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Form and Substance: The National Historic Preservation Act, Badger-Two Medicine, and Meaningful Consultation

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Student Article

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"We must act to preserve ourselves by conserving our culture and our lands for future generations. As long as we have our reservation it is up to us to be wise stewards of these sacred lands. We need to care for them in such a way that the next generation has a land resource that can be used and enjoyed."

Chief Earl Old Person, Traditional Chief of the Blackfeet Nation of Montana[1]

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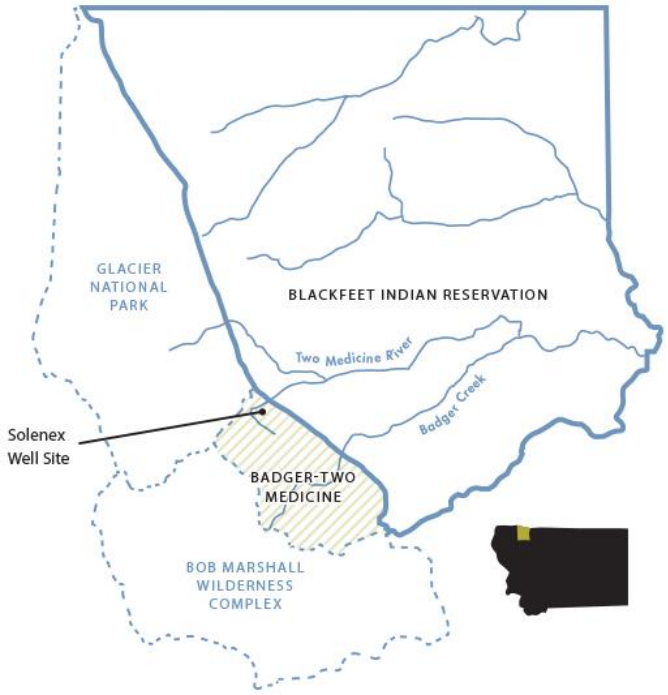

I. INTRODUCTION

Far north along the Continental Divide on the Rocky Mountain Front lies the Badger-Two Medicine, a special place to many people. Rich with cultural resources and the potential for oil and gas development, the Badger-Two Medicine was recently the center of a controversy regarding the appropriate management of federal lands and the balance between natural resource development and cultural resource preservation. A landscape critical to the "religion, traditional lifeways, and practices" of the Blackfeet Nation ("Blackfeet"),[2] the Badger-Two

SHPO, as well as the Editors and Staff of the *Public Land & Resources Law Review* for their incredible support and guidance.

1. Blackfeet Nation, *Too Sacred to Develop*, BADGER-TWOMEDICINE.ORG, http://www.badger-twomedicine.org (last visited Apr. 12, 2017).

2. ADVISORY COUNCIL ON HISTORIC PRESERVATION, COMMENTS OF THE ADVISORY COUNCIL ON HISTORIC PRESERVATION REGARDING THE RELEASE FROM SUSPENSION OF THE PERMIT TO DRILL BY SOLENEX LLC IN LEWIS AND CLARK NATIONAL FOREST, MONTANA 4 (Sept. 21, 2015), *available at* http://www.achp.gov/docs/APDinLewisandClarkNF.pdf [hereinafter ADVISORY COUNCIL'S COMMENTS] (on file with author).

Medicine is managed by the United States Forest Service ("Forest Service") as part of the Lewis and Clark National Forest.[3] It sits adjacent to Glacier National Park, the Blackfeet Indian Reservation, and the Bob Marshall Wilderness Complex.[4] The Badger-Two Medicine emerged as an area of interest for oil and gas exploration in the early 1980s, when the Bureau of Land Management ("BLM") issued fifty-one oil and gas leases as part of an "initiative to develop minerals on undeveloped federal lands."[5] Since issuance of the leases, the Forest Service and Blackfeet engaged in prolonged consultation under Section 106 of the National Historic Preservation Act ("NHPA") to identify and evaluate the significance of the Badger-Two Medicine as a traditional cultural property.[6] Throughout, the Forest Service and Blackfeet managed to work together despite internal and external challenges. As such, the Badger-Two Medicine offers a unique illustration of an organic occurrence of meaningful consultation between a federal agency and American Indian tribe.

Meaningful consultation between the federal government and American Indian tribes is vital to tribal self-determination and sovereignty.[7] Yet, meaningful consultation remains elusive. As

3. LEWIS AND CLARK NATIONAL FOREST, ROCKY MOUNTAIN RANGER DISTRICT, PONDERA AND GLACIER COUNTIES, MONTANA, ROCKY MOUNTAIN RANGER DISTRICT TRAVEL MANAGEMENT PLAN: RECORD OF DECISION FOR BADGER-TWO MEDICINE 4 (Mar. 2009), *available at* https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5374044.pdf [hereinafter BADGER-TWO MEDICINE TRAVEL MANAGEMENT PLAN] (on file with author).

4. Blackfeet Nation, *supra* note 1, map inset (on file with author).

5. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 2.

6. *See* Blackfeet Nation, *History of Oil and Gas Leases in the Badger-Two Medicine*, BADGER-TWOMEDICINE.ORG, http://www.badger-twomedicine.org/pdf/Blackfeet_chronology_r109.pdf (last visited Apr. 12, 2017) [hereinafter History of Oil and Gas Leases Timeline] (on file with author).

7. During his administration, President William J. Clinton issued a series of executive orders and memoranda recognizing and further defining the consultation rights of American Indian tribes. *See* Enhancing the Intergovernmental Partnership, Executive Order 12,875 of Oct. 26, 1993, 58 Fed. Reg. 58,093 (Oct. 28, 1993); Government-to-Government Relations with Native American Tribal Governments, Memorandum of Apr. 29, 1994, 59 Fed. Reg. 22,951 (May 4, 1994); Consultation and Coordination with Indian Tribal Governments, Executive Order 13,175 of Nov. 6, 2000, 65 Fed. Reg. 67,249 (Nov. 9, 2000). President George W. Bush reaffirmed the federal government's duty to consult with American Indian tribes by "commit[ing] to continu[e] to work with federally recognized tribal governments on a government-to-government basis and strongly support[] and respect[] tribal sovereignty and self-determination for tribal governments in the United States." Memorandum on Government-to-Government Relationship with Tribal Governments, Memorandum, 2 PUB. PAPERS 2177 (Sept. 23, 2004). President

demonstrated by recent clashes between American Indian interests and natural resource development, federal agencies often have different understandings of consultation than American Indian tribes.[8] These different understandings can be generalized into a distinction between procedural and substantive, or meaningful, consultation. Federal agencies generally favor a procedural approach to consultation that is universally applicable to all federal actions. American Indian tribes generally favor a substantive, or meaningful, approach to consultation tailored to historical, cultural, and geographical conditions. Therefore, while federal agencies may carefully follow regulatory processes to meet their procedural consultation requirements, tribes push for more meaningful consultation focused on addressing their actual, substantive concerns rather than procedural requirements.[9] The chronic discord between the federal government and American Indian tribes raises doubt as to whether a solution exists and encourages opponents to question the utility of consultation. Nevertheless, considering the recognized importance of meaningful consultation, it is worth continuing to explore potential solutions.

This Article focuses on tribal consultation under the NHPA and, more specifically, Section 106 of the NHPA.[10] It distinguishes substantive, or meaningful, consultation from procedural consultation. Meaningful consultation necessitates open dialogue centered on actual recognition of tribal interests and concerns. Procedural consultation follows the minimal procedural requirements of Section 106, as

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Barack H. Obama further supported consultation as vital to tribal self-determination and sovereignty when he issued a memorandum formally adopting Executive Order 13,175. Tribal Consultation: Memorandum for the Heads of Executive Departments and Agencies, Memorandum of Nov. 5, 2009, 74 Fed. Reg. 57,881 (Nov. 9, 2009). Under President Obama's Memorandum, "executive departments and agencies . . . [we]re charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and [we]re responsible for strengthening the government-to-government relationship between the United States and Indian tribes." *Id*. at 57,881.

8. *See, e.g.*, Paul VanDevelder, *Reckoning at Standing Rock*, HIGH COUNTRY NEWS (Oct. 28, 2016), http://www.hcn.org/articles/Reckoning-at-Standing-Rock.

9. *See, e.g.*, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4 (D.D.C. 2016).

10. Preservation practitioners refer to the procedural mechanism for protection and preservation of properties listed or eligible for inclusion in the National Register of Historic Places as Section 106. In 2014, the NHPA was revised and moved from Title 16 of the United States Code to Title 54. Under the revisions, Section 106 became 54 U.S.C. § 306108 (2012). This Article will refer to § 306108 as Section 106.

delineated by federal courts, and generally involves cataloguing contacts with American Indian tribes as a means of avoiding liability without actual consideration of tribal interests or concerns. This Article asserts that achieving meaningful consultation requires federal agencies to exceed the minimum procedural requirements of Section 106 by establishing flexible common understandings of meaningful consultation with tribes. In support of this assertion, it explores meaningful consultation by examining the conflict over oil and gas exploration in the Badger-Two Medicine of northwestern Montana.

Part II of this Article summarizes the background of the NHPA and outlines the federal government's responsibilities under Section 106. It further examines the evolution of consultation with American Indian tribes under the NHPA and highlights disparities between procedural consultation requirements of Section 106 and meaningful consultation. Part II also turns to judicial interpretations of consultation and asserts the emphasis on procedural consultation requirements of Section 106 undermines meaningful consultation. Part III employs the background provided in Part II as a framework for discussing the regulatory and permitting process surrounding oil and gas exploration in the Badger-Two Medicine, as well as the Blackfeet's religious and historical arguments. Finally, Part IV applies the Badger-Two Medicine illustration to argue that discord still exists between procedural consultation requirements of Section 106 and achieving meaningful consultation. It further suggests federal agencies and American Indian tribes find resolution by seeking common understandings of meaningful consultation.

II. NATIONAL HISTORIC PRESERVATION ACT: SECTION 106

The end of World War II marked the beginning of a period of national economic growth.[11] Dramatic shifts in social and physical landscapes threatened the Nation's natural, historic, and cultural resources.[12] The impact of these threats grew more evident by the 1960s, resulting in an emerging sense of urgency among preservationists and other advocates.[13] Congress recognized a need to "foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other

11. Diane Lea, *America's Preservation Ethos: A Tribute to Enduring Ideals*, *in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 1, 8–9 (Robert E. Stipe ed., 2003).

12. *Id.* at 10.

