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**Testimony on the Bureau of Land Management's Hydraulic Fracturing Rule's
Impact on Indian Tribal Energy Development**

House Committee on Natural Resources
Subcommittee on Indian and Alaska Native Affairs

April 19, 2012

Good Morning Chairman Young and honorable members of the House Resources Subcommittee on Indian and Alaska Natives, my name is T. J. Show and I am the Chairman of the Blackfeet Nation of Montana. I am honored to be here and thank you for conducting today's hearing and your interest in issues that affect energy development in Indian Country.

The Blackfeet Reservation, located along the Rocky Mountain Front in Northwest Montana, shares a border with Canada, is adjacent to the Glacier National Park and is inhabited by approximately 9,000 members of the total 18,000 plus Blackfeet Tribal members. The Blackfeet Reservation was established by a Treaty with the United States in 1855 and today consists of 1.5 million acres. The Blackfeet homeland is known for its pristine mountain ranges, clear mountain lakes and streams, abundant wildlife and wide open country. The Tribe has a long-standing record of responsible stewardship evidenced by the existence of tribal laws to regulate, manage and protect land, natural resources and wildlife.

The Blackfeet Tribe, like numerous other large land-based Tribes, suffers from an unemployment rate that reaches 70 to 80 percent, a lack of on-Reservation economic development opportunities, an extreme shortage of housing, sub-standard governmental buildings and overwhelmed medical facilities. The Blackfeet Tribal government, like many other tribal governments, is frustrated with the continued reduction of federal funds available to fulfill treaty obligations for essential services. Thus, the Blackfeet Council has determined that development of the large pools of oil and natural gas that on the Blackfeet reservation, in a responsible manner, is the most viable option to improve the Reservation

economy, to provide jobs to Tribal members, to provide necessary services on the Reservation, and to bring some measure of improvement to the standard of living of Blackfeet tribal members.

Status of Blackfeet Development

The Blackfeet Reservation has a lengthy history of oil and gas development that extends back to the 1930's. The 1950's and a brief period in the early 1980's marked the heyday of production on the Reservation. However, as oil fields aged and market forces have affected development, new oil and gas production has been at a standstill since the mid-1980's. However, interest in oil and gas development has greatly increased, and beginning in 2008, the Blackfeet Tribe has negotiated Indian Mineral Development Agreements with various oil and gas companies, as authorized by the Indian Mineral Development Act of 1983. Consistent with the intent of the Indian Mineral Development Act, the Tribe exercised its sovereign authority over the Blackfeet mineral resources to establish the terms and parameters for exploration and development. The IMDA's were all reviewed and approved by the Bureau of Indian Affairs.

The Tribe is now attempting to implement the IMDA's through the negotiation of mineral leases and commencement of mineral exploration by the companies. However, progress has been extremely slow and burdensome as the Tribe and the producers attempt to comply with the requirements of the BIA and BLM for access rights to exploration sites, changing environmental requirements, permits to drill and lease approvals. Often the federal mandates are duplicative and the federal agencies have been largely unable to review and approve documents in a timely manner. For Blackfeet, the local BIA agency is responsible for leases, while the Regional Office in Billings, over 350 miles away, is responsible for IMDA issues. Permitting and development issues are handled by the regional BLM office 150 miles from the reservation. Approvals of required documents for Blackfeet development can take from 6 months to two years under the present processes. Exploration and development on the Blackfeet reservation is expensive, time-consuming and lagging behind nearby off-reservation development.

The Blackfeet Tribe is concerned that BLM's proposed rule on Hydraulic Fracturing, if adopted, will create additional burdens to an already burdensome process that will likely delay and possibly prevent beneficial development of Blackfeet oil resources. To be clear, hydraulic fracturing is necessary to fully explore and maximize oil development on the Blackfeet Reservation. At the same time, the Tribe has a responsibility to its Tribal members and other Reservation residents to insure that hydraulic fracturing activities on the Reservation are conducted in a safe and environmentally sound manner. However, the Tribe is not willing to allow the imposition of rules by the Federal Government that are promulgated without the Tribe's full participation, and that do not take into account the unique issues of development on the Blackfeet Reservation.

Lack of Meaningful Consultation

On December 1st of 2011, the Department of Interior adopted Order No. 3317, the Department of the Interior Policy on Consultation with Indian Tribes to acknowledge that the provisions for conducting consultation complies with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Tribes welcomed the consultation policy as a positive effort to enhance government to government relationships and to involve Tribes in a meaningful and transparent manner in the creation

of federal policy. However, just months later, the BLM developed a rule that seriously impacts Indian Country energy development without regard to the consultation process.

