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Reclaiming Sacred Homelands: Asserting Treaty Rights and the Path Towards Restoration of the Badger-Two Medicine

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RECLAIMING SACRED HOMELANDS: ASSERTING TREATY RIGHTS AND THE PATH TOWARDS RESTORATION OF THE BADGER-TWO MEDICINE

*Sarah Greenberg*¹

I.	INTRODUCTION.....	1
II.	SETTING THE STAGE.....	2
	A. <i>The Importance of Place</i>	2
	B. <i>Indigenous Ownership and Governance of Natural Resources</i>	3
	C. <i>U.S. Forest Service and Multiple Use Management</i>	4
III.	THE BLACKFEET NATION AND BADGER-TWO MEDICINE AREA.....	6
	A. <i>Blackfeet History, Treaties, and Agreements</i>	6
	1. Treaty of 1855 -The Lame Bull Treaty.....	7
	2. Sweetgrass Hills Treaty of 1887.....	7
	3. The 1896 Agreement with the Blackfeet Indians	8
	B. <i>Badger-Two Medicine Area</i>	10
	C. <i>Present Day Conflicts and Threats</i>	11
IV.	SUCCESSFUL INDIGENOUS LAND RESTORATIONS.....	14
	A. <i>Blue Lake and the Taos Indians – The Long Road</i>	16
	1. The History and Land.....	17
	2. Fight for Land Title Recognition.....	18
	3. Legislative Path Resulting in H.R. 471	19
	B. <i>The National Bison Range and the CSKT – Cultural Preservation</i>	20
	1. History of the Confederate Salish & Kootenai Tribes and the National Bison Range	21
	2. The Hellgate Treaty of 1855.....	22
	3. Creation of the National Bison Range.....	24
	4. Path to Restoration of the Bison Range.....	25
V.	LAND BACK FRAMEWORK & RETURNING TO BADGER-TWO MEDICINE.....	27
	A. <i>Recognized Compensable Interest in the Land</i>	28
	B. <i>Broken Treaty Promises/Taking of Land</i>	29
	C. <i>Cultural or Traditional Tie to the Land</i>	29
	D. <i>Financial Compensation Does Not Necessarily Lessen the Claim to Return</i>	30
	E. <i>Continued and Persistent Fight for the Return of the Land</i>	31
	F. <i>The Importance of Public Relations</i>	31
	G. <i>Support for the Legislative and Executive Branches</i>	32
VI.	CONCLUSION	33

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“In order for law to have an influence in the lives of ordinary people, it must have something to do with the emotional feelings of justice, it must speak to our basic humanity, and it must give us common sense directions as to what behavior and beliefs are right and wrong.”²

I. INTRODUCTION

Within federal lands, especially in the West, many American Indian tribes have cultural and traditional resources and reserved treaty rights that are put at risk by the development and planning decisions made by federal agencies.³ For example, a forty-year battle to protect a culturally significant historical place for the Blackfeet Nation reached a challenging point for tribes and conservationists in September 2022. In *Solenex, LLC v. Haaland*, a D.C. District Court judge restored a drilling lease within the sacred Badger-Two Medicine Area.⁴ District Court Judge Leon stated in his memorandum opinion that the “never-ending services of administrative reviews” that had prevented any activity by the leaseholders was “Kafkaesque.”⁵

The most recent development occurred on September 1, 2023, when Louisiana-based Solenex agreed in a landmark settlement to relinquish its lease for oil and gas drilling within the Badger-Two Medicine.⁶ Such victories are pivotal, yet they also highlight the ongoing challenges faced by tribal nations. Often, tribes have little choice but to find alternative routes to protect their sacred places, either through meaningful co-management, or the return of traditional lands to indigenous control and ownership.

This concept of rightfully returning land to indigenous control and ownership is at the core of a growing movement known simply as “land back.” The “land back” movement was recently popularized by Ojibwe author and professor, David Treuer, who asserts that national park land should be returned to the indigenous peoples who had been originally removed or dislocated.⁷ The land-back movement, often using the term #Landback on social media, spread across North America, fueled by the accessibility and symbolism of the movement, and led to protests in the Black Hills of South Dakota and Winnipeg, Manitoba, as well as additional campaigns across both nations.⁸ Treuer did not spell out specific steps for making land back claims; however, he suggested that an effective, tangible process should be developed in order to determine whether land can validly be restored.⁹ In two instances land has been restored from federal public lands to

² Vine Deloria Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 204 (1989).

³ Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Land*, 48 NAT. RESOURCES J. 585 (2008).

⁴ *Solenex, LLC v. Haaland*, 626 F.Supp.3d 110 (D.D.C. Sept. 9, 2022).

⁵ *Id.* at 114.

⁶ Native American Rights Fund, *Sacred Badger-Two Medicine Area Protected* (Sept. 1, 2023), <https://narf.org/badger-two-medicine/>

⁷ Kekek Jason Stark et al., *Re-Indigenizing Yellowstone*, 22 WYO. L. REV. 397, 474-475 (2022).

⁸ See Albert Bender, *The LandBack Movement is Decolonizing Indigenous Land Across the Americas*, PEOPLE’S WORLD (Jan. 21, 2022, 10:44 AM), <https://peoplesworld.org/article/the-landback-movement-is-decolonizing-indigenous-land-across-the-americas/>

⁹ Stark et al., *supra* note 7, at 475.

tribes, and each provides an interesting picture of what the process can look like: The Blue Lake area, which was in a National Forest, was restored to the Taos Indians and the National Bison Range, part of a Wildlife Refuge, was returned to the Confederated Salish and Kootenai Tribes (CSKT).¹⁰

This note explores how tribal nations may regain control over culturally and historically significant lands currently under federal control through the assertion of treaty rights. In addition, it will identify methods used by tribes and tribal organizations to recover indigenous lands, landmarks, and culturally significant places. First, it sets the stage by providing a necessary foundation on the importance of place to indigenous peoples and federal land laws that currently control the areas in question, particularly that of the United States Forest Service (USFS). Next, it will introduce the Blackfeet history, and the Badger-Two Medicine Area (Badger-Two Medicine), including treaties and agreements, court cases, and relevant federal action and inaction in Badger-Two Medicine. Then, it will compare the Blue Lake restoration to the Taos Indians with the Bison Range restoration to the CSKT. Finally, this note will return to the Badger-Two Medicine and apply methods used by the Taos Pueblo and CSKT that may provide a path towards the restoration of the Badger-Two Medicine Area.

II. SETTING THE STAGE

A. *The Importance of Place*

Indigenous communities have lived, worked, prayed, and died on their lands since time immemorial, and “place” has a significant meaning for those communities. For Native Americans, the responsibility for the sacred landscapes arises from their intimate connection to that land, which, in turn, forms the bedrock of their religion, ceremonies, and traditions.¹¹ Vine Deloria Jr. aptly termed this profound connection as the “sacred center,” elaborating that specific places connected to religious ceremonies become “permanent fixtures in their cultural or religious understanding.”¹² For the Blackfeet people, this sacred center lies in the Rocky Mountain Front in Montana, known as the Miistakis – or “Backbone of the World”, this revered land is part of what is recognized as the “ceded strip” from the Agreement with the Blackfeet Indians of 1896.¹³

However, the sanctity and importance of these places face challenges. While legislative land-use protections and co-management practices have been instrumental in safeguarding some sacred indigenous territories,¹⁴ they offer limited authority. For sovereign tribes, these mechanisms often fall short in ensuring that their most revered sites remain untouched and respected, preserving not just land, but the very essence of their cultural and spiritual identities.

¹⁰ *Id.* at 467-477 (describing the process as beginning with Congress and requiring the tribes in each instance to demonstrate the “compelling historical and continuing connections” to the places in question).

¹¹ See VINE DELORIA JR., *GOD IS RED* 65-66 (3d ed., rev. ed., 2003).

¹² *Id.* at 66.

¹³ See John L. Weaver, *Vital Lands, Sacred Lands: Innovative Conservation of Wildlife and Cultural Values, Badger-Two Medicine Area, Montana* 11-17 (Wildlife Conservations Society Working Paper No. 44, 2015), <https://library.wcs.org/en-us/doi/ctl/view/mid/33065/pubid/DMX2867800000.aspx>.

¹⁴ See Nie, *supra* note 3, at 597-598.

As colonial Americans spread across the continent, they relied on the treaty making process to establish peaceful relations with tribal sovereignties and extinguish tribal ownership of lands in pursuit of westward expansion.¹⁵ Tribes, on the other hand, entered into treaties for varied reasons, including reserving hunting, fishing, and gathering rights as well as safeguarding their ability to continue culturally significant practices and ceremonies.¹⁶ For many tribal nations, treaties symbolized a commitment to establishing relationship through principles of “respect, responsibility and renewal.”¹⁷ These treaties offer potentially significant protections for indigenous lands and their cultural practices. Recognized by the Supreme Court, particularly concerning hunting and fishing rights,¹⁸ treaties act as instruments to enforce and uphold those cultural and resource rights.

B. *Indigenous Ownership and Governance of Natural Resources*

The treaties forged between tribal nations and the United States not only involved complex negotiations over land, but also shaped the governance and ownership of vital natural resources. Such intricacies in ownership have made stakeholders pivotal in navigating these multifaceted arrangements. Central to this issue has been the labyrinth of federal policy, which, through inconsistent interpretations and shifting priorities, has often led to a tangled web of jurisdictional disputes. It was this maze of federal oversight and policy that contributed to the initial appropriation of the Badger-Two Medicine.

Complicating this matter further are concerns over the federal government’s trust responsibility to tribes, the reduction of indigenous lands into public land, and inconsistent, unreliable reasoning in Supreme Court decisions dealing with Native Americans.¹⁹ The Department of Interior defines laws and regulations that govern indigenous land as “grounded in a trust responsibility going back to the 1830s” through changing policies that formed various Congressional acts.²⁰ Many of these policies resulted in the continued reduction of land ownership through the fractionalization in shares of land, and a checkerboard of jurisdiction.²¹

¹⁵ HILLARY HOFFMAN & MONTE MILLS, *A THIRD WAY: DECOLONIZING THE LAWS OF INDIGENOUS CULTURAL PROTECTION* 11-14 (2020).

¹⁶ *Id.* at 12.

¹⁷ Heidi Kiiwetinepinesiik Stark, *Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada*, 34 AM. INDIAN CULTURE & RESEARCH J., no. 2 at 145, 147 (2010).

¹⁸ See *United States v. Winans*, 198 U.S. 371 (1905) (upholding tribal rights to fishing through treaty reserved rights that protected tribal members’ connection to lands and use of natural resources); *Herrera v. Wyoming*, 139 S.Ct. 1686 (2019).

¹⁹ Deloria, *supra* note 2, at 205-206.

²⁰ U.S. Dep’t of Interior, *Native American Ownership and Governance of Natural Resources*, NATURAL RESOURCES REVENUE DATA, <https://revenuedata.doi.gov/how-revenue-works/native-american-ownership-governance/> (last visited Jan. 21, 2023) [hereinafter *Native American Ownership*].

²¹ *Id.*

For example, the General Allotment Act of 1887,²² commonly called the Dawes Act, further reduced Indian land ownership from roughly 138 million acres in 1887 to just 48 million by the end of allotment in 1934.²³

While the relationship between the Blackfeet and the United States government has been uniquely defined by specific treaties and agreements, it is essential to consider this relationship within the broader context of federal policies aimed at diminishing Indigenous landholdings. One glaring example is the Dawes Act.²⁴ This act set a precedent for converting tribal communal lands into individually owned plots, further fragmenting and reducing the collective land base.²⁵ While the Dawes Act's direct impact on the Blackfeet might differ from other tribes, its role in the broader narrative of Indigenous land dispossession cannot be ignored. Such federal policies, combined with treaty negotiations, have cumulatively shaped the landscape of tribal land ownership today, with the vast majority of these lands still held in trust by the federal government.²⁶

Much of the land that was ceded, through treaty or agreement, or otherwise reduced, has been owned by the federal government and managed by federal agencies.²⁷ These lands became part of the Helena-Lewis & Clark National Forest in 1897²⁸ and Glacier National Park in 1910²⁹. The National Park Service (NPS) manages Glacier National Park, while the USFS and Bureau of Land Management (BLM) manage national forests.

C. U.S. Forest Service and Multiple Use Management

The organic acts of each federal agency determine how each agency will manage the land under their care, through more dominant use statutes like those of the NPS and the U.S. Fish and Wildlife Service (FWS) or multiple use mandates in the statutes of the USFS and BLM.³⁰ While the dominant use statutes direct agencies to manage land in an effort to preserve, conserve, and

²² An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations (General Allotment Act), 24 Stat. 388, 25 U.S.C §§ 334, 348, et al., (1887) (The Act divided reservations into individual parcels, ranging from 40 acres for a child to 160 acres for each head of household. After the land on the reservation was divided out, any remaining land was considered “surplus” and gave the Secretary of the Interior authority to “purchase” the tribe’s surplus land. The Act provided that each allotment would be held in “trust” for each allottee for twenty-five years. After that a fee patent was issued to the allottees, but it would stay in trust, exempt from “conveyance or contract”).

²³ *Native American Ownership*, *supra* note 20.

²⁴ General Allotment Act, *supra* note 22.

²⁵ See Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1557, 1564-1565 (2001).

²⁶ See generally Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 Gonz. L. Rev. 3, 613-618 (2010).

²⁷ HOFFMAN & MILLS, *supra* note 15, at 59.

²⁸ U.S. DEP’T OF AGRIC., ESTABLISHMENT AND MODIFICATION OF NATIONAL FOREST BOUNDARIES AND NATIONAL GRASSLANDS: A CHRONOLOGICAL RECORD, 1891-2012, FS-612, 2 (2012) (describing the effect as establishing a reserve protecting the rights of the Blackfeet Indians).

