BEFORE THE SUBCOMMITTEE ON
INDIAN AND ALASKA NATIVE AFFAIRS

COMMITTEE ON NATURAL RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

Honorable James M. "Mike" Olguin
Vice Chairman, Southern Ute Indian Tribal Council
Southern Ute Indian Tribe

Testimony on H.R. 3973 – The Native American Energy Act
February 15, 2012

I. Introduction

Chairman Young, Ranking Member Boren and members of the subcommittee, I am Mike Olguin, the Vice Chairman of the Southern Ute Indian Tribe. I am honored to appear before you today to provide testimony regarding H.R. 3973. Although this proposed legislation was only recently introduced, it addresses a number of issues involving Indian energy resource development that have been under discussion for many months.

The proposed Native American Energy Act is a positive step forward in our longstanding effort to level the playing field when it comes to Indian energy development. For decades our tribal leaders have appeared before House and Senate Committees and urged you to change existing laws so that tribes would have the legal power to use their lands as they see fit, free from the bureaucratic delays and interference inherent in a system that relies on federal review and approval. We are very grateful for your attention and efforts toward that end. This statement presents specific comments regarding a number of the legislative provisions.

II. Background

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.

III. The Southern Ute Indian Tribe Has Assumed Significant Responsibility Over Energy Development

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." The Native American Energy Act will help implement our longstanding goal of self determination, and we thank you for introducing it.

IV. Specific Comments

A. Appraisals. Section 3 of the proposed legislation would provide tribes with meaningful options and reforms to the current appraisal process. As you know, existing regulations require the Secretary of the Interior to conduct appraisals in the course of reviewing proposed transactions affecting Indian trust lands or trust assets. While this practice reflects an ostensible effort to carry out the Secretary's trust responsibility and to ensure that Indians are not short-changed in land-related transactions, it has become a major bottleneck to Indian commerce.

The current appraisal process imposes inordinate delays. In addition to near impossible staffing challenges, the appraisal methodologies employed in determining "fair market value" do not take into account the flexibility and creative deal-making often necessary to attract economic development to Indian Country. An example we often refer to involved our tribe's consent to granting a right-of-way for a fiber optic cable. As compensation for the right-of-way, we requested capacity in the cable for data transmission. Traditional appraisal methods could not effectively measure the value for compensation purposes of capacity in an unconstructed fiber optic cable, yet our leaders knew that the connectivity to our government and businesses far exceeded tradition dollar-per-rod compensation practices.

Ultimately, and after considerable and costly delay, our leaders prevailed in obtaining a waiver of the appraisal process for that transaction. We have since insisted upon a general waiver of Interior appraisals for tribal trust land transactions on our Reservation. In lieu of those appraisals, we have a schedule of permission and surface damage compensation fees, tied to land classification categories, that guides us in most situations. We strongly support the optional, alternative approach to Interior appraisals suggested in Section 3.

B. Standardization. Section 4 of the proposed legislation directs the Secretary of the Interior to implement a uniform system of reference numbers and tracking systems for oil and gas wells. We do not know the specific facts that led to this proposal. Our tribe's energy department has worked closely with the Bureau of Land Management and the Colorado Oil and Gas Conservation Commission in many aspects of natural gas development. Through those cooperative efforts, specific API numbers and well names are assigned to each permitted well, and that indentifying information is used by operators, governmental officials, and others to reference such wells. Although there may be exceptions to the experience we have enjoyed, we would caution against adopting statutory language in this section that is so broad that it modifies

existing, standard practices that are working. Instead, more specific language that remedies the particular problems would appear preferable.

C. Environmental Reviews of Major Federal Actions on Indian Lands. Section 5 of the proposed legislation would significantly reduce the categories of persons who would be entitled to review or comment upon environmental impact statements associated with major federal actions involving Indian lands. Because energy transactional documents involving Indian land generally require the approval of the Interior Secretary, and because such approval constitutes federal action, this approval process triggers compliance with the National Environmental Policy Act ("NEPA").

