IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOLENEX LLC, Plaintiff, v. DEBRA HAALAND, in her official capacity as Secretary of the Interior, *et al.*, Defendants and PIKUNI TRADITIONALIST ASSOCIATION, *et al*. Defendant-Intervenors.	Case No. 13-cv-993-RJL

FEDERAL DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT

Federal Defendants Debra Haaland, in her official capacity as Secretary of the Interior, *et al*., hereby move this Court under Rule 56 of the Federal Rules of Civil Procedure, and for the reasons stated in Federal Defendants' accompanying memorandum, to grant Federal Defendants' Cross-Motion for Summary Judgment.

DATE: February 18, 2022

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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ACHP	Advisory Council on Historic Preservation
AIRFA	American Indian Religious Freedom Act
APD	Application for a Permit to Drill
APE	Area of Potential Effects
BLM	Bureau of Land Management
EA	Environmental Assessment
EIS	Environmental Impact Statement
FONSI	Finding of No Significant Impact
IBLA	Interior Board of Land Appeals
MLA	Mineral Leasing Act of 1920
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
ROD	Record of Decision
SHPO	State Historic Preservation Officer
TCD	Traditional Cultural District
THPO	Tribal Historic Preservation Officer

On March 17, 2016, the Secretary of the Interior ("the Secretary") cancelled a mineral lease held by Solenex LLC ("the Lease") in an area of the Lewis and Clark National Forest that Congress permanently withdrew from mineral leasing and development after the Lease issued. The Secretary explained that, although this lease was issued before the ban went into effect, it had been invalid from its inception due to noncompliance with multiple federal laws. The Secretary reasoned that Congress's subsequent leasing ban left her without discretion to correct deficiencies in the Lease and that, even if she had such discretion, she would not exercise it because mineral development on the subject land would irreparably harm irreplaceable natural and cultural resources. For the same reasons, and in the same decision, the Secretary also disapproved Solenex's Application for a Permit to Drill ("APD").

Solenex challenges those decisions. First, it contends that the Secretary lacked authority to cancel the Lease. But the Supreme Court has recognized the Secretary's authority to cancel leases for failure to comply with the law before issuance and the Mineral Leasing Act of 1920 did not remove that authority. Nor were the Secretary's reasons for cancelling the lease arbitrary and capricious, as Solenex next argues. The Secretary's decision to cancel the Lease for failure to comply with the National Environmental Policy Act ("NEPA") and Section 106 of the National Historic Preservation Act ("NHPA") was in accordance with those statutes and their regulations, and the Secretary considered appropriate factors in rendering that decision. Finally, Solenex argues that the Secretary's disapproval of the APD was arbitrary and capricious, challenging the Forest Service's underlying engagement with the requirements of the NHPA's Section 106 process. Those arguments are purely academic: an APD cannot be approved without a valid lease, and the lease has been cancelled for invalidity. But even were it not, the Forest Service complied with the NHPA and its regulations. Its designation of the Area of Potential Effects ("APE"), its

determination of the adverse effects that Solenex's proposed drilling would have on that area, and its consideration of mitigation options complied with the law and are fully supported by the record.

Accordingly, the Court should deny Solenex's motion for summary judgment and grant Federal Defendants' motion.

STATUTORY BACKGROUND

I. The Secretary's plenary land-management authority

The Property Clause of the Constitution vests Congress with "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2. "Congress exercises the powers both of a proprietor and of a legislature over the public domain," *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976), and it has delegated its "general managerial powers" over public lands to the Secretary, *Boesche v. Udall*, 373 U.S. 472, 476 (1963). Specifically, 43 U.S.C. § 2 directs the Secretary to perform "all executive duties . . . in anywise respecting such public lands." Likewise, 43 U.S.C. § 1457 charges the Secretary "with the supervision of public business relating to. . . [p]ublic lands, including mines." *See also id.* § 1457c (directing the Secretary "to enforce and carry into execution, by appropriate regulations, every part of the provisions of [Title 43] not otherwise specially provided for"). Under the aegis of these general enactments and other, more specific grants of statutory authority, the Secretary carries out the greater part of Congress's virtually unlimited power over federal lands. *See United States v. San Francisco*, 310 U.S. 16, 29 (1940).

II. Mineral leasing on public lands

The Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. §§ 181–196, empowered the Secretary to lease the rights to federal minerals. *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 659 (1980). "[A] mineral lease does not give the lessee anything approaching the full ownership of a

fee patentee, nor does it convey an unencumbered estate in the minerals." *Boesche*, 373 U.S. at 478. To the contrary, such leases are subject "to exacting restrictions and continuing supervision by the Secretary." *Id.* at 477–78; *see, e.g.*, 30 U.S.C. § 226(g) (empowering the Secretary to "determine reclamation and other actions as required in the interest of conservation of surface resources"). In other words, the Secretary exercises the "broad powers" of a "leasing agent for the [United States]." *Chapman v. Sheridan-Wyo. Coal Co.*, 338 U.S. 621, 627 (1950).

The Secretary has issued regulations (codified at 43 C.F.R Part 3100) to implement its MLA authority. *See* 30 U.S.C. § 189. As relevant here, those regulations provide that "[l]eases shall be subject to cancellation if improperly issued." 43 C.F.R. § 3108.3(d). The Secretary's authority to cancel a mineral lease after issuance is part and parcel of its general power over land management conferred by other statutes. While the MLA curtails the Secretary's lease-cancellation authority in some respects, *see* 30 U.S.C. §§ 184(h) and 188(b), none of those statutory limitations prohibit the cancellation of the Lease.

III. National Environmental Policy Act

NEPA serves the dual purpose of informing agency decisionmakers of the environmental effects of proposed federal actions and ensuring that relevant information is made available to the public so that it "may also play a role in both the decisionmaking process and the implementation of that decision." *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). NEPA imposes procedural rather than substantive requirements. It focuses the attention of federal agencies and the public on the environmental impacts of a proposed action so that those impacts can be studied before the action is implemented. 42 U.S.C. § 4321; *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).

Specifically, NEPA requires a federal agency to prepare an Environmental Impact

Statement ("EIS") if the agency proposes to undertake a "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In the context of oil and gas leasing, the Ninth Circuit Court of Appeals has held that an EIS must be prepared prior to issuing an oil and gas lease, unless the lease being sold contains a stipulation preventing all surface disturbing activities. *Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988); *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1227 (9th Cir. 1988). The Court of Appeals for the D.C. Circuit reached the same conclusion. *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (holding that "if the [Forest Service] chooses not to retain the authority to preclude all surface disturbing activities," an EIS must be prepared "when the leases are issued.").

Judicial review of agency NEPA compliance is deferential. *Marsh*, 490 U.S. at 375. The "role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Balt. Gas & Elec. Co. v. NRDC, Inc.*, 462 U.S. 87, 97–98 (1983).

IV. National Historic Preservation Act

The NHPA, 54 U.S.C. §§ 300101 *et seq*., requires federal agencies to consider the effects of "undertaking[s]" on historic properties, including traditional cultural properties. 54 U.S.C. § 306108. NHPA compliance and consultation must occur before the agency undertakes its action. *See Illinois Comm. Comm'n v. Interstate Comm. Comm'n*, 848 F.2d 1246, 1261 (D.C. Cir. 1988) (characterizing the NHPA as "a 'stop, look, and listen'" statute). An "undertaking" is "a project, activity, or program . . . including . . . those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y). Leasing of public land for oil and gas development qualifies as an NHPA undertaking. *E.g., Mont. Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1151–53 (D. Mont. 2004).

Section 106 of the NHPA requires the Secretary, as the one who approves the lease, to ensure that the appropriate entities are involved in the process through consultation. States are represented in the NHPA process by State Historic Preservation Officers ("SHPO"). If an undertaking may affect property of "religious and cultural significance" to a federally recognized Indian Tribe, the agency must also consult with the interested Tribes (whether or not the activity is directly occurring on tribal property). 54 U.S.C. §§ 306108, 302706(b). Tribal governments participate in the NHPA process through their Tribal Historic Preservation Officers ("THPO"). Both SHPOs and THPOs assist the agency in identifying historic properties, evaluating their significance, determining effects to those properties, and formulating measures to avoid, minimize, or mitigate adverse effects to those historic properties.

FACTUAL BACKGROUND[1]

I. The Badger-Two Medicine Area

The Badger-Two Medicine area encompasses approximately 129,500 acres of land within the Lewis and Clark National Forest, adjacent to Glacier National Park, the Scapegoat and Bob Marshall Wilderness Areas, and the present-day Blackfeet Indian Reservation. ECF No. 116-7 at 43 (SUPP.AR000385).[2] The Badger-Two Medicine area is a relatively pristine landscape of

[1] Given the Court's familiarity with this case, Federal Defendants recite here only those facts of particular relevance to the arguments below, and incorporate by reference their previous Statements of Material Facts, ECF Nos. 32-1 and 93-2.

[2] To avoid duplication and provide consistent citations, Federal Defendants cite to the portions of the administrative record already filed on the docket by their docket number and ECF page numbers. *See* Pl.'s Mem. at 6 n.2. When the document is Bates numbered, Federal Defendants also include the Bates number of the applicable page or range for ease of reference. Newly cited administrative record documents will be cited by their administrative record document number and Bates range.

outstanding natural and cultural values, "mostly undisturbed by modern development." *Id.* The area serves as a critical wildlife movement corridor for species that range into Glacier National Park and adjoining wilderness lands and is home to a number of wildlife species. It also contains "pure and unpolluted water as well as diverse and abundant plant life." *Id.*

Given these unique characteristics, for nearly 25 years—since 1997—the Badger-Two Medicine area has been closed to oil and gas leasing. Since 2009, motorized wheeled vehicles and snowmobiling have been prohibited in the Badger-Two Medicine region. *Id.* In 2001, the Secretary of the Interior withdrew approximately 405,000 acres of forest lands—including the Badger-Two Medicine area—from location and entry under federal mining law for a period of 20 years to preserve traditional cultural uses by Native Americans, threatened and endangered species, and the outstanding scenic values and roadless character of the lands. 66 Fed. Reg. 6657-02 (Jan. 22, 2001). Congress then withdrew the area from oil and gas leasing and location and entry under the mining law (subject to valid existing rights) in 2006, making permanent the Secretary's withdrawal and providing tax incentives for existing lessees who voluntarily relinquished their leases. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 403, 120 Stat 2922, 3050.

The Badger-Two Medicine area was once a part of the Blackfeet Tribe's reservation. ECF No. 116-7 at 43 (SUPP.AR000385). Though ceded in 1896, the area was and remains "one of the most cultural and religiously significant areas to the Blackfeet People since time immemorial." *Id.* (quoting Blackfeet Tribal Resolution No. 260-2014 (2014)). Recognizing the importance of the area to the Blackfeet People, in 2002 the Keeper of the National Register ("Keeper") concurred in establishing a portion of the Badger-Two Medicine area as a traditional cultural district ("TCD") and, in 2014—based on additional documentation provided by the Forest Service—expanded the TCD boundary to encompass 165,588 acres. *Id*.

II. Solenex's Lease

The Bureau of Land Management ("BLM") issued Lease M-53323 to Sidney M. Longwell in 1982. *Id.* at 42 (SUPP.AR000384). The Lease covers approximately 6,247 acres in the Lewis and Clark National Forest in Montana, and now falls entirely within the Badger-Two Medicine TCD. *Id.* at 43 (SUPP.AR000385); ECF No. 45-9 at 19 (HC00884). The Forest Service prepared an Environmental Assessment ("EA") before the Lease was issued, but not an EIS. ECF No. 116-7 at 44 (SUPP.AR000386). In 1983, Mr. Longwell assigned the Lease to American Petrofina Company of Texas, which later became Fina Oil and Chemical Company, and others (collectively "Fina"). *Id.* at 42 n.2 (SUPP.AR000384).

Before drilling for oil or gas, a lessee must obtain a "permit to drill" with the Secretary's approval "of a plan of operations covering proposed surface-disturbing activities." 30 U.S.C. § 226(g). In late 1983, Fina filed an APD seeking such a permit for the Federal South Glacier #1-26 well on Lease M-53323 near Hall Creek, *i.e.*, approximately two and a half miles south of U.S. Highway 2. ECF No. 116-7 at 44 (SUPP.AR000386). BLM approved Fina's APD in 1985. *Id.* Environmental groups and the Blackfeet Tribe appealed the APD approval to the Interior Board of Land Appeals ("IBLA"). The IBLA set aside BLM's decision and remanded the case to BLM to, among other things, study and address a cumulative effects determination for the proposed activity and consider the effects of the proposed activity on an archaeological site. *Id.* Lease operations were suspended at the lessee's request and remained suspended until the Lease was cancelled in 2016. *Id.* at 42–43 (SUPP.AR000384–85).

In 1987, after addressing the remand issues, BLM issued a Decision Notice and Finding of No Significant Impact (the "1987 APD FONSI"), which reactivated the APD for the Lease. *Id.* at 44 (SUPP.AR000386). After the Blackfeet Tribe and other parties appealed this decision as well, BLM moved for remand to allow further review. *Id.* The agencies prepared an EIS, which was

completed in late 1990 (the "1990 APD EIS"), and BLM issued a Record of Decision ("ROD") approving the APD for the Lease in early 1991 (the "1991 APD ROD"), subject to lease stipulations and additional mitigation measures imposed as conditions of approval. *Id.* at 44–45 (SUPP.AR000386–87). The lease suspension continued, however, at Fina's request. *Id.* at 45 (SUPP.AR000387).

This decision was also appealed to the IBLA and, at BLM's request, the IBLA remanded the 1991 APD approval for further analysis. *Id*. Following BLM's further study of surface-related issues, an Assistant Secretary of the Interior signed a ROD authorizing approval of an APD for the Lease on January 14, 1993 (the "1993 APD ROD"). *Id.* Three months later, several groups—including conservation organizations as well as a tribal traditionalists association, an association of Blackfeet tribal members, and a Blackfeet tribal member—challenged that decision in the U.S. District Court for the District of Montana, alleging, among other things, that BLM violated NEPA by failing to complete an EIS before the Lease was issued. ECF No. 116-7 at 45 (SUPP.AR000387); *National Wildlife Federation v. Robertson*, No. 4:93-cv-44 (D. Mont. filed April 14, 1993). The case was administratively closed in 1997. ECF No. 116-7 at 45 (SUPP.AR000387).

