



Miami Tribe of Oklahoma

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April 30, 2025

Federal Communications Commission
45 L Street NE
Washington, DC 20554

RE: CTIA Petition for Rulemaking, RM-12003

Via the Electronic Comment Filing System

Dear Commissioners,

The Tribal Historic Preservation Office (“THPO”) of the Miami Tribe of Oklahoma (the “Tribe”) opposes the CTIA’s Petition for Rulemaking to the Federal Communications Commission (“FCC”) requesting amendments to the FCC rules implementing the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”). These statutes and rules provide crucial processes for the fulfillment of the United States’ trust responsibility to consult with the Tribe on projects affecting its aboriginal homelands.

The Petition fails to offer a factual or legal basis to abrogate that responsibility. Instead, the Petition argues that amendments to NEPA and the repeal of Council on Environmental Quality (“CEQ”) rules warrant revisiting the FCC’s NEPA and NHPA regulations. But there is no inconsistency between the current FCC rules and these governing authorities, and the rulemaking the Petition proposes would in fact violate those governing statutes.

Nor would this proposed rulemaking have the practical effect that the Petition claims. As the experience of this THPO demonstrates, in the vast majority of cases, the consultation process creates minimal delay while ensuring that important cultural resources are identified. Without this consultation process, cultural and historic resources would be unwittingly destroyed. The FCC must reject the Petitioner’s invitation to abrogate the trust responsibility and instead encourage productive partnerships that recognize the importance of the Tribe’s government-to-government relationship with the United States.

Background

The Miami Tribe’s THPO is responsible for the protection and preservation of culturally significant properties of concern to Myaamiaki (Miami People). Because the United States forcibly

removed the Miami Tribe to Oklahoma during the 19th century, the Tribe's THPO is located in Indiana and retains interest in in aboriginal homelands across multiple states.¹

The THPO prides itself in providing effective and efficient input on historic and cultural resources that may be affected by a project. To date, the Tribe has received over 43,600 consultation requests through the FCC's TCNS system going back to 2004. So far, the THPO has received 1,468 consultation requests this fiscal year within the Tribe's area of interest, shown in Figure 1.

