



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **ADMINISTRATION/WATER RESOURCES** **USBR/Infrastructure Investment and Jobs Act**

On January 14, the Bureau of Reclamation (USBR) submitted its initial spending plan for FY2022 funding authorized under the bipartisan Infrastructure Investment and Jobs Act (IIJA). It represents a blueprint for Reclamation investments to address drought across the West, and broader water infrastructure needs, with \$1.66B to be spent annually to support a range of infrastructure improvements for FY2022 through 2026. See Reclamation Releases Blueprint for Implementation of Bipartisan Infrastructure Law in 2022 ([usbr.gov](http://usbr.gov)).

“The Bipartisan Infrastructure Law is the largest investment in the resilience of physical and natural systems in American history,” said Assistant Secretary for Water and Science Tanya Trujillo. “Reclamation’s funding allocation for 2022 is focused on developing lasting solutions to help communities tackle the climate crisis while advancing environmental justice.”

“The Bureau of Reclamation serves as the water and power infrastructure backbone for the American West. The law represents a once-in-a-generation opportunity to improve our infrastructure while promoting job creation,” said Reclamation Commissioner Camille Calimlim Touton. “The funding identified in this spend plan is the first-step in implementing the Bipartisan Infrastructure Law and will bolster climate resilience and protect communities through a robust investment in infrastructure.”

The FY2022 spending plan allocations include: (1) \$420M for rural water projects that benefit various tribal and non-tribal underserved communities by increasing access to potable water; (2) \$245M for WaterSMART Title XVI supporting the planning, design, and construction of water recycling and reuse projects; (3) \$210M for construction of water storage, groundwater storage and conveyance project infrastructure; (4) \$160M for WaterSMART Grants to support Reclamation efforts to work cooperatively with states, tribes, and local entities to implement infrastructure investments to increase water supply; (5) \$100M for aging infrastructure for major repairs and rehabilitation work; (6) \$100M for critical dam safety modifications; (7) \$50M to help implement Colorado River Basin drought contingency

plans and support the goal of reducing the risk of Lake Mead and Lake Powell reaching critically low water levels; (8) \$18M for WaterSMART’s Cooperative Watershed Management Program for watershed groups’ planning and restoration projects; (9) \$15M for Reclamation’s Desalination and Water Purification Program for brackish and ocean water; and (10) \$8.5M for Colorado River Basin Endangered Species Recovery and Conservation Programs.

Detailed information on the programs and funding and materials from recent stakeholder listening sessions are available at [www.usbr.gov/bil](http://www.usbr.gov/bil).

### **ADMINISTRATION** **U.S. Supreme Court**

On January 27, Justice Steven Breyer notified President Biden that he would retire from active judicial service on the U.S. Supreme Court, effective late June or early July when the Court rises for the summer recess. He served as a member of the Supreme Court for nearly 28 years, and as a Court of Appeals Judge for nearly 14 years. He said: “I have found the work challenging and meaningful. My relations with each of my colleagues have been warm and friendly. Throughout, I have been aware of the great honor of participating as a judge in the effort to maintain our Constitution and the rule of law.” His colleagues on the Supreme Court agreed, speaking of his optimism, friendship, intelligence, humor, generosity, integrity, civility, and wisdom. See: <https://www.supremecourt.gov/publicinfo/press/pressreleases.aspx>.

President Biden expressed gratitude for Justice Breyer’s career of public service, and noted that he was the Chairman of the Senate Judiciary Committee in 1994 when he presided over Justice Breyer’s Supreme Court confirmation hearings. He said: “You know, during his confirmation hearings, way back in 1994, nominee Stephen Breyer said, quote, ‘The law must work for [the] people.’ He explained to us his faith that our complex legal system has a single purpose: to help the people who make up our country. It was a different time, of course. But his brilliance, his values, his scholarship are why Judge Breyer became Justice Breyer by an overwhelming bipartisan vote at the time.” He went on to share his thoughts on the process of selecting a nominee

“worthy of Justice Breyer’s legacy of excellence and decency.” He pointed out that the Constitution says to seek the “advice and consent” of the Senate, and that he would invite Senators from both parties to offer their ideas and points of view. “While I’ve been studying candidates’ backgrounds and writings, I’ve made no decisions except one: The person I will nominate will be someone with extraordinary qualifications, character, experience, and integrity, and that person will be the first Black woman ever nominated to the United States Supreme Court.” See <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/>.

