UTE INDIAN TRIBE
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September 10, 2012

Mike Pool, Acting Director
Attention: 1004–AE26
Bureau of Land Management
U.S. Department of the Interior
1849 C St. NW, Mail Stop 2134 LM
Washington, DC 20240

Re: Comments on Proposed Rule for Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Land

Dear Acting Director Pool:

Please find enclosed the Ute Indian Tribe's comments on the Bureau of Land Management's (BLM) proposed rule for "Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Land" published in the Federal Register on May 11, 2012. 77 Fed. Reg. 27691. Comments on the proposed rule were originally due on July 10, 2012. In a Federal Register Notice on June 26, 2012, BLM extended the comment period on the proposed rule to September 10, 2012. 77 Fed. Reg. 38024.

The Tribe is concerned that the proposed rule will significantly impact the development of oil and gas on our Reservation. Energy development has long been an important part of the Tribe's Reservation and regional economy. The Tribe leases about 400,000 acres for oil and gas development including 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. We have plans to expand operations to open up an additional 150,000 acres to mineral leases on the Reservation with an $80 million investment dedicated to exploration.

In light of the enclosed comments, BLM should exclude Indian lands from the proposed rule. If regulation of well stimulation is needed on Indian lands, BLM should support tribal efforts to regulate this issue ourselves. At a minimum the proposed rule should be modified so that the Tribe's tremendous economic activities are not harmed. If you have any questions about these comments please contact the Tribe's General Counsel, Tom Fredericks, at 303-673-9600. Thank you for your consideration.

Sincerely,

Irene C. Cuch, Chairwoman

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Ute Indian Tribe of the Uintah and Ouray Reservation

Comments on Proposed Rule for Oil and Gas Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Land

September 10, 2012

I. Introduction: Tribes Should Be Excluded from the Proposed Rule

The Ute Indian Tribe has been concerned about the Bureau of Land Management's (BLM) proposal to regulate well stimulation, including hydraulic fracturing, since we first learned of BLM's plans at a January 17, 2012 "tribal consultation" in Salt Lake City, Utah. At this meeting, and 3 other regional meetings held in the Western United States, BLM announced its plans to regulate hydraulic fracturing on Indian lands. As we have now learned, BLM's plans were in development for more than a year, before BLM initiated its "tribal consultation" on the proposed rule. BLM never asked whether we felt there was a need for regulation of hydraulic fracturing on Indian lands or how the rule could be developed in a way that would preserve, rather than override, tribal authority.

Four months later, BLM published its proposed rule in the Federal Register, entitled "Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Land," May 11, 2012. 77 Fed. Reg. 27691. During these four short months, BLM never reached out to engage in meaningful government-to-government consultation with major oil and gas producing tribes—the very people and governments the proposed rule would affect.

Instead, we were directed to request meetings with our local Field Office Managers who were not given the authority to speak on behalf of BLM or exercise delegated authority as required by the Interior's Policy on Consultation with Indian Tribes released just last December 2011. At the one meeting we obtained with BLM officials in Washington, D.C. on March 26, 2012, as a part of a coalition of tribes and after substantial tribal effort, even those officials stated that they were not authorized to speak on behalf of Interior.

We are still waiting to talk to a BLM official who is willing to learn about oil and gas activities on our Reservation and who is willing to discuss with the Tribe whether the regulation of well stimulation on Indian lands is needed and, if needed, the best way to do it so that it will not interrupt our tremendous economic development. At a minimum, this is what Executive Order No. 13175 on Consultation and Coordination with Indian Tribal Governments and

Interior's new tribal consultation policy requires. However, we are still waiting for a reply to our multiple requests made in June 2012 for BLM officials to visit our Reservation and consult with us on a government-to-government basis.

This is not what we expect from the Obama Administration. Just last December, at the 2011 White House Tribal Nation's Conference, President Obama "promised a true government-to-government relationship" and that his Administration "wouldn't just pay lip service to the idea of consultation." President Obama also declared that Indian tribes "deserve … a federal government that helps, not hinders, [our] efforts" and that we would remember this time as "the moment when we stopped repeating the mistakes of the past, and began building a better future together."

Unfortunately, BLM continues to make the mistakes of the past by proposing to impose a national rule based on public interest standards that will override tribal authority. Rather than forcing tribes to "consult" through Federal Register notices and comments, BLM should have been meeting with us a more than a year ago on a government-to-government basis to determine whether and how well stimulation should be regulated on our lands. There are only a handful of tribes with well stimulation activities on their lands, BLM should have consulted with each of us individually.

At this point, with a rule pending in the Federal Register, the best way to avoid the mistakes of the past would be to allow individual tribes to opt-out of BLM's proposed rule. BLM could then work with tribes that opt-out to consider and develop regulations that would be appropriate for our lands. This way we can work together, as President Obama stated, to develop regulations for tribal lands that are based on tribal standards and in the best interest of the Tribe.

II. Economic Importance of Oil and Gas Development to the Tribe

The Ute Indian Tribe is one of a handful of tribes across the country with a substantial interest in the proposed rule. We are concerned about the proposed rule because the Tribe is a major oil and gas producer and uses revenues from that energy development as the primary source of funding for our tribal government and the services we provide our members. 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 is currently contemplating the purchase of Ute Energy Midstream. This investment will allow us to expand our energy development holdings and increase revenues.

