

**Royalty Policy Committee – Tribal Energy Subcommittee**  
**June 6, 2018**

Proposed Clarification of “Inherently Federal Functions” in  
Tribal Energy Resource Agreements Under 25 C.F.R. Part 224  
And Proposed Recommendation to the Secretary of the Department of the Interior

Background

Title V of the Energy Policy Act of 2005 amended existing statutes concerning development of tribal energy resources to establish a process by which a tribe can obtain a Tribal Energy Resource Agreement (TERA) granting authority to the tribe to review, approve and manage leases, business agreements and rights-of-way for energy development on tribal lands without the approval of the Secretary of the Interior. In 2008, DOI issued regulations, codified at 25 CFR Part 224, establishing the process for tribes to apply for and manage TERAs.

The TERA process has to date been unsuccessful. No tribes have formally applied to DOI for a TERA; various legal uncertainties and procedural barriers in the TERA application and management have been cited by tribes as reasons for not doing so. One specific reason that has been identified by tribes is the lack of certainty as to what permitting and regulatory functions can be delegated to a tribe under a TERA. 25 CFR § 224.52 allows the assumption by a tribe of activities normally carried out by DOI “except for inherently federal functions.” To date, however, DOI has not provided any guidance on what is considered an inherently federal function that must be retained by the Department when approving a TERA.

Proposal

The Tribal Energy Subcommittee proposes that the Secretary clarify what constitutes an inherently federal function, with the goal of having DOI issue guidance to tribes seeking approval of a TERA. As an initial matter, it should be noted that otherwise required reviews under the National Environmental Policy Act (NEPA) and Section 106 of the National Historic Policy Act are not applicable to tribal approval of leases, business agreements or rights-of-way under an approved TERA, because there is no federal action in either case. Instead, under 25 U.S.C. §3504(e)(2)(C), an approved TERA must include environmental and cultural resource review and protection procedures. Since those functions have been delegated to tribes, they are not, by definition, inherently federal functions.

Similarly, to the extent that a particular tribe has been granted “treatment as a state” under federal environmental laws, or otherwise delegated specific regulatory authority

under other applicable law, regulatory and permitting actions taken under those delegations should not be considered inherently federal.

For other federal functions, the Subcommittee recommends that one method of analyzing what other functions are “inherently federal” is to ask the question of which regulatory functions would remain in federal control if the lands in question were private or state lands, instead of tribal trust lands. There is no reason that tribes, upon the required showing of capacity, should not be able to assume responsibilities that are currently handled by state. Conversely, there are some federal regulatory functions that are universally applicable, and may therefore be considered inherently federal.

### Recommendation

Below is a list of functions that are regularly performed by states in managing the development of energy resources on private and state lands. The Tribal Energy Subcommittee recommends that the Secretary issue guidance clarifying that the following items are not inherently federal functions and therefore, appropriate for tribes to manage in a TERA:

- Surface and mineral leasing
- Oilfield regulation (APD approvals, site layout, sundry notices for petroleum operations)
- Approval of rights-of-way for access to energy development sites
- Inspection and enforcement of all permitted activities
- General land use management, such as determining what lands are available for leasing and under what conditions
- Plugging and abandonment of oil and natural gas wells and reclamation of abandoned energy development sites to return them to their original condition
- Management of wildlife and vegetation, including threatened and endangered species listed under the Endangered Species Act.

This is not a comprehensive list of all activities; it is a manageable number of activities for the Secretary to analyze to provide timely guidance. Finally, the Tribal Energy Subcommittee requests the Secretary to provide any additional guidance regarding inherent federal functions that the Secretary deems appropriate