Via Online Objection Submittal Portal:
https://cara.fs2c.usda.gov/Public//CommentInput?Project=57428

August 22, 2022

Black Hills National Forest Supervisor's Office
Attn: Objection Reviewing Officer
1019 North 5th St.
Custer, SD 57730

RE: OBJECTION to the
Jenny Gulch Gold Exploration Project
Final Environmental Assessment (EA), Draft Decision Notice (DN)
and Finding of No Significant Impact (FONSI)

Responsible Official: Jim Gubbels, District Ranger, Mystic Ranger District, Black Hills National Forest

INTRODUCTION

Pursuant to 36 CFR Part 218, on behalf of Black Hills Clean Water Alliance (BHCWA, Alliance, or Objector) on behalf of its adversely impacted members files this Objection to the EA, Draft DN and FONSI issued by Jim Gubbels District Ranger, Mystic Ranger District, Black Hills National Forest for the Jenny Gulch Gold Exploration Project (Project) on or about July 8, 2022. *See https://www.fs.usda.gov/project/?project=57428*.

BHCWA previously filed scoping comments and comments on the Draft Environmental Assessment on or about February 5, 2020 and October 22, 2021, respectively and has fully participated in the Forest Service's (USFS) review of the Project. Pursuant to 36 CFR 218.8, BHCWA states that the following content of this Objection demonstrates the connections between the February 5, 2020 and October 22, 2021 comments (or "previous comments") for all issues raised herein, unless the issue or statement in the Draft EA arose or was made after the opportunity for comment on the Draft EA closed, as detailed herein. Pursuant to the Administrative Procedure Act, 5 U.S.C. §553-706, and USFS requirements, the agency must provide a detailed response to each of the issues/objections raised in this Objection.

BHCWA was founded in 2009 with a mission to stop current and prevent future radioactive and destructive mining in the Black Hills region to protect our valuable resources – especially our water – for future generations. The Alliance is a diverse collection of citizens concerned about the

health, environmental, and economic impacts that irresponsible mining projects would have on our communities, people, economy, and natural resources.

As shown in more detail below, the USFS's review contained in the EA contains numerous legal and factual errors and as such should be revised in order to comply with federal law. In addition, any USFS plan to continue its review of the PoO must comply with federal law as detailed herein. At a minimum, an Environmental Impact Statement ("EIS") must be prepared, due to the potential for significant impacts from the Project alone, and especially when viewed with its cumulative impacts from other and/or related activities as well as connected actions. Whether the agency decides to revise the EA first, or directly prepare an EIS, the requirements noted herein must be met for either document. If the former, at a minimum, a revised Draft EA must be prepared, subject to full public comment.

As detailed herein, and as noted in the February 5, 2020 and October 22, 2021 comments, the Project would violate numerous federal and state mining, public lands, environmental, wildlife, historic/cultural preservation and related laws, regulations, and policies. As such, the USFS cannot approve the proposed Plan of Operations (PoO), as amended by any of the action alternatives. These laws (with their implementing regulations and policies) include, but are not limited to: the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), Forest Service Organic Act of 1897 (Organic Act), the 1872 Mining Law, the Surface Resources Act of 1955, the Mining and Minerals Policy Act of 1970, the National Historic Preservation Act (NHPA), and Presidential Executive Orders related to wildlife, wetlands, and other resources potentially affected by the Project.

The remedy for these violations is for the USFS to not issue any Final DN that would authorize approval of any PoO for any action alternative reviewed in the EA (i.e., the USFS must deny/reject any such PoO), that does not fully comply with each and every law, regulation, policy, and Executive Order noted herein. The EA and Draft DN should be remanded back to the Mystic Ranger District with instructions to correct all errors noted herein before the USFS can consider approving any operations.

For the reasons articulated herein, and in the previous comments, the EA is substantially inadequate and violates NEPA. The EA and Draft DN fail to take the requisite "hard look" at the Project. The EA is fundamentally flawed because of inaccurate and incomplete information that runs throughout the EA and presents an imbalanced analysis of the effects of the proposed Project. Critical and explanatory data, methodologies, and analysis are simply not provided; this failure goes to the heart of NEPA's requirements regarding full and transparent disclosure of issues so that the public can credibly comment on the proposal. As such, the remedy for these inadequacies is for the USFS to prepare and publish a revised Draft EA, or more appropriately a Draft EIS for public and agency comment.

Among other inadequacies noted herein, the EA fails to properly review all direct, indirect, and cumulative impacts (as well as connected actions), fails to properly review all reasonable alternatives, fails to conduct the required baseline analysis (and defers consideration of critical information until after the NEPA process is concluded), fails to conduct the proper mitigation analysis (including the effectiveness of all mitigation measures), presents significant new issues for which the public did not have the proper opportunity to comment upon before the close of the

comment period on the Draft EA, and fails to adequately respond to public comments (including the comments of BHCWA), against the requirements of NEPA and the other laws noted herein.

The Agency Must Prepare an Environmental Impact Statement

The USFS determined early on, as early as before even receiving any scoping comments, that only an Environmental Assessment (EA) would be prepared for the Project. However, as discussed in comments, when considered along with the cumulative impacts from all past, present, and reasonably foreseeable future projects in the region, including other exploration, mining, grazing, recreation, energy development, roads, etc., the impacts are significant and require an Environmental Impact Statement (EIS). The agency must conduct its NEPA review and subject that review to public comment in an EIS, including impacts to air quality, ground and surface water quantity and quality, recreation, cultural/religious resources, wildlife, transportation/traffic, scenic and visual resources.

"[W]here 'several actions have a cumulative ... environmental effect, this consequence must be considered in an EIS.' City of Tenakee Springs v. Clough, 915 F.2d 1308, 1312 (9th Cir. 1990)." Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1378 (9th Cir. 1998). "[I]f the cumulative impact of a given project and other planned projects is significant, an applicant cannot simply prepare an EA for its project, issue a FONSI, and ignore the overall impact of the project." Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1076 (9th Cir. 2002).

