TE-MOAK RULES OF EVIDENCE

I. **General Provisions**. The purpose of the rules are to provide structure and form to the proceedings that are fair and objective under the strictures of due process, without unnecessary delay or surprise as to the procedures and practices in the court. These rules are intended to explain and provide sufficiently detailed and rigid direction for litigants in the Te-Moak Tribal Court.

(a) ***Presenting and Excluding Evidence***. Before a party may offer any evidence, (*whether testimonial or tangible*), that party must first show that the evidence is related to a claim or cause of action. This requires that party to authenticate the evidence being offered by laying out the factual foundation by identifying the evidence and its relationship to the claim or cause of action.

(b) ***Qualification or Authentication***.

i. For testimonial evidence qualification involves identifying the witness and establishing that the testimony given is based on personal knowledge of the facts, whether the accounting of those facts are directly or indirectly related to the incident in question or related to questions of credibility.

ii. Tangible evidence must be authenticated prior to its introduction by establishing its relationship to the cause of action and whether it is factually related to the cause of action, (such as real evidence), or offered solely for its illustrative or explanatory purposes (demonstrative).

iii. Real evidence or the tangible evidence a party introduces as substantive proof, whether directly or circumstantially relevant with other evidence, must be authenticated by a sponsoring witness who has first been properly qualified as a witness.

iv. Direct authentication occurs by testimonial admissions by the party opponent or the testimony of other witnesses who have personal knowledge of the tangible evidence and its relationship to the cause of action or claim presented to the judge or before the court.

v. ***Chain of Custody***. During the process of authentication of real evidence a party or witness must show and trace backward from the time the evidence is offered to the time of the incident involved in a cause of action or claim each person or agency who maintained, held or possessed that evidence in their custody or control, and for what period of time. A Chain of Custody is not limited to real evidence, it applies equally to demonstrative evidence such as a tape recording of a statement where no one has personal knowledge to verify what was recorded, or its accuracy would require its proponent to establish a Chain of Custody, therefore, a Chain of Custody is necessary:

1) If no single person can identify the item and connect it back to a particular event or person; or
2) If the nature of the item is such that the naked eye cannot detect its alteration and any alteration would significantly affect its relevance.

vi. Demonstrative evidence includes all other tangibles not involved with the cause of action that is used to demonstrate, explain, show or illustrate the substance of testimony and other tangible evidence. This requires a qualified, sponsoring witness prior to introduction of the evidence, but its foundation only requires a showing that the evidence sufficiently reflects and duplicates the critical conditions that existed at the time the cause of action arose such that it illuminates the testimonial evidence offered to support.

1) If equipment is used to demonstrate or recreate, its proponent must prove the equipment accurately recreated or reproduced what transpired by presenting evidence showing the equipment was functioning properly at the time of recreation and that the operator used the equipment properly; or
2) If the evidence is a record of something that a sponsoring witness with personal knowledge cannot verify as accurate, then the technical accuracy of the equipment

must be established by the testimony of someone who knows how the equipment works and who tested it at the time the evidence was recorded.

(c) ***Offering***. Once a proponent has laid a proper foundation for authentication, then an oral offering of the evidence, into the record, must follow by identifying the evidence by an exhibit mark. The judge must first accept the exhibit as substantive evidence before the fact finder may rely on it as substantive evidence. It is at this point that the opposition must make any objection to the introduction of the evidence. At which point the proponent is entitled to a ruling by the court.

(d) ***Exclusion and Inadmissibility***.

i. NECESSITY for objection. The court will usually enforce the rules of evidence to exclude evidence only if the opposing party properly objects to its introduction. It is the responsibility of the parties to enforce the rules of evidence, not the court=s or judge=s.

ii. TIMELINESS. A party must make a timely objection to the opponent=s offerings of evidence. Failure to do so waives the objection, and the finder of fact may rely on the otherwise inadmissible evidence. A timely objection occurs when the objectionable nature of the evidence first become apparent.