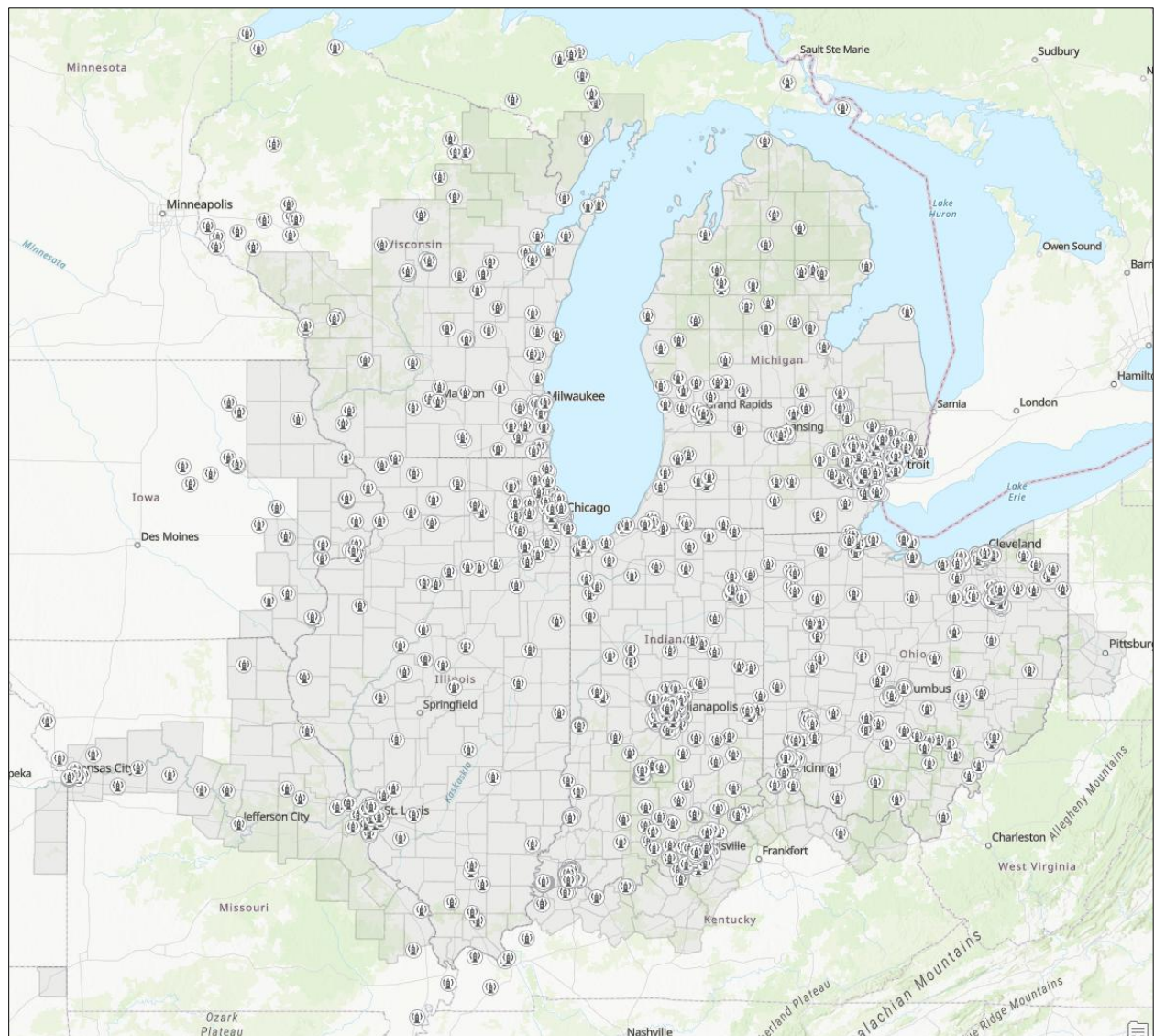


Figure 1. Map of current Fiscal Year 2025 TCNS consultation requests overlaid with the Tribe's area of interest (gray).

Despite this large volume of requests and the geographic scope of the Tribe's area of interest, the THPO strives to respond in a reasonable time frame. This February, the THPO

¹ See *Miami Tribe of Oklahoma v. United States*, 281 F. 2d 202, 205 (Court of Claims 1960) (discussing removal).

streamlined its review process, enabling an average response time of less than twenty days (Figure 2).

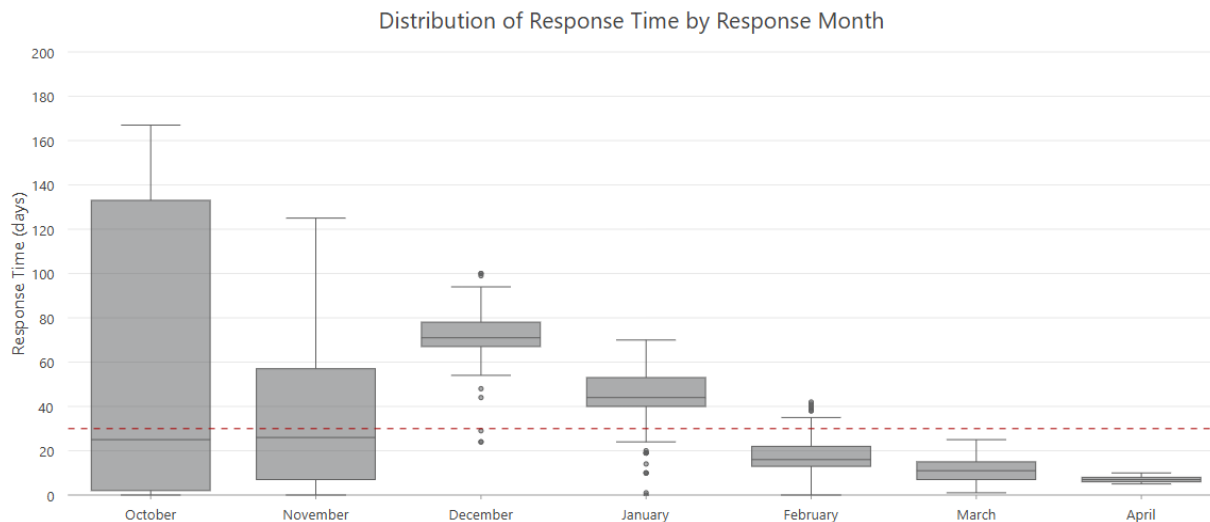


Figure 2. The current fiscal year 2025 distribution of TCNS response times highlighting efficiency improvements made after February.

