**ORAL ARGUMENT NOT YET SCHEDULED**

Nos. 18-5343 & 18-5345

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOLENEX LLC, a Louisiana Limited Liability Company,
*Plaintiff-Appellee*,
v.
DAVID L. BERNHARDT, ACTING SECRETARY OF THE INTERIOR, et al.,
*Defendants-Appellants*,

BLACKFEET HEADWATERS ALLIANCE, et al.,
*Intervenors-Appellants*.

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Appeal from the United States District Court
for the District of Columbia
No. 1:13-cv-00993-RJL (Hon. Richard J. Leon)

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# PRINCIPAL BRIEF FOR THE DEFENDANTS-APPELLANTS

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties.* The plaintiff-appellee is Solenex LLC, a Louisiana Limited Liability Company.

The defendants-appellants are Vicki Christiansen, Chief, U.S. Forest Service; William Avey, Forest Supervisor, Lewis and Clark National Forest; Leanne Marten, Regional Forester, U.S. Forest Service - Region 1; Stephanie Toothman, Keeper, National Register; David Bernhardt, Acting Secretary (substituted for former Secretary Ryan Zinke pursuant to Fed. R. App. P. 43(c)(2)) and Deputy Secretary, U.S. Department of the Interior; Sonny Perdue, Secretary, U.S. Department of Agriculture; Brian Steed (substituted for Michael Nedd), Deputy Director, Policy and Programs, Bureau of Land Management (BLM), Exercising Authority of the Director; and Don Judice (substituted for Brian Steed), Acting State Director, Montana and Dakotas State Office, BLM.

The intervenors (on the side of defendants-appellants) are Blackfeet Headwaters Alliance; Glacier-Two Medicine Alliance; Montana Wilderness Association; National Parks Conservation Association; Wilderness Society; and Pikuni Traditionalist Association.

B. *Rulings Under Review.* These appeals are from an order and memorandum opinion entered by the United States District Court for the

District of Columbia (Hon. Richard J. Leon) on September 24, 2018 in case number 1:13-cv-00993-RJL, granting summary judgment to plaintiff-appellee and remanding the matter to the Department of the Interior with the order that plaintiff-appellee's oil and gas lease be reinstated.

C. *Related Cases.* The underlying case was previously on appeal to this Court from the denial of intervention (No. 14-5193) at an earlier stage of the litigation, but the appeal was dismissed voluntarily before briefing began. The current appeals are related to the appeals pending before this Court in Nos. 18-5340 and 18-5341 from a similar order issued on the same day in another case involving a different oil and gas lease on the same national forest, *Moncrief v. U.S. Department of the Interior*, No. 1:17-cv-00609-RJL (D.D.C.).

## GLOSSARY OF ACRONYMS AND ABBREVIATIONS

| | |
|---|---|
| APA | Administrative Procedure Act |
| Area | Badger-Two Medicine Area |
| BLM | Bureau of Land Management |
| Board | Interior Board of Land Appeals |
| EA | Environmental Assessment |
| EIS | Environmental Impact Statement |
| Interior | United States Department of the Interior |
| JA | Joint Appendix |
| NEPA | National Environmental Policy Act |
| NHPA | National Historic Preservation Act |
| Service | United States Forest Service |
| Tribe | Blackfeet Tribe |

## INTRODUCTION

In 2013, plaintiff-appellee Solenex LLC brought an action under the Administrative Procedure Act (APA) to compel the Department of the Interior (Interior) to issue a decision "whether to lift the suspension" of its oil and gas lease within the Lewis and Clark National Forest in northwestern Montana. *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83, 86 (D.D.C. 2015) (*Solenex I*) (JA __. The lease had been issued in 1982 by the Bureau of Land Management (BLM) pursuant to the Mineral Leasing Act. Decades of disputes over whether to allow drilling followed. These included objections by environmental groups and members of the Blackfeet Tribe (Tribe), suspensions of lease operations at the lessees' requests, multiple rounds of administrative appeals, a decision to authorize drilling that was challenged in the District of Montana, Congress's withdrawal of the area from oil and gas leasing (subject to valid existing rights), and additional studies of the impact of oil and gas production on the Tribe's traditional cultural resources.

Although nearly all of the other nearby leases were relinquished by their leaseholders, plaintiff maintained its lease and brought this action. While the case was pending, Interior formally cancelled the lease after determining that (1) the lease was issued in violation of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA); (2) validation of

the lease was not permitted due to the congressional withdrawal of the area from leasing; and (3) cancellation was necessary to protect the Tribe's traditional cultural values.

Plaintiff filed a supplemental complaint challenging Interior's decision on several grounds. The district court held that the cancellation was arbitrary and capricious due to the passage of time and Interior's failure to consider the lessee's reliance interests. *See Solenex LLC v. Jewell*, 334 F. Supp. 3d 174, 182-84 (D.D.C. 2018) (*Solenex II*) (JA __). Instead of remanding the matter to Interior, the court directed categorically that the "lease be reinstated." *Id.* at 184.

The district court's decision should be reversed. The court erred in failing to engage in any meaningful review of Interior's reasoning for its cancellation decision. Instead, the court applied a categorical rule that the passage of time alone prevents Interior from cancelling a mineral lease. That rule is incorrect, and the court's decision fails to recognize that Interior adequately explained the reasons for its decision to cancel the lease notwithstanding the amount of time that has passed since the lease was issued. Given that the drilling has never proceeded and that Interior's decisions authorizing drilling were timely challenged, any reliance interests were minimal; in any event, Interior's decision took those interests into account. Finally, even if the cancellation were arbitrary, the district court lacked authority to order that the lease be

reinstated rather than remanding the matter to the agency to reach a reasoned conclusion after undertaking the analysis the court held was lacking.

## STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 because plaintiff's claims arise under the Mineral Leasing Act, 30 U.S.C. §§ 181 et seq., as made reviewable by the APA, 5 U.S.C. § 702. The district court entered summary judgment against defendants-appellants on September 24, 2018 in an order directing the government to reinstate plaintiff's oil and gas lease. JA __[DE:131]; *see also* JA __ (memorandum opinion). Defendants filed a notice of appeal on November 20, 2018, which was timely under Federal Rule of Appellate Procedure 4(a)(1)(B) because it was filed on the 57th day after the district court entered its order. JA__[DE:135]. This Court has jurisdiction to review the district court's order under 28 U.S.C. § 1291 because the order is final with respect to the government. *See Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 332 (D.C. Cir. 1989) (holding that an order remanding a matter to an agency is immediately appealable by the government).

## STATEMENT OF THE ISSUES

1. Whether the district court erred by concluding that due to the passage of time, Interior acted arbitrarily and capriciously in cancelling the plaintiff's mineral lease, where Interior (a) recognized that its decision to issue

the lease was made with legal errors that could not be cured; (b) explained that even if it could cure those errors, leasing would be imprudent in light of the impact of oil and gas development on cultural resources, notwithstanding the minimal reliance interests of the lessee; and (c) provided notice to the lessee and acted in good faith.

2. Whether the district court abused its discretion in directing Interior to reinstate the lease rather than remanding to allow the agency to make additional findings or to provide further explanation of its decision.

