

# **Tribal Energy Resource Agreements (TERAs): Approval Process and Selected Issues for Congress**

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## **Tribal Energy Resource Agreements (TERAs): Approval Process and Selected Issues for Congress**

Congress provided federally recognized Indian tribes the option to enter into a Tribal Energy Resource Agreement (TERA) with the federal government in the Indian Tribal Energy Development and Self-Determination Act of 2005 (ITEDSA2005; P.L. 109-58, Title V). TERAs offer tribes increased administrative and regulatory control over Indian energy projects. If the Secretary of the Interior (Secretary) approves a TERA, a tribe can enter into leases and business agreements for the purpose of energy resource development on tribal land or grant rights-of-way over tribal lands for pipelines or for electricity transmission or distribution lines, without requiring the Secretary's review and approval for each lease, business agreement, or right-of-way.

ITEDSA 2005 specified the components of a TERA, including requirements applicable to the leases, business agreements, and rights-of-way to be executed under the agreement. ITEDSA2005 also established procedural requirements and criteria for approving a TERA. One criterion, for example, included a requirement for the Secretary to determine if the tribe demonstrated sufficient capacity to regulate energy resource development. In 2008, the Department of the Interior (DOI) promulgated regulations that further established the process and time frames for DOI's review and expanded on components of a proposed TERA. Notably, the 2008 regulations provided that tribes may propose in a TERA to assume certain federal activities normally carried out by DOI on behalf of the tribe for energy resource development, except for *inherently federal functions*. The regulations, however, did not specify the functions considered to be inherently federal.

Although a handful of tribes initiated the process after the passage of ITEDSA2005, no tribes entered into a TERA and several tribes expressed concerns with the regulatory language and uncertainty regarding the approval process. In its oversight capacity, Congress requested the U.S. Government Accountability Office (GAO) examine the Bureau of Indian Affairs' (BIA's) management of Indian energy resource development, including factors deterring tribes from entering into TERAs. In 2015, GAO found that the factors deterring tribes from seeking TERAs included uncertainty regarding the regulations, a complex application process, and concerns regarding the costs to tribes of assuming federal functions.

Responding to tribal requests, Congress pursued legislative remedies to address some of these concerns. In December 2018, Congress enacted the Indian Tribal Energy and Self-Determination Act Amendments of 2017 (ITEDSA2017; P.L. 115-325), and in December 2019, DOI finalized amendments to its regulations. Among other provisions, ITEDSA2017 amends the procedural requirements regarding TERAs; adds a tribal certification of being a *qualified Indian tribe*, in lieu of a Secretarial determination of tribal capacity; and provides for financial assistance to tribes for TERA implementation. Neither ITEDSA 2017 nor the 2019 regulations, however, defines inherently federal functions. Rather, in December 2019 the Secretary of the Interior issued Secretarial Order 3377, *Contractibility of Federal Functions for Oil and Gas Development on Indian Lands* (S.O. 3377), in which the Secretary directed the Department's Office of the Solicitor to develop a list of inherently federal functions not available for inclusion in a TERA.

Congress may consider various issues regarding the TERA approval process and key differences between statutory and regulatory text. Policy considerations for Congress include (1) processing proposed TERAs; (2) the Secretary's discretion in considering TERA criteria; (3) clarifying inherently federal functions; (4) regulatory treatment of qualified Indian tribe in lieu of Secretarial determination of tribal capacity; and (5) financial assistance for TERA implementation.

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## Introduction

In 2019, federally recognized Indian tribes (Indian tribes or tribes) and individual Indian mineral owners received \$1.1 billion in energy and mineral revenue—the largest source of revenue generated from natural resources on trust lands.<sup>1</sup> In addition, significant opportunities for energy resource development for both renewable and nonrenewable energy resources exist on trust lands.<sup>2</sup> Yet tribes cite encountering substantial barriers to developing their energy resources. For instance, one tribal leader estimated it can take up to 49 steps for oil and gas exploration on trust lands, whereas there are only 4 steps on private lands under state jurisdiction.<sup>3</sup> Development of energy resources by Indian tribes on trust lands can often require the approval or involvement of agencies within the Department of the Interior (DOI), primarily the Bureau of Indian Affairs (BIA), as well as others.

In 2005, Congress sought to increase tribal control of, and encourage tribal self-determination over, Indian energy projects by enacting the Indian Tribal Energy Development and Self-Determination Act (ITEDSA 2005; P.L. 109-58, Title V). ITEDSA 2005 created Tribal Energy Resource Agreements (TERAs), which allowed tribes, at their option, to enter into an agreement with the Secretary of the Interior (Secretary). Under an approved TERA, tribes could enter into leases, business agreements, or rights-of-way for the purpose of energy resource development on tribal land without requiring the Secretary's review and approval. By removing the Secretary's review and approval, tribes could have increased control and could exercise greater self-determination over Indian energy projects on tribal lands.

ITEDSA 2005 established statutory requirements for approving a TERA and specified the components of a TERA. ITEDSA 2005 included, for example, a requirement for the Secretary to determine if the tribe demonstrated sufficient capacity to regulate energy resource development. In 2008, DOI promulgated regulations (2008 TERA regulations) that established the process and time frames for DOI's review and expanded on components of a proposed TERA.<sup>4</sup> Notably, the 2008 TERA regulations provided that a tribe may propose in a TERA to assume certain federal activities normally carried out by DOI on behalf of the tribe, except for *inherently federal functions*. The 2008 TERA regulations, however, did not specify the functions considered to be inherently federal.

Although a handful of tribes initiated the TERA process after the passage of ITEDSA 2005, no tribes entered into a TERA, and several tribes expressed concerns with the language of the 2008

<sup>1</sup> U.S. Department of the Interior (DOI), Bureau of Indian Affairs (BIA), "Budget Justifications and Performance Information Fiscal Year 2021," p. IA-ES-4, at [https://www.bia.gov/sites/bia.gov/files/assets/as-ia/obpm/BIA\\_FY2021\\_Greenbook-508.pdf](https://www.bia.gov/sites/bia.gov/files/assets/as-ia/obpm/BIA_FY2021_Greenbook-508.pdf). For the purposes of this paragraph only, *trust lands* refers to land held in trust by the United States on behalf of both a federally recognized Indian tribe (Indian tribe or tribe) and individual Indians. This report, however, addresses only land held in trust by the United States for the benefit of Indian tribes, referred to as *tribal lands*.

<sup>2</sup> Elizabeth Ann Kronk, "Tribal Energy Resource Agreements: The Unintended Great Mischief for Indian Energy Development and the Resulting Need for Reform," *Pace Environmental Law Review*, vol. 29, no. 3 (Spring 2012), pp. 814-815.

<sup>3</sup> U.S. Congress, Senate Committee on Indian Affairs, report to accompany S. 1684, 112<sup>th</sup> Congress, Second Session, December 21, 2012, S.Rept. 112-263, Government Publishing Office (GPO), p.4.

<sup>4</sup> BIA, "Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act; Final Rule," 73 *Federal Register* 12807, March 10, 2008, at <https://www.federalregister.gov/documents/2008/03/10/E8-4301/tribal-energy-resource-agreements-under-the-indian-tribal-energy-development-and-self-determination>. Hereinafter, 2008 TERA regulations.

TERA regulations and uncertainty regarding the approval process. Congress considered legislative remedies, and the U.S. Government Accountability Office (GAO) issued several reports examining BIA's management of the development of Indian energy resources. GAO examined factors deterring tribes from entering into TERAs, such as uncertainty regarding the regulations, a complex application process, and concerns regarding the costs to tribes of assuming federal duties.

After consideration in several Congresses, the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (ITEDSA 2017; P.L. 115-325) became law in December 2018. A year later, DOI finalized amendments to the regulations (2019 TERA regulations).<sup>5</sup> In P.L. 115-325, Congress addressed various tribal concerns regarding TERAs, several of which are outside the scope of this report.<sup>6</sup> This report focuses on and analyzes changes made to the TERA approval process and how Congress and DOI address some of the common concerns reportedly inhibiting tribes from entering into a TERA, such as

- process time frames,
- the Secretary's discretion in the approval process,
- certification that a tribe meets the definition of *qualified Indian tribe* instead of demonstrating tribal capacity,
- identification of inherently federal functions, and
- financial assistance for TERA implementation.

To provide context, this report provides a brief overview of the federal trust responsibility in light of Indian energy resource development. This report also provides

- a review of the statutory and regulatory TERA framework established by ITEDSA 2005 and the 2008 TERA regulations,
- a review of tribal concerns expressed following passage of ITEDSA 2005, and
- an examination of ITEDSA 2017, the 2019 TERA regulations, and other Administration actions.

In addition, this report highlights selected issues for congressional consideration: (1) processing proposed TERAs, (2) the Secretary's discretion in considering TERA criteria, (3) clarifying inherently federal functions, (4) regulatory treatment of qualified Indian tribe in lieu of Secretarial determination of tribal capacity, and (5) financial assistance for TERA implementation. This section will highlight key differences in statutory and regulatory text.<sup>7</sup>

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<sup>5</sup> BIA, "Tribal Energy Resource Agreements," 84 *Federal Register* 69602, December 18, 2019, at <https://www.federalregister.gov/documents/2019/12/18/2019-27399/tribal-energy-resource-agreements>. Hereinafter, 2019 TERA regulations.

<sup>6</sup> Tribal concerns regarding TERAs that are outside the scope of this report include potential issues after a TERA is approved, such as including public input into the tribal environmental review process, U.S. liability, as well as interested party petitions and the compliance of tribes under an approved TERA. See generally S.Rept. 112-263, U.S. Congress, Senate Committee on Indian Affairs, report to accompany S. 2132, 113<sup>th</sup> Cong., 2<sup>nd</sup> sess., July 30, 2014; S.Rept. 113-224, GPO (S.Rept. 113-224); U.S. Congress, Senate Committee on Indian Affairs, report to accompany S. 209, 114<sup>th</sup> Cong., 1<sup>st</sup> sess., September 30, 2015; S.Rept. 114-149, GPO (S.Rept. 114-149); U.S. Congress, Senate Committee on Indian Affairs, report to accompany S. 245, 115<sup>th</sup> Cong., 1<sup>st</sup> sess., May 24, 2017; and S.Rept. 115-84, GPO (S.Rept. 115-84).

