ORAL ARGUMENT NOT YET SCHEDULED

Nos. 18-5343 & 18-5345

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

SOLENEX LLC, a Louisiana Limited Liability Company,
Plaintiff-Appellee,
v.
DAVID L. BERNHARDT, SECRETARY OF THE INTERIOR, et al.,
Defendants-Appellants,

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

Appeal from the United States District Court for the District of Columbia
No. 1:13-cv-00993-RJL (Hon. Richard J. Leon)

REPLY BRIEF FOR THE DEFENDANTS-APPELLANTS

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GLOSSARY

APA	Administrative Procedure Act
EA	Environmental Assessment
EIS	Environmental Impact Statement
Interior	United States Department of the Interior
JA	Joint Appendix
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
Tribe	Blackfeet Tribe

SUMMARY OF ARGUMENT

The Department of the Interior (Interior) appeals from a district court order holding that it acted arbitrarily and capriciously by waiting too long to cancel Plaintiff's oil and gas lease on federal land due to flaws in the lease's compliance with the National Environmental Policy Act (NEPA) and with the National Historic Preservation Act (NHPA). Interior's opening brief demonstrated that the district court erred in several fundamental respects: (1) it failed to review the agency's stated reasons for cancelling the lease, which were rational, Opening Brief 19-23; (2) it incorrectly held that unreasonable delay in cancelling the lease was a sufficient basis for holding that decision arbitrary and capricious, *id.* at 23-31; and (3) it held, contrary to the record, that Interior failed to account for Plaintiff's purported reliance interests, *id.* at 31-38. The court also abused its discretion by directing Interior to reinstate the lease.

Instead of defending the district court's decision on its own terms, Plaintiff urges affirmance on two grounds that the court did not reach: (1) that Interior lacked *authority* to cancel the lease, Response Brief 29-36; and (2) that Interior acted arbitrarily in concluding that the lease was issued in violation of NEPA and the NHPA, *id.* at 40-47. Those arguments lack merit. Congress has delegated Interior plenary authority to manage the federal lands at issue, and inherent in that delegation is the authority to cancel an oil and gas lease so

long as Interior retains title to the full fee. Interior's determination that issuance of the lease violated NEPA and the NHPA was rational and follows precedent. Interior also considered Plaintiff's reliance interests, which were minimal given that the lease had already been suspended for many years by the time that Plaintiff acquired the lease. Plaintiff cites no evidence of costs that it incurred in reliance on the lease. That lack of evidence—coupled with Plaintiff's knowledge that the lease's compliance with NEPA and the NHPA was subject to dispute—demonstrates that Plaintiff's reliance was not serious enough to preclude cancellation.

Finally, Plaintiff does not defend the district court's conclusions that the lease was cancelled without notice to Plaintiff, Opening Brief 38-41, and in bad faith, *id.* at 41-43.

The district court's judgment should be reversed.

ARGUMENT

I. The district court erred in concluding that the lease cancellation was arbitrary and capricious.

A. The district court erred in holding that delay alone may be the basis for determining an agency action to be arbitrary and capricious.

As the opening brief demonstrates (at 19-24), the district court disregarded the APA's textual distinctions between judicial review of "agency action" under paragraph (2) of 5 U.S.C. § 706 for whether it is arbitrary and

capricious, and proceedings under paragraph (1) thereof to compel agency action that has been "unreasonably delayed." Unreasonable delay, by itself, "is not enough" of a reason to hold agency action arbitrary and capricious. *Dayton Tire v. Secretary of Labor*, 671 F.3d 1249, 1253 (D.C. Cir. 2012). The district court's contrary conclusion disregards the APA's plain text and the functional differences between the two modes of judicial proceedings authorized by the statute.

Rather than respond on the substance, Plaintiff calls this a "straw" argument and contends that the court also relied on Interior's "abrupt reversal of position" that was "inadequately explained." Response Brief 9, 35-36. Plaintiff, however, never disputes that the district court erred by failing to review the actual—and substantial—reasoning that Interior provided for cancelling the lease. Opening Brief 19-20. Although that error alone is enough to warrant a remand, the district court's order should be *reversed* because Interior's decision was rational and supported by the record, as explained immediately below. *See*, *e.g.*, *Etelson v. OPM*, 684 F.2d 918, 926 (D.C. Cir. 1982) (resolving an APA claim in the first instance where the "record is complete, the case was resolved below on cross-motions for summary judgment," and the merits were briefed on appeal).

