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Solenex, LLC v. Haaland

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Solenex, LLC v. Haaland, No. 13-993, 2022 U.S. Dist. LEXIS 163518 (D.D.C. Sept. 9, 2022)

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I. INTRODUCTION

Solenex, LLC v. Haaland[1] concerns the issuance and subsequent cancelation of an oil and gas lease ("Lease") in the Badger-Two Medicine area located in the Lewis and Clark National Forest in northwestern Montana, adjacent to the Blackfeet Indian Reservation.[2] The questions considered by the United States District Court for the District of Columbia were: (1) whether the Secretary of the Interior ("Secretary") possessed the authority to cancel the properly issued Mineral Leasing Act lease of Solenex, LLC, and (2) whether the Secretary's rescission of Solenex's Application for Permit to Drill ("APD") was arbitrary and capricious.[3] The court ultimately held that the Secretary does not have the power to cancel a properly issued lease and that her rescission of Solenex's APD was arbitrary and capricious.[4]

In 2005, the Louisiana-based company, Solenex, LLC ("Solenex"), acquired Sidney Longwell's oil and gas lease in the Badger-Two Medicine.[5] Solenex challenged the Secretary's cancellation of the Lease.[6] Solenex claimed the Secretary lacked the authority to cancel the Lease because it was valid upon issuance; that she violated contract law principles; and that she ignored its bona fide purchaser status.[7] For the purposes of this case note, only Solenex's first argument is discussed.

Defendants in this case include Deb Haaland in her official capacity as Secretary of the Interior and the six intervenors (collectively "Defendants").[8] Defendants argued that the Secretary was within the scope of her authority to cancel the Lease because it was invalid when it was issued and violated multiple federal laws.[9] Further, the Defendants contended

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1. No. 13-993, 2022 U.S. Dist. LEXIS 163518 (D.D.C. Sept. 9, 2022).
2. *Id.* at *8.
3. *Id.* at *17, 35.
4. *Id.* at *47–48.
5. *Id.* at *13.
6. Plaintiff's Cross-Motion for Summary Judgement at 1, Solenex, LLC v. Haaland, No. 12-993, 2022 U.S. Dist. LEXIS 163518 (D.D.C. Sept. 9, 2022), EFC No. 156.
7. *Id.* at 2.
8. *Solenex*, 2022 U.S. Dist. LEXIS 163518 at *8.
9. Defendant's Cross-Motion for Summary Judgement at 1, Solenex, LLC v. Haaland, No. 12-993, 2022 U.S. Dist. LEXIS 163518 (D.D.C. Sept. 9, 2022), EFC No. 164.

that the Secretary's rescission of Solenex's APD was proper and within her scope of power.[10]

The importance of *Solenex* reaches far beyond whether Solenex will be allowed to keep its lease. At its heart is whether federal laws like the National Environmental Protection Act ("NEPA") and the National Historic Preservation Act ("NHPA") can protect culturally significant tribal land. Although *Solenex* is a district court ruling, and thus lacks binding authority outside its jurisdiction, it raises a red flag and merits discussion because government agencies may nevertheless treat it as such.

This case note will briefly discuss the important qualities of the Badger-Two Medicine and the relevant federal law, analyze the court's decision of what qualifies as an undertaking and an adverse effect under the NHPA, and will conclude by discussing ways in which the NHPA's ability to protect culturally significant tribal land might be improved.

II. FACTS AND LEGAL BACKGROUND

A. The Badger-Two Medicine

Located in northwestern Montana, the Badger-Two Medicine is nestled between Glacier National Park, the Scapegoat Wilderness Area, the Bob Marshall Wilderness Area, and the Blackfeet Indian Reservation.[11] The Badger-Two Medicine is a large land area located within the Lewis and Clark National Forest, comprising nearly 130,000 acres.[12] The Badger-Two Medicine is an area of "immense cultural and spiritual importance" to the Blackfeet Tribe ("Tribe").[13] The Tribe's "most sacred places and sites" are located in the Badger-Two Medicine.[14] Further, the area is a "relatively pristine landscape" with many important ecological functions.[15] It is not only a critical wildlife corridor to and from Glacier National Park, but a vital source of drinking water to the Blackfeet Reservation and surrounding communities.[16] Recognizing the importance of protecting the Badger-Two Medicine, the Secretary and Congress have steadily restricted the amount of disruptive and extractive activity that may take place there since 2001.[17] In 2006, Congress withdrew the area from federal oil and gas leasing.[18]

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10. *Id.* at 1.
11. *Id.* at 5.
12. *Id.*
13. Blackfeet Tribe's Amicus Br. at 2, Solenex, LLC v. Haaland, No. 12-993, 2022 U.S. Dist. LEXIS 163518 (D.D.C. Sept. 9, 2022), EFC No. 168.
14. *Id.*
15. *Id.*
16. Defendants' Cross-Motion for Summary Judgment at 5-6, Solenex, LLC v. Haaland, No. 12-993, 2022 U.S. Dist. LEXIS 163518 (D.D.C. Sept. 9, 2022), EFC No. 164.
17. *Id.* at 6.
18. *Id.* (citing Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 403, 120 Stat 2922, 3050).

