NATIONAL INDIAN JUSTICE CENTER
5250 Aero Drive
Santa Rosa, California 95403
A non-profit corporation
Phone: (707) 579-5507
Fax: (707) 579-9019
E-mail: nijc@aol.com

Joseph A. Myers, Executive Director

An Analysis of the California Department of Transportation's Decision to Revoke its Policy to Include Tribal Employment Rights Ordinances in its Contracts for Projects On and Near Indian Reservations

BACKGROUND

On February 14, 2005, a dispute developed between the Smith River Rancheria and the California Department of Transportation (the Department) concerning the tribe's assertion that its Tribal Employment Rights Ordinances (TERO)[1] must be applied to all projects and contractors. A contractor for a project involving a state right-of-way falling within reservation boundaries refused to sign a form acknowledging the applicability of TERO to the project. Consequently, the Department's Civil Rights Division requested an opinion from the Department's Legal Division concerning the Department's legal obligation to enforce TERO provisions in its contracting.

The Legal Division's opinion concluded that Art. 1, sec. 31(a) of the California Constitution (a.k.a. Proposition 209) prohibited state agencies from granting preferential treatment in the operation of public employment, contract or education. Consequently, the Department halted its practice of employing and enforcing TERO provisions in its contracts for

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[1]. A Tribal Employment Rights Ordinance (TERO) is a legislative act adopted by the governing body of a federally recognized tribe. While each tribe has the sovereign right to adopt any language that it chooses, a TERO generally governs the contracting provisions between a tribe and any contractor and may include provisions concerning: Announcement and advertising of jobs; Indian preference in hiring goals; Permits to do business on tribal lands; TERO tax; Training and/or skills requirements; Discrimination; Fees; Personnel policies; Inspections Dismissal/Lay offs; and Non-compliance.

all projects near tribal lands. In effect, this action violates the Department's policy DD-74-R which states that "[t]he Department encourages Native American employment opportunities on transportation projects and supports TERO adopted by federally recognized California Native American Tribes." At the request of the Native American Advisory Board to the Department and Legal Division, this paper will analyze the legal issues and the position of the Department as outlined in the opinion.

The Legal Division's opinion presented two questions, as follows:

1. Can the Department recognize and comply with the Native American TERO hiring preferences and reimburse its contractors that recognize the TEROs?
2. Can the Department pay a tribe imposed TERO tax for projects and if so, can it pay the tax on State owned right-of-ways on the reservation?

The Legal Division's opinion reviewed several cases, Proposition 209 and whether tribes could assert a TERO tax on the Department or its contractors. The following analysis focuses on the historical and legal context of Indians as a political class, the applicability of Proposition 209 to a political class, and the Department's duties as outlined in its policies concerning TERO.

ANALYSIS

A. INDIANS: POLITICAL, RACIAL AND/OR ETHNIC CLASS

The Legal Division's analysis begins with a discussion of Indian preference. In it's opening paragraph for the analysis section, the Legal Division identifies several key terms that are essential to the discussion of the issues presented: Indian preference, race and political preference. First, to establish a clear foundation for discussion of any legal issue involving Indians, it is necessary to understand that "Indian" is a complex legal term. Further, Indian preference, race and political class (not preference as stated in the opinion) are also complex legal terms when used in a discussion involving Indians or Indian tribes. These terms must be presented and understood within that legal context. Indian tribes did not create these legal terms. Instead, these legal terms are applied to Indians as a result of a historical legal relationship between the United States federal government and federally recognized Indian tribes and their members, federal statutes and case law.

The term "Indian" has been used both as an ethnological term and a legal term. Legally, a person may be an Indian if they meet the criteria set forth by a federally recognized tribe which may include but is not limited to a measurement of blood quantum, whether a person is a descendant of a person recognized on government census rolls, a descendant of another enrolled Indian, and/or a descendant of a person who received a distribution from government settlement of treaty or land disputes. So, a person may be a federally recognized Indian if they are ethnologically 1/4 Indian and 3/4 African American or any other ethnic group. Ethnologically, this is not logical; however, due to the legal status of Indians it is not only logical but commonplace.

