

**BEFORE THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON THE INTERIOR, ENERGY, AND ENVIRONMENT
UNITED STATES HOUSE OF REPRESENTATIVES**

**Prepared Statement of Honorable Tyson Thompson
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**On behalf of the
SOUTHERN UTE INDIAN TRIBE**

Hearing

"Examining Federal Programs that Serve Tribes and Their Members."

February 15, 2017, 2:00 p.m.

Rayburn House Office Building

I. Introduction.

Good afternoon, Chairman Farenthold, Ranking Member Plaskett, and Members of the Subcommittee. My name is Tyson Thompson. I am an elected member of the Southern Ute Indian Tribal Council, which is the governing body of the Southern Ute Indian Tribe (Tribe). Thank you for the opportunity to provide a statement on behalf of the Tribe regarding our experiences as they relate to recent studies and analyses conducted by the Government Accountability Office (GAO) and the Department of the Interior Office of Inspector General (OIG) on the management of federal programs that serve tribes and their members.

The Tribe has extensive experience with the federal government's, and particularly the Bureau of Indian Affairs', shortcomings with respect to Indian Energy Development. On several occasions, we have shared our stories with the GAO and with the OIG regarding Bureau of Indian Affairs (BIA) mismanagement of tribal energy resources and have assisted those agencies in identifying significant problems and potential solutions. Considering our experiences with the BIA and the conclusions reached in recent OIG and GAO studies and analyses on the management of federal programs that serve tribes, we are optimistic that this Congress, and this Subcommittee, is interested in this area of concern. Thank you for taking these reports and analyses seriously and for allowing the Tribe to share with you stories of our experience.

The Tribe, which comprises just over 1,500 members, is a leader in Indian Country with a demonstrated and sterling record of foresight and business acumen. The Tribe is the only Indian tribe in the nation with an AAA+ credit rating, which was earned through years of steady governance and successful and prudent business transactions. Though the Tribe has a diversified portfolio, energy development remains a key component of the Tribe's strategy, with approximately thirty percent of the Tribe's income coming from energy development. Accordingly, we are well positioned to speak to the relationship between energy development, prosperity, and tribal self-determination.

The Southern Ute Indian Reservation consists of approximately 700,000 acres of land located in southwestern Colorado. Approximately 311,000 acres of the Reservation is held in trust by the federal government for the benefit of the Tribe. As a result of the complex history of the Reservation, the Tribe also owns severed oil and gas minerals and coal estates that are held in trust by the United States on additional portions of the Reservation. Federal regulations require federal review and approval of even the most basic realty transaction occurring on lands and minerals held in trust for the Tribe on the Reservation. Because the federal role in tribal energy development has not always served or protected the Tribe's best interests, the Tribe learned early on that if it wanted something done correctly, it often just needed to do the work itself. This is an exercise of the Tribe's self-determination; the Tribe develops internal expertise, makes informed decisions about how and when mineral resources on the Reservation should be developed, and then assists the federal government to perform the federal government's role. In instances where the Tribe recognizes that it could do a better job than a federal agency (royalty accounting is a good example), the Tribe may choose to enter into a contract under the Indian Self-Determination and Education Assistance Act ("PL 93-638 contract"), which allows the Tribe to do the federal agency's work with the federal funding that would have gone to the federal agency to do that job. Choosing to pursue a PL 93-638 contract is one way to exercise tribal self-determination and help address the problem of understaffed and undertrained federal agencies bogging down tribal energy development decisions, but there are other solutions to this problem, such as modifying federal regulations, improving the system for hiring and training federal employees, and allowing tribes that choose to do so to take on a greater role in processing realty transactions.

II. Careful Planning Led the Southern Ute Indian Tribe to Become the Premier Indian Energy Developer in the United States.

The Tribe is a great example of the positive impacts of Indian energy development. Our Reservation is part of the San Juan Basin, which has been a prolific source of oil and natural gas production since the 1940s. Beginning in 1949, the Tribe began issuing leases under the supervision of the Secretary of the Interior. For several decades, we remained the recipients of modest royalty revenue, but were not engaged in any comprehensive resource management planning. That changed in the 1970s as we and other energy resource tribes in the West recognized the potential importance

of monitoring oil and gas companies for lease compliance and keeping a watchful eye on the federal agencies charged with managing our resources. In 1974 the Tribal Council placed a moratorium on oil and gas development on the Reservation until the Tribe could gain better understanding and control over the process. That moratorium remained in place for 10 years while the Tribe compiled information and evaluated the quality and extent of its mineral resources.

