



Native Nations and Federal Telecom Policy Failures:

Lessons from the Rural Digital Opportunity Fund

By Jessica Auer
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Local Self-Reliance

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In January 2024, the manager of a Tribal Internet Service Provider (ISP) was forwarded an email. *Did they know what this was about?* The email, from a major fiber Internet provider in the area and addressed to the Chairperson of the Tribe, was notifying the Tribe that the company had received federal funding to serve a handful of locations in the heart of the Tribal Reservation.¹

“As recommended by” the federal government, the company said, it was reaching out to inform the Tribe that they would be building broadband to those locations within the year. The company also warned the Tribe that any other federal or state grants to bring broadband to those locations would be “duplicative” and, by federal rules, not allowed.

Terminology: Enforceable Commitments and Duplicative Funding

When a provider accepts federal broadband funding, they commit to serving the agreed locations with a minimum speed. The federal government can “enforce” that commitment through fines or other penalties, so these are often called “enforceable commitments.” In most cases, more than one source of federal funding cannot be used to provide service to the same location – this is a ban on “duplicative” funding where there is already an “enforceable commitment.”

There was a problem. The federal agency that gave this company funding had not consulted with the Tribe before awarding the money three years prior. Nor had the company arranged for a formal Tribal engagement, as required by the federal funding the ISP had won, in the intervening years.

Prior consultation would have revealed that the locations were already served by the Tribe’s Institutional Network and the Tribal ISP. In other words, the company should not have received funding to serve those locations at all. Formal engagement after the fact might have at least offered a chance to resolve the matter quickly and directly. In fact, the manager had already proactively reached out to notify the company of the problem in 2023. “I made an assumption that by notifying” them, the Tribal ISP manager said, “they would remedy this.” The message went unacknowledged.

Instead, three years after the funding program launched, the Tribe was being *informed* of an imminent deployment schedule, and *warned off of* other federal grant opportunities.

In short: a non-Tribal telecommunications company had received federal funding to build broadband infrastructure on Tribal lands without consultation or consent, had appeared to shirk required federal Tribal engagement requirements, had ignored the Tribe’s attempt to raise concerns about it, and now seemed to be expecting to dictate what would happen next.

The company had received the funding through a program called the Rural Digital Opportunity Fund (RDOF), administered by the Federal Communications Commission (FCC) more than four years ago. In the first days of 2021, the FCC announced the winners of RDOF program, with more than 150 companies set to receive over nine billion dollars across ten years, assuming their successful completion of more detailed technical and financial disclosures.² The FCC’s approach to broadband funding has long invited tension between providers and some Tribes, and RDOF has earned a particularly bad reputation among Tribes.

Federal Agencies and Tribal Relations in the United States

This report uses three different terms to describe the formal and informal Tribal relations processes and policies used by federal agencies in telecommunications policy, or advocated for by Tribes.

Engagement: This term might be used more broadly to describe an effort by a non-state actor, like a company, to forge a relationship with a Tribal Nation. It is also the term used to describe outreach to Tribes required of certain telecommunications providers by the Federal Communications Commission.

Consultation: This term refers primarily to a formal, Nation-to-Nation dialogue required by the federal government and its agencies, in recognition of Tribal sovereignty, when developing any regulations that have Tribal implications. Some states and localities also have Tribal consultation requirements.

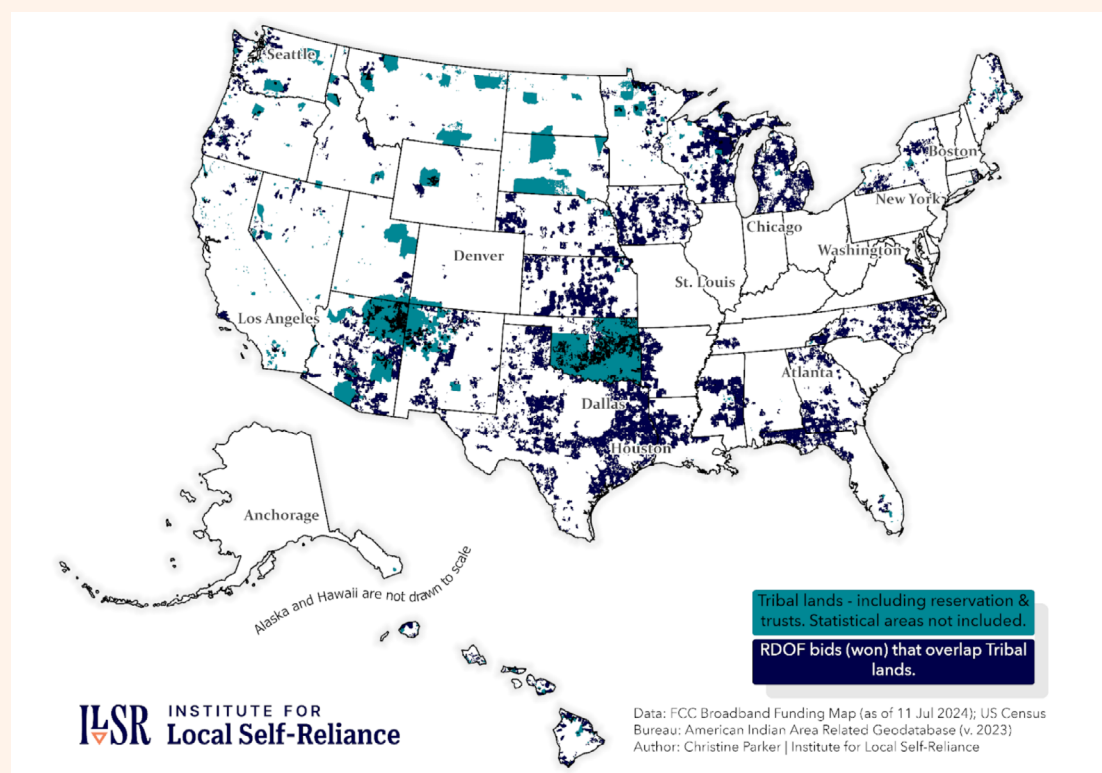
* Tribal nations, advocacy groups, and legal scholars have long raised concerns that companies and federal and state agencies have treated these processes as “box checking” exercises, and have laid out suggestions for more effective consultation and engagement methods rooted more firmly in the principles of sovereignty.³

