

BIA-TBAC Meeting Report – Will Micklin

I attended the Bureau of Indian Affairs - Tribal Budget Advisory Committee (BIA-TBAC) meeting of Central, Regional and Tribal Representatives on August 11-14 at the Turning Stone Resort on the Oneida Reservation in Verona, New York.

REPORTS

DOI IA:

George Skibine, acting Assistant Secretary Indian Affairs, reported he would be acting for the duration (until the next administration).

Ross Swimmer, Special Trustee of the Office of the Special Trustee (OST) reported on the recent Cobell case court ruling awarding \$455 million to plaintiffs, and suggested an appeal is possible. Swimmer reported on an interim decision to apply Indian preference to OST positions. Swimmer said the recent IG Report on OST official misconduct is under study. Swimmer said the DOI budget for FY 2008, 2009 and 2010 is effectively on hold until after the election through continuing resolutions for appropriations.

TRIBES

Joe Garcia, NCAI President and TBAC Co-Chair, said the TBAC committee needs to exercise its potential and move forward. The national election presents a choice for business as usual or great change. Tribal leaders must be ready for a new administration and request a meeting with the new President early on.

Ron His Horse Is Thunder, TBAC Co-Chair, asked TBAC to make productive decisions for our people.

BUDGETS

Mary Jane Miller, Director of the Office of Budget Management, reported on the status of the FY 2009 and 2010 budget. No action was taken by the Senate or House full committees on the budget markup. Preliminary markups are above the President's budget levels.

DOI Initiatives include Safe Indian Communities & Improving Indian Education (both BIA only), and Water for America (joint initiative), and Healthy Lands (BLM lead).

2 simultaneous budgets are proceeding:

Aug. 18 to OMB: CR version – baseline budget ('08 enacted = '09 CR = '10 OMB + 5%, performance focused. No real budget impact after inflation and pay costs). CR is after across the board rescission.

Aug. 29: Baseline budgets back to DOI bureaus.

Sept. 22-29: 2010 initiatives to Deputy Secretary.

Oct. 27: 2010 budget recommendations to Secretary.

Feb. 2: Formal submission of baseline budget (required by law).

March 9: 2010 budget development for "real" President's budget.

April 6: rollout of President's budget for 2010.

Simultaneous development of 2011 budget.

Joe Garcia: tribes need additional funding to support tribes' and tribal consortia development of tribal energy resources on tribal lands.

DOI IA IT

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Sanjeev "Sonny" Bhagowalia, DOI IA Chief Information Officer, reported BIA re-connected to the internet and IT operational. In FY 04 \$1.8 million cut from TPA base was not for IT and is a recurring cut (not one-time).

Joe Garica: Capital improvements should not be funded from operations budget.

Mr. Bhagowalia reported IT visions is (1) infrastructure and internet; (2) information portal services; (3) information assurance and security; (4) urgent excellence; (5) data and systems. He recognized the GIS tribal initiative by Randy Henry of CCTHITA.

Report provided on data management.

TRIBAL CAUCUS

Tribal Caucus determined the tribal priorities are: (1) carryover – early identification; retain surplus in the Regions; (2) fixed costs – tribal fringe = 36.2% (federal contractor standard); protected from recission; BIA absorbs its own fixed costs increases; (3) pay costs – in FY 07 one less day in pay calendar due to holiday was computed by BIA for a 17% reduction in pay costs; (4) information should be received by TBAC well in advance of the actual meeting.

BIA DETENTION CENTERS

Report provided on detention centers.

CONTRACT SUPPORT COSTS

Harry Rainbolt, acting Director of the Office of Indian Services, provided a report on contract support. Pool 1 - \$0 available for pool 1 for new contracts (new funding needed).

Pool 2 :

FY 09 \$4.3 million available, need shortfall report before distribution of surplus.

FY 08 \$8.2 million available, need shortfall report.

FY 07 Shortfall report due May 15 as annual deadline. Draft expected by Aug. 18 with final by Aug. 25 (notice will be sent to tribes). Submit to Congress in Sept. or Oct.

A handbook was developed and training conducted in FY 08 on shortfall reporting for BIA Regional and agency offices.

There is a statutory cap on funding for Pool 2 but not for Pool 1. ISD is a "no year" fund. Cannot re-program "2 year" funds to "no year" funds. ISD should not be "no year" funded (tribal comment).

A reduction in indirect CSC (rate) shifts funds to direct CSC.