13. *Id.*

requirements of present and future generations."[14] Congress's efforts to produce this "productive harmony" resulted in a unique federal statute, the NHPA, which sought to balance development and preservation as well as federal, state, and local interests.[15] Considered "the most far-reaching preservation legislation ever enacted in the United States,"[16] the NHPA was intended to preserve the "historical and cultural foundations of the Nation . . . as a living part of our community life and development in order to give a sense of orientation to the American people."[17] Notably, despite these intentions, American Indian interests were initially excluded from the NHPA.[18] It was not until nearly three decades after the NHPA's enactment that American Indian tribes were included as full partners in the "national preservation partnership."[19]

A. General Background

In order to counter potential threats to the Nation's heritage and promote productive harmony between development and preservation, Congress enacted a series of closely interconnected statutory sections that work together to achieve the aims of the NHPA.[20] These include sections creating the Advisory Council on Historic Preservation ("Advisory Council"),[21] National Register of Historic Places ("National Register"),[22] and the State Historic Preservation Programs.[23]

The Advisory Council is an independent agency comprised of government officials and civilians appointed by the President.[24] As the primary authority on preservation matters, the Advisory Council is tasked with three essential roles.[25] First, the Advisory Council must apprise the President and Congress of historic preservation matters by

14. 54 U.S.C. § 300101(1) (2012).
15. *See generally id*. § 300101.
16. Lea, *supra* note 11, at 11.
17. National Historic Preservation Act, Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966), *as amended by* Pub. L. No. 96-515, 94 Stat. 2987 (1980), Pub. L. No. 102-575, 106 Stat. 4753-69 (1992).
18. Alan Downer, *Native Americans and Historic Preservation*, *in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 405, 415–16 (Robert E. Stipe ed., 2003).
19. *Id*. at 416.
20. Lea, *supra* note 11, at 10–11.
21. 54 U.S.C. §§ 304101–304112 (2012).
22. *Id*. §§ 302101–302108.
23. *Id*. §§ 302301–302304.
24. *Id*. § 304101(a).
25. *Id.* § 304102(a).

advising on proposed legislative and other actions, recommending administrative and legislative improvements, assessing and advocating for current and emerging preservation concerns, and evaluating the effectiveness of federal programs and policies.[26] Second, as the "only entity with the legal responsibility to encourage federal agencies to factor historic preservation into federal project requirements,"[27] the Advisory Council must diligently review federal agency policies and programs to ensure "effectiveness, coordination, and consistency of those policies" with the NHPA's intent.[28] Third, the Advisory Council must encourage "training and education in the field of historic preservation."[29]

Historic properties listed or eligible for inclusion in the National Register are expressly subject to the NHPA's protections.[30] Under the NHPA, the Secretary of the Interior is authorized to expand and maintain the National Register as the Nation's official inventory of historic properties recognized for their importance to "history, architecture, archaeology, engineering, and culture."[31] Actual authority and responsibility for administering the National Register is delegated to the National Park Service ("NPS").[32] The NPS further delegates authority to list historic properties and determine their National Register eligibility to the Keeper of the National Register ("Keeper").[33]

The National Register is intended as a planning tool "to be used by [f]ederal, [s]tate, and local governments, private groups and citizens to identify the Nation's cultural resources and to indicate what properties should be considered for protection from destruction or impairment."[34]

26. *Id*. § 304102(a)(1), (3), (b); *see also About the ACHP: General Information*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, http://www.achp.gov/aboutachp.html (last visited Apr. 11, 2017) [hereinafter *ACHP General Information*].

27. *ACHP General Information*, *supra* note 26.

28. 54 U.S.C. § 304102(a)(6).

29. *Id*. § 304102(a)(2), (5).

30. *See, e.g.*, *id*. § 306101.

31. 36 C.F.R. § 60.4 (2017).

32. *Id*. § 60.3(h).

33. *Id*. § 60.3(f).

34. *Id*. § 60.2. Unless the federal government owns the historic property, listing in the National Register is an honorary designation not subject to federal laws or regulations. *Id*. It is unclear why the National Park Service's implementing regulations for the National Register do not mention American Indian tribes in the list of governments, groups, and citizens that use the National Register. *Id*.

Such properties include "districts, sites, buildings, structures, and objects" that possess the seven aspects of integrity[35] and:

> (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
> (b) that are associated with the lives of persons significant in our past; or
> (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
> (d) that have yielded, or may be likely to yield, information important in prehistory or history.[36]

Traditional cultural properties are an additional subset of historic properties associated with the cultural "beliefs, customs, and practices" of a community.[37] Properties may be nominated for inclusion in the National Register by federal agencies, state historic preservation programs, local preservation programs, American Indian tribes, as well as private entities and individuals.[38] The Keeper makes the final evaluation and listing of a property in the National Register.[39]

35. 36 C.F.R. § 60.4 (the seven aspects of integrity are "location, design, setting, materials, workmanship, feeling, and association").

36. *Id*. § 60.4(a)–(d).

37. NATIONAL PARK SERVICE, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 1 (1990, revised 1992, 1998), *available at* https://www.nps.gov/nr/publications/bulletins/nrb38/ [hereinafter NATIONAL REGISTER BULLETIN 38] (on file with author). National Register Bulletin 38 defines a traditional cultural property as a property "eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." *Id*. An example of a traditional cultural property is "a location where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice." *Id*.

38. NATIONAL PARK SERVICE, HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION i (1990, revised 1991, 1995, 1997), *available at* https://www.nps.gov/nr/publications/bulletins/nrb15/ (on file with author).

39. *Id*.

State Historic Preservation Programs are administered by State Historic Preservation Officers ("SHPO") to help implement federal and state preservation responsibilities.[40] The SHPOs have extensive duties including identifying, documenting, and nominating properties to the National Register; reviewing documentation of federal agency projects; helping local governments create local historic preservation programs; and conducting educational programs.[41]

B. Federal Agency Responsibilities

In addition to the Advisory Council, National Register, and the State Historic Preservation Programs, Congress enacted measures mandating federal agency participation in the preservation partnership. A portion of the NHPA, referred to as Section 106 by preservation practitioners, establishes the procedural mechanism for protection and preservation of properties listed or eligible for inclusion in the National Register.[42] Regulations promulgated by the Advisory Council to implement Section 106, 36 C.F.R. part 800, obligate federal agencies with direct or indirect control over a "proposed [f]ederal or federally assisted undertaking"[43] to consider the effects of the undertaking on significant historic properties, consult with interested parties, and provide the Advisory Council opportunity to comment on such actions prior to the final decision.[44] To fulfill these obligations, federal agencies must follow a series of procedural steps. Each step requires the federal agency to consult with other parties. Such parties include American Indian tribes.[45]

Under the NHPA implementing regulations, consultation is "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the [S]ection 106 process."[46] When tailoring the

40. 54 U.S.C. § 302303 (2012).
41. *Id*. § 302303(b).
42. *Id*. § 306108.
43. *Id*.
44. *Id*.; 36 C.F.R. pt. 800 (2017). An undertaking is any "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—(1) those carried out by or on behalf of the Federal agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 54 U.S.C. § 300320.
45. 36 C.F.R § 800.2(c).
46. *Id*. § 800.16(f).

consultation process to a particular action, federal agencies consider "the scale of the undertaking and the scope of [f]ederal involvement,"[47] and coordinate with other statutory requirements,[48] such as those under the National Environmental Policy Act ("NEPA")[49] and the Native American Graves Protection and Repatriation Act ("NAGPRA").[50] The goal of consultation is to assist federal agencies in completing the Section 106 process by "identify[ing] historic properties potentially affected by [an] undertaking, assess[ing] its effects and seek[ing] ways to avoid, minimize or mitigate any adverse effects on historic properties."[51] Notably, despite the consultation requirement, Section 106 "encourages, but does not mandate preservation,"[52] and the federal agency always retains the final decision-making authority.[53] Provided the federal agency has fulfilled the requirements of Section 106, it may commit itself to "appropriate action."[54]

C. Tribal Consultation

American Indian tribes rely on various federal statutes to protect properties of religious or cultural significance.[55] These statutes include the NHPA, NEPA, NAGPRA, American Indian Religious Freedom Act ("AIRFA"),[56] Antiquities Act,[57] and Archeological Resources Protection Act ("ARPA").[58] Specific tribal consultation provisions are included in

47. *Id*. § 800.2(a)(4).

48. *Id*.

49. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321– 4370m (2012)).

50. Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001–3013 (2012)).

51. 36 C.F.R. § 800.1(a).

52. ADVISORY COUNCIL ON HISTORIC PRESERVATION, PROTECTING HISTORIC PROPERTIES: A CITIZEN'S GUIDE TO SECTION 106 REVIEW 4 (n.d.), *available at* http://www.achp.gov/docs/citizens-guide-2015.pdf (on file with author).

53. 36 C.F.R. § 800.2(a).

54. *Id*.

55. Peter J. Gardner, *The First Amendment's Unfulfilled Promise in Protecting Native American Sacred Sites: Is the National Historic Preservation Act a Better Alternative?* 47 S.D. L. REV. 68, 79 (2002).

56. Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (2012)).

57. Pub. L. No. 59-209, 34 Stat. 225 (1906) (codified at 54 U.S.C. §§ 320301–320303 (2012)).

58. Pub. L. No. 96-95, 93 Stat. 721, 727 (1979) (codified at 16 U.S.C. §§ 470aa–470mm (2012)).

the NHPA, NAGRPA,[59] and ARPA.[60] Although these statutes are often applied in conjunction, the NHPA is the "primary mandate for federal agencies to provide leadership in preserving significant historic and prehistoric resources."[61] Thus, the NHPA provides a particularly important avenue for American Indian tribes to "influence administrative decision making" through consultation.[62]

American Indian tribes did not originally have a "substantive role in the [NHPA's] national preservation partnership."[63] While major amendments in 1980 included references to American Indians,[64] it was not until the 1992 amendments that tribes were "provided the opportunity to become full partners or to participate at whatever level m[et] their sovereign needs."[65]

A series of socio-cultural shifts, combined with increased tribal influence, led to growing awareness of American Indian cultural and religious interests, and eventually resulted in the 1992 amendments to the NHPA.[66] In the late 1970s, American Indian interest groups pushed Congress to establish "greater protections for archeological artifacts and sites, as well as active cultural and religious practices."[67] Congress responded by passing the AIRFA, which helped lay the groundwork for

59. The Native American Graves Protection and Repatriation Act outlines a process for return of certain American Indian cultural items by museums and federal agencies to lineal descendants or culturally affiliated American Indian tribes. 25 U.S.C. §§ 3001–3013 (2012). The process requires consultation with affected American Indian tribes. *See id*. §§ 3002(c)(2), 3005(a)(3).

