UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

NATIVE VILLAGE OF UNALAKLEET, NATIVE VILLAGE OF ELIM,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE'S RURAL UTILITIES SERVICE, ANDREW BERKE, *as Administrator of the Rural Utilities Service*,

Defendants,

vs.

MUKLUK TELEPHONE COMPANY, INC., INTERIOR TELEPHONE COMPANY,

Intervenors.

3:24-cv-00100-MMS

ORDER GRANTING MOTION TO INTERVENE [DOCKET 29]

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION [DOCKET 8]

This matter is before the undersigned pursuant to 28 U.S.C. § 636(c)(1) and Fed. R. Civ. P. 73(b)(1).[1] For the reasons stated below, the Motion to Intervene is **GRANTED** and the Motion for a Preliminary Injunction is **DENIED**.

[1] *See*, Order re Intent to Reassign to a United States Magistrate Judge and Declination of Consent Form, Dkt. 24 (requiring the parties to submit a declination of consent within two weeks); Dkt. 26.

I. BACKGROUND

The federal government, through the United States Department of Agriculture's Rural Utilities Service ("RUS" or the "Government")[2] offers funding for broadband service for underserved rural communities. The Rural eConnectivity Loan and Grant Program ("ReConnect Program") "furnishes loans and grants to provide funds for the costs of construction, improvement, or acquisition of facilities and equipment needed to provide broadband service in eligible rural areas."[3] Beginning in December of 2018, the ReConnect Program has had five rounds of funding to date. The fourth round ("Round Four") is at issue before the Court.

The federal government has promulgated voluminous regulations on the eligibility of regions to receive funding and on the prospective contractors' applications. *See*, Title 7 C.F.R. §§ 1700–1799. One of these regulations, at the relevant time, read:

> A complete application will include the following information as requested in the RUS Online Application System and application guide: [. . .] If service is being proposed on tribal land, a certification from the proper tribal official that they are in support of the project and will allow construction to take place on tribal land. The certification must: (i) Include a description of the land proposed for use as part of the proposed project; (ii) Identify whether the land is owned, held in Trust, land held in fee simple by the Tribe, or land under a long-term lease by the Tribe; (iii) If owned, identify the landowner; and (iv) Provide a commitment in writing from the landowner authorizing the applicant's use of that land for the proposed project[.][4]

---

[2] References to RUS and the Government are inclusive of co-defendant Andrew Berke.
[3] *See*, United States Department of Agriculture, *ReConnect Loan and Grant Program*, https://www.usda.gov/reconnect.
[4] 7 C.F.R. 1740.60(d)(19) (2021).

In August of 2022, RUS published its Round Four funding opportunity announcement ("FOA"). Rural eConnectivity Program, 87 Fed. Reg. 47690–96 (Aug. 4, 2022) ("87 Fed. Reg. 47690"). In addition to the Code of Federal Regulations, RUS included additional instructions for applicants. Amongst many other requirements, RUS included a reference to 7 C.F.R. 1740.60(d)(19), and wrote:

> Pursuant to [the C.F.R.], a certification from the appropriate tribal official is required if service is being proposed over or on Tribal Lands. The appropriate certification is a Tribal Government Resolution of Consent. The appropriate tribal official is the Tribal Council of the Tribal Government with jurisdiction over the Tribal Lands at issue. Any applicant that fails to provide a certification to provide service on the Tribal Lands identified in the PFSA will not be considered for funding.[5]

Tribal Lands was defining as meaning "any area identified by the United States Department of Interior as tribal land over which a Tribal Government exercises jurisdiction. A GIS layer of most Tribal Lands can be found on the RUS mapping tool located at https://www.usda.gov/reconnect." *Id.* at 47692. Tribal Government was defined "the governing body of an Indian or Alaska Native tribe, band, nation, pueblo, village, or community listed pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 5130." *Id.*

Mukluk Telephone Company, Inc. and Interior Telephone Company (collectively, "Fastwyre" or the Companies) applied under Round Four and were awarded roughly $70 million in combined funding in fiscal year 2023. Dkt. 32 at ¶ 29. RUS concedes that the Companies had not obtained the consent of the Native Villages of Unalakleet and Elim

[5] *Id.* at 47693.

("Unalakleet" and "Elim," respectively, or the "Villages"). *Id.* at ¶ 31. Nevertheless, RUS responded to a concern raised by Kawerak. Dkt. 9, Ex. C. Kawerak "is a nonprofit tribal consortium that provides over 40 different programs to the Inupiaq, St. Lawrence Island Yupik and Yup'ik people who reside in 16 communities of western Alaska and represents the 20 federally recognized tribes in the Bering Strait Region."[6] By letter dated October 9, 2023, Kawerak raised concerns to RUS about the grant awards to Fastwyre, pointing to a lack of tribal consent. Dkt. 9, Ex. C. RUS responded that it "takes that responsibility very seriously."[7] It went on to counter, however, that it had received certificates of support from Kawerak to rebut its argument that Fastwyre had not obtained tribal consent. *Id.* RUS wrote that it "deferred to Kawerak's representation and accepted the certificates of support for these applications" and referred to Kawerak "[a]s the native villages' representative[.]". *Id.* RUS closed its response to the lack of consent objection that it "cannot simply undo legal contracts for federal funding which it believed were properly supported and entered into." *Id.* At this point, there appears to be no dispute that Kawerak is not a tribal representative of Unalakleet or Elim or that Fastwyre did not obtain the consent of the Plaintiffs.[8]

---

[6] Kawerak, Inc. *Who We Are*, https://kawerak.org/about-us/who-we-are/.

