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May 31, 2011

Mr. David Brooks
Hearing Examiner
NM Oil Conservation Division
1220 S. St. Francis Drive
Santa Fe, NM 87501

Hand-Delivered

Re: NMOCD Case No. 14629: Application of Blue Dolphin Production, LLC for Compulsory Pooling, Rio Arriba County, New Mexico

Dear Mr. Brooks:

Enclosed is a copy of Blue Dolphin Production LLC's May 26, 2011 Response to Jicarilla Apache Nation's Motion to Dismiss.

Very truly yours,

J. Scott Hall

JSH:kw
Enclosure

cc: Steven J. Gunn, Esq. w/o
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STATE OF NEW MEXICO
DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES
OIL CONSERVATION DIVISION

IN THE MATTER OF THE APPLICATION OF BLUE DOLPHIN PRODUCTION, LLC FOR COMPULSORY POOLING, RIO ARRIBA COUNTY, NEW MEXICO

Case No. 14629

BLUE DOLPHIN PRODUCTION LLC'S RESPONSE TO JICARILLA APACHE NATION'S MOTION TO DISMISS

Applicant, Blue Dolphin Production LLC ("Blue Dolphin"), through its undersigned attorneys, Montgomery & Andrews, P.A., for its Response to the Motion to Dismiss filed on behalf of the Jicarilla Apache Nation ("Nation" or "JAN"), states:

SUMMARY

Blue Dolphin seeks an order from the Division for the compulsory pooling of an unjoined mineral interest underlying the previously approved non-standard 21.0 ± acre unit located in the approximate E/2 SW/4 NE/4 of projected Section 27, Township 30 North, Range 1 East in Rio Arriba County, New Mexico ("Subject Lands"). These lands are known as the Theis Ranch, the surface of which was purchased on the open market by the Nation in 1985. The Nation also purchased, and received by separate mineral deed, a 16.63125% unleased mineral interest in the Subject Lands. This interest, except for the executive rights, is now held in trust for the Nation. The remaining 83.3685% of the mineral interests continues to be owned by various members of the Theis family and other owners, all of whom have leased to Blue Dolphin. The leases on the 83.3685% are due to expire in October of this year.

BACKGROUND

1. The Theis Ranch is generally located east of the boundary of the reservation originally established in 1887. The *Theis Greenhorn Test Well No. 1* and the well spacing unit are adjacent to the reservation boundary.

2. On June 11, 1985, the Theis Company, as Seller, and the JAN, as Buyer, executed a Purchase Agreement for the sale of certain interests in the Theis Ranch by the Theis Company to JAN. The Purchase Agreement included a number of reservations and exceptions.

3. JAN acquired from the Theis Company the *surface* of the Theis Ranch by that Warranty Deed dated June 21, 1985. The Warranty Deed was made subject to, and excepted, reserved mineral interests and attendant rights.

4. JAN separately acquired from the Theis Company a portion of the *oil and gas and mineral interests* (including the16.63125% ULMI in the Subject Lands) by that Mineral Deed dated June 21, 1985. The remaining interests (83.36875%) were reserved and continue to be owned by the Theis family and other third parties. These leases expire in October of 2011.

5. By Mineral Deed dated December 4, 1987, JAN conveyed the mineral interests on the Theis Ranch, including the Subject Lands, to the United States to be held in trust for the Jicarilla Apache Tribe. *However*, the conveyance did not include the "*executive leasing rights*".

6. In 2006, Blue Dolphin obtained oil and gas leases from the Theis family and the other owners of 83.36875% of the mineral interests. Blue Dolphin planned to enter onto its leasehold to obtain seismic data. The Jicarilla Nation was informed, as was the BIA, but Blue Dolphin was warned by the Nation's attorneys that its access would be denied.

7. On July 14, 2006, the Office of the Solicitor, U.S. Department of Interior, affirmed Blue Dolphin's right to enter onto its lease lands and obtain seismic data on the

underlying geology and expressly advised that "[t]he Nation cannot block the exercise of the non-Indian Grantors' reserved rights... ." Exhibit 1.

8. On August 19, 2008, Blue Dolphin made the first of several requests that JAN participate in the *Theis Greenhorn Test Well No. 1* (and other possible wells) with its fractional mineral interest by a number of ways, including by lease, by operating agreement or by mineral development agreement. While negotiations continue to this day, a participation agreement has not been finalized and executed.

9. On October, 20, 2010, the Division approved Blue Dolphin's application to establish a non-standard oil spacing unit comprised of 21 acres ± situated outside the eastern boundary of the JAN reservation. (Order No. R-13326). Although notified, neither JAN, BIA nor BLM objected to the Division's consideration of the application.

10. On March 8, 2011, the NMOCD approved Blue Dolphin's drilling permit for the *Theis Greenhorn Test Well No. 1.*

11. Under §70-2-18 of the New Mexico Oil and Gas Act, as operator, Blue Dolphin has a statutory obligation to consolidate all of the interests in its oil spacing unit by voluntary agreement or by compulsory pooling.

12. To date, Blue Dolphin has been unable to obtain the voluntary participation of the JAN with its 16.63125% interest.

13. On March 25, 2011, Blue Dolphin applied to the NMOCD for a compulsory pooling order which will consolidate all outstanding mineral interests in the 21 acre spacing unit dedicated to the Theis Greenhorn Test Well No. 1.

POINTS AND AUTHORITIES

Since 2006, Blue Dolphin has made continuous, ongoing efforts to obtain the voluntary participation of the Nation and has followed all the guidance of the BIA and the Nation to include the Nation's mineral 16.63125% interest in this project. To date, Blue Dolphin's requests for participation have not been denied, but neither have they received affirmative approval.

To prevent the loss of its leasehold property rights and to avoid the waste that would inevitably result, Blue Dolphin seeks administrative relief to consolidate all the interests in the unit, including the exclusive right to drill the well and, if drilling is successful, to obtain an allowable that will allow Blue Dolphin to produce the well.

The JAN argues for the dismissal of Blue Dolphin's Application, for three primary reasons: (1) misrepresentation of the status of the Subject Lands, (2) their proximity to the boundary of the Jicarilla Reservation, and (3) pre-emption of state jurisdiction by federal and tribal law. Moreover, the JAN asserts that "[t]he trust status of the Nation's mineral interests applies to, and restrict the use of the *entire mineral estate*."[1]

I. Blue Dolphin Relies on Multiple Sources, Including the Averments and Mapping of the Jicarilla in Representing to the OCD the Location of the Reservation Boundary.

