[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,
U.S. DEPARTMENT OF THE INTERIOR, et al.,
Defendants-Appellants,

and

BLACKFEET HEADWATERS ALLIANCE, et al.,
Defendant-Intervenors-Appellants.

Appeal from the United States District Court for the District of Columbia

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DEFENDANT-INTERVENORS-APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

FEDERAL CASES

*Authorities upon which we chiefly rely are marked with asterisks.

STATUTES AND LEGISLATIVE MATERIALS

REGULATIONS AND ADMINISTRATIVE MATERIALS

GLOSSARY OF ABBREVIATIONS

EA:	Environmental Assessment
EIS:	Environmental Impact Statement
Fina:	Fina Oil and Chemical Co.
NEPA:	National Environmental Policy Act
NHPA:	National Historic Preservation Act
PTA:	Pikuni Traditionalist Association
WEA:	Western Energy Alliance

SUMMARY OF THE ARGUMENT

Plaintiff-appellee Solenex, LLC offers no legitimate defense of the judgment below. Indeed, Solenex devotes relatively little attention to defending the district court's erroneous determination that the Interior Department arbitrarily ignored reliance interests in canceling the Solenex lease. Instead, Solenex devotes most of its brief to broader attacks on Interior's lease-cancellation authority and reasoning. In doing so, Solenex invokes inapposite precedent. Contrary to Solenex's argument, the U.S. Supreme Court has repeatedly affirmed the authority that Interior utilized in this case, including in cases involving equivalent timeframes of agency action. Moreover, the circumstances of this case justify Interior's action. Finally, Solenex's attacks on the rationality of Interior's lease-cancellation decision are meritless, and Solenex's arguments repeatedly misstate the record. Accordingly, the district court's judgment should be reversed.

ARGUMENT

I. SOLENEX FAILS TO UNDERMINE INTERIOR'S LEASE-CANCELLATION AUTHORITY

Solenex cites inapposite case law to argue that Interior lacked authority to cancel the Solenex lease because the agency purportedly waited too long. See Pl.-Appellee's Resp. Br. ("Solenex Br.") 29-36. Solenex relies on Albertson v. FCC, 182 F.2d 397 (D.C. Cir. 1950), and its progeny, which hold that an agency's authority to decide a particular question "carries with it by implication the

authority to reconsider" that question. Id. at 399 ("The power to reconsider is inherent in the power to decide."); see Belville Mining Co. v. United States, 999 F.2d 989, 997 (6th Cir. 1993); Bookman v. United States, 453 F.2d 1263, 1265 (Ct. Cl. 1972) (both cited in Solenex Br. 31-32); accord Ivy Sports Med., LLC v. Burwell, 767 F.3d 81, 86 (D.C. Cir. 2014). Solenex invokes these cases to argue that such implicit reconsideration authority must be exercised within a short period, and claims Interior violated that limitation. See Solenex Br. 31-32. This argument fails because the challenged cancellation decision does not rest on any implied reconsideration authority and, even assuming for the sake of argument that it did, Interior's decision would remain valid.

Solenex's argument fails, first, because the authority on which it relies is irrelevant. Interior did not cancel the Solenex lease pursuant to any inherent reconsideration authority implied from its explicit power to issue the lease under the Mineral Leasing Act. See 30 U.S.C. § 226 (authorizing oil and gas leasing). Instead, Interior canceled the lease pursuant to its "general powers of management over the public lands," which encompass authority to cancel a mineral lease "on the basis of pre-lease factors." Boesche v. Udall, 373 U.S. 472, 476, 479 (1963); see ECF No. 68-1 at 7 (cancellation decision). Congress granted these powers through statutes enacted before the Mineral Leasing Act, and therefore they are not implied from any "power to decide" conveyed by that Act. Albertson, 182 F.2d at

399; see Boesche, 373 U.S. at 476 & n.6 (citing statutes). Nor were they withdrawn by the Mineral Leasing Act. Boesche, 373 U.S. at 478-83. In particular, Interior's "administrative cancellation power," id. at 477, is a facet of the Interior Secretary's plenary authority to take action concerning the public lands "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460 (1920); see Boesche, 373 U.S. at 476-77 (discussing Cameron and other authorities); see also Orchard v. Alexander, 157 U.S. 372, 382 (1895) (recognizing that Supreme Court rulings since 1836 are "in favor of the power of the general officers of the land department to review and correct the action of the subordinate officials in all matters relating to the sale and disposal of public lands").[1]

This cancellation power is not limited to a period of "weeks" or the "deadline for an appeal of the previous decision," as Solenex argues. Solenex Br.

