[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 18-5343 and 18-5345

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

SOLENEX LLC, a Louisiana Limited Liability Company,
Plaintiff-Appellee,

v.

DAVID BERNHARDT, Secretary of the Interior, *et al.*,
Defendants-Appellants,

and

BLACKFEET HEADWATERS ALLIANCE, *et al.*,
Intervenor Defendants-Appellants

Appeal from the U.S. District Court for the District of Columbia

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WESTERN ENERGY ALLIANCE'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLEE AND THE DECISION BELOW

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All (A) parties and amicus curiae, except Western Energy Alliance, (B) references to the rulings at issue, and (C) statement of related cases appear in the Brief for the Intervenor-Appellants.

CERTIFICATE OF SEPARATE INTEREST

Western Energy Alliance understands that the United States Chamber of Commerce intends to file an amicus brief in support of Solenex LLC. Counsel for these amici have conferred and determined that they represent different constituencies and interests. The focus of Western Energy Alliance's brief is narrow—it is the impact of the Court's decision on lessees of federal oil and gas leases. Western Energy Alliance understands that the United States Chamber of Commerce will focus on the impacts to the wider economy. It is impracticable for the briefs to be combined into a single brief, but these amici have agreed to limit the word-length of their briefs.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

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(s) Rebecca W. Watson .

Attorney for Western Energy Alliance.

Dated: June 12, 2019

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

BLM	Bureau of Land Management
Interior	The Department of the Interior
JA	Joint Appendix
Longwell's Lease	Federal Lease No. MTM53323
Mineral Leasing Act	30 U.S.C. §§ 181-287.
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
Petrofina	American Petrofina Company of Texas, Petrofina Delaware, Inc., and AGIP Petroleum Company, Inc.
Secretary	The Secretary of the Department of the Interior

IDENTITY AND INTEREST OF AMICUS CURIAE

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. Western Energy Alliance represents independents, the majority of which are small businesses with an average of fourteen employees. These members include past, present, and likely future federal oil and gas lessees—including both original lessees and subsequent assignees.

Western Energy Alliance's members have a vital interest in the security of title to federal oil and gas leases to support their significant investments to explore, develop, and produce oil and natural gas. In addition to the large tracts of federal lands that are open to oil and gas leasing under agency resource management plans, the United States also owns numerous scattered tracts of oil and gas that were reserved to the United States when the lands were patented into private ownership. Therefore, federal oil and gas leases are needed even to develop privately owned or State minerals that are located in drilling and spacing units that also contain federally owned minerals. If this Court were to adopt the Government's view that federal oil and gas

leases can be cancelled 30 years after lease issuance for purported errors made by the agency prior to lease issuance, the effect on Western Energy Alliance's members would be significant. Such a decision would chill investment in the development not only of federal oil and gas resources but also, of necessity, in State and privately owned resources which cannot be effectively developed without secure title to oil and gas leases covering the federal minerals in a drilling and spacing unit.

The Mineral Leasing Act, 30 U.S.C. §§ 181-287, sets forth Interior's authority to issue, and under certain limited circumstances cancel, oil and gas leases. The Mineral Leasing Act also provides express protections to bona fide purchasers of federal oil and gas leases. Western Energy Alliance's members have relied on the procedures and protections in the Mineral Leasing Act when they have entered into or acquired federal oil and gas leases.

Oil and gas law experts are unequivocal in stating that federal leases under the Mineral Leasing Act are "immune from denial or extinguishment by the exercise of secretarial discretion." Mary A. Viviano, *The Takings Clause: A Protection to Private Property Rights in Federal Oil and Gas Leases*, 24 Tulsa L.J. 43, 47 (1988). The

Department of the Interior ("Interior") publicly recognized this limitation on its authority to cancel leases—even with respect to the very lease at issue here. JA__ [ECF 45-6, p. 22] (1993 Record of Decision).

Based on the accepted understanding between industry and Interior that Interior may not cancel oil and gas leases issued in compliance with the Mineral Leasing Act, the Bureau of Land Management ("BLM") currently leases about 26 million acres to private lessees. BLM, *About the BLM Oil and Gas Program*.[1] The oil and gas leasing program established by the Mineral Leasing Act generated over $4 billion in direct revenues to the federal government last year. *Id.* Oil, gas, and coal produced from federal lands created "$79.4 billion in value added; an estimated economic output contribution of $134 billion; and an estimated 676,000 jobs" in 2017. Interior, *Economic Report FY 2017* (October 19, 2018).[2] All of this was made possible by the understanding that Interior would honor the rights acquired and paid for by private parties.

