



[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:** Proposed rule.

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**SUMMARY:** The Bureau of Indian Affairs (BIA) proposes to amend 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 proposed rule would update the regulations to incorporate changes recently made by Congress to the Act authorizing TERAs. This proposed rule would also establish how Tribal Energy Development Organizations (TEDOs) may obtain certification, as an alternative to a TERA.

**DATES:** Please submit comments by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Please see “III. Tribal Consultation” of this preamble for dates of Tribal consultation sessions on this proposed rule.

**ADDRESSES:** You may send comments, identified by number 1076-AF47, by any of the following methods:

- Federal rulemaking portal: <http://www.regulations.gov>. Follow the instructions for sending comments.

- E-mail: [consultation@bia.gov](mailto:consultation@bia.gov). Include the number 1076-AF47 in the subject line of the message.

- Mail or hand-delivery: Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, U.S. Department of the Interior, 1849 C Street, N.W., MIB-4660-MS, Washington, DC 20240. Include the number 1076-AF47 in the subject line of the message.

Instructions: All submissions received must include “Bureau of Indian Affairs” and “1076-AF47.” All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. We cannot ensure that comments received after the close of the comment period (see DATES) will be included in the docket for this rulemaking and considered.

Comments on the information collections contained in this proposed regulation (see “Paperwork Reduction Act” section, below) are separate from those on the substance of the rule. Send comments on the information collection burden to OMB by facsimile to (202) 395-5806 or e-mail to the OMB Desk Officer for the Department of the Interior at [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov). Please send a copy of your comments to the person listed in the FOR FURTHER INFORMATION CONTACT section of this notice.

Please see “III. Tribal Consultation” of this preamble for addresses of Tribal consultation sessions on this proposed rule.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action, (202) 273-4680; elizabeth.appel@bia.gov.

**SUPPLEMENTARY INFORMATION:**

- I. Background
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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. *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 domestic energy resources.

Congress updated provisions authorizing TERAs in the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017. The Act's 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.

## **II. Summary of This Proposed Rule**

This proposed rule would address the requirements of the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (2017 Amendments). Wherever possible, BIA has attempted to interpret these statutory changes in a manner that will impose the least burden on Tribes. As described in more detail, below, the proposed rule would: (1) reduce the information Tribes must provide in TERA

applications; (2) impose timelines on the Secretary for review and approval of TERAs; (3) limit the grounds on which the Secretary may disapprove a TERA and require an explanation of each of the grounds; (4) establish a process for amending a TERA; (5) narrow who may be considered an interested party and procedures for petitioning and for the Secretary's handling of interested party petitions; (6) address how BIA will provide unexpended funds to Tribes; (7) establish a process and criteria for certifying TEDOs ; and (8) make 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 proposed rule would delete several TERA application items and several required TERA provisions.

#### **B. Timelines**

The proposed rule would incorporate timelines established by the 2017 Amendments to ensure that the TERA application process moves forward in a timely manner.

Specifically, the proposed rule would:

- Require the Secretary to do the following within 30 days of a Tribe submitting a TERA:
  - Notify the Indian tribe as to whether the agreement is complete or incomplete;
  - If the agreement is incomplete, notify the Indian tribe of what information or documentation is needed to complete the submission; and

- Identify and notify the Indian tribe of the financial assistance, if any, to be provided by the Secretary to the Indian tribe to assist in the implementation of the tribal energy resource agreement, including the environmental review of individual projects.
- Establish that a TERA takes effect 271 days after the Secretary receives the TERA, unless the Secretary disapproves it.
- Establish that a revised TERA takes effect 91 days after the Secretary receives the TERA, unless the Secretary disapproves it.

The proposed rule would also incorporate 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 proposed rule would promote certainty in the TERA application process by limiting the grounds upon which the Secretary may disapprove a TERA. Specifically, the proposed rule would establish 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 proposed rule would provide 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 proposed rule provides more flexibility to the Tribe, in that it would establish 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 proposed rule would update 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 any 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 proposed rule would broadly set 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 proposed rule would establish a process for the Tribal Energy Development Organizations (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 proposed rule would also make 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;
- Add an address for receipt of TERA applications and requests for TEDO certifications.

