Lakota People's LAW PROJECT

SACRED DEFENSE FUND

Lakota People's Law Project is a project of Sacred Defense Fund, a nonprofit protecting the lands, waters and communities of Turtle Island.

BROKEN PROMISES, BURIED RIGHTS

Analyzing the U.S. Forest Service's Approval of Exploratory Drilling at Pe' Sla

The Rochford Mineral Exploratory Drilling Project

Prepared by Lakota People's Law Project

March 24, 2026

This document is for educational and advocacy purposes only. It is not legal advice, but rather our analysis of legal issues and context we believe supporters of Native sovereignty need to understand the approval and why it matters.

Summary

On February 27, 2026, the U.S. Forest Service issued a permit to Pete Lien & Sons, a Rapid City "construction materials" company, to conduct exploratory graphite drilling around Pe' Sla, the heart of the Black Hills and one of the most sacred ceremonial sites of the Oceti Sakowin (the Sioux Nation). The permit was approved using a "categorical exclusion" (CE), a procedural shortcut that allowed the agency to bypass a full environmental review.

The Forest Service's decision memo reveals the full scope of what was dismissed, overridden, or legally sidestepped to make this approval possible. Tribes, environmental advocates, legal experts, and area residents raised serious concerns grounded in treaty law, religious freedom, environmental defense, and water protection. The agency's responses to each of these concerns range from technically evasive to legally questionable to morally inexcusable.

This analysis examines those responses through three lenses:

- The legal framework governing sacred sites, tribal consultation, and environmental review.
- The specific flaws in the Forest Service's reasoning and process.
- Why this decision represents a continuation of a centuries-long pattern of colonial dispossession and why it matters to everyone who drinks from the Rapid Creek watershed or cares for environmental health, justice, and human rights.

Bottom line: The Forest Service used a procedural loophole to approve drilling at one of the most sacred sites in North America, brushing aside treaty rights, religious freedom protections, and the concerns of thousands of people, on the grounds that the project is too

> small to warrant scrutiny. That is exactly backwards from how a government that honors its commitments should operate.

I. Background: Pe' Sla and What Is at Stake

Pe' Sla (pronounced pay-SHLAW) is a high-elevation meadow in the central Black Hills of South Dakota, an open, treeless prairie surrounded by ponderosa pine that has served as a sacred ceremonial gathering place for Lakota, Dakota, and other Oceti Sakowin peoples since time immemorial. It sits at the center of the He Sapa, the Black Hills, which the Sioux Nation has understood as the heart of the earth, the source of life, and the foundation of our spiritual and cultural identity.

> *"The Black Hills are a sacred site and Pe' Sla is the sacred site within the sacred site. Pe' Sla, in our ancient way, they say the whole Black Hills region is the heart that's beating."*
>
> *Duane Twobulls, Black Hills Clean Water Alliance*

In 2012, at the request of Pediatrician, Dr. Sara Jumping Eagle, Chase Iron Eyes initiated a Landback crowdfunding effort which raised approximately $1 Million dollars to take Pe’ Sla off the auction block. Gratefully, four Sioux tribes, Sicangu Lakota (Rosebud), Shakopee Mdewakanton, Crow Creek, and Standing Rock, came together and raised the remaining $8 million to purchase Pe' Sla in a closed sale, reclaiming ancestral land that had been seized and sold for homesteads following the U.S. government's violation of the 1868 Fort Laramie Treaty. In 2016, the land was placed into federal Indian trust status, formally recognizing it as a protected sacred site.

In February 2026, not long after that hard-won protection, the U.S. Forest Service approved a mining company's request to drill 18 exploratory holes, up to 1,000 feet deep on land immediately surrounding Pe' Sla, within the same watershed, without a full environmental impact review, and over the explicit longstanding objections of tribal governments, environmental organizations, and thousands of members of the public.

II. The Three Pillars of the Forest Service's Defense and Why Each One Fails

Pillar One: "No Historic Properties Affected"

The Forest Service's primary legal justification for approving this project rests on a single determination: that a cultural resource survey conducted by a private engineering firm (HDR Inc.) found "no historic properties affected" under Section 106 of the National Historic Preservation Act (NHPA). Both the South Dakota State Historic Preservation Office and the Northern Cheyenne THPO concurred with this finding.

