



Red Cliff Band of Lake Superior Chippewa Indians

88455 Pike Road

Bayfield, WI 54814

Phone: 715-779-3700 Fax: 715-779-3704

Email: redcliff@redcliff-nsn.gov

November 30th, 2016

VIA ELECTRONIC MAIL

Office of the Assistant Secretary - Indian Affairs
Attention: Office of Regulatory Affairs & Collaborative Action
1849 C Street, NW, MS 3071
Washington, DC 20240

Re: Ensuring Meaningful Input Into Infrastructure Development

To whom it may concern,

Boozhoo (Greetings) from the Red Cliff Band of Lake Superior Chippewa. We have received your invitation to comment on the topic of *Tribal Input On Federal Infrastructure Decisions*. This opportunity was presented to us as a formal, government-to-government consultation. However, it was conducted as a listening session, which we do not recognize as a consultation. Please understand this nuance when engaging with the Tribes in the future.

Please accept our comments on behalf of the Red Cliff Band of Lake Superior Chippewa. Thank you for seeking our input on this subject. Do not hesitate to follow up with any questions that you may have for us.

Sincerely,

Bryan J. Bainbridge
Red Cliff Tribal Chairman

Cc: Chad Abel, Red Cliff Treaty Natural Resources Division
Linda Nguyen, Red Cliff Environmental Department
Amorin Mello, Red Cliff Environmental Department

"The Hub of the Chippewa Nation"

We support the “Ensuring Meaningful Tribal Input Into Infrastructure Development In The Ceded Territory” document from the Great Lakes Indian Fish and Wildlife Commission. Some of their talking points are quoted below:

1. General Issues and Concerns

- a. Northern Michigan, Wisconsin, and northeastern Minnesota are crossed by a complex network of pipelines, transmission lines and surface transportation corridors.
- b. Most of this infrastructure development, particularly in ceded territories, occurred without tribal input.
- c. GLIFWC member tribes are concerned about the impact of infrastructure development on the natural resources that they depend on for subsistence, medicinal, cultural, religious and economic purposes.
- d. These concerns extend to proposals that might have impacts on the reservation as well as proposals that could impact off-reservation, treaty reserved resources.
- e. The federal government cannot delegate its treaty obligations, but state governments are often responsible for issuing many of the permits necessary for infrastructure development. Tribes need federal agencies’ help to make sure that the full range of potential impacts on treaty rights are fully evaluated. To fail to do that diminishes the Tribes’ rights.
- f. For tribes in this area, having the ability to prevent the degradation of natural resources and habitats is just as important, maybe more important, than having money to clean up.
- g. Tribes would like to see a more comprehensive analysis of cumulative impacts, particularly where infrastructure projects cross state lines.

2. Ensuring Meaningful Tribal Input

- a. For consultation to be meaningful and effective, Tribes must have the capacity to engage with the other governments involved.
- b. Tribes will know that their input has been meaningful when they are able to come to consensus with the appropriate federal agency or agencies about what decision should be made.
- c. Ensuring meaningful input may involve many levels of input, from formal consultation with elected tribal officials to less formal, more technical meetings with tribal staff that are working to understand the project so that they can understand what the impacts on the Tribe are likely to be.
- d. In addition to using their own resources, Tribes often reach out to experts within federal agencies to assist them in understanding particular technical issues.
- e. Meaningful engagement takes time and must begin early.

3. Barriers to Meaningful Consultation and Potential Policy Changes

- a. The existing framework appears to provide adequate opportunities for agencies to consult with Tribes, but perhaps could be more explicit about how those agencies treat tribal input.
 - b. It should be the policy of each federal agency to treat substantive tribal input on a proposal for infrastructure development as they would the input of any other government entity with a jurisdictional nexus to the project.
 - c. Even if all the best policies are in place, the people who implement these policies are at the core of whether they result in meaningful tribal engagement.
 - d. All federal employees should receive appropriate training about engagement and consultation generally but also about the particular tribes in the region.
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We also support the recommendations from the National Tribal Water Council, as quoted below:

1. Close the mining loopholes in the Clean Water Act (1992 and 2002)

- a. *"Removing the redefinition of 'Waste Treatment System' which allows impoundment of a natural stream or lake to be used to store mine tailings and receive pollution that would not be permitted otherwise", exempting tailing discharges from Section 402 and Section 404 permits.*
- b. *"Remove the redefinition of 'Fill Material'" from Section 402 and Section 404 of the CWA, "which allows contaminated mine tailings to be used to fill wetlands and lakes under an Army Corps of Engineers permit."*

2. Review all existing pipeline infrastructure to require compliance with current regulations in order to permit continued operation, and in the case where compliance is not possible, decommission

- a. *"There are over a half million miles of pipelines transporting natural gas, oil, and hazardous liquids across the United States. More than half of these miles of pipe are more than 50 years old, pre-dating environmental and safety laws that do not therefore apply to them."*
- b. *"Laws and regulations are inconsistently applied. PHMSA is a small agency, and is poorly funded to carry out responsibilities for oversight of such a vast network of pipelines, so inspections are carried out by company operators. With only a maximum of 137 pipeline inspectors, PHMSA only rarely does independent line inspections."*
- c. *"Any existing pipelines that cannot meet current environmental and safety regulations must be decommissioned. They are a threat to our court-affirmed treaty rights to our*

natural resources and your government has no right to threaten our rights in this way."

3. **Enact provisions to mitigate the disproportionate impacts of climate change on tribal nations, including a. Enact an indefinite moratorium on new carbon fuel extraction, transportation, or processing infrastructure, and b. Amend NEPA to include a requirement to carry out a carbon impact study in EA or EIS documents**
 - a. *"Tribes within the US and our tribal members suffer the greatest impacts from climate change, for several reasons. One, our treaty rights are tied to our land base – if the animals and plants we hunt, fish, and gather must move to survive, we cannot gather them in their new places. Two, we rely on our treaty natural resources for our survival to a greater extent than other people do."*
 - b. *"We have reached the point that no new carbon infrastructure can be safely developed. No new wells, no new mines, no new pipelines, no new refineries. We have explored and tapped all that we may tap without dooming ourselves."*
 - c. *"Many federal actions do not take into consideration impacts on carbon budgets. The specific procedures and requirements that each federal agency has put in place to meet the requirements of NEPA were established decades ago and minor adjustments have been made since then – and they do not require addressing the carbon impact of the proposed action."*
 - d. *"The federal government should amend the NEPA to explicitly require carbon impacts studies as part of the analysis and documentation, whether an Environmental Assessment or Environmental Impact Statement is required under terms of any agency's NEPA process and procedures."*

4. **Insert a requirement for Free, Prior, and Informed Consent into consultation language for all infrastructure projects that cross tribal homelands or affect treaty-affirmed retained rights, whether trust land or ceded territory**
 - a. *"The United Nations Declaration of Indigenous Peoples includes the language 'Free, Prior, and Informed Consent.'"*
 - b. *"President Bill Clinton issued Executive Order 13175 of November 6, 2000, Consultation and Coordination With Indian Tribal Governments, without the language of Free, Prior, and Informed Consent."*
 - c. *"President Barack Obama reaffirmed E. O. 13175 with a Memorandum on Tribal Consultation on November 5, 2009, but failed to update its language by including the United Nations standard of Free, Prior, and Informed Consent."*
 - d. *"While tribal nations honor the current administration for its historic advances in respect and treatment of native people's rights and concerns, this is a significant lack. If we are to move forward in collaboration, full recognition of the concepts of FPIC is needed. Treaty rights do not go away because they are ignored, not understood, and not protected. Conflicts over use of court-affirmed treaty-protected resources, infrastructure decisions, etc. are inevitable without free, prior, and informed consent of the sovereign nations whose rights will be affected by those decisions."*

In closing, we cite words of wisdom shared by our Anishinaabe leaders during the listening sessions for *Tribal Input On Federal Infrastructure Decisions*:

1. Red Cliff Band of Lake Superior Chippewa; Tribal Chairperson Bryan Bainbridge

- a. *"Over 7 million acres of freshwater in Lake Superior that the Red Cliff Band uses for commercial and subsistence fishery. That's not including the area of Minnesota where we battled the Army Corps, the Department of Defense for the area where they used munitions. They used it as a munitions as a dump."*
- b. *"I will not have a consultation over Skype, over the telephone, it must be in person. This is important."*
- c. *"Believe it or not, there's been people in the background with machine guns hired by big corporations because we stood in the way. And we almost have to wage war before we can get the help. You know, it saddens me that, you know, we have to see and hear of women and children getting bit by dogs to protect their land, this day and age."*

2. Bad River Band of Lake Superior Chippewa; Tribal Historic Preservation Officer Edith Leoso

- a. *"I don't really consider this tribal consultation, okay? And the reason being is that consultation invokes something else where you sit down and you get -- you have meaningful dialogue with each other. And you're able to talk about what you think about and how you feel about things. And that is on both sides, instead of one person just listening, okay? This is more of a listening session, I would imagine."*
- b. *"On my reservation we have four pipelines that go through our reservation, all installed during periods where there was no tribal consultation, even though it clearly stated in the Treaties of 1854 that we -- things were to be done upon our consent."*

3. Lac Du Flambeau Band of Lake Superior Chippewa; Tribal Councilperson Eric Chapman

- a. *"A lot of the tribes' legal consultation is, you know, just a federal agency jumping through the hoops. They get to check that box. Yeah, we talked with the tribes over an issue that's going to impact them, you know, very little or it could have a great impact on them."*
- b. *"We lost several millions of acres of land that we could just go in our back yard, hunt, fish and gather without worrying about contamination, mercury in the fish."*
- c. *"The consultation policy from the Department of the Interior might have been sitting on the shelf, but because he didn't know what it was, what it was about, and that he was required to implement it, now we get after-the-fact consultation."*
- d. *"And one of my biggest pet peeves is the delegated authority to the states. We signed the treaties with the federal government. Some responsibilities were given to states. And*

the states look at that as well, we didn't sign the treaties with you, and so our voice isn't heard on a lot of projects that affect a lot of our resources."

4. Fond Du Lac Band of Lake Superior Chippewa; Tribal Chairperson Kevin DuPuis

- a. *"One of the problems we see that is good policies are not always followed. Another problem is that even when we have consultation with federal agencies, the final decisions are made too often do not include protection of tribal interests."*
- b. *"Consultation means to me more than just checking off a box. Consultation should result in decisions that include protection of tribal rights and interests."*
- c. *"We are concerned that the Corps hasn't started consultation with us on Line 3, because the Corps may be waiting until the company gets state permits, but at that point consultation with us will be too late."*
- d. *"This spring, the US Geological Survey did aerial surveys of mineral resources in northern Minnesota, Wisconsin and Michigan. These surveys covered our reservation as well as areas where Fond du Lac and other Ojibwe tribes hold treaty rights to hunt, fish and gather. When these surveys are done, the data becomes available to mining companies without our consent. Without our consent."*
- e. *"We are very concerned that the work USGS is doing will simply lead to increased pressures for more mining development, all of which would happen without considering the impacts of increased mining on our reservation. Or our reliance on natural resources outside our reservation within our ceded territories."*
- f. *"Tribes are disproportionately hurt by climate change, so careful consideration of climate change is essential in reviewing proposed mining projects, especially when they affect tribal rights and interests."*
- g. *"Even though the mine will destroy thousands of acres of wetland, almost all of the proposed mitigation would occur outside St. Louis watershed, and outside of the area where our reservation is located, and outside where we hold treaty rights. Developing wetlands outside this watershed won't mitigate the serious damage to the resources on which we depend."*
- h. *"Also, the Executive Order should state that, where agencies have discretion in decision-making, they must exercise their discretion in ways that protect tribal rights and interests."*
- i. *"Some of the problems may be fixed by making sure that the federal employees are trained so that they know about the tribes, and understand Indian treaty rights."*
- j. *"One important step is for the Army Corps to eliminate its Appendix C, which is inconsistent with the 1992 Amendments to the Act, as well as the regulations adopted by the Advisory Council on Historic Preservation. Another step is to adopt a policy so that federal agencies offer tribes status as signatories whenever traditional cultural property or sacred site would be affected by a project, including sites that are located outside of tribal lands."*
- k. *"I know, finally, we join with other tribes asking the Corps' Nationwide Permit 12 to be revised so that it does not apply to oil pipelines. Nationwide Permit 12 is intended to*