## I. Table of Proposed Changes

The following table summarizes revisions to part 224, by showing where the substance of each section of the current rule is in the proposed rule and describing the changes. The table does include sections for which there was no substantive change, including those sections where the only changes were to capitalize “Tribe” or replace “Director” with “Secretary.”

<b>Current 25 CFR §</b>	<b>Current Provision</b>	<b>Proposed 25 CFR §</b>	<b>Description of Proposed Change</b>
224.30	What definitions apply to this part?	224.30	In definition of “Act,” adds reference to the 2017 Amendments; adds new definitions for “qualified Tribe” and “Tribal energy development organization” and updates the definition of “Tribe” to refer to the list of federally recognized Tribes.
224.53	What must an application for a TERA contain?	224.53	Deletes provisions require descriptions of the Tribe’s expertise and capabilities and adds a provision requiring documentation that the tribe is a “qualified Tribe”
224.54	How must a tribe submit an application?	224.54	Adds an email and physical address for submitting a TERA application.
224.56	What is the effect of the Director’s receipt of a tribe’s complete application?	224.56	Adds that the TERA takes effect on the 271 <sup>st</sup> day after the Secretary receives a complete application, unless the Tribe consents to an extension.
224.57	What must the Director do upon receipt of an application?	224.57	Adds that the Secretary must identify in the written notice any financial assistance available from the Secretary to assist in implementing the TERA.
224.63	What provisions must a TERA contain?	224.63	Deletes provisions requiring that the environmental review process identifies and evaluates all significant environmental effects and proposed mitigation measures and provisions requiring mechanisms for obtaining qualifications of third parties and for securing technical information. Adds provision for the Tribe to identify functions the Tribe intends to conduct to authorize operational or development activities.
224.64	How may a tribe assume management of development of different types of energy resources?	224.64	Adds provisions allowing amendments to TERAs. Deletes provision requiring application for a new TERA and determination of the Tribe’s capacity.
224.65	How may a tribe assume additional activities under a TERA?	224.65	Deletes provision that the Secretary will determine whether the Tribe has sufficient capacity.
224.71	What standards will the Secretary	224.71	Revises to provide that the Secretary must

	use to decide to approve a final proposed TERA?		approve the TERA unless the Tribe is not a qualified Tribe, a TERA provision violates law or a treaty applicable to the Tribe, or the TERA fails to include required provisions.
224.72	How will the Secretary determine whether a tribe has demonstrated sufficient capacity?	224.72	Deletes the text of this section and reserves the section number to maintain numbering.
224.73	How will the scope of energy resource development affect the Secretary's determination of the tribe's capacity?	224.73	Deletes the text of this section and reserves the section number to maintain numbering.
224.74	When must the Secretary approve or disapprove a final proposed TERA?	224.74	Adds that if the Secretary fails to approve or disapprove a final proposed TERA, the TERA takes effect on the 271 <sup>st</sup> day after receipt.
224.75	What must the Secretary do upon approval or disapproval of a final proposed TERA?	224.75	Adds that the Secretary must provide a detailed, written explanation of each reason for the disapproval, the changes required to address each reason, and the opportunity to revise and resubmit the TERA.
224.76	Upon notification of disapproval, may a tribe re-submit a revised final proposed TERA?	224.76	Adds that if the Secretary fails to approve or disapprove a revised final proposed TERA, it takes effect on the 91 <sup>st</sup> day after receipt.
--	---	224.78	New section to address how long a TERA remains in effect. Adds that a TERA remains in effect until the Secretary reassumes activities under Subpart G or the Tribe rescinds the TERA under Subpart H.
--	--	224.79	New section to address how the Secretary will make non-expended amounts available to the Tribe.
224.80	Under what authority will a tribe perform activities for energy resource development?	224.80	Clarifies that the Tribe will perform activities under "Federal" authorities provided in the approved TERA.
224.84	When may a tribe grant a right-of-way?	224.84	Revises this section to clarify that the right-of-way may serve any of the listed purposes.
224.85	When may a tribe enter into a lease or business agreement?	224.85	Adds additional purposes, listed in the 2017 Amendments, for which the Tribe may enter into a lease or business agreement.
224.101	Who is an interested party?	224.101	Clarifies that the Secretary must determine that the person or entity has demonstrated their interest with substantial evidence.
224.107	What must a petitioner do before filing a petition with the Secretary	224.107	Clarifies that the petitioner must have exhausted all tribal remedies available under laws, regulations, or procedures of the Tribe.
224.115	When in the petition process must the Director investigate a tribe's compliance with a TERA?	224.115	Adds that the Secretary must make a threshold determination that the petitioner is an interested party.
224.116	What is the time period in which the Director must investigate a tribe's compliance with a TERA.	224.116	Adds that the Secretary must determine whether the petitioner is an interested party and, if so, that the Secretary must determine whether the Tribe is out of compliance with the TERA for the reason alleged in the petition.
224.119	What must the Director do when making a decision on a petition?	224.119	Adds that the Secretary must limit findings and conclusions to the claims made in the

