

# TRIBAL CONSULTATION & FEES FOR FCC UNDERTAKINGS



On March 7, 2005, the Federal Communication Commission's (FCC) Nationwide Programmatic Agreement (NPA) governing Section 106 (SHPO) review for wireless telecommunications facilities became effective. Procedures for consulting with Indian tribes and Native Hawaiian Organization (NHOs) were specifically addressed in the NPA.

## WHAT CONSTITUTES TRIBAL CONSULTATION?

The NPA dictates that applicants must make reasonable and good faith efforts to identify any Indian tribe or NHO that may attach religious significance to Historic Properties that may be affected by an undertaking. Identification of Tribes may be accomplished through contact with relevant SHPO/THPOs, Tribes, NHOs, state agencies, the U.S. Bureau of Indian Affairs (BIA), the Tribal Construction Notification System (TCNS), and other available sources.

## WHY TCNS?

Due to the special government-to-government relationship between the United States and Tribes/NHOs (and the FCC's designation as Lead Federal Agency for FCC Undertakings), any initial contact between an Applicant and a Tribe or NHO, where no prior relationship has been established, must be made through the FCC. The FCC TCNS method is generally viewed as being the most efficient and foolproof method of identifying tribes and NHOs. In addition, it satisfies the requirement that initial tribal consultation be made through the FCC.

## THE FCC AS THE APPLICANT'S ARBITER

Within the TCNS System, Tribes and NHOs set their geographic preferences and the applicant is obligated to obtain a concurrence or statement of no further interest from each interested Tribe. Initially, this led to delays because some tribes were unresponsive and there was no way for Applicants to proceed. To remedy this situation, The FCC issued its Declaratory Ruling of October 6, 2005. This ruling allows Applicants, after making at least two good faith efforts over a 40 day period without any response from the tribe or NHO, to request that the FCC contact unresponsive Tribes or NHOs

on a government-to-government basis. If no response is received within 20 days of the FCC contact, the FCC deems that the Tribe or NHO has no interest in or objection to the Undertaking. Due to its special government-to-government relationship with the Tribes and NHOs, only the FCC can make this determination/clearance.

## TRIBAL FEES

At the outset of the 2005 NPA process, a few Tribes charged fees. However, recently many additional Tribes have added the payment of a fee as a contingency of their review and approval. Some tribal fees are as high as \$7,000-\$10,000 per site. Generally, we have seen a dramatic increase in tribal fees over the past two years. We expect the trend to continue and the number of tribes requesting review fees to rise.

## MUST THE APPLICANT PAY TRIBAL FEES?

The Applicant may dispute a review fee. However, special procedures must be followed. It is not legally possible for an Applicant to move forward with an FCC undertaking unless all NEPA categories meet the categorical exclusion. Therefore, if any issues are unresolved, the FCC must be involved.

Due to the unique government-to-government relationship that the Tribes possess, it is not possible to contest a tribal fee without involving the FCC. ECA does not know of any instances where the FCC

has granted requests to proceed without paying tribal fees. Further, there is presently no time limit to the government-to-government consultation that would resolve a dispute over fees. Such a dispute would lead to costly project delays and would also likely result in an FCC finding that the fees should be paid.

*ECA has completed thousands of environmental and cultural resource projects at wireless telecommunications facilities. If you have any questions regarding FCC NEPA compliance or Tribal Consultation, please contact Marvin Webster or Dina Bazzill of ECA: [marvin.webster@eca-usa.com](mailto:marvin.webster@eca-usa.com), (770) 667-2040 x101, [dina.bazzill@eca-usa.com](mailto:dina.bazzill@eca-usa.com), (770) 667-2040 x111.*

Many Tribes have added the payment of a fee as a contingency of approval.



There is no time limit to resolve a dispute over fees.

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