



# NATIONAL CONGRESS OF AMERICAN INDIANS

April 28, 2023

Scott Blake Harris  
Director, National Spectrum Strategy  
National Telecommunications and Information Administration  
1401 Constitution Ave., NW  
Washington, DC 20230

Delivered via electronic mail to: [NSS Tribal Consultations@ntia.gov](mailto:NSS Tribal Consultations@ntia.gov)

## Re: NTIA National Spectrum Strategy (NSS) Tribal Consultation

Dear Director Harris,

On behalf of the National Congress of American Indians (NCAI), the oldest and largest national organization of Tribal Nations and their citizens, I write to offer comments to the National Telecommunications and Information Administration (NTIA) on the National Spectrum Strategy (NSS) Tribal Consultation. We urge NTIA and other relevant federal stakeholders, such as the Federal Communications Commission, to draft an NSS that appropriately reflects the sovereign rights and self-determination of Tribal Nations and provides adequate access and technical assistance for Tribal Nations seeking to participate in spectrum auctions in order to have agency over the spectrum bands on or adjacent to their tribal lands. Specifically, NCAI respectfully recommends the following:

- 1. Tribal Nations should be granted sovereignty over spectrum airwaves on their traditional tribal lands.**

NTIA and all other federal stakeholders must recognize Tribal Nations' inherent ownership of, and preserve the right to, spectrum licenses and spectrum over tribal lands in furtherance of the trust responsibility and acknowledgment of their sovereign status in the United States. It is well established that Tribal Nations have the right of self-determination, affording them autonomy and control over decisions that affect their land and citizens. Every spectrum license auction that affects Indian Country should require the consent of the respective Tribal Nation government as the auction qualifies as a federal government action affecting tribal interests. Further, because spectrum rights were never expressly granted to the United States in treaties, they should be considered to be retained by Tribal

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NCAI HEADQUARTERS  
1516 P Street, N.W.  
Washington, DC 20005  
202.466.7767  
202.466.7797 fax  
[www.ncai.org](http://www.ncai.org)

Nations.<sup>1</sup> As such, The National Spectrum Strategy developed by NTIA should reflect and acknowledge this inherent sovereignty.

**2. Tribal Nations should receive priority for any open or unused spectrum on or surrounding their lands.**

Granting priority to Tribal Nations with respect to open and unused spectrum on or surrounding their lands promotes the highest and best use of this spectrum. Tribal Nations, as sovereign governments, are responsible for serving their citizens and community members and thus have a strong interest in using this spectrum to provide critical services.

The Federal Communications Commission (FCC) correctly states, “members of federally-recognized American Indian Tribes and Alaska Native Villages and other residents of Tribal lands have lacked meaningful access to wired and wireless communications services.” Furthermore, according to a 2016 Government Accountability Office (GAO) report, 63 percent of households on tribal lands across the country lack access to high-speed services, and 60 percent of Bureau of Indian Education schools lack access to adequate digital broadband. High speed broadband services and other communications technologies are no longer luxury items. It is a basic necessity for quality education and economic success. Not only would access to this spectrum help Tribal Nations bring internet connectivity to tribal schools and households, but it would also help facilitate public safety activities, such as emergency response to wildfires and other states of emergency. Obstacles to accessing the radio spectrum also prevents Indigenous peoples from preserving, maintaining, and sharing their cultures, indigenous languages, music, and traditions.<sup>2</sup>

Moreover, the federal government acknowledges the importance of expanding communications and media resources to Tribal Nations. And expansion of these resources furthers the government-wide policy on addressing the needs of unserved and underserved tribal communities. Providing priority to Tribal Nation applicants will thus simultaneously advance federal policy and produce a brighter future for Indian Country.

**3. Tribal Nations must have the first right of refusal for any existing or available spectrum licenses/bands over or adjacent to their tribal lands.**

In 1985, the FCC found that local applicants were the best authorities for evaluating the needs of the people they serve and to act most responsibly in designing and developing the 2.5 GHz band of spectrum.<sup>3</sup> NCAI agrees that Tribal Nations—as local applicants—are best suited to meet the

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<sup>1</sup> *Spectrum Sovereignty on Tribal Lands: Assessing the DIGITAL Reservations Act*, Blackwater, Mutazashvili, & Weiss, 2022, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4178671](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4178671).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Transforming the 2.5 GHz Band NPRM*, WT Docket No. 18-120, ¶ 26.

needs of their citizens. NCAI urges NTIA to provide Tribal Nations the first priority in accessing spectrum and allow them the first right of refusal for available spectrum bands on or near their lands. Doing so would be consistent with the NTIA's goals for more efficient and effective use of spectrum and would address the well-documented lack of access to communications services in Indian Country.

