SOUTHERN UTE INDIAN TRIBE

April 25, 2016

The Honorable Doug Lamborn
Chairman
Subcommittee on Energy & Minerals
Committee on Natural Resources
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Alan Lowenthal
Ranking Member
Subcommittee on Energy & Minerals
Committee on Natural Resources
U.S. House of Representatives
Washington, D.C. 20515

Re: Materials for the Record for the Subcommittee's April 27, 2016, Oversight Hearing

Dear Chairman Lamborn and Ranking Member Lowenthal:

On behalf of the Southern Ute Indian Tribe (Tribe), I am pleased to attach a copy of the Tribe's comments submitted on April 6, 2015, to the Bureau of Land Management (BLM) in response to the BLM's proposed rule entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation." These comments, in turn, were submitted in lieu of a prepared statement relative to the Senate Energy and Natural Resources' April 14, 2016, oversight hearing on the BLM's rule.

I respectfully request that these comments be included in the hearing record for the Subcommittee on Energy and Minerals' April 27, 2016, oversight hearing entitled *"Bureau of Land Management's Regulatory Overreach into Methane Emissions Regulation."*

Thank you for your consideration of my request.

Sincerely,

Clement J. Frost

Clement J. Frost, Chairman

Attachment

P.O. Box 737 ✦ Ignacio, CO 81137 ✦ Phone: 970-563-0100

SOUTHERN UTE INDIAN TRIBE

April 5, 2016

April 6, 2016

Submitted electronically ~~April 22, 2016~~ via:
http://www.regulations.gov

U.S. Department of the Interior, Director (630)
Bureau of Land Management, Mail Stop 2134 LM
1849 C St. NW.
Washington, DC 20240
Attention: 1004-AE14

Re: Waste Prevention, Production Subject to Royalties, and Resource Conservation; Proposed Rule (As Published in the *Federal Register Vol. 81, No. 25* on February 8, 2016)

Dear Sir or Madam:

The Southern Ute Indian Tribe appreciates the opportunity to provide comments on the BLM's proposed rulemaking entitled *Waste Prevention, Production Subject to Royalties, and Resource Conservation.*

Tribe's interests in the proposed regulations.

There are many oil and gas production and gathering facilities that will be subject to the proposed rule on the Southern Ute Indian Reservation. Those facilities, many of which are owned and operated by the Tribe, are part of the Reservation's oil and gas industry infrastructure. Creating and maintaining a favorable business environment on the Reservation is vitally important to the Tribe; however, the Tribe also recognizes the importance and value of maintaining and improving the Reservation's air quality. As both an energy and air quality regulatory authority on the Southern Ute Indian Reservation and an owner and operator of oil and gas sources on and off the Reservation, the Tribe is uniquely positioned to comment on the proposed regulations from more than one perspective. The Tribe is submitting the following comments based on both its business and environmental protection interests.

Comments on the proposed regulations.

1. **BLM Lacks Authority Under the Clean Air Act to Impose the Air Quality Control Aspects of the Rule and, Even if BLM had Authority, its Rule Creates a Conflict Among Regulating Authorities** – Although prefaced as a waste prevention rule, at its crux, the proposed rule is an air quality rule. In the Clean Air Act, Congress has established the method by which air pollution is controlled through a cooperative approach involving the U.S. Environmental Protection Agency (which sets minimum standards to be applied nationwide) and states and

tribes that are treated as states (which are responsible for implementation, maintenance, and enforcement of the EPA standards based on EPA-approved state or tribal implementation plans). The statutes cited as authority for its proposed rule do not authorize the BLM to establish a separate program for the regulation of air pollution from oil and gas sources. Even if BLM had authority, its proposed rule has the potential to conflict with existing and proposed federal and state air quality rules, such as NSPS OOOO and OOOOa (codified at 40 CFR Part 60, Subparts OOOO and OOOOa) and Colorado Regulation #7 (codified at 5 CCR 1001-9), creating an undesirable patchwork of regulations on checker boarded reservations like the Southern Ute Indian Reservation.

