BEFORE THE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON INDIAN AND INSULAR AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
Prepared Statement of the Honorable Melvin J. Baker
Chairman, Southern Ute Indian Tribal Council

On behalf of the
SOUTHERN UTE INDIAN TRIBE
Oversight Hearing
"*Tribal Autonomy and Energy Development: Implementation of the Indian Tribal Energy Development and Self-Determination Act*"
September 28, 2023

I. INTRODUCTION

Good morning, Chair Hageman, Ranking Member Leger-Fernandez, and other Committee members. I am Melvin J. Baker, Chairman of the Southern Ute Indian Tribal Council, the governing body of the Southern Ute Indian Tribe. It is an honor to appear before you today to discuss a subject of major importance. For decades, our Tribal leaders have come before Congressional committees and subcommittees to discuss the prudent development of energy resources in Indian country. Prudent development of Tribal energy resources allows Tribal economies to grow and also helps meet the energy needs of the American people. The subject of today's hearing is tied to issues of Tribal sovereignty. I trust that our comments will be of value to the Committee.

In this testimony, I will describe our Reservation and how energy development has affected our people. I also want to share with you our role in seeking passage of the Indian Tribal Energy Development and Self-Determination Act of 2005 (25 U.S.C. §§ 3501- 3506) and the amendments to that law enacted in 2018. The job of making that legislation work for Tribes is not over, and I want to share with you what we see as obstacles to its effectiveness. With that, let me first describe our Tribe and where I come from.

II. THE SOUTHERN UTE INDIAN TRIBE AND OUR RESERVATION

As the oldest inhabitants to what is now the State of Colorado our Tribe has just under 1,500 members. Our Reservation consists of approximately 700,000 acres of land located in southwestern Colorado, near the Four Corners area. Some 311,000 surface acres of the Reservation are held in trust by the federal government for the benefit of the Tribe; however, the Tribe is also the beneficial owner of additional severed mineral estates held in trust for the benefit of the Tribe within the Reservation. Although the bulk of the Reservation involves tribal trust lands, interspersed throughout the Reservation are federal, state, and private lands, as well as some Indian allotted lands.

Through financial discipline and farsighted leadership, the Tribe has developed a record of sound managerial experience and business practice. For instance, the Tribe was the first Tribe in the nation with a AAA+ credit rating, which was earned through years of steady governance and successful business management. The path to successful economic development has had significant challenges. Fifty years ago, our 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 is the largest employer in southwest Colorado with more than 1,000 employees. The Tribe provides health insurance for its Tribal members and operates its own health clinic. The Tribe funds educational opportunity so that all members may obtain a college or vocational degree and runs its own Montessori Academy for elementary and middle school children. The campus of our Tribal headquarters is dotted with state-of-the art buildings, including a justice center, museum, and recreational health facility. This success was not an accident; it is the product of sustained effort and discipline.

Without question, the Tribe's economic success has been tied to development of the Tribe's oil and gas resources. Successful development of those resources, principally coalbed methane gas ("CBM"), has 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 our financial goals, and we are well on the way to providing our grandchildren and their grandchildren the opportunity to maintain our Tribe, our culture, and our lands in perpetuity.

Successful energy development has also enabled the Tribe to invest in diverse, non-energy projects, strengthening the foundation for long-lasting economic prosperity. For example, the Tribe has made real estate investments in multiple markets. These investments include residential, commercial, industrial, and hotel properties in California, Colorado, Texas, Kansas, Illinois, Ohio, Florida, Maryland, New Jersey, and Tennessee. Even greater diversification is reflected in the Tribe's investments in managed private equity funds involving hundreds of portfolio companies. Returns on these investments have 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.

III. TAKING CONTROL OF OUR OWN RESOURCES: TRIBAL SOVEREIGNTY AND SELF-GOVERNMENT

Indian self-determination has been the hallmark of federal Indian policy since 1970, and our Tribe has learned that we can do a better job of developing programs for the Tribe and providing services to our members than federal agencies can. In some instances, the Tribe has chosen to enter into "638 contracts" under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301, *et seq*., which authorizes the Tribe to do the tribally-related work of federal agencies and receive the federal funding that would have gone to a federal agency to perform that function. In other instances, the lack of federal funding or focus has required the Tribe to simply fill the void with its own programs and services.

