[ORAL ARGUMENT NOT YET SCHEDULED]

CASE NOS. 18-5343 & 18-5345

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOLENEX LLC, A LOUISIANA LIMITED LIABILITY COMPANY,
***PLAINTIFF-APPELLEE*,**
v.

DAVID BERNHARDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
***DEFENDANT-APPELLANTS*,**

BLACKFEET HEADWATERS ALLIANCE, ET AL.,
***INTERVENOR-APPELLANTS*.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
NO. 1:13-CV-00993-RJL (HON. RICHARD J. LEON)

PLAINTIFF-APPELLEE'S FINAL RESPONSE BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties*. All parties, intervenors, and amici appearing before the trial court and in this court are listed in the Opening Brief for Defendant-Appellants David L. Bernhardt, *et al.*

Solenex, LLC is a limited liability company organized under the laws of the State of Louisiana, with its principal place of business in Baton Rouge, Louisiana. Solenex has no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public. Solenex LLC owns Federal Oil and Gas Lease M-53323 that is the subject of the underlying case.

B. *Rulings Under Review*. References to the rulings at issue appear in the Opening Brief for Defendant-Appellants David L. Bernhardt, *et al.*

C. *Related Cases*. References to related cases appear in the Opening Brief for Defendant-Appellants David L. Bernhardt, *et al.*

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

APA	Administrative Procedure Act
APD	Application for Permit to Drill
BLM	Bureau of Land Management
EA	Environmental Assessment
EIS	Environmental Impact Statement
Fina	America Petrofina Company
IBLA	United States Department of the Interior Board of Land Appeals
MLA	Mineral Leasing Act
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
ROD	Record of Decision
TCD	Traditional Cultural District

INTRODUCTION

Defendants' arguments are built upon false premises and dangerously wide-sweeping assertions of "inherent" agency authority. They assert that the Department of the Interior possesses "authority to cancel a lease notwithstanding *any* delay or reliance interests that are implicated." Principal Brief for the Defendants-Appellants ("Fed. Br.") at 17. Further, Defendants assert this nearly unrestricted power "flows from Interior's plenary authority conferred by Congress to manage federally owned minerals, so long as fee title remains in the United States." *Id*. This is an extraordinarily broad assertion of authority that cannot be allowed to stand. They argue that they retain nearly unlimited authority, in perpetuity, to reverse their decisions, regardless of how long or how strongly the public has relied on the prior decisions, and regardless of the property interests that will be affected. As much as Defendants may plead otherwise, the limitations on agency authority provided by the Due Process Clause, the Administrative Procedure Act ("APA"), and various equitable doctrines do, in fact, apply to them.

Defendants also premise their arguments on an incorrect and reductionist interpretation of the court's order below. Defendants assert that the court's order was wrong because "delay alone" does not make an agency decision arbitrary. Fed. Br. at 19. But the district court did not say that "delay alone" is arbitrary; it said that the *extreme* delay of more than 30 years, coupled with Defendants' abrupt,

litigation-driven, inadequately explained change in position and disregard for reliance interests, made the Cancellation Decision arbitrary and capricious. Defendants' straw man argument fails. Whatever authority Defendants may possess to reconsider past decisions, such authority cannot be exercised with unreasonable delay or insufficient explanation.

Defendants' conclusions are built upon false assumptions regarding both the scope of their authority and the legal substance of the decision below, would lead to destructive consequences, and must, therefore, fail.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that the cancellation of Solenex's Lease was unlawful, arbitrary, and capricious, where the decision was made more than 30 years after the Lease was issued and abruptly reversed Defendants' longstanding position that Solenex's Lease was properly issued.

2. Whether the district court abused its discretion by ordering that Solenex's Lease be reinstated rather than remanding to the Bureau of Land Management ("BLM"), despite the fact that setting aside the Cancellation Decision as required under 5 U.S.C. § 706 necessarily results in reinstatement of the Lease.

STATEMENT OF THE CASE

A. Factual Background

Solenex's Lease (No. M-53323) (the "Lease") lies in the northern part of the Lewis and Clark National Forest in Montana, in the RM-1 unit commonly referred

to as the Badger-Two Medicine area. JA 977, 1106. The Lease consists of 6,247 acres traversed by two natural gas pipelines, a clear-cut fire break, and various trails previously used for seismic mapping, off-road vehicles, and snowmobiling. JA 654, 747, 1323. Solenex's proposed drill site is roughly two miles from the "heavy traffic" of US Highway 2 and only a few miles from the Burlington Northern Railroad, which has been in place since the late 1800s and, by the mid-1980s, was carrying roughly 30 trains per day. JA 977, 113. The Lease abuts private land and is nine miles from the town of East Glacier. JA 629.

In 1896, the United States obtained roughly 400,000-acres surrounding the Lease for mineral development purposes. 54 Cong. Ch. 398, 29 Stat. 321, 354–57 (1896). In 1896, Congress ratified the purchase with the stipulation that "the lands so surrendered shall be opened to occupation, location, and purchase under the provisions of the mineral land laws only …." *Id.* at 357. This area is now referred to as the "Ceded Strip."

By 1980, the Lewis and Clark National Forest had a backlog of over 200 oil and gas lease applications. JA 1095. To alleviate this backlog and comply with the 1980 Energy Security Act, 42 U.S.C. § 8855, the Forest Service prepared an environmental assessment ("EA") for oil and gas leasing on *non-wilderness lands* within the Lewis and Clark National Forest ("Leasing EA"). JA 2217. In the Leasing EA, the Forest Service considered six alternatives, ranging from denying

all lease applications, referred to as "no action on lease applications at this time," to leasing all applied-for lands. JA 2220, 2257–58. According to the Leasing EA, "The Forest Service first engaged in American Indian Religious Freedom Act … Compliance with the Blackfeet Tribe during the fall of 1979." JA 2254. Rather than address the entire proposed leasing area, "the Blackfeet people prefer[ed] to identify [culturally important] areas on a project by project basis." *Id.*

In February 1981, the Forest Service issued a Decision Notice and Finding of No Significant Impact approving selective leasing with protective stipulations. JA 1095–96. *No appeals were filed*. *Id.* In June 1981, the Forest Service grouped 6,247 acres from expiring leases to form lease tract NW-21. JA 2116–17.

On May 24, 1982, the BLM issued the Lease to Mr. Longwell. JA 2106–15. The Lease is subject to various stipulations for the protections of the surface, cultural and paleontological resources, endangered and threatened species, aesthetics, etc. *Id*.

Issuance of the Lease was subject to an administrative protest period for 90 days. 30 U.S.C. § 226-2. *No protests were filed*. JA 1137. In June 1983, Mr. Longwell assigned the Lease to America Petrofina Company and related entities ("Fina"). JA 2104–05.

In approximately November 1983, Fina filed an application for permit to drill ("APD") an exploratory well. JA 619–20. Concurrently, Fina submitted a

surface use plan, suggesting three alternate access. The cultural resource inventory noted that no cultural resources were located within the project boundaries, portions of the proposed access roads follow or closely parallel existing dirt roads and trails, and a prior cultural inventory by an Lewis and Clark National Forest archeologist for nearby land also did not identify cultural resources. JA 645–46.

Within a month, the Blackfeet Tribal Business Council unanimously approved Resolution 94-84, which provides:

> The Blackfeet Tribal Business Council is interested in development of any and all minerals [in the Ceded Strip], in specific, oil and gas, for the express purpose of securing financial revenues ….
>
> That the Blackfeet Tribal Business Council and Forest Oil Corporation will join efforts to take all necessary actions to secure the Blackfeet Tribe's right to explore and to develop hydrocarbons in the Ceded Strip area ….

JA 76–77.

In January 1985, the Forest Service and BLM finalized a joint EA for the APD. JA 649–972. The agencies concluded the proposed drilling would not cause significant environmental impact and, thus, should be approved. JA 650–54. Importantly, activities under the APD would not affect the Blackfeet Tribe's reserved rights and "no religious site or activities were identified in the project area …." JA 789–91. The 1985 Record of Decision ("ROD") noted, "Procedures outlined in the Proposed Forest Service Native American Relationships Policy Statement (1984) were followed …." JA 791.

