



Water Protector Legal Collective

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Via Online Portal

United States Department of Agriculture
Forest Service
Attn: Michael Boren, Under Secretary of Agriculture
for Natural Resources and Environment
Attn: Bear Lodge Rare Earth Project
Planning, Administrative Reviews, and Litigation
System (PALS) No. 291093
Black Hills National Forest Supervisor's Office
1019 N. 5th Street
Custer, SD 57730

Re: Public Comment on the Bear Lodge Rare Earth Project Notice of Intent, Docket No. 2026-15255

The Water Protector Legal Collective (“WPLC”) respectfully submits these comments in strong opposition to the proposed Bear Lodge Rare Earth Project (the “Project”). WPLC is an Indigenous-led nonprofit law firm and advocacy organization that works to protect the rights of Indigenous Peoples, Original Nations, and the Earth. These comments are submitted in defense of the Water, the Sacred, and the rights of present and future generations.

The Bear Lodge Rare Earth Project would authorize open-pit extraction of rare earth elements from National Forest System lands within Ȥe Sápa, the Lakota name for the region commonly called the Black Hills. The proposed action includes construction and operation of an open-pit mine, access and haul roads, a dewatering pond, a water pipeline, utilities, safety fencing, and other support infrastructure. Ore

would be hauled across National Forest System lands for processing at a facility on adjacent private land.¹ The Forest Service anticipates that construction and associated infrastructure would require approximately two years, mining would proceed for approximately seventeen years, and closure and final reclamation would require approximately two additional years, with monitoring and maintenance continuing until successful reclamation is demonstrated.²

The Project would occur within an area of great cultural and spiritual value to the Lakota and other Indigenous Peoples. Ĥe Sápa has long been recognized as a place of Indigenous cultural and religious importance, and the Forest Service's own cultural-resources assessment acknowledges that the entire landscape is sacred to Indigenous Tribes affiliated with the region.³ The National Park Service likewise recognizes the continuing sacred significance of Mathó Thípila, the place known in federal materials as Devils Tower, to numerous Northern Plains Nations.⁴

The Forest Service must therefore approach this environmental review with an understanding of the relationships that Indigenous Peoples maintain with Ĥe Sápa and its sacred places. Federal law requires the agency to evaluate the environmental consequences of the proposed action and reasonable alternatives, while its own locatable-minerals regulations require operations on National Forest System lands to be conducted so as to minimize adverse environmental impacts on surface resources where feasible.⁵ The environmental review should provide a complete record concerning cultural resources, water, transportation, public health, wildlife, land use, and other affected resources identified by the agency, as well as issues that emerge through Tribal consultation and public scoping.⁶

¹ U.S. Forest Service, *Black Hills National Forest; Wyoming; Bear Lodge Rare Earth Project*, 91 Fed. Reg. 47,803, 47,804 (July 29, 2026).

² *Id.* at 47,804.

³ U.S. Forest Service, *Black Hills National Forest, Forest Plan Revision Assessment: Cultural Resources* 19 (2022) (stating that “[t]he entire Black Hills are sacred to Indigenous Tribes affiliated with the area”).

⁴ National Park Service, *American Indians*, Devils Tower National Monument (Apr. 24, 2025)

⁵ 16 U.S.C. § 4332(2)(C); 36 C.F.R. §§ 228.5, 228.8 (2026).

⁶ 91 Fed. Reg. at 47,804.

The Project also arises within the unceded treaty lands of the Oceti Sakowin (Great Sioux Nation), in territory addressed by the Fort Laramie Treaties and within the broader history of federal dispossession of Indigenous lands in ǂe Sápa. The 1851 and 1868 Fort Laramie Treaties recognized and protected interests of the Great Sioux Nation in territory encompassing ǂe Sápa.⁷ These treaties remain in effect today. The Supreme Court has subsequently recognized the continuing legal significance of treaty rights and the federal government's obligations concerning rights reserved by treaty.⁸ Those obligations remain relevant to a federal decision concerning activities that could affect Indigenous cultural practices, access to sacred places, water, wildlife, and other resources associated with treaty rights.

WPLC submits these comments to ensure that the Forest Service's environmental review accounts for the full consequences of the proposed Project. The agency should carefully examine the Project's relationship to Mathó Thípila, the effects of project-related transportation and industrial activity, the potential effects on water and other natural resources, and the consequences for Indigenous Peoples whose cultural and spiritual relationships with ǂe Sápa continue today. WPLC urges the Forest Service to prepare a complete and legally adequate environmental impact statement and, based on the substantial risks identified below, to select the No Alternative and reject the Project as the record indicates that its impacts cannot be reconciled with federal law, treaty obligations, and the protection of sacred places and future generations.

Background

The Bear Lodge Project Would Authorize A Large-Scale Open-Pit Mine On Sacred Land

⁷ Treaty with the Sioux-Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee, and Arapaho, U.S.-Sioux & Arapaho, Sept. 17, 1851, 11 Stat. 749; Treaty with the Sioux, U.S.-Sioux, Apr. 29, 1868, 15 Stat. 635.

⁸ See *United States v. Winans*, 198 U.S. 371, 380-81 (1905); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 193-202 (1999).

Ĥe Sápa, meaning “Black Hills” in Lakota, is a sacred cultural region and traditional homeland of the Oceti Sakowin.⁹ The Lakota term is also rendered “He Sapa” in sources using a simplified orthography. The cultural role of Ĥe Sápa extends to particular sacred places throughout the landscape. Among those places is Mathó Thípila, the Lakota name for the geologic formation federally designated as Devils Tower National Monument. Mathó Thípila is commonly translated as “Bear’s Tipi,” “Home of the Bear,” “Bear’s Lair,” or “Bear Lodge.” It is also identified by the Lakota name Ptehé Ĝí, commonly translated as “Brown Buffalo Horn.” The National Park Service acknowledges that Mathó Thípila is a sacred site associated with numerous Indigenous Nations and Indigenous communities maintain continuing cultural and ceremonial relationships with the place.¹⁰ The National Park Service additionally recognizes that many Indigenous people regard recreational climbing on Mathó Thípila as inconsistent with its sacred character and maintains a voluntary June climbing closure in recognition of its religious significance.¹¹

The surrounding landscape of Mathó Thípila provides the setting in which Indigenous Peoples sustain cultural practices and relationships associated with the site. The Forest Service’s cultural-resources assessment recognizes that Traditional Cultural Properties can include mountains, hills, springs, gathering areas, and other geographic features associated with the religious practices and continuing cultural identity

⁹ The Smithsonian National Museum of the American Indian identifies the Black Hills as “He Sapa.” Smithsonian National Museum of the American Indian, *Oceti Sakowin Homelands: Black Hills, South Dakota (He Sapa)*.

¹⁰ National Park Service, *American Indians*, Devils Tower National Monument (Apr. 24, 2025). (stating that “[s]tories and histories shared by tribal members indicate that the Tower was a sacred site” and that “[t]oday, many tribes still utilize the park for traditional ceremonies”)

¹¹ See Craig Howe, Lydia Whirlwind Soldier & Lanniko L. Lee eds., *He Sapa Woihanble: Black Hills Dream 4* (Living Justice Press 2011); U.S. Forest Service, *Black Hills National Forest, Forest Plan Revision Assessment: Areas of Tribal Importance* (2022). National Park Service, *Voluntary Climbing Ban in June*, Devils Tower National Monument; National Park Service, *Current Climbing Closures*, Devils Tower National Monument (Apr. 27, 2026); *Supra* note 9 (The Smithsonian Institution’s National Museum of the American Indian identifies the Black Hills as “He Sapa” and describes the landscape as a place of Lakota origin, history, belonging, and continuing cultural connection. The Forest Service’s own assessment similarly recognizes that Indigenous Peoples have longstanding cultural relationships with Ĥe Sápa, including traditional gathering, hunting, medicinal practices, and other uses of its natural resources).

of Indigenous communities.¹² The agency has also recognized that sacred areas and landscapes constitute Indigenous cultural resources within Ǻe Sápa.¹³

The Bear Lodge Proposed Mine

The proposed Project is situated in the Bear Lodge Mountains in northeastern Wyoming, within the Ǻe Sápa region. The Project's proposed Bull Hill mine is approximately 22 miles from Mathó Thípila, according to Rare Element Resources, the Project proponent.¹⁴ The distance between the mine and Mathó Thípila does not resolve the cultural or environmental questions presented by the Project Notice of Intent. The proposed action includes activities that reach outside of the open-pit footprint, including access and haul roads, transportation across National Forest System lands, utilities, a dewatering pond, a water pipeline, and other infrastructure.¹⁵ The proponent states that project roads would be used for employee transportation, equipment and materials deliveries, ore transportation, and reclamation activities.¹⁶

Transportation therefore warrants consideration as part of the Project's effects on the cultural surroundings. The Forest Service should identify the routes that would be used, the anticipated frequency and type of traffic, proposed road improvements, changes in road use, and associated effects including noise, dust, visual disturbance, and increased human activity. The agency should also determine whether transportation routes or other ancillary activities would affect culturally significant places, traditional access routes, wildlife, water resources, or the ability of Indigenous Peoples to conduct cultural or religious practices. The NOI expressly identifies transportation safety and dangers associated with road use among the issues to be evaluated.¹⁷

¹² U.S. Forest Service, *Black Hills National Forest, Forest Plan Revision Assessment: Cultural Resources* 19 (2022); see also 36 C.F.R. § 800.16(l)(1) (2026).

¹³ U.S. Forest Service, *Black Hills National Forest, Forest Plan Revision Assessment: Cultural Resources* 19.

¹⁴ Rare Element Resources, *Bear Lodge Project FAQs*, response to “Is there any chance blasting could impact Devils Tower?”

¹⁵ 91 Fed. Reg. at 47,804.

¹⁶ Rare Element Resources, *Bear Lodge Project*, Proposed Bear Lodge Operations, “How will the Project affect the roads?”

¹⁷ 91 Fed. Reg. at 47,804.

Rare Element Resources submitted its proposed Mine Plan of Operations (“MPO”) to the Forest Service on March 20, 2026.¹⁸ The MPO proposes open-pit extraction of rare earth element-bearing material from unpatented lode mining claims on National Forest System lands, with mineral processing occurring at a facility on adjacent private land.¹⁹ The proposed action would require additional National Forest System infrastructure, including access and haul roads, a guardhouse, safety fencing, utilities, a dewatering pond, and a water pipeline.²⁰ The Forest Service expects the Project to require approximately two years of construction, seventeen years of mining, an additional year of mineral processing after mining, and approximately two years of closure and final reclamation. Environmental monitoring and maintenance would continue until successful reclamation is demonstrated.²¹

The current proposal follows an earlier federal environmental review. The Forest Service previously prepared a Draft Environmental Impact Statement for the Project in 2016, but that document was never finalized. The current environmental review therefore must establish present baseline conditions and determine which prior studies remain scientifically and legally adequate for a new federal decision. The agency should account for changes in hydrology, climate, land use, wildlife, cultural-resource information, regulatory requirements, mine design, transportation plans, and other relevant conditions that have developed since the earlier review.

The July 29, 2026 Notice of Intent (“NOI”) states that the Forest Service will prepare an environmental impact statement concerning the proposed MPO.²² The NOI identifies hydrologic effects on stream channels, instream flows, water-quality standards, and beneficial uses; potential effects on scenic resources and grazing allotments; air quality; public health and safety concerns associated with radioactive or hazardous elements; current and future land uses; socioeconomic consequences; cultural sites and historic

¹⁸ *Id.* at 47,803.

¹⁹ *Id.* at 47,803-04.

²⁰ *Id.* at 47,804.

²¹ *Id.*

²² *Id.* at 47,804.

properties important to Tribal Nations; and wildlife and habitat among the preliminary substantive issues expected to be evaluated.²³ The NOI also identifies alternative access and haul routes and variations in mine and facility configuration as potential alternatives for consideration.²⁴

The Project Is Proceeding Through a FAST-41 Expedited Federal Review Process Without a Draft Environmental Impact Statement

The Forest Service's environmental review is taking place under an expedited FAST-41 permitting process.²⁵ The agency states that it will prepare a final EIS but will not publish a draft EIS or conduct a project-level objections process under 36 C.F.R. part 218.²⁶ This limits implicitly any further opportunity for public comment. The Under Secretary of Agriculture for Natural Resources and Environment is identified as the responsible official and will determine whether to approve the MPO as proposed or modified, or as described in an alternative, as well as the mitigation and monitoring requirements and whether an amendment to the applicable Forest Plan is required.²⁷

The proposed action may require a project-specific amendment to the Black Hills Forest Plan concerning scenic integrity standards and guidelines.²⁸ The NOI identifies 36 C.F.R. § 219.10(a), including provisions concerning aesthetic values, scenery, viewsheds, and nonrenewable energy and mineral resources, as substantive Forest Plan requirements potentially related to the amendment.²⁹ The Project would also require approvals from other federal, state, and local agencies. The NOI identifies anticipated reviews involving the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, the Wyoming Department of Environmental Quality, the Wyoming State Engineer's Office, and Crook County,

²³ *Id.* at 47,804.

