IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

SOLENEX, LLC, Plaintiff, v. DEBRA HAALAND, et al., Defendants, and PIKUNI TRADITIONALIST ASSOCIATION, et al., Defendant-Intervenors.	)	Civ. Action No. 13-993 (RJL)

DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

Defendant-Intervenors Pikuni Traditionalist Association, Blackfeet Headwaters Alliance, Glacier-Two Medicine Alliance, Montana Wilderness Association, National Parks Conservation Association, and The Wilderness Society hereby move for summary judgment on all of their defenses pursuant to Federal Rule of Civil Procedure 56(a). This motion is supported by the accompanying memorandum. As that memorandum demonstrates, there is no genuine dispute as to any material fact and Defendant-Intervenors are entitled to judgment as a matter of law. Accordingly, this Court should grant summary judgment to Defendant-Intervenors. See Fed. R. Civ. P. 56(a).

As required by Local Civil Rule 7(c), a proposed order accompanies this motion.

Respectfully submitted this 18th day of February, 2022.

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DEFENDANT-INTERVENORS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

BFP	bona fide purchaser
BLM	Bureau of Land Management
EA	Environmental Assessment
EIS	Environmental Impact Statement
FOOLGRA	Federal Onshore Oil and Gas Leasing Reform Act
IBCA	Interior Board of Contract Appeals
IBLA	Interior Board of Land Appeals
MLA	Mineral Leasing Act
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
ROD	Record of Decision
TCD	Traditional Cultural District

Note on Citations to the Administrative Record and Court Docket

Defendant-Intervenors cite documents from the administrative record as follows: If record documents have previously been collected in a joint appendix during the course of these proceedings, Defendant-Intervenors cite such documents by the relevant appendix document's ECF docket number and pagination (i.e., ECF pagination appearing in the upper right corner). For other record documents, Defendant-Intervenors generally cite such documents by referencing the Bates pagination applied by Federal Defendants. However, for efficiency and clarity, Defendant-Intervenors cite documents from Federal Defendants' July 7, 2017 supplementation of the administrative record (ECF No. 124) by using the short forms "FS-Supp" for documents bearing the Bates label "FS_AmendedSupplimentalIndex" (sic) and "FS-HC" for documents from the supplementation titled "Environmental Impact Statement Administrative Record 1983-1991 Proposed Oil and Gas Drilling Near Badger Creek and Hall Creek."

For the sake of consistency, Defendant-Intervenors cite all documents from this Court's docket in this case, including Plaintiff Solenex LLC's summary judgment brief (ECF No. 156), by ECF pagination appearing in the upper right corner. Defendant-Intervenors also cite such documents by ECF docket number except for the Solenex brief, which is referenced as "Solenex Br." for clarity.

INTRODUCTION

This long-running case involves the Interior Department's ("Interior") cancellation of a federal mineral lease in the Hall Creek area of the Badger-Two Medicine region of the Lewis and Clark National Forest, which adjoins Glacier National Park and the Blackfeet Indian Reservation in northern Montana. Plaintiff Solenex mounts multiple challenges to Interior's cancellation of the Hall Creek lease, as well as related actions of Interior and the U.S. Forest Service in disapproving and returning a drilling permit on the lease. Defendant-Intervenors Pikuni Traditionalist Association, et al., are Blackfeet traditionalists and allied conservationists who have opposed oil and gas development in the Badger-Two Medicine region for decades and long advocated for cancellation of the Hall Creek lease.

This Court previously heard Solenex's summary judgment arguments challenging the lease cancellation and issued a decision in Solenex's favor in September 2018. See Solenex LLC v. Jewell, 334 F. Supp. 3d 174 (D.D.C. 2018). The D.C. Circuit reversed and vacated this Court's decision. See Solenex LLC v. Bernhardt, 962 F.3d 520 (D.C. Cir. 2020). On remand from the D.C. Circuit's ruling, Solenex now comes back before this Court and presents most of the claims this Court did not reach during the last round of summary judgment proceedings, along with certain variations on its prior arguments and its new challenge to disapproval of its drilling permit.

This Court should reject Solenex's claims. Solenex repeatedly asks this Court to ignore or contradict controlling authority from both the U.S. Supreme Court and the D.C. Circuit that is contrary to Solenex's arguments, and to otherwise adopt outlier positions that are often based on dissenting opinions. Among the authorities that Solenex asks this Court to disregard is the D.C. Circuit's ruling in Solenex LLC, 962 F.3d at 520, which rejected Solenex's theories that the

government acted arbitrarily in delaying cancellation of Solenex's lease, and that harm to Solenex's alleged reliance interests offered a basis for invalidating the lease cancellation, id. at 527-30. Undeterred by these appellate determinations, Solenex repeatedly reprises its rejected arguments in this new round of briefing. See, e.g., ECF No. 156, Plaintiff's Mot. for Summary Judgment ("Solenex Br.") 44, 55-59 (arguing delay and reliance issues). This Court should not accept Solenex's contentions. Instead, because Solenex fails to identify any unlawful conduct by the Federal Defendants, this Court should deny Solenex's motion for summary judgment and grant Defendant-Intervenors' cross-motion.

STATEMENT OF FACTS AND STANDARD OF REVIEW

This Court is familiar with this case given the history of these proceedings that now spans nearly a decade. Accordingly, in the interest of efficiency and economy, Defendant-Intervenors adopt and incorporate the statements of facts previously filed by the Federal Defendants in this case, see ECF Nos. 32-1 & 93-2, as supplemented by the specific facts discussed in the arguments that follow. Defendant-Intervenors further adopt and incorporate the discussion of the standard of review set forth in ECF No. 93-1 at pages 19-20.

I. THE INTERIOR SECRETARY HAD AUTHORITY TO CANCEL THE LEASE

Contrary to Solenex's argument, the Secretary of the Interior had well-established authority to cancel the Hall Creek lease under the U.S. Supreme Court's ruling in Boesche v. Udall, 373 U.S. 472 (1963). Further, neither contract law nor the Mineral Leasing Act's protection for certain bona fide purchasers of federal mineral leases applies here to limit that authority. Solenex's contrary claims are meritless.

A. Solenex's Statutory Arguments Defy Supreme Court Precedent

Solenex first errs in arguing that Interior lacked authority to cancel the lease under the lease-cancellation provisions of the Mineral Leasing Act ("MLA"). Solenex Br. 32-35. Solenex's MLA argument is misguided because Interior did not cancel the Hall Creek lease pursuant to the MLA but rather pursuant to the agency's general managerial power over the public lands. See ECF No. 116-7 at 48 (cancellation decision). This longstanding power pre-dates the MLA and—as the Supreme Court held in Boesche—was not limited by the MLA. See 373 U.S. at 478-82. Solenex's argument on this point essentially asks this Court to adopt the losing argument in Boesche.

1. Boesche v. Udall Forecloses Solenex's Argument.

Boesche held that Interior had authority to cancel a federal mineral lease due to pre-leasing errors under the agency's "general powers of management over the public lands," which arise from longstanding congressional enactments that preceded the MLA. Id. at 476 & n.6 (citing statutes); see also Cameron v. United States, 252 U.S. 450, 459-60 (1920) (recognizing Interior Secretary's authority, under "general statutory provisions" concerning the public lands, to take action "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved"); Silver State Land, LLC v. Schneider, 843 F.3d 982, 989-92 (D.C. Cir. 2016) (discussing and affirming the Interior Secretary's "plenary authority" to terminate invalid claims to the public lands). Boesche explicitly confronted the argument that the MLA afforded "the exclusive source of the Secretary's power to forfeit a lease once it has been issued," id. at 475, and rejected it, holding that the MLA "leaves unaffected the Secretary's traditional administrative authority to cancel on the basis of pre-lease factors," id. at 479. Notably, Boesche discussed the same MLA lease-cancellation provisions invoked by Solenex

here and rejected the argument that they constrained the Secretary's pre-MLA administrative authority. See id. at 479-80 (discussing MLA sections 27 and 31); compare Solenex Br. 32-36 (discussing same MLA provisions, codified at 30 U.S.C. §§ 184(h)(1)-(2); 188(a), (b)). Solenex ignores this discussion in Boesche and simply reasserts the MLA argument that Boesche rejected. Solenex Br. 32-35.[2]

When Solenex finally acknowledges Boesche, it argues for an interpretation of that ruling that has not been adopted by any other court. Solenex urges this Court to "read Boesche narrowly" by limiting the decision to its "unique facts" involving a dispute between competing applicants for a lease. Id. 38-39. But this is not how the federal courts or the Interior Department have interpreted Boesche in the nearly 60 years since it was decided. Rather, an extensive body of case law and administrative precedent has applied Boesche to hold that Interior has "broad authority" to cancel leases for "administrative errors committed before the lease was issued," Winkler v. Andrus, 614 F.2d 707, 711 (10th Cir. 1980) (emphasis added)—including for a wide variety of administrative errors that extend well beyond the circumstances addressed in Boesche, see Silver State Land, LLC, 843 F.3d at 990 (stating generally that Supreme Court in Boesche "confirmed the Secretary's authority to cancel a 'lease administratively for invalidity at its inception,' even after the lease had been issued") (quoting Boesche, 373 U.S. at 476); Texaco v. Hickel, 437 F.2d 636, 641 (D.C. Cir. 1970) (recognizing Interior Secretary's authority to cancel a lease administratively for invalidity at its inception where "the United States retains significant control over operations under the lease"); Griffin &

[2] Solenex erroneously seeks to bolster its statutory argument by citing language taken out of context from Union Oil Co. of Cal. v. Morton, 512 F.2d 743 (9th Cir. 1975) (cited in Solenex Br. 18, 23-24). The cited discussion in Union Oil Co. addressed whether Interior could prohibit lease operations based on post-leasing regulations, not whether Interior has authority to cancel a lease based on pre-leasing errors. See 512 F.2d at 750.

Griffin Expl., LLC v. United States, 116 Fed. Cl. 163, 176 (2014) (citing Boesche and stating that Interior's "right of cancellation was designed to provide the Secretary … with flexibility in managing public lands and with the ability to correct the mistakes of his subordinates"); Grynberg v. Kempthorne, No. 06-cv-01878, 2008 WL 2445564, at *4 (D. Colo. June 16, 2008) (citing Boesche to conclude that the Secretary had authority to cancel a lease improperly issued without U.S. Forest Service review); 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.'") (citing Boesche, 373 U.S. at 478-85); High Plains Petroleum Corp., 125 IBLA 24, 26-27 (1992) (affirming cancellation of lease issued in violation of agency land-management plan, citing Boesche); Elaine Wolf, 113 IBLA 364, 366 (1990) (applying Boesche to affirm lease cancellation based on leaseholder's failure to comply with signature requirement for lease offer); Joan Chorney (On Reconsideration), 109 IBLA 96, 97-99 (1989) (affirming cancellation of lease unlawfully issued in wilderness study area, citing Boesche); D.M. Yates, 74 IBLA 159, 161-62 (1983) (rejecting argument that Interior lacks administrative authority to cancel unlawfully issued lease; "Boesche clearly states that the Secretary should have the power to correct his own errors").[3]

[3] This Court's 2018 summary judgment ruling in this case suggested that there remains a split in authority "on whether or not Congress has indeed limited the scope of the Secretary's authority under the MLA." Solenex LLC, 334 F. Supp. 3d at 181 n.5. Respectfully, the case cited in the 2018 ruling to illustrate such a continuing debate—Douglas Timber Operators, Inc. v. Salazar, 774 F. Supp. 2d 245 (D.D.C. 2011) (cited in Solenex LLC, 334 F. Supp. 3d at 181 n.5)—involved agency land-management planning under the Federal Land Policy and Management Act (FLPMA), not leasing under the Mineral Leasing Act. Douglas Timber Operators held that Boesche did not apply to a FPLMA challenge because that statute has its own administrative procedures to amend the resource management plan that was at issue in that case. See 774 F. Supp. 2d at 258. Douglas Timber Operators did not indicate that the MLA limited Interior's lease-cancellation authority. Id.

