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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOLENEX LLC, 821 East Lakeview Drive Baton Rouge, Louisiana 70810, Plaintiff, v. SALLY JEWELL Secretary U.S. Department of the Interior 1849 C Street, N.W. Washington, D.C. 20240 MICHAEL CONNOR Deputy Secretary U.S. Department of the Interior 1849 C Street, N.W. Washington, D.C. 20240 NEIL KORNZE Director Bureau of Land Management 1849 C Street, N.W., Room 5655 Washington, D.C. 20240 JAMIE CONNELL State Director Montana State Office Bureau of Land Management 5001 Southgate Drive Billings, Montana 59101	)	Civil Case No. 13-00993 (RJL)

ADEN L. SEIDLITZ
Acting State Director
Montana State Office
Bureau of Land Management
5001 Southgate Drive
Billings, Montana 59101

TOM VILSACK
Secretary
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Washington, D.C. 20250

TOM TIDWELL
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Forest Supervisor
Lewis and Clark National Forest
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Great Falls, Montana 59401

STEPHANIE TOOTHMAN
Keeper
National Register
1849 C Street, N.W.
Washington, D.C. 20240

Defendants.

FIRST AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiff, Solenex LLC, files this First Amended and Supplemental Complaint against the above-named Defendants, and alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this case, pursuant to 28 U.S.C. § 1331, because the matter in controversy arises under the laws of the United States, including, but not limited to: (a) the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706; and (b) the Mineral Leasing Act ("MLA"), 30 U.S.C. § 181 *et seq.*

2. Venue rests properly in this District, pursuant to 28 U.S.C. § 1391(e)(1), because, *inter alia*, Defendant, Sally Jewell, Secretary, U.S. Department of the Interior ("DOI"), resides in this judicial district.

PARTIES

3. Plaintiff Solenex is a limited liability company organized under the laws of the State of Louisiana, with its principal place of business in Baton Rouge, Louisiana. Sidney M. Longwell is the Manager of Solenex. Solenex owned Federal Oil and Gas Lease M-53323 ("Lease") and the concomitant rights under an approved Application for Permit to Drill ("APD"), until Defendants issued the decision being challenged herein.

4. Defendant Sally Jewell is the Secretary, DOI. Defendant Jewell is responsible for, *inter alia*, administering the MLA. Defendant Jewell is responsible for the actions of her subordinates, including the actions of her subordinates complained of herein. Defendant Jewell is sued in her official capacity.

5. Defendant Michael Connor is Deputy Secretary, DOI. Defendant Connor approved the decision that cancelled the Lease and disapproved the approved APD. Defendant Connor is sued in his official capacity.

6. Defendant Neil Kornze is the Director of the Bureau of Land Management ("BLM"). Pursuant to Fed. R. Civ. P. 25(d), Defendant Kornze is automatically substituted for his predecessor, Acting Director, BLM, Mike Pool. Defendant Kornze is responsible for, *inter*

alia, administering the MLA, subject to the supervision of Defendant Jewell. Defendant Kornze is sued in his official capacity.

7. Defendant Jamie Connell is the State Director, Montana State Office, BLM. Defendant Connell is responsible for, *inter alia*, administering the MLA within the State of Montana, subject to the supervision of Defendants Jewell and Kornze. Defendant Connell is sued in her official capacity.

8. Defendant Aden L. Seidlitz is the Acting State Director, Montana State Office, BLM. Defendant Seidlitz issued the decision to cancel the Lease and disapprove the approved APD. Defendant Seidlitz is sued in his official capacity.

9. Defendant Tom Vilsack, is the Secretary, U.S. Department of Agriculture. Defendant Vilsack is responsible for, *inter alia*, managing and approving surface uses on federal oil and gas leases within the national forests. Defendant Vilsack is sued in his official capacity.

10. Defendant Tom Tidwell, is the Chief, U.S. Forest Service ("Forest Service"). Defendant Tidwell is responsible for, *inter alia*, managing and/or approving surface uses on federal oil and gas leases within the national forests, subject to the supervision of Defendant Vilsack. Defendant Tidwell is sued in his official capacity.

11. Defendant Leanne Marten is the Regional Forester, Region 1, Forest Service. Pursuant to Fed. R. Civ. P. 25(d), Defendant Marten is automatically substituted for her predecessor, Faye Krueger. Defendant Marten is responsible for, *inter alia*, managing and/or approving surface uses on federal oil and gas leases within the Lewis and Clark National Forest, subject to the supervision of Defendants Vilsack and Tidwell. Defendant Marten is sued in her official capacity.

12. Defendant William Avey is the Forest Supervisor for the Lewis and Clark National Forest. Defendant Avey is responsible for, *inter alia*, managing and/or approving surface uses on federal oil and gas leases within the Lewis and Clark National Forest, subject to the supervision of Defendants Vilsack, Tidwell, and Marten. Defendant Avey is sued in his official capacity.

13. Defendant Stephanie Toothman is the Keeper of the National Register. Pursuant to Fed. R. Civ. P. 25(d), Defendant Toothman is automatically substituted for her predecessor, Interim Keeper, Carol Shull. Defendant Toothman is responsible for, *inter alia*, administering the National Register. Defendant Toothman is sued in her official capacity.

LEGAL BACKGROUND

A. The Mineral Leasing Act.

14. The MLA was the first act that provided for the leasing of the Nation's minerals. The specific purpose of the MLA is "to promote the orderly development of the oil and gas deposits in the publicly owned lands of the United States *through private enterprise*." *Harvey v. Udall*, 384 F.2d 883, 885 (10th Cir. 1967) (emphasis added) (quotation omitted).

15. To accomplish this purpose, the MLA vests the Secretary of the Interior, acting through the BLM, with the authority to issue leases covering oil and gas deposits "and lands containing such deposits owned by the United States, including those in national forests …." 30 U.S.C. § 181; *see Mountain States Legal Foundation v. Hodel*, 668 F. Supp. 1466, 1469 (D. Wyo. 1987) (noting that the Secretary has delegated this authority to the BLM).

16. A lease issued under the MLA constitutes a contract and conveys valuable property rights/interests that are protected by the Fifth Amendment to the U.S. Constitution. *See Mobil Oil*

Expl. & Producing Se., Inc. v. United States, 530 U.S. 604, 609 (2000); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

17. Certainty of title in leases is critical in order to accomplish Congress's purpose in passing the MLA. *See Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 655 (10th Cir. 1960); *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 845 (D. Wyo. 1981).

18. A lease issued under the MLA grants the lessee the exclusive right to drill for, mine, extract, remove, and dispose of all the oil and gas in the leased lands together with the right to build and maintain necessary improvements thereon. *See* 43 C.F.R. § 3101.1–2. This exclusive right "shall be for a primary term of 10 years" and "shall continue so long after its primary term as oil and gas is produced in paying quantities." 30 U.S.C. § 226(e). This exclusive right is "conditioned upon the payment of a royalty at a rate of not less than 12.5 percent in amount or value of the production removed or sold from the lease." *Id*. § 226(a)(1)(A). Prior to the drilling of a well capable of producing in paying quantities, a lessee must pay annual rentals during the primary term. *Id*. § 226(d). After a paying well is drilled, but before the well is placed into production, a lessee must pay minimum royalties in lieu of rentals of not less than the applicable rental rate. *Id*.

19. Under limited circumstances, the Secretary may temporarily suspend "operations and production" under a lease. 30 U.S.C. § 209. During such a suspension, the obligation to pay rentals or minimum royalties is suspended and the primary term of the lease is "extended by adding any suspension period thereto." *Id*.

20. In 1987, Congress provided the Secretary of Agriculture, acting through the Forest Service, statutory authority to manage surface-disturbing activities on lands leased under the MLA within the national forests:

> The Secretary of the Interior, or for National Forest lands, the Secretary of Agriculture, shall regulate all surface-disturbing activities conducted pursuant to any lease issued under [the MLA], and shall determine reclamation and other actions as required in the interest of conservation of surface resources. No permit to drill on an oil and gas lease issued under [the MLA] may be granted without the analysis and approval by the Secretary concerned of a plan of operations covering proposed surface-disturbing activities within the lease area.

