

Written comments  
of  
Menominee Indian Tribe of Wisconsin  
Before the  
United States Department of the Interior  
On  
Tribal Consultation on Federal decision making on infrastructure projects

Minneapolis, Minnesota

November 15, 2016

Background:

The Menominee Indian Tribe of Wisconsin is presently located in northeastern Wisconsin. Our present-day reservation is approximately 236,000 acres; most of which is held in sustained yield for our sustainable forestry. Our Tribe has over 9,000 enrolled tribal members, many of which cannot and do not reside on our present-day reservation. The Menominee Indian Tribe is one of few Tribes within the United States that does not have a migration story. The Tribe's place of origin is located at the mouth of the Menominee River, which serves as a boundary water between Wisconsin and the Michigan's Upper Peninsula. While our creation began at the mouth of the Menominee River, the Tribe itself occupied the entire State of Wisconsin, the east edge of Minnesota, the western edge of Michigan, and northern sectors of Illinois and Iowa. We remain on our ancestral territory.

History with Infrastructure:

In the 1980s, the Menominee Tribe's territory, water, air, environmental and other resources were threatened by the attempted development of the mineral deposit near Crandon, Wisconsin. Our Tribe, along with many of the Tribes in Wisconsin, was successful in defending our territory and right to clean air, clean water, and a clean environment. This success culminated in a mining moratorium in Wisconsin.

Just a few short years ago, the State of Wisconsin rewrote its mining laws, which deregulated existing laws meant to protect the air, water, environment, natural resources, and would ultimately impact Tribes lands and resources. Today, we face another threat. The place of our Menominee origin is under attack, along with the burial and mounds sites, ceremonial dance rings, and village sites located along the Menominee River. However, the threats we are currently facing are a direct result of delegation of federal authority to States, which has ignored the foundation of meaningful and timely tribal consultation.

## Comments:

The Tribe has grave concerns with the exiting consultation policy, process, and interpretation. However, I am also here to provide solutions to these shortfalls within the federal structure.

### **Question 1: How can Federal agencies better ensure meaningful tribal input into infrastructure-related reviews and decisions, to protect tribal lands, resources, and treaty rights within the existing statutory framework?**

#### *1. Consultation Process (Notification)*

Presently, the process for tribal consultation includes a mass “Dear Tribal Leader” letter that is delivered by United States Postal Service to respective Tribal leaders throughout Indian Country. This process is very generic and oftentimes ignores the importance of ancestral territory of any Tribe. Per Executive Order 13175 and the Department of the Interior Tribal Consultation policy, the purpose is to engage Tribes affected by a federal action to ensure meaningful and timely consultation. However, current practice within the Department ignores the rights of Tribes regarding their ancestral territory and protection of tribal sacred sites and associated burials and funerary objects of importance. This ignores the fact that previous Federal legislation to “deal” with the Indian problem included mass relocation efforts, which displaced and removed many Tribes from their ancestral territory and any connection to such land, resources, and use. While much of this land was developed throughout the course of history, there are pristine areas of tribal ancestral territory whose archeological and other sacred sites remain untouched. However, there is still opportunity to remedy this practice by revising existing consultation policy to include executive responsibility to include research that identifies tribes existing land holdings and their treaty and ancestral territory as documented with the historical and archeological records. Treaties have established the binding fiduciary and trust responsibility of the United States Government to Tribes. Federal agencies should be required to also consider and engage Tribes on issues impacting ancestral territory no matter the distance from present-day land holdings (i.e. currently held trust and fee lands). Tribes affected by any federal action that includes current landholdings and ancestral territory should receive notification via USPS, electronic, and telephone contact to ensure that federal agencies responsible for permitting authority and regulatory oversight engage Tribes in a timely manner and in meaningful dialogue.

#### *2. Policy Issue*

Presently, Executive Order 13175 Section 3(c) (2) and 3(c) (3) provides a federal opportunity for Tribes to be a part of the decision-making process through consultation. However, this type of opportunity does not include those infrastructure decisions that impact Tribal lands and resources when the federal government has delegated permitting authority to a State. In States that hold the permitting authority, their State laws do not often include Tribes that held ancestral territory or sacred sites within that State, especially if that Tribe, was forcibly removed by the federal government. The Menominee have found that delegation of federal authority places the United States Trust responsibility in a precarious position that blatantly ignores the Tribes rights as established by treaties, executive orders, case law, etc. The problem arises when the respective State policy or executive orders do not afford recognition of the Tribe’s inherent rights, sovereignty, or use of sites that hold archeological and spiritual significance. The Tribes have negotiated with the United States, who in turn, has essentially forfeited their trust responsibility to Tribes in these types of situations. One solution to remedy this situation with consultation is to

amend existing MOU's with States to ensure that they abide by Federal laws, which recognize Tribal sovereignty, treaty rights, and other rights not only of Tribes that occupy those States with delegated permitting authority, but also Tribes that were removed from the territory at the formation of this United States.

