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108TH CONGRESS, 2d Session | SENATE | REPORT 108–389

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

OCTOBER 7, 2004.—Ordered to be printed

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

REPORT

[To accompany S. 2605]

The Committee on Indian Affairs, to which was referred the bill (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 having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE

The purpose of S. 2605 is to approve the terms of a settlement agreement addressing the water rights of the Nez Perce Tribe of Indians (the Tribe) and its allottees in the Snake River within the State of Idaho, the Tribe's rights of access to and use of water in springs or fountains on Federal lands within a Tribal cession area, monetary and other compensation to the Tribe, as well as several other issues relating to the Snake River Basin such as minimum instream flows and riparian habitat protection and improvement measures for certain streams, all as set forth in a certain "Mediator's Term Sheet" described in greater detail below. S. 2605 also authorizes the appropriation of funds to fulfill the obligations of the United States under the settlement agreement, and directs the Secretary of Interior and the heads of other Federal agencies with obligations under the agreement to take all actions, consistent with the Act, that are necessary to carry out the terms of the agreement.

39–010

BACKGROUND

S. 2605 is intended to resolve the reserved water rights claims of the Tribe and its allottees in the Snake River Basin in the State of Idaho, and to address certain other issues relating to the allocation and use of water, the establishment of minimum instream flows, and the protection and improvement of riparian habitats within that basin.

Under the reserved Indian water rights doctrine established by the U.S. Supreme Court in *Winters* v. *United States,* 207 U.S. 564 (1907), the setting aside of a reservation for an Indian tribe creates an implied reservation of rights to water in an amount sufficient to fulfill the purposes of the reservation. These *Winters* rights have a basis in Federal law that is separate and distinct from water rights created under the water rights legal system of "prior appropriation" that controls the use and allocation of water, including the priorities of use in times of shortage, under the laws of most western states. Generally speaking, in states that have adopted systems based on prior appropriation, the ownership and priority of water rights in a particular stream originate with the act of diverting water for beneficial use. Tribal reserved water rights (including the water rights of those who hold allotted trust lands located within Indian reservations) and their dates of priority, on the other hand, arise from the creation of the reservation, and are not dependent on diversion for beneficial use. Because in many areas the establishment of Indian reservations preceded the initiation of most non-Indian water uses, Indian reserved water rights often have priority over the rights of other water users whose rights are based in state law. Accordingly, if Indian tribes were to exercise long-dormant but senior *Winters* rights at times when there are insufficient flows available to satisfy the needs of all users, Indian and non-Indian alike, existing non-Indian water users with rights based on the state-law systems of prior appropriation would often face the subordination of their rights to divert and use water.

In the past, the quantification of water rights, whether based on the *Winters* or otherwise, was often accomplished through the mechanism of a "general stream adjudication," in which a court or administrative agency would undertake to quantify all of the water rights in a particular watershed. The McCarran Amendment, 43 U.S.C. 666, waives the sovereign immunity of the United States so as to allow state courts and agencies to adjudicate Federal water rights in proceedings that qualify as general stream adjudications, and this waiver of immunity from suit has been interpreted by the courts to include claims against the United States as trustee of reserved water rights of Indian tribes and individual Indian allottees.

However, the general stream adjudication process has proven itself to be an unwieldy, expensive and, above all, slow method for resolving the competing water rights claims in a stream or watershed.[1] A significant additional shortcoming from the tribal perspec-

[1] A general stream adjudication for the Nambe-Pojoaque River System in New Mexico was filed in 1966 by the State of New Mexico and is still an active case pending in the U.S. District Court for the State of New Mexico. See, *State of New Mexico ex rel. State Engineer* v. *Aamodt,* Case No. 66–cv–6639 EM. The general stream adjudication for the Gila River System in the State of Arizona was filed in 1974 is also still an active case. See, In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, Superior Court for the State of Arizona in and for the County of Maricopa. Another active stream adjudication in Arizona, involving the Little Colorado River System, was filed in 1978. See, In re the General Adjudica-

tive is that although a decree in a general stream adjudication might recognize an Indian tribe's rights to substantial quantities of water with an early priority date, this may do little, if anything, to deliver real (or "wet") water to dry Indian lands.

The shortcomings of the general stream adjudication process as a device for water rights dispute resolution have led to an increasing number of agreed-to water rights settlements on streams in the western States-where the parties, including Indian tribes, negotiate and compromise among themselves as to quantity, priority dates and other issues, and where the Federal government contributes money to the settlement in order to achieve various goals that could not otherwise be achieved within the confines of a general stream adjudication, such as monetary and other compensation to the Indian tribe, including construction of water delivery systems that bring "wet" water to the Indian lands as well as other tangible benefits to the tribe or its members.

The Snake River Basin Adjudication ("SRBA") is a state court general stream adjudication addressing claims to water rights within the Snake River Basin in the State of Idaho.[2] The SRBA involves some 150,000 claims arising in 38 of Idaho's 44 counties, among them the claims of the Tribe which are based in part on treaties executed in 1855 and 1863 between the Tribe and the United States.