30 U.S.C. § 226(g). In short, the Forest Service administers surface-disturbing activities, while the BLM administers subsurface or "downhole" activities, such as drilling, casing, and completion operations. Thus, before commencing drilling operations on national forest lands, a lessee must submit a surface use plan to the Forest Service and concurrently submit an APD to the BLM. Congress intended that the Forest Service would expeditiously process all surface use plans and that the BLM would expeditiously process all APDs. *See*, *e.g.*, 42 U.S.C. § 15921(a).

B. The National Environmental Policy Act.

21. The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331 *et seq*., is a procedural statute designed to foster informed decision-making that does not impose any substantive requirements. *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council, Inc*., 462 U.S. 87, 97–98 (1983). Instead, "NEPA merely prohibits uninformed—rather than unwise—agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989); *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012) ("NEPA is an 'essentially procedural' statute intended to ensure 'fully informed and well-considered' decisionmaking, but not necessarily the best decision." (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc*., 435 U.S. 519, 558 (1978))). Federal agencies must comply with NEPA only "to the fullest extent possible[.]" 42 U.S.C. § 4332.

22. Whenever an agency proposes a "major Federal action[,]" NEPA generally requires that the agency prepare an environmental impact statement ("EIS"). 42 U.S.C. §

4332(2)(C). All "major Federal actions," however, do not require a full-blown EIS. In order to determine whether an EIS is required, an agency may prepare an environmental assessment ("EA"). 40 C.F.R. §§ 1501.4(b), 1508.9. An EA is a "concise public document" that "[b]riefly" describes the proposal, examines alternatives, considers impacts, and provides a list of individuals and agencies consulted. 40 C.F.R. § 1508.9. If, based upon the EA, the agency concludes there will 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; *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355–56 (9th Cir. 1994). 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. *Lands Council v. McNair*, 537 F.3d 981, 1000–01 (9th Cir. 2008) (en banc), *overruled on other grounds by Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7 (2008); *see Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006).

23. Agencies shall not hide behind NEPA to avoid making decisions, even decisions they may dislike. *See* 40 C.F.R. § 1500.5 (listing methods by which agencies "shall reduce delay"); 40 C.F.R. § 1500.4 (listing methods by which agencies "shall reduce excessive paperwork"); 40 C.F.R. § 1500.1 ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."); 40 C.F.R. § 1500.2(c) (mandating that agencies "[i]ntegrate the requirements of NEPA with other planning and environmental review procedures required by law . . . so that all such procedures run concurrently rather than consecutively"); *see also* 42 U.S.C. § 4331(a) (national policy "to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, *and fulfill the social, economic, and other requirements of present and future*

generations of Americans" (emphasis added)). Nor may agencies use NEPA as a pretext for denying federal oil and gas lessees the ability to exercise their valuable contract and property rights or as a pretext for cancelling oil and gas leases.

C. The National Historic Preservation Act.

24. The National Historic Preservation Act ("NHPA"), 54 U.S.C. § 300101 *et seq*., is designed to identify potential conflicts between federal undertakings and historic properties and to provide a mechanism for attempting to resolve any purported conflicts. Section 106 of the NHPA requires that an agency having jurisdiction over an undertaking "take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108. Like NEPA, the NHPA is a strictly procedural statute that neither confers a substantive right nor dictates a particular outcome. *See Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd*., 252 F.3d 246, 252 (3d Cir. 2001) ("The NHPA is a procedural statute designed to ensure that, as part of the planning process for properties under the jurisdiction of a federal agency, the agency takes into account any adverse effects on historical places from actions concerning that property."); *Oglala Sioux Tribe v. U.S. Army Corps of Engineers*, 537 F. Supp. 2d 161, 173 (D.D.C. 2008) ("'The case law in this and other circuits holds that an agency's duty to act under the NHPA … is procedural in nature.'" (quoting *Nat'l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 925 (D.D.C. 1996), *aff'd* 203 F.3d 53 (D.C. Cir. 1999))).

25. Instead, the NHPA simply requires agencies to "stop, look, and listen" before proceeding with an undertaking. *Illinois Commerce Comm'n v. I.C.C*., 848 F.2d 1246, 1261 (D.C. Cir. 1988); *see Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287, 1291 (4th Cir. 1992) ("Congress did not intend [Section 106] to impose general obligations on federal agencies to affirmatively protect preservation interests."); *Connecticut Trust for Historic Preservation v.*

I.C.C., 841 F.2d 479, 484 (2d Cir. 1988) ("NHPA require[s] only that agencies acquire information before acting."); *United States v. 162.20 Acres of Land, More or Less, Etc*., 639 F.2d 299, 302 (5th Cir. 1981) ("[Section 106] neither … forbid[s] the destruction of historic sites nor command[s] their preservation …."). As with NEPA, agencies cannot hide behind NHPA to avoid making decisions. *See Apache Survival Coal. v. United States,* 21 F.3d 895, 906 (9th Cir. 1994) ("[T]he [NEPA and NHPA] statutory schemes are closely related."); 36 C.F.R. § 800.3(b) (mandating that agencies "coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as [NEPA]"). Nor may agencies use the NHPA as a pretext for denying federal oil and gas lessees the ability to exercise their valuable contract and property rights or as a pretext for cancelling oil and gas leases.

D. The Administrative Procedure Act.

26. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

27. The APA also provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704.

28. The APA requires that the reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

29. The APA further mandates that the reviewing court shall:

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]

(D) without observance of procedure required by law[.]

5 U.S.C. § 706.

FACTUAL BACKGROUND

30. In 1980, Congress passed the Energy Security Act, 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.

31. At that time, the Lewis and Clark National Forest in Montana had a backlog of over 200 oil and gas lease applications, some of which had been pending since 1971.

32. To alleviate this backlog of applications and to comply with the 1980 Energy Security Act, the Forest Service prepared, in conjunction with the BLM, a comprehensive, 165-page, EA for oil and gas leasing on non-wilderness lands administered by the Lewis and Clark National Forest ("Leasing EA"). In issuing the Leasing EA, both the Forest Service and the BLM satisfied NEPA. *See, e.g., Flint Ridge Development 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).

33. In the Leasing EA, six alternatives were considered. Leasing EA at 31–32. These alternatives included a no-action alternative. *Id*. The denial of all lease applications was also considered. *Id*. at 31.

34. Alternative 3 was selected. Leasing EA at 61. Under this Alternative:

- Leases with surface occupancy would be issued only for accessible areas that could be protected;
- Lease denial or issuance of a no-surface occupancy ("NSO") lease would be recommended when an application is located entirely within an area that cannot be adequately protected;
- Leases partially located in areas that cannot be protected would receive a NSO stipulation for those areas;
- All leases would be subject to the standard stipulations (listed in Appendix A of the Leasing EA); additional stipulations (listed in Appendix B of the Leasing EA), and the comprehensive surface use guidelines in Sections 6C and 6D of the Leasing EA; and
- After lease issuance, any proposed oil and gas activities would be fully analyzed under NEPA.

Leasing EA at 61.

35. On February 18, 1981, the Forest Service issued a Decision Notice and Finding of No Significant Impact, approving the implementation of Alternative 3. Adversely affected parties had 45 days to file an appeal. No appeals were filed.

36. On June 9, 1981, based upon the Leasing EA, the Forest Service and the BLM grouped 6,247 acres from expiring leases to form lease tract NW-21 for the upcoming lease drawing. On April 6, 1982, the BLM advised Sidney M. Longwell that his application for lease tract NW-21 obtained a priority at the lease drawing. The BLM further advised that the

application would become an offer to lease upon Mr. Longwell's payment of the first year's rental in the amount of $1 per acre, *i.e.*, $6,247.00.

37. On May 24, 1982, after receiving Mr. Longwell's payment of the first year's rental, the BLM accepted Mr. Longwell's offer to lease and issued the Lease to Mr. Longwell. By accepting Mr. Longwell's offer to lease and issuing the Lease, the BLM determined that issuance of the Lease was in the public interest.

38. The BLM's issuance of the Lease was in full compliance with all applicable statutes, regulations, policies, and trust responsibilities, including NEPA and the NHPA. No protests or appeals were filed challenging the issuance of the Lease to Mr. Longwell.

39. Mr. Longwell was 44 years old when he was issued the Lease; he is now 77 years old.

40. The Lease became effective on June 1, 1982, and covers 6,247 contiguous acres in Glacier and Flathead Counties, Montana. The leased acres are basically surrounded by the Lewis and Clark National Forest, although Glacier National Park forms part of the western boundary, and private lands form part of the northern boundary.

