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

MERIT ENERGY COMPANY,

Intervenor for Defendant - Appellee

FINAL REPLY BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
THE HON. JOHN D. BATES, DISTRICT JUDGE
(DIST. CT. NO. 1:10-CV-02052-JDB)

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GLOSSARY

ALJ	Administrative Law Judge
APA	Administrative Procedure Act
Director	Director of MMS
FOGRMA	Federal Oil and Gas Royalty Mgmt. Act
Hearings Division	Office of Hearings and Appeals, Dep't of Interior
IBLA	Interior Board of Land Appeals
Interior or DOI	Dep't of the Interior
Jicarilla	Jicarilla Apache Nation
Merit	Merit Energy Co.
MMS	Minerals Mgmt. Serv.
NON	Notice of Noncompliance
OHA	Hearings Division, Office of Hearings and Appeals
ONRR	Office of Natural Resource Revenue
OTP	Order to Perform
Secretary	Secretary of the Interior
Tr.	Transcript of Mot. Hearing, *Jicarilla Apache Nation v. Dep't of Interior et al.*, No. 10-2052 (JDB) (D.D.C. June 8, 2012), ECF. No. 27
Vastar	*Jicarilla Apache Nation v. U.S. Dep't of the Interior, et al.*, No. 07-00803, 604 F. Supp. 2d 139 (D.D.C. 2009)

STATUTES AND REGULATIONS – STATEMENT AS TO ADDENDUM

All applicable statutes and regulations are contained in the addenda to Jicarilla's opening brief or to the Government's or the Intervenor's response briefs.

SUMMARY OF APPELLANT'S ARGUMENT

The IBLA interpreted FOGRMA and its implementing regulations so as to allow Merit to appeal the validity of an Order to Perform ("OTP") at a hearing on a Notice of Noncompliance ("NON"). The IBLA erred first by not completely examining, and then by assigning an erroneous and illogical meaning to, a phrase found in the new FOGRMA regulations. In doing so, the IBLA rendered meaningless the terms of other longstanding regulations that were not at all ambiguous or unclear. In fact, the earlier regulations that were rendered meaningless were explicit and emphatic. There is no evidence that Congress or Interior intended to provide a brand new, duplicative, and inefficient appeal mechanism. Nevertheless, the IBLA unilaterally created just such a mechanism. Notably, the policies and practices of the rest of the agency before and after this IBLA ruling reflect a completely different understanding of the law. Perversely, IBLA's interpretation is actually contradictory to Congress' objectives in enacting FOGRMA. The IBLA's interpretation of FOGRMA and its implementing regulations was neither correct nor at all reasonable.

Accordingly, that interpretation was not entitled to deference and should instead be set aside as arbitrary, capricious, and contrary to the statute and the intent of Congress.

ARGUMENT

I. MMS' APPEAL, ENFORCEMENT, AND PENALTY PROCEDURES ARE CLEAR, LOGICAL, AND EFFICIENT.

A. Congress Recognized the Need for Improved Enforcement.

A mechanism for issuing orders to comply with lease terms and regulations had been in place for many years when Congress enacted FOGRMA in response to the January 1982 Report of the Commission on Fiscal Accountability of the Nation's Energy Resources, also known as the Linowes Commission. *See* Appellant's Br. 19-20, ECF No. 1450130. The Linowes Report discussed the pervasive shortcomings in DOI's royalty management system. *Id.* at 19. The House Report that later accompanied FOGRMA listed among these shortcomings the fact that MMS lacked adequate enforcement tools. *Id.* at 30; *see also* Intervenor's Br. at 2, ECF No. 1459594 (citing H.R. Rep. No. 97-859, at 18 (1982) *reprinted in* 1982 U.S.C.C.A.N. 4268, 4272).

The mechanism for enforcing OTPs lacked teeth. Although producers had available for many years a process for appealing OTPs, *see* 30 C.F.R. Part 290 and its predecessors, the United States had no adequately structured process for assessing penalties for noncompliance. An OTP essentially could be ignored with impunity.

A primary impetus for enactment of FOGRMA was the need for a better means of enforcing OTPs. Congress responded with FOGRMA's penalty provisions. Pub. L. No. 97-451 § 109, 96 Stat. 2447, 2454 (codified as amended at 30 U.S.C. §1719).

Contrary to the imaginative scenario painted by Merit, there is no evidence that Congress harbored any concern that producers suffered from inadequate opportunities to appeal OTPs. There is no indication that Congress believed there was a need for a second appeal process and certainly no indication that Congress meant to displace and invalidate the existing appeal process by substituting a new one. Quite to the contrary, FOGRMA's provision for a hearing on a NON was included as part of the new penalty provisions–penalties intended to increase timely royalty collections–not as a second bite at the apple for producers who failed to avail themselves of the appeal provisions that were already in place and perfectly adequate.

