on its own motion.[7] Courts are bound to take notice of the limits of their authority, and if a want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order.[8]

In discovering jurisdictional facts, the courts may consider the complaint, motions, affidavits, or any other evidence.[9]

§ 61 Power and duty to determine jurisdiction—Jurisdiction to issue ancillary orders

Research References

West's Key Number Digest, Courts ⇐27

The "jurisdiction to determine jurisdiction" doctrine authorizes courts to issue ancillary orders while determining their own jurisdiction and to punish as criminal contempt the violation of such orders, even though it may later be determined that the court lacked jurisdiction over the proceedings.[1]

A trial court has the authority to issue orders necessary for the protection of the parties during the time it makes its jurisdictional determination.[2]

§ 62 Duty to exercise jurisdiction

Research References

West's Key Number Digest, Courts ⇐26, 28

Generally, a court with jurisdiction over a case has not only the

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[4]Snell v. Cleveland, Inc., 316 F.3d 822, 54 Fed. R. Serv. 3d 652 (9th Cir. 2002).

As to how and when an objection to jurisdiction may be raised, generally, see § 64.

[5]Sheridan County Elec. Co-op. v. Anhalt, 127 Mont. 71, 257 P.2d 889 (1953).

[6]Morgan v. Hays, 102 Ariz. 150, 426 P.2d 647 (1967).

[7]Polk County v. Sofka, 702 So. 2d 1243 (Fla. 1997); In re Lyons' Estate, 79 N.D. 595, 58 N.W.2d 845 (1953); Keizor v. Sand Springs Ry. Co., 1993 OK CIV APP 98, 861 P.2d 326 (Ct. App. Div. 3 1993).

[8]Polk County v. Sofka, 702 So. 2d 1243 (Fla. 1997).

[9]Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282 (Ind. 1994).

[Section 61]

[1]Whitehead v. Nevada Com'n On Judicial Discipline, 110 Nev. 128, 869 P.2d 795 (1994), for superseding opinion see 906 P.2d 230.

As to the effect of lack of jurisdiction on orders of court, see § 65.

[2]Malik v. Malik, 99 Md. App. 521, 638 A.2d 1184 (1994).

right but also the duty to exercise that jurisdiction,[1] and to render a decision in a case before it.[2]

State courts are not free to decline the jurisdiction conferred on them by Congress in cases based on federal statutes if such cases are within the scope of the ordinary jurisdiction of the state courts as prescribed by local laws.[3] A court's duty to exercise its jurisdiction can be enforced by way of a mandamus proceeding.[4]

In certain situations, a court having jurisdiction over a case may in its discretion decline to exercise it,[5] as when the doctrine of forum non conveniens is applicable.[6]

3. Invocation of, and Objection to, Jurisdiction

§ 63 Jurisdiction as dependent on application for relief

Research References

West's Key Number Digest, Courts ⇨15

The general rule is that a court cannot adjudicate a controversy on its own motion; it can do so only when the controversy is presented to it by a party[1] and only if the case is presented to it in the form of a proper pleading.[2] A court has no power either to investigate facts or to initiate proceedings.[3]

When a statute prescribes a mode of acquiring jurisdiction, that mode must be followed or the proceedings[4] and resulting judgment will be void and the judgment subject to collateral attack.[5]

§ 64 Objections to jurisdiction; waiver of, or estoppel to assert, objection

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[Section 62]

[1]Buckman v. United Mine Workers of America, 80 Wyo. 199, 339 P.2d 398 (1959).

[2]Buckman v. United Mine Workers of America, 80 Wyo. 199, 339 P.2d 398 (1959).

[3]Bowles v. Barde Steel Co., 177 Or. 421, 164 P.2d 692, 162 A.L.R. 328 (1945).

As to state court jurisdiction over federal causes of action, see § 92.

[4]Am. Jur. 2d, Mandamus.

[5]Lyon v. Lyon, 618 So. 2d 127 (Ala. Civ. App. 1992); Sparrow v. Nerzig, 228 S.C. 277, 89 S.E.2d 718, 56 A.L.R.2d 328 (1955).

[6]§§ 130 to 143.

[Section 63]

[1]Autry v. District Court of Muskogee County, 1969 OK 159, 459 P.2d 865 (Okla. 1969).

[2]State ex rel. Houser v. Goodman, 406 S.W.2d 121 (Mo. Ct. App. 1966).

[3]Sale v. Railroad Commission, 15 Cal. 2d 612, 104 P.2d 38 (1940).

[4]State ex rel. Cowan v. District Court of First Judicial Dist. In and For Lewis & Clark County, 131 Mont. 502, 312 P.2d 119 (1957).

[5]Zarges v. Zarges, 79 N.M. 494, 445 P.2d 97 (1968).

For a discussion of judgments, generally, see Am. Jur. 2d, Judgments.

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(c) *Entity Nature of an LLP*

Whether a partnership is an entity or an aggregate has long been a disputed issue.[53] The U.P.A. does not explicitly characterize the partnership and contains both aggregate features, such as technical dissolution on dissociation of a member, and entity features, such as the partnership's power to take title to property.[54] Limited liability makes entity characterization of LLPs more certain.[55] However, it is important to note that R.U.P.A. characterizes even a non-LLP partnership as an "entity."[56]

§ 1.03 THEORETICAL ISSUES REGARDING LLPs

This section presents a brief overview of some theoretical issues raised by the overall concept of the LLP— that is, by permitting general partners to limit their liability. These issues are likely to be important in the evolution of LLP statutes, their use by firms, the tax and regulatory treatment of LLPs, and the application and enforcement of LLP provisions by courts. The issues will be discussed in more detail throughout this book.[57]

(a) *Limited Liability*

As discussed in more detail below in Section 3.01, the main issue raised by LLP provisions is whether statutes ought to limit the liability of general partners. If

[53] *See* Bromberg & Ribstein on Partnership, § 1.03 (hereinafter "Bromberg & Ribstein").

[54] Bromberg & Ribstein, § 1.03(c)(1).

[55] For cases recognizing the entity nature of an LLP, see United States v. Stein, 463 F. Supp. 2d 459, 464 (S.D.N.Y. 2006) (Del. law; partner of large accounting LLP treated as employee for purposes of applying attorney–client privilege to communications between partner and firm's counsel given that partnership has "over one thousand partners who probably are not exposed to unlimited liability for partnership obligations," citing Delaware law both on LLP liability limitation and general characterization of partnership as entity); In re Zecher, 2006 WL 3519316 (Bankr. D. Mass. Dec. 6, 2006) (Mass. law; transfer of LLP's property to partner was transfer from a separate entity which resulted in limitation of partner's homestead exemption); Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 323 F. Supp. 2d 709 (E.D. Va. 2004) (LLP was a "person" under liability policy providing coverage for "making known to any person or organization written or spoken material that violates a person's right of privacy"); Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court, 137 Cal. App. 4th 579, 595, 40 Cal. Rptr. 3d 446, 457 (2006) (LLP is a separate entity from its individual partners who have privacy rights, though court assumes without deciding that the LLP also has privacy rights). *See also* Marin v. Gilberg, 2008 WL 2770382 (S.D. Tex. July 11, 2008) (holding that LLP cannot appear pro se and must be represented by counsel).

[56] *See* R.U.P.A. § 201.

[57] For an overview of theoretical issues regarding modern unincorporated firms generally and comparing specific forms, see Ribstein, The Rise of The Uncorporation, ch. 7 (2010).

RELATED TOPICS

Federal Courts

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Defendant Satisfies Adequate Alternative Forum Prong of Forum Non Conveniens

§ 3:18. The common law doctrine of forum non conveniens
Roxanne Barton Conlin & Gregory S. Cusimano, Editors-in-Chief, by James R. Pratt, III and Bruce J. McKee *(Approx. 7 pages)*

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Chapter 3. Forum Selection: Issues of Venue, Jurisdiction, Forum Non Conveniens and Choice of Law

by James R. Pratt, III and Bruce J. McKee*

§ 3:18. The common law doctrine of forum non conveniens

West's Key Number Digest

West's Key Number Digest, Courts ⚖40.1 to 40.11

It is black-letter law that a legislative body cannot empower a court to **transfer** a case outside its own **judicial system**, however that "**system**" is defined by governing statutes.[1] Consequently, defendants who are trying to, in effect, forum shop will often turn to the common law doctrine of **forum non conveniens** in an effort to effect a "transfer" to another state's courts, a different federal court division, or, for cases that could be heard in either federal or state court, from one system to the other, or to a court in a foreign country.[2]

If the court finds that the significantly more convenient forum is another court within the same jurisdiction (another county within the state, or a different federal district court), the court will transfer the case to the more convenient court. However, if a state court finds that the more convenient forum is outside the state, the only remedy is dismissal, and the plaintiff must refile the lawsuit in another state. Similarly, if a federal court finds that the more convenient forum is outside the United States, the remedy will be dismissal, not transfer.

As a general rule, where a common law forum non conveniens challenge is upheld, whether in federal or state court, the case is dismissed, rather than transferred, thereby requiring the plaintiff to file the case in a more convenient available forum. The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.[3] In practical effect, forum non conveniens allows a court to dismiss a lawsuit in favor of an alternative, more convenient forum "even if jurisdiction and proper venue are established."[4] Because courts can view "convenience" from a public interest, as well as private interest, perspective, Plaintiff's counsel needs to be wary of the forum's general disposition towards forum non conveniens dismissals. In the words of one active plaintiff's attorney, "[a] motion to dismiss for forum non conveniens ... presents a discretionary opportunity for a court more interested in moving its docket rather than administering justice to close a file."[5]

Because of the discretionary nature of this type of motion, arguments need to be fashioned which highlight the practical need underpinning the plaintiff's position on retaining jurisdiction in a particular venue. For example, in a case where the plaintiff has a projected limited life span, transfer to a venue with a significant backlog might result in a delay that amounts to the denial of justice. Every effort should be made to analyze and present this type of practical rationale, in addition to the legal arguments, in hopes that the court concludes that justice would be best served by retaining the case. Oftentimes, plaintiff's counsel must come up with reasons that overcome the court's desire simply to get a case off of its docket. In addition to appealing to the court's sense of justice, sometimes cases can be presented in a manner where they are fascinating, triggering the court's interest in keeping the case, or where arguments can be fashioned that lead the court to conclude that it is the best court (because of its expertise) to retain and rule on a particular case.

The United States Supreme Court has long identified two principal interests as the foundation of the forum non conveniens doctrine: the interests of the litigants,[6] and the public interest in the workings of the judicial system as a whole.[7]

Footnotes

* Updated by Publisher's editorial staff.

1 For an example of a statutory statement of this restriction, see 28 U.S.C.A. § 1404(b), (c), which expressly limit federal court transfer to another court in the same division.

2 See generally Stowell R.R. Kelner, Note, Adrift on an Uncharted Sea; A Survey of Section 1404 (a) transfer in the Federal System, 67 N.Y.U. L. Rev. 612, 615 (1992) (strong pro-plaintiffs position with respect to constraining federal court's discretion to transfer cases under the federal transfer statute); see also discussion of removal and remand in Ch 7.

3

Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp., 549 U.S. 422, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) (forum non conveniens is, essentially, a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507, 67 S. Ct. 839, 91 L. Ed. 1055 (1947).