The legal status of an Indian depends upon many social factors. Due to the displacement of Indians in California after the treaties negotiated with the federal government were not ratified and California Indian tribes were forced to disperse from their homelands, federally recognized tribal communities in California may consist of persons from unrelated family groups as well as multiple tribal groups. Biological and ethnological factors are not determinative of Indian status. Laws and ordinances governing tribal enrollment are controlling. For example, tribes may have adoption and/or banishment laws. Thus, a person adopted into a federally recognized tribe may be a member of a tribe and not have any blood relation to any other member of the same tribe. In addition, a person who is 100% biologically Indian may be banished from the tribe and will not be considered a federally recognized Indian for the purposes of tribal and federal programs.

When it comes to federal case law, the most used definitions for the terms "Indian" and "Indian Tribe" are found in Titles 25 (Indians), 18 (Criminal Code) and 43 (Public Lands) of the federal code. There are many other federal statutes that also define the terms Indian, Indian Tribe and Indian country. The context of the statute determines the scope of the definition of the term. Regardless of the variation among those definitions, the definitions encompass the notion that Indians are members of certain social-political groups towards which the Federal Government has assumed special responsibilities. (Cohen's Handbook of Federal Indian Law, Ch. 1, p. 5.)

The term Indian preference has been the subject of U.S. Supreme Court cases concerning

discrimination and due process. The most noted case is Morton v. Mancari[2] which upheld an Indian preference in hiring provision enforced by the U.S. Department of Interior's Bureau of Indian Affairs. The U.S. Supreme Court characterized the term Indian as political not racial. The Court recognized that an entire title of the U.S. Code (Title 25 - Indians) could not have been effectively adopted by Congress if Indians were in fact a racial classification. California is preempted by federal law with respect to the interpretation of whether Indian is a political class rather than a racial or national origin class.

> *Since Mancari, the federal courts of appeal have concluded that employment preferences are a viable part of federal Indian policy. The Ninth Circuit has upheld both Indian Self-Determination and Education Assistance Act (25 U.S.C. § 458(e)(b)) employment and contracting preferences in Alaska. In Preston v. Heckler, (734 F.2d 1359 (9th Cir. 1984)) the court noted that "Congress [clearly] considers Indian [hiring] preferences to be an important element of federal Indian Policy." Also, in Livingston v. Ewing, (601 F.2d 1110 (10th Cir. 1979), cert. denied, 444 U.S. 870 (1979)) a Tenth Circuit Court of Appeals upheld the practice of allowing only Native Americans to display and sell handcrafted jewelry in the city square. The court justified the discriminatory treatment by finding that furthering of the public's education of Indian culture was a legitimate governmental interest. In upholding the preference, the court cited [Mancari] to support its own holding that the Title VII exception also applies to non-reservation lands near reservations.*[3]

More recently, in Yashenko v. Harrah's NC Casino Co.[4], the U.S. Court of Appeals for the Fourth Circuit heard a case in which the plaintiff alleged that an Indian preference policy enforced by Harrah's, a subcontractor for the Cherokee Tribe of North Carolina, violated his rights pursuant to 42 U.S.C.A. §1981 which prohibits discrimination in employment on the basis

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2 417 U.S. 535 (1974).

3 28 Seattle U. L. Rev. 403, 416 (2005).

4 446 F.3d 541 (2006).

of race. While the lower court found that the exemptions for Indian preferences contained in 42 U.S.C.A. §§ 2000e(b) and 2000e-2(I) applied and barred Yashenko's claim,[5] the Fourth Circuit found that Yashenko could not assert a § 1981 claim against Harrah's unless he joined the Tribe as a party to the lawsuit. The Tribe enjoys sovereign immunity from suit. Thus, the Fourth Circuit dismissed Yashenko's § 1981 claim on the basis that he did not join a necessary and indispensable party.[6] The Fourth Circuit opinion notes that its analysis is based upon a Ninth Circuit case "that presents facts materially indistinguishable from those at issue" in Yashenko. That Ninth Circuit case is Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150 (9th Cir. 2002).

INDIAN PREFERENCE IN HIRING, FEDERAL CODE

It is important to distinguish Indian preference in hiring from TEROs. Indian preference in hiring began with the historic federal practice to promote the hiring and retention of Indian employees especially those working for federal agencies who work with Indian tribes. TERO, on the other hand, is strictly a law adopted by a federally recognized tribe that governs the contracting relationship between the tribe and contractors and may also require that preference in hiring be given to qualified tribal members or Indians generally. The terms are often used interchangeably even though they are legally distinct terms.