Fina assigned its record title interest in the Lease to Mr. Longwell, effective July 1, 2000. *Id.* at 42 n.2 (SUPP.AR000384). In 2005, Mr. Longwell assigned the Lease to Solenex LLC. *Id.* Mr. Longwell was the managing owner of Solenex. *See* ECF No. 77-1 at 2.

The Blackfeet Tribe has consistently raised concerns about development of the area in which the Lease is located during its lifetime. ECF No. 116-7 at 43 (SUPP.AR000385). Beginning in the 1990s, the Forest Service undertook efforts to document the traditional and cultural practices in the Badger-Two Medicine area. *Id.* at 46 (SUPP.AR000388). Based on consultation meetings

and ethnographic studies, in 2014 the Forest Service determined that Solenex's APD had the potential to affect the whole of the TCD. *See* ECF No. 45-8 at 34–35 (FS004848–49) The Forest Service next assessed the effects of the undertaking to the TCD and determined that the effects were adverse. *See* H-0039, FS006532 (Determination of Adverse Effects). The Montana SHPO, the Blackfeet Tribe's THPO, and the Advisory Council on Historic Preservation ("ACHP") concurred with the adverse effects finding. ECF No. 116-7 at 46 (SUPP.AR000388). The Forest Service then undertook efforts to determine whether the adverse effects could be mitigated. *Id*. When those efforts appeared to stall, the Forest Service asked the ACHP for assistance and advice in continuing to seek ways to avoid, minimize, or mitigate the adverse effects. *Id.* at 46 (SUPP.AR000388). Ultimately, the consultation efforts were unsuccessful in identifying any mitigation measures that would satisfy both the Blackfeet Tribe and Solenex. *Id*. at 47 (SUPP.AR000389). On September 21, 2015, the ACHP commented on the potential impacts to the TCD caused by possible lease operations:

> If implemented, the Solenex exploratory well along with the reasonably foreseeable full field development would be so damaging to the TCD that the Blackfeet Tribe's ability to practice their religious and cultural traditions in this area as a part of their community life and development would be lost. The cumulative effects of full field development, even with the mitigation measures proposed by Solenex, would result in serious and irreparable degradation of the historic values of the TCD that sustain the Tribe.

Id. Having considered the ACHP's comments and in light of the Forest Service's own conclusion, the Secretary of Agriculture recommended that the Secretary of the Interior cancel the Lease. *Id*.

Solenex brought this action in 2013, alleging that Federal Defendants had unreasonably extended suspension of the Lease and delayed action in their review of Solenex's APD. ECF No. 1. In July 2015, the Court found that the Federal Defendants had unreasonably delayed action on the suspension and subsequently ordered Federal Defendants to notify the Court of the decision whether to initiate a process for lease cancellation or continue the Section 106 process for lifting

the suspension of the Lease. *Solenex LLC v. Jewell ("Solenex I")*, 156 F. Supp. 3d 83, 85 (D.D.C. 2015); *see also* ECF No. 57.

On March 17, 2016, the Secretary of the Interior sent a letter to Solenex in which she (1) disapproved Solenex's APD application for the Lease pursuant to 43 C.F.R. § 3162.3-1(h)(2) and (2) cancelled the Lease pursuant to 43 C.F.R. § 3108.3(d) because it was improperly issued. ECF No. 116-7 at 42–55 (SUPP.AR000384–97). The Secretary explained that she has authority, "under her general managerial power over public lands, to cancel leases issued in violation of a statute or regulation." *Id.* at 48 (SUPP.AR000390). And because the Lease authorized surface disturbance "without full prior analysis of the environmental consequences of such action, including a full analysis of impacts to natural and cultural resources," the Secretary concluded that BLM and the Forest Service had violated NEPA and NHPA in issuing the Lease. *Id.* at 49 (SUPP.AR000391). The Secretary further concluded that subsequent analysis had not corrected those legal violations and, in light of the administrative and Congressional protections that have been put in place for the Badger-Two Medicine area since the Lease was issued, the agencies could not now correct the procedural defects and BLM could not validate the Lease. *Id.* at 53–55 (SUPP.AR000395–97).

Solenex amended its complaint to challenge these decisions. ECF No. 73. The Court ultimately granted Solenex's motion for summary judgment on that challenge, concluding that the Secretary's decision was arbitrary and capricious because of the length of time between the Lease's issuance and the decision. *Solenex LLC v. Jewell ("Solenex II")*, 334 F. Supp. 3d 174, 181–82 (D.D.C. 2018). The Court of Appeals reversed that decision on the basis that (1) undue delay alone did not render the agency's action arbitrary or capricious and (2) the Secretary accounted for the reliance interests asserted by Solenex. *Solenex LLC v. Bernhardt ("Solenex III")*, 962 F.3d 520,

527–30 (D.C. Cir. 2020). On remand, Solenex amended its complaint to challenge both the Lease's cancellation and the basis for the APD's disapproval. *See* ECF No. 151.

STANDARD OF REVIEW

This Court reviews the Secretary's lease-cancellation and APD-disapproval decision using the standards for judicial review prescribed by the APA. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 872 (1990). First, the Secretary's decision may be set aside if she acted "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The Secretary's interpretation of the scope of her powers under a statute that she administers is entitled to deference. *See City of Arlington v. FCC*, 569 U.S. 290 (2013). The Secretary's view of her authority "governs if it is a reasonable interpretation of" an ambiguous statute—"not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the court[ ]." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

Under the APA, an agency's decision can also be set aside upon a showing that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). "To survive review under the 'arbitrary and capricious' standard, an agency must 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *PPL Wallingford Energy LLC v. Fed. Energy Regulatory Comm'n,* 419 F.3d 1194, 1198 (D.C. Cir. 2005) (quoting *Motor Vehicle Mfrs.,* 463 U.S. at 43). A reviewing court "will uphold [an agency's] findings, though of less than ideal clarity, if the agency's path may be reasonably discerned . . . ." *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 97 (D.D.C. 2010) (quoting *Hall v. McLaughlin,* 864 F.2d 868, 872

(D.C. Cir. 1989)) (alterations in original). "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof." *City of Olmsted Falls, OH v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002) (quoting *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1198 (D.C. Cir. 2000)) (alteration in original). And "[e]ven assuming [the agency] made missteps . . . the burden is on petitioners to demonstrate that [the agency's] ultimate conclusions are unreasonable." *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1146 (D.C. Cir. 2002).

ARGUMENT

The Secretary's power "to cancel [a mineral] lease administratively for invalidity at its inception," *Boesche*, 373 U.S. at 476, is subsumed within her "plenary authority over the administration of public lands, including mineral lands." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). The Secretary's "general administrative power of cancellation" is circumscribed in only two respects. *Boesche*, 373 U.S. at 478. First, Congress may curtail the Secretary's lease-cancellation power by express statutory directive. *Id.* at 476. Second, the Secretary's discretion to cancel a lease is cabined by the familiar APA constraint that it must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Boesche*, 373 U.S. at 485–86 (noting that judicial recognition of the lease-cancellation power "do[es] not open the door to administrative abuses" because "final action by the Secretary . . . [is] subject to judicial review" under the APA).

This case thus presents two main questions: (1) whether Congress, by statute, expressly withdrew the Secretary's plenary power to cancel Solenex's mineral lease; and (2) whether the Secretary's reasons for cancelling Solenex's lease and disapproving its APD were arbitrary or capricious. The answer to both questions is "no." The Supreme Court unanimously recognized the existence and persistence of the Secretary's mineral-lease cancellation power in *Boesche*, and

Solenex's attempts to distinguish that case are unpersuasive. With respect to the second issue, Solenex has not shown that "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs.*, 463 U.S. at 43.

Because the Secretary had authority to cancel the Lease and her reasons for doing so were not arbitrary and capricious, the Court need not reach Solenex's third and final argument—that the APD disapproval decision was arbitrary and capricious. Without a valid lease, Solenex cannot have an approved APD. But even were the Court to address that argument, Solenex has not demonstrated that the Forest Service's determinations establishing the area of potential effect or documenting the adverse effects of Solenex's proposed drilling on cultural resources in the area were arbitrary or capricious, or that the Forest Service failed to comply with the NHPA and its regulations when evaluating whether the adverse effects could be mitigated.

I. The Secretary has authority to cancel the Lease

Solenex concedes that the Secretary has the statutory authority to administratively cancel invalid leases under some circumstances, but contends that the Secretary lacked the power to cancel this specific lease. Solenex makes three arguments to this end.

First, it argues that the MLA establishes and circumscribes the Secretary's authority to cancel oil and gas leases, and does not authorize the Secretary—expressly or inherently—to cancel leases for reasons beyond those prescribed by Congress in 30 U.S.C. §§ 184(h) and 188. In doing so, however, Solenex ignores the Supreme Court's recognition in *Boesche* that the Secretary's general powers over public lands includes the authority to cancel a lease for pre-lease factors. *See*

373 U.S. at 476. As the Supreme Court further recognized, that authority does not derive *from* the MLA, but rather exists unless *withdrawn* by the MLA. *Id.* And the MLA does not withdraw the Secretary's authority to cancel leases for pre-lease factors.

Solenex next argues that the Secretary lacked contractual authority to cancel the Lease. But the Secretary did not require "contractual authority" to exercise her plenary power and, in any event, the Lease's terms incorporated the Secretary's authority to cancel the Lease. Finally, Solenex tries to cast itself as a "bona fide purchaser" whose lease cannot be cancelled by reason of invalidity under the MLA. *See* 30 U.S.C. § 184(h)(2). But the MLA's bona-fide purchaser protections are limited to cancellation on the basis of MLA violations and, in any event, the record shows that Solenex is not, in fact, a bona fide purchaser, and did not purchase the Lease for value.

A. Congress has conferred on the Secretary a general administrative power of lease cancellation

The Secretary of the Interior is empowered to "perform all executive duties . . . in anywise respecting" the "public lands of the United States . . . ." 43 U.S.C. § 2. This provision "vest[s] the Secretary with general managerial powers over the public lands." *Boesche*, 373 U.S. at 476 & n.6; *see also Cameron v. United States*, 252 U.S. 450, 459–60 (1920) ("[T]he Secretary of the Interior . . . is charged with seeing that" the authority vested "by general statutory provisions" entrusting land management to the agency is "rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved."). Because "statutes written in broad, sweeping language should be given broad, sweeping application," *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003), it is reasonable to conclude that this general authority enabled the Secretary to "correct [an] error[ ]" of her predecessor, who violated NEPA and the NHPA when the Lease was issued to Solenex's predecessor-in-interest. *Boesche*, 373 U.S. at 478.

The "authority to cancel on the basis of *pre-lease* events" is thus "found not in Section 31 of the MLA] but in [the Secretary's] general powers of management over lands in the public domain." *Id*. at 476 (emphasis added). It is these "general powers," embodied in 43 U.S.C. §§ 2, 1201 , and 1457, that confer on the Secretary her lease cancellation authority. *Boesche*, 373 U.S. at 476 & n.6 (enumerating these statutory provisions, including 43 U.S.C. § 1201 which is now enumerated at 43 U.S.C. § 1457c). The Secretary's exercise of her cancellation authority here is in complete harmony with *Boesche*, which rejected the need for an explicit statutory grant beyond those already enacted.

This authority has been recognized in numerous factual contexts by various courts. *See Winkler v. Andrus*, 614 F.2d 707, 711 (10th Cir. 1980) (recognizing the Secretary's "broad authority to cancel oil and gas leases for violations of the Mineral Leasing Act and regulations thereunder, as well as for administrative errors committed before the lease was issued"); *cf. Texas Oil & Gas Corp. v. Andrus*, 498 F. Supp. 668, 675 (D.D.C. 1980) (citing *Boesche* to support cancellation of oil and gas lease improperly issued inside military base), *rev'd sum. nom on other grounds*, *Texas Oil & Gas Corp. v. Watt*, 683 F.2d 427 (D.C. Cir. 1982); *Nat. Res. Def. Council, Inc. v. Hughes*, 454 F. Supp. 148, 154 (D.D.C. 1978) (recognizing that the MLA "does not limit the Secretary's power to cancel administratively a permit or a non-competitive lease 'on the basis of pre-lease factors.'" (quoting *Boesche*, 373 U.S. at 479–85)); *Texaco, Inc. v. Hickel*, 437 F.2d 636, 641 (D.C. Cir. 1970) (recognizing the Secretary's authority "to 'cancel a lease administratively for invalidity in its inception'" where, as here, "a determination required by law had not been made") (citations omitted); *Grynberg v. Kempthorne*, No. 06-cv-01878, 2008 WL 2445564, at *4 (D. Colo. June 16, 2008) (citing *Boesche* to conclude the Secretary could cancel a lease issued without required Forest Service review). Moreover, the Secretary's longstanding,

consistent use of her authority to cancel a variety of leases based on events that predate lease issuance "surely tends to show that the [agency's] current practice is a reasonable and hence legitimate exercise" of her power. *Entergy*, 556 U.S. at 224; *see, e.g.*, *D.M. Yates* 74 IBLA 159, 161 (1983); *Estate of Glenn F. Coy Resource Serv. Co.*, 52 IBLA 182, 187 (1981); *Fortune Oil Co.,* 69 IBLA 13, 15 (1982); *Penroc Oil Corp.*, 84 IBLA 36, 39 (1984); *Sun Exploration and Production Co.*, 95 IBLA 140, 142 (1987).

Solenex attempts to distinguish *Boesche*, arguing that its recognition of the Secretary's authority does not apply here because *Boesche* addressed an "administrative error [that] caused the Secretary to lease land inconsistent with the MLA and its regulations." Pl.'s Mem.at 24, ECF No. 156. But no court has adopted so narrow an interpretation of *Boesche*. Nor should this Court.

Most importantly, the Supreme Court did not speak in narrow terms when it addressed the nature of the Secretary's lease cancellation authority. Instead, it broadly referred to "the Secretary's traditional administrative authority to cancel on the basis of pre-lease factors," 373 U.S. at 479, an authority which allows the Secretary to "correct his own errors." *Id*. at 478.