4 American Dredging Co. v. Miller, 510 U.S. 443, 448, 114 S. Ct. 981, 985, 127 L. Ed. 2d 285 (1994). Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp., 549 U.S. 422, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007); See also, e.g., Ford v. Brown, 319 F.3d 1302 (11th Cir. 2003) (doctrine of forum non conveniens authorizes a trial court to decline to exercise its jurisdiction, even though the court has venue, where it appears that the convenience of the parties and the court, and the interests of justice indicate that the action should be tried in another forum); Seagal v. Vorderwuhlbecke, 2006 WL 64119 (9th Cir. 2006) (district court did not abuse discretion in dismissing action sua sponte on grounds of forum non conveniens when both public and private interest factors weighed in favor of dismissal of the lawsuit); Emslie v. Borg-Warner Automotive, Inc., 655 F.3d 123 (2d Cir. 2011) (a products liability action brought by Scottish consumers against the manufacturer and designer of an all-terrain vehicle (ATV) was properly dismissed on the basis of forum non conveniens; in light of the fact that the plaintiffs were residents and citizens of Scotland, the accident occurred in England, the ATV remained in England, both nonparty witnesses to the accident were British citizens residing in England, the manufacturer was subject to suit in the British courts, and the only party not subject to suit in British courts—the designer—was previously dismissed from the action—there was no abuse of discretion in dismissing on grounds of forum non conveniens); Can v. MD Helicopters, Inc., 2011 WL 1483783 (Ariz. Ct. App. Div. 1 2011) (dismissal of a products liability action arising from a helicopter crash in Turkey on grounds of forum non conveniens was affirmed; the evidence indicated that the defendant, whose principal facilities were located in Arizona, delivered a helicopter to Turkey to be used by the Turkish National Police; the helicopter was manufactured in Arizona and the pilot was trained at the defendant's facility in Arizona approximately one month before the crash; while being operated by Turkish personnel in Turkey, the helicopter crashed, causing the deaths of everyone on board, including the plaintiffs' spouses). Cf. Sport Carriers, Inc. v. Ferro Corp., 79 Fed. Appx. 336 (9th Cir. 2003) (district court erred in dismissing action on grounds of forum non conveniens when both private and public factors did not clearly indicate preference for alternate forum); Gross v. British Broadcasting Corp., 386 F.3d 224 (2d Cir. 2004) (the common law doctrine of forum non conveniens permits a court to decline to exercise jurisdiction when the convenience of the parties and the interests of justice indicate a foreign forum would be the more appropriate forum; but, because of the substantial deference to a U.S. citizen's choice of her home forum, the balance of interests must strongly favor the defendant to justify dismissal of plaintiff's complaint on such grounds); Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163 (9th Cir. 2006) (in an action brought by a Washington cigarette smoker alleging a global conspiracy to deny addictive and harmful effects of smoking, the district court did not abuse its discretion in determining that seven private interest factors and five public interest factors favored keeping the case in Washington); Namihira v. Bailey, 891 So. 2d 831 (Miss. 2005) (Miss. Code Ann. § 11-11-3(4)(a) lists the following factors to be considered by the trial court in determining whether the "convenience" of the parties and witnesses warrant granting a motion to dismiss for forum non conveniens:

(i) relative ease of access to sources of proof;

(ii) availability and cost of compulsory process for attendance of unwilling witnesses;

(iii) possibility of viewing of the premises, if viewing would be appropriate to the action; (iv) unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his remedy;

(v) administrative difficulties for the forum courts;

(vi) existence of local interests in deciding the case at home; and

(vii) the traditional deference given to a plaintiff's choice of forum).

Wright v. Aventis Pasteur, Inc., 2006 PA Super 203, 905 A.2d 544, Prod. Liab. Rep. (CCH) P 17535 (2006), appeal denied, 916 A.2d 1103 (Pa. 2007) (the doctrine of forum non conveniens permits a trial court to dismiss a case, even when the jurisdictional requirements are met, when the court determines that in the interest of substantial justice the matter should be heard in another forum; in deciding whether to dismiss a suit based on forum non conveniens, the trial court must consider two important factors: (1) a plaintiff's choice of the place of the suit will not be disturbed except for weighty reasons, and (2) no action will be dismissed unless an alternative forum is available to the plaintiff).

5 Steven C. Marks, Panel on Judicial and Legal Perspectives: An Update on Forum Non Conveniens and Two Recent Victories for the Good Guys, 1 Reference Materials, ATLA 2002 Annual Convention 267 (2002).

6 Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055 (1947) ("Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial."). Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp., 549 U.S. 422, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) (a federal court has discretion to

dismiss a case on the ground of forum non conveniens "when an alternative forum has jurisdiction to hear [the] case, and ... trial in the chosen forum would establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience ..."); See also, e.g., Sport Carriers, Inc. v. Ferro Corp., 79 Fed. Appx. 336 (9th Cir. 2003) (private factors weighed against dismissing action in favor of foreign forum where many witnesses to defendant's allegedly false representations and damages were in the United States, and many witnesses to the development and manufacture of the product in question were also in the United States); Ford v. Brown, 319 F.3d 1302 (11th Cir. 2003) (private interests of the litigants include the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive; in addition, there may also be questions as to the enforceability of a judgment if one is obtained); Gross v. British Broadcasting Corp., 386 F.3d 224 (2d Cir. 2004) (analysis of the interests of the litigants (the private interest factors) indicated that each factor was neutral except the availability of witnesses, which was neutral during discovery and somewhat favored England during the unlikely event of a trial; thus, the balance of interests was plainly insufficient to overcome the initial presumption in favor of plaintiff's choice of her home forum); SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A., 382 F.3d 1097 (11th Cir. 2004) (in considering a motion for dismissal on grounds of forum non conveniens, "the trial judge must consider all relevant factors of private interest, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice. If the trial judge finds this balance of private interests to be in equipoise or near equipoise, he must then determine whether or not factors of public interest tip the balance in favor of a trial in a foreign forum"); Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163 (9th Cir. 2006) (seven-part test is used to evaluate private interest factor considerations:

(1) the residence of the parties and witnesses;

(2) the forum's convenience to the litigants;

(3) access to physical evidence and other sources of proof;

(4) whether unwilling witnesses can be compelled to testify;

(5) the cost of bringing witnesses to trial;

(6) the enforceability of the judgment; and

(7) any practical problems or other factors that contribute to an efficient resolution.

In applying these factors, the district court may consider any or all of these factors that are relevant to the case, giving appropriate weight to each); Acosta v. JPMorgan Chase & Co., 2007 WL 689529 (2d Cir. 2007) (any degree of deference to plaintiffs' choice to sue in defendants' home forum (as opposed to plaintiffs' home forum) is available only to the extent that plaintiffs or the case possess a bona fide connection to this forum); In re Air Crash Disaster Over Makassar Strait, Sulawesi, 2011 WL 91037 (N.D. Ill. 2011) (in multi-district litigation arising from the crash of a Boeing 737-4Q8, manufactured by the defendant, off the coast of Indonesia on January 1, 2007, claims for strict liability, negligence and negligent entrustment were dismissed on the grounds of forum non conveniens; none of the decedents were U.S. citizens or residents, nor were their representatives; Indonesia was an available and adequate alternative forum; the private interest factors weighed heavily in favor of the Indonesian forum; in particular, the relative ease of access to sources of proof, and the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses made the Indonesian forum far more convenient).

7 Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–509, 67 S. Ct. 839, 843, 91 L. Ed. 1055 (1947) ("Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."). Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp., 549 U.S. 422, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) (a federal court has discretion to dismiss a case on the ground of forum non conveniens "when ... the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems"); See also, e.g., Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, Prod. Liab. Rep. (CCH) ¶16594 (5th Cir. 2003) (public interest factors favored trial in Mexico, because the case would overburden the Texas forum's already overcrowded docket, Texas had little local interest in the outcome, and Mexican law should govern the controversy); Erny v. Estate of Merola, 171 N.J. 86, 792 A.2d 1208, 1221 (2002) (public interest factors that court must consider include:

(1) administrative difficulties flowing from court congestion;

(2) local interest in having localized controversies resolved at home;

(3) interest in having trial of a diversity case in a forum that is familiar with the law that must govern the action;

(4) avoidance of unnecessary problems in conflicts of law, or in the application of foreign law; and

(5) unfairness of burdening citizens in an unrelated forum with jury duty)
; Gross v. British Broadcasting Corp., 386 F.3d 224 (2d Cir. 2004) (although public interest factors may have tipped somewhat in favor of England, they did not do so significantly; thus, the public interest factors were insufficient to support dismissal on grounds of forum non conveniens); SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A., 382 F.3d 1097 (11th Cir. 2004) (public interest factors weighed in favor of home (United States) forum because the United States has a strong interest in providing a forum for its citizens' grievances against an allegedly predatory foreign business that actively solicited business and caused harm within the home forum); Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163 (9th Cir. 2006) (five public interest factors considered by the court in deciding whether to dismiss on grounds of forum non conveniens are:

(1) the local interest in the lawsuit;

(2) the court's familiarity with the governing law;

(3) the burden on local courts and juries;

(4) congestion in the court; and

(5) the costs of resolving a dispute unrelated to a particular forum.).

Yavuz v. 61 MM, Ltd., 465 F.3d 418 (10th Cir. 2006) (included in the public-interest factors bearing on the forum non conveniens determination are: (1) administrative difficulties of courts with congested dockets which can be caused by cases not being filed at their place of origin; (2) the burden of jury duty on members of a community with no connection to the litigation; (3) the local interest in having localized controversies decided at home; and (4) the appropriateness of having diversity cases tried in a forum that is familiar with the governing law); BFI Group Divino Corp. v. JSC Russian Aluminum, 298 Fed. Appx. 87 (2d Cir. 2008) (district court properly considered both private and public factors and determined that existence of many of witnesses and evidence in Nigeria and minimal connection or interest district and its citizens had to case as compared with interest Nigeria would have in outcome of case favored dismissal on grounds of forum non conveniens); In re Air Crash Disaster Over Makassar Strait, Sulawesi, 2011 WL 91037 (N.D. Ill. 2011) (in multi-district litigation arising from the crash of a Boeing 737-4Q8, manufactured by the defendant, off the coast of Indonesia on January 1, 2007, claims for strict liability, negligence and negligent entrustment were dismissed on the grounds of forum non conveniens; none of the decedents were U.S. citizens or residents, nor were their representatives; Indonesia was an available and adequate alternative forum; the relevant public interest factors tipped decidedly in favor of the Indonesian forum, specifically, the greater interest of the citizens of Indonesia in this litigation and the unfairness of burdening the relatively disinterested citizens of this forum with jury duty supported dismissal; furthermore, the plaintiffs essentially conceded that Indonesian law applied).

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The Rights of Indians and Tribes

BY STEPHEN L. PEVAR

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nd,[117] even if one of the parties is
es involving reservation Indians

even if one spouse is a non-Indian;[118] and may not involuntarily commit a reservation Indian to a state mental hospital.[119] Federal courts may issue an injunction against any state court that begins to hear an Indian case over which it clearly lacks jurisdiction.[120] In most of the cases just discussed, the courts acknowledged that the state had an interest at stake. However, the state's interest was overridden by the federal and tribal interests in promoting tribal self-government and autonomy. Tribal jurisdiction, therefore, was exclusive, and the state could not enforce its authority in those instances.

What Civil Jurisdiction has Congress Expressly Authorized the States to Apply in Indian Country?

States can acquire civil jurisdiction in Indian country by congressional consent, and Congress has passed several laws consenting to certain types of state jurisdiction. Some laws confer jurisdiction over particular tribes, while others confer jurisdiction over particular subject areas; for instance, Congress has authorized states to regulate the sale of alcoholic beverages in Indian country. These laws are discussed in Chapter VII, Section B. The most significant of these laws is Public Law 83-280 (P.L. 280), which authorizes state courts to adjudicate cases filed by reservation Indians involving disputes arising on the reservation.[121]

For Jurisdictional Purposes, is a State-Chartered Corporation that is Owned by Indians Considered Indian or Non-Indian?

