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**July 14, 2014**

**VIA ELECTRONICALLY @ [www.regulations.gov](http://www.regulations.gov)  
Keyword/ID: ONRR 2012-0055**

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**Re: ONRR Amendments to Civil Penalty Regulations  
Regulation Identifier Number (RIN) 1012-AA05**

The following comments which have been duly authorized to be submitted on behalf of the Jicarilla Apache Nation ("Jicarilla"), are hereby submitted on its behalf by Alan R. Taradash and Donald H. Grove, of the Nordhaus Law Firm, LLP, Special Counsel to Jicarilla. Jicarilla is a major oil and gas producing federally recognized Indian Nation, located in north central New Mexico. Currently, there are in excess of one hundred oil and gas producing leases on the Jicarilla Reservation ("Reservation"). The proposed amendment referenced above directly affects Jicarilla; hence, it is important to consider Jicarilla's views relevant thereto.

The proposal to amend the Office of Natural Resources Revenue's ("ONRR") civil penalty regulations, including clarifying and simplifying the existing regulations for issuing notices of noncompliance and civil penalties, was published in the *Federal Register* on May 20, 2014. Jicarilla appreciates this opportunity to comment on the proposed amendment and clarification. The proposed § 1241.7 would specify matters for which a hearing *may not* be requested. Paragraph (a) of § 1241.7 would provide that a hearing *may not* be requested on liability for a violation in a Failure to Correct Civil Penalty (FCCP) notice if the violation cited by ONRR is a failure to comply with an order that was not appealed under 30 CFR part 1290. This provision, once effective, would prospectively supersede cases which are similar to the "Merit" decision of the Interior Board of Land Appeals (IBLA) in *Merit Energy Co. v. Minerals Management Service*, 172 IBLA 137 (2007), *aff'd*, *Jicarilla Apache Nation v. Dept. of the Interior*, No. 10-2052 (JDB) (*supra* and *infra* "Merit"). Jicarilla appealed that decision in the Court of Appeals for the D.C. Circuit. Unfortunately, the appeal was denied as was the subsequent filed Petition for Rehearing.

Jicarilla is in full support of the proposed amendment and clarification. Therefore, provided with these comments is a copy of Jicarilla's Petition for Rehearing as filed in the Merit case in the D.C. Circuit. That Petition is incorporated herein by reference.

### **The Jicarilla Revenue and Taxation Department**

Jicarilla's Revenue and Taxation Department oversees the collection of royalties and taxes on production of Jicarilla oil and gas reserves. Through the Revenue and Taxation Department, Jicarilla has developed an extensive auditing program which has operated for more than three decades, often in joint audits with the ONRR (formerly the Minerals Management Service, "MMS") through a "Section 202 Audit Agreement" as authorized under Section 202 of the Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"). The Jicarilla Revenue and Taxation Department and the Jicarilla Oil and Gas Administration have provided powerful regulatory and auditing resources to achieve the goal of the proper, complete and accurate determination and collection of revenues due and owing under its oil and gas leases while protecting Jicarilla's lands, sacred sites, natural resources, and valuable oil and gas reserves.

### **Oil and Gas Activity on the Jicarilla Reservation**

Beginning in the 1950s and continuing to date, approximately 377,000 acres or one-third of the Jicarilla Apache Reservation has been developed for oil and gas production. According to recent internal reports, approximately 302,000 barrels of oil and 32 billion cubic feet of natural gas are produced from Jicarilla lands annually, which breaks down to approximately 80 percent natural gas production and 20 percent oil production. There are about 2,150 producing wells on Jicarilla lands and 700 wells that are plugged and abandoned. To support all of this development and production, there are over 2,000 miles of gas gathering pipelines and roads on the Reservation. While a sizable portion of the Reservation is subject to oil and gas production activities, Jicarilla has been diligent in designating and protecting from disturbance pristine areas, sacred sites, its extensive habitat for its many prized species of wildlife, other natural resources, and culturally sensitive areas.

