

TERA burdens for Tribes and issues with the regulations and statutes

Background:

“In 2013, Congress, the Office of Management and Budget (OMB), and tribes expressed renewed interest in tribal energy resource agreement (TERA) legislation and regulation. Congress noted that no tribe had yet obtained a TERA, and started considering legislative “fixes” to make the TERA application and approval process more streamlined. OMB saw the same issue and used its role enforcing the Paperwork Reduction Act to ask whether there are regulatory adjustments that could reduce the burden on tribes otherwise interested in TERAs. At the same time, two tribes decided to take a fresh look at the TERA process, to see whether it could be useful to them.” Please see Attachment 3 for greater detail.

Also in 2013, IEED has “responded to several calls for ideas on how to simplify or otherwise amend the TERA process to make it more readily usable, and our thoughts on that topic remain under consideration. We also attended the August 20-21, 2013 Four Corners Tribal Summit in Ignacio, Colorado where we conducted a TERA brainstorming session to seek further views on whether and how the TERA process could be improved. The Jicarilla Apache Nation, Navajo Nation, Northern Ute, Southern Ute, and Ute Mountain Ute tribes that attended the Summit offered their thoughts.” Furthermore, “In addition to the expertise of our Office, the Energy Act also allows IEED to periodically make available tribal energy capacity-building (TEDC) grants to tribes wishing to build their capacity to develop tribal energy resources. As of FY 2015 we have awarded TEDC 10 grants.” The details of this meeting are described in Attachment 2, and the details of the capacity grant are discussed in the “Actions Taken” section of this memorandum.

The basic conclusion of the work done for this recommendation was “while thoughtful and thorough, few of the suggestions at this brainstorming session suggested a silver bullet to “fix” TERA legislation, regulations, or procedure, and there were no real “ah-Ha!” moments. One thought that merits further review, however, may be the second suggestion under Legislative Changes, above. Perhaps an amendment to the IMDA or some other statute, currently used to get at subsurface mineral development, would be simpler than trying to revise and simplify the lengthy TERA legislation.” Please see Attachment 3 for more details.

Actions Taken: IEED officials considered multiple requests for reflection on improving the TERA process, with internal meetings, meetings with two tribes then interested in pursuing a TERA, and a brainstorming session at the Four Corners Tribal Energy Summit in August, 2013. The general consensus was that regulatory and administrative procedures cannot be simplified to any great extent, because they largely track the detailed and complex TERA statute. Rather than try to simplify the procedures required by statute, however, many discussion participants thought it would be quicker and cleaner to modify another, existing statute (such as the Indian Minerals Development Act) and insert provisions similar to those found in the HEARTH Act. Doing so would allow tribes to adopt regulatory procedures similar to those followed by Federal officials, and implement them without extensive Department involvement. This idea was recommended to the Department by a joint SOL/IEED proposal, which is still under consideration by the Department.

The TEDC grant solicitation was revised to better enhance tribe's ability to exercise tribal self-determination over oil and gas operations, this is in direct response to addressing capacity recommendations. TEDC will provide tribes with funding to analyze training needs and capacity gaps for tribes on the policies and procedures for oil and gas leasing and plan to develop model policies and procedures that tribes could adopt to exercise authority over all or portions of oil and gas development. The grant solicitation for TEDC was issued and 10 grants were awarded in FY 2015. See attached revised TEDC grant solicitation.

See Attachments

MEMO

To: Karen Atkinson, Director, IEED
From: David Johnson, Program Analyst
Re: TERA Progress in 2013
Date: December 3, 2013

In 2013, Congress, the Office of Management and Budget (OMB), and tribes expressed renewed interest in tribal energy resource agreement (TERA) legislation and regulation. Congress noted that no tribe had yet obtained a TERA, and started considering legislative “fixes” to make the TERA application and approval process more streamlined. OMB saw the same issue and used its role enforcing the Paperwork Reduction Act to ask whether there are regulatory adjustments that could reduce the burden on tribes otherwise interested in TERAs. At the same time, two tribes decided to take a fresh look at the TERA process, to see whether it could be useful to them. This memo summarizes what has resulted from this recent interest.

