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

RESPONSE BRIEF OF APPELLEE MERIT ENERGY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA, No. 10-2052
(HON. JOHN D. BATES)

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October 4, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Appellee Merit Energy Company herby certifies as follows:

A. *Parties and Amici*

All parties, intervenors and amici appearing before the district court and in this Court are listed in the Brief for Appellant.

B. *Rulings Under Review*

References to the rulings at issue appear in the Brief for Appellant.

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 Merit is not aware of any related cases pending in this Court or any other court.

s/ Craig R. Carver

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CORPORATE DISCLOSURE

Appellee Merit Energy Company ("Merit") is a Delaware limited liability company organized for the purpose of allowing charitable foundations, university endowment funds, governmental employee pension funds and other tax-exempt institutional investors to make direct investments in producing oil and gas properties. None of the members, parent companies, subsidiaries or affiliates of Merit has any outstanding securities in the hands of the public.

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REGULATIONS

GLOSSARY

A.R.	Administrative Record
ALJ	Administrative Law Judge
Board	Interior Board of Land Appeals
Department or Interior or DOI	Department of the Interior
FOGRMA	Federal Oil and Gas Royalty Management Act of 1982
FOIA	Freedom of Information Act
IBLA	Interior Board of Land Appeals
Jicarilla	Jicarilla Apache Nation
Linowes Report	U.S. Dep't of the Interior, D. F. Linowes, Comm'n Chairman, Report of the Comm'n on Fiscal Accountability of the Nation's Energy Res. ("Linowes Report") (1982)
Merit	Merit Energy Co.
MMS	Mineral Mgmt. Serv.
NON	Notice of Noncompliance
OHA	Hearings Division, Office of Hearings and Appeals
ONRR	Office of Natural Resource Revenue
OTP	Order to Perform
RIK	Royalty in kind

Secretary	Secretary of the Interior
SOR	Statement of Reasons
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

STATEMENT OF ISSUE PRESENTED FOR APPEAL

Whether the district court correctly ruled that a decision of the Interior Board of Land Appeals ("IBLA" or "Board") granting Merit a right to a hearing on the questions of whether additional royalty payments and civil penalties were owed was neither arbitrary, capricious, nor an abuse of discretion.

STATUTES AND REGULATIONS – STATEMENT AS TO ADDENDUM

A separately bound Addendum of pertinent Statutes and Regulations is provided with this brief.

STATEMENT OF THE CASE

The IBLA issued a decision construing Interior's appeal regulations as granting Merit a hearing in which it could "contest its underlying liability, which includes . . . any defects in the . . . . substance" of the order issued against it. 172 IBLA 137, 156 [2010 A.R. 0483]. The IBLA then remanded the case to an administrative law judge, who dismissed the proceeding against Merit based upon the Departmental decision of *Vastar Resources, Inc.*, MMS-98-0131-IND (Mar. 28, 2007), affirmed by the district court in *Jicarilla Apache Nation v. U.S. DOI*, 604 F. Supp. 2d 139 (D.D.C. 2009), and further affirmed in relevant part by this Court in *Jicarilla Apache Nation v. U.S. DOI*, 613 F.3d 1112 (D.C. Cir. 2010). Jicarilla then brought this appeal challenging the IBLA's interpretation of the Department's appeal regulations.

STATEMENT OF FACTS

A. Passage of FOGRMA.

The Federal Oil and Gas Royalty Management Act of 1982 (Pub. L. 97-451, January 12, 1983, 96 Stat. 2447) ("FOGRMA") was enacted to address shortcomings of the Department of the Interior's royalty management system, notably those identified in a voluminous report issued by the Linowes Commission. As stated by the House Report that accompanied the bill, among these shortcomings was the fact that the Mineral Management Service ("MMS") lacked adequate enforcement tools. H.R. REP. 97-859, 1982 U.S.C.C.A.N. 4268, 4272. To address this deficiency, Congress authorized the MMS to impose civil penalties in specified circumstances. The provision that is applicable to this appeal appears at 30 U.S.C. § 1719(a), entitled "Civil Penalties (a) Failure to comply with applicable law. . . ." It provides, in relevant part:

> Any person who – after due notice of violation . . . fails or refuses to comply with any requirements of this Act or any mineral leasing law, any rule or regulation thereunder, or the terms of any lease or permit issued thereunder . . . shall be liable for a penalty. . . .

Congress further conditioned Interior's authority to impose these newly authorized penalties by specifying: "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." 30 U.S.C. § 1719(e).

B. Implementing Regulations.

At 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. That set of regulations provided that a recipient of an MMS order could appeal to the MMS Director (or, in the case of Indian leases, to the Commissioner of Indian Affairs), then to the IBLA. Part 290 granted no opportunity for a hearing on the record. Consequently, before the MMS could seek to impose civil penalties authorized by the new act it had to augment its appeal regulations to provide a hearing on the record.

MMS promulgated final regulations implementing FOGRMA on September 21, 1984, at 49 Fed. Reg. 37,336. In the preamble to that final rule, the Department explained that it was necessary to develop explicit procedures applicable to FOGRMA penalty orders. These procedures were codified in 30 C.F.R. Part 241.[1] Among other obligations, the new regulations required that whenever "MMS believes that any person has committed a violation it will issue a notice of noncompliance specifying the nature of the violations and how it should be corrected." 49 Fed. Reg. 37,336 at 37,343. If the person served with the notice

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[1] As of October 4, 2010, 30 C.F.R. Parts 241, 243 and 290 have been recodified as 30 C.F.R. Parts 1241, 1243 and 1290 with no substantive change relevant to the IBLA interpretation. For the sake of clarity and consistency, Merit, like the district court, will continue to refer to the previously codified citations.

does not correct the violation within 20 days, then he may request a hearing on the record. *Id.*

C. Origins of this Dispute.

Appellee Merit serves as an investment vehicle for charitable foundations, university endowment funds, governmental employee pension funds, and other tax-exempt institutional investors which wish to make direct investments in producing oil and gas properties. Merit's Statement of Reasons ("SOR") at 1 (July 19, 2004) [2008 A.R. 009880]. In March of 1993, certain Merit partnerships acquired a 50% working interest in six gas producing leases located within the boundaries of the Jicarilla Apache Reservation in northern New Mexico. In September of 1995, Merit sold these properties to Conoco. 172 IBLA at 139 [2010 A.R. 0466].

