

Brooks, David K., EMNRD

From: shenan.atcitty@hklaw.com
Sent: Friday, August 10, 2012 5:06 PM
To: Brooks, David K., EMNRD
Cc: Herb.Becker@jaassociatesnm.com; sjgunn37@gmail.com
Subject: Case No. 14548, Order No. R-13326 and Administrative Order NSL 6462
Attachments: Sp Appearance & Objections to Appl for Amendment - NMOCD Admin Order NSL-6462.PDF; Sp Appearance & Motion for Further Orders - NMOCD Case No 14548 Order No R-13326.PDF

*Reopened
Case 14548*

Dear Mr. Brooks,

On behalf of the Jicarilla Apache Nation, please find enclosed our "Special Appearance by the Jicarilla Apache Nation" and the "Jicarilla Apache Nation's Motion for Further Orders" for filing In the Matter of the Application of Blue Dolphin Production, LLC for an Unorthodox Well Location and Non-Standard Oil Spacing and Proration Unit, Reo Arriba County, New Mexico.

Also enclosed is our "Special Appearance by the Jicarilla Apache Nation" and the "Jicarilla Apache Nation's Objections to Application for Amendment to Administrative Order NSL-6462" for filing In the Matter of the Application of Heritage Petroleum, Inc. for an Amendment to Administrative Order NSL-6462 (Unorthodox Well Location).

In addition, we will be sending you the original signed pleadings by Federal Express for delivery on Monday morning, August 13, 2012.

Please let me know if you have any questions.

Thank you.

Shenan Atcitty | Holland & Knight

Partner

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**We have moved, our new address in Washington, D.C., is:
800 17th Street NW, Suite 1100 | Washington, DC 20006**

Our phone numbers and emails are not changing.

******IRS CIRCULAR 230 DISCLOSURE: TO ENSURE COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE IRS, WE INFORM YOU THAT ANY TAX ADVICE CONTAINED IN THIS COMMUNICATION (INCLUDING ANY ATTACHMENTS) IS NOT INTENDED OR WRITTEN BY HOLLAND & KNIGHT LLP TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (I) AVOIDING TAX-RELATED PENALTIES UNDER THE INTERNAL REVENUE CODE, OR (II)**

**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 AN
UNORTHODOX WELL LOCATION AND NON-
STANDARD OIL SPACING AND PRORATION
UNIT, RIO ARriba COUNTY, NEW MEXICO**

**Case No. 14548
Order No. R-13326**

SPECIAL APPEARANCE BY JICARILLA APACHE NATION

COMES NOW the Jicarilla Apache Nation (hereafter "Nation"), by and through the undersigned attorneys, and enters its Special Appearance in this action to contest the subject matter jurisdiction of the Division to enter Order No. R-13326 in this action. Along with this Special Appearance, the Nation is filing a Motion for Further Orders, including an order dismissing this action for lack of subject matter jurisdiction or, in the alternative, an order staying Order No. R-13326 until such time as the Division can address and determine certain threshold issues, including whether or not it has jurisdiction over this matter. By filing this Special Appearance and the corresponding Motion for Further Orders, the Nation does not consent to the jurisdiction of the Division.

Dated: August 10, 2012

Respectfully submitted,

JICARILLA APACHE NATION

By: 

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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 AN
UNORTHODOX WELL LOCATION AND NON-
STANDARD OIL SPACING AND PRORATION
UNIT, RIO ARRIBA COUNTY, NEW MEXICO**

**Case No. 14548
Order No. R-13326**

**JICARILLA APACHE NATION'S MOTION
FOR FURTHER ORDERS**

COMES NOW the Jicarilla Apache Nation (hereafter "Nation"), pursuant to Ordering Paragraph (4) of Order No. R-13326, and respectfully moves the Division to enter further orders in this action. Specifically, the Nation moves the Division to enter an order dismissing this action for lack of subject matter jurisdiction or, in the alternative, staying Order No. R-13326 pending further determination by the Division of certain threshold issues, including the legality and proper scope and conditions of Order No. R-13326. In support of this Motion, the Nation states as follows:

1. Order No. R-13326 approved an Application filed by Blue Dolphin Production, LLC ("Applicant"), under the laws of the State of New Mexico, for the formation of a non-standard oil spacing and proration unit ("Non-Standard Unit") consisting of the $21.0 \pm$ acres comprising the approximate east half of the SW/4 NE/4 of Projected Section 27, Township 30 North, Range 1 East, NMPM, in Rio Arriba County, New Mexico ("Quarter-Quarter Section"). Order No. R-13326 at 3 (Ordering Paragraph (1)).

