



MERIT ENERGY COMPANY v. MINERALS MANAGEMENT SERVICE

172 IBLA 137

Decided August 3, 2007



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

MERIT ENERGY COMPANY  
v.  
MINERALS MANAGEMENT SERVICE

IBLA 2004-267

Decided August 3, 2007

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer upholding a Notice of Noncompliance and finding that the Minerals Management Service had properly served an Order to Perform.

Affirmed in part; set aside in part and remanded.

1. Federal Oil and Gas Royalty Management Act of 1982:  
Royalties--Indian Leases: Generally--Oil and Gas Leases:  
Royalties--Regulations

When appellant timely requested a hearing on the record of the August 19, 1999, Notice of Noncompliance (NON) it received when it apparently did not comply with the Order to Perform (OTP) pursuant to the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1719 (2000), as implemented by the provisions of 30 C.F.R. Part 241, appellant was entitled to contest its underlying liability, which is predicated on its alleged failure to undertake the actions set forth in the OTP to remedy an alleged violation of a statute, regulation, rule, order, or lease or permit term within the time specified therein. Appellant's right to contest its underlying liability necessarily encompasses the right to defend the NON by showing the nature and extent of its compliance, including defenses based on flaws in the service, or in the basis and substance of the OTP that might excuse compliance. Nothing in FOGRMA or the regulations supports or provides 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 appeal the OTP under Part 290. The two appeal procedures are separate.

2. Federal Oil and Gas Royalty Management Act of 1982:  
Royalties--Indian Leases: Generally--Oil and Gas Leases:  
Royalties--Regulations

In a hearing on the record of a Notice of Civil Penalty, a party can challenge only the amount of a civil penalty if it did not previously request a hearing on the record of a NON under 30 C.F.R. § 241.54. When a hearing on the record of the NON is not requested under § 241.54, the party may not contest its underlying liability for civil penalties. 30 C.F.R. § 241.56(a). Consequently, 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. Because the OTP alleged violations and directed appellant to undertake corrective action and furnished the basis for issuance of the NON when appellant apparently took no corrective action within the period specified, the only failure that could finally cut off appellant's right to challenge the OTP under Part 241 would be a failure to timely request a hearing on the record of the NON.

3. Federal Oil and Gas Royalty Management Act of 1982:  
Royalties--Indian Leases: Generally--Oil and Gas Leases:  
Royalties--Regulations

The regulation at 30 C.F.R. § 290.111(a) broadly defines "official correspondence" to include "all RMP [Royalty Management Program, Minerals Management Service] orders that are appealable." Such official correspondence is to be served on the "addressee of record," who is defined by reference to the subject matter of the correspondence. In (b)(4), the subject matter is "official correspondence in connection with reviews and audits of payor records"; in (b)(7), the subject matter is "official correspondence including orders, demands, invoices, or decisions, and other actions identified with payors reporting to the RMP Auditing and Financial System not identified above." The qualifying phrase "not identified above" refers to the six categories of addressees, which are defined solely by the subject matter of the correspondence, not the particular caption of the correspondence or action that such correspondence

demands or induces. Official correspondence may take the more specific form of “orders, demands, invoices, or decisions, and other actions,” but because of the definition of “official correspondence,” they all in general constitute “orders” issued by RMP that are appealable under 30 C.F.R. Parts 243 and 290. More than one category can be applicable in any given situation, and service under any other applicable category is equally valid. 30 C.F.R. § 290.111(b)(8).

APPEARANCES: Craig R. Carver, Esq., Denver, Colorado, for appellant; Stephen L. Simpson, Esq., Office of the Solicitor, Division of Indian Affairs, Washington, D.C., for the Minerals Management Service; Jill E. Grant, Esq., and Donald H. Grove, Esq., Washington, D.C., for Intervenor Jicarilla Apache Nation.

#### OPINION BY ADMINISTRATIVE JUDGE PRICE

Merit Energy Company (Merit) has appealed the May 27, 2004, decision of Administrative Law Judge Harvey C. Sweitzer (ALJ) finding that a February 16, 1999, Order to Perform (OTP) issued by the Royalty Management Program (RMP), Minerals Management Service (MMS), was properly served on Merit and upholding an August 19, 1999, Notice of Noncompliance (NON) issued by MMS charging Merit with failure to comply with the OTP, which Merit did not appeal.

#### *Background*

From March 1993 through September 1995, Merit was the lessee and royalty payor for six oil and gas leases with the Jicarilla Apache Tribe (Tribe). In an audit, MMS identified four issues with Merit’s royalty calculations: Merit failed to consider major portion value for gas produced and sold from the leases; it failed to perform dual accounting; it improperly claimed deductions from royalties for gas sales to Tristar Gas Marketing Company; and it failed to report gas sales as processed for the Tribe.

On February 16, 1999, the RMP issued the OTP. The OTP directed Merit to identify, within 90 days of receipt, all leases with the Tribe and periods when Merit was the royalty payor between January 1984 and June 1995 and perform dual accounting using major portion prices calculated by MMS; to recalculate royalties for the period July 1995 through September 1995 and perform dual accounting, but without using major portion prices, which MMS had not yet calculated for that period; and to pay the recalculated royalty amount or pay a theoretical dual accounting amount if Merit was unable to obtain the information needed to perform dual accounting. The OTP informed Merit that it had the right to appeal pursuant to

30 C.F.R. Part 290 (1998).

Merit did not appeal because its personnel failed to bring the OTP to the attention of appropriate company officials until after the time for appeal had expired.