[1] Amicus curiae Western Energy Alliance ("WEA") argues that Interior lacks general authority to cancel mineral leases "because that authority is primarily defined and limited by the Mineral Leasing Act," WEA's Amicus Curiae Br. ("WEA Br.") 8, but this contention merely rehashes the losing argument in Boesche, see 373 U.S. at 478-82. While WEA seeks to narrowly limit Boesche to its facts, WEA Br. 15-21, this argument defies extensive case law applying Boesche to hold that Interior has "broad authority" to cancel leases "for administrative errors committed before the lease was issued." Winkler v. Andrus, 614 F.2d 707, 711 (10th Cir. 1980) (emphasis added); see Br. of Def.-Intervenors-Appellants Pikuni Traditionalist Association, et al. ("PTA Opening Br.") 49 n.10 (citing cases).

32 (quotations and citation omitted). Instead, "so long as the [Interior] Department retains jurisdiction of the land, administrative orders concerning it are subject to revision." West v. Standard Oil Co., 278 U.S. 200, 210 (1929) (emphasis added); see Mich. Land & Lumber Co. v. Rust, 168 U.S. 589, 593 (1897) ("[T]he power of the [Interior] department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed."); Union Oil Co. of Cal. v. Udall, 289 F.2d 790, 792 (D.C. Cir. 1961) ("[I]t is well established that until legal title has passed to the applicant for a patent, the Secretary may require further inquiry into the validity of claimed rights to public land."). Although the Supreme Court established this principle before enactment of the Mineral Leasing Act, Boesche confirmed that it applies equally in the context of mineral lease cancellation: "We think that no matter how the interest conveyed is denominated the true line of demarcation is whether as a result of the transaction all authority or control over the lands has passed from the Executive Department or whether the Government continues to possess some measure of control over them." 373 U.S. at 477 (quotations and citation omitted).

Recently, this Court in Silver State Land, LLC v. Schneider, 843 F.3d 982, 990 (D.C. Cir. 2016), applied Boesche, Cameron, and Michigan Land & Lumber Co. to hold that an Interior Secretary action to terminate an invalid sale of public land "falls comfortably within the period for her to exercise this authority." The

Court reached this holding not because the Secretary acted within any particular timeframe, but instead because Interior acted "before the patent had issued" and thus had not relinquished jurisdiction over the land. Id. Here, of course, Interior retains jurisdiction over the public lands encompassed within the Solenex lease, so it retains lease-cancellation authority under the Boesche line of precedent.[2]

These cases reflect a longstanding judicial recognition that "[t]he secretary is the guardian of the people of [the] United States over the public lands," and is obligated to ensure that "none of the public domain is wasted or is disposed of to a party not entitled to it." Knight, 142 U.S. at 181. That guardianship role is particularly relevant here, where Interior determined that the Solenex lease should be canceled in response to, among other things, findings by the Advisory Council on Historic Preservation that the foreseeable impacts of oil and gas development on the Solenex lease "would be so damaging to the [Badger-Two Medicine

[2] Solenex emphasizes that no appeals were filed when Interior issued the Solenex lease in 1982. Solenex Br. 11-12. However, the absence of appeals is not surprising given that the government's environmental assessment of the leasing decision inaccurately assured the public that "a leasing decision does not irreversibly commit the Forest Service to permit activity which would result in unacceptable effects." ECF No. 45-10 at 46; see Sierra Club v. Peterson, 717 F.2d 1409, 1413-14 (D.C. Cir. 1983) (rejecting similar agency reasoning). In any event, the Secretary's authority to review and reverse erroneous Interior Department actions "may be exercised by direct orders or by review on appeals"; thus, the Secretary may reverse an agency order despite "the fact that no appeal was taken from such order." Knight v. United Land Ass'n, 142 U.S. 161, 181 (1891) (quotations and citation omitted).

Traditional Cultural District] that the Blackfeet Tribe's ability to practice their religious and cultural traditions in this area as a living part of their community life and development would be lost." ECF No. 55-1 at 7.

Further, contrary to Solenex's argument that the cancellation came too late, see Solenex Br. 33-36, the Supreme Court has sustained similar Interior actions despite the passage of comparable periods. In West v. Standard Oil Co., an Interior Department official determined in 1904 that certain public land in California was nonmineral in character, triggering transfer of legal title to the state under an 1850 statute. 278 U.S. at 207-09, 216 n.6. For the ensuing 21 years, Interior left that classification unchanged, even as California transferred the land to Standard Oil and that company actively pursued drilling and "extensive" oil production on the property. Id. at 207-10. During this period, Interior officials initiated a new proceeding to reassess the mineral character of the affected land, but mislaid the file concerning that proceeding, resulting in Interior's failure to serve process for seven years. Id. at 209-10. Then, the Interior Secretary dismissed that reassessment proceeding, apparently putting an end to the agency's mineral-character inquiry and leaving Standard Oil with unquestioned title. Id. This record of neglect by agency officials and detrimental reliance by private interests surpasses anything that Solenex can allege in this case. Nevertheless, when a new Interior Secretary in 1925 vacated his predecessor's dismissal order

and directed the Department to conduct a hearing on the mineral character of the Standard Oil land, the Supreme Court concluded that the new Secretary "possessed the power to review the action of his predecessor and to deal with the matter as freely as he could have done if the dismissal of the proceedings had been his own act or that of a subordinate official," reasoning that such actions remain subject to revision "so long as the Department retains jurisdiction of the land." Id. at 210, 221.

