ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

No. 12-5375

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JICARILLA APACHE NATION,

Plaintiff–Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, Secretary of the Department of the Interior

Defendants–Appellees,

and

MERIT ENERGY COMPANY,

Intervenor–Defendant–Appellee,

Appeal from the U.S. District Court
for the District of Columbia, No. 10-2052
(Hon. John D. Bates).

RESPONSE BRIEF OF FEDERAL DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the Federal Defendants-Appellees hereby certifies as follows:

A. Parties, Intervenors, and Amici

The parties, intervenors, and amici appearing before the District Court and in this Court are:

Jicarilla Apache Nation

United States Department of the Interior

Ken Salazar, Secretary of the Interior

Sally Jewell, Secretary of the Interior

Merit Energy Company

There were no *amici curiae*.

B. Ruling under Review

References to the rulings at issue appear in the Brief for Plaintiff-Appellant Jicarilla Apache Nation.

C. Related Cases

This case was not previously before this Court or any other court except for the District Court for the District of Columbia from which this

appeal was taken. Counsel for the Federal Defendants-Appellees is not aware of any related cases pending in this Court or any other court.

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GLOSSARY

APA	Administrative Procedure Act
ALJ	Administrative Law Judge
Br.	Jicarilla's opening brief
Dkt.	District court docket entry
FOGRMA	Federal Oil and Gas Royalty Management Act
IBLA or Board	Interior Board of Land Appeals
MMS	Minerals Management Service
Tr.	Transcript

JURISDICTIONAL STATEMENT

Plaintiff Jicarilla Apache Nation filed suit seeking review of a decision by the Interior Board of Land Appeals ("IBLA" or "Board") regarding whether Merit Energy Company could be liable for civil penalties relating to Merit's calculation of royalties owed to Jicarilla for oil and gas leases on Jicarilla's land. The United States waived its sovereign immunity pursuant to 5 U.S.C. § 702. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1362. The district court issued a memorandum opinion and final judgment resolving all claims on September 26, 2012. Dkt. 28 & 29. Jicarilla filed a timely appeal on November 21, 2012. Dkt. 31. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The IBLA decided that a hearing on a Notice of Noncompliance pursuant to 30 C.F.R. Part 241 can reach the question of a lessee's underlying liability for an Order to Perform even though the lessee did not previously appeal the Order to Perform pursuant to 30 C.F.R. Part 290.

1. Whether the Board's decision was arbitrary, capricious or contrary to law where the relevant statutes and regulations do not address the question and the Board offered a reasonable explanation for its construction of the regulations.

2. Whether the Board had a fiduciary duty to Jicarilla and the American people to interpret the appeal regulations in favor of the Tribe and the federal government as an oil and gas lessor.

STATEMENT OF THE CASE

The Minerals Management Service ("MMS")[1] of the Department of the Interior performed an audit and found that Merit Energy Company, the defendant-intervenor here, had incorrectly calculated the royalties it owed to the Jicarilla Apache Nation, a federally recognized Indian tribe with a reservation in northwest New Mexico, for oil and gas mining Merit had completed on the Tribe's land. MMS issued Merit an Order to Perform, requiring it to recalculate the royalty payments and pay Jicarilla any additional royalties due. The Order to Perform stated that it could be appealed within thirty days of the date of service. Merit did not appeal or

[1] MMS's responsibilities included overseeing royalty payments for oil and gas leases on Federal and certain Indian land. In June 2010, the Secretary of the Department of the Interior renamed MMS the Bureau of Ocean Management, Regulation and Enforcement. *See* Secretarial Order No. 3299. In September 2010, the Secretary transferred the Minerals Revenue Management Program and the Policy and Appeals Division of the former MMS (the two programs relevant to this case) to the Office of Natural Resources Revenue. *See* Secretarial Order No. 3302. This brief continues to refer to the agency actor as MMS to be consistent with Jicarilla's brief and because MMS was the relevant agency for most of the events at the administrative stage.

respond. MMS then issued Merit a Notice of Noncompliance informing Merit that it needed to comply with the order or face civil penalties.

Merit requested a hearing before an Administrative Law Judge ("ALJ") on the Notice of Noncompliance and argued, among other things, that the Order to Perform was not properly served and that Merit was not obligated to do some of the actions required by the Order in the first place. The ALJ concluded that he did not have authority to address Merit's underlying liability to perform the actions in the Order to Perform because Merit had not appealed the Order. On administrative appeal, the IBLA disagreed and held that Merit had not waived the right to address its underlying liability because Interior's regulations governing appeals of Notices of Noncompliance permit such arguments even if a lessee does not administratively appeal an Order to Perform. The district court found that the agency's construction of its regulations was entitled to deference, was not arbitrary or capricious, and violated no fiduciary duty to Jicarilla.

STATUTES AND REGULATIONS – STATEMENT AS TO ADDENDUM

An Addendum of pertinent Statutes and Regulations is provided at the end of this brief, except for the statutes and regulations reproduced in the Addendum of the brief filed by Jicarilla.