In March 1985, the Blackfeet and other parties appealed approval of the APD to the Interior Board of Land Appeals ("IBLA"). JA 978, JA 2207–11. In August 1985, the IBLA rejected most of the appeal issues. *Glacier–Two Medicine Alliance*, 88 IBLA 133 (1985). In particular, the IBLA was untroubled that an EA rather than an Environmental Impact Statement ("EIS") was used to evaluate the APD. JA 979. Further, as to "the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places…the mitigation measures discussed below clearly overcome any challenge based on this regulatory category…" JA 987.

The IBLA, however, set aside the BLM's decision and remanded with instructions to further consider four issues: 1) whether timber harvest would be pursued and have a cumulative impact; 2) an archeological survey of a new proposed access route; 3) whether newly created roads could be closed, even to the Blackfeet, in furtherance of protecting the grizzly bear population; and 4) the execution of an interagency law enforcement agreement, again to protect the grizzlies. JA 990–95. Fina then requested a suspension of Lease operations to toll the running of the Lease. JA 2104–05. The BLM suspended the Lease effective October 1, 1985, leaving over six years remaining on the 10-year primary term. JA 2100–01.

In 1986, after conducting a thorough EIS, the Forest Service released a record of decision concerning the Lewis and Clark National Forest Land and Resource Management Plan. JA 1011–38. Oil and gas leases covered about 336,000 acres (roughly 86% of non-wilderness lands) of the Rocky Mountain Division of the forest. JA 1020. In approving the Plan, the Forest Service specifically concluded that exploration for oil and gas should continue because of available and utilized protective measures. JA 1021–23.

In the 1987 ROD, the BLM addressed the issues raised by the then-recent *Conner v. Burford* case in the District of Montana, 605 F. Supp. 107 (D. Mont. 1985) (discussed below), and stated that the 1986 EIS satisfied its requirements. JA 1045. It then approved Fina's APD for the second time. JA 1039–49. In so doing, the agencies considered the 1986 Forest Plan and its accompanying EIS, stated that the access route was clear for cultural resource purposes, and noted that the Montana State Historical Preservation Officer had issued final clearance. *See id.*

This second approval of the APD was appealed and, on BLM's request, the IBLA vacated the decision approving the APD and remanded for further action. JA 1050–51. On February 23, 1988, notice was published that the agencies combined the study for Fina's APD with an APD submitted by Chevron on a nearby lease. JA 1053. In October 1989, Notice of Availability of the draft EIS was published. JA 78–79. The notice solicited comments and advised that the draft EIS:

> [A]nalyzes the impacts of proposed drilling applications .... on the issues and concerns identified during the scoping process, the DEIS focuses on impacts to .... archaeological resources, [and] Blackfeet Tribe reserved rights and traditional religious practices ....

Id.

The final EIS, issued in October of 1990 observed that the Forest Service and BLM "have determined that the proposed exploratory drilling and reasonably foreseeable development activities would be consistent with the Lewis and Clark National Forest Plan, and all other laws, regulations and policies appertaining." JA 1060. Moreover, "[s]tudies for the specific project areas have been substantial …. These studies have met compliance with the National Historic Preservation Act (1966) [("NHPA")] and other applicable cultural resource legislation and regulations." JA 1111. Despite concern from Blackfeet traditionalists, the Forest Service stated that the proposed site is not significant based on the National Register of Historic Places criteria. JA 1113; 30 C.F.R. § 60.4. The State Historical Preservation Officer concurred. JA 1113.

In 1991, the BLM and Forest Service issued a joint Record of Decision ("1991 ROD") approving Fina's APD for the *third* time. JA 1116–51. The agencies once again found activities under the APD would not affect cultural resources. JA 1125, 1134–35. Additionally, the agencies noted that there were no affected sites eligible for listing on the National Register of Historic Places, Blackfeet traditionalists did not identify any properties qualifying for protection

under the NHPA, the State Historical Preservation Officer concurred with the agencies' findings, and the analysis met the procedural requirements of the NHPA. JA 1140. The 1991 ROD observed that noise and visual effects from the drilling would be subordinate to that from the existing nearby railroad and highway. JA 1131.

The 1991 ROD extensively addressed and found no barrier resulting from *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), which challenged an oil and gas lease and held that an EIS rather than an EA was required when issuing a lease that allowed surface occupancy. JA 1136–39. In responding to *Conner*, the Forest Service "considered whether it would be appropriate to recommend a change in lease terms which would require 100 percent No Surface Occupancy, or whether to recommend lease cancellation" and chose not to do so. JA 1138. BLM notified Fina that the APD was approved subject to stipulations and conditions. JA 1153–58; JA 80–81. Appeals to the Regional Forester were filed. The Tribe argued, *inter alia*, that it owned the mineral resources in the Ceded Strip, JA 2118–24, but did not argue that the area had religious or cultural significance. *Id*. The Forest Service denied the Tribe's appeal. JA 1269. The BLM also received and denied requests for state director review of the APD. *Id*. An administrative appeal of BLM's decision was then filed with the IBLA. *Id.* In August 1991, the IBLA granted a

voluntary remand, dismissed without prejudice, and remanded for further proceedings. JA 1160.

The BLM then began yet another an independent study of the APD surface-related issues. JA 1264. In 1992, after completing its independent study, the BLM asked for secretarial-level approval of the APD because of the unreasonable delay that had already occurred. JA 2130–61.

In January 1993 the BLM issued another Record of Decision ("1993 ROD"). JA 2294. This was the *fourth* approval of the APD. The 1993 ROD noted that following IBLA's 1991 remand, "managers and resources specialists…conducted an independent field and office review….The primary purpose of this review was to assure that the BLM had complied with" National Environmental Policy Act ("NEPA"), and that the BLM decision "was in compliance with all applicable laws, including NEPA, the NHPA, the American Indian Religious Freedom Act" and the Endangered Species Act. JA 1269–70. This ROD, approved by the Assistant Secretary, stated:

> I agree with the Forest Supervisor's finding that alternative A2 will result in no effect to identified sites or properties that are eligible for listing on the National Register of Historic Places. The identification effort for historic properties included a literature review, field inventory, and interviews with Blackfeet Traditionalists. The interviews did not result in the identification of any properties having significance as traditional cultural properties as defined by the [NHPA]. These efforts, taken as a whole, resulted in a determination that no properties included on or eligible for inclusion to the National Register of Historic Places would be affected by the proposed action…

> Compliance with the implementing regulations of Section 106 of the [NHPA] has, therefore, been completed.

JA 1281–82. The 1993 ROD, like the 1991 ROD, also addressed *Conner*. JA 1283–86. In February 1993, notice published in the Federal Register provided: "This decision, with concurrence from Interior's assistant secretary for land and minerals, constitutes final agency action for the Department of the Interior." JA 82–83.

On June 4, 1993, after a change in administrations, the new Secretary of the Interior acknowledged the approved APD, JA 1295–96, but suspended the Lease while Congress considered legislation designating the Badger-Two Medicine area as a Wilderness Study Area. *Id*. The suspension was repeatedly renewed in anticipation of similar legislation. JA 1297.

In May 1996, the Forest Service requested that BLM extend the lease suspension, noting a proposed Traditional Cultural District ("TCD") of approximately 89,000 acres, and that a portion of the Fina road was within the proposed area. JA 2096, JA 1312. In a February 1997 meeting with Blackfeet tribal officials, the Forest Service suggested that the TCD was a way for the Tribe to have a higher degree of control over the area and, in context of the Blackfeet assertion that the Ceded Strip did not belong to Forest Service, the TCD was better than the status quo. JA 1410–11. The Blackfeet agreed to the TCD because "this would begin the formal recognition process of the significance and potentially the

ownership of this very special land." *Id.* The Forest Service then submitted a nomination to the Keeper of the National Register of Historic Places for the Badger-Two Medicine TCD. JA 2014–16. The Lease was suspended yet again. JA 1316, JA 1318–19.

On April 5, 1999, Fina re-assigned the Lease to Mr. Longwell. JA 42. On October 11, 2001, in response to a congressional inquiry, BLM advised: "[w]e recognize that environmental reviews, and administrative and judicial review processes have extended resolution of action on Mr. Longwell's APD *way beyond any reasonable time line*." JA 1335–36 (emphasis added).