Consent: Echoing the UN Declaration of the Rights of Indigenous Peoples, many Tribes have advocated the use of “free, prior, and informed consent” as a standard for federal telecommunication policy.⁴ Recently, some federal agencies have begun requiring formal Tribal consent before awarding funding for construction on Tribal lands. In most cases, these federal agencies have required a formal Tribal Government Resolution, though advocates point out that Tribes should be free to express consent in the manner to which they see fit.

As Chief Kirk Francis, President of the United South and Eastern Tribes Sovereignty Protection Fund, noted in 2020 Senate testimony: “Tribal Nations are political, sovereign entities whose status stems from the inherent sovereignty we have as self-governing peoples.”⁵ ILSR makes no claim regarding how each Tribe does or should exercise its sovereignty. This report does, at times, highlight concerns raised about sovereignty by some Tribes and advocacy groups in relation to federal telecommunications policy.

As this report will lay out, this Tribe’s experience is unique in some ways, yet many of the underlying causes of the brewing conflict are all too familiar: bad program design (no formal Tribal consent or consultation required in RDOF) compounded by weaknesses in existing guardrails (sidestepping required Tribal engagement), misinformation (rules about “duplicative funding” on Tribal lands are more complex), and unproductive attitudes from non-Tribal ISPs seeking to build on Tribal Reservations. Beset by such troubles, RDOF became another hassle, another hurdle, another source of wasted time and rising frustrations among many Tribal nations.

RDOF-funded areas and Tribal lands



This map helps illustrate the overlap between RDOF-funded areas and Tribal lands.

Auction participants bid on projects of varying size, with census block groups as the minimum geographic area. The areas outlined in blue represent active RDOF-winning bids where at least some of the locations are on Tribal lands. You can find this map at <https://communitynets.org/map/rdofmapoftribalareas>. To examine RDOF-funded projects in your area, you may visit the FCC's Broadband Funding Map.

As Tribes work in record numbers to close the significant digital divide across Indian Country, they need good policy that facilitates self-determined and sustainable solutions. To the contrary, RDOF became, for many, yet another lesson in the dangers of investing significant sums of federal money into new Internet networks on Tribal lands without regard to local knowledge or priorities, leaving Tribal governments to spend their own time and resources to fix broken processes.

While some recent federal broadband programs do require ISPs to secure Tribal consent prior to receiving funds, the FCC still has not adopted this approach. The problems outlined in this report reinforce the need for such a requirement. This report examines RDOF's program design in the context of the FCC's policies on Tribal nations, highlights the practical and fundamental concerns raised by some Tribes about the program, and considers the long-term reverberations it continues to have on broadband funding for Tribes. It concludes that the FCC should have stronger, more clear requirements for ISPs operating on Tribal Reservations.

The Tribal Digital Divide

Specific data about the digital divide on Tribal lands can vary from source to source, but studies all agree that the problem is significant. A 2022 study by the Center for Indian Country Development at the Federal Reserve Bank of Minneapolis offers the following figures comparing Tribal areas to neighboring non-Tribal areas:⁶

- Households in Tribal areas are around 24% less likely to have broadband Internet
- Households in Tribal areas experience Internet access speeds that are 75% slower
- Households in Tribal areas pay 11% more for basic Internet services

A report issued by the Government Accountability Office that same year found a significant divide when comparing broadband infrastructure on Tribal lands to non-Tribal lands⁷: 18% of people living on Tribal lands have no broadband Internet availability, compared to only 4% in non-Tribal areas.

RDOF And Its Discontents

RDOF is one part of the FCC's High Cost program, administered by the Universal Service Administrative Company (USAC).⁸ Together, the various High Cost programs distribute billions of dollars in funding to connect rural areas that are the highest cost areas to connect. RDOF was planned as a two-phase program beginning in 2020, but so far only Phase 1 has taken place. It operated as a reverse auction - where entities competed to request the least amount of funding to serve designated census blocks.⁹

RDOF's Phase 1 auction concluded in December 2020. All bidders committed to complete 100% buildout by the end of year eight (with the clock starting when money began to flow), with other interim milestones also in force.