On Jicarilla lands, there are currently 26 record title operators, 132 producing leases issued under the Indian Mineral Leasing Act of 1938 ("IMLA") leases, and 12 producing lease agreements authorized under the Indian Mineral Development Act of 1982 ("IMDA"). Approximately 550 companies have oil and gas production-related Operating Permits to conduct business on the Reservation. Annually, every non-tribal employee working on the Reservation is required to register with, and obtain a work permit from, the Jicarilla Department of Labor. Annually, the Department issues over 15,000 work permits associated with oil and gas activities.

Presently, approximately 90 percent of Jicarilla's government operations are funded with revenues from oil and gas production. Thus, it is both prudent and imperative to maximize oil and gas revenue properly due under its leases by requiring strict compliance with federal and tribal laws and regulations, including requiring full and timely payment of rents, royalties, taxes, and all other sums due from oil and gas activities on the Reservation.

## **Conclusion**

Jicarilla is gratified to now see this proposed amendment and clarification that would prospectively eliminate the mis-application of the regulations governing appeals by oil and gas producers who fail to timely file appeals and then seek to come in "through the back door" as it were, in a manner similar to the very *Merit* decision that Jicarilla has fought so aggressively in court. The Nation welcomes and appreciates ONRR's efforts in this regard.

Jicarilla hopes that its comprehensive treatment of the issues arising in the *Merit* litigation, as presented in its Petition for Rehearing as filed in the Merit appeal, and incorporated herein by reference, will assist ONRR in its deliberations and that other tribal oil and gas lessors will not be similarly deprived of royalties to which they are entitled

Respectfully submitted,

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Office of Natural Resources Revenue  
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IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT

JICARILLA APACHE NATION, Petitioner

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, SECRETARY OF  
THE DEPARTMENT OF THE INTERIOR,

April 18, 2014

Respondents, MERIT ENERGY COMPANY,

Intervenor for Respondents. PETITION FOR PANEL REHEARING

ON PETITION FOR REVIEW FROM A JUDGMENT OF THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA

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The Jicarilla Apache Nation respectfully avers that the court has overlooked or misapprehended important points of law and fact as presented in the Nation's briefs and in oral argument. The Nation believes that at least three of these points are of such significance that the Nation should be granted a rehearing or alternatively that this case should be remanded to the agency.

First, 30 C.F.R. Part 241 cannot be viewed in isolation as providing in Judge Sentelle's words, "a separate track for relief which is not governed by 290," or in Judge Griffith's words "two bites at the apple," or in the words of counsel for the United States "essentially an optional appeal process." The IBLA's conclusion is inconsistent with the regulations themselves. While the Nation thought it had made that inconsistency clear in its briefs, oral argument and the Court's per curiam judgment proved the reverse. The Nation attempts to explain the regulatory inconsistency more clearly below with the focus on the language in the regulations.

Second, the IBLA had not previously considered the interaction between Parts 241 and 290, so there was no prior ruling by the IBLA with which this opinion is inconsistent. Rather, the IBLA's error lies in its inconsistency with well-established and longstanding Departmental **policy and standards**, which is the correct measure, not a narrower focus on "precedent" as the Court seemed to be searching for during oral argument.

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Finally, agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem" in rendering its decision. *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 664, 658 (2007). Here the issue of administrative finality was raised before the IBLA by Merit, by MMS, and by Jicarilla as intervenor. The Board, however,

failed to address administrative finality, a dispositive issue, in its August 3, 2007 Opinion. The Secretary, and those exercising her 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) (citing *West v. Standard Oil Co.*, 278 U.S. 200, 272 n. 4 (1929) (DOI decisions “are not to be controlled by the same strict doctrine of *res judicata* which obtains as to judgments of the courts”). As an alternative or adjunct to granting rehearing, the court may remand this case to the agency to now address the issue of administrative finality, which would correct the IBLA’s patent failure to do so.

