GREEN MONEY FOR WESTERN WATERS: NEW ENVIRONMENTAL GRANTS AND FEDERAL WATER POLICY

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SUMMARY

Congress in the 2020s has authorized three new environmentally focused grant programs relating to western waters and appropriated $450 million in multi-year funding. The Bureau of Reclamation is responsible for creating and implementing these programs, giving it a new tool and resources for addressing stubborn environmental problems—some caused by the Bureau's many dams. These programs are part of a larger trend of Congress authorizing and funding new grant programs across the government, and while competitive grant programs can incentivize and fund good works, they also raise policy concerns. This Article examines the statutes authorizing these new environmental grants, the funding provided, and the Bureau's early actions to implement them. It then examines policy choices made by Congress and the Bureau in establishing the environmental grant programs, and concludes by assessing what the programs might mean for the western water environment, for the Bureau itself, and for federal water policy.

The U.S. Congress in the 2020s has established new federal grant programs to begin addressing environmental problems affecting waters in the American West, and has appropriated hundreds of millions of dollars in funding for these programs.[1] Thus, Congress has provided tools and resources that could help undo some of the environmental harms caused by intensive water development and management in the West. Federal funding for restoring degraded waterways is both appropriate and overdue, since much of the environmental damage was done by dams authorized by Congress and built by federal agencies in the 20th century.

The U.S. Bureau of Reclamation is the agency most responsible for constructing and operating dams in the West, primarily for purposes of water supply and hydropower. The Bureau built hundreds of dams across the region, including huge and famous ones like Hoover and Grand Coulee, earning a major reputation for both engineering achievement and environmental destruction. It still operates many of these dams, and proudly touts its role as the nation's largest water wholesaler and second-largest generator of hydropower.[2]

It may seem surprising, then, that the agency responsible for implementing the new environmental grant programs is that same Bureau of Reclamation. Environmental grantmaking is indeed a remarkable new role for an agency that built its reputation in concrete, and whose logo (since the Donald Trump Administration) shows water flowing through an angular engineered structure.[3] But the Bureau's mission has been changing since major dam construction ended around 1980, and the past 30 years have brought new policy tools and a mission far broader than simply delivering water and power. While it still maintains and operates many of the dams it built in the past century, the Bureau's expanded role now includes promoting drought resiliency, water conservation, and climate adaptation through grants

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1. *See infra* Section I.A (describing authorizing statutes for three programs); Section I.B (explaining multi-year funding of $450 million for the three programs combined).

2. U.S. Bureau of Reclamation, *About Us—Mission*, https://www.usbr.gov/main/about/mission.html (last updated Aug. 4, 2023).

3. U.S. Bureau of Reclamation, *Background Images*, https://usbr.gov/history/logo.html (last updated June 9, 2020) (showing logos over time, with the current one dating to 2019).

and other forms of assistance, making the agency a logical choice to run the new environmental grant programs.[4]

Implementing these programs, however, brings significant challenges. Although the Bureau has operated some relatively modest grant programs for much of the 21st century, it now must gear up to disburse far more grant money than it ever did before, much of it through programs that are still being developed. Because Congress authorized these programs without much detail on many key points, the Bureau has been allowed—and effectively required—to make major policy calls without clear statutory direction. And the Bureau must launch these programs at a time when it must also focus on major conflicts—most famously in the Colorado River Basin—driven by drought and long-standing overallocation of water in many parts of the West.

Congress has now invested nearly half a billion taxpayer dollars into addressing environmental problems facing western waters through federal grants, and has charged the Bureau with setting up and carrying out the grant programs. These new responsibilities carry risks for the Bureau, which will face scrutiny from Congress and stakeholders over policy choices, bureaucratic performance, and spending decisions. But these new authorities and resources also provide a real opportunity for the Bureau to expand its reach and clientele, incentivize positive action, and make progress in resolving long-standing environmental water problems.

This Article begins by introducing the new environmentally focused grant programs, summarizing their authorizing statutes, the money provided through the Bipartisan Infrastructure Law[5] (BIL), and the Bureau's actions in establishing and implementing these programs. Part II examines policy choices made by Congress and the Bureau in setting up these grant programs, starting with the choice of the Bureau as the implementing agency, then reviewing eligible project and applicant types, grantmaking priorities, cost-share requirements, and other provisions. Part III considers what the new environmental grant programs might mean for the western water environment, for the Bureau itself, and for federal water policy, and identifies some concerns with competitive grant programs as a policy tool. Part IV concludes.

I. The New Environmental Grant Programs for Western Waters

Congress has made significant moves in the past three years to make federal money available to address environmental problems relating to waters in the West. This section examines the authorizations and funding for these new programs, and the Bureau's early actions to implement them.

A. The Statutory Authorities

Beginning in late 2020, Congress enacted multiple new grant programs to be implemented by the Bureau, all focused largely on addressing environmental problems relating to waters in the West. While all these authorizations call for funding water-related projects that will provide environmental benefits, there are notable differences in the kinds of projects (or benefits) to be prioritized for grants, the types of entities eligible to apply, the requirements for paying a portion of project costs with nonfederal funds, and more.

Congress first acted to provide specifically for environmental grants in the Consolidated Appropriations Act for Fiscal Year 2021 (FY21 Omnibus),[6] enacted in late December 2020 near the end of the Trump Administration. The FY21 Omnibus modestly "greened" an existing Bureau grant program known as WaterSMART,[7] and went further to establish the first grant program specific to environmentally focused projects.

The WaterSMART grant program was initially authorized in the 2009 Science and Engineering to Comprehensively Understand and Responsibly Enhance (SECURE) Water Act,[8] and its original focus (as explained below[9]) was on water conservation projects to save water used for agricultural or municipal purposes. States, tribes, irrigation or water districts, or other organizations authorized to deliver water or power could apply[10] for a grant to cover up to one-half of the cost of an eligible project. But nonprofit conservation groups were not eligible to apply, and the statutory criteria prioritized projects with water savings, not environmental benefits.[11]

The FY21 Omnibus, in a section titled "WaterSMART Extension and Expansion,"[12] made several environmentally focused changes to the grant program authorizing statute. It made projects that would "improve the condition

4. *See infra* Section II.A (discussing the Bureau's evolving mission and Congress' choice to have the Bureau implement the environmental grant programs).
5. The Bipartisan Infrastructure Law, Pub. L. No. 117-58, 134 Stat. 429 (2021), was officially titled the Infrastructure Investment and Jobs Act, *id.* §1(a). It is sometimes referred to as the IIJA, or the Infrastructure Law, but this Article refers to the law by the initials BIL.
6. Pub. L. No. 116-260, 134 Stat. 1182 (2020).
7. The "SMART" in WaterSMART stands for "Sustain and Manage America's Resources for Tomorrow." U.S. Bureau of Reclamation, *Interactive Dashboard*, https://www.usbr.gov/main/dashboard.html (last updated Aug. 25, 2021). Various Bureau programs for planning, technical assistance, stakeholder engagement, and funding come under the WaterSMART umbrella. U.S. Bureau of Reclamation, *WaterSMART*, https://www.usbr.watersmart/index.html (last updated Aug. 25, 2021).
8. Pub. L. No. 111-11, §§9501-9510, 123 Stat. 991, 1329-46 (2009). While dealing primarily with federal lands, this enactment also included several Bureau of Reclamation authorizations in its Title IX, 123 Stat. 1295-414.
9. *See infra* notes 118-24 and accompanying text.
10. Pub. L. No. 111-11, §9502(7), 123 Stat. 991, 1330 (2009) (defining "eligible applicant").
11. *Id.* §9504(a)(1), 123 Stat. 1334 (listing several purposes, including preventing the need to list species under the Endangered Species Act or accelerating the recovery of already-listed species).
12. Pub. L. No. 116-260, §1106, 134 Stat. 1182, 3240 (2020). This section of the FY21 Omnibus also increased the authorized spending limit for Water SMART grants (over the lifetime of the program) from $530 million to $700 million. *Id.* §1106(d), 134 Stat. 3242 (codified at 42 U.S.C. §10364(e)).

of a natural feature"[13] eligible for grants[14]; thus, a program largely focused on projects that save water for cities and farms could now fund those benefiting "natural" streams, lakes, or riparian areas. It allowed for grants to pay up to 75% (not the standard 50%) of the cost of projects whose benefits primarily advance "an established strategy or plan to increase the reliability of water supply for consumptive and nonconsumptive environmental values."[15] It made nonprofit conservation groups eligible to apply for grants, if "acting in partnership with and with the agreement of" a state, tribe, or water/power supply entity.[16] And it directed the Bureau, in making grants for water conservation projects, to prioritize those "that enhance drought resilience by benefitting the water supply and ecosystem."[17]

The FY21 Omnibus went further in addressing water-related environmental problems, giving the Bureau new authority to fund aquatic ecosystem restoration projects.[18] The statute enables the Bureau to "negotiate and enter into an agreement . . . to fund the design, study, and construction of an aquatic ecosystem restoration project in a Reclamation state."[19] The term "aquatic ecosystem restoration project" is not defined, but it clearly includes dam removal projects, as the statute imposes special requirements on any project to remove or modify an existing dam.[20] To fund an aquatic ecosystem restoration project, the Bureau must find it "likely to improve the health of fisheries, wildlife or aquatic habitat, including through habitat restoration and improved fish passage."[21] Before funding construction, the Bureau must find that the project would not have an "unmitigated adverse impact" on existing water users or on the environment, and must also comply with existing environmental laws.[22]

The list of entities eligible to apply for funding is similar to that for the expanded WaterSMART grants, including nonprofit conservation groups "acting in partnership" with states, tribes, or water supply authorities.[23] The statute limits the federal share of construction costs to 65%,[24] and directs the Bureau to prioritize projects that have broad stakeholder support, that benefit more than one river basin, that help replace aging water infrastructure, or that contribute to the restoration of threatened or endangered salmon species.[25]

Less than one year later, Congress directed the Bureau to set up another new grant program with a strong environmental emphasis. The BIL's §40907,[26] titled "Multi-Benefit Projects to Improve Watershed Health," calls for grants to support "habitat restoration projects that improve watershed health in a river basin that is adversely impacted by a Bureau of Reclamation water project."[27] Such projects must benefit the environment (in any of five listed ways[28]), or fisheries,[29] or river-based recreation,[30] and Congress prioritized grant funding for projects that would provide more than one of these benefits.[31] The usual categories of entities may apply,[32] but the statute authorizing these multi-benefit grants does not require that a nonprofit conservation group partner with a governmental entity in order to be eligible.[33] The federal share of the cost of multi-benefit projects is generally capped at 50%, but it may be higher if a project has ecological or recreational benefits, and "the non-consumptive water conservation benefit or habitat restoration benefit accounts for at least 75 percent of the cost" of the project.[34]

It is somewhat remarkable that Congress authorized three different new programs in such a short time span, especially since the programs are roughly similar in some

13. The statute defines "natural feature" as "a feature that is created through the action of physical, geological, biological, and chemical processes over time." *Id.* §1106(a)(5), 134 Stat. 3240 (codified at 42 U.S.C. §10364(e)).
14. *Id.* §1106(b)(1), 134 Stat. 3241 (codified at 42 U.S.C. §10364(a)(1)(I)).
15. *Id.* §1106(b)(i)(II), 134 Stat. 3242. It also provided that applications for such projects must come from "a watershed group" (as elsewhere defined in statute) or "a water user and 1 or more stakeholders with diverse interests." *Id.*
16. *Id.* §1106(a)(2), 134 Stat. 3240 (codified at 42 U.S.C. §10362(7)). For one narrow category of grant applications (for a certain type of project located on federal lands), a nonprofit conservation group could apply on its own, so long as it showed that it had notified the relevant governmental or water supply entities and received "no written objection to the project." *Id.*
17. *Id.* §1106(b)(4), 134 Stat. 3242 (codified at 42 U.S.C. §10364(a)(4)). In a similar vein, this section of the FY21 Omnibus required that an applicant for a grant of at least $500,000 for a water conservation project show how the project "would result in improved streamflows or aquatic habitat." *Id.* §1106(b)(2), 134 Stat. 3241 (codified at 42 U.S.C. §10364(a)). Projects without stream flow or habitat benefits would still be eligible for grants, however, if the applicant could show that they would have another type of benefit.
18. Pub. L. No. 116-260, §1109, 134 Stat. 1182, 3244 (2020).
19. *Id.* §1109(b)(1), 134 Stat. 3244.
20. For a project to remove a dam or modify one in a way that "reduces storage or diversion capacity," the Bureau may only fund design or study if the dam owner consents, and can only fund construction if that dam's existing water users have been officially notified of the project and have not objected. *Id.* §1109(b)(2), 134 Stat. 3244-45.
21. *Id.* §1109(b)(1), 134 Stat. 3244.
22. *Id.* §1109(c)(2), 134 Stat. 3245. The statute uses "adverse impact" as to water users and "adverse effect" as to the environment. The Bureau must make additional findings before providing construction funding, which include findings relating to Indigenous tribes, interstate compacts, and "the financial interest of the United States." *Id.*
23. *Id.* §1109(a), 134 Stat. 3244.
24. *Id.* §1109(c)(2), 134 Stat. 3245. The statute does not allow funding for operations, maintenance, or replacement costs. *Id.*
25. *Id.* §1109(g), 134 Stat. 3246.
26. Pub. L. No. 117-58, §40907, 135 Stat. 429, 1125 (2021).
27. The actual text is somewhat less straightforward, directing the Secretary of the Interior to establish within one year a competitive program for grants "for the design, implementation, and monitoring of conservation outcomes" of habitat restoration projects in affected basins. *Id.* §40907(b).
28. Funded projects must improve watershed health by accomplishing one or more of the following:
    (1) Ecosystem benefits.
    (2) Restoration of native species.
    (3) Mitigation against the impacts of climate change to fish and wildlife habitats.
    (4) Protection against invasive species.
    (5) Restoration of aspects of the natural ecosystem.