Solenex's attempts to read *Boesche* narrowly also conflict with courts of appeals' uniformly broad interpretation of the authority recognized in *Boesche. See, e.g.*, *Silver State Land, LLC v. Schneider*, 843 F.3d 982, 990 (D.C. Cir. 2016) (*Boesche* "confirmed the Secretary's authority to cancel a 'lease administratively for invalidity at its inception,' even after the lease had been issued" (citation omitted); *Winkler*, 614 F.2d at 711 ("The Secretary has broad authority to cancel oil and gas leases for violations of the Mineral Leasing Act and regulations thereunder, as well as for administrative errors committed before the lease was issued."); *Reed v. Morton*, 480 F.2d 634, 642 (9th Cir. 1973) (quoting *Boesche* for the proposition that the Secretary's jurisdiction over public lands includes "the power, in a proper case, to correct his own errors" (citation

omitted)); *Hannifin v. Morton*, 444 F.2d 200, 202 (10th Cir. 1971) (applying *Boesche* to recognize the Secretary's "broad authority" beyond that specifically granted in the Sulphur Production Act).

Courts have also followed *Boesche* where leases were issued based on mistakes made by the Secretary's subordinates. *See Griffin & Griffin Expl., LLC v. United States,*116 Fed. Cl. 163, 176 (2014) (recognizing the Secretary's authority to "correct the mistakes of his subordinates" by cancelling a lease that was invalidly issued due to a pre-existing lease); *Grynberg*, 2008 WL 2445564, at*4 (relying on *Boesche* to conclude the Secretary had authority to cancel a lease that was issued without Forest Service review as required by regulation). *Boesche* has also been applied to cases without competing lease applicants. *See Hannifin*, 444 F.2d at 202 (recognizing the Secretary's authority to impose a fee on permit applicants who applied for permits before the regulation was announced); *Grynberg*, 2008 WL 2445564, at *4. Solenex's proposed limitations of *Boesche* thus do not withstand scrutiny.

Solenex also attempts to narrow *Boesche*'s application on the basis that, here, "the government conveyed a property right" in the form of the Lease. *See* Pl.'s Mem. at 24–25. But the Supreme Court made clear in *Boesche* that "[u]nlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the Lease to exacting restrictions and continuing supervision by the Secretary." 373 U.S. at 477–78; *see also S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 752 n.6 (10th Cir. 2005) (distinguishing patented from unpatented claims in that the latter "can be revoked by the agency[ ] if an error was made or the agency determines the claim was invalid."). As a result, "[s]ince the Secretary's connection with the land continues to subsist, he should have the power, in a proper case, to correct his own errors."

Boesche, 373 U.S. at 478; s*ee also Silver State*, 843 F.3d at 990 (Secretary's "plenary authority" to cancel an invalid lease "extends at least until the issuance of [a] land patent.").

Given the distinct nature of MLA leases, which reserve the Secretary's title, control, and supervision over the land, cases relied on by Solenex wherein the federal government relinquished its power over the land are inapposite. The same holds true for *Union Oil Company of California v. Morton*, which stands for the proposition that an agency may not engage in a *de facto* taking of property rights through indefinite suspension on the basis of potential *future* risk. 512 F.2d 743, 750–751 (9th Cir. 1975). Solenex's reliance on *Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 2d 245, 258 (D.D.C. 2011), is likewise inapposite. There, the agency withdrew a ROD approving a resource-management plan despite the existence of "specific administrative procedures . . . under FLPMA to amend" such a plan. *Id.* at 258. As the court there acknowledged, however, no such procedures exist under the MLA to correct such an error. *Id.* In short, Solenex's has offered no basis for narrowing *Boesche*'s clear recognition of the Secretary's broad authority to cancel a lease based on pre-leasing factors.

B. The MLA has not withdrawn the Secretary's general administrative power to cancel the Lease

Ignoring *Boesche*'s affirmation of this plenary authority, Solenex contends that §§ 184(h) and 188 of the MLA circumscribe the extent of the Secretary's authority to cancel a lease, and that the Secretary lacks authority to cancel an oil and gas lease by means (or under circumstances) other than the ones enumerated in those two sections. But that analysis is backwards. As the Court explained in *Boesche*, "the Secretary, under his general powers of management over the public lands, ha[s] authority to cancel [a] lease administratively . . . *unless* such authority was *withdrawn* by the Mineral Leasing Act." 373 U.S. at 476 (emphasis added). Indeed, as the Court in *Boesche* observed after reviewing the legislative history of the MLA, it would "be surprising to find in the

[MLA], which was intended to expand, not contract, the Secretary's control over the mineral lands of the United States, a restriction on the Secretary's power to cancel leases issued through administrative error—a power which was then already firmly established." *Id*. at 481; *see also id.* at 482 ("From the beginnings of the Mineral Leasing Act the Secretary has conceived that he had the power drawn in question here, and Congress has never interfered with its exercise."). As explained below, none of the MLA provisions relied on by Solenex have withdrawn that authority.

In fact, Solenex's argument that the MLA's provisions are the sole express or implicit basis for the Secretary's authority to cancel a lease runs directly afoul of the Supreme Court's conclusion that Section 31 "reaches only cancellations based on post-lease events and leaves unaffected the Secretary's traditional administrative authority to cancel on the basis of *pre-lease factors*." *Boesche*, 373 U.S. at 478–79 (emphasis added). The same holds true of the same argument that Solenex makes with respect to Section 27(h), which addresses cancellation of a lease "for violation of any of the provisions of" Title 30, Chapter 3A of the U.S. Code.

Solenex contends that Sections 31 and 27(h) of the MLA, 30 U.S.C. §§ 188 and 184(h), prohibit the Secretary from cancelling certain mineral leases on the basis of certain pre-lease factors. This argument is foreclosed by the Supreme Court's unanimous decision in *Boesche*, which held that this specific MLA provision "leaves *unaffected* the Secretary's traditional administrative authority to cancel on the basis of pre-lease factors." 373 U.S. at 479 (emphasis added). Section 31 circumscribes the Secretary's cancellation authority "whenever the lessee fails to comply with any of the provisions of" the MLA or "upon the failure of the lessee to comply with any of the provisions of the lease," 30 U.S.C. § 188(a), (b), *but not* when a lease is issued unlawfully in the first place. The Supreme Court specifically rejected the proposition that Congress "should have given the Secretary authority to cancel administratively a prospecting permit (later a

noncompetitive lease), on the basis of post-issuance events, but implicitly denied him that power in respect of pre-issuance occurrences." *Boesche*, 373 U.S. at 481–82 (citations omitted); *see also id.* at 478–79 ("We believe that both the statute on its face and the legislative history of the enactment show that [section] 31 reaches only cancellations based on post-lease events and leaves unaffected the Secretary's traditional administrative authority to cancel on the basis of pre-lease factors."). And it concluded that the "fragmentary excerpts of legislative history relied on by petitioner" in that case "do not suggest an opposite conclusion."[3] *Boesche*, 373 U.S. at 482. Solenex invokes the same legislative history excerpts here, to inevitably the same result. *See* Pls.' Mem. at 23 (citing 58 CONG. REC. S4168 (daily ed. Aug. 22, 1919); 58 CONG. REC. H7604 (daily ed. Oct. 27, 1919)).

Boesche's conclusions apply equally to Section 27(h) of the MLA, which provides that "[t]he right to cancel or forfeit for violation of any of the provisions of [the MLA] shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease." 30 U.S.C. § 184(h)(2). By its plain language, this provision applies only in cases where the cancellation is "for violation of" the MLA.[4] *Id.*; *see Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 69 n.6 (1966) (noting that Section 184(h) protects the rights of bona fide purchasers "if the Secretary

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[3] Even had *Boesche* not rejected Solenex's interpretation of the same section, the legislative history of the MLA is inapposite because the plain text of Section 31 and 27(h) of the MLA, on its face, applies those provisions to post-issuance MLA violations. The Court may "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994).

[4] This Court has relied on 43 C.F.R. § 3108.4 to conclude that bona fide purchaser protections apply when a lease is subject to cancellation under 43 C.F.R. § 3108.3(d). *See Moncrief v. U.S. Dep't of Interior*, 339 F. Supp. 3d 1, 10–11 (D.D.C. 2018). But43 C.F.R. § 3108.4 does not constitute a Congressional withdrawal of the Secretary's plenary authority. *See Boesche*, 373 U.S. at 476 (such authority exists "unless . . . *withdrawn* by the Mineral Leasing Act"). And, as explained *infra* Part I.E, it does not apply to the Lease because Solenex is not a bona fide purchaser.

seeks to cancel a lease *for violations of the Act*" (emphasis added)); *Winkler*, 614 F.2d at 711 ("The Secretary has broad authority to cancel oil and gas leases *for violations of the Mineral Leasing Act and regulations thereunder* . . . ." (emphasis added)). If Section 27(h) extended bona-fide-purchaser protections to situations in which the lease was issued in error—such as without compliance with non-MLA requirements of which a purchaser might be unaware—the Secretary might have to honor an illegally-issued lease and would have no opportunity to rectify its error. But Section 27(h) does not address that situation. The bona-fide-purchaser provision is intended, instead, to cover situations in which post-lease events lead to a violation of the MLA; it shields innocent purchasers from being penalized based on the bad acts of prior leaseholders. *See* S. Rep. No. 86-754, at 3 (1959) (Section 27(h) enacted to "protect[ ] bona fide purchasers who have acquired and hold such leases in good faith from the consequences of a possible violation of some provision of the leasing act by a predecessor in title."). Section 27(h) says nothing about cancellation for violation of any other statute. So where, as here, the Secretary cancels a lease due to violations of NEPA and the NHPA prior to issuance, the bona-fide-purchaser provision does not limit the Secretary's authority.

Accordingly, *Boesche* not only forecloses Solenex's narrow reading of the Secretary's lease-cancellation authority, *see* Part I.A, *supra*, but also its argument that Sections 31 and 27(h) of the MLA bars cancellation of the Lease.[5]

[5] Sections 31 renders leases subject to cancellation based on post-leasing factors and Section 27(h) for violations of the MLA. As Solenex acknowledges, the Secretary did not rely on any post-issuance violation or lack of compliance to cancel the lease. *See* Pl.'s Mem. at 20–22. So Solenex's application of those factors to the lease's cancellation is not relevant here.

C. 43 C.F.R. § 3108.3 codifies, but does not establish, the Secretary's authority

Solenex's argument that the Secretary lacked authority to cancel the Lease because 43 C.F.R. § 3108.3 post-dated the Lease, Pl.'s Mem. at 25–27, meets the same fate. That regulation—which, as Solenex observes, issued in 1983—provides that "[l]eases shall be subject to cancellation if improperly issued." 43 C.F.R. § 3108.3(d). But the Secretary's general authority does not derive from the regulation. As *Boesche* acknowledged, the Secretary's authority to cancel a lease for pre-lease invalidity and to correct the mistakes of her predecessors derives from her "general managerial powers over the public lands." *Boesche*, 373 U.S. at 476 & n.6, 478. Because that authority is Congressionally granted and acknowledged well before the regulation issued, the Secretary could not—and did not—*assume* that authority or confer it on herself through enactment of this regulation, as Solenex suggests. *See* Pl.'s Mem. at 26. Rather, the regulation merely codified BLM's exercise of the Secretary's inherent power to cancel a lease that issued without observance of law. *See* 48 Fed. Reg. 33,648, 33,655 (July 22, 1983).

Even if the Secretary's broad cancellation authority flowed from the regulation rather than the broad managerial powers recognized in *Boesche*, however, the fact that the regulation was enacted after the Lease was issued makes no difference here. The Lease was issued "subject to the provisions of the Mineral Leasing Act and subject to all rules and regulations of the Secretary of the Interior *now or hereafter in force*," so long as "not inconsistent with any express and specific provisions" of the Lease. ECF No. 45-9 at 19 (HC 00884) (emphasis added). Solenex has not identified any express term of the Lease inconsistent with the Secretary's exercise of her cancellation authority.

The specific language of the Lease also distinguishes this lease from the one at issue in *Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 616, (2000), which Solenex invokes for the proposition that only regulations in effect at the time of a lease's issuance are

incorporated into its terms. *See* Pl.'s Mem. at 26. In *Mobil Oil*, the Supreme Court determined that the specific language of that lease rendered it subject to "then-existing regulations and to certain future regulations" issued pursuant to a specific statute—not statutes passed after the lease was issued, or regulations promulgated subject to those later-passed statutes. *Mobil Oil*, 530 U.S. at 615–617. By contrast, the language of the Lease makes clear that it is subject to regulations existing at the time the lease was issued "or hereafter in force." ECF No. 45-9 at 19 (HC 00884).

Finally, Solenex has offered no applicable authority for the proposition that the regulation "must have a narrower scope" than the Secretary interprets it to have. Even were the regulation ambiguous—which Solenex does not argue—the Secretary's interpretation merits deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). The sole decision on which Solenex relies for that proposition, *Appeal of Superior Timber Co.*, IBCA No. 3459, 97-1 BCA ¶ 28736, does not suggest otherwise—or even address the regulation, or the Secretary's interpretation, at all.

D. The Secretary had authority under the Lease to cancel it

Solenex next argues that the government, as a party to the lease as a contract, has not demonstrated that the Lease was voidable under contract principles and, in any event, the Secretary waived the ability to void the Lease by "repeatedly reaffirm[ing]" its legality and failing to do so "within a reasonable time." *See* Pl.'s Mem. at 27–31. As explained *supra* Part I.A, the Secretary's authority to cancel the Lease is grounded not in contractual principles but in the Secretary's "general powers of management over lands in the public domain" as granted by Congress. *Boesche*, 373 U.S. at 476. And here, the Secretary found that the Lease was voidable not under contract principles, but because it issued without compliance with NEPA and the NHPA. ECF No. 116-7 at 49–54 (SUPP.AR000391–96).

In arguing that the Secretary needed—and did not have—contractual authority to cancel the Lease, Solenex is effectively arguing that the Secretary's cancellation of the Lease constitutes breach of that contract.[6] But Solenex has not brought a claim for breach of contract or a claim that the Secretary deprived the company of constitutionally protected property rights. Nor could it under the APA: to make such a claim, Solenex would need to proceed under the Tucker Act, 28 U.S.C. § 1491, or the Little Tucker Act, 28 U.S.C. § 1346.

Even had it brought such a claim, as explained *supra* Part I.D, the Secretary's cancellation of the Lease for being improperly issued complied with its terms, which incorporated 43 C.F.R. § 3108.3(d). *Griffin & Griffin Expl., LLC v. United States*, in which the plaintiffs asserted a breach-of-contract claim and raised arguments similar to Solenex's, supports this result. 116 Fed. Cl. 163, 172–73 (2014). Citing *Boesche*, the Court of Claims concluded that BLM's "subsequent cancellation of the leases was not a breach of the contract" because the leases incorporated the Secretary's cancellation authority as codified in 43 C.F.R. § 3108.3(d). *Griffin & Griffin*, 116 Fed. Cl. at 176. So too here.

