



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

MEMORANDUM

TO: Employees of Farmers Home Administration, Rural Development Administration, Rural Electrification Administration, Agricultural Cooperative Service and the Alternative Agricultural Research and Commercialization Center

FROM: Bob J. Nash 
Under Secretary

SUBJECT: The Challenges Ahead for Rural Development

DATE: March 4, 1994

Introduction

I would like to extend my greetings to all of the USDA employees in the rural development mission area. The structure of the rural development mission area has continued to evolve over the last year and I would like to welcome the employees from the Agricultural Cooperative Service and the Alternative Agricultural Research and Commercialization Center into the family of Farmers Home Administration, Rural Development Administration and Rural Electrification Administration.

Prior to the reorganization of the rural development mission area, I wanted to reflect with you on the challenges ahead for the Department and for each of us.

Vision for Rural Development

My vision for rural America is based on the need to provide economic opportunities for residents in rural communities to become more competitive in the global economy.

In many parts of rural America, families lack access to decent, affordable housing, good paying jobs, and to the basic infrastructure that many in urban areas take for granted. As we approach the 21st Century, it is my goal that all citizens have access to such basic necessities as clean water, waste disposal systems, housing, and reliable and affordable telephone and electrical systems. Our past successes in providing these items are admirable, but a review of current conditions in rural America illustrates that our work must continue.

Economic opportunities for rural Americans require more than our investment in water, waste systems, housing, family farms, energy and communications systems. Primarily, it depends on the ability of rural entrepreneurs, businesses and farmers to create family-wage jobs for rural workers. We have a major role in assisting with the creation of an environment

where rural Americans are able to create new jobs as well as to expand existing economic opportunities.

To assist in the creation of such an environment, we must change our focus and reemphasize our original missions as a provider of supervised and affordable credit to those areas of greatest need. In this period of limited resources, I have directed the senior management of the rural development mission area to focus our assistance in the following priorities: (1) communities that are experiencing trauma due to natural disasters or fundamental structural changes; (2) communities that have remained persistently poor over the last 60 years or longer; and (3) communities that have experienced long-term population decline and job deterioration.

In addition, we must improve our methods of serving rural Americans. We must do more than manage our program portfolios in an efficient manner. Needy residents of rural America should be able to know that they may rely on us for advice, for assistance in identifying opportunities, and for support in developing those opportunities. To be successful in serving this role, we must reaffirm our historical commitment to serve rural citizens and communities as our customers, with all of the requirements that such a relationship involves.

The First Year

We have already made a very good beginning. During our first year, we have had a number of accomplishments that would not have been possible without the hard work and dedication of our employees. I am particularly proud of the work that has been done on preparing a reorganization plan for the rural development mission area. I recognize how difficult it has been at times with the deadlines and the ongoing program work that all of us have juggled. There is still a great deal of work that must be completed with the reorganization and I ask for your continued involvement in process, to ensure that the reinvented USDA will be a model that demonstrates how government can work best in serving the American people and in supporting our employees.

I am also proud of the work that has been accomplished out in the states by the field staff -- over the last year, your efforts have resulted in the most tangible results, new housing and water systems for distressed communities, emergency loans for small farmers, continued electricity and telephone service at affordable rates, new businesses starts, and technical assistance provided to a diverse group of rural constituents, including cooperatives and small farmers.

There are a number of accomplishments from each of the rural development agencies that I would like to note:

- Farmers Home Administration (FmHA) was extremely effective in the difficult work with the farm foreclosure issues, reviewing nearly 1,200 cases over a six month period;
- FmHA also responded quickly and impressively to the crises in the Midwest Flooding, receiving well deserved praise from many in the Administration;

- Rural Development Administration (RDA) structured and worked with a number of other federal departments in the implementation of the President's Pacific Northwest Economic Adjustment plan and in the creation of the President's Empowerment Zones and Enterprise Communities program;
- RDA also instituted a new program to assist with the diversification of businesses in traditionally agricultural-based communities;
- Rural Electrification Administration (REA) successfully initiated an exciting new grant program for connecting rural areas to urban learning and medical centers;
- REA also demonstrated its financing ability in the processing of almost \$300 million in electric loans in the last month of the fiscal year;
- Agricultural Cooperative Service (ACS) provided assistance to nearly 150 projects in 38 states for local and emerging cooperatives;
- Alternative Agricultural Research and Commercialization Center (AARC) entered into 23 cooperative agreements with start-up companies that are seeking to commercialize non-food products from agricultural and forestry materials; and,
- The entire mission area has improved the working relationship with unions that represent agency employees.