This determination is the foundation of the entire approval. And it is deeply, structurally flawed.

What Section 106 Actually Requires

Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties and to do so through meaningful consultation with tribes, not just procedural notification. The law does not simply require a survey. It requires genuine consideration of whether a project will adversely affect properties of historic, cultural, or religious significance.

The regulations implementing Section 106 (36 CFR Part 800) require agencies to identify historic properties that may be affected, which explicitly includes traditional cultural properties (TCPs): places that are eligible for the National Register of Historic Places because of their association with living communities' cultural practices, beliefs, and values. Pe' Sla is precisely this kind of site.

The Problem: The Survey Was Designed to Find Nothing

The cultural resource inventory was conducted on the project footprint, the area immediately surrounding the proposed drill pads. But Pe' Sla's significance is not confined to the specific parcel of land the drill bit will penetrate. Its sanctity encompasses the viewshed, the watershed, the sonic environment, and the integrity of the surrounding landscape. A drill operation that does not technically touch Pe' Sla's boundary can still profoundly and irreversibly affect Pe' Sla as a sacred and living place.

> **The legal problem:** Section 106 requires agencies to consider the "area of potential effect," not just the footprint. A survey that examines only the drill pad locations, while Pe' Sla sits a half-mile away, is asking the wrong question. It's the equivalent of saying a construction project next to a cathedral has "no historic properties affected" because the bulldozers won't touch the sanctuary walls.

Courts have repeatedly found that agencies violate the NHPA when they define the "area of potential effect" too narrowly to avoid finding impacts. The Forest Service's approach here, relying on a proponent-commissioned survey with a narrow footprint, is a textbook example of this error.

The Concurrences Don't Cure the Problem

The Forest Service points to two concurrences: the Northern Cheyenne THPO and the South Dakota SHPO. These are presented as independent validation. They are not.

First, the Northern Cheyenne are not among the Oceti Sakowin nations for whom Pe' Sla is a primary sacred site. Their concurrence, while meaningful for Northern Cheyenne concerns, does not speak to the cultural and religious significance of Pe' Sla for Lakota, Dakota, and Nakota peoples. The Forest Service never received meaningful concurrence from the Oglala Sioux Tribe, the Rosebud Sioux Tribe, Standing Rock, or other nations whose tribal governments had explicitly and formally objected.

The Oglala Sioux Tribe President Frank Star Comes Out wrote directly to the Mystic Ranger District during the comment period: "The OST is opposed to any exploration or development of minerals in the Black Hills that would harm our sacred Black Hills, including the sacred site known as Pe' Sla." That objection was received. It was not honored.

The Decision Memo itself makes the stakes plain. In the signed extraordinary circumstances checklist (the legal document that would be a primary target of any court challenge) the Forest Service wrote: "There are no known Native American or Alaska Native religious or cultural sites within the project area." The Area of Potential Effect is confirmed as 98 acres with a 30-meter

buffer around roads and drill pads. Pe' Sla is thousands of acres of federally recognized trust land sitting immediately outside that buffer. The agency “driller-mandered” the smallest legally defensible box, looked inside it, found nothing sacred, and signed off. This is not a technical oversight. It is the mechanism by which a living sacred site is legally disappeared from the record.

Pillar Two: "Only Congress Can Address Treaty Concerns"

Multiple commenters pointed out what should be an obvious legal problem: the 1868 Fort Laramie Treaty guarantees the Sioux Nation's rights to the Black Hills. The Black Hills were seized illegally, a fact acknowledged by the U.S. Supreme Court in 1980 (United States v. Sioux Nation of Indians), which found that the taking of the Black Hills was "a rank act of dishonorable dealing" and awarded $17.5 million (plus interest) in compensation, an award the Sioux Nation has refused to accept, because what they want is their land back, not a payment for it.

> *"The Black Hills are not for sale." The consistent position of the Oceti Sakowin*

Commenters argued that approving mining exploration on land that is, under treaty law, Sioux territory without the explicit consent of the signatory nations violates the treaties themselves.

