IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOLENEX LLC, Plaintiff, v. DEBRA HAALAND, in her official capacity as Secretary of the Interior, *et al.*, Defendants, and PIKUNI TRADITIONALIST ASSOCIATION, *et al.*, Defendant-Intervenors.	)	Civil Case No. 13-00993 (RJL)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

AIRFA - American Indian Religious Freedom Act, 42 U.S.C. § 1996

ACHP - Advisory Council on Historic Preservation

APA - Administrative Procure Act, 5 U.S.C. § 551 *et seq*.

APD - Application for Permit to Drill

APE – Area of Potential Effects

BFP - Bona Fide Purchaser

BLM - Bureau of Land Management

Department - U.S. Department of the Interior

DN - Decision Notice

EA - Environmental Assessment

EIS - Environmental Impact Statement

FONSI - Finding of No Significant Impact

Forest Service - U.S. Forest Service

IBLA - Interior Board of Land Appeals

MLA - The Mineral Leasing Act of 1920, 30 U.S.C. §§ 181–287

NEPA - The National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.*

NHPA - The National Historic Preservation Act, 54 U.S.C. § 300101 *et seq*.

NSO - No Surface Occupancy

ROD - Record of Decision

Secretary - Secretary, U.S. Department of the Interior

TCD - Traditional Cultural District

INTRODUCTION

Sidney Longwell fought for his property rights for decades, until his death in 2020. He purchased a valid oil and gas lease in the Lewis and Clark National Forest in 1982 and later founded Solenex LLC to hold that lease.[1] The Bureau of Land Management ("BLM") issued the lease without challenge. The area—which the Blackfeet Tribe sold to the United States for the purpose of mineral development—had been active in oil and gas development since the 1940s. In 1982, there was every indication that Mr. Longwell would soon be in possession of a producing well that would yield dividends for him and for U.S. consumers. It was never to be. He would instead spend the last 38 years fighting the government for his right to even begin that work.

In 2015, following more than three decades of lease suspension and delay—despite Defendants approving Solenex's application for permit to drill a well ("APD") on four separate occasions—this Court determined that enough was enough, and ordered the Secretary of the Department of the Interior ("the Secretary") to issue a final determination on the suspension of Solenex's lease. The Secretary responded by summarily cancelling the lease and disapproving the APD, citing changes in agency policies and purported procedural errors all the way back in 1981.

Solenex challenged the cancellation. This Court granted summary judgment in favor of Solenex holding that given the time lapse between the lease issuance and the cancellation, the Secretary failed to consider Solenex's reliance. The Court remanded the matter to the Secretary with instructions to reinstate the lease. On appeal, however, the U.S. Court of Appeals for the District of Columbia Circuit vacated this Court's judgment, holding that elapsed time was not sufficient to establish reliance and that the record as then presented did not demonstrate reliance.

[1] Unless specified, "Solenex" is used to refer to Solenex, LLC, and its predecessors in interest, which include Sidney Longwell and American Petrofina Company of Texas ("Fina").

Nonetheless, the Secretary's action exceeded her authority, violated principles of contract law, and ignored Solenex's *bona fide* purchaser status and valid existing rights protections passed by Congress. The Secretary also relied on retroactive application of laws and policies post-dating Solenex's lease by over a decade and reversed 23-year-old agency positions, all without adequate explanation. This Court should set aside Defendants' actions cancelling the lease, disapproving the APD, determining the alleged effects of the proposed well, and deciding that such effects cannot be mitigated.

BACKGROUND

I. Legal Background

A. Mineral Leasing Act and Other Protections for Federal Oil and Gas Leases

The Mineral Leasing Act of 1920 ("MLA") provides for the leasing of federally owned lands containing oil and gas resources, and its purpose is "to promote the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise." *Harvey v. Udall*, 384 F.2d 883, 885 (10th Cir. 1967) (quotation omitted). To accomplish this purpose, the MLA vests the Secretary, acting through the BLM, with the authority to issue leases covering oil and gas deposits "and lands containing such deposits owned by the United States, including those in national forests . . . ." 30 U.S.C. §§ 181, 226(a).

A federal oil and gas lease grants the lessee, among other things, the right to "drill for, mine, extract, remove, and dispose of all" the oil and gas in the leased lands, 43 C.F.R. § 3101.1–2, and conveys both property and contract rights. *See* Nelson, *Takings Law West of The Pecos: Inverse Condemnation of Federal Oil and Gas Lease Rights*, 37 NAT. RES. J. 253, 258–59 (1997) (federal oil and gas leases "are a unique hybrid of contract and real property rights."); *Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 609 (2000) (federal oil and gas lease is a contract). The security of a lease is necessary to fulfill Congress's purpose in passing the MLA. *See Pan Am.*

Petroleum Corp. v. Pierson, 284 F.2d 649, 655 (10th Cir. 1960) ("If 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.").

The MLA therefore includes congressional limits on the Secretary's authority to cancel a lease. *See* 30 U.S.C. §§ 184(h)(1)–(2), 188(a), (b); *Moncrief v. U.S. Dep't of Interior*, 339 F. Supp. 3d 1, 5 (D.D.C. 2018). Under the MLA, the Secretary may only cancel a lease under 3 circumstances. First, Congress authorized the Secretary to cancel a lease when an "interest in [the] lease is owned, or controlled . . . in violation of any of the" MLA, *if* cancellation does not "affect adversely the title or interest of a bona fide purchaser[.]" 30 U.S.C. § 184(h)(1)–(2). Second, the Secretary may cancel a lease when "the lessee fails to comply with" the MLA, the lease, or "regulations promulgated under [the MLA] and in force at the date of the lease[.]" 30 U.S.C. § 188(a). Third, Congress permits the Secretary to cancel a lease "after 30 days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the leasehold contains a well capable of production of oil or gas in paying quantities." 30 U.S.C. § 188(b).

The Supreme Court has also recognized a limited extra-statutory authority, necessary to enforce the MLA, that gives the Secretary "the power to correct administrative errors[,]" such as the erroneous issuance of a lease to an applicant whose application did not comply with the MLA or associated regulations, "by cancellation of leases in proceedings timely instituted by competing applicants for the same land." *Boesche v. Udall*, 373 U.S. 472, 484–85 (1963).

B. National Environmental Policy Act

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331 et seq., is a procedural statute designed to foster informed decision-making regarding the potential environmental consequences of a considered undertaking; NEPA does not impose substantive

requirements. *See Balt. Gas and Elec. Co. v. Nat. Res. Def. Council, Inc*., 462 U.S. 87, 97–98 (1983); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). Instead, "NEPA merely prohibits uninformed—rather than unwise—agency action." *Id.*; *New York v. Nuclear Reg. Comm'n*, 681 F.3d 471, 476 (D.C. Cir. 2012) ("NEPA is an 'essentially procedural' statute intended to ensure 'fully informed and well-considered' decisionmaking, but not necessarily the best decision.") (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*., 435 U.S. 519, 558 (1978)).

When an agency proposes a "major Federal action[,]" NEPA often requires that the agency prepare an environmental impact statement ("EIS"). 42 U.S.C. § 4332(C). But not all "major Federal actions," require a full-blown EIS. To determine whether an EIS is required, an agency may prepare an environmental assessment ("EA"). 40 C.F.R. §§ 1501.4, 1501.5. An EA "[b]riefly" describes the proposal, examines alternatives, considers impacts, and provides a list of individuals and agencies consulted. 40 C.F.R. § 1501.5. If, based upon the EA, the agency concludes there will be no significant environmental effects, it may issue a Finding of No Significant Impact ("FONSI"), obviating the need to prepare an EIS. *See* 40 C.F.R. §§ 1501.3, 1501.4, 1501.6. Importantly, "[s]o long as the officials and agencies have taken the 'hard look' at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or interject itself within an area of discretion of the executive as to the choice of the action to be taken." *Nat. Res. Defense Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

C. National Historic Preservation Act and Its Evolution

The National Historic Preservation Act ("NHPA"), 54 U.S.C. § 300101 et seq., is designed to identify potential conflicts between federal undertakings and historic properties, and to provide a mechanism for resolving such conflicts. Section 106 of NHPA requires that an agency having jurisdiction over an undertaking "take into account the effect of the undertaking on any historic

property . . . prior to the issuance of any license[.]" 54 U.S.C. § 306108. Like NEPA, NHPA is a strictly procedural statute that neither confers a substantive right nor dictates a particular outcome. *See Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 252 (3d Cir. 2001) ("The NHPA is a procedural statute designed to ensure that, as part of the planning process for properties under the jurisdiction of a federal agency, the agency takes into account any adverse effects on historical places from actions concerning that property."); *Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 537 F. Supp. 2d 161, 173 (D.D.C. 2008) ("The case law in this and other circuits holds that an agency's duty to act under the NHPA . . . is procedural in nature.") (quoting *Nat'l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 925 (D.D.C. 1996), aff'd 203 F.3d 53 (D.C. Cir. 1999)); *Ill. Comm. Comm'n v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988).

In 1966, when originally passed, NHPA did not apply to or mention tribes. *See* Act of Oct. 15, 1966, Pub. L. No. 89-665, 80 Stat. 915. The 1980 NHPA amendment in place when the BLM issued the lease to Solenex mentioned "Indian tribes" only a few times and did not require significant tribal consultation. 16 U.S.C. § 470-1(2)(1) (1980). NHPA was amended again in 1992. The 1992 amendments provided, for the first time, an express tribal role in the NHPA consulting process. The 1992 amendments also expanded NHPA protections and provided that "[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register." Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102–575, 106 Stat 4600.

II. Factual Background

A. Initial Issuance of Oil and Gas Lease to Mr. Longwell

In response to the energy crisis of the late 1970s, Congress passed the Energy Security Act of 1980, which, among other things, required the Secretary of Agriculture to process applications for oil and gas leases on national forest lands. 42 U.S.C. § 8855. In 1981, the Forest Service, with the

approval of the BLM as a cooperating agency, issued a comprehensive, 162-page EA for oil and gas leasing on non-wilderness lands administered by the Lewis and Clark National Forest in Montana ("1981 EA"). ECF Nos. 45-10, 45-11.[2]

On May 24, 1982, after receiving recommendations from the Forest Service, the BLM issued lease M-53323 to Mr. Longwell.[3] ECF No. 45-9 at 19, 31–32. The lease covered 6,247 acres of land that had been subject to four prior, but then expired, leases. ECF No. 45-9 at 32. Pursuant to the 1981 EA, the lease was subject to extensive general and special stipulations providing protections for various surface resources. ECF No. 45-12 at 7–9. The decision to issue this lease and the stipulations to impose on the lease were based on site-specific analyses performed by the Forest Service. ECF No. 45-9 at 31–32; ECF No. 115-4 at 40.

Neither the 1981 EA nor the lease was ever subject to any administrative challenges. ECF No. 45-5 at 16. Due to hunting and timber rights reserved to the Blackfeet Tribe as a result of an 1895 Treaty selling part of their reservation to the United States, the land under the lease was not eligible for a wilderness designation. ECF No. 45-2 at 31. Rather, the Blackfeet Tribe itself was preparing for oil and gas exploration in the area. ECF No. 45-12 at 13–14.

B. Assignment of Lease to Fina; Approval of the Application for Permit to Drill

On June 2, 1983, Mr. Longwell sold the lease to Fina, reserving a right to payment if the lease ever reached production status. ECF No. 45-9 at 17–18. In November 1983, Fina submitted

[2] Plaintiff has previously filed appendixes containing documents in the administrative record. *See* ECF Nos. 45, 48, 115, 116. To avoid duplication, these documents will be cited as ECF No. __ at __. Newly cited administrative record documents will be noted as FS000000 [Forest Service] or HC00000 [BLM], and copies will be filed in a supplemental appendix following completion of briefing pursuant to Local Civil Rule 7.n.

[3] The lease area has a high potential for discovery of natural gas and a somewhat lesser potential for discovery of oil. ECF No. 45 at 44–45. ("The USGS has estimated that as much as a billion barrels of undiscovered crude oil and 25 trillion cubic feet of natural gas may be recoverable from the Montana portion of the Overthrust Belt.")

a proposed surface use plan and application for permit to drill ("APD") on the lease. ECF No. 45 at 8–24. The BLM and the Forest Service began the required environmental and other reviews of Fina's proposals. *See* ECF No. 45 at 26. Fina also submitted a third-party-prepared cultural resource inventory report that documented the survey for cultural resources on the well site and the three proposed access routes; no cultural resources were located. ECF No. 45 at 16–24.

Major uses in the lease area "included automobile traffic…, snowmobiling, hunting, and firewood gathering." ECF No. 45 at 42; ECF No. 45-1 at 17 n.3 (noting that the area was within a livestock grazing allotment and the area was used for motorized recreation). The proposed well site was approximately 2 miles from private land, approximately 3 miles southeast of a railroad, "approximately 2 miles southeast of U.S. Highway 2[,]" and approximately "9 miles southwest of East Glacier, Montana." ECF No. 45 at 41; ECF No. 45-1 at 17; ECF No. 50-1 at 2 (map depicting well site location); ECF No. 115 at 20 (same) ("Rising Wolf Resort" is private property).

In January 1985, the Forest Service and the BLM issued a 318-page, joint EA ("1985 EA") evaluating the APD. ECF No. 45 at 31 to ECF No. 45-1 at 12, ECF No. 115 at 10 to ECF No. 115-1. Based upon a review of all feasible alternatives, the agencies chose to approve the APD and imposed additional conditions of approval to minimize any adverse effects. ECF No. 115-1 at 25–61. The conclusion of the two agencies was that the proposed project, as limited by the lease stipulations and the additional conditions of approval, should be approved because the proposed drilling activities could be performed without causing a significant environmental impact. ECF No. 45 at 26–30; ECF No. 45-1 at 3–12 (listing conditions of approval).

Activities under the APD would also not affect the Blackfeet Tribe's reserved rights in the area and "[n]o religious sites or activities were identified in the project area[.]" ECF No. 45 at 46 to ECF No. 45-1 at 1; *see also* ECF No. 115 at 107; 150–51; ECF No. 115-1 at 5 (demonstrating

consultation with the Blackfeet Tribe and compliance with both NHPA and AIRFA). The Forest Service issued a decision approving the surface use plan, ECF No. 45 at 29–30, and the BLM issued a Record of Decision and FONSI approving the APD. ECF No. 45 at 26–28.

C. The APD was Repeatedly Re-approved after Appeals and Further Environmental Studies; the Validity of the Lease Re-affirmed.

The BLM's approval of the APD—not its approval of the lease—was appealed to the Interior Board of Land Appeals ("IBLA"). ECF No. 45-1 at 16. On August 9, 1985, the IBLA generally affirmed the BLM's use of an EA to approve the APD based upon the lease stipulations and the additional conditions of approval imposed by the agencies. ECF No. 45-1 at 19 to ECF No. 45-2 at 7; *Glacier–Two Medicine All.*, 88 I.B.L.A. 133, 139–47 (1985). The IBLA did, however, set aside the approved APD and remand the APD to the BLM for further consideration of four issues related to potential timber harvest in the area, the need for an archaeological survey on a proposed new route, proposed partial closure of an access road, and the ability to implement a law enforcement program designed to protect the new access route from unauthorized public use. ECF No. 45-2 at 8–15; *Glacier–Two Medicine All.*, 88 I.B.L.A. at 148–55.