The Tribe is concerned that BLM's proposed rule to regulate well stimulation will further slow review and approval of oil and gas activities on the Tribe's Reservation, impact the Tribe's ability to expand operations and decrease the revenue the Tribe is able to earn from our lands. Despite the progress we have made, our ability to fully benefit from our resources is limited by the federal agencies overseeing oil and gas development on the Reservation.

We already know that delays in the federal oil and gas permit approval process are causing energy companies to limit their activities on the Reservation. Companies operating on the Reservation will only commit as many resources as can be supported by the pace of permit approvals. Oil and gas companies limit operations to avoid idling equipment or paying for contracted equipment that they are not using. As a result, the Tribe is not able to fully develop its resources and revenues available for tribal operations are limited.

For example, on our Reservation a company operating a single drilling rig can drill approximately 20 wells per year. From that one drilling rig, the Tribe can earn approximately $16.2 million over a twelve month period. However, if permits could keep up with operations, some companies could operate three drilling rigs on the Reservation and drill approximately 60 wells per year. From three drilling rigs, the Tribe can earn approximately $48.7 million over a twelve month period.

As the oil and gas companies who operate on the Tribe's Reservation often tell the Tribe, the federal oil and gas permitting process is the single biggest risk factor to their operations. If the risks become so great, drilling rigs will leave the Reservation for private lands. This would be even worse than companies limiting their operations because drilling rigs that leave the Reservation are difficult to get back. We are concerned that BLM's proposed rule will cause some companies to further limit their operations, and cause others to leave the Reservation. All of which will reduce the revenue the Tribe has available to fund our tribal government and the services we provide our members.

III. General Comments on the Proposed Rule

A. BLM Lacks Authority to Regulate Activities on Indian Lands

As an initial matter, BLM lacks the authority to regulate activities on Indian lands, including well stimulation. BLM's lack of authority over Indian lands is explicitly stated in the Federal Land Policy and Management Act of 1976, Public Law No. 94-579, 43 U.S.C. § 1701 *et seq.* (FLPMA) which provides BLM with authority over public lands and specifically excludes Indian lands. To correct this fundamental flaw in BLM's proposed rule, Indian lands must be excluded from BLM's proposed rule.

In the proposed rule, BLM does not address the explicit language in FPLMA prohibiting BLM from regulating activities on Indian lands. Instead, BLM claims that the Secretary of the Interior's authority under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396a *et seq.*, provides BLM with the authority to regulate oil and gas leases on Indian trust lands. Based on this very brief discussion in the proposed rule and statements from BLM officials in meetings with Indian tribes, BLM appears to be of the view that the Secretary delegated authority under the Indian Mineral Leasing Act of 1938 for oil and gas leases on Indian trust lands to BLM.

Contrary to BLM's assertions, no amount of delegated authority, agency discretion or administrative convenience can override the specific direction of Congress in FLPMA. In some cases, an agency's authorities and responsibilities might be subject to interpretation. That is not the case with BLM, FLPMA and Indian lands. In FLPMA, Congress specifically excluded Indian lands from BLM's authority.

Enacted in 1976, FLPMA was intended to recognize and promote the values of the Nation's public lands. FLPMA did this by unifying and modernizing individual and disparate public land laws under BLM's authority. While BLM was originally created in 1946 through the reorganization of two offices within Interior, FLPMA is the organic act for the modern day BLM. FLPMA invested in BLM the authorities and responsibilities for managing the "the public lands under principles of multiple use and sustained yield, . . ." 43 U.S.C. § 1732 (a).

In defining the "public lands" that BLM would manage under FLPMA, Congress specifically excluded Indian lands. Congress provided that,

> "The term 'public lands' means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except– . . . lands held for the benefit of Indians, Aleuts, and Eskimos."

43 U.S.C. § 1702 (e) and (e)(2). Thus, when BLM exercises authority over public lands, that authority does not extend to Indian lands. Like every other federal agency, the Secretary of the Interior and BLM cannot supersede or ignore the specific direction of Congress.

This explicit limitation of BLM's authority in FLMPA prevents the Secretary from delegating any authority over Indian lands to BLM. In describing the functions of BLM in FLPMA, Congress provided that the Secretary is free to delegate to BLM, but any delegations must be "according to the applicable provisions of this Act." 43 U.S.C. § 1731 (a). In addition, Congress provided that BLM could continue to carry out its existing authorities from when BLM was created in 1946, but that these pre-existing authorities shall be administered "as modified by the provisions of this Act or by subsequent law." 43 U.S.C. § 1731 (b). Because it would specifically violate FLPMA if the Secretary delegated authority over Indian lands to BLM, the Secretary cannot have made the delegation of authority that BLM appears to claim in the proposed rule.

Congress did, however, allow the Secretary to continue utilizing delegations made by regulation to BLM prior to the enactment of FLPMA. To allow for any ongoing operations, Congress provided in FLPMA that "Nothing in this section shall affect any regulation of the Secretary with respect to the administration of laws administered by him through the [BLM] on the date of approval of this section." 43 U.S.C. § 1731 (d). Of course, any delegations made by the Secretary after the passage of FLPMA must comply with the requirements of FLPMA.