Corporations that are licensed under state law usually are considered "non-Indian" for jurisdictional purposes even if they are owned by Indians. Therefore, a lawsuit brought by a non-Indian against a state-chartered Indian corporation must be filed in state court rather than tribal court.[122]

On the other hand, an Indian-owned corporation that is licensed under tribal or federal law rather than state law is considered "Indian" for jurisdictional purposes. In that situation, the corporation could not be sued in state court regarding a reservation contract dispute.[123]

Can a Situation Arise in which no Court has Jurisdiction over a Reservation Dispute?

Yes. As with the federal and state governments, tribal governments are not required to authorize their courts to hear every type of controversy. Consequently, an aggrieved party may have no court capable of hearing his or her case regarding a reservation dispute if the only court that could hear the case is a tribal court and the tribal council has not authorized tribal courts to adjudicate that type of controversy.[124]

TERO REGULATIONS

OF THE THREE AFFILIATED TRIBES

(Approved by TERO Commission 5-8-12)

PART 1.

GENERAL PROVISIONS

1.1 Purpose

The following regulations are issued pursuant to the authority granted to the Mandan Hidatsa and Arikara Employment Rights Office (hereinafter "TERO") by the Mandan Hidatsa and Arikara Tribal Employment Rights Ordinance, which requires preference in contracting and subcontracting to Indian-owned firms by all contract awarding entities operating within the exterior boundaries of the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction.

1.2 Dissemination

The obligation of all employers to comply with Tribal Employment and Contract rights requirements shall be made known to all existing and future entities. All bid announcements issued by any tribal, Federal, state or other private or public entity shall contain a statement that the successful bidder will be obligated to comply with these Regulations and that a bidder may contact the TERO to obtain additional information. Those tribal and other offices responsible for issuing business permits for the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction or otherwise engaged in activities involving contact with prospective employers on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction shall be responsible for informing such prospective employers of their obligations under these Regulations.

1.3 Definitions

(a) "Certified Firm" means a firm that is certified as an Indian owned and controlled firm pursuant to the terms and procedures provided for in these Regulations.

(b) "Commercial Enterprise" means any activity by the Nation or of the federal or state governments that is not a traditional government function as defined by the Internal Revenue Service.

(c) "Covered Employer" means any employer employing two or more employees who during any 20-day period, spend, cumulatively, 16 or more hours performing work within the exterior boundaries of the lands on which the Mandan Hidatsa and Arikara Nation has jurisdiction.

(d) "Employee" means any person employed for remuneration.

(e) "Employer" means any person, partnership, corporation or other entity that employs, for wages, two or more employees.

(f) "Entity" means any person, partnership, corporation joint venture, government, governmental enterprise, or any other natural or artificial person or organization including the Nation. The term entity is intended to be as broad and encompassing as possible to ensure the Ordinance's coverage over all employment and contract activities within the Nation's jurisdiction, and the term shall be so interpreted by the Commission and the Courts.

(g) "Indian" means any member of a federally recognized tribe.

(h) "Local Indian" means any member of a federally recognized tribe who has resided within the exterior boundaries of the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction or has lived near the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction for no fewer than 60 days prior to asserting a right granted by this Ordinance.

(i) "Nation" means the Mandan Hidatsa and Arikara Nation

(j) "Near the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction" means an Indian who resides at a location which is within a reasonable daily commuting distance of the job site at issue.

(k) "Non-local Indian" means a member of a federally-recognized tribe who does not live on or near the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction.

(l) "Reservation" shall mean those lands on which the Mandan Hidatsa and Arikara Nation has jurisdiction.

(m) "TERO" means the Mandan Hidatsa and Arikara Tribal Employment Rights Office

1.4 Coverage

(a) Employment

These employment preference regulations shall apply to any employer who employs two or more employees, who during any 20-day period spend, cumulatively, 16 or more hours performing work within the exterior boundaries of the lands on which the Mandan Hidatsa and Arikara Nation has jurisdiction. However, they shall not apply to any direct employment by the Mandan Hidatsa and Arikara Nation, the federal government, the State governments, or the subdivisions of such governments. It shall apply to all contractors or grantees of such governments and to all commercial enterprises operated by such governments.

(b) Contracting and Subcontracting

The contract and subcontract preference requirements of these regulations shall apply to any entity that awards one or more contracts and/or subcontracts for supplies, services, labor, or materials, the total amount of which exceeds $5,000, so long as the majority of the work shall occur on the reservation or the majority of the supplies or materials shall be used on the reservation. However, these requirements shall not apply to the award of any contract where the award is made directly by the State, a subdivision of the State, or the Federal government. The regulations shall apply in the award of subcontracts by entities which have received such direct contracts from the State or Federal government. They shall also apply to the award of any contract by the Mandan Hidatsa and Arikara Nation, its subdivisions, commercial enterprises, and other entities of the Nation.

(c) Employment Rights Fee

The employment rights fees of 2 and 1/2 % shall apply to any covered employer.

1.5 Submission of Compliance Plans

Each covered employer or entity intending to engage in business activity on the lands on which the Mandan Hidatsa and Arikara Nation has jurisdiction, prior to the time it commences work on the reservation, must submit a contracting, subcontracting, employment, and/or training plan to the TERO. No new employer or entity may commence work on the lands on which the Mandan Hidatsa and Arikara Nation has jurisdiction until it has met with the TERO and developed an acceptable plan for meeting its obligations under these Regulations. A covered employer or entity that fails to submit an acceptable plan in a timely manner shall be in violation of the TERO Code and subject to fines and other sanctions pursuant to Title VII of that Code.

(a) Employment and Training Plan

The employment and training plan shall show the number of man-hours, by craft and skill category, needed on the project. The employer or entity shall also identify those persons it wishes to have approved as permanent and key employees (see subsection 2.1(b) of the Regulations) and shall provide all data needed by the TERO to verify the status of those employees. As provided in Section 2.1, all non permanent key positions shall be filled with local Indians unless the TERO has determined that there is no qualified Indian available for that position. The plan shall also describe how the employer will participate in the Nation's training programs.

(b) Contracting and Subcontracting Compliance Plans

Each covered entity intending to engage in business activity on the reservation, prior to the time it commences work on the reservation, must submit a contracting and subcontracting plan to the TERO. No new entity may commence work on the lands over which the Mandan, Hidatsa and Arikara Nation has jurisdiction until it has met with the TERO and developed an acceptable plan for meeting its obligations under these Regulations. A covered entity that fails to submit an acceptable plan in a timely manner shall be in violation of the TERO Ordinance and subject to fines and other sanctions pursuant to Title VII of that Code.

The contracting and subcontracting plan shall indicate all contracts and subcontracts that will be entered into by such entity on said project and the projected dollar amounts thereof. If

the entity has already selected a firm to perform any contract or subcontract work, it shall list the name of that firm and indicate whether or not it is a firm certified as Indian preference eligible by the TERO. If it is not a certified firm, the entity shall further indicate why any technically qualified and certified firm, if any, that registered with the TERO was not selected. The plan shall also indicate how the entity intends to comply with Part 3 of these regulations when awarding all contracts and subcontracts not yet awarded at the time the plan is submitted.

PART 2.

INDIAN PREFERENCE IN EMPLOYMENT AND TRAINING

2.1 Hiring

(a) Tribal Hiring Hall

An employer may recruit and hire workers from whatever sources are available to him and by whatever process he so chooses, provided that except as provided in subsection (b) he may not employ a non-local Indian or non-Indian until he has given the Tribal Employment Rights Office 72 hours to locate and refer a qualified local Indian. However, in cases where a worker is needed in a shorter period of time, the employer may so request from the TERO and said request shall be granted so long as the employer can demonstrate that need exists. The TERO Director may enter into agreements with contractors providing that all hiring shall be done through the TERO.

Where an employer or the TERO cannot locate a qualified local Indian, they shall make a best faith effort to locate, refer and hire an Indian who does not qualify as a local Indian, but who is a member of a federally-recognized tribe.

(b) Permanent and Key Employees

Prior to commencing work on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction, a prospective employer and all subcontractors shall identify key regular, permanent employees. Such employees may be employed on the project whether or not they are local Indians. A regular, permanent employee is one who is and has been on the employer's or subcontractor's annual payroll, or is the owner of the firm (as against one who is hired on a project-by-project basis). A key employee is one who is in a top supervisory position or who performs a critical function such that a employer would risk likely financial damage or loss if that task were assigned to a person unknown to the employer. The fact that an employee had worked for the employer on previous projects shall not qualify that employee as a regular, permanent employee; provided, that exceptions for superintendents and other key personnel who are not permanent, regular employees may be granted by the TERO Director on a case-by-case basis. Any employer or subcontractor which fills vacant employment positions in its

organization immediately prior to undertaking work pursuant to a contract to take place on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction shall set forth evidence acceptable to the TERO Director that its actions were not intended to circumvent these requirements. Upon its approval of each key, regular, permanent employee requested by the employer, the TERO shall issue a permit to that worker.

(c) Sanctions

Any non-local Indian found to be employed by the covered employer who was hired in violation of the requirements of these Regulations shall be summarily removed from the job and the employer shall be subject to such additional sanctions as the Commission may impose. In imposing sanctions under this section, the Commission shall consider such factors as:

1. was the violation intentional?
2. did the employer act quickly to remove the employee at issue?
3. has the employer been cited for other work permit violations in the past?

(d) Termination

No local Indian worker shall be terminated so long as a non-local Indian or non-Indian worker in the same craft is still employed. The non-Indians shall be terminated first, and then non-local Indians so long as the Indian or local Indian meets the threshold qualifications for the job. Further, if the employer lays off by crews, qualified local Indians shall be transferred to crews that will be retained, so long as there are non-local Indians or non-Indians in the same craft employed on the crews that are to be retained.

(e) Unions

An employer or subcontractor who has a collective bargaining agreement with one or more labor unions must obtain written agreements from said unions indicating that they will comply with these Indian preference requirements. Specifically, the contractor may make initial job referral requests to the union. However, if the union does not have a qualified local Indian worker on any of its out-of-work lists, the union shall contact the TERO. If the TERO can identify a qualified local Indian worker, that worker shall be referred through the union

hiring hall to the job site. The union may not refer a non-local Indian or non-Indian until it has so contacted the TERO. Before referring the non-local Indian or non-Indian to the job site, the union shall request and the TERO shall issue a work permit for that worker.

No Indian worker shall be required to travel to a site off the reservation to be processed by the union hiring hall. Such processing shall be done on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction or by telephone or mail.

Any Indian worker who does not wish to become a member of the union shall be granted a temporary permit for the duration of the project. Said worker shall pay all union dues but shall not be required to pay an initiation fee.

2.2 Training

All employers, as requested by the TERO, shall participate in training programs to assist Indians become qualified in the various job classifications used by the employer. Employers engaged in construction shall participate in the Tribe's BAT certified training program or a union apprenticeship program. All trainees or apprentices shall be local Indians. Where an employer is not presently participating in a union apprenticeship program, the Tribe shall make a best effort to bear the costs of such training programs, but employers may also be required to bear part of the cost. Employers with collective bargaining agreements with unions may use union apprenticeship programs so long as they obtain agreement from the unions to use only Indian apprentices on the project.