On August 19, 1999, MMS issued the NON (Case No. 99-039), charging Merit with failure to perform as directed in the OTP. In addition, the NON cautioned that continuing failure to comply with the OTP could result in civil penalties, and directed Merit to perform major portion and dual accounting calculations and pay additional royalties within 20 days of receiving the NON to avoid civil penalties. On September 22, 1999, Merit requested a hearing on the record of the NON under 30 C.F.R. Part 241 and petitioned to stay the accrual of penalties during the pendency of the appeal.<sup>1</sup> As grounds, Merit contended that MMS and not Merit was obligated to calculate major portion prices because only MMS possesses the requisite data to do so, and that Merit was unable to recalculate royalties based on the prices supplied by MMS in the OTP because those prices were based on a methodology that was different from that required by the lease and regulations.<sup>2</sup>

On or about September 15, 1999, Merit requested that MMS extend the time to comply with the OTP. MMS granted a 30-day extension. In granting the extension, among other things, MMS stated that, having failed to appeal it, Merit had no further right to appeal the OTP, and that the hearing under 30 C.F.R. Part 241 would concern only the amount of the civil penalty. Oct. 12, 1999, Extension of Time at 2. In response, Merit questioned MMS' authority to grant an extension after the case had been referred to the Hearings Division or define the scope of the issues to be heard. MMS responded by arguing that no hearing on the record was required because Merit had admitted liability, that a challenge to the OTP was administratively final because Merit had failed to appeal it, and that the filing of a request for a hearing did not stay MMS' penalty process.

On November 17 and 18, 1999, Merit timely responded to the NON by recalculating royalties. It did so on the basis of prices other than the major portion prices provided by MMS because, as noted, Merit challenges the validity of MMS' data and the methodology used to derive them.

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<sup>1</sup> The parties stipulated to a stay of the accrual of penalties during the pendency of the appeal and by order dated Dec. 23, 1999, the stay was granted.

<sup>2</sup> MMS estimates additional royalty is due in the amount of \$1,263,803.77 (plus interest and penalties) as a result of recalculating royalty using MMS' major portion price methodology.

At some point, Merit submitted a request for documents pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). By this time, the matter had been assigned to Judge Sweitzer. Merit also requested a copy of the administrative record, which was supplied by MMS on April 27, 2000. The administrative record provided 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. *See* ALJ's Feb. 2, 2001, order at 6-7.

By order dated February 2, 2001, Judge Sweitzer denied MMS' request to limit the scope of the hearing without prejudice, concluding that, at that early juncture in the proceedings, he was unable to determine the propriety of applying the doctrine of administrative finality to the OTP or whether applying it would result in an injustice, noting Merit's arguments that there were compelling legal or equitable reasons for re-examining the OTP, that the OTP was seriously flawed, and that the OTP was not a final order.

Merit requested a complete copy of the unredacted administrative record, which MMS opposed on February 26, 2001. In its opposition to the request, MMS renewed its motion to limit the scope of the hearing to the NON and argued that Merit did not need an unredacted copy of the record to challenge the validity of the NON, and that the request was moot in light of the fact that the OTP was final for the Department. By order dated March 22, 2001, MMS was directed to provide a complete, unredacted copy of the record.

The parties were directed to brief the question of the applicability of the doctrine of administrative finality to the OTP, in the course of which MMS raised the additional issue of whether the Hearings Division had jurisdiction to consider the validity of the OTP even if the doctrine did not apply. Specifically, MMS contended that under 30 C.F.R. §§ 290.3, 290.6, and 290.7, the only avenue for appealing an OTP was to first appeal to the Commissioner of Indian Affairs and then to this Board. Judge Sweitzer found MMS' argument persuasive and, accordingly, by order dated November 16, 2001, Judge Sweitzer ruled that the Hearings Division lacked jurisdiction to consider the OTP, concluding therefore that there was no basis for or need to take evidence on the issue. In addition, he determined that, because Merit had had an opportunity to appeal the OTP, the exclusion of evidence relating to its validity did not constitute a denial of any statutory or regulatory rights or a denial of due process, as Merit had urged.

By pleading dated May 27, 2002, MMS identified the primary issue for hearing as the amount of the civil penalty, which included the issues of whether Merit had cured the systemic deficiencies (failure to consider major portion value for gas produced and sold from the leases, failure to perform dual accounting in calculating

royalties, improperly taking deductions from royalties for gas sold to Tristar Gas Marketing Company, and failure to report gas sales as processed for the leases), and whether any mitigating or aggravating circumstances were presented. In that pleading, MMS asserted that Merit had failed to cure the systemic violations.

In its statement of the issues for hearing, Merit averred that it had cured the systemic violations and had remitted additional royalty and interest, and that one group of issues for hearing was accordingly the nature of the requirements set by the NON and whether Merit's response constituted full compliance so that civil penalties were unwarranted. In addition, Merit sought to probe the substantive basis for the issuance of the OTP, as well as whether it was properly served at Merit's offices.

Ultimately, Judge Sweitzer denied the parties' cross-motions for summary judgment and ordered a hearing on the issue of service of the OTP only.

#### *The Facts Established at the Hearing*

The hearing was held on July 30 and 31, 2003 in Littleton, Colorado.<sup>3</sup> The only factual issue considered was whether the OTP was properly served on Merit under 30 C.F.R. § 243.4(b). In his decision issued on May 27, 2004, Judge Sweitzer held that the OTP was properly addressed and served.