## STATEMENT OF THE CASE

### A. Factual Background

The Badger-Two Medicine Area (Area) comprises 129,500 acres of land on the Lewis and Clark National Forest at the northern end of the Rocky Mountain Front in northwestern Montana. JA __[DE:68-1_at_2]. The Area, once part of the Blackfeet Indian reservation, lies adjacent to Glacier National Park and two congressionally designated wilderness areas. *Id.* The region provides habitat for wildlife such as elk, grizzly bears, wolves, lynx, mountain goats, wolverines, trout, peregrine falcons, and bald eagles; it is also home to abundant plant life. *Id.*

BLM issued oil and gas leases in June 1982 within the Area, including the lease held by plaintiff. JA __[HC884-94]. Before the lease was issued, the

Forest Service (Service) provided authorization necessary for the issuance of mineral leases in national forests, having completed an environmental assessment (EA). An EA is a "concise public document" that must "[b]riefly provide sufficient evidence and analysis for determining whether" an action would have significant environmental impacts and thereby require preparation of an environmental impact statement (EIS). 40 C.F.R. § 1508.9(a). An EA is typically "more limited" in its analysis than an EIS. *DOT v. Public Citizen*, 541 U.S. 752, 757 (2004). The lease authorizes surface occupancy on approval of a proper application by the lessee for permission to drill. *See*, *e.g.*, JA __[HC885] (granting lessee "exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits" for at least 10 years).

In 1983, plaintiff's predecessor-in-interest submitted to Interior an application for permission to drill (sometimes mentioned in the record as an "APD"). JA __[FS1-28]. A second EA was prepared, and BLM approved the application in 1985. JA __[FS32-34]. The Tribe, joined by conservation groups, filed an administrative appeal with the Interior Board of Land Appeals (Board) alleging that BLM violated NEPA by failing to prepare an EIS and to adequately evaluate cumulative effects of oil and gas development. The Board vacated the decision to allow drilling and remanded the matter for BLM to complete additional analyses of cumulative effects of its action, possible effects

of the action on a newly discovered archeological site, and other issues. *Glacier-Two Medicine Alliance*, 88 IBLA 133, 150 (1985) (JA __[FS355-78]). After the Board issued its decision, the lessee requested that BLM issue a "suspension" of lease operations, which BLM granted in October 1985. JA __[HC7159-62]. That suspension had the effect of extending the 10-year term of the lease and excusing the lessee from making rental payments. JA __[HC7159].

In April 1987, after preparing additional analysis in accordance with the remand order, BLM again found no significant environmental impact and issued a decision to reactivate the approved permission to drill. JA __[FS1109-17, HC7144]. The Tribe filed a second administrative appeal, and the Board granted a temporary stay of BLM's decision. JA __[HC1940-44]. Instead of defending its decision on the merits, BLM obtained a voluntary remand. JA __[HC1929-31]; *see also* JA __[FS1120] (Forest Service letter recommending remand), __[HC1925-27] (motion for remand). The suspension of operations remained in effect while BLM and the Service prepared a full-blown environmental impact statement (EIS), which was issued in 1990. *See* JA __[HC1932-33] (requesting confirmation of suspension), JA __[HC840] (confirming suspension).

In February 1991, BLM gave the lessee permission to drill subject to mitigation conditions. JA __[FS2185-90]. Conservation groups filed a third

administrative appeal from BLM's decision to approve the lease operation, alleging that BLM did not analyze all phases of lease development or the effects of the planned activities on grizzly bears. BLM again obtained from the Board a voluntary remand to complete an additional study of surface impacts. JA __[FS2192]. BLM continued to suspend the lessee's obligations to pay rent and to produce paying quantities of oil or gas within a 10-year period while the lessee was unable to drill. *See* JA __[FS2191] (informing lessee that an appeal from any proposed termination of suspension was "premature").

In January 1993, Interior approved the lessee's application for permission to drill once again. JA __[FS2207-43]. Several months later, in April 1993, conservation groups and groups of Blackfeet tribal members filed a complaint in the federal district court challenging the decision giving the lessee permission to drill, alleging violations of NEPA and the NHPA. *National Wildlife Federation v. Robertson*, No. 4:93-cv-00044-BMM (D. Mont. Apr. 14, 1993) (JA __[FS2266-86]).

Around the same time, Senator Max Baucus of Montana introduced the Badger-Two Medicine Protection Act, S. 853, 103d Cong. (1993), which would have prohibited any surface disturbance pursuant to oil and gas leases on federal lands within the Area until Congress determined otherwise. *Id.* § 1(a)(3)(A) (JA __[FS6083-84]); *accord* H.R. 2473, 103d Cong. § 7(a)(3)(A)

(1994). At the Senator's request, Interior extended the lease suspension through June 30, 1995 to allow time for Congress to consider the legislative proposal, which was reintroduced during the next congressional session. *See* JA __ [HC1608-09], __[HC824-25] (suspension letters); *see also* S. 723, 104th Cong. (1995) (reintroducing proposed legislation); H.R. 852, 104th Cong. § 8 (1995) (proposing designation of the Area as wilderness). Interior subsequently renewed the suspensions on an annual basis to allow the Service to complete additional historic property analysis under the National Historic Preservation Act (NHPA), and to facilitate Congress's consideration of later legislative proposals to designate the Area as wilderness and to withdraw it from disposition under the mineral leasing laws. *See* JA __[FS2412], __[FS2423-24], __[FS2431-32] (renewing suspensions).[1]

In light of the administrative suspensions and the pendency of the proposed legislation for wilderness designation, the parties in *National Wildlife Federation* secured a stay of proceedings. Eventually, the district court administratively closed the case without prejudice to the parties' right to reopen the proceedings for good cause. JA __[FS2292-93]. The termination

[1] Similar legislation was introduced in successive Congresses for about 15 years. *See* H.R. 1425, 105th Cong. § 108 (1997); H.R. 488, 106th Cong. (1999); H.R. 488, 107th Cong. (2001); H.R. 1105, 108th Cong. (2003); H.R. 1204, 109th Cong. (2005); H.R. 1975, 110th Cong. (2007); H.R. 980, 111th Cong. (2009); H.R. 3334, 112th Cong. (2011); H.R. 1187, 113th Cong. (2013).

order provided that if the parties did not seek to reopen the case within 60 days of "a determination by Congress as to whether the properties involved in this litigation should be included in a wilderness designation for the area," then the action "shall be deemed dismissed with prejudice." JA __[FS2293].

In 1998, BLM determined that the lease suspension would remain in effect until the Service completed its historic property analysis. JA __[FS2438-39]. In furtherance of its NHPA responsibilities, the Service undertook significant efforts to document traditional cultural practices in the Area, completing an ethnographic study and defining a boundary for a traditional cultural district in the vicinity of the lease. *See*, *e.g.*, JA __[DE:68-1_at_5-6] (summarizing cultural resources consultation). In 2002, the National Park Service determined that much of the Area was eligible for inclusion on the National Register of Historic Places due to its association with the significant cultural traditions, practices, and religion of the Tribe. JA __[FS6291]; *see also* 36 C.F.R. § 60.4 (setting forth criteria for listing on the Register); JA __[FS3470] (providing guidance for recognizing traditional cultural properties). The Tribe, the Service, and the State of Montana conducted further discussions and obtained additional studies to better define the boundaries of the cultural district. Those boundaries, as eventually determined, encompass the proposed well sites for the lease. JA __[DE:68-1_at_5].

In 2006, Congress passed the Tax Relief and Heath Care Act, which withdrew the federal land in the Area from "disposition under all laws relating to mineral . . . leasing," subject to valid existing rights. Pub. L. No. 109-432, § 403(b)(1)(B), 120 Stat. 2922, 3050-51. The statute also provided tax incentives for those who relinquished their leases. § 403(c), 120 Stat. at 3051.

In February 2012, plaintiff informed the Service that it would like to develop its lease and requested a timeline that started "immediately" and provided a date to begin drilling. JA __[FS3007]. On May 21, 2013, plaintiff sent the Service a letter stating that it would seek judicial relief if the lease suspension were not lifted within 30 days. JA __[FS2999]. The Service responded on June 18, 2013 by updating plaintiff on the status of NHPA consultation, but it did not indicate a date by which the agencies would decide whether to lift the suspension. JA __[FS3001], __[FS3005].