<sup>7</sup> When Congress enacts laws, it frequently gives regulatory authority to agencies to implement those laws. The regulations must be in compliance with, or within the bounds of, the statute, but agencies generally have some discretion to implement statutory language. For general information on rulemaking authority, see CRS In Focus

This report does not explore in detail related Indian energy topics, such as other Indian energy issues on GAO's High Risk List or the Department of Energy's (DOE's) Office of Indian Energy Policy and Programs and other DOE-administered programs.<sup>8</sup> This report also does not discuss other laws under which tribes can develop their energy resources, such as projects pursuant to the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (P.L. 112-151), the Indian Mineral Development Act of 1982 (P.L. 97-382), and the Indian Mineral Leasing Act of 1938 (May 11, 1938, c. 198, §1, 52 Stat. 347).

## A Note on Terminology

The following terms are defined as such for the purposes of this report. *Energy resources* refers to both nonrenewable and renewable energy, including but not limited to natural gas, oil, uranium, coal, nuclear, wind, solar, geothermal, biomass, and hydrologic resources.<sup>9</sup> Energy resources are located on *tribal lands*, which are considered lands or interests in land owned by an Indian tribe that are held in trust by the federal government or restricted from alienation.<sup>10</sup> *Indian tribe* or *tribe* means an Indian tribe, including Alaska Native villages, recognized as eligible to receive special programs and services provided by the United States to Indians because of their status as Indians.<sup>11</sup> ITEDSA2005, as amended by ITEDSA2017, expressly excludes Alaska Native corporations from TERAs.<sup>12</sup>

## The Federal Trust Responsibility, Indian Energy Resources, and Tribal Lands

Indian tribes are “domestic dependent nations” that exercise “inherent sovereign authority.”<sup>13</sup> Indian tribes have a unique relationship with the federal government. One aspect of this special relationship is the doctrine of the federal trust responsibility—a responsibility owed to Indian tribes by the United States. The federal trust responsibility is a legal obligation under which the

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IF10003, *An Overview of Federal Regulations and the Rulemaking Process*, by Maeve P. Carey.

<sup>8</sup> Every two years, the U.S. Government Accountability Office (GAO) issues a High Risk List, which is a list of programs and operations that GAO considers vulnerable to waste, fraud, abuse, mismanagement, or in need of transformation. See GAO, “High Risk List,” at <https://www.gao.gov/highrisk/overview>.

<sup>9</sup> 25 C.F.R. §224.30.

<sup>10</sup> 25 U.S.C. §3501. 25 U.S.C. §3501 also defines Indian reservation and Indian land. Indian land is broadly defined and includes land conveyances to an Alaska Native corporation. However, only tribal lands, and not Indian lands or Indian reservations, are discussed in 25 U.S.C. §3504 pertaining to TERAs. For general background on Indian reservations and other types of Indian lands, such as allotted lands, see CRS Report R46647, *Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress*, by Tana Fitzpatrick.

<sup>11</sup> 25 U.S.C. §3501(4)(A), 25 U.S.C. §5304(e). Generally, a federally recognized Indian tribe (Indian tribe or tribe) is a tribal entity made up of American Indians or Alaska Natives and recognized as having a government-to-government relationship with the federal government—a relationship that includes eligibility for funding and services from federal agencies, including BIA. See DOI, BIA, “Frequently Asked Questions,” at <https://www.bia.gov/frequently-asked-questions>. As of January 2020, there were 574 federally recognized Indian tribes and Alaska Native villages (see BIA, “Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs,” 85 *Federal Register* 20, January 30, 2020, at <https://www.federalregister.gov/documents/2020/01/30/2020-01707/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of>). Often, statutory or regulatory text will specifically define what constitutes an Indian tribe for its purposes; thus, it is important to consult the particular statute or regulatory text.

<sup>12</sup> 25 U.S.C. §3501(4)(B), see also 25 U.S.C. §3501(6)(defining Alaska Native corporation).

<sup>13</sup> *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)).



United States, through both acts of Congress and court decisions, “has charged itself with moral obligations of the highest responsibility and trust” toward Indian tribes, and it can include certain fiduciary obligations on the part of the United States.<sup>14</sup> According to BIA, “in several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and Indian tribes.”<sup>15</sup> The federal trust responsibility can include a duty on the part of the United States to protect treaty rights, lands, assets, and resources on behalf of tribes.<sup>16</sup>

The federal trust responsibility plays a significant role in the federal government’s management of tribal lands and natural resources held in trust. BIA is the lead agency responsible for the administration and management of 55 million surface acres and 59 million acres of subsurface mineral estates held in trust by the United States for Indian tribes and individual American Indians and Alaska Natives.<sup>17</sup> With a few exceptions, BIA’s approval is required for leases and agreements to develop tribal lands, including energy resource development. With respect to energy resource development, some of BIA’s actions and decisions include reviewing and approving surface and subsurface leases, drilling permits, rights-of-way, cultural resources surveys, and environmental studies and surveys.<sup>18</sup> The Bureau of Land Management, the Office of Natural Resources Revenue, and—depending on the energy resource—the Office of Surface Mining also play key roles in energy development on tribal lands.<sup>19</sup>

## TERAs: Statutory and Regulatory Framework

ITEDSA 2005 became law on August 8, 2005, enacted as part of the Energy Policy Act of 2005 (EPACT 2005; P.L. 109-58). ITEDSA 2005 amended the Indian Energy Resources title in the Energy Policy Act of 1992 (EPACT 1992; P.L. 102-486, Title XXVI).<sup>20</sup> EPACT 1992 established several financial and technical assistance programs in both DOE and DOI for tribes to pursue renewable and nonrenewable energy development, including for tribes to develop and implement tribal laws and regulations regarding energy development.

ITEDSA 2005 amended the provisions enacted in EPACT 1992 and authorized additional provisions addressing development of Indian energy resources.<sup>21</sup> Some of ITEDSA 2005’s provisions included providing grants, technical assistance, and low-interest loans from DOI and competitive grants and loan guarantees from DOE to Indian tribes. ITEDSA 2005 also established

<sup>14</sup> *Seminole Nation v. U.S.*, 316 U.S. 286, 296-297 (1942). For a general overview of the trust relationship, see *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162 (2011).

<sup>15</sup> DOI, BIA, “Frequently Asked Questions,” at <https://www.bia.gov/frequently-asked-questions>.

<sup>16</sup> DOI, BIA, “Frequently Asked Questions,” at <https://www.bia.gov/frequently-asked-questions>.

<sup>17</sup> Surface and subsurface acreage numbers obtained via personal communication between CRS and the BIA on June 17, 2021. Acreage amounts are current as of May 2021.

<sup>18</sup> GAO, *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, GAO-15-502, June 8, 2015, p. 4, at <https://www.gao.gov/products/GAO-15-502>. Hereinafter, GAO-15-502.

<sup>19</sup> DOI, BIA, Office of Indian Energy and Economic Development, “Working on Indian Lands,” at <https://www.indianaffairs.gov/as-ia/ieed/division-energy-and-mineral-development/working-indian-lands>. Depending on the circumstances, involvement of other federal agencies or offices also may be required.

<sup>20</sup> The Energy Policy Act of 1992 (EPACT 1992; P.L. 102-486, Title XXVI).

<sup>21</sup> Section 503 of the Indian Tribal Energy Development and Self-Determination Act of 2005 (ITEDSA 2005; P.L. 109-58, Title V) amended and replaced §§2601-2606 of EPACT 1992. Other sections within ITEDSA 2005 also addressed Indian energy resources.



the Office of Indian Energy and Programs within DOE and other projects and opportunities for energy efficiency on Indian lands.<sup>22</sup>

ITEDSA 2005 also introduced TERAs as an option for tribes seeking to develop energy resources on their tribal lands. In 2008, DOI promulgated TERA regulations as authorized by ITEDSA 2005. Both the statute and the regulations created a detailed process for approving a proposed TERA, which included several TERA provision and application requirements and time frames for approval or disapproval. One key aspect of the process included identifying the federal activities a tribe could assume and perform under a TERA. These activities, however, could not include inherently federal functions, which the regulations did not define. Another key aspect of the approval process required the Secretary to determine a tribe's capacity to implement energy resource development. Although a handful of tribes initiated the TERA process, no tribe entered into a TERA following ITEDSA 2005 and the 2008 regulations.<sup>23</sup> Some of these requirements were later amended by ITEDSA 2017.

This section reviews selected statutory and regulatory provisions stemming from ITEDSA 2005 relating to the TERA approval process. These provisions address the processing timelines of a proposed TERA, the Secretary's approval of a proposed TERA, TERA requirements and inherently federal functions, and the Secretary's determination of tribal capacity to develop its proposed energy resource.

## **Indian Tribal Energy Development and Self-Determination Act of 2005 and 2008 TERA Regulations**

ITEDSA 2005 authorized tribes, at their option, to enter into a TERA with the Secretary. Under an approved TERA, the Secretary's review and approval of leases, business agreements, and rights-of-way for energy resource development would not be required. An approved TERA authorized tribes to enter into a lease or business agreement to develop, process, or refine an energy mineral resource on tribal lands. Tribes also could enter into a lease or business agreement to construct or operate electricity generation, transmission, or distribution facilities on tribal land.<sup>24</sup> The terms for a lease or business agreement executed under an approved TERA could not exceed 30 years for energy development projects, except for lease terms of oil and gas production, which could not exceed 10 years.<sup>25</sup> Under an approved TERA, tribes also could enter into a right-of-way for pipelines or for electricity transmission or distribution over tribal lands as long as the term did not exceed 30 years and was serving a facility on tribal land.<sup>26</sup>

### **Time Frames for Processing a Proposed TERA**

ITEDSA 2005 and the 2008 TERA regulations outlined the procedure for considering a proposed TERA and set time frames for departmental review. ITEDSA 2005 required the Secretary to approve or disapprove a TERA no later than 270 days after the Secretary received a tribe's proposed TERA. If the Secretary disapproved the TERA, the Secretary had no more than 10 days

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<sup>22</sup> ITEDSA 2005, §§503-506.

<sup>23</sup> GAO-15-502, p. 5. In 2015, GAO reported that six tribes requested pre-application meetings with DOI to discuss TERAs.

<sup>24</sup> ITEDSA 2005, §503; 2008 TERA regulations, p. 12830.

<sup>25</sup> ITEDSA 2005, §503; 2008 TERA regulations, p. 12830. Oil and gas leases may extend past the 10-year term as long as oil or gas is produced in paying quantities.

