

CHANGING FEDERAL PRIORITIES MIDSTREAM IN  
UPSTREAM DEVELOPMENT: FEDERAL ENERGY  
DEVELOPMENT LEASE CANCELLATIONS,  
ENVIRONMENTAL POLICY, HISTORIC PRESERVATION AND  
TAKINGS

BY

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*This Article specifically examines whether a federal oil and gas lease cancellation is a Fifth Amendment taking, for which a party must be justly compensated. The consequences of the Secretary of the Interior's recent cancellation of the Solenex lease will be historic if upheld. The financial viability of federal oil and gas leases as assets would be significantly diminished, if not entirely shattered. In addition to the Takings Clause analysis, the article will demonstrate the uncertainty and lack of continuity created when energy, environmental, historical and cultural interests compete in federal oil and gas development. The finality and consistency lacking in the administrative system would make even the most courageous wildcatter or tribal leader hesitant about the rules of the game and how to anticipate their application.*

I.	INTRODUCTION.....	980
II.	SIDNEY LONGWELL, THE UNITED STATES, SOLENEX AND A LEASE IN MONTANA .....	982
	A. <i>The Early Years of the Lease—the 1980s</i> .....	983
	B. <i>Additional Environmental and Cultural Considerations         and Secretary-Level Approval—the 1990s</i> .....	985
	C. <i>The Fight Continued—the 2000s</i> .....	986
	D. <i>Unreasonable Delay—2013–Present</i> .....	987

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980	<i>ENVIRONMENTAL LAW</i>	[Vol. 46:979]
III.	SIMILARLY SITUATED PARTIES.....	989
	<i>A. White River National Forest, Colorado</i> .....	989
	<i>B. NEPA Compliance in Osage County, Oklahoma</i> .....	990
IV.	FEDERAL STATUTES AND REGULATIONS .....	991
	<i>A. The Mineral Leasing Act</i> .....	992
	<i>B. The National Environmental Policy Act</i> .....	993
	<i>C. The National Historic Preservation Act</i> .....	995
	<i>D. The Statutes as Applied</i> .....	996
	1. <i>Solonex and NEPA</i> .....	996
	2. <i>The Blackfeet Nation, Solonex and NHPA</i> .....	997
V.	THE TAKINGS CLAUSE.....	999
	<i>A. Breach of Contract Claim</i> .....	1001
VI.	WHETHER A TAKING OCCURRED .....	1001
	<i>A. DOI Lack of Authority</i> .....	1002
	<i>B. Within DOI Authority</i> .....	1004
	1. <i>A Successful Takings Claim</i> .....	1004
	<i>a. Lucas Analysis</i> .....	1004
	<i>b. Penn Central Analysis</i> .....	1005
	2. <i>An Unsuccessful Taking Claim</i> .....	1005
	3. <i>Financial Viability of Federal Oil and Gas Leases</i> ....	1006
VII.	CONCLUSION .....	1007

*“[N]or shall private property be taken for public use, without just compensation.”*<sup>1</sup>

## I. INTRODUCTION

In 1982, Sidney M. Longwell was forty-four years old when he successfully obtained a lease from the United States Government through the United States Bureau of Land Management for oil and gas exploration and production (upstream development) in the Lewis and Clark National Forest, Badger-Two Medicine area in Montana.<sup>2</sup>

Mr. Longwell is now in his late seventies, and after decades of wrangling through multiple lease suspensions, assignments, reassignments, environmental assessments (EAs), environmental impact statements (EISs),

<sup>1</sup> U.S. CONST. amend. V.

<sup>2</sup> Steven Mufson & Brady Dennis, *Obama Administration Cancels Oil and Gas Leases on Blackfeet Tribe’s Sacred Grounds*, WASH. POST, Nov. 16, 2016, <http://wpo.st/yFAJ2> (last visited Nov. 19, 2016); Darryl L. Flowers, *U.S. District Judge Denies Motion by Five Groups to Intervene in Solonex Case*, FAIRFIELD SUN TIMES, June 16, 2014, [http://www.fairfieldsuntimes.com/business/article\\_5224f6de-f59c-11e3-8fc2-0019bb2963f4.html](http://www.fairfieldsuntimes.com/business/article_5224f6de-f59c-11e3-8fc2-0019bb2963f4.html) (last visited Nov. 19, 2016); William Perry Pendley, *Reagan Era Lessee Granted Stay on Attorneys’ Fees for Beating Feds*, MOUNTAIN STATES LEGAL FOUND., June 6, 2016, <https://www.mountainstateslegal.org/news-updates/news-releases/2016/06/06/reagan-era-lessee-granted-stay-on-attorneys-fees-for-beating-feds#.V6ITZE10wdV> (last visited Nov. 19, 2016).

and now a district court case, the United States canceled the leases in 2016.<sup>3</sup> Against the backdrop of the National Environmental Policy Act<sup>4</sup> (NEPA), the National Historic Preservation Act<sup>5</sup> (NHPA), and the Mineral Leasing Act<sup>6</sup> (MLA), Mr. Longwell was never given the green light under the lease to drill a single well.<sup>7</sup>

The Longwell tale (now Solenex, his company) is long and woven in layers of law and policy. All involved—energy companies, investors, federal agencies, government leaders, local citizens, tribal members (including the Blackfeet Nation), and conservationists—are passionate about how this lease, and its corresponding property and contractual rights, should be resolved.

Oil and gas leases are not only agreements between parties like the United States and Solenex that delineate contractual rights, but are in and of themselves property with significant value.<sup>8</sup> Regardless of whether one stands on the side of continuing, ending, or curtailing fossil fuel development, lease cancellations—like the one currently challenged by Mr. Longwell—raise the question of whether the United States is taking valuable property and breaching contracts with little to no compensation.

This Article specifically examines whether a federal oil and gas lease cancellation is a *taking* as set forth by the Fifth Amendment of the United States Constitution, for which a party must be justly compensated.<sup>9</sup> The consequences of the Secretary of the Interior's recent cancellation of the Solenex lease will be historic if upheld. The financial viability of federal oil and gas leases as valuable assets with contractual and property rights would be significantly diminished, if not entirely shattered. In addition to the Takings Clause analysis, this Article will demonstrate the uncertainty and lack of continuity created when energy, environmental, historical, and cultural interests compete in federal oil and gas development. The finality and consistency lacking in the administrative system would make even the most courageous wildcatter<sup>10</sup> or tribal leader hesitant about the rules of the game and how to anticipate their application.

Parts II and III of this Article will detail the history of the Longwell/Solenex case and other federal oil and gas leaseholders similarly situated. Part IV will explore the multitude of federal laws for oil and gas leasing and development on federal and tribal lands with a focus on the United States' authority to issue oil and gas leases under the MLA, the applicability of NEPA in modern day energy production on federal lands, the

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<sup>3</sup> See *infra* Part II.

<sup>4</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

<sup>5</sup> 54 U.S.C. §§ 300101–307108 (3 Supp. II 2015).

<sup>6</sup> 30 U.S.C. §§ 181–287 (2012).

<sup>7</sup> Pendley, *supra* note 2.

<sup>8</sup> Mobil Oil Expl. & Producing Se., Inc. v. United States, 530 U.S. 604, 609 (2000); Mary A. Viviano, *The Takings Clause: A Protection to Private Property Rights in Federal Oil and Gas Leases*, 24 TULSA L.J. 43, 47 (1988).

<sup>9</sup> Viviano, *supra* note 8, at 47.

<sup>10</sup> A wildcatter is “one that drills wells in the hope of finding oil in territory not known to be an oil field.” *Wildcatter*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2615 (1971).

overlap of leases and the NHPA, and the complexity that results when these laws are applied over several decades with varying outcomes. Part V will establish the current status of regulatory takings jurisprudence and its applicability to oil and gas leases. Part VI will analyze the rights of leaseholders, determine if a taking occurs when the United States cancels oil and gas leases, and explain the significant economic ramifications for the future of onshore federal oil and gas leasing if such uncertainty in property and contractual rights persists.

## II. SIDNEY LONGWELL, THE UNITED STATES, SOLENEX AND A LEASE IN MONTANA

Determining over thirty years ago to make a risky investment, and then being repeatedly prevented from discovering if the risk was worth it, would dishearten even the most tenacious businessperson. As a successful bidder in the early eighties on a federal oil and gas lease, Mr. Sidney Longwell of Baton Rouge, Louisiana undertook the risk for the prospect of oil and natural gas exploration and production in Montana.<sup>11</sup>

The decades of drag and delay ultimately resulted in the Department of the Interior (DOI) canceling the lease, and Mr. Longwell never having the opportunity to explore and to produce oil and natural gas as provided for in the lease.<sup>12</sup> In 2016, Secretary of the Interior Sally Jewell concluded the lease was improperly issued in violation of NEPA and NHPA.<sup>13</sup> DOI's Bureau of Land Management (BLM) consulted with the United States Forest Service (Forest Service), the Advisory Council on Historic Preservation (ACHP), the Blackfeet Tribe, Mr. Longwell, and others.<sup>14</sup> Based on findings and recommendations from the Forest Service and ACHP, the Secretary of the Interior decided that the application for permit to drill should be disapproved, the lease canceled, and the lease rental payments refunded.<sup>15</sup>

Solenex is currently challenging DOI's disapproval of the application for permit to drill and lease cancellation in court.<sup>16</sup> Solenex seeks what it originally owned—the right to explore and produce oil and natural gas in accordance with its lease.<sup>17</sup> With such a ruling doubtful, concurrent takings and breach of contract claims will follow.

An evaluation of whether Solenex has a successful takings claim and a clear depiction of the frustration and economic limbo a leaseholder may encounter as federal approval to proceed is given, withdrawn, given again, suspended, and withdrawn requires a journey into the *Solenex, LLC v. Jewell*

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<sup>11</sup> Pendley, *supra* note 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Obama Administration Cancels Energy Lease in Badger-Two Medicine*, FLATHEAD BEACON, Mar. 17, 2016, <http://flatheadbeacon.com/2016/03/17/u-s-interior-cancels-energy-lease-badger-two-medicine/> (last visited Nov. 19, 2016).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Plaintiff's Motion for Summary Judgment, *Solenex LLC v. Jewell*, No. 1:13-cv-00993-RJL (D.D.C. Sept. 12, 2016), ECF No. 89.

<sup>17</sup> Memorandum of Points & Authorities in Support of Plaintiff's Motion for Summary Judgment at 30, *Solenex*, No. 1:13-cv-00993-RJL (D.D.C. Sept. 12, 2016), ECF No. 89-1.

details. The other significant stakeholders in *Solenex* are the Blackfeet Nation and the United States Government. Their roles, participation and position are interwoven with *Solenex* and expanded in Part IV.

*A. The Early Years of the Lease—the 1980s*

In 1980, Congress passed the Energy Security Act,<sup>18</sup> which directed the Secretary of Agriculture to process applications for leases and permits to explore, drill, and develop natural resources from National Forest System lands.<sup>19</sup> At the time the Energy Security Act was passed, the Lewis and Clark National Forest in Montana had a backlog of over 200 oil and gas lease applications.<sup>20</sup>

To alleviate this backlog of applications and to comply with the 1980 Energy Security Act and NEPA, the Forest Service and BLM prepared an EA for oil and gas leasing in the Lewis and Clark National Forest.<sup>21</sup> The Forest Service issued a Decision Notice and Finding of No Significant Impact, which allowed leases under certain conditions.<sup>22</sup> Adversely affected parties had forty-five days to file an appeal of the Decision Notice and Finding of No Significant Impact, but *no appeals were filed*.<sup>23</sup>

Later that year, based upon the EA, the Forest Service and BLM grouped acreage to form lease tract NW-21 for an upcoming lease drawing.<sup>24</sup> BLM informed Mr. Longwell his application for lease tract NW-21 had obtained a priority at the lease drawing, and that the application would become an offer to lease upon Mr. Longwell's payment of the first year's rent.<sup>25</sup> After receiving Mr. Longwell's payment of the first year's rent, BLM accepted Mr. Longwell's offer to lease and issued the lease to Mr. Longwell, effective June 1, 1982.<sup>26</sup> No protests or appeals were filed asserting lack of

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<sup>18</sup> Pub. L. No. 96-294, 94 Stat. 611 (1980) (codified in scattered sections of 7, 15, 30, 42, and 50 U.S.C. (2012)).