"An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment. The agency must supply a convincing statement of reasons why potential effects are insignificant." Public Service Co. of Colorado v. Andrus, 825 F.Supp. 1483, 1496 (D. Idaho 1993) *citing* The Steamboaters v. FERC, 759 F.2d 1383, 1393 (9th Cir. 1985).

"[T]o prevail on the claim that the federal agencies were required to prepare an EIS, the plaintiffs need not demonstrate that significant effects will occur. A showing that there are 'substantial questions whether a project may have a significant effect' on the environment is sufficient." Anderson v. Evans, 371 F.3d 475, 488 (9th Cir. 2004. See also Western Land Exchange Project v. BLM, 315 F.Supp.2d 1068, 1087 (D. Nev. 2004) (same).

The agency cannot avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment. See Alaska Ctr. for Env't v. United States Forest Serv., 189 F.3d 851, 859 (9th Cir. 1999). If an agency, such as the USFS, opts not to prepare an EIS, it must put forth a "convincing statement of reasons" that explain why the project will impact the environment no more than insignificantly. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir.1998).

> In considering the severity of the potential environmental impact, a reviewing agency may consider up to ten factors that help inform the "significance" of a project, such as the unique characteristics of the geographic area, including proximity to an ecologically sensitive area; whether the action bears some relationship to other actions with individually insignificant but cumulatively significant impacts; the level of uncertainty of the risk and to what degree it involves unique or unknown risks; and whether the action

> threatens violation of an environmental law. (Citations omitted). We have held that one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances. See Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001).

Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 864-65 (9th Cir. 2005)(EA and FONSI inadequate when agency fails to prepare adequate cumulative impacts analysis) (emphasis omitted).

In this case, as discussed herein, "substantial questions" exist as to whether the impacts from the Project will be significant. The drilling activities are proposed in close proximity to areas used extensively by the public as described herein and in public comments submitted relating to this Project. In addition, when viewed in combination with other mineral exploration and development proposals in the area, the impacts rise to the level of significance. As discussed below in the cumulative impacts discussion, these other proposals were not evaluated in the EA for cumulative impacts, rendering any FONSI determination unsupportable on the existing administrative record. See EA at p. 19 (Section 4.1); *infra* at pp. 5-11.

As to water quality, the EA fails to discuss in any depth or provide any surface water baseline water quality data from which to make a determination of significance of impacts, and similarly, for groundwater, merely references another study that purports to contain groundwater quality data. See EA at 29-30 (Section 3.7.1.1); see also EA Soils, Geology, and Hydrology Technical Report at p. 24 (Section 3.2.1.4 (surface water quality)); EA Soils, Geology, and Hydrology Technical Report at p. 28 (Section 3.2.2.2 (groundwater quality). For groundwater, the EA concedes that the agency lacks any information as to the aquifers in the northern area of the Project and that the aquifers in the southern end of the Project area have been assessed as highly vulnerable. See EA Soils, Geology, and Hydrology Technical Report at 28 (Section 3.2.2.2). Despite this lack of information and stark warnings, without reproducing or discussing this data, the EA fails to provide the requisite analysis of impacts to surface or groundwater that would or could result from transportation to and from and development of drill sites, extensive drilling into local aquifers, or surface drill cutting waste disposal on the ground surface as proposed by the Project. See EA at pp. 32-34 (Sections 3.7.3 and 3.7.4). Regarding surface water impacts, the EA concedes that impacts from run-off and sedimentation would occur, but fails to quantify or describe these impacts in any detail and ultimately, simply asserts without data or analysis that impacts to surface waters will be non-existent. EA at p. 34 (Section 3.7.4.1). For mitigation/minimization of impacts, the EA asserts that winter construction would occur "the extent practicable" and that if "conditions at the time of construction render" access across surface waters "unusable" the access "would be shifted to alternate locations…" EA at p. 34 (Section 3.7.4.1). However, no discussion is provided as to who makes these determinations or what conditions may trigger such changes – rendered them unenforceable as a practical matter. This type of unquantified and conclusory impact and mitigation analysis violates NEPA and cannot sustain a FONSI.

The EA and Draft DN fail to provide the required detail to justify a FONSI with respect to impacts to cultural resources. As discussed herein, the EA and Draft EA refer to the agency eliminating impacts to cultural resources by moving roads and drill hole locations, but provide

no detail or description of which roads or drill sites have been adjusted or, most importantly, how that eliminates the impacts. See EA at p. 25 (section 3.4.4)(" Under Alternative C, Project access routes and drill pads have been shifted to avoid potential effects to cultural resources features. Under Alternative C, there are also no anticipated long-term visual impacts to historic structures from the Project."). The same problem presents itself in the Draft DN, which purports to have eliminated any impacts to cultural resources, but provides no detail as to where the referenced changes occurred or how a basis for how the agency analysis of impacts was altered by these changes. See Draft DN at p. 11 (Section 2.2.3); p. 14 (Table 2-2); p. 17 (Section 3.3).

The agency relies repeatedly on proposed mitigation measures to bring the level of impacts from the project below the level of significance so as to justify a proposed FONSI, but fails to assess the effectiveness of that proposed mitigation or provide the necessary detail to explain how and whether that mitigation will even be employed. For instance, as discussed immediately above, the agency states it that some drill hole locations have been moved to reduce the impacts on cultural resources, but provides only vague descriptions. This is particularly problematic for the impacts to the Pe' Sla cultural site, an issue repeatedly raised in comments but not discussed in any detail in the EA – indeed, not even specifically mentioned in the EA at all. For impacts to big horn sheep, while the agency's selected alternative does provide a seasonal lambing restriction on drilling on three of the forty-seven approved drill pads, for the others the proposed mitigation relies on implementing restrictions only "should lambing be observed." EA at p. 13 (Table 2-1); see also EA Appendix D Wildlife and Fisheries Biological Assessment/Biological Evaluation and Technical Report p. 26 (Table 4-2). However, there is no explanation as to how this determination will be made or by whom – and importantly, what training or expertise will be required by workers at the site to enable them to assess or make this determination. The last reference in the EA Appendix D references "USFS staff" observations, but no explanation of who or when the agency intends to have its own personnel with expertise present on site. This lack of detail or planning renders the mitigation all but useless in practical effect. The same problem applies to the cultural resources impacts mitigation that relies on drilling personnel to halt drilling upon discovery of cultural resources during drilling activities. See EA at p. 25 (Section 3.4.4). There is no indication as to how the workers at the site will be trained or how any of the required expertise necessary to identify such cultural resources will be brought to bear – as the range of potential cultural resources is very broad, from natural formations such as stones or rocks to remnants of habitation to human remains. The EA provides no detail as to how these resources will be effectively identified or who will do so in the field during busy drilling and excavation activities.