<sup>26</sup> ITEDSA 2005, §503; 2008 TERA regulations, p. 12830.

to notify the tribe (in writing) about the basis of the disapproval, identify the changes needed to address the Secretary's concerns, and provide the tribe an opportunity to resubmit.<sup>27</sup> The Secretary then had no more than 60 days after receiving a revised TERA to approve or disapprove.<sup>28</sup>

The 2008 TERA regulations expanded on the TERA approval process by creating points of contact, establishing additional time frames for review and consultation of a proposed TERA, and requiring DOI to meet with tribes at various points in the approval process. For example, tribes wishing to enter into a TERA could contact the director of the Office of Indian Energy and Economic Development to schedule a pre-application consultation. During this consultation, the tribe and the director would discuss matters such as the TERA application process, content of the application, the energy resource the tribe wished to develop, and the tribe's capacity to develop the resource. The director would work with the designated tribal official (DTO) to schedule the consultation.<sup>29</sup> The director had 30 days to determine if the application was complete; if it was, the director requested an application consultation meeting with the tribe. Otherwise, the director notified the DTO that the application was incomplete and identified the information required to complete the application.<sup>30</sup> Notably, only upon the receipt of a complete application did the 270-day time frame to approve or disapprove the TERA begin, a requirement not specified in ITEDSA 2005.<sup>31</sup>

### **Secretarial Consideration of Criteria to Approve a TERA**

ITEDSA 2005 required the Secretary to approve a TERA if three criteria were met: (1) the Secretary determined the tribe demonstrated sufficient capacity to regulate energy resource development; (2) the TERA included provisions relating to the Secretary's ability to periodically review and monitor the tribe's performance under a TERA and the Secretary's enforcement authority; and (3) the TERA included required provisions applicable to leases, business agreements, or rights-of-way to be executed under the agreement.<sup>32</sup>

The 2008 TERA regulations further established standards for TERA approval. The regulations stated the Secretary would consider the best interests of the tribe and the federal government's policy on promoting self-determination. Further, the Secretary was to approve the TERA if it contained the necessary statutory and regulatory requirements and the Secretary determined the tribe demonstrated sufficient capacity to manage the development of the proposed energy resource.<sup>33</sup>

### **TERA Requirements and Inherently Federal Functions**

ITEDSA 2005 required a TERA to include several provisions. Such provisions included (1) requiring periodic reviews and monitoring of TERA activities and enforcement authority by the Secretary; (2) ensuring the tribe acquires the necessary information from an applicant for a lease, business agreement, or right-of-way; (3) addressing the terms of a lease or business agreement or

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<sup>27</sup> ITEDSA 2005, §503.

<sup>28</sup> ITEDSA 2005, §503. The Secretary of the Interior (Secretary) and the tribe may agree to a later date.

<sup>29</sup> 2008 TERA regulations, p. 12824.

<sup>30</sup> 2008 TERA regulations, p. 12826.

<sup>31</sup> 2008 TERA regulations, pp. 12826, 12829.

<sup>32</sup> ITEDSA 2005, §503.

<sup>33</sup> 2008 TERA regulations, pp. 12828-12829.

conveyance of a right-of-way; (4) providing for public notification of final approvals; (5) specifying the financial assistance, if any, the Secretary may provide to the tribe to assist in TERA implementation, including environmental review of individual projects; and (6) addressing various aspects of environmental review and compliance, among others.<sup>34</sup>

The 2008 TERA regulations required additional information not specified in law, such as auditing and record-keeping requirements.<sup>35</sup> In addition, one key aspect not specified in law states a TERA

- (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 ... [DOI], 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 DOI.<sup>36</sup>

The 2008 TERA regulations also developed requirements for TERA applications. Among other requirements, TERA applications must include the proposed TERA itself; statements about the tribe's recognition, its tribal land, and its form of government; maps of the tribal land to be developed; and statements about the tribe's experience in energy resource development and its capability to assume federal activities other than inherently federal functions.<sup>37</sup>

The regulations require the tribe and DOI discuss what services DOI will continue to provide after the TERA's approval.<sup>38</sup> Additionally, the regulations denote the activities DOI will continue to provide after the TERA's approval, which include any federal activities not assumed by the tribe; coordination between the tribe and DOI to maintain accurate real property records; assistance or support services, such as access to title status information and technical support services within DOI to assist the tribe in evaluating proposals for leases, business agreements, or rights-of-way under a TERA; and assistance in appropriately handling third-party violations or breaches.<sup>39</sup> As stated in the *Federal Register* preamble to the 2008 TERA regulations, the Secretary declined to define inherently federal functions and instead would determine such functions on a case-by-case basis, as done in the Indian Self-Determination and Education Assistance Act (ISDEAA; 25 U.S.C. §§5301 et seq.). The preamble further notes the Secretary's policy was to make available to a tribe all the services that are lawfully contractible under ISDEAA.<sup>40</sup>

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<sup>34</sup> ITEDSA 2005, §503.

<sup>35</sup> 2008 TERA regulations, p. 12827.

<sup>36</sup> 2008 TERA regulations, p. 12824 (emphasis added).

<sup>37</sup> 2008 TERA regulations, p. 12824.

<sup>38</sup> 2008 TERA regulations, p. 12826-12827 (requirement in the application consultation meeting).

<sup>39</sup> 2008 TERA regulations, p. 12830.

<sup>40</sup> 2008 TERA regulations, p. 12810.

### Regulatory Sufficient Capacity Factors

Pursuant to the Indian Tribal Energy Development and Self-Determination Act of 2005 (P.L. 109-58, Title V), the Secretary of the Interior (Secretary) promulgated regulations addressing the Secretary's consideration of a tribe's demonstration of sufficient capacity to regulate its energy resource development. The regulations required consideration of the following factors:

- The energy resource the tribe proposes to develop and regulate
- The administrative or regulatory activities the tribe seeks to assume
- Materials and information submitted with the tribal energy resource agreement (TERA) application
- The tribe's history in energy resource development
- The tribe's administrative expertise in regulating the energy resource development described in the proposed TERA
- The tribe's financial capacity to evaluate proposals and monitor anticipated activities
- The tribe's past performance administering contracts and grants associated with self-determination programs, cooperative agreements, and environmental programs
- The tribe's past performance monitoring activities undertaken by third parties under approved leases, business agreements, or rights-of-way
- Other relevant factors

**Source:** Bureau of Indian Affairs, "Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act; Final Rule," 73 *Federal Register* 12807, March 10, 2008, 25 C.F.R. §224.72

### Tribal Capacity Determination

As noted, ITEDSA 2005 requires the Secretary to determine whether the tribe demonstrated sufficient tribal capacity to regulate its energy resource development. ITEDSA 2005 also required the Secretary to promulgate regulations that addressed the standards for tribes to demonstrate capacity. The regulations were to include "the experience of the Indian tribe in managing natural resources and financial and administrative resources available for use by the Indian tribe in implementing the approved tribal energy resource agreement of the Indian tribe."<sup>41</sup> Under the 2008 TERA regulations, the Secretary considered several factors in determining whether a tribe demonstrated sufficient capacity.<sup>42</sup> (See "Regulatory Sufficient Capacity Factors" text box.)

The Secretary's review and determination of tribal capacity cover each type of energy resource the tribe wants to develop under the proposed TERA and the regulatory activities the tribe proposes to assume from the federal government.<sup>43</sup> In its TERA application, the tribe must include a statement describing the scope and amount of administrative activities it intends to conduct and the activities relating to permitting, approval, and monitoring. Further, if the tribe intends to regulate activities, in order for the Secretary to determine tribal capacity to administer and

manage the regulatory activities, the tribe must describe the scope of its plan for such administration and management in sufficient detail.<sup>44</sup>

The regulations require a series of meetings to discuss the tribe's capacity to manage energy resource development under the TERA. At the pre-application meeting, the director and the tribe are to discuss the tribe's capacity to manage and regulate its proposed energy resource development and potential funding opportunities for capacity building.<sup>45</sup> At the application consultation meeting, the discussion is to include the tribe's "administrative, financial, technical,

<sup>41</sup> ITEDSA 2005, §503.

<sup>42</sup> 2008 TERA regulations, p. 12829.

<sup>43</sup> 2008 TERA regulations, p. 12829.

<sup>44</sup> 2008 TERA regulations, p. 12824.

<sup>45</sup> 2008 TERA regulations, p. 12824.

and managerial capacities needed to carry out the tribe's obligations under a TERA."<sup>46</sup> The Secretary would then use the results of the application consultation meeting to determine the tribe's energy resource development capacity.<sup>47</sup>

## Concerns Regarding Indian Tribal Energy Development and Self-Determination Act of 2005

Members over several Congresses considered amending ITEDSA2005 in the context of concerns raised by tribes and DOI.<sup>48</sup> For instance, one tribal stakeholder testified that the approval process for oil and gas leases was cumbersome, involved too many federal agencies, and took too long.<sup>49</sup> In June 2015, GAO published the first of several reports on Indian energy development, including factors hindering the ability of tribes to enter into TERAs, in response to a request from the Senate Committee on Indian Affairs.<sup>50</sup> This section reviews selected issues considered in Congress while discussing amending ITEDSA2005. These issues included a complex application process, tribal capacity determinations, inherently federal functions, and a lack of funding for TERA implementation.

### Complex Application Process

GAO reported that tribes described the TERA application process as “complex, confusing, and time consuming” and noted that significant tribal resources were required to complete the application process.<sup>51</sup> According to GAO, BIA acknowledged concerns about the application process but noted that the process could not be simplified due the statutory framework.<sup>52</sup>

Members considered approaches to streamlining the approval process. For instance, legislation introduced in the 112<sup>th</sup>, 113<sup>th</sup>, and 114<sup>th</sup> Congresses would have revised the manner in which a TERA takes effect by having a TERA automatically take effect 271 days after submittal, unless the Secretary acts to disapprove the TERA.<sup>53</sup> This legislation also would have amended the criteria by which the Secretary may disapprove or approve a TERA—at one point adding a fourth

<sup>46</sup> 2008 TERA regulations, p. 12826-12827.

<sup>47</sup> 2008 TERA regulations, p. 12827.

<sup>48</sup> This section addresses only the legislative history of the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (ITEDSA 2017; P.L. 115-325), which includes previous versions introduced into Congress beginning in the 112<sup>th</sup> Congress. Congress, however, made prior and at times simultaneous legislative attempts to streamline Indian energy development. For example, see S. 3752, the Indian Energy Parity Act of 2010, and related concept paper on Indian energy and energy efficiency issued in September 2009 at <https://www.indian.senate.gov/sites/default/files/upload/files/IndianEnergy.pdf>.

<sup>49</sup> U.S. Congress, House Committee on Oversight and Government Reform, Subcommittee on the Interior, Energy and the Environment, hearing on *Tribal Energy Resources: Reducing Barriers to Opportunity*, 115<sup>th</sup> Cong., 2<sup>nd</sup> sess., July 17, 2018, H.Hrg. 115-91, Washington, D.C.: GPO, 2018, p. 5 (H.Hrg. 115-91).

