

**Written Statement of  
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United South and Eastern Tribes, Inc.  
Before the  
Senate Committee on Indian Affairs  
and the  
Communications Subcommittee of the Senate Committee  
On Commerce, Science & Transportation  
Regarding Telecom Carriers, Tribal Governments, and the  
Siting of Communications Towers**

**May 14, 2002**

**I. INTRODUCTION**

Thank you, Mr. Chairman and members of the Senate Committee on Indian Affairs and the Communications Subcommittee of the Senate Committee on Commerce, Science and Transportation for this opportunity to testify regarding telecom carriers, tribal governments and the siting of communication towers. My name is William Day. I am Chairman of the Culture and Heritage Committee of the United South and Eastern Tribes, Inc., an inter-tribal organization consisting of 24 tribes from Maine to Texas. I am also the Tribal Historic Preservation Officer for the Poarch Creek Indians and the Jena Choctaw, as well as the Native American Affairs coordinator for the Louisiana, Mississippi and Oklahoma National Guard. I was deeply involved in the development of the current regulations for the National Historic Preservation Act, as well as the Army Alternative Procedures for Section 106, the tribal consultation process.

I would like to address my comments specifically to the failure of the FCC to comply with Federal law when it comes to consulting with tribal governments before cell towers are constructed, the questionable legality of the FCC's purported delegation of its tribal governmental consultation obligations to private entities (the cell tower companies), and the appropriateness of tribe's charging fees of cell tower companies when those companies seek unique tribal expertise in evaluating tower sites in order to comply with a host of laws including the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA).

This has been an area of great frustration for Indian tribes and for tribal historic preservation officers. Despite federally mandated consultation requirements, literally tens of thousands of cell towers have been constructed across the United States with virtually no effort by the FCC to consult with tribes. A number of these towers have had an adverse impact on sites of religious and cultural importance to Tribes. In a belated attempt to make up for past errors, the FCC has stated that it has delegated its consultation obligations to the cell tower companies, who are now sending letters to tribes

demanding information, some of it very sensitive in nature, and asserting that if the information is not provided within a certain timeframe, usually 10 to 30 days, as one typical letter to the Chitimacha Tribe of Louisiana put it, "[w]e will presume that a lack of response from the Chitimacha Tribe of Louisiana to this letter will indicate that the Chitimacha Tribe of Louisiana has concluded that the particular project is not likely to affect sacred tribal resources." In the last year, many tribes have received hundreds, and even thousands of these letters. To add insult to injury, the letters frequently refer to the tribes as "organizations" or "groups" demonstrating disrespect for tribal sovereignty, ignorance of the status of tribes and their unique legal rights, and generally conveying an impression that these companies do not care about tribal views.

Despite the onerous workload involved in responding to these letters, the cell tower companies, which stand to make great profits from these towers, have with few exceptions, been unwilling to pay fees to cover tribal costs. These exceptions are worth noting, as they demonstrate that it is both possible and practical to establish a process involving tribes and cell tower companies which addresses tribal concerns, meets the economic needs of the cell tower companies, and preserve the consultation obligation of the FCC. For example, the Seminole Tribe of Florida has developed a professional relationship with a number of cell tower companies whereby for appropriate fees, the Seminole Tribe is able to respond in a timely manner to the requests of those companies. The process works smoothly in great part because the companies know, in advance, exactly what kind of information the Tribe needs to be able to respond. Similarly, the Narragansett Tribe has worked out an effective process with cell tower companies in Rhode Island, but has met with opposition from cell tower companies in Massachusetts and Connecticut. The success stories are the exception. By and large, cell tower companies need tribal expertise to properly evaluate commercial cell tower sites, but have refused to pay for that expertise. The FCC has an independent obligation to consult with tribes, but has refused to enter into consultation, pawning off that responsibility to the cell tower companies. Meanwhile the tribes, who are generally financially strapped, fear the continuing loss, damage or destruction of tribal cultural properties as communications towers proliferate.<sup>1</sup>

In an effort to work with the communications industry, the United South and Eastern Tribes reached out last year to industry trade organizations. With one exception, the Personal Communications Industry Association (PCIA), USET was rebuffed. At considerable expense, USET entered into detailed negotiations with PCIA over establishing a process for handling this issue. From the tribal perspective, we worked hard to find pragmatic solutions, while still assuring respect for tribal sovereignty and maintaining the FCC's ultimate consultation responsibility. Based on the negotiations, USET developed and sent to PCIA a detailed proposal for establishing a set of protocols, which I have

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<sup>1</sup> One of the cruel ironies of this situation is that cell tower companies and many tribes tend to value the same place: high points in the landscape.