A search of the Department of the Interior's regulations for mineral leases on Indian lands demonstrates that the Secretary did not attempt to delegate authority over Indian lands to BLM until after FLPMA was passed. BLM does not appear in Interior's Indian oil and gas leasing regulations until a proposed rule that was published in the Federal Register on July 12, 1983. 48 Fed. Reg. 31978.

The 1983 proposed rule is the first time that the Secretary proposed to delegate authority over Indian oil and gas leases to BLM. This proposed rule was not finalized until July 8, 1996, well after the passage of FLPMA and Congress' specific limitation of BLM's authority. 61 Fed. Reg. 35653. Indian oil and gas leasing regulations that were published in 1957 and a proposed rule in 1980 do not mention BLM or attempt to delegate authority over Indian lands to BLM. Thus, the Secretary's 1996 attempt to include BLM in regulations for activities on Indian lands is prohibited by the enactment of FLPMA in 1976.

Congress' limitation of BLM's authority makes perfect sense. Public lands and Indian lands are to be managed according to very different standards. Attempting to manage Indian lands according to public interest standards, as BLM is trying to do through the proposed rule, violates the standards established for the management of Indian lands. Of course, in recent years, Interior's failure to manage Indian lands according to appropriate standards has resulted in numerous mismanagement claims against the federal government and the recent settlement of those claims.

The public interest standards that Congress directed BLM to use in the management of public lands are set out in FLMPA Section 102 which lists the policy goals of FLPMA for the management of public lands. For example, FLPMA directs BLM to manage public lands for:

- "multiple use and sustained yield;"
- "the United States [to] receive fair market value of the use of the public lands and their resources;"
- "the Nation's need for domestic sources of minerals, food, timber, and fiber;" and,
- "the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use."

42 U.S.C. § 1701 (a)(7), (9), (12), and (8). These national and public standards have no place in the management of Indian lands.

In contrast, Indian lands are to be held for the use and benefit of Indian tribes and managed according specific treaties and the federal trust responsibility to Indian tribes. Indian lands are not intended to be storehouses for the Nation's supply of domestic resources. Indian lands are not intended to be preserved or protected for public recreation, occupancy or use. Indian tribes, not the United States, receive fair market or negotiated value for the use of their lands and resources. And, Indian tribes, not Congress, not BLM nor the Secretary determine whether Indian lands should be managed for multiple uses or specific uses.

The standards Congress provides in laws for the management of Indian lands are completely different from the standards Congress provided BLM in FLPMA. Rather than public interest standards, the Supreme Court has described the standard found in laws dealing with the management of Indian lands as trust or fiduciary standards. Importantly, Indian tribes, not the public, are the beneficiaries of these laws and standards. For example, in a case concerning the management of timber and forest resources by Interior, the Supreme Court stated:

> All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."
>
> Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.
>
> . . . .
>
> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.

United States v. Mitchell, 463 U.S. 206, 225-26 (1983) (citations and footnotes omitted).

If BLM were to impose its proposed rule on the management of oil and gas resources on Indian lands, not only it would be doing so in violation of FLPMA, but BLM would also be applying the wrong land management standards. BLM would be attempting to manage Indian lands according to public lands standards, not the trust and fiduciary standards that the Supreme Court says Congress has intended for Indian lands.

To correct this fundamental flaw, the Secretary needs to go back the drawing board for the proposed rule and its application to Indian lands. The Secretary needs to determine which Interior agency actually has the authority and skills to regulate oil and gas activities on Indian lands. That agency must then work in consultation with Indian tribes to determine whether a rule

on well stimulation is needed, and, if so, determine how that rule should be developed to be consistent with trust and fiduciary standards.

By imposing the wrong standards on Indian lands, the proposed rule will reduce the benefits that the Tribe is able to realize from its lands. The rule will increase costs to operators, slow development of Reservation lands, and introduce additional uncertainty in the federal oil and gas permitting process which will lead to reduced energy development on our Reservation. This may be acceptable according to the FPLMA's public interest standards for oil and gas development on public lands, but not on the Tribe's trust lands.

B. No Basis for the Proposed Rule

BLM's does not provide a factual or scientific basis for the application of its proposed rule to Indian lands, or any lands. BLM's proposed rule states that it was developed in response to growing public awareness regarding hydraulic fracturing and "public concern" about contamination of underground water sources, disclosure of chemicals used in fracturing, and whether there is adequate management of well integrity and the ''flowback'' fluids that return to the surface during and after fracturing operations.

Without identifying any existing problem in ongoing well stimulation operations, BLM states that in it would be a matter of "best practices" to impose requirements on federal lands for: the public disclosure of chemicals used in hydraulic fracturing operations on Federal lands; confirmation that wells used in fracturing operations meet appropriate construction standards; and that operators put in place appropriate plans for managing flowback waters from fracturing operations.

Then, without any elaboration in the proposed rule, BLM states that it plans to apply the same "best practices" to Indian lands so that Indian "lands and communities receive the same level of protection provided for public lands." Again, BLM does not identify any existing problem with well stimulation operations currently occurring on Indian lands. In fact, the Tribe does not know of any incidents on our Reservation, or tribal lands generally, that would necessitate the proposed rule.