<sup>50</sup> GAO-15-502.

<sup>51</sup> GAO-15-502, p. 33.

<sup>52</sup> GAO-15-502, p. 34.

<sup>53</sup> S. 1684, Indian Tribal Energy Development and Self-Determination Act Amendments of 2012; S. 2132, Indian Tribal Energy Development and Self-Determination Act Amendments of 2014; S. 209, Indian Tribal Energy Development and Self-Determination Act Amendments of 2015.

criterion (to the three already authorized for TERA approval) in S. 2132 that addressed if the TERA violated federal law or a treaty.<sup>54</sup>

Members also considered expediting the Secretary's determination of tribal capacity. Legislation proposed in the 112<sup>th</sup> and 113<sup>th</sup> Congresses would have required the Secretary to make a preliminary capacity determination within 120 days from the date a TERA is submitted to the Secretary, so that a tribe could know sooner than later if the Secretary has concerns about tribal capacity.<sup>55</sup>

## **Secretary's Discretion in Tribal Capacity Determinations**

Congress considered revising the Secretary's discretion in determining tribal capacity. Instead of requiring the tribe to demonstrate, and the Secretary to determine, a tribe's capacity as required under ITEDSA2005, legislation proposed in the 112<sup>th</sup>, 113<sup>th</sup>, and 114<sup>th</sup> Congresses would have required the Secretary to "deem" a tribe to have capacity.

In April 2014, the Assistant Secretary-Indian Affairs of the Department of the Interior testified to DOI's recommendations on S. 2132. One of the recommendations addressed capacity determinations and suggested basing the Secretary's determination on whether a tribe

- contracts the BIA realty functions;
- has leasing regulations approved by the Secretary under the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (P.L. 112-151), because leasing under such regulations approved by a tribe includes environmental provisions; and
- has experience in managing natural resources, which demonstrates a tribe's capacity for environmental review and compliance.<sup>56</sup>

## **Clarifying Inherently Federal Functions**

The 2015 GAO report states that tribes sought clarity from DOI about requirements under the regulations. For instance, the regulations provide the opportunity for tribes to take over activities from the federal government under a TERA, except for those activities considered inherently federal functions. GAO's report states that the regulations do not define inherently federal functions and, when tribes asked DOI to define the term, DOI informed them that doing so might have government-wide implications. Without a definition or list of items considered inherently federal functions, tribes informed GAO that they would be unable to determine what functions the tribes could take over or what they could work on to demonstrate capacity.<sup>57</sup>

In 2017, GAO added to its High Risk List federal management of programs serving tribes and their members, which included BIA's management of Indian energy resources, including

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<sup>54</sup> S. 1684, Indian Tribal Energy Development and Self-Determination Act Amendments of 2012; S. 2132, Indian Tribal Energy Development and Self-Determination Act Amendments of 2014; S. 209, Indian Tribal Energy Development and Self-Determination Act Amendments of 2015.

<sup>55</sup> S.Rept. 112-263, p. 14; S.Rept. 113-224, pp. 15, 21.

<sup>56</sup> S.Rept. 113-224, p. 21.

<sup>57</sup> GAO-15-502, p. 32. Tribal stakeholders also indicated they needed clarity about the tribal environmental review process and whether or not receiving public input opens up the tribe to liability, which could delay tribal decisionmaking. Further, tribes were unclear whether their own processes and protocols could be used when taking over a federal function.



TERAs.<sup>58</sup> In September 2017, the Acting Assistant Secretary–Indian Affairs testified that, in response to GAO’s request to clarify its regulations, the Office of Indian Energy and Economic Development reviewed comments received from tribes and determined tribes’ primary issue to be clarity about inherently federal functions. The Acting Assistant Secretary stated, “[T]he term can only truly be defined on a case-by-case basis when tribes have made a request to take over a specific Federal program, function, service or activity.” He also informed the Senate Committee on Indian Affairs that the Office of Indian Energy and Economic Development had placed additional information on its website about TERAs and would develop a primer or provide guidance on training opportunities for tribes interested in pursuing a TERA.<sup>59</sup> In June 2018, BIA testified that GAO closed out this recommendation pertaining to TERAs on March 8, 2018.<sup>60</sup> However, tribal stakeholders continued to request that inherently federal functions be defined, claiming that “BIA failed to resolve this regulatory blockage.”<sup>61</sup>

## Lack of Funding

Tribes interested in pursuing a TERA often commented on the lack of financial assistance for tribes that have entered into one.<sup>62</sup> In addition, GAO’s report highlights that assuming federal functions under a TERA did not come with federal funding. Tribes indicated to GAO that assuming the federal government’s activities would require significant tribal resources and, without additional funding, tribes would not have the resources to assume the functions or liability associated with taking over these activities.<sup>63</sup> Approaches considered in the 112<sup>th</sup> Congress included funding language based on statutory text from ISDEAA, which allows tribes to contract or compact with the federal government to assume and perform federal functions carried out on behalf of the tribe.<sup>64</sup>

## Indian Tribal Energy and Self-Determination Act Amendments of 2017 and 2019 TERA Regulations

In December 2018, Congress enacted ITEDSA 2017 (P.L. 115-325), which modified several ITEDSA 2005 provisions.<sup>65</sup> Specific to the TERA approval process, Congress amended the time frames for processing a TERA, addressed the Secretary’s discretion in determining a tribe’s capacity to develop energy projects by allowing a tribe to certify it is a qualified Indian tribe, reduced the number of TERA provision requirements and allowed tribes to enter into funding agreements with the Secretary.

<sup>58</sup> GAO, *High Risk: Federal Management Challenges Related to Indian Energy Resources*, GAO-17-434T, February 15, 2017, at <https://www.gao.gov/products/GAO-17-434T>. Hereinafter, GAO-17-434T.

<sup>59</sup> U.S. Congress, Senate Committee on Indian Affairs, hearing on *High Risk Indian Programs: Progress and Efforts in Addressing GAO’s Recommendations*, 115<sup>th</sup> Cong., 1<sup>st</sup> sess., September 13, 2017, S.Hrg. 115–235, Washington, D.C.: GPO, 2018, p. 46.

<sup>60</sup> U.S. Congress, Senate Committee on Indian Affairs, hearing on *GAO High Risk List: Turning Around Vulnerable Indian Programs*, 115<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 13, 2018, S.Hrg. 115-308, Washington, D.C.: GPO, 2018, p. 19; GAO, “Recommendations,” at <https://www.gao.gov/products/GAO-15-502>.

<sup>61</sup> H.Hrg. 115-91, p. 12.

<sup>62</sup> S.Rept. 112-263, p. 11, footnote 68.

<sup>63</sup> GAO-15-502.

<sup>64</sup> S.Rept. 112-263, p. 14.

<sup>65</sup> ITEDSA 2017, 132 Stat. 4445, 25 U.S.C. §§3501 et seq.



ITEDSA 2017 also directed DOI to update the TERA regulations. DOI issued proposed amendments to the regulations in July 2019 and finalized the regulations in December 2019. Specific to the TERA approval process, the 2019 TERA regulations amended time frames for approving a TERA, removed tribal capacity requirements, and required available financial amounts to be provided to a requesting tribe as per ITEDSA 2017. The 2019 TERA regulations also include key differences and requirements not specified in law, such as how the Secretary considers the criteria for approving or disapproving a TERA, when a TERA can take effect, inherently federal functions and the Administration's efforts to define the term, reasons for disapproving a proposed TERA, and certification as a qualified Indian tribe.

This section reviews selected provisions in ITEDSA 2017 and in the 2019 TERA regulations addressing the TERA approval process and highlights key differences between statutory and regulatory requirements.

## **Revised Time Frames for Processing TERAs**

ITEDSA 2017 amended the procedure for processing a proposed TERA. ITEDSA 2017 required the Secretary to notify the tribe if the TERA is complete or incomplete no later than 60 days after a proposed TERA is submitted.<sup>66</sup> The Secretary is to inform the tribe of what information is needed to complete the submission and identify any financial assistance the Secretary will provide to the tribe for implementation of the TERA.<sup>67</sup> The agreement takes effect 271 days after the Secretary receives a TERA from a qualified Indian tribe or 91 days after the receipt of a revised TERA, unless the Secretary disapproves the TERA before that time.<sup>68</sup> (The statutory term *qualified Indian tribe* is discussed in more detail under "Certification of Qualified Indian Tribe in Lieu of Tribal Capacity Determination.")

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<sup>66</sup> ITEDSA 2017, §103(a)(4)(A).

<sup>67</sup> ITEDSA 2017, §103(a)(4)(A).

<sup>68</sup> ITEDSA 2017, §103(a)(4)(B).

**Figure I. Statutory and Regulatory Timeline Requirements for Approving or Disapproving a Tribal Energy Resource Agreement (TERA)**

