

Written Statement of Levi Pesata, President of the Jicarilla Apache Nation
Senate Committee on Indian Affairs
Oversight Hearing on Indian Energy Issues
February 16, 2012

I. INTRODUCTION

On behalf of the Jicarilla Apache Nation ("Nation"), I am Levi Pesata and I serve as President of the Jicarilla Apache Nation. I would like to thank the Committee for convening this hearing to discuss Indian Energy Issues. The Nation is a Federally recognized Indian Tribe located in north-central New Mexico. Eighty-five percent (85%) of the Tribal population resides on the Jicarilla Apache Reservation (Reservation), mostly in the town of Dulce, which serves as our Tribal headquarters. We have a Tribal population of nearly four thousand (4,000) members and our Reservation consists of approximately one (1) million acres of trust land. We have been blessed with abundant Natural Resources such as oil and gas, timber, water, and fish and wildlife. Fortunately, our Reservation was not subjected to the disastrous Allotment Policy initiated in the 19th Century. As a result, we do not face the difficult checker-board jurisdictional challenges encountered by those Tribes and individuals whose lands were broken apart (and in many instances lost) as part of that Federal Policy. Certainly, this consequence has benefitted our energy development initiatives over the years. Yet, given our extremely rural location, the considerable public health and welfare needs of our people, as well as the fact that we provide governmental services not only to our Tribal members but for those living near or travelling through our Reservation, the Nation has a heightened need to generate revenue to provide essential governmental services on our Reservation as well as to the surrounding rural region. Thus, we rely heavily on the development of our natural resources, primarily our oil and gas resources, to raise revenue to fund our government and provision of essential governmental services. Through these lens, I am pleased to be here today to discuss our Nation's primary energy issues.

II. BACKGROUND

As noted above, our Nation heavily depends on our oil and gas production as the primary means of generating governmental revenue. Our Reservation is located in the San Juan Basin, a well-known prolific source of oil and gas production for over seventy (70) years. Oil and gas

development began on our Reservation in the 1950's, under the leasing authority of the Secretary of the Interior pursuant to the Indian Minerals Leasing Act of 1938 (IMLA). Throughout those early years, the Secretary negotiated and entered into oil and gas IMLA leases on the Nation's behalf, leaving us with a modest royalty interest in the development and production of our oil and gas reserves. In the 1970's and 1980's the Nation became more active in the development of our resources and won a significant legal ruling in the U.S. Supreme Court in 1982. In that seminal case, Jicarilla Apache Tribe v. Merrion, the U.S. Supreme Court recognized our inherent right to regulate our lands and resources within our Reservation, and upheld our sovereign authority to impose our own severance tax on the production of our oil and gas resources. That same year, Congress passed the Indian Minerals Development Act (IMDA) which authorized Tribes to negotiate energy deals directly, though subject to Secretarial approval. The tremendous impact of the Merrion case coupled with the enactment of the IMDA provided our Nation and other Tribes powerful resources and tools to expand on our energy development initiatives.

Today, we have approximately 377,000 acres of our Reservation under production, approximately one-third of our Reservation land base. According to our internal reports, our total hydrocarbon production consists of 302,000 Barrels of Oil and 32 BCF of natural gas, which breaks down to approximately eighty percent (80%) in natural gas production and twenty percent (20%) in oil production. There are about 2,150 active wells on our lands and 700 wells that have been plugged/and abandoned. To support development and production, there are over 2,000 miles of gas gathering pipelines and roads on our Reservation. While a sizable portion of our Reservation is subject to oil and gas production activities, the Nation has been diligent in designating and protecting pristine areas, as well as sacred sites, and spiritual and culturally sensitive areas from disturbance.