B. MMS Enforcement and Penalty Procedures.

Following the enactment of FOGRMA and the promulgation of its implementing regulations, MMS' enforcement process included three distinct stages. Producers like Merit had entirely different opportunities at each stage.

During the first stage, MMS issues an OTP when it identifies a violation of oil and gas lease terms or regulations. An OTP requires the recipient to report, compute, or pay royalties or other obligations, report production, or provide other information.

Pursuant to 30 C.F.R. § 290.3 (1998), the recipient has the right to appeal and challenge the merits of the OTP in an evidentiary hearing by filing a notice of appeal "within 30 days from service of the order . . . . No extension of time will be granted for filing the notice of appeal." *Id.* at § 290.3(a)(1) & (2). This is the recipient's only opportunity to appeal the validity of the OTP.

At the second stage, should the recipient of the OTP not comply with the directives in the OTP, MMS will issue a NON. The NON provides the violator with 20 days from the date of the notice to comply with the requirements of the OTP without being assessed civil penalties. The NON comes with an opportunity for a hearing on the underlying liability for civil penalties pursuant 30 C.F.R. § 241.54, but at this stage of the enforcement process, the validity of the OTP's requirements is no longer disputable.

At the third stage, should the violator not comply with the reporting or payment requirements of the OTP within 20 days of receipt of the NON, MMS will issue a Notice of Civil Penalty ("NCP"). 30 C.F.R. section 241.56 allows a payor who did not request a hearing on the record on a NON, 10 days from the receipt of the NCP to request a hearing on the record limited to the issue of the amount of the penalty only. At the NCP stage, the hearing is strictly about how much the penalty will be, not whether there will be penalties.

C. MMS Enforcement and Penalty Procedures Applied to Merit.

On February 16, 1999, MMS issued Merit an OTP. The OTP required Merit to recalculate royalties based on major portion prices and dual accounting and then pay any additional royalties due to the Jicarilla Apache Nation. MMS estimated the amount of underpaid royalties to be $1,339,899.79. 30 C.F.R. section 290.3 authorized Merit to file an appeal of the OTP within 30 days. At this first stage in MMS' enforcement process, Merit could have appealed the validity of the OTP (i.e., Merit's liability for additional royalties) including a challenge to the Jicarilla major portion methodology. Instead Merit did nothing. Merit did not perform the major portion calculation as directed. It did not pay the additional royalties it owed to Jicarilla, and it did not avail itself of the opportunity to appeal under Part 290. This was Merit's only opportunity to appeal and as discussed above the regulations are very clear in stating that an appeal must be taken within a strictly enforced time limit.

On August 25, 1999, Merit received a NON issued by MMS. The notice alleged that Merit failed to comply with the OTP and notified Merit that it could be subject to civil penalties under 30 U.S.C. § 1719 and 30 C.F.R. § 241.51. At this stage, Merit had the right to a hearing on "the underlying liability for civil penalties." The opportunity for Merit to appeal the validity of the OTP (i.e., Merit's liability for additional royalties) had already come and gone. Merit did timely avail itself of the

opportunity for a NON hearing. All that remained to discuss at the NON hearing was Merit's "underlying liability for civil penalties" (i.e., whether Merit was in compliance with the MMS' February 16, 1999 OTP, and if not, whether any civil penalties should be imposed against it).

Merit's case is a good example of a situation in which a party might challenge its "underlying liability for civil penalties" at this second stage. The ALJ and IBLA decisions describe how a Merit employee received the OTP but did not forward it to the "right" people within Merit. Assuming Merit needed more than the 20 days under the NON to cure by performing the required royalty recalculations (recall that the OTP provided 90 days), it might have requested a hearing to argue that it should not be liable for penalties because its failure to comply was excusable. One could imagine a hearing officer concluding that penalties would not be appropriate under these circumstances, but neither the language of the regulations nor logic suggests that Merit should be able to assert, many months later, the arguments regarding the underlying liability for additional royalties that would have been the subject of a Part 290 appeal of the OTP itself. If that is what was intended, the regulation would have read something more like "underlying liability for additional royalties, civil penalties, and other amounts due."

D. The IBLA Interpretation Destroys this Logical, Efficient Sequence Prescribed by the Regulations.

There is simply no way to reconcile the structure and strict time limits under Part 290 with the IBLA's illogical reading of Part 241. Under the IBLA's interpretation, the orderly progression of enforcement measures described above becomes nonsensical. It makes no sense to allow a producer who never availed itself of the Part 290 appeal process to argue non validity of the OTP at a NON hearing on liability for civil penalties. The IBLA's interpretation effectively negates the appeal procedures established by Part 290, rather than giving effect to Part 290 and Part 241.

