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WILDERNESS PROTECTION ON FOREST SERVICE LANDS:
BADGER-TWO MEDICINE

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The Public Lands During the Remainder of the Twentieth Century: Planning, Law and Policy in the Federal Land Agencies

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I. Wilderness designation is encountering new complications.
   A. Wilderness as an official designation of National Forest land originated with the Forest Service designations were made administratively by the Forest Service.
   B. After passage of the Wilderness Act in 1964, which established the National Wilderness System, designation became the responsibility of Congress. The Forest Service was asked to recommend areas for designation as Wilderness, but Congress more and more listened to the public in its consideration and decisions as to which areas to designate for Wilderness.
   C. The Forest Service recommended areas for Wilderness in RARE I and RARE II. After both were declared unconstitutional, unofficial detente appeared to reign during which wilderness recommendations were proposed state by state and Forest Service recommendations would appear in the Forest Plans being prepared to conform with the forest Management Act of 1976 (NFMA) requirement for a plan on each National Forest in ten years.
   D. In addition to the requirements of NFMA which are still being interpreted, Wilkinson and
Anderson, Land and Resource Planning in the National Forests, Oregon Law Review Vol. 64 No. 1 & 2 (1985), the Forest Service is required to observe a number of other laws, many of them the product of the environmental era: The National Environmental Policy Act (NEPA), the Forest and Rangeland Renewable Resources Planning Act (RPA), the Threatened and Endangered Species Act of 1972 (ESA) and others, and in some cases, certain Indian Treaty Rights and the American Indian Religious Freedom Act of 1964 (AIRFA) as in Badger-Two Medicine.

II. The Lewis and Clark National Forest stated that it developed its Forest Plan and Environmental Impact Statement in accordance with "the National Environmental Policy Act of 1969 (NEPA), the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA), the National Forest Management Act of 1976 (NFMA), and other appropriate federal laws and regulations including (because certain Indian Treaty Rights are involved), the American Indian Religious Freedom Act of 1964 (AIRFA)."

A. The forest planning process began in October, 1978 with the publication of the Notice of Intent in the Federal Register.

B. Public participation effort began with the identification of issues and concerns to be addressed.
1. Concerns for development: Oil and gas exploration and development including possible major wells requiring roads, pipelines and plants; timber of minor value unless road development of oil and gas made it more feasible, motorized recreation, livestock grazing and the overall development of new jobs and income.

2. Concerns for environmental protection:
Wildlife of a wide variety and large numbers providing some of the best big game hunting in the contiguous states; endangered and threatened species, particularly the grizzly bear and gray wolf, Wilderness potential of high quality contiguous to the Bob Marshall Wilderness complex and to Glacier National Park; the continuance in natural condition of a major ecosystem for protection of its natural integrity both for study and research as a permanent baseline and also for continued enjoyment of non-consumptive recreation, solitude and spiritual experience.

3. Treaty rights and religious concerns of the Blackfeet tribe created concerns not normally encountered in areas being considered for Wilderness designation. In the portion identified as RM-1, which is
locally known as the Badger-Two Medicine area, the tribe maintained certain rights when this area as well as that portion of Glacier National Park lying east of the Continental Divide were ceded to the federal government. The Badger-Two Medicine area, known also as the ceded strip, is now administered by the Forest Service as part of the Lewis and Clark National Forest. The critical issue concerns the rights of the Indians to continue their practice of religion in this area.

C. The Draft Environmental Impact Statement (DEIS) for the Lewis and Clark National Forest was released for public review on July 26, 1982. Eleven alternatives were documented and analyzed. In subsequent action, the Ninth Circuit Court's ruling in the State of California v. Block invalidated the RARE II EIS to which the Lewis and Clark National Forest Plan DEIS was tiered, and resulted in the reinventory of roadless lands and the reevaluation of wilderness potentials in those areas in a supplement to the DEIS. Five additional alternatives were analyzed. The supplement was issued on November 9, 1984. After further public comment and
revision the final FIS was prepared, and on June 4, 1986 the Regional Forester's Record of Decision documented Alternative C as the management strategy for the Lewis and Clark National Forest for the next 10 to 15 years. In addition to the normal legal requirements, the Forest Service made special effort to consult with the Blackfeet Tribal Business Council, mostly about treaty rights and also with the Blackfoot Honorary Council about religious needs. The Service organized a Religious and Cultural Use Topic Team to deal with possible conflicts on a "project by project" basis.