The Nation addresses each of these points in turn.

### **I. The IBLA’s Conclusion That Part 241 Creates a Separate, Optional Appeal Process from an Order is Inconsistent with the Agency’s Regulations.**

This court gives “substantial deference to an agency’s interpretation of its own regulations” unless that interpretation is “plainly erroneous or inconsistent with the regulation.” *St. Luke’s Hosp. v. Sebelius*, 611 F.3d 900, 904-905 (D.C.

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Cir. 2010) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). This court has rejected the reading of a regulation’s use of a term in a way that “would lead to absurd results.” *Sec’y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 260–61 (D.C. Cir. 2005) (“This Court will not adopt an interpretation of a statute or regulation when such an interpretation would render the particular law meaningless.”) (citing *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997); *AT&T Corp. v. FCC*, 394 F.3d 933, 938-39 (D.C. Cir. 2005)). As the Supreme Court noted in *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 706 (1991), “An interpretation that harmonizes an agency’s regulations with their authorizing statute is presumptively reasonable.” Here, however, the IBLA not only did not harmonize Part 241 with the purpose of FOGRMA to facilitate the collection of penalties, it failed to even harmonize Part 241 with Parts 290 and 243.

The IBLA’s decision produces a result that is inconsistent with other regulations in ways that the Board does not even acknowledge, much less explain. In fact, the IBLA’s interpretation of Part 241 renders Parts 290 and 243 meaningless and ineffective. Had the IBLA correctly interpreted 241, there would be consistency in the regulations: Part 290 provides the only avenue for challenging an OTP regarding royalty obligations. “You may not request and will not receive an extension of time for filing the Notice of Appeal.” 30 C.F.R. 290.105(b); *see also* Appellant’s

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Br. at 34-37.

If the OTP is not appealed, it becomes final and enforceable. If it is

followed by a NON, the violator may appeal the liability for civil penalties under 241 (but not the royalties themselves, which are by then part of a final enforceable order). *See* § 243.3. Pursuant to § 243.2, compliance with any order issued by the Royalty Management Program of the MMS, including orders for payments of royalty deficiencies shall be suspended by reason of an appeal having been taken pursuant to 30 CFR part 290. Suspension of an order or decision requiring the payment of a specified amount of money (over \$1000) shall be contingent upon the appellant's submission of an MMS-specified surety instrument deemed adequate to indemnify the lessor from loss or damage. Nothing prohibits an appellant from paying any demanded amount pending appeal. If the appeal is granted in whole or in part, the appellant will be entitled to a refund.

MMS's intent in promulgating this rule was "to reduce administrative burden and costs for both industry and the Federal Government while protecting the interests of Federal and Indian mineral lessors during the pendency of an appeal." 57 Fed. Reg. 44991 (Sept. 30, 1992). As clearly provided in the OTP issued to Merit on Feb. 16, 1999, Merit had two options: (1) to file an appeal within 30 days under Part 290 and submit a surety instrument adequate to

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indemnify Jicarilla from loss or damage, or (2) to comply with the OTP. There was no option to do nothing as was incorrectly permitted under the IBLA's interpretation of the regulations. This would have frustrated the very intent of the rulemaking: to allow for an appeal while protecting Jicarilla's interests during the pendency of the appeal. It is inconceivable that Congress or the Agency would have intended such a result.

Next, 30 C.F.R. 243.3 (1998) expressly states:

In order to exhaust administrative remedies, a decision or **order** of MMS' Royalty Management Program **must be appealed pursuant to 30 CFR part 290** to . . . the Deputy Commissioner of Indian Affairs when Indian lands are involved), and subsequently to the Interior Board of Land Appeals under 30 CFR part 290.7 and 43 CFR part 4....

A-38 in Addendum to Appellant's Br. (emphasis added).