²⁴ *Id.*

²⁵ *Id.* at 47,803.

²⁶ *Id.* at 47,803-04; see also 36 C.F.R. §§ 218.13(a), (b) (2026).

²⁷ 91 Fed. Reg. at 47,805.

²⁸ *Id.* at 47,803, 47,805.

²⁹ *Id.* at 47,805; 36 C.F.R. § 219.13(b)(2) (2026).

among others.³⁰ These separate regulatory processes do not diminish the Forest Service's independent obligation to evaluate the consequences of the federal action before deciding whether to approve the MPO or an alternative.

The Forest Service has expressly invited comments finding potential alternatives and impacts, as well as relevant information, studies, or analyses concerning effects on the quality of the human environment.³¹ WPLC submits these comments in response to that request and urges the Forest Service to protect Mathó Thípila and the sacred lands and spaces of Ĥe Sápa, while respecting the Indigenous cultural practices, treaty interests, and future generations connected to this region.

I. Indigenous Relationships to Mathó Thípila Must Guide the Forest Service's Evaluation of Project Effects

The sacred character of Mathó Thípila does not depend upon a prior federal designation, administrative finding, or judicial recognition. Its religious significance derives from the longstanding and continuing relationships that Indigenous Peoples maintain with the place. At the same time, federal sources provide important documentation of those relationships, but they do not create them. The National Park Service has documented Mathó Thípila, which federal agencies currently identify as Devils Tower, as a sacred site and has described continuing Tribal religious and cultural relationships with the place.³² The Tenth Circuit likewise described the religious significance of Mathó Thípila in *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 816 (10th Cir. 1999). Those sources support the significance that Indigenous Peoples ourselves have attributed to Mathó Thípila; the Forest Service should not treat federal

³⁰ 91 Fed. Reg. at 47,804.

³¹ *Id.* at 47,804-05.

³² National Park Service, *American Indians*, Devils Tower National Monument (Apr. 24, 2025), <https://www.nps.gov/deto/learn/historyculture/americanindians.htm>; see also National Park Service, *Devils Tower or Bear Lodge?*, Devils Tower National Monument, <https://www.nps.gov/deto/learn/historyculture/devilstower.htm>.

acknowledgment as the basis upon which that significance depends. This principle should govern the Forest Service's treatment of sacred places throughout Ĥe Sápa. The Forest Service's own assessment documents the presence of sacred places and Traditional Cultural Properties throughout the landscape and explains that their significance comes from Tribal relationships to particular places.³³ The agency has also recognized that Indigenous cultural resources may range from large landscapes to geographic features and that the determination of religious or spiritual significance is grounded in Tribal relationships to particular places.³⁴ Accordingly, the absence of a prior federal designation should not weigh against a Tribe's identification of a place as religiously or culturally significant.

The Forest Service should evaluate the Project's effects in light of the cultural relationships identified by affected Tribal Nations. That approach is consistent with Section 106 of the National Historic Preservation Act, which requires federal agencies to consult with Indian Tribes that attach religious and cultural value to historic properties that may be affected by a federal undertaking.³⁵ The Section 106 regulations further require the agency to seek information from Tribes concerning properties of religious and cultural value and make a reasonable and good-faith effort to identify historic properties within the undertaking's area of potential effects.³⁶ These requirements place Tribal knowledge within the agency's identification and evaluation of cultural resources. The distinction is important where the significance of a place is conveyed through oral histories, cultural practices, religious traditions, or knowledge that is not publicly documented. A federal agency may possess incomplete information concerning a sacred place, particularly where disclosure of its location or use could expose the place to harm or interfere with religious practice.³⁷ The Forest Service's own Ĥe Sápa assessment acknowledge these limitations and recognize that

³³ See U.S. Forest Serv., *Black Hills National Forest Forest Plan Revision Assessment: Cultural Resources*, *supra* note 3, at 19.

³⁴ See U.S. Forest Serv., *Black Hills National Forest Forest Plan Revision Assessment: Areas of Tribal Importance*, *supra* note 11, at 3.

³⁵ National Historic Preservation Act § 106, 54 U.S.C. § 306108 (2018); *see also* *id.* § 302706(b).

³⁶ *Id.* § 302706(b).

³⁷

Tribal Nations may decline to disclose sensitive information concerning sacred places.³⁸ The agency therefore should not infer from the absence of publicly available information that a place lacks religious or cultural value. The Forest Service also must take into account the characteristics of Mathó Thípila and its surrounding cultural setting that may be affected by the undertaking.³⁹ Section 106 defines an undertaking's area of potential effects according to the geographic area in which the undertaking may directly or indirectly alter the character or use of historic properties.⁴⁰ The relevant inquiry therefore should include the ways in which Project activities could alter characteristics that contribute to the religious and cultural value of Mathó Thípila, including its surrounding setting, views, soundscape, atmosphere, and access. The forest service should make that determination through consultation with affected Tribal Nations.

Transportation and other activities associated with the Project should likewise be evaluated according to their potential effects on culturally significant places and practices. The Projects's proposed transportation routes have not yet been selected, and the undertaking includes activities occurring outside of the mine footprint.⁴¹ Because the geographic scope of those activities remains subject to agency decision-making, the Forest Service should evaluate reasonably foreseeable transportation routes and associated effects before establishing the perimeters of its cultural-resource analysis. That analysis should account for effects that may arise from changes in traffic, noise, dust, visual conditions, access, or other characteristics of places that Tribal Nations identify as culturally or religiously significant.

Federal law offers mechanisms for protecting such information. Section 304 of the National Historic Preservation Act permits federal agencies to withhold from public disclosure information concerning the location, character, or ownership of a historic property when disclosure could cause a significant invasion of privacy, risk harm to the historic property, or impede the use of a traditional religious

³⁸ See U.S. Forest Serv., *Areas of Tribal Importance Assessment*, *supra* note 11, at 3.

³⁹ 36 C.F.R. § 800.16(d) (2026), *supra* note 40

⁴⁰ 36 C.F.R. § 800.5(a)(1), (v) (2026).

⁴¹ See *Bear Lodge Rare Earth Project*, *supra* note 1, at 47,803-05.

site by practitioners.⁴² The Section 106 regulations contain corresponding protections for information that meets those criteria.⁴³ The availability of these protections reinforces the principle that Tribal Nations should not be required to choose between participating meaningfully in the environmental review and protecting culturally sensitive knowledge. The Forest Service should use those protections where appropriate so that affected Tribes can participate in the review without being required to expose sensitive cultural knowledge.

The American Indian Religious Freedom Act (“AIRFA”) establishes additional federal policy concerning Indigenous religious practices. Congress declared it to be the policy of the United States to protect and preserve the inherent right of American Indians to believe, express, and exercise their traditional religions, including access to sites, use and possession of sacred objects, and worship through traditional rites and ceremonies.⁴⁴ Executive Order 13,007 directs federal agencies with management responsibility for federal lands to accommodate access to and ceremonial use of Indian sacred sites by religious practitioners and to avoid adversely affecting the physical integrity of such sites.⁴⁵

The Forest Service has authority over whether the proposed Mine Plan of Operations should be approved, modified, or rejected, and the current NOI states that the agency will consider alternatives and may require a project-specific amendment to the Forest Plan.⁴⁶ NEPA requires an EIS to address reasonably foreseeable environmental effects, alternatives to the proposed action, adverse effects that cannot be avoided, and irreversible and irretrievable commitments of resources.⁴⁷ Those requirements provide the framework through which the agency must consider the consequences of authorizing an industrial activity that may affect a sacred place and its associated cultural setting.

⁴² 54 U.S.C. § 307103(a) (2018).

⁴³ 36 C.F.R. § 800.11(c) (2026).

⁴⁴ 42 U.S.C. § 1996 (2018).

⁴⁵ Exec. Order No. 13,007, § 1, 61 Fed. Reg. 26,771, 26,771 (May 24, 1996).

⁴⁶ See *Bear Lodge Rare Earth Project*, *supra* note 1, at 47,803-05.

⁴⁷ 42 U.S.C. § 4332(2)(C) (2018 & Supp. IV 2022), as amended by Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38-39 (2023).

Where affected Tribal Nations identify Project effects that cannot be adequately mitigated, the Forest Service should give meaningful consideration to alternatives that avoid those effects. The agency should not presume that reclamation or post-construction mitigation can restore the religious and cultural qualities of a sacred place after those qualities have been impaired.

WPLC urges the Forest Service to place Indigenous relationships to Mathó Thípila at the center of its evaluation of the Project's cultural effects. The agency should allow affected Tribal Nations to inform the identification of culturally significant resources, determine the appropriate geographic scope of the cultural-resource analysis, protect confidential cultural information, and evaluate whether reasonable alternatives can avoid adverse effects to Mathó Thípila.

II. Meaningful Tribal Consultation Must Shape The Scope And Outcome Of The Environmental Review

The Forest Service's consultation with affected Tribal Nations must provide a meaningful opportunity to influence the identification of cultural resources, the scope of the environmental review, the evaluation of alternatives, and the resolution of adverse effects. Section 106 establishes specific consultation obligations concerning historic properties of religious and cultural value to Indian Tribes, and the Forest Service's own Ǫe Sápa assessments recognize the role of proactive Tribal consultation in identifying sacred places and appreciating their significance.⁴⁸

The current federal permitting record confirms that Section 106 consultation is part of the Project's review. The FAST-41 permitting dashboard identifies a milestone for consultation with the Wyoming State Historic Preservation Office and Tribal Historic Preservation Officers. The dashboard lists April 7, 2026 as the consultation initiation date and identifies the milestone as completed after the agency

⁴⁸ See U.S. Forest Serv., *Cultural Resources Assessment*, *supra* note 3, at 19; U.S. Forest Serv., *Areas of Tribal Importance Assessment*, *supra* note 11, at 3.

explained that an administrative error had prevented it from being marked complete when the permitting timetable was published.⁴⁹ The Forest Service should explain what consultation has occurred to date, which Tribal Nations have been invited to participate, what information the agency has received, and how that information has affected the scope and methods of the environmental review.

Section 106 requires consultation with any Indian Tribe that attaches religious and cultural value to a historic property that may be affected by a federal undertaking, regardless of where the property is located.⁵⁰ The agency official must provide such Tribes a reasonable opportunity to identify concerns about historic properties, advise on their identification and evaluation, express their views regarding the undertaking's effects, and participate in resolving adverse effects.⁵¹ The agency official also bears responsibility for making a reasonable and good-faith effort to identify the Tribes that should be consulted.⁵²

The regulations expressly recognize the federal government's unique legal relationship with Indian Tribes and require consultation to be performed in a manner respectful of Tribal sovereignty.⁵³ Consultation must also recognize the government-to-government relationship between the federal government and Indian Tribes.⁵⁴ Nothing in the Section 106 regulations alters, amends, repeals, interprets, or modifies Tribal sovereignty, treaty rights, or other rights of an Indian Tribe.⁵⁵

These requirements carry particular weight in Ĥe Sápa. The Forest Service has recognized that numerous Traditional Cultural Properties and sacred sites are unknown to Forest Service personnel and that proactive consultation is necessary to identify resources and understand their significance.⁵⁶ The agency has

⁴⁹ Permitting Council, *Bear Lodge Rare Earth Project, FAST-41 Permitting Dashboard, Section 106 Review: Consultation Initiated with SHPO/THPO, Agency Action*, <https://www.permits.performance.gov/fast-41-missed-datesection-106-review-consultation-initiated-shpothpo-agency-action-14>

⁵⁰ 36 C.F.R. § 800.2(c)(2)(ii) (2026).

⁵¹ *Id.* § 800.2(c)(2)(ii)(A).

⁵² *Id.*

⁵³ *Id.* § 800.2(c)(2)(ii)(B).

⁵⁴ *Id.* § 800.2(c)(2)(ii)(C).

⁵⁵ *Id.* § 800.2(c)(2)(ii)(B).

⁵⁶ See U.S. Forest Serv., *Cultural Resources Assessment*, *supra* note 3, at 19.

further acknowledged that Tribes may understand sacred places as landscapes and may be reluctant to disclose sensitive information concerning their locations or uses.⁵⁷ The Forest Service should incorporate those agency findings into its Project-specific consultation process.

The Forest Service should not define the relevant cultural setting before receiving meaningful Tribal input. Section 106 requires the agency to determine and document the area of potential effects in consultation with the SHPO and THPO, review existing information, seek information from consulting parties, and seek information from Indian Tribes concerning properties of religious and cultural value.⁵⁸ The agency must then make a reasonable and good-faith effort to identify historic properties within that area.⁵⁹

The requirement has particular significance for Mathó Thípila and other sacred places within Ĥe Sápa. The Project's proposed mine is approximately 22 miles from Mathó Thípila, according to Rare Element Resources.⁶⁰ The Project also includes transportation and infrastructure outside the proposed mine itself.⁶¹ The Forest Service should therefore consult with affected Tribal Nations before determining whether the mine, transportation routes, roads, water infrastructure, waste facilities, or other components of the undertaking could affect properties of religious and cultural meaning.

