SOUTHERN UTE INDIAN TRIBE

December 21, 2016

Special Counsel Carolyn Lerner
Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

Via email: clerner@osc.gov

Re: December 15th OSC Public Release: Report of Prohibited Personnel Practice
OSC File No. MA-13-0754

Dear Special Counsel Lerner:

As the governing body of the Southern Ute Indian Tribe, the Southern Ute Indian Tribal Council was very surprised to learn from inquiring media that the Office of Special Counsel had, on December 15th, issued a nationwide, public release of a "Whistleblower" report completed 18 months ago that describes the Tribe as having engaged in improper conduct. OSC had not informed the Tribe that it was undertaking any such investigation, that it had completed a report, or that it was posting its partially-redacted findings for public consumption. The report is extremely distressing on several levels, not just because of its factual and legal inaccuracies, but also in a broader sense because of its seeming disregard for the structural challenges that Indian tribes face across the country. We believe that the nationwide release of this confidential report (without the minimal courtesy of any notice to the Tribe) compounds its mistaken conclusions and was a serious disservice to the Tribe and the public. We respectfully request that you review the content of this letter and consider how you might mitigate those adverse effects.

In a narrow sense, OSC's conclusions hinge on the erroneous factual determination that the Bureau of Indian Affairs transferred two of its employees from the Southern Ute Agency because those employees had discovered and informed the Tribe's leaders of unauthorized actions on the Tribe's part—actions allegedly intended, among other things, to avoid compliance with the National Environmental Policy Act (NEPA). Supposedly, this "disclosure" of tribal wrongdoing by the two employees so angered the Tribe's representatives that the Tribal Council demanded the ouster of the two officials through a formally enacted resolution, and the BIA effectively colluded in unjustified tribal retaliation in acting on the Tribe's request. Because this factual finding also involves a determination as to whether the Tribe's positions were legally authorized or reasonably challenged, OSC has necessarily adopted interpretations about several aspects of substantive law related to tribal energy resource development that are misleading.

Contrary to OSC's determinations, had your office sought input from the Tribe's officials, your investigators would have learned that the Tribal Council requested the transfer of the

"Complainant" and "Coworker," not because those officials were inconveniently enforcing applicable law, but rather because they did not understand the laws and regulations they were called upon to administer, because they refused to consult meaningfully with the Tribe about matters of vital economic importance to the Tribe, and because they abused their authority and positions in violation of the United States' trust responsibility to the Tribe, a pattern that appears to have been repeated now by OSC. Needless to say, the Tribe's members, their leaders, and advisors are disappointed by the mischaracterization of the Tribe's actions and motives. Those mischaracterizations have unfairly damaged the Tribe's national reputation for prudent energy development and environmental stewardship.

In a broader context, OSC's nationwide distribution of the report appears to send a deliberate message to Indian tribes that they must simply tolerate incompetent, hostile, or adversarial BIA officials, whose educational backgrounds and professional experience seldom qualify them to exercise effectively the vital approval authority they hold over tribes. It is well known in Indian country that problem BIA employees are merely shuffled from agency to agency, and the Tribe is aware that at least one of the employees named in this report had been subject to a reassignment request by another tribe for reasons strikingly similar to Southern Ute's reasons. Moreover, when the BIA receives a request from a dissatisfied tribe for the transfer of an ineffective local employee, your report will chill any willingness on the part of BIA to act on such tribal requests. As in this case, an easily contrived "whistleblower" complaint, one steeped suitably with allegations of "retaliatory animus" for lawful service, will ultimately penalize the agency for transferring the ineffective employee, so no such action will be taken. It is impossible to overstate the day-to-day impact on tribes and their members that this misguided message sends.

Background

Before discussing specific deficiencies in the report, some background about the Southern Ute Indian Tribe is useful.

The Tribe is a relatively small tribe, comprising just over 1500 members, headquartered on the Southern Ute Indian Reservation in southwestern Colorado in the Four Corners Region of the United States. Our Reservation is a part of the regional San Juan Basin, which has been a prolific source of oil and natural gas production since the 1940's. The land ownership pattern within our Reservation is a complex patchwork of different categories of ownership, including tribal trust lands, allotted lands, non-Indian patented lands, federal lands, and state lands. Based in part on the timing of issuance of homestead patents, sizeable portions of these lands involve split estates in which non-Indians own the surface but the Tribe is the beneficial owner of subsurface oil and gas or coal estates. In other situations, non-Indian mineral estates are adjacent to tribal mineral estates. These complex land ownership patterns have significant implications that range from the potential for uncompensated drainage of tribal subsurface resources to complicated questions of jurisdiction.

