



[4337-15-P]

**DEPARTMENT OF THE INTERIOR**

**Bureau of Indian Affairs**

**25 CFR Part 224**

**RIN 1076-AF47**

**[192D0102DR/DS5A300000/DR.5A311.IA000118]**

**Tribal Energy Resource Agreements**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Final rule.

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**SUMMARY:** The Bureau of Indian Affairs (BIA) is amending its regulations governing Tribal Energy Resource Agreements (TERAs) between the Secretary of the Interior (Secretary) and Indian Tribes. Tribes, at their discretion, may apply for TERAs. TERAs allow Tribes to enter into leases, business agreements, and rights-of-way for energy resource development on Tribal land without the Secretary's review and approval. This final rule updates the regulations to incorporate changes recently made by Congress to the Act authorizing TERAs. This rule also establishes how, as an alternative to entering into a TERA, a Tribe may obtain certification of a Tribal Energy Development Organization (TEDO).

**DATES:** This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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### **I. Background**

The Secretary is issuing these regulations under the authority of the Indian Tribal Energy Development and Self-Determination Act of 2005, as amended by the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, 25 U.S.C. 3501-3504, Pub. L. 115-325, and 25 U.S.C. 2 and 9.

In 2005, Congress passed a law authorizing Tribes, at their discretion, to apply for and enter into TERAs with the Secretary. *See* the Indian Tribal Energy Development and Self-Determination Act of 2005, Title XXVI, Section 2604 of the Energy Policy Act (Pub. L. 109-58). Upon Secretarial approval of a TERA, the Tribe may enter into energy-related leases, business agreements, and rights-of-way on Tribal lands without the Secretary's review and approval. The BIA finalized regulations to implement this authority in 2008 at 25 CFR part 224. *See* 73 FR 12807 (March 10, 2008).

TERAs further the Federal Government's policy of providing enhanced self-determination and economic development opportunities for Indian Tribes by promoting Tribal oversight and management of energy resource development on Tribal lands. TERAs provide another avenue, in addition to the Indian Minerals Development Act and the Indian Mineral Leasing Act, under which Tribes may develop their mineral resources. TERAs also support the national energy policy of increasing utilization of both renewable and nonrenewable domestic energy resources.

Congress updated provisions authorizing TERAs in the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (2017 Amendments). The 2017 Amendments update the procedures and conditions for the Secretary's approval of TERAs, authorize Tribes to enter into leases and business agreements that pool a Tribe's energy resources with other energy resources and, among other things, establishes that energy-related leases, business agreements, and rights-of-way between a Tribe and certified TEDO do not require the Secretary's approval.

On July 2, 2019, the BIA published a proposed rule to incorporate changes made by the 2017 Amendments into the TERA regulations. *See* 84 FR 31529. The public comment period ended on September 3, 2019.

## **II. Responses to Comments on the Proposed Rule**

BIA received input from Tribes at a listening session on June 24, 2019 in Sparks, Nevada, at the National Congress of American Indians Mid-Year Conference and at Tribal consultation sessions on July 11, 2019, in Catoosa, Oklahoma; July 16, 2019, in Ignacio, Colorado; July 18, 2019, in New Town, North Dakota; and July 23, 2019, by teleconference. BIA also received 14 written comment submissions. (To view all

comments, search by Docket Number “BIA-2019-0002” in <https://www.regulations.gov>.)

The following discussion addresses each topic raised by the comments.

### **A. General Comments**

*Comment:* Several commenters, including six Tribes and one Tribal organization, stated their overall support of the revisions. A few individual commenters stated their opposition or expressed concern that TERAs in general may weaken protections for individual Indian landowners or minerals rights holders.

*Response:* The changes to the TERA regulations reflect statutory changes and are intended to encourage Tribes to enter into TERAs in support of Tribal self-governance. The regulation explicitly preserves the Department’s trust responsibilities. *See* § 224.40.

### **B. Comments on Consultation and Public Meetings**

*Comment:* One Tribe stated that BIA should have consulted with Tribes prior to publication of the proposed rule. An individual commenter requested a 90-day extension of the public comment period to obtain more input from individuals.

*Response:* BIA was unable to consult prior to publication due to statutory timing constraints. Likewise, BIA is unable to accommodate the request for an extension of the public comment period. The 2017 Amendments require publication of updates to the TERA regulations not later than December 18, 2019 (one year after the date of enactment of the 2017 Amendments). *See* Pub. L. 115-325, section 103(b).

*Comment:* A few individual commenters requested BIA hold additional public meetings at the Fort Berthold Reservation in New Town, North Dakota, to provide majority trust landowners the opportunity to provide comment. One individual requested BIA hold both a special information session in Pawhuska, Oklahoma, and an election of

the Osage headright owners to vote on whether they would like the Tribe to move forward with a TERA or TEDO before BIA approves any TERA or TEDO application from the Osage Nation.

*Response:* The TERA regulations provide the opportunity for public comment before any TERA or TEDO application is approved. *See* § 224.67. Those provisions in the existing TERA regulations are unchanged by this final rule.

### **C. Section-by-Section Comments**

#### **1. Definitions (§ 224.30)**

*Comment:* One commenter suggested clarifying that “decision deadline” is a point in time rather than a period of time.

*Response:* The final rule makes this change.

*Comment:* One Tribe requested that “energy resources” be broadly defined to include growing crops or trees for biomass.

*Response:* The existing regulation’s definition of “energy resources” is broadly defined and includes biomass as an example.

*Comment:* Several Tribes supported the definition of “qualified Tribe” in lieu of the requirement for the Secretary to determine Tribal capacity. One Tribe had several questions regarding what would meet the requirement for “substantial experience” in the second option. Another commenter asked whether “substantial experience” in the definition of “qualified Tribe” may include experience related to an agreement regarding resources on Tribal land that are developed elsewhere (e.g., an agreement to obtain oil on Tribal land and transport to a refinery off Tribal land).

*Response:* The determination of what is “substantial experience” or “substantial participation” in the administration, review, or evaluation of energy resource leases or agreements depends on the scope of the proposed TERA. There is no standard for the number of energy-related leases or agreements that a Tribe must have experience with, but the type of experience or substantial participation should be relevant. For example, experience in agreements regarding oil and gas wells, which involves significant front-end work, will differ from experience in agreements related to wind and solar farms, which involves significant back-end work on power purchase agreements. Other experience, such as treatment as a State status under the Clean Air Act may also be relevant. The definition of “qualified Tribe” allows two alternative means to qualify. Each requires a nexus to Tribal land. The second alternative would encompass experience with agreements regarding energy resources on Tribal land that are developed elsewhere.

*Comment:* One individual commenter opposed deletion of the Tribal capacity requirements and stated opposition to removing environmental review.

*Response:* The deletion of Tribal capacity requirements conforms to changes in the 2017 Amendments. The final rule does not remove environmental review.

*Comment:* One commenter requested changing language in the definition of “Tribe” from “because of their status as Indians” to “because of their status as sovereign governments.”

*Response:* While BIA recognizes that Tribes are sovereign governments, the wording of the definition referring to “Indians” comes from the original TERA statute, using the definition of “Tribe” from Public Law 93-638, which BIA is retaining here for consistency. *See* 25 U.S.C. 3504(e).

*Comment:* A few commenters requested clarification that the Osage minerals estate falls within the phrase “interests in land” in the definition of “Tribal land.”

*Response:* BIA agrees that the definition of “Tribal land” includes the Osage minerals estate in its reference to “interests in land,” but for brevity declines to amend the definition to list every individual Tribal surface and/or mineral estate it covers.

*Comment:* A Tribal organization commented that the definition of “TEDO” contains inaccurate statutory citations and suggested adding language stating that the TEDO is organized under Tribal law and subject to Tribal jurisdiction, laws, and regulatory authority.

*Response:* The final rule includes references to the correct citations, which are sections in the 2017 Amendments. The additional language is not necessary in the definition of TEDO because the Tribal law and Tribal jurisdiction language is provided in existing § 224.201(b) and (d).

## **2. Trust Responsibility (§ 224.40)**

*Comment:* Several commenters sought confirmation that the Secretary’s trust responsibility and provisions of other statutes are unaffected by the TERA regulations or expressed concern that they will lose the trust responsibility protections of the Secretary if a Tribe enters into a TERA or TEDO.

*Response:* The TERA regulations explicitly preserve the Secretary’s trust responsibility. *See* § 224.40. The TERA regulations do not affect who is considered a trust beneficiary, the 1906 Osage Allotment Act, or the ability of beneficiaries to elect to maintain their trustee for collection and disbursement of funds.

*Comment:* A Tribe requested clarification on what actions the Secretary will or will not take to maintain his or her trust responsibility.

