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20 UNITED STATES DISTRICT COURT
21 DISTRICT OF SOUTH DAKOTA

22 _____)
23 NDN COLLECTIVE; BLACK HILLS CLEAN)
24 WATER ALLIANCE; EARTHWORKS,)
25)
26 Plaintiffs,)
27)
28 v.)
29)
30 UNITED STATES FOREST SERVICE;)
31 U.S. DEPARTMENT OF AGRICULTURE;)
32 JAMES GUBBELS, District Ranger,)
33)
34 Defendants.)
35 _____)

Case No.: 5:26-cv-05035-CCT
**PLAINTIFFS' MEMORANDUM
IN SUPPORT of MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

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 15 Regional Director Bureau of Indian Affairs, Pe’Sla Property (2,022.66 acres),
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EXHIBIT LIST

- 1
- 2
- 3 Exhibit 1 *Defenders of Wildlife v. U.S. Forest Service*, Order, 4:14-cv-02446-RM (D. Ariz., 2015)
- 4 Exhibit 2 Rochford Exploration Project Plan of Operations (PoO)
- 5 Exhibit 3 Forest Service Decision Memo, February 27, 2026
- 6 Exhibit 4 MEMORANDUM OF UNDERSTANDING Between GREAT SIOUX NATION TRIBES ... And The USDA, FOREST SERVICE ROCKY MOUNTAIN REGION BLACK HILLS NATIONAL FOREST (MOU), 2024
- 7
- 8 Exhibit 5 Declaration of Nick Tilsen (CEO and Founder, NDN Collective)
- 9 Exhibit 6 Valeriah Big Eagle (Director of He Sapa Initiatives, NDN Collective)
- 10 Exhibit 7 Wizipan Garriott (President, NDN Collective)
- 11 Exhibit 8 Dr. Liliias Jarding (Executive Director, Black Hills Clean Water Alliance
- 12 Exhibit 9 Declaration of Aaron Mintzes (Earthworks)
- 13

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- 15 CE Categorical Exclusion under Forest Service NEPA regulations
- 16 DM Forest Service Decision Memo, February 27, 2026
- 17 MOU MEMORANDUM OF UNDERSTANDING Between GREAT SIOUX NATION TRIBES ... And The USDA, FOREST SERVICE ROCKY MOUNTAIN REGION BLACK HILLS NATIONAL FOREST
- 18
- 19 NEPA National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.*
- 20 PoO Rochford Exploration Project Plan of Operations (PoO)
- 21
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1 **INTRODUCTION**

2 Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs NDN Collective (NDN), Black
3 Hills Clean Water Alliance (BHCWA), and Earthworks, request a temporary restraining order
4 and preliminary injunction to prevent irreparable harm resulting from the Forest Service’s
5 approval of the Rochford Exploration Drilling Project (Project or project), a large mineral
6 exploration drilling project on federal public lands in the Black Hills that will directly affect
7 Pe’Sla, a recognized Native American sacred site and place of ceremony. Pe’Sla is sacred to the
8 Lakota and many of Plaintiffs’ members, who have visited the site for countless generations for
9 prayer, ceremony, and cultural activities. Pe’Sla is recognized as an Indigenous sacred site by
10 various Tribes, the federal government (including the Defendant Forest Service), State of South
11 Dakota, and Pennington County.

12 Injury to Plaintiffs and the Pe’Sla landscape is imminent. Without any notice by the
13 Forest Service to the public or affected Tribes, Plaintiffs have just recently become aware that
14 the company has already commenced initial drilling and road construction. These industrial
15 operations irreparably harm Plaintiffs’ members’ use of the Pe’Sla landscape and public lands
16 impacted by the project’s drilling, road construction and industrial activities. This is especially
17 urgent, for as shown in the Declarations, **sacred religious ceremonies in the Pe’Sla area will**
18 **begin on May 2, which will be directly affected by project operations.**

19 Despite the overwhelming evidence submitted to the agency by Plaintiffs and numerous
20 Native American Tribes that the Project would directly and significantly affect the Pe’Sla
21 cultural landscape, and vital water and other important public resources resulting from the
22 drilling project, the Defendant U.S. Forest Service (USFS) “categorically excluded” the Project
23 from the environmental, public, and cultural resources review required by the National
24 Environmental Policy Act, 42 U.S.C. §§4321 *et seq.* (NEPA), issuing a cursory “Categorical
25 Exclusion” (CE), which severely limited public and agency review of the Project. By relying on
26 a CE where “extraordinary circumstances”—significant impacts to recognized Native American
27 sacred sites—were present, the USFS violated NEPA.

1 The agency also violated NEPA by relying on a CE that on its face does not apply to this
2 Project. The CE the agency relied upon is for

3 Short-term (1 year or less) mineral, energy, or geophysical investigations and
4 their incidental support activities that may require cross-country travel by vehicles
5 and equipment, construction of less than 1 mile of low standard road, or use and
6 minor repair of existing roads.

7 36 C.F.R. §220.6(e)(8) (“CE-8”) (repromulgated in July 2025 at 7 C.F.R. §7.1.b.4(d)(32)). Yet the
8 approved mineral operations, by the company’s and the agency’s own statements and
9 admissions, will last more than one year, as the required reclamation of the exploration impacts
10 will last up to three years, if not longer, after completion of the initial drilling activities.

11 The agency’s use of CE-8 directly contradicts on-point federal court decisions rejecting
12 the same USFS rationale used here. *See Defenders of Wildlife v. U.S. Forest Service*, Order,
13 4:14-cv-02446-RM (D. Ariz., 2015) (Exhibit 1). On essentially the same facts, the federal court
14 held that since monitoring of reclamation success would last three years, and that reclamation
15 based on that monitoring “may be required during the three-year monitoring period” – the
16 situation here – the agency could not use the CE-8 “short-term” mineral exploration category for
17 a proposed mineral exploration project.

18 The Ninth Circuit recently held the same, vacating the Forest Service’s attempt to avoid
19 the one-year limit in CE-8 by designating the post-drilling reclamation as a separate project. The
20 Circuit confirmed that the reclamation monitoring and potential work are part of project
21 “operations,” and must be counted in determining whether the project can be completed within
22 the one-year limit in 36 C.F.R. §220.6(e)(8). “Forest Service’s mineral regulations, [] establish
23 that reclamation cannot be bifurcated from other mineral exploration efforts.” *Friends of the Inyo*
24 *v. U.S. Forest Service*, 103 F.4th 543, 552 (9th Cir. 2024).

25 Plaintiffs’ counsel notified counsel for the Federal Defendants of this Motion on April 24,
26 2026, via email to the U.S. Attorney’s Office for the South Dakota District. Counsel for the
27 Defendants has not responded.

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STANDARDS FOR PRELIMINARY RELIEF

To obtain preliminary relief, a Plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Defense Council*, 555 U.S. 7, 20 (2008). In deciding whether to grant preliminary injunctive relief, courts consider:

- (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties' litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Schmitt v. Rebertus, 148 F.4th 958, 966 (8th Cir. 2025)(citing *DataPhase Systems v. CL Systems*, 640 F.2d 109 (8th Cir. 1981)).

Plaintiffs satisfy all parts of this test, and an injunction against the Project should issue.

THE ROCHFORD EXPLORATION PROJECT

On June 11, 2024, the USFS received a proposed Plan of Operations (PoO) for the Project—a proposal to conduct extensive drilling, road building, reclamation, and other operations on public lands in the Black Hills near Rochford, South Dakota (Exhibit 2). After internal review, the USFS issued a short “scoping notification letter” on April 9, 2025, to a limited set of “interested parties” (and posting on its website). Despite such brief public notice, 2,226 scoping comments were received on the project.

With no further opportunity for public review, the agency issued the challenged Decision Memo on February 27, 2026, approving the Project (DM)(Exhibit 3). As approved by the DM, the project will result in:

[d]rilling boreholes at up to 18 proposed sites on NFS lands. Each drill site would be approximately 30 feet x 50 feet, or 0.034 acre in size. There would be one borehole at each site. ... The maximum depth of each borehole would be 1,000.

DM at 3. “Additionally, there would be two 0.15-acre laydown/staging areas used to store core boxes, hose, spare parts, water storage tanks, and site portable sanitation facilities.” DM at 3.

Other details in the DM show the large scale disruptive extent of this project:

1 Access to drill sites would rely on existing National Forest System roads (NFS) or
2 temporary access routes and overland two-track routes wherever feasible,
3 specifically NFS roads 190 and 125 for northern sites and NFS road 132 for
4 southern sites. To reach pads from those roads, the proponent would implement
approximately 5,050 feet of temporary overland access route improvements.

