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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

Crow Creek Tribe of South Dakota, a federally recognized Indian tribe, and all those tribes similarly situated,

Plaintiffs,

vs.

Federal Communications Commission, (FCC); Chairman Ajit Pai; Commissioner Michael O'Riley; Commissioner Brendon Carr; Commissioner Mignon Clyburn; and Commissioner Jessica Rosenworcel,

Defendants.

Case No. 5:18-CV-1010

COMPLAINT

This is a Class Action Complaint pursuant to Rule 23 of the Federal Rules of Civil Procedure. The Plaintiff is the Crow Creek Tribe of South Dakota, a federally recognized sovereign Indian tribe (hereinafter referred to as "Plaintiff Indian Tribe") and class representative of other federally recognized Indian tribes in the protection of Native American Communities'

culturally sensitive lands, including burial and religious sites located throughout, and complains against the Federal Communications Commission (hereinafter referred to as "FCC"); Chairman Ajit Pai; and Commissioner(s) Michael O'Reily; Brendon Carr; Mignon Clyburn and Jessica Rosenworcel (hereinafter referred to collectively as ("Federal Defendants") as follows:

I.

PARTIES

1. Plaintiffs are federally recognized tribes, which includes the Crow Creek Tribe of Indians, who are entitled under federal law to review federal undertakings that involve federal agencies, to ensure culturally sensitive sites, religious sites and burial grounds are not damaged and desecrated by the actions of the Federal Defendants and their applicants, including the right to be compensated for their work product and labor in reviewing Section 106 applicant submissions.

2. Plaintiff Indian Tribe, the Crow Creek Tribe of South Dakota, is located within the State of South Dakota and has its primary governmental address at Box 470, 100 Swifthorse Road, Fort Thompson, South Dakota .

3. There are approximately 566 federally recognized Indian tribes, not counting Native Hawaiian organizations (NHOs). The class is so numerous the joinder of all Indian tribes is impracticable.

4. There exist questions of law and fact common to the class, namely whether Indian tribes can charge review fees to assist the telecommunications industry and the Federal Defendants to comply with federal law.

5. The claims or defenses of the Plaintiff Indian Tribe will fairly and adequately protect the interests of the over 566 federally recognized Indian tribes.

6. The claims and proposed remedy in this action will have similar effect on all Indian tribes. The Plaintiff Indian Tribe can adequately represent the interests of all tribes. There will be a consistent remedy that will apply to all tribes without a conflict of interest or an inconsistent result. All Indian tribes involved in Section 106 review charge review fees to assist their own governments in financing the protection of their culturally sensitive sites and cultural landscape and this in return assists the Federal Defendants and their applicants in fulfillment of their federal legal obligations pursuant to the NEPA and NHPA.

7. The Federal Defendant is comprised of the Federal Communications Commission (FCC) and individual members of the Commission, consisting of Chairman Ajit Pai; Commissioner Michael O'Riley; Commissioner Brendon Carr; Commissioner Mignon Clyburn and Commissioner Jessica Rosenworcel who as a federal agency are responsible for the passage and approval of WT Order 17-79 (FCC 18-30).

8. Defendant FCC is and at all relevant times was an agency of the United States government.

II.

JURISDICTION AND VENUE

9. The Court has jurisdiction over Plaintiff's claim pursuant to 28 U.S.C. §§ 1331 and 1362. Jurisdiction to review agency action is authorized by the Administrative Procedure Act (hereinafter referred to as "APA"), 5 U.S.C. § 702, and to proceed with a claim under the APA the Plaintiffs must establish that "[a] person suffer[ed] legal wrong because of agency action ….within the meaning of a relevant statute." "When …review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action'." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990) (quoting 5 U.S.C. § 704). Declaratory relief is

provided for under 28 U.S.C. §§ 2201-2202; equitable relief is provided for under 28 U.S.C. § 1343.

10. Personal jurisdiction over the Federal Defendants is proper because Federal Defendants conduct business through the Defendant FCC and the actions of the Federal Defendants have negatively affected and damaged the Plaintiff Tribe's culturally significant sites in violation of federal law.

11. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) as the Federal Defendants are responsible for relevant actions and omissions that have occurred in this District.

12. The United States has waived its own and Federal Defendant's sovereign immunity to the claims herein by virtue of, without limitation, the APA and the United States' fiduciary and trustee obligations towards the Plaintiff Crow Creek Tribe and its membership. Federal Defendants Pai, O'Riley, Carr, Clyburn and Rosenworcel have acted beyond the scope of their statutory authority by passage of WT Order 17-79 (FCC 18-30), which violates the laws and Constitution of the United States, as alleged herein, and thus, removes sovereign immunity as a defense under the doctrine established by *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), *Larsen v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S. Ct. 1457 (1949), and *Bivens v. Six Unknown Named Agent of Federal Bureau of Narcotics,* 402 U.S. 388, 91 S.Ct. 1999 (1971).

13. In this action, Plaintiff Indian Tribe seeks a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. § 2201, because Federal Defendants have violated the laws of the United States, Title 16 U.S.C. § 470f, Title 54 U.S.C. § 306108 (Section 106), including the United States Constitution, Amendment(s) V (substantive due process) and XIV (procedural due process and equal protection).

14. The determination that Plaintiff Indian Tribe as class representative cannot review wireless small cell deployment, nor charge "upfront review fees" or any "fees" regarding Section 106 review of wireless infrastructure deployments or other deployments, constitutes a change of policy by the Federal Defendants, as the Federal Defendants have allowed upfront review fees charged by the Plaintiff Indian Tribe and other Indian tribes for the last twelve (12) to fourteen (14) years without objection.

III.

FACTS

15. The Federal Defendants (FCC) have amended and revised certain regulations, pursuant to WT Order 17-79 (FCC 18-30), which proximately affects an established policy, pattern and practice of how Indian tribes interact with and assist telecommunications companies in complying with federal law and thus have violated federal law and the United States Constitution. The following changes and revisions in policy and regulations made by the Federal Defendants require Federal Court review.

A. Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment-WT Docket No. 17-79 (FCC 18-30); Second Report and Order; Adopted: March 22, 2018; Released: March 30, 2018

16. The Federal Defendants first draft of the proposed rules concerning accelerating wireless small cell broadband deployment relating to the alleged barriers to infrastructure investment was released on March 30, 2017 and published on or about May 10, 2017.

17. The Second Report and Order was adopted on March 22, 2018, and released on March 30, 2018, which constitutes final agency action (hereinafter referred to as "WT Order 17-79 (FCC 18-390)").

18. This action by the Federal Defendants is a violation of the Federal

Communications Act of 1996, 47 U.S.C. 151 et seq. (hereinafter referred to as the "Act"), other federal environmental and historic preservation laws, is arbitrary and capricious, violates the Fifth and Fourteenth Amendment of the United States Constitution, common principals of contract law, and rules prohibiting conflict of interest by a federal employee, specifically Chairman Pai.

19. The actions by the Federal Defendants preventing review of wireless deployment and payment of review fees charged by the Plaintiff Indian Tribe and other Indian tribes similarly situated is beyond the scope of the Federal Defendant's authority.

B. National Historic Preservation Act

20. The National Historic Preservation Act (hereinafter referred to as "NHPA") became law on October 15, 1966, Public Law 89-665, and was originally codified in Title 16 of the United States Code. Various amendments followed over the years and on December 19, 2014, Public Law 13-287, moved the Act's provisions from Title 16 of the United States Code to Title 54, with minimal and non-substantive changes to the text of the Act.[1]

21. In 1992, the NHPA was amended to establish tribal historic preservation programs and grants to federally recognized Indian tribes.[2] According to Section 101(d)(2) of the Act it provides for federally recognized Indian tribes to apply through the National Park Service, on behalf of the Department of Interior, for the recognition of a Tribal Historic Preservation Officer (hereinafter referred to as "THPO") who assumes some, if not all of the duties of the

[1] The Act's name (the "National Historic Preservation Act") is found in the notes of the very first section of Title 54. 54 U.S.C. §100101. NHPA is found at Title 54 U.S.C. §300101 et seq.

[2] The Advisory Council Historic Preservation (ACHP) in 2000 adopted the definition of Indian tribe "... as an Indian tribe, band, nation or other reorganized group or community, including a Native village or Regional corporation [Alaska Native Claims Settlement Act (ANCSA)] as those terms are defined in Section 3 of ANCSA [43 U.S.C. § 1602], which are recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

State Historic Preservation Office (hereinafter referred to as "SHPO").[3] These amendments to the NHPA allow tribes the expanded ability to participate in the national historic preservation programs.

C. Advisory Council on Historic Preservation

22. The Advisory Council on Historic Preservation (hereinafter referred to as "ACHP") is an independent agency established by the NHPA, which has under its regulatory authority the duty to issue regulations implementing what is commonly referred to as Section 106 review of the NHPA in its entirety. This includes the involvement of Indian tribes, Alaska villages, THPOs and Native Hawaiian organizations (hereinafter referred to as "NHOs") in that process. 16 U.S.C. §§470j, 470s.[4]

23. The ACHP's policy is grounded in the belief that NHPA and regulations implementing Section 106,[5] establish the minimum standards for federal interaction with its preservation partners such as Indian tribes. 36 C.F.R. Part 800 et seq.

24. In 1998, the ACHP recognized the statutory role of THPOs and tribes in the Section 106 process and invited all THPOs to become observers to the ACHP and their assumption of the delegated authority to review federal undertakings that may or may not affect their culturally significant lands – whether in trust or upon their ancestral lands. *See*, 36 CFR § 800.2(c)(2)(ii)(D).

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[3] A tribe may assume all or any part of the functions of a State Historic Preservation Officer in accordance with subsections (b)(2) and (b)(3), with respect to tribal lands, as such responsibilities may be modified for tribal programs through regulations issued by the Secretary if- (A) the tribe's chief governing authority so requests; (B) the tribe designates a tribal preservation official to administer the tribal historic preservation program, through appointment by the tribe's chief governing authority or as a tribal ordinance may otherwise provide; (C) the tribal preservation official provides the Secretary with a plan describing how the functions the tribal preservation official proposes to assume will be carried out. *See,* 54 U.S.C. § 300320.

[4] Section 106 is in reference to the original act codified at title 16 – now codified in Title 54. Most if not all tribes refer to their authority to monitor and request consultation regarding federal undertakings as "Section 106 review". 54 U.S.C. §§ 303903-304108.

[5] 54 U.S.C. § 306108.

25. In 2000, the ACHP adopted the "Policy Statement Regarding the Council's Relationship with Indian Tribes" that recognized the special relationship with Indian tribes, acknowledging its government-to-government relationship and trust responsibility to Indian tribes as well as to recognize tribal sovereignty and the rights of Indian tribes to participate in Section 106 consultation.

26. The ACHP has recognized fully through its policy the important role of Indian tribes and their THPOs in meaningful participation in the Section 106 process and the National Preservation Program as per the 1992 amendments to said Act.