Pursuant to an order of the SRBA court, the State of Idaho, municipalities, irrigation districts and other water users in the State of Idaho, the United States as trustee for the Tribe and holders of allotted trust lands within the Tribe's reservation (the "allottees"), and the Nez Perce Tribe itself, engaged in process of mediation in an effort to resolve the Tribe's claims to water in the Snake River Basin at issue in the SRBA. Those parties have reached an agreement, which is set out in a "Mediator's Term Sheet" (the "Agreement"), that would, inter alia, settle disputes over the Tribe's Snake River water rights.[3] The intent of the present legislation is to "authorize, ratify, and confirm" the Agreement, to direct the Secretary of the Interior and other heads of Federal agencies to execute and perform actions necessary to carry out the Agreement, and to authorize appropriations so that all parties can obtain the benefits of the Agreement. S. 2605 and the Agreement provide for the quantification of the water rights of the Tribe and the allottees in the Snake River Basin and the augmentation of stream flows important to protected fish species, while at the same time protecting the interests of existing non-Indian water users by providing substantial finality and certainty to all parties.

Overview of the agreement

The terms of the Agreement with respect to the Tribe's water rights, the conduct of habitat and instream flow protections and improvements and various other measures are all set forth in the

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tion of All Rights to Use Water in the Little Colorado River System and Source, Case No. 6417, Superior Court for the State of Arizona in and for the County of Apache.

[2] In re *SRBA,* Case No. 39576, District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.

[3] The court in the *SRBA* case issued an order accepting the Mediator's Term Sheet and its three appendices for filing in Consolidated Subcase Nos. 03–10022 and 67–13701 on April 20, 2004. A copy of the term sheet with appendices is included with this Report as "Attachment A."

27-page Mediator's Term Sheet and its three attached appendices. The Term Sheet is broken out into four principal sections: I. Nez Perce Tribal Component, II. Salmon/Clearwater Component, III. Snake River Flow Component, and IV. General Conditions applicable to the entire agreement.

In the Nez Perce Tribal Component, the Agreement specifies that the Tribe's on-reservation consumptive use reserved water right will be quantified at 50,000 acre-feet per year, with a priority date of 1855, for irrigation, domestic, commercial, municipal, industrial, hatchery and cultural uses. The Agreement also recognizes the Tribe's right of access to and use of water from springs and fountains on Federal lands within the 1863 Nez Perce Treaty ceded area, while similar rights claimed on non-Federal lands are to be waived. Among other terms, the Tribal Component also includes provisions to the effect that—

—The Tribe may select from a list of available Bureau of Land Management (BLM) lands within the Nez Perce Indian Reservation up to a total value of $7 million, and these selected lands will be transferred to the Nez Perce Tribe.

—The United States and the Tribe will enter into agreements for Tribal management of the Kooskia National Fish Hatchery, co-management of the Dworshak National Fish Hatchery, and use of water in the Dworshak Reservoir for flow augmentation for fish.[4]

—The United States will establish a $50 million water and fisheries trust fund for use by the Tribe in acquiring lands and water rights, restoring and improving fish habitat, fish production, agriculture, cultural preservation and water resource development.

—The United States will provide $23 million for the design and construction of sewer and water system projects for local Nez Perce Tribal communities.

—In lieu of contracting 45,000 acre feet of uncontracted storage space in the Payette River system to the Tribe, the United States will pay to the Tribe $10.1 million.[5]

The Salmon/Clearwater Component of the Agreement sets forth several provisions designed to protect or improve instream flows and fish habitat and passage. The terms in this Component of the Agreement include provisions for establishing instream flow water rights for designated "tribal priority" streams within the Salmon and Clearwater River Basins as part of the settlement of the Tribe's claims; the implementation by the State of Idaho of a Salmon and Clearwater habitat management and restoration initiative for conservation and restoration of habitat within those basins, which would include an instream flow program for certain streams as well as a voluntary Idaho forestry program to be conducted under a "Section 6"[6] cooperative agreement between the State of Idaho on the one hand and the U.S. Fish and Wildlife Service and National Marine Fisheries Service ("NOAA Fisheries") on the

[4] The Agreement states that the Tribe and the Department of Interior will enter into agreements for the management and joint management, respectively, of the Kooskia National Hatchery and Dworshak National Hatchery. The Committee assumes that this aspect of the Agreement is based in part on an assumption that there will be continued Federal funding for those facilities, and that adequate funding will be maintained for both facilities to the extent practicable. The management and co-management agreements should include contingency provisions to protect the Tribe in the event that adequate funding for the facilities is not maintained.

[5] The parties arrived at this amount by calculating the net present value of the cost of rental payments for that storage space over the course of a 30-year period.

[6] Section 6 of the Endangered Species Act, 16 U.S.C. § 1535(c).

other; a program for management of new road construction measures and road reconstruction and upgrading; provisions for administration of the Section 6 forestry program; the establishment of a habitat trust fund for habitat protection and restoration to which the United States would contribute $38 million; and other measures relating to habitat protection and restoration in the Salmon and Clearwater River Basins.

