



June 20, 2023

Bureau of Land Management  
Black Hills National Forest  
Forest Supervisor's Office  
1019 N. 5<sup>th</sup> Street  
Custer, South Dakota 57730

*Via Online Public Comment Portal*

<https://cara.fs2c.usda.gov/Public/CommentInput?project=NP-3479>

RE: Pactola Reservoir-Rapid Creek Watershed Withdrawal  
#NP-3479

Dear Bureau of Land Management,

The American Civil Liberties Union (“ACLU”) and American Civil Liberties Union of South Dakota (“ACLU SD”) submit this letter to provide comment in support of the U.S.D.A. Forest Service’s application for the Pactola Reservoir-Rapid Creek Watershed Withdrawal (“Pactola Watershed”) in Pennington County, South Dakota. We respectfully request you 1) approve the withdrawal of the Pactola Watershed from future settlement and mining up to 20 years and on a permanent basis; and 2) expand the area to be withdrawn to include *all of the Black Hills of South Dakota* to give effect to the government’s treaty obligations; prevent devastating pollution of water systems, natural resources; and to stop the ongoing desecration of sacred Indigenous sites.

The Pactola Watershed **and** the Black Hills of South Dakota have long been the spiritual and ancestral lands sacred to the Oceti Sakowin Peoples along with two dozen other Indigenous Tribes. This region presently carries deep cultural, religious, spiritual and sovereign significance to the Dakota, Lakota and Cheyenne Peoples of South Dakota. The very existence of Indigenous life and culture is dependent upon the Black Hills and Pactola Watershed for spiritual, religious and cultural continuity, along with drinking water and natural resources to Indigenous People. Because of this, both the Black Hills of South Dakota and the Pactola Watershed should be protected and permanently withdrawn from all future mining and settlement.

### **1. Scope of Public Comment and the ACLU’s Interest in the Pactola Watershed and Black Hills of South Dakota**

While the ACLU welcomes the long-overdue application to withdraw the Pactola Watershed for 20 years, it does not nearly go far enough in terms of land size or duration. The application must include the entirety of the Black Hills and prohibit all mining and settlement permanently for several reasons. First, the Black Hills belong to the Sioux Nation Tribes legally under the 1868 Treaty of Fort Laramie. See, Fort Laramie Treaty Act of Apr. 29-Nov. 6, 1868, 15 Stat. 635. Even though the later Act of February 28, 1877, 19 Stat. 254, purportedly took the Black Hills from the Sioux Nation, many tribes continue to dispute the legality of this action by the U.S.

Government. The Sioux Nations obtained a ruling by the U.S. Court of Claims that the Act of 1877 violated the Fifth Amendment. See, *United States v. Sioux Nation of Indians*, 601 F.2d 1157, 1161 (Ct. of Claims 1979). The court ruled the Sioux Nations were entitled to monetary damages, which they rejected, because accepting the money would relinquish their land claims. Indigenous Peoples consider the Black Hills—which include Pactola Watershed—sacred in their entirety. The Sioux Nation Tribes have not relinquished ownership of the Black Hills; have not accepted payment for the illegal taking of it; nor have the Tribes ever agreed to sell the Black Hills to the United States. To this day, the Sioux Nation Tribes continue to fight for this sacred land under their sovereignty as Native Nations. Second, the devastating effects of mining and trespass onto the Black Hills interferes with Indigenous religious ceremonies that take place within several individual sacred sites in the Black Hills. Third, the devastating health effects that the long history of mining in the area have caused to Indigenous and other Peoples through the arsenic and heavy metal pollution of the rivers and waterways in the Pactola Watershed are untold. All three threaten tribal sovereignty guaranteed to the Sioux Nation Tribes under the U.S. Constitution and federal laws; all Indigenous People's First Amendment rights to exercise their religious beliefs; and Indigenous People's very lives and existence through the ongoing harm to their physical health.