60. The Archaeological Resources Protection Act imposes civil and criminal penalties for unpermitted removal or damage of archaeological resources on federal lands. 16 U.S.C. §§ 470ee–470ff. The responsible federal official must notify and consult with affected American Indian tribes prior to issuing a permit with the potential to damage a religious or cultural site. 43 C.F.R. § 7.7 (2017).

61. Gardner, *supra* note 55, at 79 (citations omitted).

62. *Id*. (citations omitted).

63. Downer, *supra* note 18, at 416.

64. *Id*.; National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987 (1980).

65. Downer, *supra* note 18, at 416.

66. PETER NABOKOV, WHERE THE LIGHTING STRIKES: THE LIVES OF AMERICAN INDIAN SACRED PLACES xv-xvii (2006).

67. S. Rheagan Alexander, *Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review*, 32 PACE L. REV. 895, 899 (2012) (citing Marilyn Phelan, *A History and Analysis of Laws Protecting Native American Cultures*, 45 TULSA L. REV. 45, 52 (2009)).

increased American Indian participation in federal preservation planning.[68]

Prior to the 1992 amendments, the NPS issued National Register Bulletin 38, a "natural predecessor to the more formal tribal consultation requirements created by amendments to the NHPA just two years later."[69] Although not limited to properties of traditional cultural significance to American Indian tribes, National Register Bulletin 38 gave "special attention" to preventing federal agencies from excluding such properties from the National Register and the protections afforded by Section 106.[70] National Register Bulletin 38 further highlighted the importance of "consult[ing] with groups and individuals who . . . . may ascribe traditional cultural significance to locations within the study area, and . . . who may have knowledge of such individuals and groups."[71] In effect, National Register Bulletin 38 prevented federal agencies from avoiding their responsibilities to American Indian traditional cultural properties[72] and "necessitated consultation and close cooperation with [tribes]."[73]

The 1992 amendments significantly modified the NHPA with regard to American Indian tribes.[74] First, the amendments authorized tribes to assume the responsibilities of SHPOs with respect to tribal lands[75] and formally clarified that traditional cultural properties could be

68. *Id*. at 899–900. The American Indian Religious Freedom Act requires Federal agencies to "protect and preserve" the religious freedoms of American Indians, including "access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 U.S.C. § 1996 (2012).

69. Alexander, *supra* note 67, at 902.

70. NATIONAL REGISTER BULLETIN 38, *supra* note 37, at 3.

71. *Id*. at 7.

72. *Id*. at 3.

73. Alexander, *supra* note 67, at 902.

74. *Id*. at 903; National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, 106 Stat. 4753-69 (1992) (codified at 54 U.S.C. §§ 300101–307108 (2012)).

75. Alexander, *supra* note 67, at 903; National Historic Preservation Act Amendments of 1992, § 4006, 106 Stat. at 4756 (codified at 54 U.S.C. § 302702). In recognition of their status as sovereign nations, American Indian tribes may request responsibility for all, some, or none of the SHPO functions. Downer, *supra* note 18, at 416. When an American Indian tribe assumes SHPO responsibilities, the Tribal Historic Preservation Officer administers its Tribal Historic Preservation Program. An American Indian tribe must meet certain standards to assume SHPO responsibilities. National Historic Preservation Act Amendments of 1992, § 4006, 106 Stat. at 4756 (codified at 54 U.S.C. § 302702). It must designate a Tribal Historic Preservation Officer and "provide[] the Secretary

eligible for listing in the National Register.[76] Further, the amendments required federal agencies to consult during the Section 106 process with "any Indian tribe . . . that attaches religious and cultural significance"[77] to a historic property that may be adversely affected by a federal undertaking, regardless of whether the undertaking occurs on or off tribal lands.[78] These amendments incorporated tribes into the national preservation partnership and included them in the Section 106 process.[79]

In recognition of the sovereignty of federally recognized tribes, as well as their "unique legal and political relationship" with the United States,[80] the NHPA requires federal agencies to conduct consultation in a "sensitive manner" that recognizes the government-to-government relationship between the federal government and federally recognized tribes.[81] Consultation with tribes must occur between a designated official representative of the federal government and a designated or identified official representative of the appropriate American Indian tribe.[82] Federal agencies must ensure tribes are provided "reasonable opportunity to identify [their] concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate [their] views

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[of the Interior] with a plan" describing how it proposes to carry out the functions of the tribal preservation program. *Id*. (codified at 54 U.S.C. § 302702(2), (3)). Additionally, the Secretary of the Interior must determine that the tribal preservation program is "fully capable of carrying out the functions specified in the plan." *Id*. (codified at 54 U.S.C. § 302702(4)(A)).

76. Alexander, *supra* note 67, at 903; National Historic Preservation Act Amendments of 1992, § 4006, 106 Stat. at 4757 (codified at 54 U.S.C. § 302706(a)).

77. Alexander, *supra* note 67, at 903; National Historic Preservation Act Amendments of 1992, § 4006, 106 Stat. at 4757 (codified at 54 U.S.C. § 302706(b)).

78. National Historic Preservation Act Amendments of 1992, § 4006, 106 Stat. at 4757 (codified at 54 U.S.C. § 302706(b)).

79. Downer, *supra* note 18, at 416; Alexander, *supra* note 67, at 903 (citing Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 553 (8th Cir. 2003) (differentiating between "consulting parties as a matter of right," including American Indian tribes, and discretionary consulting parties)).

80. The "unique legal and political relationship" between the United States and American Indian tribes is "established through and confirmed by the Constitution of the United States, treaties [and agreements], statutes, executive orders, and judicial decisions." Tribal Consultation: Memorandum for the Heads of Executive Departments and Agencies, Memorandum of Nov. 5, 2009, 74 Fed. Reg. 57,881, 57,881 (Nov. 9, 2009); 36 C.F.R. § 800.2(c)(2)(ii)(B) (2017).

81. 36 C.F.R. § 800.2(c)(2)(ii)(B), (C).

82. *Id*. § 800.2(c)(2)(ii)(C).

on the undertaking's effects on such properties, and participate in the resolution of adverse effects."[83]

In addition to the procedural consultation requirements of the NHPA, a number of executive actions have emphasized the importance of *meaningful* consultation between the federal government and American Indian tribes.[84] For example, President William J. Clinton reaffirmed the federal government's commitment to tribal sovereignty, self-determination, and self-government by issuing Executive Order 13,175 directing federal agencies "to establish regular and *meaningful* consultation and collaboration with tribal officials."[85] An Executive Memorandum by President Barack H. Obama supported Executive Order 13,175 by directing each federal agency "to submit . . . a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13,175."[86] Additionally, in 2010, President Obama announced the United States' support for the United Nations Declaration on the Rights of Indigenous Peoples,[87] which provides that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them."[88]

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83. *Id*. § 800.2(c)(2)(ii)(A).

84. *See supra* note 7.

85. Consultation and Coordination with Indian Tribal Governments, Executive Order 13,175 of Nov. 6, 2000, 65 Fed. Reg. 67,249, 67,249 (Nov. 9, 2000) (emphasis added).

86. Tribal Consultation: Memorandum for the Heads of Executive Departments and Agencies, Memorandum of Nov. 6, 2009, 74 Fed. Reg. 57,881, 57,881 (Nov. 9, 2009).

87. U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 1 (Dec. 16, 2010), *available at* https://2009-2017.state.gov/documents/organization/184099.pdf ("Today, in response to the many calls from Native Americans throughout this country and in order to further U.S. policy on indigenous issues, President Obama announced that the United States has changed its position. The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force. It expresses both the aspirations of indigenous peoples around the world and those of States in seeking to improve their relations with indigenous peoples. Most importantly, it expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.") (on file with author).

88. United Nations Declaration on the Rights of Indigenous Peoples, art. 19, Sept. 13, 2007, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, 46 I.L.M. 1013, *available at* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (on file with author).

Notably, though these executive actions emphasize meaningful consultation, none were "intended to, and [did] not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."[89] They instead serve merely to assert the importance of meaningful consultation with American Indian tribes and fail to resolve tensions between procedural and meaningful consultation.

D. The Federal Courts

Interpretation of federal agency consultation requirements by the federal courts further undermines meaningful consultation between federal agencies and American Indian tribes. To protect significant traditional cultural properties, tribes pursued legal action in federal court by asserting, in part, a failure to properly consult under the NHPA.[90] The resulting judicial opinions help define the boundaries of consultation, highlighting procedural obstacles to meaningful consultation. Given that Section 106 is a procedural statute, federal courts are limited in their interpretation of consultation. Therefore, when reviewing whether federal agencies met their consultation obligations, federal courts focus on whether the federal agency achieved procedural consultation rather than whether the federal agency engaged in meaningful consultation with American Indian tribes.[91] In other words, federal courts do not fully engage in discussions of whether consultation was structured to address the actual concerns of the tribes, or rather to merely meet procedural requirements.

89. Tribal Consultation: Memorandum for the Heads of Executive Departments and Agencies, Memorandum of Nov. 5, 2009, 74 Fed. Reg. at 57,882.

90. *See, e.g.*, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4 (D.D.C. 2016); Wyoming v. U.S. Dep't of the Interior, 136 F. Supp. 3d 1317 (D. Wyo. 2015); Grand Canyon Trust v. Williams, 98 F. Supp. 3d 1044 (D. Ariz. 2015); Confederated Tribes & Bands of Yakama Nation v. U.S. Fish & Wildlife Serv., 19 F. Supp. 3d 1114 (E.D. Wash. 2014); Summit Lake Paiute Tribe of Nev. v. U.S. Bureau of Land Mgmt., No. 11-70336, 2012 WL 5838155 (9th Cir. Oct. 22, 2012); Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010); Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior, 608 F.3d 592 (9th Cir. 2010); Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768 (9th Cir. 2006); Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800 (9th Cir. 1999).

91. Michael Eitner, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider Their Concerns*, 85 U. COLO. L. REV. 867, 891 (2014).