5 DM at 3.

6 Drilling would be supplied with water from an approved municipal or industrial
7 source trucked to the site. Water would be recirculated during drilling through
8 either in-ground infiltration galleries (excavated trenches typically 2–4 feet deep,
9 approximately 24 inches wide, up to 20 feet long) or above-ground sump systems
(double-tank or double-crib systems lined with oil-impermeable fabric), which
allow cuttings and fines to settle and clarified water to be returned to the drill.

10 DM at 3.

11 Project equipment will include one to three track or trailer mounted drill rigs; a
12 water truck; pickup support vehicles; all terrain/utility vehicles; and, on an as
13 needed basis, a compact track loader or backhoe for infiltration galleries and
minor pad grading, and a small dozer or skid steer for access maintenance and
reclamation.

14 DM at 4.

15 Drilling operations are expected to occur over less than one year from initiation,
16 with work typically conducted on two 12-hour shifts (up to 24-hour operations if
17 needed to meet schedule and subject to any timing restrictions). The maximum
18 potential surface disturbance for the updated plan comprises approximately .6
19 acres for drill pads, approximately 1.8 acres for new temporary overland access
20 routes (5,050 feet at 15 feet wide), and approximately 0.3 acre for laydown areas,
for a combined estimate of less than 3 acres.

21 DM at 4.

22 The approved project includes the required post-drilling reclamation of the lands:

23 All disturbed areas will be reclaimed concurrently where practicable and
24 immediately following completion of use at each site. Operations will adhere to
25 seasonal constraints and resource protection measures identified during the NEPA
26 review and Section 7 consultation (e.g., restrictions near mapped bat hibernacula
and potential bat maternity roost habitat), as well as Forest Service locatable
minerals regulations (36 C.F.R. 228, Subpart A), the Black Hills National Forest
Plan standards and guidelines, and applicable state and federal water quality and
noxious weed management requirements.

27 DM at 4.

1 The DM states that: “All sites will be reclaimed following drilling activities. Project
2 activities, including reclamation, will take one year or less.” DM at 4. **That is factually and**
3 **legally erroneous**, as it contradicts the Project plan and what is actually approved in the DM.
4 The Project Plan of Operations (PoO), approved in the DM, acknowledges that reclamation will
5 not be completed for at least 3 years, as ongoing monitoring, and potential “modifications to the
6 site” would occur on a yearly basis. DM at 17. (PoO attached as Exhibit 2).

7 Other statements in the PoO affirm the length of the project:

8 PLS will commit to annual field inspections of drill sites and the lay-down area in
9 conjunction with USFS and SD DANR staff (whenever possible) to cover areas
10 used and occupied by PLS under this Plan of Operations to monitor for
reclamation effectiveness and noxious weed infestations for 3 years.

11 PoO at 14. “Field inspection information will be compiled at the end of each field season and
12 provided to the USFS.” PoO at 14. The PoO continues:

13 If the above reclamation efforts do not meet the established criteria required for
14 bond release, PLS will collaborate with the USFS representative **and make**
15 **modifications to the site**, incorporating such changes and additional procedures
as may be expected to provide reclamation to the stated standard.

16 PoO at 14 (emphasis added).

17 The DM further acknowledges that operations, including the required reclamation, will
18 continue for at least 3 years:

19 PLS will commit to annual field inspections of drill sites and the lay-down area in
20 conjunction with Forest Service and SD DANR staff (whenever possible) to cover areas
21 used and occupied by PLS under this PO to monitor for reclamation effectiveness and
22 noxious weed infestations for 3 years. Such field inspections will be documented with
photographs or written descriptions. Field inspection information will be compiled at the
end of each field season and provided to the Forest Service.

23 If the above reclamation efforts do not meet the established criteria required for bond
24 release, **PLS will collaborate with a Forest Service representative and make**
25 **modifications to the site, incorporating such changes and additional procedures as**
may be expected to provide reclamation to the stated standard.

26 DM at 17 (emphasis added).

1 In addition, the Forest Service will not release the required reclamation bond until PLS
2 has demonstrated that these reclamation requirements and standards have been met – **after** the 3
3 year “monitoring” and site “modifications” have been completed. As the agency admitted:
4 “Remaining reclamation bond will be held in order to monitor onsite and off-site damage to the
5 environment and forest surface resources for three years to ensure proper revegetation and weed
6 control.” DM at 17. The PoO stated the same requirements:

7 Reclamation Bond Release

8 Release of the reclamation bonds for a specific drill site will be requested when:

- 9 1) Monitoring indicates that reclamation measures have effectively prevented or
10 controlled onsite and off-site damage to the environment and forest surface
11 resources for three years and such prevention is expected to continue.
12 2) Re-vegetation at reclaimed areas is adequate. Re-vegetation will be deemed
adequate when:
13 a. Species composition is like that of adjacent areas; and
14 b. The vegetative crown cover is 60 to 75 percent of the existing percent
15 vegetative crown cover of adjacent areas not disturbed by operations
16 authorized by this Plan.

17 PoO at 14.

18 **THE PROJECT’S SIGNIFICANT and IRREPARABLE HARM TO PE’SIA AND**
19 **PUBLIC LANDS**

20 The Project will result in significant and irreparable harm to Pe’Sia and its surrounding
21 cultural landscape, including the public lands at and around the site, including the roads, drill
22 sites, and support facilities. Pe’Sia includes a unique high mountain meadow and forests located
23 in the heart of He Sapa (Black Hills), and is sacred to Lakota people, including Plaintiffs’
24 members, who return ceremonially on an annual basis or other times of the year.

25 Indeed, due to the outstanding cultural values, and ongoing religious and cultural uses of
26 Pe’Sia, the United States, through the Department of the Interior in 2014, dedicated
27 “approximately 2,022.66 acres of land known as the Pe’Sia Property (Pe’Sia, Property) in trust
for the benefit of four Tribes (Tribes),” signifying its importance and value to Native American
Tribes. Decision, Assistant Secretary - Indian Affairs, State of South Dakota v. Great Plains
Regional Director Bureau of Indian Affairs, Pe’Sia Property (2,022.66 acres), December 2, 2016,

1 at p. 1. Available at: [https://turtletalk.blog/wp-content/uploads/2016/12/signed-decision-pe-](https://turtletalk.blog/wp-content/uploads/2016/12/signed-decision-pe-sla.pdf)
2 [sla.pdf](https://turtletalk.blog/wp-content/uploads/2016/12/signed-decision-pe-sla.pdf) (viewed April 24, 2026).

3 “Specifically, the Property trust comprises an undivided 51.2 percent interest for the
4 Rosebud Sioux Tribe, an undivided 29.9 percent interest for the Shakopee Mdewakanton Sioux
5 Community, an undivided 12 percent interest for the Standing Rock Sioux Tribe, and an
6 undivided 6.9 percent interest for the Crow Creek Sioux Tribe (collectively Tribes).” *Id.* at 1.

