

NEZ PERCE-SNAKE RIVER WATER RIGHTS ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

ON

S. 2605

TO DIRECT THE SECRETARY OF THE INTERIOR AND THE HEADS OF
OTHER FEDERAL AGENCIES TO CARRYOUT AN AGREEMENT RESOLV-
ING MAJOR ISSUES RELATING TO THE ADJUDICATION OF WATER
RIGHTS IN THE SNAKE RIVER BASIN, IDAHO

JULY 20, 2004
WASHINGTON, DC



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NEZ PERCE-SNAKE RIVER WATER RIGHTS ACT

TUESDAY, JULY 20, 2004

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m. in room 485, Russell Senate Building, Hon. Daniel K. Inouye (vice chairman of the committee) presiding.

Present: Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUE. The committee meets this morning to receive testimony on S. 2605, the Snake River Water Rights Act of 2004. S. 2605 was introduced by Senator Craig for himself and Senator Crapo on June 24 of this year. The bill was referred to the Committee on Indian Affairs and this hearing on the bill was scheduled.

The legislation is intended to resolve the water rights claims of the Nez Perce Tribe of Idaho as those claims have been asserted in the general stream adjudication known as the Snake River Basin Adjudication.

The committee looks forward to receiving the testimony on this measure today. We know that the sponsors of this measure, as well as the Nez Perce Tribe and the other parties to the settlement are anxious to have the bill move forward to the full Senate at the earliest possible time.

[Text of S. 2605 follows:]

108TH CONGRESS
2D SESSION

S. 2605

To direct the Secretary of the Interior and the heads of other Federal agencies to carry out an agreement resolving major issues relating to the adjudication of water rights in the Snake River Basin, Idaho, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 24, 2004

Mr. CRAIG (for himself and Mr. CRAPO) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

A BILL

To direct the Secretary of the Interior and the heads of other Federal agencies to carry out an agreement resolving major issues relating to the adjudication of water rights in the Snake River Basin, Idaho, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Snake River Water
5 Rights Act of 2004”.

6 **SEC. 2. PURPOSES.**

7 The purposes of this Act are—

1 (1) to resolve some of the largest outstanding
2 issues with respect to the Snake River Basin Adju-
3 dication in Idaho in such a manner as to provide im-
4 portant benefits to the United States, the State of
5 Idaho, the Nez Perce Tribe, the allottees, and citi-
6 zens of the State;

7 (2) to achieve a fair, equitable, and final settle-
8 ment of all claims of the Nez Perce Tribe, its mem-
9 bers, and allottees and the United States on behalf
10 of the Tribe, its members, and allottees to the water
11 of the Snake River Basin within Idaho;

12 (3) to authorize, ratify, and confirm the Agree-
13 ment among the parties submitted to the Snake
14 River Basin Adjudication Court and provide all par-
15 ties with the benefits of the Agreement;

16 (4) to direct—

17 (A) the Secretary, acting through the Bu-
18 reau of Reclamation, the Bureau of Land Man-
19 agement, the Bureau of Indian Affairs, and
20 other agencies; and

21 (B) the heads of other Federal agencies
22 authorized to execute and perform actions nec-
23 essary to carry out the Agreement;

24 to perform all of their obligations under the Agree-
25 ment and this Act; and

1 (5) to authorize the actions and appropriations
2 necessary for the United States to meet the obliga-
3 tions of the United States under the Agreement and
4 this Act.

5 **SEC. 3. DEFINITIONS.**

6 In this Act:

7 (1) AGREEMENT.—The term “Agreement”
8 means the document titled “Mediator’s Term Sheet”
9 dated April 20, 2004, and submitted on that date to
10 the SRBA Court in SRBA Consolidated Subcase
11 03–10022 and SRBA Consolidated Subcase 67–
12 13701, with all appendices to the document.

13 (2) ALLOTTEE.—The term “allottee” means a
14 person that holds a beneficial real property interest
15 in an Indian allotment that is—

16 (A) located within the Nez Perce Reserva-
17 tion; and

18 (B) held in trust by the United States.

19 (3) CONSUMPTIVE USE RESERVED WATER
20 RIGHT.—The term “consumptive use reserved water
21 right” means the Federal reserved water right of
22 50,000 acre-feet per year, as described in the Agree-
23 ment, to be decreed to the Tribe and the allottees,
24 with a priority date of 1855.

1 (4) PARTIES.—The term “parties” means the
2 United States, the State, the Tribe, and any other
3 entity or person that submitted, or joined in the sub-
4 mission, of the Agreement to the SRBA Court on
5 April 20, 2004.

6 (5) SECRETARY.—The term “Secretary” means
7 the Secretary of the Interior.

8 (6) SNAKE RIVER BASIN.—The term “Snake
9 River Basin” means the geographic area in the
10 State described in paragraph 3 of the Commence-
11 ment Order issued by the SRBA Court on November
12 19, 1987.

13 (7) SPRINGS OR FOUNTAINS WATER RIGHT.—
14 The term “springs or fountains water right” means
15 the Tribe’s treaty right of access to and use of water
16 from springs or fountains on Federal public land
17 within the area ceded by the Tribe in the Treaty of
18 June 9, 1863 (14 Stat. 647), as recognized under
19 the Agreement.

20 (8) SRBA.—The term “SRBA” means the
21 Snake River Basin Adjudication litigation before the
22 SRBA Court styled as In re Snake River Basin Ad-
23 judication, Case No. 39576.

24 (9) SRBA COURT.—The term “SRBA Court”
25 means the District Court of the Fifth Judicial Dis-

1 retary \$2,000,000 for a 1-time payment to local gov-
2 ernments to mitigate for the change of use of water
3 acquired by the Bureau of Reclamation under sec-
4 tion III.C.6 of the Agreement.

5 (2) DISTRIBUTION OF FUNDS.—Funds made
6 available under paragraph (1) shall be distributed by
7 the Secretary to local governments in accordance
8 with a plan provided to the Secretary by the State.

9 (3) PAYMENTS.—Payments by the Secretary
10 shall be made on a pro rata basis as water rights
11 are acquired by the Bureau of Reclamation.

12 **SEC. 6. BUREAU OF LAND MANAGEMENT LAND TRANSFER.**

13 (a) TRANSFER.—

14 (1) IN GENERAL.—The Secretary shall transfer
15 land selected by the Tribe under paragraph (2) to
16 the Bureau of Indian Affairs to be held in trust for
17 the Tribe.

18 (2) LAND SELECTION.—The land transferred
19 shall be selected by the Tribe from a list of parcels
20 of land managed by the Bureau of Land Manage-
21 ment that are available for transfer, as depicted on
22 the map entitled “North Idaho BLM Land Eligible
23 for Selection by the Nez Perce Tribe” dated May
24 2004, on file with the Director of the Bureau of
25 Land Management, not including any parcel des-

1 ignated on the map as being on the Clearwater River
2 or Lolo Creek.

3 (3) MAXIMUM VALUE.—The land selected by
4 the Tribe for transfer shall be limited to a maximum
5 value in total of not more than \$7,000,000, as deter-
6 mined by an independent appraisal of fair market
7 value prepared in accordance with the Uniform
8 Standards of Professional Appraisal Practice and
9 the Uniform Appraisal Standards for Federal Land
10 Acquisitions.

11 (b) EXISTING RIGHTS AND USES.—

12 (1) IN GENERAL.—On any land selected by the
13 Tribe under subsection (a)(2), any use in existence
14 on the date of transfer under subsection (a) under
15 a lease or permit with the Bureau of Land Manage-
16 ment, including grazing, shall remain in effect until
17 the date of expiration of the lease or permit, unless
18 the holder of the lease or permit requests an earlier
19 termination of the lease or permit, in which case the
20 Secretary shall grant the request.

21 (2) AVAILABILITY OF AMOUNTS.—Amounts
22 that accrue to the United States under a lease or
23 permit described in paragraph (1) from sales, bo-
24 nuses, royalties, and rentals relating to any land
25 transferred to the Tribe under this section shall be

1 made available to the Tribe by the Secretary in the
2 same manner as amounts received from other land
3 held by the Secretary in trust for the Tribe.

4 (c) DATE OF TRANSFER.—No land shall be trans-
5 ferred to the Tribe under this section until the waivers
6 and releases under section 10 take effect.

7 **SEC. 7. WATER RIGHTS.**

8 (a) HOLDING IN TRUST.—

9 (1) IN GENERAL.—The consumptive use re-
10 served water right shall be held in trust by the
11 United States for the benefit of the Tribe and
12 allottees.

13 (2) SPRINGS OR FOUNTAINS WATER RIGHT.—
14 The springs or fountains water right of the Tribe
15 shall be held in trust by the United States for the
16 benefit of the Tribe.

17 (b) WATER CODE.—

18 (1) IN GENERAL.—The consumptive use re-
19 served water right shall be subject to section 7 of
20 the Act of February 8, 1887 (25 U.S.C. 381; 24
21 Stat. 390, chapter 119).

22 (2) ENACTMENT OF WATER CODE.—Not later
23 than 3 years after the date of enactment of this Act,
24 the Tribe shall enact a water code, subject to any
25 applicable provision of law, that—

1 (A) manages, regulates, and controls the
2 consumptive use reserved water right; and

3 (B) includes, subject to approval of the
4 Secretary—

5 (i) a process by which an allottee, or
6 any successor in interest to an allottee,
7 may request and be provided with an allo-
8 cation of water for irrigation use on allot-
9 ted land of the allottee; and

10 (ii) a due process system for the con-
11 sideration and determination of any re-
12 quest by an allottee, or any successor in in-
13 terest to an allottee, for an allocation of
14 water, including a process for appeal and
15 adjudication of denied or disputed distribu-
16 tions of water and for resolution of con-
17 tested administrative decisions.

18 (3) RIGHTS OF ALLOTTEES.—Any provision of
19 the water code and any amendments to the water
20 code that affect the rights of the allottees shall be
21 subject to the approval of the Secretary, and no such
22 provision or amendment shall be valid until approved
23 by the Secretary.

24 (4) INTERIM ADMINISTRATION.—The Secretary
25 shall administer the consumptive use reserved water

1 right until such date as the water code described in
2 paragraph (2) has been enacted by the Tribe and
3 approved by the Secretary.

4 (c) SATISFACTION OF CLAIMS.—

5 (1) IN GENERAL.—The water rights and other
6 benefits granted or confirmed by the Agreement and
7 this Act shall be in full satisfaction of all claims for
8 water rights and injuries to water rights of the
9 allottees.

10 (2) SATISFACTION OF ENTITLEMENTS.—Any
11 entitlement to water of any allottee under Federal
12 law shall be satisfied out of the consumptive use re-
13 served water right.

14 (d) ABANDONMENT, FORFEITURE, OR NONUSE.—
15 The consumptive use reserved water right and the springs
16 or fountains water right shall not be subject to loss by
17 abandonment, forfeiture, or nonuse.

18 (e) LEASE OF WATER.—

19 (1) IN GENERAL.—The Tribe, without further
20 approval of the Secretary, may lease water to which
21 the Tribe is entitled under the consumptive use re-
22 served water right through any State water bank in
23 the same manner and subject to the same rules and
24 requirements that govern any other lessor of water
25 to the water bank.

1 (2) FUNDS.—Any funds accruing to the Tribe
 2 from any lease under paragraph (1) shall be the
 3 property of the Tribe, and the United States shall
 4 have no trust obligation or other obligation to mon-
 5 itor, administer, or account for any consideration re-
 6 ceived by the Tribe under any such lease.

7 **SEC. 8. TRIBAL FUNDS.**

8 (a) DEFINITION OF FUND.—In this section, the term
 9 “Fund” means—

10 (1) the Nez Perce Tribe Water and Fisheries
 11 Fund established under subsection (b)(1); and

12 (2) the Nez Perce Tribe Domestic Water Sup-
 13 ply Fund established under subsection (b)(2).

14 (b) ESTABLISHMENT.—There are established in the
 15 Treasury of the United States—

16 (1) a fund to be known as the “Nez Perce
 17 Tribe Water and Fisheries Fund”, to be used to pay
 18 or reimburse costs incurred by the Tribe in acquir-
 19 ing land and water rights, restoring or improving
 20 fish habitat, or for fish production, agricultural de-
 21 velopment, cultural preservation, water resource de-
 22 velopment, or fisheries-related projects; and

23 (2) a fund to be known as the “Nez Perce Do-
 24 mestic Water Supply Fund”, to be used to pay the
 25 costs for design and construction of water supply

1 and sewer systems for tribal communities, including
2 a water quality testing laboratory.

3 (c) MANAGEMENT OF THE FUNDS.—The Secretary
4 shall manage the Funds, make investments from the
5 Funds, and make amounts available from the Funds for
6 distribution to the Tribe consistent with the American In-
7 dian Trust Fund Management Reform Act of 1994 (25
8 U.S.C. 4001 et seq.), this Act, and the Agreement.

9 (d) INVESTMENT OF THE FUNDS.—The Secretary
10 shall invest amounts in the Funds in accordance with—

11 (1) the Act of April 1, 1880 (25 U.S.C. 161;
12 21 Stat. 70, chapter 41);

13 (2) the first section of the Act of June 24,
14 1938 (25 U.S.C. 162a; 52 Stat. 1037, chapter 648);

15 and

16 (3) subsection (e).

17 (e) AVAILABILITY OF AMOUNTS FROM THE
18 FUNDS.—Amounts made available under subsection (h)
19 shall be available for expenditure or withdrawal only after
20 the waivers and releases under section 10 take effect.

21 (f) EXPENDITURES AND WITHDRAWAL.—

22 (1) TRIBAL MANAGEMENT PLAN.—

23 (A) IN GENERAL.—The Tribe may with-
24 draw all or part of amounts in the Funds on
25 approval by the Secretary of a tribal manage-

1 ment plan as described in the American Indian
2 Trust Fund Management Reform Act of 1994
3 (25 U.S.C. 4001 et seq.).

4 (B) REQUIREMENTS.—In addition to the
5 requirements under the American Indian Trust
6 Fund Management Reform Act of 1994 (25
7 U.S.C. 4001 et seq.), the tribal management
8 plan shall require that the Tribe spend any
9 amounts withdrawn from the Funds in accord-
10 ance with the purposes described in subsection
11 (b).

12 (C) ENFORCEMENT.—The Secretary may
13 take judicial or administrative action to enforce
14 the provisions of any tribal management plan to
15 ensure that any amounts withdrawn from the
16 Funds under the plan are used in accordance
17 with this Act and the Agreement.

18 (D) LIABILITY.—If the Tribe exercises the
19 right to withdraw amounts from the Funds,
20 neither the Secretary nor the Secretary of the
21 Treasury shall retain any liability for the ex-
22 penditure or investment of the amounts.

23 (2) EXPENDITURE PLAN.—

24 (A) IN GENERAL.—The Tribe shall submit
25 to the Secretary for approval an expenditure

1 plan for any portion of the amounts made avail-
2 able under subsection (h) that the Tribe does
3 not withdraw under this subsection.

4 (B) DESCRIPTION.—The expenditure plan
5 shall describe the manner in which, and the
6 purposes for which, amounts of the Tribe re-
7 maining in the Funds will be used.

8 (C) APPROVAL.—On receipt of an expendi-
9 ture plan under subparagraph (A), the Sec-
10 retary shall approve the plan if the Secretary
11 determines that the plan is reasonable and con-
12 sistent with this Act and the Agreement.

13 (D) ANNUAL REPORT.—For each Fund,
14 the Tribe shall submit to the Secretary an an-
15 nual report that describes all expenditures from
16 the Fund during the year covered by the report.

17 (g) NO PER CAPITA PAYMENTS.—No part of the
18 principal of the Funds, or of the income accruing in the
19 Funds, shall be distributed to any member of the Tribe
20 on a per capita basis.

21 (h) AUTHORIZATION OF APPROPRIATIONS.—There
22 are authorized to be appropriated—

23 (1) \$60,100,000 to the Nez Perce Tribe Water
24 and Fisheries Fund; and

1 (2) \$23,000,000 to the Nez Perce Tribe Do-
2 mestic Water Supply Fund.

3 **SEC. 9. SALMON AND CLEARWATER RIVER BASINS HABITAT**
4 **FUND.**

5 (a) ESTABLISHMENT OF FUND.—

6 (1) IN GENERAL.—There is established in the
7 Treasury of the United States a fund to be known
8 as the “Salmon and Clearwater River Basins Habi-
9 tat Fund” (referred to in this section as the
10 “Fund”), to be administered by the Secretary.

11 (2) ACCOUNTS.—There is established within the
12 Fund—

13 (A) an account to be known as the “Nez
14 Perce Tribe Salmon and Clearwater River Ba-
15 sins Habitat Account”, which shall be adminis-
16 tered by the Secretary for use by the Tribe sub-
17 ject to the same provisions for management, in-
18 vestment, and expenditure as the funds estab-
19 lished by section 8; and

20 (B) an account to be known as the “Idaho
21 Salmon and Clearwater River Basins Habitat
22 Account”, which shall be administered by the
23 Secretary and provided to the State as provided
24 in the Agreement and this Act.

25 (b) USE OF THE FUND.—

1 (1) IN GENERAL.—The Fund shall be used to
2 supplement amounts made available under other law
3 for habitat protection and restoration in the Salmon
4 and Clearwater River basins, including projects and
5 programs intended to protect and restore listed fish
6 and their habitat in the Salmon and Clearwater ba-
7 sins, as specified in the Agreement and this Act.

8 (2) NO ALLOCATION REQUIREMENT.—The use
9 of the Fund shall not be subject to the allocation
10 procedures under section 6(d)(1) of the Endangered
11 Species Act of 1973 (16 U.S.C. 1535(d)(1)).

12 (3) RELEASE OF FUNDS.—The Secretary shall
13 release funds from the Clearwater River Basins
14 Habitat Account in accordance with section 6(d)(2)
15 of the Endangered Species Act (16 U.S.C.
16 1535(d)(2)).

17 (c) AVAILABILITY OF AMOUNTS IN THE FUND.—
18 Amounts made available under subsection (d) shall be
19 available for expenditure or withdrawal only after the
20 waivers and releases under section 10(a) take effect.

21 (d) AUTHORIZATION OF APPROPRIATIONS.—There
22 are authorized to be appropriated—

23 (1) \$12,666,670 to the Nez Perce Tribe Salmon
24 and Clearwater River Basins Habitat Account; and

1 (2) \$25,333,330 to the Idaho Salmon and
2 Clearwater River Basins Habitat Account.

3 **SEC. 10. TRIBAL WAIVER AND RELEASE OF CLAIMS.**

4 (a) WAIVER AND RELEASE OF CLAIMS IN GEN-
5 ERAL.—

6 (1) CLAIMS TO WATER RIGHTS; CLAIMS FOR IN-
7 JURIES TO WATER RIGHTS OR TREATY RIGHTS.—Ex-
8 cept as otherwise provided in this Act, the United
9 States on behalf of the Tribe and the allottees, and
10 the Tribe, waive and release—

11 (A) all claims to water rights within the
12 Snake River Basin (as defined in section 3(b));

13 (B) all claims for injuries to such water
14 rights; and

15 (C) all claims for injuries to the treaty
16 rights of the Tribe to the extent that such inju-
17 ries result or resulted from flow modifications
18 or reductions in the quantity of water available
19 that accrued at any time up to and including
20 the effective date of the settlement, and any
21 continuation thereafter of any such claims,
22 against the State, any agency or political sub-
23 division of the State, or any person, entity, cor-
24 poration, municipal corporation, or quasi-mu-
25 nicipal corporation.

1 (2) CLAIMS BASED ON REDUCED WATER QUALITY OR REDUCTIONS IN WATER QUANTITY.—The
2 United States on behalf of the Tribe and the
3 allottees, and the Tribe, waive and release any claim,
4 under any treaty theory, based on reduced water
5 quality resulting directly from flow modifications or
6 reductions in the quantity of water available in the
7 Snake River Basin against any party to the Agree-
8 ment or this Act.

9
10 (3) NO FUTURE ASSERTION OF CLAIMS.—No
11 water right claim that the Tribe or the allottees have
12 asserted or may in the future assert outside the
13 Snake River Basin shall require water to be supplied
14 from the Snake River Basin to satisfy the claim.

15 (4) EFFECT OF WAIVERS AND RELEASES.—The
16 waivers and releases by the United States and the
17 Tribe under this subsection—

18 (A) shall be permanent and enforceable;
19 and

20 (B) shall survive any subsequent termi-
21 nation of any component of the settlement de-
22 scribed in the Agreement or this Act.

23 (5) EFFECTIVE DATE.—The waivers and re-
24 leases under this subsection take effect on the date
25 on which the Secretary causes to be published in the

1 Federal Register a statement of findings that the ac-
2 tions set forth in section IV.L of the Agreement—

3 (A) have been completed, including
4 issuance of a judgment and decree by the
5 SRBA court from which no further appeal may
6 be taken; and

7 (B) have been determined by the United
8 States on behalf of the Tribe and the allottees,
9 the Tribe, and the State of Idaho to be consist-
10 ent in all material aspects with the Agreement.

11 (b) WAIVER AND RELEASE OF CLAIMS AGAINST THE
12 UNITED STATES.—

13 (1) IN GENERAL.—In consideration of perform-
14 ance by the United States of all actions required by
15 the Agreement and this Act, including the appro-
16 priation of all funds authorized under sections 8(h)
17 and 9(d)(1), the Tribe shall execute a waiver and re-
18 lease of the United States from—

19 (A) all claims for water rights within the
20 Snake River Basin, injuries to such water
21 rights, or breach of trust claims for failure to
22 protect, acquire, or develop such water rights
23 that accrued at any time up to and including
24 the effective date determined under paragraph
25 (2);

1 (B) all claims for injuries to the Tribe’s
 2 treaty fishing rights, to the extent that such in-
 3 juries result or resulted from reductions in the
 4 quantity of water available in the Snake River
 5 Basin;

6 (C) all claims of breach of trust for failure
 7 to protect Nez Perce springs or fountains treaty
 8 rights reserved in article VIII of the Treaty of
 9 June 9, 1863 (14 Stat. 651); and

10 (D) all claims of breach of trust arising
 11 out of the negotiation of or resulting from the
 12 adoption of the Agreement.

13 (2) EFFECTIVE DATE.—The waiver and release
 14 contained in this subsection take effect on the date
 15 on which the funds authorized under sections 8(h)
 16 and 9(d)(1) of this Act have been appropriated as
 17 authorized by this Act.

18 (c) RETENTION OF RIGHTS.—

19 (1) IN GENERAL.—The Tribe shall retain all
 20 rights not specifically waived or released in the
 21 Agreement or this Act.

22 (2) DWORSHAK PROJECT.—Nothing in the
 23 Agreement or this Act constitutes a waiver by the
 24 Tribe of any claim against the United States relat-

1 ing to non-water-based injuries resulting from the
2 construction and operation of the Dworshak Project.

3 (3) FUTURE ACQUISITION OF WATER RIGHTS.—

4 Nothing in the Agreement or this Act precludes the
5 Tribe, or the United States as trustee for the Tribe,
6 from purchasing or otherwise acquiring water rights
7 in the future to the same extent as any other entity
8 the State.

9 **SEC. 11. MISCELLANEOUS.**

10 (a) GENERAL DISCLAIMER.—The parties expressly
11 reserve all rights not specifically granted, recognized, or
12 relinquished by the settlement described in the Agreement
13 or this Act.

14 (b) DISCLAIMER REGARDING OTHER AGREEMENTS
15 AND PRECEDENT.—

16 (1) IN GENERAL.—Except as expressly provided
17 in this Act, nothing in this Act amends, supersedes,
18 or preempts any State law, Federal law, Tribal law,
19 or interstate compact that pertains to the Snake
20 River or its tributaries.

21 (2) NO ESTABLISHMENT OF STANDARD.—Noth-
22 ing in this Act—

23 (A) establishes any standard for the quan-
24 tification of Federal reserved water rights or
25 any other Indian water claims of any other In-

1 dian tribes in any other judicial or administra-
2 tive proceeding; or

3 (B) limits the rights of the parties to liti-
4 gate any issue not resolved by the Agreement or
5 this Act.

6 (3) NO ADMISSION AGAINST INTEREST.—Noth-
7 ing in this Act constitutes an admission against in-
8 terest against any party in any legal proceeding.

9 (c) TREATY RIGHTS.—Nothing in the Agreement or
10 this Act impairs the treaty fishing, hunting, pasturing, or
11 gathering rights of the Tribe except to the extent expressly
12 provided in the Agreement or this Act.

13 (d) OTHER CLAIMS.—Nothing in the Agreement or
14 this Act quantifies or otherwise affects the water rights,
15 claims, or entitlements to water, or any other treaty right,
16 of any Indian tribe, band, or community other than the
17 Tribe.

18 (e) RECREATION ON DWORSHAK RESERVOIR.—

19 (1) IN GENERAL.—In implementing the provi-
20 sions of the Agreement and this Act relating to the
21 use of water stored in Dworshak Reservoir for flow
22 augmentation purposes, the heads of the Federal
23 agencies involved in the operational Memorandum of
24 Agreement referred to in the Agreement shall imple-

1 ment a flow augmentation plan beneficial to fish and
2 consistent with the Agreement.

3 (2) CONTENTS OF PLAN.—The flow augmenta-
4 tion plan may include provisions beneficial to rec-
5 reational uses of the reservoir through maintenance
6 of the full level of the reservoir for prolonged periods
7 during the summer months.

8 (f) JURISDICTION.—

9 (1) NO EFFECT ON SUBJECT MATTER JURIS-
10 DICTION.—Nothing in the Agreement or this Act re-
11 stricts, enlarges, or otherwise determines the subject
12 matter jurisdiction of any Federal, State, or Tribal
13 court.

14 (2) CONSENT TO JURISDICTION.—The United
15 States consents to jurisdiction in a proper forum for
16 purposes of enforcing the provisions of the Agree-
17 ment.

18 (3) EFFECT OF SUBSECTION.—Nothing in this
19 subsection confers jurisdiction on any State court
20 to—

21 (A) enforce Federal environmental laws re-
22 garding the duties of the United States; or

23 (B) conduct judicial review of Federal
24 agency action.

○

Senator INOUE. Our first witness is Senator Larry Craig. Is he here? We will set aside time for him. May I now call upon the counselor to the assistant secretary for Indian Affairs of the Department of the Interior, Michael Olsen.

Mr. Olsen, please.

STATEMENT OF MICHAEL OLSEN, COUNSELOR TO THE ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. OLSEN. Thank you. Good morning, Mr. Vice Chairman.

My name is Michael Olsen. I am a counselor to the assistant secretary for Indian Affairs. Before I start, I would like to apologize on behalf of Commissioner Keyes, who until late yesterday afternoon was scheduled to be here to testify, and because of health reasons is not able to be here. I will be pinch hitting for him.

I appreciate the opportunity to present testimony on behalf of the Administration in support of the Snake River Water Rights Act of 2004. This legislation helps ensure certainty not only for the Nez Perce Tribe, but also for Idaho cities, farmers, ranchers and individual landowners. It provides numerous conservation benefits and relieves the Federal Government of the obligation to litigate the tribe's water rights claims.

The legislation and the settlement that it implements lays the groundwork for resolving longstanding and contentious water rights issues in the Snake River basin in Idaho. The result of several years of formal mediation and negotiations, the settlement provides a just resolution to protracted litigation, while protecting the interests of all parties. The settlement fully determines the Nez Perce Tribe's water rights, provides for in-stream flows that protect the habitat of endangered species, and protects valid existing rights to water and land use.

The Snake River basin adjudication involves over 150,000 claims to water from the Snake River and its tributaries. The adjudication covers all or part of 38 of Idaho's 44 counties. In 1993, the United States filed, on behalf of the tribe, several claims including in-stream flow claims to support the tribe's treaty-based fishing rights, claims to support the tribe's consumptive use, and claims to springs in the area ceded by the tribe in 1863.

The settlement agreement which is the result of the parties' creative and collaborative work contains three main components. The first is resolution of the Nez Perce Tribe's water rights. The second is a section addressing in-stream flow and Endangered Species Act issues within the Salmon and Clearwater River basins, and a component covering in-stream flows and flow augmentation from the Upper Snake River basin to benefit threatened or endangered fish.

As a package, these three provisions resolve the tribe's water rights claims, ensures that the water has enough water to meet present and future needs, and allows water users in Idaho to participate in voluntary programs to maintain, improve and restore fish habitat.

S. 2605 directs the Federal Government to implement the settlement. It also confirms the tribe's right to 50,000 acre-feet of water annually to meet on-reservation water needs. It confirms the tribe's right to water from springs on Federal land surrounding the res-

ervation and authorizes Federal funds for domestic and municipal water, sewer treatment facilities, and projects related to water and fisheries resources.

The bill also directs the BLM to transfer land valued at up to \$7 million to the BIA to be held in trust for the tribe.

S. 2605 also authorizes funding for habitat protection and restoration in the Salmon and Clearwater basins, which is one of the most important areas of spawning and rearing habitat for anadromous fish in the Columbia River system. The legislation authorizes the Secretary to carry out the Upper Snake River basin flows component of the agreement, including reclamations flow augmentation program to benefit anadromous fish.

The bill also authorizes a one-time mitigation payments to local governments that may be affected by the Bureau of Reclamation's acquisition of up to 60,000 acre-feet of consumptive natural flow rights from the Snake River.

Finally, the settlement agreement anticipates that the parties will address a number of Endangered Species Act issues through existing statutory and regulatory authorities. S. 2605 would enable the settlement to proceed and implementation would result in Federal actions that would be subject to the consultation provisions of section 7 of the Endangered Species Act.

However, neither S. 2605 nor the settlement agreement would affect the review of those Federal actions, pre-judge the outcome of that review, provide for pre-enforcement review, or limit the ability of any party to challenge the outcome of that review through existing administrative or judicial avenues.

Further, S. 2605 would not alter the procedural or substantive requirements of the National Environmental Policy Act [NEPA] or any other Federal law.

The settlement approved by S. 2605 is an example of creativity in resolving contentious water rights disputes in the West. We believe that the Federal participation and contribution contemplated in the legislation is appropriate to resolve the tribe's claims and the related issues in the settlement agreement.

This concludes my statement. I would be happy to answer any of your questions.

[Prepared statement of Mr. Olsen appears in appendix.]