A series of events in the 1980s laid the groundwork for our subsequent success in energy development. In 1980, the Tribal Council established an in-house Energy Department, which spent several years gathering historical information about our energy resources and lease records. In 1982, following the Supreme Court's decision in *Merrion v. Jicarilla Apache Tribe*, the Tribal Council enacted a severance tax, which has produced more than \$800 million in revenue over the last three decades. After Congress passed the Indian Mineral Development Act of 1982, we carefully negotiated mineral development agreements with oil and gas companies involving unleased lands, and insisted upon flexible provisions that vested the Tribe with business options and greater involvement in resource development. Because the Tribe's leaders believed that the Tribe could do a better job of monitoring its own resources than federal agencies, shortly after passage of the Federal Oil and Gas Royalty Management Act of 1982, the Tribe entered into a cooperative agreement with the Minerals Management Service permitting the Tribe to conduct its own royalty accounting and auditing. The Tribe can attest to the importance of federal legislation that allows tribes the option to take on a greater role in energy development on their reservations.

In 1992, we started our own gas operating company, Red Willow Production Company, which was initially capitalized through a Secretariially-approved plan for use of \$8 million of tribal trust funds received by our Tribe in settlement of reserved water right claims. Through conservative acquisition of on-Reservation leasehold interests, we began operating our own wells and received working interest income as well as royalty and severance tax revenue. In 1994, we participated with a partner to purchase one of the main pipeline gathering companies on the Reservation. Today, the Tribe is the majority owner of Red Cedar Gathering Company, which provides gathering, processing, and treating services throughout the Reservation. Ownership of Red Cedar Gathering Company allowed us to put the infrastructure in place to further develop and market coalbed methane gas from Reservation lands and provided an additional source of revenue. Our tribal leaders recognized that the peak level of on-Reservation gas development would be reached in approximately 2005, and in order to continue our economic growth, we expanded operations off the Reservation.

These acts of energy development through self-determination are key to the Tribe's economic success. Today the Tribe, through its subsidiary energy companies, conducts sizeable oil and gas activities in approximately ten states and in the Gulf of Mexico. We are the largest employer in the Four Corners Region of southwest Colorado. Energy resource development has unquestionably had a great positive impact on the Tribe, our members, and the surrounding community. The regional

community college even has a new associate degree program in Tribal Energy Management, and because of the Tribe's vast experience in this realm, the college has enlisted the Tribe's assistance and input.

III. Indian Energy Development has an Enormous Impact on the Economic Prosperity of Tribes and the Livelihood of Individual Tribal Members.

Less than fifty years ago the Tribal Council had to suspend the practice of distributing per capita payments to tribal members because the Tribe could not afford them. Today the Tribe provides health insurance for its tribal members, promises all members a college education, and has a campus dotted with state-of-the art buildings. This success was not an accident. Without a prolonged effort to take control of its natural resources, the Tribe would not be the economic powerhouse that it is today. Our energy-related economic successes have resulted in a higher standard of living for our tribal members. Our members have jobs. Our educational programs provide meaningful opportunities at all levels. Our elders have stable retirement benefits. We have exceeded many of our financial goals, and we are well on the way to providing our grandchildren and their grandchildren the opportunity to maintain our Tribe and its lands in perpetuity.

Along the way, we have encountered and overcome numerous obstacles, some of which are institutional in nature. We have also collaborated with Congress over the decades in an effort to make the path easier for other tribes to take full advantage of the economic promise afforded by tribal energy resources. As we have stated repeatedly to anyone who will listen to us, "We are the best protectors of our own resources and the best stewards of our own destiny; provided that we have the tools to use what is ours." Successful energy development, in spite of institutional obstacles, has also enabled the Tribe to invest in diverse, non-energy projects, laying the foundation for long-lasting economic prosperity. For example, the Tribe has made real estate investments in eleven markets located in eight states. These investments include residential, commercial, industrial, and hotel properties in California, Nevada, Colorado, Texas, Kansas, Illinois, Ohio, and Maryland. Return on these investments has spurred further economic growth for the Tribe, which would not have been possible but for the Tribe's active efforts to control and develop its energy resources.