Finally, because the Secretary did not rely on contractual authority to cancel the Lease, Solenex's arguments that the Secretary lost such authority because of the passage of time and Solenex's alleged reliance, Pl.'s Mem. at 30–31, are inapposite. And to the extent Solenex asserts them under the APA, they are foreclosed by the Court of Appeals's conclusions that "delay itself does not render agency action unlawful"; that, "from the Lease's inception, the various leaseholders, including Solenex, were aware that the NEPA and Historic Preservation Act analyses would be necessary prior to any surface-disturbing activity"; and that "[t]he Secretary adequately

[6] Solenex's argument on this front relies solely on contractual principles, and does not invoke review under the APA. *See* Pl.'s Mem. at 27–31.

considered and addressed [Solenex's] reliance interest in the cancellation decision." *Solenex III*, 962 F.3d at 527–30.

E. Solenex is not a bona fide purchaser for value

As its final argument, Solenex contends that the Secretary exceeded her authority in canceling the Lease because it is a bona fide purchaser for value. But even if the bona fide purchaser protections of 30 U.S.C. § 184 or 43 C.F.R. § 3108.4 applied to situations in which the Secretary cancels a lease for failure to comply with NEPA and the NHPA, they do not apply here because Solenex is not a "bona fide purchaser." A bona fide purchaser is one who has "acquired his interest in good faith, for valuable consideration, and without notice of" any alleged defects in the lease. *Winkler*, 614 F.2d at 711 (quoting *Sw. Petroleum Corp. v. Udall*, 361 F.2d 650, 656 (10th Cir. 1966)). Solenex is not a bona fide purchaser for two reasons: (1) it had notice of the legal issues surrounding the Lease at the time of acquisition, and (2) it did not provide valuable consideration for the Lease.

1. Solenex had notice of the Lease's legal infirmities

When it acquired the Lease in 2004, Solenex had notice—constructive, if not actual—that the Lease was issued without complying with NEPA and the NHPA. A purchaser has actual notice of information that "a person actually knows or could discover by making a reasonable investigation," *Perry v. O'Donnell*, 749 F.2d 1346, 1351 (9th Cir. 1984), and constructive notice when "facts are sufficient to put an ordinarily prudent man on inquiry, an inquiry which, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property," *Sw. Petroleum Corp*, 361 F.2d at 657.

BLM issued the Lease in 1982 to Mr. Longwell, who in turn assigned it to Fina Oil and Chemical Company in 1983. ECF No. 116-7 at 42–43 & n.1 (SUPP.AR000384–85). Fina held the

Lease until July 1, 2000, when it assigned its interest back to Mr. Longwell. *Id*. But Mr. Longwell retained involvement with the Lease because he reserved a percentage of the value of all oil and gas produced on the Lease. ECF No. 89-2 ¶ 22. And he received notice—actual or constructive—of the Lease's failure to comply with NEPA during this period.

For example, the IBLA set aside BLM's 1985 decision approving the APD and remanded the case to BLM. ECF No.116-7 at 44 (SUPP.AR000386). On October 1, 1985, at the lessee's request and because of the legal challenge, lease operations were suspended. *Id.* That suspension was never lifted. BLM subsequently issued the 1991 APD ROD and then the 1993 APD ROD, each approving the APD and determining that the Lease remained valid. But those approvals specifically premised their findings that the Lease remained valid on the lack of any litigation challenging the NEPA analysis for the Lease and any administrative action taken against the Lease.[7] ECF No. 45-5 at 16–17 (FS002169–70) (1991 APD ROD); ECF No. 45-6 at 22 (FS002316) (1993 APD ROD). Both decisions were challenged. ECF No. 116-7 at 45 (SUPP.AR000387). Three months after the 1993 APD ROD was issued, several plaintiffs filed the *National Wildlife Federation* action in U.S. District Court for the District of Montana and specifically asserted, among other things, that BLM violated NEPA by failing to complete an EIS before issuing the Lease. *See* No. 4:93-cv-44 (D. Mont. filed April 14, 1993). While neither Mr. Longwell nor Fina were named defendants in the lawsuit, a reasonable lessee would have been

[7] Solenex's arguments elsewhere in its brief—that Solenex *and its predecessors* incurred costs in reliance on these agency decisions approving the APD, *see* Pl.'s Mem. at 42–43—further demonstrates that Solenex and Mr. Longwell were aware of the contents of BLM's NEPA documents for the Lease, including those issued between 1983 and 1999 during the assignment to Fina. It also demonstrates that Mr. Longwell and Solenex were aware of the 1993 APD ROD in particular, and its lengthy explanation of the NEPA issues surrounding the Lease.

aware of a lawsuit challenging the validity of its lease.[8] At the very least, this action—which was never resolved—alerted Fina and Mr. Longwell that the Lease was in jeopardy. Mr. Longwell was also aware of these potential deficiencies, actually or constructively, when he assigned the Lease to Solenex—a company that he incorporated and managed. ECF No. 89-2 ¶¶ 68, 73.

Solenex cannot reasonably claim not to possess Mr. Longwell's knowledge of the Lease's defects. Indeed, the filings in this case demonstrate that Mr. Longwell and Solenex were essentially the same entity: Mr. Longwell was the manager and sole voice of Solenex in its correspondence with the government, and Solenex had no other employees at the time of cancellation. ECF No. 77-1 at 2 (Mr. Longwell is "the Manager of Solenex" and "Solenex has never had any employees."); ECF No. 24-2 at 36 (Mr. Longwell estimates "that Solenex and I have spent over $35,000 in seeking to develop the lease."); ECF No. 115-12 at 20 (FS002935); (correspondence by Mr. Longwell on behalf of Solenex); *id.* at 21–22 (FS002947–48) (same).

Furthermore, at the time Mr. Longwell assigned the lease to Solenex, it was and remained a matter of public record that the Secretary had not completed an EIS prior to lease issuance and that such an action was required under the precedent of the District of Columbia and Ninth Circuit Courts of Appeals. *Sierra Club*, 717 F.2d at 1415; *accord Bob Marshall All.*, 852 F. 2d at 1227; *Conner*, 848 F.2d 1451. The agencies acknowledged that these cases raised questions about the validity of the Lease in various NEPA documents related to the Lease, including the 1991 APD ROD and the 1993 APD ROD. *E.g.*, ECF No. 45-5 at 15–16 (FS002168–70); ECF No. 45-6 at 21–22 (FS002315–16). And BLM's records included information regarding the 1993 lawsuit, as well

[8] Though Solenex argues that it and its predecessors were entitled to rely on BLM's approval of the APD in 1985, *see* Pl.'s Mem. at 34, the lawsuit challenging the BLM's 1993 APD ROD post-dates that alleged reliance and predates the assignment of the lease to Solenex in 2004.

as substantial correspondence with Mr. Longwell regarding NEPA issues. *See, e.g.*, ECF No. 115-12 at 18 (FS002829). Thus even if Solenex or Mr. Longwell somehow lacked actual knowledge of the lawsuit, they had constructive knowledge because "assignees of federal oil and gas leases who seek to qualify as bona fide purchasers are deemed to have constructive notice of all of the BLM records pertaining to the lease at the time of the assignment." *Winkler*, 614 F.2d at 713.

Mr. Longwell and Solenex would also have been aware of NHPA deficiencies in the Lease because BLM specifically extended its suspension in 1995 and again in 1998 to allow the Forest Service to complete its historic property review and consultation under the NHPA for the APD—a consultation process that had not been completed before the Lease was issued. ECF No. 116-7 at 45 (SUPP.AR000387). In addition, BLM's records contained substantial correspondence with Mr. Longwell regarding NHPA issues. *See, e.g.*, ECF No. 115-12 at 18 (FS002829); ECF No. 115-12 at 12–13 (FS002765–66) and 17 (FS002814). So both Mr. Longwell and Solenex were well aware that the Lease potentially suffered from NHPA deficiencies, as well.

Solenex's two arguments to the effects that, despite all of this information possessed by Mr. Longwell and available to Solenex when it acquired the Lease, it is still entitled to bona fide purchaser protections lack merit. First, it contends that it is entitled to such protections because "its predecessor," Fina, was a bona fide purchaser. Pl.'s Mem. at 33. But Solenex received the Lease from Mr. Longwell, not Fina. ECF No. 116-7 at 42 n.1 (SUPP.AR000384). And Mr. Longwell was not a bona fide purchaser when he received the Lease from Fina in 1999 because he was indisputably on notice that no EIS was prepared before the Lease was issued. Nor does he

appear to have purchased the Lease *for value* from Fina.[9] Solenex's reliance on *Home Petroleum Corp.*, 54 IBLA 194, 213–14 (1981), and Justice Kennedy's dissent in *United States v. Parcel of Land, Bldgs., Appurtenances & Improvements, Known as 92 Buena Vista Ave., Rumson, N.J.*, 507 U.S. 111, 142–43 (1993), are thus unavailing.

Nor has Solenex supported its argument that only notice of a title defect would prevent it from being a bona fide purchaser. Pl.'s Mem. at 33–34. The sole case Solenex cites for that proposition holds no such thing—it simply addressed a situation where one party claimed bona fide purchaser status in a dispute over title. *See Sw. Petroleum Corp.*, 361 F.2d at 657. But the bona fide purchaser provision of the MLA, which formed the basis for the protected addressed in that case, protects the "title *or interest* of a bona fide purchaser" even if "the lease . . . may be . . . subject to cancellation" for violation of the MLA. 30 U.S.C. § 184(h)(2). That provision is not limited to a defect in title; and Solenex had notice that the Lease was "subject to cancellation"—albeit for violation of NEPA and the NHPA.

2. Solenex did not pay valuable consideration for the Lease

Second, even if it lacked notice, Solenex cannot be a bona fide purchaser because it did not pay valuable consideration for the Lease. It does not even attempt to establish this element of the bona fide purchaser standard, other than to erroneously contend that the element is undisputed. *See* Pl.'s Memo at 33 (contending, incorrectly and without support, that no dispute exists as to whether Solenex acquired the lease for valuable consideration). Nor can it.

[9] Mr. Longwell's declaration, on which Solenex relies for the proposition that Fina purchased the lease for value, does not indicate that he paid Fina to reacquire the lease. *See* ECF No. 24-2 at 33–34 (Longwell Decl. ¶¶ 7–8).

Mr. Longwell assigned the Lease to Solenex. ECF No. 89-2 ¶ 73. It paid no valuable consideration in exchange for the assignment. *See id.* Where a plaintiff has not provided any valuable consideration in exchange for a lease, the rationale for the bona fide purchaser protection does not apply. The protection is intended to prevent innocent investors and operators from falling victim to the bad acts of prior leaseholders, thereby losing out on the consideration they put forward in exchange for the lease. *See Winkler*, 614 F.2d at 711. Here, Solenex has no such consideration to lose. Nor can Solenex stand in the shoes of Fina in this, given that Fina paid its consideration *to Mr. Longwell*, Solenex's creator and owner at the time it acquired the lease. Under the company's logic, a lessee could manufacture bona-fide-purchaser protection by assigning the lease to a shell company "for value" and then directing the company to reassign it back to the original leaseholder who, in turn, assigns it to his own company. Solenex does not (and cannot) cite any case allowing a lessee to shield itself in this manner.

Simply put, Solenex is attempting to invoke the shield of the bona fide purchaser protection despite the fact that Mr. Longwell was the original lessee and has remained aware of and involved with the Lease from its inception through its cancellation. This Court should not allow Solenex to abuse the protections of Section 27(h) at the expense of the public's and the Tribe's strong interest in protecting irreplaceable resources within the leased area. Accordingly, Solenex is not entitled to bona-fide purchaser protections.

II. The Secretary's decision to cancel the Lease was not arbitrary or capricious

Solenex next takes aim at the Secretary's cancellation decision, arguing that it was arbitrary and capricious or not in accordance with law under the APA. *See* 5 U.S.C. § 706(2)(A). An agency's decision may be arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the

problem," or its decision "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs.*, 463 U.S. at 43. Solenex asserts each of these bases and, further, argues that the Secretary's decision cancelling the Lease was not in accordance with law because the original lease issuance did not violate NEPA or the NHPA.

But this standard of review is "narrow and a court is not to substitute its judgment for that of the agency." *Id.* at 43. "To survive review under the 'arbitrary and capricious' standard, an agency must 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *PPL Wallingford Energy,* 419 F.3d at 1198 (quoting *Motor Vehicle Mfrs.,* 463 U.S. at 43). A reviewing court "will uphold [an agency's] findings, though of less than ideal clarity, if the agency's path may be reasonably discerned . . . ." *WildEarth Guardians*, 741 F. Supp. 2d at 97 (quoting *Hall,* 864 F.2d at 872) (alterations in original). The Secretary's decision to cancel the Lease and disapprove the APD satisfy this standard. The decision was in accordance with law because the Lease was issued without compliance with NEPA and the NHPA. And it was not arbitrary or capricious on any of the grounds Solenex asserts.

A. The Secretary's decision to cancel the Lease was lawful because the Lease was legally infirm

The Secretary grounded her decision to cancel the Lease in the fact that it issued without full compliance with both NEPA and the NHPA. *See* ECF No. 116-7 at 49–55 (SUPP.AR000391–97). Solenex challenges this decision, arguing that the agencies did comply with NEPA and the NHPA before issuing the Lease and that the Secretary failed to account for important aspects of the problem or accounted for considerations that Congress did not intend. As explained below, however, the Secretary's decision was "in accordance with law," 5 U.S.C. § 706(2)(A), and should be upheld.

1. The Lease was not issued in compliance with NEPA

The Secretary concluded that the Lease should be cancelled because it was improperly issued—and specifically because the agencies did not fully comply with NEPA's requirements before the Lease was issued, as the law requires. ECF No. 116-7 at 42–43 (SUPP.AR000384–85), 49–50 (SUPP.AR000391–92). This decision was well-reasoned and complied with the law.

The Lease's issuance failed to comply with NEPA because no EIS was prepared before the Lease was issued. The Secretary must prepare an EIS before issuing a mineral lease "if the [agency] chooses not to retain the authority to preclude all surface disturbing activities." *Sierra Club*, 717 F.2d at 1415; *accord Bob Marshall All.*, 852 F.2d at 1227; *Conner*, 848 F.2d at 1451. The Lease allowed surface occupancy subject to applicable lease stipulations, but did not explicitly prohibit surface-disturbing activities. *See* ECF No. 45-9 at 20 (HC 00885). The Secretary thus made an "irrevocable commitment to allow *some* surface disturbing activities . . . without fully assessing the possible environmental consequences." *Sierra Club*, 717 F.2d at 1414–15.

