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**Written Testimony of Brian Vallo,
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Senate Energy and Natural Resources Committee
"The Department of the Interior's Onshore Oil and Gas Leasing Program"
Oversight Hearing – April 27, 2021**

Introduction. Thank you Chairman Manchin, Ranking Member Barrasso, and Members of the Committee for the opportunity to provide testimony as part of this important hearing on the Department of the Interior's (Department) onshore oil and gas leasing program. My name is Brian Vallo, and I am the Governor of the Pueblo of Acoma, located in northwestern New Mexico.

Acoma Pueblo, along with the All Pueblo Council of Governors (APCG), on which I serve, have consistently expressed grave concerns about continued oil and gas leasing and development threatening our cultural resources and sacred landscapes, including development surrounding the Chaco Culture National Historical Park in New Mexico. We are grateful that President Biden has paused new oil and natural gas leases on public lands pending a review of federal oil and gas permitting and leasing practices pursuant to Executive Order 14008. However, there have still been notices related to lease sales and development on federal land in the Greater Chaco Region. We ask that Congress and the Administration direct the Department to pause all of these actions in keeping with the President's Executive Order. We also ask that this pause be maintained in the Greater Chaco Region by the Department pending completion of the Greater Chaco Region Resource Management Plan Amendment (RMPA).

Further, we ask that the Department conduct tribal consultation on its oil and gas leasing and development practices on federal land—where tribes have many cultural resources on these lands and tribal consultation related to oil and gas development is especially broken. If the Department brings tribes into planning and decision making about oil and gas development early and often, all parties will save time and money, and irreplaceable natural resources will be better protected.

My testimony describes Acoma Pueblo's perspective on why federal oil and gas policies need to be reformed based on our experience with protecting Chaco Canyon and other sacred sites, and it shares a vision for how these activities can be positively carried out going forward.

We feel it is important to state at the outset that our Pueblo does not oppose the general leasing of federal or public lands for oil and gas development. We support economic activities that comply with all federal, state, and tribal laws. The Bureau of Land Management (BLM), as discussed below, is not meeting its federal obligation to identify and assess impacts on cultural resources and historic properties, including traditional cultural properties (TCPs), before approving the lease of

federal lands in Chaco Canyon and in the vicinity of other sacred sites. And it has allowed development on places so sacred that they should be withdrawn from development all together. It is these practices that we oppose.

I. Chaco Canyon and Energy Development

The sandstone mesas, verdant hills, brush covered flatlands, and mountains of the southwestern United States form the landscape in which Acoma Pueblo exercises our tribal sovereignty and cultural identity as Pueblo people. We are not just people residing on this beautiful land; we are a people *of* this land. We carry it in the very essence of our being. Our connection is etched deep into our collective history and memories. This state is shared by our 18 sister Pueblos, though I speak only for Acoma Pueblo in this testimony. Honoring this vital relationship through wise stewardship of resources on these lands is, therefore, key to our cultural survival and socioeconomic well-being as sovereign tribal nations.

Acoma Pueblo, acting both independently and through APCG, has been involved in formal actions calling for the reformation of oil and gas leasing and development practices since 2014. Our special interest—and regrettably, now special expertise—in this policy area came about as we recognized how these practices have contributed to the desecration of cultural sites and resources located outside of existing Pueblo landholdings, such as within the Greater Chaco Region and Bears Ears National Monument. Our Pueblos have extensive relationships with cultural landscapes in the Southwest. These sacred sites are irreplaceable. Once damaged, they cannot be replaced. The truth of this statement is perhaps nowhere more acutely realized than in the landscape surrounding Chaco Canyon.

The Chaco Culture National Historical Park is a UNESCO World Heritage Site recognized for its remarkable cultural resources and density of archeological treasures. Emanating from Chaco Canyon is a rich cultural landscape containing the footprints and fingerprints of our Ancestors. These are often recognized by archaeologists through pot sherds, village sites, or other man-made features. We as Pueblo people value these materials and consider them our cultural resources. But not all cultural resources are archaeological in nature, as there are natural features which no archaeologist can identify that have equal value to us—and most are TCPs. Together, these features, both archaeological and natural, create a cultural landscape that ties us as Pueblo people directly to Chaco Canyon, and far beyond. Even today, Pueblo tribes in New Mexico and the Hopi Tribe in Arizona, return to this landscape to fulfill an inherent responsibility to uphold and preserve their indigenous way of life.