NEPA is a procedural statute designed to ensure that federal agencies evaluate alternatives to a proposed federal action, taking into consideration the potential environmental and social impacts of the alternatives and the views of the public. Except for the federal government, no owner of land in the United States--other than an Indian tribe or an Indian allottee--is subject to NEPA with respect to its land use transactions.

Unlike Indian trust lands, which are owned beneficially by Indian tribes or Indian individuals, other federal and public lands are generally owned for the benefit of the public at large. Like many tribal representatives, our leaders have witnessed the very real economic harm done when NEPA blankets tribal land use decisions and unfairly encroaches on tribal sovereignty. To be sure, Indian tribes are bound to substantive environmental protection laws of general application when Congress has indicated its intent to bind tribes. So long as proposed transactions are to be performed in compliance with those substantive laws, however, the evaluation of multiple alternatives to a tribal land use decision and inclusion of the public in second-guessing a tribe's decision are objectionable.

Further, in the context of energy development, the NEPA process severely penalizes tribes. Energy development on private lands adjoining tribal land does not require NEPA compliance. Thus, while federal officials undertake detailed evaluation of alternatives to a tribal energy lease, for example, oil and gas resources of tribes are often being drained by their neighbors. Particularly for tribes, like the Southern Ute Indian Tribe, with sophisticated energy and environmental staffs and decades of proven success, the NEPA review process remains frustrating and damaging.

We are supportive of major NEPA reform involving the use of tribal trust lands. We were active supporters of Section 2604 of the Energy Policy Act of 2005 and the legislative authorization for use of "Tribal Energy Resource Agreements" ("TERA"). In place of NEPA, Congress now permits a tribe with an approved TERA to establish a tribal environmental review process that allows for limited public participation. A TERA would also authorize a fribe to assume federal administrative functions related to review and operation of energy development on tribal lands. Just as our tribal leaders supported the TERA concept, we are also supportive of the public participation limitations proposed under Section 5 of the Native American Energy Act.

D. Indian Energy Development Offices. Section 6 of the legislation directs the Interior Secretary to establish at least five multi-agency Indian Energy Development Offices.

The Indian Energy Development Offices would be set up in regions of significant Indian energy resource activity or potential, and, through centralized staffing, the Indian Energy Development Offices would presumably be better able to handle Indian energy development than current administrative structures. Although the establishment of Indian Energy Development Offices has been advocated by others in the Indian community, we seriously question the need for or the long-term viability of these multi-agency offices. All of the administrative agencies at the Department of the Interior share the federal trust responsibility. With the exception of the Bureau of Indian Affairs, all of those offices also have responsibilities for activities on a variety of federal lands.

Our experience indicates that when dealing with officials from non-BIA agencies, such as the BLM or the Office of Natural Resources Revenue, much can be accomplished through officials held in high regard and occupying positions of broad authority within their agencies, who have an awareness and sensitivity to Indian matters. We fear that, because of their value to their agencies for dealing with multiple issues, such officials would not be the ones selected to fill positions in Indian Energy Development Offices. With guidance from the Secretary of the Interior, we believe that prioritization of Indian trust matters and inter-agency cooperation can be effectively addressed without the creation of Indian Energy Development Offices. In sum, we do not oppose this proposal, but we seriously question whether it would be an improvement over existing practice.

E. BLM Oil and Gas Fees. Section 7 of the proposed legislation would prevent the BLM from imposing fees for (i) applications for permits to drill on Indian lands, (ii) oil and gas inspections on Indian lands, and (iii) nonproducing acreage on Indian lands. We support this legislative proposal. Energy development on Indian lands is already subject to a number of competitive disadvantages and disproportionate costs, and the imposition of the referenced fees is a further disincentive to energy development in Indian Country.