B. Mineral Leasing Act of 1920

Under the Mineral Leasing Act of 1920 ("MLA"), the Secretary has the authority to lease land with known or expected reserves of oil or gas.[19] Qualified oil and gas leasing is done through a competitive bidding process.[20] Leases are awarded to the highest "responsible qualified bidder."[21] Leases issued under the MLA have a primary term of 10 years and may be extended by 10 years as long as oil or gas is being produced in paying quantities.[22]

The Secretary may cancel an MLA lease.[23] The MLA itself grants the Secretary authority to cancel MLA leases in three situations: (1) if the lease violates a provision of the MLA, (2) if the lessee has violated a provision of the MLA or the lease, or (3) if the leased land has stopped producing.[24] 30-day notice is required for any cancelation under the Secretary's MLA authority.[25]

Additionally, the Secretary holds "traditional administrative authority" to cancel MLA leases because of pre-lease problems.[26] In *Boesche v. Udall*, the Supreme Court first considered whether the Secretary had the administrative authority to cancel an MLA lease that was invalid at the time it was assigned.[27] Next, it considered whether 30 U.S.C. § 188(b) terminated that authority.[28] The Court held that the Secretary possesses an inherent administrative authority under "general powers of management over the public lands" to cancel an invalidly issued lease.[29] The Court also held that § 188(b) only effected the Secretary's authority regarding cancellations involving post-lease events.[30] The Court thus held that the Secretary possesses authority to cancel MLA leases that were invalid upon issuance when it is necessary to correct her own errors.[31]

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19. 30 U.S.C. § 226(a) (2022).
20. 30 U.S.C. § 226(b)(1)(A).
21. *Id*.
22. 30 U.S.C. §§ 226(e)(1), 226(e)(2).
23. Solenex, LLC v. Haaland, No. 13-993, 2022 U.S. Dist. LEXIS 163518, *4–5 (D.D.C. Sept. 9, 2022).
24. 30 U.S.C. § 188(b) (2022).
25. *Id*.
26. James Lockhart, Annotation, *Cancellation, Revocation, and Automatic Termination, Under § 31 of Mineral Lands Leasing Act (30 U.S.C.A. § 188), of Lease Entered into Under Terms of Act, for Failure to Comply with Lease Provisions*, 62 A.L.R. Fed. 871, § 3 (2022).
27. 373 U.S. 472 (1963).
28. *Id*. at 437.
29. *Id*. at 476.
30. *Id*. at 478.
31. *Id*. at 476 ("We think that the secretary, under his general powers of management over the public lands, had the authority to cancel this lease administratively for invalidity at its inception, unless such authority was withdrawn by the Mineral Leasing Act.").

C. National Historic Preservation Act

1. History of the National Historic Preservation Act

Congress enacted the National Historic Preservation Act in 1966.[32] Accordingly, the NHPA marks the United States' first effort to establish a federal environmental review process.[33] The NHPA created many of today's modern preservation tools.[34] The National Register of Historic Places was established by the NHPA, for example.[35]

With increased focus on preserving local and national history, Congress provided the Advisory Council of Historic Preservation ("ACHP") in the NHPA.[36] The AHCP is an independent federal agency comprised of federal agency representatives and presidential appointees.[37] The purpose of the ACHP is to provide advice and guidance surrounding NHPA decisions, to oversee the NHPA processes, and to consult with agency, state, and tribal officials to preserve historic resources.[38]

In addition to the ACHP, the NHPA provides for state historic preservation officers ("SHPOs") and tribal historic preservation officers ("THPOs") to help facilitate the ACHP by bridging gaps between federal, state, and tribal planning processes.[39] SHPOs and THPOs wield substantial power in the NHPA process because they can determine a property's eligibility for placement on the National Register of Historic Places, which is a designation that often triggers an agency's obligations under the NHPA.[40] The THPO role was established in 1992 to conduct the same duties as a SHPO for federal agency undertakings on tribal land.[41] The addition of the THPO position was significant because it gave tribes more of a voice in the federal preservation process, making the NHPA more "responsive to tribal considerations."[42]

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32. National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966).

33. *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106*, ADVISORY COUNCIL ON HISTORIC PRESERVATION 4, (March 2013), https://perma.cc/DFF7-YC9T [hereinafter "NEPA and NHPA Handbook"].

34. Jess R. Phelps, *The National Historic Preservation Act at Fifty: Surveying the Forest Service Experience*, 47 ENV'T L. 471, 473 (2017).

35. *Id*.

36. *Id*.

37. *Id*. at 482.

38. NEPA and NHPA Handbook, *supra* note 33, at 6.

39. 36 C.F.R. §§ 800.2(c)(1)(i), 800.2(c)(2)(i)(A) (2022); Phelps, *supra* note 34, at 481.

40. Phelps, *supra* note 34, at 481, 479.

41. *Id*. at 481.

42. *Id*.

