

**DEPARTMENT OF THE INTERIOR****Bureau of Indian Affairs****25 CFR Part 224**

RIN 1076-AE80

**Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act****AGENCY:** Bureau of Indian Affairs, Interior.**ACTION:** Final rule.

**SUMMARY:** The Secretary of the Interior (Secretary) is promulgating final regulations providing that Indian tribes, at their discretion, may enter into business agreements and leases for energy resource development and grant rights-of-way for pipelines or electric transmission or distribution lines on tribal land without the Secretary's review and approval. Indian tribes entering into such business agreements, leases, and grants of rights-of-way must execute them under an approved tribal energy resource agreement (TERA) between the Secretary and the tribe. These final regulations provide the process under which a tribe may apply for, and the Secretary may grant, authority for an Indian tribe to review and approve leases and business agreements and grant rights-of-way for specific energy development activities on tribal lands through an approved TERA. The regulations also cover processes for implementation of TERAs, including periodic review and evaluation of a tribe's activities under a TERA, enforcement of TERA provisions, and administrative appeals. The regulations also include a process for a tribe's voluntarily rescinding a TERA.

**DATES:** This rule is effective April 9, 2008.

**ADDRESSES:** Further information or questions regarding this final rule should be addressed in writing to Robert Middleton, Director, Office of Indian Energy and Economic Development, Room 20—South Interior Building, 1951 Constitution Avenue, NW., Washington, DC 20245. Please include your name and return address.

**FOR FURTHER INFORMATION CONTACT:** Darryl Francois, Program Analyst, Office of Indian Energy and Economic Development, Room 20—South Interior Building, 1951 Constitution Avenue, NW., Washington, DC 20245, Telephone (202) 219-0740 or Fax (202) 208-4564.

**SUPPLEMENTARY INFORMATION:**

I. Background

II. Discussion of Final Rule

III. Discussion of Comments on Proposed Regulations and Responses  
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**I. Background**

The Secretary is issuing this part under authority of the Indian Tribal Energy Development and Self-Determination Act of 2005, Pub. L. 109-58, 119 Stat. 763, 25 U.S.C. 3501-3504, and 25 U.S.C. 2 and 9.

Title V, Section 503, of the Energy Policy Act of 2005 (Pub. L. 109-58) amended Title XXVI (Indian Energy) of the Energy Policy Act of 1992 to require the Secretary of the Interior (Secretary) to promulgate regulations that implement provisions concerning tribal energy resource development on tribal lands. Specifically, the Indian Tribal Energy Development and Self-Determination Act of 2005, Title XXVI, Section 2604 of the Energy Policy Act, as amended, authorizes tribes, at their discretion, to apply for and enter into TERAs with the Secretary. Upon Secretarial approval of TERAs, tribes may enter into energy-related business agreements and leases, and grant rights-of-way for pipelines and electric transmission and distribution lines, on tribal lands without the Secretary's review and approval. Implementation of the final regulations providing for TERAs will 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. The Act and the regulations provide another process, in addition to the Indian Minerals Development Act and the Indian Mineral Leasing Act, under which tribes may develop their mineral resources. Implementation of these regulations will also support the national energy policy of increasing utilization of domestic energy resources. As stated in the final regulations, the Secretary will interpret and implement these regulations and the Act in keeping with the self-determination and energy development provisions and policies of the Act. In drafting the proposed regulations and finalizing regulations, the Secretary has diligently attempted to conform to the requirements of the Act and to address concerns that arose during the tribal consultation and discussion of the proposed regulations during the public comment process.

The Secretary held a series of public meetings and tribal consultations in January 2006 to solicit stakeholder and tribal comments on the implementation of the Act. In addition, in two letters to tribal leaders, the Secretary solicited the

direct involvement of tribes in drafting a framework for the development of proposed regulations. The Secretary identified three primary issues based on the written and oral comments: Whether the definition of tribal land on which tribes may conduct TERA-authorized activities should include tribal fee land; what criteria the Secretary will use to determine that a tribe has sufficient capacity to regulate its energy resource development; and what will constitute adequate environmental review of leases, business agreements, and rights-of-way a tribe may include or enter into under an approved TERA.

**Definition of Tribal Lands**—In the preamble to the proposed regulations, the Secretary specifically sought public comment on the alternate definition of tribal land some tribes proposed: "Those lands for which the Secretary has determined that interests in real property held in fee by a tribe and located outside of Indian Country, as defined in 18 U.S.C. 1151, are not subject to a restriction on alienation, unless otherwise specifically imposed by Congress." In addition, the alternate definition of tribal land included the statement that "should a final, non-appealable decision of a court of competent jurisdiction invalidate the Secretary's determination that such land is not subject to a restriction on alienation and conclude such land is subject to a restriction on alienation, this definition of Tribal land will include real property held in fee by a tribe, regardless of location, except in those instances in which Congress has removed the restriction on alienation."

In comments on the proposed regulations, some tribes suggested that this more expansive definition of tribal lands had the potential to create more economically robust energy resource development projects by allowing TERA projects on tribal fee land. The Act, at 25 U.S.C. 3501(12), defines tribal land as "any land or interests in land owned by any Indian tribe, title to which is held in trust by the United States, or is subject to a restriction against alienation under the laws of the United States." Following publication of the proposed regulations, at § 224.30 *Definitions*, in which the Secretary used the statutory definition, the Secretary considered public comments received in support of the definition in the proposed regulations and the alternate definition of tribal land offered in the preamble. The Secretary determined that public comments for the alternate definition of tribal land did not provide a convincing or compelling legal argument, nor statutory or other legal support, for changing the statutory definition of

tribal land to include tribal fee land in the regulatory definition. In response to comments, the Secretary added “or mineral interests” after “interests in land” and added “or tribes” after “any Indian tribe” to clarify that tribal mineral interests severed from the surface estate and tribal jointly held interests are included in the definition of tribal land.

**Criteria for Determining Tribal Capacity**—The Act requires that the implementing regulations include criteria the Secretary will use to determine that a tribe has sufficient capacity to manage. In the preamble to the proposed regulations, the Secretary specifically sought public comment concerning sufficient criteria to enable the Secretary to determine a tribe’s capacity to manage the full scope of administrative, regulatory, and energy resource development a tribe proposes to assume under an approved TERA. The proposed regulations require that a tribe considering entering into a TERA participate in a pre-application process designed to provide a preliminary analysis of the type of expertise necessary to manage the particular type of energy resource development that the tribe contemplates. Under the proposed regulations, as part of the TERA application process, a tribe must describe the level of expertise it possesses to manage the energy resource development within the scope of the proposed TERA or how the tribe will acquire the needed expertise. As the Act requires, criteria the Secretary developed for the proposed regulations include the tribe’s experience managing natural resources and the administrative and financial resources that will be available to it when implementing an approved TERA.

**Environmental Review Processes**—The Secretary specifically requested comments during the consultation process and in the preamble to the proposed regulations on additional environmental review requirements a tribe must meet beyond the minimum included in the Act. The regulations require that a TERA include provisions that establish a tribal environmental review and compliance process for any potential environmental impacts that may occur from a lease, business agreement, or right-of-way that a tribe plans to enter into.

A main component of the regulations regarding a tribe’s approval authority for leases, business agreement, and rights-of-way is ensuring compliance with environmental laws. Under the regulations a tribe must include in its TERA: all required provisions for the tribe’s and any third party’s compliance

with Federal environmental laws in regard to leases, business agreements, and rights-of-way entered into or granted under an approved TERA; provisions that the tribe include public notice and opportunity for public comment on the potential environmental effects of leases, business agreements, and rights-of-way a tribe proposes to enter into or grant under an approved TERA; provisions that the tribe notify the Secretary of any violation or breach; provisions that acknowledge that the Secretary may take various actions, including reassertion of the authority granted in a TERA, when the Secretary finds that there is imminent jeopardy to a physical trust asset; and the Secretary’s remedies for an interested party who shows that an interest of the party has sustained or will sustain an adverse environmental impact as a result of a tribe’s non-compliance with the terms of an approved TERA.

The Secretary will also develop with a tribe in the application process, include in an approved TERA, and conduct throughout the period an approved TERA is in effect, periodic reviews and evaluations of the tribe’s performance of the energy resource development activities a tribe undertakes.

In addition, in conducting review of a tribe’s TERA application, the Secretary will perform a National Environmental Policy Act (NEPA) review consistent with the scope of the tribe’s proposed energy resource development in the TERA. The Secretary will also publish in the **Federal Register** a notice that the Secretary is considering a final proposed TERA and is requesting public comment.

In addition to the three issues identified in the consultation process discussed above, the Secretary identified several other main issues during the public comment period discussing: what is included as a physical trust asset and the exception of inherently Federal functions from responsibilities a tribe may assume under a TERA.

**Physical Trust Asset**—The regulatory definition of physical trust asset includes physical trust assets the United States owns in trust for a tribe or individual Indian or that a tribe or individual Indian owns subject to a restriction against alienation under the laws of the United States. The regulatory definition excludes improvements to the physical trust assets and monetary assets. A few commenters requested that the Secretary also exclude “water” from the definition of physical trust asset. The commenters

suggested that water and water rights issues have a different legal basis under federal and tribal laws than do other natural resources and that it is not appropriate to include water as a physical trust asset. The Secretary relied on Section 3504(e)(6)(A)(i) of the Act that provides that the Secretary must “act in accordance with the trust responsibility of the United States relating to mineral and other trust resources.”

In addition, the Secretary included the definition of physical trust asset because of the imminent jeopardy to a physical trust asset regulatory provisions the Act mandates. The Secretary asserts that the inclusion of water as a physical trust asset is necessary to ensure that any water supply to or body of water that exists on tribal land is protected from imminent jeopardy because of a tribe’s non-compliance with a TERA or a third party’s breach or violation of a lease, business agreement, or right-of-way under a TERA or violation of applicable tribal or Federal environmental laws. Imminent jeopardy means “an immediate threat of devaluation, degradation, damage, or loss of a physical trust asset, as determined by the Secretary” (§ 224.30, *Definitions*). A tribe’s energy resource development on tribal land may affect physical trust assets, including water resources on its land, adjacent Indian allotted land, or on another tribe’s land. Devaluation, degradation, or damage to, or loss of, any natural resource, including water, because of a breach or violation of a term of a lease, business agreement, or right-of-way under a TERA, or violation of applicable environmental laws, are equally potentially environmentally or financially devastating. The Secretary is required under the Act to provide for taking actions necessary to protect the asset if the Secretary determines that a non-compliance with a TERA or applicable Federal or tribal environmental laws causes imminent jeopardy to a physical trust asset or if the interest of an interested party, as defined in the regulations, has sustained or will sustain an adverse environmental impact due to a tribe’s non-compliance with an approved TERA. The Secretary must therefore include water, as a natural resource and a trust resource, as a trust asset in the definition of physical trust asset.

**Inherently Federal Functions**—In keeping with the intention of the Act and the Secretary’s intention to further tribes’ opportunities to manage their own energy resource development on tribal lands, the regulations provide that tribes, at their discretion, may review

and approve leases, business agreements, and rights-of-way associated with energy resource development on tribal lands to tribes under approved TERAs. In addition to the review and approval authority the Secretary would ordinarily perform, the Act and the regulations require that tribes provide for carrying out specific activities the Secretary would ordinarily perform. The regulations include required provisions for a tribe's establishing and carrying out an environmental review process, ensuring environmental compliance in tribal approval of leases, business agreements, and rights-of-way, and public participation in environmental review of the effects that tribal approval of leases, business agreements, and rights-of-way will have.

However, Congress also provided in the Act, and the regulations state, that the United States is not absolved of any responsibility to Indians or Indian tribes, including those derived from the trust relationship or from any treaties, statutes, and other laws of the United States, Executive Orders, or agreements between the United States and any Indian tribe. In addition, under the Act and the regulations, the Secretary must act in accordance with the trust responsibility of the United States relating to mineral and other trust resources and act in good faith and in the best interest of Indian tribes. In addition, the Act and the regulations provide that the Secretary must continue to fulfill the trust obligation of the United States to ensure that the rights and interests of an Indian tribe are protected "if any other party to a lease, business agreement, or right-of-way violates any applicable Federal law or the terms of any lease, business agreement, or right-of-way a tribe enters into under an approved TERA or any provision in a lease, business agreement, or right-of-way violates the TERA under which the lease, business agreement, or right-of-way was executed." Tribes with approved TERAs must report any violation or breach of terms of a lease, business agreement, or right-of-way or a Federal or tribal environmental law to the Secretary. The Secretary must determine that a tribe has the capacity to carry out the authority and the activities it proposes to assume under a TERA before approving a TERA. Under an approved TERA, the Secretary must conduct periodic review and evaluations of a tribe's activities. In addition, the regulations, following the requirements of the Act, provide that in a TERA a tribe must authorize the Secretary to

take any actions the Secretary determines are necessary to enable the Secretary to carry out the trust responsibility upon the Secretary's finding of imminent jeopardy to a physical trust asset.

The final regulations provide that tribes may assume activities beyond those specified in the Act. Wherever possible within the requirements of the Act and wherever tribal assumption of activities would not conflict with inherently Federal functions, the Secretary provided for as much flexibility as possible for participating tribes in providing for tribal procedures and assumption of activities for energy resource development under the regulations. Congress did not expressly prohibit the use of the term "Inherently Federal Functions," and left this issue open to the Secretary when it outlined the Secretary's trust responsibility in the Act (25 U.S.C. 3504(e)(6)). Therefore, the regulations at § 224.52(c) state that a tribe may include in a TERA the "assumption by the tribe of certain activities normally carried out by the Secretary, except for inherently Federal functions." The regulations further provide, at § 224.53(e)(3), that "the tribe's intended scope of administrative activities [in a TERA] may not include the responsibilities of the Federal government under the Endangered Species Act or any other inherently Federal functions." Under regulations for Indian self-determination, self-governance, surface leasing and grazing, and Indian Reservation Roads, for example, the Secretary has also reserved responsibility for inherently Federal functions, which a tribe may not assume. While a few commenters requested that, the Secretary define "inherently Federal functions," the Secretary declined to do so. Under the Indian Self-Determination and Education Assistance Act (ISDEAA), as amended, the Secretary determines inherently Federal functions on a case-by-case basis.

In the final regulations at § 224.58, the regulations provide that in an application consultation meeting with the tribe the Director will identify specific services, consistent with the Secretary's ongoing trust responsibility and available resources, that the Department will provide to the tribe upon approval of a TERA. The Director will also discuss with the tribe the activities the tribe proposes to assume under a TERA. It is the Secretary's policy to make available to a tribe under an approved TERA all administrative functions that may be lawfully contracted under the ISDEAA, as amended, and the Federal Oil and Gas

Royalty Management Act. It is the Secretary's intention to interpret and implement this part as stated in § 224.20.

In the final regulations, the Secretary substituted the term "activities" for "authority" and "responsibility" where "authority" and "responsibility" were used interchangeably in the proposed regulations for activities a tribe requests to assume in a TERA. In the proposed regulations, the terms "authority" and "responsibility" were also used in a manner in which they conceptually overlapped. In order to clarify meanings and distinguish what authority a tribe obtains and what other activities a tribe may assume under an approved TERA, the Secretary determined that the term "responsibility" relates to an inherently Federal function for which the Secretary must retain final decision-making. The term "authority" is properly used in connection with a tribe's review and approval of leases, business agreements, and rights-of-way to denote the effect of an approved TERA. Under an approved TERA, the Secretary is granting authority to a tribe to review and approve these instruments without Secretarial approval. Therefore, the Secretary has maintained use of the term "authority" when it applies to the Secretary's grant to a tribe under an approved TERA. The Secretary has replaced the term "authority" or "responsibility" with "activity" or "activities" when referencing what a tribe may assume from the Secretary, in addition to review and approval authority for leases, business agreements, and rights-of-way, under an approved TERA.

In addition to the issues discussed above, in several instances the Secretary found that clarification under the requirements of the Act were necessary, as discussed below.

**Miscellaneous Provisions**—In order to meet the Secretary's commitment to develop implementing regulations that conform to the requirements of the Act, where the Secretary found provisions in the regulations that incompletely reflected specific provisions of the Act, the Secretary revised them to accurately reflect the requirements of the Act. In addition, the Secretary included the following items in the final regulations after review and consideration.

**Recordkeeping Requirements**—Based on the Act's requirements, the Secretary carefully reviewed provisions for items required for inclusion in a TERA under § 224.63. The Secretary added §§ 224.63(k) and 224.56(l) to subpart B, requiring that tribes include provisions for recordkeeping in TERAs. Under these sections, tribes must create,

maintain and preserve records concerning the activities and leases, business agreements, and rights-of-way it enters into under a TERA. The Secretary must have available at periodic reviews and evaluations sufficient documentation to allow for meaningful review and evaluation of a tribe's energy development activities under a TERA. In addition, in the event a tribe voluntarily rescinds a TERA or the Secretary reassumes a TERA, the Secretary must ensure that the tribe has appropriate records to provide to the Secretary to allow the Secretary to carry out the activities the tribe assumed; ensure compliance with the leases, business agreements, or rights-of-way the tribe has entered into with third parties; protect physical trust assets; and discharge the United States' trust responsibility. Addition of this recordkeeping provision is not a substantive change since the Act and § 224.32(e) provide that under a TERA the tribe must provide the Director with "records and documents relevant to the provisions of an agreement." In addition, the Act and the final regulations provide that upon a tribe's notifying the Secretary of a violation or breach, the Secretary may "review relevant transactions and reports."

**Definition of Violation or Breach—** Upon the review of the regulations, the Secretary determined that the definition of "violation or breach" in § 224.30 should follow the definition in the Act. Therefore, in order to complete the definition of "violation or breach" in § 224.30, the Secretary added "other" before "violation" and added "by another party" after "violation." The Secretary also added "any provision in" before "lease" and added, "under a TERA or any activity or occurrence under a lease, business agreement or right-of-way that constitutes a violation of" before "Federal or tribal environmental law."