Energy development on our lands has evolved over time. 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 mineral leases under the supervision of the Secretary

of the Interior. For decades, we maintained a passive role, receiving modest royalty revenue, but we 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 a better understanding and more control over that process. The moratorium on leasing 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 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*, 455 U.S. 130 (1982), the Tribal Council instituted a severance tax, which has produced more than $900 million in revenue for the Tribe over the last four decades.

With the enactment of the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108, ("IMDA"), 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 more thorough job of monitoring the royalty payment practices of oil and gas companies, shortly after passage of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701, *et seq.*, the Tribe entered into a cooperative agreement with the Minerals Management Service ("MMS") (later named the Office of Natural Resource Revenue) permitting the Tribe to conduct its own royalty accounting and auditing under that agency's ultimate oversight. The Tribe's award-winning royalty audit program has been instrumental in recovering tens of millions of dollars of delinquent royalties, interest, and civil penalties.

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 held by the Secretary as part of a settlement of our 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. Today, Red Willow successfully operates hundreds of wells on the Reservation. It has also been a regional leader in successful development of horizontal drilling in coal formations, which has increased CBM production volumes while dramatically decreasing adverse surface impacts.

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 CBM from Reservation lands and has provided a significant source of revenue for the Tribe.

Just as we have relied economically on oil and gas development, we have also been active in overseeing environmental protection. In 1990, the Tribe established a Water Quality Program to protect and preserve the quality of the Tribe's water resources through management of various Clean Water Act programs. With support from the U.S. Environmental Protection Agency ("EPA"), the Tribe has established its own water quality standards and is actively involved in regulating the discharge of pollutants into tribal waters on the Reservation. In 2012, the Tribe became the first tribe in the country to operate its own clean air program pursuant to the federal Clean Air Act, 42 U.S.C. §§ 7401, *et seq*. Other departments within the Tribe's governmental organization assist in monitoring wildlife, enhancing habitat, and preserving cultural and archaeological resources on the Reservation.

IV. MORE RECENT EXAMPLES OF TRIBAL SELF-DETERMINATION

Despite the Tribe's decades-long success in managing its own affairs and conducting complex business transactions, both on and off the Reservation, federal law and regulations still require federal review and approval of the most basic realty transactions occurring on the lands held in trust for the Tribe. Federal approval constitutes federal action, which triggers environmental review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4332(2)(C), even for simple and straightforward realty transactions. In addition to second-guessing the Tribal Council's decisions on how to use its tribal trust lands, federal agency NEPA review can cause significant delays and lost opportunities.

To eliminate administrative delays, and in recognition of the ability of Tribal governments to protect their own interests, Congress has taken steps in recent years authorizing Tribal governments to exercise greater control over Tribal lands. Under the HEARTH Act, for example, once tribal regulatory and environmental review procedures have been approved by the Secretary of the Interior, Tribes may make final decisions in issuing tribal surface leases without prior review and approval of the Secretary. *See* 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"). Our Tribe's comprehensive environmental review code and surface leasing code received Secretarial approval under the HEARTH Act earlier this year. That approval does not extend to mineral leasing, however. As addressed below, the Indian Tribal Energy Development and Self-Determination Act, which does address mineral leasing, is more complicated than the HEARTH Act in terms of transferring final approval authority over energy agreements and development from the Secretary to Tribes.

V. THE INDIAN TRIBAL ENERGY DEVELOPMENT AND SELF-DETERMINATION ACT OF 2005

Just as Tribes had encountered delays in obtaining Secretarial approval of surface leases, obtaining timely approval of oil and gas leases and associated developmental permits has often been challenging. More than 20 years ago, in a memorandum dated June 30, 2002, our legal counsel informed the legal counsel for the Senate Committee on Indian Affairs, as follows:

> 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.

Congress responded to the concerns of energy producing Tribes in the course of revising the Nation's energy policy.

The Energy Policy Act of 2005, 42 U.S.C. §§ 15801, *et seq.*, contains a separate, stand-alone Indian energy chapter, "Title V – the Indian Tribal Energy Development and Self-Determination Act." *See* Act of August 8, 2005, Public L. No. 109-58, Title V, 119 Stat. 764 -779 (amending Title XXVI of The Energy Policy Act of 1992 (25 U.S.C. §§ 3501-3506)). Significantly, Title V authorizes an Indian tribe, in its discretion, to negotiate a bilateral agreement with the Interior Secretary, known as a Tribal Energy Resource Agreement ("TERA"), governing the rights and responsibilities for mineral leasing of tribal trust lands. *See* 25 U.S.C. § 3504. Once a TERA is approved by the Secretary, that tribe would be free to negotiate and grant energy-related leases, enter into energy-related business agreements, and issue rights-of-way for such things as pipelines and electric transmission facilities without prior Secretarial review and approval. For various reasons, some of which are identified below, no Tribe has submitted a TERA to the Secretary for final review and approval.