<sup>19</sup> *Id.* § 262, 94 Stat. at 710 (codified at 42 U.S.C. § 8855 (2012)); see Envtl. Working Grp., *Who Owns the West?: Oil & Gas Leases*, [http://www.ewg.org/oil\\_and\\_gas/part2.php](http://www.ewg.org/oil_and_gas/part2.php) (last visited Nov. 19, 2016) (describing oil and gas leases, how they are managed and evaluated by BLM, and environmental policies impact such leases).

<sup>20</sup> U.S. FOREST SERV., ENVIRONMENTAL ASSESSMENT: OIL AND GAS LEASING ON NONWILDERNESS LANDS IN THE LEWIS AND CLARK NATIONAL FOREST (1981), *reprinted in* 4 Administrative Record pt. 1, *Solenex LLC v. Jewell*, No. 1:13-cv-00993-RJL (D.D.C. Sept. 12, 2016), ECF No. 45-10, at 8.

<sup>21</sup> *Id.* at 13.

<sup>22</sup> *Id.* at 8–9.

<sup>23</sup> *Id.*

<sup>24</sup> Letter from Tom Coston, Reg'l Forester, U.S. Forest Serv., to State Dir., Mont. State Office, U.S. Bureau of Land Mgmt. (June 25, 1981), *in* 3 Administrative Record, *supra* note 20, at 31–32, ECF No. 45-9.

<sup>25</sup> Letter from Cynthia L. Embretson, Chief, Minerals Adjudication Section, Montana State Office, U.S. Bureau of Land Mgmt., to Sidney M. Longwell (Apr. 6, 1982), *in* 3 Administrative, *supra* note 20, at 30, ECF No. 45-9.

<sup>26</sup> U.S. BUREAU OF LAND MGMT., OFFER TO LEASE AND LEASE FOR OIL AND GAS. NO. M 53323 (1982) [hereinafter LEASE NO. M 53323], *in* 3 Administrative Record, *supra* note 20, at 19–32, ECF No. 45-9.

compliance with applicable statutes or regulations, including NEPA and the NHPA, at the issuance of the lease to Mr. Longwell.

With BLM's required approval, the following year, Mr. Longwell assigned the Lease to America Petrofina Company of Texas and other entities (collectively, "Fina") for valuable consideration.<sup>27</sup> In November 1983, Fina submitted a surface-use plan and an Application for Permit to Drill (APD).<sup>28</sup> Additionally, Fina submitted a cultural resource inventory report that found that "no known cultural resources will be impacted by the proposed undertaking."<sup>29</sup>

In January 1985, the Forest Service and BLM issued a joint, 324-page EA with respect to the surface-use plan and the APD.<sup>30</sup> The Forest Service approved the surface-use plan, and BLM approved the APD, after the agencies concluded the project as proposed could be performed without any adverse environmental effects.<sup>31</sup>

In March 1985, BLM's approval of the APD was appealed by a number of organizations and individuals to the Interior Board of Land Appeals (IBLA).<sup>32</sup> IBLA set aside BLM's decision and remanded with instructions for BLM to further consider certain issues.<sup>33</sup> In light of the IBLA's decision, Fina requested a temporary suspension of the lease, tolling the running of the lease's primary ten-year term while BLM addressed the remanded issues.<sup>34</sup> In November 1985, BLM suspended the lease, ultimately keeping it suspended for more than thirty years.<sup>35</sup>

The following spring, the Forest Service approved a much broader land and resource management plan for the Lewis and Clark National Forest (1986 Forest Plan) based upon a final EIS (1986 Final EIS).<sup>36</sup> In spring of 1987, after addressing the remanded issues, and incorporating the 1986 Forest Plan and 1986 Final EIS—which included the area where the lease

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<sup>27</sup> Assignment Affecting Record Title to Oil and Gas, Sidney M. Longwell, Assignor, and Am. Petrofina Co. of Tex., Assignee (approved Dec. 9, 1983), *in* 3 Administrative Record, *supra* note 20, at 17–18, ECF No. 45-9.

<sup>28</sup> Application for Permit to Drill, Deepen, or Plug Back, Am. Petrofina Co. of Tex. (Nov. 14, 1983), *in* 1 Administrative Record pt. 1, *supra* note 20, at 8, ECF No. 45.

<sup>29</sup> T. WEBER GREISER & HEIDI A. PLOCHMAN, HISTORICAL RESEARCH ASSOCS., REPORT OF A CULTURAL RESOURCE INVENTORY OF A PROPOSED DRILL HOLE LOCATION AND ALTERNATIVE RIGHT-OF-WAY ROUTES IN THE MARIAS PASS AREA, GLACIER COUNTY, MONTANA (1983), *in* 1 Administrative Record pt. 1, *supra* note 20, at 16, 23, ECF No. 45.

<sup>30</sup> U.S. Forest Serv. & U.S. Bureau of Land Mgmt., Environmental Assessment, Hall Creek APD (1985), *as reprinted in* 1 Administrative Record pt. 1, *supra* note 20, at 25, ECF No. 45.

<sup>31</sup> *Id.* at 26–30.

<sup>32</sup> Glacier-Two Medicine All., 88 IBLA 133, 136–37 (1985).

<sup>33</sup> *Id.* at 150.

<sup>34</sup> Letter from Richard Espe, Dist. Landman, Am. Petrofina Co. of Tex., to Nancy Cotner, Mont. Office, U.S. Bureau of Land Mgmt. (Aug. 16, 1985), *in* 1 Administrative Record pt. 1, *supra* note 20, at 15–16, ECF No. 45.

<sup>35</sup> Letter from Glenn W. Freeman, Dist. Manager, Lewiston Dist. Office, U.S. Bureau of Land Mgmt., to Richard Espe, Dist. Landman, Am. Petrofina Co. of Tex. (Nov. 13 1985), *in* 1 Administrative Record pt. 1, *supra* note 20, at 14, ECF No. 45.

<sup>36</sup> U.S. FOREST SERV., LEWIS AND CLARK NATIONAL FOREST PLAN: RECORD OF DECISION (1986), *reprinted in* 1 Administrative Record pt. 3, *supra* note 20, at 17, ECF No. 45-2.

was located—the Forest Service and BLM approved the Fina surface-use plan and APD for the *second time*.<sup>37</sup>

In July 1987, BLM requested that IBLA vacate BLM's decision approving the APD and remand the matter to BLM for further action.<sup>38</sup> In August 1987, BLM advised Fina that the suspension would remain in effect until completion of additional environmental analysis was completed.<sup>39</sup> The draft EIS notice solicited comments concerning the draft EIS which would analyze the impacts of the proposed drilling applications submitted by Fina, including:

impacts to water resources, air quality, Glacier National Park resources, adjacent . . . wilderness, the Badger-Two Medicine . . . area, wildlife and fisheries . . . , vegetation, outdoor recreation and visual resources, archaeological resources, Blackfeet Tribe reserved rights and traditional religious practices, local economic and social conditions.<sup>40</sup>

*B. Additional Environmental and Cultural Considerations and Secretary-Level Approval—the 1990s*

In December 1990, a 982-page final EIS (1990 Final EIS) for the Fina proposal was issued,<sup>41</sup> and based upon the 1990 Final EIS, the Forest Service and BLM issued a joint Record of Decision approving again Fina's surface-use plan and APD and published it in the Federal Register.<sup>42</sup> In late August 1991, BLM again asked IBLA to vacate and remand the APD approval and

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<sup>37</sup> U.S. BUREAU OF LAND MGMT., DECISION NOTICE AND FINDING OF NO SIGNIFICANT IMPACT: APPLICATION FOR PERMIT TO DRILL BY AMERICAN PETROFINA COMPANY OF TEXAS (1987), *reprinted in* 1 Administrative Record pt. 3, *supra* note 20, at 45, 53, ECF No. 45-2.

<sup>38</sup> Glacier-Two Medicine All., No. 87-504 (IBLA July 31, 1987) (order vacating and remanding APD), *reprinted in* 1 Administrative Record pt. 3, *supra* note 20, at 57, ECF No. 45-2; *cf.* Dale Will, *Is Any Land Sacred*, ENVIRONS, June 1987, at 19, 19–24 (detailing the other challenges being pursued by environmentalists and tribes to protect lands at the same time as the Solenex was being challenged).

<sup>39</sup> Letter from Wayne Zinne, Dist. Manager, Lewiston Dist. Office, U.S. Bureau of Land Mgmt., to John L. Davis, Senior Landman, Fina Oil & Chem. Co. (Aug. 14, 1987), *in* 1 Administrative Record pt. 3, *supra* note 20, at 58, ECF No. 45-2.

<sup>40</sup> Draft Environmental Impact Statement for Exploratory Oil and Gas Wells; Lewis and Clark National Forest, Glacier and Pondera Counties, Montana, 54 Fed. Reg. 43,188, 43,188–89 (Oct. 10, 1989); *see generally* Joseph L. Sax & Robert B. Keiter, *Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations*, 14 ECOLOGY L.Q. 208 (1987) (describing the complex relationships among agencies, the history of Glacier National Park and conflicting considerations in this area).

<sup>41</sup> U.S. FOREST SERV. & BUREAU OF LAND MGMT., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR EXPLORATORY OIL & GAS WELLS: PROPOSED OIL & GAS DRILLING NEAR BADGER & HALL CREEK (1990).

<sup>42</sup> U.S. BUREAU OF LAND MGMT. & U.S. FOREST SERV., RECORD OF DECISION: FINA OIL AND CHEMICAL COMPANY EXPLORATORY OIL/GAS WELL FEDERAL SOUTH GLACIER NO. 1-26 (1991), *reprinted in* 5 Administrative Record pt. 1, *supra* note 20, at 44, ECF No. 48-1; Record of Decision for Final Environmental Impact Statement for Fina Oil and Chemical Company Exploratory Oil/Gas Well; Lewis and Clark National Forest, Glacier County, MT, 56 Fed. Reg. 9,935 (Mar. 8, 1991).

started its own study of surface-related issues.<sup>43</sup> In December 1992, after BLM completed its study, BLM asked for secretary-level approval of Fina's APD because of the acknowledged, significant delay.<sup>44</sup>

Shortly thereafter, the DOI Assistant Secretary concurred in the Record of Decision issued by BLM, approving Fina's APD.<sup>45</sup> *This was the fourth time the APD had been approved.* The Assistant Secretary's concurrence constituted a final decision for the Secretary, and was subject to Fina complying with all lease stipulations, mitigation and monitoring requirements, and additional mitigation measures, including protecting identified cultural/religious resources and the Blackfeet Nation's reserved rights.<sup>46</sup> The 1993 Record of Decision recognized that compliance with section 106 of the NHPA had been completed.<sup>47</sup>

Notwithstanding the APD approval, a few months later, a new Secretary of the Interior, Bruce Babbitt, advised Fina that he was continuing the suspension of the lease and approved APD.<sup>48</sup> In July 1998, DOI/BLM indefinitely suspended the lease and APD to allow the Forest Service time to comply with the NHPA, despite the 1993 secretary-level approval acknowledging NHPA compliance.<sup>49</sup> In April 1999, Fina, weary of delay, assigned the lease back to Mr. Longwell with BLM's approval.<sup>50</sup>

### C. *The Fight Continued—the 2000s*

In 2004, Mr. Longwell formed Solenex LLC, and with BLM's approval, assigned the lease to Solenex.<sup>51</sup> Between 2005 and 2013, the Forest Service and BLM informed Solenex that they would not lift the suspension on the lease and APD in order for additional evaluation in accordance with the

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<sup>43</sup> U.S. Bureau of Land Mgmt.'s Motion for Remand, Nat'l Wildlife Fed'n, No. 91-302 (IBLA July 18, 1991), *reprinted in* 3 Administrative Record, *supra* note 20, at 65, ECF No. 45-9; Nat'l Wildlife Fed'n, No. 922-91-12 (BLM State Dir. Decision Aug. 30, 1991), *reprinted in* 3 Administrative Record, *supra* note 20, at 8, ECF No. 45-9.