### B. Procedural History

On June 28, 2013, plaintiff filed an APA action against Interior and the Service alleging that the agencies had unreasonably delayed and withheld permission for plaintiff to conduct activity under the oil and gas lease and seeking an order compelling them to allow plaintiff to do so. JA __[DE:1].

On July 27, 2015, the district court granted summary judgment to plaintiff. *Solenex I*, 156 F. Supp. 3d at 84 (JA __). The court held that the

agencies had unreasonably delayed making a decision whether to lift the suspension of drilling operations. *Id.* at 84-85 (JA __). The court directed the agencies to propose a schedule for the "orderly, expeditious resolution of the decision whether to lift the suspension of plaintiff's lease," including identifying the tasks to be completed, "rationales for why those tasks are legally necessary," and an "accelerated timetable" for their completion. *Id.* at 86 (JA __).

The agencies proposed a schedule allowing two options for a final decision—lease cancellation or lifting the suspension. JA __[DE:53]. Interior proposed to notify the court by November 30, 2015 what course it would pursue. JA __[DE:53_at_2]. Under Interior's proposal, cancellation could be completed by March 30, 2016. *Id.* Lifting the suspension would require the preparation of a supplemental EIS, and therefore a final decision would not be reached until July 2017. JA __[DE:53_at_2-4]. On October 8, 2015, however, the district court rejected Interior's proposed schedule and ordered the agencies to make a decision whether to cancel the lease two weeks earlier than what the government had proposed. JA __[DE:57_at_4].

After completing an extensive consultation process under the NHPA—involving plaintiff, the Tribe, the State, and the Service—the Secretary of Agriculture (who oversees the Service) determined in a letter of October 30,

2015 that permitting plaintiff to drill would result in adverse effects to the Area as a traditional cultural district that could not be mitigated, and the Secretary recommended that Interior cancel the lease. *See* JA __[DE:68-1_at_6] (quoting the Secretary's letter). Around the same time, the *National Wildlife Federation* plaintiffs filed a motion to reopen that litigation. Dkt. No. 16 (Oct. 30, 2015).

In response to the district court's October 8, 2015 order, the government notified the district court on November 23, 2015 that it was initiating the process for cancelling the lease and that it was prepared to cancel the lease "as early as December 11, 2015." JA __[DE:58_at_1]. Nearly two months later, plaintiff filed papers with the district court responding to Interior's notice that it intended to cancel the lease. JA __[DE:63].

On March 17, 2017, Interior issued a written decision cancelling plaintiff's lease on the ground that it was improperly issued. JA __[DE:68-1]. With regard to NEPA, Interior explained that an EIS had not been prepared before the lease was issued, and the original EA had not considered a "no lease" alternative. Interior observed that similar flaws in NEPA documents for oil and gas leases during the same time period have been held to violate NEPA. *See* JA __[DE:68-1_at_8-9] (discussing *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983)). In addition, Interior

concluded that its NHPA analysis was deficient because it was not completed until after the lease had been issued. JA __[DE:68-1_at_11]. Moreover, Interior agreed with the recommendations by the Advisory Council on Historic Preservation and the Secretary of Agriculture that drilling on the lease area would adversely impact the Tribe's traditional cultural interests in a way that cannot be fully mitigated. [DE:68-1_at_6, 13]; *see also* JA __[FS6583-92] (Advisory Council's recommendation).

In light of these procedural deficiencies, Interior determined that the lease was "voidable" at the time it was issued and remained so because the defects were never corrected. Interior also observed that although additional NEPA analysis was prepared after the lease was issued, a proper "no lease" alternative still has never been analyzed, leaving that defect uncured as well. JA __[DE:68-1_at_12-13]. Interior concluded that it could not lawfully reissue the lease even if the violations were corrected because Congress has permanently prohibited oil and gas leasing in the Area. Interior further stated that validation of the lease was "not warranted" in light of the findings and recommendations made during the NHPA process, which revealed adverse effects to the Area's cultural resources that cannot be mitigated. JA __[DE:68-1_at_13]. Accordingly, Interior cancelled the lease, disapproved the

application for permission to drill, and offered to refund Solenex the rent that had been paid by its predecessors ($31,235.00). JA __[DE:68-1_at_14].[2]

Plaintiff filed a supplemental complaint challenging Interior's decision and alleging that Interior lacked authority to cancel the lease, that plaintiff is protected from cancellation as a "bona fide purchaser" under Interior's regulations, and that the decision was arbitrary and capricious. JA __[DE:73_at_32-37, 39-44]. Plaintiff further alleged that the Secretary could not cancel the lease due to estoppel, laches, and the statute of limitations. JA __[DE:73_at_37-39, 42]. The district court permitted intervention by conservation groups and tribal associations, some of whom were also plaintiffs in *National Wildlife Federation*. JA __[docket_sheet] (Nov. 28, 2016 minute order).

On September 24, 2018, the district court issued an opinion and order granting summary judgment to plaintiff on the ground that the cancellation decision was arbitrary and capricious. The court held that the "reasonableness" of the lease cancellation had to be judged "in light of the time that has elapsed and the resulting reliance interests at stake." *Solenex II*, 334 F. Supp. 3d at 182 (footnote omitted) (JA __). The court pointed to its prior decision in *Solenex I*

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[2] After Interior cancelled the lease, the *National Wildlife Federation* plaintiffs withdrew their request to reopen that case. *See* Dkt. No. 35 (Mar. 29, 2016).

and to the case law cited therein holding under 5 U.S.C. § 706(1) that Interior had unreasonably delayed issuing a decision whether to lift the lease suspension. The court concluded that the "same logic applies here," where the claim is brought under 5 U.S.C. § 706(2): "An unreasonable amount of time to correct an agency error, especially where the record shows that error was readily discoverable from the beginning, violates the APA." *Solenex II*, 334 F. Supp. 3d at 182 (emphasis omitted) (JA __). The court opined that an agency's delay "of course has a practical effect: it creates reliance interests," particularly so in the context of reconsidering the type of decisions at issue here, which the court stated " 'must be timely.' " *Id.* at 183 (quoting *Prieto v. United States*, 655 F. Supp. 1187, 1191 (D.D.C. 1987)) (JA __).

The district court concluded that Interior "not only failed to consider the reliance interests at stake," but also had "dismissed them out hand." *Id*. The court held that Interior's "failure here to consider plaintiff's reliance interests constituted 'arbitrary and capricious' agency action." *Id.* at 184 (JA __). In addition, the court held that the cancellation decision was issued "*without notice*" to the lessee. *Id.* (emphasis in original). Although plaintiff did not assert a contract claim, the court opined: "The Government's fulfillment of its contractual duties requires it to act in good faith. It did not do so here!" *Id*.

