



## **UTE INDIAN TRIBE**

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### **Testimony of the Ute Indian Tribe of the Uintah and Ouray Reservation**

**Before the House Committee on Natural Resources**

**Full Committee Oversight Hearing on  
“Unleashing America’s Energy and Mineral Potential”**

**February 22, 2023**

The Ute Indian Tribe of the Uintah and Ouray Reservation appreciates the opportunity to provide this testimony to the House Committee on Natural Resources Subcommittee on Energy and Mineral Resources for its Oversight Hearing entitled the “Unleashing America’s Energy and Mineral Potential” held on February 8, 2023.

The Ute Indian Tribe is a major oil and gas producer and uses revenues from that energy development as the primary source of funding for our Tribal government and to provide vital services to our members. Our Reservation is the second largest reservation in the United States and covers more than 4.5 million acres. The majority of our approximately 3,000 members reside on the Reservation. We lease about 400,000 acres for oil and gas development, and we have about 7,000 wells that produce 45,000 barrels of oil a day. The Tribe takes an active role in the development of its resources as a majority owner of Ute Energy.

Using revenues from energy development, our Tribal government provides services to our members and manages the Reservation through 60 Tribal departments and agencies including land, fish and wildlife management, housing, education, emergency medical services, public safety, and energy and minerals management. The Tribe is also a major employer and engine for economic growth in northeastern Utah generally. Tribal businesses include a supermarket, gas stations, a feedlot, an information technology company, a manufacturing plant, Ute Oil Field Water Services, and Ute Energy.

Our governmental programs and Tribal enterprises employ approximately 450 people, 75% of whom are Tribal members. Each year the Tribe generates tens of millions of dollars in economic activity in northeastern Utah. The Tribe takes an active role in the development of its resources as a majority owner of Ute Energy and owns numerous oil and gas wells on the Reservation. In sum, energy development allows the Tribe to positively impact both the Reservation and greater Utah.

### **Tribal Energy Development Benefits the Environment and the Economy**

The Tribe's ability to develop energy on its Reservation has the potential to have a positive global impact. Specifically, as many have noted, the current regulatory climate pushes energy and mineral development abroad to countries that do not have the same safety standards as the United States. As a result, increased energy development abroad adversely impacts the environment while detracting from the United States' economy.

Tribes are in a unique position to both protect the environment and be a leader in domestic energy development. Indeed, Tribes have a special relationship with their land—it is a life giver and sustainer. Given this, Tribes skillfully thread the needle on developing energy while protecting and honoring the land and environment. Indeed, tribal energy development is a sustainable alternative to pushing energy production to companies in countries like China and Venezuela that lack sufficient environmental regulation. Thus, tribal energy development must be supported and afforded every opportunity to reach its full potential.

### **Hinderances to Tribal Energy Development**

Unfortunately, the imposition of bureaucratic red tape on the Tribe's, and Indian Country's, energy development severely impacts tribal energy development and disregards tribal sovereignty. The primary example of this hinderance is the National environmental Policy Act ("NEPA"). As it stands, the application of NEPA is causing energy companies to limit their activities on the Reservation hampering the Tribe's economic development and the economic incentive for producers to operate on the Reservation. As a result, the Tribe is not able to fully develop its resources and revenues available for Tribal operations are limited.

As noted in a 2015 Government Accountability Office ("GAO") Report, "NEPA compliance reviews significantly increase the cost of conducting operations on Indian lands and, as a result, projects are moved to adjoining state or private lands where NEPA compliance is not required."<sup>1</sup> For example, the delays and uncertainties experienced by oil and gas operators on our Reservation in obtaining drilling permits and other authorizations jeopardize future development plans. For example, in 2015, it took an average of 405 days for operators to receive a drilling permit from the Bureau of Land Management ("BLM") and the Bureau of Indian Affairs ("BIA") on our lands. In contrast, it takes the State of Utah only 73 days on average to issue drilling permits on private and state-managed lands. Much of this delay is caused by NEPA reviews and federal agencies that lack the staff and resources to conduct these reviews—particularly on Indian lands. Without significant reforms, permitting delays have and will continue to result in lost revenue to the Tribe and jeopardize the economic viability of our projects.

The last Administration took steps to help address NEPA's negative impacts by finalizing a rule entitled "Update to the Regulations Implementing the Procedural Provisions of the National

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<sup>1</sup> Gov't Accountability Office, Indian Energy Development – Poor Management by BIA has Hindered Energy Development on Indian Lands 18 (June 2015) [Hereinafter "GAO Report"].

