IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

BLM	Bureau of Land Management
DOI	Department of the Interior
EA	Environmental Assessment
IBLA	Interior Board of Land Appeals
MLA	Mineral Leasing Act
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act

Note on Citations to the Administrative Record and Court Docket

Defendant-Intervenors cite documents from the administrative record as follows: If record documents have previously been collected in a joint appendix during the course of these proceedings, Defendant-Intervenors cite such documents by the relevant appendix document's ECF docket number and pagination (i.e., ECF pagination appearing in the upper right corner). For other record documents, Defendant-Intervenors generally cite such documents by referencing the Bates pagination applied by Federal Defendants. However, for efficiency and clarity, Defendant-Intervenors cite documents from Federal Defendants' July 7, 2017 supplementation of the administrative record (ECF No. 124) by using the short form "FS-Supp" for documents bearing the Bates label "FS_AmendedSupplimentalIndex" (sic).

For the sake of consistency, Defendant-Intervenors cite all documents from this Court's docket in this case, including Plaintiff Solenex LLC's summary judgment response and reply briefing (ECF Nos. 172 & 173), by ECF pagination appearing in the upper right corner. Defendant-Intervenors also cite such documents by ECF docket number except for the Solenex response and reply briefing, which is referenced as "Solenex Response-Reply" for clarity.

Solenex's response and reply to Intervenors (ECF Nos. 172 & 173, "Solenex Response-Reply") fails to demonstrate error in the government's cancellation of the Hall Creek lease and disapproval of an associated drilling permit. Confronted with controlling authority and record evidence that contradicts its claims, Solenex repeatedly responds with immaterial distinctions and distortions of the administrative record. This Court should reject Solenex's arguments.

I. SOLENEX CANNOT ESCAPE THE SUPREME COURT'S BOESCHE V. UDALL PRECEDENT

Solenex's attempt to evade the Supreme Court's controlling precedent in Boesche v. Udall, 373 U.S. 472 (1963), is unpersuasive. Solenex's opening summary judgment brief argued that Interior's lease-cancellation authority was defined and limited by the Mineral Leasing Act ("MLA")—i.e., the losing argument in Boesche, see id. at 478-83—and that Boesche was essentially limited to its "unique facts" involving an administrative cancellation to address a claim by a competing lease applicant. ECF No. 156 at 33-39. Now, after being confronted with Boesche's language generally affirming Interior's "administrative authority to cancel on the basis of pre-lease factors," 373 U.S. at 479, as well as the broad interpretation and application of Boesche in case law and administrative precedent spanning nearly 60 years, see ECF No. 162 at 16-18, Solenex does not attempt to defend its original arguments. Solenex's Response-Reply does not contend that Interior's cancellation authority is circumscribed by the MLA, nor that Boesche authorizes cancellation only where lease issuance contravenes the rights of a competing applicant. Solenex Response-Reply at 9-23.

Instead, Solenex takes a different tack, now arguing that Boesche authorizes cancellation only where private claims to the public lands violate "the substantive laws, such as the MLA and the homestead acts, which allow the claim to be made in the first place." Id. at 10. Solenex's new theory of Boesche is no more persuasive than its abandoned predecessors. At the outset, it

is telling that, despite six decades of precedent discussing and applying Boesche, Solenex cites no case articulating the rule that Solenex proposes. See id. at 10-14. The best Solenex can do is to point out that Boesche and other cases that preceded the wave of federal environmental legislation that began in the late 1960s, such as Cameron v. United States, 252 U.S. 450 (1920), addressed actions by Interior to cancel claims for violating the statutes that authorized the making of those claims. See Solenex Response-Reply at 11-12. Yet Solenex's attempt to transform this happenstance into a limitation founders on the language of the cases themselves. Boesche spoke generally of the Secretary of Interior's authority "to correct his own errors" and broadly of Interior's "administrative authority to cancel on the basis of pre-lease factors," 373 U.S. at 478-79, and Cameron recognized Interior's continuing general authority, for so long as lands remain in the public domain, to assess whether a private claim to them "is valid and, if it be found invalid, to declare it null and void," 252 U.S. at 460. Indeed, while Solenex repeatedly criticizes Intervenors for allegedly "conscripting broad language divorced from the facts of the case," Solenex Response-Reply at 35, the fact remains that Solenex's proposed rule is not explicitly stated as a governing legal principle, in broad language or otherwise, in any of the relevant case law.

Further, while Solenex argues that Intervenors cite language from Boesche that is broader than the Supreme Court's holding, see id. at 11, the whole point of Boesche was to reject arguments that sought to narrowly limit Interior's lease-cancellation authority—either to those specific situations addressed in the MLA, 373 U.S. at 478-83, or to circumstances where only "equitable interests" in the public lands were at issue, id. at 477. Boesche's determination that Interior retained general administrative authority to correct the agency's own pre-leasing errors was a "necessary predicate" to its rejection of these proposed limitations and thus was not

surplusage or dictum. United States v. Windsor, 570 U.S. 744, 759 (2013). In any event, even if it were otherwise, Solenex's argument "carries no weight since 'carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.'" Sierra Club v. EPA, 322 F.3d 718, 724 (D.C. Cir. 2003) (quoting United States v. Oakar, 111 F.3d 146, 153 (D.C. Cir. 1997)); see also Bangor Hydro-Elec. Co. v. FERC, 78 F.3d 659, 662 (D.C. Cir. 1996) ("It may be dicta, but Supreme Court dicta tends to have somewhat greater force—particularly when expressed so unequivocally.").

Solenex's related attempt to apply a "void vs. voidable" distinction—under which a lease issued in violation of its authorizing statute is void and therefore cancelable under Boesche, but a lease issued in violation of the National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA") is voidable and not cancelable under Boesche, see Solenex Response-Reply at 9, 12—also fails. To be sure, the Interior Board of Land Appeals ("IBLA") has concluded that a NEPA violation renders a federal mineral lease voidable rather than void—a conclusion that differs from federal judicial precedent, which has recognized that such a violation voids a federal lease approval. See ECF No. 162 at 23-24 & n.5 (discussing authorities). However, Solenex errs in arguing that this distinction makes a difference for applying Boesche. Regardless whether a NEPA or NHPA violation renders a lease void or voidable, the important point is that a federal agency's failure to comply with NEPA or the NHPA in the oil and gas leasing process constitutes an error regarding a "pre-lease factor[]" that violates federal law. Boesche, 373 U.S. at 478-79. Accordingly, such a violation renders a lease subject to administrative cancellation. See id.

Solenex's attempt to relegate NEPA and the NHPA to second-class status when compared to "the MLA or homestead acts," see Solenex Response-Reply at 10, 12-13, 17-18,

makes no sense. NEPA and the NHPA, no less than the MLA and land-grant statutes, are congressional enactments that impose mandatory duties on Interior, and mineral leases may be vacated or canceled where Interior issues them in violation of NEPA and the NHPA. See, e.g., Friends of the Earth v. Haaland, Civ. Action No. 21-2317 (RC), 2022 WL 254526, at *1, 25-29 (D.D.C. Jan. 27, 2022) (vacating largest offshore oil and gas lease sale in U.S. history to remedy NEPA violation); WildEarth Guardians v. U.S. Bureau of Land Mgmt., 457 F. Supp. 3d 880, 883, 896-97 (D. Mont. 2020) (vacating 287 onshore mineral leases for violation of NEPA); Bob Marshall Alliance v. Lujan, 804 F. Supp. 1292, 1295-98 (D. Mont. 1992) (canceling mineral leases issued by Interior near Badger-Two Medicine region in Montana to vindicate "the mandate of NEPA"); see also Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 788 (9th Cir. 2006) (holding that federal lease extensions "must be undone" to remedy NEPA and NHPA violations). Thus, leases issued in violation of NEPA and the NHPA are just as "invalidly issued," Boesche, 373 U.S. at 480, as those issued in violation of the MLA.