As such, the agency must prepare an EIS.

The Agency Must Fully Analyze All Direct, Indirect, and Cumulative Impacts

The Forest Service must fully review the impacts from all "past, present, and reasonably foreseeable future actions." These are the "cumulative effect/impacts" under NEPA. To comply with NEPA, the Forest Service must consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 CFR §§ 1502.16, 1508.8, 1508.25(c). Direct effects are caused by the action and occur at the same time and place as the proposed project. 40 CFR § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in

distance, but are still reasonably foreseeable. 40 CFR § 1508.8(b). Both types of impacts include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." Id. Cumulative effects are defined as:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 CFR § 1508.7.

In a cumulative impact analysis, an agency must take a "hard look" at all actions.

An EA's analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. "Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide." Te-Moak Tribe of Western Shoshone v. U.S. Dept. of Interior, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

A cumulative impact analysis must provide a "useful analysis" that includes a detailed and quantified evaluation of cumulative impacts to allow for informed decision-making and public disclosure. Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1066 (9th Cir. 2002); Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 1118 (9th Cir. 2004).

The NEPA requirement to analyze cumulative impacts prevents agencies from undertaking a piecemeal review of environmental impacts. Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1306-07 (9th Cir. 2003).

The NEPA obligation to consider cumulative impacts extends to all "past," "present," and "reasonably foreseeable" future projects. Blue Mountains, 161 F.3d at 1214-15; Kern, 284 F.3d at 1076; Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (finding cumulative analysis on land exchange for one development failed to consider impacts from other developments potentially subject to land exchanges); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006)(requiring "mine-specific … cumulative data," a "quantified assessment of their [other projects] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed mining operations in the region).

NEPA regulations also require that the EIS obtain the missing "quantitative assessment" information:

> When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or

> unavailable information, the agency shall always make clear that such information is lacking. If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement. If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

40 CFR § 1502.22.

"If there is 'essential' information at the plan- or site-specific development and production stage, [the agency] will be required to perform the analysis under § 1502.22(b)." Native Village of Point Hope v. Jewell, --- F.3d ----, 2014 WL 223716, *7 (9th Cir. 2014). Here, the adverse impacts from the Project when added to other past, present or reasonably foreseeable future actions are clearly essential to the USFS' determination (and duty to ensure) that the Project complies with all legal requirements and minimizes all adverse environmental impacts.

"[W]hen the nature of the effect is reasonably foreseeable but its extent is not, we think that the agency may not simply ignore the effect. The CEQ has devised a specific procedure for 'evaluating reasonably foreseeable significant adverse effects on the human environment' when 'there is incomplete or unavailable information.' 40 C.F.R. § 1502.22." Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 549-550 (8th Cir. 2003)(emphasis in original). The USFS's failure to obtain this information, or make the necessary showings under § 1502.22, for all direct, indirect and cumulative impacts thus violates NEPA.

An EIS that is prepared must fully review all reasonable alternatives, provide for mitigation and an analysis of the effectiveness of all mitigation measures, review all direct, indirect, and cumulative impacts, and fully analyze all baseline conditions of the potentially affected environment, among other NEPA requirements.

NEPA's statutory framework discussed above, as well as USFS's own regulatory policies enumerated in the Forest Service Handbook (FSH), Section 1909.15 *et seq.*, require the agency to consider potentially significant environmental effects, including cumulative impacts. If the proposed action may have a significant effect, USFS must prepare an EIS. As provided in the FSH:

> If the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA. If the responsible official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS. (36 C.F.R. 220.6(c))

FSH 1909.5, Section 31.3.

> Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded […]. Scoping is important to discover information that could point to the need for an EA or EIS versus a CE. Scoping is the means to identify the presence or absence of any extraordinary circumstances that would warrant further documentation in an EA or EIS. **Scoping should also reveal any past, present, or reasonably foreseeable future actions with the potential to create uncertainty over the significance of cumulative effects.**

Id. (emphasis added). See Sierra Club v. United States, 255 F. Supp. 2d 1177, 1182 (D. Colo. 2002) ("In determining whether an action requires an EA or EIS or is categorically excluded, federal agencies must not only review the direct impacts of the action, but also analyze indirect and cumulative impacts.") (citing 40 C.F.R. §§ 1508.7,1508.8)).

As the federal courts have held:

> Our cases firmly establish that a cumulative effects analysis "must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects." Klamath–Siskiyou, 387 F.3d at 994 (emphasis added) (quoting Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 1128 (9th Cir.2004)). To this end, we have recently noted two critical features of a cumulative effects analysis. First, it must not only describe related projects but also enumerate the environmental effects of those projects. See Lands Council v. Powell, 395 F.3d 1019, 1028 (9th Cir.2005) (holding a cumulative effects analysis violated NEPA because it failed to provide "adequate data of the time, place, and scale" and did not explain in detail "how different project plans and harvest methods affected the environment"). Second, it must consider the interaction of multiple activities and cannot focus exclusively on the environmental impacts of an individual project. See Klamath–Siskiyou, 387 F.3d at 996 (finding a cumulative effects analysis inadequate when "it only considers the effects of the very project at issue" and does not "take into account the combined effects that can be expected as a result of undertaking" multiple projects).