			petition, and that the Secretary will dismiss a petition if the interested party and Tribe have reached a resolution.
224.120	What action may the Director take to ensure compliance with a TERA?	224.120	Limits the Secretary to taking such action as necessary to address the noncompliance identified in petition.
---	---	224.200	New section to address the purpose of Tribal energy development organization (TEDOs) as an alternative to a TERA.
---	---	224.201	New section to address what an application for certification as a TEDO must include.
---	---	224.202	New section to establish an email and physical address for submission of an application for certification.
---	---	224.203	New section to address that the Secretary will approve or disapprove an application for certification within 90 days.
---	---	224.204	New section to establish the criteria by which a Secretary will determine whether to certify a TEDO.
---	---	224.205	New section to establish what the Secretary will do upon approving a certification.
---	---	224.206	New section to establish the effect of certification to allow a Tribe and the TEDO to enter into leases, business agreements, and rights-of-way without Secretarial approval and without a TERA.

### III. Tribal Consultation

We will be hosting several Tribal consultation sessions at targeted locations throughout the country to discuss this proposed rule. The dates and locations for the consultation sessions are as follows:

<b>Date</b>	<b>Time</b>	<b>Location</b>	<b>Venue</b>
Monday, June 24, 2019 (Listening session)	1 p.m. – 4 p.m. (Local Time)	Sparks, NV	(In association with National Congress of American Indians Mid-Year Conference) Nugget Casino & Resort, 1100 Nugget Ave. Sparks, NV 89431 Room: Southern Pacific B
Thursday, July 11, 2019	9 a.m. – 12 p.m. (Local time)	Tulsa, Oklahoma	Hard Rock Hotel & Casino 777 W. Cherokee Street Catoosa, OK 74015

Tuesday, July 16, 2019	9 a.m. – 12 p.m. (Local time)	Ignacio, Colorado	Sky Ute Casino Resort 14324 Highway 172 North Ignacio, CO 81137
Thursday, July 18, 2019	9 a.m. – 12 p.m. (Local time)	New Town, North Dakota	MHA Nation TERO/Energy Building 305 4 <sup>th</sup> Avenue New Town, ND 58763
Tuesday, July 23, 2019	1 p.m. – 4 p.m. Eastern Time	Teleconference	Call-in number: 888-810- 4791 Passcode: 8466506

#### **IV. 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 is hosting consultation sessions with Tribes (see "III. Tribal Consultation" above) and will be individually notifying each federally recognized Tribe of these 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 totaling an estimated 3,968 annual burden hours. If this proposed rule is finalized, the annual burden hours will decrease by an estimated 900 hours. This decrease is due to: (1) a decrease in the information requested as part of the TERA application process in §§ 224.53 and 224.63; and (2) the streamlined process for seeking an expansion of the scope 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. This change would require a revision to an approved information collection under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* for which the

Department is 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 in accordance with 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 the Secretary of the 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 540 hours.

*Estimated Total Annual Hour Burden:* 3,068 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.