²⁹ NAT’L PARK SERV., FOUNDATION DOCUMENT: GLACIER NATIONAL PARK, MONTANA, U.S. Dep’t of the Int. 3 (Oct. 2016), https://www.nps.gov/glac/learn/management/upload/GLAC_FD_SP.pdf.

³⁰ See Robert L. Glickman, *Wilderness Management by the Multiple Use Agencies: What Makes the Forest Service and the Bureau of Land Management Different?*, 44 ENVTL. L. 447, 448 (2014); See also Multiple-Use Sustained-Yield Act, 16.U.S.C. §§ 528-531.

provide recreation, the multiple use mandate places an emphasis on balancing those uses with grazing, timber, and watershed uses described in the Multiple-Use Sustained-Yield Act.³¹ Over the decades, Congress continued to pass laws encouraging agency discretion while they also attempted to provide additional guidance in managing specific areas for proscribed uses, overseeing resources and stating the conditions.³² With so many interests needing to be balanced, the tension can cause disagreement about how the land should be used.³³ This can be particularly evident in culturally significant lands where tribal consultation plays a critical role in the determination.³⁴

The complex interplay of agency mandates and tribal interests is nowhere more evident than in the Badger-Two Medicine. As “one of the last cultural and religious bastions where the Blackfeet find spiritual enlightenment as well as much needed food and medicine,”³⁵ the federal government bears a trust responsibility to consult the tribe in its decisions. Yet, despite forty years of litigation and a designation as a “Traditional Cultural District,”³⁶ the BLM decided to issue oil and leases in the Badger-Two Medicine underscores the ongoing tension between multiple use management and cultural preservation.³⁷ When federal agencies are perceived as neglecting their stewardship, the call for tribal ownership and governance, as seen in the case of the Badger-Two Medicine, grows more resonant as a potential means of safeguarding culturally invaluable lands. According to John Murray, leader of the Pikuni Traditionalist Association and Blackfeet Tribal Historic Preservation Officer, the federal district court decision in September 2022 was “...[j]ust more of the same from people who refuse to consult with the Blackfeet Nation about the industrialization of our last cultural refuge.”³⁸

³¹ *See id.*

³² *See* Ross W. Gorte, *Multiple Use in the National Forests: Rise and Fall or Evolution?*, 97 J. FORESTRY 19-23, 20 (1999). These included the Wilderness Act in 1964, the Historic Preservation Act in 1966, the National Trails and Wild and Scenic Rivers Acts in 1968, the National Environmental Policy Act in 1969, the Clean Water Act Amendments in 1972, the Endangered Species Act in 1973, and the National Forest Management Act in 1976.

³³ *See id.*

³⁴ *See generally* The Blackfeet Tribe’s Final Amicus Curiae Brief in Support of Appellants and Reversal of the Dist. Ct. at 12, *Solenex, LLC v. Bernhardt*, 962 F.3d 520 (D.D.C. 2020) (Nos. 18-5343 and 18-5345) [hereafter Blackfeet Tribe’s Final Am. Br.].

³⁵ *Id.* at 2.

³⁶ *See* Elizaveta Barrett Ristroph, *An Opportunity for Alaska Tribes to Protect Subsistence Rights and Traditional Lands*, 31 ALASKA L. REV. 212, 212-213 (2014). For a property to become a “Traditional Cultural District” (TCD) and be listed on the National Register, the land must meet criteria established by the National Park Service under the National Historic Preservation Act of 1966 (NHPA). A property listed on the National Register indicates that it should be “considered for protection from destruction or impairment.” 36 CFR § 60.2. The NHPA defines district as “a geographically definable area...[p]ossessing a significant concentration, linkage, or continuity...[u]nited by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history.” 36 C.F.R. § 60.3(d). While a TCD designation does not prohibit all development in an area, it does require federal agencies to engage in communication with related tribes and develop alternative mitigation measures.

³⁷*See generally* Blackfeet Tribe’s Final Am. Br., *supra* note 34.

³⁸ *Blackfeet Traditionalists, Sportsmen, and Conservationists Vow Continued Fight to Protect the Sacred Badger-Two Medicine*, EARTHJUSTICE (Sept. 9, 2022), <https://earthjustice.org/news/press/2022/blackfeet-traditionalists-sportsmen-and-conservationists-vow-continued-fight-to-protect-the-sacred-badger-two> [hereinafter *Blackfeet Traditionalists*].

III. THE BLACKFEET NATION AND BADGER-TWO MEDICINE AREA

The Blackfeet Reservation, situated in the backdrop of American westward expansion and evolving tribal-United States relations, was established through a series of pivotal treaties and agreements. Central to this establishment was the Lane Bull Treaty of 1855, two unratified treaties (in 1865 and 1868), and the defining 1896 Agreement. These agreements marked the cession of land from the Blackfeet Nation to United States in exchange for rations, protection, education, and other services.³⁹ In addition, they played a foundational role in shaping the tribe's modern legal and territorial landscape. Recognizing the intricacies of these historical agreements and the rights they preserved is essential as they provide significant pieces of the puzzle required for understanding legitimate paths forward.

A. *Blackfeet History, Treaties, and Agreements*

According to Blackfeet traditional stories, “Napi,” or “Old Man,” created the Rocky Mountain Range, the Sweetgrass Hills, and all of Montana and Canada. The Nitsitapii, or Blackfeet, have inhabited the area from the Saskatchewan River in the north, to the source of the Missouri River, according to archaeological and linguistic evidence.⁴⁰ The North Piegan, South Piegan, Blood, and Siksika bands made up the Blackfeet Confederation, with members of present-day American Blackfeet Nation descending primarily from the South Piegan band.⁴¹ The Blackfeet and other tribes seasonally followed the buffalo on the open plains of the upper Missouri, Musselshell, and Yellowstone Rivers.⁴² Historical evidence of tribal convergences, competition, and trade in what would be recognized as the common hunting ground in the 1855 treaty signed at the mouth of the Judith River was recorded by the Lewis and Clark expedition, journals of trappers, religious missionaries, and other colonial settlers.⁴³

The confluence of intra-tribal relations due to the significance of the buffalo created a “bison diplomacy” requiring tribes to negotiate with each other to avoid constant warfare and provide for their people.⁴⁴ The federal government's agenda by this point was to “reduce white conflicts with Indians, to prevent, if possible, expensive military actions, and above all to extinguish Indian land title by purchase, thereby enabling ‘legitimate’ white settlement.”⁴⁵ In 1851, the U.S. superintendent of Indian affairs, D.D. Mitchell, joined Indian agents and commissioners in Fort Laramie to negotiate rights of way through various tribal lands and provide for peaceful

³⁹ See Tarissa Spoonhunter, *Blackfoot Confederacy Keepers of the Rocky Mountains* (UMI 3623571), 96-100, [Doctoral dissertation, University of Arizona]. Graduate Interdisciplinary Program: American Indian Studies (2014).

⁴⁰ David R. Craig et al., *Blackfeet Belong to the Mountains: Hope, Loss, and Blackfeet Claims to Glacier National Park, Montana*, 10 CONSERVATION & SOC'Y 234 (2012).

⁴¹ Blackfeet Nation, *Our Culture*, BLACKFEET NATION, <https://blackfeetnation.com/our-culture/> (last visited Oct. 30, 2022)

⁴² William E. Farr, “*When We Were First Paid*” the Blackfoot Treaty, the Western Tribes, and the Creation of the Common Hunting Ground, 1855, 2226 GREAT PLAINS Q. 130, 133-34 (Spring 2001).

⁴³ *Id.* at 134-135.

⁴⁴ *Id.* at 135.

⁴⁵ *Id.* at 131.

passage of westward settlers through the territory.⁴⁶ While the Blackfeet were not present, tens of thousands of tribal people made up the largest gathering of Plains Indians to convene a treaty council, and the result was a recognition of Blackfeet land and boundaries.⁴⁷ The recognition of territory in subsequent treaties and agreements defined the boundaries and rights reserved for the Blackfeet Nation.

1. Treaty of 1855 -The Lame Bull Treaty

Governor Stevens arrived at the confluence of the Judith and Missouri Rivers in mid-October 1855 to make a treaty with the Blackfeet, but it was vastly different than the previous treaties made under the reservation policy earlier that year.⁴⁸ Rather than extinguishing aboriginal title to the land or providing for removal of the Blackfeet to reservations, the treaty was designed to establish peace between the tribes that were party to the treaty, with each other and with the United States,⁴⁹ while also designating an area of land described in the 1851 Treaty of the Laramie as a communal hunting ground with the consent and agreement of the Blackfeet nation “for a period of ninety-nine years.”⁵⁰ For the United States, this meant a guarantee of peace as settlers traveled through the area and security of safe passage for the railroad.⁵¹ In exchange, the federal government guaranteed the signees \$35,000 each year, for ten years, and the reservation of hunting, fishing, gathering, grazing, curing meats, and dressing robes in the hunting grounds.⁵² The lease and reservation establish a basis for subsequent injury and claims for redress by the Tribe.

2. Sweetgrass Hills Treaty of 1887

While the Treaty of 1855 had not established any boundaries as to a designated reservation, it was recognized as establishing the boundaries of Blackfeet territory.⁵³ The discovery of gold in 1862 within the mountains of the Montana Territory brought speculators, merchants, and settlers in numbers that quickly changed life and the landscape for the Blackfeet.⁵⁴ Corruption and greed by the Indian agent in charge of distributing the Blackfeet Reservation’s treaty rations from the federal government played a critical role in the Tribe’s lack of adequate supplies.⁵⁵ A presidential

⁴⁶Laura Matson, *Treaties & Territory: Resource Struggles and the Legal Foundations of the U.S./American Indian Relationship*, 5 OPEN RIVERS: RETHINKING THE MISSISSIPPI 61, 63 (2017), https://openrivers.lib.umn.edu/wp-content/uploads/2017/02/openrivers_issue_5_winter2017.pdf.

⁴⁷ *Id.*

⁴⁸ Farr, *supra* note 42, at 131.

⁴⁹ Treaty with the Blackfeet, 11 Stat. 657, art. I-II (October 17, 1855).

⁵⁰ *Id.* at art. III-IV (October 17, 1855).

⁵¹ Farr, *supra* note 42, at 137.

⁵² Treaty with the Blackfeet, *supra* note 49.

⁵³ Craig et al., *supra* note 40, at 235.

⁵⁴ See Cassie Sheets, *Sweet Grass Hills and Blackfeet Indians: Sacredness, Land and Institutional Discrimination* 14, U. Mont., Graduate Student Theses, Dissertations, & Professional Papers 13-15 (2013) (M.A. thesis, University of Montana) (ScholarWorks).

⁵⁵ See H.R. Exec Doc. No. 81, 42nd Cong., 2nd Sess. (1872).

executive order in 1873⁵⁶ and an Act passed by Congress in 1874⁵⁷ decreased the Blackfeet Reservation without their consent and placed the Gros Ventre and River Crow Tribes on their reservation.⁵⁸ The winter of 1878-1879 was bitterly cold and the Blackfeet were unable to find any buffalo. An editorial in the *For Benton Record* blamed government officials for the starvation, stating:

It is a sad reflection on the wisdom and foresight of the United States and Canadian Governments that no provision was ever made for the support of Indians after the advance of civilization had deprived them of the only means that made them self-sustaining. The present scarcity of game is not the result of accident or unforeseen cause, and it's inevitable effect upon the Indians was not difficult to surmise, yet the policies pursued by the two Governments were not alone inadequate to provide for the present emergency, but were indeed calculated to leave the Indians without resource after this one means of sustaining life had been taken from them.⁵⁹

The last buffalo hunt in 1882 and the destruction of the herd by United States funded, non-Indian hunters led to extreme destitution and starvation during the winter of 1883.⁶⁰ By the winter of 1887 some Blackfeet, along with other tribes, felt they needed to turn to the federal government to survive and ceded the Sweetgrass Hills.⁶¹

3. The 1896 Agreement with the Blackfeet Indians

In late 1895, appointed commissioners, including Commissioner William Pollock, were sent to discuss the cession of the small strip of land that encompassed parts of what is today Glacier National Park and Badger-Two Medicine.⁶² The gathered Blackfeet and Belknap Indian committee initially seemed steadfast in their intent not to concede all the land sought by the federal representatives.⁶³ However, in a surprising turn of events just four days into the negotiations, the tribal committee agreed to cede the 800,000 acres originally asked for by the commissioners for \$1.5 million, “or a little less than \$2 per acre.”⁶⁴ This sudden shift remains an enigma, whether

⁵⁶ Executive Order of July 5, 1873, I Kappler, 2 Ed., 855-856. The reservation was proposed by Commissioner Edward Smith on July 2, 1873, and ordered by President Grant two days later.

⁵⁷ Act of April 15, 1874, ch. 96, 18 Stat. at L., 28 (1874). See also *Blackfoot Claim*, Montana State University Library, <https://www.lib.montana.edu/digital/objects/coll2204/2204-B03-F21.pdf> (last visited Feb. 12, 2023) The Reservation was diminished and restored over the next few years by additional Executive Orders by President U.S. Grant in 1874 and 1874, and by President Hayes in 1880.

⁵⁸ Sheets, *supra* note 54, at 15.

⁵⁹ HUGH A. DEMPSEY, *THE GREAT BLACKFOOT TREATIES* at 181-82 (2015) (quoting *Fort Benton Record*, June 20, 1879).

⁶⁰ See Helen B. West, *Starvation Winter of the Blackfeet*, MONTANA: THE MAGAZINE OF WESTERN HISTORY 9(1), 2-19, <http://www.jstor.org/stable/4516266>.

⁶¹ See *id.*

⁶² See Agreement with the Indians of Blackfeet Reservation in Montana, 54th Cong. § 9, 29 Stat. 353 (1st Sess. 1896) [hereinafter 1896 Agreement].