[7] RUS contends that this letter is not an admission of an obligation to obtain tribal consent. For the purposes of the Government's position, the Court will accept this argument, but it still finds the letter salient to describe RUS's past actions.

[8] *See*, Dkt. 45, Ex. A (Declaration of Frank Katchatag, President of the Tribal Council of Unalakleet) at ¶ 15; Dkt. 45, Ex. B (Declaration of Robert Keith, President of the Tribal Council of Elim) at ¶ 12; Dkt. 32 at ¶ 31 (admitting that Fastwyre did not obtain resolutions of tribal consent but denying the requirement to have done so.) and ¶¶ 39–41 (regarding the nature of Kawerak.).

In May of 2024, the Plaintiffs filed suit against RUS and its Administrator, Andrew Berke. Dkt. 1. The Complaint prays for injunctive relief, fees and costs, and any other relief deemed just and proper by the Court. *Id.* at 23. It advances two theories of RUS's liability and the Plaintiffs' entitlement to relief. First, it asserts that RUS was arbitrary and capricious under the Administrative Procedures Act ("APA") for failure to abide by the federal regulation requiring tribal consent. *Id.* at 16–19 (Counts I and II). Plaintiffs also assert that Fastwyre is insufficient as a contractor both because it has not performed on the contracts, but also because they cannot perform on the contracts due to the lack of backhaul capabilities. *Id.* at 19–22 (Counts III and IV). RUS filed its Answer on August 23, 2024. Dkt. 32.

On May 24, 2024, Plaintiffs moved for a preliminary injunction, arguing that Fastwyre should be deobligated from its awards under the theories of lack of tribal consent and as an independent claim, the performance of Fastwyre. Dkts. 8–9. RUS responded in opposition, and Plaintiffs replied in further support. Dkts. 18 and 21. On August 20, 2024, Fastwyre moved to intervene. Dkt. 29. Plaintiffs objected, but RUS took no position. Dkt. 38. Plaintiffs moved for a hearing on the Motion for a Preliminary Injunction. Dkt. 33. The Court granted that motion and held a hearing on both the Motion for a Preliminary Injunction and the Motion to Intervene on September 20, 2024. Dkts. 34 and 46. The Court also granted the Fastwyre movants leave to participate as amici curae. Dkt. 39. It also invited Fastwyre to file an amici brief, which it did. Dkt. 43. At the hearing, the Court heard from the parties and the amici. The Court is grateful for the preparedness of all

counsel in attendance and will address the arguments made therein in the respective sections *infra*.

II. MOTION TO INTERVENE

The Court grants the Motion to Intervene. Dkt. 29. Fastwyre argues that it is entitled to intervene as a matter of law, but in the alternative, that the Court should grant leave to intervene under its discretion. *Id.* The Plaintiffs objected on the basis of prejudice that further delay may cause. Dkt. 38. In summary, Plaintiffs wrote that they "do not oppose Fastwyre participating as amici curiae, and do not necessarily oppose Fastwyre intervening at a later stage in the litigation, but obtaining party status is not necessary for Fastwyre to be heard, and Plaintiffs cannot afford further delay resolving their Preliminary Injunction Motion." *Id.* at 2. Plaintiffs concluded that, once the preliminary injunction had been resolved, that they "welcome Fastwyre's participation in the litigation to resolve Plaintiffs' underlying claims, including Plaintiffs' request for a permanent injunction." *Id.* at 8.

The Court is sympathetic to the prospect of delay and agrees that Fastwyre's motion came at an inopportune time. This lawsuit was filed in May and Fastwyre did not move to intervene for three months and after the Motion for a Preliminary Injunction was fully briefed. As such, while the Court believes that the Fastwyre movants should be brought in as parties, the delay in moving to intervene required the Court to treat them as amici for the purposes of the initial briefing and the motion hearing. Nevertheless, the Court heard from Fastwyre both in writing and at the hearing and believes that it has had the opportunity to represent itself for the purposes of the preliminary injunction matter.

Intervention is governed by Federal Rule of Civil Procedure 24. It reads:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.[9]

The Rule also provides for permissive intervention:

> On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact. [. . .] In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.[10]

The most salient factor for delay is whether intervention would prejudice the existing parties.[11]

Fastwyre argues that its motion is timely. It argued that, at the time of filing, this case was still in the pleadings stage, that no substantive or discovery orders had been issued, and that their addition would not needlessly prolong resolution of open matters before the Court. Dkt. 29-2 (Memorandum in Support) at 5–9. Plaintiffs objected on the basis that potential delay of the Court's resolution of their Motion for a Preliminary Injunction would be prejudicial and that the balance of harms would tilt in favor of denial. *See generally*, Dkt. 38. The Court finds the Plaintiffs' objection to be moot. Not only has the Court conducted its proceedings in a manner that both permitted Fastwyre to be heard,

[9] Fed. R. Civ. P. 24(a).
[10] Fed. R. Civ. P. 24(b).
[11] *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 857 (9th Cir. 2016).

but it also did so without continuing the motion hearing or its resolution of the Motion for a Preliminary Injunction, which the Court will address *infra*. RUS took no position. As such, the Court does not find that the existing parties would be prejudiced by the inclusion of Fastwyre.