B. Interior's conclusion that the lease was issued in violation of NEPA and the NHPA was rational and supported by the record.

1. The lease was issued in violation of NEPA.

In cancelling the lease, Interior explained that the lease was issued absent compliance with NEPA and the NHPA. JA __[DE:68-1_at_8-11]. With respect to NEPA, Interior should have prepared an environmental impact statement (EIS) that analyzed the effects of fully developing the lease, along with a true no-action alternative of not issuing the lease at all, consistent with *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983).

As in *Peterson*, Interior failed to prepare an EIS before issuing a lease that lacked any provision giving Interior authority to prohibit the lessee from occupying the surface in support of drilling—for example, by requiring directional drilling from outside the leased area—so as to avoid significant environmental impacts. Although Interior *eventually* prepared an EIS when it received an application for permission to drill, that analysis came too late. Interior had already granted the lessee "exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits" for at least 10 years. JA __[HC885]. In other words, Interior made "irreversible and irretrievable commitments of resources" before fully evaluating the significant environmental impacts of that action and required alternatives. 42 U.S.C.

§§ 4332(2)(c)(iii), (v); *see also Peterson*, 717 F.2d at 1412 (holding that "the decision to lease is itself the point of irreversible, irretrievable commitment of resources").

Under *Peterson*, Interior was not permitted to defer the preparation of an EIS until the drilling-proposal stage. *See* 717 F.2d at 1415. Thus, the main flaw in the NEPA compliance was related to the *timing* of the required analysis: "To comply with NEPA, the 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." *Id.* (emphasis added). Only if Interior "retains the authority to preclude *all* surface disturbing activities . . . as well as the authority to refuse to approve proposed activities which it determines will have unacceptable environmental impacts" may Interior defer preparing an EIS until submission of an application for permission to drill (sometimes called an "APD" in the record). *Id.* (emphasis in original). But if Interior "is unable to preclude activities which might have unacceptable environmental consequences," then it "cannot issue leases sanctioning such activities without *first* preparing an EIS." *Id.* (emphasis added).

Peterson controls the question of NEPA compliance, and Plaintiff has neither distinguished that decision nor asked the full Court to overrule it. Moreover, *Peterson* is in accordance with Ninth Circuit case law that would

control a challenge to Interior's drilling on the lease that was administratively closed but never formally dismissed (*National Wildlife Federation v. Robertson*, No. 4:93-cv-00044-BMM (D. Mont.)) if that challenge were reopened and litigated. *See Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988) ("We agree with the District of Columbia Circuit that unless surface-disturbing activities may be absolutely precluded, the government must complete an EIS before it makes an irretrievable commitment of resources" by selling leases that do not contain a "no surface occupancy" clause.); *accord Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1227 (9th Cir. 1988); *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43, 49 (D.C. Cir. 1999) (relying on *Peterson* and *Conner* to conclude that the "irretrievable commitment of resources" triggering NEPA's responsibilities matures when oil and gas "leases are issued").[1]

Plaintiff tries to sidestep *Peterson* by asserting that it is the agency's responsibility "initially" to determine the need for an EIS. Response Brief 41 (quoting *Park County Resource Council, Inc. v. USDA*, 817 F.2d 609, 621 (10th

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[1] *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982), *cited in* Response Brief 42, is inapposite. That case concerned drilling on unpatented hard-rock mining claims, not leased lands. *See* 685 F.2d at 679-80. Hard-rock miners locate their claims after entering the public lands by statutory right. *See, e.g.*, 30 U.S.C. § 22 (providing that "all valuable mineral deposits" in federally owned lands "shall be free and open to exploration"). By contrast, an oil and gas lease is "discretionary with the Secretary of the Interior," *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 419 (1931), thereby allowing him to prevent surface impacts at the leasing stage altogether.

Cir. 1987)). Of course, courts routinely review those agency determinations and set them aside if they are arbitrary and capricious. Plaintiff further contends that the environmental assessment (EA) prepared at the leasing stage was the "functional equivalent" of an EIS because it was a thorough analysis. *Id.* at 42. As already discussed, however, the flaw in the NEPA compliance relates to the *timing* of the EIS. That difference matters because the EIS process provides greater opportunity for public participation. *Compare* 40 C.F.R. § 1501.4(b), (e)(2) (providing for public participation in the preparation of EAs only where "practicable" and in "certain limited circumstances") *with id.* § 1503.1(4) (requiring agency to request public comments on draft EISs). Here, that would have occurred before Interior relinquished its authority to prevent surface occupancy under the lease.

