

DEPARTMENT OF INTERIOR
U.S. Bureau of Reclamation
Buy America General Applicability Public Interest Waiver
For Rural Water Program Previously Planned Projects

1. Summary

Agency: Department of the Interior, Bureau of Reclamation

Proposed Waiver: The Department of Interior (DOI), Bureau of Reclamation (Reclamation/USBR) proposes a Public Interest previously planned project waiver for manufactured products under the Build America, Buy America (BABA) Act requirements, pursuant to Section 70914(b)(1) (public interest waiver) of the Infrastructure and Jobs Act (IIJA, Section 70914) for Reclamation’s Rural Water Program.

This waiver would apply to awards obligated or incrementally funded on or after the effective date of the waiver for a period of one year, for the seven (7) “Rural Water Projects,” identified below in Section 3, that were authorized prior to May 14, 2022, the statutory effective date of the BABA requirements. This proposed waiver would only permit the use of non-domestic manufactured products in Reclamation’s Rural Water Projects for contracts entered into prior to May 14, 2023, that resulted from solicitations published before May 14, 2022.

For awards and amendments that otherwise meet these criteria but were obligated prior to the effective date of the waiver, the waiver will apply to eligible expenditures incurred on or after the effective date of the final waiver for the period that the waiver is active. The waiver will allow these grantees to continue previously planned infrastructure projects in which the construction was initiated prior to enactment of the BABA, or the designs were completed prior to the enactment of the BABA requirements as DOI transitions to full implementation of BABA in a timely manner.

Waiver Level: General Applicability Waiver, Rural Water Projects identified in Section 3.

Waiver Justification Summary: Requiring compliance with BABA domestic preference for domestic manufactured products would be unduly burdensome for projects that have already executed construction contracts, because they have already received DOI financial assistance, are exercising DOI-approved pre-award authority, or will receive DOI financial assistance for activities already in progress. Under these circumstances, application of the BABA requirement could compel contract terminations and cause projects to be put on hold while conducting new procurements. Accordingly, application of the BABA requirement to these projects would result in unacceptable delay, increased project costs, and potential loss of jobs while construction is paused.

Based on stakeholder feedback, DOI has identified that Reclamation’s Rural Water Program and subject Projects are in varying stages of completion, and Reclamation and the rural water recipients had been funding construction and design work prior to the enactment of the BABA requirements. Imposing BABA requirements to these projects would necessitate

design changes, cancelation of solicitations, and termination of contracts; ultimately driving up the price of the project, as well as the duration of the project, which would delay critical water delivery to many rural communities throughout the western United States.

Additionally, for large infrastructure projects, the preparation of solicitations by project sponsors and the preparation of bids and proposals by offerors require significant time and investment and are based on project design that occurs well in advance of the solicitations. Reclamation Rural Water Recipients throughout the country have exercised pre-award authority to solicit contracts prior to May 14, 2022, the effective date of the BABA requirement, for which contract award will not occur until after January 12, 2023, when the DOI General Applicability Waiver expired.

Length of the Waiver: This general applicability waiver will expire in one year from the date of final approval. Each of the seven (7) Rural Water Projects covered by this waiver have project construction ceilings that were established using designs and estimates that did not include the domestic purchasing requirements and were incorporated into the authorizing legislation of the projects prior to the BABA requirement in May 2022. Project completion dates are dependent upon the availability of funds needed to reach the legislative construction ceilings. Each of the seven projects have individually established timelines that are dependent upon the amount of funding available each year and the potential for an indexed adjustment. Based upon current funding forecasts, the seven projects' ceilings and completion dates will be reached as follows:

1. Garrison Diversion Unit (Garrison Diversion Conservancy District) - 2029
2. Lewis & Clark Rural Water System (Lewis and Clark Rural Water System, Inc.) - 2030
3. Rocky Boy's/North Central Montana Regional Water System (North Central Montana Regional Water Authority) - 2030
4. Fort Peck Reservation Rural Water System (Dry Prairie Rural Water System) - 2028
5. Musselshell-Judith Rural Water System (Central Montana Regional Water Authority) - 2030
6. Eastern New Mexico (Eastern New Mexico Water Utility Authority) – 2032
7. Jicarilla Apache Water and Sewer Project (Jicarilla Apache Utility Authority) – 2030

Summary of the Projects Covered by the Waiver: DOI and Reclamation have identified the following seven (7) Rural Water Projects to be included in this waiver request:

