IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOLENEX, LLC,	)	
	)	
Plaintiff,	)	Civ. Action No. 13-993 (RJL)
	)	
v.	)	
	)	
DEBRA HAALAND, et al.,	)	
	)	
Defendants	)	
	)	

THE BLACKFEET TRIBE'S *AMICUS CURIAE* BRIEF SUPPORTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENTAND DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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DISCLOSURE STATEMENT

Pursuant to LCvR 7(o) and Fed. R. App. P. 29(a)(4), *Amici Curiae* makes the following disclosure:

Amici Curiae is a tribal government, and, therefore, has no parent corporation and does not issue stock.

DATED: February 24, 2022

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IDENTITY AND INTEREST OF AMICUS[1]

The Blackfeet Tribe of the Blackfeet Indian Reservation (the "Tribe") is a federally-recognized tribe whose sovereignty predates that of the United States. *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). The Tribe entered into treaty relations with the United States on several occasions. *See, e.g.*, Treaty of October 17, 1855, 11 Stat. 736 (establishing Blackfeet Reservation). Even after 1871, when the ordinary treaty process with tribes ended by legislation, 25 U.S.C. § 71, the Tribe continued to enter into agreements with the United States[2], which were in all respects the equivalent of treaties. *Choate v. Trapp*, 224 U.S. 665, 671 (1912).

The 1895 Agreement, ratified by the Act of June 10, 1896, 29 Stat. 321, 353-358, is one such agreement and is central to the Tribe's interest in the present action. In the 1895 Agreement, the Tribe ceded an area sometimes referred to as the Ceded Strip or the Ceded Area, while also reserving a right of access to the Ceded Area for broad purposes, which encompass hunting, fishing, and gathering rights as well as spiritual and cultural uses. *Id*. The Appellee, Solenex, LLC ("Solenex"), seeks to

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Agreements of December 28, 1886 and January 21, 1887, ratified by Congress on May 1, 1888, 25 Stat. 113 ("1888 Agreement").

drill an exploratory well in a portion of the Ceded Area known as the Badger-Two Medicine Area.

For the Tribe, the Badger-Two Medicine Area is of immense cultural and spiritual importance. It is "one of the last cultural and religious bastions where the Blackfeet find spiritual enlightenment as well as much needed food and medicine . . ." FS 004848. It "is home to the Tribe's most sacred places and sites." ECF 68-1 at 6. Accordingly, Solenex's proposed activities pose a grave danger to the Tribe's rights in that area. The Tribe seeks to ensure that its rights are protected through the required federal processes in which the Tribe, Solenex, the United States, and others are engaged, but which Solenex wishes to abort.[3]

Rather than repeat Defendants' and Defendant-Intervenors' arguments, the Tribe details its interest in the lands at issue and the laws requiring that its interests be adequately considered and protected. The Tribe's discussion herein demonstrates that the Bureau of Land Management's ("BLM") decision to cancel the lease as invalidly issued to Solenex's predecessor was reasonable and rested on sound legal principles.

[3] Supporting the Tribe's concerns are numerous environmental groups and other entities as well as Congress, which, subject to existing rights, has closed the area to future oil and gas development. Pub. L. 109-432, 120 Stat. 2922, 3050 (2006). This legislation is further confirmation of the special nature of the area and the need to preserve it.

ARGUMENT

I. The Law and Policy Underlying the Requirement of Tribal Consultation Fully Support BLM's Decision to Cancel the Lease.

The federal trust responsibility, a foundational principle of federal Indian law and the wellspring of many current laws benefitting tribes and Indians, was first articulated in three seminal cases written by Chief Justice Marshall, often called the "Marshall Trilogy": *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832). The federal trust responsibility imposes at least three general duties on the federal government: (1) to provide federal services to tribal members, such as health care and education; (2) to protect tribal resources, including cultural and natural resources; and (3) to protect tribal sovereignty. Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. Mich. J. L. Reform 417, 430-35 (2013).

