

# United States Senate

June 3, 2024

Shalanda Young  
Director  
Office of Management and Budget  
725 17<sup>th</sup> St., NW  
Washington, D.C. 20503

Re: Build America, Buy America Tribal Waivers

Dear Director Young:

We write to express our concern with the implementation of the Build America, Buy America Act (BABA Act), which was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA).<sup>1</sup> We are particularly concerned about the impacts of the application of the Buy America preference to Federal financial assistance programs for Tribal infrastructure projects and we urge the Office of Management and Budget (OMB) to waive the Buy America preference for all Federal financial assistance programs where funds are awarded to Tribal recipients and used to fund infrastructure for the next five years.

Native communities continue to face challenges with infrastructure construction due to a lack of contractors, remote geography, and ongoing supply chain issues. In Alaska, where hundreds of villages are not connected to the road system, the cost of transporting building materials is prohibitively expensive and can cost as much as the materials themselves. And any shipping delays due to the inability to source materials mean that projects could miss the entire barge and building season, which in parts of Alaska can be as short as four months. Yet, these rural Native communities are the most in need of affordable housing and infrastructure investment. During Tribal consultations on BABA, Tribal leaders in consultations have urged the Biden Administration to ensure that waivers for Tribes be uniform across the Federal government and provide for maximum flexibility in allowing waivers of Tribal participation in covered federal programs.

Multiple federal agencies have issued waivers from the application of BABA requirements as applied to Tribal recipients of federal financial assistance for infrastructure projects.<sup>2</sup> Many of these waivers are set to expire this summer, including Housing and Urban

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<sup>1</sup> Pub. L. No. 117-58, §§ 70901-52.

<sup>2c</sup> USDA, Tribal Consultation Waiver in the Public Interest for Indian Tribes, expires July 2024; DOI, General Applicability Public Interest Tribal Consultation Waiver for Financial Assistance Agreements to Indian Tribes, Expires September 1, 2024; Commerce, Public Interest Waiver for Financial Assistance Agreements to Indian Tribes, Expires September 30, 2024; DOE, General Applicability Public Interest Waiver applicable to Indian Tribes,

Development (HUD)'s Tribal general applicability waiver; the Department of Agriculture's Tribal Consultation Waiver in the Public Interest; the Department of Energy's General Applicability Public Interest Waiver; and the Department of the Interior's General Applicability Public Interest Tribal Consultation Waiver. Although these agencies have held Tribal consultations on BABA and the expiration of these waivers, OMB has yet to issue any formal guidance on extending these waivers or indicated how it will ensure that its implementation of BABA upholds the federal government's trust responsibility to Tribes.

Tribes are concerned that the BABA mandate undermines Tribal sovereignty and self-determination as it dictates the materials that must be procured for tribal infrastructure on their lands. It also contradicts President Biden's Executive Order 14112, which calls on agencies to "design, revise, provide waivers for, and otherwise administer Federal funding and support programs for Tribal Nations to achieve the following objectives[...]: (iv) take into account the unique needs, limited capacity, or significant barriers faced by Tribal Nations by providing reasonable and appropriate exceptions or accommodations where necessary."<sup>3</sup> The implementation of BABA without waivers for Tribes and Tribal organizations will prevent Native entities from leveraging federal funds across agencies which will significantly harm the economic sustainability of Native communities across the country.

We continue to hear from Tribes in our states that, in the midst of a housing crisis, BABA requirements will greatly impact the ability of Tribes and Tribally Designated Housing Entities (TDHEs) to provide their communities with safe, sanitary, and affordable housing through the Native American Housing Assistance and Self-Determination Act. If the HUD waiver is not extended for Tribes, Tribal housing authorities will be forced to apply for a waiver on a project-by-project-basis. This will result in project delays and higher product costs, where a waiver request (which is estimated to take 6-8 months) could result in projects being pushed outside their intended building season (which in Alaska is considerably shorter than the Lower 48). This is one of the many examples raised by Tribes, who continue to express strong concerns related to implementation and potential project delays due to BABA across the federal government.

The complex challenges Tribal communities face due to remote locations, high shipping and transportation costs, and other issues discussed in this letter, are difficult to understand unless you see them first-hand. Therefore, we invite you, and the staff at the "Made in America" office, to visit Tribal communities in our states. In particular, we would be happy to host you in Alaska this summer, as Alaska is home to 40 percent of all of the federally recognized Tribes in the country, including some of the most remote communities that exemplify the difficult challenges that implementing the BABA requirements presents.

In sum, again we urge OMB to issue a 5-year waiver of the Buy America preferences for all federal financial assistance programs for Tribes for infrastructure projects. This waiver is necessary to ensure well-being, equity and justice for Tribes while providing the time for the

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Expires August 18, 2024; HUD, General Applicability Waiver of Build America, Buy America Provisions as Applied to Tribal Recipients of HUD Federal Financial Assistance, expires May 23, 2024; ED, General Applicability Public Interest Tribal Consultation Waiver for Financial Assistance Agreements with Indian Tribes, expires February 7, 2025

<sup>3</sup> Exec. Order No. 14112, 88 FR 86021 (2023). <https://www.federalregister.gov/documents/2023/12/11/2023-27318/reforming-federal-funding-and-support-for-tribal-nations-to-better-embrace-our-trust>.

Federal Government Agencies to collaborate with Tribes to build the necessary capacity to work towards compliance with BABA in the future. We expect a response from OMB outlining the actions you plan to take in 30 days, before the date the first waiver expires.

Sincerely,



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Lisa Murkowski  
United States Senator



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Dan Sullivan  
United States Senator