



United States Department of the Interior

Office of the Solicitor
Southwest Regional Office
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Albuquerque, NM 87102
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FAX COVER SHEET

Number of pages (including cover page): 9 Date: 5/25/11

TO: Jami Bailey, Director, Oil and Gas Conservation Division, Department of Energy Minerals and Natural Resources, State of New Mexico FAX No. 505-476-3462

TO: William T. Walker, Regional Director, BIA, Southwestern Region Navajo Region FAX No. 505-563-3103

TO: Sherryl Vigil, Superintendent, BIA, Jicarilla Agency FAX No. 575-759-3948

TO: Shenan R. Atcitty, Herbert A. Becker, and Steven J. Gunn, Attorneys for Jicarilla Apache Nation FAX No. 505-242-2236

FROM: Leta Hollon, Attorney-Advisor

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United States Department of the Interior
OFFICE OF THE SOLICITOR
Southwest Regional Office
505 Marquette Avenue NW
Suite 1800
Albuquerque, NM 87102

May 25, 2011

Via Facsimile No. 505-476-3462 and First Class Mail

Jami Bailey, Director
Oil and Gas Conservation Division
Department of Energy Minerals and Natural Resources
1220 South St. Francis Drive
Sante Fe, New Mexico 87505

Re: Subpoena of Sherryl Vigil; In the Matter of the Application of Blue Dolphin Production, LLC for Compulsory Pooling, Rio Arriba County, New Mexico

Dear Ms. Bailey:

This office is in receipt of your two-page Subpoena, dated May 24, 2011 and personally served on Sherryl Vigil, Superintendent of the Jicarilla Agency, Bureau of Indian Affairs ("BIA"), at her work address in Dulce, New Mexico. The Subpoena was issued by David K. Brooks, Assistant General Counsel, for Jami Bailey, Director, State of New Mexico Department of Energy, Minerals and Natural Resources Oil Conservation Division. The Subpoena seeks the personal appearance of Sherryl Vigil, in order to testify at a May 26, 2011 hearing in the above-named matter. A copy of the Subpoena is attached.

The Subpoena requests Ms. Vigil's appearance to testify at a hearing. It does not provide the substance of the testimony expected of the employee or the relevance of the desired testimony to your proceeding.

Please be advised your Subpoena does not fulfill the requirements contained in the United States Department of Interior ("Department") regulations governing the process for obtaining testimony by Department employees and production of Department records for state judicial and administrative hearings. 43 C.F.R. §§ 2.80 – 2.90; *see also United States ex rel. Touhy v. Ragan*, 340 U.S. 462 (1951). Pursuant to these regulations, to obtain employee testimony, you must submit a written request (hereafter a *Touhy* Request) to the Department of the Interior. 43 C.F.R. § 2.82. Your written request must be sent to:

1. The employee's office address;
2. The official in charge of the employee's bureau, division, office or agency; and

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3. The appropriate unit of the Solicitor's office.

43 C.F.R. § 2.82. In this case, the official in charge is William T. Walker, Regional Director, Bureau of Indian Affairs, Southwestern Regional Office. The appropriate unit of the Solicitor's Office is this office.

Please note, if your request is granted you will be charged for the costs, including travel expenses, for an employee to testify under the relevant substantive and procedural laws and regulations. 43 C.F.R. § 2.85. You must pay costs for record production under 43 CFR part 2, appendix A. Costs must be paid by check or money order payable to the Department of the Interior. 43 C.F.R. § 2.85.

Your written *Touhy* request must also:

- a) Identify the employee or record;
- b) Describe the relevance of the desired testimony or records to your proceeding and provide a copy of the pleadings underlying your request;
- c) Identify the parties to your proceeding and any known relationships they have to the Department's mission or programs;
- d) Show that the desired testimony or records are not reasonably available from any other source;
- e) Show that no record could be provided and used in lieu of employee testimony;
- f) Provide the substance of the testimony expected of the employee; and
- g) Explain why you believe your *Touhy* Request complies with 43 C.F.R. § 2.88.

