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

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ACHP	Advisory Council on Historic Preservation
APD	Application for a Permit to Drill
APE	Area of Potential Effects
BLM	Bureau of Land Management
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act of 1973
FLPMA	Federal Land Policy and Management Act
IBLA	Interior Board of Land Appeals
MLA	Mineral Leasing Act of 1920
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
SHPO	State Historic Preservation Officer
THPO	Tribal Historic Preservation Officer

Solenex, as the party challenging administrative action under § 706(2) of the Administrative Procedure Act ("APA"), has the burden of demonstrating that the 2016 decision of the Secretary of the Interior to cancel an oil and gas lease in the Badger-Two Medicine area of the Lewis and Clark National Forest (the "Lease"), and to disapprove an associated Application for Permit to Drill ("APD"), was arbitrary or capricious or not in accordance with law. Solenex has not carried that burden. In its combined opposition and reply brief, it discards large portions of its previous arguments, fails to distinguish on-point, relevant authority, and mistakes—or misstates—Federal Defendants' positions in an effort to undermine them.

Solenex takes this tack because it cannot avoid the fact that Congress granted to the Secretary authority to administratively cancel leases based on pre-lease failure to comply with federal law—an authority that the Supreme Court has recognized and did not limit, and no court has limited as Solenex asks *this* Court to do, solely to instances where the Lease was issued in violation of the Mineral Leasing Act of 1920 ("MLA"). Solenex also has not demonstrated that common-law contract principles abrogate the Secretary's authority, and it cannot invoke protections reserved for bona fide purchasers because it is not, in fact, a bona fide purchaser for value.

Solenex also has not carried its burden of demonstrating that the Secretary's decision to cancel the Lease was unlawful: its insistence that the Lease in fact complied with the National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA") at time of issuance in not supported by the law or the record. It cannot avoid the fact that the agencies were required to complete an Environmental Impact Statement ("EIS") before the Lease issued, and did not; and it cannot avoid the fact that the agencies failed to satisfy the NHPA's Section 106 requirements before the Lease issued. And though Solenex twists the language of the Secretary's

decision in an effort to show that the Secretary relied on factors unintended by Congress, failed to consider an important aspect of the problem, or changed its position without explaining why, it has not shown that the Secretary's decision was arbitrary or capricious.

Finally, because Solenex has not carried *those* burdens, the Lease is properly cancelled and Solenex's arguments challenging the APD disapproval are moot. But even were they not, the Forest Service followed the law and its regulations in its adverse-effects decisions and Solenex has not carried its burden of demonstrating otherwise.

As thoroughly explained below, as well as in Federal Defendants' opening brief, ECF No. 165, the Secretary's decision to cancel the Lease and disapprove the APD was lawful and was not arbitrary or capricious. The Court should therefore deny Solenex's motion for summary judgment and grant Federal Defendants' cross-motion.

I. The Secretary has authority to cancel the Lease

The Secretary's authority to administratively cancel a lease that issued despite the agencies' failure to comply with their obligations under federal law is firmly established. Congress granted it; the Supreme Court has acknowledged it; and the Secretary appropriately exercised it in deciding to cancel Solenex's Lease. None of Solenex's last-ditch efforts to undercut that authority do so. No court has adopted Solenex's argument that *Boesche v. Udall*, 373 U.S. 472 (1963), should be narrowly interpreted to preclude this authority. The Secretary appropriately invoked MLA regulations that reflected this authority in this context. Common-law contract principles have not abrogated that authority. And Solenex is not a bona fide purchaser for value under the MLA. Accordingly, Solenex has not carried its burden of demonstrating that the Secretary lacked authority to cancel its Lease.

A. The Supreme Court recognized the Secretary's statutory authority to cancel a lease for pre-lease factors in *Boesche*

Solenex begins its combined opposition and reply by propping up a straw man, which it proceeds to knock down again and again throughout its brief, to no avail: that the Secretary has authority only to cancel leases "invalid at inception" and that Federal Defendants have somehow changed the Secretary's rationale for her decision by invoking that language from *Boesche*. *See* Plaintiff's Motion for Summary Judgment Reply and Opposition to Federal Defendants' Cross-Motion at 1, 3–5, 10, ECF No. 170 ("Pl.'s Opp'n"). But the structure of the Secretary's decision is clear: she found the Lease "voidable" because the agencies did not comply with NEPA and the NHPA before it was issued; found that those errors had not been and could not be corrected; and concluded that the Lease could not be validated in light of subsequent developments. The Secretary ultimately cancelled the Lease because of pre-lease failure to comply with federal law. Solenex acknowledges as much. Pl.'s Opp'n at 3 (citing ECF No. 68-1 at 7, 12, 13).

Federal Defendants' position has been and remains—consistently—that the Secretary possessed authority to cancel the Lease based on those failures to comply with federal law before it issued, and which could not be remedied after the fact. *See* Memorandum of Points and Authorities in Support of Federal Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment at 10, 13–18, 22–23, 31–39, ECF No. 165 ("Fed. Defs.' Mem."). This is not a *post hoc* rationalization: *Boesche* recognized the Secretary's authority to cancel the Lease for failure to comply with the law before it issued—as the Secretary herself explained. *See* ECF No. 116-7 at 48 (SUPP.AR000390). The Secretary has this authority because Congress gave it to her: the Federal Land Policy and Management Act ("FLPMA") empowers the Secretary to "perform all executive duties . . . in anywise respecting" the "public lands of the United States . . . ." 43 U.S.C. § 2. The Supreme Court has recognized FLPMA as the

source of "the Secretary's traditional administrative authority to cancel on the basis of pre-lease factors," 373 U.S. at 479, which allows the Secretary to "correct his own errors" or those of her predecessors, *id*. at 478, and which the Secretary possesses *unless* expressly curtailed by the MLA, *id.* at 476.[1]

Though the Court in *Boesche* limited its express holding to a situation where a lease issued in violation of the MLA itself, 373 U.S. at 485, it did not limit the Secretary's authority, or its discussion of that authority, to those situations. It more generally recognized that the MLA "leaves unaffected the Secretary's traditional administrative authority to cancel on the basis of pre-lease factors," as opposed to post-lease events.[2] *id.* at 479. And it did not limit its recognition of this authority solely to leases issued in violation of the MLA—as Solenex argues. *See* Pl.'s Opp'n at 5–7. In short, the Court in *Boesche* acknowledged the Secretary's general authority, delegated by Congress through FLPMA, to cancel a lease because of pre-lease factors *and* that the Secretary continues to possess that authority unless withdrawn or curtailed by Congress. *Id.* As thoroughly explained in Federal Defendants' opening brief, Solenex has not identified any statutory provision withdrawing that authority as applicable here. Fed. Defs.' Mem. at 18–20. And Solenex has cited *no case* limiting that authority as it asks the Court to do here. Its attempt to draw a belated distinction between "voidable" and "invalid" at inception is thus entirely unavailing.

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[1] It is not, as Solenex suggests, the *Secretary's* interpretation of these statutes that is at issue here: it is the Supreme Court's. As such, Solenex's invocation of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)., Pl.'s Opp'n at 2, is a red herring.