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[1] Available at https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about.

[2] Available at https://doi.sciencebase.gov/doidv/files/2017/pdf/FY%202017%20Econ%20Report.pdf.

Interior's sudden refusal to recognize the limits on its cancellation authority is both novel and surprising. The significance of Interior's newly asserted "inherent" cancellation authority cannot be overstated.

> The consequences of the Secretary of the Interior's recent cancellation of the Solenex lease will be historic if upheld. The financial viability of federal oil and gas leases as valuable assets with contractual and property rights would be significantly diminished, if not entirely shattered.

Meredith A. Wegener, *Changing Federal Priorities Midstream in Upstream Development: Federal Energy Development Lease Cancellations, Environmental Policy, Historic Preservation and Takings*, 46 Envtl. L. 979, 981 (2016). The industry relies on the sanctity of the rights it acquires from the federal government to make the multi-million dollar investments needed to develop each lease. [3] The viability of the already expensive and risky business of drilling for oil and gas on federal land would be "diminished, if not entirely shattered" if the Court reverses the decision below. That would be contrary to Congress' policy, expressed in the Mineral Leasing Act, to "foster development of oil and gas resources on public lands and to

[3] Drilling costs estimated at on average $4 million per well. United States Energy Information Administration, *Petroleum & Other Liquids* (May 21, 2019), available at https://www.eia.gov/dnav/pet/pet_crd_wellcost_s1_a.htm.

protect innocent investors and operators." *Winkler v. Andrus*, 614 F.2d 707, 711 (10th Cir. 1980) (Congress intended).

No party's counsel authored this brief in whole or in part. No party or their counsel contributed money that was intended to fund preparing or submitting this brief. This brief was funded solely by Western Energy Alliance through its membership fees.

SUMMARY OF THE ARGUMENT

Congress enacted the Mineral Leasing Act to authorize Interior to issue, and in limited circumstances cancel, oil and gas leases. Interior admits the Mineral Leasing Act does not authorize it to cancel leases in the circumstances at issue. And, Interior cannot credibly claim that its organic statutes that generically describe Interior's duties provide it with "inherent" authority to cancel oil and gas leases when the later Mineral Leasing Act expressly defined Interior's cancellation authority. Nothing in the statutes cited by Interior supports its interpretation. In fact, Interior previously agreed that it lacks inherent authority to cancel oil and gas leases. To justify its new position, Interior misapplies the holding in *Boesche v. Udall*, 373 U.S. 484 (1963) to the facts of this case. But, the Supreme Court went out of its way, in *Boesche*, not to overrule

prior case law establishing that Interior's cancellation authority is generally limited to the authority provided by the Mineral Leasing Act.

Interior also wrongly asserts that it may disregard the Mineral Leasing Act's bona fide purchaser protections. A purchaser of a federal oil and gas lease issued in compliance with the Mineral Leasing Act may rely on Interior's records showing that the lease is valid. A lease acquired by such a purchaser is protected by the Mineral Leasing Act even if it is resold.

ARGUMENT

No one appealed BLM's decision to issue Lease No. MTM53323 ("Longwell's Lease") to Mr. Longwell on May 24, 1982. JA__ [ECF 45-6, p. 22] (1993 Record of Decision) ("the lease has not been challenged by administrative appeal or in Federal District Court"). Everyone, including Interior, concluded that Longwell's Lease was a valid lease that Interior had no authority to cancel. *Id.* at 25 (BLM and Interior "lack authority to cancel or change lease terms.").

A year after entering into the lease, Mr. Longwell sold Longwell's Lease to a group of three companies (collectively "Petrofina") on June 2,

1983.[4] JA__ [ECF 45-9, pp. 17-18]. BLM approved the assignment of Longwell's Lease to Petrofina. *Id.* No one has argued or presented any evidence to suggest that Petrofina was not a bona fide purchaser.