Instead, BLM assumes that Indian lands need "protection" the same way that it plans to protect public lands. While the Tribe agrees with the protection of its lands according to tribal standards and the federal trust responsibility, the Tribe does not agree with the protection of its lands according to public lands standards. Public lands standards do not reflect the need for the Tribe to utilize our resources for our benefit and economic survival. Protection and regulation of tribal lands must be appropriately balanced against our need to engage in energy and economic development.

BLM never attempted to discuss with us or any other tribe what the appropriate balance should be for well stimulation activities. Instead the proposed rule imposes "protection" on us. This kind of paternalism is not the modern role of the federal trustee and not the kind of trustee that President Obama has directed for his Administration. The Tribe's energy and economic development pays for our tribal government and the services we provide our members. We have bills to pay. BLM's protection of our lands will make it so that we can no longer pay our bills.

BLM is so far ahead of everyone else in attempting to respond to its unspecified claims of public outcry that BLM has not even bothered to wait its sister federal agencies to complete ongoing studies regarding hydraulic fracturing. In the Fiscal Year 2010 Appropriations Committee Conference Report, Congress directed the Environmental Protection Agency (EPA) to study the relationship between hydraulic fracturing and drinking water, using the best available science, independent sources of information, and a peer-reviewed process. A final peer-reviewed draft of this study is expected in 2014.

BLM's proposed rule is premature ahead of the EPA's study or any other study of the effects of well stimulation on water and other resources. Without EPA's study or any other study, BLM's proposed rule lacks scientific basis. BLM has offered no justification for proceeding with its new regulations without the benefit of scientific studies. Without clear demonstration of a problem, specifically the type of hydraulic fracturing done on our Reservation, and any other information that may come from these studies, BLM regulation is putting the cart before the horse.

C. Lack of Staffing Plan to Effectively Process New Requirements

The Tribe has long been subject to federal permit approval processes that are not adequately staffed. The lack of federal staff to keep up with oil and gas permits is part of the reason why federal permitting is the biggest business risk that oil and gas operators face on our Reservation. The lack of federal staff is also one of the primary reasons that the Tribe's ability to develop its energy resources is limited.

For proposed rules that are going to increase the workload of federal staff, BLM and all of Interior must come forward with a staffing plan to support new agency responsibilities. The BLM and other agencies do not have enough staff to process existing permits, let alone new requirements. It already takes about 5 times to 20 times as long to get an oil and gas permit on Indian lands than on private lands. Depending on federal staffing and agency communication it can take 3 months to more than a year to approve a single oil and gas permit on Indian lands.

In the proposed rule, BLM needs to include a staffing plan that identify the staff, expertise and increases in appropriations that will be needed to efficiently process permits for each Reservation affected. On our Reservation, the Tribe needs about 10 times as many oil and gas permits to be approved then are currently being approved. Currently, about 48 Applications for Permits to Drill (APD) permits are approved each year on the Reservation. The Tribe and its business partners estimate that about 450 APDs will be needed each year as the Tribe expands its operations.

Even at current permitting levels, we already have a backlog of permits on Indian and federal lands in our local BLM Field Office. The proposed rule will increase the workload of these limited staff and unless additional resources are provided, the Tribe's energy and economic development will suffer. Unless a staffing plan is included in the proposed rule, it will increase the bureaucracy without providing the staff or expertise needed for an efficient permitting process.

D. Proposed Rule Not Developed According to Interior's Tribal Consultation Policy

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 Interior's 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 Interior's long-standing and ongoing commitment to consult with Indian tribes.

BLM can correct its violations of the Executive Order and Interior's Tribal Consultation Policy by taking three simple steps. First, Indian lands should be excluded from the proposed regulations. Second, if Interior is still interested in pursuing well stimulation regulations on Indian lands, Interior should develop a consultation protocol that sets out the steps that Interior will follow to comply with Interior's Tribal Consultation Policy. This protocol should include working with tribes to develop a consultation timeline that follows the phases of consultation outlined in the Tribal Consultation Policy. Third, the Secretary should appoint his Tribal Governance Officer to monitor Interior compliance with tribal consultation policies for the development of any well stimulation regulation for Indian lands.

These are not trivial issues. Proper tribal consultation is an expression of the unique legal relationship between Indian tribes and the federal government, the federal trust responsibility and our right to self-government. Tribal consultation also helps the federal government ensure that future federal action is achievable, comprehensive, long-lasting, and reflective of tribal input. The Tribe asks that BLM honor our relationship, ensure development of effective regulations, and work with us to resolve these issues.

The Interior's Tribal Consultation Policy states that that "[e]ach Bureau or Office will consult with Indian Tribes as early as possible when considering a Departmental Action with Tribal Implications." Department of the Interior Policy on Consultation with Indian Tribes at § VII, E, 1. This 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 spent more than a year developing the proposed rule before initiating consultation with Indian tribes. The proposed rule describes meetings and forums in 2010 and 2011 where BLM was first considering and leading discussions regarding well stimulation. During this time, Interior's Tribal Consultation Policy requires that BLM separately engage Indian tribes in consultation to discuss tribal implications of the proposed action. However, BLM did not begin holding regional tribal consultations until January 2012.