During the 2 ½ year period that Merit's partnerships owned these Jicarilla leases, it sold all of its produced gas in arm's length sales pursuant to industry-standard marketing arrangements tied to 30-day spot market index prices. Merit timely and properly reported all revenues to the MMS, and paid royalties based upon its gross proceeds - in full compliance with all applicable regulations and lease terms. At the conclusion of the administrative proceedings that gave rise to this appeal, all issues except those involving the propriety of the Jicarilla Methodology had been resolved. Order of ALJ at 1 (Nov. 16, 2010) [2010 A.R. 0001].

D. The 1988 "Major Portion Price" Regulation.

During the period of Merit's ownership of leasehold interests on Jicarilla land, the MMS regulations applicable to Indian lands[2] specified that MMS would compute a "major portion" price, then compare that price with the prices received by producers from their own marketing efforts. If the major portion price was higher than that reported by a producer, then that producer would be required to make supplemental royalty payments.

The major portion regulation dictated precisely how the MMS was to calculate that value.[3] Only the MMS can calculate a major portion price, because it alone has the data required for the calculation. By its very nature, "major portion" prices can only be calculated retrospectively, i.e. after all producers in a field have reported and paid royalties based on their actual sales prices.

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[2] 30 C.F.R. § 206.153(a)(3)(i) (1995) (processed gas produced from Indian lands). For the time period at issue in this appeal, an identical "major portion" regulation applied to unprocessed gas produced from Indian lands (30 C.F.R. § 206.152(a)(3)(i) (1995)). In 1996 these regulatory provisions were re-codified at 30 C.F.R. §§ 206.172 and 206.173, without change.

[3] "(ii) For purposes of this paragraph major portion means the highest price paid or offered at the time of production for the major portion of gas production from the same field. The major portion will be calculated using like-quality gas sold under arm's-length contract from the same field (or, if necessary to obtain a reasonable sample, for the same area) for each month. All such sales will be arrayed from highest price to lowest price (at the bottom). The major portion is that price at which 50 percent (by volume) plus 1 mcf of the gas (starting from the bottom) is sold." 30 C.F.R. § 206.152(a)(3)(ii) (1995).

Rather than using the methodology prescribed by regulation:

> In 1996, MMS and Jicarilla began developing an entirely new methodology for calculating the major portion for Jicarilla's natural gas leases. . . . This became known as the "Jicarilla methodology." In 1998 and 1999 MMS used the Jicarilla methodology to compute the major portion prices for gas sold under Jicarilla's leases during the period from January 1984 through June 1995 and then issued thirty-nine Orders to Perform, directing lessees to pay additional royalties for this period.

Jicarilla Apache Nation v. U.S. DOI, 613 F.3d 1112, 1115 (D.C. Cir. 2010).

In *Vastar Res., Inc*., MMS-98-0131-IND (Mar. 28, 2007) ("Vastar"), Interior determined the Jicarilla methodology was in violation of the 1988 Regulations and could not be used to determine the major portion price for gas sold from January 1984 through June 1995. 613 F.3d at 1116. That decision was upheld on appeal by the district court in *Jicarilla Apache Nation v. United States DOI*, 604 F. Supp. 2d 139 (D.D.C. 2009). In summarizing its basis for affirming *Vastar*, the district court stated:

> Interior then went on to explain in detail the myriad ways the Jicarilla methodology violated the 1988 MMS regulations, which included: relying on RIK sales data that constituted substantially less than 50 percent of arm's-length sales; improperly extrapolating major portion prices from the RIK sales data; relying on sales data for gas that was not like-quality in all instances; defining the relevant "area" to include thirty separate pools from many different formations without showing similarity of characteristics; and calculating major portion prices on an annual, rather than monthly, basis.

Id. at 144.

On appeal to this Court Jicarilla narrowed its challenge to the time period

before passage of the 1988 Regulations. 613 F.3d at 1118. In doing so, Jicarilla conceded that the Jicarilla Methodology contradicted the regulation that was in place for the entire time period applicable to Merit in this case. It is therefore undisputed that substantively Merit does not owe additional royalties to Jicarilla.

E. Attempted Application of the Jicarilla Methodology to Merit.

When the MMS first attempted to notify Merit of its alleged obligation to calculate and pay additional royalties, it did so by sending an Order to Perform (the "OTP") dated February 16, 1999, to a former mid-level employee who had not worked at Merit for over six months. SOR at 3 [2008 A.R. 009882].

The result was that the OTP did not come to the attention of Merit's management.[4] The OTP directed Merit to undertake a variety of royalty recalculations (172 IBLA at 139 [2010 A.R. 0466]), some involving purported "major portion prices" provided by MMS. Unaware of its existence, Merit did not respond to the OTP until it received a Notice of Noncompliance dated August 19, 1999 (the "NON").