[2] Solenex does not defend its arguments that the Secretary could cancel the lease only under the provisions of the MLA itself. *See* Pl.'s Mem. at 18–25; Pl.'s Opp'n at 3–10 (nowhere addressing Federal Defendant's contrary arguments). Instead, it only further attempts to distinguish *Boesche* and the cases acknowledging its recognition of the Secretary's authority—to no avail.

To the contrary, as Federal Defendants have explained, numerous courts have recognized the Secretary's authority to cancel a lease based on pre-lease factors. *See* Fed. Defs.' Mem. at 15–16. Solenex's futile attempts to distinguish the majority of these cases merely highlights (1) the fact that *no court* has found the MLA to so limit the Secretary's authority, which is Solenex's core argument in this case, *see* Plaintiff's Motion for Summary Judgment at 18–25 ("Pl.'s Mem."); and (2) the breadth of circumstances in which that authority has been recognized, *see* Pl.'s Opp'n at 8–10. Solenex argues that in none of the cited decisions did a court affirmatively recognize that the Secretary may cancel a lease for pre-lease violation of NEPA or the NHPA—but that argument is backwards. *Boesche* establishes that the Secretary has authority to cancel a lease based on pre-lease factors *unless* Congress has said otherwise. And Solenex cites no decision recognizing that Congress has said otherwise—through the MLA or any other statute.

Solenex specifically argues that the court in *Natural Resources Defense Council, Inc. v. Hughes (NRDC)*, 454 F. Supp. 148, 154 (D.D.C. 1978), allowed leases to issue *despite* the agency's failure to comply with NEPA. *See* Pl.'s Opp'n at 8 & n.1. There, the court found that the agency had failed to comply with NEPA and that it prepared an inadequate programmatic EIS for a new federal coal-leasing program. *NRDC*, 454 F. Supp. at 153–54. Despite this failure at the programmatic level, the court did not enjoin the agency from processing certain lease applications—albeit "only in conformance with all applicable federal laws and regulations including" NEPA. *Id.* at 152. So it did not, as Solenex suggests, permit issuance of leases without NEPA compliance.

Finally, Solenex argues that the Secretary lacks the authority recognized in *Boesche* "unless [Federal Defendants] can establish that the Solenex Lease was invalid." Pl.'s Opp'n at 10. But that is not the standard *Boesche* set. *Boesche* recognized the Secretary's authority to correct errors of

her predecessors as well as the Secretary's general authority to cancel a lease based on "pre-lease events." *Boesche*, 373 U.S. at 476, 478–79; *see also Winkler v. Andrus*, 614 F.2d 707, 711 (10th Cir. 1980) (recognizing Secretary's "broad authority to cancel oil and gas leases . . . for administrative errors committed before the lease was issued"); *Grynberg v. Kempthorne*, No. 06-cv-01878, 2008 WL 2445564, at *4 (D. Colo. June 16, 2008) (relying on *Boesche* to conclude the Secretary had authority to cancel a lease that was issued without Forest Service review, as required by regulation). The Secretary's predecessor erred by issuing the Lease without complying with NEPA and the NHPA. The Secretary concluded that those errors had not been and could not be corrected. And having done so, the Secretary appropriately exercised her authority to cancel the Lease.

B. The Secretary's authority to cancel a lease for pre-lease factors is codified in 43 C.F.R. § 3108.3(d)

The Secretary explained in her decision that her "inherent authority, under her general managerial power over public lands, to cancel leases issued in violation of a statute or regulation . . . is reflected in [the] MLA's implementing regulations" at 43 C.F.R. § 3108.3. ECF No. 116-7 at 48 (SUPP.AR000390) & n. 26. Under that regulation, "[l]eases shall be subject to cancellation if improperly issued." 43 C.F.R. § 3108.3(d). Notably, this regulation does not limit leases "improperly issued" to those issued in violation of the MLA.

Solenex expresses puzzlement over the notion that a regulation may reflect, rather than create, an agency's authority. *See* Pl.'s Opp'n at 12–13. The source of that puzzlement is likely its mischaracterization of this regulation as merely a codification of a "past practice" or its mistaken belief that the Secretary has "confer[red] upon herself the authority to cancel Solenex's lease . . . ." Pl.'s Opp'n at 12–13. To clarify, it is a fundamental principle of administrative law that an agency possesses that authority that Congress grants to it. *See Civ. Aeronautics Bd. v. Delta Air Lines,*

Inc., 367 U.S. 316, 322 (1961) ("[T]he determinative question is not what the [agency] thinks it should do but what Congress has said it can do."). Here, as the Supreme Court has recognized, Congress—through FLPMA—granted the Secretary general authority over administration of public lands, which includes the authority to cancel a lease for pre-lease factors. *Boesche*, 373 U.S. at 476, 478–79. Congress has also authorized the Secretary, "in administering public land statutes," which include FLPMA and the MLA, "and exercising discretionary authority granted by them," to "establish comprehensive rules and regulations . . . ." 43 U.S.C. § 1701(a)(5). Exercising *that* authority in 1983, the United States Bureau of Land Management ("BLM") codified in regulation its exercise of the Secretary's authority recognized in *Boesche* to cancel leases improperly issued. *See* 48 Fed. Reg. 33648, 33655 (July 22, 1983). The Secretary's long-standing use of that authority supports the reasonability of its exercise. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 224 (2009). And that is the same authority under which the Secretary cancelled the Lease because it was "improperly issued"—that is, because its issuance did not comply with NEPA and the NHPA. ECF No. 116-7 at 42 (SUPP.AR000384), 48–53 (SUPP.AR000390–95). The Secretary's invocation of that authority's "reflection" in regulation does not alter the authority itself or undermine her decision.

C. Contract law does not abrogate Congressionally delegated authority

Solenex continues its effort to incorporate contract principles into an argument about statutory authority,[3] arguing that the Secretary lost that authority to cancel a voidable lease by not

[3] Solenex is simply wrong in stating that Federal Defendants "did not address, let alone refute" its arguments concerning the Lease's voidability. *See* Pl.'s Opp'n at 5. Federal Defendants both addressed and thoroughly refuted those arguments, explaining that the Lease was voidable for failure to comply with NEPA and the NHPA before it issued—and why Solenex's challenge to the Secretary's authority through invocation of contract principles is unavailing. Fed. Defs.' Mem. at 23–25.

acting swiftly enough. *See* Pl.'s Opp'n at 10–11. But Solenex still has offered no authority for the proposition that common-law contract principles of that variety can abrogate the authority delegated by Congress. Nor has it brought a claim for breach of contract before this Court.

Even the case on which Solenex relies for the proposition that oil and gas leases create contract rights supports the Secretary's authority to cancel the Lease based on pre-lease factors. In *Griffin & Griffin Expl., LLC v. United States*, the Court of Federal Claims concluded that cancellation of the leases in question was *not* a breach of contract *because* the Secretary possessed authority to cancel an improperly issued lease—as explained in *Boesche*.[4] 116 Fed. Cl. 163, 176 (2014). Solenex simply has not established that common-law principles can strip the Secretary of Congressionally-granted authority in this context (or any other).