Consultation should inform the methods used to identify and evaluate cultural resources. Section 106 permits identification efforts to include background research, consultation, oral history interviews, field investigation, and field survey, depending on the circumstances of the undertaking.⁶² The Advisory Council on Historic Preservation has recognized that traditional cultural landscapes can present particular challenges in Section 106 review and that consultation with Indian Tribes is important to appreciating their nature and significance.⁶³ The agency should select cultural-resource methods capable of identifying resources whose

⁵⁷ See U.S. Forest Serv., *Areas of Tribal Importance Assessment*, *supra* note 11, at 3.

⁵⁸ 36 C.F.R. § 800.4(a) (2026).

⁵⁹ *Id.* § 800.4(b)(1).

⁶⁰ Rare Element Resources, *Bear Lodge Project FAQs*, *supra* note 17.

⁶¹ See *Bear Lodge Rare Earth Project*, *supra* note 1, at 47,804.

⁶² 36 C.F.R. § 800.4(b)(1) (2026).

⁶³ Advisory Council on Historic Preservation, *Native American Traditional Cultural Landscapes in the Section 106 Review Process: Questions and Answers* (July 11, 2012),

significance derives from religious practice, oral tradition, cultural association, and relationships to the surrounding landscape.

The Forest Service should seek Tribal input ahead of finalizing the geographic and methodological scope of its cultural-resource studies. Consultation ought to address the proposed mine footprint, transportation routes, roads, water infrastructure, waste facilities, viewsheds, audible effects, and other components of the undertaking that may affect cultural resources. The agency should also consider whether transportation corridors or other Project-related activities create an area of potential effects broader than the mine footprint.

Confidentiality must be protected throughout the consultation process. Section 106 expressly recognizes that Tribes may be reluctant to disclose information concerning sacred places.⁶⁴ Section 304 of the National Historic Preservation Act permits federal agencies to withhold certain sensitive information when disclosure could harm a historic property or impede traditional religious use.⁶⁵ The Forest Service should establish procedures that permit Tribes to provide culturally sensitive information while limiting unnecessary public disclosure.

The Forest Service should provide affected Tribes with sufficient information and time to evaluate the Project. The Section 106 regulations contemplate Tribal participation in identifying historic properties, evaluating effects, and resolving adverse effects.⁶⁶ Consultation should therefore occur while the agency can still modify the scope of the review, consider different alternatives, change transportation routes, revise Project components, or adopt measures that avoid adverse effects.

The FAST-41 process makes the timing of that consultation particularly vital. The July 29, 2026 NOI states that the Forest Service will prepare a final EIS but will not publish a draft EIS or conduct a

<https://www.achp.gov/digital-library-section-106-landing/native-american-traditional-cultural-landscapes-section-106>.

⁶⁴ 36 C.F.R. § 800.4(a)(4) (2026).

⁶⁵ 54 U.S.C. § 307103(a) (2018).

⁶⁶ 36 C.F.R. § 800.2(c)(2)(ii)(A) (2026).

project-level objection process. The ordinary draft EIS stage therefore will not provide the public or affected Tribal Nations with an opportunity to review the Forest Service's preliminary environmental analysis and identify deficiencies before the agency issues its final EIS. The expedited process does not eliminate the Forest Service's obligation to conduct the environmental review required by law, but it does remove an important stage at which the public and Tribal Nations ordinarily could respond to the agency's analysis.

The absence of a draft EIS places greater importance on meaningful consultation during the stages that remain available. Section 106 consultation should provide affected Tribal Nations a meaningful opportunity to identify concerns while the Forest Service can still alter the scope of its studies, reconsider alternatives, modify Project components, and address potential adverse effects. The agency should not defer substantive Tribal engagement until after the principal analytical choices have been made.

The NOI also states that the Under Secretary of Agriculture for Natural Resources and Environment will serve as the responsible official and that the final decision will determine whether the MPO is approved as proposed or modified, or as described in an alternative, as well as the mitigation and monitoring requirements.⁶⁷ Because the public and Tribal Nations will not receive a draft EIS for review, the Forest Service should ensure that consultation during scoping and Section 106 review provides a meaningful opportunity to identify deficiencies and propose changes before the administrative record is finalized.

WPLC urges the Forest Service to conduct consultation consistent with the federal government's government-to-government relationship with Tribal Nations. Meaningful consultation requires the agency to provide affected Tribes a reasonable opportunity to shape the environmental review while the agency's decisions remain open to change.

III. Federal Authorization of Mining in Ĥe Sápa Must Respect Treaty Rights and Indigenous Sovereignty

⁶⁷ *Id.* at 47,805.

The Forest Service's decision concerning the Project ought to account for the treaty relationship between the United States and the Oceti Sakowin. The 1851 and 1868 Treaties of Fort Laramie form part of the legal foundation for that relationship. The 1868 Treaty recognized the Great Sioux Reservation, including Ĥe Sápa, and separately addressed lands north of the North Platte River and east of the Bighorn Mountains.⁶⁸ The Treaty also reserved hunting rights on lands north of the North Platte River for as long as buffalo ranged there in sufficient numbers to justify the chase.⁶⁹ These provisions reflect the federal government's recognition that Lakota relationships to land and resources spanned outside of the perimeters of a permanent reservation.

The Project's location within northeastern Wyoming justifies careful review of these treaty provisions. The Bear Lodge Mountains lie north of the North Platte River and east of the Bighorn Mountains, within the area addressed by Article XVI of the 1868 Treaty.⁷⁰ Article XVI described that area as “unceded Indian territory” and provided that no white person could settle upon or occupy it, or pass through it without the Indians' consent.⁷¹ The Project therefore arises within a landscape whose legal history includes an express federal commitment concerning Indigenous control and use. Congress later enacted the Act of February 28, 1877, which purported to take the Black Hills and alter the territorial arrangements established by the 1868 Treaty.⁷² In *United States v. Sioux Nation of Indians*, the Supreme Court held that the United States had effected an unconstitutional taking of the Sioux Nation's property and affirmed an award of just compensation.⁷³ The Court's decision did not erase the history of the federal government's treaty

⁶⁸ See Treaty with the Sioux-Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee, and Arapaho, U.S.-Sioux & Arapaho, Sept. 17, 1851, 11 Stat. 749; Treaty with the Sioux, U.S.-Sioux, Apr. 29, 1868, 15 Stat. 635, 636-40; *supra* note 7.

⁶⁹ Treaty with the Sioux, U.S.-Sioux, Apr. 29, 1868, art. XI, 15 Stat. 635, 638; *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 377-83 (1980).

⁷⁰ See Treaty with the Sioux, U.S.-Sioux, Apr. 29, 1868, art. XVI, 15 Stat. 635, 640.

⁷¹ *Id.*

⁷² Act of Feb. 28, 1877, ch. 72, 19 Stat. 254; *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 382-83 (1980).

⁷³ *United States v. Sioux Nation of Indians*, 448 U.S. 371, 382-83, 423-24 (1980); *supra* note 8.

commitments or the circumstances through which the United States acquired control over Ĥe Sápa. The fact remains this is unceded treaty territory of the Oceti Sakowin.

That history continues to be relevant to the Forest Service's present decision. Federal Indian law recognizes that treaty rights are reserved rights and that treaties must be interpreted according to the terms agreed upon by the parties rather than through ordinary assumptions about federal land ownership.⁷⁴ The Supreme Court has repeatedly applied principles requiring ambiguous treaty provisions to be construed in favor of Indigenous signatories and has recognized that treaty rights may include rights necessary to make expressly reserved rights meaningful.⁷⁵ The Forest Service's own Tribal Relations materials recognize that federal land management is still affected by treaty rights, spiritual and ancestral practices, tribal water rights, and other interests even where federal ownership of the land has changed.⁷⁶ The agency has likewise described government-to-government consultation as an expression of the unique legal relationship between Tribal Nations and the United States.⁷⁷ Those principles should guide the Project's environmental review.

The treaty considerations must be evaluated alongside the statutory authorities under which the Forest Service would authorize and regulate the Project. Treaty rights operate in conjunction with the federal laws governing mineral development on National Forest System lands; the agency must apply those authorities in a manner consistent with its other legal obligations. The General Mining Law does not

⁷⁴ See *McGirt v. Oklahoma*, 591 U.S. 894, 902-03, 914-15 (2020) (explaining that the Court must “follow the text” of the governing treaty and congressional enactments and that courts cannot substitute assumptions about what the government intended for the terms of the agreement); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200-02 (1999) (explaining that Indigenous treaties are interpreted according to their text, history, purpose, and negotiations, with ambiguities resolved in favor of Natives); *United States v. Winans*, 198 U.S. 371, 380-81 (1905) (interpreting treaty rights according to the understanding of the Indigenous parties and recognizing that treaty rights reserved by a Tribe are not defeated by subsequent assumptions concerning title to the land); *supra* note 8.

⁷⁵ See, e.g., *Winans*, 198 U.S. at 380-81; *Mille Lacs*, 526 U.S. at 196-97.

⁷⁶ U.S. Forest Serv., *National Resource Guide to American Indian and Alaska Native Relations: Section 2, Treaty Rights* 53

⁷⁷ U.S. Forest Serv., *National Resource Guide to American Indian and Alaska Native Relations: Section 1, Government-to-Government Relations* (2012); see also Advisory Council on Historic Preservation, *Government-to-Government Consultation with Indian Tribes*, <https://www.achp.gov/initiatives/consultation>.

eliminate the Forest Service's responsibility to comply with other federal legal obligations. The Mining Law makes federal mineral deposits generally available for prospecting and purchase subject to applicable law, while the Forest Service's surface-management authority governs the use of National Forest System lands in connection with mining operations.⁷⁸ The Surface Resources Act further recognizes the federal government's authority to manage surface resources on mining claims.⁷⁹ The Forest Service should identify treaty-protected uses and resources that could be affected by the Project's physical footprint and associated activities. Mining could alter access to areas used for hunting, gathering, ceremony, or other cultural practices. Transportation could interfere with access to treaty-related resources even where the road itself does not cross a presently recognized reservation. Changes to water availability or quality could likewise affect resources that have traditionally supported Native practices.

The Forest Service must work with Tribal Nations to effectively examine and determine whether Project activities would impair the exercise of rights through cumulative changes to the surrounding landscape. A treaty right may depend upon the continued availability of the resource or the ecological conditions that make its exercise possible.⁸⁰ The agency, with Indigenous Peoples at the lead, should therefore evaluate whether changes to water, wildlife habitat, vegetation, access, or other resources could materially interfere with treaty-protected activities, through the government to government relationship.⁸¹ The environmental review needs to address those responsibilities directly rather than treating treaty interests as historical information separate from the Project's present effects. The Forest Service should identify any treaty or reserved rights potentially affected by the Project in consultation with the Tribal Nations holding those rights. The agency should also explain in the administrative record how it determined whether Project

⁷⁸ 30 U.S.C. § 22 (2018); 36 C.F.R. § 228.2 (2026).

⁷⁹ 30 U.S.C. § 612(a)-(b) (2018).

⁸⁰ See *United States v. Winans*, 198 U.S. 371, 381 (1905) (explaining that treaty rights should be construed to preserve the rights' intended practical benefit).

⁸¹ U.S. Forest Serv., *National Resource Guide to American Indian and Alaska Native Relations: Section 2, Treaty Rights* 53 (2012).

approval would affect those rights, and work proactively with Tribal Nations to ensure their analysis is correct during the scoping period.

WPLC therefore urges the Forest Service to treat treaty rights and Indigenous sovereignty as substantive considerations in the decision on the Mine Plan of Operations. The agency should not assume that federal ownership of National Forest System lands resolves the treaty questions presented by mining in Ĥe Sápa. Before authorizing the Project, the Forest Service should identify potentially applicable treaty rights, evaluate the Project's effects on their exercise, consult with affected Tribal Nations, and modify or reject the Project where necessary to avoid unlawful interference.

IV. Free, Prior, and Informed Consent Provides an Essential Framework for Decisions Affecting Indigenous Lands and Sacred Places - Not Mere Consultation

It is well-established that tribal consultation is a minimal requirement for any major federal project affecting the cultural resources or property of Indigenous Nations. 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. 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.”⁸² NHPA Section 106 Tribal consultation above is an additional requirement the Forest Service must abide by here. Nevertheless, consultation is often treated as a mere procedural mechanism; this is not sufficient—it must also amount to consent by consensus.

⁸² 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>

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.”⁸³ 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.”⁸⁴ 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’. Accordingly, Tribes must be afforded more than mere consultation when their cultural heritage, sacred places, and health and human welfare are at stake.