The Snake River Flow Component of the Agreement anticipates biological opinions for the 30-year term of the Agreement to be issued by NOAA Fisheries and the U.S. Fish and Wildlife Service under the Endangered Species Act.[7] Generally, these biological opinions would address issues relating to flows from the Snake River above Brownlee Reservoir and the use of water for flow augmentation. This component includes measures for minimum flows, a flow augmentation program, federal mitigation of local impacts resulting from the flow augmentation program, a 30-year term for the component with an opportunity to renew by agreement, and a provision that states that in the event that the Fish and Wildlife Service and NOAA Fisheries fail to issue "no jeopardy" biological opinions and provide incidental take coverages for this Component of the Agreement or require terms and conditions that are inconsistent with the Agreement, the Snake River Component shall be terminated upon written notice by the State or private parties to that Component.

The last section of the Agreement sets forth the general conditions applicable to the Agreement as a whole. Among these are provisions for the following—

—Issuance of biological opinions by NOAA Fisheries and U.S. Fish and Wildlife Service on each Component of the Agreement for its 30-year term;

—The right of any State or private party to a component of the Agreement to terminate that Component by giving written notice in the event that NOAA Fisheries or Fish and Wildlife Service fail to issue no jeopardy biological opinions or impose terms or conditions that are inconsistent with the Agreement;

—Waivers and releases of specified claims and injuries by the United States on behalf of the Tribe and by the Tribe itself applicable to claims for, and injuries to, water rights in the Snake River Basin (except as otherwise provided in the Agreement), and waivers and releases by the Tribe of specified categories of claims against the United States, provided that the waivers and releases by the Federal government and the Tribe "shall take effect and be permanent" once the Agreement becomes effective and enforceable under Section IV.L. of the Agreement;[8]

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[7] These biological opinions would be separate from any biological opinion addressing the Federal Columbia River Power System. The Agreement provides that the flows provided under the Agreement set forth the flow contribution from the upper Snake River above Hells Canyon Complex for the benefit of listed species covered by the agreement as they travel through the Columbia River system, including the Federal Columbia River Power System, and that the NOAA Fisheries biological opinion "will address and evaluate the expected effects of BOR's [Bureau of Reclamation's] proposed operations in the Upper Snake, including any beneficial effects on anadromous fish from the flow augmentation program established in this [the Snake River] component" of the Agreement.

[8] Section IV.L. sets forth a list of 6 events or actions that must take place before the Agreement becomes effective: execution of component agreements, Congressional approval of the Agreement and authorization of Federal expenditures, State legislature approval of the Agree-

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—Reservations of certain claims by the Tribe; and

—A provision stating that a breach of one component of the Agreement does not constitute a breach of any other component of the Agreement.

Need for legislation

As noted above, the Agreement by its terms contemplates that Congress approve the Agreement as one of the conditions to its becoming effective. Additionally, many provisions of the Agreement, imposing various obligations on the United States, including the contribution of appropriated funds, could not otherwise be accomplished without the enactment of Federal legislation.

Summary of provisions of substitute amendment

The Committee held a hearing on S. 2605 on July 20, 2004, and received testimony from representatives of the Department of Interior, the Nez Perce Tribe, the State of Idaho and private water users. The bill was considered for report to the Senate at a business meeting held on September 22, 2004, at which time the Committee approved an amendment in the nature of a substitute. The approved substitute amendment represented the efforts of Majority and Minority Committee staff, after working with the various parties and interests, to resolve issues raised during the July 20 hearing.

The substitute amendment would make both technical and substantive changes to S. 2605 as introduced, including clarification and protection of allottee rights in section 7, the scheduling of annual appropriations in section 8(h), the tolling of certain limitation periods and time-based equitable defenses to certain tribal claims in section 10, and a revision in section 11(b)(1) clarifying that the Act is not intended to amend, supersede or preempt any Federal, state or tribal laws or interstate compacts that pertain to the Snake River Basin, "[s]ubject to section 9(b)(3)," which would exempt the use of the Salmon and Clearwater River Basin Habitat Fund established in section 9(a) from section 6(d)(1) of the Endangered Species Act.

Section 1 of the substitute amendment sets forth the short title of the Act.

Section 2 of the substitute amendment states the purposes of the Act, including resolution of longstanding issues in the Snake River Basin Adjudication; a fair, equitable, and final settlement of all claims of the Tribe, its members and allottees and the United States on their behalf to the water of the Snake River Basin within Idaho; the authorization, ratification and confirmation of the Agreement; and the authorization of actions and appropriations necessary for the United States to meet its obligations under the Agreement and the Act.

Section 3 of the substitute amendment sets forth the defined terms used throughout the Act.

Section 4(a) of the substitute amendment states that "Except to the extent that the Agreement conflicts with the provisions of this

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ment and enactment of required state legislation, the Nez Perce Tribe's approval of the Agreement, the SRBA court entering a judgment and decree incorporating the Agreement, and issuance of the biological opinions anticipated by the "upper Snake component" of the Agreement.

