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THE IRRIGATION REHABILITATION AND RENOVATION FOR INDIAN TRIBAL GOVERNMENTS AND THEIR ECONOMIES ACT (THE IRRIGATE ACT)

APRIL 27, 2016.—Ordered to be printed

Mr. BARRASSO, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 438]

The Senate Committee on Indian Affairs, to which was referred the bill (S. 438) to provide for the repair, replacement, and maintenance of certain Indian irrigation projects, having considered the same, reports favorably with an amendment and recommends that the bill, as amended, do pass.

PURPOSE

The purpose of S. 438 would authorize funding to begin addressing deferred maintenance costs of certain Indian irrigation projects.

NEED FOR LEGISLATION

The bill intends to bring the Bureau of Indian Affairs (BIA) irrigation systems into the 21st century by addressing the deferred maintenance needs of these systems. Deferred maintenance means any maintenance activity that was delayed to a future date, in lieu of being carried out at the time at which the activity was scheduled to be, or otherwise should have been, carried out.

Many tribal economies depend on these water systems and the BIA has an obligation to repair and maintain those irrigation systems. This legislation would authorize \$35 million a year beginning in Fiscal Year 2016 to Fiscal Year 2037 for the rehabilitative needs of the BIA irrigation systems.

BACKGROUND

The Department of the Interior (DOI) initiated several Indian irrigation projects in the late 1800s and early 1900s intended as a central component of tribal economies and a means of implementing the Federal policy of transitioning Indians to an agrarian lifestyle on reservations.¹ The history of these systems is somewhat complex and involved, governed by several Acts of Congress and court decisions, with extensive legislative histories.²

However, these projects have a common thread. While the Federal Government, through the Indian Irrigation Service, led the construction and administration of these projects, in most cases, the construction was not even completed. For some projects, the work was “poorly designed and failed to function properly.”³

A major shift in Federal policy led to an emphasis on “water storage capacity rather than expanding the water distribution system,”⁴ with remaining irrigation efforts focused on maintenance and operation rather than construction.⁵ According to the DOI, most Indian irrigation construction activities ended in the 1940s. At that time, operation and maintenance was then transferred to the BIA.

Indian Irrigation Systems. The BIA has 15 irrigation projects that charge their water users an annual operations and maintenance fee intended to cover the cost of operating and maintaining the project.⁶ These Indian irrigation projects are mostly located on Indian reservations across the West and deliver water to over 25,000 customers and over 750,000 acres of land in ten states. While some projects serve lands still owned solely by Indian tribes or individual Indians, some of these systems serve both Indian and non-Indians. Those projects may serve lands that are “checkerboarded” meaning some lands are Indian or tribal-owned while other lands within the same reservation are owned by non-Indians.

According to the BIA, “the asset inventory includes approximately 6,200 miles of canal and drains and over 58,000 irrigation

¹“The Federal Government has been involved with Indian irrigation since the Colorado River Indian Irrigation Project was authorized in 1867.” *Irrigation Projects in Indian Country: Before the S. Comm. on Indian Affairs*, 113th Cong. (2014) (Statement of Larry Roberts, Principal Deputy Assistant Secretary for Indian Affairs, Department of the Interior). The Act of March 2, 1867, 14 Stat. 514, authorized an appropriation of \$50,000 for that irrigation project. See also <http://www.crwua.org/colorado-river/ten-tribes>. The Federal involvement relative to funding may have been reported as early as 1867, but the Federal policy to move Indians from a nomadic to an agrarian lifestyle on a reservation began much earlier and led to this subsequent “involvement”. See also *The Wind River Irrigation Project: A Class I Overview of Irrigation on the Wind River Reservation, Fremont County, Wyoming*, Blain Fandrich, at 4 (2007).

²*Irrigation Projects in Indian Country: Before the S. Comm. on Indian Affairs*, 113th Cong. (2014) (Statement of Larry Roberts, Principal Deputy Assistant Secretary for Indian Affairs, Department of the Interior). See e.g., The Pine River Irrigation Project was authorized in 1937: <http://www.gpo.gov/fdsys/pkg/BILLS-105s2142es/html/BILLS-105s2142es.htm>; September 22, 1934 *Franklin D. Roosevelt: Executive Order 6853—Withdrawal of Public Lands for Use in Connection with Duck Valley Indian Irrigation Project* <http://www.presidency.ucsb.edu/us/index.php?pid=76419#ixzz2jq2ujsS9>.

