



## BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA INDIANS

### POSITION STATEMENT ON PROPOSED GTAC IRON MINE AND PROPOSED IRON MINING LEGISLATION IN WISCONSIN

September 2011

The position of the Bad River Band of the Lake Superior Chippewa Indians (“Band”) on the proposed Gogebic Taconite LLC (“GTAC”) iron mine in the Penokee Hills of Ashland and Iron Counties, and on proposed iron mining legislation in the State of Wisconsin, is as follows:

A. THE BAND OPPOSES THE PROPOSED GTAC MINE AND ANY MINING IN THE PENOKEE HILLS. The Band opposes development of the proposed GTAC taconite iron mine in the Penokee Hills of Ashland and Iron Counties in Wisconsin, because it is clear, based on available geologic and environmental information, that such a mine cannot be developed and operated using current mining technologies and practices without destroying the environmental quality, including the air, lands and forests, wetlands, streams, and rivers of the Bad River watershed, the Bad River Indian Reservation, and Lake Superior. The Bad River watershed is a pristine environmental resource, and the Band’s way of life is highly dependent upon maintaining the health and integrity of the watershed. The proposed GTAC iron mine would destroy the Bad River watershed and the Band’s way of life.

B. THE BAND’S POSITION ON PROPOSED IRON MINING LEGISLATION. Notwithstanding the Band’s position on the proposed GTAC iron mine, the Band understands that Wisconsin Governor Scott Walker and some members of the Wisconsin Legislature are proposing to change Wisconsin’s metallic mining laws to distinguish between ferrous or iron mining and other metallic sulfide mining, to shorten the state’s permitting process, and otherwise change the permitting and regulatory process for new iron mines. As such, the Band views the process of changing state law as being distinct from the question of whether or not the proposed GTAC mine should be permitted. The Band’s position on proposed iron mining legislation is that such legislation should be based on sound science and sound legal principles. The Band opposes the proposals that were included in LRB 2035, which was leaked to the public in early 2011, to streamline and weaken the Wisconsin Department of Natural Resources (“DNR”) permitting process. With respect to any new proposals to change Wisconsin’s metallic mining laws, the Band’s position is that any such legislation should include the following principles and/or provisions, although the Band also reserves the right to propose other provisions if legislation is actually introduced:

1. THE DEFINITION OF IRON MINING SHOULD BE CLEARLY SET FORTH TO EXCLUDE ANY PROJECT PROPOSAL THAT HAS THE POTENTIAL TO CAUSE ACID MINE DRAINAGE. Regulatory requirements for any specific metallic mining proposal should be tailored to the actual characteristics of the proposed mine itself, including the nature of the overburden, the ore body, the ore processing operations, the disposal or storage of overburden, tailings, and other waste materials, and the ecology and geology of the site and surrounding environment. If iron mining is to be

treated differently than other metallic mining under any modification of existing law, the distinction or definition of iron mining must not be arbitrary. Thus, there must be a clear, unambiguous and science-based definition of iron mining that excludes from the provisions of any new law all mining proposals having any potential to cause acid-mine drainage based on the geological properties of the proposed mining site, regardless of the minerals that would be mined.

2. THE COMPLETENESS OF IRON MINING PERMIT APPLICATIONS SHOULD BE CLEARLY DEFINED. There must be a clear and comprehensive application completeness requirement, and a clear completeness determination process by the DNR. This is because the permitting time frame for any permit application is dependent on starting the review process with a complete permit application from the permit applicant. Such an application must have sufficient environmental and technical information for the DNR to conduct the review process, and the information provided must show that the proposed project will meet all applicable environmental standards and requirements. The burden of preparing and submitting a complete permit application must be entirely on the applicant and should never shift to the DNR or other interested parties.