2.3 Job Qualifications, Personnel Requirements and Religious Accommodations

An employer may not use any job qualification criteria or personnel requirements which serve as barriers to the employment of Indians and which are not required by business necessity. The burden shall be on the TERO to demonstrate that criterion or personnel requirement is a barrier to Indian employment. The burden will then be on the employer to demonstrate that such criterion or requirement is required by business necessity. If the employer fails to meet this burden, he will be required to eliminate the criterion or personnel requirement at issue. Employers shall also make reasonable accommodation to the religious beliefs of Indian workers. In implementing these requirements, the TERO shall be guided by the principles established by

the EEOC Guidelines. However, the TERO reserves the right to go beyond the EEOC principles in order to address employment barriers that are unique to Indians.

Where the TERO and employer are unable to reach agreement on the matters covered in this section, a hearing shall be held, as provided for in these Regulations. The TERO Director shall make a determination on the issues and shall order such actions as he deems necessary to bring the employer into compliance with this section. The employer may appeal the decision of the TERO Director under the procedures provided for in Part 5 of these regulations.

2.4 Promotion

The employer shall give local Indians preferential consideration for all promotion opportunities and shall encourage local Indians to seek such opportunities. For all supervisory positions filled by non-local Indians or non-Indians, the employer shall file a report with the TERO stating which local Indians, if any, applied for the job, the reasons why they were not given the job, and what efforts were made to inform local Indian workers about the job opportunity.

2.5 Summer Students

Local Indians shall be given preference in the hiring of summer student help. The employer shall make every effort to promote after-school, summer, and vacation employment for Indian youth.

2.6 Retaliation

No employer shall punish, terminate, harass, or otherwise retaliate against any employee or other person who has exercised his or her rights under the TERO Ordinance or has assisted another to do so. Further, any employer who harasses or abuses an employee of the TERO who is carrying out official duties under this Ordinance shall be summarily removed from the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction. An employer shall be responsible for the actions of all of its employees, supervisory or otherwise, and for the actions of its subcontractors and their employees in regard to the prohibitions in this section.

2.7 Counseling and Support Programs

The TERO, in conjunction with other tribal and Federal offices, will provide counseling and other support services to Indians employed by covered employers to assist such Indians retain employment. Employers shall be required to cooperate with such counseling and support services.

PART 3.

INDIAN PREFERENCE IN CONTRACTING AND SUBCONTRACTING

3.1 Entity Obligations

(a) Generally

Every entity engaged in any business activity within the reservation, including, but not limited to, construction, minerals development, supplies, service, and retail, shall give preference to firms certified by the Tribe under Part 4 of these Regulations in any contract or subcontract to be awarded by it so long as 50% or more of said contract or subcontract is to be performed on the reservation and so long as there are certified firms that are technically qualified and willing to perform the work at a reasonable price, as defined by section 3.5 of this Part. If the entity determines that certified firms lack the qualifications to perform all of the work required under a contract or subcontract, the entity shall make a good faith effort to divide the work required into small portions so that the certified firms can qualify for a portion of the work.

(b) Order of Preference

The following order of preference shall apply in the award of contracts and subcontracts:

1. Competition in the award of all contracts and subcontracts shall be limited to firms that have been certified as Indian firms by the TERO; provided that, if the bid submitted by a responsive and responsible firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work and its price is reasonable.
2. If only one responsive and responsible Indian certified firm is available, the awarding entity shall negotiate with said firm and award to it if its price is reasonable and it is technically qualified to perform the work.
3. If the awarding entity determines, through a review of the list of certified firms that there are no certified firms with the technical qualifications to perform the work, it

may, with the approval of the TERO director, award the contract through a full and open competition; provided that, if the bid submitted by a responsive and responsible firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work.

(c) Notice to TERO and to Certified Firms

Any entity planning to issue a bid, request for proposal, or other action leading to the employment of a contractor who would be covered by this Ordinance and regulations shall notify the TERO of its plans no fewer than twenty days prior to issuing notice to bidders or other potential contractors. The entity shall also obtain from the TERO a list of Indian preference certified firms and shall send a copy of the bid notice or other notice setting out the contract opportunity to each Indian preference certified firm engaged in the field of commerce in which the contract work will take place. The TERO shall identify such firms according to the order of preference set out in subsection (b) of this section. An entity that fails to comply with this requirement shall be subject to the sanctions set out in Article VII of the TERO Ordinance.

(d) Proviso

Provided, that if any requirement of these Regulations is inconsistent with the requirements of a Federal law or regulation, the latter shall take precedence. As used in these Regulations, the terms "contract" and "subcontract" apply to all contracts, including, but not limited to, contracts for construction, supplies, services, and equipment, regardless of tier.

3.2 Preference on Contracts and Subcontracts Involving Oil and Gas Exploration, Production, and Ancillary Services

(a) Order of Preference

"Qualified Indian Contractors" that are 100% owned and controlled by enrolled members of the Three Affiliated Tribes shall have first preference on all contracts and subcontracts in connection with oil and gas exploration, production, and ancillary services. (The term "Qualified Indian Contractors" is as defined in the TERO Ordinance and Regulations.) All entities engaged

in activities in connection with oil and gas exploration, production, and ancillary services, when awarding contracts or subcontracts that are subject to this section shall:

1. Review the TERO list of qualified Indian Contractors to determine if there is one or more of the Three Affiliated Tribes is registered with the TERO.
2. If there is more than one such firm described in subparagraph 1, the entity awarding the contract or subcontract shall limit bidding to such firms and award to the firm that meets the awarding entity's qualification regarding technical capability and price. Bids shall be opened in the TERO office with a TERO Employee present to observe the bid opening.
3. The decision on technical qualification and reasonable price shall rest solely with the awarding entity unless the TERO determines the awarding entity is improperly using those criteria to circumvent its obligations under the TERO Ordinance.
4. If no technically qualified firm offers a price that the awarding entity considers reasonable, the awarding entity shall seek to negotiate a reasonable price with the technically qualified firm that offered the lowest price.
5. The awarding entity may not reject a firm defined in subparagraph 1 on the basis of price and then award to a firm that is not 100% owned and controlled by a member of the Three Affiliated Tribes at a higher price.

6. If there is only one firm described in subparagraph 1 on the TERO list of Qualified Indian Contractors, the awarding entity shall negotiate with said firm and make award to it if it meets the awarding entity's qualifications regarding technical capability and price. The decision on technical qualification and reasonable price shall rest solely with the awarding entity, unless the TERO determines the awarding entity is improperly using those criteria to circumvent its obligations under the TERO Ordinance.
7. If there are no firms described in subparagraph 1 on the TERO list of Qualified Indian Contractors, the awarding entity shall follow the process as set out above, except that bidding shall be limited to Qualified Indian Contractors that are 51% or more owned and controlled by enrolled members of the Three Affiliated Tribes and registered with the TERO as having the necessary technical capability to perform the work in the general area that is the subject of the contract or subcontract.
8. If there are no firms described in subparagraphs 1 or 7 of this Subsection on the TERO list, or if the awarding entity followed the process set out in this subsection and was unable to find a firm that had the technical capability or that offered a reasonable price, it may Then go to non-enrolled members members of federal recognized tribes and finally to non-indian firms.

9. The term "reasonable price" as used in this subsection shall mean as a general rule, a price that is within 10% of the amount the awarding entity has estimated it would spend on that contract or subcontract. And the term "reasonable price" shall also mean a price that is within 2.0% of the amount the awarding entity has estimated it would spend on a vendor contract or subcontract.
10. Notwithstanding the requirements set out in paragraphs 1 through 9 of this Subsection, if an awarding entity:
    - ***a.*** Has entered into a contactor or subcontract with a Qualified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes after complying with the procedure set out in this Subsection; and
    - ***b.*** The awarding entity wishes to use that Qualified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes on subsequent contracts or subcontracts involving work in the same general business area as the initial contract or subcontract;
    - ***c.*** 2.5% For Vendors.

Then the awarding entity, after verifying with the TERO that the firm remains certified as a Qualified Indian Firm that is 100% owned by one or more members of the Three Affiliated Tribes, may enter into one or more subsequent contracts or subcontracts with that Qualified Indian

Firm that is 100% owned by one or more members of the Three Affiliated Tribes without first following the procedures set out in paragraphs 1 through 9 of this Subsection. The awarding firm shall send notice of the award of each subsequent contract(s) or subcontract(s) to the TERO within 20 days of its execution. The notice shall set out the name of the Qualified Indian Firm, the general business area of the contract or subcontract, the dollar amount, and the duration.

(b) Obligations of Qualified Indian Contractors

1. To be eligible for preference pursuant to Subsections 3.2(a)(1) or (7), a firm must be registered with the TERO as capable in the general business area in which the awarding entity is seeking a contractor or subcontractor. The TERO has established categories of business areas for oil and gas related activity (e.g., trucking, mud, Allottees signatures). To obtain registration in a category, a firm must demonstrate it has the experience or staff that are capable and equipment need to perform in that business area (herein after called "Fitness") and that the Indian owner(s) upon whom certification is based has the experience or staff that are capable and/or education to effectively manage a company engaged in that area of work. If a firm lacks such experience, capability, or equipment in a business area, it will need to obtain the experience or capability on work that is not subject to the TERO's Indian contract and subcontract preference program before it will be listed in that business area. Proof of Fitness in a category shall include:

a. Detailed list of current inventory and/or copies of current equipment leases and proof of payment.

b. Copies of all necessary certification and licenses of employees including but not limited to driver's license and adequate liability insurance.

c. The Indian Owner Must Show Proof that He or She has the experience or staff within his company who have the knowledge to engage in that business area.

d. Resumes of all key employees.

e. Must reveal financial records if requested by TERO.

f. A new company shall have 1 year probation to prove viability of company and provide references before they receive Permanent TERO Certified Indian Contractors listing status.

2. In evaluating whether a firm is a Qualified Indian Contractor and whether a firm is qualified to perform work in a particular business area, the TERO will evaluate whether the structure, finances equipment arrangements, management and other factors are ones that are consistent with normal and customary business practices in that business area. TERO will reject any firm whose factors indicate the firm's structure is so atypical for a business in that area that it is likely the firm was created to or is seeking work in a business area in order primarily to take advantage of Indian preference and not as firm that has the potential to be a successful Indian business over the long term in

general or in that business area. For example, a firm that relies inordinately on leased equipment and contract employees will not be certified. A firm whose sole experience is in gathering Allottees signatures will not be certified for Indian preference for a trucking contract.

(c) Performance of Work by the Qualified Indian Firm

1. On any contract or subcontract received by a Qualified Indian Firm as a result of a preference provided by this Ordinance, the Qualified Indian Firm must perform no less that 51% of work with its own employees. 51% of the work is defined as "51% of the total amount of the contract, minus the cost of equipment and supplies, shall be expended on employees of the Qualified Indian firm."
2. On any contract or subcontract received by a Qualified Indian Firm as a result of a preference provided by this Ordinance, the Qualified Indian Firm must either own at least 51% of the equipment or have an equipment lease arrangement that is normal and customary in that business area.