streamline the process for Clean Water Act permits for those projects that have minimal impacts on waters. But major pipelines that transport crude oil and which cross waters do not fall within this category."

- i. "Timely and proper consideration of tribal interests reduces the risk of disputes and litigation, and results in better designed, development and implementation projects."
- m. "When you take somebody's religious belief or their way of life, thinking that's a violation of the Constitution of the United States."
- n. "Genocide is happening in today's day and age. Atrocities, violation of the Constitution of the United States. And some of us upheld that. We gave an oath to protect and defend the Constitution against enemies, foreign and domestic."

5. Sokagon Mole Lake Band of Lake Superior Chippewa; former Vice Chairperson and Councilperson Tina Van Zile

- a. "Meaningful should be that when you're consulting with tribes that we have some kind of consensus."
- b. "Many of us tribes are treaty tribes. And with those treaties the government has trust responsibility to us. And often the federal agencies delegate that not the responsibility, but some of these authorities and laws, like 401 of the -- or 404 of the Clean Water Act in Michigan, for one."
- c. "So all of the money that we dumped into fighting this proposed Crandon Mine, I can't even tell you. We had three lawyers and all these experts. That means that the youth program isn't going to get their allocation for that year. Or the elder program isn't going to get the healthcare that they need that year when we have these threats to our home. There's always a cost to something. And to us it's usually the cost of who we are, what we believe in."
- d. "These executive orders and attachments that you gave us, I think when it really gets down to it, the language is gray. There's too many gray areas. It's weak. The language is weak. When it's gray and weak and not specific by meeting consensus with tribal nations, you create loopholes."

6. Leech Lake Band of Ojibwe; Tribal Councilperson LeRoy Staples Fairbanks

- a. "Obviously this issue is important enough that we have law enforcement here today. I've never been to another consult -- a consultation for a consultation that required law enforcement. So it must garner some presence of law enforcement that the issue is that important, that people are understanding how emotional they are around this issue."
- b. "We need people to see that Leech -- not Leech Lake, but indigenous people, they have a legal right by way of treaty to protect the land and water, but they also have a spiritual right by way of responsibility to protect them as well."
- c. "In the Department of the Interior policy on consultation with Indian tribes there's a guidance section. The section states: The bureau or office works with tribes to consider specific tribal structures, traditional needs, and schedules of tribes."

- d. *"What I as an Ojibwe person consider traditional needs I consider how we even conduct these consultations. In our minds, meaningful consultation that occurs with anyone that considers the traditional structures, meanings, or schedules of the tribes would consider how we meet."*
- e. *"We would expect the government would come to our territory instead of having us travel all over the country."*
- f. *"They sit on the land with us, the land that will be impacted. They walk the land with us, listen to the songs that come from the land, and eat the food that comes from the land with which we live to understand how impactful the infrastructure changes will affect us."*
- g. *"Agency liaisons must be aware of tribal leaders. We must ensure that tribal contacts are updated annually, and we've heard that agencies have a difficult time contacting tribes. This can be solved with administrative communication lines, update tribal contacts annually, or even twice yearly even. This is a simple fix that demonstrates open, transparent communication."*
- h. *"Negotiated rule-making or the process must be considered in order to align infrastructure process with tribal governance for inclusion. We ensure that our historic preservation officers are contacted and meaningfully engaged. Our officers are subject matter experts in our areas and must be treated with equal authority to state historical documentary limits."*