7 The Interior Department recognized the immense importance of Pe’Sla and the
8 surrounding lands:

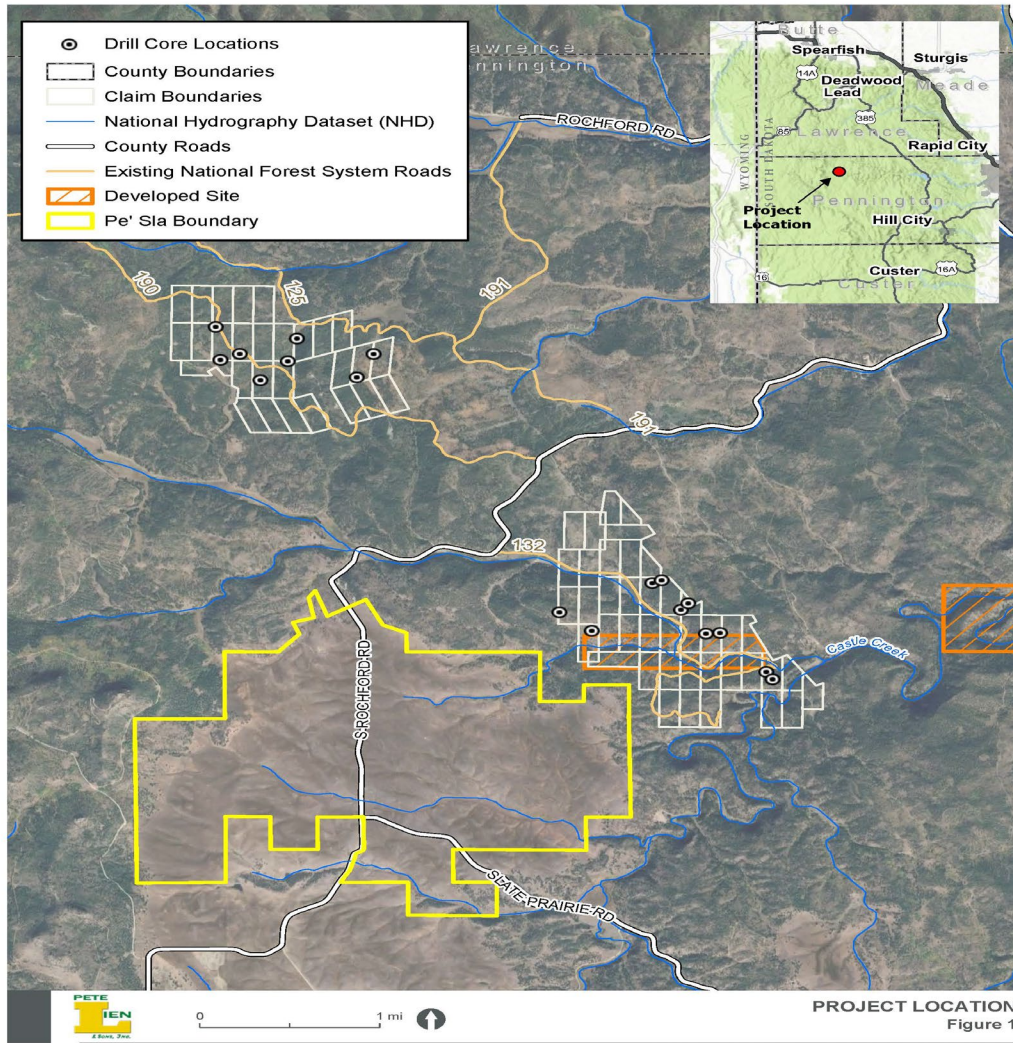
9 The land is located within the historical territory of the Great Sioux Nation. The Tribes
10 explain that Pe’Sla is **“innately tied” to their creation and existence. Their**
11 **application explains that Pe’Sla is one of their “most precious sacred sites . . . in the**
12 **heart of everything that is, in the middle of the place where [they] originate from,**
13 **and is central” to their existence.**

14 *Id.* at 4 (emphasis added). “A study of the Property directed by Rosebud and performed by a
15 group of Lakota, Dakota, and Nakota has identified 484 traditional cultural properties, 5 historic
16 sites, 3 archeological sites, and 4 disturbed cultural sites within Pe’Sla.” *Id.*

17 The Interior Department rejected the State of South Dakota’s challenge to the Interior
18 Department’s compliance with agency authorities in taking these lands into trust, but notably:
19 “The State does not challenge the religious and cultural significance of Pe’Sla.” *Id.* at 1.

20 The project’s drilling, road construction, and other industrial operations will occur within
21 the Pe’Sla area, and just north and northeast of the protected Pe’Sla lands. According to the
22 company’s PoO, Figure 1, primary access to the proposed drill site will be along Rochford Road
23 and South Rochford Road. The transport of industrial equipment along this primary access route
24 will increase traffic, dust, noise, risk of wildfire, risk of hazardous materials spills, risk of wildlife
25 impacts/fatalities and increased disruption of the cultural and ceremonial activities associated with
26 the Pe’Sla site. These roads are used by Lakota peoples, and Plaintiffs’ members, to access the
27 Pe’Sla. In addition, as shown, the company’s mining claims and the approved drilling locations

are in close proximity to the specifically-protected Pe'Sla lands.



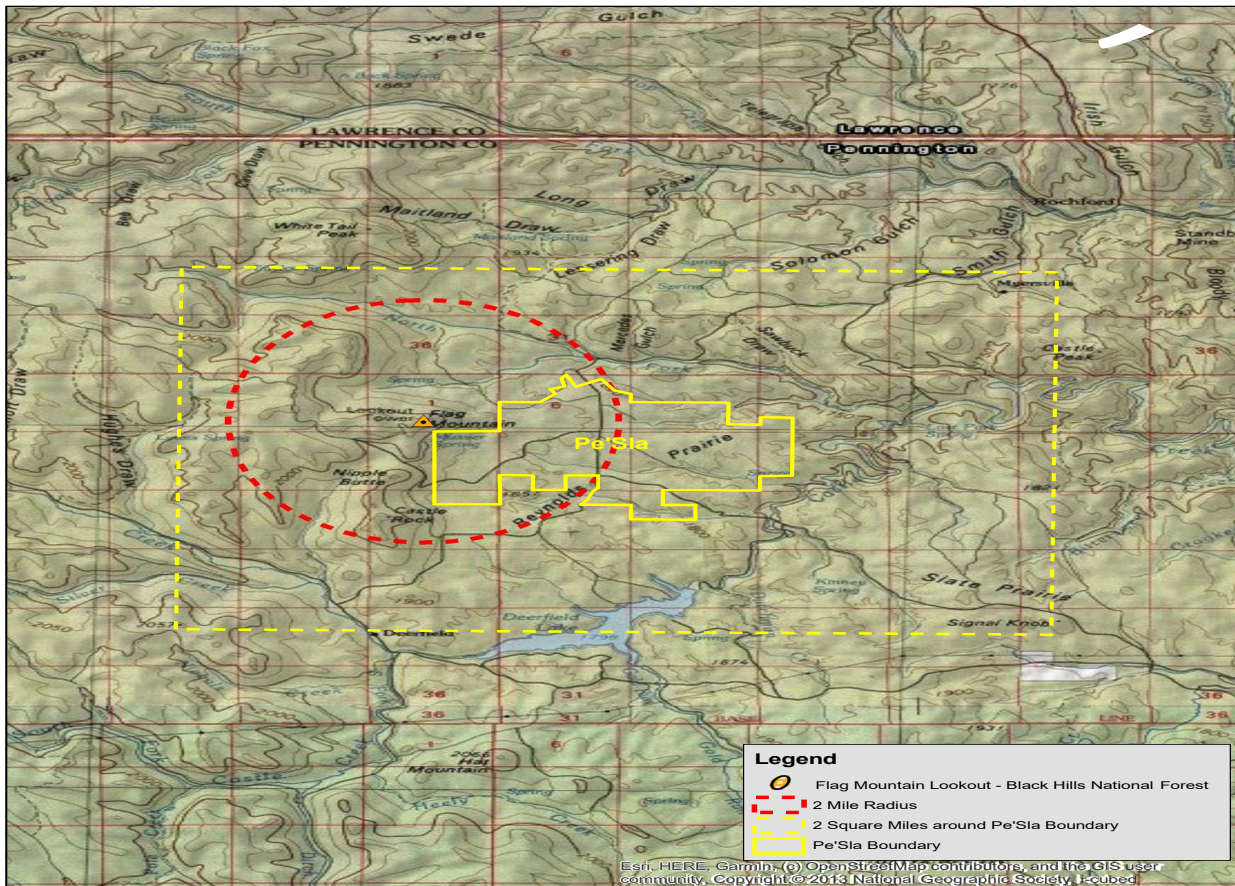
But the critical importance of Pe'Sla is **not** limited to just the specific acreage designated and taken into trust by the Interior Department. It is the heart of a larger Lakota cultural landscape recognized by the federal government, including the Defendant Forest Service. As detailed below, in approving the project, the agency refused to consider the impacts not only to the cultural and religious uses of the specific 2,022 acres, but also to the lands surrounding these lands – contradicting the Forest Service's commitment to the Tribes to protect these lands, including a 2-

1 mile wide radius of the specific Pe'Sla acres.

2 In a 2024 binding Memorandum of Understanding (“MOU”) between the Forest Service
3 and the various Tribes of the Great Sioux Nation, the agency committed to: “Co-stewardship of
4 Black Hills National Forest lands, including lands within 2-mile radius of Flag Mountain and
5 Pe'Sla Tribal Trust lands, see Appendix A map, and Black Elk Wilderness.” MEMORANDUM
6 OF UNDERSTANDING Between GREAT SIOUX NATION TRIBES ... And The USDA,
7 FOREST SERVICE ROCKY MOUNTAIN REGION BLACK HILLS NATIONAL FOREST
8 (MOU), at p. 6 (Exhibit 4). As shown below in the map contained in the MOU, the project’s
9 drilling, road construction and other industrial operations would occur within the 2-mile radius of
10 Flag Mountain and Pe'Sla Tribal Trust lands identified in the Forest Service-Tribal MOU.