By the time BLM started talking to tribes in January 2012, BLM already knew what it was going to do and was merely informing tribes of its pending action. This is not tribal consultation. Indeed, only four months later BLM proposed rule was published in the Federal Register. This abbreviated process did not involve tribes "as early as possible" and did not

include “collaboration,” “trust, respect, and shared responsibility” as required by Interior’s Tribal Consultation Policy.

In addition, BLM did not follow other requirements of the Tribal Consultation Policy such as developing a protocol or timeline for tribal consultation, engaging tribes in a discussion about the need for a rule, or engaging tribes in 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 rule will have on tribal resources, BLM is required to follow the “Stages of Consultation” set out in Interior’s Tribal Consultation Policy. 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 Interior’s Tribal Consultation Policy.

If corrective active is not taken, BLM’s actions will fail to fulfill an Interior policy that was announced less than a year 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).

In order for tribes to have a strong, meaningful role, Interior must take the corrective actions set out above. Fortunately, before the standards for managing Indian lands are violated, BLM still has the opportunity to correct its violation of Interior’s Tribal Consultation Policy and take steps to fully engage tribes in consultation. The Tribe is willing to work with the Interior, its TGO, BLM, and the Assistant Secretary for Indian Affairs to develop an appropriate tribal consultation protocol to consider issues related to well stimulation.

IV. Specific Comments on the Proposed Rule

A. Definitions (§ 3160.0-5)

1. Well Stimulation

BLM’s definitional change for “well stimulation” is overly broad and includes more than hydraulic fracturing. The proposed rule will not only cover hydraulic fracturing activities but acidizing jobs and other numerous activities. There is no known reason for including the additional practices under this rule. If BLM wishes to include these additional practices, it should withdraw the current proposed rule and resubmit the rule with these additional practices for public comment.

BLM has not provided any basis or evidence as to why this rule is intended to cover acidizing jobs. Jobs of this nature are small and routine, as just like with other parts of the rule BLM cannot point to any evidence of environmental impact form acidizing jobs. Acidizing jobs

do not use sufficient pressure to cause vertical factures of rock formations and are generally considered maintenance operations. BLM has not provided any reason for the need to incorporate these processes under the proposed rule. The Tribe strongly urges BLM to scale the final rule back based on its original intent that the rule apply to newly developed wells.

The proposed rule also presumably covers small "bucket re-fracks," where a small amount of fluid and proppants are injected into a zone that has already been stimulated, as well as "water only" re-working of an already stimulated well.

BLM must provide its rationale for including acidization and other similar activities under the rule. BLM should exempt these *de minimus* activities from the final rule. BLM must also clarify, with precision, the activities covered under the proposed rule. The definition of "well stimulation" as currently written is overly broad.

2. Useable Water

The proposed rule incorporates a definition of usable water as water with 10,000 ppm TDS or less. This is more stringent than the current "fresh water" standard (TDS<5,000 ppm). BLM does not explain the basis for this change other than to state that the standard is incorporated to make the proposed rule consistent with other regulations. This rational is not sufficient and BLM must provide more of a basis for the change.

B. Submission of Well Stimulation Proposal for Approval by BLM (§ 3162.3-3(b))

Under the proposed rule, all well stimulation activities/plans require prior approval from BLM, either through the APD process or a Notice of Intent. BLM staff will then review the plans/activities as well as the physical properties of a well prior to approving an operator's application to stimulate the well.

As noted above, the Tribe questions whether BLM has adequate staffing and expertise to adequately review a proposed stimulation activity/plan and in a timely manner. We also question whether the rule gives BLM staff the authority to 'reject' a plan or to require revisions to a plan. The potential outcome from either scenario is unacceptable to the Tribe as it will only add delay to the permitting/approval process.

BLM asserts that since the stimulation approval process may coincide with the APD approval process, the review will not result in any additional delay. 77 Fed. Reg. 27695. BLM's claim is simply not possible. Limited BLM staff cannot keep up with existing permitting requirements, not to mention all the additional time needed time to review and analyze the data required to be submitted by the proposed rule.

The current APD approval process for the Uintah and Ouray Reservation already takes an average of 484 days, well beyond the time limits established in Onshore Orders. On our Reservation, there currently is a backlog of hundreds of APDs. The authority of BLM staff to seek additional information as part of the application process, regardless of cost, technical feasibility, or relevance to the proposed activities exacerbates this fact. Not to mention that this

authority creates uncertainty as staff from within the same office for the same geologic formation may ask for more or less information; the process simply lacks consistency.

Adding to delays, costs and operator uncertainty are the requirement that operators submit additional information based on every bit of new information obtained during operations. Most, if not all, stimulation design work is completed with information gained during and after drilling. Even if stimulation activities are approved with the APD, operators will incur additional cost and delays by having to submit changes via sundry notices regarding what is actually found during drilling. BLM has not provided details concerning timing requirements as to when additional submittals are required based on new geologic information or other new information gleaned through well construction and stimulation processes.

BLM must impose specific time limits for its granting or denying of well stimulation activities. The Tribe suggests a similar approval scheme established in other federal permit programs; namely, that if the approval is not denied in thirty days it shall be deemed approved by BLM/authorizing officer. If BLM is sincere in its assertions that the approval process will not add delay, it should be amenable to placing strict time constraints on itself.