The Nation devotes much attention to the issue of proximity of the reservation boundary. But regardless of the Nation's own inconsistent positions on this particular matter, the Department of Interior has affirmed Blue Dolphin's right to enter onto and drill its leases on the Subject Lands. Exhibit 1. Dismissal of Blue Dolphin's Application is therefore not warranted.

In its Memorandum, the Nation contends that the entirety of the Subject Parcel lies within the boundary of the Jicarilla Apache Reservation. Blue Dolphin disputes this contention, and affirmatively contends that the Subject Parcel is bisected by the eastern boundary of the original

[1] Memorandum of Law In Support of the Jicarilla Apache Nation's Motion To Dismiss and Reply In Response To The Nation's Special Appearance, pg. 11 (emphasis added).

reservation. It is Blue Dolphin's position that only the western half of the Subject Parcel is located within the currently surveyed reservation boundaries while the eastern half is not. This is the position Blue Dolphin took before the Oil Conservation Division in Case No. 14548, and it is the position Blue Dolphin takes now, on the following bases: (1) although the Theis Ranch property was purchased by the Nation and placed into trust status, it does not appear (and the Nation provides no evidence) that the reservation boundary has subsequently been moved; (2) the averments of both the Nation and the Bureau of Indian Affairs do not dispute that the Subject Parcel is divided east-west by the Reservation boundary, and that only the western half is held in trust; (3) recent maps, including those produced by the Nation itself, clearly demonstrate that Section 27 is bisected by the reservation boundary.

A. It does not appear (and the Nation provides no evidence) that the reservation boundary was moved subsequent to the Theis Ranch being placed in trust.

Blue Dolphin does not dispute that the Theis Ranch property was purchased by the Nation and, with the exception of the executive rights to the mineral interest, was placed into trust status. But the Nation provides no evidence that the reservation boundary was moved subsequent to that purchase. Neither is there any evidence of a Tribal Resolution requesting that the Secretary of Interior place the Theis Ranch into "reservation status" as referenced in Exhibit A to the Nation's Memorandum. The boundary was initially set in 1887 by Executive Order. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 166, n.1 (1989). It was twice further defined in subsequent Executive Orders dating from the Roosevelt and Taft administrations. *Id.*; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133-134, n.1 (1982).

Blue Dolphin is unaware of any boundary change post-dating the acquisition of the Theis Ranch. The Proclamation of Certain Lands as Part of the Jicarilla Apache Reservation that appeared in the Federal Register on September 26, 1988, does not, itself, purport to alter the

reservation boundary, and Blue Dolphin is unaware of any Act of Congress or of the Secretary of Interior that changed the boundary. The burden should be placed on the Nation to demonstrate that the boundary has moved and that, as the Nation asserts, the entire Subject Parcel is in fact completely within the Jicarilla Apache Reservation.

B. Previous averments of both the Nation and the Bureau of Indian Affairs expressed that the Subject Parcel is divided east-west by the Reservation boundary, and that only the western half is held in trust.

Blue Dolphin's position that the Subject Parcel is bisected by the reservation boundary is consistent with the Nation's own averments in this matter, as well as those of the Bureau of Indian Affairs. The Nation filed its Special Appearance in this matter on or around April 25, 2011. In that pleading, the Nation stated as follows:

> The **western half** of the SW/4 NE/4 of projected Section 27 includes certain interests that are held in trust by the United States for the Nation, including the surface estate and at least 25% of the mineral estate.

Special Appearance by the Jicarilla Apache Nation to Contest Jurisdiction, ¶ 2 (emphasis added). Curiously, no mention is made of the eastern half of the Subject Parcel, suggesting that the Nation concurs in Blue Dolphin's position.

Federal sources also support Blue Dolphin's position. The Bureau of Indian Affairs, in a April 25, 2011 letter to counsel for Blue Dolphin, stated: "Bureau of Indian Affairs ("BIA") records confirm that the **west half** of the Subject Parcel includes interests that are held in trust by the United States for the Jicarilla Apache Nation ("Nation"), including both the surface and a split mineral estate." Exhibit 2, Letter from Office of the Superintendent, U.S. Department of the Interior to J. Scott Hall (April 25, 2011) (emphasis added). The letter goes on to assert that "the surface and the split mineral estate in the **west half** of the Subject Parcel is also subject to the

Nation's jurisdiction," and that the 40 acre unit is comprised of "both the **non-trust-half of the Subject Parcel to the east** as well as the western half. . .." *Id.* (emphasis added).

Because both the Nation and the BIA have represented to Blue Dolphin that only the western half of the Subject Parcel is held in trust, Blue Dolphin relied on these representations in its position before this board in Case No. 14548, as well as now.

C. Recent maps, including those produced by the Nation itself, demonstrate that Section 27 is bisected by the reservation boundary.

Blue Dolphin relied upon recent mapping in support of its position in Case No. 14548, and continues to do so in this matter. Publically available maps clearly demonstrate that Township 30 North, Range 1 East in Rio Arriba County, New Mexico is bisected by the reservation boundary. *See, e.g.,* Exhibit 3, National Geographic topographic map of region. More specifically, a map produced by the Nation and distributed in CD-ROM format clearly demonstrates that Section 27 of the same Township and Range is bisected by the reservation boundary. *See* Exhibit 4, Carlisle Regional Structure Map, Database Sample CD-ROM, Jicarilla Oil & Gas Administration. These maps only serve to reinforce Blue Dolphin's position, and the Nation has produced no contrary mapping demonstrating that Blue Dolphin's position is in error.

II. Consolidation Is a Condition Precedent to the Assignment of an Allowable.

In New Mexico, an operator which has drilled or proposes to drill a well on a spacing or proration unit with divided mineral ownership has a statutory obligation under the New Mexico Oil and Gas Act[2] to pool those interests through voluntary agreement or by an order of the Division and then dedicate that acreage to the well. Section 70-2-18 of the Act provides, in part:

> A. Whenever the operator of any oil or gas well shall dedicate lands comprising a standard spacing or proration unit to an oil or gas well, it shall be the obligation of the operator, if two or more separately owned tracts of land are

[2] NMSA 1978, § 70-1-1 et seq.

