

**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

MOTION FOR CONTINUANCE

The Jicarilla Apache Nation (hereafter "Nation"), acting by and through its attorneys, in accordance with NMAC § 19.15.4.13(C), respectfully moves the Division for a continuance of the hearing in this matter. In support of this Motion, the Nation states as follows:

1. On April 25, 2011, the Nation filed a Special Appearance to Contest Jurisdiction in this matter. The Nation has not consented to the jurisdiction of the Division. Nor has the Nation consented to be joined as a party to this action.
2. On May 19, 2011, the Nation filed a Motion to Dismiss this matter for lack of jurisdiction.
3. On May 19, 2011, the Nation filed a written request for the issuance of a subpoena to compel Sherryl Vigil, Superintendent of the Jicarilla Agency of the Bureau of Indian Affairs, to testify and produce documents at the hearing in this matter.
4. The testimony of Superintendent Vigil or her designated agent is necessary to establish certain facts that are relevant and material to the Nation's Motion to Dismiss, namely:
 - a. That all land within the 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 ("40 Acre Parcel") is held in trust by the United States for the Nation and

included as a part of and within of the Jicarilla Apache Indian Reservation (“Reservation”);

b. That, within the 40 Acre Parcel, the $21.0 \pm$ acre nonstandard spacing and proration unit identified as the E/2 SW/4 NE/4 of projected Section 27, Township 30 North, Range 1 East in Rio Arriba County, New Mexico (“ $21.0 \pm$ Acre Parcel”) was taken into trust by the United States for the Nation in 1988, pursuant to 25 U.S.C. § 465, and formally added to the Reservation in 1988, pursuant to 25 U.S.C. § 467;

c. That the Nation’s undivided fractional interest in the mineral estate underlying the $21.0 \pm$ Acre Parcel was taken into trust by the United States for the Nation in 1988, pursuant to 25 U.S.C. § 465, and added to the Reservation in 1988, pursuant to 25 U.S.C. § 467;

d. That the Nation’s lands and mineral interests in the $21.0 \pm$ Acre Parcel are still held in trust by the United States for the Nation and included within Reservation;

e. That Federal and Nation law provide a comprehensive and exclusive framework for the development of federally protected lands and Indian mineral interests held in trust by the United States on the Reservation and that, under those laws, Federal approval and Nation consent are prerequisites for any development of the Nation’s lands and mineral assets held in trust by the United States on the Reservation; and

f. That the United States has not approved any contracts, leases, or permits for the lease, use, development, or exploitation of any mineral interests held in trust by the United States for the Nation and situated on, under, or within the $21.0 \pm$ Acre Parcel.

5. On May 24, 2011, the Division issued a subpoena directing Superintendent Vigil to appear and testify at the hearing in this matter. The subpoena was duly served on the Superintendent the same day.

6. On May 25, 2011, Leta Hollon, Attorney-Advisor in the Southwest Regional Office of the Office of the Solicitor, responded to the subpoena issued to Superintendent Vigil by sending a letter to Jami Bailey, the Director of the Oil Conservation Division. (A copy of this letter is attached hereto as **Exhibit A.**)

7. The May 25, 2011, letter of Attorney-Advisor Hollon letter states Superintendent Vigil will not be permitted to appear and testify at the hearing in response to the subpoena issued by the Division.

8. The May 25, 2011, letter of Attorney-Advisor Hollon further states that, to compel the Superintendent to testify and produce documents at the hearing in this matter, the Division must submit a written request to the Department of the Interior pursuant to 43 C.F.R. §§ 2.80-2.90.

9. To expedite this process, the Nation submitted such a written request on May 25, 2011. (A copy of the Nation's request is attached as **Exhibit B.**)

10. On May 25, 2011, the undersigned counsel for the Nation spoke with Robert Hall, Assistant Regional Solicitor in the Office of the Solicitor, Southwest Regional Office, who informed the undersigned counsel that some or all of the testimony and documents sought by the Nation would best be produced by Marlana Reval, Realty Specialist in the Jicarilla Agency of the Bureau of Indian Affairs, and further that, upon submission of a proper request and consideration of the same by the Office of the Solicitor, the Department of the Interior would likely permit Ms. Reval to testify and produce the requested documents at the hearing in this matter.