FIXED COSTS

Tribes request BIA ask for full fixed cost funding with annual inflation increase (as all other bureaus and BIA receive) for tribal employees, exempt from recission, with increase (both BIA and tribal) not taken from tribal program funds. This is not requested in the FY 10 budget.

PAY COSTS

Tribes request BIA ask for increases, and explain "ineligible" tribal employees; and explain the one less payday adjustment that resulted in a 17% reduction.

MEETING WITH THE DOI SECRETARY

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The NCAI/TBAC requested a meeting with the DOI Secretary to discuss fixed cost increases (perhaps Aug. 26).

Tribal employees working in contract support, HIP, IRR and welfare assistance (staff pay reported under social services program) are formula based funding that BIA considers ineligible for pay costs (BIA pulled these programs from the TPA base previously - which is a problem).

Ms. Miller reported \$5 million added to FY 10 budget request for tribal fixed costs, and questioned whether direct CSC and not intended to be used for fixed costs. The tribes said "NO", that fixed costs of BIA should be treated the same as for tribes, and once funded should be protected from rescission as are BIA fixed costs (by pulling funds from tribal program dollars).

PRESIDENTIAL TRANSITION PLANNING

Discussed by Joe Garcia.

CARRYOVER

Ms. Miller committed to early identification, establish priorities and make decision for distribution. The Tribes asked that the Regions retain and expend all funds.

IRR REDUCTION

The Tribes made a report on the importance of IRR maintenance funds, in addition to IRR construction funds.

Ms. Miller reported on the IRR reduction of 50%, asserting a Fish and Wildlife Service budget analyst detailed temporarily to OMB for the budget rescission exercise was responsible for the reduction, and was impervious to BIA arguments for restoration of the funds.

NEXT MEETING

December 8-10, 2008, Washington, DC.

COMMENTS OF WILLIE MICKLIN
MEMBER, FCC INTER-AGENCY ADVISORY COMMITTEE

The following are recommendations that were discussed at the Seventh Annual Indian Telecommunications Initiatives (ITI) Regional Workshop and Roundtable in Salt Lake City Utah on July 16-17, 2008. I request tribes and tribal associations, including NTIA and NCAI, request the Federal Communications Commission adopt and implement these recommendations, or if federal legislation is deemed necessary, support the enactment of such authorizing federal bills.

I. NATIVE AMERICAN ECONOMIC POLICY REPORT DEVELOPING TRIBAL ECONOMIES TO CREATE HEALTHY, SUSTAINABLE, AND CULTURALLY VIBRANT COMMUNITIES, produced by the National Congress of American Indians and the Department of Interior, Office of Indian Energy and Economic Development.

The National Native American Economic Policy Summit held in Phoenix, Arizona, May 15-17, 2007, composed of 500 key stakeholders gathered to discuss the challenges to growing healthy, vibrant Native economies, published recommendations for innovative and progressive solutions to foster tribal economic growth. Recommendations included solutions for updating current utilities, transportation and other needed core infrastructure components necessary for tribes to keep pace with existing local demand and allowing tribes the ability to access funds for future demand and growth.

Specific policy solutions offered by Summit participants that involve telecommunications in Indian Country and the FCC are the following recommendations:

30. Change the Rural Utility Service loan policy that prohibits tribes from accessing funds to acquire facilities that are already the subject of existing loan programs. This program prohibits tribes from owning their own utilities because of the lack of availability of low cost funds since it protects the existing utilities by not allowing funds to be used to acquire existing programs - creating a self-imposed barrier to entry.
33. Expand access to broadband access by passing the Native American Connectivity Act, increasing the scope of the Universal Service Fund to include broadband and amending the Telecommunications Act to broaden the definition of "underserved areas." Work with regulators to include tribes in future ownership of telecommunications.
35. Consider tribal land rights and ownership when tribes regulate or operate utilities within their reservations. Legislation should clarify court cases that create confusion about tribal jurisdiction.
36. Allow tribes to lease facilities to service their population. This would make it more cost effective and risk averse by providing local service with adjacent utilities that service the local non-reservation community.
37. Very few tribes have been able to access licensed spectrum for public safety, telephone, community broadband or broadcast media purposes. Instead, industry has purchased spectrum licenses throughout Indian Country with very little benefit to the public interest of tribes or

Native American consumers. Summit participants recommend that Congress require government-to-government consultation for spectrum management on tribal lands, and ensure tribal access and options for ownership and management of spectrum on tribal lands.

II. COMMENTS OF THE NATIONAL TRIBAL TELECOMMUNICATIONS ASSOCIATION IN THE MATTER OF HIGH-COST UNIVERSAL SERVICE SUPPORT, WC Docket No. 05-337, Federal-State Joint Board on Universal Service, CC Docket 96-45, April 17, 2008.