Fastwyre argues that it has a legally protectable interest in the contracts awarded, which approximate $70 million, in the resources that it has used as part of the environmental review process, in defending itself against the allegations pertaining to its performance and potential lack of ability to perform, and in preventing an outcome that could impact its ability to obtain future grants. *See*, Dkt. 29-2 at 9–13. No parties substantively responded, and the Court agrees that Fastwyre has a legally protectable interest.

Fastwyre argues that the Government will not adequately represent its interests. *Id.* at 13–15. The Ninth Circuit directs its district courts to consider:

> (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect. The prospective intervenor bears the burden of demonstrating that existing parties do not adequately represent its interests.[12]

The "burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate."[13]

---

[12] *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 398 (9th Cir. 2002) (internal citations omitted).

[13] *Citizens for Balanced Use*, 647 F.3d 983, 898 (9th Cir. Cir. 2011) (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), as amended (May 13, 2003)).

Fastwyre points the Court to *Chilkat Indian Vill. of Klukwan v. Bureau of Land Mgmt.*, No. 3:17-CV-00253-TMB, 2018 WL 9854668 (D. Alaska May 24, 2018). In *Chilkat*, the court found in favor of prospective intervenors in a case where a tribe had challenged the government's authorization for the companies to explore for minerals. *Id.* at *2 and *5. The court found that "although Defendants and Movants share the same ultimate objective, Movants' interests appear to be 'narrower than that of the government and therefore may not be adequately represented.'" *Id.* at *4 (internal citations omitted).

The Court agrees that the Government is not an adequate representative of Fastwyre. The Government's interest is in preserving the integrity of these contracts as part of its larger mission to provide broadband access to rural communities. While Fastwyre of course seeks to have the Court uphold the awards, it approaches this matter from a commercial interest, not a public interest. The Court also looks to the Government's response to the Motion for a Preliminary Injunction. The Government did not substantively respond to the Plaintiffs' arguments pertaining to the performance of the Companies. Not only has the Government failed to represent Fastwyre's interest in this instance, but it has also not defended a key set of allegations in this matter for Fastwyre: a determination that Fastwyre is incapable of fulling its obligations under two contracts which may impact its ability to obtain further awards in the future. It is not just a financial interest at stake, but a reputational interest as well, and the Government's interests simply do not align with Fastwyre's here. As such, the Court agrees with Fastwyre as to whether its interests are already adequately represented.

For the foregoing reasons, Fastwyre's motion to intervene as of right is **GRANTED**.[14]

III. MOTION FOR PRELIMINARY INJUNCTION

The Court makes the following findings. First, Plaintiffs are requesting a mandatory injunction, necessitating a higher level of scrutiny. Second, Plaintiffs have Article III standing to bring suit under the APA. Third, Plaintiffs have demonstrated a likelihood of success of the merits as to their arguments pertaining to their participatory interest in Round Four of the ReConnect Program. Fourth, Plaintiffs have not demonstrated a likelihood of success on the merits as to the performance of the Fastwyre Companies under their contracts with the Government. Fifth, Plaintiffs have not demonstrated that they would suffer irreparable future injury absent the preliminary injunction. And sixth, Plaintiffs have not persuaded the Court that it would be in the public interest to grant their motion. Accordingly, absent irreparable harm and the backing of the public interest, the Motion for a Preliminary Injunction at Docket 8 is **DENIED**.

a. Applicable Standards for a Preliminary Injunction and Whether the Proposed Injunction is "Mandatory" or Status Quo.

Before the Court can grant a motion for a preliminary injunction, it must be satisfied that the Plaintiffs have established "that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public

[14] To the extent that the Court is mistaken as to whether Fastwyre is entitled to intervene as a matter of right, it otherwise finds good cause to grant leave for permissive intervention under Fed. R. Civ. P. 24(b).

interest."[15] When the government is the opposing party, the third and fourth factors merge.[16] "The sole purpose of a preliminary injunction is to 'preserve the status quo ante litem pending a determination of the action on the merits.'"[17] "[I]t is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial. This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it."[18] "A preliminary injunction is an extraordinary remedy never awarded as of right."[19] "Injunctive relief must be tailored to remedy the specific harm alleged, and an overbroad preliminary injunction is an abuse of discretion."[20]

Fastwyre argues that the relief requested is a mandatory injunction, one that compels a party to take action, rather than one that merely prohibits certain actions.[21] Dkt. 43 at 3. Mandatory injunctions are "particularly disfavored" and courts "should deny such relief 'unless the facts and law clearly favor the moving party.'"[22] This is a "doubly demanding" burden.[23]

Plaintiffs specifically request the following relief: "the Court grant a preliminary injunction that: (1) compels RUS to deobligate Interior and Mukluk's void and

---

[15] *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (internal citation omitted.).
[16] *Nken v. Holder*, 556 U.S. 418, 435 (2009).
[17] *Sierra Forest Legacy*, 577 F.3d at 1023 (internal citation omitted).
[18] *P. v. Riles*, 502 F.2d 963, 965 (9th Cir. 1974).
[19] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).
[20] *Nat. Res. Def. Council, Inc. v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007).
[21] *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).
[22] *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir. 1994).
[23] *Garcia*, 786 F.3d at 740.

unenforceable ReConnect Program awards, and (2) compels RUS to designate the Tribal Lands of Unalakleet and Elim as eligible for future federal funding during the pendency of this action." Dkt. 9 at 23. Fastwyre argues that the status quo is it continuing with the environmental review with grants awarded. Dkt. 43 at 3. In reply at the hearing, Plaintiffs argued that the Court could declare that their respective villages are not served under the program. Doing so would permit new applications to serve their areas.