In contrast to the OTP, the NON was properly addressed to Merit's Chief Financial Officer and received by him on August 25, 1999. [2008 A.R. 007723-25]. The NON required Merit either to perform those royalty recalculations

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[4] The effectiveness of service on Merit was litigated before the administrative law judge and reviewed by the IBLA. That issue is not raised in this appeal.

referenced in the OTP (a copy of which was attached to the NON), or, in the alternative, to pay the amount that MMS *estimated* as being due for major portion price and dual accounting adjustments ($1,339,899.79). [2008 A.R. 007724] It stated that Merit was "subject to potential civil penalties under 30 U.S.C. § 1719 and regulations at 30 C.F.R. § 241.51, 64 Fed Reg 26251-26252 (May 13, 1999)" and granted a right of appeal and to a hearing on the record under 30 C.F.R. § 241.54 (1999). [2008 A.R. 007723] Merit filed a timely appeal of the NON on September 22, 1999. [2008 A.R. 007736-39]

Merit's appeal resulted in an order from an administrative law judge denying Merit a hearing on the underlying question of whether it was in violation of law or regulation in refusing to pay royalties calculated under the Jicarilla Methodology. Order of ALJ (Nov. 16, 2001) [2008 A.R. 003598-602]. Merit appealed that order to the IBLA. The primary issue presented to the IBLA was whether Merit had the right under 30 U.S.C. § 1719 and 30 C.F.R. Part 241 to challenge the underlying validity of the Jicarilla Methodology. The IBLA ruled that it did, and remanded the action back to the administrative law judge "for a full hearing on the record of the NON." (172 IBLA at 156 [2010 A.R. 0483]).

On remand, after awaiting this Court's ruling on Jicarilla's appeal of the *Vastar* decision, the ALJ vacated the portions of the NON and OTP that were based upon the illegal Jicarilla Methodology and remanded the case to ONRR

(formerly MMS). Order (Nov. 16, 2010) [2010 A.R. 0001-03]. Jicarilla then filed this appeal.

SUMMARY OF ARGUMENT

In this case Jicarilla appeals an agency's interpretation of its own procedural regulations. Appeals of this nature call for application of a highly deferential standard of review. The Court must first determine whether the regulations in question implement the intent of Congress or constitute the exercise of authority delegated by statute. If so, then the regulations themselves must be upheld. The agency's interpretation of those regulations must then be given controlling weight unless it is plainly erroneous or inconsistent with the regulatory language.

The IBLA decision concluded that when Interior elected to pursue civil penalties against Merit, Merit was entitled to a hearing on the underlying question of whether the royalties assessed were proper under the 1988 regulation. Merit's right to a hearing in any proceedings invoking civil penalties is mandated by FOGRMA. The statutory mandate was properly implemented by Interior when it enacted its Part 241 regulations pertaining to civil penalty proceedings. The Board's interpretation of those regulations is unremarkable, since it gives meaning and substance to FOGRMA's hearing requirement and is based upon the plain meaning of the regulatory language. Indeed, as the Board noted, this interpretation is required because, among other reasons, accepting Jicarilla's argument "would

render the hearing on the record afforded by FOGRMA a mere formality empty of substance or meaning." 172 IBLA at 145 [2010 A.R. 0472].

Jicarilla's bases for attacking the IBLA decision have been many and varied over the course of these protracted proceedings, but seem to now be focused on two major contentions: (1) "Where the IBLA clearly erred . . . is that where an order to perform has issued, it is compliance (or noncompliance) with that order that provides the 'underlying liability for civil penalties;'" (Appellant's Br. at 27) and (2) the Board's decision violates the doctrine of administrative finality.

The first contention is contradicted by the express language of FOGRMA; therefore the Board's decision to reject it is not only reasonable, it is required. The second is incorrect for at least four reasons, any one of which is sufficient to sustain the IBLA's decision: (a) the OTP is, by its own terms, not a final order; (b) even if deemed to be final, the Board, in exercising the Secretary's review authority, does not accept as precedent erroneous decisions such as the OTP in this case; (c) once MMS chose to use the OTP as the basis for seeking civil penalties and for issuing its NON, Merit's right to defend against its alleged noncompliance arose under Part 241, rendering any failure to appeal pursuant to Part 290 of no consequence; and (d) Part 241 creates one procedure (under § 241.54) where the party charged with a violation can contest its underlying liability, and a second (under § 241.56) where a party is permitted to contest only the amount of civil

penalties, and is barred from contesting its underlying liability.

Interior was required by law and its own regulations to grant a hearing to Merit once MMS chose to seek civil penalties. It was entirely reasonable, if not required, for the IBLA to interpret Interior's appeal regulations so that the hearing would address not only the appropriateness of civil penalties, but also the underlying legality of the royalty assessment itself.

ARGUMENT

A. Standard of Review.

The Court must uphold the decision of the IBLA, unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 753 (D.C. Cir. 2007).

In this case, the Court is reviewing the IBLA's construction of the Department's procedural regulations propounded pursuant to FOGRMA. FOGRMA prevents the Department from assessing a penalty until the person charged with a violation of law or regulation is given the opportunity for a hearing on the record. The IBLA decision held that Interior's regulations implementing

this statutory requirement provided Merit with the opportunity for a hearing on the issue of whether Merit had violated the 1988 major portion price regulation by failing to calculate and pay royalties utilizing the Jicarilla Methodology.

The first question before a court reviewing an agency's construction of a statute it administers is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). In this instance, Congress expressly required in FOGRMA that "[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." 30 U.S.C. § 1719(e).

Proceeding from this language, this Court must first determine whether the Part 241 regulations do nothing more that implement this requirement in the manner in which Congress has directly specified, or in a manner consistent with the unambiguously expressed intent of Congress. If so, the inquiry is at an end.

If the Court concludes that Congressional intent is not clearly expressed, then the Court must still give deference to the Interior Department's construction of the statutory scheme if the construction "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by

the statute [and] not disturb it unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron U.S.A., Inc.*, 467 U.S. at 843-45. "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Authority is delegated, for example, by the agency having the power to engage in adjudication or in notice-and-comment rulemaking. *Id.* at 227. In the instant case, Interior executed its power of rulemaking by promulgating Part 241; then the IBLA, in a formal adjudication, interpreted the Part 241 appeal regulations to grant Merit a right to a hearing on its underlying liability.

The issues posed by Jicarilla's appeal require that deference be accorded on two levels. First, because the adoption (in 1984) and restatement into plain language (in 1999) of FOGRMA-implementing regulations were accomplished pursuant to formal rulemaking procedures, the regulations themselves are due *Chevron* deference.