41. The Lease provides:

> This oil and gas lease is issued for a period of ten (10) years … pursuant and subject to the provisions of the [MLA] and subject to all rules and regulations of the Secretary of the Interior now or hereafter in force when not inconsistent with any express and specific provisions herein, which are made a part hereof.

42. Section 1 of Lease grants the:

> [E]xclusive right and privilege to drill for, mine, extract, remove and dispose of all of the oil and gas deposits, except helium gas, in the lands leased, together with the right to construct and maintain thereupon, all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipelines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof, for a period of 10 years, and so long thereafter as oil and gas is produced in paying quantities . . . .

43. Section 2(j) of the Lease obligates the lessee to "exercise reasonable diligence in drilling and producing the wells herein provided for unless consent to *suspend operations temporarily* is granted by the lessor ...." (Emphasis added).

44. Section 2(q) of the Lease obligates the lessee "to take such reasonable steps as may be needed to prevent operations on the leased lands from unnecessarily" damaging the surface, natural resources and improvements, including objects of historic value.

45. The Lease is subject to standard stipulations for the protections of the surface, cultural and paleontological resources, endangered and threatened species, esthetics, etc.

46. The Lease is also subject to a surface disturbance stipulation and a stipulation for lands under the jurisdiction of the Department of Agriculture.

47. In accordance with the Leasing EA, the Lease is also subject to the following special stipulations:

- Eighteen percent of the leased acreage is subject to a NSO stipulation, including within 400 feet of the Summit Campground.
- Forty-eight percent of the lease is subject to a surface use timing stipulation for elk winter range. Under this stipulation, surface occupancy for pre-production activities, such as drilling, would be allowed only from May 1 to December 1.
- Fifty-seven percent of the lease is subjected to a limited surface use stipulation, which strictly controls surface use or occupancy within identified areas.
- One hundred percent of the lease is subject to an activity coordination stipulation, which allows the imposition of special time and space conditions to be imposed on activities for the protection of threatened and endangered species.

48. On June 2, 1983, Mr. Longwell assigned the Lease to America Petrofina Company of Texas (25%), Petrofina Delaware, Inc. (25%), and AGIP Petroleum Company, Inc.

(50%) (hereinafter collectively and individually referred to as "Fina") for valuable consideration, which included Fina's agreement to pay Mr. Longwell a production payment "out of five percent of ninety-five percent (5% of 95%) of the value of all the oil and gas which is produced and sold from lands covered by the lease ...." The BLM approved this assignment on December 9, 1983, effective July 1, 1983.

49. In or around November 1983, and in full compliance with all applicable statutes and regulations, Fina submitted a surface use plan and an APD to drill the Federal South Glacier #1-26 well on the Lease in Section 26, T30N, R13N, PMM, Glacier County, Montana. The proposed well site is approximately 2 miles from private land, approximately 3 miles southeast of the Great Northern Railroad, U.S. Highway 2, and Glacier National Park, and approximately 9 miles southwest of East Glacier, Montana. Specifically, Fina proposed drilling a 13,510-foot exploratory well.

50. Contemporaneously, Fina submitted a cultural resource inventory report, prepared by Historical Research Associates, that documented the survey for cultural resources performed on the well site and the three proposed access routes. No cultural resources were located during the survey.

51. The proposed well site has a very high potential for discovery of natural gas and a somewhat lesser potential for discovery of oil.

52. In November 1983, the Forest Service and the BLM began reviewing the surface use plan and APD in accordance with all applicable statutes, regulations, policies, and trust responsibilities.

53. In January 1985, the Forest Service and the BLM issued a joint, 324-page EA with respect to the surface use plan and the APD. The conclusion of the two agencies was that

the proposed project, as limited by the lease stipulations and the additional conditions of approval imposed by the agencies, could be performed without any adverse environmental effects. Thus, based upon the comprehensive EA, the Forest Service approved the surface use plan and the BLM approved the APD. In so doing, the agencies fully complied with all applicable statutes, regulations, policies, and trust responsibilities. In addition, by approving the surface use plan and APD, both the Forest Service and the BLM officially acknowledged that the Lease was in the public interest and validly issued.

54. In March 1985, the BLM's approval of the APD was appealed to the Interior Board of Land Appeals ("IBLA").

55. On August 9, 1985, the IBLA rejected most of the appeal issues. *Glacier–Two Medicine Alliance*, 88 IBLA 133 (1985). However, the IBLA set aside the BLM's decision and remanded with instructions for the BLM to further consider four issues. *Id*. at 150–55.

56. On August 16, 1985, in light of the IBLA's decision, Fina requested a temporary suspension of operations and production, to toll the running of the primary term of the Lease while the BLM addressed the remanded issues.

57. On November 13, 1985, the BLM suspended the Lease, effective October 1, 1985. The DOI/BLM then unlawfully kept the Lease in suspension for the next 30 years.

58. On May 15, 1986, the BLM advised Fina that there would be six years and eight months remaining on the 10-year primary term of the Lease when the suspension is lifted.

59. In June 1986, the Forest Service approved the land and resource management plan for the Lewis and Clark National Forest ("1986 Forest Plan"). Approval of the 1986 Forest Plan was based upon a comprehensive Final EIS ("1986 Final EIS") that was prepared in full compliance with NEPA. The 1986 Forest Plan established goals, management direction, and

resource standards and stipulations to minimize any effects of oil and gas related activity on the Lewis and Clark National Forest, including the area where the Lease is located. In approving the 1986 Forest Plan, the Forest Service specifically concluded that exploration for oil and gas was in the public interest and should continue because of these protective measures.

60. On April 13, 1987, after addressing the remanded issues, the Forest Service and the BLM approved the surface use plan and APD for the second time. In so doing, the agencies fully complied with all applicable statutes, regulations, policies, and trust responsibilities. The agencies also based their decisions on the 1986 Forest Plan and 1986 Final EIS, in which the Forest Service had thoroughly evaluated the environmental effects of oil and gas exploration and development on the Lewis and Clark National Forest, including the area where the Lease is located. The agencies also "carefully reviewed" the district court's decisions in *Conner v. Burford*, 605 F. Supp. 107 (D. Mont. 1985), *aff'd in part, rev'd in part*, 836 F.2d 1521 (9th Cir. 1988), *superseded by*, 848 F.2d 1441 (9th Cir. 1988) and *Bob Marshall All. v. Watt*, 685 F. Supp. 1514 (D. Mont. 1986), *aff'd in part, rev'd in part sub nom*. *Bob Marshall All. v. Hodel*, 852 F.2d 1223 (9th Cir. 1988), and determined that their actions were consistent with those decisions. In addition, by approving the surface use plan and APD, the Forest Service and the BLM again officially acknowledged that the Lease was in the public interest and validly issued.

61. The BLM's decision to reapprove the APD was appealed to the IBLA.

62. On July 10, 1987, the Forest Service asked the BLM to move the IBLA for a voluntary remand of the approved APD.

63. On July 28, 1987, based upon the Forest Service's request, the BLM filed a motion for a voluntary remand of the approved APD.

64. On July 31, 1987, the IBLA granted the BLM's motion and vacated the BLM's decision approving the APD and remanded to the BLM for further action.

65. On August 14, 1987, the BLM advised Fina that the suspension would remain in effect until the completion of an additional environmental analysis.

66. On February 23, 1988, notice was published in the *Federal Register* that the Forest Service decided to combine the study for Fina's surface use plan and APD with an APD submitted by Chevron on a nearby lease. 53 Fed. Reg. 5,290 (Feb. 23, 1988). The notice further provided that a draft EIS was expected to be released for public comment within 12 months, and that a Final EIS was expected by April 1989. *Id*.