3. THE PERMITTING TIME FRAME SHOULD BE REASONABLE, FLEXIBLE, AND CONSISTENT WITH FEDERAL AGENCY TIME FRAMES. Regardless of the duration of the permitting time frame, the mining permit application review process should be triggered only upon a determination of completeness by the DNR of a mining permit application. The permitting time frame should be reasonable for the applicant but, more importantly, it should provide sufficient time for the DNR, the public, federal agencies having jurisdiction or an interest in a proposed mining project, and interested Indian tribes to fully review and participate in the permitting process. The permitting process should take as much time as necessary to ensure protection of the environment and the rights of interested parties, including Indian tribes. Approval of a mining permit application should not be presumed. The permitting time frame should not be rigid because flexibility may be necessary to allow for extensions requested by an applicant or interested parties, depending on the size, scope, location, proposed operations and environmental considerations unique to any specific mining permit application. While generalized or estimated time frame goals may be appropriate to provide guidance for the DNR and permit applicants, such goals should be flexible and fully consistent with permitting procedures and requirements of federal agencies, including the U.S. Army Corps of Engineers ("USACE"), the U.S. Environmental Protection Agency ("USEPA"), and others, as well as neighboring states and Indian tribes.

4. WETLAND PROTECTION STANDARDS SHOULD BE MAINTAINED AND THE FEDERAL/STATE PARTNERSHIP IN THE ENVIRONMENTAL REVIEW PROCESS UNDER WEPA AND NEPA SHOULD NOT BE JEOPARDIZED. Wisconsin's current and long-standing wetland protection standards and provisions, including but not limited to the provisions relating to "area(s) of special natural resource interest" ("ASNRI wetlands"), under Wis. Stats. §§ 281.37(1)(a) and (a)13, as defined in Wis. Admin. Code § NR 103.04, should not be changed or weakened in any manner. In addition, the federal/state partnership between

the USACE and the State of Wisconsin in implementation of Section 404 of the federal Clean Water Act (“CWA”), Section 10 of the federal Rivers and Harbors Act, the National Environmental Protection Act (“NEPA”), and the Wisconsin Environmental Protection Act (“WEPA”), relative to review and approval of permits for work in waters and/or wetlands in Wisconsin, should not be jeopardized or weakened in any way. In a recent letter from Tamara E. Cameron, Regulatory Branch Chief of the St. Paul District of the USACE to Keith Gilkes, Chief of Staff to Wisconsin Governor Scott Walker, the USACE noted that it generally takes in excess of two (2) years to prepare a federal environmental impact statement (“EIS”) under NEPA, and that separate, disconnected state and federal environmental review of any proposed mining project would be inefficient and counterproductive. (*See* Letter from Tamara E. Cameron, Regulatory Branch Chief, St. Paul District USACE to Keith Gilkes, Chief of Staff for Wisconsin Governor Scott Walker, of 8/1/11.)

5. FEDERAL CLEAN WATER ACT IMPLEMENTATION BY DNR SHOULD BE CORRECTED AND NOT WEAKENED. Implementation of the CWA’s National Pollutant Discharge Elimination System (“NPDES”) by the DNR, through administration of the DNR’s Wisconsin Pollutant Discharge Elimination System (“WPDES”), as applied to all metallic mining permit applications, should be corrected and brought into compliance with USEPA requirements. In a July 18, 2011 letter from Susan Hedman, USEPA Region 5 Administrator, to DNR Secretary Cathy Stepp, numerous deficiencies in Wisconsin’s WPDES program and water quality protection laws were noted. These deficiencies included the inadequacy of the DNR’s authority to “ensure compliance with the applicable water quality requirements of all affected states,” under 40 C.F.R. § 122.4(d) (including the Band’s strict water quality standards which have been promulgated pursuant to the Band’s “treatment as state” designation by the USEPA under the CWA). (*See* Letter & Enclosure from Susan Hedman, USEPA Region 5 Administrator, to Cathy Stepp, DNR Secretary, of 7/18/11.)

