

**STATEMENT OF ROGER D. LING  
ON BEHALF OF FEDERAL CLAIMS COALITION  
UPPER SNAKE RIVER WATER USERS  
FOR THE  
U.S. SENATE  
SENATE INDIAN AFFAIRS COMMITTEE  
JULY 20, 2004**

TO: Senator Daniel K. Inouye, Vice-Chairman and Committee Members

It is an honor and pleasure to appear today before the Senate Indian Affairs Committee 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, Idaho 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 five 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 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.

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.