Senator INOUE. I thank you very much, Mr. Olsen.

In looking over your measure, we note that your measure does not include any schedule for the payment to the fund that will be necessary to carryout the activities set forth in the agreement. Will these terms be provided to the committee before we act on the bill?

Mr. OLSEN. Certainly. We would be willing to work with the committee to the extent that the committee would like to see those. As you mentioned, the bill is silent on payment. The Administration figures that the majority of the money that is provided for in the settlement will be paid out over the course of approximately 10 years from the final passage of legislation and execution and so forth.

The Department, of course, will include in its budget sufficient amounts to comply with the terms of the term sheet, and then we contemplate that at that point it would be up to Congress in the appropriations process. But to the extent the committee would like

to work with the Department on some sort of provision for payment of funds, we can certainly do that. At this point we intend to include the amounts necessary in our budget and then leave it up to the appropriations process.

Senator INOUE. We gather that the Indian leaders are very much in need of the funds to carry on the activities. I think it might help if all three parties sat down and discussed this matter. So I will have the staff initiate this with your office?

Mr. OLSEN. Okay.

Senator INOUE. What is the legal status of this agreement, also known as the mediator's term sheet? Does it have the effect of law that overrides any existing statutes, such as the Endangered Species Act that may conflict with it? Or is it merely a contract that binds the signatories, without changing existing law or affecting the rights of non-parties?

Mr. OLSEN. It would be the latter. It does not have the binding effect of law. This is one very important first step in the process and there will need to be Federal legislation and State legislation, as well as Endangered Species Act documents produced as part of this.

As I mentioned in my oral statement, there is no conflict in this settlement with existing law and it is not intended to trump or override existing environmental laws.

Senator INOUE. This agreement contains language that seems to appear to require the parties, including the United States, to seek amendment to the Endangered Species Act and Clean Water Act if it becomes necessary, because of the conflict between the agreement and those existing statutes. My question is, can the Congress lawfully enact a statute that binds the executive branch to seek the enactment of new legislation?

Mr. OLSEN. Could you repeat the question one more time for me?

Senator INOUE. This bill is an agreement.

Mr. OLSEN. Right.

Senator INOUE. It contains language appearing to require the parties, which includes the Government of the United States, to seek an amendment to the Endangered Species Act or the Clean Water Act if such be, quote, "necessary." My question is, can we in the Congress lawfully enact a statute that binds the executive branch to seek an enactment of legislation such as this.

Mr. OLSEN. The language that you are referring to, I believe, well, let me take a step back. The settlement requires the Federal Government to do several things, some of which require additional statutory authority. That authority is provided in the legislation, but other things that are required to carry out the legislation, we do have statutory authority for, for example, the Bureau of Reclamation's current practice, which it has been doing for approximately 10 years, of flow augmentation.

We also have authority to do everything that is required under the Clean Water Act and the Endangered Species Act. The legislation is in no way, as I said, intended to modify those two acts, and I am not certain and will have to, go back to the Department and do some reviewing with attorneys about specifics of your question. We do not view that there is going to be a need for modification of the Endangered Species Act or the Clean Water Act, but we do

need authority to perform some of the Federal functions or Federal actions upon which we will consult under section 7 of the Endangered Species Act.

For example, we would need funding for a section 6 of the Endangered Species Act program, which is contemplated in the settlement. We will also need payment of mitigation for flow augmentation.

We do not believe that there is going to be a need to modify or amend the Endangered Species Act. We will certainly look more into that to the extent there is a concern.

Senator INOUE. Can the court order the President or the Secretary of the Interior to lobby Congress to change existing law if that becomes, quote, "necessary" to allow the fulfillment of the terms of the agreement?

Mr. OLSEN. Like I said, we do not believe that that would be necessary to fulfill the terms of the agreement. I would have to consult with our attorneys on exactly what lobbying can be done. Our position, at this point, is that we do not believe that any modification is going to be necessary.

Senator INOUE. Because of the technicalities involved, Mr. Olsen, may we submit to your office questions to clarify some of these?

Mr. OLSEN. Absolutely. We would be happy to address any questions you have.

Senator INOUE. I appreciate that. In order to expedite this, and as you know we just have a few days left in the session, but I think we can if we apply ourselves get this measure through both Houses and to the President. So let's work on it.

Mr. OLSEN. Very well.

Senator INOUE. Thank you very much.

Mr. OLSEN. Thank you.

Senator INOUE. Now may I call upon Anthony Johnson, chairman of the Nez Perce Tribal Executive Committee of Lapwai, Idaho. Chairman Johnson, welcome, sir.

STATEMENT OF ANTHONY JOHNSON, CHAIRMAN, NEZ PERCE TRIBAL EXECUTIVE COMMITTEE

Mr. JOHNSON. Thank you, Senator Inouye.

Good morning. Thank you, Vice Chairman Inouye and members of this Committee on Indian Affairs and your staff members for agreeing to bring S. 2605, the Snake River Water Rights Act of 2004 to a hearing so quickly after introduction. I am Anthony Johnson, chairman of the Nez Perce Tribal Executive Committee. I appreciate the opportunity to provide testimony today on this legislation, which would implement the proposed Snake River Nez Perce water settlement.

I also add my appreciation of the efforts and leadership of Senator Craig and Senator Crapo in sponsoring this legislation.

Before I go on, I would like to say how much your leadership as vice chairman of this committee and your service as chairman as well have meant to the Nez Perce Tribe and to Indian country. As you prepare at the end of this Congress to step down as vice chairman, I want to express our deep appreciation for your many efforts

on behalf of Indian people over the years and the strong affection the Nez Perce people have for the Senior Senator from Hawaii.

This proposed settlement should be considered in the light of the history of my people and their connection to water and fish. Since time immemorial, the Nez Perce people occupied a geographic area encompassing a large part of what is today Idaho, Washington, and Oregon. The territory exclusively occupied by the Nez Perce, over 13 million acres, stretched from the continental divide forming the border between Idaho and Montana in the Bitterroot Mountains, to the Blue Mountains of northeast Oregon and southeast Washington.

I have brought with me a map that shows the aboriginal area of the Nez Perce, and the boundary lines of the 1855 and 1863 treaties with the United States. When you consider the equities of this proposed settlement for the Nez Perce Tribe as well as other parties, I hope you consider the vast expanse of land that was my people's and the portion of the Northwest United States it occupies today.

We understood that our promises to cede millions of acres of land to the United States were forever. We expect the United States' promise to protect the Nez Perce homeland and our fishing, hunting, pasturing and gathering rights was forever as well. This agreement maintains that promise. Nothing in this proposed settlement changes any of those rights.

The Nez Perce culture revolved and revolves still around water and fish, most notably salmon. Nez Perce people define themselves in terms of their relationship to water and fish. This is a lesson that has been taught to my people by our elders over many generations. Water and fish are essential to the Nez Perce in declines in their availability due to human alteration and restrictions on access have had devastating effects on our people and culture.

We did not choose to take our water rights to court. The Snake River Basin Adjudication, or SRBA, began in Idaho in 1987 as a comprehensive state court proceeding. Because of the McCarran Amendment, in 1993 we filed three categories of water rights claims together with the United States as our trustee. These are, first, claims to water for consumptive use on tribal lands within the reservation, traditionally known as Winter's rights; second, claims for access and use of springs and fountains in the 1863 treaty ceded area; and third, claims for in-stream flows based on the 1855 treaty fishing right.

The springs and fountains claims are unique. They are based on article 8 of the Nez Perce Treaty of 1863, which expressly reserved for the Nez Perce people access to and use of springs and fountains in the ceded area in common with non-Indians. The in-stream flow claims are in fulfillment of the fishing right reserved by the tribe under the Treaty of 1855 and preserved by the Treaty of 1863.

The tribe's claims are based on the simple concept that to fulfill the purpose of the reservation of fishing rights, a water right must be implied to provide habitat for fish to ensure that there are fish. These claims are supported by the U.S. Supreme Court's recognition that water rights must be implied, regardless of the silence of treaties, to fulfill the purpose of Indian reservations and by the

several Federal courts that have recognized the existence of Indian water rights necessary to fulfill the purpose of treaty fishing rights.

The litigation process changed fundamentally for us when the SRBA court ordered confidential mediation of our claims beginning in late 1998. Only since the parties' public announcement on May 15, 2004 have the complex details of the proposed agreement been permitted to be revealed to the public, including our tribal public.

This proposed settlement can be described accurately as a hybrid of Indian water rights resolutions and related Endangered Species Act agreements. Other witnesses before you today will describe its ESA provisions. For the tribe, the proposed settlement at its core is about ensuring water for fish and water for the Nez Perce people in fulfillment of the 1855 and 1863 treaties with the United States.

For the tribe, the resolution of its water rights claims in SRBA—decreasing Winter's rights on our reservation, as well as the rights to springs on Federal public lands in the 1863 ceded territory would provide, along with other provisions of the settlement, various important benefits for our people. There would be in-stream flows established under State law on approximately 200 streams of importance to the tribe in our aboriginal territory; BLM lands on the reservation transferred in trust to the tribe; Federal fish hatchery agreements; and a new flow-release agreement at Dworshak Dam on the North Fork Clearwater River.

There would be appropriations of Federal funds in consideration of tribal waivers that would enable our people to make needed improvements to drinking water and sewer systems on our reservation; and land and fish habitat improvements throughout our aboriginal territory. And I will say again how critical it is that nothing in this proposed settlement changes our treaty fishing, hunting, pasturing, and gathering rights.

The settlement of the tribe's SRBA claims involves difficult compromises for us. Other parties have made compromises and it is the collective offerings made by all parties to which the tribe looks in examining the overall merit of the proposed agreement.

It is the same set of collective provisions to which all residents of Idaho and the Pacific Northwest will look for ultimate benefits to salmon population recovery. In important respects, this proposed settlement offers a new model for future conduct in our relationship with the State of Idaho in particular, when compared to the expensive, time consuming and uncertain path of litigation. A mutual respect between the state and tribe as sovereign governments underlies this proposed agreement in ways that contrasts with the hostility of litigation.

It has taken a certain amount of courage and commonsense on the part of all parties to make it to this point, and I respect that and hope you do as well. The path of continued fighting in court begun 17 years ago could well continue for another decade if this effort were to fail.

The parties to the proposed settlement have committed to each other a final completion and approval date of March 31, 2005. By that date, a number of things need to occur, including the final approval of all three sovereigns: the United States, the Nez Perce Tribe and the State of Idaho.

A final Nez Perce decision will occur through NPTEC or a decision of the tribe's general council, or some coordination of those governing bodies. We are involved in an ongoing process of informing our tribal members that will take several months. We are committed to taking the time necessary to ensure that tribal members are fully informed and have their questions answered before a final decision is made.

Because we have just emerged from a 5-year period of confidential mediation, our public information process is particularly important. At the same time, because of your busy schedule, particularly in this election year, we are here to inform you and gain your support at this relatively early point in the final approval process.

When we look forward to March 31, 2005 and set out the work needed to complete the settlement, we know that we must be here today informing you and answering your questions to have a chance of meeting that goal. Much work remains, work that we are actively engaged in, but that will take several months more to complete—implementing parts of the proposed agreement that require additional detail, answering questions of the Indian and non-Indian public in Idaho, and reaching out to the downriver tribes and non-Indian public in Oregon and Washington. I do not underestimate the work ahead in passing this bill through Congress.

I thank you for your time and willingness to listen, and for the opportunity to provide you with these comments and my written statement. I am pleased to answer any questions you may have.

[Prepared statement of Mr. Johnson appears in appendix.]

Senator INOUE. Thank you very much, Mr. Chairman.

Before asking questions, I have the honor of presenting and calling upon my colleague, the illustrious Senator from Idaho, Senator Craig.

STATEMENT OF HON. LARRY CRAIG, U.S. SENATOR FROM IDAHO

Senator CRAIG. Mr. Chairman, thank you. I say that, Mr. Chairman, Ranking Member, but always chairman of this committee and the fine work you have done, Senator, on behalf of Native Americans in the work of this committee.

I am here only briefly, but I did want to catch the comments of Chairman Johnson, and thank you very much, Mr. Chairman, for the work of the Nez Perce and cooperating with the State of Idaho and the Federal Government in getting us to this point with S. 2605.

I welcome all who are here today on behalf of this legislation. We are moving it as quickly as we can, having received it from the negotiators very recently. I thank them for the work they have done over the last good number of years.

I think in my statement this is probably the thought that brings me here and brings most Idahoans collectively to this point. Once this legislation is enacted, and the chairman referenced this, years of protracted litigation that has caused considerable uncertainty and drained life from Idaho's economy, can come to a close.

Though much I think still needs to be done across the State, and the chairman spoke of informing his members. Certainly, that will

be true of all Idahoans, whether it be at the State level or tribal government levels.

The important thing is that officially this will end litigation when enacted. I think most importantly, it is a milestone in the State's 114-year quest to control its water destiny. It has been done at home in the State of Idaho by the interested parties involved, where it should be. But because of the magnitude of it and the character of it, we collectively, Mr. Chairman, have to put the final stamp of approval on it.

In Idaho, this is not unanimously received by all parties. There are concerns and frustrations, but all I think recognize the importance of bringing this issue to a resolution and the legislation does so. So we thank you for the timely movement of this committee in the short session that we are in, and hope that able to complete it this year.

Thank you, Mr. Chairman.

Senator INOUE. As the saying goes in our Senate, what Larry Craig wants, Larry Craig gets. [Laughter.]

I was impressed by your statement, Mr. Chairman, that for 5 years you have had mediation that members of your tribe and the community were not aware of.

Mr. JOHNSON. Mr. Chairman, that was the 5-years of negotiations.

Confidential negotiation ordered by the SRBA court.

Senator INOUE. In this city, if you said something now, we would give you 5 minutes and it would be leaked out. You have kept yours secret for 5 years? Congratulations. [Laughter.]

I know this will be a success if you can do that.

Are there any details of the bill that remain to be resolved by the parties before everything can be addressed action? I assume that the bill itself does not end.

Mr. JOHNSON. No; it does not. In fact, we have, as stated in the testimony, until March 31, 2005, where there are many processes in motion at this time, not just the Senate bill, but agreements on hatcheries. There are many technical people within our organization, the State of Idaho and the other parties to bring this all on line and provide by March 31, 2005 when all parties must make a decision, to have everything in place. Should that decision be to go forward by all parties, then everything would be put in motion all at once.

So you have hatchery agreements. You have people looking at the land transfer and prioritizing right now. So many of the things spoken of in this testimony and many of the things that are more important on the term sheet are presently ongoing and will require a lot of work up to completion of this process

Senator INOUE. Are the discussions ongoing now? Or are they waiting for the passage of this bill?

Mr. JOHNSON. No; this is a machine that has many parts ongoing right now.

Senator INOUE. Well, I can assure you, Mr. Chairman, that this committee will do its best to work on this measure and pass it, so you will have some resolution.

Mr. JOHNSON. Thank you very much.

Senator INOUE. This will be our Christmas present to you, sir.
Mr. JOHNSON. Okay. Thank you very much, Mr. Chairman. If there is anything more?

Senator INOUE. No; we have another panel here. I would suggest you may want listen to what they have to say.

Mr. JOHNSON. Okay. Thank you very much, Mr. Inouye. Thank you, Senate Committee on Indian Affairs.

Senator INOUE. Thank you very much, sir.

Our final panel consists of the counsel of the Office of Governor Kempthorne of Boise, ID, Michael Bogert; the counsel of Ling, Robinson and Walker of Rupert, ID, Roger Ling; and the executive director of the Intermountain Forest Association of Coeur d'Alene, ID, Jim Riley.

Shall we begin with Mr. Bogert? Welcome, gentlemen.

**STATEMENT OF MICHAEL BOGERT, COUNSEL, OFFICE OF
GOVERNOR KEMPTHORNE**

Mr. BOGERT. Mr. Vice Chairman, thank you for having us. I bring greetings from Governor Kempthorne, who with great disappointment could not be with the committee today. He is chairing his final day as chairman of the National Governors Association in Seattle. As you know, Senator and others, one of his joys is to come back to the Senate and visit with his former colleagues and friends. He sends his regrets that he could not be with us here today.

Senator INOUE. Would you tell the Governor we miss him here?

Mr. BOGERT. He will be pleased to hear that, Mr. Vice Chairman.

Mr. Vice Chairman, the agreement that is before this committee today is the result, as you have already heard, of several years of difficult discussions and compromise. As already mentioned by Senator Craig, water is very important in our arid State of Idaho and even more important to our people is the protection of it.

Having said that, the parties to the negotiations over the Nez Perce Tribe's water rights claims were able to reach a settlement agreement, while remaining true to their fundamental beliefs over water and protection of endangered species. There have been times during the past few years when the path we were on seemed to be leading away from the negotiating table and back into the courtroom. Time and again, we decided to come back to the table and keep the discussions moving forward.

The result is that we have formed, and Chairman Johnson touched upon this, stronger bonds with each other and between our respective governments so that the path now leads from a celebration several weeks ago in Boise to our appearance before you today in this committee.

Mr. Vice Chairman, in order to provide a bit more insight into Idaho's perspective on this settlement, let me give you a brief bit of background on the SRBA. In 1985, the Idaho legislature laid out a process to adjudicate the water rights claims that ultimately concluded in this agreement in the Snake River Basin known as the Snake River Basin Adjudication, or as we have been referring to it today, the SRBA.

As you can imagine, adjudicating or resolving all of the competing interests for Idaho water has been a monumental task. In the beginning, there were nearly 150,000 water rights in question, and

we had contested claims of 38 of Idaho's 44 counties. The Nez Perce Tribe, as they were entitled to do under the SRBA, filed their claims in the adjudication.

When the Governor took office over 5 years ago, one of his priorities was to tackle the tribe's claims head-on and come to a much-needed resolution. The Governor's directive to the State's negotiators to make progress on the tribe's claims was clear. Any resolution had to maintain our state sovereignty. It had to protect our State water rights, and it had to protect state water law by resisting any federally-reserved water rights.

After 5 years of back and forth, and frankly sometimes intense negotiations, we reached the agreement that is before you today that has accomplished, we believe, Mr. Chairman, all of these goals. The benefits of this agreement for Idaho are that we have protected our State sovereignty, provided long-term certainty for our agriculture interests in our state, and provided future opportunity for Idaho and her stakeholders to chart their own destiny under the Endangered Species Act.

This agreement protects Idaho's sovereignty by maintaining our system of water law and our existing water rights and water rights holders, which is a process familiar to this committee in traditional tribal water rights settlements. It provides certainty for the Nez Perce Tribe by resolving their water rights, and as mentioned by Senator Craig, the end of protracted litigation through the SRBA, as well as certainty for our Idaho water user community and important stakeholders in our natural resource-based economy because of the protections contained in the agreement for the next 30 years.

It provides opportunity by setting forth a new way of going about protecting endangered species, while preserving access to state and private timberlands for our resource-based industries and the rural communities that depend on Idaho's forests.

We will speak about this more in depth, but one opportunity worth highlighting in particular as a result of this agreement is that in some key parts of our state that support important, ESA-listed fish habitat, irrigators may now have a choice to forego water they would otherwise be entitled to fully divert under their state water rights, in exchange through a program that we are still working on as we speak, for protection under the Endangered Species Act.

Mr. Vice Chairman, this is an innovation in a State like Idaho 5 years ago, if we could have predicted that this would have been a possible outcome, would have boggled our minds. In this instance, there is a real possibility of a win-win for our agriculture community as well as ESA-listed fish.

Finally and importantly, almost \$200 million will be authorized in this legislation for the State of Idaho, the tribe and Federal agencies to implement the agreement.

Mr. Vice Chairman and members of the committee, this legislation is of no small significance for the State of Idaho and for state, Federal and tribal government-to-government relations. This process has spanned four Administrations in Idaho and two Administrations in the White House. The state, the Nez Perce Tribe, numerous Federal agencies, water user organizations and some of our

state's largest and most important irrigation districts came to the table, many times at the behest of the Governor in his office, to overcome their differences and achieve a solution that is best for the entire State and our stakeholders.

There has been some discussion about the process. Admittedly, I think everyone who will be before the committee today will testify that the agreement before you is a compromise and thus is inherently imperfect. But we are extremely confident, Mr. Vice Chairman, that the process we undertook was all that we could have asked of ourselves, of the people that we represent and our stakeholders that we are trying to protect and defend.

As we have traveled about the State and discussed this with the people who are wondering what is in this agreement, we have found and we have related stories of the fact that we went beyond our mere negotiating positions in these discussions. We took the time, Mr. Vice Chairman, to understand what our interests were. That is the only reason that we stayed at the table for the 5 years of this process. It was important to us. We understood what was important to the tribe, and the tribe, to their great credit, understood what was important to agriculture in Idaho and our resource-based industries. For that, we have great respect for the tribe.

As this committee reviews the agreement you have asked to approve, we believe you will find that it could very well be a national model for future tribal water settlements of this type. Now that we have agreed to these terms, there is still work ahead. Governor Kempthorne is working closely with Senators Craig and Crapo, and he looks forward to partnering with them, as well as the members of this committee, as this legislation now moves through Congress.

Mr. Vice Chairman, we appreciate the work of the committee staff, particularly Marilyn Bruce, your committee's chief clerk, to help us get ready for the hearing today. Governor Kempthorne wants to again publicly thank Chairman Johnson and his predecessor Sam Penny for their leadership, and again acknowledge publicly the commitment from the Nez Perce Tribe to proceed forward with this settlement.

The Governor greatly appreciates Idaho's water users and the countless others who agreed that working together for a solution was a better outcome than litigation and uncertainty.

Not to belabor the thank yous, Mr. Vice Chairman, but we especially appreciate the efforts of Ann Klee of the Department of the Interior who was the lead Federal negotiator on this, as well as Clive Strong from the Idaho Attorney General's Office who was our lead negotiator as well.

We are grateful for the opportunity to describe for you what we think is one of the most important and exciting developments in the Indian water rights area in the country, and we are proud of what we have accomplished and the partnerships that have developed as a result of this process.

We know that the next few weeks bring great challenges if we are to succeed in this legislative session of Congress, but we also know that with great challenges come great opportunities. We look forward to working with you in the days ahead to provide your and your staff with the information you need to help us achieve the

promise of this agreement so important for the people of Idaho and so important for the tribe.

Thank you, Mr. Vice Chairman.

[Prepared statement of Mr. Kempthorne appears in appendix.]

Senator INOUE. I thank you very much, Mr. Bogert. I will call on the other members of the panel before asking questions.

May I now call upon Mr. Roger Ling.

STATEMENT OF ROGER LING, COUNSEL, LING, ROBINSON & WALKER

Mr. LING. Thank you, Vice Chairman Inouye. It is an honor and pleasure to appear before the Senate Committee on Indian Affairs, especially you whom I have heard much about, but have not had the pleasure of testifying before your committee prior to today. I appear today as a representative of the water users of the Upper Snake River in southern Idaho in support of S. 2605.

A brief review of the efforts of water users in the Upper Snake Plain may be helpful to obtain a proper perspective on my comments. In 1987, the State of Idaho commenced what is known as the Snake River Basin Adjudication, a general river adjudication of the entire watershed of the Snake River from where it enters the State from Wyoming on the east to where it leaves the State near Lewiston, ID on the west.

Under this general adjudication, claims were required to be filed by all water users, claiming a right to divert or use water from the Snake River and its tributaries, as well as claims to any reserved water rights by the Federal Government and Indian tribes within the state, including the Nez Perce Tribe.

As the result of claims filed in the SRBA by the Federal Government in its own right and as trustee for the Nez Perce Tribe, a group of claimants in the SRBA consisting primarily of irrigation districts, canal companies, water districts and advisory committees of water districts formed a Federal claims coalition to address Federal and Nez Perce tribal claims.

In July 1998, claimants represented by the Federal claims coalition, the State of Idaho, United States, and Nez Perce Tribe tentatively agreed to proceed with a mediation of Federal and tribal claims. Mediation was ultimately ordered by the district court of the Fifth Judicial District of the State of Idaho in and for the county of Twin Falls, which has been designated as the SRBA court, and mediation ultimately culminated in a term sheet dated April 20, 2004, which is the subject matter of S. 2605.

The full significance of the mediator's term sheet and the interests of the Federal claims coalition may not be fully appreciated without some understanding of the Snake River and the interests of water users making a claim for use of the Snake River and its tributaries. The Upper Snake River Basin is generally divided into two segments. The first segment is being that portion of the Snake River and its tributaries above Milner Dam near Twin Falls, ID, which is a diversion structure used to divert all of the Snake River not previously diverted upstream by senior appropriators.

Anadromous fish have never existed in this portion of the Snake River. There are approximately 1,717,580 irrigated acres above this point, which include acres irrigated with groundwater which is

hydrologically connected to the Snake River. There are approximately one million acres irrigated from the Snake River and its tributaries below Milner Dam to the mouth of the Weiser River, with diversions primarily from the Snake River and the Boise, Payette and Weiser River tributaries.

As a part of the significant agriculture development relying upon the Snake River and its tributaries, there have been developed active storage facilities of approximately 7 million acre-feet, 6.3 million acre-feet of which are used for irrigation. Unfortunately, this storage space is not filled each and every year and substantial shortages can and do occur in times of drought similar to the drought we have experienced over the last 5 years.

It is therefore readily apparent that the agricultural community depending upon water for irrigation has significant and real concerns when there are additional claims made to the use of the water they have appropriated. The significant appropriation of the Snake River resulting in zero flows at Milner Dam does not tell the whole story. The Snake River begins to replenish itself below Milner from spring waters known as the Thousand Springs reach. As the result of these inflows to the river, the Snake River is soon replenished to a flow of approximately 5,000 cubic feet per second, and the flow increases to an average of 10,000 cubic feet per second at the Weiser gauge, which is generally considered to be below the last significant diversions from the Upper Snake River for irrigation.

Substantial litigation has occurred in the SRBA involving Federal and tribal claims to reserved water rights. It has become apparent to all concerned that negotiated settlements are the preferred method for resolving these claims, both from a financial perspective and for reaching finality and certainty in the outcome.

In the mediation of the Federal and tribal claims, however, it became apparent that a settlement of these claims would not necessarily result in finality as to the claims to the use of the water of the Snake River as additional demands could arise under the Endangered Species Act and Clean Water Act for which no claims would be filed in the adjudication.

Through the significant efforts of all parties concerned and their committed cooperation and desire to reach a resolution of these issues, the mediator's term sheet was ultimately agreed upon. Under the Snake River flow component of the mediator's term sheet, it is agreed by all parties, including water users represented by the Federal claims coalition, that the minimum in-stream flows established by the Swan Falls Agreement would be decreed in the SRBA to the Idaho Water Resource Board.

These minimum in-stream flows of 3,900 cfs average daily flow from April 1 to October 31 and 5,600 cfs average daily flow from November 1 to March 31 were affirmed to protect an in-stream power right senior to all rights acquired after July 1, 1985. It was also agreed in the mediator's term sheet that a term-of-the-agreement flow augmentation program would be implemented following in most respects the flow augmentation program that had been implemented, which allows for water to be leased on a willing lessor-lessee basis and for water right acquisitions to provide flow augmentation of up to 427,000 acre-feet per year from the Upper

Snake River. I would like to add, actually up to 487,000 acre-feet in good years.

Many terms of the flow augmentation program to be established are contained in the mediator's term sheet. It was further agreed that biological opinions will be issued for the term of the agreement, that is 30 years, which will provide incidental take coverage if necessary for all Federal actions and related private actions, including Bureau of Reclamation action in the Upper Snake River and related private depletionary effects as they may affect listed anadromous fish and listed resident species.

The mediator's term sheet provides that to the maximum extent practicable the United States shall be responsible for managing water acquired or rented pursuant to the agreement to meet needs of all species covered by the agreement, and in a manner that will not result in the violation of any permit, applicable water quality rule and regulation or other requirements of the Clean Water Act, and in a manner that will not cause jeopardy to other species in the State of Idaho or result in significant adverse impacts to recreational uses of the water in the Snake and its tributaries within the State of Idaho.

The mediator's term sheet describes the proposed Federal action for which consultation will take place under the Endangered Species Act. On the other hand, it provides that in the event that the services fail to issue no-jeopardy biological opinions and to provide incidental-take coverage, or if the services require terms or conditions inconsistent or not contained in the Upper Snake component, this component of the agreement shall be terminated upon written notice by the state or private parties to the agreement.

Finally, the Federal agencies which are parties to the agreement may seek additional Endangered Species Act flow measures from the Snake River Basin upon certain conditions that are set forth in the agreement. It is not conceded by the State of Idaho nor the private parties to the Snake River Flow component of the agreement that, by entering into the agreement, the flows identified will benefit the listed species; that BOR operations in the Upper Snake require ESA consultations, or that BOR operations in the Upper Snake are subject to modifications to meet ESA requirements or concerns, or that diversions, storage or use of water in the State of Idaho are subject to modification to meet ESA requirements or concerns. I might add, though, we are committed, however, to our conditions and our obligations under the agreement.

Of equal importance to the Federal claims coalition are the general conditions applicable to the entire agreement. Under these general conditions, certain Endangered Species Act and Clean Water Act assurances are provided under certain conditions and the Nez Perce Tribe and the United States waive and release all claims to water rights within the Snake River Basin in Idaho, injuries to such water rights, and injuries to the tribe's treaty rights, except to the extent provided in the mediator's term sheet.

I have not attempted to address all of the significant issues addressed by the mediator's term sheet, nor have I attempted to identify all terms that are extremely important to the Federal claims coalition. It is believed by the Federal claims coalition and all of the parties represented by the coalition that the mediator's term

sheet is an appropriate settlement of claims in the SRBA and provides water users in the Upper Snake River in the State of Idaho with some degree of certainty and finality in regard to future claims under the Endangered Species Act and Clean Water Act. It is for these reasons that we urge the passage of S. 2605 and the early implementation of the provisions in that bill.

Again, I would like to thank the vice chairman for the opportunity to present our views on S. 2605, and I am willing to answer questions to the extent my ability and knowledge allow.

Thank you.

[Prepared statement of Mr. Ling appears in appendix.]

Senator INOUE. I thank you very much, Mr. Ling.

May I call upon Mr. Riley.