<sup>44</sup> Memorandum from Robert H. Lawton, State Dir., Mont. State Office, U.S. Bureau of Land Mgmt., to Dir., U.S. Bureau of Land Mgmt. (Dec. 4, 1992), *in* 3 Administrative Record, *supra* note 20, at 68, ECF No. 45-9.

<sup>45</sup> U.S. BUREAU OF LAND MGMT. & U.S. FOREST SERV., RECORD OF DECISION: FINA OIL AND CHEMICAL COMPANY EXPLORATORY OIL/GAS WELL FEDERAL SOUTH GLACIER NO. 1-26 (1993) [hereinafter 1993 ROD], *reprinted in* 1 Administrative Record pt. 7, *supra* note 20, at 1, 3, ECF No. 45-6.

<sup>46</sup> *Id.* at 27–33.

<sup>47</sup> *Id.* at 19–20; NHPA, 54 U.S.C. § 306108 (3 Supp. II 2015).

<sup>48</sup> Letter from Bruce Babbitt, Sec'y, U.S. Dep't of the Interior, to Wes Franklin, Div. Manager, Fina Oil & Chem. Co. (June 4, 1993), *in* 1 Administrative Record pt. 7, *supra* note 20, at 34, ECF No. 45-6.

<sup>49</sup> Letter from Thomas P. Lonnie, Deputy State Dir., Div. of Res., Mont. State Office, U.S. Bureau of Land Mgmt., to PetroFina Delaware Inc. (July 15, 1998), *in* 1 Administrative Record pt. 7, *supra* note 20, at 46, ECF No. 45-6.

<sup>50</sup> Lease Interest Abstract, *in* 7 Administrative Record pt. 2, *supra* note 20, at 102, ECF No. 48-6.

<sup>51</sup> *Id.* at 101.



NHPA.<sup>52</sup> In May 2011, the Forest Service advised Solenex that the lease was in an area potentially eligible for listing as a Traditional Cultural District (TCD) on the National Register of Historic Places, and a determination of eligibility was being prepared.<sup>53</sup>

#### *D. Unreasonable Delay—2013–Present*

In May 2013, Solenex sent letters to BLM and the Forest Service describing the extraordinary delay in lifting the lease and APD suspension and advising that Solenex would seek judicial review if the suspension was not lifted in thirty days.<sup>54</sup> In June 2013, Solenex filed a lawsuit seeking to compel agency action ‘unlawfully withheld or unreasonably delayed’ under the Administrative Procedure Act<sup>55</sup> and requesting an order compelling the government to immediately lift the suspension.<sup>56</sup> The court eventually ruled that the government’s twenty-nine year delay was unreasonable as a matter of law.<sup>57</sup>

In August 2015, the federal government submitted its proposed schedule, and indicated that it might initiate a process to *cancel* the lease.<sup>58</sup>

<sup>52</sup> Letter from Lesley W. Thompson, Forest Supervisor, Lewis & Clark Nat’l Forest, U.S. Forest Serv., to Sidney Longwell, Solenex, LLC (Nov. 17, 2010), *in* 1 Administrative Record pt. 7, *supra* note 20, at 60, ECF No. 45-6; Letter from U.S. Forest Serv., to Sidney Longwell, Solenex LLC (May 27, 2011), *in* 1 Administrative Record pt. 7, *supra* note 20, at 62, ECF No. 45-6; Letter from William Avey, Forest Supervisor, Lewis & Clark Nat’l Forest, U.S. Forest Serv., to Sidney Longwell, Solenex, LLC (Mar. 27, 2012), *in* 1 Administrative Record pt. 7, *supra* note 20, at 60, ECF No. 45-6; Letter from U.S. Forest Serv., to Jessica J. Spuhler, Attorney for Solenex LLC (June 18, 2013), *in* 2 Administrative Record pt. 1, *supra* note 20, at 8, ECF No. 45-7; Letter from William Avey, Forest Supervisor, Lewis & Clark Nat’l Forest, U.S. Forest Serv., to Sidney Longwell, Solenex, LLC (Aug. 21, 2013), *in* 2 Administrative Record pt. 1, *supra* note 20, at 12, ECF No. 45-7; *see also* MARIA NIEVES ZEDEÑO & JOHN R. MURRAY, BADGER-TWO MEDICINE TRADITIONAL CULTURAL DISTRICT, LEWIS & CLARK NATIONAL FOREST, MONTANA: BOUNDARY EXPANSION STUDY 11 tbl.1 (2012), *reprinted in* 2 Administrative Record pt. 2, *supra* note 20, at 130, 139, ECF No. 45-8 (listing the various cultural studies in the Badger-Two Medicine area).

<sup>53</sup> Letter from U.S. Forest Serv., to Sidney Longwell, Solenex LLC, *supra* note 52. For more information about Traditional Cultural Districts, *see generally* Elizaveta Barrett Ristroph, *Traditional Cultural Districts: An Opportunity for Alaska Tribes to Protect Subsistence Rights and Traditional Lands*, 31 ALASKA L. REV. 211, 212–13 (2014).

<sup>54</sup> Letter from Jessica J. Spuhler, Attorney for Solenex LLC, to Jamie Connell, State Dir., Mont. State Office, U.S. Bureau of Land Mgmt. & Bill Avey, Forest Supervisor, Lewis & Clark Nat’l Forest, U.S. Forest Serv. (May 21, 2013), *in* 2 Administrative Record pt. 1 *supra* note 20, at 74 ECF No. 45-7.

<sup>55</sup> Complaint ¶¶ 26–44, 39, Solenex LLC v. Jewell, No. 1:13-cv-00993-RJL (D.D.C. June 28, 2013); 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012). The provision allowing a claimant to compel agency action is codified at 5 U.S.C. § 706(1) (2012).

<sup>56</sup> Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Summary Judgment at 38–39, Solenex LLC v. Jewell, 156 F. Supp. 3d 83 (D.D.C. 2015) (No. 1:13-cv-00993-RJL), ECF No. 24-1.

<sup>57</sup> Solenex LLC v. Jewell, 156 at 84–85; Darryl L. Flowers, *DOJ Unable to Cite Case of Delay Comparable to Solenex*, FAIRFIELD SUN TIMES, June 23, 2015, [http://www.fairfieldsuntimes.com/business/article\\_8e9b1a90-1a20-11e5-aed4-4bdb7fb9f061.html](http://www.fairfieldsuntimes.com/business/article_8e9b1a90-1a20-11e5-aed4-4bdb7fb9f061.html) (last visited Nov. 19, 2016).

<sup>58</sup> Response to Court Order at 2, Solenex LLC v. Jewell, No. 1:13-cv-00993-RJL (D.D.C. Aug. 17, 2015), ECF No. 53.

Alternatively, the government suggested it would need almost two more years to complete a *fifth* NEPA process before it could lift the suspension.<sup>59</sup> The court ruled that the proposed schedule was “clearly unacceptable.”<sup>60</sup>

After reaffirming the validity of the lease for over thirty-three years through multiple evaluations and approvals, the government filed a memorandum stating it may have issued the lease prematurely in violation of NEPA.<sup>61</sup> Notably, the government went on to add that this premature issuance may also have violated the NHPA, but that the alleged NHPA “defect has now been corrected.”<sup>62</sup> The government further added 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.<sup>63</sup>

On March 17, 2016, the government issued a decision administratively cancelling the lease, disapproving the APD, and directing return of the \$33,000 Solenex had paid in rental payments.<sup>64</sup> According to DOI, the lease was issued prematurely in violation of NEPA and the NHPA, and Secretary Jewell was exercising her discretion to administratively cancel the lease and disapprove the APD.<sup>65</sup>

Solenex is currently seeking judicial review of the Secretary’s administrative decision, and has demanded that its lease and APD be reinstated and that it finally be allowed to proceed drilling for oil and gas.<sup>66</sup> Takings and breach of contract claims are not in litigation as Solenex first pursues the equitable remedy of reinstatement.<sup>67</sup> The property and contractual rights of Solenex that were repeatedly acknowledged and reaffirmed over the last thirty-plus years—which have now been eliminated—hang in the balance as critical pieces of economic and energy development on federal lands. Analyzing whether a taking has occurred reveals the indeterminate economic state and ever-changing rules of the game facing federal mineral leaseholders who assume one set of rules for

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<sup>59</sup> *Id.* at 2–4.

<sup>60</sup> Solenex LLC v. Jewell, No. 1:13-cv-00993-RJL (D.D.C. Oct. 10, 2015) (order rejecting defendants’ proposed schedule), ECF No. 57; *see also* Jonathan H. Adler, *News Flash: Sitting on a Drilling Permit for 29 Years Constitutes ‘Unreasonable Delay’*, WASH. POST: THE VOLOKH CONSPIRACY (July 29, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/29/news-flash-sitting-on-a-drilling-permit-for-29-years-constitutes-unreasonable-delay/?utm\\_term=.a57f24b58b88](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/29/news-flash-sitting-on-a-drilling-permit-for-29-years-constitutes-unreasonable-delay/?utm_term=.a57f24b58b88).

<sup>61</sup> Response to Court Order at 4–5, Solenex LLC v. Jewell, No. 1:13-cv-00993-RJL (D.D.C. Nov. 23, 2015), ECF No. 58.

<sup>62</sup> *Id.* at 3–4.

<sup>63</sup> *Id.* at 2.

<sup>64</sup> Letter from Aden L. Siedlitz, Acting State Dir., Mont. Dakotas Office, U.S. Bureau of Land Mgmt., & Michael Connor, Deputy Sec’y, U.S. Dep’t of the Interior, to Solenex LLC (Mar. 17, 2016), *in* Solenex LLC v. Jewell, No. 1:13-cv-00993-RJL (D.D.C. Mar. 17, 2016), ECF No. 68-1.

<sup>65</sup> *Id.*

<sup>66</sup> Plaintiff’s Motion for Summary Judgment, Solenex LLC v. Jewell, No. 1:13-cv-00993-RJL (D.D.C. Sept. 12, 2016), ECF No. 89 (moving for summary judgment on Solenex’s claim that the cancellation of the lease and disapproval of the APD were unlawful).

<sup>67</sup> *Id.*

upstream development at lease issuance, only to find the rules have changed midstream in the contract.