III. The oil crisis raised pressure from the oil companies to get faster approval for leases on public lands. The backlog of applications for exploration and drilling on National Forests was piling up and awaiting completion of the Plans before decisions on leasing. An amendment by Senator Melcher of Montana to the Energy Securities Act of 1980 ordered the FS to proceed with action on leases without waiting for completion and approval of the Forest Plans. The Lewis & Clark Forest completed an Environmental Assessment (EA) and issued leases for oil and gas in 1981-82. Its claim of "intensive public involvement effort" is disputed by various public groups and individuals. The L & C NF moved quickly and in 1981 issued
leases to drill on the entire Forest. Limits of "No Surface Occupancy" (NSO) were imposed on certain lands under consideration for wilderness, but this did not include the Badger-Two Medicine, all of which was leased. Exploration with blasting, roading, and helicopter coverage disturbed wildlife, chased the mountain goats out of the area, disturbed grizzlies and greatly added to the concern of the Blackfeet tribal members, particularly those concerned with the traditional religious practices that had been concentrated here.

In 1985 the Bureau of Land Management approved an application to drill (APD) to Petrofina. The Wildlife Federation and others appealed on the basis of ESA and the effect on grizzly bears. The appeal was granted.

The Forest Plan was completed and the decision notice issued in 1986. There have been ten appeals in three categories: the environmental groups of Montana and national, the local Badger Chapter of the Glacier/Two Medicine Alliance, and six individuals including three religious traditionalists now called Pikuni Traditionalist's Association, Inc., whose appeal is strongly based on AIRFA.

IV. Description and Background of the Rocky Mountain Front area.
A. The Rocky Mountain Front, which lies in the western portion of the L & C NF and of which the Badger-Two Medicine area is a part, is where the Rocky Mountains jut out of the Great Plains. Forming the eastern flank of the Bob Marshall Wilderness complex, the Front contains some of the most impressive wildlife populations in the lower 48 states, including the nation's largest herd of bighorn sheep, the second largest herd of elk, and the most stable populations of grizzly bear. In fact, every species that ever existed there, with the notable exception of the bison, still resides in this rugged stronghold of the Rocky Mountains. The Front has been called "America's Serengeti."

B. The Badger-Two Medicine is a rugged, mountainous area of about 120,000 acres adjacent to Glacier National Park to the north and the Bob Marshall Wilderness complex to the west. It is part of the Rocky Mountain Front. Portions of the Front are now under consideration for inclusion in the Bob Marshall Wilderness as a means of joining wilderness from the present boundary with the public and private game ranges at the foot of the mountain range. These lands were purchased by the state of Montana and private organizations, particularly
The Nature Conservancy and the Boone and Crockett Club, for winter range for the wild game herds that summer in the wilderness area. The tribe still feels that they were cheated out of their rights in the "ceded strip" and believe that their rights to this land are well beyond those specified in the Treaty.

C. In 1976 environmentalists proposed a bill to study the area north of the original Bob Marshall Wilderness as a new wilderness to be called the Great Bear. The original proposal included a portion of the Badger-Two Medicine area. Senator Metcalf proposed the bill. But a delegation from the Blackfeet Tribe protested on the basis that this would interfere with their treaty rights and Senator Metcalf removed this portion from the bill. The Great Bear Wilderness was approved in 1978 without the Badger-Two Medicine area. Ever since then, members of the delegation refuse to consider wilderness designation of this area until they have full approval from the tribe. Environmentalists feel that they made a serious error by not being in touch with the tribe and working out an agreement with them then.