The Court finds that even the Plaintiffs' proposed narrow version of the injunction is problematic. First, it would force the Government to treat the Villages differently from its standard procedures – an approach that appears unenforceable. While denying funding would likely stop Fastwyre from continuing its projects (a prohibitory effect), the primary goal of the injunction is to compel the Government to consider grant applications for the Villages. Because this injunction would require the Government to take specific actions rather than simply halt existing ones, it must meet the heightened scrutiny and burden that apply to mandatory injunctions.

b. Likelihood of Success on the Merits: Tribal Consent.

The Court finds that the Plaintiffs have established a likelihood of success on the merits as to the counts pertaining to their consent being necessary. Plaintiffs are tribes with Tribal Governments on Tribal Land. The plain reading of the C.F.R. supports this interpretation, and the FOA gives credit to this position. Further, RUS's argument that the mapping tool effectively limits the interpretation to that of reservations is not only unpersuasive, but reliance on the mapping tool is arbitrary and capricious under the APA. The Court further finds that the Plaintiffs are within the zone of protected interests to

establish that the disregard of the necessity of their consent constitutes an actionable injury that can be remediated with a favorable court decision. Accordingly, Plaintiffs have standing to bring this suit.

1. Legal Standards and Standing.

Federal courts have limited jurisdiction. The writ of authority to federal courts comes from Article III of the Constitution, giving federal courts jurisdiction over all "Cases" and "Controversies" under federal law. Federal courts are categorically barred from providing what is known as "advisory opinions."[24] In plain English, federal courts decide disputed cases, but they must not provide opinions on the law outside of that narrow capacity. For there to be a "Case" under Article III, a plaintiff must establish that he has standing to sue. Absent such a showing, not only should a case be dismissed, but the federal court also lacks any authority to decide the matter on the merits.[25]

Standing requires a plaintiff to establish three elements. "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized [. . .] and (b) 'actual or imminent, not 'conjectural' or 'hypothetical[.]"[26] "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action

[24] *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) ("Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, [. . .], or to entertain 'friendly' suits, [. . .], because suits of this character are inconsistent with the judicial function under Art. III.").
[25] *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case.").
[26] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted.).

of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Id.* Third, it must be likely that such harm will be "redressed by a favorable decision." *Id.*

The Court believes that the APA created a legally protectable interest for the Plaintiffs to have approval of grant awards be contingent on their consent. It further finds that RUS and Fastwyre directly violated that interest. Finally, the Court believes that the Villages can find redress with a court decision, though the Court does not at this time grant their request for equitable relief.

The APA creates a private right of action when agency decisions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[27] This is a "deferential standard", and courts should not "substitute [their] judgment for that of the agency[.]" *Id.* The Court's role "is simply to ensure that the agency 'considered the relevant factors and articulated a rational connection between the facts found and the choices made.'"[28] In other words, it is the job of the Court to check that the agency did its homework, but grades it only 'pass/fail'.

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[29]

---

[27] *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011) (citing 5 U.S.C. § 706(2)(A)).
[28] *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007).
[29] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

There must only be "a rational relationship between its factual findings and its decision[.]"[30] However, agencies must follow their own regulations.[31] Failure to do so may be arbitrary and capricious.

Nevertheless, once an error has been found, the APA does not create a general right of action for whomever might discover it. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "Thus, in addition to constitutional standing requirements, under the APA a plaintiff must assert an interest 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'"[32] This "zone of interests" test is intended "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives."[33]

As to the success on the merits factor, the Ninth Circuit employes the "serious questions" test.[34] Under this approach, "[a] preliminary injunction is appropriate when a plaintiff demonstrates [. . .] that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Id.* at 1134–35 (internal citation

---

[30] *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1132 (9th Cir. 2010).
[31] *See, e.g.*, *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003) ("Having chosen to promulgate the [ ] Policy, the FWS must follow that policy"); *Ramon-Sepulveda v. I.N.S.*, 746 F.2d 466, 474 (9th Cir. 1984) ("It is a well-known maxim that agencies must comply with their own regulations.") (citing *Confederated Tribes and Bands of the Yakima Indian Nation v. F.E.R.C.*, 746 F.2d 1347 at 1355 (9th Cir.1984)).
[32] *Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 715–16 (9th Cir. 1993).
[33] *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 397 n. 12 (1987).
[34] *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011).

omitted). However, the Ninth Circuit cautioned that a mere showing of a serious question and a balance of hardships cannot supersede the necessary showing of irreparable injury and public interest. *Id.* at 1135. Plaintiffs need only make this showing as to one of their claims to satisfy this factor.

2. The Villages Occupy Tribal Land.

The lodestar of the present dispute is whether the Plaintiff Villages occupy tribal land. The Government and Fastwyre argue that the regulation only applies to the Metlakatla Indian Community, Alaska's sole reservation, or Indian county. Plaintiffs argue that the regulation applies more broadly, and that the Government relied on an approach that works for the rest of the country, but not for Alaska. The Plaintiffs are correct.

