IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOLENEX LLC, Plaintiff, v. SALLY JEWELL, *et al*., Defendants, and PIKUNI TRADITIONALIST ASSOCIATION, *et al*., Defendant-Intervenors.	)	Civil Case No. 13-00993 (RJL)

SOLENEX'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT-INTERVENORS' BRIEF (Dkt. # 104)

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LIST OF ACRONYMS

AIRFA - American Indian Religious Freedom Act, 42 U.S.C. § 1996

APA - Administrative Procedure Act, 5 U.S.C. § 551 *et seq*.

APD - Application for Permit to Drill

BFP - *Bona Fide* Purchaser

BLM - Bureau of Land Management

DN - Decision Notice

EA - Environmental Assessment

EIS - Environmental Impact Statement

FONSI - Finding of No Significant Impact

IBLA - Interior Board of Land Appeals

MLA - The Mineral Leasing Act of 1920, 30 U.S.C. §§ 181–287

NEPA - The National Environmental Policy Act, 42 U.S.C. § 4331 *et seq*.

NHPA - The National Historic Preservation Act, 54 U.S.C. § 300101 *et seq*.

NSO - No Surface Occupancy

ROD - Record of Decision

TCD - Traditional Cultural District

TCP - Traditional Cultural Property

INTRODUCTION

Pursuant to this Court's November 28, 2016, Minute Order, Solenex respectfully files this Supplemental Brief in Opposition to Defendant-Intervenors' Brief (Dkt. # 104).[1]

ARGUMENT

I. THE SECRETARY'S CANCELLATION OF THE LEASE WAS *ULTRA VIRES.*

As previously demonstrated, the Secretary's cancellation of Solenex's 33-year-old lease was *ultra vires* because the Secretary has no inherent authority and has never had any express or implied authority to administratively cancel a lease after title thereto has finally and conclusively vested in a private party. Dkt. # 89-1 at 21–28; Dkt. # 99 at 15–20.[2] This conclusion is verified by *Boesche v. Udall*, 373 U.S. 472 (1963), wherein the Supreme Court held:

> [T]he power of cancellation, at least while conflicting applications are pending, is essential to secure the rights of competing applicants.
>
> We sanction no broader rule tha[n] is called for by the exigencies of the general situation and the circumstances of this particular case. *We hold only that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land*.

Id. at 485 (emphasis added) (footnote omitted). Thus, under the holding in *Boesche,* any authority the Secretary may possess to administratively cancel a lease ends once all challenges regarding issuance of a lease are resolved and title is finally and conclusively vested in a private party. *See* Dkt. # 89-1 at 28–32; Dkt. # 99 at 20–26. Because title to Solenex's lease was finally and conclusively vested in Solenex and its predecessors for more than 33 years—as repeatedly

[1] Defendant-Intervenors are: Pikuni Traditionalist Association, Blackfeet Headwaters Alliance, Glacier-Two Medicine Alliance, Montana Wilderness Association, National Parks Conservation Association, and the Wilderness Society (collectively "Intervenors").

[2] All page citations to filed documents are to the page numbers assigned to the document by this Court's CM/ECF system.

acknowledged by the Secretary, her predecessors, the BLM, and the Forest Service—the Secretary's cancellation of the lease was *ultra vires* and must be held unlawful and set aside.

Intervenors seek to avoid this result by ignoring the holding in *Boesche,* Dkt. # 104 at 8, and relying on extraneous statements in *Boesche* that precede the holding to conclude that the Secretary has broad authority to administratively cancel valuable oil and gas leases whenever she pleases. *Id*. at 8–9. Yet, reliance on extraneous statements that precede the holding violates "the first rule of case law as well as statutory interpretation[,]" which is to "[r]ead on." *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 520 (2012). If Intervenors had taken the time to read *Boesche* to its conclusion they would have recognized that the Court issued its narrow holding to prevent the Secretary from "abus[ing]" her limited authority, as she did in the in the instant case. 373 U.S. at 485 ("In so holding we do not open the door to administrative abuses."). Moreover, it is well established that the Court's extraneous statements have no precedential effect:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. 264, 399–400 (1821) (Marshall, C.J.); s*ee Central Va. Community College v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."). To be sure, persuasive Supreme Court dicta may be entitled to some respect by lower courts. *Gabbs Expl. Co. v. Udall*, 315 F.2d 37, 39 (D.C. Cir. 1963). But, as previously demonstrated, the Court's extraneous statements that precede its holding suffered from serious deficiencies and conflicted with its earlier precedent. Dkt. # 99 at

22–26. Therefore, this Court should follow the holding in *Boesche* and hold unlawful and set aside the Secretary's cancellation decision.

In addition to criticizing Solenex's reliance on the holding in *Boesche,* Intervenors ask this Court to exponentially expand the holding in *Boesche* so that the Secretary would have *carte blanche* to cancel a lease whenever a competing lease applicant is not involved. Dkt. # 104 at 9–10. Yet, even the Solicitor General was not brave enough to make that argument in *Boesche*. Instead, he expressly limited the question presented to: "[w]hether the Secretary … has authority to cancel an oil and gas lease issued in violation of the Department's regulations and *in derogation of a competing applicant's statutory preference rights*." Brief for Respondent, *Boesche v. Udall*, 1963 WL 105567, at *2 (Feb. 6, 1963) (emphasis added). Moreover, to grant the Secretary *carte blanche* to administratively cancel a lease whenever a competing lease applicant is not involved would "open the door to administrative abuses[,]" render most leases worthless, and defeat the purpose of the MLA. Indeed, no prudent oil and gas developer would bid on a federal oil and gas lease if the Secretary could simply cancel the lease whenever she feels seller's remorse and "conveniently" discovers an alleged technical pre-lease violation, as essentially occurred in the instant case.

