BEFORE THE SUBCOMMITTEE ON
ENERGY AND MINERAL RESOURCES

COMMITTEE ON NATURAL RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

Honorable James M. "Mike" Olguin
Southern Ute Indian Tribal Council Member
Southern Ute Indian Tribe

Oversight Hearing
The Future of Hydraulic Fracturing on Federally Managed Lands
July 15, 2015

I. Introduction

Chairman Lamborn, Ranking Member Lowenthal and members of the subcommittee, I am Mike Olguin, an elected member of the Southern Ute Indian Tribal Council, which is the governing body of the Southern Ute Indian Tribe. I am honored to appear before you to provide testimony regarding the future of hydraulic fracturing regulation on federally managed lands, including Indian lands. For approximately four years, our tribe has actively opposed the Bureau of Land Management's attempt to lump Indian lands and public lands into a "one size fits all" basket for purposes of approving and regulating hydraulic fracturing. To the unnecessary detriment of our tribal government, which relies upon energy related revenue, we believe the BLM's approval requirements are poorly conceived. In order to nullify the BLM's regulatory efforts on our tribe's lands, we have exercised our sovereign rights by enacting our own hydraulic fracturing regulation. The Southern Ute regulation ensures prudent, environmentally sound practices in a much more reasonable and efficient manner than the BLM's rule. Our tribal leaders hope that your intervention in the hydraulic fracturing debate will lead to respectful recognition of Indian tribal sovereignty in regulating activities on their own lands, regardless of Executive or legislative policy decisions applicable to federal public lands.

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. Our Reservation is part of the northern San Juan Basin, an area that has seen widespread oil and gas development over a period of almost 70 years. The revenues we receive from natural gas development of tribal lands on our Reservation are the tribe's economic lifeblood. For decades, we have worked with industry and with federal agencies to ensure that oil and gas development occurs in an environmentally responsible manner on our lands.

The land ownership pattern within our Reservation is complex and includes parcels of tribal trust lands, parcels of allotted lands owned by individual Indians, parcels owned by non-Indians, federal lands and state lands. In many situations, non-Indian mineral estates are

adjacent to tribal mineral estates. This land ownership pattern is significant and magnifies the impact of differences between federal regulation of Indian lands and state regulation of neighboring non-Indian lands. The burden of unnecessary federal regulation provides a direct incentive for operators to lease and drill on offsetting non-Indian lands and to avoid development of tribal energy resources. The disincentive to develop tribal resources includes ever-increasing fees for processing Applications for Permits to Drill ("APDs") and permit delays. The burden of federal regulation results in lost revenue to our tribe, as well as potential drainage of tribal minerals.

Hydraulic fracturing involves the underground injection of fluid and proppants under high pressure in order to propagate and maintain fractures and enhance the movement and recovery of oil and gas. Hydraulic fracturing is necessary for the continued development of energy resources from sandstones, shales and coal formations on our lands. Thousands of wells on our Reservation have been stimulated through hydraulic fracturing of sandstones and coalbeds. Preliminary studies also indicate that there are significant recoverable reserves associated with shale formations underlying our Reservation that will require hydraulic fracturing in order to be produced.

Over the course of the extensive history of hydraulic fracturing on our Reservation, there have been no documented cases of adverse environmental impacts resulting from such well stimulation. It should be noted that the hydrocarbon bearing zones on our Reservation are generally located at depths much greater (2,500 to 8,000 feet below surface) than useable water aquifers (typically 100 to 300 feet below surface). Further, the hydrocarbon bearing zones are separated from useable aquifers by thick strata with low permeability. Even with those natural safeguards in place, our tribe has led the effort to ensure that oil and gas development activities do not adversely affect surface or groundwater resources. Significantly, in the course of reviewing APDs on our lands, we have insisted upon regular Bradenhead testing of well integrity and have required cementing of well casings to surface.

In recent years, oil and gas companies have been able to recover oil and gas resources throughout the country from shales and tight formations previously considered unproductive. Technological advances in horizontal drilling and hydraulic fracturing stimulation spurred these resource recovery opportunities. The significant expansion of this activity into geographic areas not previously subject to oil and gas development has fostered debate regarding the environmental effects of hydraulic fracturing. These concerns have, in turn, led the Department of the Interior and the BLM to develop a response intended to ensure the public that, through government oversight and regulation, hydraulic fracturing occurring on federal and Indian leased lands will be undertaken in an environmentally safe and prudent manner. While this goal may appear reasonable, the process employed by the BLM in developing the regulations applicable to Indian lands was flawed and the ultimate set of regulations is objectionable.