<sup>2</sup> Attachment A: "Protocols Governing the Relationship between Federal Recognized Indian Tribes and

attached.<sup>2</sup> We waited many months for a response, and then were told that PCIA had no further interest in these negotiations.<sup>3</sup>

The letter and spirit of such laws as the National Historic Preservation Act have been ignored, and continue to be ignored. The agency principally responsible for this state of affairs is the Federal Communications Commission. Although the FCC has made a few timid efforts in the last year to address these issues I, for one, see little actual progress. As an example, I have attached to my testimony an email I received from the Tribal Historic Preservation Officer for the Mississippi Band of Choctaw Indians, Ken Carleton. In his email he noted that the Mississippi Band had received "a minimum of about 400-500 requests" from cell tower companies, many providing virtually no information on the location of the sites or maps, but all with at least a check off saying that there are no sites of religious or cultural importance to the tribe to make it easy to "rubber stamp their requests!" See Attachment C. Mr. Carleton's email goes on to describe in some detail his experience with an FCC-sponsored Telecommunications Working Group in which he responded to a Public Notice issued by the FCC for tribal input, a notice which was never sent to the tribes to the best of my knowledge despite the fact that we have complained repeatedly to the FCC in the last year about its lack of contact and consultation with tribes. Mr. Carleton describes the lack of regard for his views on the Programmatic Agreement that was under discussion (by the time he received a draft copy it was already draft number #9 or #10). He has since learned that the draft agreement will likely be submitted to the Advisory Council for Historic Preservation for approval at its June 2002 Meeting, despite the fact that there has been virtually no tribal input. This level of disregard for tribal views is, unfortunately, all too common.<sup>4</sup> It is also a violation of federal law, the trust responsibility, and the government-to-government relationship between the United States and Indian tribes.

The FCC has consistently disregarded and denigrated Tribal views. Last year, the FCC advocated, and the Advisory Council on Historic Preservation adopted an antenna co-location agreement for existing cell towers with little regard for tribal views. Notably, former FCC Commissioner Tristani was quoted in the March 19, 2001 issue of *Communications Daily* as expressing concern that the agreement fell short of the FCC's obligation to facilitate tribal consultation.

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Wireless Communication Tower Manufacturers in the Review of Cell Tower and Tenant Array Siting," Draft No. 4, August 9, 2001.

<sup>3</sup> In marked contrast to USET's experience with the communications industry, I have personally been involved in a number of successful negotiations regarding consultation with tribes with the Louisiana National Guard (see Attachment B), the development of a Memorandum of Agreement between the Poarch Creek Indians and the Alabama National Resource Conservation Service (which is serving as a model for other NRCS's), and the establishment of a Keepsake Heritage Cemetery at Camp Beauregard for internment of American Indian remains.

<sup>4</sup> See discussion at Section III, below.

She stated that "[t]he overwhelming majority [of tribal comments] told us our approach is not working. This response is prima facie evidence that our understanding of tribal consultation is misguided." The Tribes could not have said it better themselves.

As sovereign nations, Tribes have an inherent right and responsibility to protect and promote the welfare of their people, which includes the right to protect their cultural and religious properties and the right to be treated with respect by Federal agencies. Federal law acknowledges these rights, but Federal agencies have been reluctant to comply.

## **II. PRINCIPAL ISSUES OF CONCERN**

### **A. The Federal Communications Commission (FCC) has violated the tribal consultation requirements of the National Historic Preservation Act, particularly when it comes to the licensing and siting of communications towers.**

The National Historic Preservation Act (NHPA) provides protection for "districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering, and culture." *16 U.S.C. Section 440(f)*. The NHPA does this by requiring federal agencies engaged in a "federal undertaking" to "take into account the effect" the undertaking may have on historic properties "included", or "eligible for inclusion" in the National Register of Historic Places. *Id.* The NHPA is implemented through a complex regulatory scheme (the Section 106 process), a consultation process through which federal agencies collect information concerning a particular site's eligibility for the National Register, potential adverse effects the undertaking may have on the site, and ways to mitigate adverse effects. *See 34 C.F.R. Part 800*.