Two Tribally-owned ISPs won RDOF bids: Fond du Lac Communications (doing business as Aaniin) and Northern Arapaho Tribal Industries (doing business as Wind River Internet). Fond du Lac Communications since withdrew from the program with penalty.

RDOF's eligible locations were census blocks where no provider was offering or had an existing grant (an "enforceable commitment") to offer speeds of at least 25/3 Mbps. Because Phase 1 was launched before the advent of the new Broadband Data Collection, these locations were identified using the old FCC Form 477 data in which providers listed a census block as served wherever they provided at least one location with service.¹⁰ RDOF census blocks, then, had no single location with reported service above 25/3 Mbps.

RDOF has been beset by troubles since the Phase 1 winners were announced. ILSR's data¹¹ estimates that more than a third of auctioned census blocks are in default, largely because the FCC later determined the service provider was not capable of delivering the speeds and reliability it promised.¹² The defaults amount to more than \$3 billion and have only served to confirm the criticisms raised in some quarters that the FCC failed to adequately screen applicants before allowing them to participate in the auction.¹³

These concerns and others had been circulating among ILSR and other broadband advocates who have pointed out the flawed system for designating eligible locations, noted some bids were so low as to make the likelihood of deployment deeply unlikely,

and raised alarms that the lengthy deployment schedule meant it would be years before some communities could expect to receive service, or worse, even tell if that service was ever coming at all.¹⁴ Additionally, the combination of poor rules and limited screening of participants made it quite difficult for high-quality rural and Tribal ISPs to compete against companies that aimed to game the system and would later forfeit their awards anyway.

RDOF Required No Tribal Consent or Even Prior Engagement

RDOF generally, then, has come in for its share of criticism. Even those who push back on this narrative offer only a qualified defense of the program.¹⁵ For many Tribal communities, the FCC's RDOF process introduced at least two special challenges.

First was the manner by which project areas were defined and auctioned. Eligible locations were determined by census block, but the FCC adopted census block groups as the minimum geography for bidding.¹⁶ Winning bidders for each census block group were required to build out to every location in all of the eligible census blocks within that block group.

Unfortunately, it looks as though many states will reproduce this problem in their BEAD project area definitions. Many states have chosen to work with such base geographies as census block groups or zip code tabulation areas, without reference to Tribal boundaries.

As Tribal broadband advocates had long pointed out, census blocks and census block groups often do not adhere to Tribal land boundaries, so such a method groups Tribal and non-Tribal areas into the same project area.¹⁷ This may even be by design, an attempt at correcting a long-standing problem in which providers would simply avoid building on Tribal lands altogether.¹⁸ However, it also created situations where buildout to these select locations on Tribal lands was little more than an afterthought for providers with few connections to the community. This was the case for NextLink, for example, who had to be told by the Iowa Utilities Board that some of their census blocks were on Tribal lands.¹⁹

Far more injurious for the auction, however, was continued adherence to FCC policies that did not require Tribal consent or even consultation before providers bid on these locations. Rather than a problem unique to RDOF, this has been a long-standing policy of the FCC.

Timeline of select events related to federal broadband policy and Tribal consultation

June 2000: FCC adopts policy statement recognizing the sovereignty of Tribal nations and establishing government-to-government relations.

November 2000: President Bush issues Executive Order 13175 on consultation and coordination with Indian Tribal Governments. As an independent regulatory agency, the FCC is “encouraged to comply.”

2011 and 2012: FCC issues new guidance requiring annual Tribal engagement for recipients of High Cost support, including on deployment planning.

2019: Oregon declines to designate provider Viasat as Eligible Telecommunications Carrier on Tribal lands due to lack of Tribal consent, holding up some of the funding Viasat won in the previous year’s CAF II Auction. The FCC later mentions this as a warning to providers in RDOF.

2019-2020: FCC solicits comments on the annual Tribal engagement policies. The Native Nations Communications Task Force responds in two reports, one in 2019 and one in 2020, pointing out serious deficiencies in the process and calling on the FCC to develop a protocol for “free, prior and informed consent of Tribes for projects on Tribal lands.”

2020: FCC launches Rural Digital Opportunity Fund (RDOF) as reverse auction and declines to require prior Tribal engagement or give preference to Tribal applicants. Many winning bidders have no history of service on Tribal lands.

2021-2023: The U.S. Department of Agriculture (USDA) and National Telecommunications and Information Administration (NTIA) strengthen or adopt Tribal consent policies in their broadband funding programs, including the ReConnect and Broadband Equity, Access, and Deployment (BEAD) programs.

2023: In latest iteration of the Alternate Connect America Cost Model (ACAM), FCC requires Tribal engagement begin within ninety days, and expects carriers “will act in good faith to provide the relevant Tribe(s) with an opportunity to consent.” Provisions stop short of requiring formal Tribal consent.

The FCC itself engages in Tribal consultation. The Office of Native Affairs and Policy (ONAP) manages much of this engagement and consultation.⁵⁶ USAC, the nonprofit that administers the High Cost program, also has a Tribal liaison, though it has no formal Tribal consultation obligations. Tribes often report that these offices are engaged and helpful.