The ACLU and ACLU of South Dakota are longtime supporters and defenders of the rights of all Indigenous Peoples to retain their specific and unique cultural and religious traditions and practices and enforce assurances made to them by the United States in treaties, compacts, and other government commitments. In our Indigenous Justice work, we are committed to following the lead of Indigenous Peoples as they endeavor to uphold their sovereignty, dignity, and identities. We believe that the future existence of Tribes across our country depends ultimately upon secure and permanent land bases. So, too, does their religious freedom. We vigorously defend the rights of all people to practice their faith. The First Amendment protects religious equality for all; people of every religion, not just the majority faith, have the right to hold and to exercise their religious beliefs. In the context of Indigenous Peoples and sacred landscapes, there can be no exercise of religious freedom if the foundation for the practice of one's belief system has been forever decimated. For Indigenous Peoples, whose belief systems and spirituality are intimately tied to the land to which they belong, exercise of religion is intimately tied to the protection of sacred landscapes.

## **2. Tribal Sovereignty**

Indigenous Peoples and their governments have inherent sovereignty, the right to govern themselves and their lands and determine their own futures. This sovereignty predates the existence of the United States and stretches back to time immemorial. It does not depend on any external recognition. Facing the seemingly insurmountable problems of impoverishment and negative outcomes Indigenous Peoples face due to ongoing colonization, the exercise of tribal sovereignty has proven to be the most successful policy.<sup>1</sup>

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<sup>1</sup> For example, JOSEPH P. KALT AND JOSEPH WILLIAM SINGER, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, NATIVE ISSUES RESEARCH SYMPOSIUM, HARVARD UNIV. (2004), available at: [https://scholar.harvard.edu/files/jsinger/files/myths\\_realities.pdf](https://scholar.harvard.edu/files/jsinger/files/myths_realities.pdf).

The U.S. Constitution, legal precedent, hundreds of treaties, acts of Congress, and applicable principles of human rights affirm and protect tribal sovereignty. Through treaties and other agreements, the United States and Native Nations entered into government-to-government relationships, the federal government acknowledging Tribes' existence as sovereign nations predating the U.S. In exchange for vast swaths of ancestral territory—nearly the entire country—and often upon forced removal to distant, barren lands, the federal government assumed a trust relationship with the Tribes, legally binding itself to provide for the education, health, and well-being of Native American peoples; to hold tribal land in trust and respect self-determination; and to provide federal protections for sacred and burial sites and rights to hunt, fish and gather.

A. The Current Occupation and Mining of the Black Hills in South Dakota Must be Viewed Through the Lens of the Violent History of Colonization in South Dakota.

*The American landscape we know today is marked by a history of genocide, forced relocations, and the search for one people's freedom at the cost of many others'. The Indigenous populations across this land were murdered, traumatized, and relocated to often unfamiliar territory to create what is now the United States. Once removed from sight, Native voices have been stifled by the conditions on reservations and the legacy of colonialism.*<sup>2</sup>

In South Dakota, the Lakota Peoples were the last forced onto a reservation after the massacre of several hundred Indigenous women, children and men at Wounded Knee.<sup>3</sup> The leaders of the Tribes were arrested, labeled “insane” and held in “insane asylums” in order to forcibly disrupt Indigenous communities and Tribes. As an example, the *Asylum for Insane Indians* in Canton, South Dakota operated from 1902 until 1934. “Canton was not designed to take care of the mentally ill. It was more used to incarcerate [Indigenous] individuals who refused to conform to the strict laws of a foreign government system which labeled them mentally ill in order to confine, constrict and keep them from influencing others to do the same.”<sup>4</sup> Native families were torn apart, children forced to attend boarding schools where their identity was stripped from them and any attempt to show Indigeneity or to escape was severely punished. Native children in the forced boarding schools were brainwashed to show no attachment to their family, culture, identity and religion and if they did, they were beaten, humiliated, their heads were shaved, and they were sent to even stricter facilities as punishment. Indigenous families who were hunters were forced to give up their only way of survival and learn agrarian ways, which were foreign and often limited to sections of land not suitable for farming.<sup>5</sup> The effects of colonization in South Dakota include generations of Native Americans whose parents, grand-parents, and great-grandparents were forced by the American government to learn, internalize and adopt survival adaptations that have lingered throughout their lineage creating incredibly difficult circumstances to overcome.