11. On May 25, 2011, the Nation submitted a request under 43 C.F.R. §§ 2.80-2.90 to compel Ms. Reval to testify and produce documents at the hearing in this matter. (A copy of the Nation's request is attached as **Exhibit C.**)

12. The Nation is filing this Motion for Continuance less than one day of learning that Superintendent Vigil will not be permitted to appear and testify at the hearing in response to the subpoena issued by the Division. The Nation asks that the Motion be considered under NMAC § 19.15.4.13(C).

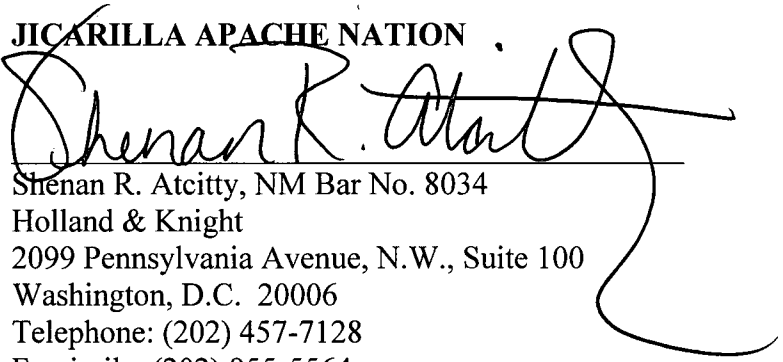
WHEREFORE, the Nation respectfully seeks a continuance of the hearing in this matter to permit the Division and the Nation to secure testimony from Superintendent Vigil or Realty Specialist Reval in support of the Nation's Motion to Dismiss for lack of jurisdiction over this matter.

Dated: May 19, 2011

Respectfully submitted,

JICARILLA APACHE NATION

By:



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Attorneys for the Jicarilla Apache Nation

**United States Department of the Interior**

**Office of the Solicitor
Southwest Regional Office
505 Marquette Avenue NW, Ste. 1800
Albuquerque, NM 87102
505-248-5600
505-248-5623 Fax**

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

The information contained in this facsimile message is attorney-client privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and destroy the fax copy you inadvertently received. Thank you.

EXHIBITA



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
Santa 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

Page 2

May 25, 2011

Oil and Gas Conservation Division

Re: Subpoena of Sherryl Vigil

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.

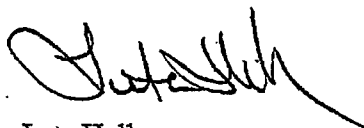
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Page 3
May 25, 2011
Oil and Gas Conservation Division
Re: Subpoena of Sherryl Vigil

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:

~~Chase, W. P. & T. L. L. C.~~
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

[x] 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 Sherry Vigil by delivering to the person named a copy of the subpoena.

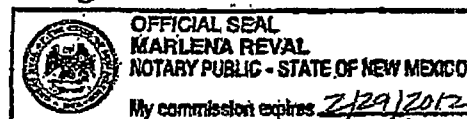
Walter Toybal, Walter Toybal
Person making service

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
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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 (I) 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—63.

(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 38928, 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 E 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. Ragen*, 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

Holland & Knight

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(202) 457-7128
shenan.atcitty@hklaw.com

May 25, 2011

Sherryl Vigil, Superintendent
Jicarilla Apache Agency
Bureau of Indian Affairs
United States Department of the Interior
208 Hawks Drive
P.O. Box 167
Dulce, NM 87528

William T. Walker, Regional Director
Bureau of Indian Affairs
Southwest Regional Office
United States Department of the Interior
1001 Indian School Road, NW
Albuquerque, NM 87104

Lynn A. Johnson, Regional Solicitor
Office of the Regional Solicitor
Department of the Interior
505 Marquette Avenue, NW
Suite 1800
Albuquerque, NM 87102

Re: Jicarilla Apache Nation *Touhy* Request for Testimony and Production of Documents by Sherryl Vigil, Superintendent, Jicarilla Agency

Dear Ladies and Gentleman:

Holland & Knight, LLP represents the Jicarilla Apache Nation ("Nation") in Case No. 14629, Application of Blue Dolphin Production, LLC ("Blue Dolphin") for Compulsory Pooling, Rio Arriba County, New Mexico ("OCD Proceeding"), filed with the State of New Mexico Department of Energy, Minerals and Natural Resources, Oil Conservation Division ("OCD"). The OCD Proceeding concerns certain land contained within the following section: Section 27,

EXHIBIT

B

T. 30 N. Range 1 East in Rio Arriba County, New Mexico ("Subject Parcel" or "Subject Section"). Portions of the Subject Section are located in the western portion of the Theis Ranch, a 55,000 \pm acre parcel of land acquired by the Jicarilla Apache Nation from the Theis Company (a Kansas partnership) on June 21, 1985.

