[ORAL ARGUMENT NOT SCHEDULED]
No. 18-1184 (consolidated with Nos. 18-1129, 18-1135, 18-1148, 18-1159)

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

BLACKFEET TRIBE, COUSHATTA TRIBE OF LIOUSIANNA, FORT BELKNAP INDIAN COMMUNITY, ROSEBUD SIOUX TRIBE, UTE MOUNTAIN UTE TRIBE, and UNITED SOUTH AND EASTERN TRIBES, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

REPLY BRIEF OF BLACKFEET TRIBE PETITIONERS

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GLOSSARY

5G	Fifth-generation cellular wireless technology
ACHP	Advisory Council on Historic Preservation
Blackfeet Petitioners	Blackfeet Tribe, Coushatta Tribe of Louisiana, Fort Belknap Indian Community, Rosebud Sioux Tribe, Ute Mountain Ute Tribe, and United South and Eastern Tribes, Inc.
FCC	Federal Communications Commission
New Rule	*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. 30, 2018), *summarized at* 83 Fed. Red. 19,440 (May 3, 2018)
MOU	Memorandum of Understanding between the Federal Communications Commission and the United South and Eastern Tribes, Inc., regarding Recommended Best Practices and the Section 106 Process
NHPA	National Historic Preservation Act
TCNS	Tower Construction Notification System
USET	United South and Eastern Tribes, Inc.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Appellate Rule of Civil Procedure 34(a)(1), Blackfeet Tribe Petitioners respectfully request the Court to schedule oral argument in these consolidated cases. The issues presented in the consolidated Petitioners for Review are of profound importance, especially to Blackfeet Tribe Petitioners and the other tribal petitioners because the FCC misrepresents is powers to unilaterally decide whether it must comply with federal law.

Pursuant to Circuit Rule 34(h), Blackfeet Tribe Petitioners also respectfully request to be allotted separate time at oral argument. Blackfeet Tribe Petitioners have been granted leave by the Court to file their own brief; thus, separate oral argument time is appropriate.

ARGUMENT

I. Background

Section 106 of the NHPA is the most important tool available to Indian Tribes seeking to defend their ancient, irreplaceable cultural resources nationwide. It requires federal agencies to consider the effects an undertaking may have on historic and cultural properties and to and consult with tribes during the entire process to ensure that culturally significant places are protected. 54 U.S.C. §§ 306108, 302706(b).

Inspired by complaints from companies like Sprint and Verizon that they could be forced to pay as much as $532 per tower, the FCC unilaterally abdicated its responsibilities under the NHPA. Resp'ts' Br. at 48 (Doc. 1763214). Placing its thumb on the scales in order to ease the "burden" of complying with federal law and paying $532, the FCC claims there are "no corresponding benefits" of NHPA compliance, Resp'ts' Br. at 47, despite tribes repeatedly submitting comments identifying the exact number of properties preserved and protected by the TCNS process. Pet'rs' Reply Br. at 23 (Doc. 1768179).

The agency's justification absurdly relies on the notion that 5G deployment is both tiny and huge. The FCC would have this Court believe the so-called "small cells" (20 percent of which are actually on new towers that can be 50 feet tall or larger), are only the "size of a pizza box." Resp'ts' Br. at 14. At the same time, they

admit that they intend to deploy "far more numerous, smaller, lower-powered base stations . . . that are much more densely spaced." Resp'ts' Br. at 39. The "pizza box" is really tens of thousands of pizza boxes, some on their own new, tall towers, and very close together.

The FCC specifically targeted tribes to remove them from the tower review process. For the first time, a federal agency purported to excuse itself from compliance with the NHPA by single-handedly redefining "undertaking" on a nationwide scale. If the FCC can do this, other federal agencies may do so as well. That is why the tribes have firmly opposed this rule: the FCC's actions are not only illegal, they are unprecedented and pose enormous risks for all tribes and their cultural properties.

II. Only the ACHP Can Promulgate Regulations Implementing Section 106.

It is undeniable that the ACHP possesses *exclusive* authority to promulgate regulations implementing Section 106. 54 U.S.C. § 304108(a). The ACHP's exclusive authority to promulgate such regulations—codified at 36 C.F.R. Part 800—has been repeatedly affirmed by this Court. *See CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 116 (D.C. Cir. 2006); *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 757 (D.C. Cir. 2003); *McMillian Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1287 (D.C. Cir. 1992).

The ACHP's regulations provide procedures for other federal agencies to promulgate their own regulations implementing Section 106. 36 C.F.R. § 800.14. To have any legal effect, such "Program Alternatives" must be developed in accordance with the procedures established by the ACHP. *See Comm. to Save Cleveland's Huletts v. U.S. Army Corps of Engineers*, 163 F. Supp. 2d 776, 792 (N.D. Ohio 2001).