1. Garrison Diversion Unit (Garrison Diversion Conservancy District) – CFDA 15.518 Authorizing Legislation: PL 99-294, as amended.
2. Lewis & Clark Rural Water System (Lewis and Clark Rural Water System, Inc.) – CFDA 15.520 Authorizing Legislation: PL106-246.
3. Rocky Boy's/North Central Montana Regional Water System (North Central Montana Regional Water Authority) – CFDA 15.525 Authorizing Legislation PL 107-331, Title IX, Rocky Boy's Rural Water System.
4. Fort Peck Reservation Rural Water System (Dry Prairie Rural Water System) – CFDA 15.516 Authorizing Legislation PL 106-382, the Fort Peck Reservation Rural

Water System Act of 2000.

5. Musselshell-Judith Rural Water System (Central Montana Regional Water Authority) – CFDA 15.076 Authorizing Legislation PL 116-220, Division FF-Other Matter, Title XI Western Water and Indian Affairs, Sec. 1110 Clean Water for Rural Communities.
6. Eastern New Mexico (Eastern New Mexico Water Utility Authority) – CFDA 15.553 Authorizing Legislation PL 111-11 Omnibus Public Land Management Act of 2009, Title IX, Sec 9103 Eastern New Mexico Rural Water System Project.
7. Jicarilla Apache Water and Sewer Project (Jicarilla Apache Utility Authority) – CFDA 15.519 Authorizing Legislation PL 107-66 as amended by 107-117.

Summary of Waiver: Reclamation is requesting a waiver to cover non-compliant manufactured products used in infrastructure projects funded through Reclamation’s Rural Water program. This public interest previously planned projects waiver applies to certain contracts within awards as described above. This waiver will help the recipients and communities of the projects authorized under the Rural Water Program prior to the enactment of BABA complete construction while avoiding excess costs and schedule delays. Completion of these projects helps ensure water delivery to the rural western United States.

2. Background

In January 2021, President Biden issued Executive Order 14005, titled “Ensuring the Future is Made in All of America by All of America’s Workers,” launching a whole-of-government initiative to strengthen Made in America standards. The Executive Order states that the United States Government “should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States.” DOI is committed to ensuring strong and effective Buy America implementation consistent with Executive Order 14005 and has a long track record of successfully applying Made in America standards to support American workers and businesses through its grant programs and direct purchases.

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act (IIJA or the Bipartisan Infrastructure Law), Pub. L. No. 117-58, which includes the Build America, Buy America Act (BABA). IIJA div. G §§ 70901-27. The Bipartisan Infrastructure Law not only makes an historic investment in American infrastructure but also greatly strengthens Made in America standards. Specifically, BABA expands the coverage and application of Buy American preferences (used herein to refer to Executive Order (E.O.) 13788, E.O. 13858, and 2 CFR Part 200.322 Domestic preferences for procurement) in Federal financial assistance programs for infrastructure. BABA requires that no later than May 14, 2022—180 days after the date of enactment—the head of each covered Federal agency shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure ... may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.” IIJA § 70914(a).

BABA provides that the preferences under Section 70914 apply only to the extent that a

domestic content procurement preference as described in Section 70914 does not already apply to iron, steel, manufactured products, and construction materials. IJA § 70917(a)–(b). This provision allows Federal agencies to preserve existing Buy America policies and provisions that meet or exceed the standards required by BABA.

3. Description of Award

Title of the Program: Reclamation Rural Water Program.

Description of the Program: Since 1980, Congress has authorized Reclamation to develop thirteen (13) municipal and industrial (M&I) water supply projects in rural areas and on Tribal lands intended to deliver potable water to specific rural communities, primarily located in North Dakota, South Dakota, Montana, and New Mexico. Of these (13) projects, six (6) have completed construction. Prior to 2007, implementation of rural water projects lacked a coordinated approach at Reclamation, leading to issues regarding the cost effectiveness of options selected to ensure adequate water supply.

As noted in 43 CFR Part 404 Reclamations rural water program “addresses domestic, municipal, and industrial water supply needs in rural areas of the Reclamation States. Reclamation’s experience, technical expertise, and financial resources assist rural communities to identify their water supply problems and needs and evaluate options for addressing those needs. Using a regional or watershed perspective, Reclamation works in cooperation with non-Federal project sponsors in Reclamation States on a cost-share basis to: investigate and identify opportunities to ensure safe and adequate rural water supplies for domestic, municipal, and industrial use in rural areas and small communities, including Indian tribes; plan the design and construction of rural water supply projects through the conduct of appraisal investigations and feasibility studies; and oversee, as appropriate, the construction of rural water supply projects that the Secretary recommends to Congress, which are subsequently authorized and funded for construction by Congress.”