After passage of the TERA legislation, the Senate Committee on Indian Affairs held hearings in which it sought input from energy producing Tribes as to why no Tribe had entered into a TERA. Our Tribe submitted formal comments addressing that issue. In our comments of April 30, 2014, we identified the following potential reasons for why no TERA had been consummated:

> 1. The BIA regulations implementing Title V's TERA provisions (25 C.F.R. Part 224) minimized the scope of authority that could be obtained by a TERA tribe by reserving to the federal government an array of functions – called "inherent federal functions" – an undefined term that potentially diluted the act's goal of fostering tribal decision-making and self-determination.
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> 2. Unlike "638 contracts" carried out by Indian tribes under the Indian Self-Determination and Education Assistance Act, the TERA legislation provided no funding to Indian tribes even though TERA-contracting tribes would be assuming duties and responsibilities typically carried out by the United States.
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> 3. One of the statutory conditions for a TERA, the establishment of a tribal environmental review process, requires public comment, participation, and appellate rights with respect to specific tribal energy projects, which some tribes considered to be an unacceptable opening of tribal decisions to outside scrutiny, including from individuals with no local connection to the affected tribe or project.

4. The statutory standards for measuring a tribe's capacity to enter into a TERA were vague and unclear.

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

Although it took several years following those hearings before changes were made, in 2018 Congress amended the TERA statute in several significant ways. *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) ("2018 Amendments").

VI. 2018 AMENDMENTS TO THE TERA STATUTE

The 2018 Amendments addressed many of the concerns that had been raised by Tribes related to implementation of TERAs. For example, in determining what Tribes were qualified to enter into a TERA, Congress replaced the vague requirement of demonstrated "capacity to regulate the development of energy resources," with a more concrete test of successful administration of "638 contracts" involving "management of tribal land or natural resources" for a period "not less than 3 consecutive years." 2018 Amendments, § 103(a), *see* 25 U.S.C. § 3504(e)(2)(B)(XII)). On another point, although Congress retained the requirement that a TERA Tribe develop environmental review procedures as a condition for entering into a TERA, the nature of those tribal environmental review procedures was refined to provide the public notification of and a reasonable opportunity to comment on "significant environmental impacts of the proposed action." *Id*., *see* 25 U.S.C. § 3504(e)(2)(C)(i)). As to funding, Congress directed that Tribes with approved TERAs will receive from the Secretary the amounts that would have been expended but were not expended "as a result of an Indian tribe carrying out the activities" under a TERA. *Id*., *see* 25 U.S.C. § 3504(g)(1). To facilitate the processing of a TERA application, Congress also imposed a 271-day deadline on the Secretary's disapproval of a TERA, which, if not met, would result in automatic approval of the TERA. *Id.*, *see* 25 U.S.C. § 3504(e)(2)(A).

In addition, the 2018 Amendments expanded the scope of approvable tribal actions that could be taken under a TERA to include transactions involving electric generation, transmission, and distribution facilities (including those associated with renewable energy) (25 U.S.C. § 3504(a)(B)(i)) and transactions involving processing and treating facilities involving production from tribal lands (§ 3504(a)(B)(ii)). The 2018 Amendments confirmed that pooling or communitization agreements could be approved by a Tribe under a TERA (25 U.S.C. § 3504(a)(1)(C)). Collectively, the 2018 Amendments, which were adopted by unanimous consent in both the House and the Senate, reflected significant changes contributing to the attractiveness of TERAs as an option for electing Tribes. To be sure, as with the original 2005 enactment, TERA Tribes would be principally responsible for the business consequences of the negotiated terms of their business agreements; however, similar provisions had not deflected Tribes from seeking HEARTH Act approvals for surface leasing. Despite the positive changes contained in the 2018 Amendments, no Tribe has yet entered into a TERA with the Secretary.