⁶³ *Id.*

⁶⁴ *Id.* at 5.

caused by the imminent threat of mass starvation⁶⁵ or some other pressure⁶⁶ affected their decision, and the Blackfeet continue to assert that they were misled by the federal agents present during the treaty negotiations.⁶⁷

During the negotiations, White Calf, speaking on behalf of the Blackfeet, told the commissioners that they would agree to the boundaries the federal government had initially proposed, and said, “I want the timber because in the future my children will need it. I also want all the grazing lands. I would like to have the right to hunt game and fish in the mountains.”⁶⁸ Addressing the assembly of thirty-five Blackfeet and Belknap representatives, Commissioner Pollock expressed the following:

...[t]he Indians should make some provisions for themselves when the present agreement expires... You have a large tract of land which you cannot use. The better plan is for the Government to buy this land, that you may be provided for when your treaty expires. You must do this or the Government will be obliged to support you, which thing, I believe, the Piegans do not wish.⁶⁹

Contrary to the commissioners’ report to the federal government, which suggested that the Blackfeet were happy with the past agreement and wanted the terms and conditions of this new agreement to mirror those, the reality was far from it.⁷⁰ The Blackfeet, under the terms of previous agreements, had been on the brink of starvation, had suffered from crop failure, and had not received adequate supplies from the government, placing them in a dire situation.⁷¹

Disparities in the drafted treaty vis-à-vis the negotiations are glaring. Perhaps the most conspicuous of these inconsistencies is the level of detail used in delineating the ceded territory within the treaty text as opposed to the more general descriptions used during the negotiation discussions.⁷² This discrepancy raises the question of whether both parties shared an understanding of the full extent of the ceded lands, or if one party had an unexpressed advantage. Another point of divergence was rooted in semantics but bore profound implications. Both parties, the Blackfeet and the commissioners, utilized the word “sell” in the course of negotiations.⁷³ However, underscoring this shared vocabulary was a vast gulf in connotation and interpretation.⁷⁴ For the

⁶⁵ See HOFFMAN & MILLS, *supra* note 15, at 58.

⁶⁶ *Id.* at 12. William C. Pollock had made an offer of \$1,000,000 for the lands north from the railway or \$1,250,000 for lands north of Birch Creek. Following that offer he remarks that they should keep in mind that they won’t get any help in keeping the white men in search of minerals off the land, should they refuse the deal.

⁶⁷ Nie, *supra* note 3, at 600.

⁶⁸ *Id.* at 19.

⁶⁹ 1896 Agreement, *supra* note 62, at 10. Pollock is referring to the payments the Blackfeet were receiving from ceding the land in the 1877 Sweetgrass Hills Agreement.

⁷⁰ *Id.* at 7.

⁷¹ Spoonhunter, *supra* note 39, at 99.

⁷² *Id.* at 8-15, art. I.

⁷³ 1896 Agreement, *supra* note 62, at 7,9-21.

⁷⁴ See Quinn Smith, Jr., *A Stolen History, Future Claims: The Blackfeet Nation and Glacier National Park*, THE WELLMAN MAGAZINE (Oct. 14, 2020), <https://sites.duke.edu/thewellianmag/2020/10/14/a-stolen-history-future->

federal representatives, the notion of selling land was intrinsically tied to Western property rights and ownership paradigms.⁷⁵ In contrast, the Blackfeet’s worldview perceived land not as an asset to be traded but as a living entity with which one maintains a symbiotic relationship.⁷⁶ Such divergent interpretations of a singular term could have, and likely did, lead to vastly different expectations and understandings of the treaty’s implications.⁷⁷

The result of the 1896 Agreement is significant. As long as the land remains “public lands” of the United States, the Blackfeet reserved their right to go on any portion of the land ceded, to cut and remove timber for the reservation’s use, and to hunt and fish on the lands in accordance with Montana’s hunting and fishing laws.⁷⁸ The treaty also determined that the reservation land is not good for agriculture, stating that the Blackfeet should, alternatively, raise cattle. As such, the treaty set aside the reservation as a communal grazing tract, where “no allotments of land in severalty shall be made to them.”⁷⁹

Most of the reserved rights that the Blackfeet established in the 1896 Agreement were taken away or litigated in the following years.⁸⁰ The Court of Claims determined that reserved rights in Glacier National Park were extinguished once the park was established, only fifteen years after the treaty had been signed.⁸¹ Additionally, the land was allotted according to the Act of March 1, 1907, without the consent or agreement of the Blackfeet, totaling approximately 880,000 acres.⁸² The remaining 175,000 “surplus” acres after allotment were sold for private ownership, with the income put in a trust account for the Tribe’s benefit.⁸³

B. Badger-Two Medicine Area

The Badger-Two Medicine Area, in the Lewis and Clark National Forest, is surrounded by the overwhelming beauty and majesty of Glacier National Park, the Bob Marshall Wilderness Complex, described as the “crown jewel” of Wilderness areas in the US,⁸⁴ and the Flathead Reservation.⁸⁵ The estimated 130,000 acres of the Badger-Two Medicine is world famous for its rugged, snowcapped mountains, alpine meadows, and is home to grizzly bears, wolverines, and

claims/ (Quoting Chief Crowfoot (1885), “We cannot sell the lives of men and animals; therefore, we cannot sell this land. It was put here for us by the Great Spirit and we cannot sell it because it does not belong to us.”).

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ 1896 Agreement, *supra* note 62, art. I.

⁷⁹ *Id.* at art. V.

⁸⁰ *See Id.*

⁸¹ *Blackfeet Nations v. United States*, 81 Ct. Cl. 101, 115 (1935).

⁸² *Disposition of Surplus Lands of Blackfeet Indian Reservation, Mont.*, Hearings Before a Subcommittee of the Committee on Indian Affairs of the House of Representatives on H.R. 14732 at 3 (1916).

⁸³ *Id.* at 6.

⁸⁴ *See The Bob Marshall Wilderness Complex*, BOB MARSHALL WILDERNESS FOUNDATION, <https://www.bmwf.org/the-bob> (last visited Oct. 19, 2022) (details the Bob Marshall Wilderness Complex and the Tribes that traditionally inhabited the area, including the Blackfeet Nation, the Blackfoot Confederacy, the Salish, the Kalispel, and the Kootenai tribes. It also describes the Bob Marshall as the third largest Wilderness in the lower 48).

⁸⁵ *See Blackfeet Traditionalists*, *supra* note 38.

elk, and native fish like the cutthroat trout.⁸⁶ The area is currently roadless and serves as an important wildlife corridor between the wilderness, reservation, and park.⁸⁷

Historically, the Blackfeet hold a deep spiritual and ancestral connection to the Badger-Two Medicine. Their origin stories intricately describe the interconnectedness of the universe, intertwining the supernatural with the natural, and merging the visible with the invisible realms.⁸⁸ This profound bond with the land, especially with the Badger-Two Medicine, has been echoed through generations.⁸⁹ In 2013, the Blackfeet identified 147 sites of cultural significance, as reflected in a registration form submitted to the National Register of Historic Places.⁹⁰ In 2002, the Badger-Two Medicine Blackfoot Traditional Cultural District was included in the National Register of Historic Places.⁹¹ This honor recognized the “culturally meaningful landscape containing peaks associated with particular effects and sacred beings connected with the creation of the world as well as plant and water sources critical for vision questing.”⁹² Regrettably, this designation has failed to protect the area from leasing permits and threats to the land from external non-Indigenous sources.

C. Present Day Conflicts and Threats

The Blackfeet Nation has continuously fought to protect the Badger-Two Medicine, a battle that intensified significantly over the past few decades, with both victories and losses in the courtroom and legislature.⁹³ In the 1980’s, the BLM and USFS issued oil and gas drilling leases in the Badger-Two Medicine to various companies despite protests from the Blackfeet Nation.⁹⁴ Under the Reagan Administration alone, the BLM and USFS granted fifty-one oil and gas leases

⁸⁶ See *id.*

⁸⁷ *Id.*

⁸⁸ See ROSALYN R. LAPIER, *INVISIBLE REALITY: STORYTELLERS, STORYTAKERS, AND THE SUPERNATURAL WORLD OF THE BLACKFEET* 25 (Nebraska 2017).

⁸⁹ See *id.*

⁹⁰ Weaver, *supra* note 13, at 782.

⁹¹ *Id.*

⁹² See Furlong, Wesley James (2019) “*That Chuiitt River is Ours*”: *Traditional Cultural Landscapes and the National Historic Preservation Act*, 13-14. In: 2018 US/ICOMOS Symposium "Forward Together: A Culture-Nature Journey Towards More Effective Conservation in a Changing World", November 13-14, 2018, San Francisco, California.

⁹³ See generally, Walter E. Stern, *Solenex, LLC v. Bernhardt, Secretary, U.S. Department of the Interior: Cancellation of 1982 Oil and Gas Lease Upheld – Significant Cultural and Religious Lands of the Badger-Two Medicine Area in Montana*, MODRALL SPERLING (June 26, 2020), https://www.modrall.com/2020/06/26/solenex-llc-v-bernhardt-secretary-u-s-department-of-the-interior-cancellation-of-1982-oil-and-gas-lease-upheld-significant-cultural-and-religious-lands-of-the-badger-two-medicine-area/#_ftnref1 (summarizes the history of the Solenex lease, court proceedings, and legislative changes that have impacted the Badger-Two Medicine from the initial decision to issue the lease to Sidney Longwell and Solenex, LLC in 1982 through the D.C. Circuit Court decision in June 2020).

⁹⁴ Michael Dax, *Protecting the Badger-Two Medicine: A Healing Story*, EARTH ISLAND J., (Dec. 23, 2015), https://www.earthisland.org/journal/index.php/articles/entry/protecting_the_badger-two_medicine_a_healing_story/.

in the Rocky Mountain Front and Badger-Two Medicine.⁹⁵ However, environmental concerns and a failure to meet the requirements set by the National Environmental Policy Act (NEPA) prompted a suspension of all drilling in 1993, a move supported by legislation introduced by former Senator Max Baucus of Montana.⁹⁶ Baucus's Badger-Two Medicine Protection Act, though unsuccessful, recognized the area's need for protection.⁹⁷ This recognition led to a continued halt in drilling, allowing the BLM and USFS to conduct further studies.⁹⁸ These studies led to a moratorium on authorization of new lands for oil and gas leasing along the Rocky Mountain Front, but did not explicitly require current leaseholders to withdraw.⁹⁹

In 2001, the USFS recommended the temporary removal of the Badger-Two Medicine area from the federal mining law's oil and gas leasing program.¹⁰⁰ This recommendation aimed in part to safeguard the Native American traditional and cultural practices in the area.¹⁰¹ Following this, the USFS ethnographic studies led to the listing of the Badger-Two Medicine in the National Register as a "traditional cultural district."¹⁰² The study highlighted the area's significance to the Blackfeet Nation, recognizing their traditional religious and cultural practices as fundamental to the identity of the Tribe.¹⁰³

Over the next few years, the USFS successfully identified issues,¹⁰⁴ undertook a NEPA analysis, sustained the lease suspensions, and enacted legislation recognizing the Badger-Two Medicine's cultural and ecological significance.¹⁰⁵ However, renewed oil and gas interests heightened tensions between the USFS, mining companies, and the Blackfeet Nation.¹⁰⁶ The University of Arizona conducted studies in collaboration with the Blackfeet Nation which focused on the cultural and religious importance, as well as the environmental significance, of the area to the Blackfeet.¹⁰⁷ Because of these studies, the USFS adopted a management plan in 2009 that prohibited the use of all-terrain vehicles and motorcycles in the area.¹⁰⁸

⁹⁵ 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 at 2 (Sept. 21, 2015) [hereinafter ADVISORY COUNCIL].

⁹⁶ *Id.*

⁹⁷ Badger-Two Medicine Protection Act, S. 853, 103d Cong § 1, 1st Sess. (Proposed Draft 1993).

⁹⁸ ADVISORY COUNCIL, *supra* note 95, at 3.

⁹⁹ *Id.*

¹⁰⁰ Kathryn Sears Ore, *Form and Substance: The National Historic Preservation Act*, 38 PUB. LAND & RESOURCES L. REV. 207, 229 (2017).

¹⁰¹ *Id.*

¹⁰² ADVISORY COUNCIL, *supra* note 95, at 4.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, §403, 120 Stat. 3050.

¹⁰⁶ Ore, *supra* note 100, at 230.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 231; See FS Record of Decision for Badger-Two Medicine, (U.S.D.A. 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 3,4 (March 2009), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5374044.pdf.

In 2013, Solenex, one of the only companies still holding leases in the Badger-Two Medicine, threatened to sue the USFS and BLM unless they released the suspension.¹⁰⁹ When the federal government failed to take any action, Solenex took their case to court.¹¹⁰ Solenex sought declaratory and injunctive relief under the Administrative Procedure Act and the Mineral Leasing Act asserting unreasonable delay.¹¹¹ The court granted relief to Solenex and ordered BLM and USFS fast-track reinstating the leases, deeming the lease cancellation decision as arbitrary and capricious.¹¹² Notably, the court overlooked the detrimental impact on the culture and ecology underlying the initial lease suspension.¹¹³ To shed light on the issue, the Blackfeet Nation presented an amicus brief, emphasizing the detrimental impact of energy development on the Blackfeet's deep-rooted connection to the land, its flora and fauna, and the undisturbed nature of the Badger-Two Medicine area.¹¹⁴

The courts continue to ignore the importance of culture, tradition, and religion to native peoples in relation to place. However, grassroots efforts are gathering momentum to protect the Badger-Two Medicine. In 2017, John Murray, a Blackfeet Tribal member, invited the Department of the Interior (DOI) to the Badger-Two Medicine, where a traditional tepee had been set up.¹¹⁵ There, within a traditional tepee, the tribal members shared the area's sacredness and its profound meaning to their community with members of the DOI.¹¹⁶ Soon after this meeting, the BLM canceled all remaining leases in the Badger-Two Medicine, marking a historic success against opposing forces.¹¹⁷ The BLM reasoned that the lease was "issued prematurely in violation of NEPA, the NHPA (the National Preservation Act of 1966), the American Indian Religious Freedom Act, and the agencies' trust responsibilities."¹¹⁸ This process and its outcome demonstrate the possibilities available when decision-makers immerse themselves in the experiences and insights of Native communities regarding land management.

