BEFORE THE UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

Prepared Statement of Honorable James M. "Mike" Olguin
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On behalf of the
SOUTHERN UTE INDIAN TRIBE

Legislative Hearing on the Indian Tribal Energy and Self-Determination Act Amendments (S.2132)

April 30, 2014

I. Introduction

Chairman Tester, Vice Chairman Barrasso and distinguished members of the Committee, my name is Mike Olguin and I am the Acting Chairman of the Southern Ute Indian Tribal Council. It is my great honor to appear before you today on behalf of the Southern Ute Indian Tribe in support of the "Indian Tribal Energy Development and Self Determination Act Amendments of 2014," (S.2132).

Although this legislation was introduced just last month, we have been working closely with this Committee for years in an effort to obtain legislation further empowering Indian tribes to address energy needs and energy development opportunities. We were active participants in field hearings and legislative discussions that led former Chairman Dorgan to introduce S.3752 in the summer of 2010. While that legislation did not become law, it served as a key building block for S.1684, which was introduced in late 2009 and for S.2132, which is before you today and is substantially similar to that earlier bill.

In recent years, tribal leader after tribal leader has come before you to express concerns about the dire economic conditions in Indian Country, and to call for statutory, regulatory and policy changes to improve access to energy and for economic development for their constituents. Today, we hope that members of the Committee will collectively determine that the needs of Indian Country merit passage of S.2132.

II. The Southern Ute Indian Tribe's Experience in Becoming the Premier Indian Tribal Natural Gas Producer in the United States

The Southern Ute Indian Reservation consists of approximately 700,000 acres of land located in southwestern Colorado in the Four Corners Region of the United States. 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. When considering energy resource development, these land ownership patterns have significant implications that range from the potential for drainage to questions of 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 as we and other 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, the 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 capitalized through a secretarially-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, 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 our economic growth, we expanded operations off the Reservation.

As a result of these decisions and developments, 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. We are the largest employer in the Four Corners Region, and there is no question that energy resource development has put the tribe, our members, and the surrounding community on stable economic footing. These 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 children and their children the potential 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." We believe S. 2132 will help us do just that and that's why we strongly urge its passage.

III. Indian Energy Legislation in Previous Congresses

Before commenting on S.2132, it is important to take a step back and re-visit the underlying reasons that led to introduction of S.3752 in the 111th Congress, S.1684 in the 112th Congress and now S.2132 in the 113th Congress. Second, we believe it is also important to review the factors leading to and the potential significance of Tribal Energy Resource Agreements ("TERAs") as an optional vehicle of tribal self-determination. Third, we hope to show why suggested changes to Title V of the *Energy Policy Act of 2005* are improvements that deserve this Committee's favorable action.

For decades our leaders have had the privilege of working with this Committee and its staff. Even when differences on other political issues have divided Congress, this Committee has consistently worked in a non-partisan manner and led the way in focusing on the needs of Indian Country and in attempting to craft solutions to those problems. We respectfully urge you to do so once again in passing S.2132.

Because the process leading to S.2132 has spanned considerable time and has included the introduction of different legislative measures addressing several of the same concerns, we believe it is worthwhile to review those two measures.

Investigative hearings before this Committee leading to introduction of S.3752 addressed a number of critical problems that continue to exist today in Indian Country. First, the unacceptable, bureaucracy-driven delays in federal approval of Indian mineral leases and drilling permits captured the attention of former Chairman Dorgan., His constituents on the Fort Berthold Indian Reservation watched their non-Indian neighbors get rich from mineral resource development, as their Indian lands remained unleased and undrilled month after month while awaiting federal approval and permitting.

The punitive effect of those delays on the poorest individuals and communities in the U.S. clearly impressed this Committee as unjustifiable. A number of the provisions of S.3752 attempted to reduce such administrative burdens through such measures as: mandated interagency coordination of planning and decision-making; regulatory waiver provisions; relief from land transaction appraisal requirements; and the elimination of fees assessed by Bureau of Land Management for applications for permits to drill on Indian lands.