STATUTORY AND REGULATORY BACKGROUND

The Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-g, allows tribes, with the approval of the Secretary of the Department of the Interior, to lease unalloted parcels of their land for mining purposes in exchange for royalty payments. 25 U.S.C. § 396a. At all times relevant to this appeal, lessees were required to pay royalties calculated as a specified percentage of the value of the production removed or sold from the lease. 25 C.F.R. 211.41 (1998); 30 C.F.R. §§ 206.170-206.179 (1998).

In 1982, Congress enacted the Federal Oil and Gas Royalty Management Act ("FOGRMA"), 30 U.S.C. §§ 1701-1759, to "clarify, reaffirm, expand, and define the authorities and responsibilities" of the Secretary of the Interior in accounting for royalty payments due from oil and gas leases on Federal lands, Indian lands, and the Outer Continental Shelf. 30 U.S.C. § 1701(b). The statute requires the "development of enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues" owed to the United States and Indian lessors. *Id*. FOGRMA gives the Secretary of the Interior authority to "prescribe such rules and regulations as [she] deems reasonably necessary" to carry out the purposes of the statute. *Id*. at 1751(a).

FOGRMA requires the Secretary of Interior to conduct audits of lease accounts and to "take appropriate actions to make additional collections or refunds as warranted." 30 U.S.C. § 1711(c)(1). Pursuant to 30 U.S.C. § 1711(c)(1), MMS may issue orders, such as the Order to Perform issued here, to lessees to tell them to comply with applicable statutes and regulations. For leases on Indian land, such orders are appealable to the Deputy Commissioner of Indian Affairs pursuant to the agency's general appeal procedures. *See* 30 C.F.R. § 243.1 (1998); 30 C.F.R. §§ 290.1, 290.6 (1998).[2] Such appeals must be filed within 30 days of the service of the order to be appealed. *Id*. at §§ 290.3, 290.5(b). Parties adversely affected by a decision of the Deputy Commissioner of Indian Affairs may appeal to the IBLA. *Id*. at § 290.7.

FOGRMA provides that any person who, after notice of a violation, fails to comply with any applicable requirement, shall be liable for civil penalties. 30 U.S.C. § 1719(a). However, the Act specifically provides that

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[2] In 1999, after the time for appealing the Order to Perform at issue here expired, MMS amended 30 C.F.R. Part 290. 64 Fed. Reg. 26,240, 26,245-46 (May 13, 1999). The amended regulations are no different substantively with respect to the issues in this case. *See* 30 C.F.R. § 290.100, *et seq.* (1999). In 2010, as part of the reorganization of the former MMS, Interior recodified the relevant parts of 30 C.F.R. Part 290 at 30 C.F.R. Part 1290. This brief refers to the 1998 version of the Part 290 regulations unless otherwise noted.

"[n]o penalty under this section shall be assessed until the person charged with a violation has been given the opportunity for a hearing on the record." *Id*. at 1719(e). The Secretary promulgated regulations implementing the civil penalty provisions of FOGRMA, which until 2010 were codified at 30 C.F.R. Part 241.

MMS implements the civil penalties portion of FOGRMA in part by issuing a Notice of Noncompliance to any person it believes has "not followed any requirement of a statute, regulation, order, or terms of a lease for any Federal or Indian oil or gas lease." 30 C.F.R. § 241.51(a) (1999).[3] The Notice of Noncompliance tells the person "what the violation is and what [the person] need[s] to do to correct it to avoid civil penalties under 30 U.S.C. 1719(a) and (b)." *Id*. As part of Interior's implementation of FOGRMA's requirement that no civil penalty be assessed under the Act

[3] In 1999, at the same time Interior amended its 30 C.F.R. Part 290 regulations (see *supra* at 5, footnote 2), it also revised the regulations implementing the penalty provisions of FOGRMA at 30 C.R.F. Part 241. The revisions became effective before MMS issued the Notice of Noncompliance to Merit here, hence the 1999 version of 30 C.F.R. Part 241 applies. *See* 64 Fed. Reg. at 26,240-43. Regardless, the two versions of Part 241 are substantively the same for purposes of this case. In 2010, as part of the reorganization of the former MMS, the Secretary recodified the Part 241 regulations at 30 C.F.R. Part 1241, and amended some of the regulations in ways irrelevant to this appeal. Unless otherwise noted, this brief refers to the 1999 version of the Part 241 regulations, consistent with the ALJ and IBLA decisions.

until the alleged violator is given the opportunity for a hearing on the record, the agency promulgated regulations providing that a recipient of a Notice of Noncompliance may request a hearing on the record before an administrative law judge ("ALJ") within 30 days of receipt. *Id*. at §§ 241.54, 241.72; *see also* 49 Fed. Reg. 37,336, 37,343 (Sept. 21, 1984). The ALJ's decision may be appealed to the IBLA. 30 C.F.R. § 241.73. The Board's decision is the final decision of the agency and may be challenged in district court within 90 days. 30 U.S.C. § 1719(j); 30 C.F.R. § 241.74.

