UTE INDIAN TRIBE
P. O. Box 190
Fort Duchesne, Utah 84026
Phone (435) 722-5141 • Fax (435) 722-5072

Testimony of the Ute Indian Tribe of the Uintah and Ouray Reservation

Before the House Committee on Natural Resources Subcommittee on Energy and Mineral Resources

Oversight Hearing on "Bureau of Land Management's Regulatory Overreach into Methane Emissions Regulation"

May 3, 2016

The Ute Indian Tribe of the Uintah and Ouray Reservation appreciates the opportunity to provide this testimony to the House Committee on Natural Resources' Subcommittee on Energy and Mineral Resources for its Oversight Hearing entitled the "Bureau of Land Management's Regulatory Overreach into Methane Emissions Regulation."

I. Tribes Should Be Excluded from the Proposed Rule

When the Ute Indian Tribe first learned of the BLM proposed regulation of methane and waste reduction to regulate flaring and venting (among other aspects of oil and gas production) on federal and Indian land, the Tribe was shocked and disturbed. BLM never asked whether we felt there was a need for new regulation of methane and waste reduction on Indian lands or how the rule could be developed in a way that would preserve, rather than override, tribal authority.

BLM published its proposed rule in the Federal Register, entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation," on February 8, 2016. 81 Fed. Reg. 6616. 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.

The only meeting the Tribe has had with BLM regarding this proposed rule was held in March 2016. The Tribe was unaware of the proposed rule prior to its publication in the Federal Register. Upon the proposed rule's publication, the Tribe initiated a meeting with BLM in order to determine why a rule directly affecting tribes was being put forward without any proper consultation. BLM's Director did not attend this meeting, which was held after the rule was published and long after drafting had been completed. This meeting was more of an information

session than a consultation, and the single meeting falls glaringly short of BLM's consultation requirements.

Only four public meetings were held, none of which was in Utah where our Uintah and Ouray Reservation is located. BLM did not offer to cover the significant expense of the Tribe's travel to Albuquerque, New Mexico the closest meeting location, which is nearly ten hours away by automobile. BLM contends that these meetings constituted initial consultation sessions, yet they were inaccessible, impersonal, and inadequate. BLM touts its use of live streaming at two meetings as allowing for the greatest possible participation by interested parties, but live streaming can hardly constitute meaningful consultation as is required.

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 methane and waste reduction 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 tribal consultation policy require.

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 throughout its development of the proposed rule on a government-to-government basis to determine whether and how activities such as venting and flaring should be regulated on our lands. There are only a handful of tribes with significant oil and gas activities on their lands; BLM should have consulted with each of us individually. This proposed rulemaking is in direct violation of the Secretary's "commitment to consultation with Indian Tribes, recognition of Indian Tribes' right to self-governance and Tribal sovereignty."[1]

At this point, with a rule pending in the Federal Register, the best way to avoid the mistakes of the past as we move forward is to allow individual tribes to opt out of BLM's proposed rule. Tribes could then work to develop regulations that are appropriate for their own lands if they feel it is appropriate and necessary to do so. This way we can work together, in accordance with federal law and policy, 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, where the majority of our

[1] *Department of Interior Policy on Consultation with Indian Tribes* (April 26, 2016), https://www.doi.gov/tribes/Tribal-Consultation-Policy.

approximately 3,000 of our members reside.

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 approximately 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 and owns numerous oil and gas wells on the Reservation.

The Tribe is concerned that BLM's proposed rule to regulate oil and gas development will further slow review and approval of oil and gas activities on our Reservation, impact our ability to expand operations, deter operators from new oil and gas operations on the Reservation, force the shut-in of numerous existing wells, and decrease the revenue we are 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. The Executive Summary of the proposed rule states that flaring, venting, and leaks deprive American taxpayers, tribes and states of royalty revenues – but the deprivation of royalty revenues is precisely what the Tribe would suffer if the proposed rule is enacted.

BLM estimates that natural gas production will increase as a result of the proposed regulations. While this might be true for public lands, for which the Tribe cannot speak, it is unlikely with respect to the Reservation. While the Tribe appreciates BLM's aims of increasing efficiency and minimizing the damage and loss caused by leaks, BLM is not in a position to impose its aims on the Reservation. Notwithstanding the beneficial aspects of the proposed rule, its requirements should not be forced upon the Tribe. The federal goal with respect to tribal lands should be to defer to tribes to make decisions about industry regulation rather than BLM imposing what it thinks is in the public's best interest. The proposed regulations will increase costs and burdens on operators that will ultimately lead to shut-ins of wells and the migration of business elsewhere. This is a cost the Tribe cannot bear.

As it stands, federal restrictions on various aspects of oil and gas production are causing energy companies to limit their activities on the Reservation. The restrictions currently in place already hamper development and the economic incentive for producers to operate on the Reservation. As a result, the Tribe is not able to fully develop its resources and revenues available for tribal operations are limited.

