



BAD RIVER BAND OF LAKE SUPERIOR
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POSITION STATEMENT ON LRB-3520/1

December 13, 2011

The position of the Bad River Band of Lake Superior Tribe of 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 CONTINUES TO OPPOSE THE PROPOSED GTAC MINE AND ANY MINING IN THE PENOKEE HILLS. The Band continues to oppose 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, LRB 3520/1. Notwithstanding the Band’s position on the proposed GTAC iron mine, 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. As such, the Band strongly opposes LRB 3520/1, which was proposed by Assembly Speaker Jeff Fitzgerald on December 8, 2011. This bill draft may also be referred to hereafter as “GTAC’s Cline Mine Bill,” because it is clearly special-interest legislation drafted for the sole benefit of GTAC and the Cline group, rather than for the people of Wisconsin.

Unfortunately, this proposed legislation is a cruel hoax. No one should be fooled by the claim that it is about jobs. It is really about deregulation for a specific mining project being proposed by GTAC. The economic evaluation of mining is incomplete. There has been no objective economic analysis to support the claims that it will lead to new jobs. Mining is a boom to bust enterprise and always has been. If anything, iron or taconite mining in the Bad River watershed near Lake Superior will probably destroy more existing local jobs in the tourism, forestry, fishing, and natural resources sectors than it would ever create.

The legislation is apparently no more than a Christmas gift to a single out of state investor who owns GTAC and who wants to weaken Wisconsin’s mining and

environmental laws to make huge profits for himself at the expense of Wisconsin citizens and Native Americans.

This is the worst kind of legislation, as it is being rushed through without responsible consideration and without public hearings on the proposed bill in the areas of the state that will be most directly affected by it. Moreover, it has been drafted with no meaningful consultation with affected Indian Tribes or other interested parties.

In September 2011, the Band set forth ten principles and provisions that should be included in any proposal to change Wisconsin's metallic mining laws relative to iron or taconite mining. The Band continues to stand by those ten principles. Unfortunately, LRB 3520/1 does not encompass or include any of the ten principles set forth by the Band. Rather, it flies in the face of those principles and would significantly weaken the water, air, and environmental standards applicable to metallic, and particularly iron, mining under Wisconsin law.

The ten principles set forth by the Band for changes to Wisconsin's metallic mining laws are set forth below, followed in bold print by a summary of how LRB 3520/1 compares:

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.

LRB 3520/1: The bill draft fails to define iron mining in a manner consistent with the first principle set forth by the Band. Legislative findings offered to legitimize the crafting of this bill are improperly stated and factually incorrect. Open-pit mining is the most disruptive and environmentally-impactful method of mineral extraction. Moreover, this form of excavation will directly expose co-occurring minerals as overburden and pit walls, creating the same conditions for acid generation as an operation extracting sulfide ore. Under the bill draft, an iron mine could have the potential to cause acid mine drainage because the definition relates to the type of ore being mined and not the geological properties of the site as proposed by the Band.

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.

LRB 3520/1: The bill would limit DNR’s ability to fully and properly evaluate the completeness of a mining permit application by severely limiting the time allowed for DNR to make a completeness determination, and by prohibiting DNR from addressing the quality of the information submitted by the permit applicant. By privatizing public resources, such as water resources and forest land, the applicant stands to solely profit at the expense of a multiple-use landscape. Thus, as the benefit is singular, so too should be the burden of preparing and submitting a complete and comprehensive application.

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.

LRB 3520/1: The bill would require DNR to issue a mining permit for an iron or taconite mining proposal within 360 days, once the application is complete. The shortened time frame does not allow DNR or the public to fully evaluate a complex mining permit application, and would be inconsistent with the time frame for review of such a project by federal agencies, including USACE and USEPA.

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's 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.)

