UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

W.A. MONCRIEF, JR., Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR *et al.*, Federal Defendants, and PIKUNI TRADITIONALIST ASSOCIATION *et al*., Intervenor-Defendants.	Case No. 1:17-cv-609-RJL The Honorable Richard J. Leon

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Moncrief lease is located in northwestern Montana in an area of great cultural and religious significance to the Blackfeet Tribe. Against this backdrop, and after years of consultation with the Tribe under the National Historic Preservation Act ("NHPA"), the Bureau of Land Management ("BLM") determined that cancellation of the lease was appropriate. The Deputy Secretary of the Interior, acting on behalf of the Secretary (hereafter "the Secretary"), approved BLM's determination, Plaintiff makes five arguments challenging the decision but none have merit, as Federal Defendants explained in their cross-motion for summary judgment, ECF No. 23-1 ("Cross-Motion").

First, Plaintiff contends the Secretary possessed no legal authority to cancel the lease. But as *Boesche v. Udall* makes clear, the Secretary does indeed possess the power to cancel leases as part of his broad authority to manage public lands. Second, despite Plaintiff's arguments to the contrary, BLM's decision to cancel the lease was neither arbitrary nor capricious; rather, it reflected a thorough consideration of the legal deficiencies in lease issuance and demonstrated why the lease was improperly issued. Third, Plaintiff contends he is a bona fide purchaser, protected from cancellation by a certain provision of the Mineral Leasing Act of 1920 ("MLA"). However, the plain language of that provision limits it to violations of the MLA itself, not other statutes. Finally, Plaintiff contends cancellation violated his due process rights, but these claims do withstand scrutiny. BLM provided seven weeks' advance notice of the impending cancellation, by telephone and follow-up email, and in January 2016 sent Plaintiff a detailed twelve-page letter, which explained the reasons for cancellation. Shortly after receiving advance notice, Plaintiff's then-counsel wrote BLM and asserted reasons why cancellation was illegal. *See* Administrative Record ("AR") BLM-M000801. Through this, Plaintiff realized his

opportunity to state his position to the agency and is now receiving additional process before this tribunal. For the reasons explained below and in the Cross-Motion, the Court should sustain the Secretary's lawful exercise of authority, which is rationally explained and meets the standard of the Administrative Procedure Act ("APA") for sustaining agency action.

ARGUMENT

I. The Secretary is Authorized to Cancel Leases Administratively.

The Secretary's lease cancellation authority is one of his "general managerial powers over the public lands." *Boesche v. Udall*, 373 U.S. 472, 476 (1963). Despite Plaintiff's emphasis on the MLA, *Boesche* makes clear that the authority derives not from the MLA but from provisions in Title 43 of the Public Land Laws. 373 U.S. at 476, n.6. One of these directs the Secretary to perform "all executive duties . . . in anywise respecting [the] public lands." 43 U.S.C. § 2. Another provision, also noted in *Boesche*, charges the Secretary with "supervision of public business" relating to the public lands, *id*. § 1457, and directs him "to enforce and carry into execution, by appropriate regulations, every part of the provisions of [Title 43] not otherwise specially provided for." *Id*. § 1457c. Interior reaffirmed this authority in a 1983 rulemaking that amended Title 43, Code of Federal Regulations. *See* 43 C.F.R. § 3108.3(d) ("Leases shall be subject to cancellation if improperly issued"). The regulation was duly adopted after APA notice and comment and has the force of law. *Nat'l Latino Media Coal. v. F.C.C.*, 816 F.2d 785, 788 (D.C. Cir. 1987) ("When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law"). The regulation is also fully consistent with *Boesche's* holding that MLA Section 31 (i.e., cancellation due to post-lease violations by a lessee) "leaves unaffected the Secretary's traditional administrative authority to cancel on the basis of pre-lease factors." *Boesche*, 373 U.S. at 479.