The BLM states that it is working closely with EPA to ensure alignment with EPA rules to avoid conflicting and redundant requirements. In many instances, this appears to have been achieved as many requirements of the rule may be satisfied or exempted through compliance with the EPA's rules; however, there are several key differences. For example, the BLM's proposed fugitive emissions leak detection and repair (LDAR) rule differ significantly from the proposed New Source Performance Standard (NSPS) OOOOa rule and Colorado Regulation #7 in that it does not take into consideration a facility's emissions, source type, or size when determining the LDAR frequency. The proposed BLM rule does not align with the proposal in the NSPS OOOOa to exempt from the LDAR requirements low production well sites (defined as a site with less than 15 barrels of oil equivalent per day averaged over the first 30 days of production) and well sites that only contain one wellhead. The BLM rule also differs in that the LDAR frequencies are based on the number of fugitive components found to be leaking during monitoring, while the proposed NSPS LDAR frequencies are based on the percentage of fugitive components found to be leaking during monitoring Colorado Regulation 7, like the NSPS rule, also has a more progressive approach that dictates the frequency of LDAR based upon annual fugitive VOC emissions, type of facility and what equipment is present at a facility (Section XVII.F).

Although similar in intent, BLM's proposed rule is not truly aligned with the aforementioned federal and state rules, which could cause compliance challenges and confusion within the regulated and regulating communities. Additionally, each agency will modify their rules over time, potentially creating more divergences. The process would benefit if the BLM deferred to EPA and state or tribal air quality rules where similar requirements exist. This would allow the regulated community to implement a single program that addresses leakage concerns yet would still achieve the ultimate goal of waste prevention.

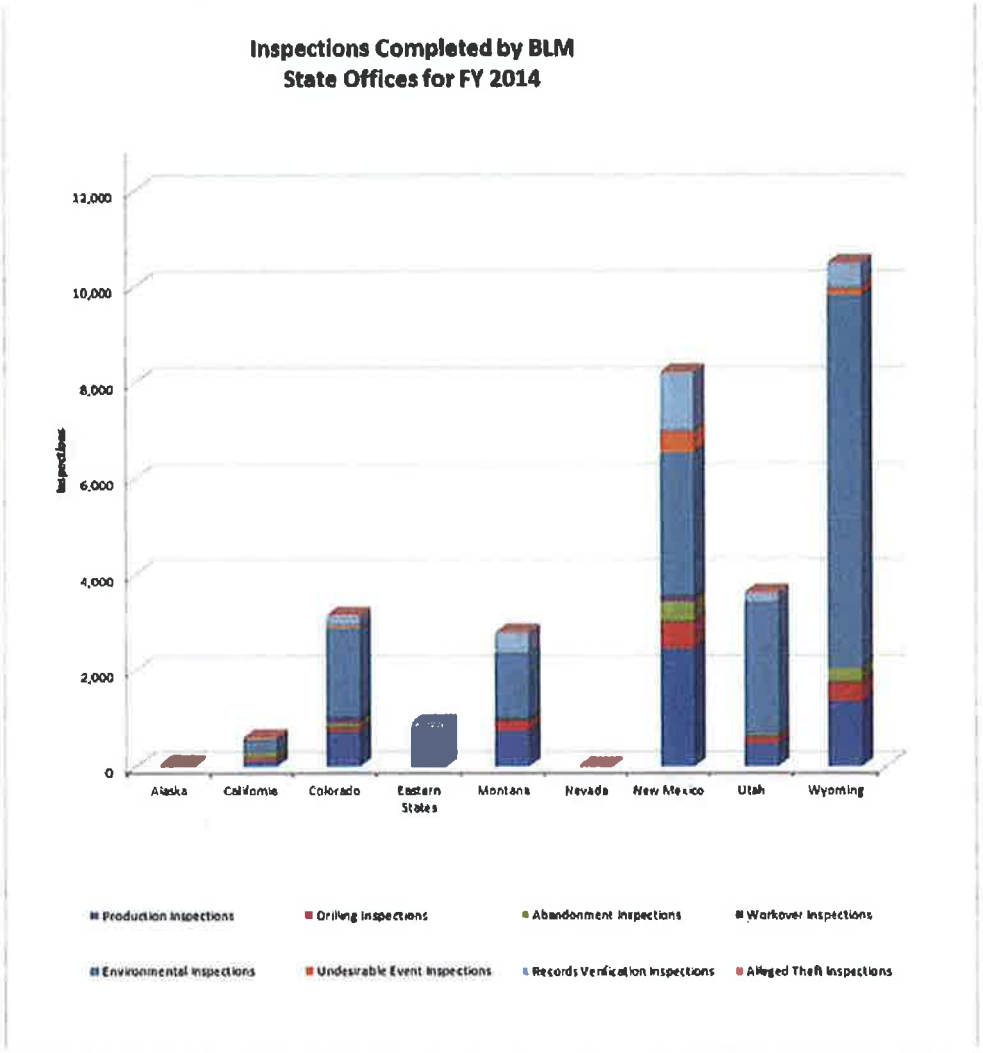
2. **One Size Fits All Model** – The proposed rule addresses all facilities and sources identically with no consideration of factors that could make a well site or facility more prone to gas leakage. What is appropriate for high pressure and volume wells that produce both oil and natural gas in the Bakken Pool may not be appropriate for lower pressure and volume coalbed methane (CBM) wells in the San Juan Basin. It is evident that the proposed rule was developed to address issues associated with co-production of natural gas from oil wells in regions with limited infrastructure. However, the primary product of CBM production is natural gas, therefore venting, flaring and leakage is minimized as it represents a direct loss of revenue to operators. Unlike BLM, EPA recognizes that emissions associated with extraction activities can vary widely.