The Forest Service's response to public comment is a masterpiece of bureaucratic deflection:

> *"Congress has not authorized the Forest Service to settle or address the lands claim issue of the Sioux Tribes. Only Congress has the authority to transfer ownership of the Black Hills National Forest to the Sioux Tribes. Any potential impacts directly linked to treaty issues and land claims are beyond the scope of the Rochford Mineral Exploratory Drilling Project."*

Why This Is Legally and Morally Unacceptable

This response conflates two entirely different legal questions. The Forest Service is correct that it cannot unilaterally transfer ownership of the Black Hills to the Sioux Nation, that is indeed a matter for Congress. But the question before the agency was not about land transfer. It was about whether approving a mining operation on treaty-protected land, over the explicit objection of the treaty signatories, is consistent with the federal government's trust responsibility and treaty obligations.

The federal trust responsibility is not contingent on Congressional action. It is a judicially recognized duty, grounded in treaty law and constitutional principle, that requires the federal government to act in the best interests of Indian nations in its management of federal lands and resources that affect those nations. Courts have held that this responsibility is "the most solemn of obligations" and that federal agencies must consider treaty rights in their decision-making.

> **The sleight of hand:** By framing the treaty issue as a question of land ownership, which Congress must address, the Forest Service avoids engaging with the more immediate question: does approving this project, on this land, in this way, honor or dishonor the United States' treaty obligations? That question is absolutely within the Forest Service's scope. They just chose not to answer it.

The U.S. Supreme Court has consistently held that treaty rights are not extinguished by silence or administrative convenience. They must be explicitly abrogated by Congress. The Fort Laramie Treaty remains in effect. The obligations it created remain in effect. Telling tribes that

their treaty rights are "beyond the scope" of an individual project decision is not a legal answer – it is a bureaucratic evasion designed to insulate the decision from review.

Pillar Three: The Categorical Exclusion – Environmental Review as Theater

Perhaps the most technically consequential decision in this approval is the Forest Service's use of a "categorical exclusion" (CE), a regulatory designation that allows agencies to bypass the full environmental review process under the National Environmental Policy Act (NEPA) for actions deemed too minor to warrant it.

The specific categorical exclusion applied here covers "short-term (1 year or less) mineral, energy, or geophysical investigations." The Forest Service's position: this is just a small drilling project, it'll be done in under a year, it doesn't rise to the level of requiring an Environmental Assessment (EA) or Environmental Impact Statement (EIS).

What NEPA Was Designed to Prevent

NEPA's core purpose is to ensure that federal agencies take a hard, honest look at the environmental consequences of their decisions before acting, and to do so in public, with meaningful opportunity for input. The EIS process was specifically designed to prevent exactly what happened here: an agency approving a project with significant potential impacts by relying on procedural shortcuts and agency-commissioned analysis.

The "Extraordinary Circumstances" Exception and Why It Should Have Applied

Even within the CE framework, the regulations provide that a categorical exclusion cannot be used if "extraordinary circumstances" related to the action are present. The regulations list specific factors that constitute extraordinary circumstances, including:

- Proximity to floodplains, wetlands, or municipal watersheds
- Potential effects on American Indians and Alaska Native religious or cultural sites
- Potential effects on archaeological sites or historic properties or areas
- Potential effects on threatened or endangered species or their habitat

Pe' Sla is a federally recognized sacred site with Indian trust status. The project is located in the Rapid Creek watershed, a municipal water supply. Commenters identified habitat for Northern long-eared bats, tricolored bats, and other species. These are not hypothetical concerns; they are the exact categories the regulations identify as requiring closer scrutiny.

The Forest Service's response to the EIS request is strikingly brief: its own resource specialists found "no extraordinary circumstances." This is the agency certifying its own work. There is no independent review. There is no acknowledgment of the extensive public and tribal record documenting concerns. There is simply the agency saying: trust us, we looked, it's fine.

> **The structural problem:** A categorical exclusion means the agency never has to answer the hard questions. There is no public EIS document laying out the tradeoffs. There is no independent review. There is no judicial record of the agency's reasoning. There is just an approval, and a comment-response document explaining why everything is fine. That is not environmental protection, that is environmental protection theater.

Cumulative Impacts: The Mine That Dare Not Speak Its Name

Several commenters raised a critical NEPA issue: if graphite is found, Pete Lien & Sons will almost certainly seek a mining permit. Under NEPA's cumulative effects doctrine, agencies are required to consider the reasonably foreseeable future actions that a current decision makes possible or enables, including subsequent mining operations.