*Response:* The existing TERA regulations set out what activities the Department will continue to perform after approval of a TERA. *See* § 224.82. Additionally, the application consultation meeting between the Tribal applicant and Secretary will identify the specific services consistent with the Secretary's ongoing trust responsibility and available resources that the Department would provide to the Tribe. *See* § 224.58(c). These existing sections are unchanged by this final rule.

### **3. Pre-Application Consultation (§ 224.51)**

*Comment:* One commenter objected to the proposed change from the Director of IEED to the Secretary as participating in pre-application consultation because the Secretary's heavy schedule could cause delays.

*Response:* The regulations' definition of "Secretary" includes the Secretary's designee. *See* § 224.30. In the Departmental Manual, the Secretary delegates authority to the Assistant Secretary – Indian Affairs, and the Assistant Secretary is able to re-delegate down to other officials. *See* 209 DM 8. Using the term "Secretary" affords the Department the flexibility to delegate authorities to the most appropriate official at any given time.

*Comment:* Two Tribes suggested adding a deadline, beginning when the Department receives the Tribe's pre-application, by which the Secretary must provide the required consultation to the Tribe. One of these commenters suggested a 30-day deadline.

*Response:* A 30-day deadline for the entire pre-application consultation process may be unrealistic if there are scheduling challenges with the Department's and Tribe's

schedules. Instead, the final rule incorporates a 30-day deadline for contacting the Tribe to schedule a pre-application consultation. *See* § 224.51(b). This new deadline for coordination meets the spirit of the comment by ensuring that the Department will not delay responding to a pre-application and the process moves forward.

*Comment:* A Tribe noted that BIA could provide additional legal and technical assistance beyond the pre-application consultation to include assistance in drafting the application and speeding up the approval process. This commenter also suggested the Department provide a template TERA.

*Response:* The Department is available to provide assistance to Tribes, beyond the formal pre-application consultation, in preparing a TERA. No templates are available at this time because it is not yet clear what standard approach would be most helpful without inadvertently limiting creative approaches.

#### **4. Application Contents (§ 224.53)**

*Comment:* A Tribe and Tribal organization expressed support for removing requirements related to a determination of Tribal capacity.

*Response:* The final rule finalizes this change.

*Comment:* A Tribe pointed out that the proposed rule would require Tribes to submit information that the Department likely already has: a statement that the Secretary recognizes the Tribe and has Tribal land (proposed § 224.53(a)(2)); a brief description of the Tribe's form of government (proposed § 224.53(a)(3)); or documentation that the Tribal governing body has authority to enter into leases, rights-of-way, and business agreements (proposed § 224.53(b)).

*Response:* The final rule deletes these provisions in response to this comment.

*Comment:* The same Tribe also suggested the requirement for a map and description of Tribal land the Tribe intends to include in the TERA (§ 224.53(a)(5)) is duplicative with the requirement at § 224.53(c)(2).

*Response:* The final rule retains both of these provisions because one provision requires a map and description of the Tribal land, while the other requires the Tribe to specify which energy resources or categories of energy-related leases, business agreements, or rights of way it intends to include in the TERA.

*Comment:* The same Tribe stated that the provision at § 224.53(d)(1), requiring the Tribe to describe the scope of its plan for administration and management of activities, duplicates the provision at (d)(3), requiring the Tribe to describe the regulatory activities it desires to assume in the geographical area with respect to leases, business agreements, and rights-of-way that exist when a TERA is approved.

*Response:* The first provision requires the Tribe to state its intent, if applicable, to regulate activities and describe a plan for administration and management, while the second provision requires the Tribe to describe which particular permitting, approval, or monitoring activities it plans undertake in the geographical areas it defines.

*Comment:* One commenter requested that the Secretary require a forensic audit of all Tribal funds as a “stress test” before accepting a TERA or TEDO.

*Response:* The final rule does not include a requirement for a forensic audit; including such a requirement would be inconsistent with other changes in the 2017 Amendments that limit the Secretary’s examination of Tribal capacity to enter into a TERA.

## **5. How a Tribe Submits an Application (§ 224.54)**

*Comment:* A commenter suggested specifying only one means of submitting a TERA, clarifying that electronic submissions must be in searchable portable document format (PDF), and clarifying that the time period begins upon the Secretary's receipt of a submission in that form, to eliminate confusion on when the date of receipt occurred.

*Response:* The final rule incorporates these suggestions by establishing email as the means of submission and requiring submissions be in PDF in § 224.54. The electronic submission will provide certainty for both the Tribe and the Department as to the date of receipt. The final rule also makes this change to the TEDO section at § 224.202 for the same reason.

*Comment:* A commenter requested the rule clarify that a submission is not technically an "application" if it does not include all the required documents and information.

*Response:* The requested clarification is not necessary because the existing regulations already specify that an application must be "complete" and, if the application is not complete, then the Secretary must specify to the Tribe what additional information is required to make the application complete. *See* § 224.56 and § 224.57.

## **6. Disclosure to Third Parties (§ 224.55)**

*Comment:* One Tribe stated that information submitted by Tribes should not be subject to disclosure to third parties under the Freedom of Information Act (FOIA) and that the procedures for identifying and justifying that information should be withheld as confidential or sensitive are burdensome.

*Response:* Information submitted by Tribes to Interior is subject to disclosure to third parties under FOIA. *U.S. Department of the Interior v. Klamath Water Users*

*Protective Ass'n*, 532 U.S. 1 (2001). The procedures in § 224.55 for identifying and justifying that information should be withheld are standard FOIA Exemption 4 procedures that are in the existing regulation and are not being changed as a part of this rulemaking.

*Comment:* A few commenters from one Tribe requested more disclosure of documents related to oil and gas production on their reservation and asked whether the Tribe could take over the responsibility to maintain custody of those records.

*Response:* The individual terms of the TERA will determine what responsibilities a Tribe takes over; however, even if a Tribe were to take over as custodian of the records, the records would continue to be Federal records with proprietary information subject to withholding under FOIA exemptions.

#### **7. Receipt of Complete Application (§ 224.56)**

*Comment:* A few commenters noted the 270-day deadline for the Secretary to issue a decision: some stated that the time period is long and should be shortened, and others stated that the time period is reasonable considering all the steps that need to occur.

*Response:* The 270-day timeline is in the existing regulations and was established by statute. This rule does not change that timeline.

*Comment:* Two commenters stated that there is no statutory authority to allow a TERA to take effect prior to the 271<sup>st</sup> day or extend the deadline. Two other commenters suggested imposing a maximum on any extension to the 270-day period for making a decision.

*Response:* In response to these comments, the final rule deletes provisions allowing for an extension of the deadline. This change will simplify the regulation to clearly provide that the TERA takes effect on the 271<sup>st</sup> day unless the Secretary disapproves it or approves it before that deadline. *See, also,* §§ 224.62, 224.74. While a strict reading of the statute would mean that the TERA could take effect only on the 271st day and no earlier, such a strict reading would undermine the clear purposes of the statute (to streamline energy development and promote Tribal self-determination) by preventing a TERA from taking effect earlier. *See, e.g.,* S. Rept. 115-84. *See, also,* §§ 224.62, 224.74.

#### **8. Financial Assistance (§ 224.57)**

*Comment:* One commenter stated that the new language providing that the Secretary will include, in the notice of a complete application, a notice of any available financial assistance duplicates the required TERA provision addressing financial assistance in § 224.63(h).

*Response:* The notice to the Tribe of available financial assistance may ultimately be different from what the Tribe and Secretary agree to include as part of the TERA, so these provisions are not duplicative.

#### **9. Application Consultation Meeting (§ 224.58)**

*Comment:* One commenter stated that the application consultation meeting should take place no later than 195 days after the Secretary receives the TERA application.

*Response:* The Department agrees with this commenter's calculation that the meeting should take place by that time, but is not including this benchmark in the rule in

order to retain the flexibility afforded in the existing regulation, which provides that the meeting will occur as at the earliest practicable time. *See* § 224.58(a).

*Comment:* A commenter stated that the Department should be required to consult with other Federal agencies that may be impacted by a proposed TERA and resolve any conflicting requirements.

*Response:* Paragraph (d) of this section provides that the Secretary will discuss the relationship of the Tribe to other Federal agencies with responsibilities for leases, business agreements, or rights-of-way. In practice, the Department will strive to use this opportunity to resolve any conflicting requirements with other Federal agencies.

*Comment:* A commenter also stated that paragraph (e), regarding a discussion of the Tribe's relationship to State and local governments and non-Indians who may be affected by a TERA, should not hinder or halt a TERA approval.