> embraced within the spacing or proration unit, or where there are owners of royalty interests or undivided interests in oil or gas minerals which are separately owned or any combination thereof, embraced within such spacing or proration unit, to obtain voluntary agreements pooling said lands or interests or an order of the division pooling said lands, which agreement or order shall be effective from the first production. Any division order that increases the size of a standard spacing or proration unit for a pool, or extends the boundaries of such a pool, shall require dedication of acreage to existing wells in the pool in accordance with the acreage dedication requirements for said pool, and all interests in the spacing or proration units that are dedicated to the affected wells shall share in production from the effective date of the said order.

NMSA 1978, § 70-2-18(A) (1969).

However, where the operator does not accomplish voluntary or compulsory joinder, it must still account and pay production proceeds to the owner of the un-joined interest. Section 70-2-18(B) of the Act provides:

> B. Any operator failing to obtain voluntary pooling agreements, or failing to apply for an order of the division pooling the lands dedicated to the spacing or proration unit as required by this section, shall nevertheless be liable to account to and pay each owner of minerals or leasehold interest, including owners of overriding royalty interests and other payments out of production, either the amount to which each interest would be entitled if pooling had occurred or the amount to which each interest is entitled in the absence of pooling, whichever is greater.

NMSA 1978, § 70-2-18(B) (1969).

These statutory provisions, however, do not constitute the full scope of the operator's duties. Rather, under the Division's implementing rules the consolidation of unpooled interests is a necessary regulatory pre-requisite to the assignment of an allowable to the well. Without an allowable, the well may not be lawfully produced unless an exception is obtained. Division form C-102 expressly requires the consolidation of interests as a condition to the assignment of an allowable:

NO ALLOWABLE WILL BE ASSIGNED TO THIS COMPLETION UNTIL ALL INTERESTS HAVE BEEN CONSOLIDATED OR A NON-STANDARD UNIT HAS BEEN APPROVED BY THE DIVISION.

See Oil Conservation Division form C-102; Exhibit 5, attached.

The conditions of approval on these forms originate from the requirement of Part 19.15.16.19A NMAC of the Division's rules, which provides for the assignment of well allowables:

> ALLOWABLES AND AUTHORIZATION TO TRANSPORT OIL AND GAS:
>
> A. The division may assign an allowable to a newly completed or re-completed well or a well completed in an additional pool or issue an operator authorization to transport oil or gas from the well if the operator:
>
> ~~(1) has filed a complete form C-104~~;
>
> (2) has provided a sworn and notarized tabulation of all deviation tests the operator has run on the well, and directional surveys with calculated bottom hole location, in accordance with the requirements of 19.15.16.14 NMAC;
>
> (3) **has dedicated a standard unit for the pool in which the well is completed, a standard unit has been communitized or pooled and dedicated to the well or the division has approved a non-standard unit**; and
>
> (4) is in compliance with Subsection A of 19.15.5.9 NMAC.

Part 19.15.16.19A NMAC (emphasis added).

The establishment and issuance of allowables by the Division is among the nature of important regulatory functions performed throughout the state, including on Jicarilla reservation lands that was recognized in *Cotton Petroleum v. New Mexico*:

> The district court found that "New Mexico provides substantial services to both the Jicarilla Tribe and Cotton," including "spend[ing] approximately $3 million per year in providing on-reservation services to Cotton and the Tribe. In addition, the court found that New Mexico does not discriminate against the Tribe or its members in providing state services; indeed, the State spends as much or more per capita on members of the Tribe than on nonmembers. The court further found that New Mexico provides services on the reservation not provided by either the Tribal or Federal Governments, and provides additional services off the reservation that benefit the reservation and members of the Tribe. **Finally, the court found that the State regulates the spacing and mechanical integrity of wells located both on and off the reservation.**

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 171, n.7 (1989) (citations omitted) (emphasis added).

Should the Division grant the Nation's motion to dismiss the instant proceedings, Blue Dolphin will be precluded from having issued an allowable under State law, unless a separate exception is obtained. Dismissal would therefore contravene the Division's statutory obligation to prevent waste and to protect correlative rights.

III. The Nation Cannot Prevent Applicant's Use of the Subject Lands.

In its Memorandum, JAN asserts that "[t]he trust status of the Nation's mineral interests applies to, and restrict the use of the *entire mineral estate*."[3] As the Nation would have it, its recent acquisition from a private, off-reservation land owner of a 16.63125% fractional interest, or even 0.1663125%, makes the remaining interests unavailable for use by its owners. Those private owners (Blue Dolphin, Theis, et al.) may obtain the right to use their own property through the federal and tribal regulatory schemes, according to the Nation.

A. The Nation has warranted that the private owners may exercise their reserved rights.

The process through which the JAN purchased the surface and the fractional mineral interest from the Theis Company involved, among other steps, performance under a purchase and sale agreement and the rendition of a title opinion by the Department of Interior's Office of Solicitor which included a requirement that the Nation deliver an acknowledgement the reserved interests did not adversely affect the Nation's use of the acquired lands. These procedures are discussed at length in that July 14, 2006 *Legal Opinion Concerning Jicarilla Apache Nation Authority as 25% Mineral Interest Owner on the Theis Ranch* dated July 14, 2006 by the Acting Regional Solicitor. Exhibit 1. The Solicitor's opinion, in pertinent part, provides:

[3] Memorandum of Law In Support of the Jicarilla Apache Nation's Motion To Dismiss and Reply In Response To The Nation's Special Appearance, pg. 11 (emphasis added).

> The Solicitor's preliminary title opinion explicitly required that "prior to closing, the tribal chairman or tribal attorney must write a letter stating that he is familiar with all of the exceptions set forth in the title binder and that they will not adversely affect or interfere with the Tribe's contemplated use of the land.' [. . .]
>
> The Nation has objected to the survey and wants to deny Discovery Exploration surface access to the property and threatens to prosecute the exploration company for trespass and/or confiscate equipment brought onto the property. The Nation's proposal would be a repudiation of its guarantee that the reservation of 75% of the fractional mineral interest beneath the property involved in its transaction would not interfere with its use of the land. The Nation cannot block the exercise of the non-Indian grantors' reserved rights through their lessee and agents.

With the Nation's acknowledgement, it agreed and in fact guaranteed that it was acquiring the fractional mineral interest subject to the full and entire set of rights attendant with the private mineral rights. These rights were to be undiminished and would include the right to rely on the full panoply of legal rights available to the owner of any oil and gas interest in New Mexico, including the right to seek the consolidation of interests by voluntary agreement or under a compulsory pooling order. As the Solicitor's opinion makes clear, the denial of the private owners' rights is a "repudiation" of the Nation's guarantee that the un-acquired interests would be unaffected.