In March 1996, MMS' lead auditor, Sonja Johnson met with Merit personnel to discuss MMS' audit of the Indian leases at issue. Decision at 5, citing Tr. 384. At that meeting, Johnson gave Merit's Becky Cantrell an audit initiation questionnaire. Ex. 38. Among other things, under the heading Audit Administration, the questionnaire required Merit to identify an audit "liaison" with MMS and to explain that person's responsibilities and identify the person to whom he/she reported. *Id.* Merit responded to that question by designating Karen Steiner as the person who would "coordinate the audit," noting that she reported to McCrory, Merit's Controller. *Id.* The questionnaire was completed and returned to MMS.

Steiner went on maternity leave. Johnson testified that after Steiner went on leave, Merit employee Becky Cantrell handled the MMS auditors' data and information requests. Tr. 387. When Cantrell was assigned to other duties, Merit

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<sup>3</sup> Merit called as witnesses Merit employees Gayle McCrory, past Controller of Merit, Kevin Ryan, Chief Financial Officer and Vice President, and Fred N. Diem, General Counsel. Merit also called as witnesses MMS employees Deborah Gibbs-Tschudy, Allen L. McDaniel, Sonja White Johnson, and Terry James Kreidler. Merit marked and introduced into evidence 38 exhibits (Exs. 1-38) and MMS introduced one exhibit (Ex. MMS-A).

employee Vanessa Russell took over. Tr. 388. When Russell moved on, Susan McCreary became the audit liaison. Johnson learned that McCreary was audit liaison from a voice mail message recorded on Steiner's telephone. Tr. 388.

By letter dated November 17, 1997, McCreary wrote to MMS' Allen McDaniel requesting an update on the audit, specifically objecting to accruing interest on any royalty obligations due to "MMS's inability to complete this audit," and complaining that MMS' responses had not addressed that problem. McCreary stated that Merit had been cooperative in an effort to resolve the audit, but that it could not remain open indefinitely. She therefore requested an immediate response and directed MMS to "[p]lease direct your comments and questions to my attention as I am handling this matter while Karen Steiner is out on maternity leave." Ex. MMS-A. When MMS issued the OTP in February 1999, it was addressed to McCreary at Merit's Dallas (Texas) offices on Merit Drive. Ex. 19. As shown by a certified return receipt card in the record, the OTP was signed by Tyra Jones, who is (or was) Merit's receptionist. Ex. 19; Tr. 68.

After extensively analyzing the regulatory provisions invoked by the parties and their arguments, Judge Sweitzer agreed with MMS that McCreary had designated herself as the point of contact for communications between MMS and Merit regarding the audit, and that MMS had properly served the OTP on her. He therefore upheld the NON.

#### *Arguments on Appeal*

On appeal, Merit disputes Judge Sweitzer's conclusion that the OTP was properly served. In addition, however, Merit renews its argument that it has the right to challenge the underlying OTP, asserts that MMS' major portion methodology is defective on its face, and maintains the OTP was improperly served under applicable regulations.

MMS counters that there is no dispute regarding the critical events relative to service of the OTP, and none regarding Merit's compliance with the order to perform dual accounting. MMS argues that this Board, like the Hearings Division, does not have jurisdiction to inquire into the validity of the OTP, so that all that remains are the questions of whether McCreary was the correct addressee of record under applicable regulations and whether MMS' estimate of \$1,263,803.77 due from Merit as a result of recalculating royalties on gas using major portion prices provided by MMS, plus penalties and interest, was correct.

The Tribe intervened and filed its Answer in support of MMS' Answer. In addition, however, it noted that, even if Merit had appealed the OTP, the Commissioner for Indian Affairs and this Board would be bound by decisions issued

by the Assistant Secretary for Indian Affairs on December 22, 2000, in which the same major portion price methodology set forth in the OTP was sustained.<sup>4</sup> As the Tribe states, under *Blue Star, Inc.*, 41 IBLA 333, 335-36 (1979), the decisions of the Assistant Secretary are final for the Department. Tribe's Answer at 1-2.

### *Analysis*

[1] The parties have devoted considerable energy to the question of whether the preclusive effect that normally attends a failure to appeal does or does not bar Merit's attempts to challenge the OTP. We begin by acknowledging that Merit could have appealed the OTP to the Commissioner of Indian Affairs under Part 290, that it did not, and that, as a consequence, it could not thereafter pursue an appeal before the Commissioner. 30 C.F.R. § 290.6. It does not follow, however, that Merit was forever barred from challenging the service or substance of the OTP.

The proceedings before Judge Sweitzer were initiated by Merit's timely request for a hearing on the record of the August 19, 1999, NON pursuant to the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1719 (2000), as implemented by the provisions of 30 C.F.R. Part 241. Part 241 applies to any situation in which MMS believes that a party has "not followed any requirement of a statute, regulation, order, or terms of a lease for any Federal or Indian oil and gas lease," for which MMS may issue a NON that explains what the violation is and what a party must do to correct it and avoid civil penalties under FOGRMA, 30 U.S.C. § 1719(a) and (b) (2000). 30 C.F.R. § 241.51.

A party may request a hearing on the record on a NON by filing a request with the Hearings Division within 30 days of the date the NON is received. 30 C.F.R. § 241.54.<sup>5</sup> Merit timely requested the hearing provided by FOGRMA, and thus it is to Part 241 that we must look to ascertain preclusive consequences and to determine the scope of the hearing, not Part 290. But the fact that Merit did not appeal the OTP under Part 290 does not mean that Merit thereby lost the right to challenge it in a

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<sup>4</sup> On Dec. 22, 2000, the Assistant Secretary denied the appeals of three Jicarilla Apache lessees who appealed OTPs and raised issues that are virtually identical to those raised by Merit in this instance. See *Dugan Production Corp.* (MMS-98-0130-IND); *Robert Bayless*, (MMS-98-0132-IND); and *Merrion Oil & Gas Corp.* (MMS-98-0228-IND).