### III. SIMILARLY SITUATED PARTIES

#### A. *White River National Forest, Colorado*

The *Solenex* case is not an isolated event. DOI recently cancelled leases in the White River National Forest in the Thompson Divide area in Colorado.<sup>68</sup> BLM conducted an environmental impact analysis on sixty-five leases on the White River National Forest which were previously issued between 1995 and 2012.<sup>69</sup>

In 2007, IBLA ruled that BLM must either perform its own environmental analysis or formally adopt the White River National Forest's 1993 Oil and Gas EIS for leasing on the White River National Forest.<sup>70</sup> Instead of formally adopting the 1993 EIS, BLM chose to conduct its own environmental analysis to determine whether the leases should be voided, reaffirmed, or modified.<sup>71</sup> Once again, leaseholders, who thought they were acquiring certain contractual and property rights, have lost their investment.

The Record of Decision was published on November 17, 2016.<sup>72</sup> BLM's decision canceled twenty-five leases owned by energy companies SG Interests and Ursa Resources, and placed additional restrictions on other leases in the Thompson Divide area.<sup>73</sup> Indications have already been made that parties will appeal and seek relief from these cancellations.<sup>74</sup> Similar to *Solenex*, the question arises of whether a taking has occurred. The economic limbo and uncertainty that abounded in the Thompson Divide leases are the same as found in *Solenex*. This additional example further demonstrates

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<sup>68</sup> U.S. BUREAU OF LAND MGMT., RECORD OF DECISION: PREVIOUSLY ISSUED OIL AND GAS LEASES IN THE WHITE RIVER NATIONAL FOREST 9 (2016) [hereinafter THOMPSON DIVIDE ROD]; Ryan Summerlin, *Thompson Divide Leases Formally Canceled*, GLENWOOD SPRINGS POST INDEP., Nov. 17, 2016, <http://www.postindependent.com/news/local/thompson-divide-leases-formally-canceled/> (last visited Nov. 19, 2016); *Feds Finalize Decision to Cancel 25 Leases in the Thompson Divide*, ASPEN DAILY NEWS, Nov. 28, 2016, <http://www.aspendailynews.com/section/home/173346> (last visited Nov. 19, 2016).

<sup>69</sup> U.S. BUREAU OF LAND MGMT., PREVIOUSLY ISSUED OIL AND GAS LEASES IN THE WHITE RIVER NATIONAL FOREST FINAL ENVIRONMENTAL IMPACT STATEMENT 1-1 (2016) [hereinafter WHITE RIVER NATIONAL FOREST FEIS].

<sup>70</sup> Bd. of Comm'rs, 173 IBLA 173, 181-84 (2007).

<sup>71</sup> WHITE RIVER NATIONAL FOREST FEIS, *supra* note 69, at 1-1 ("Following the IBLA's decision, the BLM determined that the Forest Service NEPA analysis conducted for the previously issued leases is no longer adequate due to changes in laws, regulations, policies, and conditions since the Forest Service's EIS was issued in 1993.").

<sup>72</sup> THOMPSON DIVIDE ROD, *supra* note 68.

<sup>73</sup> *Id.* at 9-12; Collin Szewczyk, *Oil, Gas Industry Lambastes BLM in House Hearing*, ASPEN DAILY NEWS, July 13, 2016, <http://www.aspendailynews.com/section/home/171780> (last visited Nov. 19, 2016).

<sup>74</sup> John Stroud, *Divide Lease Decision Likely to Land in Court*, GLENWOOD SPRINGS POST INDEP., Nov. 28, 2016, <http://www.postindependent.com/news/local/divide-lease-decision-likely-to-land-in-court/> (last visited Nov. 19, 2016).

how the application of NEPA to federal oil and gas leases can significantly alter the value of property rights and contractual rights, depending on the federal government's determinations and prioritizations in a given year.<sup>75</sup>

*B. NEPA Compliance in Osage County, Oklahoma*

The same passions for the environment, economic security, and accurate NEPA compliance also arise in oil and gas development leases in Osage County, Oklahoma.<sup>76</sup> In *Hayes v. Chaparral Energy, LLC*,<sup>77</sup> Chief Judge Gregory K. Frizzell of the United States District Court for the Northern District of Oklahoma ruled that:

the BIA's approval of the Chaparral drilling permits violated NEPA for two independent reasons. First, the agency did not prepare an EA for the action, nor did it follow the procedures necessary to rely on the 1979 EA. Second, even if the agency had followed the proper procedures, its reliance on the 1979 EA, without supplementation, was arbitrary and capricious. For these reasons, the court declares the drilling permits invalid.<sup>78</sup>

The Osage Agency approved the leases because they fell within a categorical exclusion in a 1979 EA that had a Finding of No Significant Impact.<sup>79</sup> The court ruled that the 1979 EA was outdated because it did not have regulations for hydraulic fracturing, and that the Osage Agency should have conducted a new NEPA EA.<sup>80</sup> According to the ruling, NEPA requires at a minimum, the supplementation of the 1979 EA.<sup>81</sup>

While *Chaparral Energy* is not in complete parity with the circumstances found in the *Solenex* or in the Thompson Divide leases, another energy company must now consider its legal recourse and determine what property and contractual rights were lost as a result of varied approaches to NEPA's application. An even greater concern is that this ruling could potentially impact every oil and gas well drilled in Osage County since 1970—the year NEPA took effect.<sup>82</sup> The uncertainty could spell

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<sup>75</sup> See generally Gary C. Bryner, *The National Energy Policy: Assessing Energy Policy Choices*, 73 U. COLO. L. REV. 341 (2002) (describing the cyclical nature of energy policy in the United States).

<sup>76</sup> See Tom Fredericks & Andrea Aseff, *When Did Congress Deem Indian Lands Public Lands?: The Problem of BLM Exercising Oil and Gas Regulatory Jurisdiction in Indian Country*, 33 ENERGY L.J. 119, 122 (2012) (explaining that BLM's involvement in oil and gas leases triggers a NEPA analysis); see generally Rennard Strickland, *Osage Oil: Mineral Law, Murder, Mayhem and Manipulation*, NAT. RESOURCES & ENV'T., Summer 1995, at 39 (explaining the complex history of mineral development in Osage County).

<sup>77</sup> No. 14-CV-495-GKF-PJC, 2016 WL 1254427 (N.D. Okla. Mar. 29, 2016), *appeal docketed sub nom.* Hayes v. Osage Minerals, No. 16-5060 (10th Cir. filed May 24, 2016).

<sup>78</sup> *Id.* at \*10.

<sup>79</sup> *Id.* at \*3.

<sup>80</sup> *Id.* at \*9–10.

<sup>81</sup> *Id.* at \*10 (citing 40 C.F.R. § 1502.9(c)(1)(ii) (2015)).

<sup>82</sup> Charlie Passut, *Ruling in Oklahoma County Could Affect Industry, Other Cases*, NAT. GAS INTELLIGENCE, Dec. 31, 2015, <http://www.naturalgasintel.com/articles/104869-ruling-in-oklahoma>

significant trouble for future oil and gas development in Osage County. The operators and financiers will likely be reluctant to pursue future leases, which will deprive the Osage Nation of revenue.

Uncertainty abounds in determining the actual rules under NEPA, NHPA, MLA, and other federal laws, and anticipating the results generated in their application. Before investing, energy developers expect some uncertainty, but these and other similar lease cancellations call into question the entire system of developing minerals on federal and tribal lands to a level that may cripple and potentially crush future federal mineral development. Accordingly, what are parties' available rights when the rules change in the middle of the game and ultimately no economic prospect remains? May a taking be found, and the appropriate remedies provided?

#### IV. FEDERAL STATUTES AND REGULATIONS

As demonstrated by *Solenex*, the Thompson Divide leases, and *Chaparral Energy*, navigating energy development on federal and tribal lands is complex and uncertain. The process requires significant knowledge not only of the applicable regulations but also of how they interweave, overlap, and are applied.<sup>83</sup>

NEPA and the NHPA are front and center in *Solenex*, but numerous federal laws establish requirements for oil and gas leasing and development on federal and tribal lands.<sup>84</sup> These laws include: 1) the MLA;<sup>85</sup> 2) the Mineral Leasing Act for Acquired Lands;<sup>86</sup> 3) the Mining and Minerals Policy Act of 1970;<sup>87</sup> 4) the Federal Land Policy and Management Act of 1976;<sup>88</sup> 5) the Indian Mineral Leasing Act of 1938;<sup>89</sup> 6) the Indian Mineral Development Act of 1982;<sup>90</sup> 7) NEPA;<sup>91</sup> and 8) the NHPA.<sup>92</sup>

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-county-could-affect-industry-other-cases (last visited Nov. 19, 2016) (noting the ruling could affect other leases in the Northern District of Oklahoma).

<sup>83</sup> *Accord* Ben Jackson, *Environmental Regulation of Oil and Gas Wellsites in Oklahoma*, 13 OKLA. CITY U. L. REV. 433, 433–34, 450 (1988) (explaining the complex overlap of state and federal regulation of energy production in Oklahoma including the complex relationships in Osage County, Oklahoma).

<sup>84</sup> Office of Indian Energy & Econ. Dev., U.S. Dep't of the Interior, *Tribal Energy and Environmental Information Clearinghouse: Oil and Gas Development*, <http://teec.indianaffairs.gov/ir/Wc1fa09cbeb4.htm> (last visited Nov. 19, 2016) [hereinafter *Tribal Energy*] (listing federal oil and gas statutes that regulate leasing on Indian country); Intermountain Oil and Gas BMP Project, *Federal Laws*, [http://www.oilandgasbmps.org/laws/federal\\_law.php](http://www.oilandgasbmps.org/laws/federal_law.php) (last visited Nov. 19, 2016) (listing federal oil and gas statutes that regulate leasing on public lands).

<sup>85</sup> 30 U.S.C. §§ 181–287 (2012) (establishing the authority of DOI to oversee oil and gas operations on federal land).

<sup>86</sup> *Id.* §§ 351–360 (extending DOI authority to acquired lands).

<sup>87</sup> *Id.* U.S.C. § 21a (establishing policy regarding mineral development).

<sup>88</sup> 43 U.S.C. §§ 1701–1787 (2012) (defining BLM's responsibilities with respect to oil and gas development).

<sup>89</sup> 25 U.S.C. §§ 396a–396g (2012) (providing for the leasing of minerals on tribal lands).

<sup>90</sup> *Id.* §§ 2101–2108 (providing a mechanism for tribes to enter into energy development agreements with DOI approval).

<sup>91</sup> 42 U.S.C. §§ 4321–4370h (2012) (requiring federal agencies to assess the environmental effects of their proposed actions prior to making decisions).

To determine whether a taking has occurred, a constellation of factors will be scrutinized including the United States' authority to issue oil and gas leases under the MLA, the applicability of NEPA in modern day energy production on federal lands, the overlap of leases and the NHPA, and the complexity that results when these and other laws intermingle. Knowledge of these laws is critical for any energy developer. Equally important to the financial risk analysis of leasing federal minerals is the consistent application of the laws. These laws provide the foundation for determining whether the Secretary of the Interior unilaterally had the authority to cancel the lease in the first instance and whether, in so doing, a taking occurred.

#### A. *The Mineral Leasing Act*

The MLA and the Mineral Leasing Act for Acquired Lands provide BLM the authority to lease the United States' minerals to parties like Solenex.<sup>93</sup> The almost century old MLA established the leasing system that continues today.<sup>94</sup> The MLA framework provides the federal government with flexibility to use federal lands to help satisfy the nation's energy needs, while generating revenue for the federal government and protecting environmentally sensitive areas.<sup>95</sup> The MLA provides energy producers the opportunity to engage in oil and natural gas exploration and production on federal lands.<sup>96</sup> The financial gain and national security benefits for the United States from mineral development are significant. BLM's onshore oil and gas program generated \$2.1 billion in royalties, \$30 million in rental payments, and \$112 million in bonus bids, split between the United States Treasury and the states where the development occurred.<sup>97</sup> In Fiscal Year 2015, production from federal and tribal onshore leases accounted for 11% of the natural gas and 7% of the oil produced in the United States.<sup>98</sup>

When applied to the *Solenex* case, the MLA and corresponding regulations initially seem to be a straight-forward procedure providing the authority and directive for leasing; however, it is the Secretary of the Interior's questionable authority under the MLA to cancel the Solenex lease that holds a critical piece to the takings puzzle.