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<sup>2</sup> Cheyenne River Reservation, South Dakota, “The Lakota Nation and the Legacy of American Colonization”, Annie Coombs & Zoë Malliaros, The Architectural League, New York, <https://archleague.org/article/cheyenne-river-south-dakota-intro/>

<sup>3</sup> id. <https://archleague.org/article/cheyenne-river-reservation-boarding-schools/>

<sup>4</sup> id. citing, Richie Richards, “Asylum for Insane Indians,” Native Sun News Today, September 26, 2018.

<sup>5</sup> Id. <https://archleague.org/article/cheyenne-river-reservation-boarding-schools/>

This violent past continues today through on-going government-led interference with Indigenous Peoples' access and ownership to ancestral lands in South Dakota, like the Black Hills. Under the 1868 Treaty of Fort Laramie, the Sioux Nation Tribes are the legal and rightful owners of the Black Hills, South Dakota, where the Pactola Watershed is located. As discussed above, they have never willingly ceded or sold their land to the United States and have accepted no money from the United States for this land.

Despite this, there are presently 261,000 acres of active mining claims in the Black Hills, representing a sharp increase of 33,000 acres since December 2022.<sup>6</sup> Because the entire Black Hills are illegally occupied treaty lands, all claims to mining rights anywhere in this region are not and never were legitimate. See *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) ("the 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868."). The withdrawal of the Pactola Watershed and the withdrawal of the entirety of the Black Hills<sup>7</sup> from all future mining, as requested by the Great Plains Tribal Water Alliance<sup>8</sup> should be approved to give effect and to enforce the 1868 Treaty of Fort Laramie.

### **3. Religious Freedom Under the First Amendment**

Separate from the question of ownership, the entirety of the Black Hills, including the Pactola Watershed, remain sacred within Indigenous religious, spiritual and cultural contexts. The Black Hills are known to the Lakota Peoples as "Paha Sapa" which means, "The Heart of Everything that is," signifying the importance of the Black Hills to the Lakota People.

"Manifestly, the Lakota people and the Black Hills are deeply connected through stories that demonstrate the sacredness of the land. It is inherent in Lakota spiritual and cultural understanding that this land holds infinite significance, and it is thus the obligation of the people of the earth to protect and preserve its sanctity."<sup>9</sup>

The sacredness of the Black Hills is also recognized by several other Indigenous Peoples and Tribes, including the Dakota, Nakota, Cheyenne, Omaha, Arapaho, Kowa and Kiowa-Apache Peoples, who all reference the Black Hills in their history and lore.

Indeed, the United States Forest Service has acknowledged that the Black Hills currently maintains a nation-to-nation relationship with 16 federally recognized Indian tribes from across

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<sup>6</sup> Black Hills Clean Water Alliance, Mapping Claims, <https://bhcleanwateralliance.org/mapping-claims/>, last accessed June 2, 2023.

<sup>7</sup> "The Forest Service should impose a moratorium on all mining in the Black Hills," according to Doug Crow Ghost, Great Plains Tribal Water Alliance Chairman. <https://southdakotasearchlight.com/2023/04/26/public-tells-forest-service-to-expand-proposed-mining-ban-in-portion-of-black-hills/>

<sup>8</sup> The Great Plains Tribal Water Alliance is comprised of the Oglala Sioux Tribe, Rosebud Sioux Tribe, Standing Rock Sioux Tribe, Flandreau Santee Sioux Tribe and Lower Brule Sioux Tribe. <https://www.tribalwateralliance.org/about>

<sup>9</sup> Indigenous Religious Traditions, Black Hills – Stories of the Sacred. Justine Epstein, November 2012. <https://sites.coloradocollege.edu/indigenoustraditions/sacred-lands/the-black-hills-the-stories-of-the-sacred/>

multiple states including South Dakota, North Dakota, Oklahoma, Wyoming, Nebraska, Montana and Utah that have aboriginal territories and traditional ties to the Black Hills. These tribes are:

- Cheyenne River Sioux Tribe of the Cheyenne River Reservation
- Cheyenne and Arapaho Tribes
- Crow Creek Sioux Tribe of the Crow Creek Reservation
- Eastern Shoshone Tribe of the Wind River Reservation
- Flandreau Santee Sioux Tribe
- Lower Brule Sioux Tribe of the Lower Brule Reservation
- Three Affiliated Tribes of the Fort Berthold Reservation (Mandan, Hidatsa, and Arikara)
- Northern Arapaho Tribe of the Wind River Reservation
- Northern Cheyenne Tribe of the Northern Cheyenne, Montana Indian Reservation
- Oglala Sioux Tribe
- Rosebud Sioux Tribe of the Rosebud Indian Reservation
- Santee Sioux Nation
- Sisseton Wahpeton Oyate of the Lake Traverse Reservation
- Spirit Lake Tribe
- Standing Rock Sioux Tribe
- Yankton Sioux Tribe<sup>10</sup>

Additionally, five other tribes have an interest in the Black Hills based on cultural and traditional ties including Crow Tribe, Kiowa Indian Tribe, Apache Tribe, Comanche Nation, Ute Indian Tribe of the Uintah and Ouray Reservation.<sup>11</sup> As the U.S. Forest Service has acknowledged, “These tribes maintain interest in the homeland-related traditions of their people and are consistently look[ing] for opportunities to re-establish their connection to their ancestral landscape [].”<sup>12</sup> And, it is undisputed that “certain geographical areas and resource types have particular meaning to tribes affiliated to the Black Hills [], including, but not limited to, prominent topographic and landscape features; stone circles, cairns, and game drives; and rock art. Most, if not all tribes, consider archaeological and historical sites as significant ancestral sites. [] [R]esources that are commonly classified as natural resources may also have value to certain groups as cultural resources, including certain plants, animals, water, or even landscapes.”<sup>13</sup>

Indigenous Peoples worship in the Black Hills at several individual sacred sites including Pe’Sla – (Reynold’s Prairie), Heháka Sápa, – Black Elk Peak; Mathó Pahá – Bear Butte; Mathó Thípila – Bear’s Lodge (Devil’s Tower); and Wasun Niya – Wind Cave. Other sacred sites include the Racetrack (Red Valley), Buffalo Gap, Craven Canyon, Red Canyon, Gillette Prairie, Danby Park, Hot Springs – Minnekahta area, Inyan Kara Mountain, Black Butte, White Butte, Rapid Creek Valley, Sundance Mountain (Cheyenne), Medicine Wheel Site (Cheyenne), and Stone

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<sup>10</sup> U.S. Department of Agriculture, Forest Service, “Black Hills National Forest, Forest Plan Revision Assessment: Areas of Tribal Importance” p.p. 4-5, June 2022.  
[https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd1035056.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd1035056.pdf), last accessed June 5, 2023.

<sup>11</sup> Id. [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd1035056.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd1035056.pdf), last accessed June 5, 2023.

<sup>12</sup> Id. at p. 5.

<sup>13</sup> Id.

Buffalo Horn (Cheyenne).<sup>14</sup> These sacred areas within the Black Hills are either near or within the Pactola Watershed and continue to serve as a place of pilgrimage for Indigenous Peoples who perform prayers, songs, vision quests and sweat lodges – known as “inepes” – for religious, spiritual and cultural purposes.

Within the Pactola Watershed itself is Pe’Sla (Reynold’s Prairie), which the Oceti Sakowin, Seven Council Fires of the Lakota, Nakota, Dakota Oyate (“Sioux Nation”), have revered the high-mountain prairie as a sacred site for time immemorial. Pe’Sla was originally protected by the 1868 Treaty of Fort Laramie until the United States unconstitutionally seized the land in the aftermath of the Battle of the Little Bighorn in 1876, when Pe’Sla was sold for non-Indian homesteads and used to graze cattle. Several Tribes organized to re-purchase the Pe’Sla sacred site in 2016 and the Bureau of Indian Affairs (“BIA”) placed the land back into Indian Trust.<sup>15</sup>

Additionally, visual representations of the spiritual ceremonies are present throughout the Black Hills. For example, hikes to Black Elk Peak reveal hundreds of ribbons tied to trees, denoting the religious significance of the area. Rituals and ceremonies like the Sun Dance ceremony continue to take place in and near the Pactola Watershed. The Inyan Kara Mountain nearby is also known as the Lakota’s “special place of creation” and is traditionally visited as part of preparation for the Sun Dance ceremony.