Similarly, in Michigan Land & Lumber Co., 168 U.S. at 589, 590, 595, the Supreme Court upheld Interior's authority to reconsider the Department's swampland classification of public lands, which triggered transfer to Michigan under an 1850 statute, despite the passage of 32 years (1854-1886) between Interior's initial swampland classification and its subsequent revision of that classification. The Court stated: "[N]otwithstanding that a survey had been made, and that such survey indicated that the land in controversy was swamp land, and therefore passing, under the act of 1850, to the state of Michigan, it was within the power of the land department, at any time prior to the issue of a patent, of its own

motion, to order a resurvey, and correct by that any mistakes in the prior survey." Id. at 595.[3]

In sum, Interior has continuing authority to correct erroneous Department actions for as long as the Department retains jurisdiction over the affected public lands. The Supreme Court has repeatedly recognized and upheld that authority in cases involving timeframes comparable to this case. Interior appropriately exercised that authority to cancel the Solenex lease. Solenex's citation of inapposite case law concerning implied agency reconsideration authority does not alter that conclusion.

However, even assuming, for the sake of argument, that the cases cited by Solenex concerning an agency's implied reconsideration authority did govern this case—which they do not for the reasons stated—Interior's cancellation of the Solenex lease would remain valid. Under the implied reconsideration cases, an agency's reconsideration authority must be exercised within a short period "absent

[3] In Gabbs Exploration Co. v. Udall, 315 F.2d 37, 40-41 (D.C. Cir. 1963), this Court cited the passage of time as justification for rejecting a private plaintiff's attempt to force Interior to reopen proceedings concerning the validity of mineral claims. The Court suggested that it might be inappropriate for the Secretary to reopen such proceedings where it might be "difficult, if not impossible, for the Secretary to determine the facts." Id. No such concern exists in this case, where Interior's decision rested on findings of National Environmental Policy Act ("NEPA") and National Historic Preservation Act ("NHPA") violations that were apparent from the face of the agency's environmental analysis documents for the Solenex lease. See ECF No. 68-1 at 8-12.

unusual circumstances." Mazaleski v. Treusdell, 562 F.2d 701, 720 (D.C. Cir. 1977).

This case presents unusual circumstances. First, failure to cancel the Solenex lease would have exposed Interior to renewed litigation in the District of Montana raising the same lease-invalidity claims that the agency addressed in its cancellation decision. See PTA Opening Br. 15, 17, 33 n.3. Interior therefore would have been forced to grapple with the lease-invalidity claims even if it did not independently reconsider those issues, and would have been forced to confront appellate authority—including Sierra Club v. Peterson, 717 F.2d 1409, Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988), and Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988)—adverse to the agency's position. That fact alone warrants an outcome different from the cases cited by Solenex where agency reconsideration was deemed unreasonably delayed. See Solenex Br. 33 (citing cases); see also Belville Mining Co., 999 F.2d at 999 (upholding reconsideration where original agency determinations, if "left uncorrected, would be vulnerable to

court challenge because of the wholly inadequate process by which these determinations were reached").[4]

Moreover, as underscored by a host of formal pronouncements and enactments, including the Advisory Council's 2015 findings and Congress' 2006 withdrawal of the Badger-Two Medicine region from mineral leasing, development of the Solenex lease would inflict irreparable harm on a culturally and environmentally sensitive landscape adjacent to Glacier National Park along northern Montana's scenic Rocky Mountain Front. See PTA Opening Br. 18-19, 22, 31-32; see also 151 Cong. Rec. S7389-90 (daily ed. June 24, 2005) (statement of Sen. Baucus) ("The front is too wild and too precious to subject it to roads, pipelines, noise and other such development activities."). Given this "probable impact of an erroneous agency decision" left uncorrected, "the public interest in achieving a correct result … especially tips the scales in favor of a finding that reconsideration was timely." Belville Mining Co., 999 F.2d at 1001-02 (finding

[4] Solenex cites Umpleby v. Udall, 285 F. Supp. 25 (D. Colo. 1968), and Pacific Oil Co. v. Udall, 273 F. Supp. 203 (D. Colo. 1967), see Solenex Br. 33, but both involved challenges to the Interior Department's refusal to reopen previously decided matters, not challenges to agency reconsideration. Moreover, the Tenth Circuit's decision in Pacific Oil Co., which is omitted from Solenex's citation, recognized that the Secretary "might have" lawfully reopened the 27-year-old matter in that case "under West v. Standard Oil Co.," discussed above. Pac. Oil Co. v. Udall, 406 F.2d 452, 456 (10th Cir. 1969).

reconsideration timely where agency's error would allow surface mining in national forest).