Congress originally authorized these projects, commonly known as rural water supply projects, for several locations throughout the West. While Reclamation is authorized to operate in the 17 western states and does not have authority to construct rural water projects east of the 17 western states, the Lewis & Clark Rural Water System (PL 106-246) has some features that will deliver water in IA and MN. Many of the beneficiaries of the authorized rural water projects are disadvantaged, making this program a key focus of Reclamation’s efforts to advance the Biden-Harris administration’s Justice40 Initiative established in Executive Order 14008: *Tackling the Climate Crisis at Home and Abroad*.

As noted by the Congressional Research Service, R46308, “from 1980 through 2009, Congress authorized Reclamation to undertake the design and construction, and in some cases the operations and maintenance (O&M), of specific projects intended to deliver potable water supplies to rural communities in western Reclamation states. These projects were largely located in North Dakota, South Dakota, Montana, and New Mexico... . Many rural water projects are large in scope – taking water from one location and moving it long distances to tie to existing systems. Municipal and industrial (M&I) portions of Reclamation

water supply facilities typically require 100% repayment of construction costs to the federal treasury with interest... ..Congress has funded water supply projects in rural areas for more than four decades... ..These projects have individual authorizations and generally aim to provide water exclusively for M&I water uses in rural areas.”

Due to the project types, design schedules and current state of each individual project it is not possible to state what materials are impacted by the addition of the BABA. Each of the project sponsors now includes BABA requirements in new solicitations.

For each of the projects cited below, the designs began years ago, along with the specifications for equipment and materials necessary to support those designs are specialized to support the designs and water quality needs of the disadvantaged communities.

For example, materials and equipment that are included in the design include but are not limited to: pumps and pump material, including vertical centrifugal pumps, high service pumps and low-flow jockey pumps; valves and fittings; flow meters and transmitters; and water treatment equipment including membranes and filter media. Based on the research performed by the Rural Water recipients some of these materials are produced domestically; however, additional market research is needed to understand if the domestic items meet the specifications of the previously completed designs or are they available in sufficient quantity to meet their demands.

Each of the Rural Water recipients is committed to implementing the BABA requirements whenever feasible; however, there are several types of materials commonly used in the construction of these systems that are not available within the US, produced in sufficient quantity to meet construction requirements, or at a price that is not prohibitive nor impactful to the congressionally mandated ceiling. Therefore, a limited duration previously planned project waiver for this limited set of projects is appropriate and necessary to ensure they are successfully completed in accordance with their authorizing language and congressionally mandated ceilings.

1. Garrison Diversion Unit (Garrison Diversion Conservancy District)
 - Recipient Name and Unique Entity Identifier (UEI): Garrison Diversion Conservancy District - R36UJE93SGX8, Fort Berthold/Three Affiliated Tribes – FFWAHTLVF2S7, Spirit Lake Tribe - SZYEAFV7UKK9, Standing Rock Sioux Tribe – WM1NHUZASLP6
 - Federal Financial Assistance Listing: 15.518 Garrison Diversion Unit
 - Project Ceiling: \$896,633,000
 - Infrastructure Project Descriptions and Locations: The projects include Municipal, Rural, and Industrial (MR&I) water development for the State MR&I and Tribal rural water system construction. The State MR&I program covers the entire State of North Dakota and the Tribal portion includes Standing Rock, Fort Berthold, Spirit Lake, Turtle Mountain Reservations and Trenton Indian Service Area.
2. Lewis & Clark Regional Water System (Lewis and Clark Rural Water System, Inc.)
 - Recipient Name and Unique Entity Identifier (UEI): Lewis and Clark Rural Water