In January 2002, the Keeper of the National Register of Historic Places determined that the approximately 89,000 nominated acres were eligible for listing on the National Register. JA 1403–04. The Forest Service wrote to Mr. Longwell that it had "just received word" that the Badger-Two Medicine TCD was eligible for inclusion in the National Register of Historic Places. "[W]e now are able to proceed with the assessment of effects regarding your proposal." JA 1337. The letter cited new regulations, 36 C.F.R. § 800, that "outline a greater level of participation in the process" by affected tribes. Finally, the Forest Service advised Mr. Longwell that he could become a consulting party for this upcoming Section 106 process. *Id.*

In April 2002 the BLM responded to Mr. Longwell's inquiry, "Is my permit valid?" BLM answered: "The answer is yes, you have a valid permit." JA 1342. In September 2003, the Forest Service hosted a Section 106 consulting party meeting in Montana to consider impacts of the proposed Solenex well on the TCD. JA 1393. The Blackfeet reasserted their claim to the land and that the entire Badger-Two Medicine area should be in the TCD. JA 1394. The Forest Service responded, "If we have new information, [TCD] boundaries can be changed." *Id*. In 2004, the Forest Service suspended the consulting party process because of new information it received regarding the northern end of the TCD, where the Lease was situated. JA 1412–13.

Oddly, just a few months later, the Forest Service issued the NorthWestern Energy Lewis & Clark Loop Natural Gas Pipeline Decision Notice and Finding of No Significant Impact. JA 84–111. NorthWestern proposed to construct a gas pipeline parallel to an existing gas pipeline that traversed approximately two miles of the Lease. The Decision Notice observed, "The demand for energy has been increasing in western Montana with a steady population growth over the last decade…. This has resulted in a real need for additional natural gas supplies." In the event of "[p]otential impacts to cultural resources, which are not known at this time…. specific measures will be developed and implemented to address any potential impacts as they occur." JA 91. Moreover, "[i]mpacts...are not unique to

this project; previous projects involving similar activities have had non-significant effects. On this basis we conclude that the specific and cumulative effects of the selected alternative are not significant," JA 99, and "the project will not have an adverse effect on any known or listed eligible historic places" because "[c]onsultations with the Blackfeet tribe identified no properties of traditional cultural interest to the tribe on the pipeline route [which goes through Solenex's Lease] or temporary construction sites." *Id.* at 101–02. The approved pipeline project included blasting as a potential construction method. *Id.* at 105.

From 2006 through 2012, studies of the TCD continued. *See generally* JA 1740–54. In 2010 and 2011, Solenex requested an update on when it could commence drilling. JA 1348. In response, the Forest Service confirmed that, since 2006, the Forest Service had received recommendations that the TCD be expanded to overlap the Lease. JA 1347. In April 2011, Solenex again notified the Forest Service that it wished to commence drilling. JA 1349.

On May 21, 2013, Solenex sent letters to the BLM and the Forest Service advising that Solenex would seek judicial review if the suspension was not lifted. JA 1420–21. In June 2013, Solenex filed a mandamus action. JA 23. On August 21, 2013, the Forest Service advised Solenex that it would re-convene the Section 106 consulting parties to determine the effects of the proposed drilling operations on the TCD and to develop, if necessary, additional mitigation measures. JA 1361.

In January and April 2014, the Forest Service hosted consulting party meetings in Montana. JA 1423–99. At the second meeting, the Forest Service advised that the area of potential effects from the proposed APD had been increased from 5,000 acres to all 165,000 acres (258 square miles) of the TCD. JA 1445. The Forest Service further advised that the Blackfeet Tribe's official position is that no oil and gas exploration could occur within the TCD. *Id*. While discussing potential mitigation, the BLM suggested that road access and drilling may be approved if Solenex were to pay $5,000,000. JA 1453. In April 2015, Defendants held another Section 106 meeting. JA 113.

While the purpose of these Section 106 meetings was allegedly to identify possible mitigation of the proposed drilling on the TCD, the agencies refused to provide Solenex useful information to assist in this effort. Rather, they informed Solenex that the knowledge supporting the TCD was confidential and would not be provided. JA 1430. Ultimately, they provided Solenex a heavily redacted document that was useless for the purpose of contributing to the process of mitigating the purported impacts of its drilling on the TCD. JA 1740–65.

On July 7, 2014, Solenex filed a motion for summary judgment demonstrating that Defendants had unreasonably delayed lifting the 29-year-long lease suspension. JA 20. The district court ruled that Defendants' delay was unreasonable as a matter of law. JA 180–81. The court granted summary judgment

to Solenex and ordered Defendants to submit, "a schedule for the orderly, expeditious resolution of the decision whether to lift the suspension of plaintiff's lease." JA 183. On August 17, 2015, Defendants submitted their proposed schedule indicating, for the first time, that they may initiate cancellation of the Lease. JA 186.

On March 17, 2016, the BLM administratively cancelled the Lease and disapproved the APD. JA 326–41("Cancellation Decision"). The BLM claimed, contrary to its findings made in 1981 through 1993, the Lease was issued prematurely in violation of NEPA, the NHPA, the American Indian Religious Freedom Act, and the agencies' trust responsibilities. JA 332–37. The Cancellation Decision provides, "having re-examined the conditions under which [the Lease] was approved, and *subsequent factual and legal developments*, … the BLM finds [the Lease] was improperly issued." JA 327 (emphasis added). The Cancellation Decision also found that the statutory violations leading to the issuance of the Lease had not and should not be cured and that effects of drilling within the TCD could not be mitigated. JA 337–38.

B. Procedural History

While the judicial process giving rise to this appeal began after the court below issued its order compelling Defendants to reach a final determination

regarding the suspension of Solenex's Lease, its roots stretch to the preparation of the first EA in 1981—the Cancellation Decision did not occur in a vacuum.

Solenex filed its Amended Complaint challenging the BLM's Cancellation Decision on May 5, 2016. JA 354–99. The Amended Complaint asserted that 1) the Secretary lacked the authority to administratively cancel Solenex's Lease; 2) the Cancellation Decision was unlawful because Solenex was entitled to protection as a bona fide purchaser; 3) the Secretary was equitably estopped from cancelling the Lease and disapproving the APD; and 4) the Cancellation Decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id*. at 385–97.

Solenex moved for summary judgment on September 12, 2016, JA 22.6, followed by Defendants' cross motion. JA 500. On September 24, 2018, the district court found the Cancellation Decision arbitrary and capricious. *Solenex LLC v. Jewell*, 334 F. Supp. 3d 174, 184 (D.D.C. 2018) ("*Solenex II*"). The court set aside the Cancellation Decision and ordered Solenex's Lease reinstated. *Id*. Defendants filed their Notice of Appeal on November 20, 2018, JA 610, followed by Defendant-Intervenors on November 28. JA 613.

On May 31, 2019, only days before this Response Brief was filed, the BLM reinstated lease MTM53320, owned by W.A. Moncrief, Jr. and subject to the related appeals No. 18-5340 and No. 18-5341 currently pending before this Court.

Notice of Reinstatement of Lease MTM 53320 (May 31, 2019) (attached as Exhibit 1). These appeals challenged the district court's order in *Moncrief v. U.S. Dep't. of the Interior*, 339 F. Supp. 3d 1 (D.D.C. 2018), a similar order to the one in this case, issued on the same day by the same district court and involving another oil and gas lease within the Ceded Strip. The Moncrief lease was reinstated despite Defendants' argument in this case that BLM "could not lawfully reissue the lease even if the violations were corrected because Congress has permanently prohibited oil and gas leasing in the Area." Fed. Br. at 13.

SUMMARY OF ARGUMENT

BLM lacked authority to make their belated and litigation-driven Cancellation Decision. The Lease was issued in conformance with the Mineral Leasing Act ("MLA") and existing energy policies, has been in place for 30 years, has had its validity repeatedly affirmed, and has served as the basis for millions of dollars in investments. After the district court held Defendants' delay in reviewing the lease suspension was unreasonable, Defendants conveniently decided that purported procedural errors dating back to 1982—which they had previously rejected—could serve as a basis to argue that the Lease was "improperly issued" and exercise what they view as their "virtually unlimited" "plenary" power to cancel a lease. Moreover, the district court correctly found that the cancellation

was unlawful for more reasons than mere delay. Thus, the court properly set aside the cancellation and reinstated the Lease.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment in favor of Solenex *de novo*, while "applying the [APA] standard that requires [the court] set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Grunewald v. Jarvis*, 776 F.3d 893, 898 (D.C. Cir. 2015) (quoting *Jicarilla Apache Nation v. Dep't of Interior*, 613 F.3d 1112, 1118 (D.C. Cir. 2010) and 5 U.S.C. § 706(2)(A)). The APA also requires a reviewing court to set aside agency action in excess of the agency's statutory jurisdiction or authority. 5 U.S.C. § 706(2)(C). This Court may affirm on any ground properly raised. *See Nat'l Mall Tours of Washington, Inc. v. Dep't. of Interior*, 862 F.3d 35, 40 (D.C. Cir. 2017).