B. The Nation is estopped from denying the State's jurisdiction.

For the reasons set forth above in Part III.A, the Nation may be estopped by principles of equitable consideration from denying the consolidation of interests. *See City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) (holding that equitable considerations of laches, acquiescence, and impossibility barred tribe's claim that its open market purchase of certain parcels unified fee and aboriginal title in the parcels such that the tribe could assert sovereign dominion over the parcels and avoid payment of city property taxes on the parcels). The court in *Sherrill* wrote:

> If [the Tribe] may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area.

Id., 544 U.S. at 220.

Similarly, in our case, the Nation must be estopped from repudiating its guarantee to other interest owners, so as to protect the non-Indian grantors' reserved rights.

C. It is entirely unclear from the case law that tribal sovereign immunity operates to bar State jurisdiction over tribal interests in administrative compulsory pooling proceedings.

In this action, Blue Dolphin is attempting to pool the executive interest reserved to the tribe when the Theis Ranch property was placed in trust. In its Memorandum, the Nation argues that principles of tribal sovereign immunity operate to bar State jurisdiction to compel pooling of the Nation's interests. Blue Dolphin's review of the case law demonstrates that this is not entirely clear as a matter of law. In fact, federal courts have repeatedly noted without comment the jurisdiction of State administrative bodies to involve tribal interests in compulsory pooling proceedings. Dismissal on the ground proposed by the Nation would therefore be inappropriate.

In *Samedan Oil Corp. v. Cotton Petroleum Corp.*, 468 F. Supp. 521 (1978), a federal district court held that restricted Indian land could not be included in a drilling and spacing unit created by orders of the Oklahoma Corporation Commission and pooling arrangements established by those orders until such time as those orders were considered and approved by the Secretary of the Interior or an authorized representative. However, once the subject orders were submitted for consideration as part of a proposed communitization agreement and that agreement was approved, the land became subject to the unitization and pooling orders of the Commission. *Id.* at 526-27. Accordingly, Blue Dolphin does not dispute the existence of the federal regulatory

scheme, but submits nonetheless that State jurisdiction over Indian interests for purposes of compulsory pooling was proper under *Samedan*, as well as under the following cases.

In *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana v. Calvert Exploration Co.*, 223 F.Supp. 909, 910 (D. Mont. 1963), the court noted that, just as in this matter, the tribes moved to dismiss Calvert's compulsory pooling application on the ground that the Montana Oil and Gas Commission was without jurisdiction over the tribes or the oil and gas. The court noted without comment that the Commission entered an order denying the tribes' motion to dismiss. On appeal, in *Yoder v. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana*, 339 F.2d 360, 362 (9th Cir. 1965), the Ninth Circuit noted that Calvert invoked the Montana state compulsory pooling statute "and, over the Tribes' objection, secured from the Commission an order combining the several tracts into a single 'spacing unit' and 'pooling all interests in the spacing unit for the development and operation of the spacing unit.'" This finding was made without comment, and did not serve as a factor in the court's holding.

The cases cited by the Nation discuss tribal sovereign immunity only in the context of lawsuits brought in State court. Although the Nation characterizes the case law as holding that "[t]he Nation has sovereign immunity and is not subject to *adjudicative proceedings* in State or Federal tribunals," (emphasis added), the cases cited do not stand for this broad proposition. Nowhere in these cases is the doctrine construed so broadly as to be applicable in any "adjudicative proceeding" in any State "tribunal." Instead, the cases discuss tribal immunity from "lawsuits" brought in State "courts." *See Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998) and other cases cited in the Nation's Memorandum at 12. Blue Dolphin respectfully suggests that a compulsory pooling proceeding before the New Mexico Oil Conservation

Division is not a "lawsuit" and that the Division is not a "court." Tribal sovereign immunity should not apply.

IV. Conclusion

In light of the foregoing, the Nation's motion to dismiss must be denied.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

By: _____

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Attorneys for Blue Dolphin Production LLC

Certificate of Service

I hereby certify that on May 26, 2011, a true and correct copy of the foregoing was e-mailed to the following, and that copies were hand-delivered to all counsel in attendance at the May 26, 2011 hearing before the Oil Conservation Division:

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_____
J. Scott Hall

United States Department of the Interior

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JUL 18 2006

July 14, 2006

BRANCH OF REAL ESTATE SERVICES

REGIONAL DIRECTOR'S OFFICE

MEMORANDUM
(Attorney-Client Privileged)

TO: Larry Morrin, Regional Director
Bureau of Indian Affairs (BIA), Southwest Region

FROM: Lynn A. Johnson, Acting Regional Solicitor

SUBJECT: Legal Opinion Concerning Jicarilla Apache Nation Authority as 25% Mineral Interest Owner on the Theis Ranch

Your letter, dated June 9, 2006, requested a legal opinion in response to several questions regarding the Theis Ranch property, which was purchased by the Jicarilla Apache Nation ("Nation") in 1985 with a reservation of 75% of some fraction of the remaining mineral interest,[1] including executive leasing rights, being reserved by the non-Indian grantors. The surface and 25% of the fractional mineral interest acquired by the Nation were placed in trust in 1997.

The mineral deed, warranty deed, quitclaim deed and purchase agreement involved in that transaction all confirm that the non-Indian grantors reserved and retained the full and entire mineral estate associated with their fraction. The Federal Register Notice placing the land in trust also acknowledged this reservation.[2] The Solicitor's preliminary title opinion explicitly required that "prior to closing, the tribal chairman or tribal attorney must write a letter stating that he is familiar with all of the exceptions set forth in the title binder and that they will not adversely affect or interfere with the Tribe's contemplated use of the land."[3] Although the package provided to us did not include the Tribe's letter or resolution, a memorandum from the Area Director to the Superintendent, Jicarilla Agency, dated December 15, 1987, indicates that such a Tribal resolution and understanding was to have been completed prior to closing and the acceptance of the property into trust status.[4] Since the property was placed in trust status, we assume that the Nation did make the required finding.

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[1] A fraction of the mineral interests or "estate" had been severed and conveyed to separate parties prior to the sale of the land to the Nation.