Solenex quickly responded to the victory by filing another lawsuit, but conservation groups, including Glacier-Two Medicine Alliance and National Parks Conservation Association, collaborated with the Blackfeet Nation and Senator Tester to draft the Badger-Two Medicine Protection Act in 2020.¹¹⁹ While this Act, if passed, would mark progress in recognizing the

¹⁰⁹ Solenex LLC v. Jewell, 156 F.Supp. 3d 83, 84 (D.C.D. 2015).

¹¹⁰ Stern, *supra* note 93.

¹¹¹ Solenex LLC, 156 F.Supp. 3d at 84.

¹¹² *Id.* at 85.

¹¹³ *See generally, id.*

¹¹⁴ Ore, *supra* note 100, at 231 (citing 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. (Oct. 24, 2014), *in* Letter re Request for Cancellation of All Oil and Gas Leases in the Badger-Two Medicine 2).

¹¹⁵ Cassidy Randall, *Undeniable*, PATAGONIA (Oct. 25, 2022), <https://www.patagonia.com/stories/undeniable/story-97814.html>

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Plaintiff-Appellee's Final Response Brief at 24-25, Solenex LLC, v. Bernhardt, 447 U.S. App. D.C. 260 (2019) No. 18-5343, 2019 WL3802052, at *23-24.

¹¹⁹ Badger-Two Medicine Protection Act, S. 4288, 116th Cong. (Proposed Draft 2019-2020).

Badger-Two Medicine, it does not offer the same level of recognition and security as returning the area to the Blackfeet Nation might. In September 2022, the district court revisited *Solenex LLC v. Haaland*.¹²⁰ Senior District Judge Richard J. Leon held that the government lacked the authority to unilaterally cancel the oil and gas lease.¹²¹ In addition, the judge held that the NHPA did not apply¹²² because it had not existed at the time of the original leasing.¹²³ Therefore, the BLM was required to reinstate the leases and “...[p]ut an end to this interminable, and insufferable, bureaucratic chess match.”¹²⁴

In the persistent struggle for the safeguarding of the Badger-Two Medicine, the last few years have been transformative. After decades of contention over oil and gas leases, Solenex voluntarily retired their final lease in September 2023.¹²⁵ This milestone, resulting from dedicated advocacy by the Blackfeet Nation and organizations such as the Native American Rights Fund (NARF) highlighted the religious and cultural significance of the area to the Blackfeet People.¹²⁶ The Blackfeet Tribal Business Council released a statement following the settlement: “We are proud of these victories. Moving forward we will continue our unrelenting commitment to safeguard traditional Blackfeet lands, culture and practices by remaining vigilant for any proposals that would undermine our sovereignty and treaty rights in the Badger-Two Medicine or elsewhere.”¹²⁷

The retirement of this final lease signals progress in recognizing indigenous rights but stops short of a full acknowledgment of the Blackfeet Nation’s sovereignty and aspirations. The true, long-lasting protection of the Badger-Two Medicine would necessitate a return of the land to the Blackfeet Nation, emphasizing the paramount importance of tribal heritage and rights over competing commercial interests.¹²⁸ This broader implication underscores the need for policy reconsideration to champion tribal sovereignty and actualize the vision of complete protection for such invaluable cultural territories.

IV. SUCCESSFUL INDIGENOUS LAND RESTORATIONS

Throughout the years, some tribal nations have successfully regained control of their ancestral territories. However, many have been forced to buy their land back.¹²⁹ For example, the

¹²⁰ *Solenex, LLC v. Haaland*, 626 F. Supp. 3d 110, (D.D.C. 2022), *dismissed*, 2023 WL 6756279 (D.C. Cir. Oct. 12, 2023).

¹²¹ *Id.*

¹²² *See Ristroph*, *supra* note 36.

¹²³ *See Solenex, LLC*, *supra* note 120.

¹²⁴ *Id.* at 131.

¹²⁵ *See* Press Release, Dept. of the Int., Final Oil and Gas Lease to be Relinquished in Montana’s Badger-Two Medicine Area, <https://www.doi.gov/pressreleases/final-oil-and-gas-lease-be-relinquished-montanas-badger-two-medicine-area> (last visited Sept. 17, 2023).

¹²⁶ *See* Native American Rights Fund (NARF), *Sacred Badger-Two Medicine Area Protected* (Sept. 1, 2023), <https://narf.org/badger-two-medicine/>.

¹²⁷ Blackfeet Tribal Business Council, FACEBOOK (Sept. 1, 2023), <https://www.facebook.com/p/Blackfeet-NationBlackfeet-Tribal-Business-Council-100064479078591/>

¹²⁸ *See* NARF, *supra* note 126.

¹²⁹ *See* NewsHour, *Why Native Americans Are Buying Back Land That Was Stolen From Them* *are buying back land that was stolen from them*, PBS, at 4:13 (Oct. 16, 2023), <https://www.pbs.org/newshour/show/why-native-americans-are-buying-back-land-that-was-stolen-from-them>.

Leech Lake Band of Ojibwe in Minnesota reclaimed 11,760 acres of forest service land, returning it to trust land,¹³⁰ the Yurok Tribe purchased 2,424 acres of their ancestral land along Ke'pel Creek in Northern California,¹³¹ and the Cow Creek Band of Umpqua Tribe of Indians took back 17,000 acres of public land in Western Oregon.¹³²

While many tribes buy back their land from the open market, others have regained public lands through a historically long and arduous process.¹³³ These hard-fought victories not only signify a return of land but also symbolize the resilience and enduring spirit of Tribal nations.

The Taos Indians of New Mexico offer a poignant example. After battling for decades, they marked a historic victory when they reclaimed Blue Lake and its surrounding 48,000 acres, after refusing to accept a cash compensation for the loss of their land.¹³⁴ They had previously declined offers from the Indian Claims Commission and provided evidence of their continual, exclusive use of the land for agriculture, hunting, gathering, and religious practices, especially around the sacred Blue Lake.¹³⁵ Additionally, substantial evidence of aboriginal title to the lands, until it was taken by proclamation by President T. Roosevelt in 1906, resulted in the court finding for the Taos Pueblo to the sum of \$297,684.67 for the approximately 37,000 acres including Blue Lake.¹³⁶ Following this victory, President Nixon returned the land in H.R. 471 Blue Lake Bill Taos-Pueblo American Indian Land Deed in 1970.¹³⁷ The land return to the Taos Pueblo was revolutionary for tribal nations, demonstrating that it was possible to regain their land.¹³⁸

Another significant example is the restoration of 19,000 acres to the Confederated Salish and Kootenai Tribe, hinting at a shift in political perspectives that might lead to more federal

¹³⁰ See Shirley Sneve, *Tribes reclaiming lands 'actually happening'*, INDIAN COUNTRY TODAY (Jan. 15, 2021), <https://ictnews.org/news/tribes-reclaiming-lands-actually-happening?redir=1> .

¹³¹ See TR. FOR PUB. LAND, *Yurok Tribal Lands*, <https://www.tpl.org/our-work/yurok-tribal-lands> (last visited Nov. 8, 2022).

¹³² See Anna V. Smith, *When Public Lands Become Tribal Lands Again*, HIGH COUNTRY NEWS (Aug. 16, 2019), <https://www.hcn.org/issues/51.15/tribal-affairs-when-federal-lands-become-tribal-lands-again-public-lands>.

¹³³ See Michael Albertus, *The Time to Return Land to Native Americans is Long Overdue*, THE HILL (Mar. 9, 2021, 4:01 PM), <https://thehill.com/opinion/campaign/542310-the-time-to-return-land-to-native-americans-is-long-overdue/> (describing the Mashpee Wampanoag tribe of Massachusetts decades-long fight to restore 300 acres of their traditional homeland); see also Dianne Lugo, *'Homecoming': 100 Years After Forceful removal, Nez Perce People Celebrate Reclaimed Land*, STATESMAN JOURNAL (July 29, 2021, 9:57 AM), <https://www.statesmanjournal.com/story/news/2021/07/29/oregon-nez-perce-tribe-celebrate-reclaimed-reservation-land-history-treaty-chief-joseph-amsaaxpa/5424269001/> (highlighting the Nez Perce's 100 year struggle to recover land they had been forced to leave).

¹³⁴ See William F. Deverell, *The Return of Blue Lake to the Taos Pueblo*, 49 PRINCETON U. LIB. CHRON. 57, 59 (1987).

¹³⁵ See *Pueblo of Taos v. United States*, 15 Ind. Cl. Comm 666 (1965) (acknowledging that the Taos Pueblo religion ties them to the land and included "shrines" that were visited daily).

¹³⁶ *Id.* (The Taos Pueblo waived that sum, seeking title rather than a use permit and monetary remedy.).

¹³⁷ See An Act to Amend Sec. 4 of the Act of May 31, 1933, PUB. L. No. 91-550, 84 Stat. 1437 (1970).

¹³⁸ Indian Affairs, *The White House H.R. 471 Declares Certain Lands in Carson National Forest are Held in Trust for the Pueblo de Taos*, U.S. DEP'T OF THE INTERIOR (Dec. 15, 1970), <https://www.bia.gov/as-ia/opa/online-press-release/white-house-hr-471-declares-certain-lands-carson-national-forest-are..>

returns of indigenous lands.¹³⁹ Emphasizing the Department of Interior’s “trust and treaty responsibility,” Secretary of Interior Deb Haaland underscored the Department’s commitment to work collaboratively with tribes.¹⁴⁰ She highlighted the obligation to protect their lands, ensure a homeland for Tribal citizens, and empower tribes to determine land usage.¹⁴¹ Both the Taos Pueblo and the CSKT land restorations provides insight into how the processes have changed over time to be a significant means of returning ancestral lands to tribes.

A. *Blue Lake and the Taos Indians – The Long Road*

From the initial withdrawal of their sacred land in 1906¹⁴² until the signing of H.R. 471 by President Nixon on December 15, 1970,¹⁴³ the Taos Pueblo fought in every avenue they could for the return of their land.¹⁴⁴ In 1903, the Secretary of Agriculture requested that land within the Territory of New Mexico be temporarily withdrawn for a forest reserve; the land was permanently withdrawn by President Theodore Roosevelt in 1906, creating the Carson National Forest.¹⁴⁵ In 1904, the Taos Pueblo initiated a claim for an exclusive use permit to protect their religious ceremonies and practices in the Blue Lake area.¹⁴⁶ The Taos Pueblo continued to fight to protect their lands when a bill was proposed in 1921 that would give the state jurisdiction over water rights in Blue Lake.¹⁴⁷ While the USFS granted a fifty-year special use permit in 1933 to the Taos Pueblo, the permit did little to protect the area for the Taos Pueblo’s purpose of exclusive ceremonial

¹³⁹ *Interior Department Takes Steps to Restore Tribal Homelands, Empower Tribal Governments to Better Manage Indian Lands*, U.S. DEP’T OF THE INTERIOR (April 27, 2021), <https://www.doi.gov/pressreleases/interior-department-takes-steps-restore-tribal-homelands-empower-tribal-governments> [hereinafter *Interior Department Takes Steps*].

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (commenting on the Solicitor’s Offices issuance of M-37070 M-37069 and withdrawal of M-37054, M-37055, and M-37064 in steps to provide the Department and tribes better ways to put land into trust).

¹⁴² See Act of Dec. 19, 1906, *The American Presidency Project*, UCSB, <https://www.presidency.ucsb.edu/documents/executive-order-505> (last visited Nov. 8, 2022).

¹⁴³ See Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (1970).

¹⁴⁴ See *infra* notes 151, 153, 158, 162, &171 (highlighting the various means the Taos Pueblo sought to protect their lands through decades-long battle for the land).

¹⁴⁵ Deverell, *supra* note 134, at 59.

¹⁴⁶ *Id.* at 66.

¹⁴⁷ See Bethany Berger, *Natural Resources and the Making of Modern Indian Law*, 51 CONN. L. REV. 927, 938 (2019) (referencing Senator Holm Bursum of New Mexico’s proposed bill, known as the Bursum Bill, would allow non-Indians to claim Pueblo lands once they proved ten years of residency); see also Sarah Soliz, *Pueblo Activists and Allies Against Thea Bursum Bill of 1921*, SCH. FOR ADVANCED RES. (Aug. 22, 2019), <https://sarweb.org/pueblo-activists-and-allies=against-the-bursum-bill-of-1921/>.

use.¹⁴⁸ Over and over again, the Taos Pueblo continued to fight for the land: they sent letters to legislators,¹⁴⁹ they petitioned the court,¹⁵⁰ and they sought use permits from the USFS.¹⁵¹

1. The History and Land

Nestled in the shadow of Wheeler Peak and Taos Mountain, the Taos Pueblo is uniquely positioned near three wilderness areas and the Northern Rio Grande National Monument.¹⁵² The Pueblo Indians have lived within the Northern watershed of the Rio Grande, just at the base of Taos Mountain, since time immemorial.¹⁵³ Recognized as the “oldest continually inhabited community in the United States,” some of the Taos Pueblo houses date back to between 1000 and 1450 A.D.¹⁵⁴ The Taos Pueblo cultivated the land, developed complex irrigation systems, and traded with Apache and Ute camps, as well as other Pueblo Indians. This continuous control of the land became significant in the decision to restore the land.