2. The Order also dedicated the Non-Standard Unit to a single well—the Theis Greenhorn Test Well No. 1 ("Well")—to be operated by Applicant at an unorthodox location. Order No. R-13326 at 3 (Ordering Paragraphs (2) & (3)).

3. In the Order, the Division stated: "Jurisdiction of this case is retained for the entry of such further orders as the Division may deem necessary." Order No. R-13326 at 3 (Ordering Paragraph (4)).

4. The Nation asks the Division to exercise its retained jurisdiction and to enter further orders in this case for the reasons set forth herein below.

**THE NON-STANDARD UNIT IS ON TRUST LAND ON THE RESERVATION
AND INCLUDES MINERAL INTERESTS HELD IN TRUST FOR THE NATION**

5. The lands comprising the proposed Non-Standard Unit are held in trust by the United States for the Nation and located within the Jicarilla Apache Reservation ("Reservation").

6. The unorthodox Well location is on trust lands on the Reservation.

7. The Nation owns an undivided, fractional interest in the mineral estate in, on, and under the proposed Non-Standard Unit. That mineral interest is held in trust by the United States for the Nation and is included within, and a part of, the Reservation.

8. The Non-Standard Unit is located within the 55,000 \pm acres of land known as the Theis Ranch property.

9. The Nation purchased the Theis Ranch property on or about June 21, 1985. The Nation also purchased undivided, fractional interest in the mineral estate in, on, and under the Theis Ranch property on June 21, 1985. The Nation conveyed the Theis Ranch property and its mineral interest to the United States, to be held in trust for the Nation, on or about November 6, 1987. The United States accepted the conveyance and approved the trust status of the lands and mineral interest, pursuant to 25 U.S.C. § 465, on or about March 10, 1988. The United States added the lands and mineral interest to the Reservation on or about September 1, 1988, pursuant to 25 U.S.C. § 467. *See, Proclamation of Certain Lands as Part of the Jicarilla Apache Reservation*, 53 Fed. Reg. 37355-02 (Sept. 26, 1988).

10. Formation of a Non-Standard Unit on trust lands on the Reservation, inclusion of the Nation's trust mineral interest within that unit, and dedication of the unit to a single well to be operated by Applicant would result in development of the Nation's trust mineral interests without the Nation's consent and without compliance with prevailing Federal and Nation law.

11. Formation of the Non-Standard Unit would also undermine the Nation's correlative rights. The Nation owns a 100% mineral interest in the 19.0 \pm acres comprising the approximate west half of the Quarter-Quarter Section. Excluding those lands from the Non-Standard Unit dilutes the Nation's fractional interest in mineral development within the Quarter-Quarter Section.

THE DIVISION LACKS SUBJECT MATTER JURISDICTION OVER THIS ACTION

12. The Nation maintains that, for at least three reasons, the Division did not have subject matter jurisdiction to approve the application or to enter an Order concerning lands and mineral interests that are held in trust by the United States for the Nation and that are located within, and a part of, the Reservation.

13. First, Federal and Nation law provide a comprehensive and exclusive framework for the development of Indian mineral interests on the Reservation. The relevant Federal laws include the Indian Mineral Leasing Act ("IMLA"), Act of May 11, 1938, c. 198, 52 Stat. 347, *codified as amended at* 25 U.S.C. §§ 396a-396g, and its implementing regulations, 25 C.F.R. Part 211. *See also*, Indian Mineral Development Act of 1982, Pub. L. 97-382, 96 Stat. 1938, *codified at* 25 U.S.C. §§ 2101-2108. The relevant Nation laws are set forth in Jicarilla Apache Nation Code Title 18 ("Oil and Gas"), which was approved by the Secretary of the Interior. *See*, J.A.N. Const., Art. XI.

14. Under those laws, Nation consent and Secretarial approval of a proper Indian mineral lease are absolute prerequisites for any development of the Nation's mineral interests on the Reservation. *See, e.g.,* 25 U.S.C. § 396a; J.A.N. Code § 18-1-3. The Application is an impermissible effort to evade these prerequisites, and the Division had no authority to approve it.

15. Second, State jurisdiction over the on-reservation mineral interests held in trust by the United States for the Nation—whether leased or unleased—is preempted by Federal and Nation law. *See, United States v. 9,345.53 Acres of Land*, 256 F. Supp. 603, 605, 607-608 (W.D.N.Y. 1966). State authority to tax or regulate the property or activities of Indian Nations and their members in Indian country is pre-empted by Federal law. *See, Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 125 (1993); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985); *Fischer v. Dist. Ct.*, 424 U.S. 382, 386 (1976); *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Worcester v. Georgia*, 31 U.S. 515, 561-562 (1832).

