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GENERAL MEMORANDUM 19-011

Tribes Prevail in Federal Court Challenge to FCC "Small Cell" Wireless Order

On August 9, 2019, the United States Court of Appeals for the DC Circuit issued its decision rejecting the Federal Communication Commission's (FCC) 2018 Order exempting "small cell" wireless facilities from historic-preservation review under the National Historic Preservation Act (NHPA) and environmental review under the National Environmental Policy Act (NEPA). Hobbs Straus represented the Seminole Tribe of Florida in this matter and filed suit, along with other tribes and interested parties, to challenge the FCC's Order, which allowed telecommunications companies to place new small cell infrastructure on sites of religious and cultural importance to tribes without notifying tribes or assessing the effects of that construction under relevant federal law.

This ruling by the DC Circuit is an important victory for Indian tribes across the country, which are fighting to protect their religious and cultural sites. Hundreds of thousands of small cell wireless facilities are expected to be deployed to facilitate the roll out of 5G wireless technology. The FCC argued that it could entirely exempt small cells from review under the NHPA and NEPA. This would have left tribes in the dark about where these facilities would be located, leaving tribes little opportunity to stop irreparable damage to historic and cultural sites before it occurred.

The DC Circuit ruled for tribes on the main issue in the case, finding that the FCC arbitrarily and capriciously made a public interest determination that the costs of NHPA and NEPA review for small cells outweighed the benefits. The court found the FCC failed to support its claim that small cell deployment would cause little or no harm and did not properly consider cumulative effects or the benefits of review. The court vacated that part of the Order.

The court did not agree with tribes that the Order's terms regarding tribal involvement in the review process, such as the FCC's guidance on fees, should be vacated. With respect to fees, however, the court included strong language confirming the FCC's non-delegable duty to consult with tribes regarding the effects of tower siting on properties of significance to tribes under the NHPA. Although the court also disagreed with the tribes' argument that the FCC failed to consult with tribes, the opinion implicitly affirmed the FCC's tribal consultation obligation, which the FCC had long maintained is not judicially enforceable.

The court remanded the Order to the FCC. Barring further court action if the FCC seeks rehearing by the DC Circuit or review by the U.S. Supreme Court, the FCC will need to develop policy consistent with the ruling during the remand process.

Please let us know if we may provide additional information about this case or about the remand process.

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