The National Tribal Telecommunications Association (“NTTA”) submitted comments in response to the Notices of Proposed Rulemaking (“NPRMs”) captioned above, and within three NPRMs in which the FCC outlined broad potential reforms to the federal universal support fund (“FUSF”).

The NTTA urged the FCC to ensure that the original goals of universal service policy are fulfilled for *all* areas of the country prior to pursuing additional goals. NTTA asserted the FCC needs recommit itself to its policy of a government-to-government relationship with tribal governments and ensure that tribal governments have equal opportunities to those available to any other governing authority. Specifically, the NTTA proposed: 1) the Commission adopt a definition of unserved areas; 2) recognize the authority of tribal governments regarding the use of FUSF funds on tribal lands; and 3) designate tribal lands as separate study areas.

In Section V, pages 14-17, the NTTA summarized its proposal that the Commission embrace the opportunity before it to address the mandate by the Act that all Americans are connected to a communications network. Specifically, NTTA called on the Commission for innovative measures, as follows:

1. Tribal land carve-out from any caps on FUSF support, permanent waiver of the parent trap rule and waiver from any reverse auction policy. These measures will enable communities in the most economically challenged and high-cost areas a hope that they, too, will be connected.
2. The Universal Service Fund’s primary mandate is to provide “voice dial-tone” connectivity for the hardest to reach market areas. The hard to reach areas are the highest-cost areas of providing service. Therefore an artificial cap on FUSF support, a reverse auction incentive to only provide the cheapest infrastructure, or severely limit spending in the highest-cost areas for tribal communities are the worst regulatory solutions imaginable.
3. NTTA has advocated self-provisioning through tribal telecom development as a key empowerment of building tribal sovereignty. NTTA asserts that the costs entailed with providing self-service to connect tribal communities, viewed from the standpoint that only one tribally-owned telecommunications company has been formed every six years since passage of the Act, and the impact on the Universal Service Fund to promote tribal self-service will be minimal.
4. NTTA’s call for the Commission to define the term “unserved areas” as communities at least fifteen percent below the nationwide service average for service access is a crucial recognition that universal service funds need to be better directed and held more accountable. The

Commission's universal service policy reform must prioritize funding and efforts to connect unserved communities, particularly tribal communities as required by both the mandates of the Communications Act and as required under the Federal Tribal trust responsibility.

5. In assessing innovative solutions for tribal communities, the Commission needs to clarify and define its trust responsibilities to tribal communities. Issues of tribal sovereignty, tribal authority, and tension between tribes and states must be assessed by examining how greater self-service may improve connectivity in unserved areas, and how the use of outcome predicates and metrics for universal service support might enhance efforts to serve "the last mile" communities. Increases in connectivity in tribal unserved areas must be measurable, proven, and sustained to receive FUSF support.

6. Focus has been directed at using "efficiency" as a predicate for allocating universal service funding. Efficiency as a criteria for eligibility as ETC carrier, at least in tribal areas, should not be predicated purely on "price", but should include the true "build-out" costs to "connect" all geographic areas of the service area, with particular emphasis on reaching previously "unconnected" residents. An ongoing metric and outcome, as well as incremental gains in connecting previously "unserved" or "unconnected" residents must be part of the measure of efficiency and use of universal service funding. See the example of the Mescalero Apache community's improvement from under 10% service penetration in 1990 to 98% connectivity in 2007 under Mescalero Apache Telecom's enterprise, as a more significant measure of efficiency.

7. The Commission must enforce failure to fully connect all geographic areas in tribal areas, particularly when data and determination show that a carrier has failed to provide equitable service, or material incremental gains in connecting unserved areas. When a determination has been made that a provider has discriminated against a tribal community or provided substantial lack of equitable service compared to a non-tribal community, the tribe should be delegated the authority to choose or bid—by value, not price—the next provider using the tribal area high-cost support to connect and serve the tribal area.

8. There should only be one ETC in a rural area, particularly in a tribal unserved area. Competing technologies and providers vying for the same customer is inefficient use of FUSF support, increases accounting burdens on the universal service system, and lends itself to the continuance of unconnected customers being bypassed for more cheaply "connected" customers.

9. Service plans in unserved tribal areas should be negotiated with the respective tribe(s). ETCs operating in unserved or historically underserved areas should be required to consult with tribes on how to improve connectivity in the tribal area and to file a plan with the Tribe and the Commission on proposed efforts. Failure to comply with its service plan, particularly coupled with failure to improve on connectivity in the tribal unserved area should result in the ETC losing the high-cost support for that tribal service area.