D. Section 106 Consultation

27. An important component of the Section 106 process involves engaging and consulting with Indian Tribes, Nations and NHOs. Section 101(d)(6) of the NHPA requires federal agencies to consult with any Indian Tribe, Nation or NHO that attaches religious and cultural significance to a property eligible for inclusion on the National Register of Historic Places that may be affected by their undertakings.[6]

28. The ACHP rules implement that provision by requiring that agencies make a reasonable and good faith effort to identify such Tribal Nations or NHOs and invite them to be consulting parties. Procedures to implement this requirement are set forth in the Wireless Facilities NPA, which became effective in 2005. Properties to which Tribal Nations and NHOs attach cultural and religious significance are commonly located outside Tribal lands and may include Tribal burial grounds, land vistas, and other sites that Tribal Nations or NHOs

[6] 47 C.F.R. § 1.1320(a).
[6] Section 106 is in reference to the original act codified at Title 16 – now codified in Title 54. Most if not all tribes refer to their authority to monitor and request consultation regarding federal undertakings as "Section 106 review". 54 U.S.C. §§ 303903-304108.
[6] 54 U.S.C. § 306108.

regard as sacred or otherwise culturally significant.[7]

29. The NHPA provides Indian tribes the authority to assume the role of the State Historic Preservation Officer (hereinafter referred to as "SHPO") on tribal as well as ancestral lands. The ACHP's regulations require federal agencies, such as the Federal Defendants and their applicants,[8] to consult with Indian tribes in the Section 106 process for federal undertakings both on and off tribal lands.[9]

30. Section 106 requires all federal agencies to consider the effects of projects they carry out, approve or fund on historic preservation properties, including those of significance to Indian tribes. *See*, ACHP Releases Report On Tribal Consultations, June 1, 2017.

31. One of the first steps a federal agency such as the Federal Defendants must take in the Section 106 process is to initiate consultation with SHPO, THPO, Indian tribes, NHOs and other consulting parties. Initial contact and consultation with SHPO and/or THPO is critical to ensure that the preservation experts who represent the citizens of a state or members of an Indian tribe have the opportunity to influence federal decision making at the very beginning of the Section 106 process.

32. The Plaintiff Indian Tribe and other tribes have for the last twelve (12) to fourteen (14) years or more charged upfront review fees to process the review of applicant sites during the FCC's and Federal Defendant's process of registration of not only macro-projects, ASR sites, [10] but wireless antenna and small box deployments as well.

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[7] 36 C.F.R. § 800.3(f)(2); *see also id.* at § 800.2(c)(2)(ii) (discussing role of Tribal Nations and NHOs as consulting parties in the historic preservation review process); See, also, Wireless Facilities NPA, § IV.
[8] An "Applicant" is defined as "[a] Commission licensee, permittee, or registration holder, or an applicant or prospective applicant for a wireless or broadcast license, authorization or antenna structure registration, and the duly authorized agents, employees, and contractors of any such person or entity." Nationwide Agreement, § II.A.2.
[9] Ancestral or Aboriginal Lands0 refers to the lands the tribe used and occupied for hunting, fishing and gathering purposes. *See, Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835); *See, also, Confederated Tribes of Warm Springs*, 177 Ct. Cl. 184 (1966
[10] Antenna Structure Registration (hereinafter referred to as "ASR")

33. Consequently, the substantive provisions of WT Order 17-79 that relate to applicants not being required to pay upfront review fees to tribes constitutes an agency change of policy, as no law prohibits tribes from charging upfront fees and clearly the Federal Defendants have acquiesced for approximately 12 - 14 years to the upfront review fees charged by tribes throughout the United States, which assist applicants and the Federal Defendants to comply with federal law.

34. According to the substantive provisions of WT Order 17-79 approved by the Federal Defendants, applicants who intend upon erecting and deploying wireless facilities are not required to comply with the NHPA, Section 106, and pay upfront tribal fees for the tribe's review of applicant packets, which include archeological surveys, site documentation, maps and NEPA review documents.[11]

35. Moreover, many of the wireless sites now in use where additional wireless facilities are to be deployed are known as "twilight towers", which are sites that have not been reviewed and have been erected from approximately 1992 to 2005 in violation of federal law. The Plaintiff Indian Tribe and other tribes are without knowledge of the location of said structures and whether those structures have damaged culturally sensitive sites. e.g. burial and religious sites, and other culturally significant areas.[12]

36. Twilight Towers were constructed during a time when the Federal Defendant's rules implementing Section 106 of the NHPA were not allegedly required to consult with SHPO's, THPO's, tribal nations or NHOs when evaluating the potential effects of proposed wireless infrastructure deployment and placement upon environmental or historic sites.

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[11] Many times FCC applicant document packets submitted to tribes are up to 50 to 100 pages in length or longer, which must be reviewed by tribal historic preservation staff. *See*, Form(s) 620/621 (detailed information)

[12] See, Public Notice at 1; Draft Program Comment at 1-2; Towers constructed between March 16, 2001 and March 7, 2005.

37. As mentioned, *supra*, the NHPA was amended in 1992 to include the requirement of consultation with Indian tribes; however, whether or not the Federal Defendants had developed regulations until March 5, 2005 is irrelevant as federal law required consultation with tribes.[13]

38. All of what is known as "Twilight Towers" were erected and constructed in violation of federal law and should have been reviewed prior to erection pursuant to the NEPA and NHPA as said construction was defined as a "federal undertaking" and any deployment of wireless facilities on these structures require compliance with NEPA and NHPA.[14]

39. Title 16 U.S.C. §106 (16 U.S.C. 470f) states:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

40. Title 54 U.S.C. § 306108, which codified Title 16 provisions states:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

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[13] The Nationwide Programmatic Agreement Regarding Section 106 National Historic Preservation Act Review Process, Report and Order, 20 FCC Rcd 1073 (2004); codified at 47 C.F.R. Part 1, App. C. (hereinafter referred as "2004 NP

[14] 36 C.F.R. § 800.3 et seq.

41. Section 106 consultations require that any "undertaking" sanctioned by any federal agency of the federal government allow tribal entities the statutory right to review the undertaking to ensure no cultural significant or religious sites are harmed or destroyed by the federal undertaking.[15]

42. An "undertaking" is defined by the NHPA, 54 U.S.C. §300320 as:

> In this division, the term "undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including (1) those carried out by or on behalf of the federal agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

43. There has been absolutely no change of ACHP policy, nor has the ACHP changed or revised their rules pertaining to federal undertakings; in fact the ACHP has objected to any change in the Federal Defendant's revision to 47 C.F.R. §1.1312. See, ACHP, Comment Letter to FCC, March 15, 2018.