Solenex also fails to justify why this Court should conclude that Interior may have its mineral leasing actions judicially vacated or canceled due to NEPA and NHPA violations, but Interior may not affirmatively use its own administrative authority to remedy those violations without judicial intervention. Solenex's proposed rule would yield the peculiar result that Interior could identify and acknowledge a NEPA or NHPA violation in connection with federal mineral leasing, but would have to await being haled into federal court for such a violation and subjected to a judicial remedy before any responsive action could be taken. As the Supreme Court concluded in addressing a similar prospect in Boesche,

> [m]atters of this nature do not warrant initial submission to the judicial process. Indeed the magnitude and complexity of the leasing program conducted by the Secretary [of Interior] make it likely that a seriously detrimental effect on the prompt and efficient administration of both the public domain and the federal

> courts might well be the consequence of a shift from the Secretary to the courts of the power to cancel such defective leases.

373 U.S. at 484 (footnote omitted).

Further, while Solenex denigrates NEPA as a "procedural statute," Solenex Response-Reply at 8 (emphasis in original), the MLA also imposes procedural requirements, see, e.g., 30 U.S.C. § 226(f) (establishing detailed procedures for posting public notice of lease sales and drilling applications), and Solenex appears to accept that violations of the latter could justify cancellation, see Solenex Response-Reply at 20 n.5. Yet Solenex offers no reason why violation of NEPA's procedural requirements to ensure informed decision making should not afford a basis for cancellation, but violation of the most trifling procedural requirements associated with the MLA leasing process—for example, a requirement for the prospective lessee's handwritten signature on the lease form, instead of his or her agent's—should. See Elaine Wolf, 113 IBLA 364, 365-66 (1990) (affirming Interior's cancellation of mineral lease for violation of signature requirement).[1]

Although, for the reasons discussed, Solenex's proposed "void vs. voidable" distinction is meritless, Solenex also fails to meaningfully distinguish federal case law holding that Interior's

[1] Solenex wrongly suggests that no federal court has applied Boesche in the context of a NEPA violation. Solenex Response-Reply at 8, 19-21. Natural Resources Defense Council v. Hughes, 454 F. Supp. 148, 154 (D.D.C. 1978), cited Boesche to support its ruling that applicants for "preference" leases under the federal coal leasing program were properly subjected to an injunction against further leasing to remedy a NEPA violation. Although Solenex notes that the court in that case allowed some "leases to be issued in limited circumstances," Solenex Response-Reply at 15 n.4, this reflected only judicial discretion to exempt twenty leases presenting "the least deleterious environmental consequences" from an otherwise-applicable nationwide injunction on federal coal leasing, 454 F. Supp. at 154. Far from viewing NEPA as an unimportant procedural hurdle, the Natural Resources Defense Council court issued sweeping injunctive relief to enforce the government's "mandatory, nondiscretionary duty pursuant to NEPA to consider fully all the environmental impacts of, and alternatives to, a new federal coal leasing program before deciding to adopt and implement that program." Id. at 151.

NEPA violation renders a lease void rather than voidable. The Tenth Circuit's decision in Sangre de Cristo Development Co. v. United States, 932 F.2d 891 (10th Cir. 1991), held that Interior's NEPA violation in approving a lease rendered the lease without "legal effect"—i.e., void—and therefore the leaseholder's alleged "leasehold interest … never vested in the first place." Id. at 894-95; see also Davis v. Morton, 469 F.2d 593, 597-98 (10th Cir. 1972) (earlier case holding that Interior's approval of the lease at issue in Sangre de Cristo violated NEPA). Solenex argues that the leasing statute at issue in Sangre de Cristo required Interior's approval of a lease between a private entity and an Indian Pueblo, such that Interior's invalid approval voided the lease under "the substantive statutes setting forth what was required for a valid claim on tribal land," not NEPA. Solenex Response-Reply at 21. But Solenex omits the pivotal point that the reason Interior failed to issue a valid approval in Sangre de Cristo was because "no environmental impact study had been undertaken prior to the approval," as required by NEPA. Sangre de Cristo Dev. Co., 932 F.2d at 893, 894-95 (describing Davis); see Davis, 469 F.2d at 597-98. Although the statute that authorized leasing in Sangre de Cristo did require "Departmental approval," the Tenth Circuit held that requirement to demand a "valid approval" including NEPA compliance. 932 F.2d at 894. NEPA compliance is equally a statutory prerequisite to valid issuance of an oil and gas lease allowing surface occupancy under the MLA, see, e.g., Sierra Club v. Peterson, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983), so Sangre de Cristo's reasoning applies equally here.

Solenex also fails to persuasively distinguish the IBLA's decision in Clayton W. Williams, Jr., 103 IBLA 192, 210, 212 (1988), that a NEPA violation rendered a federal mineral lease voidable. Solenex claims that the IBLA merely "speculated arguendo regarding the effect of a NEPA violation." Solenex Response-Reply at 20. However, the IBLA itself has cited

Clayton W. Williams, Jr. to demonstrate that "[t]he Board has held that an oil and gas lease issued by BLM in violation of NEPA is voidable." S. Utah Wilderness All., 194 IBLA 333, 336 (2019). As the IBLA further explained, it has also "repeatedly acknowledged the broad authority of the Secretary in such instances to cancel any lease issued contrary to law." Id. (footnote omitted, emphasis added).

In sum, Solenex fails to persuasively address the authorities that declare a federal lease either void or voidable as a result of a NEPA violation, and the difference between those outcomes is immaterial in this case because, even if the Hall Creek lease was rendered voidable rather than void as a result of Interior's NEPA violation, it was subsequently voided by Interior in a well-reasoned decision. See ECF No. 116-7 at 42-57 (cancellation decision). Solenex's remaining challenges to Interior's lease-cancellation authority equally fail:

First, Solenex unsuccessfully attempts to sidestep the rule of Seaton v. Texas Co., 256 F.2d 718, 722 (D.C. Cir. 1958), that Interior's administrative discretion is greater where, as here, the agency acts as guardian of the public interest than as referee of "private interests." Solenex notes that NEPA and the NHPA had not been enacted when Seaton was decided, Solenex Response-Reply at 16, but Seaton generally acknowledged Interior's heightened authority when acting "as guardian of the people" without reference to a particular statutory context, 256 F.2d at 722 (quotation and citation omitted). Stewart v. Penny, 238 F. Supp. 821, 827 (D. Nov. 1965) (cited in Solenex Response-Reply at 16), is not to the contrary as it holds only that Interior may not act arbitrarily—which Interior did not do here, see ECF No. 162 at 32-50.

Second, contrary to Solenex's contention, Solenex Response-Reply at 17, the 1993 Montana lawsuit that contested the validity of the Hall Creek lease was timely. That lawsuit challenged determinations made by Interior in authorizing a drilling permit on the Hall Creek

lease in 1993, when the agency for the first time asserted in a final decision that issuance of the Hall Creek lease complied with NEPA requirements as they had then recently been interpreted and applied in Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), aff'd in part, rev'd in part on other grounds, 848 F.2d 1441 (9th Cir. 1988). See ECF No. 45-6 at 21-24 (1993 Record of Decision); see also ECF No. 45-9 at 56-57 (1993 complaint). Because granting a drilling permit necessarily requires Interior to determine that the underlying lease is effective, 43 C.F.R. § 3161.2, and because in any event Interior affirmatively reconsidered the NEPA compliance questions surrounding issuance of the Hall Creek lease in light of Conner, the 1993 challenge to Interior's determination of those questions earlier that same year was timely. See Pub. Citizen v. Nuclear Reg. Comm'n, 901 F.2d 147, 150-52 (D.C. Cir. 1990) (holding challenge timely under reopener doctrine where agency explicitly reconsidered a previously determined issue).