Supported by these consonant authorities, the Secretary properly concluded he was authorized to approve BLM's cancellation determination, in order to correct the errors of his predecessors, *id*. at 478, who had indisputably violated the National Environmental Policy Act ("NEPA") and the NHPA in issuing the Moncrief lease. *See* AR BLM-M000670, BLM-M000674 (Cancellation Decision). The decision cogently explained why and how NEPA and NHPA had been violated, pointing out that the agencies had failed to conduct a full analysis of the impacts on cultural resources. AR BLM-M000676 - BLM-M000678. It also explained that the positions of industry and the Blackfeet Tribe were essentially irreconcilable and noted the Department's long-standing commitment to protecting sacred Indian sites and ensuring that "adequate and meaningful consultation occurs when Federal land management decisions have significant impacts on tribal religious and cultural practices." *Id*. BLM-M000670-671, citing Indian Sacred Sites, Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).[1] It also noted the near impossibility of mitigating impacts to the important cultural resources at stake. *See* AR BLM-M000673 (explaining that efforts in 2014 on the nearby Solenex Lease were "unsuccessful in identifying any mitigation measures to address the impacts of developing the lease, including impacts associated with any surface disturbance, that would satisfy the Blackfeet Tribe").

Despite these explanations and the legal authorities invoked by the Secretary, Plaintiff argues Interior "has no statutory, regulatory, or intrinsic power" to cancel the Moncrief lease.

[1] Section 1 of the Executive Order, entitled "Accommodation of Sacred Sites," provides: "(a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites."

Reply at 2. Plaintiff adds, without mention of Title 43 (the source of the cancellation authority), that nothing in the MLA authorizes "administrative cancellation of a lease where Interior belatedly decides that it committed a substantive error of law (as opposed to an administrative or ministerial infraction)." *Id*. at 2. This is true – the MLA includes no such provision. But Plaintiff directs the Court's attention to the wrong legal authority and, in any event, the absence of an express MLA provision does not negate the authorities relied on by the Secretary: that is, Title 43, *Boesche*, and the regulation at 43 C.F.R. § 3108.3(d).

Plaintiff's argument is also flawed because the Secretary did not act belatedly in approving BLM's cancellation determination. Federal Defendants' Cross-Motion sets out a detailed chronology showing that the Secretary's representatives diligently pursued a comprehensive NHPA process, in an attempt to determine whether a proper review at the time of lease issuance would have disclosed significant potential adverse effects to resources at issue. *See* Cross-Motion at 8-11.[2] Plaintiff's attempt to fault the agency for taking too long in what were actually dutiful efforts to *preserve* the lease rings hollow.

Plaintiff does not dispute that the Secretary possesses cancellation authority; rather he contends the Secretary may only cancel for pre-lease errors when those errors are administrative. This contention, however, ignores the Supreme Court's recognition in *Boesche* of a "traditional" cancellation authority based on "pre-lease factors," *id*. at 479, indicating a broader authority. It is this language that Plaintiff cannot reconcile – and he makes no attempt to do so. Instead he

[2] *See also* AR BLM-M000672 (cancellation decision's discussion of "substantial efforts" of the Forest Service to document "traditional practices in the Badger-Two Medicine Area"); AR FS 002328 (Forest Service "Chronology of Events" for the APD processes for the Solenex and Chevron leases, including the NHPA process); ECF No. 32-1 (¶¶ 25-93), civil action no. 13-cv-00993-RJL (Solenex) (Federal Defendants' Statement of Material Facts supporting Cross-Motion for Summary Judgment).

argues that *Boesche* cabined the Secretary's authority and points in support to its statement that the Court holds "only that the Secretary has the power to correct administrative errors of the sort involved here." Such pronouncements of narrow scope are common and prompted by principles of judicial restraint.[3] The statement, however, when considered in light of the decision as a whole, cannot fairly be read to preclude lease cancellation except in the circumstances of *Boesche*. This is evident in *Boesche's* use of the plural (i.e., "pre-lease factors"), reflecting that the court contemplated any number of considerations potentially warranting cancellation. This language defeats Plaintiff's single-circumstance theory. Moreover, the phrase offers no hint of a limitation to administrative error. Although the Reply cites instances of cancellation purportedly based on "administrative" error, Reply at 5-7, some actually involve error fairly viewed as either legal or administrative. *See e.g., Fortune Oil Co.*, 69 IBLA 13, 15 (1982) (noting "authority to cancel any lease issued *contrary to law* because of the inadvertence of his subordinates") (emphasis added); *Grynberg v. Kempthorne*, No. 06-cv-01878-WYD-MJW, 2008 WL 2445564, at *4 (D. Colo. June 16, 2008) (failure to obtain Forest Service consent, a legal requirement).