Finally, Intervenors argue that Congress somehow ratified the Secretary's assertion of authority to administratively cancel leases under the facts in this case. Dkt. 104 at 10–12. To be sure, the Solicitor General argued in *Boesche* that the Secretary had a longstanding practice of administratively cancelling leases under similar factual situations as those present in *Boesche*.[3]

[3] Contrary, to the Solicitor General's argument, the Secretary's practice was not longstanding. Dkt. # 89-1 at 23–28. In fact, the Secretary's "practice" largely involved the administrative cancellation of prospecting permits. *See* Reply Brief for Petitioner, *Boesche v. Udall*, 1963 WL 105568, at *5–8 (Feb. 19, 1963). Yet, Section 26 of the MLA, as originally enacted, expressly granted the Secretary the authority to administratively cancel prospecting permits and required

Brief for Respondent, *Boesche v. Udall*, 1963 WL 105567, at *27–31. Because Congress had "never interfered" with this alleged practice despite amending the MLA on several occasions, the Court suggested that Congress had acquiesced in the Secretary's assertion of such authority. *Boesche*, 373 U.S. at 482–83; *but see* Richard E. Blair, *The Cancellation of Oil and Gas Leases: An Administrative or Judicial Function?* 51 Geo. L.J. 221, 231–33 (1963) (demonstrating that Congress had not acquiesced in the Secretary's assertion of such authority). Yet, assuming, *arguendo*, that Congress acquiesced in the Secretary's assertion of authority to administratively cancel a lease under the facts in *Boesche*, its stretches credulity to suggest that Congress ratified, acquiesced in, or would condone the Secretary's unprecedented and egregious actions in the instant case. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169 (2001) ("*SWANCC*") ("Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care.").

Granted, Congress has amended the MLA subsequent to the Court's decision in *Boesche*, but the holding in *Boesche* would not have concerned Congress because it merely stands for the proposition that the Secretary may administratively cancel a lease for pre-lease factors to protect a competing lease applicant before title to the lease has finally and conclusively vested in another party. *Boesche*, 373 U.S. at 485 ("We hold only that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land."). Nor is there any evidence that Congress knew or even suspected that the Secretary would have the gall to administratively cancel a lease for an alleged pre-lease violation after repeatedly reaffirming the validity of the lease for more than

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each permit to expressly contain a provision reflecting that authority. 41 Stat. 437, 448 (1920); *see* Dkt. # 89-1 at 24–25.

three decades, as occurred in the instant case.[4] *See e.g.*, Dkt. # 89-2 at 6–17 (demonstrating that the APD was approved four times); *compare SWANCC*, 531 U.S. at 170 (refusing to find congressional acquiescence even though there was some evidence that Congress was aware of the agency's interpretation) *with Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983) (finding congressional acquiescence when "[d]uring the past 12 years" there were "no fewer than 13" unsuccessful attempts to overturn the agency's interpretation). Without such evidence, "[i]t is impossible to assert with any degree of assurance that congressional failure" to overrule the Secretary's newly asserted authority to administratively cancel 33-year-old leases for alleged pre-lease violations shows "affirmative congressional approval" of that authority. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) (quotation omitted). Therefore, this Court should reject Intervenors' argument that Congress somehow ratified the Secretary's assertion of authority to administratively cancel leases under the facts in this case and hold unlawful and set aside the Secretary's cancellation decision.

II. THE SECRETARY'S CANCELLATION OF THE LEASE WAS UNLAWFUL BECAUSE SOLENEX IS ENTITLED TO *BONA FIDE* PURCHASER PROTECTION.

Assuming the Secretary had the authority to administratively cancel Solenex's lease, the Secretary's actions were still unlawful because Solenex is entitled to *bona fide* purchaser ("BFP") protection and, therefore, the Secretary's cancellation decision must be set aside. Dkt. # 89-1 at 33–38; Dkt. # 99 at 26–40. Intervenors seek to avoid this result by arguing that the BFP protection

[4] Intervenors cite one post-*Boesche* decision, *Clayton W. Williams, Jr.*, 103 IBLA 192 (1988), in which there was an attempted administrative cancellation of a lease for an alleged pre-lease NEPA violation. Dkt. # 104 at 11. Although it may be presumed that Congress legislates with Supreme Court precedent as a backdrop, *see N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995), that presumption cannot be extended to little-known IBLA decisions. Even if Congress had taken the time to read *Clayton W. Williams, Jr.*, that decision involved the attempt to administratively cancel a lease less than three months after the lease became effective. 103 IBLA at 198–200.

in the MLA does not protect BFPs from non-MLA violations. Dkt. # 104 at 12–15. Yet, "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 50 (1983) ("*State Farm*"). In rejecting Solenex's status as a BFP, the Secretary based her decision solely on her contention that Solenex had notice that the lease was under suspension when it acquired the lease. Dkt. # 68-1 at 1 n.1; *see* Dkt. # 89-1 at 36–38 (demonstrating that the mere fact a lease is suspended cannot bar a subsequent assignee from qualifying as a BFP). Thus, Intervenors' argument is nothing more than an attempt at *post hoc* rationalization, which this Court should reject. *See Great Lakes Comnet, Inc. v. Fed. Commc'ns Comm'n*, 823 F.3d 998, 1004 (D.C. Cir. 2016) (refusing to accept counsel's argument because "it appears nowhere in the" agency's decision).