Further, to the extent the type of controversy giving rise to lease invalidity has any effect on the scope of Interior's lease-cancellation authority, that effect is to vest the agency with greater authority where, as here, the agency acts in the public interest rather than for the private interests of a competing lease applicant. 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 not [sic] as great as when the controversy is between private interest on one hand and the Secretary 'as guardian of the people,' on the other"); accord Cal. Co. v. Seaton, 187 F. Supp. 445, 453 (D.D.C 1960), 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.").

Solenex also attempts to distinguish Boesche on the basis that, unlike the canceled lease in that case, the Hall Creek lease "was no longer subject to administrative challenge" when it was canceled. Solenex Br. 39. However, Interior's authority to review and reverse erroneous agency actions "may be exercised by direct orders or by review on appeals"; thus, the Secretary of the Interior may reverse an agency order despite "the fact that no appeal was taken from such order." Knight, 142 U.S. at 177, 178. More fundamentally, Solenex ignores the fact that the Hall Creek lease was subject to a federal-court challenge filed in Montana by certain of the intervenors here in 1993. See ECF No. 45-9 at 44-64; see also Solenex LLC v. Bernhardt, 962 F.3d at 524 (discussing the 1993 litigation). That challenge was administratively terminated by the Montana district court in 1997 due to the then-continuing suspension of the Hall Creek lease,

but the court's termination order was issued without prejudice to reopening the case if warranted by changed circumstances. ECF No. 45-5 at 38-39.[4]

Thus, Solenex's suggestion that there was no remaining challenge to the legitimacy of the Hall Creek lease at the time of cancellation is incorrect. Failure to cancel the Hall Creek lease would have exposed Interior to renewed litigation in the District of Montana raising the same lease-invalidity claims that the agency addressed in its cancellation decision. Interior therefore would have been forced to grapple with lease-invalidity claims about the Hall Creek lease even if it did not independently reconsider them in its cancellation decision. Solenex's suggestion that the validity of the Hall Creek lease was a settled matter until Interior took up the cancellation issue is wrong.

2. Congress Has Effectively Ratified Interior's Lease-Cancellation Authority.

In addition, to the extent there were any questions as to whether Interior's exercise of a general authority to cancel mineral leases based on pre-lease errors comported with Congress's intentions—which there should not be for the reasons already stated—Congress has resolved that question by effectively ratifying Interior's position. In Boesche, the Supreme Court observed that, "[f]rom the beginnings of the Mineral Leasing Act the Secretary has conceived that he had the power [to administratively cancel invalidly issued leases], and Congress has never interfered with its exercise" despite a dozen amendments to the MLA. 373 U.S. at 482-83. Accordingly,

[4] After this Court ruled in 2015 that the government had unreasonably delayed lifting the suspension of the Solenex lease, the plaintiffs in the Montana case moved to reopen the Montana district court proceedings pursuant to the 1997 order. They withdrew that motion after the government canceled the Solenex lease in 2016, prompting the Montana court to issue an order once again subjecting that case to the provisions of the 1997 administrative termination order allowing for reopening of the proceedings. See ECF Nos. 15, 34, 35, Nat'l Wildlife Fed'n v. Tidwell, Civ. Action No. 4:93-cv-00044-BMM (D. Mont.).

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 (citations 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).

That conclusion is even stronger 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)). This promulgation merely codified "the Department of the Interior's existing practice in considering specific situations," id. at 33,655—i.e., the practice discussed and 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., the situation at issue here. Clayton W. Williams, Jr., 103 IBLA 192, 210 (1988) (holding that 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 has never done so. Only four years after the Interior Department promulgated 43 C.F.R. § 3108.3(d), Congress amended the MLA through enactment of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 ("FOOGLRA"), Pub. L. 100-203, §§ 5101-12, 101 Stat. 1330, 100th Cong.,

1st Sess. (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. See Pub. L. 100-203, § 5104. Congress has subsequently further amended the MLA in the Energy Policy Act of 2005, Pub. L. 109-58, § 350, 119 Stat. 594, 109th Cong., 1st Sess. (2005), and the Energy Policy Act of 1992, Pub. L. 102-486, §§ 2507-09, 106 Stat. 2776, 102nd Cong., 2nd Sess. (1992), but has never limited or otherwise indicated any disapproval of Interior's assertion of lease-cancellation authority, including authority to cancel a lease to remedy a NEPA violation as recognized in Clayton W. Williams, Jr.

As Boesche itself stated, 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). Here, Congress's failure to revise or repeal the Interior Department's repeatedly stated authority to cancel invalidly issued leases—including those issued in violation of NEPA—provides further reason to reject Solenex's challenge.

3. Solenex's Attack on 43 C.F.R. § 3108.3(d) is Meritless.

When Solenex addresses Interior's lease-cancellation regulation, 43 C.F.R. § 3108.3(d), it does so only to claim that this regulation could not authorize cancellation of the Hall Creek lease. Solenex Br. 39-41. Solenex's argument is misguided.

First, Solenex questions the statutory basis for 43 C.F.R. § 3108.3(d), arguing that it is not supported by the MLA. Solenex Br. 40. This argument overlooks the basic point that section 3108.3(d) codified Interior's "existing practice" in addressing lease invalidity due to pre-leasing errors, 48 Fed. Reg. at 33,655, which the Supreme Court had already found to fall well within Interior's pre-MLA statutory authority to manage the public lands, Boesche, 373 U.S. at 476. Thus, the question of MLA authorization for this regulation is irrelevant.

Second, Solenex claims this regulation could not authorize cancellation of the Hall Creek lease because the regulation was not in place when the Hall Creek lease was issued. Solenex Br. 40. But the longstanding statutory authorities cited in Boesche as the basis for Interior's lease-cancellation authority were in place for decades before Interior issued the Hall Creek lease. See 373 U.S. at 476 & n.6. Interior relied on its inherent authority under those statutes, as recognized in Boesche, to justify its cancellation of the Hall Creek lease. ECF No. 116-7 at 48. Accordingly, Solenex's argument is again beside the point.

Third, Solenex argues that a lease issued in violation of NEPA cannot be deemed "improperly issued" within the meaning of 43 C.F.R. § 3108.3(d). Solenex Br. 41. However, the IBLA ruled in Clayton W. Williams, Jr. that a NEPA violation renders a federal mineral lease voidable in a case involving Interior's application of section 3108.3(d). See 103 IBLA at 210.[5] Moreover, Solenex offers no reason why a NEPA violation should not constitute an administrative error providing a basis for lease cancellation, especially given Congress'

[5] The IBLA's position in Clayton W. Williams, Jr. that Interior's lease violation rendered the Hall Creek lease voidable rather than void is inconsistent with federal court precedent holding that an agency's NEPA violation in approving a lease by itself prevented the leaseholder from asserting any contract or property rights arising from the lease agreement. See Sangre de Cristo Dev. Co., Inc. v. United States, 932 F.2d 891, 894-96 (10th Cir. 1991). However, the Court need not resolve that inconsistency in this case because, whether the Hall Creek lease is deemed void or voidable, Solenex's argument fails.

declaration that NEPA serves to advance the public interest that Interior's cancellation authority was meant to protect. See 42 U.S.C. § 4321 (describing NEPA's role in protecting the public interest). Solenex's only support for its contrary argument is an inapposite citation to a decision of the Interior Board of Contract Appeals ("IBCA") concerning a federal timber sale contract, not a mineral lease. See Solenex Br. 41 (citing Appeal of Superior Timber Co., 97-1 BCA P 28736 (I.B.C.A. 1996)). Moreover, Solenex ignores that even its cited IBCA ruling recognized—consistent with relevant court precedent—that a government leasing contract may be rendered unenforceable where Interior "had not prepared any EIS under NEPA" to analyze the leasing decision. Appeal of Superior Timber Co., 97-1 BCA P 28736 (emphasis omitted) (citing Sangre de Cristo Dev. Co., 932 F.2d at 894-96 (holding that Interior Department's NEPA violation voided federal leasing approval)). That is precisely what happened here. See ECF No. 116-7 at 49-50.

B. Solenex's Contract Argument Equally Fails

Solenex fares no better in contending that, apart from statutory considerations, general principles of contract law independently prohibited Interior from canceling the Hall Creek lease. See Solenex Br. 41-45. Solenex argues that contract law makes it "doubtful" that Interior could cancel the Hall Creek lease, and that even if so Interior could not cancel after "the government repeatedly reaffirmed the legality of the lease" and failed to act "within a reasonable time." Solenex Br. 42-44. At the outset, this contract claim fails because "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority," and this remains so even if "the agent himself may have been unaware of the limitations upon his authority." Fed. Crop. Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947) (holding federal government not liable

under contract for crop insurance); see also Faiella v. Fed. Nat'l Mortgage Ass'n, 928 F.3d 141, 146-47 (1st Cir. 2019) (discussing and applying Merrill doctrine). Accordingly, Solenex's contract rights did not preclude action by Interior to remedy its own officials' earlier, unlawful action.

Further, contrary to Solenex's argument, Solenex's contract rights under the Hall Creek lease were expressly limited by an Interior Department regulation that specifically preserved Interior's authority to correct its own unlawful actions. In this regard, the Hall Creek lease states that it was issued "subject to all rules and regulations of the Secretary of the Interior now or hereafter in force … ." ECF No. 45-9 at 19. At the time Interior issued the Hall Creek lease, agency regulations expressly provided that the government would not be bound by unlawful agreements entered into by federal officers or agents, nor could delay or estoppel be asserted to restrict the government's authority to void such unlawful agreements:

> (a) The 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.
>
> (b) The United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.
>
> (c) Reliance upon information or opinion of any officer, agent or employee or on records maintained by land offices cannot operate to vest any right not authorized by law.

43 C.F.R. § 1810.3; see also Bureau of Land Mgmt., Dep't of the Interior, Reorganization and Revision of the Chapter, 35 Fed. Reg. 9,502, 9,513 (June 13, 1970) (promulgating 43 C.F.R. § 1810.3 twelve years before issuance of Hall Creek lease). These regulatory terms thus were part of the contractual bargain struck between Solenex and Interior. See ECF No. 45-9 at 19; see also Merrill, 332 U.S. at 385 & nn. 2, 3 (holding that term of government contract by which federal

regulations were "incorporated by reference" precluded recovery on contract claim that was contrary to regulations). Accordingly, the contractual bargain between Interior and Solenex preserved Interior's "authority to review, revise and reverse actions of [Interior Department] employees determined to be contrary to the law"—such as the Hall Creek lease. 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(b)), aff'd on other grounds, 843 F.3d at 982; High Plains Petroleum Corp., 125 IBLA at 27 (affirming lease cancellation where binding the Interior Department to an unlawful lease agreement "would be contrary to 43 CFR. [§] 1810.3"); see also Griffin & Griffin Expl., 116 Fed. Cl. at 176-77 (holding that similar term in federal onshore mineral leases incorporated Interior's lease-cancellation regulation such that "cancellation of the leases was consistent with their provisions and cannot serve as the basis for a claim for breach of contract").