Plaintiff's unqualified assertion (at 27) that the lease's validity has been "repeatedly affirmed" is misleading. The validity of the lease's NEPA and NHPA compliance has never been resolved by a court—either in this case or in *National Wildlife Federation*. Although *Interior* affirmed the lease when approving the application for permission to drill, that last occurred in 1993. More recently, Interior's cancellation decision rationally explained why Interior no longer stands by those conclusions. JA __[DE:68-1_at_8-9].

Interior also based its cancellation decision on the additional flaw that the leasing EA failed to analyze "the alternative of not leasing . . . the area." JA __[DE:68-1_at_9] (emphasis added). Plaintiff (at 42-43) contends that the leasing EA's "no action" alternative—which delayed recommendations on leasing until a forest plan was completed, *see* JA __[DE:45-10_at_48, 78] (describing alternative)—was "equivalent" to considering the option of not entering into the lease. But that is not correct with respect to the "long-term effect" of the deferral option, which the EA acknowledged "would probably be the same" as the selected alternative, JA __[DE:45-10_at_75]; both of those options would allow leasing eventually. The EA also stated that the delayed-leasing option conflicted with Forest Service policy at the time, JA __[DE:45-10_at_48], an indicator that it was not considered viable. Nothing in this regard represented a "hard look" at the option of denying the lease outright. *Cf. Bob Marshall Alliance*, 852 F.2d at 1229 (holding that even for a lease authorizing Interior to prohibit surface occupancy, the no-leasing option must "be given full and meaningful consideration").

2. The lease was issued in violation of the NHPA.

Interior's conclusion that the lease was issued in violation of the NHPA was rational. Section 106 of the NHPA requires federal agencies, "prior to the issuance of any license," to "take into account the effect of the undertaking on

any historic property," 54 U.S.C. § 306108, with "historic property" being defined to encompass districts or sites that are "included on, or eligible for inclusion, on the National Register" of Historic Places, *id.* § 300308. Regulations of the Advisory Council on Historic Preservation state that agencies "shall ensure that the Section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 C.F.R. § 800.1(c). Regulations in effect when the lease was issued were at least as stringent about timing, if not more so. *See id.* § 800.4 (1979) (requiring Section 106 compliance as "early as possible before an agency makes a final decision concerning an undertaking and in any event prior to taking any action that would foreclose alternatives").

Plaintiff (at 39) contends that Interior's conclusion that issuance of the lease did not comply with the NHPA is impermissibly based on the designation of the Badger-Two Medicine Area as a traditional cultural property, which occurred in 2002. That contention overlooks the fact that (as quoted above) the NHPA has long applied to districts that are "eligible for inclusion" in the National Register, not just those already included. 54 U.S.C. § 300308. Even at the time the lease was issued, both "sites" and "districts" could be eligible for inclusion if they were archeologically or culturally

significant. 46 Fed. Reg. 56,183, 56,189 (Nov. 16, 1981) (codified at 36 C.F.R. § 60.4). But the relevant agencies (Interior and the Forest Service) did not complete any studies to determine eligibility until the early 1990s. *See* JA __[DE:68-1_at_5 & n.16].[2]

The limited efforts that the agencies made to investigate the lease's possible effects on cultural resources before the lease was issued did not satisfy the NHPA. Although the agencies did make some inquiries with the Blackfeet Tribe (Tribe) about culturally important sites before entering into the lease, the limited information that they obtained was insufficient. The leasing EA stated that federal law "guarantees American Indians access to their religious sites and may involve preservation of these sites," but it acknowledged that "the complete implications of this are not yet clear." JA __[DE:45-10_at_71]. Instead, the agencies stated that compliance with the NHPA "will be required at the time soil disturbing activities are proposed." *Id.* If "avoidance and salvage" of the cultural resources were "not adequate," the agencies proposed conducting an "inventory" of those resources before they were disturbed. *Id.*

[2] The statute was amended in 1992 to acknowledge expressly that traditional cultural districts for Indian tribes might be found eligible for the National Register and expressly to require agencies to consult with tribes about such properties as part of the Section 106 process. Pub. L. No. 102-575, § 4006(a), 106 Stat. 4600, 4755-57 (codified at 54 U.S.C. § 302706).

