

**Prepared Statement of  
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Before the Senate Committee on Indian Affairs**

**Oversight Hearing**

***The GAO Report on Indian Energy Development:  
Poor Management by BIA has Hindered Development on Indian Lands***

**October 21, 2015**

Good afternoon Chairman Barrasso, Vice Chairman Tester, and Committee members. Thank you for the opportunity to provide a statement on behalf of the Southern Ute Indian Tribe regarding BIA’s supervision of Indian Energy Development, and thank you for commissioning this important GAO report.

My name is Mike Olguin. I am an elected member of the Southern Ute Indian Tribal Council, which is the governing body of the Southern Ute Indian Tribe. The Tribe occupies the Southern Ute Indian Reservation (Reservation) in southwest Colorado. The Reservation comprises approximately 700,000 total acres and its boundaries include approximately 311,000 surface and mineral acres of land 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 on additional portions of the Reservation that are held in trust by the United States.

The Tribe had spent a great deal of time with staff from the Government Accountability Office who prepared this report. Tribal officials and staff met with GAO auditors and provided information regarding the Tribe’s experience with the Bureau of Indian Affairs. The Tribe was pleased with the final product and would like to take this opportunity to focus on some of the key points and share with you stories of the Southern Ute Indian Tribe’s experience.

**Indian Energy—Conventional and Renewable—has Enormous Potential for Indian Tribes and their Members in Terms of Jobs and Household Incomes.**

The Southern Ute Indian Tribe is a great example of the positive impacts of Indian energy development. Less than fifty years ago the Tribal Council had to end 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 in the face of numerous obstacles, including BIA mismanagement, the Southern Ute Indian Tribe would not be the economic powerhouse that it is today. 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. As part of that process, in 1980, the Tribe created its Department of Energy. Because the Tribe's leaders believed that the Tribe could do a better job of monitoring its own resources than federal agencies did, 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. These acts of energy development self-determination are key to the Tribe's economic success.

The Tribe is a leader in Indian Country with a demonstrated and sterling record of business and administrative acumen. The Tribe is the only tribe in the nation with a AAA+ credit rating, which was earned through years of successful and prudent business transactions. Though the Tribe has a diversified economic development strategy, energy development remains the key component of the Tribe's strategy. Approximately thirty percent of the Tribe's income comes from energy development on the Reservation. Accordingly, barriers to energy development—including BIA's poor management—have a direct bearing on the Tribe's economic success. That in turn has a direct bearing on the health and welfare of the Tribe's 1500 members.

### **The Federal Role in Indian Energy Development has Enormous Impact – Largely Negative – on Revenue for the Southern Ute Indian Tribe from Reservation Energy Development.**

The Tribe has achieved its stature at times with the assistance of, but often in spite of, the BIA's role in Indian energy development. According to the GAO Report, in 2012, the Department of the Interior's Inspector General found that weaknesses in BIA's 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, who is all too aware of this reality. The Tribe's wholly owned oil and gas company has had to weigh the uncertainties associated with BIA administrative delays and the quality of BIA and BLM management decisions when considering whether to invest in energy development on Tribe's own lands or off the Reservation. The Tribe is hopeful that the GAO's conclusion in this regard brings additional attention to this problem. The GAO noted that "According to Interior officials, while the potential for oil and gas development can be identical regardless of the type of land ownership—such as state, private, or Indian—the added

complexity of the federal process stops many developers from pursuing Indian oil and gas resources for development.” In addition to a cumbersome process that involves not one but three federal agencies (BIA, BLM and ONRR), development of minerals on Indian lands also requires compliance with NEPA and the National Historic Preservation Act, which can add significant delay. Based on an interview with a private investment firm, GAO learned that an oil or gas well that develops Indian resources generally *costs almost 65 percent more* for regulatory compliance than a similar well developing private resources. The BLM’s new hydraulic fracturing rule, currently stayed by the U.S. District Court in Wyoming, would dramatically compound this problem if it ultimately goes into effect.