Solenex's argument that Interior excessively delayed in canceling the Hall Creek lease fails for another reason as well: It defies D.C. Circuit precedent addressing the exact issue of the reasonableness of Interior's delay in canceling the Hall Creek lease. In Solenex LLC v. Bernhardt, the D.C. Circuit examined the timespan of Interior's administrative process leading to cancellation of the Hall Creek lease and determined that it resulted from "extensive and complex environmental, cultural, historical, and religious challenges to the agency decision, which were then compounded by intervening legislation," such that "[a] failure to cancel the Lease earlier in the process, with less information, could not have been the sounder or legally compelled course of action." 962 F.3d at 528-29 (emphasis added). Solenex now asks this Court to essentially disregard that appellate determination, but of course "district judges … are obligated to follow controlling circuit precedent until either [the appellate court], sitting en banc, or the Supreme

Court, overrule it." United States v. Torres, 115 F.3d 1033, 1036 (D.C. Cir. 1997). For this reason too, Solenex's contract claim fails.[6]

C. Solenex Is Not Shielded by the MLA's Bona-Fide-Purchaser Provision

Solenex also errs in claiming that the Hall Creek lease was shielded from cancellation under MLA section 27(h)(2)'s protection for "a bona fide purchaser" of a federal mineral lease. 30 U.S.C. § 184(h)(2). To qualify as a bona fide purchaser under the MLA, a party "must have acquired his interest in good faith, for valuable consideration, and without notice of the violation of the departmental regulations." Sw. Petroleum Corp. v. Udall, 361 F.2d 650, 656 (10th Cir. 1966); accord Winkler, 614 F.2d at 711. Whether a party qualifies as a bona fide purchaser is to be determined under "common law standards." Winkler, 614 F.2d at 711. Regarding the issue of notice, a lease purchaser is "deemed to have constructive notice of all of the BLM records pertaining to the lease at the time of" acquisition. Id. at 713; see 43 C.F.R. § 3108.4 ("All purchasers shall be charged with constructive notice as to all pertinent regulations and all [BLM] records pertaining to the lease and the lands covered by the lease."). Solenex fails to qualify as a bona fide purchaser under these principles.

First, Solenex did not pay valuable consideration for the Hall Creek lease. Solenex received the Hall Creek lease by assignment from Sidney Longwell, the lease's original

[6] This does not mean that Solenex was denied recourse for a contract claim. The Court of Federal Claims has held that, even where a federal mineral lease was lawfully canceled by Interior, a party who fails to receive a valid leasehold due to Interior's improper conveyance of a lease may pursue a claim for damages caused by a breach "of the express terms of the contract[]" granting the exclusive right to drill on the lease parcel, "as well as the implied warranty of title" that is inherent in such a conveyance. Griffin & Griffin Expl., LLC, 116 Fed. Cl. at 175-77; see also Solenex LLC, 962 F.3d at 530 n.4 (recognizing potential contract claim in Court of Federal Claims). Accordingly, the circumstances here may have given rise to a cause of action against the government for contractual damages under such a theory, although jurisdiction over any such claim would be vested in the U.S. Court of Federal Claims under the Tucker Act, rather than this Court. See 28 U.S.C. § 1491(a)(1). Solenex has not pursued such a claim.

purchaser (and Solenex's founder and former manager), in February 2005. ECF No. 24-2 at 34 (Longwell Decl. ¶ 10). Solenex has admitted that it did not pay Mr. Longwell any money in connection with this assignment, and thus essentially was gifted the Hall Creek lease by Mr. Longwell. See ECF No. 89-1 at 35. Yet, under long-settled common law standards, "'[a] person who is a mere volunteer, having acquired title by gift, inheritance, or some kindred mode, cannot come within the scope of the term bona fide purchaser." Lykins v. McGrath, 184 U.S. 169, 173 (1902) (emphasis added, quotation and citation omitted); see also, e.g., Raymond G. Albrecht, 92 IBLA 235, 280-81 (1986) (appellant argued that MLA's protection for bona fide purchasers "is not limited to those who purchase their interests"; IBLA disagreed, holding that protection does not apply to inheritor of lease interest); Hopkinson v. First Nat'l Bank, 200 N.E. 381, 382 (Mass. 1936) (holding that bank that took title to property as "a volunteer" was not shielded by bona fide purchaser doctrine). Thus, Solenex is not a purchaser at all, much less a bona fide purchaser.[7]

[7] In the 2016 summary judgment briefing in this case, Solenex argued that it had provided consideration for the Hall Creek lease by "assum[ing] Mr. Longwell's legal obligations under the lease" and subsequently expending "time and money seeking to fulfill" those obligations. ECF No. 89-1 at 35-36. However, this overbroad argument would transform every giftee of a federal mineral lease into a bona fide purchaser, because the standard federal mineral lease contract imposes numerous obligations on every leaseholder, see, e.g., ECF No. 45-9 at 19-20; 30 U.S.C. § 187, and the MLA extends such obligations to every assignee, see 30 U.S.C. § 187a. This is not the law. The mere assumption of legal obligations is not sufficient to transform a giftee into a bona fide purchaser. See Richard W. Eckels, 65 IBLA 76, 77 (1982) ("[A]n unperformed obligation is not value sufficient to entitle the obligor to bona fide purchaser protection."). Further, even assuming for the sake of argument that subsequent expenditures in pursuit of performing lease obligations could transform a giftee into a bona fide purchaser, they could do so only if made "prior to actual or constructive notice of an outstanding interest or defect in title." Robert L. True, 101 IBLA 320, 324 (1988); accord Bernard Kosik, 70 IBLA 373, 375-76 (1983). Here, as discussed infra, Interior's records concerning the Hall Creek lease put Solenex on notice of lease-validity issues immediately upon acquisition, and well before Solenex made any development expenditures. See Bernard Kosik, 70 IBLA at 376 ("Assignees … are deemed to have constructive knowledge of all BLM records pertaining to the lease at the time of the acquisition of the interest.").

Solenex nevertheless contends that it is shielded by the MLA's protection for bona fide purchasers because "its predecessor, Fina, was a BFP." Solenex Br. 47. However, this argument fails because even the "remote purchaser" rule invoked by Solenex applies only where actual purchasers buy their interest from a bona fide purchaser, not where they assume title as mere giftees. See Robert L. True, 101 IBLA 320, 325 (1988) ("A 'remote purchaser' is one who purchases an oil and gas lease from a bona fide purchaser.") (emphasis added); Home Petroleum Corp., 54 IBLA 194, 213 (1981) (cited in Solenex Br. 47) (stating that "remote purchaser" doctrine serves to ensure that a bona fide purchaser is not prevented from "selling his property for full value" to another purchaser) (emphasis added, citation omitted); see also J.B. Ames, Purchase for Value Without Notice, 1 Harv. L. Rev. 1, 3 (1887) ("If [the acquirer of property] gave no value, though his acquisition was honest, his retention of the title, after knowledge of the equity, is plainly dishonest."). Solenex is a giftee, not a purchaser, and therefore is not shielded by Fina's alleged bona-fide-purchaser status.[8]

Solenex's attempt to rely on Fina's alleged bona-fide-purchaser status also fails for the separate and independent reason that Solenex did not acquire its lease interest from Fina but rather from Mr. Longwell, who was not a bona fide purchaser and who had notice of challenges to the validity of the Hall Creek lease when he assigned it to Solenex. In this regard, "[t]he rule that the grantee of a bona fide purchaser of real estate takes good title thereto, although cognizant of an equitable claim thereto existing in another person, is subject to a notable exception; and that is, a conveyance is not protected when made back to a former owner who had notice of the

[8] Solenex's sole support for its contrary assertion is a dissenting opinion that cites the Harvard Law Review article referenced in the text above, which actually supports the opposite conclusion. See Solenex Br. 47 (citing United States v. 92 Buena Vista Ave., 507 U.S. 111, 142 (1993) (Kennedy, J., dissenting)).

equity, and who did not originally derive title through a bona fide holder." 63 A.L.R. 1362, Right of one who, with knowledge of outstanding equity, derived his interest in real property from or through a bona fide purchaser, to same protection as latter (1929) (emphasis added); accord Huling v. Abbott, 25 P. 4, 4-5 (Cal. 1890).

Here, the original leaseholder, Mr. Longwell, assigned the Hall Creek lease to Fina in 1983, but reserved the right to a production payment to be paid from oil and gas development of the lease. See HC00869-70; ECF No. 24-2 at 6-7, 33. Thus, Mr. Longwell continued to hold an interest in the Hall Creek lease throughout Fina's period of ownership, including during the extensive administrative proceedings concerning Fina's proposed drilling project on the lease when challenges were raised to the lease's validity. See, e.g., HC05937 (administrative appeal filing discussed infra); see also FS002765-66 (Longwell letter recounting administrative proceedings). When Fina assigned its interest in the Hall Creek lease back to Mr. Longwell in 2000, Mr. Longwell took the lease with notice of those challenges, and was on such notice when he subsequently gifted the lease in 2005 to his corporate creation, Solenex, which Mr. Longwell managed. See ECF No. 114 at 42; ECF No. 24-2 at 34. Mr. Longwell's resumption of lease ownership with notice of challenges to the lease's validity precludes his status as a bona fide purchaser and severs Solenex's link to Fina in the chain of title. See 63 A.L.R. at 1362. Moreover, Mr. Longwell's consistent and ongoing interest in the Hall Creek lease from its inception until its cancellation—including during the Fina assignment and continuing when Mr. Longwell served as manager of Solenex—forecloses any claim by Solenex to vicarious bona-fide-purchaser protections; the chain of title never included a period of innocent third-party ownership that was free of Mr. Longwell's involvement. See ECF No. 116-7 at 42 n.2 (lease

cancellation decision recounting Mr. Longwell's ongoing involvement and concluding that Solenex acquired the Hall Creek lease with "full knowledge" of a "legal challenge").

Solenex's argument that the disputes over Fina's proposed drilling project focused only on the drilling permit and did not provide clear notice of challenges to the Hall Creek lease itself, Solenex Br. 47-48, also fails. When Interior attempted to reauthorize the proposed Fina drilling project on the Hall Creek lease after a 1985 remand by the IBLA, appellants of that decision in 1987 cited then-recent federal case law addressing NEPA's application to federal mineral leasing and argued to the IBLA that the underlying lease itself "is invalid since it was leased in a process which has since been judged to have been improper and illegal." HC05937 (emphasis added) (1987 IBLA appeal brief) (citing Bob Marshall Alliance v. Watt, 685 F. Supp. 1514 (D. Mont. 1986), aff'd in part, rev'd in part sub nom. Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988)). Further, as discussed supra, conservation interests in 1993 filed a lawsuit against Interior contesting the validity of the Hall Creek lease, specifically alleging that the "lease was issued illegally in that NEPA was not complied with prior to the federal government's decision to issue it, and the lease is therefore void ab[ ]initio." HC01174 (emphasis added). Thus, contrary to Solenex's argument that challenges to Fina's proposed drilling project did not include "any suggestion that the lease may have been improperly issued," id. 34, Interior's lease file documented specific challenges asserting that the Hall Creek lease was illegally issued, see HC01174; HC05937.