In this case, it is indisputable that (1) Merit failed to appeal the OTP (issued by MMS' Royalty Management Program) pursuant to 30 C.F.R. part 290 to the Deputy Commissioner of Indian Affairs; and (2) Merit failed to **subsequently** appeal to the IBLA under 30 C.F.R. part 290.7 and 43 C.F.R. part 4. Yet, the IBLA's interpretation of 241 would render meaningless the requirement that Merit exhaust its administrative remedies by first filing a timely appeal under Part 290 and subsequently to the IBLA.

The decision of the IBLA, which allowed Merit to contest the merits of the OTP in the subsequent NON enforcement proceeding under 30 C.F.R. § 241 even

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though it had failed to appeal the OTP under the governing regulation, Part 290, does not make sense in light of the objectives laid out by Congress in FOGRMA and given the prohibition against interpreting one regulation in a way that renders another regulation meaningless.

It makes no sense on the one hand to have an emphatically stated and strictly enforced time limit for appealing an OTP under 290 with built in surety protections under 243.3, but on the other hand to allow an “alternate appeal process” under 241 long after the 290 appeal is timed out and the OTP has become a final enforceable order. And the two provisions of Part 243 discussed above make it clear that a reading of Part 241 as allowing for a second chance to appeal an OTP is inconsistent with both Parts 243 and 290.

## **II. The IBLA’s Conclusion That an Order to Perform Can Be Appealed By a Violator During Its Hearing on the Violation is Inconsistent with Departmental Policy and Practices; the Law does not Require that Inconsistent IBLA Precedent be Identified.**

“Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a ‘reasoned analysis indicating that prior **policies and standards** are being deliberately changed, not casually ignored.’” *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). Or, as the Nation stated in its opening brief at 46:

While “[d]eference is particularly appropriate when the **agency interpretation** has been consistently applied,” *Gose v. United States Postal Serv.*, 451 F.3d 831, 837 (Fed. Cir. 2006) (citing *Ehlert v.*

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*United States*, 402 U.S. 99, 105 (1971)), an **agency’s** interpretation is accorded less deference when it conflicts with an earlier **pronouncement** of the agency. *Id.* (citing *Thomas Jefferson Univ.*, 512 U.S. at 515), or where evidence indicates that the proffered interpretation runs contrary to **agency intent** at the time of promulgation. *Id.* 838 (citing *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)); *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (citation omitted). (Emphasis added.)

However, during oral argument, the Court’s questioning seemed to focus solely on IBLA “precedent,” not the “intent” or “interpretation” or “pronouncement” of the broader agency, here the Department of the Interior. It is beyond dispute that the IBLA alone is not the “agency” here. It did not promulgate the regulations in question, nor does it enforce them.

While the IBLA is delegated authority to interpret those regulations under some circumstances, IBLA cases are far from the only source to look to for “consistent application.”

Here neither the agency generally nor the IBLA specifically had before or since been faced with a lessee attempting to convert a Part 241 hearing on penalties following a Notice of Non-compliance into an appeal on the merits of an Order to Perform (which can only be had under Part 290). But that is not surprising given the novelty of Merit's position and the consistent position of MMS that the **only** opportunity to challenge the merits of an OTP was through Part 290.

The OTP itself clearly states the agency's position: "You have the right to appeal in accordance with the provisions of 30 CFR 290 (1998). A copy of the

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Appeals Procedures and Bonding Requirements is attached (Enclosure 13)." JA- 77. Predictably, there is no mention that an additional appeal under 241 is available because MMS' position was that one was not. The appeals procedures attached to the OTP are also entirely inconsistent with an additional opportunity to appeal under Part 241 the **royalties** due, rather than under 290.<sup>1</sup> The entirety of the OTP is consonant with the Nation's position that the regulations, including specifically § 241.1, § 243.2, § 243.3, and Part 290, cannot be interpreted consistently with the IBLA's erroneous interpretation of § 241.56 and Part 241 generally. And lest there be any doubt, the OTP did state the position of the agency. It was issued by the "Chief, Royalty Valuation Division" of MMS, not by some low-level official.