67. On October 23, 1989, Notice of Availability of the draft EIS was published in the *Federal Register*. 54 Fed. Reg. 43,188 (Oct. 23, 1989). The notice solicited comments and advised that the draft EIS:

> [A]nalyzes the impacts of proposed drilling applications submitted by Chevron USA, near Badger Creek, and Fina Oil and Chemical Company, near Hall Creek. Based on the issues and concerns identified during the scoping process, the [draft EIS] focuses on impacts to water resources, air quality, Glacier National Park resources, adjacent Bob Marshall and Great Bear Wilderness, the Badger-Two Medicine Roadless area, wildlife and fisheries (including the grizzly bear), vegetation, outdoor recreation and visual resources, archaeological resources, Blackfeet Tribe reserved rights and traditional religious practices, local economic and social conditions, including public health and safety associated with the drilling proposals.
>
> The analysis addresses 33 combinations of alternatives, including roaded access, helicopter mobilization of the drilling projects, and no action. The [draft] EIS also addresses each of the exploration proposals independently. The [draft] EIS preferred alternative is to permit the exploration projects, utilizing roaded access and mitigation requirements that minimize adverse environmental effects.

Id. at 43,188–89.

68. On December 4, 1990, after all the comments were considered, a comprehensive, 982-page, Final EIS for the Fina and Chevron proposals was issued ("1990 Final EIS"). Based

upon the 1990 Final EIS, the Forest Service and the BLM issued a joint Record of Decision approving Fina's surface use plan and APD. In so doing, the agencies fully complied with all applicable statutes, regulations, policies, and trust responsibilities. In addition, by approving the surface use plan and APD, the Forest Service and the BLM again officially acknowledged that the Lease was in the public interest and validly issued.

69. On March 8, 1991, notice that the Forest Service and the BLM had approved Fina's surface use plan and APD was published in the *Federal Register*. 56 Fed. Reg. 9,935, 9,936 (Mar. 8, 1991). The notice further provided that Chevron's APD had not been approved. *Id*.

70. Around April 1991, the BLM received requests for state director review of the BLM's approval of the APD. These requests were denied. Appeals were then filed with the IBLA. On July 18, 1991, the BLM once again moved for a voluntary remand.

71. On August 5, 1991, the IBLA granted the BLM's motion for voluntary remand, dismissed the appeal without prejudice, and remanded for further proceedings.

72. On August 30, 1991, the BLM reversed its decision approving the APD and began its own independent study of the surface-related issues, even though it had previously adopted the Forest Service's approval of the surface use plan, which was still in effect and valid. In fact, the Forest Service's approval of the surface use plan is still in effect and valid today.

73. On December 4, 1992, after the BLM completed its independent study of the surface-related issues regarding Fina's APD, the BLM asked for secretarial-level approval of Fina's APD because of the unreasonable delay that had already occurred:

> We would like to get the issues involved in this case resolved once and for all. *The decisions concerning the Fina well have been delayed long enough*. A timely resolution would benefit all parties involved, including the applicant, the Federal government, the appellants and the American taxpayers. We would like the

> Secretary to render the final decision for the Fina [Record of Decision], thereby allowing all remaining issues to be addressed in Federal District Court.

(Emphasis added).

74. On January 14, 1993, the Assistant Secretary, DOI, concurred in the Record of Decision issued by the BLM approving Fina's APD. This was the fourth time the APD had been approved. In approving the APD, the BLM fully complied with all applicable statutes, regulations, policies, and trust responsibilities. In concurring in the BLM's approval of the APD, the Assistant Secretary officially acknowledged that the Lease was in the public interest and validly issued. The Assistant Secretary's concurrence also constituted a final decision for the Secretary.

75. The 1993 Record of Decision ("1993 ROD") allowed:

> Fina to build 4.5 miles of access road on National Forest Land to drill a single exploratory well to determine if geologic structures contain accumulations of oil and/or natural gas. If the well is dry, the access road and well pad will be reclaimed to as near natural conditions as possible. Should the well encounter commercial quantities of oil and/or gas, additional environmental analysis will be conducted.

1993 ROD, Dear Reader Letter.

76. The approval provided by the 1993 ROD was subject to Fina complying with all lease stipulations, mitigation and monitoring requirements, and additional mitigation measures that were imposed as conditions of approval. The conditions of approval limited activities from July 1 through November 30 each year, to minimize the effects on wildlife. These conditions of approval included measures to protect any cultural/religious resources. Importantly, activities under the approved surface use plan and the approved APD and would not affect any identified cultural/religious resources or the Blackfeet Tribe's reserved rights:

> I agree with the Forest Supervisor's finding that [the selected] alternative … 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 National Historic Preservation Act*. 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. The Montana State Historic Preservation Office commented on the identification effort and further stated that they had no information which disputed this finding. *Compliance with the implementing regulations of Section 106 of the National Historic Preservation Act has, therefore, been completed.*

Like the Forest Supervisor, I also recognize that the area is used by some members of the Blackfeet Tribe for religious purposes and for other uses, including the exercise of rights reserved in the Agreement of 1896. Past use includes motorized access for hunting, wood cutting and recreation. Other uses of the area include motorized winter recreation by snowmobiles. Not until 1988, with implementation of the Forest Travel Plan, were vehicle restrictions imposed in the area. As stated in the [1990 Final EIS] (Chapter IV-150), Blackfeet traditionalists view all action alternatives as negatively impacting their culture and religion. However, they have been reluctant to discuss any specific potential effects caused by the project to the practice and belief in their traditional religion ([1990 Final EIS], Chapter IV-152). I have considered what actions could be undertaken to reduce the impact of the project on traditional practitioners. Mitigation measures that will minimize visual, auditory, and physical changes have been developed and are included in Appendix A of this ROD.

In case traditional practitioners choose to use the area around the wellsite regardless of the disturbance, notice will be made in local newspapers of planned drilling activity. This will enable religious practitioners to plan their activities so they can be conducted at locations and during time periods when the effects of the project are not evident.

Visual intrusions which might affect traditional religious practices will be minimized by employing a professional landscape architect to review all project location plans and to develop mitigation measures.

In summary, I concur with the Forest Supervisor's decision to allow roaded access to the wellsite, recognizing that there may be some unavoidable impacts to traditional religious practitioners. I agree with the Forest Supervisor's determination that this decision does not change a person's freedom of religious belief. Mitigation measures that limit access and reduce noise levels will help to reduce project impacts on those who choose to practice traditional religion in the general area of the well site.

1993 ROD at 15–16 (all emphasis added).

77. By concurring in the 1993 ROD, the Assistant Secretary, on behalf of the Secretary, also officially acknowledged that any violations that may have occurred prior to lease issuance had been corrected by, *inter alia*, the 1990 Final EIS and the 1986 Final EIS:

> I agree with the Forest Supervisor's [1991] response that no court has held the Fina lease invalid. Until such action occurs or there is some other administrative action by the [DOI-BLM] which issued the lease, the Forest Service must recognize the rights of the leaseholder. Furthermore, even if subsequent litigation on Fina's lease resulted in a holding similar to the holding in Conner v. Burford, that holding would not invalidate the leases but would rather require full compliance with NEPA ... prior to any surface-disturbing activities. *This has been clearly accomplished with the comprehensive analysis in [the 1990 Final EIS] as tiered to the [1986 Final EIS]....*
>
> The [1990 Final EIS] analyzed the effects of numerous alternatives, including alternatives which would require changes to the existing lease terms and conditions of approval, and analyzed the effects of the No Action alternative…. By analyzing the effects of the no action alternative in relation to the effects of action alternatives, including the effects of exploration as well as possible future production and development, I have been able to consider whether I should recommend, in addition to denying the current proposal, that lease terms be changed or the lease cancelled. I have no authority to make a decision to cancel or change lease terms, but I can recommend that these actions be considered based on this environmental review. Under Alternative E (APD Not Approved) Fina's APD would be denied. *Should the Government determine to cancel the Fina lease, three courses of action could be taken to secure from the lessee any rights granted in the original lease transaction. These include buying back the leases, condemning the leases, and enacting legislation*.
>
> In a buy back situation, the government would offer the lessees (in this case Fina) a cash settlement for relinquishing the leases. Condemnation proceedings could be initiated by the Government to prevent enjoyment of lease rights. It would have to be shown that proposed operations were environmentally unacceptable before initiating condemnation proceedings. Lastly, legislation could be enacted by Congress to stop lease development.
>
> Based on the environmental effects disclosed in th[e] [1990] Final EIS, I concur in the Forest Supervisor's determination not to select Alternative E (No Action) which would deny the Fina Surface Use Plan. *I also do not recommend lease cancellation or a change in lease terms to require 100 percent No Surface Occupancy. In making my decision, I considered the dual objectives of conservation of our physical and biological surface resources and providing for opportunity to explore and develop oil and gas resources. I conclude that the selected alternative provides for meeting these dual objectives*….