Over the century following the Marshall Trilogy, federal Indian policy vacillated from assimilation to the modern era of self-determination, the hallmark of which is to "get away from the bureaucratic control of the Indian Department . . . [by giving] Indians control over their own affairs." 78 Cong. Rec. 11,125 (1934) (statement of Senator Wheeler, proponent of the Indian Reorganization Act). In 1970, President Nixon delivered a speech urging Congress to adopt a legislative program in which the "Indian future is determined by Indian acts and Indian

decisions." *Richard M. Nixon, Special Message on Indian Affairs July 8, 1970*, Documents of United States Indian Policy 256, 257 (Francis Paul Prucha ed., 2000). Consequently, the first consultation policies were born.

Government-to-government consultation is essential to fulfilling the federal trust responsibility. The Bureau of Indian Affairs ("BIA") enacted the first consultation policy in 1970, and it led to several successful lawsuits by tribes to enforce its provisions. Routel & Holth, *supra*, at 436-37 (citing *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 709-10 (8th Cir. 1979)). Although this first policy only applied to BIA personnel issues, consultation expanded in statute[4] and in practice to include protection of tribal cultural resources. *Id.* at 439-41. It was not until President Clinton issued several executive memoranda and orders,[5] culminating in Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), that there was an across-the-board agency acknowledgment that the "unique legal relationship with Native American tribal governments" – in other words, the trust responsibility – required consultation. Memorandum from President George W. Bush on Government-to-Government Relationship with Tribal Governments to the

[4] The first statute to require consultation was the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450-458ddd-2 (2006)).

[5] Memorandum from President Bill Clinton on Government-to-Government Relations with Native American Tribal Governments to the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22, 951 (Apr. 29, 1994); Exec. Order 13007, 61 Fed. Reg. 26771 (May 24, 1996) (Indian Sacred Sites).

Heads of Executive Departments and Agencies, 2 Pub. Papers 2177 (Sept. 23, 2004); Memorandum from President Barack Obama on Tribal Consultation to the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57, 881 (Nov. 9, 2009). The BLM consultation guidelines note the need for meaningful and direct dialogue with tribes, and treat "tribal information as a necessary factor in defining the range of acceptable public-land management options." Bureau of Land Management, H-8120-1, *BLM Manual Handbook: Guidelines for Conducting Tribal Consultation* (Dec. 3, 2004), https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_H-8120-1.pdf.

These policies, which were designed to reverse centuries of colonialism, are recognized at the international level as well. In 2007, the United Nations adopted the Declaration on the Rights of Indigenous Peoples, which recognizes "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." U.N. G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 43 (Sept. 13, 2007) (hereinafter "Declaration"). President Obama announced United States' endorsement of the Declaration in 2010, and approximately 150 countries have done likewise, with no countries opposing. U.S. Dep't of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples* (Dec. 16, 2010), http://www.state.gov/documents/organization/184099.pdf

[https://2009-2017.state.gov/r/pa/prs/ps/2010/12/153027.htm]. Article 25 of the Declaration provides that "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned . . . lands, territories, waters . . . and other resources and to uphold their responsibilities to future generations in this regard." Declaration art. 25. In addition, Article 18 recognizes the right of indigenous peoples to participate in decision-making affecting them, and Article 19 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." *Id.* arts. 18-19. In order to better implement these international standards, the Advisory Council on Historic Preservation ("ACHP") has adopted a plan to support the Declaration. *United Nations Declaration Rights Indigenous Peoples: Introduction*, Advisory Council on Historic Preservation, https://www.achp.gov/indian-tribes-and-native-hawaiians/united-nations-declaration-rights-indigenous-peoples (last visited Feb. 15, 2022).

Accordingly, in making decisions regarding the Solenex lease, the Tribe's rights must be taken into account and protected under federal law and policy, as well as under international standards. Solenex objects to the fact that the federal government is taking these obligations seriously. Once the government finally

committed the effort to engage with the Tribe regarding the lease's impacts and become fully informed as it should have done at the outset, it was able to evaluate the true impact of oil and gas development on this tremendously significant area. After taking the requisite "hard look" at the complete facts, the federal government correctly decided to cancel the lease, which never should have been issued in the first place.

