IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

W.A. MONCRIEF JR.,	)	
Plaintiff,	)	Case No. 17-CV-609-RJL
v.	)	
U.S. DEPARTMENT OF THE INTERIOR, et al.,	)	
Defendants,	)	
and	)	
PIKUNI TRADITIONALIST ASSOCIATION, et al.,	)	
Defendant-Intervenors.	)	

CROSS-MOTION FOR SUMMARY JUDGMENT OF DEFENDANT-INTERVENORS PIKUNI TRADITIONALIST ASSOCIATION, ET AL.

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Defendant-Intervenors Pikuni Traditionalist Association, Blackfeet Headwaters Alliance, Glacier-Two Medicine Alliance, Montana Wilderness Association, National Parks Conservation Association, and The Wilderness Society (collectively, "PTA") hereby cross-move for summary judgment on all of Plaintiff Moncrief's claims pursuant to Federal Rule of Civil Procedure 56(a). PTA's standing to seek summary judgment is established by the declarations filed in support of PTA's intervention motion. See ECF Nos. 9-2 to 9-11; see also ECF No. 9-1 at 22–25 (intervention memorandum addressing PTA's standing).

As set forth in the accompanying memorandum of points and authorities, the Secretary of the U.S. Department of the Interior's decision to cancel Moncrief's onshore oil and gas lease was a proper exercise of the Secretary's authority and did not violate the Mineral Leasing Act, 30 U.S.C. § 181 et seq., the Administrative Procedure Act, 5 U.S.C. § 706, or Moncrief's due process rights under the Fifth Amendment of the U.S. Constitution.

Pursuant to Local Civil Rule 7(a), this motion is supported by the accompanying memorandum of points and authorities. Because there is no genuine issue of material fact and PTA is entitled to judgment as a matter of law, this Court should enter summary judgment for PTA. See Fed. R. Civ. P. 56(a).

Respectfully submitted this 30th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was today served via the Court's CM/ECF system on all counsel of record.

/s/ Timothy J. Preso
Timothy J. Preso

IN THE UNITED STATES DISTRICT COURT
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PIKUNI TRADITIONALIST ASSOCIATION, et al.,	)	
Defendant-Intervenors.	)	

MEMORANDUM OF POINTS AND AUTHORITIES OF PIKUNI TRADITIONALIST ASSOCIATION, ET AL. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant-Intervenors Pikuni Traditionalist Association, Blackfeet Headwaters Alliance, Glacier-Two Medicine Alliance, Montana Wilderness Association, National Parks Conservation Association, and The Wilderness Society (collectively, "PTA") submit this brief in support of their motion for summary judgment and in opposition to Plaintiff W.A. Moncrief, Jr.'s motion for summary judgment. Moncrief challenges the Federal Defendants' cancellation of a federal onshore oil and gas lease that he formerly held in the Badger-Two Medicine area, which is located within the Lewis and Clark National Forest in northern Montana.

PTA agrees with and adopts the arguments raised by Federal Defendants in opposition to Moncrief's summary judgment motion. PTA offers the following additional points and authorities to supplement Federal Defendants' arguments. For the reasons stated below, in addition to those stated by Federal Defendants, the Court should grant PTA's motion for summary judgment and deny Moncrief's motion for summary judgment.

STATEMENT OF FACTS AND STANDARD OF REVIEW

PTA agrees with and adopts the legal, factual, and procedural background discussions and standard of review summary in Federal Defendants' brief. See Summary Judgment Brief of Federal Defendants ("Fed. Br."), at 3–13 (ECF No. 23-1).

ARGUMENT

This Court should reject Moncrief's challenge to the Federal Defendants' lease-cancellation decision. Much of Moncrief's argument is framed around allegations that the Blackfeet Tribe's assertions of cultural and spiritual interest in the Badger-Two Medicine region are disingenuous and pretextual and that the region is already extensively developed. See Summary Judgment Brief of Plaintiff Moncrief ("Moncrief Br."), at 6–12, 34–39 (ECF No. 19). Moncrief claims that the Interior Department failed to consider these issues and that Moncrief

should have been afforded a hearing to present this "important information" to the Department. Id. at 38. However, Moncrief's allegations defy the record and his challenges to the substance and procedure of the Federal Defendants' lease-cancellation decision fail under governing law.

I. THE BLACKFEET TRIBE HAS A LONGSTANDING CULTURAL AND SPIRITUAL INTEREST IN THE BADGER-TWO MEDICINE REGION

At the outset, Moncrief's attack on the Blackfeet Tribe's cultural and spiritual interest in the Badger-Two Medicine region is meritless. Moncrief's central contention is that the Blackfeet "only took a dramatic anti-development turn well after issuance of the Moncrief Lease" and, relatedly, that "the Blackfeet Nation did not consider the Badger-Two Medicine area to be particularly sacred at the time of lease issuance in 1982." Moncrief Br. at 37–38.

To the contrary, the Blackfeet Tribal Business Council—the governing body of the Blackfeet Indian Reservation—adopted a resolution in 1973 declaring "as Sacred Ground" the landscape encompassing the Badger-Two Medicine region and asserting that this "Sacred Ground shall not be disturbed in any way without prior consent of the Blackfeet Tribe." FS-HC 3811.

The Tribal Business Council reiterated this position in another resolution adopted in 1993. This resolution emphasized that "[t]he Blackfeet people actively practice their religious, cultural and traditional rights in the area commonly known as the Badger/Two Medicine area" and asserted that proposed oil and gas development "will seriously and adversely impact the rights of the Tribe and its members to practice and exercise their rights in this area." HC 1705. Through the resolution, the Blackfeet Tribal Business Council resolved to oppose and to seek to overturn any authorizations for such development. HC 1706.

Then, in 2004, the Tribal Business Council adopted another resolution recommending that the U.S. Forest Service prohibit all motorized-vehicle use in the Badger-Two Medicine area

and that "the entire Badger Two Medicine area be nominated to the National Registry of Historic Places as a Blackfeet Traditional Cultural District and an Ethnographic Cultural Landscape." FS 4243–45.[1]

Most recently, in 2014 the Blackfoot Confederacy, which comprises the Blackfeet Tribe of the United States along with three Blackfoot Tribes in Canada, issued a proclamation declaring the Badger-Two Medicine region "to be vital to the religious, cultural and subsistence survival of the Blackfoot people." B2M-Supp-AR 97.[2] The resolution affirmed that the Confederacy will "vigorously oppose" proposals for oil and gas development in the region. Id.

An extensive body of academic research and federal and state agency findings supports these tribal resolutions and proclamations, demonstrating the centrality of the Badger-Two Medicine region for Blackfeet tradition and spirituality. This body of material includes four professional ethnographic studies that provided the basis for submissions by the Forest Service and the State of Montana's Historic Preservation Office seeking registry of the Badger-Two Medicine area in the National Register of Historic Places as a traditional cultural district of the Blackfeet people. See FS 4951–52 (1993 ethnographic study); FS 5882–84 (Forest Service submission to Keeper of the National Register of Historic Places); FS 5466–5605 (2006 ethnographic study); FS 5606–07 (2007 and 2008 ethnographic studies); FS 5608–5731 (2012 ethnographic study); FS 4620 (determination by Montana State Historic Preservation Officer). Based on these materials and submissions, the Interior Department's Keeper of the National

[1] Under guidance issued pursuant to the National Historic Preservation Act ("NHPA"), a traditional cultural district indicates an area that has an "association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." FS 3470.

[2] PTA adopts the citation conventions outlined in note 4 to Moncrief's Brief. In addition, PTA adopts the prefix "B2M-Supp-AR" to reference documents in the record folder titled "BLM AR March 2016 Solenex Cancellation Decision."

Register twice determined that the Badger-Two Medicine Traditional Cultural District ("TCD") meets all applicable requirements for registering properties in the National Register of Historic Places, finding in May 2014 that the region "is directly associated with culturally important spirits, heroes, and historical figures central to Blackfoot religion, traditional practices, and tribal lifeways" and "provid[es] tribal members a place to conduct important prayer, hunting, and plant and paint gathering activities." FS 6464 (2014 TCD Determination of Eligibility Notification); see also FS 6291 (2002 TCD Determination of Eligibility Notification). Most recently, in September 2015, the federal Advisory Council on Historic Preservation recognized that "[t]he Badger-Two Medicine TCD is of premier importance to the Blackfeet Tribe in sustaining its religious and cultural traditions" and recommended cancellation of all remaining oil and gas leases in the TCD to preserve the area's cultural and historical value. FS 6587, 6590. In reaching this conclusion, the Advisory Council on Historic Preservation noted that "the public at large is overwhelmingly in support of the preservation of the TCD." FS 6590.