If a recipient of a Notice of Noncompliance does not correct all of the violations in the Notice within the applicable time period, MMS may assess civil penalties by issuing a separate agency action called a Notice of Civil Penalty. 30 C.F.R. § 241.53. A recipient of a Notice of Civil Penalty may also request a hearing on the record before an ALJ, but if the recipient "did not request a hearing on the record on the Notice of Noncompliance," then at this stage the recipient "may not contest [its] underlying liability for civil penalties." *Id*. at § 241.56(a). Instead, the recipient may "challenge only the amount of a civil penalty when [it] receive[s] a Notice of Civil Penalty." *Id*. No similar regulatory provision limits a recipient's ability to challenge its underlying liability during a hearing on a Notice of Noncompliance.

STATEMENT OF FACTS

A. MMS's Order to Perform and Notice of Noncompliance to Merit Energy Company

Between 1993 and 1995, Jicarilla leased certain rights to mine oil and gas on its reservation to Merit pursuant to the Indian Mineral Leasing Act. *Merit Energy Co. v. MMS*, 172 IBLA 137, 139 (Aug. 3, 2007). MMS later conducted an audit of the leases and found several accounting and calculation errors which resulted in incorrect royalty payments. *Id*. Among the errors identified by MMS's audit was Merit's failure to calculate royalty payments by a method known as "major portion" pricing.[4] *Id*.

MMS issued Merit an Order to Perform in February 1999. The Order to Perform directed Merit to identify all leases between Merit and the Tribe between January 1984 and June 1995, to perform "major portion" as well as other accounting calculations, and to pay any royalties found to be due based on those calculations. *Id*. The Order to Perform stated that Merit

[4] Under the terms of Indian leases, the value of oil or gas may, at the discretion of the Secretary, be calculated based on the highest price paid or offered for a "major portion" of like-quality oil or gas from the same field. The lessee would then be required to pay royalties based on that price or the lessee's gross proceeds, whichever is higher. MMS's regulations applicable to Indian leases implement that lease term and state how the "major portion" price should be calculated. 30 C.F.R §§ 206.152(a)(3)(i) (unprocessed gas) and 206.153(a)(3)(i) (processed gas) (1988-1995) recodified to 30 C.F.R. §§ 206.172(a)(3)(i) and 206.173(a)(3)(i) (1996-1999).

could appeal the order under 30 C.F.R. Part 290 (1998) within 30 days of service. *Id*. at 139-140; *see also* 30 C.F.R. § 290.3(a)(1).

Merit did not respond to the Order to Perform. In August 1999, after the time for complying with the order and appealing it had passed, MMS issued Merit a Notice of Noncompliance. *Merit*, 172 IBLA at 140. The Notice of Noncompliance charged Merit with failure to comply with the Order to Perform and ordered Merit to comply within 20 days of receipt or face civil penalties. *Id*.

In September 1999, Merit timely requested a hearing on the Notice of Noncompliance before an ALJ under 30 C.F.R. part 241. *Merit*, 172 IBLA at 140. In November 1999, Merit submitted a response to the Notice of Noncompliance, complying with all parts of the Order to Perform and Notice of Noncompliance except those pertaining to the calculation of royalties based on "major portion" pricing. *Id*.

Before the ALJ, Merit argued that MMS failed to properly serve the Order to Perform and attempted to contest its underlying liability, contending that the methodology in the Order to Perform for calculating "major portion" pricing for leases on the Jicarilla reservation was invalid. *Id*. at 141. MMS argued, however, that the hearing could not address Merit's underlying liability because Merit had failed to appeal the Order to

Perform under 30 C.F.R. Part 290 and thus the hearing could only address the amount of civil penalty Merit owed. *Id*. at 140-41.

The ALJ concluded that he lacked jurisdiction to review the substance of the Order to Perform and thus that there was no reason to hear evidence on the "major portion" pricing issue. *Id*. at 141. The ALJ then conducted a hearing addressing the service of the Order to Perform only. After the hearing, the ALJ determined that Merit had been properly served and upheld the Notice of Noncompliance. *Id*. at 143.

B. Interior Board of Land Appeals Proceedings

Merit appealed the ALJ's decision to the IBLA. Jicarilla intervened in support of MMS. *Id*. at 143. The Board agreed with the ALJ that the Order to Perform had been properly served. *Id*. at 155. The Board, however, held that the ALJ erred in concluding that he lacked jurisdiction to conduct a hearing on whether Merit was liable in the first place for the violations described in the Order to Perform. *Id*. at 144-151. The Board "f[ound] nothing in FOGRMA or the regulations that provides or suggests that the scope of a hearing on the record of a [Notice of Noncompliance] under Part 241 can be cut off or curtailed by the failure to pursue an appeal under Part 290." *Id*. at 145. The IBLA set aside the ALJ's decision and remanded back to the ALJ for a full hearing on the record of the Notice of Noncompliance.