Solenex still could not prevail *even if* contract principles applied in this context. Its contract-based argument ignores one of the fundamental principles of contract law: that the terms of the contract govern its enforcement. Solenex's 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). This includes 43 C.F.R. § 3108.3(d), under which leases are "subject to cancellation if improperly issued"—as the Secretary determined that Solenex's Lease was, because of a failure to comply with NEPA and the NHPA. Failing entirely to grapple with the language of the Lease itself, Solenex attempts to wish

[4] Solenex's citation to *Moncrief v. U.S. Dep't of the Interior*, 339 F. Supp. 3d 1, 11 (D.D.C. 2018), for the proposition that the Secretary lacked authority to cancel the Lease because of intervening contract principles, is equally unavailing. As this Court is well aware, it did not resolve the question of the Secretary's authority in that decision, and its discussion of contract principles arose in the context of determining that the plaintiff was a bona-fide purchaser under the MLA—30 U.S.C. § 184(h)(2)—which is patently not the case here, as explained below. *See id.* at 10–11.

43 C.F.R. § 3108.3(d) away because it was enacted after the Lease issued—but ignores the Lease's express incorporation of *future regulations*, and identifies no express or specific provision of the Lease with which that regulation is inconsistent.

D. Solenex is not a bona fide purchaser for value

Solenex has also not established entitlement to the protections afforded a bona fide purchaser for value under the MLA, 30 U.S.C. § 184(h)(2). It effectively concedes that it paid no consideration for the Lease. And it does not dispute that it obtained the Lease with full knowledge that the Lease was suspended, as well as that no EIS was prepared before it issued.

First, Solenex has not established that it paid valuable consideration for the Lease. The record is clear, and Solenex does not dispute, that Mr. Longwell assigned the Lease to it without *any* consideration paid for the assignment. ECF No. 89-2 ¶ 73. And it does not defend its argument that it could stand in the shoes of Fina, the only entity to pay any consideration for the Lease. *See* Pl.'s Opp'n at 15–16. It now argues only that it paid "valuable consideration" because Mr. Longwell estimated that he and Solenex spent some $35,000 "in seeking to develop the lease" after he assigned it to Solenex in 2014. Pl.'s Opp'n at 16 (quoting ECF no. 24-2 at 34).

But Solenex offers no authority whatsoever for the proposition that money expended on development *after* obtaining a good renders one a purchaser for value of that good. Even the sole case underlying its argument that any parting, at any time, of "something possessing an actual value" satisfies the "purchaser for value" element does not support that position. *See* Pl.'s Opp'n at 15–16. In *Lykins v. McGrath*, the Supreme Court concluded that heirs who obtained a deed through inheritance were *not* bona fide purchasers for value because they paid no value. 184 U.S. 169, 173 (1902). In doing so, it quoted the full section from Devlin, which Solenex quotes only in part and, which completed, establishes that "[a] person who is a mere volunteer, having acquired

title by gift, inheritance, or some kindred mode, cannot come within the scope of the term bona fide purchaser." *Id.* (quoting Robert T. Devlin, The Law of Real Property and Deeds § 813). Solenex, having acquired the Lease "by gift . . . or *some kindred mode*," that is, assignment with no consideration paid from Mr. Longwell, who also paid no consideration for it, is not a *purchaser* at all—let alone a bona fide purchaser for value.

Second, Solenex clearly had notice of the Lease's infirmities. In arguing otherwise, Solenex asserts that it is a bona fide purchaser because it did not have notice of a "defect" in the Lease, such as an *actual* notice of cancellation or knowledge of another's superior right. *See* Pl.'s Mem. at 14–15. But that is not the standard. To be a bona fide purchaser under the MLA, Solenex must have acquired the Lease "without notice of the violation of the departmental regulations." *Andrus*, 614 F.2d at 711. Notice of a defect in title or knowledge of another's superior right are two ways to satisfy that standard. *E.g. id.* But Solenex offers no authority suggesting that *only* those circumstances would satisfy the notice standard. That standard clearly contemplates that notice of a pre-lease violation of the law defeats bona-fide-purchaser status. *See id.* (awareness of "violation of the departmental regulations" constitutes notice). Nor has Solenex offered any authority suggesting that the notice that Solenex and Mr. Longwell[5] indisputably had does not satisfy this notice requirement—that no EIS was prepared before the Lease issued despite clear authority requiring as much; that lease operations were repeatedly challenged[6] and ultimately

[5] Solenex does not dispute that it possessed Mr. Longwell's knowledge and that it and Mr. Longwell were essentially the same entity at the time he conveyed the lease to it. *See* Fed. Defs.' Mem. at 26–27.

[6] It is not solely a question, as Solenex tries to make it, of whether Solenex (through Mr. Longwell) was simply aware that the 1993 action challenging the 1993 APD existed. *See* Pl.'s Mem. at 15. What is material is the arguments raised in that action, which included a claim that the APD was invalid because the agency failed to comply with NEPA before the Lease issued because no EIS was prepared—one of the bases for the Lease's ultimate cancellation. Solenex does not argue that

suspended on this basis; and that subsequent APD decisions acknowledged that the Lease's validity was in question. *See* Fed. Defs.' Mem. at 26–28.

In sum, Solenex has not demonstrated that the Secretary lacked authority to cancel the Lease or that principles of contract law or bona-fide-purchaser protections insulated Solenex's Lease from cancellation. The Court should deny its motion for summary judgment on its claims asserting this lack of authority.

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

Solenex, as the party challenging an agency action as arbitrary or capricious or not in accordance with law under 5 U.S.C. § 706(2)(A), has the burden of proof. *City of Olmsted Falls, OH v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002). "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. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)).

Solenex has not carried this burden. First, it has not demonstrated that the Secretary's decision to cancel the Lease was "not in accordance with law" through a showing that the Lease issued in compliance with NEPA or the NHPA. Second, it has not demonstrated that the Secretary's decision was otherwise arbitrary or capricious: it has not proven that 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's motion for summary

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it or Mr. Longwell was unaware of these claims at the time Fina assigned the lease back to Mr. Longwell or that Solenex was unaware when it received the Lease.

judgment on its claims challenging the Secretary's decision as arbitrary or capricious or not in accordance with law should therefore be denied.

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 continues to argue that the Lease in fact complied with these statutes. Despite marshalling its best arguments in reply, however, Solenex has not demonstrated carried its burden.

1. The Lease was not issued in compliance with NEPA

As Federal Defendants have thoroughly explained, the Secretary's decision to cancel the Lease because the agencies did not comply with NEPA by preparing an EIS before the Lease issued is fully supported in the record, well-reasoned, and complied with the law. *See* Fed. Defs.' Mem. at 32–35. Solenex spends the bulk of its argument in opposition contending that the Lease complied with NEPA when it issued—despite the agencies not preparing an EIS—because it did not constitute the same irrevocable commitment of land to significant surface-disturbing activities contemplated by *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) and *Conner v. Burford*, 848 F. 2d 1441, 1449 (9th Cir. 1988). *See* Pl.'s Opp'n at 18–19. As amply demonstrated below, that is simply not the case.

a) An EIS was required

Both *Sierra Club* and *Conner* concluded that an agency must prepare an EIS before issuing a lease without a "no surface occupancy" stipulation (non-NSO leases). *Sierra Club*, 717 F.2d at 1414–15; *Conner*, 848 F.2d at 1449. An NSO stipulation "*precludes* surface occupancy unless and until such activity is specifically approved by" the agency. *Sierra Club*, 717 F.2d at 1411. Once land has been leased without an NSO stipulation, the agency "no longer has the authority to

preclude surface disturbing activities even if the environmental impact of such activity is significant" and "can only impose 'mitigation' measures upon a lessee who pursues surface disturbing exploration and/or drilling activities." *Id.* at 1414; *Conner*, 848 F.2d at 1448–49. None of the stipulations in the leases at issue in those cases "expressly provide[d] that the [agency] can *prevent* a lessee from conducting surface disturbing activities." *Sierra Club*, 717 F.2d at 1414; *Conner* at 1449 ("the non-NSO leases in our case do not reserve to the government the absolute right to prevent all surface-disturbing activity").