10. All providers should be held to the same standards of quality of service and reliability in order to attain or retain their ETC designation. In that parity of standard principle, all ETCs must demonstrate specific outcomes of connectivity and incremental gains in connecting previously unconnected residential customers in tribal unserved areas. Failure to make "incremental gains"

or to demonstrate improvement in connectivity should result in the provider losing their ETC status in the tribal area.

11. The Tribe, as victim of the failure to provide fair and reasonable service, should have the delegated authority to choose or bid out its universal service provider.

12. Tribes should be given every direct assistance, resource and opportunity available through the Commission's auspices, particularly in issuance of certificates of convenience and wireless licensing, to self-provision service.

13. An annual report regarding the state of unserved areas with a specific emphasis on unserved tribal areas should be provided to the public by the Commission.

III. INDIAN OWNERSHIP OF BROADBAND/TELECOM SERVICES: THE NEED FOR TECHNOLOGICAL SOVEREIGNTY ON TRIBAL RESERVATIONS

I wish to propose the IAC assess the opportunities for the FCC to facilitate tribal ownership of telecommunications and broadband resources on tribal reservations. Broadband Internet connectivity is being both deployed and owned by localities across the country as a consequence of the advent of Wireless (Internet and IP telephone through WIFI and WIMAX) infrastructure. This subject was discussed in an FCC Indian Telecommunications Initiatives Regional Workshop and Roundtable held in San Diego, California on July 27 and 28, 2006. Wireless connectivity is dramatically less expensive and quicker to deploy than existing "wired" broadband/telecommunication platforms. The great majority of tribal Reservations are in rural areas that have limited access to broadband service. Tribal communities desire to control their own future direction for local Internet/telecommunications services in order to utilize these new technologies for the greater good of their citizens and for economic development on their Reservation lands. The FCC can foster tribal economic initiatives involving on-reservation broadband telecommunications. New broadband technologies enable tribes to overcome limitations of infrastructure and location in the delivery of communications services and networks essential to tribal education and economic development. Tribal owned and operated broadband Internet telecommunication networks are the key to the education of tribal citizens and on-reservation economic development. Broadband Internet infrastructure is directly correlated to almost every indices of job creation and economic prosperity. Only FCC policy and services can permit tribes to take full advantage of this transformative opportunity. Tribal ownership and control of telecommunications/broadband services is the sovereign right of tribes and is necessary to transform the outcomes of education, business development and job creation on tribal reservations. The FCC must adopt and adapt their policies to facilitate communications business models based on tribal ownership of telecommunications/broadband infrastructure and services which deliver last mile broadband on tribal reservations. Tribal economic growth in this 21st century depends upon this model. Thank you for the IAC participation in regard to this and related tribal telecommunications/broadband infrastructure.

Tribes' great concern with FCC policy is due, in large part, to its designation in 2001 of Western Wireless as an eligible telecommunications carrier (ETC) for Oglala Sioux tribal members living on the Pine Ridge Indian Reservation, thus making the company able to receive federal universal

service support for providing telephone service to tribal members living on the Reservation. In an order released on October 9, the FCC concluded that it has the authority to make the ETC designation for tribal members on the Reservation, but that the SD PUC should retain jurisdiction for provision of service to non-tribal members living on the Reservation. In a companion order, the FCC designated Western Wireless to be an ETC for the purpose of serving the tribal population on the Reservation. While the designation of Western Wireless as an ETC is a positive step in terms of providing telephone service to tribal consumers, it is important to note that, in reaching its decision, the FCC relied on *Montana v. U.S.* (450 U.S. 544 (1981)) and subsequent Supreme Court decisions that strictly limited the authority of tribal governments to regulate the non-Indians living within their jurisdictional boundaries. This FCC order raises continuing concerns about tribal jurisdictional issues stemming from the Montana line of cases.

Designation as an eligible telecommunications carrier is necessary to receive federal funds to support four universal service programs. The high-cost program provides support for telephone service in high-cost areas of the county. The low-income program provides support to enable low-income consumers to obtain and retain telephone service. The schools and libraries program helps schools and libraries to buy telecommunications and information services, and the rural health care program provides similar assistance support to rural health care providers. The Telecommunications Act of 1996, as amended, authorizes the FCC to make an ETC designation in cases where a carrier is not subject to state jurisdiction. Under the Universal Service Twelfth Report and Order, carriers serving tribal lands may petition the FCC for a determination whether the state lacks jurisdiction. The FCC first determines whether a carrier providing service on tribal lands is subject to the jurisdiction of a state commission or to tribal authority, given the tribal interests involved. If the FCC finds that the carrier is not subject to state jurisdiction, then it considers the merits of the carrier's request to be designated as an ETC.