**STATEMENT OF JIM RILEY, EXECUTIVE DIRECTOR,
INTERMOUNTAIN FOREST ASSOCIATION**

Mr. RILEY. Thank you, Mr. Vice Chairman. I am Jim Riley. I am the president and CEO of the Intermountain Forest Association in Coeur d'Alene, Idaho. We represent the forest businesses of our State, as well as the forest landowners.

I, too, am honored and gratified to be here today to express our support for S. 2605 and for this historic agreement that has brought to this spot. I am particularly proud of the collaboration of the colleagues that are on this panel and the work we have done with Chairman Johnson and the members of the Nez Perce Tribe to arrive at this point.

This agreement is unique. It is unique both in terms of its substance and of the people of the State of Idaho who collaborated to make it happen. It represents a significant change in our approach to public policy as it relates to water and natural resources. The fundamental premise here, which was really the vision of our Governor, Governor Kempthorne, is if we could not work together as Idahoans to refocus our energies and our investments on what could be possible, rather than in endless debates through the courts as to what is minimally required or minimal entitlements under law. In doing so, I think we have achieved a framework for benefits to publicly held fisheries resources, as well as private interests throughout the State.

Others on this panel before me have talked about the important water elements of this proposal as far as the State and tribal elements of this. I want to focus my attention on the forest and fisheries elements which are admittedly a minor, but integral part of what is before you today.

Just as a little bit of background, I want to advise the committee members that all forest management in Idaho is regulated and has been for some time by our state Forest Practices Act, which sets mandatory minimum requirements for forestry and forest-related activities on all forest lands throughout the State. This Act, as well as the performance of forestry in our State, makes Idaho's forestry some of the most environmentally and economically advanced anywhere in the world.

This agreement is not about providing fundamental threshold protections for endangered species under the Endangered Species Act in our State, because those requirements are being fully and

completely met by forestry today. What this agreement is all about is establishing a program for voluntary enrollment of landowners and forestry operations to provide additional benefits to species that might be diminished for one reason or another.

What is included in this agreement I call the forestry and fisheries component of the Snake River Basin Adjudication, are some important elements that build upon the fundamental threshold of the Idaho Forest Practices Act. The agreement in the term sheet outlines specific provisions agreed to by forestry interests, the State of Idaho and Federal fisheries experts from the Department of the Interior and from NOAA Fisheries as providing significant opportunities beyond those required by the Endangered Species Act to benefit fish species in forested habitats of Idaho covered by this agreement.

There are four essential elements of the forestry and fisheries provisions. The first and foremost platform, as it is in other elements of this program, is that participation is voluntary for landowners. It is voluntary because it establishes standards for forest management which go well beyond the requirements of current law. But we believe that these voluntary standards will be addressed and bring additional benefits to fish. Our initial expectation, based on preliminary feedback from potentially enrolling landowners is that this program will attract broad participation.

Second, there are specific standards articulated that will change the practice of forestry over time in Idaho, particularly as it relates to forest practices and forest operations in riparian areas, areas immediately adjacent to fish-bearing streams, and secondly as it relates to the construction of roads or other infrastructures in the forest. These standards are described in detail in the agreement term sheet, which the committee can review in some detail.

Third, there are recognized processes under this agreement for assessing existing forest facilities and infrastructures to identify those that are potentially limiting fish productivity in our State and mechanisms to replace and improve those limiting conditions where it is warranted. That is an important provision in our view in providing the elements of this agreement. The experts have agreed that we can provide more benefit to fish in Idaho by focusing our attentions first and foremost on historically evolved infrastructure that might be limiting fish productivity, than on additional measures on new activities that have yet to occur.

Last and perhaps also most importantly are the agreed upon provisions for adaptive management processes to continuously improve our collective understanding of the interaction between forestry and fisheries, and to improve the applications of the management practices over time. In this, all forest interests in our state are working together in a scientific framework to understand better what the implications are of various management practices on fisheries.

Over time, our expectations are for widespread enrollment of Idaho's private forest landowners, both small and large, as they come to understand the opportunities to enhance fish species consistent with the fundamental objectives for which they own their land and to gain the benefits afforded by this agreement.

Implementing the specific elements of the agreement's fisheries and forestry components is going to be accomplished principally through administrative channels currently authorized by law. We look forward to the good-faith efforts of the Federal agencies in carrying out their commitments to seeing this agreement through in the forestry and fisheries portion as well.

However, S. 2605 is needed for two very important reasons. First, forestry is just one part of this multi-party complex agreement. It is an integral part and the success or the failure of this entire agreement rises and falls upon the success or failure of the individual parts. So we fully support the parts of S. 2605 that might not directly support forestry.

Second is that the full benefits to the fish and forestry programs to be realized by this agreement need to be accomplished within the context of the agreement, including those authorized by S. 2605, and that the funding for the habitat restoration fund in the projects will be used in many cases to improve the infrastructure on forested lands.

In conclusion, Senators, I want to fully endorse S. 2605 as it authorizes important programs which benefit both the people of Idaho and the Nez Perce Tribe, but also is nationally justified as it provides essential support to species recognized as threatened or endangered under the Endangered Species Act.

This agreement is borne by a unique multi-party collaboration described in this hearing today, and I am honored to be part of the coalition which is before you.

I would be happy to answer any questions at this time.

[Prepared statement of Mr. Riley appears in appendix.]

Senator INOUE. Thank you very much, Mr. Riley.

If I may go back to Mr. Bogert, there is a provision in this act that seems to obligate the parties, including the United States, to call upon the Congress to amend certain environmental laws in order to carryout the terms of the agreement.

My question would be, how do you enforce this against the government of the United States? How do you force them to do something like this?

Mr. BOGERT. Mr. Vice Chairman, that was your question to the prior panel. I can tell you what the intent of the parties was in terms of our acknowledgement and understanding of the legal framework for the negotiations. I reference my answer by indicating that there is perhaps no former or current United States Senator with as much background of reforming the Endangered Species Act as Governor Kempthorne.

The side-bars and the ground rules for these negotiations, Mr. Vice Chairman, were that we would work within the existing confines of the Endangered Species Act and the Clean Water Act. The issues of implementation that I think you have pointed to in the agreement itself point to breathing life into the agreement through separate statutory enactments. For example, one of our obligations in Idaho, and Mr. Ling referred to that in his testimony, is that pursuant to our state law, the Bureau of Reclamation has the authority, and they have had such authority for the past several years, to obtain from willing buyers and willing sellers of water so that they can otherwise resolve their Endangered Species Act obli-

gations through the Bureau of Reclamation projects for flow augmentation.

The particular clause, Mr. Vice Chairman, that you referenced a moment ago on Mr. Olsen's panel, we have interpreted that as being a requirement that the State's obligation and the Governor's obligation to introduce legislation and in good faith advocate for a change in our existing State law is a part of the agreement.

I can tell you that having been through several of these negotiating sessions, the agreement itself, the term sheet that we have been discussing today, was negotiated within the current structures of the Endangered Species Act and the Clean Water Act. We would view it very problematic and I would think that this would be a constitutional law professor's dream question on an exam, if any judge could order the executive branch to introduce legislation and have enforcement of the agreement hinge on an act of Congress.

I think the legislation itself, Mr. Vice Chairman, speaks to what certainly the intent of the parties is by moving forward with the agreement. On page 21 of the legislation, lines 17-21, and this was negotiated, I might add, Mr. Vice Chairman, with the Department of the Interior, the Federal agencies with responsibilities. The reference in subsection B(1) says, nothing in this act is intended to amend, supersede or preempt any State law, Federal law, tribal law, or interstate compact.

Mr. Vice Chairman, it was the intent of all of the negotiators not only within the term sheet, as well as those of us who are before you today on the Senate bill, that there would be no separate substantive amendments of any of the existing Federal laws that otherwise are impacted by this agreement.

Senator INOUE. But there is another phrase before that saying, except as expressly provided in this act. Is there anything expressly provided in this Act that would say you can amend, supersede or preempt any State, Federal law, or tribal law?

Mr. BOGERT. Mr. Vice Chairman, that is correct, and the operative provision of the bill as we see it is in section 4, page 5, lines 9-10. The act of this legislation in this Senate bill is to approve, ratify and confirm the agreement itself. So we have viewed the legislation, S. 2605, as being self-contained both in terms of approving the agreement itself and then expressly intending through the language itself that there shall be no effort or interpretation of this bill to amend the Endangered Species Act or the Clean Water Act.

Senator INOUE. Thank you.

Mr. BOGERT. Mr. Vice Chairman, I apologize. We would be pleased to followup with you and your staff in terms of clarifying that that it is indeed the intent of this legislation.

Senator INOUE. I hope you will, sir.

Is there anything in this bill that remains to be negotiated, or have you finished negotiations?

Mr. BOGERT. Mr. Vice Chairman, as Chairman Johnson indicated, we are in the throes of many pieces of implementation. There are discussions as we speak about some of the Endangered Species Act understandings and section six agreements as contemplated in the term sheet. Those are ongoing as we speak.

Senator INOUE. So you agree with the Chairman?

Mr. BOGERT. Yes; we do.

Senator INOUE. Mr. Ling, in your testimony you note that the State and private parties may terminate the agreement if it becomes impossible to obtain a no-jeopardy statement for species listed under the Endangered Species Act. If you terminate the agreement, what options would be available to you and other parties? Would you then be required to obtain incidental-take permits under section 10 of the ESA?

Mr. LING. Mr. Vice Chairman, those provisions, and I might note, I have been involved in the negotiations from the very beginning on behalf of water users. We recognized at the beginning that there was no way that we could negotiate any kind of a change to the Endangered Species Act or the Clean Water Act. We had to couch an agreement consistent with those acts.

We think that we have done that, and that the agreement will be consistent with the obligations of NOAA Fisheries and the Bureau of Reclamation under the Clean Water Act and certainly under the Endangered Species Act. But in order to provide relief, because we have not agreed that our commitments are something that are actually required, and that is something that we are going to provide those things, but we have not agreed that they are necessary.

So our only alternative would be if in fact under the Endangered Species Act it should be determined that what we have agreed to do is not sufficient, and incidental-take is a fact as a result of the operation of the Upper Snake or some substantial effects on critical habitat is a result of the operation of the Upper Snake operations of the Bureau of Reclamation. Then that is a whole new ball game because now we have a commitment that we had not anticipated. The only thing we could do is say that we then want out of our agreement.

I guess we would have to go back and negotiate in the event there was, say, a court decision which said we have not done enough, or we would litigate that issue to prove that maybe we do not have any obligation at all. But that was the only relief that we could have because we are not going to bind any agency under their obligations under existing acts.

It goes the same way to the question you previously asked on whether or not we anticipated there would be any obligation to amend the ESA or the Clean Water Act. We particularly refrained from doing that, knowing that that would not be possible for us to agree to and no agency could agree to that. We do say that we ought to have necessary legislation and everybody has to work to that and to implement the agreement. That would be like the Bureau of Reclamation, how much it can pay for the lease of water to meet its obligation under the agreement may need congressional approval.

Whether or not they can mitigate properly, and we would expect that if there are any questions about their ability to mitigate the loss of power production for reserve power users, for instance by using powerhead water for augmentation, we want to make sure that, and we have provided that they would seek legislation to assure that could be done within the terms of the agreement.

Senator INOUE. My final question is to Mr. Riley. This bill has a planned cooperative agreement under section 6 of the Endangered Species Act. Does that agreement permit private parties to the agreement to obtain incidental-take permits under that act?

Mr. RILEY. We understand that under section 6 of the Endangered Species Act, the State would be provided the authority by the Federal Government to enroll private landowners who wish to step up and enroll and to obtain a permit for inclusion under a State permit for incidental take.

The interesting conundrum of the Endangered Species Act today is that a private landowner who wishes to act in a way that will increase the viability of a listed population of species on their own land has then attracted to themselves quite a liability under a risk of future litigation as to whether they harm the very species that they helped create.

That is the fundamental problem we are trying to overcome here, Senator. So section 6 would be used to establish a cooperative agreement between the Federal Government and the State, which is expressly what section 6 is for, which would allow the State to establish a programmatic process to enroll landowners, with which to embrace the supplemental measures, and therefore obtain incidental-take permit authority if there was any alleged harm to the species they help benefit.

Senator INOUE. That is a rather clever move, that cooperative agreement.

Mr. RILEY. I think that it is not only clever, it is quite insightful. It has changed the application of endangered species law or seeks to in Idaho, from rather than just trying to stimulate private parties to do the minimum necessary, to truly embrace the notion that if you act to benefit species, that you will not be jeopardized by having taken those actions, and that you can do so in a way which adds value to your ownership and your asset base.

Senator INOUE. I ask those questions as a preface to the statement I am about to make.

It is the committee's understanding that the parties have identified certain provisions of the bill that are incomplete or that need modification or correction. You have indicated that you are still in the process of negotiation.

Therefore, may I call upon the parties to assure that the committee is provided with an agreed-upon final product as soon as possible so that we can have a markup in September. A markup is when the committee acts upon the bill.

We will be suspending our activities for the August recess beginning this Saturday, because on Sunday the Democrats go to Boston for their convention and all of August members go back to their States. At the end of August, the Republicans go to New York for theirs and we return on September 7. So if you could have a product that has been agreed to by all parties, we promise you we will act upon it as soon as we can.

Is that okay?

Mr. BOGERT. Mr Vice Chairman, absolutely.

Mr. LING. It is certainly fine for the water users.

Mr. RILEY. We should have it to you by next week, in my view.

Senator INOUE. Mr. Chairman, would that be all right with you?

Well, with that assurance we will look forward to receiving your work product in September.

[Whereupon, at 11:15 a.m. the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF DIRK KEMPTHORNE, GOVERNOR, IDAHO

Mr. Chairman and distinguished members of the committee, it is with great pride that I submit this testimony in support of your consideration of S. 2605, the Snake River Water Rights Act of 2004.

This bill is the result of a monumental collaborative effort by the State of Idaho with the Nez Perce Tribe, the Bush administration, our resource industries, and our water user community.

In Idaho, when you can have the intensity of the negotiations we have had involving water over the last few years and leave the table with a deep, and abiding respect for each other, that is a great accomplishment.

We certainly have a great respect for the Nez Perce Tribe as our partners in this process, and this agreement represents a remarkable success story.

We announced the agreement on May 15, 2004, and before describing what the agreement means to us, let me provide some background on how we arrived at this moment.

In 1985, the Idaho Legislature laid out a process to adjudicate water rights claims in the Snake River Basin, known as the Snake River Basin Adjudication, or the SRBA.

The first claims in the SRBA were filed 2 years later.

As you can imagine, adjudicating—or resolving—all of the competing interests for Idaho water has been a monumental task.

In the beginning, there were nearly 150,000 water rights in question. There were contested claims in 38 of Idaho's 44 counties.

After some early jurisdictional issues were resolved in the SRBA, Idaho is now on the verge of adjudicating the water rights of many of our State's most important water users, including several of our Native American governments.

Over those years, much work has been done.

With renewed emphasis, more than 80 percent of the claims were resolved by early 2002, the majority of which have taken place in the last 5 years.

Add to the mix the settlement of the claims of the Nez Perce Tribe, and we can truly see the light at the end of the tunnel for finishing up this important water adjudication which has received national attention.

The beginning of the water rights settlement now before your committee began in 1993, when the Nez Perce Tribe filed its claims as part of the adjudication process.

When I became Governor over 5 years ago, one of my priorities was to tackle these claims head-on and come to a much-needed resolution of them through the SRBA.

I directed my Office and the Attorney General's Office to begin negotiations in earnest with all parties.

When we began, our goal was simple.

In the context of negotiating a settlement for the Nez Perce Tribe's water rights, we challenged ourselves to develop a framework that would provide protection not

only for the tribe, but for our most significant water user interests that are impacted by any adjudication of water in our State.

My directive to the State's negotiators to resolve these claims was clear.

Any resolution had to:

- Maintain State sovereignty;
- Protect State water rights; and
- Protect State water law by resisting any federally reserved water rights.

After 5 years of back-and-forth and, frankly, sometimes intense negotiations, we reached an agreement that accomplishes all those goals.

Water is the lifeblood of Idaho, and harnessing this valuable resource has allowed our State to prosper.

The major interest protected in S. 2605 Idaho for is water.

There is no more important issue to the future of our State than water, and this legislation represents one of the single most critical milestones in our State's 114-year crusade to control its water.

What we achieved in this agreement is:

- Sovereignty;
- Certainty; and
- Opportunity for Idaho and her stakeholders to chart their own destiny under the Endangered Species Act.

This is as it should be.

This agreement protects Idaho's sovereignty by maintaining our system of water law and our existing water rights, which is a process familiar to this committee in traditional water rights settlements.

It provides certainty for the Nez Perce Tribe by resolving their water rights, as well as certainty for our Idaho water user community and important stakeholders in our natural resource economy because of the protections contained in the agreement for the next 30 years.

It provides opportunity by setting forth a new way of going about protecting endangered species while preserving access to State and private timber lands for our resource-based industries and the rural communities that depend on Idaho's forests.

Importantly, almost 200 million dollars will be provided to the State, Tribe, and Federal agencies to implement the agreement.

The promise of this agreement is that the farmer in Rexburg, ID will know that he won't lose water that he was counting on to irrigate his crops for decades to come.

The logger in Orofino knows he'll have access to State or private timber lands to provide a livelihood for his family, but under a negotiated framework that protects important fish and wildlife.

And the Port of Lewiston will remain a viable gateway to the world for Idaho products for the foreseeable future.

Many individuals and groups have devoted countless hours to get where we are today.

This process has spanned four administrations in Idaho, and two administrations in the White House.

The State of Idaho, the Nez Perce Tribe, numerous Federal agencies, water user organizations, including the committee of Nine, the Federal Claims Coalition, and some of our State's largest and most important irrigation districts came to the table—many times in my office—to overcome their differences and achieve a solution that's best for the entire State.

I know that as you review the agreement you are asked to approve through this legislation, you will find that it could very well be a national model for future settlements of this type.

Now that we have agreed to these terms, there is still more work ahead of us.

This agreement requires your approval.

We are working closely with Senators Craig and Crapo, and I look forward to partnering with them as this legislation moves through Congress.

State legislation is also needed, and I intend to have a package of bills drafted and ready for the next session of the Idaho Legislature.

The Nez Perce Tribal government also needs to ratify the agreement.

Once those actions are completed, all parties will seek approval by the SRBA court.

Mr. Chairman and members of the committee, this legislation is of no small significance for the State of Idaho and for State, Federal, and tribal government-to-government relations.

When we announced the agreement on May 15 in Boise, I paused and observed the parties who joined us on that day.

I saw them enjoying the moment and each other in celebration of what was achieved through this agreement.

These were parties who were once adversaries.

I thought then as I do now that the alternative—several more years of litigation with the prospect that the ultimate outcome could be resolved by the U.S. Supreme Court—was no alternative at all.

I want to thank Chairman Johnson and his predecessor Sam Penny for their leadership, as well as the commitment from the Nez Perce Tribe to proceed with this settlement.

I greatly appreciate Idaho's water users and countless others who agreed that working together for a solution was a better outcome than litigation and uncertainty.

I want to thank the dedication of the Bush administration; Secretary Norton and her team, including Ann Klee; also John Keys, Commissioner of the Bureau of Reclamation; Bob Lohn of NOAA Fisheries; Clive Strong from the Idaho Attorney General's Office as well as Michael Bogert, Jim Yost, and Jim Caswell from my Office.

Mr. Chairman and distinguished members, I am grateful for the opportunity to describe for you what we think is one of the most exciting developments in the Indian water rights area in our country.

Again, I am proud of what we have accomplished and the partnerships that have developed as a result of this process.

We know that the next few weeks bring great challenges if we are to succeed in this legislative session of Congress.

But with great challenges come great opportunities.

I look forward to working with you in the days ahead to provide you and your staff with the information you need to help us achieve the promise of this agreement.

Thank you.

PREPARED STATEMENT OF ROGER D. LING ON BEHALF OF FEDERAL CLAIMS
COALITION UPPER SNAKE RIVER WATER USERS

It is an honor and pleasure to appear today before the Senate Committee on Indian Affairs as a representative of water users in the upper Snake River plain of Southern Idaho in support of S. 2605. A brief review of the efforts of water users in the upper Snake River plain may be helpful to obtain a proper perspective of my comments. In 1987, the State of Idaho commenced what is known as the Snake River Basin Adjudication [SRBA], a general river adjudication of the entire watershed of the Snake River from where it enters the State from Wyoming on the east to where it leaves the State near Lewiston, ID on the west. Under this general adjudication, claims were required to be filed by all water users claiming a right to divert or use water from the Snake River and its tributaries, as well as claims to any reserved water rights by the Federal Government and Indian tribes within the State, including the Nez Perce Tribe. As the result of claims filed in the SRBA by the Federal Government in its own right and as trustee for the Nez Perce Tribe, a group of claimants in the SRBA consisting primarily of irrigation districts, canal companies, water districts and advisory committees of water districts formed a "Federal claims coalition" to address Federal and Nez Perce Tribal claims. In July 1998, claimants represented by the Federal claims coalition, State of Idaho, United States, and Nez Perce Tribe tentatively agreed to proceed with a mediation of Federal and tribal claims. The mediation was ultimately ordered by the District Court of the Fifth Judicial District of the State of Idaho, in and for the county of Twin Falls, which had been designated as the SRBA Court. Mediation ultimately culminated in a "term sheet" dated April 20, 2004, which is the subject matter of S. 2605.

The full significance of the Mediator's Term Sheet and the interests of the Federal claims coalition may not be fully appreciated without some understanding of the Snake River and the interests of water users making a claim to use of the Snake River and its tributaries.

The Snake River basin is general divided into two segments, the first being that portion of the Snake River and its tributaries above Milner Dam near Twin Falls, Idaho, which is a diversion structure used to divert all of the Snake River not previously diverted upstream by senior appropriators. Anadromous fish have never existed in this portion of the Snake River. There are approximately 1,717,580 irrigated acres above this point, which include acres irrigated with ground water which is hydrologically connected to the Snake River. There are approximately 1,042,460

acres irrigated from the Snake River and its tributaries below Milner Dam with diversions primarily from the Snake River and the Boise, Payette and Weiser River tributaries. As a part of the significant agricultural development relying upon the Snake River and its tributaries, there has been developed active storage facilities of approximately 7 million acre-feet, 6.3 million acre-feet of which is used for irrigation. Unfortunately, this storage space does not fill each and every year and substantial shortages can and do occur in times of drought similar to the drought that we have experienced over the last 5 years. It is therefore readily apparent that the agricultural community depending upon water for irrigation has significant and real concerns when there are additional claims made to the use of the water they have appropriated.

The significant appropriation of the Snake River resulting in zero (0) flows at Milner Dam does not tell the whole story. The Snake River begins to replenish itself below Milner from spring waters known as the Thousand Springs reach. As the result of these inflows to the river, the Snake River is soon replenished to a flow of approximately 5,000 cubic feet per second (cfs), and the flow increases to approximately 10,000 cfs at the Weiser gauge which is generally considered to be below the last significant diversions from the upper Snake River for irrigation.

Substantial litigation has occurred in the SRBA involving Federal and tribal claims to reserved water rights. It has become apparent to all concerned that negotiated settlements is the preferred method for resolving these claims, both from a financial perspective and for reaching finality and certainty in the outcome. In mediation of the Federal and tribal claims however, it became apparent that a settlement of these claims would not necessarily result in finality as to the claims to the use of water of the Snake River, as additional demands could arise under the Endangered Species Act [ESA] and Clean Water Act, for which no claims would be filed in the adjudication. Through the significant efforts of all parties concerned and their committed cooperation and desire to reach a resolution of these issues, the Mediator's Term Sheet was ultimately agreed to.

Under the Snake River flow component of the Mediator's Term Sheet, it was agreed to by all parties, including water users represented by the Federal claims coalition, that the minimum instream flows established by the Swan Falls Agreement would be decreed in the SRBA to the Idaho Water Resource board. These minimum instream flows of 3900 cfs average daily flow from April 1 to October 31 and 5600 cfs average daily flow from November 1 to March 31 were affirmed to protect an instream power water right senior to all rights acquired after July 1, 1985. It was also agreed in the Mediator's Term Sheet that a term-of-the-agreement flow augmentation program would be implemented following in most respects the flow augmentation program that had been implemented, which allows for water to be leased on a willing lessor-lessee basis and for water right acquisitions to provide flow augmentation of up to 427,000 acre-feet per year from the upper Snake River. Many terms of the flow augmentation program to be established are contained in the Mediator's Term Sheet. It was further agreed that biological opinions will be issued for the term of the agreement (30 years) which will provide incidental take coverage, if necessary, for all Federal actions and related private actions, including Bureau of Reclamation [BOR] action in the upper Snake River and related private depletionary effects as they may affect listed anadromous fish and listed resident species. The Mediator's Term Sheet provides that, to the maximum extent practicable, the United States shall be responsible for managing water acquired or rented pursuant to the agreement to meet needs of all species covered by the agreement, and in a manner that will not result in the violation of any permit, applicable water quality rule and regulation or other requirements of the Clean Water Act, and in a manner that will not cause jeopardy to other species in the State of Idaho or result in significant adverse impacts to recreational uses of the water in the Snake River and its tributaries within the State of Idaho. The Mediator's Term Sheet describes the proposed Federal action for which consultation will take place under the Endangered Species Act. On the other hand, it provides that in the event that the services fail to issue no-jeopardy biological opinions and to provide incidental-take coverage, or if the services require terms or conditions inconsistent or not contained in the upper Snake component, this component of the agreement shall be terminated upon written notice by the State or private parties to the agreement.

Finally, the Federal agencies which are parties to the agreement may seek additional Endangered Species Act flow measures from the Snake River basin upon certain conditions that are set forth in the agreement. It is not conceded by the State of Idaho nor the private parties to the Snake River Flow Component of the agreement that, by entering into the agreement, the flows identified will benefit the listed species, that BOR operations in the upper Snake require ESA consultations, that BOR operations in the upper Snake are subject to modification to meet ESA require-

ments or concerns, or that diversions, storage or use of water in the State of Idaho are subject to modification to meet ESA requirements or concerns.

Of equal importance to the Federal claims coalition are the general conditions applicable to the entire agreement. Under these general conditions, certain Endangered Species Act and Clean Water Act, assurances are provided under certain conditions, and, the Nez Perce Tribe and the United States waive and release all claims to water rights within the Snake River basin in Idaho, injuries to such water rights, and injuries to the tribe's treaty rights, except to the extent provided in the Mediator's Term Sheet.

I have not attempted to address all of the significant issues addressed by the Mediator's Term Sheet, nor have I attempted to identify all terms that are extremely important to the Federal claims coalition. It is believed by the Federal claims coalition and all of the parties represented by the coalition that the Mediator's Term Sheet is an appropriate settlement of claims in the SRBA, and provides water users in the upper Snake River in the State of Idaho with some degree of certainty and finality in regard to future claims under the Endangered Species Act and Clean Water Act. It is for these reasons that we urge the passage of S. 2605 and the early implementation of the provisions in that bill.

Again, I would like to thank the committee for the opportunity to present our views on S. 2605, and I am willing to answer questions to the extent of my ability and knowledge.

PREPARED STATEMENT OF JAMES S. RILEY, PRESIDENT, INTERMOUNTAIN FOREST ASSOCIATION

Mr. Chairman and members of the committee, I am James S. Riley, president and CEO of Intermountain Forest Association [IFA] headquartered in Coeur d'Alene, ID. Our association represents forest land owners and forest businesses of Idaho.

IFA has a long history of developing and implementing solution-oriented policies for forest stewardship and conservation of our Idaho's remarkable and abundant forest lands. In addition, IFA provides expertise and creative opportunities for member landowners and businesses to develop cooperative relationships with other interests in forest policy.

I am honored to be here today to express our support for S. 2605, and present our views on this unique and historic agreement among the diverse interests of Idaho and the Nez Perce Tribe concerning water rights, fisheries, and forestry in Idaho. The agreement we have reached, among ourselves and with the Federal Government, is a remarkable accomplishment. All of the members represented by IFA—are proud of our role in securing this accomplishment. We are also proud of the successful collaboration we have formed with the other Idaho organizations and interests represented at this hearing today.

The legislation before this committee is the product of many years of work, much innovation, and much compromise by all involved. S. 2605 includes the essential legislative components of a broader Agreement referred to by sec. 4 the legislation. Other parts of the agreement will be accomplished administratively. Overall the Agreement resolves a long standing dispute over the water, fisheries and related resources of our state. This Agreement involves private, tribal, state, and Federal Government interests.

This Agreement is unique—both in terms of its substance and in terms of the diverse coalition of interests which have come together on the terms. As it is implemented it will bring significant benefits to the public wildlife resources, stability to the private sector by relieving the risk of continuous litigation, and support for the Nez Perce tribal fisheries programs. With the support of Congress, implementation of this Agreement and its component programs will allow land owners, resource managers for all sectors, and private and public interests to focus their energies and investments on management of our natural resources in a manner which brings significant benefits to fisheries resources, and allows for the continuation of free enterprise and resource economies of our State.

Others on this panel will discuss the important water user, tribal, and State elements of this proposal. I will focus my attention on the forestry-fisheries provisions, which are an integral part of this overall agreement.

The geographic areas covered by this agreement are the vast Clearwater and Salmon River basins of Idaho. This is the heart of our State and includes more than 20 million acres of land, of which 65 percent is forested. Seventy-five percent of the Clearwater Basin forest land, and nearly all of the Salmon Basin forests, are managed by the Federal Government as National Forests. Yet within the Clearwater basin there are 1 million acres of private forest lands, and an additional 336,000

acres of forest managed by the State of Idaho. The private forest lands are owned by both large commercial forest landowners, managed for sustained production of timber and related resources, and by small non-industrial landowners managed for a variety of purposes but commonly including timber harvest where this use meets the landowners' personal objective.

Forest management in Idaho is among the most environmentally and economically advanced anywhere in the world. All forestry activities are regulated by the Idaho Forest Practices Act which sets mandatory standards for all forest operations, including related activities such as road construction, road maintenance, and reforestation. The Idaho Forest Practices Act [FPA] standards are established by a board of experienced natural resource management professionals for the explicit purpose of ensuring forest stewardship and the long term sustainability of our forests, land, and water.