On August 16, 1985, in light of the IBLA's decision, Fina requested a temporary suspension of the lease to toll the running of the primary lease term while the BLM addressed the remanded issues. ECF No. 45-9 at 15–16. The BLM suspended the lease effective October 1, 1985. ECF No. 45-9 at 14. The lease remained in suspension for over 30 years.

On April 13, 1987, after addressing the remanded issues, the BLM reactivated the APD by issuing a Decision Notice and FONSI. ECF No. 45-2 at 45–53. The Forest Service concurred in the decision to reactivate the APD. *Id*. at 54–55. In so doing, the agencies considered the 1986 Forest Plan and accompanying FEIS, in which the Forest Service evaluated the environmental effects of oil and gas exploration and development on the Forest, including the lease area. *Id*. at

51–53.[4] The BLM also considered the recent court opinions in *Conner v. Burford*, 605 F. Supp. 107 (D. Mont. 1985) and *Bob Marshall Alliance v. Watt*, 685 F. Supp. 1514, 1523 (D. Mont. 1986), which required agencies to address specific factors in their NEPA analyses before issuing leases without stipulations adequate to prevent surface-disturbing activity. The BLM determined that its actions with regard to the Solenex lease satisfied NEPA. ECF No. 45-2 at 51–53.

The 1987 re-approvals of the APD were appealed, and the BLM and the Forest Service decided to re-analyze the APD, this time considering cumulative effects of the Fina APD and an APD submitted by Chevron on a nearby lease. Chevron and Fina Application for Permit to Drill, 53 Fed. Reg. 5,290 (Feb. 23, 1988). On October 23, 1989, Notice of Availability of the draft EIS was published in the Federal Register. Draft EIS for Exploratory Oil and Gas Wells, 54 Fed. Reg. 43,188 (Oct. 23, 1989). The notice solicited comments and advised that the draft EIS focused, among other things, on "archaeological resources, [and] Blackfeet Tribe reserved rights and traditional religious practices[.]" *Id*. at 43,188–89.

In December 1990, a comprehensive, 982-page, Final EIS for the Fina and Chevron proposals was issued ("1990 FEIS"). ECF No. 45-3 at 1 to ECF No. 45-4 at 14 (excerpts). The 1990 FEIS was tiered to the 1986 Forest Plan and accompanying, 1986 FEIS, and 1981 EA. ECF No. 45-4 at 6, 19. Based upon the 1990 FEIS, the BLM approved Fina's APD in 1991, again based on conditions intended to protect "historic or archaeological sites[.]" ECF No. 45-5 at 31–36.[5] In a

[4] The 1986 Forest Plan established management direction to minimize any effects of oil and gas related activity on the Forest, including the lease area. ECF No. 45-2 at 19, 39, 42–43. In approving the 1986 Forest Plan, the Forest Service concluded that oil and gas exploration should continue because of the protective measures provided in the 1986 Forest Plan and 1981 EA. ECF No. 45-2 at 27–28; ECF No. 45-4 at 14; ECF No. 45-2 at 23–39.

[5] Based upon the 1990 FEIS, the Forest Service and the BLM issued a joint Record of Decision approving Fina's surface use plan and APD ("1991 ROD"). ECF No. 45-4 at 15 to ECF No. 45-5 at 30. ECF No. 45-4 at 20; *see* ECF No. 45-5 at 19 (documenting compliance with NHPA and AIRFA).

Record of Decision, the agencies concluded "no identified sites or properties [were] eligible for listing on the National Register of Historic Places that [would] be effected [*sic*] by the project." ECF No. 45-5 at 13–14.

The conclusion that the Solenex APD would not affect historical sites was made after study of roughly 130,000 acres surrounding the lease and after extensive analysis of the Blackfeet Tribe's historical uses, including thorough consultation with members of the Blackfeet Tribe. *See* ECF No. 115-4 at 36 (study area included "RM-1 Geographical Unit"); ECF No. 115-6 at 38 (RM-1 Unit corresponds to 130,000 acres sold by the Blackfeet to the United States in 1895); ECF No. 115-5 at 18 (tabular comparison of alternatives on Blackfeet traditional culture, archaeological resources, and Blackfeet reserved rights); ECF No. 115-6 at 35–45 (discussing historical Blackfeet traditional culture, Blackfeet traditional cultural and religious practices in the area, the agencies' duties with regard to tribal religious practices, archaeological resources, and rights reserved to the Blackfeet); ECF No. 115-8 at 1–4 (textual discussion of consequences of considered alternatives on Blackfeet traditional culture, archaeological resources, and reserved rights); ECF No. 115-8 at 52 (discussion of mitigation and monitoring for cultural and archaeological resources); ECF No. 115-8 at 58–59, 65–66 (list and discussion of preparers and commentators including members of Blackfeet Tribe, their counsel, and the Bureau of Indian Affairs); ECF No. 115-8 at 108–112 (responses to comments regarding Blackfeet cultural values and reserved rights).

The 1991 approvals of the APD were also appealed. ECF No. 45-6 at 7; ECF No. 45-9 at 33–39. The BLM then began another review of the APD. ECF No. 45-9 at 8–9. On December 4, 1992, after completing its independent study of the surface-related issues regarding Fina's APD, the BLM asked for secretarial-level approval of the APD because of the unreasonable delay that had already occurred. ECF No. 45-9 at 68–69.

A 1993 Record of Decision ("1993 ROD") approving the APD was concurred in by the Assistant Secretary, Department of the Interior, which made it a final decision for the Secretary. ECF No. 45-5 at 40; ECF No. 45-6 at 33; ECF No. 45-6 at 3 ("I hereby concur with approval of the Fina APD[.]"). The secretarially approved ROD noted that even if litigation had been brought to challenge the lease, similar to other litigation in the jurisdiction, such litigation would "not invalidate the leases but would rather require full compliance with NEPA . . . prior to any surface-disturbing activities. *This has been accomplished with the comprehensive analysis in the Chevron-Fina FEIS [(1990 FEIS)], as tiered to the [1986 FEIS].*" ECF No. 45-6 at 22 (emphasis added). The ROD also concluded that the 1990 FEIS satisfied any requirements that courts had placed on other leases. *Id.* at 23. ("This FEIS is intended to fully meet the requirements stated in the Ninth Circuit Court's ruling in Conner v. Buford.") Further, while the ROD rejected the alternative of recommending cancellation of the lease, the ROD acknowledged that the BLM was without authority to cancel the lease under its own power. *Id.* at 22. There were only three legal ways to end the lease:

> Should the Government determine to cancel the Fina lease, three courses of action could be taken to secure from the lessee any rights granted in the original lease transaction. These include buying back the leases, condemning the leases, and enacting legislation.

Id. None of these actions have ever been taken to attempt to cancel the lease.

D. Politicians and the Agencies Begin Working against the Lease.

The 1993 Secretary-level approval of the APD, the *fourth* agency approval of the APD, was again challenged, this time by a lawsuit. ECF No. 45-9 at 44. The lawsuit became unnecessary, however, and was dismissed as the government began working to find ways to generally stop oil and gas drilling in this area of Montana.

Following President Clinton's inauguration in January 1993, the new Secretary of the Interior, Bruce Babbitt, sought to reverse his predecessor's decisions. Secretary Babbitt advised

Fina that he was continuing the suspension of the lease in aid of proposed legislation regarding protections for the lease area. ECF No. 45-6 at 34–35. Notes from February 1993 meetings between the BLM and Montana Senator Max Baucus's Legislative Director and between the BLM and the Department of Interior make plain that President Clinton's new BLM and Secretary of Interior opposed the APD and lease. ECF 114-1 at 39–40 (indicating knowledge of limitations on ability to alter an issued APD but stating it was "pretty clear that the Secretary's office wants to find a way to take care of Baucus" and Baucus knows the BLM is "exploring options trying to help").

Legislation was introduced to Congress in the mid-1990s to withdraw the Rocky Mountain Front area of the Forest, commonly referred to as the "Badger-Two Medicine" area, from further oil and gas exploration. *See* FS006064–75; ECF 45-6 at 48–49 (discussing S. 853, 103rd Cong. (1993); H.R. 2473, 103rd Cong. (1994); S. 723, 104th Cong. (1995); S. 1616, 105th Cong. (1998) that Senator Baucus introduced into legislation); ECF No. 45-6 at 34 ("Senator Max Baucus of Montana has been endeavoring for some time to have the Badger-Two Medicine Area designated as a Wilderness Study Area."). All such proposed legislation was subject to valid existing rights, and all failed. *See* S. 853, 103rd Cong. (1993); H.R. 2473, 103rd Cong. (1994); S. 723, 104th Cong. (1995); S. 1616, 105th Cong. (1998).

At that point, the Forest Service began to take protection of the area, and its efforts to frustrate the lease, into its own hands. A new Forest Supervisor became "the very embodiment of the 'new' Forest Service." Joseph L. Sax & Robert B. Keiter, *The Realities of Regional Resource Management: Glacier National Park and Its Neighbors Revisited*, 33 ECOLOGY L. Q. 233, 275 (2006). Seizing upon the 1992 amendments expanding the NPHA, the Forest Service obtained ethnographic studies of the Badger-Two Medicine area. ECF No. 48-4 at 114. By 1996, these efforts were cited to justify further suspension of the lease. ECF No. 45-6 at 37. In 1997, the Forest Supervisor advocated to the

Blackfeet Tribe that they support a historic designation for the area as a way to "have a higher degree of legally-supported control over activities" in the area. ECF No. 45-7 at 49–50. That same year, the Forest Service submitted a nomination to the Keeper of the National Historic Register ("Keeper") to designate the area adjacent to the proposed well site as a Traditional Cultural District with cultural and spiritual significance to the Blackfeet Tribe. ECF No. 45-6 at 39, ECF No. 45-7 at 17–20.

In 1999, Fina, "fed up with [the] endless delay," assigned the lease back to Mr. Longwell. ECF No. 24-2 at 33. In 2002, in response to an inquiry by Mr. Longwell as to whether his APD was still valid, the BLM responded, with "The answer is yes, you have a valid permit." ECF No. 45-6 at 55. In 2004, Mr. Longwell formed and became the manager of Solenex LLC. ECF No. 24-2 at 34. Mr. Longwell then assigned the lease and concomitant rights under the approved APD to Solenex, and the BLM approved the assignment. *Id*.[6]

By 2003, the Keeper approved the eligibility of an approximately 89,000-acre Traditional Cultural District (TCD) that was "nearby" the proposed well. ECF No. 45-7 at 28, 32; ECF No. 45-7 at 41–43. Later in 2003, the Forest Service initiated the NHPA Section 106 consultation process. ECF No. 45-7 at 28. Based on its study of expected visual, atmospheric, and audible impacts from the proposed well, the Forest Service proposed an area of potential effects ("APE") for the Solenex well. FS006296, ECF No. 48-2 at 74–78. During this meeting, the Blackfeet Tribe expressed disappointment with the size of the TCD and their belief that the entire Badger-Two Medicine area should be within the TCD. ECF No. 45-7 at 29. The Forest Service assured them that with "new information, boundaries can be changed." *Id.* The Forest Service then engaged in further repeated

[6] Solenex engaged in numerous activities and incurred expenses to comply with the lease and associated regulations and to enforce its lease rights. ECF No. 45-6 at 55; ECF No. 24-2 at 34, 38; ECF No. 45-7 at 14; ECF No. 1 at 7–10. In particular, Solenex continued to participate in a conferral process mandated by NHPA. ECF No. 45-7 at 12; ECF No. 45-8 at 1–30; *See* ECF No. 47 at 2.

studies and delays to justify expanding the TCD. ECF No. 45-7 at 18–20; ECF No. 45-8 at 36; ECF No. 45-8 at 130; ECF No. 48-1 at 97–114. After a decade, the Forest Service felt it had gathered sufficient evidence to expand the TCD.[7] In June 2013, the Forest Service formally sought the Blackfeet Tribe's concurrence to expand the TCD to approximately 165,588 acres. ECF No. 45-7 at 67.

E. The Lease is Cancelled after Solenex Sues to Resolve the Suspension.

Also in June 2013, and after repeated requests to have the lease suspension lifted, Solenex initiated this case seeking to compel agency action on the (then) more than 25-year suspension of its rights. ECF No. 1 at 7–10. Solenex requested either an order compelling Defendants to immediately lift the suspension or an order compelling Defendants to complete any remaining administrative action necessary to lift the suspension within 30 days. *Id.* at 10.

The Forest Service's Section 106 process continued while Solenex's lawsuit was pending. In January 2014, a consulting-party meeting was held to address the impacts of the now expanded TCD. During this meeting the Forest Service again suggested an area of potential effects that took into account the visual, audible, and other observable potential impacts of the proposed well. ECF No. 48-3 at 88–89, 102–03; ECF No. 48-4 at 18–19. By the next Section 106 meeting in April 2014, the Forest Service had adopted the Blackfeet Tribe's position that the area of potential effects should include the entire 165,500-plus acre TCD. ECF No. 45-8 at 14–16. In December 2014, the Forest Service finalized its analysis of the effects of the Solenex drilling proposal, noting that the area qualified for protection under NHPA due to its "power," ability to convey traditional knowledge to

[7] Meanwhile, in 2006, Congress finally passed legislation to discourage oil and gas exploration in the area of the Lease. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 403, 120 Stat. 2922 withdrew the area from any new leasing, but like prior proposals, the withdrawal did not affect "valid existing rights." To deal with the existing rights, Congress offered a tax incentive to lessees who would transfer existing mineral rights to tax-exempt entities. *Id.* at § 403(c).

the Blackfeet Tribe and its holy nature to the Blackfeet Tribe. FS006532–42. On April 23, 2015, a final Section 106 consulting party meeting was held, to "have a dialog about any present opportunities to avoid, minimize, or mitigate the adverse effects" of the proposed well. ECF No. 115-14 at 14. No Defendant suggested or entertained ideas for mitigation, and the Blackfeet Tribe opined that mitigation was impossible. *Id.* at 14–23. The Blackfeet Tribe then terminated their participation in the Section 106 process, reiterating that no mitigation would be acceptable to the Tribe. FS006567.

On July 27, 2015, this Court ruled that Defendants' (then) 29-year delay was unreasonable as a matter of law and required Defendants to propose a schedule for resolving the suspension. ECF No. 52 at 2–4. Following that adverse ruling, Defendants suggested—for the first time—that they might cancel the lease. ECF No. 53 at 2. In the alternative, Defendants suggested that they would need almost two more years to complete another NEPA process before they could lift the suspension. *Id*. This Court rejected Defendants' proposed schedule as unacceptable because it "would not only draw out this process another two years potentially, but also lacked rationales for the necessity of certain proposed steps as ordered." ECF No. 57 at 2. Accordingly, the Court ordered Defendants to file a memorandum providing their decision as to whether they would pursue cancellation of the lease, or the steps required for renewed approval of the APD. *Id*. at 4.