The principle of free, prior, and informed consent provides an important framework for the Forest Service's consideration of a project affecting Indigenous cultural interests in Ĥe Sápa. The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) recognizes Indigenous Peoples' right to participate in decisions affecting their lands, territories, resources, and cultural interests. Article 19 calls for consultation and cooperation in good faith with Indigenous Peoples through their own representative

⁸³ UN Sub-Commission on the Promotion and Protection of Human Rights 2004, p. 5.

⁸⁴ 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.

institutions to obtain free, prior, and informed consent before adopting measures that may affect them.⁸⁵

Article 32 similarly addresses projects affecting Indigenous lands, territories, and resources and calls for consultation and cooperation in good faith to obtain free, prior, and informed consent.⁸⁶

For the Bear Lodge Project, meaningful participation requires access to information before the agency resolves significant questions concerning the Project. The current NOI identifies alternative access and haul routes and variations in mine and facility configuration as matters that may be considered.⁸⁷ Tribal Nations should have an opportunity to evaluate those options before the Forest Service narrows the range of options available for consideration. The timing of consultation is especially important because the Forest Service intends to issue a final EIS without first publishing a draft EIS.⁸⁸ The agency should therefore use the scoping and consultation process to identify deficiencies while alternatives and Project components persist subject to change. Tribal governments should have sufficient information concerning the proposed mine, transportation system, water management, waste facilities, and other relevant components to evaluate their potential consequences. A consent-based framework also requires the agency to take Tribal concerns seriously when determining whether an alternative is acceptable. Consultation should not be treated as a procedure completed after the agency has already settled the central questions. The Forest Service should apply that same principle to the environmental review by considering Tribal recommendations while the agency can still modify the proposed action.

The principle of free, prior, and informed consent is particularly relevant where a federal decision may affect a sacred place. The significance of Mathó Thípila derives from Indigenous religious and cultural relationships that continue today. A decision concerning a nearby industrial development can therefore affect

⁸⁵ G.A. Res. 61/295, arts. 19, 32, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁸⁶ *Id.* art. 32(2).

⁸⁷ *See Bear Lodge Rare Earth Project*, *supra* note 1, at 47,804.

⁸⁸ *Id.* at 47,803-04; *supra* notes 76-77.

interests that cannot be fully captured through conventional measures of acreage, distance, or economic value. Well-informed participation also requires disclosure of relevant scientific information. Tribal Nations should receive sufficient information concerning anticipated groundwater drawdown, water quality, radionuclides, transportation, air quality, waste management, and other Project effects to evaluate the consequences for their communities and cultural practices. The agency should provide meaningful opportunities for Tribal technical experts and representatives to identify deficiencies in the studies or recommend alternative procedures.

The Forest Service should also recognize that Tribal Nations may possess information unavailable through conventional agency research. Oral histories, traditional ecological knowledge, cultural practices, and knowledge concerning particular places can inform the identification of environmental and cultural effects. Section 106 expressly requires consultation and other forms of information gathering in identifying historic properties, and the Forest Service has acknowledged the importance of Tribal knowledge to federal land management.⁸⁹ A consent-based framework further supports consideration of alternatives that avoid impacts before the agency turns to mitigation. Avoidance preserves the ability of Tribal Nations and the Forest Service to prevent an impact before it occurs. Mitigation measures developed after a decision to proceed may not address cultural or spiritual effects that Tribal Nations identify as unacceptable.

WPLC urges the Forest Service to use free, prior, and informed consent as an instructive principle for the Project's remaining review. The agency should provide affected Tribal Nations with complete and timely information, engage them before significant Project choices become fixed, consider their recommendations in developing alternatives, and explain how their concerns influenced the proposed action and the final decision.

⁸⁹ See 36 C.F.R. § 800.4(b)(1) (2026); Advisory Council on Historic Preservation, *Native American Traditional Cultural Landscapes in the Section 106 Review Process: Questions and Answers* (July 11, 2012), *supra* note 72.

V. Pit Dewatering and Contamination Constitute Serious Hazards to the Water of Ħe Spa

Water must receive sustained attention throughout the Project's environmental review. The proposed open-pit mine would require active dewatering, and the current federal permitting record states that groundwater would be removed from the pit to maintain dry working conditions. The same record recognizes that dewatering could temporarily lower groundwater levels and reduce water availability to nearby springs and seeps, followed by groundwater rebound and eventual formation of a pit lake after mining ends.⁹⁰ These effects require a site-specific hydrologic analysis capable of identifying changes in groundwater flow and surface-water connectivity. Groundwater systems can supply springs, seeps, wetlands, and stream baseflow. USGS studies of mine dewatering have documented declines in groundwater levels and reductions in spring discharge, and have stressed the need of comprehensive groundwater studies to understand the extent of mining-related effects.⁹¹ Another USGS study of an open-pit mine documented substantial groundwater-level declines associated with dewatering and concluded that recovery toward a new equilibrium could require many decades after pumping ceased.⁹² The Forest Service should therefore require a quantitative groundwater model that reflects current site conditions and the proposed mine design. The model should identify the expected cone of depression, groundwater inflow to the pit, changes in groundwater gradients, interactions between aquifers, effects on springs and seeps, and potential changes to stream baseflow. The analysis should evaluate conditions throughout the anticipated seventeen-year mining period and during closure and post-closure recovery.

⁹⁰ Permitting Council, *Bear Lodge Rare Earth Project, FAST-41 Permitting Dashboard*, Agency Postings, <https://www.permits.performance.gov/permitting-project/bear-lodge-rare-earth-project/agency-postings>

⁹¹ T.W. Danielson, M.D. ReMillard & R.H. Fuller, *Hydrology of the Coal-Resource Areas in the Upper Drainages of Huntington and Cottonwood Creeks, Central Utah*, U.S. Geological Survey Open-File Report 81-539 (1981).

⁹² D.L. Berger, *Ground-Water Conditions and Effects of Mine Dewatering in Desert Valley, Humboldt and Pershing Counties, Northwestern Nevada, 1962-91*, U.S. Geological Survey Water-Resources Investigations Report 95-4119 (1995).

The agency should also examine whether the Project could alter water quality as groundwater moves through disturbed rock and waste materials. Mining exposes geologic materials that have previously remained isolated from atmospheric oxygen and circulating water. EPA identifies hard-rock mining as a potential source of contaminated mine water and explains that acid drainage can mobilize metals and other constituents from mined materials into groundwater and surface water.⁹³ The Project's geology warrants particular scrutiny because the Bear Lodge deposits contain mineralized materials associated with thorium and uranium as well as rare earth elements.⁹⁴ Groundwater moving through newly excavated rock, waste-rock storage areas, stockpiles, roads, and other disturbed areas could therefore provide a pathway for dissolved constituents to reach surface or groundwater. The Forest Service should evaluate those pathways rather than assuming that water-quality protections proposed for routine operations will prevent all releases.

The water analysis should evaluate the entire Project life cycle. Conditions during initial excavation may differ from those during full-scale mining, closure, reclamation, and the period after dewatering ends. The eventual pit lake may create a new groundwater and surface-water interaction that differs from pre-mining conditions. The agency should model the chemistry and movement of that water and determine whether contaminants could migrate from the pit into surrounding groundwater or surface-water systems.

The Forest Service should also examine the consequences of failure or underperformance of water-management measures. Diversion channels, sediment controls, liners, monitoring systems, and other engineered features may reduce risks, but the environmental review should evaluate their functioning during foreseeable extreme precipitation, snowmelt, equipment failure, operational changes, and long-term

⁹³ U.S. EPA, *Engineering Issue: Management and Treatment of Water from Hard Rock Mines*, EPA/540/S-97/500 (1997); see also U.S. EPA, *Hardrock Mining Framework* (1997).

⁹⁴ M.H. Staatz, *Geology and Description of Thorium and Rare-Earth Deposits in the Southern Bear Lodge Mountains, Northeastern Wyoming*, U.S. Geological Survey Professional Paper 1049-D (1983).

degradation. NEPA requires agencies to evaluate reasonably foreseeable environmental effects rather than assume that proposed mitigation will perform perfectly under all circumstances.⁹⁵ The analysis must include a meaningful baseline. The Project was previously evaluated in a Draft EIS issued in 2016, but that review was withdrawn before a final EIS was completed.⁹⁶ The current Forest Service review should therefore distinguish historical data from current conditions and identify which prior hydrologic studies remain scientifically adequate. Changes in precipitation, groundwater conditions, mine design, waste management, and surrounding land use may affect the assumptions underlying earlier analyses. The Forest Service has an opportunity to re-engage the process in good faith and engage in the EIS with a full scope of potential impacts and dangers, as a result, the Agency must consider worst case scenarios and how associated factors will affect Tribal Nations that hold the region sacred and engage in rights of subsistence practices.

Water quality should also be evaluated in relation to beneficial uses and applicable standards. The NOI expressly identifies stream channels, instream flows, water-quality standards, and beneficial uses among the issues expected to be evaluated.⁹⁷ The Forest Service should coordinate its analysis with the Tribes in the region as well as Wyoming water-quality permitting process along with any Clean Water Act authorizations while retaining responsibility for evaluating the environmental consequences of the federal action. Any discharge associated with dewatering must receive appropriate regulatory and ecological scrutiny. The Clean Water Act generally prohibits the discharge of pollutants except in compliance with applicable statutory permitting provisions.⁹⁸ Where the Project would discharge pollutants through a point source into waters of the United States, the agency should ensure that the relevant permitting process addresses the constituents reasonably expected to occur in mine water.⁹⁹ The existence of a separate permit

⁹⁵ 42 U.S.C. § 4332(2)(C) (2018), as amended by Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38-39 (2023).

⁹⁶ See *Bear Lodge Project*, 81 Fed. Reg. 5,075 (Jan. 29, 2016).

⁹⁷ *Bear Lodge Rare Earth Project*, *supra* note 1, at 47,804.

⁹⁸ 33 U.S.C. § 1311(a) (2018).

⁹⁹ See 33 U.S.C. § 1342 (2018).

process does not relieve the Forest Service of its obligation to disclose and evaluate the environmental effects of the discharge as part of its decision.

The Forest Service should also review the implications of water loss even where discharged water meets applicable water-quality standards. A discharge may comply with chemical limits while still altering the quantity, timing, temperature, or location of water available to springs, streams, wetlands, wildlife, or cultural uses. Water quantity and water quality should therefore be analyzed together. The potential effects on Indigenous water interests require particular attention. The Forest Service has recognized that treaty rights and tribal water rights can remain relevant to management decisions involving National Forest System lands.¹⁰⁰ The agency should consult affected Tribal Nations concerning water sources, uses, and culturally significant aquatic resources that may not appear in conventional agency databases.

WPLC urges the Forest Service to require a current, transparent, and independently reviewable analysis of groundwater and surface-water effects before approving the Project. The EIS should quantify anticipated groundwater drawdown, evaluate effects on springs and streams, identify pathways for contamination, analyze post-closure water conditions, and explain whether the proposed water-management measures can reliably protect the Water of H̃e Sápa.

VI. Rare Earth Mining Requires Thorough Analysis of Radioactive and Hazardous Materials

The Forest Service must conduct a detailed assessment of radioactive and hazardous materials associated with the Project before deciding whether to approve the Mine Plan of Operations. The presence of rare earth elements does not eliminate the radiological characteristics of the mineral deposit. USGS studies of the Bear Lodge Mountains have documented thorium and uranium within the same geologic

¹⁰⁰ U.S. Forest Serv., *National Resource Guide to American Indian and Alaska Native Relations: Section 2, Treaty Rights* 53 (2012).

formations containing rare earth minerals.¹⁰¹ The USGS's geological assessment is particularly relevant because it identifies thorium and rare earth minerals occurring together in disseminated deposits and veins in the southern Bear Lodge Mountains.¹⁰² The earlier USGS reconnaissance survey likewise documented uranium and thorium in the Bear Lodge Mountains and reported radioactivity exceeding that expected from the measured uranium content, with thorium accounting for much of the difference.¹⁰³ The results warrant project-specific radiological characterization of ore, waste rock, overburden, soils, groundwater, surface water, dust, and other potentially affected media.

Federal regulators recognize the connection between rare earth extraction and naturally occurring radioactive materials. EPA explains that rare earth ores and minerals commonly contain uranium and thorium and that processing can separate and concentrate those radionuclides into technologically enhanced naturally occurring radioactive material (“TENORM”) wastes.¹⁰⁴ EPA separately identifies mining as an important source of TENORM and recognizes that extraction and processing can expose or concentrate naturally occurring radioactive materials.¹⁰⁵ The Forest Service must therefore determine the concentrations and distribution of uranium, thorium, radium, radon, and relevant decay products throughout the proposed mine and associated waste streams. Sampling should account for variability across the ore body and waste-rock units rather than relying on average concentrations. The agency should identify the portions of the Project where radionuclides could become concentrated through excavation, crushing, stockpiling, hauling, processing, evaporation, or water movement.