Project review under NEPA and NHPA is a crucial part of the process by which the federal government fulfills its trust responsibility to consult on these projects. Yet, as this data shows, effective consultation can often be accomplished with minimal burden to the project proposer. In reality, the primary burden falls on the THPO that reviews such requests. Because NHPA regulations provide for the process to continue to the next steps if the THPO does not respond within thirty days,² THPOs have strong incentive to do so.

Comments on the Petition

I. The Petition fails to offer factual support for a rulemaking.

A petition for rulemaking must “set forth the text or substance of the proposed rule, amendment, or rule to be repealed, together with all facts, views, arguments and data deemed to support the action requested, and shall indicate how the interests of petitioner will be affected.”³

The instant Petition falls short in multiple respects. Rather than providing the required “facts” and “data,” the Petition makes sweeping statements about the nature of the licensing process and cell tower deployments without citing applicable rules, authority, or sources of data.⁴

The characterizations in the Petition are not only unsupported—they are inaccurate. When confronted with a factual record about small cell tower deployment, the D.C. Circuit soundly

² 36 C.F.R. § 800.3(c)(4).

³ 47 C.F.R. § 1.401(c).

⁴ See Petition, at 16, 18-19 (discussing mixed-use deployments).

rejected the argument that geographic area licenses have a negligible impact on deployment.⁵ Although geographic area “licenses authorize using spectrum rather than building wireless facilities, . . . they necessarily contemplate facility construction.”⁶ As explained below, the court’s factual analysis undermines the Petition’s legal arguments that the geographic area license are not major federal actions (under NEPA) or undertakings (under the NHPA).

II. The proposed rulemaking is not justified under applicable laws.

The FCC may grant a rulemaking petition if “the petition discloses sufficient reasons in support of the action requested to justify the institution of a rulemaking proceeding.”⁷ The Petition fails to show that the time and resources spent on this rulemaking would be justified by a change in the law or practical realities. To the contrary, the proposed rulemaking would be in violation of governing statutes.

A. The authorities cited have not changed the legal landscape in a way that affects the FCC’s current NEPA rules.

The Petition primarily requests amendments to FCC rules implementing NEPA. The Petition asks the FCC to promulgate rules exempting certain licenses from NEPA review by determining that the granting of such licenses are not “major Federal actions” and adopt other miscellaneous amendments.⁸ The Petition cites the repeal of the CEQ NEPA rules, the executive order directing CEQ to issue “guidance” to agencies on how to move forward absent those rules, and a CEQ memorandum issuing such guidance.⁹

The statutes, rules, caselaw, and guidance cited in the Petition fail to provide a basis to commence the requested rulemaking. The current rules are already consistent with NEPA as amended, are not based on the former CEQ rules or executive order that directed promulgation of those rules, and are unaffected by recent executive orders and memoranda.

1. The actions discussed in the Petition are major federal actions under NEPA as amended.

Under NEPA as amended by the Fiscal Responsibility Act, a “major Federal action” is defined as “an action that that the Agency carrying out such action determines is subject to substantial Federal control and responsibility.”¹⁰ The statute excludes an action “with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project.”¹¹

⁵ *United Keetoowah Band of Cherokee Indians v. FCC*, 933 F. 3d 728, 740-41 (2019).

⁶ *Id.* at 736.

⁷ 47 C.F.R. § 1.407.

⁸ Petition, at 4, 18-19, 22.

⁹ *Id.* at 5-6.

¹⁰ 42 U.S.C. § 4336e(10)(A). Notably, the statute sets forth a standard that the action *carried out by the agency* must be “subject to substantial Federal control and responsibility.” *Id.* Thus, by the plain language of the statute, actions that are nondiscretionary or ministerial are not “major Federal actions.” The language of the exclusion, which exempts actions “with *no* or *minimal* Federal involvement,” *id.* § 4336e(10)(B) (emphasis added), reinforces that the phrase “major Federal action” encompasses a wider scope than Petitioners claim.

¹¹ *Id.* § 4336e(10)(B).