    Id. However, the statute prohibits grant funding for any habitat project "the purpose of which is to meet existing environmental mitigation or compliance obligations under Federal or State law." *Id.* §40907(c)(1)(B).
29. The BIL provides that a project may be eligible for grants if it achieves "[e]nhancement of commercial, recreational, subsistence, or Tribal ceremonial fishing." *Id.* §40907(b)(6).
30. *Id.* §40907(b)(7).
31. *Id.* §40907(c)(1)(A).
32. These categories include states, tribes, local governments, regional authorities, and entities that deliver water or power. *Id.* §40907(a)(1)-(4).
33. *Id.* §40907(a)(5).
34. *Id.* §40907(d). Under these circumstances, the federal share of the cost may be as high as 75%. *Id.*

key respects such as the types of projects and benefits prioritized, the categories of entities eligible to apply, and the maximum federal share of project costs. The aquatic ecosystem restoration statute, however, brought a new emphasis to fish passage benefits and a limited but explicit approval of grants for dam removal projects. And the more recent multi-benefit authorization broke new ground by focusing on river basins "adversely impacted" by a Bureau project, by allowing nonprofit conservation groups to apply on their own, and by including river-based recreation in the list of benefits that could make a project grant-worthy.

B. *Funding Levels for Environmental Grant Programs*

Congress has not only expanded the Bureau's environmental grantmaking responsibilities in the 2020s, it has also provided substantial funding for these newly authorized programs. In the BIL, Congress authorized a total of $450 million to be spent over five years (through FY 2026)[35] on grants for environmental water resources projects under WaterSMART, aquatic ecosystem restoration projects, and multi-benefit projects.[36] Congress appropriated money at these levels in another portion of the BIL.[37]

Each of these programs received at least $100 million in five-year funding. The Aquatic Ecosystem Restoration Program received the biggest chunk of money: $250 million for design, study, and construction of restoration projects.[38] Congress also provided $100 million for multi-benefit projects.[39] Additionally, Congress directed $100 million to fund environmental water resources projects under WaterSMART,[40] representing one-quarter of the $400 million provided for all types of WaterSMART grants.[41]

This five-year investment may be viewed as relatively modest in relation to the scope and scale of environmental problems facing waters in the West.[42] It also fits with a trend of increased funding for water grants, as Congress in recent years had boosted funding for the established WaterSMART Program from less than $30 million per year in FY 2015 and FY 2016 to more than $50 million in FY 2020 and FY 2021,[43] with a further increase in the BIL. And with Congress providing several billion dollars in the BIL for more conventional water supply infrastructure,[44] it is not so remarkable that Congress also provided eight figures annually[45] for each of three environmentally oriented grant programs to be administered by the Bureau.

Perhaps the most remarkable thing about these spending levels is that the grant programs being funded were all initially authorized either in the FY21 Omnibus or the BIL itself.[46] Congress provided sizable funding for environmental grants before the Bureau had even rolled out the application process and selection criteria. Thus, Congress effectively entrusted the Bureau to make sound policy decisions in designing the programs, and to implement them swiftly and effectively. The next section summarizes the Bureau's actions to date in setting up the new environmental grant programs.

C. *Implementation*

Although the authorizing statutes specified some elements of the new grant programs—especially as to eligible applicant types, benefits to be achieved, and cost-share requirements—Congress gave the Bureau little or no direction on how to set them up. Only the authorization for multi-benefit project grants speaks directly to process, requiring the Bureau to establish a competitive grant program "in consultation with the heads of relevant agencies" within one year of the BIL's enactment.[47] None of the authorizing statutes requires the Bureau to take further steps, such as consulting with other constituencies or providing an opportunity for public comment on the design of these new programs. By omitting so many key details, Congress left the Bureau great discretion, not only in making choices

35. Congress authorized this level of funding for these programs "for the period of fiscal years 2022 through 2026." *Id.* §40901, 135 Stat. 1116.
36. Congress authorized another $100 million over five years for cooperative watershed management projects, *id.* §40901(9), 135 Stat. 1118, under an older grant program that funds projects—including projects to benefit water quality or "the ecological resilience of a river or stream"—implemented by cooperative watershed management organizations. 16 U.S.C. §§1015, 1015a; *see infra* notes 125-31 and accompanying text.
37. Pub. L. No. 117-58, div. J, tit. III, 135 Stat. 429, 1364-66 (2021).
38. *Id.* §40901(10), 135 Stat. 1118.
39. *Id.* §40901(11), 135 Stat. 1118.
40. Congress directed $100 million to be "made available for projects that would improve the condition of a natural feature or nature-based feature," as defined in 42 U.S.C. §10362. *Id.* §40901(7), 135 Stat. 1117.
41. *Id.*
42. According to a U.S. Environmental Protection Agency study, roughly 20%-30% of river and stream miles in the Western Mountains ecoregion—including much of the territory in the Rocky Mountain and West Coast states—were in poor condition for many environmental parameters relating to ecosystem health. The survey covered more than 186,000 river and stream miles, of which 30% rated poor for macroinvertebrates, 31% poor for fish (with another 32% of miles not assessed), 21% poor for instream fish habitat, 16% poor for riparian disturbance, and 24% poor for excess streambed sediments. U.S. Environmental Protection Agency, National Rivers and Streams Assessment 2013-2014: A Collaborative Study 50-51 (2020), https://www.epa.gov/system/files/documents/2021-10/nrsa_13-14_report_508_ci_2021-10-15.pdf. The drier, southwestern Xeric ecoregion, with about 44,000 stream miles, showed generally similar percentages of poor conditions in these five categories. *Id.* at 52-53. These statistics suggest that at least 25% of the river and stream miles in these two western regions need significant work to regain ecological health, which would total more than 57,000 miles.
43. Charles V. Stern, Congressional Research Service, IF12127, Bureau of Reclamation: FY2023 Budget and Appropriations fig.3 (2022).
44. This includes more than $3 billion for the Bureau's own aging infrastructure and dam safety work. As for grant funding, the BIL authorized five-year spending of $1 billion for water recycling and reuse projects (known in Reclamation-speak as Title XVI projects), another $1 billion for rural water supply projects, and $250 million for water desalination projects and studies, as well as $300 million for traditional, non-environmental WaterSMART grants for water and energy conservation projects. *See* Charles V. Stern & Anna E. Normand, Congressional Research Service, R47032, Bureau of Reclamation Provisions in the Infrastructure Investment and Jobs Act (P.L. 117-58) 1-3 (2022).
45. Since the BIL appropriated these funds over a five-year period, the money available as an annual average would be "only" $20 million for environmental water resources projects and multi-benefit projects, and $50 million for aquatic ecosystem restoration projects.
46. Congress originally authorized the Aquatic Ecosystem Restoration Program for a maximum of $15 million annually. Pub. L. No. 116-260, §1109(d), 134 Stat. 1182, 3246 (2020).
47. Pub. L. No. 117-58, §40907(b), 135 Stat. 429, 1125 (2021).

about the substance of the new grant programs, but also in deciding the process for making those choices.

The Bureau's initial public step in setting up these programs has been producing and posting documents called "Draft Eligibility and Evaluation Criteria for Review and Comment," dated May 2021 for the Environmental Water Resources Program[48] and March 2023 for the Aquatic Ecosystem Restoration Program.[49] These documents stated the Bureau's proposed terms for the new grant programs, focusing on categories of applicants,[50] eligible and ineligible project types,[51] cost-share requirements,[52] and especially the Bureau's scoring criteria for grant applications.[53] They also requested comments from the public and interested constituencies, to be submitted by e-mail[54]; the Bureau set a comment period of a few weeks on its environmental water resources proposal,[55] and just over two months on its aquatic ecosystem restoration proposal.[56]

Although these draft criteria documents are somewhat detailed in laying out the Bureau's intentions for the new grant programs, they say very little about the Bureau's *rationale* on key issues, such as the weight assigned to various scoring criteria and the eligibility (or not) of various project types. For example, the aquatic ecosystem restoration document flatly states that the program will not fund any purchases of water,[57] but never explains why. In summarizing and responding to public comments, however, the Bureau has briefly explained some of its choices regarding the Environmental Water Resources Program,[58] and should soon do the same for the Aquatic Ecosystem Restoration Program.

The next official step is the notice of funding opportunity (NOFO), by which the Bureau announces a new grant cycle, sets an application deadline, and lays out the terms and conditions that will apply to this round of applications. Here, the agency lays out its "final" choices regarding the program, although it may revise them in a future NOFO. The first such notice for environmental grants was an August 2021 NOFO for environmental water resources projects,[59] in which the Bureau announced its plans to award 15 to 20 such grants of up to $2 million in that cycle, but did not identify a specific amount of money to be spent.[60]

The Bureau issued a second environmental water resources NOFO in early 2023,[61] stating its intention to award 20-40 grants of up to $3 million each.[62] The first aquatic ecosystem restoration NOFO was issued in March 2023[63]—the same month that the Bureau rolled out the draft program criteria for public comment—and anticipated allocating $95 million in funding available under the BIL for grants as large as $20 million.[64] Although the NOFOs are fairly detailed in explaining application requirements and other aspects of the grant program, the Bureau provides further assistance to prospective applicants via webinars, guidance documents, and opportunities for online meetings with relevant officials.[65]

The NOFOs devote a couple of pages to explaining the Bureau's review process for grant applications,[66] but say almost nothing about who decides which applications are most deserving. Each states that applications are scored by