¹⁰¹ M.H. Staatz, *Geology and Description of Thorium and Rare-Earth Deposits in the Southern Bear Lodge Mountains, Northeastern Wyoming*, U.S. Geological Survey Professional Paper 1049-D (1983), *supra* note 107.

¹⁰² *Id.*

¹⁰³ V.R. Wilmarth & D.H. Johnson, *Preliminary Reconnaissance Survey for Thorium, Uranium, and Rare-Earth Oxides, Bear Lodge Mountains, Crook County, Wyoming*, U.S. Geological Survey Trace Elements Investigations 172 (1953).

¹⁰⁴ U.S. EPA, *TENORM: Rare Earths Mining Wastes* (updated July 6, 2026), <https://www.epa.gov/radiation/tenorm-rare-earths-mining-wastes>.

¹⁰⁵ U.S. EPA, *TENORM: Technologically Enhanced Naturally Occurring Radioactive Materials* (2025), <https://www.epa.gov/radiation/technologically-enhanced-naturally-occurring-radioactive-materials-tenorm>.

Radiological exposure pathways must be evaluated for workers, nearby communities, visitors to National Forest System lands, and wildlife. The analysis should consider inhalation of dust, ingestion of contaminated soil or water, external exposure, radon, and transport of radioactive constituents through groundwater and surface water. The Forest Service should also evaluate whether ordinary dust-control measures would adequately address radiological contaminants attached to fine particulate matter.

The regulatory status of radioactive materials associated with rare earth development further accentuates the need for a holistic record. The Nuclear Regulatory Commission defines “source material” to include uranium or thorium, as well as ores containing 0.05 percent or more by weight of uranium, thorium, or a combination of the two.¹⁰⁶ Rare Element Resources previously submitted an application for an NRC source-material license for the Bear Lodge Project, and the NRC opened a proceeding concerning that application in 2015.¹⁰⁷ The historical application was not approved and was later suspended, demonstrating that radiological regulation has long been a component of the proposed Project rather than an issue that emerged only after environmental review began.¹⁰⁸

The regulatory framework has since changed. Wyoming became an Agreement State for specified radioactive materials in 2018, and an amended agreement effective April 30, 2026 expanded Wyoming's authority over source material recovered from mineral resources processed primarily for purposes other than uranium or thorium.¹⁰⁹ Rare earth extraction falls within the category identified by the NRC as potentially subject to that state authority.¹¹⁰ The Forest Service should identify which federal and state radiological

¹⁰⁶ 10 C.F.R. § 40.4 (2026).

¹⁰⁷ *Rare Element Resources, Inc.; Bear Lodge Project*, 80 Fed. Reg. 70,846, 70,846-50 (Nov. 16, 2015); *In re Rare Element Resources, Inc. (Bear Lodge Project)*, No. 40-38367-ML, LBP-16-02, 2016 WL 1146893 (N.R.C. Atomic Safety & Licensing Bd. Mar. 23, 2016).

¹⁰⁸ Rare Element Resources Ltd., *Annual Report* 17-1 to 17-2 (2024).

¹⁰⁹ Agreement Between the United States Nuclear Regulatory Commission and the State of Wyoming for the Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended (Apr. 30, 2026), <https://www.nrc.gov/docs/ML2609/ML26099A146.pdf>.

¹¹⁰ U.S. Nuclear Regulatory Comm'n, *Wyoming: Agreement State Information*

requirements apply to each Project component and should coordinate with the responsible agencies before relying on future permits as a substitute for present environmental analysis.

The Project's waste-management system deserves particular scrutiny. Excavation will create waste rock and other materials that may contain radionuclides at concentrations different from the ore that is ultimately processed. Those materials may remain exposed to water and oxygen for decades. EPA has identified mine waste and drainage as pathways through which naturally occurring radioactive materials and other contaminants can enter the environment.¹¹¹ The EIS should evaluate whether waste-rock storage, stockpiles, sedimentation facilities, and reclamation covers will prevent migration of radioactive constituents over the full period during which the materials remain environmentally active.

The agency should also evaluate transportation of radioactive or hazardous materials. The Project includes transportation of ore and other materials across National Forest System lands.¹¹² If materials containing source material or elevated concentrations of radionuclides are transported, the Forest Service should identify the applicable packaging, routing, monitoring, emergency-response, and accident requirements. The environmental review has to address reasonably foreseeable spills, vehicle accidents, loss of containment, and exposure resulting from transportation incidents. The previous federal review provides another reason for caution. The Forest Service's 2016 Draft EIS was withdrawn, and the earlier NRC source-material licensing process was suspended.¹¹³ The current Project is therefore not supported by a final federal environmental decision establishing the adequacy of the prior radiological analysis. The Forest Service should update the baseline and independently determine whether the current Mine Plan of Operations changes the volume, concentration, handling, or location of radioactive materials.

¹¹¹ U.S. EPA, *TENORM: Uranium Mining Residuals* (2026), <https://www.epa.gov/radiation/tenorm-uranium-mining-residuals>; see also U.S. EPA, *TENORM: Rare Earths Mining Wastes*, *supra* note 117.

¹¹² *Bear Lodge Rare Earth Project*, *supra* note 1, at 47,804.

¹¹³ See *Bear Lodge Project*, 81 Fed. Reg. 5,075 (Jan. 29, 2016); Rare Element Resources Ltd., *Annual Report*, *supra* note 121, at 17-1 to 17-2.

The Forest Service should not defer the central radiological questions to later permitting. The EIS must provide enough information for the responsible official and the public to understand the environmental consequences of the federal decision before that decision is made.¹¹⁴ Where the record does not establish the concentration, mobility, or prolonged behavior of radioactive constituents, the agency should identify that uncertainty and obtain the information necessary to make a reasoned decision.

WPLC urges the Forest Service to conduct a comprehensive radiological and hazardous-materials analysis covering the mine, waste facilities, transportation system, water pathways, reclamation period, and post-closure conditions. The agency should coordinate with Wyoming and federal radiological regulators, incorporate current site-specific data, evaluate exposure and contamination pathways, and require protective measures sufficient to prevent radioactive and hazardous materials from impairing the Water, health, and cultural resources of ǂe Sǂpa and the Indigenous Peoples that hold the landscape sacred and engage in usufructuary rights..

VII. Mine Waste and Reclamation Could Create Environmental Liabilities Long After Mining Ends

The Forest Service should evaluate reclamation as a long-term environmental obligation rather than treating closure as the final administrative step following seventeen years of extraction. The current proposal anticipates approximately two years of closure and final reclamation, followed by environmental monitoring and maintenance until the agency determines that reclamation has been successfully demonstrated.¹¹⁵ The Project's physical and environmental effects, however, may persist after active mining

¹¹⁴ 42 U.S.C. § 4332(2)(C) (2018), as amended by Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38-39 (2023).

¹¹⁵ See Black Hills National Forest; Wyoming; Bear Lodge Rare Earth Project, 91 Fed. Reg. 47,803, 47,804 (July 29, 2026); *supra* notes 1-2.

and the initial reclamation period have ended. The environmental review should determine whether the proposed reclamation measures can maintain the stability and environmental function of the site for as long as those measures are needed.

The Forest Service's locatable-minerals regulations require reclamation measures that prevent or control onsite and off-site damage to environmental and forest surface resources.¹¹⁶ The regulations specifically address erosion and landslides, runoff, toxic materials, revegetation, and wildlife habitat.¹¹⁷ They also require the operator to provide financial assurance when the authorized officer determines that such assurance is necessary to provide reasonable assurance that the obligations contained in the regulations and approved plan of operations will be completed.¹¹⁸ The financial-assurance requirement is significant because the costs of reclamation cannot be known simply by estimating the cost of earthmoving and revegetation at the end of mining. A proper reclamation estimate needs to account for the full scope of disturbance and the possibility that particular facilities will require continued management after closure. The regulations expressly permit the Forest Service to require a trust fund for long-term post-closure reclamation activities when an operator must continue to operate or maintain aspects of the mine after closure.¹¹⁹ The agency should determine whether any proposed monitoring, water-management, waste-management, erosion-control, or other obligations would continue after the initial reclamation period and should ensure that the financial assurance corresponds to those obligations.

The Mine Plan of Operations should therefore be assessed against a reclamation standard based on the actual risks created by the Project. The Forest Service should identify each facility or disturbed area that could require continued management, determine the duration of the necessary management, and calculate the cost of performing that work if the operator were unable or unwilling to do so. The analysis

¹¹⁶ 36 C.F.R. § 228.8(g) (2026).

¹¹⁷ *Id.*

¹¹⁸ 36 C.F.R. § 228.13(a)-(b) (2026).

¹¹⁹ *Id.* § 228.13(e).

should also account for inflation, changing regulatory requirements, unexpected maintenance, and the possibility that reclamation could take longer than currently projected.

The proposed waste-rock facilities warrant particular attention. Material excavated from an open pit can remain environmentally active after mining ceases, especially when exposure to precipitation and groundwater permits continued chemical weathering. The Project's earlier technical record identifies waste-rock storage as a component of the proposed operation, and the current permitting record continues to identify waste-rock storage as part of the Bull Hill Mine.¹²⁰ The EIS should determine whether the proposed waste-rock configuration will remain physically stable and environmentally isolated throughout closure and post-closure conditions.

Reclamation should also be evaluated under conditions in which the proposed measures do not perform exactly as anticipated. Covers can settle, erode, crack, or lose effectiveness. Drainage controls can require repair. Vegetation can fail to establish as expected. Changes in precipitation or runoff can alter the performance of structures designed under earlier climatic assumptions. The Forest Service's own watershed assessment recognizes that climate conditions in Ĥe Sápa are changing and projects increased variability in precipitation and runoff, along with warmer temperatures.¹²¹ Those conditions should be incorporated into reclamation design and cost estimates.

The Project's roads create another long-term reclamation obligation. The Forest Service's regulations require roads no longer needed for operations to be closed to normal vehicular traffic and, unless otherwise approved, stabilized and returned as nearly as practicable to natural contours.¹²² Because the current proposal contemplates transportation of employees, equipment, materials, ore, and reclamation

¹²⁰ See Permitting Council, *Bear Lodge Rare Earth Project*, FAST-41 Permitting Dashboard, Project Description, <https://www.permits.performance.gov/permitting-project/fast-41-covered-projects/bear-lodge-rare-earth-project>; *supra* note 1.

¹²¹ U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Soils and Watersheds* 37-38 (2023).

¹²² 36 C.F.R. § 228.8(c) (2026).

materials, the agency should identify which roads will remain after mining and why continued access would be necessary.¹²³ Roads that are retained should be evaluated for their continuing environmental effects and maintenance requirements rather than assumed to become environmentally neutral when extraction ends.

The Forest Service should also distinguish between reclamation that restores a physical surface and reclamation that restores ecological function. A graded and revegetated mine area may remain different from the pre-mining landscape in soil structure, drainage patterns, vegetation composition, habitat connectivity, and hydrologic behavior. The agency should identify which ecological functions can reasonably be restored and which changes are likely to stay permanent. This distinction matters particularly for a project in Ĥe Sápa. The Forest Service's own assessment recognizes that watershed functions depend upon interconnected soil, water, vegetation, wildlife, and infrastructure systems.¹²⁴ Where a disturbance permanently changes those relationships, the EIS should disclose that limitation rather than describing reclamation in terms that imply complete restoration.

The Forest Service should also establish objective criteria for determining when reclamation has been successfully completed. Those criteria ought to address physical stability, vegetation establishment, erosion, water management, waste containment, road closure, habitat recovery, and any continuing obligations associated with hazardous or radioactive materials. The agency should identify who will conduct post-closure monitoring, how frequently monitoring will occur, what conditions will trigger corrective action, and how long the monitoring program will remain in place.

Past mining in Ĥe Sápa demonstrates why these questions call for careful consideration. The Forest Service has documented abandoned mines, waste-rock piles, acid-mine drainage, and other hazards that have required continuing assessment and remediation.¹²⁵ The agency's experience with these sites

¹²³ See Rare Element Resources, *Bear Lodge Project, Proposed Bear Lodge Operations*, *supra* note 19.

¹²⁴ U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Soils and Watersheds* 1, 3-8 (2023).

¹²⁵ See *id.* at 39; *supra* notes 106, 124.

provides relevant information concerning the practical difficulty and expense of restoring lands affected by mineral development. The EIS should therefore include a remediation alternative that assumes the Forest Service may have to perform the work if the operator defaults. Financial assurance should be sufficient to cover that scenario. The agency should also retain authority to increase the assurance amount when the Mine Plan of Operations changes or when updated cost estimates demonstrate that the existing amount is inadequate.¹²⁶

WPLC urges the Forest Service to establish reclamation and financial-assurance requirements based on the full environmental obligations created by the Project. The agency should require a detailed closure and post-closure plan, calculate the cost of implementing that plan without relying on the operator's continued financial capacity, and uphold financial assurance for as long as environmental obligations remain. The Forest Service should reject the Project if the proposed reclamation measures cannot reasonably protect Ĥe Sápa after mining ends.