Oregon Natural Resources Council Fund v. Brong, 492 F.3d 1120, 1133 (9th Cir. 2007). Note that the requirement for a full cumulative impacts analysis is required in an EA, as well as in an EIS. See Te-Moak Tribe of Western Shoshone, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

The immediate area of the Project includes Pactola Reservoir and Rapid Creek, which supply water for domestic, municipal, and agricultural use. These waters are also sources for wildlife and provide the setting for extensive recreation activities. The Project area also includes other National Forest lands and resources used extensively by the public for myriad purposes, including hiking, biking, water-based recreation, fishing, and other pursuits. Immediately upstream, there is exploratory drilling occurring, as well as at least one former mine site.

The EA fails to disclose and analyze the potential impacts to these water supplies and these uses. The EA provides only a broad range of the depth of each of the proposed drill holes. For instance, the EA states only that "Drill holes would range from 500 to 6,000 feet in depth dependent on the results of each hole. Although depths up to 6,000 feet would be authorized, very few holes are planned to extend to this depth; most holes would be drilled to a depth of approximately 1,000 feet." EA at p. 3. Compounding this problem is the lack of information related to the aquifers that may be impacted by this drilling. The EA states that "[l]ocalized, non continuous aquifers occur within weathered and fractured rocks in the crystalline core. The extent and distribution of these aquifers are difficult to determine without drilling. These aquifers are generally unconfined and are recharged from precipitation and infiltration, though most of the precipitation that falls is lost to evapotranspiration and runoff (overland and stream flow). Domestic water supply wells have been drilled into crystalline aquifer(s) in the Project area (Figure 3-3 and Figure 3-4)." EA Appendix E Soils, Geology, and Hydrology Technical Report at p. 27-28. This admitted lack of information renders the EA impacts review flawed. Without more specific information as to the location of aquifers or the depth of specific drill holes in specific areas, neither the agency nor the public are able to effectively predict and analyze the impacts to groundwater and drinking water supplies from the proposed drilling. The agency must disclose with more precision the details of the proposal in order to adequately assess the potential impacts and to allow the public a meaningful opportunity to provide effective comments.

As referred to herein and as the Forest Service is aware, several other mineral exploration projects have been proposed in the area that will contribute to cumulative impacts. For instance, the Mineral Mountain Resources Rochfort Project (see Attachment 8) and Bloody Gulch Project (see Attachment 9) must be addressed in addition to the four other projects/companies the Forest Service has confirmed at a recent National Forest Advisory Board meeting are seeking to apply for exploration permits. No reference to any additional mineral exploration or prior mining is mentioned in the EA cumulative impacts analysis section. See EA at pp. 39-40 (Section 3.10.1). The attached maps document the fact that at least 10 separate mineral exploration companies have staked mining claims in the Black Hills in areas that could result in cumulative impacts with proposed Project. See Attachment 1 (August 2022 updated map of Mineral and Land Records System Active Mining Claims) and Attachment 2 (Mining claim map).

At minimum, the EA must address the Solitario Zinc exploration drilling proposal. See Attachment 3 (scoping notice). While this project is proposed in the Northern Hills Ranger District, there are cumulative impacts associated with it, particularly with regard to cultural

resources, surface and groundwater resources, recreation, and wildlife, among others. As the USFS has been made aware through its interactions with the Tribal governments, the Black Hills is a highly culturally significant landscape, such that mineral exploration and development proposals such as the Solitario Zinc proposal and the others referenced herein have cumulative impacts with the Jenny Gulch Project. The EA fails to make any reference to this ongoing project. Also relevant to the USFS cumulative impacts analysis but wholly unaddressed in the EA is the Dakota Territory Resources Exploration Drilling proposal. See Attachment 4 Dakota Territory Resources Drilling NOI. While this project is not a USFS project, as made clear herein, the USFS cumulative impacts analysis must assess impacts regardless of what agency is considering the project – federal or non-federal. Similarly, the DTRC notice of intent to conduct exploration for gold and associated minerals must also be considered in any legally-compliant cumulative impacts analysis. See Attachment 5 DTRC Notice of Intent. Further, the United Lithium and the IRIS metals projects were recently proposed in the same area as the Jenny Gulch Project and must be assessed in the cumulative impacts analysis. See Attachment 10 and Attachment 11. In addition to these proposed mineral projects, existing mining operations also have cumulative impacts associated with the Jenny Gulch Project – particularly with respect to cultural resources, wildlife, water resources, and recreation, among others. The Coeur Wharf Mine expansion approved just this year is such a project that must be taken into consideration by the USFS in its cumulative impacts analysis. See Attachment 6 Wharf Mine Expansion article. This 1480 acre-mine has been in place for years and must be included in the USFS EA analysis. Lastly, the Gilt Edge Mine Superfund site was improperly omitted from the USFS cumulative impacts analysis of all past, present, and future actions. See Attachment 7 EPA webpage on Gilt Edge Superfund Site. This contamination site has similar cumulative impacts to the other projects given its long-term problematic history in the Black Hills.

Overall, the cumulative impacts analysis left out a multitude of past, present, and reasonably foreseeable actions that must be accounted for in the EA and factored in to whether a FONSI is appropriate or not. Absent such an analysis, the EA does not comply with NEPA.

Importantly, the agency must disclose and provide a detailed review of the impacts to cultural and historic resources in the area. The agency purports to have conducted a Class I cultural resources survey that identified previous cultural resources surveys identifying 25 previously recorded cultural resources located in the project area. EA at p. 24 (Section 3.4.1). However, no information is provided on who conducted these surveys or whether those persons possessed the necessary relevant cultural expertise, where the surveys were conducted, for which projects they were conducted, when they were conducted, what methodologies were used, or any other information. This information is necessary for the agency to accurately assess the results of these surveys and would not need to disclose any sensitive information about the cultural resources themselves.