Other testimony received by this Committee prior to the introduction of S.3752 reflected frustration regarding barriers to capital, technical expertise and facilities needed for tribes to proceed with alternative or renewable energy development. Again, the Committee attempted to address these concerns through a number of provisions including authorization for greater federal technical assistance, reclassification of certain tribal agricultural management practices as sustainable management practices under federal laws, treating Indian tribes like State and municipal governments for preferential consideration of permits and licenses under the Federal Power Act's hydroelectric provisions, expansion of the Indian Energy Loan Guaranty Program, and authorization for a tribal biomass demonstration project.

In response to other evidence demonstrating inadequate access of many Indian communities to energy services and weatherization assistance, S.3752 authorized the Secretary of Energy to establish at least 10 distributed energy demonstration projects to increase the availability of energy resources to Indian homes and community buildings. To carry out these projects, *Indian Self-Determination and Education Assistance Act* contracts and funding provisions were proposed for energy efficiency activities associated with tribal buildings and facilities. Section 305 of S.3752 reflected a major revision of the federal weatherization program by authorizing direct grants to Indian tribes for weatherization activities.

S.3752 also proposed significant revision of the *Indian Land Consolidation Act* to address practical problems in that act's administration and substantial expansion of the durational provisions of the non-mineral, long-term business leasing provisions of 25 U.S.C. § 415(a).

While this brief summary can adequately describe the myriad matters addressed in S.3752, it is fair to state that it touched a wide array of Indian-related programs involving Indian energy issues.

In contrast, the scope of S.1684 was considerably more narrow than S. 3752. Nonetheless, S1684 contained provisions equating tribes with States and municipalities for hydropower permits and licensing under the *Federal Power Act* [Sec. 201]. It also made provision for biomass tribal demonstration projects [Sec. 202] and would have provided considerably more modest, indirect access to weatherization program funding [Sec. 203] for Indian communities. It encouraged tribal energy resource development planning in coordination with the Department of Energy [Sec. 101]. That bill did not, however, address a number of matters contained in S.3752, such as expansion of the Indian Energy Loan Guaranty Program, establishment of distributed energy demonstration projects, revision of the Indian Land Consolidation Act provisions, or expansion of the durational provisions of the non-mineral, long-term business leasing provisions of 25 U.S.C. § 415(a).

S.2132 revives the concepts set forth in S.1684 as that earlier bill was referred to the full Senate by this Committee but does not tackle the full scope of reforms that S.3752 sought. The differences between the much earlier S.3752 and the much more modest recent proposals reflect both fiscal realities associated with cost as well as the need to ensure this Committee maintains jurisdiction over this important legislation.

Perhaps the most significant element in S.2132 and S.1684 is the series of amendments to the TERA provisions initially established in the Title V of the *Energy Policy Act of 2005*. For reasons discussed in more detail below, those changes merit the Committee's support.

We urge those members of this Committee who sponsored S.3752, which our Tribe fully supported, not to abandon S.2132 because of its narrower scope because the legislation before you is badly needed in Indian Country.

IV. TERAs and the Balancing of Tribal Self-Determination and Secretarial Review

On August 8, 2005, the *Energy Policy Act of 2005* became law. Title V of this 15-title statute is the "Indian Tribal Energy Development and Self-Determination Act of 2005," which provided comprehensive amendments to Title XXVI of the Energy Policy Act of 1992. One of the key provisions of Title V was Section 2604 [25 U.S.C. §3504], which created a mechanism pursuant to which Indian tribes, in their discretion, could be authorized to grant energy-related leases, enter into energy-related business agreements, and issue rights-of-way for pipelines and electric transmission facilities without the prior, specific approval by the Secretary of the Interior.. As a pre-condition to such authorization, a tribe and the Secretary of the Interior are first required to enter into a Tribal Energy Resource Agreement (TERA) --- a master agreement of sorts --- addressing the manner in which such a tribe would process such energy-related agreements or instruments.

Although the TERA concept did not become law until 2005, its genesis before this Committee occurred several years earlier, and our files show that our former Chairman Howard Richards, Sr. formally requested support for similar legislation in 2003. Earlier correspondence confirms that we had the same concerns about federal delays and trust administration then that we have now. A memorandum from our legal counsel to the Committee's 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.