Second, the ruling of the IBLA interpreting the Part 241 regulations is entitled to "substantial deference" and is given "controlling weight unless it is

plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). The IBLA decision in this case was reached in exactly the type of formal administrative proceeding that is entitled to deference. *Mount Royal Joint Venture*, 477 F.3d at 754-55 (an IBLA decision is agency adjudication and is given *Chevron* deference); *See also Independent Petroleum Assoc. of America v. DeWitt*, 279 F.3d 1036, 1040 (D.C. Cir. 2002) (courts regularly apply *Chevron* deference in royalty cases).

Consequently, the scope of review in this case is highly deferential.

B. The Statute and Its Relation to the Orders at Issue.

As noted above, Interior's authority to impose penalties under Section 109(a) of FOGRMA is triggered when there is a "failure to comply with applicable law." Under that section, any person from whom penalties are sought must receive "due notice of violation," and thereafter must "fail or refuse to comply with any requirements of this chapter or any mineral leasing law, any rule or regulation thereunder, or the terms of any lease or permit issued thereunder." 30 U.S.C. § 1719(a).

Interior's penalty assessment authority is not triggered by a failure to comply with an illegal order issued by the MMS. In addition, the OTP issued by MMS in this case did not constitute the "due notice of violation" required to be given to an alleged violator. The OTP did not advise Merit that it was in violation of the

MMS' major portion price regulation. Rather, it stated that the current audit of Merit had identified "the following systemic problems with your royalty calculations," the relevant one of which for purposes of this appeal was: "you failed to consider major portion value for gas produced and sold from the Jicarilla Apache leases." [2008 A.R. 007669] The OTP supplied, for the first time, the MMS-calculated major portion prices, and further provided, also for the first time, a sketchy outline of how such prices had allegedly been calculated.[5] The OTP did not provide an assessment of royalties due, in either a final or even an estimated amount. In the concluding portion of the OTP, MMS pointed out that Section 109 of FOGRMA "authorizes MMS to assess civil penalties," and warned: "Consequently, your failure to comply with the terms of this Order may be considered a violation pursuant to 30 C.F.R. § 241.51 and could subject you to appropriate penalties as provided therein." (emphasis added). [2008 A.R. 007676] But the OTP did not announce any decision on the part of MMS that it would seek to assess civil penalties against Merit.

Thus, as of the date of the OTP, Merit had not been charged with a violation of anything, much less of a failure to comply with applicable law. Further, the

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[5] The IBLA decision noted that even after Merit filed its appeal under Part 241, "the administrative record provided [by MMS] failed to disclose the price data necessary to understand or perform MMS' major portion price calculations, and that data was redacted in the documents produced in response to the FOIA request." 172 IBLA at 141 [2010 A.R. 0468].

OTP itself contained no final determination of what, if any, remedies MMS would seek in the event that Merit failed to pay additional royalties calculated on the basis of the newly-announced major portion prices.

It was only by issuance of its NON that MMS gave "due notice of violation" and announced its intent to assess penalties against Merit for its alleged failure or refusal "to comply with any requirements of this chapter or of any mineral leasing law, any rule or regulation," as required by FOGRMA. It was by issuance of its NON that MMS put at issue the question of whether Merit's continuing failure to comply with the OTP's requirement to utilize allegedly major portion prices calculated in accordance with the Jicarilla Methodology constituted a failure to comply with the 1988 major portion price regulation.

C. The Implementing Regulations.

As noted in the IBLA decision (172 IBLA at 145-6 [2010 A.R. 0472-3]), the recipient of an NON has three appeals paths available to it: (a) correct the violation within 20 days, thereby eliminating any possibility of having to pay penalties, then challenge the order by pursuing the Part 290 "no hearing" process; or (b) challenge the underlying liability of the NON under the 30 C.F.R. § 241.54 (1999) "full hearing" process; or (c) await issuance of a subsequent Notice of Civil Penalty, then appeal the amount of penalties assessed under 30 C.F.R. § 241.56 (1999), a process in which, as the regulation states, "you may not contest your

underlying liability." The situation is thus analogous to the choice a taxpayer has upon receiving a tax assessment notice from the IRS: appeal the order to Tax Court; or pay the assessment and file for a refund in District Court.

The recipient of an OTP also has choices under these regulations. He can attempt to do what is required by the OTP. Or, he can challenge the underlying validity of the Order, utilizing the "no hearing" appeal procedures of Part 290. Or, he can do nothing, and wait to see if the MMS will think better of the order (e.g. by rescinding it), or will seek to collect additional royalties without seeking penalties, or will decide to issue an NON in order to seek additional royalties and penalties.

To draw another analogy, the situation is similar to that faced by a property owner who receives a notice from the city claiming that his property is zoned R2, that certain aspects of his building are out of compliance with R2 requirements, and he needs to bring them into compliance. In response, he can either: (a) undertake the requested compliance measures; or (b) call the zoning department to point out that they made a mistake (e.g., the property is actually zoned R3 and it is in full compliance); or (c) do nothing until he receives a citation seeking to impose a fine for the alleged violation. Once he receives the citation, there is nothing improper or unusual if the city ordinances allow him to then challenge the underlying validity of the citation, as do the MMS regulations in this instance.

D. The IBLA Decision.

The IBLA explains the history and operation of the Department's procedural regulations in detail (172 IBLA at 144-151 [2010 A.R. 0471-78]). The core of the IBLA's holding is set out at the commencement of its analysis on page 144. There the Board addressed the question of whether Merit's failure to pursue an appeal of the OTP under Part 290 has a preclusive effect on its ability to challenge the substance of the OTP. The Board's discussion notes that Merit's appeal was initiated by a timely request for a hearing under Part 241. Therefore, "it is to Part 241 that we must look to ascertain preclusive consequences and to determine the scope of the hearing, not Part 290." *Id.* at 144. In looking at Part 241, the Board concluded: "The purpose of a hearing on the record of a NON is to allow the party to challenge its 'underlying liability,'" which right "necessarily encompasses the right to defend against and even defeat the NON by . . . affirmative defenses based on flaws in the . . . substance of the OTP that might excuse compliance." *Id.* at 145.