The continued operation of mines destroy these sacred sites and preclude safe access to them. The presence of pollutants like arsenic and other chemical contaminants caused by the mining process have not only desecrated the Black Hills but actively interfere with, defeat and prevent the ability of Indigenous Peoples to practice religious ceremonies which are intricately tied to the protection of natural resources like water, wildlife and forests. Destruction of the natural resources and blocking of access around the area through mining operations directly harms the ability to perform Indigenous religious ceremonies. The ongoing mining and occupation of these sacred sites interferes with Indigenous religious beliefs that require the protection, honoring, celebrating and worshipping of natural resources as a source of all life.

This type of harm and violence to Indigenous People’s religious beliefs and culture is a continuation of the horrific genocidal and assimilation policies, described above, that the United States inflicted upon Indigenous Peoples since colonization. Continued mining of the Black Hills is an insidious modern-day equivalent to the past prohibition of Indigenous religious beliefs and ceremonies. It must be condemned and discontinued permanently.

#### **4. The Pactola Watershed Provides Life-Giving Water Supplies to Indigenous and other Communities**

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<sup>14</sup> U.S. Department of Agriculture, Forest Service, “Black Hills National Forest, Forest Plan Revision Assessment: Areas of Tribal Importance” p.p. 8-9, June 2022.

[https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd1035056.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd1035056.pdf), last accessed June 5, 2023.

<sup>15</sup> <https://shakopeedakota.org/sacred-site-persquo-sla-gains-indian-land-status/#:~:text=Hill%20City%2C%20SD%20%E2%80%93%20The%20United,into%20federal%20Indian%20trust%20status.>



Genuine and identifiable health concerns resulting from mining in the Black Hills threaten the very existence of Indigenous Peoples and other residents in the region. Indigenous Peoples have long cared for the rivers, streams and lakes in the Pactola Watershed as a source of life to all living creatures and they have always relied upon waterways for spiritual and cultural purposes. Water is sacred to Indigenous Peoples as the “first medicine,” leading to Indigenous beliefs that natural waters and forest ecosystems should be protected. The Pactola Watershed supplies vital drinking water to approximately 100,000 people upstream and downstream in rural and tribal communities. Rapid Creek, which is part of the proposed application for withdrawal, is known in Lakota as “Mniluzuhan-Mni,” and is approximately 86 miles long. Rapid Creek originates in the Black Hills and runs east into the Pactola Reservoir. From the Pactola Reservoir, Rapid Creek flows through Rapid City, South Dakota, the second largest city in the state, and into the Cheyenne River, a tributary of the Missouri River.

If mining is continued to be permitted in the Black Hills and Pactola Watershed, significant pollutants caused by mining will continue to infiltrate the natural waterways and surrounding lands. Past mining of gold in the Black Hills spanning 130 years, much of it from the largest underground gold mine in North America – the Homestake Mine – caused long-standing damage to the Indigenous lands and waters surrounding it. One hundred million tons of mine tailings went downstream in Whitewood Creek into the Belle Fourche, Cheyenne and Missouri Rivers. Elevated levels of arsenic, mercury and other pollutants traced to mining caused Whitewood Creek to become an Environmental Protection Agency (“EPA”) Superfund Site.<sup>16</sup> While the subsequent contamination cleanup was reported as successful, research from the South Dakota School of Mines and Technology almost 20 years after the cleanup occurred found that mine tailings with high concentrations further downstream were not removed. Challenges to removal of the lingering pollutants include re-mobilization of contaminants, which risk re-contamination of waterways further downstream.

Another mining operation in the Black Hills resulting in catastrophic environmental pollution to the waterways and surrounding lands is the 360-acre Gilt Edge Mine in Lawrence County, which is located near Lead, South Dakota. Mining and mineral processing began on site in 1876. The last mine operator, Brohm Mining Company, abandoned mining the site in 1999. They also abandoned their on-going water treatment responsibilities to address acidic heavy-metal-laden water (acid rock drainage) that is constantly generated from the exposed highwalls of the three open mine pits and from the millions of cubic yards of acid-generating spent ore and waste rock.<sup>17</sup> The Gilt Edge Mine was declared an EPA Superfund site in 2000 after historic mine operations at the site contaminated surface water and groundwater with acidic water containing heavy metals. The area encompasses a former open pit and a cyanide heap-leach gold mine, as well as prior mine exploration activities from various companies. The EPA added the site to the National Priorities List (NPL) in 2000 and began operating a mine water treatment system for the