Forestry operations in Idaho are carefully and continuously monitored to ensure absolute compliance with the FPA standards, and to collect data for continuous improvement of those standards. The State of Idaho conducts periodic effectiveness monitoring with the Idaho Department of Environmental Quality and includes the Federal agencies responsible for certain wildlife and fisheries species. Data from this monitoring demonstrate and ensure that forestry in Idaho protect the fish species listed as threatened or endangered under the Endangered Species Act.

This Agreement is not about providing fundamental threshold protections for these species as required by law, because that requirement is being fully met by existing practices. This Agreement is all about providing a program for forest owners to provide additional support for listed fish species, beyond the minimums required by law.

The forestry-fisheries component of the Agreement uses the Idaho Forest Practices Act framework as a base for providing additional forestry measures to benefit fish in forested habitats. The additional measures are made available to voluntarily enrolling landowners who will then benefit from participation in the habitat improvement programs authorized by this agreement, secure protection from subsequent litigation over management of ESA listed fish species, and consequently add value to their lands. The agreement terms outline specific provisions agreed to by forestry interests, the State of Idaho, and Federal fisheries experts in the Department of the Interior and NOAA Fisheries, as providing additional significant opportunities, beyond those minimally required by the ESA, to benefit fish species in forested habitats.

Briefly there are four essential elements of the forestry-fisheries portion of this agreement.

First, and foremost, it is voluntary for private landowners. It is voluntary because it establishes standards for forest management which go well beyond the requirements of current law. Consequently land owners are provided an opportunity and incentives to participate. The initial expectation, based on preliminary feed-back from potentially enrolling landowners, is that this program will attract broad participation.

Second, there are specifically articulated standards for:

No. 1. Forestry operations in riparian areas;

No. 2. Road construction, particularly for stream crossings.

These standards are described in detail in the Agreement term sheet and will be mandatory for any voluntarily enrolling landowner.

Third, there are recognized processes for assessing existing forest facilities and infrastructures that are potentially limiting fish productivity, and mechanisms to replace or improve these limiting conditions when, identified.

Last, there are agreed upon "adaptive management" processes to continuously improve both our collective understanding of the interaction between forestry and fisheries, and to improve the application of the management practices.

Over time the expectation is for wide-spread enrollment from Idaho's private forest landowners, both large and small, as they come to understand the opportunities to enhance fish species, consistently with the fundamental objectives for which they own the land, and to gain the benefits afforded by this agreement. Today, private forestry interest in enhancing ESA fish populations is severely limited due to the increased exposure to litigation over alleged future harm to the very species a landowner helps promote.

Implementing the specific elements of the Agreement's forestry-fisheries component is being accomplished administratively, using the current authorities of sec. 6 of the Endangered Species Act, and the State authorities provided under the Idaho Forest Practices Act and related Idaho law. However, S. 2605 is needed for two important reasons. First, forestry is just one part of this multi-party, complex Agreement. S. 2605 gives important recognition to the entire agreement, and au-

thorizes essential non-forestry components. For the full benefits of the forestry-fisheries program to be realized, this program needs to be accomplished within the context of all the other components this Agreement, including those authorized by S. 2605.

Second, the funding authority established by this legislation will be available for qualifying forest habitat projects. The habitat improvement funding is essential to accomplish existing fish-limiting infrastructure improvements, and to maximize support for broad voluntary landowner participation.

Senators, S. 2605 will authorize important programs which benefit both the people of Idaho and the Nez Perce Tribe, but also is nationally justified as it provides essential support to species recognized as threatened or endangered under the Endangered Species Act. It is born by the unique multi-party agreement described in this hearing today. I am honored to be part of the Coalition which is before you today. IFA strongly and fully supports this Agreement and we urge its timely consideration and passage by this Congress.

**Senate Committee on Indian Affairs
Hearing on S. 2605
July 20, 2004
Prepared Statement of
Anthony D. Johnson, Chairman,
Nez Perce Tribal Executive Committee**

Thank you, Chairman Campbell and Vice Chairman Inouye and members of the Committee on Indian Affairs.

I am Anthony Johnson, Chairman of the Nez Perce Tribal Executive Committee, or NPTEC as we call it. I appreciate the opportunity to provide testimony today on Senate Bill 2605, the Snake River Water Rights Act of 2004, which would implement the proposed Snake River/Nez Perce Water Settlement. I would add my appreciation of the efforts and leadership of Senator Craig and Senator Crapo in sponsoring this important legislation.

The proposed settlement can be described accurately as a creative hybrid of Indian water rights resolutions and related Endangered Species Act agreements. We are here today because of the many parties who participated in good faith in the Snake River Basin Adjudication (the "SRBA") mediation over the last five years. The proposed settlement would provide important benefits for the Nez Perce people, and for the fish who are at the core of the claims we brought in the SRBA, but it includes difficult compromises for us. But first, I must tell you some of our history before I tell you more about this proposed settlement.

Nez Perce history: people, fish and water

Since time immemorial, the Nez Perce people, the Nimi'ipuu, occupied a geographic area encompassing a large part of what is today Idaho, Washington and Oregon. The territory exclusively occupied by the Nez Perce, over 13 million acres, stretched from the continental divide forming the border between Idaho and Montana in the Bitterroot Mountains on the east, to the Blue Mountains of northeastern Oregon on the west.

Fishing locations extended well beyond the exclusively occupied area, and throughout the Clearwater River drainage, the Salmon, Weiser and Payette River drainages to Shoshone territory; the Snake River above Lewiston through Hells Canyon; the Imnaha, Grande Ronde and Wallowa drainages in the present states of Oregon and Washington; the Snake River below Lewiston to the confluence with the Columbia River; selected areas on the Columbia River to Celilo Falls; and the Willamette River. It is estimated that at or before 1855, various bands of Nez Perce

occupied upwards of 130 villages and many more seasonal fishing camps throughout the area, with a total population of 4,500 - 5,000.

A color map depicting the aboriginal area of the Nez Perce Tribe and other modern-era boundary lines such as reservation boundaries and states is attached as Exhibit 1.

The region from which the Nez Perce obtained the great bulk of their subsistence resources was the Snake River drainage basin from roughly the mouth of the Weiser River downstream to the Palouse River, including the entire Salmon and Clearwater River tributary drainages. Sources of Nez Perce subsistence included fish, roots, berries and other plant products, and deer and other game.

Fish comprised up to one-half of the total food supply, with game and vegetable products comprising lesser amounts. The Nez Perce developed methods for drying and storing the seasonally abundant fish and plant resources. The cold months of winter were spent by the Nez Perce people in clusters of villages located along rivers and the lower courses of streams, which provided protected conditions and more moderate temperatures, as well as a source of food as stored foods diminished.

The principal fish was the salmon, including sockeye (red fish or blueback salmon), chinook (quinnat or tye salmon), and steelhead trout. In addition, the Nez Perce caught the cutthroat trout, Waha lake trout, the sturgeon, suckers, Dolly Varden and chiselmouth and the lamprey eel. These fish were caught throughout the Nez Perce aboriginal territory, including the Snake, Salmon and Clearwater Rivers and their tributaries, including but not limited to the Minam, Wallowa, Grande Ronde, Imnaha, Weiser, Selway, Tucannon, Lochsa, South, Middle and North Forks of the Clearwater, the Little Salmon, and their tributary streams and lakes.

Nez Perce attention turned to fishing for anadromous species in the spring when steelhead began to run in the rivers and streams. Sockeye salmon were first available in the Snake River in June and in the Clearwater River in July. Runs of chinook followed the sockeye and reached mountain streams by September, where they were also taken by the Nez Perce. Lamprey eel - considered a Nez Perce delicacy - and sea run suckers were plentiful in the Snake and Clearwater rivers by July, with at least one major eel spawning and catching area near present-day Asotin, Washington. Steelhead returned in the fall and tribal fish harvesting activities focused briefly on upstream locations before returning to the lower rivers. Steelhead and some salmon were taken through the winter to supplement the stores of dried fish.

Nez Perce fishers utilized a variety of equipment and techniques, each adapted to the conditions of the water and to the species, to harvest fish and freshwater shellfish. Dip nets, thrown nets, harpoons, spears, hooks, drift nets, seines, weirs, traps, walls, and other structures were all used by the Nez Perce.

The first recorded contact between Euroamericans and the Nez Perce occurred in September 1805, when the Lewis and Clark Expedition encountered Twisted Hair and other members of the Nez Perce Tribe shortly after they crossed the Rocky Mountains and descended down the west side of the Continental Divide into our country.

The Lewis and Clark journals note the existence of many Nez Perce Indian fishing places and fishing activities. For instance, William Clark's diary entry of September 15, 1805, notes that, "[w]e set out early, the morning cloudy, and proceeded on down the right side of the Kooskooskee [Clearwater] River, over steep points, rocky and bushy as usual, for 4 miles to an old Indian fishing place." The Nez Perce were generous, providing the expedition with food and other essential provisions. Even though the expedition arrived at a time when Nez Perce fishing activity was at a relatively low ebb due to the time of year, the Lewis and Clark journals record on several occasions how the Indians provided salmon and other fish, both fresh and dried, for the expedition's use.

Other Euroamericans, particularly missionaries and their families, had contact with the Nez Perce following the Lewis and Clark expedition, and had occasion to comment upon the Tribe's use of the abundant fishery resource. For example, on May 1, 1837, Reverend Henry H. Spalding wrote that his mission at Lapwai had received over the past two months from the Nez Perce "plenty of fresh trout [possibly steelhead], usually weighing from 8 to 10 lbs." In September of that year, he visited one of the fisheries and observed the Indians catching "202 large salmon weighing from 10 to 25 lbs. These fisheries will always be of great importance to this mission [Lapwai]." He stated that "there were probably as many taken at 50 other stations in the Nez Perce country.

The Nez Perce also engaged in an extensive trade network from the Pacific Coast into the Northern Plains with other Indian tribes, as well as with the early non-Indian explorers such as Lewis and Clark, and dried fish was an important commodity. Dried salmon, salmon pemmican, and salmon oil were among the items traded by the Nez Perce to other groups on the Northern Plains.

Nez Perce culture and subsistence activities revolved around the fish -- most notably salmon -- and water. Simply put, Nez Perce people defined, and define, themselves in terms of their association with, and relationship to, fish and water, and other natural elements. The testimony of tribal elders, together with that of expert anthropologists, establishes the values associated with fish and water to the Nez Perce people. Fish and water are materially and symbolically essential to Nez Perce people both in the present and the past; and declines in fish and water availability, primarily due to human environmental alteration and restrictions on access, have had devastating effects on our people and their culture.

The story of that devastation begins with the treaties between the Nez Perce and the United States. On June 11, 1855, Isaac Stevens and other representatives of the United States entered into a treaty with representatives of the Nez Perce Tribe, through which the Tribe ceded approximately 6.5 million acres to the United States in return for, among other things, and retained a reservation of approximately 7.5 million acres.

Article 3 of the 1855 Nez Perce Treaty provides, in part, as follows:

The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with the citizens of the Territory; * * *.

The events behind and leading up to the negotiations of the Treaty of 1855 at the Walla Walla Council have been the subject of scrutiny by anthropologists, historians, and ethnologists. An examination of the Treaty Council is critical to an understanding of how vitally important the right of continued access to the fishery resource was – and still is – to the Nez Perce people. As the Supreme Court noted in its seminal decision on Indian treaty fishing, these rights were as important to the Indians as “the air they breathed.” *United States v. Winans*, 198 U.S. 371, 381 (1905). What becomes crystal clear following an objective examination of history is that the United States understood full well the importance of the fishing right to the Nez Perce, and brought this understanding to the table at Walla Walla as a primary purpose for the 1855 Treaty.

It is necessary to proceed back in time a few years prior to 1855 to understand the full context of the events at Walla Walla. The United States claimed to have acquired legal title to the Pacific Northwest, including Nez Perce country, in 1792 when Captain Gray “discovered” the mouth of the Columbia River. Great Britain also claimed title by discovery, and the region was governed jointly by treaty from 1824-1846.

The Oregon Territorial Act was passed by Congress in 1848, creating the Oregon Territory, and expressly recognized Indian (and thus Nez Perce) title. The Washington Territory Organic Act of 1853 also expressly recognized Indian title. When Congress enacted the Oregon Donation Act in 1850, which gave title to lands to settlers, a conflict arose: the Oregon Donation Act grants could not become effective until Indian title was extinguished. The United States soon recognized the problem and determined to enter into treaties with the Indian tribes to resolve the apparent conflict.

President Franklin Pierce appointed Isaac I. Stevens as the first governor of the Washington Territory in 1853, a position which carried with it the superintendency of Indian Affairs for the Territory. In his first speech to the Territorial Legislature in February of 1854, he identified the problem Congress created by passing the Oregon Donation Act without first extinguishing Indian title, and proposed treaties with the tribes as the solution. In the summer of 1854, Stevens successfully lobbied Congress for

appropriations for the treaties, and met with Commissioner of Indian Affairs George Manypenny to develop a plan for the treaty process. Resolution of disputes over fishing rights was a high priority for Governor Stevens. He wrote Commissioner Manypenny in September 1854 to advise:

The subject of the right of fisheries is one upon which legislation is demanded. It could never have been the intention of Congress that Indians should be excluded from their ancient fisheries; but, as no condition to this effect was inserted in the donation act, the question has been raised whether persons taking claims, including such fisheries, do not possess the right of monopolizing. It is therefore desirable that this question should be set at rest by law.

Stevens selected his Treaty Commissioners and met with them on December 7 and 10, 1854, to prepare a model treaty to be used at the various councils. The new commissioners included George Gibbs, who had served in previous years on the councils negotiating treaties in western Oregon and northern California. All of these treaties created land reservations and reserved the right to fish at traditional fishing stations off-reservation. Gibbs had also, at Stevens' request, written a report on the tribes of the Washington Territory. In the report Gibbs stated that the Indians in the eastern region of the Territory "require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish, where they can be found"

Because of his experience and familiarity with the Indian fishing rights and their importance to the tribes, Gibbs was assigned the task of drafting the section of the model treaty which became Article III of the Walla Walla Treaty. He knew well from experience that the tribes would not treat with the United States unless their resources were protected. The draft contained the following fishing clause: "the right of taking fish at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory and of erecting temporary houses for the purpose of curing"

That the express, reserved fishing rights were the primary inducement to the Indians was recognized even before the time of the Walla Walla Council. For example, on April 13, 1855, Joel Palmer, Governor of Oregon and Superintendent of Indian Affairs for the Oregon Territory, wrote to George Manypenny advising him of the date set for joint treaty negotiations with the Nez Perce, and other tribes, and also advising him of the importance of fish in that process. "They rely much on fish for food," he wrote, "and a reserve lacking this almost indispensable article, would be strenuously opposed by them, and perhaps render a treaty impossible."

The Walla Walla Treaty Council was convened on May 29, 1855. The tribes involved included the Nez Perce, the Yakama, the Umatillas, the Cayuses, the Walla Wallas and several other tribes. Interpreters were selected and sworn in. The United States kept the official minutes of the Council. It is said that two Nez Perce kept

records of the proceedings, Timothy and Lawyer, but their minutes have never been found. Deliberations continued over a two week period.

Stevens first described to the assembled tribal representatives the concepts of their ceding title to lands but reserving therefrom and establishing "reservations" as exclusive homelands. Different Indian leaders had strongly held – and at times widely divergent – views and attitudes about the propriety of ceding land to the United States. Land was – and still is – sacred to the Nez Perce and other Indians. In the end the tribes, including the Nez Perce, agreed to cede title to vast amounts of land in exchange for the promise to recognize their reserved rights to hunt, fish and gather, exclusively possess certain lands, and to provide other consideration such as clothing, tools, mills, and teachers.

Just as with the treaties west of the Cascades, Governor Stevens knew that a fishing clause was an absolute prerequisite to any agreement with the Nez Perce. Accordingly, he included Article III, paragraph 2, in the very first draft of the treaty. In his talk to the Nez Perce, Stevens made much of the rivers and fisheries he proposed that the Nez Perce reserve:

Here (showing a draft on a large scale) is a map of the reservation. There is the Snake River. There is the Clear Water river. Here is the Salmon River. Here is the Grande Ronde river. There is the Palouse river. There is the El-po-wow-wee. * * * This is a large reservation. The best fisheries on the Snake River are on it; there are the fisheries on the Grande Ronde river. There are fisheries on the Os-ker-ma-wee, and the other streams. * * * You will be allowed to go to the usual fishing places [off the reservation] and fish in common with the whites, . . . ; all this outside the Reservation.

Later, at a critical moment when Stevens was trying to persuade the reluctant Nez Perce Chief Looking Glass, he said: "Looking Glass knows that in this reservation settlers cannot go . . . , [and] that he can catch fish at any of the fishing stations" Governor Stevens would later report to Commissioner Manypenny that the Walla Walla Treaties had reserved to the signatory tribes a "nearly inexhaustible Salmon" fishery.

That the treaty reserved right to fish at all usual and accustomed places was one of the primary inducements of the Nez Perce to sign the 1855 treaty is corroborated by a collection of affidavits of Nez Perce elders, several of whom were actually at the Treaty Council in 1855. These testimonials, executed as part of a Memorial of the Tribe to the United States Congress, dated August 14, 1911, 62d Congress, First Session, make the essential role of the fishing clause in the eyes of the Nez Perce even more apparent than the words of the government negotiators. A sampling of their statements concerning the fishing right follows:

Yellow Bull, age 86 in 1911, present at the signing of the treaty in 1855: "We also contended that we had the right to the game and fish in this vast territory, whether it was included in the ceded portion or the part that was reserved to ourselves."

George Amos, age 73 in 1911: "Stevens told the people that even though they ceded to the Government the hills, mountains surrounding them, they would still have access to hunt and fish on the ceded land and the right to the streams, springs, and fountains These privileges would belong to them no matter what conditions came over the country or what laws were passed."

Kol-Kol-Chaw-hin, age 89 in 1911; present at the council and the signing of the 1855 treaty: "The thing that finally reconciled the people and made them feel inclined to sign the treaty was the fact that we reserved the game and fish rights, camping, . . . on the ceded land. *** We made another treaty in 1863. *** . . . and other things promised and the same assurance given us to the rights of the fish and game and other privileges on the ceded lands."

Black Eagle, age 51 in 1911. Nephew of Chief Joseph. Respecting the reserved fishing rights in the 1855 treaty: "We have never given up those rights; we have never been paid for those rights; they have been taken from us [by the state licensing and season restrictions illegally being imposed thereon] without our consent and without our advice."

Stot-Ka-Yai, age 88 in 1911, present at the council and at the signing of the 1855 treaty: ". . . and when we relinquished over 12,000,000 acres we reserved the game and fish and the use of the streams, springs and fountains thereon. *** [I]n 1863 another treaty was signed and more land was sold, but that we still reserved our rights to fish and game, the use of streams, springs, and fountains"

Henry E-nah-la-lamkt, age 85 in 1911, was present at the council to the 1855 treaty: "While the treaty did not provide to pay us for the game or fish lost by reason of the large cession made, it did provide that we should still have access to the same [The treaty of 1863 provided] that we still have the right to hunt and fish on any of the lands formerly owned by the Nez Perces. *** The thing of the greatest interest to us at that time was the right and possession of the game and fish, and the fact that these were reserved to our people was considered as the greatest compensation for the cessions."

Respecting the paramount importance of the 1855 Treaty reserved fishing rights, Professor Dennis Colson of the University of Idaho has concluded:

It is clear from the historical record that the fisheries clause was of paramount importance to both the Nez Perce and the United States at the Walla Walla Council. The thing of greatest interest to the Nez Perce at the Council [in addition to preserving a large land base] was the right and possession of the game and the fish. The thing that finally reconciled the Nez Perce and made them inclined to sign the treaty was the reservation of the game and fish rights. * * * [Treaty Commissioners Dart and Palmer] were told that without protection of the fisheries there would be no treaties. Stevens was told the same thing . . . by the oldest settlers in the country and those best acquainted with the Indians. The fishing clause was as important to the interests of the United States as it was to the interests of the Nez Perce. * * * As Governor Stevens recognized, any other policy would be injudicious, almost impossible and contrary to customary use and natural right.

The promise of an exclusive homeland made by the United States in the 1855 Treaty was fleeting. The 1863 Lapwai Treaty Council was precipitated by the discovery of gold in the Clearwater River area of Idaho by E. D. Pierce and the arrival of the horde of miners and settlers that followed. Pierce and others pressured the local Indian agent to amend the 1855 Treaty to reduce the size of the exclusive Nez Perce land reservation. The Council convened in May of 1863, and for many days the assembled Nez Perce leaders refused to assent to the proposal to cede title to any additional lands. At one point Lawyer said to the government negotiators: "Dig the gold, and look at the country, but we cannot give you the country you ask for."

On June 5, Commissioner Hutchins made an outright threat that "the Treaty is binding on you, whether you accept these things or not." Several Nez Perce leaders spoke of their disgust for the proposal and stormed out of the negotiations. In the end, however, the Nez Perce were forced into an agreement that ceded an additional six million acres of land to the United States. The 1863 Treaty reduced the Nez Perce Reservation to approximately 750,000 acres, or about one tenth of its size as described in the 1855 Treaty.

By its express terms, the 1863 Treaty was not an abrogation of the 1855 Treaty, but merely "supplementary and amendatory." The final language of the 1863 Treaty preserved expressly the fishing rights laid out in the 1855 Treaty. Article 8 of the 1863 Treaty provided that "all the provisions of the said treaty which are not abrogated or specifically changed by any article herein contained, shall remain the same to all intents and purposes as formerly, — the same obligations resting upon the United States, the same privileges continued to the Indians outside of the reservation."

The testimonials of the Nez Perce elders in the 1911 Memorial to the United States Congress, quoted earlier, clearly establish that the Nez Perce understanding of the 1863 Treaty was that none of our fishing rights expressly reserved in the 1855

Treaty were compromised or reduced by the events of 1863. This understanding is firmly held by the Nez Perce people today.

Moreover, other than compensation in the 1950's for the loss of access to one usual and accustomed fishing place, associated with the construction of the dam at The Dalles and the flooding of Celilo Falls, the Nez Perce have never been compensated by the United States for any taking of their fishing or access rights, or associated implied federal reserved water rights.

Seven dams in particular in the 20th century, unaddressed by this proposed settlement and the subject of separate legal processes by the Tribe, continue to haunt our people. Brownlee Dam, Oxbow Dam and Hells Canyon Dam, completed respectively in 1958, 1961 and 1967, and licensed together by the United States as a Federal Energy Regulatory Commission project to the Idaho Power Company, have had devastating impacts on fish passage, spawning habitat and water quality through temperature, dissolved oxygen and total dissolved gas effects – as well as inundating numerous cultural sites.

Ice Harbor, Lower Monumental, Little Goose and Lower Granite Dams, together the "Lower Four" Snake River dams, completed in 1961, 1969, 1970 and 1975 respectively, have likewise had devastating effects on fish runs, through delayed migration time, increased river temperature and other water quality impacts, and inundated spawning habitat.

The effects of another dam, Dworshak Dam, located on the North Fork of the Clearwater River within the Nez Perce Reservation, are partially addressed by this proposed settlement as explained later in this statement. The history of Dworshak Dam is particularly offensive to our people. When the construction of Dworshak was initially proposed, the Nez Perce Tribe perceived the project as a serious threat to its treaty-reserved fishing rights. The Tribe strenuously and repeatedly protested construction of the dam to Congress beginning in 1954. Despite assurances from the United States Army Corps of Engineers that a mutually satisfactory resolution would be found, none was, and the Dworshak Dam project has had devastating effects on the Tribe's fishing rights. Because there are no fish passage facilities at the dam, migrations of anadromous fish which previously spawned in 1,667 miles of the North Fork of the Clearwater River and its tributaries ended with completion of the dam in 1972. To this day, the Tribe has never been compensated for those losses.

It is an understatement to say that the relationship of the Nez Perce people to their environment has changed drastically as a result of alterations in the water regimes of the streams and rivers within our aboriginal territory and consequent declines in fisheries. Changes in instream flows, stream configurations, and riparian habitats due to modern irrigation, dams, timber harvest techniques, mining, ranch management practices, and a host of other development impacts have changed the fishing habits and practices of Nez Perce fishermen.

These changes in the streams and rivers have reduced the available fish, especially salmon, which has thus reduced the production of fish and salmon for Nez Perce subsistence, ceremonial and commercial uses. But these changes have not reduced the importance of fish and water to the Nez Perce people. In the face of these unfortunate changes, the Tribe and the United States over the years have attempted, and are continuing to attempt, to find ways to stabilize declining stocks of salmon, and return them some day to harvestable levels, in fulfillment of the United States' solemn treaty obligations to the Nez Perce people.

The Snake River Basin Adjudication

The State of Idaho began the SRBA in 1987 in order to establish an accurate, prioritized inventory of over 150,000 water rights in the Snake River Basin. As a comprehensive state water rights adjudication, the SRBA triggered the McCarran Amendment, 43 U.S.C. Sec. 666, which through subsequent U.S. Supreme Court interpretations effectively requires the adjudication of Indian water rights, both those held by the United States as trustee and those held by tribes themselves, in state court.

I must take this opportunity to tell you that the impact of the McCarran Amendment has been devastating on Indian tribes in the West. It has forced tribes, including mine, into state court systems unfamiliar with Federal Indian law, unfamiliar with Indian treaties and their interpretation, and often resistant or even hostile to Indian claims. The argument that efficiency is somehow served by state court adjudication of Indian water rights is wrong. Separate adjudication of Indian water rights in corresponding federal district courts would almost certainly be faster, and the water rights determined could be incorporated into state court adjudications and their final decrees with ease.

Justice Stevens, dissenting in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), provided two warnings as to the "virtual abandonment of Indian water rights to the state courts" under the McCarran Amendment, that ring true today to tribes around the West:

Although the Court correctly observes that state courts, 'as much as federal courts, have a solemn obligation to follow federal law,' state judges, unlike federal judges, tend to be elected and hence to be more conscious of the prevailing views of the majority. Water rights adjudications, which will have a crucial impact on future economic development in the West, are likely to stimulate greater public interest and concern.

463 U.S. at 577 n.8 (citation omitted).

And,

Unlike state-law claims based on prior appropriation, Indian reserved water rights are not based on actual beneficial use and are not forfeited if they are not used. Vested no later than the date each reservation was created, these Indian rights are superior in right to all subsequent appropriations under state law. Not all of the issues arising from the application of the Winters doctrine have been resolved, because in the past the scope of Indian reserved rights has infrequently been adjudicated. The important task of elaborating and clarifying these federal-law issues in the cases now before the Court, and in future cases, should be performed by federal rather than state courts whenever possible.

463 U.S. at 575.

Justice Stevens was correct: Indian water rights have borne the brunt of increasingly political and controversial water rights disputes across the West. And the development of Indian water law itself has stagnated as a result of the many Indian water rights cases that have not been heard in the federal courts.

Because of the requirements of the McCarran Amendment, in 1993 the Tribe and the United States as trustee for the Tribe filed claims to water rights in the Snake River Basin in three categories: (1) claims to water for consumptive use for tribal lands within the Reservation; (2) claims for access and use of "springs or fountains" in the 1863 Treaty ceded area; and (3) claims for instream flows based on the 1855 Treaty fishing rights.

The springs or fountains claims are unique. They are based on Article 8 of the Treaty of 1863, which expressly reserved access to and use of "springs or fountains" in the ceded area for the Nez Perce in common with non-Indians.

The instream flow claims were based on the fishing rights reserved by the Tribe under the Treaty of 1855 and preserved by the Treaty of 1863. They were based on the simple concept that, to fulfill the purpose of the reservation of fishing rights by the Tribe, a water right must be implied to provide habitat for fish – to ensure that there *are* fish. The claims are supported by the United States Supreme Court's recognition that water rights must be implied, regardless the silence of treaties, to fulfill the purpose of land reserved under treaty by tribes, and by the several federal courts that have recognized the existence of Indian water rights as necessary to fulfill the purpose of treaty fishing rights.

Mediation, "term sheet" agreement and the Snake River Water Rights Act

In late 1998, the SRBA Court ordered confidential mediation of the Tribe's instream flow claims, and appointed Professor Francis McGovern of the Duke University Law School as mediator. After five years of difficult negotiations, the parties,

including the United States, the Tribe, the State of Idaho, various private water users and water user coalitions on the Snake River and on the Salmon and Clearwater Rivers, and certain timber interests, developed a proposed settlement agreement in the form of a "term sheet," setting out in varying levels of detail the basis for a settlement agreement.

The term sheet agreement is divided into three components: (1) the Nez Perce tribal component; (2) the Salmon/Clearwater component; and (3) the Snake River flow component. The proposed settlement would determine Nez Perce water right claims in the Snake River Basin in Idaho; provide other related compensation from the United States to the Tribe; set out understandings and criteria necessary to provide long-term Endangered Species Act coverage for various federal and private water uses in the Snake River Basin in Idaho, and for forestry practices on state and private lands; and protect existing water uses.

What the proposed settlement does not address should be understood as well. It does not cover the operations of the Hells Canyon Complex; resolve the Tribe's Endangered Species Act dispute with the Bureau of Reclamation over the operation of the Lewiston Orchards Irrigation District federal project on the Reservation; resolve certain claims against the United States for the construction and operation of the Dworshak Dam; or resolve the dispute over the impacts of the lower four Snake River dams on fish. These issues will continue to be addressed in other forums on varying timetables.

The proposed settlement would recognize two categories of water rights to be held by the United States in trust for the Tribe. The Tribe's on-Reservation, consumptive water right would be decreed in the amount of 50,000 acre-feet per year, primarily from Clearwater River sources. Its priority date would be 1855, but if portions were taken from streams tributary to the Clearwater, the Tribe would agree not to injure existing water rights in those streams. This water right would provide important benefits to the Tribe, and would be used at the Tribe's discretion for irrigation, hatchery, cultural, domestic, commercial, municipal, industrial or other purposes.

The Tribe's "springs or fountains" water rights would be recognized and decreed on federal lands within the 1863 ceded area; claims on state and private lands within this area would be released and waived. This is an extremely difficult compromise for the Tribe, and underlies in substantial part the federal funding that would be authorized and appropriated under the Act.