These materials in the lease file put Solenex on notice of lease-validity challenges at the moment when Mr. Longwell gifted the Hall Creek lease to Solenex in 2005. Bernard Kosik, 70 IBLA at 376 (holding that lease assignees are charged with constructive knowledge of records in Interior's lease files "at the time of the acquisition of the interest"). Notice of these challenges

meant that Solenex could not have taken title to the Hall Creek lease "without some uncertainty as to its validity, and so did not qualify as a bona fide purchaser." Home Petroleum Corp., 54 IBLA at 208 (discussing lease purchaser's disqualification as bona fide purchaser where "he knew that litigation about the validity of [his interest] was still in prospect"); see Rosita Trujillo, 77 IBLA 35, 40 (1983) (holding that lease assignee did not qualify as bona fide purchaser where Interior's lease record "included a detailed protest by a junior applicant and a decision denying that protest which expressly noted that it would be final only if no timely appeal was filed"). For all these reasons, Solenex is not shielded by the MLA's bona-fide-purchaser provision.

II. SOLENEX'S ARBITRARY-AND-CAPRICIOUS CHALLENGE DEFIES THE RECORD CONCERNING INTERIOR'S LEASE-CANCELLATION DECISION

Solenex's attacks on the substance of Interior's lease-cancellation decision also are unpersuasive. The D.C. Circuit's decision in this case aptly described Interior's "painstaking efforts to ensure that the agency's statutory duties were met" with respect to the Hall Creek lease, Solenex LLC, 962 F.3d at 529, as well as the logical reasoning of Interior's ultimate lease-cancellation decision:

> The Secretary explained that cancellation was necessary because drilling would violate both NEPA and the [National] Historic Preservation Act. The Secretary stated at the outset that an environmental impact analysis should have been made prior to the initial leasing decision. But it was not. Instead, the agency's Environmental Assessment for leasing erroneously delayed that environmental analysis until the receipt of applications for surface-disturbing activity like drilling. In addition, the Environmental Assessment failed to consider a no-action alternative regarding leasing as the law requires. The Secretary further acknowledged that the agency had failed to meet the requirements of the Historic Preservation Act in issuing the Lease. The Secretary explained, in particular, that the agency had failed to undertake the required consultation efforts prior to issuance and, instead, wrongly delayed compliance with that Act to the drilling approval stage. As a result, the Secretary determined that the Lease was voidable.
>
> The Secretary then concluded that there was no viable way to make the Lease valid. In the intervening years, Congress had "permanently prohibited oil and gas leasing in the Badger-Two Medicine area." J.A. 338 (citing Tax Relief and

> Health Care Act, div. C, § 403(b)(1)(B), 120 Stat. at 3050–3051). As a result, the Secretary determined that it could not lawfully re-validate the Lease. The Secretary stated, lastly, that even if the agency had retained discretion to validate the Lease, "the facts as discussed * * * d[id] not warrant doing so." J.A. 338.

Id. at 525-26. Solenex's arguments fail to undermine the soundness of Interior's decision.

A. Interior Did Not Impermissibly Rely on Post-Leasing Developments

Solenex argues that Interior improperly based its lease-cancellation decision on events that "post-date the lease" and that such post-leasing events "cannot invalidate Solenex's lease." Solenex Br. 50, 52. This argument rests on an inaccurate depiction of the record that erroneously blurs together (1) the reasons that Interior deemed the Hall Creek lease illegally issued and therefore voidable, and (2) the reasons that Interior decided to take the further step of voiding the voidable lease.

As the cancellation decision makes clear, Interior determined that the Hall Creek lease was illegally issued and therefore voidable based on violations of NEPA and the NHPA—statutes enacted, respectively, 12 and 16 years before Interior issued the lease. See ECF No. 116-7 at 49-53. Specifically, Interior concluded that issuance of the Hall Creek lease violated NEPA because (1) the government issued the lease without completing a pre-leasing environmental impact statement, (2) the more limited environmental analysis that the government performed prior to lease issuance failed to include a legitimate no-action alternative, and (3) the Interior Department's Bureau of Land Management failed to independently evaluate lease issuance in light of environmental impacts. Id. at 49-51. Interior similarly concluded that issuance of the Hall Creek lease violated the NHPA because the government failed to fully consider the impacts of leasing, including the impacts of post-leasing development on cultural resources, prior to lease issuance. Id. at 51-52. This discussion from the lease-cancellation

decision demonstrates that Interior's determination of illegality regarding issuance of the Hall Creek lease did not rest on post-leasing events.

Nevertheless, Solenex contends that Interior based its cancellation decision "primarily on predicted impacts to the [Badger-Two Medicine Blackfoot Traditional Cultural District ("TCD")]," designation of which post-dated lease issuance. Solenex Br. 51-52. However, Interior did not rely on the cultural district in determining that Solenex's lease was illegally issued in 1982. See ECF No. 116-7 at 49-52. Instead, Interior considered impacts on the cultural district, as detailed in a report by the federal Advisory Council on Historic Preservation, in assessing the separate question whether, in 2016, it should void the lease or instead exercise agency discretion to undertake new analysis in an effort to validate and re-issue the lease. Id. at 54. That assessment had no bearing on Interior's assessment of lease invalidity in the first instance and demonstrates no impropriety in the agency's decision making. See Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1050 (D.C. Cir. 2002) (rejecting argument that agency's decision whether to retain administrative rule is "limited to grounds upon which it adopted the rule in the first place"), modified in other part on reh'g by 293 F.3d 537 (D.C. Cir. 2002).

For the same reason, Solenex's attack on Interior's consideration of other post-leasing "legal or policy developments" fails. Solenex Br. 52. Interior referenced President Clinton's 1996 executive order on tribal sacred sites, the government's 1997 decision to forego further leasing in the Badger-Two Medicine region, and Interior's subsequent mineral withdrawal in the region in describing the history of executive and administrative action concerning Montana's Rocky Mountain Front and the Hall Creek lease area, see EFC No. 116-7 at 46-48 & 46 n.15—not in stating the reasons why the Hall Creek lease was illegally issued, see id. at 49-53. Interior addressed the 2006 legislation that permanently withdrew the Badger-Two Medicine region from

mineral leasing in describing the backdrop of government action affecting the area, and then again cited it as a reason not to "re-validate the Lease" after finding it voidable. See id. at 48, 54; Solenex LLC, 962 F.3d at 526. But Interior did not conclude that the lease was illegally issued because of the 2006 legislation, much less that the 2006 legislation somehow vitiated any "valid existing rights" allegedly granted by the Hall Creek lease. Solenex Br. 53; see ECF No. 116-7 at 49-54. Solenex's argument ignores these distinctions, but Solenex cannot demonstrate arbitrariness by misstating Interior's reasoning.

B. Solenex Identifies No Relevant Factors That Interior Overlooked

Solenex also fails to identify any relevant factors that were omitted from Interior's analysis.

First, Solenex claims Interior failed to consider congressional acts that "encourage and protect development of oil and gas resources on federal land." Solenex Br. 54. However, while Congress has certainly enacted legislation to authorize oil and gas development on public lands, it has not made oil and gas development an unqualified imperative that overrides every other consideration—including considerations imposed by co-equal congressional enactments in NEPA and the NHPA. See Sierra Club v. Peterson, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983) (holding that NEPA requires preparation of environmental impact statement prior to federal mineral leasing); see also, e.g., Friends of the Earth v. Haaland, Civ. Action No. 21-2317 (RC), 2022 WL 254526, at *25-29 (D.D.C. Jan. 27, 2022) (vacating federal government oil and gas lease sale that violated NEPA). Moreover, Solenex's catalog of congressional acts ignores Congress's 2006 legislation withdrawing an area of public lands in Montana, including the Badger-Two Medicine region, from federal mineral leasing and offering existing oil and gas leaseholders tax incentives to retire their leases. See Tax Relief & Health Care Act of 2006, Pub.

L. 109-432, § 403, 120 Stat. 2922, 109th Cong., 2nd Sess. (2006); Solenex LLC, 962 F.3d at 525 (discussing 2006 legislation); see also Solenex Br. 54-55 (ignoring 2006 legislation and instead addressing only enactments up to 1980). Interior appropriately considered this 2006 enactment in determining whether to attempt to re-validate the Hall Creek lease after finding it voidable. See ECF No. 116-7 at 54. Interior thus considered relevant congressional intent regarding the "specific area" at issue. Solenex Br. 54.

Second, Solenex seeks to rehash arguments rejected by the D.C. Circuit in claiming that Interior failed to consider Solenex's reliance interests resulting from the passage of time between the government's issuance and cancellation of the Hall Creek lease. Solenex Br. 55-59. The D.C. Circuit has already conclusively resolved these issues against Solenex, holding that "Solenex's complaints about the Secretary's consideration of reliance interests" do not "hold[] up as a basis for invalidating the Lease cancellation," and that Interior's "failure to cancel the Lease earlier in the process, with less information, could not have been the sounder or legally compelled course of action." Solenex LLC, 962 F.3d at 529. Solenex now asks this Court to effectively reconsider these appellate determinations, but its argument runs afoul of the mandate rule, which directs that "[a]n inferior court has no power or authority to deviate from the mandate issued by an appellate court." Am. Council of the Blind v. Mnuchin, 977 F.3d 1, 5 (D.C. Cir. 2020) (quotations and citation omitted). This rule is "a more powerful version of the law-of-the-case doctrine, which prevents courts from reconsidering issues that have already been decided in the same case." Id. (quotations and citation omitted). Under the mandate rule, a district court "cannot fashion a remedy that is inconsistent with either the spirit or express terms

of" an appellate ruling, and this prohibition "is especially compelling in long-running litigation" such as this case. Id. (quotations, alteration, and citations omitted).[9]

Solenex's argument runs headlong into this rule. Solenex claims it incurred "significant costs" in reliance on Interior's past assertions of lease validity. Solenex Br. 56-57. But the referenced costs include expenses allegedly incurred not by Solenex, but by Mr. Longwell and Fina prior to Solenex's assumption of the lease. Id. 57. As the D.C. Circuit already ruled, any such expenses incurred by those who "are not the current holders of the Lease or parties to this action" are irrelevant. Solenex LLC, 962 F.3d at 530. Further, while Solenex now claims that it incurred expenses beyond the $35,000 that it asserted before the D.C. Circuit, Solenex Br. 56-57 (alleging travel and litigation expenses), notably Solenex's founder and former manager, Mr. Longwell, did not claim any such additional expenses in his sworn declaration to this Court, ECF No. 24-2 at 36 (asserting that Longwell and Solenex had spent "over $35,000 in seeking to develop the lease" since it was issued). Moreover, Solenex's new claim of additional expenses beyond $35,000 rings hollow because Solenex itself in the appellate proceedings "identifie[d] no other reliance interests that the Secretary failed to consider or address when making the cancellation decision," Solenex LLC, 962 F.3d at 530—despite being specifically asked about this by the appellate panel at oral argument, see id. (appellate court exchange with Solenex's counsel: "Q: 'I'm just asking you is there another place that you can point me other than to this $35,000 number?' A: 'No, Your Honor.'") (emphasis added). Given Solenex's disavowal of any additional reliance interests during the prior appellate proceedings, Solenex has forfeited any argument that its lease-related expenditures "far exceed" the $35,000 figure that it previously

[9] Solenex also again seeks to support its argument by citing a dissent. See Solenex Br. 58-59 (citing Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 732 (D.C. Cir. 2016) (Kavanaugh, J., dissenting)).

asserted to this Court and the D.C. Circuit. Solenex Br. 58; see United States v. Saani, 794 F.3d 44, 48 (D.C. Cir. 2015) (holding that defendant forfeited argument in district court sentencing proceedings following appellate remand where defendant "did not raise that argument in his first appeal" of his sentence).[10]

Third, Solenex contends that Interior failed to consider its "obligations to Solenex under principles of contract law and property law." Solenex Br. 59. However, Interior did recognize its obligations to Solenex under the Hall Creek lease when it determined that Solenex was entitled to a refund of $31,235 in lease payments that were made by Solenex's predecessors in interest. See ECF No. 116-7 at 55. More fundamentally, Solenex's argument on this point recycles Solenex's meritless property and contract law contentions regarding Interior's authority to cancel the Hall Creek lease, which are addressed at Points I.A and B, supra. Because, as discussed above, neither contract nor property law principles constrained Interior's cancellation of the Hall Creek lease, it was not necessary for Interior to undertake a more detailed examination of those principles in its cancellation decision. See Alcoa Power Generating Inc. v. FERC, 643 F.3d 963, 974-75 (D.C. Cir. 2011) (holding that agency did not violate "reasoned decision-making" requirement in licensing proceeding by failing to give greater consideration to factors that did not constrain its authority to proceed with licensing).