ITEDSDA Amendments of 2017 25 U.S.C. §3504(e), TERAs	2019 TERA Regulations 25 C.F.R. Part 224
	<b>SUBPART B – Procedures for Obtaining a TERA</b>
	<b>§224.51</b> The tribe requests a pre-application consultation meeting; upon receipt of the request, the Secretary of the Interior (Secretary) has 30 days to contact the designated tribal official (DTO) to schedule.
<b>§3504(e)(2)(A)(i)</b> <b>271 days</b> ← <b>to take effect</b> → <b>271 days</b> On the 271st day after receipt of a TERA from a qualified Indian tribe, the TERA takes effect unless the Secretary disapproves.	<b>§224.56</b> Receipt of a qualified tribe's complete application begins the 270-day review period; on the 271st day, the TERA becomes effective unless the Secretary approves an earlier date or disapproves the application. See also §224.74.
<b>§3504(e)(1)(B)</b> <b>60 days</b> ← <b>after submittal</b> → <b>30 days</b> Within 60 days after the TERA submittal, the Secretary notifies the tribe whether the agreement is complete or incomplete. If not complete, the Secretary notifies the tribe what information or documentation is needed to complete the submission. <sup>1</sup>	<b>§224.57</b> Upon receipt of an application, the Secretary promptly notifies the DTO the application is received and date received. The Secretary has 30 days to determine whether the application is complete. <b>Complete:</b> If complete, the Secretary requests an application consultation meeting. <b>Not Complete:</b> If not complete, the Secretary must provide written notice the application is not complete and state what additional information is needed. The 270-day review period does not start until the application is complete. <b>§225.58</b> – The application consultation meeting is held at the “earliest practicable time” after receipt of a complete application. <b>§224.60</b> – Within 30 days of the meeting, the Secretary provides the DTO a written report of the application consultation meeting and recommendations for revising the proposed TERA. <b>§224.61</b> – Within 45 days of receiving the Secretary's report, the tribe must submit a final proposed TERA if proceeding with the application. <b>§224.67</b> – Within 10 days of receiving the final proposed TERA, the Secretary must submit a notice to the public in the <i>Federal Register</i> .
	<b>SUBPART C – Approval of TERAs</b>
<b>§3504(e)(4)</b> <b>10 days</b> ← <b>after disapproval</b> → <b>10 days</b> Not more than 10 days after disapproval, the Secretary provides a detailed, written explanation of each reason for disapproval, necessary revisions to the TERA to address each reason, and gives the tribe an opportunity to revise and resubmit.	<b>§224.75</b> The Secretary must notify the tribal governing body in writing within 10 days of approval or disapproval of a final proposed TERA. If approved, the Secretary signs the TERA and returns to the tribe. If disapproved, the Secretary provides a detailed written explanation, changes required to address the Secretary's reasons for disapproval, and an opportunity to revise and resubmit. <sup>2</sup>
<b>§3504(e)(2)(A)(ii)</b> <b>91 days</b> ← <b>after receipt</b> → <b>91 days</b> On the 91st day after receipt of a revised TERA, the TERA takes effect unless the Secretary disapproves.	<b>§224.76</b> <b>45 days</b> The tribe may resubmit a revised final proposed TERA within 45 days of receiving a notice of disapproval (or a later agreed upon date). <b>90 days</b> The Secretary must approve or disapprove within 90 days of receiving a revised final proposed TERA. <b>91 days</b> On the 91st day, the TERA becomes effective if no action is taken. <b>10 days</b> The Secretary must notify the tribe in writing within 10 days of approving or disapproving a revised final proposed TERA. If approved, the Secretary signs the TERA and returns to the tribe. If disapproved, the Secretary sends a notice of disapproval and includes reasons for disapproval. <sup>3</sup>

**Sources:** Prepared by CRS using information from the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (P.L. 115-325), 25 U.S.C. §3504, and 25 C.F.R. Part 224, as amended by U.S. Department of the Interior, Bureau of Indian Affairs, “Tribal Energy Resource Agreements,” 84 *Federal Register* 69602, December 18, 2019.

**Notes:** The left side of the figure provides the statutory requirements as included in the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (ITEDSA 2017; P.L. 115-325). The right side

provides a list of the regulatory requirements as provided in the 25 C.F.R. Part 224, as amended by the 2019 TERA regulations. References to the “Secretary” refer to the Secretary of the Interior.

1. Notification also includes identification of financial assistance provided by the Secretary to assist in implementation of the TERA. 25 U.S.C. §3504(e)(1)(B)(iii).

2. Disapproval includes statement that it is a final agency action and subject judicial review. 25 C.F.R. §224.75(b)(4).

3. Disapproval includes statement that it is a final agency action and subject to judicial review. 25 C.F.R. §224.76(b)(2).

The 2019 TERA regulations amended the TERA approval process to incorporate the revised time frames specified by ITEDSA 2017, but the rest of the regulatory time frames created in the 2008 regulations remained the same. (See **Figure 1** for an overview of the statutory and regulatory processing timeline for approving or disapproving a TERA.) Additionally, one key difference between the law and the regulations is when the review time begins after a proposed TERA is initially submitted to the Secretary. The 2019 regulations maintained that the 271-day review period starts once the Secretary determines a TERA application is complete, whereas ITEDSA 2017 required the TERA to take effect upon receipt of the TERA by the Secretary (unless the Secretary disapproves the TERA).<sup>69</sup> (See text box for a summary of required TERA application contents.)

The 2019 TERA regulations also replaced the director of the Office of Indian Energy and Economic Development with the Secretary or the Secretary’s designee in processing TERAs. For example, under the 2019 regulations, tribes wishing to enter into a TERA may contact the Secretary or the Secretary’s designee rather than the director of the Office of Indian Energy and Economic Development to schedule a pre-application consultation.<sup>70</sup> BIA indicated that the Indian Energy Service Center within BIA will be the point of contact responsible for intake and will ensure TERAs are processed.<sup>71</sup>

### **Tribal Energy Resource Agreement (TERA) Application Contents Required by Regulation**

When a tribe submits a TERA for review, the application needs to include the following:

- (1) A proposed TERA containing required statutory and regulatory provisions.
- (2) A map, legal description, and general description of the tribal land to be included in the TERA.
- (3) A statement describing the tribe’s intent to (a) retain the option to enter into energy-related leases under other laws on the tribal lands included in the TERA; (b) include some or all of its tribal land and energy resources in its TERA; and (c) modify existing leases once a TERA is approved.
- (4) Documentation that the tribe meets the definition of qualified tribe.
- (5) A statement of the scope of administrative activities that the tribe intends to conduct related to the permitting, approval, and monitoring of activities the tribe proposes to undertake in a lease, business agreement, or right-of-way executed under a TERA. The intended scope may not include the federal government’s responsibilities under the Endangered Species Act or other inherently federal functions.
- (6) A copy of the tribe’s, or tribes’, formal action approving the TERA application submission. The regulations require the formal action to include various statements.
- (7) The name of the designated tribal official who will receive notifications from the Secretary regarding the TERA application’s status.

**Source:** 25 C.F.R. §224.53.

**Notes:** DOI made technical updates to 25 C.F.R. §224.53 to correct cross-references in (3) and (5). Bureau of Indian Affairs, “Tribal Energy Resource Agreements,” 86 *Federal Register* 98, May 24, 2021.

<sup>69</sup> 2019 TERA regulations, 25 C.F.R. §§224.56, 224.57; see also 25 C.F.R. §224.74. The regulations also clarify that the Secretary can approve an earlier date for the TERA to take effect.

<sup>70</sup> 2019 TERA regulations, 25 C.F.R. §224.51.

<sup>71</sup> Personal communication between CRS and the Indian Energy Service Center (IESC) on February 10, 2020. For more

## Revised Secretarial Consideration of TERA Criteria

ITEDSA 2017 amends the criteria for approving a TERA and how the Secretary can consider such criteria. ITEDSA 2017 states the Secretary shall disapprove a TERA *only* if the TERA (1) violates federal law (including regulations) or a treaty (a new provision); (2) does *not* include a provision authorizing the Secretary to annually review and evaluate the tribe's performance under the TERA and take enforcement action in specific situations; or (3) does *not* include required provisions applying to leases, business agreements, or rights-of-way to be executed under an approved TERA.<sup>72</sup> In the act, Congress removed the previous requirement for the Secretary to determine whether the tribe demonstrated sufficient capacity.

DOI also amended the criteria the Secretary considers to approve a TERA. The 2019 TERA regulations state the Secretary must approve a final proposed TERA, unless

- (a) The Tribe does not meet the definition of a “qualified Tribe” in § 224.30;
- (b) A provision of the TERA violates applicable Federal law (including regulations) or a treaty applicable to the Tribe; or
- (c) The TERA fails to include the provisions required by § 224.63.<sup>73</sup>

Notably, the regulations allow the Secretary to disapprove a final proposed TERA if a tribe does not meet the definition of qualified tribe—a provision not required by law. The amended regulations also removed two requirements that allowed the Secretary to (1) consider the tribe's best interests and the federal government's policy on promoting self-determination and (2) determine the tribe demonstrated sufficient capacity to manage the development of the proposed energy resource.<sup>74</sup>

## Revised TERA Requirements and Inherently Federal Functions

ITEDSA 2017 and the 2019 TERA regulations amended the TERA provision requirements. Under ITEDSA 2017, TERAs have 13 provision requirements with respect to leases, business agreements, and rights-of-way subject to the TERA (ITEDSA 2005 required 16 provisions).<sup>75</sup> (See **Appendix** for a list and comparison of the statutory and regulatory TERA provision requirements and authorities.) Congress kept several of the previous requirements and introduced two new ones.<sup>76</sup> One, requiring an Indian tribe to submit a certification that it meets the requirements of a qualified Indian tribe, is discussed below (see “Certification of Qualified Indian Tribe in Lieu of Tribal Capacity Determination”). The other allows a tribe, at its option, to identify in the TERA the operational or development functions it intends to conduct pursuant to a

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information on the IESC, see DOI, BIA, “Indian Energy Service Center,” at <https://www.bia.gov/bia/ots/indian-energy-service-center>. The regulations require tribes submit a TERA application to TERA@bia.gov. 25 C.F.R. § 224.54.

<sup>72</sup> ITEDSA 2017, § 103(a)(4)(B)(ii). Italics added for emphasis.

<sup>73</sup> 2019 TERA regulations, 25 C.F.R. § 224.71.

<sup>74</sup> 2008 TERA regulations, pp. 12828-12829.

<sup>75</sup> Congress removed three provisions relating to the demonstration of tribal capacity.

<sup>76</sup> Congress kept certain requirements, including those ensuring compliance with applicable environmental laws, establishing a process for consulting with a state for off-reservation impacts, and citing tribal laws that require the exhaustion of tribal remedies before a petition may be submitted to the Secretary regarding a tribe's compliance under the TERA. See 25 U.S.C. § 3504(e)(2)(B)(iii) for a complete list of TERA provision requirements with respect to leases, business agreements, and rights-of-way subject to the TERA.

lease, right-of-way, or business agreement approved by the tribe.<sup>77</sup> The 2019 TERA regulations also incorporate this amendment.<sup>78</sup> However, ITEDSA 2017 did not address inherently federal functions and the 2019 TERA regulations do not amend its requirements for inherently federal functions or define the term.

## Inherently Federal Functions and Secretarial Order 3377

DOI did not amend the requirements pertaining to inherently federal functions and did not add a definition of inherently federal functions.<sup>79</sup> In response to tribal comments requesting the term be defined, the final rule's preamble indicated the Secretary would undertake efforts to define inherently federal functions.<sup>80</sup> On December 16, 2019, the Secretary signed Secretarial Order (S.O.) 3377, *Contractibility of Federal Functions for Oil and Gas Development on Indian Lands*, which required the Solicitor's Office to create a list of inherently federal functions that are contractible—or that tribes could assume from the federal government—under a TERA.<sup>81</sup> The intent of S.O. 3377 is to “provide policy guidance on contractible Federal functions in support of [TERAs] relating to energy resource development.”<sup>82</sup> S.O. 3377 applies to inherently federal oil and gas functions. It states that the typical process determining whether the functions are inherently federal for the purposes of an ISDEAA contract or compact begins with the Office of the Solicitor or the appropriate bureau or office, which reviews the list of functions prepared by the applicant tribe. Only after this review does DOI inform the tribe which functions are contractible. S.O. 3377 states that since DOI's management of energy resources on tribal lands involves both BIA and the Bureau of Land Management, DOI has not previously received a list of inherently federal functions regarding TERAs. The order states this created uncertainty about what functions are contractible for tribes.<sup>83</sup>

<sup>77</sup> ITEDSA 2017, §103(a)(4)(B)(ii)(II)(ee).