In response, Defendants stated that they "ha[d] not yet made a final cancellation decision," ECF No. 58 at 2, but they were "prepared to cancel the lease as early as December 11, 2015, or as soon thereafter as the Court approves the proposed schedule." *Id*. at 1. Defendants also suggested that they may have issued the lease prematurely in violation of NHPA, *id*. at 5, but that the alleged NHPA "defect has now been corrected[.]" *Id*.

On March 17, 2016, the BLM issued a decision administratively cancelling the lease. ECF No. 68-1. According to the BLM, the lease was issued prematurely in violation of NEPA, NHPA, AIRFA, and the agencies' trust responsibilities. *Id.* at 7–12. Further, the BLM found that the proposed well on the lease would interfere with the entire 165,500-plus acre TCD and that the adverse effects could not be mitigated. *Id.* at 13. Based upon these alleged violations and concerns, the BLM advised that it was exercising its alleged authority to cancel the lease by administrative, rather than civil, process. *Id*. at 13–14. Unable after decades to convince Solenex to give up its rights, and unable after decades to obtain congressional or judicial approval for taking Solenex's rights, Defendants unilaterally did it on their own.

ARGUMENT

I. Standard of Review

Under the APA, a reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found" not to satisfy any one of six listed standards. 5 U.S.C. §§ 706(2)(A)–(F). These standards require the reviewing court to engage in a "substantial inquiry." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977) ("*Overton Park*"). And, although an agency's decision is generally entitled to a presumption of regularity, "that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review." *Id*.

Two of these standards are relevant in this case. *First*, under 5 U.S.C. § 706(2)(C), a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" Whether an agency acted "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" requires a determination of the scope of the authority delegated by Congress, because "an agency literally has no power to act . . . unless and until Congress confers power upon

it." *Id.*; *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Once the scope of the agency's authority is determined, the reviewing court must decide whether the challenged agency action fell within that authority. If the agency acted in excess of its delegated authority, "then its action is plainly contrary to law and cannot stand." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

Second, under 5 U.S.C. § 706(2)(A), a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" This "arbitrary and capricious" standard, serves as a "catchall" that "pick[s] up administrative misconduct not covered by the other more specific" standards in 5 U.S.C. § 706(2). *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984). Thus, if an agency action was within the agency's delegated authority but was nevertheless arbitrary and capricious, then a reviewing court must still set it aside. *See Overton Park*, 401 U.S. at 413–14; *Moncrief v. U.S. Dep't of Interior*, 339 F. Supp. 3d 1, 6 (D.D.C. 2018).

The "arbitrary-and-capricious standard requires that agency action be [both] reasonable and reasonably explained." *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). An agency action was not reasonable "if the agency [1] has relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] [gave an explanation that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) ("*State Farm*"). And an agency action is not reasonably explained unless the agency "[1] explain[s] the evidence which is available, and [2] offer[s] a 'rational connection between the facts found and the choice made.'" *Id.* at 52 (quoting

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). Agency actions that do not run afoul of the various arbitrary and capricious factors may nonetheless violate 5 U.S.C. § 706(2)(A) if the action violates a provision of positive law such as a statute. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) (courts "must reject administrative constructions of the statute. . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.").

II. The Secretary Had No Authority to Cancel the 1982 Solenex Lease.

The Court must hold unlawful and set aside the Secretary's cancellation of the Solenex lease because Congress did not confer on the Secretary the power to cancel the lease. *See* 5 U.S.C. § 706(2)(C); *La. Pub. Serv. Comm'n*, 476 U.S. at 374–75. Congress gave the Secretary neither any (A) express, nor (B) inherent statutory power to cancel the lease; Congress did not give the Secretary (C) authority to cancel the lease as a matter of contract, and (D) Congress forbids the Secretary from cancelling the lease of a bona fide purchaser. Accordingly, the cancellation of the 1982 Solenex lease cannot stand. *See Mich.*, 268 F.3d at 1081.

There are sound and constitutionally based reasons why the Secretary had no authority to cancel the Solenex lease. Federal oil and gas leases "convey a property interest enforceable against the Government[.]" *Union Oil Co. of Cal. v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975). As a result, "Congress clearly did not intend to grant leases so tenuous in nature that the Secretary could terminate them, in whole or in part, at will." *Id.* at 750. Accordingly, the Court should "hold unlawful and set aside" the Secretary's cancellation action because it was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" *See* 5 U.S.C. § 706(2)(C).

A. The Secretary Did Not Have Express Statutory Authority to Cancel the Lease.

When Congress has directly spoken regarding the measure and limit of an agency's authority and Congress's intent is clear, then a reviewing court "must give effect to the

unambiguously expressed intent of Congress." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013) (quotation omitted) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)) ("*Chevron*"). In the MLA, Congress directly addressed the Secretary's authority to cancel an oil and gas lease—the MLA is neither silent nor ambiguous with respect to the Secretary's authority. *See* 30 U.S.C. §§ 184(h)(1)–(2), 188(a), (b); *see also Chevron*, 467 U.S. at 843. Congress recognized three bases for the Secretary to cancel an oil and gas lease: (1) the lessee owns or controls the lease in violation of the MLA, unless the leaseholder is a bona fide purchaser; (2) the lessee has violated the MLA, its implementing regulations, or the lease itself; or (3) after 30 days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the leasehold contains a well capable of production of oil or gas in paying quantities, or the lease is committed to an approved cooperative or unit plan or communitization agreement. *Moncrief*, 339 F. Supp. 3d at 5 (citing 30 U.S.C. §§ 184(h)(1)–(2), 188(a), (b)).

Here, the Secretary did not ground her Cancellation Decision on a basis authorized by Congress. *See* ECF 116-7 at 48. Instead, she took the position that Congress did not set limits on the Secretary's authority in the MLA. *See id.* But the Secretary cannot go beyond the limits Congress set—whether characterized as "improper" or "beyond the Secretary's jurisdiction," the Secretary's Cancellation Decision was "*ultra vires*." *See City of Arlington, Tex.*, 569 U.S. at 297.

Further, none of Congress's bases for cancelling a lease applies to Solenex's lease. *First*, Solenex does not own or control the lease in violation of the MLA. *See* 30 U.S.C. § 184(h)(1)–(2). *Second*, Solenex has not violated the MLA, its implementing regulations, or the lease. *See* 30 U.S.C. § 188(a). And *third*, Solenex is—again—not in violation of lease provisions, had not received 30 days' notice of any violations, and had not even had a chance to have a producing lease. *See* 30 U.S.C. § 188(b). No express authority existed to cancel the lease.

1. Solenex does not own or control the lease in violation of the MLA.

In the MLA, Congress provided the Secretary with the following cancellation authority:

> If any interest in any lease is owned, or controlled, directly or indirectly, by means of stock or otherwise, ***in violation of any of the provisions of this chapter***, the lease may be cancelled, or the interest so owned may be forfeited . . . , in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district . . . .

30 U.S.C. § 184(h)(1) (emphasis added). "This chapter," which is Chapter 3A of Title 30 in the U.S. Code, sets two restrictions on owning or controlling an interest in a lease—citizenship requirements and anti-speculation limits. 30 U.S.C. §§ 181 (citizenship requirements), 184(d)(1) (acreage limits), 184(d)(2) (time limits for options to purchase land).

With respect to citizenship requirements, the MLA says, "[c]itizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not…own any interest in any lease acquired under the provisions of this chapter." 30 U.S.C. § 181. The restriction "permits the Secretary to respond in kind when another country restricts American investment in its minerals." *Restrictions on Canadian Ownership of Fed. Mineral Leases under the Mineral Leasing Act of 1920*, 5 Op. O.L.C. 250, 253 (1981).

With respect to the anti-speculation limits, the MLA says, "[n]o person, association, or corporation . . . shall take, hold, own or control at one time . . . oil or gas leases . . . exceeding in the aggregate two hundred forty-six thousand and eighty acres in any one State other than Alaska." 30 U.S.C. § 184(d)(1).

Here, the Secretary did not cancel the lease based on the authority that Congress granted to the Secretary in 30 U.S.C. § 184. *See* ECF No. 116-7 at 48–55. Solenex's ownership of the lease did not violate citizenship requirements or anti-speculation limits. And neither the Secretary nor the Attorney General initiated a federal-court proceeding to cancel the lease, which Congress

required of any cancellation pursuant to citizenship and speculation-based cancellations. *See generally id.; cf.* 30 U.S.C. § 184(h)(1). Accordingly, the Cancellation Decision did not fall within the first explicit basis in the MLA to cancel a lease.

2. Solenex had not violated the MLA, MLA-based regulations or the lease, so the Secretary did not have authority to cancel the lease by civil proceeding.

In the MLA, Congress also provided the Secretary authority to cancel:

> [A]ny lease . . . by an appropriate proceeding in the United States district court . . . whenever the lessee fails to comply with any of the provisions of this chapter, of the lease, or of the general regulations promulgated under this chapter and in force at the date of the lease[.]

30 U.S.C. § 188(a). This express cancellation authority "reaches only cancellations based on *post-lease events*[.]" *Boesche v. Udall*, 373 U.S. 472, 478 (1963) (emphasis added).

Here, the Secretary did not purport to cancel the Solenex lease based on any post-lease violation of the MLA, its implementing regulations, or the lease. *See* ECF No. 116-7 at 48–55. The Secretary admits that neither Solenex nor its predecessors violated lease terms. ECF No. 152 ¶ 196. Instead, the Secretary alleges that the lease *issuer*—the federal government—violated the law "in the process leading to the issuance of [the lease.]" *Id.* at 53. And even if the Secretary had alleged that Solenex had violated the MLA, regulations or lease, the Secretary did not initiate a federal court proceeding to cancel the lease. *See generally id.*; *cf.* 30 U.S.C. § 184(h)(1). Accordingly, the Cancellation Decision did not fall within the second of Congress's three explicit bases in the MLA for cancelling a lease.

3. Although the lease was not producing, the Secretary did not have authority to cancel the lease administratively.

Congress also gave the Secretary express authority to cancel non-producing leases administratively:

> [A]fter 30 days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the leasehold contains a well capable of production of oil or gas in paying quantities, or the lease is committed to an approved cooperative or unit plan or communitization agreement . . . which contains a well capable of production of unitized substances in paying quantities.

30 U.S.C. § 188(b).

Here again, regardless of production status, the Secretary did not purport to cancel the lease based on any violation of the lease provisions by Solenex or any other lessee. *See* ECF No. 116-7 at 48–55; ECF No. 152 ¶ 196. Nor did the Secretary follow the administrative-cancellation procedures that Congress set out in the MLA. *See generally id.*; *cf.* 30 U.S.C. § 188(b). Accordingly, the Cancellation Decision did not fall within the third of Congress's three explicit bases in the MLA for cancelling a lease.

B. The Secretary Did Not Have Inherent Authority to Cancel the Lease.

In the Cancellation Decision, the Secretary did not cite a statutory basis for her cancellation of the lease because none exists. Rather, the Secretary purported to cancel the lease based on her "inherent authority . . . to cancel leases[.]" ECF No. 116-7 at 48. The Secretary supported her claimed inherent authority with two points. *First*, the Secretary alleged that the MLA did not supersede the Secretary's inherent authority. *Id. Second*, the Secretary alleged that an MLA implementing regulation, which the Interior promulgated in 1983, reflects the alleged inherent authority. *Id.* But neither point supports the Secretary's allegation that she had inherent authority to cancel Solenex's lease. The Secretary's exercise of "inherent authority" to cancel the lease was unlawful, and must be set aside. *See* 5 U.S.C. § 706(2)(C).

1. The MLA limited the Secretary's authority to cancel the lease.

The Property Clause of the U.S. Constitution grants Congress—and Congress alone—authority to "dispose of and make all needful Rules and Regulations" with respect to federal

property. U.S. Const. art. IV, § 3, cl. 2. As a result, the Secretary can lease and regulate interests in land belonging to the United States only within the limits authorized by Congress. *United States v. California*, 332 U.S. 19, 27 (1947); *Union Oil Co. of Cal.*, 512 F.2d at 748. The Secretary "literally has no power" to lease and regulate federal minerals "unless and until Congress confers power upon it." *See La. Pub. Serv. Comm'n*, 476 U.S. at 374.

In the MLA, Congress laid out the measure and limit of the Secretary's authority to cancel a lease. 30 U.S.C. §§ 184(h)(1)–(2), 188(a), (b). The legislative history demonstrates that members of Congress intended to limit the Secretary's authority to cancel valid leases through judicial action. *See* 58 CONG. REC. S4168 (daily ed. Aug. 22, 1919) (statement of Rep. Lenroot) ("I would like to suggest to both Senators that the Secretary of the Interior has no right or authority under the bill to cancel a lease. It can only be cancelled by judicial procedure and a forfeiture..."); 58 CONG. REC. H7604 (daily ed. Oct. 27, 1919) (statement of Rep. Sinnott) ("It is in recognition of that legal, or equitable principle that the law abhors a forfeiture, and there must be a showing made in court before the forfeiture can be secured."). Congress' delineation of the Secretary's power to invade a lessee's property rights in its federal oil and gas lease demonstrates that "Congress did not confer . . ." an inherent power to cancel a lease "upon the Secretary by implication." *See Union Oil Co. of Cal.*, 512 F.2d at 750. If Congress intended the Secretary to have inherent authority to administratively cancel property interests, then Congress would not have delineated the explicit authority granted in MLA. *See id.*; *see also La. Pub. Serv. Comm'n*, 476 U.S. at 374.

To be clear, Congress knew how to provide the executive branch with authority to cancel an oil and gas lease administratively. In other statutes, Congress has given the Secretary explicit authority to cancel a lease for environmental reasons while providing procedural protections for leaseholders. *See* 43 U.S.C. § 1334(2)(2) (administrative cancellation permitted only after a

hearing, and only if Secretary makes specific findings that continued activity would cause serious harm, the threat of harm will not decrease in a reasonable time, and the advantages of cancellation outweigh continuing the lease, and providing for compensation to leaseholder); 16 U.S.C. § 3148 (requiring specific findings, five-year suspension, continued existence of threat of harm, and compensation). Congress could have—but did not—convey such authority to the Secretary in the MLA; instead, it conveyed specific means and reasons for cancelling an oil and gas lease, none of which apply here. *See* 30 U.S.C. §§ 184(h)(1)–(2), 188(a), (b); ECF No. 116-7 at 48–55.