The proposed settlement would transfer certain BLM lands within the Reservation to the BIA in trust for the Tribe. Exhibit 2 contains a map showing the location of the BIA lands available to be transferred. The mechanism would be an appraisal of some 11,000 acres of BLM land, and a selection by the Tribe of acreage totaling in value \$7 million. In the event that this acreage appraises for less than \$7 million, we intend to approach the United States about additional compensation up to

that agreed amount in some form acceptable to the Tribe and the United States prior to final settlement approval. Although distinct from the purpose of the tribal water right claims in the SRBA, this transfer would restore lands to the Tribe that were originally its own, and would support the Tribe's goal of cohesive management of fish and wildlife resources on its Reservation. BLM land along the Clearwater River and Lolo Creek corridors would be excluded from this transfer, but would be subject to a cooperative management agreement to be executed by the BLM and the Tribe as part of the settlement.

The United States and Tribe would enter into an agreement providing for tribal management for Kooskia National Fish Hatchery and co-management of the Dworshak National Fish Hatchery. This agreement supports the Tribe's goal of cohesive management of fish and wildlife resources on its Reservation.

The United States and the Tribe would enter into a permanent agreement as to the use of 200,000 acre-feet of water in Dworshak Reservoir. This agreement would include an operational component, which would include the State of Idaho, as to the use of this block of water for flow augmentation purposes beneficial to fish.

It is important that you understand that the Tribe is not releasing all claims against the United States for damages from the construction and operation of the Dworshak Dam. Only those Dworshak claims covered by the waivers in the Act would be released, *i.e.*, injuries to water rights and to treaty rights to the extent of reduced water quantities. Potential claims relating to destruction of hunting and fishing sites, trespass on tribal land, and fair and honorable dealing, just to name a few, would be the subject of future discussions between the Tribe and the United States aimed at an equitable resolution. I will tell you now that the Tribe hopes to send a delegation to meet with representatives from your committee and from the Idaho delegation in the coming months, to begin this discussion process. The history of the Dworshak Dam on the Nez Perce Reservation is one of the most offensive, and yet unresolved, issues to our tribal members, and I hope you will meet with us in good faith to discuss this matter at the appropriate time.

The proposed settlement would set instream flows at nearly 200 locations important to the Tribe for cultural and biological reasons throughout the Salmon and Clearwater Basins. Exhibit 3 contains a map showing the locations of the Tribal Priority Streams. The flows would be subordinated to existing water uses and to future domestic, commercial, municipal and industrial uses, with a limited subordination to future agricultural diversions. In fully appropriated streams where aquatic habitat has been impaired, specific measures to improve habitat conditions would be identified through a process that brings the three sovereigns together with local landowners and community groups.

The agreement to have these flows held by the State, and subordinated so broadly, represents an extremely difficult compromise for the Tribe. Some reassurance

is provided by the extensive federal land ownership bordering most of these streams. I will tell you that continued federal ownership and care for these lands and riparian areas is critical, and we expect the United States to honor its commitment to maintain these lands and the important habitat they provide in perpetuity. I will also note that the proposed settlement provides a process for alteration of these flows by the State in the future, but only based on concrete justifications that consider fish and wildlife resources, and only after consultation with the Tribe. The Tribe intends to enter into a memorandum of understanding with the State prior to final agreement that would provide for a meaningful process of consultation between the two sovereigns, and would include the United States as trustee for the Tribe.

The proposed settlement would establish three trust funds for the benefit of the Tribe. These funds are based on the substantial compromises which would be made by the Tribe through this settlement.

The Water and Fisheries Fund would be used to acquire land and water rights, restore and improve fish habitat, and fund fish production, agricultural development, cultural preservation, and water resource development. These are precisely the sort of projects and tribal priorities for which the Tribe brought its water right claims in the SRBA.

The Domestic Water Supply Fund would be used for urgently needed projects for tribal communities around the Nez Perce Reservation. A list of essential domestic water and sewer infrastructure needs was developed with input from the Tribe, the Indian Health Service, and others. There are two types of projects for which the funding would be used. First, we have existing water and sewer systems that have deteriorated and have not been properly maintained by the Bureau of Indian Affairs and others. The second type of project is provide water and sewer facilities so that additional housing can be built to solve acute housing problems on the Reservation. These projects are urgently needed to bring the Tribe's existing facilities up to modern standards and will provide Tribal members with safe drinking water and adequate sanitary waste water disposal systems.

The Nez Perce Tribe Salmon and Clearwater River Basins Habitat Account would be a one-third portion of the Salmon and Clearwater River Basins Habitat Fund, with the other two-thirds an account targeted at ESA-related projects pursuant to the State's ESA Section 6 agreement. This fund, through both accounts, would be used for fish habitat improvements throughout these basins which are situated in the aboriginal territory of the Tribe. The habitat improvements would include: correcting fish passage barriers such as unscreened diversions; consolidation of diversions to minimize screens; development of suitable alternatives to push-up dams; protecting or augmenting stream flows; and incentives to private landowners to implement other measures to enhance riparian habitat. Despite the Tribe's disappointment at not achieving tribally-held instream flows through the SRBA, it is hoped that these funded habitat improvements will help to restore these important fisheries.

I must note that both the Tribe and the State of Idaho view the proposed amount of the Salmon and Clearwater River Basins Habitat Fund as inadequate to the extensive area and variety of improvements needed. I also note that the proposed settlement dictates that in the expenditure of funds from the two-thirds ESA-related account, the State would collaborate with the Tribe and the United States in determining how best to expend funds. The Tribe has high expectations of its ability to lend its fisheries expertise to this process and intends to enter into a memorandum of understanding with the State and the United States as to the nature of this collaborative process.

The Tribe understands that, during the mediation process, Administration representatives met with, and received favorable review from, the Office of Management and Budget about the appropriations that would be authorized under the proposed settlement. The bill as introduced does not provide a schedule for appropriation and payment of these funds, and we intend to work with your staff to address that issue in the near future, so that the Tribe will feel comfortable with the payment schedules for these funds. We hope to see maximum schedules of five years, beginning in year one after enactment, for each of the Tribal funds. We are also concerned about the certainty that all of the funds will be appropriated by Congress, and we intend to seek a cause-of-action provision included in the bill like the provision included in the Fort Hall Settlement of 1990, another Indian water settlement within the SRBA.

The waivers by the Tribe and by the United States, as trustee for the Tribe, that are contained in the term sheet and this legislation represent difficult compromises for the Tribe, but they are confined to the Tribe's and the United States' claims for water quantities or injuries related to lack of water quantities. They have no effect on the exercise by the Tribe of its fishing, hunting, pasturing and gathering treaty rights. The waivers simply provide assurance that any claims for water that could have been brought by the Tribe through the SRBA, or injuries to such water rights or to treaty rights as a result of inadequate water quantities, are being resolved. All other aspects of all treaty rights, and all other legal theories, including federal law theories, are retained.

It is critical that you understand that nothing in any section of the proposed settlement in any way affects the Tribe's ability to exercise its fishing, hunting, pasturing and gathering rights under the 1855 and 1863 Treaties.

The proposed settlement contemplates in essence a hybrid of Indian water rights and other tribal benefits and waivers, and related ESA agreements. These are intended as complimentary components, with the common objective of improved habitat for fish, and consequent benefits to Indian and non-Indian alike. The ESA aspects of the agreement, under both Section 6 and Section 7 of the ESA, have no effect on Nez Perce treaty rights except to the extent they benefit listed species that are important to the Tribe.

The agreement also does not alter the ESA itself. It does not prejudice or circumvent the normal ESA biological assessment and biological opinion processes of the relevant US agencies and services. And it does not preclude or constrain judicial review of final biological opinions through challenge by outside entities that are not party to the agreement.

As a hybrid agreement, the settlement term sheet addresses the possibility of particular components being terminated in the future due to one event or another. The agreement provides for the severability of such components in such an event. But it is important to note that the severability contingencies all relate to ESA components of the settlement. The tribal, Indian water settlement, aspects become permanent and interminable once the agreement takes effect. If one or another ESA agreement requires the reinitiation of consultation under Section 7 of the ESA, and if as a result the state and private parties to that component choose to terminate that ESA component, that has no effect on either the permanence of all tribal benefits under the agreement, including all aspects of the tribal component, and the instream flow program of the Salmon/Clearwater component of the agreement, or the waivers provided by the Tribe and the United States once the agreement becomes effective.

Conclusion

For the Tribe, this proposed settlement is about water for fish and water for the Nez Perce people in fulfillment of the 1855 and 1863 Treaties with the United States. As this Committee well knows, "settlement" is a troubling word for Indian people. It often means loss and disappointment. It often means treaties unfulfilled and treaty rights compromised in a world in which Indian people are outnumbered and limited in their political power.

Nevertheless, this proposed settlement offers a superior model of future conduct, in our relationship with the State of Idaho in particular, when compared with the expensive, time-consuming and uncertain path of litigation. A mutual respect between the State and the Tribe as sovereign governments underlies this proposed agreement in ways that contrast strikingly with the hostility of litigation. It has taken a certain amount of courage and common sense on the part of all the mediation parties to make it to this point in time, and I want to say I respect that and hope you do as well.

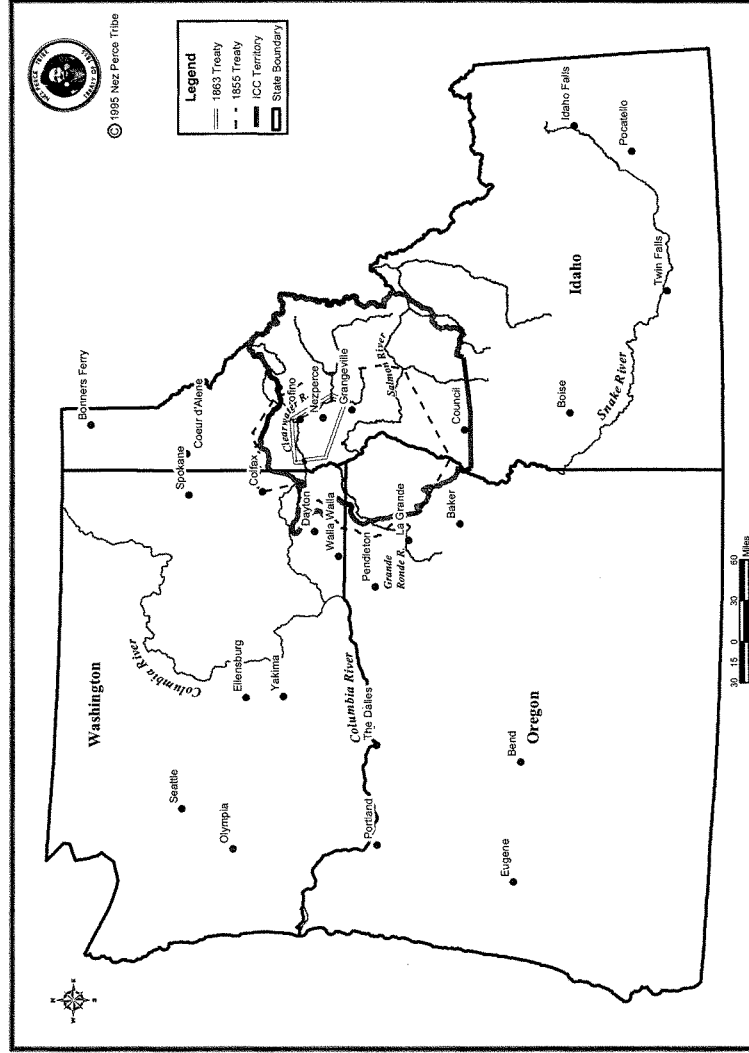
Much work remains, work that we are actively engaged in, but that will take several months to complete – implementing parts of the proposed agreement that require additional detail, answering questions of the Indian and non-Indian public in Idaho, and reaching out to the downriver tribes in Oregon and Washington.

And I don't underestimate the work ahead in passing this bill through this Congress. Because of your busy schedules, particularly in this election year, we are here to inform you and gain your support at this relatively early point in the final approval process. When we try to look forward to March 31, 2005, to set out the work needed to complete the settlement, we know that we must be here today, informing you and answering your questions, for the settlement to have a chance of meeting its goal.

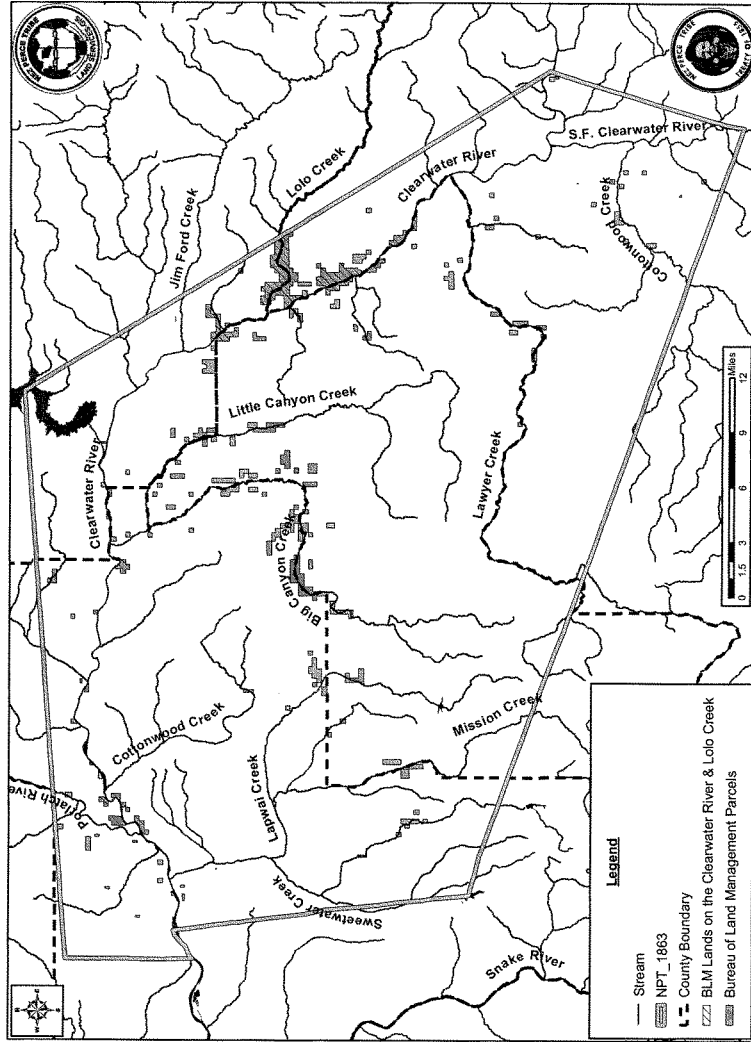
I thank you for your time and consideration of this statement.

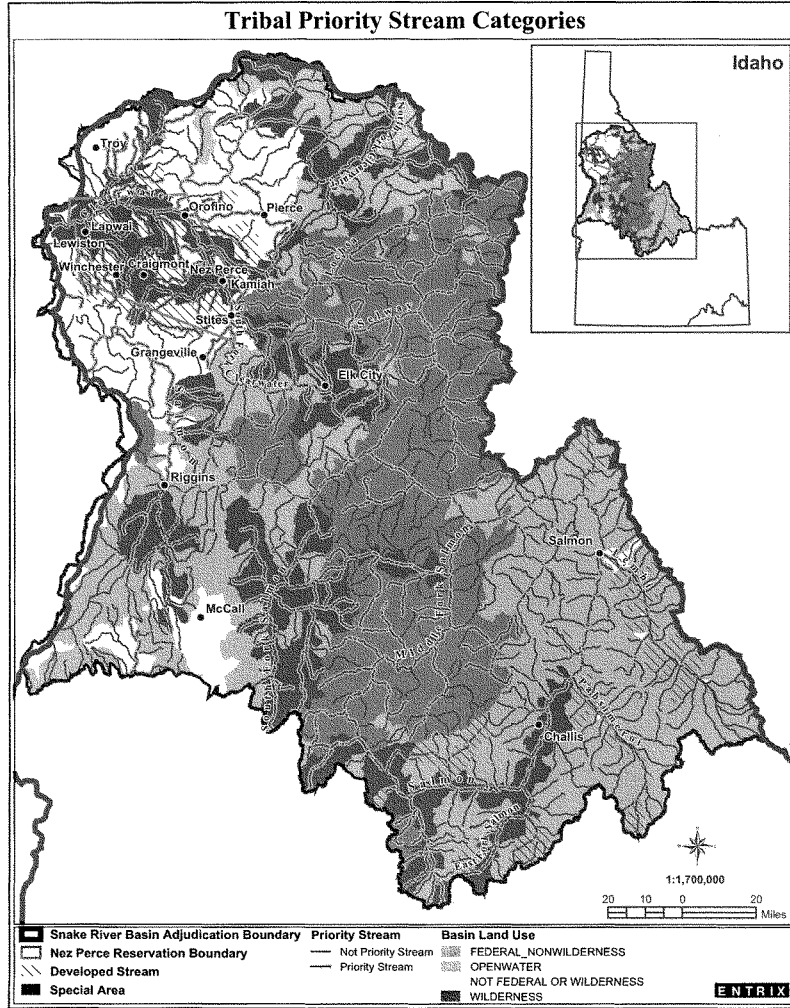
Territory of the Nez Perce Tribe

Reproduction of map depicting findings of Indian Claims Commission Docket No. 175



Nez Perce Tribe - BLM Lands within the 1863 Treaty





TESTIMONY OF
MICHAEL D. OLSEN
COUNSELOR TO THE ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
ON S. 2605 THE SNAKE RIVER WATER RIGHTS ACT OF 2004

July 20, 2004

Good morning Mr. Chairman and members of the Committee. I appreciate the opportunity to appear before this Committee today to discuss S. 2605, the “Snake River Water Rights Act of 2004.”

The Administration supports S. 2605. The bill and the settlement it approves are the result of over five years of formal mediation preceded by several years of negotiations prior to the appointment of a mediator. Parties to the settlement negotiations included the United States, the Nez Perce Tribe, the State of Idaho, and a wide variety of water users within Idaho. The bill and the settlement lay the foundation for resolving long-standing and contentious water rights issues in the Snake River Basin in Idaho. This settlement provides a just resolution to this protracted litigation, protecting the interests of all parties. The settlement recognizes the water rights of the Nez Perce Tribe, provides for instream flows that protect the fish and riparian habitat for endangered species as well as other flora and fauna, and protects existing water users in a way that allows those who have relied and invested in these resources to continue their ways of life.

Background

The Snake River Basin Adjudication (SRBA) in Idaho is one of the largest water rights adjudications in the country, sorting out over 150,000 claims to water from the Snake River and its tributaries. The area covered by the Adjudication includes all or part of 38 of Idaho’s 44 counties. In 1993, the United States filed claims in the SRBA as trustee for the Nez Perce Tribe. Those claims have been contentiously litigated over the past decade even while settlement discussions moved forward.

Some of the claims filed by the Nez Perce Tribe and by the United States as the Tribe's trustee sought instream flows to support the Tribe's treaty-based fishing rights. If granted, those instream flow claims would have the potential to significantly affect existing non-Indian water uses within the State of Idaho. The instream flow claims raise many of the same issues that the Pacific Northwest region has been grappling with to protect salmon and steelhead listed as threatened or endangered under the Endangered Species Act. Because of this alignment of issues, the settlement negotiations have focused on the Tribe's water needs as well as balanced measures to meet the needs of threatened or endangered fish species.

The agreement among the SRBA parties was submitted to the SRBA Court on April 20, 2004.

The proposed settlement has three main components:

- (1) a resolution of the Nez Perce Tribe's water rights for use on and near the Nez Perce Reservation, including provisions that will allow the Tribe to develop and use those water rights,
- (2) a component addressing instream flow and Endangered Species Act issues within the Salmon and Clearwater River basins, and
- (3) a component addressing instream flows and flow augmentation from the upper Snake River basin above Hells Canyon to benefit threatened or endangered fish species.

As a package, these three primary components resolve all of the Nez Perce water right claims, ensure that the Nez Perce Tribe has the water resources needed to meet present and future needs, and provide mechanisms that will allow water users within Idaho to participate in voluntary programs to maintain, improve, and restore fish habitat. The entire cost of this settlement to the United States is approximately \$193 million. The United States would expect to spend over \$130 million of this over the next 30 years on existing programs in the area, including the Bureau of Indian Affairs' program to support tribes' domestic water and sewer systems and the Bureau

of Reclamation's water acquisition program on the Upper Snake River. We expect the payout of these monies over the next 30 years will be consistent with other settlements of this magnitude. In addition, the State of Idaho will be contributing a value of at least \$8.5 million to the settlement and will be taking other actions, such as amending its laws to provide for instream flows to benefit listed fish and to facilitate the Bureau of Reclamation's flow augmentation program.

S. 2605

S. 2605 approves and authorizes federal participation in all components of the Nez Perce water rights settlement. When fully implemented, the settlement will constitute a final resolution of all of the water right claims filed by the Nez Perce Tribe and by the United States on behalf of the Tribe. The bill will confirm the Tribe's right to 50,000 acre-feet of water annually to meet the Tribe's on-reservation water needs. The Tribe's rights to use water from "springs or fountains" in the area surrounding the Nez Perce Reservation—originally reserved in their 1863 Treaty—would be confirmed on federal lands and the claims to such springs on private lands would be relinquished. S. 2605 would authorize federal funds to allow the Tribe to develop and rehabilitate domestic and municipal water and sewer treatment facilities. In addition, federal funding would allow the Tribe to develop its water rights through projects related to water and fishery resources. The bill would direct the Bureau of Land Management to transfer land valued at up to \$7 million to the Bureau of Indian Affairs to be held in trust for the Tribe.

For the settlement component addressing issues within the Salmon and Clearwater River basins, S. 2605 will authorize funding of the Salmon and Clearwater River Basins Habitat Fund. That fund will be used for habitat protection and restoration in the Salmon and Clearwater River basins—one of the most important areas of spawning and rearing habitat for anadromous fish in the Columbia River system. One-third of the Fund will be managed by the Nez Perce Tribe and the remaining two-thirds will be managed by the State of Idaho through cooperative agreements with the United States pursuant to Section 6 of the Endangered Species Act (16 U.S.C. § 1535).

To implement the component of the settlement addressing water in the upper Snake River basin, S. 2605 would authorize the Secretary to carry out the upper Snake flows component of the agreement, including the Bureau of Reclamation's flow augmentation program to benefit anadromous fish. Because the settlement envisions that the Bureau of Reclamation may permanently acquire up to 60,000 acre-feet of consumptive natural flow rights from the Snake River, the bill would authorize a one-time mitigation payment to local governments that may be affected by the Bureau's acquisition of irrigation water rights.

The settlement agreement anticipates that the settlement parties will address a number of Endangered Species Act issues through existing statutory and regulatory authorities. S. 2605 would enable the settlement to move forward and implementation would result in federal actions that would be subject to the consultation provisions of Section 7 of the Endangered Species Act (16 U.S.C. § 1536). However, nothing in S. 2605 or the settlement agreement would affect the review of those federal actions pursuant to the Endangered Species Act, prejudge the outcome of that review, provide for pre-enforcement review, or limit the ability of any party to challenge the outcome of that review through existing avenues for administrative or judicial consideration. Further, S. 2605 would not alter the procedural or substantive requirements of the National Environmental Policy Act or any other federal law.

We believe that the federal participation and contribution contemplated in S. 2605 is appropriate to resolve the Nez Perce water rights and the related issues resolved by the Nez Perce settlement agreement. Implementation of the settlement will release the United States from any potential damage claims that might be asserted by the Tribe with respect to failure to protect its treaty-based rights and will relieve the federal government of the obligation to litigate, at significant cost and likely over many additional years, the Tribe's water right claims. Settlement of the Tribe's water rights will help ensure certainty for Idaho and its many communities—farmers, ranchers, the Nez Perce Tribe, individual landowners, cities—while providing conservation benefits to the environment.

Conclusion

Negotiated agreements among Indian tribes, states, local parties, and the federal government are, in general, the most effective way to resolve reserved water right claims, provide assured water supplies for present and future tribal generations, and wisely manage an increasingly scarce resource. The known benefits of settlement to the Tribe, the State, other interested parties, and the United States generally outweigh the uncertainties that are inherent in litigation. The settlement approved by S. 2605 is an example of the creative solutions that can be found to resolve contentious water rights problems in the West.

This concludes my statement. I would be happy to answer any questions that the Committee may have.

MEDIATOR'S TERM SHEET

- I. **Nez Perce Tribal Component.**
- A. The Tribe's on-reservation, consumptive use reserved water right will be quantified in the amount of 50,000 AF per year, with a priority date of 1855. This water right will be established so as to allow for irrigation, DCMI, hatchery and cultural uses, at the discretion of the Tribe. The parties expect the source of most of this water right will be the Clearwater River; however, the source of some this water right may be from tributary streams adjacent to tribal lands to the extent unappropriated water is available and no injury to existing water rights will occur. The Tribe will administer the on-reservation use of this water right pursuant to the tribal water code. The Tribe may rent this water within the State of Idaho through the state water bank or water banks.
 - B. The United States will establish a \$50 million multiple-use water and fisheries resource trust fund for the Tribe to use in acquiring lands and water rights, restoring/improving fish habitat, fish production, agricultural development, cultural preservation, and water resource development or fisheries-related projects.
 - C. Subject to authority, the United States will enter into an agreement with the Tribe as to the use of 200 KAF in Dworshak Reservoir, which will include an operational MOA between the Tribe, Corps of Engineers (COE), National Marine Fisheries Service (NOAA Fisheries), the Bonneville Power Administration (BPA), and the State of Idaho implementing a flow augmentation plan beneficial to fish. Prior to the agreement implementing this term sheet,^{1/2} the Tribe and the US will mutually agree that the power revenue effect of implementing this term will be either neutral or positive, or in the absence of such agreement, will revise this term so that such effect will be neutral or positive.
 - D. The United States will fund the design and construction of domestic water supply and sewer systems for tribal communities on the reservation, including a water quality testing laboratory, in the total amount of \$23 million.
 - E. The United States will enter into a long-term contract with the Tribe at the time of settlement, transferring management control of the federal hatchery at Kooskia to the Tribe. The United States and the Tribe will enter into an agreement for joint management of hatchery programs at the Dworshak National Hatchery.
 - F. Prior to the completion of the agreement, the United States and the Tribe will agree to a quantity of BLM lands within the reservation to be transferred from the United States to the Tribe, to be selected by the Tribe from within the 11,000 acres identified as available for selection by the BLM, up to a total value of \$7 million as determined by mutual agreement or, in the absence of mutual agreement, by an independent appraisal report based upon the fair market value that is prepared in accordance with the *Uniform Standards of Professional Appraisal Practice (USPAP)* and the *Uniform Appraisal Standards for Federal Land Acquisitions*. The BLM and the Tribe, under the authority of the Federal Land Policy and

^{1/2}Implementation of this Term Sheet will involve drafting of a number of implementation documents including federal and state legislation, a consent decree, biological assessments and opinions in accordance with the Endangered Species Act, and other documents. References in this Term Sheet to "agreements" refer to those implementation documents.

- Management Act of 1976, will enter into a cooperative agreement to coordinate and cooperate in management of BLM lands within the reservation which will include a right of first refusal for the Tribe to purchase any BLM lands that the United States may choose in the future to sell, transfer, or exchange.
- G. Any non water-based claims the Tribe may have against the United States for the construction and operation of the Dworshak Dam will not be waived as a part of this agreement, nor will any compensation for such alleged claims be a part of the agreement. The United States understands that the Tribe intends to pursue such claims, moral or legal, separately from this agreement, and, without admitting any liability, agrees to meet in good faith with the Tribe to attempt to resolve such claims.
 - H. In lieu of contracting 45,000 AF of uncontracted storage space in the Payette River system to the Tribe, the United States will pay the Tribe the present value of \$10.1 million of the 30-year rental value of that space based on the rental charges set in section III.C.8.
 - I. The Tribe's treaty right of access to and use of water from springs and fountains on Federal public lands within the 1863 Nez Perce Treaty ceded area shall be recognized and established under the agreement.
 - J. Lewiston Orchards Irrigation District (LOID)/City of Lewiston. This term sheet does not address any of the issues surrounding the proposed transfer of the LOID/Bureau of Reclamation water diversion system to the Tribe or funding by the United States of a replacement water intake system on the Clearwater River for LOID. The intention of the parties is to allow any discussions that may take place in the future among LOID, the Tribe, the Bureau of Reclamation (BOR), the City of Lewiston, and other affected water right holders to occur separately from and unaffected by this term sheet.