The information that the agencies had obtained at the time the lease issued, however, was sufficient to put them notice that there were likely culturally important sites in the area. The leasing EA noted archeological evidence of a "variety of uses by aboriginal people over a period of several thousand years," including possibly for "spiritual activities." JA __[DE:45-10_at_44-45] ("The Forest Service recognizes that . . . the Forest may contain areas of spiritual importance."). The agencies were aware that tribal members "prefer to identify these areas on a project-by-project basis." The lack of any diligent follow-up on such information has been held to be unreasonable. *See*, *e.g.*, *Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995) (holding that the NHPA is violated where agency does "not reasonably pursue the information necessary to evaluate the [site's] eligibility for inclusion in the National Register," despite knowing that Indians likely want to keep such information private).

Plaintiff argues (at 44) that deferring NHPA compliance at the leasing stage was proper because "issuing the lease does not have an impact on historic properties." Even the leasing EA, however, acknowledged: "Surface disturbing operations associated with oil and gas activities may have an impact on cultural resources." JA __[DE:45-10_at_71]. Yet the EA deferred a full analysis because it believed that an impacted area "may be avoided completely

if mitigation is not possible." *Id.* That assumption was mistaken, however, because the lease does not authorize Interior to prohibit surface occupancy. Indeed, the Interior Board of Land Appeals reached a similar conclusion when it remanded the drilling decision because Interior's chosen mitigation for protecting archeological resources discovered during survey of an access route was "not available" under the lease's terms. *Glacier-Two Medicine Alliance*, 88 IBLA 133, 152 (1985) (JA __[FS374]); *see also National Wildlife Federation*, *supra*, Complaint 16 (JA __[FS2281]) (alleging NHPA violation).

Here, the Advisory Council on Historic Preservation (which is entitled to comment on federal undertakings subject to the Section 106 review process) confirmed that the agencies never conducted that review prior to the lease. JA __[FS00689]. Whatever Section 106 consultation later did occur "had not addressed the possibility of prohibiting gas exploration." *Id.* As the Advisory Council explained in its 2014 comments to Interior: "For the Section 106 process to work effectively, the agency's consideration of a 'broad range of alternatives' " under the regulations "must include avoidance alternatives, if they exist." JA __[FS006591]. Here, they did not. Interior's conclusion that it "mistakenly delayed full compliance with NHPA . . . until after lease issuance," JA __[DE:68-1_at_11], was rational. *Cf. National Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1085 (D.C. Cir. 2019) (observing that the

Council's comments about an undertaking's effects on historic properties merit "special attention").

That conclusion is consistent with the NHPA's text, which provides that the effect of the undertaking must be taken into account "*prior to* the issuance of any license." 54 U.S.C. § 306108 (emphasis added). Drilling is unquestionably an "effect" of entering into the lease. *See* 36 C.F.R. § 800.5(a)(1) ("Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time . . . .").

Plaintiff's reliance on *National Indian Youth Council v. Watt*, 664 F.2d 220 (10th Cir. 1981) as holding that the NHPA compliance need not be undertaken when a lease is issued, is misplaced. Response Brief 44. There, the court determined that the agencies had made a "reasonable effort to satisfy NHPA," including by preparing "exhaustive studies of potential historical sites" and by adopting protective stipulations that were "adequate, reasonable, and enforceable." 664 F.2d at 227-28. Here, by contrast, the pertinent studies were not completed until after Interior had both issued the lease *and* approved the application for permission to drill. Furthermore, the lease was not "expressly conditioned upon completion of the § 106 process," as might have satisfied the NHPA. *City of Grapevine v. DOT*, 17 F.3d 1502, 1509 (D.C. Cir. 1994).

3. The defects in NEPA and NHPA compliance were not cured.

Plaintiff further asserts (at 44-45) that any defects in NHPA and NEPA compliance were cured through additional analyses prepared before 1993. Interior's cancellation decision did acknowledge that it had previously "opined" in its drilling-approval decisions that an EIS finalized in 1990 had "fully complied with NEPA." JA __[DE:68-1_at_12]. Interior nevertheless explained that a "careful examination" of the 1990 EIS's no-action alternative revealed that it was not intended as an analysis of whether the lease should have issued in the first place; accordingly, Interior concluded that it had not cured the NEPA and NHPA defects. *Id.*

The record supports that conclusion. The EIS described the no-action alternative as follows: "Under this alternative, Fina's APD,"[3] or application for permission to drill, "would be denied . . . . *Previously issued leases would remain in effect.* Future APDs may still be submitted by Fina and other leaseholders in the area. Denial of Fina's APD would not automatically result in denial of future applications for exploration and development . . . ." JA __[FS1248] (emphasis added); *see also* JA __[FS1171] (stating that under the no-action alternative, "Fina's APD would be denied," but making no mention of lease cancellation).