On May 24, 2011, at the Nation's request, OCD issued a subpoena directing Sherryl Vigil, Superintendent of the Jicarilla Agency of the Bureau of Indian Affairs, to appear and testify at the OCD Proceeding. The subpoena was served on the Superintendent the same day. (Copies of the subpoena and return of service are attached collectively as **Exhibit A.**)

We are in receipt of a copy of a letter dated May 25, 2011, from Leta Hollon, Attorney-Advisor in the Southwest Regional Office of the Office of the Solicitor, to Jami Bailey, Director of OCD. (A copy of the letter is attached as **Exhibit B.**) This letter directs OCD to submit a written *Touhy* request to the Department of the Interior in order to secure the testimony of Superintendent Vigil at the OCD Proceeding. In order to expedite this process, the Nation is submitting this *Touhy* request on its own behalf.

This *Touhy* request is submitted pursuant to 43 C.F.R. § 2.82, for the purpose of securing the testimony and production of records by Superintendent Vigil at the OCD Proceeding. This *Touhy* request contains the information required by 43 C.F.R. § 2.84. The information is organized according to the enumerated items in § 2.84, which are paraphrased in italics below:

(a) Identify the employee and/or record.

(i) Employee

The Nation seeks the testimony of Sherryl Vigil, Superintendent, Jicarilla Agency, Bureau of Indian Affairs, on the following subjects:

- the trust and reservation status of the Theis Ranch property, including the portion of the Theis Ranch property that is included within the Subject Parcel or Subject Section;
- the trust and reservation status of the Nation's undivided fractional interest in the mineral estate in, on, and under the Theis Ranch property, including the Nation's undivided fractional interest in the mineral estate in, on, and under the portion of the Theis Ranch property that is included within the Subject Parcel or Subject Section;

- authentication of any deeds or other records verifying the transfer of ownership and title of the Theis Ranch property, or any interest therein, from the Nation to the United States in trust for the Nation;
- authentication of any records affirming, declaring, establishing or otherwise verifying that the Theis Ranch property, or any interest therein constitutes or is made a part of the Jicarilla Apache Indian Reservation ("Reservation"), including but not limited to the "Proclamation of Certain Lands as Part of the Jicarilla Apache Reservation," which is set forth at 53 Fed. Reg. 37355-02 (Sept. 26, 1988); and
- whether the United States has approved any contracts, leases, or other agreements for the lease, use, development, or exploitation of any gas, oil, or other minerals held in trust by the United States for the Nation and situated on, under, or within the Subject Parcel.

(ii) *Records*

The Nation also requests production of the following records:

A record or records verifying the transfer of ownership and title of the Theis Ranch, or any interest therein, from the Jicarilla Apache Nation to the United States in Trust for the Jicarilla Apache Nation; and a record or records affirming, declaring, establishing or otherwise verifying that the Theis Ranch property, or any interest therein constitutes or is made a part of the Reservation.

A record or records, if any, constituting a contract, lease, or agreement that reflects either approval of the Secretary of the Interior or any subordinate official acting on behalf of the Secretary of the Interior that grants (or purports to grant) the approval by or on behalf of the United States for the lease, use, development or exploitation of any and all gas, oil, or any other minerals of any kind that are situated, on, under or within the Subject Section. The preceding shall, without limitation, include any lease under the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a et seq., the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101 et seq., or any other federal law relating to the leasing or development of any and all gas, oil, or any other minerals of any kind.

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

Case No. 14629 concerns the Application of Blue Dolphin for compulsory pooling of all interests in all pools or formations underlying all or part of the Subject Parcel. The trust and reservation status of the Subject Parcel in this case is a material factor in demonstrating that the relevant property interests in the Subject Parcel are beyond OCD's jurisdiction.