Id. at 156. Jicarilla attempted to challenge the IBLA decision in federal district court. The court dismissed Jicarilla's case without prejudice, concluding that the Board's decision was not yet ripe for review because the remand was still pending and the Board's decision was therefore not an appealable final agency action under the Administrative Procedure Act, 5 U.S.C. § 704. *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 648 F. Supp. 2d 140, 146-48 (D.D.C. 2009). Jicarilla did not appeal that decision to this Court.

On remand, the ALJ stayed the proceedings pending the outcome of another case (known as the Vastar litigation) where the validity of the same methodology for calculating the "major portion pricing" for royalty payments on Jicarilla leases was at issue. The district court in the Vastar litigation ultimately found the methodology invalid. *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 604 F. Supp. 2d 139, 143-45 (D.D.C. 2009).[5] In light of this holding, the ALJ vacated the parts of the Order to Perform and Notice of Noncompliance here that directed Merit to use the major portion pricing methodology and pay Jicarilla additional royalties.

[5] Jicarilla appealed, but this Court reversed only with respect to the pre-1988 regulations, not with respect to the regulations applicable during the time period of the Merit leases at issue here. *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112 (D.C. Cir. 2010).

2010 AR 1-2. The ALJ remanded the case to MMS, at which point the IBLA's 2007 decision became final and ripe for review. 2010 AR 2. Jicarilla then timely filed this suit.

C. District Court Proceedings

Jicarilla's complaint alleged that the IBLA's decision was arbitrary, capricious, or contrary to law under the Administrative Procedure Act ("APA") and breached the duty of trust the United States has to Indian tribes. Dkt. 1 at 6-9. On cross motions for summary judgment, the district court denied Jicarilla's motion and granted Merit's and the government's motions with respect to both claims. *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 892 F. Supp. 2d 285, 297 (D.D.C. 2012).

With regards to Jicarilla's APA claim, the court held that the IBLA's interpretation of FOGRMA and its regulations was reasonable and entitled to deference. *Id*. at 292-93. The court held that the IBLA's decision was entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) because FOGRMA did not specifically address the issue before the agency – whether a party should be able to challenge its underlying liability during a hearing on a Notice of Noncompliance. *Id*. at 293. It concluded that the Board's decision was "based on a permissible construction" of the statute. *Id*. (internal quotation marks omitted). The

court held that Interior's administration of FOGRMA's penalty provisions is entitled to deference because the program is "complex and highly technical" and "[t]he administration of such programs, including how challenges to violations can be presented and resolved, has been specifically entrusted to Interior." *Id*. at 292 (internal quotation marks omitted).

With regards to Jicarilla's breach of trust claim, the court rejected the Tribe's contention that because Interior is acting as a fiduciary when administering FOGRMA, it had to construe the statute and regulations in the Tribe's favor. *Id*. at 296-97. The court distinguished *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) because *Cobell* involved agency actions that pertained only to Indian programs whereas here, the regulations at issue also apply to all federal leases for oil and gas. *Id*. at 296. In addition, FOGRMA requires Interior to enforce its regulations "'effectively and uniformly,'" therefore, it would be unreasonable to require Interior to construe its regulations differently depending on the nature of the party, or to construe the regulations in favor of a tribe in one situation and in turn "bind all other parties to the same construction solely because a tribe, by happenstance, was the implicated party." *Id*. (quoting 30 U.S.C. § 1701(a)(4)).

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment "*de novo* applying the same standards as those that govern the district court's determination." *Mingo Logan Coal Co. v. U.S. Envt'l Prot. Agency*, 714 F.3d 608, 612 (D.C. Cir. 2013) (internal quotation marks omitted).

Under the APA, a court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). This standard of review is "narrow" and "a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

SUMMARY OF ARGUMENT

When Congress enacted FOGRMA, it required Interior to provide an opportunity for a hearing on the record before Interior imposed civil penalties on oil and gas lessees that violated certain requirements. Interior promulgated regulations implementing the hearing requirement and the IBLA interpreted those regulations to allow the hearing here to address Merit's underlying liability to perform the actions required by an Order to Perform, even though Merit had not appealed the Order pursuant to the regulations applicable to such orders. The Board explained its rationale,

noting especially that nothing in FOGRMA or its implementing regulations prevent such hearings from addressing a lessee's underlying liability and that the regulations suggest that hearings on Notices of Noncompliance can address a lessee's underlying liability. Jicarilla has not shown that the Board's interpretation was plainly erroneous or inconsistent with the regulations, therefore this Court should defer to the agency's interpretation.

The doctrine of administrative finality does not require reversal. While agencies often forbid parties from collaterally attacking agency actions that were not administratively appealed, the Board in this case provided a cogent explanation for why the hearing on the Notice of Noncompliance could address Merit's underlying liability to perform the acts required by the Order to Perform.