The same is true here. The Solenex Lease, on its face, is a non-NSO lease like those at issue in *Sierra Club* and *Conner*. Its NSO stipulation only covers 18% of the area leased—specifically, areas with slopes greater than 60%. ECF No. 45-9 at 27 (HC 00892). The remaining 82% of the leased area is thus *not* subject to NSO stipulations (excepting some timing limitations). The sale of the Lease thus "entailed an irrevocable commitment of land to significant surface-disturbing activities, including drilling and roadbuilding, and . . . such a commitment could not be made under NEPA without an EIS." *Conner* at 1449 (citing *Sierra Club*, 717 F.2d at 1414–15).

Solenex's arguments to the contrary do not distinguish the Lease from those at issue in *Sierra Club* and *Conner*. Solenex first argues that the history of the APD over the course of the Lease shows that this lease was not a non-NSO lease. Pl.'s Opp'n at 19. But the history of the Lease does not support this argument. Though an APD was approved, remanded, or vacated at various points, and ultimately disapproved because the Lease was cancelled, Solenex identifies no instance where an APD was *denied*.

Next, Solenex points to three other terms of the Lease in an attempt to distinguish it from those at issue in *Sierra Club* and *Conner*. But two of those terms were included in the lease at issue in *Sierra Club*, and so cannot distinguish Solenex's Lease from that one. Specifically, citing

Form 3109-5, Solenex argues that it was "not permitted to enter the land or to disturb the surface without prior approval," which approval would require an environmental analysis and a cultural resources survey. *See* Pl.'s Opp'n at 19 (citing ECF No. 49-9 at 21 (HC00886)). And citing Form 3109-3, it invokes the requirement to "comply with all the rules and regulations of the Secretary of Agriculture governing the national forests." *Id.* (citing ECF No. 49-9 at 22–23 (HC00887–88)). The non-NSO leases considered in *Sierra Club* included the same "standard stipulations," including "the Stipulation for lands under jurisdiction of the Department of Agriculture, 3109-3" and "the Surface Disturbance Stipulation, 3109–5." *Sierra Club*, 717 F. 2d at 1411 & n.4. And all federal oil and gas leases require an approved APD, whether or not the lease prohibits surface occupancy. 30 U.S.C. § 226(g), (p); 43 C.F.R. § 3162.3-1(c).

Finally, Solenex points to a provision of the Lease under which the Forest Service retained the ability to "disallow use and occupancy." *See* Pl.'s Opp'n at 19 (citing ECF No. 45-9 at 26, 24 (HC00889, HC00891)). But the full provision reserves to the Forest Service the ability to "disallow use and occupancy that would be in violation of the Endangered Species Act of 1973" ("ESA"), following an examination—which the lessee could conduct "at his discretion and cost . . . ." ECF No. 45-9 at 24 (HC00889). The provision does not reserve to the agency the ability to disallow full use or occupancy—only that which would violate the ESA. And *any* federal oil and gas lessee bears the risk that the ESA might prohibit some or all enjoyment of the lease.

In short, these are exactly the same sorts of provisions addressed in *Sierra Club* and *Conner* that "authorize the government to impose reasonable conditions on drilling, construction, and other surface-disturbing activities" but that, "unlike NSO stipulations . . . do not authorize the government to preclude such activities altogether." *Conner*, 848 F.2d at 1444; *Sierra Club*, 717 F.2d at 1409. So while these provisions allow the agencies to *regulate* surface-disturbing

activities, none of them "expressly provides that the [agency] can prevent a lessee from conducting surface disturbing activities" in a way that would remove the requirement that an EIS be prepared before leasing. *Sierra Club*, 717 F.2d at 1414.

b) No true no-action alternative was considered

Solenex next presses its argument that the 1980 Environmental Assessment ("EA") satisfied the agencies' NEPA obligations notwithstanding the holdings in *Sierra Club* and *Conner*. But even if an EA *could* suffice in place of an EIS in these circumstances, the Secretary's decision was sound because the 1980 EA did not meaningfully consider the alternative of not issuing the Lease—as NEPA requires.

The Court has not "already found that the [1980] EA . . . considered a no action alternative," as Solenex argues. Pl.'s Opp'n at 20. In describing the procedural history, the Court merely recited Plaintiff's Statement of Facts to note that "[t]he 1981 EA considered . . . 'no action' alternatives," without analyzing whether the no-action alternative presented in the EA satisfied NEPA. *Solenex LLC v. Jewell (Solenex II)*, 334 F. Supp. 3d 174, 179 (D.D.C. 2018). There is no dispute here that the 1980 EA listed a "no action" alternative. But that alternative did not satisfy NEPA because it merely delayed recommendations on leasing without evaluating the effects of *not* issuing the Lease.

NEPA "requires that alternatives—including the *no-leasing* option—be given full and meaningful consideration" before a lease is issued. *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988) (emphasis added). There is no dispute that the 1980 EA did not include a "no-leasing option." Solenex argues that Federal Defendants "mistakenly convert a 'no action' alternative into a 'no leasing' alternative," Pl.'s Opp'n at 20, but Solenex is the one who is mistaken. In the lease-sale context, the no-action alternative must consider not taking the action

under consideration—that is, issuing the lease. *See Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 171 (D.D.C. 2014) (in "instances involving federal decisions on proposals for projects[,] '[n]o action . . . would mean the proposed activity would not take place" (quoting Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026–01, 18027 (March 23, 1981))). That is what is meant by the "current level of activity [being] used as a benchmark," *see Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1040 (10th Cir. 2001)—not other disturbances already in the area, as Solenex proposes, *see* Pl.'s Mem. at 20–21.[7]

Finally, Solenex doubles down on *Spiller v. White*, 352 F.3d 235, 240–45 (5th Cir. 2003) and *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 683 (D.C. Cir. 1982), as supporting the proposition that the 1980 EA can take the place of an EIS under these circumstances. *See* Pl.'s Mem. at 21–22. In doing so, Solenex purports not to understand the relevance of the fact that neither case addressed an "irretrievable commitment of resources." Pl.'s Opp'n at 21–22. But their lack of relevance here is clear: an EIS is required—and therefore an EA cannot stand in its place—where the agency's action makes an irrevocable commitment to allow surface disturbing activity. *Sierra Club*, 717 F.2d at 1414–15. As explained *supra*, that is the case here. Cases interpreting NEPA requirements in other circumstances cannot support the sufficiency of an EA where this Circuit's Court of Appeals has required an EIS.