The OTP is also consonant with the position taken consistently by MMS in issuing orders to other producers and in Merit's challenge to this OTP under Part 241, as the United States' counsel conceded during oral argument: "Certainly the MMS argued the opposite way in front of the IBLA. That is no secret in this case."

Moreover, the Department's position was stated explicitly by the Deputy Solicitor from the Interior Department in a memorandum regarding this OTP well before this case made its way to the IBLA on appeal.

For example, the enclosure states, "You **must** file the notice of appeal within 30 days of receiving this letter," that any extension of the time to file a statement of reasons "**must**" be requested "within the 30-day appeal time period," and that under 30 CFR § 243.2 (1998) an appeal bond or payment of the underlying royalty amount due is required. JA-86 (emphasis added).

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The Deputy Solicitor took the "extraordinary step" of writing to OHA Director, Robert S. More to request that you instruct the Hearings Division, in your supervisory capacity, concerning the proper scope of the evidentiary hearing in this case. This is an issue with implications for MMS's entire enforcement program, far beyond the case before [ALJ] Sweitzer.

Memo Timothy Elliott, June 6, 2001 at 1, AR008069.

The Deputy Solicitor's express statements, worthy of quotation at length, cautioned that:

Judge Sweitzer is allowing Merit another chance to challenge the validity of the underlying Order, even though Merit slept on its rights and neither complied with the Order nor followed **the required appellate process in 30 C.F.R. Part 290** and 43 C.F.R. Part 4. . . . Such a ruling invites aggrieved parties to ignore Orders and ignore **the established appeals process**. Such a ruling can serve to eviscerate MMS's enforcement program and be used as precedent to similarly eviscerate enforcement programs of other bureaus. As discussed below, **this ruling expands OHA's jurisdiction well beyond the regulations and case law**. We therefore request that you, in your supervisory capacity under 43 C.F.R. § 4.1, Secretarial Order 3218, and 211 DM 13.1, instruct the Hearings Division that **the evidentiary hearing on the record on the Notice of Noncompliance under 30 C.F.R. § 241.54 in this case is limited** to the question of whether Merit failed to comply with the MMS Order (and therefore with the relevant regulations) and the amount of any civil penalty that should be assessed and **may not address the validity of the underlying MMS Order or Merit's liability for additional royalties** under that Order.

Consistent with its standard practice, when MMS issued its Order in this case on February 16, 1999, it included a page concerning appeal rights under 30 C.F.R. § 290.3. (Such an appeal also includes the possibility of an evidentiary hearing on any issues of fact.) Merit did not file an appeal. As noted by Judge Sweitzer in his February 2, 2001, Order, "[30 C.F.R.] Part 290 provides the only avenue of appeal for such orders." Thus, jurisdiction over the initial appeal of an MMS

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Order lies with MMS, not OHA. Moreover, the time for appeal under 30 C.F.R. § 290.3 is jurisdictional, and OHA has no authority to waive a jurisdictional requirement.

*Id.* at 2-3, AR008070-71 (emphasis added).<sup>2</sup> The Deputy Solicitor's memorandum is a clear statement of the Department's position regarding exclusive avenue of appeal under Part 290; a second appeal under Part 241 was expressly not allowed. The IBLA wholly failed to explain its departure from that position, stated both by the MMS Royalty Valuation Division Chief in numerous OTPs and the Deputy Solicitor, not to mention § 243.3.<sup>3</sup> The District Court's considerable deference to the IBLA's decision therefore contravenes the Supreme Court's admonition that

"an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is " 'entitled to considerably less deference' than a consistently held agency view," *INS v. Cardoza-Fonseca*, [480 U.S. 421](#), 446 n. 30, 107 S.Ct. 1207, 1221, n. 30, 94

L.Ed.2d 434 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273, 101 S.Ct. 1673, 1681, 68 L.Ed.2d 80 (1981)).