In August 2000, Western Wireless and the Oglala Sioux Tribe signed the Tate Woglaka Service Agreement for the provision of telephone service on the Reservation. The agreement provides that the Tribe has the right to participate extensively in and administer the service plan for the Reservation. It also subjects Western Wireless to the Tribe's regulatory authority and requires that disputes under the agreement be resolved through an arbitration process that is enforceable by the Tribal court. In January 2001, Western Wireless filed a petition under the Twelfth Report and Order requesting ETC designation for the entire geographic area of the Pine Ridge Reservation. In its petition, supported by the Oglala Sioux Tribe, Western Wireless stated that it intends to provide supported services to both tribal and non-tribal members living on the Reservation if granted ETC status. The SD PUC opposed the petition, arguing, among other things, that Western Wireless is subject to its general regulatory authority under state law. In performing its analysis, the FCC relied on the Supreme Court's decision in *Montana v. United States*, in which the Supreme Court found that tribes generally lack regulatory authority over non-tribal members living on a reservation, with two exceptions. First, a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.(450 U.S. 544, 565 (1981)) Second, a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. (450 U.S. 544, 566 (1981))

The FCC concluded that the first Montana exception is satisfied under the provisions of the service agreement and further found that the Tribe's sovereignty interests in Western Wireless' service to tribal members outweigh the State's regulatory interests. However, the FCC concluded that it would not support the extension of tribal jurisdiction to non-tribal members on the Reservation. This finding was based on the second Montana exception, which has been narrowly construed in Supreme Court decisions to include only those activities that are "necessary to protect tribal self-government or to control internal relations. (STRATE VA-1 CONTRACTORS, 520 U.S. 438, 459 (1997) (quoting MONTANA V. UNITED STATES, 450 U.S. 544, 564 (1980)))

FCC Commissioner Kevin J. Martin filed a dissenting statement, asserting that the FCC does not have the experience, skill, or authority to make decisions involving state and tribal jurisdictional claims. He states that "While Indian tribes may have legitimate claims of sovereignty in these situations, both they and the States deserve a better forum than this one to resolve their claims. I am convinced that the parties would be far better served by resolving such claims in the courts . . . (Dissenting Statement of Commissioner Kevin J. Martin, FCC 01-284, page 2).

Both orders are available at

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-01-284A1.pdf and
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-01-283A1.pdf.

IV. INDIAN DESK OR TRIBAL GOVERNMENT BUREAU AT FCC

The Ewiiapaayp Band of Kumeyaay Indians requests the Federal Communications Commission establish an "Indian Desk" reporting directly to the Chairman of the Commission, such as an "Office of Tribal Government Affairs", or a Tribal Government Bureau. The tribal liaison position is currently functions in the Consumer & Governmental Affairs Bureau. Such placement in the FCC organization does not provide tribal governments and their issues sufficient exposure to Commissioner's and their staff, especially with regard to policy formulation.

V. SIRIUS/XM RADIO PROVISION OF A 24-HOUR PROGRAM STREAM FOR NATIVE RADIO

The opportunity in the pending Sirius/XM merger to secure some channel space for Native voices is important for Indian Country. The question is what would it take to create a 24-hour program stream drawing on existing program sources? Native radio proponents have tried for several years to secure some airtime at XM but with no luck. XM airs a one hour Native music program called Hand of Grandfather, but that's about it.

Speculation on the business issues surrounding the merger and the NCE channels is as follows:

1) The FCC has indicated that for the new satellite NCE radio channels it will follow the same rules as apply to making "public interest" television channels available on direct satellite TV providers Directv and Dishnet.

2) The FCC will not select the content providers for the NCE channels --they will ultimately chosen by the merged XM/Sirius, possibly following a programming "beauty contest" of some sort.

3) The merged XM/Sirius will not be required to provide "free Channels" to the selected content providers, but channels at "actual cost."

5) The merged satellite entity will likely have the discretion to pick and choose among financially qualified content providers based on the quality and variety of proposed content offerings with consideration for how those offerings will increase the appeal of the merged satellite offerings to existing and potential paying customers.

Indian Country deserves serious consideration by the FCC and the Sirius/XM merged business entity for its provision of a 24-hour program stream drawing on existing Native radio program sources.