



September 7, 2023

Dear Tribal Leader:

On behalf of the Indian Health Service (IHS), I am writing to announce FY 2023 allocation decisions for \$700 million appropriated to the IHS in the Infrastructure Investment and Jobs Act, 2021, Pub. L. No. 117-58, Title VI, 135 Stat. 1411 (Nov. 15, 2021).

The Infrastructure Investment and Jobs Act, or Bipartisan Infrastructure Legislation (BIL), appropriates \$700 million in each year from fiscal year (FY) 2022 through FY 2026, for a total of \$3.5 billion for the IHS Sanitation Facilities Construction (SFC) program. These resources are available until expended. These funds are one-time, non-recurring, and can only be used for the purposes specified in the statute.

The statute provides up to 3 percent of these funds (\$21 million) for “salaries, expenses, and administration” each year. It also requires that one-half of 1 percent of these funds be transferred to the United States (U.S.) Department of Health and Human Services (HHS) Office of Inspector General “for oversight of funding provided in the BIL” (\$3.5 million). The statute also directs the IHS to use up to \$2.2 billion for “projects that exceed the economical unit cost,” also referred to as “economically infeasible” projects.

Projects deemed economically infeasible are defined as projects that exceed a per unit cost established for each IHS Area and three different regions within the Alaska Area IHS. While no statutory barrier to funding economically infeasible projects existed prior to enactment of the BIL, limited annual appropriations prevented the IHS from funding these types of projects.

The IHS tracks projects to address sanitation needs in American Indian and Alaska Native (AI/AN) communities through the Sanitation Deficiency System (SDS). On an annual basis, the Indian Health Care Improvement Act (IHCIA) requires the IHS to update the SDS to account for changes to the scope of a project, refine cost estimates, and identify any new needs.

As of December 31, 2022, there were 1,369 projects, totaling \$4.4 billion in eligible costs, and \$1.1 billion in ineligible costs. Of the 1,369 total projects, 751 were considered economically feasible, and 618 were considered economically infeasible. The IHS completed its most recent annual update of the SDS on December 31, 2022, which reflects the most updated, complete data set on projects and costs. Please see the Enclosure, which summarizes SDS projects and costs by IHS Area as of December 31, 2022.

Ineligible costs are the costs associated with serving commercial, industrial, or agricultural establishments, including nursing homes, health clinics, schools, hospitals, hospital quarters, and non-AI/AN homes. The Indian Sanitation Facilities Act (Public Law 86-121) and the IHCA prevent the IHS from using its appropriations for these ineligible costs. However, the IHS regularly partners with Tribes and other Federal agencies to identify alternative resources to successfully support these ineligible costs.

Tribal Consultation

The IHS conducted a virtual Tribal Consultation on the BIL on April 12, 2023, and accepted written comments through April 28, 2023. The common themes from Tribal Consultation noted that the IHS should:

- Retain some funding at IHS Headquarters to cover project costs above budgeted amounts for design, construction documents, and construction;
- Prioritize funding projects with the BIL using the SDS list (Legacy) reported at the time the BIL was enacted by Congress (e.g., end-of-year December 2021);
- Utilize FY 2023 enacted funding to address projects added to the SDS after December 31, 2021;
- Prioritize funding of Tier 1 (ready to fund) projects, while also providing funding to complete needed design and construction document preparation to accelerate the construction completion timeframes; and
- Provide funding to support planning, design, and construction document preparation for Tier 2 (engineering assessed) projects and Tier 3 (preliminary assessed) projects to transition the projects to Tier 1 (ready-to-fund) status.

Based on review and consideration of input received through Tribal Consultation, the IHS decided to use current SDS data and the Agency's existing funding mechanisms to allocate these resources. This includes IHS direct service projects funded through Federal Acquisition Regulations contracts or Tribal procurement, and Indian Self-Determination and Education Assistance Act construction contracts (25 Code of Federal Regulations (CFR) 900 Subpart J, Title 42 CFR § 137, Subpart N).

These allocation decisions align with recommendations received from Tribal Leaders to prioritize funding for projects that have completed the planning phase and can be immediately placed into the design and construction phase, and to provide sufficient funding for planning and design activities to get projects ready to fund.

The following table and narrative describe Agency decisions regarding allocation of funds received through the BIL.

**FY 2023 Bipartisan Infrastructure Legislation
Funding Allocation**

(dollars in millions)

Activity	FY 2023 BIL
Tier 1 Projects Construction Costs /1	583.7
Tier 1 Design & Construction Documents	28.9
Project Shortfalls, Additional Planning, Design, & Construction Documents	<u>65.5</u>
<i>subtotal, Regular Projects</i>	<i>678.1</i>
Federal Salaries, Expenses, and Administration /2	21.0
HHS Office of Inspector General /3	3.5
Total	702.6

1/ Includes \$2,599,832 FY 2022 BIL Undispersed Funds.

2/ \$21 million in BIL funding is limited to Federal activities only.

3/ BIL-directed transfer.