E. Merit's Creative Overhaul of Well Established Rules.

Merit's tortured description of the implementing regulations borders on sophistry. For example, Merit states that "[a]t the time that FOGRMA was enacted the sole administrative appeal process applicable to orders issued by the MMS was contained in 30 C.F.R. Part 290." Intervenor's Br. at 3. Mr. Carver has deliberately conflated the NON hearing with the OTP appeal by methodically referring to the former as an "appeal," which it is not. The reader could be forgiven for supposing, based on Merit's characterization, that the "sole administrative appeal process" was inadequate and that Congress had addressed that failure by providing a second appeal process. *Id.* Although the IBLA inappropriately took it upon itself to do just that, Congress did not. Another example of Merit's blatant obfuscation is the practice of

methodically referring to "underlying liability" instead of the full phrase from the regulation – "underlying liability for civil penalties" – which makes clear that which Merit seeks to make unclear. See, *e.g.*, Intervenor's Br. at 1, 8, 9, 10, 11. As is discussed below, the IBLA adopted that practice as well.

Merit's creative overhaul of well established rules to accommodate its special case was akin to swatting a fly with a sledgehammer. It may have killed the fly, but unfortunately it also did extensive collateral damage and has harmful implications for the future of MMS' entire enforcement program.

II. THE IBLA DECISION IS NOT ENTITLED TO DEFERENCE

The district court erred in deferring to the decision of the IBLA for several distinct reasons. As the district court stated, a decision of the IBLA is generally entitled to "substantial deference," *St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 904 (D.C. Cir. 2010) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)) and is accorded "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (internal quotation omitted)*; see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 150, 150-51 (1991); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Here, however, the IBLA decision is plainly erroneous and inconsistent with the regulations. It is in clear tension with the statute and is

inconsistent with the longstanding position of the Department of the Interior both before and after the IBLA decision.

A. The IBLA Decision is Inconsistent with the Regulations and in Clear Tension with the Statute and Congressional Intent.

As section I(B) above makes abundantly clear, the regulations properly interpreted lay out an ordered and efficient structure for the resolution of challenges at each step as MMS (now ONRR) issues an order, a notice of noncompliance, and a notice of civil penalty. The IBLA decision subverts that orderly process, and it does so in a manner that is clearly erroneous.

1. The Regulation on which the IBLA Relied is not Ambiguous and Compels the Opposite Result.

The district court stated, "[a]s an initial matter, the Court must decide whether Interior's decision is the type of agency action entitled to deference." *Jicarilla Apache Nation v. U.S. Dep't of Interior et al.*, 892 F. Supp. 2d 285, 292 (D.D.C 2012) [JA50-51]. "Generally, the answer is yes so long as the statutes and regulations in question are ambiguous and the [agency's] interpretations are reasonable," *AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 754 (D.C. Cir. 2012) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)). While the district court never expressly concluded that the regulatory scheme is ambiguous, it proceeded as though it were. It erred by not explaining the reasoning for its assumption, and it erred in its

implicit conclusion. Neither the specific regulation relied upon by the IBLA nor the regulatory structure (Parts 290, 241, and 243 taken together) is ambiguous, and the IBLA is entitled to no deference for ignoring the plain meaning of the regulation(s).

a. The IBLA did not Consider Properly or Fully the Meaning of the Full Phrase "Underlying Liability for Civil Penalties."

The IBLA did not consider the full language of the regulatory provision it considered key to its decision. 30 C.F.R. section 241.56 ended with the sentence, "[i]f you did not request a hearing on the record on the Notice of Noncompliance under § 241.54, you may not contest your underlying liability **for civil penalties**." *Id.* (emphasis added). The IBLA either misunderstood or misconstrued the process discussed above in Section I(B) and conflated "liability for civil penalties" with "liability for additional royalties". That error is plain. It completely distorted the meaning of § 241.56 and in the process distorted the entire regulatory structure for the orderly review of orders, notices of noncompliance, and notices of civil penalties.

At the key juncture in its opinion, the district court quoted the reasoning of the IBLA:

> The purpose of a hearing on the record of a NON is to allow the party to challenge its "underlying liability," which is the failure to undertake the actions set forth in the OTP. . . . Therefore, Merit's right to contest its underlying liability necessarily encompasses the right to defend against and even defeat the NON . . . including affirmative defenses based on flaws in the service or basis and substance of the OTP that might excuse

> compliance. We find nothing in FOGRMA or the regulations that provides or suggests that the scope of a hearing on the record of a NON under Part 241 can be cut off or curtailed by the failure to pursue an appeal under Part 290. . . . 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.