Further, the cancellation did not disturb reasonable reliance interests. By the time the lease was canceled, Solenex and its principal, Sidney Longwell, had notice that challenges to the validity of its lease had been raised in public proceedings for nearly 20 years. See PTA Opening Br. 32-35. Further, Solenex's investment of resources in the lease is relatively modest. Although Solenex claims the lease "has served as the basis for millions of dollars" of investment, Solenex Br. 29, an affidavit filed by Longwell discloses that he and Solenex actually have spent only approximately "$35,000 in seeking to develop the lease," in addition to posting a $10,000 bond. ECF No. 24-2 at 36 (Longwell Decl. ¶ 17).[5]

[5] Solenex has recourse for these expenditures. The Court of Federal Claims has held that a party who fails to receive a valid leasehold due to Interior's improper lease issuance may pursue a claim against the government for breach "of the express terms of the contract[]" conveying the exclusive right to drill, "as well as the implied warranty of title"—even where the lease was lawfully canceled. Griffin & Griffin Expl., LLC v. United States, 116 Fed. Cl. 163, 176-77 (2014). Solenex has pursued no such remedy.

Accordingly, even if the implied reconsideration authority cases cited by Solenex applied here—which they do not—the Interior Department's cancellation decision remains valid.[6]

II. SOLENEX'S ARBITRARY-AND-CAPRICIOUS CHALLENGE EQUALLY FAILS

Solenex fares no better in challenging the substance of Interior's lease-cancellation decision. As discussed in PTA's opening brief (at pages 35-42), Interior's decision provided a detailed justification for the agency's conclusions. Solenex's arguments fail to demonstrate otherwise.

[6] Solenex in a footnote argues that it is entitled to the Mineral Leasing Act's protection for bona fide purchasers. Solenex Br. 34 n.7; see also WEA Br. 22-28. However, "[a] footnote is no place to make a substantive legal argument on appeal; hiding an argument there and then articulating it in only a conclusory fashion results in forfeiture." CTS Corp. v. EPA, 759 F.3d 52, 64 (D.C. Cir. 2014). Solenex cannot avoid forfeiture "by incorporating argument presented in the district court." Davis v. Pension Benefit Guar. Corp., 734 F.3d 1161, 1166-67 (D.C. Cir. 2013); see Solenex Br. 34 n.7 (citing district court briefing). In any event, the Leasing Act's bona-fide-purchaser protection is inapplicable where, as here, cancellation is based on violations of NEPA and the NHPA. See Brief of Defendant-Intervenors-Appellants, Moncrief v. U.S. Dep't of Interior, No. 18-5340 (D.C. Cir. filed Apr. 4, 2019), at 43-51. Further, by Solenex's admission, it "did not pay money to Mr. Longwell for the assignment of the lease." ECF No. 89-1 at 21. "'A person who is a mere volunteer, having acquired title by gift, inheritance, or some kindred mode, cannot come within the scope of the term bona fide purchaser." Lykins v. McGrath, 184 U.S. 169, 173 (1902) (quotation and citation omitted).

A. Solenex Mischaracterizes the Badger-Two Medicine Region

Solenex wrongly claims the Interior Department was mistaken in describing the Badger-Two Medicine region as a remote and relatively pristine landscape. Solenex Br. 45-46. Solenex argues the region is extensively disturbed with pipelines, a rail line, a federal highway, roads and jeep trails, and snowmobile routes. Id. at 10, 45-46.

However, the referenced pipelines, railroad and federal highway run along the extreme northwestern fringe of the region in a transportation corridor that divides the Badger-Two Medicine region from Glacier National Park. See FS001293, 001296-97 (map), 001298 (1990 EIS). By contrast, Solenex's proposed drill site is located in the backcountry nearly three air miles from this corridor; accessing it would require punching 5.7 miles of new road into the undeveloped Badger-Two Medicine landscape. See FS001193 (map); ECF No. 32-2 at 16 (Bodily Decl. Att. A); ECF No. 45-6 at 12.[7]

Apart from this corridor skirting its northwest border, the Badger-Two Medicine region is hardly subject to "heavy traffic," as Solenex claims. Solenex

[7] Solenex misleadingly claims "noise and visual effects" from drilling on its lease "would be subordinate to that from the existing nearby railroad and highway," citing a 1991 agency document. Solenex Br. 17. The cited document actually reaches this conclusion about noise and visual effects on Glacier National Park, which adjoins the railroad and highway, not the Solenex drill site 2.75 miles away. ECF No. 45-5 at 10.