Legislation.

Concerning Congress, we believe efforts to streamline the TERA process to date have been misguided. Congress’ approach thus far has been to shorten the time the Interior Secretary has to determine whether a tribe has the capacity to perform energy development functions identified in its TERA application, and to create something of a standard for the determination of tribal capacity. Shortening deadlines would be unlikely to help, and may in fact make matters worse. There is no indication Secretarial delay or inaction is the problem. Rather, the problem seems to be that the law is too complex, has no associated funding, contains ambiguous environmental standards likely to induce litigation regardless of approach, and contains certain standards that appear poorly matched with the notion of tribal sovereignty (such as a high level of public scrutiny required for projects). As for tribal capacity determinations, some guidance might be useful if done correctly, but so far the standards suggested do not appear quite ready.

Rather than try to respond to this suggested legislation, we took advantage of a request for legislative drafting services and proposed alternative legislation: a modification of the Indian Minerals Development Act (IMDA) adopting an approach similar to that used in the HEARTH Act. This approach would let tribes enter into IMDA agreements without Secretarial approval, merely by adopting regulations similar to those that bind DOI. This way, tribes could quickly and easily pursue the vast majority of their energy projects without following the daunting procedures associated with TERAs, and without DOI having to reach a determination of tribal capacity at all. But it is not clear whether this approach has been endorsed by senior DOI officials, so we may yet have to attempt to significantly modify what we see as unfortunate Congressional efforts.

Regulation/Administration.

OMB's interest does not afford us much room to make a helpful response. Most of the regulatory and administrative features of TERAs involve only slight embellishment of statutory requirements. Thus, to cut down on paperwork or administrative work, we could not simply modify or waive regulations at 25 CFR Part 224. The underlying statute would have to be changed. Nonetheless, we anticipate needing to conduct a thorough review of our regulations and procedures soon, to search for anything we may have overlooked.

Tribal Interest.

Two tribes have expressed interest in TERAs during 2013: the Moapa Band of Paiutes (which currently hosts the only two commercial scale solar projects on any Indian reservation) and the Southern Ute Indian Tribe (which suggested the TERA legislation in the first place).

We conducted a pre-TERA application consultation with Moapa on September 10-11, 2013. Moapa is interested primarily in developing more solar energy. Our meeting was very informative, but inconclusive. It appears the tribe is internally divided over what further tribal energy projects it would like to pursue, if any. We are therefore unable to proceed with TERA activities involving Moapa until that tribe makes some internal decisions.

We also conducted pre-TERA application consultation meetings with Southern Ute on August 22 and again on November 21-22, 2013. Southern Ute is interested primarily in taking over greater control of its oil and gas development activities. The tribe has made it plain that it is not yet committed to submitting a TERA application, but it has nonetheless devoted a great deal of attention to these meetings, with good representation from tribal council members, legal staff, administrative personnel, environmental staff, etc. The level of exploration and detail at these meetings – from what process (638, TERA, HEARTH Act, etc.) would make the most sense for the assumption of certain functions, to the precise limits of “inherently Federal functions” that the tribe may not be able to assume under any circumstance – is helping both the tribe determine its level of interest in pursuing a TERA under existing law, and how IEED would broker a TERA among DOI bureaus in the context of oil and gas. Thus, even if Southern Ute eventually decided not to apply for a TERA, the nature of its conversations with IEED have been enormously helpful in distilling concepts for future TERA discussions, whether about modifying current law, or preparing an application under existing law.

Tribal Energy Resource Agreements (TERAs) and Capacity Building

The Energy Act of 2005 introduced a procedure to allow tribes to develop energy resources on tribal trust land without Secretarial approval, pursuant to a tribal energy resource agreement (TERA). Like other important Indian initiatives with significant potential, however, the TERA concept has been slow to catch on. One reason is that a tribe must have the demonstrated capacity to develop the energy resource(s) identified in the TERA, and few tribes have had the opportunity to establish the expertise and internal structure needed to meet this requirement. Anticipating this problem, the Energy Act also provides IEED with some tools to help interested tribes build their energy development capacity.