³*The Wind River Irrigation Project: A Class I Overview of Irrigation on the Wind River Reservation, Fremont County, Wyoming*, Blain Fandrich, at 9 (2007). For example, “by 1899, Chief Inspector of Irrigation Walter Graves reported too much money had been expended on useless ditches on the Wind River Reservation.” Id. While a comprehensive plan had been developed and “new irrigation completion studies are issued at least once per decade since 1950,” ultimately, “none of the proposed construction projects have been implemented.” Id., at 16.

⁴Id., at 14.

⁵Id.

⁶Blackfoot, Colorado River, Crow, Duck Valley, Flathead, Fort Belknap, Fort Hall, Fort Peck, Pine River, Pyramid Lake, San Carlos, Uintah & Ouray, Walker River, Wapato, and Wind River irrigation projects.

structures.”⁷ These projects also assist in the production of over \$300 million in gross crop revenues annually.⁸

The BIA considers these irrigation systems “revenue generating” because income from agriculture is supposed to be generated by the BIA irrigation project fees. Most of these revenue-generating projects receive little to no Federal funds regardless of whether revenue is generated or not or the collected fees from irrigators cover the operations and maintenance costs.

Condition of Indian Irrigation Systems. In 2006, the Government Accountability Office (GAO) issued a report titled, “*Indian Irrigation Projects: Numerous Issues Need to Be Addressed to Improve Project Management and Financial Stability*,” which highlighted the inefficiencies of the operation, maintenance, and management by the BIA. The 16 BIA irrigation projects studied in the report, according to the GAO, are plagued by maintenance issues, structural deficiencies, and insufficient funding for project operations.⁹ These maintenance and operations concerns ranged from basic maintenance items such as the need to clear weed and tree overgrowth and repair cattle-crossings to more long-term issues such as the increased demand for water.¹⁰

A 2007 report found that, for at least one project, since the 1930s, “the irrigation units have remained essentially unchanged, except for periodic maintenance in order to keep the system operational, such as the replacement of decayed structures with like structures at the same locations.”¹¹ Remarkably, the GAO Report affirms that this type of finding is not uncommon for other Indian irrigation projects.¹²

Since 2007, the BIA has been conducting a Condition Assessment for all 16 irrigation projects, completing 12 by 2013, “one ongoing through Fiscal Year 2014, with five remaining to complete.”¹³ For some projects, a critical deficiency ranking was given. This ranking is given if there is “a threat to the health and/or safety of the user which may occur within two years, an advanced deterioration which has resulted (or will result) in the failure of the feature if not corrected within two years, an accelerated deterioration of adjacent or related materials as a result of the deficiency, or a failure to meet a legislated requirement.”¹⁴

⁷ These figures also include the Navajo Indian Irrigation Project in New Mexico and the Pyramid Lake Irrigation Project in Nevada, both non-revenue generating irrigation projects. The operations and maintenance costs for these two projects are “paid through appropriations or other means” but not from user fees. *Irrigation Projects in Indian Country: Before the S. Comm. on Indian Affairs*, 113th Cong. (2014) (Statement of Larry Roberts, Principal Deputy Assistant Secretary for Indian Affairs, Department of the Interior).

⁸ *BIA Irrigation Accomplishments since the 2006 GAO Report*, Bureau of Indian Affairs, Department of the Interior, at 1 (2013).

⁹ According to the BIA, the Shoshone-Paiute Tribes operate the Duck Valley Indian Irrigation Project under a self-governance compact.

¹⁰ U.S. Gov’t Accountability Office. GAO-06-314, *Indian Irrigation Projects: Numerous Issues Need to Be Addressed to Improve Project Management and Financial Stability* (2006).

¹¹ *The Wind River Irrigation Project: A Class I Overview of Irrigation on the Wind River Reservation, Fremont County, Wyoming*, Blain Fandrich, at 28 (2007).

¹² U.S. Gov’t Accountability Office. GAO-06-314, *Indian Irrigation Projects: Numerous Issues Need to Be Addressed to Improve Project Management and Financial Stability* (2006).

¹³ *BIA Irrigation Accomplishments since the 2006 GAO Report*, Bureau of Indian Affairs, Department of the Interior, at 3 (2013). These assessments also include the Navajo Irrigation Project because “the facilities are owned by the BIA and are therefore included in the BIA’s asset management responsibility.” *Id.*, at 2.