Defendants agree that the question before this Court is whether the district court abused its discretion when fashioning a remedy. Fed. Br. at 18; *accord Woerner v. Small Bus. Admin.*, 934 F.2d 1277, 1279 (D.C. Cir. 1991). To show an abuse of discretion appellants must establish that the court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *accord Fraenkel v. Islamic Republic of Iran*, 892 F.3d 348, 356 (D.C. Cir. 2018). In other words, the

district court abuses its discretion when it was "*clearly* wrong in reaching its conclusions." *White House Vigil for ERA Comm. v. Watt*, 717 F.2d 568, 571 (D.C. Cir. 1983) (emphasis added). A court also abuses its discretion when there has been a "*clear* misapplication of legal principles, *arbitrary* fact finding, or *unprincipled* disregard for the record evidence." *Kattan by Thomas v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993) (emphasis added). Demonstrating an abuse of discretion is a "heavy burden," *see Greater Se. Cmty. Hosp. Found. v. Potter*, 586 F.3d 1, 5 (D.C. Cir. 2009), which appellants cannot carry here.

ARGUMENT

I. THE SECRETARY'S DECISION TO CANCEL SOLENEX'S LEASE WAS UNLAWFUL.

A. Defendants Did Not Have Authority to Cancel the Lease.

BLM cancelled Solenex's Lease without authority. The MLA provides no express authority to cancel a lease. Fed. Br. at 27 ("Neither the [MLA] nor any other statute even addresses … Interior's authority to cancel a lease for legal deficiencies at the time it was issued."). Instead of relying on the MLA, the Cancellation Decision states the Lease was cancelled "pursuant to" and "in accordance with" 43 C.F.R. § 3108.3(d). JA 326, 338. This regulation, in its entirety, states, "Leases shall be subject to cancellation if improperly issued." 43 C.F.R. § 3108.3(d).

Lacking any statutory authority for their action, Defendants rely on the Secretary's allegedly "inherent authority, under [his] general managerial power over public lands." JA 332. They assert he has the "inherent authority" to cancel a contract that has existed for more than 30 years, has more than six years remaining on its primary term, and has served as the basis for millions of dollars and countless hours of investment. Fed. Br. at 39. They argue the Secretary can cancel the Lease because, taking into account more than 30 years of legislation, policy shifts and administrative changes that occurred *after* Solenex's Lease, they can now decide the Lease was "improperly issued."

The administrative decision to cancel Solenex's Lease is entitled no deference. Agency action does not receive deference when it represents an about-face from that agency's long-held positions or contradicts the Secretary's prior statements. *See Tex. Oil & Gas Corp. v. Watt*, 683 F.2d 427, 432 n.7 (D.C. Cir. 1982); *Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958); Daniel Bress, *Administrative Reconsideration*, 91 VA. L. REV. 1737, 1748 (2005) (laying out the "four main circumstances" under which courts are "less likely to accord an agency the inherent power to reconsider.").

1. *Administrative Agencies Have a Limited Amount of Time to Reconsider Their Actions.*

Agencies may only reconsider their decisions within a reasonable time. Any purported "inherent authority" that may exist to reconsider a lease does not apply

to a lease issued 30 years prior, and upon which the lessee has relied.[1] Pursuant to Section 706(2)(C) of the APA, courts may hold unlawful and set aside agency actions "in excess of statutory jurisdiction, authority or limitations, or short of statutory right." The Cancellation Decision meets these criteria and this Court should affirm the district court's decision.[2]

Defendants, particularly the BLM, describe their inherent power as "plenary" and "virtually unlimited." *See* JA 503–05; Fed. Br. at 27. They cite *Boesche v. Udall*, 373 U.S. 472 (1963), for the incorrect premise that the federal government has unchecked authority to cancel an existing lease based on pre-lease factors. Fed. Br. at 27–28. *Boesche*, however, is only one of many cases holding that an administrative agency, having the power to decide, also has the inherent power to reconsider.[3] *See, e.g.*, *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950); *Belville Mining Co. v. U.S.*, 999 F.2d 989, 997 (6th Cir. 1993); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972).

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[1] Defendants admit that the Cancellation Decision constitutes a reconsideration of a prior agency position. Fed. Br. at 25 ("any reliance interests stemming from Interior's delay in canceling the lease do not eliminate the agency's authority to reconsider its prior decision ….").

[2] The Secretary's overstepping of his authority can alternatively be vacated as an action "otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A).

[3] In *Boesche* the lease appeal was "duly taken within the 30-day period allowed by the regulations," and cancellation issued in the case's first administrative appeal. Brief for Respondent, *Boesche v. Udall*, 373 U.S. 472 (1963) (No. 332), 1963 WL 105567, at *3.

Inherent power comes with inherent limitations. In particular, an agency's latitude to reconsider a prior decision is time-bound. "The general rule regarding whether an agency reconsideration decision is timely is that, 'absent contrary legislative intent or other affirmative evidence, this court will sustain the reconsidered decision of an agency, *as long as the administrative action is conducted within a short and reasonable time period.*'" *Belville Mining*, 999 F.2d at 1000 (emphasis added) (quoting *Bookman*, 453 F.2d at 1265). "'What is a short and reasonable time period will vary with each case, but absent unusual circumstances, the time period would be measured in weeks, not years.' … Once this reasonable time period has run, 'there is no longer an opportunity to correct the procedural error retroactively.'" *Id.* (quoting *Gratehouse v. United States*, 512 F.2d 1104, 1109 (Ct. Cl. 1975)).

In *Albertson*, this Court emphasized that a challenged reconsideration occurred within the 20-day deadline for an appeal of the previous decision. 182 F.2d at 399. Recently, this Court again recognized a temporal limitation on reconsideration authority, holding that "Section 706(1) [of the APA] does not restrict our authority to 'set aside action … found to be … not in accordance with law,' including agency action that does not conclude a matter 'within *a reasonable time*.'" *Dayton Tire v. Sec'y of Labor*, 671 F.3d 1249, 1253 (D.C. Cir. 2012) (emphasis added) (citation omitted).

Courts routinely hold that any power to reconsider must be exercised within a reasonable time, often using (as in *Albertson*) the time allowed for an appeal.[4] Here, Defendants took more than 30 years and so lacked any authority to reconsider Solenex's Lease. The district court addressed this in its first summary judgment order, stating, "I could not find a single example where agency action was as egregiously delayed as the 29 years at issue here." *Solenex II*, 334 F. Supp. at 183 (quotation omitted). Indeed, several courts have found shorter delays unreasonable.[5] *See, e.g.*, *C.J. Langenfelder & Son, Inc. v. U.S.*, 341 F.2d 600, 604 (Ct. Cl. 1965) (one year unacceptable); *Gratehouse v. U.S.*, 512 F.2d at 1110 (two years); *Cabo Distribution v. Brady*, 821 F. Supp. 601, 612 (N.D. Cal. 1992) (three years); *Brooklyn Heights Ass'n v. National Park Serv.*, 818 F. Supp. 2d 564, 570 (E.D.N.Y. 2011) (five years); *Umpleby v. Udall*, 285 F. Supp. 25, 28, 30 (D. Colo.

[4] The MLA provides that "[n]o action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within *ninety days*…." 30 U.S.C. § 226-2 (emphasis added). Here, the Federal Defendants are effectively "contesting" their own final decision decades after the fact. Even if one considered 28 U.S.C. § 2462, the "catch-all statute of limitations [for forfeiture] situations where Congress did not specifically include a time limitation in the statute," then five years would be the outside limit of a reasonable time for depriving Solenex of its lease based on pre-lease factors. *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 17 (D.D.C. 1995).