The Board notes 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. . . ." *Id.* It points out that it can 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. . . ." *Id.* The decision observes that "MMS has not cited any authority on the point to the contrary," (*Id.*) a statement which applies equally well to Jicarilla today.

The Board also points out that MMS' arguments to the contrary (which are now Jicarilla's bases for challenging the IBLA decision) "would render the hearing on the record afforded by FOGRMA a mere formality empty of substance or meaning." *Id.* This characterization is unquestionably correct, because if, as Jicarilla argues, Part 290 trumps Part 241, then regardless of whether Merit had timely appealed the OTP under Part 290, it would have lost its right to a hearing on the record before such a right even arose. That would violate the FOGRMA mandate, as well as the language and purpose of the appeal procedures contained in Part 241.

E. The District Court Decision.

The district court decision under appeal succinctly summarized "the central issue in this case" as "whether the IBLA erred in finding that the scope of a Notice of Noncompliance hearing could include arguments as to a party's underlying liability." *Jicarilla Apache Nation v. U.S. DOI*, 892 F. Supp. 2d 285, 289 (D.D.C. 2012). The decision resolved that issue by holding: "Because the Court has determined that the IBLA's interpretation was based on a reasonable construction of FOGRMA, and the regulations in Parts 241 and 290, deference to the IBLA's

interpretation is warranted and the IBLA's decision will be upheld." *Id*.

The court reasoned that since "FOGRMA does not explicitly address the specific question here," its task was to consider whether IBLA's answer "is based on a permissible construction" of FOGRMA. *Id*. at 293. It concluded: "Certainly, it is." *Id*. The balance of the opinion then considered all of the Jicarilla's arguments to the contrary and rejected them as being "unavailing." *Id*. The core of the court's basis for reaching those conclusions was summarized in these terms:

> The IBLA reasonably concluded that nothing in the statute precludes the scope of a Notice of Noncompliance hearing from encompassing a challenge to a party's underlying liability. *Merit Energy Co.*, 172 IBLA at 145. Moreover, the IBLA reasoned that allowing a party to raise its full affirmative defenses – i.e., that it was not subject to any underlying liability at all – was consistent with FOGRMA's mandate that parties have a right to a hearing before penalties based on a party's underlying violations can be imposed. *Id.; see also* 30 U.S.C. § 1719(e).

Id.

F. Jicarilla's Arguments.

Before the district court Jicarilla advanced six arguments, all of which were carefully considered and rejected in the court's opinion. Before this Court, Jicarilla has narrowed and reshaped its attacks into two main arguments, the second of which is largely dependent upon the first. Merit will limit its response to the major points still being advanced by Jicarilla.

1. The Statutory and Regulatory Framework Both Provide that it is Noncompliance with Law or Regulation that Triggers Liability for Civil Penalties.

From the premise that "one of the explicit purposes of FOGRMA was 'to require 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,'" (Appellant's Br. at 19-20, emphasis in original) Jicarilla concludes that it is entitled to the improper collection of amounts that Jicarilla itself long ago conceded were not owed under Interior's 1988 major portion price regulation. This logical disconnect mirrors the errors in Jicarilla's attempt to establish that both the statute and implementing regulations create "distinct methods for challenging orders to perform and penalties assessed for violation of such orders." *Id.* at 16, heading II.

The first flaw in the argument is Jicarilla's assertion that FOGRMA permits penalties to be assessed for a violation of an improper and illegal order. This is, indeed, the keystone of Jicarilla's argument: "Where the IBLA clearly erred, however, is that where an order to perform has issued, it is compliance (or noncompliance) with that order that provides the 'underlying liability ***for civil penalties.***'" Appellant's Br. at 27, emphasis in original.

It is not the IBLA that is in error on this point, it is Jicarilla. As pointed out above, FOGRMA itself does not allow civil penalties to be imposed unless and

until it is established that a person has failed to comply with law or regulation.[6] The statute does not permit penalties to be imposed for failure to comply with an illegal order. Therefore, if MMS chooses to pursue penalties, as it did here against Merit, it is required by statute to put the issue of the legality of any underlying OTP to the test of a hearing on the record. That is the choice that MMS made in this case when it decided to seek civil penalties by issuing its NON, and that is what the IBLA correctly held was the effect of MMS' choice.

MMS could have chosen not to pursue penalties, thereby limiting its remedies to payment of the additional royalties claimed, plus interest. That is what MMS did in the *Oryx*[7] and *Santa Fe*[8] cases relied upon by Jicarilla and discussed in the district court's decision. 892 F. Supp.2d at 295. Had it followed this approach, it would not have triggered FOGRMA's hearing requirement. Had Merit initiated an appeal in a "proceeding disputing the demand for late payment charges," then perhaps Merit, like the appellants in those two cases, might have been precluded from challenging the underlying royalty assessment via such a proceeding. *See,*

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[6] Even the snippet of legislative history quoted by Jicarilla (Appellant's Br., p. 30) contradicts Jicarilla's argument: "The Committee attempted to achieve balance 'by providing a requirement of notice of violation and a lower civil penalty limit for certain violations of the Act and a steeply rising civil penalty for serious violations knowingly or willfully committed.'" Citing S. Rep. No. 97-512, at 17 (1982) (emphasis added).

[7] *Oryx Energy Co.*, 137 IBLA 177 (1996).

[8] *Santa Fe Energy Co.*, 110 IBLA 209 (1989).

Id.

But that is not what happened here. As presaged in the OTP, MMS subsequently elected to issue an NON seeking civil penalties authorized by FOGRMA. Issuance of the NON triggered the need for Interior to provide Merit with the opportunity to obtain a hearing on the record on the issue of whether Merit was in violation of a law or regulation by refusing to pay royalties calculated under the Jicarilla Methodology.