> [The 1990 Final EIS] is intended to fully meet the requirements stated in the Ninth Circuit Court's ruling in Conner v. Burford. I [also] agree with the Forest Supervisor's determination that the requirements of Connor v. Burford are met by the [1986 Final EIS] which considered additional leasing alternatives which did not take into consideration the commitments embodied in the existing leases ....

1993 ROD at 18–19 (all italics added).

78. On June 4, 1993, after a change in administrations, the new Secretary of the Interior, Bruce Babbitt, unlawfully sought to reverse what his predecessor had done for policy reasons. For example, despite the approved APD, then-Secretary Babbitt advised Fina that he was continuing the suspension of the Lease and approved APD. Then-Secretary Babbitt further advised that the suspension would remain in effect for one year. The stated purpose for continuing the suspension was in aid of proposed legislation regarding the area where the Lease is located. The real purpose for continuing the suspension was to unlawfully deny Fina the ability to exercise its valuable contract and property rights.

79. On May 4, 1994, although no action had been taken on any proposed legislation regarding the area where the Lease is located, the DOI/BLM unlawfully continued the suspension of the Lease and approved APD for another year.

80. On May 19, 1995, although no action had been taken on any proposed legislation regarding the area where the Lease is located, the DOI/BLM unlawfully continued the suspension of the Lease and approved APD for another year.

81. On June 11, 1996, the DOI/BLM unlawfully continued the suspension of the Lease and approved APD for another year.

82. On April 18, 1997, the DOI/BLM unlawfully continued the suspension of the Lease and approved APD for another year.

83. On July 15, 1998, the DOI/BLM indefinitely suspended the Lease and approved APD. The DOI/BLM, however, lacked authority to indefinitely suspend the Lease. The stated purpose for this indefinite suspension was to allow the Forest Service time to comply with the NHPA. The real purpose for this indefinite suspension was to unlawfully deny Fina the ability to exercise its valuable contract and property rights.

84. On April 5, 1999, Fina, fed up with the endless delay, assigned the Lease back to Mr. Longwell. The BLM approved this assignment on June 15, 2000, effective July 1, 2000.

85. On October 11, 2001, in response to a congressional inquiry, the 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*." (Emphasis added). The BLM further advised: "[w]e realize that an attempt to reach closure on this case has taken many years *and share Mr. Longwell's frustration with the extraordinary delays involved in the process*." (Emphasis added).

86. On April 19, 2002, in response to an inquiry by Mr. Longwell, the BLM confirmed that the approved APD was still valid: "you have a valid permit." By acknowledging the validity of the APD, the BLM necessarily acknowledged that the Lease was in the public interest and validly issued.

87. In June 2003, the Forest Service began the scoping process for NorthWestern Corporation's proposal to construct a 12-inch gas pipeline parallel to its existing 8-inch gas pipeline along the northwest boundary of the Lewis and Clark National Forest. The new pipeline would be buried 30 feet south of an existing line and would cross approximately 3 miles of the Lewis and Clark National Forest and approximately 2 miles of the Lease. One year later, in June 2004, the Forest Service issued a Decision Notice and Finding of No Significant Impact

approving construction of the NorthWestern Corporation's pipeline. Importantly, the Forest Service determined that construction of the pipeline "w[ould] not have an adverse effect on any known or listed or eligible historic places." In fact, the Forest Service advised that consultation with the Blackfeet Tribe "identified no properties of traditional cultural interest to the tribe on the pipeline route or temporary construction sites." That the "pipeline route" and "temporary construction sites" had no religious/cultural significance to the Tribe demonstrates that the Forest Service was using the NHPA process as a pretext to deny Mr. Longwell the ability to exercise his valuable contract and property rights. This is especially true considering the "lightning speed" at which the Forest Service approved the pipeline.

88. In 2004, Mr. Longwell formed Solenex LLC, a Louisiana limited liability corporation. On July 9, 2004, based upon the BLM's repeated representations regarding the validity of both the Lease and the approved APD, Mr. Longwell assigned the Lease and concomitant rights under the approved APD to Solenex. The BLM approved the assignment, effective February 1, 2005.

89. Between 2005 and 2013, the Forest Service and the BLM continued their use of the NHPA as a pretext for not lifting the suspension on the Lease and approved APD and as a pretext for denying Solenex the ability to exercise its valuable contract and property rights.

90. For example, on April 15, 2011, Solenex sent a letter to the Forest Service reminding the Forest Service that the Lease was a valid contract, the approved APD remains valid, and that Solenex wished to commence drilling.

91. On May 27, 2011, the Forest Service responded to Solenex's April 15, 2011 letter advising that the Lease is allegedly in an area potentially eligible for listing as a Traditional Cultural District ("TCD") on the National Register of Historic Places. The Forest Service further

represented that it was preparing a determination of eligibility to submit to the state historic preservation officer ("SHPO") for a concurrence.

92. On February 16, 2012, Solenex sent a letter to the Forest Service expressing its desire to develop the Lease under the approved APD and again requesting a timeline for when drilling operations may commence. Solenex further explained:

> [I]t is important to proceed with development of this lease based on the amount of drilling activity in the area, including that on the nearby Blackfeet reservation, as well as the need to develop domestic energy resources on both public and private lands as outlined by President Obama in his State of the Union Address.

93. On March 27, 2012, in response to Solenex's February 16, 2012 letter, the Forest Service advised that the Lease is allegedly in an area potentially eligible for listing as a TCD. Like it did in its May 27, 2011 letter, the Forest Service represented that it was preparing a determination of eligibility to submit to the SHPO for a concurrence. The Forest Service did not seek this concurrence until June 2013, after Solenex gave notice of its intent to seek judicial review of Forest Service's and the BLM's unreasonable delay.

94. In December 2012, the Forest Service accepted the boundaries of a proposed 165,000-acre TCD. The boundaries of a proposed 165,000-acre TCD were conveniently drawn so that the entire Lease would be embraced within those boundaries. The creation of the proposed 165,000-acre TCD was simply a ploy to prevent Solenex from exercising its valuable contract and property rights.

95. Between January 2013 and May 23, 2013, the Forest Service and the BLM took no action toward completing the purported NHPA process and lifting the suspension on Solenex's Lease.

96. On May 21, 2013, counsel for Solenex sent letters to the BLM and the Forest Service describing the extraordinary and unlawful delay in lifting the suspension and advising that Solenex would seek judicial review if the suspension was not lifted in 30 days.

97. On June 7, 2013, after receiving Solenex's notice of intent to sue, the Forest Service transmitted the boundaries of a proposed 165,000-acre TCD to the Blackfeet Tribal Business Council and asked whether the Council concurred with the boundaries.

98. On June 18, 2013, the Forest Service responded to counsel for Solenex's letter and suggested that it had transmitted the boundaries of a proposed 165,000-acre TCD to the SHPO for comment. The Forest Service, however, did not transmit the boundaries of a proposed 165,000-acre TCD to the SHPO for comment until June 20, 2013.

99. On June 28, 2013, Solenex filed this case against Defendants seeking to compel agency action "unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1). Dkt. # 1 at 7–10.[1] Solenex requested either an order compelling Defendants to immediately lift the suspension or an order compelling Defendants to complete any remaining administrative action necessary to lift the suspension within 30 days. *Ibid.*

100. On September 9, 2013, Defendants filed an Answer to Solenex's Complaint. In answering Solenex's Complaint, Defendants never suggested or hinted that the Lease may have been issued prematurely in violation of any applicable statute, regulation, policy, or trust responsibility.

101. In January 2014 and April 2014, Defendants forced Solenex to travel to Montana—at considerable expense to Solenex—to attend NHPA meetings that Defendants represented were necessary before the suspension could be lifted. During those meetings, Defendants never

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

suggested or hinted that the Lease may have been issued prematurely in violation of any applicable statute, regulation, policy, or trust responsibility.

102. On July 7, 2014, Solenex filed a motion for summary judgment and supporting memorandum demonstrating that Defendants had unreasonably delayed in lifting the 29-year-long suspension. Dkt. #s 24, 24-1.

