



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

# Notice

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

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Classification Code  
**N 4720.7**

Date  
**March 15, 1993**

1. PURPOSE. To consolidate all previous guidance for Federal Highway Administration (FHWA) field officials, State Highway Agencies, and their subrecipients and contractors regarding the allowance for Indian preference in employment on projects on and near Indian reservations.
  
2. BACKGROUND
  - a. Section 122 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURRA) amended Section 140 of Title 23, United States Code (U.S.C.) by adding a new subsection (d) to allow Indian preference in employment on Federal and Federal-aid Indian Reservation Roads (IRR).
  
  - b. Instructions to implement Section 122 of the STURRA of 1987 were issued on October 6, 1987, in a memorandum from the FHWA Administrator to Regional Administrators. The FHWA field offices were to encourage States to meet with Indian tribes and Tribal Employment Rights Offices (TERO) to develop contract provisions for Federal-aid highway projects which would promote employment opportunities for Indians on reservations.
  
  - c. Section 140(d) of Title 23, U.S.C., was amended by Section 1026 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) to include that "States may implement a preference for employment of Indians on projects carried out under this title near Indian reservations."
  
3. GUIDANCE
  - a. In order to ensure consistent application of Section 140(d) of Title 23, U.S.C., as amended, the following clarification is provided:
    - (1) Applicability - eligible projects for Indian preference consideration

are those projects which are on IRRs, (i.e., roads within or providing access to an Indian reservation or other Indian lands as defined under the term "Indian reservation roads" in Section 101 of Title 23, U.S.C., and regulations issued pursuant thereto), or are not on IRRs, but are near the boundaries of reservations and other Indian lands. Bureau of Indian Affairs (BIA) maps showing Indian Land Areas can be obtained from BIA Area Offices listed in the attachment. Roads "near" an Indian reservation are those within a reasonable commuting distance from the reservation.

(2) Eligible Employees - All Indians are eligible for employment preference. However, recruiting efforts may be targeted toward those living on or near a reservation or Indian lands (as defined above). Indian employment preference is to be applied without regard to tribal affiliation or place of enrollment.

### (3) Indian Preference Goal

(a) During project development, State and Tribal representatives are to confer to make determinations regarding Indian employment goals for the contractor's work force who are other than core crew members; and, if necessary, consider the impact of other work in the area on the available work force. A contractor's core crew is composed of full time employed individuals necessary to satisfy his/her reasonable needs for supervisory or specially experienced personnel to assure an efficient execution of the contract work. Any Indian already employed by a contractor shall be included in the core crew, regardless of job function, to avoid the unintended results of having a contractor lay-off or terminate an Indian employee to hire another under this provision.

(b) In setting reasonable Indian employment goals, consideration should be given to the availability of skilled and unskilled Indian workers, the type of work to be performed, the contractor's employment requirements, and, with regard to projects near reservations, unemployment rates prevailing among non-Indians. Also to be considered are the employment goals for minorities and women established for the area by the U.S. Department of Labor's Office of Federal Contract Compliance Programs pursuant to Chapter 41, Code of Federal Regulations, Part 60.4.

(c) Once established, the goals should only be changed by the State after consultation with the Indian Tribal government representative or TERO and the contractor; and, after



consideration of the good faith efforts of the contractor together with the ability of the Tribal government or TERO to refer workers in numbers and in time for the contractor to meet the goal and perform the work.

(d) Within 1 week of the placement of a job order by the contractor, if the responsible Indian employee referral agency is unable to provide sufficient qualified or qualifiable applicants to meet the employment goal, the contractor, ensuring nondiscrimination and providing equal employment opportunity, may employ persons living off the reservation. The contractor shall give full consideration to all qualified job applicants referred by the TERO, Tribal Employment and Contracting Rights Office (TECRO), or designated tribal council representative. The contractor is not required to employ any applicant who, in the contractor's opinion, is not qualified to perform the classification of work required.

(e) When an Indian employment goal has been inserted in a contract, the State will follow normal contract compliance, or contract administration oversight procedures to effect compliance. The States may elect to invite TERO, TECRO, or designated tribal council representatives to assist their monitoring efforts in all or any part of its compliance process. The State should review the contractor's employment practices and take appropriate enforcement actions when the goal is not reached after consideration of good faith efforts. Sanctions for failure to meet the goal should be determined in advance and be made a part of the contract to facilitate enforcement.

(4) TERO Tax - many tribes have established a tax which is applied to contracts for projects performed on the reservation. Tribes may impose this tax on reservations, but they have no tax authority off reservations. In off reservation situations, TERO's can bill contractors at an agreed upon rate for services rendered, i.e., recruitment, employee referral and related supportive services. The proceeds are used by the tribes to develop and maintain skills banks, to fund job referral, counseling, liaison, and other services and activities related to the employment and training of Indians. It has been FHWA's longstanding policy to participate in State and local taxes which do not discriminate against or otherwise single out Federal-aid highway construction contracts for special or different tax treatment.

Therefore, if the TERO tax rate on highway construction contracts is the same as that which is imposed on other contracts on the reservation, such costs are eligible for Federal-aid reimbursement.

4. ACTION. The FHWA field staffs are to provide information, advice, and assistance to States, Tribal governments, and TERO representatives and to work with them to meet the intent of the ISTEA. To assist in meeting these responsibilities, the FHWA Office of Civil Rights will be offering a course, sponsored by the National Highway Institute, addressing Indian preference in employment on highway projects on and near reservations. The intended audience of the course is State, local government, Tribal and TERO representatives and contractors.

Original signed by:  
E. Dean Carlson  
Executive Director

Attachment

(Attachment not available)

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