Br. 10, 45. While the region once held certain primitive roads resulting from seismic exploration for oil and gas during the 1950s-1960s, these routes never afforded extensive motorized access, and by 1972 the U.S. Forest Service described the area as "relatively inaccessible." FS-HC002533. By the mid-1980s, use of such routes was generally limited to off-road vehicles. FS-Supp000794. Then, in 2009, the Forest Service closed all but 8.6 miles of routes in the Badger-Two Medicine region to all motorized vehicles, leaving 182 miles of primitive routes in the region open only to foot, livestock, and bicycle access. See ECF No. 116-7 at 6. That decision also closed the snowmobile routes that Solenex claims lace the area. See id. at 8. As a result, former motorized "access routes" within the Badger-Two Medicine region "have been or are currently being closed and rehabilitated." FS006533-34 (Forest Service assessment).

Accordingly, when the Forest Service in 2014 described the natural integrity of the Badger-Two Medicine region for purposes of assessing the likely impacts of drilling on the Solenex lease, it stated:

> The core … setting is primarily natural and, for the most part, undisturbed by modern development. The area consists of rugged mountainous terrain transitioning to prairie-mountain foothills on its eastern edge. Much of the area is heavily vegetated by conifer forests, interspersed with open parklands and meadows. The natural setting of this area is further reinforced by the surrounding designations of Glacier National Park to the north and the Bob Marshall Wilderness Complex to the west and south and most recently by the Forest's 2009 Travel Management decision that designated this area for non-

> motorized travel only. Overall, the natural setting of the district is relatively pristine.

FS006533; see also ECF No. 74-8 at 8-18; ECF No. 74-11 at 5-22 (photographs). That description—not Solenex's mischaracterization—accurately depicts the Badger-Two Medicine region.

B. Solenex Wrongly Dismisses the Cultural Resources at Stake

Solenex's claim that Interior erred in recognizing Blackfeet cultural interests in the Badger-Two Medicine region is equally meritless. Solenex Br. 46-47. Solenex repeatedly suggests that Blackfeet cultural concerns with oil and gas drilling in this region are disingenuous and ultimately attributes the tribe's position to "economic self-interest." Id. 58-59; see also id. 12-13, 23, 46-47.

Solenex ignores the long record of Blackfeet advocacy to protect the Badger-Two Medicine region dating back to 1973, when the Blackfeet Tribal Business Council—the governing body of the Blackfeet Reservation—declared the landscape encompassing this region "Sacred Ground" and asserted that it "shall not be disturbed in any way without prior consent of the Blackfeet Tribe." ECF No. 116 at 3. The council reiterated this position in 1993, emphasizing that "[t]he Blackfeet people actively practice their religious, cultural and traditional rights in the area," and asserting that proposed oil and gas development "will seriously and adversely impact the rights of the Tribe and its members to practice and exercise their rights." HC01705-06. Then, in 2004, the council recommended that the

Forest Service prohibit all motorized-vehicle use in the area and that "the entire Badger Two Medicine area be nominated to the National Registry of Historic Places as a Blackfeet Traditional Cultural District and an Ethnographic Cultural Landscape." FS004243-45. Most recently, in 2014 the council reiterated that the Badger-Two Medicine region "has been one of the most culturally and religiously significant areas to the Blackfeet People since time immemorial." ECF No. 115-12 at 180-82.

Extensive research supports the tribe's position, including four ethnographic studies that provided the basis for the Forest Service and Montana Historic Preservation Office to seek listing of the Badger-Two Medicine area in the National Register of Historic Places. See FS004951-52; FS005882-84; FS005466-5605; FS005606-07; FS005608-5731; FS004620. Based on these materials, the Interior Department's Keeper of the National Register twice determined that the Badger-Two Medicine Traditional Cultural District meets all National Register requirements, concluding that the region "is directly associated with culturally important spirits, heroes, and historic figures central to Blackfoot religion, traditional practices, and tribal lifeways" and "provid[es] tribal members a place to conduct important prayer, hunting, and plant and paint gathering activities." FS006464; see FS006291. More recently, the Advisory Council in September 2015 recognized that the region "is of premier importance to the Blackfeet Tribe in

sustaining its religious and cultural traditions" and recommended cancellation of all remaining mineral leases in the area to preserve its cultural value. FS006587, 006590; see also Nat'l Parks Conservation Ass'n v. Semonite, 916 F.3d 1075, 1085 (D.C. Cir. 2019) (recognizing that "[t]he Advisory Council, tasked as it is with preserving America's historic resources, merits special attention when it opines" about impacts on historic properties).[8]

In the face of these multiple Blackfeet declarations, expert studies, and government certifications, Solenex cites a single tribal resolution from 1983 approving a joint venture to explore for minerals in the area. Solenex Br. 12-13, 58. Yet within six months of that resolution, an outpouring of Blackfeet traditionalist opposition to mineral development in the Badger-Two Medicine region persuaded the Tribal Business Council to join a comment letter from appellant Montana Wilderness Association objecting to proposed oil and gas drilling in the area. HC04131. A few months later, the council itself appealed the Interior Department's decision to issue a drilling permit on the Solenex lease. FS-

[8] Solenex complains that ethnographic information underlying the cultural district designation was redacted, Solenex Br. 47 n.11, but the NHPA mandates such redactions to protect the confidentiality of culturally sensitive locations. See 54 U.S.C. § 307103(a) (requiring federal agencies to withhold historic property information if disclosure may "impede the use of a traditional religious site by practitioners"). In any event, Solenex fails to disclose that the government provided Solenex with the referenced ethnographic information pursuant to a protective order issued by the district court. See ECF Nos. 86, 88.