Third, Solenex wrongly disputes any inference that Congress has implicitly ratified Interior's asserted lease-cancellation authority. Solenex Response-Reply at 17-19. Congress has repeatedly revised the MLA post-Boesche but has never limited that authority. See ECF No. 162 at 20-22. Nevertheless, Solenex argues that post-Boesche circumstances provided no notice to Congress that Interior asserted authority to cancel a lease for a NEPA violation. Solenex Response-Reply at 17-19. But Interior promulgated a regulation in 1983 stating without limitation that "[l]eases shall be subject to cancellation if improperly issued." 43 C.F.R. § 3108.3(d). This regulation did not differentiate between leases issued in violation of the MLA or other statutes. Nor did it refer to leases issued "invalidly," which Solenex (erroneously) deems so important in indicating issuance in violation of the MLA rather than NEPA, see Solenex Response-Reply at 9-10, but referred generally to any lease issued "improperly," 43 C.F.R. § 3108.3(d)—a formulation that encompasses leases issued in violation of any federal law, see

Exxon Corp., 95 IBLA 374, 376 (1987) (describing "improperly issued" lease as one issued "in violation of the terms of statute and/or implementing regulations and, hence, was either a nullity or subject to cancellation"). Given Interior's unqualified declaration of cancellation authority in a final regulation, "the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) (quotation and citation omitted).

Fourth, Solenex errs in relying on American Wild Horse Preservation Campaign v. Perdue, 873 F.3d 914 (D.C. Cir. 2017) (discussed in Solenex Response-Reply at 21-22). That case involved an agency's change of position in circumstances where the agency "fail[ed] even to acknowledge its past practice and formal policies regarding [the issue], let alone to explain its reversal of course." Id. at 927. It bears no resemblance to this case, in which Interior acknowledged its prior determinations regarding the Hall Creek lease and explained the reasons for modifying its position. See ECF No. 162 at 38-39.

II. SOLENEX CANNOT SALVAGE ITS CONTRACT CLAIM

Solenex's arguments fail to justify its claim that cancellation of the Hall Creek lease violated principles of contract law. Solenex first wrongly disputes application of Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947), which held the federal government not bound by its agents' unauthorized acts. Solenex Response-Reply at 23. Solenex contends that contracts with the federal government "can have the binding legal force of any other contract." Id. True, but this principle does not distinguish Merrill. As the D.C. Circuit has stated, "[u]nless as in Merrill there is a statute or regulation to the contrary, the government is subject, when it enters the domain of commerce, to the same principles of justice that govern private parties." Molton, Allen & Williams, Inc. v. Harris, 613 F.2d 1176, 1179 (D.C. Cir. 1980) (emphasis

added). Here, NEPA and the NHPA were "contrary" authorities, id., that Interior violated when issuing the Hall Creek lease, so the rule that the government is not bound by the unauthorized acts of its agents applies, Merrill, 332 U.S. at 384. Solenex relies on Mobil Oil Exploration and Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) (cited in Solenex Response-Reply at 23), but that case does not support a different conclusion, as it did not address any question involving the government's violation of federal law in issuing lease contracts, but instead addressed the government's contention that post-leasing legislation justified its non-performance under such contracts. See id. at 615-20. As for Solenex's argument that the Hall Creek lease was somehow "within the authority of BLM to issue" despite violations of NEPA and the NHPA, Solenex Response-Reply at 24, this argument again relies on Solenex's proposed "void vs. voidable" distinction, which is unfounded for the reasons discussed above.

Solenex next fails to meaningfully address 43 C.F.R. § 1810.3, which was incorporated into the Hall Creek lease contract by the terms of the federal leasing form, and which explicitly preserved Interior's authority to correct its legal errors in issuing the lease. See ECF No. 162 at 25-26; see also Mobil Oil Expl. & Prod. Se., 530 U.S. at 616 (recognizing that lease term incorporating applicable regulations subjected the lessee's rights to all "regulations already existing at the time of the contract"). Solenex quotes 43 C.F.R. § 1810.3, but disregards key regulatory language: "The United States is not bound … by the acts of its officers or agents when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." 43 C.F.R. § 1810.3(b); compare Solenex Response-Reply at 24 (omitting most of this provision). The Hall Creek lease incorporated section 1810.3's regulatory language into Solenex's contractual bargain with the federal government, such that Interior retained "authority to review, revise and reverse actions of DOI employees determined to be

contrary to the law." Silver State Land, LLC v. Schneider, 145 F. Supp. 3d 113, 133 n.16 (D.D.C. 2015), aff'd, 843 F.3d 982 (D.C. Cir. 2016). Although Solenex argues that this result means "oil and gas leases would never be binding," Solenex Response-Reply at 24, the cited regulatory language applies only where leases are issued in violation of federal law—the limited circumstance in which Boesche and Merrill, among others, recognize that a private leaseholder's or contractor's interest does not supersede the public interest.

Solenex further errs in contending that its contract argument alleging that Interior unreasonably delayed in canceling the Hall Creek lease remains viable despite the D.C. Circuit's conclusion in this very case that a quicker cancellation decision was not justified by the governing law or factual circumstances. See Solenex LLC v. Bernhardt, 962 F.3d 520, 529 (D.C. Cir. 2020). Solenex contends the D.C. Circuit did not consider the issue of delay "within the context of contract principles." Solenex Response-Reply at 26. But Solenex's contract argument alleges that Interior failed to cancel the lease "within a reasonable time." ECF No. 156 at 44-45. The D.C. Circuit considered "the reasonableness of delay" in this case, deeming it "a function of context," and ultimately concluded, after a lengthy discussion of the context for Interior's action here, that quicker cancellation "could not have been the sounder or legally compelled course of action." Solenex LLC, 962 F.3d at 528-29. Given that appellate conclusion, Solenex's invitation for this Court to reconsider the reasonableness of Interior's delay defies the well-established rule that a district court "cannot fashion a remedy that is inconsistent with either the spirit or express terms" of an appellate mandate. Am. Council of the Blind v. Mnuchin, 977 F.3d 1, 5 (D.C. Cir. 2020) (quotations, alteration, and citation omitted).

III. SOLENEX FAILS TO DEFEND ITS BONA-FIDE-PURCHASER CONTENTIONS

Solenex fares even worse in addressing its mistaken claim to bona-fide-purchaser status under the MLA, because Solenex mostly fails to respond at all to Intervenors' arguments. Solenex purports to respond to Intervenors' bona-fide-purchaser arguments by incorporating its opening brief and its opposition to Federal Defendants' cross-motion for summary judgment. Solenex Response-Reply at 26 n.8. But Solenex's argument-by-incorporation approach fails to address the following points raised by Intervenors:

- Solenex's expenditures in pursuit of lease development after acquisition of the lease do not transform Solenex from a giftee into a bona fide purchaser because Solenex had notice of challenges to the validity of the Hall Creek lease before it made any such expenditures. Such notice disqualified Solenex from subsequently attaining bona-fide-purchaser status by spending money. See ECF No. 162 at 28 n.7.

- These same expenditures do not constitute valuable consideration giving rise to bona-fide-purchaser status because the standard federal lease form contract obliges every leaseholder to perform numerous development obligations. Solenex's argument would thus transform every giftee of a federal mineral lease into a bona fide purchaser. See id.

- Solenex cannot claim bona-fide-purchaser status under the "remote purchaser" rule because Solenex took the lease from the original leaseholder, Mr. Longwell, after Mr. Longwell resumed ownership of the lease with knowledge of challenges to its validity. Under established common law principles, Mr. Longwell was not a bona fide purchaser in these circumstances and thus Solenex could not claim vicarious bona-fide-purchaser status through acquisition from an innocent prior owner. See ECF No. 162 at 29-31.

Because Federal Defendants did not advance the first two of these arguments, Solenex's response to Federal Defendants fails to address them. See ECF No. 170 at 22-25 (Solenex Response-Reply to Federal Defendants); see also ECF No. 164 at 38-43 (Federal Defendants' cross-motion). Instead, Solenex's response to Federal Defendants asserts that Solenex paid valuable consideration for the Hall Creek lease by expending funds in pursuit of lease development, without addressing Intervenors' rebuttals to that contention discussed above. See ECF No. 170 at 24-25. Further, while Federal Defendants and Intervenors both advanced

versions of the third argument, Solenex does not address it. Compare ECF No. 162 at 29-31 and ECF No. 164 at 40-42 with ECF No. 170 at 22-25. In these circumstances, Solenex has waived any response to Intervenors' arguments for summary judgment on these points. "It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." Banner Health v. Sebelius, 905 F. Supp. 2d 174, 185 (D.D.C. 2012) (quotations and citation omitted). This Court should do so here.