Oil and gas development in the San Juan Basin, which comprises the Greater Chaco Region, has reached breakneck speed in recent years. The BLM is responsible for administering the leasing process on federal lands. Despite the BLM already leasing nearly 91% of available federal land and having not completed the RMPA (the guiding document meant to regulate horizontal drilling and multi-stage fracturing technology) or the congressionally mandated tribally-led cultural resource studies of the Greater Chaco Region, the BLM has continued to push for oil and gas development to the detriment and possible destruction of Pueblo cultural resources and sacred sites. While this push extends further back in time, for the purposes of this testimony, we will

share some of the recent agency actions that have underscored for us the pressing need for wide scale Department reforms.

In one such example, on August 22, 2017, the Pueblos received notice of the BLM's intent to offer competitive oil and gas lease sales in March 2018 for lands within Chaco Canyon. The BLM was notified that, for National Historic Preservation Act (NHPA) compliance, it would be essential to work with tribal leaders in the area to determine whether the proposed lease sales would have any adverse effect on TCPs. The BLM, however, completed its National Environmental Policy Act (NEPA) Environmental Assessment of the sites based solely on a literature review and the contents of an archeological database maintained by the State of New Mexico but not used by the majority of Pueblos. As a result, the database did not contain a comprehensive listing of all culturally significant archeological sites. Several Pueblos, including Acoma, protested the BLM's reliance on these sources as insufficient.

On February 12, 2018, after almost six months of repeated requests for consultation on the proposed sale and its impacts, the BLM sent an email announcing that it would hold a two-day "field trip" to the leasing sites the next week to identify TCPs. Participation was limited to a maximum of 26 Pueblo representatives. This was entirely too little, and much too late.

First, Pueblo governments were not consulted as to whether the appropriate specialists could be available on those two days, and many were not. Second, while the field trip could have served as an initial reconnaissance of the lease sites, the identification of cultural resources, historic properties, and TCPs in an area of such great cultural and sacred significance to the Pueblos would have taken at least two, if not more, visits. Cultural specialists often engage in protracted discussions on the status of a site before determining whether it falls under the NHPA's or NEPA's protection. Such careful review is necessary to ensure accountability in the proper application of the NHPA and NEPA. Third, there are 20 independent Pueblos; each of our communities share significant ties to Chaco Canyon and would have needed to send not one, but 3-4 representatives each on these trips to evaluate the lands from different perspectives. It is imperative that tribal leaders have a meaningful opportunity to review proposed leasing sites to identify cultural resources, historic properties, and TCPs and extend the appropriate NHPA and NEPA protections over irreplaceable resources. The BLM's February 2018 action achieved neither of these goals. However, the fact that Pueblo representatives nonetheless were able to identify a number of cultural resources, historic properties, and TCPs that BLM did not identify itself was telling. The BLM never again organized a similar field visit despite similar requests in subsequent lease sales.

The BLM's actions in regards to Chaco Canyon are not an isolated occurrence. They are both a product of and a perpetuation of the built-in policies, mindsets, and practices of the Department that value economic development over tribal interests and cursorily checked-boxes over genuine tribal engagement. While the March 2018 scheduled sale was ultimately postponed¹, and further oil and gas activities in the Greater Chaco Region paused during the pandemic, these postponements only took place after significant outside pressure at great cost to the Pueblos, and with the underlying problems in the system remain.

¹ <https://www.blm.gov/press-release/blm-defers-oil-and-gas-lease-sale-parcels-new-mexico>

The Pueblos advocate for the Department to take certain steps to protect the sacred landscape of the Greater Chaco Region. First, they advocate for permanent withdrawal of federal land from future mineral development in an approximately 10-mile withdrawal area surrounding the Chaco Culture National Historical Park and including the satellite outliers included in the national park. This area is so critical that it should not be made available for development. Second, for all development taking place within the Greater Chaco Region but outside the withdrawal area, the Pueblos take the position that sufficient tribally-led cultural resource studies must occur before any steps toward development happen, including lease sales.