HC002768. Then, in November 1986, the council issued an official statement reaffirming the tribe's cultural interest in the Badger-Two Medicine area and declaring support for traditionalists who were actively opposing oil and gas drilling. FS-HC003083; see also FS-HC003076-78 (describing November 1986 traditionalist gathering); FS-HC008008-10, 008035, 008396-8400 (reflecting traditionalist advocacy against drilling). Accordingly, the resolution cited by Solenex was both isolated and quickly superseded by multiple Blackfeet statements of opposition to oil and gas development in the Badger-Two Medicine region that continue to embody the tribe's position to this day.

Solenex also relies on government findings from 1983-1993, when drilling was first considered on the Solenex lease parcel, discounting impacts to tribal cultural interests. Solenex Br. 12-18, 46, 58. However, these early cultural assessments were "later questioned by Blackfeet traditionalists," FS001517, who were initially "reluctant to discuss any specific potential effects caused by the project to the practice and belief in their traditional religion," FS002313; see ECF No. 45-8 at 8 (Blackfeet representative explaining that traditionalists "were reluctant to participate because of [agency official's] statement about identifying sites and putting fences around them and then leasing everything else"). That initial reluctance was overcome beginning in 2003 when, during the process of NHPA consultation on the proposed Fina Oil and Chemical Co. ("Fina") drilling

project on the Solenex lease, knowledgeable tribal members assigned to a Cultural Committee concluded that "significant areas" had been omitted from past assessments. FS003772-73. Their response triggered preparation of the large body of later ethnographic work discussed above that did identify Blackfeet cultural resources in the Badger-Two Medicine region with a level of evidentiary support that satisfied the Forest Service, the Montana Historic Preservation Office, the Keeper of the National Register, and the Advisory Council.

Solenex also deems it "[o]dd[]" that Blackfeet traditionalists did not raise cultural concerns when the Forest Service in 2004 approved a gas pipeline traversing part of its lease parcel. Solenex Br. 21-22. However, the Service approved the new pipeline alongside an existing gas pipeline within the established development corridor skirting the northwest fringe of the Badger-Two Medicine region. See FS-Supp002216 (2004 Environmental Assessment for Pipeline Project ("Pipeline EA")) (map of pipeline project area). As the Service stated, "the area under consideration has been highly disturbed in the recent past" and "contains no features or archaeological deposits that would contribute to those qualities of the property that make it eligible for listing in the National Register." FS-Supp002282 (Pipeline EA). Accordingly, the absence of Blackfeet objections is not surprising.

As for Solenex's insinuation that the Blackfeet sought to extract $5 million from Solenex in exchange for drilling approval, Solenex Br. 23, 58-59, this charge

is spurious. Solenex cites notes from a 2014 NHPA consultation meeting where an Interior Department archaeologist—not a Blackfeet representative—appeared to hypothesize about "money to compensate Tribe" as among "possible mitigation" opportunities for drilling on the Solenex lease. ECF No. 45-8 at 23. Nothing suggests this archaeologist was speaking for the tribe. The sole tribal representative at this meeting stated that "the Tribe is not willing to move from the position of no drilling." Id. at 19.

C. Solenex's Remaining Arguments Are Unpersuasive

Solenex's remaining arguments fail to demonstrate any error by Interior:

1. Solenex wrongly claims that Interior "premised the cancellation on statutes and regulations promulgated years—decades—after they issued the Lease." Solenex Br. 38. Interior canceled the lease based on violations of NEPA and the NHPA—statutes enacted, respectively, 12 and 16 years before Interior issued the Solenex lease. See ECF No. 68-1 at 8-12. Although Solenex complains that the cancellation cited Congress's 2006 mineral withdrawal of the Badger-Two Medicine region, Solenex Br. 38-39, Interior did not cite the 2006 withdrawal to determine that Solenex's lease was unlawfully issued in 1982, but rather to explain why new environmental analysis to validate and effectively re-issue the unlawful Solenex lease today would contravene congressional policy. ECF No. 68-1 at 13. In any event, Interior determined that, regardless of the 2006 withdrawal, it would

not exercise discretion to validate the lease given the cancellation recommendations issued by the Advisory Council and the Agriculture Secretary, id., so Solenex's complaint is immaterial.