1) With testimony this means after the objectionable question is posed, but before the witness answers.
2) With tangible evidence, objections usually are appropriate only after the proponent has called the sponsoring witness, authenticated the exhibit, and formally offered the exhibit.
3) *In Limine*B where a party anticipates that its adversary will attempt to introduce evidence that is so inflammatory or otherwise sensitive that its mere mention would unfairly prejudice the jury, this device allows a

preliminary ruling on admissibility or fairness of its use.
4) Failure to make a timely objection where required results in a waiver of the error as a ground for appellate review, unless the error constitutes plain error.
5) *Plain errors* are those that should have been obvious to the trial judge and that had a substantial impact on the trial.

iii. SPECIFICITY. In addition to being timely, objections must be specific, whether hearsay, privilege, violation of the best evidence rule, etc., and the proponent of the objection must identify the evidence or which portions of it that are allegedly inadmissible.

iv. OFFERS OF PROOF. Where a party offers testimonial evidence by asking questions of a witness, then each question constitutes as a formal offer of proof related to the response it seeks to elicit. If an opponent objects to the introduction of tangible evidence, the judge=s decision is subject to review at the conclusion of trial, and may be reversed only if >harmful error= or the decision probably affected the outcome of the trial.

1) The law requires that the proponent seeking reversal make an Offer of Proof at the time the objection was sustained, using several different methods insuring that the evidence is placed on the record-into the transcript, (if testimonial), or into the collection of exhibits, (if tangible).
2) Offers of Proof regarding tangible evidence is accomplished by the proponent handing the item to the clerk/reporter, and referring to it by exhibit mark, announces to the court that he is offering it as proof.
3) Proffer is one method of Offering of Proof regarding oral testimony, it occurs where the lawyer states what the witness would have stated if the court had allowed her to answer.
4) Another method to Offer Proof is for the lawyer, outside the jury=s presence, to question the witness such as a witness' testimony in written formBdeposition or affidavit.

5) For Tangible Evidence: A) Call sponsoring witness; B) Establish relationship between evidence and the cause of action; C) Court reporter marks the exhibit; D) Show item to opposing counsel; E) Present the item to the sponsoring witness; F) Move for admission; G) Obtain a ruling; H) Show to jury if admitted; or I) if denied make an offer of proof.

II. Trial Stages or Progression

(a) 1st Stage: ***Case in Chief.*** The plaintiff or prosecutor must present sufficient evidence from which a reasonable jury could find that the plaintiff or prosecutor has proven all of the elements of the claim(s) on which its cause of action is based, this is termed the *prima facie* standard. During this point the defendant can test whether the plaintiff or prosecutor met its burden by a Motion for Directed Verdict. If granted the case is over and the defendant wins on this cause of action.

(b) 2nd Stage: ***Defendant=s Case in Chief***. This stage is optional in that the defendant can elect to submit the case as presented to the trier of fact for determination or proceed with its case in chief. There are three (3) primary forms:

1) Defendant may offer evidence to disprove the facts that the witnesses for the plaintiff or prosecutor attempted to establish; or
2) Defendant can present evidence to establish an affirmative defense; or
3) Defendant can offer evidence that attacks the credibility of the plaintiff's or prosecutor's witnesses.

(c) 3rd Stage: ***Rebuttal***. The plaintiff or prosecutor has the opportunity to respond to any affirmative defenses, reinforce its case relative to those issues and facts being contested by the defendant.

(d) 4th Stage: ***Defendant=s Rejoinder***. The defendant has the opportunity to respond to any additional facts and issues raised by plaintiff or prosecutor's rebuttal.

(e) ***Mode and Order of Presentation and Interrogation***. The Presentation of Testimony shall occur during each stage of

trial or evidentiary proceeding, where each side will present evidence through the testimony of witnesses equally in stages:

i. DIRECT EXAMINATION. This is the initial presentation of a witness by the party who called the witness. The proponent of the witness can inquire about firsthand information the witness possesses that is relevant and related to any of the claims or defenses, as well as to facts that are related to the credibility of any witness.

ii. CROSS EXAMINATION. This is where the opposing party tests the witness credibility and the reliability of the information the witness provided during direct examination or as further provided during cross examination.

iii. RE-DIRECT EXAMINATION. When cross examination raised a question regarding credibility or reliability and the witness was not given sufficient opportunity to explain during cross examination, the witness' proponent may elicit an explanation on re-direct.

iv. RE-CROSS EXAMINATION. This is the final phase of examination where the opponent to the witness' testimony is permitted to test only new information the proponent may have brought out during re-direct.