2. Section 106 Consultation

Section 106 mandates that federal agencies consult with tribes when a federal undertaking could adversely affect historic properties.[43] Federal agencies must "take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings."[44]

Determining what triggers NHPA Section 106 consultation is complicated. Once an agency determines Section 106 review is necessary, it must initiate the process.[45] Step one involves establishing whether there is an undertaking, notifying the SHPO or THPO, identifying consulting parties, coordinating the parallel NEPA process (described *infra*), and creating a plan to involve the public.[46] At step one, if the undertaking does not have the potential to cause adverse effects to a historic property on or eligible for the National Register of Historic Places, then the Section 106 process is complete and no further action is required by the NHPA.[47]

During step two, the agency must determine the Area of Potential Effect ("APE"), identify historic properties, continue consultation with historic preservation officers and other interested parties, and involve the public.[48] An APE is the geographic boundary circumscribing the potentially affected area.[49] Agencies work with the historic preservation officer to establish the APE and must support the boundary decision with documentation and a rationale.[50] Once the APE is established and the agency has made a "good faith effort" to identify historic properties, the agency must determine whether those historic properties will be affected by the proposed undertaking.[51] If the answer is no, then the Section 106 review process is complete, and no further action is required by the NHPA.[52]

Next, the agency must consult with the SHPO or THPO and "any Indian tribe…that attaches religious and cultural significance" to the historic property to determine whether identified effects will be adverse to

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43. NEPA and NHPA Handbook, *supra* note 33, at 8.

44. 36 C.F.R. § 801.1 (2022); 36 C.F.R. § 800.16(y) (2022) ("Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency,…those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.").

45. NEPA and NHPA Handbook, *supra* note 33, at 8.

46. *Id*.

47. *Id*.

48. *Id*.

49. Phelps, *supra* note 34, at 488.

50. *Id*.

51. *Id*.; NEPA and NHPA Handbook, *supra* note 33, at 8.

52. NEPA and NHPA Handbook, *supra* note 33, at 8.

the property.[53] 36 C.F.R. § 800.5 provides substantive criteria for that process.[54] If the historic property is not likely to be adversely affected by the proposed undertaking, no further action is required by the NHPA.[55]

Finally, if the proposed undertaking is likely to adversely affect an identified historic property, the agency must continue to step four.[56] Here, the agency must notify the ACHP and work with the historic preservation officer and consulting parties to avoid, minimize, or mitigate adverse effects.[57] Avoidance is the preferred option, but "[a]n agreed-upon outcome under Section 106 is not usually a pure preservation solution."[58] Economic considerations surrounding Section 106 consultation often result in the minimization or mitigation of adverse effects.[59] If parties reach an agreement on how to avoid, minimize, or mitigate the adverse effects, the agency will normally execute a legally binding document recording the decisions reached during negotiations.[60] This document is a simple memorandum of agreement if the project is discrete, or a programmatic agreement if the project is complex.[61] If the parties do not reach an agreement, consultation can be terminated by the agency, the SHPO or THPO, or the ACHP.[62] The terminating party must notify other consulting parties and provide the reason for termination in writing.[63]

D. National Environmental Protection Act

President Nixon signed the National Environmental Protection Act ("NEPA") into law in January 1970.[64] NEPA was established to "create and maintain the conditions under which man and nature can exist in productive harmony" by providing the public a mechanism to hold federal

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53. 36 C.F.R. § 800.5(a) (2022).

54. 36 C.F.R. § 800.5(a)(1) ("An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association").

55. NEPA and NHPA Handbook, *supra* note 33, at 8. ("An agency must notify consulting parties of a finding of no adverse effect and provide them with an opportunity to review the finding. 36 C.F.R. § 800.5(c). Agencies must maintain a record of a no adverse effect finding, but must only provide it to the public upon request. 36 C.F.R. § 800.5(d)").

56. *Id.*

57. *Id.*

58. Phelps, *supra* note 34, at 490.

59. *Id.*

60. NEPA and NHPA Handbook, *supra* note 33, at 12.

61. *Id.* at 8.

62. 36 C.F.R. § 800.7(a) (2022).

63. *Id.*

64. *Citizen's Guide to NEPA: Having Your Voice Heard*, COUNCIL ON ENV'T QUALITY 4, January 2021), https://perma.cc/7LRN-ALW8 [hereinafter "*Citizens Guide to NEPA*"].

agencies accountable for procedural failures.[65] NEPA requires agencies to take a "hard look" at an action's environmental impacts before proceeding.[66] The Council on Environmental Quality is charged with implementing NEPA regulations as a framework for other agencies to follow.[67]

The NEPA process is initiated when a federal agency proposes a major federal action.[68] Prior to approving a major federal action, an agency must determine whether it will have significant effects.[69] If the agency makes a "finding of no significant impact," or the action is eligible for a categorical exclusion, it must publish its decision on the record.[70] If the action might have significant effects, the agency must complete an environmental assessment ("EA") or an environmental impact statement ("EIS").[71] An EA is a "checklist" that must establish whether effects are significant and identify a spectrum of alternatives.[72] If the agency identifies significant effects, it must complete an EIS.[73] An EIS must contain a more detailed analysis of the significant effects and alternatives, including:

> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[74]

III. PROCEDURAL HISTORY

In 2013, Solenex sued multiple government agencies to compel a decision on the lease suspension.[75] The court partially granted Solenex's motion for summary judgment on BLM's suspension of the Lease, holding

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65. 42 U.S.C. § 4331(a) (2022).