44. All licenses, permits or other activity of the Federal Defendants in regards to each applicant involves activity and involvement by said Defendants that rise to the level of a federal undertaking.

45. Further, many of the 4G and 5G wireless facilities will receive or have received federal subsidies "....under the direct or indirect jurisdiction of...." of the Federal Defendants. *Id.*

46. Any attempt by the Federal Defendants to redefine the meaning of a federal undertaking under the NHPA or the agency's own regulations is arbitrary and capricious and

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[15] 54 U.S.C. §300318(c) EXEMPTION FOR FEDERAL PROGRAMS OR UNDERTAKINGS. The Council, with the concurrence of the Secretary, shall promulgate regulations or guidelines, as appropriate, under which Federal programs or undertakings may be exempted from any or all of the requirements of this division when the exemption is determined to be consistent with the purposes of this division, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic property.

outside the scope of their authority in violation of the NHPA, Federal Communications Act and other federal laws.[16]

47. The Federal Defendant's action to amend 47 C.F.R. § 1312 to negate NEPA and NHPA pursuant to WT Order 17-79 is arbitrary and capricious.[17]

E. Tower Notification Construction System

48. In 2004, the Wireless Telecommunications Bureau of the Federal Communications Commission announced the dedication of an electronic mail (e-mail) account for applicants to use when sending Federal Defendants informational copies of their initial contacts with federally-recognized Indian Tribes, including Alaska Native Villages and NHOs, that are made outside of the Tower Construction Notification System (hereinafter referred to as "TCNS"). The TCNS was introduced by the Commission to Tribes, NHOs, SHPOs, and the general public specifically in February 2004.[18]

49. The Federal Defendants indicated that the TCNS will assist applicants in meeting one of their obligations as set forth in the Nationwide Programmatic Agreement (NPA),[19] which was adopted and released in October 2004. The NPA went into effect March 7, 2005.[20] Under

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[16] The ACHP does not see a reason why the cited evolution of technology and changes in infrastructure deployment would in any way change the FCC's interpretation of its Section 106 responsibilities, as upheld by the D.C. Circuit in *CTIA - The Wireless Ass'n v. FCC*, 466 F.3d 105 (D.C. Cir. Sept. 26, 2006). See, Advisory Council on Historic Preservation Comments on the Federal Communications Commission's Notice of Proposed Rulemaking, dated May 10, 2017, WT Docket No. 17-79, June 15, 2017.

[17] *See, e.g.*, 47 U.S.C. § 4332 ("The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter[.]"); 54 U.S.C. § 300101 ("It is the policy of the Federal Government, in cooperation with other nations and in partnership with States, local governments, Indian tribes, Native Hawaiian organizations, and private organizations and individuals, to" promote or encourage the preservation of historic property in various ways)

[18] *See* FCC Announces Voluntary Tower Construction Notification System to Provide Indian Tribes, Native Hawaiian Organizations, and State Historic Preservation Officers with Early Notification of Proposed Tower Sites, *Public Notice*, DA 04-270, 19 FCC Rcd. 1998 (2004).

[19] In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Report and Order*, FCC 04-222 (rel. Oct. 25, 2004), 2004 WL 2248768, 34 Communications Reg. (P&F) 112.

[20] *See* Nationwide Programmatic Agreement for Review Under the National Historic Preservation Act, 70 Fed. Reg. 556 (Jan. 4, 2005).

Section IV.E of the NPA, if an applicant does not have a pre-existing relationship with an Indian tribe or NHO, initial contact with the Tribe or NHO shall be made through the Federal Defendants. Unless the Tribe or NHO have indicated otherwise, the Federal Defendants may make this initial contact through the TCNS. An applicant that has a pre-existing relationship with a Tribe or NHO shall make initial contact in the manner that is customary to that relationship or in such other manner as may be accepted by the Tribe or NHO. An applicant shall copy the Federal Defendants on any initial written or electronic direct contact with a Tribe or NHO, unless the Tribe or NHO has agreed through a best practices agreement or otherwise that such copying is not necessary." *See*, FCC-DA 05-47, Wireless Telecommunications Bureau Announces Electronic Mail Account For Applicants to Send Informational Copies of Contacts with Indian Tribes and Native Hawaiian Organizations, Public Notice, January 10, 2005.

50. The TCNS each week publishes six digit numbers associated with licenses or permits that have been issued to applicants who intend upon constructing wireless communications towers or placing antennas and small boxes on various structures.

51. The Federal Defendants oversee the TCNS, which works to increase communication with Plaintiff Indian Tribes and NHOs in the context of site review required by Section 106 of the NHPA. It also provides Plaintiff Indian Tribes, NHOs and SHPOs with early notification of proposed towers and antenna placement in order to facilitate compliance with the Federal Defendant's rules and streamlines the review process for construction of towers and other undertakings initiated by the Federal Defendants and their applicants.

52. Based upon this notification the Plaintiff Indian Tribe notifies the applicant that they require consultation regarding the site and request a review fee for review of the archeological survey and environmental report that has been generated by the applicant. Based upon the request the applicant will transmit to the Plaintiff Indian Tribe a packet, which may be

between 10 and 100 pages in length. The Plaintiff Indian Tribe through their THPO reviews the packet with their experts and archeologists who are then paid for their time through the review fees charged the applicant.[21]

53. If the Plaintiff Indian Tribe believes the site selected by the applicant requires further investigation, the Plaintiff Indian Tribe will send to the site a Tribal Monitor Survey Crew which is usually accompanied by the Plaintiff Indian Tribe's archeologist for further investigation and, if need be, a request that the applicant mitigate the position of the structure to another site or even close the original structure to hinder destruction of a historic site, which includes burial sites.

54. All of these procedures performed by the Plaintiff Indian Tribe required financial resources. In most cases prior to review of the original packet the Plaintiff Indian Tribe requests an "upfront review fee" which is anywhere from $200 -$1,500. The review fees, as mentioned, are utilized to finance tribal historic preservation staff during the review process, develop reports regarding the proposed sites, make site visits and retain expert consultants to assist with the review process.