Much like the debate that surrounded passage of the *Indian Mineral Development Act of 1982*, the potential diminishment of the Secretary's role contemplated under a TERA caused considerable discussion before this Committee and in Indian Country. We participated in those debates. Ultimately, with the encouragement of the National Congress of American Indians and the Council of Energy Resource Tribes, compromise was reached among this Nation's leaders on energy and Indian issues. Senator Bingaman and Senator Domenici and Senator Inouye and Senator Campbell reached agreements on a number of matters that paved the way for passage of this legislation in both houses of Congress. These legislative resolutions were reached only because of the overriding recognition that the federally-dominated system of Indian trust

administration was broken and was condemning Indian people to an arbitrarily imposed future of impoverishment and hopelessness

Despite the potential promise extended by Section 2604, no tribe has yet entered into a TERA. We have spent considerable time asking ourselves why. Clearly, the inadequacies of federal trust supervision persist and show no signs of marked improvement. Given the years that we have invested in pushing for the TERA alternative, it is worth identifying some of the reasons why no tribe has entered into a TERA. The following is a list of some of the reasons we have considered:

1. The regulations implementing Section 2604 diminished the scope of authority to be obtained by a TERA tribe by preserving to the federal government its prerogative in carrying out an array of functions --- called "inherent federal functions" in the vernacular --- an undefined term that potentially rendered the act's goal of fostering tribal decision-making and self-determination practically meaningless.

2. Unlike contracts carried out by Indian tribes under the *Indian Self-Determination and Education Assistance Act*, Section 2604 provided no funding to Indian tribes even though TERA-contracting tribes would be assuming duties and responsibilities typically carried out by the United States.

3. One of the statutory conditions for a TERA, the establishment of tribal environmental review processes requiring public comment, participation, and appellate rights with respect to specific tribal energy projects, was an unacceptable opening of tribal decisions to outside input and potential criticism.

4. Many Indian tribes lacked the internal capacity to perform the oversight functions potentially contemplated in a TERA or standards for measuring tribal capacity were vague or unclear.

5. The extensive process of applying for and obtaining a TERA was simply too consuming and distracting to merit disruption of ongoing tribal governmental challenges.

Clearly, this list is not exhaustive. The lesson for this Committee, therefore, is that the tragic consequence of no approved TERAs and a continued reliance upon federal supervision has been the incredible lost opportunities to develop Indian energy resources during the period between 2005 and today. Those development opportunities were extended to non-Indian mineral owners on State and private lands in other regions of the country, where no federal approval was required for leasing or development.

For example, when one considers that the price of natural gas in 2008 exceeded $10 per mcf, and today is only one third of that price, those lost opportunities may not return for decades. In February 2009, we sent a letter to the Regional Director of the BIA and explained the impacts being caused by bureaucratic delays at that time:

> The Tribe's Energy Department recently completed a review of delays in processing pipeline rights-of-way (ROWs) and BIA concurrences for the BLM to issue permits to drill wells on tribal oil and gas leases. The results of that review are staggering. Currently, approximately 24 Applications for Permit to Drill (APDs) await BIA concurrence. Additionally, approximately 81 pipeline ROWs await issuance by the BIA. Of the 81 pending ROWs, 11 were approved in Tribal Council resolutions adopted in 2006, 44 were approved in Tribal Council resolutions adopted in 2007, 22 were approved in Tribal Council resolutions adopted in 2008, and 4 were approved in Tribal Council resolutions adopted in 2009. … It should be emphasized that in each instance these pending transactions have already undergone environmental reviews by the Tribe's Natural Resource Department pursuant to the Tribe's 638 contract with the BIA as well as review by the Tribe's Energy Department.
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> Had these APDs and ROWs been approved, the Tribe would have received revenue in a number of different ways, including: (i) surface damage compensation; (ii) grant-of-permission fees; (iii) severance taxes; (iv) royalties; (v) Red Willow Production Company working interest income; and (vi) Red Cedar Gathering Company gathering and treating fees. We estimate that lost revenue attributable to severance taxes and royalties alone exceeds $94,813,739. Significantly, during the period of delay, prices for natural gas rose to an historic high, but have now declined to approximately one-third of that market value. Thus, much of this money will never be recovered by the Tribe.
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> One example of these delays involves the Samson South Ignacio Pipeline Project, which was introduced to the Tribe and the BIA in June of 2006. It is our understanding that Samson has complied with all BIA requirements, yet BIA continues to resist issuance of the ROWs. We estimate that the Tribe is losing royalties on this project at the rate of approximately $300,000 per month.