3. EPA's Approach on Existing Oil & Gas Minor Sources in Indian County. "We believe that existing sources are best addressed through tailored, federal or tribal air quality plans because each basin producing oil and/or natural gas possesses different geological and meteorological characteristics and, thus, what primary fossil fuel resource is extracted can be very different in quality and type and the impacts from emissions associated with extraction activities can vary widely. For example, the predominant resource extracted from the Bakken Pool [44] is a light, volatile oil, while the primary resource extracted from the Uintah Basin is a heavy, thick oil. Each of these types, in many cases, call for different sets of control requirements that are best addressed through tailored plans versus a national FIP." (FR Vol. 80, No. 181 page 56570 September 18, 2015)

The BLM should consider incorporating regional characteristics, substances produced, and other risk factors into the proposed rule.

3. **Cost of Compliance** – The cost to comply with a minimum of annual inspections at all facilities will likely outweigh the production value of some low-producing wells, thereby causing operators to plug those wells. This will ultimately result in a net loss of royalty to the public and tribes, which is inconsistent with the BLM's stated intent of the proposed rule. It would be beneficial to the regulated community if the BLM implemented a tiering mechanism for inspection frequency based upon the appropriate factors, such as those used in Colorado Regulation #7 (Section XVII.F. Tables 3 and 4). BLM's focus should be on higher emitting facilities, such as compressor stations and storage tanks, rather than single, low-volume well sites.