55. The Federal Defendants in passage and approval of WT Order 17-79 have redefined 47 C.F.R. §1.1213 of their regulations in an attempt to arbitrarily and capriciously prohibit Plaintiff Indian Tribe and other tribes from exercising their legal authority pursuant to the NHPA, Section 106, to consult with their applicants regarding potential cultural significance of site selection based upon the substantial federal involvement of the Federal Defendants in the deployment of wireless facilities.

56. The ACHP has indicated "When Payment Is Appropriate":

[21] The response by the applicant to a tribal reply to the Section 106 request, based upon notice to a tribe by the TCNS, constitutes an implied-in-law contract and failure to pay requested fees constitutes quantum meruit and unjust enrichment

> When, during the identification phase of the Section 106 process, an agency or applicant seeks to identify historic properties that may be significant to an Indian tribe, it may ask for specific information and documentation regarding the location, nature, and condition of individual sites, or actually request that a survey be conducted by the tribe. In doing so, the agency essentially asks the tribe to fulfill the role of a consultant or contractor. In such cases, the tribe would seem to be justified in requiring payment for its services, just as any other contractor. The agency or applicant is free to refuse, but retains the obligation for obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on the historic properties. *See*, ACHP 2012 Tribal Handbook (emphasis added)

57. The Federal Defendants have not objected to the upfront review fees charged to applicants by the Plaintiff Indian Tribe, as mentioned, for twelve (12) to fourteen (14) years, but now have decided arbitrarily and capriciously that the Plaintiff Indian Tribe and other tribes have no authority to charge a reasonable fee for review of the applicants' plans and placement of wireless facilities.

58. The Plaintiff Indian Tribe and other Indian tribes have the inherent sovereign authority to draft and implement their own laws without consulting with the Federal Defendants.[22]

59. The Federal Defendants' determination on what is or is not in the public interest is based on the supposition that compliance with NEPA and NHPA is not justified based upon the cost and delay to the applicant, the latter being the wireless industry.

60. The Federal Defendants belief that their numerous meetings with the tribes throughout the United States relieve them of their trust responsibility to federally recognized

[22] See, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet. 1 (1831); *Worchester v. Georgia*, 31 U.S. (6 Pet. 515, 559 (1932); *United States v. Wheeler*, 435 U.S. 313, 323-324 (1978).

Indian tribes is misplaced as absolutely none of the concerns of the Plaintiff Indian Tribe or other tribes voiced at said meetings has been incorporated in WT Order 17-79.[23]

61. Federal Defendant Jessica Rosenworcel in her statements objecting to the passage of WT Dkt. No. 17-79 stated the following:

> If we want to lead in 5G, we need to modernize our approach to wireless infrastructure. We need to streamline the process for the deployment of small cells because over the next eight years we will require as many as 800,000 of them. That's daunting. At the same time, we need to modernize our approach to larger wireless facilities—and that's daunting, too. A solution to this infrastructure challenge is long overdue—and while today's decision purports to be one—it misses the mark. It runs roughshod over the rights of our Tribal communities and gives short shrift to our most basic environmental and historic preservation values. Moreover, too much of its policy and legal analysis is lacking the heft necessary to support the result.
>
> What we have here will not help us lead—or even be 5G ready. Our work deserves a delay so we can fix these deficiencies and move forward together. Because we do not take the time to remedy these problems—when we can and should—I dissent.
>
> This decision takes three main actions. All three have problems.
>
> First, this decision cuts Tribal authorities from their rightful role reviewing wireless facilities. While I believe this process would clearly benefit from modernization, in this decision we fail to fulfill our federal trust relationship with respect to 5G deployment. We have long-standing duties to consult with Tribes before implementing any regulation or policy that will significantly or uniquely affect Tribal governments, their land, or their resources. This responsibility is memorialized in the FCC's Policy Statement on Establishing a Government-to-Government Relationship with Indian Tribes. But we do not honor it here. While the decision lists every minor contact this agency has had with Tribal authorities remember this: Not a single Tribe has expressed support for today's action.

[23] Approximately 102 federally recognized tribes objected to the substantive contents of WT 17-79, but not any of the points of objection were considered by the Federal Defendants. Meetings with federally recognized tribes, including the Plaintiff Indian Tribe which is exemplified by paragraph(s) 17 – 32 of the Order do not prove the Federal Defendants gave Tribes any consideration – other than by the appearance only based upon the fact that representatives of the Federal Defendants were in attendance. The comments were defined by the Federal Defendants as either "anecdotal", "generalized" or "speculative". WT Order, pg(s) 25, 31, ¶¶ 73, 84 85. Further, many of the meetings, if not all, scheduled by the Federal Defendants with the Plaintiff Indian Tribe and other Indian tribes were not audio recorded to give evidence of the tribes comments and objections to WT 17-79. These meetings did not constitute government-to-government consultation.

Second, this decision removes small cells from the purview of the National Historic Preservation Act and National Environmental Policy Act. This approach has both policy and legal frailties.

With respect to policy, it's no secret that rural and low-income communities trail our urban areas when it comes to broadband access. But not a single comment in this proceeding has suggested that the root of that problem is our historic or environmental review process. Rather, it's simple economics—these communities are difficult to serve because they do not provide the return on investment that supports build out. We don't tackle that hard truth here—or seek commitments to ensure deployment in hard to serve areas. But we should.

With respect to the law, the problems with our small cell analysis are real. For starters, this decision asserts that a federal undertaking under the National Historic Preservation Act is the same as a "major federal undertaking" under the National Environmental Policy Act. But this interpretation is not right. In fact, the Advisory Council on Historic Preservation—the body entrusted with interpreting the law—has said as much in their comments to this agency. We shouldn't ignore them. We should work with them.