[3] Fina was one of Plaintiff's predecessors in the leasehold.

The Bureau of Land Management area manager did state that he considered recommending that the lease be cancelled and concluded that such an option was unnecessary because the adverse surface-resource impacts were "within acceptable ranges" and could meet forest plan goals. JA __[FS2317]. But the manager acknowledged that he had "no authority to cancel or change lease terms" and that cancellation could entail "buying back" or "condemning" the lease or "enacting legislation." JA __[FS2316]. Interior was therefore in a different posture at that stage than when it could have rejected the lease altogether. At the leasing stage, it would not have had to consider the cost of taking those additional steps of lease buy-back or condemnation.

C. The district court erred in holding that Interior's cancellation decision was arbitrary and capricious due to a failure to consider plaintiff's reliance interests.

1. Interior retains authority to cancel the lease notwithstanding any reliance interests.

Rather than defend the district court's decision that the lease cancellation was arbitrary and capricious due to unreasonable delay, Plaintiff argues that Interior "did not have authority to cancel the lease" after the passage of time. Response Brief 29 (capitalization omitted). That argument should be rejected.

As explained in the opening brief (at 17, 27-28), Congress has entrusted the Secretary with "plenary authority over the administration of public lands." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *accord Boesche v.*

Udall, 373 U.S. 472, 476 (1963); *Silver State Land, LLC v. Schneider*, 843 F.3d 982, 990 (D.C. Cir. 2016); *see also* 43 U.S.C. § 2 (directing the Secretary to "perform all executive duties . . . in anywise respecting such public lands"). Nothing in any statute divests the Secretary of that authority due to the passage of time. As *Silver State* held, the Secretary retains the "authority to cancel an invalid land sale . . . at least until the issuance of the land patent." 843 F.3d at 990. Because "a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee," *Boesche*, 373 U.S. at 478, the greater authority to cancel the sale of a fee necessarily includes the lesser authority to cancel a mineral lease.

Instead of responding to those arguments, Plaintiff (at 33) relies on a general proposition that where an agency exercises its inherent authority to reconsider a matter, it may do so only within a reasonable time after the original decision. But none of the appellate cases cited by Plaintiff concerns the Secretary's plenary authority to manage the public lands. Plaintiff's discussion of the Mineral Leasing Act (at 29, 32 n.4, 34) is beside the point because, as Plaintiff acknowledges (at 29), Interior cancelled the lease based on its "inherent authority" to manage the public lands. JA __[DE:68-1_at_7]. As *Silver State* recognized, even where the pertinent statutes contain "'no express administrative cancellation authority,'" Interior has "authority to cancel a

'lease administratively for invalidity at its inception,' even after the lease had been issued." 843 F.3d at 990 (quoting *Boesche*, 373 U.S. at 476). The fact that Congress enacted an express statutory limitation on mineral leasing contests but did not include any limit on Interior's inherent cancellation authority, supports a conclusion that Interior possesses that authority. Indeed, Congress has confirmed even in the Mineral Leasing Act that Interior may "do any and all things necessary to carry out and accomplish the purposes of this chapter." 30 U.S.C. § 189.

At a minimum, Interior's authority must exist where the lease decision is timely challenged in litigation, as occurred in *National Wildlife Federation*. There, the plaintiffs timely challenged the drilling decision and alleged that it was "based on an oil and gas lease" that was void and "issued illegally" because an EIS had not first been prepared. JA __[FS2278-79]. Those plaintiffs attempted to reopen the suit in 2015 but voluntarily withdrew their request after the lease was cancelled. If Interior lacked authority to cancel the lease, it would have no means to respond to the claims raised by the litigation, e.g., through settlement or by taking other corrective action.