Act, the Agreement is approved, ratified, and confirmed." This language should not be interpreted to mean that the Agreement has been "deemed" by Congress to be in compliance with the requirements of the Endangered Species Act (ESA), the Clean Water Act (CWA) or any other Federal environmental law, or to somehow restrict the rights of any person or organization to pursue remedies otherwise available under Federal environmental laws such as the CWA and the ESA-including remedies under the ESA to challenge any of the biological opinions by NOAA Fisheries or U.S. Fish and Wildlife Service that are contemplated under the terms of the Agreement. In other words, the Committee does not intend this language to support an inference that Congress has made a determination that the Agreement meets the requirements of the Endangered Species Act or other Federal environmental laws.[9]

Similarly, the Committee does not intend the language of section 4(a) of the substitute amendment to create a valid or enforceable obligation on the part of the United States to enact Federal legislation, or on the part of any agency or official thereof to seek the enactment of such legislation, with regard to the provision in section III.A. of the Agreement stating that "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 necessary ESA and CWA protection for this component of the agreement and to provide statutory authority necessary to implement the agreement" or with regard to the similar provision in section IV.A. of the Agreement.[10]

Section 5(a) of the substitute amendment directs the Secretary of Interior to take such actions consistent with the Agreement, the Act and water law of the State of Idaho as are necessary to carry out the Snake River Flow Component of the Agreement. Subsection (b) authorizes an appropriation of $2,000,000 for a 1-time payment to local governments to mitigate impacts resulting from the change of use of water acquired by the Bureau of Reclamation pursuant to the Agreement, and directs how those funds are to be distributed.

Section 6 of the substitute amendment addresses the transfers of the BLM lands selected by the Tribe pursuant to the Agreement. Subsection (a)(1) provides that any such land shall be transferred to the Bureau of Indian Affairs in trust for the Tribe; (a)(2) states that the lands must be selected from a certain specified list of available lands; and (a)(3) limits the total appraised value of the lands to $7,000,000. Subsection (b) states that any use of the transferred land under a lease or permit with the BLM will remain in effect until its expiration unless the holder of the lease or permit requests an earlier termination, and that amounts accruing under such leases or permits from sales, bonuses, royalties and rentals shall be made available to the Tribe.

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[9] However, the Committee notes that section 9(b)(3) of the substitute amendment sets forth an express exemption of the Salmon and Clearwater River Basins Habitat Fund from section 6(d)(1) of the Endangered Species Act, and that this exemption must be given effect.

[10] Additionally, although the Agreement by its terms would create certain binding obligations on the part of United States and other parties once all conditions precedent thereto have been met, the Committee does not intend that the language in section 4(a) cause the Agreement itself, or any provision in the Agreement, to become Federal statutory law.

Section 7 of the substitute amendment states that the consumptive use reserved water right[11] shall be held in trust by the United States for the benefit of the Tribe and allottees as set forth in that section and shall be subject to 25 U.S.C. 381, and that the springs and fountains water right of the Tribe shall be held in trust by the United States for the benefit of the Tribe. This section of the amendment includes a number of provisions that are intended to protect the rights of allottees to a portion of the consumptive use reserved water right and clarify the nature of their rights: the allottees are "entitled to a just and equitable allocation of the consumptive use water right for irrigation purposes." This subsection also states that the Tribal water code that must be enacted to manage, regulate and control the consumptive use reserved water right must include a due process system for considering and determining any allottee's request for an allocation of such water for irrigation purposes on allotted land. Any provision of the water code (or amendments to the code) that affect the rights of allottees must be approved by the Secretary before they become valid.

Subsections (c) and (d) of section 7 of the substitute amendment set forth the requirements for a claimant seeking to challenge an allocation of water under the Tribal water code, by petitioning the Secretary after exhausting remedies available under that water code and other Tribal law. Subsection (e) states that the water rights and other benefits granted or confirmed under the Agreement are in full satisfaction of all claims for water rights and injuries to water rights of allottees, that any entitlement of an allottee to water under Federal law shall be satisfied out of the consumptive use reserved water right, and that the water rights, resources and other benefits provided under the Act are a complete substitution for any rights and claims that might have been held or asserted by allottees within the exterior boundaries of the Nez Perce Indian Reservation before the enactment of the Act. Subsection (g) authorizes the Tribe to lease its consumptive use water right through the state water bank without approval of the Secretary, and states that the United States will have no trust or other obligation to monitor, administer, or account for any funds received by the Tribe under any such lease.

Section 8 of the substitute amendment establishes the Nez Perce Tribe Water and Fisheries Fund and the Nez Perce Domestic Water Supply Fund, provides for the management and investment of the two funds by the Secretary, and sets out the requirements that must be met in order for the Tribe to withdraw amounts in the funds, including the adoption of a tribal management plan and its approval by the Secretary pursuant to the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4001 et seq.), or of an expenditure plan approved by the Secretary for amounts not withdrawn from the funds. Subsection (g) prohibits per capita payments to Tribal members out of the funds, and subsection (h) sets forth schedules of annual authorizations for appropriations to the two funds.[12] The amounts in the funds may not be

[11] The consumptive use reserved water right is defined in section 3(3) as "the Federal reserved water right of 50,000 acre-feet per year, as described in the Agreement, to be decreed to the United States in trust for the Tribe and the allottees, with a priority date of 1855."