The Forest Service's response: "The proponent's Plan of Operations only includes exploratory drilling, not mining. Any future mining proposal would require its own separate Plan of Operations and a new NEPA analysis."

This is the "foot in the door" fallacy: the idea that because each step of a larger process is individually small, no single step triggers comprehensive review. Courts have been deeply skeptical of this approach. The Council on Environmental Quality's NEPA regulations explicitly require analysis of cumulative impacts, including "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." An exploratory drilling project whose entire purpose is to determine whether mining is commercially viable is, self-evidently, the first step toward mining. The Forest Service's refusal to acknowledge this is not legally defensible – it is legally convenient.

III. The Consultation Failure: "Engagement" Is Not Consent

The Forest Service is at pains to document its tribal consultation efforts: ten government-to-government meetings, multiple mailed invitations, coordination with THPOs. This is presented as evidence that the agency fulfilled its obligations.

It is not.

Federal consultation requirements, grounded in Executive Orders 13007 (Indian Sacred Sites) and 13175 (Consultation with Indian Tribal Governments), as well as the American Indian Religious Freedom Act, do not require merely that the government talk to tribes. They require meaningful consultation with the goal of reaching accommodation and, where possible, consensus. Consultation that ends with the agency approving the project over explicit tribal objections is not meaningful consultation – it is notification theater.

> *Executive Order 13007 requires federal agencies managing federal lands to: "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites."*

The Forest Service approved a project that, by its own mapping, places drill pads in the immediate vicinity of a federally recognized Indian sacred site. How this is consistent with the requirement to avoid adversely affecting its physical integrity, let alone its ceremonial integrity, is never explained.

The distinction between consultation and consent is not semantic. Under international law standards (including the UN Declaration on the Rights of Indigenous Peoples, which the United States has endorsed), indigenous peoples have the right to free, prior, and informed consent regarding projects affecting their lands and sacred sites. While the U.S. has not ratified UNDRIP as binding law, it has repeatedly affirmed its principles. A consultation process designed to document engagement rather than seek genuine agreement falls short of both the letter and the spirit of the government's commitments.

The Decision Memo confirms that formal tribal government resolutions were received and ignored. Opposition to the project arrived from the Rosebud Sioux Tribe (December 30, 2025) and Cheyenne River Sioux Tribe (December 31, 2025), eight weeks before the permit was signed on February 27. These are not one-off public comments. These are sovereign governmental acts. The agency noted them in the record and approved anyway. This is the clearest single piece of evidence that consultation was no measured dialogue, but a performative process flattening tribal sovereignty.

IV. The Larger Pattern: This Has All Happened Before

To understand why this approval is so devastating, you have to understand what it represents historically, not as an isolated bureaucratic decision, but as the latest episode in a 150-year pattern.

The Black Hills were guaranteed to the Sioux Nation by the 1868 Fort Laramie Treaty, one of the most explicit and formally documented land agreements in U.S. history. The ink was barely dry when gold was discovered, and the U.S. government violated its own treaty, seized the Hills, and opened them to mining.

In 1980, the Supreme Court confirmed this was illegal: Calling it a "rank act of dishonorable dealing." The Sioux Nation was offered $106 million in compensation (the original $17.5 million plus a century of interest). They refused it. The account, now worth over a billion dollars, sits untouched in the U.S. Treasury. Because the Black Hills are not for sale. Because what was taken cannot simply be paid for.

Since then, the federal government has continued to manage the Black Hills, issuing mining permits, logging permits, grazing rights, as if the treaty violations had been addressed. It has not been. When tribes raised treaty concerns in this proceeding, the Forest Service's answer was simple: that's a matter for Congress, not us. That response is not a legal conclusion. It is the same evasion that has been used for 150 years. It is the government saying: yes, we know what was taken, yes, we know the obligations we assumed, but that is someone else's problem to fix. In the meantime, Pete Lien & Sons can drill.