11 Appendix A

12 Pe'Sla Boundary and Flag Mountain 13 Black Hills National Forest in South Dakota



1 This larger Pe'Sla landscape includes both the prairie grassland and the more forested
2 lands nearby. In addition to the critical cultural and religious significance and uses, these lands
3 are ecologically unique and include important surface water resources. It is an important home to
4 an ecologically significant landscape characterized by unique assemblages of native plant
5 species, serving as a critical habitat refuge within an otherwise fragmented landscape. The
6 disturbance inherent in the proposed drilling at or immediately adjacent to this sensitive area
7 poses serious and potentially permanent ecological risks.

8 The area is underlain by the undifferentiated igneous and metamorphic rocks known as
9 the Precambrian core or the crystalline core of the Black Hills. The U.S. Geological Survey
10 describes this area and its subsurface as the oldest rocks in the Black Hills, ranging from 1.7 to
11 about 2.5 billion years old. Ground water is found in erratic, mostly unstudied fractures that may
12 be contained or may be joined with water in other fractures. This creates a very unpredictable
13 drilling environment.

14 The surface water in the area forms North Castle Creek and Castle Creek. The latter is
15 downstream from Deerfield Reservoir in this area. These flow into upper Rapid Creek nearby,
16 and then into Pactola Reservoir and on to Rapid City. The area and the Reservoir provide
17 municipal and drinking water for Rapid City, Ellsworth Air Force Base, and communities and
18 reservation lands down the Cheyenne River to the Missouri River. This water either directly
19 flows at the surface into Rapid City's water plants, or it flows through the bottom of the creek
20 underground into rock layers that become the aquifers from which Rapid City also draws water.

21 This unique mountain grassland is home to an abundance of life, including an incredible
22 diversity of native grasses, wildflowers, pollinators, birds, mammals and other species adapted to
23 the long-standing environmental and soil conditions of the area. They provide critical ecosystem
24 services such as water filtration, carbon sequestration, and habitat connectivity for wildlife.
25 Despite their ecological richness and vital functions, grasslands are highly vulnerable to human
26 activity and have experienced severe global decline.

27

1 Pe'Sla represents a remnant of a once more extensive high-elevation mixed-grass prairie
2 grassland ecosystem. The habitat it represents, Black Hills Montane Grassland (BHMG), sustains
3 an endangered plant community endemic to the Black Hills of western South Dakota and
4 northeastern Wyoming. These rare types of prairie ecosystem depend on intact soil-plant
5 relationships and minimal surface disruption. Even small-scale human impacts can have long-
6 lasting consequences. This type of habitat is now rare in the Black Hills and is globally unique. It
7 is an ancestral lineage of grassland communities, now sparsely scattered as diminishing islands
8 within a Ponderosa pine ocean.

9 **PLAINTIFFS SATISFY THE INJUNCTION REQUIREMENTS**

10 **I. Plaintiffs Are Likely To Succeed on the Merits.**

11 The likelihood of success factor examines whether plaintiffs can “demonstrate that [they
12 have] a ‘fair chance’ of prevailing on the merits.” *Schmitt v. Rebertus*, 148 F.4th 958, 966 (8th
13 Cir. 2025), quoting *Sleep Number Corp. v. Young*, 33 F.4th 1012, 1016 (8th Cir. 2022). “While
14 no single factor is determinative, the probability of success factor is the most significant.”
15 *Schmitt* at 966, quoting *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013). “To
16 show a fair chance of prevailing, [Schmitt] must show that [his] claims provide fair ground for
17 litigation, but [he] need not show that [he] has a greater than fifty per cent likelihood of success.”
18 *Schmitt*, at 966, quoting *Sleep Number*, at 1016–17.

19 Plaintiffs have shown that, at a minimum, that they “have a fair chance of prevailing” on
20 the merits, **especially since the Forest Service’s use of CE-8 for similar exploration projects**
21 **has been repeatedly rejected by the federal courts considering the very same issue and**
22 **agency explanation.**

23 *A. Statutory and Regulatory Background: NEPA and Categorical Exclusions.*

24 “The purposes of this Act [NEPA] are: To declare a national policy which will encourage
25 productive and enjoyable harmony between man and his environment; to promote efforts which
26 will prevent or eliminate damage to the environment and biosphere and stimulate the health and
27

1 welfare of man; to enrich the understanding of the ecological systems and natural resources
2 important to the Nation.” 42 U.S.C. §4321.

3 “NEPA declares a broad national commitment to protecting and promoting
4 environmental quality.” *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835, 1844
5 (1989). “In NEPA, Congress recognized the ‘profound impact’ of human activities, including
6 ‘resource exploration,’ on the environment and declared a national policy ‘to create and maintain
7 conditions under which man and nature can exist in productive harmony.’ 42 U.S.C. §4331(a).”
8 *Center for Biological Diversity v. U.S. Dept. of the Interior*, 623 F.3d 633, 642 (9th Cir. 2010).
9 NEPA has “twin aims.” First, it requires federal agencies “to consider every significant aspect of
10 the environmental impact of a proposed action. Second, it ensures that the agency will inform the
11 public that it has indeed considered environmental concerns in its decision-making process.”
12 *Kern v. BLM*, 284 F.3d 1062, 1066 (9th Cir. 2002), quoting *Baltimore Gas & Electric Co. v.*
13 *Natural Res. Def. Council*, 462 U.S. 87, 97 (1983).

14 NEPA mandates “all agencies of the Federal Government” to perform certain procedures.
15 42 U.S.C. §4332(2). For “major Federal actions significantly affecting the quality of the human
16 environment, a detailed statement by the responsible official on—

- 17 (i) reasonably foreseeable environmental effects of the proposed agency action;
18 (ii) any reasonably foreseeable adverse environmental effects which cannot be
19 avoided should the proposal be implemented;
20 (iii) a reasonable range of alternatives to the proposed agency action, including an
21 analysis of any negative environmental impacts of not implementing the proposed
22 agency action in the case of a no action alternative, that are technically and
23 economically feasible, and meet the purpose and need of the proposal;
24 (iv) the relationship between local short-term uses of man’s environment and the
25 maintenance and enhancement of long-term productivity; and
26 (v) any irreversible and irretrievable commitments of Federal resources which would
27 be involved in the proposed agency action should it be implemented.

42 U.S.C. §4332(2)(C). This “detailed statement” is known as an “Environmental Impact
Statement” or “EIS.”

“An agency shall prepare an environmental assessment [EA] with respect to a proposed

1 agency action that does not have a reasonably foreseeable significant effect on the quality of the
2 human environment, or if the significance of such effect is unknown.” §4336(b)(2). An EA is not
3 required if “the agency finds that the proposed agency action is excluded pursuant to one of the
4 agency’s categorical exclusions.” §4336(b)(2). Under the Forest Service NEPA regulations for
5 categorical exclusions,

6 A proposed action may be categorically excluded from further analysis and
7 documentation in an EIS or EA only if there are no extraordinary circumstances
8 related to the proposed action and if: (1) The proposed action is within one of
9 the categories established by the Secretary at 7 C.F.R. part 1b.3; or (2) The
10 proposed action is within a category listed in § 220.6(d) and (e).

11 36 C.F.R. §220.6 Categorical exclusions.

12 For all levels of NEPA review, the agencies must: “ensure the professional integrity,
13 including scientific integrity, of the discussion and analysis in an environmental document,” 42
14 U.S.C. §4332(2)(D); make use of reliable data and resources in carrying out this Act,
15 §4332(2)(E); and “study, develop, and describe technically and economically feasible
16 alternatives.” §4332(2)(F). “An agency shall issue an environmental impact statement with
17 respect to a proposed agency action requiring an environmental document that has a reasonably
18 foreseeable significant effect on the quality of the human environment.” §4336(b)(1).

19 In the challenged DM, the agency utilized CE Category 220.6(e)(8), (CE-8), which is
20 limited to “[s]hort-term (1 year or less) mineral, energy, or geophysical investigations and their
21 incidental support activities” as a type of action potentially appropriate for a categorical
22 exclusion from further NEPA analysis. 36 C.F.R. §220.6(e)(8). Because the agency began its
23 review of the project under the previous CE regulations and policies, they control the agency’s
24 review and govern this case. *See Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 141
25 F.4th 976, 994 & n.5 (9th Cir. 2025)(applying 2019 NEPA regulations to NEPA process initiated
26 before 2020 amendments).

27 Although the agency recently re-organized its NEPA and CE regulations, the relied-upon
CE for mineral exploration is the same under the current or previous rules. “Importantly, while

1 the citation has changed, the intent and scope of the categorical exclusion remain the same.”