LRB 3520/1: The bill would significantly weaken existing wetland protection provisions that would otherwise apply to any proposed iron or taconite mining operation. It would effectively eliminate the protection of high quality ASNRI wetlands relative to such a project, and would allow "mitigation" or replacement of such wetlands by constructing or protecting lower quality wetlands anywhere within the state. It also creates inconsistencies between Wisconsin law and federal law with respect to wetland protection under the CWA. In addition, analyses of waste characterization and leachate testing are reduced to characterizations of other mining operations and "past experience", none of which are likely to be directly comparable to a modern, open-pit mine in the Penokee Hills. This completely undermines the absolutely essential role of site-specific data in the context of project-specific processes. Given the history of ground- and surface-water pollution throughout Minnesota and Michigan that have largely resulted from unanticipated and uncontrolled discharges from waste piles and tailings basins, improper assessment and prediction of any modern, hard-rock mining project is misdirected and lacks the most basic foresight.

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); and Wisconsin's lack of "rules to establish permit application requirements for...mining..." (See Letter & Enclosure from Susan Hedman, USEPA Region 5 Administrator, to Cathy Stepp, DNR Secretary, of 7/18/11.)

LRB 3520/1: The bill would significantly weaken surface and ground water quality and quantity protections under existing law, relative to proposed iron or taconite mines. It would allow massive groundwater withdrawals, filling and diversion of streams and wetlands, and ground and surface water pollution in and around iron and taconite mines to proceed under an entirely separate regulatory track termed a "mining water withdrawal permit." The bill doesn't just modify existing state regulatory standards for surface water and high capacity well groundwater withdrawals; it *replaces* critical protections—including the environmental review process designed to protect against significant adverse environmental impacts—with starkly different criteria and constraints on agency review.

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 with by permit applicants.

LRB 3520/1: The bill would eliminate contested case hearings for iron and taconite mining proposals. This means the information supporting such proposals could not be tested by placing witnesses under oath or through cross-examination. Neither DNR nor citizens would be left with any *effective* means of testing or challenging the accuracy or validity of a mining applicant's statements or reports.

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.

LRB 3520/1: The bill would substantially eliminate local control over iron and taconite mining proposals. It would specifically exempt such proposals from county shoreland and floodplain zoning.

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 ("CAA"). 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 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.

LRB 3520/1: The bill would completely eliminate citizen suits relative to iron and taconite mining projects. Thus, the only means of enforcement if an iron or taconite mining company is not following the law would be for DNR and the Wisconsin Department of Justice to undertake an enforcement action.

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.

LRB 3520/1: The bill does not contain any provisions requiring DNR to consult with Indian tribes when considering an iron or taconite mining application. Indeed, Indian tribes appear to be the only impacted stakeholder excluded under the sections of public information and notice and the distribution of permit applications

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.

LRB 3520/1: The bill does not contain any provisions that would provide intervenor financing to interested parties.

In addition, LRB 3520/1 contains several new provisions that are alarming. In particular, the bill would allow an iron or taconite mining company to engage in “Bulk Sampling” as an alternative to traditional mineral exploration, before ever submitting a mining permit application to DNR. Bulk sampling involves exploratory excavation of potential mining sites. Bulk Sampling activities have highly negative environmental impacts and are nearly unregulated under the proposed bill.

The bill further creates a proprietary right for mining companies over data regarding mining operations that does not otherwise exist in Wisconsin laws, keeping what has been important public information hidden from citizens.

The underlying philosophy of the bill is to designate mining as the most important activity which could be conducted anywhere within Wisconsin. To provide blanket exemptions for mining-related activities from the state’s laws greatly harms neighboring private property owners, nearby communities, and the state’s air, water, and soil resources.

In the 1970s, Wisconsin legislators wrote the state’s current mining law because of recognized adverse impacts on water resources resulting from mining. In Chapter 293, the state’s existing mining law, legislators carefully crafted a bipartisan bill that addressed the needs and interests of all interested stakeholders. The mining industry, other business interests, Tribes, municipalities, environmental groups, and individual citizens and property owners, were all able to participate in the process of creating and drafting that legislation. That consensus work benefitted the state of Wisconsin, and a similar process to address any changes in the existing mining laws would benefit the state and all of its citizens.

For all of the above reasons, the Band urges the Wisconsin Legislature to reject LRB 3520/1 and any similar legislation.