**Provision for Hearing on Determination of Non-Compliance With TERA—** The proposed regulations did not include a provision for a hearing for a tribe upon the Director's determination that the tribe is not in compliance with the terms of its approved TERA. The Secretary added a provision for a hearing for a tribe to § 224.121 at (a), along with a provision granting a tribe a reasonable opportunity to comply with the TERA. The provision was inadvertently left out of the proposed regulations. The Secretary wanted to acknowledge that a tribe has due process rights in this section.

## II. Discussion of Final Rule

The final regulations include the specific regulatory provisions the Act required for TERAs: (1) Criteria for determining that a tribe has sufficient capacity to regulate the development of its energy resources; (2) a scope of, and procedures for, Secretarial review and evaluation of tribal action under a TERA, including provisions for review of transactions, reports and site inspections, and any other review processes the Secretary deems appropriate; (3) provisions for final agency actions after exhaustion of administrative appeals of Secretarial decisions regarding interested party petitions; and (4) a process and requirements for a tribe's voluntarily rescinding a TERA and returning to the Secretary the review and approval authority for future leases, business agreements and rights-of-way for energy resource development. The regulations also provide for a tribal application process for a TERA, tribal consultation throughout the pre-application and application processes, and a process for Secretarial review and approval of TERAs. The regulations require that the Secretary provide notice of, and an opportunity for public comment on, a final proposed TERA. In addition, the regulations require that a TERA include provisions that cover tribal environmental compliance measures and a process for review of any potential environmental impacts to areas affected by activities that the tribe could approve under the TERA. Further, the final regulations provide processes for tribes and the Secretary to take any action necessary to protect physical trust assets if activities undertaken under an approved TERA cause imminent jeopardy to a physical trust asset. The regulations also require that the Secretary take any action necessary upon a third-party lessee's non-compliance with a lease or agreement or right-of-way or a violation of a Federal or tribal environmental law results in imminent jeopardy to a physical trust asset.

Because an approved TERA is the decisional and operational document governing tribal authority to approve leases and business agreements on, and to grant rights-of-way, over tribal land, the Act requires that specific provisions be included in a TERA. In addition to requiring that a tribe provide information regarding its capacity to assume certain duties, a TERA, pursuant to the Act, also sets forth detailed provisions a tribe must include in a lease, business agreement, or grant of right-of-way to ensure environmental

compliance, including reporting violations and breaches of leases, business agreements, and rights-of-way and violations of Federal and tribal environmental laws to the Secretary. TERAs must also specify that the Secretary will conduct periodic reviews and evaluations of a tribe's performance under a TERA. During the application consultation, the Director and the tribe will develop a periodic review and evaluation process that addresses the tribe's specific circumstances and the tribe will include the process in its final TERA. The regulations also provide that a tribe may voluntarily rescind its authority to the Secretary. Under the regulations, the Secretary may reassume all of a tribe's activities under a TERA under very specific circumstances. Consequently, the Secretary carefully reviewed provisions requiring items to be included in a TERA. The Secretary added §§ 224.63(k) and 224.63(l) to subpart B, to provide that tribes include a provision for recordkeeping in each TERA. Under this section, tribes must create, maintain and preserve records concerning the leases, business agreements, and rights-of-way it enters into under a TERA. The Secretary must have available at periodic reviews and evaluations sufficient documentation to allow for meaningful review and evaluation of a tribe's energy development activities under a TERA. In addition, in the event a tribe voluntarily rescinds a TERA or the Secretary reassumes a TERA, the Secretary must ensure that the tribe has appropriate records to allow the Secretary to carry out the activities; protect physical trust assets; and discharge the United States' trust responsibility. The Secretary does not consider the addition of this section to be a substantive change, since § 224.32(e) already requires that the tribe provide the Director with "records and documents relevant to the provisions of an agreement."

## III. Discussion of Comments on Proposed Regulations and Responses

The Secretary received input from 20 commenters on the proposed regulations published in the **Federal Register** on August 21, 2006 (71 FR 48626). Tribes, private companies, tribal organizations, non-governmental associations, a Federal government agency, and individuals provided written comments. A number of comments indicated that commenters were not familiar with provisions of the Act from which we developed the regulations. In responses to comments, the Secretary indicated where the Act required specific provisions in the

regulations. Public comments and the Secretary's responses are arranged first by general comments and then by comments to subpart and/or section. We have included responses only to substantive comments. Where commenters suggested minor editorial revisions such as changes in grammar or minor word changes that we accepted, we have made such changes to the regulations, but have not included these comments in the responses that follow. In addition, in final review of these regulations, we identified minor editorial revisions and provisions that required edits, either to clarify a section or to provide for agreement between the regulations and the Act. We made those changes. In a few instances, we identified items that we wanted to add to sections either to clarify the section or to provide for agreement between the regulations and the Act. We also made those changes. We did not make substantive changes in any of these instances, and have provided a discussion of them in this document.

#### *Subpart A—General Provisions*

**Section 224.20** How will the Secretary interpret and implement this Part and the Act?

Several commenters requested that the Department impose specific timeline requirements on tribes for energy development activities that they manage under a TERA or mandate that tribes develop processes that parallel state and federal practices. In fulfilling the requirement to write implementing regulations for Title V—Indian Energy of the Act, we have imposed specific requirements where appropriate or mandated by the Act. In other places, we have allowed as much flexibility as possible to participating tribes in accordance with the mission of the Department to advance the objectives of the Indian Self-Determination and Education Assistance Act, as amended, and in recognition of tribal sovereignty. The regulations in § 224.20 incorporate the Department's attempt to balance requirements of the Act and the flexibility tribes need to facilitate economic development.

**Section 224.30** What definitions apply to this Part?

There were several comments concerning definitions. Several commenters said that the use of the term "agreement" throughout the regulations, when referring to a Tribal Energy Resource Agreement (TERA), was confusing and could lead to misinterpretation of the regulations. We agree with these commenters, and

throughout the final rule, we replaced the term "agreement" with "TERA," where appropriate, and added a definition of TERA to § 224.30. In the Preamble of the proposed rule, the Secretary published an alternate definition of the term "tribal land" and sought comment on how the term "tribal land" should be defined. The Secretary received comments on both the proposed definition and the alternate definition of tribal land. The Secretary determined that the definition of tribal land at § 224.30, which follows the definition in the Act at 25 U.S.C. 3501(12), is the appropriate definition.

Some commenters suggested that the definition of "Interested Party" unfairly limits the interests of parties that could appeal actions taken under a TERA. The Secretary recognizes the limitation of the definition, but it follows the definition in the Act. In addition, there are other avenues for appeal of TERA approved actions in Subpart I Appeals. A few commenters suggested that the Secretary constrain the definition of Violation or Breach by inserting the word "significant" to indicate that only a violation or breach of a certain degree of seriousness would require Secretarial action. The definition the Secretary uses follows the definition in the Act. In addition, under the definition the Secretary has discretion to determine the seriousness of the violation or breach within the context of the approved TERA. Some commenters suggested excluding water from the definition of a "Physical Trust Asset." The Secretary determined that the regulations must include a definition of "Physical Trust Asset" because the Secretary has a trust responsibility for natural resources and the Act mandates provisions dealing with a breach or violation that has caused or will cause "imminent jeopardy to a physical trust asset." The Secretary determined that the inclusion of water as a physical trust asset is necessary to ensure that any water supply or body of water that exists on tribal land has protection from imminent jeopardy because of the action or inaction of a tribe or a third party under a TERA.

**Section 224.40** How does the Act or a TERA affect the Secretary's trust responsibility?

One commenter asked that the regulations reflect the Secretary's ongoing accountability for stewardship of energy and other subsurface resources. Another commenter requested that the Secretary state the specific requirements of the trust responsibility. We note that the proposed regulations in § 224.40 states

that the Secretary continues to maintain trust responsibilities (as defined by statutes and regulations under *U.S. v. Mitchell*, 463 U.S. 206 (1983) and its progeny) and that the regulatory language is consistent with the Act at 25 U.S.C. Section 3504(e)(6)(B). One commenter objected to § 224.40(d), which relieves the Secretary of liability for any losses resulting from a business agreement, lease, or right-of-way granted under a TERA, and claims that this provision is inconsistent with the Secretary's obligation to intervene where imminent jeopardy to a physical trust asset occurs under a business agreement, lease, or grant of right-of-way. However, this provision is entirely consistent with the language of the Act which states that the Secretary "shall not be liable to any party (including any Indian tribe) for any negotiated term of, or loss resulting from the negotiated terms for, a lease, business agreement, or right-of-way executed pursuant to and in accordance with a tribal energy resource agreement approved by the Secretary." The Secretary believes that the regulations outlined in Subpart E are sufficient to protect physical trust assets from imminent jeopardy conditions. Another commenter asked what form a TERA would take. The language of the Act and the regulations provide that an approved TERA is the Secretary's grant of authority to a tribe to approve leases, business agreements, or rights-of-way for specific energy development activities on tribal lands. The Secretary conditions this grant of authority on the Secretary's periodic review and evaluation of the tribe's compliance with the terms of the TERA and these regulations as mandated by Title V, Section 503 of the Energy Policy Act of 2005. The final regulations contain provisions under which the Secretary may reassume the authority granted to the tribe under a TERA. One commenter expressed concern that in the case of jointly held tribal land that § 224.41 should specifically refer to "tribal minerals." However, the definition of tribal land in § 224.30 includes "land or interests" owned by a "tribe or tribes" and therefore jointly held mineral interests are covered in the final regulations.

#### *Subpart B—Procedures for Obtaining Tribal Energy Resource Agreements*

A commenter expressed concern that the Secretary would not fully consult with tribes on the range of opportunities available to determine the scope of energy development and regulatory authority that they may want to assume under a TERA. The commenter suggested that the Secretary apprise

tribes of financial resources available to help them develop the expertise and capacity to develop their energy resources. In response, the Secretary notes that the regulations under Subparts B and C require the Secretary to conduct a thorough consultation process with a tribe applying for a TERA that will lead to a comprehensive review of the capacity of a tribe to conduct the activities that are the subject of a TERA. In addition, under Subpart F, the Secretary will conduct periodic review and evaluation of the tribe's compliance with a TERA to identify any inadequacy in the tribe's capacity to perform under the requirements of its approved TERA. If the Secretary identifies any inadequacies in the tribe's capacity to implement the provisions of the TERA, the Secretary will communicate those concerns and incorporate those findings in a decision to allow the tribe's activities to continue or to reassume the authority granted to the tribe in the TERA. Finally, in § 224.63(h), the regulations require that the TERA identify the financial assistance, if any, that the Secretary has agreed to provide to the tribe to assist in the implementation of the TERA, including the tribe's environmental review of individual energy development activities. In addition, § 224.89 of the regulations requires that the Secretary and the tribe consult regarding the extent of Secretarial assistance, if any, to enforce leases, business agreements or rights-of-way entered into under a TERA.

Some commenters noted that the regulations should retain the greatest flexibility possible to allow tribes to acquire the appropriate level of involvement with a TERA.

The Secretary recognizes the need for ongoing consultation with tribes during the process of approval and implementation of a TERA. The regulations include a pre-application consultation process at Subpart B, §§ 224.51–53. In addition, §§ 224.58–62 outline the consultation process that begins with receipt of a tribe's formal application for a TERA. Finally, at many points throughout the TERA review, approval, and monitoring process the Secretary will consult with the tribe when making decisions about the tribe's TERA. Throughout the consultation processes and implementation of TERAs, the Secretary will strive to include officials at the local level as well as officials that deal with Indian affairs in other bureaus within the Department, relevant Federal agencies outside the Department, and the

Department's advisory committee in discussions with the tribe.

**Section 224.52** What may a tribe include in a TERA?

In § 224.52(c), the Secretary states that a tribe may assume under a TERA “\* \* \* certain activities normally carried out by the Secretary, except for inherently Federal functions.” Several commenters objected to the exclusion of inherently Federal functions from a TERA. These commenters either wanted the exclusion deleted or expanded into a definition. In response, the Secretary notes that Congress did not expressly prohibit the use of the term “Inherently Federal Function,” and left this issue up to the Secretary's discretion when it outlined the Secretary's trust responsibility in the Act (25 U.S.C. Section 33504(e)(6)(A) and (B)). The Secretary therefore determined that exclusion of inherently Federal functions from a TERA is consistent with the Act and other legislation, specifically the Indian Self Determination and Education Assistance Act, as amended. Furthermore, the pre- and post-application consultation process between tribes and the Department outlined in the regulations should enable the tribes and the Department to reach an agreement as to what activities a tribe can assume under a TERA.

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

This section describes the various elements that a TERA application must contain. One commenter said that the provision in § 224.53 went beyond the provisions of the Act. However, the Secretary determined that the regulations are fully consistent with the Act's stated purpose of assisting Indian tribes in the development of their energy resources and furthering the goal of Indian self-determination. Furthermore, the specific provisions of the Act that are codified at 25 U.S.C. 3504(e)(2)(B)(i) provide that the Secretary shall approve a TERA if the Secretary determines that the Indian tribe has demonstrated sufficient capacity to regulate the development of its energy resources. At the tribe's discretion, the tribe may include the full range of development activities in its TERA application which the Secretary must approve or disapprove.

Several commenters requested that the regulations provide an “opt out” clause for tribes so that tribes may choose to pursue agreements outside the TERA process. The Secretary notes that a tribe is not required to enter into a TERA to pursue energy development

activity. In fact, the Act and the regulations provide that it is a tribe's discretion whether to enter into a TERA. When applying for a TERA, a tribe may preserve the option to use the provisions of the Indian Mineral Development Act, or other existing authorities, to pursue energy development on tribal land by complying with the requirements in § 224.53(c)(1) and (2).

Some commenters seek to insert language to clarify that after a TERA goes into effect, tribes may amend existing leases, business agreements, and rights-of-way and exercise TERA regulatory authority under a TERA with respect to the existing agreements to promote efficient administration of energy resource development projects on tribal land. The Secretary agrees with the commenters and has added clauses (c)(3) and (e)(3) to § 224.53 to allow a tribe to state its intent to amend or modify (with the agreement of relevant third parties) leases, business agreements, and rights-of-way that exist when a TERA is approved, if those activities are directly related to the activities authorized by the TERA.

**Section 224.55** Is information a tribe submits throughout the TERA process under this Part subject to disclosure to third parties?

Although this section states that a tribe may identify information it determines is confidential and proprietary, one commenter requested that the regulations outline the process the Secretary will use if it receives a Freedom of Information Act (FOIA) request concerning a TERA. The Secretary does not think it is necessary to outline the procedures in these regulations, because we will follow the procedures found at 43 CFR Part 2. This commenter also requested the addition of language to the regulations that would require that the Secretary consult with the tribe before responding to a FOIA request. The Department will comply with applicable sections of both FOIA (5 U.S.C. 552) and the Departmental regulations (43 CFR Part 2) in responding to FOIA requests for tribal information submitted in pre-application and application processes.

**Section 224.59** How will the Director use the results of the application consultation meeting?

One commenter noted that this section does not sufficiently describe the factors the Secretary will consider based on the information from the application consultation meeting. In response, the Secretary revised the section so that it refers to the specific

sections in which the regulations describe the evaluation process.

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

A commenter requested that time limits on the review process for a TERA change only with the consent of the affected tribe when changes are made between the original proposed TERA proposal and the final proposed TERA. We agree with this request and modified the language in § 224.62(b) to indicate that tribal consent is required.

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

Several commenters questioned the environmental review provisions in § 224.63(c). One commenter said that the regulations did not set a “real standard” for what would constitute an “appropriate” environmental evaluation for activities proposed under a TERA. Other commenters noted that the provisions are more stringent than what is required under the National Environmental Policy Act (NEPA). In response, the Secretary agrees that the provisions in § 224.63(c) go beyond the requirements of NEPA. However, this language is consistent with the requirements of the Act at 25 U.S.C. 3504(e)(2)(C)(i)–(ii). With respect to environmental review, we agree that it is the Secretary’s responsibility to ensure that the environmental review process that the tribe proposes as part of the TERA is sufficient to ensure that the tribe identifies, evaluates, and mitigates foreseeable impacts during energy resource development. The Secretary will address the process and procedures to use in this evaluation, guided by the specifics of each tribe’s TERA proposal as we implement these regulations.

Another commenter requested that the Secretary require that all tribes use the same royalty accounting methodology. However, in fulfilling the requirement to write implementing regulations for Title V—Indian Energy of the Act, also called the Indian Tribal Energy and Self-Determination Act of 2005, the Secretary has imposed specific requirements where appropriate or mandated by the Act. In other sections, the Secretary has allowed as much flexibility as possible to participating tribes in accordance with the mission of the Department to advance the objectives of the Indian Self-Determination and Education Assistance Act, as amended, and in recognition of tribal sovereignty.

One commenter noted that it is important to provide that the option for a lease, business agreement, or right-of-

way may have retroactive application from the date it becomes effective because parties in commercial transactions often fix the operative date of a transaction as the date upon which an agreement was reached. The Act provides that a lease, business agreement, or right-of-way becomes effective when a tribe executes it and mails it to the Secretary. Therefore, in these regulations the Secretary agrees that commercial considerations may necessitate a retroactive applicability date for a lease, business agreement or right-of-way. We modified § 224.63(c)(14) to allow for a lease, business agreement, or right-of-way to become applicable retroactively by agreement of the tribe and other parties, under certain conditions.

Another commenter noted that in the proposed regulations we used the word “reassume” in § 224.63(c)(13), but the Act uses the word “suspend.” We have made the word change to make the regulations consistent with the Act. The same commenter also suggested redesignation for clauses (c)(15) to (c)(21). We agree with the suggestions, in part, and have changed § 224.63(c)(15) to § 224.63(d) and have similarly redesignated the clauses that follow from § 224.63(c)(16) to (21) to § 224.63(e) to (j).

**Section 224.67** What must the Secretary do upon the Director’s receipt of a final proposed TERA?

One commenter said that it was not clear if the public notification of a TERA application would also provide access to the proposed TERA, and suggested that the public should have sufficient time to review any proposed TERA. We note that the regulations clearly state at § 224.67(a) that the **Federal Register** notice shall advise the public on how to request and receive copies of the final proposed TERA from the Secretary. Since this is a NEPA process (40 CFR 1502.25(a)), the Department will follow the longstanding procedures of the Federal government outlined in its NEPA public notice procedures to allow the public sufficient time to review the proposed TERAs.