[5] The longest delay allowed in agency reconsideration Solenex was able to find was four and a half years in *Elkem Metals v. U.S.*, 193 F. Supp. 2d 1314 (Ct. Int'l Trade 2002).

1968) (16 years); *Pacific Oil Co v. Udall*, 273 F. Supp. 203, 214–15 (D. Colo. 1967) (27 years).[6]

2. A 30-Year Agency Delay Is Prejudicial and Unreasonable.

Congress and the courts have repeatedly stressed the importance of finality in agency decision-making. *See Belville Min.*, 999 F.2d at 997 (quoting *Civil Aeronautics Bd. v. Delta Air Lines*, 367 U.S. 316, 321 (1961)); *Am. Trucking Ass'ns*, 358 U.S. 133 at 146 ("Of course the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies …. To allow the reopening of proceedings in such a case under the pretext of correction would undercut the obvious purpose" of identifying a final step in the administrative process.); S. Rep. No. 86-1549, *reprinted in* 1960 U.S.C.C.A.N. 3313, 3316 (Congress added a ninety-day limitation on challenges to leases to provide lessees certainty of title).[7]

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[6] Defendants attempt to avoid this time limitation by asserting that the lease was voidable. Fed. Br. at 22–23. The power to void a voidable contract, however, ends once the party with the power to void has affirmed the contract or when the party without the power to void relies upon the contract. *Meyerson v. Werner*, 683 F.2d 723, 728 (2d Cir. 1982).

[7] Solenex is also entitled to the finality Congress provided to bona fide purchasers, both in its own right as a good-faith assignee for consideration of the Lease, and as a remote purchaser through Fina, which is undisputedly a bona fide purchaser. *See* JA 492–97; Pub. L. No. 86-294, 73 Stat. 571–72 (1959).

Finality in federal oil and gas leasing is a vital public policy concern. Exploring for and developing oil and gas are difficult and expensive endeavors that require significant up-front investment and usually take years to become profitable. *See* JA 1158a–58b (as of 1991, Fina's project costs were "about $2.4 million"); JA 1066 (estimating, in 1986, that the development cost for Fina's APD "would be approximately $5,600,000"); *Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 655 (10th Cir. 1960) ("It is common knowledge that exploration for oil and gas is costly."). No rational person would risk the sizeable investment required to find and produce oil and gas knowing that the federal government might suddenly cancel the underlying lease—whether immediately or after 30 years—upon deciding the lease was "improperly issued."

The district court's concern for reliance interests is consistent with these policy considerations. *Solenex II*, 334 F. Supp. at 182–83. Solenex and its predecessors spent considerable time, effort, and resources pursuing the right to drill on the Lease, premised on the agencies' repeated representations that the Lease was valid. *See* JA 619–46 (APD); JA 1393–1408; JA 2074–83; JA 484. In focusing on the reliance engendered by Defendants' 30-year delay, the district court applied common sense to find that the Lease application, APD preparation, related environmental studies and participation in cultural consultations came at a cost.

Defendants argue that "delay alone" does not make a decision arbitrary. Fed. Br. at 19. They attack a straw man, as it is Defendants' *extreme, decades-long* delay, coupled with their abrupt reversal of position and total disregard for Solenex's reliance interests—no mere delay—that convinced the district court that the cancellation of Solenex's Lease was arbitrary and capricious. Even if this was a situation of mere delay, delay alone can still deprive an agency of authority to reconsider. *See* Part I(A)(1), *supra.* During the more than 30 years between Lease issuance and cancellation, Solenex and its predecessors invested millions of dollars, while Defendants repeatedly verified that the Lease was valid. *See* Part I(B)(6), *infra*. Assuming, *arguendo,* that Defendants had authority to cancel Solenex's Lease, that authority would have expired in 1982, 1983, or 1988, long before 2016, when they sought to wield it.[8]

B. The Lease Cancellation was Arbitrary and Capricious.

BLM's cancellation of Solenex's Lease, in addition to being unauthorized, was arbitrary and capricious. The district court saw that, and correctly set the cancellation aside. *See* 5 U.S.C. § 706(2)(A).

[8] This Court need not establish a bright-line rule here, as the delay of more than 30 years here far exceeds wherever that line may be. *Solenex II*, 334 F. Supp. at 183 ("I could not find a single example where agency action was as egregiously delayed as the 29 years at issue here.") (quotation omitted).

The arbitrary, capricious nature of the cancellation is indicated by, among other things, the following facts: the Lease was never timely challenged when issued, JA 1096, the Lease has been in place, invested in, and repeatedly reaffirmed for more than 30 years, JA 650–54; JA 1039–49; JA 1116–51; JA 1262–94; JA 1342, the cancellation was based on an improper retrospective application of policy by a later administration, JA 330–31; JA 565–66, and the Cancellation Decision was motivated by litigation.

In general, a reviewing court can find that an agency action must be set aside under 5 U.S.C. § 706(2)(A) "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

"[A]n agency action which is supported by the required substantial evidence may in another regard be 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law'—for example, because it is an abrupt and unexplained departure from agency precedent." *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984). Applying *State Farm* to this case, cancellation of Solenex's Lease was arbitrary and capricious.

1. *The Agency Defendants Relied on Factors that They Were Not Supposed to Consider.*

Defendants premised the cancellation on statutes and regulations promulgated years—decades—after they issued the Lease. Congress did not authorize such retrospective application.

The Cancellation Decision states that, "having re-examined the conditions under which Lease No. MTM53323 was approved, and *subsequent factual and legal developments* … the BLM finds [the Lease] was improperly issued." JA 327 (emphasis added). The BLM then cites P.L. 109-432, the Tax Relief and Health Care Act of 2006 ("2006 Tax Act"). Congress enacted the 2006 Tax Act more than two decades after BLM issued Solenex's Lease. Although the 2006 Tax Act withdrew over 356,000 acres of land in the area of the Solenex Lease from mining or mineral location, Congress explicitly preserved "valid existing rights." Tax Relief and Health Care Act of 2006, Pub. L. 109-432, § 403(b)(1), 120 Stat. 2922, 3050.

There is no dispute that the Lease was a "valid existing right" in 2006. Defendants' 2016 invocation of the 2006 Tax Act is not consistent with Congress's intent or with guidance from the Supreme Court that pre-existing vested rights are not generally impacted by later legislation and regulation. *See Greene v. U.S.*, 376 U.S. 149, 160 (1964) ("'the first rule of construction is that legislation must be considered as addressed to the future, not to the past…(and) a retrospective

operation will not be given to a statute which interferes with antecedent rights … unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'") (quoting *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)).

Moreover, the Cancellation Decision is largely concerned with predicted impacts on the TCD. JA 330–31, 38. But TCDs did not exist when Solenex's Lease was issued. Bulletin #38, the document defining TCDs, was not available until nearly a decade later. *See* Patricia L. Parker & Thomas F. King, National Register Bulletin #38, Guidelines for Evaluating or Documenting Traditional Cultural Properties (1990). An agency decision that rests on "considerations that Congress could not have intended to make relevant" is an abuse of discretion. *Littell v. Morton*, 445 F.2d 1207, 1211 (4th Cir. 1971).[9]

Whatever influences the post-lease TCD designation may have had on suspension or APD approval, it is irrelevant to the question of whether Solenex's Lease was properly issued in 1982. Thus, relying on the TCD to invalidate the Lease is arbitrary and capricious. *See Judulang v. Holder*, 565 U.S. 42, 55–56 (2011) (holding agency action that hinges eligibility for relief on irrelevant factors to be arbitrary and capricious); *Rainbow Navigation, Inc. v. Dep't of Navy*, 620 F.

[9] During oral argument below, the agencies admitted that the delay in cancelling Solenex's Lease appeared to be caused, at least in part, by political concerns. JA 565–66.

Supp. 534, 539–40 (D.C. Cir. 1985) (holding decision by Secretary of the Navy was arbitrary and capricious because "the [documents] relied upon by the Secretary do not provide facts relevant to [the] determination"). As in *Rainbow Navigation*, the documents and decisions produced via the post-lease Section 106 process "do not provide facts relevant" to the inquiry of whether the Lease was valid as originally issued.