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<sup>16</sup> South Dakota School of Mines and Technology, “SD Mines Researchers Trace Pollution from Historic Northern Hills Mine Tailings Hundreds of Miles Downstream,” July 20, 2018, last accessed May 31, 2023. <https://www.sdsmt.edu/Research/Research@Mines/SD-Mines-Researchers-Trace-Pollution-from-Historic-Northern-Hills-Mine-Tailings-Hundreds-of-Miles-Downstream/>

<sup>17</sup> Environmental Protection Agency, GILT EDGE MINE, LEAD, SD, Cleanup Activities, last accessed June 5, 2023. <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0801668>

site and capping contamination at Ruby Gulch Waste Rock Dump. In 2017, the EPA began work to remove mine waste from source areas and consolidate it on site in the open mine pits and the cleanup effort is ongoing.<sup>18</sup> All of this has devastating and long-standing effects on Indigenous populations who rely on the water for drinking. Elevated arsenic concentrations in groundwater also contribute to soil pollution in agriculture and ranching areas resulting in the incorporation of arsenic into plant and animal food supplies that are then consumed.

Mining disproportionately puts Indigenous populations at risk for arsenic contamination because Indigenous communities primarily rely on well-water to drink in the Black Hills and the Pactola Watershed area. Native American populations are disproportionately exposed to arsenic in drinking water.<sup>19</sup> Overall, a quarter of private wells tested in tribal communities in North and South Dakota had arsenic at or higher than the amount deemed safe by the EPA. This is much higher than the national average of 7% of domestic well users in the U.S. with arsenic at or higher than the recommended amount. These findings are consistent with historic Indian Health Service data for the area and with urinary arsenic excretion patterns.<sup>20</sup> Elevated levels of arsenic exposure in ground water have been shown to significantly increase the risk of peripheral neuropathy, cardiovascular disease, myocardial infarction, stroke, chronic obstructive pulmonary disease (COPD), gout, lung cancer, and diabetes.<sup>21</sup>

Native American populations have long experienced significant health disparities in comparison to other populations, ranging from lower life expectancy, increased risk of cardiovascular disease, and higher rates of chronic disease factors, poor nutrition, and a lack of access to quality health care. These factors stem from systemic inequalities in economic opportunities and poor social conditions<sup>22</sup> caused by lasting and ongoing effects of colonization. As the United Nations has recognized, “Indigenous Peoples were victims of colonialism and

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<sup>18</sup> Environmental Protection Agency, Superfund Redevelopment Initiative, Superfund Sites in Reuse in South Dakota, last accessed June 5, 2023.

[https://19january2021snapshot.epa.gov/superfund-redevelopment-initiative/superfund-sites-reuse-south-dakota\\_.html#:~:text=Superfund%20Sites%20in%20Reuse%20in%20South%20Dakota%201,3%20Williams%20Pipe%20Line%20Co.%20Disposal%20Pit%20](https://19january2021snapshot.epa.gov/superfund-redevelopment-initiative/superfund-sites-reuse-south-dakota_.html#:~:text=Superfund%20Sites%20in%20Reuse%20in%20South%20Dakota%201,3%20Williams%20Pipe%20Line%20Co.%20Disposal%20Pit%20)

<sup>19</sup> Martha Powers, Joseph Yracheta, David Harvey, Marcia O’Leary, Lyle G. Best, Annabelle Black Bear, Luke MacDonald, Jolie Susan, Khaled Hasan, Elizabeth Thomas, Camille Morgan, Pablo Olmedo, Rui Chen, Ana Rule, Kellogg Schwab, Ana Navas-Acien, Christine Marie George, ISSN 0013-9351, <https://doi.org/10.1016/j.envres.2018.09.016>. “Implementing a Community-Led Arsenic Mitigation Intervention for Private Well Users in American Indian Communities: A Qualitative Evaluation of the Strong Heart Water Study Program” *Environmental Research*, Volume 168, January 2019, Pages 41-47,

<https://www.sciencedirect.com/science/article/abs/pii/S0013935118305036>, last accessed June 2, 2023.

