



# Water Protector Legal Collective

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June 20, 2023

## Via Online Portal

Carl Petrik  
Acting Forest Supervisor  
Black Hills National Forest  
United States Forest Service

### **Re: Support for Pactola Reservoir-Rapid Creek Watershed Withdrawal #NP-3479**

Dear Acting Forest Supervisor Petrik:

Please accept these comments on behalf of the **Water Protector Legal Collective** (“WPLC”), an Indigenous-led legal non-profit organization that works throughout the United States and internationally, in defense of the rights of Indigenous Peoples, the Earth, Water, and climate justice movements.

Our organization is in strong support of the proposed mineral withdrawal of 20,574 acres of land near and within the Pactola Reservoir and Rapid Creek Watershed area to safeguard the “cultural and natural resources” from “adverse impacts of minerals exploration and development” for a period of 20 years. 88 Fed. Reg. 17006. The application filed by the U.S. Forest Service to the Secretary of the Interior, is an important effort to protect those the waters of *Hé Sápa* (Black Hills) and all those who call the sacred lands and surrounding areas home.

The Black Hills have already suffered greatly from extensive historical impacts of mining and other development, which is once again on the rise. A mineral withdrawal is an effective mechanism to curb the desecration of the Black Hills and protect the area from the impacts of mining exploration and other forms of development.

The proposed withdrawal will:

- **Protect Important Water Resources**

Mining and exploration activities have a direct impact on the safety of surface and ground water, including waters used for domestic and agricultural uses. It is widely known that mining can severely impact water quality, with inevitable release of heavy metals into waterways.

Past mining has impacted the Rapid Creek watershed already through acid mine drainage, spills of toxic fluids including cyanide, ANFO solution, hydraulic fluid, diesel fuel, and antifreeze. The watershed cannot afford to be impacted again. See “Upper Rapid Creek Watershed Assessment” by Dr. Scott Kenner, Scott Miller, A.J. Silva, and Charles Tinant, November 2004; *see also*

“Tanks, Spills, and Environmental Events,” Northern Black Hills Gold Operation Spills Data from South Dakota Department of Agriculture and Natural Resources.

Finally, Rapid City, South Dakota derives its water supply from the Rapid Creek Watershed and connected aquifers. Due to this, there is widespread community opposition to gold exploration and mining in the Rapid Creek Watershed. Resolution 2020-011, February 3, 2020. The proposed withdrawal will guard against this.

- **Ensure Critical Wildlife Habitats Are Able To Thrive**

Mining, exploration, and development can significantly impact wildlife and delicate ecosystems. The area included in the proposed withdrawal area contains critical wildlife habitats for many rare species including Bighorn sheep, Osprey, Northern Goshawk, Dakota Vertigo, Smooth Green Snake, and Black Hills Redbelly Snake. See February 3, 2020 South Dakota Department of Game, Fish, and Parks Comment letter re Jenny Gulch Exploration Drilling Project.

The proposed withdrawal will protect against increased infrastructure, road construction, roadkill, introduction of species that are not native to the region, and guard against disturbance of wildlife habitats and populations.

- **Respect the Cultural Values and Rights of Indigenous Peoples**

The 1868 Treaty of Fort Laramie designated the *Ĥe Sápa* (Black Hills) as “unceded Indian Territory” for the exclusive use of the *Oceti Šakowiŋ* (Great Sioux Nation) “for as long as the grass shall grow and the rivers will flow.” When gold was found in the Black Hills, the United States reneged on the agreement and re-drew the boundaries of the treaty. In 1980, the Supreme Court of the United States recognized that the 1877 act of Congress by which the United States unilaterally abrogated the Fort Laramie Treaty of 1868 and wrested control of the Black Hills, was a violation of and an unconstitutional “taking” under the Fifth Amendment. 448 U.S. 371 (1980). In other words, the Supreme Court found that the Black Hills is *stolen land*. The 1980 decision represented the culmination of more than sixty years of litigation and lobbying in which the *Oceti Šakowiŋ* (Great Sioux Nation) sought remedy for broken treaty promises.