#### *Subpart C—Approval of Tribal Energy Resource Agreements*

**Section 224.70** Will the Secretary conduct a review of a final proposed TERA under the National Environmental Policy Act (NEPA)?

Several commenters asked that we insert clarifying language in § 224.70 that the Secretary’s NEPA review is triggered by a tribe’s submittal of a TERA for review and approval, but that

such review does not extend to subsequent leases, business agreements, or grants or rights-of-way that a tribe may enter into with third parties pursuant to an approved TERA. The Secretary agrees that this is the intent of the Act and we have added language to § 224.70 of the regulations to make this clear.

One commenter stated that the relationship between these regulations, NEPA, and other Federal laws was unclear. The Secretary believes that the language in the proposed regulations at § 224.70 is consistent with the NEPA public notice and public comment requirements at 40 CFR 1503 and 1506. Furthermore, the Secretary will comply with all applicable Federal laws in the TERA review and approval process. In addition, one commenter noted that some projects might not be viable unless a tribe can opt out of the environmental review process required to be included in the TERA. We note that the proposed regulations already addressed this issue at § 224.53(c)(1), which we have retained in the final regulations. This provision of the regulations provides a tribe an opportunity to identify resources on tribal land or parts of tribal land that the tribe does not want to include in the proposed TERA.

**Section 224.72** How will the Secretary determine whether a tribe has demonstrated sufficient capacity?

One commenter objects to the Secretary approving a TERA because other provisions in the Act that would build tribal capacity have not been put in place. Until these provisions have been implemented for a considerable time, according to the commenter, all tribes should be prevented from taking advantage of the TERA program. In response, the Secretary states that, in fulfilling the Act’s requirement to develop implementing regulations for Title V—Indian Energy of the Act, also called the Indian Tribal Energy and Self-Determination Act of 2005, we have imposed specific requirements where appropriate or mandated by the Act. In other places, we have allowed participating tribes as much flexibility as possible in accordance with the mission of the Department to advance the objectives of the Indian Self-Determination and Education Assistance Act, as amended, and in recognition of tribal sovereignty.

In addition, given the varying experiences of tribes with managing their energy resources, the Secretary cannot ignore the intent and will of Congress in the Act, which is to provide tribes with an additional tool to enhance their financial sovereignty while

requiring a thorough evaluation of the tribe's capacity to develop its own resources. The Secretary will diligently carry out the regulations' requirement that the Secretary evaluate a tribe's technical, financial, and administrative capacity in full consultation with the tribe and in response to individual proposed TERAs. A couple of commenters indicated that the language in this section should make it clear that the Secretary's determination of tribal capacity to manage energy development under a TERA is limited to the administrative and regulatory activities the tribe seeks to assume from the Secretary, and not specific projects that a tribe may seek to develop under a TERA. In response, we have made changes consistent with these comments. Finally, one commenter objected to a provision in § 224.72(i) that allows the Secretary, in evaluating tribal capacity to assume energy development regulatory authority, to determine "any other relevant factors" for consideration. In response to this comment, the Secretary notes that the Act specifically provides this discretion to the Secretary.

**Section 224.73** How will the scope of energy resource development proposed in a tribe's TERA affect the Secretary's determination of the tribe's capacity?

One commenter stated that the language in this section again suggests that a TERA will include a description of each energy resource development subject to a TERA and that tribes will have to go through multiple capacity determinations as each proposed development project arises under a TERA. We agree that this is not the intent of the Act. We have revised the language in this section to indicate that the Secretary's capacity determination will include a determination as to each type of energy resource development subject to the TERA which the tribe seeks to regulate and each type of administrative or regulatory activity the tribe proposes to assume. Furthermore, the section now makes it clear that the Secretary's review of a TERA is limited to activities specified by its provisions. Another commenter requested that we change the word "manage" in § 224.73 to "monitor," stating that this would be consistent with language in § 224.71(b). The Secretary believes that the word "manage" is consistent with intent of the Act, and, in response, has made a change in §§ 224.71(b) and 224.72 to refer to tribe's intent to "manage" regulatory activities under a TERA.

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

In this section, a commenter objected to the inclusion of the terms "if any" in reference to revisions in § 224.75(b)(2). The commenter stated that addition of "if any" contradicts the language and one of the purposes of the Act, which is to "provide the Indian Tribe with an opportunity to revise and resubmit the tribal energy resource agreement." Under the Act, if the Secretary disapproves of the submitted TERA, the Secretary is required to state the "changes or other actions" a tribe is required to submit to address the Secretary's concerns. Therefore, the commenter recommends that we delete the phrase "if any." The Secretary agrees with this comment, and we have made the suggested change. Another commenter suggested that in § 224.75(c), where there is a reference to complying with FOIA, that the regulations refer to the disclosure procedures in § 224.55. The Secretary agrees that this proposed change would clarify the regulations and has eliminated the references to FOIA in § 224.75(c).

#### *Subpart D—Implementation of Tribal Energy Resource Agreements*

**Section 224.82** What activities will the Department continue to perform after approval of a TERA?

A commenter said that § 224.82(e) is ambiguous and needs clarification. The commenter specifically requested that the reference to Department "activities" should be changed to "services." The commenter also stated that the phrase "does not affect" is unclear. We agree with the comments about the "does not affect" language and have revised this section. For the purposes of consistency with other provisions of the regulations, we are not changing "activities" to "services." Another commenter sought the addition of a subsection that would state that the Department would provide "access to leases, agreements, rights-of-way, and other contracts entered into between the tribe and any third party." The Secretary believes the existing language in § 224.82(a) and (e) has the same effect as proposed by this commenter. In addition, we note that when a tribe enters into a TERA, the Department's existing responsibilities to provide information or services to the tribe remains unchanged.

**Section 224.84** When may a tribe grant a right-of-way?

One commenter said that this section contained too many limitations on a tribe's ability to grant a right-of-way.

The Secretary notes that the limitations in the regulations regarding rights-of-way are fully consistent with the Act. Another commenter suggested that the authority for "\* \* \* renewals of leases and rights of ways and other rights under the current TERA regulations should be included and be clear and flexible enough to allow a project to retain its lease or other rights as long as a project is being depreciated." The Secretary agrees with this comment. In response, we added a § 224.86(d) that states that when a tribe enters into a lease or business agreement or grants a right-of-way, at its discretion, this tribe may renew the lease, business agreement, or right-of-way as long as the TERA remains in effect and as long as the tribe still has the authority to approve leases and business agreements, and grant rights-of-way under the TERA.

**Section 224.85** When may a tribe enter into a lease or business agreement?

A couple of commenters said that § 224.85 is too narrow in its limitation of energy resource development activities and it could be interpreted to preclude tribes from entering into agreements for processing minerals or other activities which include non-tribal sources of production. These commenters suggested that the Secretary delete this section of the regulations or modify it to indicate that a tribe may enter into a lease or business agreement for the purpose of energy resource development on "or affecting" tribal land. In response, the Secretary notes that the Act limits energy resource development projects to those that develop resources on tribal land as defined in § 224.30 and so has not made the requested change.

**Section 224.86** Are there limits on the duration of leases, business agreements, and rights-of-way?

One commenter noted that no mention was made of how to deal with renewals of leases, business agreements, and rights-of-way under a TERA. As noted before, the Secretary agrees with this comment and in response has added a § 224.86(d) that states that when a tribe enters into a lease or business agreement or grants a right-of-way, it may be renewed at the discretion of the tribe as long as the TERA remains in effect and as long as the tribe still has the authority to approve leases, business agreements, or rights-of-way under the TERA.

Another commenter requested that we change the phrase "in terms" to "on the duration" to clearly indicate that this section deals with the temporal existence of leases, business agreements,

and rights-of-way under a TERA and not the legal “terms” and conditions. The Secretary agrees with this comment and has made the requested change.

**Section 224.87** What are the obligations of a tribe if it discovers a violation or breach?

A commenter suggested we clarify this section to state that Secretarial responsibilities also apply to third-party violators and that § 224.89 should be cross-referenced in these other sections to better clarify the delineation of actions by the Secretary. In response to this comment we have made specific reference to third party actions in § 224.87 and in the § 224.30 definition of imminent jeopardy.

#### *Subpart E—Interested Party Petitions*

**Section 224.100** May a person or entity ask the Secretary to review a tribe’s compliance with a TERA?

One commenter suggested that we delete this section because it creates a conflict of interest for the Secretary in its requirement that the Secretary act as an arbiter of a dispute between a tribe and a third party petitioner. The commenter stated that this would be a clear violation of the Secretary’s trust responsibilities. Another commenter suggested that this Subpart implies that a tribe waives its sovereign immunity when it enters into a TERA. The Secretary notes that the language in Subpart E regarding the rights of a third party petitioner is identical to language in the Act codified at 25 U.S.C. 3504(e)(7)(A) and (B). The Act expressly provides that any person or entity, who is an interested party, as defined in the Act, may file a petition alleging that a tribe is not complying with a TERA. The Act also provides that an interested party must first exhaust tribal remedies if the tribe has enacted laws, regulations, or procedures providing tribal remedies. There is no waiver of sovereign immunity implied or intended in the Act or these regulations.

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

Several commenters objected to this regulatory provision as too broad, and permitting “anyone who claims a hypothetical or other form of inadequate ‘interest’ to participate as an ‘interested party’” or that “\* \* \* such a loose standard may create a cause of action where no actual standing exists.” One commenter requested that we define “Interested Party” in § 224.101 as a person or entity “that has demonstrated that a legally cognizable interest of the person or entity in property or a

resource has sustained, or will sustain, an adverse environmental impact because of a tribe’s failure to comply with an agreement.” The commenter notes that this suggested definition is consistent with the Department’s existing administrative appeal practice at 43 CFR 4.410(d) (requiring a legally cognizable interest). In response, the Secretary notes that Congress defined this term in the Act as codified at 25 U.S.C. 3504(e)(7)(A). In developing the regulations, the Secretary cannot limit the definition when the Act does not do so.

**Section 224.106** If a tribe has enacted tribal laws, regulations, or procedures for challenging tribal action, how must the tribe respond to a petitioner’s challenge?

One commenter noted that while under § 224.106(a) a tribe must respond within a “reasonable” time, the regulation should include a specified time period no longer than 30 days. In fulfilling the requirement to write implementing regulations for the Act, the Secretary has imposed specific requirements where appropriate or mandated by the Act. In other places, such as this section, the Secretary has allowed as much flexibility as possible to participating tribes in accordance with the mission of the Department to advance the objectives of the Indian Self Determination and Education Assistance Act, as amended, and in recognition of tribal sovereignty.

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

One commenter stated that § 224.107(a) should explicitly require a petitioner to use “any appeals or appellate court review” allowed under the tribe’s laws. The inclusion of such language would ensure that a petitioner must proceed through all available tribal remedies prior to filing a petition with the Secretary. We have added “including any tribal appeal process” to § 224.107. In addition, we note that § 224.109(c) requires a petitioner to include specific facts demonstrating that the petitioner has exhausted tribal remedies in the petition. Also, in § 224.113, a tribe may state whether the petitioner has exhausted tribal remedies in its response to a petition.

Another commenter said that this section lists as a prerequisite to filing a petition that a petitioner has participated in a tribal hearing or comment process regarding allegations of tribal non-compliance with its TERA. The commenter suggests that a petitioner should have participated in a

tribal hearing or comment process regarding the tribe’s proposed activity, if such a process was provided, in addition to exhaustion of tribal remedies, if any, for alleging non-compliance with a TERA. The Secretary believes that this would place an unfair burden on a petitioner to have known with foresight the full range of potential impacts and their magnitude prior to their implementation. The Secretary believes that the provision, as written, reflects the intent of Congress.

**Section 224.110** When may a petitioner file a petition with the Secretary?

One commenter recommended that we shorten to 30 days the 45-day period for filing a petition that § 224.110(a) allows after receipt of the tribe’s written decision on a petition, noting that Act did not specify a period for filing a petition for review and 30 days should be adequate for doing so. The Secretary agrees with the commenter and has made the change.

**Section 224.115** When must the Director make a threshold determination about a petition?

A commenter objected to § 224.115(c), which allows the Director to reject the resolution mutually agreed upon by the tribe and the petitioning party. The commenter expressed the opinion that resolution of such disputes should be encouraged. The Act provides that “[t]he Secretary [shall take certain steps to ensure compliance with a TERA] only if the Indian tribe fails, refuses, is unable to cure or otherwise resolve each claim made in the petition within a reasonable period, as determined by the Secretary, after the expiration of the [consultation] period.” 25 U.S.C. 3504(e)(7)(C)(iii)(II). The commenter understands the language “as determined by the Secretary” gives the Secretary the right to determine what is a reasonable period, not to reject a settlement that the tribe and petitioning party have reached. The commenter suggests changing “may” to “will” in line 7 of § 224.114 and deleting § 224.115(c). However, the Secretary believes that the existing language in this section is consistent with the intent of the Act, and fulfills the Department’s residual trust responsibility as noted in the Act (25 U.S.C. 3504(e)(6)(A)(I) and (ii)) and Section 3504(e)(6)(B)) to consider the best interests of the tribe and the protection of trust resources in the Secretary’s decision-making. Therefore, the Secretary declines to make the suggested change.

**Section 224.117** When must the Director dismiss a petition after making a threshold determination about a petition?

A commenter suggested that § 224.117(b) include as a basis for dismissal that a petitioner's lack of participation in a tribal hearing or comment process regarding the tribe's proposed activity, as well as failing to exhaust tribal remedies, if any, for alleging non-compliance with a TERA. The Secretary determined in response to a comment for § 224.107 that participation in a tribal hearing or comment process regarding a tribe's proposed activity under a TERA as a prerequisite for filing a petition would place an unfair burden on a petitioner and declined to make the suggested change. The Secretary also declines to make the suggested changes to § 224.117(b) because such a change would be inconsistent with the requirements in § 224.107 and would impose more requirements on a petitioner than Congress intended.

**Section 224.119** How must the Director proceed if the Director does not dismiss the petition based on a threshold determination?

A commenter suggested that, if a petition is not dismissed based on threshold determinations, the Secretary's action on a petition should be limited to that necessary to cure or otherwise resolve each claim of adverse environmental impact to the petitioner's interest. The Secretary disagrees with the comment by noting that the Act expressly provides that the basis for an interested party's petition is a claim of a tribe's noncompliance with a TERA (5 U.S.C. 3504(e)(7)(B)). In addition, the Secretary's required consultation with a tribe after receipt of an interested party's petition is about "any noncompliance alleged in the petition" (25 U.S.C. 3504(e)(7)(C)(i)(II)). Also, if a tribe "denies, or fails to respond to, each claim made in the petition \* \* \* or fails, refuses, or is unable to cure or otherwise resolve each claim made in the petition, \* \* \* the Secretary shall determine whether the Indian tribe is not in compliance with the TERA." (25 U.S.C. 3504(e)(7)(C)(iii)(I) and (II) and (e)(7)(D)(I)).

While we have maintained the general petition process included in Subpart E of the proposed regulations, after further review we have modified sections of Subpart E that did not accurately reflect the provisions of the Act or that required clarification, as follows:

Under the statutory scheme, Congress is providing third parties who may be

interested parties, as defined in the Act, the opportunity to request that the Secretary review a claim that a tribe is not complying with a TERA. However, before a person or entity that may be an interested party may file a petition with the Secretary, the person or entity must exhaust tribal remedies. Under § 224.105(a) we clarified that tribal laws, regulations, or procedures establish "tribal remedies" rather than "a process for hearing and comments" because under § 224.105(b) tribal remedies provide a person or entity the opportunity to file a petition with the tribe. We have added a new provision at § 224.107 to clarify that during the tribal remedy process a tribe may resolve the claims in a petition with the petitioner. The new provision does not provide for how a tribe may resolve the claims or require that the Director make any determination on the tribe's resolution during the tribal remedy process. Under the final regulations at § 224.106(c) a person or entity that files a petition becomes a petitioner. In § 224.111 we added as a provision under which a petitioner may file a petition with the Secretary that the tribe failed to provide a person or entity that may be an interested party with copies of applicable tribal laws within a reasonable time of a request.

In review of the proposed regulations, the Secretary finds that proposed § 224.112 inaccurately states that after a petition consultation with the Director, a tribe "may" respond to the petition. Consequently, § 224.112 is re-numbered to § 224.113 and we have changed "may" to "must" to reflect the Act's requirement in 25 U.S.C.

3504(e)(7)(C)(ii). The Secretary also finds that § 224.113 states that a tribe "may or may not" dispute the petitioner's allegations. Consequently, § 224.113 is re-numbered to § 224.114 and we have changed this provision to state that a tribe "must respond to any claims made in the petition \* \* \*" to reflect the Act's requirement in 25 U.S.C. 3504(e)(7)(C)(ii). We have also added subsection (b) to state that a tribe "must cure or otherwise resolve each claim of noncompliance made in the petition" as required under 25 U.S.C. 3504(e)(7)(C)(iii).

In review of comments on proposed § 224.119 on threshold determinations, the Secretary finds that proposed § 224.119 does not accurately reflect when the Director makes a threshold determination or what the threshold determination should be. The Act requires the Secretary, upon receipt of a petition, to notify the tribe of the petition within 20 days of receipt and initiate consultation with the tribe. The

Act requires the tribe, within 45 days of completion of the consultation, to respond to the claims in the petition. Following consultation, the tribe has the opportunity to deny or respond to the claims in the petition and then has the opportunity to resolve or otherwise cure the claims. The Act requires the Director to make certain threshold determinations on a petition following consultation with the tribe before proceeding to review a tribe's compliance with a TERA, not upon receipt of the petition (25 U.S.C. 3504(e)(7)(C)(iii) and (e)(7)(D)(I). The Act at (e)(7)(D)(I) requires that the Director investigate a tribe's compliance with a TERA within 120 days of receipt of a petition, only upon making a threshold determination under 25 U.S.C. 3504(e)(7)(c)(iii). The threshold determinations the Director must make are whether the tribe has denied or failed to respond to each claim made in the petition or whether the tribe has failed or refused or is unable to cure or otherwise resolve each claim made in the petition (25 U.S.C. 3504(e)(7)(C)(iii)(I) and (II)). The Director may not proceed with a review of the tribe's compliance with a TERA unless the Director determines that one of the threshold determinations is met (25 U.S.C. 3504(e)(7)(C)(iii)). It is only upon the Director's determination that one of the threshold determinations is met that the Director reviews the petition and the tribe's response, if any, makes a written determination on the tribe's compliance with a TERA, and offers the tribe an opportunity for a hearing and a reasonable opportunity to attain compliance (25 U.S.C. 3504(e)(7)(E)). The Director may not take action to ensure compliance with the TERA under 25 U.S.C. 3504(e)(7)(D)(iii) before complying with 25 U.S.C. 3504(e)(7)(E)(i)–(iii). Therefore, the Secretary has modified proposed § 224.112 through § 224.122 in final § 224.113 through § 224.120 to accurately reflect the provisions of the Act.