[12] Subsection (h) authorizes a schedule of appropriations totaling $60,100,000, over the course of fiscal years 2007 through 2013, to be used to reimburse the Tribe for the cost of certain measures undertaken to benefit protected fish species in the Salmon and Clearwater River Basins,

withdrawn or expended until the waivers and releases under section 10(a) take effect.

Section 9 of the substitute amendment establishes the Salmon and Clearwater River Basins Habitat Fund and, within that Fund, two separate accounts, one administered by the Secretary for use by the Tribe and the other administered by the Secretary and provided to the State in accordance with the Agreement. Section 9 also sets forth the authorized uses of the Fund and directs the Secretary to release funds in the account administered for the State in accordance with section 6(d)(2) of the Endangered Species Act, but exempts uses of amounts in the Salmon and Clearwater River Basin Fund from section 6(d)(1) of the that Act.[13]

Section 10 of the substitute amendment provides for waivers and releases by the United States on behalf of the Tribe and the allottees and by the Tribe itself with respect to specified claims to water rights within the Snake River Basin, injuries to those rights and claims for specified injuries to treaty rights of the Tribe, all as described in section 10(a). Subsection (a)(5) states that the waivers and releases take effect on the date that the Secretary publishes a findings in the Federal Register that the actions set forth in section IV.L of the Agreement have been completed (including issuance of a judgment and decree by the SRBA court from which no further appeal may be taken) and have been determined by the United States on behalf of the Tribe and allottees, the Tribe, and the State to be consistent in all material respects with the Agreement. Subsection (b) sets forth the terms and requirements of a waiver and release that the Tribe must execute in favor of the United States in consideration of the performance by the United States of all actions required under the Agreement and the Act, as well as a provision that tolls all periods of limitation and time-based equitable defenses until the earlier of the date on which amounts authorized under sections 8(h) and 9(d)(1) are appropriated, or October 1, 2017. Subsection (c) states that the Tribe retains all rights not specifically waived or released in the Agreement or the Act, that the Agreement and Act do not constitute a waiver by the Tribe of any claim against the United States arising from the construction and operation of the Dworshak Project, other than those specified in subparagraphs (A) and (B) of subsection (b)(1),[14] and that the Agreement and Act do not preclude the Tribe or allottees, or the United States as trustee of the Tribe or allottees, from purchasing or otherwise acquiring water rights in the future to the same extent as any other entity in the State.

Section 11 of the substitute amendment sets forth several miscellaneous provisions, including reservations of rights not expressly

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and totaling $23,000,000, over the course of fiscal years 2007 through 2011, to defray the costs of constructing water and sewer facilities on the reservation.

[13] The two accounts described in section 9 are both part of the same fund, and by authorizing appropriations to the accounts in the same subsection, it is the Committee's intent that they be appropriated proportionately, with no disparate funding levels or disparate rates of appropriation to the accounts.

[14] The Committee is aware of the Tribe's concern, expressed in testimony at the hearing on S.2605, that the Act should not be interpreted as a waiver of its claims for destruction of treaty hunting, gathering and fishing areas inundated as a result of the construction of the Dworshak Dam and Reservoir on the Nez Perce Indian Reservation. Although the Committee takes no position here on the merits of those claims, the Committee does expect the Department of Interior and the Department of Justice to attempt to work with the Tribe to devise a mechanism or process for addressing the Tribe's claims relating to the Dworshak Dam and Reservoir that are not specifically waived under the provisions of S.2605.

granted, recognized or relinquished by the Agreement or the Act. Other disclaimers are found in subsection (b)(1), providing that, subject to section 9(b)(3), nothing in the Act amends, supersedes, or preempts any State law, Federal law, Tribal law, or interstate compact that pertains to the Snake River Basin; subsection (b)(2), clarifying that the Act is not intended to establish any standard for quantifying Federal reserved water rights or any other Indian water claims in any other judicial or administrative proceeding; subsection (b)(3), stating that nothing in the Act or Agreement affects the water rights or claims or other treaty rights of other Indian tribes; subsection (c), stating that nothing in the Agreement or Act impairs treaty rights of the Tribe except to the extent expressly provided in the Agreement or Act; and subsection (d), stating that nothing in the Agreement or Act quantifies or affects the water rights, claims, entitlements to water or any other treaty right of any Indian tribe other than the Tribe. Subsection (e) relates to flow augmentation with water stored in the Dworshak Reservoir, and subsection (f) states that nothing in the Agreement or Act restricts, enlarges or otherwise determines the subject matter jurisdiction of any Federal, State or Tribal court; that the United States consents to jurisdiction in a proper forum for purposes of enforcing the provisions of the Agreement; but that nothing in subsection (f) confers jurisdiction on any State court to enforce Federal environmental laws regarding duties of the United States or conduct judicial review of Federal agency action. Nothing in subsection (f) should be read or construed as altering existing law regarding pre-enforcement review of Federal agency action.