In *Quechan Tribe of Fort Yuma Indian Reservation v. United States Department of the Interior*, the United States District Court for the Southern District of California restricted its focus to the procedural aspects of consultation.[92] The Quechan Tribe filed an action seeking to enjoin the Department of the Interior's ("DOI") approval of a large solar energy project located in the California Desert Conservation Area.[93] The Quechan feared the project would "destroy hundreds of their ancient cultural sites including burial sites, religious sites, ancient trails, and probably buried artifacts."[94] In addition to several other arguments, the Quechan alleged the DOI failed to engage in proper consultation.[95]

The court carefully reviewed the record of consultation, recognizing Section 106 "require[s] the agency to consult extensively with Indian tribes" throughout the process and that tribes are "entitled to *special consideration* in the course of an agency's fulfillment of its consultation obligations."[96] Despite the "sheer volume of documents"[97] presented, the court concluded the Quechan Tribe was likely to prevail on its claim that DOI's consultation effort was insufficient to comply with the NHPA's procedural consultation requirements.[98] The court focused on whether the DOI achieved its procedural requirements of providing the Quechan with "adequate information and time, consistent with its status as a government."[99] No discussion occurred as to whether the DOI had meaningfully addressed the Quechan's actual concerns.[100]

The United States District Court for the Eastern District of Washington also took a procedural approach in *Confederated Tribes and Bands of the Yakama Nation v. United States Fish and Wildlife Service*.[101] The Yakama Nation sought judicial review of the Fish and Wildlife Service's ("FWS") approval of guided bus tours on Rattlesnake Mountain, a traditional cultural property overlooking the Hanford Reach National Monument.[102] The Yakama argued, in part, that the FWS failed to adequately fulfill its Section 106 consultation obligations.[103] Like

92. 755 F. Supp. 2d at 1108–1120; *see also* Eitner, *supra* note 91, at 891–92.
93. *Quechan Tribe*, 755 F. Supp. 2d at 1106–07.
94. *Id*. at 1107.
95. *Id*. at 1108.
96. *Id*. at 1109 (emphasis original).
97. *Id*. at 1118.
98. *Id*. at 1119–20.
99. *Id*. at 1119.
100. *See id*. at 1118–20; Eitner, *supra* note 91, at 892.
101. 19 F. Supp. 3d 1114 (E.D. Wash. 2014).
102. *Id*. at 1116–17.
103. *Id*. at 1119.

Quechan, rather than focusing on whether the FWS meaningfully consulted with the Yakama by adequately considered their concerns, the court limited its discussion to whether the FWS "followed correct [consultation] procedure."[104]

In *Muckleshoot Indian Tribe v. United States Forest Service*, the United States Court of Appeals for the Ninth Circuit addressed a similar issue regarding consultation.[105] This case marked the Ninth Circuit's first opportunity to "interpret the specific consultation requirements of [the] NHPA."[106] Joined by several environmental organizations, the Muckleshoot Indian Tribe challenged the Forest Service's exchange of Huckleberry Mountain in the Mt. Baker-Snoqualmie National Forest with a private logging company.[107] The exchanged lands were part of the Muckleshoot's ancestral grounds—the Muckleshoot have used Huckleberry Mountain for "cultural, religious, and resource purposes" for thousands of years.[108] In partial support of their challenge, the Muckleshoot claimed "the Forest Service failed to consult adequately with it regarding the identification of traditional cultural properties."[109]

Similar to the federal district courts, the Ninth Circuit undertook a procedural analysis rather than addressing the substantive issue of whether the Forest Service actually considered the Muckleshoot's concerns during consultation.[110] After a review of the consultation record, the Ninth Circuit determined the Muckleshoot had "many opportunities to reveal more information to the Forest Service."[111] The Ninth Circuit was "unable to conclude" the Forest Service failed to adequately consult with the Muckleshoot.[112] Notably, despite the Ninth Circuit's procedural reasoning, it nevertheless recognized the Forest Service "could have been more sensitive to the needs of the [Muckleshoot]."[113] In reversing on other grounds, the Ninth Circuit noted the Forest Service's increased "understanding and appreciation of the importance of the Huckleberry Mountain area to the [Muckleshoot]" and encouraged the Forest Service to "re-open its quest and evaluation of historic sites on Huckleberry Mountain."[114] This recommendation hints

104. *Id*. at 1120–22.
105. 177 F.3d 800, 805 (9th Cir. 1999).
106. *Id*. at 805–06.
107. *Id*. at 802–03.
108. *Id*. at 805.
109. *Id*.
110. *Id*. at 805–07.
111. *Id*. at 807.
112. *Id.*
113. *Id.*
114. *Id*.

at the Ninth Circuit's potential recognition of the underlying intent of consultation as a means of actual communication rather than merely a procedural requirement.

Finally, the United States District Court for the District of Columbia in *Standing Rock Sioux v. United States Army Corps of Engineers*, reviewed a preliminary injunction sought by the Standing Rock Sioux Tribe to block an Army Corps of Engineers ("Corps") permit for the Dakota Access Pipeline.[115] The Dakota Access Pipeline is a domestic oil pipeline that "runs within half a mile of [the Standing Rock Sioux Reservation] in North and South Dakota."[116] According to the Standing Rock Sioux, the Corps failed to make a good faith effort to engage in consultation under the NHPA,[117] and the Dakota Access Pipeline construction had the potential of causing "irreparable injury to historic or cultural properties of great significance."[118] The Corps provided the court with a substantial record that carefully documented its attempts to consult with the Standing Rock Sioux from 2014 to 2016.[119] After examining the record, the court denied the preliminary injunction[120] and concluded "[t]his was not a case about empty gestures."[121] The Standing Rock Sioux "largely refused to engage in consultations,"[122] and the Corps' effort to consult sufficed to meet and, at times, exceed its NHPA obligations.[123] The court compared the record to *Quechan Tribe*, stating that "this [wa]s not a case . . . where a tribe entitled to consultation actively sought to consult with an agency and was not afforded the opportunity."[124]

The United States Court of Appeals for the District of Columbia Circuit upheld the court's determination that the Standing Rock Sioux failed to meet the standards governing injunctive relief.[125] Notably, the D.C. Court of Appeals seemed to express some reluctance when it concluded its order by stating:

115. 205 F. Supp. 3d 4, 7 (D.D.C. 2016).
116. *Id*.
117. *Id*.
118. *Id*. at 8.
119. *Id*. at 24.
120. *Id*. at 33.
121. *Id*. at 32.
122. *Id*.
123. *Id*. at 32–33.
124. *Id*. at 33 (citations omitted).
125. Order Denying Appellants' Motion for Injunction at 1–2, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs* (D.C. Cir. 2016) (No. 16-5259) (on file with author).

> . . . we recognize Section 106 of the [NHPA] was intended to mediate precisely the disparate perspectives involved in a case such as this one. *Its consultative process—designed to be inclusive and facilitate consensus—ensures competing interests are appropriately considered and adequately addressed*. But ours is not the final word . . . . *We can only hope the spirit of Section 106 may yet prevail*.[126]

Once again, rather than holding on whether the Corps actually considered the Standing Rock Sioux's concerns, both the court and D.C. Court of Appeals focused on whether the Corps fulfilled its procedural consultation duties. However, similar to the Ninth Circuit in *Muckleshoot*, the D.C. Court of Appeals' concluding statement regarding the consultation process recognized the import of *meaningful* consultation and the spirit of Section 106.

E. Practical Challenges

Meaningful consultation is vital to maintaining government-to-government relationships between the federal government and American Indian tribes in light of tribes' status as sovereign nations and the federal government's unique trust responsibilities. In practice, however, consultation requirements "lack[] the specificity needed to provide clear guidelines to agency actors, tribal officials, and reviewing courts."[127] Federal agencies are left to struggle with how to follow procedural consultation requirements of Section 106 and related judicial decisions, while attempting to achieve a vaguely defined concept of meaningful consultation. In addition to the lack of specificity, a seemingly irreconcilable contradiction exists between achieving meaningful consultation and expedient governmental action.[128]

Federal agencies often develop different understandings of procedural consultation depending on their needs and resources.[129] For example, some federal agencies conflate public notification and

126. *Id*. at 2 (emphasis added).

127. Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 453 (2013).

128. The D.C. district court's order demonstrates that federal agencies are expected to allow for timely and meaningful input from American Indian tribes while minimizing project delays and costs. *See generally* Solenex LLC v. Jewell, 156 F. Supp. 3d 83 (D.D.C. 2015) (mom. order).

129. Routel & Holth, *supra* note 127, at 454.

consultation, requiring only notification through avenues like the Federal Register.[130] Other federal agencies require multiple methods of communications beyond the Federal Register, such as meetings, written and email correspondence, and telephone conversations.[131] Many federal agencies develop standardized approaches to consultation,[132] and fall into the habit of perceiving the consultation process as a formulaic series of tasks rather than a "process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement."[133] Instead of using consultation as a dialogue to encourage the incorporation of multiple perspectives and creative problem solving, these federal agencies "routinely catalog the number of 'contacts' that they have with a particular tribe through notices, letters, phone calls, and other means."[134] All of these contacts are "then consider[ed] . . . to collectively constitute consultation."[135]

While such standardized approaches may increase predictability and meet the basic procedural consultation requirements of Section 106, they fail to meet the spirit of meaningful consultation. American Indian tribes find themselves bombarded by contacts without the practical ability to meaningfully voice their concerns and discuss how a project could be revised to avoid impacts to their communities and cultural resources.[136] Consequently, American Indian tribes frequently "opt-out"[137] or find their interests inadequately considered by federal agencies, and federal agencies find themselves in opposition to tribes.[138] Chronic opposition encourages federal agencies and American Indian tribes to perceive themselves as adversaries, rather than collaborators, which

130. *Id*. Public participation processes focus on information gathering through public notices, public hearings, and consideration of public comment. *See, e.g.*, 40 C.F.R. §§ 1503.1–1503.4 (2017). In contrast, the NHPA defines consultation as "the process of seeking, discussing, and considering the views of other participates, and, where feasible, seeking agreement." 36 C.F.R. § 800.16(f) (2017); *see also* Routel & Holth, *supra* note 127, at 456 ("There is a fundamental difference between the public participation process (notice and comment), which is an information-gathering exercise, and consultation, which is a government-to-government process that requires greater involvement in decision making by Indian tribes.").

131. Routel & Holth, *supra* note 127, at 455.

132. *Id*. at 456–57 (discussing the Federal Energy Regulatory Commission's Rudy Pipeline project).

133. 36 C.F.R. § 800.16(f).

134. Routel & Holth, *supra* note 127, at 456.

135. *Id*.

136. *Id*. at 463.

137. *Id*.

138. *See, e.g.*, *supra* note 90.

further undermines the potential for meaningful consultation by fostering rigidity rather than willingness to find balanced solutions.

III. STRUGGLE TO PRESERVE THE BADGER-TWO MEDICINE

Given the procedural limitations of Section 106, whether meaningful consultation occurs largely depends on the impetus of the federal agency, its willingness to fully engage with impacted American Indian tribes, its recognition of the significance of tribal concerns and external pressure by other consulting parties, the demands of the project itself, and its budgetary and personnel constraints. The struggle to preserve the Badger-Two Medicine demonstrates the complexity of conducting meaningful consultation on a federal action involving a traditional cultural property of extreme significance to an American Indian tribe. It also reveals the political and social repercussions federal agencies and tribes face when attempting to engage in meaningful consultation.