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

The Secretary's conclusion that the Lease was improperly issued for failure to comply with the NHPA is also supported by the record and complied with the law. Solenex concedes that

[7] Solenex's attempt to distinguish *Bob Marshall* as addressing a potential future wilderness designation likewise hinges on this patently incorrect argument. *See* Pl.'s Opp'n at 20.

"NHPA compliance is required 'prior to' an undertaking." Pl.'s Opp'n at 22. Solenex does not dispute that the Lease sale was an "undertaking" for NHPA purposes.[8] Nor does Solenex dispute that the Forest Service failed to consult with the Blackfeet Tribe to identify historic properties of religious and cultural significance *before* the Lease was issued. It continues to argue that consultation *after* the Lease issued may satisfy the NHPA—but that was simply not the case.[9]

Specifically, Solenex continues to argue that the law in place at the time the Lease issued permitted phased compliance with Section 106. But none of its arguments to that effect overcome the fact that the NHPA regulations in place at the time did not allow for phased compliance. *See* Fed. Defs.' Mem. at 36–37. To the contrary, they provided that compliance must occur "[a]s early as possible before an agency makes a final decision concerning an undertaking and in any event prior to taking any action that would foreclose alternatives or the Council's ability to comment . . . ." 36 C.F.R. § 800.4 (1979). Solenex leans on the language following "and in any event" to support its phased-compliance argument. *See* Pl.'s Mem. at 24. But that language on its face does not alter the requirement that compliance occur *before* a final decision—it merely sets an earlier deadline for compliance if action before a final decision would foreclose alternatives or the Council's ability to comment.

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[8] Federal Defendants cited *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) for this uncontroversial proposition. Like *Sierra Club*, *Conner*, and *Bob Marshall Alliance*, *Pit River Tribe* addressed non-NSO leases and concluded—in light of the irreversible and irretrievable commitment of resources under them—that NHPA compliance was required before the lease issued and that later review "cannot cure [an] earlier violation, because it did not deal with the question of whether the land should have been leased at all." 469 F.3d at 787.

[9] Solenex also suggests that the Forest Service "had been consulting with the Tribes since at least 1972." Pl.'s Opp'n at 25. Though it cites in support of that proposition a chronology of meetings with the Blackfeet Tribe included as an appendix to the 1990 APD EIS, it offers no argument at all that these contacts satisfied the NHPA's consultation requirements or otherwise undermined the Secretary's conclusion that the agencies failed to comply with the NHPA before the lease issued.

The language of the NHPA itself does not support Solenex's argument, either. It provides, as Solenex observes, that an agency must account for the effect of the undertaking on historic property "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license . . . ." 54 U.S.C. § 306108. But this provision says nothing about compliance in stages, and Solenex offers neither authority nor argument for the propositions that an oil-and-gas lease is not a license as contemplated by this provision, or—even were it not—that this provision undermines or abrogates any earlier deadline set by 36 C.F.R. § 800.4.

Finally, Solenex attempts to distinguish *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), on which Federal Defendants relied for the proposition that the NHPA and its regulations, in 1983, required federal agencies to identify properties eligible for listing in the National Register that may be affected by the project, including sites of historic and cultural significance to tribes. *See* Pl.'s Mem. at 24; Fed. Defs.' Mem. at 37. But that attempt is unavailing. *Wilson* demonstrates that agencies were required, at the time the Lease issued, to evaluate properties of importance to tribes under the NHPA. 708 F.2d at 754–55. The court found no violation of the NHPA when the Forest Service did not identify the San Francisco Peaks as eligible for listing on the National Register due to a lack of archeological evidence in the area—not on the basis that the Forest Service was not required to evaluate those properties in the first instance. *Wilson*, 708 F.2d at 754–55. Had there been any evidence of archeological sites on the peaks—as there was in the early surveys conducted here, *see* Fed. Defs.' Mem. at 38 & n.12—it concluded that a more robust survey to locate such sites would have been necessary. *Wilson*, 708 F.2d at 755–65.

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

Solenex has not carried its burden of demonstrating that the Secretary, in deciding to cancel the Lease, "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.

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

In reply, Solenex has distilled its argument that the Secretary relied on factors unintended by Congress in rendering her decision to cancel the Lease to two allegedly "unintended" factors. Neither argument compels a conclusion that the Secretary's decision was arbitrary or capricious.

First, Solenex falls back on a single, summarizing sentence in the introduction of the Secretary's decision to support its position that the Secretary relied on post-lease factual developments in determining that the Lease was improperly issued. *See* Pl.'s Opp'n at 25. This argument requires no further response: a plain reading of the Secretary's decision makes clear that she relied on the insufficiencies of the agencies' pre-lease NEPA and NHPA analyses to conclude that the Lease was improperly issued and thus voidable, *see* ECF No. 116-7 at 49–53 (SUPP.AR000391–95); on subsequent analyses to conclude that those deficiencies had not been cured, *see id.* at 53–54 (SUPP.AR000395–96); and on post-lease developments to conclude that the Lease could not be validated, *see id.* at 54 (SUPP.AR000396). Solenex's attempts to obfuscate the Secretary's decision cannot render the decision arbitrary or capricious, especially where a reviewing court "will uphold [an agency's] findings, though of less than ideal clarity, if the agency's path may be reasonably discerned"—as it may here. *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 97 (D.D.C. 2010) (quoting *Hall,* 864 F.2d at 872) (alterations in original); *see* also *Investment Co. Inst. v. Commodity Futures Trading Comm'n*, 720 F.3d 370, 380 (D.C. Cir. 2013).

Second, Solenex now argues that the Secretary's decision is arbitrary and capricious because she cited the then-current versions of the NHPA and its regulations when analyzing the agencies' failure to comply with that statute before the Lease issued. *See* Pl.'s Opp'n at 25–26. As explained *supra*, however, the Secretary's conclusions remain accurate under the NHPA and its regulations in force at the time of the leasing decision. And even were there some error in invoking a more recent version of the NHPA, the Secretary's conclusion that the agencies failed to satisfy NEPA's requirements is an independent and sufficient basis for finding the Lease improperly issued—which would render any such error harmless. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007) (statement that "could have had no effect on the underlying agency action being challenged" constitutes harmless error).

Finally, Solenex continues to press the argument that the Secretary was obligated to consider the Lease as a "valid existing right" under the 2006 Tax Act. *See* Pl.'s Opp'n at 27. But it would not have been appropriate for the Secretary to consider post-lease legislative developments in determining that the Lease was improperly *issued* or whether subsequent analyses corrected those errors. And once the Secretary concluded that the Lease was improperly issued and those errors not corrected, it would have been contradictory for the Secretary to then conclude that such a lease constituted a *valid* existing right. Other than bald, unsupported assertions, Solenex has not demonstrated otherwise. *See* Pl.'s Opp'n at 27, 31 (arguing that Secretary both should and should not have considered the 2006 Tax Act); Pl.'s Mem. at 38–39 (same).