This information was only provided for the first time in the Final EA. As such the public never had the opportunity to review this information. The agency should have initiated these reviews before seeking public comment, as the information produced from these surveys are necessary for the public and the Tribes to have the legally-required opportunity to participate in the agency's analysis and decision. This fact again necessitates that a draft NEPA document be produced and

circulated for public review and comment once all relevant information has been disclosed.

Given the lack of information on the purported surveys in the project area, there is insufficient basis for the agency to claim that the Project area has been surveyed for cultural resources by a competent and trained surveyor with a complex understanding of the Indigenous peoples of the area. As the agency is no doubt aware, the Black Hills – including the Project area – are subject to treaties and have been occupied since time immemorial by the Lakota and others. These parties must be involved in a cultural resources survey in order to effectively identify and evaluate cultural and historic resources.

The EA references a government to government consultation held with the Oglala Sioux Tribe on January 28, 2022. EA at p. 42 (Section 4.4). However, no detail of any kind is presented. The agency failed to disclose or analyze any follow up site visits and additional survey work that were committed to by Black Hills National Forest Supervisor Jeff Tomac at that meeting. This information as to any follow-up site visits, any results or information gathered from any such site visits, is critical in the assessment of impacts to cultural resources. Absent this information, the agency's responsibilities with regard to this project fall short of the legal requirements under NEPA.

Additionally, impacts to Pe' Sla (Reynolds Prairie), which contains significant sacred, ceremonial, and historic qualities and resources, must be assessed. Despite the repeated reference to this area in the comments submitted to the agency, neither the EA nor the Draft DN make any specific mention of the area. Without this specific discussion, the EA and Draft DN lack sufficient information to demonstrate a proper analysis as to whether the character and use of this site could be significantly impacted by the proposed operation, even if indirectly. Operations proposed during the Project may have significant adverse effects on the use and character of the cultural, spiritual and religious area. The USFS must consider the obvious adverse impacts to the cultural resources, the certain adverse impacts to the cultural and religious uses of the area, including Pe' Sla, along with impacts to the users of this religious area from the noise, visual intrusions, and other direct adverse effects must be addressed.

The USFS Must Fully Analyze All Baseline Conditions

The Forest Service is required to "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. The establishment of the baseline conditions of the affected environment is a fundamental requirement of the NEPA process.

"NEPA clearly requires that consideration of environmental impacts of proposed projects take place before [a final decision] is made." LaFlamme v. FERC, 842 F.2d 1063, 1071 (9th Cir. 1988). Once a project begins, the "pre-project environment" becomes a thing of the past, thereby making evaluation of the project's effect on pre-project resources impossible. Id. Without establishing the baseline conditions which exist in the vicinity "… before [the project] begins, there is simply no way to determine what effect the proposed [project] will have on the environment and, consequently, no way to comply with NEPA." Half Moon Bay Fisherman's Mark't Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988).

"In analyzing the affected environment, NEPA requires the agency to set forth the baseline conditions." Western Watersheds Project v. BLM, 552 F.Supp.2d 1113, 1126 (D. Nev. 2008). "The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process." Council of Environmental Quality, Considering Cumulative Effects under the National Environmental Policy Act (May 11, 1999).

Such baseline information and analysis must be part of the NEPA analysis and be subject to public review and comment. The lack of an adequate baseline analysis fatally flaws a NEPA document. Given the lack of public information from the Plan of Operations or EA, there is insufficient detail to satisfy NEPA's requirements for public review of the baseline.

Here, the EA fails to demonstrate that the Forest Service has obtained and evaluated sufficient baseline information and subjected that baseline information and analysis to public review and comment. As to water quality, the EA fails to discuss in any depth or provide any surface water baseline water quality data from which to make a determination of significance of impacts, and similarly, for groundwater, merely references another study that purports to contain groundwater quality data, but this information is not reproduced or discussed in any detail. See EA at pp. 29-30 (Section 3.7.1.1); see also EA Soils, Geology, and Hydrology Technical Report at p. 24 (Section 3.2.1.4 (surface water quality)); EA Soils, Geology, and Hydrology Technical Report at p. 28 (Section 3.2.2.2 (groundwater quality).

"NEPA requires that the agency provide the data on which it bases its environmental analysis. Such analyses must occur before the proposed action is approved, not afterward." Northern Plains v. Surf. Transp. Brd., 668 F.3d 1067, 1083 (9th Cir 2011) (concluding that an agency's "plans to conduct surveys and studies as part of its post-approval mitigation measures," in the absence of baseline data, indicate failure to take the requisite "hard look" at environmental impacts).

The EA also provides no baseline data on cultural resources. The document purports to have conducted a Class I cultural resources survey that identified previous cultural resources surveys identifying 25 previously recorded cultural resources located in the project area. EA at p. 24 (Section 3.4.1). However, no information is provided on who conducted these surveys or whether those persons possessed the necessary relevant cultural expertise, where the surveys were conducted, for which projects they were conducted, when they were conducted, what methodologies were used, or any other information. This information is necessary as baseline information for the agency to accurately assess the results of these surveys and would not need to disclose any sensitive information about the cultural resources themselves.

The baseline requirement applies not only to ground and surface waters, but any potentially affected resource such as air quality, recreation, cultural/religious/historical, soils, and wildlife.

The Agency Must Include an Adequate Mitigation Plan Under NEPA

Under NEPA, the agency must have an adequate mitigation plan to minimize or eliminate all potential significant project impacts in order to make a rational finding of no significant impacts.

NEPA requires the agency to: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," 40 CFR § 1502.14(f); and (2) "include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 CFR § 1502.16(h). NEPA regulations define "mitigation" as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 C.F.R. §§1508.20(a)-(e). "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989).

NEPA requires that the agency discuss mitigation measures, with "sufficient detail to ensure that environmental consequences have been fairly evaluated." Methow Valley, 490 U.S. at 352, 109 S.Ct. 1835.