The Petition primarily requests promulgation of a rule stating that “wireless facility deployments pursuant to a geographic area license that do not require antenna structure registrations (‘ASR’) (hereinafter ‘geographic area deployments’) are not major federal actions” under NEPA as amended by the Fiscal Responsibility Act.”¹² The Petition argues that issuing a geographic area license does not give the FCC substantial control or responsibility over cell tower deployments.

The Petition incorrectly characterizes the nature of geographic area licenses. Such licenses “necessarily contemplate facility construction.”¹³ As the D.C. Circuit discussed on review of rules governing these licenses:

They have coverage requirements—for instance, one type of geographic area license required licensees to provide service to at least 40% of the population in their geographic service area by June 2013. *See* 47 C.F.R. § 27.14(h). If they fail to meet the coverage requirements, they can be stripped of authority to operate for the license’s full term or serve part of its geographic area, and they “may be subject to enforcement action, including forfeitures.” *Id.* The Commission also exercises continuing authority to inspect radio installations to ascertain their compliance with any and all applicable laws, whether or not the licensee itself constructed those installations. *See* 47 U.S.C. § 303(n); 47 C.F.R. § 1.9020(c)(5).¹⁴

Thus, both the *granting* of a geographic area license and development and operation *pursuant to* such license are subject to substantial FCC control. Even the Petition admits that “geographic area licenses are a legal prerequisite to the provision of licensed wireless service.”¹⁵

The Petition further asks the FCC to promulgate a rule stating that “mixed-use tower or pole deployments that primarily enable the use of spectrum licensed on a geographic area basis, but also will support the use of spectrum under a site-based license as part of the initial deployment” are not major federal actions.¹⁶ The Petition cites no authority or data to support this proposition. Instead, the Petition states in a conclusory fashion: “The Commission does not have ‘substantial’ control and responsibility over such mixed-use deployments where the site-based element is only a smaller component of the broader geographic area deployment.”¹⁷ The Petition does not explain why the “site-based element” could be considered a “small[] component” of a deployment or why it is not outcome-determinative. Consequently, the Petition fails to meet the basic standard for establishing grounds for rulemaking, let alone that these deployments are not subject to NEPA.

¹² Petition, at 4.

¹³ *United Keetoowah Band of Cherokee Indians v. FCC*, 933 F.3d 728, 736 (D.C. Cir. 2019).

¹⁴ *United Keetoowah Band of Cherokee Indians*, 933 F.3d at 736.

¹⁵ Petition, at 16.

¹⁶ *Id.* at 18.

¹⁷ *Id.*

2. None of the other FCC rules discussed in the Petition are inconsistent NEPA as amended.

The Petition requests other miscellaneous amendments that would essentially restate what is already set forth in statute. There is no legal or practical basis to commence a rulemaking process on these grounds.

For example, the Petition argues that 47 C.F.R. § 1308 should be amended to reflect NEPA's amendments to limit the consideration of environmental effects to those that are "reasonably foreseeable" and to foreclose analysis of cumulative impacts.¹⁸ But there is nothing in the current FCC rules that contradicts the "reasonably foreseeable standard," and the current rules do not include any requirements to consider cumulative impacts. Nor does the Petition cite any language that should be amended.

Similarly, there is nothing in the current rules that contradicts NEPA's requirement to consider a "reasonable range of alternatives" that are "technically and economically feasible, and meet the purpose and need of the proposal."¹⁹ There is no reason to open a rulemaking process based on the NEPA amendments cited in the Petition.

3. The executive orders and memoranda cited in the Petition do not provide a basis to amend the current rules.

The Petition then cites the revocation of the CEQ rules and executive order on which they were based.²⁰ But the current FCC rules do not rely on the CEQ rules or the revoked executive order that directed promulgation of the CEQ rules. The Petition cites no authority for the proposition that the FCC's NEPA regulations were implemented pursuant to the now-repealed CEQ regulations.

Nor does Executive Order 14154 change the legal landscape in the way the Petition suggests.²¹ The executive order did not, and cannot, amend NEPA's statutory requirements.²² Rather, the executive order only directs the CEQ to rescind its NEPA regulations (as the courts have determined that CEQ lacks rulemaking authority) and for CEQ to issue "guidance" to agencies on how to move forward in the absence of those rules.²³ The resulting CEQ guidance "encouraged" agencies to use the 2020 CEQ rules as an "initial framework" and to "[i]dentify activities or decisions that are not subject to NEPA at a threshold stage such that no further [environmental] consideration is necessary."²⁴

¹⁸ *Id.* at 23.

