



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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CONGRESS/WATER RESOURCES

Rural Water Projects/Tribal Water Right Settlements

On June 24, Senator Jon Tester (D-MT) introduced the Western Water, Jobs, and Infrastructure Act (S. 2286). Title I of the bill establishes the Reclamation Rural Water Project Construction Fund, with \$200M authorized for each of FY2022-2026, to remain available without further appropriation until the end of FY2036. The funds are directed to complete authorized rural water projects, with priorities set for: (1) urgent and compelling need for potable water supplies in rural and tribal communities; (2) the project status of current stages of completion; (3) the financial needs of rural and tribal communities; (4) the potential economic benefits; (5) the project's ability to address regional and watershed-level water supply needs; (6) the project's ability to minimize water and energy consumption and encourage renewable energy resources; and (7) the project's ability to address the needs of tribes and other community needs or interests. The funds may not be used for operation and maintenance, and they are intended to supplement, not supplant, other amounts appropriated for authorized rural water projects.

Title II of the bill establishes the Indian Water Rights Settlement Completion Fund, with \$400M a year from FY2022-2026, to remain available through FY2036 to implement Congressionally-approved Indian water rights settlement agreements. The funding is limited to settlement agreements or legislation that requires the Bureau of Reclamation or the Bureau of Indian Affairs to provide financial assistance for, or plan, design, and construct water supply infrastructure, or a project to rehabilitate a water delivery system to conserve water, or a project to restore fish and wildlife or improve environmental conditions in the same river basin as a federal reclamation project.

Title III of the bill authorizes \$200M for FY2022 to carry out Milk River Project rehabilitation, including replacement of aging or damaged infrastructure, improving efficiency, protecting fish and wildlife, and protecting municipal, agricultural, and tribal water supplies. The bill sets the federal cost share at 100%, but also authorizes voluntary contributions from non-Federal partners.

Tribes/Infrastructure

On July 15, Senators Michael Bennet (D-CO) and Martin Heinrich (D-NM) introduced the Tribal Access to Clean Water Act (S. 2369). The bill would increase funding for water infrastructure programs under the U.S. Department of Agriculture (USDA), the Bureau of Reclamation (USBR), the Environmental Protection Agency, and Indian Health Service. The bill directs the agencies to consult with Indian Health Services regarding interagency collaboration, prioritization, staffing needs, and ensuring the funds are effectively used to promote access to water and sanitation.

The bill's section on Congressional findings notes that: "[I]n the United States, access to reliable, clean, and drinkable water has long been a significant problem in many Native communities, such that nearly half of all households in those communities do not have access to reliable water sources, clean drinking water, or basic sanitation, and are significantly more likely than White households to lack indoor plumbing."

The bill goes on to say: "[T]he trust responsibility of the Federal Government to Indian Tribes requires the Federal Government to ensure the survival and welfare of Indian Tribes, and the failure to provide basic water service cannot be reconciled with that trust responsibility."

It authorizes \$500M for USDA grants (7 U.S.C. 1926c, 1926d) for the extension or improvement of existing water supply systems for eligible entities, sets priorities for funding, and does not require matching funds or a demonstration of inability to finance proposed projects.

The bill reauthorizes the USBR's Water Supply Program through 2031, and establishes a competitive grant program for tribal clean water access projects. The bill authorizes \$2B for rural water supply projects, with half going toward the projects described in the 2014 report, "Assessment of Reclamation's Rural Water Activities and Other Federal Programs That Provide Support on Potable Water Supplies to Rural Communities in the Western United States." The other half would go toward the new competitive grant program.

Priority is given to projects that: (1) provide potable water supplies to communities or households on tribal land without running water; (2) address urgent and compelling public health or safety concerns; (3) are shovel-ready or in progress; (4) utilize Bureau of Reclamation expertise and take advantage of economies of scale; (5) utilize local or regional partnerships, and complement related efforts by and resources of tribal, state, or federal agencies to enhance access to drinking water or water sanitation services on tribal lands; (6) provide multiple benefits, including water supply reliability, public health, ecosystem benefits, groundwater management and enhancements, and water quality improvements. The bill further provides \$90M for Reclamation's Native American Affairs Technical Assistance Program.