An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. Compare Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1381 (9th Cir.1998) (disapproving an EIS that lacked such an assessment) with Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 477 (9th Cir. 2000) (upholding an EIS where "[e]ach mitigating process was evaluated separately and given an effectiveness rating").

The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. Methow Valley, 490 U.S. at 351–52, 109 S.Ct. 1835 (*citing* 42 U.S.C. § 4332(C)(ii)).

A mitigation discussion without at least some evaluation of effectiveness is useless in making that determination. South Fork Band Council v. Dept. of Interior, 588 F.3d 718, 727 (9th Cir. 2009) (rejecting EIS for failure to conduct adequate review of mitigation and mitigation effectiveness in mine EIS).

"The comments submitted by [plaintiff] also call into question the efficacy of the mitigation measures and rely on several scientific studies. In the face of such concerns, it is difficult for this Court to see how the [agency's] reliance on mitigation is supported by substantial evidence in the record." Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1251 n. 8 (D. Wyo. 2005). See also Dine Citizens v. Klein, 747 F.Supp.2d 1234, 1258-59 (D. Colo. 2010) (finding "lack of detail as the nature of the mitigation measures" precluded "meaningful judicial review").

In this case, many of the mitigation proposals relied upon do not contain sufficient detail as require by NEPA. The proposed mitigation plans for impacts to cultural resources, big horn sheep, water impacts from heavy equipment crossing sensitive water resources (WIZ) all lack the necessary detail. For surface water, the EA states only that an alternative drilling location will be found "if seasonal conditions indicate the WIZ is impassible without causing considerable damage to soils, wetlands, and other resources." EA at p. 15 (Section 2.3). However, no detail on the locations and no description of how this determination is to be made or what constitutes

"considerable" damage, except that decisions will be made "in coordination" with USFS personnel. This utter lack of specificity is not compliant with NEPA's mitigation requirements.

For impacts to big horn sheep, while the agency's selected alternative does provide a seasonal lambing restriction on drilling on three of the forty-seven approved drill pads, for the others the proposed mitigation relies on implementing restrictions only "should lambing be observed." EA at p. 13 (Table 2-1); see also EA Appendix D Wildlife and Fisheries Biological Assessment/Biological Evaluation and Technical Report p. 26 (Table 4-2). However, there is no explanation as to how this determination will be made or by whom – and importantly, what training or expertise will be required by workers at the site to enable them to assess or make this determination. The last reference in the EA Appendix D references "USFS staff" observations, but no explanation of who or when the agency intends to have its own personnel with expertise present on site. This lack of detail or planning renders the mitigation all but useless in practical effect.

The same problem applies to the cultural resources impacts mitigation that relies on drilling personnel to halt drilling upon discovery of cultural resources during drilling activities. See EA at p. 25 (Section 3.4.4). There is no indication as to how the workers at the site will be trained or how any of the required expertise necessary to identify such cultural resources will be brought to bear – as the range of potential cultural resources is very broad, from natural formations such as stones or rocks to remnants of habitation to human remains. The EA provides no detail as to how these resources will be effectively identified or who will do so in the field during busy drilling and excavation activities.

The Agency Must Fully Review All Reasonable Alternatives

NEPA requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E); 40 CFR § 1508.9(b).

It must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990). The alternatives analysis is considered the heart of a NEPA analysis. 40 C.F.R. § 1502.14.

The alternatives analysis should present the environmental impacts in comparative form, thus sharply defining important issues and providing the public and the decisionmaker with a clear basis for choice. Id.

The lead agency must "rigorously explore and objectively evaluate all reasonable alternatives" including alternatives that are "not within the [lead agency's] jurisdiction." Id.

Even if a NEPA document leads to a FONSI, it is essential for the agency to consider all reasonable alternatives to the proposed action. A leading federal court EA/alternatives decision states:

> NEPA requires that federal agencies consider alternatives to recommended actions

> whenever those actions "involve[ ] unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1982). The goal of the statute is to ensure "that federal agencies infuse in project planning a thorough consideration of environmental values." The consideration of alternatives requirement furthers that goal by guaranteeing that agency decisionmakers "[have] before [them] and take [ ] into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance." NEPA's requirement that alternatives be studied, developed, and described both guides the substance of environmental decisionmaking and provides evidence that the mandated decisionmaking process has actually taken place. Informed and meaningful consideration of alternatives--including the no action alternative-- is thus an integral part of the statutory scheme.
>
> Moreover, consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process. This is reflected in the structure of the statute: while an EIS must also include alternatives to the proposed action, 42 U.S.C. § 4332(2)(C)(iii) (1982), the consideration of alternatives requirement is contained in a separate subsection of the statute and therefore constitutes an independent requirement. See id. § 4332(2)(E). The language and effect of the two subsections also indicate that the consideration of alternatives requirement is of wider scope than the EIS requirement. The former applies whenever an action involves conflicts, while the latter does not come into play unless the action will have significant environmental effects. An EIS is required where there has been an irretrievable commitment of resources; but unresolved conflicts as to the proper use of available resources may exist well before that point. Thus, the consideration of alternatives requirement is both independent of, and broader than, the EIS requirement.

Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-1229 (9th Cir. 1988).

"While a federal agency need not consider all possible alternatives for a given action in preparing an EA, it must consider a range of alternatives that covers the full spectrum of possibilities." Ayers v. Espy, 873 F.Supp. 455, 473 (D. Colo. 1994).