2. The Doctrine of Administrative Finality Does Not Apply in this Case.

As Jicarilla would have it, once the MMS issued its OTP Merit was obligated to appeal that order pursuant to Part 290 – a process which fails to provide Merit with a hearing. Merit's failure to do so within 30 days, or the ultimate denial of that appeal, would then invoke the doctrine of administrative finality. Consequently, all subsequent efforts to avoid underlying liability for royalties and penalties pursuant to an appeal with a right to a hearing under Part 241 would be "a mere formality." *Id*. at 145. According to Jicarilla, "provisions for a hearing on penalties under Part 241 for failure to comply with the OTP do not offer a new opportunity to appeal the validity of the underlying order to recalculate and pay additional royalties." Appellant's Br. at 13.

It is no mystery why Jicarilla takes this position. Extraordinary efforts were undertaken by both Jicarilla and the MMS to hide the facts that went into

development and implementation of the Jicarilla Methodology, and avoid any exploration of its underlying merits. These efforts included production of multiple boxes of blank sheets of redacted documents in its initial version of the administrative record and in responses to FOIA requests.[9] That tactic, in turn, required Merit to resort to federal court to obtain an order to produce the entire administrative record. *See*, *Merit Energy Company v. DOI*, 180 F. Supp. 2d 1184 (D. Colo. 2001). The record that was ultimately produced in response to court order revealed innumerable facts that required a hearing to sort out. These included such documents as a contingency fee agreement between Jicarilla and its auditor, whereby that auditor (who developed and successfully lobbied for MMS' implementation of the Jicarilla Methodology) stood to benefit personally from collections in excess of those authorized by law and regulation. They included innumerable emails and memoranda from MMS staff members explaining why the Jicarilla Methodology was at odds with the regulations and past practices. They included evidence of political appointees overruling the staff in adopting and approving the Jicarilla Methodology. The record provided the facts that were utilized by Jicarilla to try to justify the Methodology, plus a number of facts that were discarded and disregarded by MMS because they demonstrated that the Jicarilla Methodology was invalid. *See*, Merit SOR pp. 25-33. [A.R. 9904-9912]

[9] 172 IBLA at 141.

and A.R. 10252.

By its very nature the calculation of "major portion prices" is heavily fact dependent, requiring MMS to use a proper population of sales prices to do it right. *See, e.g.*, *Burlington Resources Corp*., 151 IBLA 144, 156 (1999) and *Phillips Petroleum Co.*, 152 IBLA 109, 116 (2000). This is precisely the type of case that requires a hearing on the record to establish whether the assertion of royalty obligations and accompanying claim for civil penalties is lawful.

Jicarilla's view of the doctrine of administrative finality would permanently deprive Merit of any right to a hearing that would present an opportunity for it to discover and utilize any or all of these facts in its defense to the charges assessed against it. Jicarilla argues: first, the OTP was a final order; second, it became non-appealable within the agency and non-reviewable in court 30 days after its issuance; third, the unappealed OTP therefore resolved in Jicarilla's favor the issue of whether Merit owed additional royalties; and fourth, upon issuance of the NON the only issue that Interior had jurisdiction to consider was the amount of civil penalties. Each prong of this argument is contradicted by Departmental and judicial precedents. Accordingly, the IBLA's and district court's rejection of this argument was reasonable and correct.[10]

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[10] Jicarilla's description of the "treatment of administrative finality below" (Section III.B.1. of its brief, at pp. 33-34) is simply incorrect. The government's

(a) The OTP was not a final order.

The doctrine of administrative finality has been described by the IBLA as "the administrative counterpart of the principle of res judicata. . . ." *Thermal Energy Co.*, 135 IBLA 291, 306 (1996). For the doctrine to apply at all the decision at issue must itself have been final.

The question of whether an agency decision is final is not dependent upon the particular label placed upon it by the agency; rather, it is the substance of what the agency has purported to do and has done which is decisive. *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942);

As a general concept, "the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual concrete injury." *Darby v. Cisneros*, 509 U.S. 137, 144 (1993). The issue of whether an agency decision is "final" usually comes up in the context of determining whether that decision is ripe for judicial review. The same principles apply in determining whether an MMS decision is final for purposes of applying principles of *res judicata* within the Department. This Court has noted

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counsel did not "agree with the court that the IBLA had failed to address the issue of administrative finality," as asserted in Jicarilla's brief. Instead, the district court ruled. "IBLA did not ignore its prior precedents applying the administrative finality doctrine because that doctrine simply did not apply." 892 F. Supp. at 295. The government's counsel agreed in oral argument that "the law is clear with respect to administrative finality that because it's a separate process and that is what the IBLA found, administrative finality doesn't even kick in." Tr. 31:1-5.

that "different verbal formulations have been used" to determine whether an agency order is "final," including: is it sufficiently direct and immediate, and does it have a direct effect on day-to-day business? Has the agency completed its decision-making process and is the result of that process one that will directly affect the parties? Is the agency action finally operative and decisive? Has the decision-maker arrived at a definitive position on the issue that inflicts an actual, concrete injury? *DRG Funding Corporation v. Secretary of Housing and Urban Development*, 76 F.3d 1212, 1214 (D.C. Cir. 1996). By contrast, courts have defined a nonfinal agency order as one that "does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action." *Id.* (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939)).

Here, the OTP that Jicarilla relies upon as a final decision contained no assessment of royalties due. It alleged no violation of law or regulation. It ordered Merit to perform major portion calculations for a portion of the audit period (from March 1993 through June 1995) "in order to comply with the regulations and lease terms." [2008 A.R. 007672] It granted 90 days to perform the calculations. It stated that for the period July 1995 – September 1995, the major portion prices "will be provided to Merit in the future by MMS." [2008 A.R. 007674] Finally, and most importantly, it indicated – without determining – that still further orders

could be issued in the future, since "your failure to comply with the terms of this Order may be considered a violation pursuant to 30 C.F.R. § 241.51 and could subject you to appropriate penalties as provided therein." [2008 A.R. 007676]

The decision therefore met none of the "finality" criteria discussed above, while it did fit within the "nonfinal" definition by threatening to affect Merit's rights adversely on the contingency of future administrative action.

