

CHEYENNE RIVER SIOUX TRIBE

ORDINANCE NUMBER 42A (As Amended)

TRIBAL EMPLOYMENT RIGHTS OFFICE

SECTION 1: DECLARATION OF POLICY

As a guide to the interpretation and application of this Ordinance, the public policy of the Cheyenne River Sioux Tribe is declared to be as follows:

Like land, water, and minerals, jobs, subcontracts, and contracts in the private sector on or near the Cheyenne River Sioux Reservation are an important resource for Indian people and Indians must use their rights to obtain their rightful share of such opportunities as they become available. Indians have unique and special employment, subcontract and contract rights, and the Cheyenne River Sioux Tribal Government has the inherent sovereign power to pass laws to implement and enforce those special rights on behalf of Indians. Indians are also entitled to the protection of the laws that the Federal Government has adopted to combat employment discrimination, and tribal governments can and should play a role in the enforcement of those laws. The Cheyenne River Sioux Tribe believes it is important to establish an employment rights program and office in order to use the aforementioned laws and powers to increase employment of Indian workers and businesses and to eradicate discrimination against Indians.

SECTION 2: DEFINITIONS

- A. "Employee" means any person employed for remuneration.
- B. "Employer" means any person, partnership, corporation or other entity that employs, for wages, two or more employees.
- C. "Covered Employer" means any employer employing two or more employees who during any 30-day period, spend, cumulatively, 40 or more hours performing work within the exterior boundaries of the Cheyenne River Sioux Reservation.
- D. "Entity" means any person partnership, corporation, joint venture, government, governmental enterprise, or any other natural or artificial person or organization. The term "entity" is intended to be as broad and encompassing as possible to ensure the Ordinance's coverage over all employment and contract activities within the Tribe's jurisdiction and the term shall be so interpreted by the Commission and the Courts.
- E. "Commission" means the Cheyenne River Sioux Tribal Employment Rights Commission established by this Ordinance.

- F. "Commercial Enterprise" means any activity by the Cheyenne River Sioux Tribe or by the federal or state governments that is not a traditional government function as defined by the Internal Revenue Service.
- G. "Indian" means any member of a federally-recognized tribe.
- H. "Local Indian" means any member of a federally-recognized tribe who resides within the exterior boundaries of the Cheyenne River Sioux Reservation.
- I. "Director" shall mean the Director of the Commission as a referred to in Section 8 of this Ordinance.
- J. "Second Offense" shall mean non-compliance of any part of Ordinance 42A or regulations issued pursuant to it, in which the offender has previously been warned and/or sited for non-compliance.

SECTION 3: INDIAN PREFERENCE IN EMPLOYMENT

All covered employers, for all employment occurring within the exterior boundaries of the Cheyenne River Sioux Reservation, shall give preference to qualified Indians, with the first preference to local Indians, in all hiring, promotion, training, layoffs, and all other aspects of employment. Such employers shall comply with the rules regulations, guidelines and orders of the Cheyenne River Sioux Tribal Employment Rights Commission which set forth the specific obligations of employers in regards to any direct employment by the Cheyenne River Sioux Tribe or by the federal, state or other government or their subdivisions. It shall apply to all contractors or grantees of such governments and to all commercial enterprises operated by such governments.

SECTION 4: INDIAN PREFERENCE IN CONTRACTING

All entities, except as provided below, awarding contracts or subcontracts for supplies, services, labor and materials in an amount of \$5,000 or more where the majority of the work on the contract or subcontract will occur within the exterior boundaries of the Cheyenne River Sioux Reservation, shall give preference in contracting and subcontracting to qualified entities that are certified by the Commission of 51% or more Indian owned and controlled, with a first preference to qualified entities that are 51% or more owned and controlled by local Indians. Indian preference shall not be required in the award of the prime contract let directly by the Cheyenne River Sioux Tribal Council or by the federal or state governments or their subdivisions. The prime contractor, in these instances, shall be required to comply with all other requirements of this Ordinance, including preference in subcontracting, employment, training and payment of the TERO fee. They shall apply to any contracts awarded by any commercial enterprise of the Cheyenne River Sioux Tribal Council. Tribal programs or divisions other than commercial enterprises shall not be required to comply with these requirements but shall be required, when submitting a contract to the Cheyenne River Sioux Tribal Council for approval, to indicate, as part of the submission to the Council, the steps taken to award the contract to a local Indian contractor. These requirements shall apply to all subcontracts awarded