This is especially true considering that Intervenors' argument is disingenuous. As noted above, Intervenors rely on *Clayton W. Williams, Jr*., for the proposition that the Secretary had the authority to administratively cancel Solenex's lease for an alleged pre-lease NEPA violation. *See* Dkt. # 104 at 11. Yet, the crucial ruling in *Clayton W. Williams, Jr*., was that the BFP protection in the MLA, *i.e*., 30 U.S.C. § 184(h)(2), protects BFPs from having their leases cancelled for alleged pre-lease NEPA violations. 103 IBLA at 210–16; *see* Dkt. # 99 at 30–32. In short, because Intervenors' argument has already been rejected by the Secretary in *Clayton W. Williams, Jr*., it should be summarily rejected by this Court.[5]

Assuming, *arguendo*, that this Court were to accept Intervenors' *post hoc* rationalization and rule that the BFP protection in the MLA protect BFPs only from pre-lease MLA violations,

[5] Even if this Court were to entertain Intervenors' *post hoc* rationalization, such a crabbed interpretation of the BFP protection in the MLA would frustrate the overall purpose of the MLA and Congress's stated purpose for amending the MLA to protect BFPs. *See* Dkt. # 99 at 27–30.

Solenex would still be entitled to BFP protection under the common law. Dkt. # 99 at 32. Indeed, the Supreme Court has been applying common law BFP principles against the United States for more than 100 years. *United States v. Burlington & M.R.R. Co*., 98 U.S. 334, 342 (1878); *Colo. Coal & Iron Co. v. United States*, 123 U.S. 307, 313–14 (1887); *United States v. Winona & St. P. R. Co*., 165 U.S. 463, 478 (1897). Therefore, at a minimum, Solenex is entitled to BFP protection under the common law. *See United States v. Pan-Am. Petroleum Co*., 55 F.2d 753, 768–69 (9th Cir. 1932) (recognizing that common law principles would bar the cancellation of a federal oil and gas lease owned by a BFP).

Intervenors also suggest that Solenex is not entitled to BFP protection because Solenex "admits" that it is did not "pay valuable consideration" for the lease. Dkt. # 104 at 15 n.4. This is more than a slight misrepresentation. Although, Solenex did not pay money for the lease, Solenex clearly demonstrated that it provided valuable consideration in return for the lease. Dkt. # 89-1 at 35–36; Dkt. # 99 at 38–40; *see also Stanley v. Schwalby*, 162 U.S. 255, 276 (1896) (ruling that "valuable consideration may be other than the actual payment of money, and may consist of acts to be done after the conveyance"). For example, Solenex assumed all legal duties and obligations under the lease. *Id*.; 30 U.S.C. § 187a ("Upon approval of any assignment ... the assignee ... shall be bound by the terms of the lease to the same extent as if such assignee ... were the original lessee, any conditions in the assignment ... to the contrary notwithstanding."). These duties and obligations under the lease would have included drilling the well in accordance with the approved APD, but for the federal government's unlawful delay.[6] *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83, 84 (D.D.C. 2015) ("[S]ince the APD was first approved in 1985, the lease has been suspended for more than 29 years! No combination of excuses could possibly justify such ineptitude or

[6] These duties also included posting a $10,000 bond and agreeing to post an additional $95,000 bond prior to commencing drilling operations. Dkt. # 99 at 38 n.12.

recalcitrance for such an epic period of time."); *see* Dkt. # 24-2 at 38 (April 15, 2011 letter from Solenex indicating a desire to "commence drilling"). Therefore, contrary to Intervenors' mischaracterization, Solenex did provide valuable consideration for the lease, entitling it to BFP protection.

III. THE SECRETARY'S CANCELLATION OF THE LEASE WAS UNLAWFUL BASED UPON LACHES AND ESTOPPEL.

Even if the Secretary had the authority to cancel Solenex's lease and assuming Solenex is not entitled to BFP protection, this Court should still hold unlawful and set aside the Secretary's cancellation decision based upon, *inter alia*, laches and estoppel. Dkt. # 89-1 at 39–43 (demonstrating that the elements for invoking laches and estoppel against the Secretary are satisfied in the instant case); Dkt. # 99 at 43–51. Intervenors seek to avoid this result by arguing these doctrines are inapplicable because of an obscure, self-serving BLM regulation, 43 C.F.R. § 1810.3.[7] Dkt. # 104 at 15–18. According to Intervenors, this non-MLA regulation was incorporated by reference into Solenex's lease. *Id*. at 15–17. To be sure, Solenex's lease provided that it was:

> [S]ubject to the provisions of the Mineral Leasing Act and subject to all rules and regulations of the Secretary ... now or hereafter in force, when not inconsistent with any express and specific provisions herein, which are made a part hereof.

Dkt. # 45-9 at 19. But this provision merely incorporated into the lease those regulations promulgated to implement the MLA. Indeed, it would be an unreasonable interpretation of this lease provision to suggest that it covers all non-MLA, Department of the Interior regulations found

[7] The provisions in 43 C.F.R. § 1810.3 were originally promulgated in 1964 without notice and comment. 29 Fed. Reg. 6,628 (May 14, 1964). Importantly, these provisions were not promulgated to implement any particular statute; instead, they were promulgated to incorporate what the then-Secretary believed were "long-established principles." *Id*. Yet, subsequent cases have proven that the so-called "long-established principles" do not carry the weight they may have carried in 1964. *See, e.g.*, *United States v. Wharton*, 514 F.2d 406, 410–13 (9th Cir. 1975) (applying estoppel against the federal government based upon the BLM's erroneous advice).

in the *Code of Federal Regulations* at the time of lease issuance and all future non-MLA regulations promulgated by the Department. *Cf. Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 615–17 (2000) (Outer Continental Shelf Lands Act lease not subject to regulations promulgated to implement a later enacted statute); *Amber Res. Co. v. United States*, 538 F.3d 1358, 1368 (Fed. Cir. 2008) ("[A]pplying the Supreme Court's analysis [in *Mobil Oil*] …, we treat the lease agreements as incorporating by reference any statutes or regulations that were in effect at the time of the leases' execution and any [future] regulations promulgated pursuant to those statutes."). This conclusion is supported by the fact that counsel for the Secretary has not suggested that 43 C.F.R. § 1810.3 was incorporated into Solenex's lease. Nor has she suggested that 43 C.F.R. § 1810.3 would insulate the Secretary's unprecedented and egregious actions in this case from Solenex's claims of laches or estoppel.[8] This is not surprising considering that the IBLA has applied estoppel against the BLM, notwithstanding the existence of 43 C.F.R. § 1810.3. *Floyd Higgins*, 147 IBLA 343, 346–51 (1999). Therefore, Intervenors' reliance on 43 C.F.R. § 1810.3 is badly misplaced.