Most significant is the fact that the contingency that was forecast, but had not yet occurred, was that MMS might invoke its penalty assessment powers. In that case, as the decision stated, MMS would be electing to proceed under the Part 241 appeal regulations that provided for a hearing, rather than the non-hearing procedures set out in Parts 243 and 290. Though the OTP did contain language granting a right of appeal under Part 290, it was entirely unclear what there was in the OTP to be appealed. Was Merit supposed to appeal the decision's order that Merit comply with regulations and lease terms? Did Merit have sufficient information about the basis of the major portion prices that were supplied to know that they were, in fact, out of compliance with the regulations? If Merit was given 90 days to perform the calculations, why was it provided only 30 in which to file a Part 290 appeal? If it didn't appeal under Part 290, what consequences would ensue, given the MMS's indication that Merit might be given the right to appeal under Part 241 in the future?

Therefore, one reason why it was reasonable for the IBLA to conclude that principles of *res judicata* should not be applied to the OTP is that the substance of the OTP did not make it a final decision.

(b) Even if the OTP is deemed final, its illegality provided the IBLA with a compelling reason for not applying the doctrine of administrative finality.

The second prong of Jicarilla's argument is that the doctrine of administrative finality should have made it non-appealable, thus depriving the Office of Hearings and Appeals (OHA) of jurisdictional authority to consider the continued validity of the OTP. The IBLA's rejection of this argument was proper and reasonable, and was supported by long-standing Departmental precedents. The Board had dealt with this issue several times in the past, and had consistently held: "Nor are we limited by the doctrine of administrative finality from considering whether BLM had authority to issue these prospecting permits in the first place." *Thermal Energy Co.,* 135 IBLA 291, 305 (1996). In explaining why the doctrine did not limit its authority to consider and reverse previously final decisions, it considered numerous precedents:

> The rule is not absolute, because decisions by administrative officials, as well as those of this Board, are made exercising authority delegated by the Secretary of the Interior. The Secretary, and those exercising his authority, may review a matter previously decided and correct or reverse an erroneous decision. See *Gabbs Exploration Co. v. Udall, 315 F.2d 37, 40 (D.C. Cir. 1963).* . . .
>
> *Turner Brothers, Inc. v. OSMRE,* 102 IBLA 111, 121 (1988). The

> Secretary of the Interior "is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest." *Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1368 (9th Cir. 1976).* "It necessarily follows that this Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates." *Pathfinder Mines Corp., 70 IBLA 264, 278, 90 I.D. 10, 18 (1983),* aff'd, *Pathfinder Mines Corp. v. Clark, 620 F. Supp. 336 (D. Ariz. 1985);* aff'd, *Pathfinder Mines Corp. v. Hodel, 811 F.2d 1288 (9th Cir. 1987).* In our view, if BLM lacked authority to issue the prospecting permits, that would constitute a compelling legal reason for reviewing its decisions to issue them.

Id. at 306.

In a royalty payment case quite comparable to this one, *Kirby Exploration Company*, 143 IBLA 133 (1998), the Board reached the same conclusion, for the same reasons. There the MMS had issued a decision advising Kirby that it had underpaid royalties. Kirby had not appealed that decision. The Board ruled: "We need not decide whether the April 8, 1991 [MMS] letter was a final order which Kirby was required to appeal because, even assuming arguendo that the letter became a final Departmental decision upon Kirby's failure to appeal, the doctrine of administrative finality does not prevent us from considering whether MMS properly determined that Kirby owed additional royalties for the Kirby leases." *Id.* at 139. Applying the same principles from *Thermal Energy* that are quoted above, the Board in *Kirby* found that the legal invalidity of the non-appealed order provided the necessary compelling reason for reexamining it and reversing the

order's erroneous determination.

Here, the Board was faced with the same situation. The MMS's OTP was premised upon a Jicarilla Methodology that *Vastar* declared to be illegal. 604 F. Supp. 2d 139 (D.D.C. 2009). At the time the IBLA issued the decision that Jicarilla is now appealing, the *Vastar* decision had already been issued by the Assistant Secretary, and was therefore final and binding upon the entire Department, including OHA, MMS and the IBLA. With respect to the 1993-1995 royalties at issue in this case, *Vastar* was subsequently affirmed by the district court and this Court. *Id*; *Jicarilla Apache Nation v. United States DOI*, 613 F. 3d 1112 (D.C. Cir. 2010). In light of this record, Jicarilla's arguments seeking to distinguish the holdings of *Thermal Energy* and *Kirby Exploration* are inexplicable. Jicarilla asserts: "MMS made no admission of error in its Order nor has it offered to correct any alleged error." Appellant's Br. at 40. The fact is that the Assistant Secretary made exactly that admission on behalf of the MMS in *Vastar*, and the IBLA, ALJ and ONRR (as successor to MMS) have all now sought to correct the errors in the OTP by dismissing this case. Similarly, Jicarilla unaccountably claims "There is no allegation that MMS lacked authority to issue its Order as a matter of law," (Appellant's Br. at 40) when in fact there is not only such an allegation, the allegation has now been fully and finally proven to be true. The simple fact is that MMS did lack legal authority to order Merit to pay

additional royalties based upon the Jicarilla Methodology, because that methodology was illegal.

In sum, the IBLA was fully justified by its precedents in determining that the doctrine of administrative finality simply did not apply in this case.

(c) An illegal order, even if not appealed, does not resolve royalty payment issues if MMS seeks civil penalties.

Jicarilla's third argument seems to be that regardless of whether the OTP was legal or not, the failure of Merit to have appealed it under Part 290 within 30 days resolved the royalty issue in Jicarilla's favor. While this argument is closely related to Jicarilla's second argument, discussed above, it focuses on Jicarilla's assertions concerning the relationship between Part 290 and Part 241 appeals regulations.