Jicarilla, (No. 10-2052), 892 F.Supp. 2d at 291-92 [JA49-51] (quoting *Merit v. MMS*, 172 IBLA 137, 145 [JA191]).

It is telling that the IBLA quoted only part of the regulatory phrase, "underlying liability," and omitted its crucial ending, ". . . for civil penalties." This failure carries over to the pivotal paragraph in the IBLA decision, which immediately precedes its summary "setting aside" of the ALJ's decision. The IBLA wrote:

> Given that the regulation at 30 C.F.R. § 24l.56(a) provides that a party can contest its "underlying liability" in the subsequent hearing on the record of a Notice of Civil Penalty only if it has previously requested a hearing on the NON, it follows that if a party is to have any opportunity to contest its "underlying liability," it must do so in a timely requested hearing on the record of a NON.

Merit, 172 IBLA at 150 [JA196].

A party's "underlying liability for civil penalties" is not the same as its "underlying liability to pay royalties," and the process discussed above in Section I(B) of this brief is the only way to harmonize the regulatory language in all of the provisions. If a party wishes to contest the underlying liability for royalties, it must do so through the Part 290 appeal process. If it wants a hearing to contest its **liability**

for civil penalties, it must do so under § 241.54. If it wants to contest the **amount** of the civil penalties, it may do so under § 241.56.

So, when the IBLA stated that "it follows that if a party is to have any opportunity to contest its 'underlying liability,' it must do so in a timely requested hearing on the record of a NON," it engaged in an impermissible error in logic that is inconsistent with the regulation. *Merit*, 172 IBLA at 150 [JA196]. It does not "follow" at all. A party already had an opportunity to contest its underlying liability for **royalties** at the OTP stage under Part 290. At the NON stage, it is only its liability for **civil penalties** that are expressly addressed by the regulation. The IBLA by deleting the key phrase "for civil penalties" both from its sentence and its reasoning impermissibly changed the meaning of the regulation.

If "underlying liability for civil penalties" meant the same thing as "underlying liability for royalties," the IBLA would have been correct in stating: "Merit's failure to appeal the OTP to the Deputy Commissioner of Indian Affairs pursuant to Part 290, was of no consequence." *Id.* But a regulation addressing only "underlying liability for civil penalties" does not create an "independent right to a hearing on the record of the NON" regarding the liability for additional royalties. *Id.*

Both Merit and the IBLA avoid the use of the full phrase. Particularly in Merit's case that appears to be more than just inadvertent obfuscation. Instead, this

careful avoidance of the full phrase "underlying liability for civil penalties" suggests that the phrase is not at all ambiguous.

Even a cursory examination of the NON issued to Merit confirms that the recalculated royalties **are not civil penalties**. It reads: "This is how you avoid civil penalties: Merit can pay the [MMS] estimated amount [of royalty due] or provide payment and revised calculations." Notice of Noncompliance [JA87-91]. The "underlying liability for civil penalties" –the failure to comply with the OTP–could be avoided by paying either the estimated amount or an amount recalculated by Merit within 20 days. But the royalty due (whether MMS' estimate or an amount recalculated by Merit) was not part of the penalty. In summary, the IBLA's failure to address the entire phrase "underlying liability for civil penalties" is a fatal flaw in its reasoning and thus its conclusion.

Accordingly, the IBLA's interpretation is not "persuasive in its own right," *cf. Christopher v. SmithKline Beecham Corp.* , 132 S. Ct. 2156, 2170 (2012). The IBLA interpretation fails to examine in any meaningful way the very "underlying liability" language on which its ruling turns and as a result eviscerates the appeal procedures of Part 290 because they would become superfluous if a party could simply ignore those time limits with impunity, wait to see if MMS issues a NON, and if so bring its appeal then.

2. The Statute and Legislative History Make it Apparent that Congress would not have Countenanced the Delay and Inefficiency Inherent in the IBLA's Decision.

The regulations at issue were promulgated to implement FOGRMA, which added penalty provisions but made no mention of appeals. Section 109 of FOGRMA deals with penalties. After listing penalties with dollar amounts that section provides:

> (e) No 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.
>
> (f) The amount of any penalty under this section, as finally determined may be deducted from any sums owing by the United States to the person charged.
>
> (g) On a case-by-case basis the Secretary may compromise or reduce civil penalties under this section.

Subsection (e), pursuant to which 30 C.F.R. § 241.54 was promulgated, is expressly limited to penalties. Subsections (f) and (g), which of course immediately follow, are similarly and expressly limited. It follows from the structure of the statutory language that, at the hearing on a NON, the penalty will be "finally determined" and that, the hearing may give rise to "compromise" or "reduce[d] civil penalties under this section." This is the hearing where a violator can "contest your liability for civil penalties" under §241.54 as described in § 241.56.