103. On August 26, 2014, Defendants filed their own motion for summary judgment and supporting memorandum. Dkt. #s 32, 33. In their motion and supporting memorandum, Defendants argued that this Court was powerless to do anything about their 29-year-long suspension. In the alternative, Defendants argued that they had not unreasonably delayed in lifting the suspension. In their summary judgment filings, Defendants never suggested or hinted that the Lease may have been issued prematurely in violation of any applicable statute, regulation, policy, or trust responsibility.

104. In April 2015, Defendants forced Solenex to travel to Montana—at considerable expense to Solenex—to attend another NHPA meeting that Defendants represented was necessary before the suspension could be lifted. During that meeting, Defendants never suggested or hinted that the Lease may have been issued prematurely in violation of any applicable statute, regulation, policy, or trust responsibility.

105. On June 10, 2015, this Court heard oral arguments on the pending motions for summary judgment. During that hearing, Defendants continued to maintain their position that this Court was powerless to do anything about their 29-year-long suspension. Defendants also continued to maintain their position that they had not unreasonably delayed in lifting the suspension. At no time during that hearing did Defendants suggest or hint that the Lease may have

been issued prematurely in violation of any applicable statute, regulation, policy, or trust responsibility.

106. On July 27, 2015, this Court ruled that Defendants' 29-year delay was unreasonable as a matter of law:

> [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 recalcitrance for such an epic period of time.
>
> Under the APA, administrative agencies have a *duty* to decide issues presented to them within a reasonable time, 5 U.S.C. § 555(b), and reviewing courts have a *duty* to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) …. By any measure, defendants' 29-year delay in reviewing plaintiff's suspended lease, and reaching a final determination, is "unreasonable delay" within the meaning of the APA.

Dkt. # 52 at 2–3 (all emphasis in original) (footnote omitted).

107. Based upon this ruling, this Court granted summary judgment in favor of Solenex and ordered Defendants to submit, within 21 days, "a schedule for the orderly, expeditious resolution of the decision whether to lift the suspension of plaintiff's lease." Dkt. # 52 at 5. This Court further advised that:

> This schedule shall include (1) the defendants' proposed tasks remaining to be completed and rationales for why those tasks are legally necessary, and (2) an accelerated timetable for completing those tasks still necessary to expeditiously resolve the issues regarding plaintiff's suspended lease.

Ibid.

108. On August 17, 2015, Defendants submitted their proposed schedule. Dkt. # 53. In their proposed schedule, Defendants suggested—for the first time—that they may initiate a process for cancelling the lease, which they claimed could be completed by March 30, 2016. *Id*. at 2. In the alternative, Defendants suggested that they would need almost two more years to complete a fifth NEPA process before they could lift the suspension. *Ibid.*

109. After Solenex filed a response demonstrating that Defendants' proposed schedule was a pretext for further unlawful delay (Dkt. # 54), this Court held a status conference on October 6, 2015. Following that status conference, this Court ruled that Defendants' proposed schedule was "clearly unacceptable" because it "would not only draw out this process another two years potentially, but also lacked rationales for the necessity of certain proposed steps as ordered." Dkt. # 57 at 2. Accordingly, this Court ordered Defendants to file a memorandum by November 23, 2015:

> [T]hat sets forth their decisions, and the factual and legal bases therefore, regarding: (1) whether to initiate the process for cancellation of the lease; (2) whether to continue the[NHPA] process for lifting the suspension of the lease; (3) if so, whether any additional NEPA compliance is necessary before lifting the suspension; and (4) a proposed *accelerated* schedule that sets forth the tasks remaining to be completed—either under the process for cancellation, or under NEPA before lifting the suspension—and the rationales for their necessity.

Dkt. # 57 at 4 (emphasis in original). This Court also ordered Solenex to file a response to Defendants' memorandum by December 4, 2015, *id*., which was subsequently extended by this Court. *See* Dkt. #s 59, 60. This Court further advised that, after receiving Solenex's response, it would "either approve or reject the defendants' schedule or order such further adjustments as necessary." Dkt # 57 at 4.

110. On November 23, 2015, Defendants filed their memorandum. Dkt. # 58. Although Defendants stated that they "ha[d] not yet made a final cancellation decision," *id*. at 2, they were prepared to cancel the Lease "as early as December 11, 2015 or as soon thereafter as th[is] Court approves the proposed schedule." *Id*. at 1. After repeatedly reaffirming the validity of the Lease for over 33 years, Defendants suggested that they may have issued the lease prematurely in violation of NEPA. *Id*. at 4. Defendants also suggested that they may have issued the lease prematurely in violation of the NHPA, *id*. at 4–5, but that the alleged NHPA "defect has now been

corrected ...." *Id*. at 5. Defendants also suggested that a lease issued prematurely in violation of NEPA makes a lease voidable and that the Secretary has the inherent authority to administratively cancel a voidable lease under the facts in this case. *Id*. at 2–3, 5.

111. Solenex timely filed its response and demonstrated that there was no factual or legal support for Defendants' proposed course of action of cancelling the lease. Dkt. # 63 at 15–36. Specifically, Solenex demonstrated that the Secretary lacked the authority to administratively cancel the lease. *Id*. at 15–26. In the alternative, Solenex demonstrated that, even if the Secretary possessed such authority, the exercise of that authority under the facts in this case would be unlawful. *Id*. at 27–36. Because Defendants intended to embark on a course of action that would be *ultra vires* and unlawful, and that was simply a pretext for further unlawful delay, Solenex requested that this Court reject Defendants' proposed course of action, enjoin Defendants from taking any further steps toward administratively cancelling Solenex's lease, and order Defendants to lift the suspension on Solenex's lease immediately. *See*, *e.g*., *id*. at 43.

112. On March 16, 2016, the Court held a Status Conference, during which this Court "request[ed]" that Defendants act "within 24 hours." Transcript of Mar. 16, 2016 Status Conference 9:17–20.

113. On March 17, 2016, Defendant Seidlitz issued a decision administratively cancelling the Lease and disapproving the approved APD ("Challenged Decision"). Dkt. # 68-1. According to Defendant Seidlitz, the Lease was issued prematurely in violation of, *inter alia*, NEPA and the NHPA. Dkt. # 68-1 at 7–12. Defendant Seidlitz further stated that because, in his opinion, the Lease was issued prematurely the Lease was voidable and that he was exercising his alleged discretion to administratively cancel the Lease and disapprove the approved APD. *Id*. at 13–14.

114. Defendant Connor concurrently approved the Challenged Decision. Because the Challenged Decision was approved by Defendant Connor, it constitutes a final decision for the Secretary and is subject to judicial review under the APA. *See* Dkt. # 68-1 at 14; *see also* 5 U.S.C. § 704.

115. Moreover, because Solenex is adversely affected and/or aggrieved by the Challenged Decision, it is entitled to judicial review of the Challenged Decision. *See* 5 U.S.C. § 702.

FIRST CLAIM FOR RELIEF
(THE SECRETARY LACKED THE AUTHORITY TO ADMINISTRATIVELY CANCEL THE LEASE AND TO DISAPPROVE THE APPROVED APD)

116. Solenex incorporates the allegations in the foregoing paragraphs as if fully set forth herein.

117. "[A]n agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

118. Because certainty of title is critical to fulfill the purpose of the MLA and because the law abhors forfeitures, Congress granted the Secretary only limited authority to administratively cancel a lease.

119. The Secretary may only administratively cancel a lease for violations of the lease terms by the lessee, and only so long as the lease does not contain a well capable of commercial production or is not held by production from another lease. 30 U.S.C. § 188(b).

120. In the absence of a violation by the lessee, the Secretary may only cancel/forfeit a lease by instituting a judicial proceeding. 30 U.S.C. § 188(a); *see* 30 U.S.C. § 184(h)(1); *see also Pan Am. Petroleum*, 284 F.2d at 655–57.

121. Neither Solenex nor it predecessors ever violated the terms of the Lease.

122. The Secretary did not institute a judicial proceeding prior to cancelling the Lease.

123. The Secretary's actions in administratively cancelling the Lease are in excess of statutory authority.

124. Despite that lack of statutory authority, the Secretary claims that she has inherent authority to administratively cancel a lease that may have been issued prematurely.