Since September 2018, Acoma and our sister Pueblos have been advocating for a tribally-led cultural resource study in the Greater Chaco Region. The idea is that this study will both save the Department, developers, and the Pueblos time and money and protect cultural resources by avoiding especially sensitive areas right from the beginning. In October 2018, APCG, at the invitation of the Department, submitted proposals for a study in the Greater Chaco Region and of select lease sale parcels nominated in a lease sale at the time. Back and forth conversations about the location of the study took place thereafter, but no final decision by the Department was made. Congress, at the request of the Pueblos, stepped in to fund the study with a \$1 million appropriation in FY 2020 in order to ensure the study moved forward. Together, the Pueblos of Acoma, Jemez, Laguna, and Zuni and the Hopi Tribe created the Chaco Heritage Tribal Association (CHTA) for purposes of jointly receiving and managing federal funding to carry out the study. This study aimed to identify areas of high concentrations of cultural resources, provide information on types of cultural resources generally so that the BLM may better identify them in the future, and—in some cases—identify the location of particular cultural resources.

The Department-approved and Congressionally-funded study still has not been completed, however. Due to the COVID-19 pandemic as well as the Department's decision to bifurcate the funding between the CHTA and the Navajo Nation, which submitted its own proposal, the CHTA's work has been considerably delayed. However, an additional allocation of \$600,000 was awarded to the CHTA on April 16, 2021. The CHTA is now working with the grant officer to amend the previous grant agreement and scope of work to account for this additional funding. The study as originally proposed is now fully funded.

II. The Acoma Model for Effective Project Review Processes

The existing oil and gas leasing program has long sequestered the values of Pueblos and other tribal nations in the promotion of economic development. Yet, despite this negative history, Acoma Pueblo has not and does not now believe that energy development and cultural preservation are inherently incompatible. Rather, it is our position that reformation of the Department's oil and gas leasing policies and program is needed to raise both priorities to their highest levels in mutually beneficial ways. As a central consideration, we would like to raise for the Committee our homegrown model for reviewing proposed projects.

Our Pueblo has developed a process for ensuring early and consistent tribal participation in the federal agency review processes of proposed projects that may implicate tribal interests. We believe that our model, referred to as the Acoma Rapid Ethnographic Assessment (AREA), provides a cost-effective means of addressing both tribal cultural preservation concerns and oil and gas leasing that

can be readily adopted by the Department. We have successfully deployed the AREA in relation to a proposed uranium mine on our sacred Mt. Taylor, and a proposed pipeline across Acoma lands. We describe the steps for carrying out AREA engagement in this section for the Committee's consideration in the hopes that it can serve as a starting point for reimagining how Department processes can be reformed to better serve tribal, federal, and private interests.

The model rests on proactivity. The project proponent and/or federal agency engaging in an activity with potential tribal impacts must meet early and often with tribal leaders. The acting entity works with the relevant tribal nation(s) at the beginning of a project to identify cultural resources of concern. This shifts the onus of activity to the onset of a project, rather than waiting on the NHPA Section 106 process that usually takes place later on in the development—and often after matters have been assessed and put in motion without tribal input, as has happened in the Greater Chaco Region.

As illustration of the AREA in action, I would like to share the Pueblo's positive experience in working with Kinder Morgan and the BLM on a proposed CO₂ pipeline that would cross approximately 14 miles of Acoma trust lands and ultimately connect with the Cortez pipeline in Torrance County, New Mexico, for enhanced oil recovery in the Permian Basin. Kinder Morgan and the BLM approached our Pueblo at the outset on planning the route across our lands. Our tribal experts, including our Tribal Historic Preservation Office, worked with the company's archaeologists and engineers in the field to design and implement a simultaneous Class III cultural resources survey, TCP survey, and routing study for the pipeline. Kinder Morgan covered the Pueblo's actual expenses in relation to the project, including the costs of cultural resource surveys along potential pipeline routes. Ultimately, our joint team identified a route with no adverse effects to cultural resources. The entire process took only six weeks from start to plotted route. The proactive engagement saved Kinder Morgan time (by significantly reducing the time involved for NEPA and NHPA compliance) and money (by deftly avoiding investments in unworkable routes or construction that would later need to be redone).

A central element driving the entire process was genuine respect for tribal sovereignty. Kinder Morgan reached out to us at the outset and invited us to the decision-making table with its internal team. Our Pueblo was compensated for our expertise—which cannot be outsourced or otherwise obtained. And, critically, there was a clear deference to the confidentiality of information about our cultural resources. All non-federal employees who worked on the project signed confidentiality agreements regarding the cultural and/or archeological properties that might be encountered on our lands. Of the 150 properties recorded, 60% were TCPs that would not have been recognized by archaeologists untrained in Acoma traditional cultural practices.