LEGISLATIVE HISTORY

S. 2605 was introduced by Senator Craig on June 24, 2004, with Senator Crapo as a cosponsor, and referred to the Committee on Indian Affairs. On July 20, 2004, the Committee held a hearing on the bill, and at a business meeting held on September 22, 2004, the Committee ordered that the bill, with an amendment in the nature of a substitute, be reported favorably to the Senate with a recommendation that the bill, as amended, do pass.

COMMITTEE RECOMMENDATION

The Committee on Indian Affairs, in an open business session on September 22, 2004, approved the amendment in the nature of a substitute to S. 2605 and ordered S. 2605, as amended, to be reported to the Senate with a favorable recommendation that it be passed.

COST AND BUDGETARY CONCERNS

The costs estimate for S. 2605, as provided by the Congressional Budget Office, is set forth below.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 7, 2004.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2605, the Snake River Water Rights Act of 2004.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mike Waters.

Sincerely,

ELIZABETH ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

S. 2605—Snake River Water Rights Act of 2004

Summary: S. 2605 would ratify an agreement between the Nez Perce Tribe of Idaho, the United States, and Idaho to resolve water rights claims in the Snake River Basin made by the tribe. The bill would increase the amount of water used for the benefit of wildlife, transfer certain federal lands to the tribe, authorize appropriations to trust funds designed to help the tribe manage aquatic resources, build a domestic water supply system, and protect and restore aquatic habitats. CEO estimates that implementing S. 2605 would cost $58 million over the 2005–2009 period, assuming appropriation of the necessary amounts. CBO estimates that the bill would authorize the appropriation of $61 million after 2009 (all of that amount except for estimated interest earnings on a trust fund is specified by the bill).

Enacting S. 2605 could affect direct spending by reducing potential offsetting receipts for leases of federal land that would be transferred to the tribe. CEO estimates that any such effects would be insignificant.

S. 2605 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. Any costs or duties imposed by this bill on state, local, or tribal governments would be those assumed by them voluntarily as parties to the agreement.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 2605 is shown in the table below. The costs of this legislation fall within budget functions 300 (natural resources and environment) and 450 (community and regional development).

	By fiscal year, in millions of dollars—				
	2005	2006	2007	2008	2009
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Mitigation Payment:					
Specified Authorization Level	2	0	0	0	0
Estimated Outlays	2	0	0	0	0
Payments to Trust Funds:					
Estimated Authorization Level	0	0	21	21	21
Estimated Outlays	0	0	17	19	20

	By fiscal year, in millions of dollars—				
	2005	2006	2007	2008	2009
Total Changes:					
Estimated Authorization Level	2	0	21	21	21
Estimated Outlays	2	0	17	19	20

Basis of estimate: For this estimate CBO assumes the bill will be enacted early in fiscal year 2005 and that the amounts authorized to be appropriated will be provided for each year.

Mitigation payment

The bill would authorize the appropriation of $2 million to certain local governments in Idaho to mitigate the effect of decreased water-flows resulting from the use of over 400,000 acre-feet of water a year in the Snake River Basin to benefit wildlife.

Payments to trust funds

This bill would create three Indian trust funds for the Nez Perce Tribe related to activities in the Snake River Basin. The Nez Perce Tribe Water and Fisheries Fund would be authorized to be appropriated about $20 million over the 2005–2009 period, and it could be used by the tribe to acquire lands and water rights and to restore and improve fish and agricultural resources. Under the bill the tribe would use the Nez Perce Tribe Domestic Water Supply Fund, to develop and to build a domestic water and sewer system. The bill would authorize the appropriation of $19 million to that fund over the 2005–2009 period. The third fund under the bill would be the Salmon and Clearwater River Basins Habitat Fund. The Habitat Fund would consist of two separate accounts, one for the benefit of the tribe, and the other for the benefit of Idaho. The bill would authorize the appropriation of $24 million over the 2005–2009 period for this fund.

Payments to certain trust funds that are held and managed in a fiduciary capacity by the federal government on behalf of Indian tribes are treated as payments to a nonfederal entity. Based on information from the Department of the Interior (DOI), CBO expects that the Fisheries and Water Supply Funds would be treated in this manner. In addition, a specified part of the third trust fund would also receive that budgetary treatment. As a result, CBO expects that the entire amount appropriated to these funds for the benefit of the tribe would be recorded as budget authority and outlays in the year it is appropriated. Because these accounts would be nonbudgetary, the subsequent use of such accounts by the tribe would not affect federal outlays.

Because part of the Salmon and Clearwater River Basins Habitat Fund would not be held in trust for a tribe, it would be treated as a federal fund. Thus, the initial deposits into this account therefore would not affect the budget, however any subsequent use of the funds by Idaho would have a budgetary impact.

Additional provisions

The bill would allow the Nez Perce tribe to choose certain land to be held in trust for the tribe from among 11,000 federal acres on or near the reservation. Based on information from the DOI, CBO estimates the land likely to be chosen has insignificant min-

eral value and timber value of about $6 million. CBO expects the loss of potential federal receipts from transferring this land to the tribe would be insignificant because there are no current or planned timber leases for any of the land. There are currently 43 grazing leases on the affected lands, and the offsetting receipts (a credit against direct spending) from these leases are less than $1,000.