Congress made clear that it did not intend for FOGRMA to undermine existing law. In "relation to other laws" the statute provides that:

> (a) The penalties and authorities provided in this Act are supplemental to, and not in derogation of, any penalties or authorities contained in any other provision of law.
>
> (b) Nothing in this Act shall be construed to reduce the responsibilities of the Secretary to ensure prompt and proper collection of revenues from coal, uranium and other energy and nonenergy minerals on Federal and Indian lands.

Pub. L. No. 97-451 ("FOGRMA") § 304, 96 Stat. 2461 (codified at 30 U.S.C. § 1753). Clearly the IBLA's interpretation of § 241.54–that nullifies Part 290 and results in delayed collection of royalties, reduced collections, and increased cost and administrative and judicial burden for the agency as trustee as well as its tribal and federal taxpayer beneficiaries–is at odds with the express provisions of FOGRMA.

By elevating this hearing on "liability for civil penalties" to a second opportunity to appeal the OTP, the IBLA incongruously created a situation in which it would now make sense for a violator to ignore an OTP and drag its feet indefinitely while waiting to see whether MMS would go to the trouble and expense of estimating additional royalty due and submitting a NON. It is not hard to see that the IBLA's interpretation has rendered the appeal provisions of Part 290 a dead letter.

Curiously, the IBLA expressed its view that MMS' position on the scope of a NON hearing, "if sustained, would render the hearing on the record afforded by FOGRMA a mere formality empty of substance or meaning." *Merit*, 172 IBLA at 144 [JA190]. Of course that is not at all the case. Meanwhile, the IBLA was apparently

oblivious to the fact that it was committing a much greater sin by nullifying Part 290. *Cf.* 78 Fed. Reg. at 43844.

3. In Addition, the IBLA Decision is Contrary to Prior Precedent regarding Administrative Finality.

The IBLA also failed to consider administrative finality. Administrative finality was addressed and applied by the ALJ in earlier proceedings but those proceedings were merely noted by the IBLA without deliberation or application. The district court then erroneously concluded that the IBLA's path could "reasonably be discerned" in its decision because the doctrine of administrative finality did not apply. *Jicarilla* (No. 10-2052), 892 F.Supp. 2d at 295 [JA52-53]. Improved enforcement of royalty collection was the whole point of the penalty structure imposed by Congress. It simply makes no sense that a regulation intended to implement a statute that imposed a penalty structure that was in turn intended to improve enforcement would actually slow and complicate the collection of royalties. Nevertheless, the IBLA's and district court's disregard for longstanding agency precedent of enforcing strict time limits for appeals had exactly that result.

"[A]n agency's unexplained departure from precedent must be overturned as arbitrary and capricious." *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008). The precedent here was a long history of consistently dismissing administrative appeals untimely filed. *See Save Medicine Lake Coal.*, 156 IBLA 219,

228 (2002) ("Board lacks any jurisdiction to entertain [an] appeal" that "is filed more than 30 days after the appellant has had actual notice" and "must be dismissed."); *U.S. Forest Serv.*, 124 IBLA 336, 339 (1992) (timely filing "necessary" to establish Board's jurisdiction, late filing "deprives the Board of jurisdiction" and "necessitates dismissal"); *Walter Van Norman, Jr.*, 114 IBLA 56, 62 (1990) ("well established" that MMS dismissal of late filed notice of appeal will be affirmed by Board, "strictly interpreted requirement").

The IBLA has held that late filing of a notice of appeal to the Director, pursuant to 30 C.F.R. § 290.3, requires dismissal just as failure to timely file a notice of appeal under 43 C.F.R. § 4.411 deprives the Board of jurisdiction. *See Murphy Oil Corp.*, 147 IBLA 40, 41 (1998); *BLM v. Fallini*, 136 IBLA 345, 348 (1996) (timely filing "essential" to exercise of Board's jurisdiction and "necessary for the orderly administration of Departmental business"); *see also Am. Petroleum Energy Co.*, 160 IBLA 59, 71-72 (2003) (IBLA "has consistently held that . . . if an appeal is not timely filed in the office of the officer who made the decision, the appeal must be dismissed . . . and strict adherence to the rule is required.").

> While agencies are generally under a duty to treat likes cases alike, *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007), they are also "free to change course as their expertise and experience may suggest or require." *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003). While this Court's review under the APA is a highly deferential one, "[w]here an agency departs from established precedent

> without a reasoned explanation, its decision will be vacated as arbitrary and capricious." *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *see also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (agencies departing from their own precedent must "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored")."