Solenex does not dispute that no EIS was prepared before the Lease was issued. Instead, it raises several other arguments—but none of them alters the fact that the Lease was issued without compliance with NEPA's requirements. First, Solenex contends that the 1980 EA prepared before the Lease was issued satisfied NEPA because it "acted as the functional equivalent of a full-blown EIS," Pl.'s Mem. at 49–50. But it has offered no authority for the proposition that an EA can satisfy the EIS requirement in this context. Neither of the cases on which Solenex relies for that proposition—*Spiller v. White*, 352 F.3d 235, 240–45 (5th Cir. 2003) or *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 683 (D.C. Cir. 1982)—addresses at all the NEPA process required before issuance of an oil or gas lease. And neither discusses whether the subject of the action—the decision to approve use of a pre-existing pipeline to transport petroleum products in *Spiller* or to approve a plan of operations for mineral drilling

on unpatented mine claims in *Cabinet Mountains*—constituted an irretrievable commitment of resources.

Even if preparation of an EA could have satisfied NEPA, the 1980 EA did not because it failed to meaningfully consider a no-leasing alternative. *Sierra Club,* 717 F.2d at 1415; *Bob Marshall All.*, 852 F.2d at 1230 (NEPA requires that alternatives, including a no-lease option, be given full and meaningful consideration). An agency is required to "include the alternative of no action" in its alternatives. 40 C.F.R. § 1502.14(d) (1978). But here, instead of considering a no-lease alternative, the EA's "no-action" alternative simply delayed recommendations on leasing. ECF No. 45-10 at 48. The EA explicitly considered this alternative as a "delay prior to implementation," *id.* at 62, and accordingly projected that the longer-term effects for that alternative would "probably be the same" as for the leasing alternatives, *id.* at 75. The EA accordingly never contemplated a circumstance under which no lease would issue. And such an alternative did not, as Solenex argues, "preserve[ ] the status quo" because, as explained *infra* Parts III.B and III.C, the area encompassed by the Lease was not developed.

Next, Solenex makes the curious argument that the Lease did not make the "irrevocable commitment of land to significant surface-disturbing activities" contemplated by *Conner v. Burford*, 848 F. 2d 1441, 1449, solely because the Secretary retains the right to cancel the Lease for failure to comply with the NEPA process. Pl.'s Mem. at 50–51 (quoting *Conner*, 848 F.2d at 1449). But Solenex has offered no authority to support this argument. Nor can it, because there is no tension in the Secretary's positions. An agency's NEPA obligations mature once it reaches a "critical stage of a decision which will result in irreversible and irretrievable commitments of resources to an action that will affect the environment." *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009) (internal citations and quotations omitted). In

the oil-and-gas leasing context, that point is when a lease is issued. *Id.* (quoting *Wyo. Outdoor Council v. U. S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir.1999)). The Secretary's authority to cancel a lease for the agency's failure to comply with NEPA obligations does not relieve the agency of the obligation to complete the NEPA process at the appropriate level and appropriate time.

Finally, Solenex suggests that the NEPA process conducted for the APD approvals cured the agency's failure to prepare an EIS before the *lease* was issued. Specifically, Solenex argues that the 1990 APD EIS corrected that deficiency in light of statements made in the 1991 and 1993 APD RODs that the agencies believed the requirements of *Conner* and *Bob Marshall Alliance* to be satisfied. Pl.'s Mem. at 51–52. This is wrong for four reasons.

First and foremost, the BLM's statements in the 1991 and 1993 APD RODs that the 1990 EIS cured any NEPA violation is not supported by the relevant caselaw, as explained above. Second, a subsequent NEPA analysis relating to an APD approval could not cure such a failure because NEPA requires the appropriate analysis to be conducted *before* the decision committing resources—here, before the Lease issued. *See Sierra Club*, 717 F.2d at 1414 ("[T]he appropriate time for preparing an EIS is prior to a decision, when the decisionmaker retains a maximum range of options."). Third, the 1990 EIS recognized that, under its no-action alternative, previously issued leases would remain in place and further APDs could be submitted and considered. Thus, the 1990 EIS's no-action alternative was not intended to—and could not—cure the failure of the 1980 EA to consider a no-action (that is, no-leasing) alternative. Finally, neither the 1991 APD ROD nor 1993 APD ROD were implemented. Rather, after numerous groups challenged the 1993 APD ROD on NEPA and other grounds in *National Wildlife Federation v. Robertson*, No. 4:93-cv-44 (D. Mont. filed April 14, 1993). , the Secretary suspended the 1993 APD ROD. BLM then continued the suspension of lease operations, which remained in place through the Lease's

cancellation. The agencies' suspended 1993 APD ROD, and its conclusion that the Lease was properly issued, therefore, does not represent the final official position on the part of the Secretary. Rather, the Secretary has now made a final determination that the legal defects associated with the original lease decision have not been corrected, and that the Lease is voidable.[10]

In short, the agencies did not comply with NEPA before the Lease was issued. No subsequent actions have cured that failure. Accordingly, the Secretary's decision cancelling the Lease for failure to comply with NEPA before issuance was not arbitrary or capricious and complied with the law.

2. The Lease was not issued in compliance with the NHPA

The Secretary further concluded that the Lease should be cancelled because it was improperly issued for failure to comply with the NHPA prior to its Issuance. ECF No. 116-7 at 42–43 (SUPP.AR000384–85), 51–52 (SUPP.AR000393–94). This decision was also well-founded and complied with the law. Issuance of the Lease violated NHPA because the NHPA process and consultation were not completed prior to the decision to issue the Lease.

The NHPA requires agencies to evaluate and account for the effects of "undertakings" on historic properties.[11] 54 U.S.C. § 306108. It mandates that cultural impacts must be considered "prior to" the undertaking. *Id.*; *see also Sheridan Kalorama Hist. Ass'n v. Christopher*,

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[10] Solenex also invokes the FONSI prepared in support of the 1987 APD decision, in which the agencies stated their belief that *Conner* and *Bob Marshall Alliance* were satisfied. That statement also did not represent the final agency position and was not supported by the relevant caselaw.

[11] Solenex contends that the lease itself did not "authorize significant surface disturbance" or "itself impact historic properties," Pl.'s Mem. at 53, but does not dispute that issuance of an oil and gas lease constitutes an "undertaking" for NHPA purposes, as courts have routinely held. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006); *Mont. Wilderness Ass'n*, 310 F. Supp. 2d at 1152. And as explained *supra* Part II.A.1, the lease did not preclude all surface disturbing activities and authorized surface occupancy.

49 F.3d 750, 754 (D.C. Cir. 1995) ("Section 106 requires each federal agency to 'take into account the effect of [a proposed] undertaking' upon historic properties . . . prior to the agency's funding or licensing it."); *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."). But here, the Forest Service failed to consult with the Blackfeet Tribe, as required by the NHPA, to locate, record, and evaluate cultural resources and sites before the Lease was issued.

Specifically, the NEPA analysis for the leasing action included some tribal consultation to comply with the American Indian Religious Freedom Act ("AIRFA"), but improperly deferred the NHPA consultation process. Though the Forest Service recognized in the 1980 EA that "[s]urface disturbing operations associated with oil and gas activities may have an impact on cultural resources," it determined that compliance with the NHPA and AIRFA "will be required at the time soil disturbing activities are proposed," not at the leasing stage. ECF No. 45-10 at 71. An agency's failure to engage in a reasonable and good faith effort to identify historic properties of religious and cultural significance prior to lease issuance is a violation of the NHPA. *See Pit River Tribe*, 469 F.3d at 787 (agency "violated NHPA by failing to complete the necessary review before extending the leases").

Solenex argues that such phased compliance did not violate the NHPA because it was authorized by NHPA regulations. *See* Pl.'s Mem. at 53. But the regulations on which Solenex relies for the proposition that "NHPA compliance can occur in stages"—36 C.F.R. § 800.1(c)—did not issue until 2000. *See* 65 Fed. Reg. 77,698, 77,726 (Dec. 12, 2000). And it only permits the agency official to "authoriz[e] nondestructive project planning activities before completing compliance with section 106" insofar as those actions "do not restrict the subsequent consideration

of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties." 36 C.F.R. § 800.1(c). The regulations in place at the time the decision was rendered, to the contrary, required that "[a]s early as possible before an agency makes a final decision concerning an undertaking . . . the Agency Official shall take the following steps to comply with the requirements of Section 106 . . . ." 36 C.F.R. § 800.4 (1979).

Solenex is likewise incorrect when it argues that the version of the NHPA in force at the time the Lease was issued did not require consultation with the Blackfeet Tribe. *See* Pl.'s Mem. at 54–55. At that time, 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 significance to tribes. *Wilson v. Block*, 708 F.2d 735, 754 (D.C. Cir. 1983). The 1980 amendment to the NHPA provided that federal agencies would approach the Act's goals "in partnership with the States, local governments, *Indian tribes*, and private organizations and individuals . . . ." 16 U.S.C. § 470-1 (1980) (emphasis added).

The NHPA regulations in force at the time also provided for consultation with the Blackfeet Tribe. Specifically, they provided that the agencies "shall consult" with the SHPO "and other individuals or organizations with historical and cultural expertise," which would necessarily include the tribe that considered the area one of cultural and religious importance, "to determine what historic and cultural properties are known to be within the area of the undertaking's potential environmental impact." 36 C.F.R. § 800.4(a)(1) (1979). And they provided that the agencies "should seek assistance from the public including . . . *federally recognized Indian tribes* in evaluating National Register and eligible properties, determining effect, and developing alternatives to avoid or mitigate an adverse effect." 36 C.F.R. § 800.15 (1979) (emphasis added).

Finally, Solenex suggests that the Lease's issuance did not violate the NHPA because a cultural inventory conducted in the early 1980s, in connection with the APD," found no significant evidence of the presence of cultural resources."[12] Pl.'s Mem. at 53–54. But that survey did not relieve the agency of the responsibility to complete the NHPA process *prior* to issuing the Lease. In any event, any reliance on cultural inventories and surveys conducted in connection with Solenex's APD *after* the Lease was issued must necessarily also extend to the ACHP's determination that the TCD as a whole was eligible for listing on the National Register, *see* ECF No. 115-12 at 177–79 (FS0006462–64), and the 2012 ethnographic survey underlying the Forest Service's decision establishing the APE for the APD, *see* F2-0060, FS005608—which, as explained in detail *infra* Parts III.A and III.B, support the existence of cultural resources in the lease area that would be adversely affected by Solenex's drilling proposal.

[12] While the 1983 cultural resources inventory contracted and paid for by Fina found "[n]o cultural resources" within the boundaries of the APD, ECF No. 45 at 18 (FS00022), the subsequent 1984 and 1985 surveys and addenda to the 1983 report did find several cultural sites, including one that overlapped one of the proposed alternative access routes to the Fina drill site. *E.g.*, 0170 (11788 (Disc 3)) at 011802–05. Later ethnographies and surveys—including a subsequent 1988 survey, FS 2022 Supp. 00001 at 2002 Supp.00006, and the 2012 ethnographic survey, F2-0060, FS005608—also documented the cultural and spiritual importance of the area to the Blackfeet Tribe, as did the agency's NEPA analyses both before and after the Lease issued. The 1980 EA itself indicated that the area ECF No. 45-10 at 44–45 (acknowledging in 1980 that the area "continue[d] to be of spiritual importance to the Blackfeet People."); ECF No. 45-5 at 13–14 (FS002166–67) (acknowledging in 1990 that "the area is used by some members of the Blackfeet Tribe for religious purposes . . . ."). This importance should have prompted the agencies to consult with the Tribe to document and evaluate the importance prior to the Lease's issuance. And the agency's finding findings highlight the importance of full NHPA compliance and consultation as well as the inadequacy of the agency's compliance and consultation efforts prior to the Lease's issuance. Though the Tribe once expressed a preference for identifying areas of such importance "on a project-by-project basis," ECF No. 45-10 at 45, this does not absolve the agencies of their legal obligations under NHPA or AIRFA.

In sum, because the agency failed to comply with the NHPA before the Lease was issued, the Secretary's decision to cancel the Lease was not arbitrary and capricious and was made in accordance with the law.

B. The Secretary's decision was not otherwise arbitrary or capricious

In addition to arguing, incorrectly, that the leasing decision complied with both NEPA and NHPA, Solenex challenges the Secretary's decision to cancel the Lease as arbitrary and capricious on three other grounds. Specifically, Solenex argues that, in rendering the decision to cancel the Lease, the Secretary: (1) relied on factors that Congress did not intend; (2) failed to consider important aspects of the problem; and (3) failed to reasonably explain a change in position. Solenex is wrong on all three counts.

1. The Secretary did not rely on factors unintended by Congress

Solenex argues that the Secretary's decision to cancel the Lease was arbitrary and capricious because it was based "primarily on predicted impacts to the TCD" and on legal and policy developments post-dating the Lease's issuance. Pl.'s Mem. at 37–38. This argument misconstrues and mischaracterizes the Secretary's decision.

Specifically, the Secretary based the decision that the Lease was "improperly issued and . . . voidable" on the fact that the agencies authorized and issued the Lease "without properly complying with NEPA and NHPA." ECF No. 116-7 at 49–50 (SUPP.AR000391–95). The Secretary then analyzed whether subsequent administrative procedures—including the 1985 APD EA, the 1986 EIS and Record of Decision for the Lewis and Clark National Forest Plan, the 1990 APD EIS, the 1991 APD ROD, and the 1993 APD ROD—had corrected those errors and concluded that they had not. ECF No. 116-7 at 53–54 (SUPP.AR00395–96). Because the Secretary concluded that the errors had not been corrected, the Lease remained voidable. *Id.*

The Secretary *then* had to determine whether corrective action could be taken to validate the Lease. At that point, the Secretary appropriately considered the developments subsequent to the Lease's issuance that Solenex invokes, including Congress's prohibition on oil and gas leasing in the Badger-Two Medicine area and the impacts to the TCD. *Id.* at 54 (SUPP.AR000396). The Secretary thus did not base her decision that the Lease was voidable on any factor post-dating the Lease's issuance; she considered later developments only in the proper course of determining whether corrective action could be taken as of 2016.