- System, Inc. - DQAXCLT7CYL4
- Federal Financial Assistance Listing: 15.520 Lewis and Clark Rural Water System
 - Project Ceiling: \$451,838,000
 - Infrastructure Project Descriptions and Locations: Project will address regional poor water quality problems, groundwater contamination vulnerability, and inadequate water supply and will serve more than 300,000 people in 20 communities and rural water systems in southeast South Dakota, southwest Minnesota, and northwest Iowa.
3. Rocky Boy's/North Central Montana Regional Water System (North Central Montana Regional Water Authority)
- Recipient Name and Unique Entity Identifier (UEI): North Central Montana Regional Water Authority/Rocky Boy's - K8HGTDMU3HA1, Chippewa Cree Tribe of the Rocky Boy's Reservation – UHTLWHKJUAT9
 - Federal Financial Assistance Listing: 15.525 Rocky Boy's / North Central Montana Regional Water System
 - Project Ceiling: \$362,803,000
 - Infrastructure Project Descriptions and Locations: The project will provide water from Reclamation's Tiber Reservoir (Lake Elwell) to the Rocky Boy's Reservation, local communities, and rural water districts. As designed, the Project will serve an estimated population of 43,000 once completed.
4. Fort Peck Reservation Rural Water System (Dry Prairie Rural Water System)
- Recipient Name and Unique Entity Identifier (UEI): Dry Prairie Rural Water Authority - F7QAL4LN58M2, Fort Peck & Assiniboine Sioux Tribes- UWGWN3HB8Y66
 - Federal Financial Assistance Listing: 15.516 Fort Peck Rural Water System
 - Project Ceiling: \$380,861,000
 - Infrastructure Project Descriptions and Locations: The Project provides potable water from the Missouri River to the Fort Peck Reservation and local communities and rural customers, serving an estimated population of 27,500 upon completion.
5. Musselshell-Judith Rural Water System (Central Montana Regional Water Authority)
- Recipient Name and Unique Entity Identifier (UEI): Central Montana Regional Water Authority - HU59MMFLRBG1
 - Federal Financial Assistance Listing: 15.076 Musselshell-Judith Rural Water System
 - Project Ceiling: \$79,413,000
 - Infrastructure Project Descriptions and Locations: Upon completion, the Project will provide potable water from groundwater wells to an estimated population of 8,700 citizens in Judith Basin, Wheatland, Golden Valley, Musselshell, and portions of Yellowstone and Fergus Counties of Montana.
6. Eastern New Mexico (Eastern New Mexico Water Utility Authority)
- Recipient Name and Unique Entity Identifier (UEI): Eastern New Mexico Water Utility Authority - JKM8S9ZEA3Z8
 - Federal Financial Assistance Listing: 15.553 Eastern New Mexico Rural Water

System

- Project Ceiling: \$666,530,000
- Infrastructure Project Descriptions and Locations: this project is designed to deliver approximately 16,500 acre-feet of water per year from the Ute Reservoir to the cities of Clovis, Elida, Grady, Melrose, Portales, and Texico and other locations in Curry, Roosevelt, and Quay Counties in New Mexico.

7. Jicarilla Apache Water and Sewer Project (Jicarilla Apache Utility Authority)

- Recipient Name and Unique Entity Identifier (UEI): Jicarilla Apache Nation - GXEZDJ1RSLB4
- Federal Financial Assistance Listing: 15.519
- Project Ceiling: \$89,276,000
- Infrastructure Project Descriptions and Locations: Replace and construct municipal water and wastewater system in Dulce, New Mexico in accordance with planning report entitled “Municipal Water and Wastewater Systems Improvement”.

4. **Waiver Justification**

Anticipated Impact if no Waiver is Issued: Since enactment of the Bipartisan Infrastructure Law, Reclamation has received numerous inquiries and comments from its Rural Water Recipients raising concerns about the applicability of the BABA requirements on their existing projects, which are either designed or have begun construction prior to the enactment of the BABA requirements in May 2022. For example, as part of the Garrison Diversion Unit, a large Water Treatment Plant in North Dakota has asked whether its project, which is fully designed and is under construction could continue to comply with Buy America requirements as they existed at the time of design and contract award, or if they would be affected by the BABA preferences. The Rural Water projects throughout Reclamation are large multi-year projects that have been under construction and planning for the last several decades. The recipients identified that the BABA manufactured product requirements could have a significant impact on their schedules, costs, and their ability to complete their project without an appropriate period of transition. In addition, each of Reclamation’s Rural Water projects are large scale water systems, providing water to remote areas of the western United States. Each project’s scope, design, and costs used to enact the project ceilings were based on did not include the Buy American requirements, which were not in effect at the time of Congressional authorization. In addition, many of the projects rely on multiple sources of financing, including state and local communities, as well as water users. Throughout the life of these projects, the recipients have worked diligently within their communities and states to ensure they are expending funds in the most efficient and effective manner. The projects’ designs were completed using the laws and regulations prior to implementation of BABA and include many integrated components and materials that are consistent with the already completed sections of the projects, and that were designed and specified for use in the remaining sections of the project.