[2] *See* Proclamation of Certain Lands as Part of the Jicarilla Apache Reservation, 53 Fed. Reg. 37355, 37356 (1988) ("parcels are subject to all *valid rights, reservations,* right of ways, *exceptions* and easements of record") (emphasis added).

[3] Memorandum from Arthur Arguedas, Attorney-Adviser, Southwest Region, to Area Director, Albuquerque Area Office, Bureau of Indian Affairs, Dec. 8, 1987 at 2.

[4] Memorandum from Area Director, to Superintendent, Jicarilla Agency, Dec. 15, 1987 at 1-2 ("Mr. Taylor also indicated he will be obtaining a tribal council resolution indicating the Tribe i

EXHIBIT
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The current request is for Discovery Exploration to conduct a seismic survey of the property's minerals as an agent for the private mineral interest owners, who have leased their oil and gas interests to Blue Dolphin.[5] The Nation has objected to the survey and wants to deny Discovery Exploration surface access to the property and threatens to prosecute the exploration company for trespass and/or confiscate equipment brought onto the property. The Nation's proposal would be a repudiation of its guarantee that the reservation of 75% of the fractional mineral interest beneath the entire property involved in its transaction would not interfere with its use of the land. The Nation cannot block the exercise of the non-Indian grantors' reserved rights through their lessee and agents.

The materials provided to us included a memorandum written by the Nordhaus Law Firm for the Nation, dated May 26, 2006. We disagree with the conclusions in this memorandum as it ignores the tenancy in common that the Nation shares with the non-Indian grantors for the mineral estate as explained below. The Federal law and concepts cited in this document apply to the 25% fractional interest held by the Nation and the United States, but not to the 75% fractional interest reserved by the non-Indian grantors, which is subject to state law and regulation. Thus, in a dispute before a federal court with jurisdiction, it is most likely that principles of property law and oil and gas law from the state of New Mexico would apply. We have provided the applicable citations in our discussion below.

We agree that the United States and the Nation would have to approve actions on the 25% fractional interest but no approval is required for the non-Indian grantors to access, explore, and produce their 75% interest of the mineral estate held in common. A federal court could enjoin the Nation and the United States from interfering with the legitimate exercise of the co-tenants' rights on this property. The Nordhaus memorandum states that no procedure exists to compel the Nation's approval of the seismic permit; however, such permission is not required and if such permission is "allegedly" denied by the United States and/or the Nation, a federal court could issue an injunction that does compel recognition of the co-tenants' right to conduct the survey without explicit permission from the Federal and Indian co-tenants. We also disagree that the fact of whether or not oil/gas exists beneath the property that could be revealed in a seismic survey is a trade secret. Trade secrets are compilations of information used in one's business.[6] The Nation has not conducted its own surveys and thus there are no potential trade secrets to be

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familiar with all of the exceptions set forth in the title binder and *that they will not adversely affect or interfere with the Tribe's contemplated use of the land.*") (emphasis added).

[5] A lease by one tenant in common is valid and effectual to the extent of the lessor's interest and "entitles the lessee to occupy, use, and enjoy the premises as fully as the lessor himself might do but for the lease." Allen, W.W., *Effect of Lease Given by Part Only of Cotenants*, 49 A.L.R.2d 797 (1956, updated 2002); *Williams v. Sinclair Refining Co.*, 39 NM 388 (NM 1935). "The lease does not bind the interests of nonjoining owners ... but ...the lessee does not become a trespasser as to the nonjoining owners, nor liable to pay them rent or anything as for the value of his use and occupation while they are not excluded." *Id.* The owners of an undivided interest have "the capacity and right to execute a valid lease" and the "lessee becomes for the term of the lease substantially a cotenant of the nonjoining owners." *Id.* Clearly, Blue Dolphin and its agent, Discovery Exploration enjoy the same rights and privileges for exploring and producing the minerals on these lands as the non-Indian grantors who reserved them.

[6] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Kewanee v. Bicron*, 416 U.S. 470 (1974); *In re Bass*, 113 S.W.3d 735 (TX 2003).

revealed by a co-tenant exercising its legitimate right to compile its own survey information regarding its portion of the mineral estate. To the extent the Nation fears condemnation because the survey may reveal that there is no oil and gas present, inhibiting future leasing actions on their part, their single protection is to lease their property before the results of the survey are made known. They will not have a legitimate claim against their co-tenants for compiling their own data and forming their own conclusions regarding future development of their 75% fractional interest.

The following provides answers to the specific questions posed in your letter:

1. Can the Nation deny use of the surface or sub-surface by Discovery?

The short answer is *no*. The Nation cannot deny Discovery access or reasonable use of the surface or sub-surface because that would be an interference in the co-tenants' right to explore and produce their 75% fractional mineral interests. The Nation is a tenant in common with the non-Indian mineral interest owners and each co-tenant has the independent right to develop its share of the minerals under the surface.[7] Moreover, when the mineral estate is severed from the surface by a mineral deed or oil and gas lease, such action creates in the mineral owner "inherent surface rights to find and develop the minerals."[8] That is, the mineral owner is the dominant estate and the surface interest owner is the servient estate, which means in this case that the non-Indian mineral owners have reserved an easement granting them access to the surface of the property they separately conveyed to the Nation, to explore and develop their share of the mineral estate.[9] Placing the land in trust did not extinguish or modify the non-Indian grantors' reserved rights or implied easement to exploit the minerals they reserved.

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[7] *Williams v. Sinclair Refining Co., Inc.*, 39 N.M. 388, 391 (NM 1935) ("As co-tenants of the property, each had a right to the equal use and enjoyment thereof.... The right of each to occupy the premises is one of the incidents of a tenancy in common. Neither tenant can lawfully exclude the other... If, for any reason, one does not choose to assert the right of common enjoyment, the other is not obliged to stay out.") citing *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566 (8th Cir. 1924) ("A tenant in common may ... let his own share of the common property....as long as the lessee recognizes the title of his lessor and his cotenants, he is entitled to enjoy the possession under the terms of his lease, and cannot be ousted therefrom by another cotenant." The *Prairie Oil* case has been adopted by the Tenth Circuit Court of Appeals, which would make it applicable to the Federal court in New Mexico. *Williams* has not been repealed or modified by the New Mexico state courts and was followed in numerous cases including *Estate of Duncan v. Kinsolving*, 133 N.M. 821 (2003).