The Secretary has added a new provision in § 224.117 that the Director provide the tribe an opportunity for a hearing, as required by 25 U.S.C. 3504(e)(7)(C)(iii). New provision § 224.118 requires that a tribe must respond in writing to the Director's opportunity for a hearing within 20 days and, if the tribe does not respond, the Director will proceed to a determination of whether the tribe is in compliance with the TERA. Requiring the tribe to respond to the opportunity for a hearing allows for a timely hearing if the tribe requests it and allows the Director to

make a determination on compliance under the petition without undue delay.

#### *Subpart F—Periodic Reviews*

**Section 224.132** How does the Director conduct a periodic review and evaluation?

One commenter raised concern that a tribe's provision of records and documents in the TERA review and evaluation process raises confidentiality issues similar to those involved in the initial application process. They recommend that the Secretary add a provision concerning record and document confidentiality. The Secretary agrees with the concern expressed in the comment. Our change is to insert in § 224.132(e) that the tribe should identify any information in these submitted records and documents that is confidential and proprietary. Specific exemptions to disclosure under the Freedom of Information Act, or other statutory protections against disclosure, may apply and preclude disclosure of this information to third parties.

**Section 224.140** What must the Secretary do if the tribe fails to respond to or does not comply with the Director's order?

Two commenters raised a concern that under this section the Secretary could make a decision to reassume all activities the tribe assumed under the agreement if the tribe does not comply or respond to the Director's order to cease conduct or take a specific action to correct a condition that caused imminent jeopardy to a physical trust asset. These commenters requested that flexibility be added to this requirement so that the Secretary could reassume either all or a part of the activities the tribe assumed under the TERA. The Secretary recognizes this concern, but notes that the Act at 25 U.S.C. 3504(e)(2)(D)(ii) does not provide the desired flexibility. The Act requires total reassumption where the Secretary determines there is imminent jeopardy to a physical trust asset and the tribe does not comply or respond to the Director's order to cease conduct or take a specific action to correct a condition that caused imminent jeopardy to a physical trust asset.

#### *Subpart G—Reassumption*

**Section 224.151** When may the Secretary reassume activities?

One commenter in this section suggested that when the Secretary invokes reassumption procedures because of a tribe's actions or inaction, such reassumption should be limited to the specific activity (or inactivity) giving

rise to the reassumption, and not to the TERA in its entirety. The commenter further suggests that, at the very least, the regulations should give the Secretary discretion to reassume only a specific activity. In the case of reassumption in this section, the Secretary notes that the intent of the existing language of the regulations is consistent with the Act at 25 U.S.C. 3504(e)(2)(D)(ii) where there is imminent jeopardy to a physical trust asset. The language of the Act at 25 U.S.C. 3504(e)(7)(D)(iii)(II) refers to a condition of non-compliance with the conditions of the TERA that do not rise to the level of imminent jeopardy and gives the Secretary discretion to rescind all or part of a TERA. However, if the Secretary makes a decision to rescind all provisions of the TERA based on a finding of imminent jeopardy to a physical trust asset, then the Secretary must reassume all of the activities and authority under the TERA.

Another commenter requests the insertion of language in this section that states reassumption is "based on a tribal violation of an agreement or applicable Federal law." The purpose of this change would be to clarify the underlying legal basis required for the Secretary's reassumption. However, the Secretary believes that the regulations already adequately deal with this issue and declines to make this addition.

**Section 224.152** Must the Secretary always reassume the activities upon a finding of imminent jeopardy to a physical trust asset?

A commenter recommends that the text of this section should correspond to the question and should address situations involving imminent jeopardy to a physical trust asset. The Secretary believes that the section adequately responds to the question and refers to the flexibility that the Secretary has to take action when there is imminent jeopardy to a physical trust asset. The commenter also suggests that the regulations note that under the Act, (25 U.S.C. 3504(e)(2)(D)(ii), the time period for reassumption appears to expire once the violation and any condition that caused the jeopardy is corrected. The Secretary agrees with this assertion and notes that §§ 224.154 and 224.157 deal with setting conditions and a timeline for a reassumption or termination of the reassumption process.

**Section 224.160** How will reassumption affect a TERA?

One commenter noted a conflict in the regulations in which § 224.160 states that reassumption of a TERA applies to all activities undertaken under a TERA

and § 224.150 of Subpart G titled "What is the purpose of this subpart?" states that the subpart explains when and how the Secretary may reassume all or certain activities included within an agreement. The Secretary agrees that these sections of the regulation conflict with each other and notes that the question of reassumption as stated in the Act applies to all activities and resources transferred under a TERA. The Secretary has made changes to both sections to make them consistent and clarify their meaning. In addition, the Secretary made a change to § 224.137(d) to make clear that in case of a finding of non-compliance with a TERA or other applicable Federal law, where said non-compliance does not cause imminent jeopardy to a physical trust asset, the Secretary has the discretion to suspend or rescind a part or all activities approved under a TERA.

#### *Subpart H—Rescission*

**Section 224.170** What is the purpose of this subpart?

A commenter states that the reassumption and rescission processes should allow for reassumption of specific activities and should not automatically require a tribe to relinquish all activities assumed under a TERA. The Secretary does not agree with this contention. We believe that the language in the regulations is consistent with the Act. When a rescission of a TERA takes place because of a voluntary action by the tribe, it must be done in its entirety. It is only when the rescission is a result of Secretarial action to remedy a finding of non-compliance with the TERA or other applicable Federal laws that the rescission action can be taken in part or whole.

**Section 224.172** May a tribe rescind only some of the activities subject to a TERA while retaining a portion of those activities?

One commenter suggests the addition of a new sentence to the end of this section that states, "Nothing in this section shall prohibit the Secretary and a tribe from amending an agreement to change its scope." Another commenter agrees and states that the Secretary's authority could, through an amendment to a TERA, permit a tribe to rescind a portion of a TERA voluntarily. The commenter notes that this would appear to be precluded by § 224.172 in which the Secretary appears to have limited rescission of a TERA to an all or nothing proposition. If the Secretary feels that that is the only statutorily permitted form of unilateral tribal rescission, the

commenter suggests, the Secretary should nonetheless make provision for a mutually agreed upon amendment of a TERA so that the scope of a TERA can be reduced without negating the entire TERA. The commenter argues that it is foreseeable that, in many instances, the precise scope of the optimal TERA will be developed over time and urges the Secretary to retain and apply a flexible approach to TERA amendments. The Secretary believes that the language in this section is consistent with the intent of Congress. However, the Department has added a § 224.66 to allow for a reduction in the scope of a TERA. The Secretary believes that, the addition of this section preserves the flexibility of the tribe and the Secretary while meeting the intent of Congress.

#### IV. Procedural Matters

##### *Regulatory Planning and Review (Executive Order 12866)*

This rule is a significant rule and the Office of Management and Budget has reviewed this rule under Executive Order 12866. We have made the assessments required by E.O. 12866 and the results are summarized below and can be obtained by writing to the address in the addressees section.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. These regulations create a process that will allow tribes to enter into an agreement with the Department whose intent is to promote tribal oversight and management of energy and mineral resource development on tribal lands. Approval of a Tribal Energy Resource Agreement (TERA) under the requirements of the regulations and will not, by itself, result in energy development related leases, business agreements, or rights-of-way.

It is important to note that there is a great amount of flexibility in the construction of a TERA with the Department. A TERA can cover energy development on all or part of the tribal land controlled by the tribe for development of energy resources (renewable and/or nonrenewable); including, but not limited to, natural gas, oil, uranium, coal, nuclear, wind, solar, geothermal, biomass, and hydrologic. Energy resource development may include the following types of arrangements between a tribe and private industry or a tribal energy resource development organization (in which the tribe is a partner):

*Lease* defined as a written agreement, or modification of a written agreement, between a tribe and a tenant or lessee, whereby the tenant or lessee grants a right to possession of tribal land or energy mineral resources for purposes of energy resource development.

*Business agreement* which includes (1) Any permit, contract, joint venture, option, or other agreement that furthers any activity related to locating, producing, transporting, or marketing energy resources on tribal land; (2) Any amendment, supplement, or other modification to such an agreement; or (3) Any other business agreement entered into or subject to administration under a TERA.

*Right-of-Way* which means an easement, right, or other authorization over tribal lands, granted or subject to administration under a TERA, for a pipeline or electric transmission or distribution line that serves a facility located on tribal land related to energy resource development.

The ability to derive a quantitative estimate for the overall impact on the economy of these regulations is highly speculative because of the varying size of Indian Tribes, their level of infrastructure and economic development, tribal development expertise, and the type of energy resource that they possess. In addition, it is not known how many tribes will choose a TERA as a development vehicle, since the decision to enter into a TERA is voluntary. In addition the large degree of flexibility with regard to the range of regulatory activities, type of business arrangements, and type and scale of energy development that a tribe may wish to engage in makes any quantitative analysis of the costs or benefits to a tribe highly uncertain.

The business climate for companies that seek to negotiate for leases, business agreements or rights-of-way for energy development projects on tribal land (as defined in § 224.30) would not change substantially because of these regulations. National or regional economic costs of energy development (i.e. coal vs. natural gas; wind vs. coal) and other market forces (e.g., location, access to transmission networks, cost of technology, etc.) would be the most likely principal drivers for companies that want to enter into energy development-related business arrangements than whether a tribe is negotiating under Indian Mineral Leasing Act, Indian Mineral Development Act or TERA regulations.

One benefit, to both industry and tribes that may occur, could be a reduction in the time needed to complete negotiations and enter into

contracts for proposed projects. Presumably once a TERA is final a tribe's capacity to conduct negotiations, complete contractual arrangements, and conduct any needed technical analyses leading to the commencement of operations, would increase with time and could lead to an increased ability of tribes and third parties to more readily take advantage of and adjust to current market conditions without waiting for Departmental approval.

The requirement for submittal of commercial and financial information by businesses contracting with tribes should not change markedly because the regulations require tribes to adhere to administrative practices similar to what the Department already requires. Therefore, compliance costs for businesses should largely remain the same as in the pre-TERA climate.

For tribes, one factor that could increase their administrative costs would be, in some cases, an increased need for creating, maintaining and preserving records of their technical and financial arrangements with industry. These record keeping requirements now largely are the responsibility of the Department.

These recordkeeping requirements are necessary because of the Department's residual trust responsibility under the Act. In the case of a reassumption by the Department or a voluntary rescission by a tribe of authority that is granted through a TERA the Department must be able to regain effective regulatory and management control over any energy development projects on tribal trust land. However, these costs should be largely related to the initial creation of records management systems, acquisition of physical space, and training of staff for implementation.

Another factor that could increase tribal costs would be the assumption by the tribe of costs for assessing potential environmental impacts and creating an ongoing environmental review process for activities covered by a TERA. The regulations as authorized by the Act require a tribe to develop these internal capacities and programs or to identify how they will acquire these capacities externally.

Although a tribe is permitted to identify in a proposed TERA, any Departmental resources that they could use to fund administrative and technical programs that they want to assume activities there is no guarantee that an affirmative decision by the Department would provide enough financial resources to allow the tribe to not incur increased cost. However, the magnitude of these costs is highly uncertain, again because of the large variation in the

range of activities and scale of energy development that a tribe may seek to assume.

The Department believes that the benefits derived from implementation of these regulations are in keeping with Congressional and Departmental goals for advancing tribal self-governance and far outweigh the potential costs as described. Furthermore, these regulations are not unduly burdensome to Indian Tribes, private industry, or consumers and will actually serve to decrease the workload currently in place.

(2) The regulations do not preclude tribes from using other existing regulations to pursue economic development opportunities and so will not create serious inconsistency or otherwise interfere with any action taken or planned by another agency. The main benefit of this rulemaking is an enhanced self-governance opportunity for tribes. By implementing the provisions of the Act, these regulations will further the goal of Indian self-determination, that is a longstanding goal of the Federal Government and the Department.

(3) The creation of a TERA between a tribe and the Department does not affect other entitlement, grant, or loan programs with the Department or any other Federal agency. Furthermore, this rule does not establish new user fees, or restrict in any way any other existing user fees. Therefore, these regulations will not affect any such programs or the rights or obligations of their recipients.

(4) These regulations will not create serious inconsistency with existing laws or executive orders or raise novel legal or policy issues. As stated before the main benefit from these regulations is an enhanced self-governance opportunity for tribes. Implementation of the provisions of the Act is consistent with the Indian Self Determination and Education Assistance Act, as amended. These regulations further the development of Indian self-determination, which is a longstanding goal of the Federal Government and the Department.

#### *Regulatory Flexibility Act (RFA)*

The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities as defined under the RFA (5 U.S.C. 601 *et seq.*). Most of the costs for complying with this rule would be information collection costs. The total estimated annual burden hours for responding to the information collection requirements in this rule are 10,752. Respondents to the information collection required by these regulations

would need to acquire the services of individuals in the project management and energy, environmental, financial and legal analyses fields as well as administrative service staff. The annual non-hour burden associated with the regulations is \$48,200 for office and maintenance expenses associated with preparation of reports and a variety of correspondence. When added to the salary and benefits for personnel, the annual industry-wide cost for the information collection burden in this rule would be about \$375,795.

Therefore, complying with "Part 224—Tribal Energy Resource Agreements under The Indian Tribal Energy Development and Self-Determination Act" should not be a significant financial burden. For a rule with these relatively low projected costs, a Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

#### *Small Business Regulatory Enforcement Fairness Act (SBREFA)*

This rule is not a major rule under SBREFA (5 U.S.C. 804(2)) because:

(a) Most of the costs for complying with this rule would be information collection costs. The total estimated industry-wide cost for the information collection burden in this rule would be about \$375,000. Therefore, the rule will not have an annual effect on the economy of \$100 million or more.

(b) The approval of a Tribal Energy Resource Agreement will not, by itself, result in energy development related leases, business agreements, or rights-of-way. Therefore, the regulations will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic areas.

(c) Because the regulations do not directly result in energy resource development projects, they will 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.

#### *Unfunded Mandates Reform Act (UMRA)*

Participation in the development of Tribal Energy Resource Agreements as outlined in these regulations is voluntary. In addition, there are regulatory alternatives for tribes that want to develop energy resources on tribal lands, but they may not want to develop a TERA. Furthermore, the regulations will not result in the expenditure by the state, local or tribal governments or private sector of \$100 million or more in any one year.

Therefore, these regulations do not impose an unfunded mandate on state, local, or tribal governments, or the private sector, of more than \$100 million per year, and the regulations do not have a significant or unique effect on state, local, or tribal governments, or the private sector. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

#### *Federalism (Executive Order 13132)*

According to Executive Order 13132, these regulations do not have Federalism implications. While these regulations are of interest to tribes, there is no federalism impact on the trust relationship or balance of power between the United States government and the various tribal governments affected by this rulemaking. Therefore, the regulations do not substantially and directly affect the relationship between the Federal and State governments, and would not impose costs on states or localities and so do not require a federalism assessment.

#### *Civil Justice Reform (Executive Order 12988)*

With respect to Executive Order 12988, the Office of the Solicitor has determined that this rule would not unduly burden the judicial system, and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

#### *Paperwork Reduction Act (PRA)*

Under the proposed rule (71 FR 48626, August 21, 2006), we asked for comments regarding any information collection burdens that would arise under these regulations at 25 CFR part 224 that govern the review of Tribal Energy Resource Agreements and activities undertaken pursuant to a TERA.

We specifically solicited comments on the following questions:

(a) Is the proposed collection of information necessary for the Department to properly perform its functions, and will it be useful?

(b) Are the estimates of the burden hours of the proposed collection reasonable?

(c) Do you have any suggestions that would enhance the quality, clarify, or usefulness of the information to be collected?

(d) Is there a way to minimize the information collection burden on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology?

The Department issued a **Federal Register** notice for the information

collection authorization for the proposed rule. After the comment period, the Office of Management and Budget (OMB) subsequently approved the information collection associated with this rule on March 12, 2007 under OMB control number 1076-0167 (OMB approval expires March 31, 2010). The total hour burden currently approved under 1076-0167 is 9,290 hours.

Respondents to the information collections in these regulations derive economic benefit from an enhanced ability to manage energy resources that exist on tribal lands. Therefore, the frequency of response will vary and depends on the respondents' needs. The information collection (IC) does not include questions of a sensitive nature. The Department will protect proprietary information according to the Freedom of Information Act (5 U.S.C. 522) and its implementing regulations (43 CFR part 2) or other applicable laws. You may obtain a copy of the supporting statement for the new collection of information by contacting the Bureau of Indian Affairs' Information Collection Clearance Officer at (703) 735-4414.

#### *National Environmental Policy Act (NEPA)*

This final rule is categorically excluded from the preparation of an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*, because its environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and the federal actions under the final rule (i.e., approval or disapproval of TERAs) will be subject at the time of the action itself to the NEPA process, either collectively or case-by-case. (Because they are not Federal actions, approval or disapproval by a tribe of leases, business agreements, and rights-of-way under a TERA will not be subject to NEPA review.) Further, no extraordinary circumstances exist to require preparation of an environmental assessment or environmental impact statement.

#### *Data Quality Act*

In developing these regulations, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106-554).