#### **L. Clarity of this Regulation**

We are required by Executive Orders 12866 (section 1(b)(12)), and 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- a) Be logically organized;
- b) Use the active voice to address readers directly;
- c) Use clear language rather than jargon;
- d) Be divided into short sections and sentences; and,
- e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the "ADDRESSES" section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

#### **M. Public Availability of Comments**

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment

– including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

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

4. 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 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 period 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. 2602 or to enter into a lease or business agreement with, or acquire a right-of-way from, a Tribe under 25 U.S.C. 2604(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]**

5. In § 224.51, in paragraph (a), remove the words “Office of Indian Energy and Economic Development”.

6. Amend § 224.53 by:

- a. Removing paragraphs (a)(7), (8), (10);
- b. Adding a new paragraph (a)(7);
- c. Redesignating paragraph (a)(9) as (a)(8) and removing the words “paragraph (e)” and adding the words “paragraph (d)” in their place;
- d. Redesignating paragraphs (a)(11) and (12) as paragraphs (a)(9) and (10), respectively.
- e. Removing paragraphs (d) and (f);
- f. Redesignating paragraph (e) as paragraph (d) and removing the words “paragraph (a)(9)” and adding the words “paragraph (a)(8)” in their place;

g. Removing the phrase “in sufficient detail for the Secretary to determine the Tribe’s capacity to administer and manage the regulatory activity(ies)” in newly redesignated paragraph (d)(1).

The revision reads as follows:

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

(a) \* \* \*

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

\* \* \* \* \*

7. 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 written and electronic forms to the Secretary at 1849 C Street, NW, Washington, DC 20240, and [TERA@bia.gov](mailto:TERA@bia.gov).

8. 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. With the consent of the Tribe, the Secretary may extend the 270-day period for making a decision. 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, the Tribe consents to extending the 270-day period, or the Secretary disapproves the application before that date.

9. Amend § 224.57 by:

- a. Redesignating paragraph (a)(3)(i)(B) as paragraph (a)(3)(i)(C); and
- b. Adding a new paragraph (a)(3)(i)(B).

The additions read as follows:

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

(a) \* \* \*

(3) \* \* \*

(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

\* \* \* \* \*

10. 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.

11. 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]**

12. In § 224.65, remove the last sentence.

13. 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]**

14. Remove and reserve §§ 224.72 and 224.73.

15. 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. With the consent of the Tribe, or as provided in § 224.62(b), the Secretary may extend the period for a

decision. If the Secretary fails to approve or disapprove a final proposed TERA within 270 days and the Tribe does not consent to extend the 270-day period, the TERA takes effect on the 271<sup>st</sup> day after the Secretary’s receipt of a complete application from a qualified Tribe.

16. In § 224.75, revise paragraphs (b)(1) through (3) and add paragraph (b)(4) 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) * * *	<p>* * * *</p> <p>(1) A detailed written explanation of each reason for the disapproval;</p> <p>(2) The changes or other actions required to address each reason for the Secretary’s disapproval;</p> <p>(3) An opportunity to revise and resubmit the TERA: and</p> <p>(4) A statement that the decision is a final agency action and is subject to judicial review.</p>

17. 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. Unless the Secretary and the Tribe otherwise agree, 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:

\* \* \* \* \*

18. 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.

19. 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]**

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

21. 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.

22. 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.

23. 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.

24. 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.

25. 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;

\* \* \* \* \*

26. 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:

\* \* \* \* \*

27. 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 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.

28. 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.

29. 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 the petition including:

\* \* \* \* \*

31. In § 224.181 revise paragraph (c) to read as follows:

**§ 224.181 Who may appeal Departmental decisions or inaction 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.

32. 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;

\* \* \* \* \*

33. 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 Tribal energy development organization?

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? 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; and

(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 written and electronic form to the Secretary at 1849 C Street, NW, Washington, DC 20240, and TERA@bia.gov.

**§ 224.203 What must the Secretary do upon receipt of an application for certification as a Tribal energy development organization?**

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: May 30, 2019

**Tara Sweeney,**

*Assistant Secretary – Indian Affairs.*

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