In deciding whether to grant your *Touhy* Request, the appropriate Department official will consider all of the factors discussed above and the criteria under 43 C.F.R. § 2.88. Please bear in mind it is the Department's general policy to disallow its employees to testify or to produce Department records either upon request or by subpoena. 43 C.F.R. § 2.81. However, if a *Touhy* request is made in writing, the Department will consider whether to allow its employees to testify or produce records, taking into consideration the extent to which responding to such a request will impede the orderly execution of the Department's mission and programs while at the same time not impeding any judicial proceeding inappropriately.

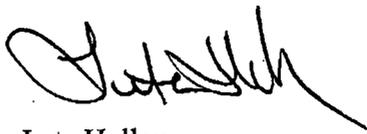
If the above procedures are not followed and the required information is not provided, your request cannot be processed and the documents requested will not be released. It is recommended that a proper request be filed as soon as possible. We have attached a copy of the regulations for your convenience.

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Oil and Gas Conservation Division
Re: Subpoena of Sherryl Vigil

Feel free to contact me at (505) 248-5600 with any questions regarding this correspondence.

Sincerely,



Leta Hollon
Attorney-Advisor

cc: Sherryl Vigil, Superintendent, Bureau of Indian Affairs, Jicarilla Agency
William T. Walker, Regional Director, Bureau of Indian Affairs, Southwestern Regional
Office
Shenan R. Atcitty, Holland & Knight, Attorney for Jicarilla Apache Nation
Herbert A. Becker, JA Associates, Attorney for Jicarilla Apache Nation
Steven J. Gunn, Attorney for Jicarilla Apache Nation
David K. Brooks, General Counsel, Oil and Gas Conservation Division

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

SUBPOENA

SUBPOENA FOR APPEARANCE OF Sherryl Vigil FOR A HEARING

YOU ARE HEREBY COMMANDED TO APPEAR as follows:

Blue Dolphin Hall
Wendell Chino Building

1220 South St. Francis Drive, Santa Fe, New Mexico.87505

Date: May 26, 2011 Time: 8:15(a.m.)
To: Sherryl Vigil
P.O. Box 167
Dulce, NM 87528

testify at a hearing.

IF YOU DO NOT COMPLY WITH THIS SUBPOENA you may be held in contempt and punished by fine or imprisonment.

May 24, 2011

Jami Bailey
Director By David K. Brooks
Assistant General Counsel

**RETURN FOR COMPLETION BY OTHER PERSON
MAKING SERVICE**

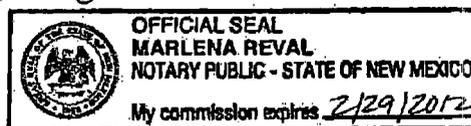
I, being duly sworn, on oath say that I am over the age of eighteen (18) years and not a party to this lawsuit, and that on the 24th day of May, 2011, in Rio Arriba County, I served this subpoena on Sherryl Vigil by delivering to the person named a copy of the subpoena.

Walter Toybal, Walter Toybal
Person making service

SUBSCRIBED AND SWORN to before me this 24th day of May, 2011 (date).

Marlena Reval
notary

THIS SUBPOENA issued by or at request of:
Shenan R. Atcitty
Shenan R. Atcitty, NM Bar No. 8034
Holland & Knight
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006



Telephone: (202) 457-7128
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Email: sjgunn@wulaw.wustl.edu
Attorneys for the Jicarilla Apache Nation

Office of the Secretary, Interior**§2.81**

systems of records have been exempted from subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I) and (f) of 5 U.S.C. 552a and the provisions of the regulations in this subpart implementing these subsections:

- (1) [Reserved]
- (2) National Research Council Grants Program, Interior/GS-9
- (3) Committee Management Files, Interior/Office of the Secretary—68.

(5 U.S.C. 301, 552a and 5 U.S.C. app. sections 9(a)(1)(D) and 9(b); 5 U.S.C. 301, 552, and 552a; 31 U.S.C. 483a; and 43 U.S.C. 1460)

[40 FR 44505, Sept. 26, 1975, as amended at 40 FR 54790, Nov. 26, 1975; 47 FR 38328, Aug. 31, 1982; 48 FR 37412, Aug. 18, 1983; 48 FR 56586, Dec. 22, 1983; 49 FR 6907, Feb. 24, 1984]

Subpart H—Legal Process: Testimony by Employees and Production of Records

SOURCE: 65 FR 46369, July 28, 2000, unless otherwise noted. Redesignated at 67 FR 64530, Oct. 21, 2002.