48. U.S. Bureau of Reclamation, WaterSMART: Environmental Water Resources Projects, Drought Resiliency Projects, and Water and Energy Efficiency Grants—Draft Eligibility and Evaluation Criteria for Review and Comment (2021), https://www.usbr.gov/watersmart/docs/2021/Draft-Eligibility-and-Evaluation-Criteria-for-Review-and-Comment.pdf [hereinafter EWRP Draft Criteria].
49. U.S. Bureau of Reclamation, WaterSMART: Aquatic Ecosystem Restoration Projects—Draft Eligibility and Evaluation Criteria for Review and Comment (2023), https://www.usbr.gov/watersmart/aquatic/docs/AERP%20Framework%20for%20Public%20Comment_3.20_508.pdf [hereinafter AERP Draft Criteria].
50. EWRP Draft Criteria, *supra* note 48, at A-1 to A-2; AERP Draft Criteria, *supra* note 49, attach. A, at 1-2.
51. EWRP Draft Criteria, *supra* note 48, at A-2 to A-4; AERP Draft Criteria, *supra* note 49, attach. A, at 4-14.
52. EWRP Draft Criteria, *supra* note 48, at A-4; AERP Draft Criteria, *supra* note 49, attach. A, at 2-3.
53. The draft scoring criteria are easily the longest and most detailed portion of each document. EWRP Draft Criteria, *supra* note 48, at A-4 to A-12; AERP Draft Criteria, *supra* note 49, attach. A, at 14-27.
54. EWRP Draft Criteria, *supra* note 48, at unnumbered third page of front matter; AERP Draft Criteria, *supra* note 49, at unnumbered third page of front matter.
55. On the May 2021 EWRP Draft Criteria, the Bureau initially asked for comments by June 4, 2021, and later extended that deadline by two weeks. EWRP Draft Criteria, *supra* note 48, at unnumbered third page of front matter.
56. On the March 2023 Draft Criteria, the Bureau set a deadline of June 1, 2023. AERP Draft Criteria, *supra* note 49, at unnumbered third page of front matter.
57. It does note that water purchases in drought emergencies may be eligible for funding under the Bureau's Drought Response Program. *Id*. attach. A, at 12.
58. U.S. Bureau of Reclamation, WaterSMART: Environmental Water Resources Projects, Drought Resiliency Projects, and Water and Energy Efficiency Grants—Public Comments Received for Fiscal Year 2022 Draft Eligibility and Evaluation Criteria 12-18 (2021), https://www.usbr.gov/watersmart/docs/WaterSMART-Public-Comments-and-Responses-Aug2021.pdf.
59. U.S. Bureau of Reclamation, WaterSMART: Environmental Water Resources Projects for Fiscal Year 2022, Notice of Funding Opportunity R22AS00026 (2021) (on file with author).
60. *Id*. at 3 (noting the Bureau's "plans to allocate a significant amount of available WaterSMART funding under this NOFO, as part of an overall approach to prioritize WaterSMART projects that are expected to result in environmental benefits").
61. U.S. Bureau of Reclamation, WaterSMART: Environmental Water Resources Projects for Fiscal Year 2023, Notice of Funding Opportunity R23AS00089 (2023) (on file with author) [hereinafter Environmental NOFO 2023].
62. *Id*. at 3-4.
63. U.S. Bureau of Reclamation, WaterSMART: Aquatic Ecosystem Restoration Projects for Fiscal Year 2023, Notice of Funding Opportunity R23AS00106 (2023) (on file with author) [hereinafter Aquatic NOFO 2023].
64. *Id*. at 5 (noting that study and design grants were limited to $2 million each, but construction grants could be up to $20 million each).
65. These items—including a two-page fact sheet, a link to a webinar explaining the grant program, and a link saying "Click here to schedule a time to talk with the program coordinators"—all appear on the Bureau's main page for each grant program. U.S. Bureau of Reclamation, *WaterSMART Environmental Water Resources Projects—Schedule Tracker: Environmental Water Resource Projects*, https://www.usbr.gov/watersmart/ewrp/index.html (last updated Oct. 30, 2023) [hereinafter *Schedule Tracker: EWRP*]; U.S. Bureau of Reclamation, *WaterSMART Aquatic Ecosystem Restoration Program—Schedule Tracker: Aquatic Ecosystem Restoration Projects—Round I*, https://www.usbr.gov/watersmart/aquatic/index.html (last updated Oct. 30, 2023) [hereinafter *Schedule Tracker: AERP*]. The Environmental Water Resources page also contains a link to information about successful grant applications, and the Aquatic Ecosystems Restoration page presumably will have the same once the Bureau makes its initial grants under that program.
66. Environmental NOFO 2023, *supra* note 61, at 45-47; Aquatic NOFO 2023, *supra* note 63, at 53-55.

an Application Review Committee (ARC), and that the ARC "is made up of experts in relevant disciplines selected from across Reclamation,"[67] without explaining such things as the size of the ARC, the relevant disciplines, or how the experts are selected.[68] The NOFOs then note that after applications have been scored by the ARC, "Reclamation offices will review the top-ranking applications and will identify any reasons why a proposed project would not be feasible or advisable, including environmental or cultural resources compliance issues, permitting issues, legal issues, or financial position."[69]

The Bureau announced its initial environmental grant awards in July 2022, providing a total of $36.1 million for 27 environmental water resources projects located in 12 states and Puerto Rico.[70] The Bureau's website provides additional information on the selected projects,[71] which range from restoring salmon and steelhead spawning habitat in California,[72] to replacing nearly a mile of open irrigation ditch with PVC pipe in Texas,[73] to removing feral pigs from 1,900 acres of a watershed in Hawaii.[74] About one-half the successful applicants were local water districts or suppliers of some type, although a handful of grants also went to state agencies and nonprofits, and one to a tribal government.[75] California had the most projects selected with four, while Idaho, Oregon, Utah, and Washington had three each.[76]

The Bureau announced its second set of Environmental Water Resources grants in November 2023, awarding $51 million for 30 projects largely focusing on fish passage and habitat restoration; while these projects were located in 11 states, nearly two-thirds of the awards went to Colorado (eight), Idaho (six), and Washington (five).[77] The Bureau's first Aquatic Ecosystem Restoration awards were tentatively scheduled for December 2023.[78]

What about the third environmental grant program, for multi-benefit projects, authorized in §40907 of the BIL? The Bureau has decided to implement §40907 through the Environmental Water Resources Program despite the statutory differences between the two authorities.[79] According to a Bureau official responsible for the grant programs, the rationale for handling multi-benefit project grants through the other programs was twofold: that authorization is very similar to those for the Environmental Water Resources and Aquatic Ecosystem Restoration Programs, and it was more efficient for both applicants and the Bureau to avoid having yet another one.[80] The Bureau intends to identify certain grants made through the other NOFOs as multi-benefit project grants if they meet the statutory criteria.[81]

This decision by the Bureau regarding the basic structure of the environmental grant programs raises a key point: Congress has been fairly specific about some aspects of these programs, but has left many key questions for the Bureau to decide. The next part explores some of these legislative and administrative policy decisions, starting with Congress' choice of the Bureau as the agency to set up and implement them.

II. Key Policy Choices Regarding the Environmental Grant Programs

The Bureau's decisions on environmental grant awards depend heavily on the answers to four basic questions. What kinds of entities are eligible to apply? What kinds of projects or activities are eligible for grants? What are the cost-share requirements for nonfederal money (or in-kind contributions)? And what criteria does the Bureau use to determine which applications are most deserving of funding?

Although fairly specific on some of these points, the authorizing statutes say much less about others, leaving key policy choices to the Bureau. Perhaps Congress' most fundamental choice in establishing these programs, however, was choosing the Bureau to administer them. This section puts this decision in the context of the Bureau's evolving mission and authorities, then examines choices made by Congress and the Bureau regarding the new environmental grant programs.

67. Environmental NOFO 2023, *supra* note 61, at 46; Aquatic NOFO 2023, *supra* note 63, at 54.
68. According to Bureau officials, directors of the Bureau's regional offices and other managers within the agency nominate staff to serve on the ARCs based on those individuals' expertise in relevant areas, and program managers within the Bureau select the ARC members from among those nominees. Video Interview with Avra Morgan and Dean Marrone, Water Resources and Planning Office, U.S. Bureau of Reclamation (May 31, 2023).
69. In the course of this "red-flag review," Bureau offices may also consider other issues, including "past performance by the applicant and any partners in previous working relationships with Reclamation," as well as the applicant's ability to meet the required nonfederal cost share. Environmental NOFO 2023, *supra* note 61, at 46; Aquatic NOFO 2023, *supra* note 63, at 54.
70. Press Release, U.S. Bureau of Reclamation, President Biden's Bipartisan Infrastructure Law to Help Safeguard Water Supplies in 12 States and Puerto Rico (July 5, 2022), https://www.usbr.gov/newsroom/news-release/4261.
71. U.S. Bureau of Reclamation, *Selected Applications 2022*, http://www.usbr.gov/watersmart/ewrp/selected.html (last updated Jan. 27, 2023). The page consists of a series of links to selected projects, each of which leads to a pdf of the grant application for that project.
72. *Id.* (application of Marin Municipal Water District).
73. *Id.* (application of Cameron County Water Improvement District No. 10).
74. *Id.* (two applications of Hawaii Department of Land and Natural Resources).
75. *Id.*
76. Press Release, U.S. Bureau of Reclamation, *supra* note 70.
77. Press Release, U.S. Bureau of Reclamation, Biden-Harris Administration Announces $51 Million From Investing in America Agenda for Water Resources and Ecosystem Health (Nov. 15, 2023), https://www.usbr.gov/newsroom/news-release/4678. The awards were spread across several types of applicants, including watershed groups, local districts, nonprofit conservation groups, and tribal governments, with no category getting the lion's share. *Id.*
78. *Schedule Tracker: AERP*, *supra* note 65.
79. *See supra* notes 26-34 and accompanying text, including the paragraph following note 34.
80. E-mail from Avra O. Morgan, Water Resources and Planning Office Program Analyst, U.S. Bureau of Reclamation, to author (Aug. 23, 2023, 08:36 MDT) (on file with author).
81. E-mail from Avra O. Morgan, Water Resources and Planning Office Program Analyst, U.S. Bureau of Reclamation, to author (Aug. 23, 2023, 12:01 MDT) (on file with author).

A. *The Bureau as Environmental Grantmaking Agency*

Making grants for environmental projects that may include dam removals is a very far cry from the Bureau's original mission: building dams and other infrastructure to supply irrigation water. The 1902 Reclamation Act[82] "authorized and directed" the Secretary of the Interior to "locate and construct . . . irrigation works" to store and develop waters,[83] to withdraw federal lands needed for such works,[84] to buy or condemn other property as needed,[85] and "to perform any and all acts" and make any rules needed to carry out the purposes of the statute.[86] Thus, the Secretary (through the Bureau[87]) was given extensive powers to site and build projects in 16 western states[88] to benefit irrigators. Under the original design, however, these projects were supposed to cost the government very little money, as the irrigators receiving the water were supposed to repay the full amount of construction costs within 10 years.[89]

As the 20th century progressed, Congress expanded the purposes of the Reclamation program, authorizing the Bureau to build dams that would generate hydropower, supply water for cities and industry, help control floods, and provide reservoir-based recreation. Construction boomed, especially in the mid-century decades, and during that time, the Bureau would "become the most important federal agency in the West. From 1930 to 1970 the water and power provided by the [B]ureau transformed the region . . . ."[90] But the hundreds of dams it built to store that water and generate that power have left a variety of ongoing and intractable problems for aquatic and riparian ecosystems across the West[91]; the author Marc Reisner called it "the most fateful transformation that has ever been visited on any landscape, anywhere."[92] By the 1970s, the Bureau and the U.S. Army Corps of Engineers (the Corps)—two agencies Reisner called "Rivals in Crime"[93]—had acquired big reputations for environmental destruction.[94]

Environmental concerns and other factors helped bring an end to the "Big Dam Era" by about 1980,[95] and with few major new water projects to build, the Bureau faced a major change in mission.[96] Since then, the Bureau has regarded its primary job as delivering water and power to the beneficiaries of all those water projects,[97] most of which are well over 50 years old.[98] Today, the Bureau still maintains nearly 500 dams and proudly touts their benefits, including providing irrigation water to 10 million acres of farmland, a source of drinking water for more than 30 million people, hydropower averaging 40 billion kilowatt hours per year, and recreational sites with more than 90 million visitor-days annually.[99]

Congress in the 1990s began giving the Bureau significant new powers and duties. For example, the 1992 Reclamation States Emergency Drought Relief Act[100] gave the Bureau new planning and study authorities regarding drought response,[101] along with power to take certain actions to mitigate drought impacts, ranging from drilling new water supply wells[102] to providing water for fish and wildlife habitat.[103] Another 1992 statute empowered the Bureau to study and support water recycling and reuse

82. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified in scattered sections of 43 U.S.C. from §371 to §498).
83. *Id.* §2.
84. *Id.* §3.
85. *Id.* §7, 32 Stat. 389.
86. *Id.* §10, 32 Stat. 390. Many original provisions of the 1902 Reclamation Act have been repealed over time, but this one remains good law (codified at 43 U.S.C. §373).
87. The U.S. Department of the Interior (DOI) initially formed the Reclamation Service to implement the 1902 Act, then upgraded the agency to the Bureau of Reclamation in 1907. U.S. Bureau of Reclamation, *Reclamation History*, https://www.usbr.gov/history/ (last updated Sept. 11, 2023).
88. The original 16 states (two of which were still territories at that time) were Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. Act of June 17, 1902, ch. 1093, §1, 32 Stat. 388. Texas became the 17th Reclamation state in 1906. Act of June 12, 1906, ch. 3288, 34 Stat. 259.
89. Act of June 17, 1902, ch. 1093, §4, 32 Stat. 388, 389.
90. Donald J. Pisani, *Federal Reclamation in the Twentieth Century: A Centennial Retrospective*, *in* The Bureau of Reclamation: History Essays From the Centennial Symposium Volumes I and II, at 611, 625 (2008), https://www.usbr.gov/history/Symposium_2008/Historical_Essays.pdf.
91. *See* Reed D. Benson, *New Adventures of the Old Bureau: Modern-Day Reclamation Statutes and Congress's Unfinished Environmental Business*, 48 Harv. J. on Legis. 137, 141-43 (2011), and sources cited therein. For a much more comprehensive explanation of the environmental impacts of dams generally, see Michael Collier et al., U.S. Geological Survey, Circular No. 1126, Dams and Rivers: A Primer on the Downstream Effects of Dams (2d ed. 2000).
92. Marc Reisner, Cadillac Desert 166 (rev. ed. 1993).
93. *Id.* at 176.
94. Reisner, after noting that federal water development "was a spectacular achievement, and its worst critics have to acknowledge its positive side," then turned to the costs of it all, stating:

> Thus far, nature has paid the highest price. Glen Canyon is gone. The Colorado Delta is dead. The Missouri bottomlands have disappeared. Nine out of ten acres of wetlands in California have vanished, and with them millions of migratory birds. The great salmon runs in the Columbia, the Sacramento, the San Joaquin, and dozens of tributaries are diminished or extinct.