## **CONGRESS/WATER RIGHTS**

### **Indian Water Rights Settlements**

On January 21, the WSWC hosted a virtual Congressional briefing for House staffers on the importance of authorizing and adequately funding Indian water rights settlement agreements. John Echohawk, Executive Director of the Native American Rights Fund, explained the historical background of federal treaties with tribes and the resulting federal trust obligations. He described the impact of the *Winters v. United States* (1908) decision, holding that when Congress created Indian reservations, it implicitly reserved water sufficient to fulfill the purpose of the reservation. He described the subsequent efforts of the tribes to quantify those rights, the important work of settlement negotiations with States beginning in the 1980s, and the creation of the Secretary of the Interior’s Indian Water Rights Office in the 1990s to provide federal teams to work on those settlements.

Tony Willardson, Executive Director, WSWC, described the prior appropriation water rights system in the Western States, and explained the importance of quantifying the tribes’ reserved water rights - which cannot be forfeited through non-use - for States managing water rights that are often junior to the priority of tribal water rights. He also spoke of the benefits settlements provide in terms of enabling the tribes and the non-tribal communities to be better neighbors, and to better manage water resources through persistent droughts.

Anne Castle, Senior Fellow, Getches-Wilkinson Center, University of Colorado Law School, spoke about the ongoing need for drinking water infrastructure for tribes. She expressed appreciation for the recent funding in the Investment in Infrastructure and Jobs Act, and offered a Congressional roadmap for next steps: (1) promoting a whole of government approach by directing the utilization of existing interagency working groups, such as the Tribal Infrastructure Task Force, to deploy funds in a coordinated and impactful way; (2) remove barriers to program administration, including restrictive regulations and policies developed when programs were underfunded; (3) exercise appropriate oversight and ensure agency accountability for the new funds, not simply allocating the funds but making identifiable

progress; and (4) provide funding to support the operation and maintenance of existing and new infrastructure, so the substantial investment is not lost.

## **LITIGATION/WATER QUALITY**

### ***Sackett v. EPA/Clean Water Act/WOTUS***

On January 24, the U.S. Supreme Court granted the petition for certiorari in *Sackett v. EPA* (21-454). The Sacketts filed the lawsuit over the Environmental Protection Agency’s (EPA) administrative compliance order “determining that their home construction violated the Clean Water Act [CWA] because their lot contains wetlands that qualify as regulated ‘navigable waters.’” The Sacketts argued that the lot has no surface water connection to any body of water. The limited issue on appeal is whether the 9th Circuit should have applied Justice Kennedy’s “significant nexus” test set forth in *Rapanos v. United States*, 547 U.S. 715 (2006).

On October 25, the States of Alabama, Alaska, Arizona, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia and Wyoming filed an amicus brief in support of the petition. The States emphasized their residual and inviolable sovereignty, the division of powers between state and federal governments, and the states’ interest in protecting their authority over local water management matters. “The CWA has an important role to play in ensuring clean water for our country’s interstate waters. But it should not be allowed to engulf every other water law.”

The States noted the inconsistent interpretations of *Rapanos* and the onerous process of identifying a water of the United States (WOTUS), particularly under the indefinite “significant nexus” standard. In the argument summary, the States said: “Given these problems, the Court should grant the petition and embrace the *Rapanos* plurality’s test: ‘the waters of the United States’ include only relatively permanent, standing or flowing bodies of water.” That construction is most consistent with the text that Congress chose. And it gives an understandable, appropriately constrained scope to the Act. The federal government retains its role as the guardian of truly national, navigable waters; the States retake their place as guardians of state waters; and citizens can move forward knowing what, when, and how the various rules apply. The CWA promises an opportunity for genuinely cooperative federalism while advancing the important objective of clean water for all.”

EPA recently held virtual outreach meetings with state and local government officials on its Rule 1 proposal to return to the definition of WOTUS pre-2015, pending promulgation of a new WOTUS Rule 2. The public comment period on Rule 1 is now open and will close on February 7 ([epa.gov/wotus](https://epa.gov/wotus)).

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**The WESTERN STATES WATER COUNCIL is a government entity of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.**