¹⁴ *The Wind River Irrigation Project: A Class I Overview of Irrigation on the Wind River Reservation, Fremont County, Wyoming*, Blain Fandrich, at 7 (2007).

The Committee held a field hearing in Wyoming on April 20, 2011¹⁵ and an oversight hearing on Indian irrigation projects on September 10, 2014.¹⁶ Testimony received at both hearings indicated that, aside from the increases to the total amount of deferred maintenance costs, nothing has changed since the release of the GAO Report.

Deferred Maintenance Costs. Recent information from the BIA clearly reflects an upward trend in the deferred maintenance costs of these systems, growing from \$549 million to in excess of \$567 million in only one quarter year alone in Fiscal Year 2014. By the end of Fiscal Year 2015, that amount was in excess of \$576 million.

While the BIA has indicated that the current backlog of deferred maintenance is estimated to be in excess of \$576 million, some Indian tribes estimate that this backlog estimate may be even higher. Yet, in Fiscal Year 2014, the BIA only allocated \$998,000 to rehabilitate BIA irrigation systems. In Fiscal Years 2015 and 2016, the BIA provided \$2.6 million each Fiscal Year for rehabilitation.¹⁷

The Need for the IRRIGATE Act. The Committee is concerned that, without adequate structural updating, the BIA irrigation systems will create further inefficiencies to agricultural production on Indian reservations. The GAO Report highlighted that the deferred maintenance undermines the projects' long-term sustainability.¹⁸ The Assistant Secretary for Indian Affairs, Kevin Washburn, testified that to effectively address the deferred maintenance, the BIA "would need some sort of assured source of funding."¹⁹

During the legislative hearing on S. 438, the GAO Director of Natural Resources and Environment, Ms. Anne-Marie Fennell, testified that, despite the serious backlog, the BIA "did not have a plan for how it would obtain funding to fix the deferred maintenance items."²⁰ The tribal water engineer from the Wind River Indian Reservation, Mitch Cottenoir, also expressed concerns regarding the BIA's continued management of irrigation projects.

Councilman Charles Headdress, Sr. from the Fort Peck Assiniboine & Sioux Tribes of Fort Peck Reservation also indicated that the IRRIGATE Act, S. 438, would increase productivity of irrigable acres, which in turn, would help their economy.²¹ Mr. Cottenoir also noted that "[w]ith increased funding and rehabilitation of the

¹⁵The *Wind River Irrigation Project—Issues Arising From and Contributing to Deferred Maintenance and Other Project Management Problems: Before the S. Comm. on Indian Affairs*, 112th Cong. 1 (2011).

¹⁶*Irrigation Projects in Indian Country: Before the S. Comm. on Indian Affairs*, 113th Cong. 2 (2014).

¹⁷The total budget for irrigation operations and maintenance includes mandatory payments as required by other Federal laws or Court-ordered payments as well as payments to the Bureau of Reclamation for the ability to store water using the BOR reservoirs. See Budget Justifications and Performance Information for Fiscal Year 2017. Bureau of Indian Affairs, Department of the Interior (2016).

¹⁸U.S. Gov't Accountability Office. GAO-06-314, *Indian Irrigation Projects: Numerous Issues Need to Be Addressed to Improve Project Management and Financial Stability* (2006).

¹⁹The *IRRIGATE Act: Hearing on S. 438: Before the S. Comm. on Indian Affairs*, 114th Cong. 1 (2015) (statement of Kevin K. Washburn, Asst. Sec'y for Indian Affairs, Department of the Interior). This statement echoed Mr. Larry Roberts' testimony before the Committee ("[W]ithout new funding deferred maintenance remains an enormous challenge.") *Irrigation Projects in Indian Country: Before the S. Comm. on Indian Affairs*, 113th Cong. at 2 (2014).

²⁰The *IRRIGATE Act: Hearing on S. 438: Before the S. Comm. on Indian Affairs*, 114th Cong. 1 at 9 (2015).

²¹The *IRRIGATE Act: Hearing on S. 438: Before the S. Comm. on Indian Affairs*, 114th Cong. 1 at 20, 45-6. (2015) (Statement of Charles S. Headdress, Sr., Council Member, Fort Peck Assiniboine & Sioux Tribes of Fort Peck Reservation).

system, [the] efficiency rates [of irrigation systems] could be raised.”²²

LEGISLATIVE HISTORY

On February 10, 2015, Senator Barrasso introduced S. 438, along with Senators Tester, Daines, Hatch, and Enzi. Senator Bennet was later added as a co-sponsor. The bill was referred to the Committee on Indian Affairs of the Senate.

