



Scott Russell  
Secretary of the Crow Tribe  
NCAI Board Member, Area Vice President

Testimony on  
“Bureau of Land Management’s Hydraulic Fracturing Rule’s Impacts on  
Indian Tribal Energy Development”  
April 19, 2012

### **Introduction**

I’d like to thank the House subcommittee for Indian and Alaska Native Affairs for holding this important hearing at such a crucial time and inviting NCAI to testify. I am the Area Vice President for the Rocky Mountain Region for NCAI and the Secretary of the Crow Tribe in Montana.

The National Congress of American Indians (NCAI) is the oldest and largest national organization of American Indian and Alaska Native tribal governments. Since 1944, tribal governments have gathered as a representative congress through NCAI to deliberate issues of critical importance to tribal governments.

Indian tribes control significant areas of land that contain oil & gas that could be accessed by hydraulic fracturing. BLM regulation and related activities that affect tribal lands must be guided by meaningful consultation with tribal governments. Tribal interests are distinct from the public interest and are

sovereign nations, furthering the need for meaningful consultation between the BLM and tribal governments.

NCAI recently passed a resolution seeking meaningful consultation with the Bureau of Land Management regarding new hydraulic fracturing regulations. The resolution also asserts that the BLM regulations for hydraulic fracturing on public lands should not apply to Indian lands. The resolution is attached to this testimony for inclusion in the record.

**The BLM is required to conduct meaningful consultation with tribal governments to develop new regulations.**

NCAI's concerns are focused on consultation. The Department of Interior has a responsibility to consult with Indian tribes to "ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This is Executive Order 13175, and it is also a trust responsibility of the federal government. The hydraulic fracturing regulations affect us directly, as they apply only to federal lands and tribal lands. We are directly affected and we have not been consulted. The BLM did hold some meetings with tribal leaders. I went to the meeting in Salt Lake City. But it clearly wasn't consultation. The regulations were drafted before we met with BLM, and then submitted to the Office of Management & Budget before the due date for tribal comments last week. We didn't have any input into the regulations, much less "meaningful and timely input." Tribal leaders were handed a copy of the draft regulations and told that it was purely an informational meeting.

In the DOI's own words, the consultation policy is necessary to, "detail early tribal involvement in the design of a process implicating tribal interests," and to, "honor the government to government relationship." BLM has not followed the consultation policy and risks creating burdensome regulations that further restrict tribes from using their lands to benefit tribal members.

In addition, I believe that the BLM understated the impact of these regulations. In all of the summaries, BLM focuses on the disclosure requirements, and that doesn't sound like a big problem. But if you read more deeply into the draft regulations, you will see that they are significantly more burdensome and will substantially impact tribal development. In particular, every drilling plan and every minor change to a

drilling plan triggers another set of documentation and approvals by the Department of Interior. Federal approval is a nightmare scenario for Indian tribes. The federal government does not have the funding or the staff to do this process efficiently. Oil & gas producers have millions of dollars worth of equipment and employees in the field with the meter running, and creating multiple new requirements for federal review and approval will drive them away because the costs are too high.

My tribe, the Crow Tribe, is directly affected. We have oil & gas on our reservation in Montana, and hydraulic fracturing offers the potential for significantly expanded production in the future. In fact, these regulations affect tribes more than anyone else. BLM manages 700 million acres of subsurface, so oil producers will put up with some extra expenses and burdens to get access to federal lands. The Crow Reservation has only 2 million acres of subsurface in trust, and it is checkerboarded. If the costs and burdens are too high, the producers can avoid the tribal lands and drill on the private lands right next door. We will get shut out of the biggest oil boom in the history of the United States, perhaps billions of dollars. I cannot overemphasize what that kind of revenue could do for our Tribe.

In addition to the economic affect, many tribes, including the Crow Tribe, have concerns about the environmental impacts of hydraulic fracturing. It is happening all over the country, near Indian reservations and upstream from Indian reservations. We want to know more about it. Will these regulations provide enough protection? I am here on behalf of the many member tribes of NCAI, and the environmental concerns are important to all of us.

### **Impact on Tribal Sovereignty and Regulation**

The Executive Order on Tribal Consultation has another important feature. It requires that:

When undertaking to formulate and implement policies that have tribal implications, agencies shall:

1. encourage Indian tribes to develop their own policies to achieve program objectives;
2. where possible, defer to Indian tribes to establish standards; and
3. in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

One sign of the lack of consultation on these regulations is that they give no consideration at all to tribal regulation of hydraulic fracturing processes. We believe that there are more efficient and effective ways to do disclosure of hydraulic fracturing chemicals and processes, and that tribes are already engaged in this regulation. The Indian Mineral Development Act of 1982 clearly envisioned a role for tribes in regulating mineral production through the use of mineral agreements. We believe that an Indian tribe should be able to opt out of the BLM regulations, and instead institute tribal government regulatory methods.

**Tribal Lands are not public lands.**

Though tribal lands are held in trust by the federal government, they are not public. Tribal lands are under the jurisdiction of sovereign tribal governments and are for the benefit of tribal members. However, BLM continues to treat tribal lands like public land by trying to regulate oil and gas development on tribal lands.