C. Interior Did Not Fail to Explain Its Departure From Earlier Findings

Solenex again misses the mark by arguing that Interior's lease-cancellation decision arbitrarily failed to explain the agency's departure from representations that the lease was valid in a 1993 record of decision. Solenex Br. 60-63 & 63 n.13. Contrary to Solenex's argument,

[10] Further, to the extent Solenex incurred any such additional expenses, it has chosen to forego an apparent opportunity to seek to recover them as damages in an action for breach of contract in the Court of Federal Claims. See n.5, supra.

Interior's cancellation decision explicitly addressed the agency's prior statements in the 1993 decision and explained why the agency was now taking a different position:

> In their 1991 and 1993 Records of Decision for the APD, BLM and USFS opined that the 1990 FEIS fully complied with NEPA. But, careful examination of the FEIS's no-action alternative reveals that it was not intended to be an environmental analysis of whether leases should have been issued across the Lewis and Clark National Forest in the first place and did not address the requirements set forth by the Ninth Circuit in Conner [v. Burford] and Bob Marshall Alliance [v. Hodel]. Thus, the procedural and legal defects associated with the original lease decision, as identified by the Ninth Circuit, have not been corrected, and the NHPA process has led to the finding that impacts to Tribal cultural resources cannot be mitigated. Thus, Lease No. MTM53323 remains voidable because the defects associated with lease issuance have never been corrected.

ECF No. 116-7 at 53-54. Solenex ignores this agency reasoning.

Solenex's remaining arguments fail to demonstrate arbitrary agency conduct. Solenex relies heavily on Texas Oil & Gas Corp. v. Watt, 683 F.2d 427 (D.C. Cir. 1982) (discussed in Solenex Br. 61-62), but that case addressed a situation in which the Interior Department promulgated a regulation authorizing mineral leasing of military reservations and accepted applications for such leases, then subsequently issued an order rejecting applications for leases that had been filed prior to the regulation's effective date, id. at 434. The D.C. Circuit ruled that the Interior Secretary "was mistaken in believing that he was required to act as he did" under the governing statutory framework in that case. Id. at 431, 433. Nothing similar happened here, and Watt did not establish a general rule for assessing lease cancellations, as demonstrated by the D.C. Circuit's arrival at a very different conclusion concerning the Hall Creek lease cancellation in this case. See Solenex LLC, 962 F.3d at 527-30.

Solenex's claims of political interference similarly fall flat. Solenex cites actions and communications by members of the Clinton administration and former Montana Sen. Max Baucus in the 1990s. Solenex Br. 61-62. But the notion that conduct by political officials during

the Clinton administration 20 years earlier somehow improperly influenced the Obama administration to cancel the Hall Creek lease in 2016 makes no sense. Moreover, the cultural and environmental importance of the Badger-Two Medicine region where the Hall Creek lease is located has been recognized by multiple administrations, ranging from the Clinton administration's suspension of leases in the area to allow NHPA review, to the George W. Bush administration's designation of the first Traditional Cultural District and mineral withdrawal in the region, to the Obama administration's lease cancellation, and to the Trump and Biden administrations' consistent and ongoing defenses of that cancellation decision up to and including the current round of summary judgment briefing. Against that backdrop, Solenex's allegations of political impropriety ring hollow.[11]

Solenex also again contends that the length of time that passed between lease issuance and cancellation demonstrates arbitrariness. Solenex Br. 62-63. As discussed supra, the D.C. Circuit rejected this very contention. See Solenex LLC, 962 F.3d at 527-29. Moreover, although Solenex emphasizes the passage of 23 years in this case, Solenex Br. 63, Interior's administrative authority to cancel invalid claims and interests in the public lands persists for "so long as the Department retains jurisdiction of the land" in question, West v. Standard Oil Co., 278 U.S. 200, 210 (1929); accord Boesche, 373 U.S. at 477, and the Supreme Court has sustained similar reversals of position by Interior under this authority despite the passage of comparable periods, see West, 278 U.S. at 207-10, 221 (recognizing Interior Secretary's authority to pursue proceeding against transfer of public land despite passage of 21 years since Interior's original

[11] Solenex alleges that a Lewis and Clark National Forest supervisor "lobbied the Blackfeet Tribe to support a historic designation" of the Badger-Two Medicine area, Solenex Br. 62, but the record document cited to support this charge actually describes a meeting in which Blackfeet leaders wanted a larger designation and the supervisor spoke in support of the smaller boundary being proposed by federal agency officials, ECF No. 45-7 at 49-50.

approval of transfer); Mich. Land & Lumber Co. v. Rust, 168 U.S. 589, 590, 595 (1897) (upholding Interior's authority to reconsider swampland classification of public lands, which triggered transfer to Michigan under an 1850 statute, despite the passage of 32 years (from 1854 to 1886) since initial agency classification). Solenex's delay argument fails for this reason as well.

D. Interior's Findings of NEPA and NHPA Violations Were Well Founded

Solenex is also wrong in arguing that Interior's findings that the Hall Creek lease was issued in violation of NEPA and the NHPA were "legally erroneous." Solenex Br. 63-70.

1. Issuance of the Hall Creek Lease Violated NEPA

Solenex's NEPA argument once again disregards controlling authority. NEPA requires federal agencies to prepare an environmental impact statement before approving "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Solenex contends that Interior erred in concluding that issuance of the Hall Creek lease violated the NEPA rule that "a full [environmental impact statement ("EIS")] is required before issuing leases which do not prohibit all surface disturbing activities." ECF No. 116-7 at 49; see Solenex Br. 63-65. Solenex asserts that a more limited environmental assessment ("EA") of the leasing decision prepared in 1981 was sufficient for NEPA compliance. Solenex Br. 63-64. However, the D.C. Circuit has rejected the argument that an environmental assessment suffices for NEPA compliance in connection with federal mineral leasing that conveys surface-development rights, instead holding that "an EIS assessing the full environmental consequences of leasing must be prepared at the point of commitment—when the leases are issued." Sierra Club v. Peterson, 717 F.2d at 1415. This is because, "once the land is leased[,] the Department no longer has the authority to preclude surface disturbing activities even if the environmental impact of such

activity is significant." Id. at 1414 (emphasis in original). Therefore, with respect to federal oil and gas leases that do not contain specific stipulations prohibiting all surface development—such as the Hall Creek lease, see ECF No. 45-9 at 19-29—"the decision to allow surface disturbing activities has been made at the leasing stage and, under NEPA, this is the point at which the environmental impacts of such activities must be evaluated" in an EIS, Sierra Club v. Peterson, 717 F.2d at 1414 (emphasis in original). The Ninth Circuit agreed with and applied this D.C. Circuit reasoning in Conner v. Burford, 848 F.2d 1441, 1449-51 (9th Cir. 1988), and Bob Marshall Alliance v. Hodel, 852 F.2d at 1227, which addressed federal mineral leasing controversies in Montana, where the Hall Creek lease is located, dating from the same period. Interior appropriately cited and relied on Sierra Club, Conner, and Bob Marshall Alliance in the cancellation decision. See ECF No. 116-7 at 49-50.

Solenex equally disregards controlling Circuit authority in arguing that the 1981 EA fulfilled NEPA's requirement to consider a "no action" alternative. Solenex Br. 64. As the D.C. Circuit has ruled, this NEPA requirement necessitates "that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance." Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (emphasis added). The Ninth Circuit relied on and adopted the D.C. Circuit's Calvert Cliffs reasoning in Bob Marshall Alliance, holding that the environmental analysis for a federal mineral leasing decision must consider "the option of not issuing any oil and gas leases." 852 F.2d at 1228 (quoting Calvert Cliffs, 449 F.2d at 1114). Yet the 1981 EA's so-called "no action" alternative did not include the option of not issuing leases; rather, it proposed only to "delay recommendations on leasing until completion of [a new] Forest

Plan" later that year. HC10140. The EA explained that "this alternative would be a delay prior to implementation" of action alternatives that called for leasing and development of the Badger-Two Medicine area. HC10154. Accordingly, it projected that "[t]he long-term effect for this [no-action] alternative would probably be the same as [for two leasing alternatives]." HC10167. This was not an alternative of "total abandonment of the project." Calvert Cliffs, 449 F.2d at 1114.

Sierra Club v. Peterson and Calvert Cliffs foreclose Solenex's argument that the 1981 EA complied with NEPA. Nevertheless, Solenex does not discuss either ruling. Instead, Solenex makes a meritless attempt to distinguish Conner and Bob Marshall Alliance. First, Solenex claims the Hall Creek lease did not make an irretrievable commitment of resources to development because Interior canceled it. Solenex Br. 64-65. But the fact that an unlawfully conveyed interest may be canceled does not render NEPA's requirements inapplicable; if it did then no interest conveyed by the government would ever be subject to NEPA's EIS requirement because agencies generally retain authority to reconsider and reverse their mistakes. Ivy Sports Med., LLC v. Burwell, 767 F.3d 81, 86 (D.C. Cir. 2014). This is especially true of Interior, which retains authority to eliminate invalid claims to the public lands for "so long as the Department retains jurisdiction of the land." West, 278 U.S. at 210; see also Cameron, 252 U.S. at 460. It would be a strange and unjust result if Interior's violations of NEPA in issuing the Hall Creek lease, which rendered the lease unlawful and therefore subject to cancellation, somehow also operated to make NEPA's requirements inapplicable.