As to the sole point on which Solenex's approach responds to Intervenors on the bona-fide-purchaser issue—concerning whether Solenex's notice of lease-validity challenges was substantively adequate to preclude bona-fide-purchaser protection—Solenex is wrong. Solenex argues that the only notice that would suffice is "notice of a lease cancellation or knowledge that someone else has a superior right." ECF No. 170 at 23. To the contrary, notice of a "climate of adversity surrounding the [lease] interest" suffices to preclude bona-fide-purchaser status whenever there is any information "in the record suggesting that an adverse claim may be asserted and prevail, such as a protest or apparent defect in the lease." Home Petroleum Corp., 54 IBLA 194, 209-10 (1981). This includes even the circumstance where a claimant has raised an unsuccessful challenge to a federal mineral lease, so long as the period for appeal has not expired. See Rosita Trujillo, 77 IBLA 35, 40 (1983) (holding that lease assignee was not bona fide purchaser where assignee took lease with notice that Interior had denied protest against lease but appeal could still be filed). Here, Solenex took the Hall Creek lease with notice that members of the public had asserted the lease's invalidity in an administrative appeal process that resulted in a voluntary remand, and that an unresolved federal lawsuit in Montana alleged that the lease was issued in violation of NEPA. See HC05937; ECF No. 114-1 at 29-30. Solenex

does not claim that it lacked notice of these challenges, which were documented in the agency leasing file. See ECF No. 170 at 23-24. Accordingly, Solenex took the lease with notice of a "climate of adversity" as to its validity that precluded bona-fide-purchaser status. Home Petroleum Corp., 54 IBLA at 209.[2]

IV. SOLENEX BREATHES NO LIFE INTO ITS MERITLESS ARBITRARY-AND-CAPRICIOUS CLAIM

Solenex's arguments also fail to resuscitate its arbitrary-and-capricious challenge to Interior's cancellation decision.

A. Solenex Identifies No Improper Reliance on Post-Leasing Developments

In attempting to salvage its claim that Interior's determination of lease invalidity improperly relied on post-leasing developments, Solenex begins by seizing upon a single sentence from Interior's lease-cancellation decision taken out of context. See Solenex Response-Reply at 27-28. Solenex points out that a summary sentence from the introductory portion of Interior's cancellation decision references the circumstances of lease issuance as well as subsequent developments before concluding that the Hall Creek lease "was improperly issued." ECF No. 68-1 at 2 (discussed in Solenex Response-Reply at 27-28). However, this Court's assessment of the rationality of Interior's decision is not limited to this sole sentence but rather must encompass the entirety of Interior's analysis. See Ams. for Clean Energy v. EPA, 864 F.3d 691, 735 (D.C. Cir. 2017) (stating that court's review of agency decision was not limited to single statement identified by challenger "as if that were the only explanation given," but must

[2] Although Solenex claims that the statute of limitations for challenges to the lease expired in 1988, Solenex Response-Reply at 24, as discussed at Point I, supra, Interior's consideration of leasing issues in connection with review of a drilling application in 1993 afforded an opportunity for challenges to the agency's new lease-validity determinations. See Pub. Citizen, 901 F.2d at 150-52 (discussing reopener doctrine); see also ECF No. 170 at 24 (Solenex acknowledging "one cannot have an APD without a valid lease").

consider agency's entire explanation). Here—as the D.C. Circuit correctly summarized—the substance of Interior's cancellation decision consisted of a determination that the Hall Creek lease was unlawfully issued based on violations of NEPA and NHPA requirements that long pre-dated the lease, and then a separate determination that the lease should not be re-validated based on circumstances that included post-leasing developments. See Solenex LLC, 962 F.3d at 525-26; see also ECF No. 162 at 32-35; ECF No. 116-7 at 49-54. Accordingly, even assuming for the sake of argument that the single introductory sentence quoted by Solenex was not crystal clear in summarizing Interior's subsequent analysis, that would not undermine Interior's decision. See Investment Co. Inst. v. Commodity Futures Trading Comm'n, 720 F.3d 370, 380 (D.C. Cir. 2013) (rejecting challenge based on single agency statement of "less than ideal clarity" where agency "gave sufficient other explanations" for its decision) (quotations and citation omitted).

Next, Solenex incorrectly contends that the NHPA requirements applied by Interior in the lease-cancellation decision did not arise until 2016. See Solenex Response-Reply at 28-32. At the outset, this argument addresses only one of two statutory bases upon which Interior relied in determining that the Hall Creek lease was invalidly issued. See ECF No. 116-7 at 49-53. While Interior concluded that issuance of the Hall Creek lease violated the NHPA, Interior also found a violation of NEPA, see id., and Solenex offers no argument that Interior relied on NEPA requirements that post-dated the lease, see Solenex Response-Reply at 28-32. Accordingly, even if Solenex's NHPA argument were correct, it would at best establish harmless error because Interior's NEPA determination would remain as a basis for lease cancellation. See 5 U.S.C. § 706 (court reviewing agency action shall take "due account … of the rule of prejudicial error").

But Solenex's NHPA argument is not correct. Solenex claims the NHPA "[a]s passed in 1966" did not require agency consultation regarding the Hall Creek leasing decision. Solenex Response-Reply at 28. However, as Solenex's own statutory quotation reveals, the original 1966 version of NHPA Section 106 mandated agency consideration of the impact that any federal license or undertaking would have on historic properties. Id. at 28 (quoting Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (1966)). That is the same statutory duty that Interior violated in issuing the Hall Creek lease. See ECF No. 116-7 at 51-52; see also ECF No. 162 at 44-48. In arguing otherwise, Solenex appears to contend that the original version of NHPA Section 106 would not have mandated agency consideration of impacts on historic properties until Interior issued a drilling permit on the Hall Creek lease. Solenex Response-Reply at 28, 30-31. However, this is just a repackaging of Solenex's argument that issuance of the lease by itself did not threaten any impact to the leasehold—an argument that recycles a contention rejected by the D.C. Circuit in Sierra Club v. Peterson, which recognized that "once the land is leased the [Interior] Department no longer has the authority to preclude surface disturbing activities even if the environmental impact of such activity is significant." 717 F.2d at 1414 (emphasis in original); see also ECF No. 162 at 46. Although Solenex later in its brief seeks to distinguish Sierra Club v. Peterson and its progeny, as discussed infra that attempt is meritless.

Solenex fares no better in suggesting that the NHPA did not protect historic properties of interest to Native Americans until 1992. See Solenex Response-Reply at 29-31. Intervenors reference and incorporate the Federal Defendants' rebuttal of this contention. See ECF No. 164 at 50. In addition, Solenex fails to distinguish relevant NHPA case law that rebuts its argument. Solenex claims Stop H-3 Association v. Coleman, 533 F.2d 434 (9th Cir. 1976), did not recognize the NHPA's application to properties that were significant to native Hawaiians but

instead required only "consideration of state or local history." Solenex Response-Reply at 30. Solenex omits the fact that the state and local significance of the area involved in Stop H-3 Association arose from its importance in "Hawaiian folklore and tradition" extending from the ancient past into modern times, as it "retain[ed] a traditional natural state associated with the legend and history of the area" and contained a site that was sacred to native Hawaiians. 533 F.2d at 436 n.1, 439 n.6 (quotations and citation omitted). The significance of the Badger-Two Medicine area in this case involves similar factors. See, e.g., ECF No. 115-12 at 179 (National Register determination documenting that Badger-Two Medicine region "is directly associated with culturally important spirits, heroes, and historic figures central to Blackfoot religion, traditional practices, and tribal lifeways" and "provid[es] tribal members a place to conduct important prayer, hunting, and plant and paint gathering activities"). Stop H-3 Association demonstrates that the NHPA required consideration of such factors when Interior issued the Hall Creek lease in 1982, just as it does today.