Environmental Policy Act.” (2020 Final Rule). The 2020 Final Rule was intended to comprehensively update, modernize, and clarify the current regulations to facilitate more efficient, effective, and timely NEPA reviews by federal agencies. The 2020 Final Rule also served to improve interagency coordination in the environmental review process, promote earlier public involvement, increase transparency, and enhance the participation of states, Tribes, and localities, including increased tribal participation in projects with off-reservation impacts. The Tribe generally supported the 2020 Final Rule in its efforts to streamline the review process. However, the current Administration unwound a number of the changes made by the 2020 Final Rule.

This is a cautionary tale that highlights the need for changes beyond the regulatory level. Indeed, NEPA itself must be addressed to ensure lasting changes that foster tribal energy development and that tribal sovereignty is recognized.

### **NEPA Should Not Apply to Secretarial Approvals on Indian Lands**

A threshold issue regarding Indian tribes and NEPA is whether NEPA should apply to Indian lands at all. Although it is well established in caselaw and regulations that NEPA applies to major federal action on Indian lands, typically triggered by approval of leases by the Bureau of Indian Affairs, this was not always the case. In fact, the legislative history of NEPA is silent of any indication of whether Congress considered NEPA’s application to Indian lands or whether the Secretarial approval of Indian leases are major federal action.

Absent any intent to the contrary, it is logical that Congress did not intend to subject the discretionary execution of fiduciary duties imposed on the government by the trust responsibility and various federal statutes to the procedural and bureaucratic stranglehold that NEPA imposes on development. To impose the burden of NEPA on private Indian land places the Indians at an economic and competitive disadvantage when compared to non-Indian competitors not subject to NEPA, and subjects the development of their property and resources to judicial challenge by those with no connection to the land or affected community.

Put another way, subjecting development on Indian lands to NEPA places Indian landowners in a uniquely disadvantageous position, where they not only must secure federal approval for almost any transaction involving the development of their lands, but then they must also wait months, and in some circumstances years, before the federal government administrators comply with NEPA before approval for development can be obtained. This scenario directly undermines the role of the government as trustee, where the government’s duty to approve leases of Indian land if they are in the best interest of the landowners is directly supplanted by the requirement to burden the lease with competitive disadvantages of the administrative costs and delays associated with NEPA.

For example, in 2013, the Commission on Indian Trust Administration and Reform reported that the Department of Interior does not have adequate resources to meet Indian leasing demands for oil and gas development, including the resources to analyze and approve NEPA

documents.<sup>2</sup> Additionally, according to a report from the GAO, stakeholders, including Interior officials, have also highlighted this concern and “further identified inadequate staff resources as a contributing factor in lengthy review times and a hindrance to development of Indian energy resources.”<sup>3</sup>

In addition to delays caused by the willful understaffing and underfunding of the BIA, the involvement of other federal agencies in the NEPA process also works against Tribe’s in the efforts to develop their land and resources. During the NEPA process a number of other federal agencies may become involved in review of the document, increasing both the number of approvals needed for authorization and overall delay of the project. For operations on the Uintah and Ouray Reservation, the United States Fish and Wildlife Service will consult on the document under Endangered Species Act Section 7 authority and the Environmental Protection Agency will often consult on air and water quality issues. These administrative inefficiencies cost the Tribe time and money related to potential projects. Specifically, as noted in the GAO report, industry stakeholders have:

[H]ighlighted the additional costs required for NEPA compliance and the uncertainty associated with public opposition and comments received during the NEPA process as factors that can cause a developer to avoid Indian energy resources and choose to develop non-Indian resources that do not require federal agency action.”<sup>4</sup>

And, as noted above, NEPA reviews increased costs and result in projects being moved “to adjoining state or private lands where NEPA compliance is not required.”<sup>5</sup>

From this evidence it is clear that the imposition of NEPA on the development of Indian lands has worked to increase the costs and delay of projects on Indian lands, driving developers away from Indian lands to lands that are not similarly burdened with NEPA’s bureaucratic hurdles. As such, the application of NEPA to Indian lands is antithetical to the duty of the United States owed to Indian tribes under the federal trust responsibility. It was on this basis which the United States initially resisted the application of NEPA to Indian lands in *Morton v. Davis*<sup>6</sup>, and it is on this same basis that the Tribe continues to object to the applicability of NEPA to development on tribal lands. Given this, NEPA should be amended to clarify that Indian lands are not “public lands” subject to NEPA.

### **Limit NEPA Review for Tribal Actions On-Reservation**

NEPA boldly proclaims that “each person has a responsibility to contribute to the preservation and enhancement of the environment.”<sup>7</sup> In doing so, it expressly contemplates input

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<sup>2</sup> *Report of the Commission on Indian Trust Administration and Reform*, Approved December 10, 2013.

<sup>3</sup> GAO Report, at 24.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 26.

<sup>6</sup> 469 F.2d 593 (10th Cir. 1972).