*Response:* Discussion regarding those who may be affected by a TERA will not hinder or halt approval of the TERA because the final rule limits the grounds upon which a TERA may be disapproved. *See* § 224.71.

#### **10. Review of Final TERA proposal (§ 224.62)**

*Comment:* A Tribe stated that the regulation refers to a "final proposed TERA" without defining what that is. This commenter expressed concern that having both an original proposed TERA version and a final proposed TERA version would cause delays.

*Response:* A final proposed TERA may differ from an original proposed TERA in a limited number of ways, as enumerated in § 224.62. The final proposed TERA is the version of the TERA that the Tribe submits after the application consultation meeting, which may address any recommendations provided by the Secretary in the report

provided after the application consultation meeting. *See* § 224.60. The 270-day deadline for a decision on a TERA begins to run from the time the Department receives the original proposed TERA, so there is no risk of delay. *See* § 224.62.

*Comment:* Two commenters again noted that the statute does not provide the Secretary discretion to extend the 270-day review period.

*Response:* The final rule deletes provisions allowing for an extension of the deadline. This change will simplify the regulation to clearly provide that the TERA takes effect on the 271<sup>st</sup> day unless the Secretary disapproves it or approves it before that deadline. *See, also,* §§ 224.62, 224.74.

#### **11. Required TERA Provisions (§ 224.63)**

*Comment:* One Tribe stated that certain paragraphs (e.g., paragraph (c)(1), regarding public opportunity to comment) should not be construed to mean that public comment or non-Tribal entities may impact TERA application approval or continuation.

*Response:* This section will impact TERA application approval or continuation only to the extent that the listed provisions must be included in a TERA for the Department to approve the TERA.

*Comment:* One commenter stated that the provision requiring the environmental review process to identify and evaluate significant environmental effects and proposed mitigation measures should not be deleted because deletion will degrade trust land, water, and air quality.

*Response:* The final rule retains provisions informing the public of the opportunity to comment on environmental impacts and provides for Tribal responses to relevant and substantive public comments before approval of the lease, right-of-way, or

business agreement. The specific references to significant environmental effects and proposed mitigation were deleted in the proposed and final rule to conform to changes to the statute at 25 U.S.C. 3504(e)(2)(C).

**12. Assuming Management of Different Resources under TERAs (§ 224.64)**

*Comment:* Tribes and Tribal organizations supported these revisions.

*Response:* The final rule retains the proposed revisions.

**13. Assuming Additional Activities under TERA (§ 224.65)**

*Comment:* One Tribe requested that this section include a definite timeframe for Secretarial approval of an amendment to assume additional activities.

*Response:* Because the Department has not yet developed any experience in reviewing TERA amendments by which to judge what timeframe would be most appropriate for such a review, the final rule does not include a definite timeframe at this point.

**14. Reducing the Scope of TERAs (§ 224.66)**

*Comment:* One Tribe requested that this section include a definite timeframe for Secretarial approval of an amendment to reduce the scope of a TERA.

*Response:* Because the Department has not yet developed any experience in reviewing TERA amendments by which to judge what timeframe would be most appropriate for such a review, the final rule does not include a definite time frame at this point.

*Comment:* The Osage Minerals Council stated that, in the case of the Osage Nation, there is no single Tribal governing body that can unilaterally decide to reduce the

scope of a TERA related to the Osage mineral estate, because both the Osage Minerals Council and the Osage Nation Congress and Chief would have to agree.

*Response:* No change is made to the rule to address this comment because the regulation continues to define “Tribal governing body” to be a Tribe’s governing entity, such as Tribal council or Tribal business committee, as established under Tribal or Federal law and recognized by the Secretary. *See* § 224.30. In the case of the Osage, the Osage Minerals Council is “an independent agency within the Osage Nation . . . with no legislative authority for the Osage Nation government.” Osage Const., Art. XV § 4. *See also, Boone v. Osage Nation of Oklahoma*, No. SCV-2015-01 (Supreme Court of the Osage Nation; September 9, 2016). Thus, under the Osage Constitution and a decision of the Osage Supreme Court, the “Tribal governing body” as defined in the TERA regulations is the Chief and Osage Nation Congress, not the Osage Minerals Council. The Department will not insert itself into the internal consultation process of the Osage Nation government.

#### **15. Public Notification and Comment (§§ 224.67-224.68)**

*Comment:* Two Tribes expressed concern that allowing for comment from the public, States, or local governments on a TERA would derail the Tribe’s plans and requested adding language to protect Tribes from undue influence.

*Response:* The Tribe and Secretary may mutually agree to make changes to the TERA based on comments from the public, States, or local governments, but those comments cannot alone provide the basis for approving or disapproving a TERA because the final rule restricts the basis for disapproving a TERA to three reasons. *See* § 224.68 and § 224.71.

*Comment:* One Tribe suggested that Tribes provide a robust plan for public involvement and participation in Tribal projects under TERAs.

*Response:* The Department defers to Tribes on the extent to which they involve their members and the public in Tribal projects under TERAs.

#### **16. Standards to Approve a TERA (§ 224.71)**

*Comment:* All the comments received on this section supported the revisions in limiting grounds for disapproval.

*Response:* The final rule retains these revisions.

#### **17. Timing of Approval (§ 224.74)**

*Comment:* A commenter stated that there is no statutory authority to allow a TERA to take effect prior to the 271<sup>st</sup> day or extend the deadline.

*Response:* The final rule deletes provisions allowing for an extension of the deadline. This change will simplify the regulation to clearly provide that the TERA takes effect on the 271<sup>st</sup> day unless the Secretary disapproves it or approves it before that deadline. *See, also,* §§ 224.56, 224.62. The rule does delete the provision allowing for an earlier effective date because of the reasons stated in response to the comments on § 224.56, above.

#### **18. Action Upon Approval or Disapproval (§ 224.75)**

*Comment:* One Tribe expressed concern that the Department may wait until the last day to disapprove an application and require the Tribe to revise and resubmit the application multiple times. This Tribe suggested that the final rule limit the Secretary to one revision encompassing all needed changes or show cause for failing to request such changes the first time.

*Response:* The final rule is designed to avoid the need for multiple resubmissions by first allowing the opportunity for a “thorough discussion of the Tribe’s application” at the application consultation meeting (§ 224.58(b)) and then, after submission of the final proposed TERA, by requiring the Secretary to specify the changes or other actions required to address each reason for the disapproval (§ 224.75(b)).

*Comment:* A Tribal organization suggested adding a requirement that the Secretary include notification in the approval that the Tribe may request non-expended amounts.

*Response:* Section 224.79 provides notice of this opportunity.

*Comment:* One commenter noted that the new approach that provides Tribes with the opportunity to revise and resubmit a TERA and requiring the Department to provide technical assistance to Tribes is consistent with contracting and compacting approvals under the Indian Self-Determination and Education Assistance Act (ISDEAA).

*Response:* The final rule includes these provisions.

#### **19. Resubmission of TERA (§ 224.76)**

*Comment:* A commenter noted that the statute does not provide the Secretary discretion to agree with the Tribe to extend the period for resubmission review period or the period for a decision.

*Response:* Provisions allowing for extensions have been deleted; see response to the last comment regarding § 224.56.

#### **20. Appeals of Secretary’s Decision on TERA (§ 224.77)**

*Comment:* One Tribe stated that this section should be revised to allow a TEDO to appeal a Secretary’s decision.

*Response:* The final rule does not incorporate this suggested change because this section addresses appeals related to TERAs and a Secretary's decision on a TERA would not affect a TEDO, as the TEDO is an alternative to a TERA. The final rule does account for a TEDO's ability to appeal Departmental decisions or inaction in § 224.181, however.

### **21. How Long a TERA is in Effect (§ 224.78)**

*Comment:* A Tribe expressed support for the proposed changes providing that the TERA remains in effect unless and until the Tribe rescinds or the Secretary reassumes activities because these provisions provide certainty.

*Response:* These provisions are included in the final rule.

### **22. Providing Unexpended Amounts to Tribe (§ 224.79)**

*Comment:* One Tribe stated that TEDOs should also have the opportunity to obtain unexpended amounts.

*Response:* No change has been made to address this comment because the statute limits the availability of unexpended amounts to Tribes with a TERA. Additionally, because TEDOs do not take over any Departmental activities, there would be no unexpended amounts associated with a TEDO.

*Comment:* A few Tribes stated that the rule should include more detail on how the Secretary will calculate the amount of unexpended funds to provide to Tribes.

*Response:* The rule provides a basic framework for accounting because the accounting depends on the scope and breadth of activities each Tribe undertakes in its TERA. The Department will, by necessity, analyze on a case-by-case basis the particular functions undertaken, the funding available for those functions, and the extent to which there will be unexpended funds remaining when the Tribe takes over the functions. The

accounting will be too specific to each TERA to provide a detailed breakdown of how the Department will calculate unexpended funds across the board.