His concern and the points he raised then are mirrored now in the near-final rule that will “supersede” IBLA’s *Merit* decision. 78 Fed. Reg. 43843, July 22, 2013, Appellant’s Addendum A-102.

The IBLA decision also contravened the Department’s longstanding practice of strictly enforcing time limits for appeal under the doctrine of administrative finality. Despite the parties’ having raised administrative finality in their filings, the Board sidestepped that dispositive issue, as discussed in Part III.

The IBLA’s conclusion was also inconsistent with the agency’s statements when promulgating regulations implementing RSFA amendments to FOGRMA. Lest there be any confusion over the distinction between 241 and 290, the agency added: “. . . the purpose of section 1724(h) [RSFA] was to address perceived problems with MMS’s administrative appeal process that are **unrelated** to civil penalty proceedings. 64 Fed. Reg. at 26247-48 (emphasis added); *see* Appellant’s Br. at 23-26.

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*Thomas Jefferson Univ.*, 512 U.S. at 515. And again, agencies “must provide a ‘reasoned analysis indicating that prior **policies and standards** are being deliberately changed, not casually ignored.” *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (emphasis added).<sup>4</sup> The IBLA’s radical departure from the position taken by the Department over many years is both unexplained and not entitled to deference.

### **III. Given the Inconsistency of the IBLA’s Decision with the Regulations and the Department’s Prior Position, the IBLA’s Failure to Address Administrative Finality was Clear Error and Provides Ample Grounds for a Remand to the Agency if not Outright Reversal.**

Administrative finality was addressed by Merit, MMS, Jicarilla, and by ALJ Sweitzer, but the IBLA failed to address that dispositive issue.

ALJ Sweitzer ultimately held that he was barred by the doctrine of administrative finality from entertaining any challenge to the underlying validity of the Order to Perform (OTP) issued to Merit in 1999. Merit appealed that decision to the IBLA. *See* Order on jurisdiction at 3, November 16, 2001, AR003600; *cited in* SOR at 20-21 AR009899-900.

*See also*, “[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.” *Ramaprakash v. FAA*, 346 F.3d 1121, 1130 (D.C. Cir. 2003); *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (“an agency’s unexplained departure from precedent must be overturned as arbitrary and capricious.”).

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In its Answer to Merit's Statement of Reasons, MMS presented extensive analysis of numerous cases dealing with the doctrine of administrative finality and explained that:

These decisions are only a part of a line of Board precedent consistently holding that, once a party has been given an opportunity to seek review but failed to do so, the party cannot then challenge the underlying decision in a later proceeding, no matter what it alleges are the deficiencies in the underlying decision. Merit cannot make a prima facie case or prove any injustice as a matter of law. Therefore, the doctrine of administrative finality bars consideration of Merit's attack on the Order.

MMS Answer at 15, January 17, 2005, AR010006

Jicarilla, in its Answer, noted that the IBLA "has consistently held that the timely filing of a notice of appeal is a jurisdictional requirement, and if an appeal is not timely filed in the office of the officer who made the decision, the appeal must be dismissed ... strict adherence to the rule is required." *American Petroleum*, 160 IBLA 59, 71-72 (2003); accord *Friends of the River*, 146 IBLA 157, 161, (1998) ("timely filing of a notice of appeal is a jurisdictional requirement and the failure to file timely mandates dismissal"); *U.S. Forest Svc.*, 124 IBLA 336, 339 (1992) (appeal filed one day late dismissed as untimely); *Ron Williams Construction Co.*, 124 IBLA 340, 341 (1992) (same); *State of Alaska v. Patterson*, 46 IBLA 56, 59 (1980) (timely filing of notice of appeal is jurisdictional, "strictly applied"). In addition, "arguments presented before the Board but not before the Director must be dismissed for lack of jurisdiction," *ANR Production Co.*, 110 IBLA 127, 128 (1989); *Black Hawk Coal*, 104 IBLA 169 (1988) ("in the absence of consideration of and a decision on the issue by the Director, the Board lacks jurisdiction to consider the issue").