The "ceded strip" is now administered as part of the L & C NF. Treaty rights are recognized and have not been a problem until recent-
The Indians are now concerned over the development activities taking place and proposed, and some of the Indians are now concerned that they are losing control of the area and that development of roads, timber harvest and so on is not what they want. They are now looking to wilderness designation as a means of protecting their rights provided that their treaty rights are protected. But the Indians are deeply divided over this. Jobs and money are also important. Unemployment runs 80%. Poverty prevails. Cutting off any possible source of money flow seems suicidal to many. They do not speak in one mind. The governing council of the tribe favors development. The traditional religious practitioners want the area preserved as wilderness.

V. The Glacier-Two Medicine Alliance (a citizens' organization) appealed the Plan and FIS for the L & C NF on July 15, 1986. The appeal contained a request for a stay and a request for time extension for filing statement of reasons.

A. Appellants sought total reevaluation of the FIS process to determine the wilderness qualities of each area and wildlife studies, environmental impact of development plans...and to include an intensive study of H2SO4 on humans, wildlife, water supplies, fisheries and soils.
B. The general legal basis of the appeal included violation of NFPA and the mandate of California v. Block (690 F.2d 753 (9th Cir. 1982)).

C. Oil and gas leasing/exploration and development have been conducted illegally in violation of NFPA, ESA and the Administrative Procedures Act. Judge Hatfield in Federal District Court May 27, 1986, in Bob Marshall Alliance v. Watt stated that the decision not to conduct a full EIS before leasing the Deep Creek Unit (RM-4 of the L & C NF) was "unreasonable" and in violation of NEPA, NEMA and ESA. The Forest Service has appealed this decision.

D. Oil and gas development in RM-1 (Badger-Two Medicine) violates the American Indian Religious Act (AIRFA, P.L. 95-341), First Amendment Rights and the Administrative Procedures Act. Roadbuilding and motorized recreation and the management prescriptions for RM-1 also violate these acts.

1. The FS consulted with the governmental leaders, not the traditional religious leaders as provided in AIRFA, and thus did not learn religious needs.

2. Religious practices and traditions of the Blackfeet can only be provided for if the whole RM-1 (Badger-Two Medicine) area can be maintained in its natural condition and
be designated wilderness. Provision for protection of individual sites as proposed on a project by project basis is unsatisfactory. The decision is a land use decision to allocate the whole area, not just small individual sites.

E. Management prescriptions for the Rocky Mountain Ranger District (embracing the Rocky Mountain Front) violate the Wilderness Act, the Administrative Procedures Act, NEPA, and ESA.

F. Oil and gas development may affect the economic livelihoods of persons on the Rocky Mountain Ranger District.

G. Effect of H2S04 were not studies or known. Water quality studies violate NEPA.

H. Summary. The Plan and FIS are deficient, violating federal and state laws. Constitutional rights would be denied. Irreversible and irretrievable commitments are made in roadless areas, no site-specific analysis is made regarding development proposals and several laws require it. The Plan and FIS assume mitigation is possible for any development with no supporting data. Threatened and endangered species are not protected. Law enforcement goals are unrealistic. Data are ignored on a large scale. For example, the FWS on the Hall Creek APD declared the grizzly population
severely depressed and further threatened by the proposed well. The wildest land remaining in the lower 48 is found here. Genetic diversity here is perhaps greater than any area in the northern Rocky Mountains.

VI. The Plan and PIS were also appealed by six people, three of whom are identified as "members of the Blackfeet Tribe, and are practitioners of their native traditional religion." Their appeal is based on the contention that the effects of development as proposed in the Plan "will violate appellants' rights in RM-1 (Badger-Two Medicine) by infringing on their free exercise of religion, and in the Blackfeet Tribal members' rights to access, hunting, fishing, and timber removal."

They argue that "by protecting the area, say through wilderness designation, with a timber removal clause for Blackfeet members, all rights would be protected as far as access, hunting, fishing, and timber cutting." Sacred sites and the significance of the area as sacred and "natural," and therefore free exercise of religion, would also be protected. In their Statement of Reasons they specify:

A. The Forest Plan and PIS fail to comply with the AIRFA (P.L. 95-341), and therefore the Administrative Procedures Act. Section 2 of AIRFA states that "Federal Agencies will consult with Native traditional religious leaders." Senate
Report 95-709 specifies that religious leaders must be consulted:

1) . . . it is imperative that the evaluation find a source of knowledge if it is to rectify the problem. It is the intent that that source be the practitioners of the religion, the medicine people, religious leaders, and traditionalists who are natives --- and not Indian experts, political leaders, or any other nonpractitioner.