Id. at 503-04.
95. *See* Pisani, *supra* note 90, at 625 (noting that 1968 saw "the last really big project construction authorization" for the Bureau). Donald Pisani, an eminent western water historian, then provides an informed and interesting take on the reasons why the "Big Dam Era" ended.
96. The Bureau recognized this as far back as the Ronald Reagan Administration. "Reclamation's future role will entail a shift in emphasis—an acknowledgment that past goals have been met even as new challenges are emerging." U.S. Bureau of Reclamation, Reclamation Faces the Future 1 (1988), *quoted in* Charles V. Stern & Anna E. Normand, Congressional Research Service, R46303, Bureau of Reclamation: History, Authorities, and Issues for Congress 6 (2020).
97. On the "About Us" page of its website, the Bureau lists five priorities, the first of which is "Ensure the continued delivery of water and power benefits in conformity with contracts, statutes, and agreements." U.S. Bureau of Reclamation, *About Us—Fact Sheet*, https://www.usbr.gov/main/about/fact.html (last updated Aug. 21, 2023).
98. Most of the Bureau's infrastructure is now 60 to 100 years old. Stern & Normand, *supra* note 44, at 6.
99. U.S. Bureau of Reclamation, *supra* note 97.
100. Pub. L. No. 102-250, 106 Stat. 53 (1992) (codified as amended at 43 U.S.C. §§2201-2247). For more detail on the Bureau's authorities under this statute, see Reed D. Benson, *Federal Water Law and the "Double Whammy": How the Bureau of Reclamation Can Help the West Adapt to Drought and Climate Change*, 39 Ecology L.Q. 1049, 1067-83 (2012).
101. 43 U.S.C. §2221 (water conservation and supply studies), §2222 (drought response plans).
102. *Id.* §2211(a).
103. *Id.* §2212(d).

projects,[104] dozens of which have since been authorized[105]; this "Title XVI" Program[106] has been a favorite of Congress, which appropriated nearly $580 million for this purpose in the dozen years through FY 2020.[107] Congress has continued to give the Bureau new authorities and resources, ranging from building new water supply projects for rural communities, to implementing approved settlement agreements with tribes.[108]

One of the Bureau's most remarkable authorities is the Reclamation Climate Change and Water Program,[109] authorized in the 2009 SECURE Water Act.[110] This authority directs the Bureau to take a series of steps to assess and address the effects of climate change on western waters. The Bureau must "assess specific risks to the water supply" of western river basins, such as reductions in snowpack, changes to the quantity and timing of runoff, and potential increases in water demands caused by higher temperatures.[111] It must also identify potential impacts of such changes in water supply, including effects on water deliveries, hydropower generation, fish and wildlife habitat, water quality, flood control, and "flow and water dependent ecological resiliency."[112]

The Bureau must then develop strategies for mitigating these impacts, such as changing reservoir operations or promoting water conservation.[113] The statute also requires the Bureau to issue reports every five years,[114] the most recent of which dates to 2021.[115] The Bureau has also produced a Climate Change Adaptation Strategy,[116] and the 2023 version lists a series of action items under each of four primary goals: increase water management flexibility, enhance climate adaptation planning, improve infrastructure resilience, and expand information-sharing.[117]

The SECURE Water Act also authorized a program whereby the Bureau could make grants for an "improvement" that conserves water, improves water management, facilitates water markets, or serves other purposes,[118] or for an activity that addresses climate impacts to water supply and "increases ecological resiliency to the impacts of climate change."[119] The Bureau offers an array of these WaterSMART grants, the largest of which are water and energy efficiency grants (WEEG) for as much as $5 million each, focusing on projects that produce "quantifiable and sustained water savings."[120] The Bureau operates other grant programs—most notably for drought resiliency projects[121]—that fall under the general WaterSMART umbrella but may not be considered WaterSMART grants.[122] WaterSMART grants have been well-supported by Congress, receiving more than $400 million in appropriations through FY 2020,[123] plus another $400 million over five years through the BIL.[124]

Congress in 2009 also directed the U.S. Department of the Interior (DOI) to establish a Cooperative Watershed Management Program[125] to support "watershed groups" within western river basins. The statute requires that a "watershed group" represent a range of stakeholders within the basin, be a "grassroots, nonregulatory entity that addresses water availability and quality issues" and makes decisions by consensus, and be "capable of supporting the sustainable use of water resources in the relevant watershed and improving the functioning condition of rivers and streams."[126] Congress directed the agency to set up a program of grants to fund the formation of such groups and the implementation of "watershed management projects"[127] that would conserve water, benefit water quality, "improve ecological resiliency of a river or stream,"

104. Pub. L. No. 102-575, §§1601-1605, 106 Stat. 4600, 4664 (1992). The basic authorities as amended are now codified at 43 U.S.C. §§390h to 390h-3.
105. *See* 43 U.S.C. §§390h-4 to 390h-39 (listing more than 50 authorized projects).
106. This program got its name because it was originally authorized in Title XVI of the sprawling Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600, 4664.
107. *See* Stern & Normand, *supra* note 96, at 17 (noting that Title XVI received more money from Congress than any of the Bureau's other WaterSMART programs in the span from FY 2009-FY 2020). Congress added another $1 billion for recycling and reuse projects in the BIL, including $450 million for "large-scale" projects. Stern & Normand, *supra* note 44, at 11.
108. *See* Stern & Normand, *supra* note 44, at 14-16 (discussing authorities and funding for these two programs).
109. 42 U.S.C. §10363.
110. Pub. L. No. 111-11, 123 Stat. 991 (2009). While dealing primarily with federal lands, this enactment also included several Bureau of Reclamation authorizations in its Title IX, 123 Stat. 1295-1414.
111. 42 U.S.C. §10363(b)(2).
112. *Id.* §10363(b)(3).
113. *Id.* §10363(b)(4).
114. *Id.* §10363(c).
115. U.S. Bureau of Reclamation, Water Reliability in the West—2021 SECURE Water Act Report (2021), https://www.usbr.gov/climate/secure/docs/2021secure/2021SECUREReport.pdf. This document and the 2011 and 2016 reports are available at the Bureau's main climate page, *Climate Change*, https://www.usbr.gov/climate/ (last updated Apr. 20, 2023).
116. U.S. Bureau of Reclamation, Climate Change Adaptation Strategy (2023), https://www.usbr.gov/climate/docs/2023ccas/CCAS2023Webversion.pdf.
117. *Id.* at 7-9. The ensuing 20 pages provide more information on these items and identify several examples.
118. Pub. L. No. 111-11, §9504(a)(1)(A)-(G), 123 Stat. 991, 1334 (2009) (listing several purposes, including preventing the need to list species under the Endangered Species Act or accelerating the recovery of already-listed species).
119. *Id.* §9504(a)(1)(H).
120. U.S. Bureau of Reclamation, WaterSMART Grants (2022), https://www.usbr.gov/watersmart/docs/WaterSMART_FactSheet_2022.pdf. Other categories of WaterSMART grants are smaller: small-scale water efficiency project grants that cannot exceed $100,000 per award, and water marketing strategy grants limited to $400,000 per award. *Id.*
121. The size of these grants depends on the scale and timeline of the drought resiliency project, with a maximum award of $5 million. *See* U.S. Bureau of Reclamation, *WaterSMART Drought Response Program—Frequently Asked Questions*, https://www.usbr.gov/drought/faq.html (last updated Oct. 27, 2022).
122. *See* Charles V. Stern & Anna E. Normand, Congressional Research Service, IF12414, Bureau of Reclamation WaterSMART Program (2023) (describing WaterSMART grants and other WaterSMART Program elements, including the Drought Response Program, the Title XVI Program, the Basin Studies Program, and the Cooperative Watershed Management Program).
123. *See* Stern & Normand, *supra* note 96, at 17.
124. Pub. L. No. 117-58, §40901(7), 135 Stat. 429, 1117 (2021). Of this total, however, $100 million must go to "projects that would improve the condition of a natural feature or a nature-based feature," *id.*, directing this sum to environmental water resources project grants.
125. Pub. L. No. 111-11, §6002, 123 Stat. 991, 1166-69 (2009). This same enactment included the SECURE Water Act and other Bureau of Reclamation authorizations in Title IX, but the Cooperative Watershed Management Program appears in Title VI.
126. *Id.* §6001(5), 123 Stat. 1165-66.
127. *Id.* §6002(a), 123 Stat. 1166.

or reduce water conflicts.[128] The Bureau began making Cooperative Watershed Management Program grants in 2012,[129] making this the agency's first environmentally oriented grant program[130]; under this program, smallish Phase I grants are available with no cost-share requirement, but Phase II grants are handled through the Environmental Water Resources Program described below.[131]

Given these established grant programs, and its evolving mission as a planning and problem-solving agency for western water issues, the Bureau might seem the natural choice to implement the new environmental grant programs. On the other hand, one could question the fit, given the Bureau's history of dam construction and continuing emphasis on delivering water and power as its primary mission. And at least until recently, nearly all the Bureau's own environmental restoration work was driven by the need for its project operations to comply with the Endangered Species Act (ESA).[132] Congress has maintained a narrow focus for the Bureau's own ecosystem restoration work, never giving the agency the kind of general environmental authorities that it has provided the Corps.[133] Congress has shown that it trusts the Bureau as a grantmaker, however, providing the agency with both the mandate and the millions to assist organizations tackling environmental problems facing waters in the West.[134]

B. *Eligibility: Applicant Categories and Project Types*

Each program has a set of eligible applicant categories listed by type of entity, and it is here that Congress has provided its most detailed directions for the new programs. As originally authorized, WaterSMART grants were open only to a state, a tribe, or a district or other entity responsible for delivering water or power.[135] The FY21 Omnibus opened the door for nonprofit conservation groups to apply (including those for environmental water resources projects), but generally required them to be "acting in partnership" with a state, tribe, or water supply organization.[136] It defined "eligible entity" categories very similarly for the new Aquatic Ecosystem Restoration Program.[137] The eligibility list was similar in the multi-benefit project authorizing statute, but here Congress made nonprofit conservation groups eligible to apply without requiring any partnership with a state, tribe, or water supplier.[138] The NOFOs mostly track the statutes closely in defining eligible entities,[139] but by lumping the Multi-Benefit Project and Environmental Water Resources Programs together, the Bureau has effectively maintained the partnership requirement[140] for all applications from nonprofit groups.

The statutes are less specific on the types of projects and activities eligible to receive funding under these new programs. Although WaterSMART grants were already authorized for certain limited environmental aims (mostly relating to species listed or proposed for listing under the ESA),[141] Congress greatly expanded their purposes in

128. *Id.* §6001(6), 123 Stat. 1166.

129. U.S. Bureau of Reclamation, Cooperative Watershed Management Program (2022), https://www.usbr.gov/watersmart/cwmp/docs/CWMP_FactSheet_2022.pdf.

130. Although the Cooperative Watershed Management Program can make grants for certain environmental purposes, this Article does not feature it because it differs in key respects from the more recently authorized environmental grant programs. In authorizing grants for watershed management projects, the statute does not prioritize projects with environmental benefits, and seems to indicate that water conservation benefits are most important. *See* 16 U.S.C. §1015(7) (defining "watershed management project" as one with certain types of benefits, and listing water conservation first); *id.* §1015a(f) (requiring the Secretary of the Interior to report to Congress on the benefits of the programs, and listing "addressing water conflicts" and "conserving water" first). In addition, the larger second- and third-stage grants (up to $1 million and $5 million per year, respectively, 16 U.S.C. §1015a(c)(2)) require a 50% nonfederal cost share, 16 U.S.C. §1015a(c)(3). Thus, Congress capped the federal share of cooperative watershed management project costs at the standard 50%, unlike the 65% to 75% share it allowed under the newer programs. *See infra* notes 191-96 and accompanying text. Congress did make small changes to the Cooperative Watershed Management Program authorizing statute in the FY21 Omnibus, Pub. L. No. 116-260, §1107, 134 Stat. 1182, 3243 (2020), and it provided $100 million in five-year funding for it in the BIL, Pub. L. No. 117-58, §40901(9), 135 Stat. 429, 1118 (2021).

131. *See* Stern & Normand, *supra* note 122, at 2.