F. Bonding Requirements and Nonpayment of Attorneys' Fees To Promote Indian Energy Projects. Section 8 of the legislation imposes significant hurdles and disincentives for litigants desiring to block Indian energy projects in court or through administrative processes. Although there are aspects of this proposal that we favor, we also have some concerns. Clearly, the object of this section is to eliminate frivolous challenges to proposed activities, which challenges are designed principally as delay tactics. Our hesitancy to support this measure fully, however, derives from the knowledge that, in some cases, challenges to energy development may not be frivolous. In that regard, our tribe was the plaintiff in hard-fought litigation that ended only after the Supreme Court ruled that we did not own the coalbed methane gas trapped in our coal deposits. Legitimate disputes, such as good faith disputes regarding ownership, should not necessarily be swallowed by the reforms contemplated in this section. We are continuing our study of this section and look forward to reviewing the thoughts of other witnesses and commentators.

G. Tribal Biomass Demonstration Project; Tribal Resource Management Plans; and Leases of Restricted Lands For the Navajo Nation. Sections 9, 10, and 11 of the proposed legislation contain provisions that we support. The tribal biomass demonstration project would encourage use of valuable timber resources obtainable from federal lands for

energy purposes. Section 10 recognizes resource development activity undertaken under an approved tribal resource management plan as a federally-acknowledged sustainable management practice. Finally, section 11 would expand the authorization currently extended to the Navajo Nation to enter into leasing activities with minimal federal oversight. We believe that the processes in place and being proposed for the Navajo Nation should be considered as an option available to all tribes.

V. Cooperative Agreements and Civil Penalty Cost Sharing

This portion of our testimony discusses a new issue that we hope will be addressed by the Subcommittee as the Native American Energy Act evolves: clarification regarding the sharing of civil penalties under the Federal Oil and Gas Royalty Management Act ("FOGRMA"). Under the FOGRMA, Indian tribes may enter into contracts with the Office of Natural Resources Revenue ("ONRR") to conduct audit work related to the payment and reporting of oil and gas royalties due under federally approved oil and gas leases involving tribal lands. 30 U.S.C. §§ 1732.

The Southern Ute Indian Tribe and ONNR are currently parties to such a cooperative audit agreement, which is similar to previous cooperative agreements that have been in place since the late 1980s. One provision of FOGRMA authorizes ONRR to assess civil penalties against oil and gas companies who fail to make proper payments or file accurate reports under the applicable leases and regulations. 30 U.S.C. § 1719. If the assessment of such civil penalties is the product of work performed by a tribal audit team, FOGRMA also authorizes ONRR to share such civil penalty proceeds on 50/50 basis with the applicable tribe. 30 U.S.C. 1736. The civil penalty sharing provision also states, however, that the portion received by a tribe "shall be deducted from any compensation due such . . . Indian tribe under" the applicable cooperative agreement.

Historically, the ONRR and its predecessor agencies have not collected significant civil penalties from misreporting oil and gas companies, and, accordingly, the effect of sharing such civil penalties on contract funding has not been an issue. However, the issue has recently come to the forefront. See Decision re: Office of Natural Resources Revenue – Cooperative Agreements, No. B-32197 (Comptroller General of the United States, August 2, 2011). There appears to be a common recognition among participating tribes and ONRR that clarification is needed with respect to 30 U.S.C. § 1736. In order to provide statutory clarity and preserve the full incentive associated with the sharing of civil penalties, we suggest the following statutory language, or materially similar language:

SEC. ___. SHARED CIVIL PENALTIES.

> Section 206 of the Federal Oil and Gas Royalty Management Act of 1982 (30 U.S.C. 1736) is amended by striking the second sentence and replacing it as follows: "Within 180 days from the date of enactment of this section, the Secretary shall also pay to applicable tribes an amount equal to 50 per centum of any civil penalty collected by the federal government under this Act resulting from activities conducted by an Indian tribe pursuant to a cooperative agreement

under section 202, not previously paid under this section by the Secretary to such tribe, without deduction from any compensation due such tribe under a previous or currently existing cooperative agreement under section 202.

We hope that the Subcommittee will consider the proposed language favorably, and we look forward to working with you in discussing this matter further.

Conclusion

In conclusion, I am honored to appear before you today on behalf of the Southern Ute Indian Tribe. We believe that our experiences have given us a unique perspective on matters related to energy development in Indian Country. We look forward to continuing our work with the Subcommittee on this important matter.

At this point, I would be happy to answer any questions you may have.