<sup>20</sup> *Id.*

<sup>21</sup> Arsenic: The Underrecognized Common Disease-inducing Toxin, Walter Crinnion, NDi, Joseph Pizzorno, ND, Editor in Chief\*, Copyright © 2017 InnoVision Health Media Inc., <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6413640/#:~:text=Elevated%20levels%20of%20arsenic%20exposure,%2C%20lung%20cancer%2C%20and%20diabetes>, last accessed June 6, 2023.

<sup>22</sup> Mayer, B., Joshweseoma, L. & Sehongva, G. Environmental Risk Perceptions and Community Health: Arsenic, Air Pollution, and Threats to Traditional Values of the Hopi Tribe. *J Community Health* 44, 896–902 (2019). <https://doi.org/10.1007/s10900-019-00627-8>, last accessed June 2, 2023.



continue to be victims of its consequences.”<sup>23</sup> The ongoing desecration and mining in the Black Hills and Pactola Watershed is an example of this.

The permanent withdrawal of the Pactola Watershed is not only necessary, but critical to the future existence of Indigenous Peoples in the Black Hills and to other populations that rely on the rivers within the Pactola Watershed for their drinking water supply, agriculture and ranching.

## **5. Protection of the Black Hills is Vital for Indigenous Peoples and for the Public Interest**

*“The protection of sacred places is vital to maintaining and preserving the distinct identities, traditions, and histories of Native peoples. Co-management practices must be an inclusive and shared responsibility. It is our sovereign right to manage and protect our resources.”*<sup>24</sup>

Cultural connection and identity are protective factors for Indigenous youth and communities. For example, according to research compiled by the National Indian Child Welfare Association, “cultural identity and ethnic pride result in greater school success, lower alcohol and drug use, and higher social functioning in Native children, adolescents, and young adults. Native children, adolescents, and young adults involved in their tribal communities and cultural activities have lower rates of depression, alcohol use, and antisocial behavior. Tribal language, ceremonies, and traditions are linked to a reduced risk of delinquent behavior for Native children, adolescents, and young adults ... Identification with a specific cultural background and a secure sense of cultural identity is linked to higher self-esteem, higher educational attainment, and lower rates of mental health problems and substance abuse in adolescents and adults.”<sup>25</sup> Barriers to ancestral lands impede access to culture, which in turn, impede educational and later lifetime success.

Compounding this, significant discrimination against Native American students and the phenomenon of invisibility pervades our education system. Ninety-two percent of Native American students attend public schools<sup>26</sup> and experience disproportionate rates of discipline as compared to non-Native American students, with Native American students more than twice as likely to face disciplinary actions and out-of-school suspensions than their White counterparts.<sup>27</sup>

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<sup>23</sup>United Nations Committee on Elimination of all Forms of Discrimination Concluding Observations, August 12, 2022,

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhspzO19YwTXeABruAM8pBAK1xYN2wdGpGmJxT4qZ%2b%2fzhl9s68flbQK27IwmDC1j6l212QsTq%2b%2fghOEik44QlDIYZdyGiNLspvbKJ1mADJtn5a1Ojg9FFaST8zoSIBL%2fEgHQ%3d%3d>

<sup>24</sup> Fawn Sharp, NCAI State of Indian Nations 2022 Address - Raising the Bar: Advancing Advocacy for Indian Country, NAT'L CONG. OF AM. INDIANS (Feb. 14, 2022), available at: [https://www.ncai.org/2022\\_State\\_of\\_Indian\\_Nations\\_Address.pdf](https://www.ncai.org/2022_State_of_Indian_Nations_Address.pdf).

<sup>25</sup> PROTECT ICWA CAMPAIGN, ICWA Talking Points Guide, NAT'L INDIAN CHILD WELFARE ASS'N (Feb. 2019), available at: [https://www.nicwa.org/wp-content/uploads/2019/02/2019-02-12-ICWA-Talking-PointsGuide\\_NICWA-FINAL.pdf](https://www.nicwa.org/wp-content/uploads/2019/02/2019-02-12-ICWA-Talking-PointsGuide_NICWA-FINAL.pdf).