The EA and Draft DN review only two meaningful alternatives: the company's proposal (Alternative B) and the agency's version of the same with a few additional mitigation measures included (Alternative C). The agency did not address the following reasonable alternatives that were presented to it in BHCWA's comments on the project: (1) access to drill holes without the construction or reconstruction/improvement of new or improved roads; (2) reduction in the amount, scope, number of holes, and impact of each drill pad; (3) additional timing restrictions to protect wildlife and area residents; (4) preclusion of any impact to cultural/religious/historical resources; (5) a phased approach to allow for sufficient information on ground water and surface water baseline conditions and impacts to be assessed and considered prior to additional drilling; (6) requiring aboveground tanks to contain drilling fluids and rock cutting instead of allowing land application; (7) the Forest Service should be notified before a drill hole is to be plugged to allow sufficient time to inspect the plugging while in progress; (8) improving and straightening roads before allowing water trucks in the area; (9) providing access gates to allow access only to

workers who have cleared a background check and drug tests; (10) forbidding operations within at least 24 hours of a snowfall or ice event due to the dangerous roads into the area.

Despite the reasonableness of these alternatives and that they were all specifically raised in comments submitted by BHCWA, the EA does not address them in any meaningful way, in violation of NEPA.

The Forest Service Must Minimize All Adverse Impacts from the Project

On the National Forests, the Organic Act requires the Forest Service "to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. § 551. "[P]ersons entering the national forests for the purpose of exploiting mineral resources must comply with the rules and regulations covering such national forests." Clouser v. Espy, 42 F.3d 1522, 1529 (9th Cir. 1994).

The USFS mining regulations require that "all [mining] operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest resources." 36 C.F.R. § 228.8. In addition, the operator must fully describe "measures to be taken to meet the requirements for environmental protection in § 228.8." 36 C.F.R. 228.4(c)(3). "Although the Forest Service cannot categorically deny a reasonable plan of operations, it can reject an unreasonable plan and prohibit mining activity until it has evaluated the plan and imposed mitigation measures." Siskiyou Regional Education Project v. Rose, 87 F. Supp. 2d 1074, 1086 (D. Or. 1999), citing Baker v. U.S. Dept. of Agriculture, 928 F.Supp. 1513, 1518 (D. Idaho 1996). "This court does not believe the law supports the Forest Service's concession of authority to miners under the General Mining Act in derogation of environmental laws and regulations." Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, at *6 (D. Or. 2006)(finding violation of Organic Act in Forest Service's failure to minimize adverse impacts to streams).

In addition to ensuring compliance with all applicable environmental standards under the 36 CFR Part 228 regulations, the USFS has a mandatory duty to require "all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations" under 36 CFR § 228.8(e)). See Rock Creek Alliance v. Forest Service, 703 F.Supp.2d 1152, 1170 (D. Montana 2010) (Forest Service violated Organic Act and 228 regulations by failing to protect water quality and fisheries in approving mining PoO).

Importantly, a simple and generalized reduction of impacts does not equate to the strict requirements for minimization of impacts and protection of resources. The Forest Service's duty to minimize impacts is not met simply by somewhat reducing those impacts. Trout Unlimited v. U.S. Dep't. of Agriculture, 320 F.Supp.2d 1090, 1110 (D. Colo. 2004). In interpreting the Federal Land Policy and Management Act (FLPMA)'s duty on the agency to "minimize damage to … fish and wildlife habitat and otherwise protect the environment," 43 U.S.C. § 1765(a), the court specifically stated the agency's finding that mitigation measures would "reasonably protect" fisheries and habitat failed to meet its duty to "minimize" impacts. Id. In this case, the exploration occurs in the Rapid Creek watershed. Rapid Creek is a world-class trout fishery.

The agency must demonstrate that all feasible means have been required to minimize all adverse impacts to all potentially affected resources. For example, the Ninth Circuit Court of Appeals recently held that the Forest Service had the authority to strictly limit mining claimants' vehicular access to mining claims. Public Lands for the People v. U.S. Dept. of Agriculture, 697 F.3d 1192 (9th Cir. 2012). As held by the court:

> The Secretary of Agriculture has the right to restrict motorized access to specified areas of the national forests, including mining claims. [Clouser v. Espy, 42 F.3d at 1530 (citing 16 U.S.C. § 551)] (means of access "may be regulated by the Forest Service"). More specifically, we have upheld Forest Service decisions restricting the holders of mining claims to the use of pack animals or other non-motorized means to access their claims. Id. at 1536-38. Relatedly, we have rejected the contention that conduct "reasonably incident[al]" to mining could not be regulated. United States v. Doremus, 888 F.2d 630, 632-33 (9th Cir. 1989). Our precedent thus confirms that the Forest Service has ample authority to restrict motor vehicle use within the ENF [El Dorado National Forest].

Id. at 1197.

Thus, in this case, in order to minimize all adverse impacts, the agency must consider, among other restrictions to protect wildlife and the environment, limit project activities to existing roads and upgrade those roads. Exploration-related traffic would present an undue risk on Silver City Road, given how narrow and winding the road is. Further, in the summer, the road receives a high level of traffic. Similarly, Rochford Road presents serious transportation risks, evidenced by the Mineral Mountain Resources vehicle that recently slid off the road into Rapid Creek. Transportation of fuels and any other drilling or other chemicals must be tightly controlled to prevent contamination. As noted herein, the agency must fully consider such limitations as reasonable alternative(s) under NEPA. Additionally, to reduce cumulative impacts to wildlife species that are sensitive to light, noise, and other human activities incidental to mineral exploration, the USFS should consider the timing of the project in relation to other adjacent or nearby mineral projects and consider imposing timing restrictions so that these multiple projects in the same general area occur sequentially rather than at the same time. The same is true for other affected resources such as ground water, surface water, and air quality.

The Agency Must Comply with the National Historic Preservation Act (NHPA) and Other Requirements to Protect Cultural, Historic, and Native American Interests and Resources.

The USFS must comply with the NHPA and requirements regarding cultural, historic, and Native American interests and resources. Due to the likelihood that cultural and religious sites and resources will be adversely affected, it would be a violation of the NHPA and other laws (and NEPA as noted above) to approve the projects without the required review of, and protection of, cultural/historical resources.