In 2011 and 2012, the FCC issued new guidance requiring annual Tribal “engagement” for recipients of High Cost support who provide services on Tribal lands.²⁰ But according to the guidance, these telecommunications providers were only required, *after receiving funding*, to discuss with Tribes a series of questions related to deployment, and to certify and summarize that engagement.²¹ This engagement between providers and Tribes was separate from, and meant to be complementary of, the FCC’s own obligations dating from a 2000 policy for a “robust government-to-government consultation” process on matters affecting Tribal governments, their land and resources.²²

RDOF proceeded under these limited engagement requirements. In fact, the FCC’s 2020 Report and Order launching RDOF specifically “decline[d] to extend a Tribal-specific preference to Tribal entities or to require a nontribal entity to ‘prove an established partnership’ prior to the auction.”²³ The FCC policy of ignoring local preference is somewhat universal, as West Virginia found when Frontier, which has an extremely poor reputation in that state, won RDOF awards there.²⁴

In fact, the FCC’s 2020 Report and Order launching RDOF specifically “decline[d] to extend a Tribal-specific preference to Tribal entities or to require a nontribal entity to ‘prove an established partnership’ prior to the auction.”⁵⁵

When the FCC released further details about RDOF procedures later that year, it confirmed that the program would add no additional requirements to the Commission’s existing Tribal engagement policy.²⁵ Noting that the FCC required applicants to certify to their responsibility to abide by the annual Tribal engagement rules, the Commission argued that this certification would also “ensure that an applicant has conducted due diligence to provide service should it win support for an area that includes Tribal lands.”²⁶ A footnote specifically noted that, for this reason, the commission saw “no need for the short-form application to include a specific question on Tribal engagement.”²⁷ Twice, then, the FCC explicitly declined to require or even encourage pre-auction engagement between RDOF bidders and Tribes, or to include more extensive engagement provisions.

“We encourage applicants,” the FCC went on to say, “to engage in outreach to Tribal entities as early as possible to ensure that no issues arise post-auction that may delay the authorization of support,” pointing to a problem experienced by Viasat during an earlier funding program when the Oregon Public Utilities Commission would not approve their ETC status on Tribal lands without Tribal consent.²⁸

Tribes and tribal broadband advocacy groups already (and often) noted the challenges they’d experienced with this engagement policy, prompting the FCC to solicit comments on it in late 2019.²⁹ After including a brief section on Tribal engagement in a 2019 report,³⁰ the Native Nations Communications Task Force (NNCTF) issued another report exclusively related to this issue in response to the FCC’s request.³¹ While this second report was adopted after RDOF, it details concerns with the FCC’s policies that were widely known. Among the recommendations advanced by the NNCTF was the development of a protocol for “free, prior and informed consent of Tribes for projects on Tribal lands.”

More recent federal broadband programs not operated by the FCC have begun to respond to these demands by incorporating Tribal consent requirements into the granting process. The ReConnect program, through the US Department of Agriculture, has required Tribal consent for any application since 2021.³² The Tribal Broadband Connectivity Program³³ and BEAD funding,³⁴ administered by the National Telecommunications and Information Administration (NTIA), likewise made Tribal consent in the form of a Tribal Government Resolution mandatory for any planned deployment on Tribal lands.

Meanwhile, the FCC has so far not issued a holistic “refresh” of the Tribal engagement policies since their 2019 request for comments.

The FCC’s latest High Cost program, the Enhanced Alternative Connect America Cost Model (E-ACAM), was launched in 2023.³⁵ It differed significantly from RDOF in that it offered financial support to select providers already receiving High Cost support to serve an area under a prior program. Assuming these providers had pre-existing relationships with Tribes, the E-ACAM rules offered only slight modifications to their Tribal consultation guidance.

While reiterating the “ongoing annual Tribal engagement obligations” that these providers would have already been subject to, the FCC did add a bit of urgency, mandating that recipients reach out to Tribal governments within 90 days of an E-ACAM offer being made. Still there would appear to be no problem, from the FCC’s perspective, with beginning that required engagement after funds were awarded.

Unlike rules authorizing previous Alternative Connect America Cost Model programs (ACAM, Revised ACAM, and ACAM II),³⁶ the E-ACAM rules made reference to Tribal consent. Nevertheless, the language in the rules fails to lay out new, clear directives for providers. At times, the Commission equates required Tribal engagement topics like rights of way, permitting, and licensing requirements with Tribal consent. “Through these obligatory Tribal engagements,” it notes, “carriers receiving high-cost support [...] should have received consent from the local tribal government.” Because these providers are already present in the area and thus were already required to engage with Tribes, the FCC appears to assume consent without reference to concerns repeatedly raised by Tribes through the Native Nations Task Force about the quality of those engagements.

Among the recommendations advanced by the Native Nations Communications Task Force was the development of a protocol for ‘free, prior and informed consent of Tribes for projects on Tribal lands.’