Finally, Interior did not have a fiduciary duty to interpret its regulations in favor of the Tribe and the federal government when it is a lessor. Jicarilla failed to raise this argument before the district court or the IBLA. Regardless, the provisions of FOGRMA providing for the opportunity for a hearing before civil penalties are imposed on lessees were not enacted for the benefit of Indian tribes, therefore the agency had no duty to interpret its regulations in favor of the Tribe.

ARGUMENT

I. The IBLA's decision was not arbitrary, capricious, or contrary to law.

A. The Board's construction of the statutes and regulations at issue was reasonable and deserves deference.

When courts review an agency's interpretation of a law that it administers, they first look to see if Congress expressed a clear intent on the issue. *Chevron*, 467 U.S. at 842-43. Here, Congress did not express a clear intent on whether a hearing on a Notice of Noncompliance could reach the question of a recipient's underlying liability. Jicarilla does not contend otherwise.

Where, as in this case, a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. Moreover, the oil and gas lease royalty program is a "complex and highly technical regulatory program" which requires "significant expertise" and the "exercise of judgment grounded in policy concerns" that makes deference even more appropriate. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)). This Court has held that increased deference is due to an agency's procedural rules where, as here, Congress has placed significant

discretion with the agency, "the governing statute requires only that a 'hearing' be held," and when the statute "nowhere describes the content of a hearing or prescribes the manner in which this 'hearing' is to be run." *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 920 F.2d 50, 53-54 (D.C. Cir. 1990).

Moreover, an agency's construction of its own regulations receives "substantial deference" and is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *St. Luke's Hospital v. Sebelius*, 611 F.3d 900, 904 (D.C. Cir. 2010) (internal quotation marks omitted). The IBLA's interpretation of the Part 241 regulations to allow hearings on Notices of Noncompliance to reach the question of the underlying liability of the lessee for the violation alleged in the Notice of Noncompliance if the lessee failed to appeal an Order to Perform under Part 290 is neither plainly erroneous nor inconsistent with any of the regulations and should be upheld.

The IBLA examined the Part 241 and Part 290 regulations as well as the history behind the two processes and reasonably concluded that a hearing under Part 241 could reach the lessee's underlying liability. The Board explained that the appeal processes in Parts 241 and 290 are separate and there was "nothing in FOGRMA or the regulations that

provides or suggests that the scope of a hearing on the record of a [Notice of Noncompliance] under Part 241 can be cut off or curtailed by the failure to pursue an appeal under Part 290." *Merit*, 172 IBLA at 145. Specifically, nothing in the regulations makes an appeal under Part 290 "a prerequisite to a hearing on the record under Part 241." *Id*. Rather, the regulations provide that "*[e]xcept as may otherwise be provided in Part 241 hereof*, an order or decision issued . . . by the Royalty Management Program *may* be appealed in accordance with the provisions of part 290 of this chapter." 30 C.F.R. § 243.1 (1998) (quoted at *Merit*, 172 IBLA at 146) (emphasis added); *see also* 30 C.F.R. § 290.102 (1999) (exempting Notices of Noncompliance and Notices of Civil Penalty from the definition of orders appealable under Part 290).

The Board reasoned that because "Merit timely requested the hearing provided by FOGRMA, . . . it is to Part 241 that we must look to ascertain preclusive consequences and to determine the scope of the hearing, not Part 290." *Merit*, 172 IBLA at 144. The IBLA found significant that the Part 241 regulations specifically provide for one circumstance where a hearing cannot reach a lessee's underlying liability: if a lessee requests a hearing on a Notice of Civil Penalty, but had not requested a hearing on a Notice of Noncompliance under section 241.54, that lessee "'may not

contest [its] underlying liability for civil penalties.'" *Id*. at 149 (quoting 30 C.F.R. § 241.56(a)). As MMS explained when promulgating the regulations relating to appeals of civil penalty orders, "[b]y not requesting a hearing on the record on the [Notice of Noncompliance], the recipient waived the right to contest the underlying liability for penalties." *Id*. at 149 (quoting 64 Fed. Reg. at 26,242) (added emphasis omitted). In contrast, the regulations place no similar restriction on a lessor contesting its underlying liability during the hearing on the Notice of Noncompliance, as Merit did here.

Considering the separateness of the Part 290 and Part 241 appeal processes as well as the language of the regulation, the Board concluded that

> the only failure that could finally cut off Merit's right to defend against its alleged noncompliance under Part 241 would be its failure to timely request a hearing on the record of the [Notice of Noncompliance]. Accordingly, Merit's failure to appeal the [Order to Perform] . . . pursuant to Part 290[] was of no consequence to the independent right to a hearing on the record of the [Notice of Noncompliance] pursuant to FOGRMA, at which Merit is entitled to dispute its underlying liability.

Id. at 150. The Board's opinion contains a reasonable interpretation of ambiguous regulations and should be upheld.

B. Jicarilla has not shown that the Board's interpretation was plainly erroneous or inconsistent with any statute or regulation.

