



DEPARTMENT OF THE ARMY  
CORPS OF ENGINEERS, OMAHA DISTRICT  
1616 CAPITOL AVENUE  
OMAHA NE 68102-4901

REPLY TO  
ATTENTION OF

CENWO-OC

14 JAN 2014

POLICY MEMORANDUM ON TERO

SUBJECT: Policy on the Application of Tribal Employment Rights Ordinances in the Execution of Federal Contracts on Federal Project Lands Held in Fee by the United States

1. REFERENCES:

- a. Montana v. United States, 450 U.S. 565 (1981)
- b. South Dakota v. Bourland, 508 U.S. 679 (1993)
- c. Atkinson Trading Company, Inc. v. Shirley, 532 U.S. 645 (2001)
- d. Protocol for Implementation of Tribal Employment Rights Office and Amendments and Oglala Sioux Tribes and the U.S. Army Corps of Engineers 2006, dated 19 Aug 2006.
- e. Various Tribal Employment Rights Ordinances

2. There has been some confusion over the use of the Tribal Employment Rights Ordinances (TERO) provisions as it relates to its proper application to contracts being performed on Federal project lands held in fee by the United States.

3. TERO provisions have two components. One is a tax on the contract amount and the second pertains to Tribal control over a contractor's hiring, training, promoting, and other personnel related aspects of the contract work. There have been instances where the Tribes have attempted to impose their TERO provisions on contractors working exclusively on Federal project land held in fee by the United States.

4. POLICY:

a. In order to clarify the Federal law on the imposition of TERO, the following policy is implemented for the Omaha District.

(1) TERO provisions on both tax and personnel actions are not applicable to federal contracts being performed on Federal project lands held in fee by the United States.

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Corps and the Oglala Sioux Tribe, dated July 19, 2006, *Protocol for Implementation of Tribal Employment Rights Office and Amendments and, Oglala Sioux Tribe and the U.S. Army Corps of Engineers 2006*. The agreement only applies to labor and services performed on the Pine Ridge Reservation lands.

b. The general *Montana* rule is not applicable when the contract performance is on lands owned by the Tribes or held in trust for them. The contract for the Badlands Bombing Range was on lands owned by the Tribe or held in trust for it. As such, the Tribe possessed limited jurisdiction to impose TERO on nonmembers (contractors) working on Tribal lands as long as the incidence of the tax does not fall on the United States and the tax is limited to the work performed on the Trust lands.

c. The Badlands Bombing Range agreement is not authority to impose TERO on nonmembers of the Tribe working on Federal project lands held in fee by the United States.

d. Situations involving federal contract work on Tribal lands or lands held in trust for the Tribes will be considered on a case by case basis as to the authority to tax as well as the value of the contract work performed in such situations, if applicable.

#### 8. PROCEDURE:

a. Contractors will report any attempt by TERO officials to impose a TERO obligation to the applicable Contracting Officer Representative (COR).

b. The COR will report the situation up the chain of command and to the responsible Contracting Officer as well as alert the Office of Counsel.

c. The responsible Contracting Officer and the Office of Counsel will gather the facts and attempt to intercede with the TERO office in an attempt to stop the action.

d. In the event the responsible Contracting Officer and the Office of Counsel are unable to dissuade the TERO office from pursuing the matter further, it will communicate with the appropriate Department of Interior/Bureau of Indian Affairs (DOI/BIA) office to seek its cooperation to end the enforcement action.

e. Should the DOI/BIA fail to have the TERO office end its enforcement action, the contractor is encouraged to seek injunctive and declaratory judgment action in federal court to enjoin the TERO office from proceeding against the contractor.

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f. A contractor possesses the independent right to seek action in federal court when a TERO tax is imposed on it when performing a Federal contract on Federal project lands held in fee by the United States.

9. USACE OBLIGATION TO FACILITATE ACTIONS:


a. The USACE is not under any legal obligation to facilitate the perfection of any TERO process on contractors working on Federal contracts on Federal project lands held in fee by the United States.

b. TERO officials are not allowed to interfere with the execution of the work of Federal contractors on Federal project lands in any manner.

c. Should TERO officials request information on contractors working on Federal project lands, they will be required to make a formal Freedom of Information Act (FOIA) request to the FOIA Officer, Office of Counsel, 1616 Capitol Avenue, Omaha, Nebraska 68102-4901.

10. This Policy Memorandum will be included in all contracts to be performed on Federal project lands and made available to all Tribes and TERO Offices.

11. The point of contact for this matter is the Office of Counsel, (402) 995-2599.

  
JOEL R. CROSS  
Colonel, EN  
Commanding

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