VIII. The Project Would Impose Environmental And Cultural Burdens Within A Place Already Burdened By A Legacy Of Extraction

The proposed mine would enter a terrain where previous development has already altered environmental conditions and where the Forest Service proceeds to manage the consequences of past extraction. The agency's own watershed assessment describes mineral extraction, transportation, recreation, vegetation management, and other human activities as influences operating over various geographic and temporal scales in Ĥe Sápa.¹²⁷ That existing condition matters to the Forest Service's assessment of whether another major industrial disturbance is appropriate in the Bear Lodge Mountains.

¹²⁶ 36 C.F.R. § 228.13(c)-(d) (2026).

¹²⁷ U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Soils and Watersheds* 38-39 (2023).

The current condition of the surrounding area also affects the significance of new disturbance. The Forest Service's 2023 watershed assessment found that 72 percent of Black Hills National Forest sub-watersheds received a poor rating for the Roads and Trails indicator in the agency's 2010 evaluation.¹²⁸ The assessment explains that the number and placement of roads associated with forest uses affect hydrologic and sediment regimes.¹²⁹ The Project would install additional roads and substantially increase industrial traffic in an area already influenced by transportation infrastructure.

Mining has likewise left environmental liabilities elsewhere in the forest. The Forest Service identifies the Gilt Edge Mine as a former gold operation that was abandoned in 1989 and later placed on the National Priorities List. Remediation for acid mine drainage has continued for years.¹³⁰ The agency also identifies abandoned uranium and vanadium mines and notes that its inventory of abandoned mine hazards is incomplete.¹³¹ These conditions supply pertinent context for evaluating whether additional disturbance should occur in a zone where the Forest Service is already managing the consequences of mineral extraction. The Project's contribution should be assessed against that existing condition. NEPA requires the Forest Service to evaluate the reasonably foreseeable environmental effects of the proposed action and alternatives, including adverse effects that cannot be avoided and irreversible and irretrievable commitments of federal resources.¹³² The agency should therefore identify what environmental functions currently remain available in the Project area and determine how the proposed mine would alter those functions.

The assessment should include the physical character of the landscape. Open-pit excavation, waste-rock storage, stockpiles, roads, fencing, utilities, and other infrastructure would create visible and

¹²⁸ *Id.* at 7-8.

¹²⁹ *Id.* at 38.

¹³⁰ *Id.* at 39; *see also* U.S. EPA, *Gilt Edge Mine Superfund Site*, <https://www.epa.gov/superfund/gilt-edge>.

¹³¹ U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Soils and Watersheds* 39 (2023).

¹³² 42 U.S.C. § 4332(2)(C) (2018), as amended by Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38-39 (2023); *supra* note 56.

physical changes that could remain after reclamation. The Project may also require a site-specific amendment to existing scenic-integrity standards and guidelines.¹³³ The Forest Service should evaluate that amendment based on the condition of the landscape as a whole rather than treating the proposed mine as an isolated exception to an otherwise intact setting. The cultural consequences should be evaluated with the same geographic perspective. Earlier sections of our comments explain that Indigenous cultural resources in Ĥe Sápa may encompass landscapes and relationships extending beyond the physical boundary of a particular feature. *See supra* Sections I-II. The fact that the surrounding landscape has already experienced development does not establish that additional industrial activity would have no cultural effect. A sacred landscape may retain significance even where portions of it have been altered by prior federal or private actions.

The Forest Service should also consider whether the Project would diminish opportunities for continued cultural use of the nearby environment. Increased traffic, industrial noise, visual infrastructure, restricted access, and changes in the character of particular areas can affect how people experience and use a place. Those effects will be relevant to both Section 106 and NEPA where they alter the setting or use of a culturally significant property. *See supra* Section I. The agency should not treat existing disturbance as an automatic justification for concentrating additional disturbance in the same area. A previously altered landscape may contain remaining resources whose protection is important precisely because they have survived earlier development. The Forest Service's own assessment recognizes that ecosystem conditions can be affected by the interaction of multiple human influences.¹³⁴ The EIS should determine whether the Project would further reduce ecological or cultural resilience inside the Bear Lodge Mountains.

¹³³ *See* Bear Lodge Rare Earth Project, 91 Fed. Reg. at 47,803, 47,805; *supra* notes 31-32.

¹³⁴ U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Soils and Watersheds* 38-40 (2023).

The current proposal also should be evaluated in light of the Forest Service's responsibility to manage National Forest System lands for multiple uses while continuing the longevity of those lands.¹³⁵ The Project's proposed use of National Forest System lands would occupy land and infrastructure for decades, restrict some uses during operations, and create continuing management obligations after closure. The agency should explain how that use is compatible with the existing management direction for the affected area.

WPLC urges the Forest Service to evaluate the Project against the actual environmental and cultural condition of the landscape rather than a simplified description of an undisturbed project site. The EIS should identify existing burdens from mineral development and associated infrastructure, determine what resources remain vulnerable to additional disturbance, and assess whether the proposed mine would further impair the ecological and cultural functions of Ĥe Sápa.

IX. Bear Lodge Must Be Evaluated Within the Cumulative Impacts of Development Across Ĥe Sápa

Although recent Supreme Court cases have limited cumulative effects analysis, despite the legal narrowing, the Forest Service should nonetheless consider all impacts to ensure Indigenous Peoples are effectively protected, and that the Forest Service analysis reflects the geographic and temporal relationships among the Project, past development, existing activities, and reasonably foreseeable future actions in Ĥe Sápa. The appropriate scope cannot be determined by the perimeters of the Mine Plan of Operations alone. The Forest Service's own watershed assessment recognizes that resources move across administrative

¹³⁵ See 16 U.S.C. §§ 478, 482, 551 (2018); *supra* note 1.

boundaries and that actions occurring within or near the National Forest can affect resources beyond the Forest boundary.¹³⁶

The Bear Lodge Mountains illustrate why a watershed-scale analysis is warranted. The Forest Service identifies portions of the Bear Lodge Mountains within the Lower Belle Fourche, Redwater, and Upper Belle Fourche HUC 8 sub-basins.¹³⁷ Water, wildlife, sediment, and human activity do not stop at those boundaries. A cumulative analysis should therefore identify the pathways through which Project effects could interact with other activities across the relevant watersheds. The Forest Service's mineral assessment provides an additional basis for a wide analysis. The agency has documented numerous mining claims within the National Forest and continuing mineral exploration. It further explains that the number and location of forthcoming exploration and development projects cannot be predicted with certainty because locatable-mineral development is initiated by proponents.¹³⁸ The agency identified seven mineral exploration or development projects on its Schedule of Proposed Actions during one 2023 reporting period, including projects in the Northern Hills, Hell Canyon, and Mystic Ranger Districts.¹³⁹ The EIS should therefore identify reasonably foreseeable mineral activities that could interact with the Bear Lodge Project. That inquiry should include projects whose environmental effects overlap with the Project through watersheds, transportation corridors, habitat, viewsheds, cultural landscapes, or other relevant pathways. The agency need not create an exhaustive inventory of every activity occurring within the National Forest. It should identify those activities for which there is a meaningful causal relationship to the Project's environmental consequences.

The current USDA NEPA regulations provide a useful framework for making that determination. The regulations require the EIS to explain how the agency established a reasonable and manageable

¹³⁶ U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Soils and Watersheds* 3-4 (2023).

¹³⁷ *Id.* at 3-4.

¹³⁸ U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Renewable and Non-Renewable Energy and Minerals* 3-4 (2023).

¹³⁹ *Id.* at 4.

geographic and temporal boundary for effects extending beyond the territory of the proposed action or materializing later in time.¹⁴⁰ They also permit USDA agencies to analyze effects from separate actions when doing so would assist reasoned decision-making.¹⁴¹ The Forest Service should apply that authority here because its own resource assessments identify interacting development pressures across the landscape. The cumulative analysis should also account for past mining where its present effects remain relevant. The Forest Service has documented acid mine drainage, contaminated soil and water, abandoned mine hazards, and continuing remediation associated with historic mineral development.¹⁴² Those existing conditions establish part of the environmental baseline against which additional disturbance must be evaluated. A new mine may contribute to an already altered watershed even where the new project, viewed independently, would comply with applicable standards.

The Forest Service should quantify cumulative effects wherever reliable information permits. The Ninth Circuit has held that a cumulative-effects analysis requires sufficient quantified or detailed information to allow the public and reviewing courts to understand the agency's assessment.¹⁴³ The principle is particularly relevant where multiple actions affect the same environmental resource through similar pathways. The Forest Service's watershed assessment identifies transportation, water use, recreation, vegetation management, livestock grazing, wildfire management, and urbanization among the human influences affecting watershed conditions.¹⁴⁴ The agency should determine which of those activities have effects that could interact with the Project. For example, the Project's transportation network should be evaluated in relation to existing road density and associated sediment and habitat effects rather than assessed as though the new roads would be the first transportation infrastructure in the affected watersheds. The same

¹⁴⁰ 7 C.F.R. § 1b.7(g)(2) (2026).

¹⁴¹ *Id.* § 1b.7(g)(3).

¹⁴² U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Soils and Watersheds* 39 (2023).

¹⁴³ *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998).

¹⁴⁴ U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Soils and Watersheds* 38-39 (2023).

approach should apply to cultural resources. A cultural setting can be affected by the accumulation of physical changes over time. The Forest Service should consult with affected Tribal Nations concerning which past and present developments remain relevant to the cultural character of places associated with Mathó Thípila and the surrounding Ĥe Sápa landscape. *See supra* Sections I-II. Tribal knowledge may be necessary to identify relationships that cannot be established through existing agency databases.

Climate conditions should also form part of the cumulative analysis where they affect the interaction among the Project and other activities. The Forest Service projects increased temperatures, changed precipitation patterns, changes in runoff, and greater variability in watershed conditions in the coming decades.¹⁴⁵ The Project's seventeen-year mining period and subsequent reclamation would occur within that changing environmental context.¹⁴⁶ The Forest Service should present the cumulative analysis in a form that permits meaningful comparison among alternatives. The EIS should identify the baseline condition, describe the applicable past and ongoing disturbances, identify reasonably foreseeable future actions, explain the geographic and chronological boundaries selected for the analysis, and quantify the incremental contribution of each Project alternative where the available information permits. The agency should also explain where uncertainty prevents quantification and how that uncertainty affects the decision.

WPLC urges the Forest Service to conduct a cumulative-effects analysis at the scale necessary to understand the Project's contribution to development across Ĥe Sápa. The analysis should include appropriate past, present, and reasonably foreseeable actions, use watershed and cultural-landscape boundaries where appropriate, and provide enough detail to allow Tribal Nations, the public, and the responsible official to understand how the Project would interact with existing and future development.

X. An Outdated Environmental Record Cannot Provide an Adequate Basis for a New Decision

¹⁴⁵ *Id.* at 37-38

¹⁴⁶ *See Bear Lodge Rare Earth Project*, 91 Fed. Reg. at 47,804; *supra* note 2.

The Forest Service cannot base its decision on an environmental record developed for a substantially different stage of the Bear Lodge Project. The agency prepared a Draft Environmental Impact Statement in 2016, but that document was withdrawn before a final EIS or record of decision was issued.¹⁴⁷ The current proposal was submitted as a new Mine Plan of Operations in March 2026, and the Forest Service's permitting record expressly states that a new environmental analysis is required for the new plan.¹⁴⁸ The distinction between utilizing prior information and relying upon a prior environmental decision is important. The Forest Service may use information from the earlier review where that information is reliable and relevant. The agency cannot, however, assume that conclusions reached in an abandoned environmental review remain adequate without examining whether the underlying assumptions, data, project design, and regulatory framework continue to apply.

The current USDA NEPA regulations require an EIS to address the reasonably foreseeable environmental impacts of the proposed action and alternatives, describe the potentially affected environment, and provide the scientific and analytic basis for comparing alternatives.¹⁴⁹ The regulations further require the responsible official to certify that the completed EIS adequately informs the final decision.¹⁵⁰ That obligation requires a record capable of supporting the decision that the agency is actually making in 2026 and 2027.

The Project has changed materially since the earlier review. The current MPO was submitted in March 2026, and the present proposal includes a mine, waste-rock storage, ore stockpiling, crushing and loading, pit dewatering, transportation, utilities, and other infrastructure.¹⁵¹ The Forest Service has also

¹⁴⁷ See *Bear Lodge Project*, 81 Fed. Reg. 5,075 (Jan. 29, 2016); *supra* note 109.

¹⁴⁸ Permitting Council, *Bear Lodge Rare Earth Project*, FAST-41 Permitting Dashboard, Agency Postings, <https://www.permits.performance.gov/permitting-project/bear-lodge-rare-earth-project/agency-postings>; *supra* note 103.