Since TERAs offer the opportunity not only to spur the development of domestic conventional and renewable energy resources, consistent with the Administrations “all of the above” energy strategy, but also an opportunity to vastly improve the economies of Indian nations with tribal energy resources, the Office of Management and Budget, Congress and the tribal community all have taken a renewed interest in the TERA concept. This year we have responded to several calls for ideas on how to simplify or otherwise amend the TERA process to make it more readily usable, and our thoughts on that topic remain under consideration. We also attended the August 20-21, 2013 Four Corners Tribal Summit in Ignacio, Colorado where we conducted a TERA brainstorming session to seek further views on whether and how the TERA process could be improved. The Jicarilla Apache Nation, Navajo Nation, Northern Ute, Southern Ute, and Ute Mountain Ute tribes that attended the Summit offered their thoughts, which we also passed along to those interested in reviewing TERA legislation and regulatory procedures.

Meanwhile, both the Southern Ute Indian Tribe and the Moapa Band of Paiutes requested pre-application TERA consultation meetings in accordance with 25 CFR §224.51 this year. We conducted these consultations on August 22 and September 10-11, 2013 respectively. Southern Ute, a well-known leader among tribes engaged in conventional energy development, has already requested a follow-up meeting to further explore the parameters of a TERA application. Moapa, the only tribe in the nation to have begun development of commercial-scale solar energy projects, has indicated that it too will be interested in further TERA discussions once it has more closely considered its next solar project.

In addition to the expertise of our Office, the Energy Act also allows IEED to periodically make available tribal energy capacity-building (TEDC) grants to tribes wishing to build their capacity to develop tribal energy resources. We have prepared a fresh grant solicitation for this purpose, and are awaiting its publication in the Federal Register.

MEMO

To: Karen Atkinson, Director, IEED

From: David Johnson, Program Analyst

Re: TERA Brainstorming Session, Four Corners Tribal Energy Summit, Ignacio, Colorado, August 20-21, 2013

Date: December 3, 2013

On August 20-21, 2013, the Southern Ute Tribe hosted what it billed as the first annual energy summit for area energy tribes of the San Juan Basin: itself, the Navajo Nation, the Northern Ute Tribe, the Jicarilla Apache Nation, and the Ute Mountain Ute Tribe. The goal was to discuss and share information and experiences concerning the development of tribal oil and gas resources, to see where the tribes could initiate changes that might improve Federal permitting procedures and other perceived areas of concern. The Summit was intended to help the tribes get prepared for what they believe will be a new boom in oil and gas development in the Mancos Shale deposits of the San Juan Basin, made recoverable by technological advances like horizontal drilling and hydraulic fracturing.

The Summit was attended by roughly 70 attendees, consisting of tribal leaders, tribal technology experts, attorneys, Federal officials from Interior's Office of Indian Energy and Economic Development and the Bureau of Land Management, and the Chief of Staff for the U.S. House of Representatives Subcommittee on Natural Resources.

Summit presentations and discussion began with a description of the energy development history of the Southern Ute Tribe. Participants then heard a detailed presentation concerning the potential of the San Juan Basin in general, and the Mancos Shale in particular. The subject of hydraulic fracturing came next, followed by presentations by each of the tribes concerning their past, present, and anticipated energy development activities.

Our office was already planning to be in town to conduct a tribal energy resource agreement (TERA) pre-application consultation pursuant to 25 U.S.C. §3503(c) and 25 CFR §224.51, so we agreed to attend the Summit and make a presentation concerning TERAs. TERAs were created in the 2005 Energy Act, and were designed to allow tribes which demonstrate the capacity to handle their own energy development activities (*i.e.*, negotiating and approving leases, business agreements, and rights-of-way) the ability to do so without seeking approval in each case from the Secretary of the Interior. No tribe has applied for a TERA yet, however, and the Administration and Congress are both wondering why. Our presentation on TERAs was designed to encourage participants to discuss what the main reasons might be that no TERAs have yet been sought, and how legislative or administrative adjustments might encourage their future use.

