Message

From: Wester, Barbara [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CEA2B9B4C21E414495BC675184A5291B-BEWESTER]
Sent: 1/18/2018 2:57:53 PM
To: Pallesen, Reginald A. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=368d3b434e30423cbddd2e249043c016-RPallese]
Subject: FW: Menominee Tribe and Back Forty Mine

just fyi

Attorney Client / Ex. 5

Attorney Client / Ex. 5

From: Stephanie Tsosie [mailto:stsosie@earthjustice.org]
Sent: Friday, January 12, 2018 2:22 PM
To: Wester, Barbara <wester.barbara@epa.gov>; Pallesen, Reginald A. <pallesen.reginald@epa.gov>
Cc: Janette Brimmer <jbrimmer@earthjustice.org>; Starlyn Tourtillott <stourtillott@mitw.org>
Subject: Menominee Tribe and Back Forty Mine

Ms. Wester and Mr. Pallesen,

Please thank Chief Swenson for his call and offer to re-engage in conversations with the Menominee Indian Tribe of Wisconsin. Before we confirm a second meeting, we wanted to summarize our last meeting and ask for further clarification on what this next meeting would entail in order to ensure that it is efficient and actually accomplishes the Tribe's goals.

The first meeting between representatives of the Menominee Tribe and EPA occurred via telephone on December 21, 2017 and was actually a meeting about having a meeting. Both parties agreed that it was not a consultation. Our understanding of the December 21, 2017 discussion was that it was a planning meeting for EPA to explain what it could or could not address in an upcoming consultation with the Tribe, should the consultation occur. Our understanding from the meeting on December 21, 2017, was that EPA was unable to "consult" on the substance of issues raised in the notice of intent to sue letter sent by the Menominee Tribe. From that meeting, we understand EPA's position to be that the state of Michigan has been delegated authority to issue Section 404 permits since 1984, and that the EPA's only avenue for "consultation" was to seek input for what EPA might include in its comments and/or objection to the state wetland permit process in Michigan because the EPA's position is that it has no authority to stop Michigan's permit process. We also understood EPA's solicitation of Menominee Tribe's opinions to be on the substance of Aquila's 404 permit application as it is presented in the Michigan permit process. In particular, on the issues raised in the NOI, our understanding of EPA's position from the December 21, 2017 call is that the EPA represented that the only extent to which they might engage in the permit process is whether or not they might comment and/or object to the permit process in Michigan and that they lacked the authority to take broader action.

We also understood EPA's clear position to be that it had no authority to consult and would not consult as required by the National Historic Preservation Act because EPA would not be taking a federal action, and that EPA has also taken the position that the NHPA does not apply to assumption of Clean Water Act delegation by states. In sum, EPA stated it did not believe NHPA Section 106 consultation applied in this situation.

This demonstrates that perhaps EPA is using the term "consult" too loosely. In the interest of being very clear as we move forward, the Menominee Tribe considers "consult" to mean, for this case, the actual consultation obligations and process that would occur in accordance with the NHPA and other federal statutes and responsibilities. We would like to suggest that if the parties simply mean to discuss matters that are in play in the Michigan 404 permitting process and EPA is seeking some kind of informal input from the Tribe, then we all refer to that as "confer" and not "consult." It will help keep matters clear. Based on that understanding of terms, it is the Tribe's understanding that to date, EPA is willing to "confer" on what the Tribe thinks about the 404 Permit that has been proposed by the State of Michigan in its delegated process, but that EPA is unwilling to either "confer" or "consult" on any of the other matters that have been raised by the Tribe in the Back Forty Mine situation, either in the NOI or as may apply under the NHPA.

We now understand that the DC Office of General Counsel may have had a different opinion than Region 5 on "consultation" and, after summarizing our last conversation with EPA, we would like to know on which specific issues or matters described above, those differing interpretations are before we take everyone's time to schedule and have a second call. We would also like to know if EPA has any additional issues to raise regarding either the substance of the Menominee Tribe's NOI or other avenues on which EPA would like to engage. Please advise on which issues would be appropriate for a future call, or whether there are new issues that EPA would like to raise. Until we have a more-detailed understanding of what has changed, we can't know if EPA is willing to "confer", or actually "consult", or on what substance. We are not interested in the effort and resources it will take to engage in another preliminary call without additional information.

And to be absolutely clear, , the Menominee Tribe presented in its NOI – and will argue and would like to actually discuss with EPA– that the Menominee River and adjacent wetlands were not, and could not have been, delegated to the state of Michigan for CWA Section 404 permitting. The Menominee Tribe maintains that any Section 404 permit jurisdiction and associated process on the Menominee River must be assumed by the Corps and EPA. To the extent that the Menominee Tribe engages in any conversation with EPA, it does not waive its objection to Michigan's alleged exercise of authority of the

Section 404 permit process and the NOI is unaffected. The Menominee Tribe also presented – and will argue – that because Section 404 permitting should be with the Corps, the Federal obligations on the NHPA and other attendant federal statutes apply, and that future conversations with EPA does not waive that argument. The Menominee Tribe, as a sovereign tribal nation, believes that consultation is a true government-to-government process, and as long as the Section 404 permitting process of the Menominee River remains in the State of Michigan without federal intervention or oversight, the true intent and meaning of tribal consultation through the means summarized above cannot be achieved.

We look forward to hearing from you on which topics you are able to discuss. Thank you.

Stephanie Tsosie and Janette Brimmer

Stephanie Tsosie
Associate Attorney
Earthjustice Northwest Office
705 2nd Avenue, Suite 203
Seattle, WA 98104
T: 206.343.7340, ext. 1023
F: 206.343.1526
earthjustice.org

<image001.jpg>

Because the earth needs a good lawyer.

The information contained in this email message may be privileged, confidential and protected from disclosure.
If you are not the intended recipient, any dissemination, distribution or copying is strictly prohibited.
If you think that you have received this email message in error, please notify the sender by reply email and delete the message and any attachments.