(d) Joint Venture Agreements, 51% Indian Ownership, and Memberships

1. Any firm whose qualifications rely in any significant manner on a joint venture or mentorship with a non-Qualified Indian Contractor or on the qualifications of a non-Indian owning 49% or less of the firm must meet the following requirements in order to obtain or retain certification as a Qualified Indian Contractor:
    a. The Firm must submit a plan demonstrating that at the end of three Indian preference contracts or three years, whichever comes first, that

it has made progress toward ownership and that the total buyout occurs within 10 years.

b. For firms reliant on mentorships or joint venture relationships with non-Indian firms:

    i. The firm shall, submit copies of any mentorship, joint venture or partnership agreement the firm is relying on to demonstrate its capability to work in a particular area.

    ii. Must show proof that the partnership includes off reservation work or projects.

c. Any Qualified Indian Contractor that fails to meet these requirements shall be notified by the TERO that its certification as a Qualified Indian Contractor will be withdrawn. The notification shall specify which requirement(s) the firm failed to meet and the information the TERO relied on to make its determination. The firm shall have ten days to request a hearing before the TERO Commission at which it will be given an opportunity to demonstrate that the decision of the TERO was incorrect.

d. Any Qualified Indian Contractor who fails to meet the conditions set out in the contract or subcontract it was awarded pursuant to these Indian preference requirements, such as failure to perform, or that abandons the job before completion, shall:

    i. Lose its eligibility to bid as a Qualified Indian Contractor or any contract or subcontract for a period of six months; and

ii. Be reinstated as a Qualified Indian Contractor only upon reapplying and demonstrating that is has corrected the problems that led to its loss of eligibility. The decision to reinstate a contractor shall be at the discretion of the TERO Commission.

(e) Obligation of Awarding Entity

An entity awarding a contract or subcontract to a Qualified Indian Contractor pursuant to these Regulations shall:

1. Provide mentoring the Qualified Indian Contractor to assist it succeed on the contract or subcontract. The Awarding Entity shall submit to the TERO its mentoring plan within 10 days after the Qualified Indian Contractor begins work.

2. Inform the TERO within 15 working days if a Qualified Indian Contractor failed to perform on a contract or subcontract, abandoned the contract or subcontract, or engaged in any other actions that may constitute ground for the Qualified Indian Contractor to have its certification withdrawn or suspended, with specific information so that the TERO may exercise its responsibilities under subsection 3.2(d)(1)d of these Regulations.

3. At the end of the contract or subcontract, provide the Qualified Indian Contractor's performance on that contract or subcontract, with a copy to the TERO. The evaluation shall contain sufficient specificity to enable the Qualified Indian Contractor to determine how it can improve its performance in the future.

3.2 (f) Subcontracting

A tribally controlled company or a 51%/49% may sub-contract, but must first contact all 100% owned firms and then the 51%/49% firms to see if they can do the work before bringing a non-Indian subcontractor. The Company must provide however evidence that 100% and 51%/49% firms were first of all contacted via written correspondence.

3.3 Requirements in Contracting

Preference shall be given to Indian certified firms in the award of all contracts. An entity may select its contractor in any manner or procedure it so chooses. Provided that:

(a) Competitive Award

(1) If the entity uses competitive bidding or proposals, competition shall be limited to certified firms. If the entity is unsure if there are any qualified certified firms, it may first publish a prior invitation for certified firms to submit a Statement of Intent to respond to such a limited advertisement when published and to furnish, with the Statement of Intent, evidence sufficient to establish their technical qualifications, provided that, if the bid submitted by a firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work.

(2) If the entity fails to receive any Statement of Intent from a technically qualified certified firm, it may, after so notifying the TERO, advertise for bids or proposals without limiting competition to certified firms and may award to the low bidder, provided that, if the bid submitted by a firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work.

(3) If only one certified firm submits a bid or Statement of Intent, the entity (unless otherwise prohibited by federal law or regulation) shall enter into negotiations with that firm for a period not to exceed ten days and shall award the contract to that firm so long as the firm is technically qualified and is willing to perform the work at a reasonable price as defined in section 3.5 of this Part.

(b) Negotiated Award

If the entity selects its contractor through negotiations or other informal process, it may not enter into a contract with a non-certified firms unless it has contacted every certified firm in the relevant field and has determined that there is no certified firm available that is technically qualified to perform the work required at a reasonable price as defined in section 3.5.

So long as a certified firm meets the minimum threshold qualifications, no non-certified firm may be selected.

(c) Sole Source Negotiations with Tribal Contracting Firms by Tribal Entities and Programs

Notwithstanding subsections (a), (b) and (c) of this Section, all tribal programs and tribal entities shall give a right of first refusal for the work on any project funded by tribal or Tribal entity dollars and/or PL 93-638 funds to a Tribally-owned contracting firm qualified to perform the work on the project. The Tribal program or entity that is letting the contract on the project shall engage in negotiations with the qualified Tribally-owned contracting firm to negotiate a price and terms of a contract for the work. If good faith negotiations do not result in a contract within thirty days after commencement of negotiations, the Tribal entity letting the contract may put the contract our for competitive bid in a manner consistent with subsections (a). (b) and (c) of this Section.

3.4 Requirements in Subcontracting

(a) General Requirements

Preference shall be given in the award of all subcontracts to certified firms. The contractor may select its subcontractor in any manner it so chooses. Provided that:

If the contractor uses competitive bidding or proposals, competition shall be limited to certified firms and award shall be made to the responsive and responsible firm submitting the lowest bid if its price is reasonable; provided that, if the bid submitted by a firm owned by a member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work. If the contractor is unsure if there are any qualified certified firms, it may first publish a prior invitation for certified firms to submit a Statement of Intent to respond to such a limited advertisement when published and to furnish, with the Statement of Intent, evidence sufficient to establish their technical qualifications. If the contractor fails to receive any Statement of Intent from a technically qualified firm, it may, after so notifying the TERO, advertise for bids or proposals without limiting competition to certified firms and may award to the low bid; provided that, if the bid submitted by a firm owned by a

member of the Three Affiliated Tribes is within 2% of the low bid, award shall be made to that firm if it is technically qualified to perform the work. If only one certified firm submits a bid or Statement of Intent, the contractor shall enter into negotiations with that firm and shall award the contract to that firm so long as the firm is technically qualified and is willing to perform the work at a reasonable price as defined in section 3.5.

If the contractor selects its subcontractor through negotiations or other informal process, it may not enter into a contract with a non-certified firm unless it has contacted every certified firm in the relevant field and has determined that there is not a certified firm available that is technically qualified to perform the work required at a reasonable price as defined in section 3.5. So long as a certified firm meets the minimum threshold qualifications, no non-certified firm may be selected.

(b) Special Requirements

Entities awarding construction contracts shall comply with the following special requirements in the award of subcontracts:

(1) The bid notice shall require that each bidder submit, as part of its bid, an Indian subcontract plan showing, for each subcontract it intends to enter into, the name of the firm, whether it is or is not certified, and, if not certified, why the contractor did not select a certified firm, and the projected subcontract price, as provided for in Part 1, section 1.3(b). (Since, pursuant to that section a contractor will not be permitted to commence work on the reservation unless it has an approved subcontracting plan, it is in the contract awarding entity's self-interest to declare as nonresponsive or nonresponsible any bidder who fails to submit a satisfactory plan.) The subcontract price information for each bidder shall be made available to the TERO and shall be used to ensure that a contractor has not engaged in bid shopping as a means to discourage certified firms or to force them to accept a subcontract at an unreasonably low price.

(2) It shall be illegal for any contractor or bidder to engage in bid shopping. Bid shopping is defined as any practice involving or comparable to the contacting of different subcontracting firms, informing them that a competitor has underbid them, but offering them an opportunity to underbid the competitor. Any contractor found to have engaged in bid shopping shall be prohibited from engaging in work on the reservation or, if engaged in work, shall be

liable for treble damages for any losses suffered by a certified firm as a result of the contractor's bid shopping practices. The TERO reserves the right to require any contractor to demonstrate that a reasonable relationship exists between the dollar amount of a proposed subcontract and the reasonable costs of supplies, materials, and labor.

(3) The contractor shall not be prohibited from requiring that a subcontractor provide some form of security. However, if a subcontractor bonding requirement has been imposed and an Indian firm is unable to obtain a bond, the prime contractor must permit the Indian subcontractor to provide another adequate form of security. A list of acceptable bonding alternatives is provided here:

a. No bond required on amounts of $25,000;

b. Surety bonds;

c. Cash bonds -- to 25% -- held in escrow by tribal attorney or bank;

d. Increased retainers -- 25% instead of normal;

e. Letter of credit -- 100%;

f. Letter of credit -- 10% -- with cash monitoring system;

g. Cash monitoring system;

h. Other options to be considered as they arise. The final decision on whether an alternative form of security is sufficient shall rest with the TERO.

(4) If it is determined that there is no certified firm available qualified to perform a particular subcontract because the subcontract is too large for the capacity of any one certified firm, the contractor shall make a good faith effort to divide that subcontract into smaller pieces so that several certified firms may qualify and perform the work.

(c) Technical Assistance to Indian Subcontractors

The prime contractor shall develop and submit and implement a plan to assist Indian subcontractors to develop and improve their technical and managerial capabilities.

3.5 Responsibility for Evaluating Technical Qualifications and Reasonable Price

(a) Technical Qualifications

The entity and its contractors and subcontractors shall have the discretion to determine technical qualifications. However, if the entity determines that there are no certified firms that are technically qualified, the entity must provide to each certified firm it rejects a description, in writing, of areas in which it believes the firm is weak and steps it could take to upgrade its qualifications.

If a certified firm that was disqualified on the grounds of technical qualification believes that the disqualification was the result of an improper effort by an entity, contractor, or subcontractor, to circumvent its preference responsibilities under these Regulations, it may file a complaint with the TERO. Said complaint shall be filed within 20 days after the firm was notified of its non-qualification. The burden shall be on the complaining firm to demonstrate that (a) it is qualified, and (b) its disqualification was the result of an effort to circumvent these Regulations. If after a hearing, as provided for in Part 5, section 5.3, the complaint is found to be valid, the TERO Director shall impose such sanctions as he deems appropriate, including punitive damages.

(b) Reasonable Price

An entity may use any process it so chooses for determining what constitutes a reasonable price including, but not limited to, competitive bidding (open or closed), private negotiations, or the establishment of a prototype cost ceiling before bidding or negotiations commence. However, before an entity may reject all certified firms on the basis of price, it must offer one or more of the certified firms an opportunity to negotiate price. If there is only one technically qualified certified firm, an entity must enter into negotiations on price with such firm and must contract with that firm if a reasonable price can be negotiated. No entity may reject a certified firm on the grounds that the price is not reasonable and subsequently contract with a non-certified firm at the same or higher price. Any contract modification executed between an entity and a non-certified firm during the course of a project which results in a higher price to the firm will be subject to review by the TERO to assure that the modification in price is justified and not a circumvention of this section. Any entity found to have violated this requirement by such circumvention shall be liable for treble damages for any losses suffered by a certified firm as a result of the entity's actions.

3.6 Operation of the Contract or Subcontract

Once an entity enters into a contract with a certified firm, the TERO will not intervene in any way in the relationship between the parties unless a certified firm demonstrates that action taken against it is intended primarily to circumvent the requirements of these Regulations.

3.7 Maintenance of Indian Preference Status

If a certified Indian firm receives a contract or subcontract award on the basis of Indian preference as provided for in this Part, it shall maintain its certification throughout the entire period of the contract. If, as a result of changes in the firm's ownership or control during the period of the contract, the firm no longer qualifies as a certified firm, the TERO reserves the right to take such action against the firm as it deems appropriate to preserve the purposes of these Regulations.

PART 4.

CRITERIA AND PROCEDURES FOR CERTIFYING FIRMS AS INDIAN PREFERENCE ELIGIBLE

4.1 General Statement of Policy

Pursuant to its sovereign authority, the Mandan Hidatsa and Arikara Nation (hereinafter, "the Tribe) has imposed Indian contract preference requirements as one tool for promoting the economic development of the Reservation. When used properly, Indian preference in contracting can assist in the development of Indian businesses and thereby assist the Tribe and its members to achieve economic self-sufficiency. However, if the preference is abused, it will undermine this development and discredit the preference tool. Because of this, it is the policy of the Tribe to require that an applicant for Indian contract preference certification provide rigorous proof that it is a legitimate Indian-owned and controlled firm.