66. Arnold W. Reitze, Jr., *The Role of NEPA in Fossil Fuel Resource Development and Use in the Western United States*, 39 B.C. ENV'T. AFFS. L. REV. 283, 289 (2012).

67. *Id*.

68. *Citizen's Guide to NEPA*, *supra* note 64, at 5.

69. *Id*. at 8.

70. *Id*.

71. *Id*.

72. *Id*. at 10.

73. *Id*. at 8.

74. 42 U.S.C. § 4332(c)(i)–(v).

75. Solenex, LLC v. Haaland, No. 13-993, 2022 U.S. Dist. LEXIS 163518, *13 (D.D.C. Sept. 9, 2022).

that BLM's decades long delay of decision "constituted unreasonable delay under the APA."[76] The court ordered Defendants to accelerate the decision process.[77] In 2016, the Secretary formally cancelled Solenex's lease.[78] Solenex filed a supplemental complaint that challenged the cancellation, arguing that the Secretary lacked the legal authority to cancel the Lease and that the cancelation was arbitrary and capricious.[79] The court also granted Solenex's motion for summary judgment in regards to the Secretary's cancelation.[80] The court held the Secretary's cancellation of the Lease was arbitrary and capricious,[81] citing agency delay and reliance interest.[82] The court did not address whether the Secretary had authority for the cancellation.[83]

On appeal, here, the United States Court of Appeals for the District of Columbia reversed the lower court's ruling, holding that agency delay alone is inadequate to render an agency action unlawful, and that Solenex's reliance interests were minimal and largely self-imposed.[84] The court vacated summary judgment and remanded for further consideration.[85]

IV. HOLDING

First, the court held the Secretary does not possess inherent authority to cancel a validly issued lease.[86] To support its holding, the court noted that the MLA does not grant the Secretary "unfettered discretion" to cancel a lease and that *Boesche* provides only limited authority to cancel an invalidly issued lease.[87]

Next, the court held the Lease was validly issued.[88] The court advanced three reasons for the ruling.[89] First, BLM complied with NEPA when it considered a no-action alternative and reasonably relied on the EA instead of conducting an EIS.[90] Second, the Lease was not an undertaking that triggered Section 106 consultation and BLM did not need to comply with the NHPA.[91] Even assuming the Lease was an undertaking, the court

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76. Solenex, LLC v. Jewell, 334 F. Supp. 3d 174, 180 (D.D.C. 2018).
77. *Id*.
78. *Id*.
79. Solenex, LLC v. Bernhardt, 962 F.3d 520, 526 (D.C. Cir. 2020).
80. *Id*.
81. *Id*.
82. *Id*. at 527.
83. *Id*. at 526.
84. *Id*. at 527, 529-30.
85. *Id*. at 530.
86. Solenex, LLC v. Haaland, No. 13-993, 2022 U.S. Dist. LEXIS 163518, *17-18 (D.D.C. Sept. 9, 2022).
87. *Id*.
88. *Id*. at *16.
89. *Id*.
90. *Id*. at *22
91. *Id*. at * 25.

held that BLM adequately consulted the Tribe to fulfil Section 106 requirements.[92] Third, the Secretary ratified the Lease even after learning of alleged imperfections, thereby waiving the right to rescind it.[93] The court supported this ruling with the fact that MLA leases are governed by contract law principles and that those principles bind the government.[94]

Finally, the court ruled the Secretary's revocation of the APD was arbitrary and capricious.[95] The court advanced two reasons for this holding. First, BLM's alleged inability to mitigate adverse effects to tribal cultural resources was based on an overly broad Area of Potential Effects ("APE").[96] The court reached this conclusion because the Defendants established the APE based on factors not "'influenced by the 'nature of the undertaking,'"[97] such as spiritual properties, and offered support for their decision based on a Forest Service analysis that actually ran counter to their position.[98] Second, the court held the rescission was arbitrary and capricious because the Secretary improperly considered nonphysical adverse effects outside of the scope of the NHPA's adverse effects criteria.[99] The court reached its holding because the implementing regulations only enumerated physical adverse effects,[100] and because nonphysical adverse effects considered alone are "'impermissibly vague and overbroad.'"[101]

This case note will focus on (1) the court's holding that the Secretary lacked the authority to cancel the Lease regarding the NHPA and Section 106 consultation compliance and (2) the court's holding that the Secretary acted arbitrarily and capriciously for improperly considering nonphysical adverse effects when she rescinded Solenex's APD.

V. ANALYSIS

The D.C. District Court's ruling is poorly reasoned because the Secretary possesses the authority to cancel Solenex's lease and she did not act arbitrarily and capriciously in rescinding Solenex's APD.

First, the court applies a narrow reading of the term *undertaking* under 36 C.F.R. § 800.16(y).[102] Other courts have understood the term more broadly.[103] Under a broader, and sufficiently protective interpretation, Solenex's lease constitutes an undertaking, requiring NHPA Section

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92. *Id*. at *28.
93. *Id*. at *30, 33.
94. *Id*. at *30.
95. *Id.* at *35.
96. *Id*.
97. *Id*. at *37 (citation omitted).
98. *Id*. at *42.
99. *Id*.
100. *Id*. at *43.
101. *Id*. at *45 (citation omitted).
102. *Id.* at *25.
103. Mont. Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127 (D. Mont. 2004).