A. History of the Badger-Two Medicine

Since time immemorial, the Northern Rocky Mountains and Badger-Two Medicine have occupied a special place in the cultural and spiritual identity of the Blackfeet.[139] Originally inhabiting an expansive territory extending across the Northern Great Plains,[140] the Blackfeet were eventually confined to a small reservation in the northwest corner of Montana. The initial 1855 Treaty with the Blackfeet reserved a large expanse of land stretching across northern Montana.[141] This land was intended as a "common-hunting ground for ninety-nine years" where all the tribal parties to the treaty could "enjoy equal and uninterrupted privileges of hunting, fishing and gathering fruit, grazing animals, curing meats and dressing robes."[142] Much of these lands—approximately

139. Blackfeet Tribal Business Council Res. 260-2014 (2014), *available at* http://www.badger-twomedicine.org/pdf/Blackfeet_Tribe_Resolution.pdf (on file with author); *see also* The Blackfeet Tribe's Brief as *Amicus Curiae* in Support of Defendants' Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment at 1, *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83 (D.D.C. Nov. 28, 2016) (No. 13-cv-00993) (on file with author).

140. Blackfoot territory originally encompassed southern Saskatchewan, Alberta and northern Montana. HANA SAMEK, THE BLACKFOOT CONFEDERACY 1880-1920: A COMPARATIVE STUDY OF CANADIAN AND U.S. INDIAN POLICY 13 (1987).

141. Treaty with the Blackfeet, 1855, Oct. 17, 1855, 11 Stat. 657.

142. *Id*. art. III, 11 Stat. at 657.

seventeen million acres—were later ceded by the Blackfeet and other tribes to the United States in the 1886 Sweetgrass Hills Agreement.[143] The Blackfeet relinquished control to the common-hunting ground, reserving only a portion of their lands as "set apart for their separate use and occupation."[144] As consideration for this exchange, the United States agreed to provide $150,000 in goods and services every year for a period of ten years.[145]

In 1895, the Blackfeet Reservation was further diminished through another agreement with the United States.[146] After resistance from the Blackfeet, the United States purchased a strip of land on the western portion of the Blackfeet Reservation for $1.5 million.[147] Known

143. Agreement with Indians of the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Reservation, Montana, Dec. 28, 1886, ch. 213, 25 Stat. 113 [hereinafter 1886 Agreement].

144. *Id*. art. II, 25 Stat. at 114. Although the Sweetgrass Hills Agreement is often referred to as a treaty, it is technically an agreement, since it occurred after Congress ended treaty-making in 1871. *See* 25 U.S.C. § 71 (2012) ("No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.").

145. *Id*. art. III, 25 Stat. at 114.

> In consideration of the foregoing cession and relinquishment the United States hereby agrees to advance and expend annually, for a period of ten years after the ratification of this agreement, under the direction of the Secretary of the Interior, for the Indians now attached to and receiving rations at . . . the Blackfeet Agency, one hundred and fifty thousand dollars, in the purchase of cows, bulls, and other stock, goods, clothing, subsistence, agricultural and mechanical implements, in providing employees, in the education of Indian children, procuring medicine and medical attendance, in the care and support of the aged, sick, and infirm, and helpless orphans of said Indians, in the erection of such new agency and school buildings, mills, and blacksmith, carpenter, and wagon shops as may be necessary, in assisting the Indians to build houses and inclose [sic] their farms, and in any other respect to promote their civilization, comfort and improvement."

Id.

146. Agreement with the Indians of the Blackfeet Indian Reservation in Montana, Sept. 26, 1895, ch. 398, § 9, 29 Stat. 353 [hereinafter 1895 Agreement].

147. *Id*. § 9, art. II, 29 Stat. at 354.

> For and in consideration of the conveyance, cession, and relinquishment hereinbefore made the United States hereby covenants and agrees to advance and expend during the period of

as the "ceded strip," this area comprised the Badger-Two Medicine—a landscape of towering mountains, rich forests, and pristine waterways along the Rocky Mountain Front.[148] The Blackfeet expressly reserved their existing rights to access the ceded strip for cultural, religious, and other purposes; hunting and fishing; and timber gathering.[149] The relevant treaty language reads:

> *Provided*, That said Indians shall have and do hereby reserve to themselves, the right to go upon any portion of the lands hereby conveyed so long as the same shall remain public lands of the United States, and to cut and remove therefrom wood and timber for agency and school purposes, and for their personal uses for houses, fences, and other domestic purposes: *And provided further*, That said Indians hereby reserve and retain the right to hunt upon said lands and to fish in the streams thereof so long as the same shall remain public lands of the United States under and in accordance with the provisions of the game and fish laws of the State of Montana.[150]

Around fifteen years after the Senate ratified the 1895 agreement, Congress used a portion of the ceded strip to create Glacier National

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> ten years beginning from and after the expiration of the payments provided for in the agreement may between the parties hereto on the eleventh day of February, A.D. eighteen hundred and eighty-seven, and ratified by Congress on the first day of May, A.D. eighteen hundred and eighty-eight, under the direction of the Secretary of the Interior for the Indians, both full bloods and mixed bloods, now attached to and receiving rations and annuities at the Blackfeet Agency, and all who shall hereafter be declared by the tribes located upon said reservation, with the approval of the Secretary of the Interior, entitled to membership in those tribes, the sum of one million five hundred thousand ($1,500,000.00) dollars.

Id. (postponing payment of consideration until completion of ten-year payment period established under the 1886 Agreement).

148. María Nieves Zedeño, *Blackfeet Landscape Knowledge and the Badger-Two Medicine Traditional Cultural District*, 7 SAA ARCHAEOLOGICAL RECORD 9, 9 (March 2007), *available at* https://www.academia.edu/14852061/Indigenous_Knowledge_in_Archaeological_Practice (on file with author).

149. 1895 Agreement, *supra* note 146, at § 9, art. I, 29 Stat. at 354.

150. *Id*. (emphasis original).

Park.[151] The Forest Service manages the remaining ceded lands as part of the Lewis and Clark National Forest.[152] Blackfeet tribal members have continued to exercise their treaty rights in the Lewis and Clark National Forest[153] and, to some extent, Glacier National Park.[154]

B. The Badger-Two Medicine and the NHPA

From 1981 to 1983, under President Ronald W. Reagan's Secretary of the Interior James G. Watt, the DOI's oil and gas leasing policy dramatically increased the number of leases issued in wilderness areas.[155] As part of this policy shift, the BLM and Forest Service[156] issued fifty-one oil and gas leases in the Badger-Two Medicine in the Lewis and Clark National Forest.[157] One leaseholder was Fina Oil and Chemical Company, the predecessor to Solenex, LLC, a Louisiana-based company.[158] Fina acquired a 6,247-acre energy lease from Sidney M. Longwell in 1983.[159] Its drilling permit was initially approved in 1985.[160] That same year, however, the DOI suspended drilling activities

151. Glacier National Park Establishment Act, Pub. L. No. 171, 36 Stat. 354 (1910) (codified at 16 U.S.C. § 161 (2012)).

152. Zedeño, *supra* note 148, at 9; Jay Hansford C. Vest, *Traditional Blackfeet Religion and the Sacred Badger-Two Medicine Wildlands*, 6 J.L. & RELIGION 455, 456 (1988).

153. Zedeño, *supra* note 148, at 9–10.

154. *See* United States v. Peterson, 121 F. Supp. 2d 1309 (D. Mont. 2000) (holding Congress abrogated the Blackfeet's treaty right to hunt in Glacier National Park); *see also* United States v. Kipp, 369 F. Supp. 774 (D. Mont. 1974) (finding the Blackfeet have a right to enter the portion of Glacier National Park that was once located within the Blackfeet Reservation boundary).

155. Stephen S. Edelson, *The Management of Oil and Gas Leasing on Federal Wilderness Lands*, 10 B.C. ENVTL. AFF. L. REV. 905, 907–08 (1983); Lawrence J. Cwik, *Oil and Gas Leasing on Wilderness Lands: The Federal Land Policy and Management Act, the Wilderness Act, and the United States Department of the Interior, 1981-1983*, 14 ENVTL. L. 585, 602–08 (1984).

156. The oil and gas leasing process on National Forest System lands involves both the BLM and Forest Service. The BLM leases the oil and gas rights, and the Forest Service protects the surface resources for all oil and gas exploration, development, production, and reclamation operations. *See* Jan G. Laitos, *Oil and Gas Leasing on Forest Service Lands*, 5 NAT. RESOURCES & ENV'T, Winter 1991, at 23, 23.

157. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 2.

158. Complaint ¶ 13, *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83 (D.D.C. June 28, 2013) (No. 13-cv-00993) [hereinafter Solenex Complaint] (on file with author).

159. *Id.* ¶ 12–13.

160. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 2.

when it determined the permit did not meet the NEPA's requirements.[161] Following subsequent attempts to address environmental concerns, the energy leases were suspended in 1993[162] in response to legislation introduced in Congress by former Montana Senator Max Baucus to protect the Badger-Two Medicine from oil and gas development.[163] While the Badger-Two Medicine Protection Act did not pass,[164] the BLM and Forest Service continued the suspension.[165]

In 1996, with the cooperation of the Blackfeet, the Forest Service undertook ethnographic studies to better understand the significance of the Badger-Two Medicine.[166] And, in 1997, the Forest Service placed a moratorium on authorization of new lands for oil and gas leasing along the Rocky Mountain Front, including the Badger-Two Medicine.[167] The decision did not directly impede the previously issued oil and gas leases in the area.[168] Nevertheless, Fina reassigned its rights to the leases to Mr. Longwell in 1999, who later assigned the rights to Solenex.[169]

Upon a recommendation by the Forest Service, in 2001, the Secretary of the Interior withdrew nearly half a million acres of forest lands from "location and entry under federal mining law for a period of twenty years."[170] The withdrawal included the Badger-Two Medicine and was intended, in part to "preserve traditional cultural uses by [American Indians]."[171] A year later, the Forest Service's ethnographic studies resulted in the National Register listing of the Badger-Two Medicine as a traditional cultural district.[172] The Badger-Two

161. *Id*.

162. *Id*. at 3.

163. Badger-Two Medicine Protection Act, S. 853, 103d Cong. § 1 (1st Sess. 1993).

164. *Id*.; *see S.853 – A Bill Entitled the "Badger-Two Medicine Protection Act*," CONGRESS.GOV, https://www.congress.gov/bill/103rd-congress/senate-bill/853?q=%7B%22search%22%3A%5B%22Badger-Two+Medicine+Protection+Act%22%5D%7D&r=1 (last visited Apr. 29, 2017).

165. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 3.

166. *Id*.

167. *Id*.

168. *Id*.

169. Solenex Complaint, *supra* note 158, at ¶¶ 22–23.

170. Letter from Aden L. Seidlitz, Acting State Dir., BLM Mont. Dakotas Office, to Solenex LLC, *Letter re Cancellation of Federal Oil and Gas Lease MTM53323* 7 (Mar. 17, 2016), *available as attachment to* Defendants' Notice, *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83 (D.D.C. Mar. 17, 2016) (No. 13-cv-00993) [hereinafter Letter from Seidlitz] (on file with author).

171. *Id*.

172. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 4.

Medicine's eligibility for listing stemmed from its association with "Blackfeet traditional religious and cultural practices,"[173] its connection to "culturally important spirits, heroes, and historic figures central to Blackf[eet] religion, traditional lifeways, and practices,"[174] and its significant archaeological sites and features.[175] Following this determination, the Forest Service "initiated efforts to identify issues associated with the [Section 106 process]" and the NEPA analysis.[176] The BLM confirmed continuance of the suspension until identified issues were resolved.[177]

Congress officially passed legislation acknowledging the cultural and ecological significance of the Badger-Two Medicine as part of the Tax Relief and Health Care Act of 2006.[178] The legislation prohibited new leasing of federal minerals in the area, provided existing leases would not be reissued if expired or retired, and provided tax incentives to encourage existing leaseholders to voluntarily retire or donate their leases.[179] All but eighteen of the original fifty-one leases were transferred.[180] The remaining eighteen leases, including the Solenex lease, continued in place.[181]

Over the next decade, renewed interest in natural gas exploration led the Forest Service to work with Blackfeet tribal representatives and María Nieves Zedeño, an Associate Research Anthropologist with the Bureau of Applied Research in Anthropology at the University of Arizona, to determine the boundaries of the Badger-Two Medicine traditional cultural district thorough additional archaeological and ethnographic studies.[182] The studies focused on the northern Badger-Two Medicine, originally excluded from the traditional cultural district.[183] Further recognizing the cultural and spiritual significance of the area to the Blackfeet, as well as its environmental importance, the Forest Service adopted a travel management plan in 2009 that largely

173. *Id.*
174. *Id.*
175. *Id.*
176. Letter from Seidlitz, *supra* note 170, at 5.
177. *Id.*
178. Tax Relief and Health Care Act, Pub. L. 109-432, § 403, 120 Stat. 3050, 3050–53 (2006); *see also* Letter from Seidlitz, *supra* note 170, at 7.
179. Tax Relief and Health Care Act § 403(b), (c), 120 Stat. at 3051–53.
180. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 3.
181. *Id.*
182. Zedeño, *supra* note 148, at 10; *see also* Letter from Seidlitz, *supra* note 170, at 5.
183. Zedeño, *supra* note 148, at 10.

prohibited motorized all-terrain vehicles and motorcycles in the Badger-Two Medicine.[184]

In 2013, Solenex rekindled its efforts to develop its lease by sending a letter to the BLM and Forest Service describing the suspension and threatening it would "seek judicial relief" if the "suspension [wa]s not lifted in 30 days."[185] Frustrated with the suspension and lack of a final federal decision, Solenex filed an action in the United States District Court for the District of Columbia on June 28, 2013, alleging the federal defendants "unlawfully withheld and/or unreasonably delayed" federal agency action in reviewing Solenex's suspended drilling permit.[186] As a remedy, Solenex requested the court directly order the federal defendants to lift the suspension of the Solenex lease.[187] On August 20, 2014, the Blackfeet Tribal Business Council, charged with the responsibility of "protecting and preserv[ing] . . . areas of cultural and religious significance to the Blackfeet,"[188] authorized an amicus brief on behalf of the Blackfeet "to ensure that the interests of the Blackfeet . . . [were] fully represented and heard in th[e] case."[189] The Blackfeet maintained that "any short-term private-industry profit from energy development w[ould] irrevocably change the Blackfeet's ancient right to the natural capacity, power and ability of the land, including its plants, animals, and the [Badger-Two Medicine's] pristine and isolated nature."[190]

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184. BADGER-TWO MEDICINE TRAVEL MANAGEMENT PLAN, *supra* note 3, at 4–5. The United States District Court for the District of Montana upheld the Badger-Two Medicine Travel Management Plan holding, in part, that it did not violate the Establishment Clause of the First Amendment of the United States Constitution. Fortune v. Thompson, No. CV-09-98, 2011 WL 206164, *1–3 (D. Mont. Jan. 20, 2011).

185. Letter from Jessica J. Spuhler, Attorney for Solenex, to Jamie Connell, State Dir., BLM Mont. State Office, & Bill Avey, Reg'l Forester, Lewis & Clark Nat'l Forest, *Demand Letter re Federal Oil and Gas Lease MTM53323* 1 (May 21, 2013), *available at* Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment, Appendix Volume II of IV Forest Service Documents, *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83 (D.D.C. Jul. 7, 2014) (No. 13-cv-00993) (on file with author).

186. Solenex Complaint, *supra* note 158, at ¶ 32.

187. *Id*. at 10:3.

188. Blackfeet Tribal Business Council Res. 260-2014, *supra* note 139.

189. *Id*. at 2.

190. Letter from Harry Barnes, Chairman, Blackfeet Tribal Bus. Council, & Tyson T. Running Wolf, Sec'y, Blackfeet Tribal Bus. Council, to Sally Jewel, Sec'y, U.S. Dep't of the Interior, and Tom Vilsack, Sec'y, U.S. Dep't of Agric., *Letter re Request for Cancellation of All Oil and Gas Leases in the Badger-Two*

After completing additional cultural resource studies and consultation, the Forest Service provided documentation to the Keeper in 2014, resulting in an expansion of the Badger-Two Medicine traditional cultural district boundary to include the Solenex lease and additional tribal lands located outside of the Lewis and Clark National Forest.[191] The Forest Service further determined the proposed drilling would have an adverse effect on the characteristics that qualified the Badger-Two Medicine for inclusion in the National Register.[192]

Following the adverse effect determination, the Forest Service notified the Advisory Council and requested "assistance and advice in continuing to seek ways to avoid, minimize, or mitigate the adverse effects."[193] Consulting parties—the Forest Service, the Montana SHPO, the Blackfeet Tribal Historic Preservation Office ("Blackfeet THPO"), and Solenex—continued consultation in an attempt to reach agreement.[194] While the consulting parties were working to find a balanced solution, the BLM and Forest Service were also preparing to

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Medicine 2 (Oct. 24, 2014), *available at* http://www.badger-twomedicine.org/pdf/jewellandvilsackletter.pdf (on file with author).

191. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 4; *see also* Letter from Seidlitz, *supra* note 169, at 5.

192. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 3. In its adverse effect finding the Forest Service stated:

> . . . anything that disrupts the visual natural setting, interrupts meditation, or affects the feeling of power in the area will affect the associated current traditional uses of the area by the Blackfeet. This decreased ability for the Blackfeet to use this area for traditional cultural practices would also indirectly reduce the Blackfeet's ability to identify themselves as Blackfeet. It would make the associated power of the area less suitable by decreasing its effectiveness and accessibility to traditional practitioners. Further, any negative effects to the associated power in this portion of the district would also indirectly affect the power of the entire district since it is all interconnected in the Blackfeet worldview.

Id. at 5–6.

193. Letter from Seidlitz, *supra* note 170, at 5; *see also* ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 3 ("On December 4, 2014, the [Forest Service] sent a letter to the [Advisory Council], notifying it of the finding of adverse effect, requesting the [Advisory Council's] review of that disputed finding, and inviting [Advisory Council] participation in the Section 106 review.").

194. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 6–7.

present oral arguments in support of their motion for summary judgment for the lawsuit filed by Solenex.[195]

On July 27, 2015, the D.C. district court determined that "[n]o combination of excuses could possibly justify such ineptitude or recalcitrance" for the "epic" 29-year lease suspension.[196] Rather than ordering the federal defendants to lift the suspension, however, Judge Richard J. Leon ordered them "to submit [within twenty-one days], and to stick to, an accelerated and fixed schedule"[197] that set forth: "(1) the tasks remaining to be completed, and the rationales for their necessity; and (2) an accelerated timetable necessary for those tasks to be completed expeditiously."[198] After the D.C. district court approved the schedule, the federal defendants were required to adhere to it at the risk of a possible order entirely lifting the current suspension.[199]

Several weeks before the D.C. district court issued its order, the Section 106 consultation process broke down in Montana.[200] Solenex rejected several mitigation strategies as infeasible, including directional drilling and well pad relocation proposals.[201] It further rejected the Blackfeet's offer to trade the Solenex leasehold for a lease of comparable value on the Blackfeet Reservation.[202] On July 7, 2015, the Blackfeet THPO determined further discussions were "unlikely to be productive" and terminated Section 106 consultation.[203] The Blackfeet stated that "no mitigation could resolve the adverse effects to [the Badger-Two Medicine]," and any oil and gas development would destroy its religious

195. Transcript of Oral Argument Before the Honorable Richard J. Leon, United States District Judge, *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83 (D.D.C. June 10, 2015) (No. 13-cv-00993) (on file with author).

196. Solenex LLC v. Jewell, 156 F. Supp. 3d 83, 84 (D.D.C. 2015) (mom. order).

197. *Id*. at 85.

198. *Id*. at 85–86.

199. *Id*. at 86.

200. Matthew Brown, *Blackfeet Tribe Breaks Off Talks over Badger-Two Medicine Drilling*, ASSOCIATED PRESS (Jul. 9, 2015), http://missoulian.com/news/local/blackfeet-tribe-breaks-off-talks-over-badger-two-medicine-drilling/article_43f80cba-aa83-5e76-b924-800316fe28eb.html.

201. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 6.

202. *Id*. Prior to the Advisory Council's Comments, the Blackfeet informed the Advisory Council that the offer to trade leaseholds was no longer available for discussion. *Id*.