#### *Energy Supply, Distribution, or Use (Executive Order 13211)*

This rule is not a significant rule and is not subject to review by the Office of Management and Budget under Executive Order 13211. The regulations

are administrative in nature and will not directly lead to energy development projects. Therefore, they will not have a significant effect on energy supply, or distribution. Thus, a Statement of Energy Effects is not required.

#### *Consultation and Coordination With Indian Tribal Governments (Executive Order 13175)*

Pursuant to Executive Order 13175 of November 6, 2000, Consultation and Coordination with Indian Tribal Governments, the Department determined that because the rulemaking will uniquely affect tribal governments it would follow Department and Administrative protocols in consulting with tribal governments on the rulemaking. Consequently, the Department notified tribal governments through a **Federal Register** notice of the proposed rulemaking and through the BIA regional offices. The notices enabled tribal officials and the affected tribal constituency throughout Indian country to have meaningful and timely input in the development of the proposed rule. We believe that these actions reinforce good intergovernmental relations with tribal governments and better inform, educate, and advise such tribal governments on compliance requirements of the rulemaking.

The Department sent letters to tribal leaders on October 31, 2005 with information about the TERA provisions of Title V, Section 503 and solicited participation in a process to develop a framework for the implementing regulations. On December 9, 2005, the Department published a **Federal Register** notice (70 FR 73257) announcing public meetings and tribal consultations in 10 cities between January 9 and 20, 2006. The **Federal Register** notice also solicited written comments and the BIA regional offices distributed the notice to all tribes. We held the meetings in the following cities: Tulsa, OK; Denver, CO; Houston, TX; Albuquerque, NM; Las Vegas, NV; Sacramento, CA; Minneapolis, MN; Billings, MT; Portland, OR; and Washington, DC. The comments received from these public meetings and consultations and the written comments submitted were taken into consideration in the formulation of the proposed regulations. In response to the proposed rule, the Department received comments from several tribes and organizations that represent tribal interests. We have committed to consulting with tribal representatives in developing processes and procedures for the implementation of these Tribal Energy Resource Agreement regulations following

publication of the final rule. In addition, the Department has incorporated a Pre- and Post-Application consultation process designed to enable tribes that pursue a TERA with the Department to have the widest available knowledge base with which to operate during the application review and evaluation phase.

#### **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.

Dated: October 1, 2007.

**Carl J. Artman,**

*Assistant Secretary—Indian Affairs.*

■ For the reasons stated in the preamble, the Department amends Chapter I of Title 25 of the Code of Federal Regulations to add a new part 224, to read as follows:

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

#### **Subpart A—General Provisions**

Sec.

- 224.10 What is the purpose of this part?
- 224.20 How will the Secretary interpret and implement this Part and the Act?
- 224.30 What definitions apply to this Part?
- 224.40 How does the Act or a TERA affect the Secretary's trust responsibility?
- 224.41 When does the Secretary require agreement of more than one tribe to approve a TERA?
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#### **Subpart B—Procedures for Obtaining Tribal Energy Resource Agreements**

- 224.50 What is the purpose of this subpart?
- Pre-application Consultation and the Form of Application
- 224.51 What is a pre-application consultation between a tribe and the Director?
- 224.52 What may a tribe include in a TERA?
- 224.53 What must an application for a TERA contain?
- Processing Applications
- 224.54 How must a tribe submit an application?
- 224.55 Is information a tribe submits throughout the TERA process under this Part subject to disclosure to third parties?
- 224.56 What is the effect of the Director's receipt of a tribe's complete application?
- 224.57 What must the Director do upon receipt of an application?
- Application Consultation Meeting

- 224.58 What is an application consultation meeting?
- 224.59 How will the Director use the results of the application consultation meeting?
- 224.60 What will the Director provide to the tribe after the application consultation meeting?
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- TERA Requirements**
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- 224.67 What must the Secretary do upon the Director's receipt of a final proposed TERA?
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- 224.72 How will the Secretary determine whether a tribe has demonstrated sufficient capacity?
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- 224.74 When must the Secretary approve or disapprove a final proposed TERA?
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- 224.76 Upon notification of disapproval, may a tribe re-submit a revised final proposed TERA?
- 224.77 Who may appeal the Secretary's decision on a final proposed TERA or a revised final proposed TERA?

#### **Subpart D—Implementation of Tribal Energy Resource Agreements**

##### **Applicable Authorities and Responsibilities**

- 224.80 Under what authority will a tribe perform activities for energy resource development?
- 224.81 What laws are applicable to activities?
- 224.82 What activities will the Department continue to perform after approval of a TERA?
- Leases, Business Agreements, and Rights-of-Way under a TERA**
- 224.83 What must a tribe do after executing a lease or business agreement, or granting a right-of-way?
- 224.84 When may a tribe grant a right-of-way?

- 224.85 When may a tribe enter into a lease or business agreement?
- 224.86 Are there limits on the duration of leases, business agreements, and rights-of-way?
- Violation or Breach**
- 224.87 What are the obligations of a tribe if it discovers a violation or breach?
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- 224.101 Who is an interested party?
- 224.102 Must a tribe establish a comment or hearing process for addressing environmental concerns?
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- 224.106 If a tribe has enacted tribal laws, regulations, or procedures for challenging tribal action, how must the tribe respond to a petition?
- 224.107 What must a petitioner do before filing a petition with the Secretary?
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- 224.111 When may a petitioner file a petition with the Secretary?
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- 224.117 Must the Director make a determination of the tribe's compliance with a TERA?
- 224.118 How must the tribe respond to the Director's notice of the opportunity for a hearing?
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#### **Subpart F—Periodic Reviews**

- 224.130 What is the purpose of this subpart?
- 224.131 What is a periodic review and evaluation?
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- 224.136 How will the Director's report address a tribe's noncompliance?
- 224.137 What must the Director do if a tribe's noncompliance has resulted in harm or the potential for harm to a physical trust asset?
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#### **Subpart G—Reassumption**

- 224.150 What is the purpose of this subpart?
- 224.151 When may the Secretary reassume activities?
- 224.152 Must the Secretary always reassume the activities upon a finding of imminent jeopardy to a physical trust asset?
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- 224.154 What must a notice of intent to reassume include?
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- 224.156 What information must the tribe's response to the notice of intent to reassume include?
- 224.157 How must the Secretary proceed after receiving the tribe's response?
- 224.158 What must the Secretary include in a written notice of reassumption?
- 224.159 How will reassumption affect valid existing rights or lawful actions taken before the effective date of the reassumption?
- 224.160 How will reassumption affect a TERA?
- 224.161 How may reassumption affect the tribe's ability to enter into a new TERA or to modify another TERA to administer additional activities or assume administration of activities that the Secretary previously reassumed?

#### **Subpart H—Rescission**

- 224.170 What is the purpose of this subpart?
- 224.171 Who may rescind a TERA?

- 224.172 May a tribe rescind only some of the activities subject to a TERA while retaining a portion of those activities?
- 224.173 How does a tribe rescind a TERA?
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#### Subpart I—General Appeal Procedures

- 224.180 What is the purpose of this subpart?
- 224.181 Who may appeal Departmental decisions or inaction under this part?
- 224.182 What is the Initial Appeal Process?
- 224.183 What other administrative appeals processes also apply?
- 224.184 How do other administrative appeals processes apply?
- 224.185 When are decisions under this part effective?

**Authority:** 25 U.S.C. 2 and 9; 25 U.S.C. 3501–3504; Pub. L. 109–58

#### Subpart A—General Provisions

##### § 224.10 What is the purpose of this part?

This part:

- (a) Establishes procedures by which a tribe, at its discretion, may enter into and manage leases, business agreements, and rights-of-way for purposes of energy resource development on tribal land; and
- (b) Describes the process for obtaining, implementing, and enforcing a tribal energy resource agreement (TERA) that will allow a tribe to enter into individual leases, business agreements, and rights-of-way without obtaining Secretarial approval.

##### § 224.20 How will the Secretary interpret and implement this part and the Act?

(a) The Secretary will interpret and implement this part and the Indian Tribal Energy Development and Self-Determination Act (the Act) in accordance with the self-determination and energy development provisions and policies in the Act.

(b) The Secretary will liberally construe this part and the Act for the benefit of tribes to implement the Federal policy of self-determination. The Secretary will construe any ambiguities in this part or the Act in favor of the tribe to implement a TERA as authorized by this part and the Act.

##### § 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.

*Application* means the application submitted for a TERA under subpart B.

*Business agreement* means:

(1) Any permit, contract, joint venture, option, or other agreement that furthers any activity related to locating, producing, transporting, or marketing energy resources on tribal land;

(2) Any amendment, supplement, or other modification to such an agreement; or

(3) Any other business agreement entered into or subject to administration under a TERA.

*Days* mean calendar days in computing any period prescribed or allowed by the Act and this part:

(1) Do not include the day of the event from which the period begins to run;

(2) Include the last day of the period, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or Federal holiday; and

(3) When the period prescribed or allowed is less than 11 days, exclude intermediate Saturdays, Sundays, and Federal holidays from the computation.

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

*Department* means the Department of the Interior.

*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 or the Director to the tribe regarding the status of a TERA or activities under a TERA.

*Director* means the Director of the Office of Indian Energy and Economic Development or the Secretary's designee, authorized to act on behalf of the Secretary.

*Energy Resources* means both renewable and nonrenewable energy sources, including, but not limited to, natural gas, oil, uranium, coal, nuclear, wind, solar, geothermal, biomass, and hydrologic resources.

*Imminent jeopardy to a physical trust asset* means an immediate threat of devaluation, degradation, damage, or loss of a physical trust asset, as determined by the Secretary, caused by the noncompliance of a tribe or third party with a TERA or applicable Federal laws.

*Interested party* means a person or entity who has filed a petition with the Secretary under subpart E seeking review of a tribe's compliance with a TERA and who meets the criteria in § 224.101.

*Lease* means a written agreement, or modification of a written agreement, between a tribe and a tenant or lessee, whereby the tenant or lessee is granted a right to possession of tribal land or energy mineral resources for purposes of energy resource development.

*Petitioner* means a person or entity who has filed a petition under subpart E with a tribe or the Secretary seeking review of a tribe's compliance under a TERA. A petitioner is not considered to be an interested party unless the petitioner meets the criteria in § 224.101.

*Physical trust asset* means a physical asset held in trust by the United States for a tribe or individual Indian or by a tribe or individual Indian subject to a restriction against alienation under the laws of the United States. "Physical trust asset" does not include:

(1) Any improvements (for example, wells or structures) to the assets held in trust or restricted status; or

(2) Monetary assets.

*Public* means one or more natural or legal persons, and their associations, organizations, or groups; or Federal, State, tribal and local government agencies; or private industry and their associations, organizations, or groups.

*Right-of-way* means an easement, right, or other authorization over tribal lands, granted or subject to administration under a TERA, for a pipeline or electric transmission or distribution line that serves a facility located on tribal land that is related to energy resource development.

*Secretary* means the Secretary of the Interior or the Secretary's designee.

*TERA* means tribal energy resource agreement.

*Tribal governing body* means 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.

*Tribal land* means any land or interests in land owned by a tribe or tribes, title to which is held in trust by the United States, or is subject to a restriction against alienation under the laws of the United States. For the purposes of this part, tribal land includes land taken into trust or subject to restrictions on alienation under the laws of the United States after the effective date of the agreement.

*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.

*Violation or breach* means any breach or other violation by another party of any provision in a lease, business agreement, or right-of-way under a TERA or any activity or occurrence under a lease business agreement or right-of-way that constitutes a violation of Federal or tribal environmental law.

**§ 224.40 How does the Act or a TERA affect the Secretary's trust responsibility?**

(a) The Act (25 U.S.C. 3504(e)(6)) preserves the Secretary's trust responsibilities relating to mineral and other trust resources and requires the Secretary to act in good faith and in the best interest of Indian tribes.

(b) Neither the Act nor this part absolves the Secretary of responsibilities to Indian tribes under the trust relationship, treaties, statutes, regulations, Executive Orders, agreements or other Federal law.

(c) The Act and this part preserve the Secretary's trust responsibility to ensure that the rights and interests of an Indian tribe are protected if:

(1) Another party to a lease, business agreement, or right-of-way executed under an approved TERA violates any term of the lease, business agreement, or right-of-way, or any applicable Federal law; or

(2) Any provision of a lease, business agreement, or right-of-way violates the TERA under which it was executed.

(d) The United States is not liable for losses to any party (including any tribe) for any negotiated term of, or any loss resulting from, the negotiated terms of a lease, business agreement, or right-of-way the tribe executes under a TERA.

**§ 224.41 When does the Secretary require agreement of more than one tribe to approve a TERA?**

When tribal land held for the benefit of more than one tribe is contemplated for inclusion in a TERA, each appropriate tribal governing body must request a pre-application consultation meeting, and submit a resolution or formal act of the tribal governing body approving the submission of any application. Each appropriate tribal governing body must also sign the TERA, if it is approved.

**§ 224.42 How does the Paperwork Reduction Act affect these regulations?**

The information collected from the public is cleared and covered by OMB Control Number 1076-0167. The sections of this rule which have information collections are §§ 224.53, 224.57(d), 224.61, 224.63, 224.64, 224.65, 224.68(d), 224.76, 224.83, 224.87, 224.109, 224.112, 224.120(a), 224.139(b), 224.156, and 224.173. Please note that a Federal Agency may not

conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

**Subpart B—Procedures for Obtaining Tribal Energy Resource Agreements**

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

This subpart establishes procedures for:

(a) Pre-application and application consultations and process;

(b) Requirements for the content of applications;

(c) Submittal of completed applications; and

(d) Secretarial review and processing of applications.

**Pre-application Consultation and the Form of Application**

**§ 224.51 What is a pre-application consultation between a tribe and the Director?**

(a) A tribe interested in entering into a TERA should request a pre-application consultation by writing to the Director, Office of Indian Energy and Economic Development. The request should include the name and contact information for the Designated Tribal Official who will coordinate scheduling with the Director.

(b) Upon receiving a pre-application consultation request, the Director will contact the Designated Tribal Official to schedule a pre-application consultation meeting. The Director may also initiate pre-application discussions with the tribal governing body.

(c) At the pre-application consultation meeting, the tribe and the Director may discuss any of the matters related to a future application including, but not limited to:

(1) The application process;

(2) The potential scope of the tribe's future application, including any regulatory or administrative activities that the tribe anticipates exercising;

(3) The required content of an application for a TERA;

(4) The energy resource the tribe anticipates developing;

(5) The tribe's capacity to manage and regulate the energy resource development the tribe identifies;

(6) Potential opportunities for funding capacity-building and other activities related to the energy resource the tribe anticipates developing under a TERA; and

(7) Any other matters applicable to this part, the Act, and the tribe.

**§ 224.52 What may a tribe include in a TERA?**

A TERA under this part:

(a) May include development of all or part of a tribe's energy resources;

(b) Must specify the type of energy resource included;

(c) May include assumption by the tribe of certain activities normally carried out by the Department, except for inherently Federal functions; and

(d) Must specify the services or resources related to the specific activity related to energy resource development that the tribe proposes to assume from the Department.

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

(a) An application for a TERA must contain all of the following:

(1) A proposed TERA between the tribe and the Secretary, signed by the authorized representative of the tribe, that contains the provisions required by § 224.63;

(2) A statement that the Secretary recognizes the tribe as an Indian tribe and that the tribe has tribal land;

(3) A brief description of the tribe's form of government;

(4) Copies of relevant portions of tribal documents (see paragraph (b) of this section);

(5) A map, legal description, and general description of the tribal land that the tribe intends to include in the TERA;

(6) A statement that meets the requirements in paragraph (c) of this section;

(7) A statement describing the tribe's experience in negotiating and administering energy-related leases, business agreements, and rights-of-way issued under other Federal laws that includes descriptions of significant leases, business agreements, and rights-of-way the tribe has entered into with third parties or to which it has consented;

(8) A description of the expertise that the tribe will use to administer the TERA and an explanation of how that expertise meets the requirements of paragraph (d) of this section;

(9) A statement of the scope of administrative activities that the tribe intends to conduct and an explanation of how that meets the requirements of paragraph (e) of this section;

(10) A statement that meets the requirements of paragraph (f) of this section describing the capability of the tribe to assume all of the activities the tribe has identified in the application;

(11) A copy of the resolution or formal action of the tribal governing body or bodies under § 224.41 that approves submission of an application for a TERA; and

(12) A designation of, and contact information for, the Designated Tribal

Official who will receive notifications from the Secretary or the Director regarding the status of the TERA application.

(b) The documents required by paragraph (a)(4) of this section include documents such as a constitution, code, ordinance, or resolution, that designate the tribal governing body or tribal officials that have authority to enter into leases, business agreements, or rights-of-way on behalf of the tribe.

(c) The statement required by paragraph (a)(6) of this section must:

(1) If applicable, state that the tribe retains the option of entering into energy-related leases or agreements under laws other than the Act for any tribal land that the TERA includes; and

(2) State one of the following:

(i) The tribe intends the TERA to include all tribal land, energy resources, and categories of energy-related leases, business agreements, and rights-of-way; or

(ii) The tribe intends the TERA to include only certain tribal land, energy resources, or categories of energy-related leases, business agreements, or rights-of-way in the TERA. In this case, the statement must specify and describe the 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.

(3) State the tribe's intent to amend or modify leases, business agreements, or rights-of-way that exist when a TERA is approved if those activities are directly related to the activities authorized by the TERA. The tribe's ability to amend or modify such leases, business agreements or rights-of-way requires the agreement of the other parties to the lease, business agreement or rights-of-way, which must be stated in the TERA.

(d) The statement required by paragraph (a)(8) of this section must describe the expertise that the tribe will use in the four areas specified in paragraph (d)(1) of this section. It must also address, at a minimum, the administrative and personnel resources specified in paragraph (d)(2) of this section.

(1) The statement must describe the expertise that the tribe will use to:

(i) Negotiate or review leases, business agreements, or rights-of-way under the TERA;

(ii) Evaluate the environmental effects, including those related to cultural resources, of leases, business agreements, or rights-of-way entered into under a TERA;

(iii) Review proposals for leases, business agreements and rights-of-way under the TERA; and

(iv) Monitor the compliance of a third party with the terms and conditions of any leases, business agreements and rights-of-way covered by the TERA.