Plaintiff's assertion that *Boesche* "only" allows cancellation for administrative errors, Reply at 7, is also not aided by his reliance on *Winkler v. Andrus*, 614 F.2d 707 (10th Cir. 1980). There the Tenth Circuit recognized the Secretary's authority to cancel leases "for violations of the [MLA] and regulations thereunder, as well as for administrative errors committed before the lease was issued." *Id.* at 711. Plaintiff quotes this passage but omits, using an ellipsis, the reference to legal error, while retaining the reference to "administrative errors." Although the Tenth Circuit made no reference to NEPA or NHPA, it said nothing to suggest that

[3] *See Air Courier Conference of Am. v. Am. Postal Workers Union,* 498 U.S. 517, 531 (1991) ("Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available.") (Stevens, J., concurring).

administrative error alone can justify cancellation and, in fact, recognized a legal error – violation of the MLA – as a proper basis for cancellation. *Id*.

Also unavailing is Plaintiff's contention that an agency "'cannot rely on its general authority to make rules necessary to carry out its function when a specific statutory directive defines the relevant function of [the agency] in a particular area,'" Reply at 3, quoting *Am. Petroleum Inst. v. EPA ("API")*, 52 F.3d 1113, 1119 (D.C. Cir. 1995). It appears from the context that Plaintiff is referring to section 31 of the MLA (that is, post-leasing violations by lessee, in cases of either producing or non-producing leases). These provisions, however, do not "define" the "function" relevant here: that is, what to do with a lease improperly issued. They only define what must be done when a lessee commits violations in the noted circumstances. Consequently, this is not an instance of an agency relying on "general authority" to act in an arena subject to a "specific statutory directive." And unlike the defendant agency in *API*, Federal Defendants do not ask the Court to "presume a delegation of power based solely on the fact that there is not an express withholding of such power." *Id*. at 1120. To the contrary, the delegated power exercised in this case inheres in Title 43, as *Boesche* held. The Court should reject the suggestion that the function relevant here has been defined by Section 31 or any other provision of the MLA. Likewise it should reject Plaintiff's contention that case law cited in Defendants' opening briefs cannot "confer authority" otherwise lacking in a statute or regulation. Reply at 4. The argument fails because here the authority invoked is provided for by statute.

Plaintiff also takes aim at Federal Defendants' discussion of the preamble to the 1983 final rulemaking for the cancellation regulation at 43 C.F.R. § 3108.3(d), calling it a self-serving *post hoc* interpretation for its reference to "legal defect." The discussion, Cross-Motion at 4, centered on a statement in the preamble that a certain modification to the rule, as originally

proposed, "reflects the [Department's] existing practice in considering specific situations." 48 Fed. Reg. 33,648, 33,655 (July 22, 1983). The proposed rule had stated that leases improperly issued "shall be cancelled." *See* 47 Fed. Reg. 28,550. The final rule provided that such leases shall be "subject to cancellation." 48 Fed. Reg. at 33,655. Although the preamble's language is vague, the agency's reason for the change can be readily gleaned: cancellation would not be automatic. Rather, consistent with Interior's "existing practice," "specific situations" would receive "consider[ation]." This was the point of Federal Defendants' discussion, but under any view of the preamble's language, the language of the regulation itself is plain and unambiguous: a lease "improperly issued" is subject to cancellation. And even without the regulation, Plaintiff's claim of error would fail because the Supreme Court has found that the powers granted by Title 43 include lease cancellation. *Boesche*, 373 U.S. at 476, n.6.

For all these reasons, the Court should reject the Plaintiff's contention that the Secretary lacked authority to approve BLM's cancellation determination.