Jicarilla contends mainly that the Board's interpretation of the regulations is erroneous because the appeal processes in Part 290 and Part 241 are separate and distinct and the Board inappropriately conflated them. Br. 22-24, 42-43. However, it was exactly the separateness of the two processes that the Board used to explain why its result was correct. *Merit*, 172 IBLA at 145-49. For example, the Board reasoned that "the two appeal routes are separate procedures, and an appeal under Part 290 is not a prerequisite to a hearing on the record under Part 241, as a brief review of MMS' pronouncements in its rulemaking to implement the two appeal procedures confirms." *Id*. at 145. Jicarilla has not shown how the distinct nature of the appeals processes required the Board to reach a different result here.

In support of its argument that the separate nature of the appeals processes require reversal, Jicarilla contends that because the Part 290 and Part 241 appeals go to different places initially (an appeal of an Order to Perform under Part 290 would go to the Deputy Commissioner of Indian Affairs, while an appeal of a Notice of Noncompliance would go to the

Hearings Division under Part 241),[6] the Hearings Division could not hear an appeal of an Order to Perform. Br. 24. However, the hearing on the Notice of Noncompliance is not an "appeal" of the Order to Perform and the Board did not hold that it was. The Board held only that the ALJ had jurisdiction to address Merit's underlying liability in the hearing on the Notice of Noncompliance. *Merit*, 172 IBLA at 151 ("We therefore set aside Judge Sweitzer's decision to the extent that he upheld the [Notice of Noncompliance] in the absence of a hearing on the record and remand the case for such a hearing so that Merit can contest its underlying liability.").

Jicarilla similarly asserts that the hearing on the Notice of Noncompliance is limited to whether Merit complied with the Order to Perform and cannot address whether the Order to Perform is valid. Br. 24. This contention, however, begs the question. The Board reasonably reached the opposite conclusion, explaining that *not* allowing a Part 241 hearing to reach the question of Merit's underlying liability on the Order to Perform "would render the hearing on the record afforded by FOGRMA a mere formality empty of substance or meaning." *Merit*, 172 IBLA at 145.

[6] Of course, appeals of the royalty decisions of the Deputy Commissioner of Indian Affairs and the ALJ both go to the IBLA. 30 C.F.R. §§ 241.73, 290.7.

Likewise, Jicarilla incorrectly asserts that the Board left the Part 290 time limit on appeals of Orders to Perform an "empty shell." Br. 46-47. In fact, the time limit still has meaning because any recipient of an Order to Perform that wants to have the order reviewed by the Deputy Commissioner of Indian Affairs, or have the order reviewed before the agency issues a Notice of Noncompliance, must appeal within the Part 290 time limitations. The Board thus made a "reasonable accommodation" of the policies and procedures that were entrusted to its care (see *Chevron*, 467 U.S. at 844-45) and gave a rational justification for its conclusion.

Jicarilla is incorrect as a factual matter that "no time limit is imposed for requesting a Part 241 hearing," "in sharp contrast to the restriction on Part 290 appeals." Br. 23. Hearings on Notices of Noncompliance pursuant to Part 241 must be requested within 30 days of receipt of the Notice of Noncompliance. 30 C.F.R. § 241.54. Even if there were a difference in the time for requesting further process until Parts 241 and 290, such a difference would not make the Board's construction of the regulations arbitrary and capricious given the Board's reasoning.

Jicarilla's citation of 30 C.F.R. § 241.20(d) (1998) is also of no help. Br. 21-22. As an initial matter, that provision does not apply to this case because Merit's Notice of Noncompliance was issued after it was removed

from the Part 241 regulations in 1999. Regardless, that section states only that the decision at the end of a Part 241 hearing *on a Notice of Noncompliance* will be final unless appealed as provided in 30 CFR Part 243. Nothing in the Board's ruling is inconsistent with saying that a Part 241 hearing is final unless appealed to the Board. Merit appealed the result of its Part 241 hearing to the Board. The 1999 regulations do not state that a hearing on a Notice of Noncompliance under Part 241 cannot reach the question of a lessee's underlying liability to perform the acts cited in an Order to Perform if that order was not appealed through the Part 290 regulations.

In July 2013, the Office of Natural Resources Revenue, successor to MMS for the purpose of enforcing the collection of royalty revenues, and the Office of Hearing and Appeals published a proposed rule that would require orders appealable under Part 290 to be timely appealed under that part or become administratively final. 78 Fed. Reg. 43,843 (July 22, 2013). Jicarilla cites the proposed rule (Br. 48-49), claiming that it "serves to reiterate" that the Board's decision here "was a mistake and misinterpreted Interior's regulations." In reality, the proposed regulation (which the agency has not yet decided to promulgate) demonstrates that there is a gap in the existing regulations. Of course, the agency is free to amend its rules

and fill that gap in a way different from the Board's ruling and consistent with the relevant statutes, as it is considering doing now. However, that does not show that the Board's construction of the existing regulations is clearly erroneous or inconsistent with the regulations.