Solenex next argues that designation of the Badger-Two Medicine Traditional Cultural District "is irrelevant to the question of whether Solenex's Lease was properly issued in 1982." Solenex Br. 39. But Interior did not rely on the cultural district in determining that Solenex's lease was illegally issued. See ECF No. 68-1 at 8-11. Instead, Interior found lease issuance unlawful because, prior to leasing, government officials "failed to inventory lease parcels to locate and record cultural resources" of any kind. Id. at 11. While Interior considered the Advisory Council's determination of impacts on the cultural district in assessing the separate question whether to exercise discretion to undertake new analysis to validate and re-issue Solenex's lease, id. at 13, that had no bearing on its assessment of lease invalidity in the first instance and demonstrates no impropriety. See Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1050 (D.C. Cir. 2002) (rejecting argument that agency's decision whether to retain administrative rule is "limited to grounds upon which it adopted the rule in the first place"), modified in other part on reh'g by 293 F.3d 537 (D.C. Cir.).

2. Solenex defies Circuit precedent in arguing that issuance of its lease complied with NEPA. Solenex argues that Sierra Club v. Peterson, 717 F.2d at

1414, was "inappropriate" in holding that where, as here, the government issues a mineral lease permitting surface development, it must prepare an environmental impact statement ("EIS") to inform the leasing decision. Solenex Br. 41. However, this Court does not jettison Circuit precedent "absent contrary authority from an en banc court or the Supreme Court." United States v. Carson, 455 F.3d 336, 384 n.43 (D.C. Cir. 2006). Solenex ignores this rule.

Moreover, Solenex offers no persuasive reason to jettison Peterson. Solenex contends that the inadequate environmental assessment prepared for the 1982 leasing decision was actually "the functional equivalent of a full-blown EIS." Solenex Br. 42. However, that assessment erroneously asserted that no EIS was warranted because "[l]ease issuance is an action which does not directly result in effects on the environment," and wrongly claimed that "a leasing decision does not irreversibly commit the Forest Service to permit activity which would result in unacceptable effects." ECF No. 45-10 at 10, 46. Based on this flawed reasoning, the assessment offered only generic descriptions of oil and gas development impacts and did not attempt to assess impacts on specific parcels, see id. at 63-71, or cumulative effects, see id. at 28. The assessment thus exhibits the same defects that prompted this Circuit to find a NEPA violation in Sierra Club v. Peterson. See 717 F.2d at 1413 (faulting leasing agencies for "essentially assum[ing] that leasing

is a discrete transaction which will not result in any 'physical or biological impacts'").

Solenex next argues that this leasing assessment actually considered a legitimate no-action alternative, Solenex Br. 42-43, but its so-called no-action alternative merely proposed delaying leasing for approximately a year, see ECF No. 45-10 at 48; see also PTA Opening Br. 13-14. This analysis failed to fulfill NEPA's mandate of providing agency decision-makers and the public with an accurate depiction of the trade-offs between pursuing leasing options or "not issuing any oil and gas leases." Bob Marshall All., 852 F.2d at 1228. While Solenex cites Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980), to argue that failing to lease would have "constituted an unlawful withdrawal," Solenex Br. 43, the Ninth Circuit rejected precisely this argument in Bob Marshall Alliance, correctly reasoning that the Mineral Leasing Act allows, but does not require, Interior to lease public lands, 852 F.2d at 1230 (citing Udall v. Tallman, 380 U.S. 1, 4 (1965)).

As for Solenex's argument that the government subsequently corrected any NEPA violations, Solenex Br. 44-45, Interior accurately concluded that no post-leasing agency document examined "whether leases should have been issued across the Lewis and Clark National Forest in the first place," ECF No. 68-1 at 12. Further, the documents cited by Solenex came after leases were issued, yet "the no-

leasing option is no longer viable once the leases have been issued; it must be considered before any action is taken or the statutory mandate becomes ineffective." Bob Marshall All., 852 F.2d at 1229 n.4. The government thus did not correct its NEPA violations.

3. Solenex's NHPA argument is equally flawed. Solenex contends no pre-leasing NHPA compliance was required because "[i]ssuance of an oil and gas lease does not have an impact on historic properties." Solenex Br. 44. This contention echoes an argument rejected in Sierra Club v. Peterson, where this Court held, in the NEPA context, that, "once the land is leased the Department no longer has the authority to preclude surface disturbing activities even if the environmental impact of such activity is significant," and therefore pre-leasing analysis is required. 717 F.2d at 1414 (emphasis in original). Given that "courts treat 'major federal actions'" requiring NEPA analysis "similarly to 'federal undertakings'" requiring NHPA analysis, Karst Envtl. Educ. & Prot., Inc. v. EPA, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007), Interior properly applied this principle in the NHPA context, see ECF No. 68-1 at 11 (cancellation decision); see also Mont. Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127, 1152 (D. Mont. 2004) (holding that Interior "violated NHPA by failing to follow the prescribed NHPA process prior to selling" mineral leases). Although Solenex deems it "absurd" to suggest that thousands of acres should be surveyed for cultural resources before leasing,