The FCC also notes that they “expect carriers [...] will act in good faith to provide the relevant Tribe(s) with an opportunity to consent to [...] deployment of broadband in the Tribal area.” But offering “an opportunity to consent” is not the same as requiring prior consent, and the phrasing does not appear to contemplate the possibility of dissent.

RDOF was just one in a line of FCC programs that have dispersed large amounts of money to broadband providers to deploy on Tribal lands, and it carried in its DNA some of the weaknesses that already troubled some Tribal broadband advocates - weak Tribal engagement requirements with even weaker enforcement and no requirement for prior consent or consultation. Other federal agencies have since moved towards stricter Tribal consent policies, but the

FCC has not followed suit. While there are mechanisms for Tribal input into FCC policies, there remains a chasm between “free, prior and informed consent of Tribes for projects on Tribal lands” and FCC funding program rules. And the badly designed programs, like RDOF, have a long tail - often hampering the work of existing and emergent Tribal ISPs into the present.

All recipients of High Cost support serving Tribal land (including but not limited to RDOF) are required to file annual reports that include a section on required Tribal engagement. This is called Form 481. Tribes have a right to view these reports. Representatives of Tribal governments can contact the High Cost program to gain access to the system. Details and a user guide for Tribes is available at usac.org/about/tribal-nations/programs/ under the High Cost Program tab.

“Of Great Concern”: RDOF’s Approach Invites Conflict Between Tribes and Providers

The FCC sometimes explains what it feels are good reasons for these program decisions, that treating Tribal lands separately or requiring prior consent risks delaying or even possibly foreclosing buildout in areas that need it most.³⁷ But the Commission’s approach also sets the stage for conflict.

Tribes are left scrambling, and often find themselves negotiating with a provider that feels they have not just a right but a mandate to deploy to Tribal lands. Without having broken any program rules, even providers that approach this *post facto* engagement with good intentions may encounter reasonable skepticism from Tribes. Non-Tribal ISPs may, after all, essentially be showing up late for a meeting and then expecting to dictate the agenda.³⁸

This is not a recipe for productive relationships.

“My biggest takeaway,” the network manager noted, “is the amount of time and resources it has taken” to confront the problem.

The story of the Tribal ISP in the Pacific Northwest is illustrative of this point. Pulled from their work providing reliable, high-speed Internet to their community, the Tribal ISP spent hours and hours of staff time trying to resolve the trouble caused by RDOF. “My biggest takeaway,” the network manager noted, “is the amount of time and resources it has taken” to confront the problem. In the end, their effort seemed only to foreground the yawning gulf between Tribal, FCC, and provider views of what a productive relationship would look like, much less how to forge one.

Immediately upon receiving the January 2024 letter, the Tribal ISP again informed the outside provider that the Tribal addresses were included in the auction erroneously. In many years of informal discussion on other issues, the provider had not approached the Tribe for a formal engagement on these RDOF locations, as required by the FCC. Previous correspondence from the provider about RDOF had been painfully generic - a form letter sent to all public entities in the RDOF geography.

The network manager is not alone in finding the “collaboration” between High Cost recipients and Tribes lacking, despite the annual tribal engagement guidelines. The Native Nations Task Force has pointed to the challenges of ensuring providers meet these obligations fully for years, writing in 2019 of the frequent “lack of meaningful engagement and collaboration with Tribal governments” and noting that “the Tribal engagement obligation has been treated as a mere formality by many carriers.”⁵⁷

The presumption of suddenly being informed of a scheduled deployment had not started the conversation off on the right foot. “Now we’re in catch up and we have to fix it,” the Manager remembers thinking. Still, the Tribe did everything it could, convening with both the provider and the FCC, to clear up the error amicably.

Instead, the conversation deteriorated. Even the meeting invitation - titled “partnership kickoff” - completely misrepresented what was clearly articulated as the purpose of the meeting. The network manager felt that the Tribe was cast as “the bad guy” when they tried to explain their concerns. Ultimately, the provider insisted that they planned to proceed until told otherwise by the FCC, with or without the Tribe’s consent, and the FCC acknowledged having no formal method for Tribes to challenge or contest the award on their lands. Frustration increased.

A conversation about permitting during the meeting also did not engender confidence. When the network manager raised concerns that “the other thing that is not happening is permitting,” the provider’s response was jarring. “They were shocked,” the Manager remembers, “like, ‘you have a permitting department?’” An outside provider was approaching the Tribe with “deployment plans” supported by federal funds, and yet did not know the Tribe had a permitting department. This

is not the foundation for a successful program - or an effective use of federal funds.

The provider’s follow up to the meeting only served to drive home that the two sides were talking at cross purposes. The first thing they did was ask for the Tribe to sign an NDA in advance of a potential collaborative relationship - an outcome that the Tribe had made absolutely clear was not going to happen. Exhibiting a stubborn insistence on branding this rapidly deteriorating relationship a “partnership” and no real knowledge of Tribal processes, the ISP seemed to want to bulldoze through Tribal engagement. The Manager was left genuinely wondering - would they simply find the outside provider’s trucks on Tribal lands one day?