The district court declined to reach additional arguments by plaintiff about estoppel, laches, the statute of limitations, constitutional due process, and its status as a good-faith purchaser, as well as the questions whether the lease originally had been issued in violation of NEPA or the NHPA, and whether the Secretary had authority to cancel the lease at all. *Id.* at 183-84 & nn.7-8 (JA __). As relief, the court purportedly "remanded" the matter to Interior with instructions that the lease be reinstated. *Id.* at 184 (JA __). The court's separately issued order, however, directs "that plaintiff's lease be reinstated" without mentioning a remand. JA __[DE:131].[3]

## SUMMARY OF ARGUMENT

1. Contrary to fundamental principles of judicial review, the district court ignored the reasoning that Interior provided in support of its lease cancellation decision. Instead, the court imposed a categorical rule that Interior's delay in determining whether to lift the suspension was unreasonable and necessarily rendered the cancellation decision arbitrary. Based only on its own assumption that, "of course," unreasonable delay creates reliance

[3] The same district court issued a similar decision in *Moncrief v. U.S. Department of Interior*, 339 F. Supp. 3d 1 (D.D.C. 2018), *on appeal*, No. 18-5340, a related case in which Interior cancelled a different lease in the same geographic area. *Moncrief* also held that the lessee was protected from cancellation due to its status as a bona fide purchaser. *Id.* at 10-11. The court did not reach that legal issue here. *Solenex*, *II*, 334 F. Supp. 3d at 184 (JA __). In any event, the issue arises in a factual and procedural setting different from that in *Moncrief*.

interests, the court held that Interior had arbitrarily failed to consider those interests. That conclusion was incorrect.

First of all, the court erroneously conflated the standards for compelling an agency to make a decision that has been "unreasonably delayed" with the standards for determining whether agency action, once it is finally taken, is "arbitrary and capricious." Delay alone does not render agency action arbitrary. But in any event, Interior rationally explained why the legal errors surrounding issuance of the lease, the congressional withdrawal of the Area from leasing, and the impacts of oil and gas development on cultural resources all warranted cancelling the lease notwithstanding the lapse of time and minimal reliance interests.

Interior's authority to cancel a lease notwithstanding any delay or reliance interests that are implicated flows from Interior's plenary authority conferred by Congress to manage federally owned minerals, so long as fee title remains in the United States. Moreover, the record contains no evidence of any substantial reliance interests by plaintiff. In any event, Interior reasonably accounted for those interests, which are diminished given the nature of the lessee, its long involvement with the lease, and its knowledge that the lease has been challenged through successive administrative appeals and a civil action. Finally, the district court's conclusion that the lease was cancelled "without

notice" to Solenex and in bad faith is unsupported by the record. The district court's decision was erroneous and should be reversed.

2. Even if the district were correct on the merits, the court erred in directing Interior to reinstate the lease. The proper remedy under those circumstances would have been a remand to allow Interior to consider any reliance interests identified by plaintiff and to make a new decision based upon whatever further record is created before the agency. By ordering the lease to be "reinstated," the district court left no room for Interior to reach a different conclusion. That was an abuse of discretion. At a minimum, therefore, the district court's order should be vacated and the matter should be remanded for appropriate proceedings before the agency.

## STANDARD OF REVIEW

The district court's summary judgment is reviewed de novo. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 918 (D.C. Cir. 2008). Interior's decision to cancel the lease is reviewed for whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The district court's remedy is reviewed for abuse of discretion. *13th Regional Corp. v. U.S. Department of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980) (mandamus of agency officials). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

## ARGUMENT

### I. The district court erred in concluding that the lease cancellation decision was arbitrary and capricious.

#### A. The district court erred in holding that delay alone may be the basis for determining an agency action to be arbitrary and capricious.

The district court held that Interior's lengthy delay, in itself, rendered the agency's decision to cancel the lease arbitrary and capricious: "An unreasonable amount of time to correct an alleged agency error" that was "readily discoverable from the beginning, violates the APA." *Solenex II*, 334 F. Supp. 3d at 182 (emphasis omitted) (JA __). In so holding, the district court relied on the discussion in its own prior ruling that Interior had unreasonably delayed making a decision whether to lift the suspension. *See id.* (citing *Solenex I*, 156 F. Supp. 3d at 84 (JA __)). But the court ignored the fact that its prior decision responded to the delay by ordering the agency to decide *whether* to lift the suspension (which it did), and the court ignored the agency's reasons for canceling the lease notwithstanding the delay. That was incorrect. Delay alone does not categorically render Interior's decision arbitrary and capricious on the facts of this case.

In determining whether an agency action is arbitrary or capricious, a reviewing court must examine the agency's explanation for its decision: the "reasons stated by the agency for its actions are an essential element of judicial

review." *City of Gallup v. FERC*, 702 F.2d 1116, 1123 (D.C. Cir. 1983). And "when there is a contemporaneous explanation of the agency decision, the validity of that action must 'stand or fall on the propriety of that finding.'" *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 549 (1978) (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (holding that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained").

The district court here plainly erred, because it failed to review the actual —and substantial—reasoning that Interior provided for cancelling the lease. The court concluded that it "need make no finding on whether there was in fact compliance with NEPA or NHPA" when the lease was originally issued, *Solenex II*, 334 F. Supp. 3d at 184 n.8 (JA __), even though Interior's decision was based in significant part on a determination that it had not complied with those statutes. Interior explained that the record demonstrated violations of NEPA in issuing the lease and in approving the application for permission to drill. Interior explained that it should have prepared an EIS that analyzed both cumulative effects from leasing and a true no-action alternative when it issued the lease, consistent with *Peterson, Conner*, and *Bob Marshall Alliance*. *See* JA __[DE:68-1_at_8-11]. Interior further explained with respect to the NHPA that

subsequent studies have demonstrated that drilling operations would adversely affect a traditional cultural district of the Tribe in a way that "cannot be mitigated." JA __[DE:68-1_at_13].

Interior still further explained that even if those legal flaws in the agency's procedural obligations could be cured through additional analyses, lifting the suspension would "in effect reissue" the lease, *id.*, an outcome that is now prohibited by the statutory withdrawal of the Area from disposition under the mineral leasing laws, 120 Stat. at 3051. Finally, Interior concluded that the facts "do not warrant" drilling operations; rather, cancellation is "appropriate given the findings and recommendations made during the NHPA consultation" by the Advisory Council and the Secretary of Agriculture. JA __[DE:68-1_at_13]; *see also*, *e.g.*, JA __[FS6583-92] (providing Council's comments); JA __[DE:68-1_at_6] (quoting Agriculture's recommendation). Interior concluded, in light of those findings and recommendations, that it does "not believe there is a basis" for the lessee, the federal agencies, and the Tribe to reach an agreement that would protect the Area's cultural resources by fully mitigating lease impacts while still allowing oil and gas development to proceed. JA __[DE:68-1_at_13]. That comprehensive explanation was neither arbitrary nor capricious.

The district court opined that Interior "apparently ignored the discretion with which agencies apply procedural statutes like NEPA and [the] NHPA as part of the consultation process." *Solenex II*, 334 F. Supp. 3d at 184 n.8 (JA __). But the district court's conclusion is doubly wrong. First, the court was not charged with reviewing the original lease decision to determine whether as a de novo matter it complied with NEPA and the NHPA. Rather, the court was charged with reviewing the rationale supporting the current cancellation decision under the APA to determine whether it was arbitrary or capricious. Under that deferential standard, "a court is not to substitute its judgment for that of the agency." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 30 (1983). Thus, Interior's cancellation decision must be upheld even if reasonable minds could differ about whether the original lease decision violated NEPA and the NHPA.

Second, Interior's cancellation decision made the distinction that the lease was voidable rather than void ab initio. JA __[DE:68-1_at_12]. As Interior explained (JA __[DE:68-1_at_7]), that distinction is premised on an understanding that a lease is void only where it is issued outside Interior's statutory authority altogether. Where, however, the lease was not issued in compliance with proper procedures, it is voidable at the agency's discretion. *See*, *e.g.*, *Clayton W. Williams, Jr.*, 103 IBLA 192, 210 (1988) ("[S]ince NEPA is

primarily procedural, even if a lease were issued in violation thereof, such a lease would be merely voidable rather than void."). That distinction accounts for the very agency discretion that the district court incorrectly regarded Interior as having "ignored." *Solenex II*, 334 F. Supp. 3d at 184 n.8 (JA __).