The bill authorizes \$100M for CWA §518(c)(3) tribal assistance grants and \$100M for SDWA §1452(l) SRFs. The bill authorizes up to \$5M of those amounts to provide training, technical assistance, and educational programs to tribes operating and maintaining treatment works and public water systems. The bill also directs EPA to increase efforts to promote access to drinking water and wastewater services, by increasing direct communication with communities to assess their needs, providing clear information on funding availability, and providing the option to receive direct grants in coordination with the Indian Health Service.

The bill authorizes \$3.41B for all Indian Health Care Improvement Act §302(b)(1) activities, including the planning, design, construction, modernization, improvement, and renovation of water, sewer, and solid waste sanitation facilities. An additional \$150M is authorized for technical assistance under §302(b)(2). For operation and maintenance of water facilities serving tribal communities, the bill authorizes \$500M, with priority given to those most in need of assistance.

LITIGATION/WATER QUALITY

County of Maui/Groundwater

On July 15, the U.S. District Court of Hawaii decided on remand that the County of Maui is required to obtain National Pollutant Discharge Elimination System (NPDES) permits for discharges of treated wastewater into wells at the Lahaina Wastewater Reclamation Facility (LWRF). (*Hawaii Wildlife Fund, et al. v. County of Maui*, 12-cv-198.) (WSW #2397, 2374, 2336, 2331)

The Court said: "There is no dispute that the LWRF is a 'point source,' that the Pacific Ocean is a 'navigable water,' or that the wastewater discharged into the Pacific Ocean is a 'pollutant'.... This case turns on whether the LWRF's placement of wastewater into injection wells from which the wastewater flows to the Pacific Ocean is the 'functional equivalent of a direct discharge' from the LWRF into the Pacific Ocean. The present case falls

between the two examples set forth by the Supreme Court. The LWRF's injection wells are neither located just a few feet from the ocean nor 50 miles from shore. Instead, the wells are about half a mile from the ocean. Even if the wastewater is diverted off of a straight line to the sea, at least some of it appears to travel between half a mile and a mile and a half. Nor does the pollutant routinely take 'many years' to reach the sea. Some of it reaches the sea in 84 days, and much of it within 400 days."

Notably, while several facts were unclear regarding precisely how the treated wastewater traveled through the aquifer and reached the Pacific Ocean, and the quality of those waters at that point, the Court declined to hold a trial, granting the Plaintiffs' summary judgment motion on the basis of the extensive record before the Court.

The Court said: "While the record does not show where 98 percent of the wastewater discharges into the ocean, it does show that tens of thousands of gallons of wastewater were detected at monitors in the nearshore ocean seeps on a daily basis. The difficulty of detecting and measuring what may be the diffuse discharge of much of the remaining wastewater that reaches the ocean does not nullify the Clean Water Act's NPDES permit requirements. It is likely that much of that remaining wastewater discharges near the monitored seeps in this case, but even if this court relies only on the evidence from the monitored seeps, the County was required to get an NPDES permit."

Montana and Wyoming v. Washington

On June 28, the U.S. Supreme Court denied Montana and Wyoming's motion to file a complaint regarding whether Washington's denial of CWA §401 certification and port access to ship Montana and Wyoming coal to foreign markets violates the commerce clause. (WSW #2389, 2408, Special Report #2456)

PEOPLE

On July 13, **Sara Larsen** became the Acting Executive Director for the Upper Colorado River Commission when **Amy Haas** left her position as Executive Director. Larsen previously worked with the WSWC as the WaDE Senior Program Manager.

On July 20, the Nevada Department of Conservation and Natural Resources announced that WSWC member **Adam Sullivan** was appointed as the Nevada State Engineer and Administrator of the Division of Water Resources (NDWR). Sullivan has worked on water resources in Nevada for over 20 years. He was named as the Acting State Engineer in November 2020 when **Tim Wilson** retired.