by a tribal, federal or state direct contractor or grantee, whether or not the prime contract was subject to these requirements. All covered entities shall comply with the rules, regulations, guidelines and orders of the Commission which set forth the specific obligations of such entities in regard to Indian preference in contracting and subcontracting. The Commission shall establish a system for certifying firms as Indian preference and local Indian preference eligible. Exemptions apply only to the employment practices of the above governmental entities but do not extend to contracts let by them. Contractors working on Federal, State, and Tribal contracts are required to comply with Ordinance 42A and/or regulations issued pursuant to it.

SECTION 5: UNIONS

Any covered employer who has a collective bargaining agreement with one or more unions shall obtain written agreement from such union(s) stating that the union shall comply with Indian preference laws, and with the rules, regulations and guidelines of the Cheyenne River Sioux Tribe. Such agreement shall be subject to the approval of the Director.

SECTION 6: COMMISSION; MEMBERS; COMPENSATION; QUORUM

- A. There is created a Cheyenne River Sioux Tribal Employment Rights Commission.
- B. The Commission shall consist of six Tribal Council Representatives appointed by the Tribal Chairman, or five Council Representatives and the Tribal Chairman at his discretion, who shall hold office as so required and regulated by the Commission's by-laws and policies dictating the Commission's duties and responsibilities.
- C. Members of the Commission shall be entitled to receive, upon presentation of proper vouchers, such mileage and per diem payments as are in effect for Commissioners of the Cheyenne River Sioux Tribe or for committees or officers of the Cheyenne River Sioux Tribal Council.
- D. A quorum of the Commission will consist of three (3) members, and a quorum is required to transact business. When a vacancy occurs in the Commission, the remaining members may use a majority of the Commission to constitute a quorum and may exercise all the powers of the Commission until the vacancy is filled.
- E.
 1. For purposes of this Section, "immediate Family" means brother, sister, son, daughter, mother, father, husband, wife, step-brother, step-sister, half-brother, half-sister, or brother, sister, son, daughter, mother or father by adoption.
 2. No member of the Commission shall participate in any action or decision by the Commission directly involving himself, or a member

of his immediate family, or any person, business or other entity of which he or a member of his immediate family is an employee, or in which he or a member of his immediate family has a substantial ownership interest, or with which he or a member of his immediate family has a substantial contractual relationship.

3. Nothing in this Section shall preclude a Commissioner from participating in any action or decision by the Commission which:
 - a. Generally affects a class of person, regardless of whether the Commissioner or a member of his immediate family is a member of the affected class;
 - b. Affects the Cheyenne River Sioux Tribe, a tribal enterprise, or a person or entity in a contractual relationship with the tribe or a tribal enterprise, regardless of whether the Commissioner is a member of the tribe.
4. A Commissioner may voluntarily recluse him/herself and decline to participate in any action or decision by the Commission when the Commissioner, in his discretion, believes:
 - a. That he cannot act fairly or without bias; or
 - b. That there would be an appearance that he could not act fairly or without bias.

SECTION 7: POWERS OF THE COMMISSION

- A. Formulate, adopt, amend and rescind rules, regulations and guidelines necessary to carry out the provisions of this Ordinance. Except when an emergency exists, the Commission shall provide the public with a reasonable time for comment before promulgating any final regulations.
- B. Require each covered employer or entity to submit to the Commission an acceptable compliance plan indicating how it will comply with this Ordinance, before a covered employer or entity may commence work within the exterior boundaries of the Cheyenne River Sioux Reservation.
- C. Impose numerical hiring goals and timetables that specify the minimum number of Indians a covered employer must hire, by craft or skill level.
- D. Require covered employers to establish or participate in such training programs as the Commission determines necessary in order to increase the pool of qualified Indians on the Cheyenne River Sioux Reservation as quickly as possible.