In the face of these repeated Blackfeet declarations, supporting expert studies, and government certifications, Moncrief offers only inapposite information and superseded materials to support his disparagement of Blackfeet cultural concerns. First, Moncrief claims that the Blackfeet supported oil development in the "general vicinity of the Badger-Two Medicine area" in connection with the Morning Gun No. 1 well drilling project in 1955. Moncrief Br. 6, 39. But the Morning Gun well was drilled outside the Badger-Two Medicine region on Blackfeet Reservation land near the town of East Glacier Park, Montana. See id. (citing extra-record internet news article and acknowledging that well was drilled outside of national forest lands). Accordingly, Blackfeet support for this project does not indicate support for development in the Badger-Two Medicine region any more than support for a project in Georgetown would

demonstrate support for development in the National Cathedral. In this regard, the Blackfeet have repeatedly "acknowledged the importance of energy development, both in and around Indian Country, and stressed that they have supported many permitted oil and gas projects," but they have equally stressed that "[t]he Badger-Two Medicine is the exception." B2M-Supp-AR 106 (Blackfeet public statement).[3]

Moncrief's effort to impeach Blackfeet credibility by citing the tribe's non-opposition to installation of a natural gas pipeline is equally flawed. See Moncrief Br. 36–37. Moncrief asserts that the pipeline was installed in the Badger-Two Medicine region, see id., but in fact the pipeline was installed alongside an existing natural gas pipeline within an established utility corridor that spans National Forest and private lands parallel to U.S. Highway 2 and the Burlington Northern-Santa Fe Railroad at the northernmost boundary of the Badger-Two Medicine region. See FS-Supp 2216 (2004 Environmental Analysis of Pipeline Project ("Pipeline EA")) (map of pipeline project area). Accordingly, the expansive backcountry of the Badger-Two Medicine region where the tribe's cultural and spiritual interests are centered—and where the Moncrief lease was located—was not impacted by this project. Indeed, while

[3] Moncrief also notes that an exploratory oil well was drilled on the Moncrief lease site in the 1960s. Moncrief Br. 6–7. In fact, two wells were drilled in 1963–64 in the Mount Baldy area, which holds a developed communications site; both were dry. FS 1278 (1990 Hall Creek APD EIS ("1990 EIS")). This result is consistent with the unsuccessful outcome of other exploratory drilling efforts in and around the Badger-Two Medicine region, as well as the U.S. Bureau of Land Management's ("BLM") estimate that the likelihood that the proposed Hall Creek well on the former Solenex lease would "be a 'dry hole' ranges from 84:1 to 98:1." FS 1366 (1990 EIS); see also Brief of Amici Curiae Blackfeet Headwaters Alliance, et al., in Opposition to Plaintiff's Motion for Summary Judgment, at 13–15 (ECF No. 37), Solenex, LLC v. Jewell, No. 13-CV-993 (RJL) (D.D.C. filed Sep. 2, 2014) (describing recent industry abandonment of oil and gas exploration activity on portions of Blackfeet Reservation near Rocky Mountains); 151 Cong. Rec. S7390 (daily ed. June 24, 2005) (statement of Sen. Baucus) (stating that surveys of Montana's Rocky Mountain Front, where the Badger-Two Medicine area is located, "indicate that there just isn't that much oil and gas in the front, certainly not enough to justify disturbing this pristine area") (attached as Exhibit 1).

Moncrief highlights a Forest Service analysis stating that the Blackfeet identified no cultural properties along the pipeline route, Moncrief Br. 37, he fails to report that the Service also stated that "the area under consideration has been highly disturbed in the recent past" and "contains no features or archaeological deposits that would contribute to those qualities of the property that make it eligible for listing in the National Register." FS-Supp 2282 (Pipeline EA). Accordingly, the absence of Blackfeet objections is not surprising.

Moncrief also references a 1983 resolution from the Blackfeet Tribal Business Council that supported securing mineral rights within the Badger-Two Medicine region along with correspondence from former Council Chairman Earl Old Person directed at wilderness legislation and another legislative proposal that arose when oil and gas drilling was considered in the Hall Creek portion of the Badger-Two Medicine region in the 1980s. See Moncrief Br. 8–9, 35–36. Moncrief's selective focus on these documents ignores the fact that by 1984 the Tribal Business Council had joined a comment letter from defendant-intervenor Montana Wilderness Association opposing issuance of a permit for the proposed Hall Creek development, FS-HC 2725, and, less than a year later, the council itself appealed the Interior Department's decision to issue that permit, FS-HC 2768. Then, in November 1986, the Tribal Business Council issued an official statement reaffirming the tribe's cultural and spiritual interest in the Badger-Two Medicine area and declaring the council's support for Blackfeet traditionalists who were actively opposing the Hall Creek drilling proposal. FS-HC 3083; see also FS-HC 3076–78 (describing November 1986 Blackfeet traditionalist gathering to discuss protection of Badger-Two Medicine); FS-HC 8008–10, 8035, 8396–8400 (reflecting traditionalist advocacy against Hall Creek drilling). Further, as discussed supra, the Tribal Business Council in 1993 issued a strongly worded resolution opposing any oil and gas development in the Badger-Two Medicine

region that continues to embody the tribe's position to this day. See HC 1705–06. Accordingly, contrary to Moncrief's contention, the Interior Department did not overlook any relevant factors by failing to address the superseded 1980s-era materials cited by Moncrief given the Blackfeet Tribal Business Council's consistently stated opposition to oil and gas development in the Badger-Two Medicine region for more than two decades.

Next, quoting extensively from former Chairman Old Person's letter of April 1986, Moncrief claims support for his position based on tribal opposition to a 1980s-era proposal to designate a federal wilderness in the Badger-Two Medicine region. See Moncrief Br. 8–9. However, opposing wilderness does not mean embracing oil and gas development. As discussed supra, only six months after the Old Person letter, the Tribal Business Council issued a formal statement siding with traditionalists who were opposing oil and gas development in the region. Further, in 1993 former Chairman Old Person himself authored a letter to the Forest Service opposing "the issuance of permits to drill" in the Badger-Two Medicine region. FS 3247. While Moncrief also seeks to make much of former Chairman Old Person's description of roads existing in the Badger-Two Medicine region at the time of his 1986 correspondence, Moncrief Br. 8–9, 36, 38, these developments have faded over the ensuing decades and continue to be obliterated under the Forest Service's 2009 decision to prohibit motorized-vehicle use across most of the area, as discussed at Point II, infra.

Moncrief's remaining arguments also fail. Moncrief attempts to invoke a 1982 letter from a Bureau of Indian Affairs trustee on the basis that it did not reference any tribal cultural interest in the Badger-Two Medicine region, see Moncrief Br. 35, but a government agent's statement that did not, in any event, even attempt to address tribal cultural issues is not more

probative of the tribe's interest than the multiple resolutions from the tribal government itself spanning the period from 1973–2014, discussed supra.[4]

Moncrief also seeks to exploit a 1984 summary of Blackfeet cultural resources in the Badger-Two Medicine region, see Moncrief Br. 36, but the record establishes that such early cultural assessments were "later questioned by Blackfeet traditionalists." FS 1517 (1990 EIS). These traditionalists were initially "reluctant to discuss any specific potential effects caused by the project to the practice and belief in their traditional religion." FS 2313 (1993 Hall Creek APD Record of Decision). That initial reluctance was overcome beginning in 2003 when, during the process of NHPA consultation on the proposed Hall Creek drilling project, knowledgeable tribal members assigned to a Cultural Committee concluded that "significant areas" had been omitted from past cultural assessments. FS 3772–73 (notes of NHPA Sec. 106 meeting). As they pointed out, "[w]hen the original interviews were done with Tribal members, not all the people were interviewed that knew this area and at that time they didn't fully understand the laws. The new committee has more knowledge." FS 3773. Their response triggered preparation of the large body of later ethnographic work discussed above that did identify cultural resources in the Badger-Two Medicine region with a level of evidentiary support that satisfied the U.S. Forest Service, the Montana State Historic Preservation Office, and the Interior Department's

[4] Moncrief claims the Interior Department issued the former Moncrief lease against the "background" of this letter, Moncrief Br. 35, but the letter post-dates issuance of the lease by five months, see BLM-M 763 (Moncrief lease).

Keeper of the National Register that designation of a traditional cultural district in the region was justified. In sum, Moncrief once again rests his argument on outdated and superseded materials.[5]

II. MONCRIEF MISCHARACTERIZES THE BADGER-TWO MEDICINE REGION

Just as Moncrief wrongly discounts the Blackfeet Tribe's cultural and spiritual interest in the Badger-Two Medicine region, he errs in mischaracterizing the Badger-Two Medicine region as an extensively developed landscape. Moncrief Br. 8–10, 35–39.

