[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BLACKFEET TRIBE, et al., *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION, et al., *Respondents*.	No. 18-1184 (consolidated with Nos. 18-1129, 18-1135, 18-1148, 18-1159)

OPENING BRIEF OF PETITIONERS BLACKFEET TRIBE, ET AL.

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

1. No district court proceedings occurred. Petitioners are United Keetoowah Band of Cherokee Indians in Oklahoma; Osage Nation; Shawnee Tribe of Oklahoma; Ponca Tribe of Indians of Oklahoma; Delaware Nation; Otoe-Missouria Tribe; Sac and Fox Nation; Thlopthlocco Tribal Town; Delaware Tribe of Indians; Pawnee Nation; Crow Creek Tribe of South Dakota; Omaha Tribe of Nebraska; Seminole Tribe of Florida; Blackfeet Tribe; Coushatta Tribe of Louisiana; Fort Belknap Indian Community; Rosebud Sioux Tribe; Ute Mountain Ute Tribe; United South and Eastern Tribes, Inc.; and Natural Resources Defense Council.

2. Respondents are the Federal Communications Commission and the United States of America.

3. Interveners for the Petitioners are: National Association of Tribal Historic Preservation Officers, National Trust for Historic Preservation, Cheyenne & Arapaho Tribes, Apache Tribe of Oklahoma, Mescalero Apache Tribe, Alabama-Quassarte Tribal Town, Tonkawa Tribe, Peoria Tribe of Indians of Oklahoma, and Edward B. Myers. Interveners for the Respondents are CTIA-The Wireless Association and Sprint Corporation.

4. No *amici* have appeared.

B. Rulings Under Review

Petitioners seek review of *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Dkt. No. 17-79, FCC 18-30 (adopted Mar. 22, 2018, and released Mar. 20, 2018), *summarized* 83 Fed. Reg. 19,440 (May 3, 2018).

C. Related Cases

Petitions for Review have been consolidated. Blackfeet Petitioners are unaware of any other related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Court of Appeals for the District of Columbia Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Blackfeet Petitioners make the following disclosures:

1. Blackfeet Tribe, Coushatta Tribe of Louisiana, Fort Belknap Indian Community, Rosebud Sioux Tribe, and Ute Mountain Ute Tribe are all federally recognized Indian tribes that do not issue stock, and none of these tribes have parent corporations.

2. United South and Eastern Tribes, Inc., respectfully states that it is a nonprofit corporation with no parent companies, subsidiaries, or affiliates, and has not issued shares to the public.

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GLOSSARY

5G	Fifth Generation cellular wireless technology
ACHP	Advisory Council on Historic Preservation
Blackfeet Petitioners	The Blackfeet Tribe, the Coushatta Tribe of Louisiana, the Fort Belknap Indian Community, the Rosebud Sioux Tribe, and the Ute Mountain Ute Tribe, and United South and Eastern Tribes, Inc
FCC	Federal Communications Commission
MOU	Memorandum of Understanding
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NPA	Nationwide Programmatic Agreement
Second Report and Order	*In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Dkt. No. 17-79, FCC 18-30 (adopted Mar. 22, 2018, and released Mar. 20, 2018), *summarized* 83 Fed. Reg. 19,440 (May 3, 2018)
TCNS	Tower Construction Notification System
USET	United South and Eastern Tribes, Inc.

JURISDICTION

Jurisdiction arises from 5 U.S.C. §§ 701-706, 28 U.S.C. §§ 2342, 2344, 47 U.S.C. § 402(a), and Federal Rule of Appellate Procedure 15(a).

STATUTES AND REGULATIONS

Applicable statues and regulations are included by addendum.

STATEMENT OF THE CASE

Blackfeet Petitioners[1] incorporate by reference the Statement of the Case filed by Petitioners United Keetoowah Band of Cherokee Indians in Oklahoma in case 18-1129 on October 12, 2018.