Solenex's attempt to distinguish Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), is also unpersuasive. Solenex argues that Wilson addressed "expansion of a ski area, not an oil and gas lease." Solenex Response-Reply at 30-31. However, the importance of Wilson is that it applied the early-1980s version of the NHPA to properties of significance to Native American tribes. 708 F.2d at 754. Solenex wrongly suggests the NHPA's reach did not extend this far until 1992; Wilson demonstrates otherwise. See Solenex Response-Reply at 29 (claiming 1992 NHPA amendments extended NHPA to properties of importance to tribes). While Solenex points out that the federal investigation of impacts to historic properties of importance to Native Americans in Wilson was less searching than the Federal Defendants' NHPA process in this case, see id. at 31, Solenex ignores critical factual distinctions. The agency surveys and literature examinations

in Wilson identified no evidence of tribal use of the property at issue in that case and thus suggested that a more extensive investigation "would be fruitless." 708 F.2d at 754. That is a far cry from the circumstances of this case, where even initial agency investigation of the Badger-Two Medicine region identified its "unique cultural and religious significance," Solenex LLC, 962 F.3d at 528, and subsequent, more detailed ethnographic investigations established to the satisfaction of the U.S. Forest Service, Montana Historic Preservation Office, Keeper of the National Register, and Advisory Council on Historic Preservation that the Badger-Two Medicine region is central to traditional Blackfeet culture, see ECF No. 162 at 47-48. Solenex's Wilson-based argument thus fails.

B. Solenex Demonstrates No Important Omissions from Interior's Analysis

Solenex's arguments do not demonstrate that Interior overlooked any important factors in canceling the Hall Creek lease:

First, in arguing that Interior disregarded evidence of congressional intent to develop minerals on federal land, Solenex wrongly dismisses the significance of the 2006 legislation that withdrew the Badger-Two Medicine region from mineral leasing. Solenex argues that this legislation "preserved valid existing rights." Solenex Response-Reply at 32. However, Solenex's argument that the Hall Creek lease "was valid at its inception," id., relies once again on Solenex's proposed "void vs. voidable" distinction, which is unfounded for the reasons discussed supra. Further, the 2006 withdrawal legislation did not itself determine the validity of any then-existing mineral leases in the region and Senator Baucus, who sponsored the legislation, stated that such leases could be canceled voluntarily or "for any other reason" under the 2006 law. 151 Cong. Rec. S7390 (daily ed. June 24, 2005).

Second, Solenex erroneously seeks to escape its forfeiture of new reliance-interest arguments in this remand proceeding. Solenex argues that its omission of any such arguments in response to specific questioning from the D.C. Circuit reflected its counsel's forgetfulness rather than a "disavowal" of any reliance interests beyond those the D.C. Circuit deemed insufficient to demonstrate arbitrariness of Interior's action. Solenex Response-Reply at 32-33; see also Solenex LLC, 962 F.3d at 529-30 (rejecting Solenex's reliance-interest argument, noting that "Solenex identifies no other reliance interests that the Secretary failed to consider or address when making the cancellation decision," and quoting statement from Solenex's counsel). However, where, as here, a party fails to raise a contention in pursuing a losing argument before an appellate court, that party cannot evade forfeiture by "attempt[ing] to inject[] any other argument respecting" the issue in subsequent remand proceedings. United States v. Saani, 794 F.3d 44, 48 (D.C. Cir. 2015). In any event, Solenex's claims of additional reliance costs represent a departure from its prior sworn testimony to this Court, see ECF No. 162 at 37, and involve costs allegedly incurred by Solenex's predecessors in interest, which the D.C. Circuit already deemed irrelevant because they were incurred by entities "who are not the current holders of the Lease or parties to this action," Solenex LLC, 962 F.3d at 530. Solenex's new reliance-interest arguments are therefore unpersuasive.

Also unpersuasive is Solenex's hyperbolic claim to speak for a class of "ordinary plebians being crushed by the wheels of federal bureaucracy." Solenex Response-Reply at 33. Far from being "crushed," id., the former mineral leaseholders in the Badger-Two Medicine region have been offered numerous accommodations to address their interests, ranging from the 2006 withdrawal legislation's provision of tax incentives to leaseholders who voluntarily retired

their leases,[3] to a private financial resolution with leaseholder W.A. Moncrief Jr., who brought his own litigation challenging cancellation of his lease in the region.[4] Other former leaseholders in the Badger-Two Medicine region relinquished their leases in response to these accommodations,[5] or in recognition that this was "simply the right thing to do" in light of the importance of the Badger-Two Medicine region to the Blackfeet people.[6] Solenex has rejected all such accommodations. Although that is Solenex's right, Solenex's claim to speak for a broader group of oppressed "plebians," Solenex Response-Reply at 33, should not obscure the fact that Solenex now stands as the lone holdout among the group of former federal mineral leaseholders in the Badger-Two Medicine region.[7]

Third, Solenex erroneously attempts to distinguish the Hall Creek lease from the leases at issue in Sierra Club v. Peterson, 717 F.2d at 1414, Conner v. Burford, 848 F.2d at 1449-51, and Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1227 (9th Cir. 1988), all of which held that

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[3] See Tax Relief & Health Care Act of 2006, Pub. L. 109-432, Title IV, § 403(c), 120 Stat. 2922 (2006); Solenex LLC, 962 F.3d at 525 (discussing 2006 legislation).

[4] See Badger-Two Medicine Drilling Lease Canceled, Missoulian (Oct. 1, 2019), https://missoulian.com/news/local/article_c417bde0-9f17-5377-9575-4830c3a670ae.html.

[5] See ECF No. 116-7 at 33 (describing lease relinquishments by Occidental Petroleum Corporation, Williams Cos., Rosewood Resources, XTO Energy Inc., and BP encompassing 28,370 acres).

[6] U.S. Dep't of Interior, Secretary Jewell, Senator Tester, Blackfeet Nation and Devon Energy Announce Cancellation of Oil & Gas Leases in Montana's Lewis and Clark National Forest (Nov. 16, 2016), https://www.doi.gov/pressreleases/secretary-jewell-senator-tester-blackfeet-nation-and-devon-energy-announce (discussing Devon's relinquishment of 15 mineral leases in the Badger-Two Medicine region encompassing more than 32,000 acres).

[7] Nor is Solenex without other recourse for its alleged harms arising from cancellation of the Hall Creek lease. As discussed in Intervenors' opening summary judgment brief, Solenex may have a cause of action for contractual damages in the U.S. Court of Federal Claims. See ECF No. 162 at 27 n.6. Solenex on March 14, 2022 took action to pursue such a claim by filing a complaint in the Court of Federal Claims seeking recovery for alleged lost profits together with restitution and reliance damages. See Complaint for Federal Taking of Private Property and Breach of Contract, Solenex, LLC v. United States, No. 22-295 L (Fed. Cl. filed Mar. 14, 2022).

federal mineral leases that do not prohibit all surface development—i.e., leases equivalent to the Hall Creek lease—may not be issued in compliance with NEPA unless the impacts of leasing are first examined in an environmental impact statement. Solenex claims the Hall Creek lease differed from those in the aforementioned cases because it "was subject to many additional limitations and prohibitions" such that no "irreversible and irretrievable commitment of surface resources" was made by issuing the lease. Solenex Response-Reply at 35-36. Solenex is wrong. Solenex relies on lease stipulation forms establishing prerequisites for surface disturbance of the leasehold. See ECF No. 45-9 at 21 (Form 3109-5), 22-23 (Form 3109-3) (cited in Solenex Response-Reply at 35-36). But these same stipulation forms were attached to the leases at issue in Sierra Club v. Peterson and Conner, which date from the same era as the Hall Creek lease. See Sierra Club, 717 F.2d at 1411 n.4 (referencing standard lease stipulation Forms 3109-3 and 3109-5); Conner, 848 F.2d at 1449-50 (quoting Form 3109-5). As the D.C. and Ninth Circuits concluded, these stipulations authorized the government to "impose 'reasonable' conditions which are designed to mitigate the environmental impacts of the drilling operations," but not to deny surface development altogether. Sierra Club, 717 F.2d at 1411 (quoting Form 3109-5), 1414 & n.7; accord Conner, 848 F.2d at 1449-50 (reaching same conclusion regarding Form 3109-5); compare ECF No. 45-9 at 21 (Hall Creek lease stipulation Form 3109-5 authorizing imposition of "reasonable conditions, not inconsistent with the purposes for which this lease is issued"). The same is true of the Hall Creek lease stipulation requiring that surface disturbance be preceded by a "cultural resources survey." Solenex Response-Reply at 35-36 (citing ECF No. 45-9 at 24). This requirement may yield "mitigation measures" but the stipulation does not prohibit all surface development. ECF No. 45-9 at 24.