Jicarilla Answer at 1-2 n.1, January 31, 2005, AR010055-56.

Later in the District Court Judge Bates asked both counsel for MMS and for

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Jicarilla about administrative finality. Both Steve Gordon for Jicarilla and Ruth Ann Storey for MMS said that the IBLA had not addressed that issue and both said that the solution should be remand to the agency.

MR. GORDON: Because the whole point of administrative finality is you must take the first opportunity you have to appeal an adverse agency decision . . . . Because the royalty determination had not been timely appealed under 290, you couldn't later come back and attack that royalty determination. That is the ruling of the IBLA in those cases. They've applied the doctrine in other contexts beyond gas and oil royalty. That argument was explicitly raised by the MMS, and the IBLA didn't even address it.

THE COURT: You're right that the IBLA did not address it. What should that lead me to do if I agree with you?

MR. GORDON: Well, that leads to the conclusion that the decision is arbitrary and capricious.

THE COURT: And therefore should be remanded to the IBLA in order to address that?

MR. GORDON: On that ground, Your Honor, yes. Tr. 15-16, Motions Hearing, June 8, 2012.

THE COURT: [to MMS counsel Ruth Ann Storey] I'd like to make sure that I have your view with respect to the administrative finality issue. . . . I want to make sure that I have Interior's view on that administrative finality issue, both with respect to the proper resolution of it and with respect to if I should decide that the IBLA failed to address that issue, and they do seem to have failed to address that issue.

MS. STOREY: They did.

THE COURT: What should I do?

MS. STOREY: I think the answer to that is remand to the IBLA.

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THE COURT: Does that resolve it right there? Because the IBLA failed to address it, I should remand it?

MS. STOREY: No. I don't think necessarily so, because I think that the doctrine of administrative finality really applies that when a party has an opportunity to seek review and doesn't do so, that they then are precluded by administrative finality.

THE COURT: Well, if we stop right there, certainly the party had an opportunity to seek review of the underlying OTP issue under 290 and didn't seek it.

MS. STOREY: And we all agree with that.

THE COURT: So what you just said would seem to mean that administrative finality should apply here.

MS. STOREY: But the IBLA looked at the 290 process and 241 as separate processes [*but see* discussion of RSFA *supra*]. So even though they failed to appeal under 290, they had another opportunity under 241. That's what the IBLA found.  
Tr. 29-30.

As discussed in Part I, *supra*, Merit never exhausted its administrative remedies under 30 C.F.R. 243.3. Under long-standing departmental policies and practices, as discussed in section II, Merit lost its only opportunity to challenge the validity of its OTP upon the expiration of Part 290's strictly enforced 30-day time limit. In this context the IBLA (and by extension the district court) could not ignore administrative finality. Even if the court elects not to reverse or grant a rehearing, remand to the agency is appropriate, particularly in light of rulemaking left incomplete in 1999 with respect to precisely the questions at issue in this case.

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#### **IV . Conclusion**

The Jicarilla Apache Nation respectfully requests that the court grant rehearing or remand this case to the Agency.

Date: April 18, 2014.

Respectfully submitted,  
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Counsel for Petitioner

#### **CERTIFICATE OF SERVICE**

I certify that on this 18th day of April, 2014, I filed the foregoing Petition for Panel Rehearing electronically with the Clerk of the Court using the CM/ECF System. I further certify that counsel for Respondent and for Respondent- 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 18th day of April, 2014.