Use of the AREA avoided time and costs for preparation and negotiation of NHPA Section 106 agreement documents (memorandum of agreement, programmatic agreements, etc.); avoided Phase II evaluations; avoided large expenditures for mitigation (data recoveries); and avoided legal challenges. The cost reimbursement approach for actual incurred expenses removed any issue as to the appropriateness of the Pueblo fees. Further, with participation of the BLM staff in the overall effort, there were no certification issues. This project worked so well that Kinder Morgan's attorneys subsequently made presentations to industry groups using our partnership as

an example for other companies to follow in working proactively and effectively with tribal nations.

We believe the AREA model is a viable, low-cost, mutually beneficial, and positive path forward for the Department to deploy as part of a reformed oil and gas permitting and leasing framework. We would welcome the opportunity to discuss it further with Members of this Committee and your staff, as well as the Department, and answer any questions you or your staff may have.

III. Further Recommendations for Reforming the Oil and Gas Leasing Process

In addition to the AREA model, our Pueblo has several concrete recommendations for further reforming the Department's oil and gas leasing program for the Committee's consideration.

Tribal Consultation. As a foundational recommendation and a lynchpin to any reformation of the Department's existing processes, we urge the Department to conduct a national tribal consultation on oil and gas leasing and development on federal and public lands. Tribal nations should have adequate notice (not less than 30 days) of at least a 30-day consultation period, with 60 days being preferred, which should be implemented through both regional and national teleconference consultations. Additionally, the Department should provide appropriate background information as part of its Dear Tribal Leader Letter announcing the consultation, including details on existing policies and practices and links to further information, so that tribal leaders can participate in the consultation on an informed basis. The Department held a public forum on its oil and gas leasing practices on public lands and a tribal consultation on energy development on tribal lands, but the Department must hear from tribal nations about how oil and gas leasing and development on federal and public lands requires change.

Further, we recommend that the BLM be directed to amend its oil and gas leasing regulations and guidance to mandate that tribal consultation be a required component of all leasing, permitting, and development decisions. Robust, meaningful, and proactive tribal consultation is the underlying theme that unifies this testimony, and it should be carried through into a mandatory consultation requirement for the agency responsible for the administration of the federal government's oil and gas activities.

Consent. The Department should work to implement the United Nations Declaration on the Rights of Indigenous Peoples' (UNDRIP) principle of free, prior, and informed consent when oil and gas leasing and development decisions affect tribal lands or waters, cultural resources, or other interests. So called "tribal consultation" that does not begin early in the decision-making process or that cannot affect the actual outcome of decisions is not meaningful. It does not fulfill federal legal and trust obligations.

Consistency. Currently, tribal consultation processes are not consistent across different federal agencies, bureaus, and regional offices involved in oil and gas leasing and development. Instead, much of this work ends up being relationship-based. By this we mean that where tribal consultation is most effective is where Department staff and tribal representatives are able to forge a productive and trusting relationship. Not all are able to do so. Further, this means tribal leaders

must build new relationships and educate new officials whenever staff changes, and it also means that different offices produce different outcomes, which is inequitable and confusing.

Affirmatively Recognize Oil and Gas Leasing as a Discretionary Action. We recommend that the Department develop and implement a new policy that expressly recognizes that oil and gas leasing and development must be weighed against other valid uses of public lands. While this is a recognized requirement under federal law, the BLM's practice has been one that more closely treats the onshore program as a mandatory deference to oil and gas usages. This must change beginning at the top with an explicit Department mandate recognizing such usages as discretionary actions that should only be authorized when consistent with multiple use and sustained yield principles.

Expanded Use of Tribally-Led Cultural Resource Studies. We recommend that the Department ensure that sufficient tribally-led cultural resource studies take place prior to and inform the Department's decision-making about oil and gas leasing and development. This includes allowing tribal representatives to generate ethnographic information necessary for the Department to properly identify and assess impacts on cultural resources. This is especially important in areas known to be significant to tribal nations including, but not limited in any way, to Chaco Canyon.

Greater Confluence between NHPA and NEPA. Section 106 of the NHPA and NEPA review processes must be intertwined so that they can meaningfully inform each other. The Section 106 process must progress so that information is gathered on cultural resources, including historic properties and TCPs, which should then be considered during the NEPA review. NEPA review, in turn, informs the Department's choice of a particular alternative—the effects of which should then be mitigated through Section 106. The Department must ensure that these processes move forward together so that each is effective in fulfilling its intended purpose.