VII. THE SECRETARY'S IMPLEMENTING REGULATIONS AND INHERENT FEDERAL FUNCTIONS

The TERA provisions contained in the 2005 Act directed the Secretary to adopt implementing regulations within 1 year of the effective date of the legislation, i.e., by August 8, 2006. *See* 25 U.S.C. § 3504(e)(8). Recognizing the challenges that the Interior Department would have in meeting that deadline, our Tribe volunteered to assist the Secretary in preparing a preliminary set of draft regulations, and then-Assistant Secretary James Cason accepted that offer. In collaboration with representatives from the Department of the Interior, including the Interior Solicitor's office, a small working group proceeded with that task, and a preliminary draft was submitted to the Secretary's representative in early 2006. The product generated by that working group assisted the Secretary in developing proposed regulations that would later be subject to comment and refinement under the rulemaking process prescribed by the Administrative Procedures Act. The Secretary issued implementing regulations on March 10, 2008 (73 Fed. Reg. 12, 821).

At the outset, we recognized that administrative delays associated with proposed federal agency approvals were not limited simply to minerals agreements or rights-of-way, but often involved the subsequent issuance of operational permits related to those documents. For example, the approval of an oil and gas lease or IMDA minerals agreement by the BIA, did not have any effect on the timing of the Bureau of Land Management's approval of an application for a permit to drill a well on those affected lands. With that in mind, we sought to authorize a Tribe to seek, not just mineral lease approval, but other Interior agency authority needed to implement such a lease. The working group was supportive of that approach. When the final implementing regulations were issued, however, 25 C.F.R. § 224.52(c) stated as follows:

> [A TERA may] include assumption by the tribe of certain activities normally carried out by the Department, except for inherently Federal functions . . . .

(emphasis added). The term "inherently Federal functions" was not defined in the Secretary's implementing regulations. Despite repeated efforts to get meaningful clarification from the Interior Department as to what that exception means, we have been unable to do so.

Among other provisions in the 2018 Amendments, Congress explicitly provided that in its TERA application a tribe could:

> at the option of the Indian tribe, identify which functions, if any, authorizing any operational or development activities pursuant to a lease, right-of-way, or business agreement approved by the Indian tribe, that the Indian tribe intends to conduct.

25 U.S.C. § 3504(e)(B)(iii) (XIII). Following enactment of the 2018 Amendments, the Secretary was again directed to promulgate implementing regulations, and, in light of the statutory language set forth above, that rulemaking provided another opportunity to find out what the Department

would preclude a tribe from undertaking under a TERA. In response to comments submitted during that rulemaking, the BIA stated as follows:

> *D. Inherently Federal Functions*
> *Comment:* Several Tribes and other commenters expressed the need to define "inherently Federal functions" to clarify what functions are not available for Tribes to undertake in a TERA. According to these Tribes, a definition is necessary for several reasons, including to address issues, provide certainty, and ensure consistency of interpretation. A few requested that the definition exclude basic minerals development functions, like applications for permits to drill, thereby allowing Tribes to undertake these functions through TERAs. . . .
> *Response:* The Department has undertaken efforts to define "inherently Federal functions" based on years of Tribal input and anticipates releasing a list of functions that it has determined to be "inherently Federal" in the near future.

BIA, "Tribal Energy Resource Agreements," Final Rule, 84 Fed. Reg. 69602 (Dec. 18, 2019). Our Tribe and all energy producing Tribes are still waiting for that promised clarification just as we have been waiting since 2008.

We anticipate, when confronted with questions about "inherent Federal functions" that Interior will say something to the effect of, "Submit your application; tell us what you want to undertake, and we'll see if we can work it out." If that is Interior's position, it shows a clear, institutional disregard for the unambiguous objectives of Congress. It also grossly underestimates the time, expense, and lost opportunities associated with participating in required pre-application meetings (which we undertook several years ago), preparing a detailed application, negotiating final terms of a TERA, only to be potentially confronted at the end of that process with a stop sign saying that a critical aspect of our proposed TERA is now a closed opportunity. With deep respect for the Secretary, we do not believe that is what Congress intended, and we hope that greater clarity on this critical point can be obtained.

CONCLUSION

We hope this testimony provides background about how the concept of a TERA became embraced in law and how Interior's regulations were developed. We still believe that TERAs are a valuable option for many Tribes, including our Tribe. Again, we are most appreciative of the opportunity to present this testimony.

Respectfully submitted,

Melvin J. Baker, Chairman
Southern Ute Indian Tribal Council