2. *The Evidence before the Agencies Supports Their Prior Finding that the Lease Complied with NEPA.*

The cancellation of Solenex's Lease was also arbitrary and capricious because the evidence before the agencies and their own prior conclusions demonstrated that they properly issued Solenex's Lease. When they issued the Lease in 1982, the agencies complied with all relevant NEPA requirements in effect at the time. Alternatively, even if they had not complied with the statutes in 1982, they cured any purported NEPA violations during the exhaustive preparation of FEIS documents in 1986 and 1990.

NEPA is a procedural statute "intended to ensure 'fully informed and well-considered' decision-making[.]" *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012) (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)). Not all "major Federal actions," however, require a full EIS. In order to determine whether an EIS is required, an agency may first prepare a relatively less costly EA. 40 C.F.R. §§ 1501.4(b), 1508.9. If, based upon the EA, the agency

concludes there would be no significant environmental effects, it may issue a Finding of No Significant Impact, obviating the need to prepare an EIS. *See* 40 C.F.R. §§ 1501.3, 1501.4(c), (e), 1508.9. Moreover, when an agency provides a full and fair discussion of environmental impacts in a NEPA document, the agency has satisfied NEPA by taking the requisite "hard look" at environmental consequences. *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006). The agencies complied with NEPA in this case.

Defendants cite *Conner v. Burford* and *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) for the contention that the issuance of an oil and gas lease lacking a no-surface occupancy stipulation always constitutes an "irreversible commitment of resources" requiring the preparation of an EIS. Fed. Br. at 12. The categorical rule in those cases, however, is inappropriate given the discretion afforded to agencies in this context. *See* 40 C.F.R. §§ 1501.3, 1501.4(c), (e), 1508.9. "It is the agency's responsibility to initially determine the need for an EIS." *Park County Resource Council, Inc. v. U.S. Dep't. of Agriculture*, 817 F.2d 609, 621 (10th Cir. 1987) (*overruled on other grounds by Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 971 (10th Cir. 1992). It is not this Court's responsibility to substitute its judgment for the agencies' judgments in 1981 through 1993, *State Farm*, 463 U.S. at 30, especially when the agencies repeatedly reaffirmed the initial lease issuance decision.

Contrary to the agencies' current characterization, the 164-page Leasing EA was a comprehensive document that acted as the functional equivalent of a full-blown EIS. *See Spiller v. White*, 352 F.3d 235, 240–45 (5th Cir. 2003) (upholding an agency's decision not to prepare an EIS when the EA was "akin to a full-blown EIS"); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 683 (D.C. Cir. 1982) (upholding an agency's decision not to prepare an EIS because "[t]he record indicates that the Forest Service carefully considered the [proposal], was well informed on the problems presented, identified the relevant areas of environmental concern, and weighed the likely impacts"). In preparing the Leasing EA, the agencies compared the potential effects of six different alternatives on erosion, water and soil quality, wildlife, vegetation, socio-economic conditions, recreation, and Native American cultural resources; considered more than 800 public comments; and consulted with numerous state, federal, and tribal authorities. *See* Leasing EA, JA 2217–381. This was a major NEPA analysis demonstrating that the agencies had taken a "hard look" at the consequences of the leasing decision.

The agencies' new argument that they improperly issued Solenex's Lease because the Leasing EA lacked a no-action alternative, JA 334, is also wrong. The district court found that the Leasing EA evaluated a no-action alternative. *Solenex II*, 334 F. Supp. at 179. The no-action alternative was one of six fully considered in

the Leasing EA, and was defined as the alternative to delay making recommendations on all pending lease applications until completion of the forest plan. JA 2257. This alternative was equivalent to a "no-lease" alternative because to delay making lease recommendations has the same effect as deciding not to lease. *See MSLF v. Andrus*, 499 F. Supp. 383, 386–95 (D. Wyo. 1980) (failure to make recommendations on lease applications constituted an unlawful withdrawal). That Defendants may now wish that they had selected the no-action alternative does not establish that they failed to consider that alternative in 1981. Indeed, they explicitly considered and rejected the "No Action on Lease Applications at this Time" alternative "required for consideration by NEPA." JA 2257, 2287. *See Hammond v. Norton*, 370 F. Supp. 2d 226, 242 (D.D.C. 2005) (refusing to second-guess any agency's decision not to select the no-action alternative).

3. *The Evidence before the Agencies Supports Their Prior Finding that They Issued the Lease in Compliance with NHPA.*

The Secretary's new contention that issuance of the Lease violated NHPA is equally lacking in merit. JA 335–36. NHPA is intended to identify potential conflicts between federal undertakings and historic properties and to provide a mechanism for attempting to resolve any purported conflicts. Like NEPA, NHPA is a strictly procedural statute that neither confers a substantive right nor dictates a particular outcome. *See Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 537 F. Supp. 2d 161, 173 (D.D.C. 2008). It instead requires agencies to "stop, look, and

listen" before proceeding. *Ill. Commerce Comm'n v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988) (quotation omitted). Issuance of an oil and gas lease does not have an impact on historic properties. *See Nat'l Indian Youth Council v. Andrus*, 501 F. Supp. 649, 674–76 (D.N.M. 1980), *aff'd sub nom. Nat'l Indian Youth Council v. Watt*, 664 F.2d 220, 228 (10th Cir. 1981) (approval of a mining plan, which authorizes surface disturbing activity—not approval of a lease, which requires subsequent approval for future surface disturbing activity—requires compliance with NHPA).

Here, in the Leasing EA, the Forest Service recommended that additional NHPA consultations be deferred until a specific surface-disturbing activity was proposed. Defendants' new suggestion that more than 400,000 acres of land should have been inventoried for a TCD prior to the issuance of *any* oil and gas leases is absurd. JA 336; *see Nat'l Indian Youth*, 664 F.2d at 228 ("The argument that a complete survey must be made of 40,000 acres before mining begins on eight acres borders on the absurd.").

4. Defendants Corrected Any Deficiencies by 1993.

Assuming, *arguendo*, that deficiencies existed in the Leasing EA, Defendants corrected any errors by 1993 via subsequent NEPA and NHPA processes.

Defendants conducted thorough NEPA and NHPA analyses in preparation of the Leasing EA, 1985 EA, 1986 Forest Plan and FEIS, and 1990 FEIS. Not one, but two full-blown EISs related to the Badger-Two Medicine area were performed, in addition to multiple cultural resource studies. The Forest Service explicitly stated that "the requirements of *Conner v. Burford* are met by the [1986 FEIS and 1990 FEIS]."[10] JA 1138–39. In 1993, after an independent field and office review, the BLM explicitly reiterated and approved the conclusion that any requirement set forth in *Conner* had been satisfied. JA 1283–84. All the work Defendants now wish they had done *was* done (on multiple occasions).

5. *The "Facts" in the Cancellation Decision Are Contrary to the Evidence.*

The "facts" recounted in the Cancellation Decision contradict findings in the record that the agencies made in the decade following lease issuance. The Cancellation Decision contended that the Badger-Two Medicine area is "a very remote and relatively pristine landscape" "mostly undisturbed by modern development." JA 327. These "facts" omit that the "heavy traffic" of US Highway 2 is located two miles from Solenex's proposed drill site, JA 1131, multiple dirt roads, jeep trails, snowmobile routes, and the Great Northern Railroad all pass through the area, *Id.*, JA 747, and natural gas pipelines bisect the Lease. JA 1352.

[10] *Conner* required a full EIS prior to lease issuance, but did not invalidate the underlying lease. 848 F.2d at 1460–61.

The record evidence also contradicts the *new* purported finding that oil and gas exploration by Solenex would have negative effects on the religious and cultural quality of the TCD. JA 336. In 1984, the Blackfeet Tribal Council passed a resolution describing how the Tribe and Forest Oil Corporation "will join efforts to take all necessary actions to secure the Blackfeet Tribe's right to explore and develop hydro carbons in the Ceded Strip area." JA 76–77.