These regulatory compliance costs are magnified when oil is trading around \$50 a barrel, as it is now. 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 just wait. In addition, permitting costs are much higher on tribal lands than on fee lands. While the GAO Report noted that the BLM’s drilling permit fee is \$6500.00, as of today that fee is actually \$9500.00, and none of that money goes to the Tribe. In comparison, a state drilling permit in Colorado is free. These disparities create a problem 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, all-the-while 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 the BIA to review and approve even the most basic realty transaction occurring on the lands held in trust for the Tribe on the Reservation. The Tribe must generally wait upon approval from the Agency, which will invariably delay a proposed tribal project. These delays are exacerbated by the fact that the Agency 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 the BIA, the statutory and regulatory requirements for BIA approval of tribal transactions must be modified so that BIA review and approval of realty-related

tribal projects is not required. Entering into a Tribal Energy Resource Agreement (TERA) would—at least in theory—address this problem, but despite the Tribe’s repeated requests for clarification of the TERA process, and in particular, for clarification on what constitutes an “inherent 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 now learns in the GAO Report that “Interior officials told GAO that the agency has no plans to provide additional clarification.” The Tribe notes that this is a problem Interior created for itself, as the term “inherent federal functions” is only contained within Interior’s regulations, and is found nowhere in the Indian Tribal Energy Development and Self-Determination Act, the statute through which Congress created TERAs.

**Tribes like Southern Ute that Actually Practice Self-Determination Still Need the BIA to be Effective, Efficient, and Responsive to the Tribe’s Needs When it Comes to Federal Functions.**

The BIA, particularly at the local Southern Ute Agency office, has been underfunded and understaffed for decades. As a result, the review and approval process often causes substantial delays that damage the Tribe and its interests. At one point in time several years ago, the Tribe estimated that delays associated with the review and approval of pipeline projects had cost the Tribe over \$90M in lost revenue. To make up for the BIA’s shortcomings and ensure that tribal business can continue, the Tribe has committed tribal staff and resources to ensuring that the work needed to be done by the BIA to approve transactions can be completed in a timely manner.

Unfortunately, none of the GAO Report’s Recommendations for Executive Action address the problem of underqualified and untrained staff. The Department of the Interior’s comments stated that the development of an Indian Energy Service Center will solve this problem, but this solution still will not solve the problem at a local level. In addition, before an Indian Energy Service Center is implemented, there should be a review of existing organizations (e.g., various offices and services provided by the OST) that were created to assist in the wake of the Cobell lawsuit.

The high cost of living in the Durango area is often cited as the reason that the Bureau cannot attract candidates to staff the Southern Ute Agency, yet the Bureau does not advertise locally and in forums where local people look for jobs in the area. If flight risk and high cost of living make it difficult to attract staff who will stay here, why would the Bureau not look to candidates who already live in and are committed to this Region, and then provide training?

## **If BIA Cannot Help Itself, it Should Readily Accept Assistance *from Tribes when Offered.***

*“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 Bureau officials. The Southern Ute Indian Tribe has implored the BIA to accept the Tribe’s countless offers to assist. BIA has repeatedly resisted those offers for reasons that are not particularly compelling. The GAO’s report makes perfectly clear that the BIA does not have the data, resources, technological capabilities, or staffing to meet the needs of tribes. The Bureau also has no apparent incentive to meet tribal needs.<sup>1</sup> The Tribe has data, resources, staffing, technological capabilities, and the incentive to improve the situation. To help with the backlog in processing transactions, the Tribe has attempted to assist with Trust Asset Accounting Management System (TAAMS) encoding, only to be told that it was not permissible for the Tribe to assist unless it has a 638 contract.<sup>2</sup> This fact was only communicated after the Bureau led the Tribe on for several years, requiring technology expenditures and requiring and conducting extensive background checks for tribal employees who would be assisting.

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 Tribe was told that tribal employees assisting with the Tribe’s records needed to have extensive background checks, and that the tribal employees did not have the knowledge and expertise necessary to assist. The Tribe had several of its employees go through the 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 OPM contract investigator. This process took many months. The Tribe even hired local museum archivists to conduct a training on archival techniques for Agency and tribal staff so that the Bureau would allow tribal staff to handle the tribal records that had been desecrated by the Bureau for decades. Time and time again the Bureau held up its trust responsibility to the Tribe as the reason it could not allow the Tribe to assist. This circular reasoning (if we let the Tribe, without proper background checks and training, assist us in organizing and inventorying the irreplaceable historic records that we have haphazardly thrown in open cardboard boxes on the floor below shelves of industrial size bottles of toilet bowl cleaner, they might sue us for not upholding our trust responsibility to protect their

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<sup>1</sup> This appears to be a systemic issue. The Tribe’s few positive experiences with the BIA in the past decade are limited to positive interactions with motivated, committed, engaged individual Agency employees, such as the Tribe’s new Agency Superintendent, Priscilla Bancroft.