<sup>5</sup> A hearing on the record may be requested regardless of whether the violation is corrected or not, and if the violation is not corrected, in the absence of a stay, penalties will continue to accrue even if a hearing is requested. 30 C.F.R. §§ 241.54 and 241.55(a).

hearing on the record pursuant to Part 241. Indeed, MMS' position to the contrary, if sustained, would render the hearing on the record afforded by FOGRMA a mere formality empty of substance or meaning.

The purpose of a hearing on the record of a NON is to allow the party to challenge its "underlying liability," which is the failure to undertake the actions set forth in the OTP to remedy an alleged violation of a statute, regulation, rule, order, or lease or permit term within the time specified therein. Therefore, Merit's right to contest its underlying liability necessarily encompasses the right to defend against and even defeat the NON by showing the nature and extent of Merit's compliance, including affirmative defenses based on flaws in the service or basis and substance of the OTP that might excuse compliance. We find nothing in FOGRMA or the regulations that provides or suggests that the scope of a hearing on the record of a NON under Part 241 can be cut off or curtailed by the failure to pursue an appeal under Part 290, and MMS has not cited any authority on the point to the contrary. Nor can it, because the two appeal routes are separate procedures, and an appeal under Part 290 is not a prerequisite to a hearing on the record under Part 241, as a brief review of MMS' pronouncements in its rulemaking to implement the two appeal procedures confirms.

In 1984, MMS promulgated final rules to implement FOGRMA. This rulemaking included rules to implement Civil Penalties (30 C.F.R. Part 241) under FOGRMA and under other statutes as well, including the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 to 287 (2000), and rules for Appeals in the Royalty Management Program (30 C.F.R. Part 243). Civil penalties under FOGRMA are addressed at 30 C.F.R. § 241.51. For civil penalties authorized by statutes other than FOGRMA, final regulation 30 C.F.R. § 241.20 (proposed as 30 C.F.R. § 241.50) provided that no penalty could be assessed "until the person charged with a violation has been given the opportunity for a hearing." 49 Fed. Reg. 37336, 37352 (Sept. 21, 1984). That hearing was to be conducted by the "appropriate MMS official[,] whose findings shall be conclusive unless an appeal is taken pursuant to 30 CFR Part 243." *Id.* MMS noted that "[a]ssessment of penalties under these other statutes are [sic] subject to less rigorous procedural requirements than those prescribed by the Act." *Id.* at 37342.

With respect to civil penalties under the more rigorous procedural requirements of FOGRMA, two responses to comments during the rulemaking are relevant. First, in addressing the case when MMS has issued a NON and a violator corrects the violation within 20 days or as specified in the order, MMS acknowledged that no civil penalty could be assessed. Therefore, in that case, no hearing on the record would be provided, and "the only available appeal will be to the MMS Director and then the Board of Land Appeals, in accordance with the appeals procedures in 30 CFR Part 243 [Appeals--Royalty Management Program]." *Id.* at 37343. Second,

MMS addressed the situation where a person receiving a NON had *not* paid pursuant to the underlying MMS order that initiated the notice. In that case, MMS stated that if the violator did *not* request a hearing on the record on receipt of the NON, that person would be deemed to have been given the opportunity for a hearing on the record and penalties properly could be assessed. In such circumstances, MMS explained, “the penalty assessment would be a final order and, pursuant to the terms of the Act, no further appeal is available since a hearing was not requested when the opportunity was provided.” *Id.*

Thus, it was clear from this rulemaking that MMS envisioned that issuance of the NON would afford a procedural right to a hearing, which, if not exercised, would result in the loss of the right to contest the underlying violation.

Consistently, MMS stated that § 243.1 “provides that most decisions and orders of the [RMP] may be appealed in accord [sic] with the appeal procedures in 30 CFR Part 290. *The exception is appeals from FOGRMA penalty assessment orders[,] which must be appealed with the specific appeal procedures of Part 241.*” *Id.* at 37343-44 (emphasis added). Accordingly, the final regulation explicitly provides that “[e]xcept as may otherwise be provided in Part 241 hereof, an order or decision issued . . . by the [RMP] may be appealed in accordance with the provisions of Part 290 of this chapter.” 30 C.F.R. § 243.1.

Those rules were in effect in 1994 when MMS began studying its appeals process.

On August 13, 1996, the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 (RSFA), 30 U.S.C. §§ 1701-1735 (2000), was enacted. Section 4 of RSFA amended FOGRMA and added a new FOGRMA section 115(h). Among other things, as part of the effort to reform the royalty program, RSFA required the Secretary to issue a final decision in any pending administrative proceeding within 33 months of the date on which such proceeding was commenced, or as might be extended by any agreement of the Secretary and the appellant. 30 U.S.C. § 1724(h)(1) (2000). While this appeal does not present a RSFA question, we think MMS’ discussion of its proposed and final rules to implement that statute underscores our conclusion regarding the separateness of Part 241 and Part 290 appeal procedures. In response to its initiative to revise its appeal process and the enactment of RSFA, MMS published a proposed rule to amend the administrative appeals process contained in 30 C.F.R. Part 290. 62 Fed. Reg. 68244 (Oct. 28, 1996). In the proposed rule, as background, MMS explained that it had determined that the length of the process and its excessive costs to both MMS and appellants were its chief defects. The Royalty Policy Committee (RPC), an advisory committee to the Secretary, established a subcommittee to look at appeals and alternative dispute resolution (ADR) and make recommendations to the Secretary to improve

those processes. MMS anticipated that the recommendations of the subcommittee would be considered during the pendency of the proposed rule, although RFSA compelled action to implement the 33-month deadline for administrative appeals.