There are many other accomplishments from each of your agencies that are too numerous to mention in this brief memorandum. I do want you to know that I recognize and appreciate your hard work.

Conclusion

In the near future, we will face some difficult challenges as we implement the restructuring and reinventing of the Department. I believe strongly that if we each embrace the changes that the agencies must make in order to be responsive to the needs of rural America, we will make the future a better place for our rural constituents and communities, our employees and for the country as a whole. I sincerely thank you for your commitment to rural Americans.

USDA'S RURAL DEVELOPMENT STRATEGY

In many parts of rural America, families still lack access to decent, affordable housing, good paying jobs, and to the basic infrastructure that many in urban areas take for granted. However, economic opportunities for rural Americans require more than investment in water and waste systems, housing, family farms and communications systems. Primarily, it depends on the ability of rural entrepreneurs, businesses and farmers to create family wage jobs for rural workers. USDA, and specifically the Rural Economic and Community Development Service, has a major role in creating an environment where rural Americans are able to create new jobs as well as expand existing economic opportunities. The emerging global economy dictates that we assist rural communities develop economies that can successfully compete in this new economy.

To assist in the creation of such an environment, we must reemphasize our original mission as a provider of supervised and affordable credit to those with the greatest need, but we also need to change our focus and approach to assisting rural Americans in creating a productive economic environment. We must become more than a lending institution offering a variety of one size fits all financial assistance to those eligible communities that are first in line. We must become an active partner, working with the States and local governments and the private sector to create an environment that fosters competitive, sustainable economic development.

This will require that State Directors and field staff have the flexibility, within existing authorities, to tailor financial and technical assistance to meet the diverse needs encountered in each State. A major part of the reorganization of the mission area is designed to delegate as much decision making authority as possible to the State Directors responsible for delivering these programs. We cannot continue to run these programs from Washington. The State Directors are in a position to better understand the needs and problems of the State, and they are in a better position to utilize our resources in conjunction with those of State and local government and the private sector.

The State Directors also serve on the State Rural Development Councils established for the purpose of building a partnership with all participants to promote effective strategic development activities, utilize resources more effectively, identify impediments, and mutually work to resolve problems by encouraging private-public collaboration. This Partnership has strong support from participating States and has been identified by the National Performance Review as model of new governance.

Consistent with this new direction, the Under Secretary for Rural Economic and Community Development has directed the senior management of the mission area to focus assistance in the following priorities: (1) communities that are experiencing trauma due to natural disasters or short-term fundamental structural changes; (2) communities that have remained persistently poor over the last 60 years; and (3) communities that have experienced long-term population decline and job deterioration.



April 9, 1996

MEMORANDUM FOR JILL LONG-THOMPSON
UNDER SECRETARY
RURAL ECONOMIC AND COMMUNITY DEVELOPMENT

FROM: James S. Gilliland *J. S. Gilliland*
General Counsel

SUBJECT: Policy Statement Concerning TEROS

I have cleared for legal sufficiency a draft policy statement prepared for your signature concerning Tribal Employment Rights Ordinances (TEROs).

As you know, the decision described in this memo embodies a policy change concerning the agencies in your mission area. There has been in place a policy that Indian Tribal governments could not impose TERO requirements on subcontracts and subgrants under grants and contracts to Tribal governments, because imposition of TEROs was considered inconsistent with the "full and open competition" requirements of Federal regulations.