Blackfeet Petitioners are federally recognized tribes and an intertribal organization who regularly consult with the FCC and other federal agencies in order to preserve and defend their unique and sacred cultural heritage from casual destruction through any federally-permitted activities. The cultural and religious activities and traditions of both Tribal Petitioners and USET members often depend upon their ancestral lands, which contain many places of cultural, historic, religious, and traditional significance. These ancestral lands extend beyond the boundaries of their current reservations, and the location and significance of many cultural sites is

[1] The Blackfeet Tribe, the Coushatta Tribe of Louisiana, the Fort Belknap Indian Community, the Rosebud Sioux Tribe, and the Ute Mountain Ute Tribe ("Tribal Petitioners") and United South and Eastern Tribes, Inc. ("USET"), a non-profit, inter-tribal organization representing 27 tribes on regional and national policy issues (the Tribes and USET collectively, "Blackfeet Petitioners").

not discussed outside the Tribes – a practice required by the customary and religious traditions of the Tribes that also serves to protect such sites from looting. Tribal consultation, as mandated by the NHPA, enables the Tribes to protect their historic properties of cultural and religious significance.

Prior to the Second Report and Order, the FCC had developed the Tower Construction Notification System ("TCNS"), an automated system that facilitates communications with tribes for consultation, in close coordination with tribal leaders and organizations, particularly Petitioner USET, and worked hard to encourage tribal participation in the system.[2] In return, the Tribes developed substantial infrastructure to enable them to respond to consultation requests, covering tailored geographic areas and including additional staff.[3] The TCNS was supposed to become a model for other federal agencies looking to fulfill their requirements under the NHPA.

Instead of working closely with Petitioners and other tribes and tribal organizations as it had in the past and as is required by law and Respondent's 2004

[2] *See* Comments of the National Congress of American Indians, United South and Eastern Tribes Sovereignty Protection Fund, and National Association of Tribal Historic Preservation Officers (discussing the history of the TCNS system) (JA0030-0052, 0415-0436, 0715-0729).

[3] *See* Comments of the Fort Belknap Indian Community Tribal Historic Preservation Office (detailing the measures their office took in reliance on the TCNS system and related fees) (JA0028-0029, 0657-0659).

MOU with USET, the FCC abandoned tribal consultation. Although Petitioners all participated in the comment period on the New Rule, none had their concerns addressed.

SUMMARY OF THE ARGUMENT

The Blackfeet Petitioners challenge FCC's attempts to excuse itself from its most basic federal legal obligations to consult with Indian tribes on a government-to-government basis, as both the National Environmental Protection Act ("NEPA") and the National Historic Preservation Act ("NHPA"), and their corresponding regulations plainly require, and as likewise required by the FCC's 2004 Memorandum of Understanding with Petitioner USET,[4] by excluding the deployment of certain small wireless facilities from review and tribal consultation and by placing onerous restrictions on tribal review more generally. *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Dkt. No. 17-79, FCC 18-30 (adopted Mar. 22, 2018, and released Mar. 20, 2018), *summarized* 83 Fed. Reg. 19,440 (May 3, 2018) ("Second Report and Order") (Exhibit A). The FCC's attempt

[4] Exhibit B hereto (February 3, 2004 Memorandum of Understanding between the FCC and USET Regarding Best Practices and the Section 106 Process wherein Respondent expressly acknowledged its consultation obligations) (JA0915-0919); *see also* Exhibit C (October 25, 2004 Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106) (JA0920-0934).

to evade controlling federal law on grounds of economic efficiency and streamlined regulation is improper.

Section 106 of the National Historic Preservation Act ("NHPA") requires every "Federal department and independent agency having authority to license any undertaking, . . . prior to the issuance of any license, [to] take into account the effects of the undertaking on any historic properties." 54 U.S.C. § 306108. Federal agencies fulfill this obligation by identifying historic properties potentially effected by an undertaking and assessing and seeking to resolve the undertaking's adverse effects on those properties. *See* 36 C.F.R. §§ 800.3-800.6. Section 106 requires federal agencies to "consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking." *Id.* § 800.2(c)(2)(ii); 54 U.S.C. § 302706(b). Consultation is essential, especially for agencies with little expertise in historic preservation, such as the FCC. Indeed, the FCC has itself recognized these federal legal obligations and agreed the best way to fulfill them was to engage early and substantively in tribal consultation. *See generally* Exhibits B and C.