- E. Establish in conjunction with tribal employment and training programs, a tribal hiring hall or skills bank and impose a requirement that no covered employer may hire a non-Indian until the tribal hiring hall or skills bank has certified that no qualified Indian is available to fill the vacancy, with a first preference in referral to local Indians.
- F. Prohibit covered employers from using qualification criteria or other personnel requirements that serve as barriers to Indian employment unless the employer can demonstrate that such criteria or requirements are required by business necessity. In developing regulations to implement this requirement, the Commission shall adopt the EEOC guidelines on these matters to the extent that they are appropriate. The Commission shall have the right to impose its own requirements in addition to address unique qualification problems confronting Indians.
- G. To enter into agreements with unions to insure union compliance with this Ordinance. Such agreements shall in no way constitute recognition or endorsement of any union.
- H. Impose contract and subcontract preference requirements, with a first preference to local Indian firms, and establish and operate a system for certifying firms as eligible for Indian preference and local Indian preference.
- I. To enforce the requirements of the Fair Labor Standards Act pursuant to the provisions of Section 18 of this Ordinance.
- J. To expend funds in accordance with current accounting practices.

SECTION 8: DIRECTOR; QUALIFICATIONS; STAFF; DUTIES

- A. The Commission shall have exclusive authority to appoint, direct, suspend or remove the Director of the Commission.
- B. The Director shall have such administrative ability, education and training as the Commission determines. He may be removed by the Commission for cause.
- C. The Director shall have authority to hire staff, to expend funds appropriated by the Cheyenne River Sioux Tribal Council, and to obtain and expend funding from federal, state, or other sources to carry out the purposes of the Commission, subject to approval by the Commission.
- D. The Director shall administer the policies, authorities, and duties prescribed for him in the Ordinance and delegated to him by the commission pursuant to Section 9.

SECTION 9: DELEGATION OF AUTHORITY

The Commission shall delegate to the Director the authority to carry out the day-to-day operations of the Commission and such other authority as is convenient or necessary to the efficient administration of this Ordinance, except that the Commission may not delegate its power or duty to:

- A. Adopt, amend, rescind, rules, regulations or guidelines.
- B. To conduct hearings or to impose sanctions pursuant to Section 15.

SECTION 10: INTERGOVERNMENTAL RELATIONSHIPS

The Commission acting through the Director is authorized to enter into cooperative relationships with federal employment rights agencies, such as EEOC and OFCCP, in order to eliminate discrimination against Indians on and off the Cheyenne River Sioux Reservation.

SECTION 11: EMPLOYMENT RIGHTS FEE

As employment rights fee, to raise revenue for the operation of the Commission, is imposed as follows:

- A. Every covered employer with a construction contract in the sum of \$25,000 or more shall pay a one-time fee of 4% of the total amount of the contract (per contract). Such fee shall be paid by the Prime Contractor prior to commencing work on the Cheyenne River Sioux Reservation. However, where good cause is shown, the Director may authorize a construction contractor to pay said fee in installments over the course of the contract. In instances where each construction phase is to be bid out, each prime contractor will be appropriated his/her percentage of the TERO fee for his/her portion of the total project cost.
- B. The Director shall be responsible for collecting said fees pursuant to any rules and regulations adopted by the Commission. Said fees shall be paid to the Cheyenne River Sioux Tribal Treasurer and shall be credited to the Tribal Employment Rights Office account of the Cheyenne River Sioux Tribe.

SECTION 12: COMPLAINTS

Any individual, group of individuals or organization that believes any covered employer or entity, or the Commission has violated any requirements impose by this Ordinance or regulations issued pursuant to it, may file a complaint with the Director. The complaint shall be writing and shall provide such information as is necessary to enable the Director to carry out an investigation. The Director shall investigate every complaint filed with him. If upon investigation, he has reason to believe a violation has occurred, he shall proceed pursuant to the provision in Section 15. Within 20 days after complaining party with a written report on the status of the complaint.