Finally, Jicarilla asserts that the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 requires reversal because the Board's holding would result in a 33-month deadline for ruling on a Part 290 appeal for federal leases but no deadline for ruling on the same issue if allowed to proceed pursuant to Part 241. Br. 25-26. The Act is inapplicable here because, as Jicarilla admits, it does not apply to leases on Indian land. 30 U.S.C. § 1701 note, citing Pub. L. No. 104-185, § 9, 110 Stat. 1717 ("The amendments made by this Act . . . shall not apply with respect to Indian lands."); *see also* Br. 25. The district court appropriately found this point dispositive. *Jicarilla Apache Nation*, 892 F. Supp. 2d at 294.

Moreover, Jicarilla failed to argue in the administrative process that the Board should consider the Federal Oil and Gas Royalty Simplification and Fairness Act. *See* Tr. 29; 2008 AR010055-60 (Jicarilla's answer before the Board, incorporating MMS's answer (see 2008 AR009992-AR010014)); 2008 AR010277-82 (Jicarilla's response to Merit's reply brief before Board). Accordingly, the issue is not preserved and this Court should not

address it. *Nuclear Energy Institute, Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1297-98 (D.C. Cir. 2004). Because Jicarilla did not present this issue to the Board, the Board had no reason to consider whether its interpretation of the appeal regulations in the context of Federal leases would violate the Federal Oil and Gas Royalty Simplification and Fairness Act or whether the appeal regulations might be interpreted in such a way as to avoid the conflict that Jicarilla posits. This should be an issue for the Board to consider in the first instance, in a case where it is properly raised.[7]

C. The doctrine of administrative finality does not require reversal.

Jicarilla incorrectly contends that the doctrine of administrative finality – meaning that if an agency decision is not appealed administratively, it generally cannot be relitigated later – requires reversal here and means that the Board's construction of the regulations does not deserve deference. Br. 33-44. While the IBLA cases Jicarilla cites recognize the administrative finality principle, none stand for the proposition that the Board can never, as it did here, interpret agency

[7] The Board discussed the Federal Oil and Gas Royalty Simplification and Fairness Act when explaining that Interior considered establishing a single appeal process for all appeals that proceed under Parts 290 and 241. *Merit*, 172 IBLA at 146. However, the conflict that Jicarilla now asserts was never brought to the Board's attention.

regulations to allow examination of a prior agency decision that was not administratively appealed as part of a different process. There is good reason for this. Agencies have broad discretion to order their own administrative processes. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) ("administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties") (internal quotation marks omitted). This discretion includes the ability to establish optional administrative appeals (unless provided otherwise by statute, of course). *See Darby v. Cisneros*, 509 U.S. 137, 154, (1993) ("where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review"). Whether the Part 241 regulations required a lessee to appeal an Order to Perform under Part 290 or only made such appeals an option for lessees who later receive a Notice of Noncompliance is precisely the question the Board addressed in this case. The Board reasonably found that the applicable regulations did not require appeal under Part 290 as described *supra*.

While the IBLA did not directly address administrative finality, see Br. 33-34, 43-44, as the district court held (*Jicarilla Apache Nation*, 892 F. Supp. 2d at 294-95) and we argued (Tr. 30, Dkt. 19 at 15 (Memo. of Support for Fed. Defendants' Cross Motion for Summary Judgment)), the fact that Parts 241 and 290 contain two different appeal processes and that the Part 241 regulations contemplate that Part 241 hearings may address "underlying liability" unless a lessee fails to request a hearing on a Notice of Noncompliance means that administrative finality simply did not apply here and the IBLA did not have to directly address it. An agency's decision of "less than ideal clarity" will be upheld "if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974). This Court has upheld agency decisions even if the agency did not directly address a particular issue. S*ee, e.g.*, *New York v. U.S. Envt'l Prot. Agency*, 413 F.3d 3, 21 (D.C. Cir. 2005). The Board's decision here explained that Merit's failure to appeal the Order to Perform

> foreclosed only the opportunity to challenge the [Order to Perform] before the Deputy Commissioner of Indian Affairs under Part 290. Merit's timely request for a hearing on the record of the [Notice of Noncompliance] pursuant to 30 C.F.R. Part 241 entitled Merit to contest the underlying liability, which includes the nature, extent, and timing of its actions to correct violations identified in the [Order to Perform] and any affirmative defenses thereto, including any defects in the service or substance of the [Order to Perform].

Merit, 172 IBLA at 156. Given that the IBLA concluded that a Part 241 appeal is a separate process that may address underlying liability, it was not necessary to directly address administrative finality.