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<sup>92</sup> 54 U.S.C. §§ 300101–307108 (3 Supp. II 2015) (establishing a comprehensive program to preserve the historical and cultural foundation of the nation as a living part of community life).

<sup>93</sup> MLA, 30 U.S.C. §§ 181–182 (2012); Brittany Patterson, *Will the U.S. Government Stop Selling Fossil Fuels?: Coal, oil and gas leases on federal land may change in the last year of the Obama Administration*, SCI. AM.: CLIMATEWIRE, Jan. 14, 2016, <http://www.scientificamerican.com/article/will-the-u-s-government-stop-selling-fossil-fuels> (last visited Nov. 19, 2016).

<sup>94</sup> Samuel Western, *The Mineral Leasing Act of 1920: The law that changed Wyoming's economic destiny*, WYOHISTORY, <http://www.wyohistory.org/essays/mineral-leasing-act-1920> (last visited Nov. 19, 2016) [hereinafter Western].

<sup>95</sup> ADAM VANN, CONG. RESEARCH SERV., R40806, ENERGY PROJECTS ON FEDERAL LANDS: LEASING AND AUTHORIZATION, at i (2012).

<sup>96</sup> *Id.* at 1.

<sup>97</sup> Press Release, U.S. Bureau of Land Mgmt., BLM Releases Statistics in Oil and Gas Activity on Federal, Indian Lands (Apr. 11, 2016), [http://www.blm.gov/wo/st/en/info/newsroom/2016/april/nr\\_04\\_11\\_2016.html](http://www.blm.gov/wo/st/en/info/newsroom/2016/april/nr_04_11_2016.html) (last visited Nov. 19, 2016).

<sup>98</sup> *Id.*

When first entering into a lease, companies pay a bonus or other up-front fees.<sup>99</sup> Leases are conditioned upon payment of a rental payment or a minimum royalty for the oil or gas that is removed or sold from the leased land once wells are producing.<sup>100</sup> The federal government, in turn, pays a percentage of that royalty to the state from which the mineral was extracted.<sup>101</sup> The primary term for leases is ten years, and this may be extended to allow for continuing exploration or production.<sup>102</sup>

While BLM controls the leasing process for subsurface rights to land in the National Forest System, the Secretary of the Interior cannot issue a lease for National Forest System lands reserved from the public domain if the Secretary of Agriculture objects.<sup>103</sup> This dynamic in the MLA between the Secretaries of Agriculture and the Interior was important in the most recent application of the NHPA to the Solenex lease when the Secretary of the Interior's cancellation was preceded by a recommendation from the Secretary of Agriculture to cancel the lease.<sup>104</sup>

Failure to comply with the MLA, the lease's provisions, or regulations may result in lease cancellation.<sup>105</sup> Under very limited circumstances, the Secretary has the authority to cancel the lease, but others require a judicial proceeding to cancel the lease.<sup>106</sup>

The Secretary's authority to cancel the Solenex lease under these circumstances, and possibly the leases in the Thompson Divide, is questionable. If the authority to cancel the lease is so broad, then the economic uncertainty of participating in leases allowed under the MLA is far beyond the risk of drilling a dry hole. Knowing the parameters of this authority is also important in determining if a taking has occurred. If final administrative processes and approvals, like the ones reached in *Solenex*, can be undone and contracts broken so easily, does one have a property right that could be taken?

### *B. The National Environmental Policy Act*

DOI administratively canceled the Solenex lease and disapproved the APD, because after thirty-three years, DOI decided the lease was issued

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<sup>99</sup> 43 C.F.R. §§ 3110.4(a), 3150.5-2 (2015).

<sup>100</sup> Federal Onshore Oil and Gas Leasing Reform Act of 1987, 30 U.S.C. § 226(b)(1) (2012); VANN, *supra* note 95, at 6–7.

<sup>101</sup> 30 U.S.C. § 191(a) (2012).

<sup>102</sup> *Id.* § 226(e).

<sup>103</sup> *Id.* § 226(h).

<sup>104</sup> Letter from Thomas J. Vilsack, Sec'y, U.S. Dep't of Agric., to Sally Jewell, Sec'y, U.S. Dep't of the Interior (Oct. 30, 2015), *available at* <http://www.achp.gov/docs/sec-vilsack-letter.pdf>.

<sup>105</sup> *See* 30 U.S.C. § 188(b) (2012) (allowing for cancellation of a lease where the lessee fails to comply with any applicable law or regulation); *id.* § 226(i) (providing some restrictions on when a lease may be canceled); 43 C.F.R. § 3108.3(a)–(b) (2015) (setting forth when the Secretary may cancel a lease).

<sup>106</sup> 43 C.F.R. § 3108.3(a) (2015) (administrative cancellation); *id.* § 3108.3(b) (cancellation via judicial proceeding).

prematurely in violation of NEPA and the NHPA.<sup>107</sup> Whether an abuse of discretion occurred remains to be determined. The extensive study, delay, approvals, and finally secretary-level approval of the lease and APD prior to its cancellation may leave one questioning the rules in upstream development and exactly what complying with NEPA entails. The parties in *Solenex*, the Thompson Divide, and *Chaparral Energy* represent multiple perspectives and expectations for NEPA and how long an issued lease should remain suspended while repeated EAs and EISs are conducted.

NEPA established a national framework to protect the environment.<sup>108</sup> NEPA requires the federal government to incorporate environmental considerations in their planning and decision making, including preparing detailed statements assessing the environmental impact of, and alternatives to, major federal actions (“airports, buildings, military complexes, highways, parkland purchases, and other federal activities”) significantly affecting the environment;<sup>109</sup> these statements are EISs and EAs.<sup>110</sup> Agencies evaluate the environmental, social, and economic effects of their proposed actions, and provide opportunities for public review and comment on those evaluations.<sup>111</sup>

NEPA requires agencies to follow a three-step review process: (1) Conduct a preliminary screening for NEPA’s applicability; (2) Prepare an Environmental Assessment (EA) to determine whether an Environmental Impact Statement (EIS) is required; and (3) Prepare an EIS if required (an EIS is required if a proposed action may “significantly affect the quality of the human environment”).<sup>112</sup>

An EA is a significantly less cumbersome undertaking than an EIS, and determines whether or not a federal action has the potential to cause significant environmental effects.<sup>113</sup> Generally, an EA includes: the need for the proposal, alternatives, the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.<sup>114</sup>

If the agency determines that the action will not have significant environmental impacts, the agency will issue a Finding of No Significant Impact that includes the reasons why there are no significant environmental impacts projected to occur.<sup>115</sup> If the EA determines that the environmental

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<sup>107</sup> Letter from Aden L. Siedlitz & Michael Connor to Solenex LLC, *supra* note 64.

<sup>108</sup> NEPA, 42 U.S.C. § 4321 (2012).

<sup>109</sup> U.S. Env’tl. Prot. Agency, *Summary of the National Environmental Policy Act*, <https://www.epa.gov/laws-regulations/summary-national-environmental-policy-act> (last visited Nov. 19, 2016); 42 § 4332(2)(C) (2012); 40 C.F.R. §§ 1508.18, .27 (2015).

<sup>110</sup> 42 § 4332(2)(C) (2012); 40 C.F.R. §§ 1508.9, .11 (2015).

<sup>111</sup> 40 C.F.R. §§ 1503.1, 1508.14 (2015).

<sup>112</sup> U.S. Bureau of Land Mgmt., *The NEPA Process*, <http://www.blm.gov/wo/st/en/prog/planning/nepa/nepa.html> (last Nov. 19, 2016).

<sup>113</sup> U.S. Env’tl. Prot. Agency, *National Environmental Policy Act Review Process*, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited Nov. 19, 2016).

<sup>114</sup> *Id.*

<sup>115</sup> 40 C.F.R. § 1501.4(e) (2015).



impacts of a proposed federal action will be significant, an environmental impact statement is prepared.<sup>116</sup>

An EIS is an immense process that involves federal, regional, local, and public participation, and can take many years to complete.<sup>117</sup> The requirements for an EIS are significantly demanding for all stakeholders.<sup>118</sup> An EIS addresses “the existing natural, built, social and environmental setting of the area affected.”<sup>119</sup> This includes: “visual resources, cultural and historic resources, surface water and groundwater resources, land use, traffic impact and transportation, air and noise quality, socio-economic impacts, visitor use, public health and security.”<sup>120</sup> The final EIS incorporates the draft EIS with changes made as appropriate to reflect the alternative selected, updated information as needed, mitigation measures selected, comments received during the notice and comment process on the draft EIS, and responses to comments.<sup>121</sup> The EIS process concludes with the issuance of the Record of Decision.<sup>122</sup>

### C. The National Historic Preservation Act

The historical review process initiated with the passage of the 1966 National Historic Preservation Act<sup>123</sup> by Congress created a new approach to federal project planning.<sup>124</sup> Both NEPA and NHPA require federal officials to stop, look, and listen before making decisions that impact historic properties and the human environment.<sup>125</sup> ACHP administers regulations for review procedures, such as section 106 of the NHPA,<sup>126</sup> the section that the Assistant Secretary of the Interior found had been complied with in *Solenex* in the 1993 Record of Decision.<sup>127</sup>

Section 106 requires federal agencies to consider historic preservation in their projects.<sup>128</sup> Section 106 is intended to ensure that federal agencies consult with interested parties “to identify and evaluate historic properties, assess the effects of their historic undertakings on historic properties, and

<sup>116</sup> *Id.* § 1501.4(c).

<sup>117</sup> Nat'l Park Serv., U.S. Dep't of the Interior, *Section 106: Frequently Asked Questions*, [https://www.nps.gov/nationalmallplan/106\\_FAQ.html](https://www.nps.gov/nationalmallplan/106_FAQ.html) (last visited Nov. 19, 2016).

<sup>118</sup> See 40 C.F.R. § 1502.1–.23 (2015) (setting forth the demanding requirements of an EIS).

<sup>119</sup> *Section 106: Frequently Asked Questions*, *supra* note 117.

<sup>120</sup> *Id.*

<sup>121</sup> *National Environmental Policy Act Review Process*, *supra* note 113.

<sup>122</sup> *Id.*

<sup>123</sup> Act of Oct. 15, 1966, Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 54 U.S.C. §§ 300101–307108 (3 Supp. II 2015)).

<sup>124</sup> COUNCIL ON ENVTL. QUALITY & ADVISORY COUNCIL ON HISTORIC PRES., A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106, at 4 (2013), *available at* [http://www.achp.gov/docs/NEPA\\_NHPA\\_Section\\_106\\_Handbook\\_Mar2013.pdf](http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf) [hereinafter INTEGRATING NEPA AND SECTION 106].

<sup>125</sup> NEPA, 42 U.S.C. § 4321 (2012); NHPA, 54 U.S.C. § 306108 (3 Supp. II 2015); INTEGRATING NEPA AND SECTION 106, *supra* note 124, at 6.

<sup>126</sup> 54 U.S.C. § 304108 (3 Supp. II 2015); INTEGRATING NEPA AND SECTION 106, *supra* note 124, at 4.

<sup>127</sup> 1993 ROD, *supra* note 45, at 19–20.