What came up in conversation was as follows:

Legislative Changes –

1. Restrict the environmental review process tribes must follow. The tribes believe that many laws applicable to Federal lands ought not to apply to Indian lands, which they insist are *not* Federal lands. The tribes point out that, if they had true sovereignty, they should be able to decide for themselves what environmental analysis and precautions to conduct with respect to energy development. After all, they observe, it isn't as though they can be careless with their land base – the tribes aren't going anywhere.
2. Instead of addressing TERA legislation, consider modifying other laws that may be easier to adapt to a HEARTH Act-like process. Participants observed that TERA legislation may be too long and detailed to simplify without a huge effort at re-drafting. Other laws that involve leasing and/or mineral extraction might be comparatively simple to amend, adopting an approach like that used in the HEARTH Act, *e.g.*, allowing a tribe that adopts certain acceptable laws and practices to take over the functions those laws cover (without necessarily having the tribe prove in advance it has the “capacity” to follow or enforce its laws).
3. Provide funding as an incentive for a tribe to take over functions the Federal government would otherwise perform for free. Several participants noted that, unlike self-determination compacting or contracting, if a tribe takes over energy development functions that would otherwise have been performed by the Secretary, with a TERA the tribe does not get any portion of the funding the Secretary saves by no longer having to perform that function.
4. Reduce the public scrutiny associated with TERAs. Concerning the environmental review process, make it clear that persons who are not tribal members or immediate neighbors of the tribe have no right to comment on or challenge a proposal. (In judicial terms, this could be considered a standing issue.) Also, tribes are concerned that in general their projects are subject to more scrutiny when compared with States. Tribes made it abundantly clear that they do not want matters that should be driven by the internal deliberations of a sovereign political body to be complicated by persons or outside entities with no direct stake in the matter.
5. Streamline the capacity determination process. The concept of determining a tribe's “capacity” is peculiar to TERAs, and has never been fully fleshed out. That may be due in part to the broad number of possible energy development activities a tribe could potentially pursue under a TERA – from geothermal, to wind, to oil & gas, to solar, to biofuels. It seems likely that one could more readily determine what would qualify as tribal capacity once the scope of endeavor is better defined. But Congress could also change the TERA legislation to narrow the scope of what the Secretary uses to consider “capacity.”
6. Clarify the meaning of “inherent Federal functions” so that tribes can anticipate which activities they can assume in a TERA. To the extent that some aspect of developing a tribe's energy resources must be conducted by Federal officials in order to preserve an essential aspect of Federal duty, tribes would like to have that function defined in advance, so they don't waste time and effort developing an energy development plan for a TERA that cannot be approved.
7. Improve the right-of-way appraisal process (this actually isn't a TERA issue, but points out a frustration that would impede even a tribe that secured a TERA).

Administrative Changes –

1. Provide tribes with access to teams of Interior experts from different disciplines, when needed to cut through tough issues, administrative delays, and questionable decisions by line officials. (This is a resurrection of the One Stop Shop concept of assembling talent in one location to collaborate and quickly move project approvals. It isn't a TERA issue.)
2. Review earlier comments on TERAs made to OIEED by a tribal advisory committee, back when the regulations were being formulated. (These comments were of course considered at the time the current regulations were finalized by the Department. Studying them might offer some historical context, but absent new information suggesting they were not properly considered the first time, it may be that this exercise will not suggest significantly helpful administrative adjustments we can adopt today.)
3. Create a model TERA agreement. (Due to the potential breadth of activity a tribe can use a TERA to undertake, it may be more plausible to create several model TERA agreements, one for wind, one for oil and gas, etc.)
4. Improve the appraisal process. (This isn't a TERA issue.)

Conclusion.

While thoughtful and thorough, few of the suggestions at this brainstorming session suggested a silver bullet to “fix” TERA legislation, regulations, or procedure, and there were no real “ah-Ha!” moments. One thought that merits further review, however, may be the second suggestion under Legislative Changes, above. Perhaps an amendment to the IMDA or some other statute, currently used to get at subsurface mineral development, would be simpler than trying to revise and simplify the lengthy TERA legislation.