4. **How will BLM Fund and Staff the Program?** – BLM has undertaken an aggressive roll-out of several new and updated rules including the pending Hydraulic Fracturing rule, updates to Onshore Orders 3, 4, and 5, as well as the proposed rule. The level of effort and technical training needed to appropriately implement and enforce each of these rules is significant. Funding does not appear to be in place currently to support additional document review and field inspection requirements required by these rules, potentially leaving existing staff further burdened and creating delays in permitting and enforcement. BLM oil and gas inspections in 2014, as reported for the Colorado State offices, totaled only about 3,000 statewide for all disciplines; well below the minimum annual inspection required of the regulated community in the proposed rule. It is unclear how the BLM intends to implement any kind of a relevant field inspection or confirmation program when inspections are not currently a priority. This is especially concerning since enforcement will require the purchase of "approved" measurement instrumentation (e.g. FLIR cameras) which are costly and require significant training to operate correctly. Implementation of a rule without adequate staff and equipment to manage and enforce the program does not benefit either the regulating or regulated community.



(From BLM.gov)

5. **Creation of a Regulatory Gap** – The proposed rule will create a regulatory gap that further incentivizes mineral development on non-Indian lands within the exterior boundaries of the Southern Ute Indian Reservation. The proposed BLM rule will apply to lands under BLM's jurisdiction only – namely trust and allotted Indian lands. Non-Indian lands, although subject to EPA's NSPS OOOO and OOOOa regulations, will not be subject to BLM's proposed rule. At the same time, the State of Colorado has no jurisdiction within the tribal air shed, regardless of surface ownership and, therefore, a regulatory gap is being created where there will be no program equivalent to BLM's proposed rule applicable to non-Indian lands within the Reservation. Tribal land development is already hindered by the recent increases in the application for permit to drill (APD) filing fee to $9,500 per well (IM 2015-142) while there is zero cost to file an APD on adjacent fee land. Creating a regulatory "free zone" within the Reservation will likely divert additional development, and the resultant royalties, away from Indian lands.

6. **Bradenhead Venting of Shallow Gas** – The proposed rule is silent on the practice of bradenhead venting of shallow, stray gases. In the San Juan Basin, the BLM has historically allowed bradenhead venting of low volume, low pressure gases when the gas is demonstrated to be of a different composition than the production gas (aka "stray" gas). The intent of this practice is to keep the stray gases from impacting the shallow groundwater table. In some situations, the gases are captured and routed to the production stream; however, more commonly, they are vented directly to the atmosphere. It appears this practice will be prohibited under the proposed rule. In order to prevent a potential unintended consequence of groundwater contamination by unilaterally shutting in all bradenhead venting upon rule implementation, the BLM should allow operators to develop a compliance program to phase out this practice over a prescribed timeframe. Removal of this gas source to the atmosphere is a positive step, but we do not want to create a groundwater issue as a result.

7. **Applicability of the Rule to Midstream Compression Facilities Located on BLM Surface Leases** – The proposed rule's language needs to be changed to clarify that the rule will apply only to mineral lease production operators and will not apply to midstream compression facilities operating on BLM surface leases.

8. **Southern Ute Indian Tribe's Title V Operating Permit Program** – On March 2, 2012, the EPA approved the Tribe's Title V Operating Permit Program granting the Tribe full authority to implement and administer the program for all Title V sources within the exterior boundaries of the Reservation. The proposed rule creates new air requirements that are not currently in the Tribe's permit program and that do not fall under the program's definition of "applicable requirement" (requirements that are legally required to be included in the operating permit). It is unclear if EPA will consider BLM's proposed rule an applicable requirement under the federal Title V Operating Permit Program. If determined to be an applicable requirement, the Tribe would have to allocate resources to incorporate the rules into the Tribe's currently issued operating permits. Also, if the rules are incorporated into operating permits it could be unclear what agency, the BLM or the Tribe, would have enforcement authority for violations identified at Title V sources. The Tribe recommends that BLM consult with the EPA to determine if the proposed rules would be considered "applicable requirements" for the purpose of the federal Title V Operating Permit Program and if so, what agency would retain enforcement authority.