Defendants knew all this. Agency officials routinely referenced these facts throughout the 1980s and early 1990s, and on multiple occasions made findings of no significant impact. No cultural resources were located within project boundaries when analyzing the 1983 APD. JA 838. The Decision Notice and Finding of No Significant Impact issued in 1987 cited an archeological survey that found no cultural resources along the proposed access route to the proposed drill site. JA 1040. The 1991 ROD approving Fina's well proposal states that "[n]o archeological sites in the project area were determined to be eligible for listing on the National Register of Historic Places, and no traditional cultural properties were found in the project area." JA 1124–25. It was not until years later, after changes in administration and regulations, that the agencies began declaring that Solenex's APD would affect important cultural resources.[11]

[11] Furthermore, it is impossible to know whether the evidence supports the agencies' conclusions. Most of the 2012 TCD Boundary Expansion Study—which allegedly

6. *The Agencies Failed to Consider the Extreme Delay and Solenex's Reliance Interests.*

The agencies, relying on their "virtually unlimited plenary power," entirely failed to consider how the decades-long delay in cancelling the Lease caused Solenex and its predecessors to rely on the Lease to their detriment. The Supreme Court has held that a change in an agency's long-held position "that does not take account of legitimate reliance on" the agency's prior expressed position may constitute arbitrary and capricious action. *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996).

Congress made it clear in the MLA that certainty of title was necessary to encourage investment in and development of federal lands. *See* Part I(A)(1), n.4, *supra* (discussing how Congress included a 90-day statute of limitations for contest actions in the MLA in order to protect the legitimate reliance interests). In this case, the agencies failed to acknowledge reliance interests when they issued the Cancellation Decision. In fact, the Cancellation Decision gives no indication that they considered reliance interests at all. JA 326–41.

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precludes mitigation of adverse impacts—is redacted, including the entire section describing the traditional use areas and resources. JA 1740–1851. This raises due process concerns. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) ("A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.").

For decades agency officials repeatedly represented that the Lease was valid, despite disputes over a drilling permit. For example, following the initial issuance of the Lease in 1982, the agency approved the APD on Solenex's Lease on four separate occasions—in 1985, 1987, 1991, and 1993—and confirmed that the APD remained valid in 2002. JA 650–54; JA 1039–49; JA 1116–51; JA 2294.

As described above, these repeated representations induced Solenex and its predecessors to incur significant costs that they would not have otherwise incurred. In addition to the monetary costs, Solenex's principal has dedicated a considerable portion of his life to fighting this legal battle; Mr. Longwell was 44 years old when he received the Lease in 1982. He is now 81. JA 41, 44.

Furthermore, the agencies' contention that reliance interests are diminished because "[t]he pertinent NEPA case law at the time, as well as the designation of the Area as a traditional cultural district under NHPA, rendered issuance of the lease legally questionable at best," Fed. Br. at 35, is misplaced.[12] This appeal exists because neither BLM nor the Forest Service thought the issuance was invalid, or gave any indication that the question was close, for more than 30 years until backed into a corner by an adverse judicial decision.[13]

[12] This argument further demonstrates that the agency delay was unreasonable.

[13] Intervenors contend that Solenex lacks reliance interests because of Lease terms incorporating language from 43 C.F.R. § 1810.3 should have put Solenex on notice

7. The Cancelation Was an Abrupt, Unexplained Departure from Precedent.

"[A]n agency action which is supported by the required substantial evidence may in another regard be 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law'—for example, because it is an abrupt and unexplained departure from agency precedent." *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors*, 745 F.2d at 683; *Jicarilla*, 613 F.3d at 1120 ("Like a court, [n]ormally, an agency must adhere to its precedents in adjudicating cases before it. Thus, [a]n agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making.") (quotations omitted).

This Court has reinstated oil and gas leases that were cancelled in an "eleventh-hour" change in the BLM's position on the validity of the leases, much as Solenex's Lease was. *See Tex. Oil & Gas Corp. v. Watt*, 683 F.2d at 431 ("*Watt*"). In *Watt*, agency officials first supported the BLM's decision to issue leases, "consistently and positively [taking] the position that the military lands were open for leasing, in the Secretary's discretion" and expressing this interpretation that the leases were validly issued "in rulings, letters, and instruction

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that its Lease was subject to cancellation at any time. Brief of Defendant-Intervenors-Appellants at 42. Even if this argument did not significantly overstate the power of Section 1810.3, BLM did not list this as a reason for cancellation in its Cancellation Decision. The argument should therefore be rejected as a post-hoc rationalization.

memoranda by department officials, including the Associate Solicitor for Energy and Resources." *Id.* at 432. Under mounting pressure, the BLM abruptly reversed its interpretation several months later, and TXO sued. In its decision, this Court stated that "we believe that the BLM's eleventh-hour interpretation of his duty is owed no great degree of deference," *id.* at 431, and ordered the leases be reinstated because allowing the Secretary's change in position to stand "would be sanctioning a retroactive exercise of discretion to which it is impossible to ascribe any rational purpose." *Id.* at 434–35.

As in *Watt*, the agencies in this case consistently and repeatedly represented that they had validly issued Solenex's Lease. Now they say the opposite. The primary fact distinguishing this case from *Watt* is the length of delay prior to changing position: in *Watt*, the court overturned a sudden reversal of only several months' worth of representations, while here Defendants attempted to reverse their official position that has stood for at least 23 years.[14]

[14] The 1993 ROD that approved Solenex's APD necessarily also confirmed the validity of the underlying lease. Since the 1993 ROD was a final decision of the Secretary, *see Role Models America, Inc. v. White*, 317 F.3d 327, 331–32 (D.C. Cir. 2003) it constituted the official position of the Secretary until the Secretary's sudden reversal in 2016.

8. The Cancellation Decision Was Also Contrary to Law Under the Doctrines of Laches and Estoppel

"Equity aids the vigilant, not those who slumber on their rights …." *Powell v. Zuckert*, 366 F.2d 634, 636 (D.C. Cir. 1966) (quoting 2 POMEROY, EQUITY JURISPRUDENCE § 418 (5th ed. 1941)). Under the doctrine of laches, courts will not enforce a legal claim—even if otherwise valid—if a party's delay or lack of diligence in bringing a claim unfairly prejudiced the adverse party. *See Costello v. U.S.*, 365 U.S. 265, 282 (1961); "Laches," BLACK'S LAW DICTIONARY (10th ed. 2014). Here the agencies delayed three decades before asserting that Solenex's Lease was improperly granted, harming Solenex and triggering the application of the doctrine of laches.

Defendants should also be estopped from cancelling Solenex's Lease, even if doing so would have otherwise been within their authority. Estoppel is based on the principle that "he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Dickerson v. Colgrove*, 100 U.S. 578, 580–81 (1879). The elements for invoking estoppel against the government are:

> (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury.

U.S. v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970). These elements are easily satisfied here, as discussed in detail in Part I(B)(6), *supra*.

II. THE DISTRICT COURT PROPERLY SET ASIDE THE LEASE CANCELLATION.

The district court correctly set aside the arbitrary, capricious, and unauthorized cancellation of Solenex's Lease, which resulted in its reinstatement. The district court should be affirmed unless it abused its discretion. But the Defendants have not established that the district court abused its discretion.

Specifically, this Court should affirm the district court's remedy because (A) the district court's remedy complied with 5 U.S.C. § 706; and (B) remand to the agencies for further consideration would have been (and would be) fruitless.

A. The District Court's Remedy Complied with 5 U.S.C. § 706.

The law specifically allowed the district court to set aside the Cancellation Decision, and this Court should affirm. Further, the Court should disregard any argument that the district court's specific order of "reinstate[ment]" was in error, as any error in the phrasing of the remedy was harmless. *See* 5 U.S.C. § 706 (stating that, when a court reviews an agency decision, "due account shall be taken of the rule of prejudicial error").

When a reviewing court finds that an agency action was arbitrary or capricious, *Solenex II*, 334 F. Supp. at 184, the APA prescribes the remedy: the

reviewing court must hold the action unlawful and set it aside. 5 U.S.C. § 706(2)(A).[15] That is exactly what the district court did here—no more, no less. *Solenex II*, 334 F. Supp. at 184. Additionally, the court properly found that Solenex (and its predecessors) had relied to its detriment because of the more than 30-year delay, and Defendants have not challenged that finding of fact as clear error.