Indian preference has historically been part of the federal code. In 1834, Congress enacted what is now 25 USC § 45, requiring that in all cases of persons "employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties." See also 25 USC § 46 (1882), § 44 (1894), and § 47 (1908). In 1934, the Indian Reorganization Act, Sec. 12, required that the Secretary of the Interior use Indian preference in hiring of administrators of services to Indians. In 1950, Congress enacted the Navajo-Hopi Rehabilitation Act which provided for Navajo and Hopi "preference in employment on all projects undertaken pursuant to this subchapter, and, in

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5 See Yashenko v. Harrah's NC Casino Co., LLC, 352 F. Supp. 2d 653, 663 (W.D.N.C. 2005).

6 See Yashenko, V. Harrah's NC Casino Co., LLC, U.S. Court of Appeals, 4th Cir., No. 05-1256, 2006, p. 14.

furtherance of this policy may be given employment on such projects without regard to the provisions of the civil-service and classification laws." 25 USC § 633. In 1964, Congress enacted the Civil Rights Act which exempted preferential employment of Indians by tribes or industries located on or near Indian reservations. 42 USC §§ 2000e(b) and 2000e-2(I). In 1972, Congress required that Indians be given preference in Government programs for training teachers of Indian children. 20 USC §§ 887c(a) and (d), and § 1119a. In 1972, the U.S. Supreme Court decided Morton v. Mancari ruling that the Indian preference laws governing employment in the U.S. Bureau of Indian Affairs were constitutionally permissible under the Equal Employment Opportunities Act of 1972, because they were not racially based, but are "reasonably designed to further the cause of Indian self-government . . ." 417 U.S. 535, 554 (1974). In 1975, the Indian Self-Determination Act provided Indian preferences, and later amended to provide that tribal employment laws (i.e., TEROs) adopted by the tribe shall govern with respect to the administration of a Self-Determination contract with that tribe.

There are some federal laws that require Indian Preference in hiring: P.L. 93-638 - Indian Education Assistance and Self Determination Act of 1974, HUD Revised Indian Housing Regulations. P.L. 81-815 and 874 - Higher Education Impact Aid and the Buy Indian Act of 1910. Other federal laws permit but do not require Indian Preference including: Title VII - Section 703(I) - Civil Rights Act of 1964, as Amended; P.L. 94-48 - U.S. Forest Service Native American Co-op Agreement Program; Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA); and Executive Order 11246 (Affirmative Action). There are even more supplemental laws protecting Indian status: Age Discrimination in Employment Act of 1967; Civil Rights Act of 1991 (Comp and Damages); Small Business Act 8(a) Program; Americans with Disabilities Act of 1990; Vietnam Veterans Readjustment Assistance Act of 1974; Disadvantage Business Enterprise Program (DBE); Occupational Safety & Health Act (OSHA); Rehabilitation Act, Sec. 503; Immigration Reform & Control Act of 1986; Fair Labor Standards Act; and Equal Pay Act. Clearly, Indian Preference does not violate the U.S. Constitution's provisions concerning equal protection and due process.

INDIAN PREFERENCE IN HIRING FOR FEDERAL HIGHWAY PROJECTS

FHWA Notice N 4720.7 consolidates guidance for FHWA field officials, State Highway Agencies and their sub-recipients and contractors regarding the allowance for Indian preference in employment on projects on and near Indian reservations. This notice highlights that the FHWA allows for Indian preference and will provide technical assistance to facilitate incorporation of Indian preference in state contracting.

On June 18, 2002, the U.S. Equal Employment Opportunity Commission (EEOC) Chair reaffirmed the EEOC's partnership with Native Americans in a speech to the Council for Tribal Employment Rights. The notice states that the EEOC contracts with more than 60 Tribal Employment Rights Offices to secure Indian preference agreements with employers operating on or near reservations and to process employment complaints. The EEOC Los Angeles Area Office contracts with: Campo Band of Mission Indians TERO (California), Chemehuevi Indian Tribe TERO (California), Fort Mojave Indian Tribe TERO (California), Moapa Band of Paiute TERO (Nevada), and Shoshone-Paiute Tribe TERO (Nevada).