Several rural water projects have reported that they have many multi-year contracts in place that incorporate the Buy America standards (per CFR) as they existed prior to BABA. Several recipients are asking whether these contracts now have to change to add BABA

requirements in the middle of their projects. Additionally, projects throughout Montana, North Dakota, South Dakota, and New Mexico requested that DOI not apply the BABA manufactured product requirement to projects where planning and contracting were already submitted and awarded, because doing so would require project sponsors and contractors to cancel orders and contracts, causing the project to incur significant additional costs and delays. In addition, many of the designs utilize parts and products that are no longer manufactured in the United States or remain unavailable at this time to keep the project on schedule.

Requiring compliance with the BABA manufactured product domestic preferences identified in Section 70914 would be burdensome for projects that already have completed design and/or executed construction contracts, because they already have received DOI financial assistance, or will receive DOI financial assistance for construction or Operation, Maintenance and Replacement (OM&R) of rural water projects for activities already in progress and where the authorization and design was based on requirements in place prior to BABA. Under these circumstances, application of the BABA manufactured product requirement could compel contract terminations and cause projects to be put on hold while design changes are made, and new contracts are issued. Additionally, for large infrastructure projects, the preparation of solicitations by project sponsors and the preparation of bids and proposals by offerors require significant time and investment and are based on project design that occur two to three years in advance of the solicitations.

DOI Rural Water Program recipients and others throughout the country are in the process of awarding construction contracts that were solicited prior to the May 14, 2022, the effective date of the BABA requirements. In these instances, amending the specifications of the contract solicitations to impose the BABA requirements would cause considerable delay and likely inflate the costs of the project. Accordingly, application of the BABA manufactured product requirement to these categories of Rural Water Program projects would result in unacceptable delays, increased project costs, and the potential loss of jobs while project construction is paused.

Description of Efforts Made to Avoid the Need for a Waiver: Each of the Rural Water Program projects provides for critical water infrastructure throughout the western United States. Delays and cost increases will directly impact the rural communities that are desperate for these systems to come on-line after the many decades of design and development. Each recipient and Reclamation have extensively reviewed the designs, project timelines and availability of domestic parts, prior to seeking this waiver. However, due to the age of the designs, the complexity of the systems, and limited availability of materials needed to complete these projects, it is not possible to apply the full Buy America preference requirements without significant delay and cost impacts to the Rural Water Program projects.

The Rural Water Projects have been under construction for ten (10) or more years. The project designs were completed utilizing the best materials and regulations at the time of design. Changing designs at this stage affects the completed work, as well as future work, resulting in significant delays and cost increases. Each recipient will continue to assess their design requirements and the availability of domestic products each time they compete a sub-

contract with the goal of increasing use of BABA compliant components. Recipients will be expected to transition utilizing domestically sourced products moving forward, while keeping the projects within their legislative ceilings and on schedule to provide critical water sources to the western United States.

Expectations for the Agency, Award Recipients, and Industry at the Conclusion of the Waiver: Reclamation expects to work with the Rural Water Program’s recipients to implement the BABA manufactured product requirements, but recognizes that existing designs, contracts, and construction efforts should not be altered in a manner that causes undue delays, costs, or impacts the overall project ceilings, as authorized by Congress. Reclamation will maintain close contact with each of the recipients throughout the course of the projects to re-assess opportunities to incorporate domestic components and materials consistent with the BABA requirements.

5. Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB M-24-02, agencies are expected to assess “whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products” as appropriate before granting a public interest waiver. DOI’s analysis has concluded that this assessment is not applicable to this waiver, as these projects were designed and competed prior to implementation of the BABA requirements and the need is not based on the costs of foreign-sourced products.

6. Solicitation of Comments

Proposed Waiver: This notice posted on February 20, 2024, satisfies the requirement to publish any proposed Buy America waiver and provide the public with a reasonable period of time for notice and comment. The Department of the Interior seeks public and industry comment from all interested parties. Relevant information and comments will help the Department understand completely the facts and impacts surrounding this waiver request. This notice will be closed for comments on March 5, 2024. Comments can be sent to DOI_Grants_BuyAmerica_Waiver@ios.doi.gov. Please reference the associated project title in the subject line of the email. Comments received prior to the public comment closing date will be reviewed and considered by DOI.

For more information on the Buy America Preference, please reference www.doi.gov/grants/buyamerica or MadeinAmerica.gov.