II. <u>The Secretary's Decision is Rational and Adequately Explained.</u>

Plaintiff argues that the Secretary's decision, if legally permissible, should nonetheless be set aside as arbitrary. He also argues that Federal Defendants declined to defend the charge. Reply at 9 (cautioning that the Court "should not presume that an agency action is not arbitrary and capricious simply because the Government declines to defend it on the merits").

Before addressing the claim of arbitrary conduct, Federal Defendants note that they did in fact defend the decision on the merits. Although the Cross-Motion did not include a section specifically devoted to the issue, Federal Defendants argued at the outset that the decision was thoroughly explained and rational, Cross-Motion at 2-3, and should be sustained under the applicable legal standard, *see id*. at 13, which requires an agency to "examine the relevant data

and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *PPL Wallingford Energy LLC v. Fed. Energy Regulatory Comm'n*, 419 F.3d 1194, 1198 (D.C. Cir. 2005)) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

The Cross-Motion also cited the explanation in the cancellation decision that BLM had issued the lease without complying with NEPA and the NHPA. It pointed to a statement that "the procedural defects cannot be corrected because the [lease] will result in adverse effects to the TCD in ways that cannot be fully mitigated," and recounted Interior's statement that reissuance "would be inconsistent with the policy expressed in an act of Congress." AR BLM-M000680. Further discussion of the decision's content, which underscores its reasonableness, appears in the Factual Background section. *See* Cross-Mot. at 12. Federal Defendants also argued that Interior "acted in accord with its authority under Title 43 of the public land laws" and "rationally explained the reasons for the decision." *Id*. at 2-3. Little value is added by lengthy *post hoc* embellishment of the Secretary's cogent explanation of the irreconcilable positions of industry and the Tribe, the lack of suitable mitigation, and the recommendations of the Advisory Council on Historic Preservation and the Tribal Historic Preservation office that the leases in the Badger-Two Medicine Area be cancelled, to name just a few considerations. In short, the decision speaks for itself and its rationality is self-evident.[4]

[4] As an additional threshold matter, Federal Defendants note in regard to Plaintiff's caution on allowable presumptions, Reply at 9, that controlling authority makes clear that courts should indeed presume the legitimacy of government action – and that the burden of overcoming this presumption lies with plaintiff. *See Henry v. Sec'y of Treasury*, No. CV 13-183 (RJL), 2017 WL 4296716, at *5 (D.D.C. Sept. 26, 2017) (the agency's decision is entitled to a "presumption of procedural regularity and substantive rationality") (quoting *Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 212 (D.C. Cir. 2015)).

Nonetheless, Plaintiff argues that the record supporting the decision was based "almost entirely" on post-lease events, making the decision a mere pretext, a term Merriam-Webster defines as an "appearance assumed in order to cloak the real intention or state of affairs." *See* https://www.merriam-webster.com/dictionary/pretext (last checked Dec. 5, 2017). With this overstated claim, Plaintiff utterly dismisses the agencies' diligent efforts over many years aimed at preserving the leases in the Badger-Two Medicine Area. *See* discussion, *supra*, at 2-3.[5] Indeed, the record across the board reflects that the agencies vigorously endeavored to determine whether a full analysis at the time of lease issuance would have disclosed significant adverse effects on cultural resources. This is no simple task, as NHPA and its regulations set forth a multi-step process for consultation and analysis. This includes requirements that the agency: (i) identify historic properties which may be of religious or cultural significance to tribes, including traditional cultural districts, recognizing that tribes may be reluctant to divulge specific information on such sites (*see* 36 C.F.R. § 800.4); determine the area of potential effect of the undertaking and assess its adverse effects on historic properties (*see* 36 C.F.R. § 800.5); undertake efforts to resolve adverse effects, including developing and evaluating measures to avoid, minimize, or mitigate such effects (*see* 36 C.F.R. § 800.6); and pursue a specified process if resolution of adverse effects is not possible (*see* 36 C.F.R. § 800.7). This was not arbitrary conduct. It was an effort to faithfully execute the law in a complex and, unfortunately, controversial setting.