There are currently 26 current Record Title/Operators, 132 active IMLA leases, and 12 active IMDAs which accounts for approximately 550 companies with Operating Permits to conduct oil and gas business on our Reservation. Every non-Tribal employee working on our Reservation is required to register with and obtain a work permit every year from our Department of Labor (DOL). The Nation's DOL issues over 15,000 work permits annually associated with oil and gas

activities. Of the estimated 15,000, it is estimated that 2-3% constitutes Jicarilla Tribal Members.

Presently, approximately ninety percent (90%) of the Nation's government operations are funded with revenues stemming from production of our oil and gas resources. Thus, it is imperative to maximize oil and gas resource revenue by requiring compliance with Federal and Tribal laws and regulations as well as full and timely payment of royalties and taxes. At the same time, incentives such as Federal tax credit and other Federal resources (such as additional staffing and financing opportunities) are necessary to support the development of a robust energy industry on Indian lands. Certainly, maximizing our revenues and protecting our leases will allow the Nation to continue to provide essential governmental services to Tribal Members, and others working and residing on our Reservation.

To that end, the Nation's Oil & Gas Administration (OGA) is our regulatory compliance arm. OGA is lead by a Director who manages 16 employees organized in 7 divisions. OGA also has a lead role in evaluating various proposals and energy deals submitted to the Nation. The OGA directly interacts and coordinates with the Bureau of Indian Affairs (BIA) and Bureau of Land Management (BLM) on regulatory matters. The Nation's Revenue & Taxation Department (R&TD) oversees the collection of royalties and taxes on production of our oil and gas reserves. Through the R&TD, the Nation has developed an extensive auditing program which has operated for many years in collaboration with the Office of Natural Resources Revenue (ONRR) (formerly the Minerals Management Service). Together, the agencies of the Nation have provided the Nation powerful regulatory and auditing resources to achieve the goal of maximizing revenues while protecting our lands and valuable oil and gas reserves.

In addition, the Nation established the Jicarilla Apache Energy Company known as JAECO as a Section 17 Federally chartered corporation which is wholly owned by the Nation. The Nation's primary intent in establishing JAECO was to become the Nation's oil and gas production "operating arm" that could evaluate and develop existing and new acreage for enhancement of production potential. Furthermore, the Nation also sought to provide opportunities for JAECO to evaluate existing lease acreages that come available for possible acquisition through a confirmed

sale or bankruptcy proceedings. The overall intent has been a positive for the Nation, though JAECO's progress has been somewhat stymied in this process due to lack of financing. In summary, there are meaningful and viable opportunities for the Nation through JAECO especially if there are significant financing opportunities to support its initiatives.

Looking forward in expanding and enhancing our efforts to maximize revenues from production of our oil and gas resources, we intend to pursue the following initiatives:

- Continue to update, digitize and improve the Lease Record Management System so that we can more accurately and efficiently track and monitor all of the production on our Reservation;
- Update Environmental Review Documents such as Environmental Assessment and Environmental Impact Statements to address current and future potential impact from increased drilling and development;
- Maximize and expand development potential of current IMLA and IMDA lease acreages, increase drilling and payout on wells, pursue and achieve successful drilling in deeper depths, and develop successful horizontal drilling opportunities;
- Continue our collaborative efforts to provide a unilateral enforcement of lease activity by collaboration with Federal Regulatory Agencies such as BIA and BLM, as well as expedite/streamline the processing of IMDAs, assignments, plans of development, applications for permit to drill (APD), and right-of-way (ROW) agreements, for example; and
- Increase marketing of the Nation's oil & gas resources.

III. SUMMARY OF FEDERALLY RELATED ENERGY ISSUES

In addition, the Nation would like to bring a set of other issues to the Committee's attention which relates to our Federal partners and agencies:

A. Indian Oil and Gas Exploration and Production

The Nation continues to experience challenges with oil and gas lease compliance primarily due to the large amount of acreage under lease and/or production, the number of wells in service, the extensive gas gathering systems operating throughout the Reservation, the large number of

operators and related vendor service providers on the Reservation, to name a few. Under these circumstances, there is an acute need for additional BIA and BLM regulatory oversight including enhanced Federal coordination with the Nation and increased funding to fully support Tribal regulatory needs.