III. Division of Responsibility

(a) ***The Finder of Fact***. Either the jury or a judge is responsible for determining whether a party has satisfied its burden of persuasion by submitting enough admissible evidence to prove the facts claimed in a cause of action.

(b) ***Parties and Production***. By presenting sufficient, relevant evidence to convince the finder of facts that their claim or defense is valid under a party=s respective burden of persuasion a party satisfies their burden of production. Under this requirement the parties bear the burden of producing sufficient evidence to establish a *prima facie* caseBone that a reasonable jury could find that the necessary facts have been established. If not the judge may end the trial and direct a verdict against a party so failing.

i. At the end of a party's case in chief, that party will proceed to one of three stages:

1) If the party failed to meet its burden of production, then directed verdict;
2) If the burden of production was satisfied and a reasonable jury could differ on the resolution, the judge will decide that the case will proceed even if there is no immediate legal effect for the opposing party;
3) If a party satisfied its burden of production so convincingly that unless the opposition comes forward with evidence to refute, then a directed verdict for the party who overwhelmingly satisfied its burden of production.

ii. If the defendant in its case in chief attempts to refute the plaintiff's claim through an affirmative defense, the defendant usually bears the same burden of production as the plaintiff did in the original claim. At the end of defendant's case in chief, the judge can direct a verdict for the plaintiff, dismissing the affirmative defense if the defendant failed to satisfy its burden.

iii. If the defendant meets the burden of production, (*after the plaintiff met its initial burden*), as well as the burden of producing evidence in support of affirmative defenses; then the case will proceed to the finder of fact because a reasonable jury question may be raised, or directed verdict for defendant unless the plaintiff presents additional evidence, i.e. the burden of production shifts on rebuttal.

(c) ***Burden Of Persuasion***. Where the finder of fact cannot decide who should prevail, the law allocates among the parties burdens of persuasion on every issue raised in the case. The party with the burden must convince the finder of fact that the facts support its position. If that party is unable to convince a fact finder, then it has failed to satisfy its burden of persuasion and will lose on that issue.

i. In civil actions the degree of persuasion is measured by a preponderance of evidence, unless otherwise provided by

Constitution, Rule, Ordinance or Resolution;

ii. Criminal cases require beyond a reasonable doubt;

iii. All party's asserting an affirmative defense must satisfy the burden of persuasion measured by clear and convincing evidence, which is between preponderance and reasonable doubt.

(d) ***Allocating the Burden***. The party to whom the ultimate burden of persuasion is assigned will also be allocated the initial burden of production. The party with the burden of production and persuasion will often have the initial burden of pleadingBraising the issue at the beginning of the action, unless otherwise provided in the Constitution, Rule or Ordinance that allocates the burdens of evidence and persuasion. If another provision in the Constitution, Rule or Ordinance does not create a cause of action or specify the allocation of burdens, then court shall allocate the burdens based on the following factors of allocation:

i. Assignment to the party who seeks to change the *status quo*, or the party who instituted the action.

ii. *Probability*. The court may assign to the party who relies on an improbable fact the burden or responsibility to establish that fact.

iii. *Convenience and fairness*. If the imposition of the burden on that party is unfair in light of the adversary=s unique access to exculpatory or inculpatory evidence, the court will relieve a party of the burden of persuasion.

III. Rules

Rule 101. Scope and Definitions

(a) The Te-Moak Rules of Evidence, (T.R.E.), and their exceptions, shall apply to all proceedings in the Te-Moak Tribal Courts unless otherwise provided by law.

(b) In these rules the following terms shall be defined as:

i. A "civil case" shall mean any lawsuit or proceeding before any Te-Moak Tribal Court pursuant to

T.R.C.P. Rule 2.

ii. A "criminal case" or action shall include any criminal proceeding.

iii. Public office shall mean any elected or appointed tribal position that requires the taking of an oath of office prior to assuming the duties of that position.

iv. "Record" and "official record" shall include any memoranda, report, data compilation, instrument, written statement, resolution, meeting minute, agreement, document or contract produced, published or authorized by any public office.

v. A reference to any kind of written material or any other medium includes electronically created or stored information.