In addition, our interpretation of the National Historic Preservation Act is flawed—and likely to have messy consequences for future wireless deployment. The law defines an "undertaking" as a "project, activity, or program funded in whole or part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license, or approval." Count them—there are three elements to that definition: projects carried out by a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license, or approval. But today's decision addresses only the first and last elements.

In effect, the FCC reads "projects carried out with Federal financial assistance" out of the law. Yet going forward, it is highly likely that small cells are going to be deployed using federal financial assistance—for example, using the Mobility Fund. That's the universal service fund that will support updated wireless service in rural areas—to the tune of $4.53 billion. That's not a small amount and we won't improve 5G deployment in rural areas by sweeping this legal problem under the rug. This is especially true when there are different paths we can take. For instance, even if small cell deployment is determined to be an undertaking, the FCC has authority to find, consistent with the Advisory Council on Historic Preservation's rules, that it "has no further obligations under section 106" if deployment has no more than a de minimis impact on historic properties. In short, there are other ways to address these issues. I wish we could explore them here.

> Third, and finally this decision removes many larger wireless facilities from environmental oversight. If our environmental assessment process is too complex or too lengthy, we should fix it. But tossing this process out is unsupported by the record. In fact, there is so little discussion of the consequences of this change in our docket, the White House Council on Environmental Quality wrote us a letter on this subject that is devoid of any substantive analysis and offers only the most superficial support. We should do better than this.
>
> In sum, this decision does not clear the way for 5G. It does not make us 5G ready. It only guarantees that a messy series of legal challenges will follow in its wake. I regret that we did not delay today's vote to fix these problems. I can only hope that with this crude effort we do not further risk our leadership in 5G as a result.

Dissenting Statement of Commissioner Jessica Rosenworcel, Re: Accelerating Wireless Broadband Deployment Barriers to Infrastructure Investment, WT Docket No. 17-79, March 22, 2018.

62. It is clear the Federal Defendants do not have the authority to redefine an undertaking that would trigger the Section 106 process. WT Order 17-79 (FCC 18-30) cites 36 C.F.R. § 800.3(a) in claiming that "FCC has authority to determine what activities constitute federal undertakings."

63. Section 800.3(a) does not define what qualifies as an undertaking as that definition is established in 36 C.F.R. § 80016(y) and includes activities or projects "requiring a Federal permit, license, approval, federal funds or financial assistance." Consequently the Federal Defendants do not have the authority to redefine the definition of "undertaking". Their actions are arbitrary and capricious and in violation of their own regulations and federal law.

F. <u>Fees Charged by Federally Recognized Indan Tribes For Requested Section 106 Review</u>

64. The Federal Defendants in WT Order 17-79 indicated that the Plaintiff Indian Tribe and other Indian tribes are not allowed to charge upfront review fees or any fees for review of applicant packets (form 620, 621), either for wireless small cell facility deployment

or any other deployments, including macro cell towers. The Federal Defendants state the following:

> Consistent with the Wireless Facilities NPA, once an applicant, through TCNS, has identified that particular Tribal Nations or NHOs may attach religious and cultural significance to historic properties located in areas that may be affected by an undertaking, the applicant contacts the Tribal Nation or NHO, typically through
>
> TCNS, to ascertain whether there are in fact such properties that may be affected. The record indicates that, at this stage in the Section 106 review, some Tribal Nations are directing applicants to pay an "up-front fee" before the Tribal Nation will respond to the contact. At no time to date has the Commission explicitly endorsed such up-front fees. We now clarify, consistent with ACHP guidance, that applicants are not required to pay Tribal Nations or NHOs up-front fees simply for initiating the Section 106 consultative process.

WT 17-79 Order, ¶108, pg. 41, 42; (FCC 18-30).

65. The Federal Defendants have further indicated that any attempt by Plaintiff Indian Tribe and other Indian tribes to charge an upfront review fee may be ignored by the applicant and the Federal Defendants and applicant may move forward, based upon their alleged "reasonable and good faith effort" to comply with Section 106 obligations.[24]

66. The Federal Defendants continue to explain possible situations where a Tribal consultant or expert may be compensated on behalf of a Tribe:

> …during the identification and evaluation phase of the Section 106 process when the agency or applicant is carrying out its duty to identify historic properties that may be significant to an Indian tribe, it may ask a tribe for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the tribe would be justified in requesting payment for its services, just as is appropriate for any other contractor.[25]

[24] WT 17-79 Order, ¶110, pg(s) 42, 43 (FCC 18-30) citing ACHP, Consultation with Indian Tribes in Section 106 Review Process: Handbook, at 13 (2012).
[25] *Id.*

67. The Federal Defendants further indicate that tribal governments do not fall within the category which would allow for payment of upfront review fees or other fees for review of Section 106 applicant packets. Federal Defendants indicate that "...we affirm that applicants are not required to pay up-front fees to Tribal Nations or NHOs to initiate Section 106 reviews". WT Order 17-79, pg. 43, ¶111.

68. The Federal Defendants continue with their assault on tribal sovereignty by indicating that if the Plaintiff Indian Tribe and other Indian tribes condition their review on receipt of up-front review fees then the Federal Defendants will treat such a response as a "...failure to respond..." by the Plaintiff Indian Tribe. *Id.*

69. Federal Defendant's process of allowing applicant to proceed if the Plaintiff Indian Tribe does not act due to the failure to pay Section 106 review fees is a change of policy and also delays deployment of wireless facilities and even macro cell facilities. Federal Defendants state:

> Accordingly, Tribal Nations remain free to request upfront fees and applicants may, if they choose, voluntarily pay such fees. If, however, a Tribal Nation or NHO opts not to provide its views without an up-front payment, and the applicant does not voluntarily agree to provide the payment, consistent with the ACHP's guidance, our obligations have been satisfied and we may allow our applicant to proceed with its project after the 45-day period described above.[26]

70. Plaintiff Indian Tribe asserts that they are entitled to up-front review fees to compensate them for the effort or cost of participating in the Section 106 process. Indian tribes have indicated that they rely upon up-front review fees to fund their Section 106 activities or to eliminate the administrative burden of calculating actual costs incurred in reviewing each TCNS submission. The fees charged cover the Plaintiff Indian Tribe's actual average costs associated with reviewing and commenting on commercial

[26] WT 17-79 Order, pg. 43, ¶112 (FCC 18-30).

projects.[27]

71. Discounting the cost of Plaintiff's review of Section 106 packets is a violation of federal law and as well constitutional provisions. It constitutes a change of policy as the Federal Defendants have not objected to upfront review fees charged by tribal entities for the last twelve (12) to fourteen (14) years.