As discussed above, oil and gas leasing activity on our Reservation is conducted in accordance with the IMLA or the IMDA. Through these laws, Congress created a statutory fiduciary relationship, whereby the government acts as a trustee for the Tribes in the context of mineral leasing of Tribal trust resources. Accordingly the three separate agencies within the Department of Interior ("Department") have jurisdiction over Indian leasing: the BIA, the BLM, and the ONRR. The Nation exercises concurrent regulatory jurisdiction with these Federal agencies over oil and gas leasing activities, and the Nation imposes and collects Tribal severance taxes.

Yet, though we have made tremendous progress through the years working with our Federal partners, the Nation believes there is room for improvement as far as coordination among the Nation and the Federal agencies in management and regulation. The Nation requests that Congress exercise oversight to consider a reform of current policies, procedures, practices and systems of the Department of the Interior, the BIA, the BLM, and the ONRR in order to ensure the proper and efficient discharge of the Secretary's trust responsibilities regarding oil and gas leasing on our Reservation.

B. Bankruptcy Declarations by Oil and Gas Lessees

The Nation is concerned about the bankruptcy filings involving entities that hold or assert rights to IMLA leasing interests covering thousands of acres on our Reservation. In some cases, it is apparent that these bankruptcy filings apparently have been pursued as a means to circumvent Federal and Tribal laws. The Nation has already been involved in several bankruptcy proceedings to protect our interest in these IMLA leases. To address this alarming circumvention of Federal law and regulations, the Nation proposes that legislative or administrative fixes be put into place. Specifically, the law should be made clear that prior to any assignment or assumption of Tribal oil and gas leases, especially in the context of bankruptcy cases, both the Tribal mineral owner and the BIA must review and duly approve. A

related issue is compliance by industry and enforcement by the BIA. It is important that Congress protect the integrity of IMLA leases by ensuring that Federal and Tribal oil and gas regulatory authority is not diminished through bankruptcy filings.

C. Hydraulic Fracturing

A burgeoning issue in natural gas production is the practice of hydraulic fracturing, also known as "fracking". We are also experiencing this development on our lands. BLM has provided the Nation its draft regulations on fracking, which would also apply on Tribal lands. The Nation has been involved in these discussions and is aware of both the concerns raised about environmental and water resource contamination and of overlapping and potentially burdensome Federal, Tribal, and state regulations. We continue to watch this closely and plan to file comments on BLM's draft regulations.

D. Split Mineral Estate Development

An important aspect of Energy Development on our Reservation is to protect the integrity of the Nation's sovereignty and control of its lands and the development of its resources. This aspect extends to the development of the split mineral interests on our Reservation. As noted above, our Reservation was not subject to the Allotment Policy and Law and therefore we retain 100% of the surface and mineral estate of our original Executive Order lands. However, the Nation subsequently purchased several large ranches adjacent to the Reservation and such lands and minerals were taken into trust and added to the Reservation. One particular ranch was taken into trust subject to a split mineral estate.

As background, in 1985, the Nation purchased a 55,000 acre ranch contiguous to our northeastern boundary. At the same time, we purchased an approximate undivided twenty-five percent (25%) interest in and to all oil, gas, and other minerals owned by the seller, who held seventy-five percent (75%) of the mineral estate. A third party entity holds the other twenty-five percent (25%) of the mineral interests. In November 1987, the Nation conveyed the surface lands of this property to the United States, to be held in trust. In December 1987, the Nation conveyed its interest in the mineral estate to the United States. On or about March 10, 1988, pursuant to 25 U.S.C. § 465, the United States accepted these conveyances and approved the

trust status of the surface lands and the Nation's undivided interest in the subsurface mineral estate. On or about September 1, 1988, pursuant to 25 U.S.C. § 467, the United States added the surface lands and the Nation's undivided interest in the subsurface mineral estate to the Reservation. *See, Proclamation of Certain Lands as Part of the Jicarilla Apache Reservation*, 53 Fed. Reg. 37355-02 (Sept. 26, 1988).