Plaintiff contends that the record does not support a conclusion that the Moncrief lease was issued in violation of NEPA and the NHPA. This is incorrect. As Federal Defendants

[5] Federal Defendants note that, while NHPA efforts were in progress, the Moncrief lease was administratively suspended, thus freeing Plaintiff from the duty to make rental payments and perform drilling or other activities necessary to maintain the lease.

explained in detail in the related Solenex case, ECF No. 93-1 at 27-28, No. 13-cv-00993, and in the Cross-Motion, the Secretary did not comply with NEPA before issuing the lease. First, in relying on an environmental assessment ("EA"), the agency contravened the requirement that an EIS be prepared if the agency "chooses not to retain authority to preclude all surface disturbing activities." *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983); *accord Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Bob Marshall All. v. Hodel*, 852 F.2d 1223 (9th Cir. 1988). Given that the Moncrief lease allows surface occupancy subject to applicable lease stipulations, without an explicit prohibition on surface-disturbing activities, the Secretary made an "irrevocable commitment to allow some surface disturbing activities . . . without fully assessing the possible environmental consequences." *Peterson*, 717 F.2d at 1414-15. Second, the EA did not consider a proper "no action" alternative. AR BLM-M000676 (identifying deficiencies in the EA's "no action" alternative, including failure to consider a "true 'no lease' alternative"). Third, BLM failed to properly adopt the Forest Service's EA. AR BLM-M000677 (explaining that "BLM neither adopted [the] EA nor conducted any environmental review of its own when deciding whether to make National Forest System lands available for leasing"). These deficiencies render the lease improperly issued and thus voidable. The law of this Circuit compels the conclusion that the lease was issued in violation of NEPA. *Id*.

BLM also determined that the lease was issued in violation of the NHPA because the agencies, prior to lease issuance, had failed to adequately consider the effects of oil and gas development on cultural resources, including religious values and activities. Although the EA reflected some tribal consultation, in compliance with the American Indian Religious Freedom Act ("AIRFA"), because it did not immediately authorize surface disturbance, the agencies mistakenly delayed full compliance with NHPA. Consequently, BLM contravened Section

106's mandate that cultural impacts be considered "prior to" project approval. *See Mont. Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1153 (D. Mont. 2004) ("BLM violated NHPA by failing to follow the prescribed NHPA process prior to selling the oil and gas leases"). And while Moncrief argues that events occurring after lease issuance were the basis for the Secretary's finding that the NHPA had been violated, that argument mischaracterizes the Secretary's decision. Specifically, prior to lease issuance and before the irretrievable commitment of resources, the Forest Service did not engage in appropriate discussions with the Tribe that would have revealed the cultural and religious importance of the area and appropriately informed agency decision making. AR FSHallCreek 14400-14401. The Secretary's determination that the leasing decision did not comply with the NHPA is thus neither arbitrary nor capricious.

III. The MLA's "Bona Fide Purchaser" Provisions Do Not Apply.

Plaintiff contends he is a "bona fide purchaser" of the lease and thus protected from cancellation under Section 27(h)(2) of the MLA. 30 U.S.C. § 184(h)(2). In their Cross-Motion, Federal Defendants explained that Section 27(h) does not shield purchasers from lease cancellation based on violations of statutes other than the MLA. Rather it provides that the protections apply only to lease cancellations based on "violation of any of the provisions of [the MLA]." 30 U.S.C. § 184(h)(2). The Court must give this language effect. *Zerilli v. Evening News Ass'n*, 628 F.2d 217, 220 (D.C. Cir. 1980) (if the statute's language is clear, "the judicial inquiry ends, for a court must give effect to a statute's unambiguous meaning."); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (same).

In his Reply, Plaintiff makes no attempt to overcome this presumption that the plain language expresses congressional intent. *See Williams v. Glickman*, 936 F. Supp. 1, 4 (D.D.C.