Commencing in 1949, our Tribe began issuing oil and gas leases under the supervision of the Secretary of the Interior. For several decades, we remained the passive recipients of modest royalty revenue, but were not engaged in any active, comprehensive resource management

planning. That changed in the 1970's as we 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. Among our concerns were slipshod field practices that often resulted in unnecessary surface disturbance and inadequate protections for wildlife, but we were also mindful that our energy resources were finite. Once depleted, those resources are gone forever.

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. With only one geologist then employed throughout the entire Bureau of Indian Affairs, we hired our own experts and consultants to assist us. While we collected and analyzed data, we halted any new leasing of our minerals. After Congress passed the Indian Mineral Development Act of 1982 (IMDA), and subject to ultimate BIA approval, 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, and 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. Ownership of that company, which now provides gathering and treating services throughout the Reservation, allowed us to develop and market our gas production.

In the late 1990s, the Tribe insisted upon the preparation of a programmatic environmental impact statement (EIS) under NEPA in order to analyze in a comprehensive fashion the impacts of oil and gas development on Indian lands within the Reservation. The BIA and BLM initially objected to that environmental review because such a programmatic NEPA analysis was unprecedented in Indian country and they considered such an undertaking as unnecessary. The Tribe viewed the project as critical, however, so it agreed to pay for the bulk of the EIS preparation. Completion of the programmatic EIS took several years and cost the Tribe several million dollars, funds that the Department of the Interior did not have to carry out its statutory duties. Completion of the EIS was one of many examples of the Tribe's leadership in promoting energy resource development in conjunction with environmental stewardship.

Through hard work, self-discipline, strong intergovernmental relationships and visionary leadership, the Tribe developed a national reputation as a progressive force in Indian country. It is the only tribe in the nation to have earned a AAA+ credit rating, a status achieved through years of successful, prudent planning and business development. Though the Tribe has a diversified economic development approach, energy development remains the key component of the Tribe's strategy. Approximately, thirty percent of the Tribe's income comes from on-Reservation energy development. Successful energy development has also enabled the Tribe to invest in diverse projects, laying the foundation for long-lasting prosperity. For example, the Tribe has successful real estate investments in eleven markets located in eight states, including residential, commercial, industrial and hotel properties.

The Tribe's energy-related economic success 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 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.

What we did not know until several years ago, however, was that the BIA had allowed our real property records to fall into a chaotic state of disarray. Somehow, in the early 2000s, when the BIA was converting the land records for the rest of Indian country to an electronic recording and retrieval system (TAAMS), the Southern Ute Agency fell through the cracks. The historic real property records affecting the lands of the Tribe and its allottees simply were not encoded into the new system, which operationally became a pre-requisite for processing Indian land related transactions, including those affecting Southern Ute Indian lands.

To make matters worse, for several years immediately prior to the Complainant and Coworker being assigned to the Southern Ute Agency, local BIA officials concealed the fact that the BIA real property records had become so deficient that the local and regional BIA offices could no longer process many of the transactions generated by the Tribe. Inexplicably, fairly standard transactions, like simple grants of easements for a small pipeline or a connection to an electric system, languished and, in numerous cases were lost by the agency. Further, as a high level BIA official would later report—on the record—to the Tribal Council at its meeting of August 24, 2012, the regional BIA office during the TAAMS conversion period had purposefully starved the local agency of real estate services funding hoping that the Tribe, with no awareness of the disastrous condition of its real property records, would feel compelled to take over real property functions through an intergovernmental compact.

When the BIA assigned the Coworker and the Complainant to the Southern Ute Agency in 2010 and 2011, the Tribe did not know that the BIA had failed to encode its historic land transactions into TAAMs and did not know that the agency's land record files were a dysfunctional mess. The Tribe's officials in its Department of Energy and Department of Natural Resources did know, however, that hundreds of real property transactions were backlogged. The Complainant and the Coworker had to face the challenges of the Southern Ute Agency despite almost no experience with complex energy transactions, and much of their exposure to mineral leasing and right-of-way processing involved BIA transactions in Oklahoma, most of which were individual allottee matters rather than tribal transactions. Unfortunately, their supervisor, the Agency Superintendent, was a forester by background, who admittedly knew little about real property matters and nothing about oil and gas transactions.