6. THERE SHOULD BE CONTESTED CASE HEARINGS TO ALLOW FULL PARTICIPATION BY INTERESTED PARTIES. Contested case hearings and full participation by interested parties, as provided for under Wisconsin’s existing metallic mining laws, should be maintained for iron mining permit applications as well as all other metallic mining permit applications. Contested case hearings with full participation by interested parties are trial-like hearings on permit applications where the permit applicant and interested parties may call witnesses, including technical experts, to testify under oath subject to cross-examination by the administrative law judge (“ALJ”), as well as other parties and attorneys. Such hearings are very different than so-called “public hearings,” in which permit applicants and interested parties and their witnesses are not required to testify under oath and are not subject to cross-examination. The requirement of presenting testimony under oath which is subject to cross-examination is a fundamental aspect of due process and the truth finding process in legal proceedings. Such requirements are important to prevent fraudulent or poorly documented mining permit applications. These procedures are highly important to ensure that all legal and technical standards under the law will actually be met by permit applicants.

7. THERE SHOULD BE NO PREEMPTION OF LOCAL CONTROL. Local and county land use controls over metallic mining projects, including town and

county zoning restrictions and other laws and regulations based on the police powers of towns and counties, should not be preempted by state law.

8. **CITIZEN SUITS SHOULD BE MAINTAINED.** The citizen suit provisions of Wisconsin's existing metallic mining law, under Wis. Stat. § 293.89, should be maintained and applied equally to iron mining projects. Similar citizen suit provisions are found in the federal CWA and the federal Clean Air Act. Citizen suits are suits that may be brought by interested citizens who have standing to sue to enforce environmental standards that are not being complied with by a project developer, a permit holder, or applicable regulatory agencies. Such provisions help ensure that permit standards will be complied with after a permit has been issued. These provisions hold permit holders and the regulatory agencies like the DNR accountable under the law.

9. **CONSULTATION WITH INDIAN TRIBES SHOULD BE REQUIRED.** In many parts of Wisconsin where iron and other metallic mineral deposits have been discovered, Indian tribes and Indian reservations would be adversely impacted if mining operations are approved. The adverse impacts would include pollution of air and water resources, destruction of fish and wildlife habitat, and loss of public lands which are currently open to off-reservation treaty rights for hunting, fishing, and gathering, as well as adverse cultural, economic, and social impacts. Under federal law the federal agencies have a trust relationship with Indian tribes and must, therefore, consult with and fully consider the impacts of their decisions on the tribes. Any change to Wisconsin's mining laws should include provisions to require the DNR to fully consult with and consider the potential impacts of mining projects on interested Indian tribes, in much the same manner as federal agencies are required to under federal law. This type of consultation between the DNR and interested Indian tribes is important for environmental, economic, legal, cultural, and social reasons, to ensure that principles of "environmental justice" are followed by the State of Wisconsin, and to prevent minority and low income Indian communities from being discriminated against and from being forced to bear undue adverse impacts from proposed mining projects.

10. **INTERESTED PARTY FINANCING SHOULD BE PROVIDED.** Some proponents of changing Wisconsin's mining laws to streamline the review process for iron mining permits have used the Wisconsin Public Service Commission's ("PSC") time frames for reviewing proposals for new electric generating plants and high voltage electric transmission lines as an example of how such time frames might be established. However, metallic mining activities involve excavation of minerals from below the ground surface, which is very different than the type of impacts associated with development of electric generating plants and high voltage transmission lines. Nonetheless, even the existing PSC review process for such projects provides for contested case hearings and intervention in the PSC review and hearing process by interested parties other than the applicant and the PSC staff. Moreover, such "intervenor" have often been eligible to receive "intervenor financing" so they can fully participate in the hearing process by hiring attorneys and experts to testify and present technical information to the PSC. Such "intervenor financing" should also be provided for if there is any change to Wisconsin's metallic mining laws specific to iron mining.