132. In a 2011 report summarizing its 16 ongoing river restoration projects, the Bureau concluded, "Every one of the 16 programs address endangered species issues, and cite the Endangered Species Act (ESA) as one of the program authorities." U.S. Bureau of Reclamation, Bureau of Reclamation River Restoration Programs: A Summary of 16 Programs and Shared Institutional Challenges 72 (2011) (on file with author); 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.

133. *See* Benson, *supra* note 91, at 167-84 (comparing Bureau and Corps environmental authorities and arguing that Congress should expand the Bureau's, especially as to addressing problems relating directly to Bureau projects).

134. Congress entrusted the Bureau with billions more dollars in the Inflation Reduction Act (IRA), Pub. L. No. 117-169, 136 Stat. 1818 (Aug. 16, 2022). The agency's largest appropriation, $4 billion, was for "grants, contracts, or financial assistance agreements . . . to or with public entities or Indian Tribes . . . to mitigate the impacts of drought" in 17 western states. *Id.* §50233, 136 Stat. 1818, 2053. The Bureau may use this money to compensate water users who temporarily reduce their use, to fund projects that reduce water use or demand, or to pay for "ecosystem and habitat restoration projects to address issues directly caused by drought in a river basin or inland water body." *Id.* §50233(b), 136 Stat. 1818, 2053-54. While this appropriation provides the Bureau with additional money that could be used for environmental purposes, early implementation focused on paying for temporary reductions in water use in the Colorado River Basin. *See* Charles V. Stern & Anna E. Normand, Congressional Research Service, IF12437, Bureau of Reclamation Funding in the Inflation Reduction Act (P.L. 117-169) (2023).

135. The latter category was limited to an "irrigation district, water district, or other organization with water or power delivery authority." Pub. L. No. 111-11, §9502(7), 123 Stat. 991, 1330 (2009).

136. Pub. L. No. 116-260, §1106(a)(2), 134 Stat. 1182, 3240 (2020). Nonprofit groups do not need such a partnership if their application is for one specific type of project, but must still show that they have notified affected states, tribes, and water supply organizations about the project, and that no such entity has objected to it. *Id.*

137. *Id.* §1109(a), 134 Stat. 3244. On this point, the main difference between these two programs is that the aquatic ecosystem restoration statute adds "any other entity that owns a facility that is eligible for upgrade, modification, or removal under this section" as an eligible category. *Id.*

138. Pub. L. No. 117-58, §40907(a), 135 Stat. 429, 1125 (2021) (also adding "a regional authority" to the list).

139. Environmental NOFO 2023, *supra* note 61, at 5-6; Aquatic NOFO 2023, *supra* note 63, at 9-10.

140. Neither the statutes nor the NOFOs define the term "partnership." The NOFOs indicate that the partner need only "participate in the project in some way, for example, by providing input, feedback, or other support for the project," and need not contribute any funding. Environmental NOFO 2023, *supra* note 61, at 5; Aquatic NOFO 2023, *supra* note 63, at 9.

141. WaterSMART grants could be made for projects that would help keep candidate species from being added to the list of threatened or endangered species, 43 U.S.C. §10364(a)(1)(G); to help recover listed species affected

2020, making grants available for projects and activities "to improve the condition of a natural feature"[142]; the latter term was defined rather cryptically as "a feature that is created through the action of physical, geological, biological, and chemical processes over time."[143]

Congress was similarly general in authorizing agreements to fund "construction of an aquatic ecosystem and protection project," so long as the Bureau finds the project "likely to improve the health of fisheries, wildlife or aquatic habitat,"[144] but did specify that dam removal or modification projects could qualify.[145] The multi-benefit project statute was generally similar in providing funding for "habitat restoration projects that improve watershed health," but required that they be "in a river basin that is adversely affected by a Bureau of Reclamation water project"[146]; it also allowed a project to qualify based on "enhancement of river-based recreation" as well as the usual environmental and fisheries benefits.[147]

Because the authorizing statutes are so general on this point, the Bureau has had to make important decisions in defining which project types are eligible for each program, and has provided fairly specific guidance in the NOFOs about eligible project types. For environmental water resources projects, eligible projects are described generally as "on-the-ground implementation projects for the primary purpose of benefitting ecological values or improving watershed health that have a nexus to water resources management."[148]

The NOFO lists several types of environmental, habitat, or recreational benefits that could make a project eligible,[149] and lays out three general categories, each of which specifically must benefit ecological values or watershed health: "water conservation and efficiency projects that result in quantified and sustained water savings,"[150] "water management or infrastructure improvements,"[151] and "restoration projects . . . that have a nexus to water resources or water resources management."[152] Aquatic ecosystem restoration projects generally must benefit fisheries, wildlife, or aquatic habitat, which may include fish passage improvements.[153]

The NOFO lists four types of activities (most of which are more like benefits) eligible under this program: "removal or modification of barriers to fish passage," "restoration of connectivity," "restoration of aquatic habitat," and "improvement of water availability, quality, and temperature."[154] Under each of these four headings are four to eight bullet points, each listing a more specific type of project or benefit.[155] Dam removal or modification projects are listed as a separate category with more specific requirements,[156] consistent with the authorizing statute.

The Bureau has been similarly specific in identifying project types that are *not* eligible for funding, listing at least 15 such categories in each NOFO.[157] Most categories are common to both programs, ranging from "operations, maintenance, and replacement,"[158] to "land purchase and easements,"[159] to "removal and prevention of invasive mussel species."[160] For some categories, the NOFOs explain that funding or assistance is available under another program.[161] Other project types are simply declared ineligible without explanation despite their potential benefits, including "prescribed burns,"[162] "mine remediation projects,"[163] and "water purchases."[164]

C. *Priorities and Evaluation Criteria for Grant Applications*

The environmental grant program authorizing statutes all direct the Bureau to prioritize funding for projects that meet certain general criteria, most of which relate to project benefits. When Congress amended the WaterSMART

by a Bureau project, *id*. §10364(a)(1)(H); or "to address any climate-related impact to the water supply of the United States that increases ecological resiliency to the impacts of climate change," *id*. §10364(a)(1)(J)(i).

142. Pub. L. No. 116-260, §1106(b)(1)(I), 134 Stat. 1182, 3241 (2020).
143. *Id*. §1109(a)(5), 134 Stat. 3240 (also defining the term "nature-based feature"). For some context on the relevant terms, see Charles V. Stern, Congressional Research Service, TE10061, Statement Before the Senate Committee on Energy and Natural Resources, Subcommittee on Water and Power 1-2 (2021).
144. Pub. L. No. 116-260, §1109(b)(1), 134 Stat. 1182, 3244 (2020) (giving two examples of ways that a project could improve fisheries, wildlife, or aquatic habitat: restoring habitat and improving fish passage).
145. *Id*. §1109(b)(2), 134 Stat. 3244-45 (imposing special preconditions for agreements to fund such projects).
146. Pub. L. No. 117-58, §40907(b), 135 Stat. 429, 1125 (2021).
147. *Id*. §40907(b)(1)-(7) (listing five categories of environmental benefits, plus benefits to "commercial, recreational, subsistence, or Tribal ceremonial fishing," and benefits to river recreation).
148. Environmental NOFO 2023, *supra* note 61, at 9.
149. *Id*.
150. *Id*. at 10. Examples include lining or piping a water supply canal, or "municipal and industrial water use efficiency improvements." *Id*.
151. *Id*. Examples include improving fish passage or installing fish screens, water management changes or infrastructure improvements to benefit water availability or quality, and projects to address salinity or temperature problems. *Id*. at 10-11.
152. *Id*. at 11. The NOFO then lists 11 types of projects, or project benefits, ranging from "stream restoration to improve groundwater recharge and riparian habitat," to removing invasive species of plants or animals, to restoring watersheds after a wildland fire. *Id*. at 11-12.
153. Aquatic NOFO 2023, *supra* note 63, at 15.
154. *Id*. at 16-17.
155. *Id*.
156. *Id*. at 18.
157. Environmental NOFO 2023, *supra* note 61, at 13-16 (15 categories); Aquatic NOFO 2023, *supra* note 63, at 18-22 (18 categories).
158. Environmental NOFO 2023, *supra* note 61, at 13; Aquatic NOFO 2023, *supra* note 63, at 19-20.
159. Environmental NOFO 2023, *supra* note 61, at 14; Aquatic NOFO 2023, *supra* note 63, at 20.
160. Environmental NOFO 2023, *supra* note 61, at 15; Aquatic NOFO 2023, *supra* note 63, at 21.
161. Examples include "water reclamation, reuse, and desalination" (under the Bureau's Title XVI Program), and "injection wells and recharge projects primarily for agricultural and municipal benefits" (under the Bureau's Drought Response Program). Environmental NOFO 2023, *supra* note 61, at 14; Aquatic NOFO 2023, *supra* note 63, at 20.
162. Environmental NOFO 2023, *supra* note 61, at 15; Aquatic NOFO 2023, *supra* note 63, at 21.
163. Environmental NOFO 2023, *supra* note 61, at 15; Aquatic NOFO 2023, *supra* note 63, at 22.
164. Environmental NOFO 2023, *supra* note 61, at 14; Aquatic NOFO 2023, *supra* note 63, at 20. Both note that the Bureau's Drought Response Program may assist those seeking to purchase water supplies in a drought emergency, but neither addresses why purchases of water rights for environmental purposes are categorically ineligible for grants.

Table 1. Grant Application Scoring Frameworks

Evaluation Criteria: Category	Environmental Water Resources Scoring Value	Aquatic Ecosystem Restoration Scoring Value
Project benefits	25	30
Collaborative/restoration planning, stakeholder support*	35	30
Readiness to proceed, project implementation**	20	15
Performance measures	5	10
Agency and presidential priorities***	15	15
TOTAL	100	100

* The environmental NOFO makes this two categories: "Collaborative Planning" for 20 points and "Stakeholder Support for Proposed Project" for 15 points. The aquatic NOFO combines two very similar categories into one: "Prior Restoration Planning and Stakeholder Involvement and Support," worth 30 points. U.S. Bureau of Reclamation, WaterSMART: Environmental Water Resources Projects for Fiscal Year 2023, Notice of Funding Opportunity R23AS00089, at 35 (2023) (on file with author) [hereinafter Environmental NOFO 2023]; U.S. Bureau of Reclamation, WaterSMART: Aquatic Ecosystem Restoration Projects for Fiscal Year 2023, Notice of Funding Opportunity R23AS00106, at 39 (2023) (on file with author) [Aquatic NOFO 2023].

** Both NOFOs have a "readiness to proceed" category, but the Aquatic Ecosystem Restoration Program also adds the term "project implementation" here. Aquatic NOFO 2023, at 39.

*** Curiously, the environmental NOFO labels this category "Presidential and DOI priorities," while the aquatic ecosystem restoration NOFO summary table calls it "Department of the Interior and Bureau of Reclamation priorities." Environmental NOFO 2023, at 35; Aquatic NOFO 2023, at 39. The White House returns in the aquatic ecosystem restoration NOFO's narrative explanation of the categories, however. *Id.* at 51.

grant statute, it charged the Bureau, in making grants for "projects intended to have a quantifiable water savings . . . [, to] give priority to projects that enhance drought resilience by benefitting the water supply and ecosystem."[165] This emphasis on ecosystem benefits applies to the Bureau's WEEG grants for water conservation projects as well as the new Environmental Water Resources Program.[166]

The aquatic ecosystem restoration statute lays out four criteria—diverse stakeholder support, regional benefits that extend beyond fisheries, aging infrastructure solutions, and restoration of endangered salmon species—and seems to say that a project must check all four boxes to get priority for funding.[167] The Multi-Benefit Project Program authorization lays out seven categories of benefits, then directs the Bureau to give priority to a habitat restoration project that would provide benefits in at least two categories.[168]

The Bureau's evaluation criteria for grant applications are much more complex, however, and here the NOFOs provide some of their most detailed guidance.[169] Each begins by summarizing the scoring categories and the number of points each is worth, and the two are remarkably similar. The categories are not exactly the same between the two NOFOs, and the Aquatic Ecosystem Restoration Program is complicated by providing two types of grants that depend on the stage of project development: smaller ones for "study and design" of potential projects, and larger ones for construction.[170] Table 1 compares the scoring frameworks for environmental water resources projects and aquatic ecosystem restoration projects at the "construction" stage.[171]

Most of these categories are described similarly in the two NOFOs, with the most important differences found in the explanation of "project benefits." The environmental water resources NOFO states, "This criterion evaluates the extent to which the project will benefit ecological values and watershed health that have a nexus to water resources or water resources management."[172] It then identifies various ways that a project could show such benefits, such as improving aquatic or riparian ecosystems, aiding particu-

165. Pub. L. No. 116-260, §1106(b)(4), 134 Stat. 1182, 3242 (2020).

166. The statute directs the Bureau to apply this priority "[i]n providing grants to, and entering into agreements for, projects . . . under this subsection," *id.*, and the subsection covers both the established and new WaterSMART grant programs.