A. Cancellation of the Lease Was Appropriate Because BLM Failed to Consider Impacts on the Tribe's Reserved Rights.

The lease's impact on environmental resources and the Tribe's reserved rights are inextricably tied. As their trustee, the federal government owes a fiduciary obligation to Indian tribes. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006). At a minimum, this fiduciary obligation "requires the government to demonstrate compliance with general obligations and statutes not specifically aimed at protecting Indian tribes." *Id.* Hence, violation of National Environmental Policy Act ("NEPA") requirements constitutes a failure of the federal government to meet its minimum fiduciary obligations to Indian tribes. *Id.*

When considering the environmental consequences of a proposed action, NEPA requires an agency to take a "hard look" at issues affecting a tribe's reserved rights. *See Okanogan Highlands All. v. Williams*, 236 F.3d 468, 480 (9th Cir. 2000); *Edwardsen v. U.S. Dep't of the Interior*, 268 F.3d 781, 785 (9th Cir. 2001). The hard look doctrine requires that an agency's Environmental Assessment ("EA") discuss

and give full and meaningful consideration to all reasonable alternatives, including one that preserves the status quo, such as no development in an area that is not currently developed. *See Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245 (9th Cir. 2005); *see also* 40 C.F.R. § 1508.9(b). These requirements serve the dual purpose of ensuring an agency is adequately informed, and disclosing considerations given a "hard look" by the agency in order to facilitate informed public comment on the proposed action and alternatives that might cause less environmental harm. *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996); *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005); 42 U.S.C. § 4332(E); 40 C.F.R. § 1500.1(c); *see also Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 601–02 (9th Cir. 2010).

While an agency may sometimes fulfill its NEPA obligations by preparing an EA, where a lease allows for surface occupancy, a full Environmental Impact Statement ("EIS") is required prior to lease issuance. *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983); *Connor v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988); *Bob Marshall Alliance*, 852 F.2d at 1229. An EIS must contain "a reasonably thorough discussion of the significant aspects of the probable environmental consequences," which includes consideration of a tribe's reserved rights. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 809 (9th Cir. 1999).

Where its decisions impact reserved treaty rights, BLM must "consult with Tribes and identify, protect, and conserve trust resources, trust assets, and Tribal health and safety." *Island Mountain Protectors*, 144 IBLA 168, 185 (May 29, 1998); 40 C.F.R. § 1501.2 (requiring federal agencies to consult with Indian tribes at the earliest stages of the NEPA process).

In the case at bar, the BLM did not conduct *any* environmental analysis prior to lease issuance, let alone consider how to protect the Tribe's reserved rights. While the Forest Service prepared an EA, the BLM never adopted it, nor did it independently analyze impacts of the proposed agency action on the Tribe's reserved rights. Moreover, the Forest Service's EA never mentions the Tribe's reserved rights, much less considers how issuing leases in the Badger-Two Medicine area would impact the Tribe's reserved rights.

The lack of consideration of the Tribe's rights is highlighted by Section 10 of the Forest Service's EA, which describes the consultation process utilized by the Forest Service. Notably, neither the Tribe nor the BIA were consulted. And while the EA says the Tribe was "notified," this falls well short of the required tribal consultation.[6]

[6] BLM itself defines tribal consultation as a bilateral activity: "Consultation: the process of identifying and seeking input from appropriate tribal governing bodies, considering their issues and concerns, and documenting the manner in which the input affected the specific management decision(s) at issue." Bureau of Land Management, 8120, *BLM Manual: Tribal Consultation Under Cultural Resources*

The Forest Service EA also failed to analyze a true "no action" alternative that would have preserved the status quo and not opened the area for leasing.[7] This fundamental NEPA requirement is particularly appropriate where tribal reserved rights may be affected. Yet, under pressure to clear a backlog of applications, the Forest Service and BLM only considered various ways to issue leases, and never considered a no-leasing alternative.

Having skirted NEPA's requirements in opening the area for leasing, BLM further violated NEPA by issuing Solenex's predecessor a lease allowing surface occupancy in an area where the Tribe possesses reserved rights, without developing an EIS.[8] Consequently, the BLM "irreversibly and irretrievably" committed agency resources without preparing an EIS or considering the effects on the Tribe's reserved rights. *See Sierra Club*, 717 F.2d at 1412-15. This failure to thoroughly consider the consequences of agency action is precisely what NEPA's procedural requirements are designed to avoid.