In evaluating an applicant, a number of specific criteria will apply. These criteria are set out in section 4.2, the criteria section, of this Part. However, experience has shown that persons interested in abusing the Indian preference program are able to structure firms to get around most specific criteria. Therefore, in addition to applying the specific criteria, the reviewing body for the Tribe will evaluate a firm under the following general criterion: applying sound management principles, would the firm have been structured in the manner it is, and would the Indian owners have been given the amount of ownership and control they have been given, if there were no Indian preference program in existence? If the reviewing body determines that it has good reason to believe that the firm has been structured (managerially or financially) in a manner that is convoluted or inconsistent with sound business practices in order to enable the firm to qualify for Indian preference certification, the firm will be denied such certification, even if it meets the specific criteria, unless the firm is able to demonstrate beyond a reasonable doubt that it was not structured to manipulate the Indian preference criteria.

The specific criteria also require that the ownership, control, and management arrangements of a firm make sense from a sound business perspective. The Indian owners must

own and control 51% or more of the firm. One primary consideration in applying this criterion is whether the Indian owner's contribution to the firm is appropriately related to the extent of ownership given them such that sound business practice would justify their assigned share were Indian preference not a consideration. For example, assume the Indian owner paid for his 51% share through a promissory note to the non-Indian owners. In the ordinary course of business, such a transaction would not occur unless the new owner brought something of value, such as managerial or technical expertise, capital and equipment, or marketing opportunities. (The ability to qualify for Indian preference is not considered such a marketing opportunity.) Therefore, such an arrangement would be denied Indian preference certification unless some other sound business reason for the arrangement could be demonstrated. Where an Indian can demonstrate that he or she was unable to provide good value for his or her 51% share because the usual sources of capital were closed off to him or her because he or she was an Indian, that person shall be required to demonstrate that he or she extended his or her capital-raising ability as far as possible -- such that he or she is "at risk" in a significant way -- e.g., mortgaged a house or vehicle.

The Indian owner(s) must be directly involved in the firm's management. While it is not required that the Indian owner(s) be the Chief Operating Officer of the firm, at least one of the Indian owners will have to be involved in the day-to-day operations of the firm on a full-time basis and in a senior level position. The Indian person(s) in this position must have the experience or expertise in the area of business the firm is engaged in (or in management generally) to make the senior level role a legitimate one. The Indian owner(s) must also have sufficient knowledge about the firm to be accountable for the firm's activities.

Certification will not be granted to a firm where one or more of the Indian owners are not involved in the day-to-day operations of the firm in the manner described above. There is virtually no benefit to the Indian community from such passive ownership, other than profits to the owners. It could take several years for a firm to show a profit, if one in fact materializes. Yet, during that time, the non-Indian managers can benefit at the expense of the Indian community. The limited benefits to the Indian owner(s) do not justify this risk. One of two exceptions to this rule is that certification will be granted to 100% Indian-owned firms where the manager of the business is a non-Indian spouse of an Indian and the family lives on or near the

reservation. No effort will be made to distinguish between the value contributed by a non-Indian spouse versus the Indian spouse. The family's contribution will be treated as an undivided unit. The second exception is for a more "public corporation," defined as one that is owned by 10 or more persons, 70% of which is Indian-owned, and where the Chief Executive Officer is an Indian.

Joint ventures will not be granted certification as Indian preference firms, except in exceptional circumstances where it is clear that the Indian-owned firm has the capability to manage the project and the non-Indian joint venture partner is involved to provide certain technical or other specialty capability. The TERO will certify Indian-owned companies that have entered into legitimate management contracts with non-Indian firms to assist the Indian firm develop its management and technical capability.

Such rigorous criteria, giving substantial discretion to the reviewing body, are necessary and appropriate for the Indian contract preference program. Neither the Tribe nor the Indian community benefits from the establishment of "bogus" Indian firms, while the certification of such firms undercuts the credibility of the Tribe's Indian preference program. An Indian firm or individual that is unable, on its own, to qualify as the prime contractor on a large project has other options open to it besides participating in the development of a bogus firm. For example, he or she can seek work at the subcontractor or employee level and benefit from the Tribe's requirement that preference be given to Indian subcontractors and employees.

The procedural requirements for certification provide that applications shall be reviewed by the Director of the Tribe's Tribal Employment Rights Office (TERO), who shall request any additional information it believes appropriate. It will then submit the application, along with its recommended findings, to the TERO Commission. The Commission shall review the application and findings, interview the principals of the firm, request additional information as appropriate, and then make a determination on whether certification should be granted. The firm will have a right of appeal to the Tribal Court, which shall reverse the decision only if it finds that the decision was arbitrary or capricious.

A firm shall first receive a probationary certification, to be made final at the end of one year; or a longer period where the Commission believes such is necessary. The TERO Office

shall have the right, at any time, either on their own initiative or upon the filing of a complaint by any party, to conduct an investigation of a firm to determine if its certification should be suspended or withdrawn. The TERO Office shall require new applications from firms that had been certified by the Tribe prior to the adoption of these criteria. If it is determined that a firm does not qualify under the new criteria, the firm will be given four months to come into compliance with the new criteria. If it fails to do so by the end of that period, its certification shall be withdrawn.

4.2 Criteria for Indian Contract Preference Certification

To receive certification as a firm eligible for Indian preference, an applicant must satisfy all of the criteria set out in this section.

(a) Ownership

The firm must be 51% or more Indian-owned. The applicant must demonstrate the following:

1. Formal Ownership. That an Indian or Indians own(s) 51% or more of the partnership, corporation, or other arrangement for which the application is being submitted. Such ownership must be embodied in the firm's organic documents, such as its stock ownership or partnership agreement. Ownership includes:

   a. financial ownership -- i.e., the Indian(s) owns 51% or more of the assets and equipment, will receive 51% or more of the firm's assets upon dissolution, and will receive 51% or more of the profits; and

   b. control -- i.e., the Indian(s) 51% or more ownership provides him or her with a majority of voting rights or other decisional authority and that all decisions of the firm are to be made by a majority vote except where otherwise required by law.

2. Value. The Indian owner(s) provided real value for his or her 51% or more ownership by providing capital, equipment, real property, or similar assets commensurate with the value of his or her ownership share. It will not be considered "real value" if the Indian(s) purchased his or her ownership share, directly or indirectly, through a promissory note, the ultimate creditor of which is the non-Indian owner of the firm or an immediate relation

thereof, or any similar arrangement, unless a convincing showing can be made that the Indian owner(s) brought such special skills, marketing connections, or similar benefits to the firm that there is a good reason to believe the arrangement would have been entered into even if there were not an Indian preference program in existence. Where the Indian participant can demonstrate that he or she could not pay good value for his or her 51% or more Indian ownership because the normal capital sources were closed to him or her because he or she is an Indian, that person may satisfy this requirement by demonstrating further that he or she extended his or her capital-raising capability as far as possible, such that the Indian participant clearly is at risk in the business in relationship to his or her means.

3. Profit. The Indian owner(s) will receive 51% or more of all profits. If there is any provision that gives the non-Indian owner a greater share of the profits, in whatever form and under whatever name, such as through management fees, equipment rental fees, or bonuses tied to profits, certification will be denied. Salary scales will be reviewed to ensure the relative salaries being paid Indian and non-Indian owners are consistent with the skills of the parties and are not being used to circumvent the requirement that Indian owners receive 51% or more of the profits.

(b) Management Control

The firm must be under significant Indian management and control. The firm must be able to demonstrate that:

1. One or more of the Indian owners must be substantially involved, as a senior level official, in the day-to-day management of the firm as his or her primary employment activity. The Indian owner does not have to be the "Chief Executive Officer." However, he or she must, through prior experience or training, have substantial occupational ties to the area of business in which the firm is engaged such that he or she is qualified to serve in the senior level position and is sufficiently knowledgeable about the firm's activities to be accountable to the Tribe for the firm's activities. This provision may be waived when:

a. the firm is 100% Indian owned and the Chief Executive Officer is the spouse and/or parent of the owner(s), the family lives on or near the reservation, and the majority of employees are Indian; or

b. the firm is modeled on a publicly-held corporation such that it is owned by 10 or more persons, is at least 70% Indian-owned, the Chief Executive Officer and the highest-salaried employee in the firm is/are Indian, and a majority of the employees are Indian.

(c) Integrity of Structure

There must be good reason to believe that the firm was not established solely or primarily to take advantage of the Indian preference program. In evaluating an applicant under this criterion the TERO will consider the factors set out below. The TERO shall exercise broad discretion in applying these criteria in order to preserve the integrity of the Indian preference program and in questionable cases shall deny certification.

1. History of the Firm

Whether the history of the firm provides reason to believe it was established primarily to take advantage of the Indian preference program, and in particular whether the firm, a portion of the firm, or key actors in the firm originally were associated with a non-Indian owned business that gained little of business value in terms of capital, expertise, equipment, etc., by adding ownership or by merging with an Indian firm.

The Certified Indian Contractor shall determine qualified and responsive subcontractors they deem to be qualified and or contractible within their firm.

2. Employees

Whether key non-Indian employees of the applicant are former employees of a non-Indian firm with which the Indian firm is or has been affiliated, through a joint venture or other arrangement, such that there is reason to believe the non-Indian firm is controlling the applicant.

Whether Indians are employed in all or most of the positions for which qualified Indians are available. A high percentage of non-Indian employees in such positions will provide reason to believe the firm was established primarily to benefit non-Indians.

The Certified Indian Contractor shall determine offers for employment they deem to be qualified or employable within their firm.

3. Relative Experience and Resources

Whether the experience, expertise, resources, etc., of the non-Indian partner(s) is so much greater than that of the Indian(s) that there is little sound business reason for the non-Indian to accept a junior role in the firm other than to be able to take advantage of the Indian preference program.

(d) Brokers

Brokers will be certified only if they are dealers who own, operate, or maintain a store, warehouse, or other establishment in which the commodities being supplied are bought, kept in stock, and sold to the public in the usual course of business; Provided, that this requirement shall not apply where the applicant demonstrates that it is customary and usual in the area of trade for a broker/dealer not to maintain an establishment and to keep the commodities in stock.

(e) Manufacturing Companies

In determining whether or not a manufacturing firm is 51% Indian-owned and controlled, the Commission shall be guided by the Small Business Administration Standard Operating Procedures on certifying firms as eligible for the 8(a) program.

4.3 Certification Procedures

(a) Application for Certification

A firm seeking certification as an Indian preference eligible firm shall submit a completed application to the TERO on a form provided by the TERO Office. (Application forms may be obtained at the TERO office.) The TERO director will be available to assist a firm fill out the application. Within 21 days after receipt of a completed application, the TERO Director shall review the application, request such additional information as he believes appropriate (computation of the 21-day period shall be stayed during the time any request for additional information is outstanding), conduct such investigations as it deems appropriate, and submit an analysis and recommended disposition to the Commission. Copies of the analysis and recommended disposition shall be kept confidential and shall not be made available to the applicant or any other party. When it is so required, the TERO Office may extend the processing period by an additional 21 days, by sending notification of the extension to the applicant by registered mail. Within 15 days of receipt of the TERO's analysis and recommended disposition,

the Commission shall hold a hearing on the application, posting notice of the hearing time at the Tribal Office, the Agency, and the TERO Office at least five days prior to the hearing. Only the Indian principal(s) of the firm shall be present at the hearing. In addition, any other party wishing to present information to the Commission shall be entitled to do so, by requesting, no less than one day prior to the hearing, an opportunity to participate. A party may not be represented by counsel. Hearings shall be conducted as provided for in the TERO Hearing Procedures.