The Spanish claimed the area in 1689, followed by Mexico in 1821, after the Mexican Revolution. Next, the United States gained title to the land through the Treaty of Guadalupe Hidalgo in 1848.¹⁵⁵ Though the United States acknowledged only 17,000 of the original 300,000 acres of pre-Hispanic use as patented land, the Taos Pueblo preserved the Blue Lake area during these national shifts.¹⁵⁶ They ensured that the sacred site, vital for ceremonies and pilgrimages, maintained both its pristine quality and its cultural and religious importance.¹⁵⁷ But when the United States annexed the land, it overlooked the Spanish land tenure system, removing the Blue Lake and forty-eight surrounding acres from the Taos Pueblo to form the Carson National Forest.¹⁵⁸

The Pueblo Lands Act of 1924¹⁵⁹ established the Pueblo Lands Board to address non-Indian/Indian land disputes.¹⁶⁰ The Taos Pueblo tribal leaders presented the Board with a settlement offer: the Taos Pueblo would drop their challenge against the non-Indians residing

¹⁴⁸ Linda Moon Stumpff, *Through the Taos Pueblo Lens Case Study*, ENDURING LEGACIES NATIVE CASES, <https://nativecases.evergreen.edu/collection/cases/through-the-taos-pueblo-lens-values-and-emerging-strategies-for-protecting-wild> (last visited Nov. 8, 2022).

¹⁴⁹ See *Taos Pueblo - Letters Addressing the Proposed By-Pass, 1958-1960*, Box: 18, Folder: 38. NEW MEXICO ARCHIVES ONLINE https://nmarchives.unm.edu/repositories/22/archival_objects/193763 (last visited Oct. 19, 2023); See also Cody White, *Righting a Wrong: The Return of Blue Lake to the Taos Pueblo*, NATIONAL ARCHIVE: THE TEXT MESSAGE BLOG (Nov. 10, 2020) <https://text-message.blogs.archives.gov/2020/11/10/righting-a-wrong-the-return-of-blue-lake-to-the-taos-pueblo/>.10, 2020).

¹⁵⁰ See *infra* note 164. See Andrew Graybill, *Strong on the Merits and Powerfully Symbolic: The Return of Blue Lake to Taos Pueblo*, 76 N.M. HIST. REV. 125, 137 (2001). See *infra* note 163.

¹⁵¹ See THEODORE CATTON, *AMERICAN INDIANS AND NATIONAL FORESTS* 98 (2016)

¹⁵² *Id.* at 126.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 125.

¹⁵⁵ *Id.* at 134.

¹⁵⁶ See Act of Dec. 15, 1970, Pub. L. No.91-550, 84 Stat. 1437 (1970).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ 25 U.S.C. § 331, 43 Stat. 636 (1924).

¹⁶⁰ CATTON, *supra* note 151 at 97 (2016).

within their land in exchange for the return of the Blue Lake area to their reservation.¹⁶¹ The Board accepted their offer but then failed to include the agreement in its report to Congress.¹⁶² In 1927, the Taos Pueblo negotiated a Cooperative Use Agreement with the Forest Service allowing for tribal timber and gathering rights within the area and “co-management” of the area, which required the forest supervisor’s consent for camping and access permits.¹⁶³ The next year, Congress passed a bill withdrawing 30,000 acres from Carson National Forest to protect the headwaters of the Rio Pueblo and Blue Lake from mineral entry, but not from recreational use.¹⁶⁴ With full management authority over Blue Lake, the Forest Service’s decisions often clashed with tribal interests in the following years.¹⁶⁵

2. Fight for Land Title Recognition

The Treaty of Guadalupe Hidalgo brought Pueblo Indians into the United States as citizens after one year and promised that the United States would honor private land holdings, including land grants previously issued by the Spanish and Mexican governments.¹⁶⁶ However, the United States acknowledged only 17,000 acres of the Taos Pueblo land and considered the Blue Lake area to be unclaimed territory.¹⁶⁷ The Taos Pueblo obtained a Cooperative Use Agreement from the USFS after the Blue Lake area was removed by President T. Roosevelt.¹⁶⁸ However, the USFS repeatedly violated this agreement, allowing recreational use and permits during religious ceremonies.¹⁶⁹ The multiple-use mandate of the USFS played a role in the conflict, attempting to balance tribal consultation and the Cooperative Use Agreement with the mandate that the national forests are to be administered for “[o]utdoor recreation, range, timber, watershed, and wildlife and fish purposes.”¹⁷⁰

The Indian Claims Commission (ICC) was established in 1946 to “include moral claims based on ‘unconscionable consideration’ and ‘fair and honorable dealings,’” with the goal of making “final determinations” on Indian claims leading to a financial award, “the only kind allowed the Commission.”¹⁷¹ The Taos Pueblo took their claim to the ICC arguing that title to the land had been illegally extinguished with the creation of Carson National Forest.¹⁷² The Taos Pueblo alleged that they had occupied the land since time immemorial, that the aboriginal title had been recognized by Spain and then Mexico, and that the Treaty of Guadalupe-Hidalgo established

¹⁶¹ *Id.*

¹⁶² Andrew Graybill, *Strong on the Merits and Powerfully Symbolic: The Return of Blue Lake to Taos Pueblo*, 76 N.M. HIST. REV. 125, 128 (2001) (forfeiting the award of almost \$300,000 but received nothing in return). *See also* Pueblo of Taos v. United States, 15 Ind. Cl. Comm. 666-687, 685 (1965).

¹⁶³ CATTON, *supra* note 151.

¹⁶⁴ *Id.*

¹⁶⁵ *See* Graybill, *supra* note 163, at 129.

¹⁶⁶ Treaty with the Republic of Mexico art. 8, Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

¹⁶⁷ Stumpff, *supra* note 148, at 6.

¹⁶⁸ *Id.* at 7.

¹⁶⁹ *Id.*

¹⁷⁰ Multiple-Use Sustained Yield Act of 1960 (MUSYA), Pub. L. 86-517 (1960).

¹⁷¹ Stumpff, *supra* note 148, at 9-13.

¹⁷² Deverell, *supra* note 134, at 59.

their property rights.¹⁷³ In 1965, an ICC decision was returned in favor of the Taos Pueblo, but the Taos Pueblo continued to deny any financial recompense for the taking and insisted that the land be returned.¹⁷⁴ The ICC determination acknowledged six of the arguments the Taos Pueblo made: (1) the Taos Pueblo made a permanent home within the settlement beginning around 1300,¹⁷⁵ (2) that religion was central to their identity and tied to the land which held “shrines” visited daily as a part of the practice of their faith and worship,¹⁷⁶ (3) that the area was used for natural resources upon which the Tribe relied,¹⁷⁷ (4) recognition of the possession and use by the Spanish and Mexican governments,¹⁷⁸ (5) that Art. VIII and IX of the Treaty of Guadalupe Hidalgo required the United States to “respect and protect property rights within the ceded area,”¹⁷⁹ and (6) the Taos Pueblo had continued exclusive possession and use of the area until the land was taken on Nov. 7, 1906.¹⁸⁰ The ICC decision became the evidence needed to gain Congressional support moving forward.¹⁸¹

3. Legislative Path Resulting in H.R. 471

After the ICC decision, the Taos Pueblo sought Congressional support from New Mexico Senator Clinton P. Anderson, who introduced a Senate bill in 1966 “by request” for the return of 50,000 acres, including Blue Lake,¹⁸² to the Pueblo by amending the Act of 1933.¹⁸³ The support from Senator Anderson quickly shifted as his interests in the timber industry conflicted with the removal of the land from the National Forest; the bill was buried in the Senate.¹⁸⁴ In hearings before the sub-committee, Louis S. Clapper of the National Wildlife Federation was the most vocal dissent to the bill and warned against the precedent such land return could have.¹⁸⁵ Senator Anderson later announced plans for a new bill that would provide the Taos Pueblo only 3,100 acres in trust title and a use permit for the remaining land.¹⁸⁶ S.3085 died in Committee during the summer of 1966 but strengthened the Taos Pueblo’s resolve to only accept title to the Blue Lake area.¹⁸⁷

¹⁷³ *Id.* at 59-60 (The ICC claims had an expiration date, requiring the tribe to file a claim by 1951, which the tribe was hesitant to do, afraid that it would limit future claims for actual recovery of the land. However, they were urged to file a claim in hopes that a favorable decision could be used in subsequent claims as “judicial confirmation of the Pueblo’s original rights in the Blue Lake area.”)

¹⁷⁴ *Id.* at 60.

¹⁷⁵ *See Pueblo of Taos v. United States*, 15 Ind. Cl. Comm. 666, 669 (Sept. 8, 1965).

¹⁷⁶ *Id.* at 670-71.

¹⁷⁷ *Id.* at 673-77.

¹⁷⁸ *Id.* at 678-81.

¹⁷⁹ *Id.* at 681.

¹⁸⁰ *Id.* at 682.

¹⁸¹ Deverell, *supra* note 134, at 61.

¹⁸² *Id.* at 62.

¹⁸³ S. Comm. on Indian Affairs, 89th Cong., *S.3085: Hearing Before the S. Comm. on Indian Affairs*, 112 Cong. Rec. 28846 (1966).

¹⁸⁴ Deverell, *supra* note 134, at 62.

¹⁸⁵ Graybill, *supra* note 163, at 140-141.

¹⁸⁶ *Id.* at 141.

¹⁸⁷ *Id.* at 142.

In 1965, the Taos Pueblo successfully pushed the Association on American Affairs to publish *The Blue Lake Appeal*, a pamphlet highlighting their plight. *The Blue Lake Appeal's* goal was to garner support from churches and Congressional members.¹⁸⁸ This effort was successful in many ways: newspapers across the country picked up the story, church organizations, like the National Council of Churches (NCC), supported the Pueblo, and Florida Congressman James A. Haley reintroduced the bill (H.R. 3306) in 1967.¹⁸⁹ The lobbying support of the NCC was a gamechanger and the NCC advised the Pueblo in non-violent protests should the Forest Service attempt to log timber or build roads in the Blue Lake area.¹⁹⁰ Congressman Haley's bill passed the House in June 1968, but Senator Anderson successfully opposed it at every step in the Senate.¹⁹¹ Congressman Haley refused to throw in the towel and instead introduced H.R. 471 on the first day of the next congressional session.¹⁹²

To embolden their claim, the Taos Pueblo looked at the new White House's policies and connected with White House Presidential Fellow Bobbie Greene, who worked with the Nixon administration's Native American policymakers.¹⁹³ In addition, in January of 1970, the National Congress of American Indians decided to prioritize the Taos Pueblo's claim and President Nixon's assistant released a memorandum in support of their claim during a White House meeting.¹⁹⁴ This influenced Vice President Spiro Agnew to write President Nixon stating, "[a]fter having reviewed the situation, it is my conclusion that the equities lie with the Toas Pueblo Indian and that we should endorse H.R. 471...and should aggressively seek its enactment."¹⁹⁵ Finally, in December of 1970, after urging Congress to pass H.R. 471, President Nixon signed it into law, settling the claim by restoring the 48,000 acres to the Tribe rather than only providing a monetary settlement.¹⁹⁶

After fighting for sixty-four years, the return of the Blue Lake and the 48,000 surrounding acres was the first -time land had been returned to Indian title and established the "Blue Lake precedent."¹⁹⁷ While there have not been many successful claims resulting in the return of direct ownership,¹⁹⁸ the Taos Pueblo case sets a strong and effective precedent for other tribes to follow.

B. The National Bison Range and the CSKT – Cultural Preservation

Much closer to the Blackfeet Nation than the Taos Pueblo's Blue Lake, approximately 18,800 acres comprising the National Bison Range (NBR) was restored to the Confederated Salish

¹⁸⁸ *Id.* at 137.

¹⁸⁹ *See* Deverell, *supra* note 134, at 62-64.

¹⁹⁰ *Id.* at 64.

¹⁹¹ *Id.* at 66.

¹⁹² *See* Graybill, *supra* note 163, at 146.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 146-147.

¹⁹⁵ *Id.* at 147 (quoting a memo from Agnew to Nixon written April 17, 1970).

¹⁹⁶ *Id.* at 126.

¹⁹⁷ *Id.* at 149-50.

¹⁹⁸ *Id.* at 127.

and Kootenai Tribe (CSKT) in 2020.¹⁹⁹ The Montana Water Rights Protection Act, which restored this land to CSKT and was included in the Consolidated Appropriations Act of 2021, passed both houses of Congress on Dec. 21, 2020, and was signed into by President Trump on December 27, 2020.²⁰⁰ In Secretary of the Interior Deb Haaland’s speech at the three-day Powwow celebration, she stated that, “[t]he return of the bison range to these tribes is a triumph and a testament to what can happen when we collaboratively work together to restore balance to ecosystems that were injured by greed and disrespect.”²⁰¹ The return of the NBR resulted from claims of broken treaty promises in the Hellgate Treaty of 1855.²⁰²

1. History of the Confederate Salish & Kootenai Tribes and the National Bison Range

The 1,250,000 acres of the Flathead Reservation is home to the Bitterroot Salish, Kootenai, and Upper Pend d’Orielle tribes, and was established by the Hellgate Treaty of 1855.²⁰³ The Salish and Pend d’Orielle are some of the easternmost Salish speaking bands.²⁰⁴ They originally lived on over two million acres, covering both sides of the Continental Divide and included parts of British Columbia, Idaho, Montana, and Wyoming.²⁰⁵ Conflicts with the Blackfeet Nation drove them west of the Continental Divide in the early 1800s, but they continued to use the common hunting ground in the NBR. The tribe’s rights to the NBR were maintained in the 1855 Treaty with the Blackfeet Nation.²⁰⁶ Ktunaza, or Kootenai, rely on archaeological evidence and oral tradition which tells of their native ancestors living in the Flathead Watershed area as early as 40,000 years ago.²⁰⁷ The Kootenai people consists of five bands, three are First Nation people in Canada and then the Kootenai Tribe of Idaho and the Ksnaka band of the Confederated Salish & Kootenai Tribe.²⁰⁸ When the leaders of the Salish, Pend d’Orielle, and Kootenai tribes met with Commissioner Isaac

¹⁹⁹ See, Consolidated Appropriations Act, 2021, Pub. L. 116-260, Sec. 13, 3029 Stat. 134, 134.