*Comment:* One commenter asked that this section clarify that unexpended funds are available based on the availability of appropriations.

*Response:* While it is true that the availability of appropriations will affect the amount of unexpended funds that are available, the Department declines to specify this in the final rule because this fact applies nearly universally.

### **23. When a Tribe may Grant a Right-of-Way (§ 224.84)**

*Comment:* One Tribe supported revisions to this section that broaden the types of rights-of-way that may be included in a TERA.

*Response:* The final rule includes these revisions.

*Comment:* One commenter suggested making a technical edit to delete the word “renewable” from the parenthetical description in paragraph (a) because the regulatory definition of “energy resources” includes both renewable and nonrenewable.

*Response:* The final rule does not make this edit because the term “renewable energy resources” is an example of a source of electricity production, rather than a restriction on the source of electricity production. This example is included in the statute and carried into the regulation because it appears that Congress intended to emphasize that an electric production facility includes one that produces electricity from renewable energy resources. *See* 25 U.S.C. 3504(g).

### **24. When a Tribe may enter into a Lease or Business Agreement (§ 224.85)**

*Comment:* A commenter suggested, in paragraph (d) (which addresses pooling, unitization, or communitization of energy mineral resources), deleting the word

“mineral” from “energy mineral resources” and adding the word “mineral” at the end of the sentence to read “or other mineral resources”.

*Response:* The Department did not make these edits because the wording included in the rule currently matches the wording in the statute. In particular, the rule does not delete the word “mineral” specifying that pooling, unitization, or communitization is for “energy mineral resources” because it appears Congress intended this paragraph to apply only to mineral resources.

## **25. Interested Party Petitions (§ 224.101) and Requirements Before Filing a Petition (224.107)**

*Comment:* One Tribe suggested defining the phrase “substantial evidence” in this section, which requires persons or entities to demonstrate with substantial evidence that they have sustained or will sustain, an adverse environmental impact as a result of a Tribe’s failure to comply with a TERA.

*Response:* The Department declines to define “substantial evidence” in order to allow for a case-by-case analysis.

*Comment:* Two individual commenters objected to limiting who is considered an interested party to those able to demonstrate the adverse environmental impact with substantial evidence, and to the requirement that an interested party exhaust all Tribal remedies. A Tribe supported limiting who is considered an interested party and requiring exhaustion of all Tribal remedies before filing a petition with the Secretary as affirming Tribal self-determination and acknowledging that Tribes are responsible for managing the TERA.

*Response:* The final rule incorporates changes made by Congress to limit who is an interested party and require exhaustion of “all” Tribal remedies before filing a petition. *See* 25 U.S.C. 3504(e)(7)(A).

*Comment:* A Tribe stated that the provisions regarding interested party petitions may be unduly burdensome and interfere with Tribal business because in the past, non-Tribal comments have derailed proposed actions of Tribes. This commenter suggested adding language to protect Tribes from undue influence.

*Response:* The public comment procedures included in the regulation are established by statute. The revisions include protections for Tribes by limiting who is considered an interested party, requiring interested parties to first exhaust all Tribal remedies, and by limiting the grounds on which the Secretary may disapprove of a TERA. *See* §§ 224.101, 224.107, and 224.71, respectively.

#### **26. Action to Ensure Compliance (§ 224.120)**

*Comment:* A Tribe stated that, when the Secretary reassumes activities under a TERA, Tribes should have the opportunity for a hearing and the Secretary should have the burden of proving by clear and convincing evidence the grounds for the reassumption.

*Response:* Later provisions in the regulation set out the processes for the Secretary to notify the Tribe of noncompliance, including the opportunity for a hearing, and the process for the Secretary to reassume functions. *See* §§ 224.115 through 224.121, and 224.136 through 224.161. This rulemaking does not change these processes.

#### **27. Appeal of Secretary’s Decision on Tribal Compliance with a TERA (§ 224.121)**

*Comment:* One commenter suggested technical edits to clarify that the Secretary’s designees will be carrying out the regulation because, otherwise, it appears odd for the Principal Deputy Assistant Secretary – Indian Affairs to be the arbiter of actions taken by the “Secretary.”

*Response:* The regulation refers to “Secretary” in order to provide the Secretary with the maximum flexibility as to who to designate to act on his or her behalf. *See* response to comment regarding delegation under “3. Pre-Application Consultation (§ 224.51), above.

## **28. Appeals of Departmental Decisions (§§ 224.181-224.185)**

*Comment:* One individual commenter objected to the regulations’ limit on who may appeal to only those who are adversely affected, as limiting the ability of a Tribal member to appeal and to limiting the basis of the appeal to those issues raised in prior participation in the petitioning process. Another commenter requested adding a paragraph to clarify that the person may petition under the First Amendment to the U.S. Constitution.

*Response:* The Department did not propose any changes to the rights of an interested party to appeal, and is not making any changes in the final rule to an interested party’s right to appeal. To the extent someone would have the right to petition under the First Amendment to the U.S. Constitution notwithstanding Congress’s limitations on appeals as reflected in this rule, that right would exist regardless of whether the Department makes the right explicit in the rule.

## **29. TEDOs (Subpart J)**

*Comment:* Several Tribes expressed their strong support of provisions allowing for TEDOs, stating that these provisions promote Tribal self-determination and Tribal economic development and provide additional opportunities for Tribes to develop their energy resources. One Tribe requested clarification that a TEDO may consist of more than one Tribe.

*Response:* The final rule includes the proposed provisions for certification of TEDOs as an alternative to TERAs. Paragraph (2) of the definition of “TEDO” already allows for two or more Tribes to organize as a TEDO. *See* § 224.30.

*Comment:* A Tribe requested clarification regarding whether a Tribe could enter into a TEDO with another entity if the other entity has a refinery that is not on Tribal land.

*Response:* The regulations would allow a Tribe to enter into a TEDO with another entity if the other entity has a refinery not on Tribal land, as long as the Tribe owns and controls the majority of the interest in the TEDO and owns the Tribal land being developed (i.e., the energy resources being developed for transfer to the refinery are on Tribal land). *See* § 224.201(c).

*Comment:* A Tribe requested clarification on whether a joint venture organized under State laws (e.g., a Delaware limited liability company) could be certified as a TEDO.

*Response:* Both the statute and regulations provide that the joint venture must be organized under the Tribe’s law to be certified as a TEDO. *See* 25 U.S.C. 3504(h)(2)(B), and 25 CFR 224.201(b).

*Comment:* One commenter asked whether a Tribe could do both a TEDO and a TERA and what the difference between the two is.

*Response:* The TEDO is an alternative to a TERA that allows a Tribe to create its own entity as a TEDO or enter into a joint venture with other Tribes or non-Tribal entities as a TEDO and then, once the Secretary certifies the TEDO, the Tribe can enter into leases, rights-of-way, and business agreements with the TEDO without the Secretary's approval. A TERA, on the other hand, is an agreement between the Tribe and the Secretary that allows the Tribe to enter into leases, rights-of-way, and business agreements with any other entity or person (not just a TEDO). It would be possible for a Tribe to create a TEDO and also have a TERA with the Secretary.

*Comment:* A commenter suggested a technical edit to clarify that the Tribe must exercise sovereign authority over the Tribal land being developed by a TEDO.

*Response:* The current language "the Tribal land of which is being developed" appears in several sections of the regulation and was not proposed for change; therefore, the final rule retains this language. *See, e.g.*, §§ 224.201(c), (d), and 224.205(a)(2), (4).

*Comment:* An individual commenter stated that the intent of this language is to withhold trust responsibilities of the Federal government, especially when an individual Tribal member's energy resources are included in a TEDO, and that this does not comply with the Federal government's trust responsibility to individual Tribal members.

*Response:* While a lease of individual Tribal member energy resources could be included in a Tribe's pooling, unitization, or communitization agreement with a TEDO, the usual requirements for landowner consent would still apply. Additionally, the

regulation states that the Act preserves the Secretary's trust responsibilities relating to trust resources. *See* § 224.40.

#### **D. Inherently Federal Functions**

*Comment:* Several Tribes and other commenters expressed the need to define “inherently Federal functions” to clarify what functions are not available for Tribes to undertake in a TERA. According to these Tribes, a definition is necessary for several reasons, including to address issues, provide certainty, and ensure consistency in interpretation. A few requested that the definition exclude basic minerals development functions, like applications for permits to drill, thereby allowing Tribes to undertake these functions through TERAs. A Tribal organization commenter requested consultation with Tribes before the Department defines the term.