The ACHP allows federal agencies to "develop procedures to implement section 106 and substitute them for all or part of" the ACHP's regulations, 36 C.F.R. § 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 are validly promulgated and legally enforceable only if they are developed in consultation with, among others, the ACHP and tribes, *id*. § 800.14(a)(1), (c)(3)-(4), (f), are reviewed and approved by the ACHP, *id.* § 800.14(a)(2), (c)(5), and are consistent with the NHPA and the ACHP's regulations. *Id*. § 800.14(a), (a)(2), (c)(1)(iii), (c)(5). Unless these conditions are met, federal agencies cannot promulgate regulations implementing or interpreting Section 106.

The New Rule was not developed in accordance with these regulations and is therefore unlawful and without legal effect.[1] Indeed, the ACHP has specifically

[1] In a footnote, the FCC argues that Blackfeet Petitioners waived this argument by not raising it during rulemaking. Resp'ts' Br. 43, n.4. However, Blackfeet Petitioners and others did raise this issue during rulemaking. *See, e.g.*, Coushatta Tribe of

repudiated the New Rule. ACHP Letter at 1 (JA0749) ("[The New Rule] remains inconsistent with the views of the ACHP."). The ACHP's interpretation of its own regulations are controlling. *CTIA-Wireless*, 466 F.3d at 117 (recognizing the Court and the FCC must defer "to the [ACHP]'s reasonable interpretations of the meaning of section 106.").

III. The FCC Cannot Redefine Undertaking.

Furthermore, the New Rule is inconsistent with the NHPA's and the ACHP's definition of undertaking. The NHPA and the ACHP's regulations define undertaking as a "project, activity, or program . . . requiring a Federal permit, *license*, or approval." 54 U.S.C. § 300320 (emphasis added); 36 C.F.R. § 800.16(y). 5G deployment requires a FCC license, regardless the size of the towers. This falls within the plain definition of an undertaking. The New Rule purports to exclude 5G deployment from Section 106 review by removing federally *licensed* projects, activities, and programs from the *FCC's* definition of undertaking. *See* ACHP Letter at 1 (JA0749) (noting, the New Rule "effectively revises the definition of federal undertaking."); *McMillian*, 968 F.2d at 1287 ("[W]e look to the [ACHP]'s

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Louisiana Comments at 2 (JA0754) ("The proposed Order establishes a dangerous precedent by allowing a single federal agency—the FCC—to reinterpret the [NHPA] by unilaterally determining what constitutes and 'undertaking,' thereby bypassing or effectively eliminating the protections afforded to Tribes under th[e] [NHPA]. The FCC lacked authority to do so.").

regulations implementing the NHPA" in determining whether an action is an undertaking.).

The FCC contends its authority to redefine undertaking stems from 36 C.F.R. § 800.3(a), which grants it unfettered discretion to determine what constitutes an undertaking. This is incorrect. 36 C.F.R. § 800.3(a) is perfectly clear: "the agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y)." This provision grants the FCC the authority only to determine whether a *particular* action is an undertaking triggering Section 106 review. It does not grant the FCC unbridled discretion to *redefine* undertaking. Nor does it grant the FCC unlimited discretion to determine entire programs or categories of undertakings exempt from Section 106. 36 C.F.R. § 800.14(c) expressly provides for making such determinations. *See* ACHP Comments at 7 (JA0256) (stating, it is not "appropriate to reconsider the status of undertakings subject to Section 106 review per 36 C.F.R. 800.3(a)(1)."

IV. The FCC Violated the NHPA's Explicit Consultation Mandate and the MOU with USET

Finally, the FCC asserts that tribal consultation is not enforceable, but that if so, it fulfilled its mandate. Resp'ts' Br. at 80-85. However, the FCC is bound to follow the detailed and explicit consultation mandates of the NHPA's implementing regulations. Although the FCC claims there is no definition of "consultation," Resp'ts' Br. at 82, the NHPA clearly defines it as "the process of seeking, discussing,

and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process." 36 C.F.R. § 800.16(f). Such consultation must "commence early in the planning process," *id*. § 800.2(c)(2)(ii)(A), and it must be with the leadership of the tribes in question. 36 C.F.R. § 800.2(c)(2)(ii)(C). This means that tribal consultation is not satisfied by merely holding *public* meetings. Since this was the entirety of the FCC's efforts, it clearly failed.

The FCC's definition of consultation is to hold a few public meetings and allow tribal leaders to submit letters voicing strong objections—and then entirely ignore those objections. This is not tribal consultation. On the contrary, consultation requires meaningful engagement on the issues. *See Quechan Tribe of Fort Yuma Indian Reservation v. U.S. DOI*, 755 F. Supp. Ed 1104, 1118 (S.D. Cal. 2010) ("mere *pro forma* recitals do not, by themselves, show [the agency] actually complied with the law.").