> [T]he fundamental purpose of the NHPA is to ensure the preservation of historical resources. See 16 U.S.C. § 470a(d)(1)(A) (requiring the Secretary to "promulgate regulations to assist Indian tribes in preserving their particular historic properties" and "to encourage coordination ... in historic preservation planning and in the identification,

> evaluation, protection, and interpretation of historic properties"); see also Nat'l Indian Youth Council v. Watt, 664 F.2d 220, 226 (10th Cir.1981) ("The purpose of the National Historic Preservation Act (NHPA), is the preservation of historic resources."). Early consultation with tribes is encouraged by the regulations "to ensure that all types of historic properties and all public interests in such properties are given due consideration...." 16 U.S.C. § 470a(d)(1)(A).

Te-Moak Tribe of Western Shoshone v. U.S. Department of the Interior, 608 F.3d 592, 609 (9th Cir. 2010).

> Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8[c], 800.9(c). The [federal agency] must confer with the State Historic Preservation Officer ("SHPO") and seek the approval of the Advisory Council on Historic Preservation ("Council").

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999). See also 36 CFR § 800.8(c)(1)(v)(agency must "[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA.")

The Advisory Council on Historic Preservation ("ACHP"), the independent federal agency created by Congress to implement and enforce the NHPA, has exclusive authority to determine the methods for compliance with the NHPA's requirements. See National Center for Preservation Law v. Landrieu, 496 F. Supp. 716, 742 (D.S.C.), *aff'd per curiam*, 635 F.2d 324 (4th Cir. 1980). The ACHP's regulations "govern the implementation of Section 106," not only for the Council itself, but for all other federal agencies. Id. See National Trust for Historic Preservation v. U.S. Army Corps of Eng'rs, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982).

NHPA § 106 ("Section 106") requires federal agencies, prior to approving any "undertaking," such as approval of the Project at issue here, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. See Pueblo of Sandia v. United States, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 provides a mechanism by which governmental agencies may play an important role in "preserving, restoring, and maintaining the historic and cultural foundations of the nation." 16 U.S.C. § 470.

If an undertaking is the type that "may affect" an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect. See 36 CFR § 800.4(d)(2). See also Pueblo of Sandia, 50 F.3d at 859-863 (agency failed

to make reasonable and good faith effort to identify historic properties). Consultation "must be 'initiated early in the undertaking's planning', so that a broad range of alternatives may be considered during the planning process for the undertaking." Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 787 (9th Cir. 2006).

The NHPA also requires that federal agencies consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites. 16 U.S.C. § 470(a)(d)(6)(B). Consultation must provide the tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 CFR § 800.2(c)(2)(ii). "The agency official **shall ensure that the section 106 process is initiated early in the undertaking's planning**, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 CFR § 800.1(c) (emphasis added).

The NHPA requires that consultation with Indian tribes "recognize the government-to-government relationship between the Federal Government and Indian tribes." 36 CFR § 800.2(c)(2)(ii)(C). See also Presidential Executive Memorandum entitled "Government- to-Government Relations with Native American Tribal Governments" (April 29, 1994), 59 Fed. Reg. 22951, and Presidential Executive Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771.

The USFS must also protect archeological and grave resources, Sacred Sites and Native American religious and cultural uses pursuant to the above laws and requirements as well as: (1) the American Indian Religious Freedom Act (AIFRA), 42 U.S.C. 1996 et seq.; (2) the Archaeological Resources Protection Act (ARPA), 16 U.S.C. 470aa-mm ; and (3) the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 et seq.

In this case, the USFS has not completed the required NHPA consultations, either with the public or with the relevant Tribes. BHCWA's previous comments informed the agency that the Project area must be subject to a culturally-relevant and competent cultural resources survey, and the public and Tribes must be given an opportunity to participate and comment on the identification, evaluation, and protection of the cultural resources at the site. The agency purports to have conducted a Class I cultural resources survey that identified previous cultural resources surveys identifying 25 previously recorded cultural resources located in the project area. EA at p. 24 (Section 3.4.1). However, no information is provided on who conducted these surveys or whether those persons possessed the necessary relevant cultural expertise, where the surveys were conducted, for which projects they were conducted, when they were conducted, what methodologies were used, or any other information. This information is necessary for the agency to accurately assess the results of these surveys and would not need to disclose any sensitive information about the cultural resources themselves.

This information was only provided for the first time in the Final EA. As such the public never had the opportunity to review this information. The agency should have initiated these reviews before seeking public comment, as the information produced from these surveys are necessary for the public and the Tribes to have the legally-required opportunity to participate in the agency's

analysis and decision. This fact again necessitates that a draft NEPA document be produced and circulated for public review and comment once all relevant information has been disclosed.

With regard to consultation efforts, the EA references a government to government consultation held with the Oglala Sioux Tribe on January 28, 2022. EA at 42 (Section 4.4). However, no detail of any kind is presented. The agency failed to disclose or analyze the fact that at that meeting, the Black Hills National Forest Supervisor Jeff Tomac agreed to: (1) conduct one or more targeted site visits of the proposed exploration site with the cultural and natural resource experts of the Tribe; and (2) engage with the Tribe's cultural and natural resource experts on a meaningful survey of cultural and religious resources at and near the proposed exploration site; and (3) consult again with the Tribal Council following the site visit (or visits) and survey work. Thus, the Tribe's consultation process with BHNF was to be ongoing. No information was provided as to any follow-up site visits, any results or information gathered from any such site visits, or how or whether the agency ever made good on its express commitment to consult again with the Oglala Sioux Tribal Council. Absent this information, the agency's responsibilities with regard to this project under both NEPA and the NHPA fall short of the legal requirements.

CONCLUSION

In conclusion, as detailed above and in previous comments submitted by the Objector, the EA and Draft DN/FONSI fail to fully comply with numerous federal and state laws, regulations, policies, and other requirements. As such, the USFS must vacate and remand both documents and order the correction of all errors noted herein. The USFS cannot approve any of the action alternatives described in the EA, or any action alternative at all that the applicant may propose, unless and until all laws, etc., noted herein are satisfied. Please direct all communications regarding this Objection to the undersigned attorneys.

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