IV. Federal Oversight Often Impedes Tribal Self-Determination.

The Tribe has achieved its stature despite the federal government's stifling role in Indian energy development. We have been carrying this same message to Capitol Hill since at least 2002. A memorandum from our legal counsel to the Senate Committee on Indian Affairs' legal counsel dated June 30, 2002 states:

The problems with Secretarial approval of tribal business activities include an absence of available expertise within the agency to be helpful Some structural alternative is needed. The alternative should be an optional mechanism that allows tribes to elect

to escape the bureaucracy for mineral development purposes, provided the Secretary has a reasonable indication that an electing tribe will act prudently once cut free.

More than a decade later, the Tribe's longstanding concerns were supported by the findings of a 2015 GAO Report that weaknesses in the Bureau of Indian Affairs' (BIA) management of oil and gas resources contributed to a general preference by industry to acquire oil and gas leases on non-Indian lands over Indian lands. This conclusion comes as no surprise to the Tribe, which is all too aware of this reality. For example, the State of Colorado, which issues drilling permits on fee lands, typically issues a permit in approximately 45 days. If the permit is not issued within 75 days, the operator has a right to a hearing. In comparison, on tribal lands, BLM issues the permits to drill, which typically take four to six *months*. There are no regulatory commitments to a processing timeframe; operators must simply wait. In addition, permitting costs are much higher on tribal lands than on fee lands. The BLM's drilling permit fee is \$9,500.00, and none of that money goes to the Tribe. In comparison, a state drilling permit in Colorado is free. These disparities create a comparative disadvantage that is exacerbated on reservations like the Southern Ute Indian Reservation, where tribal land and non-Indian fee land are arranged like a checkerboard, and oil or gas operators can develop on non-Indian fee land for less time and money, while potentially depleting Indian minerals.

Despite the Tribe's decades-long success in managing its own affairs and conducting highly complex business transactions, both on and off of the Reservation, federal law and regulations still require federal review and approval of even the most basic realty transaction occurring on the lands held in trust for the Tribe on the Reservation. Federal involvement invariably delays a proposed tribal project. These delays are exacerbated by the fact that a federal approval often constitutes a federal action, which triggers environmental and other review requirements, even for simple and straightforward realty transactions. In essence, the Tribe's own lands are treated as public lands, and, if federal approval is involved, no action – not even some initiated by the Tribe itself – can occur until the federal government has analyzed the potential impacts. In order to eliminate these delays and in recognition of the Tribe's ability to protect its own interests and assets without assistance from federal agencies, the statutory and regulatory requirements for federal approval of tribal transactions must be modified so that federal review and approval of realty-related tribal projects is not required.

The Energy Policy Act of 2005 offered a new and creative alternative to this situation in the form of "Tribal Energy Resource Agreements" (TERAs), which are essentially bi-lateral agreements between an electing tribe and the Secretary of the Interior that would govern energy resource development on Indian lands. Under an approved TERA, a tribe would have the authority to negotiate and enter leases, business agreements, rights of way and other agreements without the prior review or approval of the Secretary.

Entering into a TERA would—at least in theory—address the problems the Tribe has faced. However, the implementing regulations diminished the scope of authority to be obtained by a TERA

tribe by preserving the federal government’s prerogative in carrying out an array of functions—called “inherently federal functions” in the vernacular—an undefined term that could render the Act’s goal of fostering tribal decision-making and self-determination practically meaningless. For example, the Tribe would like to have the authority to issue Applications for Permits to Drill (“APDs”), but it is not clear whether that is an “inherently federal function.” Despite the Tribe’s repeated requests for clarification of the TERA process, and in particular, for clarification on what constitutes an “inherently federal function” for which the Tribe would not be allowed to assume authority under the Department’s regulations, the Department of the Interior has refused to provide guidance. The Tribe has explained repeatedly why it has not entered into a TERA, and has even testified on the issue before the Senate Committee on Indian Affairs. So far, Congress has not enacted the amendments that would encourage tribes to assume greater responsibility for processing and approving energy transactions.