**4. Tribal Nations should be properly notified of any potential Spectrum Licenses on or adjacent to their lands prior to approving the license so that the Tribal Nation may have a role in the approval process.**

Tribal Nations should be properly notified of, and included in, the approval of any new contractual agreements for the lease or sub-lease of any tribal spectrum. New contracts established with third-party licensees to assign or lease spectrum over a Tribal Nation's lands must be negotiated at the discretion of the respective Tribal Nation. The NSS should also require that any new contracts entered into must ensure the Tribal Nation retains permanent spectrum rights over the tribal lands where the spectrum is located. Additionally, tribal spectrum contracts for third-party licensees should not extend past a five-year time period, after which the Tribal Nation, Native Hawaiian organization, or qualifying tribal entity may review the negotiated terms with the third-party licensee.<sup>4</sup>

**5. NTIA and the FCC should adopt a "use or lose" approach to spectrum licensing over tribal lands.**

NTIA and the FCC should require the licensee to provide universal service using the spectrum or return the unused portions of the spectrum to the Tribal Nation government. The license of any third-party licensee that has failed to extend coverage on the underserved tribal lands one year from the date that the Commission accepted the third-party licensee's notice of construction permit fulfillment should immediately expire, including all rights to the spectrum licenses. The Commission should then reassign the spectrum licenses for the tribal lands so that the licenses shall immediately revert to the Tribal Nation or Native Hawaiian organization where the spectrum is geographically located.

**6. Require Tribal Nations receive a portion of the profit from spectrum leases over their lands.**

If the NTIA or the FCC auctions any spectrum associated with tribal lands, the overseeing agency or commission should pay the Tribal Nation government the reasonable estimated value of the portion of spectrum associated with the tribal lands, such as the appropriate price per

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<sup>4</sup>S. 4331: *DIGITAL Reservations Act*, 116th Congress, Introduced 07/27/2020, <https://www.congress.gov/bill/116th-congress/senate-bill/4331/text?r=1&s=1#toc-HC1F30C4E27754B48BA20336F91928F58>.

megahertz per population, including taking into account the respective population density of the tribal lands, less the reasonable estimated clearing costs for clearing the spectrum attributed to those lands.

**7. Ensure the statutory definition of “Tribal Lands” is as flexible and expansive as possible to avoid excluding Tribal Nations based on unique individual circumstances.**

In 2019, the FCC, during the rulemaking period for the 2.5 GHz Tribal Priority Window (TPW), limited the eligibility for the TPW by using the definition of “tribal lands” found in 47 C.F.R. § 54.5 as the definition of eligible tribal lands instead of the broader definition contained in 47 C.F.R. § 73.7000. This decision effectively excluded Tribal Nations who lack reservations and or have service populations located over non-contiguous parcels of off-reservation trust land from participating in the TPW.<sup>5</sup>

Further, the FCC restricted qualification for the TPW to tribal lands that it considers “rural.” Despite the efforts of countless Tribal Nations and national Native organizations, the FCC refused to reconsider the restriction of the TPW to “rural” tribal lands. This decision ignored the unique history of land loss and current land holdings of tribal nations, which includes non-Indian settlement in and around traditional tribal homelands, such as, for example, Seattle, WA, or Phoenix, AZ, which today would not be considered “rural” areas but whose neighboring Tribal Nations nonetheless occupy tribal lands.<sup>6</sup>

The federal government has a trust relationship to federally recognized Tribal Nations, regardless of the location of tribal lands. There has never been any constitutionally or legally based avenue whereby the federal government would not be required to adhere to certain fiduciary standards in its dealings with Tribal Nations simply because of the location of tribal lands. As an independent agency of the federal government, the Commission has long recognized and honored its own general trust relationship with, and responsibility to, federally recognized tribal nations. This trust relationship and responsibility applies equally to all federally recognized Tribal Nations, not just to certain subsets of Tribal Nations based on the location of tribal lands.<sup>7</sup> NCAI strongly encourages NTIA and the FCC to ensure that the statutory definition of tribal lands used in the National Spectrum Strategy or in any proposed rulemakings regarding spectrum over tribal lands avoid the same pitfalls of the FCC’s 2.5 Ghz Tribal Priority Window.

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<sup>5</sup>*Petition for Reconsideration in the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Education and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands (WT Docket No. 18-120)*, National Congress of American Indians, November 2019.

<sup>6</sup>*Ibid.*

<sup>7</sup>*Ibid.*

**8. NTIA and other relevant federal stakeholders shall provide specialized and ongoing technical assistance to Tribal Nations regarding spectrum.**

NTIA should develop a team of technical experts to provide training and technical assistance to Tribal Nations that are culturally-informed and appropriate. Federal stakeholders must also provide ongoing and unbiased technical assistance on spectrum management, contractual agreements, and procedural requirements.

**9. NTIA must implement a consultation process that gives Tribal Nations ample time to respond and meaningfully engage with any forthcoming drafts of the NSS.**

NTIA should carry-out robust, interactive, pre-decisional, informative, and transparent consultation with Tribal Nations in order for them to obtain free, prior, and informed consent before the approval and adoption of administrative measures or agency action that affects tribal lands or tribal resources. This is especially true of any actions regarding spectrum or tribal airspace, where telecommunications processes and associated information are unclear, unreported, or inadequate to meet the needs of Tribal Nations.