Intergovernmental and private-sector impact: S. 2605 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments. Any costs or duties imposed by this bill on state, local, or tribal governments would be those assumed by them voluntarily as parties to the agreement.

Estimate prepared by: Federal Costs: Mike Waters; Impact on State, Local, and Tribal Governments: Marjorie Miller; and Impact on the Private Sector: Selena Caldera.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

EXECUTIVE COMMUNICATIONS

The Committee has received no executive communications relating to S. 2605.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that the regulatory and paperwork impacts of S. 2605 will be minimal.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of S. 2605 will not effect any changes in existing law.

ATTACHMENT A

"MEDIATOR'S TERM SHEET"

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,[y] 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

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[y]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 that 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 rocked 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 re-location 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 Complex[2] 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

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[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

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[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.[4] 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.

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[4] 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 the 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

[1] 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)

Appendix II

Section A. Channel types.

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

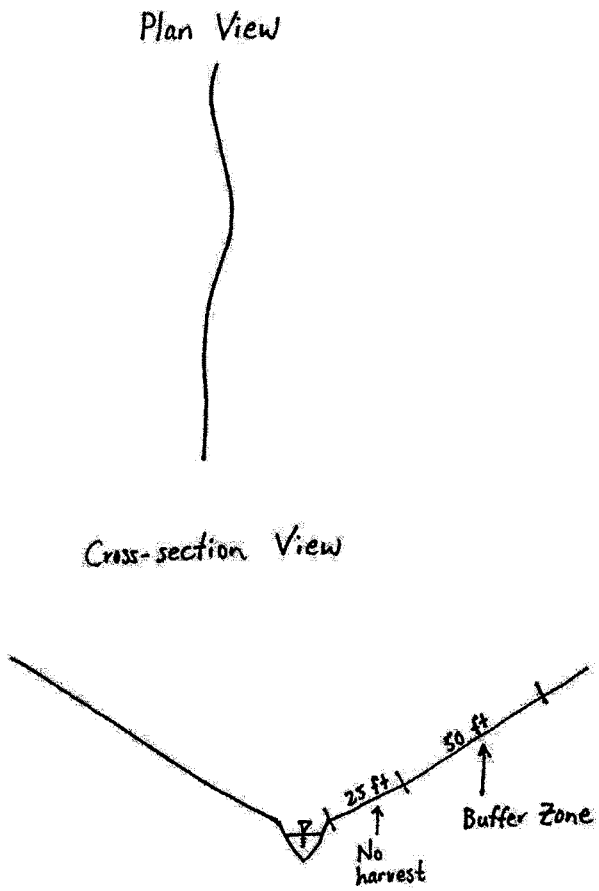


Figure 2. Stream is stable in an un-confined valley.

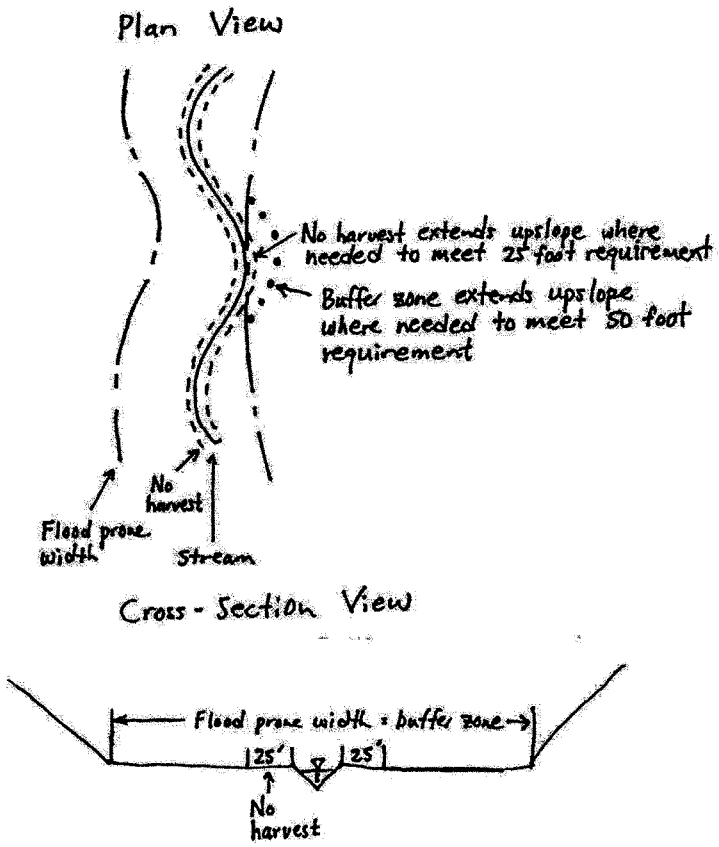


Figure 3. Multiple channels in an un-confined valley.