Alaska, as with the rest of the country, has a storied and often troubling history regarding the treatment of its indigenous population. Alaska came into the fold of the United States much later than most of the country, and as such, approaches that the federal government took in the Lower 48, Alaska's colloquial term for the contiguous United States, were often not applied here. Alaska's sheer size, which is nearly a fifth of all the land in the United States, also necessitated a different approach. Unlike most of the country, it is exceedingly difficult to define and parcel land in Alaska. As such, defining specific land to be held by the United States as Indian country was far less feasible. As a result, Alaska has tribal villages as registered with the Department of the Interior that have a level of tribal interest outside of the strictly defined reservations in the rest of the

country.[35] The Government was arbitrary by applying a standard that was inapplicable to the Alaskan people that Congress has directed it to serve. The Villages of Unalakleet and Elim occupy tribal land and are tribal governments.

RUS's Round Four FOA described the C.F.R. as follows:

> Pursuant to [the C.F.R.], a certification from the appropriate tribal official is required if service is being proposed over or on Tribal Lands. The appropriate certification is a Tribal Government Resolution of Consent. The appropriate tribal official is the Tribal Council of the Tribal Government with jurisdiction over the Tribal Lands at issue. Any applicant that fails to provide a certification to provide service on the Tribal Lands identified in the PFSA will not be considered for funding.[36]

Tribal Lands was defined as "any area identified by the United States Department of Interior as tribal land over which a Tribal Government exercises jurisdiction. A GIS layer of most Tribal Lands can be found on the RUS mapping tool located at https://www.usda.gov/reconnect." *Id.* at 47692. Tribal Government was defined as "the governing body of an Indian or Alaska Native tribe, band, nation, pueblo, village, or community listed pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 5130." *Id.* Both Plaintiffs are listed in the Federal Register as Tribes.[37]

The Plaintiffs fit squarely within the terms of the FOA for Round Four. It is undisputed that both Unalakleet and Elim are Tribes under the List Act. RUS and Fastwyre

---

[35] For general information on Alaska Native Tribes, *see* Geoffrey D. Strommer & Stephen D. Osborne, *"Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska*, 22 ALASKA L. REV. 1 (2005); Mitchell Forbes, *Beyond Indian Country: The Sovereign Powers of Alaska Tribes Without Reservations*, 40 ALASKA L. REV. 171 (2023).
[36] 87 Fed. Reg. 47690, 47692.
[37] Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636–41 (Jan. 28, 2022).

also have not substantively objected to considering the Villages to have tribal governments, and such objection would not be persuasive. The Plaintiffs have provided affidavits from the presidents of both respective tribal councils along with the tribal constitutions and by-laws that govern the tribal governments. *See*, Dkt. 45, Exs. A–B. The Court also takes independent notice of the corporate charters for the Villages, which give further credit to the United States' determination of their tribal designation.[38] As such, the Plaintiffs have Tribal Governments under the FOA, which is the trigger for the FOA's definition of Tribal Land. Under the FOA's interpretation of the C.F.R., the Plaintiffs' certification was necessary.

Even just looking to the language in the C.F.R., the Court would believe that the Plaintiffs' certification was necessary. The C.F.R. at the applicable time read:

> A complete application will include the following information as requested in the RUS Online Application System and application guide: [. . .] If service is being proposed on tribal land, a certification from the proper tribal official that they are in support of the project and will allow construction to take place on tribal land. The certification must: (i) Include a description of the land proposed for use as part of the proposed project; (ii) Identify whether the land is owned, held in Trust, land held in fee simple by the Tribe, or land under a long-term lease by the Tribe; (iii) If owned, identify the landowner; and (iv) Provide a commitment in writing from the landowner authorizing the applicant's use of that land for the proposed project[.][39]

---

[38] *See*, United States Department of the Interior Office of Indian Affairs, *Corporate Charter of the Native Village of Unalakleet*, retrieved from https://maint.loc.gov/law/help/american-indian-consts/PDF/40029068.pdf; United States Department of the Interior Office of Indian Affairs, Corporate Charter of the Native Village of Elim, retrieved from https://maint.loc.gov/law/help/american-indian-consts/PDF/40029110.pdf.

[39] 7 C.F.R. 1740.60(d)(19) (2021).

Tribal land is not defined by the 2021 C.F.R. However, the C.F.R. refers to the property ownership of the tribal land as possibly being held in trust, held in fee simple, or as a lease. Indian county,[40] or specifically, land held by the United States for tribes organized into reservations, which is how RUS effectively requests the Court to construe tribal land in this instance, is not held in fee simple by tribes. Such land is held in trust by the United States.[41] RUS's proposed reading of the C.F.R. would render part of this paragraph as surplusage and without effect.[42] As such, the Court believes that the plain reading of the C.F.R. supports the Plaintiffs' interpretation.

The parties wrote extensively on the user interface of the USDA GIS mapping tool, including how the layers work and what they represented. The Court does not give much credit to any party's view on the mapping tool other than the Plaintiffs' argument that it itself is not relevant. The FOA explicitly warns that the map does not show all Tribal Lands – only "most" of them. Moreover, even if the map's user interface provides a legal definition of Tribal Lands, that definition cannot override the official written regulations when the two conflict.

---

[40] 18 U.S.C. § 1151 – (Indian country defined).

[41] *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527–530 (1998) (describing Indian country.); *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 328 (2008) ("Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.").

[42] *United States v. Barraza-Lopez*, 659 F.3d 1216, 1220 (9th Cir. 2011); Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("If possible, every word and every provision is to be given effect [. . .] None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").