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

Next, Solenex doubles down on its argument that the Secretary's failure to consider its reliance, contract, and property interests was arbitrary and capricious. But it still has not presented any aspect of the problem that the Secretary was required to consider, but did not.

a) Reliance interests

Solenex's main argument on this front is that the Secretary failed to consider its and its reliance interest. Notably, Solenex does not defend the particulars of its alleged reliance interests or further argue that Mr. Longwell's personal expenses or Fina's expenditures constitute *Solenex's* reliance. *See* Fed. Defs.' Mem. at 42–44 (explaining why Mr. Longwell's and Fina's expenditures are not attributable to Solenex). That leaves only Solenex's own alleged reliance, which the Court of Appeals concluded the Secretary already considered. *Solenex LLC v. Bernhardt (Solenex III)*, 962 F.3d 520, 530 (D.C. Cir. 2020).

Solenex now asks the Court to narrowly interpret the Court of Appeals's findings with respect to the Secretary's decision. *See* Pl.'s Opp'n at 27–29. But "the *same* issue presented a second time in the *same* case in the *same* court should lead to the same result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). Accordingly, "a court involved in later phases of a lawsuit should not re-open questions decided . . . by that court or a higher one in earlier phases." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). And "when an appellate court has reached and necessarily decided an issue of fact or law, the doctrine provides that a district court in the same case 'has no power or authority to deviate from' the appellate court's conclusion. *Alabama Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 20-CV-3377 (DLF), 2021 WL 3577367, at *4 (D.D.C. Aug. 13, 2021) (quoting *Briggs v. Pa. R. Co.*, 334 U.S. 304, 306 (1948)).

Solenex does not dispute that its reliance interests were essential to its previous arguments before this Court and the Court of Appeals that the Secretary's decision was arbitrary and capricious under § 706(2)(A) in light of the time it took the Secretary to render it. Solenex also does not dispute that the Court of Appeals addressed its reliance interests and concluded that those interests "were, in fact, specifically considered and addressed by the Secretary." *Solenex III*, 962

F.3d at 530. Yet Solenex asks this Court to conclude exactly the *opposite*—that the Secretary did *not*, in fact, "specifically consider[ ] and address[ ]" Solenex's reliance interests. Solenex has had a full and fair opportunity to litigate the Secretary's consideration of its reliance interests through proceedings during which it was incumbent on Solenex, and in its interests, to identify the full range of its reliance—both in its briefing and in response to questions from the Court of Appeals at oral argument.[10] In that context, the Court of Appeals having "affirmatively decided" that the Secretary specifically considered those interests, Solenex may not now relitigate the issue. *Crocker*, 49 F.3d at 739.

The Court of Appeals's determination that the Secretary considered Solenex's reliance interests also further undermines Solenex's attempts to rely on *Encino Motorcars v. Navarro*, 579 U.S. 211, 221–22 (2009). And despite Solenex's efforts to shoehorn this case into the *Encino Motorcars* framework, it will not fit (1) because *Encino Motorcars* addresses a completely different variety of "agency action" under the APA and (2) because of the undisputed fact that Solenex, Mr. Longwell, and Fina were *all* on notice of the Lease's legal deficiencies for decades, *see* Fed. Defs.' Mem. at 26–28 (describing notice).

Finally, Federal Defendants need not "make [an] effort to oppose the substance of then-Judge Kavanaugh's dissent" in *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732 (D.C. Cir. 2016), *see* Pl.'s Opp'n at 30, because a dissent is not the law. And the *majority's* conclusion that an agency cannot consider costs when the permittee fails to present those costs to the agency remains

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[10] By the time the action reached oral argument before the Court of Appeals, Solenex had relied solely on its alleged $35,000 in reliance interests in multiple briefs at multiple levels. That Solenex had not asserted any other reliance interests during that time severely undermines its excuse that its counsel could not identify any other such interests in the record during oral argument solely because of an "inability to recall a specific document within a voluminous administrative record during oral argument . . . ." Pl.'s Opp'n at 29.

applicable, regardless of the statute under consideration. In any event, if the majority opinion in *Mingo Logan Coal* "is not applicable to this case" because of the statute under consideration in that case, as Solenex argues, *see* Pl.'s Opp'n at 31, then neither is the dissent.

b) Contract and property interests

Solenex's arguments that the Secretary should have, but did not, consider its property and contract interests are equally unavailing. First, Solenex continues to invoke the basic premise that oil and gas leases are property interests, subject to the law of contracts. But none of the cases it cites for this proposition require the Secretary to have considered the "property or contract principles" that Solenex asserts when administratively cancelling a lease for failure to comply with the law before issuance. *See Union Oil Co. of California v. Morton*, 512 F.2d 743, 752 (9th Cir. 1975) (remanding for determination of whether Secretary's suspension order following oil spill constituted exercise of regulatory power or a taking, in light of lack of clarity in the record); *Griffin & Griffin*, 116 Fed. Cl. at 171 (evaluating breach of contract claims); *Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000) (acknowledging contract principles in breach-of-contract case). Rather, they establish that the appropriate vehicle for addressing potential infringement on a lessee's property or contract rights is an action for breach of contract or a taking under the Fifth Amendment. Solenex in effect asks this Court to determine that the Secretary erred by failing to evaluate whether the government breached the Lease or took Solenex's property by cancelling it—without ever asserting such a cause of action in this case.[11]

[11] On March 14, 2022, Solenex filed a complaint in the United States Court of Federal Claims asserting claims for breach of contract and a Fifth Amendment taking. *Solenex v. United States*, Case No. 22-cv-295-TMD (Fed. Cl. filed Mar. 14, 2022).

Solenex's final argument that the agency was "obligated to consider . . . the potential costs to those impacted by the action," Pl.'s Opp'n at 32, is simply a reiteration of its reliance and contract-based arguments. It is also grounded in the *Mingo Logan* dissent which, as explained above, is not the law; and on *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1913–14 (2020), which, as previously explained, is distinguishable, *see* Fed. Defs.' Mem. at 44.

c) Any error was harmless

Despite protestations to the contrary, Solenex still has not demonstrated that the Secretary's alleged failure to consider these "aspects of the problem" would be anything other than harmless error. *See* Pl.'s Opp'n at 33–35. The Secretary concluded that the Lease issued without compliance with NEPA or the NHPA; that no subsequent analyses corrected those legal errors; and that, given Congress's prohibition on leasing in the Badger-Two Medicine area, the Lease could not be validated. Solenex has not demonstrated that consideration of reliance or contract-based interests (or any others Solenex raised in its opening brief) *could* alter those conclusions so as to change the Secretary's ultimate decision to cancel the Lease. That is the very definition of a harmless error. *See 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[.]").

3. The Secretary adequately explained any departure from earlier findings

Finally, Solenex has not carried its burden of demonstrating that the Secretary changed a policy, let alone that the Secretary failed to fully explain any change of position. *See* Pl.'s Opp'n at 35–36. Federal Defendants do not "enlist" *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009), "to shore up" their argument: *Fox* sets the standard that Solenex must satisfy to

demonstrate that any agency change of policy is "arbitrary and capricious." Solenex has not done so. And even assuming that the Secretary's cancellation of the Lease is the sort of action that is subject to this inquiry, Solenex's cursory dismissal of *Fox*'s factors does not carry that burden.

