

# 2019 Environmental Regulatory Panel



Presented By:



# Meet the Panel



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# Agenda

- Review of FCC Second Report and Order (Effective 7/2/18)
  - What was supposed to happen
    - Small Cell Deregulation
    - Changes to Section 106 Tribal Consultation Process & Rules
    - Streamlined FCC Environmental Assessment Processing
  - What actually happened
- New Challenges
- Current Issues Affecting NEPA Timelines in the Southeast Region
- Suggested Responses to Specific Challenges

# What Was Supposed to Happen

- Small Cell Deregulation
- FCC Environmental Assessments
  - 60-day review
  - Elimination of EAs for floodplains (note: BFE)
- Tribal Consultation Process
  - Streamlined timeline; consistent shot clock
  - Limitation of information required for tribal review
  - Elimination of “up-front” tribal review fees

# What Actually Happened In Industry's Favor

- Applicants making use of small cell deregulation; designing with exclusions in mind to avoid NEPA and NHPA review altogether
- FCC EA timelines shortened!
- FCC EA review less clogged due to elimination of requirement for floodplain EAs
- “Simplified” tribal consultation with standardized information for tribal review

# New Challenges

## Tribal challenges:

- Tribal nations unhappy with elimination of up-front tribal review fees, continue to request fees and invoice applicants and consultants for review fees
- Tribal nations resisting streamlined processes: still requesting SHPO responses, site forms, expanded documents, studies, and monitoring to justify fees
- Tribal nations issuing adverse effect findings (inconsistent with the NHPA framework) and/or requesting government-to-government consultation without identifying historic properties being affected
- Lawsuit has been filed against the Commission; tribes threatening stakeholders with litigation
- Strain on Tribal-Consultant working relationship

# New Challenges

## FCC Challenges:

- FCC has yet to implement simple IT solutions for applicant referrals resulting in the often ineffective and unsustainable process that has come to be called the “Manual Referral”
- FCC missing tribes in weekly “Manual Referral” process, leading to timeline delays
- No shot-clock for sites in dispute resolution with the FCC – can stay in consultation indefinitely
- Continued delays with FCC review of MOAs (no relief from EA rule change)
- Government shutdown was not helpful during transition – impacted: FCC, FAA, USFWS, USACE, etc.
- FCC lacks bandwidth to address new challenges brought on by the rule changes

# Specific Issues Affecting NEPA Timelines SE Region

- Some tribal nations are trying to enforce standards that exceed federal requirements by:
  - Objecting to the qualifications of archaeologists who meet the federal standard and whose work has been approved by the same tribes on hundreds of prior occasions
  - Objecting to the number and spacing of archaeological shovel tests
  - Objecting to the prescribed minimum federal standard document set for NHPA review
- Some Tribal Nations issuing Adverse Effect without identifying any historic property that may be affected. Technically not allowed

# Specific Issues Affecting NEPA Timelines SE Region

- When the applicant or consultant asks for identification of Historic Properties, the tribe immediately requests government-to-government consultation. FCC not equipped to resolve
- Generally where historic properties that may be affected are identified, these are often historic trails. In the past, we have sited at similar distances from known trails without any issue. Now, poorly documented trails/disputed alignments are an issue

# Specific Issues Affecting NEPA Timelines SE Region

- FCC has not implemented seemingly easy IT fixes to its online referral system, applicants/consultants must request “manual referral”
- Manual referral has applicant/consultant making a separate list of tribes that have not responded to request for comment and emailing that list to the FCC. FCC only accepts manual referrals up to COB on Tuesdays, and often omits one or more tribe in error. Missing one clearance delays in same manner as if it hadn’t been done at all and electronic referrals end up on a different schedule
- Some tribes still sending consultants/applicants invoice
- UKB v. FCC Oral Arguments heard on 3/15/2019

# Suggested Applicant Response to New Challenges

- We encourage Applicants to be assertive and adhere strictly to the new requirements and have your consultants hold tribal nations and FCC to the requirements of the new rules
- Be strategic. The Applicant, with the guidance of the consultant should judge the circumstances and determine whether agreeing to a tribal request outside the rules is in its best interest. Warning: payment of fees may produce a binary outcome
- We have successfully resolved a number of adverse effects by fervently insisting that a request or determination does not conform to the new rules
- We have completed special studies/provided additional information when tribes have identified historic properties and have resolved a number of issues by pointing out that the identified historic properties could not possibly be impacted by the infrastructure in question because these were not visible or outside the area of potential effect

# Questions?



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