The Secretary's decision must be read as a whole, and so reading it undermines Solenex's efforts to cherry pick language from different sections of the decision to support its argument. For example, Solenex invokes the Secretary's introductory statement that, "having re-examined the conditions under which Lease No. MTM53323 was approved, and subsequent factual and legal developments concerning the Badger-Two Medicine area, the BLM finds that Lease No. MTM53323 was improperly issued" in support of the proposition that the Secretary improperly considered subsequent developments in determining whether the Lease was validly issued. Pl.'s Mem. at 36 (citing ECF No. 116-7 at 43). But a review of the Secretary's reasoning demonstrates that the Secretary invoked subsequent developments only in (1) a recitation of the factual background of the decision; (2) evaluating whether the legal violations had been corrected—and determining that they had not; and (3) evaluating whether corrective actions could be taken *in 2016* to validate the Lease—and determining that they could not, ECF No. 116-7 at 44–48 (SUPP.AR000386–90) and 53–54 (SUPP.AR000395–96).

Similarly, Solenex's contentions that "the Secretary based the Cancellation Decision primarily on predicted impacts to the TCD," Pl's Mem. at 37, ignores that discussion's context. For that proposition, Solenex cites the factual background section—ECF No. 116-7 at 47–48

(SUPP.AR000389–90)—and the Secretary's analysis of whether corrective action could be taken—*id.* at 54 (SUPP.AR000396). The same holds true for the Secretary's discussion of Congress's withdrawal of the Badger-Two Medicine area from oil and gas leasing. It was mentioned in her summary, *id.* at 43 (SUPP.AR000385), which Solenex cites, Pl.'s Mem. at 38, but only factored into the determination of whether corrective action could be taken in 2016, ECF No. 116-7 at 54 (SUPP.AR000396)—not the decision that the lease was invalid when it issued.

Finally, for the reasons explained *supra* Part II.A, Solenex is simply incorrect when it argues that the Lease was issued in 1982 "in full compliance with NEPA and NHPA as those statutes then stood." Pl.'s. Mem. at 37. As a result, the Lease was not a "valid existing right" when the 2006 Tax Act withdrew the Badger-Two Medicine area from operation of the mining law. To fall within the "valid existing rights" of § 403(b)(1), the Lease needs to have been valid—and, as the Secretary reasonably explained, relying on the appropriate factors, it was not.

2. Plaintiff has not identified aspects of the problem that the Secretary was required to consider but did not

Solenex next argues that, in rendering her decision to cancel the Lease, the Secretary failed to account for three "important aspects" of the problem. As explained below, the Secretary was not required to account for the considerations that Solenex raises. But even if she were, any such failure is harmless. None of the allegedly important aspects of the problem that Solenex invokes could change the fact that the Lease was issued without complying with NEPA and the NHPA. So even had the Secretary considered them, they could not change the outcome and so would not warrant relief. *Cf. Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 830 F.3d 552, 568 (D.C. Cir. 2016) ("If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration[.]" (citation omitted))

a) Reliance interests

Solenex focuses this portion of its argument on the contention that the Secretary failed to consider Solenex's reliance interests. Pl.'s Mem. at 41–42. But Solenex has already raised and lost this argument. In granting summary judgment to Solenex, this Court concluded that Federal Defendants' "failure here to consider plaintiff's reliance interests" when making the decision to cancel the Lease rendered that decision "arbitrary and capricious agency action." *Solenex II*, 334 F. Supp. 3d at 184. The Court of Appeals reversed that decision in part on the basis that "the Secretary did consider, and in fact compensated, Solenex's identified reliance interests." *Solenex III*, 962 F.3d at 522. In doing so, the Court of Appeals acknowledged that "the reliance interests that Solenex flag[ged]," and specifically the $35,000 in rental payments identified by Mr. Longwell in an affidavit, *see* ECF No. 24-2 at 36; ECF No. 45-9 at 30, "were, in fact, specifically considered and addressed by the Secretary." *Solenex III*, 962 F.3d at 529.

Solenex now argues that the Secretary failed to account for *other* reliance interests it allegedly accrued in rendering her decision. Specifically, it invokes a $10,000 bond and the unidentified cost of sending members and attorneys to participate in the NHPA consultation process, which it allegedly expended in reliance on the Secretary's approvals of the APD between 1985 and 1993. Pl.'s' Mem. at 42–43. As an initial matter, this argument is foreclosed by Solenex's express disavowal to the Court of Appeals of any reliance interests beyond that $35,000 in rental payments.[13] *See Solenex III*, 962 F.3d at 530. But even were it not, the Court of Appeals has also

[13] Notably, these costs were in the record well before the Court of Appeals rendered its decision. Furthermore, though Solenex suggests that it cost some $3,500 for one individual to attend the NHPA consultation meetings, the documents on which Solenex relies indicates that its member expended only $976.85 in that pursuit, with the remainder constituting travel expenses to Washington, D.C. to attend court proceedings in this case. *See* ECF No. 77-3.

called into question the reasonability of any reliance interests raised by Solenex on its own behalf as, for the twenty-one years preceding the Lease's cancellation—and since well before Solenex acquired it—"the Secretary had asserted the power to cancel leases that were improperly issued." *Solenex III*, 962 F.3d at 530 (citing 48 Fed. Reg. at 33,674). And Solenex was on notice, when it obtained the Lease, that "administrative appellants in the drilling proceedings raised substantial NEPA compliance issues" as early as 1985 and that the Lease had been suspended "for nineteen years by the time Solenex acquired it." *Id.*

And even if not foreclosed, the remaining interests that Solenex invokes—Mr. Longwell's personal expenses and Fina's expenditures—do not constitute reliance by *Solenex*, the plaintiff in this case.[14] *See* Pl.'s Mem. at 43. Even if they did, the Court of Appeals has already concluded that the agency "expressly addressed and offered redress" for the investment of funds made by prior owners of the Lease and identified in the record.[15] *See Solenex III*, 962 F.3d at 530. As the Court of Appeals acknowledged, the Secretary offered to refund the full sum that Solenex had, until its brief filed on December 21, 2021, identified as sums expended by Fina in reliance on the Lease. *Id.* at 530. And the Secretary explained why Solenex, as the Lease's current owner, was entitled to that $31,325 refund, but not interest on that amount. *See* ECF No. 116-7 at 54–55 (SUPP.AR000396–97).

Furthermore, the cases that Solenex invokes for the proposition that the agency was required to account for these newly-raised reliance interests are inapposite here. The reliance

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[14] That said, the fact that Solenex claims as its own the right to recoup reliance interests laid out by earlier owners of the lease severely undercuts its argument that it is a bona fide purchaser.

[15] Solenex flags a 1991 letter from Fina to Forest Supervisor D. Gorman ostensibly enumerating Fina's costs which was not included in the record, but (1) Solenex did not challenge its lack of inclusion, and (2) Solenex has not demonstrated an entitlement to recoup *Fina's* investments.

interests contemplated by *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2009), were those of parties subject to agency enforcement actions, who relied on the agency's previous interpretations of a key term in regulations in seeking to comply with regulations and avoid such actions. *Id.* at 222–23. Such interests are not implicated here. Nor *could* the Secretary have considered "any of the other ways in which the lessees relied on" earlier agency actions because Solenex did not raise them before the agency prior to the decision being rendered—as it was required to do. Solenex's reliance on *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1913–14 (2020), is likewise misplaced: there, the Court found that the agency had discretion not in deciding *whether* the DACA program was unlawful—it was bound by the Attorney General's determination in that regard—but in how to unwind the decision and, in that context, should have accounted for "serious reliance interests" in the form of individuals' reliance on not being deported. *Id.* at 1910, 1913 (citation omitted). And the Supreme Court did not find any change of position *at all*, let alone one that required accounting for reliance on its prior statutory interpretation, in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996).

Solenex then invokes then-Judge Kavanaugh's dissent in *Mingo Logan* that agencies must evaluate "the costs to the human beings impacted by [their] decision" alongside its benefits. Pl.'s Mem. at 44 (citing *Mingo Logan Coal Co v. EPA*, 829 F.3d 710, 732 (D.C. Cir. 2016) (Kavanaugh, J., dissenting)). But, as the majority in that case concluded, the agency could not have considered and justified those costs when revoking a permit because the permittee failed to detail its costs before the agency. *Mingo Logan Coal*, 829 F.3d at 723. The same is true here: the Secretary offered to refund the only costs that Solenex indicated to the agency—and, indeed, to this Court and the Court of Appeals—that it expended in reliance on the Lease's validity. Solenex's

failure to assert its new-found costs in reliance precludes a finding that the agency was arbitrary and capricious for failure to address them. *See Mingo Logan Coal*, 829 F.3d at 723 & n.7; *see also Solenex III*, 962 F.3d at 529 ("[T]he harm occasioned must be specifically identified, reasonably incurred, and causally tied to the delay." (citing *Mingo Logan Coal*, 829 F.3d at 722–723)).

Finally, the disposition of legal costs and fees related to this action, *see* Pl.'s Mem. at 43, is not a question of reliance on the *lease* but, instead, one under the Equal Access to Justice Act, which Solenex has already raised in a motion, *see* ECF No. 77, and which the Court has held in abeyance at Solenex's request, *see* ECF No. 78 and Order of June 6, 2016.

b) Solenex's other arguments

Solenex raises two other interests that it argues the Secretary should have considered. Neither renders the Secretary's decision arbitrary or capricious.

First, Solenex argues that the Secretary ignored Congressional encouragement of "private development of federal oil and gas resources" on public land. Pl.'s Mem. at 40–41. But Solenex has not explained how consideration of the general policy statements that it invokes could have altered the basis for the Secretary's validity determination—that issuance of the Lease failed to comply with statutory and regulatory requirements. *See Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1451 (D.C. Cir. 1988) ("Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action.") (citation omitted).

Solenex then argues that the Secretary was obligated to consider "her obligations to Solenex under principles of contract and property law." Pl.'s Mem. at 45. But Solenex has provided no authority for the proposition that a lease cancellation decision must address principles of contract and properly law. And as explained *supra* Part I.A, the Secretary's decision to cancel the

Lease was grounded not in principles of contract but in administrative authority granted by Congress and recognized by the Supreme Court to address pre-lease violations. Had Solenex wished to challenge the decision for violating contract principles, its appropriate recourse would be a claim against the Secretary under the Tucker Act, 28 U.S.C. § 1491, or the Little Tucker Act, 28 U.S.C. § 1346. It has brought no such claim.

3. The Secretary adequately explained any departure from earlier findings

Solenex's argument that the Secretary's decision to cancel the Lease constitutes an unexplained departure from a prior agency position meets the same fate. An agency's change in policy is not arbitrary or capricious when: (1) the agency "display[s] awareness that it *is* changing position," (2) the agency "show[s] that there are good reasons for the new policy," though they need not be "*better* than the reasons for the old one," (3) the agency "*believes*" the new policy "to be better," which can be demonstrated by "the conscious change of course,"; and (4) the "new policy is permissible under the statute . . . ." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Under this standard, a court may set aside, as "arbitrary or capricious," an agency's change in policy for which it did not "provide reasoned explanation . . . ." *Id.* The Secretary explicitly laid out a reasoned explanation for her decision to cancel the Lease, as well as any departure from earlier RODs for the APD, *see* ECF No. 116-7 at 53 (SUPP.AR000395), and so satisfied each of those requirements here.

As an initial matter, it is not even clear that the *Fox* factors apply to a case like this, where the Secretary cancelled a lease based on pre-lease factors. The Court in *Fox* addressed the FCC's change in its policy for enforcing the Communication Act of 1934's indecency ban—from permitting nonliteral, single use of certain words to declaring that such words could be "actionably indecent." 566 U.S. at 508–09. The Secretary's cancellation of the Lease is not such an

enforcement policy. But even if it were, it satisfies those factors. First, BLM "display[ed] awareness that it [was] changing position" by issuing the cancellation in the first place. *Id*. at 515. Second, this "conscious change of course adequately indicates" that the Secretary believed that vacating the Lease would be the better course. *Id.* Third, as explained *supra* Parts 1.A and II.A, cancelling the Lease because the agencies had not satisfied NEPA or the NHPA before it issued was "permissible under the statute." *Id.* Finally, the Secretary gave "good reasons for the new policy." *Id.* She explained that the Lease was voidable for failure to comply with NEPA and the NHPA, that those violations had not been corrected, and that corrective action was unavailable. ECF No. 116-7 at 48–54 (SUPP.AR000390–96). She also explained why the statements in the 1991 APD ROD and 1993 APD ROD to the effect that the 1990 EIS complied with NEPA were incorrect. *Id.* at 53 (SUPP.AR000395). The decision to cancel the Lease and disapprove the APD was thus not arbitrary or capricious.

Solenex does not even attempt to argue its position under the *Fox* factors. Instead, it ignores the Secretary's reasoned explanation and challenges the decision as a "sudden reversal of the agency's position" under "political pressure." Pl.'s Mem. at 47–49. For this proposition, Solenex relies heavily on the distinguishable case of *Texas Oil & Gas Corp. v. Watt*, 683 F.2d 427, 431 (D.C. Cir. 1982), in which the Department of the Interior promulgated a regulation authorizing mineral leasing on lands reserved for the military and accepted applications for such leases, but then rejected applications for leases that had been filed before the regulation went into effect. The Court of Appeals concluded that "the Secretary was mistaken in believing that he was required" to reject the applications under a regulation that required rejection "for any reason the land has not been made subject, or restored, to the operation of the public land laws" because the 1976 Federal Coal Leasing Amendments opened the lands in question to leasing. *Id.* at 431–32 (quoting

43 C.F.R. § 2091.1 (1981)). Here, as explained thoroughly *supra* Parts I.A and II.A, there was no such mistake of law: the Secretary exercised her authority to find the Lease voidable because its issuance did not comply with the law; and the Secretary reasonably concluded that the legal defects could not be cured in light of subsequent developments.