²⁰⁰ *Id.*

²⁰¹ Press Release, U.S. Dep’t of Int., Interior Transfers National Bison Range Lands in Trust for the Confederated Salish and Kootenai Tribes (June 23, 2021) (On file with U.S. Dep’t of Int.), [https://www.doi.gov/pressreleases/interior-transfers-national-bison-range-lands-trust-confederated-salish-and-kootenai#:~:text=WASHINGTON%20%E2%80%94%20In%20an%20important%20move,Confederated%20Salish%20and%20Kootenai%20Tribes%20\(](https://www.doi.gov/pressreleases/interior-transfers-national-bison-range-lands-trust-confederated-salish-and-kootenai#:~:text=WASHINGTON%20%E2%80%94%20In%20an%20important%20move,Confederated%20Salish%20and%20Kootenai%20Tribes%20()

²⁰² Sarah Mosquera, *A Bison Range homecoming: Confederated Salish and Kootenai Tribes and neighbors celebrate ‘restoration of a piece that was missing.’*, MONT. FREE PRESS (May 23, 2022), <https://montanafreepress.org/2022/05/23/cskt-host-celebration-of-bison-range-transfer/> (.

²⁰³ Brian Upton, *Returning to a Tribal Self-Governance Partnership at the National Bison Range Complex: Historical, Legal, and Global Perspectives*, 35 PUB. LAND & RESOURCES L. REV. 51, 57-58 (2014).

²⁰⁴ Salish and Pend d’Orielle Culture Committee, *Ql’ispé (Pend d’Orielle or Kalispel) and Séliš (Salish or Flathead People)*, FLATHEAD WATERSHED SOURCEBOOK, https://www.flatheadwatershed.org/cultural_history/pend_salish.shtml (last visited Nov. 27, 2022).

²⁰⁵ *Id.*

²⁰⁶ *Id.* (describing the language spoken by the Ktunaxa as distinct and does not belong to any classification, unlike the Salish and Pend d’Orielle whose language is classified as Salish, and the Blackfeet whose language is included in the Algonquian family.); See also Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657, Art. I-II.

²⁰⁷ Kootenai Culture Committee, *Brief History of the People*, FLATHEAD WATERSHED SOURCEBOOK, https://www.flatheadwatershed.org/cultural_history/history_people.shtml (last visited Nov. 27, 2022).

²⁰⁸ *Id.*

Stevens in 1855 near present day Missoula, Montana, they believed the discussion would focus on dealing with their main problem: the advance of the Blackfeet Nation into their territory.²⁰⁹

2. The Hellgate Treaty of 1855

With the completion of the railroad survey in 1853, Commissioner Stevens had been tasked with ensuring that the path was cleared for the railroad through Indian territory to the Pacific Ocean.²¹⁰ Commissioner Stevens was also instructed to combine the tribes whenever possible, with as many as eight different bands to each designated territory. Charles Mix, Commissioner of Indian Affairs George Manypenny's second-in-command, provided Commissioner Stevens with copies of the recent treaties with the Omaha, Otoe, and Missouri Indians, the Table Rock tribe, and the Crow Creek tribe.²¹¹ Commissioner Mix told Commissioner Stevens they would provide Tribes who made treaties with

[p]rovisions proper on the part of the Government and advantageous to the Indians & will afford you valuable suggestions. Those with the Omahas & Otoes & Missourias will indicate the policy of the Government in regard to the ultimate civilization of the Indian Tribes, the graduation of the annuity payments secured to them, [and] the encouragement of Schools and Missions among them...²¹²

This approach, which unilaterally treated indigenous communities the same regardless of their distinct backgrounds, beliefs, or lifestyles, was previously used to relocate eastern tribes to areas now within modern-day Oklahoma.²¹³ This policy was viewed as a means to mitigate the perceived "threat posed by natives."²¹⁴ It was seen as a step toward assimilation and termination, with the ultimate goal of transforming tribes into "enterprising and prosperous American citizens."²¹⁵

When Commissioner Stevens arrived in western Montana on July 7, 1855, the council of Salish ("Flathead"), Kootenai, and Pend d'Orielle were very reluctant to accept a reduced reservation, ultimately only signing with the understanding that the entire area would be surveyed for an acceptable place for the reservation in the Bitterroot Valley, their traditional homeland.²¹⁶ During the negotiations, Big Canoe, a Pend d'Orielle war chief, stated,

²⁰⁹ See ROBERT J. BIGART, GETTING GOOD CROPS: ECONOMIC AND DIPLOMATIC SURVIVAL STRATEGIES OF THE MONTANA BITTERROOT SALISH INDIANS 30 (2012). (last visited Nov. 27, 2022).

²¹⁰ See Lonny Hill, *Blast from the Past: Treaty of Hellgate 164 Years Old Today*, CHAR-KOOSTA NEWS (July 18, 2019 updated July 23, 2019) https://www.charkoosta.com/news/blast-from-the-past-treaty-of-hellgate-164-years-old-today/article_9aa93da4-a9a9-11e9-bb18-7b71d639c06d.html

²¹¹ Kent Richards, *The Stevens Treaties of 1854-1855*, 106 OR. HIST. SOC'Y 342, 346 (2005).

²¹² *Id.*

²¹³ See *id.* at 342-343.

²¹⁴ *Id.*

²¹⁵ *Id.* at 347 (Quoting FRANCIS P. PRUCHA, GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS at 317 (Univ. Neb. Press abr. ed. 1986)).

²¹⁶ FRANCIS P. PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 254 (1994).

If I go to your place on your land – If I get there [and say] give me a little piece. I wonder would you say here take it. I will wait till you give it... That is the way with you white man. I expect that is the same way you want me to do here, this place.²¹⁷

He also made it clear that he felt there was no reason for the treaty because none of the gathered tribes had ever been at war with the United States government.²¹⁸ Chief Victor, chief of the Salish, stated plainly he did not want to leave the Bitterroot Valley, while Chief Alexander, chief of the Upper Pend d'Oreilles, wanted to stay on the land with the “mission,”²¹⁹ believing it to be a bigger tract of land.²²⁰ By Thursday, July 21st, Commissioner Stevens was clearly frustrated, having provided a “feast” of 2 beefs, coffee, sugar, etc. on Thursday in lieu of mediation.²²¹ He demanded an answer by Friday on whether they would choose the mission or the valley.²²² After once again talking in circles on Friday July 13th, Chief Victor left negotiations as the talks broke down to have time to think and consider the issue.²²³ On Monday, July 16, Chief Victor said he would agree to the treaty if the federal government would agree to have both parcels of land surveyed and examined before choosing the location for the reservation.²²⁴

By the end of negotiations, the bands, except Crawling Mountain – second chief of the Flatheads, agreed to sign the treaty ceding their land for one reservation – understanding that both locations would first be surveyed, reserving rights to fishing, gathering roots and berries, pasturing horses and cattle on unclaimed land, and erecting temporary buildings for curing.²²⁵ In exchange, they would receive \$120,000 with most of the expenses going towards moving to the reservation and establishing homes, buildings, fences, etc.²²⁶ Art. VI of the treaty stated that the President may survey the reservation into lots and assign them as he sees fit.²²⁷ Additionally, the treaty stated that the Bitter Root Valley would be surveyed, not open for settlement until that occurred, and examined to determine if it would provide a better place for a reservation, leaving the actual

²¹⁷ Albert J. Partoll, *The Flathead Indian Treaty Council of 1855*, 29 PAC. NW. Q. 283-314, 292 (1938).

²¹⁸ *Id.* at 293.

²¹⁹ *Id.* at 296 (“mission” is believed to refer to the new St. Ignatius Mission in the Flathead Valley); *see also* Mark Spero, *St. Ignatius – Guardian of the Mission Mountains*, U. MONT.: STORIES ARCHIVE, <https://www.umt.edu/this-is-montana/columns/stories/st-ignatius--guardian-of-the-mission-mountains.php> (last visited Oct. 6, 2023).

²²⁰ Partoll, *supra* note 218 at 298-300.

²²¹ *Id.* at 300.

²²² *Id.* at 301-303 (Alexander again tells Stevens that the land is not large enough for them, especially once they have cattle; Stevens responds, “How far do you wish the land to extend? We told Alexander the place was not large enough; he said it was; Victor said it was; believing they could agree we have drawn it up. Do you bear in mind you can pasture your cattle at any place not occupied by whites?”).

²²³ *Id.* at 308 (The council was meant to reconvene on Saturday, but Victor sent word that he still had not made up his mind.).

²²⁴ *Id.* at 308-310. (Chief Victor ultimately agrees that he is willing to leave the valley for the mission land only if the President determines that the mission land is the “best” land. On the other hand, if the survey determines that the valley land is the best, Victor states that he will remain in the valley. When asked whether Alexander and Michelle would be willing to go to the valley, both make it clear they are not willing to move from their land.).

²²⁵ Treaty with the Flatheads, Etc. U.S.-Flatheads, Kootenai, Upper Pend d'Oreille Indians, July 16, 1855, 12 Stat. 975 art. IV [hereinafter Treaty with the Flatheads].

²²⁶ *Id.*

²²⁷ *Id.* art. VI.

location of the reservation ambiguous.²²⁸ Finally, the treaty would not take effect until ratified by the President and Senate.²²⁹ In Commissioner Stevens' letter to Commissioner Manypenny, he clearly lays out the terms saying,

Victor finally made a proposition in council today, which I accepted, providing for the survey of the Bitter Root Valley above the Loo-lo Fork, and guaranteeing to the Flatheads a separate Reservation in that valley, should it prove to be better adapted to the wants of his people than the Reservation on the Flathead River. To this latter Reservation he and his people have agreed to go, should it prove to be more eligible than that in the Bitter Root Valley.²³⁰

Neither the Bitter Root Valley nor the area set aside for the Flathead Reservation were ever surveyed prior to ratification of the treaty in 1859. In 1971, President Grant ordered the Salish to be removed from the Bitterroot Valley and established the reservations boundaries by executive order.²³¹

3. Creation of the National Bison Range

Following the establishment of the reservation, federal policies and actions, such as the buffalo's near-extinction in the 1880s and the allotment of the Flathead Reservation in 1904, drastically disrupted the tribes' traditional way of life.²³² By 1905, the North American buffalo were on the verge of extinction.²³³ Congress established the National Bison Range Complex (Range), which set aside roughly 18,000 acres within the Flathead Reservation, with bison from the herd owned by CSKT members Charles Allard and Michel Pablo in the 1870s.²³⁴ The herd had been sold in 1906 to Canada, when the government determined that allotted land on the reservation did not really provide the right environment for a buffalo ranch.²³⁵ However, the American Bison Society convinced President Theodore Roosevelt, who had a penchant for conservation and

²²⁸ *Id.* art. XI.

²²⁹ *Id.* art. XII.

²³⁰ Partoll, *supra* note 218, at 312-313.

²³¹ Emmi Blades, *Using the Legal System to Gain Control of Natural Resources on Tribal Lands: Lessons from the Confederated Salish and Kootenai Tribes and the Coeur d'Alene Tribe*, 47 IDAHO L. REV. 175, 179 (2010).

²³² Upton, *supra* note 204, at 59 (referencing the "Dawes Act," Pub. L. No. 58-159, 33 Stat. 302 (1904)); and David D. Smits, *The Frontier Army and Destruction of the Buffalo: 1865-1883*, W. Hist. Q. 312 (1994).

²³³ See Dean Lueck, *The Extermination and Conservation of the American Bison*, 31 J. LEG. STUD. S609, S620 (June 2002) (describing the decimation of wild and free-roaming bison herds, including just 1,090 bison as of 1889 and on 23 bison in Yellowstone by 1902. The American Bison Society was founded in 1905 and led to successful lobbying for the establishment of various bison reserves on the western plains, including the National Bison Range.).

²³⁴ Erin Patrick Lyons, *Give Me a Home Where the Buffalo Roam: The Case in Favor of the Management-Function Transfer of the National Bison Range to the Confederated Salish and Kootenai Tribes of the Flathead Nation*, 8 J. GENDER RACE & JUST. 711 (2005).

²³⁵ Mark Matthews, *Indian Tribes Aim to Manage Bison Refuge, Salish and Kootenai Seek to Continue Ancestors' Efforts to Protect Once-Endangered Species*, WASH. POST (July 8, 2003), <https://www.washingtonpost.com/archive/politics/2003/07/08/indian-tribes-aim-to-manage-bison-refuge/64334fc4-2af9-4ab6-a885-d39456119ca3/>.

preservation in the American West, to create a bison refuge before they were completely extinct.²³⁶ After the National Bison Range was created in 1908, some of the same bison originally sold were bought back from Canada and returned to the refuge on the Flathead Reservation.²³⁷ CSKT members had continually adapted their way of life and became steadfast in efforts to always retain their self-governance and self-determination.²³⁸ The tribes opposed the federal government's appropriation of the land and maintained their opposition even as Congress allocated \$1.56 per acre to pay for the land.²³⁹ The creation of the Range established one of the nation's first wildlife refuges, set aside for the conservation and protection of the North American Plains Buffalo.²⁴⁰

4. Path to Restoration of the Bison Range

In 1950 CSKT brought claims against the United States to the Indian Claims Commission (ICC) for the broken treaty promises and the takings of various parts of the Reservation, including the land taken for the National Bison Range.²⁴¹ In 1971, the United States Court of Claims ruled that the federal government had breached the treaty in granting 18,523.85 acres for the National Bison Range without the Tribe's consent and that the United States had acted in a manner "inconsistent with good-faith effort to give Indians the full money value of their land."²⁴² The court held that while the United States has broad "power to control and manage the property and affairs" of Indian tribes, it does not allow the United States to "appropriate tribal lands to its own purposes or use, or to hand them over to others" without just compensation.²⁴³

The connection to the bison herd on the range provided the Tribe with a sense of continued responsibility to ensure that the bison herd would be well-managed.²⁴⁴ The Tribal Self Governance Act (TSGA) passed in 1994, authorizing the United States Secretary of the Interior to enter into annual agreements for tribal operation and management of federal programs, services, and

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Kootenai Culture Committee, *supra* note 170 (describing tobacco growing, harvesting, fur-trading, and ranching as means used by the Kootenai to survive and flourish on the reservation. The Kootenai Cultural Preservation Society also describes Four Pillars that guide their communities: Traditional Language & Knowledge, Social Sector, Land & Resources, and Economic Investment. The pillars have continued to teach their important and unique traditional knowledge for how to care for the land and their resources, while also developing economic interests that have provided for the tribe.).