Recently, I was invited by the Bureau of Land Management to participate in discussions regarding the process of hydraulic fracturing well stimulation for oil development. I attended the scheduled discussion in Billings, Montana on January 12, 2012. BLM representations, from the outset of the day-long presentation, stated the session was informational only and was not a formal consultation. While the presentation generally discussed issues related to hydraulic fracturing, it did not include an overview of the proposed rule on hydraulic fracturing, and BLM representatives did not solicit any Tribal comments on issues relating to regulation of well stimulation. While the BLM discussed the hydraulic fracturing processing with Tribes, these discussions fall short of compliance with the mandates of Order No. 3317 that “Communication will be open and transparent without compromising the rights of Indian tribes or the government-to-government consultation process” Unfortunately, the BLM choose to develop a rule without Tribal participation, in apparent response to issues outside Indian Country, and chose to forward the proposed rule toward final adoption without regard to Order No. 3317.

The Proposed Rule’s impact on Tribal Sovereignty

Blackfeet Tribal representatives participated in a discussion with BLM officials specifically regarding the proposed hydraulic fracturing rule on March 23, 2012. BLM officials stated the rule was developed to respond to public outcry regarding the use of hydraulic fracturing for east coast development of public lands. However, we do not consider our reservation lands public lands. The considerations that the Federal Government must take into account for development on federal lands in furtherance of its responsibility to the general public do not apply on Indian lands. Tribal lands are governed by the Tribes pursuant to “inherent powers of a limited sovereignty which have never been extinguished,” derived from their sovereign existence predating European settlement of the United States. On Tribal lands, the Tribes have ownership and control of the minerals subject to the trust obligations of the United States. The policy considerations for development of Tribal lands are made by the Tribes in the best interest of their Tribal members. BLM’s proposed rule to address public outcry for activities on public lands overreaches its goal and infringes on tribal sovereign authority to make decisions concerning development on reservation lands.

As discussed above, the Tribe has entered into Indian Mineral Development Agreements, consistent with its sovereign authority to govern oil and gas development, that specifically address the development and production relationship between the Tribe and oil companies. The additional requirements of the proposed rule may impact a company’s ability to comply with negotiated timeframes for exploration and well construction in an IMDA.

The proposed rule also mandates that development activities comply with all applicable federal laws, rules and regulations and “state and local laws, rules, and regulations.” Imposing state and local law on Tribes clearly infringes on tribal sovereignty and could empower an unfriendly local government to adopt regulations that curtail or complicate Tribal oil development. The State of Montana has no jurisdiction over Tribal lands, and the Tribe is unwilling to accept a mandate that on-reservation activities comply with local or State regulations.

In addition to the delay concerns with duplicative requirements, the proposed rule requires BLM to make a formal decision before well stimulation operations. 43 CFR Part 4 allows any interested party to appeal a BLM decision. The rule authorizes BLM to render a formal decision although no standards were included in the rule for approval or disapproval of hydraulic fracturing proposals. Thus, the door opens for entities in conflict with tribal development, regardless of affiliation with the Tribe, to file an appeal of the approval. Without standards for approval of the various hydraulic fracturing activities, the determination of whether a proposed well stimulation activity is acceptable will be determined by either an administrative decision-maker or a federal court. Further, an appeal, if pursued through the various administrative stages can take years to resolve before proceeding in Federal Court. This open-ended opportunity for interested parties to appeal creates a mechanism to thwart development of Blackfoot resources, empowers either an administrative body or the Court to determine acceptable practices for hydraulic fracturing, and more importantly, infringes on Tribal sovereignty. Such a process may be appropriate for development on federal lands, but not on Indian lands.

Burdensome Requirements of New Rule

Presently, operators must submit an application for a permit to drill (“APD”) before any drilling activity commences. The APD describes the proposed drilling plan. The proposed rule then requires submission of a Notice of Intent Sundry (“NOI”) to the BLM for any and all well stimulation activities at least 30 days before the commencement of well stimulation operations. In most instances, the chemical composition for the fracturing activity is not finally determined until data is collected from the well. To stop the on-going exploration activity and submit the NOI for approval 30 days prior to the fracturing activity will disrupt the exploration process.

Presently, we struggle with the delayed BLM approval of APDs which has routinely taken from three months to 18 months. Adding twice the paperwork, with new requirements, for review and approval will certainly increase the delay time as well as increase the overall costs for BLM. Additionally, and most importantly, the proposed rule provides no standards to approve or disapprove well stimulation activities as no guidance is provided for acceptable or unacceptable well stimulation, chemical/additive usage, or chemical mass compositions. The rule makes no reference to current industry standards and instead appears to disregard them.

Hydraulic fracturing well stimulation is currently under debate in many forums across the country. A major concern exists regarding the chemical additives utilized by the industry for fracturing activities and I understand BLM’s proposed rule is to facilitate disclosure of additives utilized for well stimulation operations. However, the rule does not address how the BLM will react to the chemical disclosures other than to grant approval or disapproval of activities. A public disclosure of specific chemicals utilized presently occurs in numerous jurisdictions but little information exists as to appropriate action following disclosure.