II. **Salmon/Clearwater Component**

- A. **Instream Flows To Be Established As Part of Settlement of Nez Perce Claims.**
 - 1. Idaho will establish, pursuant to state law, instream flow water rights, to be held by the Idaho Water Resource Board (IWRB), on the streams within the Salmon and Clearwater Basins listed in Appendix I, List A in accordance with the protocol set forth as part of Appendix I. Such water rights will be established by March 31, 2005.
 - 2. By March 31, 2005, the IWRB will establish pursuant to state law instream flow water rights for the streams within the Salmon and Clearwater River Basins on the streams listed in Appendix I, List B, in amounts that are negotiated by the parties in consultation with local communities. In conjunction with the establishment of instream flows for the streams listed in Appendix I, List B, the parties will seek legislation from the Idaho Legislature to permit the IWRB to protect from diversion water to satisfy such instream flows, where needed, under state laws, regulations, and water bank rules. In negotiation of the quantification of instream flows, the parties will take into consideration the present hydrograph and the status of state-granted water rights on each stream.
 - 3. The instream flows will be subordinated to water rights existing on or before the date of this agreement and to future domestic, commercial, industrial and municipal water rights. In issuing any new water rights for future uses that may affect the instream flows, IDWR will consider the local public interest under Idaho Code § 42-203(A)5, including but not limited to the protection of fish and wildlife habitat, aquatic life,

- recreation, aesthetic beauty, transportation and navigation values, and water quality.
4. The SRBA court will decree the instream flows established by the IWRB on the streams listed in Appendix I, Lists A and B. In the event the State proposes to change any instream flow listed in Appendix I, Lists A and B, the State agrees to: 1) provide 6 months advanced written notice to the parties of any proposed change, including the basis for the proposed change and an analysis of the impacts, if any, resulting from the proposed change to fish and wildlife resources; and 2) to consult with the Nez Perce Tribe on a government-to-government basis prior to making the change.
 5. Federal reserved water rights for the Selway, Lochsa, Middle Fork Clearwater, Rapid River, Main Salmon and Middle Fork Salmon River will be decreed under the Wild and Scenic Rivers Act to the United States pursuant to a separate settlement in the SRBA.
 6. Existing state instream flows on the mainstem Clearwater, the mainstem Salmon, the Lemhi and the Pahsimeroi Rivers will be maintained as presently quantified, subject to I.C. § 42-1504.
 7. The parties will study the relationship of the IWRB instream flows on the Clearwater River with the potential future operations of Dworshak Reservoir including evaluations of the existing rule curve and proposed future integrated rule curves to provide for operation of Dworshak consistent with anadromous and resident fishery objectives, and other information as appropriate. The parties will complete the study by December 31, 2004.
 8. In the Lemhi and Pahsimeroi, additional habitat actions will be developed by the Parties in consultation with the local community and stakeholder groups in the course of developing the proposed Section 6 Cooperative Agreement (see Section II.D). The Parties' anticipation is the development of the actions will be specifically directed toward (1) assembling by March 31, 2005 sufficient agreement on actions to ensure settlement of the Nez Perce instream water right claims, and (2) maximizing the consistency between those actions and all provisions of any proposed Section 6 Cooperative Agreement that may relate to the Lemhi or Pahsimeroi basins.
 9. Enforcement. In accordance with Idaho Code Title 42, Chapter 6, or other applicable law, IDWR will regulate the delivery of the instream flow water rights and protect from diversion water to satisfy such instream flows through the designated stream reaches, subject to priority and to the subordinations specified in section II.A.3.
- B. **Salmon/Clearwater Habitat Management and Restoration Initiative.** The State of Idaho will implement a Salmon and Clearwater Habitat Management and Restoration Initiative for the conservation and restoration of habitat within the Salmon and Clearwater River Basins. The Initiative will consist of three components: 1) instream flow program, 2) forest practices program, and 3) a habitat restoration program.
1. Instream Flow Program.
 - a. The State will identify as part of the development of a Section 6 Cooperative Agreement(s) as provided for in Section II.D a list of streams for which it desires incidental take coverage. Within 60 days of this notice, the State will provide existing and expected future water depletions, including quantity and location (basin) for those streams that are to be included in the Section 6 Cooperative Agreement. Streams determined by the Services to be flow limited will be

addressed in collaboration among the parties and local communities in order for the Section 6 Cooperative Agreement described in section II.D to satisfy the requirements of section 7(a)(2) of the ESA. Any state instream flows established under this section will not be decreed by the SRBA court nor will such instream flows be subject to the notice and consultation process described in section II.A.4 above.

- b. Monitoring. The parties will negotiate a monitoring plan and method for determining compliance with the instream flow program.
 - c. Enforcement. IDWR will regulate the delivery of the instream flow water rights and protect from diversion water to satisfy such instream flows through the designated stream reaches, subject to priority and to the subordinations specified in section II.A.3 above.
2. **Idaho Forestry Program.** [Appendix II contains the figures and other references in this section.] Owners or operators who participate in the following State of Idaho Section 6 forest practices program will receive incidental take coverage under the ESA for any incidental take that may occur of listed species covered by this Agreement due to forest practices conducted in accordance with this Agreement. The forest practice program will be based on the Idaho Forest Practices Act (“IFPA”), Idaho Code §§ 38-1301 et seq. Owners and operators participating in the forest practices program voluntarily commit to implement the following prescriptions, in addition to the IFPA, to provide additional short-term and long-term conservation benefits for listed species. The Section 6 Agreement to be negotiated by the parties will not vary materially from the following terms, but may explain and define these terms, including establishment of standards relating to subsequent administrative decisions by the Idaho Department of Lands, as mutually agreed by the parties. This forestry program is a cooperative agreement between the State and the Services pursuant to Section 6(c) of the ESA, and neither applies to Nez Perce tribal lands nor impairs Nez Perce treaty fishing, hunting, pasturing, or gathering rights.
- a. **DEFINITIONS:**
 - i. Bank Full Depth: The average depth of the stream when the flow is at the ordinary high water mark. This is used to determine the average depth of the stream for the reach adjoining management activities.
 - ii. Class I Stream: For purposes of this Agreement, Class I streams are those that contain habitat which is used by fish at any life stage at any time of the year including potential habitat likely to be used by fish which could be recovered by restoration or management and includes off-channel habitat. Where it is unknown whether the stream may contain fish, fish habitat or potential habitat, the current IFPA rules based on upstream drainage area will be used to determine the Class I-Class II boundary. The Class I-Class II boundary may be determined from other, analytically-based or empirical methods, as approved by the IDL.
 - iii. Class II Stream: For purposes of this Agreement, Class II streams are headwater streams or minor drainages that do not contain habitat likely to be used by fish at any life stage at any time of the year. The principle value of Class II streams lies in their influence on ecological functions, water

- quality and water quantity downstream in Class I streams.
 - iv. Cumulative Watershed Effects Process (CWE): Forest Practices Cumulative Watershed Effects Process for Idaho, as amended.
 - v. Distances: All distances referenced in these supplement measures are slope distances, unless otherwise provided herein.
 - vi. Flood Prone Width: Flood prone width is defined as the width of the water's surface at twice the bank full depth.
 - vii. Idaho Department of Lands (IDL): The administering agency of the IFPA.
 - viii. Hot spot: (as defined in the Native Fish Habitat Conservation Plan (NFHCP)).
 - ix. Large Woody Debris (LWD): Live or dead trees and parts or pieces of trees that are large enough or long enough or sufficiently buried in the stream bank or bed to be stable during high flows.
 - x. Multiple Unconfined Channel: Valley bottom contains multiple (braided) channels that are active or relic.
 - xi. Ordinary High Water Mark: That mark on all water courses in respect to vegetation, which will be found by examining the beds and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years as to mark upon the soil a character distinct from that of the abutting upland.
 - xii. Riparian Protection Zone (RPZ): The combined widths of the no harvest and buffer zones defined in these measures.
 - xiii. Single Confined Channel: Bank full flow is contained within a single channel and the flood prone width is less than four times the bank full channel width.
 - xiv. Single Unconfined Channel: Bank full flow is contained within a single channel and the flood prone width is greater than four times the bank full channel width.
 - xv. SPZ: Stream Protection Zone as defined in the IFPA.
- b. **RIPARIAN MANAGEMENT MEASURES**
- i. Because of the diversity of terrain and forest types in Idaho, it is difficult to design a "one-size fits all" set of riparian management measures. Thus, while the supplemental measures set forth below are designed for application to all enrolled forest lands, the program to be included in the Section 6 Agreement will also provide a mechanism for enrollees to design site-specific stream protection measures that must be reviewed and approved by the IDL forest practices coordinator or designee and a fisheries biologist as appropriate prior to implementation. An approved site-specific stream protection plan shall provide for equivalent or better results than these supplemental conservation measures.
 - ii. **RIPARIAN MEASURES FOR CLASS I STREAMS.** -- On Class I streams the following measures shall apply to the RPZ.
 - (a) No Harvest Zone Measures
 - i) The No Harvest Zone is defined as:
 - a) Twenty-five (25) feet (each side) of the ordinary high

- water mark where the stream is contained in a Single Confined Channel (Figures 1, 4).
 - b) Twenty-five (25) feet (each side) of the ordinary high water mark where the stream is contained in a Single Unconfined Channel (Figures 2, 5).
 - c) The entire flood prone width where the stream is contained in Multiple Unconfined Channels (Figures 3, 6). Where the current channel, or any relic channel is within 25 feet of the valley sidewall, the No Harvest Zone will be extended upslope twenty-five (25) feet from the ordinary high water mark of that channel.
- ii) Harvest will not occur in the No Harvest Zone unless determined by the IDL, on a site-specific basis, that harvest is necessary to maintain or improve riparian function, which may include reduction of the risk of forest fires, disease, or insect infestation. An enrollee who believes harvest is necessary to maintain or improve riparian function must submit a site-specific plan for IDL review and approval prior to implementation. Such harvest plan must describe how riparian function will be protected.
 - iii) Yarding corridors will not be placed through the No Harvest Zone unless required to minimize road construction, for operator safety, or to achieve sound forestry practices in the adjacent area. Any such yarding corridor shall be placed in a No Harvest Zone only to the minimum extent necessary, and only as approved by the IDL forest practices coordinator or designee, with advice from a fisheries biologist as appropriate. Any approved plan authorizing a yarding corridor within the No Harvest Zone must still ensure the minimum stocking levels are retained within the RPZ. Yarding corridors that affect more than ten (10) percent of the RPZ will be mitigated as approved by IDL.
 - iv) When harvesting in areas adjacent to Class I streams, LWD may be added (through active placement of LWD) from the buffer zone, in accordance with an approved site-specific plan (II.B.2.b.i). This may alter the leave tree requirements.
- (b) Buffer Zone Measures
 - i) The buffer zone is defined as:
 - a) Fifty (50) feet (each side) of the No Harvest Zone where the stream is contained in a Single Confined Channel (Figures 1, 4).
 - b) The entire flood prone width beyond the No Harvest Zone where the stream is contained in a Single Unconfined Channel (Figure 2, 5). Where the channel is within twenty-five (25) feet of the valley sidewall, the

- buffer zone will be extended fifty (50) feet upslope of the No Harvest Zone.
- c) Where the stream is contained in Multiple Unconfined Channels, and the current channel, or any relic channel is within twenty-five (25) feet of the valley sidewall, the buffer zone will be extended fifty (50) feet upslope from the No Harvest Zone (Figures 3, 6).
- ii) During development of the section 6 agreement, the parties will work to evaluate the appropriateness of the LWD instream target and the leave trees per acre target and make revisions as mutually agreed. Absent such agreement, within the buffer zone an average of 88 trees per acre of trees larger than 8 inches diameter breast height (DBH) will be retained, selected as follows;
 - a) Trees leaning toward the stream or flood plain will be favored for retention,
 - b) Trees retained will be lineally distributed along the length of the stream segment even though they may be concentrated closer to the stream,
 - c) Trees with the highest crown to height ratios (crowns from the tip to the ground) will be favored for retention to enhance stream shading,
 - d) Native species leave trees will be selected based on their suitability to survive and thrive in the RPZ.
 - e) All snags will be retained in the No Harvest Zone (where they do not interfere with logger safety), with no more than 9 snags to be included in the total tree count per acre. Snags must be over 10 feet tall to be included in the total tree count,
 - f) Trees less than 8 inches DBH and shrubs will be retained to the extent possible,
 - g) The diameter distribution of the live leave trees in the buffer zone will match a forest stand diameter distribution consistent with the age of the stand in its pre-harvest condition. The Parties envision that the section 6 agreement will include provisions that will encourage recruitment of large, older trees to the RPZ.
 - iii) Because Idaho forest ecology varies tremendously from north to south, it may not be possible to maintain 88 trees per acre of trees larger than 8 inches DBH on all forest lands. Thus, in the event an enrollee demonstrates that the site productivity within the riparian zone cannot support an average of 88 trees per acre of trees larger than 8 inches DBH, then IDL will work with the enrollee(s) to determine an appropriate site-specific tree retention policy that ensures protection of riparian habitat. In

- no event will the tree retention be less than 60 trees per acre of trees larger than 8 inches DBH.
- (c) Measures Applicable to Entire Riparian Zone
 - i) Operation of ground-based equipment shall not be allowed within the RPZ.
 - ii) The outer perimeter of the RPZ will be designated on the ground/trees prior to the commencement of logging activities.
- iii. **RIPARIAN MEASURES FOR CLASS IIa STREAMS.** Class IIa streams are Class II streams that contribute surface stream flow directly into a Class I stream.
- (a) There will be a fifty (50) foot buffer zone adjacent to the main stem of Class IIa streams. Within this zone a minimum of thirty-five (35) trees per acre larger than 8 inches DBH will be retained. This corresponds to an average thirty-five (35) foot spacing. Trees retained must be representative of the size of trees that existed in the stand prior to harvest.
 - (b) The buffer zone of perennial Class IIa streams that contribute, based on contributory acres, more than twenty (20) percent of the flow to a Class I stream will extend one-thousand (1000) feet above the confluence. Above this point, Class II SPZ requirements in the IFPA will apply.
 - (c) The buffer zone of perennial Class IIa streams that contribute, based on contributory acres, less than twenty (20) percent of a perennial Class I stream flow will extend five-hundred (500) feet above the confluence. Above this point, Class II SPZ requirements in the IFPA will apply.
 - (d) The riparian management of intermittent Class IIa streams will be covered by the IFPA Class II rules.
- iv. Removal of LWD from Class I and Class IIa streams shall be prohibited unless necessary to maintain or improve riparian function, which may include reduction of the risk of forest fires, disease or insect infestation. A site-specific management plan approved by IDL will be required for the removal of any LWD prior to implementation.
- v. As part of these Supplemental Measures, participating enrollees commit to mapping all stream segments on their ownerships as Class I and Class II within 15 years from the date of enrollment. Enrollees also agree to participate in any efforts by IDL, USFWS, NOAA Fisheries, and Idaho Department of Fish and Game to update mapping of stream segments on their ownerships.
- vi. As part of these Supplemental Measures, the parties will cooperate in developing and undertaking a series of research projects designed to compare the effectiveness of these Supplemental Measures with alternative management strategies in enhancing native fish habitat and populations. These projects would include examples of active management within riparian areas.

- c. **ROAD MANAGEMENT MEASURES.** The road management measures set forth herein will constitute the measures to be included in the Section 6 Agreement. Additional road measures may be included in the Section 6 Agreement only with the consent of all parties.
- i. New Road Construction:
- (a) An attempt will be made to find a suitable alternative location for new roads that are proposed for construction on side slopes greater than sixty (60) percent and/or in unstable or erodible soils. Unstable or erodible soils are those defined as "high" in the Idaho CWE Process for Idaho (Table B-1) or other agreed upon hazard-rating analysis process. Where an alternative location is not feasible, the road will be full benched without fill slope disposal.
 - (b) Where road grades slope toward stream crossings, the enrollee will install drivable drain dips and/or ditch relief pipes at the nearest practicable location to streams so that an adequate filtration zone exists to minimize sediment delivery to streams;
 - (c) Road fills over stream crossings will be grass seeded and straw-mulched concurrent with construction. Other road cuts and fills on newly constructed roads will be seeded within one operating season. The tread on native-surface roads will also be grass seeded within one operating season following construction unless the road will be used for hauling within two (2) years of construction;
 - (d) New road construction will be minimized in stream RPZs. If road construction occurs in an RPZ, slash filter windrows or suitable alternative measures will be installed at the toe of all fill slopes;
 - (e) Fills at culvert inlets on stream crossings where the culvert is 24-inch-diameter or larger will be well-armored with rock or other erosion control measures. A flared inlet structure may be used as an alternative;
 - (f) Stream crossing culvert installations will be designed to accommodate at least the fifty (50) year peak flow as determined by U.S. Geological Survey flood magnitude prediction procedures. As an alternative, the culvert size for a fifty (50) year flow may be calculated by an IDL hydrologist based on an analysis of channel dimensions;
 - (g) New roads will be minimized where the potential for erosion is high. If roads are built in an area where soils are identified in the CWE process surface erosion hazard ratings as high (Table B-2), the road tread over stream crossings will be rockered or otherwise stabilized to prevent sediment transport.
 - (h) Road cross-drainage will be provided as frequently as necessary to control road tread erosion. On active native-surfaced roads, road drainage features will be located such that road runoff distances generally do not exceed three-hundred (300) feet (and will not exceed four-hundred (400) feet) along the road centerline. On

erodible soil types, or on road grades steeper than eight (8) percent, this spacing will be reduced from the specifications listed above; alternatively a localized IDL approved method to adequately control road tread erosion will be applied.

- (i) Road right of way clearings will be minimized where roads cross streams.
 - (j) Seeps or springs will be avoided during road design and construction, if possible. If roads cross seeps or springs, drainage features will be installed that pass accumulated surface water across the road prism and return it to the forest floor as close to the point of origin as reasonably practicable;
 - (k) New roads will be minimized in the RPZ. Roads located in RPZs will be constructed with appropriate fill depths and will include properly sized drainage features at all active channels;
 - (l) Stream crossing culvert installations must be designed to accommodate fish passage on Class I streams (an inspection program for culvert failures following significant hydrologic events will be negotiated as a part of the Section 6 agreement);
 - (m) The enrollee will inspect roads to determine their status and condition in comparison to these supplemental measures and results will be included in the periodic update of the road database.
 - (n) Road surface drainage will keep drainage within the source watershed.
- ii. Road Reconstruction and Upgrading:
- (a) A prioritization of road upgrades will be developed through CWE and/or an enrollee inventory of roads within five years of enrollment in this program. The prioritization schedule shall set forth a time frame for upgrading roads within fifteen years of the date of enrollment to the standards listed in the Supplemental Measures below. To the extent practicable, roads that have the potential to deliver sediment to Class I and Class II streams will receive priority for upgrading.
 - i) Within an operation area (Timber Sale) when the haul routes cross Class I streams, the Class I stream crossing culverts will be upgraded to meet the Supplemental Measures listed below no later than one year after completion of harvesting operations.
 - ii) For all roads, using the data from the CWE and/or enrollee inventory, enrollees will identify "hot spots." Hot spots will be addressed within five years from the date of identification. Hot spots will be upgraded to the standards in these Supplemental Measures when indicated by the CWE and/or enrollee inventory. An incentive program to encourage early response to hot spots will be included.

- (b) Supplemental Measures for Reconstructing and Upgrading Existing Roads:
- i) Road Tread Erosion—Within the RPZ of Class I streams, road cross-drainage will be provided as frequently as necessary to control road tread erosion. On active native-surfaced roads, road drainage features will be located such that road runoff distances generally do not exceed three hundred (300) feet (and will not exceed four-hundred (400) feet) along the road centerline. On highly erodible soil types, or on road grades steeper than eight (8) percent, this spacing will be reduced from the specifications listed above; alternatively, a localized method to adequately control road tread erosion from providing sediment to Class I streams will be applied. Procedures for alternative methods will be agreed upon.
 - ii) Culvert Replacement and Upgrading—Where existing stream crossing culverts do not pass the fifty (50) year flow, or where blockage of fish passage is documented, replacements will be designed and constructed to carry the fifty (50) year peak flow as determined by U.S. Geological Survey flood magnitude prediction procedures (as an alternative, the culvert size for a fifty (50) year flow may be calculated by a IDL hydrologist based on an analysis of channel dimensions and/or drainage size);
 - iii) Filtration—When the outlet of road drainage features are too close to streams for effective forest-floor filtration, supplemental sediment filtration will be provided (such as slash filter windrows, straw-bales, silt fences, etc.) and/or drainage feature spacing will be decreased to minimize sediment delivery;
 - iv) Relocation—For stream-adjacent/parallel roads or where there is a high density of stream crossings, simple/inexpensive relocation will be utilized in addition to (or in lieu of) road drainage improvements where possible.
- iii. Other Road Management. Site-specific access restriction commitments currently in place in cooperation with the Idaho Department of Fish and Game and/or other cooperators will be continued (and updated as necessary for new road construction and road abandonment) to protect riparian habitats and listed species.
- iv. Road Management Database
- (a) The enrollee will commit to tracking the status of road conditions on enrolled lands. The methods for this will be either an updateable geographic information system (GIS), or a system of hand or computer aided drawing (CAD) maps, and tabular data suitable for periodic audits. It will show the road network spatially and facilitate estimation of road miles by road class. Additionally there is a

commitment to periodically (ten (10) year cycle) re-inspect roads that have been constructed or upgraded to the supplemental standards and to perform any maintenance necessary to preserve the upgraded function.

- (b) The inspection process will be performed using several methods including but not limited to: Forestry personnel reviewing roads for use in management activities, personnel knowledgeable about such road inspection, and through the Cumulative Watershed Effects Analysis (CWE) field review activities.
 - (c) The checklist for inspection will include all the elements necessary to ensure roadbed integrity, sediment management, and drainage structure function in regard to protecting streams.
- d. **VARIANCE COMMITMENTS.** All variances to these Supplemental Measures that affect fish habitat shall be reviewed by the IDL Forest Practices Coordinator or designee in consultation, as defined in the IFPA, with a fisheries biologist and approved and signed by the IDL Area Supervisor.
- e. **IMPLEMENTATION MONITORING.**
- i. IDL will monitor implementation and effectiveness of the IFPA and these additional conservation measures in protecting riparian function.
 - ii. Implementation Monitoring Plan. Each enrollee will be monitored separately within the program. Management Responses generated by the various methods listed below will be tailored to the landowner. Standards, criteria, and methods for implementation monitoring will be agreed upon.
 - (a) Three basic methods of implementation monitoring will occur to ensure the IFPA and these supplemental conservation measures are being applied on the ground. The first will be the routine on-site inspections carried out by IDL Forest Practice Advisors in the course of their work. These inspections are reviewed by staff and trends noted and reported on a yearly basis. The second is by periodic audits of management activities by an Interdisciplinary Team to review IFPA rule implementation and effectiveness. The third is by systematic implementation of CWE, which provides a framework to assess all the elements that may affect habitat and water quality, and provide a feedback loop for implementation of corrective measures and further assessment.
 - (b) For each of these methods, a report will be generated and sent to the landowner(s) with specific corrective action options presented and a timeframe in which the action is to be completed. An Interdisciplinary team will be available for consultation in reviewing the site if necessary and offering inputs on the corrective action.
 - i) Nonperformance issues documented in yearly reports may result in an increased rate of inspection and a revision of the enrollee's implementation plan.
 - ii) Nonperformance issues identified in periodic IFPA audits and CWE analyses will lead to adjusting inspection cycles and

- frequencies and reviews of enrollee's implementation plan.
- iii) It is the responsibility of the person seeking authorization for incidental take of listed fish to show that actions taken are in compliance with the Section 6 Agreement and the Idaho Forest Practices Act.
- f. **ADAPTIVE MANAGEMENT:** The parties will implement an adaptive management plan comparable in kind to that in the NFHCP, which will include among other things the following:
- i. **Effectiveness Monitoring Plan:** All of the supplemental measures in this program are expected to benefit listed fish, however, some of the commitments provide more certain benefits than others. At present, the scientific information regarding the cause-and-effect relationships between some forest management activities and aquatic resource concerns are not well understood. Thus, methods by which adaptive management strategies will investigate scientific questions on the following issues will be identified:
 - (a) Evaluation of the effects of riparian management on woody debris loads and fish habitat diversity.
 - (b) Evaluation of effectiveness of supplemental measures at minimizing stream temperature increases.
 - (c) Evaluation of the sediment inputs, including the effectiveness of road measures.
 - ii. **Changed Circumstances.**
 - (a) A "changed circumstance" is a change in the circumstances affecting a covered species that can be reasonably anticipated to occur during the term of the agreement. Changed circumstances include, among others:
 - i) Forest fires that are stand replacement fires 300 acres and larger or that affect more than 25 percent of the stream length within the watershed. "Stand replacement" is of sufficient intensity to kill 90 percent or more of the trees (i.e., a fire that would necessarily result in the need to establish a new stand);
 - ii) Flooding when the flood has a recurrence interval greater than 25 years based on stream gauging station data in the watershed, for 4th order watersheds and above; and
 - iii) Landslides larger than 500 cubic yards that deliver sediment to streams.
 - (b) Promptly after a changed circumstance is discovered, IDL will be notified and invited to help craft a site-specific management alternative.
 - iii. **Evaluation and Response Plan:** Adaptive Management triggers, similar in kind to the NFHCP will be established utilizing the data from effectiveness monitoring projects, the annual and periodic reports on implementation monitoring, and independent research as applicable to watersheds covered by these Supplemental Measures. The basic response mechanism for

instituting programmatic changes in these measures is as follows:

- (a) A trigger can be tripped by findings from any level of reporting (yearly, periodic IFPA, or CWE) or scientific study conducted as part of this program.
- (b) When a trigger is tripped, an assessment of the biological relevance of the findings between expectations and results will be performed and a determination made as to whether there is a causal linkage, or an unforeseen circumstance.
- (c) Depending on the determination above, a management response will be crafted to address the issue and enrollee implementation plans will be modified accordingly.

g. **ADMINISTRATION AND IMPLEMENTATION OF SECTION 6 PROGRAM**

- i. **IDL Administration:** IDL shall be responsible for administering and ensuring compliance with the Idaho Forestry Program.
- ii. **Enrollment and Commitment:** A landowner may enroll in this program by submitting a written request to IDL. IDL shall develop an enrollment form for use by landowners. The enrollment form shall require, at a minimum, that the enrollee:
 - (a) Identify all lands for which enrollment is sought;
 - (b) Agree to abide by the supplemental measures set forth in this program;
 - (c) Set forth a detailed schedule for implementation of the commitments required by these supplemental measures on the enrollee's forest lands;
 - (d) Authorize IDL access to the enrollee's land for purposes of monitoring compliance with this program;
 - (e) Provide IDL with an explanation of the landowners system for record keeping; and
 - (f) Provide a plan for how the enrollees' personnel will implement the supplemental measures and report actions to the landowner for compliance with these supplemental measures. This plan will include:
 - i) What internal auditing procedures will be used to check compliance with the supplemental measures;
 - ii) How hot-spot reporting and repair will be handled;
 - iii) How the schedule for tracking road condition and stream class will be accomplished; and
 - iv) Procedures for reporting changed circumstances.
- iii. **Noncompliance:** In the event that IDL determines that an enrollee is not in compliance with these supplemental measures, IDL shall work with the enrollee to cure any noncompliance or take action to revoke the enrollee's participation in the program.
- iv. **Administration Methods:** The IDL, as the administrator of the supplemental measures program, will undertake the following actions to

implement this program and to ensure enrollee compliance:

- (a) **Field Manual:** The IDL will create a field implementation manual for all enrollees to the plan within 3 months.
 - (b) **Participant Training:** IDL will create a standardized training workshop program, including field and office procedures, to be utilized by enrollees within 6 months of signing an enrollment agreement. This program will be utilized to certify that field personnel understand the supplemental measures and can apply them on the ground.
 - (c) **Inspections:** As part of the normal process of IFPA notification and inspection, the IDL will conduct field inspections of enrollee operations. All inspection items relevant to the Supplemental Measure will be reported separately, with copies sent to the operator and landowner as standardized in the Field Manual.
 - (d) **Enrollee Annual Audits:** IDL will require the enrollee to file an annual report. This report will include a summation of performance on all program activities, and progress on items such as hot-spot location and repair, stream classification and road system mapping, and road construction, upgrading, repairs and obliterations.
 - (e) **IDL Annual Audit:** IDL will prepare an annual report to NOAA Fisheries and the U.S. Fish and Wildlife Service (FWS, or collectively "Services") summarizing all program activities and detailing the performance of enrollees. This report will also include all applicable data from periodic IFPA audit results and CWE report summations on conditions and trends for enrolled lands that occurred during the preceding year. Also, any final or interim results from adaptive management activities will be reported.
 - (f) **IDL Five Year Audit:** Within 5 years of enrolling in the program the IDL will conduct an audit of all enrollee activities and prepare a report that documents a summary of those activities and compliance/non-compliance with the Supplemental Measure terms. This report will also state the total enrollee statistics as to acres of activity, miles of streams and roads surveyed and/or on which action has been taken. A comparison of the total acres enrolled and the trends of activity will also be included. These periodic audits will also include any accomplishments in adaptive management projects and any changes in procedures or standards brought about from adaptive management projects.
- h. **Forest Landowner Program.** The parties will explore the development of a landowners incentive program as a part of the Section 6 agreement.
 - i. **General Provisions**
 - i. The measures set forth in this document are the product of good faith negotiations for the purpose of resolving legal disputes, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal

proceeding. Nothing in this document shall be read as an admission or determination by the parties that any of the actions anticipated by this document are necessarily required in order to comply with the Endangered Species Act. Nothing in this document shall be interpreted as suggesting that the FPA standards as they presently exist are insufficient to avoid take of listed species.

- ii. By entering into this Agreement, neither the State of Idaho nor the private parties to this component concede that the present FPA standards are insufficient to avoid take of listed species.
3. **Habitat Improvement Program.** The State will develop a program to provide incentives for improving fish habitat. The habitat program will include the following types of measures:
- a. Correcting existing man-made passage barriers such as unscreened diversions, stream crossings, or instream structures;
 - b. Consolidation of diversions to minimize the number of screens and bypasses;
 - c. Development and construction of suitable alternatives to push-up dams;
 - d. Projects that will restore large organic debris (LOD) in streams and riparian zones, repair or remove structures that degrade fish habitat, stabilize or abandon roads, and other habitat improvement projects identified through the Cumulative Watershed Effects process;
 - e. Incentives to private landowners to undertake projects or implement other measures to enhance riparian habitat;
 - f. Habitat improvement or protection projects, such as land acquisition, conservation easements and the development of best management practices designed to provide for water quality for resident and anadromous fish;
 - g. Improving or protecting flow conditions to augment streamflows; and
 - h. Planning and monitoring.
4. **Purpose.** These measures are expected to protect and restore listed fish and their habitat in the Salmon and Clearwater basins and downstream basins.
5. **Funding.** Funds from the Habitat Trust Fund, in part (and without judgment or conclusion as to whether the amount available from the fund is, by itself, sufficient to adequately implement the Initiative), will be used to implement the Salmon/Clearwater Habitat Management and Restoration Initiative.
- C. **Habitat Trust Fund.**
- 1. As part of the settlement agreement, the parties will establish a trust fund to which the United States will contribute \$38 million (in 2004 dollars) according to a schedule determined by Congress in legislation implementing this Agreement.
 - 2. The purpose of the fund is to supplement monies otherwise available for habitat protection and restoration in the Salmon and Clearwater basins through projects, purchases, and investments such as those specified in section II.B.3 above.
 - 3. The fund will be divided into two accounts: (1) one-third of the contribution of the United States to the fund will be placed into an account for which the Nez Perce Tribe will develop a process for administration ("tribal account"), and (2) the remainder will be placed into an account for the which primary purpose will be implementation of a

Section 6 Cooperative Agreement(s) anticipated by this Agreement (see section II.D below) ("Section 6 account"). The State will collaborate with the Nez Perce Tribe and the United States to determine how to direct use of the Section 6 account. If any part of the Section 6 account is available beyond that needed for implementation of any Section 6 Cooperative Agreement(s) anticipated by this Agreement, remaining funds may be used for other habitat purposes as directed by the State, the Nez Perce Tribe, and the United States. In administration of the Section 6 account, the State of Idaho will contribute a value of no less than 33% of the contribution of the United States (*i.e.*, Idaho and the United States will provide 25%/75% matching contributions). If any portion of the fund is used to implement a Section 6 Cooperative Agreement(s), the proportional federal contribution to that portion of the fund will be considered to be a federal contribution towards implementation of the Section 6 agreement.