203. ADVISORY COUNCIL ON HISTORIC PRESERVATION, PUBLIC INVITED TO COMMENT ON THE EFFECTS TO HISTORIC PROPERTIES OF THE PERMIT TO DRILL IN LEWIS AND CLARK NATIONAL FOREST 1 (Aug. 17, 2015), *available at* http://www.achp.gov/docs/MTPermittodrill-Advisory.pdf [hereinafter PUBLIC INVITED TO COMMENT] (on file with author); *see also* Brown, *supra* note 200.

and cultural significance.[204] In accordance with Section 106's implementing regulations, after termination of consultation by the Blackfeet THPO, the Advisory Council was required to provide written recommendations to the Secretaries of Agriculture and Interior within forty-five days.[205]

On August 17, 2015, the Advisory Council announced it would do an on-site inspection and hold a public hearing in Choteau, Montana.[206] This decision likely resulted from the complexity of the issues involved, the high level of public interest, and the strict timelines imposed by the D.C. district court. The September 2, 2015 public hearing featured strong support for the termination of leases located in the Badger-Two Medicine.[207] Only one person, an attorney representing Solenex, opposed termination by highlighting the substantial delays and stating that the single exploratory well would have little impact on the cultural significance of the area.[208]

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204. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 6–7.

205. PUBLIC INVITED TO COMMENT, *supra* note 203, at 2; 36 C.F.R. § 800.7(c)(2) (2017).

206. PUBLIC INVITED TO COMMENT, *supra* note 203, at 2.

207. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 7. According to the Advisory Council:

> . . . in the oral and written comments of the public received by the [Advisory Council], the vast majority of respondents voiced their strong opposition to the proposed gas exploration. Many non-tribal commenters specifically identified the religious and cultural importance of the area to the Blackfeet and the tribe's earnest interest in continuing to practice their religious and cultural traditions in the area as the basis for their opposition to the project. Two Montana State Representatives and the Glacier County Council expressed their support of the recognition and protection of this area. The [Advisory Council] was also provided with a copy of a letter dated May 14, 2015, from the Governor of Montana to the Chairman of the Blackfeet Tribe stating support for the protection of the area. This consistent and overwhelming opposition to the project provides compelling evidence that the public respects the cultural importance of this area to the tribe.

Id.

208. Alex Sakariassen, *Badger-Two Medicine: A United Front*, MISSOULA INDEPENDENT (Sept. 10, 2015), http://missoulanews.bigskypress.com/missoula/badger-two-medicine/Content?oid=2444173.

The Advisory Council submitted its comments to the Secretaries of Agriculture and Interior on September 21, 2015.[209] In addition to a general recommendation for all federal land management agencies to conduct meaningful consultation with American Indian tribes, the Advisory Council specifically recommended "the Departments of Agriculture and Interior revoke the suspended [p]ermit to [d]rill, cancel the lease, and ensure that future mineral development does not occur" in the Badger-Two Medicine.[210] According to the Advisory Council, the Solenex exploratory well and other reasonably foreseeable development would irreparably degrade the historic value of the Badger-Two Medicine, as well as the Blackfeet's "ability to practice their religious and cultural traditions in the area as a living part of their community life and development."[211]

Since the consultation process was terminated under Section 106, the United States Department of Agriculture ("USDA") was required to consider the Advisory Council's comments in its recommendations to the DOI.[212] After receiving the Advisory Council's comments, the USDA recommended the DOI cancel the Solenex lease, writing:

> After reviewing the Section 106 documentation and considering the [Advisory Council]'s final comments, [the USDA] agree[s] that the Solenex [lease] in the Badger-Two Medicine . . . will pose adverse effects to the [traditional cultural district] in ways that cannot be fully mitigated. Based on this information gained through the full consideration of the spiritual and cultural significance of the Badger-Two Medicine . . . , the Forest Service's determination of adverse effects, [Advisory Council]'s final comments, changes in land management priorities, and consideration of Solenex LLC's comments, [the USDA] find[s] the balance of considerations weigh in favor of not lifting the suspension of operations and production. Therefore, [the USDA] recommend[s] that [the DOI] takes action as

209. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 3.
210. *Id.* at 7.
211. *Id.*
212. 36 C.F.R. § 800.7(a)(3), (c)(4) (2017).

> [it] deem[s] consistent with [its] statutory and regulatory authorities to cancel the Solenex lease.[213]

Upon receiving the USDA recommendations, the DOI was tasked with making the final decision on whether the lease should be revoked or released from suspension. On November 23, 2015, the DOI filed its response to the D.C. district court's order, and set forth its "decision to initiate the process for cancellation" of Solenex's lease.[214] In support of this decision, it cited its "tentative conclusion" that the "[Solenex] lease was issued without properly complying with the NEPA and NHPA" and, therefore, was voidable.[215] Following additional argument by Solenex regarding the validity of cancellation, the DOI issued its decision to cancel the lease on March 17, 2016.[216] In cancelling the lease, the DOI wrote:

> Based on [environmental and historic property review] and the administrative and Congressional protections that have been put in place for the Badger-Two Medicine . . . since [the Solenex lease was issued], the BLM and [DOI] have determined that surface disturbing activities are incompatible with the irreplaceable natural and cultural resources of the Badger-Two Medicine. Those resources must be safeguarded from all future oil and gas activities.[217]

The DOI also notified the Advisory Council of its decision to cancel Solenex's lease as required by the Section 106 regulations.[218]

The Blackfeet and other preservation advocates celebrated the cancellation of the Solenex lease. Blackfeet Tribal Chairman Harry Barnes stated:

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213. Letter from Seidlitz, *supra* note 170, at 6 (quoting 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, *Letter re Cancellation of Solenex Lease* 2 (Oct. 30, 2015)).

214. Defendants' Response to Court Order at 1, *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83 (D.D.C. Nov. 23, 2015) (No. 13-cv-00993) (on file with author).

215. *Id*. at 3–5.

216. Defendants' Notice at 1, *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83 (D.D.C. Mar. 17, 2016) (No. 13-cv-00993) (on file with author).

217. Letter from Seidlitz, *supra* note 170, at 13.

218. *Id*. at 6; 36 C.F.R. 800.7(c)(4) (2017).

> Today the Blackfeet People have reason to rejoice . . . . The oil and gas leases granted to Solonex [sic] are now being canceled by the Department of the Interior . . . . This fight has been about more than the Blackfeet. All of Montana and our country win. This pristine area so special to us and special to all who fight in this fight.[219]

The DOI cancelled the remaining leases in the Badger-Two Medicine shortly before President Obama left office.[220] Devon Energy, another lease holder, chose to retire its fifteen leases in November 2016, and the DOI cancelled the remaining two leases in January 2017.[221] These cancellations are not the end of the dispute. Litigation has continued with Solenex asserting the DOI lacks authority, cannot abruptly change position, is estopped from cancelling the lease, and may need to comply with the NEPA before cancelling the lease.[222] Additionally, Texas billionaire, W.A. Moncrief, Jr., filed suit on April 5, 2017 in the D.C. district court challenging the DOI's "sudden cancellation" of the remaining two leases[223] and raising many of the

219. *Obama Administration Cancels Energy Lease in Badger-Two Medicine: BLM Concluded the Solenex Lease Violated National Environmental Policy Act, National Historic Preservation Act*, FLATHEAD BEACON (Mar. 17, 2016), http://flatheadbeacon.com/2016/03/17/u-s-interior-cancels-energy-lease-badger-two-medicine/.

220. Elizabeth Shogren, *Interior Cancels Oil and Gas Leases in Montana's Badger-Two Medicine: The Blackfeet Tribe Fought for This Decision for More Than 30 Years*, HIGH COUNTRY NEWS (Jan. 11, 2017), http://www.hcn.org/articles/interior-cancels-oil-and-gas-leases-in-montanas-badger-two-medicine; Lauren Bally & Jason Mast, *Interior Cancels 15 More Oil-Gas Leases in Badger-Two Medicine*, GREAT FALLS TRIBUNE (Nov. 2016), http://www.greatfallstribune.com/story/news/local/2016/11/16/interior-cancels-oil-gas-leases-badger-two-medicine/93961050/; Karl Puckett, *Two More Leases in Badger-Two Medicine Canceled*, GREAT FALLS TRIBUNE (Jan. 10, 2017), http://www.greatfallstribune.com/story/news/local/2017/01/10/two-leases-badger-two-medicine-canceled/96406970/.

221. Bally & Mast, *supra* note 220; Puckett, *supra* note 220.

222. *See generally* Plaintiff's Response to Defendants' November 23, 2015 Memorandum, *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83 (D.D.C. Jan. 19, 2016) (No. 13-cv-00993) (on file with author).

223. Complaint ¶ 2, *Moncrief v. U.S. Dep't of the Interior* (D.D.C. Apr. 05, 2017) (No. 17-cv-00609) [hereinafter Moncrief Complaint] (on file with author); *see also* Tristan Scott, *Texas Oilman Challenges Cancellation of Badger-Two Medicine Lease: Lawsuit Contends that Oil and Gas Lease on Land Sacred to Blackfeet Tribe Was Illegally Canceled*, FLATHEAD BEACON (Apr. 14, 2017), http://flatheadbeacon.com/2017/04/14/texas-oilman-challenges-cancellation-badger-two-medicine-lease/.

same arguments as brought by Solenex.[224] Judge Leon is once again assigned to preside over the case.[225] The Blackfeet continue to maintain that the cancellation of the oil and gas leases in the Badger-Two Medicine is "essential to conserve the [its] resources."[226]

IV. LESSONS IN MEANINGFUL CONSULTATION

Perceptions of time vary. In terms of Mr. Longwell's life, thirty years is a long time—long enough for him to transition from middle age to an old man. For the Blackfeet, who have celebrated the Badger-Two Medicine from time immemorial, thirty years is nearly imperceptible. Rather than dwelling on whether or not thirty years is an acceptable amount of time for a Section 106 process, the substantive issue is whether meaningful consultation occurred and what lessons may be learned.

A. Learning from the Badger-Two Medicine

The struggle over the Badger-Two Medicine is a complex example of consultation under Section 106. It is fraught with periods of avoidance and disregard. Nevertheless, it exemplifies an organic development of a common understanding of meaningful consultation between a federal agency and an American Indian tribe. It offers federal agencies and tribes insight into potential approaches and pitfalls of negotiating a common understanding of meaningful consultation. It also demonstrates the complexity of meaningful consultation, especially when consultation involves a traditional cultural property of dramatic significance to one population and economic potential to another.

After initially disregarding the Badger-Two Medicine's cultural significance to the Blackfeet, the Forest Service eventually changed its approach.[227] The shift likely resulted from a change in personnel, increased political momentum supporting meaningful consultation, and a fuller awareness of the application of National Register Bulletin 38 and the 1992 amendments to the NHPA. Accompanying the shift was a change in the way the Blackfeet approached the Forest Service. The Blackfeet, in seeking to protect the Badger-Two Medicine, embraced a

224. *Compare* Solenex Complaint, *supra* note 158, *with* Moncrief Complaint, *supra* note 223.