This Court should not require the agency to forbid a lessee from presenting a defense and contesting its alleged underlying liability in a Part 241 hearing on a Notice of Noncompliance simply because the lessee did not appeal an Order to Perform under Part 290 where the regulations do not explicitly require such an appeal and the Board held otherwise. While Jicarilla asserts that Part 290 is for challenging orders and that Part 241's reference to the ability to challenge "underlying liability" is limited only to the question of whether the lessee complied with the order, not whether the order is valid (Br. 27-28), Jicarilla points to no statute, regulation, or decision applying the administrative finality doctrine that requires that result. The IBLA's interpretation of the agency's regulations is reasonable and should be upheld.

Similarly, Jicarilla's observations that the time limit for appealing under Part 290 is jurisdictional and cannot be waived (Br. 34-36, 45-47),[8] as well as its more general contention that the Board cannot waive or ignore regulations (Br. 36-37) are beside the point because the Board did not waive any jurisdictional requirement or regulation or depart from prior precedent. It merely concluded that the Part 241 hearing and appeal process separately permit a lessee to challenge its underlying liability before a penalty may be imposed. None of the cases cited by Jicarilla involved a Part 241 appeal, thus the Board has not departed from any prior precedent and its decision is not worthy of less deference.

Finally, Jicarilla's contention that no exemption to the doctrine of administrative finality applies here (Br. 39-42) is also irrelevant because the doctrine itself does not apply, as explained above.

II. The IBLA did not violate any trust duty to Jicarilla.

As Jicarilla notes (Br. 50-53), the government owes a fiduciary duty to tribes when managing their assets. However, the trust duty of the United States is defined by statute and regulations. *United States v. Jicarilla*

[8] *See also* Br. 18, n.8, citing addition of a 10-day "grace period" to the Part 290 regulations if appellant could show the appeal was timely transmitted, 54 Fed. Reg. 52,796 (Dec. 22, 1989), and noting that "MMS has been strict in its evaluation of timeliness, a policy that has been consistently upheld by the [IBLA]."

Apache Nation, 131 S. Ct. 2313, 2324-25 (2011); *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). As explained *supra*, no statute or regulation forbids Interior from permitting the hearing on the record mandated by FOGRMA, 30 U.S.C.§ 1719(e), to address a lessee's underlying liability.

In the district court Jicarilla argued that the Board has a trust responsibility to construe Interior's regulations in favor of the Tribe. The court rejected that argument, noting that the regulations "apply to *all* federal leases for oil and gas" and that FOGRMA provides "the Secretary should enforce its regulations 'effectively and *uniformly*.'" *Jicarilla Apache Nation*, 892 F. Supp. 2d at 296 (quoting 30 U.S.C. § 1701(a)(1)) (emphases supplied by district court). The district court then reasoned that it cannot be that the Board "must construe procedural regulations to benefit Jicarilla, but then either bind all other parties to that same construction solely because a tribe, by happenstance, was the implicated party, or take different approaches in construing its own regulations depending on the nature of the party." *Id*.

The district court's conclusion is correct, as this Court has held that the principle that statutes should be construed in favor of Indian tribes applies only to provisions "that are 'for the benefit of Indian tribes,'" not to

provisions of more general application. *City of Tacoma v. Fed. Energy Regulatory Comm'n*, 460 F.3d 53, 64 (D.C. Cir. 2006) (quoting *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976)). Interior's regulations providing for appeals by lessees are not "for the benefit of Indian tribes."

Jicarilla does not challenge the district court's holding on appeal. Instead it raises a new issue, contending that Interior also has a trust duty to the American people in the administration of *federal* oil and gas leases, therefore the agency should not permit any lessee, whether on federal or Indian land, to challenge the conclusions in an Order to Perform in a Part 241 hearing where the lessee has not appealed the Order pursuant to Part 290. Br. 14, 52-53. Jicarilla cites no authority for the proposition that the agency has a fiduciary duty to construe its regulations in favor of the American people aside from references to Interior having a fiduciary duty to the public in managing government resources contained in a report by the House Committed on Oversight and Government Reform. Br. 53 (citing "Teapot Dome Revisited: Dereliction of Fiduciary Duty at the Interior Department," Staff Report, U.S. House of Rep. 111th Congress (Oct. 7, 2009)). Of course, such a report is not the law. Holding that the government had a fiduciary duty to construe ambiguous oil and gas regulations generally in favor of the American people would be a radical

departure from existing law, which applies standard deference principles to Interior's interpretation of oil and gas statutes and regulations. *E.g.*, *Indep. Petroleum Ass'n of Am. v. DeWitt*, 279 F.3d 1036, 1039-40 (D.C. Cir. 2002). In any event, Jicarilla did not make this argument in district court (Dkt. 15 at 21, Dkt. 22 at 10-11, Tr. 16-23), therefore it is waived and this Court should not consider it.[9] *Marymount Hosp., Inc. v. Shalala*, 19 F.3d 658, 663 (D.C. Cir. 1994).

[9] Jicarilla also failed to raise this argument to the IBLA. 2008 AR010055-60 (Jicarilla's answer before the Board, incorporating MMS's answer (see 2008 AR009992-AR010014)), 2008 AR010277-82 (Jicarilla's response to Merit's reply brief before Board)).

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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