Our Tribe continues to believe that TERAs provide great potential as a vehicle for tribal self-determination and development. We remain extremely frustrated with the federal administrative impediments to making simple decisions, such as granting rights-of-way across our lands. The federal system on our reservation is getting worse, not better, and, increasingly, we are spending more time fighting with the Bureau of Indian Affairs (BIA) about nonsensical directives and conditions for obtaining federal approvals. This is true even though we are considered one of the most commercially advanced tribes in the country, with operations in multiple states related to energy exploration and production, commercial real estate acquisition, real estate development, midstream gathering and treating, and private equity investment.

V. TERA Provisions of S.2132

The major proposed revisions to current law affecting TERAs are found in Section 103 of S.2132. The proposed changes are technical in many cases and cannot be easily understood without a side-by-side comparison of the existing law. We fully support the changes, however,

and hope that the Committee considers them favorably. Some key changes proposed in S.2132 include the following.

First, Section 103 expands the scope of TERAs to include leases and business agreements related to facilities that produce electricity from renewable energy resources.

Second, clarifying amendments also confirm that TERAs may extend to pooling and communitization agreements affecting Indian energy minerals.

Third, Section 103 expands existing law related to direct development of tribal mineral resources when no third party is involved. Under existing law, because no federal approval for such activity is required, a tribe may lawfully engage in such activity, but few tribes have the capacity or internal expertise to do so directly. The expansion contemplated by Section 103 extends such an approval exemption to leases, business agreements and rights-of-way granted by a tribe to a tribal energy development organization in which the tribe maintains a controlling interest. This provision expands the opportunity for access to capital for direct tribal development without federal approval where the tribe continues to control the activity.

Fourth, Section 103 would make a proposed TERA effective after 271 days following submittal unless disapproved by the Secretary and would shorten the time-period for review of TERA amendments.

Fifth, Section 103 provides for a favorable tribal capacity determination based on a tribe's performance of *Indian Self-Determination and Education Assistance Act* contracts or *Tribal Self Governance Act* compacts over a three year period without material audit exceptions.

Sixth, Section 103 allows for TERA funding transfers to be negotiated between the Secretary and the tribe based on cost savings occasioned by the Secretary as a result of a TERA.

Seventh, Section 103 confirms that TERA provisions are not intended to waive tribal sovereign immunity.

While Section 103 includes other clarifying provisions, these constitute the major changes to TERA requirements found in Section 2604 of existing law. The changes improve the scope and clarity of current statutory provisions.

VI. Other Important Provisions of S. 2132

In addition to the critical changes to existing law regarding TERAs to be made by S.2132, the legislation also includes much-needed changes to the appraisal requirements for projects proposed on tribal trust lands. Section 204 would amend the *Energy Policy Act of 2005* by making clear that, for such projects where approval by the Secretary of the Interior is required – which is most, if not all of them, the Tribe or a third-party contractor hired by the Tribe can conduct the required appraisal. Furthermore, S 2132 would require Secretarial review and approval of the appraisal within 45 days, unless specific disapproval criteria are met. That section would also require that the Secretary provide the Tribe with written notice of any such

disapproval and such notice must explain how any deficiencies in the appraisal can be cured or the specific reasons why the appraisal was not approved.

If enacted, this section would eliminate the timely and often costly delays associated with completing fair market value appraisals for projects on tribal trust lands. Given the unique status and nature of these lands, determining such values is always difficult and sometimes impossible; however, under existing law, the Secretary must have an appraisal in order to ensure that the proposed transaction would benefit the Tribe.

The fact is that the Southern Ute Indian Tribe long ago surpassed the capabilities of the Department of the Interior to advise the Tribe regarding its business decisions and often seeks waivers of the appraisal requirement for various tribal projects. Passage of S.2132 would ensure that the Tribe has the necessary flexibility to do its own appraisals and require that the Secretary approve those appraisals in a timely fashion, which would significantly reduce the risk of delays and the threats such delays pose to the Tribe's business interests.

VII. Conclusion

Individually and on behalf of the Southern Ute Indian Tribe, I hope that these comments have been instructive as to why we strongly support S.2132, and respectfully request that you move expeditiously on this legislation on behalf of Indian Country