The Nation asserts that the Subject Parcel is held in trust by the United States for the Nation and has been added to the Reservation. Further, the Nation asserts that its mineral interests underlying the Theis Ranch property are held in trust by the United States for the Nation. These assertions form a key basis for the Nation's pending Motion to Dismiss in Case No. 14629 for lack of jurisdiction. (Copies of the Nation's Motion to Dismiss and accompanying Memorandum of Law are attached as **Exhibits C and D**, respectively, and incorporated herein by reference.) As these documents make clear, Blue Dolphin has consistently misrepresented the status of the Subject Parcel and the status of the Nation's underlying mineral interests, first in Case No. 14548, in which Blue Dolphin sought approval of 21.0 + acres of the Subject Parcel as a non-standard spacing and proration unit, and now in Case No. 14629, in which Blue Dolphin seeks an order pooling all interests in all pools or formations underlying the 21.0 + acres constituting the non-standard spacing and proration unit, including those unleased mineral interests held in trust for the Nation.

The records and testimony of the Superintendent are essential to demonstrate that the land is held in trust for the Nation and a part of the reservation of the Nation, and thus subject to tribal and federal jurisdiction, not state jurisdiction. Federal law expressly requires tribal consent and Bureau of Indian Affairs ("BIA") approval prior to the lease or development of oil and gas and other minerals on land held in trust status for an Indian tribe. The records and testimony from Superintendent Vigil put the trust status of the Subject Parcel beyond dispute with respect to the entire surface estate as well as some or all of the mineral estate. Furthermore, testimony is necessary to "prove the negative" with respect to absence of any BIA-approved leases covering either any of the surface estate or any of the minerals interests held in trust on the Subject Parcel. In other words, because the BIA is solely responsible for both approving and recording such leases, the Superintendent can provide definitive testimony that no such federally-required lease or agreement exists.

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

Blue Dolphin is the Applicant in Case No. 14629. It is represented by J. Scott Hall of Montgomery & Andrews, P.A.

The Nation has filed a Special Appearance to Challenge Jurisdiction in Case No. 14629. It has not consented to the jurisdiction of the OCD or to be joined as a party in the action. The Nation is represented by Shenan Atcitty of Holland & Knight, Herb Becker of J.A. Associates, and Steven Gunn.

The Nation is a federally recognized Indian Nation. The United States has a government-to-government relationship with the Nation. The United States holds title to the entire surface estate in trust for the Nation as well as the entire mineral estate on the western half of the Subject Parcel. Nonetheless, on the eastern half of the Subject Parcel the United States holds in trust for the Nation an undivided fractional interest in the mineral estate underlying the Subject Lands. The United States has a statutory trust responsibility to protect the Nation's interests in these lands and the minerals.

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

Federal statutes provide that the BIA is the definitive source of information concerning any questions relating to the title and/or transactions involving Indian trust lands. *In re Emerald Outdoor Advertising, LLC*, 444 F.3d 1077 (9th Cir. 2006), explains the singular nature of the BIA's role:

Pursuant to 25 U.S.C. § 5, the BIA has promulgated regulations that establish a comprehensive scheme for recording title documents relating to Indian lands. For instance, 25 C.F.R. § 150.1 states that the BIA is to "set forth authorities, policy and procedures governing the recording, custody, maintenance, use and certification of title documents, and the issuance of title status reports for Indian land." Section 150.6 mandates that "[a]ll title documents shall be submitted to the appropriate Land Titles and Records Office for recording immediately after final approval, issuance, or acceptance." 25 C.F.R. § 150.6.

Id., at 1082.

The BIA is, at Congress's express direction, the reasonable source for complete and accurate records regarding the status of Theis Ranch and the Subject Parcel.

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

The testimony of Superintendent Vigil is indispensable to: establish the trust and reservation status of the Subject Parcel or Subject Section and the trust and reservation status of the Nation's undivided fractional interest in the mineral estate in, on, and under the Subject Parcel or Subject Section; authenticate existing records on the trust and reservation status of the Subject Parcel or Subject Section; and establish and verify that there are no BIA-approved leases involving those interests. Records alone will not suffice.

We are attaching a draft Affidavit (as **Exhibit E**) for the Superintendent which sets forth many of the facts and includes many of the documents the Nation believes are critical to its success in Case No. 14629. It is possible that this affidavit, if executed by the Superintendent, might obviate the need for the Superintendent to testify and produce documents at the OCD Proceeding. Nevertheless, we are mindful that the hearing examiner may have questions about the facts or documents set forth in the draft Affidavit. As a result, Superintendent Vigil should be authorized to offer testimony and produce records at the OCD Proceeding.

See also, Sections (b), (c), and (d), above.

(f) Provide the substance of the testimony expected of the employee.