72. It is clear that Plaintiff Indian Tribe and other Indian tribe's expertise in their culture and traditions is work product that should be compensated for by the applicant. Obviously the Federal Defendants are compensated for their regulatory responsibilities. Denying Plaintiff Indian Tribe and other Indian tribes the right to charge review fees violates the equal protection clause of the United States Constitution and the intent of the NHPA.

73. In addition, the Federal Defendants pursuant to WT Order 17-79 indicate that applicants are only required to pay fees in situations when the applicant has executed a "consultant contract" or similar agreement with the Plaintiff Indian Tribe and other tribes, prior to payment of review fees. Such a regulatory requirement is beyond the scope of the Federal Defendant's regulatory authority.[28]

74. Plaintiff Indian Tribe as class representative of other Indian tribes has established an implied-in-law contract with the applicants once the Plaintiff Indian Tribe and other Indian tribes respond to Section 106 notices appearing on the TCNS. This response and communication between the applicant and the Plaintiff Indian Tribe and other Indian tribes is a contract and there is absolutely no requirement that said contract be substantively etched in a written agreement.

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[27] Based upon the legal doctrines of "quantum meruit" and "unjust enrichment" as the Plaintiff Indian Tribe and other Indian tribes have been requested to review applicant packets regarding historic preservation issues, e.g. religious and burial sites, mounds, prayer alters, teepee rights, ceremonial grounds, etc. – once the tribe responds and reviews a packet a contract has been established and each tribe has the right to charge fees for their work product so requested by an applicant.

[28] WT 17-79 Order, pg(s). 45, 46, ¶¶117, 121 (FCC 18-30).

G. Chairman Pai – Ethics Violations

75. All federal employees including the Federal Defendants are required to ensure that all actions taken do not give the appearance of impropriety and conflict of interest.

76. Federal Defendant Pai worked as in-house General Counsel to the Verizon Corporation, which benefits from actions the Federal Defendant has taken in approval of WT Order 17-79 (FCC 18-30). Federal Defendant Pai cites to Verizon comments 53 times in said Order and over another 50 times in regards to other wireless carriers.

77. The actions of Federal Defendant Pai constitutes a clear violation of the ethical standards and rules of conduct for federal employees and all Federal Defendants have as well violated said standards and rules. *See,* 5 C.F.R. Part 2635.

78. The Federal Defendant's mission statement does not indicate the Federal Communications Commission (hereinafter referred to as "FCC") will cater and serve the needs of the wireless industry, nor fleece the staff of the FCC with industry shills. Presently, Federal Defendant Pai has a clear conflict of interest and is working for the wireless industry, instead of leading an impartial agency that should be committed to regulation of the wireless industry, protecting the public interest, and adherence to federal law.

H. Wireless Industry Overstated Costs and Lack of Qualifications to Identify Native American Cultural Sites

79. The wireless industry's costs associated with Section 106 review relating to the deployment of wireless facilities and other deployments cited by the Federal Defendants is overstated and inflated. The studies cited by the Federal Defendants that the wireless industry submitted as comments are generalizations, speculation in some cases, and biased, partial, and clearly unreliable.

80. Federal Defendant's citation of industry studies submitted as comments is

arbitrary and capricious as those studies are suspect, generalized, anecdotal and not based upon unbiased empirical evidence.

81. No true cost-benefit analysis has been completed by an independent party who can reliably gauge the actual cost of compliance with federal law by the applicants and Federal Defendants. Each is required to make reasonable and good faith efforts in complying with their legal obligations pursuant to the NEPA and NHPA.

82. WT Order 17-79 (FCC 18-30) allows the wireless industry (applicants) to hire and retain "any properly qualified consultant or contractor when expert services are required, whether in the course of identifying historic properties, assessing effects, or mitigation."[29]

83. The industry and any experts they retain for review services must exercise "reasonable and good faith efforts" to satisfy Federal Defendant's and applicant's legal obligations pursuant to Section 106. The industry and their experts lack qualifications and cultural knowledge of tribal historic preservation issues and how to identify culturally sensitive sites. Each tribe has their own culture, language, historic path, and religion that no archaeological expert or other individual retained by applicant would have the working and specialized knowledge necessary to identify sensitive sites.

84. This void would leave the issue of qualifications open to interpretation on a case-by-case basis. Only a THPO from each tribe can determine culturally sensitive sites and thus the applicant and the Federal Defendants will be unable to show that they exercised "reasonable and good faith efforts" to comply with their legal obligations pursuant to the NHPA.

IV.

CAUSES OF ACTION

(Judicial Review of Agency Action Under APA, NEPA, NHPA, and United States Constitution

[29] WT Order 17-79 (FCC 18-30), ¶ 120, p. 46, 47

Against the Federal Defendants)

85. Plaintiff Indian Tribe repeats and re-alleges any and all allegations set forth in paragraphs 1-84 as if set forth fully herein.

A. Excluding Small Wireless Facilities From NHPA & NEPA Review

86. The Plaintiff Indian Tribe alleges herein that the action by the Federal Defendants to remove wireless small cell facilities from the NEPA and NHPA review is not supported by their organic laws they are sworn to uphold.