D. Section 6 Cooperative Agreement.

1. The State of Idaho will submit the Salmon and Clearwater Habitat Management and Restoration Initiative or components thereof to the Services as a proposed cooperative agreement(s) under Section 6 of the Endangered Species Act, 16 U.S.C. § 1535(c). The Services will enter into a Cooperative Agreement(s) with the relevant state agencies under Section 6(c) of the Endangered Species Act for the purpose of assisting the State in implementation of components of the Initiative for a thirty-year period. This Section 6 Cooperative Agreement(s) will be limited to the matters set forth in this settlement agreement. The Section 6 Cooperative Agreement(s) between the Services and the State is intended to satisfy the requirements of section 7(a)(2) of the ESA, while at the same time providing sufficient incentives to private landowners to encourage their participation in the Initiative.
2. The Parties will commit sufficient resources to complete drafting of a Section 6 Cooperative Agreement for the State Forestry Program by March 31, 2005 in accordance with the provisions of this section. The Services are committed to collaborate with the State during development of the proposal to maximize the likelihood that the submission satisfies the requirements of Section 6 and Section 7 of the ESA.
3. Federal Procedures
 - a. Endangered Species Act.
 - i. The Services will consult on any Section 6 program submitted by the State under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), regarding the federal approval and implementation of a Section 6 Cooperative Agreement(s). Incidental take authorization shall be extended to all state-authorized diversions and uses of water that are identified and analyzed from those streams identified by the State for inclusion in the Section 6 Cooperative Agreement upon issuance of a Biological Opinion on the Section 6 Cooperative Agreement(s).
 - ii. Similarly, the owners of state and private lands in Idaho ("owners"), and those undertaking timber management activities on such lands ("operators") who enroll in the forest practices program shall be entitled to incidental take coverage upon issuance of the Biological Opinion on the Section 6 Cooperative Agreement for the State Forestry Program so long as

such owners or operators are employing timber management practices that meet or exceed mandatory best management practices (BMPs) set forth in the Idaho Forest Practices Act (IFPA), Idaho Code §§ 38-1301 et seq. and are implementing the program.

- iii. A Biological Opinion(s) on any Section 6 Agreement(s) also will provide incidental take authorization for those who participate in the habitat program when they implement measures (including some of those found in section II.B.3) in accordance with the findings that derive from an analysis in the biological opinion(s) on a Section 6 Cooperative Agreement(s).
 - b. National Environmental Policy Act. The Services will prepare appropriate environmental documents and comply with the procedural requirements of the National Environmental Policy Act associated with the review and approval of a Cooperative Agreement(s).
 - c. In issuing biological opinions on a Section 6 Cooperative Agreement(s), the federal agencies shall allow the State and the parties to this Agreement to participate in the consultation and comment on the draft biological opinion.
 - d. Reinitiation of consultation on the NOAA Fisheries or the FWS FCRPS or the other component biological opinions shall not automatically trigger reinitiation of consultation on any Section 6 Cooperative Agreement(s) biological opinion.
 - e. Consultation on a Section 6 Cooperative Agreement(s) biological opinion may be reinitiated only under the following circumstances:
 - i. The State or the participants fail to comply with the terms and conditions of this agreement;
 - ii. To reduce the obligations of the parties in the event the measures in the agreement are determined to no longer be necessary; or
 - iii. Pursuant to 50 C.F.R. § 402.16.
 - f. Nothing in this section is intended to limit the use of habitat conservation plans, landowner incentives, or other habitat protection and restoration programs under the Endangered Species Act, the Fish and Wildlife Coordination Act, the Fish and Wildlife Act, or other federal or State laws.
 - g. The federal agencies may only seek additional Endangered Species Act measures in the Salmon and Clearwater Basins for the covered activities and covered species if:
 - i. The federal agencies have implemented relevant RPA actions set forth in all other biological opinions intended to benefit Snake River Basin listed species; and
 - ii. All other discretionary measures, including but not limited to, reinitiation of consultation on other relevant BiOps and the component biological opinions, that provide the reasonable potential for achieving necessary reductions in the mortality of the Snake River listed species have been implemented, to the maximum extent practicable.
- E. **Termination.** If the United States reinitiates consultation on or revokes incidental take authorization, the State may terminate the Cooperative Agreement.

III. Snake River Flow Component.

- A. General Principle: Biological Opinions will be issued for the term of this agreement which will provide incidental take coverage, if necessary, for all federal actions and related private actions including: (1) all BOR actions in the upper Snake River basin, (2) all private depletionary effects in the Snake River basin above the Hells Canyon Complex² to the extent they affect listed anadromous fish, and (3) all private depletionary effects above the Hells Canyon Complex to the extent that they are related to the federal action and affect listed resident species. These Biological Opinions shall be separate from any Federal Columbia River Power System (FCRPS) Biological Opinion. Separate biological opinions will be prepared for other components as necessary. Additionally, the parties will use their best efforts to seek enactment of state and federal legislation consistent with the terms of the general conditions to provide the necessary ESA and CWA protection for this component of the agreement and to provide statutory authority necessary to implement the agreement. The flows provided in this agreement set forth the flow contribution from the upper Snake above the Hells Canyon Complex for the benefit of listed species covered by this agreement as they travel throughout the Columbia River system, including through the FCRPS. The biological opinion on this component to be prepared by NOAA Fisheries will directly address and evaluate the expected effects of BOR's proposed operations in the Upper Snake, including any beneficial effects on anadromous fish from the flow augmentation program established in this component.
- B. Tier 1–Minimum Flow. The minimum instream flows established by the Swan Falls Agreement shall be decreed in the SRBA to the Idaho Water Resource Board (IWRB). If the Idaho Department of Water Resources fails to regulate these minimum instream flows in accordance with the Swan Falls Agreement, then any party to this agreement shall be entitled to seek injunctive relief through the state district court responsible for the SRBA.
- C. Tier 2–Flow Augmentation. The parties will establish a term-of-the-agreement flow augmentation program containing the following elements:
1. All flow augmentation from waters of the State of Idaho pursuant to Idaho Code § 42-1763B shall be done in compliance with Idaho state law and regulations, existing water bank rules and existing local rental pool procedures of the appropriate local committee, including but not limited to last to fill rule and the procedures for priorities among renters and lessors, unless changes are agreed to by the spaceholders within the water district(s) in which the reservoirs are located, the State of Idaho, and BOR. Unless otherwise agreed by the parties to give effect to sections III.D and III.E, all parties agree that they will refrain from exercising the procedures for priorities among renters and lessors the specific uncontracted storage space now held by BOR assigned for flow augmentation and powerhead available for flow augmentation as shown on Appendix III as long as this agreement has not been terminated or has not expired. Except as otherwise provided, nothing in this component shall be construed or interpreted as affecting or in any way interfering with the laws of the State of Idaho relating to the control, appropriation, use, or distribution of water or any vested rights created thereunder, or as conferring new authority to, or modifying existing authority of the

² “Above the Hells Canyon Complex,” when used in this term sheet, means the Snake River basin above the Complex, including any tributaries which drain into the Complex.

- federal government.
2. The flow augmentation program above the Hells Canyon Complex is designed to assist fish survival downstream of Hells Canyon Dam. The parties understand that the flow augmentation program provides maximum amounts of flow augmentation delivered from the upper Snake and that no guarantee can be provided, beyond the terms of this agreement, that any particular amount of water will be provided in any particular water year.
 3. Sources shall include, but are not limited to contracted and uncontracted storage, powerhead, Oregon natural flow water, Sho-Ban water bank water, rentals pursuant to the IWRB Water Bank, and natural flow acquisitions herein provided.
 4. Idaho Code § 42-1763B will be reenacted to authorize the rental of up to 427,000 acre-feet (AF) of water annually for flow augmentation for the term of the agreement. Reauthorization shall also provide for the rental of water from storage or natural flow sources from the Snake River and its tributaries at or above Lewiston.
 5. If necessary to implement the flow augmentation program of this section III, the BOR will negotiate a lease with Idaho Power pursuant to Idaho Code § 42-108A to rent uncontracted and powerhead space in the Boise Project, Arrowrock Division, for power production. In the event powerhead water is released pursuant to this section, it shall be the last of the last space to refill.
 6. The United States may also acquire on a permanent basis or rent up to 60,000 acre-feet of consumptive natural flow water rights diverted and consumed below Milner and above Swan Falls from the mainstem of the Snake River. The United States may rent said rights for flow augmentation through the IWRB Water Bank pursuant to the Board's water bank rules and I.C. Sec. 42-1763B as amended (to include up to 60,000 acre-feet of consumptive natural flow acquisition and to allow its use pursuant to this section). The 60,000 acre-feet may be rented through the water bank as long as the total rentals in III.C.4, III.C.5 and this III.C.6 do not exceed 487,000 acre-feet.
 7. Powerhead water in BOR storage facilities may be used only to increase the reliability of 427,000 acre-feet for flow augmentation and is subject to the following limitations:
 - a. After utilization by the United States of all water described in sections III.C.4 through 6, above, if the total amount of water released for flow augmentation is less than the 427,000 acre-feet, the Palisades Reservoir powerhead water may be utilized by the United States to attain 427,000 acre-feet for flow augmentation;
 - b. Use of powerhead shall not at any time interfere with the currently established minimum conservation pools or hereinafter established minimum conservation pools;
 - c. Powerhead space used for flow augmentation shall be the last space to refill after all other space in reservoirs in that water district, including other space used to provide flow augmentation, in the basin has filled;
 - d. Use of water from powerhead space shall be in compliance with state law;
 - e. Use of powerhead space shall not interfere at any time with the operating levels required for diversions of water by spaceholders in the reservoir pool, with the ability of spaceholders to refill and use active storage of the reservoir, or with the diversion of natural flow.
 8. Rental charges for stored water.

- a. A uniform rate will apply to all stored water released for flow augmentation:
 - i. \$14 per acre-foot through 2012,
 - ii. \$17 per acre-foot from 2013-2017,
 - iii. \$20 per acre-foot from 2018-2022,
 - iv. \$23 per acre-foot from 2023-2030.
 - b. The above rates are comprehensive. They include administrative fees and all other charges.
 - c. The administrative fee on BOR storage will equal the administrative fee applicable to other rentals within the basin in question.
9. All water released from BOR projects in the irrigation season after April 10 shall be treated as releases for flow augmentation except for releases (1) for delivery to or use by spaceholders, contract holders, or rentals from the water bank for purposes other than flow augmentation; (2) pursuant to established water rights; (3) in accordance with existing project operation criteria or other subsequent project operation criteria agreed to by the spaceholders and contract holders within the water district in which the reservoirs are located, the State of Idaho, and BOR; or (4) pursuant to duly adopted flood control rule curves.
10. Regulation of the delivery of rental water shall be the responsibility of the IDWR and appointed state watermasters. The timing of the release of water shall be determined by a process involving the State, the spaceholders, contract holders, and the United States.
- D. Water District 01 Rental Pool. The State of Idaho, BOR, and the spaceholder contractors in Water District 01 agree, to consider changes to rental pool procedures in Water District 01 as part of the flow augmentation program outlined in section III.C above. The State and the spaceholder contractors acknowledge that BOR, in negotiating a final agreement, will require that any rental pool provide BOR with an acceptable opportunity, as determined by it, to rent water for flow augmentation.
- E. The United States shall make its Upper Snake basin uncontracted space available to irrigation delivery entities, if the United States or irrigation delivery entities obtain the rights to an equivalent amount of replacement water from subbasins within the Upper Snake to be used for flow augmentation. Details regarding the exchanges anticipated in this section will be defined in the final settlement agreement.
- F. Reclamation will make available for irrigation, subject to the triggers and conditions in this section III.F, 30,000 acre-feet of water from the Boise Project, Payette Division. This water will be from sources exclusive of the 95,000 acre-feet of storage currently used for flow augmentation.
- 1. Triggers. Water under this section will be made available only under the following water year conditions, based on the April 1 forecast used by Reclamation of April through July runoff for the Payette River at Horseshoe Bend and the Boise River at Lucky Peak. For the Payette basin, this provision will be triggered when the April 1 forecast at Horseshoe Bend is less than 700,000 acre-feet. For the Boise basin, this provision will be triggered when the April 1 forecast at Lucky Peak is less than 570,000 acre-feet.
 - 2. Conditions of use.
 - a. The maximum volume of water to be provided by Reclamation under this provision in any given water year will be 30,000 acre-feet.

- b. Water may be used directly by Payette River water users and through exchange by Boise River water users within irrigation entities signatory to this agreement. The Boise exchange will be effected by Reclamation making water available to Boise River water users from the Boise Project in lieu of releasing that water for flow augmentation. An equivalent amount of water from the Payette storage identified above would then be released for flow augmentation.
 - c. When the Payette trigger is met, Reclamation will consign 30,000 acre-feet of Payette Division water to the Water District 65 Rental Pool, for one-year rental by irrigation water users in the Payette basin. The price for Payette rentals will be 50% of the price applicable to flow augmentation rentals or the price applicable to irrigation rentals in the basin, whichever is greater.
 - d. When the Boise trigger is met, Reclamation will consign 30,000 acre-feet of Arrowrock Division water to the Water District 63 Rental Pool, for one-year rental by irrigation water users in the Boise basin. Reclamation will then deliver a like amount of water from the Payette Division for flow augmentation, over and above the volume otherwise available from Reclamation-held storage. The price for Boise basin rentals will be the price applicable to flow augmentation rentals or the price applicable to irrigation rentals in the basin, whichever is greater.
 - e. When both triggers are met, Reclamation will consign a total of 30,000 acre-feet to be divided between Water Districts 63 and 65. Water Districts 63 and 65 will meet within 30 days of the publication of the April 1 forecasts at Lucky Peak and Horseshoe Bend, and determine how much water will be made available in each basin, with the understanding that irrigation entities in Water District 65 have the first right to rent the water consigned, up to the full amount consigned. As divided, the water rentals will be subject to the exchange conditions and prices applicable to that basin, as defined in sections c and d above. The water users will negotiate a process for implementation of this provision.
 - f. Once water is consigned to a rental pool, water users will have until July 15 to rent the water. Water not rented by July 15 will return to Reclamation.
- G. The United States will mitigate local impacts identified by the State of Idaho that may result from the rental of water for flow augmentation. The scope and amount of mitigation will be negotiated. Mitigation shall be based on the following understandings:
- 1. Powerhead: In setting rates for power and energy provided by BOR for project purposes entitled to the use of reserved power, BOR will insure that reserved power rates are neither increased nor decreased as a result of the leasing and release of water from powerhead space under the terms and conditions set forth in this agreement.
 - 2. 60,000 acre-feet: The federal legislation drafted to authorize the agreement will include a provision to authorize and seek appropriations for a one-time payment of \$2 million to the local governments in which the water rights accruing up to 60,000 acre-feet are currently used to mitigate for the change in use of the acquired water.
- H. The minimum evacuation reservoir levels for flood control shall not be altered for reasons other than flood control purposes.
- I. The Milner Agreement shall be renewed for the term of this agreement. The parties agree, however, to modify the flow limitation contained in the agreement to the extent practical to facilitate the water rental program, while still protecting the interests of the parties.

- J. To the maximum extent practicable, the United States shall be responsible for managing water acquired or rented pursuant to this agreement to meet needs of all species covered by this agreement. To the maximum extent practicable, all water acquired or rented by the United States under this agreement shall be delivered and managed: (1) in a manner that will not result in the violation of any permit, applicable water quality rule and regulation or other requirements of the Clean Water Act; (2) in a manner that will not cause jeopardy to other species in the State of Idaho; and (3) in a manner that will not result in significant adverse impacts to recreational uses of the waters of the Snake River and its tributaries within the State of Idaho. During the development of the Biological Assessment by BOR, the parties, to ensure that all water acquired or rented by the United States under this agreement does not result in the type of impacts listed above, will address the concerns that can be identified and analyzed and will develop a mutually acceptable process to address the type of impacts listed above that arise after implementation of the agreement. The State agrees that it will not require any restriction, modification, or condition on the diversion, storage, use, discharge of water, or land use to remedy or address violations of water quality standards or other Clean Water Act requirements to the extent the use of water acquired or rented by the United States pursuant to this agreement causes the violations.
- K. The term of this component of the agreement shall be for a period of thirty (30) years with opportunity for renewal upon mutual agreement.
- L. The proposed federal action for consultation will describe the agreement, including the minimum instream flows, the water rental program, and BOR operations as of the date of the agreement and during the term of the agreement, subject to the general principle contained in the agreement. In the event that the BOR fails to describe the proposed federal action consistent with this component, or it fails to issue a Biological Assessment based upon the proposed federal action which concludes that the action is not likely to jeopardize the continued existence of any listed species addressed by this consultation nor will it result in destruction or adverse modification of the critical habitat of the species, this component of this agreement shall be terminated upon written notice by the State or private parties to this component of the agreement.
- M. Consistent with the Snake River Flow Component general principle (section III.A), the Services will evaluate this component as a proposed federal action under section 7 of the Endangered Species Act, 16 U.S.C. § 1536. In the event that the Services fail to issue no jeopardy biological opinions and provide incidental take coverages as described in section III.A, or if the Services require terms or conditions inconsistent with or not contained in this Upper Snake component of the agreement, this component of the agreement shall be terminated upon written notice by the State or private parties to this agreement.
- N. Reinitiation of Consultation
1. If the United States is unable to rent flow augmentation water under the terms of this agreement because of a change to state law, regulations or water bank rules, or because of an arbitrary or capricious decision by the Director of IDWR or IDEQ, the United States may reinitiate consultation on this component of the agreement. If the United States reinitiates consultation, this component of the agreement may be terminated, including any necessary statutory components, at the option of the State of Idaho or the private parties to this component of the agreement.
 2. Reinitiation of consultation on any NOAA Fisheries or FWS FCRPS biological

opinions (hereinafter “FCRPS BiOps”), or on the biological opinions on other components of this agreement shall not automatically trigger reinitiation of consultation on the Upper Snake BOR biological opinion. Rather, consultation on the Upper Snake BOR biological opinion may be reinitiated only a) if the State or the water users fail to comply with the terms and conditions of this agreement or the United States is unable to rent flow augmentation water under the terms of the agreement because of a change to state law, regulations, or water bank rules; b) to reduce the obligations of the parties in the event the measures in the agreement are determined to no longer be necessary for any reason, including, but not limited to, the delisting of the species; or c) pursuant to 50 C.F.R. § 402.16.

3. The federal agencies which are parties to this agreement may only seek additional Endangered Species Act flow measures from the Snake River basin above the Hells Canyon Complex for the benefit of anadromous fish if: a) a jeopardy biological opinion is issued on the Upper Snake River BOR projects after utilization of all of the measures in this agreement; b) the relevant actions set forth in all other biological opinions intended to benefit Snake River basin listed species have been implemented; c) substantially all water made available under the terms and conditions of this agreement has been rented; and d) all other discretionary measures, including reinitiation of consultation on other relevant BiOps, that provide the reasonable potential for achieving necessary reductions in the mortality of the Snake River listed species have been or are being implemented, to the maximum extent practicable. In issuing any future biological opinions on Upper Snake River BOR projects, the federal agencies shall provide all parties to this agreement an opportunity to comment on the draft biological opinion. The provisions concerning reinitiation of consultation for the Upper Snake BOR projects shall remain effective so long as this component is effective.
 4. Nothing in this agreement shall be used or construed to determine or interpret in any manner what obligations, if any, the federal agencies charged with operating the FCRPS may have under the 2000 FCRPS BiOps, or other biological opinions addressing FCRPS operations or the Endangered Species Act or its implementing regulations as applied to the FCRPS, provided that no additional flows shall be required from the upper Snake above the Hells Canyon Complex except as provided for in this agreement.
- O. Subject to section IV.G of this agreement, if any party fails to implement any provision of this component, this component may be terminated at the option of any other party to this component of the agreement. By entering into this agreement, neither the State of Idaho nor the private parties to this component concede that the flows identified under section III.C benefit the listed species; that BOR operations require ESA consultations; that BOR operations are subject to modification to meet ESA requirements or concerns; or that the diversion, storage, or use of water in the State of Idaho is subject to modification to meet ESA requirements or concerns.
- IV. **General conditions applicable to the entire agreement and to all parties.** Unless otherwise specified, each of the following general conditions applies jointly and severally to each component of this agreement.
- A. Implementation and enforcement – There will be enactment of necessary laws by federal,

- state, and tribal governments to effectuate and implement the settlement agreement including legislation consistent with provisions of the agreement to provide the necessary ESA and CWA protection for the State and the private parties to this agreement.
- B. Mitigation of impacts caused by the management of water by the Federal agencies pursuant to this agreement on local and private interests (sideboards to be negotiated).
- C. ESA and CWA Assurances – (1) The water provided under this settlement shall fully satisfy any ESA requirements for the diversion and use of water, as specifically provided in each of the components of this agreement. Compliance with this agreement satisfies all CWA obligations for flows for the benefit of such species for the term of this agreement. No party shall use, during the term of this agreement, the CWA or any other theory to seek additional flows for the benefit of such species based on reduced water quality resulting directly from flow modifications or reductions in the quantity of water available in the Snake River Basin above the Hells Canyon Complex and in the Salmon and Clearwater basins in Idaho.³ (2) The Services shall evaluate each component of this agreement as separate proposed federal actions under the Endangered Species Act, 16 U.S.C. § 1536. Term-of-the-agreement (thirty (30) years) Biological Opinions will be issued on each component of this agreement. The specific provisions relating to these Biological Opinions are contained in the respective sections of this agreement. These Biological Opinions shall be separate from the FCRPS Biological Opinion. In the event that the Services fail to issue no jeopardy biological opinions or if the Services require terms or conditions inconsistent with or not contained in the component of the agreement which corresponds to the biological opinion, that component of the agreement shall be void upon written notice by the State or private parties to this agreement. If the State or private parties do not concur with the biological assessment prepared for the consultation on a particular component, that component of the agreement shall be terminated upon written notice by the State or private parties.
- D. Waivers and releases.
1. Except as otherwise provided in the Settlement Agreement, the United States, on behalf of the Nez Perce Tribe, and the Nez Perce Tribe waive and release (1) all claims for water rights within the Snake River Basin in Idaho; (2) injuries to such water rights; and (3) injuries to the Tribe's treaty rights to the extent that such injuries result or resulted from flow modifications or reductions in the quantity of water available in the Snake River Basin in Idaho that accrued at any time up to and including the effective date of the Settlement Agreement, and any continuation thereafter of any such claims, against the State of Idaho, any agency or political subdivision thereof, or any person, entity, corporation, municipal corporation, or quasi-municipal corporation. The Tribe agrees that it will not assert any claim, under any treaty theory, based on reduced water quality resulting directly from flow modifications or reductions in the quantity of water available in the Snake River Basin in Idaho, against any party to the agreement. No water rights claims the Tribe has asserted or may in the future assert outside of the Snake River Basin in Idaho shall require water to be supplied from the Snake River

³ Nothing in this agreement is intended to affect in any way the development, approval, modification, implementation, or enforcement of Clean Water Act Total Maximum Daily Load (TMDL) requirements for Brownlee Reservoir.

Basin in Idaho to satisfy such claims. Allottee language will be developed by the parties for inclusion in the decree to reflect the concept that the allottees' water comes from the overall tribal right.

2. "Water rights" means rights under state and federal law to divert, pump, impound, use or reuse, including for instream use, or permit others to divert, pump, impound, use or reuse, including for instream use, water. This includes all water right claims filed by or on behalf of the Nez Perce Tribe in the Snake River Basin Adjudication. "Injuries to water rights" means the loss, deprivation, or diminution of water rights.
 3. The Nez Perce Tribe hereby waives and releases the United States from: (1) all claims for water rights within the Snake River Basin in Idaho, injuries to such water rights, or breach of trust claims for failure to protect, acquire, or develop such water rights that accrued at any time up to and including the effective date of the Settlement Agreement; (2) all claims for injuries to the Tribe's treaty fishing rights to the extent that such injuries result or resulted from reductions in the quantity of water available in the Snake River Basin in Idaho; (3) all breach of trust claims for failure to protect Nez Perce "springs or fountains" treaty rights reserved in Article 8 of the 1863 Treaty with the Nez Perce; and (4) all breach of trust claims arising out of or resulting from the adoption of this Settlement Agreement. Provided, however, that waivers described in this section shall not be effective until all Federal funds described in the term sheet are appropriated and paid to the Nez Perce Tribe.
 4. Nothing in this agreement shall waive the Tribe's right to pursue claims against the United States relating to non-water-related injuries resulting from the construction of the Dworshak Project. Nothing in this agreement shall be interpreted to prevent the Nez Perce Tribe or the United States as trustee for the Tribe from purchasing or otherwise acquiring water rights in the future to the same extent as any other entity in accordance with Idaho state law. Nothing in this agreement shall be interpreted to impair the treaty fishing, hunting, pasturing, or gathering rights of the Nez Perce Tribe except to the extent expressly provided in this agreement. The Nez Perce Tribe shall retain all rights not specifically satisfied, waived, or released in this agreement.
 5. The waiver and releases by the federal government and the Nez Perce Tribe shall take effect and be permanent once the agreement is effective and enforceable pursuant to section IV.L. Waivers, once effective, will survive any subsequent termination of any component(s) of the agreement.
- E. This agreement, the decree, and the order approving this agreement may not be modified in any manner except as herein provided or with the joint written consent of the duly authorized representatives of the parties and the consent of the court approving this agreement, which court shall have the sole jurisdiction to modify its decree. The parties further recognize that the law dealing with federal reserved Indian water rights is a subject of ongoing litigation and agree that subsequent changes, developments, or interpretations in such law shall not change the enforceability of this agreement as written in the decree relating to such rights. Nothing in this agreement shall otherwise be construed or interpreted to restrict, enlarge, or otherwise determine the subject matter jurisdiction of any state, tribal or federal court.
- F. If any party believes that another party has failed to perform or implement a provision of this agreement, the party will inform the other party, and the parties will meet to seek to resolve the dispute. If the dispute cannot be resolved, one or more parties may request that the SRBA

- court (or any successor court) appoint a mediator, provided that the mediation will not be binding and will not be prejudicial to any jurisdictional issues raised by the dispute.
- G. A breach of one component of this agreement shall not constitute a breach of any other component of the agreement.
 - H. Nothing in this agreement shall be so construed or interpreted: (1) to establish any standard to be used for the quantification of federal reserved water rights or any other Indian water claims of any other Indian Tribes in any judicial or administrative proceeding or (2) to limit in any way the rights of the parties or any person to litigate any issue or question not resolved by this agreement. This agreement has been reached in the process of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceeding and nothing in this agreement shall be read as an admission or determination by the parties that any of the actions anticipated by this agreement are necessarily required under the Endangered Species Act.
 - I. Implementation of this Agreement by the federal or state agencies is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. §§ 1341-1519, similar requirements of state law, and the availability of appropriated funds. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury or the State General Fund. The Parties acknowledge that the federal or state agencies shall not be required under this Agreement to expend any appropriated funds unless and until an authorized official of the relevant agency affirmatively acts to commit to such expenditures in writing.
 - J. No member of or delegate to Congress shall be entitled to any share or part of this Agreement or to any benefit that may arise from it.
 - K. The parties will jointly move the Idaho Supreme Court to remand the pending appeal in Case Nos. 26042 and 26128 for entry of an order consistent with the final settlement agreement.
 - L. The agreement shall be effective when all of the following have occurred prior to March 31, 2005 (this list is not intended to determine the proper sequencing of these actions):
 1. Execution of the necessary component documents which will make up the agreement;
 2. Congressional approval of agreement and authorization of all federal expenditures required under agreement;
 3. State legislature approval of agreement and enactment of all required state legislation;
 4. Nez Perce Tribe approval of agreement;
 5. SRBA Court entry of judgment and decree incorporating agreement;
 6. Issuance of the Biological Opinions anticipated by the upper Snake component of this agreement.

Appendix I

This appendix to Section II of the term sheet describes an implementation plan to assign instream flows and reserve opportunities for future use in the Tribal Priority Streams in the Salmon and Clearwater Basins by March 31, 2005. All instream flow water rights established pursuant to the Agreement and this Appendix I will be junior to all existing water rights and subordinate to all future domestic, commercial, municipal, and industrial (DCMI) water rights.

The Tribal Priority Streams are listed in the attached Lists "A" and "B." Some of the streams on these lists are included in the Wild and Scenic Settlement Agreement between the State of Idaho and the U.S. Forest Service. Because this implementation plan is intended to be consistent with the Wild and Scenic federal reserved water rights, where Wild and Scenic stream reaches are involved, the plan adopts the future development subordinations in the Wild and Scenic reserved water right decrees.

The Tribal Priority Streams have been divided into "A" and "B" List groups based on the level of existing use. The "B" List streams include those streams where instream flows and other non-flow-related actions will be developed by the parties, in conjunction with local stakeholders and communities. The "A" List Tribal Priority Streams will have instream flows and future non-DCMI use levels assigned based on land classification except in those cases specifically set forth below where the parties have agreed to address certain special resource value areas, or areas of special concern relative to local uses. Land classification will be established based upon the predominant land ownership and where appropriate, federal land classification, existing in particular stream's basins.

For the "A" List Tribal Priority Streams, instream flows would be determined based on categories assigned using ownership of the lands within the basin. The ownership classification in a given basin would be recognized as falling into one of four categories: 1) State and private, 2) federal non-wilderness, 3) wilderness/Wild and Scenic, and 4) special areas as set forth below.

For each of these four categories, instream flows will be set by month based on estimated hydrology of unimpaired flows, and a reservation for future non-DCMI use equal to a percentage of the minimum monthly median flow value from the estimated hydrology.[‡] To prevent dewatering streams by future non-DCMI use, future non-DCMI use would be curtailed at a floor equivalent to the unimpaired monthly 80% exceedence flow. Consequently, the flow values for the four categories will be as follows:

1. For State and private basins, instream flows would be decreed for each month of the year at the 50% exceedence level of the estimated unimpaired flow, subordinated to a future non-DCMI use in the amount of 25% of the lowest median monthly unimpaired flow value.