In the interest of efficiency for all parties, the Tribe suggests that BLM allow operators to submit a general stimulation proposal for an entire area subject to an Exploration and Development Agreement and/or geologic zone, rather than require separate submissions for each oil and gas well. This will allow the operator to reference the general plan, and refine it as necessary, as part of the APD process. Similarly, in areas where wells have already been drilled, allowing information from those existing well logs should be allowed so as to avoid unnecessary and duplicative surveys and tests thereby reducing delays and costs.

Finally, BLM must explain whether or not agency action approving the stimulation plan triggers the National Environmental Policy Act. In addition, BLM must explain if a third-party can challenge the approval of a hydraulic fracturing plan. Additionally, if a stimulation plan is not approved, is there an appeal process for the operator. Furthermore, BLM must explain the extent to which it can dictate the terms of a proposal such as requiring: mitigation; an alternative water source; or operators to take certain actions which were not included in the original proposal.

C. Submission Requirements – Pre-Stimulation (§ 3162.3-3(c))

The Tribe feels that BLM requires too much information for stimulation activity approval.

1. Cement Bond Log (CBL)

Requiring submission of CBL will cause delay and increase costs to operators on our Reservation.

The Tribe believes that protecting our groundwater resources is of utmost importance. However, requiring the submission of a CBL for every well is not the answer. Requiring a CBL on the surface casing for every well is unnecessary and very burdensome.

Of concern to the Tribe is the fact that BLM does not have the personnel or the expertise to determine if a CBL should be "approved." The lack of adequate personnel and time frames in which BLM has to conduct its review of a CBL will only add to delay.

Additionally, BLM must take into consideration additional costs of running a CBL on a surfacing casing. Those costs include idle rig time while the cement cures and testing is conducted. The cost of a rig averages about $50,000 per day. In addition, the cost of idle completion crews which could reach as much as $100,000 per day must also be included.

Furthermore, since Onshore Order No. 2 already requires pressure testing of the surface casing shoe, this additional regulation is not necessary. This regulation is duplicative.

2. Required Submission of Water Sources

The requirement that operators disclose specific information about the water resources to be used in the well stimulation activity, including the location of the water that would be used as the base fluid is of great concern to the Tribe. First and foremost BLM does not have jurisdiction over Indian water rights. If BLM is asserting jurisdiction over Indian water rights, it needs to disclose the source of its authority.

Second, the Tribe currently regulates the uses of water on the Reservation. BLM does not have authority to regulate the use and sources of water on the Reservation. BLM's proposed rule should not seek to expand BLM oversight on the Reservation where BLM lacks the authority for that oversight and, particularly, where BLM would be interfering with tribal authority.

Third, as time and technology change, so do sources of water and types of proppants. Prior approval of water sources, trucking routes and proppants will only add to delay.

3. Certification Requirements

The certification requirements in the proposed rule are untenable. There are numerous places in the proposed rule requiring certification, however BLM does not designate which party or parties must submit certifications. BLM does not address the consequences if inaccurate statements are made whether intentional or unintentional. Operators cannot realistically be expected to certify that their service providers have complied with all applicable laws. Additionally, BLM must address the need for similar certifications that are already required in the APD process and explain why this is not duplicative. Furthermore, an operator may not be able to comply with these proposed regulations and at the same time comply with federal, state, tribal and local laws. Not all laws are applicable and in most instances not consistent across tribal or state lines.

4. Submission of detailed description of well stimulation engineering and design

This information is not necessary and will only add delay and costs to an already burdensome process. BLM does not have the staff or expertise to verify that the proposed engineering design is adequate for safely conducting the proposed well stimulation. BLM must clarify whether it has the authority under the rule to require an operator to change elements of its well design. BLM must delete this requirement from the proposed regulation.

5. Submission of estimated or actual fracture lengths and height

The Tribe does not see any value in this requirement. It will only add to delay and increase costs. Even with the best technology, fracture lengths and heights cannot be estimated with any certainty. In addition, modeling efforts to determine height and length of factures is very expensive and is often beyond the capabilities of small developers. Additionally, stimulation jobs are designed to stay within the production zone. There is no data showing that factures occur anywhere near aquifers or leave intended zones.

6. Requiring estimate of fluid flowback

The Tribe does not see any value in this requirement as existing regulatory requirements, such as SPCC plans, already guide an operator's activities at the site. In some geologic areas, it can take months and sometimes up to a year to recover flowback fluids. In addition, if available tankage or other equipment is not available on site to handle flow volumes, the well would be shut-in. Based on past and current experience, BLM does not have the staff to make on-site determinations if the equipment can contain the fluid volume.

Additionally, the reporting of chemical composition should be struck from the proposed rule because a flowback fluid's chemical composition is not relevant to the volume of flowback. It is nearly impossible to accurately estimate the chemical composition of flowback before well completion. Trying to calculate "estimates" only adds to the cost and provides no value.

7. Comments on waste streams

BLM specifically requested comments on whether the operator should be required to submit as part of the Sundry Notice application additional information about how it will dispose of waste streams not specifically addressed in the proposed rule. BLM cannot finalize this proposed rule unless it provides an additional comment period after providing any additional proposed waste streams language.

8. Authorizing BLM to require additional information

The Tribe is very concerned with the amount of discretion afforded to BLM staff under the proposed rule. This provision creates too much uncertainty for operators. BLM staff could grossly abuse this provision should they want to delay of even prevent stimulation activities. The provision does not include any standards under which BLM can request additional information. As currently written, the request does not even have to be "reasonable."