Solenex also cites a lease stipulation allowing the government to "'disallow use and occupancy'" that would violate the Endangered Species Act. Solenex Response-Reply at 36 (quoting ECF No. 45-9 at 24). But the leases at issue in Conner contained this same stipulation. Compare 848 F.2d at 1455 with ECF No. 45-9 at 24. As Conner discussed, this stipulation grants no authority to preclude "the myriad of significant environmental effects outside the narrow issue of species survival" and therefore does not obviate NEPA's demand for a pre-leasing environmental impact statement. 848 F.2d at 1449 n.18.

In sum, the stipulations referenced by Solenex do not guarantee "the government's ability to adequately regulate activities which it cannot absolutely preclude" so as to ensure that significant environmental impacts will be avoided once a lease is issued. Id. at 1450. For this reason, in issuing the Hall Creek lease—just as in issuing the leases involved in Sierra Club and Conner—Interior "made an irrevocable commitment to allow some surface disturbing activities" such that an environmental impact statement was required under NEPA. Sierra Club, 717 F.2d at 1414-15 (emphasis in original).

Fourth, Solenex fails to rehabilitate the deficient "no action" alternative from the 1981 environmental assessment ("EA") that preceded issuance of the Hall Creek lease. Contrary to the controlling NEPA rule that an environmental impact analysis must include consideration of "total abandonment of the project," Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971), the 1981 EA's so-called "no action" alternative proposed merely to delay leasing for a few months, ultimately yielding the same impacts as leasing alternatives, see ECF No. 162 at 42-43. Nevertheless, Solenex claims this Court "already found that the 1981 EA … considered a no action alternative." Solenex Response-Reply at 36. However, Solenex references only a summary description of the EA

contained in this Court's procedural history discussion in Solenex LLC v. Jewell, 334 F. Supp. 3d 174, 179 (D.D.C. 2018), vacated, 962 F.3d at 520. That discussion did not purport to decide the adequacy of the 1981 EA's "no action" alternative, and elsewhere this Court made clear that it was making "no finding on whether there was in fact compliance with NEPA." Id. at 184 n.8. Accordingly, the passing remark referenced by Solenex does not resolve this issue. See United States v. Wittig, 575 F.3d 1085, 1097 (10th Cir. 2009) ("The law of the case does not extend to issues a previous court declines to decide.").

Nor does Solenex offer any legitimate reason why this Court should now rule that the 1981 EA's purported "no action" alternative complied with NEPA. Instead, Solenex erroneously attempts to distinguish Bob Marshall Alliance, which held, consistent with Calvert Cliffs, that a NEPA analysis of federal oil and gas leasing must consider "the option of not issuing any oil and gas leases." 852 F.2d at 1228-30. Solenex seizes on immaterial distinctions, noting that the Forest Service was considering wilderness designation for the area involved in Bob Marshall Alliance, but not for the Badger-Two Medicine region because of Blackfeet reserved rights to the latter area. See Solenex Response-Reply at 36-37; ECF No. 45-2 at 31 (Forest Service wilderness assessment for Badger-Two Medicine region). Contrary to Solenex's argument, application of NEPA's requirement to study alternatives, including a meaningful "no action" alternative, does not hinge on such site-specific details but rather applies generally "whenever an action involves conflicts" regarding the use of resources. Bob Marshall Alliance, 852 F.2d at 1229; see 42 U.S.C. § 4332(E) (requiring agencies to consider alternatives "in any proposal which involves unresolved conflicts concerning alternative uses of available resources"). Surely, the history of the present controversy, involving a dispute over oil and gas development stretching back over more than 40 years and continuing to this day, demonstrates that there

remain unresolved conflicts over the use of the Badger-Two Medicine region's resources. Accordingly, NEPA's alternatives requirement, including the requirement to consider a legitimate "no action" alternative, applies. See 42 U.S.C. § 4332(E); Calvert Cliffs, 449 F.2d at 1114; Bob Marshall Alliance, 852 F.2d at 1228-30.[8]

Fifth, contrary to Solenex's characterization, no one disputes that "property law matters." Solenex Response-Reply at 37-38. However, where the government's attempt to convey a property interest violates federal statutes, including NEPA and the NHPA, property law does not render that interest immune from corrective action to vindicate federal statutory mandates. See, e.g., Boesche, 373 U.S. at 478-82; Sangre de Cristo, 932 F.2d at 894-95; Pit River Tribe, 469 F.3d 768 at 788; Clayton W. Williams, Jr., 103 IBLA at 210, 212 (all discussed supra). Nor can federal officials' erroneous affirmance of an unlawfully conveyed interest operate to "ratif[y]" a property right whose issuance violated federal law. Solenex Response-Reply at 38; see 43 C.F.R. § 1810.3 (discussed supra); see also ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988) ("[W]e are aware of no case in which this court has applied [estoppel] against the government.").

As for Solenex's contention that there is no "rational limit" to NEPA's application in such situations, Solenex Response-Reply at 38, Solenex ignores the extreme circumstances that prompted Interior to cancel the Hall Creek lease. This case does not involve a minor trespass on NEPA's peripheral requirements based on a trivial "environmental procedural shortcoming," id., but rather a violation that strikes at the heart of Congress's purpose in enacting NEPA. Congress

[8] As for Solenex's argument that delaying issuance of leases for a few months was consistent with the "then-current level of activity" around the Hall Creek lease, Solenex Response-Reply at 37, this argument relies on Solenex's flawed contention that the area around the Hall Creek lease is already extensively developed, which is wrong. See ECF No. 162 at 53-54.

enacted NEPA's "look-before-you-leap" environmental analysis mandate to "ensure[] that [an] agency will not act on incomplete information, only to regret its decision after it is too late to correct." Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 371 (1989). Here, federal officials failed to develop complete information about the impacts of issuing the Hall Creek lease until after the lease issued, at which point over a multi-year period local U.S. Forest Service officials, leaders of the Interior and Agriculture Departments, the Advisory Council on Historic Preservation, and even the U.S. Congress determined and declared that the Badger-Two Medicine region was unsuitable for oil and gas development because of its extraordinary environmental and cultural values. See ECF No. 116-7 at 46-48 (recounting history of administrative and congressional action concerning Badger-Two Medicine region). Interior's choice to act in response to such extreme circumstances hardly suggests that it will now subject "every oil and gas lease" to "new scrutiny and vulnerability." Solenex Response-Reply at 38.

V. SOLENEX'S OBJECTIONS TO THE NHPA PROCESS LEADING TO DISAPPROVAL OF ITS DRILLING PERMIT ARE MERITLESS

Finally, Solenex offers no legitimate critique of what the D.C. Circuit aptly characterized as the government's "painstaking efforts" to comply with the NHPA in reviewing Solenex's proposed drilling project. Solenex LLC, 962 F.3d at 529. Solenex concedes that its challenges to the government's disapproval of a drilling permit on the Hall Creek lease are moot if this Court upholds Interior's cancellation of the lease. Solenex Response-Reply at 38 n.16; see also ECF No. 162 at 50-51. As discussed supra, this Court should uphold the cancellation. The Court thus should not consider Solenex's moot contentions regarding the NHPA process concerning the drilling permit. In any event, Solenex's arguments are meritless.