125. The Secretary has no inherent authority to administratively cancel a lease, even one that may have been issued prematurely. *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374–75 ("To permit an agency to expand its power in the face of a congressional limitation on its [authority] would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.").

126. Contrary to the Secretary's suggestion, *Boesche v. Udall*, 373 U.S. 472 (1963) does not support her claimed inherent authority. The Secretary's reading of *Boesche* cannot be reconciled with the Supreme Court's more recent holdings that an agency has no authority without an express delegation of authority from Congress.

127. Even if *Boesche* were correctly decided, it stands for the very narrow proposition that the Secretary may administratively cancel a lease that was improperly issued to an applicant who had submitted an application that violated the regulations promulgated under the MLA, but only when necessary to protect the rights of a competing lease applicant. *Boesche*, 373 U.S. at 485.

128. Mr. Longwell did not violate the MLA or the regulations promulgated thereunder in acquiring the Lease.

129. The BLM did not violate the MLA or the regulations promulgated thereunder in issuing the Lease to Mr. Longwell.

130. Because there were no appeals or protests to the issuance of the Lease in 1982, there are no competing lease applicants whose rights would need protection by the Secretary's claimed inherent authority to administratively cancel the Lease.

131. Therefore, *Boesche* provides no support for the Secretary's action administratively cancelling the Lease.

132. To the extent that the Secretary relied upon 43 C.F.R. § 3108.3(d) for the proposition that she has authority to administratively cancel the Lease, that regulation may not confer greater authority on the Secretary than that conferred by Congress. Therefore, to the extent that the Secretary relied upon 43 C.F.R. § 3108.3(d) in administratively cancelling the Lease, both the Secretary's action and 43 C.F.R. § 3108.3(d) are unlawful.

133. The Secretary's action in administratively cancelling the Lease was in excess of statutory, inherent, and regulatory authority.

134. The MLA does not give the Secretary the authority to disapprove an approved APD, especially one that has been approved for more than 23 years.

135. Contrary to the Secretary's suggestion, 43 C.F.R. § 3162.3-1(h)(2) does not provide her with the authority to disapprove the approved APD. First, that regulation may not confer greater authority on the Secretary than that conferred by Congress. Second, 43 C.F.R. § 3162.3-1(h)(2) merely allows the Secretary to disapprove an *unapproved* APD and in a timely manner. Thus, 43 C.F.R. § 3162.3-1(h)(2) provides no support for the Secretary's contention that she can disapprove an *approved* APD, especially one that was approved by her predecessor 23 years earlier.

136. The Secretary's action in disapproving the approved APD is in excess of her statutory, inherent, and regulatory authority.

137. Because the Secretary lacked the authority to administratively cancel the Lease and to disapprove the approved APD, the Challenged Decision is, *inter alia*: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and/or (D) without observance of procedure required by law. 5 U.S.C. § 706(2). Therefore, this Court must "hold unlawful and set aside" the Challenged Decision. *Id*.

SECOND CLAIM FOR RELIEF
(THE CHALLENGED DECISION IS UNLAWFUL BECAUSE SOLENEX IS ENTITLED TO BONA FIDE PURCHASER PROTECTION)

138. Solenex incorporates the allegations in the foregoing paragraphs as if fully set forth herein.

139. Even if the Secretary has the authority to administratively cancel the Lease and to disapprove the approved APD, the Challenged Decision is unlawful because Solenex is entitled to bona fide purchaser protection.

140. Neither the Secretary nor the judiciary may cancel/forfeit a lease owned by one entitled to bona fide purchaser protection. *See* 30 U.S.C. § 184(h)(2); *cf*. *Colorado Coal & Iron Co. v. United States*, 123 U.S. 307, 313–14 (1887) (a fraudulently obtained patent cannot be attacked by the United States after it has been transferred to a bona fide purchaser); *United States v. Burlington & M.R.R. Co*., 98 U.S. 334, 342 (1878) (noting that the United States "certainly could not insist upon [the] cancellation of … patents so as to affect innocent purchasers").

141. A bona fide purchaser is generally described as one who acquired its interest in good faith, for valuable consideration, and without notice of any deficiency in its grantor's title.

142. Solenex is entitled to bona fide purchaser protection. It is undisputed that Solenex and its predecessors acquired the lease in good faith and with no notice that the lease may have been issued prematurely in violation of any statute, regulation, policy, or trust responsibility. In fact, Defendants first came up with the idea that the Lease may have been issued prematurely only after this Court granted summary judgment in favor of Solenex in 2015, *i.e.*, more than 33 years after the BLM issued the Lease. It is further undisputed that valuable consideration has been paid for the Lease after it was originally issued. In 1982, the BLM issued the Lease to Mr. Longwell. Dkt. # 24-2 at 4. In 1983, Fina paid valuable consideration to Mr. Longwell for the assignment of the Lease. Dkt. # 24-2 at 33 (indicating that the lease was assigned in return for, *inter alia*, a production payment); *see Waskey v. Chambers*, 224 U.S. 564, 566 (1912) (lessee who agreed to work the mine and remit to the lessor 30 percent of the minerals extracted paid valuable consideration for the lease); *see also* 30 U.S.C. § 187a (indicating that an assignee assumes all the duties and obligations in the lease). In 1999, Fina—tired of Defendants' endless delays— assigned the lease back to Mr. Longwell, who ultimately assigned it to Solenex in 2004. Dkt. # 24-2 at 33–34. Thus, at a minimum, Solenex is entitled to bona fide purchaser protection based upon the fact that Fina was a bona fide purchaser. *See Home Petroleum Corp.*, 54 IBLA 194, 213–14 (1981) (successor in interest to a bona fide purchaser may take advantage of its predecessor's status as a bona fide purchaser to prevent its lease from being cancelled), *aff'd sub nom*, *Geosearch, Inc. v. Watt*, 721 F.2d 694, 699 (10th Cir. 1983); *United States v. Parcel of Land, Bldgs., Appurtenances & Improvements, Known as 92 Buena Vista Ave., Rumson, N.J.*, 507 U.S. 111, 142 (1993) (Kennedy, J., dissenting) ("[A] transferee who acquires property from a good-faith purchaser for value … obtains good title, even if the transferee did not pay value or act in good faith.").

143. Contrary to the suggestion in the Challenged Decision, that Solenex acquired the Lease while the Lease was suspended does not affect Solenex's entitlement to bona fide purchaser protection. This is especially true considering that Defendants only came up with the idea that the Lease may have been issued prematurely in 2015, *i.e*., more than 10 years after Solenex acquired the Lease.

144. Because Solenex is entitled to bona fide purchaser protection, neither the Secretary nor the judiciary may cancel/forfeit the Lease or disapprove the approved APD. Therefore, the Challenged Decision is, *inter alia*: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and/or (D) without observance of procedure required by law. 5 U.S.C. § 706(2). Accordingly, this Court must "hold unlawful and set aside" the Challenged Decision. *Id*.

THIRD CLAIM FOR RELIEF
(THE SECRETARY IS EQUITABLY ESTOPPED FROM CANCELLING THE LEASE AND DISAPPROVING THE APPROVED APD)

145. Solenex incorporates the allegations in the foregoing paragraphs as if fully set forth herein.

146. Equitable estoppel prevents the federal government from changing positions to the detriment of a private party. *United States v. Georgia-Pacific Co*., 421 F.2d 92, 96 (9th Cir. 1970). The party claiming estoppel "must have relied on its adversary's conduct in such a manner as to change his position for the worse … and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc*., 467 U.S. 51,

59 (1984) (quotations and footnotes omitted). Application of equitable estoppel is especially appropriate when necessary to ensure that private parties are treated with a "minimum standard of decency, honor, and reliability in their dealings with their Government." *Id*. at 60–61; *see Georgia-Pacific Co*., 421 F.2d at 100 ("[I]t is hardly in the public's interest for the Government to deal dishonestly or in an unconscientious manner.").

147. The undisputed facts in this case prove that the Secretary is estopped from cancelling the Lease and disapproving the approved APD.

148. For 33 years, Defendants affirmatively represented—through their actions, statements, documents—that the lease was valid and properly issued. *See* Dkt. #24-2 at 2–28 (describing Defendants' actions, statements, documents); *see generally* Transcript of June 10, 2015 Oral Argument at 22:1–40:8 (Defendants arguing that they have not unreasonably delayed completing administrative action vis-à-vis the Lease—a lease they now contend was issued prematurely). Similarly, for 23 years, Defendants affirmatively represented— through their actions, statements, and documents—that the APD was validly approved.