7. Sault Sainte Marie Tribe of Chippewa Indians; Tribal Chairperson Aaron Payment

- a. *"We have a court affirmed retained rights to fish within the water of the Great Lakes [...] and hunt fish and gather foods, and medicines on public lands within the treaty ceded territory."*
- b. *"To exercise the treaty right to fish, there have to be fish in the waters, and the fish have to be safe to eat. Our fisheries are threatened by crude oil pipelines that run under the Great Lakes waters and the straits of Mackinaw."*
- c. *"The State of Michigan, the beneficiary of our treaty is allowing the continued operation of an imminent threat of our core affirmed treaty rights. The Governor is doing nothing. This is the same Governor who presided over Michigan and the Flint water crisis."*
- d. *"The U.S. government does not have the right to give away our court affirmed treaty rights to those who threaten them with environmental disaster. We did not negotiate away these rights, so you do not have the right to threaten them by allowing a poorly regulated industry. You do not have the right to give them away to a state that does not have any requirements to consult either."*
- e. *"It is essential that the environmental law must be made to apply retroactively to projects that threaten treaty resources."*

8. Sault Sainte Marie Tribe of Chippewa Indians; Tribal Councilperson Jennifer McCleod

- a. *"Understand that our values, our sensibilities, our priorities, and everything that is about who we are is markedly different than the society that I prepare our children to go into and to thrive in."*
- b. *"You would take the time to understand about the people that you're going to be across the table from so that you could relate more and understand more, so that you could come to that consensus understanding that we're all looking for. That's what the consultations -- that's our big hope for those consultations is that we will come to an understanding. We're not all going to get exactly what we want, but we can work together to get to that point where everybody's okay."*

9. Sault Sainte Marie Tribe of Chippewa Indians; Tribal Councilperson Catherine Hollowell

- a. *"We haven't heard from Army Corps of Engineer on anything to do with Enbridge. We haven't heard from PHMSA. And, obviously, we didn't hear from EPA when they went ahead and did the consent decrees. There's no language in any of that about the adverse impact on tribes to our food that grows on water, to our fishing rights, and as our chairman said, that pipe sits right above spawning beds, even a small spill would erupt and harm those."*
- b. *"We hope to bring forward some ideas on economic policies and fiscal policies, and some things that when we see oil and global policies and dollars, you know, national security is one thing but, you know, when we see our exports, our fossil fuels are being exported to a world market, that's a concern for us."*
- c. *"We're United States citizens, and we know our contributions to this great country, and we also -- we hold the cost that it was to us."*
- d. *"I was in Phoenix when we had the listening session. And I noticed that the EPA was not at the table, and I notice again today that they're not. Now, they're a regulatory agency not necessarily involved with the building of infrastructure, but when you're a water protector, and for many of us this is what this is about, protecting the waters. It's kind of sad that we don't see them here."*
- e. *"So it's not necessarily that a new federal regime has to be enacted so much as just keep it simple, and ask that pertinent question, who is going to be impacted. And then engage them at the table as soon as possible."*
- f. *"So it just seems it would be better if we were there in the decision-making process down from there, we'd probably avoid a lot of the angst that there is. There's a problem with communication among the different agencies. I think somebody already spoke to it today where EPA's role is strictly after there's been an incident."*

10. Sault Sainte Marie Tribe of Chippewa Indians; Environmental Program Manager Kathleen Brosemer

- a. *"We are sovereign nations. You have treaties with us. You have treaties with Canada. You do not have treaties with other states. You do not have treaties with counties. You do not have treaties with townships, you do not have treaties with stakeholders, you do not have treaties with corporations."*

- b. *"We all know no that no infrastructure is safe to operate indefinitely. Nothing. The Straits are a valuable water, ecosystems. We know that no one would be allowed to place pipelines there if they were applying to do it now. It's too risky, it's too valuable. The ecosystem is too valuable, the water. So why in the heck is a 63-year-old pipeline acceptable?"*
- c. *"State government is behaving as if pump-and-pray is a way to protect the Great Lakes. We know better and we need to do better."*
- d. *"The United Nations Declaration on the Rights of Indigenous People was adopted in 2007 with 143 countries affirming this, four countries not. The United States was in those four."*
- e. *"When he [President Obama] finally endorsed it, State Department came out with a document that described what they intended to do. The announcement of U.S. support for the United Nations Declaration on the Rights of Indigenous People."*
- f. *"However, on page 5 of this 2010 document from the State Department, in this regard the United States recognizes the significance of the declaration's provisions on free, prior, and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken."*
- g. *"If I were to go on a date, and my date said these are my intentions, tell me what you think. And I told him what I thought. And if I said no, and he said well, I've heard you, I listened to you, but I'm going to go ahead and do what I like anyway, that is not consent."*