Solenex also again invokes earlier statements by government officials that their environmental review of the Hall Creek leasing decision complied with NEPA, culminating in the 1993 record of decision. Solenex Br. 65-66. While Solenex contends that Interior provided

"no explanation" for departing from these statements, id. 65, Interior's cancellation decision explicitly addressed these statements and explained why the agency was reaching a different conclusion, as discussed at Point II.C, supra. See ECF No. 116-7 at 53. As for Solenex's contention that NEPA's EIS requirement was inapplicable to the Hall Creek leasing decision because the lease was not located in a wilderness study area, see Solenex Br. 65-66, Sierra Club v. Peterson and its progeny did not turn on such site-specific distinctions but rather on the more fundamental question whether a mineral lease allowed at least "some surface-disturbing activities," in which case a pre-leasing EIS is required. 717 F.2d at 1414-15 (emphasis in original); accord Conner, 848 F.2d at 1448-51. The Hall Creek lease allowed surface disturbance, see ECF No. 45-9 at 19-29, and therefore Sierra Club v. Peterson is controlling.[12]

2. Issuance of the Hall Creek Lease Also Violated the NHPA

Solenex also erroneously contends that Interior improperly found that issuance of the Hall Creek lease violated the NHPA. Solenex Br. 67-70. 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 historic property." 54 U.S.C. § 306108.[13] "In general, the NHPA requires that a federal agency take into account any adverse effects on

[12] Solenex also faults Interior's conclusion that issuance of the Hall Creek lease violated NEPA for the additional reason that the Bureau of Land Management "neither adopted the [U.S. Forest Service's] EA nor conducted any environmental review of its own when deciding whether" to issue the lease. ECF No. 116-7 at 51; see Solenex Br. 66-67. However, "[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 ECF No. 116-7 at 51 n.52 (lease-cancellation decision citing Pitkin County and other authorities). Here the record documents no such independent BLM determination. See ECF No. 116-7 at 51.

[13] Section 106 was formerly codified at 16 U.S.C. § 470f.

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, 754-55 (D.C. Cir. 1983) (explaining that 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," and to determine whether a project "will affect the historical, archaeological, or other characteristic of the property that qualified it for inclusion in the National Register"). "When 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)). "NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment." Pit River Tribe, 469 F.3d at 787 (quoting United States v. 0.95 Acres of Land, 994 F.2d 696, 698 (9th Cir.1993)); see also Karst Envtl. Educ. & Prot., Inc. v. EPA., 475 F.3d 1291, 1295-96 (D.C. Cir. 2007) (likening federal action under NEPA to federal undertaking under NHPA).

The issuance of the Hall Creek lease did not comply with Section 106's mandate that cultural properties must be identified and cultural impacts must be considered before issuing a license or authorizing an undertaking. 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[.]"). Rather, as Interior concluded in the cancellation decision, the government postponed compliance with the NHPA "until after lease issuance," and thus "failed to inventory lease parcels to locate and record cultural resources and

guarantee access and preservation of religious sites important to the Blackfeet people." ECF No. 116-7 at 52; see HC10163 (1981 leasing EA stating that compliance with NHPA will be postponed until "soil disturbing activities are proposed"). This violated the NHPA's mandate to evaluate historic and cultural impacts "prior to" approving an action. 54 U.S.C. § 306108.

Solenex attacks Interior's NHPA conclusion by arguing that issuing an oil and gas lease does not impact historic properties. Solenex Br. 67. This argument recycles a contention rejected by the D.C. Circuit in Sierra Club v. Peterson, which recognized, in the NEPA context, that, "once the land is leased the Department no longer has the authority to preclude surface disturbing activities even if the environmental impact of such activity is significant." 717 F.2d at 1414 (emphasis in original). Given that "courts treat 'major federal actions'" requiring NEPA analysis "similarly to 'federal undertakings'" requiring NHPA analysis, Karst Envtl. Educ. & Prot., 475 F.3d at 1295-96, Interior properly applied this principle in the NHPA context, ECF No. 116-7 at 52 (cancellation decision); see Mont. Wilderness Ass'n, 310 F. Supp. 2d at 1152 (requiring NHPA compliance prior to selling mineral leases); see also New Mexico ex rel. Richardson v. Bureau of Land Mgmt., 459 F. Supp. 2d 1102, 1125 (D.N.M. 2006) (concluding that "the most significant point in the process as far as NHPA is concerned … is the time at which a lease is issued"), aff'd in part, vacated in part, rev'd in part on other grounds, 565 F.3d 683 (10th Cir. 2009).[14]

[14] Solenex's argument relies on National Indian Youth Council v. Andrus, 501 F. Supp. 649 (D.N.M. 1980) (cited in Solenex Br. 67). However, that case did not address federal oil and gas leasing but rather a tribal lease for strip mining of Indian reservation land under a different regulatory framework. See id. at 652-54. Its holding that Interior's approval of a tribal lease was not an action that "actuates" mining under that framework, id. at 676, is inapposite because the D.C. Circuit has determined that federal oil and gas lease leasing is the point at which "the decision to allow surface disturbing activities has been made," Sierra Club, 717 F.2d at 1414.

Solenex also disputes the presence of any cultural resources in the area surrounding the Hall Creek lease, citing inventories from the 1980s and 1990s. Solenex Br. 67-68. However, these early inventories were "later questioned by Blackfeet traditionalists," ECF No. 115-8 at 3, who were initially "reluctant to discuss any specific potential effects caused by the project to the practice and belief in their traditional religion," ECF No. 48-1 at 63; see ECF No. 45-8 at 8 (Blackfeet representative explaining that traditionalists "were reluctant to participate because of [agency official's] statement about identifying sites and putting fences around them and then leasing everything else"). That initial reluctance was overcome beginning in 2003 when, during the process of NHPA consultation on the proposed Fina drilling project on the Hall Creek lease, knowledgeable tribal members assigned to a Cultural Committee concluded that "significant areas" had been omitted from past assessments. ECF No. 45-7 at 28-29.

Their response triggered preparation of ethnographic studies that provided the basis for the Forest Service and Montana Historic Preservation Office to seek northward expansion of the Badger-Two Medicine Blackfoot Traditional Cultural District to encompass, among others, the Hall Creek area. See ECF No. 48-5 at 13-152; ECF No. 48-6 at 1-2; FS005608-5731; ECF No. 45-7 at 7. In response, the Interior Department's Keeper of the National Register determined that the expanded area qualified under National Register requirements, concluding that this region "represents a place of extreme power for the Blackfoot tribal community, providing tribal members a place to conduct important prayer, hunting, and plant and paint gathering activities." ECF No. 115-12 at 179; see also FS006291. More recently, the federal Advisory Council on Historic Preservation in September 2015 recognized that the entire traditional cultural district "is of premier importance to the Blackfeet Tribe in sustaining its religious and cultural traditions" and recommended canceling all remaining mineral leases in the area to preserve its cultural

value. ECF No. 115-14 at 28, 31; see also Nat'l Parks Conservation Ass'n v. Semonite, 916 F.3d 1075, 1085 (D.C. Cir. 2019) (recognizing that "[t]he Advisory Council, tasked as it is with preserving America's historic resources, merits special attention when it opines" about impacts on historic properties). In the face of these repeated expert findings, Solenex's reliance on outdated and superseded cultural inventories from the 1980s and 1990s is unpersuasive.

Solenex's last contention on this point is to argue that the government's failure to identify and assess impacts to historic and cultural resources prior to issuing the Hall Creek lease satisfied the version of the NHPA in effect in 1982, which—Solenex argues—did not require the government to consult with tribes or identify their cultural resources. Solenex Br. 68-69. This too is wrong. When the Hall Creek lease was issued, the NHPA and its implementing regulations required "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," including sites of historic and cultural value to tribes, and to assess project impacts on those values. Wilson v. Block, 708 F.2d at 754; Stop H-3 Ass'n v. Coleman, 533 F.2d 434, 438, 444 (9th Cir. 1976) (affirming Secretary of the Interior's listing of certain properties as eligible for the National Register that were historically and culturally significant to native Hawaiians); see 54 U.S.C. § 306108. As Interior's cancellation decision properly determined, those are the duties that the government violated in issuing the Hall Creek lease by postponing its cultural-impacts analysis until after lease issuance. See ECF No. 116-7 at 52.

3. The NEPA and NHPA Violations Were Not Corrected

Contrary to Solenex's arguments, Interior's NEPA and NHPA violations in issuing the Hall Creek lease were not corrected. Solenex Br. 69. Solenex contends that environmental analysis preceding the 1993 record of decision on Fina's proposed drilling project "did all the

work" necessary to comply with NEPA and the NHPA. Id. 69. However, as discussed at Point II.C, supra, Interior's lease-cancellation decision expressly considered this issue and determined, after "careful examination," that the environmental analysis referenced by Solenex did not correct the agency's prior NEPA and NHPA errors because "it was not intended to be an environmental analysis of whether leases should have been issued across the Lewis and Clark National Forest in the first place." ECF No. 116-7 at 53. Although Solenex argues that Interior's post-leasing analysis was consistent with the Ninth Circuit's ruling in Conner, Solenex Br. 69, Solenex ignores Bob Marshall Alliance, which recognized that Interior's failure to consider a no-action alternative in that case constituted "an additional factor not present in Conner" that implicated different considerations, 852 F.2d at 1230. Accordingly, the Ninth Circuit remanded Bob Marshall Alliance to the Montana district court to clarify an appropriate remedy. Id. On remand, the Montana district court held that "this additional factor … compels the utilization of a more comprehensive remedy." Bob Marshall Alliance v. Lujan, 804 F. Supp. 1292, 1297 n.8 (D. Mont. 1992). As the Montana 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; see also Oglala Sioux Tribe v. Nuclear Reg. Comm'n, 896 F.3d 520, 532 (D.C. Cir. 2018) (holding that NEPA requires "that agencies must take the required hard look before taking [a proposed] action") (emphasis in original). The same is true under the NHPA. See Pit

River Tribe, 469 F.3d at 787 (holding that agency's failure to conduct historical-property review prior to leasing was not corrected by post-leasing review "because it did not deal with the question of whether the land should have been leased at all"). As in these cases, here post-leasing reviews could not provide the "clean slate" analysis necessary to remedy Interior's NEPA and NHPA violations. Bob Marshall Alliance v. Lujan, 804 F. Supp. at 1298.

III. INTERIOR LAWFULLY DISAPPROVED SOLENEX'S DRILLING PERMIT

In its final set of arguments, Solenex turns its attention from the Hall Creek lease cancellation to actions taken by Interior and the U.S. Forest Service in disapproving and returning Solenex's drilling permit on the lease. Solenex Br. 70-79. Solenex claims these agencies based their actions on an unlawful analysis of the drilling permit's impacts on cultural resources under the NHPA Section 106 process. Id. However, given Interior's lawful cancellation of the Hall Creek lease, Solenex's challenge to the disapproval of a drilling permit on that lease is moot. "A case is moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990). Here, any rights that Solenex might have claimed under its drilling permit depended on the validity of the underlying Hall Creek lease. See 43 C.F.R. § 3161.2 (providing that, before approving "operations on leasehold," Interior must "determine that the lease is in effect"). Because, as discussed at Points I-II, supra, Interior lawfully canceled that lease, Solenex's challenges to disapproval of its drilling permit do not present a live controversy—i.e., there is no relief this Court can provide that could resurrect even a lawful drilling permit on an unlawful lease. See Anderson v. Carter, 802 F.3d 4, 9-10 (D.C. Cir. 2015) (holding journalist's due-process challenge to termination of military accommodation status moot where larger program under

which accommodation had been requested was no longer in effect). For this reason alone, Solenex's arguments fail.

However, even if this Court were to entertain Solenex's moot contentions—which it should not do—they do not identify any error in the government's disapproval of the drilling permit. Under Section 106 of the NHPA, a federal agency must first identify the area potentially affected by a proposed undertaking. 36 C.F.R. § 800.4(a)(1). Then the agency must identify properties within the potentially affected area that may be eligible for inclusion in the National Register of Historic Places. Id. § 800.4(a)-(c). The agency must then evaluate whether the project will adversely affect those potentially historical places. Id. § 800.5; see generally Wilson, 708 F.2d at 754-55 (describing section 106 process). The government lawfully implemented that process here, and Solenex fails to demonstrate otherwise.

