



**Written Testimony of the Honorable Irene C. Cuch
Chairwoman, Ute Tribal Business Committee
Ute Indian Tribe of the Uintah and Ouray Reservation**

**Before the Subcommittee on Indian and Alaska Native
Affairs
Natural Resources Committee
U.S. House of Representatives**

April 19, 2012

**Oversight Hearing on
Bureau of Land Management's Hydraulic Fracturing Rule's Impacts
on Indian Tribal Energy Development**

Chairman Young, Ranking Member Boren, and Members of the Subcommittee on Indian and Alaska Native Affairs, my name is Irene Cuch. I am the Chairwoman of the Ute Tribal Business Committee for the Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe). The Ute Indian Tribe consists of three Ute Bands: the Uintah, the Whiteriver and the Uncompahgre. Our Reservation is located in northeastern Utah. Thank you for the opportunity to provide this testimony on the Bureau of Land Management's (BLM) proposed hydraulic fracturing (fracing) rule and the impact it will have on energy development in Indian Country.

My testimony will focus on problems with the BLM's fracing rule, BLM's failure to conduct meaningful tribal consultation, and some solutions to these issues. Although I have many concerns with the BLM's fracing rule, this should not be confused with a lack of concern for the environment, water, or the health of the Tribe's members. The Tribe is interested in not duplicating existing regulations and creating an efficient permitting process that will allow us to conduct business on the Reservation. The Reservation is our home and we know the value of protecting our natural resources.

I. Energy Development of the Ute Indian Tribe

Energy development has long been an important part of the Tribe's Reservation economy. Production of oil and gas began on the Reservation in the 1940's. Over the past 70 years, production has been ongoing and went through periods of expansion. Today, the Tribe is a major oil and gas producer. The Tribe leases about 400,000 acres for oil and gas development. We have about 7,000 wells that produce 45,000 barrels of oil a day. We also produce about 900 million cubic feet of gas per day. And, we have plans for expansion. The Tribe is currently in process of opening up an additional 150,000 acres to mineral leases on the Reservation with an \$80 million investment dedicated to exploration.

The Tribe relies on its oil and gas development as the primary source of funding for our tribal government and the services we provide. We use these revenues to govern and provide services on the second largest reservation in the United States. Our Reservation covers more than 4.5 million acres and we have 3,175 members living on the Reservation.

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. Tribal businesses include a bowling alley, 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 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 which has an annual capital budget of \$216 million. In addition to numerous oil and gas wells, Ute Energy teamed with the Anadarko Petroleum Corporation to establish and jointly own the Chipeta gas processing and delivery plant in the Uintah Basin. The Tribe recently approved plans for Ute Energy to become a publically traded company. This investment will allow us to expand our energy development and increase revenues.

Despite our progress, the Tribe's ability to fully benefit from its resources is limited by the federal agencies overseeing oil and gas development on the Reservation. As the oil and gas companies who operate on the Tribe's Reservation often tell the Tribe, the federal oil and gas permitting and regulatory process is the single biggest risk factor to operations on the Reservation. Add the BLM's proposed hydraulic fracturing regulations increase the risks dramatically. This process is primarily managed by the Department of the Interior (DOI).

II. General Problems with BLM's Proposed Hydraulic Fracturing Rule

The BLM is developing new regulations, which I understand are under review by the Office of Management and Budget (OMB), for hydraulic fracturing activities used in the oil and gas development process on "public lands." We are concerned with the process by which BLM is developing its regulations as well as the impact it will have on the significant oil and gas industry on our Reservation. On its face, there are a variety of problems with BLM's fracing rule.

First, the BLM incorrectly considers Indian lands to be public lands and plans to apply its fracing regulations to Indian lands. Indian lands are not public lands. Indian lands are for the exclusive use and benefit of Indian tribes. BLM's oversight of activities on our lands should be in fulfillment of the federal trust responsibility to the Tribe. BLM should not apply public interest standards to our lands. The Tribe requests that the Subcommittee develop and Congress pass legislation that would prevent Indian lands from being swept into laws and policies for public lands.