[8] *Kysar v. Amoco Prod. Co.*, 135 N.M. 767 (NM 2004) ("The rights of a mineral owner, when those rights have been severed from the surface are implied servitudes, or easements created by necessity." Mineral estate co-tenants or oil and gas lessees have the right to explore, drill, mine, and produce oil and gas and associated with that right gain "by implication the right to enter upon and use as much of the surface as may be necessary for the lessee's operations." The legal basis for this rule is that when a thing is granted (or reserved) "all the means to obtain the fruits and effects of it are also granted.").

[9] *Amoco Prod. Co. v. Carter Farms Co.*, 103 N.M. 117 (NM 1985) ("The mineral lessee is entitled to use as much of the surface area as is reasonably necessary for its drilling and production operations. The mineral lessee's surface rights and the servitude [dominant estate] it

A. Surface Use:

There are five defining elements of the easement reserved by the dominant mineral estate owner.[10]

1. Mineral interest owners or lessees may only make such use of the surface as reasonably necessary to produce the oil and gas.

2. Use of the land must not violate the accommodation doctrine which protects existing uses of the land by the surface owners that may be impaired when there are other established industry practices that can be used as an alternative that do not interfere with the existing use.

3. The surface use must be related exclusively to obtaining the minerals under the servient estate.

4. If the lessee cannot negotiate an agreement with the surface owner, claims of excessive or negligent damages must be resolved by litigation or arbitration.

5. Contract or lease clauses may curtail the rights of use of the mineral owners or lessee.

In this case, the Nation did not place any restrictions on the surface use in the conveyance documents it executed when acquiring this property. Therefore, it is our conclusion that the non-Indian mineral interest owners and their lessees and agents may enter the property *without* permission from either the Nation or the United States to complete the seismic survey. Moreover, they may proceed to drill wells or make other reasonable uses of the surface to develop and produce the oil and gas to which they are entitled.

If the surface owner (here the United States as trustee for the Nation) interferes with reasonable access and use by the mineral estate owner, it can be liable for consequential damages to the lessee (and co-tenant mineral owners) or subject to injunction. The surface owner cannot deny the agents or lessees of the co-tenant mineral owners access to the surface or sub-surface, nor can they attempt to prosecute a trespass action or confiscate equipment. Therefore, the Nation cannot bar entry of Discovery Exploration, nor could it lawfully prosecute a trespass action and/or confiscate equipment.

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holds, however, must be exercised with due regard for the rights of the surface owner." However, the lessee and/or co-tenant does not have a duty to completely restore the surface estate to its original condition as it existed prior to the commencement of drilling operations in the absence of an express provision in the mineral lease or granting instrument.). *See also Carter Farms Co v. Amoco Prod. Co.*, 23 N.M. St. B. Bull. 1174 (NM 1984) overturned on other grounds (103 N.M. 117 (1985)) ("A mineral rights lessee has the dominant estate and the surface owner the subservient estate. The lessee of the mineral estate has a fundamentally superior position, which entitles him to the free and uninhibited use of the surface estate to such an extent as is reasonably necessary to explore for and develop mineral production.").

[10] *Id.*

B. Sub-surface Use—Mineral Development and Exploration:

The non-Indian owners have reserved 75% of the fractional mineral interest or estate and the Nation has agreed this would not interfere with their use of the land. A severed mineral estate with executive rights consists of five specific rights:[11]

1. right to ingress and egress for exploration and development;
2. right to lease and assign the right of entry;
3. right to receive bonus payments;
4. right to delay rentals; and
5. right to receive royalty payments.

Each of these incidents of ownership can be conveyed separately and become estates apart from the others, except for the executive right to enter into leases.[12] In this case, the non-Indian grantors reserved or retained all of the five ownership rights for their 75% fractional interest. The Nation obtained the same five rights for its 25% fractional interest, but that act did not extinguish the rights of its co-tenants or provide the Nation with total control of development of the minerals under the property. The only way to obtain such control and prevent exploration for and development of the oil and gas under this property would be to obtain 100% of the mineral estate or 100% of the right of ingress and egress for exploration and development, which the Nation did not accomplish in the conveyance documents executed in 1987. The 25% interest of the Nation is subject to the federal regulatory scheme but the 75% interest of the non-Indians is not subject to federal regulation or approval.

In this case the Nation and the non-Indian mineral estate owners are concurrent owners or tenants in common. The joint owners have separate but undivided interests in the minerals and each owns a separate fraction, but it is not possible to identify which part belongs to which co-tenant. That is, each fractional owner controls its percentage of the entire mineral deposit under the entire property and has the right to present possession of the property at the same time. The only way to give either co-tenant complete control of any piece of the property or mineral estate is to partition the undivided interests of equal dignity by judicial decree.[13] Such an allocation of specific portions to each owner would require protracted litigation; it would be more desirable to resolve differences between the co-tenants by negotiated agreement if possible.

When concurrent owners of the mineral estate disagree about exploration or development of oil and gas resources, any one of the co-tenants may proceed without consent and over the objection of other co-tenants without being considered to be in trespass.[14] The courts have found that a

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[11] *HNG Fossil Fuels Co. v. Roach*, 99 N.M. 216 (NM 1982).

[12] *Id.*

[13] *Sims v. Sims*, 122 N.M. 618 (1996) ("The purpose of partition is to create a way for the parties to avoid the inconvenience and dissension caused by the inharmonious joint possession of the property.").

[14] *Williams v. Sinclair Refining Co., Inc.*, 39 N.M. 388, 391 (NM 1935); *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566 (8th Cir. 1924).

tenant in common (or the tenant's lessee) has the right to remove minerals from the jointly owned property because an interest in minerals can only be enjoyed by developing them.[15] If no minerals are found or drilling produces a dry hole, the co-tenant who began the work is liable for 100% of the costs.[16] If, however, oil and gas are found, it is not possible to produce only a fractional interest of the resource as all co-tenants have their fractional ownership of whatever is produced. If production occurs, the remaining co-tenants are entitled to their share of the proceeds but are also responsible for paying their share of the costs of development.[17] This sharing is usually accomplished by means of the non-consenting co-tenants being force pooled into the development of a successful well under state law. The developing owners must account to the non-consenting owners and not deny the non-consenting owners the right to develop independently or to lease for development.[18] Even though the Nation is not subject to state court jurisdiction, the United States, which holds the legal title to the trust land and minerals, could be enjoined by a Federal court to join in the development to protect the Nation's interests, using applicable State and 10th Circuit decisions regarding oil and gas law and the rights and responsibilities of co-tenants.