Solenex first dismisses the Secretary's satisfaction of the first and third factors—that acknowledging the change of position displays awareness of that change in position—as "tautological," ignoring that this is the Supreme Court's reasoning. *Fox*, 556 U.S. at 515, 517 ("There is no doubt that the Commission knew it was making a change" because it said as much, and a "conscious change of course adequately indicates" that "the agency *believes* [the new policy] to be better . . . ."). Solenex then concedes that the third factor weighs in Federal Defendants' favor and that the other two factors are "arguable," depending on its earlier arguments challenging the bases for the Secretary's decision, *see* Pl.'s Opp'n at 35—which, as amply demonstrated *supra*, are well explained and supported by the record and the law. In short, Solenex concedes that it has not carried its burden under the *Fox* factors. Nor can it, given the thorough and reasoned explanation that the Secretary provided for her decision to cancel the Lease—which satisfies the standard. *Fox*, 556 U.S. at 515 (requiring the agency only to provide a "reasoned explanation for its action").

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

Solenex does not dispute that, should the Court affirm the Secretary's decision cancelling the Lease, its arguments challenging the APD disapproval are moot because a valid lease is a necessary precondition to an approved APD. *See* 43 C.F.R. § 3161.2. Even were the Lease valid, the Secretary's decision disapproving the APD was not arbitrary or capricious and is supported by the administrative record. *See* Fed. Defs.' Mem. at 64. None of the arguments Solenex marshals against the Forest Service's Area of Potential Effects ("APE") determination, adverse effects

determination, or handling of the mitigation process carry its burden of demonstrating that the agency failed to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *PPL Wallingford Energy LLC v. Fed. Energy Regulatory Comm'n,* 419 F.3d at 1198 (quotation omitted). Ultimately, Solenex does not *like* the Forest Service's decisions. But that does not render an agency's actions arbitrary or capricious.

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

Federal Defendants have amply demonstrated that the Forest Service made its own APE determination in full compliance with the regulations. It prepared a draft determination, requested comments from the State Historic Preservation Officer ("SHPO") and Tribal Historic Preservation Officer ("THPO"), finalized the determination, sought and reviewed comments from the consulting parties, and finalized its determination—with which the Advisory Council on Historic Preservation ("ACHP") concurred. Fed. Defs.' Mem. at 54–55. And its conclusions were supported by the record. *Id.* at 55. None of Solenex's arguments in reply undermine this decision.

First, Solenex now charges, essentially, that the 2003 *initial* APE determination should have been the final APE determination; and that the actual final APE determination "uncritically" adopted the Tribe's position. *See* Pl.'s Opp'n at 36–37. As an initial matter, the 2003 APE was not a final determination—whether or not it accounted for both direct and indirect effects.[12] Nor could

[12] Though Solenex cites language from the 2003 APE suggesting that it was "an attempt to reasonably consider the geographical area that may be indirectly impacted by" drilling activities, on its face the 2003 APE only considered ground disturbance and visual, audio, and olfactory effects directly observable from the proposed drilling activity. *See* H-0010, FS006374–79; *id.* at FS006378 (concluding that "a person standing within the proposed APE could see, hear, or smell the activities associated with proposed well drilling activities," without addressing any other factors).

it be, because the Forest Service had not yet consulted with the SHPO and THPO—as the regulations required, *see* 36 C.F.R. § 800.4(a)—before rendering the 2003 determination. After following that required process, the Forest Service was required to account for comments from the SHPO, recommending that the agency consult with the Tribe on "indirect and cumulative effects," ECF No. 45-8 at 34 (FS004848), and the THPO, indicating that the contemplated drilling would negatively affect the area, which "possesses spiritual and religious power for the Blackfeet," *id.* Finally, it explained the basis of its decision establishing the APE. 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).

Solenex charges that this determination was arbitrary or capricious by mischaracterizing the Forest Service's decision as accounting solely for "metaphysical" effects on the area. Pl.'s Opp'n at 38–39. They cite no authority for the proposition that is improper for an agency to account, in determining the APE, for effects on the spiritual nature of an area as viewed by a Tribe that considers the area culturally and religiously significant.[13] Ultimately, however, the APE is "influenced by the scale and nature of [the] undertaking." 36 C.F.R. § 800.16(d). The effects from the undertaking in this case were documented in comments from the THPO, as well as an

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Federal Defendants also stand corrected: *Dine Citizens Against Ruining Our Environment v. Bernhardt* did in fact address whether the agency evaluated indirect effects, albeit outside of the established direct-effects APE. 923 F.3d 831, 847–48 (10th Cir. 2019). But Solenex's reliance on the case remains misplaced. Nothing in that decision indicates that the APE is necessarily *limited* to an area within "one mile" of well-pad construction, *see* Pl.'s Mem. at 57, or that it would be error for an agency to consider indirect or cumulative effects across a broader area, *c.f. Dine Citizens*, 923 F.3d at 848 (pedestrian surveys conducted over a 108-acre area and evaluating impacts at a location over 11 miles away).

[13] Solenex's hypothetical concerning the beliefs of an *idiosyncratic* John Doe in Texas, *see* Pl.'s Opp'n at 39, is irrelevant and finds no basis or support in this administrative record. The record does, however, support a conclusion that development of the area would harm the religious and cultural interests of the Tribe.

ethnographic study. *See* ECF No. 45-8 at 34 (FS004848). The Forest Service explained the basis of its decision, which was supported by this evidence in the record. *Id.* Solenex points to no contradictory evidence. And ultimately, the Forest Service was required to account for effects 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). It did that too, and explained the basis of that decision as well. *See* H-0039, FS006532 (Determination of Adverse Effects).

Solenex also argues, now, that the Forest Service failed to balance Solenex's and the public's interests against the Tribe's in establishing the APE. Pl.'s Opp'n at 38, 40–41. But it cites no authority requiring an agency to "balance interests" in establish an APE. Rather, as explained above, the APE is "influenced by the scale and nature of an undertaking," and requires determining where that undertaking "may directly or indirectly cause alterations in the character or use of historic properties," not any balance of interests. 36 C.F.R. § 800.16(d). Even the Interior Board of Land Appeals ("IBLA") decision on which Solenex relies for the proposition, *Earth Power Res., Inc.*, did not require such a balancing for establishing an APE—but instead for BLM's decision to "refrain from leasing certain lands for geothermal resources" under a different statutory and regulatory regime.[14] 181 IBLA 94, 109 (May 12, 2011).

In short, no matter how many times Solenex asserts that the Forest Service "uncritically" adopted the position of the Tribe, it has not carried its burden of demonstrating that the APE determination was arbitrary or capricious. The Forest Service was entitled to rely on evidence in

[14] This case is further inapposite because, there, the agency merely pointed to the *existence* of a Traditional Cultural District in explaining its decision; it did not "describe how and to what extent geothermal leasing would impact specific values in specific places." *Id.* at 109. Here, the Forest Service rendered just such an explanation, grounded in evidence in the record. *See* Fed. Defs.' Mem. at 50–53.

the record and its own expertise to establish the APE. It did so. Solenex has not demonstrated otherwise.

B. The adverse effects determination was not arbitrary or capricious

Solenex likewise has not carried its burden of demonstrating that the Forest Service's Determination of Adverse Effects was arbitrary or capricious. Though Solenex again repeats its charge that the agency "outsource[d] its decision" to the Tribe, Pl.'s Opp'n at 36, repetition does not make it so. As Federal Defendants have amply demonstrated, the Forest Service complied with the regulatory process for rendering a Determination of Adverse Effects. *See* Fed. Defs.' Mem. at 54 (describing process). In doing so, it considered input and comments from the SHPO, THPO, and other consulting parties—including Solenex. *Id.* at 55–56. Though Solenex does not like the Forest Service's ultimate determination, it has not demonstrated error.

