

**BEFORE THE UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS**

**Prepared Statement of Honorable Steve Herrera,
Southern Ute Indian Tribal Council Member
On behalf of the
SOUTHERN UTE INDIAN TRIBE**

Hearing on Indian Energy and Energy Efficiency

October 22, 2009

INTRODUCTION

Good afternoon Chairman Dorgan, Vice Chairman Barrasso, and members of the Committee on Indian Affairs. I am Steve Herrera an elected member of the Southern Ute Indian Tribal Council, the governing body of the Southern Ute Indian Tribe. Unfortunately, our Chairman, Matthew Box, is unable to attend this hearing on the Southern Ute Indian Tribe's behalf because of an important, previously scheduled, medical appointment. However, the Tribal Council and the Chairman have designated me to appear before you today on behalf of the Southern Ute Indian Tribe. In addition to our tribe being honored by your invitation to testify, it is a great personal honor to appear before you today.

Also with me is Tom Shipps, whose firm has served as general legal counsel for our tribe since 1968. Mr. Shipps has represented us on energy matters for more than 30 years. He has testified before this committee on several occasions and has worked cooperatively with committee members and staff throughout his distinguished career. If needed in answering questions, I would like to call upon him for assistance.

As a final introductory matter, our tribe would like to thank the committee, not only for its work on behalf of tribes in the energy arena, but also for its leadership on numerous issues that affect Indian people throughout this Country, including law enforcement and health care.

BACKGROUND

The Southern Ute Indian Reservation, the exterior boundaries of which were confirmed by Congress in 1984 (Pub. L. No. 98-290, 98 Stat. 201), consists of approximately 700,000 acres of land located in southwestern Colorado in the Four Corners Region. The land ownership pattern within our Reservation is complex and includes tribal trust lands, allotted lands, non-

Indian patented lands, federal lands, and state lands. Based in part upon the timing of issuance of homestead patents, sizeable portions of the Reservation lands involve split estates in which non-Indians own the surface but the tribe is beneficial owner of oil and gas or coal estates. In other situations, non-Indian mineral estates are adjacent to tribal mineral estates. These land ownership patterns have significant implications when considering energy mineral development ranging from the potential for drainage to jurisdiction. Historically, we have established solid working relationships with the State of Colorado and local governmental entities, which have minimized conflict and emphasized cooperation.

Our reservation is a part of the San Juan Basin, which has been a prolific source of oil and natural gas production since the 1940's. Commencing in 1949, our 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 any active, comprehensive resource management planning. That changed in the 1970's for our tribe as energy resource tribes in the West recognized the potential importance of monitoring oil and gas companies for lease compliance and maintaining a watchful eye on the federal agencies charged with managing our resources. A series of events in the 1980's 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, our Tribal Council enacted a severance tax, which has produced more than \$500 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 our tribe with business options and greater involvement in resource development.

In 1992, we started our own gas operating company, Red Willow Production Company, which was initially funded through a Secretariially approved plan for use of \$8 million of trust funds received 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, our tribe is the majority owner of Red Cedar Gathering Company, which provides gathering and

treating services throughout the reservation. Ownership of Red Cedar Gathering Company allowed us to put the infrastructure in place to develop and market coalbed methane gas from Reservation lands and gave us 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 economic growth, we expanded operations off the Reservation.

Today, the Southern Ute Indian Tribe, through its subsidiary energy companies, conducts sizeable oil and gas activities in approximately 10 states and in the Gulf of Mexico. Despite the recent downturn in energy commodity prices, we continue to be successful and growing. We are the largest employer in the Four Corners Region. We are also diversifying into other areas, including renewable energy development. Along the way, we have encountered and overcome numerous obstacles, some of which are institutional in nature. We have also worked actively with this committee 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.

These economic successes have allowed us to provide a higher standard of living for our tribal members than many would have thought possible a generation ago. 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 children and their children the potential to maintain our tribe and its lands in perpetuity.

INDIAN ENERGY INITIATIVE

One persistent theme reflected in the last thirty years of our tribe's history is the notion that ultimately 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 and reasonable access to opportunities extended to other members of society. Though recognizing the critical historical importance of the federal trust responsibility, we also see on a daily basis the immobility that arises from forced reliance on a pervasive system of protection that is underfunded, understaffed, and often of questionable competence. Congress has created many paths for tribes to assume increased control over the governmental institutions that affect the daily lives of tribal members, and our tribe has taken advantage of many of them. The shift in roles, however, is particularly difficult when the systems that are being transferred are broken. Even for our tribe, which has achieved remarkable success, the challenges and responsibilities of preserving our culture, our

tribal community, and our remaining attributes of sovereignty are daunting. We believe that this committee knows that improvements can be made in fostering effective tribal governance and opportunity, and that when recognized, impediments to tribal success can be removed. It is for all of those reasons that we have participated actively in recent discussions related to problem-solving in the energy arena, and we hope that our ideas will be of value to the committee.

Representatives of our tribe have participated actively in an ad hoc working group of energy producing tribes and associated organizations, which has responded to the initial energy concept paper prepared by this committee's staff. Although we have been involved in discussions related to all of the issues contained in the initial concept paper, we have also identified some specific items that we hope will be addressed by the committee and, potentially, in legislation.

First, with respect to Title V of the Energy Policy Act of 2005, we were vocal advocates for the Tribal Energy Resource Agreement ("TERA") mechanism approved by Congress. We believe that the Secretary's regulations implementing those provisions undermined much of what Congress intended by eliminating "inherent Federal functions" – an undefined term in the regulations—from the scope of functions that could be assumed by a tribe. To be sure, the Director of the Office of Indian Energy and Economic Development has encouraged us to prepare a proposed scope for a Southern Ute TERA, and we may yet prepare one. We do request, however, that the committee examine this issue and obtain some clear understanding from the Administration as to how this regulatory restriction is to be interpreted.

Second, we strongly believe that National Environmental Policy Act ("NEPA") review mandated in the course of a federal agency's consideration of approval or disapproval of tribal land use decisions and related activities discourages tribal energy development, whether renewable or non-renewable. We have provided several suggestions for mitigating the unintended adverse consequences of NEPA review on Indian lands. Those suggestions include removing Indian lands from NEPA review, utilization of alternative tribal environmental review processes, and commanding expeditious review by Federal agencies involved in decisions affecting tribes or their lands.

Third, one impediment to access to commercial capital related to tribal energy projects involves the absence of an effective, clear system for issuing security interests in tribal lands in a way that will confirm a first priority in the event of default. We urge the committee to

investigate the relationship of the BIA Land Title and Records system and its function, if any, in perfecting or providing assurances of priority of encumbrances and security interests with respect to tribal energy projects.

Fourth, we request that this committee initiate review and communicate with other applicable committees the absence of access by tribes or parties contracting with tribes to federal courts under diversity jurisdiction. This limitation imposes institutional obstacles to tribes who wish to provide for effective and commercially acceptable judicial mechanisms for dispute resolution, yet who are unwilling to default to state courts in the resolution of potential contractual disputes.

CONCLUSION

In conclusion, the Southern Ute Indian Tribe is honored to appear before you today. We intend to remain active participants in this process as it develops, and we believe that our experiences have contributed to a unique perspective on matters related to energy development in Indian country.