(b) Probationary Certification

An applicant granted certification shall be issued a one-year probationary certificate. During that period, the TERO Office shall monitor the firm's activities to ensure that the firm is operating in the manner described in its application. During the probationary period, the TERO Office shall have the right to request and receive such information and documents as they deem appropriate.

(c) Final Certification

At the end of the probationary period the Commission, after receiving recommendations from the TERO Director, shall either:

1. grant full certification;
2. continue the probationary period for up to six months; or
3. deny certification.

(d) Withdrawal of Certification

From the information provided in reports required by sections 3.3(f) and 5.1, on the basis of a written grievance filed by any other firm or person, or on its own initiative, the TERO may initiate proceedings to withdraw or suspend the certification of any firm. The TERO director shall prepare an analysis and recommended disposition for the Commission and shall send the firm notice, by registered mail, that its certification is being examined, along with the grounds therefor. The Commission shall then set a date for a hearing, which shall be held within 21 days after it receives the analysis and recommended disposition from the TERO. At the hearing, the TERO Director shall present the case for suspension or withdrawal, and the hearing shall be conducted as set out in section 5.2. After the hearing, the Commission may:

1. withdraw certification;

2. suspend certification for up to one year;

3. put the firm on probation; and/or

4. order that corrective action be taken within a fixed period. A firm that has had its certification withdrawn may not reapply for a period of one year.

(e) Firms Certified Prior to the Adoption of These Criteria

Each firm holding Indian preference certification from the Tribe prior to the effective date of these Regulations shall submit an application required under these criteria to the TERO within 30 days after the effective date of these Regulations. If the TERO determines the firm qualifies under these new criteria, it shall, within 21 days of receipt of the application, so recommend to the Commission, which, unless it has grounds to act to the contrary, shall, without the requirement of a public hearing, issue a new certificate within 30 days of receipt of the TERO's recommendation. If the TERO has reason to believe the firm does not qualify, it shall prepare an analysis of the reasons therefore along with its recommended disposition. The analysis shall be submitted to the Commission within 21 days after receipt of the application. Should the TERO require additional information from the firm, computation of the 21-day period shall be stayed by the Commission for a reasonable time to permit such information to be provided. The Commission, after providing the firm an opportunity for a hearing as provided in section 5.2, which shall be held within 15 days after receipt of the TERO's findings, shall:

1. grant the firm a new certification; or

2. determine that the firm is not in compliance. If the Commission determines that the firm is not in compliance, it shall provide the reasons therefore. The firm shall then have 15 days from the date of the decision to demonstrate to the Commission that it has made such changes as are necessary to come into compliance. If at the end of the 15-day period the firm has failed to come into compliance, its certificate shall be withdrawn. A copy of the withdrawal notice shall be sent to the firm.

(f) Change in Status and Annual Reports

Each certified firm shall report to the TERO, in writing, any changes in its ownership or control status within 60 days after such changes have occurred. Each certified firm, on the anniversary of its receipt of permanent certification, shall update the information provided in its initial application on an Annual Report form provided by the TERO. Failure to provide information pursuant to these requirements shall constitute grounds for withdrawal of certification.

PART 5.

TERO FEES

5.1 Provision for Collection of Fees

Except as provided in Section 2, all fees are due and shall be paid in full by any covered employer prior to his or her commencing work on the reservation, unless other arrangements are agreed to, in writing, by the Director.

Immediately upon becoming aware that a covered employer is intending to engage in work on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction, the Director shall mail to said employer by registered mail, a notice informing him of the nature and the purpose of the fee, the percentage, the specific amount due, if known, the date due, and the possible consequences if the employer fails to comply. Said notice shall be accompanied by a formal notice of fees due.

If the employer fails to pay the fee by the day it commences work on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction, interest shall begin accruing on that date at the rate of 10% per annum. Further, following the day on which the employer commences work, the Director shall send a notice to the employer by registered mail, informing him that his payment is overdue and of the consequences that will result if the fee is not paid immediately.

If the fee is not paid by the 15th day after the employer commenced work, the Director shall file a formal charge of non-compliance, and shall schedule a Commission hearing to be held in five days or as soon thereafter as the Commission can meet, and shall inform the employer of the scheduled hearing.

At the hearing, to be held whether or not the employer attends, the Commission shall determine whether or not the employer has failed to comply. If it finds non-compliance, it shall:

(a) Impose penalties of up to 10% of the amount due.

(b) Petition the Tribal Court to uphold the decision of the Commission and to enforce it through confiscation proceedings as provided for in Section 16 of the Ordinance.

Where the Director or Commission has reasonable cause to believe that an employer will flee the jurisdiction before the procedures set out above can be completed, they may apply any of the procedures provided for in Section 15 of the Ordinance, notwithstanding the above procedures.

5.2 Employers with a Permanent Place of Business on the Lands Over Which the Mandan Hidatsa and Arikara Nation Has Jurisdiction

An employer that the Director determines will have a permanent place of business on the reservation shall pay the fee pursuant to the following procedures:

(a) On April 15, July 15, October 15, and January 15, the employer shall submit, on a form provided by the Director, information showing his total payroll for the previous quarter, accompanied by a check for an amount equal to 1/2 of 1% of the payroll for that quarter.

(b) The Director, upon receipt of a written request, may authorize, in writing, an employer to submit the information and payments on a quarterly schedule other than the one set out in subsection "a", when doing so would make the schedule compatible with the employer's fiscal year structure.

(c) An employer covered by this section shall be subject to the same interest, penalty and enforcement requirements and deadlines as those established in section 1. The Director shall send said employers appropriate notices and forms.

5.3 Alternative Arrangement

The Director, in his discretion, may, upon receipt of a written request, authorize an employer to pay the required fees in installments over the course for the year or the contract, as appropriate, when:

(a) The total annual fee exceeds $10,000, and

(b) The employer demonstrates hardship or other good cause.

The decision to authorize an alternative arrangement, which shall be in writing, shall rest solely with the TERO Director and may not be appealed to the Commission or the Courts.

The employer shall pay interest, at the prime rate, on all amounts paid after the day he commences work on the reservation when paying under an alternative arrangement.

PART 6.

ADMINISTRATIVE PROCEDURES

6.1 Reports and Monitoring

All entities engaged in any aspect of business activity on the reservation shall submit reports and such other information as is requested by the TERO. Employees of the TERO shall have the right to make on-site inspections during regular working hours in order to monitor an entity's compliance with these Regulations. Employees of the TERO shall have the right to inspect and copy all relevant records of an entity, of the entity's signatory unions or subcontracts, to speak with workers on the job site, and to engage in similar investigatory activities. All information collected by the TERO shall be kept confidential, unless disclosure is required during a hearing or appeal as provided for in these Regulations.

6.2 Individual Complaint Procedures

(a) Non-Compliance by an Entity

Any Indian, group of Indians, representatives of a class of Indians, certified firm, group of certified firms, or other person or entity who believes that an entity has failed to comply with these Regulations, or who believes that they have been discriminated against by a covered entity because they are Indian may file a complaint with the TERO. Persons may file whether or not they can show that they were personally harmed by the entity's non-compliance.

(b) Non-Compliance by the TERO

Any entity, group of entities, non-certified firms, group of non-certified firms, non-Indian worker, group of non-Indian workers or other person or entity who believes that an action of the TERO office under these Regulations is in violation of these Regulations, the Mandan Hidatsa and Arikara Nation Code, or Federal law or regulation may file a complaint with the TERO. Persons may file whether or not they can show they were personally harmed by the TERO's action.

6.3 Compliance and Hearing Procedures

(a) Informal Settlement

If, based on a complaint filed pursuant to Section 5.2 or on its own information, the TERO has reason to believe that an entity covered by these Regulations has failed to comply with any of these requirements, the TERO shall so notify the entity in writing, specifying the alleged violation(s). If the party so notified is a contractor or subcontractor, notice shall also be provided to the entity holding the permit or authorization under which the contractor or subcontractor is operating, and such entity shall be a party to all further negotiations, hearings, and appeals. The TERO shall then conduct an investigation of the charge and shall attempt to achieve an informal settlement of the matter. If voluntary conciliation cannot be achieved and the Director has reasonable cause to believe a party has violated the Ordinance or Regulations, he shall issue a formal notice of non-compliance to the party and shall proceed with the enforcement procedures as set out in Title VII of the Ordinance.

(b) Procedures for Hearing

All hearings before the Commission shall be governed by the Due Process Hearing Procedures at Part 7 of these Regulations.

6.4 Sanctions

The Commission may impose any or all of the following sanctions where it finds a violation of Ordinance or Regulations, pursuant to the procedures set out in Title VII of the Ordinance. If after the hearing, the Commission determines that the violation alleged in subsection (a) occurred and that the party charged has no adequate defense in law or fact, or if no hearing is requested, the Commission may:

(a) Deny such party the right to commence business on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction;

(b) Impose a civil fine on such party in an amount not to exceed $500 for each violation;

(c) Suspend such party's operation on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction;

(d) Terminate such party's operation on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction;

(e) Deny the right of such party to conduct any further business on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction;

(f) Order such party to make payment of back pay to any aggrieved Indian;

(g) Order such party to dismiss any employees hired in violation of the Tribe's employment rights requirements.

(h) Order the party to take such other action as is necessary to ensure compliance with this Ordinance or to remedy any harm caused by a violation of this Ordinance.

The Commission's decision shall be in writing, shall be served on the charged party by registered mail or in person and shall be submitted no later than thirty days after the close of the hearing. Where the party's failure to comply immediately with the Commission's orders may cause irreparable harm, the Commission may move the Tribal Court for, and the Tribal Court shall grant, such injunctive relief as necessary to preserve the rights of the beneficiaries of this ordinance, pending the party's appeal or expiration of the time for appeal.

6.5 Appeals

Any entity or complaining party shall have the right to appeal any decision of the Commission to the Tribal Court, pursuant to the procedures set out in Title VII of the Ordinance.

6.6 Bonds

The Director may require an entity to post a bond with the Commission pending a hearing before the Commission, pursuant to Title VII of the Ordinance, and may petition the Court to require an employer to post a bond pending an appeal to the Court from a decision of the Commission, pursuant to Title VII of the Ordinance, upon making a written finding that any of the conditions set out below exists. The entity:

(a) has no permanent place of business on the lands over which the Mandan Hidatsa and Arikara Nation has jurisdiction; and

(b) the amount of the sanctions exceeds or likely will exceed $1,000; and

(c) the project on which the entity is employed will be substantially completed within 60 days, such that it may be difficult to locate property of said employer on the reservation that would be available for attachment or confiscation if the entity fails to pay any sanction imposed on it; or

(d) the entity has failed to comply with an order of the Commission or the Courts in the past, and the employer has engaged in behavior that demonstrates a blatant disregard for the authority and requirements of the Commission, such that the Director or Commission has good reason to believe the entity will not comply with the orders of the Commission or the Court.

6.7 Attachment

The Commission may petition the Court for attachment of property of an entity, pursuant to Section 16B, when it finds that any one of the conditions set out below exists:

(a) An entity has refused or failed to post a bond after being so order to do so by the Director, Commission, or Court, as provided in Section 6.6 of this part; or

(b) The Commission has good reason to believe the entity will remove itself or its property from the reservation before it can complete its effort to require the entity to post a bond; or

(c) The entity has demonstrated, through its behavior an intent to disregard the requirements and orders of the Director, Commission or Court.