Plaintiff asserts (at 30) that Interior's cancellation decision receives "no deference" because it is an "about-face" that "contradicts the Secretary's prior statements." That is an incorrect statement of law. It is well-established that an

agency's decision is not reviewed under a less deferential standard merely because it represents a change of position. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review."). And if the agency adequately explains the reasons for a reversal of policy, "change is not invalidating." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996). To offer a satisfactory explanation for its action, the agency must give "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 516. Here, Interior reasonably explained its position that the lease had been issued in violation NEPA and the NHPA by the failure to prepare an EIS or consider the effects to culturally important sites before entering into the lease, as already discussed above (pp. 4-15) and in the opening brief (at 20-21).

2. Interior reasonably accounted for any reliance interests, which were negligible.

If Interior had a responsibility to take reliance interests into account, it did so. *See* Opening Brief 32-37. As the opening brief explained (at 32-36), Plaintiff's reliance interests are negligible because (1) the lease was originally acquired by Plaintiff's principal, Sidney Longwell, and drilling operations have been suspended (originally at the request of Plaintiff's predecessor) nearly since

they were first approved, *id.* at 32-33; (2) Plaintiff had notice of the legal flaws in the lease's issuance due to the administrative and district court challenges, *id.* at 32, 35-36; and (3) Plaintiff acquired the lease with knowledge of the suspensions then in effect, *id.* at 33-34, and Longwell (Plaintiff's principal) has a longstanding familiarity with the lease history, *id.* at 34-35. Interior acknowledged those interests by offering to refund all the rental payments—roughly the amount that Plaintiff and Longwell spent on the lease. *Compare* JA __[DE:68-1_at_14] (refunding $31,235 in rent) *with* JA __[DE:24-2_at_36] (estimating non-legal expenses "over $35,000," plus the cost of $10,000 bond).

Instead of citing any evidence that it spent money in reliance on the lease, Plaintiff contends that its reliance costs are a matter of "common sense" because of Interior's past statements supporting the lease. Response Brief 35, 47-49. But an asserted failure to consider reliance interests may not prevail where "a detailed statement of costs is missing" from the record. *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 721 (D.C. Cir. 2016). Additionally, Plaintiff knew the relevant facts and history of the lease, including that it remained subject to challenge in *National Wildlife Federation*. Opening Brief 34-35. Moreover, Plaintiff's principal was informed by 2002 that completion of the cultural resource study process "will determine what happens" to Plaintiff's ability to drill. JA __[FS2756]; *accord* JA __[FS2811]. Because Plaintiff presents

no evidence of any "*serious* reliance interests" that Interior failed to consider, *Fox Television*, 556 U.S. at 515 (emphasis added), the cancellation decision may not be set aside on that ground.

D. Plaintiff's remaining arguments lack merit.

Plaintiff makes other arguments that Interior's cancellation decision is arbitrary and capricious, but they should all be rejected.

First, Plaintiff asserts that the cancellation decision is "contrary to the evidence" because Interior omitted certain facts and because various "facts throughout the 1980s and 1990s" purportedly contradict Interior's conclusion in 2016 (based on additional studies) that lease development would negatively affect the Tribe's cultural resources. Response Brief 45-46 (capitalization omitted). But Interior's fact-based determinations are reviewed for "substantial evidence." *Center for Auto Safety v. FHWA*, 956 F.2d 309, 314 (D.C. Cir. 1992). That threshold is "not high," *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019), and means only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). A decision may be reversed under the standard only if the evidence "was such that a reasonable factfinder would have to conclude" in the challenger's favor. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

Here, as already discussed, the legal flaws in the lease issuance that Interior identified relate to the timing of the required analyses; those analyses were conducted only after Interior had entered into a lease that could no longer prohibit surface-resource impacts. Impacts to cultural resources were adequately documented in the thorough process that occurred beginning in the early-to-mid-1990s, post-dating the information on which Plaintiff (at 46) relies. Opening Brief 9; *see*, *e.g.*, [DE:68-1_at_5-6] (summarizing process); JA __[FS6583-92] (Advisory Council's recommendation). Given the significant amount of new information on which Interior relied for its conclusion about adverse cultural effects, it cannot be said that statements from decades earlier based on less information render Interior's conclusions irrational.