Almost two years later, on January 31, 1985, BLM approved Petrofina's November 1983 application for a permit to drill an oil and gas well. JA__ [ECF 115, p. 5] (1985 Record of Decision). That is when appeals and litigation ensued. For decades, Interior steadfastly maintained that Longwell's Lease was valid, and that it could not be cancelled. *See e.g.* JA__ [ECF 45-6, p. 22] (1993 Record of Decision); JA__ [ECF 45-6, p. 55] (April 19, 2002 letter from BLM to Mr. Longwell) ("Specifically, you asked the BLM a simple question, ***'Is my permit valid?'*** The answer is yes, you have a valid permit." (emphasis in original)). But, when forced by the court below to end its decades of unlawful delays, the BLM decided to short-circuit the litigation over its approval of Petrofina's application for a permit to drill. BLM simply cancelled Longwell's Lease administratively and then denied Petrofina's application. JA__ [ECF 68-1] (Cancellation Letter).

[4] The companies are American Petrofina Company of Texas (25% interest), Petrofina Delaware, Inc. (25% interest), and AGIP Petroleum Company, Inc. (50% interest).

In cancelling Longwell's Lease, BLM incorrectly asserted that the Secretary of the Interior ("Secretary") has virtually unlimited inherent authority to cancel oil and gas leases. *Id.* According to Interior, the Secretary, or his or her subordinates, need only provide "a reasoned explanation for disregarding facts and circumstances" they previously concluded made the lease valid. Principal Br. for the Def.-Appellants, 32 (Doc. # 1781182) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009)). As the court below concluded, Interior is wrong.

The Court may affirm either based on the reasons stated by the lower court or on an alternative basis. *See SEC v. Sprecher*, 81 F.3d 1147 (D.C. Cir. 1996) ("we can affirm on other grounds."). While Western Energy Alliance agrees with the decision below, the Court should affirm on two alternative grounds to provide certainty about the scope of Interior's newly asserted "inherent" cancellation authority. The Court should hold that (I) Interior lacks general inherent authority to cancel oil and gas leases because that authority is primarily defined and limited by the Mineral Leasing Act, and (II) the Mineral Leasing Act prohibits Interior from cancelling oil and gas leases acquired by bona fide purchasers.

I. Interior has no inherent general authority to cancel oil and gas leases issued pursuant to the Mineral Leasing Act.

A. Interior's general authority to cancel oil and gas leases is defined in the Mineral Leasing Act.

Interior has no inherent authority or powers because it is a creature of statute with only those powers Congress provides. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). Interior admits that neither the Mineral Leasing Act nor any other statute expressly authorizes BLM or Interior to cancel Longwell's Lease. Principal Br. for the Def.-Appellants, p. 27 (Doc. # 1781182) (admitting that "[n]either the Mineral Leasing Act nor any other statute even addresses . . . Interior's authority to cancel a lease for legal deficiencies at the time it was issued."). In fact, Interior acknowledges that its cancellation of Longwell's Lease may violate its contractual obligations and be unconstitutional. *Id.* at 37 (arguing that its contractual and constitutional violations immunized its decision from this challenge because Solenex could conceivably seek monetary compensation instead). But, Interior cannot obtain additional "inherent" authority by violating its contracts and the Constitution.

Interior relies on a broad interpretation of generic language in its organic statutes to assert that it has unlimited inherent power to cancel leases. Nothing in the text of the three statutes cited by Interior, 43 U.S.C. § 2, 43 U.S.C. § 1457, and 43 U.S.C. § 1201, mentions any authority to cancel leases issued pursuant to the Mineral Leasing Act. Section 2 states that the Secretary may perform the duties Congress delegates to Interior. 43 U.S.C. § 2. This statute does not, on its face, establish what Interior's authority is. *Id.* Similarly, Section 1457 does not specifically address the confines of Interior's authority to issue or cancel oil and gas leases. 43 U.S.C. § 1457. This statute simply provides a generic job description for the Secretary, which includes supervision of public lands. *Id.* Finally, Section 1201 (now Section 1457c) authorizes the Secretary to delegate his or her duties, whatever they may be. 43 U.S.C. § 1457c (transferred from 43 U.S.C. § 1201). This statute does not establish what those duties are. *Id.* The text of the statutes Interior relies on neither permit nor prohibit Interior from cancelling oil and gas leases—the text is silent on the matter.[5]

[5] The canon of construction against surplusage suggests that general statutes that do not mention Interior's authority to cancel oil and gas leases should not be interpreted to provide such sweeping authority