149. Solenex and its predecessors changed position to their detriment in reasonable reliance on Defendants' affirmative representations. Defendants also knew that their affirmative representations would cause Solenex and its predecessors to change their positions in reliance thereon.

150. For example, on April 19, 2002, in response to an inquiry from Mr. Longwell as to whether the 1993 approved APD was still valid, the BLM responded: "The answer is yes, you have a valid permit." Dkt. # 45-6 at 55; *see also* Dkt # 34-1 at 10. Based upon that representation, Mr. Longwell assigned the Lease and the concomitant rights under the approved APD to Solenex. Dkt # 24-2 at 20–22.

151. Neither Solenex nor its predecessors could have known that the Lease may have been issued prematurely because Defendants only came up with this idea after this Court granted summary judgment in favor of Solenex in 2015, *i.e.*, more than 33 years after the BLM issued the lease and more than 10 years after Solenex acquired the Lease.

152. Therefore, the Secretary is estopped from cancelling the Lease and disapproving the approved APD. *See United States v. Eaton Shale Co*., 433 F. Supp. 1256, 1272 (D. Colo. 1977) ("[W]e hold that the government is estopped from asserting the invalidity of the patent. The action taken by the government in granting the patent, and the consistent course of administrative conduct from the mid-1930's to the early 1960's, are persuasive grounds for application of the doctrine of estoppel.").

153. Because the Secretary is estopped from cancelling the Lease and disapproving the approved APD, the Challenged Decision is, *inter alia*: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; and/or (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and/or (D) without observance of procedure required by law. 5 U.S.C. § 706(2). Accordingly, this Court must "hold unlawful and set aside" the Challenged Decision. *Id*.

FOURTH CLAIM FOR RELIEF
(THE CHALLENGED DECISION IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW)

154. Solenex incorporates the allegations in the foregoing paragraphs as if fully set forth herein.

155. The "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review in the APA, 5 U.S.C. § 706(2)(A) serves as a "catch-all" that

"pick[s] up administrative misconduct not covered by the other more specific" standards of review in 5 U.S.C. § 706(2). *Ass'n of Data Processing Serv. Organizations, Inc. v. Bd. of Governors of Fed. Reserve Sys*., 745 F.2d 677, 683 (D.C. Cir. 1984) (explaining that the standards of review in 5 U.S.C. § 706(2) "are cumulative"). Thus, an agency action that is within the agency's authority may still be held unlawful as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

156. Under the "arbitrary and capricious" standard a reviewing court must analyze both the factual basis for an agency's action, *id*. at 416, as well as the reasoning employed by the agency. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc*., 419 U.S. 281, 285–86 (1974). In general, agency action is "arbitrary and capricious" "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, 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., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) ("*State Farm*") (emphasis added).

157. The Challenged Decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" for, *inter alia*, the following reasons:

a. The Challenged Decision is simply a pretext for further unlawful delay, which was the basis for Solenex's original claims for relief.

b. Contrary to the suggestions in the Challenged Decision, the Lease was issued in full compliance with all applicable statutes, regulations, policies, and trust responsibilities.

c. Assuming the Lease may have been issued prematurely in violation of any applicable statute, regulation, policy, or trust responsibility, any such violations have been corrected.

d. Assuming the Lease may have been issued prematurely in violation of any applicable statute, regulation, policy, or trust responsibility, and assuming that said violations have not been corrected, the Secretary abused her discretion in issuing the Challenged Decision instead of correcting the violations.

e. The Challenged Decision is in direct and irreconcilable conflict with Congress's intent in passing the MLA, the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a, and numerous other acts passed by Congress to encourage the development of the oil and gas resources on federal lands.

f. Contrary to the suggestions in the Challenged Decision, the APD was properly approved in accordance with all applicable statutes, regulations, policies, and trust responsibilities.

g. The Challenged Decision is in direct and irreconcilable conflict with the 1993 ROD, which the Secretary and her predecessors treated as final and conclusive for 23 years. *See Texas Oil & Gas Corp. v. Watt*, 683 F.2d 427, 431–34 (D.C. Cir. 1982) (reversing a lease cancellation decision that was based upon the Secretary's "eleventh-hour" change in position, because to allow such a decision to stand "would be sanctioning a retroactive exercise of discretion to which it is impossible to ascribe any

rational purpose"); *State Farm*, 463 U.S. at 46–57 (agency action is arbitrary and capricious if a change from a previous position is not adequately explained). This is especially true considering that Solenex and its predecessors changed their position in reasonable reliance on the 1993 ROD. *See Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) (a change in position "that does not take account of legitimate reliance on" the prior position may constitute arbitrary and capricious action).

h. The Challenged Decision is inappropriately based upon a change in policy. *See Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958) ("[T]he 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."); *United States v. Seatrain Lines*, 329 U.S. 424, 428–33 (1947) (rejecting the federal government's attempt to revoke a certificate of convenience in light of a change in policy).

i. The Challenged Decision is barred by the statute of limitations including the 5-year statute of limitations in 28 U.S.C. § 2462.

j. The Challenged Decision is barred by the passage of time and the doctrine of laches.

k. The Challenged Decision was issued out of spite and/or was a vindictive response to Solenex being granted summary judgment on its original claims for relief. *See Iceland Steamship Co. v. United States Dep't of the Army*, 201 F.3d 451, 461 (D.C. Cir. 2000) (agency action motivated by subjective bad faith is arbitrary and capricious); *cf. Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most

basic sort …, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." (internal quotations and citations omitted)).

l. Contrary to the suggestions in the Challenged Decision, Section 403 of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, provides no support for cancelling the Lease and disapproving the approved APD, because in passing that provision Congress expressly preserved all "valid existing rights," which includes both the Lease and the approved APD. Nor does Section 403 prohibit Defendants from correcting any violations they may have committed prior to issuing the Lease.

m. Contrary to the suggestions in the Challenged Decision, activities under the Lease and approved APD would neither have an adverse effect on the environment nor an adverse effect on any purported religious/cultural resources. Even if they did, any adverse effects could be easily minimized or mitigated.

n. Contrary to the suggestions in the Challenged Decision, the purported 165,000-acre TCD does not justify cancellation of the Lease and/or disapproving the approved APD. In fact, the purported TCD itself is "arbitrary and capricious" because, *inter alia*, it was created as a pretext for denying Solenex the ability to exercise its valuable contract and property rights.

o. The Challenged Decision was issued in violation of NEPA. *See* Dkt. # 63 at 37–42; *California ex rel. California Coastal Comm'n v. Norton*, 150 F. Supp. 2d 1046, 1055–58 (N.D. Cal. 2001) (federal government had to comply with NEPA before suspending offshore oil and gas leases), *aff'd sub nom. California v. Norton*, 311 F.3d 1162 (9th Cir. 2002).

p. The Challenged Decision was impermissibly based upon purported religious concerns of the Blackfeet Tribe in violation of the Establishment Clause of the First Amendment.

158. Because the Challenged Decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," this Court must "hold unlawful and set aside" the Challenged Decision. 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, Solenex prays:

(1) That it be declared and adjudged that the Challenged Decision is in excess of statutory, inherent, and regulatory authority.

(2) That it be declared and adjudged that the Challenged Decision is unlawful because Solenex is entitled to bona fide purchaser protection.

(3) That it be declared and adjudged that the Challenged Decision is barred by the doctrine of equitable estoppel.

(4) That it be declared and adjudged that the Challenged Decision is, *inter alia*: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and/or (D) without observance of procedure required by law.

(5) That the Challenged Decision be held unlawful and set aside.

(6) That both the Lease and approved APD be reinstated.

(7) That Defendants be ordered to immediately lift the suspension on the Lease and approved APD so that Solenex may exercise its valuable contract and property rights.

(8) That Solenex be awarded costs and attorneys' fees in accordance with law, including the Equal Access to Justice Act, 28 U.S.C. § 2412.

(9) That Solenex be awarded such further relief as this Court deems just and equitable.

DATED this 15th day of April 2016.

Respectfully submitted,

MOUNTAIN STATES LEGAL FOUNDATION

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April 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