MMS subsequently withdrew the October 1996 proposed rule and proposed a revised rule that reflected the RPC's report and recommendations. 64 Fed. Reg. 1930 (Jan. 12, 1999). As MMS' discussion of the revised proposed rule makes abundantly clear, the process for contesting a NON and potential civil penalty is a different process than that for challenging RMP orders under Part 290:

In the new proposed §§ 241.51 through 241.55, MMS would establish the same process for all persons who wish to contest a potential civil penalty that would be assessed under FOGRMA § 109(a) and (b), 30 U.S.C. 1719(a) and (b). Under the current rules, there are separate processes for those persons who comply within the twenty days allowed to correct certain violations under FOGRMA and for those who do not correct within the statutory time frame. The proposed sections would allow all persons served with [NONs] to request a hearing on the record before the Hearings Division of the OHA.

The current rule also provides that a person may appeal to the MMS Director if the violation has been corrected within the 20-day cure period. MMS does not believe there is any reason to retain this separate process because we have eliminated appeals to the MMS Director for other appeals involving lease obligations. Thus, consistent with the changes made to 30 CFR parts 243 and 290 and 43 CFR part 4, subpart J, the appeals related to the MMS royalty civil penalty process will also be before the OHA. MMS requests comments on whether MMS should retain the process for appealing royalty civil penalty assessments to the MMS Director.

*Id.* at 1957.

MMS received numerous comments on the January 1999 proposed rule and ultimately determined to postpone action on the entire proposed appeals process, mainly because it was necessary to adopt a final rule implementing RFSA appeals time periods before May 13, 1999. 64 Fed. Reg. 26240, 26241 (May 13, 1999). MMS therefore determined to adopt as final only what was necessary to implement RFSA and those parts of the proposed rule that had generated no comments or few comments:

Because we are not finalizing the entire proposed rule, we will continue to require appellants to use the appeals procedures for royalty

orders found at 30 CFR part 290 and 43 CFR part 4, subpart E, until we can publish a final rule on the appeals process. However, for royalty-related appeals to the MMS Director, the rules are now located at 30 CFR part 290, subpart B.

*Id.*

Because the final rule was not the general appeals provision proposed in January 1999, MMS found it necessary to narrow the definition of “order” for purposes of RFSA’s 33-month decision deadlines. In addition, it clarified that the term does *not* include NONs or Notices of Civil Penalty issued under FOGRMA, 30 U.S.C. § 1719 (2000), and its implementing regulations in 30 C.F.R. Part 241, or decisions of administrative law judges after a hearing on the record or Board decisions in appeals from decisions of administrative law judges following a hearing on the record:

This follows from the first sentence of 30 U.S.C. 1724(h)(1), which establishes that the RSFA time of decision and rule of decision requirements cover “demands or orders issued by the Secretary or a delegated State” that are “subject to administrative appeal in accordance with the regulations of the Secretary. *FOGRMA civil penalty assessments result from an entirely different process that is prescribed separately by statute.*

Civil penalty assessments do not result from administratively appealable MMS orders or delegated State orders. Instead, FOGRMA section 109(e) prescribes that no civil penalty may be assessed until a person has been given an opportunity for a “hearing on the record” -- *i.e.*, a formal trial type hearing before an administrative law judge, which must be conducted under the Administrative Procedure Act provisions at 5 U.S.C. 554, 556, and 557. *The rules at part 241 implement the statutory requirements of those sections regarding adjudication and agency review.*

It appears plain that Congress did not intend for the RSFA time of decision and rule of decision requirements to cover FOGRMA civil penalty proceedings. RSFA itself is primarily an amendment to FOGRMA with respect to Federal leases. Had Congress intended to change the statutory civil penalty procedures, it knew how and could have done so. There is no mention of any intent to include civil penalty proceedings within the 30 U.S.C. 1724(h) requirements. Moreover, the purpose of section 1724(h) was to address perceived problems with MMS’ administrative appeals process that are unrelated to civil penalty

proceedings.

64 Fed. Reg. 26248 (May 13, 1999) (emphasis added).<sup>6</sup>

[2] Once the two appeal procedures are separated, we appropriately look to Part 241 to determine what Merit could or could not raise in the hearing on the record of the NON. The regulation at 30 C.F.R. 241.56 answers the question, “May I request a hearing on the record regarding the amount of a civil penalty if I did not request a hearing on the Notice of Noncompliance?” as follows:

(a) You may request a hearing on the record to challenge only the amount of a civil penalty when you receive a Notice of Civil Penalty, if you did not previously request a hearing on the record under §241.54. *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.*

30 C.F.R. § 241.56(a) (emphasis added).

In the May 13, 1999, final rulemaking, MMS received comments on proposed regulations 30 C.F.R. §§ 241.53, 241.54, and 241.56 that related to, among other things, “a separate opportunity for a hearing, even if no request for a hearing is made from the [NON].” 64 Fed. Reg. at 26242. MMS responded as follows:

We agree with the comment that the violator may still have need for redress concerning the amount of a civil penalty even though that violator did not contest the [NON]. We therefore have added new sections 241.56 and 241.64 that allow a violator, who did not request a hearing on the record on a [NON], 10 days from the receipt of the Notice of Civil Penalty to request a hearing on the record limited to the issue of the amount of the penalty only. *By not requesting a hearing on the record on the [NON], the recipient waived the right to contest the underlying liability for penalties.*

<sup>6</sup> In September 1999, MMS amended its rules governing appeals of RMP and Delegated State to address appeal provisions that it had inadvertently omitted from the May 13, 1999, final rulemaking implementing. As a result of the September 1999 revisions, provisions governing service of official correspondence that had been contained in 30 C.F.R. § 243.4 were codified as 30 C.F.R. § 290.111. 64 Fed. Reg. 50753 (Sept. 20, 1999).

*Id.* (Emphasis added.)

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. Therefore, 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.<sup>7</sup>

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<sup>7</sup> We note that the NON cited 30 U.S.C. § 1719 (2000) and 30 C.F.R. § 241.51 as authority. By its terms, 30 C.F.R. § 241.51 implements only 30 U.S.C. § 1719(a) (“[f]ailure to comply with applicable law, to permit inspection, or to notify Secretary of assignment; exceptions to penalty” after “due notice”) and (b) (“[f]ailure to take corrective action” under (a)(1), violations other than failure to permit inspection). The regulations provide for penalties after a period to correct as specified in a NON. 30 C.F.R. §§ 241.51 through 241.56. The statute provides that the notice to be given means the notice under § 1719(a). 30 U.S.C. § 1719(h).

In contrast, the regulations at 30 C.F.R. § 241.60 through 30 C.F.R. § 241.64 implement 30 U.S.C. § 1719(c) (“[f]ailure to make royalty payment; failure to permit lawful entry, inspection, or audit; failure to notify Secretary of well production”). The provision at § 1719(c) applies to knowing and willful failures and refusals, with no similar requirement of notice and an opportunity to correct.

Though we do not decide the issue, it appears that, under 30 U.S.C. § 1719(c), MMS was not required to issue a NON for violations involving royalty. MMS accordingly promulgated regulations for imposing penalties without a period to correct. *See* 30 C.F.R. § 241.60. Yet MMS also promulgated a regulation stating that it “will inform you of violations without a period to correct by issuing a [NON] explaining what the violation is *and how to correct it.*” 30 C.F.R. § 241.61 (emphasis added). Regardless of whether FOGRMA requires issuance of a NON in royalty payment cases before seeking a civil penalty or not, however, it is clear that if MMS does choose to issue a NON in such a case, the recipient is entitled to a hearing on the record under FOGRMA. As with violations under § 1719(a) and (b), a violator must request a hearing on the record of a NON issued without a period to correct in order to contest underlying liability in a hearing on the record of the civil penalty. 30 C.F.R. §§ 241.62 and 241.64.

We therefore set aside Judge Sweitzer's decision to the extent that he upheld the NON in the absence of a hearing on the record and remand the case for such a hearing so that Merit can contest its underlying liability.

One element of Merit's right to a hearing on the record of the NON, the question of the appropriateness of MMS' service of the OTP, has been decided adversely to Merit and thus it has appealed Judge Sweitzer's conclusion that the OTP was properly served. This issue is moot to the extent the allegedly improper service of the OTP was the basis for Merit's claim that it is entitled to a hearing on the merits of the OTP, as we have held that Merit is entitled to a hearing as a result of its timely challenge of the NON. Nonetheless, we will briefly address the issue to the extent that Merit would argue, at the hearing our ruling requires, that the allegedly improper service justifies its failure to comply with the OTP and compels a ruling in its favor.

We find no reason to disturb the Judge's decision. Because of the audit issues letter it had received from MMS, Merit was fully aware of MMS' position and knew what was at stake. Where Merit would impute to MMS the responsibility for deciding who among several "more logical and appropriate persons" should be the designated addressee of record, we think it beyond question that Merit knew or should have known who among its staff was assigned which responsibilities, what functions its employees were performing, when they were assigned other duties in lieu of the audit liaison function or went on leave, and when their employment ended. Being in command of that knowledge, it was Merit's exclusive responsibility to manage its designations to ensure an uneventful transition between the personnel it did assign to the audit, and to, on its own behalf, "devote scrupulous attention to accomplishing proper service," *see* SOR at 42, rather than attempting to shift that burden to MMS.

Merit has offered nothing that changes the essential facts that, in response to MMS' written questionnaire, Steiner's was the "individual name and address designated, in writing, by the company at the initiation of the audit," and when she departed, McCreary was "the most recent addressee that was specified, in writing, by the payor." 30 C.F.R. § 243.4(b)(4). Nor has Merit produced any other document that would require us to reject the two documents on the subject that were introduced at the hearing. As MMS made plain in the regulatory preamble to the final rule governing service of official correspondence, "[i]t is the responsibility of the addressee of record to ensure that, once received at the address of record, the document is routed to the proper official within the company and that any appeal is filed within 30 days of receipt of an order or decision at the established address of record." 56 Fed. Reg. 5946.