<sup>128</sup> 36 C.F.R. § 800.1(a) (2015); INTEGRATING NEPA AND SECTION 106, *supra* note 124, at 8.

attempt to negotiate an outcome that will balance project needs and historic preservation values.”<sup>129</sup> Additionally, federal agencies must also provide the ACHP a reasonable opportunity to comment.<sup>130</sup>

Section 106 review recognizes occasions when there is no way for a project to proceed without affecting historic properties, but encourages a preservation outcome.<sup>131</sup> These reviews result in a wide spectrum of consequences, from “avoidance of historic properties to the acceptance of extensive adverse effects to historic properties.”<sup>132</sup> The Solenex lease and the Thompson Divide leases both triggered section 106 consideration.

#### *D. The Statutes as Applied*

*Solenex* reveals the conflict between federal mineral development laws and environmental protection laws. *Solenex* also demonstrates that the finality that NEPA and its corresponding implementing regulations should provide may be denied in costly and complicated twists and turns. Time and politics alter priorities, and the rights awarded under the MLA are eroded, diminished, and at times extinguished.

##### *I. Solonex and NEPA*

The EIS process is time consuming and difficult.<sup>133</sup> The procedures are critical, but the end result should provide a conclusion for all parties involved. Over several decades, multiple EISs and EAs were undertaken in conjunction with the Solenex lease, all resulted in approval of Solenex’s plans to drill under its lease.<sup>134</sup> The EA and EIS provided the opportunities for all stakeholders (including the government) to stop, look and listen and evaluate the environmental impact of Solenex’s proposed drilling activities.

From an environmental perspective, stakeholders (including any member of the public or the Blackfeet Nation) had numerous opportunities to participate in the assessment of the environmental impact of exploration and production of oil and natural gas in the Badger-Two Medicine area. The first time was when an EA was created (and no challenges or disputes were made) to allow for the leasing to occur.<sup>135</sup> Additional chances for

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<sup>129</sup> 36 C.F.R. § 800.1(a) (2015); Advisory Council on Historic Pres., *Section 106 Applicant Toolkit*, <http://www.achp.gov/apptoolkit.html#section106> (last visited Nov. 19, 2016).

<sup>130</sup> *Section 106 Applicant Toolkit*, *supra* note 129.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *City of Dallas v. Hall*, 562 F.3d 712, 717 (5th Cir. 2009) (“An EA is a ‘rough cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement—which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project—is necessary.’” (quoting *Sabine River Auth. v. U.S. Dep’t of the Interior*, 951 F.2d 669, 677 (5th Cir. 1992))).

<sup>134</sup> *See supra* Part II.

<sup>135</sup> *See supra* note 24.

participation arose when Solenex sought its APD. Many stakeholders did in fact participate in these multiple EAs and EIS.<sup>136</sup>

The government's "preferred alternative" was consistently to allow Solenex to proceed. It was this preference that became the secretary-level final decision.<sup>137</sup> That final decision was put on hold while the NHPA was considered further, but the validity of the Solenex lease issuance was not called into question under NEPA.<sup>138</sup> Approvals were suspended, but not denied, until DOI canceled Solenex's lease and disapproved the approved APD in 2016.<sup>139</sup>

The environmental review of the Solenex lease was extensive. The repeated approval and acknowledgement of the lease's validity throughout the entire NEPA process bolsters the notion that a valid contract existed with contractual rights and property rights. As analyzed in Part VI, the NEPA process followed in *Solenex* supports a finding of a taking—a valid property right was acknowledged repeatedly and then canceled without compensation.

Similarly, in the Thompson Divide, oil and gas operators have held leases for an extended period of time, and now those leases have been cancelled or modified.<sup>140</sup> The uncertainty of federal leasing can be crippling to businesses, investors, and other stakeholders.

In Osage County, the recent ruling invalidated the lease, paving the way for additional litigation and creating significant ambiguity for other similarly situated oil and gas operators. The NEPA process in place in Osage County also calls into question the duration and breadth of an EA. Bona fide purchasers of Osage County leases incurred the risk of an oil and gas lease, only to learn that the lease should not have been issued in the first instance.<sup>141</sup> The rules and their consistent application are critical for domestic energy production.

## 2. *The Blackfeet Nation, Solenex and NHPA*

In late 2015, after evaluating the Badger-Two Medicine area Solenex lease, the ACHP released official comments.<sup>142</sup> The ACHP found that "Badger-Two Medicine TCD is of premier importance to the Blackfeet Tribe in sustaining its religious and cultural traditions," and that "the entire

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<sup>136</sup> See *supra* Part II.

<sup>137</sup> See 1993 ROD, *supra* note 45, at 1.

<sup>138</sup> Letter from Thomas P. Lonnie to PetroFina Delaware Inc., *supra* note 49.

<sup>139</sup> Letter from Aden L. Siedlitz & Michael Connor to Solenex LLC, *supra* note 64; Press Release, U.S. Dept. of the Interior, Interior Department Cancels Oil and Gas Lease in the Lewis and Clark National Forest, (Mar. 17, 2016), <https://www.doi.gov/pressreleases/interior-department-cancels-oil-and-gas-lease-lewis-and-clark-national-forest> (last visited Nov. 19, 2016).

<sup>140</sup> THOMPSON DIVIDE ROD, *supra* note 68, at 9–12.

<sup>141</sup> Passut, *supra* note 82.

<sup>142</sup> Advisory Council on Historic Pres., Comment Letter on the Release from Suspension of the Permit to Drill by Solenex LLC in Lewis and Clark National Forest, Montana (Sept. 21, 2015), available at <http://www.achp.gov/docs/APDinLewisandClarkNF.pdf>.

Solenex leasehold is located within the Badger-Two Medicine TCD.<sup>143</sup> ACHP recommended that the only way to protect the traditional and cultural values of this area, held sacred by the Blackfeet people, was to prohibit drilling and cancel the lease.<sup>144</sup> In its recommendation, ACHP stated that oil and gas development could irrevocably harm the area.<sup>145</sup>

The Badger-Two Medicine area is the site of a long running dispute between the United States and the Blackfeet Nation that predates the Solenex lease.<sup>146</sup> The Blackfeet assert the mountains hold “the spirit of our land and the spirits of our people that occupy that land.”<sup>147</sup> The Blackfeet Tribal Business Council described the TCD as “one of the most cultural and religiously significant areas to the Blackfeet People since time immemorial.”<sup>148</sup>

The area is known as the “ceded strip,” and the Blackfeet’s rights (logging, fishing, hunting, using motorized vehicles, not to mention drilling) have been constantly debated since a treaty was signed in 1895.<sup>149</sup> The Blackfeet strongly oppose oil and gas drilling in the area.<sup>150</sup> Following the district court’s sharp criticism of the government for its “epic” delay in *Solenex*,<sup>151</sup> Blackfeet leaders commented that Solenex’s “plight doesn’t begin to approach epic proportions” compared to the duration of their struggles.<sup>152</sup>

The Blackfeet Nation’s struggles are real, and they compete in part with Solenex’s contractual and property rights. Following the recommendations of the ACHP, and comments from additional stake-holding parties, including the Blackfeet, the United States Secretary of Agriculture Thomas J. Vilsack wrote Secretary of the Interior Jewell a letter in late 2015.<sup>153</sup> Secretary Vilsack recommended that Secretary Jewell “take action as you deem consistent with your statutory and regulatory authorities to cancel the Solenex lease.”<sup>154</sup> He added that the “Solenex APD in the Badger-Two

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<sup>143</sup> *Id.* at 4.

<sup>144</sup> *Id.* at 7.

<sup>145</sup> *Id.*

<sup>146</sup> Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585, 588–94 (2008); Amy Corbin & Ashley Tindall, Sacred Land Film Project, *Badger-Two Medicine*, <http://www.sacredland.org/index.html?p=100.html> (last visited Nov. 19, 2016).

<sup>147</sup> Ellen M. Gilmer, *Drillers Call ‘NEPA Shenanigans’ on Interior as It Scraps Leases*, ENERGYWIRE, Feb. 19, 2016, <http://www.eenews.net/stories/1060032614> (last visited Nov. 19, 2016).

<sup>148</sup> Res. 260-2014, Blackfeet Tribal Bus. Council (2014), *available at* [http://www.badger-twomedicine.org/pdf/Blackfeet\\_Tribe\\_Resolution.pdf](http://www.badger-twomedicine.org/pdf/Blackfeet_Tribe_Resolution.pdf).

<sup>149</sup> See generally Nie, *supra* note 144, at 588–94 (discussing the history of the Badger-Two Medicine area dispute); Colleen M. Barcus, Nat’l Geographic: Crown of the Continent, *Badger-Two Medicine Area*, <http://crownofthecontinent.natgeotourism.com/content/badger-two-medicine-area/cot27010917eebb26b46> (last visited Nov. 19, 2016) (explaining how the Badger-Two Medicine is a center of controversy and describing current developments to address these issues including drilling and motorized vehicles).

<sup>150</sup> Nie, *supra* note 146, at 590.

<sup>151</sup> *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83, 84 (D.D.C. 2015).

<sup>152</sup> Gilmer, *supra* note 147.

<sup>153</sup> Letter from Secretary Vilsack to Secretary Jewell, *supra* note 104.

<sup>154</sup> *Id.*

Medicine TCD will pose adverse effects to the TCD in ways that cannot be fully mitigated.”<sup>155</sup> As noted previously, Secretary Jewell followed the recommendation of Secretary Vilsack and canceled the lease in part because of BLM’s purported lack of compliance with the NHPA at the issuance of the lease.<sup>156</sup>

The federal government issued a lease for this area *decades* before the 2015 recommendation to cancel the lease and the 2016 cancellation.<sup>157</sup> The entire time, Solenex and its predecessors hung in economic limbo, expended significant resources attempting to realize the lease’s value, only to have those efforts and their contractual and property rights vanquished.

Notably, Secretary Vilsack also remarked that his recommendation was based upon “changes in land management priorities.”<sup>158</sup> Issues with the Blackfeet must be handled justly, and what “justly” entails has changed over time. Critically, errors and their correction on the part of the government should not result in another uncorrected error. Allowing the federal government to simply cancel the Solenex lease, and refund \$33,000 in lease payments lays the grounds for compensable taking and breach of contract claims.

#### V. THE TAKINGS CLAUSE

The Takings Clause states, “nor shall private property be taken for public use, without just compensation.”<sup>159</sup> The Solenex lease carried contractual and property rights.<sup>160</sup> If the lease and APD are not reinstated, and Solenex is not permitted to finally proceed with drilling, the federal government may face a significant breach of contract claim and concurrent

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<sup>155</sup> *Id.*

<sup>156</sup> Letter from Aden L. Siedlitz & Michael Connor to Solenex LLC, *supra* note 64.

<sup>157</sup> *See supra* Part II.

<sup>158</sup> Letter from Secretary Vilsack to Secretary Jewell, *supra* note 104.

<sup>159</sup> U.S. CONST. amend. V; *see also* J. Peter Byrne & Kathryn A. Zyla, *Climate Exactions*, 75 MD. L. REV. 758, 763 (2016) (“The Supreme Court construes the Takings Clause of the Fifth Amendment to require the government to pay ‘just compensation’ not just when it expropriates or physically occupies land but also when regulations of use go ‘too far.’” (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922))); Nestor M. Davidson, *Resetting the Baseline of Ownership: Takings and Investor Expectations After the Bailouts*, 75 MD. L. REV. 722, 740 (2016) (“[T]he Takings Clause is ‘designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))); Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137, 138 (2016) (“[The Takings Clause] has been interpreted to constrain not only physical appropriations by the state but also regulatory actions, including exactions, that affect myriad incidents of property.”); Daniel P. Selmi, *Takings and Extortion*, 68 FLA. L. REV. 323, 348 (2016) (“[T]he case law under the Takings Clause has been concerned principally with determining when a government action has crossed the line into a taking and secondarily with whether the government’s action was specific enough to calculate damages for the taking.”).