The tone of the letter also struck the Manager as dismissive of the Tribal ISP’s work to get their community connected. This felt particularly galling in context of what led to the Tribal ISP’s creation in the first place: decades of failure by outside providers to adequately serve the Tribal community. The Tribe had repeatedly, and for years, asked providers like this one to partner on a connectivity solution. Over and over, they found themselves looking at highly-touted investments in the region that just, simply, skipped over the Reservation. Now, after the Tribe had spent their own money solving their community’s digital divide, the provider insisted that they could do it better.

The Manager hears echoes of this dynamic in the comments of some large ISPs as they gear up for BEAD’s unprecedented broadband investment: *Smaller ISPs think they can handle it, but they can’t, they say. You need to go with a trusted partner. Yes, we have exhibited zero interest in serving these communities ever before, but, really, you have little other choice.*³⁹

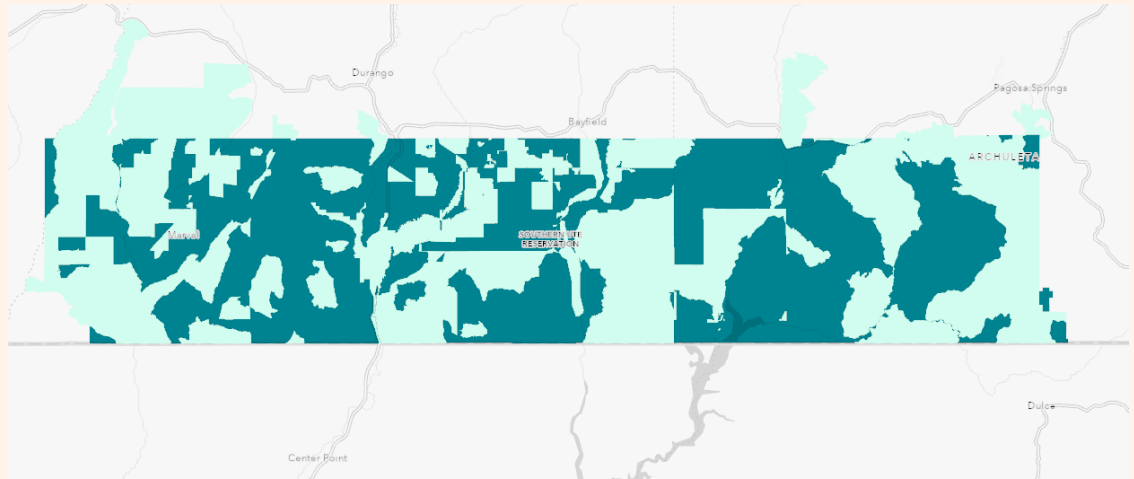
After building up community-focused and accountable providers in the face of years of neglect, and committing their own funds, Tribal communities find themselves “having to compete with companies that don’t have the same mindset,” the network manager said.

ILSR’s latest research estimates that there are around eighty Tribally-owned broadband networks currently operating, at least half of which of which have fought their way to connectivity in the last ten years, and another forty gearing up to launch services imminently. After building up community-focused and accountable providers in the face of years of neglect, and committing their own funds, Tribal communities find themselves “having to compete with companies that don’t have the same mindset,” the network manager said.

This Tribe is a bit of an unusual case in that RDOF funding actually represents an overbuild of existing Tribal infrastructure. What we have heard about more commonly are cases in which Tribes who are just starting to launch networks are confronted by an outside provider wielding federal dollars to build out some portion of their land.

An example of this comes in comments to USDA and NTIA in 2021 from the Southern Ute Indian Tribe, which laid out its concerns about RDOF in detail.⁴⁰ Only weeks after obtaining a license for the 2.5 Ghz spectrum over their land and undertaking planning and feasibility studies in preparation for launching their own broadband network, the Tribe was “surprised to learn” that the FCC had awarded a company funds to serve over nine hundred census blocks on Tribal lands in RDOF “inexplicably” and “without the prior written concurrence” of the Tribe. “Of great concern,” they noted, was that the RDOF award seemed poised to “disqualify the Tribe from eligibility” for other federal grant programs which would provide a vital lifeline for the Tribe’s nascent broadband efforts. (The Tribe was ultimately able to secure a Tribal Broadband Connectivity Program grant under NTIA rules that required Tribal consent and the RDOF bidder indicated its willingness to withdraw if they were not penalized.)⁴¹

For more on ILSR’s census of Tribally-owned broadband networks, see our latest data at <https://communitynets.org/content/indigenous-broadband-networks>



Areas previously covered by an RDOF award on the Southern Ute Indian Tribe's Reservation. Light green areas included in RDOF. Dark green areas on Reservation not included in RDOF. The provider eventually voluntarily surrendered these RDOF locations.

Another example comes from the Ute Mountain Ute Tribe, which had to fight through the Public Service Commission of Utah to contest an RDOF winner's eligibility to build on its lands.⁴² Its filing notes that "non-Tribal carriers have historically failed to provide adequate, affordable communications services" on the Reservation, with devastating consequences: only 11% of households in the community of White Mesa had a broadband Internet subscription. Since 2018, the Tribe had been developing "ambitious deployment plans" to answer its community's needs "on its own terms." Now it had to contend with RDOF.