The NHPA has always required consultation with Tribes, but in 1992 it was specifically amended to clarify and mandate such consultation. The 1992 amendments state that federal agencies "shall consult with any Indian tribe and Native Hawaiian organization that attaches religious or cultural significance" to properties that might be affected by a federal undertaking. *16 U.S.C. Section 470a(d)(6)(B)* (emphasis added). The FCC licensing process for cell tower antenna arrays is a federal undertaking, but the FCC has consistently failed to consult with Tribes in this process.

The NHPA tribal consultation requirement applies broadly to traditional religious and cultural properties of Native Americans and Native Hawaiians, and makes no distinction with respect to tribal religious or cultural properties located on or off tribal lands. The law does not provide for delegation of this responsibility to private entities, such as cell tower companies.

### **B. The FCC is also in violation of general principles of Federal Indian law which recognize tribal sovereignty, place tribal-US relations in a government-to-government framework, and set forth a Federal trust responsibility to American Indian tribes that applies to all Federal**

**departments and agencies.**

These general principles are rooted in the U.S. Constitution (Art. I, Section 8), Federal case law, Federal statutes (including the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, and the Archaeological Resources Protection Act), Executive Orders (including Executive Order 13007—Indian Sacred Sites, and Executive Order 13175—Consultation and Coordination with Indian Tribal Governments), regulations, and case law, as well as in the policy statement of the Advisory Council on Historic Preservation entitled *The Council's Relationship with Indian Tribes*.

**(1) Federal Statutory Consultation Obligations with Indian Tribes on Religious Matters.** Congressional Indian policy with respect to Indian religious matters is set forth in the American Indian Religious Freedom Act (AIRFA):<sup>5</sup>

"Protection and preservation of traditional religions of Native Americans

Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

42 U.S.C. Section 1996. AIRFA also requires federal agencies to consult with Native American traditional religious leaders in order to evaluate existing policies and procedures and make changes necessary to preserve Native American cultural practices. Act of Aug. 11, 1978, P.L. 95-341, Section 2. 92 Stat. 470.

There are several other statutes where Congress has set forth a policy of protecting traditional Indian religion, such as the Native American Graves Protection and Repatriation Act (NAGPRA),<sup>6</sup> the Archaeological Resources Protection Act (ARPA),<sup>7</sup> and the National Museum of the American Indian Act (20 U.S.C. Sections 80q to 80q-15). The consultation requirements of, and legal rights established by, these statutes are not geographically confined to situations where cultural or religious objects are

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<sup>5</sup> Pub. L. No. 95-341, Section 1, 92 Stat. 469 (1978)(codified at 42 U.S.C. Section 1996 (1988)).

<sup>6</sup> Pub. L. No. 101-601, Section 2, 104 Stat. 3048 (1990)(codified at 25 U.S.C. Sections 3001-13 (Supp. III 1991)).

<sup>7</sup> Pub. L. No. 96-95, Section 2, 93 Stat. 721 (1979)(codified at 16 U.S.C. Sections 470aa-70mm (1988)).

found (or activities occur) solely on tribal lands.

**(2) Executive Action.** There are also several presidential orders which mandate Federal consultation with Indian tribes. Executive Order 13007 (May, 24 1996) (hereafter "Executive Order on Sacred Sites") directs federal agencies to provide access to American Indian sacred sites, to protect the physical integrity of such sites and, where appropriate, to maintain the confidentiality of these sites. This Executive Order on Sacred Sites also incorporates a prior Executive Memorandum issued on April 29, 1994, which directed federal agencies to establish policies and procedures for dealing with Native American Tribal Governments on a "government-to-government basis."

Executive Order 13175 (Consultation and Coordination with Indian Tribes, November 6, 2000) directs Federal officials to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.