George Kipp (one of the appellants), a native traditional religious leader, had not been approached on this matter by anyone in the FS and to his knowledge, no other religious leaders had been consulted as religious leaders on any matters pertaining to RM-1. "If the Forest Service would have consulted with the religious leaders they would have learned that the entire area is indispensable to native traditional religion and considered the traditionalist 'stronghold.'" To imply that only the sites are sacred is to imply that only the altar in a church is sacred and the rest could be torn down." Cite Circuit Judge Canby in Northwest, 764 F.2d, 581:

1) Contained within the Blue Creek Unit is a segment of land known as the "high country" which is considered sacred by . . . Indians who live in the surrounding region. Although the Indians use specific sites within the Blue Creek Unit for prayer and religious uses, the sacred area encompasses an entire region.
"The Forest Service interest seems to only want to indicate and map sacred sites. This in itself represents an infringement of religious rights. In the first place it is contrary to the perception of "land" held by practitioners of this native religion to mark it neatly on a map. It also takes from the sacredness of the site. Both these concepts, though they may be hard to relate to, are real to the practitioners."

"Congress realized that such concepts as these, which are common among traditional religions, are often not considered or understood by Federal Agencies." This was reflected in the House of Representatives Report on American Indian Religious Freedom (No. 95-130P):

2) Lack of knowledge, unawareness, insensitivity, and neglect are the keynotes of the Federal Government's interaction with traditional Indian religion and culture.

Pinpointing sacred sites and identifying them makes it impossible to maintain secrecy required for religious activity. The curious sightseers and others cannot be kept away. Sacred objects are removed, graves desecrated. The need for privacy and isolation is common in native ceremonies such as vision quests. Isolation is becoming more and more difficult to
find. Congress recognized this in House Report 95-1308:

4) ...actual interference in religious events. These instances include being present at ceremonies which require strict isolation ... and

5) An example of this (Government interaction) is the theft or removal of votive offerings left at religious shrines.

and

6) This direct Federal interference in the religious ceremonies imposes on one religion, by government action, the values of another.

"The EIS and Forest Plan should carefully consider the aspects of solitude and the need for sacred sites to remain secret. Mapping and locating specific sites is the wrong approach. Preservation of the entire area, and allowing the native traditional religious leaders to be fully in control ... is the approach that allows for the most effective "accommodation" of freedom of religion in accordance with AIRFA."

The hearings on the 956h Congress recommend:

2) Each Federal Agency can also revise existing regulations, policies and practices to provide for separate consideration of any Native American religious concerns prior to making any decisions regarding use of federal lands and resources.

B. L & C Plan and EIS violate First Amendment rights to freedom of religion and Fourteenth
Amendment to protect persons' "liberties" to practice that religion.

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C. L & C NF Plan and FIS fail to comply with NEPA, the Wilderness Act of 1964, and therefore, the Administrative Procedures Act.

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D. Intentions to consult with Blackfeet Tribe as indicated in L & C Plan and FIS, questioned in light of numerous previous examples of bad faith towards the Blackfeet Tribe on the part of the U.S. Government and its agency the L & C NF.

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VII. The Forest responded to the appeal of the six people (now called the Pikuni Traditionalist's Association). No other responses have been issued yet. By Responsive Statement sent October 28, 1987, the Chief of the FS denied the stay request, and the Regional Forester in Missoula, Montana recommended that the appeal be denied. "All operations were legal":

A. Concerns for threatened and endangered species are expressed, recognized and provided for.

B. Effects on wildlife, water quality, etc. not serious.

C. AIRFA was given appropriate attention. The FS gave it major concern, held meetings, consulted
with the governing council and the Honorary Council which it believed represented the older religious practitioners. The FS expressed its policies in regard to the Blackfeet Tribe in several ways:

1. "Court cases establish that AIRFA imposes a duty on federal agencies to 'evaluate their policies and procedures with the aim of protecting Indian religious freedoms'. . . However, the AIRFA does not require that Native religious considerations always prevail to the exclusion of all other considerations." Id. The District of Columbia Court of Appeals has stated: (p. 8) "... an agency undertaking a land use project will be in compliance with AIRFA if, in the decision-making process it obtains and considers the views of Indian leaders, and if, in project implementation it avoids unnecessary interference with Indian religious practices." Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983).

