



USET

SOVEREIGNTY PROTECTION FUND

1730 Rhode Island Avenue, NW
Suite 210
Washington, DC 20036
P: (615) 872-7900
F: (615) 872-7417
www.usetinc.org

Transmitted Electronically
To WHCNAA@bia.gov

October 20, 2022

Secretary Debra Haaland
Chairperson
White House Council on Native American Affairs
1849 C Street NW
Washington DC 20240

Dear Secretary Haaland,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Tribal consultation on the Build America, Buy America (BABA) Act hosted by the White House Council on Native American Affairs (WHCNAA) on September 21, 2022. Included in the Infrastructure Investment and Jobs Act, BABA established a new purchasing preference for American-made products to be utilized in all federally funded infrastructure projects. While Tribal Nations with Indian Self-Determination and Education Assistance Act (P.L. 93-638) agreements are exempt from BABA requirements, we are still concerned that Tribal Nations will be affected disproportionately by BABA. Some federal agencies are seeking, and some have received, BABA waivers for their programs. However, we strongly recommend that all Tribal Nations receive a blanket exemption from BABA, which would be consistent with the federal government's stated commitment to uphold Executive Order 13175.

USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

The Federal Government Has Consistently Neglected its Infrastructure Obligations to Tribal Nations

Tribal Nations continue to experience some of the greatest disparities among all populations, especially in areas of critical infrastructure due to the federal government's failure to uphold its trust and treaty

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), , Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

obligations and fully fund programs and services for Tribal Nations. Funding of this obligation, as with others, remains grossly inadequate and is a barely discernable and decreasing percentage of department and agency budgets. This chronic underfunding of federal programs has contributed to the disastrous impacts of the COVID-19 pandemic on Tribal Nations, especially in our health care service and delivery systems. These chronic failures have persisted for centuries throughout changes in Administration and Congress, and the COVID-19 pandemic has only served to compound these budget and service delivery deficits. It is through the lens of this public health emergency that the failure of the federal government to uphold its most basic trust and treaty obligations has become ever more apparent. For this reason, it is critically important that infrastructure deployment in Indian Country be prioritized and permitted to proceed without impediment.

Tribal Nations Should be Exempt from the Requirements of the Build America, Buy America Act

According to the Memorandum for Heads of Executive Departments and Agencies issued by the Office of Management and Budget (OMB) on April 18, 2022, agencies may consider whether public interest waivers to BABA requirements may be needed to avoid undue increases in the time and cost of a project.

Therefore, the federal government should defer to Tribal Nations requesting waivers to BABA requirements since OMB's Memorandum has stated that federal departments and agencies can adopt a waiver process to these requirements. To truly support Tribal Nation rebuilding from the centuries of neglect in infrastructure funding and the ramifications of the COVID-19 pandemic, the federal government must be obligated to grant these BABA waivers to Tribal Nations. This action would also be consistent with upholding Sec. 6 of Executive Order 13175, which encourages the federal government to facilitate and streamline Tribal applications for waivers of statutory and regulatory requirements. However, with some notable exceptions, this section does not appear to be actively implemented across the federal government.

The Biden Administration has stated its commitment to upholding Executive Order 13175 and through this commitment it should grant waivers to Tribal Nations from BABA purchasing requirements. This action will ensure that rising inflation costs and continuing issues with the national supply chain do not disproportionately affect Tribal Nations, especially as we continue to recover from the ramifications of the COVID-19 pandemic and utilize federal funds to address our long-standing infrastructure issues. Programs and services for Tribal Nations have consistently represented a small percentage of the federal budget, yet the federal government has neglected its trust and treaty obligations to fully fund these programs and services. It is due to this failure that Tribal Nations continue to deal with dilapidated, and in some cases non-existent, critical infrastructure in our communities.

In addition to addressing the centuries of neglect in fully funding Tribal Nation services, adopting a waiver process for Tribal Nations from the requirements of BABA will also benefit federal agencies since they won't have to submit specific budget line items for Tribal programs to OMB. Application of BABA purchasing requirements is likely to undermine the overall goals of advancing Tribal Nation sovereignty, self-determination, and infrastructure deployment on our lands. While Tribal Nations may purchase a product or supply consistent with the requirements of BABA if they are widely available and affordable, we should not be subject to these requirements if they would delay an infrastructure project or go over established budgets for a project. Additionally, many Tribal Nations contend with burdensome administrative requirements to amend project proposals in the instance a project is delayed or goes over budget due to external circumstances, such as dealing with non-Native vendors for the purchase of supplies or services. Tribal Nations already have limited access to a wide variety of products, supplies, and personnel, and enforcing BABA purchasing requirements would further exacerbate this issue. Therefore, we strongly recommend that federal departments and agencies adopt a waiver for Tribal Nations and

Tribally operated enterprises from the requirements of BABA to purchase products and supplies made in the United States for federally funded infrastructure projects.

Conclusion

We appreciate the focus of this consultation on BABA and its coordination through WHCNAA. As we look toward recovery from the global pandemic, USET SPF asks that you join us in working toward a legacy of change for Tribal Nations and the sacred trust relationship. This includes the enactment of policies that uphold our status as sovereign governments, our right to self-determination and self-governance, and honor the federal trust obligation in full. It is concerning that BABA will not only apply to federal funds authorized by the Infrastructure Investment and Jobs Act and the Inflation Reduction Act, but to all annual appropriations. To prevent delays in long-awaited infrastructure construction on Tribal Lands, especially from programs funded through annual appropriations, federal departments and agencies must adopt a waiver process for Tribal Nations from the requirements of BABA. We look forward to continuing to work on this issue with WHCNAA to ensure Indian Country's infrastructure priorities are addressed in all federal funding efforts. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director