This bill is similar to the amendment Senator Barrasso offered to and was included in S. 715, the *Authorized Rural Water Projects Completion Act*, reported by the Energy and Natural Resources Committee of the Senate during the 113th Congress. No further action was taken on that bill last Congress.

On March 4, 2015, the Committee on Indian Affairs of the Senate held a legislative hearing on the bill. On March 18, 2015, the Committee held a duly called business meeting to consider the bill, among other bills. The Committee then ordered the bill to be reported favorably, as amended, to the Senate by voice vote.

Amendments

At the March 18, 2015, Committee business meeting, Senator Barrasso offered a substitute amendment to S. 438. That amendment incorporated recommendations from the Administration, made clarifying and technical changes to the bill, and required the Secretary of the Interior report to the Committee on the progress being made to improve the irrigation systems with the IRRIGATE funds. The substitute amendment was adopted by voice vote.

In addition, Senator Barrasso offered another amendment that would extend the deadline for the Secretary to conduct consultation with affected Indian tribes from 60 to 120 days. This amendment was based on a late request by the Administration. The Chairman and Vice Chairman agreed to waive the 48 hour filing requirement under the Committee rules so that the amendment could be offered and considered.

Senator Tester offered an amendment that would ensure the IRRIGATE Act funds expended will not penalize landowners that use the BIA irrigation systems. Both of these amendments were considered en bloc and adopted by voice vote.

SECTION-BY-SECTION ANALYSIS OF BILL AS ORDERED REPORTED

Section 1—Short title; Table of contents

Section 1 states that the Act may be cited as the *Irrigation Rehabilitation and Renovation for Indian Tribal Governments and Their Economies Act*, or the *IRRIGATE Act*.

Section 2—Definitions

The bill defines the term “fund” to mean the Indian Irrigation Fund established by the bill. The bill defines the term “Indian Tribe” to have the same meaning as it does in section 4 of the *Indian Self-Determination and Education Assistance Act*. The bill defines the term “Secretary” to mean the Secretary of the Interior.

²²*Id.* at 49.

TITLE I—INDIAN IRRIGATION FUND

Section 101—Establishment

This section establishes the Indian Irrigation Fund that will consist of amounts deposited in the Fund pursuant to Section 103 and interest earned to repair certain Indian irrigation projects.

Section 102—Deposits to fund

This section establishes that \$35,000,000 will be deposited in the Indian Irrigation Fund (Fund) each year from Fiscal Year 2016 to 2037. The funds will come from the reclamation fund (established by 32 Stat. 388, chapter 1093).

Section 103—Expenditures from fund

This section establishes that the Secretary of the Interior may expend not more than the sum of \$35 million and interest accrued for each of Fiscal Years 2016 through 2037 to the extent provided in advance of appropriations acts. The Secretary may expend more than \$35 million if additional funds are available in the Fund as a result of a failure of the Secretary to expend all the amounts available in 1 or more prior years.

Section 104—Investments of amounts

The Secretary of the Treasury may invest excess amounts from the Fund if there is enough money to meet current withdrawals. Interest accrued and any sales from such investments shall be credited to and become a part of the Fund.

Section 105—Transfers of amounts

Amounts to be transferred in the Indian Irrigation Fund shall be transferred at least monthly from the general fund on the basis of estimates by the Secretary of the Interior.

Section 106—Termination

At the end of Fiscal Year 2037, the Indian Irrigation Fund shall terminate and unexpended funds returned to the reclamation fund.

TITLE II—REPAIR, REPLACEMENT, AND MAINTENANCE OF CERTAIN
INDIAN IRRIGATION PROJECTS*Section 201—Repair, replacement and maintenance of certain Indian irrigation projects*

This section requires that the Secretary of the Interior create a program to address the deferred maintenance needs of Indian irrigation projects that pose risks to public or employee safety or natural or cultural resources and impede management and efficiency of the Indian irrigation projects. Section 201 establishes that the Secretary of the Interior shall transfer \$35 million, plus any accrued interest, from the Fund to the BIA every year from 2016 to 2037 to carry out the program to address the deferred maintenance needs of Indian irrigation projects described in Section 202. This section also ensures that the *IRRIGATE* funds expended will not penalize landowners that use the BIA irrigation systems, consistent with the Federal Government's responsibility for these systems.