BLM’s proposed rule goes beyond requiring the disclosure of additives to requiring a report on the complete chemical makeup of the stimulation. Prior to stimulation operations, the operator must submit the mass composition of the chemical and water combination for the entire stimulation to the BLM for approval. Two specific concerns exist with this requirement. First, no standards are provided to determine acceptable or unacceptable chemicals or in what quantities or an acceptable total chemical makeup of the stimulation activity (including fresh water). Second, I understand that stimulation

activities often change depending on geologic conditions, weather and temperature, that are often unpredictable and outside the control of the operator. I am concerned that operations would shut down each time a change in the stimulation process occurs to comply with the additional reporting and approval process which would prevent expeditious exploration and likely delay moving from oil exploration to productive development. For example, if it rains, snows, or temperatures drop below freezing during well stimulation activities, the chemical composition of the fracturing fluids would likely change and, under the rule, the operation would have to stop and a new report for approval of the changed fluid submitted for approval. Blackfeet Country is subject to extreme climate changes that will likely cause changes in stimulation process especially when stimulating previously drilled wells. This provision of the rule appears drafted to intentionally stop hydraulic well fracturing activity. These additional requirements will increase costs of development and decrease proceeds from oil development to tribal members and Tribes. Further, these additional requirements will render reservation development less attractive and open doors for our neighboring fee land owners to realize the financial benefits of oil development long before we do.

Current Blackfeet Practices

The BLM proposed rule appears to raise three distinct concerns with hydraulic fracturing well stimulation; disclosure of chemical additives for well stimulation, well-bore integrity (to insure protection of the aquifer) and water management. The Blackfeet Tribe already seriously considered these concerns and implemented measures to address them to our satisfaction. First, we have reached an agreement with our industry partners for full disclosure of chemicals/additives utilized for well stimulation. As required by the BLM in Montana, these chemicals are also disclosed to the State. Thus, the Tribe, the owner of the land and governing authority over all lands within the Blackfeet reservation is informed about the chemicals used for well stimulation. The Tribal Oil and Gas Department is now reviewing industry standards to determine acceptable types of hydraulic fracturing well stimulation.

Secondly, the Blackfeet Tribe has entered into a contract with the BLM for the training and employment of a tribal member to serve as a petroleum engineer technician that inspects all well construction activity to insure well bore integrity. Thus, we are assured that we are monitoring the construction of well casings to comply with industry standards for the protection of the aquifer.

Finally, the Blackfeet Tribe is proposing a water management scheme that will treat water recovered from hydraulic fracturing activities on-site utilizing a mobile water treatment process that will treat water for re-use.

These efforts reflect how seriously the Blackfeet Tribe considers these matters. We will continue to address them as a matter of Tribal law and regulation. Any federal regulations must take into account the Tribe's role in these matters, and its on-going effort to address them, and not supplant them.

Instead of applying a rule to Indian country that is intended to address a set of very different situations on public lands, I am hopeful that through Tribal and federal collaboration and cooperation, a different alternative is considered. In that spirit, I believe there are sound alternatives to the proposed rule.

Recommendations

1. An alternative hydraulic fracturing rule to the proposed BLM rule should be developed to apply to Indian Country exploration and development that considers the unique issues on Indian reservations. This rule should be promulgated in compliance with Interior's Order No. 3317 in collaboration with the Bureau of Indian Affairs. An alternative rule could balance the interests of Tribal oil and gas development with protection of pristine Tribal lands and water and avoid infringement on tribal sovereignty. Tribes must be trusted with decision-making authority over their lands and allowed to be at the forefront of the development of any rules or regulations that impact, affect or involve their homelands. Upon completion of a rule applicable to Indian Country, Tribes could be allowed to undertake regulatory activities through compacting or contracting. In addition to this alternative rule, Tribes should be provided financial resources to develop capacity for effective regulation. The proposed BLM rule necessitates additional funds to the BLM and BIA for implementation. Thus, it should not be considered unrealistic that Tribes, instead of the BLM, should be funded to carry out regulatory activities on Indian lands.
2. Standards for acceptable hydraulic fracturing well stimulation should be developed with consideration of the varying types of geology, chemical compositions of water, location of wells, probability of success at stimulation and industry practices.
3. This rule, consistent with public concerns, is generated due to a lack of knowledge regarding impacts of hydraulic fracturing of groundwater. However, impacts can only be assessed with existing water quality data for comparison. Thus, the development of baseline water quality data for groundwater is essential.
4. If a rule on hydraulic fracturing, similar to the proposed rule, is adopted, sufficient resources to the BLM and BIA are absolutely necessary for efficient implementation of the rule including enforcement.
5. Finally, implementation of a "one-stop shop" comprised of representatives of the various agencies with approval authority over exploration and development activities housed on the Blackfeet Reservation would streamline the review and approval process of the required applications, permits and sundry notices required for Blackfeet oil exploration and development. A one-stop shop would demonstrate a clear commitment to realistic development for the Blackfeet Reservation.

Conclusion

I would like to again thank the Committee for conducting this hearing regarding BLM's proposed rule on hydraulic fracturing and for consideration of my testimony. In conclusion, the Blackfeet Nation hopes to proceed with responsible oil and gas exploration and development while remaining always mindful of environmental protection. Further, we are not proposing the hydraulic fracturing occur without regulation. However, BLM's proposed rule is not the appropriate rule for Indian Country development and will likely prevent development of reservation fossil fuels.