Interior's argument that a passing mention of its duty to manage "public lands" grants it sweeping powers to cancel leases issued pursuant to the Mineral Leasing Act at any time for any reason is flawed. First, "the term 'public-land laws' is ordinarily used to refer to statutes governing the alienation of public land, and generally is distinguished from . . . 'mineral leasing laws,' a term used to designate that group of statutes governing the leasing of public lands for gas and oil." *Udall v. Tallman*, 380 U.S. 1, 19–20 (1965). Interior's assertion that Congress impliedly provided it with unlimited inherent authority to cancel oil and gas leases based on a vague reference to "public lands" in a statute that predates oil and gas leasing is therefore contrary to the ordinary understanding of the term Interior relies on. *See id.*

More troubling than the lack of textual support for Interior's interpretation is the lack of any reasoned limitation to that interpretation. On Interior's interpretation, even the enactment by Congress of a comprehensive scheme addressing the issue and

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because that would render the specific grant of cancellation authority in the Mineral Leasing Act superfluous. The *unius est exclusion alterius* canon of construction suggests that Congress' grant of authority to cancel leases in the circumstances enumerated in the Mineral Leasing Act means that it did not grant such authority in other circumstances.

enumerating the circumstances under which Interior can cancel oil and gas leases does not prevent it from doing so in any unenumerated circumstance unless expressly prohibited. Interior could, on that interpretation of its duty regarding "public lands," do anything it wanted related to public lands as long as Congress did not expressly prohibit the precise act at issue. Such a limitless interpretation of its powers based on a general statement that Interior is responsible for administering public lands is untenable and should be rejected. *See United States v. Fisher*, 39 App. D.C. 158, 161 (D.C. Cir. 1912) (quoting *Fisher v. United States*, 37 App. D.C. 436, 441 (D.C. Cir. 1911) (holding that Interior's "supervisory authority . . . over the disposition of the public lands" is not unlimited.).

B. Interior's newly claimed authority is inconsistent with its own regulations and prior statements that lessees relied on when acquiring federal leases.

Interior cannot create its own authority by selectively misinterpreting the governing statutes. An agency's interpretation of statutes and regulations governing its conduct is not entitled to deference if it is "plainly erroneous or inconsistent with the regulation[s]." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142,

155, (2012) (quotation omitted). Likewise, an agency should not be permitted to reverse a long-standing interpretation retroactively to affect the interests of parties that already acted based on the agency's prior interpretation. *Id.* at 156 (citing cases supporting this principle).

The Court should not defer to Interior's new interpretation of the scope of its cancellation authority because it is inconsistent with Interior's regulations and its decades of prior consistent, contrary interpretation of its authority. Interior relies on 43 C.F.R. § 3108.3(d) for its claimed authority. JA __ [ECF 113, p. 4] (Reply to Pl.'s Opp. to Def.'s Cross-Mot. for Summ. J.). Interior's argument begs the question because a regulation cannot provide Interior any powers beyond what Congress has delegated to it. *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374. Interior's interpretation of its authority based on this regulation is also inconsistent with other parts of the same set of regulations. The very next section of these regulations implementing the Mineral Leasing Act provides protections to bona fide purchasers, but BLM and Interior assert that they are not bound by that. *See* JA __ [ECF 113, pp. 8-13]. Because Interior's new interpretation of its

authority is inconsistent and "plainly erroneous," it is not entitled to any deference. *See Christopher*, 567 U.S. at 155. Nor is it persuasive.

Contrary to their new assertions in this case, BLM and Interior have on numerous occasions over the past several decades acknowledged that their authority to cancel oil and gas leases issued pursuant to the Mineral Leasing Act derives from and is limited by the Mineral Leasing Act. *See e.g. Penroc Oil Corp. et al.*, 84 IBLA 36, 40 (1985) ("Notwithstanding the restricted nature of the Federal leasehold and the plenary power of the Secretary over leasing Federal lands, we conclude that a Federal oil and gas lessee must derive certain rights from the Mineral Leasing Act of 1920 . . . [and] once the Secretary has leased the land he may not deny or extinguish the rights of the Federal oil and gas lessee under the valid oil and gas lease.")[6]; JA__ [ECF 45-6, p. 22] (1993 Record of Decision) (BLM and Interior "lack[s] authority to cancel or change lease terms.").[7] Interior may not suddenly reverse

[6] The Secretary has delegated to the IBLA the authority to hear certain administrative appeals and issue final decisions on behalf of Interior. *See Shell Offshore Inc. v. F.E.R.C.*, 858 F.2d 1147, 1151 (5th Cir. 1988).
[7] Interior and BLM concluded in 1993 that, if they wanted to cancel Longwell's Lease, they could do so by "buying back the lease, condemning the lease, and enacting legislation." JA__ [ECF 45-6]. Simply cancelling the lease was not one of the available options. *Id.*

course to retroactively cancel existing leases acquired by lessees in reliance on Interior's prior interpretation.