While the Supreme Court recognized an additional, extra-statutory "power to correct administrative errors . . . by cancellation of leases in proceedings timely instituted by competing applicants for the same land[,]" *Boesche*, 373 U.S. at 485, that carve-out is not applicable to this case. In *Boesche*, unlike here, the administrative error caused the Secretary to lease land inconsistent with the MLA and its regulations. *See id*. at 474 (describing the circumstances). When the Secretary issued the "lease" in that case, the Secretary had not actually conveyed any property interest. *See id*. "Matters of this nature"—where property does not change hands—"do not warrant initial submission to the judicial process." *Id. at 484*. But that is not what happened, nor what the Secretary claims happened, in this case. The Secretary admitted that "the area covered by [the Solenex lease] was open to leasing at the time of issuance." ECF No. 116-7 at 49. And the Secretary acknowledged that, "a void lease is one that suffers from a substantive defect . . . such as including lands that were not available for BLM to lease at the time the lease was issued." *Id*. at 48. The Secretary further contended that the lease in this case is merely "voidable" due to alleged procedural defects, not a "legal nullity." *Id.* Here, the government conveyed a property right to Solenex and had to comply with the express authority and limits on that authority imposed by Congress. *See Union Oil Co. of Cal.*, 512 F.2d at 750; *see also La. Pub. Serv. Comm'n*, 476 U.S.

at 374. This case highlights the unique facts of—and the Supreme Court's appropriate caution in—*Boesche*, and compels a different result.

The Court should read *Boesche* narrowly. In this Circuit, "administrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion." *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014). But "Congress . . . can limit an agency's discretion to reverse itself" with statutory language. *Id.* (quoting *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008)). Congress has done so in the MLA. And in *Boesche*, the Supreme Court limited its ruling "to 'the exigencies of the general situation and the circumstances of this particular case' and noted that judicial safeguards were in place to 'not open the door to administrative abuses.'" *Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 2d 245, 258 (D.D.C. 2011). The Supreme Court did not preemptively bless the Secretary with a broad lease-cancellation authority for purported pre-lease errors. *See id.*

Here, the Secretary issued the lease in compliance with the MLA. The lease was no longer subject to administrative challenge. And the Secretary's decision to cancel the lease did not fit within the narrow exception carved out in *Boesche*—it did not arise from an alleged substantive violation of the MLA or its regulations, nor from a timely challenge by a "competing applicant[] for the same land." *Boesche*, 373 U.S. at 485; *See* ECF No. 116-7 at 48–55. Because the Secretary's action did not fit the narrow circumstances the Supreme Court identified in *Boesche*, the MLA *did* supersede any inherent authority that the Secretary may have had to cancel the lease.

2. The Secretary could not use a 1983 regulation to confer inherent authority.

While rules in effect when a lease is executed may be incorporated into the lease, rules issued after the lease has been executed do not enable the Secretary to cancel the lease. *See Mobil Oil Expl. & Producing Se.*, 530 U.S. at 616–17; *see also Union Oil Co. of Cal.*, 512 F.2d at 747–

48 ("Violation of rules issued after the lease has been executed does not enable the Secretary to cancel the lease, however. The property rights of the lessee are determined only by those rules in effect when the lease is executed.").

Here, the Secretary cited a regulation, 43 C.F.R. § 3108.3(d), as "reflecting" her inherent authority. ECF No. 116-7 at 48. But the Interior's assumption of authority via regulation did not authorize its cancellation of the lease.

As a preliminary matter, Congress authorized the Secretary of the Interior "to prescribe necessary and proper rules and regulations" to carry out the MLA. 30 U.S.C. § 189. In 1983, the BLM promulgated a regulation providing for cancellation of a lease "improperly issued." Minerals Management and Oil and Gas Leasing, 48 Fed. Reg. 33,648, 33,674 (July 22, 1983) (to be codified at 43 C.F.R. § 3108.3(b), now at (d)). Notably, the BLM did not cite § 189 or any other provision of the MLA as providing authority to promulgate the regulation, and it is not clear that Congress conferred upon the BLM the authority to give itself "inherent" power to cancel "improperly issued" leases. *See La. Pub. Serv. Comm'n*, 476 U.S. at 374; *see generally* 48 Fed. Reg. at 33,655, 33,674. Rather, the BLM admitted that it was just codifying its own, self-conferred "existing practice in considering specific situations." 48 Fed. Reg. at 33,655; *accord* ECF No. 116-7 at 38.

More to the point, the BLM issued the lease in 1982—*before* it promulgated the relevant regulation. *See* ECF No. 45-9 at 19; 48 Fed. Reg. 33,648, 33,674 (July 22, 1983). Only the rules in effect when the lease was issued were incorporated into the lease terms. *See Mobil Oil Expl. & Producing Se., Inc.*, 530 U.S. at 616–17; *Union Oil Co. of Cal.*, 512 F.2d at 747–48. The Secretary could not rely on 43 C.F.R. § 3108.3(d) as a basis for terminating the lease or supporting her argument that she had inherent authority to cancel the lease. *See id.*; *contra* ECF No. 116-7 at 48.

Finally, for the sake of argument, even if 43 C.F.R. § 3108.3(d) applied to the Solenex lease, "improperly issued" must have a narrower scope then the Secretary advocates. ECF No. 116-7 at 48 (claiming § 3108.3(d) permits the Secretary to cancel leases issued in violation of NEPA). Particularly here, "improperly issued" does not encompass any lease issued in the face of an alleged NEPA violation. *See Appeal of Superior Timber Co.,* 97-1 B.C.A. P 28736 (1996) (discussing enforceability of government contract in light of court's holding that a NEPA violation had occurred and noting "NEPA does not provide for any unenforceability sanction").

C. The Secretary Lacked Contractual Authority to Cancel the Lease; Voidability, If Any, Had Been Waived.

The lease was not voidable in 2016. The Secretary based her authority to cancel the lease on the theory that the lease was voidable due to alleged NEPA and NHPA violations associated with the lease issuance in 1982. ECF No. 116-7 at 48–54. The Secretary acknowledges that under this theory the lease was not void or a "legal nullity," but merely voidable. *Id*. at 48; *see also Griffin & Griffin Expl. LLC v. United States.*, 116 Fed. Cl. 163, 173 (2014) ("[A] finding of fraud or other wrongdoing is a necessary predicate to a finding that the leases were void ab initio for purposes of government contract law.")

Oil and gas leases are subject to general contract law. *See Mobil Oil Expl. & Producing Se.*, 530 U.S. at 607–08 ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.") (cleaned up) (quoting *United States v. Windstar Corp.*, 518 U.S. 839, 895 (1996)); *Griffin & Griffin Expl. LLC,* 116 Fed. Cl. at 171 (oil and gas lease conveys property and contract rights). The law of contracts places limits on when a contract may be avoided, by whom, and for how long.

As an initial matter it is therefore questionable whether the lease was ever voidable by the government as a party to the lease. A contract may be avoided where it is made by a party without

capacity to contract (such as a minor), or was secured by duress, undue influence, abuse of a fiduciary position, or misrepresentation. *See* RESTATEMENT (SECOND) OF CONTRACTS, §§ 380–81 (AM. LAW INST. 1981). None of these principles is applicable here, nor have Defendants asserted any of these justifications.

A contract is also *sometimes* voidable when one or both of the contracting parties made a mistake. *See id*. §§ 152–53. But there are limitations on a party's ability to avoid a contract made by mistake. For example, risk of such mistake may be allocated to one of the parties, and that party could not then invoke the mistake to avoid the contract. *Id.* § 154. Additionally, to allow avoidance, a mistake must be "as to a basic assumption on which the contract was made" and must have a "material effect on the agreed exchange of performances[.]" *Id.* §§ 152–53; *see Siewick v. Jamieson Science & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000) (identifying hurdles to relator's claim that contract with government was voidable); *Griffin & Griffin Expl.*, *LLC*, 116 Fed. Cl. at 175 (identifying requirements for mutual mistake in government contract). Further, whether there has been a "material effect" is impacted by the availability of reformation, restitution, or other relief. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 152(2) (AM. LAW INST. 1981). Such "other relief" would presumably include the government's ability to suspend the contract while the mistake is corrected.

Here, it is doubtful that the government, as the party responsible for the alleged failure to comply with environmental requirements, may avoid the contract. *See Appeal of Superior Timber Co*., 97-1 B.C.A. P 28736 (1996) (distinguishing other cases where leases were not enforceable in part because "BLM, the party which did not fully comply with NEPA, is the party seeking to render the [] contract unenforceable"); *see also Griffin & Griffin Expl., LLC*, 116 Fed. Cl. at 175 (a party,

including the government, cannot rely upon mistake where the mistake was the "result of that party's failure of due diligence").[8]

Assuming, for the sake of argument, that the lease was once voidable, the lease was no longer voidable after it was affirmed by the party with the power to void it (arguably the lessee). *See* RESTATEMENT (SECOND) OF CONTRACTS, § 7 (AM. LAW INST. 1981) ("A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, *or by ratification of the contract to extinguish the power of avoidance*.") (emphasis added); *id.* at §§ 380–81; *see also Godley v. United States*, 5 F.3d 1473, 1476 (Fed. Cir. 1993) (government's acceptance of benefit of contract with knowledge of alleged defect was relevant to whether government exercised avoidance remedy).

In this case, even if the government were once the party with the power to void the lease, the government repeatedly reaffirmed the legality of the lease after it had reason to know of any alleged mistake. ECF No. 45-2 at 45–55 (1987); ECF No. 45-5 at 15–18 (1991); ECF No. 45-6 at 21–24 (1993). At least three times after the first appeal of the APD the government declared that it had complied with environmental requirements, that the alleged NEPA failings or any defects associated with the issuance of the lease had been cured. ECF No. 45-2 at 51 ("The Forest Service and BLM carefully reviewed [*Conner* and *Bob Marshall Alliance*] with respect to the proposed action and believe themselves to be in compliance for the following reasons…"); ECF No. 45-5 at 15–18 (noting several commentators that claimed lease "was not issued legally[,]" and concluding "the requirements of *Conner v. Burford* are met" by the 1990 EIS and the Forest Plan); ECF No. 45-6 at 21–23 (same). The government also assured Mr. Longwell in 2002 that his APD, and by

[8] The leases at issue in *Griffin & Griffin Exploration* were issued in 2006 and 2007. *Griffin & Griffin Expl.*, 116 Fed. Cl. at 169. To the extent that the Secretary's "improperly issued" regulation is valid, it was therefore incorporated in the Griffin & Griffin lease, unlike here. *Id.* at 176.

implication the lease, remained valid. ECF No. 45-6 at 55. Having affirmed the validity of the lease in the 1980s, 1990s, and early 2000s, the government may not now avoid it. *See Appeal of Superior Timber Co.,* 97-1 B.C.A. P 28736 (1996) (refusing government's argument that sale of timber was unenforceable as a result of NEPA violation where BLM never attempted to revoke the contract but rather "asserted that the contract remained in effect and continued to act under it while it was suspended, requiring bond payments…[.]").

Finally, a party empowered to void a lease must do so within a reasonable time. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 381 (AM. LAW INST. 1981); *see also Mobil Oil Expl. & Producing Se.*, 530 U.S. at 620–21 (holding "timely and fair consideration" of a proposed drilling plan was a "necessary reciprocal obligation[]" in the contract and "lengthy delays matter") (quotation and citation omitted); *Moncrief v. U.S. Dep't of Interior*, 339 F. Supp. 3d 1, 11 (D.D.C. 2018) ("[T]he suggestion of voidness is further rebutted by Interior's failure to cancel the lease to remedy the supposed violation for more than thirty years."); *Godley*, 5 F.3d at 1476 (If the government contract was voidable, "trial court must also determine whether the Government cancelled the contract within a reasonable time after discovery of the illegality."). Determining a reasonable time takes into account whether the delay allowed speculation "at the other party's risk[,]" whether the delay caused reliance, whether the "ground for avoidance was the result of any fault" of one of the parties, or whether the delay was caused by one of the parties. RESTATEMENT (SECOND) OF CONTRACTS, § 381(3) (AM. LAW INST. 1981).

Here the delay caused reliance by Solenex, *see infra* III.B.2, the alleged ground for the avoidance—failure to comply with NEPA—was caused by the government, and the delay was caused by the government, who then performed more than a decade of additional analysis, ECF No. 48-1 at 97–114. Additionally, the Secretary acknowledged that under her view, the lease had

been subject to cancellation since 1985. ECF No. 116-7 at 54 (lease "could have been properly cancelled" in 1985). Under these circumstances, "reasonable time" to void the Solenex lease was something well short of three decades. *See Godley*, 26 Cl. Ct. at 1081–82 (holding government "lost any right it may have had to avoid the contract…by failing to exercise that right in a timely manner[]" where approximately eight months had passed), *reversed on other grounds at Godley v. United States*, 5 F.3d 1473 (Fed. Cir. 1993). For all these reasons, the government, as a party to the lease, did not have the contractual authority to cancel the lease.

D. Due to Solenex's Bona Fide Purchaser Status, the MLA Precluded the Secretary from Cancelling the Lease.

Even if the Secretary had authority to cancel Solenex's lease, the Secretary exceeded her authority because Solenex, who acquired its interest "in good faith, for valuable consideration, and without notice" of any deficiency in title, is entitled to bona fide purchaser ("BFP") protection. *Sw. Petroleum Corp. v. Udall*, 361 F.2d 650, 656 (10th Cir. 1966). In 1959, the Secretary initiated proceedings to cancel hundreds of leases held by the original lessees and their assignees. *See* H.R. Rep. No. 86-1062 (1959), as reprinted in 1959 U.S.C.C.A.N. 2620, 2621. The asserted basis for these proceedings was that the original lessees had fraudulently acquired their leases in furtherance of a scheme to evade the acreage limitations in the MLA. *See generally Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 651 (10th Cir. 1960) (describing aspects of the purported scheme). In response to the Secretary's actions, Congress passed emergency legislation to protect the interests of the assignees. MLA, Pub. L. No. 86-294, 73 Stat. 571–72. Specifically, Congress amended Section 27 of the MLA, 30 U.S.C. § 184, to provide statutory protection for BFPs.[9] 73 Stat. at 572; *see* H.R.

[9] This amendment may have been a "belt and suspenders" approach because neither the Secretary nor the judiciary could cancel a property interest after that it had been transferred to a BFP. *See, e.g.*, *Colo. Coal & Iron Co. v. United States*, 123 U.S. 307, 313 (1887) (a fraudulently obtained patent cannot be attacked by the United States after it has been transferred to a BFP).

Rep. No. 86-1062 (1959), as reprinted in 1959 U.S.C.C.A.N. 2620, 2621 (explaining that the amendment to Section 27 of the MLA would remove the cloud placed on the titles of BFPs by the Secretary's action and encourage investment in developing the Nation's oil and gas resources).

One year later, Congress further strengthened the BFP protection. Mineral Leasing Act, Pub. L. No. 86-705, Sec. 3, 74 Stat. 781, 788–89. As amended, Section 27(h)(2) now provides:

> The right to cancel or forfeit for violation of any of the provisions of [the MLA] shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease . . . which lease . . . was acquired and is held by a qualified person . . ., even though the holdings of the person, association, or corporation from which the lease . . . was acquired … may have been cancelled or forfeited or . . .subject to cancellation or forfeiture for any such violation.