The absence of meaningful consultation is particularly startling for USET, which has a MOU with the FCC regarding tribal consultation, painfully hammered out on behalf of its tribal membership. The MOU commits the FCC to "working with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance . . . to consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely

affect Tribal governments, their land and resources." (JA0916). The MOU also contains a series of *specific* commitments regarding the FCC's use of the TCNS to facilitate consultation. *Id.*

After negotiating, entering into, and complying with this MOU, the FCC simply abandoned its contacts with tribal governments and organizations in favor of a handful of public meetings and calls where it shared with tribes the decision it had made under industry pressure and brushed off their specific concerns. Consultation is not satisfied by simply telling tribes about a decision the agency has already made. *See Wyoming v. Jewell*, 136 F.Supp.3d 1317, 1343-46 (D. Wyo. 2015). This is the extent of the FCC's consultation efforts, which clearly fail.

DATED: January 25, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. The foregoing **REPLY BRIEF IF BLACKFEET TRIBE PETITIONERS** complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) and this Court's order dated October 4, 2018, (Doc. 1753866) because, excluding the parts of the document exempted by Fed. R. App. P. 27(d)(2)(B) this document contains 1,498 words.

2. The foregoing **REPLY BRIEF IF BLACKFEET TRIBE PETITIONERS** complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Time New Roman font.

DATED: January 25, 2019

/s/ Wesley James Furlong
Wesley James Furlong
NATIVE AMERICAN RIGHTS FUND

CERTIFICATE OF SERVICE

I certify that on this 25th day of January, 2019, I electronically filed the foregoing **REPLY BRIEF IF BLACKFEET TRIBE PETITIONERS** 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 each of the participants in these consolidated cases via the Court's CM/ECF system.

DATED: January 25, 2019

/s/ Wesley James Furlong
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STATUTORY AND REGULATORY ADDENDUM

54 U.S.C. § 300320

In this division, the term "undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—

(1) those carried out by or on behalf of the Federal agency;

(2) those carried out with Federal financial assistance;

(3) those requiring a Federal permit, license, or approval; and

(4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

54 U.S.C. § 302706

(a) In general.—Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.

(b) Consultation.—In carrying out its responsibilities under section 306108 of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a).

* * *

54 U.S.C. § 304108

(a) In general.—The Council may promulgate regulations as it considers necessary to govern the implementation of section 306108 of this title in its entirety.

54 U.S.C. § 306108

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior

to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

36 C.F.R. § 800.2

(c) Consulting parties.

* * *

(2) Indian tribes and Native Hawaiian organizations.

* * *

(ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations. Section 101(d)(6)(B) of the act requires the agency official 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. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in

subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

* * *

36 C.F.R. § 800.3

(a) Establish undertaking. The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

36 C.F.R. § 800.14

(a) Alternate procedures. An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

(1) Development of procedures. The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers, or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the Federal Register and take other appropriate steps to seek public input during the development of alternate procedures.

(2) Council review. The agency official shall submit the proposed alternate procedures to the Council for a 60–day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

(3) Notice. The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the Federal Register.

(4) Legal effect. Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

* * *

(c) Exempted categories—

(1) Criteria for establishing. The Council or an agency official may propose a program or category of undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as "undertakings" as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

(iii) Exemption of the program or category is consistent with the purposes of the act.

(2) Public participation. The proponent of the exemption shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The proponent of the exemption shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) Consultation with SHPOs/THPOs. The proponent of the exemption shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) Consultation with Indian tribes and Native Hawaiian organizations. If the exempted program or category of undertakings has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) Council review of proposed exemptions. The Council shall review an exemption proposal that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of paragraph (c)(1) of this section have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the SHPO/THPOs, the public, and any others consulted. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt, and thereafter notify the relevant agency official and SHPO/THPOs of the decision. The decision shall be based on the consistency of the exemption with the purposes of the act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the act.

(6) Legal consequences. Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) Termination. The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph (c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

(8) Notice. The proponent of the exemption shall publish notice of any approved exemption in the Federal Register.

* * *

(f) Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives. Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) Identifying affected Indian tribes and Native Hawaiian organizations. If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them. When a proposed program alternative has nationwide applicability, the agency official shall identify an appropriate government to government consultation with Indian tribes and consult with Native Hawaiian organizations in accordance with existing Executive orders, Presidential memoranda, and applicable provisions of law.

(2) Results of consultation. The agency official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The agency official and the Council shall take those views into account in reaching a final decision on the proposed program alternative.

36 C.F.R. § 800.16

(f) Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.

* * *

(y) Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

* * *