**(3) Federal Court Interpretation of Indian-Related Statutes.** The Federal Courts have developed canons of construction that are used to interpret Indian treaties and statutes relating to Indians. The fundamental component of these canons of construction is that treaties and statutes are to be liberally interpreted to accomplish their protective purposes, with any ambiguities to be resolved in the favor of the Indian tribes or individual Indians. See *Alaska Pacific Fisheries Co. V. United States*, 248 U.S. 78, 89 (1918) ("the general rule [is] that statutes passed for the benefit of the dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians"); *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *McClanahan v. Arizona State Tax Com'n*, 411 U.S. 164 (1973). In this context, the National Historic Preservation Act should be read broadly to support and protect tribal interests.

There has been an effort from some quarters to cloud the consultation right by asserting that the tribal right to consultation is not as strong off tribal lands as on tribal lands. This argument ignores the fact that Congress, in providing in the National Historic Preservation Act that federal agencies "shall consult" with Indian tribes regarding their properties of cultural and historic importance, created no distinction between off and on-reservation sites. It also ignores the numerous instances where Congress has acted to provide tribes with jurisdictional and other rights off tribal lands in conformity with the "overriding duty of [the] Federal government to deal fairly with Indians wherever located . . . ." *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). One quirk in this legal framework is that the authority of the Tribal Historic Preservation Officer is a creature of federal statute (101(d)(2)(3). The federally created Tribal Historic Preservation Officer arguably only has jurisdiction over tribal lands. Nonetheless, this limitation does not affect the Tribes' right to be consulted with regard to tribal cultural and religious properties located off of tribal lands. A tribe may designate the federally created Tribal Historic Preservation Officer as the Tribe's representative for the off-reservation sites.

### **C. The FCC has unlawfully attempted to delegate its consultation obligations to the cell**

**tower industry.**

The FCC's consultation obligation is an "inherent Federal" or "inherently Governmental" function that is non-delegable. FCC efforts to delegate this function to the cell tower companies violate the principle of separation of powers founded in the Constitution. The U.S. Constitution provides that "[t]he executive power shall be vested in a President of the United States of America," and gives the President the responsibility to "take care that the Laws be faithfully executed." U.S. Const., art. II, sec. 1, cl. 1; art. II, sec. 3. The President delegates this power to Federal officers ("Officers of the United States") pursuant to the Appointments Clause. U.S. Const., art. II, sec. 2, cl. 2.

The Federal courts have identified a "horizontal" component of the Appointments Clause that assures that executive power is not exercised by individuals appointed by, or subservient to, another branch of government. See *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Bowsher v. Synar*, 478 U.S. 714. The Courts have also identified a "vertical" component of the Appointments Clause that protects against the delegation of Federal authority to private entities outside the constitutional framework. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

The Executive Branch has further interpreted the "Vertical" component of the Appointments Clause in OMB Circular A-76 which states that certain functions are "inherently Governmental in

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<sup>8</sup> OMB Circular A-76

"5. Policy. It is the policy of the United States Government to:

...

b. Retain Governmental Functions In-House. Certain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees.

...

6. Definitions. For purposes of this Circular:

e. An inherently Governmental function is a function which is so intimately related to the public interest as to mandate performance by Government employees. Consistent with the definitions provided in the Federal Activities Inventory Reform Act of 1998 and OFPP Policy Letter 92-1, these functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Services or products in support of inherently Governmental functions, such as those listed in Attachment A, are commercial activities and are normally subject to this Circular. Inherently Governmental functions normally fall into two categories:

nature" and therefore can only be performed by Federal employees.<sup>8</sup> The circular goes on to specifically identify as governmental functions "activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government." The circular describes specific examples of the "act of governing," including "management of Government programs requiring value judgments", the "regulation of the use of space, oceans, navigable rivers and other natural resources", and the "conduct of foreign relations." Under each of these bases, as well as the unique Federal trust responsibility to Indian tribes, the FCC's obligation to consult with federally recognized sovereign Indian tribes with regard to federal undertakings that could affect tribal cultural and religious properties is a non-delegable "inherent Governmental" function.

Although the Advisory Council on Historic Preservation has promulgated regulations that purport to allow limited delegation by an agency to private entities "to initiate consultation" with tribes, such delegation, on its face, violates the "vertical" component of the separation of powers doctrine. Moreover, even these regulations require notification to Tribal Historic Preservation Officers of such a delegation, which the FCC has not done. Contradictorily, and in an attempt to have their cake and eat it too, the ACHP regulatory process also provides that agencies that do delegate the initiation of consultation "remain responsible for their government-to-government relationship with Indian tribes." It is not possible to delegate this consultation obligation to private companies and maintain the government-to-government relationship with a tribe at the same time.