The Tribe agrees with the provisions creating limited exemptions to certain requirements of the proposed rule, but ultimately they are of little comfort to the Tribe. The rule would still require operators to undergo a process laden with red tape, and with no guarantee that the BLM would agree with the operator that the exemption should apply. Moreover, it should be up to the Tribe to determine what limits and exemptions thereto should apply on the Reservation. The

Tribe must determine the best regulatory balance to strike in protecting its land and resources, of which the Tribe is the steward, while maintaining an adequate revenue stream to provide for its people.

If additional restrictions are imposed on necessary activities like flaring and venting and on drilling permits and day-to-day operations, companies will be less likely to drill those wells and will in fact be incentivized to shut in certain existing wells due to the financial burden of the proposed rule. The increased cost of operating on tribal lands will cause companies to move their operations from the Reservation to private lands. With diminished growth and unnecessary shutting in of wells, the Tribe's bottom line will suffer significantly, crippling our ability to fund our tribal government and the services we provide our members.

III. General Issues Related to 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 oil and gas activities. 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 vests 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 the proposed rule.

In the proposed rule, BLM does not address the explicit language in FLPMA 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.* ("IMLA"), and the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101 *et seq*. ("IMDA"), enable BLM to regulate oil and gas leases on Indian trust lands. BLM appears to be of the view that the Secretary delegated authority under the IMLA and the IMDA for oil and gas leases and development 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 vested in BLM the authority and responsibility 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.[2]

This explicit limitation of BLM's authority in FLPMA 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 "[n]othing 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.

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. 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 FLPMA 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;"

[2] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.")

- "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, nor are they 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 standards 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 for methane and waste reduction 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 FLPMA'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 has not provided 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 to give operators on Federal and tribal leases clear direction to minimize waste and losses of natural gas. However, the NTL-4A currently provides for this.

BLM claims, without explanation, that technological advances and current scientific understanding are not reflected in the current requirements of venting and flaring. It further alleges that these requirements have failed to deter rising losses of gas and failed in some respects to provide clear guidance to BLM staff and oil and gas operators. Again, BLM provides no explanation or further analysis to support these claims and to justify the imposition of a new rule that would impose economic hardships on operators and tribes.

What BLM does not mention is that the oil and gas industry is already reducing emissions through voluntary action. Methane emissions from oil and gas production have declined by 21% since 1990 despite the fact that natural gas production has increased by 47% during that time. Leaks have also been diminishing, and are estimated by the EPA to have a rate of just 1.1%. Recent studies have shown that methane emissions from natural gas production sites constitute a meager 0.38% of production. Furthermore, according to the EPA, oil and natural gas production constitute only 3.4% of greenhouse gas emissions, while power plants account for roughly ten times that amount. Industry innovations and market incentives have

resulted in these continuously reducing rates in ways that work for producers, nullifying any purported need for federal regulations.

The Tribe does not know of air quality or other issues on our Reservation that would necessitate the proposed rule. Instead of fulfilling a legitimate obligation, 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. This is something only the Tribe itself can do.

BLM never attempted to discuss with the Tribe what the appropriate balance should be for well venting and flaring or whether a rule for methane and waste reduction is even necessary on the Tribe's Reservation. Instead, the proposed rule imposes forced "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 pay 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.

Furthermore, much of BLM's proposed rule is duplicative of the new proposed EPA rule which BLM clearly expects to go into effect. BLM even admits as much in the publication of the proposed BLM rule. There is no basis for a federal agency to implement a new rule that will be redundant with another agency's overlapping rule. It is therefore unnecessary for BLM to issue the proposed rule. BLM, in fact, lacks statutory authority to create an air quality regulatory program. This area of environmental regulation belongs jurisdictionally with the EPA and with states, which is precisely why the EPA has proposed its new Source Performance Standards, 40 CFR part 60 subpart OOOOa ("SPS"). Moreover, BLM's cost assessment of the proposed rule is wholly dependent on the passage of the proposed EPA rules. BLM and the public cannot accurately evaluate the proposed rule without knowing whether EPA's new SPS will be enacted. It is therefore premature for BLM to propose its rule and the cost-benefit analysis is speculative at best.

BLM's publication in the Federal Register admits with respect to its proposed measures for reduction of waste from drilling, completion, and related operations that "operators are already controlling gas from workover operations on conventional wells as a matter of safety and operating practice" – thus, it states, there should be no cost for operators to comply with this requirement. If operators are already self-imposing the requirements of this proposed rule, there is simply no need for the rule. In addition, BLM states that EPA currently regulates this aspect of oil and gas operations with respect to hydraulically fractured and refractured wells. Again, if this is already regulated, the proposed rule is redundant and unnecessary.

Furthermore, the proposed rule is unnecessary with respect to the Tribe due to the Tribe's comprehensive program for regulating oil and gas development on the Reservation. The Tribe has a robust energy and minerals regulatory department as well as air and water quality

regulatory departments that fully monitor and regulate oil and gas companies' operations on the Reservation. Violations of the Tribe's regulatory requirements are subject to enforcement through the Tribe's compliance enforcement officers. The Tribe is fully capable of self-regulation in this regard and is both experienced and successful in doing so. Self-regulation of its oil and gas activities is consistent with federal policy to promote self-governance as outlined in federal statutes such as 25 U.S.C. §450, *et seq*. (the Indian Self-Determination and Education Assistance Act) and Interior's Tribal Consultation Policy. Imposition of overreaching federal regulations in an area already effectively regulated by the Tribe is an encroachment on the Tribe's sovereignty and would jeopardize the Tribe's ability to self-govern, including providing vital services to its membership. BLM has provided no justification for such an encroachment with respect to the Tribe.