By applying a categorical rule that Interior's delay renders its cancellation decision arbitrary and capricious, the district court conflated judicial review of agency action with its authority to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The proper judicial response to unreasonably delayed agency action is to order the agency "to take action upon a matter, without directing *how* it shall act." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). Once an agency has undertaken the final action that was sought to be compelled, however, the agency action is reviewable under Section 706(2) for whether it is "arbitrary" or "capricious." 5 U.S.C. § 706(2).

Whereas Section 706(1) expressly addresses agency "delay," Section 706(2) makes no mention of delay as a basis for holding agency action to be arbitrary or capricious as a categorical matter. Nor is delay among the other grounds expressly listed in Section 706(2) for setting aside agency action. Conceivably, a court might consider a long period of delay—if left unexplained or if explained irrationally—as one factor in determining whether an agency

action is arbitrary and capricious. *Cf. Dayton Tire v. Secretary of Labor*, 671 F.3d 1249, 1253 (D.C. Cir. 2012) (stating that unreasonably delayed action may be regarded as "not in accordance with law"). Delay alone, however, "is not enough; it is the consequences of the [agency's] delay that dictate whether corrective action" by a court to set aside the agency's decision "is needed." *Id.* (internal quotation marks and brackets omitted).

As demonstrated in Section I.B.2 below (pp. 31-38), Interior adequately addressed the reasons for and the possible consequences of the delay, and it reasonably determined that those consequences (if any) were outweighed by Interior's responsibility to protect the Tribe's cultural district from the adverse effects of future oil and gas development that might occur under the lease.

### B. The district court erred in holding that Interior's cancellation decision was arbitrary and capricious due to a failure to consider plaintiff's reliance interests.

The district court assumed that an agency's delay necessarily "creates reliance interests" that must be taken into account, and it concluded that Interior acted arbitrarily because it had both "failed to consider the reliance interests" and "dismissed them out of hand." *Solenex II*, 334 F. Supp. 3d at 183 (JA __). The court's emphasis on unspecified reliance interests is misplaced for two reasons. First, Interior is not stripped of its authority to correct legal errors in its public land management decisions merely because, due to the passage of

time, reliance interests might be present. Moreover, to the extent that reliance interests might be relevant to a decision to correct legal errors in issuing the lease, the record demonstrates that plaintiff here had little to no reasonable expectation of reliance on the suspended lease. In any event, Interior's cancellation decision reasonably accounted for any such reliance.

### 1. Interior retains authority to cancel the lease notwithstanding any reliance interests.

Contrary to the district court's decision, any reliance interests stemming from Interior's delay in canceling the lease do not eliminate the agency's authority to reconsider its prior decision, much less correct erroneous decision making. *See Dixon v. United States*, 381 U.S. 68, 72-73 (1965) (observing that an agency official may retroactively correct mistakes of law "even where a [party] may have relied to his detriment on the [official's] mistakes"); *Belville Mining Co. v. United States*, 999 F.2d 989, 999 (6th Cir. 1993) (observing that a private party's "reliance on the [agency] determinations" recognizing valid existing mining rights in that party "does not preclude [Interior's] reconsideration of this decision"); *Sangre de Cristo Development Co. v. United States*, 932 F.2d 891 (10th Cir. 1991) (rejecting claims stemming from the government's rescission of approval of a lease issued seven years earlier between an Indian tribe and a third party based on NEPA violation).

Here, the district court stated that it did not reach the question whether the Interior had authority to cancel the lease. *Solenex II*, 334 F. Supp. 3d at 181 (JA __). Nevertheless, the court couched its decision in terms of whether the cancellation was "arbitrary and capricious" as a result of Interior's "failure to consider the reliance interests," *id.*at 182 (JA __), which the court *presumed* ("of course") arise from the passage of time, *id.* at 183 (JA __). But however framed, the court's ruling categorically divested Interior of authority to cancel a mineral lease after the passage of a requisite amount of time. For the following reasons, that ruling was erroneous.

Hypothesized reliance interests stemming from agency delay cannot divest Interior of authority to correct *legal defects* in agency decisions that are timely challenged. Otherwise, agencies would be bound to defend their illegal actions and would lack authority to recognize and correct errors. Here, for example, Interior's decision to permit drilling was timely challenged in the *National Wildlife Federation* action in the District of Montana. The plaintiffs in that action attempted to reopen those proceedings after the court in *Solenex I* ordered Interior to make a decision whether to lift the suspension. *See* Dkt. No. 16 (Oct. 30, 2015). If the proceedings had been reopened, the district court's ruling would have severely and unjustifiably compromised the

government's authority to recognize its errors and settle that litigation by seeking a voluntary remand to revoke the lease and drilling permission.

In briefly mentioning Interior's reconsideration authority, *Solenex II*, 334 F. Supp. 3d at 181 (JA __), the district court cited authority that an agency may exercise its authority to reconsider past decisions only if it does so "in a timely fashion." *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014). That decision is inapposite, however, because it held that an agency's "inherent reconsideration authority does not apply in cases where Congress has spoken" as to the process that applies. *Id.*; *accord Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 245 (D.D.C. 2011), *cited in Solenex II*, 334 F. Supp. 3d at 181 n.5 (JA __) (holding that a statute that provides administrative procedures "to amend a resource management plan" with the opportunity for public involvement implicitly foreclosed Interior from withdrawing a plan absent compliance with those procedures). Neither the Mineral Leasing Act nor any other statute even addresses, much less displaces, Interior's authority to cancel a lease for legal deficiencies at the time it was issued.

As this Court has recognized, the Supreme Court has "confirmed the Secretary's authority to cancel a 'lease administratively for invalidity at its inception,' even after the lease had been issued." *Silver State Land, LLC v. Schneider*, 843 F.3d 982, 990 (D.C. Cir. 2016) (quoting *Boesche v. Udall*, 373

U.S. 472, 476 (1963)). Based on the Secretary's "plenary authority over the administration of public lands" and with nothing in any relevant statute limiting that authority, *Silver State* held that the Secretary had "authority to cancel an invalid land sale . . . at least until the issuance of the land patent." *Id.* Because "a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee," *Boesche*, 373 U.S. at 478, it follows that the greater authority to cancel a sale of the entire fee necessarily includes the lesser authority to cancel a lease of the mineral estate. In addition, as discussed below (p. 37), if lease cancellation breaches a contract or results in a taking of property without just compensation, plaintiff might be able to pursue claims in another forum. But that possibility does not undercut the rationality of the Secretary's decision to cancel the lease.

The district court mistakenly relied on *Texas Oil & Gas Corp. v. Watt*, 683 F.2d 427 (D.C. Cir. 1982), as a case concerning facts "similar" to this case. *Solenex II*, 334 F. Supp. 3d at 182-83 (JA __). In that case, the Secretary cancelled leases based on a regulation that "requires the rejection of applications" if the land was not subject to the public land laws. 683 F.2d at 431-32 (citing 43 C.F.R. § 2091.1 (1981)). When the lease applications were filed, Interior's regulations contained language similar to a "statutory prohibition on leasing military lands" that Congress later eliminated. *Id.* at

429. Although the Secretary was revising the regulation in conformity with the statutory repeal, he nevertheless cancelled the leases based on the rule in effect when the leases were sought. The Court reversed, holding "that the Secretary was mistaken in believing that he was required to act as he did." *Id.* at 431.