(2) The statement must describe the following:

(i) Existing energy resource development related departments or administrative divisions within the tribe;

(ii) Proposed energy resource development related departments or administrative divisions within the tribe;

(iii) Existing energy resource development related expertise possessed by the tribe, including a description of the relevant expertise of designated tribal employees, consultants and/or advisors; and

(iv) Proposed energy resource development related expertise that the tribe may acquire, including a description of the relevant expertise of designated tribal employees, consultants and/or advisors that the tribe intends to hire or retain.

(e) The statement required by paragraph (a)(9) of this section must describe the amount of administrative activities related to the permitting, approval, and monitoring of activities, as applicable, that the tribe proposes to undertake under any lease, business agreement, or right-of-way the tribe executes under an approved TERA.

(1) If the tribe proposes to regulate activities, the tribe must state its intent and describe the scope of the tribe's plan for such administration and management in sufficient detail for the Secretary to determine the tribe's capacity to administer and manage the regulatory activity(ies).

(2) The tribe's intended scope of administrative responsibilities may not include the responsibilities of the Federal Government under the Endangered Species Act or other inherently Federal functions.

(3) If the tribe intends to regulate activities, it should also describe the regulatory activities it desires to assume in the geographical area identified in § 224.53(c)(2) with respect to leases, business agreements, and rights-of-way that exist when a TERA is approved.

(f) The statement required by paragraph (a)(10) of this section must:

(1) Describe the tribe's ability to negotiate and enter into leases, business agreements, and rights-of-way;

(2) Include a discussion of the estimated annual costs to the tribe to assume those activities the tribe has identified in the application and the proposed source of tribal funds to carry out those activities; and

(3) Describe the estimated annual amounts needed to conduct those activities the tribe has identified in the application and identify the Federal program that may provide those funds, if one of the sources of tribal funds includes grants or contract awards from the Department, the Department of Energy, or other Federal agencies.

(4) Include a description of any:

(i) Compacts and contracts between the tribe and the Secretary under the Indian Self-Determination and Education Assistance Act, as amended;

(ii) Environmental programs a tribe has assumed under the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C.A. 7401); or

(iii) Cooperative agreements under the Federal Oil and Gas Royalty Management Act (30 U.S.C. 1701 *et seq.*).

### Processing Applications

#### § 224.54 How must a tribe submit an application?

A tribe must submit an application and all supporting documents in written and electronic form to the Director.

#### § 224.55 Is information a tribe submits throughout the TERA process under this Part subject to disclosure to third parties?

The requirements of this section implement the requirements of the Freedom of Information Act (5 U.S.C. 552) (FOIA) and 43 CFR Part 2:

(a) Information a tribe submits to the Department throughout the TERA process under this Part may be subject to disclosure to third parties under FOIA unless a FOIA exemption or exception applies or other provisions of law protect the information.

(b) A tribe may, but is not required to, designate information it submits as confidential commercially or financially sensitive information, as applicable, in any submissions it makes throughout the TERA process, including, but not limited to:

- (1) Pre-application information;
- (2) Application information
- (3) A final proposed TERA;
- (4) Any amendments to a TERA; and
- (5) Leases, business agreements, and grants of right-of-way executed under an approved TERA.

(c) Upon receipt of a FOIA request for records that contain commercial or financial information a tribe has submitted under the TERA process, as required by 43 CFR Part 2 the Department will provide the tribe, as submitter, with written notice of the FOIA request if:

(1) The tribe has designated the information as confidential commercial or financial information; or

(2) The Department has reason to believe that the information requested may be protected under FOIA Exemption 4 (trade secrets and commercial or financial information which is obtained from a person and is privileged or confidential).

(d) The notice to the tribe will:

(1) Include a copy of the FOIA request;

(2) Describe the information requested or include copies of the pertinent records;

(3) Advise the tribe of procedures for objecting to the release of the requested information and specify the time limit for the tribe's response;

(4) Give the tribe no less than ten (10) working days from the Department's notice to object to the release and explain the basis for objection, if any;

(5) Advise the tribe that:

(i) Information contained in the tribe's objections may be subject to disclosure under FOIA if the Department receives a FOIA request for it; and

(ii) If the tribe's objections contain commercial or financial information and a requestor asks for the objections under FOIA, the same notification procedures as above will apply;

(6) Advise the tribe that it is the Department, rather than the tribe, that is responsible for deciding whether the information will be released or withheld;

(7) If the tribe designated the information as commercial or financial information 10 or more years before the FOIA request, the Department will

request the tribe's views on whether the tribe still considers the information to be confidential;

(e) If the tribe has any objection to disclosure of the information, the tribe must submit a detailed written statement to the Department including the following:

(1) The justification for withholding any portion of the information under any exemption of FOIA, and if the applicable exemption is Exemption 4, the tribe must submit a specific and detailed discussion of:

(i) Whether the Federal government required the information to be submitted, and, if so, how substantial competitive harm or other business harm would likely result from release of the information; or

(ii) Whether the tribe provided the information voluntarily and, if so, how the information fits into a category of information that the tribe customarily does not release to the public;

(2) A certification that the information is confidential, has not been disclosed to the public by the tribe, and is essentially non-public because it is not routinely available to the public from other sources;

(3) If not already provided, a tribal contact telephone and fax number so that the Department can communicate with the tribe about the FOIA request;

(f) The Department will review and consider all objections to release that are received within the time limits specified in the notice to the tribe, and if the tribe does not respond within the time limits

specified in the notice, the Department will presume that the tribe has no objection to release of the information;

(g) If the Department decides to release the information over the objection of the tribe, it will notify the tribe in writing by certified mail, return receipt requested, and will include copies of the records the Department intends to release and the reasons for deciding to release them. The notice will also inform the tribe that it intends to release the records within 10 working days after the tribe's receipt of the notice.

#### **§ 224.56 What is the effect of the Director's receipt of a tribe's complete application?**

The Director's receipt of a 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.

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

(a) Upon receiving an application for a TERA, the Director must:

(1) Promptly notify the Designated Tribal Official in writing that the Director has received the application and the date it was received;

(2) Within 30 days from the date of receiving the application, determine whether the application is complete; and

(3) Take the following actions:

| If the Director determines that . . . | Then the Director must . . .                                                                                                                                                                                                                                                                                      |
|---------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (i) The application is complete.      | (A) Issue a written notice and a request for an application consultation meeting to the Designated Tribal Official; and<br>(B) If appropriate, notify other Departmental bureaus and offices of receiving the application and provide copies.                                                                     |
| (ii) The application is not complete. | (A) Issue a written notice to the Designated Tribal Official that the application is not complete;<br>(B) Specify the additional information the tribe is required to submit to make the application complete; and<br>(C) Start the 270-day review period only when the Director receives a complete application. |

(b) Unless the Director notifies the Designated Tribal Official during the 30-day review period that the application is not complete, the application is presumed to be complete and the 270-day review period under 25 U.S.C. 3504(e)(2)(A) of the Act will begin as of the date that the application was received.

#### **Application Consultation Meeting**

##### **§ 224.58 What is an application consultation meeting?**

An application consultation meeting is a meeting held at the tribe's headquarters between the Director and the tribal governing body and any other

representatives that the tribe may designate to discuss the TERA application. The Secretary will designate representatives of appropriate Departmental offices or bureaus to attend the application consultation meeting, as necessary. The meeting will:

(a) Be held at the earliest practicable time after the Director receives a tribe's complete application;

(b) Include a thorough discussion of the tribe's application;

(c) Identify the specific services consistent with the Secretary's ongoing trust responsibility and available resources that the Department would

provide to the tribe upon the approval of a TERA;

(d) Include a discussion of the relationship of the tribe to other Federal agencies with responsibilities for implementing or ensuring compliance with the terms and conditions of leases, business agreements, or rights-of-way and applicable Federal laws;

(e) Include a discussion of the relationship of the tribe to its members, to State and local governments, and to non-Indians who may be affected by approval of a TERA or by leases, business agreements, or rights-of-way that the tribe may enter into or grant under an approved TERA;

(f) Include a discussion of the tribal administrative, financial, technical, and managerial capacities needed to carry out the tribe's obligations under a TERA; and

(g) Include a discussion of the form of the TERA and the timing and relative responsibilities of the parties for its preparation.

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

The Director will use the information gathered during the application consultation meeting in conjunction with information provided through § 224.53 and § 224.63 to determine the energy resource development capacity of the tribe as detailed in § 224.72.

**§ 224.60 What will the Director provide to the tribe after the application consultation meeting?**

Within 30 days following the meeting with the tribe, the Director will provide to the Designated Tribal Official a written report on the application consultation meeting. The report must include the Director's recommendations, if any, for revising the proposed TERA that was submitted as part of the tribe's application.

**§ 224.61 What will the tribe provide to the Director after receipt of the Director's report on the application consultation meeting?**

If the tribe wishes to proceed with the application, the tribe must submit a final proposed TERA to the Director within 45 days following the date of the Tribe's receipt of the Director's report on the application consultation meeting.

**§ 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.

(a) If a final proposed TERA does not differ significantly or materially from the original TERA contained in the complete application, the 270-day review period will begin to run on the date the original complete application was received (under § 224.57(c)) or on the date established by operation of § 224.57(d)).

(b) If a final proposed TERA differs significantly or materially from the original TERA contained in the complete application, the Secretary, with the tribe's consent, may extend the 270-day period for a reasonable time. The Secretary will notify the tribe in writing if an extension of time is necessary.

**TERA Requirements**

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

A TERA must contain all the elements required by this section.

(a) A provision for the Secretary's periodic review and evaluation of the tribe's performance under a TERA.

(b) A provision that recognizes the authority of the Secretary, upon a finding of imminent jeopardy to a physical trust asset, to take actions the Secretary determines to be necessary to protect the asset, including reassumption under subparts F and G of this part.

(c) A provision under which the tribe establishes and ensures compliance with an environmental review process for leases, business agreements, and rights-of-way which, at a minimum:

(1) Identifies and evaluates all significant environmental effects (as compared to a no-action alternative), including effects on cultural resources, arising from a lease, business agreement, or right-of-way;

(2) Identifies proposed mitigation measures, if any, and incorporates appropriate mitigation measures into the lease, business agreement, or right-of-way;

(3) Informs the public and provides opportunity for public comment on the environmental impacts of the approval of the lease, business agreement or right-of-way;

(4) Provides for tribal responses to relevant and substantive public comments before tribal approval of the lease, business agreement or right-of-way;

(5) Provides for sufficient tribal administrative support and technical capability to carry out the environmental review process; and

(6) Develops adequate tribal oversight of energy resource development activities under any lease, business agreement or right-of-way under a TERA that any other party conducts to determine whether the activities comply with the TERA and applicable Federal and tribal environmental laws.

(d) Provisions that require, with respect to any lease, business agreement, or right-of-way approved under a TERA, all of the following:

(1) Mechanisms for obtaining corporate, technical, and financial qualifications of a third party that has applied to enter into a lease, business agreement, or right-of-way;

(2) Express limitations on duration that meet the restrictions of the Act and this Part under § 224.86;

(3) Mechanisms for amendment, transfer, and renewal;

(4) Mechanisms for obtaining, reporting and evaluating the economic return to the tribe;

(5) Mechanisms for securing technical information about activities and ensuring that technical activities are performed in compliance with terms and conditions;

(6) Assurances of the tribe's compliance with all applicable environmental laws;

(7) Requirements that the lessee, operator, or right-of-way grantee will comply with all applicable environmental laws;

(8) Identification of tribal representatives with the authority to approve a lease, business agreement, or right-of-way and the related energy development activities that would occur under a lease, business agreement, or right-of-way;

(9) Public notification that a lease, business agreement, or right-of-way has received final tribal approval;

(10) A process for consultation with affected States regarding off-reservation impacts, if any, identified under paragraph (c) of this section;

(11) A description of remedies for breach;

(12) A statement that any provision that violates an express term or requirement of the TERA is null and void;

(13) A statement that if the Secretary determines that any provision that violates an express term or requirement of the TERA is material, the Secretary may suspend or rescind the lease, business agreement, or right-of-way, or take any action the Secretary determines to be in the best interest of the tribe, including, with the consent of the parties, revising the nonconforming provisions so that they conform to the intent of the applicable portion of the TERA; and

(14) A statement that the lease, business agreement, or right-of-way subject to a TERA, unless otherwise provided, goes into effect when the tribe delivers executed copies of the lease, business agreement, or right-of-way to the Director by first class mail return receipt requested or express delivery. The parties to a lease, business agreement, or right-of-way may agree in writing that any provision of their contract may have retroactive application.

(e) Citations to any applicable tribal laws, regulations, or procedures that:

(1) Provide opportunity for the public to comment on and to participate in public hearings, if any, under paragraph (c)(2) of this section; and

(2) Provide remedies that petitioning parties must exhaust before filing a

petition with the Secretary under subpart E of this part.

(f) Provisions that require a tribe to provide the Secretary with citations to any tribal laws, regulations, or procedures the tribe adopts after the effective date of a TERA that establish, amend, or supplement tribal remedies that petitioning parties must exhaust before filing a petition with the Secretary under subpart E of this part.

(g) Provisions that designate a person or entity, together with contact information, authorized by the tribe to maintain and disseminate to requesting members of the public current copies of tribal laws, regulations, or procedures that establish or describe tribal remedies that petitioning parties must exhaust before instituting appeals under subpart E of this part.

(h) Identification of financial assistance, if any, that the Secretary has agreed to provide to the tribe to assist in implementation of the TERA, including the tribe's environmental review of individual energy development activities.

(i) Provisions that require a tribe to notify the Secretary and the Director in writing, as soon as practicable after the tribe receives notice, of a violation or breach as defined in this Part.

(j) Provisions that require the tribe and the tribe's financial experts to adhere to Government auditing standards and to applicable continuing professional education requirements.

(k) Provisions that require the tribe to submit to the Director information and documentation of payments made directly to the tribe, if any. These provisions enable the Secretary to discharge the trust responsibility of the United States to enforce the terms of, and protect the rights of the tribe under, a lease, business agreement, or right-of-way. Required documentation must include documents evidencing proof of payment such as cancelled checks; cash receipt vouchers; copies of money orders or cashiers checks; or verification of electronic payments.

(l) Provisions that ensure the creation, maintenance and preservation of records related to leases, business agreements, or rights-of-way and performance of activities a tribe assumed under a TERA sufficient to facilitate the Secretary's periodic review of the TERA. The Secretary will use these records as part of the periodic review and evaluation process under § 224.132. Approved Departmental records retention procedures under the Federal Records Act (44 U.S.C. Chapters 29, 31, and 33) provide a framework the tribe may use to ensure that its records under a TERA adequately document

essential transactions, furnish information necessary to protect its legal and financial rights, and enable the Secretary to discharge the trust responsibility if:

(1) Any other party violates the terms of any lease, business agreement, or right-of-way; or

(2) Any provision of a lease, business agreement or right-of-way violates the TERA.

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

In order for a tribe to assume authority for approving leases, business agreements, and rights-of-way for development of another energy resource that is not included in the TERA, a tribe must apply for a new TERA covering the authority for the development of another energy resource it wishes to assume. The Secretary's consideration of a new TERA will include a determination of the tribe's capacity to develop that type of energy resource and will trigger the public notice and opportunity for comment consistent with § 224.67.

#### **§ 224.65 How may a tribe assume additional activities under a TERA?**

A tribe may assume additional activities related to the development of the same type of energy resource included in a TERA by negotiating with the Secretary an amendment to the existing TERA to include the additional activities. The Secretary will determine in each case whether the tribe has sufficient capacity to carry out additional activities the tribe may wish to assume under an approved TERA.

#### **§ 224.66 How may a tribe reduce the scope of the TERA?**

A tribe may reduce the scope of the TERA by negotiating with the Secretary an amendment to the existing TERA to eliminate an activity assumed under the TERA or a type of energy resource development managed under the TERA. Any such reduction in scope must include the return of all relevant Departmental resources transferred under the TERA and any relevant records and documents.

#### **Public Notification and Comment**

#### **§ 224.67 What must the Secretary do upon the Director's receipt of a final proposed TERA?**

(a) Within 10 days of the Director's receipt of a final proposed TERA, the Secretary must submit a notice for publication in the **Federal Register** advising the public:

(1) That the Secretary is considering a final proposed TERA for approval or disapproval; and

(2) Of any National Environmental Policy Act (NEPA) review the Secretary is conducting.

(b) The **Federal Register** notice will:

(1) Contain information advising the public how to request and receive copies of or participate in any NEPA reviews, as prescribed in subpart C of this part, related to approval of the final proposed TERA; and

(2) Contain information advising the public how to comment on a final proposed TERA.

#### **§ 224.68 How will the Secretary use public comments?**

(a) The Secretary will review and consider public comments in deciding to approve or disapprove the final proposed TERA; and

(b) The Secretary will provide copies of the comments to the Designated Tribal Official;

(c) Upon mutual agreement between the tribe and the Secretary, the tribe may make changes in the final proposed TERA based on the comments received; and

(d) If the tribe revises the final proposed TERA based on public comments, the tribal governing body must approve the changes, the authorized representative of the tribe must sign the final proposed TERA as revised, and the tribe must send the revised final proposed TERA to the Director. The Secretary and the tribe will consult on whether an extension of the review period is necessary under § 224.62(b).

#### **Subpart C—Approval of Tribal Energy Resource Agreements**

#### **§ 224.70 Will the Secretary review a proposed TERA under the National Environmental Policy Act?**

Yes, the Secretary will conduct a review under the National Environmental Policy Act (NEPA) of the potential impacts on the quality of the human environment that might arise from approving a final proposed TERA. The scope of the Secretary's evaluation will be limited to the scope of the TERA. The public comment period, when required, under the NEPA review will occur concurrently with the public comment period for a TERA under § 224.67.

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

The Secretary will consider the best interests of the tribe and the Federal policy of promoting tribal self-

determination in deciding whether to approve a final proposed TERA. The Secretary must approve a final proposed TERA if it contains the provisions required by the Act and this part and the Secretary determines that the tribe has demonstrated sufficient capacity to manage the development of energy resources it proposes to develop.