225. *Moncrief v. U.S. Dep't of the Interior* (D.D.C. Apr. 05, 2017) (No. 17-cv-00609).

226. Blackfeet Nation, *supra* note 1.

227. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 2–3, 8.

greater trust for archaeologists, ethnographers, and a willingness to share knowledge with the Forest Service.[228]

In turn, the Forest Service also began steadily working with the Blackfeet, archaeologists, historians, ethnographers, and others to carefully study the cultural significance of the Badger-Two Medicine.[229] The Forest Service demonstrated its willingness to listen to the Blackfeet's concerns on multiple levels. Not only did it devote resources to the study of the Badger-Two Medicine's cultural significance, it also considered the Blackfeet's concerns when amending its management plan for the area.[230]

By working closely with the Blackfeet and attempting to understand their perspectives, the Forest Service developed a common understanding of meaningful consultation with the Blackfeet, as well as a trusting relationship that enabled comprehensive study of the region and improved future efforts for historic preservation in the Badger-Two Medicine. This comprehensive study served as a platform for assessing the potential adverse effects of the proposed development of the Solenex lease. And, when the Section 106 consultation process broke down in the final stage, it was not the result of the Forest Service's consultation efforts with the Blackfeet, but rather the challenge of finding a balanced solution that avoided, minimized, or mitigated the identified adverse effects.[231]

While the Section 106 process for the Badger-Two Medicine is unique—most Section 106 issues resolve more quickly—it can still function as a framework for other federal agencies attempting to balance development with protection of significant American Indian traditional cultural landscapes. Federal agencies should follow the Advisory Council's recommendation to "seek to replicate the collaborative effort to conduct meaningful consultation with and to identify and evaluate properties of religious and cultural significance to Indian tribes."[232] They should look to the Forest Service's efforts in the Badger-Two Medicine struggle as a model when challenged by similar concerns.

Similar to the Forest Service, federal agencies should use the resources necessary to respect American Indian tribes' concerns by

228. *Id.* at 3, 8; Blackfeet Tribal Business Council Res. 260-2014, *supra* note 139; Zedeño, *supra* note 148, at 9–12.

229. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 3, 8; *see also* Zedeño, *supra* note 148, at 9–11.

230. BADGER-TWO MEDICINE TRAVEL MANAGEMENT PLAN, *supra* note 3, at 9–10.

231. ADVISORY COUNCIL'S COMMENTS, *supra* note 2, at 6–7.

232. *Id*. at 7–8.

making a meaningful effort to identify significant tribal cultural resources and assess potential adverse effects. Doing so requires including affected American Indian tribes throughout the Section 106 process as partners rather than merely consulting parties. It also requires a willingness, by the federal government, to devote the time and financial means necessary to achieve meaningful consultation. Federal agencies can decrease budgetary and personnel strains by partnering with universities and other institutions, like the Forest Service in the Badger-Two Medicine, or employing tribal members as cultural resource specialists. Too often, meaningful consultation is undercut in the guise of fiscal responsibility—the Section 106 process is analogous to maintaining a house, if done right the first time it will last.

Finally, at times, true meaningful consultation requires a willingness to recognize when affected American Indian tribes' interests outweigh development interests. Much of the extended timeline of the Badger-Two Medicine struggle likely resulted from the BLM and Forest Service's inability to cancel the lease due to political and other pressures. Before President Obama's administration, it appears the Secretaries of the Interior and Agricultural lacked political support to fully acknowledge the Blackfeet's interests outweighed Solenex's interests. While federal agencies should not have to acquiesce to every tribal request, they should be encouraged, not restrained from making the difficult decision of terminating a federal action in light of American Indian concerns. If federal agencies are discouraged or unwilling to do so, tribes will continue to understand that their interests are not being considered and meaningful consultation will remain elusive.

B. Common Understandings

It took the Forest Service and the Blackfeet more than three decades to organically achieve a common understanding of meaningful consultation. While the unique complexities of the Badger-Two Medicine struggle extended its overall timeline, the question remains as to the possibility of achieving meaningful consultation in a shorter time period and resolving the divide between procedural consultation and meaningful consultation.

One way may be to increase the specificity of meaningful consultation by creating uniform rules through congressional legislation.[233] Uniform rules and guidelines could incorporate enough

233. Routel & Holth, *supra* note 127, at 466–75; *see also* Eitner, *supra* note 91, at 895–900.

flexibility to allow federal agencies and American Indian tribes to meet their individual needs.[234] This approach could ensure that every federal agency consults in the same or similar manner. It could also resolve confusion among federal agencies and American Indian tribes about what to expect during the consultation process, for example, the number and method of contacts for each federal action. However, despite these positives, it would be difficult for Congress to enact a statute that would not undermine the potential for meaningful consultation under the NHPA. While Congress could incorporate flexibility into a uniform statutory definition of meaningful consultation, the probable result would be vague legislation untailored to the individual needs of federal agencies and American Indian tribes. Ultimately, such congressional action is more likely to amplify than resolve the divides between procedural and meaningful consultation.

Another possible solution would be for Congress and the Advisory Council to revise Section 106 to partially constrain the federal agencies' final decision making authority by requiring fuller recognition of American Indian interests. The current Section 106 process allows for federal agencies to entirely disregard American Indian interests, even after conducting extensive consultation. While excluding tribes from the final decision may serve federal interests by decreasing potential for delays or inconsistences, it ultimately neuters the consultation process and undermines meaningful consultation. Including American Indian interests in the final decision making process, not just the consultation process, would be a significant step towards a true government-to-government relationship between the federal government and American Indian tribes.

Unfortunately, such a revision is unlikely to occur. A more viable solution, therefore, is to preserve the Section 106 process, while continuing to seek meaningful consultation through executive actions and agency regulations and policies rather than congressional action. Such an approach allows for the continued natural evolution of meaningful consultation as federal agencies and American Indian tribes seek its contours. In seeking meaningful consultation while allowing for its natural evolution, federal agencies and American Indian tribes should actively develop common understandings of meaningful consultation. In other words, federal agencies and American Indian tribes should consult on consultation. Such consultation could be individually tailored and occur prior to the commencement of each federal action. Federal agencies and American Indian tribes could also work together to

234. Routel & Holth, *supra* note 127, at 473–74.

negotiate broader common understandings. For example, a federal agency could establish a consultation procedure with an American Indian tribe that would apply to all its future federal actions. These common understandings could be formally memorialized in a programmatic agreement.[235]

Despite their potential utility, programmatic agreements are currently rarely utilized by federal agencies.[236] Furthermore, they are not generally used to memorialize common understandings of meaningful consultation.[237] Therefore, considering the current reluctance of many federal agencies and American Indian tribes to enter into programmatic agreements, federal agencies would likely need financial and political support to fully pursue and memorialize common understandings of meaningful consultation with American Indian tribes. Such political support would need to extend beyond and offer greater specificity than the broad mandates of existing statutes, executive orders and memoranda, and agency regulations.[238] American Indian tribes would also need to fully engage in the development of programmatic agreements, and recognize the importance of common understandings of meaningful consultation to achieving their interests.

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235. A programmatic agreement is a "document that records the terms and conditions agreed upon to resolve the potential adverse effects of a [f]ederal agency program, complex undertaking or other situation." 36 C.F.R. § 800.16(t) (2017).

236. In my experience as the Deputy State Historic Preservation Officer of Review and Compliance at the Montana State Historic Preservation Office, over a period of two years we only worked on two programmatic agreements. Both were updates to existing programmatic agreements detailing alternative procedures for the involved federal agencies. Federal agencies often expressed reluctance to enter into programmatic agreements for other purposes, viewing them as either unnecessary, cumbersome, or a waste of resources. Federal agency personnel delegated with the responsibility to consult rarely had legal or general agency support to enter into programmatic agreements. Additionally, American Indian tribes are often reluctant to sign programmatic agreements.

237. Programmatic agreements are generally used in the Section 106 process: for large-scale or phased undertakings where it is impracticable for the federal agency or agencies fully identify historic properties and evaluate adverse effects prior to commencement of an undertaking; to resolve adverse effects in complex undertakings, emergencies, or for post-review discoveries; to detail alternative procedures for the federal agency or agencies to follow to fulfill their Section 106 obligations; and for a particular type of federal undertaking. *See* 36 C.F.R. § 800.14.

238. *See generally* Routel & Holth, *supra* note 127 (providing a thorough discussion of the limitations of the existing statutes, executive orders and memorandum, and agency regulations with regard to meaningful consultation).

V. CONCLUSION

Most federal actions progress through Section 106 without incident. Only a few require the intensive consultation process illustrated by the struggle over the Badger-Two Medicine. The flexibility of the Section 106 consultation process enables federal agencies to tailor their consultation efforts based on the potential adverse effects of a federal action as well as the American Indian tribes involved. It encourages federal agencies to go above and beyond the minimum procedural requirements of Section 106 to achieve meaningful consultation. Nevertheless, many federal agencies choose to follow the minimum procedural requirements of Section 106 rather than attempting meaningful consultation. Accordingly, these federal agencies find themselves in conflict with American Indian tribes seeking meaningful consultation focused on substantive concerns rather than procedural requirements. Such conflicts demonstrate the importance of establishing common understandings of meaningful consultation, as well as the need to carefully explore and apply the lessons of circumstances, like the Badger-Two Medicine, where despite initial upsets meaningful consultation organically occurred.

In its examination of the facts, the D.C. district court was preoccupied with the thirty-year time span rather than what actually occurred during those years. Considering the timeline from a different perspective, it is not surprising the process took decades to complete. Examination of the timeline for the Badger-Two Medicine struggle reveals much of the delay is attributable to more than the Section 106 consultation process. Years passed due to congressional action and inaction to protect the Badger-Two Medicine, shifts in federal policy towards oil and gas leasing on public lands, and increased executive and congressional emphasis on meaningful consultation with American Indian tribes.

Nevertheless, the fact remains that meaningful consultation requires a careful and sometimes lengthy approach. The NHPA was enacted to protect against untrammeled development, mandating federal agencies pause to consider the impacts of their actions on significant historic resources through discussion with interested parties. Considering the potentially devastating impact of loss or desecration of the Badger-Two Medicine, the Forest Service should be commended for going beyond procedural consultation obligations to actually address the concerns of the Blackfeet. The Forest Service's efforts to properly identify and record the traditional cultural significance of the Badger-Two Medicine through oral histories, archaeological surveys, and

meaningful consultation with the Blackfeet should be celebrated as a success rather than characterized as ineptitude or recalcitrance.