Merit nonetheless contends that the OTP should have been served pursuant to 30 C.F.R. § 243.4(b)(7), and that MMS' failure to serve the addressee of record

established in (b)(7) invalidates purported service pursuant to a different paragraph. Merit relies on *F. Howard Walsh, Jr.*, 93 IBLA 297, 308 (1986) and *Coastal Oil & Gas Corp.*, 106 IBLA 90, 91-92 (1988), to support its argument that “constructive service by certified mail is vitiated where the decision was improperly addressed and it appears from the record the error caused appellant to fail to receive the decision.” SOR at 44. Merit further argues that the decisions in *Walsh* and *Coastal* “hold that constructive service can be established *only* if the MMS has addressed its document to the ‘addressee or record’ established by the regulation.” *Id.* at 45.

Merit notes that 30 C.F.R. § 243.4(b)(7) is the only provision that uses the term “order,” and concludes that service therefore must be effected under that subparagraph. *Id.* at 46. Merit notes that MMS initially had agreed with Merit’s interpretation. *Id.* at 46, *citing* MMS’ July 12, 2002, brief at 6-7 and its March 3, 2003, brief, at 8. In addition, Merit cites *Apache Corporation*, 152 IBLA 30, 32 (2000). It claims that “[t]he conclusion of Merit, Apache, the IBLA, the MMS, and the Solicitor’s Office in this case [is] that subparagraph (b)(7) is *the* applicable regulatory provision,” because it is the only subparagraph that expressly pertains to “orders,” SOR at 46; that “order constitutes an “action not identified above,” *id.* at 47; that subparagraph (b)(7) refers to “formal ‘actions’ . . . in contrast to the less formal types of ‘actions’ referenced in the other subparagraphs,” *id.* at 48; and that MMS’ construction is contrary to the stated purpose of the regulation, which is that there will be one addressee of record based on the subject matter of the communication at issue, *id.* at 49-50.

As an initial matter, we do not agree with Merit’s view of the applicability of *Walsh* and *Coastal* to the facts of this case. In *Walsh*, the notice of a royalty assessment on vented gas was addressed to the wrong person, the appellant’s father, F. Howard Walsh, Sr., at the right address, which father and son shared, and the notice was sent regular mail, so that we could not determine when it was received. *F. Howard Walsh, Jr.*, 93 IBLA at 307.

In *Coastal*, the appellant had designated in writing the person to whom official correspondence should be directed. MMS sent its correspondence to a different individual at the correct address of record: “although the MMS invoice was addressed to the attention of Robert L. Schaffer, Supervisor of Reporting and Coordination, it was attached to an audit letter addressed to Al Moss, Manager, Gas Revenue Accounting.” *Coastal Oil & Gas Corp.*, 106 IBLA at 91. Noting the absence of any regulation governing service of correspondence, the Board held that the “[f]ailure to properly address the envelope containing the bill for collection to the company official expressly denominated by Coastal to receive such notices vitiates constructive service of the subject document.” *Id.* Both decisions predate the rule now at issue.

Because the OTP was addressed to the person Merit had designated in writing and had not changed that designation, this is not a case of addressing the OTP to the wrong person or of attaching the OTP to correspondence addressed to someone else. *Walsh* and *Coastal* are therefore inapposite.

We also do not agree that *Apache Corporation* constitutes a ruling that, in circumstances similar to those presented here, (b)(7) applies exclusively. In *Apache*, MMS addressed an OTP to “Alicia” Anderson, Apache Corporation, at Apache’s record address by certified mail, return receipt requested. The correspondence containing the OTP was received by a mail room employee who was working on a Saturday when Apache’s offices were officially closed. That employee signed the delivery receipt. However, the certified letter was received and opened by the addressee, Alycia Anderson, on the following Monday, the next working day for Apache. Apache argued that Anderson had not been served until that Monday. The Board held that under 30 C.F.R. § 243.4(c), *Dates of service*, “an order is considered served on the ‘date that it is received at the address of record established in accordance with paragraph (b) of this section as evidenced by a signed receipt of *any person at that address.*” *Apache Corporation*, 152 IBLA at 32 (emphasis added). Nothing in *Apache* purports to be a construction of, or ruling upon, the question of whether 30 C.F.R. § 243.4(b)(7) is the exclusive method of constructive service of an OTP, though the case prompted MMS to promulgate a rule to establish addressees of record for purposes of serving appealable official correspondence.

In any event, Merit has failed to demonstrate that 30 C.F.R. § 243.4(b)(4) does not apply. That regulation applies to official correspondence “in connection with reviews and audits of payor records” and identifies the addressee of record for service of official correspondence as the person “designated, in writing, by the company at the initiation of the audit.” We agree with Judge Sweitzer’s conclusions regarding the applicability of (b)(4). The OTP clearly was in connection with an ongoing audit, its directives equally clearly related to issues revealed in the course of that audit activity, and it provided for the right to appeal pursuant to Part 290. As discussed above, Merit designated Steiner as the person who was to be MMS’ point of contact; when Steiner went on maternity leave, Cantrell and then Russell discharged Steiner’s responsibilities as Merit’s audit liaison. McCreary’s November 17, 1999, letter to McDaniel designated herself as the point of contact for matters relating to the ongoing audit, and Merit has not produced anything showing or suggesting that it ever designated someone other than Steiner and McCreary to serve as audit liaison.