MOTIVATIONS FOR REMOVAL

Contrary to OSC's lynchpin finding, the Tribal Council did not seek to have the Complainant and Coworker transferred because of their insistence upon the Tribe's compliance with laws and regulations. During their tenure at the Southern Ute Agency, some aspects of their service were positive; however, during that time the working relationship between the local agency and the Tribe deteriorated and ultimately became untenable.

The Southern Ute situation presented the unusual circumstance of having a tribally owned oil and gas company—which was not a separate legal entity, but rather an internal governmental division of the Tribe—being treated as a lessee of tribal trust minerals under IMDA Minerals Agreements. The regulations of the BIA (25 C.F.R. Part 225) do not contemplate such a situation, and, not surprisingly, some standard requirements make no sense in that unusual circumstance. For example, since the Tribe was actually the employer of its company's workers and the company had no employees, standard workers' compensation provisions had no application to the company. Similarly, regulatory provisions that would normally require a third party company to indemnify the Tribe as lessor also had no application since the Tribe would be indemnifying itself. Had the Tribe so chosen, it could have simply directed Red Willow to develop oil and gas minerals directly with no operational oversight from and no reporting to Department of the Interior agencies. *See Fluid Mineral Estate Procedural Handbook* § 3.5 (DOI, BIA July, 2012). Instead, however, the Tribe and the Department of the Interior had long felt that the benefits of federal involvement and NEPA compliance were sufficiently positive to use the IMDA mechanism for the Tribe's "leasing" to itself. Educating the Complainant and Coworker about the nuances of the Southern Ute situation was challenging, particularly when they had little background about IMDA at all.

Under applicable federal statutes, the BIA is generally prohibited from approving leases and rights-of-way in the absence of tribal consent. For decades throughout Indian country, tribes have conditioned the issuance of that consent, a practice that also is often used by federal agencies in granting regulatory approvals. At Southern Ute, for example, the Tribe's consent is generally conditioned upon such things as the payment of surface damage compensation, well-head measurement of gas volumes, and mitigation of adverse environmental impacts. Without any reasonable notification to the Tribe, the Complainant and Coworker initially declined and then flatly refused to approve any lease or right-of-way which contained the Tribe's conditions for consent. What initially began as passive aggressive behavior grew into active attempts to subjugate the Tribe's decision-making to their uninformed preferences. Effectively, they attempted to hold the Tribe's financial livelihood hostage, not to compliance with lawful requirements, but to their conflicting judgment.

The agency's lack of progress in processing long-pending applications for grants of easements for rights-of-way was particularly frustrating for the Tribe. To chart the status of those projects, the Tribe's Department of Energy had maintained detailed records of dates the Tribe had submitted the application to the agency, as well as progress updates. The Complainant and Coworker resented the Tribe's desire for accountability and, among other measures, ultimately barred the Tribe's representatives from access to the Tribe's real property record files.

Perhaps the final straw came at a meeting between the Tribe's representatives and the Complainant and Coworker at which those BIA employees stated they would block the processing of any right-of-way or surface lease for a facility located within the boundaries of an oil and gas lease because it was legally unnecessary, even if the purpose of the facility was to serve lands outside the boundary of the oil and gas lease. Their position was fundamentally contrary to well-established law and in clear disregard of the Tribe's best interests. Ironically, it was actually at this meeting that the Tribe learned for the first time that the BIA had never

encoded the Tribe's historic real property records into TAAMS, which also explained why so many transactions were on hold.

Despite the Tribe's extensive efforts to work cooperatively with the BIA employees, they failed to carry out their duties. To be sure, BIA regional and central offices provided little meaningful support to the local agency. Confronted with declining budgets and layoffs, upper management simply did not have the tools needed to support their floundering employees. Further, the Tribe and its attorneys were directed to refrain from directly contacting lawyers within the Southwest Region's Interior Office of the Solicitor. For budgetary reasons, such contacts could be established only at the direction of the local agency employees with the concurrence of the BIA's Regional Office. Even when Solicitor review was requested by the local agency, the questions asked were stilted and improperly framed, and the delays in issuing guidance were prolonged. Once it became apparent that the situation was unworkable and would not improve, the Tribal Council had an obligation to its members to insist that the BIA remove the ineffective employees and focus attention on fixing the crisis at Southern Ute.

