



SOUTHERN UTE INDIAN TRIBE

October 31, 2023

Hon. Bruce Westerman, Chairman
House Committee on Natural Resources
1324 Longworth House Office Building
Washington, DC 20515-6201

Hon. Harriet M. Hageman, Chair
House Subcommittee on Indian and Insular
Affairs
1328 Longworth House Office Building
Washington, DC 20515

Ransom Fox, Clerk
House Subcommittee on Indian and Insular
Affairs
1328 Longworth House Office Building
Washington, DC 20515
Via Email: ransom.fox@mail.house.gov

Re: Follow-up questions Subcommittee Hearing of September 28, 2023, *"Tribal
Autonomy and Energy Development: Implementation of the Indian Tribal Energy
Development & Self-Determination Act"*

Dear Chairman Westerman and Chair Hageman:

This letter responds to two additional questions posed by Chairman Westerman, which were forwarded by Subcommittee Chair Hageman, asking how energy development has impacted the quality of life of members of the Southern Ute Indian Tribe ("Tribe") and requesting identification of specific barriers and potential solutions to Tribal energy development (aside from instituting a Tribal Energy Resource Agreement ("TERA")). Please accept my apology for not getting this response to you in time for this information to be included in the record of the referenced hearing. Our efforts to respond to Chairman Westerman's request were interrupted by our Tribe's participation in a subsequent subcommittee hearing related to offshore energy leasing. Nonetheless, we still wanted to address your follow-up questions. We are also transmitting this supplemental letter to the Subcommittee clerk for potential distribution to other members of the Subcommittee, subject to your direction. Thank you again for your interest in the Tribe and ways that energy development in Indian country can be moved forward.

Question 1. *Can you further expand on your written testimony and explain further how the Southern Ute tribal members' standard of living, economically, culturally, and socially has improved over the last four decades as a result of the tribe taking an active role in developing energy resources?*

As reflected in my written testimony, the Tribe's economic success has been tied to energy development and the expanding roles that the Tribe has filled over the course of several decades.

Prior to 1982, the sole economic benefits derived by the Tribe from energy resources came from modest lease bonuses, rentals, and royalties paid by oil and gas companies under oil and gas leases issued by the Tribe and approved by the Bureau of Indian Affairs (“BIA”) under standard BIA forms. Shortly following the 1982 decision by the U.S. Supreme Court in *Merrion v. Jicarilla Apache Tribe* upholding the right of tribal governments to impose severance taxes, our Tribe enacted a 5% severance tax, which expanded the revenues received by the Tribe. Ten years later, in 1992, we formed our own oil and gas exploration and production company, Red Willow Production Company, which added working interest revenue to the mix. In 1995, we joined with a third-party to form a gas gathering and treating company, Red Cedar Gathering Company, which expanded market access for our natural gas and added another important component to energy-sourced revenue received by the Tribe.

Revenue and income from energy development within the Southern Ute Indian Reservation provided the capital needed to expand those businesses off-Reservation and for other types of investment, such as commercial real estate and private equity. Despite diversification, however, approximately 80% of the Tribe’s revenue/income comes from energy development. Since 1989, the net worth of the Tribe has increased more than 100 times. The economic benefits of energy development have been essential to supporting governmental services and benefits to Tribal members.

Four decades ago, the percentage of unemployed members of the Tribe living on the Reservation was high and income levels for many, if not most such members, hovered around poverty levels. Today the Tribe is the largest employer in southwest Colorado with over 1,000 employees, many being Tribal members. Our energy companies provide technical employment opportunities. The Tribe’s high-quality, stable employment opportunities ensure that Southern Ute Indian Tribal members can provide for themselves and their families.