*Texas Oil* provides no support for the district court's conclusion that reliance interests presumptively arise out of agency delay or that such interests invariably render a lease cancellation arbitrary and capricious. Although the district court pointed to a statement from *Texas Oil* that the Secretary had made an "eleventh-hour" change in the "interpretation of his duty" as evidence that the lease cancellation here was arbitrary, that statement was both inapposite and in any event was dictum because it was not essential to the judgment. *Id.* Although the lateness of the change was an *additional* reason for *Texas Oil*'s holding that the interpretation was "owed no great degree of deference," *id.*, the more salient point was that deferring to the Secretary would have required interpreting the Mineral Leasing Act "in a way that defies common sense and the ordinary meaning of words." *Id.* at 433. Here, by contrast, the district court identified nothing in Interior's decision that contradicts the plain meaning of any statutory text.

Other cases cited by the district court are likewise readily distinguished. *See Solenex II*, 334 F. Supp. 3d at 178-79 (JA __) (citing *Encino Motorcars, LLC v.*

*Navarro*, 136 S. Ct. 2117 (2016), and *American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017)). *Encino Motorcars* declined to grant deference to a regulation that was inconsistent with an agency's prior position because the agency "gave almost no reasons at all" for its changed interpretation other than "conclusory statements" that "do not suffice to explain its decision." 136 S. Ct. at 2127. *American Wild Horse* held that the Forest Service acted arbitrarily by eliminating the designation of an area for managing wild horses while failing "even to acknowledge its past practice and formal policies" to the contrary, "let alone to explain its reversal of course." 873 F.3d at 927. Here, by contrast, Interior acknowledged that its decision had changed and provided a detailed explanation for concluding that the original decision was both legally flawed and inappropriate. JA __[DE:68-1_at_8-13]; *see also supra* pp. 20-21.

Finally, the district court's reliance on the nonbinding decision in *Prieto* for the proposition that the passage of time (no mention of reliance interests) may invalidate an agency's reconsideration decision, *Solenex II*, 334 F. Supp. 3d at 183 (JA __), is misplaced. *Prieto* relied on *Albertson v. FCC*, 182 F.2d 397, 398-99 (D.C. Cir. 1950), as holding that an agency may reconsider a decision only within the time allowed for an administrative appeal. 655 F. Supp. at 1191. *Albertson*, however, does not support that proposition. The case held that

it was *sufficient* to sustain an agency's reconsideration authority that the agency issued its new decision within the time allowed for appealing the original decision. It did not, however, hold that such timing was *required*.

In sum, the district court erred in holding that the mere passage of time, and the mere existence of some reliance interest created by the passage of time, renders an agency decision arbitrary and capricious as a matter of law.

### 2. Interior reasonably accounted for any reliance interests, which were negligible.

Even if reliance interests are *relevant* to whether Interior's cancellation of the plaintiff's mineral lease was arbitrary and capricious, Interior took those interests into account and reasonably explained why they were outweighed by the need to address the legal errors associated with issuing the lease and the need to protect the Tribe's cultural resources.

Reliance interests may be relevant in assessing the propriety of an agency change in *policy*. *See*, *e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (discussing what level of explanation an agency must provide "when its prior policy has engendered serious reliance interests that must be taken into account"). Even if a lease cancellation made to correct a legal error can be considered a change in *policy*, Interior need not satisfy an especially "demanding burden of justification" for its decision. *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016). The agency "need not demonstrate to a

court's satisfaction that the reasons for the new policy are better than the reasons for the old one." *Fox*, 556 U.S. at 515 (emphasis omitted). Rather, to offer "a satisfactory explanation" for its action—"including a rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43 (internal quotation marks omitted)—the agency must give "a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy," *Fox*, 556 U.S. at 516.

Assuming that it had a responsibility to take "reliance interests" into account in its reconsidering of the lease decision, Interior's decision reasonably accounts for any such interests that plaintiff might claim. Interior's decision demonstrates that drilling operations have been suspended nearly since they were first granted, JA __[DE:68-1_at_3-5]; that plaintiff had ample notice that the original lease could be set aside because of legal flaws, JA __[DE:68-1_at_8-12]; and that plaintiff would receive a full refund of the rent that had already been paid toward the lease, JA __[DE:68-1_at_13-14]. That explanation reasonably addressed any potential reliance by plaintiff on the expectation of developing the lease.

Any such "reliance interests" were negligible here for several reasons. First, the lease "has never been developed," JA __[DE:68-1_at_13], principally because lease operations were suspended for three decades. *See supra* pp. 6-9.

That suspension was originally (and successively) requested by the lessee, who benefited from it in two major respects. *See* JA __[HC7159] (granting suspension); JA __[HC7160-62] (requesting suspension following the Board's decision in the first administrative appeal); JA __[HC1932-33] (requesting confirmation of suspension after BLM completed the remand). First, the suspension tolled the 10-year period within which the lessee was required produce "paying quantities" of oil and gas. JA __[HC885]; *see also* 43 C.F.R. § 3103.4-4(b) ("The term of any lease shall be extended by adding thereto the period of the suspension"). Second, the suspension halted the lessee's obligation to pay rent. *See id*. § 3103.4-4(d) ("Rental and minimum royalty payments shall be suspended during any period of suspension of all operations and production"). Those benefits reasonably explain why the lessees requested or acquiesced in the suspensions of operations while the drilling permission was under challenge.

Plaintiff acquired the lease in 2005 with full knowledge of the suspensions that were then (or had been) in effect. JA __[DE:68-1_at_1 n.2]. Lessees have constructive notice of the legal challenges of record to the leases that they hold or acquire through assignment. *See*, *e.g.*, 43 C.F.R. § 3108.4 ("All purchasers shall be charged with constructive notice as to all pertinent regulations and all Bureau records pertaining to the lease and the lands

covered by the lease."); *accord Winkler v. Andrus*, 614 F.2d 707, 711 (10th Cir. 1980). In addition, plaintiff had *actual* knowledge of the suspension because the company was formed and is managed by Sidney Longwell, the original holder of the lease. JA __[DE:68-1_at_1 n.2, DE:24-2_at_32].

Longwell's longstanding involvement with the lease significantly diminishes any reliance interests that his company may proffer. Longwell was granted the lease in 1982. JA __[DE:68-1_at_1]. In 1983, he "entered into an agreement with American Petrofina Company" to pursue oil and gas production on the leased property. JA __[FS002760]. After transferring the lease to American Petrofina Company in 1983, Longwell retained a monetary interest in any oil and gas that might have been produced under the lease. JA __[DE:24-2_at_33]. In August 1985, he was listed as a recipient of the letter by which American Petrofina Company first requested a suspension of operations on the lease. JA __[HC7162]. Indeed, Longwell sent a letter to then-Vice President Cheney on September 10, 2001, recounting Longwell's knowledge of the lease history, including the "suit seeking judicial review" of Interior's drilling approval, *National Wildlife Federation*. JA __[FS002761]. Interior responded to a congressional inquiry about Longwell's letter about a month later by informing him that the "completion of the Section 106 process" under

the NHPA "will determine what happens" to the application for permission to drill. JA __[FS2756].

Longwell's familiarity with the lease history is readily imputed to plaintiff. According to Longwell, he incorporated the company (which "has never had any employees") and serves as its manager. JA __[DE:77-1_at_2]. The lease at issue is "the only substantive asset that Solenex ever owned." *Id.* Longwell held the lease when he assigned it to plaintiff. JA __[DE:68-1_at_1 n.2]. Prior to that, the lease was held by American Petrofina Company (renamed Fina Oil and Chemical Company), which acquired it from Longwell (with whom it had a production-interest agreement). *Id.*; *see also supra* p. 34. In other words, Longwell has lived with the vicissitudes of the lease throughout its history. Plaintiff was formed by Longwell and can reasonably be expected to share his knowledge. Moreover, throughout the period that the lease was suspended, plaintiff or its predecessors could have brought suit to compel Interior to make a decision whether to lift the suspension, but they did not.