The Second Report and Order unlawfully: (1) adopts a definition of "undertaking" that directly conflicts with its statutory and regulatory definition, and (2) prohibits tribes from collecting fees. The FCC does not have any authority to promulgate regulations purporting to implement or interpret Section 106 and its

regulations. Even in the limited circumstance where the FCC may promulgate "Program Alternatives" pursuant to the Advisory Council on Historic Preservation's ("ACHP") regulations, the Second Report and Order was not developed pursuant to or consistent with this limited authority. The Second Report and Order, insofar as it purports to implement or interpret Section 106 and the ACHP's regulations, is therefore unlawful and without legal effect. Finally, in promulgating the Second Report and Order, the FCC also violated the tribal consultation requirements as set forth in the ACHP regulations, Executive Order, its own policies and the MOU it entered into with Petitioner USET.

ARGUMENT

The Second Report and Order is arbitrary and capricious because the FCC has no authority to promulgate regulations under the NHPA, because any regulations regarding its own procedures for complying with the NHPA must be approved by the ACHP and consistent with ACHP regulations, and because it is inconsistent with the NHPA.

I. The Exclusive Authority to Promulgate Regulations Implementing Section 106 of the NHPA lies with the ACHP, not the FCC.

Congress delegated exclusive authority to the ACHP to "promulgate regulations as it considered necessary to govern the implementation of section [106] . . . in its entirety." 54 U.S.C. § 304108(a). This Court has repeatedly recognized that the ACHP possesses the sole authority to promulgate such regulations. *See, e.g.*,

CTIA-Wireless Ass'n v. Fed. Comms. Comm'n, 466 F.3d 105, 116 (D.C. Cir. 2006) ("Congress has entrusted one agency with interpreting and administering section 106 of the NHPA: the [ACHP]"); *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 757 (D.C. Cir. 2003) ("[I]t is the [ACHP] to whom Congress gave regulatory-writing authority"); *McMillian Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1287 (D.C. Cir. 1992) ("[T]he [ACHP]'s regulations implementing the NHPA[] [are] promulgated under authority granted by Congress"). The ACHP's regulations "are binding on federal agencies." *Nat'l Mining Ass'n v. Slater*, 167 F. Supp. 2d 265, 284 (D.D.C. 2001), *rev'd on other grounds*, *Nat'l Mining Ass'n*, 324 F.3d 752.

The FCC lacks independent authority to promulgate regulations implementing Section 106. The Second Report and Order purports to do so by revising the definition of undertaking. The FCC asserts that 36 C.F.R. § 800.3(a) and the 2004 Nationwide Programmatic Agreement ("NPA") between it and the ACHP, provides it the authority to unilaterally determine that all small wireless deployments are not undertakings. The FCC misconstrues its authority.

A. The FCC has no authority under 36 C.F.R. § 800.3(a).

Although under the ACHP regulations, "The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y)," 36 C.F.R. § 800.3(a), this provision only authorizes agencies to determine whether

a *specific* action is an undertaking thereby triggering Section 106 review for that action. This provision does not provide agencies the authority to determine, programmatically, whether entire categories of actions are undertakings or exempt entire categories of undertakings from Section 106 review. *Accord* 36 C.F.R. § 800.14(a), (c). Instead, 36 C.F.R. § 800.3(a) requires a fact-specific inquiry into whether that particular action is an undertaking. Indeed, in comments to the FCC, the ACHP stated that it is not "appropriate to reconsider the status of undertakings subject to Section 106 review per 36 C.F.R. 800.3(a)(1)." ACHP Comments, as revised, June 15, 2017, at 1. (JA0256).

B. The FCC has no authority under the NPA.

The FCC's reliance on the NPA is no more availing. While the FCC asserts that the NPA provides it with unfettered discretion to determine what constitutes undertakings, the NPA merely affirms the FCC's authority under 36 C.F.R. § 800.3(a) to determine whether specific actions are undertakings triggering Section 106 review. Indeed, in its comments to the FCC, the ACHP states that should the FCC wish to revisit what undertakings are exempt from Section 106 review pursuant to the NPA, the ACHP would be "willing to engage with FCC in this discussion along with the other signatories to those agreements." ACHP Comments, as revised, June 15, 2017, at 7. (JA0256).