Ultimately, then, this was a question both of "upholding the Tribe's sovereign rights over its own land and communications policies" and "ensuring prompt access to adequate, equitable broadband services."

In its response to the RDOF winner's petition for Eligible Telecommunications Carrier (ETC) status on Tribal lands, the Tribe laid out a series of urgent concerns that were both fundamental and practical. Tribal sovereignty was of paramount significance. Utah, the Tribe argued, had no jurisdiction to grant ETC status on Tribal lands, for one. Second, RDOF funds had been awarded without adequate consultation by either the FCC or the provider, "meaningful" consultation had still not been performed, and the provider "*did not have approval from the Ute Mountain Ute Tribe*" (emphasis in original).

More practically, RDOF threatened to bar the Tribe from obtaining other federal and state awards for its own broadband projects, which, in contrast to the outside provider's plans, were supported by the "requisite knowledge, cultural sensitivity, and commitment" necessary to bring them to fruition.

Ultimately, then, this was a question both of "upholding the Tribe's sovereign rights over its own land and communications policies" and "ensuring prompt access to adequate, equitable broadband services."

This conflict was costly for both the Tribe and the provider. For the Tribe, it brought legal fees and years of uncertainty. The provider also incurred legal fees, as well as delays in acquiring ETC status and unlocking RDOF funds throughout their winning bids and, potentially, a penalty for failing to meet their RDOF commitments in those locations.⁴³

Other tribes have raised similar concerns with USDA and NTIA.⁴⁴ And while specific elements of each story may differ, the broad outlines remain similar: providers who feel entitled to build on Tribal lands, and are willing to throw their weight around to do it (see, for instance, the provider's response to the Ute Mountain Ute filing).⁴⁵ Distrust fueled by years of broken promises where federally-funded buildouts on Tribal lands were the very last area on the deployment plan, or never happened at all.⁴⁶ And a costly and frustrating experience, filled with bureaucratic headaches and massive time loss as Tribes sort through what it will mean for their own plans.

In its 2019 report to the FCC, the Native Nations Communications Task Force surveyed some of the federally funded buildout failures or delays being reported by Tribes.⁵⁸ The Morongo Band of Mission Indians waited seven years for funded buildouts to occur, and the Tribe was still required to pay for the installation and guarantee a minimum number of subscribers to make it happen at all.

Concerns about Tribal sovereignty loom over and above these practical frustrations. RDOF funds were allocated without prior consultation or even notification, much less consent. For the Ute Mountain Ute Tribe and the Southern Ute Indian Tribe, RDOF's violation of Tribal sovereignty laced through their critiques of the program. And again and again, Tribes "pointed to Tribal sovereignty over their lands" as a major source of concern over RDOF and other FCC programs, where the Commission

had awarded "funding to serve Tribal lands when the Tribal Governments had not been contacted or authorized the provider to build."⁴⁷

The FCC and RDOF recipients were not breaking any program rules. But those rules themselves posed serious questions for Tribal sovereignty. And they hardly seemed to set the program up for success - not for Tribal nations, and not for the FCC. With so much money out the door, the most assured outcomes for the program are frustration and distrust, not better, more reliable Internet access.

Can Tribal Consent Requirements Elsewhere Correct for RDOF?

The relevance of this conflict borne from RDOF remains strong today, with rules against "duplication" for areas receiving federal infrastructure funding becoming a point of significant contention of late because of their implications for the \$42.5 billion Broadband Equity, Access, and Deployment (BEAD) program.⁴⁸ Winning RDOF bids that have not been defaulted on are considered "enforceable commitments" by the federal government, and would usually make those areas ineligible for funding through other grant programs, whether or not communities believed that RDOF-funded buildout was likely.

However, the rules about enforceable commitments and duplication for BEAD are different on Tribal lands. When issuing its BEAD guidance, the National Telecommunications and Information Administration (NTIA) determined that federal and state grant funding for build-out on Tribal lands - like RDOF - that do not carry Tribal Government Resolutions of consent *are not considered to be enforceable commitments*. (This echoes a similar policy decision by NTIA in the Tribal Broadband Connectivity Program (TBCP), developed after Tribes raised concerns about RDOF during consultation.)⁴⁹

Without formal Tribal consent in the form of a legally binding agreement, which includes a Tribal Government Resolution, funding programs like RDOF should have no bearing on the BEAD eligibility of locations on Tribal lands. As long as they are not currently receiving service from a provider, these locations should remain BEAD-eligible. These BEAD rules might be a helpful corrective for Tribes concerned that RDOF would prevent them from getting other grant funding to build sovereign networks.

However, misinformation about this policy could hinder Tribes' ability to ensure it is being followed. For instance, because the outside provider in the Pacific Northwest had sent the Tribe form letters, they had gotten this expressly wrong in previous correspondence. Instead of acknowledging the special rules governing RDOF on Tribal lands, the company incorrectly stated that *all* RDOF locations were ineligible for BEAD. With incorrect or at least misleading information, correspondence like this risks introducing uncertainty and confusion into an already complex process.