As you consider the advisability of this decision, please note that the policy statement as drafted contemplates the recognition of all TERO ordinances, regardless of content. You should be aware that some TERO ordinances may have the effect of diminishing the goods and services that can be purchased with Federal funds, because the ordinances may have the effect of increasing subcontract costs. Specifically, I am referring to those TERO ordinances which impose a tax on activities carried out under the grant or contract and bidding preferences which may cause a subcontract to be awarded to other than the lowest bidder. If the goal is to treat Indian Tribal governments on a par with state and local governments, this policy statement may in fact cause tribal ordinances to be given greater deference than ordinances enacted by these other government entities. You may wish to consider whether such an unqualified policy is consistent with the goals of the USDA programs at issue.

In any event, our legal review concludes that you possess the necessary discretion to implement the decision described in the attached policy statement if you feel that this policy change is appropriate.

**TO: UNITED STATES DEPARTMENT OF AGRICULTURE,
RURAL DEVELOPMENT MISSION AREA OFFICIALS**

FROM: JILL LONG THOMPSON
Jill Long Thompson
**UNDER SECRETARY,
RURAL DEVELOPMENT MISSION AREA**

DATE: 4/8/96

POLICY STATEMENT

DESCRIPTION OF SUBJECT MATTER:

Tribal Employment Rights Ordinance (TERO).

ISSUE:

Whether the United States Department of Agriculture, Rural Development Mission Area should acknowledge the rights of federally recognized Tribal governments to impose TERO requirements on subcontracts and subgrants under contracts and grants to the Tribal governments and those for the benefit of Tribal members.

BACKGROUND INFORMATION:

As a means of addressing employment needs in Indian Tribal communities, many Indian Tribal governments have adopted various forms of a Tribal Employment Rights Ordinance (TERO). The purpose of a TERO is to ensure that when there is economic activity on or near the Reservation, which is generally under the control of the Tribal government, Indians will be afforded the opportunity to share in that activity. In the past, the USDA Rural Development Mission Area has not issued a formal policy statement which acknowledged the rights of federally recognized Tribal governments to impose TERO requirements on subcontracts and subgrants under grants and contracts to the Tribal governments and those for the benefits of Tribal members.

Although TEROs vary from Tribe to Tribe, they typically contain several common provisions which allow Tribes to enforce Native American employment preference and the imposition of taxes on operations of the subcontractor or subgrantee. Additionally, TEROs often allow for bidding preferences for Native American entities in obtaining contracts or grants unless they are the lowest bidder.

Tribal advocates have argued that based upon Tribal sovereignty rights, TEROs should be recognized by the USDA Rural Development Mission Area.

DISCUSSION:

The United States Department of Agriculture, Rural Development Mission Area should acknowledge the rights of federally recognized Tribal governments to impose TERO requirements on subcontracts and subgrants under contracts and grants to the Tribal governments and those for the benefit of Tribal members.

A TERO is an ordinance of a governmental unit (the Tribal government) and the USDA Rural Development Mission Area should permit Tribal governments to give full effect to TEROs in the administration of Rural Development Mission Area contracts, grants, and loans.

SUMMARY:

It is the policy of the USDA Rural Development Mission Area to acknowledge the rights of federally recognized Tribal governments to impose TERO requirements on subcontracts and subgrants under contracts and grants to the Tribal governments and those for the benefit of Tribal members.

The policy statement does not explicitly address the free & open competition issue



United States
Department of
Agriculture

Office of the
General
Counsel

Washington,
D.C.
20250-1400

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Wally

April 29, 1996

MEMORANDUM FOR WALLY BEYER
ADMINISTRATOR
RURAL UTILITIES SERVICE

FROM: Michael W. Kelly *mw*
Assistant General Counsel

SUBJECT: Tribal Employment Rights Ordinance (TERO)

This is a follow-up to our discussion on the recent Policy Statement, dated April 3, 1996 on TERO from the Under Secretary. I understand that the Statement was drafted in close consultation with OGC. I have attached a portion of an issue paper developed by OGC that reflects some of the considerations underlying the Statement. We will be happy to consider with RUS staff the programmatic implications of this new policy.

ISSUE.

Whether the Department of Agriculture should reverse its long-standing policy and allow for preference in the award of subcontracts and subgrants to Indian owned organizations and provide for preference in the employment of Native Americans.