(Dec. 3, 2004) https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual8120.pdf (defining "Consultation" in the Glossary). And, as pointed out earlier, the goal should be to achieve "free, prior, and informed" consent.

[7] While the EA refers to a "no action" alternative, that alternative is merely an option to delay lease issuance, and does not consider the option of not issuing the lease. ECF Doc. 45-10, Vol. IV at 78 (1980 EA at 61).

[8] Solenex's lease does contain an NSO stipulation for 18% of the leased area. ECF 45-12 at 7 (Solenex Lease). However, the NSO stipulation applies only to areas with slopes greater than 60%. Thus, Solenex's lease allows surface occupancy on more than 5,122 acres — the vast majority of the leased area.

Although the scope and extent of the Tribe's rights were delineated in subsequent studies, this does not remedy the fundamental error: that the BLM did not consider them during the initial decision of whether to open the area for leasing. Thus, these subsequent reports were falsely premised on the notion that Solenex's predecessor was issued a valid lease in the first instance and, therefore, cannot substitute for an EIS examining whether the lease should be issued at all. *See Pit River Tribe*, 469 F.3d at 787.

The persistent failure to comply with NEPA's requirements constituted a breach of the federal government's minimum fiduciary obligation to the Tribe to preserve and protect its reserved resources. Under these circumstances, BLM was well within its authority to cancel the lease as unlawfully issued.

Solenex urges this Court to disregard the Tribe's interests in favor of its own. In contrast to Solenex's vague and unquantified "reliance interests," the Tribe's interests are specific and embodied in an agreement with the United States, which was approved by Congress more than 100 years ago. The government's decision to cancel the lease finds firm footing on its fiduciary obligation to protect the Tribe's interests, rights, and resources.

B. Cancellation of the Lease Was Appropriate Because BLM Failed to Consider Effects on the Tribe's Historic and Cultural Resources.

An agency must consider cultural and historic resources in its NEPA process and adhere to National Historic Preservation Act ("NHPA") requirements to fulfill its minimum fiduciary obligations to Indian tribes. *See* 40 C.F.R. § 1508.8; *Nat'l Parks Conservation Assoc. v. Semonite*, 916 F.2d 1075, 1079 (D.C. Cir. 2019); *Pit River Tribe*, 469 F.3d at 788; *see also Karst Envtl. Educ. & Prot., Inc. v. Envtl. Prot. Agency*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) (stating that NEPA and NHPA are operationally similar). The NHPA creates a comprehensive program for the protection of national, State, tribal, and local historic resources. Like NEPA, the NHPA is described as a "stop, look and listen" provision that "requires each federal agency to consider the effects of its programs." *Muckleshoot Indian Tribe*, 177 F.3d at 805.

The NHPA broadly requires federal agencies to "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]." 16 U.S.C. § 470f (1982) (now codified as 54 U.S.C. § 306108); 36 C.F.R. § 800.4. Additionally, "[t]he head of the Federal agency [considering the undertaking] shall afford the [Advisory Council on Historic Preservation] a reasonable opportunity to comment with regard to such undertaking." 54 U.S.C. § 306108.

BLM failed to meet these mandates prior to issuing the Solenex lease. The Forest Service EA acknowledges extensive Native American cultural, historic and religious resources in the area. ECF 45-10, Vol. IV at 44-45 (1980 Environmental Assessment at 27-28). Yet, prior to issuing the Solenex lease, BLM neither determined potential adverse impacts on historic and cultural resources, nor identified methods of mitigation. Nor did it provide an opportunity for the ACHP or others to comment. Instead, the agencies attempted to defer NHPA compliance until "the time soil disturbing activities are proposed." ECF 45-10, Vol. IV at 44-45 at 61 (1980 Environmental Assessment at 44). Deferring this analysis until after an "irretrievable and irreversible" commitment of agency resources occurred violated the NHPA's requirements. *Pit River Tribe*, 469 F.3d at 787; *cf. Sierra Club*, 717 F.2d at 1414-1415.