See, Section (a)(i), above.

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

Providing the requested records and testimony will not detract from the Department's core mission and responsibilities. Indeed, the Nation's *Touhy* request advances two of the Department's key statutory responsibilities, namely maintaining land title records involving Indian trust lands and overseeing the leasing and development of on-reservation, federally protected Indian mineral interests. The United States—while not a party to the OCD Proceeding—has a direct and substantial interest in ensuring that state, tribal, and federal agencies have access to accurate and complete information about title and transactional records involving Indian tribal lands and in ensuring full compliance with the IMLA and other Federal and Nation laws governing the development of on-reservation, federally protected Indian mineral interests.

As explained above, the requested testimony and records are not reasonably available from any other source. This is because the Congress designated BIA as the source for records on Indian land title and transactions. Testimony by Superintendent Vigil, or production of the requested records should not impede the Department's official business, as the requested records are records that should be kept in the course of the Department's business. The Nation's request will allow the Department to remain impartial as it will merely be producing records already on hand. As these records are kept in the regular course of business, there will not be an undue burden on the Department to produce them.

The Nation will submit a check for costs payable to the Department of the Interior, in accordance with §2.85, if the Nation's *Touhy* Request is granted and Superintendent Vigil is permitted to testify. In the event the requested records are produced to the Nation, the Nation will submit a check payable to the Department of the Interior for the costs of duplication in accordance with 43 CFR part 2, appendix A.

If you have any questions regarding this matter or the enclosed documents, please do not hesitate to contact me. I thank you in advance for your time and attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Shenan R. Atcitty", with a long, sweeping horizontal line extending to the right.

Shenan R. Atcitty

Enclosures (Exhibits A-E, referenced herein)

cc: Robert Hall, Assistant Regional Solicitor, Office of the Solicitor, Southwest Regional Office (via email to Robert.Hall@sol.doi.gov)

Holland & Knight

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Shenan R. Atcitty
(202) 457-7128
shenan.atcitty@hklaw.com

May 25, 2011

Marlena Reval, Realty Specialist
Jicarilla Apache Agency
Bureau of Indian Affairs
United States Department of the Interior
208 Hawks Drive
P.O. Box 167
Dulce, NM 87528

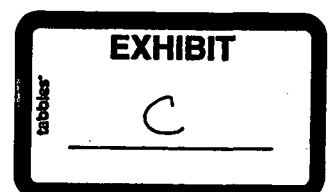
Sherryl Vigil, Superintendent
Jicarilla Apache Agency
Bureau of Indian Affairs
United States Department of the Interior
208 Hawks Drive
P.O. Box 167
Dulce, NM 87528

Lynn A. Johnson, Regional Solicitor
Office of the Regional Solicitor
Department of the Interior
505 Marquette Avenue, NW
Suite 1800
Albuquerque, NM 87102

Re: Jicarilla Apache Nation *Touhy* Request for Testimony and Production of Documents by Marlena Reval, Realty Specialist, Jicarilla Agency

Dear Ladies:

Holland & Knight, LLP represents the Jicarilla Apache Nation ("Nation") in Case No. 14629, Application of Blue Dolphin Production, LLC ("Blue Dolphin") for Compulsory Pooling, Rio Arriba County, New Mexico ("OCD Proceeding"), filed with the State of New Mexico



Department of Energy, Minerals and Natural Resources, Oil Conservation Division ("OCD"). The OCD Proceeding concerns certain land contained within the following section: Section 27, T. 30 N. Range 1 East in Rio Arriba County, New Mexico ("Subject Parcel" or "Subject Section"). Portions of the Subject Section are located in the western portion of the Theis Ranch, a 55,000 \pm acre parcel of land acquired by the Jicarilla Apache Nation from the Theis Company (a Kansas partnership) on June 21, 1985.

This *Touhy* request is submitted pursuant to 43 C.F.R. § 2.82, for the purpose of securing the testimony and production of records by Marlena Reval, Realty Specialist at the Jicarilla Agency of the Bureau of Indian Affairs, at the OCD Proceeding. This *Touhy* request contains the information required by 43 C.F.R. § 2.84. The information is organized according to the enumerated items in § 2.84, which are paraphrased in italics below:

(a) Identify the employee and/or record.

