

**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 Willowa 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 tyee 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 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 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.