Although the proposed withdrawal only covers a small portion of treaty lands of the *Oceti Šakowiŋ* (Great Sioux Nation), the withdrawal would help protect the cultural and historical resources in that area—which rests on stolen, unceded treaty lands. Mining activity in the proposed withdrawal area would undeniably threaten cultural resources in the Black Hills and the rights of Indigenous Peoples and Original Nations that call *Ĥe Sápa* home. The proposed withdrawal is a step forward towards compliance with federal laws and applicable international standards.

Under United States federal laws such as the Native American Graves Protection and Repatriation Act of 1990 (“NAGPRA”), federal land-managing agencies are required to “consult” with federally recognized Indian Tribes prior to actions that might involve the intentional removal or excavation of Native American human remains and other cultural items. Such items are often found in the path of resource exploration, infrastructure and other

development. As defined by the Department of the Interior, “Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility.”<sup>1</sup> Nevertheless, mere consultation as a procedural mechanism, is not sufficient—it must also amount to consent by consensus.

The United Nations Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly in 2007 and recognized by the U.S. State Department as having both moral and political force, recognizes, among other things, that Free, Prior and Informed Consent (“FPIC”) is a pre-requisite for any activity that affects Indigenous ancestral lands, territories, or natural resources.

FPIC “recognizes indigenous peoples’ inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful choices by indigenous peoples about their development path.”<sup>2</sup> FPIC is intrinsically tied to the concept of self-determination: that “human beings, individually and as groups, are equally entitled to be in control of their own destinies.”<sup>3</sup> As stated in the Charter of the United Nations (United Nations 1945) (treaty ratified by the United States in 1945) and in Article 1 of the International Covenant on Economic, Social and Cultural Rights (UN General Assembly 1966) (treaty signed by the United States in 1992), self-determination is to be provided to ‘all peoples’.

In light of proposed mining exploration in the Rapid Creek Watershed, the Oglala Sioux tribe passed Resolution 22-118 opposing mining activities in the Black Hills. The resolution states that such mining activities would “have significant impact on [Oglala] Treaty rights; cultural and religious resources and practice; and the environment.” Oglala Sioux Tribe Resolution 22-118 (July 22, 2022). The proposed withdrawal would protect some of the Great Sioux Nation treaty lands and cultural resources found in the area and it is a step in the right direction to protect sacred lands that were already subject to historical wrongs.

**We also request and recommend an expansion of the withdrawal area. Specifically:**

- Include the entire Upper Rapid Creek Watershed in the proposed withdrawal area. While the original proposal is a step in the right direction, it only includes approximately 10% of the Upper Rapid Creek Watershed. We recommend and support the expansion of the withdrawal to include the entire watershed.
- As also noted in the public comment submitted by the Black Hills Clean Water Alliance, adequate protection of cultural resources also “requires expansion of the proposed withdrawal to the broader Black Hills, as 248,000 acres of the Black Hills – or 20% of the

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<sup>1</sup> Department of the Interior Policy on Consultation, available at: <https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf>

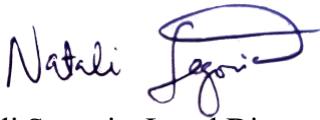
<sup>2</sup> UN Sub-Commission on the Promotion and Protection of Human Rights 2004, p. 5.

<sup>3</sup> Former U.N. Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, quoted in conference report on ‘Common Roots, Common Futures: Different Paths to Self-determination—An international Conversation’, University of Arizona, 2012.

total – were under active mining claims as of April 26, 2023.” The Black Hills are sacred in their entirety and possess deep cultural and spiritual significance to the Lakota and other tribal nations that have lived and traveled in the area since time immemorial. An Environmental Assessment to protect the Black Hills would also be a welcome expansion of this proposal.

In conclusion, we strongly support the proposed withdrawal and urge the Secretary to move forward with the protection of the Pactola Reservoir-Rapid Creek Watershed for the longest permissible withdrawal period of 20 years.

Sincerely,



Natali Segovia, Legal Director & Staff Attorney  
Water Protector Legal Collective  
**Mni Wiconi. Water is Life.**