*Response:* The Department has undertaken efforts to define “inherently Federal functions” based on years of Tribal input and anticipates releasing a list of functions that it has determined to be “inherently Federal” in the near future.

#### **E. Other Comments**

*Comment:* Two Tribes requested that the TERA regulations address dual taxation by clarifying that Tribes are the exclusive sovereign authority to tax improvements and activities on lands and energy development under TERAs.

*Response:* The leasing and right-of-way regulations at 25 CFR part 162 and 169, respectively, each include provisions that address taxation; these provisions apply to surface leases and rights-of-way under TERAs.

*Comment:* One commenter stated that the rule will adversely affect property rights.

*Response:* The rule does not affect property rights in any way because the Tribe is requesting the right to approve agreements related to Tribal land. In cases where an individual's land may be affected through pooling, unitization, or communitization, the requirements to obtain the consent of individual landowners remain.

*Comment:* A few commenters asked how the National Environmental Policy Act (NEPA) applies to the rule and to actions taken under a TERA. One commenter stated the rule will be a major Federal action significantly affecting the quality of the human environment

*Response:* The rule will not significantly affect the quality of the human environment, because no action is being taken with a TERA except that the Tribe takes over for the Department as approving authority for individual leases, rights-of-way, and business agreements on Tribal land. The regulation requires the TERA to include an environmental review process for the individual leases, business agreements, and rights-of-way entered into under the TERA. *See* § 224.63(c). The regulation also requires the Secretary to issue a notice advising the public when it receives a final proposed TERA of any NEPA review it is conducting related to approval of the final proposed TERA. *See* § 224.67(a)(2).

*Comment:* Two commenters asked for economic analysis of how the rule could impact different Tribes or how much it costs to administer mineral estates.

*Response:* Any economic effect of the TERA regulations on Tribes would be too speculative to estimate at this point because the economics will depend on whether any Tribe enters a TERA and what functions each Tribe chooses to undertake. To date, no

Tribe has entered into a TERA, so there is no baseline for estimating what potential economic impacts may be.

Remaining comments addressed issues specific to one individual Tribe, advocated for funding, were out of scope, or addressed implementation, rather than the regulation itself.

### **III. Overview of Final Rule**

This rule addresses the requirements of the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (2017 Amendments). Wherever possible, BIA has interpreted these statutory changes in a manner that will impose the least burden on Tribes. As described in more detail, below, the rule: (1) reduces the information Tribes must provide in TERA applications; (2) imposes timelines on the Secretary for review and approval of TERAs; (3) limits the grounds on which the Secretary may disapprove a TERA and require an explanation of each of the grounds; (4) establishes a process for amending a TERA; (5) narrows who may be considered an interested party and procedures for petitioning and for the Secretary's handling of interested party petitions; (6) addresses how BIA will provide unexpended funds to Tribes; (7) establishes a process and criteria for certifying TEDOs ; and (8) makes various technical nomenclature and other technical edits.

#### **A. Information Required in Applications for TERAs**

The 2017 Amendments deleted a requirement for the Secretary to consider the capacity (experience in managing natural, financial and administrative resources) of a Tribal applicant to carry out a TERA. *See* Section 103(a) of the 2017 Amendments. To

reflect this deletion, the rule deletes several TERA application items and several required TERA provisions.

## **B. Timelines**

The rule incorporates timelines established by the 2017 Amendments to ensure that the TERA application process moves forward in a timely manner. Specifically, the rule:

- Requires the Secretary to contact the Tribe within 30 days of receiving a pre-application consultation request;
- Requires the Secretary to do the following within 30 days of a Tribe submitting a

TERA:

- Notify the Tribe as to whether the agreement is complete or incomplete;
- If the agreement is incomplete, notify the Tribe of what information or documentation is needed to complete the submission; and
- Identify and notify the Tribe of the financial assistance, if any, to be provided by the Secretary to the Tribe to assist in the implementation of the TERA, including the environmental review of individual projects.
- Establishes that a TERA takes effect 271 days after the Secretary receives the TERA, unless the Secretary approves the TERA to take effect on an earlier date, or the Secretary disapproves the application before the 271st day.
- Establishes that a revised TERA takes effect 91 days after the Secretary receives the TERA, unless the Secretary and the Secretary approves the revised TERA to take effect on an earlier date, or the Secretary disapproves it before the 91st day.

The rule also incorporates statutory requirements that the TERA remains in effect to the extent any provision is consistent with applicable Federal law (including regulations),

unless the Secretary reassumes the authority by necessity to protect the physical trust asset or the Tribe voluntarily rescinds the TERA pursuant to the regulations.

### **C. Grounds for Disapproval of a TERA**

The rule promotes certainty in the TERA application process by limiting the grounds upon which the Secretary may disapprove a TERA. Specifically, the rule establishes that the Secretary may disapprove a TERA only if:

- The Tribe does not meet the definition of a “qualified Tribe;”
- A provision of the TERA violates applicable Federal law, regulations, or a treaty;  
or
- The TERA fails to include certain provisions.

In addition, the rule provides that, where the Secretary does disapprove a TERA application, the Secretary must provide the Tribe with a detailed, written explanation of each reason for a disapproval, specify the revisions or changes to the TERA necessary to address each reason, and offer the Tribe an opportunity to revise and resubmit the TERA.

### **D. Amendments to TERAs**

The rule provides more flexibility to the Tribe, in that it establishes a process to amend an approved TERA to assume authority for approving leases, business agreements, or rights-of-way for development of another energy resource that is not already covered, without requiring the Tribe to apply for a new TERA.

### **E. Petitions by Interested Parties**

The rule updates the existing current regulatory process for ensuring that the public is informed of, and has reasonable opportunity to comment on, environmental impacts by:

- Limiting who is considered an interested party to those able to demonstrate their interest with substantial evidence;
- Requiring exhaustion of all remedies provided under Tribal law before an interested party may submit to the Secretary a petition to review Tribal compliance with the TERA;
- Requiring the Secretary to determine whether the petitioner is an interested party and whether the Tribe is not in compliance with the TERA as alleged in the petition;
- Limiting the Secretary to taking only such action as the Secretary determines is necessary to address the noncompliance claims; and
- Requiring the Secretary to dismiss a petition if the Tribe and interested party who filed the petition reach a resolution of the petition's claims.

#### **F. Unexpended Amounts**

The rule broadly sets out the manner in which the Secretary will provide to a requesting Tribe the amounts that the Secretary would have spent carrying out activities the Tribe carries out in the TERA (unexpended amounts), and will provide the Tribe with an accounting of those unexpended amounts.

#### **G. Certification of TEDOs**

The rule establishes a process for the TEDOs to obtain certification from the Secretary so that they may enter into leases, business agreements, and rights-of-way with Tribes on Tribal land without Secretarial approval. *See* Section 103(b) of the 2017 Amendments.

#### **H. Nomenclature and Technical Changes**

The rule also makes changes to:

- Capitalize “Tribe” consistent with the Government Printing Office Manual;
- Add reference to the annual list of federally recognized Tribes in the definition of “Tribe;”
- Replace “Director” of the Office of Indian Energy & Economic Development (IEED) with “Secretary” to indicate the Secretary of the Interior and maintain delegation flexibility, except where necessary to provide for administrative appeal options; and
- Add an address for receipt of TERA applications and requests for TEDO certifications.

#### **IV. Summary of Changes Made to Proposed Rule**

The Department made the following changes to the proposed rule in response to comments, as described above:

- In § 224.30, updated the definition of “decision deadline” to refer to an end date rather than a period of time, and corrected U.S.C. citations in the definition of “Tribal energy development organization (TEDO)”;
- In § 224.51, added a requirement for the Secretary to contact the Tribe within 30 days of receiving a request for pre-application consultation;
- In § 224.53, deleted requirements for the TERA application to include a statement that the Tribe is federally recognized and has Tribal land, a brief description of the Tribe’s form of government, and documents such as a Tribal constitution;

- In §§ 224.54 and 224.202, eliminated the need to submit a hard copy application and instead required Tribes and TEDOs to email a searchable, portable document format (PDF);
- In §§ 224.56, 224.62, 224.74, and 224.76, deleting provisions allowing the Secretary to extend time periods; and
- In § 224.181, adding that a TEDO may appeal Departmental decisions or inaction.

The Department also made an additional conforming edit to the proposed rule, which now appears in the final § 224.59 to delete reference to a determination of the Tribe's capacity.

## **V. Procedural Requirements**

### **A. Regulatory Planning and Review (E.O. 12866, 13563, and 13771)**

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is

also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations.