2. If not, what action would the Nation and BIA have to follow to protect the Nation's surface estate?

Since our answer to question one is *no*, the United States would have a trust responsibility to protect the Nation's surface interests from unreasonable or negligent use by the co-tenants and their lessees. The best way to achieve that protection would be to enter into a surface disturbance agreement with the oil and gas lessee, Blue Dolphin, and/or the exploration company, Discovery Exploration. In a negotiated agreement, specific protections could be set out for the surface lands as well as remediation and clean-up requirements after the specific exploration and development operations were completed. An agreement would be enforceable as a contract rather than seeking damages under a negligence claim for unacceptable surface disturbance from the co-tenants exercising their legal rights to explore for and develop the oil and gas after the surface disturbance occurs and is found by inspection.

You did not ask, but we offer the recommendation that the Nation actively participate in the exploration and development activities to protect their mineral interests rather than wait to see if the survey results produce negative results or a forced pooling action of some type is attempted to share proceeds from a producing well. That is, it would be a positive protection step to enter into a leasing agreement or option agreement. If the Nation wants to have complete control over the mineral estate it should attempt to purchase the interests its does not own or seek to partition

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[15] *Id.*

[16] *Id.*

[17] *Prairie Oil v. Allen; See also Carter Oil Co. v. Crude Oil Co.*, 201 F.2d 547,551 (10th Cir. 1953) ("While there is no fiduciary relationship between tenants in common, if one co-tenant comes into possession of funds belonging to his co-tenant, he becomes trustee of such funds and stands in fiduciary relationship to his co-tenant with respect thereto.")

[18] *Prairie Oil v. Allen.*

the interests it does own, although partition of fugitive oil and gas resources is quite difficult and would involve lengthy and expensive litigation.

In conclusion, we do not believe that Discovery Exploration can be excluded from reasonable surface use to conduct the seismic survey. The company would not be in trespass and it would be unlawful to confiscate its equipment when it entered the property. Discovery does not need explicit permission from the Nation or the United States to proceed with exploration and development of this property. Any attempts to block access or take other adverse actions could result in liability against the United States as Trustee and the Nation for preventing legitimate access to and use of the joint mineral estate and its associated surface easement by the lawful co-tenants to the property. We recommend negotiation agreements and active participation in the process as the best protection of the Nation's surface and mineral rights. The United States does not have a fiduciary obligation to manage the negotiation of leases for the Nation's mineral estate.[19] But we do recommend that a surface use agreement be negotiated for all exploration and development activities.

If you have any questions or require any further information, please call me or Sue E. Umshler, the attorney primarily responsible for this matter, at 505-248-5612.

cc: George Tetreault, SWRO, Real Estate Services, BIA

[19] *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339,1349-50 (Fed. Cir. 2004).

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Jicarilla Agency
P.O. Box 167
Dulce, New Mexico 87528

IN REPLY REFER TO:
Office of the Superintendent

APR 2 5 2011

VIA CERTIFIED MAIL

Mr. J. Scott Hall, Esq.
Montgomery & Andrews PA
325 Paseo De Peralta
Santa Fe, NM 87501-1860

Re: CASE 14629: Application of Blue Dolphin Production, LLC for Compulsory Pooling, Rio Arriba County, New Mexico ("Pooling Application")

Dear Mr. Hall:

This letter responds to your letter dated April 8, 2011 regarding the above-referenced matter that you filed with the New Mexico Oil Conservation Division ("NMOCD"). Your letter and the accompanying Pooling Application concern some or all of a 40 acre parcel of land identified as the SW/4 NE/4 of projected Section 27, Township 30 North, Range 1 East in Rio Arriba County, New Mexico. ("Subject Parcel"). Bureau of Indian Affairs ("BIA") records confirm that the west half of the Subject Parcel includes interests that are held in trust by the United States for the Jicarilla Apache Nation ("Nation"), including both the surface and a split mineral estate.

Federal law imposes both substantive and procedural requirements on the use and/or development of Indian trust property, including Indian mineral interests. Applicable statutes and regulations vest the United States with the authority and responsibility to ensure that the best interest of Indian mineral owners -like the Nation- are taken into account in evaluating any and all proposals to develop Indian mineral interests.

The BIA exercises exclusive jurisdiction vis-à-vis states concerning well spacing and communitization of Indian mineral interests and related matters is discussed at 61 Federal Register 35634, 35644 (1996). The Pooling Application raises additional concerns because the surface and the split mineral estate in the west half of the Subject Parcel is also subject to the Nation's jurisdiction. The Nation's OGA has advised us that the Nation shares our concern that the Pooling Application appears to include Indian trust interests in the mineral estate, which are not subject to the NMOCD's jurisdiction. Also, the close proximity of this project to trust lands is nearly certain to trigger requirements for federal and Nation review and approval. In instances similar to this situation the BIA has relied on Communitization Agreements ("CA") as a means of

EXHIBIT
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managing interests held by different parties within a spacing unit. There does not appear to be any reason to abandon that approach in this situation.

A contentious jurisdictional dispute is certain to arise from if a forced pooling effort continues before the NMOCD. In order to avoid further complications, the BIA proposes that you take steps to dismiss or at least postpone the NMOCD hearing scheduled for April 28, 2011.

In closing, the Pooling Application that you sent to the BIA and OGA seek a communization order covering all interests within the 40 acre unit, *i.e.* both the non-trust-half of the Subject Parcel to the east as well as the western half that includes interests that are subject to exclusive federal supervision and control. Nevertheless, any development of Indian trust resources must comply with federal statutes and regulations requiring both explicit tribal consent and BIA approval before the capture and/or development of any Indian mineral assets or interests. These requirements are absolute and unqualified.

Your prompt response is appreciated.