**§ 224.72 How will the Secretary determine whether a tribe has demonstrated sufficient capacity?**

The Secretary will determine whether a tribe has demonstrated sufficient capacity under § 224.71 based on the information obtained through the application process. The Secretary will consider:

- (a) The specific energy resource development the tribe proposes to regulate;
- (b) The scope of the administrative or regulatory activities the tribe seeks to assume;
- (c) Materials and information submitted with the application for a TERA, the result of meetings between the tribe and a representative of the Department and the Director's written report;
- (d) The history of the tribe's role in energy resource development, including negotiating and approval or disapproval

of pre-existing energy-related leases, business agreements, and rights-of-way;

(e) The administrative expertise of the tribe available to regulate energy resource development within the scope of the final proposed TERA or the tribe's plans for establishing that expertise;

(f) The financial capacity of the tribe to maintain or procure the technical expertise needed to evaluate proposals and to monitor anticipated activities in a prudent manner;

(g) The tribe's past performance administering contracts and grants associated with self-determination programs, cooperative agreements with Federal and State agencies, and environmental programs administered by the Environmental Protection Agency;

(h) The tribe's past performance monitoring activities undertaken by third parties under approved leases, business agreements, or rights-of-way; and

(i) Any other factors the Secretary finds to be relevant in light of the scope of the proposed TERA.

**§ 224.73 How will the scope of energy resource development affect the Secretary's determination of the tribe's capacity?**

The Secretary's review under § 224.72 of the tribe's capacity to manage and

regulate energy resource development under the TERA will include a determination as to each type of energy resource development subject to the TERA for which the tribe seeks to regulate, and each type of regulatory activity the tribe proposes to assume. The Secretary's review of a TERA must be limited to activities specified by its provisions.

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

The Secretary must approve or disapprove a final proposed TERA or a revised final proposed TERA within 270 days of the Director'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.

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

Within 10 days of the Secretary's approval or disapproval of a final proposed TERA, the Secretary must notify the tribal governing body in writing and take the following actions:

| If the Secretary's decision is . . .       | Then the Secretary will . . .                                                                                                                                                                                                                                                                                                                                                                   |
|--------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (a) To approve the final proposed TERA.    | (1) Sign the TERA making it effective on the date of signature, and return the signed TERA to the tribal governing body; and                                                                                                                                                                                                                                                                    |
| (b) To disapprove the final proposed TERA. | (2) Maintain a copy of the TERA and any subsequent amendments or supplements to the TERA.<br>Send the tribe a notice of disapproval that must include:<br>(1) The basis of the disapproval;<br>(2) The changes or other actions required to address the Secretary's basis for disapproval; and<br>(3) A statement that the decision is a final agency action and is subject to judicial review. |

**§ 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 Director 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 60 days of the Director's receipt of the revised final proposed TERA. 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:

| If the Secretary's decision is . . .               | Then the Secretary will . . .                                                                                                                                                                                                                                                                       |
|----------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (a) To approve the revised final proposed TERA.    | (1) Sign the TERA making it effective on the date of signature, and return the signed TERA to the tribal governing body; and                                                                                                                                                                        |
| (b) To disapprove the revised final proposed TERA. | (2) Maintain a copy of the TERA and any subsequent amendments or supplements to the TERA.<br>Send the tribe a notice of disapproval that must include:<br>(1) The reasons for the disapproval; and<br>(2) A statement that the decision is a final agency action and is subject to judicial review. |

**§ 224.77 Who may appeal the Secretary's decision on a final proposed TERA or a revised final proposed TERA?**

Only a tribe applying for a TERA may appeal the Secretary's decision to disapprove a final proposed TERA or a revised final proposed TERA in accordance with the appeal procedures contained in subpart I of this part. No other person or entity may appeal the Secretary's decision. The Secretary's decision to approve a final proposed TERA or a revised final proposed TERA is a final agency action.

**Subpart D—Implementation of Tribal Energy Resource Agreements**

**Applicable Authorities and Responsibilities**

**§ 224.80 Under what authority will a tribe perform activities for energy resource development?**

A tribe will perform activities for energy resource development activities undertaken under a TERA under the authorities provided in the approved TERA. Notwithstanding anything in this part or an approved TERA to the contrary, a tribe will retain all sovereign and other powers it otherwise possesses.

**§ 224.81 What laws are applicable to activities?**

Federal and tribal laws apply to activities under a TERA, unless otherwise specified in the TERA.

**§ 224.82 What activities will the Department continue to perform after approval of a TERA?**

After approval of a TERA, the Department will provide a tribe:

- (a) All activities that the Department performs unless the tribe has assumed such activities under the TERA;
- (b) Access to title status information and support services needed by a tribe in the course of evaluating proposals for leases, business agreements, or rights-of-way;
- (c) Coordination between the tribe and the Department for ongoing maintenance of accurate real property records;
- (d) Access to technical support services within the Department to assist the tribe in evaluating the physical, economic, financial, cultural, social, environmental, and legal consequences of approving proposals for leases, business agreements, or rights-of-way under a TERA; and
- (e) Assistance to ensure that third-party violations or breaches of the terms of leases, business agreements, or rights-of-way or applicable provisions of Federal law by third parties are handled appropriately.

**Leases, Business Agreements, and Rights-of-way Under a TERA**

**§ 224.83 What must a tribe do after executing a lease or business agreement, or granting a right-of-way?**

Following the execution of a lease, business agreement, or grant of right-of-way under a TERA, a tribe must:

- (a) Inform the public of approval of the lease, business agreement, or right-of-way under the authority granted in the TERA; and
- (b) Send a copy of the executed lease, business agreement, or right-of-way, or amendments, to the Director within one business day of execution. The copy must be sent by certified mail return receipt requested or by overnight delivery.

**§ 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 for a pipeline or an electric transmission or distribution line if the pipeline or electric transmission or distribution line serves:

- (a) An electric generation, transmission, or distribution facility located on tribal land; or
- (b) A facility located on tribal land that processes or refines energy resources developed on tribal land.

**§ 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 generation, transmission, or distribution facility located on tribal land; or
- (c) A facility to process or refine energy resources developed on tribal land.

**§ 224.86 Are there limits on the duration of leases, business agreements, and rights-of-way?**

- (a) The duration of leases, business agreements, and rights-of-way entered into under a TERA are limited as follows:
  - (1) For leases and business agreements, except as provided in paragraph (b) of this section, 30 years;
  - (2) For leases for production of oil resources and gas resources, or both, 10 years and as long after as oil or gas production continues in paying quantities; and
  - (3) For rights-of-way, 30 years.

(b) A lease or business agreement a tribe enters into, or a right-of-way a tribe grants may be renewed at the discretion of the tribe as long as the TERA remains in effect and the approved activities have not been rescinded by the tribe or suspended or reassumed by the Department.

**Violation or Breach**

**§ 224.87 What are the obligations of a tribe if it discovers a violation or breach?**

As soon as practicable after discovering or receiving notice of a violation or breach of a lease, business agreement, or right-of-way of a Federal or tribal environmental law resulting from an activity undertaken by a third party under a lease, business agreement, or right-of-way, the tribe must provide written notice to the Director describing:

- (a) The nature of the violation or breach in reasonable detail;
- (b) The corrective action taken or planned by the tribe; and
- (c) The proposed period for the corrective action to be completed.

**§ 224.88 What must the Director do after receiving notice of a violation or breach from the tribe?**

After receiving notice of a violation or breach from the tribe, the Director will:

- (a) Review the notice and conduct an investigation under § 224.135(b) including, as necessary:
  - (1) An on-site inspection; and
  - (2) A review of relevant records, including transactions and reports.
- (b) If the Director determines, after the investigation, that a violation or breach is not causing or will not cause imminent jeopardy to a physical trust asset, the Director will review, for concurrence or disapproval, the corrective action to be taken or imposed by the tribe and the proposed period for completion of the corrective action;
- (c) If the Director determines, after the investigation, that a violation or breach is causing or will cause imminent jeopardy to a physical trust asset, the Director will proceed under the imminent jeopardy provisions of subpart F of this part.

**§ 224.89 What procedures will the Secretary use to enforce leases, business agreements, or rights-of-way?**

- (a) The Secretary and a tribe will consult with each other regarding enforcement of and Secretarial assistance needed to enforce leases, business agreements, or rights-of-way entered into under a TERA. When appropriate, the Secretary will:
  - (1) Use the notification and enforcement procedures established in 25 CFR parts 162, 211 and 225 to ensure

compliance with leases and business agreements; and

(2) Use the notification and enforcement procedures of 25 CFR part 169 to ensure compliance with rights-of-way.

(b) All enforcement remedies established in 25 CFR parts 162, 211, 225, and 169 are available to the Secretary.

#### **Subpart E—Interested Party Petitions**

##### **§ 224.100 May a person or entity ask the Secretary to review a tribe's compliance with a TERA?**

In accordance with this subpart, a person or entity that may be an interested party may submit to the Secretary a petition to review a tribe's compliance with a TERA. However, before filing a petition with the Secretary, a person or entity that may be an interested party must first exhaust tribal remedies, if a tribe has provided for such remedies. If a tribe has not provided for tribal remedies, a person or entity that may be an interested party may file a petition directly with the Secretary.

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

For the purposes of this Part, an interested party is a person or entity that has demonstrated 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.

##### **§ 224.102 Must a tribe establish a comment or hearing process for addressing environmental concerns?**

Yes. The Act (25 U.S.C. 3504(e)(2)(C)(iii)(I), (II) and 25 U.S.C. 3504(e)(2)(B)(iii)(X)) and subpart B of this part require a tribe to establish an environmental review process under a TERA that:

(a) Ensures that the public is notified about and has an opportunity to comment on the environmental impacts of proposed tribal action to be taken under a TERA;

(b) Requires that the tribe respond to relevant and substantive comments about the environmental impacts of a proposed tribal action before the tribe approves a lease, business agreement, or right-of-way; and

(c) Provides for a process for consultation with any affected States regarding off-reservation environmental impacts, if any, resulting from approval of a lease, business agreement, or right-of-way.

##### **§ 224.103 Must a tribe establish other public participation processes?**

No. Except for the environmental review process required by the Act and

§ 224.63(b)(1), a tribe is not required to establish a process for public participation concerning non-environmental issues in a TERA or leases, business agreements or rights-of-way undertaken under a TERA. However, a tribe may elect to establish procedures that permit the public to participate in public hearings or to expand the scope of matters about which the public may comment.

##### **§ 224.104 Must a tribe enact tribal laws, regulations, or procedures permitting a person or entity to allege that a tribe is not complying with a TERA?**

No. A tribe is not required, but may elect, to enact tribal laws, regulations, or procedures permitting a person or entity that may be an interested party to allege that a tribe is not complying with its TERA.

##### **§ 224.105 How may a person or entity obtain copies of tribal laws, regulations, or procedures that would permit an allegation of noncompliance with a TERA?**

(a) A person or entity that may be an interested party may obtain copies of tribal laws, regulations, or procedures that establish tribal remedies that permit a person or entity to allege that the tribe is not complying with its TERA by making a request to the tribe in accordance with the TERA and § 224.63(g).

(b) Upon obtaining copies of tribal laws, regulations, or procedures under subsection (a), a person or entity that may be an interested party may file a petition with the tribe under those tribal laws, regulations, or procedures.

(c) If the person or entity that may be an interested party files a petition alleging noncompliance with a TERA, the person or entity becomes a petitioner, and the tribe must respond according to § 224.106.

##### **§ 224.106 If a tribe has enacted tribal laws, regulations, or procedures for challenging tribal action, how must the tribe respond to a petition?**

If a tribe has enacted tribal laws, regulations, or procedures under which a petitioner may file a petition alleging noncompliance with a TERA, the tribe must:

(a) Within a reasonable time issue a final written decision under the tribal laws, regulations, or procedures that addresses the claim. The decision may include a determination of whether the petitioner is an interested party;

(b) Provide a copy of its final written decision to the petitioner; and

(c) If the tribe fails, within a reasonable period, to issue a written decision to a petition that a petitioner brings under applicable tribal laws,

regulations, or procedures the petitioner may file a petition with the Secretary.

##### **§ 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 tribal remedies by participating in any tribal process under § 224.106, including any tribal appeal process.

##### **§ 224.108 May tribes offer a resolution of a petitioner's claim?**

Yes. In responding to a petition filed under tribal laws, regulations or procedures, a tribe may, with the petitioner's written consent, resolve the petitioner's claims.

##### **§ 224.109 What must a petitioner claim or request in a petition filed with the Secretary?**

In a petition filed with the Secretary, a petitioner must:

(a) Claim that the tribe, through its action or inaction has failed to comply with terms or provisions of a TERA, and, as a result, the petitioner's interest has sustained or will sustain an adverse environmental impact.

(b) Request that the Secretary review the claims raised in the petition; and

(c) Request that the Secretary take whatever action is necessary to bring a tribe into compliance with the TERA.

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

A petition must contain:

(a) The petitioner's name and contact information;

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

(c) Specific facts demonstrating that the petitioner exhausted tribal remedies, if tribal laws, regulations, or procedures permitted the petitioner to allege tribal noncompliance with a TERA;

(d) A description of facts supporting the petitioner's allegation of the tribe's noncompliance with a TERA;

(e) A description of the adverse environmental impact that the petitioner's interest has sustained or will sustain because of the tribe's alleged noncompliance with the TERA;

(f) A copy of any written decision the tribe issued responding to the petitioner's claims;

(g) If applicable, a statement that the tribe has issued no written decision within a reasonable time related to a claim a petitioner has filed with the tribe under applicable tribal laws, regulations, or procedures;

(h) If applicable, a statement and supporting documentation that the tribe

did not respond to the petitioner's request under § 224.105(a) for copies of any tribal laws, regulations, or procedures allowing the petitioner to allege that the tribe is not complying with a TERA; and

(i) Any other information relevant to the petition.

**§ 224.111 When may a petitioner file a petition with the Secretary?**

(a) A petitioner may file a petition with the Secretary:

(1) By delivering the petition to the Director within 30 days of receiving the tribe's final written decision addressing the allegation of noncompliance under applicable tribal laws, regulations, or procedures;

(2) Within a reasonable period following the tribe's constructive denial of the petition under § 224.106(c), and the Secretary will determine if the petition is timely in light of the applicable facts and circumstances; or

(3) The tribe did not respond to the petitioner's request for copies of any tribal laws, regulations, or procedures under § 224.105(a).

(b) A petitioner may file a petition directly with the Secretary if the tribe has no tribal laws, regulations or procedures that provide the petitioner an opportunity to allege tribal noncompliance with a TERA.

**§ 224.112 What must the Director do upon receipt of a petition?**

Within 20 days after receiving a petition, the Director must:

(a) Notify the tribe in writing that the Director has received a petition;

(b) Provide a copy of the complete petition to the tribe;

(c) Initiate a petition consultation with the tribe that will address the petitioner's allegation of a tribe's noncompliance with a TERA and alternatives to resolve any noncompliance; and

(d) Notify the tribe in writing by certified mail, return receipt requested, when the petition consultation is complete.

**§ 224.113 What must the tribe do after it completes petition consultation with the Director?**

(a) Within 45 days of receiving the Director's notice that the petition consultation is complete, the tribe must respond to any claim made in the petition by submitting a written response to the Director; and

(b) Within a reasonable time after 45 days following the completion of the petition consultation process, the tribe must cure or otherwise resolve each claim of noncompliance made in the petition.

**§ 224.114 How may the tribe address a petition in its written response?**

In addition to responding to the petitioner's claims, the tribe may also:

(a) Include its interpretation of relevant provisions of the TERA and other legal requirements;

(b) Discuss whether the petitioner is an interested party;

(c) State whether the petitioner has exhausted tribal remedies, and if so, how; and

(d) Propose to cure or otherwise resolve the claims within the time frame in § 224.113(b).

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

The Director must investigate the petitioner's claims of the tribe's noncompliance with a TERA only after making a threshold determination that:

(a) The tribe has denied or failed to respond to each claim made in the petition within the period under § 224.113(a); or

(b) The tribe has failed, refused, or was unable to cure or otherwise resolve each claim made in the petition within a reasonable period, as determined by the Director, after the expiration of the period in § 224.113(b).

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

(a) If the Director determines under § 224.115 that one of the threshold determinations in § 224.114 has been met, then within 120 days of the Director's receipt of a petition, the Director must determine whether or not a tribe is in compliance with the TERA;

(b) The Director may extend the time for determining a tribe's compliance with a TERA up to 120 days in any case in which the Director determines that additional time is necessary to evaluate the claims in the petition and the tribe's written response, if any. If the Director decides to extend the time, the Director must notify the petitioner and the tribe in writing of the extension.

**§ 224.117 Must the Director make a determination of the tribe's compliance with a TERA?**

(a) Yes. Upon a finding that one of the threshold determinations in § 224.115 has been met, the Director must make a determination of the tribe's compliance with a TERA within the time period in § 224.116.

(b) If the Director determines that the tribe is in compliance with the TERA, the Director will notify the tribe and the petitioner in writing;

(c) If the Director determines that the tribe is not in compliance with the

TERA, the Director will notify the tribe and the petitioner in writing and, in addition, must provide the tribe:

(1) A written determination that describes the manner in which the TERA has been violated together with a written notice of the violations;

(2) Notice of a reasonable opportunity to comply with the TERA; and

(3) Notice of the tribe's opportunity for a hearing.

**§ 224.118 How must the tribe respond to the Director's notice of the opportunity for a hearing?**

The tribe must respond in writing to the Director's notice of the opportunity for a hearing within 20 days of receipt of the notice by requesting a hearing or declining to request a hearing. If the tribe does not respond within the time period, the Director will proceed with making a decision without further input from the tribe.

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

(a) The Director must issue a written decision to the tribe and the petitioner stating the basis for the decision about the tribe's compliance or noncompliance with the TERA within 30 days following:

(1) A hearing, if the tribe requested a hearing;

(2) The tribe's declining the opportunity for a hearing; or

(3) The tribe's failure to respond to the opportunity for a hearing within 20 days of the Director's written notice of the opportunity for a hearing.