Jicarilla v. DOI, (*Vastar*) 604 F. Supp. 2d 139, 143 (D.D.C. 2009) (citations omitted). Not only did the IBLA not, in this court's words, "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored," it is not clear that the IBLA was even aware of the unintended consequences of its ruling.

B. The IBLA Decision is Inconsistent with the Position of Interior and the Understanding of Other Oil and Gas Producers Both Before and After the Decision.

The whole question of deference in administrative law cases is whether to defer to the "agency." Facially, of course, the IBLA made the decision under review here, but this case involves a rare, if not unique, set of circumstances that raises the question: who states the true view of the agency entitled to any deference? In this instance, the IBLA decision was an anomaly, an outlier. And when that decision was confirmed by the district court, Interior promptly stepped in with proposed regulations to correct that deviance from Departmental intent.

1. Interior Consistently Took the Position Advocated by Jicarilla Prior to IBLA Decision.

Exercising its full legislative regulatory power under FOGRMA, Interior promulgated the regulations at issue here. It is apparent from the record that MMS consistently took the position that the only way to challenge the substance of an OTP was through 30 C.F.R. Part 290. For example, when it issued the OTP to Merit, MMS wrote "You have the right to appeal in accordance with the provisions of 30 CFR 290 (1998)." Order to Perform at 9 [JA77]. The attached explanation of the appeal procedures state that they "must" be followed and include the strict time limits of Part 290. There is no mention of an alternative means of challenging the substance of the OTP later in a hearing on a NON.

Not surprisingly, Interior consistently asserted the exclusivity of the Part 290 appeal throughout these proceedings before ALJ Sweitzer, and of course, the ALJ agreed with MMS. MMS again strongly defended the position Jicarilla advances here before the IBLA. Breaking with every apparent interpretation of the regulations by Interior, however, the IBLA reached a contrary conclusion. Even before the district court, Interior continued to support the position that the IBLA had rejected. At the June 8, 2012 motions hearing, Ruth Ann Storey, representing DOI, acknowledged that "the Federal Register notice appears to argue that [a Part 241 hearing] is limited to the amount of the civil penalty." Tr. 27:10-12 [SA4].

2. Other Producers Understood the Regulatory Scheme and Brought Appeals to OTPs under 290.

If the appeal process in the regulations was ambiguous or unclear, one would expect to see producers simply ignoring OTPs while waiting to challenge the substance of the OTPs at the NON hearing stage.

However, no producer other than Merit, *post hoc*, read the regulations the way the IBLA did. As addressed in Appellant's opening brief, Appellant's Br. at 32, during the same June 8, 2012 motions hearing before the district court, Craig Carver, for Merit, said that Merit's was the only such appeal he could find arising under Part 241. Remarkably, he made this statement nearly five years after the IBLA issued its decision. If there were a need – real or perceived – for such appeals under the current version of Part 241, one would expect at least a handful in five years. Mr. Carter even admitted that Merit would have appealed under § 290 but did not because it was timed out.[1] Tr. 33 [JA41]. In short, prior to the IBLA decision, everyone understood that the regulations required a producer to appeal from the OTP in order to challenge the substance of the OTP.

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[1] Of course, Merit was timed out because of its own negligence. Merit's argument that it was not properly served was soundly rejected by the ALJ and affirmed by the IBLA. *See* Appellant's Br. at 32 n. 9 (citing Tr. 33 [JA41] and *Merit*, 172 IBLA at 151-156 [JA197-202].

3. After the District Court Deferred to the IBLA, Interior Timely Promulgated a Proposed Regulation Expressly Overriding the IBLA Decision.

a. Proposed Rule

When it appeared that the IBLA's unsupported and illogical conclusion might survive judicial review, Interior promptly took steps to correct the IBLA's error. On July 22, 2013, less than a year after the district court deferred to the IBLA position, ONRR and OHA published in the Federal Register notice of a proposed rule for "Clarification of Appeal Procedures." 78 Fed. Reg. 43843-46 (July 22, 2013). The agency proposes to add a new 30 C.F.R. §1290.111 to read as follows:

> **§1290.111 What happens if I do not pay or appeal an order?**
>
> If you neither pay nor appeal an order under this part, that order is the final decision of the Department, you have failed to exhaust administrative remedies as required under §1290.110(a), and you may not contest the validity or merits of that order in any subsequent proceeding to enforce that order under 30 U.S.C. 1719 and part 1241 of this chapter.

78 Fed. Reg. 43846.

In its explanation of this specific proposed amendment, ONRR states:

> This amendment would supersede the IBLA decision in *Merit Energy* . . . 172 IBLA 137 (2007). . . . <u>We believe that giving appellants who do not appeal orders under current 30 CFR part 1290 another avenue of appeal when the agency seeks to enforce an order that was not appealed nullifies the intent of part 1290. It also undermines the requirement to</u>

> exhaust administrative remedies by relieving a party of the consequences of failing to do so with respect to the initial order.