The fracing rule, as currently written, will reduce the benefits that the Tribe is able to realize from its lands. The fracing rule will increase costs to operators, slow development of Reservation lands, and introduce additional uncertainty in the permitting process that will lead to reduced oil and gas development on our Reservation. This may be acceptable for oil and gas development on public lands, but not on the Tribe's lands. The Tribe relies on its oil and gas development to fund its government, provide services to members, and invest in the regional economy.

Second, we know of no incidents on tribal lands that would necessitate federal regulation of fracing. According to the draft regulations the BLM provided at a meeting in Salt Lake City, Utah, the BLM plans to look at three key issues pertaining to the fracing process: wellbore integrity, disclosure, and flowback water. For each of these three areas, there has never been a fracing related problem on our Reservation.

Third, the proposed rule would require prior approval from the BLM for all well stimulation activities, not just fracing of oil and gas wells. This additional time required for BLM staff to review a proposed fracing job only adds to delays oil and gas companies on the Reservation face—delays that have economic consequences. Requiring BLM approval for fracing adds to the burden of an already short-staffed BLM Field Office. At our BLM Field Office there is already a backlog of application for permits to drill (APD). Adding an additional burden on BLM staff will only worsen the problem.

Fourth, oil and gas operators seeking permits to drill on Indian already undergo an extensive environmental review process before they can begin drilling activities. This process has become lengthy, time consuming and costly, so much so that there is a backlog of hundreds of APD's that have not been acted upon by our local BLM Field Office.

An oil and gas permit is already subject to approval processes by the BLM, the Bureau of Indian Affairs, the Utah Division of Oil and Gas and the Tribe's Energy and Minerals Department. New Clean Air Act restrictions may be on the horizon for activities on the Reservation, and new United States Fish and Wildlife Service sage grouse conservation requirements are pending. Further, hookless cactus mitigation requirements applicable to the Tribe's lands become more restrictive daily. When operating on the Reservation, our industry partners are also subject to review under the National Environmental Policy Act and BLM's Federal Lands Policy and Management Act planning rules. Adding to these hurdles and requirements by requiring additional approval of fracing plans will in no way improve an already over-regulated process.

Fifth, delays in the oil and gas permit approval process are already causing energy companies to limit their activities on the Tribe's lands. Companies operating on the Reservation cite the federal approval process as the single biggest risk to their business activities, and additional delays will cause oil and gas operators to leave the Tribe's lands for state and private lands. Each delayed approval for drilling activities, each drilling rig that must leave the Tribe's

lands due to uncertainty or inactivity, each limitation on oil and gas production on the Tribe's lands, reduces the Tribe's revenues from oil and gas development.

The additional delays that will be caused by the BLM's fracing rule will have an astronomical economic impact on the Tribe. For example, a company operating single drilling rig can drill approximately 20 wells per year. If that drilling rig were to leave the Reservation because of delays in obtaining permits, the economic loss to the Tribe will be approximately \$16.2 million over a twelve month period.

In addition, some companies could operate three drilling rigs on the Reservation and drill approximately 60 wells per year. If those drilling rigs leave the Reservation or are limited in the number of wells they can drill, the economic loss to the Tribe will be approximately \$48.7 million over a twelve month period. This data is illustrative of only a single company's drilling program; the figures become more daunting when you multiply the figures by the many companies operating on the Reservation.

Finally, BLM's fracing rule is premature ahead of Environmental Protection Agency (EPA), and other federal agencies, ongoing scientific studies on fracing. BLM has offered no justification for proceeding with this new regulation without the benefit of these studies. Without clear demonstration of a problem with the fracing process, specifically the type of fracing done on our Reservation, and any other information that may come from these studies, the BLM regulation is putting the cart before the horse.