**D. The cell tower companies seek information from tribes necessary to carryout National Historic Preservation Act, NEPA and other requirements, but have generally been unwilling to pay for that expertise.**

Tribes have a consultation right, but lack the resources to exercise it. The Federal government has an obligation to protect this right, but has failed to do so. The cell tower companies, in order to complete their evaluation of potential cell tower sites, often need the unique expertise of tribal experts to

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(1) The act of governing; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs."

evaluate the sites but are generally reluctant to provide compensation which would be standard for other professionals. In the last year, tribes have been buried in hundreds and even thousands of letters from cell tower companies demanding a response, usually within 10 to 30 days. Few, if any tribes, can afford to put thousands of staff hours into responding to these letters which only benefit the cell tower companies' commercial interests. If a tribe does not respond, or seeks compensation for services rendered to help the cell tower companies, the cell tower companies move ahead without any regard to tribal interests or rights.

### **III. COURT DECISIONS UNDER THE NATIONAL HISTORIC PRESERVATION ACT.**

A review of federal court decisions brought by tribes under Section 106 of the NHPA demonstrates a pattern of non-compliance and an unwillingness to truly seek tribal input by federal agencies. *See e.g., Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995); *Attakai v. United States*, 746 F. Supp. 1395 (D.Ariz. 1990); *Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425 (C.D. Cal. 1985). These same cases also demonstrate how important the NHPA is to tribes to provide some modicum of protection to their sacred and cultural properties, particularly those properties located off tribal lands.

In *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995),<sup>9</sup> the United States Court of Appeals for the Tenth Circuit held that the U.S. Forest Service violated section 106 of NHPA by failing to properly evaluate or reasonably pursue information provided by various Pueblos regarding the Las Huertas Canyon as a traditional cultural property eligible for listing in the National Register. The Forest Service had sent letters to various local Pueblos requesting information regarding the existence and location of traditional cultural properties in the Las Huertas Canyon, and had attended various tribal council meetings to request the same information. General information was made available to the Forest Service indicating the existence of sacred ceremonial sites, but specific information was not provided largely because secrecy is often a vital aspect of these ceremonies.

The Forest Service took the position that it had made the efforts required by the regulations to identify historic properties in the canyon and that none existed. The SHPO

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<sup>9</sup> Although this case was decided by the Court of Appeals in 1995, the district court case was brought earlier, and the facts complained of occurred prior to 1992 when Congress amended the NHPA to provide tribes with consultation rights (see discussion below).

<sup>10</sup> After the Pueblo of Sandia filed suit in federal court, the SHPO withdrew its concurrence in the Forest Service's "no adverse effects determination". There is evidence that

concluded in this determination and a final agency decision was rendered.<sup>10</sup> The Pueblo of Sandia brought suit in federal district court, alleging, among other things, that the Forest Service failed to comply with section 106 of NHPA by failing to properly evaluate the canyon as a "traditional cultural property" eligible for listing on the National Register. The district court noted that the Forest Service "does not appear to have taken the requirements of [the NHPA] very seriously." 50 F. 3d at 858, *quoting Memorandum Opinion and Order* (April 30, 1993) at 12. Nevertheless the district court ruled in favor of the Forest Service, finding that it had made the required "good faith effort" to identify historic properties in the canyon.

The United States Court of Appeals for the Tenth Circuit reversed the district court, finding that the Forest Service violated its obligation under Section 106 by failing to adequately pursue information it had in its possession that the canyon was used by the Pueblos for religious and ceremonial purposes and contained sacred sites: "[W]e hold that the agency did not reasonably pursue the information necessary to evaluate the canyon's eligibility for inclusion in the National Register." *Pueblo of Sandia*, 50 F.3d at 861. The Tenth Circuit also found that the Forest Service failed to act in good faith by withholding certain information, and by ignoring various of the section 106 procedural requirements (*e.g.*, not providing documentation to the SHPO upon concluding that no historic properties existed until after litigation was filed by the Sandia Pueblo).