GENERAL INFORMATION

§2.80 What does this subpart cover?

(a) This subpart describes how the Department of the Interior (including all its bureaus and offices) responds to requests or subpoenas for:

- (1) Testimony by employees in State, territorial or Tribal judicial, legislative or administrative proceedings concerning information acquired while performing official duties or because of an employee's official status;
 - (2) Testimony by employees in Federal court civil proceedings in which the United States is not a party concerning information acquired while performing official duties or because of an employee's official status;
 - (3) Testimony by employees in any judicial or administrative proceeding in which the United States, while not a party, has a direct and substantial interest;
 - (4) Official records or certification of such records for use in Federal, State, territorial or Tribal judicial, legislative or administrative proceedings.
- (b) In this subpart, "employee" means a current or former Department employee, including a contract or special government employee.

- (c) This subpart does not apply to:
- (1) Congressional requests or subpoenas for testimony or records;
 - (2) Federal court civil proceedings in which the United States is a party;
 - (3) Federal administrative proceedings;
 - (4) Federal, State and Tribal criminal court proceedings;
 - (5) Employees who voluntarily testify, while on their own time or in approved leave status, as private citizens as to facts or events that are not related to the official business of the Department. The employee must state for the record that the testimony represents the employee's own views and is not necessarily the official position of the Department. See 5 CFR §§ 2635.702(b), 2635.807 (b).

(6) Testimony by employees as expert witnesses on subjects outside their official duties, except that they must obtain prior approval if required by §2.90.

(d) This subpart does not affect the rights of any individual or the procedures for obtaining records under the Freedom of Information Act (FOIA), Privacy Act, or statutes governing the certification of official records. The Department FOIA and Privacy Act regulations are found at 43 CFR part 2, subparts B and D.

(e) Nothing in this subpart is intended to impede the appropriate disclosure under applicable laws of Department information to Federal, State, territorial, Tribal, or foreign law enforcement, prosecutorial, or regulatory agencies.

(f) This subpart only provides guidance for the internal operations of the Department, and neither creates nor is intended to create any enforceable right or benefit against the United States.

§2.81 What is the Department's policy on granting requests for employee testimony or Department records?

(a) Except for proceedings covered by §2.80(c) and (d), it is the Department's general policy not to allow its employees to testify or to produce Department records either upon request or by subpoena. However, if you request in writing, the Department will consider whether to allow testimony or production of records under this subpart. The

§ 2.82

Department's policy ensures the orderly execution of its mission and programs while not impeding any proceeding inappropriately.

(b) No Department employee may testify or produce records in any proceeding to which this subpart applies unless authorized by the Department under §§ 2.80 through 2.90 *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

RESPONSIBILITIES OF REQUESTERS**§ 2.82 How can I obtain employee testimony or Department records?**

(a) To obtain employee testimony, you must submit:

(1) A written request (hereafter a "Touhy Request;" see § 2.84 and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)); and

(2) A statement that you will submit a check for costs to the Department of the Interior, in accordance with § 2.85, if your Touhy Request is granted.

(b) To obtain official Department records, you must submit:

(1) A Touhy Request; and

(2) A Statement that you agree to pay the costs of duplication in accordance with 43 CFR part 2, appendix A, if your Touhy Request is granted.

(c) You must send your Touhy Request to:

(1) The employee's office address;

(2) The official in charge of the employee's bureau, division, office or agency; and

(3) The appropriate unit of the Solicitor's Office.

(d) To obtain employee testimony or records of the Office of Inspector General, you must send your Touhy Request to the General Counsel for the Office of Inspector General.

(e) 43 CFR part 2, appendix B contains a list of the addresses of the Department's bureaus and offices and the units of the Solicitor's Office. The General Counsel for the Inspector General is located at the address for the Office of the Inspector General. If you do not know the employee's address, you may obtain it from the employee's bureau or office.

43 CFR Subtitle A (10-1-10 Edition)**§ 2.83 If I serve a subpoena *duces tecum*, must I also submit a Touhy request?**

Yes. If you serve a subpoena for employee testimony, you also must submit a request under *United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951)? If you serve a subpoena *duces tecum* for records in the possession of the Department, you also must submit a Touhy Request.