In fact, the U.S. Forest Service, which administers the area, recently described the Badger-Two Medicine region as "wild" and "remote." FS-Supp 2157 (Badger-Two Medicine Travel Management Plan ROD ("Travel Plan ROD")); see also FS 6464 (2014 TCD Eligibility Determination Notification describing Badger-Two Medicine Blackfoot TCD as a "remote wilderness area"). Named for the two waterways—Badger Creek and the Two Medicine River—that wind through the area after originating in the snowfields along Montana's Continental Divide, the Badger-Two Medicine region "is adjacent to Glacier National Park on the northwest boundary and borders both the Great Bear Wilderness and the Bob Marshall Wilderness on the south." FS-Supp 2158 (Travel Plan ROD). According to the Forest Service, the area sustains abundant elk as well as rarer species such as grizzly bears, lynx, wolves, and wolverines, and "is a magnificent area to enjoy solitude, wildlife viewing, hiking, hunting,

[5] Relying extensively on extra-record materials attached to a declaration of his counsel, see ECF Nos. 19-3 to 19-8, Moncrief also cites a proposal for a Badger Creek irrigation project, see Moncrief Br. 38–39. The Court should not consider these extra-record materials, especially given that Moncrief did not submit a motion to supplement the record but simply filed the cited materials with his brief. See Caez v. United States, 815 F. Supp. 2d 184, 192 (D.D.C. 2011) ("Courts ordinarily restrict their review to the administrative record under the [Administrative Procedure Act]."); see also CTS Corp. v. EPA, 759 F.3d 52, 64 (D.C. Cir. 2014) (finding plaintiff's argument "procedurally foreclosed" where, inter alia, plaintiff "did not even move to supplement the record" but "simply attached the new evidence to its brief"). However, even were the Court to consider these materials, they demonstrate only another instance of Moncrief relying on decades-old statements that have long since been superseded.

fishing, stock use, snowshoeing and cross-country skiing." Id., FS-Supp 2166–69 (Travel Plan ROD). Recognizing the significance of the area's natural values, Congress in 2006 enacted Public Law 109-432, permanently withdrawing an area inclusive of the Badger-Two Medicine region from future mineral leasing and offering existing oil and gas lease holders such as Moncrief tax incentives to retire their leases. See Tax Relief & Health Care Act of 2006, Pub. L. No. 109-432, § 403, 120 Stat. 2922, 3050–53 (2006) (FS 6271–79); 151 Cong. Rec. S7389–90 (daily ed. June 24, 2005) (statement of Sen. Baucus) ("The front is too wild and too precious to subject it to roads, pipelines, noise and other such development activities.").

Nevertheless, Moncrief claims the Badger-Two Medicine region is extensively disturbed with developments including pipelines, a rail line, a federal highway, roads and jeep trails, a Forest Service administrative site and a communications tower. Moncrief Br. 10. However, as discussed at Point I, supra, the referenced pipelines, Burlington Northern-Santa Fe Railroad and U.S. Highway 2 run along the extreme northwestern boundary of the region, see FS 1293, 1296-97 (map), 1298 (1990 EIS)—i.e., about five miles away from the closest portion of the predominantly backcountry area where Moncrief's former lease was located.

Moncrief also asserts that the region is laced with "a network of existing roads." Moncrief Br. 10; see also id. at 8–9 (quoting Old Person letter). However, while the region once held certain primitive roads resulting from seismic exploration activity for oil and gas during the late 1950s and early 1960s, these routes never afforded extensive motorized access; indeed, in 1972 the Forest Service described the area as "relatively inaccessible." FS-HC 2533. By the mid-1980s, use of such routes was generally limited to administrative and trail vehicles, snowmobiles, and motorcycles. FS-Supp 794 (1986 Lewis & Clark National Forest Plan EIS). Then, in 2009, the Forest Service issued a travel planning decision to close all but 8.6 miles of

routes in the Badger-Two Medicine region to all motorized vehicle use, leaving 182 miles of primitive routes in the region open only to foot, livestock, and bicycle access. See FS-Supp 2152–55 (Travel Plan ROD). As a result, the Forest Service reported in 2014 that former motorized "access routes" within the Badger-Two Medicine region "have been or are currently being closed and rehabilitated as a result of the 2009 Travel Management decision." FS 6533–34 (determination of adverse effects from Hall Creek APD).

Regarding Moncrief's claim of "a Forest Service administrative site," Moncrief Br. 10, this site consists of a log cabin used by Forest Service rangers that is accessible only by foot or horse travel on backcountry trails. See Travel Plan ROD Map[6]; see also FS 1294 (cabin photo) (1990 EIS). Further, while there is "an active communications tower" in the area encompassed by the former Moncrief lease, Moncrief Br. 10, the Forest Service prohibits all public motorized use of the access road to that facility, and that road is one of only a handful of short routes on which any motorized travel is allowed in the Badger-Two Medicine region, see Travel Plan ROD Map.

Accordingly, when the Forest Service in 2014 sought to characterize the natural integrity of the Badger-Two Medicine region for purposes of assessing the likely impacts of oil and gas development, it stated as follows:

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

[6] Counsel for Federal Defendants has indicated that this map from the Forest Service's 2009 Travel Management Record of Decision will be added to the administrative record. For the Court's convenience, the map is attached to this brief as Exhibit 2.

> Travel Management decision that designated this area for non-motorized travel only. Overall, the natural setting of the district is relatively pristine.

FS 6533 (determination of adverse effects from Hall Creek APD). That description—and not Moncrief's mischaracterization—accurately depicts the Badger-Two Medicine region.

III. THE INTERIOR DEPARTMENT PROPERLY EXERCISED ITS AUTHORITY TO CANCEL THE FORMER MONCRIEF LEASE

Contrary to Moncrief's contention, the Secretary of the Interior has broad lease-cancellation authority—an authority recognized more than fifty years ago by the U.S. Supreme Court and effectively ratified over the ensuing decades by Congress—especially when, as here, it is exercised to serve the public interest. The bona-fide-purchaser protections of Section 27 of the Mineral Leasing Act ("MLA") do not restrict that authority in this case.

A. The Secretary Has Longstanding Administrative Authority to Cancel Invalidly Issued Leases

The Secretary of the Interior has general administrative authority to cancel leases that were invalidly issued based on administrative errors, such as the former Moncrief lease. In addressing this point, Moncrief offers six pages of argument and quotes the Federalist papers before finally mentioning the U.S. Supreme Court decision that controls this issue, Boesche v. Udall, 373 U.S. 472 (1963). See Moncrief Br. 20–25. As Federal Defendants correctly argue, Boesche established that the Secretary holds general administrative authority to cancel leases that were invalidly issued as part of his Congressionally delegated authority over public lands and that this authority is not limited by Section 31 of the MLA. See Fed. Br. 13–19. PTA provides the following additional bases for rejecting Moncrief's meritless attempts to limit the Secretary's lease-cancellation authority.

1. As the Supreme Court Recognized, the MLA Preserves the Secretary's Longstanding Lease-Cancellation Authority

The Supreme Court's decision in Boesche v. Udall is controlling here. Not only did Boesche hold that Section 31 of the MLA "leaves unaffected the Secretary's traditional administrative authority to cancel on the basis of pre-lease factors," the decision also rebuts Moncrief's contention that MLA Section 27 restricts that authority. 373 U.S. at 479–82; see Moncrief Br. 21–22.

Section 27 of the MLA provides for lease forfeiture or cancellation if a lease is owned in violation of the provisions of the MLA. 30 U.S.C. § 184(h). As Boesche observed, Congress enacted this provision out of concern over abuses of the MLA's minimum acreage allowances that threatened to enable large oil companies to monopolize oil resources on public lands. See 373 U.S. at 480. Although the Supreme Court recognized that Section 27 was the only one of the MLA's forfeiture provisions addressing pre-lease errors, it nevertheless deemed this provision to offer no indication of congressional intent to curtail the Interior Department's administrative lease-cancellation authority. See id. To the contrary, after reviewing Sections 27 and 31 and the overall purpose of the MLA to advance "[c]onservation through control," the Supreme Court concluded that "[i]t would thus be surprising to find in the Act, which was intended to expand, not contract the Secretary's control over the mineral lands of the United States, a restriction on the Secretary's power to cancel leases issued through administrative error—a power which was then already firmly established." Id. at 481.

