



THE SECRETARY OF THE INTERIOR
WASHINGTON

ORDER NO. 3377

Subject: Contractibility of Federal Functions for Oil and Gas Development on Indian Lands

Sec. 1 Purpose. This Order is intended to provide policy guidance on contractible Federal functions in support of tribal energy resource agreements (TERAs) relating to energy resource development. This Order further identifies actions needed to implement such guidance in a manner that promotes tribal self-determination and is consistent with the President's national policy of increasing utilization of domestic energy resources for greater prosperity as described in Executive Order 13783, "Promoting Energy Independence and Economic Growth," dated March 28, 2017, and Executive Order 13868, "Promoting Energy Infrastructure and Economic Growth," dated April 10, 2019.

Sec. 2 Authorities. This Order is issued under the authority of Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), as amended, the Department's statutory authority for contracting, including, the Indian Tribal Energy Development and Self-Determination Act of 2005 (Act) (Pub. L. No. 109-58, 119 Stat. 763, 25 U.S.C. §§ 3501-3504), as amended by the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (Amendments) (Pub. L. No. 115-325), and other relevant statutes and regulations.

Sec. 3 Background. In August 2005, the President signed into law the Act, authorizing Federally recognized Tribes to apply for and enter into TERAs with the Secretary of the Interior (Secretary). Upon the Secretary's approval of a TERA, an applicant Tribe may then enter into certain energy-related business agreements and leases and grant rights-of-way for energy resource development, including oil and gas development, on tribal lands without the review and approval of the Secretary. The Act was intended to further the Federal Government's policy of providing enhanced self-determination and economic development opportunities for Tribes by promoting tribal oversight and management of energy resource development on tribal lands.

Under final regulations promulgated in 2008 by the Bureau of Indian Affairs (BIA) implementing TERAs (Final Rule), the TERA process is administered by the Department's Office of Indian Energy and Economic Development (IEED). *See* 25 CFR 224. Although the Department has discussed the TERA process with several Tribes, to date no Tribe has submitted an application.

A Tribe may include in a proposed TERA "assumption by the tribe of certain activities normally carried out by the Department, except for inherently Federal functions." 25 CFR 224.52(c). In the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (Pub. L. No. 115-325, title I, §103(a)(4)(B)(ii)(II)(ee), 132 Stat. 4454), Congress amended the Act to require that a TERA, "at the option of the Indian 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 Indian tribe, that the Indian tribe intends to conduct.” 25 U.S.C. § 3504(e)(2)(B)(iii)(XIII).

The preamble to the regulations notes that “[i]t is the Secretary’s policy to make available to a tribe under an approved TERA all administrative functions that may be lawfully contracted under the [Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA)], as amended, and the Federal Oil and Gas Royalty Management Act.” 73 Fed. Reg. 12808, 12810 (March 10, 2008). Beginning in January 2006, the Department has received several requests to define what constitutes “inherently Federal functions” for the purposes of the Act. Since issuance of the Final Rule in March 2008 and until the date of this Order, the Department’s consistent reply has been that it would not further define “inherently Federal functions” and that such determinations would be made on a case-by-case basis, consistent with previous ISDEAA guidance provided by the Department’s Solicitor. Memorandum from the Solicitor to Assistant Secretaries and Bureau Heads on the Subject: Inherently Federal Functions Under the Tribal Self-Governance Act (dated, May 17, 1996) (1996 Solicitor’s Memorandum).

Sec. 4 Basis for Identifying Which Functions are Inherently Federal. This Order is being issued in response to several requests from Tribes for the Department to provide clarity on the Federal functions that are contractible under an approved TERA. Since most of the discussions with Tribes concerning TERAs to date have involved conversations related to fluid mineral development, specifically concerning oil and gas, this Order addresses “inherently Federal” oil and gas functions. This action is consistent with a recommendation received in January 2019 from the Government Accountability Office that the Assistant Secretary – Indian Affairs (AS-IA) issue guidance clarifying what constitutes “inherently Federal functions” for tribally-administered Federal programs and develop a process that results in consistent determinations for inherently Federal functions. U.S. Gov’t Accountability Office. GAO 19-87, *Indian Programs: Interior Should Address Factors Hindering Tribal Administration of Federal Programs* (2019).

Typically, when the Department determines which functions are “inherently Federal” for purposes of an ISDEAA contract or compact, the Office of the Solicitor or the appropriate Bureau/Office examines a list of functions prepared by an applicant Tribe and, after review, informs the applicant Tribe which of the functions are contractible. With respect to TERAs, however, the Department has not previously received such a list, as the nature of the Department’s management of energy resources on tribal lands – involving both the BIA and the Bureau of Land Management (BLM) – have created uncertainty among Tribes as to which functions are contractible.

Sec. 5 Directives. Consistent with applicable laws and regulations, the actions listed below are to be taken to provide a mechanism for Tribes to avail themselves of the opportunities provided to them under the Act. **All of the following actions are to be taken within 90 days of the date of this Order.**

a. Office of the Solicitor. The Office of the Solicitor will:

(1) Complete a review of the functions and sub-functions outlined in the Onshore Energy and Mineral Lease Management Interagency Standard Operating Procedures

(SOP) issued by the Assistant Secretary – Policy, Management and Budget on September 28, 2013. The SOP details the processes that the BIA, the BLM, the Office of Natural Resources Revenue (ONRR), the Appraisal and Valuation Services Office, and the Office of the Special Trustee for Americans Indians all undertake when managing mineral development on Federal and Indian lands.

(2) Develop a list of “inherently Federal” functions related to fluid mineral development that are not available for inclusion in an approved TERA. These determinations need to be consistent with the 1996 Solicitor’s Memorandum, the Office of Management and Budget Circular A-76, and the 1998 Federal Activities Inventory Reform Act (31 U.S.C. § 501 note).

(3) Develop a list of contractible Federal functions related to fluid mineral development that are available for inclusion in an approved TERA.

b. Bureaus/Offices.

(1) BLM and ONRR will review and determine whether any regulation change or delegation of authority is required for the proper administration of Pub. L. No. 93-638 contracts and self-governance annual funding agreements.

(2) BIA, BLM, ONRR, and the Office of Self-Governance will enter into an inter-agency agreement to assist in the coordination, planning, and implementation of an ISDEAA program within the BLM and ONRR.

(3) BIA will provide training and technical assistance to BLM and ONRR on the administration of Pub. L. No. 93-638 contracts and self-governance annual funding agreements.

Sec. 6 Effect of the Order. This Order and any resulting reports or recommendations are not intended to, and do not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person.

Sec. 7 Expiration Date. This Order is effective immediately and will remain in effect until the appropriate provisions are incorporated into the Departmental Manual, or until the Order is amended, superseded, or revoked, whichever occurs first.



Secretary of the Interior

Date: DEC 16 2019