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

**July 20, 2004**

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

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

**Background**

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

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

The agreement among the SRBA parties was submitted to the SRBA Court on April 20, 2004. The proposed settlement has three main components:

(1) a resolution of the Nez Perce Tribe's water rights for use on and near the Nez Perce Reservation, including provisions that will allow the Tribe to develop and use those water rights,

(2) a component addressing instream flow and Endangered Species Act issues within the Salmon and Clearwater River basins, and

(3) a component addressing instream flows and flow augmentation from the upper Snake River basin above Hells Canyon to benefit threatened or endangered fish species.

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

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

**S. 2605**

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

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

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

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

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

**Conclusion**

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

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