167. The relevant subsection is titled "priority for projects providing regional benefits and assistance for aging assets," and uses the conjunction "and" (not "or") between the third and fourth factors in the statutory list. *Id.* §1109(g), 134 Stat. 3246.

168. Pub. L. No. 117-58, §40907(b)-(c), 135 Stat. 429, 1125 (2021).

169. The section explaining the Bureau's evaluation framework exceeds 10 pages in the Environmental NOFO and 14 pages in the Aquatic NOFO. Environmental NOFO 2023, supra note 61, at 35-45; Aquatic NOFO 2023, *supra* note 63, at 39-53. The NOFOs devote roughly the same amount of space—about 12 and 10 pages, respectively—to guidance on the form and content of grant applications. Environmental NOFO 2023, *supra* note 61, at 17-29; Aquatic NOFO 2023, *supra* note 63, at 23-33.

170. The NOFO provides fairly detailed guidance on appropriate elements to be included in grant applications for each of these stages. Aquatic NOFO 2023, *supra* note 63, at 12-18.

171. For aquatic ecosystem restoration projects at the "study and design" stage, the scoring criteria differ slightly from those for construction projects. There are no points for "performance measures," so "prior restoration planning and stakeholder involvement and support" count for 40 points instead of 30. *Id.* at 39.

172. Environmental NOFO 2023, *supra* note 61, at 35.

lar species (especially ESA-listed ones) or their habitats, or providing long-term water quality gains.[173] Specific guidance ensues for various kinds of projects, including water conservation projects, water infrastructure improvements, and wildfire prevention or recovery activities,[174] followed by questions about whether the project will have multiple benefits for water uses or environmental values.[175]

The aquatic ecosystem restoration NOFO is generally simpler on this point.[176] After asking a series of questions tied to the authorizing language about project types,[177] the NOFO directs applicants to identify and quantify the project's expected benefits for species and their habitats, watershed health (e.g., water quality and ecological function), and water supply.[178]

In the Bureau's system for evaluating any environmental grant application, nothing about a project is more important than collaborative planning and stakeholder support.[179] Whether these factors are considered a single category or two, they are closely related, essentially asking if a project has been developed, vetted, and accepted (at least) by a range of stakeholders. Both NOFOs specifically ask if the project would advance some aspect of a plan or strategy developed through a collaborative process,[180] involving a group of stakeholders representing diverse interests.[181] They then ask if the project itself is supported by a broad range of stakeholders[182]; the environmental water resources NOFO, which lists "stakeholder support for the proposed project" as a category separate from collaborative planning, states that projects with demonstrated support from a diverse array of stakeholders will earn top scores in this area.[183]

Under both scoring systems, the Bureau allocates a modest 15 points to presidential and DOI priorities.[184] The first listed priority is climate change, and the NOFOs ask whether the project will both build climate resiliency and help reduce greenhouse gas emissions.[185] The second is whether the project will benefit a disadvantaged or underserved community,[186] such as by improving water quality, supporting economic growth, or expanding access to water supplies or natural areas.[187] The third is "tribal benefits," assessing whether a project would directly serve or benefit a tribe, support the Bureau's tribal trust responsibilities, or advance some Bureau activity with a tribe.[188]

Two other categories are described similarly in both NOFOs and combine for 25 points in each. "Readiness to proceed" assesses whether the proposed project has a detailed implementation plan with a schedule, workplan, and budget; it also considers the status of required permits, agency approvals, or agreements regarding access to land or water.[189] "Performance measures," with the lowest point allocation in both NOFOs, assesses whether the application includes "a plan to monitor the effectiveness of the project," especially regarding conservation outcomes, but does not extend to long-term monitoring.[190]

D. Cost-Share Requirements, Maximum Grant Amounts, and Miscellaneous Provisions

For each program, Congress has specified the maximum percentage of a project's total cost that can be paid for with federal dollars. Most WaterSMART grants are capped at one-half the total cost of water conservation projects,[191] but Congress in 2020 incentivized environmental water resources projects by allowing grants for those projects to pay up to 75% of the cost of an "infrastructure improvement or activity" under specified conditions.[192] The aquatic ecosystem restoration authorizing statute requires the project sponsor to agree to pay at least 35% of construction costs, effectively capping the federal share at 65%.[193] While Congress authorized the Multi-Benefit Project Program

173. *Id*. at 36-37. It also asks (but does not explain) the question, "Will the project improve watershed health in a river basin that is adversely impacted by a Reclamation water project?" *Id*. As noted above, the multi-benefit project authorizing statute directs grants to projects that would benefit basins harmed by Reclamation projects. *See supra* notes 26-34 and accompanying text, including the paragraph following note 34.
174. For water conservation projects, applicants must not only quantify expected water savings, but also explain how the conserved water "will be used to increase water sustainability for ecological values." Environmental NOFO 2023, *supra* note 61, at 37-39.
175. *Id*. at 39.
176. The complexity in this NOFO largely stems from the two types of aquatic ecosystem restoration grants, as different requirements and scoring criteria apply for "study and design" versus "construction" applications.
177. These questions ask whether the project will affect water management in two or more basins, offer regional benefits, help resolve aging infrastructure problems, and benefit ESA-listed species and/or their habitat. Aquatic NOFO 2023, *supra* note 63, at 40.
178. *Id*. at 42-44 (for construction project applicants).
179. Environmental NOFO 2023, *supra* note 61, at 35 (35 combined points for these two categories, 25 points for project benefits, fewer points for all others); Aquatic NOFO 2023, *supra* note 63, at 39 (30 points for this category, 30 points for project benefits, fewer points for all others; collaborative planning and stakeholder support count for 40 points at the "study and design" stage).
180. Environmental NOFO 2023, *supra* note 61, at 39-40; Aquatic NOFO 2023, *supra* note 63, at 47.
181. Environmental NOFO 2023, *supra* note 61, at 40; Aquatic NOFO 2023, *supra* note 63, at 47-48.
182. Environmental NOFO 2023, *supra* note 61, at 40-41; Aquatic NOFO 2023, *supra* note 63, at 48.
183. Environmental NOFO 2023, *supra* note 61, at 40.
184. *Id*. at 43; Aquatic NOFO 2023, *supra* note 63, at 51.
185. Environmental NOFO 2023, *supra* note 61, at 43; Aquatic NOFO 2023, *supra* note 63, at 51.
186. The environmental water resources projects NOFO asks grant applicants to assess whether a community is disadvantaged or underserved based on a list of 13 factors. Environmental NOFO 2023, *supra* note 61, at 44. The aquatic ecosystem restoration NOFO, by contrast, directs applicants to use an online Climate and Economic Justice Screening Tool to determine the status of the community. Aquatic NOFO 2023, *supra* note 63, at 51-52.
187. Environmental NOFO 2023, *supra* note 61, at 44; Aquatic NOFO 2023, *supra* note 63, at 52.
188. Environmental NOFO 2023, *supra* note 61, at 45; Aquatic NOFO 2023, *supra* note 63, at 52.
189. Environmental NOFO 2023, *supra* note 61, at 41; Aquatic NOFO 2023, *supra* note 63, at 49-50.
190. Environmental NOFO 2023, *supra* note 61, at 42; Aquatic NOFO 2023, *supra* note 63, at 52.
191. 43 U.S.C. §10364(a)(3)(E)(i)(I).
192. Pub. L. No. 116-260, §1106(b)(3), 134 Stat. 1182, 3242 (2020). Specifically, the project must have been "developed as part of a collaborative process" involving two or more interests, and the majority of project benefits must be "for the purpose of advancing 1 or more components of an established strategy or plan to increase the reliability of water supply for consumptive and nonconsumptive ecological values." *Id*.
193. *Id*. §1109(c), 134 Stat. 3245 (also requiring the project sponsor to agree to pay 100% of operations and maintenance costs).

for the purpose of funding "habitat restoration projects that improve watershed health,"[194] it capped the federal share at 50% of the cost of most such projects, but allowed up to 75% if at least three-quarters of total costs could be attributed to certain environmental benefits.[195] The Bureau's NOFOs simply fill in details regarding cost-share requirements, such as explaining what may and may not be counted toward the nonfederal portion.[196]

The only statutory maximum for a grant under any of the Bureau's environmental programs is the $5 million cap that applies generally to WaterSMART grants,[197] including the new Environmental Water Resources category. The Bureau, however, has established caps for each type of environmental grant. Environmental water resources grants are capped at $3 million per award,[198] unlike WEEG grants, which can be up to the $5 million cap.[199] The Bureau has set different limits for aquatic ecosystem restoration grants depending on the stage of the project: "study and design project" grants are capped at $2 million each, while awards for construction projects can go up to $30 million each.[200]

Each of the authorizing statutes has certain provisions imposing limits or requirements regarding grant awards. The WaterSMART grant program has few statutory restrictions, but water conservation grantees for agricultural projects must not use any water saved to increase irrigated acreage or consumptive use.[201] The multi-benefit project statute prohibits funding any "habitat restoration project the purpose of which is to meet existing environmental mitigation or compliance obligations under federal or state law"[202]; the Bureau has broadened this restriction, making any mandatory compliance project ineligible for any of its environmental grants.[203]

Both the multi-benefit project and aquatic ecosystem restoration statutes require that any funded project comply with all applicable federal and state laws.[204] The latter statute imposes many more restrictions and requirements regarding ecosystem restoration projects, including several that impose duties on the Bureau; for example, the agency itself must comply with all applicable environmental laws[205] and state water laws,[206] determine that the project "will not result in an unmitigated adverse impact" on either existing water delivery obligations or on the environment,[207] and find that the project is consistent with the Bureau's other legal duties.[208]

In assessing the policy choices reflected in the environmental grant programs, it is important to remember that all these programs are very new. Congress authorized them within the past three years and provided major funding in late 2021. While the Bureau has set up two programs and made its initial round of grants for environmental water resources projects, its implementation is still necessarily a work in progress. Changes seem likely as both the agency and stakeholders gain experience with the programs and evaluate the early results. With minimal history of grantmaking for environmental purposes, multiple new programs to establish at once, and hundreds of millions to spend on them in a few short years, the Bureau will unavoidably make some initial missteps. Its capacity and willingness to make adjustments will go a long way in determining whether these programs bring lasting benefits for aquatic and riparian ecosystems—and for the agency itself.

III. What Grant Programs May Mean for Ecosystems, the Bureau, and Federal Water Policy

Because the Bureau is still in its early days as an environmental grantmaker, there are many unknowns about the actual impacts and significance of these programs. But much of what makes these programs interesting is that so much about them is new: the environmental focus, the magnitude of funding, and the initial grant criteria. The Bureau has a big new job to do in helping deliver environmental benefits to western waters, and this section asks what these grant programs could mean for the environment, for the Bureau, and for federal water policy.

A. Grant Programs and Environmental Benefits

The new grant programs provide two important things that the Bureau had lacked. First, the Bureau now has an authorized tool to address environmental problems generally—not just to comply with the ESA or carry out environmental activities in specified basins.[209] Second, by providing $450 million (over five years) in funding for grant programs that have a statutory focus on environmental benefits, Congress has given the Bureau unprec-

194. Pub. L. No. 117-58, §40907(b), 135 Stat. 429, 1125 (2021).
195. *Id.* §40907(c), 135 Stat. 1125-26. Federal money can pay up to 75% if the project benefits ecological or recreational values (which most habitat restoration projects presumably would), and "the non-consumptive water conservation benefit or habitat restoration benefit accounts for at least 75 percent of the cost." *Id.*
196. Environmental NOFO 2023, *supra* note 61, at 7-8; Aquatic NOFO 2023, *supra* note 63, at 10. For example, an applicant may count certain in-kind contributions toward the cost-share requirement, but may not rely on other sources of federal funding. *Id.*
197. 42 U.S.C. §10364(a)(3)(E)(iii).
198. Environmental NOFO 2023, *supra* note 61, at 3.
199. U.S. Bureau of Reclamation, WaterSMART: Water and Energy Efficiency Grants for Fiscal Year 2023, Notice of Funding Opportunity R23AS00008, at 5 (2022) (on file with author) [hereinafter WEEG NOFO 2023].
200. Aquatic NOFO 2023, *supra* note 63, at 5.
201. 42 U.S.C. §10364 (applying this restriction to agricultural projects, including those for tribes). This restriction is not specific to environmental water resources project grants, and is most relevant to WEEG grants, which are geared largely toward water conservation.
202. Pub. L. No. 117-58, §40907(c), 135 Stat. 429, 1125 (2021).
203. Environmental NOFO 2023, *supra* note 61, at 16; Aquatic NOFO 2023, *supra* note 63, at 22.
204. Pub. L. No. 117-58, §40907(c), 135 Stat. 429 (2021); Pub. L. No. 116-260, §1109(c)(2)(C)(v), 134 Stat. 3245 (2020).
205. Pub. L. No. 116-260, §1109(c)(2)(D), 134 Stat. 3245 (2020).
206. *Id.* §1109(f), 134 Stat. 3246.
207. *Id.* §1109(c)(2)(C)(i)-(ii), 134 Stat. 3245.
208. *Id.* §1109(c)(2)(C)(iii), 134 Stat. 3245 (noting duties regarding tribes, international treaties, and interstate compacts).
209. *See supra* Section II.A.

edented resources to address environmental problems in a meaningful way. These actions may have been overdue, but they show that Congress—at least the 117th Congress that enacted the BIL—was serious about making progress on stubborn environmental problems facing western waters.