A. The Government Properly Identified the Area of Potential Effects From Drilling in the Badger-Two Medicine Region

Solenex first wrongly argues that the U.S. Forest Service identified an "exaggerated and arbitrary" area of potential effects from drilling on the Hall Creek lease. Solenex Br. 71. The NHPA consultation process required the Forest Service to "[d]etermine and document the area of potential effects" of drilling on the lease. 36 C.F.R. § 800.4(a)(1). The area of potential effects "means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist." Id. § 800.16(d). Here, the Forest Service in April 2014 determined that the area of potential effects for the Solenex drilling project consisted of the Badger-Two Medicine Blackfoot Traditional Cultural District. See FS006398-99. The agency made this determination after consulting with state and tribal historic preservation officers, as required by regulation, see 36 C.F.R. § 800.4(a), and in recognition of the then-pending nomination to the Keeper of the National Register to

expand the cultural district's boundary northward to encompass the entire Badger-Two Medicine region, including the area of the Hall Creek lease, see FS006398-99; FS006397 (nomination).[15]

Solenex claims the Forest Service arbitrarily "outsource[ed]" its determination regarding the area of potential effects to the Blackfeet Tribe. Solenex Br. 72. However, as discussed, NHPA regulations required the Forest Service to consult with the tribal historical preservation officer on this determination. 36 C.F.R. § 800.4(a). Moreover, while the tribal historic preservation officer recommended expanding the area of potential effects, FS006394-95, the Forest Service equally considered a substantial body of other pertinent information, including the ethnographic studies documenting the Blackfeet cultural interest in the area and the then-recent determination that the entire Badger-Two Medicine area possessed cultural values to the Blackfeet people that made it eligible for designation as a traditional cultural district under the NHPA. See FS006398-99. The Montana state historic preservation officer concurred with the Forest Service's determination, noting that agency guidance, "numerous studies by academics and third party cultural resource consultants," and statements by numerous practitioners of traditional Blackfeet cultural practices all supported it. See FS006461; see also FS006402-03 (Forest Service official explaining to Solenex representatives that expanded boundary for area of potential effects resulted from "new information," including "recent ethnographic study and expanded TCD boundary," since earlier boundary determination). This body of supportive evidence belies Solenex's contention that the Forest Service "uncritically adopted the Tribe's position" with "no other explanation." Solenex Br. 72 (emphasis in original).

[15] The Keeper approved this nomination less than a month later, in May 2014. See ECF No. 115-12 at 177-79.

Nor did the Forest Service ignore the "'scale and nature'" of Solenex's proposed drilling project. Solenex Br. 73 (quoting 36 C.F.R. § 800.16(d)). To the contrary, the Forest Service's determination of the area of potential effects began with an assessment of "actual ground disturbance" associated with the proposed drilling project, together with its immediate "visual" and "audio" effects. FS006398. The Forest Service then took account of new information that disclosed a higher potential for the project to also have indirect and cumulative impacts extending across a broader landscape, referencing ethnographic evidence that the traditional cultural district's integrity for Blackfeet people depends on the spiritual and cultural connection that the proposed project area has to other locations within the district. See FS006398-99; FS006402-03. It was not inappropriate—and indeed it was legally required—for the Forest Service to consider these factors. See 36 C.F.R. § 800.16(d) (requiring consideration of indirect impacts in determining area of potential effects).

B. Solenex's Adverse-Effects Arguments are Factually Inaccurate and Misguided

Solenex next challenges the Forest Service's determination of adverse effects from the proposed drilling project, but this challenge rests on a fundamental factual inaccuracy. Running through Solenex's arguments on this point is a central contention that "the area around Solenex's proposed well site" is "already developed" by a railroad, federal highway, utility corridor, and private property, such that its proposed drilling project would add little new disturbance. Solenex Br. 73-74. This is incorrect. The developments referenced by Solenex run along the extreme northwestern fringe of the Badger-Two Medicine region in a transportation corridor that divides this region from Glacier National Park. See ECF No. 115-5 at 50, 53-54 (map), 55 (1990 EIS). By contrast, Solenex's proposed drill site is located in the backcountry nearly three air miles south of this corridor, so that accessing it would require punching 5.7 miles of new road

into the undeveloped Badger-Two Medicine landscape. See ECF No. 115-4 at 29 (map); ECF No. 32-2 at 16 (Bodily Decl. Att. A). To put this in perspective within a geography closer to this District, Solenex's claim that the referenced transportation corridor defines the character of the proposed drill site is equivalent to claiming that the bustle of Union Station defines the character of the Lincoln Memorial.

Apart from this transportation corridor skirting its northwest border, the Badger-Two Medicine region is hardly a "developed" area, as Solenex contends. Solenex Br. 74. Indeed, the Advisory Council on Historic Preservation specifically considered Solenex's contention that the area was already developed and rejected it, stating:

> Documentation of the [Forest Service] and the Keeper's determinations of eligibility and additional aerial and ground-level images provided by the [Forest Service] clearly demonstrate that the drill site and access area as well as the overall TCD are not "disturbed." The nearly 259 square mile area included in the TCD is generally unspoiled by modern development and intrusions, and retains integrity as a historic property.

ECF No. 115-14 at 29; see also FS006533 (Forest Service description of Badger-Two Medicine: "the natural setting of the district is relatively pristine"); ECF No. 74-11 at 5-22 (photographs of region and drill site). This Court too should reject Solenex's inaccurate characterization.

Solenex's remaining arguments on this point are equally invalid. Contrary to Solenex's assertion, Solenex Br. 73, the Forest Service considered Solenex's views in response to the agency's draft finding of adverse effects from the proposed drilling project. See FS006496-97 (Forest Service solicitation of comments); ECF No. 115-13 at 1-13 & ECF No. 115-14 at 1-12 (Solenex comment letter). For instance, Solenex criticized the agency's draft adverse-effects finding for inaccurately referencing the criteria underlying the traditional cultural district designation, and the Forest Service corrected that reference in the final version. Compare FS006486 (draft adverse effects finding) with ECF No. 115-13 at 5-6 (Solenex letter) and FS006533 (final Forest Service determination). But the

obligation to "consider" Solenex's views did not require the Forest Service to adopt Solenex's position on every point. 36 C.F.R. § 800.5(a).

Solenex also claims the Forest Service improperly relied on locations "miles from" the proposed well site to justify its adverse-effects finding. Solenex Br. 73-74. However, the Forest Service documented extensive direct impacts to the traditional cultural district stemming from activities at the proposed drill site and new access road themselves, finding that these proposed developments would "create new visual disturbance in the Hall Creek area" that will "reduce the integrity of the natural setting in this area of the district," "remove from the landscape any plant and mineral resources within the footprint of the proposed development," "disturb traditional meditation, fasting, and prayers being performed today by Blackfeet people using the area," and "affect the natural viewshed" in and around Hall Creek. FS006535-36. The Forest Service's finding of indirect effects likewise focused on "the Hall Creek area" of the traditional cultural district. FS006536. Even the agency's broader finding of cumulative impacts was substantially grounded in the additive impacts that the proposed drilling project would have on the northern portion of the Badger-Two Medicine region where the Hall Creek area is located, stating that "the proposed project, while only creating about 20 acres of disturbance[,] would be permanently in place until the well was retired/abandoned (and reclaimed)," and thus "would push the cumulative setting threshold close to the edge and adversely affect the integrity of the setting." FS006537. In sum, the Forest Service's adverse-effects finding was centered on the Hall Creek area where Solenex proposed to drill, and not on far-flung, remote impacts, as Solenex suggests.

Nor did the Forest Service improperly rely on "subjective, personal, and non-quantifiable" impacts of the drilling project. Solenex Br. 74. As demonstrated by the statements quoted above referencing new visual disturbances, plant and mineral removal, and disturbance of traditional Blackfeet practices, the Forest Service's finding was thoroughly grounded in concrete impacts. While the agency

also referenced additional cultural and spiritual characteristics of the traditional cultural district underlying its value to Blackfeet people, FS006533, this was hardly inappropriate given that these characteristics underlay the area's inclusion in the National Register of Historic Places, id., and the Forest Service's obligation was to consider impacts to "any of the characteristics of a historic property that qualify the property for inclusion in the National Register," 36 C.F.R. § 800.5(a).

Importantly, the Forest Service's findings on these issues were approved and adopted by the Advisory Council on Historic Preservation, the agency that "oversees the operation of the section 106 process" for the federal government. 36 C.F.R. § 800.2(b). "The Advisory Council, tasked as it is with preserving America's historic resources, merits special attention when it opines" about a project's impact on historic properties. Nat'l Parks Conservation Ass'n, 916 F.3d at 1085. Here, the Advisory Council not only approved the adverse effects finding for the reasons documented by the Forest Service, but also added its own finding that, "because the undertaking is located primarily within the TCD, implementation of the undertaking may result in diminution of the TCD's integrity of setting, materials, feeling, and association, even with the mitigation measures specified in the 1991 and 1993 RODs." ECF No. 115-14 at 30. Thus, while Solenex claims its proposed mitigation plans were disregarded, Solenex Br. 74-75, the Advisory Council specifically considered them and deemed them inadequate. For this reason too, Solenex's argument is unpersuasive.[16]

[16] Solenex's so-called "small" example of Forest Service carelessness, Solenex Br. 74, is also off the mark. Solenex claims there is no record support for the Forest Service's conclusion that Solenex's proposed drilling project would impact berry patches of value to Blackfeet culture, id., but the agency's 1990 environmental impact analysis of the drilling project documented numerous berry species in the proposed project area, ECF No. 115-6 at 23, and concluded that implementation of project alternatives would cause "vegetation loss of 25 to 38 acres." ECF No. 115-7 at 148-49.

C. The Government's Mitigation Findings Were Lawful and Well Reasoned

Solenex's arguments equally fail to undermine the government's well-reasoned conclusion that "no mitigation measures would achieve an acceptable balance between historic preservation concerns and the undertaking" in this case. ECF No. 115-14 at 31 (Advisory Council determination).

Solenex first criticizes the government's withholding of confidential cultural information in ethnographic studies of the Badger-Two Medicine region. Solenex Br. 75. However, the NHPA generally mandates such confidentiality measures to protect culturally sensitive locations. See 54 U.S.C. § 307103(a) (requiring federal agencies to "withhold from disclosure to the public information about the location, character or ownership of a historic property" if disclosure may, among other things, "impede the use of a traditional religious site by practitioners"); see also Pub. Emps. for Envtl. Resp. v. Beaudreau, No. CV 10-1067 RBW/DAR, 2012 WL 12942599, at *8 (D.D.C. Nov. 9, 2012) (upholding agency redactions of sensitive cultural resource information protected by the NHPA), objections overruled sub nom. Pub. Emps. for Envtl. Resp. v. Beaudreau, No. CV 10-1073, 2013 WL 12193038 (D.D.C. May 16, 2013). While the IBLA in Earth Power Resources, Inc., 181 IBLA 94 (2011) (quoted in Solenex Br. 75), faulted Interior for relying on an ethnographic study without disclosing it to a geothermal lease applicant for the purpose of challenging the agency's action, 181 IBLA at 110, here the government did provide Solenex with the referenced ethnographic information pursuant to a protective order issued by this Court, see ECF Nos. 86, 88, so Solenex was not disabled from using that information to support its ongoing challenge. Notably, despite having access to those materials, Solenex offers

no argument in its brief as to why the ethnographic studies did not support Interior's mitigation decision. See Solenex Br. 70-79. Solenex's complaint thus rings hollow.[17]

Solenex next contends that the government failed to comply with the NHPA's mandate "to seek ways to mitigate adverse effects." Solenex Br. 76. However, the section 106 regulations require agency officials to "consult with the [state historic preservation officer/tribal historic preservation officer] and other consulting parties, including Indian tribes … , to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6(a). Here, the Forest Service did that, convening and consulting with the relevant parties in April 2015 to attempt to develop such mitigations. See FS006543-44; FS006553-54 (Forest Service letters to consulting parties); ECF No. 115-14 at 14-23 (notes of consultation meeting).