In *Watt*, the Court of Appeals also acknowledged that several Senators had engaged in "frequent and forceful communications" with the Secretary about the specific leases, and the subject of mineral leasing in general, but did not find any political influence that "could serve as evidence of improper motivation for an agency's action." *Id.* at 430, 434. The alleged political pressure that Solenex invokes likewise does not rise to that standard. "[P]olitical pressure invalidates agency action only when it shapes, in whole or in part, the judgment of the ultimate agency decisionmaker." *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220 (D.C. Cir. 2011). For political pressure to invalidate an agency action, Solenex "must demonstrate that political pressure was applied to the agency's decisionmakers" *and* "that the pressure caused those decisionmakers to rely on improper factors." *Connecticut v. U.S. Dep't of the Interior*, 363 F. Supp. 3d 45, 63–64 (D.D.C. 2019) (citations omitted). Here, Solenex has not even demonstrated that political pressure was applied. It invokes three actions: (1) Congressional action, Pl.'s Mem. at 47–48; (2) an interim action—continued suspension of the Lease—pending Congressional action, *id.*at 48 (citing ECF No. 45-6 at 34–35); and (3) a single telephone conversation in 1993—more than 20 years before the Lease was cancelled—concerning the interests of a Senator no longer in office when the decision was rendered, *id.* at 48, (citing ECF No. 114-1 at 39–40 (HC01183–84)). None of these actions constitutes "frequent and forceful communications," let alone demonstrates the application of political pressure on the decisionmaker. Nor does a letter from the former Forest Supervisor

describing discussions with the Blackfeet Tribe concerning the process for developing the TCD.[16] *See id.* at 48 (citing ECF No. 45-7 at 49–50). Even if they constituted political pressure, as explained *supra* Part II.B.1, Solenex has not demonstrated that the Secretary actually relied on improper factors.

Finally, Solenex also argues that "length of delay" and Solenex's alleged reliance interests should bear on this analysis. Pl.'s Mem. at 48–49. But, as explained *supra* Part B.II, the Court of Appeals has already rejected the argument that the length of time, alone, and any reliance by Solenex would render the Secretary's decision arbitrary or capricious. *See Solenex III*, 962 F.3d at 522.

III. The Secretary's decision to disapprove the APD approval was not arbitrary or capricious

As its final argument, Solenex contends that the Secretary's decision to disapprove the APD was arbitrary and capricious. As an initial matter, as thoroughly explained above, the Secretary's decision cancelling the Lease itself was not arbitrary or capricious and was in compliance with the law. A valid lease is a necessary precondition to an approved APD. *See* 43 C.F.R. § 3161.2 (providing that, "[b]efore approving operations on leasehold," Interior must "determine that the lease is in effect"). So once the Secretary determined that the Lease was invalid, the APD must of necessity be disapproved—and Solenex's arguments concerning its disapproval became moot.

[16] Solenex characterizes this letter as an effort by the former Forest Supervisor to "lobby" the Blackfeet Tribe to support a historic designation . . . ." Pl.'s Mem. at 48. Nothing in this letter is indicative of "lobbying," indicates any such purpose, or otherwise indicates that the process of designating the TCD was based on anything other than data and analysis.

But even if the Lease were valid, the Secretary's decision disapproving the APD was not arbitrary or capricious. The NHPA sets forth procedural requirements for federal agencies to "take into account the effect of [an] undertaking on any historic property." 54 U.S.C. § 306108. The NHPA, like NEPA, "is a 'stop, look, and listen' provision" that "requires federal agencies to take into account the effect of their actions" on locations "eligible for inclusion in the National Register of Historic Places." *Ill Com. Comm'n*, 848 F.2d at 1260–61. The ACHP administers the NHPA, *see* 54 U.S.C. § 306112, and has promulgated regulations to govern federal agency compliance with the NHPA Section 106 process, codified at 36 C.F.R. Part 800.

When engaging that process, the federal agency first determines the APE and identifies the "historic properties" within the APE that are listed or eligible for listing on the National Register. 36 C.F.R. § 800.4. The agency then evaluates the proposed undertaking's effects on those properties. 36 C.F.R. § 800.5. Finally, if an adverse effect is found, the agency considers measures to avoid, mitigate, or minimize those effects. 36 C.F.R. § 800.6. Solenex argues that the Forest Service erred at each step of this process. But the record clearly demonstrates that the Forest Service complied with the NHPA in designating the APE to identify and evaluate the historic properties; rendering its adverse effects determination; and considering mitigation options. Its compliance with the Section 106 process was not arbitrary or capricious.

A. The Forest Service complied with the NHPA in designating the APE

The "area of potential effects" is "the geographic area or areas within which an undertaking may *directly or indirectly* cause alterations in the character or use of historic properties," and "is influenced by the scale and nature of an undertaking" such that it "may be different for different kinds of effects caused by the undertaking." 36 C.F.R. § 800.16(d) (emphasis added). "Establishing an APE requires a high level of agency expertise, and as such, the agency's

determination is due a substantial amount of discretion." *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1091 (10th Cir. 2004) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)). The agency is also required to determine the APE "in consultation with" the SHPO and THPO. 36 C.F.R. § 800.4(a). Here, the Forest Service's decision designating the APE accounted for the different kinds of effects caused by the proposed drilling and was properly the product of the agency's expertise and consultation with the SHPO and THPO—not, as Solenex argues, a rubber stamp of others' interests.

The Forest Service made an initial APE determination for Solenex's APD in 2003, based on direct effects of the proposed drilling on the area—that is, ground disturbance as well as potential visual, audio, and olfactory effects. *See* H-0010, FS006374–84. In February 2014, the Forest Archaeologist acknowledged the 2003 APE boundary and rationale; updated it to include a quarter-mile buffer around the access route, H-0010, FS006370–72; and sought concurrence from the Montana SHPO and Blackfeet THPO, F3-0049, FS006016–17. Neither concurred, but both provided additional comments on the APE. *See* H-0013, FS006387 (SHPO); F1-0367, FS004829 (THPO).

Specifically, the SHPO indicated that the APE for the *direct* effects was "adequate," but "recommending that [the agency] consult with the Blackfeet on an indirect and cumulative effects APE." ECF No. 45-8 at 34 (FS004848). The Blackfeet THPO indicated that the contemplated drilling would have an adverse effect on the entire Badger-Two Medicine TCD because it adversely affects the power and spirituality of the entire district. As the THPO explained, the entire TCD "possesses spiritual and religious power for the Blackfeet," which "can be affected negatively by secular activity." ECF No. 45-8 at 34 (FS004848). After considering those comments and that position, which was supported in documented ethnographic information, as well as the National

Register eligibility determination, the Forest Archaeologist "recommended that the Solenex APE boundary should be expanded from the previously recommended APE to encompass the entire district."[17] ECF No. 45-8 at 34–35 (FS004848–49). As the Forest Service explained, those "adjustments were made in consultation with the THPO and the SHPO to reflect not just the direct effects, but the indirect and cumulative effects as well," and were made based on "new information gathered" since the original 2003 APE was determined, including a "recent ethnographic study and [the] expanded TCD boundary." ECF No. 45-8 at 15–16 (FS004774–75); *see also* ECF No. 45-8 at 34–35 (FS004848–49) (outlining rationale for expanding APE boundary). The Forest Service requested the concurrence of the SHPO and THPO on this APE determination on April 16, 2014. F3-0052, FS006020–21. Both concurred. H-0022, FS006461 (SHPO); H-0024, FS006465 (THPO).

Solenex challenges this decision as an "uncritical adoption" of the Tribe's position or as "outsourcing the determination of the APE to a third party . . . ." Pl.'s Mem. at 58–59. But, as explained above, the record demonstrates that the Forest Service, not the Tribe or any other third party, made the APE determination and that it provided a reasoned explanation for doing so. That it did so after consultation with the SHPO and THPO does not render the decision arbitrary or capricious—rather, it renders the decision compliant with the NHPA and its regulations, which require such consultation prior to making the final APE decision. *See* 36 C.F.R. § 800.4(a). Its

[17] It is unclear whether Solenex is suggesting that the APE should have been defined *at* the April 3, 2014 consultation meeting. *See* Pl.'s Mem. at 58 ("But [that] meeting *was not* to "define and explain the APE; the Forest Service had already determined the new APE."). Such an argument would run afoul of the NHPA regulations. It is not the consulting parties' role to "define" the APE; rather, that is the role of the agency, albeit through consultation with the SHPO and THPO. *See* 36 C.F.R. § 800.4(a). The meeting's agenda used the terms "define and explain" to indicate that the other parties would be informed about the current boundary and how it was developed.

reasoned explanation further distinguishes this case from *Illinois Public Telecommunications Ass'n v. FCC,* 117 F.3d 555, 564 (D.C. Cir. 1997), where the FCC dismissed data contrary to its own conclusions with an unexplained "[w]e disagree," and *Earth Power Resources, Inc.*, 181 IBLA 94, 110–11 (2011), where the BLM merely cited a TCD's existence as the basis for rejecting a geothermal application without further analysis or explanation.

Finally, Solenex argues that the Forest Service's decision defining the APE was arbitrary and capricious because it did not "depend[ ] on the 'scale and nature' of [the] undertaking." Pl.'s Mem. at 59 (quoting 36 C.F.R. § 800.16(d)). But that regulation does not require that the APE "depend on" the scale and nature of the undertaking; only that it be "influenced by" those factors. 36 C.F.R. § 800.16(d). And as explained above, the APE in this case was "influenced by the scale and nature of" the undertaking and accounted for the *direct* effects of the undertaking that would impact the area immediately surrounding the proposed drill pad, as well as the *indirect effects*, which would extend beyond that area—which the regulation also accounts for. 36 C.F.R. § 800.16(d) (acknowledging that the APE "may be different for different kinds of effects"). This also undercuts Solenex's reliance on *Valley Community Preservation Commission v. Mineta*, 373 F.3d at 1092 and *Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 847–48 (10th Cir. 2019), for the proposition that "ordinary practice" requires defining the APE solely on the basis of noise, visual effects, or vibrations. *Dine Citizens* addressed the area of *direct* effects, while the indirect effects of an undertaking may have a different boundary. And while the Federal Highway Administration considered the vibration and noise impacts from traffic as indirect effects, *Valley Community Preservation Commission*, 373 F.3d 1078 at 1091–92, Solenex has offered no authority for the proposition that these are the *only* effects that must be considered, or that it would be improper to consider other, indirect effects. To the contrary, the Forest Service

was obligated to consider the indirect effects of the undertaking on area. *See* 36 C.F.R. § 800.16(d); *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1438 (C.D. Cal. 1985).

B. The adverse effects determination was not arbitrary or capricious

Solenex next challenges as arbitrary and capricious the agency's Determination of Adverse Effects. *See* Pl.'s Mem. at 59–61. As explained below, however, this decision—which is also subject to a high level of deference, *see Mineta*, 373 F.3d at 1091—was thoroughly explained and reasonably accounted for the criteria required by 36 C.F.R. § 800.5(a). None of Solenex's arguments to the contrary establish otherwise.

Having established the APE for the proposed drilling, the Forest Service then prepared a draft Determination of Adverse Effects dated July 11, 2014. H-0025, FS006466–75. The Forest Service requested comments on this draft from the SHPO and THPO. H-0027, FS006478 (SHPO); H-0028, FS006479 (THPO). On September 15, 2014, the Forest Service finalized the draft Determination and shortly thereafter shared it with the consulting parties to seek their comments. *See* H-0032, FS006485–95; H-0033, FS006496–97. Solenex provided comments by letter dated November 4, 2014. ECF No. 115-13 at 1 to ECF No. 115-14 at 6 (FS006507–25). After reviewing those comments, the Forest Service adjusted and finalized the Determination of Adverse Effects on December 3, 2014. H-0039, FS006532–42. In conveying the final Determination to the consulting parties, the Forest Service stated that it considered the comments of the THPO, SHPO, *and Solenex*. H-0040, FS006543–44. It said the same in conveying the Determination to the ACHP for review. H-0041, FS006545–46. The ACHP responded on January 9, 2015, concurring with the Forest Service's findings and concluding that "the FS has correctly applied the criteria of adverse effect to historic properties for this undertaking" and that it "agree[d] with the FS that the undertaking may adversely affect the Badger-Two Medicine TCD . . . ." H-0044, FS006549–50.

In its final Determination, the Forest Service thoroughly explained the direct, indirect, and cumulative effects of Solenex's proposed APD on the area's setting, materials, feeling, and association. H-0039, FS006535–37. It further summarized the characteristics of the historic property in light of the comprehensive ethnographic study prepared in 2012. *Id.* at FS006538–42. In doing so, it complied with 36 C.F.R. § 800.5(a), under which "[a]n adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(a)(1). Solenex challenges this decision on four fronts, none of which render the decision arbitrary or capricious.

First, Solenex argues that the Forest Service failed to consider its input. Pl.'s Mem. at 59. The record demonstrates that Solenex is quite simply wrong. The Forest Service's letter conveying the final Determination to the consulting parties on December 3, 2014 states outright that the Forest Service "received and considered" Solenex's comments, alongside those of the SHPO and THPO. H-0040, FS006543–44. It further explained that "[r]eference to Criterion C was removed" as an oversight, a direct response to Solenex's comment that "the Keeper did not determine that the . . . TCD is eligible under Criterion C." *Id.* at FS006543; *see also* ECF No. 115-13 at 5–6 (FS006511–12). The Forest Service's letter to the ACHP likewise indicates that comments from Solenex were received and considered. In fact, it quoted Solenex's position that "because the APE was unlawfully created, the Forest Service's adverse effects finding is necessarily arbitrary and capricious." H-0041, FS006545 (quoting ECF No. 115-13 at 3 (FS006509)). Finally, a comparison of the draft Determination against the final Determination demonstrates that the agency considered Solenex's comments. For example, and among other things, the Forest Service included an

explanation of what would happen if the well was dry (compare H-0039, FS006532 with H-0032, FS006485) and clarified its explanation on how the disturbances would affect the Blackfeet Tribe's use of the area by increased disturbances to the remaining natural solitude and silence (compare H-0039, FS006535 with H-0032, FS006488). These two specific changes from the draft to the final Determination were in direct response to two of Solenex's comments. *See* ECF No. 115-13 at 5, 12 (FS006511, FS006518). The record thus clearly demonstrates that the Forest Service considered Solenex's input.

