



Protecting the Land, Cultural,  
Heritage and Tradition for  
the Future Generation

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March 8<sup>th</sup>, 2018

Federal Communications Commission  
Washington, D.C.

Dear Sir or Madam:

The Rosebud Sioux Tribe sends its greetings. We are in receipt of the latest notice of the *Second Report and Order released March 2<sup>nd</sup>, 2018* (Hereinafter "Report") from the Federal Communications Commission (FCC) concerning changes to the Infrastructure Investment and deployment of next-generation wireless facilities as they relate to the requirements of the National Historic Preservation Act of 1966, as amended (NHPA) and the National Environmental Policy Act of 1969 (NEPA) review.

We of the Rosebud Sioux Tribe Historic Preservation Office are commenting on the proposed changes that will be voted for acceptance or denial on March 22<sup>nd</sup>, 2018 by the five (5) person Commission.

Our concerns with the proposed changes in a numbered order as follows:

"Undertaking" as stated within Section 106 for federal agency compliance.

- 1) As stated in Section 106 of the National Historic Preservation Act of 1966 (amended 1992) and stated and defined as an "undertaking":

"A Federal undertaking is a project, activity, or program either funded, **permitted**, **licensed**, or **approved** by a Federal Agency. Undertakings may take place either on or off federally controlled property and include new and continuing projects, activities, or programs and any of their elements not previously considered under Section 106."

Requirements of compliance with and under Section 106 by a federal agency.

- 2) Federal agencies are required to consult on the Section 106 process with State Historic Preservation Offices (SHPO), Tribal Historic Preservation Offices (THPO), Indian Tribes (to include Alaska Natives) [Tribes], and Native Hawaiian Organizations (NHO).

As stated in the *Report*, the FCC asserts that its threshold determination as it relates to Section 1.1312 of its rules that "small cell technology" is not viewed as a federal undertaking. We categorically disagree with this determination of how a "federal undertaking" is being determined or interpreted by the FCC. A "federal undertaking", as clearly and succinctly stated in #1 of this letter, is a "permitted, licensed or approved" action or activity of a Federal Agency. Unless the FCC has recently changed its status of being an agency of the United States government, the FCC is required to adhere to the contents of all codified law(s).

Further, the Report spends a great deal of time in its introduction referring to the rights THPOs and NHOs were given through Acts of Congress when it enacted the NHPA and the NEPA as a burden or an impediment to the "technological revolution." It talks about 5G networks, the need for more towers throughout the landscape, \$275 billion that will be invested over the next ten (10) years. This is disingenuous for the FCC to then say that the deployment of the small wireless facilities are not an undertaking when it clearly is due to the benefits that it will bestow to the businesses. If we are to believe the FCC's justification of creating jobs, encouraging infrastructure investment, and other "benefits," then it cannot be honestly stated that the smaller cell technology is not a major undertaking.

There was reference in the report to some of the major telecommunications carriers having to expend significant sums of monies adhering to the Section 106 requirements. What gets lost in the complaints of the carriers is that they are most able to absorb the costs. They can pass on those costs to the consumers. What is evident to us as well as other Tribes is that this is whittling away the rights of Tribes granted by Congress in the name of profit margin(s).

Section 106 definitively states that consultation will occur with SHPO's, THPO's, Indian Tribes, Alaskan Natives, and Native Hawaiian Organizations (#2 of this letter). Unless there is a typographical error in the reiteration of the law, Section 106 incontrovertibly states that this will occur and as stated further on within the NHPA under Section 101 (d)(6)(B) "which requires Federal agencies, in carrying out their Section 106 responsibilities, to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking regardless of the location of that property." It would seem that a plain text reading of the NHPA indicates that the agencies consult with the Tribes. It is worth noting that nothing within the NHPA grants the FCC any authority to modify these consultations.

As such, the Rosebud Sioux Tribe can and will require consultation on any proposed activities as noted under the current and future notices within the TCNS.

Furthermore, treaties between the United States government and Tribal groups are defined under Article 6 of the Constitution of the United States. As such, the *Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.* The Rosebud Sioux Tribe is bound to the United States by virtue of the Treaty of Ft. Laramie of 1851 and the Ft. Laramie Treaty of 1868 which creates a government to government relationship as parties under the Supremacy clause of the Constitution and has standing in jurisprudence.



As such, the FCC has and is creating rule making that is contrary to the unique relationship between the Rosebud Sioux Tribe and other Tribes having interest in homeland cultural landscapes and properties. In suggesting that Tribes having such interest in their cultural patrimony and history and should be excluded from the Section 106 process components as codified is a ludicrous assumption of objectionable authority. In addition, compensation for services rendered (record searches of locations, review of historical and oral histories, review of proposed location impacts) to the FCC TCNS notifications from industry proponents is costly to Tribes.

As proposed within your *Report* and what will potentially become rule made policy, we of the Rosebud Sioux Tribe will exercise our legal right which will include calling for consultation with our Tribal Council on every proposed project as designed on locations within our ten (10) state area of interest. Additionally, we will under Section 106, be requiring physically traveling to locations scheduled for proposed infrastructure projects to assess and identify impacts to cultural properties.

Thank you for your time and consideration of this letter.

With Regards,

A handwritten signature in black ink, appearing to read "William Kindle". The signature is fluid and cursive, with the first name "William" being more prominent than the last name "Kindle".

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