§ 2.84 What information must I put in my Touhy Request?

Your Touhy Request must:

(a) Identify the employee or record;

(b) Describe the relevance of the desired testimony or records to your proceeding and provide a copy of the pleadings underlying your request;

(c) Identify the parties to your proceeding and any known relationships they have to the Department's mission or programs;

(d) Show that the desired testimony or records are not reasonably available from any other source;

(e) Show that no record could be provided and used in lieu of employee testimony;

(f) Provide the substance of the testimony expected of the employee; and

(g) Explain why you believe your Touhy Request complies with § 2.88.

§ 2.85 How much will I be charged?

We will charge you the costs, including travel expenses, for employees to testify under the relevant substantive and procedural laws and regulations. You must pay costs for record production under 43 CFR part 2, appendix A. Costs must be paid by check or money order payable to the Department of the Interior.

§ 2.86 Can I get an authenticated copy of a Department record?

Yes. We may provide an authenticated copy of a Department record, for purposes of admissibility under Federal, State or Tribal law. We will do this only if the record has been officially released or would otherwise be released under § 2.13 or this subpart.

Office of the Secretary, Interior**§2.90****RESPONSIBILITY OF THE DEPARTMENT****§2.87 How will the Department process my *Touhy* Request?**

(a) The appropriate Department official will decide whether to grant or deny your *Touhy* Request. Our Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, may negotiate with you or your attorney to refine or limit both the timing and content of your *Touhy* Request. When necessary, the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, also will coordinate with the Department of Justice to file appropriate motions, including motions to remove the matter to Federal court, to quash, or to obtain a protective order.

(b) We will limit our decision to allow employee testimony to the scope of your *Touhy* Request.

(c) If you fail to follow the requirements of this Subpart, we will not allow the testimony or produce the records.

(d) If your *Touhy* Request is complete, we will consider the request under §2.88.

§2.88 What criteria will the Department consider in responding to my *Touhy* Request?

In deciding whether to grant your *Touhy* Request, the appropriate Department official will consider:

(a) Your ability to obtain the testimony or records from another source;

(b) The appropriateness of the employee testimony and record production under the relevant regulations of procedure and substantive law, including the FOIA or the Privacy Act; and

(c) Our ability to:

(1) Conduct our official business unimpeded;

(2) Maintain impartiality in conducting our business;

(3) Minimize the possibility that we will become involved in issues that are not related to our mission or programs;

(4) Avoid spending public employee's time for private purposes;

(5) Avoid the negative cumulative effect of granting similar requests;

(6) Ensure that privileged or protected matters remain confidential; and

(7) Avoid undue burden on us.

RESPONSIBILITIES OF EMPLOYEES**§2.89 What must I, as an employee, do upon receiving a request?**

(a) If you receive a request or subpoena that does not include a *Touhy* Request, you must immediately notify your supervisor and the Solicitor's Office, or the General Counsel of the Office of the Inspector General, as applicable, for assistance in issuing the proper response.

(b) If you receive a *Touhy* Request, you must promptly notify your supervisor and forward the request to the head of your bureau, division or office. After consulting with the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, the official in charge will decide whether to grant the *Touhy* Request under §2.88.

(c) All decisions granting or denying a *Touhy* Request must be in writing. The official in charge must ask the applicable unit of the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, for advice when preparing the decision.

(d) Under 28 U.S.C. 1733, Federal Rule of Civil Procedure 44(a)(1), or comparable State or Tribal law, a request for an authenticated copy of a Department record may be granted by the person having the legal custody of the record. If you believe that you have custody of a record:

(1) Consult your delegated authority to determine if you can grant a request for authentication of records; and

(2) Consult the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, concerning the proper form of the authentication (as authentication requirements may vary by jurisdiction).

§2.90 Must I get approval before testifying as an expert witness on a subject outside the scope of my official duties?

(a) You must comply with 5 CFR 2635.805(c), which details the authorization procedure for an employee to testify as an expert witness, not on behalf of the United States, in any judicial or administrative proceeding in which the United States is a party or has a direct