Even if this Court were to consider 43 C.F.R. § 1810.3, it would not bar Solenex's laches and estoppel claims because Solenex is not seeking to revive a void lease. *See* 43 C.F.R. § 1810.3(b) ("The United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to do or *cause to be done what the law does not sanction or permit*." (emphasis added)); *see also Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922) (laches cannot "give vitality to a void deed"). According to the Secretary, Solenex's lease was not

[8] It is hard to image that the Secretary could lawfully promulgate a regulation, such as 43 C.F.R. § 1810.3, that purports to immunize Department of the Interior employees from claims of laches, estoppel, "neglect of duty, failure to act, or delays in performance of their duties[,]" considering that such a regulation would, *inter alia*, frustrate Congress's intent in passing the judicial review provisions of the APA. *See, e.g.*, 5 U.S.C. § 706(1) (a "reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed").

void, but merely voidable.[9] Dkt. # 68-1 at 7. Yet, a voidable lease is still valid and effective until lawfully cancelled. *See Weeks v. Bridgman*, 159 U.S. 541, 547 (1895) ("Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed.");[10] *John Bloyce Castle*, 81 IBLA 53, 54 n.4 (1984) ("Unless it is void from the outset, when the Department issues a lease it creates a property right."). Therefore, application of laches and estoppel against the Secretary and setting aside the Secretary's cancellation decision would not result in "what the law does not sanction or permit." 43 C.F.R. § 1810.3(b). This is especially true considering that the federal government treated Solenex's lease as valid and properly issued for more than 33 years. *See, e.g., Lewis and Clark National Forest Oil and Gas Leasing, Final Environment Impact Statement,* Appendix K (1997) (recognizing the validity of the existing leases in the National Forest, including Solenex's lease, and explaining that only Congress could eliminate the leases).[11] Therefore, 43 C.F.R. § 1810.3 is no obstacle to this Court holding unlawful and setting aside the Secretary's cancellation decision based upon laches and estoppel.

Intervenors also argue that estoppel should not be applied against the Secretary because doing so would unduly damage what they believe is the public interest. Dkt. # 104 at 18–22. Yet, true harm to the public interest and the principles upon which the country was founded would occur if this Court were to allow the Secretary to destroy valuable property interests and contract rights with a mere stroke of her pen. *Wharton*, 514 F.2d at 413 (applying estoppel against the

[9] Because Solenex's lease was not void, whether the Secretary has the authority to administratively cancel a void lease and, if so, under what circumstances, are not at issue in this case.

[10] Under *Weeks*, Solenex's lease was "valid and effectual[.]" 159 U.S. at 547. Therefore, the Secretary's suggestion that she would have to "validate" the lease in light of the alleged pre-lease violations is clearly wrong. *See* Dkt. # 68-1 at 13.

[11] Relevant excerpts from this document will be provided in the Appendix.

United States because, *inter alia*, "the public has an interest in seeing its government deal carefully, honestly and fairly with its citizens"); Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5, 5 (2002) ("For the Framers of our Constitution, the principles of good government started with the protection of private property—that guardian of all other rights."); *John Bloyce Castle*, 81 IBLA at 54 (an oil and gas lease "is a contractual obligation that binds the Department"); Dkt. # 105 at 5–8 (Brief of Amici Curiae Chamber of Commerce of the United States and the Montana Petroleum Association demonstrating that the public interest is served by having the federal government honor its contractual obligations.). Moreover, if the Secretary can get away with cancelling Solenex's 33-year old lease after the Secretary, her predecessors, the BLM, and the Forest Service repeatedly acknowledged that the lease was valid and properly issued for more than 33 years, no lease is worth the paper it is written on, and the public interest in the development of the country's oil and gas resources and the related national security benefits would be effectively eviscerated. *See* Dkt. # 45-10 at 9 (Decision Notice ("DN") for 1981 EA providing that "mineral exploration and development (including energy resources) are in the public interest and can be compatible with other purposes for which National Forest lands are managed."); *Cal. Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961) ("The public does not benefit from resources that remain undeveloped, and the Secretary must administer the [MLA] so as to provide some incentive for development."); 42 U.S.C. § 13401 (declaring it to be a "goal of the United States … to strengthen national energy security by reducing dependence on imported oil").

Intervenors belittle the importance of private property interests and having the federal government honor its contractual obligations by arguing that the public interest reflected by NEPA and the NHPA should trump all other interests. Dkt. # 104 at 19. Yet, this argument presupposes

that the lease may have been issued in violation of those statutes. As previously demonstrated and as further demonstrated below, both of those statutes were fully complied with prior to lease issuance. Moreover, those statutes are not substantive statutes, but are merely procedural statutes. *See, e.g*., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.… Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action." (footnote and citations omitted)); *United States v. 162.20 Acres of Land,* 639 F.2d 299, 302 (5th Cir. 1981) ("[Section 106 of the NHPA] neither … forbid[s] the destruction of historic sites nor … command[s] their preservation …."). That Congress did not mandate particular results in passing those statutes, but simply created processes by which purported effects on the environment and historic properties are to be considered, proves that the interests reflected by those statutes do not trump all other interests, especially private property interests and contract rights. *Cf. Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 23–31 (2008) (NEPA's environmental interest did not trump the public interest in ensuring that Navy sailors are properly trained so as to warrant injunctive relief); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (environmental interest reflected in Alaska National Interest Lands Conservation Act did not automatically trump public interest reflected in leases issued under Outer Continental Shelf Lands Act).