C. Interior's argument is based on an overbroad application of the narrow opinion in *Boesche*.

The Court should reject Interior's attempt to expand the holding in *Boesche* because the Supreme Court expressly narrowed its opinion to the facts of that case. The *Boesche* opinion addressed only whether Interior can administratively cancel an invalidly issued lease or must use a judicial proceeding. *Boesche*, 373 U.S. at 475. This is not the question before the Court.

i. The Court expressly limited the applicability of Boesche *to avoid overruling prior limitations on Interior's authority.*

In *Boesche*, the Supreme Court went out of its way to make abundantly clear that it would "sanction no broader rule than is called for by the exigencies of the general situation and the circumstances of this particular case." *Id.*; *see also Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 2d 245, 258 (D.D.C. 2011) (recognizing that *Boesche* is limited to the facts of that case). The Court narrowly limited its opinion to "not open the door to administrative abuses." *Boesche*, 373 U.S. at 485.

The Supreme Court emphasized how narrowly its opinion should be interpreted to avoid overruling *Pan American Petroleum Corp. v. Pierson*, 284 F.2d 649 (10th Cir. 1963). In *Pan American*, the Tenth Circuit considered Interior's assertion that it had inherent authority to cancel oil and gas leases because it was charged "with the supervision of public business relating to . . . Public lands, including mines." *Id.* at 654 (omission in original) (quotation omitted). The Tenth Circuit disagreed, and noted that

> [i]f the continued existence of the granted leasehold estate is dependent upon the fluctuating policies of governmental departments uninhibited by any limitations upon time of action, the value of federal oil and gas leases as a title basis for oil and gas development is greatly diminished if not practically destroyed. No prudent operator would be willing to accept the financial risks if he were subject to ouster because of some administrative decision based upon improper conduct of an assignor occurring at some distant time in the past.

Id. at 655. The Tenth Circuit determined that, to protect operators and thereby promote development of oil and gas on public lands, Congress limited Interior's authority to administratively cancel oil and gas leases after they were issued to those reasons listed in the Mineral Leasing Act. *See id.* at 655-56.

The Supreme Court granted certiorari in *Boesche* in part to evaluate what initially appeared to be a split between the Tenth Circuit in *Pan American Petroleum Corp.* and the D.C. Circuit in *Boesche*. *Boesche*, 373 U.S. at 473. But, after careful review, the Supreme Court declined to overrule either decision. Instead, the Court narrowly limited its opinion upholding the D.C. Circuit's decision in *Boesche* to the peculiar facts of that case. *Id.* at 485-86.

The only other time the Supreme Court cited *Pan American* was when Justice Douglas, who joined the opinion in *Boesche*, nine years later cited *Pan American* with approval. *United States v. Jim*, 409 U.S. 80, 90 (1972) (Douglas, J., dissenting). Justice Douglas cited *Pan American* for the proposition that Interior can only cancel oil and gas leases if the lessee fails "to comply with the lease, the [Mineral Leasing Act], and regulations." *Id.* This Court should not do what the Supreme Court declined to do when it declined to overrule *Pan American*. Instead, this Court should reject Interior's attempt to expand *Boesche* to provide Interior general "inherent" authority to cancel oil and gas leases.

ii. Boesche *is inapposite because it addressed only Interior's authority to administratively correct a subordinate's mistake in processing lease applications when challenged.*

The issue in *Boesche* was not whether the lease should or could be cancelled. The lease had been cancelled below. *Boesche*, 373 U.S. at 475, fn. 4. The sole issue was whether the Secretary could promptly correct his own agency's mistake in issuing a lease to the wrong applicant by cancelling the lease administratively or whether it must be cancelled judicially before a new lease could be issued to the correct applicant. *Id.* ("We limited the writ of certiorari to the single question of the authority of the Secretary to cancel this lease administratively").