On appeal, rather than address the lawful setting aside of the cancellation, *see* 5 U.S.C. § 706(2), Defendants argue that the district court erred because it granted Solenex a mandatory injunction. Fed. Br. at 45. That is incorrect. [16]

If this Court is unsure of the implications of the district court's wording, it should determine any lack of clarity was harmless error because it had no effect on the outcome. *See, e.g.*, *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1512 (D.C. Cir. 1995). The court stated that it was remanding the case to the Department of the Interior "with the order that the Solenex Lease be reinstated." *Solenex II*, 334 F. Supp. at 184. The proper understanding of the ruling is that the district court set aside the cancellation of the Lease as it must under 5 U.S.C. §

[15] The same remedy applies when the reviewing court finds that an agency has acted in excess of its statutory jurisdiction. 5 U.S.C. § 706(2)(C).

[16] If Defendants argue that the district court improperly granted an injunction, then they erroneously omit any case law discussing the injunction factors and their application. Thus, Solenex has not briefed those issues. If the Court wishes to hear argument on this issue, Solenex respectfully requests that it be able to file a sur-reply or supplementary brief on this issue.

706(2)(A). The result of the ruling is that the Lease *is* reinstated—there is nothing else that it *could be*. Regardless of whether the district court ordered reinstatement, the Lease *is* reinstated because it is no longer cancelled. Thus, the agencies' arguments regarding the granting of an injunction are inapplicable. The trial court did not base its remedy ruling on an erroneous view of the law. It correctly applied the APA, 5 U.S.C. § 706(2)(A), to the facts of this case.

B. Remand to the Federal Defendants Would be Fruitless.

The district court correctly set aside the cancellation rather than remand for further agency review. This is a case where the government did not act in "good faith." *Solenex II*, 334 F. Supp. at 184. Fortunately, cases like this one are rare, but they are not unprecedented. Analogous cases from the Tenth and D.C. Circuits demonstrate the wisdom of the district court's remedy here.

First, in *Woods Petroleum Corp. v. Dep't of Interior*, a group of American Indians leased their mineral interests to a lessee. 47 F.3d 1032, 1035 (10th Cir. 1995) (en banc). The Oklahoma Corporation Commission later established a drilling and spacing unit that included the leases. *Id.* The working-interest owners in the area executed a communization agreement and named Woods Petroleum as the operator. *Id.* Woods Petroleum submitted the communization agreement to the Department of the Interior and began drilling an authorized well six weeks before the expiration of the leases. *Id.* At that point, the area director of the Bureau of

Indian Affairs approved the communization agreement, which extended the leases. *Id.*

The American Indians objected to the approval and extension, and filed an administrative appeal; but they raised no issues with the communization agreement itself. *Id.* Instead, they wanted the Assistant Secretary to reject the communization agreement so that the leases would expire, allowing them to re-lease the lands at higher prices. *Id.*

The Assistant Secretary accordingly reversed the original approval of the communization agreement. *Id.* at 1036. The lands were *re*-leased for a new, higher bonus, and the agency approved a new communization agreement in favor of an operator other than Woods Petroleum, but which was otherwise identical to the prior, rejected communization agreement. *Id.*

Woods Petroleum sued, alleging that the rejection of the initial, approved communization agreement was arbitrary and capricious, and should be set aside. *Id.* The district court upheld the federal agency's decision. *Id.* at 1037. On appeal, the Tenth Circuit held that the federal agency's trust duty to the American Indians "is not boundless and cannot be exercised in a manner that exceeds or flouts the authorizing statute and regulations." *Id.* at 1038. The court noted that the issue before the agency was whether to approve the communization agreement, *not* whether the underlying leases were good deals or bad deals. *Id.* at 1038–39.

Because the federal agency rejected the initial communization agreement only as a vehicle to force termination of the underlying leases, the Tenth Circuit held that the agency's action was arbitrary. *Id.* at 1039.

As for remedy, the agency asked for another chance to review its rejection of the initial, approved-then-rejected communization agreement. The Tenth Circuit denied the request and elaborated on the appropriate remedy:

> Under the APA, a reviewing court must rely on the administrative record to assess the validity of the agency action. *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973) (per curiam). When the agency has failed to explain adequately the rationale underlying its action, and "further explanation is necessary to a proper assessment of the agency's decision," the court should ordinarily remand for further proceedings. *Id.* at 143, 93 S.Ct. at 1244...."[I]f the only deficiency in the Secretary's actions were an inadequate analysis," remand would be appropriate...
>
> However, *remand for further explanation would be fruitless in this case because the Secretary has unequivocally explained his action*.... With respect to the propriety of the [first] communization agreement, neither the Secretary nor the Indian lessors has ever identified any deficiencies, and the Secretary's approval of the identical [second] communization agreement is tantamount to an approval of the reasonableness of the [first] communization agreement. …[W]e conclude that the BIA Area Director's approval of the [first] communization agreement should be upheld.

Woods Petroleum, 47 F.3d at 1041 (emphasis added). Accordingly, the Tenth Circuit ordered the district court to reverse the offending agency action and reinstate the first communization agreement. *Id.* Judge Ebel's reasoning supports the district court's remedy here.

Second, in *Texas Oil & Gas Corp. v. Watt* (facts discussed *supra* at Part I(B)(7)), this Court held, "In view of the circumstances of this case, we believe that the Secretary's eleventh-hour interpretation of his duty is owed no great degree of deference." *Id.* at 431.[17] Thus, because the leases were "valid when issued," the Court reinstated the lease without remanding to the agency. *Id.* at 435.

This case is analogous to both *Woods Petroleum* and *Watt* for three reasons. *First*, the history of this case shows that the defendant agencies complied with NEPA and NHPA. The Leasing EA contemplated a no-action alternative. JA 2287–88. The Forest Service and BLM created a comprehensive, 982-page, Final EIS, issued in December 1990. JA 1057. Based on that Final EIS, BLM approved an APD for the Lease in 1991 and again in 1993. JA 1153, 1175. To utilize the APD, Solenex's predecessor-in-interest (Fina) had to comply with all lease stipulations, mitigation and monitoring requirements, and additional mitigation measures imposed as conditions of approval. JA 1265, 1287–88. Additionally, the 1993 Record of Decision—which was a final decision for the Secretary and in which the Assistant Secretary of the Department of the Interior concurred—approved the APD. In doing so, it acknowledged that BLM had fully complied with all applicable statutes (including NEPA and NHPA), regulations, policies and

[17] *See also Solenex II*, 334 F. Supp. at 182 (quoting same).

trust responsibilities, and that the approval was given after consultation with the Blackfeet Tribe, who did not identify any historic properties that would be affected. JA 1264, 1270, 1275, 1281, 1282, 1286. The Assistant Secretary also officially determined that any pre-issuance NEPA violations were corrected by the 1990 FEIS and 1986 FEIS. JA 1283–86. Similar to the leases in *Woods Petroleum*, and *Watt*, Solenex's Lease was valid when it was issued in 1982. When a lease is valid when issued, but later cancelled due to later-in-time developments, reinstatement is a proper remedy. *See, e.g.*, *Watt*, 683 F.2d at 435.

Second, the Blackfeet Tribe's challenge to the Lease appears to be borne, at least partly, of economic self-interest. The Blackfeet Tribe Business Council had previously approved a resolution stating that it wished to enter into a joint venture agreement to develop oil drilling in the same area as Solenex's Lease. JA 76–77. In negotiations as Solenex tried in vain to defend its lease rights, BLM suggested to Solenex that road access and drilling may be approved if Solenex were to just pay the Blackfeet Tribe $5 million. JA 1453.

Third, "remand for further explanation would be fruitless in this case[,]" *see Woods Petroleum*, 47 F.3d at 1041, because Defendants have already explained their decision. *Cf. Camp v. Pitts*, 411 U.S. 138, 142–43 (1973) (when an agency's failure to explain its action frustrates effective judicial review, the remedy is to obtain from the agency additional explanation—*i.e.* vacatur with remand). Here the

agencies believe cancellation is proper due to developments that occurred after the Lease had been granted, and that they could not re-lease the property. No further explanation is necessary for this Court to assess why Defendants cancelled the Lease. Thus, setting aside the cancellation—and reinstatement—is the proper remedy. *See, e.g.*, *Watt*, 683 F.2d at 435; *Woods Petroleum*, 47 F.3d at 1041. In any event, remand would be futile as the BLM lacks any authority to administratively cancel the Lease.

CONCLUSION

For the foregoing reasons, this Court should affirm.

DATED this 12th day of August 2019.

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I hereby certify that on August 12, 2019, I electronically filed the foregoing using the Court's CM/ECF system which will send notification of such filing to all counsel of record.

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