Sincerely,

Superintendent

cc: Mr. Levi Pesata, Jicarilla Apache Nation President
Shenan R. Atcitty, General Counsel
George Tetreault, Petroleum Engineer, BIA Southwest Regional Office

TOPO! map printed on 04/07/11 from "Untitled.tpo"

NATIONAL GEOGRAPHIC

0 5 10 15 20 miles

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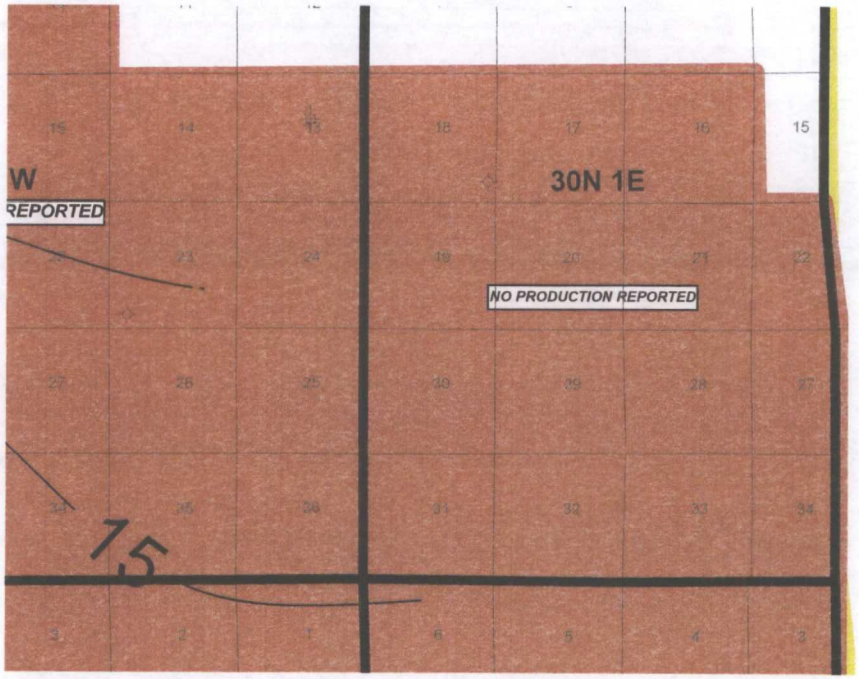

EXHIBIT 4

DATABASE SAMPLE

District I
1625 N. French Dr., Hobbs, NM 88240
District II
1301 W. Grand Avenue, Artesia, NM 88210
District III
1000 Rio Brazos Rd., Aztec, NM 87410
District IV
1220 S. St. Francis Dr., Santa Fe, NM 87505

State of New Mexico
Energy, Minerals & Natural Resources Department
OIL CONSERVATION DIVISION
1220 South St. Francis Dr.
Santa Fe, NM 87505

Form C-102
Revised July 16, 2010
Submit one copy to appropriate District Office

☐ AMENDED REPORT

WELL LOCATION AND ACREAGE DEDICATION PLAT

[1] API Number	[2] Pool Code	[3] Pool Name

[4] Property Code	[5] Property Name	[6] Well Number

[7] OGRID No.	[8] Operator Name	[9] Elevation

[10] Surface Location

UL or lot no.	Section	Township	Range	Lot Idn	Feet from the	North/South line	Feet from the	East/West line	County

[11] Bottom Hole Location If Different From Surface

UL or lot no.	Section	Township	Range	Lot Idn	Feet from the	North/South line	Feet from the	East/West line	County

[12] Dedicated Acres	[13] Joint or Infill	[14] Consolidation Code	[15] Order No.

No allowable will be assigned to this completion until all interests have been consolidated or a non-standard unit has been approved by the division.

16

[17] OPERATOR CERTIFICATION

I hereby certify that the information contained herein is true and complete to the best of my knowledge and belief, and that this organization either owns a working interest or unleased mineral interest in the land including the proposed bottom hole location or has a right to drill this well at this location pursuant to a contract with an owner of such a mineral or working interest, or to a voluntary pooling agreement or a compulsory pooling order heretofore entered by the division.

Signature Date

Printed Name

E-mail Address

[18] SURVEYOR CERTIFICATION

I hereby certify that the well location shown on this plat was plotted from field notes of actual surveys made by me or under my supervision, and that the same is true and correct to the best of my belief.

Date of Survey

Signature and Seal of Professional Surveyor:

Certificate Number

EXHIBIT
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New Mexico Oil Conservation Division

C-102 Instructions

IF THIS IS AN AMENDED REPORT, CHECK THE BOX LABELED "AMENDED REPORT" AT THE TOP OF THIS DOCUMENT.

Surveyors shall use the latest United States government survey or dependent resurvey. Well locations will be in reference to the New Mexico Principal Meridian. If the land is not surveyed contact the appropriate OCD district office. Independent subdivision surveys will not be acceptable.

1. The OCD assigned API number for this well.

2. The pool code for this (proposed) completion.

3. The pool name for this (proposed) completion.

4. The property code for this (proposed) completion.

5. The property name (well name) for this (proposed) completion.

6. The well number for this (proposed) completion.

7. Operator's OGRID number.

8. The operator's name.

9. The ground level elevation of this well.

10. The surveyed surface location of this well measured from the section lines. NOTE: If the United States government survey designates a Lot Number for this location use that number in the 'UL or lot no.' box. Otherwise use the OCD unit letter.

11. Proposed bottom hole location. If this is a horizontal hole indicate the location of the end of the hole.

12. The calculated acreage dedicated to this completion to the nearest hundredth of an acre.

13. Put a Y if more than one completion will be sharing this same acreage or N if this is the only completion on this acreage.

14. If more than one lease of different ownership has been dedicated to the well show the consolidation code from the following table:
    - C Communitization
    - U Unitization
    - F Forced pooling
    - O Other
    - P Consolidation pending

NO ALLOWABLE WILL BE ASSIGNED TO THIS COMPLETION UNTIL ALL INTERESTS HAVE BEEN CONSOLIDATED OR A NON-STANDARD UNIT HAS BEEN APPROVED BY THE DIVISION!

15. Write in the OCD order(s) approving a non-standard location, non-standard spacing, or directional or horizontal drilling.

16. This grid represents a standard section. You may superimpose a non-standard section over this grid. Outline the dedicated acreage and the separate leases within that dedicated acreage. Show the well surface location and bottom hole location, if it is directionally drilled, with the dimensions from the section lines in the cardinal directions. (Note: A legal location is determined from the perpendicular distance to the edge of the tract.) If this is a high angle or horizontal hole, show that portion of the well bore that is open within this pool.

    Show all lots, lot numbers, and their respective acreage.

    If more than one lease has been dedicated to this completion, outline each one and identify the ownership as to both working interest and royalty.

17. The signature, printed name and e-mail address of the person authorized to make this report, and the date this document was signed.

18. The registered surveyors certification. This section does not have to be completed if this form has been previously accepted by the OCD and is being filed for a change of pool or dedicated acreage.