Section 202—Eligible projects

This section establishes that the projects eligible for these funds are Indian irrigation projects in the western United States and are owned by the Federal Government, managed and operated by the BIA (or Indian tribes through *Indian Self Determination and Education Assistance Act* contracts or compacts), and have documented deferred maintenance.

Section 203—Requirements and conditions

This section requires that within 120 days after enactment the Secretary in consultation with the Assistant Secretary for Indian Affairs and representatives of affected Indian tribes shall develop and submit to Congress (1) programmatic goals to carry out the new Indian irrigation program and (2) funding prioritization criteria to serve as a methodology for distributing the funds.

Section 204—Study of Indian irrigation program and project management

This section establishes that within 2 years, the Secretary, acting through the Assistant Secretary for Indian Affairs, shall complete a study that evaluates options for improving programmatic and project management of BIA-managed Indian irrigation projects. The report, submitted to Congress, will also include recommendations for improvement in each qualifying project area. Prior to conducting the study, the Secretary is required to consult with Indian tribes with jurisdiction over the land on which an eligible project is located and consider input of landowners served by the project. This section also requires the Secretary of the Interior to report every 2 years to Congress on the progress being made to improve the irrigation systems with the IRRIGATE funds.

Section 205—Tribal consultation and user input

This section establishes that, within 120 days of enactment and prior to spending any funds on a project, the Secretary shall consult with impacted Indian tribes and consider the input of landowners.

Section 206—Allocation among projects

This section establishes that, for every year funding is available through 2037, each eligible project with critical maintenance needs qualifies for at least some funding. This section establishes additional considerations for prioritizing funding for Indian irrigation projects.

This section limits the total allocation for any individual project to no more than \$15 million during any consecutive three year period. Notwithstanding the cap, if the full amount of \$35 million cannot be allocated because the costs of the remaining maintenance activities exceed the cap, the Secretary may allocate funds in accordance with this title. This section authorizes the *Indian Self Determination and Education Assistance Act* to apply to activities under this section.

COST AND BUDGETARY CONSIDERATIONS

Summary: S. 438 would establish a new Indian Irrigation Fund and transfer \$35 million from the existing Reclamation Fund into the proposed fund each year over the 2016–2037 period. Those annual deposits, and interest credited to the unspent balances in the new fund, would be authorized to be appropriated for maintaining Indian Irrigation projects operated by the Bureau of Indian Affairs (BIA) in the western United States.

Based on information from the BIA, CBO estimates that implementing the legislation would cost \$152 million over the 2016–2020 period and about \$625 million after 2020. Pay-as-you-go procedures do not apply to this legislation because it would not affect direct spending or revenues.

S. 438 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

	By fiscal year, in millions of dollars—					
	2016	2017	2018	2019	2020	2016–2020
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	35	35	36	37	37	180
Estimated Outlays	18	26	34	37	37	152

Estimated cost to the Federal Government: The estimated budgetary effect of S. 438 is shown in the following table. The costs of this legislation fall within budget functions 300 (natural resources and environment) and 450 (community and regional development).

Basis of estimate: For this estimate, CBO assumes that S. 438 will be enacted before the end of 2015 and that the authorized amounts will be appropriated for each fiscal year. Estimated outlays are based on information from the BIA and on historical spending patterns for similar projects.

S. 438 would authorize the annual appropriation of \$35 million, and any interest credited to the proposed fund, for maintenance of Indian Irrigation projects owned by the federal government and operated by the BIA. According to the BIA, the agency operates 18 Indian Irrigation projects that would be eligible to receive appropriated funds under the bill. The total cost to complete the deferred maintenance for all those projects is currently estimated to be about \$600 million. S. 438 funds also could be used for additional maintenance costs until 2037.

CBO estimates that implementing S. 438 would cost \$152 million over the 2016–2020 period and about \$625 million thereafter, assuming appropriation of the authorized amounts.

Pay-As-You-Go considerations: None.

Intergovernmental and private sector impact: S. 438 contains no intergovernmental or private-sector mandates as defined in UMRA.

Estimate prepared by: Federal Costs: Aurora Swanson; Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Amy Petz.

Estimate approved by: Theresa Gullo, Assistant Director for Budget Analysis.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 438.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 438 will have a minimal impact on regulatory or paperwork requirements.

CHANGES IN EXISTING LAW

In accordance with subsection 12 of rule XXVI of the Standing Rules of the Senate, S. 438 makes no changes to existing law.