106 consultation. Failure to comply with those proceedings means the Lease was invalidly issued and the Secretary lawfully cancelled it.

Second, the court's interpretation of *adverse effect* ignores relevant parts of 36 C.F.R. § 800.5(a), again resulting in an overly narrow interpretation. By considering only physical adverse effects of an undertaking, the court's conclusion fails to fully examine the impact of the Lease. When considering the full scope of adverse effects, the Secretary's decision to rescind Solenex's APD is not arbitrary and capricious.

A. The Lease was Invalid Upon Issuance

1. Issuance of the Lease was an Undertaking that Qualified for Section 106 Consultation

The Lease was an undertaking that necessitated Section 106 consultation. Section 106 consultation must be completed "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license."[104] An undertaking is defined as:

> …[A] project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.[105]

Although which government actions classify as an undertaking under the NHPA has been a source of debate,[106] courts have found a lease to qualify as an undertaking.[107] In *Fry*, BLM issued multiple oil and gas leases in Blaine County, Montana.[108] Part of the leases included national monument land in the Upper Missouri River Breaks National Monument.[109] The Montana Wilderness Association brought a suit against BLM for failing to conduct site inventories or consult with tribes in violation of the NHPA.[110] In response to the Montana Wilderness Association's claim, BLM argued that the lease sales did not trigger Section 106 consultation because a lease is not an undertaking.[111]

The *Fry* court held that leases qualify as undertakings.[112] The court dismissed BLM's argument that a lease sale is not an undertaking

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104. 36 C.F.R. § 800.1(c) (2022).
105. 36 C.F.R. § 800.16(y).
106. George C. Coggins & Robert L. Glicksman, *The NHPA and Resource Development § 28.10*, 3 PUB. NAT. RES. LAW (2d ed. 2022).
107. *Fry*, 310 F. Supp. 2d at 1152.
108. *Id*. at 1134.
109. *Id*.
110. *Id*. at 1133, 1152–53.
111. *Id*. at 1152–53.
112. *Id*. at 1152.

because, at the point of the sale, the agency does not yet have to consider potential adverse effects.[113] The court reasoned that Section 106 consultation has two steps and BLM wrongly conflated them.[114] First, the agency must determine if an activity is an undertaking, then it should consider whether that undertaking will have adverse effects to cultural or historic properties.[115] When considering the first step, the court found that the sale of oil and gas leases to be an undertaking because they are "activit[ies] 'requiring a Federal permit, license or approval,'" which meets the definition of an undertaking.[116] Accordingly, the court found BLM violated the NHPA for failing to complete Section 106 consultation.[117]

Here, the *Solenex* court held a lease is not considered an undertaking that could violate the NHPA, and thus Section 106 consultation was not required for the Lease.[118] When interpreting *undertaking* the court used a narrow lens to reach the conclusion that the Lease does not qualify as an undertaking.[119] The court first ruled that no federal funds were expended, so that could not be the cause of an undertaking.[120] From there, the court quoted the Black's Law Dictionary definitions of a lease and a license.[121] Leaving its analysis to the fact that the two words are defined differently, the court ruled that since a lease is not exactly the same thing as a license, a lease cannot be an undertaking.[122] However, the court failed to consider the federal activity and the approval portions of the undertaking definition which, for the *Fry* court, were satisfactory to qualify a lease as an undertaking.[123] Taking into account this omission, the *Solenex* court's interpretation of *undertaking* is overly narrow without further explanation and excludes other relevant parts of the definition.

With a more inclusive understanding of *undertaking*, the Secretary had the authority to cancel the invalid Lease. *Boesche* established that the Secretary possesses the authority to cancel an MLA lease that is invalid upon issuance.[124] Qualifying the Lease as an undertaking means the 1982 Lease issuance violated the NHPA, making the Lease invalidly issued. Accordingly, the Secretary does possess the authority to cancel the Lease.

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113. *Id*.
114. *Id*.
115. *Id*.
116. *Id*. (citing 36 C.F.R. § 800.16(y)).
117. *Id*. at 1153.
118. *Id*. at *25.
119. Solenex, LLC v. Haaland, No. 13-993, 2022 U.S. Dist. LEXIS 163518, *26 (D.D.C. Sept. 9, 2022).
120. *Id*.
121. *Id*.
122. *Id*.
123. Mont. Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127, 1152 (D. Mont. 2004).
124. Boesche v. Udall, 373 U.S. 472, 476 (1963).

2. Defendants Most Likely Did Not Satisfy Tribal Consultation Requirement Under the NHPA

Assuming the Lease was an undertaking, the court's holding that BLM met all the necessary NHPA requirements to issue a valid lease is most likely flawed and merited more deliberation.[125] First, the NHPA regulations in force at the time required BLM to consult the Tribe prior to issuing the Lease.[126] Second, BLM most likely did not properly consult with the Tribe.[127]

Originally, in 1966, the NHPA did not require tribal consultation.[128] In 1980, Congress amended the NHPA to include tribal consultation in Section 106.[129] However, it was not until the 1992 amendment that tribal consultation was explicitly required.[130] Regardless, even under the weaker 1980's standard, BLM was still required to adequately consult the Tribe.