<sup>2</sup> The Tribe has repeatedly told the Bureau that it will not enter into a 638 contract for realty functions unless and until the Bureau organizes its records. The lack of a 638 contract is nevertheless heralded as the reason the Tribe cannot assist with TAAMS encoding.

records from tribal staff who do not have the requisite background checks and training) was illogical, maddening, patronizing, and contrary to the Tribe's best interests, as articulated by the Tribe.

**The Trust Responsibilities of the BIA to the Tribe must be Modified so that the Agency Can Provide Support for and Enforcement of the Tribe's Decisions Rather than Delay the Implementation of those Decisions.**

Many months after the OTRA report, after the arrival of a new, helpful Agency Superintendent, the Bureau has entered into a PL 93-638 contract which allows the Tribe to, largely with the Tribe's own funding, scan and organize the Agency's files before they are sent to the American Indian Records Repository. The records will be prepared and scanned using 300 dpi scanners. The electronic files will be sent off site, where they will be organized 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 will then be indexed into the Tribe's proprietary Geographic Information System (GIS). This scanning project, which utilizes less than \$100,000 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 Southern Ute Agency's belated cooperation on this project brings a sigh of relief and a radical change from past practice. The Bureau's past attempts to protect the Tribe from itself are patronizing at best, and a breach of trust, at worst. The Tribe is well-equipped to define and articulate its best interests, yet the ethic of the Bureau is to second-guess and overrule it. This does not make sense, particularly given that the Bureau itself cannot meet the Tribe's needs. The Bureau must be more flexible.

**The BIA Cannot Be All Things to All Tribes, but in Consultation with Tribes, it Should Identify Those Things It Will Do and then Endeavor to do them Extremely Well.**

Southern Ute recognizes that the Bureau cannot be all things to all tribes, and that each tribe is different. Too, the trust responsibility means different things to different tribes. This underscores the need for each Agency to endeavor to truly understand the needs of the tribes that it serves, and to work toward responding to those needs. This will mean that the Bureau will not be able to rely on a one-size-fits-all approach. The Bureau is not particularly well equipped for flexibility, unfortunately. For example, the Southern Ute Indian Tribe, as well as operators on the Reservation, prefer to handle an operator'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. However, when the Southern Ute Indian Tribe presented one of these "global rights-of-way" packages to the Southern Ute Agency for approval, it took the Agency approximately four years to approve them. 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 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 Bureau cannot assist the Tribe. If this system is so fundamental to the Bureau's ability to function, why did the Bureau select and contract for a system that is so poorly designed and so inadequate?

The GAO Report identified problems with TAAMS. As the Report noted, "BIA does not have geographic information system (GIS) mapping data identifying resource ownership and use of resources, such as existing leases. Interior guidance identifies that efficient management of oil and gas resource relies, in part, on GIS mapping technology because it allows managers to easily identify resources available for lease and where leases are in effect. However, BIA's database for recording and maintaining historical and current data on ownership and leasing of Indian land and mineral resources (TAAMS), does not include a GIS mapping component." The Report noted that "according to a BIA official, without a GIS component, the process to identify transactions such as leases and ROW agreements for Indian land and resources can take significant time and staff resources to search paper records stored in multiple locations."

To improve access to critical mineral resource information, 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 Department of Energy's Land Information Management System and represents a major improvement to tribal operations. Basically, because the BIA lacks the technology 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. It is juxtapositions like these—the disparity between the Tribe's technological acumen as compared to the Bureau's technological paralysis—that make the "inherent federal function" requirement all the more patronizing and meaningless.

The shortcomings of the BIA are not fresh revelations and, as you know, last week the House passed the "Native Energy Act" (H.R.538), which would tackle many of the problems identified in the GAO report. The Tribe supports that bill as it supports Chairman Barrasso's "Indian Tribal Energy Development and Self-Determination Act Amendments" (S.209). With a short calendar remaining in 2015, we hope the Senate takes up S.209 in the days ahead.

Thank you for the opportunity to appear before you today. I would be happy to answer any questions the Committee may have.