Subsequent studies, which were conducted in consideration of Solenex's APD and the creation of a Tribal Cultural District ("TCD"), demonstrate the magnitude of what the agencies initially missed. *See* FS 005235-005328 (Walker & Reeves Report); FS 005466-5605 (Zedeno Report); FS 005606-005881 (Zedeno & Murray Report). Moreover, they would have discovered – as they did years later – that the effects of oil and gas development upon the extensive tribal cultural and historic resources in the Badger-Two Medicine Area cannot be mitigated. ECF No. 68-1 at 13 (Lease Cancellation Letter).

The Badger-Two Medicine Area and, more specifically, the vicinity of Solenex's lease, is tied to past and present cultural, subsistence, and religious activity that merited special protection in the form of a TCD, which was eligible for listing on the National Register of Historic Places. ECF 68-1 at 2 (Lease Cancellation Letter).

Experts have recognized that "Blackfoot cultural landscapes are the product of a multitude of human-nature interactions that date to the beginning of time." FS 005631. And the specific landscape at issue here "is inseparable from the historical processes and events that shaped and still affect Blackfeet society and culture since time immemorial." FS 005643. These historical events "characterized the lives of tribal societies along the Rocky Mountain Front." FS 005643. The area is associated with supreme beings as well as "Blackfeet individuals that figure prominently in the recent history of the tribe . . ." FS 005643.

Findings in the area indicate it "has potential to yield archaeological and historical information that documents Blackfeet traditional land and resource uses including, but not limited to: hunting, praying, individually and in group, plant animal, and mineral collecting, scouting, and trapping." FS 005644. The area may also contain "undisclosed burials of prehistoric or early historic age." FS 005645.

This unique landscape ties together history and contemporary life for the Tribe. "[S]ince the establishment of the reservation and the extermination of bison

herds, the study area has been the focus of a new, emerging modern Blackfeet identity as elk hunters, with unique social networks and cultural practices that are both rooted in antiquity and renewed with modern adaptations to new living conditions." FS 005645. In sum, this area "embodies Blackfeet tradition and identity, past and present" and "the resiliency of an ancient way of life and a cultural tradition that has survived into the present." FS 005643, 005644.

The studies conducted after the lease issuance demonstrate the insufficiency of the early review process and how ill-informed the BLM's initial decisions were. However, these subsequent studies "cannot cure the earlier violation, because it did not deal with the question of whether the land should have been leased at all." *Pit River Tribe*, 469 F.3d at 787.

Additionally, the record undercuts any assertion that the Tribe's concerns regarding cultural and historic resources are a manufactured pretext[9] for lease cancellation. The record amply demonstrates the Badger-Two Medicine Area's cultural and religious importance to the Tribe,[10] and its constant efforts to protect its rights there – although it also reflects an inconsistent response from the BLM and

[9] *See* ECF No. 156 at fn. 16 (suggesting the Tribe and the United States possess ulterior motives).

[10] As the D.C. Circuit pointed out, the Badger-Two Medicine Area has "long held a special place in the cultural history and religious life of the Blackfeet Tribe." The practices undertaken in the Badger-Two Medicine Area are "central and inseparable part of [the Tribe's] religion and lifeway." *Solenex v. Bernhardt*, 962 F.3d 520, 522 (D.C. Cir. 2020).

Forest Service. Nevertheless, once the federal agencies appropriately reviewed the procedural history of the lease and noted lapses where they should have identified eligible resources as well as sought and received the Tribe's input, they correctly decided to cancel the lease.

CONCLUSION

For the foregoing reasons, Amicus Blackfeet Tribe of the Blackfeet Indian Reservation respectfully requests that this Court grant the Motions for Summary Judgment filed by Defendants and Defendant-Intervenors, and deny Plaintiff's Motion for Summary Judgment.

Respectfully submitted this 24th day of February, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(a)(4)(G) and 32(g)(1) of the Federal Rules of Appellate Procedure and LCvR 7(o)(5), I hereby certify that the foregoing **THE BLACKFEET TRIBE'S *AMICUS CURIAE* BRIEF SUPPORTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**, filed on February 24, 2022, complies with LCvR 7(o)(4) because it does not exceed 25 pages.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 24th day of February, 2022, a copy of the foregoing **THE BLACKFEET TRIBE'S *AMICUS CURIAE* BRIEF SUPPORTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was filed through the Court's CM/ECF management system and electronically served on counsel of record.

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