/s/ Donald H. Grove  
Counsel for Petitioner

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#### **ADDENDUM FOR PETITION FOR PANEL REHEARING**

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United States Court of Appeals  
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**  
**September Term, 2013**

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FILED ON: MARCH 4, 2014  
**No. 12-5375**

JICARILLA APACHE NATION, APPELLANT

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., APPELLEES  
Appeal from the United States District Court for the District of Columbia  
(No. 1:10-cv-02052)

Before: HENDERSON and GRIFFITH, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*

## **JUDGMENT**

This appeal was considered on the record and on the briefs and oral argument of the parties. This court has determined, after according full consideration to the issues presented, that no published opinion is necessary. *See* D.C. CIR. RULE 36(d).

It is **ORDERED** and **ADJUDGED** that the district court's judgment be affirmed for substantially the reasons stated in its September 26, 2012 Memorandum Opinion and Order. We agree with the district court's analysis in its entirety and find unpersuasive appellant's contention that a few legal authorities (*e.g.*, some legislative history and a proposed regulation) not addressed by the district court undermine its conclusions. We agree with the district court that 30 C.F.R. Part 241 leaves unclear whether 30 C.F.R. Part 290 affords the sole avenue for challenging a determination that additional royalties are owed.<sup>1</sup> In light of this ambiguity, the Department of the Interior's construction is permissible because it is not "plainly erroneous or inconsistent with th[ose] regulation[s]" or otherwise arbitrary and capricious. *St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 904 (D.C. Cir. 2010) (internal quotation marks omitted). Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any

These provisions have been recodified and now appear at 30 C.F.R. Parts 1241 and 1290.

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timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. RULE 41(a)(1).

*Per Curiam*

### **FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Jennifer M. Clark

Deputy Clerk

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and Rule 26.1 of the Circuit Rules for the United States Court of Appeals for the District of Columbia, Petitioner Jicarilla Apache Nation (“JAN”) states that it is a federally recognized Indian tribe, recognized by the Secretary as a sovereign Indian tribe with legal rights and responsibilities, eligible for the special programs and services provided by the United States to the Indians because of its status as an Indian tribe, and recognized as possessing powers of limited self-government. JAN has no parent company and no publicly-held company that has a 10% or greater ownership interest exists.

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## **CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

### *A. Parties and Amici*

The parties who appear before this Court are Petitioner Jicarilla Apache Nation, a federally recognized Indian tribe; Respondent United States Department of the Interior and Sally Jewell, Secretary of the Interior; and Respondent- Intervenor Merit Energy Company. There were no *amici curiae*. The same parties appeared before the district court although the Secretary of Interior was then Kenneth Salazar. There were no *amici curiae*.

### *B. Rulings Under Review*

The Plaintiff-Appellant appeals from the Memorandum Opinion and Order issued by the United States District Court for the District of Columbia (Hon. John D. Bates) on September 26, 2012, in *Jicarilla Apache Nation v. United States*, Case No. 1:10-cv-02052, granting the Federal Defendants’ and Defendant- Intervenor’s motions for summary judgment and denying Plaintiff’s motion for summary judgment. The opinion is published at \_\_ F. Supp. 2d \_\_ (D.D.C. 2012), 2012 WL 4373449 (D.D.C. Sept. 26, 2012). This decision upheld the decision of the Interior Board of Land Appeals in *Merit Energy Co. v. Minerals Management Serv.*, 172 IBLA 137 (Aug. 3, 2007).

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### *C. Related Cases*

In another case regarding major portion prices, *Jicarilla Apache Nation v. U.S. Dept. of the Interior (Vastar)*, 613 F.3d 1112 (D.C. Cir. 2010), this court reversed in part the district court’s grant of summary judgment and remanded the case to the district court with

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instructions to vacate *Vastar* in part and remand the decision to the Interior Department to reconsider its method of calculating royalties pursuant to the major portion requirement in Indian mineral development leases for natural gas extracted from the Jicarilla Reservation during the period 1984 to February 1988. A decision is pending.