In 1984, the Tribe established the Tribal Higher Education Scholarship Committee and Tribal Higher Education Scholarship Program. Today, the Scholarship Program covers the cost of tuition and provides a living stipend for full-time college or vocational school students. Part-time students can receive scholarship funds to cover tuition, books, fees, and mileage. Since 2000, 456 Tribal members have received college degrees with assistance from the Scholarship Program. In 2000, the Southern Ute Indian Academy opened to provide educational opportunities to Southern Ute children and descendants. The Academy is based on the Montessori philosophy of teaching that provides rigorous, self-motivated growth in all areas, including instruction that supports preservation of the Ute language. There are approximately 100 children enrolled in the Academy each year. The Academy provides excellent foundational level education.

In addition to our educational programs, our Tribe honors our ancestors, and our community proudly celebrates traditional gatherings and ceremonial dances with our members and other Native Americans from sister tribes in our region. Among other buildings, our headquarters houses a modern museum as a lasting monument to the history of our people. Although we certainly welcome you to visit our Reservation, until such a visit occurs, we encourage you to take a visual tour of our museum at: <https://www.southernutemuseum.org/exhibits/online-videos/>.

In 1978, the Indian Health Service opened a health clinic on the Reservation to serve the expanding needs of Native Americans living in our region. In 2009, the Tribe entered into a “638 Contract” with the Indian Health Service and assumed control of the management of the health clinic. Today, the Southern Ute Health Center has approximately 4,000 active users and offers primary care services, pediatrics, dentistry, optometry, behavioral health services, and pharmacy services. The behavioral health department has almost quadrupled in size and now has a separate, dedicated building. The services offered by the behavioral health department include substance use assessments and treatments, group and family therapy, peer recovery coaching, and referrals to residential treatment when needed.

In 2001, the SunUte Community Center opened its doors. Sun Ute is a 50,000 square foot facility with a gymnasium, rock climbing wall, children and adult pools, sauna, and weightlifting and exercise equipment. The facility offers fitness assessments, personal training, and childcare. The facility also provides a variety of group exercise classes including Zumba, yoga, water-based classes for seniors, and archery. The Tribe’s health clinic, behavioral health clinic, and fitness facilities ensure that Southern Ute members have access to a holistic approach to medicine and healthy living.

In 2004, the Tribe was able to build new housing in its Cedar Point subdivision. Southern Ute members can purchase lots in the subdivision and build homes in close proximity to the Tribal campus and governmental services. Other amenities include access to a community park. Nearby, the Tribe also owns well-maintained, affordable rental units with rates well below comparable units in the area. The Tribe also provides home maintenance and repair services as well as construction services.

The impacts of energy development listed above are but a few examples of the improvements in Tribal services made possible through prudent energy development of the Tribe’s natural resources. The positive economic impacts of energy development have allowed the Tribe’s leaders to expand the opportunities available to Southern Ute members in all aspects of their lives. Our members have quality and stable employment. Our educational programs provide advanced technical training for all who seek it. Our elders have stable retirement benefits. Our members have access to affordable housing. Frankly, the revenues we receive from energy development are the Tribe’s economic lifeblood.

Question 2. Are there other specific barriers the Southern Ute Indian Tribe has experienced when seeking to develop energy projects on Indian lands? And beyond simply instituting a Tribal Energy Resource Agreement, what other solutions exist for getting rid of or lessening barriers to developing projects on Indian lands?

Unfortunately, there are many obstacles that prevent full tribal self-determination in the energy sector, including general challenges such as access to capital. Although we have been able to overcome some of those barriers, Indian tribes seeking to engage in energy development encounter several shared obstacles. Among those barriers that we view as being significant are the following: (i) reviews mandated by the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332(2)(C); and (ii) the status of real property record-keeping by the BIA. Additionally, we continue to believe that the lack of a definition of inherently Federal functions in the BIA’s TERA regulations (25 C.F.R. § 224.52) has discouraged tribes from taking advantage of

Congress' statutory program envisioned in 2005 (25 U.S.C. § 3504), even as amended by Congress in 2018.¹