<sup>7</sup> 42 U.S.C. § 4331(c).

from the general public to help realize national environmental policies. The public is brought into the NEPA process in many ways. For example, major projects are required to prepare an Environmental Impact Statement which must be published in the Federal Register for public review and notice, and comment procedures are mandated in various circumstances throughout the NEPA process. Moreover, NEPA's implementing regulations stress public involvement by containing a number of commenting requirements to allow public input in the implementation of NEPA.<sup>8</sup>

These regulations speak broadly about involvement from "the public" and in doing so exceed the statutory requirements of NEPA itself. The regulations provide no limitations on who may comment on a particular project, opening up agencies to dutifully receive comments from individuals and special interest organizations that are often outside of the projects geographically impacted area. This regime does not serve the goals of the NEPA process and actively inhibits agencies by requiring them to review, and in many cases respond, to comments that are generally inapplicable or at the very least not representative of localized concern.

A one-size-fits-all approach to public participation in environmental decision making is not acceptable in the context of Indian lands. A system that was meant to promote inclusiveness and flexibility now runs amok with involvement from disinterested parties who have no real stake in the outcome other than their ability to impute their own values on actions that exclusively implicate local concerns. This broad implementation of public participation as it relates to development in Indian country has rendered it unwieldy, incoherent, and ad hoc.

Moreover, subjecting Indian energy development to NEPA's public participation regime by allowing the public to present concerns for consideration before BIA approves leases and permits has had a negative impact on overall development. In the same GAO Report referred to above, it is noted that stakeholders highlighted the "uncertainty associated with public opposition and comments received during the NEPA process as factors that can cause a developer to avoid Indian energy resources and choose to develop non-Indian resources that do not require federal agency action."<sup>9</sup>

To illustrate the problems associated with NEPA's current public participation regime, one needs only to look at the example provided by past attempts to close the Bonanza Power Plant located within the exterior boundaries of the Tribe's Uintah and Ouray Reservation. The Plant is a five hundred (500) megawatt power plant that burns approximately two million tons of coal annually, contributing untold amounts of air pollution on the Reservation and destroying local flora and fauna within a vast swath of land surrounding the Plant. Because of these environmental consequences and the plant's location on the Reservation, the Tribe was steadfast in support of the Plant's closure when both the lease supporting the Plant and the Plant's operating permit were up for review. However, during meetings and hearing on the renewal of the Plant's coal lease and operating permit, the focus and attention was diverted from the inhabitants of the land who live with the consequences of the Plant on a daily basis, and was instead placed on the coal mining

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<sup>8</sup> See 40 C.F.R. §§ 1503.1, 1506.6; 43 C.F.R. §§ 46.235, 46.305.

<sup>9</sup> GAO Report, at 26.

company and various national public interest groups. In doing so, industry and public interest groups successfully hijacked the NEPA public participation process to realign the discussion to address their concerns and impose their individual ethics on decisions exclusively impacting tribal lands.

In sum, the reality is that certain individuals or organizations participate in NEPA's public participation regime regardless of their proximity to a project or its impacts. In these cases, agencies can expend untold federal resources considering and responding to comments that only detract from the views that matter most, those of local concern.

As such, with respect to NEPA's application to Indian lands, public participation should be limited to tribal members and residents of immediately surrounding communities. This will greatly reduce the time and resources agencies expend and prevent outside influences from muddying and complicating the issues and injecting controversy where none exists. Moreover, this will further the government's trust obligations to tribes by eliminating the uncertainty developer's face associated with public opposition and comments received during the NEPA process. This policy makes sense from a tribal sovereignty perspective, as members of the public who are not tribal members should not have any say over tribal development projects. Instead, tribal voices should have primacy in any discussion regarding the use and development of tribal lands and resources.

### **Streamlining Indian Energy Development**

Beyond NEPA, there are several other areas that must be addressed to fully unleash tribal energy development. For example, the energy permitting process on Indian lands needs to be made more efficient, including Applications for Permits to Drill. Moreover, deference should be given to tribal authority on hydraulic fracturing and should recognize individual tribal experiences and practices with hydraulic fracturing. Beyond this, applicable permitting decisions should give deference to tribal decision-making on how to best assess and mitigate for climate change on individual tribal lands. In short, tribes must be allowed to fully utilize their knowledge in developing energy within their lands. As longtime stewards of our lands, we are in the best position to develop our energy resources and contribute to the economy while protecting the environment.

### **Conclusion**

Thank you for the opportunity to provide the testimony of the Ute Indian Tribe of the Uintah and Ouray Reservation on unleashing the Tribe's energy potential. As we have outlined, the Tribe's potential to fully utilize its energy resources and be a leader in the industry is often hampered by overburdensome regulation. As a primary example, the inherent problems caused by NEPA's application to development on Indian lands and the barriers it places on development of our lands and resources works to stifle the Tribe's energy potential. It is our hope that these comments are fully considered by the Committee and that positive changes can be made to minimize the unnecessary constraints placed on tribal energy development.