²³⁹ Lyons, *supra* note 235, at 721.

²⁴⁰ Upton, *supra* note 204, at 62-63.

²⁴¹ *See infra* note 234 describing the case brought by CSKT to the ICC.

²⁴² Confederated Salish & Kootenai Tribes of Flathead Reservation, *Montana v. United States*, 193 Ct. Cl. 801, 437 F.2d 458 (1971) (holding that some 404,047.33 acres were patented to settlers, some 60,843.4 acres were granted to the state of Montana, some 18,523.85 acres were reserved for the National Bison Range, and some 1,757.9 acres were reserved by the U.S. for other purposes in violation of the Treaty of Hellgate, granting the Tribes fair market value for the lands as of January 1, 1912 (\$7,410,000) minus the difference in compensation already received (\$1,343,331.22) totaling \$6,066,668.78 plus interest at 5% from January 1, 1912 to January 1, 1934, and at 4% per annum thereafter until paid).

²⁴³ *Id.* at 468.

²⁴⁴ Confederated Salish and Kootenai Tribes, *Our History*, BISON RANGE RESTORATION, <https://bisonrange.org/about> (last visited Nov. 27, 2022).

activities,²⁴⁵ gave CSKT an opportunity to take a role in the management of the Range and CSKT Tribal Chairman Michael Pablo requested a Tribal Self-Governance agreement.²⁴⁶ Attempts at negotiations with the Department of Interior(DOI) and U.S. Fish & Wildlife Service (FWS) continued until an agreement was finally reached in December 2004.²⁴⁷ The agreement, designated as the 2005 AFA allowed CSKT to contract for part of the National Bison Range Complex’s (NBRC) “visitor services, biology, maintenance, and fire control programs,” as well as placing CSKT members at the NBRC under the Coordinator, a FWS employee.²⁴⁸ However, after reports in 2006 were filed that the CSKT’s management efforts were failing or in need of improvement and that there NBRC had become a hostile work environment, FWS requested the agreement with CSKT be terminated.²⁴⁹ CSKT appealed the decision and issued a response to the FWS’s report of poor management performance.²⁵⁰

The termination of the 2005 AFA was met with disappointment by those within the DOI, and Deputy Secretary of the Interior Lynn Scarlett sought to renew CSKT’s relationship with NBRC.²⁵¹ In 2008 a new agreement (2008 AFA) allowed CSKT to have increased management of the NBRC and to collaborate on operations through a “Refuge Leadership Team.”²⁵² However, the 2008 AFA was challenged and eventually vacated due to NEPA violations.²⁵³ No additional negotiations for another AFA were undertaken.²⁵⁴ In 2015, FWS once again began to talk with CSKT and sponsored legislation that would transfer the NBRC from the National Wildlife Refuge to tribal trust for CSKT.²⁵⁵ This legislation was also challenged, but a settlement agreement was reached with FWS agreeing to prepare a Comprehensive Conservation Plan (CCP) and an Environmental Impact Statement (EIS) pursuant to NEPA.²⁵⁶ CSKT collected 153 comments on the “National Vison Range Transfer and Restoration Act of 2016” draft; 76 comments in support of the draft, 55 comments opposed, and 14 commenters presenting questions or concerns.²⁵⁷

The CCP and EIS were completed by FWS in 2019 which identified goals, plans, and a vision for the NBRC for the next fifteen years.²⁵⁸ It also identified four listed species that may

²⁴⁵ Tribal Self-Governance Act of 1994, H.R. 3508, 103d Cong. (1994).

²⁴⁶ Upton, *supra* note 204, at 63.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *See* Reed v. Salazar, 744 F. Supp. 2d 98 (D.D.C. 2010).

²⁵⁰ *Id.* at 105-107.

²⁵¹ *Id.* at 107.

²⁵² *Id.*

²⁵³ *Id.* at 108-109.

²⁵⁴ *Id.* at 108.

²⁵⁵ FWS Records, Pt 2 00413, 2017, <https://www.fws.gov/sites/default/files/documents/FWS-2017-00413-Records-Part-2.pdf> (last visited Nov. 27, 2022).

²⁵⁶ Settlement Agreement at 3, Reneau, et al., v. U.S.F.W.S., (2017) (No. 1:16-cv-00966-TSC); *See also id.*

²⁵⁷ *Responses of the Confederated Salish and Kootenai Tribes to Public Comments on the Tribes’ Draft “National Bison Range Transfer and Restoration Act of 2016*, Bison Range Working Group, <https://bisonrange.org/wp-content/uploads/2019/10/Public-Comment-Responses-July-2016.pdf> (last visited Nov. 27, 2022) [hereinafter *Responses of the CSKT*].

²⁵⁸ *U.S. Fish & Wildlife Serv., Comprehensive Conservation Plan: National Bison Range (2019)* U.S. FISH & WILDLIFE SERVICE https://bisonrange.org/wp-content/uploads/2021/01/CCP-NBR_Final_12-2019_accessible-1.pdf.

occur on NBRC including the bull trout and grizzly bear which are both threatened.²⁵⁹ Montana Senator Steve Daines introduced the proposition under the Montana Water Rights Protection Act in December 2019.²⁶⁰ In late 2020, Congress passed the Consolidated Appropriations Act which included the transfer of the NBRC to Indian trust land, “solely for the care and maintenance of bison, wildlife, and other natural resources, including designation or naming of the restored land.”²⁶¹ The legislation stipulates that the Tribes will provide public access and educational opportunities and “at all times, have a publicly available management plan for the land, bison, and natural resources, which shall include actions to address management and control.”²⁶² Looking at the Badger-Two Medicine, similar stipulations could provide relevant precedent for the federal government to return the land to the Tribe, ensuring the land remains open to the public, but is under tribal control and management.

The process for CSKT involved some of the same steps as made by the Taos Pueblo in the return of Blue Lake, but the distribution of the original payment and the distribution from the Court of Claims award, make it clear that a tribe does not have to turn down the financial award to receive the land back.²⁶³ Acknowledging this fact is significant, as Tribes may have assumed that accepting the small monetary Court of Claims awards could preclude a request for land back, such as the Sioux Tribes who have refused to accept the payment for the South Hills.²⁶⁴ Despite the proven success of dual claims, it may be more difficult for a Tribe to garner support for a return of land when financial compensation has already been awarded and distributed from the ICC trust account.²⁶⁵ However, it does not mean that a tribe will be barred from the restoration of their land or unable to get legislative or executive support for the return of the land, as the restoration of the Range demonstrates.²⁶⁶ CSKT garnered support for the return of the Range from the USFS and DOI without bringing in their monetary award granted by the United States Court of Claims.²⁶⁷

V. LAND BACK FRAMEWORK & RETURNING TO BADGER-TWO MEDICINE

Where CSKT looked for opportunities of co-management,²⁶⁸ Taos Pueblo went straight to the legislature after the return of the ICC decision.²⁶⁹ Both Taos Pueblo and CSKT spent 4 years in legislative debate before getting it through Congress and obtaining Presidential consent. The two land restorations are similar, though separated by 50 years. While the processes for regaining

²⁵⁹ *Id.*

²⁶⁰ Montana Water Rights Protection Act, S. 3019, 116th Cong. (2019-2020).

²⁶¹ Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 1182 et al. title V, § 12 (2021).

²⁶² *Id.*

²⁶³ Confederated Salish & Kootenai Tribes of Flathead Reservation, Montana v. United States, 193 Ct. Cl. 801, 437 F.2d 458, 468 (1971).

²⁶⁴ Maria Streshinsky, *Saying No to \$1 Billion: Why the Impoverished Sioux Nation Won't Take Federal Money*, ATLANTIC (Mar. 2011) <https://www.theatlantic.com/magazine/archive/2011/03/saying-no-to-1-billion/308380/> (last visited Dec. 3, 2022.)

²⁶⁵ *See generally, Id.*

²⁶⁶ *See supra* notes 198-199, 209-215 and accompanying text.

²⁶⁷ *Id.*

²⁶⁸ *See supra* notes 201-203 and accompanying text.

²⁶⁹ *See supra* notes 148-157 and accompanying text.

land for the Taos Pueblo and CSKT varied, the similarities and struggles for both Tribes provide important lessons that can be applied should the Blackfeet seek to recover Badger-Two Medicine.

A. *Recognized Compensable Interest in the Land*

An important first step in getting any land returned is showing that a tribe had a recognized compensable interest in the land at the time of the taking.²⁷⁰ The Taos Pueblo demonstrated that they had occupied the land since time immemorial, that aboriginal title had been recognized by Spain and then Mexico, and that the Treaty of Guadalupe-Hidalgo established their property rights.²⁷¹ Similarly, CSKT held their land under aboriginal title, having lived on the land since time immemorial, and that their property rights were recognized in the Treaty of Hellgate.²⁷² The Blackfeet can demonstrate their interest in the land through the Treaty of Fort Laramie, which recognized the Blackfeet territory,²⁷³ and the Lame Bull Treaty, which further described their land, including the Common Hunting Ground.²⁷⁴ The Blackfeet also reserved rights to hunting, fishing, grazing, and timber in the ceded area.²⁷⁵ Those off-reservation, reserved treaty rights may conflict with the rules of the managing agency, including hunting and fishing, gathering, grazing, and water rights.²⁷⁶ However, reserved rights were not given by the Federal government but are reserved by tribes as sovereigns, constituting property that could be taken.²⁷⁷ When looking at whether the reserved rights of the Tribe were extinguished when the land in Badger-Two Medicine was included in the Carson National Forest, the court should look to the enabling act that created the Forest and whether Congress' intent to abrogate the Blackfeet's reserved rights was expressly stated.²⁷⁸

²⁷⁰ *Crow Tribe of Indians v. U.S.*, 284 F.2d 361, 151 Ct. Cl. 281, 284 (1960) (stating that the Tribe “was required to show that it possessed a compensable interest in those lands at that time. This could have been shown in either one of two ways. First, the Tribe could have shown that it had ‘Indian title’ to the lands in question; that is, that it used and occupied those lands from time immemorial, to the exclusion of all others. On the other hand, it could show that at some time prior to 1868 the United States had recognized or acknowledged that the Tribe had title to the lands.).

²⁷¹ Act of Dec. 15, 1970, Pub. L. No.91-550, 84 Stat. 1437.

²⁷² *Supra* note 223.

²⁷³ Treaty of Fort Laramie with Sioux, etc., Sioux, etc.-U.S., Sept. 17, 1851, 11 Stat. 749.

²⁷⁴ Treaty with the Blackfoot Nation, Blackfoot-U.S., Oct. 17, 1855, 11 Stat. 657; *See also* *Blackfeet & Gros Ventre Tribes of Indians v. United States*, 119 F.Supp. 161, 162-163 (Fed Cl. 1954).

²⁷⁵ Agreement with the Blackfeet, S. Doc. No. 118, 54th Cong. (1896).

²⁷⁶ *Nie*, *supra* note 4 at 597-598.

²⁷⁷ *Id.* at 598. (referencing *United States v. Winans*, 198 U.S. 371, 381 (1905); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968)).

²⁷⁸ *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2462-2463 (2020). (*McGirt* held that the only place a court may look to determine whether a tribe continues to hold a reservation is in the Acts of Congress. Only Congress can divest a reservation of its land and diminish its boundaries. Additionally, it does not matter how many other promises to a tribe the federal government has already broken, “if Congress wants to break the promise of a reservation, it must say so, with its intent to do so clearly expressed.” *Id.* at 2463. *See also* *United States v. Dion*, 752 F.2d 1261 (1985)).

B. Broken Treaty Promises/Taking of Land

Once interest in, or title to, the land has been recognized, a tribe should establish that the federal government broke its treaty promise or failed to fulfill its trust relationship resulting in an unlawful taking of the land.²⁷⁹ The federal government has a “substantive duty to protect ‘to the fullest extent possible’ the Tribes’ treaty rights, and the resources on which those rights depend.”²⁸⁰ Both the Taos Pueblo and CSKT demonstrated this through claims brought to the ICC showing that their land was taken without the tribes’ consent and without just compensation.²⁸¹ While the Blackfeet were not successful in their claim to the ICC seeking just compensation for lands including, the ceded strip, that does not mean that there has been no recognition of broken treaty promises, specifically related to the Badger-Two Medicine area.²⁸² Senator Tester introduced S.Res. 250 in 2019 arguing that the Department of the Interior had failed in its trust duties to the Blackfeet by issuing oil and gas leases within Badger-Two Medicine.²⁸³ Therefore, the Blackfeet tribe can hold the federal government accountable for failure to protect their interest and rights in the Badger-Two Medicine, and that failure would constitute a taking.²⁸⁴

C. Cultural or Traditional Tie to the Land

Cultural or traditional connections to land often underpin and strengthen efforts to reclaim it. The Taos Pueblo and CSKT both showcased such ties, which not only enhanced their claims but also rallied support for their land recovery efforts. The Taos Pueblo continuously used their land for religious ceremonies, illustrating a deep-seated spiritual bond to the land.²⁸⁵ Similarly, the CSKT shared their unique, indigenous knowledge of both the bison and the Range.²⁸⁶ Their profound cultural connection to the bison even motivated them to reintroduce ancestors of the current herd on the Range to the Reservation.²⁸⁷ The Blackfeet Nation, too, emphasize the sacredness of the Badger-Two Medicine, linking it to their creation story – a connection recognized

²⁷⁹ Nie, *supra* note 4 at 596 (citing *Klamath Tribes v. United States*, No. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996)).