The EEOC enforces: Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, national origin; the Equal Pay Act of 1967; prohibitions against discrimination affecting individuals with disabilities in the federal sector; sections of the Civil Rights Act of 1991; the Americans with Disabilities Act of 1990, which prohibits discrimination against people with disabilities in the private sector and state and local governments; and the Age Discrimination in Employment Act.

If TERO provisions triggered any violation of federal due process, the EEOC would not be contracting with tribal employment rights offices.

The Department's Director's Policy #19 recognizes a government-to-government relationship with ***federally recognized tribes*** in California and as such has incorporated by reference the federal criteria and definitions concerning Indians and Indian tribes (emphasis added).

MALABED V. NORTH SLOPE BOROUGH

On page 7 of its opinion, the Legal Division asserts that "TEROs are based on racial or national origin." It also asserts that "TEROs are not a political preference in that they do not

relate to the self-government rationale articulated in Mancari." The Legal Division asserts that the Ninth Circuit case Malabed v. North Slope Borough,[7] (9th Cir. 2003), 335 F.3d 864, allows for California's anti-discrimination statute (added to the California Constitution by Proposition 209) to control and prohibit the employment and enforcement of TEROs in the Department's contracting.

To properly address the assertions by the Legal Division, it is important to look at the issues, facts, standards and the holding in the Malabed decision. In this case, the plaintiff's challenge that their job applications were rejected in favor of less qualified individuals, and that the Indian preference ordinance[8] adopted by the Borough (a non-Indian governmental entity) impermissibly discriminates on the basis of race, national origin, and political affiliation. They also argued that the ordinance violated the equal protection clauses of both the Alaska Constitution and the Fourteenth Amendment to the U.S. Constitution. The Alaska Supreme Court granted certification and held that the Borough's hiring preference violates the Alaska Constitution's guarantee of equal protection because the Borough lacks a legitimate governmental interest to enact a hiring preference favoring one class of citizens at the expense of others and because the preference it enacted is not closely tailored to meet its goals." The issues concerning discrimination on the basis of national origin and violation of the federal constitution were not reached in Malabed. Thus, the Malabed decision is restricted in its application to cases involving Indian preference in hiring statutes that violate state anti-discrimination statutes and whether federal law preempts the state's anti-discrimination statute.

The equal protection clause of the Alaska Constitution, Art. I, Sec. 1, provides:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own

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7 335 F.3d 864 (9th Cir. 2003).

8 The text of the Indian preference language is as follows: "The granting of employment preference to Native Americans. The preference shall apply to hirings, promotions, transfers, and reinstatements. A Native American applicant who meets the minimum qualifications for a position shall be selected, and where there is more than one Native American applicant who meets the minimum qualification for a position, the best qualified among these shall be selected. A Native American is a person belonging to an Indian tribe as defined in 25 U.S.C. Section 3703 (10)." North Slope Borough Code § 2.20.150(A)(27). 335 F.3d 864.

industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

The Alaska Supreme Court used a three-step equal protection test:

> *To implement Alaska's more stringent equal protection standard, we adopted a three-step, sliding scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at state: [F]irst, we determine the weight of the individual interest impaired by the classification; second, we examine the importance of the purposes underlying the government's action; and third, we evaluate the means employed to further those goals to determine the closeness of the means-to-end fit.*[9]

In response to the Ninth Circuit's request for certification, the Alaska Supreme Court applied the three-step test above and held that "the Borough's hiring preference violate[d] the Alaska Constitution's guarantee of equal protection because the Borough lack[ed] a legitimate governmental interest to enact a hiring preference favoring one class of citizens at the expense of others and because the preference it enacted [was] not closely tailored to meet its goals."[10]

Alaska's three-step test is not relevant to the jurisdiction of California. Malabed is persuasive only to the extent that procedure would dictate that the federal circuit would ask the California Supreme Court to certify whether a specific TERO provision enforced in a Department contract violates California's anti-discrimination statute also known as Prop. 209. Other than that, the facts of the case are distinguishable at a fundamental level. Unlike California, the State of Alaska does not recognize the unique status of Alaska Natives as "tribes." As a result of the Alaska Native Claims Settlement Act, nearly all Alaska Native villages and communities were organized into corporations chartered under Alaska state law. In addition, after the U.S. Supreme Court decision in Alaska v. Native Village of Venetie Tribal

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9 Malabed, 70 P.3d at 420-21.