However, when the parties met, Solenex itself was intransigent. Despite claiming that "we want to mitigate," ECF No. 115-14 at 19, Solenex representatives repeatedly took the position at the April 2015 meeting that mitigations for their proposed drilling project's cultural impacts could not extend beyond those previously applied when Interior approved the drilling permit on the Hall Creek lease in 1993—before the development of extensive ethnographic information about the cultural value of the Badger-Two Medicine region and the resulting designation of the Badger-Two Medicine Blackfoot Traditional Cultural District. See ECF No.

[17] Solenex insinuates that the traditional cultural district boundary was improperly manipulated to advance the "Tribe's claim of ownership and the desire to interfere with" the Hall Creek lease. Solenex Br. 75. However, Solenex's sole record support for this charge actually documents an ethnographer's determination that the "adverse impacts" to the district from development on the Hall Creek lease would be more severe than those resulting from existing developments along the northwestern fringe of the district. FS004399. Further, it demonstrates that the Forest Service did not rely on any tribal land claims as a basis for establishing the district boundary and instead took pains to conform its boundary proposal to NHPA guidance. FS004400.

115-14 at 17 (Solenex representative: "we have an approved APD that already contains conditions for approval, including mitigations, from 1993"), 19 (Solenex representative: "mitigations should be the same as in 1993"). Yet the Advisory Council had already determined that those 1993-vintage mitigation measures were inadequate to protect cultural resources even before this consultation meeting began. See FS006550. Moreover, Solenex rejected an offer from Blackfeet representatives to negotiate with Solenex about trading the Hall Creek lease for a lease of "comparable value" in a less sensitive area on the Blackfeet Reservation. ECF No. 115-14 at 30; see id. at 14-23 (notes of April 2015 meeting). Thus, while Solenex contends that it was willing to compromise but "the Tribe refused to consider mitigation measures," Solenex Br. 76, the record is to the contrary.

As for Solenex's contention that the Forest Service nevertheless somehow "abdicat[ed] its duty to develop and consider ways to mitigate adverse effects," id. 77, Solenex misstates the agency's obligation. The NHPA Section 106 regulations required the Forest Service to "consult with" interested parties in an effort to develop mitigation measures—not to unilaterally impose such measures by itself. 36 C.F.R. § 800.6(a). Indeed, under those regulations, any mitigations approved through the consultation process must be embodied in a memorandum of agreement among all consulting parties, including the tribal historic preservation officer. Id. § 800.6(b)(1)(iv). Where, as here, there is no such agreement, the consulting agency must request the Advisory Council to participate in the process—a step that was further necessitated in this case when the tribal historic preservation officer terminated consultation following the parties' stalemate at the April 2015 meeting. See 36 C.F.R. §§ 800.6(b)(1)(v), 800.6(a)(3); see also FS006565 (Forest Service requesting Advisory Council recommendations); FS006567 (letter terminating consultation). The regulations then call for the Advisory Council to solicit views of

the consulting parties and the public and to provide its comments within 45 days, at which point the "head" of the consulting agency must "reach[] a final decision on the undertaking." 36 C.F.R. § 800.7(c).

The government faithfully implemented that NHPA process here. The Advisory Council held a public hearing on the proposed Solenex drilling project on September 2, 2015, at which "the vast majority of respondents voiced their strong opposition to the proposed gas exploration." ECF No. 115-14 at 31. Opponents of the project at this hearing and in related written correspondence included the governor of Montana, two Montana state representatives, and the governing council of the Montana county where drilling was proposed. Id. The Advisory Council issued its comments on the drilling proposal on September 21, 2015, recommending that the Interior and Agriculture Departments revoke the drilling permit, cancel the Hall Creek lease, and ensure that future mineral development does not occur in the Badger-Two Medicine region. Id. The Secretary of Agriculture then agreed with the Advisory Council's comments and recommended cancellation of the Hall Creek lease, and the Interior Department canceled the lease on March 17, 2016. See ECF No. 116-7 at 47, 55. Thus, the government followed the Section 106 process.

As for Solenex's argument that the conclusions of the Section 106 consultation process were unlawfully "implausible," Solenex Br. 77-79, Solenex once again rests its argument on an inaccurate depiction of the record. Solenex repeats its claim that the proposed drilling site on the Hall Creek lease "is an area of modern development," reprising its incorrect assertion that the railroad, highway, and utility corridor at the northwestern fringe of the Badger-Two Medicine area characterize the proposed drill site located nearly three miles away from those disturbances in the backcountry. Id. 78. As already addressed at Point III.B, supra, this is wrong. Solenex

supplements this contention by asserting that the proposed drilling area had been "subject to extensive intrusive seismographic activity" and "was frequented by Jeeps and snowmobiles." Solenex Br. 78. However, while the Badger-Two Medicine 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; by 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 ECF No. 116-7 at 5-8 (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," and described the region's setting as "primarily natural and, for the most part, undisturbed by modern development." FS006533–34. That description—not Solenex's mischaracterization—accurately depicts the area where Solenex proposed to drill.

Solenex's attack on the Blackfeet's cultural and spiritual interest in the Badger-Two Medicine region is also meritless. Solenex claims the Blackfeet "supported oil and gas development in the area," Solenex Br. 78, and even charges that the tribe "seeks to prevent Solenex from exercising its property rights in order to appropriate Solenex's resources for itself," id. 77 n.16. Solenex ignores the long record of Blackfeet advocacy to protect the Badger-Two Medicine region dating back to 1973, when the Blackfeet Tribal Business Council—the governing body of the Blackfeet Reservation—declared the landscape encompassing this region

"Sacred Ground" and asserted that it "shall not be disturbed in any way without prior consent of the Blackfeet Tribe." ECF No. 116 at 3. The Council reiterated this position in 1993, emphasizing that "[t]he Blackfeet people actively practice their religious, cultural and traditional rights in the area," and asserting that proposed oil and gas development "will seriously and adversely impact the rights of the Tribe and its members to practice and exercise their rights." ECF No. 114-1 at 41-42. Then, in 2004, the Council recommended that the Forest Service prohibit all motorized-vehicle use in the area and that "the entire Badger Two Medicine area be nominated to the National Registry of Historic Places as a Blackfeet Traditional Cultural District and an Ethnographic Cultural Landscape." ECF No. 115-12 at 80-82. Most recently, in 2014 the council reiterated that the Badger-Two Medicine region "has been one of the most culturally and religiously significant areas to the Blackfeet People since time immemorial." ECF No. 115-12 at 180-82; see also Solenex LLC, 962 F.3d at 522-24 (describing Blackfeet cultural interest in Badger-Two Medicine and advocacy for protecting the area).

As discussed supra, extensive research supports the tribe's position, including the ethnographic studies that provided the basis for the Forest Service and Montana Historic Preservation Office to seek listing of the Badger-Two Medicine area in the National Register of Historic Places. See ECF No. 48-4 at 113-14; ECF No. 48-6 at 7-9; ECF No. 48-5 at 13-152; ECF No. 48-6 at 1-2; FS005608-5731; ECF No. 45-7 at 77. Based on these materials, the Interior Department's Keeper of the National Register twice determined that the Badger-Two Medicine Blackfoot Traditional Cultural District meets all National Register requirements, concluding that the region "is directly associated with culturally important spirits, heroes, and historic figures central to Blackfoot religion, traditional practices, and tribal lifeways" and "provid[es] tribal members a place to conduct important prayer, hunting, and plant and paint

gathering activities." ECF No. 115-12 at 179; see FS006291. And the Advisory Council in September 2015 recognized that the region "is of premier importance to the Blackfeet Tribe in sustaining its religious and cultural traditions." ECF No. 115-14 at 28, 31.

In the face of these multiple Blackfeet declarations, expert studies, and government certifications, Solenex cites a tribal resolution from 1983 approving a joint venture to explore for minerals in the area. Solenex Br. 77 n.16, 78-79. Yet within six months of that resolution, an outpouring of Blackfeet traditionalist opposition to mineral development in the Badger-Two Medicine region persuaded the Tribal Business Council to join a comment letter from conservationists objecting to proposed oil and gas drilling in the area. ECF No. 114-1 at 55. A few months later, the Council itself appealed the Interior Department's decision to issue a drilling permit on the Solenex lease. FS-HC002768. Then, in November 1986, the Council issued an official statement reaffirming the tribe's cultural interest in the Badger-Two Medicine area and declaring support for traditionalists who were actively opposing oil and gas drilling. FS-HC003083; see also FS-HC003076-78 (describing November 1986 traditionalist gathering); FS-HC008008-10, 008035, 008396-8400 (reflecting traditionalist advocacy against drilling). Accordingly, the resolution cited by Solenex was both isolated and quickly superseded by multiple Blackfeet statements of opposition to oil and gas development in the Badger-Two Medicine region that continue to embody the tribe's position to this day.

Finally, Solenex is wrong in claiming that the NHPA section 106 process in this case "created an effective tribal veto." Solenex Br. 79. While it is true that the NHPA process does not always "prevent all development," id., it is equally true that the process may conclude that development is not justified given the severity of likely impacts on cultural values. Because of the gravity of that decision, Section 106 specifically calls on the head of the relevant agency, not

a lesser official, to make the final determination whether to proceed with a proposed undertaking where, as here, the consulting parties fail to resolve adverse effects to cultural resources. See 36 C.F.R. § 800.7(c)(4). As already extensively discussed, the record of this case does not reflect that agency officials reflexively deferred to the Blackfeet Tribe's opposition to drilling in the area, but rather that they carefully weighed the impacts of authorizing oil and gas development in a formally designated traditional cultural district that multiple ethnographic studies and government certifications confirmed was "of premier importance to the Blackfeet Tribe in sustaining its religious and cultural traditions." ECF No. 115-14 at 28 (Advisory Council comments); see Solenex LLC, 962 F.3d at 529 (recognizing government's "painstaking efforts" to comply with NHPA obligations). At the conclusion of that consideration process, leaders of the Agriculture and Interior Departments ultimately agreed with the Advisory Council's recommendation "that no mitigation measures would achieve an acceptable balance between historic preservation concerns and the undertaking," and that the Hall Creek lease and associated drilling permit should therefore be canceled. ECF No. 115-14 at 31 (Advisory Council comments); ECF No. 116-7 at 54 (cancellation decision). Solenex has failed to demonstrate any error in that judgment.

CONCLUSION

For the foregoing reasons, Defendant-Intervenors Pikuni Traditionalist Association, et al., respectfully request that this Court deny Solenex's motion for summary judgment and grant their cross-motion for summary judgment.

Respectfully submitted this 18th day of February, 2022.

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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
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