16. Third, Federal and Tribal sovereign immunity preclude the Division from adjudicating the interests of the United States and the Nation with respect to lands and mineral interests that are held in trust by the United States for the Nation and included within, and a part of, the Reservation.

17. The Nation has not leased its trust mineral interests to Applicant, and the Secretary of the Interior has not approved Applicant's proposed development of the Nation's trust mineral interests.

18. The Nation has not consented to the adjudication of its land rights or mineral interests in this proceeding. Nor has the Nation consented to the proposed Non-Standard Unit, the unorthodox location of Applicant's proposed Well, or the dedication of the proposed Non-Standard Unit to Applicant's proposed Well.

**APPLICANT MISREPRESENTED THE STATUS OF THE NON-STANDARD UNIT
AND THE NATION'S CONSENT (OR LACK THEREOF) TO FORMATION OF THE
UNIT**

19. In an apparent effort to overcome these obstacles, Applicant made false representations of facts that were (and are) material to the Division's jurisdiction over this action and its authority to issue Order No. R-13326.

20. In its application, Applicant affirmatively misrepresented the status of the lands at issue. Applicant represented that the Non-Standard Unit and Well location are not within the Reservation or located on the Nation's tribal lands, when, in fact, the Non-Standard Unit and Well location are within the Reservation and on lands that are held in trust by the United States for the Nation. *See*, Application at Paragraphs 6 & 7.

21. Applicant's proposed legal notice, which was adopted and published by the Division, failed to correct these misrepresentations or disclose the Reservation status of the lands at issue. As a result, the notice did not contain "a reasonable identification of the adjudication's subject matter that alerts persons who may be affected if the division grants the application," as required by 19.15.4.9(A)(6) N.M.A.C. (Further, the notice was defective in that it failed to "specify each pool or common source of supply that the division or commission's granting the application may affect," as required by 19.15.4.9(A)(7) N.M.A.C.)

22. Applicant repeated its misrepresentations of the status of the lands at issue at the hearing on the merits. *See*, Hearing Transcript at 5:17-18, 5:21-6:3, 6:23-24, 7:13-14, 7:22-23 & 9:3-6.

23. Further, Applicant misrepresented the Nation's consent to the well location and formation of the Non-Standard Unit. Specifically, Applicant represented that the well location was selected in consultation with the Nation and that the Nation did not oppose formation of the

Non-Standard Unit. *See, e.g.*, Application at Paragraph 3; Hearing Transcript at 9:16-10:3 & 10:15-10:17. These representations were false.

24. In entering Order No. R-13326, the Division relied on these representations, not knowing them to be false.

25. The Division relied on Applicant's misrepresentations concerning the location of the proposed Non-Standard Unit, finding that the unit "consist[s] of that portion of the SW/4 NE/4 of Projected Section 27 lying east of the eastern boundary of the Jicarilla Apache Reservation," *id.*, at 1 (Finding Paragraph (2)), and further finding that, "[t]he only lands within the quarter-quarter section that will not be included in the proposed non-standard unit are those lands within the Jicarilla Apache Reservation." *Id.*, at 2 (Finding Paragraph (3)(d)). This finding is inaccurate in that the entire quarter-quarter section is within the boundaries of the Reservation, and no portion of the said section is outside Reservation boundaries.

26. The Division relied on Applicant's misrepresentations concerning the proposed Well location, finding that, "[t]he proposed non-standard location is more than 330 feet from the eastern boundary of the Jicarilla Apache Reservation." Order No. R-13326 at 2 (Finding Paragraph (3)(e)). This finding is inaccurate, in that the proposed non-standard well location is on the Reservation.

27. Finally, the Division relied on Applicant's misrepresentations concerning the Nation's consent to formation of the Non-Standard Unit and location of the Well, finding that, "Applicant's representatives have conferred with officials of the Jicarilla Apache Nation who have specifically advised them that the Tribe does not oppose formation of the proposed non-standard unit." *Id.* (Finding Paragraph (3)(f)). This finding is inaccurate in that the Nation does

oppose formation of the proposed Non-Standard Unit, and neither the Nation nor its representatives advised Applicant otherwise.

28. In Order No. R-13326, the Division approved Applicant's proposed Non-Standard Unit and unorthodox Well location, but was careful to exclude any Reservation lands from the Non-Standard Unit. The Division specifically stated that the Non-Standard Unit, "consist[s] of all of the SW/4 NE/4 of Projected Section 27, Township 30 North, Range 1 East, NMPM, in Rio Arriba County, New Mexico [the Quarter-Quarter Section], lying east of the eastern boundary of the Jicarilla Apache Reservation." Order No. R-13326 at 3 (Ordering Paragraph (1)).