At the hearing, the Government also argued that the purpose of requiring tribal consent in the C.F.R. was to clear property rights issues on the front end. This is not persuasive. To the extent that clearing title was a priority, it makes no sense to limit this certification only to tribal lands. Additionally, such purpose would rarely be served if it were only applicable to Alaska's one reservation. Fastwyre asked the Court to defer to the agency's interpretation of tribal land. This is not persuasive either for two reasons. First, the agency's interpretation is reflected in the FOA, which the Court believes supports the Plaintiffs' reading. Second, the Court believes that the plain meaning of the underlying C.F.R. supports the Plaintiffs, and the Court will not defer to an agency's implied interpretation via action of a C.F.R. in a manner that conflicts with its plain meaning.

Fastwyre has pointed to the Alaska Native Claims Settlement Act ("ANCSA") for the proposition that the Plaintiffs' do not exercise jurisdiction over tribal land, but rather, that the Department of the Interior does. Dkt. 43 at 8. It further directs the Court to Chief Judge Gleason's recent ruling in *Alaska v. Newland*.[43] In *Newland*, the court, after reviewing ANCSA in detail, found that the Secretary of the Department of the Interior "retains the authority to take land into trust in Alaska[.]" *Id.* at *16. The court wrote that "ANCSA eliminated all existing reservations (save one), ended the Alaska Native allotment program going forward, and extinguished all aboriginal claims[.]" *Id.* at 10. ANCSA provides that "All claims [. . .] based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the

[43] No. 3:23-CV-00007-SLG, 2024 WL 3178000 (D. Alaska June 26, 2024).

United States relating to Native use and occupancy [. . .] are hereby extinguished." 43 U.S.C. § 1603(b). ANCSA did not, however, extinguish the existence of native village corporations or tribes broadly as legal entities.

The Court does not believe that the present suit falls under ANCSA. First, the Plaintiffs are not suing based on any "right, title, use, or occupancy of land[,]" but rather, they are suing based on the Government's own regulations that provided them with the right to participate in an administrative decision. In other words, while tribal jurisdiction is implicated in this case, this is not a case for tribal jurisdiction.

3. The Tribal Councils are the Proper Tribal Officials.

Now that the Court has found that RUS and Fastwyre were required to obtain certifications of tribal consent from Unalakleet and Elim, the Court turns to the question of what a "proper tribal official" under the C.F.R. is. This term is similarly undefined in the C.F.R., but the FOA defines it as "the Tribal Council of the Tribal Government with jurisdiction over the Tribal Lands at issue."[44] In its Answer,[45] RUS admitted that Interior and Mukluk did not obtain certifications of tribal consent from the Villages. Dkt. 32 at ¶ 31. Instead, RUS's position is that there was no need to do so. *Id.*

Notwithstanding, there was hesitation to concede this point at the hearing. A possible wrinkle in this matter is Kawerak, which apparently had expressed some support for the projects, which RUS had accepted as tribal consent in response to an objection later

[44] 87 Fed. Reg. 47690, 47693.
[45] Fastwyre has not answered the Complaint because until now, its Companies have not been parties.

raised by Kawerak itself. Dkt. 9, Ex. C. On the other hand, Plaintiffs submitted declarations from the presidents of their respective tribal councils, and each averred that the Companies had not presented proposals to them prior to submitting their applications.[46] While there may be lingering arguments about whether Kawerak was authorized to consent on behalf of the village or about the role of apparent authority, the parties have not argued as much. As such, the Court believes that the parties have not rebutted that Plaintiffs' argument that tribal councils' consent via certification was required.

Accordingly, it would be arbitrary and capricious to not obtain tribal consent from the Villages' tribal councils under the C.F.R. and the FOA. RUS acted as such to the extent that it itself relied on the GIS mapping tool as the definitive guide to what tribal land is and insofar as it improperly relied on Kawerak's approval in lieu of the Villages'. Therefore, the Court finds that Plaintiffs' have demonstrated a likelihood of success on the merits under the APA.

c. Likelihood of Success on the Merits: Fastwyre's Performance.

The Court does not believe that the Plaintiffs have demonstrated a likelihood of success on the merits as to the claims pertaining to Fastwyre's performance under the contracts under the APA. While success on all merits is not necessary, the Court still wanted to address these issues because they affect the Court's analysis as to irreparable harm and balance of equities.

[46] Dkt. 45, Ex. A ¶ 14, Ex. B. ¶ 11.

Apart from the lack of tribal certification of consent, Plaintiffs have not demonstrated that RUS acted arbitrarily and capriciously as to the contractors that it selected. Not only have RUS and Fastwyre provided the entirely reasonable explanation that the lack of construction is due to the ongoing environmental review, but Plaintiffs have not demonstrated that RUS acted improperly in judging the technical ability of Fastwyre to perform. The APA does not authorize courts "to substitute [their] judgment for that of the agency."[47] As written *supra*, it is not the role of the Court to judge the decision that the agency made. Instead, the Court's role is to judge the process and whether the agency adhered to the results of that process. Perhaps Fastwyre was the wrong technical choice for the job. The Court is not equipped to answer that question without more from the Plaintiffs. The fact that construction has not started does not convince the Court that Plaintiffs are likely to succeed on the merits of these claims, though it does not dismiss the related counts at this time.

d. Irreparable Harm and the Need for Emergency Relief.