<sup>78</sup> 25 C.F.R. §224.63(m).

<sup>79</sup> The 2019 regulations did not amend the 2008 TERA regulations requiring that a tribe may include in its TERA a provision addressing the assumption of activities normally carried out by DOI but that such activities cannot include inherently federal functions. 25 C.F.R. §224.52. The regulations also did not amend the requirement that a tribe include a statement in its TERA application describing the administrative activities related to the permitting, approval, and monitoring of activities the tribe proposes to undertake in a lease, business agreement, or right-of-way executed under a TERA but that the intended scope may not include inherently federal functions. 25 C.F.R. §224.53.

<sup>80</sup> 2019 TERA regulations, p. 69608. The preamble states,

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

<sup>81</sup> Secretarial Order (S.O.) 3377, *Contractibility of Federal Functions for Oil and Gas Development on Indian Lands*, December 16, 2019, at DOI, Electronic Library of the Interior Policies, “Secretary's Orders,” at <https://www.doi.gov/elips/browse>. The National Congress of American Indians (NCAI) informed CRS that it had requested DOI to engage in government-to-government consultation about determining the definition of inherently federal functions prior to the issuance of the secretarial order; however, no such consultation has been conducted. Personal communication between CRS and NCAI on January 16, 2020.

<sup>82</sup> S.O. 3377, §1.

<sup>83</sup> S.O. 3377, §4.



Thus, S.O. 3377 required the Solicitor's Office to create two lists: one for inherently federal functions that are not contractible under a TERA and one for federal functions that are. It also required the Bureau of Land Management and the Office of Natural Resources Revenue to implement an ISDEAA program with the assistance of BIA and the Office of Self Governance.<sup>84</sup> All actions were to be taken within 90 days from the date of S.O. 3377.<sup>85</sup> On February 24, 2020, the Assistant Secretaries for Indian Affairs; Land and Minerals Management; and Policy, Management, and Budget approved a Memorandum of Agreement that included a list of contractible federal functions related to oil and gas development, as well as a list of inherently federal functions.<sup>86</sup>

## Certification of Qualified Indian Tribe in Lieu of Tribal Capacity Determination

ITEDSA 2017 removed the requirement for tribes to demonstrate tribal capacity in order to obtain an approved TERA. ITEDSA 2005 required the Secretary, as one of three criteria in approving a TERA, to determine whether a tribe demonstrated "sufficient capacity" to regulate energy resource development.<sup>87</sup> Further, ITEDSA 2005 required the Secretary, when implementing regulations, to develop criteria for determining a tribe's capacity to develop energy resources. ITEDSA 2017 removed these requirements.

In lieu of requiring the Secretary to determine a tribe's capacity, ITEDSA 2017 required a qualified Indian tribe to submit in its TERA a certification that it has either operated under an ISDEAA contract or compact for managing tribal land or natural resources for at least three consecutive years, or can otherwise demonstrate experience developing, administering, reviewing, and evaluating energy resource leases or business agreements (ITEDSA 2017 defined *qualified Indian tribe* using the same language).<sup>88</sup> ITEDSA 2017 authorized a qualified Indian tribe, rather than *any* Indian tribe, to submit a TERA to the Secretary.<sup>89</sup> ITEDSA 2017 also provided that the time frames for the TERA effective dates (i.e., the TERA takes effect on the 271<sup>st</sup> day) begins when the Secretary receives a TERA or revised TERA from a qualified Indian tribe.<sup>90</sup> The law does not otherwise reference qualified Indian tribe or a tribe's capacity to administer or manage its energy resources under a TERA.

The 2019 TERA regulations removed most, but not all, tribal capacity requirements. In accordance with ITEDSA 2017's amendments, DOI removed several requirements that provided the criteria for the Secretary's review and determination of tribal capacity. For example, the regulations previously included several requirements pertaining to the demonstration of tribal capacity, namely the list of factors the Secretary would consider in determining sufficient capacity.<sup>91</sup> However, the regulations continued to allow the Secretary and tribe to discuss the tribe's capacity to manage and regulate the tribe's natural resources and to perform

<sup>84</sup> S.O. 3377, §5.

<sup>85</sup> S.O. 3377, §5.

<sup>86</sup> DOI, *Memorandum of Agreement Between Bureau of Indian Affairs, Office of Self-Governance, Office of Natural Resources Revenue, and Bureau of Land Management*, February 24, 2020 (on file with CRS).

<sup>87</sup> ITEDSA 2005, §503.

<sup>88</sup> ITEDSA 2017, §§103 (a)(1)(B)(ii)(II)(ee), 105(a)(2).

<sup>89</sup> ITEDSA 2017, §103(a)(4)(A).

<sup>90</sup> ITEDSA 2017, §103(a)(4)(B)(i).

<sup>91</sup> 2008 TERA regulations, p. 12829.

administrative, technical, financial, and managerial responsibilities needed to carry out the TERA.<sup>92</sup> Although the 2019 TERA regulations no longer required documentation specific to a tribe's capacity, they required a tribe to include documentation in its TERA application that it meets the definition of qualified tribe, rather than a certification as required by ITEDSA 2017.<sup>93</sup> The regulations did not expand on the documentation requirements.

## **Financial Assistance via Annual Funding Agreements**

ITEDSA 2017 allowed for financial assistance through a written annual funding agreement (AFA), which is a separate agreement from the TERA.<sup>94</sup> ITEDSA 2005 did not include funding to tribes for taking over a program or activity from the federal government. By contrast, as a result of a tribe carrying out a federal activity under a TERA, ITEDSA 2017 required the Secretary to make available, upon a tribe's request, any amounts the Secretary would have expended to carry out the same activity on the tribe's behalf.<sup>95</sup> ITEDSA 2017 required the Secretary to address the calculation of the amounts the Secretary would have expended in the regulations. It also expressly required provisions in the regulations

- identifying the activities and amounts the Secretary will not have to carry out or expend as a result of the tribes carrying out the activity under a TERA and
- addressing how a tribe will be provided a list and associated amounts of the activities.<sup>96</sup>

ITEDSA 2017 states that a TERA's effective date or implementation shall not be delayed or affected by the time needed for the Secretary to make such calculations or by the adoption of an AFA.<sup>97</sup>

The 2019 TERA regulations address the availability of expenditures to a tribe assuming activities from the Secretary. Similar to ITEDSA 2017, the new regulatory section provided that the Secretary will provide a requesting tribe the amounts the Secretary otherwise would expend to carry out a federal activity on the tribe's behalf. However, unlike ITEDSA 2017, the regulation required that the request must come from a tribe "for whom an approved TERA is in effect."<sup>98</sup> The regulations do not otherwise include provisions as required by ITEDSA 2017. However, the Secretary addressed annual funding agreements in S.O. 3377, requiring the Bureau of Land Management and the Office of Natural Resources Revenue to prepare for administering and implementing annual funding agreements.

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<sup>92</sup> 2019 TERA regulations, 25 C.F.R. §§224.51, 224.58.

<sup>93</sup> 2019 TERA regulations, 25 C.F.R. §224.53.

<sup>94</sup> ITEDSA 2017, §103(a)(6) (emphasis added). In addition, the amounts are subject to appropriations and the Secretary is not required to reduce amounts for activities that serve other Indian tribes to make amounts available to an Indian tribe for an annual funding agreement under ITEDSA 2017.

<sup>95</sup> ITEDSA 2017, §103(a)(6).

<sup>96</sup> ITEDSA 2017, §§103(a), (b).

<sup>97</sup> ITEDSA 2017, §103(a)(6).

<sup>98</sup> 2019 TERA regulation, 25 C.F.R. §224.79. The Secretary is also to provide the tribe with a full accounting of the amounts calculated using the specific terms of the TERA, the scope of the contracted functions, and the applicable circumstances.



## Policy Considerations

Congress may consider issues that were raised in the context of ITEDSA2005 and ITEDSA2017. These issues generally focus on process, reducing the Secretary's discretion, inherently federal functions, and funding. Tribes commented on the complexity of the TERA approval process, which presents a number of sub-issues that the legislation and the revised regulations tried to address. Additionally, issues surrounding what are considered inherently federal functions in TERAs and in annual funding agreements are interconnected but are presented as two separate potential issues of concern.

Because no tribe has yet entered into a TERA,<sup>99</sup> some policy issues that are not yet apparent may emerge and require congressional consideration once the DOI processes its first complete TERA.<sup>100</sup>

## Processing Proposed TERAs

According to GAO, BIA asserts that complex TERA approval and application process could not be simplified due to the statutory framework authorized under ITEDSA2005. ITEDSA2017 amended the process for approving a TERA to make it less complex. DOI amended its regulations in response to changes in the law but kept many of the same TERA processing requirements as before. Some of these requirements, such as the deadlines for scheduling the pre-application meeting and the application consultation meeting, may continue to be an issue for tribes seeking to further reduce complexity in the TERA process.

Exactly when a TERA may take effect is ambiguous, because what is specified in law and what the DOI requires in regulation are potentially confusing. The law provides that a TERA takes effect on the 271<sup>st</sup> day after the Secretary receives a TERA submission, but the regulations state that the time does not start until DOI considers the application to be complete—a regulatory requirement that did not change after enactment of ITEDSA2017. In January 2019, GAO issued a report examining DOI's lengthy review periods of tribal leasing regulations submitted under the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (P.L. 112-151).<sup>101</sup> The act required DOI to complete its review within 120 days after the tribe's regulations are submitted.<sup>102</sup> However, according to GAO's report, DOI does not consider the time frame to begin until it has received a final version of the tribe's regulations. GAO reported that tribal stakeholders did not know when to expect a final decision approving their regulations. GAO also reported that the review process could be lengthy and time consuming, sometimes taking longer than two years.<sup>103</sup>

Similarly, DOI does not consider a submitted TERA application to necessarily be a complete application and may require tribes to do additional work after their initial submissions, which

<sup>99</sup> On June 7, 2021, CRS confirmed via personal communication with IESC staff that no tribe has entered into a TERA; however, IESC continues to provide training to tribes that have expressed an interest in TERAs.