SECTION 13: INVESTIGATIONS

On his own initiative or pursuant to a complaint, the Director or any field compliance officer designated by the Director shall make such public or private investigation within the Cheyenne River Sioux Reservation as he or the Commission deems necessary to determine whether any covered employer or other covered entity to submit such reports as he deems necessary to monitor compliance with the requirements of this Ordinance or any rule or order hereunder.

SECTION 14: POWER TO REQUIRE TESTIMONY AND PRODUCTION OF RECORDS

For the purpose of investigation or hearings which, in the opinion of the Director or the Commission, are necessary and proper for the enforcement of this Ordinance, a Commissioner, the Director, or any field compliance officer designated by the Director may administer oaths or affirmations, subpoena witnesses, take evidence, and require, by citation, the production of books, papers, contracts, agreements or other documents, records or information which the Director or the Commission deems relevant material to the inquiry.

Any state or federal tax records subpoenaed pursuant to this section or used in a Compliance Hearing or subsequent appeal to Tribal Court shall be confidential records of the Commission of the Tribal Court, shall not be opened to public inspection, and shall be used only by the Director, the Commission parties to a Compliance Hearing or subsequent appeal to Tribal Court, and Tribal Court.

SECTION 15: ENFORCEMENT

- A. When, after conducting an investigation, initiated by a complaint pursuant to Section 12 or a self-initiated investigation pursuant to Section 13, the Director has reason to believe a violation of this Ordinance or regulations issued pursuant to it has occurred, the Director shall notify the covered employer or entity in writing, specifying the alleged violations. However, he may withhold the name(s) of the complaining party if he has reason to believe such party shall be subject to retaliation. The Director shall seek to achieve an informal settlement of the alleged violation. If he is unable to do so, he shall issue a formal notice of noncompliance, which shall also advise the covered employer or entity of his right to request a hearing.
- B. The formal notice shall set out the nature of the alleged violation and the steps that must be taken to come into compliance. It shall provide the employer or entity with a reasonable time, which in no event shall be less than five days from the date of receipt of such notice, to comply, unless the Director has reason to believe irreparable harm will occur within fewer than five days. If the party fails or refuses to comply, he may request a hearing before the Commission which shall be held no sooner than five days. If the party fails or refuses to comply, he may request a hearing before the

Commission which shall be held no sooner than five days and no later than 30 days after the date for compliance set forth in the Director's notification to the party charged of violation, unless an expedited hearing is deemed necessary by the Commission to avoid irreparable harm. If a party fails or refuses to comply and does not request a hearing, the Commission may proceed pursuant to subsection E.

- C. If the party requests a hearing pursuant to subsection B, and the Director has good cause to believe that there is danger that the party requesting the hearing will remove itself or its property from the jurisdiction of the Tribe prior to the hearing, he may, in his discretion, require the party to post a bond with the Commission in an amount sufficient to cover possible monetary damages that may be assessed against the party at the hearing. If pursuant to subsection E. The Director may also petition the Cheyenne River Sioux Tribal Court for such interim and injunctive relief as is appropriate to protect the rights of the Commission and other parties during the pendency of the complaint and hearing proceedings.
- D. Any hearing held pursuant to subsection B shall be conducted by the Commission. Conduct of the hearing shall be governed by the rules and practices and procedures which may be adopted by the Commission. The Commission shall not be bound by technical rules of evidence in the conduct of hearings under this Ordinance, and no informality in any proceedings, as in the manner of taking testimony, shall invalidate any order, decision, rule or regulation made, approved or confirmed by the Commission. No stenographic record of the proceedings and testimony shall be required except upon arrangement by, and at the cost of the party charged.
- E. If, after the hearing, the Commission determines that the violation alleged in subsection A occurred and that the party charged has no adequate defense in law or fact, or if no hearing is requested, the Commission may:
 - 1. Deny such party the right to commence business on the Cheyenne River Sioux Reservation;
 - 2. Suspend such party's operation within the Cheyenne River Sioux Reservation;
 - 3. Terminate such party's operation with the Cheyenne River Sioux Reservation;
 - 4. Deny the right of such party to conduct any further business within the Cheyenne River Sioux Reservation;
 - 5. Impose a civil fine on such party in an amount not to exceed \$500 for each violation, plus interest and penalties for failure to pay a fine in a timely manner. For purposes of this Ordinance each day a party is out of compliance shall institute a separate violation.