2. In its consultation with the Indian leaders, sites were discussed to protect religious sites on a project by project basis. The land use decision to lease the whole area for oil and gas was not a point of consideration. "I believe that the L & C
National Forest clearly made a good faith effort to comply with AIRFA in the initial stages of the Planning Process and has continued that effort." In addition, the Forest Plan provides to initiate contact with the Blackfeet Tribe in advance of any oil and gas development activities to promote compliance with the intent of AIRFA to protect Indian religious freedom.

3. "Oil and gas exploration related activities will not have significant adverse impacts on wildlife under the guidelines, management standards, and prescriptions to be used to mitigate any potential impacts."

4. Don't worry about the H2SO4.

VIII. The appellants issued a Reply Statement to the FS's Responsive Statement (Appeal NO. 1633).

A. The management area RM-1 (Badger-Two Medicine) has been allocated management prescriptions that permit activities that impermissibly infringe upon the appellants' right to freely exercise their traditional Blackfeet religious practices as guaranteed by the First Amendment.

B. In addition, the planning process is flawed and unacceptable by standards set forth in AIRFA and NFPA because the FS failed to consult traditional practitioners in a way proper to traditional Blackfeet protocol and made only
cursory contact. Their decision is based on inappropriate sources of information.

C. The failure to assess environmental consequences on wildlife, wilderness, water and visual resources on all RARF II lands and then evaluate those consequences in light of religious beliefs requires a restudy of those areas. Also the part of the Badger-Two Medicine RARF II must be restudied for wilderness suitability.

D. To the FS claim that the Plan is not the decision-making document, the appellants argue that the management prescriptions for RM-1 are designed to facilitate a comprehensive program of oil and gas development, with attendant impacts of road construction, seismic testing, helicopter traffic and greatly increased human presence. The land use decisions are properly made in the Plan. Promises to evaluate and mitigate impacts on the traditional religious practices at the project level are meaningless.

IX. The BLM reissued the APD to Petrofina on the Pal Creek well on April 13, 1987. Several groups are planning to appeal. The groups believe that they will have to appeal each APD for the Badger-Two Medicine area as they are granted. They believe that they can hold the line here unless another oil emergency occurs. Their hope for termination of
leases is far less optimistic. They look forward to the ten year renewal period where they will seek to eliminate or greatly reduce the leases. Until that time, potential for wilderness designation is not promising. In Connor v. Burford, leasing on the Flathead and Gallatin National Forests was held to be illegal on the basis of NEPA and ESA. Now awaiting 9th Circuit decision. If upheld, leases will have to be redone and some not issued. An FIS will be required.

X. Northwest Indian Cemetery Protective Association v. Peterson, 795 F.2d, 6PP (9th Cir. 1986) is the strongest support for the Indians' religious case. Their case is well put in Jay Hansfort C. Vest, Traditional Blackfeet Religion and the Sacred Padger-Two Medicine Wildlands, Environmental Review June, 1987. Also, Joseph Epes Brown, The Spiritual Legacy of the American Indian, NY Crossroads Press, 1982. The FS has appealed this case to the Supreme Court. The case is based on protection of First Amendment rights to disturb natural conditions infringes on freedom to practice their religion. The FS is most concerned for the effects on many other areas. This is the reason for their appeal. Supreme Court review is critical.

XI. On the wildlife issue, the FS should have seriously considered a "no action" alternative. This is a depressed population of grizzly bears, a threatened
species. While the Fish and Wildlife Service and the State counted different numbers, they are essentially in agreement in their testimony that the Hall Creek well will prevent complete recovery and the Badger-Two Medicine area would not reach its potential population if the APD were granted.