Fortunately, Indian energy legislation currently pending would address other inefficiencies in the TERA process, but does not address the “inherently federal function” dilemma. Just last week the Senate Committee on Indian Affairs approved legislation to address some of the weaknesses in the TERA mechanism. The Tribe strongly supports the bill (S.245) and is hopeful it will be enacted into law this year. The bill would help to address some of the problems the Tribe has identified in this testimony by allowing tribes to make the choice to play a larger role in the energy development process and to allow the United States to play a smaller role. This is a solution that could be achieved even despite federal funding and staffing shortages.

V. Willing and Able Tribes Should be Allowed Greater Authority over Energy Development on Tribal Lands.

Some tribes do not need or desire the current level of federal interference and “oversight” in tribal energy development, and in some instances like at Southern Ute, the federal “oversight” is a massive and quantifiable impediment to the Tribe’s ability to develop its own resources. The Tribe has consistently demonstrated that it can successfully complete major undertakings more quickly and effectively than federal agencies can.

For example, after a 2014 Office of Trust Review and Audit (OTRA) report revealed the massive mishandling of the Tribe’s priceless, historical trust and realty records at the Southern Ute Agency¹,

¹ The Tribe’s repeatedly-expressed concerns about delays in BIA approvals led to a series of independent governmental investigations and reports documenting the gross deficiencies at the agency, culminating in a report issued by the Interior’s Office of Inspector General in February, 2016. Bureau of Indian Affairs’ Southern Ute Agency’s Management of the Southern Ute Tribe’s Energy Resources, Report No.: CR-EV-BIA-0011-2014 (Dep’t of the Interior, OIG, Feb. 2016), see also Indian Energy Development – Additional Actions by Federal Agencies Are Needed to Overcome Factors Hindering Development, Report No. GAO-17-43 (GAO, Nov. 2016); Indian Energy Development – Poor Management by BIA Has Hindered Development of Indian Lands, Report No. GAO-15-502 (GAO, June 2015); Trust Records in

and after months of the Tribe virtually begging Interior to be allowed to help solve the problem, the BIA finally entered into a PL 93-638 contract that authorized the Tribe to (largely with the Tribe's own funding) scan and organize the Bureau's own archival files at the Southern Ute Agency before the files were sent to the American Indian Records Repository. The Tribe is then organizing the files in accordance with the Bureau's filing protocol, the 16 BIAM, which has been only loosely followed at the Southern Ute Agency in past decades. The electronic files are then being indexed into the Tribe's proprietary Geographic Information System (GIS). This scanning project, which utilizes \$250,000 from the Department of the Interior and more than \$1M of tribal money and the dedication of tribal staff, is well worth the money to the Tribe. The Tribe is well-equipped to define and articulate its best interests, yet the ethos of federal agencies is to second-guess and overrule it. This makes no sense, particularly given that federal agencies cannot themselves meet the Tribe's needs, and in at least this instance, was the cause of the problem.

As another example, the Southern Ute Indian Tribe and major energy companies on the Reservation prefer to handle the renewal of a company's rights-of-way all at once. This utterly rational approach allows the Tribe to more easily monitor the end date and renegotiate renewals when an operator's hundreds of rights-of-way are handled together. In one instance, the Tribe was even able to leverage the renewals to require an operator on the Reservation to replace several grandfathered high pollutant-emitting 1950s-era compressor engines in lieu of paying compensation for the right-of-way renewal. However, when the Tribe presented one such "global rights-of-way" package to the Southern Ute Agency for approval, it took the Agency approximately *four years* to approve it. The Tribe later learned that the biggest hurdle to prompt approval was that there was no effective way to enter the rights-of-way into the Department's Trust Asset and Accounting Management System (TAAMS). The unwieldiness of TAAMS has been cited numerous times as an excuse for delays in energy transaction processing and as an excuse for why the BIA cannot assist the Tribe. The problem with the TAAMS system is well documented. (*See U.S. Gov't Accountability Office, GAO-15-502, Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands; Office of Inspector General, U.S. Dep't of Interior, Report No.: CR-EV-BIA-0011-2014, Bureau of Indian Affairs' Southern Ute Agency's Management of the Southern Ute Tribe's Energy Resources.*)

To improve access to critical mineral resource information and to avoid being hamstrung by TAAMS, the Tribe's Department of Energy has scanned its entire set of files and developed an associated GIS system that allows each document to be linked to a location on a map. Together the store of digital documents and the GIS make up the Tribe's Department of Energy's "Land Information Management System" and represent a major improvement to tribal operations.