29. The Order, as written, describes a Non-Standard Unit that does not exist, since no part of the Quarter-Quarter Section lies "east of the eastern boundary of the Reservation." The entire Quarter-Quarter Section lies within the boundaries of the Reservation.

**THE DIVISION SHOULD ENTER AN ORDER DISMISSING THIS ACTION FOR
LACK OF SUBJECT MATTER JURISDICTION**

30. The Nation submits that the Division should enter an order dismissing this action because it does not have subject matter jurisdiction over on-Reservation lands and mineral interests that are held in trust by the United States for the Nation.

31. The Division has authority to enter such an order since it retained jurisdiction over this case "for the entry of such further orders as the Division may deem necessary." Order No. R-13326 at 3 (Ordering Paragraph (4)).

32. Furthermore, entry of such an order is within the Division's powers as set forth in N.M.S.A. 1978 §§ 9-5A-4(E), 70-2-6(A), 70-2-11(A), and 70-2-13. It is also consistent with the Division's rules and procedures, as set forth in 19.15.4 N.M.A.C., including 19.15.4.12(D) N.M.A.C., and with the New Mexico Administrative Procedure Act, N.M.S.A. 1978 § 12-8-1, *et seq.*

**IN THE ALTERNATIVE, THE DIVISION SHOULD STAY ORDER NO. R-13326
PENDING THE ENTRY OF FURTHER ORDERS**

33. In the alternative, the Nation submits that the Division should enter an Order staying Order No. R-13326 pending further determination by the Division of certain threshold issues, including the legality and proper scope and conditions of Order No. R-13326.

34. Before lifting the stay, the Division should enter further orders:

- a. Determining what portion, if any, of the Non-Standard Unit lies outside the boundaries of the Reservation;
- b. Determining whether the Division has jurisdiction over on-Reservation lands and mineral interests that are held in trust by the United States for the Nation; and
- c. In the event the Division finds that it has jurisdiction over on-Reservation trust lands and trust minerals, conditioning the formation of any Non-Standard Unit that includes such trust lands and trust minerals on the approval and consent of the Nation and the Secretary of the Interior, as required by Federal and Nation law.

35. The Division has the power to stay Order No. R-13326 pursuant to 19.15.4.23(B) N.M.A.C., and it has the power to enter the further orders described herein under the authorities set forth in Paragraphs 31 and 32, above.

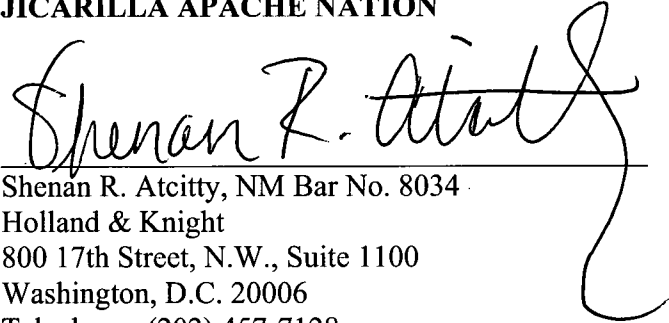
WHEREFORE, the Nation respectfully requests that the Division grant this Motion and enter an order dismissing this action for lack of subject matter jurisdiction or, in the alternative, staying Order No. R-13326 pending further determination by the Division of the scope, legality, and conditions of Order No. R-13326.

Dated: August 10, 2012

Respectfully submitted,

JICARILLA APACHE NATION

By:

A handwritten signature in black ink, reading "Shenan R. Atcitty". The signature is written in a cursive style with a large, sweeping "S" and a long, trailing flourish at the end.

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CERTIFICATE OF SERVICE

I certify that on this date, August 10, 2012, I caused a true and accurate copy of the foregoing to be served on the following parties and attorneys of record by depositing the same in the United States mail, postage prepaid, addressed as follows:

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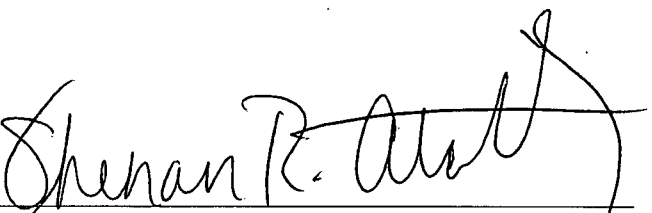
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