2 USFS Response to comments at 1.

3 <https://www.fs.usda.gov/r02/blackhills/projects/archive/67838> (viewed April 25, 2026). As

4 stated in the agency’s response to comments posting for the project:

5 On July 3, 2025, 36 Code of Federal Regulations (C.F.R.) 220 were finalized,
6 rescinding the previous regulation and which modified the citations associated
7 with certain categorical exclusions applicable to Forest Service actions.
8 Specifically, the reference formerly cited as 36 C.F.R. 220.6(e)(8) has been
9 superseded and is now codified under 7 C.F.R. 1b.4(d)(32). This change reflects
10 the Department of Agriculture’s consolidation of categorical exclusions and
11 aligns Forest Service procedures with the broader USDA regulations governing
12 environmental analysis and decision-making under the National Environmental
13 Policy Act (NEPA).

14 Response to comments at 1.

15 The USFS’s categorical exclusion regulations require “scoping” prior to the use of a
16 categorical exclusion. *See* 36 C.F.R. §220.6(c)(determination of potential for significant effects
17 must be “based on scoping”). *See also* 36 C.F.R. §220.4(e).

18 Scoping is important to discover information that could point to the need for an
19 EA or EIS versus a CE. Scoping is the means to identify the presence or absence
20 of any extraordinary circumstances that would warrant further documentation in
21 an EA or EIS. Scoping should also reveal any past, present, or reasonably
22 foreseeable future actions with the potential to create uncertainty over the
23 significance of cumulative effects.

24 Forest Service NEPA Handbook (FSH), FSH §1909.15, Chapter 31.3.

25 https://www.fs.usda.gov/emc/nepa/includes/wo_1909_15_30.pdf (viewed April 25, 2026).

26 Accordingly, only where the potential effects of a proposed action are certain to be
27 insignificant, and scoping does not reveal otherwise or raise uncertainty, may USFS invoke a
28 categorical exclusion. The determination of the significance of the potential effects requires
29 USFS to consider the direct, indirect, and cumulative effects and impacts of past, present, and
30 reasonably foreseeable future actions. *See* FSH 1909.15, Chapter 31.3.

31 In addition, even if a project qualifies under a CE category, where “extraordinary
32 circumstances” are present and may be affected, an agency may not invoke a categorical

1 exclusion and USFS should prepare an EA or EIS instead. 36 C.F.R. §220.6(a) and (b). USFS
2 has developed criteria specifying resource conditions that must be considered in determining
3 whether “extraordinary circumstances” related to a proposed action make the use of a categorical
4 exclusion inappropriate and whether the proposed action warrants further analysis in an EA or
5 EIS. 36 C.F.R. §220.6(a) and (b); Forest Service Handbook §1909.15, Chapter 31.2.

6 For this case, the critical “extraordinary circumstances” that must be considered by USFS
7 before using a categorical exclusion include, but are not limited to, consideration of the impacts
8 to “American Indians and Alaska Native religious or cultural sites.” 36 C.F.R. §220.6(b)(1)(vi).
9 Similarly, the new CE rules states that:

10 The resources to screen for in the potentially affected environment when
11 considering extraordinary circumstances may include, but are not limited to:
12 sites ... of historic... significance, as designated by Federal, Tribal, State, or local
13 governments, or property eligible for listing on the National Register of Historic
14 Places.

15 7 C.F.R. §7.1b.3(f)(1)(vii).

16 The record in this case demonstrates that the approved mineral exploration project will
17 not be completed within one year and that Pe’Sla and surrounding lands qualify under the
18 applicable “extraordinary circumstances” requirements.

19 *B. The Project Operations, Which Include the Required Reclamation, Will Not Be
20 Completed Within One Year, and Thus Do Not Qualify for the Asserted Categorical
21 Exclusion.*

22 1. Forest Service Mining Regulations Consider Multi-year Reclamation as an
23 Integral and Necessary Part of Exploration Operations.

24 To avoid full public and NEPA review, the agency relied upon CE-8 for “Short-term (1
25 year or less) mineral, energy, or geophysical investigations and their incidental support activities
26 that may require cross-country travel by vehicles and equipment, construction of less than 1 mile
27 of low standard road, or use and minor repair of existing roads.” 36 C.F.R. §220.6(e)(8) (“CE-
8”)(repromulgated in July 2025 at 7 C.F.R. §7.1.b.4(d)(32)).

But based on the company’s proposal, as approved by the agency, project operations will

1 **not** be completed within the required one year, and will take at least another three years to
2 complete. Under USFS mineral regulations, the required reclamation of the impacts from the
3 exploration are considered part of the mineral exploration “operations” approved by Forest
4 Service. 36 C.F.R. §228.3(a). All aspects of the Project, including monitoring and reclamation,
5 are considered part of the authorized “operations.”

6 The regulations define “operations” as “[a]ll functions, work and activities in connection
7 with prospecting, exploration, development, mining or processing of mineral resources and all
8 uses reasonably incident thereto.” 36 C.F.R. §228.3. Under these regulations, the agency can
9 only approve activities that can be reclaimed. In detailing the reclamation requirements, the
10 regulation specifically includes rehabilitation/restoration of public lands as part of reclamation
11 component of a mineral exploration plan:

12 [O]perator shall, where practicable, reclaim the surface disturbed in operations by taking
13 such measures as will prevent or control onsite and off-site damage to the environment
and forest surface resources including:

- 14 (1) Control of erosion and landslides;
15 (2) Control of water runoff;
16 (3) Isolation, removal or control of toxic materials;
17 (4) Reshaping and revegetation of disturbed areas, where reasonably practicable; and
18 (5) Rehabilitation of fisheries and wildlife habitat.

19 36 C.F.R. §228.8(g). As detailed in the USFS’s Anatomy of a Mine regulatory guidance report,
20 reclamation is a critical and required component of a mineral exploration plan:

21 Satisfactory reclamation should emphasize three major objectives:

- 22 1. The productivity of the reclaimed land should at least equal that of the premine
23 surface. This does not necessarily mean that the site must be restored to an
24 approximation of its original condition, or that surface uses after mining will be the
25 same as those existing prior to mining. For example, an area used for marginal
26 grazing prior to mining may be changed to a useful and attractive recreational
27 complex, or perhaps in another case to a housing area.
2. Satisfactory reclamation should leave the mined area in a condition that will not
contribute to environmental degradation either in the form of air- or water-borne
materials, or from chemical pollution.
3. The reclaimed area should be esthetically acceptable and it should be safe for the uses
intended.

1 “Anatomy of a Mine, From Prospect to Production,” USDA Forest Service, General Technical
2 Report INT-GTR-35, Revised February 1995, at 68-69.
3 https://www.fs.usda.gov/geology/includes/minerals/anatomy_mine.pdf (viewed April 23, 2026).

4 Thus, the Forest Service cannot plausibly divorce the required reclamation from the
5 project “operations” in determining whether the “operations” will be completed within the strict
6 one-year limit for CE-8 to apply. But that is what the agency did here.

7 2. The Agency and Project Applicant Acknowledge That Project Operations Will
8 Not Be Completed Within a Year.

9 The company and agency admit that the required reclamation will **not** be completed
10 within the required one-year limit, as additional work in future years will be needed before
11 reclamation is completed:

12 PLS will commit to annual field inspections of drill sites and the lay-down area in
13 conjunction with USFS and SD DANR staff (whenever possible) to cover areas
14 used and occupied by PLS under this Plan of Operations to monitor for
15 reclamation effectiveness and noxious weed infestations for 3 years. Such field
16 inspections will be documented with photographs or written descriptions. Field
17 inspection information will be compiled at the end of each field season and
18 provided to the USFS.

19 PoO at 14 (Exhibit 2).

20 If the above reclamation efforts do not meet the established criteria required for
21 bond release, **PLS will collaborate with the USFS representative and make**
22 **modifications to the site**, incorporating such changes and additional procedures
23 as may be expected to provide reclamation to the stated standard.

24 PoO at 14 (emphasis added).

25 PLS further acknowledges that the required revegetation can only occur in the proper
26 season, which could result in work done after the one-year limit.

27 Re-vegetation will be accomplished as soon as possible; however, will be
performed in the proper season in accordance with accepted agricultural and
reforestation practices identified in consultation with USFS personnel on a site-
specific basis.

PoO at 14.

1 The USFS Decision also admits that the required reclamation will not be completed
2 within the one-year limit: “All areas of ground disturbance would be monitored for noxious
3 weeds **and treated for two to three years post-disturbance** following Forest Service standards
4 for treatment methods.” DM at 11 (emphasis added).

5 In addition, under USFS mining regulations, PSL is required to submit a “reclamation
6 cost estimate/financial assurance” (or bond). 36 C.F.R. §228.13. PLS admits that it will not
7 request release of the reclamation bond until **three years** of monitoring and reclamation is
8 completed: “Release of the reclamation bonds for a specific drill site will be requested when:
9 Monitoring indicates that reclamation measures have effectively prevented or controlled onsite
10 and off-site damage to the environment and forest surface resources for three years and such
11 prevention is expected to continue.” PoO at 14.