While $450 million represents a lot of money in the context of the Bureau's pre-BIL grant programs,[210] it is at best a down payment on large-scale environmental restoration westwide. That amount is roughly the cost of *one* river restoration project—albeit an epic one that will remove four dams on the Klamath River[211]—and there are countless other western rivers in serious need of restoration.[212] But if that sum seems too little for the size of the problem, it could prove too much for the Bureau to be able to spend effectively in the time available. It would be one thing if the BIL appropriated that money to super-size established environmental grant programs; instead, it provided $450 million for two programs that had been authorized less than one year prior, and a third one authorized in the BIL itself,[213] effectively asking the Bureau to fly a plane that it was still building. And since the BIL gave it other big new jobs and big new money—$8.3 billion in total[214]—the Bureau will be hard-pressed to spend all the environmental grant money effectively by the end of FY 2026.[215]

Capacity challenges are not limited to the Bureau. Many potential applicants, especially smaller organizations and those that have no experience in pursuing Bureau grants, may lack the resources and expertise to develop a competitive application. The requirements are detailed and somewhat complex, and while the Bureau offers considerable guidance and assistance to would-be applicants,[216] submitting a complete package of up to 125 pages[217] will be a heavy lift for many smaller entities.[218] Securing nonfederal funding for 25% to 35% of project costs, as mandated by statute, poses an additional challenge; notably, Congress did not impose cost-share requirements for certain environmental funding in the BIL, including nonfederal dam removals by the Corps.[219] The heavier the application and cost-share requirements, the more they effectively favor applicants with resources and expertise; it is not surprising that 20 of the 27 initial environmental water resources grants went to water districts, state agencies, and a pair of national conservation groups.[220]

Maximizing environmental benefits from the available dollars may require the Bureau to reconsider some of its policy choices, especially as to project types and scoring criteria. Excluding any purchase of water from grant funding, no matter how beneficial or broadly supported, seems especially hard to justify. Purchasing water to increase stream flows or support wetlands may help restore aquatic habitats, reestablish connectivity, and improve water availability, quality, and temperature,[221] all of which are criteria for aquatic ecosystem restoration projects.[222]

As for the scoring criteria, project benefits carry relatively little weight—only 25 and 30 points out of 100 for environmental water resources and aquatic ecosystem restoration applications, respectively. In the former, the environmental benefits of the project count much less than collaborative planning and stakeholder support (35 points total), and not much more than "readiness to proceed" (20 points). Allocating so many points to collaborative planning and support[223] provides an incentive for a range of interests and stakeholders to come together and address problems, but also makes it easier for the Bureau to deny grants for environmental projects that may be

210. *See supra* Section I.B.

211. Charles V. Stern & Pervaze A. Sheik, Congressional Research Service, IF11616, Klamath River Dam Removal and Restoration (2022) (noting that removing four dams on the Klamath River had been estimated to cost $445 million, "although some argue these figures are out of date").

212. *See supra* note 42.

213. *See supra* Section I.A.

214. *See* Stern & Normand, *supra* note 44, at 1-3 (listing BIL funding for 13 separate Bureau programs, and noting that the $8.3 billion is more than eight times greater than the Bureau's previous largest supplemental appropriation (2009)).

215. In the 2022 Inflation Reduction Act, Congress gave the Bureau significant additional money for "grants, contracts, or financial assistance agreements": $4 billion for drought mitigation efforts (which may include ecosystem and habitat restoration projects to address drought impacts), and $550 million for domestic water supply projects for disadvantaged communities. Pub. L. No. 117-169, §50231, 136 Stat. 1818, 2053 (2022) (domestic water supply); *id.* §50233, 136 Stat. 2053-54 (drought mitigation).

216. In addition to the NOFOs, the Bureau's web page for each of the grant programs includes a recorded webinar, written fact sheet and/or FAQ documents, and a link on which applicants can click to schedule a time to meet with program coordinators. *See Schedule Tracker: AERP*, *supra* note 65 (for aquatic ecosystem restoration); *Schedule Tracker: EWRP*, *supra* note 65 (for environmental water resources projects).

217. This is the page limit for the entire application, including attachments, under both environmental grant programs. Environmental NOFO 2023, *supra* note 61, at 17; Aquatic NOFO 2023, *supra* note 63, at 23.

218. A recent Congressional Research Service report highlights this challenge along with a potential solution:

> Nonfederal partnership may be limited due to lack of interest in restoration opportunities, limited capacity to track and apply for funds, inability to provide applicable cost shares, or limited capacity to implement activities with [BIL] funds. To address this challenge, some agencies, such as NOAA [the National Oceanic and Atmospheric Administration], intend to use a portion of [BIL] funds to help applicants build capacity to apply for grants and implement projects.

Anna E. Normand et al., Congressional Research Service, R47263, Ecosystem Restoration in the Infrastructure Investment and Jobs Act: Overview and Issues for Congress 25 (2022).

219. *Id.* There is also no cost-share requirement for the smaller Phase I grants under the Cooperative Watershed Management Program. *See supra* notes 125-31 and accompanying text.

220. U.S. Bureau of Reclamation, *supra* note 71 (identifying 13 grants to local water districts or agencies, 3 to state agencies, 3 to Trout Unlimited, and 1 to the Nature Conservancy).

221. The state of Oregon's Watershed Enhancement Board (OWEB) has a grant program specifically for water right acquisitions from willing sellers, and the grant guidance notes the habitat, species, and water quality benefits that water purchases (or other short-term acquisitions) may provide. OWEB, Water Acquisition Grant Program Overview and Guidance (2022), https://www.oregon.gov/oweb/Documents/Water-Acquisition-Program-Guidance-Fall-2022.pdf. OWEB describes itself as "a state agency that provides grants to help Oregonians take care of local streams, rivers, wetlands, and natural areas." OWEB, About Us, https://www.oregon.gov/oweb/about-us/Pages/welcome.aspx (last visited Nov. 3, 2023).

222. Aquatic NOFO 2023, *supra* note 63, at 16-17.

223. This category is worth 40 points in the aquatic ecosystem restoration scoring framework for "study and design" applications, and 30 points for construction applications. Aquatic NOFO 2023, *supra* note 63, at 39.

unpopular with some constituencies,[224] thus avoiding criticism and pushback.[225]

The scoring criteria are unevenly tied to other important parts of the Bureau's mission. The great weight given to collaborative planning effectively supports "basin studies," which the Bureau funds in collaboration with one or more local entities for purposes of engaging various stakeholders to develop water management plans[226]; a project supported by a collaboratively developed basin study would pile up points, creating synergy between that program and the Bureau's environmental grantmaking. The Bureau's Climate Change and Water Program under the SECURE Water Act,[227] by contrast, appears disconnected from environmental grants. While both scoring frameworks allocate 15 points to "Presidential and DOI priorities," climate change is one of three such priorities,[228] seemingly making it worth about five points.

In describing the climate change scoring criterion, the NOFOs cite an Executive Order but do not mention the Bureau's established program.[229] As for the Bureau's updated Climate Change Adaptation Strategy, although it was issued in early 2023,[230] it mentions the environmental grant authorizations and funding only in a brief sidebar that does not explain how they relate to the Bureau's climate activities.[231] The Bureau could boost its adaptation efforts and improve its environmental grantmaking by offering a few points to any project that would support one or more elements of the Climate Change Adaptation Strategy.[232]

By prioritizing projects with broad support, making all water purchases ineligible, and downplaying any links with its potentially controversial climate change work,[233] the Bureau is playing it safe. Perhaps this approach will allow these new programs to gain long-term acceptance and backing in a polarized political context, raising the chances that future Congresses will provide more permanent funding for environmental grants. There may be wisdom in playing that kind of long game—but the Bureau can help the cause by making some tweaks to help ensure that the BIL's $450 million moves the needle for western aquatic ecosystems.

B. Environmental Grant Programs and the Bureau

This Article has focused on the three recently authorized environmental grant programs, which provide the Bureau with new authorities and substantial funding. The Bureau now has a tool to expand its environmental mission greatly, and enough money to fund potentially impactful work over the next few years. Because its grants can pay the great majority of project costs—up to 75%—the Bureau can now be a key player and leader in addressing long-standing environmental problems facing western waters. If successful, the agency—yes, the dam-building Bureau of Reclamation—can become known and respected as a *restorer* of rivers.

But the $450 million for environmental grants is just a small fraction of the special funding the Bureau received through the BIL, totaling $8.3 billion.[234] Congress directed nearly one-half that total toward existing Bureau facilities, addressing issues of aging infrastructure[235] and dam safety.[236] More than $2 billion more went to construction of new water projects—water storage and conveyance infrastructure[237] or rural water supply facilities.[238] Congress directed most of the remaining money to various grant programs, including $1 billion for water recycling and reuse (Title XVI) projects,[239] $400 million for WaterSMART grants of

224. The Bureau weights these factors much less heavily in the WEEG program for water and energy conservation projects. "Collaboration" is worth all of six points out of 100 in the WEEG scoring framework, and while "planning" is worth another eight, there is not the same emphasis on the plan having been developed collaboratively as in the environmental grant programs. WEEG NOFO 2023, *supra* note 199, at 42-43.

225. The Bureau's selection process gives it another way of avoiding this kind of trouble, however: the "red-flag review" of high-scoring applications by the Bureau's local offices, whereby the Bureau's people on the ground can let the grantmaking team know if there is any reason why a project should not be funded. *See supra* note 69 and accompanying text. Given the "red-flag" safety valve, the Bureau could shift some points in its scoring frameworks from "stakeholder support" to other categories while still protecting itself against making grants it might regret.

226. According to the Bureau, the "WaterSMART Basin Study Program supports collaborative planning to help Reclamation and its partners assess risks to water supplies from competing demands and identify strategies to meet those demands." As of early 2023, the Bureau had funded 27 basin studies across the West, 19 of which had been completed. U.S. Bureau of Reclamation, WaterSMART Basin Study (2023), https://www.usbr.gov/watersmart/bsp/docs/BasinStudy_FactSheet_2023.pdf.

227. *See supra* notes 109-17 and accompanying text.

228. The other two are "disadvantaged or underserved communities" and "tribal benefits." Environmental NOFO 2023, *supra* note 61, at 43-45; Aquatic NOFO 2023, *supra* note 63, at 51-52.

229. Environmental NOFO 2023, *supra* note 61, at 43; Aquatic NOFO 2023, *supra* note 63, at 51 (citing Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021)).

230. U.S. Bureau of Reclamation, *supra* note 116.

231. *Id*. at 17.

232. *See supra* notes 116-17 and accompanying text.

233. Republicans in the U.S. House of Representatives have been critical of federal agency spending for climate-resilience work, and sought to eliminate funding for such programs, including in the appropriations bill that funds the Bureau. *See* Nico Portuondo & E.A. (Ev) Crunden, *House Releases Energy-Water Bill With Deep Cuts, Riders*, Greenwire (June 14, 2023).

234. *See* Stern & Normand, *supra* note 44, at 1-3. This report provides an excellent summary of BIL funding provisions for 13 separate Bureau programs, the purpose of each, and the authorization and spending history.

235. *Id*. at 3, 6-8 (explaining the $3.2 billion in BIL funding for the Bureau's Aging Infrastructure Account, which funds upkeep of Bureau facilities that are typically 60-100 years old).

236. *Id*. at 12-13 (explaining the $500 million for the Bureau's Dam Safety Program, which addresses safety issues at Bureau dams). The combined $3.7 billion for aging infrastructure and dam safety represents about 45% of the BIL's $8.3 billion in special funding for the Bureau.

237. *Id*. at 3-5 (explaining the $1.05 billion in funding for water projects, which may be federal or nonfederal, eligible based on certain criteria stated in the BIL). The report lists 13 such projects eligible for construction funding, eight of which are in California. *Id*. at 5 tbl.1.

238. *Id*. at 8-10 (explaining the $1 billion in funding for rural water supply projects and listing seven such projects, previously authorized by Congress, for which this BIL funding may be used).