30 U.S.C. § 184(h)(2); *see also* 30 U.S.C. § 184(i) (requiring BFPs to be "dismissed promptly" from any judicial proceeding for the cancellation of a lease (or an interest therein)).

These BFP provisions have been interpreted broadly. *J. Penrod Toles*, 68 D.O.I. 285, 289–91 (1961) (ruling that statute was broad enough to cover situations beyond acreage limits); 43 C.F.R. § 3108.4 ("A lease or interest therein shall not be cancelled to the extent that such action adversely affects the title or interest of a bona fide purchaser even though such lease or interest, when held by a predecessor in title, may have been subject to cancellation."). Thus, neither the Secretary nor the judiciary may cancel a lease owned by a BFP.

Solenex is entitled to BFP protection. Solenex and its predecessors acquired the lease in good faith and with no notice that the lease may have been improperly issued. It was not until 2015, after Solenex prevailed upon its writ of mandamus, that the Secretary first suggested that the lease may be cancelled as improperly issued. ECF No. 53 at 2. This suggestion arose over 30 years after the BLM issued the lease and 10 years after Solenex was assigned the lease. ECF No. 24-2 at 32, 34. It is further undisputed that valuable consideration had been paid for the lease after it was originally issued. ECF No. 24-2 at 33. In 1982, the BLM issued the lease to Sidney M.

Longwell. ECF No. 24-2 at 32. In 1983, Fina paid valuable consideration to Mr. Longwell for the assignment of the lease. ECF No. 24-2 at 33; *see Waskey v. Chambers*, 224 U.S. 564, 566 (1912) (lessee who agreed to work the mine and remit to the lessor 30 percent of the minerals extracted paid valuable consideration for the lease).

In 1999, Fina assigned the lease back to Mr. Longwell, who ultimately assigned it to Solenex in 2004. ECF No. 24-2 at 33–34. Thus, at a minimum, Solenex is entitled to BFP protection based upon the fact that its predecessor, Fina, was a BFP. *Home Petroleum Corp.*, 54 I.B.L.A. 194, 213–14 (1981) (successor in interest to a BFP may take advantage of its predecessor's status as a BFP to prevent its lease from being cancelled) (citation omitted), *aff'd sub nom*, *Geosearch, Inc. v. Watt*, 721 F.2d 694, 699 (10th Cir. 1983); *United States v. Parcel of Land, Bldgs., Appurtenances & Improvements, Known as 92 Buena Vista Ave., Rumson, N.J., et al.,* 507 U.S. 111, 142 (1993) (Kennedy, J., dissenting) ("[A] transferee who acquires property from a good-faith purchaser for value . . . obtains good title, even if the transferee did not pay value or act in good faith.").

Solenex is also entitled to BFP protection in its own right. The Secretary does not dispute Solenex's good faith or that Solenex acquired the lease for valuable consideration. Instead, the Secretary argues that Solenex is not entitled to BFP protection solely because Solenex had notice that the lease was suspended when it acquired the lease. ECF No. 68-1 at 1 n.2 ("Solenex LLC acquired the lease with full knowledge that lease operations were suspended in 1985 because of a legal challenge and they remain suspended to date."). But the notice that could deny an assignee BFP protection is notice of a defect in the assignor's *title*, not a lease suspension. *Sw. Petroleum Corp*., 361 F.2d at 657 ("The [BFP] amendment . . . [to the MLA] necessarily contemplates some inquiry be made into the *records pertaining to title*.") (emphasis added). That a lease is suspended does

not suggest that there is a defect in the title. *See* 30 U.S.C. § 209 (indicating that the Secretary may suspend operations and production "in the interest of conservation").

To be sure, an assignee may be charged with constructive notice of documents in the BLM's lease file. *See Winkler v. Andrus*, 614 F.2d 707, 713 (10th Cir. 1980). But the Secretary failed to cite a single document in the lease file as of 2004 that would have put Solenex on notice that there was a purported defect in Mr. Longwell's *title*. Without citing any evidence, the Secretary's argument is unavailing. *See State Farm*, 463 U.S. at 43 (a court "may not supply a reasoned basis for the agency's action that the agency itself has not given") (cleaned up).

Moreover, contrary to the Secretary's suggestion, ECF No. 68-1 at 1 n.2, the so-called 1985 legal challenge *to the APD* would not have put Solenex on notice that there was a purported defect in the title of the *lease*. In November 1983, Fina submitted the APD. ECF No. 45 at 8–24. In January 1985, the Forest Service and the BLM issued the 1985 EA with respect to the APD. ECF No. 45 at 25 to 45-1 at 12 (excerpts). The conclusion of the two agencies was that the proposed project, as limited by the lease stipulations and the additional conditions of approval, could be performed without significant adverse environmental effects. ECF No. 45 at 26–30. Thus, based upon the 1985 EA, the BLM approved the APD. *Id*. at 26–28. The BLM would not have approved the APD if there were a defect in the title to the lease.

After the BLM's approval of the APD in 1985, the approval was appealed to the IBLA. *Glacier–Two Medicine All.*, 88 I.B.L.A. 133, 139–47 (1985). Noticeably absent from the appeals and the IBLA's decision is any suggestion that the lease may have been improperly issued. ECF No. 45-1 at 19 to ECF No. 45-2 at 7; *Glacier–Two Medicine All.*, 88 I.B.L.A. 133, 139–47 (1985). Thus, contrary to the Secretary's suggestion, the so-called 1985 legal challenge would not have put Solenex on notice that there was a purported defect in the title to the lease.

The Secretary exceeded her authority in cancelling the lease. The Secretary did not have explicit statutory authority to cancel the lease; she did not have inherent authority to cancel the lease; she did not have contractual authority to cancel the lease; and Solenex is entitled to BFP protection. Therefore, this Court should hold the cancellation unlawful and set aside the Secretary's decision. *See* 5 U.S.C. § 706(2)(C).

III. The Secretary's Decision to Cancel the 1982 Solenex Lease Was Arbitrary and Capricious and Not in Accordance With Law.

Even if the Secretary had authority to cancel the Solenex lease, the Court should set the cancellation aside as arbitrary and capricious. *See* 5 U.S.C. §706(2)(A); *Overton Park*, 401 U.S. at 415–16; *Moncrief*, 339 F. Supp. 3d at 6. During arbitrary and capricious review under the APA, a reviewing court does not supplant the agency's decision-making with its own, but reviews the agency's actions to ensure it conducted a full and earnest investigation of the facts and explained the reasoning of its decision sufficiently. *Overton Park*, 401 U.S. at 416. Here, the Secretary cancelled Solenex's lease based on factors Congress had not intended her to consider. Meanwhile, the Secretary ignored factors Congress *did* intend for her to consider, and the reasoning offered for reversing multiple decisions that the government made and reaffirmed several times, decades closer to the events at issue, is so implausible that the Court cannot ascribe it to a mere difference in view or the product of any agency expertise. The Secretary's Cancellation Decision was neither reasonable nor reasonably explained. *See Prometheus Radio Project*, 141 S. Ct. at 1158.

First, the Secretary's decision was unreasonable because she relied on at least two factors Congress did not intend for the Secretary to consider: changes in agency policy and associated regulations that post-date the lease, and a misreading of Section 403 of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 ("2006 Tax Act"). *See State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied

on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem[.]").

Second, the Cancellation Decision was unreasonable because the Secretary failed to consider important aspects of the problem: Congress's intent in passing the MLA, Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a ("MMPA"), and other acts encouraging the development of oil and gas resources; reliance interests that had developed since the lease was issued; and the implications of the cancellation on Solenex's contract and property rights.

Third, the Secretary did not reasonably explain the Cancellation Decision because she failed to explain adequately her reasons for suddenly changing the Secretary's position that the lease was valid—a position that the relevant agencies held for 23 years prior to cancellation. *State Farm*, 463 U.S. at 56 (when an agency has previously held one view and then changes its positions, it must "explain its reasons for doing so"); *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display an awareness that it *is* changing position.") (emphasis in original).

Finally, the Cancellation Decision was contrary to law because it rests on the false legal conclusions that the lease issued in 1982 violated NEPA or NHPA as they then existed and that any alleged violations of those statutes had not since been corrected.

A. The Secretary Relied on Factors that Congress did not Intend for the Secretary to Consider.

The Secretary's decision to cancel Solenex's lease after 34 years was improperly based on changes in policy and associated regulations that post-date the lease, some by decades. ECF No. 116-7 at 43 ("[H]aving re-examined the conditions under which lease No. MTM53323 was approved, and *subsequent factual and legal developments* … the BLM finds [the lease] was improperly issued.") (emphasis added). Attempting to graft the policy concerns and regulatory

requirements of 2016 onto agency decisions made in 1982 is arbitrary and capricious. *See Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958) ("[T]he power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies."); *United States v. Seatrain Lines*, 329 U.S. 424, 428–33 (1947) (rejecting the federal government's attempt to revoke a certificate of convenience in light of changed policy).

When the BLM issued the Solenex's lease in 1982, it was in full compliance with NEPA and NHPA as those statutes then stood. It is the law then in existence, not the law of some later date, that is relevant when assessing the legality of the lease issuance. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). A failure to consider "whether [an application of law] would have an 'impermissible retroactive effect" is arbitrary and capricious. *Quantum Entertainment, Ltd. v. U.S. Dep't of Interior, Bureau of Indian Affairs*, 597 F. Supp. 2d 146, 152–53 (D.D.C. 2009).

Here, the Secretary based the Cancellation Decision primarily on predicted impacts on the TCD. ECF No. 116-7 at 46–47, 54. The TCD was not established until 2002. *Id.* at 43. However, not only did the specific TCD at issue post-date Solenex's lease, but also TCDs did not exist *at all* when Solenex's lease was issued. Bulletin #38, the document defining TCDs, was not available until nearly a decade later. *See* Patricia L. Parker & Thomas F. King, *National Register Bulletin #38, Guidelines for Evaluating and Documenting Traditional Cultural Properties* (1990). Before 1992, NHPA did not allow for or require the creation of a TCD. The 1992 Amendments included, for the first time, an express tribal role in NHPA processes. Whatever impact the 1992 NHPA

amendments may have on later activity on the lease, they cannot invalidate the lease itself or demonstrate violation of NEPA or NHPA *in 1982*.

The same logic follows for other legal or policy developments the Cancellation Decision cites, such as President Clinton's 1996 executive order requiring additional procedures regarding Indian sacred sites, the BLM and Forest Service's 1997 ROD declining to authorize "further oil and gas leasing on approximately 356,000 acres of forest lands . . . including the Badger-Two Medicine Area," and the Secretary's 2001 withdrawal of over 400,000 acres of forest lands from mineral development for 20 years "to preserve traditional cultural uses by native Americans, threatened and endangered species, and the outstanding scenic values and roadless character of the lands, subject to valid existing rights." ECF No. 116-7 at 46, n.15, 47–48. Whatever relevance these changes in policy may have on the issuance of new leases, developments made 15 and 19 years after lease issuance, respectively, cannot invalidate Solenex's lease.

Congress also did not intend the Secretary to rely upon its 2006 withdrawal of the area from leasing to cancel the lease. Defendants point to the 2006 Tax Act, which withdrew over 356,000 acres of land around the Solenex lease from mining or mineral location, as justification for cancelling the lease. ECF No. 116-7 at 43. Like the NHPA amendments that gave rise to TCDs, this statute post-dates the lease—this one by over two decades. Citing such post-lease-issuance legal developments, absent specific command from Congress, would be inappropriate on its own, but doing so also ignores the fact that the statute expresses Congress's intention that its act not deprive citizens of their existing property. Included within the 2006 Tax Act is an explicit preservation of "valid existing rights." 2006 Tax Act, § 403(b)(1).

The lease was not void and was a "valid existing right" in 2006. Indeed, the BLM has officially endorsed the position that an oil and gas lease is a "valid existing right" in other contexts.

See Barlow & Haun, Inc. v. United States, 118 Fed. Cl. 597, 621–22 (FEIS included statement from the BLM that "[w]hen an oil and gas lease is issued, it constitutes a valid existing right; BLM cannot unilaterally change the terms and conditions of the lease. Existing leases would not be affected by decisions resulting from this RMP that designate areas administratively unavailable for oil and gas leasing. New restrictions . . . could not be added to an existing lease. Existing leases would not be terminated until the lease expires.").

Defendants' 2016 invocation of the 2006 Tax Act is not consistent with Congress's intent to protect valid existing rights and is not consistent with guidance from the Supreme Court that pre-existing vested rights are not generally impacted by later legislation and regulation. *See Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) ("[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past. . . . [A] retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." (citation and quotation omitted)).

Because the Secretary cancelled the lease based on factors Congress did not intend for her to consider, the Cancellation Decision was unreasonable; it was arbitrary and capricious, and the Court should set it aside. *See* 5 U.S.C. §706(2)(A); *Prometheus Radio Project*, 141 S. Ct. at 1158; *State Farm*, 463 U.S. at 43; *Overton Park*, 401 U.S. at 415–16.

B. The Secretary Entirely Failed to Consider Several Important Aspects of the Problem.

In addition to relying on factors that Congress did not intend her to consider, the Secretary entirely failed to consider factors that any reasonable review of Solenex's situation should have addressed. The Secretary failed to consider Congress's statutorily expressed intent to encourage development of oil and gas resources on federal lands, the impact of decades of reliance on agency

assurances that the lease was valid, and whether and how contract and property law principles applied to cancellation of the lease.

1. The Secretary ignored contravening statutory instructions from Congress

Completely absent from the Cancellation Decision is any recognition of Congress's repeatedly and statutorily expressed intent to encourage and protect development of oil and gas resources on federal land. Congress expressed this intent with regard to this specific area at least as far back as 1896, when it approved the purchase of the land from the Blackfeet Tribe for the explicit purpose of mineral development. Act of 1896, 54 ch. 398, 29 Stat. 321, 353–57 (the purchase of the land included a stipulation that "the lands so surrendered shall be open to occupation, location, and purchase, under the provisions of the mineral-land laws only . . . ."). By the time the BLM issued the Solenex lease, this area had been specifically ear-marked by Congress for mineral development for 86 years and had been subject to leasing for 40 years.

Congress continued to encourage private development of federal oil and gas resources through the MLA and MMPA. The fundamental purpose of the MLA is "to promote the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise." *Harvey*, 384 F.2d at 885 (quotation and citation omitted). Meanwhile, the MMPA's policy statement says: "it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining . . . industries," which includes oil and gas development. 30 U.S.C. § 21a. Congress passed the Energy Security Act of 1980 as an explicit response to the energy crisis of the late 1970s, instructing the Secretary of Agriculture to clear out the Department's long backlog of oil and gas lease applications and open more of the federal government's national forest land to energy development. 42 U.S.C. § 8855. Even as Congress has

focused more intensely on environmental and historical preservation, Congress has not seen fit to amend those statutes to remove this encouragement of oil and gas development.