*Executive Order 13175, Section 3(c) (2) and Section 3 (c) (3) states that,*

*“Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:*

*(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:*

*(2) Where possible, defer to Indian tribes to establish standards; and*

*(3) In determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.” (Executive Order 13175)*

### *3. Policy Interpretation*

The term meaningful consultation is often interpreted differently across the federal agencies and tribal governments. What is meaningful consultation? This problem permeates our contact with federal agencies and more so with States who have federal authority delegated unto them by the federal government. The Menominee tribe takes serious issue with the previous practice of “meaningful consultation” amounting to a mere “check in the box.” This method ignores the Tribe’s dialogue especially when such dialogue results in opposition to a proposed project that would threaten the Tribe’s rights, sovereignty, and resources located within the Tribe’s present-day reservation, treaty-ceded territory, and sacred ancestral territory.

### *4. FAST Act (Title 61 U.S.C.)*

The FAST Act was signed into law December 2015 in an effort to strengthen the economy and create new jobs through the expedition of federal review of infrastructure projects. The Implementation Plan and streamlined processes fail to include Indian tribal governments or any recognition of the federal trust responsibility of tribal lands, resources, and sacred places. There are 56 million acres of tribal land held in trust by the United States under binding legal obligations as defined in the following:

- a. Executive Order 13175 (*duty to consult with Indian Tribes on any federal action that may affect tribal interests*),
- b. United Nations Declaration on the Rights of Indigenous Peoples (*duty to seek free, prior, and informed consent on any decision affecting tribal lands or interests*),
- c. Statutory obligations to Tribal Nations under Section 106 of the National Historic Preservation Act, the National Environmental Policy Act, the Clean Water Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and other federal laws.
- d. Indian Nations are also subject to an array of laws restricting infrastructure development on Indian Reservations.

- e. The President and Secretary of the Interior have authority to regulate matters affecting Indian Lands under 25 U.S.C. §2 under “*such regulations as the President may prescribe...*”

The United States has trust and treaty obligation to protect tribal lands, waters, and sacred places. The Menominee Tribe agrees with the National Congress of American Indians Resolution 067 that calls upon the President and the Secretary of the Interior to do the following to remedy these shortfalls created by the FAST Act Law;

- Ensure all agencies permitting infrastructure projects affecting tribal lands, waters, or sacred places demonstrate compliance with federal trust obligations, treaties, the consultation requirements, the United Nations Declaration on the Indigenous Peoples, and all statutory obligations applicable to the project; and
- Require that such tribal trust compliance be integrated into all regulations and guidance implementing the FAST Act and other federal infrastructure permitting projects; and
- Require that appointees to the Federal Permitting Improvement Steering Council includes a Tribal Trust Compliance Officer who is knowledgeable about Indian Tribes and tribal lands; and
- Require that federal policy should support greater tribal control over infrastructure development on Indian lands, or lands where Indian tribes hold natural, cultural, or spiritual resources, ceded territories, and when tribal nations are initiating or supporting an infrastructure project, there should be a presumption the tribe’s direct involvement is evidence that concerns over lands, waters, resources, and sacred places have been adequately addressed; and
- Require that Indian tribal governments must be provided, in a manner similar to state governments, full and early participation in “purpose and need” infrastructure permitting discussions, and funding for participation in federal permitting process.

**Question 2: Should the Federal agencies propose new legislation altering the statutory framework to promote these goals?**

1. The proposal of legislation that identifies Tribes with ancestral and historic connections as having “standing” and are required to be engaged at the onset of the exploration and throughout the process, for any lands that are impacted by infrastructure proposals, whether governmental or privately held.
2. Close mining loopholes in the Clean Water Act of 1992 and 2000
  - a. Mines and mining impacts disproportionately impact Tribes, due to our proximity to public lands where mining is prioritized, and our court-affirmed treaty rights on these lands.
  - b. Mining, mineral processing, and mine tailings disposal result in cyanide, lead, zinc, and other heavy metal contamination in water, fish, and wildlife.
  - c. The Clean Water Act (1973) was intended to prevent further degradation of natural waters. Modern mines had been meeting CWA regulations, avoiding water pollution, and operating at a profit.