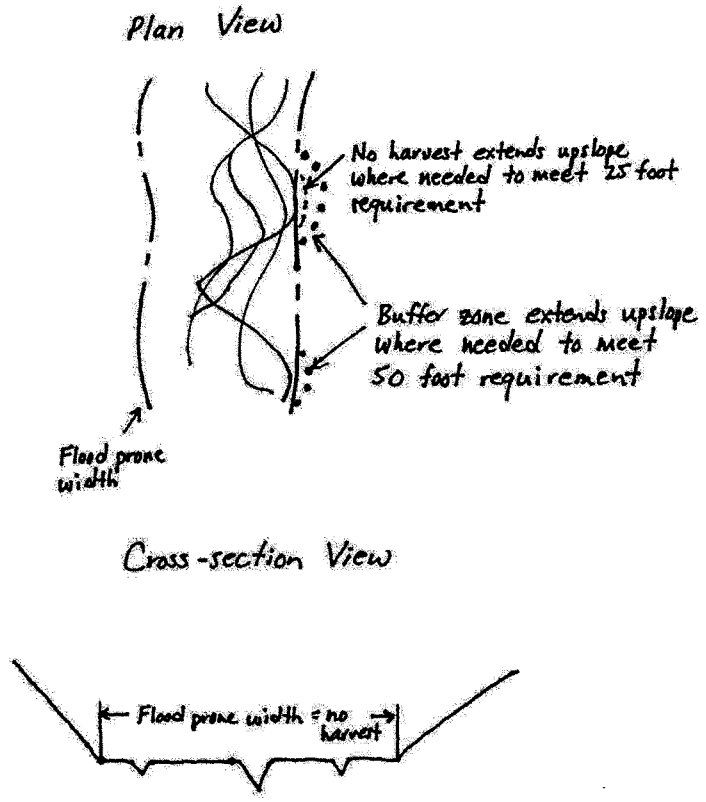
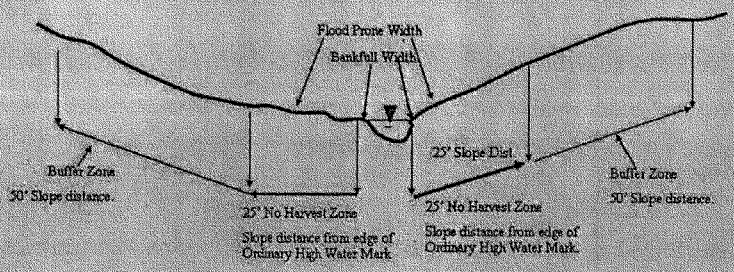


Figure 4

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.

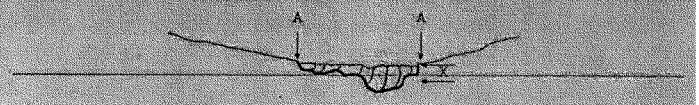
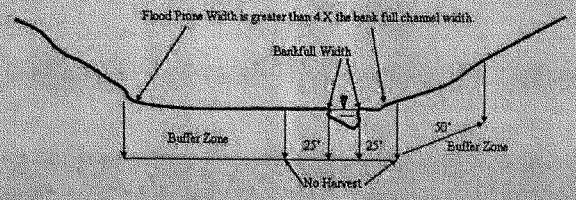


Figure 5

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 then 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

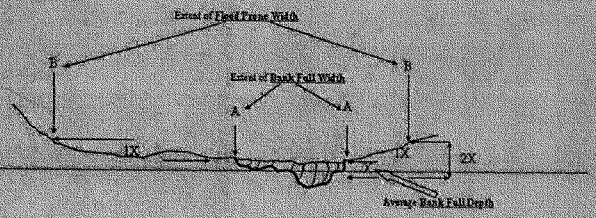
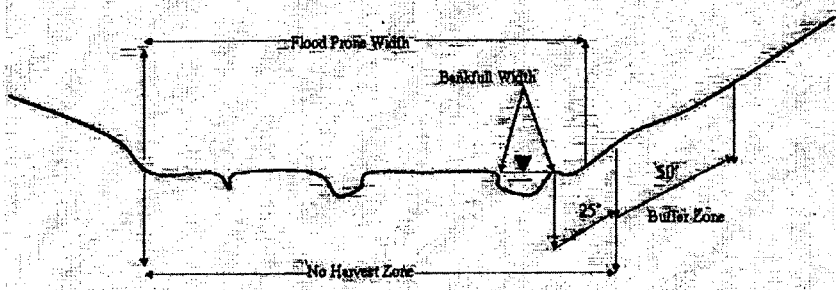


Figure 6

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



MULTIPLE UNCONFINED CHANNELS: Bankfull flow occupies multiple (braided) channels and the flood prone width is greater than four times the bankfull channel width.

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.

Megahan, Walter F. 1972. Logging, Erosion, Sedimentation - Are They Dirty Words? Journal of Forestry. 70:403-407.

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.

Reinig, Lyn, and J. Potyondy. 1991. BOISED, Sediment Prediction Model. USDA Forest Service, Boise National Forest.

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 Tertiary sediments – unconsolidated/loose	L	H	H
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/]
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/]Reassigned for flow augmentation.

[2/]Reacquired for flow augmentation.

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