Indeed, the steps that the Tribe took, including requesting the removal of the incompetent and abusive employees, were critical in correcting the situation at the Southern Ute Agency. While OSC appears to be offended by the Tribe's approach in contacting Interior's managers and policy makers, the Tribe was desperate and its actions were justified. Ultimately, following the removal of the Complainant and the Coworker, representatives from BIA's central and regional offices, including solicitors, spent several days reviewing the Tribe's charts and lists of issues. Through collaboration rather than conflict, emergency measures were taken to break the log jam on processing many of the backlogged transactions. In some cases, reasoned input from those BIA officials led to improvements in forms and processes used by both the Tribe and the BIA. Further, those meetings provided an opportunity for federal and tribal officials to review the physical condition of the records maintained at the agency, which led to critical steps in archival preservation of priceless historical records and the scanning of real property records by the Tribe needed to carry out day-to-day operations.

Because OSC made no attempt to solicit any input from the Tribe regarding the "Whistleblower" allegations, the report is understandably one-sided and devoid of context. You should be aware, however, that the Tribe's repeatedly-expressed concerns about delays in BIA approvals led to a series of independent governmental investigations and reports documenting the gross deficiencies at the agency, culminating in a report issued by the Interior's Office of Inspector General in February, 2016. *Bureau of Indian Affairs' Southern Ute Agency's Management of the Southern Ute Tribe's Energy Resources*, Report No.: CR-EV-BIA-0011-2014 (Dep't of the Interior, OIG, Feb. 2016), *see also Indian Energy Development – Additional Actions by Federal Agencies Are Needed to Overcome Factors Hindering Development,* Report No. GAO-17-43 (GAO, Nov. 2016); *Indian Energy Development – Poor Management by BIA Has Hindered Development of Indian Lands*, Report No. GAO-15-502 (GAO, June 2015); *Trust Records in Jeopardy,* Report No. OTRA-14-015RA (Office of Special Trustee, Aug., 2014); *Records Management at Selected Bureau of Indian Affairs' Agency Offices*, Report No. CR-IS-BIA-0001-2014 (OIG, Jan., 2014). Significantly, the injuries to the Tribe resulting from the BIA's historical mismanagement of the Tribe's resources, including those outlined in this letter, led to a recently court-approved settlement in which the United States paid the Tribe $126 million. *See*

Joint Stipulation of Settlement between Defendants and Plaintiff Southern Ute Indian Tribe (ECF 43) and Minute Order (Nov. 9, 2016), *Sisseton Wahpeton Oyate, et al. v. S.M.R. Jewell*, Case No. 1:13-cv-601-TFH (D.D.C.).

SUBSTANTIVE LEGAL MISSTATEMENTS IN OSC REPORT

The published report describes in considerable detail information regarding the legal positions allegedly advanced by the Complainant and the Coworker in its "disclosure" to the Tribe, and, whether intentionally or unintentionally, OSC appears to take legal positions on substantive matters that are incorrect or misleading. Because OSC intended that this report be circulated to and read by BIA officials who are legally responsible for performing trust functions related to tribal energy development, those mistakes should be reviewed and affirmatively corrected by OSC. Among those are the following.

1. Gas Volume Measurement

In describing the conduct of the Complainant and Coworker, OSC states that the employees believed that the "Tribe had inserted language into [lease or right-of-way] documents [addressing] 'matters that [were] beyond BIA's scope of authority to approve . . . .'" OSC Report at 2. Specifically, OSC continues:

> For example, the lease agreements imposed on BIA an obligation to measure the volume of gas after it had been severed from tribal lands to ensure there were no losses in transport of the gas. This appeared to extend BIA's trust authority beyond its jurisdiction over tribal assets because, once severed from tribal lands, these assets ceased to be in the trust.

Id. Later, OSC concludes that the Complainant's actions were protected because his view that trust duties ended upon the physical severance of gas was "reasonably believed." OSC Report at 8. The conclusion reached by OSC in this regard is simply outrageous.