One part of the 1982 regulation reads, "agencies '*should seek assistance* from the public including…federally recognized Indian tribes in…determining effect, and developing alternatives to avoid or mitigate an adverse effect.'"[131] The term *should* is not binding.[132] It is reasonable to interpret this portion of the regulation as only suggesting tribal consultation. However, the 1980's consultation standard is strengthened when read in conjunction with other NHPA regulations also in force at the time. The relevant portion of another NHPA regulation reads:

> [A]gencies *'shall consult'* with the SHPO and '*other individuals or organization with historical and cultural expertise*…to determine what historic and cultural properties are known to be within the area of the undertaking's potential environmental impact.'[133]

This regulation necessarily includes the Tribe as "other individuals or organization with historical and cultural expertise."[134] The Badger-Two Medicine is an area of "immense cultural and spiritual importance"

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125. Solenex, LLC v. Haaland, No. 13-993, 2022 U.S. Dist. LEXIS 163518, *27 (D.D.C. Sept. 9, 2022).

126. *Id*. at *28.

127. *Id.*

128. *Id*. at *8.

129. *Id*.

130. *Id*.

131. Defendants' Cross-Motion for Summary Judgement at 37, Solenex, LLC v. Haaland, No. 12-993, 2022 U.S. Dist. LEXIS 163518 (D.D.C. Sept. 9, 2022), EFC No. 164 (quoting 36 C.F.R. § 800.15 (1979)) (emphasis added).

132. Lambert v. Austin Ind., 544 F.3d 1192, 1196 (11th Cir. 2008).

133. Defendants' Cross-Motion for Summary Judgement at 37, Solenex, LLC v. Haaland, No. 12-993, 2022 U.S. Dist. LEXIS 163518 (D.D.C. Sept. 9, 2022), EFC No. 164 (quoting 36 C.F.R. § 800.15 (1979)) (emphasis added).

134. *Id*.

to the Tribe, so it follows that the Tribe is an organization with historical and cultural expertise on the area.[135] The language *shall consult* goes beyond merely suggesting BLM should have consulted with the Tribe—it required them to do so.

Here, the court found the 1980's version of the NHPA did not require tribal consultation because the regulation "states a broad policy" as opposed to obligating tribal consultation to achieve compliance.[136] To support its ruling, the court cites case law ruling against applying the broad purpose of provisions at the expense of specific provisions.[137] Although the court raises an important point, it is also necessary to consider a provision in context.[138] As shown above, a more thorough, comprehensive reading of that the 1980s regulations required tribal consultation. Accordingly, the NHPA required BLM to adequately consult the Tribe prior to issuing the Lease.

Assuming the NHPA required BLM to consult with the Tribe, it is likely that BLM failed to meet this requirement. The 1982 version of the NHPA did not explicitly define consultation.[139] A later portion of the regulation mandated a level of consultation appropriate to determine what historic and cultural properties were known within the area of the undertaking's potential environmental impact.[140] Only after due consideration of the information gathered during consultation would BLM be positioned to determine the necessary actions to "discharge the agency's affirmative responsibilities to locate and identify eligible properties…that may be affected by the undertaking."[141]

The court held BLM did not fail to consult because it communicated with the Tribe, and "the Blackfeet decided not to cooperate," thus BLM met its consultation requirements.[142] However, BLM actions do not appear to support this holding. After approaching the Tribe, BLM disregarded the Tribe's response because it did not align with their goals.[143] The 1981 EA notes that BLM consulted with the Tribe when it requested the Tribe identify areas of cultural and historic significance.[144] However, because the Tribe requested to identify such areas on a case-by-case basis instead of a single time prior to the Lease being issued, BLM effectively disregarded the Tribe's input.[145]

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135. Blackfeet Tribe's Amicus Br. at 2, Solenex, LLC v. Haaland, No. 12-993, 2022 U.S. Dist. LEXIS 163518 (D.D.C. Sept. 9, 2022), EFC No. 168.

136. Solenex, LLC v. Haaland, No. 13-993, 2022 U.S. Dist. LEXIS 163518, *27 (D.D.C. Sept. 9, 2022).

137. *Id.* at *27 (citing Cont'l Air Lines, Inc v. Dep't of Transp., 843 F.2d 1444 (D.C. Cir. 1988)).

138. King v. Burwell, 576 U.S. 473, 486 (2015).

139. 36 C.F.R. § 800.2 (1979).

140. 36 C.F.R. § 800.4(a)(1) (1979).

141. 36 C.F.R. § 800.4(2) (1979).

142. *Solenex*, 2022 U.S. Dist. LEXIS 163518 at *28.