III. The Process of Consultation with Affected Indian Tribes Was Inadequate.

A. The Initial Proposed Rule

In mid- December of 2011, BLM's Assistant Director for Minerals and Realty Management Michael D. Nedd sent a letter inviting our tribe and other tribes to engage in government-to-government consultation regarding BLM's intent to develop regulations governing hydraulic fracturing on federal and Indian lands. We welcomed this initial invitation for early consultation. On January 19, 2012, a substantial contingent of our tribe's staff, including representatives from our Energy Department, Natural Resources Department, and Environmental Programs Division, attended a BLM information session in Farmington, New Mexico, where representatives from the BLM provided basic information about hydraulic fracturing and asked for tribal input regarding the shape that any such regulations might take. We congratulated BLM on this seemingly fresh approach to visiting with tribes at the formative stages of regulation development. We also delivered at that time written comments from our now deceased Chairman, the late Jimmy R. Newton, Jr., that addressed three principal matters: (1) suggestions for process; (2) a summary of the importance of hydraulic fracturing to the tribe; and (3) a summary of potential environmental concerns and protection measures associated with hydraulic fracturing.

In commenting on process, Chairman Newton's letter specifically urged that "the consultation process include not only an opportunity to comment on proposed BLM regulations but consultation on the formulation of proposed regulations." Chairman Newton further suggested that "BLM circulate discussion drafts of possible regulations for review and comment before any proposed regulations are issued." Only later did we learn that our concept of meaningful tribal consultation had been shortchanged from the outset by the BLM. Notwithstanding our requests and suggestions, BLM proceeded to develop draft proposed regulations in isolation and, without disclosing its activities to tribes, submitted those draft regulations to the Office of Management and Budget for publication approval in the Federal Register. This process truly was an example of the federal trustee's train having left the station before Indian Country had a chance to know that the train was even moving. Within a month following BLM's publication of the proposed regulation, we submitted written comments to the BLM on June 11, 2012, and expressed our deep concerns with many of the substantive proposals contained in those draft regulations. Our comments at that time reflected our ongoing concern that every extra regulatory step, every extra required report, and every extra approval imposed by the federal government on operators in Indian Country increases the costs of operating in Indian Country and decreases the ability of tribes to attract energy development dollars to our lands.

B. The Revised Proposed Rule

In response to over 177,000 comments, the BLM issued a revised proposed rule on May 24, 2013. Again, our tribe weighed into the discussion, not just by submitting written comments, but by meeting with key officials within the Department of the Interior, the BLM, the Bureau of Indian Affairs ("BIA"), and the White House. Among our substantive comments to the revised proposed rule, we questioned the cost effectiveness of the BLM's approval requirements; its capacity to interpret cement evaluation logs and cement bond logs; its approach to isolation of geologic zones containing unusable ground water; and the vague—but broad—discretion retained by the BLM to impose potentially unlimited conditions on hydraulic fracturing activities without any established time frames for issuing approval. Most significantly, we urged the BLM to separate its rulemaking on public lands from Indian lands. In calling for that separation, we

emphasized the dramatic differences in federal law and policy underpinning federal public lands and Indian lands, which had spawned separate regulatory regimes for Indian mineral leasing, royalty valuation and collection, and pooling and unitization of subsurface resources, as well as empowerment of tribes in implementing key environmental laws. Further, we specifically reminded the BLM that, under long-established regulations governing Indian mineral leasing, tribes organized under the Indian Reorganization Act of 1934 ("IRA"), like the Southern Ute Indian Tribe, retained the authority to supersede the BIA's mineral leasing regulations, including incorporated BLM regulations made applicable to tribal lands. *See* 25 C.F.R. § 211.29. In its explanation of the revised proposed rule, however, the BLM stated that Congress had tied its hands and that it lacked the authority to separate tribal lands and public lands in developing the proposed rule. In response, we stated as follows:

> For the BLM to suggest that it lacks the power to consider tribal lands and public land distinctly defies decades of statutory and regulatory treatment and is, frankly, insulting. Rather, the proper question is whether there is any reason to treat such lands differently, and, if reasonable grounds are provided for such different treatment, then the BLM should strive to do so.