(i) Employee

The Nation seeks the testimony of Marlena Reval, Realty Specialist, Jicarilla Agency, Bureau of Indian Affairs, on the following subjects:

- the trust and reservation status of the Theis Ranch property, including the portion of the Theis Ranch property that is included within the Subject Parcel or Subject Section;
- the trust and reservation status of the Nation's undivided fractional interest in the mineral estate in, on, and under the Theis Ranch property, including the Nation's undivided fractional interest in the mineral estate in, on, and under the portion of the Theis Ranch property that is included within the Subject Parcel or Subject Section;
- authentication of any deeds or other records verifying the transfer of ownership and title of the Theis Ranch property, or any interest therein, from the Nation to the United States in trust for the Nation;
- authentication of any records affirming, declaring, establishing or otherwise verifying that the Theis Ranch property, or any interest therein constitutes or is made a part of the Jicarilla Apache Indian Reservation ("Reservation"), including but not limited to the "Proclamation of Certain Lands as Part of the Jicarilla

Apache Reservation,” which is set forth at 53 Fed. Reg. 37355-02 (Sept. 26, 1988); and

- whether the United States has approved any contracts, leases, or other agreements for the lease, use, development, or exploitation of any gas, oil, or other minerals held in trust by the United States for the Nation and situated on, under, or within the Subject Parcel.

(ii) *Records*

The Nation also requests production of the following records:

A record or records verifying the transfer of ownership and title of the Theis Ranch, or any interest therein, from the Jicarilla Apache Nation to the United States in Trust for the Jicarilla Apache Nation; and a record or records affirming, declaring, establishing or otherwise verifying that the Theis Ranch property, or any interest therein constitutes or is made a part of the Reservation.

A record or records, if any, constituting a contract, lease, or agreement that reflects either approval of the Secretary of the Interior or any subordinate official acting on behalf of the Secretary of the Interior that grants (or purports to grant) the approval by or on behalf of the United States for the lease, use, development or exploitation of any and all gas, oil, or any other minerals of any kind that are situated, on, under or within the Subject Section. The preceding shall, without limitation, include any lease under the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a et seq., the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101 et seq., or any other federal law relating to the leasing or development of any and all gas, oil, or any other minerals of any kind.

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

Case No. 14629 concerns the Application of Blue Dolphin for compulsory pooling of all interests in all pools or formations underlying all or part of the Subject Parcel. The trust and reservation status of the Subject Parcel in this case is a material factor in demonstrating that the relevant property interests in the Subject Parcel are beyond OCD’s jurisdiction.

The Nation asserts that the Subject Parcel is held in trust by the United States for the Nation and has been added to the Reservation. Further, the Nation asserts that its mineral

interests underlying the Theis Ranch property are held in trust by the United States for the Nation. These assertions form a key basis for the Nation's pending Motion to Dismiss in Case No. 14629 for lack of jurisdiction. (Copies of the Nation's Motion to Dismiss and accompanying Memorandum of Law are attached as **Exhibits A and B**, respectively, and incorporated herein by reference.) As these documents make clear, Blue Dolphin has consistently misrepresented the status of the Subject Parcel and the status of the Nation's underlying mineral interests, first in Case No. 14548, in which Blue Dolphin sought approval of 21.0 + acres of the Subject Parcel as a non-standard spacing and proration unit, and now in Case No. 14629, in which Blue Dolphin seeks an order pooling all interests in all pools or formations underlying the 21.0 + acres constituting the non-standard spacing and proration unit, including those unleased mineral interests held in trust for the Nation.

The records and testimony of Realty Specialist Reval are essential to demonstrate that the land is held in trust for the Nation and a part of the reservation of the Nation, and thus subject to tribal and federal jurisdiction, not state jurisdiction. Federal law expressly requires tribal consent and Bureau of Indian Affairs ("BIA") approval prior to the lease or development of oil and gas and other minerals on land held in trust status for an Indian tribe. The records and testimony from Realty Specialist Reval put the trust status of the Subject Parcel beyond dispute with respect to the entire surface estate as well as some or all of the mineral estate. Furthermore, testimony is necessary to "prove the negative" with respect to absence of any BIA-approved leases covering either any of the surface estate or any of the minerals interests held in trust on the Subject Parcel. In other words, because the BIA is solely responsible for both approving and recording such leases, Ms. Reval can provide definitive testimony that no such federally-required lease or agreement exists.

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

Blue Dolphin is the Applicant in Case No. 14629. It is represented by J. Scott Hall of Montgomery & Andrews, P.A.