A. NEPA Review

NEPA generally calls for the review of the environmental impacts of proposed Federal action, evaluation of alternatives, and consideration of public comment. When NEPA was enacted in 1969, Congress did not distinguish between proposed Federal agency actions taken as the trustee over Indian trust or restricted lands in contrast to proposed Federal agency actions involving public lands or other lands administered by Federal agencies. Decades earlier, following enactment of the Indian Reorganization Act in 1934, Congress had taken the critical step of requiring the consent of a tribe's governing body before tribal trust land could be sold, leased, or otherwise encumbered (25 U.S.C. § 5123). However, Federal approval by the BIA was also still necessary for a tribe to enter into binding agreements for use of its trust lands. The imposition of NEPA review in the context of obtaining that Federal approval essentially undermined the authority of tribal governing bodies to engage with third-parties in developing or using tribal trust lands. Not only was the BIA being called upon to make approval decisions wearing its trustee hat based on the best interests of a tribe, the BIA was also required to undertake NEPA review, which has become an extremely complex, time-swallowing labyrinth of administrative procedures and judicial decisions.

Politically, over the course of several decades, Congress has been very reluctant to amend NEPA. In recent years, however, Congress has taken some steps empowering tribal governments to make decisions regarding use of their lands and resources outside of the NEPA process. For example, under the HEARTH Act of 2012,² tribes whose leasing codes and environmental review codes are approved by the Secretary of the Interior may issue surface leases of their trust lands, free of the complications of Federal agency NEPA review. In fact, the concept of a TERA was intended to follow that same pattern. Most recently, with passage of the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, Congress has taken steps to amend NEPA; however, those changes, which include such matters as suggested time frames and document-length for NEPA review, do not specifically address the relationship of NEPA to Federal agency decisions approving land-use decisions made by the governing bodies of tribes. In the context of the Council on Environmental Quality's Proposed NEPA Phase 2 Rulemaking, the Tribe has urged the CEQ to adopt rules that provide greater deference to the governing bodies of tribes and streamline the NEPA process applicable to land-use decisions and related Federal agency approvals involving tribal trust lands. *See* Letter from Chairman Melvin J. Baker to CEQ dated September 26, 2023, CEQ-2023-003-27134. We respectfully encourage Congress to consider further amendments to NEPA exempting Federal agencies, such as the BIA, from having to

¹ *See* Act of Dec. 18, 2018, "Indian Tribal Energy Development and Self-Determination Act Amendments of 2017," Public L. No. 115-325 § 103, 132 Stat. 4445 – 4465 (amending Section 2604 of the Energy Policy Act of 1992 (25 U.S.C. § 3504)).

² 25 U.S.C. § 415(h), Helping Expedite Affordable and Responsible Tribal Homeownership Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150 ("HEARTH Act").

conduct NEPA reviews in the course of considering whether or not to approve a decision made by a tribe's governing body involving the use of tribal trust land.

B. BIA Real Property Record Keeping

The BIA's Land Title and Records Offices are the official repositories for legal instruments affecting the title to Indian trust lands.³ County real property records and Uniform Commercial Code recordings are not substitutes for BIA LTRO record-keeping. As reconfirmed by a government study issued only days ago,⁴ the real property record keeping services performed by the BIA are not adequate to sustain modern day commercial and financial transactions associated with effective use of tribal lands. As stated by the GAO in that study, "[I]t can take a tribal citizen as long as 2 years or more to obtain a mortgage on trust land, largely due to BIA's review process . . ." ⁵ The most recent study was focused on housing, but the GAO's concerns regarding the inadequacy of the BIA's record-keeping system and processes are a major impediment to effective energy and economic development in Indian country.

When one considers the myriad of real property transactions that are involved in energy development, such as the issuance of leases, rights-of-way, power purchase agreements, transmission agreements, and financing agreements and mortgages, the importance of an effective real property record system cannot be overstated. Regardless of whether the source of energy is fossil fuel resources or renewable energy, the systems that must be put in place for modern development, such as remote monitoring and control systems, often require the installation of towers, fiber optic cable, and broadband access, not to mention roads and access to electricity. Accurate records are needed not only to confirm title, but also to determine if those lands are burdened by liens or encumbrances.