10 Id. at 420.

Government,[11] Alaska Native tribes and villages were deemed to lack sovereign authority over their lands. Consequently, the development of a TERO in Alaska would have to be done under the guise of state law rather than tribal law. In contrast, California tribes that develop TEROs do so pursuant to their individual sovereign authority which California and the Department have recognized in a variety of policies, compacts and other governing documents.

The Malabed preemption analysis specifically finds that states may outlaw discrimination and that the federal statutes do not preempt the states from applying its anti-discrimination laws outside of reservation lands. This statement makes Malabed more of a procedural precedent rather than a substantive precedent.

IS THE CALIFORNIA DEPARTMENT OF TRANSPORTATION VIOLATING CALIFORNIA STATE LAW (SPECIFICALLY PROPOSITION 209) BY ALLOWING TRIBAL EMPLOYMENT RIGHTS ORDINANCES (TERO) PROVISIONS IN ITS CONTRACTING FOR PROJECTS NEAR INDIAN LANDS?

Proposition 209 prohibits the state from granting ***"preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting."*** See Art. 1, sec. 31(a), California Constitution.

In order for the Department to assert that it is in violation of Prop. 209 by enforcing TERO ordinances in its contracting, it must show that enforcing of TERO ordinances in its contracting constitutes preferential treatment of a tribe or tribes (a group) on the basis of race, ethnicity or national origin. On page 7 of the Legal Division's opinion, the Legal Division asserts with emphasis only a portion of the language in Prop. 209. Preferential treatment alone does not constitute a violation of the California Constitution. The preferential treatment must be on one of the bases enumerated in the legislation. The Legal Division Opinion reiterates its interpretation that California prohibits preferential treatment in general on page 11. This is a manipulative misstatement of California law. In fact there are two provisions within Prop. 209

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[11] Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998).

which allow for preferential treatment on the basis of race, ethnicity or national origin if it would be inconsistent with federal law or if failure to do so would result in a loss of federal funds.

The Legal Division fails to show that TEROs constitute preferential treatment on the bases enumerated in Prop. 209. Instead, on page 6 of the Legal Division's opinion, the Legal Division asserts that the Malabed decision reviewed the rationale underlying Mancari and Indian preference. This statement is not true. On the same page, the Legal Division's opinion points to a quotation (Malabed at 15) that purports to undermine the ruling in Mancari. Malabed has had no such effect. On page 7 of the Legal Division's opinion, the Legal Division asserts that it is the state agency that must comply with the state anti-discrimination law. This is true. Unfortunately, the Legal Division further states that TEROs are based on racial or national origin bases without any evidence to support its assertion. Certainly, each TERO would have to be reviewed on a case-by- case basis to determine if it individually would violate California's anti-discrimination statute. The Legal Division points to specific provisions in the Smith River TERO to assert that it violates Prop. 209. Is there a severability clause in the Smith River TERO that would eliminate any offending provisions and save the non-offending provisions? The Legal Division does not provide enough information to make such a determination.

The dispute in Malabed concerns an Indian preference in hiring statute adopted by a political subdivision of the State of Alaska. TERO ordinances can be distinguished from the ordinance in question in Malabed. First and foremost, TERO ordinances are tribal laws designed to decrease unemployment among Indians which in turn may reduce alcoholism, drug abuse, poverty and economic dependency. If the Department chooses to employ TERO provisions in its contracting for on or near reservation lands projects,[12] then each TERO should be reviewed on a case-by-case basis to determine if the state had a legitimate governmental interest to enforce (not to enact) a hiring preference that benefits a federally recognized tribe. The enforcement of the TEROs in state contracting has already been allowed under federal and state law. Nothing, not even Malabed, has impacted those existing laws.