1996) (the presumption is "rebutted only in 'rare and exceptional circumstances,' where a contrary legislative intent is 'clearly expressed'") (quoting *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36 (1991) (additional citations omitted)). Instead Plaintiff criticizes the government's position as anomalous for contending that issuing a lease in violation of NEPA "does not violate the [MLA]." Reply at 16. Plaintiff appears to contend, indirectly, that violation of *any* statute in the issuance of a lease is, *ipso facto*, a violation of the MLA.

Plaintiff cites no authority for this proposition, which contravenes the statute's plain language. For example, in the first subsection of 27(h), Congress expressly authorized cancellation for certain violations of the MLA, providing that a lease may be cancelled, or an interest in a lease forfeited, if "any interest in any lease is owned, or controlled, directly or indirectly . . . in violation of any of the provisions of this chapter . . . ." 30 U.S.C. § 184(h)(1). In the subsection immediately following, Congress provided that the "right to cancel or forfeit for violation of any of the provisions of this chapter shall not apply so as to affect adversely the title or interest of a bona fide purchaser . . . ." 30 U.S.C. § 184(h)(2). These consecutive provisions clearly function together – one granting a cancellation authority and the next imposing limitations on its exercise, that is, exceptions to the express cancellation authority. Each refers quite specifically to violations "of any of the provisions *of this chapter*." *Id*. §§ 184(h)(1), (2) (emphasis added).

Despite this, Plaintiff argues that the exception has application beyond chapter 3 of the MLA, but he points to no language of general scope in the bona fide purchaser provision. *Id*. Simply put, the argument ignores the fact that the Secretary possesses multiple cancellation authorities, derived from multiple sources. Not only does Section 27 make an express grant of cancellation authority, 30 U.S.C. § 184, but Section 31, 30 U.S.C. § 188, does as well, in two

separate provisions, as Plaintiff points out in his opening brief. ECF No. 19 at 3. In addition to these express statutory grants under the MLA, the Secretary enjoys a "traditional administrative authority to cancel on the basis of pre-lease factors." *Boesche*, 373 U.S. at 479 (noting that Section 31 of the MLA "leaves unaffected the Secretary's traditional administrative authority . . . ."). As discussed in argument I, *supra*, this authority derives from Title 43 of the Public Land Laws, *id*. at 476, n.6, not from the MLA. Plaintiff's reading of the MLA does not withstand scrutiny.

For all these reasons, the Court should reject the contention that Section 27(h) extends bona fide purchaser protection to violation of statutes other than the MLA.

IV. Plaintiff's Remaining Arguments Lack Merit.

Plaintiff makes two additional arguments: first, that the cancellation decision was time barred; and second, that it was undertaken in a manner that deprived Plaintiff of due process of law. Both arguments fail for the reasons advanced in Federal Defendants' opening brief, Cross-Mot. at 23-26, and just a few additional observations are necessary here.

First, regarding the claimed time bar, Federal Defendants note that the statute of limitations Plaintiff relies on, 28 U.S.C. § 2462, applies to the type of civil action authorized in the immediately preceding statutory section, that is, 28 U.S.C. § 2461 (entitled "Mode of Recovery"). These provisions were enacted as part of the same public law, 62 Stat. 974 (June 25, 1948). The first provision creates a right in the government, to bring a civil action to enforce a "civil fine, penalty, or pecuniary forfeiture," 28 U.S.C. § 2461(a), in circumstances where the "violation of an Act of Congress" giving rise to the fine, penalty, or forfeiture does not "specify[] the mode of recovery or enforcement thereof." *Id*. The second provision imposes a five-year time bar on such actions. *Id*. § 2462.