¹⁹ *Id.* at 24 (quoting 42 U.S.C. § 4332(2)(C)(iii)).

²⁰ *Id.* at 11.

²¹ *Id.* at 12.

²² *See, e.g., Marin Audubon Society v. FAA*, 121 F.4th 902, 908 (D.C. Cir. 2024) ("CEQ traces its rulemaking authority not to legislation but to an Executive Order of the President. But 'an executive order is not "law" within the meaning of the Constitution.'" (quoting *California v. EPA*, 72 F.4th 308, 318 (2023))).

²³ Exec. Order No. 14154, 90 Fed. Reg. 8353, § 5(b) (Jan. 29, 2025).

²⁴ Petition at 12-13 (quoting CEQ, Memorandum for Heads of Federal Departments and Agencies: Implementation of NEPA, at 4 (Feb. 19, 2025)).

Even if these were binding directives, the FCC already has done exactly what the CEQ guidance purports to require. The current FCC rules identify multiple categorical exclusions to NEPA review.²⁵ Before NEPA was amended and the CEQ rules were repealed, these rules already pushed the boundaries of what could be excluded from NEPA review.²⁶ The NEPA amendments, repeal of CEQ rules, and subsequent guidance do not provide additional bases to add to these already-liberal exclusions.

B. The definition of “undertaking” in the NHPA is unaffected by the NEPA amendments, and the FCC lacks authority to rewrite the language of the statute.

The Petition attempts to bootstrap its faulty NEPA analysis to an entirely different statute—the NHPA—which contains express definitions and requirements that are unaffected by amendments to NEPA.

The purpose of the NHPA review process is to “accommodate historic preservation concerns with the needs of Federal undertakings . . . at the early stages of project planning” so that adverse effects on historic properties can be avoided, minimized, or mitigated.²⁷ Accordingly, the NHPA and its implementing regulations “require[] 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.”²⁸

The Petition argues that an “undertaking” is the same as a “major federal action,” and therefore NHPA review of FCC licenses should be eliminated.²⁹ But the definition of “undertaking” in the NHPA is distinct from the definition of “major Federal action” in NEPA as amended—which post-dates the court decisions cited in the Petition.³⁰ It is presumed that Congress deliberately chooses distinct language for different statutes, and the language of each statute must be given effect.

The NHPA defines “undertaking” as “a project, activity, or program funded in whole *or in part* under the direct *or indirect* jurisdiction of a Federal agency.”³¹ Federal agencies that have “direct or indirect jurisdiction over a proposed Federal or federally *assisted* undertaking” must “take into account the effect of the undertaking on any historic property” before “the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance *of any license*.”³² A geographic area license is plainly an “undertaking” under the NHPA.

²⁵ 47 C.F.R. § 1.1306; *see also* 54 U.S.C. § 302701 (requiring consultation with tribes and assistance to tribes in preserving their historic properties).

²⁶ *See, e.g., Questions And Answers in the FCC NEPA Process*, The Environmental Health Trust, <https://ehtrust.org/question-and-answers-on-the-fcc-nepa-process/> (last visited Apr. 24, 2025) (“The FCC has never done an EIS. It has done one programmatic Environmental Assessment.”); Erica Rosenberg, *Commentary: How the FCC Fails to Follow Environmental Laws and Fails the Public*, Public Employees for Environmental Responsibility (Feb. 20, 2023) <https://peer.org/commentary-fcc-fails-follow-environmental-laws/>.

²⁷ 36 C.F.R. § 800.1(a).

²⁸ *Id.* § 800.2(c)(2)(ii).

²⁹ Petition, at 7.

³⁰ *See id.* at 7 n.20.

³¹ 54 U.S.C. § 300320 (emphasis added); *accord* 54 U.S.C. § 306108; 36 C.F.R. § 800.16(y).

³² 54 U.S.C. § 306108 (emphasis added).