Likelihood of success on the merits, however, is not sufficient for a preliminary injunction. To justify this disfavored emergency remedy, Plaintiffs must demonstrate that, absent the relief requested, they would likely suffer irreparable harm, possibly mooting the underlying issue.[48] This must be more than a mere possibility, and the harm must not be "conclusory or speculative[.]" *Id.* "Irreparable harm is traditionally defined as harm for

[47] *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1132 (9th Cir. 2010).
[48] *Titaness Light Shop, LLC v. Sunlight Supply, Inc.*, 585 F. App'x 390, 391 (9th Cir. 2014).

which there is no adequate legal remedy, such as an award of damages."[49] "Because intangible injuries generally lack an adequate legal remedy," they may constitute irreparable harm. *Id.* In other words, this factor helps ensure that there is "an urgent need for speedy action to protect the plaintiff's rights."[50] The need for speedy action, however, may become stale if a plaintiff has not acted expeditiously. *Id.* "The purpose of a preliminary injunction is not to remedy past harm but to protect plaintiffs from irreparable injury that will surely result without their issuance."[51]

Plaintiffs offer three ways in which they would be harmed. First, by denying the Villages their participatory right their sovereignty is violated. Dkt. 9 at 17–18. However, they also wrote that "an injunction cannot undo the injury of excluding Plaintiffs from their sovereign right to participate[.]" *Id.* at 18. Second, Fastwyre's lack of performance has left the region without broadband. *Id.* Third, the award of the grant to Fastwyre has deemed the Villages served under the program. *Id.* RUS responded that Unalakleet is benefiting from a separate program currently, that the Plaintiffs' regions may not receive another grant nevertheless, and Plaintiffs are going to benefit from the ReConnect Program, so they have no injury. Dkt. 18 at 7–8.

Plaintiffs replied that they "**have been** irreparably harmed." Dkt. 21 at 10 (emphasis added). They argued that "the primary injury here is the violation of Tribal sovereignty

---

[49] *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014).
[50] *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (citation omitted).
[51] *Schrier v. Univ. Of Co.*, 427 F.3d 1253, 1267 (10th Cir. 2005); *Wolfe v. Logan*, No. 2:22-cv-06463-JLS-PDx, 2023 WL 2347133, at *3 (C.D. Cal. Jan. 2, 2023) ("A preliminary injunction will do nothing to repair alleged past harms.").

denying Plaintiffs the voice guaranteed them by ReConnect regulations." *Id.* at 11. They further argued that they had good reason to be concerned about the Companies' performance, pointing the Court to images that Plaintiffs argue represent empty offices, and therefore, an insincere approach to performing on the contracts. *Id.* Plaintiffs also argue that the denial of the ability to seek future funding is a harm in itself, even if they are not ultimately successful in obtaining it, and that Unalakleet received separate grant money under a different program should not inform on the present dispute. *Id.* at 12–15.

Fastwyre argued in its amici brief (1) that Plaintiffs did not have a right to participate; (2) that the case law regarding tribal sovereignty cited by Plaintiffs is inapposite; (3) that Plaintiffs' concerns about Fastwyre's performance are misguided because it is still in the environmental review process, which prevents the beginning of construction, and that there is no evidence that they would not be able to ultimately perform; and (4) that the lack of a guarantee of future funding makes the harm alleged by Plaintiffs speculative. Dkt. 43 at 18–21. The parties did not discuss irreparable harm to a further depth at the motion hearing; however, Plaintiffs indicated that they "don't actually have a beef [. . .] with Fastwyre" and "don't actually care if the contract with Fastwyre ultimately goes forward or doesn't go forward." This, of course, is difficult to reconcile with their other arguments relating to the Fastwyre's performance.

As a preliminary matter, the Court disagrees with Plaintiffs regarding the performance of Fastwyre for similar reasons stated *supra* regarding its lack of confidence in likelihood of success on those merits. Further, with the projects currently under environmental review, the lack of current construction does not raise an alarm for the

Court. As such, Plaintiffs' second stated harm is rejected as a basis for a finding of irreparable harm. The Court disagrees with RUS's argument that because Unalakleet is being served by a different program, that negates the potential harm here. Without being persuaded that participation in the other grant program disqualifies Unalakleet from the ReConnect program, the Court will not take it into account.

As to the third stated harm, the Villages are being deemed as served because they are being served. While the Court appreciates the argument that the Villages are not guaranteed to have their areas qualify for future grants nevertheless, the Court finds that any such injury is more than mere conjecture. The Villages qualified to be served under the ReConnect Program previously, and without indication that the posture of either the Villages or the goals of the federal government have changed, the Court has no reason to believe that the Villages would not requalify. However, excising the potential non-ability to perform by the Companies, the Plaintiffs have not demonstrated that this is a separate harm from their sovereignty argument. In fact, Plaintiffs have separately represented choosing Interior and Mukluk specifically is not their claimed injury. In addition to their statement at the hearing, they wrote, "[t]he point isn't that Plaintiffs necessarily would have refused to support the Interior and Mukluk applications; it's that the government never required the applicants to abide by the regulations mandating that discussion, thus denying Unalakleet and Elim their sovereign right to participate in the federal government award process." Dkt. 21 at 12. Plaintiffs are currently being served by the ReConnect Program, so the inability to apply for future grant awards is not a harm outside of Plaintiffs' arguments pertaining to sovereignty.