[3] There is no question that 30 C.F.R. § 290.111(a)<sup>8</sup> broadly defines “official correspondence” to include “all RMP orders that are appealable.” Such official correspondence is to be served on the “addressee of record,” who is defined by reference to the subject matter of the correspondence. In 30 C.F.R. § 290.111(b)(4), the subject matter is “official correspondence in connection with reviews and audits of payor records”; in 30 C.F.R. § 243.4(b)(7), the subject matter is “official correspondence including orders, demands, invoices, or decisions, and other actions identified with payors reporting to the RMP Auditing and Financial System not identified above.” Merit reasons that since the OTP is styled an “order” and it is an order that is identified with payors reporting to the RMP Auditing and Financial System, the correct addressee of record is identified in (b)(7) as the person identified on the Payor Information Form (PIF).<sup>9</sup>

By its terms, subparagraph (b)(7) pertains to official correspondence identified with payors reporting to the RMP Auditing and Financial System not identified above in 30 C.F.R. § 243.4(b)(1) through (b)(6). We do not agree that the qualifying phrase within (b)(7) “not identified above” refers to and modifies only the phrase “other actions” as Merit claims. The phrase “not identified above” refers to the six categories of addressees, which are defined solely by the subject matter of the correspondence, as MMS made clear when it adopted the final rule, not the particular caption of the correspondence or action that such correspondence demands or induces.<sup>10</sup> Subparagraph (b)(7) therefore is properly construed in terms of subject

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<sup>8</sup> When the OTP was served on Merit, the regulation was codified as 30 C.F.R. § 243.4 (1998). The regulation was inadvertently omitted from final rulemaking implementing RFSA on May 13, 1999. MMS therefore issued a corrective amendment recodifying 30 C.F.R. § 243.4 as 30 C.F.R. § 290.111. *See* n.6 *ante*. Although there are some minor differences between the 1998 and current versions, the substance regarding service of official correspondence on addressees of record is the same.

<sup>9</sup> In discovery, MMS produced only rental PIFs, and these designated Daniel W. Mathis as the contact person. MMS did not produce any copies of the royalty PIFs, however, and Merit has no copies. SOR at 51. McCrory testified that the designee on the royalty PIFs would have been either Mathis or Rusty Mondelli. Merit avers that the designee could not have been McCreary because she was not employed by appellant when royalty PIFs were filed, and she was employed at a time when Merit no longer owned the leases. *Id.* at 52.

<sup>10</sup> Thus, the Preamble to the final rule stated: “Paragraph 243.4(b) of the proposed rule provided for a different addressee of record to whom official correspondence would be delivered depending on the subject matter involved.” “The MMS concurs

matter not specifically covered in the subparagraphs that precede it.<sup>11</sup> Such official correspondence may take the more specific form of “orders, demands, invoices, or decisions, and other actions,” but by reason of the definition of “official correspondence,” they all in general constitute “orders” issued by RMP that are appealable under 30 C.F.R. Parts 243 and 290. Merit thus construes (b)(7) too narrowly.

Moreover, even assuming *arguendo* that 30 C.F.R. § 243.4(b)(7) also applies in these circumstances, nothing in that provision suggests the exclusivity that Merit posits. To the contrary, 30 C.F.R. § 243.4(b)(8) implements MMS’ recognition that more than one category could be applicable in any given situation by expressly providing that service under any other applicable category is equally valid.

Although Merit labors to persuade us that only (b)(7) applies to OTPs, its assertion is simply not supported by the regulatory record. In response to the recommendation that only one address be designated for service of official correspondence “if a lack of a response could result in a waiver of rights by the addressee,” MMS stated that the majority of commenters supported the idea of different addresses of record based upon the subject matter of the correspondence and, on that basis, declined to abandon the proposed rule in favor of a single address of record. 56 Fed. Reg. 5946, 5947 (Feb. 14, 1991).

We conclude that Judge Sweitzer correctly found that McCreary was the addressee of record under former 30 C.F.R. § 243.4(b)(4), now codified at 30 C.F.R. § 290.111(b)(4). Even if (b)(7) of the regulation arguably could have been used, under (b)(8) of that regulation, MMS could properly choose to serve the OTP under (b)(4). Therefore, the OTP was properly served.

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and has provided for different addressees of record at paragraphs [sic] 243.4(b) of the final rule based on the subject matter involved.” “There may be situations where official correspondence falls into more than one subject matter category.” 56 Fed. Reg. 5946, 5947 (Feb. 14, 1991).

<sup>11</sup> Again, this is confirmed by the regulatory Preamble. One comment recommended a provision that would cover official correspondence “dealing with bonuses and rentals” a subject matter category not covered in (b)(1) through (b)(6). 56 Fed. Reg. at 5948. MMS agreed with that recommendation: “The MMS concurs and has included an addressee of record for this purpose in paragraph 243.4(b)(7) of the final regulation.” *Id.*

*Conclusion*

The OTP was an RMP order that could have been appealed to the Commissioner of Indian Affairs exercising the functions vested in the MMS Director. 30 C.F.R. § 290.6. The failure to do so foreclosed only the opportunity to challenge the OTP before the Commissioner of Indian Affairs under Part 290. Merit's timely request for a hearing on the record of the NON pursuant to 30 C.F.R. Part 241 entitled Merit to contest its underlying liability, which includes the nature, extent, and timing of its actions to correct the violations identified in the OTP and any affirmative defenses thereto, including any defects in the service or substance of the OTP. Judge Sweitzer therefore erred in upholding the NON in the absence of a full hearing on the record. We affirm Judge Sweitzer's finding that the OTP was properly served, and remand the case for a full hearing on the record of the NON pursuant to 30 C.F.R. Part 241.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the finding that the OTP was properly served on Merit is affirmed, and the decision upholding the NON is set aside and the case is remanded to the Hearings Division for a full hearing on the record of the NON.

\_\_\_\_\_/s/\_\_\_\_\_  
T. Britt Price  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
David L. Hughes  
Administrative Judge