Next, Plaintiff contends (at 38-39) that the lease confers "valid existing rights" that Congress preserved when it withdrew the federal land in the area from "disposition under all laws relating to mineral . . . leasing." Pub. L. No. 109-432, § 403(b)(1)(B), 120 Stat. 2922, 3050-51 (2006). The scope of Plaintiff's rights in the lease, however, remains subject to Interior's cancellation authority. Interior's Solicitor has determined that although a "valid existing right may be created as a result of the exercise of secretarial discretion" (e.g., by issuing an oil and gas lease), such rights "are not absolute. The nature and extent of the rights are defined . . . by the manner in which the Secretary chose

to exercise his discretion." Solicitor's Opinion M-36910, 88 Interior Decision 909, 912 (1981). Here, Plaintiff's lease is expressly "subject to all rules and regulations of the Secretary of the Interior now or hereafter in force." JA __[HC884]. Indeed, Interior's regulations provide: "Leases shall be subject to cancellation if improperly issued." 43 C.F.R. § 3108.3(d). Accordingly, the extent of Plaintiff's rights in the lease is limited by the Secretary's authority to cancel the lease because of defects in issuance. *Cf. National Mining Association v. Kempthorne*, 512 F. 3d 702, 709-10 (D.C. Cir. 2008) (granting *Chevron* deference to Interior's interpretation of "valid existing rights" under the Surface Mining Control and Reclamation Act).

Plaintiff also mentions (at 26) that Interior recently reinstated a cancelled lease in *Moncrief v. U.S. Department of Interior*, 339 F. Supp. 3d 1 (D.D.C. 2018), in which the district court overturned that cancellation decision on similar grounds but in which Interior is not appealing. As the opening brief explained (at 16 n.3), *Moncrief* arises in a different factual and procedural setting from the present case. For example, the lessee in *Moncrief* was held to be protected from cancellation as a good-faith purchaser. 339 F. Supp. 3d at 10-11. The district court did not reach that issue here, and Plaintiff mentions it only in a footnote, *see* Response Brief 34 n.7, which "results in forfeiture." *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014); *accord Hutchins v. District of Columbia*, 188 F.3d

531, 539-40 n.3 (D.C. Cir. 1999).[4] In another footnote (at 47 n.11), Plaintiff suggests that Interior violated due process by withholding information about the Tribe's use of the leasing area. But that information is protected from disclosure by statutes that are unchallenged here. *See* 16 U.S.C. § 470hh(a) (archeological resources); 54 U.S.C. § 307103(a) (religious sites).

At several points, Plaintiff faults Interior's cancellation decision for being "litigation-driven" or "motivated by litigation." Response Brief 9, 27, 37. As already demonstrated, however, the stated reasons for Interior's decision are rational and supported by the record. Judicial review of agency action is ordinarily limited to evaluating the agency's "contemporaneous explanation" of its decision, *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 549 (1978), and that explanation must be upheld if the record reveals a "rational" basis supporting it, *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42-43 (1983). A "court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019). And Plaintiff makes no serious argument that

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[4] Amicus presses the good-faith-purchaser argument, *see* Brief of Western Energy Alliance 22-28, but the Court does "not entertain arguments not raised by parties." *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335, 1338 (D.C. Cir. 1998). Interior rationally rejected the good-faith-purchaser defense presented by Plaintiff. JA __[DE:68-1_at_1 n.2].

Interior's decision should be set aside *despite* its rationality. *See* Opening Brief 41-43 (demonstrating that the district court erred in concluding that Interior did not act in good faith).

Plaintiff (at 59) cites comments by agency staff that "possible" mitigation "could" take the form of monetary payments to the Tribe. JA __[FS4782]. But those statements do not undermine Interior's ultimate conclusion that the parties were unable to reach an "agreement to protect or mitigate impacts" to the Tribe's cultural district while allowing lease development to proceed. JA __[DE:68-1_at_13]; *cf. National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (fact that preliminary views of agency are "later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious"); *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (an "agency is not bound by the actions of its staff if the agency has not endorsed those actions").

Plaintiff suggests (at 32-33 n.4) that a five-year statute of limitations, 28 U.S.C. § 2462, applies to lease cancellation because the government is "effectively" suing itself. That is wrong for two reasons. First, "no person may sue himself." *United States v. ICC*, 337 U.S. 426, 430 (1949). Second, the five-year statute applies only to proceedings to enforce a "civil fine, penalty, or forfeiture." 28 U.S.C. § 2462. Lease cancellation for defective issuance is not

such a proceeding because it is not "imposed in a punitive way." *Kokesh v. SEC*, 137 S. Ct. 1635, 1643 (2017) (internal quotation marks omitted) (applying the statute to disgorgement for securities law violations).