As to the tribal sovereignty harm, Plaintiffs rely on *Northern Arapaho Tribe v. LaCounte*, 215 F. Supp. 3d 987 (D. Mont. 2016). In *LaCounte*, the government had obtained the consent from one, but not both, tribes as it admitted that it was required to do so pursuant to a treaty before entering into a contract. *Id.* at 992–93. This occurred because the government had previously approached a joint council of both tribes, but one tribe had discontinued its participation in that council. *Id.* As such, when the government approached and obtained consent from that council, it failed to obtain the consent of the Northern Arapaho Tribe. *Id.* The government had separately committed to not approve uniliteral contracts, but such commitment was not legally binding. *Id.* at 1000. As such, the tribe moved the District of Montana for a preliminary injunction that would prevent the government from representing that the council represented the tribe and from taking unilateral action again in the future. *Id.* at 998.

The Court believes that Plaintiffs' reliance on *LaCounte* is misplaced for two reasons. First, the tribal sovereignty at issue there was pursuant to a treaty. Here, the tribal sovereignty at issue is only pursuant to federal regulation. Not including the Villages pursuant to a C.F.R. is not the same betrayal of trust from the federal government as violating a treaty. Second, the injunction at issue in *LaCounte* was to prevent future harms, and here, the proposed injunction is to remedy a past harm.

The Court agrees that RUS and Fastwyre should have obtained tribal consent and that failure to do so is a cognizable injury. However, that injury has already occurred. To the extent that such injury cannot be properly redressed by remedies at law, an injunction would not undo it. If Plaintiffs were requesting that the Court prevent RUS from acting

without tribal consent in the future, *LaCounte* would be more applicable. Plaintiffs' argument is, in effect, that it is a continued injustice to not have their rights vindicated, therefore, as more time passes, the more injustice they endure. But that is the nature of much of civil litigation. The time in between injury and a favorable judgment is often difficult for plaintiffs, but measures such as punitive damages or prejudgment interest are intended to redress the harm that occurs in the interim.[52]

Accordingly, the Court finds that Plaintiffs have not demonstrated that they would likely suffer irreparable harm in the future absent the preliminary injunction.

e. Balance of Equities and Public Interest.

The Court is also not convinced that the balance of equities and public interest would tip in favor of Plaintiffs' motion being granted. Plaintiffs argue that RUS will not be harmed because it can redo the funding process. Dkt. 9 at 22. They also argue that the public will benefit from the potential avoidance of waste of federal funds. *Id.* at 22–23. RUS argues an injunction would delay construction of broadband infrastructure, which would harm the intended beneficiaries of the ReConnect Program. Dkt. 18 at 10. In reply, Plaintiffs repeated their previous argument as to preserving federal funds, but they also argued that it was in the public interest to respect tribal sovereignty. Fastwyre argued that the Plaintiffs' argument was improperly premised on their perception that Fastwyre is unable to perform and that it has an interest in the proceeds from the grants. 43 at 22–24.

[52] The Court is not expressing any opinion on the applicability of these remedies at this time.

The Court does not find it to be in the public interest to grant the preliminary injunction. First, granting the injunction would delay the implementation of broadband access for rural Alaskans. The Round Four FOA was promulgated over two years ago. Setting broadband access back two years cuts against the public interest. Second, granting the motion may render stale the environmental review work that has already occurred, which would be a waste of resources itself. Third, it would be against public interest to permit Plaintiffs to apply for, and potentially obtain, a grant in a future round of funding while funds have previously been awarded for their regions. Not only would this present possible issues with the Antideficiency Act, but it would cause confusion, duplicative work, a waste of resources, and again, delay in serving the individuals who are the target beneficiaries of the ReConnect Program.

The Court is sympathetic to the Plaintiffs' argument that the public interest is served by respecting tribal sovereignty, and the Court agrees with that principle. However, as the Court found *supra*, the instant proposed preliminary injunction would not remedy irreparable harm to future injuries to tribal sovereignty. As such, the Court does not now find that Plaintiffs have demonstrated that it would be in the public interest for the Court to grant the preliminary injunction.

IV. CONCLUSION AND ORDER

This order should be read with caution. It should not be read as a contradiction of the case law surrounding ANCSA or Indian country generally. Instead, it recognizes that village corporations and tribes in Alaska remain as legal entities, and to the extent that

federal regulations give credit to them beyond the aboriginal titles that have been extinguished by ANCSA, it is arbitrary to then set such consideration aside.

While the Court agrees with the Plaintiffs on some important matters, the specific relief sought in this motion is not appropriate. The Court agrees that Plaintiffs can show that they *have been* harmed, but it has not been convinced that a preliminary injunction would prevent *future harm*. The Court has also not been convinced that halting construction on projects to benefit rural Alaskans, including Alaska Natives, is in the best interest of the affected communities. Courts have tools to remedy past harms, but courts cannot undo delay in providing basic broadband service to people who have been underserved by private market forces.

//

//

//

//

//

//

//

//

//

//

//

The Court separately appreciates the counsels' assistance and professionalism with this matter. While the Court assumes that no party will be completely enthusiastic about this order, it issues it with confidence in part due to the commendable competence and preparedness of counsel. For the reasons set forth above, **IT IS SO ORDERED THAT**:

1) the Motion to Intervene at Docket 29 is **GRANTED**;
2) the Office of the Clerk of Court shall please amend the case caption and intervenor titles as appropriate;
3) the Motion for a Preliminary Injunction at Docket 8 is **DENIED**; and
4) Mukluk Telephone Company, Inc. and Interior Telephone Company shall file an Answer to the Complaint within **21 days of the date of this order**.

DATED this 17th day of December, 2024, at Anchorage, Alaska.

MATTHEW M. SCOBLE
CHIEF U.S. MAGISTRATE JUDGE