- d. However, loopholes were inserted into its implementing regulations in 1992 and 2002, enabling new mine development that pollutes waters receiving mine tailing waste.
  - e. There are two loopholes: the first redefines a “waste treatment system” to include an impoundment of a natural stream or lake being used to store mine tailings. This allows it to receive pollution that would not be permitted if it were not a “waste treatment system.”
  - f. The second loophole redefines “fill material” in a way that allows contaminated mine tailings to be used to fill wetlands and lakes under a Corps of Engineers permit.
  - g. These two loopholes have allowed mining companies to continue to directly discharge pollution into our nation’s waters as they have been doing for over a century. To redefine a lake or a river as a “waste treatment system” is shameful, an abomination of the natural order of things, and a giant step back in time.
  - h. To close these loopholes does not require a Congressional Act. The two federal agencies responsible for these regulations, the U.S. Environmental Protection Agency, and the U.S. Army Corps of Engineers can change their regulations governing hardrock mining, tailings disposal, and fill in wetlands permits
3. 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. According to the US Department of Transportation, Pipeline Hazardous Materials Safety Administration (PHMSA), the majority of pipeline significant incidents for the transmission lines portion are caused by weld failures or corrosion (or both).
    - c. 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.
    - d. In addition, most pipelines are not even subject to regular inspections. Only 44% of hazardous liquid lines, the ones deemed to be flowing through a “high consequence area” (near population centers or drinking water sources) are tested and inspected regularly.
    - e. Many larger, newer pipelines have detection equipment and automatic shutoff valves but these features aren’t required despite decades of discussions about regulations. They are strictly voluntary measures, many of them placed into service only after a major spill. And these safety features can only detect a full blown rupture, not the myriad small leaks that go undetected and poison ecosystems over long periods of time.

- f. Gas and hazardous liquid pipelines must be brought under the regulatory framework of environmental and safety laws, no matter when they were installed. Older pipelines pose a grave risk to our environment, our lives, our health, and our treaty rights. With the combination of old welds, old technology, old materials, and corrosion with age, they are riskier and riskier as time goes by. There is no reason to give them a pass from meeting environmental and safety standards that newer pipelines, with new technology, new steel, new welds must meet.
  - g. 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.
4. Enact provisions to mitigate the disproportionate impacts of climate change on tribal nations, including (a) an indefinite moratorium on new carbon fuel extraction, transportation, or processing infrastructure, and (b) A NEPA requirement to carry out a carbon impact s 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. Climate change is happening. The scientific consensus has been confirmed over and over, and the changes we are seeing are greater, and faster, than even the models had predicted. Immediate action is vital to preserving life on earth.
  - c. The amount of carbon we can still put into the sky, while we figure out how to stop burning it, and still stay under 1.5 degrees Celsius global temperature rise is now lower than the amount in currently operating oil and gas fields.
  - d. 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.
  - e. There is no more compelling thing that the US government could do, than to place an indefinite moratorium on new carbon-fuels infrastructure projects.
  - f. 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.
  - g. The federal government should amend the NEPA to explicitly require carbon impacts studies as part of the analysis and documentation, whenever an Environmental Assessment or Environmental Impact Statement is required under terms of any agency's NEPA process and procedures.

5. Insert a requirement for Free, Prior, and Informed Consent into consultation language for all infrastructure projects that cross tribal homelands, ancestral territory, or affected treaty affirmed retained rights, whether trust or ceded territory.
  - a. The United Nations Declaration on the Rights of Indigenous Peoples includes the language “Free, Prior, and Informed Consent.”
  - b. The United States is one of only four nations that did not vote to adopt this Declaration at the UN General Assembly on 13 September 2007.
  - c. 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.
  - d. 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.
  - e. None of the Federal agencies, in their response to the memorandum from President Obama, included Free, Prior, and Informed Consent in their policies and procedures for meaningful consultation and collaboration.
  - f. Free, Prior, Informed Consent, and its working definition, needs to be incorporated into all of the consultation and coordination documents of Federal agencies. The current Administration should make this explicitly clear in a further Memorandum requiring Federal agencies to revise their consultation documents to include these concepts.