12 Thus, whether or not drilling may finish in one year, Project operations “in connection
13 with” and “reasonably incident” to the actual exploration (as defined in 36 C.F.R. §228.3(a)) will
14 not be completed until up to three years or more after drilling is completed. As such, the Project
15 operations, taken as a whole as mandated by the agency regulations, does not meet the “1 year or
16 less” requirement of CE-8 utilized by the agency here.

17 3. Federal Courts Have Rejected the Same Forest Service Rational Relied Upon
18 Here.

19 The agency’s failure to consider the required multi-year required reclamation as part of
20 the approved “operations,” and thus did not count towards the one-year limit in CE-8, has been
21 repeatedly rejected by federal courts. The District of Arizona, in ruling against the Forest
22 Service’s approval of a mineral exploration project on essentially the same facts, held that since
23 monitoring of reclamation success would last three years, and that reclamation based on that
24 monitoring “may be required during the three-year monitoring period” – the situation here – the
25 agency could not use the “short-term” CE-8 mineral exploration category:

26 Defendants argue that this three-year monitoring period should not be considered
27 part of the project’s duration because all ground-disturbing project activities will
be completed before the monitoring period begins; however, the Decision

1 Memorandum anticipates that additional ground disturbing reclamation activities
2 may be required during the three-year monitoring period. USFS’s determination
that the project can be completed in one year or less is unsupported by the record.

3 *Defenders of Wildlife v. U.S. Forest Service*, Order p. 8, 4:14-cv-02446-RM (D. Ariz.,
4 2015)(Exhibit 1).

5 Here, in an attempt to avoid the one-year limit, the DM asserts that “[i]f project activities
6 must extend beyond that time, additional environmental analysis would be necessary.” DM at 4.
7 Yet that attempt to rely on future review and reclamation to fit the project under the one-year
8 limit was squarely rejected by the court in *Defenders*:

9 USFS argues that, if additional reclamation work is required during the three-year
10 monitoring period, the additional reclamation work would be reviewed under
11 NEPA. However, the reclamation work is already contemplated in and authorized
12 by the Decision Memorandum, with no indication in the record that the already-
approved reclamation design features would require a new Plan of Operations or
further review and approval.

13 *Defenders* Order at 8, n.5. “Therefore, USFS’s approval of the project using the categorical
14 exclusion for short-term mineral explorations pursuant to 36 C.F.R. §220.6(e)(8) was arbitrary
15 and capricious.” *Id.* at 8.

16 Similarly, in a more recent case, in vacating the Forest Service’s attempt to avoid the
17 one-year limit in CE-8 by designating the post-drilling reclamation as a separate project, the
18 Ninth Circuit confirmed that the post-drilling reclamation monitoring and potential work are part
19 of project “operations,” and must be counted in determining whether the project can be
20 completed within the one-year limit in CE-8, 36 C.F.R. §220.6(e)(8).

21 Forest Service’s mineral regulations, which establish that **reclamation cannot be**
22 **bifurcated from other mineral exploration efforts**. Specifically, the mineral
23 regulations govern mineral exploration “operations.” 36 C.F.R. pt. 228.3(a). Operations
24 encompass “[a]ll functions, work, and activities in connection with” mineral exploration.
25 § 228.3(a). This definition necessarily includes reclamation because mineral operations
are required under § 228.8 to meet certain environmental protection procedures,
including revegetation and wildlife habitat rehabilitation. § 228.8(g).

26 *Friends of the Inyo v. U.S. Forest Service*, 103 F.4th 543, 552 (9th Cir. 2024)(emphasis added).

27 As the Circuit further noted:

1 In fact, operators must submit a ‘proposed plan of operations’ to the Forest
2 Service that describes ‘measures to be taken to meet the requirements for
3 environmental protection in § 228.8,’ § 228.4(c)(3), and the Forest Service must
4 then review the plan's environmental impact, §§ 228.4(a)(4), (b), 228.5(a)–(b).

**The Forest Service thus necessarily reviews mineral exploration and
reclamation as a single proposed project.**

5 *Friends of the Inyo*, 103 F.4th at 552 (emphasis added).

6 The Forest Service cannot escape this directly-on-point federal caselaw. Thus, because
7 the mandated and required reclamation operations in this case – essentially the same as in
8 *Defenders and Friends of the Inyo* – will last beyond one year, the project does not qualify for
9 the relied-upon CE category and the agency’s decisions violate NEPA and its implementing
10 regulations.

11 C. *The Project’s Significant Impacts to Pe’Sla Are an “Extraordinary Circumstance” Which
12 Disqualifies the Application of a Categorical Exclusion.*

13 The agency’s reliance on the CE to avoid public review also contradicts the evidence in
14 the record that the extensive drilling, road construction, and other industrial operations within the
15 Pe’Sla landscape (affecting not only the cultural uses on the specific Pe’Sla protected acreage but
16 the larger cultural landscape within the Forest Service’s 2-mile MOU buffer) represents an
17 “extraordinary circumstance” which precludes use of any CE. Where “extraordinary
18 circumstances” are present and may be significantly affected, an agency cannot invoke a
19 categorical exclusion and USFS must prepare an EA or EIS instead. 36 C.F.R. §220.6(a) and
20 (b)(previous CE rules); 7 C.F.R. §1b.3(f)(new CE rules).

21 For this case, the critical “extraordinary circumstances” that must be considered by USFS
22 before using a categorical exclusion include, but are not limited to, consideration of the impacts
23 to “American Indians and Alaska Native religious or cultural sites.” 36 C.F.R. §220.6(b)(1)(vi).
24 Similarly, the new CE rules states: “The resources to screen for in the potentially affected
25 environment when considering extraordinary circumstances may include, but are not limited to
26 sites ... of historic... significance, as designated by Federal, Tribal, State, or local
27 governments, or property eligible for listing on the National Register of Historic Places.” 7

1 C.F.R. §1b.3(f)(1)(vii).

2 Despite the voluminous submittals by Plaintiffs, as well as numerous Tribal governments,
3 detailing the significant impacts from the project to Pe'Sla and the surrounding cultural
4 landscape, the USFS based its CE on its unsupported statement that "[t]here are no known Native
5 American or Alaska Native religious or cultural sites within the project area." DM at 20. But as
6 detailed by the record, and evidenced by the Declarations of Plaintiffs' members noted below,
7 this is wrong as a factual matter, as the project will adversely and significantly affect cultural and
8 religious uses of Pe'Sla and its surrounding landscape by Plaintiff members and the public. At a
9 minimum, as shown by these Declarations, the noise from the constant drilling will reverberate
10 across the landscape, adversely affecting the ongoing and recognized cultural and religious uses
11 of the protected Pe'Sla acreage. *See* NDN Collective Exhibits 5, 6, 7.

12 The agency's refusal to consider the impacts to Pe'Sla also contradicts the Forest
13 Service's commitment to the Tribes to protect these lands, including a 2-mile-wide radius of
14 Pe'Sla. As detailed above, in the 2024 binding Memorandum of Understanding ("MOU")
15 between the Forest Service and the various Tribes of the Great Sioux Nation, the agency
16 committed to: "Co-stewardship of Black Hills National Forest lands, including lands within 2-
17 mile radius of Flag Mountain and Pe'Sla Tribal Trust lands, see Appendix A map, and Black Elk
18 Wilderness." (Exhibit 4). The project is within the 2-mile radius of Flag Mountain and Pe'Sla
19 Tribal Trust lands identified in the MOU.

20 In any event, the test for whether there may be "extraordinary circumstances" is **not**
21 limited to the project's drilling and road construction footprint, as USFS maintains. Rather,

22 [w]hen applying categorical exclusions, USDA subcomponents [USFS] **shall**
23 **consider relevant resources in the potentially affected environment for which**
24 **an extraordinary circumstance may exist** that would require the action to
25 instead be documented in an environmental assessment (when there is uncertainty
regarding the degree of effect) or an environmental impact statement (if it is
determined there is a reasonably foreseeable significant impact).

26 7 C.F.R. §1b.3(f)(emphasis added).
27

1 Here, in determining that there were no “extraordinary circumstances,” the agency failed
2 to analyze the project’s impacts to the “potentially affected environment,” which necessarily
3 includes impacts to Pe’Sla and the surrounding cultural landscape, resources and uses recognized
4 by the agency in the Tribal MOU.