(b) If the Director decides that the tribe is not in compliance with the TERA, the Director must:

(1) Include findings of fact and conclusions of law with the written decision to the tribe; and

(2) Take action to ensure compliance with the TERA.

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

If the Director decides that a tribe is not in compliance with a TERA, the Director may take action to ensure compliance with the TERA including:

(a) Temporarily suspending any activity under a lease, business agreement, or right-of-way until the tribe complies with the TERA; or

(b) Rescinding approval of part of the TERA, or

(c) Rescinding all of the TERA and recommending that the Secretary reassume activities under subpart G of this part.

**§ 224.121 How may a tribe or a petitioner appeal the Director's decision about the tribe's compliance with the TERA?**

A tribe or a petitioner, or both, may appeal the Director's decision on the petition under § 224.119 to the Principal Deputy Assistant Secretary—Indian Affairs under subpart I of this part.

**Subpart F—Periodic Reviews**

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

This subpart describes how the Secretary and a tribe will develop and perform the periodic review and evaluation required by the Act and by a TERA.

**§ 224.131 What is a periodic review and evaluation?**

A periodic review and evaluation is an examination the Director performs to monitor a tribe's performance of activities associated with the development of energy resources and to review compliance with a TERA. During the TERA consultation, a tribe and the Director will develop a periodic review and evaluation process that addresses the tribe's specific circumstances and the terms and conditions of the tribe's TERA. The tribe will include the agreed-upon periodic review and evaluation process in its final proposed TERA.

**§ 224.132 How does the Director conduct a periodic review and evaluation?**

(a) The Director will conduct a periodic review and evaluation under the TERA, in consultation with the tribe, and in cooperation with other Departmental bureaus and offices whose activities the tribe assumed or that perform activities for the tribe.

(b) The Director will communicate with the Designated Tribal Official throughout the process established by this section.

(c) During the periodic review and evaluation, the Director will:

(1) Review relevant records and documents, including transactions and reports the tribe prepares under the TERA;

(2) Conduct on-site inspections as appropriate; and

(3) Review compliance with statutes and regulations applicable to activities undertaken under the TERA.

(d) Review the effect on physical trust assets resulting from activities undertaken under a TERA.

(e) Upon written request, the tribe should provide the Director with records and documents relevant to the provisions of the TERA. In addition, the tribe should identify any information in these submitted records and documents that is confidential, commercial and

financial. Specific exceptions to disclosure under the Freedom of Information Act, or other statutory protections against disclosure, may apply and preclude disclosure of this information to third parties as provided for in § 224.55.

**§ 224.133 What must the Director do after a periodic review and evaluation?**

After a periodic review and evaluation, the Director must prepare a written report of the results and send the report to the Designated Tribal Official.

**§ 224.134 How often must the Director conduct a periodic review and evaluation?**

The Director must conduct a periodic review and evaluation annually during the first 3 years of a TERA. After the third annual review and evaluation, the Secretary and the tribe may mutually agree to amend the TERA to conduct periodic reviews and evaluations once every 2 years.

**§ 224.135 Under what circumstances may the Director conduct additional reviews and evaluations?**

The Director may conduct additional reviews and evaluations:

(a) At a tribe's request;

(b) As part of an investigation undertaken when the tribe notifies the Director of a violation or breach;

(c) As part of an investigation undertaken because of a petition submitted under subpart E of this part;

(d) As follow-up to a determination that harm or the potential for harm to a physical trust asset, previously identified in a periodic review and evaluation, exists; or

(e) As the Secretary determines appropriate to carry out the Secretary's trust responsibilities.

**Noncompliance**

**§ 224.136 How will the Director's report address a tribe's noncompliance?**

This section applies if the Director conducts a review and evaluation or investigation of a notice of violation of Federal law or the terms of a TERA.

(a) If the Director determines that the tribe has not complied with Federal law or the terms of a TERA, the Director's written report must include a determination of whether the tribe's noncompliance has resulted in harm or the potential for harm to a physical trust asset.

(b) If the Director determines that the tribe's noncompliance may cause harm or has caused harm to a physical trust asset, the Director must also determine whether the noncompliance cause imminent jeopardy to a physical trust asset.

**§ 224.137 What must the Director do if a tribe's noncompliance has resulted in harm or the potential for harm to a physical trust asset?**

If, because of the tribe's noncompliance with Federal law or the terms of a TERA, the Director determines that there is harm or the potential for harm to a physical trust asset that does not rise to the level of imminent jeopardy to a physical trust asset, the Director must:

(a) Document the issue in the written report of the review and evaluation;

(b) Report the issue in writing to the tribal governing body;

(c) Report the issue in writing to the Assistant Secretary—Indian Affairs; and

(d) Determine what action, if any, the Secretary must take to protect the physical trust asset, which could include temporary suspension of the activity that resulted in non-compliance with the TERA or other applicable Federal laws or rescinding approval of all or part of the TERA.

**§ 224.138 What must the Director do if a tribe's noncompliance has caused imminent jeopardy to a physical trust asset?**

If the Director finds that a tribe's noncompliance with a Federal law or the terms of a TERA has caused imminent jeopardy to a physical trust asset, the Director must:

(a) Immediately notify the tribe by a telephone call to the Designated Tribal Official followed by a written notice by facsimile to the Designated Tribal Official and the tribal governing body of the imminent jeopardy to a physical trust asset. The notice must contain:

(1) A description of the tribe's noncompliance with Federal law or the terms of the TERA;

(2) A description of the physical trust asset and the nature of the imminent jeopardy to a physical trust asset resulting from the tribe's noncompliance; and

(3) An order to the tribe to cease specific conduct or take specific action deemed necessary by the Director to correct any condition that caused the imminent jeopardy to a physical trust asset.

(b) Issue a finding that the tribe's noncompliance with the TERA or a Federal law has caused imminent jeopardy to a physical trust asset.

**§ 224.139 What must a tribe do after receiving a notice of imminent jeopardy to a physical trust asset?**

(a) Upon receipt of a notice of imminent jeopardy to a physical trust asset, the tribe must cease specific conduct outlined in the notice or take specific action the Director orders that

is necessary to correct any condition causing the imminent jeopardy; and

(b) Within 5 days of receiving a notice of imminent jeopardy to a physical trust asset, the tribe must submit a written response to the Director that:

(1) Responds to the Director's finding that the tribe has failed to comply with a Federal law or the terms of the TERA;

(2) Responds to the Director's finding of imminent jeopardy to a physical trust asset;

(3) Describes the status of the tribe's cessation of specific conduct or specific action the tribe has taken to correct any condition causing imminent jeopardy to a physical trust asset; and

(4) Describes what further actions, if any, the tribe proposes to take to correct any condition, cited in the notice, causing imminent jeopardy to a physical trust asset.

**§ 224.140 What must the Secretary do if the tribe fails to respond to or does not comply with the Director's order?**

If the tribe does not respond to or does not comply with the Director's order under § 224.138(a)(3), the Secretary may take any actions the Secretary deems appropriate to protect the physical trust asset, which may include the immediate reassumption of all activities the tribe assumed under the TERA. The procedures in subpart G of this part do not apply to reassumption under this section.

**§ 224.141 What must the Secretary do if the tribe responds to the Director's order?**

(a) If the tribe responds in a timely manner to the Director's order under § 224.138, the Secretary must:

(1) Evaluate the tribe's response;

(2) Determine whether or not the tribe has complied with the TERA and the Federal law cited in the notice; and

(3) If the Secretary determines, after reviewing the tribe's response, that the tribe has not complied with the TERA or with a Federal law, the Secretary will determine whether the noncompliance caused imminent jeopardy to a physical trust asset.

(b) If the Secretary determines that the tribe's noncompliance has caused imminent jeopardy to a physical trust asset, the Secretary may:

(1) Order the tribe to take any action the Secretary deems necessary to comply with the TERA or Federal law and to protect the physical trust asset; or

(2) Take any action the Secretary deems necessary to protect the physical trust asset, including reassumption under subpart G of this part.

(c) If the Secretary determines, after reviewing the tribe's response, that the

tribe has complied with the TERA and with Federal law, the Secretary will withdraw the Director's order.

(d) The Secretary must base a finding of imminent jeopardy to a physical trust asset on the tribe's non-compliance with a TERA or violation of a Federal law.

**Subpart G—Reassumption**

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

This subpart explains when and how the Secretary may reassume all activities included within a TERA without the consent of the tribe.

**§ 224.151 When may the Secretary reassume activities?**

Upon issuing a written finding of imminent jeopardy to a physical trust asset, the Secretary may reassume activities under a TERA in accordance with this subpart. The Secretary may also reassume activities approved under a TERA in response to a petition from an interested party under subpart E of this part. Only the Secretary or the Assistant Secretary—Indian Affairs may reassume activities under a TERA.

**§ 224.152 Must the Secretary always reassume the activities upon a finding of imminent jeopardy to a physical trust asset?**

(a) The Secretary may take whatever actions the Secretary deems necessary to protect the physical trust asset. At the discretion of the Secretary, these actions may include reassumption of the activities a tribe assumed under a TERA.

(b) If the tribe does not respond to or does not comply with the Director's order under § 224.138(a)(3), the Secretary must immediately reassume all activities the tribe assumed under the TERA. The notice procedures in this subpart will not apply to such immediate reassumption.

**Notice of Intent To Reassume**

**§ 224.153 Must the Secretary notify the tribe of an intent to reassume the authority granted?**

If the Secretary determines under § 224.152 that reassumption is necessary to protect the physical trust asset, the Secretary will issue a written notice to the tribal governing body of the Secretary's intent to reassume.

**§ 224.154 What must a notice of intent to reassume include?**

A notice of intent to reassume must include:

(a) A statement of the reasons for the intended reassumption, including, as applicable, a copy of the Secretary's written finding of imminent jeopardy to a physical trust asset;

(b) A description of specific measures that the tribe must take to correct the violation and any condition that caused the imminent jeopardy to a physical trust asset;

(c) The time period within which the tribe must take the measures to correct the violation of the TERA and any condition that caused the imminent jeopardy to a physical trust asset; and

(d) The effective date of the reassumption, if the tribe does not meet the requirements in paragraphs (b) and (c) of this section.

**§ 224.155 When must a tribe respond to a notice of intent to reassume?**

The tribe must respond to the Director in writing by mail, facsimile, or overnight express within 5 days of receiving the Secretary's notice of intent to reassume. If sent by mail, the tribe must send the response by certified mail, with return receipt requested. The Director will consider the date of the written response as the date it is postmarked.

**§ 224.156 What information must the tribe's response to the notice of intent to reassume include?**

The tribe's response to the notice of intent to reassume must state that:

(a) The tribe has complied with the Secretary's requirements in the notice of intent to reassume;

(b) The tribe is taking specified measures to comply with the Secretary's requirements, and when the tribe will complete such measures, if the tribe needs more than 5 days to do so; or

(c) The tribe will not comply with the Secretary's requirements.

**§ 224.157 How must the Secretary proceed after receiving the tribe's response?**

(a) If the Secretary determines that the tribe's proposed or completed actions to comply with the Secretary's requirements are adequate to correct the violation of the TERA or Federal law and any condition that caused the imminent jeopardy, the Secretary will:

(1) Notify the tribe of the adequacy of its response in writing; and

(2) Terminate the reassumption proceedings in writing.

(b) If the Secretary determines that the tribe's proposed or completed actions to comply with the Secretary's requirements are not adequate, then the Secretary will issue a written notice of reassumption.

**§ 224.158 What must the Secretary include in a written notice of reassumption?**

The written notice of reassumption must include:

(a) A description of the authorities the Secretary is reassuming;

(b) The reasons for the determination under § 224.157(b);

(c) The effective date of the reassumption; and

(d) A statement that the decision is a final agency action and is subject to judicial review.

**§ 224.159 How will reassumption affect valid existing rights or lawful actions taken before the effective date of the reassumption?**

Reassumption will not affect valid existing rights that vested before the effective date of the reassumption or lawful actions the tribe and the Secretary took before the effective date of the reassumption.

**§ 224.160 How will reassumption affect a TERA?**

Reassumption of a TERA applies to all of the authority and activities assumed under a TERA. Upon reassumption, the tribe must also return all Departmental resources transferred under the TERA and any relevant records and documents to the Secretary.

**§ 224.161 How may reassumption affect the tribe's ability to enter into a new TERA or to modify another TERA to administer additional activities or to assume administration of activities that the Secretary previously reassumed?**

Following reassumption, a tribe may submit a request to enter into a new TERA or modify another TERA to administer additional activities, or assume administration of activities that the Secretary previously reassumed. In reviewing a subsequent tribal request, however, the Secretary may consider the fact that activities were reassumed and any change in circumstances supporting the tribe's request.

**Subpart H—Rescission**

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

This subpart explains the process and requirements under which a tribe may rescind a TERA and therefore return to the Secretary all authority and activities assumed under that TERA.

**§ 224.171 Who may rescind a TERA?**

Only a tribe may rescind a TERA.

**§ 224.172 May a tribe rescind only some of the activities subject to a TERA while retaining a portion of those activities?**

No. A tribe may only rescind a TERA in its entirety, including the authority to approve leases, business agreements and grant rights-of-way for specific energy resource development, not some of the authority or activities subject to the TERA.

**§ 224.173 How does a tribe rescind a TERA?**

To rescind a TERA, a tribe must submit to the Secretary a written tribal resolution or other official action of the tribe's governing body approving the voluntary rescission of the TERA. Upon rescission, the tribe must also return all Departmental resources transferred under the TERA and any relevant records and documents.

**§ 224.174 When does a voluntary rescission become effective?**

A voluntary rescission becomes effective on the date specified by the Secretary, provided that the date is no more than 90 days after the Secretary receives the tribal resolution or other official action the tribe submits under § 224.173.

**§ 224.175 How will rescission affect valid existing rights or lawful actions taken before the rescission?**

Rescission does not affect valid existing rights that vested before the effective date of the rescission or lawful actions the tribe and the Secretary took before the effective date of the rescission.

**Subpart I—General Appeal Procedures**

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

The purpose of this subpart is to explain who may appeal Departmental decisions or inaction under this part and the initial administrative appeal processes, and general administrative appeal processes, including how 25 CFR Part 2 and 43 CFR Part 4 apply, and the effective dates for appeal decisions.

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

The following persons or entities may appeal Department decisions or inaction under this part:

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

(b) A third party who has entered into a lease, right-of-way, or business agreement with a tribe under an approved TERA and is adversely affected by a decision of, or inaction by a Department official under this part; or

(c) An interested party who is adversely affected by a decision of or inaction by the Director 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.

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

The initial appeal process is as follows:

(a) Within 30 days of receiving an adverse decision by the Director or within 30 days after the time period within which the Director 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;

(b) Within 60 days of receiving an appeal, the Principal Deputy Assistant Secretary—Indian Affairs will review the record and issue a written decision on the appeal; and

(c) Within 7 days of a decision by the Principal Deputy Assistant Secretary—Indian Affairs, the Secretary will provide a written copy of the decision to the tribe and other participating parties.

**§ 224.183 What other administrative appeals processes also apply?**

The administrative appeal processes in 25 CFR Part 2 and 43 CFR Part 4, subject to the limitations in § 224.184, apply to:

(a) An interested party's appeal from an adverse decision or inaction by the Principal Deputy Assistant Secretary—Indian Affairs under § 224.182; and

(b) An appeal by a tribe or a person or entity that has entered into a lease, business agreement, or right-of-way from an adverse decision by or the inaction of a Departmental official taken under this part.

**§ 224.184 How do other administrative appeals processes apply?**

The administrative appeals process in 25 CFR Part 2 and 43 CFR Part 4 are modified, only as they apply to appeals under this part, as set forth in this section.

(a) The definition of interested party in 25 CFR Part 2 and as incorporated in 43 CFR Part 4 does not apply to this part.

(b) The right of persons or entities other than an appealing party to participate in appeals under 25 CFR Part 2 and 43 CFR Part 4 does not apply to this part, except as permitted under paragraph (c) of this section.

(c) The only persons or entities, other than appealing parties, under § 224.181(a) to (c), who may participate in an appeal under this part are:

(1) The Secretary, if an appeal is taken from a decision of the Director or Principal Deputy Assistant Secretary—Indian Affairs;

(2) A tribe, which may intervene, appear as an amicus curiae, or otherwise appear in any appeal taken under this

part by a person or entity who has entered into a lease, business agreement, or right-of-way with the tribe or by an interested party under this part; or

(3) A person or entity that has entered into a lease, business agreement, or right-of-way with a tribe, may intervene, appear as an amicus curiae, or otherwise appear in any appeal taken under this part by the tribe or by an interested party under this part.

(d) The Secretary does not have an obligation to provide notice and service upon non-appealing persons as provided in 25 CFR Part 2 and 43 CFR Part 4. The only exception to this principle is that notice and service of all documents must be served consistent with the requirements of 25 CFR Part 2 and 43 CFR Part 4 on those persons or entities identified in paragraph (c) of this section.

**§ 224.185 When are decisions under this part effective?**

Decisions under subpart I are effective as follows:

(a) Decisions of the Secretary disapproving a final proposed TERA or a revised final proposed TERA under subpart C of this part, a finding of imminent jeopardy to a physical trust asset under subpart F of this part, and decisions by the Secretary or the Assistant Secretary—Indian Affairs to reassume activities under subpart G of this part are final for the Department. These decisions and findings are effective upon issuance.

(b) Decisions under this part, other than those in paragraph (a) of this section, that adversely affect a tribe and for which an appeal is pending are not final for the Department and are not effective while the appeal is pending, unless:

(1) The tribe had an opportunity for a hearing before the decision was issued;

(2) The tribe had a reasonable amount of time to comply with the TERA after the decision was issued; and

(3) The Interior Board of Indian Appeals (Board), the Secretary, or Assistant Secretary—Indian Affairs issued a written decision that, notwithstanding a reasonable period given the tribe to comply with the TERA, the tribe has failed to take the actions necessary to comply with the TERA.

(c) All other decisions rendered by the Board or the Assistant Secretary—Indian Affairs in an appeal from a Director's decision under subparts E, F, or G of this part are effective when issued.

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