Solenex Br. 44, the NHPA review that led to the Advisory Council's recommendation to cancel leases in the Badger-Two Medicine area encompassed the 165,588-acre Traditional Cultural District. ECF No. 68-1 at 5-6 (cancellation decision); FS006584-85 (Advisory Council comments); ECF 32-2 at 8-9. Completion of this review belies Solenex's suggestion that an adequate NHPA process was impracticable.

4. Solenex erroneously claims Interior "failed to acknowledge reliance interests" arising from government representations that the Solenex lease was valid. Solenex Br. 47-48. In fact, Interior explicitly discussed the four agency approvals of the Fina drilling permit on the Solenex lease and pointed out that the first three were remanded after administrative appeals while the fourth was challenged by Blackfeet and conservation interests in an unresolved lawsuit. ECF No. 68-1 at 3-4. Accordingly, Interior addressed the government representations cited by Solenex, but also accurately discussed subsequent reversals of and challenges to those representations that undermined reliance on them.

Further, the terms of Solenex's lease incorporated an Interior Department regulation explicitly preserving agency authority to "enforce a public right or protect a public interest" notwithstanding agency delay, 43 C.F.R. § 1810.3(a), further undermining reliance interests. See PTA Opening Br. 29-32. While Solenex contends that PTA's argument invoking this regulation is a post hoc

rationalization, Solenex Br. 49 n.13, PTA cites section 1810.3(a) to rebut a post-decisional challenge to Interior's action and does not ask this Court to substitute this regulation for the agency's reasoning. See Ameren Servs. Co. v. FERC, 330 F.3d 494, 500 n.10 (D.C. Cir. 2003) (finding no post hoc rationalization where agency responded to plaintiff's challenge by citing authority consistent with its record conclusions).

5. Solenex and its supporting amici suggest that the Solenex lease cancellation represented an illegitimate political act of the prior presidential administration. See Solenex Br. 34, 37, 39 n.9, 46-47; accord Br. of Chamber of Commerce as Amicus Curiae ("Chamber Br.") 2, 6-7; WEA Br. 20-21. However, while the Obama administration canceled the lease, the Trump administration is defending that decision. Moreover, the cultural and environmental importance of the Badger-Two Medicine region where the Solenex lease is located has been recognized by multiple administrations, ranging from the Clinton administration's suspension of leases in the area to allow NHPA review, to the George W. Bush administration's designation of the first Traditional Cultural District and mineral withdrawal in the region, to the Obama administration's lease cancellation and the

Trump administration's defense of that decision. Against that backdrop, Solenex's allegations of political impropriety ring hollow.[9]

6. Solenex's final arguments invoke this Court's decision in Texas Oil & Gas Corp. v. Watt, 683 F.2d 427 (D.C. Cir. 1982), and urge affirmance under alternative theories of laches and estoppel. Solenex Br. 49-52. PTA has already distinguished Texas Oil & Gas Corp. and refers the Court to that discussion. See PTA Opening Br. 46-47. As for laches, the very case cited by Solenex observes that "laches is not a defense against the sovereign." Costello v. United States, 365 U.S. 265, 281 (1961) (cited in Solenex Br. 51); accord Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917); 43 C.F.R. § 1810.3(a). Estoppel against the United States—if it applies at all, see Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 421-23 (1990) (declining to resolve this issue)—is not warranted given that Solenex had no "ignorance" of issues concerning the validity of its lease. ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988). In any event, no estoppel can apply if it would cause "undue damage to the public

[9] Amicus curiae Chamber of Commerce warns that upholding Interior's cancellation authority "could chill American businesses' desire to conduct any manner of business with the federal government." Chamber Br. 8. This concern is overblown given that Interior's cancellation authority has been recognized by the Supreme Court since 1963 and declared by administrative regulation since 1983, see 43 C.F.R. § 3108.3(d), yet Interior has successfully auctioned thousands of federal mineral leases since that time.

interest." Id. (quotation omitted). Here, as the Advisory Council made clear, an estoppel enabling development of the Solenex lease "would be so damaging" to the Blackfeet Tribe's interest in the Badger-Two Medicine region that their "ability to practice their religious and cultural traditions in this area as a living part of their community life and development would be lost." ECF No. 55-1 at 8.

CONCLUSION

For the foregoing reasons, defendant-intervenor-appellants Pikuni Traditionalist Association, et al., respectfully request that this Court reverse the decision below.

Respectfully submitted this 26th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,451 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

/s/ Timothy J. Preso
Timothy J. Preso

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

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