First, Solenex cites no authority in support of its allegation that the Forest Service engaged in a "paradigmatic case of outsourcing" its decision. *See* Pl.'s Opp'n at 41. Nor does it challenge Federal Defendants' distinction of the cases on which it relied for that proposition with respect to the APE determination. *See* Fed. Defs.' Mem. at 52–53. It is not outsourcing when—as Solenex does not dispute—the agency consulted with all of the appropriate parties *and* considered those parties' positions before coming to an independent decision.

Solenex then argues that Federal Defendants' explanation for why the Determination of Adverse Effects accounted for existing infrastructure constitutes a "post hoc" rationalization. This is not so, where Forest Service explained in the record why additional disturbance beyond existing infrastructure would adversely affect the APE, and where the location of that infrastructure is also described in the record. *See* Fed. Defs.' Mem. at 56–57 (citing H-0039, FS006536–37); H-0039, FS006536–37; *cf. Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971),

abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977) (post-hoc rationalizations inadequate basis for review because they "do not constitute the 'whole record' compiled by the agency").

Next, Solenex confuses the cumulative effects analysis by contending that Federal Defendants must "explain" how various infrastructure "would not have already caused the effects . . . imputed to the proposed well." *See* Pl.'s Opp'n at 41–42. In doing so, Solenex effectively asks the Court to substitute its judgment for the agency's—which is not proper. *Motor Vehicle Mfrs.*, 463 U.S. at 43. The question is rather whether the agency "examine[d] the relevant data and articulate[d] 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. The Forest Service did so here, when it described the direct, indirect, and cumulative effects of Solenex's proposed APD on the area's setting, materials, feeling, and association; summarized the characteristics of the historic property in light of the comprehensive ethnographic study prepared in 2012; and explained that disturbance *in addition to* that caused by the existing infrastructure would have a negative effect, based on evidence before it. H 0039, FS006535–42.

Finally, Solenex argued in its opening brief that there was no evidence in the record concerning berry patches or other culturally significant resources that would be affected by the proposed well. *See* Pl.'s Mem. at 60–61. Federal Defendants have pointed to evidence in the record, as well as the Forest Service's reliance on that evidence in rendering and explaining its decision. *See* Fed. Defs.' Mem. at 57–58. Federal Defendants are not obligated to prove that the well would further affect these resources, as Solenex now suggests, Pl.'s Opp'n at 42. It is rather *Solenex's* burden to demonstrate that the Forest Service's decision was not supported by the record—a burden it has not met.

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

Finally, Solenex has not carried its burden of demonstrating that the Forest Service's handling of the mitigation process was arbitrary or capricious. Contrary to Solenex's new arguments, the Forest Service's "exclusive concern" during the consultation on mitigation options was complying with the law—which it did, and Solenex has not demonstrated otherwise.

The law required the Forest Service to "consult with the SHPO/THPO and other consulting parties, including Indian tribes . . . to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6(a). As Federal Defendants have explained, the Forest Service consulted with the SHPO/THPO, the Tribe, and Solenex to develop and evaluate options that could avoid, minimize, or mitigate adverse effects. *See* ECF No. 45-8 at 1 (FS004752); ECF No. 45-8 at 14 (FS004773); ECF No. 115-14 at 14 (FS006555). Solenex has not shown any deficiency in this course of action.

Instead, Solenex argues that it was "not given adequate documentation to evaluate" those adverse effects and propose mitigation measures. Pl.'s Opp'n at 43. Federal Defendants acknowledge that some documentation was withheld during the consultation process consistent with the agency's obligations under the Archeological Resources Protection Act ("ARPA"). *See* Fed. Defs.' Mem. at 62. But despite having access to those documents for years now, after receiving them subject to the protective order in this litigation, Solenex has still not identified any information that would change the mitigation analysis, or any other mitigation options that it would have proposed, had it had this information at the time. *See* Pl.'s Mem. at 61; Pl.'s Opp'n at 43.

Solenex then argues that the agency did not "develop and *independently* evaluate mitigation measures . . . ." Pl.'s Opp'n at 43. But the law does not require the agency to *independently* develop or evaluate mitigation measures. Solenex relies on an IBLA decision for this proposition, but the IBLA required the agency only to *consider* (but not independently

propose) protective stipulations before rejecting a lease application. *See* Pl.'s Opp'n at 43 (citing *George G. Witter*, 129 IBLA 359, 365 (1994)). NHPA regulations explicitly require the agency to consult with the relevant parties to both develop and evaluate those alternatives. 36 C.F.R. § 800.6(a), (b)(i). The Forest Service indisputably did so.

Solenex next argues that the "mitigation proposals" were in some manner deficient or their failure a "foregone conclusion" because some contemplated Solenex relinquishing the Lease. Pl.'s Opp'n at 43–44. But the regulations require the agency, in consultation, to consider "alternatives or modifications to the undertaking that could *avoid, minimize, or mitigate* adverse effects . . . ." 36 C.F.R. § 800.6(a). Options under which Solenex relinquished the Lease would, in fact, *avoid* adverse effects. Other proposed and discussed options would mitigate them. *See* Fed. Defs.' Mem. at 59.

Though Solenex characterizes "most of the proposals" as "either sophistry, or an admission that the impossibility of mitigation was a foregone conclusion," it does not substantiate those accusations. *See* Pl.'s Opp'n at 44. Nor does it identify which proposals it contends were not adequately considered, nor describe a standard for evaluating such adequacy. Nor does it address its own cited authority, which requires only that the agency must *consult* and *try* to resolve the adverse effects; not that it must necessarily succeed. *See* Fed. Defs.' Mem. at 60.

The record does not support Solenex's statements that that the Forest Service or the Tribe rejected all mitigation proposals or that the Forest Service "gave the Tribe veto power over mitigation measures" by rejecting unspecified proposals. Pl.'s Opp'n at 43–45. Ultimately, no option was deemed accepted by all parties to the consultation and the Tribe terminated consultation. The regulations provide a process when a Tribe terminates consultation, which the agency followed here. First, the ACHP prepared comments as 36 C.F.R. § 800.7(a)(3) requires.

The Forest Service took account of the ACHP's comments in rendering its final decision. *Id.* § 800.7(c)(4). Following the regulations that govern the process when a Tribe terminates consultation does not constitute giving "veto power" to the Tribe.

In short, no matter how often or stridently Solenex asserts that the Forest Service deferred to the Tribe, Solenex has not demonstrated that the Forest Service's decisions in connection with its adverse-effects determinations in any way failed to follow the NHPA regulations or afforded any undue influence to any party. Rather, the Forest Service complied with the regulatory process and its decisions are thoroughly explained and supported by evidence in the record—and Solenex has not carried its burden of demonstrating otherwise. So even were the Court to find the Lease valid, Solenex's motion for summary judgment on its claims challenging the APD disapproval should be denied.

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. And Solenex has not carried it burden of proving otherwise. 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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