The legislative history cited by Moncrief does not support a different conclusion. Moncrief Br. 22–23. With the exception of a 1976 revision to Section 27 coal-leasing provisions that does not address oil and gas leases, see Pub. L. No. 94-377, 90 Stat. 1083 (1976), the legislative history cited by Moncrief occurred before Boesche and thus does not undermine the

Supreme Court's recognition in that case of the Secretary's broad lease-cancellation authority. Rather, this history was part of the legislative backdrop that informed the Boesche Court's holding that, "[a]lthough the [MLA], as it relates to oil and gas leases, has been amended a dozen times in the last 40 years, Congress has never interfered with this long-continued administrative practice" of canceling invalidly issued leases. 373 U.S. at 482–83 (footnote omitted). Accordingly, the Court reasoned, "[t]he conclusion is plain that Congress, if it did not ratify the Secretary's conduct, at least did not regard it as inconsistent with the Mineral Leasing Act." Id. at 483. The Supreme Court's recognition of this "plain" statutory interpretation, id., rebuts Moncrief's argument that the Interior Department's assertion of administrative lease-cancellation authority fails under either a Chevron step one or two analysis. Moncrief Br. 21 (discussing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984)).[7]

The Boesche Court's conclusion is even more strongly justified today given the record of administrative and congressional action concerning the federal mineral leasing program in the years since Boesche was decided. In 1983, the Interior Department promulgated 43 C.F.R. § 3108.3(d), providing that "[l]eases shall be subject to cancellation if improperly issued." Final Rule, U.S. Bureau of Land Mgmt., Revision of the Regulations Covering Oil and Gas Leasing on Federal Lands, 48 Fed. Reg. 33,648, 33,674 (July 22, 1983) (originally promulgated as 43 C.F.R. § 3108.3(b)). That provision "reflect[ed] the Department of the Interior's existing practice in

[7] Moncrief's reliance on a statement by Wyoming Representative Thomson, Moncrief Br. 23, is misplaced. Representative Thomson's statement was made in support of an amendment to Section 27 requiring the Secretary to initiate a judicial proceeding to cancel or forfeit a lease based on charges of fraudulent behavior by the leaseholder. See 106 Cong. Rec. 6,130, 6,139–41 (Mar. 21, 1960) (proposed amendment); id. at 6,145 (statement of Representative Thomson) (discussing federal district court decision concerning leases canceled based on leaseholder's fraudulent behavior); id. at 6,147 ("We are not out to in any way protect the guilty, but we are out to protect the innocent."). Accordingly, this discussion has no bearing on Interior's administrative authority to cancel leases based on the Department's own errors in issuing a lease.

considering specific situations," id. at 33,655—i.e., the practice approved in Boesche. Five years later, the Interior Board of Land Appeals ("IBLA") recognized that this lease-cancellation authority would apply in the case of a lease issued in violation of the National Environmental Policy Act ("NEPA")—i.e., precisely the situation at issue in this case. Clayton W. Williams, Jr., 103 IBLA 192, 210 (1988) (lease issued in violation of NEPA is voidable).

Congress has had ample opportunity to limit or invalidate the Interior Department's lease-cancellation authority since these agency promulgations and pronouncements, but never has done so. Only four years after the Interior Department's promulgation of 43 C.F.R. § 3108.3(d) and six months after the IBLA's pronouncement in Clayton W. Williams, Jr., Congress amended the MLA through enactment of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 ("FOOGLRA"), Pub. L. No. 100-203, §§ 5101–12, 101 Stat. 1330 (1987). Although FOOGLRA contained a provision expressly addressing the subject of "lease cancellation" (which solely modified the first sentence of section 31(b) of the Mineral Leasing Act, 30 U.S.C. § 188(b), in a manner not relevant here), Congress did not interfere with the Interior Department's explicitly declared authority to cancel invalidly issued leases, including those issued in violation of NEPA. See Pub. L. No. 100-203, § 5104. Congress has subsequently further amended the MLA in the Energy Policy Act of 2005, Pub. L. No. 109-58, § 350, 119 Stat. 594 (2005), and the Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 2507–09, 106 Stat. 2776, (1992), but has never limited or otherwise indicated any disapproval of the lease-cancellation authority challenged by Moncrief.

As Boesche itself recognized, such repeated legislative silence in the face of a "long-continued administrative practice" is a significant indicator of congressional intent. 373 U.S. at 483. "It is well established that when Congress revisits a statute giving rise to a longstanding

administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) (quotation and citation omitted); see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000) (holding that, after Food and Drug Administration had repeatedly stated that it lacked authority to regulate tobacco, Congress "effectively ratified" that interpretation by passing other tobacco legislation without giving the agency jurisdiction). Moncrief's contrary argument—which posits that the Interior Department has, for nearly four decades, flouted Congress's clear direction regarding the limits of the agency's administrative lease-cancellation authority but Congress has not seen fit to correct this situation despite enacting multiple amendments to the MLA, including one explicitly addressing lease cancellation—defies logic and applicable law.[8]

2. The Secretary's Lease-Cancellation Authority Is at Its Broadest Where, as Here, It Is Exercised to Protect the Public Interest

Moncrief's attempt to limit Boesche's application to a narrow set of circumstances also fails. See Moncrief Br. 25–27. As Federal Defendants explain, an extensive body of precedent recognizes the Secretary's lease-cancellation authority in a variety of factual contexts. See Fed. Br. 18; see also Winkler v. Andrus, 614 F.2d 707, 711 (10th Cir. 1980) ("The Secretary has

[8] Pan American Petroleum Corp. v. Pierson (discussed at Moncrief Br. 23) does not support Moncrief's legislative history argument. The Tenth Circuit in that case found "it unnecessary to explore the legislative history of the Mineral Leasing Act or of the amendments thereto." 284 F.2d 649, 655 (10th Cir. 1960). Further, as Federal Defendants note, the Tenth Circuit's analysis conflicts with the Supreme Court's decision in Boesche, so even if Boesche did not explicitly overrule Pan American, the Supreme Court's recognition of the Secretary's authority controls and precludes reliance on the Tenth Circuit's contrary analysis. See Fed. Br. 19; see also Moncrief Br. 27 n.17 (acknowledging Boesche's "seeming conflict" with Pan American) (quoting Boesche, 373 U.S. at 473).

broad authority to cancel oil and gas leases for violations of the Mineral Leasing Act and regulations thereunder, as well as for administrative errors committed before the lease was issued.") (citations omitted); Texaco v. Hickel, 437 F.2d 636, 641 (D.C. Cir. 1970) (recognizing Secretary of the Interior's authority to cancel a lease administratively for invalidity at its inception); Texas Oil & Gas Corp. v. Andrus, 498 F. Supp. 668, 675 (D.D.C. 1980) (citing Boesche to support Secretary's cancellation of oil and gas lease improperly issued inside military base), rev'd on other grounds, sub nom. Texas Oil & Gas Corp. v. Watt, 683 F.2d 427 (D.C. Cir. 1982) (concluding that leases could be issued inside military base); Nat. Res. Def. Council v. Hughes, 454 F. Supp. 148, 154 (D.D.C. 1978) ("The Mineral Leasing Act does not limit the Secretary's power to cancel administratively a permit or a non-competitive lease 'on the basis of pre-lease factors.'") (quoting Boesche, 373 U.S. at 478–85). Accordingly, Moncrief's narrow reading of Boesche should be rejected.

Further, to the extent the type of controversy giving rise to lease invalidity has any effect on the Secretary's lease-cancellation authority, that effect is to vest the Secretary with greater authority where, as here, she acts in the public interest rather than for the private interests of a lease holder. See Seaton v. Texas Co., 256 F.2d 718, 722 (D.C. Cir. 1958) ("[T]he Secretary's latitude is not the same in all circumstances. When the controversy is fundamentally between two private interests … his discretion is not … as great as when the controversy is between private interests on one hand and the Secretary 'as guardian of the people,' on the other ….") (citations omitted); cf. Cal. Co. v. Seaton, 187 F. Supp. 445, 453 (D.D.C 1960) ("[T]he courts have also determined that the Secretary's discretion is greater when a controversy exists between private interests on the one hand and the Secretary, as guardian of the people, on the other, than when the Secretary is involved in a dispute between two private interests.") (footnote omitted)

(citing Seaton, 256 F.2d at 718), aff'd sub nom. Cal. Co. v. Udall, 296 F.2d 384 (D.C. Cir. 1961); see also Knight v. United Land Ass'n, 142 U.S. 161, 181 (1891) ("The secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.").

Here, the Secretary's cancellation of the Moncrief lease serves the public interest by ensuring the fair and proper implementation of federal laws and maintaining the environmental and cultural values of the Badger-Two Medicine region. First, the public has an interest in the proper implementation of both NEPA and the NHPA, statutes designed to preserve the environmental and cultural values of the United States. Second, as discussed at Points I and II, supra, the public has an interest in maintaining the cultural and environmental values of the Badger-Two Medicine region that repeatedly have been recognized by federal and state governmental entities, including the Interior Department's Keeper of the National Registry, Montana State Historic Preservation Office, Advisory Council on Historic Preservation, and the U.S. Congress. Because the lease-cancellation decision in this case serves these public values instead of Moncrief's or any other lease holder's private interests, the Secretary's administrative authority recognized in Boesche is at its apex.

B. Moncrief Cannot Avail Itself of Bona-Fide-Purchaser Protections Under the MLA

Moncrief is not entitled to the bona-fide-purchaser protections of Section 27(h)(2) of the MLA, 30 U.S.C. § 184(h)(2). PTA agrees with and adopts Federal Defendants' arguments that Section 27(h)(2) does not apply to cancellations based on non-MLA violations and that this conclusion is supported by the provision's legislative history. See Fed Br. 20–21. Indeed, a more detailed review of the legislative history of Section 27(h)(2) confirms that Congress

intended to limit the bona-fide-purchaser provision of Section 27 to situations where the MLA itself was violated—specifically, violations of the Act by the leaseholder's predecessor in interest. This provision thus has no bearing on a situation where, as here, lease cancellation is based on violations of NEPA or the NHPA.