11. Lac Courte Oreilles Band of Lake Superior Ojibwe; Tribal Councilperson Jason Schlender

- a. *"They created the dam there in our communities, which is now called the Winter Creed Dam, a Chippewa Flowage. In our -- in our -- and the result was many of our families were displaced, a lot of people -- some people died. But one of the main things that happened is it destroyed our wild rice crop, 'Manoomin' as it's called."*
- b. *"And so when you think about that, we think about the restoration of our wild rice crop, what can be done about that, because what has happened as a result of that has destroyed, you know -- you know, the -- a source of dietary nutrition for our people. As a result, it's planted by disease and unhealthy lifestyles."*
- c. *"But as I think about that, as I think about the consultation process, I think about -- I think about it in a historical way. A long time ago when -- when tribes, and whether it was the Spanish, or if it was the French, or the British, or the Americans, there was also an exchange of gifts that took place."*
- d. *"And so be the envy -- be the envy of your institutions and remember that, because that's something that -- let's change how it's done. Let's make a remarkable, profound change. Because I think that would -- that would resonate with all of us here if we could just take all day -- if it takes days to consult, because you don't do a consultation in two hours, so -- and we sit there and we have a moment to acknowledge our Creator, and the Creator of all things, and everything that's part of our creation and everything that*

is, we should -- let's try to do that."

12. Pokagon Band of Potawatomi Indians; Tribal Council Secretary Mark Parrish

- a. *"I'm guessing that when you go and, let's say, talk with Canada and, you know, in reference to the Great Lakes Water Quality Agreement there, I think there was some meaningful dialogue and meaningful input that you accepted by the Canadian government."*
- b. *"And so now we're talking about, you know, the possibility of having to codify what it -- what it will take to actually consult and what meaningful consultation is. But let's be careful that we don't make another set of laws that will end up to be broken."*
- c. *"Sometimes that whole -- that whole consultation comment period, from my standpoint, isn't adequate, simply because of we don't have the full staff that the U.S. Government has and can afford. So I'd like you -- you know, to take that into consideration too when we're talking. It's not that we're slow. We're not slow. We're taking our time so we can get it, hopefully, correct."*

13. Little Traverse Bay Bands of Odawa Indians; Tribal Vice Chairperson Stella Kay

- a. *"The federal government seems to feel that consulting or, you know, whoever, agencies feel that consulting is sending us a letter and letting us know that it's happening, right? Prior early consent in consultation should be the goal, okay? Notification does not qualify as consent. Consultations should not be delegated to the corporations who profit from the permit. Consultation should be local and face-to-face."*
- b. *A tribal trust compliance officer who is knowledgeable about Indian tribes and tribal lands should be appointed to the Federal Permitting Improvement Steering Committee to make sure that a tribal trust compliance is integrated into all regulations, and guidance implementing the FAST Act in any other federal infrastructure permitting in any agency."*
- c. *"The Great Lakes Treaty fishing and hunting rights lies at the heart of the tribe's culture, water especially so. The Straits of Mackinac, the water that connects the Lakes Huron and Michigan between Michigan's Upper and Lower Peninsulas, are the center our tribe's treaty fishing."*
- d. *"An oil spill in the straits could destroy our sacred treaty right and be impossible to clean up during the winter months when the straits are frozen over."*
- e. *"That was their consultation. We told them we had a legitimate concern, and the Army Corps of Engineers sent us a letter telling us we were wrong. We asked for scientific documentation to show us why they believed this, and to date we have received nothing, and no promise to provide us this proof."*