BEAD's enforceable commitment rule for Tribes applies to all federal and state funding programs where the provider did not obtain Tribal consent. Along with RDOF, this might include state programs, Enhanced A-CAM, and other High Cost programs. The rule against double dipping would still hold for recipients of recent ReConnect or Tribal Broadband Connectivity Program awards - programs in which Tribal consent was already required.

To make matters worse, until April of 2024 (after ILSR asked them to clarify this matter), there was little public guidance from NTIA on how the issue of otherwise "enforceable commitments" on Tribal lands without Tribal consent would be resolved. This has led to a patchwork of approaches by states that, in most cases, puts the burden of ensuring accurate data on Tribes, making Tribes' participation in the BEAD challenge process even more important - and causing more costly work.

Arizona is an example of states using this approach. They preemptively considered all RDOF locations on Tribal lands "enforceable commitments" without evidence of Tribal consent, and required Tribes to formally challenge those locations if they did not grant consent. Though the state was clear in its commitment to processing these challenges, the responsibility fell to Tribes to ensure that BEAD's provisions about enforceable commitments were followed.⁵⁰ Given the complex and burdensome nature of the challenge process, many Tribes

will struggle to engage in this process. Almost certainly, RDOF awards that never got Tribal consent will still end up blocking BEAD funds, despite BEAD rules trying to correct for this.

In contrast, Washington executed a plan that reverses the burden of proof and should produce more accurate data. The state's broadband office required that all federal or state grant recipients submit documentation of a legally binding agreement of Tribal consent (except in cases where the Tribe itself was the recipient).⁵¹ Otherwise, those locations would not be considered under an "enforceable commitment" and would instead be BEAD-eligible.

In April, NTIA issued a fact sheet along with some outreach guidance to Tribes covering this matter.⁵² The fact sheet makes clear that, while funding for locations on Tribal lands without a "legally binding agreement" does not constitute an enforceable commitment, a Tribe "should submit a challenge if it wants that location to be deemed unserved and eligible for BEAD funding." And, if Tribes do not do so, it warns about exactly the situation described above: "locations may be marked as 'served' (and ineligible for BEAD)" incorrectly.

Thus, Arizona's policy is well in line with NTIA's latest guidance. But is it the most reasonable?

For many years, the FCC has doled out the largest share of money, especially to rural areas, but the Commission's policies on Tribal consultation have often resulted in broken promises, frustration, and bureaucratic hurdles for already time-strapped Tribes looking to close the digital divide on their lands.

It's an approach that shifts the responsibility onto Tribes (in a challenge process that is itself time-consuming) and risks disqualifying locations for BEAD funding that are actually not under a recognized enforceable commitment. NTIA itself notes this probability. It is also an approach that could be especially disastrous for Tribes that are looking to access this once-in-a-generation funding to build out broadband networks on their own lands or to work with a trusted partner.

Even more unfortunate is that NTIA's clarification for Tribes came at a time when nearly a third of the challenge processes were already concluded, with several more states closing their challenge process in such short order that Tribes in those states likely struggled to respond.⁵³

On the other hand, Washington's approach seems both feasible and justifiable. With dedicated staff and extensive experience with broadband mapping, a provider should have no trouble producing proof of Tribal consent.

The FCC does not appear interested in putting much pressure on providers either. FCC guidance to High Cost support recipients issued in November 2023 reminded them of their annual Tribal engagement responsibilities and offered a warning on BEAD.⁵⁴ Without Tribal consent, the Commission noted, an RDOF award winner might find themselves overbuilt by another provider funded through BEAD. But the notice says only that "if a high-cost support recipient has obtained consent [...] it should be prepared to provide documentation to the relevant state broadband office." This guidance falls short of requiring recipients to proactively disclose that they have not obtained consent - and thus their funded locations are technically BEAD-eligible.

Conclusion

It doesn't seem far-fetched to tie the release of the FCC's November 2023 memo to the provider letter in the Pacific Northwest. With state BEAD challenges underway or on the horizon, RDOF recipients bumped up against the threat of competition and felt a renewed sense of urgency to secure consent. Companies could use undue pressure or selective information in an attempt to do so. If Tribes do not fully understand the leverage they hold, they may feel pressured to provide that consent or be unnecessarily warned off of competing for BEAD funds. The legacy of disingenuous outsiders taking advantage of Tribes does not seem to be consigned to history.

There remain a lot of moving parts in the broadband funding landscape - a lot of different state and federal funding programs with different rules and guidelines. For many years, the FCC has doled out the largest share of money, especially to rural areas, but the Commission's policies on Tribal consultation have often resulted in broken promises, frustration, and bureaucratic hurdles for already time-strapped Tribes looking to close the digital divide on their lands. It is a heap of trouble that some Tribes are still actively trying to unwind. NTIA's decision not to recognize enforceable commitments without Tribal consent can be a helpful corrective for Tribes who might otherwise be eligible for BEAD funding, though it looks like it may take another big effort to make it a reality.

Endnotes

¹ Events relayed to this report's author by the manager of a Tribal ISP, who wished to remain anonymous but gave consent to include in the narrative below. Interviews conducted during March and April, 2024.

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⁹ For background on RDOF, see <https://www.usac.org/high-cost/funds/rural-digital-opportunity-fund/>.

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