<sup>100</sup> One option available to Congress is to use the Congressional Review Act (CRA; Title II, Subtitle E, P.L. 104-121, 5 U.S.C. §§601 et seq.) to overturn regulations. The CRA is available to Congress for a limited time after a rule is finalized. No member of Congress introduced a resolution of disapproval to overturn the 2019 TERA regulations. For more information on the CRA, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

<sup>101</sup> GAO, *Indian Programs: Interior Should Address Factors Hindering Tribal Administration of Federal Programs*, GAO-19-87, January 2019, at <https://www.gao.gov/products/GAO-19-87>. Hereinafter, GAO-19-87.

<sup>102</sup> P.L. 112-151, §2.

<sup>103</sup> GAO-19-87, pp. 19-22.

could cause uncertainty among tribes about when exactly the 271-day review period begins and when the TERA may automatically take effect if the Secretary does not take action. An option for Congress is to consider amending the law to more clearly specify when the timeline begins to eliminate potential ambiguity.

## Secretary's Discretion in Considering TERA Criteria

The ITEDSA 2017 amendments reversed how the Secretary is to consider a proposed TERA, stipulating that the Secretary must disapprove a TERA *only* if three criteria are not met. Thus, the statute appears to set a presumption that a TERA is considered approved unless the Secretary takes action to disapprove the agreement. Additionally, ITEDSA 2017 removed one criterion requiring the Secretary make a determination about whether a tribe demonstrated tribal capacity. Both revisions presumably made it easier for tribes to enter into a TERA with the Secretary. By contrast, the 2019 TERA regulations continued to require the Secretary to approve a TERA if three criteria are met, and the presumption by DOI is that a TERA is considered unapproved unless the Secretary takes action to approve the agreement. Further, the 2019 TERA regulations expanded the Secretary's discretion to allow the Secretary to disapprove a TERA if the tribe does not meet the definition of a qualified Indian tribe. However, ITEDSA 2017 provided three criteria for disapproving a TERA and did not expressly include that a tribe does not meet the definition of qualified Indian tribe as one of the criteria. An option for Congress is to consider amending the law to clarify the Secretary's role in approving a TERA.

## Clarifying Inherently Federal Functions

A primary issue for tribes is defining inherently federal functions. According to tribal stakeholders, knowing what functions a tribe could or could not assume is key to the process of developing and proposing a TERA.

The phrase *inherently federal functions* comes from the 2008 TERA regulations as a part of DOI's consideration of assessing the administrative and regulatory functions a tribe would assume from the federal government in implementing a TERA. In promulgating the 2008 TERA regulations, the Secretary stated that DOI's policy was to make available to tribes all the services that are lawfully contractible under ISDEAA. After the 2008 TERA regulations were implemented, GAO recommended that DOI define inherently federal functions, but DOI did not expressly do so. Tribal stakeholders insisted on defining inherently federal functions, referring to the lack of clarity as a "regulatory blockage."<sup>104</sup>

Although ITEDSA 2017 allows a tribe to identify in the proposed TERA what operation and development functions it will assume from the federal government, DOI did not define the phrase inherently federal functions in the 2019 TERA regulatory amendments. Rather, the Secretary issued S.O. 3377 directing the Office of the Solicitor to issue additional guidance by providing a detailed list of functions a tribe could or could not assume from the federal government with respect to energy resource development. The Office of the Solicitor has not published additional guidance per S.O. 3377 as of June 2020. Congress also may consider that S.O. 3377 focuses only on inherently federal oil and gas functions, and omits federal functions addressing coal or renewable resources.

Additionally, in January 2019 GAO issued a report addressing factors that hinder tribes from entering into funding contracts and compacts under ISDEAA. The report states that, because

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<sup>104</sup> H.Hrg. 115-91, p. 12.

inherently federal functions are determined on a case-by-case basis, such determinations are not consistent across BIA.<sup>105</sup> Although S.O. 3377 states its requirements are consistent with the report's recommendations, S.O. 3377 only addresses oil and gas, thus it is unclear how inherently federal functions in coal or renewables could be affected. Without a definition or clarification of what an inherently federal function is for all energy resources, a tribe may not know whether it is requesting to take over an inherently federal function or whether what is considered an inherently federal function in the energy context will be applied evenly throughout BIA.

Further, ITEDSA 2017 mandated that a TERA's effective date or implementation may not be delayed by the amount of time needed for the Secretary to make funding calculations or the adoption of an AFA. However, the regulations do not clearly indicate how the Secretary will make funding calculations or lay out the process for adopting an AFA.

The lack of clarity about inherently federal functions may discourage tribes from entering into a TERA. Congress may wish to seek an explanation from DOI about how it is providing clarification to tribes about inherently federal functions for all energy resources, how DOI will consistently address inherently federal functions, and how DOI will address funding calculations.

Another option may be to revise the statute to define inherently federal functions. However, this option could affect other agencies involving ISDEAA, such as the Bureau of Indian Education (BIE) and Indian Health Service (IHS), which regularly contract or compact with tribes for different purposes. Congress could seek to tailor a definition for inherently federal functions specific to TERAs and exclude BIE and IHS.

## Regulatory Treatment of Qualified Indian Tribe in Lieu of Secretarial Determination of Tribal Capacity

ITEDSA 2017 removed the requirement for secretarial determination of sufficient tribal capacity to develop energy resources and all requirements of tribes to demonstrate such capacity. Instead, ITEDSA 2017 defined the phrase *qualified Indian tribe* and provided that a tribe need only submit a certification that it either (1) has managed an ISDEAA contract or compact for three years involving tribal land management or (2) has sufficient experience in managing energy development. Pursuant to ITEDSA 2017, the 2019 regulations removed several tribal capacity requirements and included a similar definition for qualified tribe.

However, a potential issue for Congress could be *when* the Secretary can disapprove a TERA because the tribe is not a qualified Indian tribe. ITEDSA 2017 and the 2019 TERA regulations required that only a qualified Indian tribe—as opposed to any Indian tribe—can submit a proposed TERA, which could suggest that a determination about whether a tribe is qualified to submit a TERA requires an upfront determination or that when a tribe submits a certification, it automatically becomes qualified. In the legislative history of ITEDSA 2017, Congress considered a “preliminary capacity determination,” but instead Congress removed the Secretary's determination of tribal capacity in its entirety and opted instead for a tribal certification. The 2019 regulations allow the Secretary to disapprove a TERA at any time because a tribe is not eligible to be a qualified Indian tribe, including the possibility of waiting until the end of the 270-day review period to make this determination. Informing a tribe it does not qualify to enter into a TERA at the end of the review period could defeat the purpose of removing tribal capacity requirements to make it easier for a tribe to enter into a TERA, which was one of many factors Congress considered when it amended the prior law. If the treatment of the term *qualified Indian tribe* is an

<sup>105</sup> GAO-19-87, p. 15.

issue for tribes or DOI, Congress could consider amending the statutory language to require that DOI decide on the tribal certification early in the process.

ITEDSA 2017 states that a tribe has only to certify it is a qualified Indian tribe; however, the 2019 TERA regulations required a tribe, as a part of the application contents, to submit documentation proving it meets the definition of qualified tribe. Both the law and the regulations state that to be considered a qualified Indian tribe, a tribe must either (1) have experience contracting or compacting under ISDEAA or (2) have substantial experience in administering energy leases or managing its energy resources.

The regulations do not specify the types of documents a tribe is required to submit. Documentation of ISDEAA experience might be the contract or compact itself, which DOI should already have, but it is unclear what documentation the tribe must provide to demonstrate it has substantial experience in administering energy leases or managing its energy resource. This might include documentation of how the tribe has administered and monitored energy leases or descriptions of experienced staff and departments within the tribe—all of which were previously required to demonstrate tribal capacity. In addition, the regulations do not mention how the Secretary will consider the tribe's certification or documentation as a qualified Indian tribe or the types of documents a tribe will need to produce to meet the definition of qualified Indian tribe. Further, such documentation may inadvertently require a tribe to demonstrate to the Secretary it has sufficient capacity to develop its energy resources, which ITEDSA 2017 sought to mitigate by removing tribal capacity requirements.

An option for Congress is to clarify how a tribal certification should be treated by the Secretary, which may result in less confusion for tribes moving forward.

## **Financial Assistance for TERA implementation**

ITEDSA 2017 states that a TERA is separate from an AFA and appears to require an AFA only when a tribe requests funding amounts from the Secretary that will not be spent as a result of the tribe carrying out the federal activity. The regulations state the Secretary will provide such amounts only upon written request of the tribe, they do not expressly require an AFA or address how AFAs are processed separately from a TERA.

Additionally, ITEDSA 2017 expressly required regulatory requirements addressing how the Secretary will provide tribes lists and associated amounts of activities the Secretary will not have to spend as a result of the tribes carrying out the federal activity. These requirements do not appear in the 2019 TERA regulations. Instead, the Secretary addressed AFAs and ordered lists of contractible federal functions to be prepared through S.O. 3377. Although a federal agency has some discretion in developing and implementing statutory directives, generally speaking, the more precise statutory directives are, the less discretion an agency has to independently develop policy objectives. DOI did not incorporate regulatory requirements addressing contractible federal functions as specified by ITEDSA 2017, which may be a potential issue for Congress.

Another issue for Congress could be whether the implementation of a TERA is ultimately delayed or affected if DOI does not provide a list of contractible federal functions for all applicable energy sources, including both renewables and nonrenewables. Like TERAs, DOI and tribes cannot contract for inherently federal functions in an AFA. ITEDSA 2017 mandates that a TERA's effective date or implementation cannot be delayed or affected by the time needed for the Secretary to make funding calculations or for the adoption of an AFA. The 2019 regulations require that a TERA must be in effect before the Secretary will provide funding. Although the Secretary issued S.O. 3377, which requires a listing of contractible federal functions to be made available by mid-March 2020, a listing had not been posted publicly on BIA's website as of June

2020. Additionally, S.O. 3377 is specific to oil and gas only, which could mean a delay in the funding calculations for tribes wishing to enter into a TERA for coal or renewable energy development.

Congress also may consider other related GAO findings and recommendations regarding tribal administration of federal programs. In a 2019 report, GAO stated that a factor hindering tribal administration of federal programs is a tribe's capacity to assume a federal program.<sup>106</sup> GAO also found other factors that hinder tribes' ability to use self-determination contracts and self-governance compacts, including (1) BIA's approach for sharing key information with tribes seeking to assume a federal program, (2) DOI's process to disburse funds to tribes associated with self-determination contracts and self-governance compacts, and (3) BIA's management and maintenance of the federal programs that tribes seek to assume.<sup>107</sup> Such hindrances could also be concerns for tribes wishing to pursue an AFA to assist with TERA implementation.