The Tribe requests that this provision be struck from the proposed rule due to the lack of any consistency, standards and rational. As written, different BLM offices will have different requirements depending on which part of the country they are operating in. It is even possible that staff from within the same office may have different ideas and/or concerns regarding stimulation activities which could result in different outcomes for two operators operating in the same field.

D. Mechanical Integrity Testing Prior to Well Stimulation

Requiring a Mechanical Integrity Test (MIT) for each well is untenable. Having operators perform a pre-stimulus MIT increases delays and costs for which BLM has provided no basis. This requirement forces operators to kill the well, set a bridge plug, perform the MIT, remove the bridge plug, and restore the well to production; a process which could reach up to $40,000 per well. This does not include the costs of idle rigs, crews, and repairs if the well is damaged during the MIT.

BLM has not provided any evidence of casing failure to require a MIT for every well. BLM could require a MIT for wells five years old or older. In addition, there is no need to apply this requirement to acidizing jobs or steam jobs.

E. Monitoring and Recording During Well Stimulation

The Tribe understands the importance of well monitoring. Where operators are required to submit completion reports to document annulus pressure to other agencies such as EPA or a state, that same information should acceptable to BLM.

F. Recovered Fluids

Per the proposed rule "[t]he authorized officer may require additional measures to protect the mineral resources, other natural resources, and environmental quality from the release of recovered fluids." The Tribe has great concerns over the amount of discretion afforded the authorized officer. At a minimum, any requirements imposed by the authorized officer should be "reasonable." If limits on this discretion are not imposed, BLM could use this requirement to prevent oil and gas development in order to prevent the release of recovered fluids. BLM must limit this discretion or it must be struck from the prosed rule.

Statements such as the one described above create uncertainty for operators. That uncertainty could ultimately scare operators off Tribal lands and onto state or private lands just across the Reservation boundary taking with them revenues and jobs from the Tribe.

G. Submission of Post-Stimulation Activities Information

Most of the information required by BLM is duplicative and the need for it is unsubstantiated. BLM requires operators to submit pre- and post-stimulation information so it may confirm what was proposed and what was actually done; there is no added benefit requiring

operators to do this. This only adds costs and delays to operators. BLM should streamline reporting requirements to only require one report, not multiple reports.

1. Pre- and Post-Stimulation Reporting is Duplicative

BLM should streamline the reporting requirements which would lessen the burden and costs on both operators and BLM staff. In addition, there are no standards for determining what "slight" difference is acceptable between pre- and post-stimulation reports. Additionally, BLM does not provide what consequences if any, an operator will suffer should there be an unacceptable difference between pre- and post-stimulation reports.

It is not unlikely that an operator would have to modify its activities after the submission of a pre-stimulation report. Operators may have to make changes based on temperature changes and/or changes that are occurring down hole. BLM must recognize and take into consideration this fact. BLM should find alternatives to requiring pre- and post-stimulation reports.

If BLM is requiring reports for every minor change, operators and BLM staff will be buried in paperwork. This could also lead to enforcement actions against the operator for minor insignificant changes which is not acceptable.

2. Chemical Disclosure

The proposed rule requires disclosure of "complete chemical makeup" of the stimulation fluids and 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, service providers simply will not operate on tribal land or alternatively, the very best environmentally sound products will not be used for oil and gas recovery on tribal land.

In addition, the prosed rule requires disclosure of more than just "intentionally added ingredients." The proposed 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.

Additionally, BLM must recognize that service companies and contractors often control the stimulation fluids used on a site. BLM must delineate which parties are responsible for chemical disclosures and any liability imparted to said parties if a service company misstates, misrepresents, or misreports the chemicals used in the fracturing fluids.

Furthermore, BLM must recognize that not all chemicals have an assigned Chemical Abstracts Service (CAS) number. Thus, it may be impossible to provide CAS numbers for all chemicals.

3. Certification that Fluid used complied with all laws and regulations.

As stated above, it is nearly impossible to certify that the operator has complied with this rule and all laws and regulations since there are bound to be conflicts between the rule and all state, tribal, and local laws and regulations. If the BLM wants operators to certify, the BLM should make sure that the proposed rule does not conflict with tribal, state, and local laws and regulations before making the proposed rule final. Furthermore, the Tribe suggests that the company responsible for or in control of the fracturing fluids be the one to certify as to compliance with all laws and regulations. BLM must recognize that service providers or contractors control the fracturing fluids. BLM must delineate who is responsible for this certification.

4. Submission of actual, estimated or calculated facture length and heights.

Requiring this information may require the release of proprietary information concerning facture modeling. The Tribe asks BLM what is the purpose of collecting this information, how it will be used and for what reason. If it is simply to compare what the operator submitted pre-stimulation to what happened post-stimulation, this is an unnecessary requirement as things are likely to change, even slightly, between pre- and post-stimulation.

5. Flowback amounts, handling process used, and disposal methods

The proposed 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 every well to determine its chemical makeup. This is costly and unnecessary. In addition, this requirement would bury BLM staff in paperwork and create delays in processing permits as staff time is used to compare pre- and post-stimulation reports. BLM does not have the staff to meet its current workload and will be unable to keep up with additional work created by this proposed rule.