The cancellation decision is simply not such an action. Nonetheless, Plaintiff argues the decision is in fact a "forfeiture," contending this brings it within the act's scope. *See* Reply at 18 (curiously referring to cancellation as "Interior's forfeiture"). The contention lacks merit because it depends entirely on Plaintiff's erroneous belief that the MLA uses the terms forfeiture and cancellation interchangeably. It does not. Cancellation is an action undertaken by the lessor; forfeiture involves an act of a lessee. But even if the terms were interchangeable, the argument fails for three additional reasons. First, it fails because in approving cancellation, the Secretary did not invoke any of the MLA's express cancellation authorities, despite Plaintiff's suggestions to the contrary. Rather, Interior relied on Title 43 of the U.S. Code, *Boesche*, and the regulation at 43 C.F.R. § 3108.3(d). AR BLM-M000674; *id*. n.14. Second, it fails because the provision, by its plain language, contemplates a "pecuniary forfeiture," not forfeiture of a lease. Finally, it fails because the "civil fine, penalty or pecuniary forfeiture" triggering the cause of action must be one "prescribed for the violation of an Act of Congress." The present circumstances involve no prescription for "violation of an Act of Congress." The Secretary invoked authority to cancel, not a reason *for* cancellation specified in a statute. The provision Plaintiff cites is an example of the latter. The Court should reject Plaintiff's misreading.

Second, with respect to Plaintiff's due process argument, Federal Defendants explained in their Cross-Motion that, seven weeks prior to the cancellation decision, a BLM official telephoned a representative of Moncrief Oil and advised that the Moncrief lease would be cancelled. AR BLM-M000665. Six days later, on November 23, 2016, then-counsel for Mr. Moncrief wrote BLM to advise that lease cancellation was illegal. AR BLM-M000801. As the record reflects, Plaintiff received notice, he had ample opportunity to respond, and he did in fact respond. In doing so, Plaintiff's then-counsel stated his view of the law – but did not request a

hearing and did not cite any legal authority requiring one. Likewise in briefing, Plaintiff identifies no specific requirement of a hearing, insisting instead that the right to a hearing is "fundamental." The claim should be rejected.

The Supreme Court has made clear that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The situation here involves defects that were legal, not fact-based, involving clear deficiencies in NEPA and NHPA compliance. It was founded on pre-lease factors that do not call into question the lessee's actions. Confronted by these considerations, Plaintiff argues he was denied a "[r]eal" opportunity to be heard, Reply at 19, arguing that the notices were vague as to the "rationale for the cancellation," but this is not so. The November 23, 2016 letter from Plaintiff's then-counsel reflects an understanding that the rationale included violation of NEPA and the NHPA. *See* BLM-M000801 (arguing that, at the time of lease issuance, there had been "no violations of either NEPA or NHPA"). BLM's November 17, 2016 email and its attachment, which followed up on the telephonic notice, made clear that the Devon leases (situated in the same circumstances as the Moncrief lease) were being cancelled "in recognition of the significant resources in the Badger-Two [Medicine] Area and the longstanding concerns about potential development there." *See* BLM-M000665. The attachment further explained that lease cancellation "respects the significant concerns identified by the Blackfeet, responds to recommendations from the U.S. Forest Service and the Advisory Council on Historic Properties [sic], and is consistent with the Congressional withdrawal of the area." *Id.*

Plaintiff also takes exception with the Cross-Motion's use of the term "certainty" in referring to lease cancellation, arguing this demonstrates that Interior had no intention of providing any process. Reply at 21. This is not so – Plaintiff quotes the Cross-Motion out of

context. In his opening brief, Plaintiff had contended he was advised only that Interior "may be about to cancel the Moncrief lease." Mot. at 18. Federal Defendants responded in their Cross-Motion, based on record evidence, that there was no ambiguity or uncertainty in the message to Plaintiff's representative about cancellation. The record makes clear that Interior intended to cancel the lease and so advised Plaintiff. Undersigned counsel's use of the term "certainty," in response to Plaintiff's mischaracterization of the notice, was intended only to convey the lack of ambiguity in the notice provided, not that Interior did not intend to provide any process. In fact, Plaintiff received process before the agency and is now receiving additional process in this Court. Given the "precise nature of the government function involved," *Morrissey*, 408 U.S. at 481, it is clear that the defects were legal and not fact-based. In such circumstances, Plaintiff received that process which was due.

CONCLUSION

For the foregoing reasons, the Court should grant the Defendants' cross-motions for summary judgment, deny Plaintiff's motion for summary judgment, and enter judgment for all Defendants.

Respectfully submitted this 5th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2017, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

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