An option for Congress is to consider seeking clarification from DOI on the status of the listing of contractible functions and how DOI plans to process AFAs separately from TERAs. Providing clarity to tribes and removing potential barriers to fully implementing a TERA could bolster a tribe's ability to take over a federal activity that may later assist a tribe in relying less on federal funding in the future. This, in turn, may provide tribes the opportunity to build capacity and take on additional programs in the energy context.

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<sup>106</sup> GAO-19-87, p. 11.

<sup>107</sup> GAO-19-87, p. 13.

## Appendix. Tribal Energy Resource Agreement (TERA) Submittal Requirements

**Table A-1** compares the statutory and regulatory requirements for a tribal energy resource agreement (TERA). The left column lists the statutory requirements under 25 U.S.C. §3504 applicable to TERA provisions. The right column lists the regulatory requirements under 25 C.F.R. §§224.63 and 224.52 applicable to TERA provisions. Some requirements have been summarized or condensed.

**Table A-1. A Comparison of the Statutory and Regulatory Tribal Energy Resource Agreement (TERA) Requirements**

Statute	Regulation
The tribal energy resource agreement (TERA) must include one or more provisions requiring periodic review and evaluation of the tribe's performance under the TERA and the Secretary of the Interior's (Secretary's) authority to reassume activities upon a finding of imminent threat to physical trust asset. [25 U.S.C. §§3504(e)(2)(B)(ii); 3504(e)(2)(D)]	A provision for the Secretary of the Interior's (Secretary's) periodic review and evaluation of the tribe's performance under a tribal energy resource agreement (TERA). [25 C.F.R. §224.63(a)] 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. [25 C.F.R. §224.63(b)]
The terms for a lease or business agreement executed under an approved TERA could not exceed 30 years for energy development projects, except for lease terms of oil and gas production, which cannot exceed 10 years (oil and gas leases may extend past the 10-year term as long as oil or gas is produced in paying quantities). The term for a right-of-way for a pipeline or for electricity transmission or distribution under an approved TERA cannot exceed 30 years. [25 U.S.C. §§3504(a)(2)(B); (b)(3)]	Express limitations on duration of leases, business agreements, and rights-of-way. [25 C.F.R. §224.63(d)(1)]
Address amendments and renewals. [25 U.S.C. §3504(e)(2)(B)(iii)(I)]	Mechanisms for amendment, transfer, and renewal. [25 C.F.R. §224.63(d)(2)]
Address the economic return to the Indian tribe under leases, business agreements, and rights-of-way. [25 U.S.C. §3504(e)(2)(B)(iii)(II)]	Mechanisms for obtaining, reporting and evaluating the economic return to the tribe. [25 C.F.R. §224.63(d)(3)]
Establish requirements for environmental review: (1) A process for ensuring that <ul style="list-style-type: none"> <li>the public is informed of, and has reasonable opportunity to comment on, any significant environmental impacts of the proposed action;</li> <li>the tribe provides responses to relevant and substantive public comments on any impacts before the tribe approves the lease, business agreement, or right-of-way;<sup>a</sup></li> </ul> (2) Sufficient administrative support and technical capability to carry out the environmental review process; and (3) the tribes' oversight of energy development activities by another party under any lease, business agreement, or right-of-way entered into under a TERA,	Provisions for an environmental review process that (1) 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; (2) Provides for tribal responses to relevant and substantive public comments before tribal approval of the lease, business agreement, or right-of-way; (3) Provides for sufficient tribal administrative support and technical capability to carry out the environmental review process; and (4) 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



Statute	Regulation
to determine whether the activities are in compliance with the TERA and applicable federal environmental laws. [25 U.S.C. §§3504(e)(2)(B)(iii)(III), 3504(e)(2)(C)]	activities comply with the TERA and applicable federal and tribal environmental laws. [25 C.F.R. §224.63(c)]
Ensure compliance with all applicable environmental laws, including a requirement that each lease, business agreement, and right-of-way state that the lessee, operator, or right-of-way grantee shall comply with all such laws. [25 U.S.C. §3504(e)(2)(B)(iii)(IV)]	Assurances of the tribe's compliance with all applicable environmental laws. [25 C.F.R. §224.63(d)(4)] Requirements that the lessee, operator, or right-of-way grantee will comply with all applicable environmental laws. [25 C.F.R. §224.63(d)(5)]
N/A	Identification of tribal representatives with the authority to approve a lease, business agreement, or right-of-way and the related energy development activities. [25 C.F.R. §224.63(d)(6)]
Provide for public notification of final approvals. [25 U.S.C. §3504(e)(2)(B)(iii)(V)]	Public notification that a lease, business agreement, or right-of-way has received final tribal approval. [25 C.F.R. §224.63(d)(7)]
Establish a process for consultation with any affected states regarding off-reservation impacts, if any. [25 U.S.C. §3504(e)(2)(B)(iii)(VI)]	A process for consultation with affected states regarding off-reservation impacts, if any. [25 C.F.R. §224.63(d)(8)]
Describe the remedies for breach of the lease, business agreement, or right-of-way. [25 U.S.C. §3504(e)(2)(B)(iii)(VII)]	A description of remedies for breach. [25 C.F.R. §224.63(d)(9)]
Require each lease, business agreement, and right-of-way to include a statement that, if any of its provisions violates an express requirement of the TERA (1) the provision shall be null and void; and (2) if the Secretary determines the provision to be material, the Secretary may suspend or rescind the lease, business agreement, or right-of-way or take other appropriate action that the Secretary determines to be in the best interest of the tribe. [25 U.S.C. §3504(e)(2)(B)(iii)(VIII)]	A statement that any provision that violates an express term or requirement of the TERA is null and void. [25 C.F.R. §224.63(d)(10)] 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. [25 C.F.R. §224.63(d)(11)]
Require each lease, business agreement, and right-of-way to provide that it will become effective on the date on which a copy of the executed lease, business agreement, or right-of-way is delivered to the Secretary. [25 U.S.C. §3504(e)(2)(B)(iii)(IX)]	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 Secretary 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. [25 C.F.R. §224.63(d)(12)]
Include citations to tribal laws, regulations, or procedures, if any, that set out tribal remedies that must be exhausted before a petition may be submitted to the Secretary. [25 U.S.C. §3504(e)(2)(B)(iii)(X)]	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; and (2) provide remedies that petitioning parties must exhaust before filing a petition with the Secretary. [25 C.F.R. §224.63(e)]
N/A	Provisions that require a tribe to provide the Secretary with citations to any tribal laws, regulations, or



Statute	Regulation
	procedures the tribe adopts after the effective date of a TERA that establish N/A, amend, or supplement tribal remedies that petitioning parties must exhaust before filing a petition with the Secretary. [25 C.F.R. §224.63(f)]
N/A	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. [25 C.F.R. §224.63(g)]
Identify and notify the tribe of financial assistance, if any, to be provided by the Secretary to the tribe to assist in the TERA implementation, including the environmental review of individual projects. [25 U.S.C. §3504(e)(1)(B)(iii)]	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. [25 C.F.R. §224.63(h)]
Require that the tribe, as soon as practicable, give written notice to the Secretary of (1) any breach or other violation by another party of any provision in a lease, business agreement, or right-of-way entered into under the TERA, and (2) any activity or occurrence under a lease, business agreement, or right-of-way that constitutes a violation of federal environmental laws. [25 U.S.C. §3504(e)(2)(B)(iii)(XI)]	Provisions that require a tribe to notify the Secretary in writing, as soon as practicable after the tribe receives notice of a violation or breach. [25 C.F.R. §224.63(i); see also 25 C.F.R. §224.87, providing additional information]
N/A	Provisions that require the tribe to adhere to government auditing standards and to applicable continuing professional education requirements. [25 C.F.R. §224.63(j)]
If a TERA, or a lease, business agreement, or right-of-way, permits payments directly to the tribe, information and documentation of those payments sufficient to enable the Secretary to discharge the trust responsibility of the U.S. to enforce the terms of, and protect the rights of the Indian tribe under, the lease, business agreement, or right-of-way. [25 U.S.C. §3504(e)(5)(B)]	Provisions that require the tribe to submit to the Secretary information and documentation of payments made directly to the tribe in order to enable the Secretary to discharge the trust responsibility of the U.S. 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. [25 C.F.R. §224.63(k)]
N/A	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. Tribes may use departmental records retention procedures under the Federal Records Act (44 U.S.C. Chapters 29, 31, and 33) as a framework, which enables 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

Statute	Regulation
	(2) Any provision of a lease, business agreement, or right-of-way violates the TERA. [25 C.F.R. §224.63(l)]
<p>Include a certification by the tribe that it has</p> <ul style="list-style-type: none"> <li>carried out a contract or compact under Title I or IV of the Indian Self-Determination and Education Assistance Act (25 U.S.C. §5301 et seq.) for a period of not less than three consecutive years ending on the date on which the tribe submits the application without material audit exception (or without any material audit exceptions that were not corrected within the three-year period) relating to the management of tribal land or natural resources; or</li> <li>substantial experience in the administration, review, or evaluation of energy resource leases or agreements or has otherwise substantially participated in the administration, management, or development of energy resources located on the tribal land of the tribe. [25 U.S.C. §3504(e)(2)(B)(iii)(XII)]</li> </ul>	[Not a TERA provision requirement in the regulations. See instead TERA application requirements, 25 C.F.R. §224.53(a)(4).]
At the option of the tribe, identify which functions, if any, authorizing any operational or development activities pursuant to a lease, right-of-way, or business agreement approved by the tribe, that the tribe intends to conduct. [25 U.S.C. §3504(e)(2)(B)(iii)(XIII)]	At the option of the tribe, identify which functions, if any, the tribe intends to conduct to authorize any operational or development activities pursuant to a lease, business agreement, or right-of-way approved by the tribe.
N/A	<p>A TERA under this part</p> <ul style="list-style-type: none"> <li>may include development of all or part of a tribe's energy resources;</li> <li>must specify the type of energy resource included;</li> <li>may include assumption by the tribe of certain activities normally carried out by DOI, except for inherently federal functions; and</li> <li>must specify the services or resources related to the specific activity related to energy resource development that the tribe proposes to assume from DOI. [25 C.F.R. §224.52]</li> </ul>

**Source:** Prepared by CRS with information from 25 U.S.C. §3504, 25 C.F.R. §224.63, and 25 C.F.R. §224.52.

**Notes:** All references to the Secretary refer to the Secretary of the Interior.

- a. 25 U.S.C. §3504(e)(2)(C)(ii) appears to be redundant to 25 U.S.C. §3504(e)(2)(C)(i) and is not included here.

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