¹⁴⁹ 7 C.F.R. § 1b.7(g)-(h) (2026); 42 U.S.C. § 4332(2)(C) (2018), as amended by Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38-39 (2023).

¹⁵⁰ 7 C.F.R. § 1b.7(m) (2026).

¹⁵¹ See *Bear Lodge Rare Earth Project*, 91 Fed. Reg. at 47,803-04; *supra* notes 21-24.

identified alternative access and haul routes and variations in mine and facility configuration as potential alternatives.¹⁵² The agency must evaluate those current components rather than treating the 2016 project configuration as the operative proposal. The scientific baseline has changed as well. The Forest Service's current watershed assessment identifies substantial data gaps and notes that several watershed-condition indicators continue to rely on 2010 information that has not been fully updated.¹⁵³ The same assessment identifies climate projections extending through the period relevant to the Project and describes changes in temperature, precipitation, runoff, drought, and wildfire conditions.¹⁵⁴ These data demonstrate why the agency must distinguish historical observations from current baseline conditions and must identify where older information is still reliable.

The environmental setting has also continued to change during the years since the 2016 Draft EIS. The Forest Service's current assessments document ongoing mining interests, transportation pressures, watershed conditions, abandoned mine hazards, and other human influences throughout Ĥe Sápa.¹⁵⁵ The current environmental review should therefore use present conditions as its baseline and should identify how those conditions differ from those analyzed in 2016. The proponent's own records reinforce the need for an updated analysis. Rare Element Resources has described the current proposed operations as based on economic work completed in 2014 and 2015 and updated in 2024.¹⁵⁶ The company has also reported that baseline information submitted to Wyoming was supplemented in 2019 and again in 2023.¹⁵⁷ Those later studies may provide useful information, but they also demonstrate that the technical record has evolved

¹⁵² *Id.* at 47,804; *supra* note 27.

¹⁵³ U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Soils and Watersheds 2* (2023) (identifying watershed-condition data gaps and noting that several indicators are based on 2010 data); *see also id.* at 7-8.

¹⁵⁴ *Id.* at 37-38.

¹⁵⁵ *See* U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Renewable and Non-Renewable Energy and Minerals 3-4* (2023); U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Soils and Watersheds 38-40* (2023).

¹⁵⁶ Rare Element Resources, *Bear Lodge Project*, <https://www.rareelementresources.com/bear-lodge-project/>.

¹⁵⁷ Rare Element Resources Ltd., *Annual Report 17-1 to 17-2* (2024), *supra* note 121.

since the withdrawn Draft EIS. The Forest Service should identify every material update and determine whether additional information is necessary.

The Supreme Court has recognized that NEPA's procedural criteria are intended to prevent uninformed agency action.¹⁵⁸ Where significant new information becomes available before a federal decision, the agency must consider whether that information changes the environmental analysis.¹⁵⁹ Although *Marsh* concerned supplementation of a completed EIS, its reasoning reinforces the need for a current environmental record where substantial federal action remains to be taken. The Forest Service should therefore identify the portions of the 2016 Draft EIS and supporting materials that it proposes to incorporate into the current record. For each incorporated study, the agency should identify its date, methodology, baseline conditions, assumptions, and relationship to the current MPO. The agency should then explain whether later information confirms, modifies, or compromises the earlier analysis. The current record should receive particular scrutiny where older studies concern resources that have changed materially since 2016. Hydrology, groundwater, climate conditions, transportation patterns, cultural-resource information, mine design, waste management, and regulatory requirements all warrant review. Earlier sections of these comments identify specific information that should be incorporated into those updated analyses. *See supra* Sections I-VI.

The Forest Service should also avoid using the absence of a draft EIS as a reason to limit substantive review. The current USDA regulations permit the responsible official to publish a draft EIS, but they also allow the agency to proceed directly to a completed EIS.¹⁶⁰ If the agency elects not to provide a draft EIS, the completeness and transparency of the underlying administrative record become especially important. Tribal Nations and the public must have a meaningful opportunity to understand the evidence on

¹⁵⁸ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-49 (1989).

¹⁵⁹ *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371-78 (1989).

¹⁶⁰ 7 C.F.R. § 1b.7(n)(1)-(2) (2026).

which the agency will base its decision. The final EIS should clearly distinguish current information from historical information and identify any material uncertainty that remains. Where a prior study no longer provides a reliable basis for a decision, the Forest Service should update or replace it. Where the agency relies upon an older study, it must clarify why the study remains applicable to the current Project.

WPLC urges the Forest Service to conduct a genuinely current environmental review rather than reconstructing the withdrawn 2016 review. The agency should establish present baseline conditions, update material scientific and cultural information, evaluate the current Mine Plan of Operations and alternatives, and identify the changes that have occurred since the earlier review. A new federal decision concerning Bear Lodge should rest upon a record that reflects the Project and Ĥe Sápa as they exist today.

XI. Climate Change Increases the Long-Term Risks of the Project and Its Impacts on Future Generations

Climate change should be treated as a condition that affects the Project's foreseeable environmental consequences throughout its anticipated life cycle. The Forest Service's current watershed assessment identifies projected changes in temperature, precipitation, runoff, drought, and wildfire conditions in the Black Hills.¹⁶¹ Those projections are directly relevant to a project expected to require approximately two years of construction, seventeen years of mining, additional mineral processing, and approximately two years of closure and reclamation, followed by monitoring and maintenance until reclamation is demonstrated.¹⁶² The environmental review should therefore evaluate whether the Project remains environmentally viable under the conditions expected to exist during its operation and post-closure

¹⁶¹ U.S. Forest Serv., *Black Hills National Forest, Revised Forest Assessment: Soils and Watersheds* 37-38 (2023); see also *supra* notes 157-158.

¹⁶² See *Black Hills National Forest; Wyoming; Bear Lodge Rare Earth Project*, 91 Fed. Reg. 47,803, 47,804 (July 29, 2026); *supra* notes 1-2, 162.

period. The need for that analysis is particularly apparent for water resources. The Black Hills are an important regional recharge area, and groundwater and surface-water systems are closely connected. A recent USGS assessment of six major bedrock aquifers in the Black Hills found that precipitation recharge and streamflow recharge together supply substantial portions of regional groundwater resources and that recurring drought has generated concerns regarding future water availability.¹⁶³ The Forest Service should evaluate whether projected changes in precipitation, temperature, snowpack, evapotranspiration, and drought could alter the hydrologic assumptions underlying the Project's water-management system.

The agency should also examine whether climate-related changes could interact with the Project's groundwater effects. Section V explains why pit dewatering requires a quantitative assessment of groundwater drawdown, groundwater flow, and post-closure recovery. *See supra* Section V. Climate change adds further uncertainty into those projections because groundwater recharge depends in part upon precipitation and streamflow conditions. The Forest Service should therefore evaluate whether projected changes in recharge could alter the duration, magnitude, or geographic extent of Project-related groundwater effects. Climate change may also affect the reliability of proposed water-management infrastructure. The Project would rely on engineered systems to manage water during construction, mining, closure, and reclamation.¹⁶⁴ The Forest Service should evaluate those systems under a range of reasonably foreseeable hydrologic conditions rather than relying exclusively on historical averages. A design that performs adequately under historical conditions may perform differently when precipitation cycles, snowmelt, drought, or extreme runoff depart from those conditions.

The same concern applies to reclamation. The Project's reclamation period would occur after nearly two decades of mining, meaning that the environmental conditions prevailing when reclamation

¹⁶³ U.S. Geological Survey, *Hydrologic Budgets and Water Availability of Six Bedrock Aquifers in the Black Hills Area, South Dakota and Wyoming, 1931-2022*, Sci. Investigations Rep. 2025-5067 (2025).

¹⁶⁴ *See* Bear Lodge Rare Earth Project, 91 Fed. Reg. at 47,804; *supra* notes 21-24, 103.

begins may differ materially from those used to design the first reclamation measures. The Forest Service should require the EIS to address whether vegetation establishment, erosion control, drainage management, waste containment, and slope stability remain realizable under projected climate conditions. Section VII explains why reclamation obligations may continue long after active mining ends. *See supra* Section VII. Climate projections should be incorporated into that long-term assessment rather than treated as a separate issue.

Wildfire presents another foreseeable interaction. Forest Service research concerning the Black Hills reports that increasing temperatures and drought have contributed to changes in fire regimes and that prospective climate conditions are expected to increase wildfire potential and lengthen fire seasons.¹⁶⁵ The Project would operate within a forested landscape for decades and would maintain roads, utilities, facilities, disturbed ground, and other infrastructure throughout that period. The EIS should assess how wildfire could affect Project facilities and how Project infrastructure, disturbance, and post-fire conditions could affect environmental risks associated with waste materials, water management, transportation, and reclamation.

The analysis should also address climate-related effects on transportation and access. Extreme weather can affect road stability, drainage, erosion, and the reliability of routes used to transport ore, equipment, materials, and personnel. Section I explains why transportation is part of the Project's environmental and cultural footprint. *See supra* Section I. The Forest Service should determine whether anticipated climate conditions could increase the frequency or severity of transportation-related environmental risks over the Project's operating period.

¹⁶⁵ U.S. Forest Serv., Rocky Mountain Research Station, *Fire Regimes of Ponderosa Pine Communities in the Black Hills and Surrounding Areas*, Fire Effects Information System (discussing observed and projected effects of increasing temperatures and drought on wildfire frequency, severity, and fire seasons).

Climate change also affects the reliability of the Project's environmental baseline. Section X explains that the agency cannot simply carry forward assumptions from the withdrawn 2016 Draft EIS. *See supra* Section X. The same principle applies to climate conditions. A baseline derived primarily from historical observations may fail to represent the conditions under which the Project would actually operate. The Forest Service should distinguish observed historical conditions from projected future conditions and explain how those differences affect each material environmental conclusion. The EIS should use climate projections in a manner proportionate to the actual decision before the agency. The Forest Service need not predict a single prospective climate condition accurately. Instead, the agency should identify the range of reasonably foreseeable conditions that could materially affect the Project and evaluate whether the proposed design remains protective across that range. Current USDA NEPA regulations require the EIS to address reasonably foreseeable environmental impacts and to disclose environmental consequences that cannot be avoided.¹⁶⁶

This analysis is also necessary because some consequences of the Project would be borne by people who will not participate in the decision to authorize it. The current proposal would commit National Forest System lands to an industrial use extending across multiple decades.¹⁶⁷ Future generations would inherit the consequences of decisions made during the current permitting process, including any residual changes to groundwater, surface water, waste facilities, roads, habitat, and cultural landscapes. NEPA expressly requires the EIS to disclose irreversible and irretrievable commitments of Federal resources associated with the proposed action or an action alternative.¹⁶⁸ The Forest Service should apply that requirement to the Project's long-term climate context. Where an environmental consequence cannot

¹⁶⁶ 7 C.F.R. § 1b.7(h)(5)(i), (iii), (vi) (2026); 42 U.S.C. § 4332(2)(C) (2018), as amended by Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38-39 (2023).

¹⁶⁷ *See* Bear Lodge Rare Earth Project, 91 Fed. Reg. at 47,804; *supra* note 175.

¹⁶⁸ 42 U.S.C. § 4332(2)(C)(v) (2018), as amended by Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38-39 (2023); 7 C.F.R. § 1b.7(h)(5)(vi) (2026).

realistically be reversed through reclamation, the agency should identify it as such. Where future conditions could make a mitigation measure less effective, the EIS should disclose that uncertainty rather than treating the mitigation measure as a guaranteed outcome.

The intergenerational dimension of the decision is particularly important in Ĥe Sápa. The Forest Service has already recognized the continuing cultural value of the landscape and the relationships that Indigenous Peoples maintain with its waters, lands, wildlife, and sacred places. *See supra* Sections I-III. A decision that changes environmental conditions for decades may affect the ability of future generations to maintain those relationships. The environmental review should therefore consider whether the Project would constrain future uses of the landscape or transfer environmental management obligations to people who did not authorize the disturbance.

The Forest Service should also evaluate the consequences of taking no action against the expected future condition of the landscape. The current USDA regulations require the EIS to disclose the consequences of taking no action and compare those consequences with the proposed action and alternatives.¹⁶⁹ That comparison should include future environmental conditions under continued climate change. The relevant question is not simply whether the landscape would remain unchanged without the Project. The agency should determine how the landscape is reasonably expected to change without the mine and then assess how Project-related disturbances would interact with those changes. A climate-informed analysis may therefore affect the relative merits of the alternatives. An alternative that avoids major groundwater disturbance, reduces permanent surface alteration, or preserves greater flexibility for future land management may perform differently under evolving environmental conditions than an alternative dependent upon long-term engineered controls. The EIS should make those differences visible to the responsible official.

¹⁶⁹ 7 C.F.R. § 1b.7(h)(5)(iv) (2026).