This incorrect treatment of tribal lands as public lands extends to the burden of the Application for Permit to Drill (APD) fees. The BLM APD fees only apply to public lands and therefore, tribal lands should be exempted from APD fees. APD fees are known to deter investment in tribal oil and gas, slowing down much needed economic development.

**Tribes would like to work with the BLM to develop regulations for hydraulic fracturing that are specific to Indian lands.**

Regulation that is generated in consultation with tribes can become not only less burdensome but a constructive tool to guide tribal processes. The BIA has recently conducted extensive consultation to generate new surface leasing regulations specifically for Indian lands. These regulations are likely to not only improve the economic development opportunities on tribal lands but also preserve the environment by further enabling renewable energy development.

BLM hydraulic fracturing regulations, when promulgated specifically for tribes and in consultation with tribes also have the opportunity to strike this balance. Currently, the lack of consultation almost ensures

that the resulting regulation will further burden tribal economies and the process has dishonored the nation to nation relationship between the federal government and tribes.

## **Conclusion**

Thank you for the opportunity today to testify on this important issue, and for your consideration of the views of the National Congress of American Indians. We urge Congress to continue its oversight of the BLM Hydraulic Fracturing regulations and the more general issue of consultation with Indian tribes. We have great confidence that this issue with the BLM can be worked out in a beneficial way for tribes and the federal government, if truly meaningful consultation takes place in the near future.



# NATIONAL CONGRESS OF AMERICAN INDIANS

## The National Congress of American Indians Resolution #ECWS-12-005

### **TITLE: Seeking Meaningful Tribal Consultation on the Bureau of Land Management's Proposed Hydraulic Fracturing Regulations**

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**NCAI HEADQUARTERS**  
1516 P Street, N.W.  
Washington, DC 20005  
202.466.7767  
202.466.7797 fax  
www.ncai.org

**WHEREAS**, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS**, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS**, the NCAI seeks meaningful tribal consultation on the Bureau of Land Management's (BLM) proposed regulatory scheme regarding Hydraulic Fracturing (HF); and

**WHEREAS**, the BLM hosted only four informational meetings throughout the West and is describing these meetings as tribal consultations; and

**WHEREAS**, the BLM's proposed HF regulations were only available at one of these informational meetings; and

**WHEREAS**, the BLM proposes conducting tribal consultation through its field offices while Indian tribes should address policy makers in Washington, D.C. for true government-to-government consultation; and

**WHEREAS**, Indian lands are not "public lands" therefore, the tribes deserve a regulation that deals with Indian lands only; and

**WHEREAS**, tribes are also interested in consultation on the impacts of hydraulic fracturing on the environment, land and human health; and

**WHEREAS**, the BLM should consider that oil and gas operators seeking permits to drill on lands held in trust by the federal government already undergo an extensive environmental review process before they can begin drilling activities; and

**WHEREAS**, the BLM should consider that the permitting process has become lengthy, time consuming and costly, so much so that there is a backlog of hundreds, if not thousands, of applications for permits to drill that have not been processed by the BLM; and

**WHEREAS**, the proposed BLM regulations will require oil and gas operators to seek another round of permits for all well stimulation activities leading to further delay; and

**WHEREAS**, this added delay will cause oil and gas operators to leave Indian lands for state and private lands, a fact that is occurring under the Application for Permit to Drill scheme; and

**WHEREAS**, the BLM should balance regulatory concerns with the needs of Indian tribes to develop their energy resources to provide long-term economic resources for tribal communities; and

**WHEREAS**, oil and gas royalties from drilling on Indian lands are significant sources of revenue for the tribes and tribal members and the proposed BLM HF regulations will severely and disproportionately impact tribal economies because of their greater reliance on oil and gas development for economic growth and sustainability.

**WHEREAS**, the NCAI requests that BLM engage in true government-to-government consultation with the tribes regarding the HF regulations.

**NOW THEREFORE BE IT RESOLVED**, that NCAI seeks meaningful government-to-government consultation on the Bureau of Land Management's proposed Hydraulic Fracturing regulations so that the regulations will better meet the needs of the tribes.

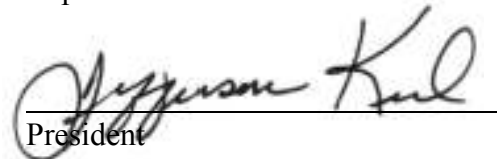
**BE IT FURTHER RESOLVED**, that the Secretary of the Interior should declare that the proposed BLM Hydraulic Fracturing regulations do not apply to Indian lands because Indian lands are not "public lands" and are for the use and benefit of the tribes and tribal members.

**BE IT FURTHER RESOLVED**, that NCAI supports the Bureau of Land Management proposing a rule specifically for the Indian lands which should be developed with input from the tribes.

**BE IT FURTHER RESOLVED**, that this resolution shall be the policy of NCAI until is withdrawn or modified by subsequent resolution.

#### CERTIFICATION

The foregoing resolution was adopted by the Executive Committee at the 2012 Executive Council Winter Session of the National Congress of American Indians, held at the L'Enfant Hotel and Conference Center in Washington, DC, with a quorum present.

  
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President

**ATTEST:**

  
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Recording Secretary