In 2006, more than twenty years after the Nation purchased the ranch and eighteen years after the United States took into trust the surface lands and mineral interest the Nation purchased, the owner of the majority mineral interest entered into a lease with a third party for mineral development. The lease was not reviewed by the Nation or the BIA even though it purported to lease the Nation's trust lands and its undivided trust mineral interest.

Incidentally in July of 2006, the Solicitor's Office of the Department of the Interior essentially determined that neither the Nation nor the United States could "stop" development, which has led to a confusing opinion which created more questions than answers. In particular, the Solicitor's opinion ignores Supreme Court decisions, which clearly hold that Indian trust land cannot be leased or otherwise encumbered without the approval of Congress. Congress has passed statutes which provide such approval subject to important protections, such as the IMLA and the Indian Reorganization Act. The fundamental reason for these laws is that the United States holds title to Indian trust land, and therefore, the United States must protect the beneficial interest of the Indian nation. The Nation requested the Solicitor to rescind or modify its legal opinion and further requested to meet directly with the Solicitor. Our requests were not granted, though the law is clear that both Federal approval and Tribal consent are required prior to any development or encumbrance of Tribal trust minerals. Congress should exercise its oversight authority over the Department of the Interior to ensure that these important and fundamental principles are fully adhered to, especially in our case where we have worked so hard to protect reservation lands.

E. Dual Taxation of Oil and Gas Production in Indian Country.

Following our victory in the Merrion case, the Supreme Court considered another case arising from our Reservation which involved an oil and gas company's challenge to the imposition of the

New Mexico Oil and Gas Severance Tax for activities on the Reservation arguing that those taxes were preempted by the State and Tribal regulatory schemes. In that case, States were granted permission to impose severance taxes on non-Indian activities involving the on-reservation production of Indian oil and gas reserves in the 1989 United States Supreme Court decision *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989), which established a dual taxation burden on Tribal non-renewable trust resources.

Three years later, Congress acknowledged the problem with this type of dual taxation. In the Energy Policy Act of 1992, Pub. L. 102-486, an Indian Energy Resources Commission ("Commission") was established. Among several other objectives, the Commission was to (1) develop proposals to address the dual taxation of the extraction of mineral resources on Indian reservations; (2) develop proposals on incentives to foster the development of energy resources on Indian reservations; (3) identify barriers or obstacles to the development of energy resources on Indian reservations, (4) make recommendations designed to foster the development of energy resources on Indian reservations and promote economic development; and (5) develop proposals on taxation incentives to foster the development of energy resources on Indian reservations including, but not limited to, investment tax credits and enterprise zone credits.

In June 2001, the Nation attempted to address the dual taxation issue working with our then senior Senator, Pete Dominici, who introduced S. 1106, a bill to provide a tax credit for the production of oil or gas from deposits held in trust for, or held with restrictions against alienation by, Indian Tribes and Indian individuals. A year later, the National Congress of American Indians passed Resolution #BIS-02-060 to include S. 1106 in the National Energy Bill during conference between the United States House of Representatives and the United States Senate. However, the proposed bill was referred to the Committee on Finance, and was not passed into law.

To date, the issues the Commission was to address have not been fully addressed by either the Commission or Congress. As Tribes increase their economic development efforts, issues with dual taxation also increase. Dual taxation is an impediment and deterrent to economic development on Indian trust and restricted land. Dual taxation of Tribal oil and gas reserves

creates an adverse economic environment which impedes self-determination and strong economic development in Indian Country. The United States Congress has the power to address the dual taxation of Tribal non-renewable resources by providing a Federal tax credit for the production of Tribal resources, much like the one Senator Dominici introduced in the 107th Congress.