The Nation has filed a Special Appearance to Challenge Jurisdiction in Case No. 14629. It has not consented to the jurisdiction of the OCD or to be joined as a party in the action. The Nation is represented by Shenan Atcitty of Holland & Knight, Herb Becker of J.A. Associates, and Steven Gunn.

The Nation is a federally recognized Indian Nation. The United States has a government-to-government relationship with the Nation. The United States holds title to the entire surface

estate in trust for the Nation as well as the entire mineral estate on the western half of the Subject Parcel. Nonetheless, on the eastern half of the Subject Parcel the United States holds in trust for the Nation an undivided fractional interest in the mineral estate underlying the Subject Lands. The United States has a statutory trust responsibility to protect the Nation's interests in these lands and the minerals.

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

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Id., at 1082.

The BIA is, at Congress's express direction, the reasonable source for complete and accurate records regarding the status of Theis Ranch and the Subject Parcel.

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We are attaching a draft Affidavit (as **Exhibit C**) for Realty Specialist Reval which sets forth many of the facts and includes many of the documents the Nation believes are critical to its success in Case No. 14629. It is possible that this affidavit, if executed by Ms. Reval, might obviate the need for Ms. Reval to testify and produce documents at the OCD Proceeding. Nevertheless, we are mindful that the hearing examiner may have questions about the facts or documents set forth in the draft Affidavit. As a result, Ms. Reval should be authorized to offer testimony and produce records at the OCD Proceeding.

See also, Sections (b), (c), and (d), above.

(f) Provide the substance of the testimony expected of the employee.

See, Section (a)(i), above.

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

Providing the requested records and testimony will not detract from the Department's core mission and responsibilities. Indeed, the Nation's *Touhy* request advances two of the Department's key statutory responsibilities, namely maintaining land title records involving Indian trust lands and overseeing the leasing and development of on-reservation, federally protected Indian mineral interests. The United States—while not a party to the OCD Proceeding—has a direct and substantial interest in ensuring that state, tribal, and federal agencies have access to accurate and complete information about title and transactional records involving Indian tribal lands and in ensuring full compliance with the IMLA and other Federal and Nation laws governing the development of on-reservation, federally protected Indian mineral interests.

As explained above, the requested testimony and records are not reasonably available from any other source. This is because the Congress designated BIA as the source for records on Indian land title and transactions. Testimony by Realty Specialist Reval, or production of the requested records, should not impede the Department's official business, as the requested records are records that should be kept in the course of the Department's business. The Nation's request will allow the Department to remain impartial as it will merely be producing records already on hand. As these records are kept in the regular course of business, there will not be an undue burden on the Department to produce them.

The Nation will submit a check for costs payable to the Department of the Interior, in accordance with §2.85, if the Nation's *Touhy* Request is granted and Realty Specialist Reval is

Jicarilla Apache Nation

May 25, 2011

Page 7

permitted to testify. In the event the requested records are produced to the Nation, the Nation will submit a check payable to the Department of the Interior for the costs of duplication in accordance with 43 CFR part 2, appendix A.

If you have any questions regarding this matter or the enclosed documents, please do not hesitate to contact me. I thank you in advance for your time and attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Shenan R. Atcitty", with a long, sweeping flourish extending from the end of the signature.

Shenan R. Atcitty

Enclosures (Exhibits A-C, referenced herein)

cc: Robert Hall, Assistant Regional Solicitor, Office of the Solicitor, Southwest Regional Office (via email to Robert.Hall@sol.doi.gov)

CERTIFICATE OF SERVICE

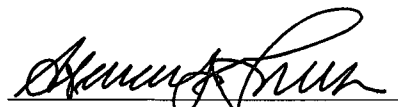
I, Steven J. Gunn, swear that a true and accurate copy of the foregoing "MOTION FOR CONTINUANCE" was hand-delivered on May 26, 2011, to the following:

J. Scott Hall, Esq.
Montgomery & Andrews PA
523 Paseo de Perlata
Sante Fe, New Mexico 87051

Dixon Sandoval, Director
Oil and Gas Administration
Jicarilla Apache Nation
P.O. Box 146
Dulce, New Mexico 87528

I further swear that a copy was served by electronic mail on May 26, 2011, to:

Superintendent Sherryl Vigil (Email to: Sherryl.Vigil@bia.gov)
P.O. Box 167
Dulce, NM 87528


Steven J. Gunn