BACKGROUND:

As a means of addressing employment needs in Indian tribal communities, many Indian tribal governments have adopted various forms of a Tribal Employment Rights Ordinance (TERO). The purpose of TEROs is to ensure that when there is economic activity on or near the Reservation which is generally under the control of the tribal government, Indians will be afforded the opportunity to share in that activity.

TEROs vary from tribe to tribe but typically contain several common provisions. Those provisions of interest for the purpose of this memorandum have, *inter alia*, provided:

- * A preference in awarding of contracts to Indian owned firms, if not higher than a certain percentage over the next lower bid.
- * A requirement that contractors comply with mandatory Indian hiring and firing preferences
- * A requirement that contractors pay a percentage of the contract cost to the tribal employment rights office that administers contractors' compliance with the TERO and acts as a clearinghouse or employment agency for the tribal members.
- * A requirement that contractors abide by tribally imposed numerical hiring goals and timetables.

Although some United States Government Agencies (primarily Housing and Urban Development, Interior, and Transportation) have agreed to allow tribal governments to impose TERO requirements on subcontracts and subgrants under grants and contracts to the tribal governments or for the benefit of tribal members, Agencies within the Rural Economic and Community Development (RECD) mission area have refused to do so. These Agencies cite Departmental and Agency regulations requiring free and open competition and the added expense of complying with these ordinances as a basis for this policy.

The Department of Agriculture (Department) has promulgated regulations at 7 C.F.R. part 3016 which provide "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments."¹ This part applies generally to all USDA grants, including grants to tribal governments.

The USDA-wide regulations provide that:

Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to the applicable Federal law and the standards identified in this section.

7 C.F.R. § 3016.36(b)(1). While this provision at first blush seems to provide some recognition of TEROs, the remainder of 7 C.F.R. part 3016 contains standards that restrict this provision.

7 C.F.R. § 3016.36(c)(1) establishes the overarching premise that "[a]ll procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 3016.36." This section provides further that:

Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference.

7 C.F.R. § 3016.36(c)(2). This exception to free and open competition appears to be the only one that arguably would support a regulation that would allow recognition of TEROs.

It is not clear, however, that section 7(b) of the Indian Self-Determination Act² (section 7(b)) would be considered a

¹ These regulations were drafted by OMB in consultation with affected Government Agencies and promulgated as a common (government wide) rule. These regulations replace OMB Circular A-102 and control the actions of most Government Agencies in this respect.

² 25 U.S.C. § 450 et seq. Section 7(b) provides, in part, that:

Any contract, subcontract, grant, or subgrant pursuant to . . . any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest

geographic preference. It also is not clear why the government-wide policy that is articulated in part 3016, which applies specifically to Indian tribal governments, does not recognize the Congressional policy articulated in section 7(b).

7 C.F.R. § 3016.6(b) provides that the Office of Management and Budget may provide exceptions for classes of grantees. The Congressionally articulated policy in section 7(b) -- a policy that withstands the onslaught of Constitutional challenge--could be a basis to seek an exception from OMB for that part of TEROs, which incorporate the requirement of section 7(b).

In addition the RECD regulations in conflict with recognizing some provision of TEROs also require "free and open competition."³

Section 7(b) has been interpreted by the Department to require compliance only as it pertains to programs specifically for

extent feasible --

(1) preferences and opportunities for training and employment in connection with the administration of such grants shall be given to Indians; and

(2) preference in the award of subcontract and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises

³ 7 C.F.R. § 1942.18(j)(2) provides:

Maximum open and free competition. All procurement transactions, regardless of whether by sealed bids or negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition. Procurement procedures shall not restrict or eliminate competition. Examples of what are considered to be restrictive of competition include, but are not limited to: placing unreasonable requirements on firms in order for them to qualify to do business

The Departmental policy set out in part 3016 deals with the identical subject matter as section 1942.18(j)(2) and therefore controls section 1942(j)(2) to the extent of conflicting provisions.

