



UNIVERSAL ACCESS TO CLEAN WATER
FOR TRIBAL COMMUNITIES

January 21, 2022

IHS Tribal Consultation
Email to: consultation@ihs.gov

Re: Proposed Allocation of Funding from the American Rescue Plan Act, Infrastructure Investment and Jobs Act, and Build Back Better Act

We appreciate the opportunity to comment on the Indian Health Service's (IHS) request for comments on the allocation of \$210 million in additional agency funding from the American Rescue Plan Act of 2021, \$3.5 billion from the Infrastructure Investment and Jobs Act, and \$2.35 billion under consideration in the Build Back Better Act. Our comments are limited to the proposed allocation of the funding in the Infrastructure Investment and Jobs Act (IIJA).

We work on the initiative on [Universal Access to Clean Water for Tribal Communities](#). As part of that initiative, we have looked closely at the programs of the various federal agencies, including IHS, that address the provision of clean water and associated infrastructure in Indian country. Our published reports address the historical provision of support for Tribal water infrastructure by IHS,¹ and provide specific recommendations for deploying the newly available funding in the most effective manner possible.²

We recommend IHS take the following steps:

1. Publish the most current SDS list along with a clear identification of the shovel-ready projects.

It is our understanding that the funding level of \$3.5 billion for the IHS Sanitation Facilities Construction Program provided in the IIJA is based on IHS estimates of the cost to remedy unmet need for Tribal sanitation facilities that will become part of the Fiscal Year 2021 IHS report to Congress.³ This report has not yet been transmitted to the President or made available to the public. In fact, the most recent report on sanitation deficiencies is for Fiscal Year 2019. The unavailability of the report on which the

¹ Universal Access to Clean Water for Tribes in the Colorado River Basin, April 2021, available at https://drive.google.com/file/d/11_a5wZNFJE-1xw94K5K4f2cwLDAuUzaW/view.

² Recommendations for Operational, Administrative, Policy, and Regulatory Reform, Nov. 2021, available at <https://tribalcleanwater.org/wp-content/uploads/2021/11/Full-Report-11.21-FINAL.pdf>.

³ Under the Indian Health Care Improvement Act (IHCA) (25 U.S.C. § 1632(g)) the annual report shall set forth the following: (a) the current Indian sanitation facility priority system of the Service; (b) the methodology for determining sanitation deficiencies; (c) the level of sanitation deficiency for each sanitation facilities project of each Indian Tribe or community; (d) the amount of funds necessary to raise all Indian Tribes and communities to a level I sanitation deficiency; and (e) the amount of funds necessary to raise all Indian Tribes and communities to zero sanitation deficiency.

funding in the IJA is based makes it difficult to assess: the allocation plan proposed by IHS; the extent of what are deemed to be “shovel-ready” projects; the allocation of funding to “infeasible” projects; and the accuracy of the cost estimates for listed projects.

In order to enhance transparency, it is important that the IHS improve its compilation and dissemination of the most current and up-to-date data available in its Sanitation Deficiency System (SDS). This information should be made available to the public, Congress, and Tribes in a more timely manner such that it enables the opportunity to comment meaningfully on prioritized projects. As part of its efforts to increase transparency and sharing of information, IHS should explore avenues to better meet its obligation under the Indian Health Care Improvement Act to provide this annual report which lays out critical information related to sanitation deficiencies.

2. Continue to seek annual, ongoing funding for the IHS SFCP to ensure the achievement of universal access to clean water for Tribal communities.

The need for sanitation facilities in Indian country will continue, even with the unprecedented funding in the IJA. New needs will emerge, previous cost estimates may become outdated or inaccurate, and existing infrastructure may deteriorate and require major repair. The necessity of operation and maintenance assistance for Tribal water infrastructure will likely be ongoing, as will the need for adequate IHS internal staffing to effectively deploy construction funding. Therefore, it is essential that adequate annual appropriations continue for the IHS Sanitation Facilities Construction Program to ensure that these future needs can be met and that new deficits do not develop. The infusion of infrastructure funding through the IJA should not be seen as a substitute for ongoing appropriations at historical levels.

3. Support Tribal capacity development with existing resources.

Increasing Tribal capacity will protect current and future investments in drinking water infrastructure, and help decrease the size of the SDS list in the future. IHS has the authority to provide O&M support for Tribal water systems, though the agency lacks appropriations to fund this important mission. While receiving adequate funding to carry out this mission would be invaluable, IHS can still take important steps to work with Tribes to increase current and future capacity. IHS should work with Tribes during every phase of SDS projects, with a focus on an exchange of knowledge that will benefit both Tribes and the agency in the future.

Beginning with the engineering and design phase, IHS engineers should work more closely with Tribal members. Though Tribes may not currently have an engineer on staff, bringing in members of the Tribal government or even the local community can help the Tribe to better understand the engineering process. By gaining this knowledge, future projects could be closer to “shovel ready” as the Tribe will have a better understanding of the preliminary work needed before construction begins. Additionally, IHS staff could benefit greatly by more closely working with the community that will benefit most from SDS construction projects. Particularly in systems where knowledge is institutionalized, e.g., where detailed drawings of the existing system are not available or incomplete, IHS can design and construct projects more efficiently through this working relationship.

Similarly, IHS should work closely with community members during the construction phase. Involving local community members in the construction of new projects would provide an economic benefit, while at the same time building some of the skills necessary for a Tribal operator to eventually maintain the system. During the construction process, IHS should implement a local hiring preference to help facilitate local participation and buy-in for projects. And, as noted above, community members may gain the knowledge to help future projects be completed more quickly and efficiently.