[‡] The algorithms proposed here for establishing instream flows, future allocations, and the floor flow are based on exceedence values. The individual instream flows will be decreed as quantities in cubic feet per second (cfs) as will the future allocation for non-DCMI uses and floor flows. The administrative provisions for these instream flows will, however, recognize they are being established based upon estimated flow. The provisions of the final decrees will provide a mechanism for changes to these decreed amounts based upon actual flows if such data become available.

2. For federal, non-wilderness basins, instream flows would be decreed for each month of the year at the 40% exceedence level of the estimated unimpaired flow, subordinated to a future non-DCMI use in the amount of 10% of the lowest median monthly unimpaired flow value.
3. For federal wilderness and Wild and Scenic basins, instream flows would be decreed for each month of the year at the 30% exceedence level of the estimated unimpaired flow, subordinated to a future non-DCMI use in the amount of 5% of the lowest median monthly unimpaired flow value.
4. The Special Areas include watersheds that hold special values including high value habitat for fish resources, other special values, and areas where future development opportunities would be preserved. The instream flows and reservations for future non-DCMI use for the special areas differ from the land-based formula described above.

Special Areas include:

Lower Salmon River below Long Tom Bar to the mouth: Instream flows for the lower Salmon River downstream of the Wild and Scenic Reach would be consistent with the application filed for the lower Salmon River below Hammer Creek. The State application for the instream flow in the Lower Salmon addresses the reach from the mouth to Hammer Creek. The instream flows reach in the current application will be extended to include the reach of the Salmon below the Little Salmon. The instream flows in the reach between the Little Salmon and the Wild and Scenic River will be based on the downstream reach and adjusted for the inflow from the Little Salmon River. The State instream flow will be made consistent with the Wild and Scenic instream flow for the main Salmon River.

South Fork Salmon River and tributaries contained within the Tribal Priority Stream List: Instream flows would be decreed for each month of the year at the 40% exceedence level of the estimated unimpaired hydrology, subordinated to a future non-DCMI use in the amount of 5% of the lowest median monthly unimpaired flow value.

Upper Salmon: The upper Salmon basin includes a number of tributaries that meet the criteria of "B" List streams. Instream flows established for the tributaries or the mainstem Salmon will be in accord with Wild and Scenic River instream flows and future allocations, subject to the Order Approving Stipulation and Dismissing Objections in Consolidated Subcase Nos: 63-25239, 75-13316, and 75-13606, issued by Judge Daniel C. Hurlbutt, Jr., Presiding Judge, Snake River Basin Adjudication, on June 16, 1998.

Lolo Creek: Instream flows will be decreed for each month of the year at the 40% exceedence level of the estimated unimpaired hydrology, subordinated to a future non-DCMI use in the amount of 10% of the lowest median monthly unimpaired flow value.

Bedrock Creek: Instream flows will be decreed for each month of the year at the 40% exceedence level of the estimated unimpaired hydrology, subordinated to a future non-DCMI use in the amount of 10% of the lowest median monthly unimpaired flow value.

Upper North Fork Clearwater River, Breakfast Creek: Instream flows would be decreed for each month of the year at the 40% exceedence level of the estimated unimpaired hydrology, subordinated to a future

non-DCMI use in the amount of 10% of the lowest median monthly unimpaired flow value.

Future Uses for "A" List streams.

The future use allocations will provide water for non-DCMI uses. The parties will study the overlap of existing uses and future use to determine if additional criteria will assist the parties in allocating future use. The goal is to avoid reducing streamflows to a level where the unimpaired 80% exceedence value is the flow that normally occurs in the stream due to the combination of existing and future use.

List A, Non-Developed Streams

Stream Name	Tributary to	BIA Basin Number(s)	Quantification Location(s)
Captain John Creek	Snake River	1107	1107
Clearwater River	Snake River	143, 150, 152, 155, 156, 160, 165, 167, 168, 181, 182, 196, 223, 229, 248, 260, 276, 277	182, 165
Pine Creek	Clearwater River	129	129
Bedrock Creek	Clearwater River	131	131
North Fork Clearwater	Clearwater River	42, 51, 59, 71, 73, 83, 96, 113, 118, 130, 146, 39, 31, 30, 10, 34, 35, 37, 56, 61, 66, 91, 99, 95, 70	34, 39, 146
Elk Creek	North Fork Clearwater River	75, 27	75
Skull Creek	North Fork Clearwater River	41, 22	41
Collins Creek	Skull Creek	14	14
Breakfast Creek	North Fork Clearwater River	25, 28	25
Fourth of July Creek	North Fork Clearwater River	102	102
Lake Creek	North Fork Clearwater River	40, 46	40
Little N.F. Clearwater	North Fork Clearwater River	2, 12, 17, 24	24
Canyon Creek	Little N.F. Clearwater River	4, 6	4
Foehl Creek	Little N.F. Clearwater River	9	9
Isabella Creek	North Fork Clearwater River	23	23
Weitas Creek	North Fork Clearwater River	125, 128, 140, 141, 157, 163	125, 157
Kelly Creek	North Fork Clearwater River	60, 78, 81, 87, 89	81
Cayuse Creek	Kelly Creek	94, 101, 109, 119	94
Toboggan Creek	Cayuse Creek	105	105
Vanderbilt Gulch Creek	North Fork Clearwater River	20	20
Orofino Creek	Clearwater River	144, 149, 158, 172	172
Lolo Creek	Clearwater River	186, 210, 247, 256	210
Yakus Creek	Lolo Creek	267	267
Eldorado Creek	Lolo Creek	216	216
Musselshell Creek	Lolo Creek	190	190
Yoosa Creek ¹	Lolo Creek	186	9186
Sixmile Creek	Clearwater River	244, 253	253
Effie Creek	Sixmile Creek	254	254
Fivemile Creek	Clearwater River	231	231
Unnamed Stream	Clearwater River	243	243
South Fork Clearwater	Clearwater River	306, 326, 327, 340, 357,	306, 411

Stream Name	Tributary to	BIA Basin Number(s)	Quantification Location(s)
		363, 399, 403, 405, 409, 410, 411, 413, 416, 423	
Threemile Creek	South Fork Clearwater River	338	338
Mill Creek	South Fork Clearwater River	417	417
Meadow Creek	South Fork Clearwater River	373	373
Johns Creek	South Fork Clearwater River	419, 440	419
Cougar Creek	South Fork Clearwater River	396	396
Peasley Creek	South Fork Clearwater River	385	385
Silver Creek	South Fork Clearwater River	379	379
Tenmile Creek	South Fork Clearwater River	425	425
Newsome Creek	South Fork Clearwater River	358	358
Crooked River	South Fork Clearwater River	420	420
Red River	South Fork Clearwater River	418, 421, 422, 430	422
S. Fork Red River	Red River	444	444
American River	South Fork Clearwater River	364, 389	389
Sally Ann Creek ¹	South Fork Clearwater River	340	340
Middle Fork Clearwater	Clearwater River	287, 290, 308	290
Maggie Creek	Middle Fork Clearwater River	278	278
Clear Creek	Middle Fork Clearwater River	311, 318	311
S. Fork Clear Creek	Clear Creek	344	344
Selway River	Middle Fork Clearwater River	288, 303, 309, 310, 312, 313, 317, 329, 335, 349, 352, 365, 371, 374, 404, 406, 424, 431, 435, 447, 463, 469, 481	309, 404
Gedney Creek	Selway River	289, 300, 320	320
O'Hara Creek	Selway River	325, 346	325, 346
Hamby Fork of O'Hara Creek	O'Hara Creek	345	345
Meadow Creek	Selway River	347, 368, 391, 393, 398, 401, 415	347
Buck Lake Creek	Meadow Creek	366	366
Three Prong Creek	Meadow Creek	414	414
Mink Creek	Selway River	322	322
Marten Creek	Selway River	321	321
Moose Creek	Selway River	292	292
E. Fork Moose Cr.	Moose Creek	251, 258	258
N. Fork Moose Cr.	Moose Creek	239, 255, 272	272
West Moose Cr.	North Fork Moose Creek	227	227
Rhoda Creek	Selway River	259, 270	270

Stream Name	Tributary to	BIA Basin Number(s)	Quantification Location(s)
Wounded Doe Cr.	Rhoda Creek	250	250
Pettibone Creek	Selway River	291	291
Bear Creek	Selway River	299, 304, 341	341
Cub Creek	Bear Creek	343, 351, 355	351
Goat Creek	Selway River	370	370
Running Creek	Selway River	386, 383	386
White Cap Creek	Selway River	367, 388, 390	388
Indian Creek	Selway River	412	412
Deep Creek	Selway River	433	433
Wilkerson Creek	Selway River	460	460
Lochsa River	Middle Fork Clearwater River	151, 161, 162, 178, 179, 183, 192, 232, 242, 252, 266, 268, 274, 284, 296	296
Pete King Creek	Lochsa River	273	273
Old Man Creek	Lochsa River	261	261
Fish Creek	Lochsa River	201, 219	201
Hungery Creek	Fish Creek	198	198
Boulder Creek	Lochsa River	237	237
Warm Springs Creek	Lochsa River	187, 209	187
Fishing Creek (Squaw Creek)	Lochsa River	135	135
Legendary Bear Creek (Papoose Creek)	Lochsa River	133	133
Walton Creek	Lochsa River	174	174
Crooked Fork	Lochsa River	84, 122, 139	139
Brushy Fork	Crooked Fork	107, 124	124
Spruce Creek	Brushy Creek	126	126
White Sand Creek	Lochsa River	154, 188, 189, 193, 203	154
Big Sand Creek	White Sand Creek	206, 222, 236	206
Big Flat Creek	White Sand Creek	208	208

Stream Name	Tributary to	BIA Basin Number(s)	Quantification Location(s)
Salmon River	Snake River	323, 330, 331, 353, 354, 356, 369, 380, 384, 397, 432, 441, 445, 454, 458, 467, 474, 475, 486, 488, 489, 490, 494, 499, 505, 508, 511, 512, 515, 517, 520, 521, 522, 524, 525, 527, 530, 532, 535, 538, 541, 544, 545, 546, 549, 550, 551, 553, 558, 564, 570, 574, 575, 578, 580, 582, 587, 592, 604, 629, 664, 705, 717, 747, 786, 788, 831, 851, 853, 876, 916, 924, 928, 989, 1006, 1009, 1013, 1014, 1015, 1016, 1017, 1019, 1027, 1024, 1034, 1047, 1050, 1062, 1065, 1073, 1074	397, 525, 578, 664, 853, 1015
Pine Creek	Salmon River	586	586
Rice Creek	Salmon River	387	387
Rock Creek	Salmon River	372	372
Wind River	Salmon River	471, 519	519
White Bird Creek	Salmon River	408, 407, 427	407
Skookumchuck Creek	Salmon River	437	437
Slate Creek	Salmon River	442, 453, 456, 457	453
Little Slate Creek	Slate Creek	466, 478, 492	466
Sheep Creek	Salmon River	464	464
Billy Creek ¹	Snake River	91105	91105
French Creek	Salmon River	556, 624	556
South Fork Salmon River	Salmon River	583, 613, 659, 666, 695, 714, 740, 744, 752, 770, 771, 806, 823, 896, 1081, 1082	583, 752
Blackmare Creek	South Fork Salmon River	813	813
Porphyry Creek	South Fork Salmon River	610	610
Secesh River	South Fork Salmon River	588, 649, 652, 686	588, 686
Lake Creek	Secesh River	9588	9588
Lick Creek	Secesh River	700	700
E. Fork S. Fork Salmon	South Fork Salmon River	742, 745, 753, 756, 759, 761, 778	745
Profile Creek	E. Fork S. Fork Salmon River	723	723
Johnson Creek	E. Fork S. Fork Salmon River	765, 780, 808, 833, 883	765
Burntlog Creek	Johnson Creek	835	835

Stream Name	Tributary to	BIA Basin Number(s)	Quantification Location(s)
Quartz Creek	E. Fork S. Fork Salmon River	720	720
Sugar Creek	E. Fork S. Fork Salmon River	757	757
Tamarack Creek	E. Fork S. Fork Salmon River	736	736
Buckhorn Creek	South Fork Salmon River	766, 783	766
Fitzum Creek	South Fork Salmon River	734	734
Warm Lake Creek	South Fork Salmon River	861	861
Bargamin Creek	Salmon River	426	426
Chamberlain Creek	Salmon River	539, 540, 543, 567, 571	540
W. Fork Chamberlain	Chamberlain Creek	526	526
Horse Creek	Salmon River	498, 495, 531, 554	554
Middle Fork Salmon River	Salmon River	631, 607, 612, 658, 711, 739, 762, 777, 794, 814, 818, 820, 839, 847, 864, 884, 894, 917, 932, 958	607, 814
Big Creek	Middle Fork Salmon River	641, 650, 651, 655, 670, 676, 681, 687, 697	655, 697
Rush Creek	Big Creek	706, 709, 713, 725	706
Monumental Creek	Big Creek	671, 701, 750	671
Smith Creek	Big Creek	639	639
Logan Creek	Big Creek	675	675
Brush Creek	Middle Fork Salmon River	751	751
Camas Creek	Middle Fork Salmon River	781, 782, 792, 815, 822, 830, 844, 848, 868	782
Silver Creek	Camas Creek	773	773
Loon Creek	Middle Fork Salmon River	824, 880, 889, 897, 901, 930, 943, 950	824
Marble Creek	Middle Fork Salmon River	758, 789, 805	805
Dynamite Creek	Marble Creek	791	791
Indian Creek	Middle Fork Salmon River	795	795
Pistol Creek	Middle Fork Salmon River	855, 858	855
Rapid River	Middle Fork Salmon River	874, 900, 920	874
Sheep Creek	Middle Fork Salmon River	775	775
Sulphur Creek	Middle Fork Salmon River	918	918
Marsh Creek	Middle Fork Salmon River	971, 981, 986	971
Bear Valley Creek	Middle Fork Salmon River	967, 987	967
Elk Creek	Bear Valley Creek	949, 963, 972	972
Panther Creek	Salmon River	593, 600, 621, 628, 645, 682, 690, 715, 718, 726, 735	600, 735
Lightning Creek	Yankee Fork	964	964
Eightmile Creek	Yankee Fork	962	962
Redfish Lake Creek	Salmon River	1036, 1040	1036
Yellow Belly Lake Cr.	Alturas Lake Creek	1066	1066

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Stream is located within basin number.

List B. Developed Streams/Watersheds.

Stream Name	Tributary to	BIA Basin Number(s)	Quantification Location(s)	Tributary Quantification Location(s)
Lapwai Creek and tributaries	Clearwater River	195, 197, 207, 213	195	177, 220, 225, 214, 264, 265, 238
Potlatch River and tributaries	Clearwater River	15, 43, 54, 90, 106, 108, 112, 138, 159	159	110
Cottonwood Creek	Clearwater River	170	170	N/A
Jacks Creek	Clearwater River	171	171	N/A
Big Canyon Creek and tributaries	Clearwater River	175, 185, 226, 230	175	234, 235, 180, 241, 245
Whiskey Creek	Orofino Creek	134	134	N/A
Jim Ford Creek	Clearwater River	184, 217	184	N/A
Tom Taha Creek	Clearwater River	257	257	N/A
Lawyer Creek and tributaries	Clearwater River	275, 280, 285, 298, 301	275	283, 293, 294, 302
Cottonwood Creek and tributaries	South Fork Clearwater River	307, 315, 334, 336	307	295
Rabbit Creek	South Fork Clearwater River	332	332	N/A
Big Elk Creek	American River	382	382	N/A
Little Salmon River and tributaries	Salmon River	548, 561, 581, 637, 643, 656, 693, 710, 1079, 1080	548, 693	605, 620, 638
Sheep Creek	South Fork Salmon River	719	719	N/A
Hat Creek	Salmon River	796, 802, 826	826	N/A
East Fork Salmon River and tributaries	Salmon River	1018, 1028, 1032, 1033, 1041, 1046, 1052, 1063, 1068	1018, 1052	1060, 1042, 1053
North Fork Salmon River and tributaries	Salmon River	448, 491, 506, 516, 533	533	N/A
Lemhi River and tributaries	Salmon River	640, 646, 673, 698, 729, 737, 755, 767, 776, 797, 800, 804, 846, 829	640, 800	801
Pahsimeroi River and tributaries	Salmon River	873, 908, 915, 929, 947, 956, 991, 1011, 1031	873	N/A

Stream Name	Tributary to	BIA Basin Number(s)	Quantification Location(s)	Tributary Quantification Location(s)
Yankee Fork	Salmon River	942, 977, 982, 992, 998, 1001	1001	N/A
Alturas Lake Creek	Salmon River	1067, 1078	1078	N/A
Valley Creek and tributaries	Salmon River	1004, 1008	1008	1021, (streams in 1004 and 1008)

Section A. Channel types.

Figure 1. Stream is confined in a V-shaped valley.

Plan View



Cross-section View

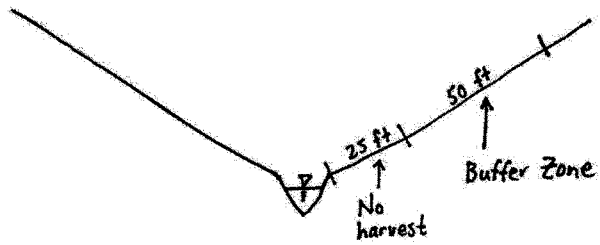


Figure 2. Stream is stable in an un-confined valley.

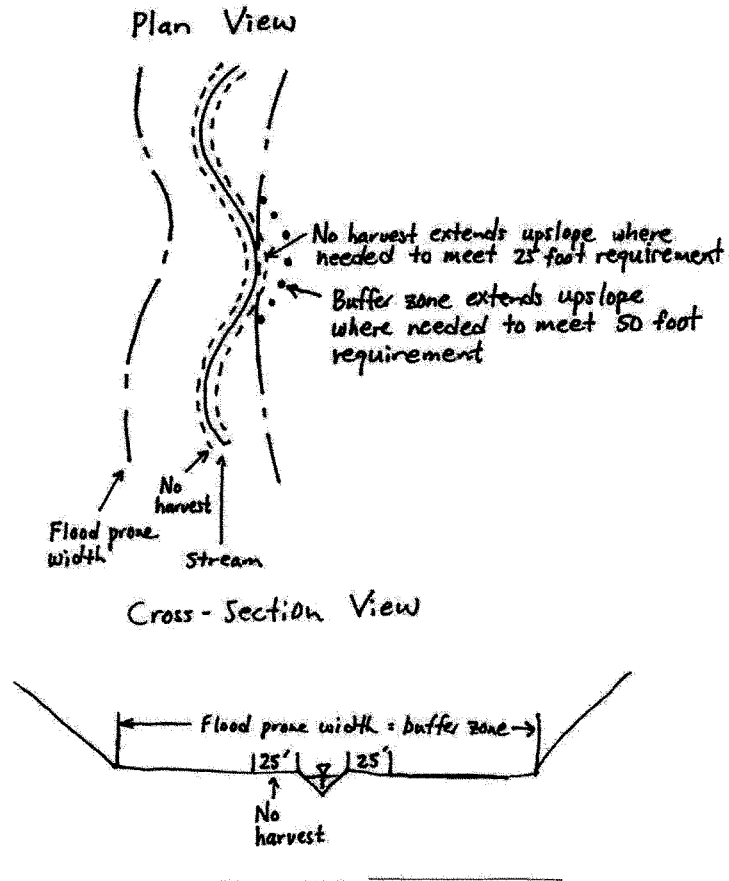
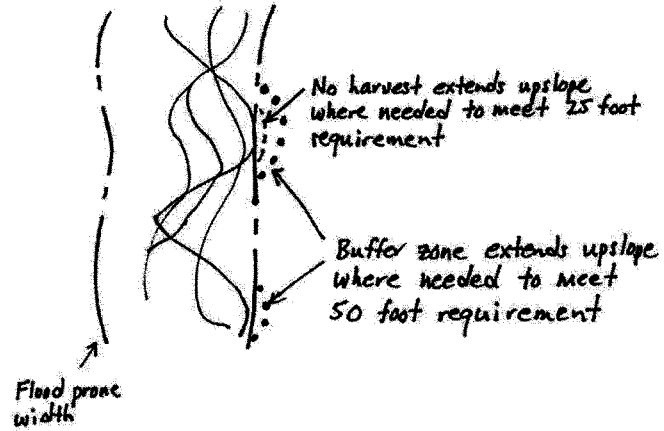


Figure 3. Multiple channels in an un-confined valley.

Plan View



Cross-section View

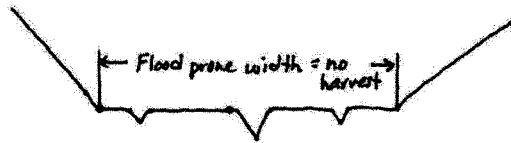
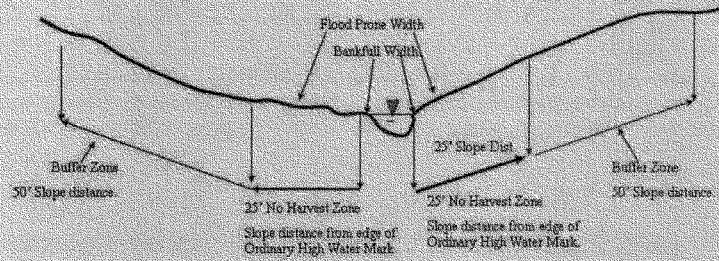


Figure 4

Determine the extent of the No Harvest and Buffer Zone for single confined channels.



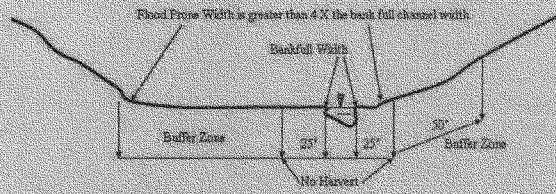
SINGLE CONFINED CHANNEL: Bank full flow is contained within a single channel and the flood prone width in less than four times the bank full channel width

- A) Determine average Bankfull Depth (at Ordinary High Water Mark) for the reach being managed. The extent of this stage is marked by points A.



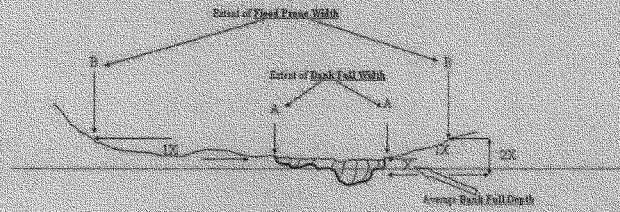
Figure 5

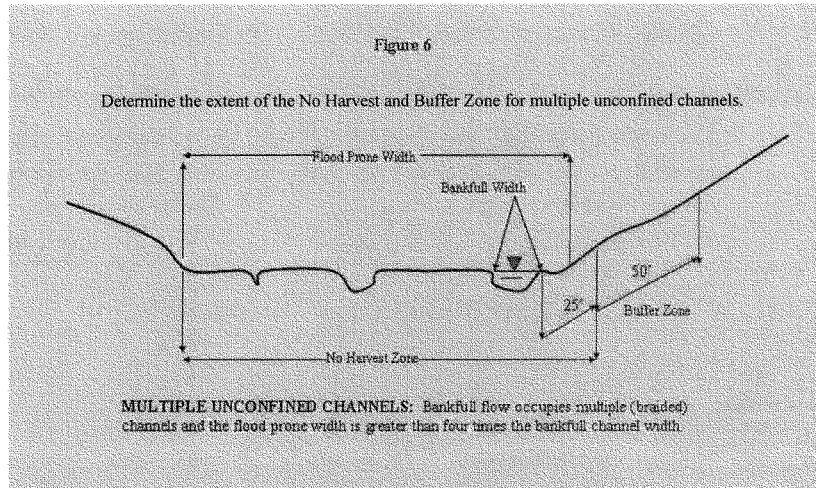
Determine the extent of the No Harvest and Buffer Zone for single unconfined channels.



SINGLE UNCONFINED CHANNEL: Bank full flow is contained within a single channel and the flood prone width is greater than four times the bank full channel width.

B. Calculate the Flood-Prone Width, which is 2X the bankfull depth, projected out to locate reference points B.





Section B. EROSION AND MASS FAILURE HAZARDS ASSESSMENT**Introduction**

Sediment in streams is caused by past or present erosion in the watershed. The two most important erosion processes in the forested environment are surface erosion and mass failures. In forested watersheds, the hazard of surface erosion is largely a function of parent material and slope steepness. Road construction exposes significant areas of parent material and soil, reduces soil permeability, and intercepts, reroutes, and concentrates runoff. Roads are therefore the primary source of sediment from management activities in forested areas.

Increased peak stream flows may destabilize stream channels and erode stream banks. This effect is evaluated in Section D of this manual.

The hazard of mass failure (landslides) is primarily a function of the steepness of slopes, the parent material, and subsurface hydrology.

Both mass failure and surface erosion occur naturally in the forest, but they can be accelerated by poorly planned or executed forest practices.

The mass failure and surface erosion hazard ratings determined in this section will also be used in the Nutrient Hazard section (Section H).

Each item in this section is designed to answer two questions:

1. What is the inherent potential for mass failure in the watershed?
2. What is the inherent potential for surface erosion in the watershed?

Rationale

The CWE process for Idaho relies on readily available and commonly understood data to predict erosion hazards. Geology, slope and surface soil texture are landscape characteristics easily recognized by field foresters. Geologic, topographic, and soil maps are readily available. Foresters continually use geology, soil and slope information to make decisions about forest management activities. The CWE hazard ratings are based on analyses of geology, soils, and slopes as they relate to surface erosion and mass failures.

The surface erosion and mass failure hazard ratings below reflect the best judgment of professionals incorporating field experience and existing data (IDL, 1999). As a CWE analysis progresses in a watershed, the evaluators should monitor the geology, soils, and slopes in the area to verify that the hazard ratings reflect on-the-ground conditions.

References:

- IDL. 1999. Analysis of mass failure data from the Pend Oreille, St. Joe, Clearwater, and Payette regions of Idaho. Unpublished. IDL, Coeur d'Alene, Idaho.
- Kappesser, Gary B. 1993. Riffle Stability Index, A Procedure to Evaluate Stream Reach and Watershed Equilibrium. USDA Forest Service, Idaho Panhandle National Forests.
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- Nygaard, Rosa, B. Kulesza, B. Putnam, R. Russell. 1990. WATSED, Water and Sediment Yield Model. USDA Forest Service, Region 1, Range, Air, Watershed, and Ecology Staff Unit.
- Patton, Rick. 1989. WATBAL, Watershed Response Model for Forest Management. USDA Forest Service, Clearwater National Forest.
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Section C. Mass Failure Hazard Ratings

Slope and bedrock are generally the most important predictors of the risk of mass failure. A considerable amount of data collected in Idaho supports this conclusion. Additional factors to be considered on the ground are degree of bedrock weathering, slope shape, with concave slopes being more prone to mass failure, aspect, dip of the bedrock, geologic contact and fault zones, presence of springs or seeps, and other features indicating accumulations of water and/or soil materials. Table B-1 shows the relation of geologic material and slope to mass failure hazard. It is important that field examinations verify this information and add the degree of weathering, if necessary.

**TABLE B-1
MASS FAILURE HAZARD RATINGS**

BEDROCK/PARENT MATERIAL	Slopes 0-30%	Slopes 31-60%	Slopes >60%
Alluvium – coarse textured	L	M	H
Alluvium – fine textured	L	H	H
Tertiary sediments – unconsolidated/loose			
Lacustrine sediments	M	H	H
Loess	L	M	H
Metasediments – quartzite to argillite (Belt Supergroup) weakly weathered	L	L	M
Metasediments – quartzite to argillite (Belt Supergroup) highly weathered	L	M	H
Schist & Gneiss weakly weathered	L	M	H
Schist & Gneiss highly weathered	M	H	H
Granitics weakly weathered	L	M	H
Granitics highly weathered	M	H	H
Basalt – Columbia River Basalt flows	L	M	H
Limestone & Dolomite	L	M	H
Shale	L	H	H
Glacial Drift	M	H	H

Surface Erosion Hazard

The potential for surface erosion in forested terrain is largely a function of slope steepness, surface soil texture/soil structure, and the amount of roots in the surface few inches. Generally the surface texture, structure and amount of roots in the surface of forest soils are strongly related to the soil parent material. The hazard ratings in Table B-2 below are based on a surface soil where the above ground vegetation and duff have been removed, as with logging and/or burning, but the soil itself has not been substantially disturbed. These ratings are for soils that retain the cohesion supplied by intact roots, mycorrhizae and organic matter.

TABLE B-2
SURFACE EROSION HAZARD RATINGS

EROSION HAZARD	0-30% Slopes	31-60% Slopes	>60% Slopes
LOW	Volcanic Ash* Metasediments Argillite & Siltite Quartzite Basalt Schist & Gneiss Limestone/Dolomite Alluvium--coarse textured	Volcanic Ash* Metasediments Argillite & Siltite Quartzite Limestone/Dolomite Alluvium-coarse textured	
MEDIUM	Granitics Glacial Drift Loess Lacustrine Sediments Tertiary Sediments Alluvium-fine textured Shale	Glacial Drift Loess Schist & Gneiss Basalt Alluvium-fine textured	Volcanic Ash* Metasediments Argillite & Siltite Quartzite Limestone/Dolomite Alluvium-coarse textured
HIGH		Lacustrine Sediments Tertiary Sediments Granitics Shale	Lacustrine Sediments Tertiary Sediments Alluvium-fine textured Glacial Drift Granitics Schist & Gneiss Basalt Shale

Appendix III

Reclamation Project Reservoirs Above Hells Canyon Dam
Water Assigned for Flow Augmentation

Reservoir	Acre-Feet
Payette	
Cascade	69,600 ^{1/2}
Deadwood	25,400 ¹
Subtotal	95,000
Upper Snake	
American Falls	8,951 ²
Jackson	3,923 ²
Palisades	10,022 ²
Subtotal	22,896
Grand Total (non-powerhead)	117,896
Powerhead	
Anderson Ranch powerhead	41,000
Palisades powerhead	157,000
Powerhead Total	198,000

^{1/2}Reassigned for flow augmentation.

²Reacquired for flow augmentation.