Native Americans.⁴ Therefore the Department has treated these requirements as discretionary as to its programs, none of which are specifically for or to the benefit of native Americans. Since at least one of the provisions of section 7(b), on its face, limits competition, it would require an exception to 7 C.F.R. § 3016.36(c)(1) and 7 C.F.R. § 1942.18(j)(2).⁵

The legal basis for the section 7(b) requirements is rooted in the distinction that a TERO is an ordinance of a governmental unit (the tribal government) and therefore is to be treated just as any other local or state statute. To the extent that the agency does not disallow employment preferences and taxes in state and local statutes in the administration of its grants such provisions of TEROs should not be similarly be disallowed. However, the approval of TERO provisions granting preference to Indian subcontractors and subgrantees, even though their bid is not the lowest competitive bid, is contrary to free and open competition and a waiver should be obtained from OMB to the provisions of § 3016.36 and the Department should amend 7 C.F.R. 1942.18(j)(2) if it is determined to conform the Departmental position to section 7(b) and allow the application of TEROs to the RECD loans and grants in question.

The President issued a memorandum dated April 29, 1994 on "Government-to-Government Relations With Native American Tribal Governments." That memorandum reads in part as follows:

Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the . . . governmental rights of tribes.

Each executive department and agency shall . . . design solutions and tailor Federal programs, in appropriate

⁴ Given that other Agencies of the Government, (specifically the Departments of Transportation, Interior, and Housing and Urban Development) allow preference for employment of Native Americans and Indian Organizations in the administration of contracts and grants, this position is not without considerable litigative risk.

⁵ The recent Supreme Court decision on minority set aside in Adarand Constructors, Inc., v. Peña, 63 U.S.L.W. 4523 (June 12, 1995) would probably not bar the implementation of any decision to comply with TEROs. Preference for Tribal actions has been upheld by the Supreme Court on a political as apposed to an ethnic basis.

circumstances, to address specific or unique needs of tribal communities.

The tribal advocates are claiming that the Department is not complying with the requirements of this memorandum.

OPTIONS:

Option 1: Continue with the present RECD policy of refusing to allow enforcement of TEROs in the administration of any RECD grant or cooperative agreement.

- Pros:
- * Provides for maximum free and open competition in accordance with Departmental and Agency regulations.
 - * Allows for maximum use of limited program funds.
- Cons:
- * At least as to those provisions of TEROs which are, conceptionally, no different than provisions of state or local laws, this option treats grants and cooperative agreements with Indian tribes differently than other governmental organizations are treated and, in that respect discriminates against Indian tribes.
 - * Will probably result in litigation. Various tribal and Indian organizations have threatened litigation in this matter, specifically as to the Department's non-compliance with section 7(b). Such litigation would have a good chance of success as to those provisions not related to free and open competition. (The Department of Justice has indicated that they would not be in accord with the Department's our legal position if litigation is instituted.)
 - * Would not bring Departmental policy into conformance with the policy of other Departments of the government and would not be in the spirit of the President's memorandum of April 29, 1994.

Option 2: Allow the enforcement of TEROs as to those provision which do not affect free and open competition. Primarily allow tribes to enforce Native American employment preference and the imposition of taxes on operations of the subcontractor or subgrantee but not allow for the preference of Native American entities in obtaining contracts or grants unless they are the lowest bidder.

- Pros:
- * Would not discriminate against tribal governments in relation to our actions with state and local Governments.
 - * Would substantially lessen the possibility of litigation and, if litigation occurs, would substantially lessen litigative risk.
 - * Would bring the Department more in line with the spirit of the President's memorandum of April 29, 1994.
 - * Would give partial effect to the legislative acts of a sovereign tribal government.

- Cons:
- * Would not completely eliminate the possibility of litigation or litigative risk.
 - * May still allow criticism of the Department for not being completely in compliance with the spirit of the President's memorandum of April 29, 1994.
 - * Would not bring the Department in line with other U.S. Government Agencies.

Option 3: Request an OMB waiver to the free and open competition requirements of 7 C.F.R. § 3016.36. Change the free and open competition requirements of 7 C.F.R. § 1942.18(j)(2) to allow an exception for TEROs. Immediately allow the enforcement of those parts of TEROs not involved with the free and open competition requirements.

- Pros:
- * Would bring the Department into conformance with most, if not all, other major governmental Agencies addressing this matter.
 - * Would bring the Department into conformance with the spirit of the President's memorandum of April 29, 1994.
 - * Would comply with the spirit of section 7(b).
 - * Would remove the threat of litigation from Native American advocacy groups.
 - * Would improve the Department's relationship with Native American tribal governments.