Intervenors also argue that the public interest reflected in the later enacted Tax Relief & Health Care Act of 2006 should trump Solenex's valuable lease rights. Dkt. # 104 at 20. Granted, that Act withdrew the area of Solenex's lease from future oil and gas leasing. Pub. L. No. 109-432, § 403 120 Stat. 2922 (2006). But, in passing that Act, Congress did not authorize the cancellation or condemnation of existing leases. *See id*. In fact, Congress expressly preserved all

existing leases. *Id*. § 403(b) ("[s]ubject to valid existing rights"). Thus, Congress recognized that the public interest would be served by the federal government honoring its contractual obligations and allowing oil and gas development in the area. Congress also provided tax benefits for those lessees who wished to voluntarily relinquish their existing leases. *Id*. § 403(c). By expressly preserving all existing leases and providing tax benefits for lessees, Congress implicitly recognized that the existing leases, including Solenex's lease, were valid and properly issued.

Moreover, the Secretary admits that "29 leases" were "relinquished" as a result of the Tax Relief & Health Care Act. Dkt. # 68-1. It is reasonable to presume that those lessees received the concomitant tax benefits. Yet, Congress would not have allowed those lessees to reap the tax benefits if it knew that the leases were improperly issued, as the Secretary now contends. Thus, either the Secretary's predecessor purposefully misled Congress or the Secretary's current position that the leases were improperly issued is simply a convenient change in policy. Because the Secretary did not take the position that the leases were improperly issued until after this Court granted summary judgment in favor of Solenex, it is reasonable to conclude that the latter scenario is more accurate. This further demonstrates that the Secretary's cancellation decision was unlawful or, at a minimum, that she should be estopped from now asserting that the Solenex's lease was improperly issued.

Finally, Intervenors argue that applying estoppel against the Secretary would impair the public interest reflected by their purported environmental and cultural interests in the area. *See* Dkt. # 104 at 22. Yet, it is undisputed that Intervenors did not assert these purported interests when the Forest Service and the BLM were preparing the 1981 EA or when the BLM issued the lease in 1982. *See* Dkt. # 54-4 at 12–13 (indicating that no appeals were received regarding the 1981 EA and that no protests to the issuance of the lease were filed). By failing to assert their purported

interests at the appropriate time, Intervenors cannot be heard to complain if this Court holds that the Secretary is estopped from now asserting that the lease may have been improperly issued. *Cf. Nat'l Wildlife Fed. v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002) ("It is well established that issues not raised ... before the agency are waived and this Court will not consider them."); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553–54 (1978) ("[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'").

IV. THE SECRETARY'S CANCELLATION OF THE LEASE WAS UNLAWFUL BECAUSE THE LEASE WAS PROPERLY ISSUED.

Intervenors attempt to support the Secretary's cancellation decision by arguing that the lease was prematurely issued in violation of NEPA and the NHPA. Dkt. # 104 at 22–30. As previously demonstrated and as further demonstrated below, the lease was properly issued in full compliance with both NEPA and the NHPA.

A. NEPA Was Fully Complied With Prior To Issuance Of The Lease.

In the late 1970s, this Nation was facing an energy crisis that had been brought on by its increasing consumption of oil, its failure to discover new domestic supplies of oil, and its growing dependency on foreign supplies of oil. S. Rep. No. 96-387, at 5–6, *reprinted in* 1980 U.S.C.C.A.N. 1751, 1755–56. In response to this crisis, Congress passed the Energy Security Act of 1980, which provides, *inter alia*:

> It is the intent of the Congress that the Secretary of Agriculture shall process applications for leases of National Forest System lands and for permits to explore, drill, and develop resources on land leased from the Forest Service, notwithstanding

> the current status of any plan being prepared under [the National Forest Management Act of 1976].

42 U.S.C. § 8855; *see* 42 U.S.C. § 8801(1) ("The Congress finds that ... the dependence of the United States on imported petroleum and natural gas must be reduced by all economically and environmentally feasible means."). Thus, in passing the Energy Security Act of 1980, Congress mandated that the Forest Service prioritize the processing of lease applications over completing forest plans and concomitant EISs. *See MSLF v. Hodel*, 668 F. Supp. 1466, 1472 (D. Wyo. 1987) ("The clear language of [the Energy Security Act of 1980] does not permit the Secretary of Agriculture to delay processing of lease applications pending the completion of a Forest Plan. It is evident from the congressionally stated intent that self-sufficiency in our energy resources is of prime importance to the nation."); *see also* 42 U.S.C. § 4332 (federal agencies must comply with NEPA only "to the fullest extent possible"); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787–93 (1976) (NEPA compliance may be excused if it would conflict with another statutory mandate).

In 1980, the Lewis and Clark National Forest had a backlog of over 200 oil and gas lease applications, some of which had been pending since 1971. Dkt. # 45-10 at 13. To alleviate this backlog of applications and to comply with the Energy Security Act of 1980, the Forest Service prepared, in conjunction with the BLM as a cooperating agency, the comprehensive, 162-page, 1981 EA, Dkt. # 45-10 at 11 to Dkt. # 45-11 at 45, wherein six alternatives were fully considered:

1. No action on lease applications at this time.
2. Leasing of all acreage without prior evaluation of occupancy opportunities.
3. Occupancy leasing only of accessible acres which can be adequately protected through the application of standard and special stipulations.
4. Leasing of all acreage with no-surface occupancy ("NSO").