Any reliance interests that plaintiff might possess are also diminished in view of the legal deficiencies that Interior identified in the original leasing and drilling decisions. The pertinent NEPA case law at the time, as well as the designation of the Area as a traditional cultural district under the NHPA, rendered issuance of the lease legally questionable at best. *See*, *e.g.*, *Peterson*,

717 F.2d at 1415 (holding that Interior "must either prepare an EIS prior to leasing or retain the authority to preclude surface disturbing activities until an appropriate environmental analysis is completed"). Accordingly, plaintiff's predecessors (including its manager) and interested members of the public and were on notice decades earlier that there might be problems with the NEPA and NHPA compliance: the drilling approval for the lease was challenged in multiple administrative appeals, resulting in several administrative remands. Furthermore, when the final drilling approval that Interior issued was challenged in district court, the court denied the government's motion to dismiss. *National Wildlife Federation*, Dkt. No. 4 (July 28, 1994). Under these circumstances, plaintiff is reasonably charged with awareness of the potential legal flaws in the original decision to issue the lease and of the possible consequences if the NEPA or NHPA compliance were found deficient.

In any event, Interior's cancellation decision acknowledges the reliance interests that plaintiff may have had by offering to refund plaintiff the lease payments that were made between the time the lease was issued in 1982 and when it was first suspended in 1985. JA __[DE:68-1_at_14]. The refund payment provides plaintiff the full amount of rent that its predecessors paid Interior over the life of the lease. And as a practical matter, that amount ($31,235) is roughly equivalent to the expenses (other than attorneys' fees) that

Longwell states that he and plaintiff incurred in seeking to develop the lease. *See* JA __[DE:24-2_at_36] (estimating that Longwell and Solenex spent "over $35,000," plus the cost of posting a $10,000 bond).

Of course, a lease cancelled after a period of delay may conceivably give rise to a claim under contract law or a claim for a taking of property without just compensation. Either claim may conceivably support an action by a lessee for monetary relief in the United States Court of Federal Claims (CFC). *See* 28 U.S.C. § 1491(a)(1) (granting the CFC jurisdiction over claims "founded either upon the Constitution . . . or upon any express or implied contract with the United States"); *see also Franklin-Mason v. Mabus*, 742 F.3d 1051, 1055 (D.C. Cir. 2014) (recognizing a "presumption of exclusive jurisdiction" in the CFC over "contract disputes seeking more than $10,000 in damages" (internal quotation marks and citation omitted)). The potential availability of such a claim, however, undercuts the availability of equitable relief in an action brought under the APA, given the "bedrock principle of the American legal system" that such relief "is not available when there is an adequate remedy at law." *Cohen v. United States*, 650 F.3d 717, 738 n.2 (D.C. Cir. 2011).

Finally, the district court cited no evidence of reliance by plaintiff on an expectation that it might develop the lease. Plaintiff raised the argument in a footnote to its summary judgment motion and only in slightly more detail in its

reply, which referred to declarations that Longwell previously submitted to the court rather than to the administrative record. *See* JA __[DE:89-1_at_28-29 n.17] (referencing an unspecified amount of "time and money invested by Solenex in seeking to develop the lease"); *see also* JA __[DE:99_at_48] (citing JA __[DE:24-2_at_32-36], Dkt. Nos. 77 to 77-3), JA __[DE:99_at_49-51, 58] (additional statements in reply). Given that half-hearted presentation, along with plaintiff's failure to identify where it presented evidence of reliance interests to Interior, the cancellation decision should not have been invalidated for failure to consider reliance interests. *Cf. Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 719 (D.C. Cir. 2016) (holding that consideration of reliance interests was forfeited by failure to raise the issue with the agency).

### C. Plaintiff received notice of the cancellation.

The district court attempted to bolster its conclusion that the cancellation was arbitrary by twice stating that the decision was made "without notice" to plaintiff. *Solenex II*, 334 F. Supp. 3d at 181-82, 184 (JA __) (emphasis omitted). Those statements are refuted by the record.

In its first summary judgment order on July 27, 2015, the district court directed Interior to propose a schedule for reaching a "resolution of the decision *whether* to lift the suspension of plaintiff's lease." *Solenex I*, 156 F. Supp. 3d at 86 (JA __) (emphasis added). The order reasonably suggests that

Interior might choose *not* to lift the suspension. More expressly, on October 8, 2015, the court rejected Interior's proposed schedule and once again ordered Interior to decide "whether to initiate the process for cancellation of the lease." JA __[DE:57_at_3]. The court's order referred to Interior's "long-awaited lease cancellation decision," and it required the agency to resubmit a "proposed *accelerated* schedule" setting forth tasks to be completed "either under the process for cancellation, or . . . before lifting the suspension." JA __[DE:57_at_4] (emphasis in original). By that time, the reasonable expectation was established that Interior might decide cancellation was the appropriate course.

On November 23, 2015, Interior filed a notice with the district court announcing its plan to cancel the lease: "BLM has concluded that proceeding with administrative lease cancellation under its inherent authority to manage public lands is the most appropriate course of action." JA __[DE:58_at_5]. Interior was "prepared to cancel the Lease as early as December 11, 2015." JA __[DE:58_at_1]. At the joint request of the parties, however, the court stayed the litigation for some *six weeks* so that the parties could discuss settlement. The court ordered that Interior "shall not finalize any action to cancel Solenex's lease until after the stay is lifted." JA __[DE:60_at_1]; *see also* JA __[docket_sheet] (minute order extending the stay).

On January 19, 2016, the court lifted the stay. That same day, plaintiff filed a 33-page response to Interior's notice that the agency intended to cancel the lease. Plaintiff argued that Interior had no authority to cancel the lease, that it could not change positions on whether NEPA compliance had been adequate, that Interior was estopped from cancelling the lease, and that a NEPA analysis was required before the lease could be cancelled. JA __[DE:63_at_15-43]. On March 16, 2016, the district court directed Interior to produce a written decision on lease cancellation within 24 hours. JA __[DE:69_at_9]. The court rejected Interior's request for additional time, JA __[DE:69_at_9-10], and Interior cancelled the lease the next day. JA __[DE:68-1].

Plaintiff actively participated in the district court proceedings and was aware at least as early as November 23, 2015 (nearly four months in advance) that Interior planned to cancel the lease. Significantly, plaintiff filed a lengthy legal memorandum arguing against cancellation nearly two months before Interior issued its written decision. *See* JA __[DE:63_at_15-43]. That filing alone refutes the district court's conclusion that the lease was cancelled "without notice" to the lessee. *Solenex II*, 334 F. Supp. 3d at 181-82, 184 (JA __) (emphasis omitted). Moreover, the district court adamantly rejected Interior's proposals for additional time to make its decision. Under those

circumstances, Interior cannot reasonably be faulted for the timing of its notification to plaintiff.

Because the district court's conclusion that plaintiff was "without notice" is clearly incorrect, it provides no basis for holding Interior's lease cancellation to be arbitrary and capricious.

**D. Interior acted in good faith when cancelling the lease.**

The district court further stated that "the Government's fulfillment of its contractual duties requires it to act in good faith. It did not do so here!" *Solenex II*, 334 F. Supp. 3d at 18 (JA __). That conclusion—that Interior cancelled the lease in bad faith—is arguably dicta; in any event, it is without basis in the record.