- Cons:
- * Would reduce the return received for program funds since some of the funds will be used for purposes which were not in accord with the

purposes of the program (employment training, taxes, compensation for other than the lowest bidder, etc.).

RECOMMENDATION:

The Department should approve Option 3.



MAY 02 1996

**United States
Department of
Agriculture**

Rural Business and
Cooperative Development
Service

Washington, D.C. 20250

SUBJECT: Policy Statement Pertaining to Tribal
Employment Rights Ordinance (TERO)

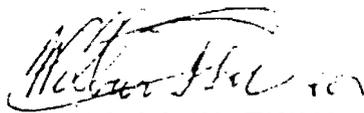
TO: Jill Long Thompson
Under Secretary
Rural Development

We are in receipt of subject dated April 8, 1996. In the past, situations pertaining to TERO have been handled on a case-by-case basis. Most Rural Development programs do not have statutory or regulatory provisions that provide for preference for ordinances such as TERO in the Agency's administration of its programs.

Most Rural Development programs require Agency concurrence in borrower/grantee awarding of contracts for which Rural Development financial assistance is provided. These contracts, by regulation, must provide for "open and free competition" in the awarding of construction contracts. In the past the Rural Development mission area has, in most cases, been able to resolve individual TERO issues, which conflict with "open and free competition" of contract awarding, with the Indian Tribal communities.

A few years ago some consideration was given to amending the authorizing legislation to recognize preferences for TERO. No action was taken on this consideration. Attached are two memorandums from the Office of the General Counsel that have provided guidance on this issue in the past.

My office is available to discuss this issue in more detail.


DAYTON J. WATKINS
Administrator

Attachments



JAN 27 1994

OUR REF: LEG 5-4-7

MEMORANDUM FOR BOB NASH
UNDER SECRETARY FOR SMALL COMMUNITY
AND RURAL DEVELOPMENT

FROM: Stephen L. Babcock
Associate General Counsel
Rural Development

SUBJECT: Letter from Senator Conrad

J. Michael Kelly recently forwarded your request for assistance in answering the above referenced letter to me. Hugh Cannon, Acting Assistant General Counsel for Community Development, informs me that his Division has been working with the Rural Development Administration (RDA) in preparing a response to Senator Conrad's letter in relation to the issue of Tribal Employment Rights Ordinances (TEROs).

Over the years that FmHA, and subsequently RDA, have encountered the use of TEROs in projects funded by the agencies on Indian reservations, the agencies have sought the advice of the Office of General Counsel as questions have arisen regarding individual TEROs. The Community Development Division has given its opinion on many individual TEROs during this period as the agencies have solicited guidance.

This review on a case-by-case basis has been in existence for several years in the area of Community and Business Programs (C&BP). As to what type of review is performed by FmHA personnel in the multi-family housing (MFH) area, we can only state that according to our discussion with FmHA personnel, the TEROs that tribes seek to enforce on projects funded with MFH project funds are reviewed by that agency on a case-by-case basis as well. In this review, FmHA program personnel seek to ensure that the TEROs provide for maximum open and free competition in the construction of the projects. According to FmHA MFH personnel, any conflicts with the provision of a TERO and open and free competition or any program regulations are generally resolved through a modification of the TERO.

This policy of reviewing the TEROs on a case-by-case basis seems to be consistent between MFH and C&BP. We do not know whether MFH and C&BP would reach the same

conclusion on an identical TERO. Multi Family Housing, unlike C&BP, has not asked the Community Development Division for its advice in reviewing the individual tribal ordinances.

We will continue to advise RDA and FmHA in this area as they request our advice. In the meantime, should you have any questions regarding this matter, do not hesitate to phone me on 720-8063.

cc: Wilbur Peer, RDA
Obediah Baker, FmHA

MAY 19 1992

OUR REF: LEG 5-1-2; LEG 5-4-7

MEMORANDUM FOR MARY ANN BARON
ACTING ADMINISTRATOR
RURAL DEVELOPMENT ADMINISTRATION
MARCIA E. ASQUITH

FROM: Marcia E. Asquith, Attorney
Community Development Division

SUBJECT: Implementation of Section 7(b) of the Indian Self Determination Act

ISSUE

You have asked us to determine the extent to which other federal agencies recognize the applicability of Section 7(b) of the Indian Self Determination Act (Act) to their programs and the corresponding rights of Indian tribes to impose Tribal Employment Rights Ordinances (TEROs).