143. *Id.*

144. *Id.*

145. *Id.*

The court spends very little time discussing the communications between BLM and the Tribe recorded in the 1981 EA before holding BLM met consultation requirements. This lack of discussion indicates the court's holding is poorly reasoned, as the topic is ambiguous and cannot be considered settled without more discussion. Rejecting the Tribe's request to identify historic and cultural locations on a case-by-case basis indicates BLM most likely did not achieve the appropriate level of consultation necessary to determine the existence or location of such sites known by the Tribe. Without further discussion, it is unclear how BLM's half-hearted communication could be considered appropriate consultation that met the 1982 standard. It appears more likely that BLM failed to comply with the NHPA consultation requirements, and that the court's holding is flawed.

B. The Secretary's Rescission of Solenex's APD was not Arbitrary and Capricious

The court's ruling that the Secretary improperly interpreted *adverse effect* is also flawed. The Secretary based her decision to cancel the Lease on a balanced reading of *adverse effect* that included the impacts the Lease would have on the feelings and associations of the land. Both the Secretary and the court interpreted the term based on 36 C.F.R. § 800.5(a), which provides criteria for an agency assessing whether a proposed activity will result in an adverse effect.[146] § 800.5(a)(1) provides that an adverse effect occurs "when an undertaking may alter…any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association".[147] § 800.5(a)(2) provides an inexhaustive list of examples that are known to have an adverse effect.[148]

Unlike the Secretary, who grounds her decision in the first portion of the regulation, the court relied almost exclusively on the examples provided in the second portion of the regulation.[149] Because six of the seven examples relate to physical changes to the environment, the court rules "that the regulations contemplate only those [physical] harms."[150] It reached this conclusion because, if nonphysical harms were considered adverse effects, they would be listed on the long list of "prototypical examples of 'adverse effect.'"[151]

When it ruled adverse effects must be physical, the court improperly ignored § 800.5(a)(2) and the broader § 800.5(a)(1) criteria the Secretary properly relied on.

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146. 36 C.F.R. § 800.5(a) (2022).
147. *Id.*
148. 36 C.F.R. §§ 800.5(a)(2)(i)-(vii).
149. *Solenex*, 2022 U.S. Dist. LEXIS 163518 at *42–43.
150. *Id.* at *43.
151. *Id.*

First, before listing the examples of adverse effects, the regulation explicitly states that the list is not limited to the enumerated examples.[152] The court's holding that adverse effects can only be physical because most of the § 800.5(a)(2) examples are physical effects is weakened considering the court entirely disregarded the inexhaustive nature of the list and that a nonphysical example is included on that inexhaustive list.[153]

Second, the court's complete disregard of the regulation's broader adverse effect criteria found in C.F.R. § 800.5(a)(1) is more problematic. The Secretary based her determination that the Lease will result in adverse effects upon the fact that it would "diminish the integrity of the property's location…feeling, or association."[154] The court dismissed the Secretary's determination on the grounds that feeling and association are "categorically distinct from the types of factors contemplated by the regulations."[155] Despite feeling and association being regulation acknowledged criteria to determine whether a proposed activity will have an adverse effect, the court held such "subjective factors" should not be considered because they are outside of the narrow scope the court itself attached to the regulation.[156]

The language found in the 36 C.F.R. § 800.5(a)(1) criteria for determining adverse effects mirrors the language found in National Register Bulletin 15 ("Bulletin 15"), which addresses aspects of integrity.[157] Integrity is important in determining a property's eligibility for the National Register of Historic Places because it speaks to a property's "ability to convey its significance."[158] Bulletin 15 is clear that, although integrity is sometimes based in subjective judgment, it must be grounded in a property's physical features and how those physical features relate to the property's significance.

The court improperly conflated Bulletin 15 and § 800.5(a)(1) when it held that the Secretary cannot base her recission of the APD solely on the subjective aspects of feeling and association.[159] The court concluded that feeling and association alone cannot be sufficient to support a property's eligibility for the National Register.[160] The court correctly reached this conclusion regarding eligibility for the National Register based on a line in Bulletin 15 disallowing a property to qualify for the

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152. 36 C.F.R. § 800.5(a)(2).

153. 36 C.F.R. § 800.5(a)(2)(vii).

154. *Solenex*, 2022 U.S. Dist. LEXIS 163518 at *44 (quoting 36 C.F.R. § 800.5(a)(1)).

155. *Id*.

156. *Id*.

157. *National Register Bulletin: How to Apply the National Register Criteria for Evolution*, DOI 44 (1995), https://perma.cc/8V3G-KA5R [hereinafter "Bulletin 15"].

158. *Id*.

159. *Solenex*, 2022 U.S. Dist. LEXIS 163518 at *45.

160. Bulletin 15, *supra* note 157, at 45.

National Register based solely on subjective aspects of integrity.[161] However, the court used flawed logic when it grounded its holding regarding the recission of the APD in Bulletin 15 language.

The court tried to hold the Secretary to standards that do not apply to the situation. The Secretary was not trying to list the Badger-Two Medicine on the National Register, she was trying to rescind an APD. It was illogical to say failing to meet the Bulletin 15 standards resulted in an automatic failure to meet the § 800.5(a) adverse effect criteria. Because, although the § 800.5(a) adverse effect criteria mirror the Bulletin 15 aspects of integrity, the criteria serve a different purpose.