It is this argument that received most of the IBLA's attention. It conducted a detailed review of the regulatory language itself, as well as the contents of the Federal Register notices proposing the rule, the comments received, the Departmental explanations that accompanied issuance of the final rules, and even Departmental explanations pertaining to the Part 241 process that appeared in conjunction with other, later rules involving the Royalty Simplification and Fairness Act of 1996. 172 IBLA at 144-150 [2010 A.R. 0471-77]. Its conclusion was that:

Because the OTP alleged violations and directed Merit to undertake

> corrective action that furnished the basis for issuing the NON when Merit did not take action within the period specified, 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 NON. Accordingly, Merit's failure to appeal the OTP to the Deputy Commissioner of Indian Affairs pursuant to Part 290, was of no consequence to the independent right to a hearing on the record of the NON pursuant to FOGRMA, at which Merit is entitled to dispute its underlying liability.

Id. at 150.

This holding simultaneously recognized the non-final nature of the OTP and interpreted the Part 241 regulations in a fashion that was reasonable – indeed quite probably the only reasonable interpretation, given the factors discussed in the decision. It acknowledged the importance of the fact that while the OTP "furnished the basis for issuing the NON," by issuing the NON MMS had elected to grant to Merit "the independent right to a hearing on the record of the NON pursuant to FOGRMA," and that by doing so MMS necessarily put in play the question of Merit's underlying liability for additional royalties.

The decision also correctly observed that the interpretation urged by Jicarilla "if sustained, would render the hearing on the record afforded by FOGRMA a mere formality empty of substance or meaning." *Id.* at 145. The IBLA correctly felt that the statute's grant of a hearing on the record was meant to have substantial meaning, and thus interpreted the Department's regulations to give it such meaning. This conclusion furnishes the most telling rebuttal to the full range of

Jicarilla's argument in this appeal. There is no escaping the fact that the very purpose and goal of those arguments is to render the FOGRMA hearing a mere formality. Under the Jicarilla's theory a right to a hearing arises only after a party charged with violating its royalty obligations has already lost all ability to challenge the legality of the order issued against it. This was not the intent that Congress evidenced in the language of its statute, nor was it the intent of the regulations that the Department adopted to implement that statute.

(d) Jicarilla's argument that the only purpose of a Part 241 appeal is to challenge the amount of civil penalties owed contradicts express regulatory language.

Jicarilla's final prong of its administrative finality argument is that upon issuance of an unappealed, final OTP, the only issue remaining to be decided is the amount of civil penalties. The IBLA dealt with this argument by pointing out that Part 241 contains two separate subsections (241.54 and 241.56) only one of which is limited to the amount of civil penalties already assessed. *Id*. at 149. Under § 241.56 "if 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*. After considering both the language and history of these two regulations, the IBLA quite logically concluded:

> Given that the regulation at 30 C.F.R. § 241.56(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.

Id. at 150.

Jicarilla contends (fn 7, at p. 22) that § 241.56 "is actually not relevant to the issues in this case except that it is in this provision that we find the language that seems to have led the IBLA astray." Once again, however, it is Jicarilla that is lost, not the IBLA. Under Jicarilla's view of FOGRMA and the Part 241 regulations, in any and all circumstances the only purpose of a hearing on the record, and indeed the only purpose of any appeal under Part 241, is to determine whether the amount of penalties assessed is correct. But if that were so, what is the purpose and applicability of § 241.54? The fact and consequences of non-compliance would, under Jicarilla's view, have been established in the OTP, before issuance of the statutorily required notice of violation, and before any right to a hearing arose. This interpretation is designed to eviscerate FOGRMA's requirements, and it was rejected by the IBLA because it correctly interpreted the Department's regulations as doing no such thing.

3. ONRR's Proposed Rule Is Irrelevant to this Appeal.

Jicarilla's brief references a July 22, 2013 Federal Register notice containing a proposed rule that would prospectively change the IBLA's holding in this case. (Appellant's Br. at 31.) If the proposed rule is finalized, and if it is applied under facts comparable to those presented here, then a future case might raise the issue of

whether the interpretation urged by Jicarilla in this case is permissible under FOGRMA.

But that is not the issue presented here. Here, the IBLA interpreted the existing regulation as granting Merit a right to a substantive hearing. In so doing, it spoke for the Secretary, and the Secretary has not overruled it. Therefore, the sole question presented here is whether – after applying substantial deference – the decision under appeal is permissible under FOGRMA and its implementing regulations. Resolution of that question is not affected in the slightest by a proposal which might change those regulations on a prospective basis.

4. There Is No Fiduciary Obligation to Deprive Merit of Its Statutory Hearing.

Jicarilla also argues that the Interior Department had a fiduciary obligation to construe Part 241 so as to prevent Merit from receiving the on-the-record hearing called for by FOGRMA.

The extent of the United States' fiduciary obligations to Indian tribes is "established and governed by statute rather than common law." *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2318 (2011). Consequently, the government's duty "is not boundless and cannot be exercised in a manner that exceeds or flouts the authorizing statute or regulations." *Woods Petroleum Corp. v. Department of Interior*, 47 F.3d 1032, 1038 (10th Cir. 1995).

The issues in the cases upon which Jicarilla relies were substantive:

management of and accounting for funds in individual Indian money accounts (*Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001)); and royalty calculation in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555 (10th Cir. 1984). In this case, however, the IBLA was not acting in the role of a fiduciary when it construed Part 241. It was analyzing statutorily mandated procedural regulations applicable to any civil penalty order arising from any federal oil or gas royalty. FOGRMA is a statute of general applicability. It does not establish any special responsibility toward Indian tribes. Similarly, the procedures called for in Part 241 are just that, procedures, which provide for the scope and conduct of the on-the-record hearing mandated by FOGRMA.

Because the IBLA decision involved procedures adopted pursuant to a generally applicable statute, not one that established any fiduciary duty to Jicarilla, the fiduciary duty cited by Jicarilla is wholly inapplicable in this case.

CONCLUSION

The IBLA decision in this case was both reasonable and in full accord with FOGRMA and Interior's regulations. The decision of the district court should be affirmed.

Dated the 4th day of October, 2013.

Respectfully submitted,

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