Jeopardy, Report No. OTRA-14-015RA (Office of Special Trustee, Aug., 2014); Records Management at Selected Bureau of Indian Affairs' Agency Offices, Report No. CR-IS-BIA-0001-2014 (OIG, Jan., 2014).

Basically, because the BIA lacks the technology and sophistication required to manage the Tribe's energy resources adequately, the Tribe developed its own database in-house, complete with the GIS module that TAAMS lacks. When the Southern Ute Agency needs a realty document, sometimes they just call the Tribe's Department of Energy to get it, because it is quicker. Juxtapositions like these—the disparity between the Tribe's technological acuity as compared to Interior's technological bankruptcy— make the “inherent federal function” requirement all the more patronizing and meaningless.

“What is it that we need to do, to help you help us?” is a common refrain in meetings between the Southern Ute Tribal Council and Interior officials. The Tribe has implored the BIA in particular to accept the Tribe's countless offers to assist. BIA has repeatedly resisted those offers for reasons that are not particularly compelling. It is perfectly clear that the BIA does not have the data, resources, technological capabilities, or staffing to meet the needs of tribes. The Tribe has data, resources, staffing, technological capabilities, and the incentive to improve the situation.

The Department constantly cites lack of resources as the reason for delays, but in the Tribe's experience, it sometimes seems as if more federal resources are expended trying to thwart the Tribe's exercise of self-determination than are spent supporting the Tribe. For example, when the Agency's records were discovered to be in utter disarray, and after an OTRA audit resulted in findings of records in jeopardy, the Tribe tried to assist the Bureau with cleanup and organization. However, the Bureau told the Tribe that because of its trust responsibility, tribal employees assisting with the Tribe's records needed to have extensive background checks, and staff from the BIA's Albuquerque Area Office met with tribal representatives in Ignacio to explain that the tribal employees did not have the knowledge and expertise necessary to assist. To address this, the Tribe had several of its employees go through the Department's background check process, which involved a long application, a 160 mile round trip drive to be finger-printed and have a photograph taken for facial recognition, and an hour-long interview with an Office of Personnel Management contract investigator. This process took many months, as did the negotiation of an MOU to establish the parameters within which the Tribe could provide assistance. The Tribe even hired local museum archivists to conduct training on archival techniques for Agency and tribal staff so that the BIA would allow tribal staff to handle the tribal records that had been desecrated by the BIA for decades. Time and time again the BIA held up its trust responsibility to the Tribe as the reason it could not allow the Tribe to assist.

These issues are exacerbated by the difficult task of recruiting quality staff to fill critical energy-related positions at the Southern Ute Agency. The positions are not advertised locally, there has not been a much-needed cost of living adjustment for the area, and there is no program in place to train new realty staff. To assist with the dire staffing shortage at the Agency, the Tribe has entered into Interpersonnel Agreements with the Bureau to allow for tribal staff, paid with tribal funds, to assist

the Agency in processing realty transactions. This is not a long-term solution. But now, with the current administration's federal hiring freeze, filling these positions is completely impossible. If the current framework requiring BIA approval for energy projects persists, the hiring freeze must be lifted for those BIA positions related to the approvals necessary to get energy projects moving.

VI. Conclusion.

Like other energy tribes, the Southern Ute Indian Tribe's economic prosperity is due in large part to responsible energy development, and because of the Tribe's energy resources, tribal members have education, health, and employment benefits they would not likely otherwise have. The Southern Ute Indian Tribe, like many other tribes, is well-equipped to utilize its own energy resources, particularly if given ever-increasing self-determination, and if limited federal resources are used to encourage those efforts rather than stifling them. We believe that this approach should be at the forefront of any Congressional oversight and action taken as response to GAO's and OIG's reports and analyses. The Tribe appreciates the continued efforts of this Congress, this Subcommittee, and others to encourage tribal self-determination through economic and energy development.