DISCUSSION

Per our recent meeting, I have researched the treatment of this subject by the Department of Housing and Urban Development (HUD), the Department of Commerce's Economic Development Administration (EDA), the Department of Education, the Federal Highway Administration (FHWA), and the Department of Health and Human Services (HHS).

The above listed departments and agencies have determined that Section 7(b) of the Indian Self Determination Act applies only to programs specifically targeted to Indian tribes. For instance, the Economic Development Administration, in administering its Public Works and Development Facilities program, gives special consideration to Indian tribe projects which are concerned with general economic development. 13 C.F.R. § 305.5. Additionally, the EDA regulations provide specifically for Indian set-asides. 13 C.F.R. § 317.42. More importantly, the EDA regulations contain a requirement for the use of local labor in project areas. 13 C.F.R. § 305.54. For such projects, TEROs are a tool for implementation of the program regulations that are aimed to improve economic conditions in a localized area and not, like FmHA program regulations, concerned with free and open competition in the targeted areas.

The BIA and FHWA recognize the use of TEROs in building Indian reservation roads and bridges. 25 C.F.R. § 170.5a. The Department of Health and Human Services allows Indian preferences in the administration of grants and contracts in the Indian Health Services programs. 42 C.F.R. Part 36.

TO: UNITED STATES DEPARTMENT OF AGRICULTURE,
RURAL DEVELOPMENT MISSION AREA OFFICIALS

FROM: JILL LONG THOMPSON *Jill Long Thompson*
UNDER SECRETARY,
RURAL DEVELOPMENT MISSION AREA

DATE: 4/8/96

POLICY STATEMENT

DESCRIPTION OF SUBJECT MATTER:

Tribal Employment Rights Ordinance (TERO).

ISSUE:

Whether the United States Department of Agriculture, Rural Development Mission Area should acknowledge the rights of federally recognized Tribal governments to impose TERO requirements on subcontracts and subgrants under contracts and grants to the Tribal governments and those for the benefit of Tribal members.

BACKGROUND INFORMATION:

As a means of addressing employment needs in Indian Tribal communities, many Indian Tribal governments have adopted various forms of a Tribal Employment Rights Ordinance (TERO). The purpose of a TERO is to ensure that when there is economic activity on or near the Reservation, which is generally under the control of the Tribal government, Indians will be afforded the opportunity to share in that activity. In the past, the USDA Rural Development Mission Area has not issued a formal policy statement which acknowledged the rights of federally recognized Tribal governments to impose TERO requirements on subcontracts and subgrants under grants and contracts to the Tribal governments and those for the benefits of Tribal members.

Although TEROs vary from Tribe to Tribe, they typically contain several common provisions which allow Tribes to enforce Native American employment preference and the imposition of taxes on operations of the subcontractor or subgrantee. Additionally, TEROs often allow for bidding preferences for Native American entities in obtaining contracts or grants unless they are the lowest bidder.

Tribal advocates have argued that based upon Tribal sovereignty rights, TEROs should be recognized by the USDA Rural Development Mission Area.

DISCUSSION:

The United States Department of Agriculture, Rural Development Mission Area should acknowledge the rights of federally recognized Tribal governments to impose TERO requirements on subcontracts and subgrants under contracts and grants to the Tribal governments and those for the benefit of Tribal members.

A TERO is an ordinance of a governmental unit (the Tribal government) and the USDA Rural Development Mission Area should permit Tribal governments to give full effect to TEROs in the administration of Rural Development Mission Area contracts, grants, and loans.

SUMMARY:

It is the policy of the USDA Rural Development Mission Area to acknowledge the rights of federally recognized Tribal governments to impose TERO requirements on subcontracts and subgrants under contracts and grants to the Tribal governments and those for the benefit of Tribal members.