E.O. 13771 of January 30, 2017, directs Federal agencies to reduce the regulatory burden on regulated entities and control regulatory costs. OIRA has determined that this rule is deregulatory because the updates will reduce the requirements and annual burden hours imposed on Tribes seeking to enter into a TERA.

### **B. Regulatory Flexibility Act**

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

### **C. Small Business Regulatory Enforcement Fairness Act**

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of \$100 million or more because it merely codifies eligibility requirements that were already established by past practice and a Federal District Court ruling.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions because this rule affects only individuals' eligibility for certain education contracts.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises because this rule affects agreements between Tribes and the Department to allow Tribes to authorize individual leases, business agreements, and

rights-of-way on Tribal land

**D. Unfunded Mandates Reform Act**

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a monetarily significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

**E. Takings (E.O. 12630)**

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 because this rule does not affect individual property rights protected by the Fifth Amendment or involve a compensable "taking." A takings implication assessment is not required.

**F. Federalism (E.O. 13132)**

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement because the rule affects only agreements entered into by Tribes and the Department. A federalism summary impact statement is not required.

**G. Civil Justice Reform (E.O. 12988)**

This rule complies with the requirements of Executive Order 12988. Specifically, this rule: (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

## **H. Consultation with Indian Tribes (E.O. 13175)**

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has substantial direct effects on federally recognized Indian Tribes because the rule affects the criteria, process, and effectiveness of agreements Tribes may enter into with the Department of the Interior to develop energy resources. The Department hosted consultation sessions with Tribes and individually notified each federally recognized Tribe of those opportunities to consult.

## **I. Paperwork Reduction Act**

OMB Control No. 1076-0167 currently authorizes the collections of information contained in 25 CFR part 224, with an expiration of January 31, 2020. With this rulemaking, we are seeking to renew this information collection. The current authorization totals an estimated 3,968 annual burden hours. This rule decreases the annual burden hours by an estimated 1,008 hours, due to: a decrease in the information requested as part of the TERA application process in §§ 224.53 and 224.63, and the streamlined process for seeking expansion of an existing TERA to cover additional Tribal land, energy resources, or categories of energy-related leases, business agreements, or rights-of-way in § 224.64. Also, under § 224.64, a Tribe now may submit an amendment, rather than applying for a new TERA. These revisions reduce the hour burden, as a result of a program change made through regulatory updates to implement a new statute, and so

require a revision to an approved information collection under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq. for which we are requesting OMB approval.

*OMB Control Number:* 1076–0167.

*Title:* Tribal Energy Resource Agreements, 25 CFR 224.

*Brief Description of Collection:* Submission of this information is required for federally recognized Indian Tribes to apply for, implement, reassume, or rescind a TERA that has been entered into under 25 U.S.C. 3501 *et. seq.*, and 25 CFR 224. This collection also requires the Tribe to notify the public of certain actions and allows a petition from the public to be submitted to Interior to inform of possible noncompliance with a TERA.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Federally recognized Indian Tribes and the public.

*Number of Respondents:* 1 on average (each year).

*Number of Responses:* 11 on average (each year).

*Frequency of Response:* On occasion.

*Estimated Time per Response:* Varies from 32 hours to 432 hours.

*Estimated Total Annual Hour Burden:* 2,960 hours.

*Estimated Total Non-Hour Cost:* \$18,100.

## **J. National Environmental Policy Act**

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because this is an administrative and procedural regulation. (For further information see 43 CFR 46.210(i)). We have also determined that the rule does not involve any of the extraordinary

circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

**K. Effects on the Energy Supply (E.O. 13211)**

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

**List of Subjects in 25 CFR Part 224**

Agreement, Appeals, Application, Business Agreements, Energy Development, Interested Party, Lease, Record keeping requirements, Reporting requirements, Right-of-Way, Tribal Energy Resource Agreements, Tribal capacity, Tribal lands, Trust, Trust asset.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 224 in Title 25 of the Code of Federal Regulations as follows:

**PART 224— TRIBAL ENERGY RESOURCE AGREEMENTS UNDER THE INDIAN TRIBAL ENERGY DEVELOPMENT AND SELF DETERMINATION ACT**

1. Revise the authority citation for part 224 to read as follows:

AUTHORITY: 25 U.S.C. 2 and 9; 25 U.S.C. 3501-3504; Pub. L. 109-58; Pub. L. 115-325

2. In part 224:

a. Throughout the part, remove the words “tribe”, “tribe’s”, “tribes”, and “tribal”, wherever they appear, and add in their place the words “Tribe”, “Tribe’s”, “Tribes”, and “Tribal”, respectively.

b. In subparts B through H, remove the words “Director” and “Director’s”, wherever they appear, and add in their place the words “Secretary” and “Secretary’s”, respectively.

3. Amend § 224.30 by:

a. Revising the definitions of “Act”, “Decision Deadline”, and “Designated Tribal Official”;

b. Adding in alphabetical order definitions for “Qualified Tribe” and “Tribal energy development organization”; and

c. Revising the definition of “Tribe”.

The revisions and additions read as follows:

**§ 224.30 What definitions apply to this part?**

*Act* means the Indian Tribal Energy Development and Self-Determination Act of 2005, as promulgated in Title V of the Energy Policy Act of 2005, Public Law 109-58, 25 U.S.C. 3501-3504, and as amended by the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, Public Law 115-325.

\* \* \* \* \*

*Decision Deadline* means the end of the 120-day period within which the Secretary will make a decision about a petition submitted by an interested party under subpart E. The Secretary may extend this deadline for up to 120 days.

\* \* \* \* \*

*Designated Tribal Official* means the official designated in a Tribe's pre-application consultation request, application, or agreement to assist in scheduling

consultations or to receive communications from the Secretary to the Tribe regarding the status of a TERA or activities under a TERA.

\* \* \* \* \*

*Qualified Tribe* means a Tribe with Tribal land that has—

(1) For a period of not less than 3 consecutive years ending on the date on which the Tribe submits the application, carried out a contract or compact relating to the management of tribal land or natural resources under title I or IV of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.) without material audit exception (or without any material audit exceptions that were not corrected within the 3-year period); or

(2) Substantial experience in the administration, review, or evaluation of energy resource leases or agreements or has otherwise substantially participated in the administration, management, or development of energy resources located on the Tribal land of the Indian Tribe.

\* \* \* \* \*

*Tribal energy development organization or TEDO* means:

(1) Any enterprise, partnership, consortium, corporation, or other type of business organization that is engaged in the development of energy resources and is wholly owned by a Tribe, including but not limited to an organization incorporated under section 17 of the Indian Reorganization Act, 25 U.S.C. 5124 or section 3 of the Oklahoma Indian Welfare Act, 49 Stat, 1967, chapter 831; and

(2) Any organization of two or more entities, at least one of which is a Tribe, that has the written consent of the governing bodies of all Tribes participating in the

organization, to apply for a grant, loan, or other assistance under 25 U.S.C. 3502 or to enter into a lease or business agreement with, or acquire a right-of-way from, a Tribe under 25 U.S.C. 3504(a)(2)(A)(ii) or (b)(2)(b).

\* \* \* \* \*

*Tribe* means any Indian Tribe, band, nation, or other organized group or community that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, except a Native Corporation as defined in the Alaska Native Claims Settlement Act, 43 U.S.C. 1602, as evidenced by inclusion of the Tribe on the list of recognized Tribes published by the Secretary under 25 U.S.C. 5131.

\* \* \* \* \*

**§ 224.51 [Amended]**

4. Amend § 224.51 by:

- a. Removing the words “Office of Indian Energy and Economic Development” in paragraph (a);
- b. Adding the words “within 30 days” after the words “Designated Tribal Official” in paragraph (b).

5. Amend § 224.53 by:

- a. Removing paragraphs (a)(2), (3), (4), (7), (8), (10);
- b. Redesignating paragraphs (a)(5) and (6) as (a)(2) and (3), respectively;
- c. Adding a new paragraph (a)(4);
- d. Redesignating paragraph (a)(9) as paragraph (a)(5);

- e. In newly redesignated paragraph (a)(5), removing the words “paragraph (e)” and adding the words “paragraph (d)” in their place;
- f. Redesignating paragraphs (a)(11) and (12) as paragraphs (a)(6) and (7), respectively.
- g. Removing paragraph (b);
- h. Redesignating paragraph (c) and paragraph (b);
- i. Removing paragraphs (d) and (f);
- j. Redesignating paragraph (e) as paragraph (c);
- k. In newly redesignated paragraph (c) introductory text, removing the words “paragraph (a)(9)” and adding the words “paragraph (a)(5)” in their place; and
- l. In newly redesignated paragraph (c)(1), removing the phrase “in sufficient detail for the Secretary to determine the Tribe’s capacity to administer and manage the regulatory activity(ies)”.