H. Identifying Information Claimed to be Exempt from Public Disclosure (§ 3162.3(h), (i))

BLM must recognize that service providers and contractors are the companies that hold the rights to fluid trade secrets. The proposed rule must include protections for service companies and contractors. Under the proposed rule, trade secret information must be submitted to BLM along with a justification for the trade secret claim. It is BLM who will then determine whether trade secret claims have been sufficiently justified.

Does BLM have the qualified personnel to make these determinations? Does BLM have intellectual property attorneys on staff to make these kinds of determinations?

States, including Colorado, Montana, New Mexico and North Dakota, allow companies to withhold trade secret and proprietary information for routine, well-by-well reporting, and instead only require reporting of trade secret information to regulators when it is necessary to respond to emergencies. The proposed rule will force BLM to expend resources to manage trade secret information to ensure that it does not inadvertently disclose such information. It will also require to BLM to expend resources to defend lawsuits should it disclose trade secrets to the public. These are resources that BLM could use toward the APD approval process.

The proposed rule disincentives companies to use innovative, environmentally safe, mixtures for fear that their trade secrets will be disclosed. In addition, submission of trade secrets to CBL or BLM exposes information to inadvertent disclosure. Additionally, any requirement to disclose trade secret information would be inconsistent with BLM's expressed interest in using FracFocus given that FracFocus is not set up to receive and hold trade secret information.

Under the proposed rule, companies will not know whether their trade secrets/proprietary information will be publicly disclosed until after the chemicals have been used and it is too late to withhold use of the chemicals. BLM must delete this requirement.

The Tribe supports the use of FracFocus for disclosing fluids used in hydraulic fracturing.

I. Control of Wells (§ 3162.5-2(d))

The Tribe is concerned that this proposed rule will make projects uneconomical for operators. Many states have regulations in place which protect "usable water" as it is defined in the proposed rule. The proposed rule requires surface casing depths sufficient to protect usable water, but does not establish a maximum depth for the requirement.

The Tribe understands the need to protect usable water. However, BLM must address a number of concerns. For example, there is not sufficient data available as to where "usable water" is currently located. This uncertainty will require operators to drill test wells to determine the depth and location of usable water. This is an added cost that operators and ultimately the Tribe will have to incur. In addition, BLM must decide how it is going to treat oil and gas zones that naturally occur within zones containing usable water.

BLM must take into consideration the costs associated with extending casing down hole to protect usable water. In some instances it could cost as much at $25,000 per well depending on the depth of the usable water. BLM must include this in its economic analysis, something which BLM failed to do in the first instance.

J. Additional Comments

BLM requested comments to specific questions. BLM asked: 1) how best in can avoid duplication of state efforts and regulations, 77 Fed. Reg. 27694; 2) whether waste streams other than those discussed in the proposed rule should be addressed in the final rule, 77 Fed. Reg.

27696; and 3) whether the proposed rule should require tanks or lined pits for storage of drilling fluids or any other fluid use for stimulation, 77 Fed. Reg. 27697.

If BLM wants answers to these questions, it needs to withdraw the proposed rule and provide a new notice-and-comment rulemaking consistent with the Administrative Procedures Act. In addition, if BLM is sincere about not duplicating state efforts, the best way for BLM to avoid duplication is to not duplicate state efforts.

V. Conclusion

There are many general and specific problems with BLM's proposed rule. Many of these problems are specific to BLM's attempt to inappropriately regulate activities on Indian lands. Fortunately, it is not too late. There are at least three key actions that BLM and Interior can take to ensure that the development of any well stimulation rule for Indian lands complies with federal laws and policies.

First, Indian lands should be excluded from the proposed regulations or tribes should be allowed to opt-out. When the modern day BLM was created by FLPMA, Congress provided BLM with authority that was limited to "public lands" and specifically excluded Indian lands from this authority. Taking corrective action to exclude Indian lands from the proposed regulations would also go a long way to correcting the application of public standards to Indian trust lands. Unlike public lands, Indian lands are to be held for the use and benefit of Indian tribes, not the public. Any regulations and policies affecting Indian lands should be developed consistent with the federal trust responsibility, our treaty rights, and United States policies favoring tribal self-government, self-sufficiency and economic development.

Second, if Interior is still interested in pursuing well stimulation regulations on Indian lands, Interior should develop a consultation protocol that sets out the steps that Interior will follow to comply with Interior's Tribal Consultation Policy. This protocol should include working with tribes to develop a consultation timeline that follows the phases of consultation outlined in the Tribal Consultation Policy.

Third, the Secretary should appoint his Tribal Governance Officer to monitor Interior compliance with tribal consultation policies for the development of any well stimulation regulation for Indian lands. We hope that BLM and Interior can agree that appointment of the Tribal Governance Office to oversee the development of any rule can only help and is required in these circumstances. Additional monitoring is needed in situations such as this where the proposed regulations will have such a direct impact on our ability to develop and benefit from tribal trust resources.

The Tribe appreciates BLM's consideration of these comments and we look forward to consulting with BLM and Interior on well stimulation, whether the activity should be regulated on our lands, and, if needed, developing a rule that is consistent with the federal trust responsibility and the use of tribal lands for the benefit of the Tribe.