The House Report on the MLA amendment that added the bona-fide-purchaser provision to the statute identifies three purposes of the amendment, each of which specifically references protecting innocent purchasers from lease cancellation, forfeiture, or suspension due to violations of the MLA. Those purposes were:

> (1) To provide that the right to cancel or declare a forfeiture of leases, interests in leases, and options to acquire leases or interests therein for violation of any provision of the act shall not be exercised in such a way as to affect adversely the interest of any bona fide purchaser who is not himself in violation of the acreage limitation provisions of the act.
>
> (2) To provide that bona fide purchasers in such situations shall have a right to be dismissed from pending or future proceedings which are based only upon a violation of the act by a predecessor in interest.
>
> (3) To provide that lease terms and rental-payment obligations shall be tolled where drilling or lease assignment rights of a party are (1) administratively suspended by the Secretary of the Interior before a decision is reached in a government contest proceeding alleging violation of the act, or (2) voluntarily waived by the party during such a proceeding.

H.R. Rep. No. 86-1062, at 2620 (1959) (emphases added). These legislative purposes indicate that Congress intended to extend bona-fide-purchaser protections to lease cancellation based only on violations of the MLA, not other statutes. The language of Section 27(h) reflects this intent by exempting innocent purchasers from cancellation or forfeiture only "for violation of any of the provisions of this chapter." 30 U.S.C. § 184(h)(2).

Moreover, the legislative history contemplates bona-fide-purchaser protections in the context of "a violation of the act by a predecessor in interest," not government error in issuing the lease. H.R. Rep. No. 86-1062, at 2620. In enacting this amendment Congress sought to afford relief to innocent purchasers faced with actions by the Secretary of the Interior against "alleged violators of the acreage limitation provisions" of the MLA and to respond to industry concerns about "the danger that in the chain of title of a lease one of its prior holders may have been in violation of the acreage limitation or other provisions of the act and that the lease might be subject to cancellation for this reason." Id. at 2621 (emphases added); see also Petrolex 84-1 Ltd., 118 IBLA 372, 379 (1991) ("The legislative history of the 1959 act, the basic amendment which provided protection for bona fide purchasers, indicates that the intent of Congress was to protect good faith purchasers whose predecessors in interest were in violation of some provision of the act, such as the acreage limitation provisions, and not for the protection of purchasers of leases erroneously issued for lands not subject to noncompetitive leasing.") (quoting Oil Res. Inc., 14 IBLA 333, 337 (1974)). Consistent with this legislative intent, the Tenth Circuit interprets Section 27(h)(2) to protect bona fide purchasers "from the possible consequences of Mineral Leasing Act violations by their predecessors in title." Winkler, 614 F.2d at 711 (emphasis added); see also Sw. Petroleum Corp. v. Udall, 361 F.2d 650, 656 (10th Cir. 1966) ("The legislators and witnesses particularly emphasized that one claiming to be a bona fide purchaser must not have been involved in or have knowledge of any fraud or violation of any of the provisions or regulations of the Mineral Leasing Act by his predecessor in title.") (emphasis added). Nothing in the legislative history or the context of its enactment supports application of

Section 27(h)(2)'s bona-fide-purchaser protection in the context of a lease canceled on grounds other than a violation of the MLA by a predecessor in interest.[9]

Contrary to Moncrief's argument, Moncrief Br. 32, the Interior Department's bona-fide-purchaser regulation implementing Section 27(h)(2) is consistent with the statutory language and legislative intent. See 43 C.F.R § 3108.4. Although Moncrief claims that the regulation's application is not limited to violations of the MLA, the bona-fide-purchaser regulation, like MLA Section 27, provides that a bona fide purchaser shall be dismissed as a party to any proceeding "with respect to a violation by a predecessor of any provision of the act." Id. (emphasis added). Not only is Moncrief's interpretation contrary to the regulation, but it also conflicts with IBLA precedent treating Section 27 of the MLA and 43 C.F.R. § 3108.4 as coextensive and recognizing limitations on the scope of the bona-fide-purchaser protections. See Petrolex 84-1 Ltd., 118 IBLA at 378–79 (describing Section 27 as the "statutory counterpart" to 43 C.F.R. § 3108.4 and discussing limited application of bona-fide-purchaser protections). The IBLA decisions cited by Moncrief, Moncrief Br. 32, do not support a different conclusion. Neither Beverly M. Harris Aminoil, Inc. nor Clayton W. Williams, Jr. explicitly asserts that Section 3108.4 expands the scope of the bona-fide-purchaser protections beyond those provided for in Section 27. See Beverly M. Harris Aminoil, Inc., 78 IBLA 251 (1984) (citing only Section

[9] Congress made minor changes to Section 27(h) in 1960 that do not affect the applicability of the 1959 legislative history. See Sw. Petroleum Corp., 361 F.2d at 652 n.1, 656 (showing relevant changes).

27, not 43 C.F.R. § 3108.4); Clayton W. Williams, Jr., 103 IBLA at 210–11 (quoting without discussion both MLA Section 27(h)(2) and 43 C.F.R. § 3108.4).[10]

Nor do pre-lease violations of NEPA and the NHPA by the Secretary and his subordinates somehow constitute violations of the MLA for the purpose of triggering the bona-fide-purchaser protection, as Moncrief contends. Moncrief Br. 31–32. Moncrief cites no authority for this unusual proposition, but instead rests this argument on a contention that the IBLA's decision in Clayton W. Williams, Jr. implicitly so held because the IBLA in that proceeding applied the bona-fide-purchaser protection in the context of a NEPA violation. Id. However, the better view is that Clayton W. Williams Jr. is simply an unpersuasive authority on this point given that the IBLA applied the bona-fide-purchaser provision without first addressing whether the MLA's statutory language made it applicable in the context of a NEPA violation. See 103 IBLA at 211–12. Absent any IBLA reasoning to explain how MLA Section 27(h)(2) may be applied beyond the limits of its plain language, the Board's decision on this point, which was never subjected to judicial review, should not trump the plain language of the MLA.

For much the same reason, Moncrief's last-ditch argument that the Interior Department arbitrarily failed to consider whether Moncrief was a bona fide purchaser, Moncrief Br. 32–33, also fails. Given that the Interior Department canceled Moncrief's lease based on NEPA and

[10] Beverly M. Harris Aminoil, Inc. is particularly unpersuasive because the decision stated that Section 27(h)(2) was added to the MLA to protect bona fide purchasers "from the possible consequences of Mineral Leasing Act violations." 78 IBLA at 253. Further, the decision largely turned on the absence of any regulatory or statutory violation to support lease cancellation. Id. at 253–54. Moncrief's reliance on Champlin Petroleum Co., see Moncrief Br. 32, suffers from the same flaws. See 99 IBLA 278, 280 (1987) (characterizing bona-fide-purchaser protection as applying to "violations of Departmental regulations" and reviewing cancellation decision based on nonbinding agency policy not statutory or regulatory violations).

NHPA grounds that are facially beyond the scope of Section 27(h)(2)'s plain language, there was no legitimate reason for the agency to evaluate this issue.

IV. MONCRIEF WAS NOT DENIED DUE PROCESS

Cancellation of the former Moncrief lease did not deprive Moncrief of any constitutional right to due process for two reasons. First, Moncrief's property interest in his former lease did not include any right to be free of Interior Department administrative action to correct the government's own errors in issuing the lease. Second, even assuming for the sake of argument that due process was required, Moncrief received constitutionally adequate process.

A. Moncrief Had No Property Right to Be Free of Administrative Action to Correct Government Errors

To establish a procedural due process claim, Moncrief must first show that he was deprived of a viable property interest protected by the Fifth Amendment Due Process Clause. Roth v. King, 449 F.3d 1272, 1284 (D.C. Cir. 2006). A viable property interest requires "a legitimate claim of entitlement" to that interest as defined by an independent source, such as state or federal law. Id. at 1284–85 (quotations and citation omitted). However, "whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause" is a matter of federal constitutional law. Town of Castle Rock v. Gonzales, 545 U.S. 748, 757 (2005) (quotations and citation omitted). Notably, "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." Id. at 756.