C. The FCC Has No Authority to Prohibit the Collection of Fees.

The FCC does not have the authority to prohibit tribes from collecting fees. Tribes routinely collect fees during the Section 106 process. These fees are for services tribes provide when applicants and federal agencies request tribes produce "specific information and documentation regarding the location, nature, and condition of individual site" and conduct surveys. ACHP Comments at 1 (JA0250). Indeed, the ACHP recognizes that "[i]n such cases, the tribe would be justified in requesting payment for services, just as is appropriate for any other contractor." *Id*.

By prohibiting the collection of such fees with the Second Report and Order, the FCC is implementing and administering Section 106 through regulation. The FCC has no authority to promulgate regulations implementing and administering Section 106. *See CTIA-Wireless*, 466 F.3d at 116; 54 U.S.C. § 304108(a).

II. The FCC has no authority under 36 C.F.R. § 800.14 because the Second Report and Order is not a Valid "Program Alternative."

The FCC may only promulgate regulations implementing Section 106 of the NHPA if it is done so consistent with the procedures established by the ACHP at 36 C.F.R. § 800.14, by which other agencies can develop "Program Alternatives." *See* 36 C.F.R. § 800.14. These procedures permit agencies to "develop procedures to implement section 106 and substitute them for all or part of" the ACHP's regulations, *id*. § 800.14(a), and to "propose a program or category of undertakings

that may be exempted from review under the provisions of" the ACHP's regulations. *Id*. § 800.14(c).

Program Alternatives Procedures have legal effect only if they are reviewed and approved by the ACHP, *id.* § 800.14(a)(2), (c)(5), are consistent with the NHPA and the ACHP's regulations, *id*. § 800.14(a), (c)(1)(iii), and are developed in consultation with, among others, the ACHP and tribes. *Id*. § 800.14(a)(1), (c)(4), (f); *see Comm. to Save Cleveland's Huletts v. U.S. Army Corps of Eng'rs*, 163 F. Supp. 2d 776, 792 (N.D. Ohio 2001) (after determining "that there [was] no record of ACHP ever approving or concurring in the Corps' regulations," holding: "the Corps cannot rely on its own regulations to determine compliance with the NHPA").

A. The ACHP Has Not Approved the Second Report and Order.

The Second Report and Order has not been approved by the ACHP. Quite the contrary. The ACHP has specifically disavowed the FCC's rulemaking and the Second Report and order, stating: "The ACHP noted in its comments . . . submitted to the FCC last June that it disagreed with the FCC's proposal to amend Section 1.1312 of its regulations, which effectively revises the definition of federal undertaking. While the Second Report and Order further elucidates the FCC's rationale for the change, it remains inconsistent with the views of the ACHP." ACHP Letter, March 15, 2018, at 1. (JA0749). Without the ACHP's approval, the Second Report and Order does not possess legal effect as a Program Alternative.

B. The Final Report and Order is Inconsistent with the ACHP's Regulations and the NHPA.

Even if the FCC had authority to promulgate this regulation, it is inconsistent with the NHPA and the ACHP's regulations. An undertaking is defined as any "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit, *license* or approval." 36 C.F.R. § 800.16(y) (emphasis added); 54 U.S.C. § 300320 (same).[5]

In contrast, the FCC purports to exempt the deployment of small wireless facilities by redefining undertaking to exclude projects, activities, or programs requiring a federal license. The FCC acknowledges that the deployment of small wireless facilities requires FCC licensing. Second Report and Order, at ¶ 85. Yet, the FCC simply asserts that such deployments are not undertakings because the Section 106 process "is inconsistent with the manner in which [FCC] licensing occurs," *id*., the Communication Act does not require Section 106 compliance, *id*. ¶ 90, and that it would be too hard for the FCC to conduct Section 106 review when it licenses small wireless facilities. *Id*. at ¶ 85.

[5] Federal funding not required to trigger Section 106. *CTIA-Wireless*, 466 F.3d at 112 (discussing *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995)).