The addition reads as follows:

**§ 224.53 What must an application for a TERA contain?**

(a) \* \* \*

(4) Documentation that the Tribe meets the definition of “qualified Tribe” in § 224.30;

\* \* \* \* \*

6. Revise § 224.54 to read as follows:

**§ 224.54 How must a Tribe submit an application?**

A Tribe must submit an application and all supporting documents in a searchable portable document format (PDF) to TERA@bia.gov.

7. Revise § 224.56 to read as follows:

**§ 224.56 What is the effect of the Secretary’s receipt of a qualified Tribe’s complete application?**

The Secretary’s receipt of a qualified Tribe’s complete application begins a 270-day statutorily mandated period during which the Secretary must approve or disapprove a proposed TERA. The TERA takes effect upon the 271<sup>st</sup> day after the Secretary’s receipt of a complete application from a qualified Tribe, unless the Secretary approves the TERA to take effect on an earlier date, or the Secretary disapproves the application before that date.

8. Amend § 224.57 by redesignating paragraph (a)(3)(i)(B) as paragraph (a)(3)(i)(C) and adding a new paragraph (a)(3)(i)(B).

The addition reads as follows:

**§ 224.57 What must the Secretary do upon receipt of an application?**

(a) \* \* \*

(3) \* \* \*

If the Director determines that . . .	Then the Director must . . .
---------------------------------------	------------------------------

(i) \* \* \*

(B) Identify in the written notice any financial assistance available from the Secretary to assist in implementing the TERA, including environmental review of individual projects; and

\* \* \* \* \*

9. Revise § 224.59 to read as follows:

**§ 224.59 How will the Secretary use the results of the application consultation meeting?**

The Secretary will use the information gathered during the application consultation meeting in conjunction with information provided through §§ 224.53 and 224.63 to determine whether to recommend any revisions to the proposed TERA.

10. Revise § 224.62 to read as follows:

**§224.62 May a final proposed TERA differ from the original proposed TERA?**

The final proposed TERA may or may not contain provisions that differ from the original proposed TERA submitted with the application. In either case, the 270-day review period will begin to run on the date the original complete application was received (under § 224.57).

11. Amend § 224.63 by:

- a. Removing paragraphs (c)(1) and (2);
- b. Redesignating paragraphs (c)(3) through (6) as (c)(1) through (4);
- c. Removing paragraphs (d)(1) and (5);
- d. Redesignating paragraphs (d)(2) through (4) as paragraphs (d)(1) through (3);
- e. Redesignating paragraphs (d)(6) through (14) as paragraphs (d)(4) through

(12); and

- f. Adding paragraph (m).

The addition reads as follows:

**§ 224.63 What provisions must a TERA contain?**

\* \* \* \* \*

(m) At the option of the Tribe, identify which functions, if any, the Tribe intends to conduct to authorize any operational or development activities pursuant to a lease, business agreement, or right-of-way approved by the Tribe.

12. Revise § 224.64 to read as follows:

**§ 224.64 How may a Tribe assume management of development of different types of energy resources?**

(a) In order for a Tribe to assume authority for approving leases, business agreements, and rights-of-way for the development of another energy resource that is not included in the TERA, a Tribe must submit to the Secretary:

(1) An amendment to the TERA that specifies and describes the additional Tribal land, energy resources, or categories of energy-related leases, business agreements, or rights-of-way that the Tribe intends to include in the TERA; and

(2) A copy of the resolution or formal action of the Tribal governing body, or Tribal governing bodies if the land is held for the benefit of more than one Tribe, that approves submission of the TERA amendment.

(b) Submission of the documents in paragraph (a) of this section will trigger the public notice and opportunity for comment consistent with § 224.67.

(c) The Secretary will process the amendment in accordance with §§ 224.67 through 224.78.

(d) Each Tribal governing body that is party to the TERA must sign the TERA amendment upon approval.

**§ 224.65 [Amended]**

13. In § 224.65, remove the last sentence.

**§ 224.68 [Amended]**

14. In § 224.68, remove the last sentence in paragraph (d)

15. Revise § 224.71 to read as follows:

**§ 224.71 What standards will the Secretary use to decide to approve a final proposed TERA?**

The Secretary must approve a final proposed TERA unless:

- (a) The Tribe does not meet the definition of a “qualified Tribe” in § 224.30;
- (b) A provision of the TERA violates applicable Federal law (including regulations) or a treaty applicable to the Tribe; or
- (c) The TERA fails to include the provisions required by §224.63.

**§§ 224.72 and 224.73 [Removed and Reserved]**

16. Remove and reserve §§ 224.72 and 224.73.

17. Revise § 224.74 to read as follows:

**§ 224.74 When must the Secretary approve or disapprove a final proposed TERA?**

The Secretary must approve or disapprove a final proposed TERA within 270 days of the Secretary's receipt of a complete application for a TERA. If the Secretary fails to approve or disapprove a final proposed TERA within 270 days, the TERA takes effect on the 271<sup>st</sup> day after the Secretary's receipt of a complete application from a qualified Tribe.

18. In § 224.75, revise paragraph (b) to read as follows:

**§ 224.75 What must the Secretary do upon approval or disapproval of a final proposed TERA?**

\* \* \* \* \*

If the Secretary's decision is . . .	Then the Secretary will . . .
* * * * *	
(b) To disapprove the final proposed TERA	Send the Tribe a notice of disapproval that must include: (1) A detailed written explanation of each reason for the disapproval; (2) The changes or other actions required to address each reason for the Secretary's disapproval; (3) An opportunity to revise and resubmit the TERA: and (4) A statement that the decision is a final agency action and is subject to judicial review.

19. In § 224.76, revise the introductory text to read as follows:

**§ 224.76 Upon notification of disapproval, may a Tribe re-submit a revised final proposed TERA?**

Yes, within 45 days of receiving the notice of disapproval, or a later date as the Secretary and the Tribe agree to in writing, the Tribe may re-submit a revised final proposed TERA, approved by the Tribal governing body and signed by the Tribe's

authorized representative, to the Secretary that addresses the Secretary's concerns. The Secretary must approve or disapprove the revised final proposed TERA within 90 days of the Secretary's receipt of the revised final proposed TERA. If the Secretary does not approve or disapprove the revised proposed TERA within that time, it will take effect on the 91st day. Within 10 days of the Secretary's approval or disapproval of a revised final proposed TERA, the Secretary must notify the Tribal governing body in writing and take the following actions:

\* \* \* \* \*

20. Add § 224.78 to subpart C to read as follows:

**§224.78 How long will a TERA remain in effect?**

A TERA that takes effect under this part remains in effect to the extent any provision of the TERA is consistent with applicable Federal law (including regulations), unless and until either:

- (a) The Secretary reassumes all activities included within a TERA without the consent of the Tribe under Subpart G; or
- (b) The Tribe rescinds a TERA under Subpart H.

21. Add § 224.79 to subpart C to read as follows:

**§224.79 Will the Secretary make non-expended amounts available to the Tribe?**

Upon written request of a Tribe for whom an approved TERA is in effect, the Secretary will provide to the Tribe those amounts that the Secretary would otherwise have expended to carry out any program, function, service, or activity (or portion thereof)

that the Secretary does not expend as a result of the Tribe carrying out the activities under a TERA. The Secretary will provide the Tribe with a full accounting of the amounts as calculated based on the specific terms of the TERA, the scope of the contracted functions, and applicable circumstances.

**§ 224.80 [Amended]**

22. In § 224.80, add the word “Federal” before the word “authorities”.

23. Revise § 224.84 to read as follows:

**§224.84 When may a Tribe grant a right-of-way?**

A Tribe may grant a right-of-way under a TERA if the grant of right-of-way is over tribal land and the right-of-way serves:

(a) An electric production, generation, transmission, or distribution facility (including a facility that produces electricity from renewable energy resources) located on tribal land;

(b) A facility located on tribal land that processes or refines energy resources; or

(c) The purposes, or facilitates in carrying out the purposes, of any lease or agreement entered into for energy resources development on tribal land.

24. Revise § 224.85 to read as follows:

**§224.85 When may a Tribe enter into a lease or business agreement?**

A Tribe may enter into a lease or business agreement for the purpose of energy resource development for:

(a) Exploration for, extraction of, or other development of the Tribe's energy mineral resources on tribal land including, but not limited to, marketing or distribution;

(b) Construction or operation of an electric production, generation, transmission, or distribution facility (including a facility that produces electricity from renewable energy resources) located on tribal land;

(c) Construction or operation of a facility to process or refine energy resources, at least a portion of which have been developed on tribal land; or

(d) Pooling, unitization, or communitization of the energy mineral resources of the Indian tribe located on tribal land with any other energy mineral resource (including energy mineral resources owned by the Indian tribe or an individual Indian in fee, trust, or restricted status or by any other persons or entities) if the owner, or, if appropriate, lessee, of the resources has consented or consents to the pooling, unitization, or communitization of the other resources under any lease or agreement.