Here, Moncrief does not assert a due process right to defend himself against any finding by the government that he erred or violated a lease term, but rather to contest the government's finding that it erred in issuing his lease. Yet Moncrief never possessed any lease right to constrain the government's discretion to correct its own leasing errors. The terms of Moncrief's former lease explicitly made his lease "subject to all rules and regulations of the Secretary of the

Interior now or hereafter in force." BLM-M 763; see also BLM-M 741 (1989 assignment stating that Moncrief accepts "all applicable terms, conditions, stipulations, and restrictions pertaining to the lease"). At the time Interior issued the former Moncrief lease, such regulations included 43 C.F.R. § 1810.3, which provided that "[t]he authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act, or delays in the performance of their duties." 43 C.F.R. § 1810.3(a). By the time Moncrief took the lease in 1989, the applicable regulations also included 43 C.F.R. § 3108.3 providing that "[l]eases shall be subject to cancellation if improperly issued." 43 C.F.R. § 3108.3(d). Accordingly, these provisions were part of the fundamental bargain struck between Moncrief and the federal government when Moncrief acquired the lease and defined the property right that Moncrief received in that bargain.

As a result, the contractual terms of Moncrief's former lease reserved to the government the discretion to take corrective action upon finding that the lease was issued in error. For this reason, exercise of that discretion by the Interior Department did not deprive Moncrief of any right that he possessed in the leasehold. See Griffin & Griffin Expl., LLC v. United States, 116 Fed. Cl. 163, 176–77 (Fed. Cl. 2014) (holding that federal government's lease cancellation did not breach its oil and gas lease contracts with the plaintiffs because the leases expressly incorporated the Secretary of the Interior's regulations, which included 43 C.F.R. § 3108.3(d) authorizing cancellation of improperly issued leases); see also Silver State Land, LLC v. Schneider, 145 F. Supp. 3d 113, 133 n.16 (D.D.C. 2015) (citing 43 C.F.R. § 1810.3 for the principle that "[t]he agency's own regulations reflect the Secretary's authority to review, revise and reverse actions of DOI employees determined to be contrary to the law"), aff'd, 843 F.3d 982 (D.C. Cir. 2016). For this reason alone, Moncrief's due process argument fails. See Roth,

449 F.3d at 1285 ("When a statute leaves a benefit to the discretion of a government official, no protected property interest in that benefit can arise.") (quoting Bloch v. Powell, 348 F.3d 1060, 1069 (D.C. Cir. 2003) (alteration omitted)).

B. Moncrief Received Constitutionally Adequate Due Process

Even assuming for the sake of argument that Moncrief were entitled to due process protections, he received the process to which he was due. "[T]he contours of due process are flexible and vary depending upon the circumstances of a given case." Propert v. D.C., 948 F.2d 1327, 1332 (D.C. Cir. 1991). Under the circumstances here, Moncrief received adequate due process for the Federal Defendants' lease-cancellation decision.

1. Moncrief Received Adequate Notice

First, Moncrief received sufficient notice that cancellation of his former lease was being considered. To be constitutionally valid, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In some circumstances, oral notice can be constitutionally sufficient. See Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) (recognizing the sufficiency of oral notice in cases involving the termination of public employees). Here, as Federal Defendants correctly state, the notice provided to Moncrief both in advance of lease cancellation and through the final lease-cancellation decision satisfies constitutional due process. Fed. Br. 24.

By Moncrief's own admission, Moncrief received advance notice of lease cancellation through both (1) a phone call on November 17, 2016 from Don Judice, the Deputy State Director for the BLM Montana Office, to a Moncrief employee alerting Moncrief that the lease may be canceled, Moncrief Br. 18, and (2) a follow-up email that same day from Don Judice providing a press release related to the administrative cancellation of Devon Energy leases in the Badger-

Two Medicine area and a related news article, both of which discussed the cancellation of the Devon leases as well as the Solenex lease, id. at 18–19, see also BLM-M 665–68 (Judice email). This notice of potential lease cancellation came nearly two months before the lease-cancellation decision on January 6, 2017. Compare Moncrief Br. 18, with BLM-M 670–82 (lease-cancellation decision).

In response, Moncrief's attorney sent a letter dated November 23, 2016 to Mr. Judice, arguing that the Moncrief lease should not be canceled because (1) the Secretary lacked authority to cancel the lease; (2) Moncrief is entitled to bona-fide-purchaser protections; (3) the lease could not be canceled "after years of the BLM confirming its validity;" (4) the lease was properly issued and there was no violation of NEPA or the NHPA; and (5) the lease-cancellation decision is arbitrary and capricious. BLM-M 801–02.

These communications demonstrate that Moncrief had prior notice of lease cancellation that was reasonably calculated to apprise Moncrief of the pendency of the lease cancellation and allow him an opportunity to present his objections well before the lease-cancellation decision. See Moncrief Br. 19 n.12 (stating that letter "was an attempt to quickly protest the notice of cancellation"). That is all that the law requires. See Mullane, 339 U.S. at 314.

2. Moncrief Was Not Entitled to an Evidentiary Hearing

Moncrief's contention that he was entitled to an evidentiary hearing fails. At the outset, Moncrief did not request a hearing in his November 23, 2016 letter objecting to the Interior Department's notice that lease cancellation was being considered. See BLM-M 801–02.

Further, the Due Process Clause does not ensure Moncrief's right to an evidentiary hearing because Moncrief has not identified any material issues underlying the Government's lease-cancellation decision that would warrant an evidentiary hearing. See Orion Reserves Ltd.

Partnership v. Salazar, 553 F.3d 697, 708 (D.C. Cir. 2009) ("Given Orion's failure to identify any meaningful factual dispute, the agency proceedings provided sufficient process and Orion's due process challenge to the IBLA decision fails."); see also Goldberg v. Kelly, 397 U.S. 254, 269 (1970) ("[W]here important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); Kizas v. Webster, 707 F.2d 524, 539 (D.C. Cir. 1983) (evidentiary hearing required when deprivation of an entitlement "turns upon material questions of disputed fact"); Two Bay Petroleum v. U.S. Dep't of the Interior, No. 2:05-CV-2335-MCE-JFM, 2007 WL 2028192, at *5 (E.D. Cal. July 10, 2007) (due process does not require notice of the ability to request a hearing when the lessee does not offer credible evidence to dispute basis for lease cancellation).

The D.C. Circuit's decision in Orion Reserves Ltd. Partnership is instructive. In that case, the court rejected the plaintiff's claim that the Interior Department violated its due process right by invalidating the plaintiff's oil shale claim for failing to comply with the legal requirements to maintain the claim because (1) the plaintiff did not request a hearing from the agency; (2) Interior's process complied with its own regulations; (3) there was "no indication that Orion was foreclosed in any way from submitting documents or other evidence in its defense," and (4) Orion failed to identify any meaningful factual dispute. 553 F.3d at 707–08. The same is true here: (1) Moncrief did not request a hearing, BLM-M 801–02; (2) the Interior Department followed its own regulations that do not permit an appeal when a decision issues with the Secretary's approval, 43 C.F.R. § 4.410(a)(3); (3) Moncrief was not foreclosed from submitting documents to Interior, as evidenced by his November 17, 2016 letter; and (4) as discussed at Points I and II, supra, Moncrief has not presented any material factual evidence to undermine the Secretary's lease-cancellation decision. Instead, Moncrief's arguments rest on

irrelevant assertions that do not undermine the legal justification for the lease-cancellation decision. Accordingly, Moncrief was not entitled to an evidentiary hearing.

Because there is no dispute of material fact in this case, Moncrief's reliance on cases concerning factual disputes about the validity of mining claims and other authorizations does not establish that a hearing was required. See Moncrief Br. 17–18; see, e.g., Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336-38 (1963) (establishing validity of a mining claim requires a factual inquiry into whether "there has been a discovery of mineral within the limits of the claim" and whether "the lands are still mineral"); Cameron v. U.S., 252 U.S. 450, 461 (1920) (discussing the factual basis or "proofs" underlying a valid claim) (quotations omitted); Reed v. Morton, 480 F.2d 634, 641-42 (9th Cir. 1973) (canceling of land patents concerned "the suppression of facts" in obtaining rights to the land); Coomes v. Adkinson, 414 F. Supp. 975, 995 (D.S.D. 1976) (explaining that sufficient process would allow holders of grazing leases to dispute adverse facts through testimony). These cases further involved situations where due process was required to enable the holder of an interest to defend itself against charges of default or insufficiency of legal compliance by the interest holder, which is not what Moncrief seeks here. See Moncrief Br. 19 (acknowledging that Moncrief "is accused of no wrongdoing").

Nor does BLM's Federal Register notice discussing amendments to 43 C.F.R. § 3108.3 support Moncrief's position. Contrary to Moncrief's claim, Moncrief Br. 18–19, the discussion Moncrief quotes from the preamble to this regulation responds to comments on the process for canceling a lease without a productive well under section 3108.3(a). Final Rule, BLM, Minerals

Management, 53 Fed. Reg. 22,814, 22,822 (June 17, 1988). This discussion does not apply to Section 3108.3(d), which the Secretary relied on for the lease-cancellation decision in this case.[11]

V. MONCRIEF'S NEPA AND NHPA ARGUMENTS ARE MERITLESS

Moncrief offers a series of argument in an effort to demonstrate that issuance of his former lease complied with NEPA and the NHPA. None has merit.