78 Fed. Reg. at 43844 (emphasis added).

b. The Proposed Regulation, Consistent with Every Position Taken by Interior on this Issue Except the IBLA Decision, is Entitled to Deference or, at a Minimum, Diminishes any Deference Due the IBLA Decision.

This proposed rule leaves no doubt that the IBLA decision at issue here is an outlier and error, an anomaly that was inconsistent with Interior's regulatory intent and out of step with the rest of the agency. The tepid response to the agency's request for comments on this proposed rule is itself telling.

If the final regulation had already been published (and a motion to stay this appeal until it is may be an option), the new regulation would have a clear place in defining **which** agency position is due deference in this case. The Supreme Court dealt with an analogous situation in *Barnhart v. Walton*, 535 U.S. 212 (2002). The situation is close enough that it is worth quoting Justice Breyer at length:

> Walton also asks us to disregard the Agency's interpretation of its formal regulations on the ground that the Agency only recently enacted those regulations, perhaps in response to this litigation. We have previously rejected similar arguments. *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 741 (1996); *United States* v. *Morton*, 467 U. S. 822, 835–836, n. 21 (1984).
>
> Regardless, the Agency's interpretation is one of long standing. *See supra*, at 220. And the fact that the Agency previously reached its

> interpretation through means less formal than "notice and comment" rulemaking, *see* 5 U. S. C. § 553, does not automatically deprive that interpretation of the judicial deference otherwise its due. *Cf. Chevron*, 467 U. S. at 843 (stating, without delineation of means, that the "'power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy'" (quoting *Morton* v. *Ruiz*, 415 U. S. 199, 231 (1974))). If this Court's opinion in *Christensen* v. *Harris County*, 529 U.S. 576 (2000), suggested an absolute rule to the contrary, our later opinion in *United States* v. *Mead Corp.*, 533 U. S. 218 (2001), denied the suggestion. *Id.* at 230-231 ("The want of" notice and comment "does not decide the case"). Indeed, *Mead* pointed to instances in which the Court has applied *Chevron* deference to agency interpretations that did not emerge out of notice-and-comment rulemaking. 533 U. S. at 230-231 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U. S. 251, 256-257 (1995)). It indicated that whether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue. 533 U. S. at 229-231. . . .
>
> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue. *See United States* v. *Mead Corp.*, *supra*; *cf. also* 1 K. Davis & R. Pierce, Administrative Law Treatise §§ 1.7, 3.3 (3d ed. 1994).
>
> For these reasons, we find the Agency's interpretation lawful.

Barnhart, 535 U.S. at 221-22.

Here the agency has a longstanding course of conduct consistent with the proposed but not yet final rule. And while the proposed rule was apparently prompted "by litigation," and in fact by **this** litigation, the Supreme Court was unconcerned by

that fact when the agency's position, including informal expressions of that position, have been consistent. Of course, Interior's position here has been consistent, but for the IBLA.[2]

The unique timing of this appeal forces the Court and the parties to address the significance of a proposed regulation that is not yet final but is absolutely dead on point and is intended to correct the erroneous interpretation of existing regulations at issue in this very case.

As a general matter, proposed regulations do not share the lofty heights of deference afforded to completed formal rulemakings and adjudications. And as a general matter, that makes sense. A proposed regulation may change after notice and comment. The executive may simply change its mind. As the Supreme Court recognized:

> It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound. Indeed, it would be antithetical to the purposes of the notice and comment provisions of the Administrative Procedure Act, 5 U. S. C. § 553, to tax an agency with "inconsistency" whenever

[2] Of course, Interior's solicitors are duty bound to defend the IBLA decision in this proceeding, but that defense rings hollow as the Department simultaneously is seeking to correct the IBLA's error through regulation.

> it circulates a proposal that it has not firmly decided to put into effect and that it subsequently reconsiders in response to public comment.

Commodity Futures Trading Corp. v. Schor, 478 U.S. 833, 845 (1986).

In context, it makes sense that the Court would pay little heed to a proposed regulation because, once a regulation is finalized, the agency should not be charged with inconsistency if it made reasoned changes before promulgating the final rule.

But this situation is different. As the Court knows, it actually takes considerable institutional thought and effort to publish a proposed rule. It is not an activity that agencies undertake lightly or without thought. And common sense tells us that most rules are published largely in their proposed form unless they draw constructive or otherwise persuasive comments.

There were only two comments submitted in response to the proposed rule here: from Jicarilla and from the American Petroleum Institute ("API"). API's comments did not reflect any concern about losing the second bite at the appellate apple at issue here. Instead, API simply took the opportunity to advance a few minor housekeeping items. There is little reason to believe that Interior's position on the relevant question will change before the regulation is finalized.