Lastly, Plaintiff contends (at 51-52) that laches and estoppel prevent cancellation. Those arguments lack merit. "A private party asserting estoppel against the United States Government must demonstrate . . . that the latter has engaged in 'affirmative misconduct.'" *LaRouche v. FEC*, 28 F.3d 137, 142 (D.C. Cir. 1994) (citations omitted). Plaintiff identifies no such conduct. Nor is laches applicable where, as here, the government asserts public rights. *See*, *e.g.*, *Illinois Central Railroad Co. v. Rogers*, 253 F.2d 349, 352 (D.C. Cir. 1958) (rejecting laches argument where the government was "seeking possession of property to which it has title in its own right"). Finally, Plaintiff's own delay in bringing suit to lift the suspension undercuts the attempt to apply laches.

* * *

In sum, Interior acted within its authority by cancelling Plaintiff's lease based on a rational conclusion that it had been issued in violation of NEPA and the NHPA, and it reasonably considered Plaintiff's reliance interests in explaining its decision. The district court's order should be reversed, and Interior's cancellation decision should be upheld.

II. The district court abused its discretion in ordering the lease to be reinstated rather than remanding the matter for Interior to address issues that the court held the agency overlooked.

If, as the district court believed, Interior "failed to consider the reliance interests" of Plaintiff, *Solenex LLC v. Jewell*, 334 F. Supp. 3d 174, 183 (D.D.C. 2018) (JA __) (*Solenex II*), then the court should have remanded for Interior to provide additional explanation for its decision. *See* Opening Brief 44-48. Instead, the court directed "that plaintiff's lease be reinstated." JA __[DE:131]; *accord Solenex II*, 334 F. Supp. 3d at 184 (JA __). That remedy was an abuse of discretion because it exceeds the district court's authority under the APA to "hold unlawful" and "set aside" agency actions that are determined to be arbitrary and capricious. 5 U.S.C. § 706(2). Moreover, the remedy violates the standard for issuing a mandatory injunction to agency officials, which requires "a specific, unequivocal command" found in statute or regulation that Interior keep the lease in place. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (internal quotation marks omitted); *see also 13th Regional Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980) (holding that the duty to take the requested action must be "clear and undisputable" (internal quotation marks omitted)).

In response, Plaintiff argues (at 53) that the district court did not grant a mandatory injunction. That assertion, however, is contradicted by the text of

the court's order and opinion, which "ORDERED that plaintiff's lease be reinstated," thereby preventing Interior from reaching any other conclusion after a remand. JA __[DE:131] (capitalization in original, boldface omitted); *see also Solenex II*, 334 F. Supp. 3d at 184 (JA __) (remanding to Interior "with the order that the Solenex lease be reinstated"). Such an order is a mandatory injunction that must be based on an unequivocal duty in statute or regulation. *See 13th Regional Corp.*, 654 F.2d at 762 (finding a "peremptory command" in a statute that "directed" the Secretary to conduct a study). There is no such duty here that prevents Interior from cancelling the lease on remand.

Nor is the court's reinstatement order "harmless error," as Plaintiff contends. Response Brief 53. Interior risks facing proceedings to enforce the court's injunction, possibly including contempt, if it does anything other than reinstate the lease. Indeed, the lessee in *Moncrief* has moved to enforce a similar reinstatement order there because Interior's letter reinstating the lease contains language that the lessee believes affects the lease's marketability. The court's mandatory injunction here risks creating similar mischief.

Finally, Plaintiff's argument that a remand would be "fruitless . . . because Defendants have already explained their decision," Response Brief 59 (quotation marks omitted), lacks merit. First, that argument contradicts Plaintiff's argument elsewhere in its brief (at 9, 49) calling Interior's decision

"inadequately explained" or "unexplained." Additionally, Plaintiff's argument ignores that the district court concluded Interior "failed to *consider* the reliance interests" at issue. *Solenex II*, 334 F. Supp. 3d at 183 (JA __) (emphasis added). In such circumstances, remand to the agency is the proper course. Opening Brief 44.

CONCLUSION

For the reasons discussed above and in the government's opening brief, the district court's order should be reversed.

Respectfully submitted,

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I hereby certify that on July 11, 2019, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to all counsel of record.

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