Withdrawal of Critical Tribal Areas. We also call on the Department to use its existing statutory authority to withdraw from development areas that are especially critical to tribal nations. In certain instances, areas are of such significance to our identities and lives as indigenous peoples that there is simply no means of conducting energy or other development activities without causing irreparable harm. These circumstances are rare, and when they are identified they must be accorded the special attention that they require in the form of a withdrawal from development.

End the Use of Expedited NEPA and NHPA Timeframes. Oil and gas leasing and development is one area where tribal consultation and NEPA and NHPA review processes are especially broken. Expedited timeframes have put significant pressure on these processes, preventing them from unfolding in a way that allows for meaningful tribal participation and proper consideration of tribal interests. We understand the need for efficient processes. There is a discernable distinction between *efficiency* and *expediency*. An expedient process that fails to implement federal law, that prevents tribal voices from having a say, or that ultimately causes delays due to the inevitable challenges that will follow is *not* efficient. We urge the cessation of arbitrary expediency in the conduct of tribal consultation and NEPA and NHPA review processes going forward.

Further, such a change in Department policy would be consistent with the goals of the new Administration. We applaud Executive Order 13990, titled *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis* (Jan. 20, 2021), which revoked

Executive Order 13807, titled *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects* (Aug. 15, 2017). It was from the latter Executive Order that Secretarial Order 3355, titled *Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807 of August 15, 2017* (Aug. 31, 2017), came to be. This Secretarial Order was used to claim that Department decision-making surrounding oil and gas must progress on an expedited timeframe, even during the COVID-19 pandemic. Secretarial Order 3389, titled *Coordinating and Clarifying National Historic Preservation Act Section 106 Reviews* (Dec. 22, 2020), when paired with Secretarial Order 3355 then allegedly required the NHPA Section 106 process to proceed on the same expedited timeline. Both Secretarial Order 3355 and Secretarial Order 3389 have now been withdrawn by Secretary Haaland.

As you know, NEPA and NHPA Section 106 review processes are important opportunities for tribal nations to consult on federal decision-making. Any changes made to those processes should only be accomplished through tribal consultation. If the Department chooses to issue new NEPA or NHPA Section 106 guidance, it should first engage in sufficient and meaningful tribal consultation. Integration of NEPA and NHPA Section 106 processes together so that they may inform each other, a concept noted in Secretarial Order 3389, should be carried forward into new guidance. Additionally, new guidance should address how the presence of environmental justice concerns affects mitigation requirements.

Finally, on this issue, we also urge reformation of the Department's internal guidance and instructional memoranda on oil and gas leasing and development, including lease schedules, to remove their imposed and rigid timeframes.

Greater Chaco Region. We are glad that the Department has now paused work on the Greater Chaco Region RMPA due to the COVID-19 pandemic. Once safe, we recommend the Department allow for completion of the ongoing tribally-led cultural resource studies of the Greater Chaco Region and further progress to be made on the RMPA's NHPA Section 106 process. Only then should the RMPA's NEPA process move forward, and the Department should then incorporate the baseline cultural resource information collected from the studies and the Section 106 process into a new draft NEPA Environmental Impact Statement that contains legally sufficient alternatives. We also ask that the especially critical area of approximately 10 miles surrounding the Chaco Culture National Historical Park and including its outliers be administratively withdrawn from development. This is necessary as a matter of justice to protect this cultural resources-rich zone from irreparable harm.

IV. Conclusion

We close in noting that, in recent appropriation legislation, Congress at the urging of the New Mexico Congressional Delegation has included a moratorium on the Department's use of funding for mineral leasing, which primarily includes oil and gas, on federal land in the proposed Chaco Cultural Heritage Area Protection Act withdrawal area until completion of the ongoing tribally-led cultural resource studies, for which Congress also provided funded. Maintaining this oil and gas leasing moratorium until a more permanent solution can be found is important. Acoma Pueblo and many of our sister Pueblos were forced to protest oil and gas lease parcels within the proposed

withdrawal area many times under the previous Administration in the absence of such a moratorium and as a result of the Department's existing, and inadequate, oil and gas leasing program.

Thank you for the opportunity to share the Pueblo of Acoma's testimony on the need to reform the Department's oil and gas leasing program and the ways in which we see that positively taking shape going forward. The system must be changed so that proper protocols are in place—and enforced—that address Pueblo and tribal concerns. Again, we do not seek to block all oil and gas development on public lands; we are only attempting to ensure that such activities do not take place at the expense of our sacred places and cultural heritage. Dawa'ee, Thank you.