2. The Secretary failed to consider reliance interests and the effect of the passage of time

When the Secretary cancelled Solenex's lease and disapproved the APD in 2016, she suddenly and without adequate explanation reversed the position officially held by her agency for 23 years, ignoring the fact that Solenex had relied on the Secretary's repeated statements that the lease was valid in expending time and resources attempting to develop the lease. The Supreme Court has held that a change in an agency's long-held position "that does not take account of legitimate reliance on" the agency's prior expressed position may constitute arbitrary and capricious action. *Smiley v. Citibank (S. D.), N.A.*, 517 U.S. 735, 742 (1996).

On appeal, the D.C. Circuit vacated this Court's grant of summary judgment in Solenex's favor, in part because "the Secretary did consider, and in fact compensated, Solenex's identified reliance interests." *Solenex LLC v. Bernhardt*, 962 F.3d 520, 522 (D.C. Cir. 2020). The court determined the Secretary "considered" Solenex's reliance interests because the Secretary offered to refund Solenex the $31,235 paid in rent by Solenex's predecessors. *Id.* at 530. The court identified "no other reliance interests that the Secretary failed to consider or address when making the cancellation decision." *Id.* The D.C. Circuit also concluded that "delay by itself is not enough to render the Lease cancellation arbitrary or capricious." *Id.* at 522. While the extreme delay suffered by Solenex is *one of several* important factors making the decision to cancel its lease arbitrary and capricious, Solenex does not argue that "delay by itself" is the reason this decision violated the APA. It is extreme delay, coupled with a sudden reversal of decades of official agency pronouncements and wholly inadequate contemporaneous justifications, that renders the decision arbitrary and capricious.

For decades, agency officials represented that the lease was valid, despite disputes over a drilling permit. Following the initial issuance of the lease in 1982, the agency approved the APD on Solenex's lease on four separate occasions—in 1985, 1987, 1991, and 1993—and confirmed that the APD remained valid in 2002. ECF No. 45 at 26–30; ECF No. 45-2 at 45–55; ECF No. 45-4 at 15 to ECF No. 45-5 at 30; HC 10177. Indeed, Defendants continued to maintain that position long after their early enthusiasm for development in the area gave way under political pressure in the 1990s, only reversing *after* suffering a defeat in court that rendered their existing strategy of interminable delay untenable. Solenex relied upon these official pronouncements from Defendants. *See United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973) ("the rulings, interpretations and opinions of the (responsible agency) . . . , while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which . . . litigants may properly resort for guidance." (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). And, even assuming for the sake of argument that the Secretary had discretion under contract law or her own inherent authority to reverse prior decisions and cancel the lease, that discretion lasts only a reasonable amount of time. As demonstrated in Part II, *supra*, during the incredible passage of time in this case justification for Solenex's reliance increased over time.

These repeated representations induced the lessees to incur significant costs that they would not have otherwise incurred. For example, in accepting assignment of the lease from Mr. Longwell, Solenex was required to post a $10,000 bond. ECF 24-2 at 36. Solenex also expended resources in order to participate—in good faith—in the NHPA Section 106 consultation process, sending representatives (Mr. Longwell, an attorney, or a consulting geologist) to meetings in September 2003, January and April 2014, and April 2015. ECF No. 24-2 at 33–35; ECF No. 116-6 at 216–21 (describing Solenex's Section 106 involvement). Related travel expenses for just one

Solenex member totaled roughly $3,500. ECF No. 77-3. Mr. Longwell also incurred expenses personally, before he passed away, including rental payments in 1982 and 1983 totaling approximately $35,000 in current, inflation-adjusted dollars. ECF No. 24-2 at 36; ECF No. 45-9 at 30. Furthermore, Solenex was forced to enforce its rights in court, incurring over $120,726 in legal costs and expenses before June 2016, ECF No. 77 ¶¶14–18, and substantial additional expenses since then.[10] Prior to assigning the lease back to Mr. Longwell, Fina also expended significant sums attempting to develop the Lease. *See* Letter from Fina to Forest Supervisor John D. Gorman (Apr. 4, 1991) (as of 1991, Fina's project costs were "about $2.4 million").[11]

The Secretary's offer to refund Solenex $31,235 in rent in exchange for relinquishing its lease does not satisfy the Secretary's responsibility under the APA to consider Solenex's reliance interests. As the Secretary acknowledged in the Cancellation Decision, Solenex was *entitled* to a refund of those rental fees, and would be regardless of any reliance that may have been caused by Defendants' repeated affirmations of lease validity. ECF No. 116-7 at 55. The Secretary did not make the offer in an effort to be "cognizant that longstanding polices may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (quoting *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009). Nor does the Secretary consider any of the other ways in which the lessees relied on agency pronouncements of lease validity. The mere fact that an offer of a cash payment was made does not satisfy the searching inquiry the Supreme Court requires. *See id.* at 222 ("In promulgating the 2011 regulation, the Department offered barely any explanation. A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on

[10] Since 2016, Solenex has incurred five years' worth of attorney fees, travel, and related expenses associated with litigating this case.
[11] As Defendants failed to consider this fact, this letter was not included in the record.

the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its prior position.").

To the extent the offer can be construed as a consideration of *some* reliance interests, the costs incurred by Solenex and the earlier lessees far exceed the amount offered. This is especially true in light of the United States Supreme Court's recent decision holding agency reversals in position arbitrary and capricious for not adequately considering generalized, largely unquantified reliance interests asserted mostly be *amici*. *See Dep't of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913–14 (2020) (finding agency's failure to consider reliance interests of students who "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance on [the agency's prior position]," as well as second-order effects on the families and employers of affected students, was arbitrary and capricious because the contemporaneous justification for the agency action did not consider these broadly described interests).

Ignoring all this, Defendants engaged in an "utterly one-sided analysis [that] did not come close to satisfying the agency's duty under the Administrative Procedure Act and relevant Supreme Court precedents to consider and justify the costs" of cancelling Solenex's lease. *See Mingo Logan Coal Co v. EPA*, 334 F.3d 161, 732 (D.C. Cir. 2016) (Kavanaugh, J., dissenting). As then-Judge Kavanaugh remarked in his *Mingo Logan* dissent, agencies must consider not only the perceived environmental and other *benefits* of potential decisions, but also the *costs* to the human beings impacted by that decision. *Id.* at 731. And these costs extend beyond the narrow class of direct, financial harm to Solenex. As Judge Kavanaugh elaborated, the costs associated with revoking Mingo Logan's permit included harm to "Mingo Logan's owners and shareholders, including those who relied on the permit; on the coal miners who would lose their jobs; on the collateral businesses

that sold services and products for the mining operation or otherwise depended on the mining operation; on the consumers who pay less for electricity when additional sources of energy are available; and on West Virginia's tax revenues." *Id.* Defendants, in cancelling Solenex's lease, did not so much as mention *any* of these potential costs that would be associated with that decision, let alone carefully weigh them against the benefits. At the very least, Defendants were required to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

3. The Secretary failed to consider the contract and property law implications of the decision to cancel Solenex's Lease

The Secretary also failed to consider her obligations to Solenex under principles of contract law and property law. As explained above, federal oil and gas leases are governed by "basic contract law principles," and federal agencies are bound by those principles. *See* Part II(C), *supra*. When the United States enters into a contract that that incorporates current specific legal requirements, it is those legal requirements in effect at the time of the contract and those explicitly anticipated in the contract that control interpretation of the contract. *See Mobil Oil*, 530 U.S. at 616. Laws and regulations that are enacted later and that are inconsistent with the contract terms are not part of the contract. *Id.*

Similarly, the Secretary failed to address the significance of Solenex's property interest in its lease and the Fifth Amendment takings implications of the Cancellation Decision. Federal oil and gas leases are no mere licenses to be rescinded at will, but convey property interests that cannot be taken without just compensation. *Union Oil Co. of Cal. v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975); *Griffin & Griffin Expl. LLC,* 116 Fed. Cl. at 171. Yet the Secretary's contemporaneous explanation of her decision makes no mention of Solenex's property right nor expresses any

claimed authority to take property through a unilateral administrative decision.[12]

Because the Secretary failed to consider several important aspects of the problem when making the Cancellation Decision, the Cancellation Decision was unreasonable; it was arbitrary and capricious, and the Court should set it aside. *See* 5 U.S.C. §706(2)(A); *Prometheus Radio Project*, 141 S. Ct. at 1158; *State Farm*, 463 U.S. at 43; *Overton Park*, 401 U.S. at 415–16.

C. Failure to Explain the Secretary's Sudden Reversal of a Long-Held Position is Arbitrary and Capricious.

Agency action must be set aside if the agency "offered an explanation for its decision that . . . is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. The "arbitrary and capricious provision . . ." of the APA "is a catchall, picking up administrative misconduct not covered by the other more specific paragraphs." *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984). Situations where an agency fails to adequately explain a sudden and extreme departure from prior agency precedent in reaching its decision can constitute arbitrary and capricious conduct prohibited by the APA.

1. The Cancellation Decision was a sudden and unexplained departure from agency precedent

"[A]n agency action which is supported by the required substantial evidence may in another regard be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law—for example, because it is an abrupt and unexplained departure from agency precedent." (quotation and citation omitted) *Id.*; *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010) ("Like a court, [n]ormally, an agency must adhere to its precedents in adjudicating cases before it. Thus, [a]n agency's failure to come to grips with conflicting precedent constitutes

[12] As explained below, the Secretary also inappropriately failed to consider any options for mitigating the harm Solenex's well would allegedly cause to the TCD.

an inexcusable departure from the essential requirement of reasoned decision making.") (quotations and citations omitted).

Cancelling an oil and gas lease due to an "eleventh-hour" change in the BLM's position on the validity of the lease is the sort of conduct that Section 706 of the APA was intended to prohibit. *See Tex. Oil & Gas Corp. v. Watt*, 683 F.2d 427, 431 ("*Watt*"); *Connecticut*, 363 F. Supp. 3d at 64. In *Watt*, agency officials first supported the BLM's decision to issue leases, "consistently and positively [taking] the position that the . . . lands were open for leasing" and expressing the interpretation that the leases were validly issued "in rulings, letters, and instruction memoranda by department officials, including the Associate Solicitor for Energy and Resources." *Id.* at 432. Under mounting political and social pressure, the BLM abruptly reversed its interpretation, and TXO sued. *Id.* at 429–31. In its decision, the D.C. Circuit stated that "we believe that the Secretary's eleventh-hour interpretation of his duty is owed no great degree of deference," *id.* at 431, and ordered the leases be reinstated because allowing the Secretary's change in position to stand "would be sanctioning a retroactive exercise of discretion to which it is impossible to ascribe any rational purpose." *Id.* at 434–35. As in *Watt*, Defendants in this case consistently and repeatedly represented that Solenex's lease was validly issued. Now they say the opposite.

Also like *Watt*, unofficial political pressure likely improperly influenced the Secretary's decision to cancel Solenex's lease. Here, high-level members of the executive and legislative branches who opposed the Congressional consensus that oil and gas development should be encouraged and protected, beginning in the mid-1990s, worked to exert influence over the agencies to prohibit oil and gas development (both generally and in the specific context of Solenex's lease) via non-legislative means, with such efforts only increasing when Congressional majorities frustrated attempts at restrictive legislation. *See* S. 853, 103rd Cong. (1993); H.R. 2473, 103rd

Cong. (1994); S. 723, 104th Cong. (1995); S. 1616, 105th Cong. (1998). *See also* ECF No. 45-6 at 34 ("Senator Max Baucus of Montana has been endeavoring for some time to have the Badger-Two Medicine Area designated as a Wilderness Study Area."). Then-Secretary of the Interior Bruce Babbitt informed Fina in 1993 that he was continuing the suspension of the lease in order to aid the proposed legislation. ECF No. 45-6 at 34–35. And notes from February 1993 meetings between the BLM and Senator Baucus's Legislative Director, and between the BLM and DOI, show that President Clinton's new BLM and Secretary of Interior opposed the APD and lease. ECF 114-1 at 39–40 (BLM official remarking that it was "pretty clear that the Secretary's office wants to find a way to take care of Baucus" and that Baucus knew the BLM was "exploring options to try to help [him]"). Later, Forest Supervisor Gloria Flora, in an effort to frustrate development of the lease, lobbied the Blackfeet Tribe to support a historic designation for the area as a way of gaining greater control over the land. ECF No. 45-7 at 49–50.

Courts have held that similar demonstrations of political pressure brought to bear on agency decision-making, when coupled with a sudden reversal of the agency's position, are sufficient to infer improper influence in violation of the APA. *See Connecticut v. U.S. Dep't of the Interior*, 363 F. Supp. 3d at 64–65 (under pressure from the White House and a member of Congress, "the Secretary reversed course at the eleventh hour," which "create[d] the plausible inference that political pressure may have cause the agency to take action it was not otherwise planning to take.") (quoting *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1529 (D.C. Cir. 1994) ("If the decision maker were suddenly to reverse course or reach a weakly-supported determination . . . we might infer that pressure did influence the final decision.")).

The primary fact distinguishing this case from *Watt* is the length of delay prior to changing position: in *Watt*, the court overturned a sudden reversal of only several months' worth of

representations, while here Defendants attempted to reverse their official position that has stood for at least 23 years.[13] The argument is even stronger here, because Solenex and its predecessors changed their position in reasonable reliance on Defendants' official statement of position expressed in the 1993 ROD, *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (a change in position "that does not take account of legitimate reliance on" the prior position may constitute arbitrary and capricious action).

D. The Cancellation Decision Is Contrary to Law.

In additional to being *ultra vires* and unreasonable, the Secretary's conclusion that the lease violated NEPA, NHPA or other procedural statutes in 1982 or that such violation could justify administrative forfeiture of a property right in 2016 is legally erroneous.

1. The Lease issued in 1982 did not violate NEPA.

The Secretary's underpinning legal conclusion that the Solenex lease failed to satisfy NEPA in 1982 is false. ECF No. 116-7 at 49–51. NEPA is a procedural statute "intended to ensure 'fully informed and well-considered' decision-making[.]" *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012) (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)). Not all "major Federal actions," however, require a full EIS.

Here, the analysis conducted prior to issuing Solenex's lease in 1982 constituted a sufficiently hard look to satisfy NEPA. The 1981 EA—which determined that an EIS was not necessary here—was a comprehensive, 164-page document that acted as the functional equivalent of a full-blown EIS. *See Spiller v. White*, 352 F.3d 235, 240–45 (5th Cir. 2003) (upholding an agency's decision not to prepare an EIS when the EA was "akin to a full-blown EIS"); *Cabinet*

[13] The 1993 ROD that approved Solenex's APD necessarily also confirmed the validity of the underlying lease. Since the 1993 ROD was a final decision of the Secretary, *see Role Models Am., Inc. v. White*, 317 F.3d 327, 331–32 (D.C. Cir. 2003), it constituted the official position of the Secretary until the Secretary's sudden reversal in 2016.

Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678, 683 (D.C. Cir. 1982) (upholding an agency's decision not to prepare an EIS because the agency "carefully considered the [] proposal, was well informed on the problems presented, identified the relevant areas of environmental concern, and weighed the likely impacts").

In particular, the 1981 EA included a "consideration of reasonable alternatives to the proposed action," including a "no action" alternative, as this Court already recognized. ECF No. 130 at 6 ("The 1981 EA considered the effects on the environment of various alternatives to leasing, including 'no action' alternatives."). This consideration of alternative actions is the "heart" of NEPA's requirement to take a hard look at the potential environmental impacts of a particular action. *Conner v. Burford*, 848 F. 2d 1441, 1451 (9th Cir. 1988). Further, the purpose of including a no action alternative is to ensure one of the alternatives preserves the status quo—to ensure the agency takes into "proper account all possible approaches to a particular project (*including total abandonment of the project*)." *Bob Marshall Alliance*, 852 F.2d at 1228 (internal quotations omitted) (emphasis in original). Here, unlike in *Bob Marshall Alliance*, the status quo in 1982 was not wilderness. The area constituting Solenex's lease was both broadly characterized by oil and gas development since the 1940s, and already leased for that purpose. *See* Part IV(A), *infra*.

Defendants contend that *Conner* required an EIS. *Conner*'s requirement that agencies prepare a full-blown EIS prior to making an "irrevocable commitment of land to significant surface-disturbing activities," 848 F. 2d at 1449, however, is inapplicable here because the issuance of Solenex's lease did not constitute an irrevocable commitment of land to significant surface-disturbing activities. At no point was an irrevocable commitment of land made, as illustrated by Defendants' other arguments in this case. The Secretary cannot claim plenary authority to cancel a lease decades after issuance, through no fault of the lessee, and then turn

around and argue that its issuance of the lease constituted a point of no return beyond which substantial ground disturbing activity was inevitable. Both things cannot simultaneously be true. Further, there is *no* evidence the Secretary considered the specific terms of the Solenex lease, based on site-specific considerations, and found they were the same as in *Conner.*

What's more, Defendants spent *years* explaining, over and over, why *Conner* was either satisfied or not applicable to Solenex's lease. On April 13, 1987, the agencies approved Solenex's APD for the second time. ECF No. 45-2 at 53. The BLM stated in its FONSI, that "[t]he Forest Service and BLM carefully reviewed" both *Conner* and *Bob Marshall Alliance* and "believe[d] themselves to be in compliance[,]" explaining that the lease was not within a wilderness study area, and multiple environmental analyses and projects had already been conducted, including modeling of cumulative effects and detailed ground mapping *Id.* at 51–52. When this approval was appealed, the agencies analyzed the APD again, focusing on the cumulative effects of Solenex's APD and the nearby Chevron APD, which eventually culminated in the publication of a comprehensive, *982-page Final EIS* in December 1990. ECF No. 45-3 at 1 to ECF No. 45-4 at 14.

On the back of the 982-page Final EIS, the BLM re-approved the APD in its 1991 ROD, again stating that the requirements of *Conner* had been satisfied. ECF No. 45-5 at 15–19. After another round of appeal and review, the BLM *again* stated *Conner* was satisfied in its 1993 ROD. ECF No. 45-6 at 21–24. This remained the BLM's official position until 2016 after losing summary judgment to Solenex. S*ee Role Models Am., Inc. v. White*, 317 F.3d 327, 331–32 (D.C. Cir. 2003).

Despite all this, the Cancellation Decision that reverses these long-held position provides no explanation for how the specific provisions and limitations of Solenex's lease no longer rendered *Conner*'s reasoning inapplicable. *See* ECF No. 45-2, at 51–52 (dismissing argument that *Conner* requires disapproval of APD, in part, because—unlike the lease at issue in *Conner*—

Solenex's lease was not located in a Wilderness Study Area, and because the Lewis and Clark Forest Plan included multiple standards intended to minimize the impacts of oil and gas development). Prior to a sudden and unexplained change in agency policy, the BLM and the Forest Service were confident Solenex's lease was valid, and repeatedly and explicitly stated that the issuance of Solenex's lease satisfied both NEPA and *Conner*.

But even if the facts at issue here are sufficiently analogous to those in *Conner*, *Conner*'s insistence that an EIS is always required unless the possibility of surface disturbance has been absolutely precluded is inappropriate given the discretion afforded to agencies in this context. *See* 40 C.F.R. §§ 1501.3, 1501.4, 1501.6.

Finally, the Secretary's argument that BLM somehow violated NEPA by failing to adopt the 1981 EA or do its own environmental analysis fails. The BLM was a cooperating agency in the preparation of the 1980 EA. ECF No. 15-10 at 11. Further, the BLM and Forest Service were operating under a Memorandum of Understanding addressing their shared responsibilities where leasing may affect one agency regarding surface management and the other regarding underground minerals. *See* ECF No. 89-1 at 61–65. Consistent with this Memorandum, and likely taking into account work the agencies had already performed in issuing the four leases that previously covered the Solenex lease area, the Forest Service took the lead on the EA and performed site specific analysis to recommend to BLM specific lease terms for each lease. ECF No. 45-9 at 19, 31–32. Based on the BLM's own analysis, the BLM then grouped specific areas to form a new lease parcel, attached stipulations specific to not just to the lease as a whole, but specific to areas in the lease, posted and issued the lease, and performed analyses to examine proposed operations on the lease. Finally, even if there were some fault in the BLM's conduct, that fault has been waived and

cannot be invoked to cancel a lease after for approvals of the proposed drilling on the lease and the passage of decades.

2. The Lease issued in 1982 did not violate NHPA.

The Secretary's conclusion that the lease violated NHPA in 1982, and so warrants cancellation of the lease, is also contrary to law. Like NEPA, NHPA is a procedural statute that neither confers a substantive right nor dictates a particular outcome. *See Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 537 F. Supp. 2d 161, 173 (D.D.C. 2008). It instead requires agencies to "stop, look, and listen" before proceeding with the authorization of significant surface disturbance. *Ill. Comm. Comm'n v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988) (quotation omitted). NHPA cases and regulations recognize that NHPA compliance can occur in stages. *See* 36 C.F.R. § 800.1 (nondestructive project planning may take place before completing Section 106 compliance); *Appalachian Voices v. Federal Regulatory Comm'n*, No. 17-1271, 2019 WL 847199 at *3 (D.D.C. Feb. 19, 2019) (upholding issuance of "certificate of public convenience and necessity" for construction of new natural gas pipeline as consistent with NHPA where later development was conditioned on Section 106 compliance) (citing *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1509 (D.C. Cir. 1994) (upholding approval of runway for the same reason)).

Solenex's lease did not authorize significant surface disturbance. Also, the issuance of an oil and gas lease does not itself impact historic properties. *See Nat'l Indian Youth Council v. Andrus*, 501 F. Supp. 649, 674–76 (D.N.M. 1980), *aff'd sub nom. Nat'l Indian Youth Council v. Watt*, 664 F.2d 220, 228 (10th Cir. 1981) (approval of a mining plan, which authorizes surface disturbing activity—not approval of a lease, which requires subsequent approval for future surface disturbing activity—requires compliance with NHPA).

Cultural inventories of the area surrounding Solenex's lease conducted throughout the 1980s and 1990s found no significant evidence of the presence of cultural resources. *See* 1981 EA,

ECF No. 45-10, at 44–45, 51 (stating the approved alternative would protect cultural resources, and remarking that "[h]istoric use of [the area that would contain Solenex's lease] has been limited[,]" and that, while the area "may contain areas of spiritual importance[,]" the Blackfeet Tribe refused to identify any such areas prior to the proposal of specific projects); ECF No. 45 at 16–24 (independent third-party conducted a literature review and "an intensive, pedestrian survey for cultural resources . . ." at Solenex's proposed well site and "along three alternative routes for an access road[,]" and concluded "[n]o cultural resources were located within the project boundaries[.]"); ECF No. 45 at 46 to ECF No. 45-1 at 1 ("No religious sites or activities were identified in the project area, therefore, no effects are expected as a result of implementing any of the Alternatives."); ECF No. 115 at 107 (stating that "an intensive survey of the alternative road routes and the proposed drill site was conducted[,]" and that only two cultural site were found within the project area, for which either "avoidance" or "mitigation" were recommended); ECF No. 45-5 at 13–14 ("[T]here are no identified sites or properties that are eligible for listing on the National Register of Historic Places that will be effected [sic] by the project. Consultation with Blackfeet traditionalists and other Tribal members did not identify any properties as having significance as traditional cultural properties as defined by the [NHPA].").

Further, the consultations with the Blackfeet Tribe *in 1982* satisfied NHPA. NHPA contained no requirement to consult with Native American tribes until 1992. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102–575, 106 Stat 4600. The initial version of NHPA did not mention tribes at all, and the 1980 amendments only mention tribes in the same context as foreign nations, lacking any central role in the NHPA process. *See* Act of Oct. 15, 1966, Pub. L. No. 89-665, 80 Stat. 915. Tribal consultation and TCD requirements were not enshrined in law until a full decade after Solenex's lease issued, and Defendants' failure to comply

with statutory requirements that Congress would not even enact for another decade cannot be the basis for cancelling the lease—particularly considering the pains Congress took to preserve valid existing rights.[14] Finally, with one narrow exception for a newly proposed access route, based on the mitigating measures in place, the IBLA rejected the assertion that greater analysis was required to identify sites or objects eligible for listing in the National Register of Historic Places before the APD was approved. *See* ECF No. 45-2 at 7.

3. Any violations have been corrected

Even assuming, for the sake of argument, that Solenex's lease was issued in violation of NEPA or NHPA, any violations had been corrected by 1993, long before the Secretary ever contemplated cancelling the lease. Defendants conducted thorough NEPA and NHPA analyses in preparation of the 1981 EA, 1985 EA, 1986 Forest Plan and FEIS, and 1990 FEIS.

The government published *two* full-blown EISs—not just EAs— related to the Badger-Two Medicine area, and multiple cultural resource studies. The Forest Service stated that "the requirements of *Conner v. Burford* are met by the [1986 FEIS and 1990 FEIS]." ECF No. 45-5 at 17–18. In 1993, after an independent review, the BLM reiterated and approved the conclusion that any requirement set forth in *Conner* had been satisfied. ECF No. 45-6 at 21–22. Defendants already did all the work they now wish they had done. This also is consistent with *Conner*. [15]

Even if the Secretary possessed authority to cancel Solenex's lease, the manner in which it was done was arbitrary and capricious in violation of the APA. The Cancellation Decision was based on new policies and regulations arising years after lease, a misreading of the 2006 Tax Act,

[14] The Cancellation Decision asserted that the alleged violations of NEPA and NHPA also constituted a violation of Defendants' trust obligations to the Tribe. ECF No. 116-7 at 52. But the BLM did not violate NEPA or NHPA, and the BLM considered the impact of leasing on the Tribe's rights in the area, thus its trust obligations were fulfilled.

[15] *Conner* required a full EIS but did not invalidate the underlying lease. 848 F.2d at 1460–61.

and undue political pressure. The Secretary also ignored statutory instructions from Congress, Solenex's ability to mitigate potential harms, and the wide-ranging implications contract, takings, and other areas of law. Meanwhile, the arguments the Secretary has marshalled in defense of her Cancellation Decision fail to acknowledge and explain the sudden change of position, and run contrary to law. The Cancellation Decision was unreasonable; it was arbitrary, capricious, and contrary to law, and the Court should set it aside. *See* 5 U.S.C. §706(2)(A); *Prometheus Radio Project*, 141 S. Ct. at 1158; *State Farm*, 463 U.S. at 43; *Overton Park*, 401 U.S. at 415–16.

IV. The Secretary's Withdrawal of the Previously Approved APD Was Arbitrary and Capricious.

The Defendants unreasonably based their withdrawal of Solenex's APD, their determination of adverse effects, and the conclusion that such effects could not be mitigated on a misapplied "commitment to protect Indian sacred sites." ECF No. 116-7 at 43. In this case, the Secretary capriciously used that commitment as a sword to injure Solenex.

Agencies responsible for complying with NHPA are subject to regulations passed by the Advisory Council on Historic Preservation ("ACHP"). *See* 54 U.S.C. § 304108. Pursuant to these regulations, an agency should determine whether an action is an "undertaking" and whether the action could cause effects on historic properties. 36 C.F.R. § 800.3. Assuming that criterion is satisfied, the agency must "determine and document the area of potential effects," "apply the criteria of adverse effect[s]", and "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects[.]" 36 C.F.R. §§ 800.4–.6; *see also Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 846 (10th Cir. 2019).

Defendants here exaggerated the area of potential effects, sweeping in 165,588 acres for a less than 30 acre well site and access route, which magnified the alleged adverse effects. Contrasted with the 982-page EIS leading to the 1991 and 1993 approvals of the Solenex APD,

and the decades of time spent documenting oral and other histories of traditional use of the area, the Forest Service immediately adopted the Tribe's suggested area of potential effects without further analysis, and then provided only a six-page generic determination of adverse effects. Defendants ignored suggestions that these alleged effects could be mitigated and accepted that the effects could not be mitigated as a foregone conclusion. Defendants unreasonably abdicated their obligations to their lessee, Solenex, and their decisions to deny the APD, designate the area of effects, determine the effects, and refuse consideration of mitigation should be vacated.

A. The Designation of the 165,000-Acre APE was Arbitrary and Capricious

The area of potential effects identified by the Forest Service is exaggerated and arbitrary. Originally, the Forest Service considered using objective criteria and technical studies to identify the area of potential effects. In August 2003 and even in February of 2014, the Forest Service proposed an area of potential effects—the APE—consisting of approximately 5,000 acres in the immediate vicinity of the proposed well site and its access route. ECF No. 45-7 at 41–43; ECF No. 48-2 at 74–78; ECF No. 48-3 at 88; FS006370–80; ECF No. 45-7 at 90–91.

The Forest Service's original proposed APE followed ordinary practice. *See, e.g., Dine Citizens*, 923 F.3d at 847–48 (noting BLM protocol set "standard APE for well pads of the well pad and construction zone plus 100 feet on each side from the edge of the construction zone," but BLM examined "an area that extended far beyond the direct-effects APE" by looking as far as *one mile* from the project area (cleaned up)); *Valley Cmty. Preservation Comm'n v. Mineta*, 373 F.3d 1078, 1092 (10th Cir. 2004) (APE considered indirect effects including noise, visual effects, and vibrations); *Wyoming State Protocol Between the BLM and SHPO, Appendix L*, https://www.achp.gov/sites/default/files/2018-08/Appendix%20L%20WY%20Protocol.pdf ("Standard Direct APEs" include 10 acres for single well pads and twice-construction-ROW for roads, and no further SHPO is consultation necessary if APE exceeds those sizes).