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[12] On page 7, the Legal Division asserts that tribes may choose to hire only Indians for projects on tribal property without triggering any violations of state law. I agree with this assertion and will refrain from any further discussion of on-reservation jurisdiction and tribal TERO enforcement.

The next question would be whether the TERO is closely tailored to meet its goals. The ordinance in question in the Malabed case allowed for hiring of Indians who were not qualified. The California Department of Transportation would have to review each TERO on a case-by-case basis to determine if it is closely tailored to meet its goals.

The final question is whether the TERO violates Proposition 209 subsection (a) which prohibits the state from granting "preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting." See Art. 1, sec. 31(a), California Constitution. If a TERO provision requires Indian preference in hiring, the provision will not violate Prop. 209 on the basis of race or national origin. Section (h) of Prop. 209 provides that Prop. 209 will be implemented to the maximum extent that federal law and the U.S. Constitution permit. The definitions of Indian and Indian tribe are found in federal statutes. The U.S. Constitution's commerce clause and treaty power clause are the sources for the trust relationship between the federal government and the tribes. Morton v. Mancari held that the challenge to an Indian preference in hiring law did not require a strict scrutiny review because Indians constitute a political class not a racial class.

TERO TAX

On page 12 of the Legal Division's opinion, the Legal Division asserts that "[r]egarding the tribal tax, generally, absent some congressional authority, an Indian tribe has no regulatory authority over non-tribal members for activities on reservation 'land alienated to non-Indians.'" This is simply a misstatement of the existing federal case law. While there is a presumption that tribes do not have regulatory authority over non-Indians on non-Indian owned fee land within the reservation (which included proven state rights of way), there are two very well known and exercised exceptions to the rule as stated in the Montana Test:

> The U.S. Supreme Court recognizes two exceptions to the main rule:
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> *[T]ribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [First, a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who*

enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Second, a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. 450 U.S. at 565-66.

This holding was crucial to the decision in FMC v. Shoshone Bannock Tribes, 905 F. 2d 1311 (9th Cir. 1990) (denied cert., 499 U.S. 943 (1991)) which held FMC (a non-Indian company doing business on non-Indian owned fee lands) was subject to the tribal TERO and was liable for damages for violation of the Shoshone Bannock Tribes TERO.

The Montana DOT v. King case specifically denies tribal application of TERO to the Montana DOT on a state right of way that was provided from the federal government using allotted lands owned in fee by Indians. The land in question in King was privately owned (not in trust) prior to the grant of the right of way by the federal government. Rights of way granted over trust lands have a different characteristic and may include jurisdictional rights reserved to the tribe. The burden will be on the state to prove that it in fact has a right of way exclusive of tribal jurisdiction.

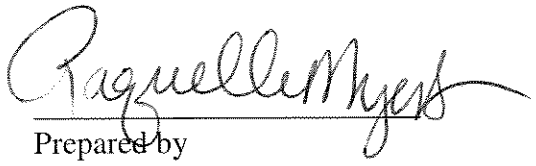
CONCLUSION

California tribes that have TEROs have adopted the laws for the purposes of reducing unemployment and the social risk factors associated with poverty. The federal government pursuant to its government-to-government relationship and trust relationship with the federally recognized tribes of the United States has encouraged the adoption of the TEROs by both tribes and federal agencies. Federal case law has found that Indian preference and tribal preference in hiring differ. The latter, tribal preference in hiring has been deemed unconstitutional.

The California Department of Transportation Legal Division is in error in its assertion that TEROs, generally, are based on racial or national origin classes. This finding can only be done on a case-by-case basis. Since some tribes may have reason to legislate only for their own members, it is possible that they possess tribal preference in hiring provisions or they may be

using "Indian" and "tribal" interchangeably. If the provision contains a severability clause, the remainder of the TERO remains in effect. If not, the TERO could be rejected. It would be to the benefit of the Department and the tribes to work together on a case by case basis to tailor the TEROs to more general Indian preference language.

To initiate a revocation of Department policy employing TERO provisions in Department contracting on the basis of Malabed without engaging in a meaningful discussion with the tribes does not provide any confidence at all that the Department has or will uphold a government to government relationship with California's federally recognized tribes on this or other future issues.



Prepared by
Ms. Raquelle Myers, Esq.
NIJC Staff Attorney
CSB# 196977