5. Leasing only of areas currently accessible without construction of new roads.

6. Staged oil and gas exploration and development.

Dkt. # 45-10 at 48–49. The environmental effects of each alternative were then thoroughly evaluated, including the effects on: (1) soils, watershed, and atmosphere; (2) wildlife, including endangered and threatened species; (3) vegetation, including rare plants; (4) social and economic conditions; (5) recreation; (6) special uses; and (7) cultural (archaeological, historic, and religious) resources. Dkt. # 45-10 at 62–71.

On February 18, 1981, after the environmental effects of all the alternatives were fully considered, the Forest Service issued a DN and FONSI, approving implementation of Alternative 3.[12] Dkt. # 45-10 at 9–11. Under this alternative:

- Leases with surface occupancy would be issued only for accessible areas that could be protected;
- Lease denial or issuance of an NSO-lease would be recommended when the area cannot be adequately protected;
- Leases partially located in areas that cannot be protected would receive an NSO stipulation for those areas;
- All leases would be subject to: (a) standard stipulations; (b) special stipulations, and (c) comprehensive surface use guidelines; and

[12] The FONSI and concomitant determination not to prepare an EIS was based upon, *inter alia*, the following factors:

> Lease issuance is an action which does not directly result in effects on the environment. It grants the lessee mineral rights and privileges subject to stipulated limitations. If surface disturbing activities are to be conducted as a result of granting oil and gas leases, they will be analyzed on a case-by-case basis, and further environmental analysis will be prepared as required by [NEPA]. If unacceptable environmental impacts are identified and cannot be resolved, development will not be permitted.

Dkt. # 45-10 at 10.

- After lease issuance, any proposed oil and gas activities would be fully analyzed under NEPA.

Dkt. # 45-10 at 78; *see also id.* at 9 (DN providing that the selection of "Alternative 3 contributes to fulfilling national energy needs, while providing environmental protection and coordination with other resources and uses.").

Following the DN and FONSI, the Forest Service conducted additional site-specific analyses on the acres not recommended for lease denial to determine the specific stipulations and mitigation requirements to be applied on an acre-by-acre basis. Dkt. # 45-4 at 13. Based upon this site-specific analysis, special stipulations were attached to Solenex's lease to protect surface resources. Dkt. # 45-12 at 3–9. More importantly, in accordance with the DN, FONSI, and 1981 EA, Solenex's APD was subjected to multiple, comprehensive NEPA reviews, as reflected by, *inter alia*, the 1985 EA and 1990 FEIS. Dkt. # 89-2 at 6–17.

In light of the comprehensive nature of the 1981 EA, Intervenors do not argue that the agencies violated NEPA by failing to take a "hard look" at the environmental consequences of issuing the leases. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (A court's role in reviewing an agency's compliance with NEPA is simply to insure that agency has taken a "hard look" at environmental consequences of the proposed action. (quotation omitted)). Instead, Intervenors argue that the issuance of a non-NSO lease requires an EIS in each and every situation. Dkt. # 104 at 22–23. This argument, however, elevates form over substance and makes a mockery of NEPA. *See Park County Res. Council, Inc. v. U.S. Dep't of Agric*., 817 F.2d 609, 623 (10th Cir. 1987) ("To require a cumulative EIS ... at the leasing stage would ... result in a gross misallocation of resources, would trivialize NEPA and would diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment." (quotations omitted)); 40 C.F.R. § 1500.1(c) ("NEPA's purpose is not to generate paperwork—even

excellent paperwork—but to foster excellent action."); *Vermont Yankee*, 435 U.S. at 557–58 (noting that only a substantial violation of NEPA would warrant overturning an agency's decision).

Intervenors also argue that NEPA was violated because a no-action alternative was neither "include[d]" nor "consider[ed]" in the 1981 EA. Dkt. # 104 at 23. Yet, Alternative 1 in the 1981 EA was expressly identified as the no-action alternative. Dkt. # 45-10 at 48. Under this alternative, recommendations on all pending lease applications would be deferred until completion of the Forest Plan. Dkt. # 45-10 at 48 (the no-action alternative "would delay leasing recommendation until completion of the Forest Plan in October 1981");[13] Dkt. # 45-10 at 78 (the no-action alternative "would allow management guidelines for leasing recommendations to be made by the Forest Plan"). Thus, under this alternative, no leases would be issued and it was concluded that this alternative would have "no effects." Dkt. # 45-10 at 62. In addition, this alternative (and its "no effects") was properly used as a baseline to which the other five alternatives were compared. Dkt. # 45-10 at 76 (chart comparing effects of alternatives in 1981 EA); *see Hammond v. Norton*, 370 F. Supp. 2d 226, 241–42 (D.D.C. 2005) (noting that, although the discussion of the no-action alternative was "brief," it satisfied NEPA by providing "enough specificity to allow meaningful comparisons with other alternatives").

More importantly, the no-action alternative was still available for selection when Alternative 3 was selected for implementation in the DN and FONSI.[14] Dkt. # 45-10 at 78. Yet,

[13] Although it was believed that the Forest Plan would be completed in October 1981, Dkt. # 45-10 at 48, the Forest Plan was not completed until 1986. Dkt. # 45-2 at 17–44.

[14] That the no-action alternative was still available for selection when the final decision was made makes Intervenors' reliance on *Bob Marshall All. v. Hodel*, 852 F.2d 1223 (9th Cir. 1988) unavailing. In that case, the no-action alternative was eliminated from further consideration before a final decision was made. HC11646 (defining the no-action alternative as "[d]eferring action on lease applications"); HC11674–75 (explaining why the no-action alternative was "eliminated from further consideration"). Because the no-action alternative had been eliminated from further consideration before a final decision, the no-action alternative had not been

it was not selected because it would violate the Energy Security Act of 1980, 42 U.S.C. § 8855 and "Forest Service Policy[,]" Dkt. # 45-10 at 78. Therefore, contrary to Intervenors' argument, the no-action alternative was included and fully considered in the 1981 EA. That Intervenors now wish that the no-action alternative had been selected does not render the no-action alternative deficient. *See Hammond*, 370 F. Supp. 2d at 242 (reiterating that NEPA does not mandate particular results and ruling that the failure to select the no-action alternative does not render the agencies' action arbitrary or capricious); *Nat'l Parks Conservation Ass'n v. Jewell*, 965 F. Supp. 2d 67, 80–81 (D.D.C. 2013) (ruling that NEPA is not violated when the agency considers and "rationally reject[s]" the no-action alternative).