A. The Government Did Not Improperly Defer to the Blackfeet Tribe's Identification of the Tribe's Own Cultural and Spiritual Values

Solenex's arguments regarding the NHPA process sound a refrain that the government acted arbitrarily by "simply adopting the Tribe's view" about Blackfeet cultural and spiritual interests in the Badger-Two Medicine region "with no critical examination." Solenex Response-Reply at 39-41. This contention is misguided.

As an initial matter, NHPA regulations required federal officials reviewing Solenex's proposed drilling project to consult with "any Indian tribe … that attaches religious and cultural significance to identified historic properties," and to consider their "views" regarding any effects of the project that "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). Here, the characteristics that qualified the Badger-Two Medicine Blackfoot Traditional Cultural District for inclusion in the National Register include that the "area represents a place of extreme power for the Blackfoot tribal community, providing tribal members a place to conduct important prayer, hunting, and plant and paint gathering activities" and a place to "conduct their spiritual practices with little or no interference." ECF No. 115-12 at 179. Accordingly, the NHPA required federal officials to consult with the Blackfeet Tribe and consider tribal views about the impacts of Solenex's proposed drilling project on Blackfeet cultural and spiritual interests.

Even so, the government did not simply "defer to the Tribe's claimed need to protect the entire area," as Solenex claims. Solenex Response-Reply at 39. To the contrary, as already extensively discussed, the Blackfeet Tribe's cultural and spiritual interests in the Badger-Two Medicine area were documented in a series of ethnographic studies that provided the evidentiary

foundation for the Traditional Cultural District's nomination to the National Register and the Forest Service's subsequent impact analysis. See ECF No. 162 at 47-48, 52, 55-56, 62-63. Although Solenex disparages those studies as "rest[ing] entirely upon the Tribe's contentions," Solenex Response-Reply at 39, the first such ethnographic study was prepared by two non-tribal historical research consultants from Montana, Sally T. and T. Weber Greiser, see ECF No. 48-4 at 114; ECF No. 32-2 at 6-7, while the lead author on four subsequent studies was Dr. Maria Zedeno, a highly credentialed research anthropologist from the University of Arizona, see ECF No. 32-2 at 6-8; FS005340-51 (Zedeno curriculum vitae). Solenex appears to contend that these non-tribal experts themselves should not have relied on "evidence of the Tribe's position" to identify Blackfeet cultural and spiritual interests in the Badger-Two Medicine region, Solenex Response-Reply at 41, but it is hard to imagine how an assessment of any community's cultural and spiritual concerns could be conducted without relying on information obtained from those persons who practice the culture and spirituality at issue. Solenex's contention that the government's assessment of impacts on Blackfeet culture and spirituality should not have been grounded in testimony from the Blackfeet Tribe is illogical, impractical, and contrary to law. See 36 C.F.R. § 800.5(a)(1).

Further, Solenex identifies no persuasive countervailing information that the government should have utilized as the basis for additional "critical examination" of evidence obtained from the Blackfeet Tribe. Solenex Response-Reply at 41. Solenex's bullet-pointed list of purported "facts" regarding this issue, id. at 39-40, consists of a selective presentation that distorts the record. Solenex cites a 1983 tribal resolution proposing a joint mineral exploration venture, id. at 39, but fails to address the fact that this resolution represented the lone—and quickly superseded—exception to a consistent record of traditionalist-driven Blackfeet opposition to oil

and gas development in the Badger-Two Medicine region spanning nearly 50 years, see ECF No. 162 at 61-63. Solenex also suggests that the tribe opposed drilling on the Hall Creek lease as a pretext for seeking "to have the land under and around the Lease … returned to the Tribe," Solenex Response-Reply at 39, but the record documents cited for this proposition do not support Solenex's contention, consisting of the same superseded 1983 tribal resolution and a Blackfeet legal brief asserting only that tribal rights to the area had not been fully adjudicated, see ECF No. 45-12 at 13-14; ECF No. 45-9 at 34-36 (cited in Solenex Response-Reply at 39).

Equally unpersuasive is Solenex's invocation of a charge by "a few Blackfeet people" that tribal assertions of historic use in the Badger-Two Medicine region were pretextual. ECF No. 48-1 at 13 (cited in Solenex Response-Reply at 40). Although the Blackfeet community is not monolithic, Solenex offers no reason why the government should have credited such minority dissenters over the unified position of "Blackfeet traditionalists, as a group," who explained the tribe's longstanding cultural and spiritual use of the Badger-Two Medicine region, ECF No. 48-1 at 12, or numerous formal resolutions of the Blackfeet Tribe's governing body, the Tribal Business Council, affirming the traditionalists' position, see ECF No. 162 at 61-62. Once again, Solenex asks this Court to rely on exceptions and outliers.

As for Solenex's reference to a 1986 Forest Service plan disputing that there was a site in the Badger-Two Medicine region eligible for the National Register of Historic Places, Solenex Response-Reply at 40 (citing ECF No. 48-1 at 27), Solenex relies on erroneous early conclusions that have long since been superseded by better-informed judgments, including two determinations by the Keeper of the National Register that the Badger-Two Medicine region is eligible for inclusion as a traditional cultural district, see ECF No. 162 at 47-48.

The Forest Service's determination that a proposed pipeline route along the edge of the Hall Creek lease presented no significant cultural impacts, see Solenex Response-Reply at 40, does not undermine this recognition of the region's cultural importance. The proposed pipeline route ran beside an existing gas pipeline within the established development corridor skirting the northwest fringe of the Badger-Two Medicine region. See FS-Supp002216 (2004 Environmental Assessment for Pipeline Project ("Pipeline EA")) (map of pipeline project area). As the Forest Service stated, "the area under consideration has been highly disturbed in the recent past" and "contains no features or archaeological deposits that would contribute to those qualities of the property that make it eligible for listing in the National Register." FS-Supp002282 (Pipeline EA). The same is not true for Solenex's proposed drilling site located nearly three air miles south of this development corridor in the Badger-Two Medicine backcountry. See ECF No. 162 at 53-54; ECF No. 115-14 at 29.[9]

Solenex's citation of the IBLA's decision in Earth Power Resources, Inc., 181 IBLA 94 (2011) (cited in Solenex Response-Reply at 38-41), also fails to support its argument. The agency decision at issue in Earth Power Resources cited cultural-resource concerns in denying a geothermal leasing application, but did "not describe how and to what extent geothermal leasing would impact specific values in specific places." Id. at 109-10. Here, by contrast, the record supporting the challenged decision includes not only the Forest Service's detailed examination of site-specific effects from Solenex's proposed drilling project—which described direct impacts

[9] Intervenors have already addressed Solenex's erroneous contention that the Forest Service schemed with the Blackfeet Tribe to support a traditional cultural district designation to seize "greater control over the Lease area pending return of the land to the Tribe." Solenex Response-Reply at 40. The record document cited for this charge actually describes a meeting in which a Forest Service official advocated for Blackfeet leaders to support a smaller boundary for the traditional cultural district than tribal officials wanted. See ECF No. 162 at 40 n.11 (citing ECF No. 45-7 at 49-50). Solenex offers no response.

stemming from development of the proposed access road and drill site themselves, indirect impacts to the broader Hall Creek area from disturbance associated with those developments, and cumulative impacts from the proposed drilling in the northern portion of the Badger-Two Medicine region, see FS006535-37—but also confirmation of the Forest Service's analysis by the Advisory Council on Historic Preservation, which further noted the inadequacy of proposed mitigations, additional impacts from loss of information that could be obtained from affected archaeological sites, and the potential for even greater impacts if Solenex's proposed drilling led to the construction of additional wells, see ECF No. 115-14 at 29-30. This is not a situation where the government has not explained, "in any detail in the Decision or in the record," the basis for its conclusion. Earth Power Resources, Inc., 181 IBLA at 109.