See Comment Letter from Chairman Jimmy R. Newton, Jr. to BLM at 4 (Aug. 20, 2013).

As the subcommittee is fully aware, on March 26, 2015, the Assistant Secretary for Land and Minerals Management, Janice M. Schneider, approved the BLM's final rule regulating hydraulic fracturing on federal and Indian lands. 80 Fed. Reg. 16128.

IV. The Tribe's Hydraulic Fracturing Regulation

On June 16, 2015, the Southern Ute Indian Tribal Council adopted Resolution No. 2015-98, which approved the tribe's regulation of hydraulic fracturing and chemical disclosure on lands within the jurisdiction of the tribe. As authorized by 25 C.F.R. § 211.29, the tribe's regulation expressly states that it supersedes the BLM's regulation. I will briefly summarize the key differences between the Southern Ute rule and the BLM rule. Under the Southern Ute rule, an operator must provide the Southern Ute Department of Energy forty-eight hours advance written notice of its intent to conduct hydraulic fracturing operations. The tribe's Department of Energy may review operator information related to the proposed activity and may monitor that activity. Following the completion of hydraulic fracturing, the operator must provide the tribe with a detailed report describing the activities. In order to ensure that hydraulic fracturing occurs in an environmentally sound manner, an operator is required to cement all surface and intermediate casing with a continuous column from the bottom of that casing to the surface, and all production casing must be cemented from the bottom of the vertical portion of the production casing to at least fifty feet above the bottom of the intermediate casing. In that regard, the Southern Ute rule is more restrictive than the BLM rule or the state of Colorado's cementing requirements. The Southern Ute rule provides a better safeguard to water quality and greater certainty to operators, while also eliminating the delays inherent in pre-approval. Like the BLM rule, however, the tribe's rule also requires storage of wastewater in tanks and the public disclosure of the chemical composition hydraulic fracturing fluids.

In contrast, under the BLM rule an operator must obtain BLM ***pre-approval*** before the operator may proceed with hydraulic fracturing activities. There is no time period following submission of such an application within which BLM must issue its approval or disapproval. In granting approval, the BLM has the discretion to impose a wide variety of conditions, including the imposition of discretionary conditions that exceed those explicitly required in the rule. Critically, unlike the tribe's straight forward cementing requirement, the BLM rule's cementing requirement is based upon on the isolation of zones that contain useable water, which requires an interpretive water quality analysis. In addition to the inherent delay associated with securing discretionary agency approval, the act of approval for each well arguably triggers the need for a separate analysis under the National Environmental Policy Act ("NEPA"), which invites additional delays through third-party challenges and potential litigation by those opposed to oil and gas development.

In sum, we strongly believe that the Southern Ute rule provides a simpler and more effective way to regulate hydraulic fracturing activity on the tribe's lands than the BLM rule.

V. Southern Ute Indian Tribe v. Department of the Interior

On June 18, 2015, several days before the BLM rule was to become effective, the Southern Ute Indian Tribe filed a lawsuit in the United States District Court for the District of Colorado. *Southern Ute Indian Tribe v. United States Department of the Interior, et al.*, Civil Action No. 1:15-cv-01303-MSK (D. Colo). In that case, the tribe has challenged the lawfulness of the rule, including its failure to recognize an IRA tribe's unconditional right to supersede the BLM final rule. We have also asserted that the rule should be vacated as arbitrary and unreasonable in its treatment of Indian tribes, whose powers of self-governance under statutes and policies have been repeatedly emphasized over the last forty years. The tribe's opening brief on the lawfulness challenge is due on July 23, 2015, and oral argument is scheduled for October 14, 2015.

Conclusion

In conclusion, I am honored to appear before you today on behalf of the Southern Ute Indian Tribe. We recognize that your work involves broad oversight of BLM's role in energy development on public lands, and that energy development on Indian lands is not a matter on which you typically focus. To the extent you can do so, however, we hope that you will assist us in preserving our sovereign rights to regulate activities on our lands. We also hope that the common sense approach that we have taken with respect to our lands will assist you and the BLM in fashioning a reasonable approach to hydraulic fracturing regulation on federal public lands. We look forward to continuing our work with the subcommittee on this and other important matters.

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