It is important to note that the State of New Mexico enacted a state severance tax credit for producers who developed new wells after 1995. This is an important incentive to address the dual taxation issue. However, it is also important to note that many of the existing wells on the Nation's lands were placed in service prior to 1995, and that many other States with oil and gas producing Tribal lands do have similar law in place.

Thus, the enactment of a Federal tax credit for the production of oil and gas produced on Indian lands would be helpful in addressing this problem. The creation of such a tax credit would not only address the dual taxation of Tribal non-renewable resources, but would also help stimulate Tribal economies, and contribute to the United States energy policy of boosting domestic production to decrease reliance on foreign production. It is truly ironic that, as America seeks greater energy independence and undertakes hazardous energy sources such as nuclear energy and off-shore drilling, Federal law burdens the development of safe Native American energy resources with dual taxation. This must end.

We respectfully request an opportunity to work with you to craft a provision outlining Federal tax credit for the production of oil and gas produced in Indian Country.

F. Electricity Transmission & Distribution Needs

The final important energy issue the Nation would like to raise with the Committee is our ongoing efforts to address the weak electricity distribution system that serves our Reservation, which has long afflicted our people with rolling blackouts and has suffered from longstanding load capacity deficiencies.

For decades the Nation has struggled with an unreliable source of electric energy. Sadly, the lack of reliable energy has had a direct impact on the quality of life of Tribal members and has slowed down and deterred the growth and business development opportunities. Years of negotiation with the local electric cooperative that serves the Nation via a 26 mile 24.9kv distribution line has not changed this unfortunate situation. After years of study, the Nation has elected to construct its own 115kv transmission line, a line that will provide a reliable source of electric energy for years to come. Perhaps just as important, the line also has sufficient capacity to permit the Nation to facilitate the transmission of electric energy for other power providers across the state of New Mexico.

Most recently, the Nation has undertaken and accomplished the following tasks, all with an eye towards electric energy independence:

- In January of 2011 the Nation contracted with Public Service Company of New Mexico (PNM) to complete a System Impact Study to evaluate the Nation's proposed 115 kV transmission line;
- PNM completed the System Impact Study and issued its findings in June 2011. No adverse findings were noted;
- On September 9, 2011 the Nation passed a resolution authorizing and implementing the next phases of the Nation's project, including continued discussions with PNM regarding siting and interconnection agreements and authorizing the appraisal of the local electric distribution system;
- On October 18, 2011, the Nation, by Ordinance, authorized the creation of the Jicarilla Apache Nation Power Authority;
- In October 2011, the site of the physical interconnection and location of the switch station of the proposed 115kV line with PNM's 345 kV line was identified and blessed with Tribal leaders and local dignitaries;
- In November of 2011, the Nation put the local electrical cooperative on notice of its intent to acquire its electric distribution assets located on Tribal lands;
- In December of 2011, the Nation submitted its draft *Cultural Resource Survey for a Proposed Power Line Easement on the Jicarilla Apache Reservation in Rio Arriba County, New Mexico* to the BIA; and

- In January 2012, the Nation filed comments with the New Mexico Public Regulation Commission addressing the Commission's concerns about FERC Order 1000 and the planning of inter-regional transmission projects in the regional Southwest.

Going forward, the Nation continues to communicate with both PNM and the local co-op on a weekly basis in an effort to coordinate the construction and interconnection of its proposed 115kV transmission line and the acquisition of a distribution system by Spring 2014. As our project progresses, we will also continue communication with our New Mexico Congressional Delegation and this Committee regarding related Federal issues and support that needs to be addressed to bring this project to fruition.

IV. CONCLUSION

In closing, the Nation appreciates the opportunity to appear before this Committee and provide testimony on this extremely important subject. We look forward to working with the Committee to address these pressing Energy issues.