Note: The BIL provides \$700 million per fiscal year, from FY 2022 through FY 2026, totaling \$3.5 billion. The \$2.6 million in FY 2022 BIL undispersed funds is available because selected projects were supported by other funding sources prior to approval of the FY 2022 BIL Spend Plan and projects being removed from the SDS by relevant Tribes.

Tier 1 Project Design, Construction Document Creation, and Construction

The IHS will allocate approximately \$612.6 million in FY 2023 BIL funding for Tier 1 project construction costs. A Tier 1 project is considered ready to fund because planning is complete. However, design and construction contract document creation activities are not yet complete for current Tier 1 projects. These steps must be finalized before a construction contract can be initiated through Federal or Tribal procurement methods. When combined with FY 2023 annual appropriations, the IHS will fully fund construction costs for 197 Tier 1 projects. A table displaying Tier 1 projects and funding allocation amounts by IHS Area is provided in the Enclosure. These Tier 1 projects span Deficiency Levels 2 through 5. Deficiency Levels are assigned in accordance with the IHCIA for every proposed project in the SDS. A summary of the Deficiency Levels is provided in the Enclosure.

There are \$105.1 million in ineligible costs associated with these Tier 1 projects. The IHS works closely with other Federal agencies, Tribes, and other project participants to identify funding for the portions of projects that serve non-AI/AN homes, businesses, and public institutions. For example, the IHS partners with the U.S. Environmental Protection Agency (EPA), the U.S. Department of Agriculture Rural Development, the U.S. Department of Housing and Urban Development, the U.S. Department of the Interior’s Bureau of Reclamation, the National Tribal

Water Center, the Rural Water Association, the Rural Community Assistance Partnership, the Denali Commission, the State of Alaska, and Tribal Consortia to secure resources for ineligible costs. The IHS also participates in the EPA-led Infrastructure Task Force, along with other Federal partners, which serves as a forum to discuss funding for ineligible costs associated with SFC projects. The IHS will continue to work with our Tribal and Federal partners to identify resources to fund these ineligible costs.

This allocation also includes 68 economically infeasible Tier 1 projects, totaling \$496.6 million in eligible costs.

Since design activities and construction contract document creation activities have not been completed for current Tier 1 projects, these steps must be finalized before a construction contract can be initiated through Federal or Tribal procurement methods. The IHS is allocating approximately \$28.9 million in FY 2023 BIL funding to support contracts with architecture and engineering firms to complete design and construction document creation activities for Tier 1 projects.

Planning, Design, and Construction Document Creation for Tier 2 Projects

The IHS will use FY 2023 enacted appropriations to support additional planning, design, and construction document creation activities for Tier 2 projects. The SDS currently includes 589 Tier 2 projects, totaling approximately \$2.5 billion.

Tier 2 projects are projects that have a level of engineering assessment completed, such that the deficiency is understood and a recommended solution has been analyzed and scoped; these projects have a cost estimate and design parameters that are accurate within plus or minus 25 percent.

Project Shortfalls, Additional Planning, Design, and Construction Contract Document Creation

The IHS will allocate \$65.5 million in FY 2023 BIL funding to address potential project shortfalls, and to support additional planning, design, and construction document creation activities. Project shortfall funding is needed to support previously funded SFC projects that exceeded the original project budget due to increased construction costs driven by inflation and supply chain constraints.

Salaries, Expenses, and Administration

The IHS will allocate \$21 million for salaries, expenses, and administration. These funds are available for SFC project support activities that are typically funded through the Facilities and Environmental Health Support annual appropriation. However, these funds are limited to Federal activities only, due to the following subsequent provisions in the BIL:

Provided further, That no funds available to the Indian Health Service for salaries, expenses, administration, and oversight shall be available for contracts, grants, compacts, or cooperative agreements under the provisions of the Indian Self-Determination and Education Assistance Act as amended:

The IHS is aware of the impacts this language places on the Tribes that choose to manage their SFC projects directly. We will continue to work with Tribes to identify potential solutions. The IHS expects to use the salaries, expenses, and administration resources provided in the BIL for additional staff required to support the implementation of SFC projects, systems improvements, stakeholder engagement, recruitment activities, and other related needs.

The IHS will use these funds to hire the additional engineers, field technicians, inspectors, Geographic Information System analysts, and other critical positions that are necessary to support the planning, design, and construction of SFC projects. The IHS will also use these funds to hire additional contract specialists, human resources specialists, and other necessary support positions to successfully recruit for the above-mentioned positions, and to manage the significant influx of construction contracting needs resulting from the BIL.

The IHS will continue to leverage the use of multiple strategies and available authorities to ensure timely and efficient distribution of BIL funding to IHS Areas.

I sincerely value your input regarding allocation of BIL funding to make historic investments in SFC projects that will result in significant improvements to the SFC infrastructure in AI/AN communities across the country. We will begin the distribution of FY 2023 BIL and FY 2023 enacted funding as soon as possible.

Sincerely,

Roselyn Tso

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Roselyn Tso
Director

Enclosures: Sanitation Deficiency Levels
Sanitation Deficiency System Projects as of December 31, 2022
FY 2023 Tier 1 Project Counts and Estimated Total Costs