III. Specific Problems with BLM's Proposed Hydraulic Fracturing Rule

First, the BLM's hydraulic fracing rule requires "pre-fracing disclosure." The fracing rule, as drafted, requires operators to provide BLM with detailed information regarding anticipated fracing operations at least 30 days in advance of the proposed fracing job. The information required by BLM includes identification of all additives to be used in fracing and the complete chemical makeup of the overall fracing fluid mixture, as well as other detailed information. The "plan" is subject to approval by the authorized officer.

Requiring "pre-fracing disclosure" is impractical and will ultimately be ineffective. The fracing rule would require operators to estimate the types and amounts of chemicals to be used at a time when that information may not be known or when that information may change due to conditions the operator obtains from subsurface conditions. In addition, the plan that the operator submits to the BLM for approval may change over the course of time due to scheduling conflicts and other factors thus forcing the operator to use a different service provider which results in the use of a different set of product additives. Moreover, fracing treatments are often continuously adjusted and revised as the well is drilled and more information is gathered about well-specific conditions.

As a result, the information that is supplied to the BLM prior to fracing a well may well become stale as conditions change. Thus, the information supplied to the BLM will be of no

practical use, yet causing the operator to devote substantial resources to gathering and providing this information to the BLM. This is simply not practical.

Second, the BLM's fracing rule requires disclosure of "chemical concentrations." The BLM fracing rule requires the disclosure of the percentage by mass of each chemical contained in the fracing fluid. However, providing the exact concentration of an ingredient in the fracing fluid used at a specific well site would be very difficult and burdensome because it would require sampling and extensive laboratory testing of the fluid used at each well.

In contrast, state governments that require the disclosure of fracing fluids only require the maximum concentrations of chemicals. This also helps to prevent the disclosure of the chemical formulas or particular additive products, which companies consider proprietary information. The Tribe is concerned that rather than disclosing confidential competitive information, services providers simply will not operate on tribal land or alternatively, the very best products will not be used for oil and gas recovery on tribal land.

Third, the BLM fracing rule requires disclosure of more than just "intentionally added ingredients." The BLM's fracing rule, as currently written, requires the disclosure of all ingredients in a fracing fluid mixture. State governments which have adopted a fracing rule only require the disclosure of ingredients intentionally added to a base fluid and does not extend to chemicals that may be incidentally present in fracing fluids as a result of chemical reactions or impurities in the base fluid. Both Texas and Colorado have adopted this approach.

Fourth, the BLM fracing rule requires an operator to provide the "chemical composition of flowback" as part of its plan for well stimulation operations. This requirement is inherently unworkable. It would, in effect, mandate that operators sample and analyze the flowback fluid from a well to determine its chemical makeup at a time when the flowback has not even been generated and would therefore be impossible to analyze.

Finally, the BLM fracing rule requires "compliance certification." The BLM fracing rule requires operators to certify that they are in compliance not only with applicable federal law but also state and local law concerning fracing. This would effectively make state and local law applicable to Indian lands. The BLM cannot by regulation make state and local law applicable to Indian lands without a specific act of Congress. The Tribe maintains its own laws and, pursuant to its federal trust responsibility, the BLM should instead be encouraging tribal regulation of oil and gas activities on tribal lands, rather than threatening tribes with state and local jurisdiction.

IV. Failure of BLM to Fulfill Tribal Consultation Policies

After barely beginning to consult with tribal governments, I understand that OMB is already reviewing BLM's draft fracing rule. This rule will have a substantial impact on energy development on Indian lands and BLM must fulfill tribal consultation policies. To date, BLM has not complied with Executive Order No. 13175 on Consultation and Coordination with Indian Tribal Governments, the Department of the Interior's Policy on Consultation with Indian Tribes (Tribal Consultation Policy), and its December 1, 2011, affirmation of those policies in

Secretarial Order No. 3317. BLM's actions do not uphold its obligations under the federal trust responsibility and do not fulfill the Department's long-standing and ongoing commitment to consult with Indian tribes.