The Court highlighted the following limiting facts as important to its decision that under the "peculiarly appropriate" circumstances in *Boesche*, *id.* at 483, Interior could administratively cancel a lease: (1) the lease at issue could indisputably be cancelled either by the courts or Interior, *id.* at 475, fn. 4; (2) the Secretary merely attempted to correct his own administration's error, *id.* at 478 (the Secretary "should have the power, in a proper case, to correct his own errors"); (3) the validity of the lease was promptly challenged, *id.* at 474; and (4) the decision to cancel the lease was to protect the rights of the applicant that was

entitled to the lease, *id.* at 485 (holding that Interior had "the power of cancellation, at least while conflicting applications are pending, . . . to secure the rights of competing applicants.").

In contrast, this case is not about a lease invalidly issued to the wrong applicant. No one asserts that Interior violated the Mineral Leasing Act. No one asserts that Mr. Longwell was not a qualified lessee. And, no one asserts that Mr. Longwell did not comply with the Mineral Leasing Act or any regulations issued thereunder. Nor is there a claim that BLM, Interior, or any subordinate made a substantive mistake in processing Mr. Longwell's lease application. All of the challenges arose post-lease issuance from BLM's decision to approve Petrofina's application for permit to drill an oil and gas well on the lease Petrofina acquired from Mr. Longwell in reliance on Interior's position that it could not cancel existing leases.

Unlike *Boesche*, here the Secretary did not seek to promptly correct her own administration's mistake in processing a lease application. Instead, Interior acknowledged the validity of Longwell's Lease during the administration of seven Secretaries before Secretary

Jewell suddenly reversed course.[8] Interior's cancellation of Longwells' Lease is not the type of prompt administrative fix of an administration's own error that *Boesche* permits. *See Boesche*, 373 U.S. at 485. Rather, this cancellation is "administrative abuse," *id.*, by a new Secretary who regretted that a predecessor used his discretion to issue a lease.

Moreover, the Court's decision to protect the rights of a qualified applicant that promptly challenged the lease at issue in *Boesche* upholds Congress' expressed policy to promote oil and gas development on public lands. *See Winkler*, 614 F.2d at 711 (Congress intended to "foster development of oil and gas resources on public lands and to protect innocent investors and operators."). BLM's and Interior's decision to cancel Longwell's Lease does not.

None of the primary facts supporting the Supreme Court's narrow decision in *Boesche* are present here. *Boesche* is therefore inapposite. Not only are the facts in this case inapposite, they represent the type of administrative abuse that the Supreme Court warned against in *Boesche*. *See Boesche*, 373 U.S. at 485. While "elections have

[8] *See* Department of the Interior, *Past Secretaries*, available at https://www.doi.gov/whoweare/past-secretaries.

consequences," as President Obama stated,[9] the rule of law requires that changes in policy comply with proper procedures. *Pan American*, 284 F.2d at 655; *see also Christopher*, 567 U.S. at 156-57 (warning against an agency changing interpretations that an industry has relied on); *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1111 (D.C. Cir. 2019) ("An agency cannot ignore its prior factual findings that contradict its new policy nor ignore reliance interests."). Interior's attempt to retroactively change its policy to cancel Longwell's Lease is precisely the type of administrative abuse that *Boesche* did not condone. *See Boesche*, 373 U.S. at 485.[10]

The Court should not permit Interior to retroactively cancel Longwell's Lease issued, without protest, over thirty years ago by a

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[9] Quoted in Eric Cantor, *What the Obama Presidency Looked Like to the Opposition*, N.Y. Times, January 14, 2017, available at https://www.nytimes.com/2017/01/14/opinion/sunday/eric-cantor-what-the-obama-presidency-looked-like-to-the-opposition.html.

[10] Interior's reasoning for changing its decision is also directly contrary to Congress' expressed intent. Interior relies on Congress' subsequent withdrawal of the area at issue from leasing to support its changed position. But, in withdrawing the area at issue from future leasing, Congress expressly stated its intent was to preserve existing leases and other "valid existing rights." Pub. L. No. 109-432, § 403(b)(1), 120 Stat. 2922 (2006). Interior recognizes that even under its interpretation of its authority, Longwell's Lease is not void, but rather voidable. Principal Br. for the Def.-Appellants, p. 22 (Doc. # 1781182). Longwell's Lease was a valid existing right that Congress intended to preserve.

predecessor based on a new Secretary's policy desires. Instead, the Court should hold that Interior has no "inherent" authority to cancel oil and gas leases under these circumstances, but is limited by the Mineral Leasing Act.