87. The Federal Defendant's action approving WT Order 17-79 (FCC 18-30) is arbitrary and capricious and is not a "reasonable and good faith effort" to abide and fulfill their obligations under NEPA and NHPA.

B. Revision to 47 U.S.C. §1.1312 Excluding Wireless Small Cell Facility Deployment from NHPA Section 106 Review

88. The Federal Defendant's action to redefine 47 C.F.R. §1.1312 to exclude wireless facilities from NEPA and NHPA review is arbitrary and capricious, not in the public interest, and constitutes action outside the scope of authority by a federal agency.

89. 36 C.F.R. § 800.3(a) does not confer upon the Federal Defendants the authority to redefine what constitutes an "undertaking".

90. 36 CFR §16(y) defines a federal undertaking as a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

91. In the present situation wireless small cell deployments are federally licensed and in many cases federally funded with subsidies thus being a "federal undertaking".

C. Change of Policy – No Up-Front Review Fees Required

92. The Federal Defendant's allowance and acquiescence to Plaintiff Indian Tribe and other Indian tribes charging applicants up-front review fees for their labors related to reviewing applicant packets constitutes an established policy of the Federal Defendants.

93. The Federal Defendants change of policy in adoption and approval of WT Order 17-79 (FCC 18-30) is not reasonable, supported by public interest or federal law, arbitrary and capricious, and in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

D. Exclusion of Geographic Area Licenses

94. The exclusion of geographic area licenses from NEPA and NHPA is not in the public interest and the cost to applicants is not exorbitant nor does it slow the process of deployment; consequently, the Federal Defendant's action in excluding wireless facilities and geographic area license from review is arbitrary and capricious.

95. The Federal Defendant's exclusion of geographic area licenses from NEPA and NHPA review and redefining Section 1.1312 is arbitrary and capricious and in violation of federal law.

96. 36 C.F.R. § 800.3(a) does not confer upon the Federal Defendants the authority to redefine what constitutes an "undertaking".

E. Requiring Tribal Review Fees for Section 106 to be Consumated in a Written, Substantive Agreement between the Plaintiff Indian Tribe and Applicants is Arbitrary and Capricious

97. The Federal Defendants have acquiesced and permitted the Plaintiff Indian Tribe and other Indian tribes to charge up-front fees and other fees for their work in review of Section 106 applicant packets (Form 620, 621) for numerous years and the promulgation of WT Order 17-79 (FCC 18-30) constitutes a change of policy without reasonable cause or justification and is arbitrary and capricious.

98. The Federal Defendant's adoption of certain provisions contained in WT 17-79 (FCC 18-30) that require the Plaintiff Indian Tribe and other Indian tribes to have a written contract or agreement in place with applicants as basis for payment of review fees and expenses violates the equal protection and due process of the Fifth and Fourteenth Amendment of the United States Constitution and also constitutes a violation of commonly accepted principles of contract law, e.g. implied-in-law-contract, quantum merit, and unjust enrichment.

99. Said actions by the Federal Defendants are outside the scope of their authority and are arbitrary and capricious.

F. Federal Defendant Pai's Previously Employment by the Industry as General Counsel to Verizon Constitutes an Impermissibcle Conflict of Interest

100. The Federal Defendant's cite to Verizon 53 times; Sprint 43 times; AT & T 29 times, and Crown Castle 10 times exemplifies the extent of the favoritism shown to the industry by the adoption of WT Order 17-79 (FCC 18-30).

101. The action by Federal Defendant Pai in the approval of said Order by voting with the majority clearly indicates a conflict of interest and gives the clear appearance of impropriety.

102. Federal Defendant Pai in performing his duties as the Chairman of the Defendant FCC is not preforming his duties in an impartial manner and based upon his actions in voting on WT Order 17-79 (FCC 18-30) has lost his impartiality violating 5 C.F.R. Part 2635 et al. and the ABA Rules of Professional Responsibility, Rule(s) 1.6, 17, 1.10, 1.11.

V.

PRAYER FOR RELIEF

WHEREFORE the Plaintiff Indian Tribe and other federally recognized Indian tribes pray for the following relief:

1. Plaintiff prays for and requests a declaration, pursuant to 28 U.S.C. § 2201, that under 5 U.S.C. § 701 et seq., the complained of actions by the Federal Defendants were arbitrary, capricious, an abuse of discretion, and not in accordance with law;
2. Declare that the Federal Defendants adhere to their duty to be reasonable and to act in good faith in compliance with their obligations pursuant to the NEPA and NHPA in reference to wireless small cell facilities and any other structure or deployment that is defined as a federal undertaking;
3. Declare that the Federal Defendant's action to amend and revise 47 C.F.R. §1.1312 is arbitrary, capricious, and violation of federal law;
4. Declare that the Federal Defendants have acted outside the scope of their authority by denying Plaintiff the contractual right to request review fees and that any interference in said review under Section 106 is arbitrary and capricious and a violation of the Plaintiff Indian Tribe's right to due process and equal protection guaranteed to them pursuant to the Fifth and Fourteenth Amendments to the United States Constitution;
5. Declare that the Federal Defendants have violated the Plaintiff's Fifth and Fourteenth Amendment rights under the United States Constitution to require payment for their services pursuant to Plaintiff's Section 106 review of each applicant's licensing submission;
6. Plaintiff prays for and requests declaratory relief stating that Federal Defendant Pai has violated his ethical responsibilities by involving himself in issues surrounding his previous client Verizon and other industry entities;
7. Plaintiff prays for and requests a permanent injunction enjoining the Federal Defendants from arbitrarily and capriciously abusing their discretion by failing to follow federal law

and by hindering the Plaintiff Indian Tribe from charging reasonable review and survey fees from each applicant;

8. Plaintiff prays for and requests an award of reasonable attorney's fees, costs, and disbursements from the Federal Defendants, including but not limited to recovery of fees and costs from the United States under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

9. Certify this case as a class action.

Dated this 23rd day of April, 2018.

Respectfully submitted,

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