<sup>160</sup> *Mobil Oil Expl. & Prod. Se., Inc. v. United States*, 530 U.S. 640, 609 (2000); Camisha L. Simmons, *Rejection of Oil and Gas Leases May Prove Futile*, LAW360, May 14, 2015, <http://www.law360.com/articles/653737/print?section=bankruptcy> (last visited Nov. 19, 2016).

takings claim. Similar litigation may follow in the Thompson Divide and Osage County.<sup>161</sup>

Without a physical taking, the analysis and precedent to consider fall under regulatory takings principles.<sup>162</sup> Regulatory takings analyses must initially assess whether a per se taking—destruction of all economic value—has occurred.<sup>163</sup> If no per se taking is found, the *Penn Central Transportation Co. v. City of New York*<sup>164</sup> (*Penn Central*) analysis of whether the government sufficiently interfered with the property owner's legitimate economic expectations in the property to warrant compensation is utilized.<sup>165</sup>

In *Penn Central*, a zoning ordinance declared Penn Central Station a historic landmark, limiting additional construction on the property, including the owners' planned construction of a high-rise on top of the station.<sup>166</sup> The Supreme Court of the United States analyzed the ordinance utilizing a three-pronged analysis to determine if a taking had occurred: 1) economic impact of regulation on property owner; 2) extent to which regulation interferes with distinct investment-backed expectations; and 3) "character" of government action—meaning principally that regulation of use is less likely to be taking than physical invasion.<sup>167</sup> In *Penn Central*, the property owner maintained certain property rights that did not result in a complete loss of value even after the zoning ordinance was enacted, and consequently, the Court did not find a regulatory taking.<sup>168</sup>

In *Solenex*, unlike *Penn Central*, no property rights remain after the Secretary's cancellation. While the government is making a token return of the \$31,235 in lease payments, the lease and corresponding property rights were extinguished.<sup>169</sup> In *Lucas v. South Carolina Coastal Council*,<sup>170</sup> the Court held that a South Carolina law prohibiting development on beachfront properties was in fact a taking, because the law was the functional equivalent of a physical appropriation.<sup>171</sup> The Court added that prior to finding a regulatory taking, the court must inquire as to whether the proposed use was inherent in the landowner's title in light of "background principles of the state's law of property and nuisance" in existence when the

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<sup>161</sup> See, e.g., Stroud, *supra* note 74.

<sup>162</sup> Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538–40 (2005); James E. Holloway & Donald C. Guy, *Extending Regulatory Takings Theory by Applying Constitutional Doctrine and Elevating Takings Precedents to Justify Higher Standards of Review* in Koontz, 22 WIDENER L. REV. 33, 37 (2016); Editorial, *Judicial Takings and Givings*, WASH. POST, May 28, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/27/AR2005052701267.html> (last visited Nov. 19, 2016).

<sup>163</sup> Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015–16 (1992); Steven C. Begakis, Note, *Stop the Reach: Solving the Judicial Takings Problem by Objectively Defining Property*, 91 NOTRE DAME L. REV. 1197, 1198–99 (2016).

<sup>164</sup> 438 U.S. 104 (1978).

<sup>165</sup> *Penn Central*, 438 U.S. at 124; Begakis, *supra* note 163, at 1203.

<sup>166</sup> *Penn Central*, 438 U.S. at 115–17.

<sup>167</sup> *Id.* at 124.

<sup>168</sup> *Id.* at 138.

<sup>169</sup> Letter from Aden L. Siedlitz & Michael Connor to Solenex LLC, *supra* note 64.

<sup>170</sup> 505 U.S. 1003 (1992).

<sup>171</sup> *Id.* at 1031.

property was acquired.<sup>172</sup> Part VI will analyze Solenex's takings claim under *Lucas* and the background principles exception.

#### A. Breach of Contract Claim

The Solenex lease, issued under the MLA, was a contract and the federal government canceled that contract. The government breached its agreed-to bargain, and classic contract law should apply.<sup>173</sup> While the government has indicated it will return Solenex's rental payments under the lease prior to suspension, the damages that flow from this breach are far more significant than the rental payments.

The breach of contract claim against the government may be pursued concurrently with the takings claim.<sup>174</sup> The remedies that Solenex and others similarly situated may seek are substantial. The government's breach of contract with Solenex caused compensable contract damages that were foreseeable in Solenex's attempt to pursue its rights to explore and produce oil and gas.<sup>175</sup> Solenex and its predecessors expended a great deal of resources in justifiable reliance for multiple decades. A breach of contract claim will be a robust claim.

#### VI. WHETHER A TAKING OCCURRED

The Solenex lease created property rights.<sup>176</sup> Like other MLA leases, the Solenex lease granted Mr. Longwell the exclusive right to drill for, remove, and dispose of the oil and gas under the leased lands for a primary term of ten years and so long thereafter as oil and gas is produced in paying quantities.<sup>177</sup> The lessee owned, until the cancellation, the right to explore for minerals.<sup>178</sup> In fact, pending BLM's approval, these rights were assignable to other parties *for valuable consideration*.<sup>179</sup> Mr. Longwell assigned his original rights to Fina for consideration, Fina (with approval again) eventually assigned the rights back to Mr. Longwell who ultimately assigned them to his company, Solenex, LLC.<sup>180</sup> Given that the Solenex lease is property, was the

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<sup>172</sup> *Id.* at 1029.

<sup>173</sup> *See, e.g.,* Mobil Oil Expl. & Producing Se. Inc. v. United States, 530 U.S. 604, 607–08 (2000) (applying contract law to a lease to explore and develop oil).

<sup>174</sup> Stockton E. Water Dist. v. United States, 583 F.3d 1344, 1368 (Fed. Cir. 2009), *on reh'g in part*, 638 F.3d 781 (Fed. Cir. 2011).

<sup>175</sup> *See* Bruce M. Pendery, *BLM's Retained Rights: How Requiring Environmental Protection Fulfills Oil and Gas Lease Obligations*, 40 ENVTL. L. 599, 667–69 (2010) (discussing breach of contract claims in the context of oil and gas leases).

<sup>176</sup> Viviano, *supra* note 8, at 47.

<sup>177</sup> MLA, 30 U.S.C. § 226(b)(1)(D), (e) (2012); 43 C.F.R. § 3101.1–2 (2015); LEASE NO. M 53323, *supra* note 26.

<sup>178</sup> Viviano, *supra* note 8, at 47.

<sup>179</sup> 43 C.F.R. § 3106.1 (2015); *e.g.,* Assignment Affecting Record Title to Oil and Gas, *supra* note 27.

<sup>180</sup> *See supra* notes 27, 50–51.

Secretary of the Interior's cancellation of the lease a Fifth Amendment taking for which compensation is due?

*A. DOI Lack of Authority*

A preliminary question in the *Solenex* case, and potentially in the Thompson Divide leases, is the question of the authority of DOI to cancel the leases under the circumstances. If the Secretary was *without* the authority to cancel the leases, then Solenex should be allowed to move forward with its exploration and production activities posthaste, and the question of whether a taking occurred will no longer be a necessary inquiry.

DOI and its leaders have concurrent duties to develop federal minerals, protect the environment, preserve historical and cultural properties, and fulfill countless other responsibilities.<sup>181</sup> It is Congress that limits and expands the authority of DOI to accomplish these obligations, and DOI has no more authority than Congress delegates.<sup>182</sup>

The Secretary of the Interior canceled the Solenex lease because the lease was improperly issued in violation of NEPA and NHPA.<sup>183</sup> Unlike the Outer Continental Shelf Lands Act,<sup>184</sup> the MLA does not provide DOI inherent authority to cancel a lease when environmental issues arise.<sup>185</sup> Leases under the MLA, like the Solenex lease, are “subject to cancellation if improperly issued.”<sup>186</sup> However, the Supreme Court has so far only found this inherent authority to extend to leases issued in violation of the regulations promulgated under the MLA.<sup>187</sup>

Previous decisions do not provide succinct clarity as to whether under NEPA, an EIS is necessary *prior* to a lease sale or issuance or at the time a permit to drill is sought.<sup>188</sup> Applying any of the cases cited by the federal

<sup>181</sup> U.S. Dep't of the Interior, *What We Do*, <https://www.doi.gov/whatwedo> (last visited Nov. 19, 2016).

<sup>182</sup> *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”); Frederick M. MacDonald, *Utah*, 18 TEX. WESLEYAN L. REV. 661, 664–67 (2012) (describing issue of the boundaries of the Secretary's limited discretion, then pending before the United States Court of Appeals for the Tenth Circuit).

<sup>183</sup> Letter from Aden L. Siedlitz & Michael Connor to Solenex LLC, *supra* note 64.

<sup>184</sup> 43 U.S.C. § 1331–1356a (2012).

<sup>185</sup> *Compare id.* § 1334(a)(2)(A) (2012), *with* 30 U.S.C. § 188(a) (2012), *and id.* § 226(i).

<sup>186</sup> 43 C.F.R. § 3108.3(d) (2015).

<sup>187</sup> *Boesche v. Udall*, 373 U.S. 472, 476, 485 (1963) (ruling that the Secretary may administratively cancel a lease 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 applicant). *Cf.* Emma Gannon, *Greens Fight Oil Drilling in Western Colorado*, COURTHOUSE NEWS SERV., July 20, 2016, <http://www.courthousenews.com/2016/07/20/greens-fight-oil-drilling-in-western-colorado.htm>. (last visited Nov. 19, 2016) (discussing allegations of illegal leases issued by BLM, failing to consider alternatives to reduce the acreage available for oil and gas leases in accordance with NEPA).

<sup>188</sup> *Connor v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988) (holding that an EIS must be completed prior to non-NSO leases unless surface-disturbing activities may be absolutely precluded); *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1227 (9th Cir. 1988) (following *Conner*,



government in *Solenex* to MLA leases is difficult “because when and how the administering agency actually commits to resource-disturbing activities in some ‘irreversible’ way is deeply uncertain.”<sup>189</sup> Additionally, an unchallenged EA was published prior to leasing to Mr. Longwell.<sup>190</sup>

Mr. Longwell acquired contractual and property rights in the early 1980s that were not called into question at the time the lease was issued. Pursuant to the MLA, and in accordance with NEPA, BLM issued the lease and no appeal or challenge was filed. Analysis of the environmental and historical impacts of drilling under this lease have been repeatedly studied and approved, all the way to the through final agency action and review DOI.<sup>191</sup>

While leases under the MLA are subject to compliance with a multitude of statutes and regulations, the leases “are immune from denial or extinguishment by the exercise of secretarial discretion.”<sup>192</sup> Permitting such inherent discretion allows the Secretary to dismiss the approvals of preceding colleagues and calls into question the rights of all federal leaseholders. Upholding the discretion exemplified in *Solenex* would be significant.<sup>193</sup> Protecting the environment, culture, and history is vital, but DOI must balance such protections with the value of maintaining private property rights.

The takings claim may be bypassed, and *Solenex* should be permitted to explore and produce oil and natural gas in accordance with its lease, if the court finds the Secretary abused her discretion in cancelling the lease.

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reversing the district court’s judgment in regards to preparation of an EIS for the sale of NSO leases).