WPLC urges the Forest Service to incorporate climate projections into every portion of the environmental review where changing conditions could affect the Project's consequences or the effectiveness of proposed mitigation. The agency should evaluate water availability, groundwater recharge, extreme hydrologic events, wildfire, infrastructure stability, reclamation, and long-term resource commitments under reasonably foreseeable future conditions. The Forest Service should reject the Project if the record indicates that climate-related uncertainty or changing conditions make its environmental risks unacceptable or its proposed mitigation unreliable.

XII. Alternatives That Avoid Harm to Mathó Thípila and Ĥe Sápa Deserve Meaningful Consideration

The Forest Service should use the alternatives analysis to determine whether the purposes identified in the NOI can be addressed while steering clear of the Project's most consequential environmental and cultural effects. NEPA requires an EIS to evaluate a reasonable range of technically and economically feasible alternatives that meet the proposal's purpose and need, and current USDA regulations expressly require the alternatives section to include the no-action alternative and to compare the alternatives according to differences in their scope and scale.¹⁷⁰ The NOI itself identifies no action, alternative access and haul routes, and variations in mine and facility configuration as potential alternatives.¹⁷¹

The alternatives analysis should begin with the No Action Alternative. Under the NOI, no action would mean denial of the MPO.¹⁷² That alternative provides the necessary baseline for determining what environmental conditions would be avoided if the Forest Service does not approve the Project. The agency should describe the future environmental condition under no action rather than treating the alternative as an

¹⁷⁰ *Id.* § 1b.7(h)(3)(i), (iv).

¹⁷¹ Bear Lodge Rare Earth Project, 91 Fed. Reg. at 47,804; *supra* notes 27, 165.

¹⁷² Bear Lodge Rare Earth Project, 91 Fed. Reg. at 47,804.

administrative rejection without substantive environmental consequences. The No Action Alternative is particularly important because the Project would require a project-specific amendment to the Black Hills Forest Plan concerning scenic-integrity standards and guidelines.¹⁷³ The Forest Service should determine whether approving an action alternative that requires such an amendment is consistent with the Forest Plan's broader management objectives and whether the amendment would create conflicts with the protection of scenic, cultural, ecological, and other resources. The agency should explain why a Forest Plan amendment is necessary and whether an alternative that avoids the amendment would better satisfy the governing plan.

The EIS should also examine alternatives that avoid or substantially reduce disturbance to culturally significant areas. Section I determines that the relevant cultural setting may extend past the mine footprint and that Section 106 requires consideration of direct and indirect effects within the undertaking's area of potential effects. *See supra* Section I. Section II further explains that Tribal consultation should inform the geographic and methodological scope of the cultural-resource analysis. *See supra* Section II. Those principles should carry forward into the alternatives analysis. The Forest Service therefore must consult with affected Tribal Nations before eliminating alternatives on the ground that they would not adequately protect cultural resources. Tribal Nations possess information concerning places, viewsheds, access routes, ceremonial practices, or landscape relationships that cannot be identified through conventional agency data.¹⁷⁴ An alternative should not be dismissed as infeasible merely because the agency's existing records do not document the cultural interest that the alternative would protect.

The EIS should evaluate alternative mine and facility configurations that reduce the geographic extent of surface disturbance. The NOI expressly identifies variations in mine and facility configuration as alternatives that may be considered.¹⁷⁵ The Forest Service should compare those configurations according to

¹⁷³ *Id.* at 47,803, 47,805; *supra* notes 31-32.

¹⁷⁴ *See supra* Section II; 36 C.F.R. § 800.4(a)-(b) (2026).

¹⁷⁵ Bear Lodge Rare Earth Project, 91 Fed. Reg. at 47,804; *supra* note 27.

the resources affected, rather than describing them only in engineering terms. Relevant differences may include the amount and location of surface disturbance, the extent of waste-rock storage, the amount of road construction, water-management requirements, visual effects, and the degree to which culturally significant landscapes stay intact. The agency should likewise evaluate alternative access and haul routes according to their complete environmental and cultural consequences. The NOI expressly identifies alternative routes as potential alternatives.¹⁷⁶ Earlier sections explain that transportation can create effects beyond the mine itself through noise, dust, traffic, visual changes, safety risks, and interference with access. *See supra* Section I. The Forest Service should compare routes using those effects as part of the alternatives analysis. The alternatives analysis should also consider whether a configuration could reduce the Project's dependence upon long-term water-management systems. Sections V and VII identify the risks associated with dewatering, groundwater recovery, waste management, and post-closure reclamation. *See supra* Sections V, VII. An alternative that materially reduces those dependencies may have environmental positives that cannot be captured by comparing the size of the mine footprint alone.

The agency should evaluate alternatives according to their ability to avoid irreversible extractive commitments of forests under the jurisdiction of the Forest Service NEPA requires disclosure of those commitments, and the current USDA regulations incorporate that requirement into the environmental-impacts analysis.¹⁷⁷ An alternative that preserves greater future flexibility for management of National Forest System lands may therefore warrant consideration where the proposed action would permanently alter a resource or create long-term management obligations. The alternatives analysis should not assume that mitigation can substitute for avoidance in every circumstance. The Supreme Court has explained that NEPA requires a reasonably complete discussion of mitigation because that discussion allows

¹⁷⁶ *Id.*

¹⁷⁷ 42 U.S.C. § 4332(2)(C)(v) (2018), as amended by Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38-39 (2023); 7 C.F.R. § 1b.7(h)(5)(vi) (2026).

an agency and the public to understand the severity of environmental consequences. .¹⁷⁸ Where a cultural, ecological, or physical effect cannot reasonably be restored after it occurs, the EIS should compare an avoidance alternative directly against an alternative that relies upon mitigation. That consideration is especially important for Mathó Thípila. The Forest Service should evaluate whether any Project configuration or transportation alternative could avoid adverse effects to the sacred place and its cultural setting. Section 106 requires consideration of effects to historic properties, including adverse effects resulting from changes to considerable visual, atmospheric, or audible characteristics. *See supra* Section I. Where consultation concludes that a particular impact cannot be acceptably mitigated, the agency must give meaningful consideration to alternatives that eliminate the source of that impact, and choose alternatives that have the least impact on Indigenous Peoples given the sovereign nature of Tribal Nations and government-to-government relationship. The same approach should apply to Ĥe Sápa as a historic landscape. The Forest Service has recognized that the Black Hills are sacred to Indigenous Tribes affiliated with the region and that Traditional Cultural Properties may encompass landscapes and geographic features associated with continuing religious and cultural practices.¹⁷⁹ The alternatives analysis should therefore consider whether different project configurations would preserve greater portions of the landscape's existing cultural character.

The Forest Service should also compare alternatives using a full life-cycle analysis. The relevant differences among alternatives may not appear during initial construction. One alternative could require less construction but create greater long-term waste-management obligations; another could decrease operational disturbance while increasing reclamation requirements. Sections VII and XI demonstrate why closure,

¹⁷⁸ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989); *supra* note 171.

¹⁷⁹ U.S. Forest Serv., *Black Hills National Forest Forest Plan Revision Assessment: Cultural Resources* 19 (2022), *supra* note 3; U.S. Forest Serv., *Black Hills National Forest Forest Plan Revision Assessment: Areas of Tribal Importance* 3 (2022), *supra* note 11.

post-closure conditions, and changing climate conditions should be incorporated into those comparisons. *See supra* Sections VII, XI. The alternatives analysis should include the environmentally preferable alternative to the extent required by applicable law and must explain the agency's reasoning if it selects an alternative that causes greater environmental harm than another feasible option. The current USDA regulations require the alternatives section to provide a comparative basis for the responsible official's decision and require discussion of the environmental consequences of each alternative.¹⁸⁰ The final EIS must therefore make clear why the selected alternative provides the strongest overall basis for federal action.

The Forest Service should also preserve alternatives until the environmental review is complete. Current USDA regulations provide that an agency should not commit resources in a manner that prejudices the selection of alternatives before the final decision.¹⁸¹ That principle is particularly important here because the Forest Service has chosen to proceed directly to a final EIS without publishing a draft EIS.¹⁸² The agency should ensure that the absence of a draft does not narrow the range of alternatives before Tribal Nations and the public have had a meaningful opportunity to identify options.

WPLC recommends that the Forest Service retain and evaluate, at minimum, the No Action Alternative, alternative access and haul routes, alternative mine and facility configurations, and any additional alternatives identified through Tribal consultation and public scoping. Each alternative should be evaluated across the Project's full life cycle and against the resources addressed throughout these comments. The Forest Service should explain why any technically and economically feasible alternative is eliminated from detailed study. Most importantly, the Forest Service should select an alternative that avoids unacceptable harm to Mathó Thípila and Ĥe Sápa. Where the record establishes that the proposed mine

¹⁸⁰ 7 C.F.R. § 1b.7(h)(3)-(5) (2026).

¹⁸¹ *Id.* § 1b.7(h)(3)(ii).

¹⁸² *Id.* § 1b.7(n)(1)-(2); *supra* note 173.

would adversely affect sacred places, cultural landscapes, Water, or other resources in ways that cannot be adequately avoided or mitigated, the appropriate alternative is the No Action Alternative.

Recommendation

WPLC respectfully recommends that the Forest Service deny Rare Element Resources' Mine Plan of Operations. The present record identifies substantial questions concerning the Project's effects on Mathó Thípila as well as the Ĥe Sápa cultural setting, water resources, radioactive and hazardous materials, mine waste, reclamation, cumulative effects, and long-term environmental conditions. The preceding sections explain why those questions require a complete and current environmental analysis before any approval could be justified. *See supra* Sections I-XI.

If the Forest Service nevertheless proceeds to evaluate an action alternative, WPLC recommends that the agency require the EIS to include a genuine comparison of alternatives capable of avoiding or substantially reducing the Project's most consequential effects. That comparison should incorporate the No Action Alternative, alternative access and haul routes, alternative mine and facility configurations, and alternatives developed through government-to-government consultation.¹⁸³ The agency should not treat the applicant's preferred configuration as the starting point from which every other alternative must justify its existence.

The Forest Service should also ensure that the final EIS provides the responsible official with sufficient information to determine whether any action alternative can comply with applicable law and protect the resources entrusted to the agency. The current locatable-minerals regulations require the Forest Service to evaluate proposed operations and to impose changes necessary to satisfy the purposes of the

¹⁸³ *See supra* Section II; Bear Lodge Rare Earth Project, 91 Fed. Reg. at 47,804.

regulations, including protection of National Forest surface resources.¹⁸⁴ Where those requirements cannot be satisfied through reasonable modifications, the MPO should not be approved.

Conclusion

The Bear Lodge Project presents the Forest Service with a decision concerning a landscape whose cultural value predates federal management and whose importance continues today. The Project would commit National Forest System lands to a major mineral development for decades and could create environmental obligations that extend well beyond the period of active extraction. The agency's current environmental review must therefore account for the Project as it is proposed today, the conditions expected to exist during its operation, and the consequences that could remain after mining ends. The need for a current record is particularly important because the 2016 Draft EIS was withdrawn and the present MPO represents a new proposal requiring new environmental analysis. *See supra* Section X.

The Forest Service has the authority to determine whether the MPO should be approved, modified, or rejected, and the NOI expressly contemplates a decision based upon the proposed action or an alternative.¹⁸⁵ The agency should exercise that authority in a manner that gives meaningful weight to the environmental, cultural, and intergenerational consequences documented through the NEPA process. WPLC therefore urges the Forest Service to prepare an EIS that fully evaluates the alternatives identified above, incorporates current scientific and cultural information, and gives affected Tribal Nations a meaningful opportunity to shape the review. If the completed record reveals that the Project's impacts cannot be avoided or sufficiently addressed through a feasible alternative, the Forest Service should select the No Action Alternative and deny the MPO.

¹⁸⁴ 36 C.F.R. §§ 228.5(a)(3), 228.8 (2026).

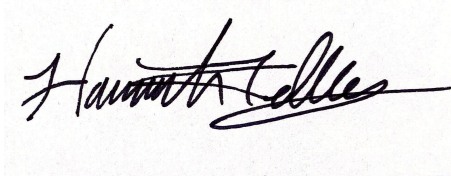
¹⁸⁵ Bear Lodge Rare Earth Project, 91 Fed. Reg. at 47,805; *supra* note 30.

Protecting Ĥe Sápa requires the federal government to consider the consequences of its decisions beyond the short-term permitting period. Mathó Thípila is still a sacred place. The Water continues to be essential to the well-being of the region. The environmental conditions inherited by future generations will be shaped in part by decisions made now. The Forest Service should therefore decline to authorize the Bear Lodge Project and preserve the ability of future generations to maintain their relationships with Ĥe Sápa.

WPLC respectfully requests that the Forest Service deny the Bear Lodge Rare Earth Project Mine Plan of Operations.

Respectfully Submitted,

WATER PROTECTOR LEGAL COLLECTIVE

A handwritten signature in black ink, appearing to read "Hannah Kelley", written over a light blue grid background.

Hannah Kelley
Research and Special Projects Coordinator
Mni Wiconi. Water is Life.