§ 800.5(a)(1) shows that an "adverse effect is found when an undertaking may alter…any characteristic of a historic property that *qualify the property for inclusion in the National Register* in a manner that would diminish the integrity of the [property]."[162] Feeling and association are characteristics of a historic property that would factor into the Badger-Two Medicine's qualification for the National Register.[163] While feeling and association alone could not qualify the Badger-Two Medicine for the National Register, for the purpose of the § 800.5(a)(1) adverse effect criteria, the regulation is silent about whether an undertaking must alter any certain number or type of the integrity aspects before it is considered to adversely affect the area.[164] For this reason, the Secretary's reading of adverse effect did not consider improper factors, thus her recission of the APD was neither arbitrary nor capricious.

C. Improving the NHPA's Ability to Protect Tribal Cultural Sites

For the reasons stated above, the *Solenex* court's decision is flawed. Although the decision is not binding outside the D.C. District Court, the court's holding leaves the Lease in place and nevertheless impact how federal agencies make decisions moving forward. Most immediately, this result means that portions of culturally important, sacred land to the Blackfeet Tribe are positioned to be jeopardized by extractive operations. This result also shines light on the difficulty tribes might have trying to use the NHPA to protect culturally significant land. The remainder of this case note will focus on key problems with the NHPA and potential improvements.

The NHPA's struggle to protect tribal cultural sites already faced criticism prior to the *Solenex* decision.[165] One glaring issue is that the

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161. *Id.*

162. 36 C.F.R. § 800.5(a)(1) (2022) (emphasis added).

163. Bulletin 15, *supra* note 157, at 45.

164. 36 C.F.R. § 800.5(a)(1).

165. Matthew J. Rowe et al., *Accountability or Merely "Good Words"? An Analysis of Tribal Consultation under the National Environmental Policy Act and the National Historic Preservation Act*, 8 ARIZ. J. ENV'T L. & POL'Y 1 (2018); Amanda M. Marincic, Note, *The National Historic Preservation Act: An Inadequate Attempt to Protect the Cultural and Religious Sites of Native Nations*, 103 IOWA L. REV. 1777 (2016).

NHPA tribal consultation process has always failed to meet its statutory purpose due to a lack of transparency.[166] Because agency decision-making is often non-transparent, an agency may get away with failing to truly incorporate tribal input.[167] Further, the NHPA does not concretely disallowing undertakings in areas where a tribal historic site will be adversely affected.[168] Explicitly disallowing an undertaking to progress unless the adverse effect is resolved or the project is moved would better fulfill the purpose of the NHPA.[169]

Solenex exposes another considerable flaw in the NHPA. Currently there is no mechanism to retroactively address an undertaking that was valid at the time but now fails to meet Section 106 consultation standards. In *Solenex*, the most apparent example of this problem occurred when Section 106's tribal consultation requirement was put in place after the Lease was issued. Even if BLM was not required to consult the Blackfeet Tribe before issuing the Lease in 1982, today, BLM would have consultation obligations.[170] Because the Tribe was not adequately consulted in the 1980s, the current stricter consultation regulations mean little to nothing for the Tribe. Unfortunately, the Tribe has no redress because the regulations do not provide a retroactive consultation requirement.

One way to improve this gap would be to create such a mechanism. This could be implemented through a review process of past undertakings in areas culturally significant to tribes that have only recently been identified and acknowledged by the Federal Government. A review process would allow portions of the current, improved Section 106 consultation standards to be applied where they were not originally. Further, establishing a review process would open a dialog between existing parties and those parties who were not invited to the table but should have been.

Implementing this review process would be most effective as an amendment to the NHPA. Admittedly, given the partisanship in Congress, the likelihood of such an amendment passing is low. Reopening discussion about undertakings originally considered completed would be wildly unpopular and, in some cases, it might not be feasible to address an undertaking many years after the fact. However, despite the probable unpopularity and the fact that retroactivity is usually frowned upon, the immense importance of protecting areas of tribal cultural significance should tilt the scales in favor of amending the NHPA.

VI. CONCLUSION

The *Solenex* court's holding that the Lease was properly issued, and that the Secretary lacked authority to cancel the Lease is flawed. Case law implies the court's interpretation of *undertaking* is too narrow, and

166. Rowe, *supra* note 165, at 41.
167. *Id.*
168. Marincic, *supra* note 165, at 1806.
169. *Id.*
170. 36 C.F.R. § 800.2(c)(2)(i) (2022).

that issuance of a lease should be included within the definition. Accordingly, BLM should have been required to follow Section 106 review requirements, which it would not have met because of a failure to adequately consult the Blackfeet Tribe. The court also improperly held the Secretary acted arbitrarily and capriciously when she considered subjective aspects of integrity. The applicable regulation criteria for assessing adverse effects under the NHPA do not include type or quantity requirements like Bulletin 15. Clearly there are significant challenges to using the NHPA framework to protect areas of tribal cultural significance. These challenges, and the impracticability of mitigating them through statutory and regulator channels, indicates that that the NHPA is simply not the best way for tribes to retroactively protect areas of cultural significance that have been harmed by extractive leases.