<sup>189</sup> Jamison Colburn, *Keep it in the Ground: A Crown of the Continent Kickoff?*, NEPA LAB, Nov. 25, 2015, <http://www.nepalab.com/?p=1166> (last visited Nov. 19, 2016); *see also* NEPA, 42 U.S.C. § 4332(2)(C)(v) (2012) (requiring detailed statement in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment on any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented); Robert A. Nelson, *Oil and Gas Leasing on Forest Service Lands: A Question of NEPA Compliance*, 3 PUB. LAND L. REV. 1, 3 (1982) (discussing the interpretation of 42 U.S.C § 4332 when leasing is the major federal action significantly affecting the quality of the human environment).

<sup>190</sup> *See supra* notes 21–23.

<sup>191</sup> 1993 ROD, *supra* note 45, at 2 (“As a result of this review I have determined that the FEIS for the Fina APD complied with all applicable laws and regulations, and that the February 19, 1991, ROD issued by the Forest Service is proper and should stand. I, therefore, approve the Fina APD with signatory concurrence from the Montana BLM State Director and Department of Interior’s Assistant Secretary for Land and Minerals, as indicated by the signatures on the attached ROD. This decision, with concurrence from Interior’s Assistant Secretary for Land and Minerals, constitutes final agency action for the Department of the Interior.”).

<sup>192</sup> Viviano, *supra* note 8, at 47.

<sup>193</sup> *Cf. Tex. Oil & Gas Corp. v. Watt*, 683 F.2d 427, 434 (D.C. Cir. 1982) (reversing the Secretary’s “eleventh-hour” lease cancellation decision, 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”).

*B. Within DOI Authority*

If the court determines that the Secretary of the Interior was within her authority to cancel the Solenex lease—after decades of review and secretary-level approval—because the lease was improperly issued, then a takings claim may or may not be successful. The characterization of the Secretary of the Interior’s authority to cancel the lease under the background principles exception in the *Lucas* analysis creates the most significant hurdle to asserting a successful takings claim and being awarded compensation.<sup>194</sup>

*1. A Successful Takings Claim*

“There is a fundamental tension between constitutional regulatory takings doctrine, natural resource protection and historical preservation.”<sup>195</sup> A leasehold interest in federal mineral rights is considered a less than fee interest estate in real property.<sup>196</sup> It is property—not a mere expectancy—and a taking must be compensated under the Fifth Amendment.<sup>197</sup>

Federal mineral leases are assets for energy companies and their financial backers. There is risk involved in exploring for oil and gas in paying quantities. Adding the risk of never being allowed to engage in exploration due to environmental and historical preservation laws without compensation, would limit, if not end, federal leasing. The Solenex lease was property, and it was a valuable asset for Solenex. Even in the name of protecting the environment and honoring the spiritual practices of the Blackfeet, canceling the lease caused Solenex to lose valuable property. Whether that loss is a taking falls to the Supreme Court’s regulatory takings jurisprudence.

*a. Lucas Analysis*

The *Lucas* Court articulated a regulatory takings rule that private property owners are entitled to compensation for a taking under the Fifth Amendment Takings Clause when a government “regulation denies all economically beneficial or productive use of land.”<sup>198</sup> Unlike the plaintiff in *Penn Central*, Solenex does not have any property left in its bundle of sticks, making *Lucas* the appropriate precedent for analysis.

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<sup>194</sup> See *supra* note 172 and accompanying text.

<sup>195</sup> Robin Kundis Craig, *What the Public Trust Doctrine Can Teach Us About the Police Power, Penn Central, and the Public Interest in Natural Resource Regulation*, 45 ENVTL. L. 519, 556 (2015); see also Susan Cantlie, *When Words Collide: Environmental Regulation in Conflict with Bankruptcy Legislation*, 21 CAN. BUS. L.J. 190, 210 (1993) (describing a similar conflict between resource protection and bankruptcy laws in Canada).

<sup>196</sup> Viviano, *supra* note 8, at 47.

<sup>197</sup> *Id.*

<sup>198</sup> 505 U.S. 1003, 1015–16 (1992); Carol Nicole Brown, *The Categorical Lucas Rule and the Nuisance and Background Principles Exception*, 30 TOURO L. REV. 349, 350 (2014).

Solenex's story of compliance with NEPA and NHPA demonstrates the incredible conflict among environmental laws, historical and cultural preservation laws, mineral leasing laws, and energy development. The federal government must regularly sort priorities and make a choice. When the federal government's prioritizing decision deprives a party its property, compensation may be due. Under *Lucas*, a regulatory takings claim would likely be successful and just compensation would follow for Solenex. While all in the name of NEPA and NHPA, the federal government engaged in a regulatory taking that deprived Solenex of its property interest.

The Secretary of the Interior, in defending the decision to cancel the lease, will have to show the reasoning behind the decision. Adhering to NEPA and NHPA while developing an MLA lease is required by multiple federal agencies.<sup>199</sup> However, NEPA and NHPA compliance does not alleviate the federal government of its duty to compensate parties who lose property through the exercise of its regulatory power. Solenex had property rights in the lease. Canceling the lease prior to being held by production, because it was improperly issued under NEPA and NHPA, resulted in a taking. Applying *Lucas*, the federal government took those rights and compensation is due in accordance with the Fifth Amendment.

#### *b. Penn Central Analysis*

If the court applies *Penn Central* to the Solenex lease, a taking would likely still be found. Balancing the factors—the economic impact of regulation on property owner, the extent to which regulation interferes with distinct investment-backed expectations, and the “character” of the government action—is highly fact-specific.<sup>200</sup> Unquestionably, the economic impact to Solenex has been and will be significant, and its investment-backed expectations have been crushed.<sup>201</sup> The character of the government action is situated in protecting the environmental and cultural interests potentially impacted by drilling under the lease. The government will face the challenge of defending its 2016 prioritization and decision compared to its 1982 prioritization when the lease was issued. Investments were made and expectations were created in 1982, that were affirmed in years of approvals, including the suspended final approval.<sup>202</sup> Property rights were created that have now been taken. If the cancellation is upheld, compensation is due under *Lucas* and *Penn Central*.

## *2. An Unsuccessful Taking Claim*

The *Lucas* Court acknowledged that the regulatory takings rule was subject to an exception: the government can avoid compensating if it can

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<sup>199</sup> See *supra* Part IV.

<sup>200</sup> *Penn Central*, 438 U.S. at 124; Begakis, *supra* note 163, at 1205–06.

<sup>201</sup> Viviano, *supra* note 8, at 44 (explaining that oil and gas leases are a valuable property right).

<sup>202</sup> See *supra* Part II.

prove that the “proscribed use interests were not part of [the owner’s] title to begin with.”<sup>203</sup> Any limitation that is severe enough to deprive a private property owner of all economically beneficial use of the owner’s property “cannot be newly legislated or decreed (without compensation),” but is not compensable if it inheres “in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”<sup>204</sup>

The analysis of *Solenex* requires an evaluation of the background laws when the property (the lease) was acquired. The authority and discretion the Secretary asserts in the cancellation is vast and bound by almost no limits.<sup>205</sup> If this decision is upheld, and is considered a *Lucas* background principle exception, then the court may rule a taking did not occur. With such discretion, the Secretary of the Interior could arguably undercut the notion of property rights in a nonproducing lease by pulling it back into additional NEPA and NHPA review, and canceling it because it should not have been issued in the first instance.

If the outcome in *Solenex* was always a possibility, then there is no taking, since regulation does not take any property right an owner never had. Mr. Longwell, and any other federal leaseholder, may wonder what rights are held under a nonproducing/undeveloped lease if the possibility readily exists that the lease may be canceled if deemed improperly issued, despite extensive evaluation. What due diligence must bidders on federal leases (before ever becoming a leaseholder) now engage in to determine if the leases are exposed to cancellation? Application of the *Lucas* exception could result in an unsuccessful takings claim for *Solenex*, but the repercussions would be far reaching.

### 3. Financial Viability of Federal Oil and Gas Leases

The sky is not falling, but the ramifications for the Secretary of the Interior’s actions may be significant if they are upheld, and no compensable taking is found. They call into question the financial sustainability of federal oil and gas leases as valuable assets with contractual and property rights attached thereto.

Should it be held that the Secretary of the Interior was within her authority and discretion to unilaterally cancel the *Solenex* lease, because the lease was allegedly improperly issued, all investors in federal leases—the actual leaseholders, financial institutions large and small, private equity groups, and individual citizens financially backing these enterprises—should pause and consider the value assigned to federal leases marked as assets for energy companies.

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<sup>203</sup> *Lucas*, 505 U.S. 1003, 1027 (1992); Brown, *supra* note 198, at 359.

<sup>204</sup> *Lucas*, 505 U.S. at 1029; Brown, *supra* note 198, at 350–51.

<sup>205</sup> Memorandum of Points and Authorities in Support of Defendant’s Cross-Motion for Summary Judgment and Opposition to Plaintiff’s Motion for Summary Judgment at 3–4, *Solenex LLC v. Jewel*, No 1:13-cv-00993-RJL (D.D.C. Oct. 3, 2016), ECF No. 93-1.

Leases held by production would likely fall out of the concerns generated by the events described herein.<sup>206</sup> However, given that MLA leases are for ten-year terms, exploration and production does not have to happen immediately on a federal lease.<sup>207</sup> The future potential is still a valuable asset. Leases that still require additional process—an APD, EA, or EIS—should be flagged for financial evaluation.

The Solenex lease and the Thompson Divide leases demonstrate that a nonproducing lease could be pulled back by a NEPA and/or NHPA review and canceled because it was improperly issued. While not an issue of discretion, the ever changing applicability of NEPA and lease issuances triggered the lease cancellation in Osage County.<sup>208</sup> Upstream opportunities were thwarted with a game-changing determination while in midstream pursuit of an economic venture.

Concerns are growing that:

developing leases on public lands is getting “exceedingly difficult” with changes in land-management decisions that seem to be made without legal precedent. The BLM’s approach is having a “chilling effect” on extraction progress. BLM’s lease cancellation decision calls into question the foundation for the development of federal oil and gas, the sanctity of a federal contract, and the rule of law. Those private-sector investments won’t be made if there is no longer confidence in a government lease contract.<sup>209</sup>

Undertaking a journey like the one in *Solenex* is not sustainable by most energy companies and operators. Successfully pursuing a takings claim is not a path that any bidder in a federal oil and gas lease sale seeks.

## VII. CONCLUSION

Natural resource development, environmental, historical, and cultural preservation laws conflict. While current lease cancellation lawsuits and pending administrative actions vary in certain respects, the leaseholders all encounter similar uncertainty in anticipating decisions made under NEPA and the NHPA. Realizing financial rewards from the risks assumed in federal leases looms farther in the distance for energy companies and their financial backers. When property is taken in order to comply with NEPA or the NHPA, a Fifth Amendment Takings Clause claim may follow. Under the Supreme Court’s regulatory takings jurisprudence, whether the claim is successful depends greatly on the circumstances of each case. In *Solenex*, a federal leaseholder held a bundle of rights and when all of those rights were retracted through a lease cancellation, property was taken, making

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<sup>206</sup> See MLA, 30 U.S.C. § 188(b) (2012) (restricting the Secretary’s authority to cancel leases containing wells capable of producing oil or gas in paying quantities).

<sup>207</sup> *Id.* § 226(e).

<sup>208</sup> See *supra* note 80 and accompanying text.

<sup>209</sup> Collin Szewczyk, *Oil, Gas Industry Lambastes BLM in House Hearing*, ASPEN DAILY NEWS ONLINE (July 13, 2016) <http://www.aspendailynews.com/section/home/171780> (last visited Nov. 19, 2016).

1008

*ENVIRONMENTAL LAW*

[Vol. 46:979

compensation due in accordance with the United States Constitution. With the regulatory environment of upstream development in great flux, *Solenex* is the case to watch.