9. **Voluntary Programs** – The Tribe requests further clarification on how the proposed rule will interact with voluntary EPA emission reduction programs such as Natural Gas STAR and Ozone Advance. These programs provide recognition and benefits to companies who voluntarily commit to employ emission reduction strategies. Many of the actions taken in these programs would become required actions after the proposed rule is final. Additionally, during the public comment period for the proposed NSPS OOOOa rule, EPA requested comment on criteria that could be used to determine if voluntary emission reduction measures could be deemed to satisfy the requirements of the NSPS. The Tribe recommends that BLM fully analyze how the benefits of voluntary emission reduction programs would not be eliminated due to mandatory compliance

with the proposed rule and to also consider if voluntary emission reduction measures could satisfy any proposed requirements.

10. The BLM Should Follow Its Sister Agencies' Leads and Promote Tribal Self-Determination and Self-Governance – In its 2013 revised surface leasing regulations (codified at 25 CFR Part 162) and in the update of its rights-of-way regulations (Rights-of-Way on Indian Land, 80 Fed. Reg. 72492 (Nov. 19, 2015)), the Bureau of Indian Affairs has taken the progressive step of promoting tribal self-determination and self-governance by providing greater deference to tribes on decisions affecting tribal lands. For example, BIA's proposed right-of-way regulations affirm tribal jurisdiction over lands subject to a right-of-way, incorporate tribal land policies in processing a request for a right-of-way, and defer to tribes on right-of-way terms such as compensation and duration.

Like BIA's new rights-of-way across Indian lands regulations and BIA's 2013 revised surface leasing regulation, EPA's 2011 Tribal Minor New Source Review Rule promotes tribal self-determination and self-governance and recognizes that, if the objectives of the federal program can be met through different, less stringent tribal regulations, a "one size fits all" approach is unnecessary. *Review of New Sources and Modifications in Indian Country*, 76 Fed. Reg. 38,748 (July 1, 2011) (codified at 40 CFR §§ 49.151 – 49.161) (commonly known as EPA's "Tribal Minor New Source Review Rule"). Unlike the BLM's proposed rule, EPA's Tribal Minor New Source Review Rule does not require tribal programs to be "at least as stringent as" the federal program. In other words, the program does not establish a set of minimum criteria that must be followed in developing a reservation-specific minor source program. Instead, the rule provides that the federal program may be used as a model for the development of a tribal implementation plan. The adequacy of the tribal implementation plan submitted for EPA approval will be judged by whether it satisfies the requirements for approval of state implementation plans. For example, any tribal implementation plan will have to include provisions necessary to assure that the National Ambient Air Quality Standards are maintained, enforceable procedures that enable the tribe to determine whether construction of a source will violate any applicable requirements, and adequate public participation requirements.

The BIA and EPA's recent approaches to rulemaking applicable to Indian lands are much more enlightened and progressive than BLM's approach. Although the BLM is proposing to provide a mechanism for granting a tribe a variance from the BLM's proposed rule (81 Fed. Reg. 6616, 6686 (Feb. 8, 2016) (to be codified at 43 CFR § 3179.401), BLM's proposed mechanism is inadequate inasmuch as it reflects a distrust of tribal decision making by adopting a "meet or exceeds" (aka "at least as stringent as") requirement. The approval of a variance is subject to the absolute discretion of the State BLM Director. 81 Fed. Reg. at 6686 (stating that the Director **may** approve a variance if the tribal program meets or exceeds the requirements of the BLM's rule). In the event of a denial of a tribal variance request, the BLM's proposed rule states that "[t]he decision on a variance request is not subject to administrative appeals." *Id.*

The Tribe respectfully requests that BLM consider adopting a less restrictive, more tribal deferential, variance provision such as those found in the BIA and EPA rules described above.

Conclusion.

Thank you again for the opportunity to comment on the proposed regulations. When considering possible revisions to the proposed regulations, we hope you will take the Tribe's comments into account.

Sincerely,

Clement J. Frost, Chairman
Southern Ute Indian Tribal Council