This pattern of rushing to pro-extractive judgement was accelerated by several decrees including Executive Order 14241, signed by the Trump administration in early 2025: "Immediate Measures to Increase American Mineral Production." The Forest Service lists it in their Decision Memo among the laws this decision is "consistent with" (alongside the Clean Water Act, the American Indian Religious Freedom Act, and Executive Order 12898 on Environmental Justice). It appears last, almost as a footnote. But its presence names the pressure under which this decision was made. 2,226 public comments. Two formal tribal resolutions received weeks before the signing. A federally recognized sacred site a half-mile from the drill pads. And yet the permit was signed February 27, 2026. Like many decisions that are anti-democratic and anti-sovereignty, it was signed on a Friday afternoon.

> **The cumulative picture:** There are currently over 13,000 active mining claims in the Black Hills, covering an estimated 259,000 to 271,000 acres, roughly 20% of the entire Black Hills region. The Rochford project is not an outlier. It is the system working exactly as designed: a regulatory apparatus that formally acknowledges tribal rights while systematically enabling their erosion, project by project, permit by permit.

V. The Water Question: Who Bears the Risk?

The Forest Service's response to water concerns is detailed, technical, and confidently dismissive. The agency's hydrologists conclude that the risk of contamination is "non-existent or insignificant" based on the geology of the crystalline core in which the project is located, the distance of drill sites from perennial streams, and the nature of the drilling fluids to be used.

These conclusions may or may not be correct. That is precisely the point: They should be subject to independent scrutiny through a full Environmental Assessment, not accepted on the word of the permitting agency.

The Rapid Creek watershed supplies drinking water to Rapid City (population ~75,000), Ellsworth Air Force Base, and surrounding Oceti Sakowin communities. The lands most immediately downstream from the watershed include the Pine Ridge reservation. The people bearing the greatest risk from any contamination event are disproportionately Native, the same communities whose objections to this project were dismissed as beyond scope.

Environmental justice doctrine, codified in Executive Order 12898 and its successors, requires federal agencies to identify and address disproportionately high adverse effects on minority and low-income populations. The Forest Service's comment-response document contains no environmental justice analysis. The word "justice" does not appear in it.

VI. What Should Have Happened and What Must Happen Now

This decision should be challenged and reversed. The grounds for such a challenge are substantial:

- The categorical exclusion was improperly applied: the presence of a federally recognized sacred site within the area of potential effect constitutes an "extraordinary circumstance" under the regulations, requiring at minimum an Environmental Assessment.
- The Section 106 consultation was procedurally deficient: the "area of potential effect" was defined too narrowly, the survey methodology was inadequate to assess impacts on a traditional cultural property, and the agency failed to obtain concurrence from the nations for whom Pe' Sla holds primary sacred significance.
- The agency failed to fulfill its trust responsibility: the Forest Service has a fiduciary duty to tribal nations that is not discharged by holding meetings and mailing letters. Approving a project over explicit tribal objections, on treaty-implicated land, without meaningful accommodation, is a breach of that duty.
- The NEPA analysis was inadequate: the failure to assess cumulative effects, including the reasonably foreseeable scenario in which graphite is found and mining is pursued, renders the environmental analysis legally insufficient.
- Procedural stonewalling is codified in the decision memo with: "Decisions that are categorically excluded from documentation in an EIS or EA are not subject to an administrative review (pre-decisional objection process)." In one stroke, this bypasses environmental review and it strips the public of the normal objection process.

Deprived of an administrative remedy pathway, the main recourse is now litigation, raising the barrier to accountability with significantly greater expense, delay and risk for tribes and advocates.

Beyond litigation, what is needed is what has always been needed: a people that holds the federal government accountable to its treaty obligations, not as historical footnotes to be acknowledged and then set aside when they become inconvenient for extractive industry.

Pe' Sla was bought back with $9 million raised by tribal nations who understood its importance. It was placed in trust to protect it. It has been used for ceremony, prayer, and cultural practice for thousands of years. The fact that a mining company can drill dangerously and intrusively nearby, over the objection of those nations, using a procedural shortcut, on the basis of a survey that never asked the right questions, tells us something important about what the law, as currently administered, is actually protecting.

It is protecting the right to extract. It is not protecting the right to pray.

> **Take action:** Tell U.S. Secretary of the Interior Doug Burgum to suspend this permit and all mining claims in the Black Hills until treaty rights to our ancestral homelands are respected and restored: https://action.lakotalaw.org/action/black-hills-mining

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