

**DEPARTMENT OF COMMERCE**

**National Telecommunications and Information Administration**

**Notice of Programmatic Waiver**

**ACTION: Notice**

**SUMMARY: Waiver of subpoint (E) of BEAD NOFO definition of Tribal Lands**

The Infrastructure Investment and Jobs Act (Infrastructure Act), enacted in November 2021, includes funding for robust investment in American infrastructure projects. The Infrastructure Act includes the Broadband Equity, Access, and Deployment (BEAD) Program, which provides \$42.45 billion of funding to achieve reliable, affordable, and high-speed Internet coverage throughout the United States. *See* Infrastructure Investment and Jobs Act of 2021, Division F, Title I, Section 60102, Public Law 117-58, 135 Stat. 429 (Nov. 15, 2021). The U.S. Department of Commerce, in keeping with its mission to create the conditions for economic growth and opportunity for all communities, is ready to lead the building of equitable access to universal high-speed Internet coverage in the United States, in partnership with other agencies and Departments.

The National Telecommunications and Information Administration (NTIA), as the agency responsible for administering the BEAD program, provides herein notice of a programmatic waiver of subpoint (E) of the definition of “Tribal Lands” set forth in section I.C(y) of the BEAD Program Notice of Funding Opportunity (NOFO).<sup>1</sup> This waiver means that lands described in subpoint (E) will no longer be considered Tribal Lands for purposes of BEAD.

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<sup>1</sup> *Broadband Equity, Access, and Deployment Program Notice of Funding Opportunity* at 15-16, § I.C(y) (2022).

## 1. Background

Section I.C(y) of the BEAD NOFO defines “Tribal Lands” as follows:

The term “Tribal Lands” means (A) any land located within the boundaries of— (i) an Indian reservation, pueblo, or rancharia; or (ii) a former reservation within Oklahoma; (B) any land not located within the boundaries of an Indian reservation, pueblo, or rancharia, the title to which is held— (i) in trust by the United States for the benefit of an Indian Tribe or an individual Indian; (ii) by an Indian Tribe or an individual Indian, subject to restriction against alienation under laws of the United States; or (iii) by a dependent Indian community; (C) any land located within a region established pursuant to section 7(a) of the Alaska Native Claims Settlement Act (43 U.S.C. § 1606(a)); (D) Hawaiian Home Lands, as defined in section 801 of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. § 4221); or (E) those areas or communities designated by the Assistant Secretary of Indian Affairs of the Department of the Interior that are near, adjacent, or contiguous to reservations where financial assistance and social service programs are provided to Indians because of their status as Indians.<sup>2</sup>

For BEAD deployment projects covering areas that meet the definition of “Tribal Lands,” the BEAD NOFO requires Eligible Entities to submit proof that the relevant Tribal Governments have consented to deployment on Tribal Land.<sup>3</sup>

In addition, the BEAD NOFO prohibits an Eligible Entity from treating as “unserved” or “underserved” any location that is already subject to an enforceable federal, state, or local commitment to deploy qualifying broadband.<sup>4</sup> Prior governmental support for broadband deployment on Tribal Land is not considered to be an enforceable commitment unless there is a legally binding agreement between the Tribal Government and a service provider offering qualifying broadband service to that location.<sup>5</sup>

Subpart (E) of BEAD’s definition of Tribal Lands applies to areas near or adjacent to reservations. These are not areas in which a Tribal authority has jurisdiction. Therefore, requiring Tribal consent for projects in these areas raises serious administrability challenges for Eligible Entities and subgrantees.

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<sup>2</sup> *BEAD NOFO* at 15-16, § I.C(y).

<sup>3</sup> *See id.* at 38, § IV.B.7.a.ii (“if an Eligible Entity’s Final Proposal includes plans to deploy broadband to Unserved Service Projects or Underserved Service Projects that include any locations on Tribal Lands, the Eligible Entity must submit proof of the Tribal Government’s consent to such deployment”); *see also id.* at 48, § IV.B.9.b.

<sup>4</sup> *See id.* at 36-37, § IV.B.7.a.ii & n.52.

<sup>5</sup> *Id.* at n.52.

As such, the Assistant Secretary has determined that, for good cause shown, and in the best interest of the Federal Government, a programmatic waiver of Subpoint (E) of the definition of “Tribal Lands” in Section I.C(y) of the BEAD NOFO should be granted, as described herein.

## **2. Programmatic Waiver**

Subpoint(E) of the definition of “Tribal Lands” in Section I.C(y) of the BEAD NOFO is waived.

As a result, Eligible Entities will not be required to show Tribal consent to broadband infrastructure deployment under the BEAD Program in areas that fall within the scope of subpoint (E). Additionally, a binding agreement evidencing Tribal consent will not be required to treat a prior governmental commitment for the deployment of qualifying broadband as “enforceable” in a location subject to subpoint (E).