II. The Mineral Leasing Act prohibits Interior from cancelling oil and gas leases acquired by bona fide purchasers.

A. The Mineral Leasing Act expressly protects bona fide purchasers of federal oil and gas leases.

Congress prohibits Interior from cancelling oil and gas leases held by bona fide purchasers. 30 U.S.C. § 184(h)(2). In fact, Congress was so appalled by a prior Secretary's attempt to cancel oil and gas leases held by bona fide purchasers[11] that it provided for prompt dismissal of bona fide purchasers from any suit to cancel their leases. 30 U.S.C. § 184(i).

The regulations that implement the Mineral Leasing Act's bona fide purchaser protection also prohibit the Secretary from cancelling leases acquired by bona fide purchasers. 43 C.F.R. § 3108.4. The Secretary's interpretation of the Mineral Leasing Act's bona fide purchaser protection in this case as having a "NEPA exception"

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[11] *See* H.R. Rep. No. 86-1062 (explaining that Congress added the bona fide purchaser protections to the Mineral Leasing Act in response to Interior promulgating new regulations and initiating the process to cancel 491 leases for violations of the Mineral Leasing Act).

incorrectly deviated from its prior view of the Mineral Leasing Act and its own regulations. *See Clayton W. Williams, Jr. Exxon Corp.*, 103 IBLA 192, 216, GFS(O&G) 62 (1988) (holding that the bona fide purchaser protection in the Mineral Leasing Act and its implementing regulations applies to protect against cancellations for pre-lease violations of NEPA).

In an order addressing the same issues entered on the same day as the order at issue here, the court below held that Interior is prohibited from cancelling leases acquired by bona fide purchasers. *Moncrief v. United States Dep't of Interior*, 339 F. Supp. 3d 1, 10-11 (D.D.C. 2018). Interior "cannot at once argue that a violation of NEPA and NHPA renders a lease 'subject to cancellation' under its regulations, and at the same time deprive plaintiff of the exception in those same regulations prohibiting cancellation 'to the extent that such an action adversely affects the title or interest of a *bona fide* purchaser.' That is too clever by half." *Id.* (citations omitted). Interior cannot evade the bona fide purchaser protection created by Congress simply by recharacterizing the reason for cancelling a lease.

Here, Interior pays lip service to its flawed argument that it is not constrained by any bona fide purchaser protection. Interior's actions, however, show that it recognizes that it must respect the rights of bona fide purchasers. Interior voluntarily dismissed its appeal in *Moncrief*, reinstated the *Moncrief* lease covering nearby lands, and filed a motion to dismiss the appeal filed by the same intervenor-defendants that filed an appeal here. *Moncrief v. United States Dep't of the Interior*, No. 18-5340, 2019 WL 2263348, at *1 (D.C. Cir. Apr. 12, 2019) (dismissing appeal); Exhibit 1 (Reinstatement of the *Moncrief* Lease). The only material difference between the cases is that the *Moncrief* order includes bona fide purchaser protection as an alternative basis for the same holding. By seeking to dismiss the virtually identical appeals in *Moncrief,* Interior recognized that the Mineral Leasing Act's bona fide purchaser protection is dispositive of the issue before the Court.

B. Purchasers may presume that leases issued in compliance with the Mineral Leasing Act are valid.

"[W]hether or not a party qualifies as a bona fide purchaser within 30 U.S.C. § 184(h)(2) depends on common law standards." *Winkler*, 614 F.2d at 711. To be a bona fide purchaser under this standard, the purchaser "must have acquired his interest in good faith, for valuable

consideration, and without notice of the violation of the departmental regulations." *Southwestern Petroleum Corp. v. Udall*, 361 F.2d 650, 656 (10th Cir. 1966).

An assignee may presume that a lease properly issued under the Mineral Leasing Act is valid if Interior's Land Office records show that the land was available for leasing. *Southwestern Petroleum Corp.*, 361 F.2d at 657; *see also Geosearch, Inc. v. Watt*, 721 F.2d 694, 699 (10th Cir. 1983) ("the assignees were entitled to presume that the BLM had properly discharged its responsibilities"). An assignee is not required to search all available records to ascertain whether there was a pre-leasing defect in the lease issued by the BLM because "such a requirement would nullify the bona fide purchaser amendment." *Southwestern Petroleum Corp.*, 361 F.2d at 657. An assignee is not even required to await the BLM's approval of the assignment to be entitled to bona fide purchaser protection. *Id.* at 656.