6. Order such party to make payment of back pay to any aggrieved Indian;
7. Order such party to dismiss any employee hired in violation of the Cheyenne River Sioux Tribe's employment right requirement;
8. Order the party to take such other action as is necessary to ensure compliance with this Ordinance or to remedy any harm caused by a violation of this Ordinance, consistent with the requirements of 25 U.S.C. 1301 et seq.

The Commission's decision shall be in writing, shall be served on the charged party by registered mail or in person no later than 30 days after the close of the hearing provided in subsection E. Where the party's failure to comply immediately with the Commission's orders may cause irreparable harm, the Commission may move the tribal rights of the beneficiaries of this Ordinance, pending the party's appeal or expiration of the time for appeal.

FIRST OFFENSE: Any individual, group or individuals or organization, covered employer or entity found to be in violation of this Ordinance or regulations issued pursuant to it, shall have the right of due process as stated in Sections 12-16.

SECOND OFFENSE: The Director shall have the right to impose fines and/or suspend/terminate the party's operation until the entity sited for violation comes into compliance in accordance with this Ordinance or regulations issued pursuant to it.

SECTION 16: APPEALS

- A. An appeal to the Tribal Court may be taken from any final order of the Commission by any party adversely affected thereby. Said appeal must be filed no later than 20 days after the party receives a copy of the Commission's decision. The Tribal Court shall uphold the decision of the Commission unless it is demonstrated that the decision of the Commission is arbitrary, capricious or in excess of the authority of the Commission. The appeal shall be taken by serving a written notice of appeal with the Tribal Court, with a copy to the Director within twenty days after the date of the entry of the order.

The notice of appeal shall:

1. Set forth the order from which appeal is taken;
2. Specify the grounds upon which reversal or modification of order is sought;
3. Be signed by appellant.

Except as provided below or in subsection B, the order of the Commission shall abate pending the determination of the Tribal Court. However, the Director may petition and, for good cause shown, the Court may order the party requesting a hearing to post a bond sufficient to cover monetary damages that the Commission assessed against the party or to assure the party's compliance with other sanctions or remedial actions imposed by the

Commission's order if that order is upheld by the Court. If the order of the Commission is reversed or modified, the court shall by its mandate specifically direct the Commission as to further action in the matter, including making and entering any order or orders in connection therewith, and the limitations, or conditions to be contained therein.

- B. If the Commission's order is upheld on appeal, or if no appeal is sought within 20 days from the date of party's receipt of the Commission's order, the Commission shall petition the Court and the Court shall grant such orders as are necessary and appropriate to enforce the orders of the Commission and the sanctions imposed by it.
- C. If at any stage in the enforcement process, the Commission has reason to believe there is a danger that a party will remove itself or its property from the jurisdiction of the Tribal Court, such that the Commission or the Court will not be able to collect monetary damages or TERO fees that are (a) owed by that party pursuant to any outstanding order of the Commission or Court, or (b) which may be owed if the charges set out any outstanding notice of violations are upheld, the Commission may petition the Tribal Court pursuant to the rules and procedures of that Court to attach and hold sufficient property of the party to secure compliance or for such other relief as is necessary and appropriate to protect the rights of the Commission and other affected parties.

SECTION 17: CONFISCATION AND SALE

If, 21 days after a decision by the Commission pursuant to subsection E of Section 15, no appeal has been filed, or 30 days after a decision by the Court on appeal for a decision by the Commission pursuant to subsection A of Section 16 a party has failed to pay monetary damages imposed on it or otherwise comply with an order of the Commission or the Court, the Commission may petition the Court to order the tribal police to confiscate, and hold for sale, such property of the party as is necessary to ensure payment of said monetary or otherwise achieve compliance. Said petition shall be accompanied by a list of property belonging to the party which the Commission has reason to believe is within the jurisdiction of the Tribal Court, the value of which approximates the amount of monetary damages at issue. If the Court finds the petition to be valid, it shall order the tribal police to confiscate and hold said property or as much as is available. The Tribal police shall deliver in person or by certified mail, a notice to the party informing it of the confiscation and of its right to redeem said property by coming into compliance with the order outstanding against it. If 30 days after confiscation the party has not come into compliance, the Court shall order the police to sell said property and use the proceeds to pay any outstanding monetary damages imposed by the Commission and all costs incurred by the Court and police in confiscation and sale. Any proceeds remaining shall be returned to the party.