But when the Blackfeet Tribe took the position that the APE should be the entire 165,000-acre TCD, FS006394–95, the Forest Service suddenly and uncritically adopted the Tribe's position that the area "is spiritually powerful or potent" with *no* other explanation for the change. FS0063598–99. This nearly thirty-fold change in the scope of the APE was announced at the April 3, 2014 consulting party meeting, which the Forest Service said was held to "define and explain the Area of Potential Effects and make an Assessment of Adverse Effects[.]" FS006401–03.

But the meeting *was not* to "define and explain" the APE; the Forest Service had already determined the new APE. *Id*. The APE changed not because of any change in the potential effects of the undertaking, but because the Tribe wanted a new APE. The Forest Service, not the Tribe, had its own responsibility to determine the APE and abdicated that responsibility. *See Dine Citizens*, 923 F.3d at 846 ("Establishing an APE requires a high level of agency expertise." (cleaned up)); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 31 (D.D.C. 2016) (noting that "it falls squarely within the expertise of the Corps, not the Advisory Council, to determine the scope of the effects of construction activities at U.S. waterways").

Uncritical adoption of a self-interested third party's conclusions does not constitute well-reasoned, well-supported analysis. *See Earth Power Res., Inc.*, 181 I.B.L.A. 94, 110–11 (2011) (remanding decision to BLM for additional analysis because general references to an EA and an ethnographic study did not constitute reasoned, well-supported analysis); *Illinois Pub. Telecommunications Ass'n v. F.C.C.,* 117 F.3d 555, 564 (D.C. Cir.) (where agency dismissed argument with "We disagree," its "*ipse dixit* conclusion, coupled with its failure to respond to contrary arguments . . . , epitomize[d] arbitrary and capricious decisionmaking"). By outsourcing the determination of the APE to a third party, as the Forest Service did here, it failed to follow the law or engage in reasoned decision-making.

Further, the Forest Service's unlawful approach led it to ignore the straightforward requirement that an APE depends on "the scale and nature of an undertaking[.]" 36 C.F.R. § 800.16(d). Instead, the Forest Service allowed the scale and nature of the undertaking to have *no influence whatsoever* on the APE and determined the APE by the scale and nature of the historical property. This misapplication of NHPA was arbitrary. The Forest Service's failure to follow the process outlined in law and its failure to consider the factors required by law are each sufficient reasons to set aside its determination of the 165,000-acre APE.

B. The Adverse Effects Determination was Arbitrary and Capricious

The December 2014 "Determination of Adverse Effects," FS006532–42, was arbitrary and capricious because it was both unreasonably explained and, at bottom, unreasonable.

First, Section 106 requires that when an agency is applying the criteria of adverse effects the "agency official *shall* consider any views concerning such effects which have been provided by consulting parties and the public." 36 C.F.R. § 800.5 (emphasis added). The Forest Service failed to do that. The Forest Service provided Solenex, a consulting party, with a draft determination of adverse effects in September 2014 and Solenex provided extensive feedback. ECF No. 116-6 at 215–75. Nothing in the record or the Determination of Adverse Effects indicates that the agency considered Solenex's input. FS006532–42.

Second, the Forest Service's inappropriate selection of the APE enabled the Forest Service to use claims associated with the entire TCD, even areas miles from—and out of sight and sound from—the proposed well, to justify its assertion of impacts. FS006538–42. Further, considering the TCD as a whole allowed the Forest Service to dilute the effects of the more developed and disturbed nature of the area surrounding the proposed well in light of the "overall" or "core" TCD. FS006533. For example, the Forest Service acknowledged that "[m]odern disturbances" are particularly present on the "northern periphery of the district[,]" including "the noise and visual

intrusions of the Great Northern Railroad, Montana Highway 2, several utility lines," and private property. FS006533. Each of these are only a few miles from the proposed wellsite, yet the Forest Service failed to address how the well could have adverse effects in light of existing impacts.

Third, the primary "characteristics" that qualified the area for protection were "[p]ower," "[k]nowledge/[v]iew," and the "[h]oly" nature of the area. FS006533. These characteristics are subjective, personal, and non-quantifiable. Defendants had no basis for weighing these more heavily than objective facts in the record. For example, while ignoring the established fact that the area around Solenex's proposed well site was already developed and that sight and sound disturbances have relatively small geographic impacts, the Forest Service determined that the well would "serve as a reminder of modern intrusions into the natural setting[,]" "degrade the integrity of association[,]" "disturb the natural, holy, and spiritual feeling that currently exists[,]" "affect[] the feeling of power in the area[,]" "reduce the Blackfeet's ability to identify themselves as Blackfeet[,]" and "affect the power of the entire district[.]" FS006535–36.

Finally, in many instances the Forest Service simply assumed that the proposed well would have an impact, even when the existence or lack of such impact would have been—in fact, was—verifiable. For example, in considering "materials" the Forest Service determined that the access road and well pad would "affect berry patches" and "other [unnamed] culturally significant resources[.]" FS006535. But the Forest Service had no cite to the record for that, and there is none. This example might seem small, but it is emblematic of Defendants' approach to their obligations. They took the Tribe's subjective "evidence" and concerns at the Tribe's word, without more, while disregarding objective evidence that would undermine the Tribe's newly chosen narrative. There is no indication that the Forest Service undertook a survey of the proposed access route or well site, let alone an intensive survey of the type that Fina submitted in support of its APD. *See* ECF

No. 45 at 16–24. As another example, the Determination assumes that the proposed well would disturb animals, making the area less suitable for hunting by the Blackfeet Tribe. FS006535. But there is no indication that the Forest Service took into account the stipulations and conditions of approval that had already been imposed on Solenex through the lease terms and APD process, or that the Blackfeet Tribe actually hunted in the area around the proposed well.

C. The Refusal to Adequately Consider Mitigation Options Was Arbitrary and Capricious

Finally, the agencies' refusal to develop or evaluate ways to mitigate the alleged effects of the Solenex proposed well was arbitrary and capricious.

First, NHPA regulations specifically contemplate that consulting parties and others involved in attempting to mitigate the adverse effect of an undertaking will have adequate documentation. *See* 36 C.F.R. § 800.6(a)(3).

> [An] applicant contending that mitigation measures may protect sensitive resources must be advised of the basis for BLM's determination regarding mitigation in order to challenge that decision. If BLM would deny . . . information that the agency relied upon to summarily dismiss the possibility of mitigation and to deny . . . [the] application, the agency must clearly demonstrate that disclosure of that information . . . is prohibited by law.

Earth Power Res., Inc., 181 I.B.L.A. 94, 1091 (2011) (setting aside agency decision due to agency failure to explain how proposed lease would impact "specific values in specific places[,]" and failure to give adequate consideration to protective stipulations). But here the agency withheld from Solenex information necessary to evaluate the availability and sufficiency of mitigating measures, providing Solenex only with heavily redacted versions of the studies at which the Forest Service gestured to justify its decision. ECF No 45-6 at 52–54; ECF 116-6 at 215–16, 222–24; *see also* ECF No. 48-3 at 104 (Solenex seeking ethnographic study and being refused). ECF No. 45-8 at 130–57 (excerpt); FS006555. *See also* FS004399–401 (indicating that TCD boundary was influenced by Tribe's claim of ownership and the desire to interfere with "Longwell lease").

Second, agencies are required to seek ways to mitigate adverse effects. "If the undertaking may cause adverse effects, the agency *must* develop and evaluate alternatives or modifications that could avoid, minimize, or mitigate them." GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCE LAW § 28:10 (2d ed. 2021) (emphasis added) (citing *Dine Citizens*, 923 F.3d at 845–47); 36 C.F.R. § 800.6(a) ("agency official *shall* consult . . . to develop and evaluate alternatives or modifications" (emphasis added)); s*ee also, e.g., Nw. Bypass Grp. v. U.S. Army Corps of Eng'rs*, 470 F. Supp. 2d 30, 53 (D.N.H. 2007) ("[T]he agency *must* try to resolve the adverse effects by developing and evaluating alternatives to the project 'that could avoid, minimize, or mitigate adverse effects on historic properties.'" (emphasis added) (quoting 36 C.F.R. § 800.6(a)); *accord Del. Riverkeeper Network v. Pa. Dep't of Transp.*, No. 18-4508, 2020 WL 4937263, at *27 (E.D. Pa. Aug. 21, 2020) ("If an adverse effect is determined, then Defendants *must* consult with the Section 106 consulting parties 'to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.'" (emphasis added) (quoting 36 C.F.R. § 800.6(a)).

Here there is no evidence that any agency made an effort to "develop [or] evaluate alternatives or modifications . . . that could avoid, minimize or mitigate adverse effects," despite the regulation's compulsory statement that the agency shall consult for that purpose. 36 C.F.R. § 800.6(a). Solenex was "willing[] to commit to and implement mitigation measures," as the ACHP noted in its comments. ECF No. 115-14 at 24–33. Indeed, Solenex had already committed to numerous mitigation measures as part of the Conditions of Approval for its APD. *See* ECF No. 45-6 at 27–33. But the Forest Service had no interest in mitigation measures because neither did the Tribe, so when the Tribe refused to consider mitigation measures, so did the Forest Service. FS006565. The Forest Service's refusal to consider mitigation measures is contrary to law.

The Defendants' position is that the only mitigation measures that matter are those that mollify the Tribe; if no mitigation measures can mollify the Tribe, then no mitigation is possible. That is not the law. To the contrary, "[T]he Preservation Act *does not require* that an agency chose the least damaging alternative; it requires that the agency complete the Section 106 consultation process by identifying adverse impacts on historic resources *and develop methods to mitigate the identified adverse impacts*." *Advocs. For Transp. Alt., Inc. v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 2d 289, 313 (Mass. Dist. Ct. 2006) (emphasis added) (citing 36 C.F.R. § 800.5(b)–(c)).

The Blackfeet Tribe is within its rights to take the position that no mitigation measures could suffice.[16] But the Tribe's position does not substitute for reasoned analysis by the Forest Service, and it does not excuse the Forest Service's abdication of its duty to develop and consider ways to mitigate adverse effects. An agency "decision exercising the agency's discretionary authority . . . must do more than implicitly favor one public interest over another. It must clearly reflect and articulate a reasonable public interest analysis, supported in the record." *Earth Power Res., Inc.*, 181 I.B.L.A. at 111. *See also Quantum Ent., Ltd. v. U.S. Dep't of Interior*, 597 F. Supp. 2d 146, 153 (D.D.C. 2009) (remanding because agency "failed to articulate a reasoned basis for determinations central to its holding"); *Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 541 (D.D.C. 2016) (remanding where agency adopted third party's conclusions as its own, because agency had "acted essentially as a rubber stamp" and decision was thus arbitrary and capricious).

Third, the agency's decision is too implausible to be "ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Contrary to the Forest Service's

[16] The Blackfeet Tribe has been forthcoming, to varying degrees, about the fact that it seeks to prevent Solenex from exercising its property rights in order to appropriate Solenex's resources for itself. *See, e.g.,* ECF No. 45-12 at 13–14; ECF No. 45-9 at 33, 36 (claiming ownership of mineral rights); FS003523–26. And the Forest Service has been forthcoming, in some settings, about its desire to help the Blackfeet accomplish that goal. ECF No. 45-7 at 49–50.

description, the area near the proposed well is an area of modern development. The area had been subject to oil and gas leasing since at least the 1940s and subject to extensive intrusive seismographic activity, which at that time generally involved the use of explosives. *See* HC10286–88; ECF No. 45 at 10; PROSPECTING PERMIT APPLICATION CONSOLIDATED GEOREX GEOPHYSICS, LEWIS & CLARK AND FLATHEAD NATIONAL FORESTS: ENVIRONMENTAL ASSESSMENT (1980), https://archive.org/stream/prospectingpermi1980cons/prospectingpermi1980cons_djvu.txt ("The proposed method of seismic exploration consists of detonating a series of 50 lb. 'shots' composed of 10 five pound explosive charges each affixed to a 30 inch wooden lath. About 16 'shots' are required per mile of seismic line or a total of about 800 lb. of explosives per mile.") (referred to in ECF No. 45-10 at 80). At least two wells had already been drilled on lands within the TCD. ECF No. 45-7 at 79. Solenex's well site is only a few miles away from heavily trafficked Highway 2, ECF No. 45-1 at 17; ECF No. 45-5 at 10, and a railroad which carried around 30 trains per day. ECF No. 45-5 at 10. It was frequented by Jeeps and snowmobiles. ECF No. 45 at 7, 10, 14. And it is traversed by two pipelines. *See* ECF 45-12 at 57 (2004 Forest Service finding of no significant impact for second pipeline, noting "[c]onsultations with the Blackfeet tribe identified no properties of traditional cultural interest to the tribe on the pipeline route").

It is implausible that all of these activities could take place near the proposed well site, but the effects of the well could not be mitigated *to any degree*. That can't be right—particularly when, until recently, the Tribe supported oil and gas development in the area, appealing BLM's first approval of Solenex's APD in 1985 not because of any concern regarding historical use or cultural resources, but because the Tribe claimed ownership of the land and was actively engaged in its own oil and gas development projects. *See, e.g.,* ECF No. 45-12 at 13-14 (Blackfeet Tribal Business Council unanimously resolving in 1983 to "take all necessary actions to secure the

Blackfeet Tribe's right to explore and to develop hydrocarbons in the Ceded Strip area").

By unlawfully outsourcing its decisions to an interested third party, the Forest Service created an effective tribal veto. But because Section 106 is a procedural statute that dictates no outcomes, and merely requires obtaining input from potentially-interested tribes, "there is no tribal veto[.]" *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 168 (1st Cir. 2003). Rather, "the role afforded to Indian tribes is for the purposes of consultation only: It does not imbue tribes with a final say in the decisionmaking process." *Save Med. Lake Coal.,* 156 I.B.L.A. 219, 261 (2002) (citing 36 CFR § 800.2(c)(3)). "[T]he NHPA does not give the Tribes the right to prevent all [development]. It merely provides for consultation." *Bartell Ranch LLC v. McCullough*, No. 3:21, 2021 WL 4037493, at *10 (D. Nev. Sept. 3, 2021). But the Forest Service's position that mitigation measures are only relevant if they result in tribal assent *does* give the Tribe a final say in the decision-making process—including the right to prevent all development without independent balancing of interests by the Forest Service.

The Secretary's withdrawal of Solenex's APD and the determination of and refusal to address effects were unreasonable and unreasonably explained. As with Cancellation Decision, the Court should set these decisions aside. *See* 5 U.S.C. §706(2)(A); *Prometheus Radio Project*, 141 S. Ct. at 1158; *State Farm*, 463 U.S. at 43; *Overton Park*, 401 U.S. at 415–16.

CONCLUSION

The Court should grant summary judgment in Solenex's favor and set aside the Secretary's decisions that: cancelled Solenex's lease, disapproved Solenex's APD, found a 165,000 acre area of potential effects, found the effects of Solenex's proposed drilling, and determined such effects could not be mitigated.

DATED this 21st day of December 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December 2021, I electronically filed the foregoing using this Court's CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and service will be accomplished by this Court's CM/ECF system.

/s/ *Meri Pincock*