Rule 102. Purpose

These rules should be construed liberally to administer every proceeding, hearing and action fairly, to substantially reduce or eliminate justifiable expense and delay and to promote the growth and development of evidentiary law for the end result of determining the truth and obtaining a just result.

Rule 103. Evidentiary Errors

(a) A party may claim an error in an evidentiary ruling to admit or exclude evidence only if the claimed error affects a substantial right of that party and:

i. If the ruling admits evidence and the party timely objects or moves to strike on the record and states the specific grounds for the objection unless the grounds are apparent from the context of the objection or request; or

ii. If the ruling excludes evidence and the party informs the court of its substance by an offer of proof unless the substance was apparent from the context.

(b) Once the judge definitively rules on the record a party need not renew an objection or offer of proof to preserve a claim of error for an appeal.

(c) The court may make any statement about the character or form of the evidence, the objection made, and the ruling itself. The judge may direct that an offer of proof is made in the form of question and answer.

(d) Whenever feasible the court must conduct a jury trial so that inadmissible evidence is not suggested or presented to the jury by any means.

(e) A judge may take notice of a plain error affecting a substantial right even if the claim of error was not preserved properly by a party.

Rule 104. Preliminary Questions

(a) All questions related to the qualification of a witness to testify, if a privilege exists or the admissibility of evidence shall be determined by the court before trial, and the judge is not bound by the rules of evidence except those that apply to any privilege.

(b) When the relevance of evidence depends on the fulfillment of a condition of fact, the court may admit conditionally relevant evidence on a promise by the proponent that the proponent will later prove that the fact does exist.

(c) All matters involving preliminary questions must be conducted outside the presence of a jury, if:

i. The hearing involves the admissibility of a confession;
ii. A defendant in a criminal case is a witness and requests to be questioned outside the presence of the jury; or
iii. Fairness and equity require that questions are posed outside the presence of the jury as a preliminary matter.

(d) If a criminal defendant requests and testifies on a preliminary matter, that defendant will not be subject to cross examination on other issues in the case.

(e) This rule does not limit a party's right to introduce evidence relevant to the weight or credibility of other evidence to a jury.

Rule 105. Limiting Evidence

If a judge admits evidence that is admissible against a purpose or a party but not against another party or another purpose, the judge must instruct the jury that the evidence is admitted for a limited

purpose.

Rule 106. Writings and Recorded Statements

If a party introduces all or part of a writing or recorded statement, the opposing party at that time may require the introduction of the remaining portion or any other writing or recorded statement that in fairness should be considered at the same time.

Rule 201. Judicial Notice

(a) This rule shall not apply to any legislative fact. A legislative fact shall consist of those that have relevance to legal reasoning, the lawmaking process in the creation of any legal principle and the enactment of rules, policy and law by any legislative body.

(b) The court may, at its discretion, take notice of an adjudicative fact that is not subject to reasonable dispute when a request to take notice of a fact is known or easily ascertainable to the court or is capable of accurate and ready determination by resorting to sources the accuracy cannot be reasonably questioned. Adjudicative facts are those in a particular case before the court.

(c) The court must take judicial notice of an adjudicative fact if a party requests it and the court is supplied with necessary information supporting a high degree of indisputability and the fact is known or easily ascertainable by the court within the territorial jurisdiction of the court.

(d) On timely request any party is entitled to be heard on the correctness of taking judicial notice and the nature of the fact to be given judicial notice. If a judge grants judicial notice before notifying a party, that party, on request, is entitled to a hearing on the correctness of the taking and the nature of the fact before the fact is presented to the jury as judicially noticed.

(e) In a civil case the judge must instruct the jury that a grant of judicial notice has the legal effect of avoiding the need for further formal proof and the fact noticed is deemed admitted as conclusive and reliable. In a criminal case the judge must instruct the jury that each jury member is free to accept or reject the noticed fact as conclusive or reliable.