But the FCC has no discretion in complying with Section 106, which imposes obligations on "the head of *any* Federal department or independent agency having authority to license any undertaking." 54 U.S.C. § 306108; *see also* Exhibit B (explaining FCC's admission that "the NHPA also requires Federal agencies to consult with Indian Tribes with regard to historic properties"). The FCC cannot simply relieve itself of its obligation to comply with Section 106 because it believes that the NHPA is "inconsistent" with its licensing process. *See Lee v. Thornburgh*, 877 F.2d 1053, 1056 (D.C. Cir. 1989) ("An agency having authority to license an undertaking may not issue such a license without fulfilling these [Section 106] requirements."); *Nat'l Mining Ass'n*, 167 F. Supp. 2d at 284 (ACHP's regulations "are binding on federal agencies.");[6] *see generally CTIA-Wireless*, 466 F.3d 105 (the FCC's obligation to comply with Section 106 unquestioned).

Furthermore, the FCC's interpretations of Section 106 are afforded no deference. Since Congress delegated rulemaking authority to the ACHP, its "reasonable interpretations of the meaning of section 106" must be afforded "substantial deference." *CTIA-Wireless*, 466 F.3d at 116; *McMillian Park*, 968 F.2d at 1287-88.

[6] *See also Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 607 (9th Cir. 2010) ("We have previously held that federal agencies must comply with these regulations").

The FCC's definition of undertaking is inconsistent with both the NHPA and the ACHP's regulations. As the ACHP recognized, the Second Report and Order "effectively revises the definition of federal undertaking." ACHP Letter at 1 (JA0749). Indeed, the ACHP notes that the Second Report and Order "remains inconsistent with the views of the ACHP." *Id.*

The FCC's prohibition on the collection of fees is also inconsistent with the ACHP's interpretation Section 106. In comments to the FCC, the ACHP notes that tribes are often "justified in requesting payment for its services." ACHP Comments at 1. The ACHP also notes that "federal agencies should reasonably expect to pay for work carried out by tribes" as tribes are a recognized source of information regarding historic properties. Advisory Council on Historic Preservation, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* 13 (Dec. 2012) (JA1015).

C. The FCC Failed to Adequately Consult with Tribes.

Finally, the FCC abandoned its own consultation obligations when issuing the Second Report and Order. Federal Agencies are required to engage in tribal consultation regarding "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes." Executive Order 13175. The FCC's 2004 MOU with Petitioner USET virtually catalogs the FCC's failures with respect to the Second Report and

Order, referencing: (1) the FCC's consultation obligations pursuant to its own environmental rules (47 C.F.R. §§ 1.1301-1.319), (2) its own Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes (16 FCC 4078 (2000)), and (3) its own "certain trust responsibilities when dealing with Federally Recognized Tribes," and stating that the FCC "commits, in accordance with the federal government's trust responsibility and as provided in the NHPA, to take account of, and where possible, avoid adversely affecting tribal properties when Commission actions may have an impact upon tribal properties listed in or eligible for the National Register." Exhibit B (JA0916). The Second Report and Order blatantly contradicts the MOU and the FCC's own judicially-enforceable policies, effectively crumpling the USET MOU into a waste-paper basketball rather than treating it as a solemn government-to-government obligation.[7]

The FCC made absolutely no effort to sit down with the tribes to discuss these issues or hear their views. Its cavalier approach fell far short of the Commission's legal obligation and arbitrarily deprived the FCC of valuable perspectives and information that would have helped it develop a more balanced approach to

[7] Tribes' rights to consultation with the Commission and other federal departments and agencies are judicially enforceable. To give just one example, in *Wyoming v. Jewell*, 136 F. Supp. 3d 1317 (D. Wyo. 2015) (vacated on other grounds), the court issued a nationwide injunction preventing the Bureau of Land Management from implementing its proposed rules regulating hydraulic fracturing on BLM and tribal lands after determining that federal officials had failed to engage in meaningful consultation with affected tribes.

addressing economic efficiency and wireless service delivery objectives with other equally important federal values and obligations.

DATED: January 25, 2019.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(a) because, excluding the parts of the document exempted by Fed. R. App. P. 27(d)(2)(B) and contains 2992 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of January 2019, I electronically filed the foregoing **OPENING BRIEF OF PETITIONERS BLACKFEET TRIBE, ET AL.** with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all participates in the case via the Court's CM/ECF system.

/s/ Wesley James Furlong
Wesley James Furlong