A. Issuance of the Moncrief Lease Violated NEPA

Moncrief defies controlling authority in asserting that the Federal Defendants wrongly determined that issuance of Moncrief's former lease violated NEPA. Moncrief Br. 40–42. Moncrief argues that the Federal Defendants erred in determining that the government must prepare an EIS prior to issuing an onshore mineral lease that allows surface disturbance, citing Ninth and Tenth Circuit authorities for the proposition that this principle "has long been in dispute." Id. at 40. But there is no dispute about this principle in the D.C. Circuit—where Moncrief chose to file this case—which has held for more than 30 years that, "[t]o comply with NEPA, the [Interior] Department must either prepare an EIS prior to leasing or retain the authority to preclude surface disturbing activities until an appropriate environmental analysis is completed." Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983). Moncrief asserts that this "blanket rule" "contradicts arguments Interior made to the contrary at least as recently as 2009," Moncrief Br. 40, but supports this assertion solely with a citation to a case from the Tenth Circuit, which applies a different rule from the D.C. Circuit on this issue, see Park Cty.

[11] Moncrief also wrongly supports his argument with inapposite language from a proposed coal-leasing regulation (that does not appear to have been finalized) when there is no indication that the Interior Department intended this proposed regulation to apply to situations outside of the coal-leasing program. See Moncrief Br. 18. Further, contrary to Moncrief's argument, see id. 19–20, Interior did not act arbitrarily by failing to explain why it was not implementing this inapposite proposed regulation in canceling Moncrief's lease.

Res. Council v. U.S. Dep't of Agric., 817 F.2d 609, 620–24 (10th Cir. 1987) (holding no EIS required prior to issuance of onshore mineral lease allowing surface occupancy), overruled on other grounds by Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992).[12] Even assuming Moncrief is correct about Interior's argument to the Tenth Circuit, it is not surprising that the Department would mount an argument consistent with that Circuit's authority. However, the dispositive point is that Moncrief's argument is inconsistent with this Circuit's authority. Nor is this an instance of Federal Defendants inequitably determining whether "a 1982 agency action may be sufficient under 2017 standards," as Moncrief complains. Moncrief Br. 39. Sierra Club v. Peterson, along with its progeny in the Ninth Circuit, Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988), and Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988), arose from the same early-1980s federal mineral leasing campaign that yielded the former Moncrief lease. See BLM-M 675–76. It is not inequitable to hold the former Moncrief lease to the same legal standards as contemporaneous leases.[13]

As for Moncrief's argument that issuance of the former Moncrief lease complied with Sierra Club v. Peterson because "the EA here did retain" authority to preclude surface-disturbing activities, Moncrief Br. 41 (emphasis added), this is beside the point. The critical point under

[12] The Tenth Circuit has subsequently clarified that the Park County holding applies only where the lease-issuing agency has "prepared an 'extensive' [Environmental Assessment] that addressed the potential environmental impacts of issuing the leases and considered the option of not issuing leases." Pennaco Energy, Inc. v. U.S. Dep't of Interior, 377 F.3d 1147, 1162 (10th Cir. 2004). As discussed infra, that did not happen here. Accordingly, the Interior Department's NEPA compliance in issuing the former Moncrief lease would not have passed muster under Tenth Circuit authority either.

[13] Moncrief also argues that "Interior's entire legal justification in the Cancellation appears to be paraphrased from a letter" submitted by defendant-intervenors' counsel in this case. Moncrief Br. 39 n.27. However, parallels between the referenced letter and the lease-cancellation decision do not demonstrate any defect in the lease cancellation. Rather, they demonstrate that both the letter and cancellation decision recognized the readily apparent outcome of applying controlling authority to the Interior Department's actions in issuing the former Moncrief lease.

Sierra Club v. Peterson is not whether Interior's environmental assessment document may contemplate the possibility of retaining authority to preclude surface-disturbing activity in certain circumstances—which is all that Moncrief cites, see id.—but rather whether the terms of the relevant mineral lease retain such authority for the Interior Department, see Peterson, 717 F.2d at 1414 (observing that "[n]one of the stipulations [in the leases at issue] expressly provides that the Department or the Forest Service can prevent a lessee from conducting surface disturbing activities") (emphasis in original). The Moncrief lease did not. See BLM-M 763–74 (conveying extensive surface-disturbance rights). Accordingly, a pre-leasing EIS was required, but none was prepared.

Moncrief equally errs in claiming that the environmental analysis that preceded issuance of the former Moncrief lease complied with NEPA's fundamental requirement to consider the no-action alternative of "total abandonment of the project." Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971). Moncrief argues that Bob Marshall Alliance v. Hodel, which applied the Calvert Cliffs no-action alternative requirement in the context of onshore mineral leasing, is inapposite because it did not consider "a no-action alternative that delayed recommendations on leasing—but still maintained the status quo." Moncrief Br. 41. However, the so-called no-action alternative in the pre-leasing environmental assessment document in this case did not maintain the status quo. To the contrary, the Forest Service concluded in that EA that this alleged no-action alternative would inflict equal or even more severe long-term impacts than leasing alternatives on "[p]ristine or undeveloped areas," threatened and endangered species and their habitat, and "[r]ecreation and visual quality." FS–HC 14432 (Leasing EA Table 5). The EA's analysis therefore failed to allow decision makers or the public to legitimately compare the environmental consequences of

leasing versus no-leasing options, as NEPA requires. See Hammond v. Norton, 370 F. Supp. 2d 226, 241 (D.D.C. 2005) (holding that NEPA mandates consideration of no-action alternative to enable meaningful comparison of taking versus forgoing proposed activity).

Moncrief's contention that the EA in this case did not run afoul of Bob Marshall Alliance because it did not say that the reason for rejecting the no-action alternative "was that the alternative was contrary to NEPA," Moncrief Br. 41, also reflects a misunderstanding of the law and the record. Bob Marshall Alliance found a NEPA violation where the government dismissed consideration of the no-action alternative as inconsistent not with NEPA but with agency policy. See 852 F.2d at 1228–30; see also Bob Marshall Alliance v. Watt, 685 F. Supp. 1514, 1520 (D. Mont. 1986) (discussing agency rationale for dismissing no-action alternative). The pre-leasing EA for the former Moncrief lease committed the same error. See FS-HC 14434 (Leasing EA) (rejecting no-action alternative as "contrary to present Forest Service Policy").

Moncrief next contends that the "proper course of action" to address Interior's NEPA violation in issuing the former Moncrief lease "would have been to prepare a supplemental EA or EIS" instead of canceling the lease. Moncrief Br. 41. However, Bob Marshall Alliance demonstrates otherwise. There, the Ninth Circuit observed that the defendant agencies' failure to consider a no-action alternative constituted "an additional factor" that justified further examination to determine whether a mere remand for corrective NEPA compliance could adequately address the agencies' violation. 852 F.2d at 1230. Accordingly, the Ninth Circuit directed the Montana district court to clarify the appropriate remedy. Id. The district court held that lease cancellation was required. Bob Marshall All. v. Lujan, 804 F. Supp. 1292, 1297 n.8 (D. Mont. 1992). As the court explained:

> Cancellation of the leases is, in this court's opinion, the only remedy which will effectively foster NEPA's mandate requiring informed and meaningful

> consideration of alternatives to leasing the Deep Creek area, including the no-leasing option. Cancellation of the leases is the only remedy which will effectively ensure the goal envisioned by NEPA, particularly 42 U.S.C. § 4332(2)(E) (1982), by guaranteeing, to the fullest extent possible, that the defendant agencies have studied, developed and described alternatives, including the no-action alternative. … The court is of the opinion that full and meaningful consideration of the no-action alternative can be achieved only if all alternatives available with respect to utilization of the Deep Creek Further Planning Area are developed and studied on a clean slate. In this manner, the mandate of NEPA will remain effective.

Id. at 1297–98. The same reasoning applies here to rebut Moncrief's argument. See BLM-M 676, 679 n.46 (lease-cancellation decision) (discussing and citing Bob Marshall Alliance lease-cancellation order).[14]

B. Issuance of the Moncrief Lease Violated the NHPA

Moncrief wrongly attempts to dismiss Federal Defendants' violation of the NHPA in issuing Moncrief's lease as a "red herring." Moncrief. Br. 42. Contrary to Moncrief's claims, the issuance of Moncrief's lease violated the NHPA by unlawfully deferring government review of the lease's impact on cultural resources.