SECTION 18: FAIR LABOR STANDARDS

The provisions of the Federal Fair Labor Standards Act, as amended now or in the future, regarding minimum wages (including Davis Bacon minimum wages), overtime, fringe benefits, and time for payment of wages, are adopted by reference in and by this Ordinance. The Commission shall have the authority to monitor and enforce those requirements, pursuant to the monitoring and enforcement authorities provided generally to the Commission by this Ordinance. Provided that, this section shall apply only to those employers who are otherwise covered by the Federal law. No employer who is not presently subject to the Federal laws (or subsequently made subject by amendments or court decisions) shall be covered by this section. The purpose of this section is to give the Commission the parallel authority to monitor and enforce the fair labor requirements against those already covered by the Federal law, not to expand such requirements to employers not already covered. In imposing back pay awards, penalties and interest sanctions under this provision, the Commission shall credit an employer with any back pay, interest or penalties paid pursuant to an order of settlement entered into with the Federal government for the same violation.

SECTION 19: ORDERS TO POLICE

The Cheyenne River Sioux Tribal Police are hereby expressly authorized and directed to serve, and enforce such cease and desist or related orders as may from time to time be properly issued by the Commission and the Director.

Such orders do not require a judicial decree or order to render them enforceable. The police shall not be civilly liable for enforcing such orders so long as the order is signed by the Director and the Commission. The Cheyenne River Sioux Tribal Police shall not enforce a removal order for the Director unless it is accompanied by the judicial decree or order to the Commission and/or Tribal Court.

SECTION 20: BOND ADJUDICATION AND STATE PROJECTS

The Cheyenne River Sioux Tribe waives any objection, based on the grounds of interference with the rights of tribal self-government, to adjudications, in the South Dakota state courts, of disputes between the State of South Dakota or its agencies or subdivisions, and their contractors, involving performance bonds furnished by such contractors, or involving other aspects of this Ordinance or other tribal law, or any action taken pursuant to this Ordinance or other tribal law; provided further, that this subsection in no way limits or reduces the jurisdiction of the Cheyenne River Sioux Tribal Court; and provided further, that nothing in this subsection constitutes a waiver, in any respect, of the sovereign immunity of the Cheyenne River Sioux Tribe and its constituent parts, including but not limited to the Tribal Employment Rights Office Director, and Commission.

Notwithstanding any provision of the Tribal Law and Order Code, the Cheyenne River Tribal Court is hereby granted jurisdiction to render advisory opinions construing this Ordinance upon certification to the Court of a request for any such advisory opinion by a state or Federal Court. This advisory opinion may include both legal construction of this Ordinance and application of this Ordinance in any factual situation certified in the request.

SECTION 21: SEVERABILITY

If for any circumstances, provision(s) or sections of this Ordinance are held invalid by the appropriate court of jurisdiction, the remainder of this Ordinance and other provisions or sections will not be affected in the application of the Ordinance if any person, employer or others covered by the Ordinance.

SECTION 22: COVERAGE

This Ordinance shall be binding on all covered employers operating within the exterior boundaries of the Cheyenne River Sioux Indian Reservation, and whether or not they are doing so at the time of the implementation of this chapter and Ordinance.

SECTION 23: EFFECTIVE DATE

This Ordinance shall be effective from the date of its approval by the Cheyenne River Sioux Tribal Council.

The Cheyenne River Sioux Tribal Council established TERO ORDINANCE 42A by Resolution No. 46-87-CR on February 6, 1987.

Amended Ordinance 42A on March 16, 2000.