5 The agency’s failure to evaluate uses of Pe’Sla, and the impacts to the Pe’Sla landscape,
6 also violated its commitment in the MOU, among other requirements, that “Forest Service
7 Interdisciplinary Teams shall seek input from designated Tribal indigenous ecological
8 knowledge holders and THPOs during analysis and planning processes for land management
9 activities.” MOU at 5, ¶ IV.E.

10 Lastly, and further demonstrating the arbitrary and illegal focus on just the actual drilling
11 “site” acreage, the agency’s self-imposed limit of its “extraordinary circumstances” analysis to
12 just the “project area,” and not the project’s access routes/activities, ignores the agency’s mining
13 regulations which consider all access roads as part of the project “operations.” 36 C.F.R.
14 §228.3(a)(defining “operations” as “including roads and other means of access.”). As shown in
15 the attached maps, these existing, and to-be-constructed roads are all within the MOU’s 2-mile
16 buffer, and are used by Lakota peoples, including Plaintiffs’ members, to access these lands,
17 including the Pe’Sla site.

18 Thus, USFS’s failure to consider the impacts to Pe’Sla and the surrounding cultural
19 landscape outside of the limited “project area” acreage renders its Decision arbitrary and
20 capricious and not in compliance with NEPA and its implementing regulations.

21 **II. Injunctive Relief is Needed to Prevent Irreparable Harm**

22 Injury to Plaintiffs and the Pe’Sla landscape is imminent. Without any notice by the
23 Forest Service to the public or affected Tribes, Plaintiffs have just recently become aware that
24 the company has already commenced initial drilling and road construction. These industrial
25 operations irreparably harm Plaintiffs’ members’ use of the Pe’Sla landscape and public lands
26 impacted by the project’s drilling, road construction and industrial activities. This is especially
27

1 urgent, for as shown in the Declarations, **sacred religious ceremonies in the Pe'Sla area will**
2 **begin on May 2, which will be directly affected by project operations.**

3 This Court should issue preliminary injunctive relief to prevent imminent and irreparable
4 harm to Plaintiffs, Pe'Sla, and the environment. *Winter*, 555 U.S. at 20. "Environmental injury,
5 by its nature, can seldom be adequately remedied by money damages and is often permanent or
6 at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the
7 balance of harms will usually favor the issuance of an injunction to protect the environment."
8 *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). *See also Sierra Club v. U.S.*
9 *Army Corps of Engineers*, 645 F.3d 978, 996 (8th Cir. 2011)(court affirmed issuance of
10 preliminary injunction against federally-approved development project, quoting *Amoco*).
11 "[P]laintiff need not prove with absolute certainty that injury will occur, but must demonstrate
12 that irreparable harm is likely without injunction." *Iowans for Alternatives to Smoking &*
13 *Tobacco, Inc. v. Iowa Department of Revenue*, 781 F.Supp.3d 724, 730 (S.D. Iowa 2025).

14 Plaintiffs submit detailed declarations showing the imminent harm from the project's
15 drilling, road construction and ground clearing in the Pe'Sla area: Exhibit 5, Nick Tilsen (CEO
16 and Founder, NDN Collective); Exhibit 6, Valeriah Big Eagle (Director of He Sapa Initiatives,
17 NDN Collective); Exhibit 7, Wizipan Garriott (President, NDN Collective); Exhibit 8, Dr. Liliias
18 Jarding (Executive Director, Black Hills Clean Water Alliance, and member of Earthworks).

19 Each establish that the project is already causing and will continue to cause immediate
20 and irreparable harm to the declarants personally, to their organizations, and to their members.
21 The harms span four independent but interrelated categories: (1) harm to sacred and cultural
22 practices at Pe'Sla; (2) harm to water quality and drinking water resources; (3) ecological harm
23 to a rare landscape; and (4) permanent loss of procedural rights under NEPA. "The harm to NDN
24 Collective constituents, the Tribes, the Native American community and to me and my family is
25 happening right now. PLS has already began drilling into the land and the aquifer in exact
26 locations that we have picked medicines before." Tilsen Decl. ¶15. Tilsen personally visited the
27 site and found that "access roads were carved into the landscape, ripping up the plants and

1 medicines that grow in Pe'Sla" and that "a site that I have picked medicines at as recently as last
2 spring is now replaced with a drilling machine that is leaking oil and hydraulic fluid onto the
3 earth." *Id.* He adds: "The topsoil at the site has been completely scraped off killing off the
4 medicines, and plants that I once harvested there. It looks like there is water and chemicals of
5 some kind dripping out of the machinery and there is no mitigation being done to protect the
6 earth." *Id.*

7 Valeriah Big Eagle similarly confirms: "On April 21, 2026, NDN Collective became
8 aware that PLS has commenced drilling operations." Big Eagle Decl. ¶16. All NDN Collective
9 declarants establish deep, ongoing, and personally observed spiritual ties to Pe'Sla, and each
10 identifies specific upcoming ceremonial activities that will be directly and immediately impaired.

11 Nick Tilsen describes a lifetime of sacred use: "I have come to Pe'Sla for 43 years for
12 sacred ceremonies. I have attended over 40 ceremonies at Pe'Sla and picked medicines on over
13 40 different occasions." Tilsen Decl. ¶6. His most recent visits were April 1, 10, 15, 21, and 23,
14 2026 — all within weeks of filing. *Id.* He states that ongoing "ceremonies will be directly
15 impaired by the project operations, including disruption and interference by noise and visual
16 intrusion," and that "[t]hese ceremonies cannot be completed in the midst of industrial noise and
17 activity, effectively eliminating our ceremonial use of Pe'Sla." Tilsen Decl. ¶15. He further
18 describes the irreversible nature of this harm: "The disruption of this land by industrial drilling
19 operations would represent an irreparable harm to these living traditions and to the communities
20 NDN Collective serves." Tilsen Decl. ¶8.

21 Valeriah Big Eagle confirms a ceremony is imminent: "The Lakota spiritual calendar,
22 which is linked to times of the year when ceremonies are conducted at sacred sites in He Sapa,
23 indicates that ceremony will be held at Pe'Sla in May 2026." Big Eagle Decl. ¶16. She states that
24 she "is personally aware that this ceremony will occur and that NDN Collective members and
25 their relatives plan to take offerings at Pe'Sla on May 2, 2026, which will be directly impacted
26 by industrial mining activity." *Id.* Her own most recent visit to Pe'Sla for a prayer gathering was
27 April 21, 2026. Big Eagle Decl. ¶6. She characterizes these harms as irreversible: "Once drilling

1 begins, the industrial activity at the site will disrupt ceremonial activities that have occurred there
2 since time immemorial.” Big Eagle Decl. ¶16.

3 Wizipan Garriott explains that Pe’Sla is not merely historically significant — it is an
4 active, required destination in living Lakota spiritual practice. He describes how “the Lakota
5 must be in specific places in the Black Hills, mirroring the movement of the stars” during
6 specific times of year as part of what is known as “the journey,” of which “Pe’Sla is the second
7 stop on this annual journey.” Garriott Decl. ¶8. He states: “To be Lakota requires free,
8 unfettered, and undisturbed access to Pe’Sla, especially during the Spring season.” *Id.* Mr.
9 Garriott personally plans to participate in ceremonies at Pe’Sla during the first week of May and
10 in a personal ceremonial activity in May “that requires solitude, silence, and peacefulness.”
11 Garriott Decl. ¶18. He attests that:

12 industrial mining activity, such as drilling, cutting of trees, grading of roads,
13 hauling of industrial supplies, storage containers, heavy diesel industrial
14 equipment, and muddy drainage expelling industrial waste directly impairs NDN
15 Collective’s ability and my personal ability to engage in and continue the
16 ceremonial activities that my ancestors have conducted for thousands of years,
because it disrupts prayer and meditation, defaces the land from which I gather
medicinal and ceremonial plants, and poisons the pure, clean water that we use for
ceremonies.

17 *Id.*

18 Despite the overwhelming evidence submitted by NDN Collective, numerous Tribal
19 governments, BHCWA, and Earthworks, and over 2,200 members of the public, the DM states
20 that “there are no known Native American or Alaska Native religious or cultural sites within the
21 project area” — a finding that, as Ms. Big Eagle and Mr. Garriott each note, “is flatly
22 contradicted by the record and by the Department of Interior’s own recognition of Pe’Sla’s
23 significance.” Big Eagle Decl. ¶12; Garriott Decl. ¶14.