Thus, on the one hand, we have a two-judge panel of the IBLA whose opinion is at the very least in tension with the very regulatory language on which it purports to rely. On the other, we have (otherwise) consistent agency positions over a long

period of time, culminating in a proposed regulation that could be finalized soon, perhaps before oral argument in this case.

Our law has come to afford great deference to reasoned agency positions. Here, however, the agency is of two minds, but only one of those is reasoned and longstanding. That is the position that is entitled to deference.

III. MAJOR PORTION METHODOLOGY

A. Major Portion Analysis Required by Leases.

Merit's reference to the "illegal Jicarilla Methodology" and accompanying discussion in its Intervenor's Response brief could easily leave the impression that Jicarilla and MMS were trying to collect something that was not due. Intervenor's Br. at 8. Nothing could be further from the truth. Producers knew, based on clearly stated lease terms, that they were required to calculate and pay royalties using major portion analysis. The issue was not whether those royalties were due, it was whether there were records upon which to base the major portion calculation. That data is available only from MMS. Each payor does not know how much others sold and at what price, but MMS does (or should) since all payors report to MMS. It was the MMS' obligation as trustee for federal and Indian lands to maintain those records. As the *Vastar* district court indicated, however, MMS concluded that it did not have a

database with the information necessary to perform major portion analysis. *Vastar,* 604 F. Supp. 2d at 141.

B. Jicarilla's Alternative Methodology was the Best and Reasonable Estimate of Acknowledged Lease Liability in Light of the United States' Failure to Maintain Records.

Jicarilla proposed a rational alternate methodology that was adopted by agreement with the agency. Major portion is simply about finding market evidence of an arm's-length price for non-arm's length transactions. One does that by looking at a "major portion" of arm's-length sales. The United States failed to maintain that data. Unlike MMS, Jicarilla had records of arm's length sales. Therefore, Jicarilla looked at its own arm's-length sales through the royalty-in-kind program and proposed its alternate methodology based on those sales.

C. Merit Failed to Perform Major Portion Analysis and Should be Required to Pay the Royalties it Still Owes.

Each payor knew it owed royalty based on major portion analysis, but had to decide whether to try to avoid paying it. Many producers calculated royalties based on the prescribed Jicarilla major portion methodology and paid. Others appealed under Part 290. Merit did neither. Merit's approach was one-of-a-kind. Its special treatment has come at the expense of the Jicarilla Apache Nation, to which it owes royalties, and is an affront to other producers who played by the rules. Should the Court reverse, the burden of that decision will fall as it should on Merit and Merit

alone. As Merit itself acknowledged there have been no other cases of producers attempting to treat a NON hearing as an OTP appeal. As noted elsewhere herein, a formal rulemaking by the agency that would supercede the same decision now under review by this Court only attracted two comments, neither of which would preserve Merit's peculiar distortion of the law and regulations. Lastly, the royalties Merit owes to the Jicarilla should be paid by Merit, not the American taxpayers. Jicarilla's breach of trust case against the United States pending in the United States Court of Federal Claims, includes claims for uncollected royalties. The lease terms are clear: Jicarilla is owed royalty calculated using major portion analysis. The breach is clear: MMS failed in its duty to keep data necessary to the major portion analysis, but did not do so. A judgment from the Court of Federal claims will be paid ultimately by the taxpayers. There is no justification for saddling taxpayers with Merit's bill when it failed to appeal timely.

IV. OTHER ARGUMENTS ADVANCED BY THE DEPARTMENT OF INTERIOR AND MERIT ENERGY

Other arguments advanced by the Department of Interior and Merit Energy in their respective Response briefs are adequately addressed in Jicarilla's opening brief filed August 5, 2013.

CONCLUSION

Merit should be held to the requirements of the OTP: that it perform restructured accounting as prescribed and pay to Jicarilla any additional royalties due. The order of the district court should be vacated and the district court should be ordered to vacate the ruling of the IBLA and remand the case to the Hearings Division for a hearing limited to the NON with respect to penalties.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect in 14-point Times New Roman type style and contains 6,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

/s/ Donald H. Grove
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I certify that on this 8th day of November, 2013, I filed the foregoing Final Appellants' Reply Brief electronically with the Clerk of the Court using the CM/ECF System. I further certify that on this day I hand delivered the required paper copies

to the Court. I further certify that counsel for Defendant-Appellee and for Defendant-Intervenor are registered CM/ECF users and will be served via the CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct. Executed this the 8th day of November, 2013.

/s/ Donald H. Grove
Counsel for Plaintiff-Appellant