Similarly, in *Attakai v. United States*, 746 F. Supp. 1395 (D.Ariz. 1990), the United States District Court for the District of Arizona found that the Bureau of Indian Affairs (BIA) and the Department of Interior failed to adequately consider the effects of a federal undertaking on Navajo ceremonial sites located in areas no longer a part of the Navajo reservation. (The sites were located on what is now Hopi reservation land.) The district court issued a preliminary injunction enjoining further governmental activity as a violation of Section 106 of NHPA. The court held that the BIA violated Section 106 consultation requirements because it failed to consult with the Navajos. (The BIA had consulted with the Hopi Tribe but not the Navajos, apparently because the sites were not located on Navajo land.) The court emphasized that the Section 106 process depended upon proper consultation since the goal is to gather the necessary information to properly evaluate historic properties. Moreover, "the regulations clearly contemplate participation by Indian tribes regarding properties beyond their own reservations."

The *Attakai* court also held that the BIA violated Section 106 by failing to consult with the Advisory Council and the SHPO during the preliminary determination as to whether historic properties existed which were eligible for protection under Section 106. The BIA had

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the Forest Service withheld certain information from the SHPO.

conducted its own survey to locate historic properties and a BIA archeologist had recommended certain steps intended to avoid adverse effects on the properties located. Significantly, BIA officials testified that it was standard practice for the BIA Phoenix Office to make eligibility and adverse effects determinations under Section 106 prior to consulting with the SHPO. The court emphasized the importance of the initial identification stage of the Section 106 process. Here, however, the BIA ignored the procedures, acting "contrary to the letter and spirit of the regulations." 746 F. Supp. at 1408. The court concluded that the BIA "did not adequately take into account the effect of the undertakings on historic properties" in violation of the NHPA.

The Army Corps of Engineers (Corps) was found to have flouted Section 106 procedures in *Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425 (C.D. Cal. 1985). In *Marsh*, the district court granted the plaintiff Colorado River Indian Tribes (Tribes) an injunction against the Corps' issuance of a permit for construction along the western shore of the Colorado River in California, on land abutting property owned by the United States, administered by the Bureau of Land Management (BLM), and located near the Colorado River Indian Reservation. The BLM managed land is an archeological district with significant cultural and archeological sites. The construction involved the placement of riprap along the riverbank to stabilize the bank and establish a boundary line for a housing development.

In conducting surveys to determine if eligible historic or cultural properties existed, the Corps relied on proposed (but not yet promulgated) regulations it had adopted but which had not been approved by the Advisory Council as counterpart regulations for Section 106. These proposed regulations imposed different responsibilities on the agency depending on whether a site was listed on the National Register and those not yet listed, but potentially eligible. By doing this, the Corps was able to conduct archeological surveys in a more limited area than the section 106 regulations require and the Corp therefore did not survey the required areas for potentially eligible historic and cultural sites. The Court emphasized that possible sites of archeological and cultural significance had subsequently been located on lands nearby the proposed development that should have been surveyed if the proper regulations had been adhered to.

In short, the court in *Marsh* concluded that the Corps "breached its responsibilities under NHPA", and violated Section 106 by failing to properly evaluate ceremonial sites of the Colorado River Indian Tribes as eligible properties entitled to protection under Section 106. 605 F. Supp. at 1438.

All of the above cases were brought by tribes who claimed an interest in traditional cultural sites located off tribal lands. They were all brought prior to the time that Congress amended the NHPA to statutorily impose an affirmative obligation on federal agencies engaged in the Section 106 consultation process to "consult" with "any Indian tribe or Native American

Organization"

#### **IV. CONCLUSION**

The FCC has been unwilling to live up to its consultation obligations both under the National Historic Preservation Act and the Trust Responsibility to Tribes. Instead, it has sought to delegate those obligations to the cell tower companies, who have little understanding, and generally even less regard for, tribal sovereignty. The cell tower companies have sought the unique expertise of tribes in the evaluation of sites for commercial cell towers, but have been unwilling generally to cover the costs associated with using that expertise. The result is an untenable situation where tribal rights are trampled and tribal cultural and religious properties are endangered. I urge the Committee to examine this situation closely and ensure the protection of tribal rights and properties.

Thank you for this opportunity to testify. Your attention to this matter is very important, and greatly appreciated by the United South and Eastern Tribes.