Section 106 of the NHPA requires that a federal agency with "authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any

[14] Moncrief also attacks the cancellation decision's determination that the BLM violated NEPA "by failing to properly adopt the EA prepared by [the Forest Service]." BLM-M 677. Moncrief presumes "[t]o quickly dispose" of this rationale because "Interior cites nothing in the record showing that BLM did not undertake an independent analysis." Moncrief Br. 40. But that is the point: the absence of essential record evidence to document BLM's required action demonstrates the NEPA violation on this issue. This is because, "[i]n exercising its discretionary authority to lease national forest lands and in complying with NEPA, BLM may adopt Forest Service environmental documents as its own or rely on those documents in BLM's evaluation of environmental impacts"—but it must do so on the record. Bd. of Comm'rs of Pitkin Cty., 173 IBLA 173, 181–83 (2007); see also BLM-M 677–78 n.39 (lease-cancellation decision) (citing Pitkin County and other authorities). Here the record documents no such independent BLM determination.

historic property." 54 U.S.C. § 306108. "In general, the NHPA requires that a federal agency take into account any adverse effects on historical or culturally significant sites before taking action that might harm such sites." San Juan Citizens All. v. Norton, 586 F. Supp. 2d 1270, 1280 (D.N.M. 2008); see also Wilson v. Block, 708 F.2d 735, 754 (D.C. Cir. 1983) (explaining that NHPA Section 106 and its implementing regulations "require federal agencies approving land use projects to identify all properties within and about the project area that are eligible for listing in the National Register and that may be affected by the project"). Further, "[w]hen an undertaking may affect properties of historic value to an Indian tribe on non-Indian lands, the consulting parties shall afford such tribe the opportunity to participate as interested persons." Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 787 (9th Cir. 2006) (quoting Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 806 (9th Cir. 1999)). Issuance of a federal mineral lease is an undertaking that requires review of affected cultural and historical resources prior to lease issuance. Mont. Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127, 1152 (D. Mont. 2004) (holding that "BLM violated NHPA by failing to follow the prescribed NHPA process prior to selling the [oil and gas] leases").

Accordingly, by issuing the Moncrief lease without conducting NHPA review, Federal Defendants violated Section 106 of the NHPA. Id.; BLM-M 678 (lease-cancellation decision). As the lease-cancellation decision states, the Forest Service and BLM "failed to fully consider the effects of leasing on cultural resources, including religious values and activities, within the Badger-Two Medicine area" and "improperly deferred NHPA review until the early 1990s, long after the leases had been issued without any consideration of adequate alternatives to avoid, minimize or mitigate adverse effects to traditional religious and cultural properties within the Badger-Two Medicine TCD." BLM-M 678.

Moncrief does not dispute that Federal Defendants issued the Moncrief lease without first satisfying their obligations under Section 106 of the NHPA, but nevertheless contends that deferred review does not violate the NHPA. See Moncrief Br. 42. Moncrief's contention is contrary to established law.

First, Moncrief's assertion that NHPA review need not occur at the same time as an environmental analysis under NEPA, see id., disregards governing case law "treat[ing] 'major federal actions' under NEPA similarly to 'federal undertakings' under NHPA." Karst Envtl. Educ. & Prot., Inc. v. EPA, 475 F.3d 1291, 1295–96 (D.C. Cir. 2007) (citations omitted); see also Pit River Tribe, 469 F.3d at 787 ("NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment.") (quotations and citation omitted); Nat'l Trust for Historic Pres. v. Blanck, 938 F. Supp. 908, 919 (D.D.C. 1996) (examining NEPA decisions to determine whether agency action constituted an "undertaking" under NHPA), aff'd per curiam, 203 F.3d 53 (D.C. Cir. 1999); 36 C.F.R. § 800.8(a) (encouraging coordination of NHPA Section 106 and NEPA procedures). As with NEPA, the triggering event for NHPA review in the mineral development context "is the point at which [the agency] makes an irrevocable commitment of resources and thereby surrenders its ability to prevent any development on a particular parcel of land." New Mexico ex rel. Richardson v. BLM, 459 F. Supp. 2d 1102, 1125 (D.N.M. 2006), aff'd in part, vacated in part, rev'd in part on other grounds, 565 F.3d 683 (10th Cir. 2009). Here, that irrevocable commitment of resources occurred at the leasing stage, see Peterson, 717 F.2d at 1414, triggering both NEPA, id., and NHPA review, see New Mexico ex rel. Richardson, 459 F.Supp.2d at 1125; 54 U.S.C. § 306108; see also Sheridan Kalorama Historical Ass'n v. Christopher, 49 F.3d 750, 754 (D.C. Cir. 1995) (explaining that "Section 106 requires each federal agency to 'take into account the effect of [a proposed]

undertaking' upon historic properties …prior to the agency's funding or licensing it.") (emphasis added, alteration in original).

Moreover, Moncrief's assertion that this approach would necessitate NHPA review "for an entire National Forest," Moncrief Br. 42, is meritless. No party contends that the NHPA required the government to conduct NHPA review for the entire 1.8-million-acre Lewis and Clark National Forest. FS 380 (1986 Lewis and Clark Forest Management Plan EIS). In fact, when the Forest Service conducted the NHPA review process that led to the Advisory Council on Historic Preservation's recommendation to cancel all leases in the Badger-Two Medicine area, the review was limited to the 165,588-acre Traditional Cultural District, not the entire Forest. BLM-M 671–73 (lease-cancellation decision); FS 6584–85 (Advisory Council on Historic Preservation Comments). The fact that this review was accomplished belies Moncrief's suggestion that an appropriate NHPA review was impracticable.

Moncrief's vague assertion that NHPA requirements were not in effect at the time of lease issuance also fails. See Moncrief Br. 42. Congress enacted the NHPA, including Section 106, in 1966—16 years before Moncrief's lease issued in 1982. CTIA-Wireless Ass'n v. F.C.C., 466 F.3d 105, 106 (D.C. Cir. 2006) (discussing enactment of the NHPA).

Moncrief's assertion that the Blackfeet people "were in accord" with the Government's failure to comply with NHPA is unfounded. Moncrief Br. 42. The language that Moncrief cites from the 1981 EA addresses efforts to comply with the American Indian Religious Freedom Act, not the NHPA. FS-HC 14401 (1981 EA). In sum, Moncrief's NHPA arguments lack merit.

C. The Secretary Properly Interpreted Congress's 2006 Withdrawal of the Badger-Two Medicine Area from Oil and Gas Leasing

Finally, Moncrief errs in asserting that the Secretary incorrectly interpreted a provision of the Tax Relief & Health Care Act of 2006, Pub. L. No. 109-432, § 403, 120 Stat. at 3050, that

withdrew the Badger-Two Medicine area from future mineral leasing because of the area's cultural and environmental significance. See Moncrief Br. 43–44. As an initial matter, Moncrief's argument cherry picks one line from the Secretary's lease-cancellation decision and ignores the Secretary's more robust discussion of the 2006 legislation, which notes that "Congress withdrew the area from oil and gas leasing and location and entry under the mining law, subject to valid existing rights." BLM-M 674. As a result, Moncrief's argument that the Secretary did not understand that the withdrawal was subject to valid existing rights defies the record.

Moncrief next suggests that this legislation implicitly recognized the legitimacy of existing mineral leases in the area by preserving "valid existing rights" and making tax benefits available for existing leaseholders who voluntarily relinquished their holdings. §§ 403(b)(1), 403(c), 120 Stat. at 3050–53 (discussed in Moncrief Br. 43–44). However, a more reasonable reading of this legislation is that Congress passed no judgment regarding which existing rights in the area might be "valid," but instead left that determination to independent processes. In this regard, nothing in the legislation addressed the validity of then-existing mineral rights and Senator Baucus, who sponsored the legislation, stated that leases could be canceled voluntarily or "for any other reason" under this law. 151 Cong. Rec. at S7390.

Because Moncrief has no valid existing right, Moncrief's claim that he should be able to apply for a permit to drill also fails. Moncrief Br. 43–44. As discussed supra, Moncrief's former lease was canceled based on a well-justified conclusion that issuance of that lease violated NEPA

and the NHPA. The lease area therefore became subject to the 2006 Act's mineral withdrawal. See 151 Cong. Rec. S7390 (statement of Senator Baucus).[15]

CONCLUSION

For the foregoing reasons, in addition to those stated by the Federal Defendants, Defendant-Intervenors Pikuni Traditionalist Association, Blackfeet Headwaters Alliance, Glacier-Two Medicine Alliance, Montana Wilderness Association, National Parks Conservation Association, and The Wilderness Society respectfully request that the Court grant their motion for summary judgment and deny Moncrief's motion for summary judgment.

Respectfully submitted this 30th day of October, 2017.

/s/ Timothy J. Preso
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[15] Moncrief's reliance on National Parks Conservation Association v. United States, 177 F. Supp. 3d 1 (D.D.C. 2016) (cited in Moncrief Br. 5, 44), is misplaced. That case concerned a land transfer to the United States in which valid existing mineral rights were reserved to the land's seller by the explicit terms of the warranty deed that effectuated the government's purchase of the property. Id. at 17. By contrast, the court recognized that where, as here, "the federal government owned outright the land that a private party sought to use," the government "would have greater discretion over whether to allow" mineral development. Id.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was today served via the Court's CM/ECF system on all counsel of record.

/s/ Timothy J. Preso
Timothy J. Preso