²⁸⁰ Nie, *supra* note 4, at 597-598 (quoting *Klamath Tribes v. United States*, No. 96-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996)).

²⁸¹ *Confederated Salish & Kootenai Tribes of Flathead Reservation, Montana v. United States*, 193 Ct. Cl. 801, 437 F.2d 458, 468 (1971); *Pueblo of Taos v. United States*, 15 Ind. Cl. Comm. 666, 682 (Sept. 8, 1965).

²⁸² *Blackfeet et al. Nations v. U.S.*, 81 Ct.Cl. 101 (1935).

²⁸³ S.Res. 250, 116th Cong., 1st Sess. (2020). The Resolution declares that Badger-Two Medicine area is sacred to the Blackfeet Tribe and holds “critical and unique importance in the culture of the Blackfeet Tribe”, but the DOI issued leases in the Badger-Two without proper Tribal consultation and failed in their trust responsibility to the Tribe.

²⁸⁴ *See generally Klamath Tribes v. United States*, No. 96-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996); *United States v. Mitchell*, 463 U.S. 206 (1983) (holding that where the federal government has taken comprehensive control over Indian trust property, the U.S. must fulfill their fiduciary duty as trustee to that property); *Seminole Nation v. United States*, 316 U.S. 286 (1942) (holding that under the trust relationship, the United States had “moral obligations of the highest responsibility and trust” to protect tribal lands, resources, and treaty rights).

²⁸⁵ Act of Dec. 15, 1970, Pub. L. No.91-550, 84 Stat. 1437.

²⁸⁶ Lyons, *supra* note 235, at 711.

²⁸⁷ *Id.*

when the National Register of Historic Places designated it as a CTCA in 2002.²⁸⁸ The Pikuni Traditionalists Association expressed:

Our religion is inseparably connected to the land. The mountains especially hold a great significance. In our beliefs “natural” and “spiritual” are one and the same. The mountains are essential to our religion; they provide the solitude of a pristine natural setting which enables our people to communicate with the Creator.²⁸⁹

The Blackfeet’s spiritual bond to the land mirrors the Taos Pueblo’s relationship with the Blue Lake area and the CSKT’s connection to the Range, further solidifying their rightful claim to the territory.

D. Financial Compensation Does Not Necessarily Lessen the Claim to Return

The principle that interest in the land can be extinguished through conquest or purchase is foundational to the framework on which modern Indian law was established and provided the background of taking Indian title by the federal government from various tribes.²⁹⁰ This principle has led tribes, including the Sioux in South Dakota and the Taos Pueblo, to refuse financial compensation for federally seized land, fearing that accepting money would equate to a land sale and extinguish their claims to the land.²⁹¹ The Taos Pueblo successfully used that refusal of payment in negotiations for the land with the Pueblo Lands Board.²⁹²

While refusing payment may provide leverage and a legal or moral support for ownership of the land, it does not necessarily mean that a tribe that has taken money for land in the past will be unable to have that land returned.²⁹³ Congress appropriated \$30,000 for CSKT, approximately \$1.56/acre, for the land taken to create the National Bison Range.²⁹⁴ In addition, the U.S. Court of Claims awarded CSKT \$6,066,668.78 as the difference between previous compensation and the fair market value of all land taken by the federal government, including the bison range, plus interest.²⁹⁵ Funds were distributed to members enrolled on March 17, 1972.²⁹⁶ In the Act returning the land to CSKT, there is no mention of money previously paid out or having to return payment.²⁹⁷

²⁸⁸ Ore, *supra* note 89, at 229; ADVISORY COUNCIL, *supra* note 83, at 4.

²⁸⁹ Gabriel A. Renville, *Blackfeet Environmental Ethnography* (1999) (Masters Theses, University of Montana), (On file with University of Montana) (quoting Pikuni Traditionalists Association (1996)).

²⁹⁰ VINE DELORIA JR., *Behind the Trail of Broken treaties: An Indian Declaration of Independence* 86-90 (1974) (citing Johnson v. M’Intosh, 21 U.S. 543 (1823)).

²⁹¹ Tom LeGro, *Why the Sioux Are Refusing \$1.3 Billion*, PBS (Aug. 24, 2011), https://www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23 (last visited Dec. 1, 2022).

²⁹² John J. Bodine, *Blue Lake: A Struggle for Indian Rights*, 1 AM. INDIAN L. REV. 23-32, 26 (1973).

²⁹³ See *supra* notes 198-199, 209-215 and accompanying text.

²⁹⁴ Confederated Salish and Kootenai Tribes of Flathead Reservation, *Montana v. U.S.*, 193 Ct.Cl. 801, 814 (1971).

²⁹⁵ *Id.* at 826.

²⁹⁶ Confederated Salish and Kootenai Tribes of the Flathead Reservation, *Montana: Distribution of Judgment Fund*, 25 U.S.C. §§ 1251-1253 (1972).

²⁹⁷ Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 1182 et al. title V, § 12 (2021).

When considering how these differing approaches could impact the Blackfeet Nation's recovery of Badger-Two Medicine, the important takeaway is that it should not matter whether the Blackfeet ever received just compensation for this fifth amendment violation of taking. While some may argue that they received payment for the land when they signed the 1896 agreement,²⁹⁸ others argue the Blackfeet Nation never received this money.²⁹⁹ Either way, the Blackfeet Nation still have a path forward to recover the land through legislative measures.

E. Continued and Persistent Fight for the Return of the Land

Both the Taos Pueblo and CSKT demonstrated that continued and persistent fighting for the land is crucial to the eventual return of the land. While it took decades for the Tribes to see that land returned, their efforts through the courts, media, and legislation led to their ultimate success.³⁰⁰ The Blackfeet Nation has been fighting for the protection of the Badger-Two Medicine for decades.³⁰¹ William Talks About, Chairman of the Blackfeet Nation's Tribal Business Council said:

The Front is our 'backbone of the world' and a vital part of the culture since it gives us life and is utilized everyday as it was by past generations of our ancestors to provide us strength, subsistence, cultural identity and to connect us with our creator. We are committed to its protection and to the protection of our treaty and reserved rights.³⁰²

The Blackfeet Nation's continued support and commitment to the Badger-Two Medicine is evident and will be an integral part in regaining control of the land, should the Tribe choose to pursue that path.

F. The Importance of Public Relations

Garnering media support is paramount for successful public relations campaigns in any cause, especially in politics. When the Taos Pueblo created a brochure to inform about their cause, they did not anticipate its vast impact.³⁰³ The brochure not only elevated national awareness about their mission but also secured support from Congress, the executive branch, and religious freedom

²⁹⁸ See *supra* note 63.

²⁹⁹ Quinn Smith Jr., *A Stolen History, Future Claims: The Blackfeet Nation and Glacier National Park*, THE WELLMAN MAGAZINE (Oct. 14, 2020), <https://sites.duke.edu/thewellianmag/2020/10/14/a-stolen-history-future-claims/#:~:text=%E2%80%9CIn%201932%2C%20a%20US%20District,had%20therefore%20forfeited%20these%20rights.%E2%80%9D> (Describes the distribution of the \$1.5 million that had been promised in the 1896 Agreement as being held in trust and paid over many years. In addition, in only 17 years, the commissioner of the tribe declared the Blackfeet bankrupt.).

³⁰⁰ See *supra* Part IV.A.2., Part IV.A.3., and Part IV.B.4.

³⁰¹ Solenex, LLC v. United States, No. 22-295, *appeal filed* (D.D.C. Nov. 29, 2022).

³⁰² Nie, *supra* note 4, at 593 (quoting Letter from William Talks About, Chairman, Blackfeet Tribal Business Council, to Whom it May Concern (Dec. 8, 2004)).

³⁰³ Deverell, *supra* note 134, at 65.

advocates.³⁰⁴ The CSKT harnessed media power by launching a website to address concerns about a proposed bill.³⁰⁵ Historically, the media has shaped political narratives, swaying public opinion and fostering political endorsement.³⁰⁶ The Blackfeet, already supported by various groups, including the Pikuni Traditionalists, Patagonia magazine, NARF, and Bob Marshall Wilderness supporters, the main focus had been on the *Solenex* lawsuit³⁰⁷ and the region's protection.³⁰⁸ Yet, with the media's leverage, this support could pivot towards land reclamation efforts.

G. Support for the Legislative and Executive Branches

Finally, one of the most important steps to land reclamation is finding the support of a legislator or within the Executive branch. The Taos Pueblo had the support of a tireless representative, as well as support within the White House, which helped get their bill through Congress and President Nixon's support in the signing of the Act.³⁰⁹ CSKT was able to also get the support of Senator Tester, FWS, and the Department of the Interior.³¹⁰ The Blackfeet's legislative efforts for protecting the Badger-Two Medicine began in the early 1990s with an unsuccessful attempt at a protection bill to withdraw the area from mineral leasing.³¹¹ However, that support has continued with additional bills being proposed and the most recent Badger-Two Medicine Protection Act introduced by Senator Jon Tester in 2020.³¹² Additionally, the USFS recommended the Badger-Two Medicine for the National Register as a Traditional Cultural District in 2002, recognizing the significant oral, cultural, and religious traditions of the Blackfeet in the Badger-Two Medicine.³¹³ Moving forward, should the Blackfeet pursue return of the Badger-Two Medicine, rather than protection, they would need to get support for the bill to be introduced and passed by Congress. Based on the failure of legislative support to protect the area in the past, hopefully the delegates from Montana would be willing to advocate for the return of the Badger-Two Medicine to the Blackfeet.

³⁰⁴ *Id.*

³⁰⁵ *Responses of the CSKT*, *supra* note 258.

³⁰⁶ Nikki A. Pieratos, Sarah S. Manning, and Nick Tilsen, *Land Back: A Meta Narrative to Help Indigenous People Show Up as Movement Leaders*, 17 LEADERSHIP 47-61 (2021).

³⁰⁷ *Solenex, LLC v. Haaland*, No. 13-993 (RJL), 2022 WL 4119776 at 14 (D.D.C. Sept. 9, 2022).

³⁰⁸ *See Protecting Badger-Two Medicine and the Grand Canyon*, LIVING ON EARTH, Mar. 12, 2021, <https://www.loe.org/shows/segments.html?programID=21-P13-00011&segmentID=4> (last visited Nov. 28, 2022); Randall, *supra* note 100.

³⁰⁹ Graybill, *supra* note 163, at 142-146.

³¹⁰ *Reed v. Salazar*, 744 F.Supp. 2d 98, 107 (D.D.C. 2010); *Comprehensive Conservation Plan*, *supra* note 212; Mosquera, *supra* note 164.

³¹¹ HOFFMAN & MILLS, *supra* note 15 at 65; *See* H.R. 3873, 101st Cong. (1993).

³¹² *Badger-Two Medicine Protection Act*, S.4288, 116th Cong. (2020), *See also* S.Res. 250, 116th Cong.(2020). (A resolution expressing the sense of the Senate that the Department of the Interior has broken a commitment to the Blackfeet Tribe to defend the cancellation of all leases in the Badger-Two Medicine area and urging the Department of the Interior to work closely with the Blackfeet Tribe to defend the Badger-Two Medicine area from oil and gas development).

²⁵⁶ HOFFMAN & MILLS, *supra* note 15 at 66 (citing DOI/BLM letter to Solenex 1, 7 (Mar. 17, 2016)).

VI. CONCLUSION

Cultural and traditional ties to land often form the bedrock of recovery attempts, establishing an unbreakable bond that serves as a catalyst for restoration movements. Drawing from past instances, we can discern a structured framework for pursuing land back initiatives.

The experiences of the Taos Pueblo and the CSKT underscore that the path to land restoration is not merely about reclaiming a title. At its heart, it is about the reestablishment and nurturing of a profound relationship that indigenous communities share with their ancestral lands. The choice to pursue such an initiative, however, rests primarily on the tribe's intent and interest in regaining control.

It is paramount that indigenous communities are not merely spectators, but active participant in decision-making processes concerning land management and utilization.³¹⁴ "If attempts to protect sacred terrains and land hit roadblocks, then tribes should have other avenues available to reassert their rights and claim their legacy.

When Congress initially hesitated to restore the Blue Lake area to the Taos Pueblo, there were fears of setting an unwelcome precedent.³¹⁵ Yet, history has shown that such land transfers to indigenous tribes have been sporadic, with each being carefully assessed based on multiple variables – from reserved tribal rights and deep-rooted connections with the land to the prevailing political environment.

The Blackfeet's relentless drive to safeguard the Badger-Two Medicine Area highlights a broader narrative of tribes striving to conserve their sacred territories. Perhaps, placing the land in trust for the Blackfeet Nation could be the key to truly shielding the Badger-Two Medicine Area. This move would not only safeguard the area but also pave the way for the renewal of the age-old bond between the Blackfeet Nation and its ancestral domain.

³¹⁴ See Stark et al., *supra* note 7, at 446 (referencing Lindsey Schneider, *Land Back beyond Repatriation: Restoring Indigenous Land Relationships*, in *THE ROUTLEDGE COMPANION TO GENDER AND THE WEST* (Susan Bernardin ed., forthcoming 2022)).

³¹⁵ Deverell, *supra* note 134, at 65.