Not only would the proposed rule affect the Tribe's governance activities through the loss of funding but it would also directly impact the Tribe's commercial development and enterprises. The Tribe has its own comprehensive energy development company that maintains the Tribe's midstream assets which are 100% owned by the Tribe. Those assets include both oil and gas pipelines and compressor stations which would be directly affected by imposition of this rule.

C. Costs of Rule and Benefits of Natural Gas

The proposed rule misevaluates the cost of its implementation and overlooks the significant benefits of natural gas production. Companies will incur up to $161 million in additional costs to implement the proposed rule, compared to the estimated $17 million in additional royalties. The expense of complying with the rule will cause operators on Indian lands to decrease activities in an already declining market. If the rule goes into effect, oil and gas production will diminish as operators are drawn from tribal lands to state and private lands to which the proposed rule would not apply. This is a particular threat to the Tribe due to our dependence on oil and gas revenues to function as a government and meet the needs of our people. The proposed rule places 85% of federal and Indian oil wells and 73% of federal and Indian gas wells in jeopardy due to their low-production status.

In addition, several provisions contained in the proposed rule are not feasible, furthering the damage to the oil and gas industry. For example, the use of remote gas capture technology, as required by the proposed rule, is only cost effective under certain circumstances and its capabilities are limited. While the Tribe agrees with the use of this technology and the benefits it can provide, again, it is not BLM's place to impose conditions on oil and gas operations on the Reservation. The proposed rule also purports to set standards for liquids unloading, despite the fact that the EPA refrained from establishing such standards in its proposed rule due to the variability of liquids unloading operators and the lack of sufficient information. The lack of information leaves BLM as ill-equipped to regulate liquids unloading as the EPA. The resulting standards set by BLM are therefore likely to be impractical and ineffective and to add uncertainty to the industry.

In attempting to take action to curb natural gas production, BLM disregards the important climate benefits provided by the natural gas industry. As a result of natural gas production, the United States has been able to significantly reduce its greenhouse gas emissions. According to

the Energy Information Administration, since 2006, increased natural gas and electricity production have displaced 59% more greenhouse gas emissions than wind and solar energy combined. Furthermore, the Intergovernmental Panel on Climate Change has stated that the increased and diversified gas supply resulting from new oil and gas technologies are an important cause of the reduction of greenhouse gas emissions in the United States. Natural gas turbines cut more greenhouse gas emissions than wind energy and solar energy. The benefits of natural gas cannot be denied, and are crucial to our efforts as a nation to reduce greenhouse gas emissions and protect our future. If the proposed rule ends up forcing a decrease in natural gas production, it would have a deleterious effect on those efforts and would thwart President Obama's overall climate change goals.

D. 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. 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 as it does 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 identifies the staff, expertise and increases in appropriations that will be needed to efficiently process permits and other required documents for each Reservation affected. On our Reservation, the Tribe needs about 10 times as many oil and gas permits to be approved as are currently being approved.

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, with its new requirements to provide additional documentation at the time of a permit request and throughout the life of a well, 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.

E. 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 new oil and gas 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 her Tribal Governance Officer to monitor Interior compliance with tribal consultation policies for the development of any methane and waste reduction 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.

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 … Consultation 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.

During the development of the proposed rule, Interior's Tribal Consultation Policy requires that BLM separately engage Indian tribes in consultation to discuss tribal implications of the proposed action. However, by the time BLM started talking to tribes, BLM already knew what it was going to do and was merely informing tribes of its pending action. This is not tribal consultation. 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."

If corrective active is not taken, BLM's actions will fail to fulfill an Interior policy that was announced less than five years 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 Interior, its Tribal Governance Officer, BLM, and the Assistant Secretary for Indian Affairs to develop an appropriate tribal consultation protocol to consider issues related to methane and waste reduction.

IV. 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. BLM and Interior can take the following actions to ensure that the development of any methane and waste reduction 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, Interior should develop a consultation protocol that provides consultation but defers to tribes to regulate oil and gas on their respective reservations. Interior should work with tribes to develop their own regulations that cover the issues addressed by this proposed rule if tribes find it appropriate and necessary to take these steps. BLM should in no way be involved in this process, as it lacks authority and jurisdiction over these issues on tribal lands. Interior should be available to tribes to provide assistance as tribes deem necessary.

The Tribe appreciates the Subcommittee's consideration of this testimony. The Tribe asks that the Subcommittee require Interior to defer to tribal regulation of oil and gas activities and ensure that any BLM regulations are consistent with the federal trust responsibility and the use of tribal lands for the benefit of the Tribe.