This letter cannot be a substitute for the kind of detailed review and overhaul of the BIA real property record-keeping system needed to meet the reasonable expectations of Congress and tribes and their members. We believe that this is an extremely important and complex issue that will require focused study and reform, and we urge this Subcommittee to take a careful look at the functional status of the BIA real property record-keeping system.

C. Inherent Federal functions.

One of the principal issues that was discussed in our September 28th testimony is the lack of a definition of "inherently Federal functions," a category of functions that are not eligible for tribal contracting in a TERA. In apparent recognition that uncertainty in this area was discouraging tribes from pursuing TERA applications, Interior Secretary David Bernhardt issued a Secretarial Order on December 16, 2019, directing the BIA, Bureau of Land Management ("BLM"), and Office of Natural Resource Revenue ("ONRR") to review this issue. Since providing testimony

³ See <https://www.bia.gov/bia/ots/dltr>.

⁴ U.S. Gov't Accountability Off., GAO-24-105875, "Bureau of Indian Affairs should Take Additional Steps to Improve Timely Delivery of Real Estate Services," (Oct. 26, 2023).

⁵ *Id.* at 2.

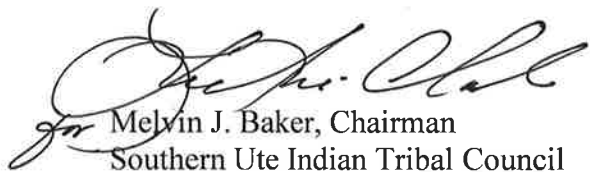
to the Subcommittee on September 28th, and much to the Tribe's surprise, we learned that approximately two months after issuance of the Secretarial Order, the BIA's Office of Self-Governance ("OSG"), the ONRR, and the BLM entered into a Memorandum of Agreement ("MOU") listing contractible Federal functions and inherently Federal functions related to Indian Oil and Gas Development.⁶ Despite the Tribe requesting this definition for years, the MOU was not communicated to the Tribe or to Indian Country generally. While this is a first step in defining inherent Federal functions, the MOU inadequately addresses the problem. For example, each of the listed inherent Federal functions states it "[i]ncludes, but is not limited to" the respective function.⁷ As an internal, inter-agency guidance document, the MOU does not provide tribes the enforceability that regulations would provide. Lastly, the MOU is scheduled to expire in 2025 unless terminated earlier by any of the parties.

The MOU, while registering a recognition among Interior agencies that greater certainty was needed, does not alleviate the uncertainty as to what Federal functions are reserved from TERAs under the BIA's current regulations. The Interior agencies seemingly fail to recognize the time, expense, and lost opportunities associated with preparing a TERA application. The Tribe appreciates that there was some follow-up from then Secretary Bernhardt's Order No. 3377 but is disappointed in the lack of consultation and communication, and that the functional listings were not included as proposed amendments to the TERA regulations with an opportunity for public comment. Congress intended for TERAs to give tribes greater control over their own resources. Respectfully, the current regulations and supplemental MOU fail to meet this objective. The Tribe intends to submit a request for new clarifying rules that will be open for public comment. The Tribe would greatly appreciate support in this matter.

Conclusion

Thank you again for your interest in the Southern Ute Indian Tribe and in improving Tribal energy development. We hope these supplemental comments are helpful to you in performance of your important work.

Sincerely,



Melvin J. Baker, Chairman
Southern Ute Indian Tribal Council

cc:

Hon. Lauren Boebert
Hon. Michael Bennet
Hon. John Hickenlooper

⁶ See Memorandum of Agreement Between Bureau of Indian Affairs, Office of Self-Governance, Office of Natural Resources Revenue, and Bureau of Land Management, (Feb. 24, 2020).

⁷ Inherently Federal Functions MOU at Annex B.