The government's contractual obligations are governed by the law applicable to contracts between private parties. *Mobil Oil Exploration & Producing S.E., Inc. v. United States*, 530 U.S. 604, 607 (2000). "'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.'" *Alabama v. North Carolina*, 560 U.S. 330, 351 (2010) (brackets omitted) (quoting *Restatement (Second) of Contracts* § 205 (1981)). Bad faith that violates the implied contractual covenant may include "lack of diligence and slacking off." *Restatement* § 205, cmt. d. Although an implied covenant of good faith might inform the terms and obligations in the

lease agreement, it may not expand or contradict them. *See*, *e.g.*, *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152-53 (D.C. Cir. 1984) (Scalia, J.) (observing that the covenant seeks to honor "the reasonable expectations created by the autonomous expressions of the contracting parties").

Neither the district court nor plaintiff points to any lease provision imposing such an "implicit contractual restriction" on Interior's authority to cancel the lease. *Id.* at 1153 (discussing cases in which "the concept of good faith was a surrogate for an implied obligation or limitation"). In any event, Interior did act in good faith. It complied with the court's order to issue a written decision whether to lift the lease suspension, and it set forth a detailed, rational explanation of the reasons for cancelling the lease. The court identified nothing other than the delay as a reason for finding bad faith. But again, the court never engaged with Interior's actual reasoning for deciding to cancel the lease. Nothing in that decision supports a conclusion that Interior failed to act in good faith here. To the contrary, Interior's cancellation decision forthrightly acknowledges legal deficiencies in its past decisions, which had long been alleged by others but never previously conceded by the agency.

Nor is the district court's bad faith determination saved by its reliance on *United States v. Winstar Corp.*, 518 U.S. 868 (1996). *Solenex II*, 334 F. Supp. 3d at 18 (JA __). The question presented in *Winstar* was whether private parties to a

contract with the government should be "denied a remedy *in damages*" for breach of contract unless they demonstrated that the government had surrendered its sovereign power (i.e., to enact legislative changes to regulatory requirements that were the subject of the contract) in unmistakable terms. 518 U.S. at 884 (emphasis added). In answering that question in the negative, the plurality observed that the contracts "do not purport to bind the Congress from enacting regulatory measures," and that the private parties "seek no injunction against application of the law to them." *Id.* at 881. The private parties "simply claim that the Government assumed the risk that subsequent changes in the law might prevent it from performing, and agreed to *pay damages* in the event that such failure to perform caused financial injury." *Id.* at 871 (emphasis added). Whatever implications *Winstar* might have for the government to pay contract damages when an agency changes its policy, the case provides no support for a conclusion that Interior acted in bad faith when it cancelled plaintiff's lease.

* * *

In sum, the district court erred in holding that Interior acted arbitrarily and capriciously by cancelling plaintiff's lease. Interior rationally explained the basis for its decision, and it took plaintiff's reliance interests into account. The district court's conclusions that Interior cancelled the lease without notice to

the lessee and acted in bad faith are clearly incorrect and have no basis in the record. Therefore, the court's decision should be reversed.

## II. The district court abused its discretion in ordering the lease to be reinstated rather than remanding the matter for Interior to address issues that the court held the agency overlooked.

When a district court holds an agency's decisions to be arbitrary and capricious in violation of the APA, it should remand the matter to the agency for reevaluation of its conclusions. *See INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."); *Pension Benefits Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (holding that "remanding to the agency" for a fuller explanation of the agency's reasoning at the time of the agency action "is in fact the preferred course"); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("[I]f the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"); *Camp*, 411 U.S. at 143 (opining that if an agency official's finding is "not sustainable on the administrative record made, then the [official's] decision must be vacated and the matter remanded to him for further consideration"); *accord PPG Industries, Inc. v. United States*, 52 F.3d 363, 366 (D.C. Cir. 1995).

Here, the district court held that Interior's cancellation decision was unreasonable in light of the passage of time because Interior did not consider the lessee's reliance interests. As shown at length in Part I, that decision was erroneous and should be reversed. But if this Court were to agree with the district court, the proper remedy should have been a remand to Interior for consideration of reliance interests and to take appropriate further action. The district court, however, purportedly remanded the cases "with the order that the . . . lease be reinstated." *Solenex II*, 334 F. Supp. 3d at 184 (JA __). The court's order does not even *mention* a remand, however; it states only that it is "ORDERED that plaintiff's lease be reinstated." JA __[DE:131]. That direction was an abuse of discretion.

Under the APA, courts may "hold unlawful" and "set aside" agency actions that are determined to be arbitrary and capricious. 5 U.S.C. § 706(2). That is not what the district court did here, however. Instead, it issued a mandatory injunction ordering Interior to reinstate the lease. But that remedy is available only where the duty to take the requested action is "clear and undisputable." *13th Regional Corp.*, 654 F.2d at 760 (internal quotation marks omitted). There is no such duty here, where Interior plainly has authority to cancel a lease, even if the Court concludes that this particular lease cancellation was arbitrary and capricious. In that circumstance, the proper

remedy is to set aside or vacate the cancellation decision. *See*, *e.g.*, *LTV Corp.*, 496 U.S. at 654; *Camp*, 411 U.S. at 143. Even injunctive relief—much less a mandatory injunction—is typically not warranted as a remedy. *See*, *e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010) ("If a less drastic remedy (such as partial or complete vacatur of [an agency's challenged] decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted."); *North Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008) ("Only in extraordinary circumstances do we issue detailed remedial orders, and this maxim applies equally to district courts acting in an agency review capacity.").

The district court's remedy also violates basic legal principles applicable to orders compelling agency officials to act. Under those principles, a claim to compel agency action "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Southern Utah*, 542 U.S. at 64 (emphasis in original). Furthermore, a court compelling agency action may do so only "without directing how" the agency must act. *Id.* at 66. Where, as here, "an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *Id.* at 65. In other words, courts may "not . . . direct the

exercise of judgment or discretion" by the agency. *Miguel v. McCarl*, 291 U.S. 442, 451 (1934); *see also Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (holding that when considering nondiscretionary duty claims, the "only required judicial role" is "to make a clear-cut factual determination of whether a violation did or did not occur").

The district court violated those principles by ordering "that plaintiff's lease be reinstated," JA __[DE:131], based on the court's conclusion that Interior failed to consider the lessee's reliance interests or to provide adequate notice. The court identified no statute or regulation imposing a "a specific, unequivocal command" upon Interior to keep the lease in place, nor are we aware of any such statutory or regulatory command. *Southern Utah*, 542 U.S. at 63 (internal quotation marks omitted). Yet the relief directed by the district court prevents Interior from ever reaching a different result after correcting the purported deficiencies identified by the court.

Not only that, but the district court's order prevents Interior from correcting the deficiencies the agency *itself* identified in its own NEPA and NHPA compliance for the original lease. That consequence may have additional significance if the *National Wildlife Federation* plaintiffs succeed in reopening their case or if another organization with standing files a new challenge to subsequent administrative action (like allowing plaintiff's lease

operations to proceed) flowing from the district court's direction to reinstate plaintiff's lease. Under such circumstances, Interior would be unable to cancel the lease as part of a settlement or a voluntary remand. Yet the district court expressly *avoided* deciding whether the original lease was issued in violation of NEPA and NHPA. *Solenex II*, 334 F. Supp. 3d at 184 n.8 (JA __). Absent resolution of that question, however, the court had no foundation to compel Interior to reinstate a lease that the agency believes was issued contrary to law.

In sum, if the Court disagrees with the government's arguments in Part I that Interior's cancellation decision was not arbitrary, it should nevertheless vacate the district court's decision and remand for Interior to conduct such further proceedings as the agency deems warranted and in conformity with applicable law.

## CONCLUSION

For these reasons, the district court's order should be reversed.

Respectfully submitted,

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I hereby certify that on April 4, 2019, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to all counsel of record.

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