Intervenors also quibble with how the no-action alternative in the 1981 EA was defined by arguing the no-action alternative should have entailed "not issuing any oil and gas leases." Dkt. # 104 at 23. Of course, the proper time for Intervenors to have made this objection was in 1980, during the comment period for the 1981 EA. *See* Dkt. # 45-10 at 82 (1981 EA providing that as of November 7, 1980, "over 35" comments were received, but "no new concerns were mentioned."); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) ("Persons challenging an agency's compliance with NEPA must 'structure their participation so that it ... alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." (alteration in original) (quoting *Vermont Yankee*, 435 U.S. at 553)). In any event, "[d]enial of all lease applications" was considered, but was "not treated as a separate alternative because it may result from implementation of Alternative 4 (Leasing of all Acreage with No-Surface Occupancy)." Dkt. # 45-10 at 48; *see id*. at 49 (Alternative 4 providing

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seriously considered. *Bob Marshall*, 852 F.2d at 1228–29. Intervenors' reliance on the fact that the district court ultimately cancelled the remaining leases in *Bob Marshall* is also unavailing because the remaining lessee advocated for such a result over the objection of the federal government. *Bob Marshall All. v. Lujan*, 804 F. Supp. 1292, 1295–98 (D. Mont. 1992).

that a lease application would be denied, if the applicant did not accept an NSO stipulation for the entire lease); *see also id*. (Alternative 3 providing that a lease application would be denied or an NSO lease would be issued if the application covered an area that could not "be adequately protected."). Moreover, under both the no-action alternative in the 1981 EA and the no-action alternative proposed by Intervenors, no leases would be issued and there would be no environmental effects. In short, there is no material difference between the no-action alternative in the 1981 EA and the no-action alternative proposed by Intervenors. As a result, there is no basis for concluding that the no-action alternative in the 1981 EA was inadequate or deficient. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013) (In reviewing an agency's compliance with NEPA, "we are mindful that our role is not to 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor. Rather, it is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." (quotation and internal citation omitted)).

Intervenors seek to avoid this conclusion by focusing on the statement in the 1981 EA that "[t]he long-term effect for [the no-action] alternative would *probably* be the same as Alternative 2 or 3 … upon implementation of the [Forest] Plan." Dkt. # 45-10 at 75 (emphasis added). As Alternatives 2 and 3 were leasing alternatives, Intervenors seem to imply that the no-action alternative was not seriously considered. Dkt. # 104 at 23–24. Yet, speculation that leasing could ultimately occur sometime in the future under the no-action alternative does not mean that leasing was predetermined or a foregone conclusion. Nor does that speculation change the fact that, under the no-action alternative, no leasing would occur unless and until authorized in the Forest Plan and that there would be "no effects" until such time, if ever. *See*

Dkt. # 45-10 at 75. Therefore, because the agencies and the interested public had an accurate baseline from which to compare the other alternatives, the no-action alternative in the 1981 EA was more than adequate. *Cf. N. Carolina Wildlife Fed'n v. N. Carolina Dep't of Transp*., 677 F.3d 596, 601 (4th Cir. 2012) (ruling that the no-action alternative was deficient because it assumed the existence of the proposed project).

B. The NHPA Was Fully Complied With Prior To Issuance Of The Lease.

The NHPA is designed to identify potential conflicts between federal undertakings and historic properties and to provide a mechanism for attempting to resolve any purported conflicts. Specifically, Section 106 of the NHPA requires:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property….

54 U.S.C. § 306108;[15] *see* 54 U.S.C. § 300308 (current definition of "historic property"); *id*. § 300320 (current definition of "undertaking").[16]

As previously demonstrated, issuance of Solenex's lease in 1982 was not an "undertaking" so as to trigger Section 106. Dkt. # 89-1 at 53; *see* 44 Fed. Reg. 6,068, 6,073 (Jan. 30, 1979) (regulation defining "undertaking" to "include new and continuing projects and program activities … that are … carried out pursuant to a Federal lease, permit, license …."); *Nat'l Indian Youth Council v. Andrus*, 501 F. Supp. 649, 674–76 (D.N.M. 1980) (interpreting

[15] Section 106 has only been slightly amended since it was originally enacted in 1966. Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (1966).

[16] At the time of lease issuance, "undertaking" was statutorily defined in a circular manner as "any action defined in section 106." Pub. L. No. 96-515, § 501, 94 Stat. 2987 (1980); *see Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003). The 1992 amendments to the NHPA amended the statutory definition of "undertaking" to its current form. Pub. L. No. 102-575, § 4019, 106 Stat. 4600 (1992).

then-existing regulations and ruling that approval of a mining plan—not approval of a lease—requires compliance with the NHPA), *aff'd sub nom. Nat'l Indian Youth Council v. Watt*, 664 F.2d 220 (10th Cir. 1981).