Going forward, NCAI urges NTIA to give Tribal Nations more time than previously allotted to submit public comments following consultations. Extending the timing of comment periods following any tribal consultations are important in order to allow Tribal Nations, especially smaller Tribal Nations with less capacity, enough time to incorporate any new feedback or input following the consultation into their comments. NTIA should allow for a period of at least 30 days following consultations to submit comments, in accordance with the most recent Presidential Memorandum on Uniform Standards for Tribal Consultation from November 2022.<sup>8</sup> Additionally, actions should be taken after initial consultation to host follow up consultations and give tribal leaders the opportunity to comment and submit feedback on any actions taken since the initial consultation and any draft policies, regulations, rules, or proposals by NTIA prior to taking final action on a matter in which Tribal Nations have a stake.

**NCAI Resolutions and Materials Related to Spectrum on Tribal Lands**

- Resolution #ABQ-19-87C: Creating Tribal Opportunities for Partitioning, Disaggregation, and Leasing of Spectrum for Wireless Services in Indian Country<sup>9</sup>
- Resolution #ABQ-19-86C: Providing for the Success of Tribal Nations in the 2.5 Gigahertz Broadband Tribal Priority for Wireless Networks<sup>10</sup>

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<sup>8</sup>*Presidential Memorandum on Uniform Standards for Tribal Consultation*, November 30, 2022, <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/>.

<sup>9</sup>[https://www.ncai.org/attachments/Resolution\\_fYPwknYLYvTqtONSNDsTqorAmwOvecBbYkGJZFXOmvmMwmHqvnB\\_MKE-11-07.pdf](https://www.ncai.org/attachments/Resolution_fYPwknYLYvTqtONSNDsTqorAmwOvecBbYkGJZFXOmvmMwmHqvnB_MKE-11-07.pdf).

<sup>10</sup> <https://www.ncai.org/ABO-19-086C.pdf>.

- Resolution #SD-15-037: Urging the Federal Communications Commission to Improve Access to Spectrum Licenses for Tribal Nations<sup>11</sup>
- Resolution #SAC-12-034: Promoting Tribal Nation Access and Use of Spectrum for Communications Services<sup>12</sup>
- Resolution # MKE-11-007: In Support of a Tribal Priority for the Utilization of Spectrum on Tribal Lands<sup>13</sup>
- Resolution #PSP-09-083c: Removing the Barrier to Entry for the Tribal Digital Village and Tribal Use of White Space Spectrum Involving International Border Exclusion Zones<sup>14</sup>

If NTIA has any questions about any of the above mentioned recommendations, please do not hesitate to reach out to our team. Specifically, you may reach out to C.C. Wright, Policy Lead for Infrastructure and Community Development, [cwright@ncai.org](mailto:cwright@ncai.org). Thank you for your consideration, and the opportunity to submit these comments.

Respectfully,



Larry Wright, Jr.  
Executive Director, National Congress of American Indians

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<sup>11</sup>[https://www.ncai.org/attachments/Resolution\\_BUFFOLwyvmqOzhoauWvqvPMTLKsOSkoRfKLCFkAvjEOvTZJcmE\\_SD-15-037.pdf](https://www.ncai.org/attachments/Resolution_BUFFOLwyvmqOzhoauWvqvPMTLKsOSkoRfKLCFkAvjEOvTZJcmE_SD-15-037.pdf)

<sup>12</sup>[https://www.ncai.org/attachments/Resolution\\_rYYpZVNclWOCglrGloYXfbRdouiKtxSePLwbZoYYEDWbtuzfTwP\\_SAC-12-034%20final.pdf](https://www.ncai.org/attachments/Resolution_rYYpZVNclWOCglrGloYXfbRdouiKtxSePLwbZoYYEDWbtuzfTwP_SAC-12-034%20final.pdf)

<sup>13</sup>[https://www.ncai.org/attachments/Resolution\\_fYPwknYLyvTqtONsNDsTqorAmwOyecBbYkGJZFXOmvbMwmHqvnMKE-11-07.pdf](https://www.ncai.org/attachments/Resolution_fYPwknYLyvTqtONsNDsTqorAmwOyecBbYkGJZFXOmvbMwmHqvnMKE-11-07.pdf)

<sup>14</sup>[https://www.ncai.org/attachments/Resolution\\_lzwXaDeWAekatwNKNnwBmDPrRovvppwaGbLlhagkLzKjIlgBqYW\\_PSP-09-083c\\_final.pdf](https://www.ncai.org/attachments/Resolution_lzwXaDeWAekatwNKNnwBmDPrRovvppwaGbLlhagkLzKjIlgBqYW_PSP-09-083c_final.pdf)