25. Revise § 224.101 to read as follows:

**§224.101 Who is an interested party?**

For the purposes of this part, an interested party is a person or entity that the Secretary determines has demonstrated with substantial evidence that an interest of the person or entity has sustained, or will sustain, an adverse environmental impact as a result of a Tribe's failure to comply with a TERA.

26. Revise § 224.107 to read as follows:

**§ 224.107 What must a petitioner do before filing a petition with the Secretary?**

Before a petitioner may file a petition with the Secretary under this subpart, the petitioner must have exhausted all tribal remedies by participating in any tribal process under §224.106, and available under the laws, regulations, or procedures of the Tribe, including any tribal appeal process.

27. In § 224.110 revise paragraph (b) to read as follows:

**§224.110 What must a petition to the Secretary contain?**

\* \* \* \* \*

(b) Specific facts demonstrating that the petitioner is an interested party under § 224.101, including identification of the affected interest;

\* \* \* \* \*

28. In § 224.115, revise the introductory text to read as follows:

**§ 224.115 When in the petition process must the Secretary investigate a Tribe's compliance with a TERA?**

The Secretary must investigate the petitioner's claims of the Tribe's noncompliance with a TERA only after making a threshold determination that the petitioner is an interested party and:

\* \* \* \* \*

29. Revise § 224.116 to read as follows:

**§ 224.116 What is the time period in which the Secretary must investigate a Tribe's compliance with a TERA?**

(a) If the Secretary determines under §224.115 that one of the threshold determinations in §224.114 has been met, then within 120 days of the Secretary's receipt of a petition, the Secretary must determine:

(1) Whether the petitioner is an interested party; and

(2) If the petitioner is an interested party, whether or not a Tribe is in compliance with the TERA as alleged in the petition;

(b) The Secretary may extend the time for the Tribe making the determinations in paragraph (a) of this section for up to 120 days in any case in which the Secretary determines that additional time is necessary to evaluate the claims in the petition and the Tribe's written response, if any. If the Secretary decides to extend the time, the Secretary must notify the petitioner and the Tribe in writing of the extension.

30. In § 224.119, revise paragraph (b)(1) and add paragraph (c) to read as follows:

**§ 224.119 What must the Secretary do when making a decision on a petition?**

\* \* \* \* \*

(b) \* \* \*

(1) Include findings of fact and conclusions of law with respect to each claim made in the petition in the written decision to the Tribe; and

\* \* \* \* \*

(c) The Secretary will dismiss any petition if the interested party who filed the petition has agreed with the Tribe to a resolution of the claims presented in the petition.

31. In § 224.120, revise the introductory text to read as follows:

**§ 224.120 What action may the Secretary take to ensure compliance with a TERA?**

If the Secretary decides that a Tribe is not in compliance with a TERA, the Secretary may take only such action as the Secretary determines to be necessary to address the claims of noncompliance made in the petition including:

\* \* \* \* \*

32. In § 224.181 revise paragraphs (a) and (c) to read as follows:

**§ 224.181 Who may appeal Departmental decisions or inaction under this part?**

\* \* \* \* \*

(a) A Tribe or TEDO that is adversely affected by a decision of or inaction by an official of the Department of the Interior under this part;

\* \* \* \* \*

(c) An interested party who is adversely affected by a decision or inaction by the Secretary under subpart E of this part, provided that the interested party may appeal only those issues raised in its prior participation under subpart E of this part and may not appeal any other decision rendered or inaction under this part.

33. In § 224.182, revise paragraph (a) to read as follows:

**§ 224.182 What is the Initial Appeal Process?**

\* \* \* \* \*

(a) Within 30 days of receiving an adverse decision by the Director or similar level official within 30 days after the time period within which the Secretary is required

to act under subpart E, a party that may appeal under this subpart may file an appeal to the Principal Deputy Assistant Secretary – Indian Affairs;

\* \* \* \* \*

34. Add subpart J, consisting of §§ 224.200 through 224.206, to read as follows:

**Subpart J—Alternative to TERAs: Tribal Energy Development Organization**

**(TEDO) Certification**

Sec.

- 224.200 What is the purpose of this subpart?
- 224.201 What must an application for certification as a Tribal energy development organization (TEDO) include?
- 224.202 How must a TEDO submit an application for certification?
- 224.203 What must the Secretary do upon receipt of an application for certification as a TEDO?
- 224.204 What criteria will the Secretary use to determine whether to approve an application for certification of a TEDO?
- 224.205 What must the Secretary do upon approval of an application for certification?
- 224.206 What is the effect of a TEDO receiving certification?

**§ 224.200 What is the purpose of this subpart?**

The purpose of this part is to establish a process by which an entity may be certified as an Tribal energy development organization (TEDO) that may enter into a lease or business agreement with an Indian Tribe without Secretarial review under 25 U.S.C. 3504(a)(2) or right-of-way with an Indian Tribe without Secretarial review under 25 U.S.C. 3504(b)(2)(B) and without a TERA.

**§224.201 What must an application for certification as a Tribal energy development organization (TEDO) include?**

An application for certification as a TEDO must include documentation of the items listed in paragraphs (a) through (d) of this section.

(a) The Tribe has carried out a contract or compact under title I or IV of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.) for a period of not less than 3 consecutive years ending on the date on which the Tribe submits the application, and the contract or compact:

(1) Has been carried out by the Tribe without material audit exceptions (or without any material audit exceptions that were not corrected within the 3-year period); and

(2) Has included programs or activities relating to the management of Tribal land;

(b) The TEDO is organized under the Tribe's laws;

(c) The majority of the interest in the TEDO is owned and controlled by the Tribe (or the Tribe and one or more other Tribes) the Tribal land of which is being developed; and

(d) The TEDO's organizing document:

(1) Requires the Tribe with jurisdiction over the land to maintain, at all times, the controlling interest in the TEDO;

(2) Requires the Tribe (or the Tribe and one or more other Tribes the Tribal land of which is being developed) to own and control, at all times, a majority of the interest in the TEDO; and

(3) Includes a statement that the TEDO is subject to the jurisdiction, laws, and authority of the Tribe.

**§ 224.202 How must a TEDO submit an application for certification?**

A TEDO must submit an application and all supporting documents in a searchable portable document format (PDF) to TERA@bia.gov.

**§ 224.203 What must the Secretary do upon receipt of an application for certification as a TEDO?**

Within 90 days of receiving an application for certification as a TEDO, the Secretary must approve or disapprove the application.

**§ 224.204 What criteria will the Secretary use to determine whether to approve an application for certification of a TEDO?**

The Secretary will approve the application for certification upon determining that the application contains the documentation required in § 224.201.

**§ 224.205 What must the Secretary do upon approval of an application for certification?**

If the Secretary approves an application for certification, the Secretary must do the following within 10 days of making the determination under § 224.203:

(a) Issue a certification stating that:

(1) The TEDO is organized under the laws of the Tribe and subject to the Tribe's jurisdiction, laws, and authority;

(2) The majority of the interest in the TEDO is owned and controlled by the Tribe (or the Tribe and one or more other Tribes) and the Tribal land of which is being developed;

(3) The TEDO's organizing document requires the Tribe with jurisdiction over the land to maintain, at all times, the controlling interest in the TEDO;

(4) The TEDO's organizing document requires the Tribe (or the Tribe and one or more other Tribes the Tribal land of which is being developed) to own and control, at all times, a majority of the interest in the TEDO;

(5) The certification is issued under 25 U.S.C. 3504(h); and

(6) Nothing in the certification waives the sovereign immunity of the Tribe.

(b) Deliver a copy of the Certification to the applicant Tribe (or Tribes, as applicable); and

(c) Publish the certification in the Federal Register.

**§224.206 What is the effect of a TEDO receiving certification?**

Upon receiving certification under this subpart, a TEDO may enter into a lease, business agreement, or right-of-way with an Indian Tribe without Secretarial approval as long as:

(a) The scope of the lease or business agreement does not exceed that of a TERA as established in §224.85 of this part.

(b) The scope of a right-of-way does not exceed that of a TERA as established in §224.84 of this part.

(c) The term of a lease, business agreement, or right-of-way does not exceed that of a TERA as established in §224.86 of this part.

Dated: November 15, 2019.

**Tara Sweeney,**

*Assistant Secretary – Indian Affairs.*

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