239. *Id*. at 10-12 (explaining the $1 billion for Title XVI projects, both those receiving grants from the Bureau under an established framework, and those eligible for a new program of bigger grants for "large-scale" projects).

all types,[240] $250 million for desalination projects,[241] and $100 million for small water storage projects.[242] Thus, while environmental grant programs received significant funding in the BIL, Congress provided far more money overall for more conventional water supply infrastructure.

More significant than the dollar amounts, perhaps, is the sheer number and variety of grant programs that the Bureau has been directed to implement. Seemingly pleased with the established Title XVI and WaterSMART Programs,[243] Congress not only boosted both programs, it greatly expanded the purposes for which the Bureau would make grants. The BIL alone authorized new competitive programs for small water storage projects,[244] large-scale water reuse and recycling projects,[245] and multi-benefit projects (as discussed above).[246] Thus, the environmental water resources and aquatic ecosystem restoration authorizations are part of a larger trend of Congress charging the Bureau with helping solve water problems by making sizable grants to nonfederal project sponsors. The Bureau now has a distinct grantmaking mission, and while it has not overtaken the water-and-power-delivery function yet, it is gaining.

The Bureau must place the same kind of priority on its grantmaking as on its traditional mission. Success will depend in part on the policy calls the Bureau makes for each type of grant, and this Article has examined some of the major ones for the environmental programs. It will also depend on bureaucratic performance—the ability of the agency to guide and assist would-be applicants, receive and process applications efficiently, make timely decisions consistent with authorized purposes and program criteria, and ensure that the money is spent appropriately. Having been entrusted with billions of dollars across multiple grant programs, the Bureau's implementation and spending will be scrutinized by stakeholders, the media, and Congress.[247]

The new environmental grant programs are not the Bureau's biggest in dollar terms, nor are they the most closely connected to the agency's traditional mission. But there is at least one compelling reason that the Bureau must prioritize getting them right: for many environmental problems that do not involve an endangered species, grants may be the Bureau's only viable tool.

C. *Grant Programs and Federal Water Policy*

Grant programs have burgeoned across the federal government, involving a wide array of agencies and funding work in sectors going far beyond water. The number and range of recently authorized programs is staggering: one summary based on four recent acts of Congress identifies about 200 federal grant programs covering everything from boosting cybersecurity to removing culverts to addressing air pollution in schools.[248] Competitive federal grant programs have become a go-to policy tool on many issues, and the Bureau now has its share, each with its own purposes, eligibility rules, and cost-share requirements.

Popular as they are—who could complain about voluntary programs to fund good works through big checks from Uncle Sam?—the Bureau's programs in their current form have some troubling implications for federal water policy. First, there are equity concerns with competitive grant programs that have detailed/complex application requirements and sizable cost-share mandates. These features tend to favor sophisticated applicants with access to resources, which are not necessarily those with the greatest need for federal financial assistance; the Bureau's scoring criteria for environmental grants do consider whether a project would benefit tribes or disadvantaged/underserved communities, but these factors only count for roughly 10% of the total score.[249] According to the congressional sponsor of a bill to ease cost-share requirements for tribes pursuing WaterSMART grants, tribal projects have received less than 5% of such grants since 2010.[250]

Grant awards also vary wildly from state to state. In the WEEG program, applicants in California and Utah received 84 and 76 grants, respectively, from 2015 through 2020, while no other state had more than 24 recipients in that period; Arizona and New Mexico combined got six.[251] While differences in application numbers may explain much of the disparity, such results are still troubling. Even setting aside California, if one views Utah, Arizona, and

240. *Id.* at 13-14 (explaining the $400 million for these grants, of which $100 million must be for projects to improve natural or nature-based features). The report notes that the BIL provides "a significant influx in funding that expands the number and types of WaterSMART grant projects funded by Reclamation." *Id.* at 14.

241. *Id.* at 16-17 (explaining the $250 million for these projects, along with BIL provisions easing project eligibility requirements).

242. *Id.* at 5-6 (explaining the $100 million for these projects, which must have a storage capacity between 2,000 and 30,000 acre-feet).

243. *See* Stern & Normand, *supra* note 96, at 17 (noting that Congress appropriated a combined $980 million for these programs from FY 2009 through FY 2020).

244. Pub. L. No. 117-58, §40903, 135 Stat. 429, 1119-21 (2021) (authorizing grants of up to 25% of project costs or $30 million, whichever is less).

245. *Id.* §40905, 135 Stat. 1122-24 (authorizing grants for projects exceeding $500 million in total costs; grants may be for any amount, but cannot exceed 25% of the total project costs).

246. *See supra* notes 26-34 and accompanying text.

247. Other federal agencies have been taking heat from Congress, and sometimes their own inspectors general, over their grantmaking. *See, e.g.*, Nico Portuondo, *DOE Works to Appease Lawmakers After Microvast Debacle*, Greenwire (June 23, 2023); E.A. (Ev) Crunden, *Watchdog Faults EPA for Mismanaging Water Funds*, E&E News PM (June 20, 2023).

248. Jared Huffman, Grant Summary: Grants in the Infrastructure Act, Safer Communities Act, CHIPS and Science Act, and Inflation Reduction Act (2023), https://huffman.house.gov/imo/media/doc/grants_summary_guide_4.2023.pdf. The "Infrastructure Act" refers to the BIL, and all four of these statutes were enacted in 2021 or later.

249. These are two of the three "Presidential and DOI priorities" (along with climate change), worth a total of 15 points out of 100 in both the environmental water resources projects and aquatic ecosystem restoration scoring frameworks. Environmental NOFO 2023, *supra* note 61, at 43-45; Aquatic NOFO 2023, *supra* note 63, at 51-52.

250. Press Release, Office of Rep. Melanie Stansbury, Rep. Stansbury Reintroduces WaterSMART Access for Tribes Act (June 23, 2023), https://stansbury.house.gov/media/press-releases/rep-stansbury-reintroduces-watersmart-access-tribes-act.

251. Texas was in third place with 24 awards. *See* U.S. Bureau of Reclamation, *Selected Applications—WaterSMART Water and Energy Efficiency Grants*, https://www.usbr.gov/watersmart/applications/ListProposals.action (last visited Nov. 3, 2023).

New Mexico as comparably large, dry, climate-impacted states, it is a problem when one of the three gets 12 times more awards than the other two together.

A second concern with these new grant authorizations is that they give the Bureau great discretion to design programs and make awards with little public input and few official safeguards.[252] Although the Bureau, to its credit, has made draft NOFOs available for review and comment,[253] this step is not legally required, as notice and comment generally is for rulemaking.[254] And because many key aspects of these programs appear only in grant guidance, a new presidential administration could alter them quickly with little or no public input.[255]

The process for reviewing grant applications and making awards is entirely in-house, with one key exception: the Bureau by statute must "accept and consider public comment prior to initiating design, study or development" of an aquatic ecosystem restoration project,[256] showing that Congress sees the need for public input on at least some of these funding decisions. And while many types of agency policy decisions can be challenged in court, many of the Bureau's choices implementing grant programs may be largely unreviewable; for example, NOFO provisions on eligible project types and scoring criteria might be considered unripe for review.[257] To be clear, none of this suggests that the Bureau is acting inappropriately or that its discretion is entirely unchecked—only that grant programs, especially those with limited statutory direction, give the agency a lot of freedom in setting policy and spending public money without some of the familiar safeguards that apply to other types of agency action.

A third concern with grant programs as policy tools, and perhaps the most serious one for western waters, is that they give the government a very limited and passive role in addressing big problems. That may seem like a good thing for those whose top priority is preventing federal agency "overreach"[258] or encroachment on state authority over water.[259] But as climate change increasingly plays havoc with western waters and watersheds, resulting in more common and severe droughts, floods, water shortages, wildfires, and environmental problems, the biggest risk may be that the government does too *little*.

Congress recognized the need for climate action in the SECURE Water Act, directing the Bureau not only to assess the risks of climate change on western waters, but also to develop strategies to help reduce those risks and build resilience.[260] The environmental grant programs limit the Bureau to helping fund other peoples' strategies,[261] and the current framework prioritizes broadly supported and shovel-ready projects over those with the greatest environmental and climate-resilience benefits. Given the scope and severity of the challenges, the Bureau may need to play a more active role in developing, prioritizing, and implementing strategies that will most effectively help the West deal with these harsh 21st-century realities.

IV. Conclusion

The Bureau of Reclamation built hundreds of dams throughout the West, using broad powers originally enacted in 1902 to site and construct water infrastructure projects. Those projects provided important economic benefits while causing significant environmental harm. Congress in the 2020s gave the Bureau limited authority to make competitive grants for environmental purposes, and entrusted the agency with multi-year funding of $450 million to spend on those grants. The new authority and money offer hope for western aquatic ecosystems and fish and wildlife populations, and an opportunity for the Bureau—if it succeeds in its new role as environmental grantmaker—to begin addressing some long-standing problems.

Historian Donald Worster memorably wrote that some major western rivers had been so altered by dams and other works that they were "part[s] of nature that had died and

252. While the Administrative Procedure Act lays out general requirements (including notice and comment) for agency rulemaking in 5 U.S.C. §553, the statute exempts actions regarding grants from these requirements, suggesting that Congress sees little need for public involvement in agency decisions regarding grantmaking. 5 U.S.C. §553(a)(2).

253. *See supra* notes 48-56 and accompanying text.

254. The Administrative Procedure Act, 5 U.S.C. §553, generally requires notice and comment for agency rulemaking, but not for policy statements, interpretive rules, or other guidance documents. Courts enforce the notice-and-comment requirement, and sometimes will block an agency from applying "guidance" that the court regards as a rule that should have gone through that process. *See, e.g.*, Community Nutrition Inst. v. Young, 313 F.2d 924 (D.C. Cir. 1987) (setting aside Food and Drug Administration guidance document after finding that it was effectively a rule with binding effect).

255. *See generally* Hanna Northey & Timothy Cama, *How a Republican President Could Hobble the Climate Law*, Greenwire (Aug. 16, 2023) (describing ways that a new administration could quickly shift policy regarding certain spending provisions of the Inflation Reduction Act). By contrast, an agency policy adopted through notice-and-comment rulemaking is more difficult to overturn, typically requiring the agency to conduct a new rulemaking process to undo, change, or even stay it. *See, e.g.*, Clean Air Council v. Pruitt, 862 F.3d 1, 47 ELR 20084 (D.C. Cir. 2017).

256. Pub. L. No. 116-260, §1109(c)(1), 134 Stat. 1182, 3245 (2020).

257. *See, e.g.*, Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 28 ELR 21119 (1998) (Sierra Club's challenge to forest management plan was unripe because plaintiff was not yet harmed, as-applied facts would aid the court, and premature review might interfere with the agency's work).

258. This is a common critique of federal agency involvement in western water issues, and has recently been voiced most strongly by those arguing against the Joseph Biden Administration's proposed waters of the United States (WOTUS) rule defining federal Clean Water Act jurisdiction. *See, e.g.*, Press Release, Congressional Western Caucus, What They Are Saying: Overturn WOTUS Rule (Mar. 14, 2023), https://westerncaucus.house.gov/news/documentsingle.aspx?DocumentID=4205 (quoting agricultural, industry, and trade association critics of the Biden WOTUS rule).

259. The states, especially in the West, have long asserted that managing water is their business and insisted that the federal government respect their primary authority over water resources. *See, e.g.*, Western States Water Council, Resolution Regarding Water-Related Federal Rules, Regulations, Directives, Orders, and Policies (Position #503) (May 24, 2023), https://westernstateswater.org/wp-content/uploads/2023/06/503-Resolution-on-Federal-Regulatory-Actions-May-2023.pdf (declaring that federal agency actions must respect the primary role of states in managing waters).

260. *See supra* notes 109-17 and accompanying text.

261. Federal grant programs may be especially ineffective in places where political leaders make a point of rejecting federal money. *See* Jennifer Haberkorn, *DeSantis Tells Biden: Keep Your IRA Money*, Greenwire (Aug. 30, 2023) (describing Florida Gov. Ron DeSantis' rejection of federal energy-efficiency funding under the Inflation Reduction Act).

been reborn as money."[262] The Bureau is the federal agency most responsible for remaking the West's rivers in that way, and it now has an important new challenge: to effectively select and fund projects that can begin repairing some of the damage. These grant programs are an imperfect policy tool, and it will take far more than a few years' worth of environmental awards to see meaningful improvement in the health and integrity of many western rivers. The rivers of old may never return, but if the Bureau can spend it well, money can now help revive some bygone parts of nature.

262. The full quote reads, "What those northern rivers, the Missouri and the Columbia, were still struggling toward, the Colorado had become—a part of nature that had died and been reborn as money." Donald Worster, Rivers of Empire 276 (1985).