Intervenors try to distinguish *Nat'l Indian Youth Council* by arguing that the tribe issued the lease and that the federal agency merely approved it. Dkt. # 104 at 29. Perhaps true, but largely irrelevant. The federal "license" that triggered NHPA compliance was approval of the mining plan:

> The regulations define "(u)ndertaking" in a broad sense. They include "(n)ew and continuing projects ... involving a Federal lease, permit, license...." 36 C.F.R. Part 800.3(c)(2) (1977); accord, Part 800.2(c)(2) (1979). The Court concludes that the [agency] intended "undertaking" to include a mining project entered into pursuant to a federally-approved lease. See, 36 C.F.R. Parts 800.3(c) (1977) and 800.2(c) (1979).
>
> [S]imply because the ConPaso Project involves a federally-approved lease it does not necessarily follow that the approval of that lease constitutes the 'issuance of any license' as intimated by Plaintiffs' position. The ConPaso Project is a coal mining project. The 'license' which actuates that mining is the … approval of the 1978 Mining Plan. The approval of the lease was required only because tribal lands were involved. See, 25 U.S.C. Section 396a. The 'license' which required prior compliance with Section 106 and NHPA is the 1978 Mining Plan approval.

Nat'l Indian Youth Council, 501 F. Supp. at 676; *Nat'l Indian Youth Council,* 664 F.2d at 228 ("Although lease approval is necessary for mining on Tribal lands, no operations could have occurred until the approval of the Mining Plan…. Approval of the Mining Plan, not approval of the lease, is the federal action which might affect historic sites.").

Similarly here, although issuance of a lease precedes surface-disturbing activities, such as drilling, no such activities could have occurred without an approved APD. Therefore, because an approved APD is the "license" that allows surface-disturbing activities, it is the "federal action which might affect historic sites[,]" and thereby triggers compliance with Section 106 of the NHPA. *See* Dkt. # 45-10 at 10 (1981 FONSI providing that "[l]ease issuance is an action

which does not directly result in effects on the environment."); *see also* Dkt. # 99 at 59 (Solenex demonstrating that an approved APD is a "license" under the APA).

Even if issuance of the lease in 1982 were an "undertaking" so as to trigger Section 106, a reasonable and good faith effort was made to identify cultural resources prior to lease issuance. Dkt. # 99 at 54. But those efforts were largely stymied by the refusal of the Blackfeet Tribe to identify any important areas of the National Forest at the leasing stage:

> The Forest [Service] first engaged in [AIRFA] [c]ompliance with the Blackfeet Tribe during the fall of 1979. It was learned that portions of the [Forest] continue to be of spiritual importance to the Blackfeet people…. However, the Blackfeet people prefer to identify these areas on a project-by-project basis.

Dkt. # 45-10 at 45. Accordingly, it was determined that full NHPA compliance would be deferred until a specific surface-disturbing activity was proposed. Dkt. # 45-10 at 71. And, to ensure full NHPA compliance prior to any surface-disturbing activity, the 1981 EA mandated that all leases include a stipulation for the protection of cultural resources, Dkt. # 45-10 at 86, and such a stipulation was attached to Solenex's lease. Dkt. # 45-12 at 6. More importantly, it is undisputed that both the lease stipulation and the NHPA were fully complied with after the APD was submitted in 1985. *See* Dkt. # 99 at 55–56.

Finally, even if issuance of the lease in 1982 were an "undertaking" so as to trigger full-blown Section 106 compliance, Intervenors have not demonstrated any prejudicial error. 5 U.S.C. § 706 (In reviewing agency action, "due account shall be taken of the rule of prejudicial error."); *cf*. *Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006) (listing cases in which the prejudicial error rule was applied when the agency did not comply precisely with NEPA). It is undisputed that the purported 165,000 acre Traditional Cultural District ("TCD") could not have been discovered prior to lease issuance because the Tribe was uncooperative and because the concept of a traditional cultural property ("TCP") had not yet been invented. Indeed, it was

not until 1990, when the National Park Service released National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, that the concept of a TCP was first recognized, albeit informally. And, it was not until the 1992 amendments to the NHPA that Congress expressly recognized that "[p]roperties of traditional religious and cultural importance to an Indian tribe … may be determined to be eligible for inclusion on the National Register." Pub. L. No. 102-575, § 4006(a)(2), 106 Stat. 466 (1992) (codified at 54 U.S.C. § 302706); 65 Fed. Reg. 77,698 (Dec. 12, 2000) (final rule amending NHPA regulations in light of 1992 statutory amendments); Dkt. # 93-2 at 9–10 (counsel for the Secretary explaining the importance of the 1992 amendments to the NHPA); Dkt. # 43-7 (counsel for the Secretary arguing that 1992 amendments to the NHPA justified the unlawful delay). Granted, based upon those 1992 amendments, a purported TCD was discovered in 2002. Dkt. # 68-1 at 5; *but see* Dkt. # 45-12 at 57–58 (Forest Service reporting in 2004 that consultation with the Blackfeet Tribe "identified no properties of traditional cultural interests to tribe on the" proposed route for the Northwestern Corporation pipeline, which crossed approximately 2 miles of Solenex's lease). Yet, it goes without saying that the 1992 amendments to the NHPA and a new factual determination based upon those amendments cannot prove a NHPA violation occurred prior to lease issuance in 1982. *Cf. Sheridan Kalorama Historical Ass'n v. Christopher,* 49 F.3d 750, 754 (D.C. Cir. 1995) (New statutes that "'would impair rights a party possessed when he acted ... or impose new duties with respect to transactions already completed' should not be applied retroactively absent an indication of clear congressional intent to the contrary[.]" (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994))). Therefore, even if issuance of the lease in 1982 were an "undertaking" so as to trigger full-blown Section 106 compliance,

Intervenors have not proven that a substantive, prejudicial NHPA violation occurred prior to lease issuance that would justify the Secretary's cancellation decision.

CONCLUSION

As the foregoing demonstrates, Intervenors' arguments in support of the Secretary are unavailing. Therefore, this Court should grant summary judgment in Solenex's favor and hold unlawful and set aside the Secretary's cancellation decision.

DATED this 16th day of December 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December 2016, I electronically filed the foregoing using this Court's CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and service will be accomplished by this Court's CM/ECF system.

/s/ Steven J. Lechner
Steven J. Lechner