<sup>26</sup> Report to Congress on the Social and Economic Conditions of Native Americans, p. 53, 2014 [https://www.acf.hhs.gov/sites/default/files/documents/ana/final\\_fy\\_2014\\_social\\_economic\\_conditions\\_of\\_na\\_report.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ana/final_fy_2014_social_economic_conditions_of_na_report.pdf), last accessed June 28, 2022.

<sup>27</sup> Lost Opportunities, How Disparate School Discipline Continues to Drive Differences in Opportunity to Learn, Daniel J. Losen and Paul Martinez, October 2020,

The Native American community comprises only one percent of the student population in the U.S., however, they represent two percent of total school arrests and three percent of incidents reported by school staff to law enforcement.<sup>28</sup> Native American students have drop-out rates of 34% and represent the lowest graduation rate of any demographic across all schools.<sup>29</sup> A contributing factor to this phenomenon is because “Native Americans are invisible to most Americans.”<sup>30</sup>

Native Americans are also over-incarcerated as a result of discriminatory targeting by police officers, prosecutors, and unfair sentencing paradigms within court systems. This results in a disproportionate share of the prison population in states like South Dakota, where 55.3% of overall federal cases involve a Native American, demonstrating the school-to-prison pipeline is still a significant problem.<sup>31</sup> Without the ability to maintain connection with their ancestral lands, their religious ceremonies and culture, Indigenous children and communities will continue to suffer from disparate outcomes in physical and mental health and education.

## Conclusion

The devastating impact of mining and illegal occupation on the ancestral Indigenous Black Hills and Pactola Watershed cannot be ignored. We support the withdrawal of the Pactola Watershed for 20 years as an initial step but also urge you to withdraw it permanently from future mining or settlement.

Further, we urge the permanent withdrawal of the Black Hills of South Dakota to protect its delicate and sacred ecosystem from further desecration and harm to its inhabitants, including humans. The land rightfully belongs to the Sioux Nation Tribes and ongoing mining in the area detrimentally impacts constitutionally protected rights and treaty laws.

The health, religious freedoms, and culture of the Indigenous Tribes who hold the Black Hills and the Pactola Watershed sacred surpass any economic need or policy. We urge you to not only approve the application to withdraw the Pactola Watershed for 20 years, but to do so permanently, and broaden its scope to include the entire Black Hills of South Dakota to avoid further harms outlined in this comment.

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<https://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/lost-opportunities-how-disparate-school-discipline-continues-to-drive-differences-in-the-opportunity-to-learn/Lost-Opportunities-REPORT-v17.pdf>, last accessed June 28, 2022.

<sup>28</sup> Report to Congress on the Social and Economic Conditions of Native Americans, 2014 [https://www.acf.hhs.gov/sites/default/files/documents/ana/final\\_fy\\_2014\\_social\\_economic\\_conditions\\_of\\_na\\_report.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ana/final_fy_2014_social_economic_conditions_of_na_report.pdf), last accessed June 28, 2022.

<sup>29</sup> Id. p. 53.

<sup>30</sup> National Congress of American Indians, *Becoming Visible Report*, p. 8, citing *Reclaiming Native Truth* (2018) Research Findings: Compilation of All Research. Echo Hawk Consulting & First Nations Development Institute, June 2018, Accessed on September 15, 2019 at: <https://illuminatives.org/reclaiming-native-truth/>

<sup>31</sup> Quick Facts in the Federal Offender Population, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Native\\_American\\_Offenders\\_FY15.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Native_American_Offenders_FY15.pdf), last accessed June 28, 2022.

Sincerely,

/s/ Christopher Anders  
Christopher Anders  
Federal Policy Director  
American Civil Liberties Union  
National Political Advocacy Department  
915 15th Street, NW, 6th Floor  
Washington, DC 20005  
[canders@aclu.org](mailto:canders@aclu.org)

/s/ Stephanie Amiotte  
Stephanie Amiotte  
Legal Director  
American Civil Liberties Union of North Dakota, South Dakota and Wyoming  
[samiotte@aclu.org](mailto:samiotte@aclu.org)