The statute's requirements cannot be erased by regulation or contract. The Petition points to the Programmatic Agreement stating that the FCC "has sole authority to determine what activities undertaken by the [FCC] or its Applicants constitute Undertakings within the meaning of the NHPA."³³ This provision does not—and cannot—trump the statute's definition of "undertaking" to include projects and activities funded "in part" by the FCC or under their "indirect jurisdiction."³⁴ Nor can it erase the directive requiring the FCC to "take into the account the effect" of an undertaking "on any historic property" that is protected by the NHPA.³⁵

In any event, the FCC lacks statutory authority to create such an exemption. Only the Advisory Council on Historic Preservation has statutory authority to promulgate regulations governing the implementation of a federal agency's responsibility to review the impacts of an undertaking on historic property.³⁶ "[A]n agency 'literally has no power to act—including under its regulations—unless and until Congress authorizes it to do so by statute.'³⁷ There is no basis for the FCC to undertake a rulemaking that the statute does not allow.

III. The solution is to ensure that THPOs have the resources to execute their responsibilities efficiently, as the Miami THPO does.

The only facts offered in support of the Petition are general project timeframes.³⁸ The Petition does not acknowledge that there are other processes and factors affecting these timeframes. Regardless, as the track record of the Miami THPO demonstrates, there are multiple ways to achieve efficiencies in the review process. In the majority of cases, these processes do not present an undue burden on the project proponent.

The value achieved from the review process far outweighs that minimal burden. Tribes and THPOs are important partners in both NHPA and NEPA review processes. Without effective consultation, historic resources can be unwittingly lost forever.³⁹ This is particularly true of historic properties important to tribes, which may not be identifiable at all without consultation.⁴⁰

Importantly, the consultation on—and protection of—historic and cultural resources is crucial to the fulfillment of the federal trust responsibility to tribes.⁴¹ This trust responsibility is

³³ Petition, at 21 (quoting Nationwide Programmatic Agreement, 47 C.F.R. Part 1, App'x C, § I.B).

³⁴ 54 U.S.C. § 300320.

³⁵ *Id.* § 306108. The statute allows for a programmatic agreement to develop provisions regarding certain undertakings, but it does not provide for the agencies to develop a new definition of "undertaking." See 54 U.S.C. § 306114 ("Where an agreement pursuant to regulations issued by the Council has been executed with respect to *an undertaking*, the agreement shall govern *the undertaking* and all of its parts." (Emphasis added.)).

³⁶ 54 U.S.C. § 304108(a); *United Keetoowah Band of Cherokee Indians*, 933 F.3d at 734.

³⁷ *FEC v. Cruz*, 596 U.S. 289, 301 (2022).

³⁸ Petition, at 20-21.

³⁹ *Attakai v. United States*, 746 F. Supp. 1395, 1408 (D. Ariz. 1990) ("The [NHPA's] regulatory scheme *depends* on consultation with appropriate persons to gather information concerning historic properties . . ." (emphasis added)).

⁴⁰ Dean B. Suagee & Jack F. Trope, *Protection of Native American Sacred Places on Federal Lands*, 54 Rocky Mnt. Min. L. Inst. 12-1, § 12.02[2][c] (2008).

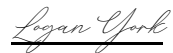
⁴¹ See, e.g., *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001); *Nance v. E.P.A.*, 645 F.2d 701, 711 (9th Cir. 1981) ("It is fairly clear that *any* Federal government action is subject to the United States' fiduciary responsibilities toward

“undeniable” and “grounded in the very nature” of the relationship between tribes and the United States.⁴² The rulemaking process requested in the Petition would undermine that relationship and the rights memorialized in current statutes and rules.

Conclusion

Because the Petition fails to set forth a factual or legal basis to upend the government-to-government consultation process, the FCC should decline to undertake the requested rulemaking. The current rules are already consistent with NEPA as amended, and none of the authorities cited provide a basis to revisit them. Additionally, the requirements of the NHPA remain fully in force and are not abrogated by NEPA’s amendments. Rather than pouring resources into a rulemaking process, the FCC should instead encourage productive partnerships that allow for effective, efficient project review.

Kikwehsitoole (“respectfully”),



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the Indian tribes.” (Emphasis in original)); *Oglala Sioux Tribe v. Andrus*, 603 F. 2d 707, 721 (8th Cir. 1979) (discussing federal obligation to consult with tribes when making decisions affecting tribal interests).

⁴² *Cobell*, 240 F.3d at 1086.