B. Solenex's Objections to the Adverse-Effects Determination Are Misguided

Solenex fails to justify its contention that existing developments on the northwestern fringe of the Badger-Two Medicine region were inadequately considered in the government's assessment of adverse effects threatened by Solenex's proposed drilling project. Solenex does not dispute Intervenors' demonstration that such developments are remote from, and therefore do not define the character of, the company's proposed drill site. See Solenex Response-Reply at 41-42; ECF No. 162 at 53-54. Instead, Solenex appears to contend that such existing developments on the periphery of the Badger-Two Medicine region nevertheless should have been deemed to present impacts equivalent to punching six miles of new road and constructing a new drill pad nearly three miles into the Badger-Two Medicine backcountry. Solenex Response-Reply at 42. However, the Forest Service properly addressed these existing developments under the category of cumulative impacts from Solenex's proposed drilling project, observing that new drilling disturbance in "the northern portion of the district" where the existing developments are

located threatens to "approach a threshold of cumulative effects" that would "adversely affect the integrity of setting." FS006536-37; see 36 C.F.R. § 800.5(a)(1) (stating that adverse effects under NHPA "may include reasonably foreseeable effects … that may … be farther removed in distance or be cumulative"). Recognizing the common-sense point that the degree of a development's impact may depend on its setting and proximity to other developments is not "unreasonable." Solenex Response-Reply at 42.

Solenex also fails to salvage its argument that the government's adverse-effects determination was improperly grounded in "unobservable metaphysical effects in far-flung regions" of the traditional cultural district. Id. Solenex's opening brief asserted that the government improperly based its adverse-effects determination on such impacts. See ECF No. 156 at 73-74. Intervenors responded by pointing out that the effects determination actually centered on observable impacts located in Solenex's proposed drilling area itself, the associated Hall Creek drainage, and the northern portion of the Badger-Two Medicine region where Hall Creek is located. See ECF No. 162 at 55-56. Now Solenex argues that this only proves that such concrete impacts are the only "adverse effects that matter," such that a smaller area should have been examined. Solenex Response-Reply at 35 (emphasis in original). To the contrary, all adverse effects contemplated by the NHPA regulations matter, and these include the concrete effects catalogued in the bulk of the Forest Service's assessment as well as the agency's further recognition that Solenex's proposed development would "decrease the spiritual feelings felt by the Blackfeet" across the entire district. FS006537. All are relevant to the identification of

adverse effects to "any of the characteristics of a historic property that qualify the property for inclusion in the National Register." 36 C.F.R. § 800.5(a)(1).[10]

C. Solenex's Mitigation Arguments Are Unpersuasive

Solenex further fails to demonstrate that the government inadequately considered measures to mitigate the impacts of Solenex's proposed drilling project. Solenex first objects that it was not given access to confidential ethnographic studies bearing on the mitigation issues until this litigation. Solenex Response-Reply at 43. However, Forest Service documentation shared with Solenex during the administrative process included a detailed five-page summary of the ethnographic information, including extensive quotations of the key findings from confidential study materials. See FS006538-42; see also FS006543-44 (Forest Service letter to Solenex). Nevertheless, Solenex did not attempt to utilize this information "to present ways to mitigate the alleged adverse effects of its well" during the administrative process, Solenex Response-Reply at 36, but rather simply insisted that no new mitigations were acceptable, see ECF No. 162 at 58-59; see also, e.g., ECF No. 115-14 at 30 (Advisory Council reporting that Solenex "rejected directional drilling and well pad relocation proposals").[11]

[10] Solenex disputes Intervenors' demonstration of record support for the government's identification of impacts to berry patches of importance to the Blackfeet people, claiming that evidence of "berries in the entire Badger-Two Medicine" region is insufficiently specific. Solenex Response-Reply at 43 n.17. However, the Forest Service documented that the specific river drainage encompassing the region where Solenex proposed to drill holds "[s]ome of the closest and best huckleberry patches to the [Blackfeet] reservation," FS006540, so the government's assessment was adequately supported.

[11] While Solenex asserts that the Blackfeet Tribe was equally steadfast in opposing drilling in the Badger-Two Medicine region, Solenex Response-Reply at 44, Solenex does not address the Tribe's proposal to trade the Hall Creek lease for a comparable lease in a less sensitive area on the Blackfeet Reservation, see ECF No. 162 at 59. Moreover, the relevant issue is not the Tribe's compliance with mitigation obligations but the government's, and the government explored multiple mitigation options. See ECF No. 164 at 71-73.

Even today, with full access to the previously withheld ethnographic studies pursuant to a protective order issued by this Court, see ECF Nos. 86, 88, Solenex offers no argument why the studies did not support the government's mitigation determination, but only seeks to make tactical use of the studies' prior unavailability, see Solenex Response-Reply at 43-44. Solenex's objection thus rings hollow.

Solenex next argues that ongoing rehabilitation of past intrusions into the Badger-Two Medicine region, such as old seismographic survey roads from the 1950s and off-road vehicle trails, demonstrates that the "temporary" impacts of Solenex's proposed drilling project should have been authorized. Id. at 44. However, this Court should not accept the notion that progress toward healing past injuries to the Badger-Two Medicine region's cultural integrity somehow makes inflicting additional injuries more acceptable under the NHPA framework. If that "one-step-forward, two-steps-back" approach were acceptable, the Blackfeet cultural interest in the region would remain in a state of perpetual impairment. As the Advisory Council correctly concluded, no available mitigation would "address the diminution of qualifying characteristics" of the traditional cultural district that were threatened by Solenex's proposed drilling project. ECF No. 115-14 at 30-31.

Finally, Solenex identifies no error in the Forest Service's effort to develop mitigation measures for the proposed drilling project. As Federal Defendants describe in detail, the consulting parties considered multiple mitigation options over a period spanning more than a year in 2014-2015, with the Forest Service prompting and presiding over their discussions. See ECF No. 164 at 71-73. This process was not "a quick, empty gesture." Solenex Response-Reply at 44. Nevertheless, the Forest Service was not empowered to unilaterally impose mitigation measures, but was required to consult with the interested parties and, if agreement was not

reached, to elevate the issue, first to the Advisory Council for its views, and then ultimately to the head of the agency for a final decision on the proposed undertaking. See 36 C.F.R. §§ 800.6(b), 800.7(c). The Forest Service did that. See ECF No. 162 at 60.

Although Solenex argues that the Forest Service's mitigation assessment reflected a "wildly imbalanced approach" when compared to the government's evaluation of the traditional cultural district as a historic property, this is an apples-to-oranges comparison that ignores the law and the record. NHPA regulations require agency officials to "take the steps necessary to identify historic properties within the area of potential effects" of a proposed undertaking, and specifically prescribe a "[l]evel of effort" that "may include background research, consultation, oral history interviews, sample field investigation, and field survey," and must "take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects." 36 C.F.R. § 800.4(b). Here, the level of effort required for this mandatory process also involved the steps needed to correct initial agency oversights in assessing the Badger-Two Medicine region's cultural significance and to overcome initial tribal reluctance and mistrust concerning the government's cultural inquiries. See ECF No. 162 at 47-48.

By contrast, the Forest Service's regulatory obligation concerning mitigation required the agency simply to "consult with the [state and tribal historic preservation officers] and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects." 36 C.F.R. § 800.6(b). The Forest Service did so, overseeing substantial discussions of potential mitigation measures at consultation meetings with the interested parties in April 2014 and April 2015. See FS006401-15 (notes and agenda from April 2014 consultation meeting); ECF No. 115-14 at 14-

23 (notes of April 2015 consultation meeting). Indeed, the Forest Service continued to doggedly pursue these mitigation discussions well after clear indications emerged that a stalemate was likely. See FS006410 (notes of April 2014 consultation meeting: "The Tribe won't change, Mr. Longwell won't change."). Solenex's dissatisfaction with the outcome does not make this process illegal.

CONCLUSION

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

Respectfully submitted this 12th day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was today served via the Court's CM/ECF system on all counsel of record.

/s/ Timothy J. Preso
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