Building the relationships necessary to increase Tribal capacity may require an upfront investment of time, one which may seem straining to agency staff already stretched thin. These current investments are worth the time and resources as they will help future projects to be completed more efficiently and over time allow Tribes to take more ownership of their drinking water infrastructure, lessening the need for SDS projects.

4. Engage in Tribal and sister agency consultation regarding potential projects to maximize community benefit.

The \$3.5 billion in the IJA is a game changer for water infrastructure in Indian country, but it is not a panacea. Costs not included in the 2021 Sanitation Deficiency list, such as design of some projects, inflation since the cost estimates were prepared, costs considered “ineligible” because of IHS’s own definition of “Indian community” (see #5 below), and non-comprehensive nature of the project list, result in a higher overall total spending need. But IHS can partner with other agencies, EPA and USDA Rural Development in particular, and the collective funding can provide more comprehensive coverage of the need for water and sanitation infrastructure in Native communities. We applaud IHS’s recognition of the problem of “ineligible” costs and proposed support for helping Tribes identify alternate funding sources for these costs. For example, EPA’s increased funding in the Tribal Set-Asides for the Clean Water and Safe Drinking Water funds can be used to provide the funding necessary for the portions of projects deemed “ineligible” by IHS. [But see suggestions in #5 below for the appropriate interpretation of “Indian community” in light of the funding now available.] IHS should be a central source of information for Tribes on other sources of funding available to fill gaps and ensure that this additional funding is made available. Finally, projects that maximize benefit to both Indian communities and surrounding non-Native communities for which additional funding sources are available should be considered for funding if the overall benefit justifies the cost.

5. Remove previously imposed restrictions on IHS water infrastructure funding that are no longer necessary or appropriate with the new funding stream.

Section 7(a)(1) of the Indian Sanitation Facilities Act (ISFA) authorizes IHS to provide sanitation facilities to “Indian homes, communities, and lands.”⁴ To date, and likely due to historically insufficient funding, IHS has adopted a restrictive interpretation of this responsibility, providing funding only to projects that serve Native homes directly, and requiring communities to find matching funds for other structures in the community that

⁴ Pub. L. 86-121.

would be served by water and wastewater infrastructure.⁵ This is true even for structures that are essential to the life of the Native community and provide indispensable educational, economic, and community services, such as schools, hospitals, nursing homes, teachers' homes, Tribal offices, and post offices. The matching requirement creates an insurmountable financial obstacle for too many communities, particularly in Alaska, as no portion of the project may proceed if a community cannot secure the required funds. This unnecessary matching requirement, coupled with IHS's narrow interpretation of their Section 7(a)(1) duty to Native communities has left far too many American Indian and Alaska Natives (AI/AN) without water and wastewater services.

With adequate funding now available, IHS should remove this unnecessary matching fund requirement and adopt a broad interpretation of its responsibility to provide sanitation facilities under Section 7(a)(1) of the ISFA, including structures essential to the educational, economic, and health needs of the community. IHS should issue new guidance explaining this change.

Additionally, and relatedly, though IHS has established basic eligibility criteria⁶ for providing service to "Indian homes, communities, and lands" under Section 7(a)(1) of the ISFA, the agency does not have regulations that define Indian community for this purpose. Under current criteria, IHS assistance depends upon the community size and Indian population.⁷ In Indian communities (50 percent of more Federally recognized AI/AN people), non-Indian persons or organizations must contribute funds to cover the prorated cost of facilities required to serve them. In non-Indian communities, IHS can only provide funding to improve or replace existing sanitation facilities in communities with less than 10,000 people, and again, that funding is prorated to cover only the cost to serve Tribal homes. It cannot be used for any commercial, industrial, institutional or governmental establishments benefitting from the projects. In non-Indian communities with more than 10,000 people, IHS is only able to support connecting individual Tribal homes to public infrastructure, making these communities entirely reliant on state or other sources of funding for upgrades to existing systems. These community and population distinctions are both unnecessarily complex and confusing, and create barriers and disadvantages for both AI/AN households that are located within non-Indian communities, and non-AI/AN households that are located within Indian communities. In consultation with Tribes, IHS should clarify the definition of Indian community through new regulations or other agency direction to better provide drinking water and sanitation to all Tribal members, regardless of the makeup of the communities in which they live. As noted by Senator Lisa Murkowski of Alaska, "it makes sense to provide some incidental benefits to non-Indians in an Indian community in order to get the full sanitation benefits to the folks that are there."⁸

⁵ Jojo Phillips, ['Unserviced': Why some Western Alaska villages lack basic sanitation infrastructure](#), KNOM NEWS, May 20, 2020.

⁶ Indian Health Service, *Criteria for the Sanitation Facilities Construction Program*, at 5-3 (2003).

⁷ *Id.* at 5-7.

⁸ Lisa Murkowski, [Senator Murkowski Speaks on Improving Health Care Outcomes and Sanitation in Indian Country](#), YOUTUBE, (Dec. 12, 2019).

The initiative on Universal Access to Clean Water for Tribal Communities strongly supports IHS's efforts to provide clean water access and sanitation services to Tribal communities and applauds the new funding available through the Infrastructure Investment and Jobs Act. We appreciate the thoughtful approach that IHS is taking to the allocation of this funding. We want to emphasize the need to deploy this unprecedented capital infusion in a manner tailored to the specific needs of individual Tribes, in consultation with them, and in a manner that sets both the Tribes and the projects up for long term success.

Thank you for your time and consideration.

Sincerely,

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