The severance of gas from the ground does not end federal trust functions any more than it ends the federal government's interest in proper measurement of gas volumes produced from and sold off of federal lands. Indeed, Congress has statutorily mandated that the Department of the Interior ensure that both the federal government and Indian mineral owners are properly paid on such production, and, an entire Interior bureau, the Office of Natural Resource Revenue (ONRR), is devoted to that function. *See Federal Oil and Gas Royalty Management Act*, 30 U.S.C. §§ 1701, *et seq.* Significantly, the Tribe, through its energy accounting department, is an Indian tribe that for many years has been a party to a cooperative agreement with ONRR, and it implements the complex royalty valuation regulations that govern the payment of royalties to the Tribe, regulations that it helped write. 30 C.F.R. Part 1202, Subpart J – Gas Production from Indian Leases. In conjunction with the volume measurement standards established by the Bureau of Land Management, the ONRR, as part of its trust duties, conducts extensive audits of oil and gas companies which necessarily include review of volume measurement by operators not just at the wellhead but at distant points in the processing and marketing chain for such products.

Contrary to the statements of the employees accepted by OSC, the Tribe at no time asked or directed the BIA to measure any volumes of gas obtained from tribal lands. No tribal documents support that statement. However, in exercise of its powers to conditionally consent to the granting of rights-of-way (25 U.S.C. 324), the Tribe regularly prohibited third party grantees from measuring volumes of gas produced from the Tribe's lands at points distant from the wellheads where it was produced. By these conditions, the Tribe ensured that payments to it based on gas volumes did not bear impermissible reductions for shrinkage, fuel charges or other reasons. Similarly, as authorized by the provisions of IMDA, in granting minerals agreements, the Tribe insisted that companies measure gas volumes at the wellhead rather than at some distant point or at a central facility in the absence of the Tribe's consent. The BIA's employees' opposition to the Tribe's exercise of its sovereignty and federally authorized decision-making on these points highlights their incompatibility with the Tribe. Unfortunately, OSC's report appears to vindicate them for their misconduct.

2. Conditional Consents to the Granting of Rights-of-Way or Leases

As outlined at several points in this letter, the Complainant and Coworker opposed the Tribe's imposition of substantive conditions in issuing statutorily required consents for the granting of rights-of-way or mineral leases affecting its lands. In seemingly supporting the reasonableness of that position, OSC has directly undermined aspects of sovereignty that both it and the transferred employees had a responsibility to uphold. OSC's adoption of the Complainant's assignation of personal motive to the refusal of tribal officials to succumb to the strong-arm tactics of the Complainant and Coworker in defense of the Tribe's powers (OSC Report at 3), is insulting, demeaning and unjustified. Far from inappropriate, the positions taken by the Tribe and its officials were lawful extensions of tribal authority confirmed in the statutes governing issuance of rights-of-way (25 U.S.C. 324) and the granting of mineral agreements under IMDA (25 U.S.C. §§ 2101, *et seq.*).

Conclusion

We recognize that OSC's negative findings about the Tribe's conduct depended upon the information it reviewed in the course of its investigation and that the BIA did not necessarily provide OSC with the contextual summary set forth in this letter. It is also possible that OSC's concerns about confidentiality protection constrained its ability to consult with the Tribe about the matters addressed in the report. Particularly because OSC never asked the Tribe about these matters, however, we are shocked that OSC would release its report nationally without first alerting the Tribe or without redacting the Tribe's name from this one-sided critique, especially when OSC had given *all* others, including its own attorney, the courtesy of identity protection through redaction.

In failing to consult with the Tribe, OSC missed an opportunity to protect the legitimate interest of Whistleblowers and to understand the systemic deficiencies that tribes are expected to endure powerlessly in the face of a dysfunctional system. Not only was your conduct an exercise of poor judgment, it violated the principles reflected in Executive Order 13175 regarding meaningful government-to-government consultation with Tribes, which has been repeatedly

embraced by the current Administration. We urge you to take positive steps to rectify the unfair injury you have inflicted on our people and Indian country as a whole. At the very least, we believe we are entitled to a public apology.

Clement J. Frost, Chairman
Southern Ute Indian Tribal Council

CC:
Senator Michael Bennet
Senator Cory Gardner
Representative Scott Tipton
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