Second, Solenex argues that the Forest Service "failed to address how the well could have adverse impacts in light of" infrastructure already existing "only a few miles from the proposed wellsite . . . ."[18] Pl.'s Mem. at 60. But the area is not, as Solenex suggests, extensively developed. Several of the developments Solenex cites—for example, the railroad and private property—are outside the boundary of the APE. And while U.S. Highway 2, the transmission line, and the buried pipelines Solenex invokes cross segments of the TCD, they are parallel and near that northeastern border of the TCD—the pipeline being the one that is furthest from the TCD border by approximately 0.4 miles. *See* ECF No. 45-7 at 90–91 (FS004742–43. Additionally, they are difficult to see from the proposed drilling area because of heavy vegetation. ECF No. 45-8 at 5–6 (FS004756–57). By contrast, the proposed well pad is located 2.4 miles into the interior of the APE, and the Lease would extend as far as approximately 4.8 miles into it. H-0019, FS006455. And the Forest Service explained that disturbance *beyond* those already existing would have a

[18] Solenex also suggests that designating the entirety of the TCD as the APE permitted the Forest Service "to use claims associated with the entire TCD, even area miles from . . . the proposed well, to justify its assertion of impacts." Pl.'s Mem. at 59. But those "claims" are the characteristics, integrity, and information (including both comments and ethnographies), that were compiled, reviewed, and concurred to by experts, including the ethnographer who prepared the ethnography, the Forest Service's archaeologists, the Blackfeet THPO, the Montana SHPO, and the ACHP.

cumulative impact on the natural setting. H-0039, FS006536–37. Solenex cites no authority for the proposition that the Forest Service was required to further address these in determining the adverse effects of the well on the APE.

Third, Solenex argues that the Forest Service weighted "subjective, personal, and non-quantifiable" characteristics of the area "more heavily than objective facts in the record." Pl.'s Mem. at 60. But as the final Determination demonstrates, the Forest Service accounted for *all* of these considerations—both subjective and objective—in its direct, indirect, and cumulative impacts analyses. Solenex provides no authority for the proposition that this is error. And it cannot, because the regulations require the Forest Service to consider subjective criteria, including the effects of an undertaking on the "integrity of the property's location, . . . feeling, or association." 36 C.F.R. § 800.5(a)(1).

Finally, Solenex argues that the Forest Service's decision was arbitrary and capricious because it "determined that the access road and well pad would 'affect berry patches' and 'other culturally significant resources'" without directly citing to the record for support and "assume[d] that the proposed well would disturb animals, making the area less suitable for hunting by the Blackfeet Tribe." Pl.'s Mem. at 60–61. In so arguing, Solenex ignores the Determination's excerpts from and citations to the ethnography that located "some of the closest and best huckleberry patches to the reservation" along the South Fork of the Two Medicine River, along with other culturally significant plants. H-0039, FS006540–41. The Forest Service also relied on and cited the ethnography's documentation of animals important to the Blackfeet Tribe in the same area and the importance of hunting in that area to the Tribe. *Id.* at FS006541–42. And the Forest Service's decision to rely on the ethnography in rendering this decision warrants deference. *S. Utah Wilderness All. v. Norton*, 326 F. Supp. 2d 102, 113 (D.D.C. 2004) (agency's decision to

rely on study warrants deference, especially where plaintiffs fail to identify flaws in study). Solenex simply has not carried its burden of demonstrating that the agency's Determination of Adverse Effects was arbitrary or capricious.

C. The Forest Service complied with the NHPA in consulting on mitigation options

The final step in the process was determining whether the adverse effects could be mitigated. *See* 36 C.F.R. § 800.6. To that end, the Forest Service—along with Solenex, the Blackfeet Tribe, and other consulting parties—prepared and proposed multiple mitigation options for consideration by the consulting parties. These mitigation options were presented for evaluation and discussed at the consulting party meetings on January 29 and April 3, 2014, and April 23, 2015. *See* ECF No. 45-8 at 1 (FS004752); ECF No. 45-8 at 14 (FS004773); ECF No. 115-14 at 14 (FS006555). Some 22 mitigation options were proposed in total; and all were rejected by one or more consulting party, with Solenex rejecting 13 of the proposals.

Specifically, as early as May 27, 2011, the Forest Service proposed that Solenex could (1) pursue drilling from adjacent private land; (2) exchange Solenex's lease for another federal lease; or (3) take advantage of the 2006 Tax Relief bill by relinquishing the Lease. *See* D-0079, FS002989. During the first consulting party meeting in January 29, 2014, four more mitigation options were discussed: (4) drilling from a site near the edge of the area; (5) direction drilling; (6) mobilizing without roads; and (7) approaching the drill site using an old fire line. ECF No. 45-8 at 4–5, 9 (FS004755–56, FS004760). A primary purpose of the second consulting party meeting, held April 3, 2014, was to propose and evaluate mitigation measures. *See id.* 45-8 at 15, 17 (FS004774, FS004775); *id.* at 19 (FS004778) ("we are here trying to listen to and explore what each party is saying and trying to reach some common ground."). During that meeting, the parties considered, for example: (8) moving the drilling location; (9) technological mitigation options;

(10) the Tribe helping Mr. Longwell recover money he had invested in the project; (11) drilling from other property; (12) moving the road and well pad to areas of previous disturbance; and (13) Solenex sponsoring a course on Blackfeet religion and culture. *Id.* at 18–19 and 25 (FS0064777–78 and FS004784). Another eight or so mitigation options were written on a white board during the meeting. *Id.* at 19–20 (FS004778–79). Ultimately, however, by this point, Solenex had concluded that "logistically," there were no acceptable mitigation options; and the THPO remained opposed to drilling within the TCD because of its impacts on the Tribes' religious beliefs and practices. *Id.* at 20–21 (FS004779–80). The Forest Service also considered the mitigation options in the APD conditions of approval, which Solenex attached to its comments in response to the draft Determination. *See* ECF No. 115-14 at 7–12 (FS006526–31) (APD conditions of approval); H-0040, FS006543 (Forest Service letter to consulting parties indicating that it had reviewed Solenex's comments prior to finalizing the Determination).

As the Forest Service explained to the ACHP later that year, it had "also tried to establish if there was any room for compromise to avoid or minimized adverse effects, such as moving the well pad closer to the TCD boundary where modern intrusions are more prevalent; using helicopters to bring in drilling equipment rather than building roads; or directional drilling from private lands," but "none of these mitigation measures satisfy the primary consulting parties, the Blackfeet Tribe and Solenex LLC." H-0041, FS006546. In response, the ACHP acknowledged that "the undertaking . . . even when considering the mitigation measures . . . in the 1991 and 1993 RODs, may result in diminution of the TCD's integrity of setting, materials, feeling, and association." H-0044, FS006550.

Still, as of its letter to the ACHP, the Forest Service intended to "continue [its] efforts with the consulting parties to seek ways to avoid, minimize or mitigate the adverse effects per 36 C.F.R.

§ 800.6(b)(2).” H-0041, FS006546. To that end, it held yet a third consultation meeting on April 23, 2015, but the parties were unable to come to any agreement on mitigation. *See* ECF No. 115-14 at 14 (FS006555). Finally, over a year and a half after that first consultation meeting, the Blackfeet Tribe terminated consultation on July 7, 2015 per 36 C.F.R. § 800.7(a). H-0050; FS006567. The ACHP, after summarizing the mitigation options considered and holding its own public hearing to consider multiple viewpoints, likewise concluded that “no mitigation measures would achieve an acceptable balance between historic preservation concerns and the undertaking.” ECF No. 115-14 at 24–33 (FS006583–92).

Despite these extended efforts to propose, evaluate, and discuss mitigation, Solenex contends that the Forest Service failed to adequately consider mitigation options. The regulations require that the “agency official shall consult . . . to develop and evaluate alternatives or modifications.” 36 C.F.R. § 800.6(a). As the cases cited by Solenex observe, the agency must consult and *try* to resolve the adverse effects through developing alternatives and modifications. *E.g.*, *Nw. Bypass Grp. v. U.S. Army Corps of Eng’rs*, 470 F. Supp. 2d 30, 53 (D.N.H. 2007) (“[T]he agency must *try* to resolve the adverse effects by developing and evaluating alternatives to the project ‘that could avoid, minimize, or mitigate adverse effects on historic properties.’” (emphasis added) (quoting 36 C.F.R. § 800.6(a)); *Del. Riverkeeper Network v. Pa. Dep’t of Transp.*, No. 18-4508, 2020 WL 4937263, at *27 (E.D. Pa. Aug. 21, 2020) (“If an adverse effect is determined, then Defendants must *consult* with the Section 106 consulting parties ‘to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.’” (emphasis added) (quoting 36 C.F.R. § 800.6(a)). Here, the record clearly demonstrates that the Forest Service consulted and *tried* to resolve the adverse effects over the course of several mitigation meetings.

Having done so, in this instance, it chose the alternative least damaging to historic preservation interests—recommending that the Secretary cancel the Lease and disapprove the APD. *See* ECF No. 116-7 at 47 (SUPP.AR000389). Though an agency is not *required* to choose the least damaging alternative, it is not prohibited from doing so. The Forest Service followed the Section 106 process and concluded no adequate mitigation was possible. The record clearly demonstrates that the Forest Service proposed and considered mitigation efforts, through the requisite consultation with interested parties, for a year and a half and over three consultation meetings before rendering its decision. And when the Blackfeet Tribe terminated consultation, the ACHP prepared comments as 36 C.F.R. § 800.7(a)(3) requires, and which the head of the agency is required to "take into account . . in reaching a final decision on the undertaking," *id.* § 800.7(c)(4). It ultimately recommended termination of the lease—which the Secretaries of Agriculture and the Interior took into account in reaching their own final determination, as the regulations require. *See* ECF No. 115-14 at 24–33 (FS006583–92) (ACHP's comments); ECF No. 116-7 at 46–47 (SUPP.AR000388–89) (cancellation decision accounting for ACHP's comments). Those are not the actions of a rubber stamp.

That extensive process also distinguishes this case from those on which Solenex relies. In *Quantum Entertainment, Ltd. v. U.S. Department of Interior*, the court remanded an agency action where the agency applied an old version of a statute after assuming that application of a new version of a statute would have retroactive effect without determining whether that effect would be permissible, and simply did not address one factor of a three-part test. 597 F. Supp. 2d 146, 153 (D.D.C. 2009). And in *Sierra Club v. Salazar*, the Keeper adopted—without independent analysis but aware of potential inaccuracies—a state agency's list of property owners and objectors to listing Blair Mountain in West Virginia on the National Register of Historic Places. 177 F. Supp.

3d 512, 541 (D.D.C. 2016). Here, as explained above, the record shows that the Forest Service engaged in the requisite analysis and consultation on mitigation before arriving at its decision.

Solenex's remaining arguments are unavailing. First, Solenex argues that it lacked access to unredacted versions of the ethnographic studies. Pl.'s Mem. at 61. But even the authority on which Solenex relies did not require disclosure of those documents during the Section 106 process. In *Earth Power*, the IBLA concluded that BLM did not demonstrate that it was "prohibited by law from disclosing" specific documentation to the appellant. 181 IBLA 94, 105 (2011). Here, the Forest Service withheld confidential information subject to the Archeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. § 470hh, and explained as much at the time, *see* H-0047, FS006557. Ultimately, however, Federal Defendants produced those documents in unredacted form to Solenex subject to the protective order entered in this action. *See* ECF Nos. 86 (motion seeking protective order prior to releasing unredacted reports containing sensitive cultural resources to Solenex), 88 (protective order). Solenex still has not identified any information within them that would alter the mitigation analysis.[19]

Solenex next argues that "the agency's decision [was] too implausible to be 'ascribed to a difference in view or the product of agency expertise,'" largely in light of existing development near the TCD. Pl.'s Mem. at 63 (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43). To the contrary:

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[19] In connection with this argument, Solenex characterizes a 2006 email correspondence between one of the ethnographers and the Forest Service as "indicating that [the] TCD boundary was influenced by [the] Tribe's claim of ownership and desire to interfere with 'Longwell lease.'" Pl.'s Mem. at 61 (citing F1-0268, FS004399–401). The email correspondence indicates no such thing, but rather reflects a discussion the ethnographer held with the Tribe and the varying opinions on whether the TCD included or excluded the area of the pipeline, to which the Forest Service responded with its view. It does not represent the agency's final decision or its rationale—indeed, three additional ethnographic reports were required before the TCD's boundaries were delineated in 2012 to include the pipeline.

the agency's conclusions were entirely plausible, summarized in the Determination of Adverse Effects, and based on scientific ethnographic documentation that described the worldview held by the Blackfeet Tribe. As explained *supra* Part III.B, several of the developments Solenex cites are outside boundary of the APE or on its periphery. The wells that Solenex invokes are located two air miles—six by road—from Solenex's proposed drill pad and, being unproductive, were never further developed. *See* ECF No. 45-7 at 80 (FS004716). By the time the APE was developed, the area was closed to motorized vehicles. *See* ECF No. 45-8 at 6 (FS004757). And the pipelines are buried and not visible. *See id.* at 5 (FS004756). The Forest Service acknowledged these developments and their impact on the integrity of the setting. *See* H-0039, FS006533–37. And it explained that this "variety of intrusions . . . approach[ed] a threshold of cumulative effects where even small additional disturbances," such as the proposed drilling operation, "could have great impacts to the natural setting," and that the "[c]umulative losses of control of or access to the natural and spiritual resources" in the Badger-Two Medicine TCD were such that "additional modern developments and associated loss of power, control, and access to resources will increase the cumulative feelings of frustrations and decrease the spiritual feelings felt by the Blackfeet in this area." H-0039, FS006536–37; *see also* ECF No. 45-8 at 6–7 (FS004757–58); *id.* at 16–19 (FS004775–78) (describing APE in terms of Blackfeet worldview).

Nor did the Forest Service, as Solenex charges, "unlawfully outsourc[e] its decisions" to the Tribe or afford it a veto. Pl.'s Mem. at 65. Though the NHPA is a procedural statute that does not dictate a given outcome, *see Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003), as thoroughly explained above, the Forest Service followed the prescribed processes and consulted with the Blackfeet Tribe—as well as with Solenex and the SHPO—in an effort to find a way to mitigate the documented impacts of the proposed project on the APE. Ultimately, and in light of

the information obtained through that process, it concluded that no mitigation would resolve the adverse effects to the TCD. H-0048, FS006565. The ACHP agreed. *See* ECF No. 115-14 at 30–31 (FS006589–90). Though Solenex may disagree with the decision, it was rendered by the agency—not by the Tribe or any third party—in accordance with applicable law and regulations, and supported by evidence in the record. It was not arbitrary or capricious.

CONCLUSION

The Secretary possessed authority to cancel the Lease and disapprove the APD. Her decision doing so complied with the law and was not arbitrary or capricious. Federal Defendants therefore respectfully request that the Court grant their cross-motion for summary judgment and deny Solenex's motion.

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Respectfully submitted,

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