24 In addition, the irreparable harm from the drilling and other project operations is not
25 limited to the impending cultural and religious ceremonies and uses. “Pe’Sla sits within the
26 watershed that supplies drinking water to Rapid City, Ellsworth Air Force Base, and
27

1 communities and reservation lands down the Cheyenne River to the Missouri River” and that
2 “[t]he area is underlain by an unpredictable network of fractured rock formations in which
3 groundwater pathways are poorly understood. Exploratory drilling into this geology poses a
4 serious risk of contaminating water supplies that cannot be fully anticipated or reversed. Once
5 contamination occurs, it cannot be undone.” Tilsen Decl. ¶16. *See also* Jarding Decl. ¶10 (Water
6 Quality).

7 The DM’s reliance on “in-ground infiltration galleries to manage drilling water —
8 essentially open trenches designed to allow drilling fluids and cuttings to percolate into the
9 ground” are “particularly concerning in this fractured-rock hydrogeologic setting, where
10 contaminants introduced at the surface can migrate unpredictably through the subsurface.” *Id.*
11 “The risk of contamination to and overuse of that water supply — risks the USFS never
12 evaluated because it bypassed full NEPA review — is a concrete and immediate threat to my
13 health and safety.” Jarding Decl. ¶17.

14 Dr. Jarding also provides extensive testimony on the ecological irreversibility of the
15 Project’s impacts. Pe’Sla supports “a Black Hills Montane Grassland ecosystem — a globally
16 rare and endemic plant community found only in the Black Hills of western South Dakota and
17 northeastern Wyoming.” Jarding Decl. ¶10 (Ecological Impacts). This habitat “depends on intact
18 soil structure and minimal surface disturbance; industrial drilling, road construction, increased
19 traffic, and water brought in from other locations would disturb these soils and plant
20 communities in ways that cannot be fully restored within any reasonable timeframe, if at all.” *Id.*
21 She specifically identifies the risk of noxious weed invasion — a risk the USFS’s own
22 reclamation requirements acknowledge by requiring two to three years of post-disturbance weed
23 treatment — as “a particular long-term threat to the rare native plant communities at Pe’Sla.” *Id.*
24 “Once disturbed by industrial operations, the soil-plant communities of this rare grassland type
25 cannot be restored to their prior condition within any reasonable timeframe.” Jarding Decl. ¶18.

26 Lastly, the declarants establish that the USFS’s use of a categorical exclusion — without
27 conducting a full Environmental Assessment or Environmental Impact Statement — has already

1 and permanently deprived them of their right to meaningful participation in the environmental
2 review process. “As ground-disturbing operations proceed, the procedural right to meaningful
3 public participation in the review of those operations is permanently lost.” Tilsen Decl. ¶17; Big
4 Eagle Decl. ¶17; Garriott Decl. ¶19; Jarding Decl. ¶19. As the Eighth Circuit held:

5 [T]his court has found that failure to comply with NEPA, “causes harm itself, specifically
6 the risk that real environmental harm will occur through inadequate foresight and
7 deliberation.” *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir.
8 2011)(internal quotations omitted)(recognizing the “difficulty of stopping a bureaucratic
9 steam roller, once started” (internal quotations omitted)). Harm to the environment “may
10 be presumed when an agency fails to comply with the required NEPA procedure.” *Id.*

11 *Richland/Wilkin Joint Powers Authority v. United States Army Corps of Engineers*, 826 F.3d
12 1030, 1037 (8th Cir. 2016).

13 Overall, the four declarations collectively establish that the irreparable harm from the
14 project has begun, with drilling already underway and sacred ceremonies planned within days.
15 “[T]he cultural, religious, and ecological values of Pe’Sla, once damaged by industrial drilling
16 operations, cannot be restored or compensated through money damages.” Tilsen Decl. ¶13.

17 **III. The Balance of Equities and Public Interest Support an Injunction**

18 The “balance of equities” and “public interest” factors “merge when the Government is
19 the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance of equities and
20 public interest here support preliminary injunctive relief.

21 The injuries that the project will inflict on the environment and Plaintiffs’ interests are
22 irreversible or at least of long duration, including the immediate impact to the Pe’Sla landscape
23 for cultural and religious purposes starting on May 2nd. There is no hardship to the agency while
24 this court considers the merits of the case. In addition, any potentially-asserted arguments from
25 the project proponent would likely consist of delayed economic hopes and would last only until
26 this court’s resolution of this case on the merits, and the agency’s compliance with its statutory
27 duties to conduct a legitimate NEPA analysis. But such impacts do not supersede the public
interest in preventing harms to these invaluable resources. As the Eighth Circuit held:

1 We agree that, just as important as the public interest in potential economic gains is “the
2 public’s confidence that its government agencies act independently, thoroughly, and
3 transparently when reviewing permit applications.” *Davis v. Mineta*, 302 F.3d 1104, 1116
4 (10th Cir.2002). The “environmental dangers at stake in this case are serious,” and the
5 public interests that might be injured by a preliminary injunction, such as temporary loss
of jobs or delays in increasing energy output in the region, “do not outweigh the public
interests that will be served.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138
(9th Cir.2011).

6 *Sierra Club*, 645 F.3d at 997-98. *See also S. Fork Band Council of W. Shoshone of Nev. v. U.S.*
7 *Dep’t of the Interior*, 588 F.3d 718, 728 (9th Cir. 2009)(balance of hardships favored plaintiff in
8 challenge to mining project because principal hardship to project developer was “economic” and
9 “may for the most part be temporary”).

10 Further, “[A]fter a defendant has been notified of the pendency of a suit seeking an
11 injunction against him, even though a temporary injunction be not granted, he acts at his peril
12 and subject to the power of the court to restore the status, wholly irrespective of the merits as
13 they may be ultimately decided.” *Jones v. SEC*, 298 U.S. 1, 17-18 (1936)). *See also Porter v.*
14 *Lee*, 328 U.S. 246, 251 (1946)(“It has long been established that where a defendant with notice
15 in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory
16 injunction restore the status quo.”).

17 **IV. The Court Should Impose No Bond or Only a Nominal Bond**

18 In issuing the requested injunctive relief, the Court should require no or only a nominal
19 bond. *See Fed. R. Civ. Proc. 65(c)*(plaintiff must generally post a bond “in such sum as the court
20 deems proper”). The Eighth Circuit recognizes the district court’s discretion to waive the bond
21 requirement (or require only a nominal bond) in cases vindicating the public interest, such as
22 here. “[C]ourts have not required a bond, or have only required a minimal bond, because of the
23 important public interest in the enforcement of NEPA.” *Richland/Wilkin Joint Powers Authority*
24 *v. United States Army Corps of Engineers*, 826 F.3d 1030, 1043 (8th Cir. 2016). “[T]he Eighth
25 Circuit has approved of a district court waiving the bond requirement based on ‘the important
26 public interest in the enforcement of’ federal law. (collecting cases where district courts required
27 no, or minimal, bond where injunctions enforced the National Environmental Policy Act).”

1 *Tincher v. Noem*, No. 0:25-cv-4669 (KMM/DTS), 2026 WL 125375, *35 (D. Minn, Jan. 16,
2 2026), relying on *Richland/Wilkin*.

3 Where, as shown by Plaintiffs' Declarations, (Exhibits 5, 6, 7, 8, 9), Plaintiffs are
4 nonprofit organizations seeking to vindicate an established public interest in cultural resource
5 and environmental protection, courts routinely waive the bond requirement or impose a nominal
6 bond. "It is well established that in public interest environmental cases the plaintiff need not post
7 bonds because of the potential chilling effect on litigation to protect the environment and the
8 public interest." *Hualapai Indian Tribe v. Haaland*, No. CV-24-08154-PCT-DJH, 2024 WL
9 4678059, *21 (D. Az, Nov. 5, 2024)(issuing preliminary injunction, without any bond, which
10 extended an earlier temporary restraining order, against the federal land agency's approval of a
11 mineral exploration project that threatened the Hualapai Tribe's sacred spring).

12 Due to the critical public interest issues raised in this case, as well as the impending
13 immediate irreparable, Plaintiffs respectfully request that this Court do likewise.

14 **CONCLUSION**

15 For the foregoing reasons, Plaintiffs respectfully request that the Court issue a temporary
16 restraining order and preliminary injunction to prohibit further industrial intrusions into the
17 Pe'Sla cultural landscape until Plaintiffs' claims can be adjudicated on the merits.

18
19 Respectfully submitted this 27th day of April, 2026,

20 /s/ Tracey Zephier

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Certificate of Service

I, Tracey Zephier, attest that I filed the foregoing and all exhibits with this Court’s ECF filing system on this 27th day of April, 2026. In addition, I sent, via email on this date, the foregoing and all exhibits to the Office of the U.S. Attorney for the District of South Dakota, which has yet to enter its appearance on behalf of Defendants in this case.

/s/ Tracey Zephier