While the parties vigorously disagree about whether Solenex is a bona fide purchaser, and the court below did not rule on this issue, there is no genuine dispute that Petrofina was a bona fide purchaser. *See* JA__ [ECF 113, pp. 14-15] (Reply to Pl.'s Opp. To Def.'s Cross-Mot.

for Summ. J.) (arguing that certain facts that all post-date Petrofina's acquisition of Longwell's Lease put Solenex on notice of potential defect)); JA __ [ECF 112, p. 16](Reply Br. of Pikuni Traditionalist Assoc., *et al.*, to P's Supp. Br. on Summ. J.) (arguing the same). Petrofina—like all other purchasers of federal leases—was entitled to rely on Interior's records showing that the lands were available for leasing, and that Interior considered the lease validly issued. *Southwestern Petroleum Corp.*, 361 F.2d at 657. Petrofina may certainly rely on Interior's records when BLM in fact approved the assignment. *See id.* at 656. It is therefore indisputable on this record that Petrofina was a bona fide purchaser, and that it was protected as such by the Mineral Leasing Act during the sixteen years it owned Longwell's Lease.

To protect similarly situated bona fide purchasers, the Court should be clear that the Mineral Leasing Act protects bona fide purchasers such as Petrofina—even if, for other reasons, the Court decides that Solenex is not entitled to the same protection on the facts of this case.

C. The Mineral Leasing Act's bona fide purchaser protections do not disappear when a lease is resold.

To protect both a bona fide purchaser's lease interests and the value thereof, the Mineral Leasing Act's bona fide purchaser protection cannot magically disappear if the bona fide purchaser wants to sell its interest. *See* Patton and Palomar on Land Titles § 13 (3d ed.) (Describing this rule, in the context of recording statues, as the "shelter rule"). Otherwise, such lease interests would lose their resale value. *See id.* ("This rule is necessary if the recording act is to give the *bfp* [bona fide purchaser] the benefit of her bargain and permit her to market the property.").[12] Limiting the bona fide purchaser protection to prevent later resale would render the protection Congress provided virtually meaningless. [13]

Courts across the country have therefore recognized that successors can assert a predecessor's right to bona fide purchaser protection. *See e.g.*, *United States v. Parcel of Land, Bldgs.,*

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[12] *But see*, *id.* (pointing out that equitable principles may prevent a prior non-bona fide purchaser from acquiring bona fide purchaser protection by conveyances through a bona fide purchaser.).

[13] A bona fide purchaser may even be unable to develop the lease without the "shelter rule" because it could not use the lease as collateral for financing its development if the secured party—or a purchaser at a foreclosure—could not claim bona fide purchaser protection.

Appurtenances & Improvements, Known as 92 Buena Vista Ave., Rumson, N.J., 507 U.S. 111, 142 (1993) (recognizing that bona fide purchaser protections protect "[b]ona fide purchasers for value or their lawful successors.").[14] Otherwise, the Secretary would be incentivized to delay and outwait the bona fide purchaser, as she successfully did here where Petrofina re-conveyed Longwell's Lease sixteen years later after it became "fed up with the [Secretary's] endless delay." JA__[ECF 24-2, p. 33].[15] The Court should not endorse this tactic.

Instead, the Court should uphold the protections that Congress provided to bona fide purchasers such as Petrofina and many of Western Energy Alliance's members. That necessarily includes protecting the resale value of the leases these people and entities acquired in good faith as bona fide purchasers relying on the statutory protections Congress provided.

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[14] *See also*, *Mills v. Damson Oil Corp.*, 686 F.2d 1096, 1102 (5th Cir. 1982) (holding that a person who is not a bona fide purchaser but can only claim title if he is protected as such must rely on his predecessor's status as a bona fide purchaser to claim title); *In re Hassen Imports P'ship*, 502 B.R. 851, 857 (C.D. Cal. 2013) ("The bona fide purchaser can convey to a successor who also takes title free and clear of the prior interest." (quotations omitted)).

[15] BLM approved this assignment. *Id.*

CONCLUSION

Western Energy Alliance respectfully asks the Court to protect the interests of lessees of federal oil and gas leases and the continued viability of the leasing program created by Congress through the Mineral Leasing Act by affirming the decision below. The Court should affirm based on Interior's lack of authority and the express protections Congress provided bona fide purchasers in the Mineral Leasing Act.

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2019, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Rebecca W. Watson
Rebecca W. Watson