The Department's tribal consultation policy states that tribal "[c]onsultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making [and, that] ... [c]onsultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility." Department of the Interior Policy on Consultation with Indian Tribes at § II. In contrast, BLM has only held four informational meetings on the proposed fracing rule and already has a draft rule pending at the OMB for publication in the Federal Register.

In addition, BLM never developed a protocol or timeline for tribal consultation, did not include tribal input in its draft regulations, did not engage tribes in a discussion about the need for a rule, and did not engage tribes in a discussion about alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes. Because of the impacts the proposed fracing rule will have on tribal resources, BLM is required to follow the "Stages of Consultation" set out in the Department's Policy on Consultation with Indian Tribes in the development of any fracing rule. These stages include an "Initial Planning Stage," a "Proposal Development Stage," and an "Implementation of Final Federal Action Stage."

On March 26, 2012, a few tribes met with BLM in Washington, D.C. to attempt to resolve our concerns regarding BLM's failure to meaningfully consult with tribes. BLM rejected our concerns. BLM stated that its past actions and its willingness to meet with tribes if tribes so request fulfills the Department's tribal consultation policies. These actions completely fail to provide tribes with effective consultation as required by the Administration's and the Department's consultation policies.

If corrective active is not taken, the BLM's actions will fail to fulfill a Departmental policy that was announced only four months ago. In December 2011, the Department announced that its new Tribal Consultation Policy would provide, "a strong, meaningful role for tribal governments at all stages of federal decision-making on Indian policy." Press Release, Department of the Interior, "Secretary Salazar Kicks Off White House Tribal Nations Conference at Department of the Interior" (Dec. 2, 2011). BLM has not afforded tribes the meaningful role described in this announcement in the development of its fracing rule.

To ensure that the proposed rule will be developed according to tribal consultation policies, I ask that the Subcommittee seek the help of the Assistant Secretary for Indian Affairs in this matter. The Assistant Secretary could work with the BLM to: (1) develop a consultation protocol that will comply with the Department's Tribal Consultation Policy, and (2) determine how the proposed rule should apply in Indian Country if at all, in light of the federal trust responsibility, the federal policy to promote economic development and tribal self-sufficiency, and other concerns unique to Indian Country.

I also ask that the Subcommittee inquire about involving the Department's Tribal Governance Officer (TGO) to monitor BLM's actions as it develops an appropriate consultation protocol. This protocol should clarify that BLM has withdrawn the draft regulations from OMB or excluded Indian lands from the proposed rule, is ready to engage tribes in the Initial Planning Stage and the other two stages of consultation, and generally set out the steps that BLM will follow to comply with the Department's Tribal Consultation Policy, including working with tribes to develop a consultation timeline.

The Department's TGO can assist and monitor BLM's efforts to develop this protocol. The Department's Tribal Consultation Policy directs TGO's to facilitate government-to-government consultation, to implement a reporting system to ensure that consultation efforts are documented and reported to the Secretary, and to fulfill other TGO obligations under the Department's policy. Tribal Consultation Policy § VII.B.1(a)-(g).

Fortunately, the BLM still has the opportunity to correct its violation of the policy and take steps to fully engage tribes in consultation. The Tribe is willing to work with the Department, its TGO, the BLM, and the Assistant Secretary for Indian Affairs to develop an appropriate tribal consultation protocol to consider issues related to fracing.

V. Conclusion

I would like to thank Chairman Young, Ranking Member Boren and members of the Subcommittee for the opportunity to present this testimony on behalf of the Ute Indian Tribe. The Tribe stands ready to work with the Subcommittee to find common and practical ground concerning the proposed fracing rule and to eliminate the barriers to tribal resource development that this rule would create. The current barriers, and the promulgation of any new barriers, have a direct effect on the Tribe's revenues, our ability to invest in the future, and the services we are able to provide our members, our children and grandchildren.

Towaok (Thank You)