6.8 Irreparable Harm

A finding of irreparable harm, such that the Director, pursuant the Title VII of the Ordinance, or the Commission pursuant to Title VII, may petition the Court for injunctive relief, shall be made only upon a showing that damage will occur than cannot be adequately remedied through the payment of monetary damages. Such a showing shall include but is not limited to the following:

(a) That a contractor or subcontractor is about to or has begun work on a contract or subcontractor entered into in violation of the provisions of the Ordinance or

regulations requiring contract or subcontract preference, when there are one or more Indian firms available to perform said contract or subcontract, since it is impossible to measure in monetary terms the damages suffered by an Indian firm's failure to obtain a contract or subcontract.

(b) An entity or its subcontractors is about to or has hired four or more persons in violation of the provisions of the Ordinance or Regulations requiring Indian employment preference, and there are Indians available to fill those positions, since it is difficult to identify the specific Indians who would fill those positions once the number of positions at issue is four or greater, making the payment of payback difficult to achieve.

(c) An entity refuses to submit a preference plan in the time required and indicates through words or action that it intends to disregard the requirement imposed by the Ordinance and Regulations.

PART 7.

DUE PROCESS HEARING PROCEDURES

7.1 Pre-Hearing Procedures

(a) Review of TERO Files

The respondent (the employer or entity against whom a charge has been filed) shall have the right to review the case file of the TERO Director (the Director) by scheduling a visit to the TERO office during regular working hours at any point after receiving notice of a hearing. However, the Director shall have the right to "sanitize" any portion of the file to protect confidential information. The file shall be sanitized in a manner that causes the loss of the least amount of relevant information from the files.

(b) List of Witnesses

Ten (10) days prior to the hearing (or as soon as possible if the hearing is to be held within ten (10) days after notice.) the respondent and the Director shall submit to the Commission Chairman a list of witnesses each intends to call at the hearing, the approximate length of their testimony, and the subject matter and relevance of their testimony. It shall indicate any witnesses that must be subpoenaed. The Director shall then issue the subpoenas.

(c) Pre-Hearing Interviews of Witnesses

The respondent and the Director shall have the right to interview the witnesses of the other party, prior to hearing. The Director's witnesses shall be interviewed in the presence of the Director or his delegate. The respondent's witnesses shall be interviewed under such reasonable conditions as are established by the respondent. Either party may appeal to the Chairman of the Commission if cooperation is not forthcoming on this matter and the Chairman is empowered to require such steps as are necessary to resolve the problem.

(d) Subpoenas of Documents and Things

The respondent shall, no later than 10 days prior to the hearing (or as soon as possible if the hearing is noticed less than ten (10) days before the hearing) provide the Director with a list of items it wishes to have subpoenaed and the relevance of each. The Director shall

subpoena all relevant items listed as well as items needed by the Director. Any disputes shall be brought to the Chairman of the Commission who shall resolve such disputes.

(e) Postponements

Any request for a postponement of the hearing must be submitted in writing to the Chairman of the Commission no fewer than three (3) days prior to the hearing. However, if the Director and respondent mutually submit a request for a postponement because there is a possibility of settling the matter, the request for a postponement may be submitted at any time.

7.2 Conduct of the Hearing

(a) Presiding Officer

As presiding official, the Chairman of the Tribal Employment Rights Commission will control the proceedings. He or she will take whatever action is necessary to insure an equitable, orderly, and expeditious hearing. Parties will abide by the presiding official's rulings. The presiding official has the authority, among others, to:

1. administer oaths or affirmations;
2. regulate the course of the hearing;
3. rule on offers of proof;
4. limit the number of witnesses when testimony would be unduly repetitious; and
5. exclude any person from the hearing for contemptuous conduct or misbehavior that obstructs the hearing.

(b) Director

The TERO Director shall represent the TERO on all charges filed by it, even if the charge was initiated by a complaint filed by a private individual.

(c) Respondent

The respondent shall be present for the entire hearing and he or his representative (other than an attorney) shall represent him during the proceedings.

(d) Attorneys

Either party may have an attorney present as an advisor. However, the attorney may not make any presentations, cross-examine witnesses or address the Commission.

(e) Recording of the Hearing

The Commission shall have the hearing tape recorded in full and shall retain the tape(s) for no less than one (1) year after the hearing. The respondent shall also be permitted to tape the hearing.

(f) Prohibition Against Reprisals

All parties shall have a right to testify on their own behalf, without fear of reprisal.

(g) Starting Time

The hearing shall be opened promptly at the time specified by the Commission.

(h) Opening Statements

Both parties will be afforded the opportunity to present opening statements with respect to what they intend to prove at the hearing.

(i) Order of Proceeding

The Director will present the TERO's case first.

(j) Examination and Cross Examination of Witnesses

Both parties may subpoena and examine friendly and hostile witnesses. Both parties may examine and cross-examine witnesses. However, no harassment or efforts to intimidate witnesses shall be permitted. The Commission members may examine witnesses at any point in their testimony. The testimony of all witnesses shall be under oath or affirmation.

(k) Irrelevant Testimony

Parties may object to clearly irrelevant material, but technical objections to testimony as used in a Court of law will not be entertained. The Commission shall prohibit any testimony that it deems clearly irrelevant in order to keep control of the hearing.

(l) Written Testimony

Written testimony will be admitted into evidence during the hearing only when a witness cannot appear in person. When a party wishes to use the written testimony of a witness who cannot appear, the party must submit, in advance of the hearing, a written explanation for

the non-appearance of the witness to the Tribal Business Preference Commission. If the Commission is satisfied with the explanation, the party will obtain the testimony by means of an interrogatory. When, for reasons satisfactory to the Commission, an interrogatory cannot be used, an affidavit or a deposition from the witness may be used. A signed, but, unsworn statement will be admitted into evidence only under unusual circumstances and when the Commission is satisfied that the testimony cannot be obtained otherwise.

(m) Closing Statement

Closing statements for each party will be permitted. The Director shall proceed first.

(n) Audience

The hearing shall be open to the public. However, the Commission may remove any person who disrupts the hearing or behaves in an inappropriate manner.

7.3 The Decision

The decision shall be in writing and issued within 30 days after the hearing. The decision shall consist of the following parts, in the following order:

(a) The facts,

(b) The finding of violation or no violation on each charge filed by the Director, along with the legal and factual basis for the finding,

(c) The orders and/or sanctions imposed, if any,

(d) Information on the respondent's right to appeal,

(e) Information on the authority of the Commission to act if the party fails to comply with its orders or fails to appeal, and

(f) The injunctive relief or bonding requirements, if any, that the Commission will seek from the Court pending the completion of the appeal if an appeal is filed, or the running of the time for the appeal if no appeal is filed.

UNIFORM LAWS ANNOTATED

Volume 6 Pt. I

Business and Nonprofit Organizations and Associations Laws

With
Annotations From State and Federal Courts

UNIFORM PARTNERSHIP ACT (1997)

1997 ACT

[ARTICLE] 1

GENERAL PROVISIONS

Section

[ARTICLE] 2

NATURE OF PARTNERSHIP

[ARTICLE] 3

RELATIONS OF PARTNERS TO PERSONS DEALING WITH PARTNERSHIP

[ARTICLE] 4

RELATIONS OF PARTNERS TO EACH OTHER AND TO PARTNERSHIP

[ARTICLE] 5

TRANSFEREES AND CREDITORS OF PARTNER

NATURE OF PARTNERSHIP

§ 201. Partnership as Entity.

(a) A partnership is an entity distinct from its partners.

(b) A limited liability partnership continues to be the same entity that existed before the filing of a statement of qualification under Section 1001.

Comment

RUPA embraces the entity theory of the partnership. In light of the UPA's ambivalence on the nature of partnerships, the explicit statement provided by subsection (a) is deemed appropriate as an expression of the increased emphasis on the entity theory as the dominant model. *But see* Section 306 (partners' liability joint and several unless the partnership has filed a statement of qualification to become a limited liability partnership).

Giving clear expression to the entity nature of a partnership is intended to allay previous concerns stemming from the aggregate theory, such as the necessity of a deed to convey title from the "old" partnership to the "new" partnership every time there is a change of cast among the partners. Under RUPA, there is no "new" partnership just because of membership changes. That will avoid the result in cases such as *Fairway Development Co. v. Title Insurance Co.*, 621 F.Supp. 120 (N.D. Ohio 1985), which held that the "new" partnership resulting from a partner's death did not have standing to enforce a title insurance policy issued to the "old" partnership.

Subsection (b) makes clear that the explicit entity theory provided by subsection (a) applies to a partnership both before and after it files a statement of qualification to become a limited liability partnership. Thus, just as there is no "new" partnership resulting from membership changes, the filing of a statement of qualification does not create a "new" partnership. The filing partnership continues to be the same partnership entity that existed before the filing. Similarly, the amendment or cancellation of a statement of qualification under Section 105(d) or the revocation of a statement of qualification under Section 1003(c) does not terminate the partnership and create a "new" partnership. See Section 1003(d). Accordingly, a partnership remains the same entity regardless of a filing, cancellation, or revocation of a statement of qualification.

Action in Adopting Jurisdictions

Variations from Official Text:

ARIZONA

In subsec. (b), substitutes "is the same entity" for "continues to be the same entity".

MONTANA

Omits "distinct from its partners".

NEBRASKA

Subsec. (b) provides:

"A limited liability partnership is a syndicate for purposes of Article XII, section 8, of the Constitution of Nebraska, except that a registered limited liability partnership in which the partners are members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day-to-day labor and management of the farm or ranch and none of whom are nonresident aliens, is not a syndicate for purposes of Article XII, section 8, of the Constitution of Nebraska. A limited liability partnership continues to be the same entity that existed before the filing of a statement of qualification under section 54 of this act."

NORTH DAKOTA

In subsec. (b), substitutes "the registration under chapter 45–22" for "a statement of qualification under Section 1001".

TENNESSEE

In subsec. (b), substitutes "an application under" for "a statement of qualification under".

WASHINGTON

In subsec. (b), substitutes "an application under" for "a statement of qualification under".

WYOMING

Omits "distinct from its partners".

Treatises

General and Limited Liability Partnerships Under the Revised Uniform Partnership Act. Robert W. Hillman, Allan W. Vestal, and Donald J. Weidner. West Publishing Company, 1996.

Law Review and Journal Commentaries

Historical view of limited partnership roll-ups: Causes, abuses, and protective strategies. Gordon B. Shneider. 72 Denv.U.L.Rev. 403 (1995).

Limited Liability for Lawyers: General Partners Need Not Apply. Jennifer J. Johnson, 51 Bus.Law. 85 (1995).

Library References

Partnership ⇐ 1, 63, 349
WESTLAW Topic No. 289
C.J.S. Partnership §§ 1–7, 17, 68, 403

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

Generally 1

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1. Generally

Under Kansas law, any doubtful terms in partnership agreement had to be construed against partnership as drafter of document. In re Villa West Associates, C.A.10 (Kan.) 1998, 146 F.3d 798.

Knowledge possessed by one partner concerning general partnership's business is deemed to be possessed by all partners. Zimmerman v. Dan Kamphausen Co., Colo.App.1998, 971 P.2d 236, modified on denial of rehearing, certiorari denied.

§ 202. Formation of Partnership.

(a) Except as otherwise provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

(b) An association formed under a statute other than this [Act], a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this [Act].

(c) In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

DATED this 16th day of May, 2013.

Respectfully submitted,

PEARCE & DURICK

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