

SNAKE RIVER BASIN ADJUDICATION

NEZ PERCE TRIBE WATER RIGHTS SETTLEMENT



*12th Western States Water Council
Native American Rights Fund*

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Overview of Presentation

- I. General Background on Indian Water Rights
- II. The Importance of Fish and Water to the Nez Perce People.
- III. Background on the SRBA and the Nez Perce/United States Claims
- IV. General Overview of Agreement
 - A. Nez Perce Tribal Component
 - B. Salmon/Clearwater River Basins Component
 - C. Upper Snake River Basin Component
- V. Implementing Legislation



I. General Background on Indian Water Rights

- *United States v. Winans*, 198 U.S. 371 (1905) – the Supreme Court construed the fishing provision in an 1859 Yakama treaty (one of the Stevens Treaties) to be a reservation of pre-existing Yakama rights, not a grant of rights to the Tribe. Like the 1855 Nez Perce Treaty, the treaty reserved “the right of taking fish at all usual and accustomed places in common with the citizens of the territory” in the land area ceded by the Yakamas to the United States:
- **The right to resort to the fishing places in controversy was a part of the larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them – a reservation of those not granted. *Winans*, 198 U.S. at 381 (emphasis added).**

- *Winters v. United States*, 207 U.S. 564 (1908) – the Supreme Court construed an 1889 agreement establishing the Fort Belknap Reservation in Montana to include an implied right to water from the Milk River in order to fulfill the purposes of the agreement between the Tribe and the United States. *Winters* was a landmark decision, and courts still use the *Winters* standard of construction for construing Indian treaties:
- The Indians had command of the lands and the waters, — command of all their beneficial use, whether kept for hunting, “and grazing roving herds of stock,” or turned to agriculture and the arts of civilization. . . . **By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purposes of the agreement and the other impair or defeat it.**



- *Arizona v. California*, 373 U.S. 546 (1963) – practicably irrigable acreage (PIA) standard used by the Special Master was accepted by the Supreme Court to **quantify** present and future water needs of Indian reservations (in Arizona, California, and Nevada) with an agricultural purpose.
- *Cappaert v. United States*, 426 U.S. 128 (1976) – the Supreme Court concluded that the withdrawal of land from the public domain for the establishment of Devil’s Hole National Monument in Death Valley included an **implied reservation of water to protect an underground pool of water and the rare pup fish that lived in the pool**. Federal reserved water rights are based on federal law, not state law, and are senior to future appropriators of either surface water or ground water.



- *United States v. New Mexico*, 438 U.S. 696, 702 (1978) – the Supreme Court applied the Winters doctrine to federal reserved water rights for federal land reservations other than Indian reservations (there, the Gila National Forest), but only for the **primary purpose** of the federal land reservation.

- ***United States v. Adair***, 723 F.2d 1394 (9th Cir. 1983), cert. denied sub nom. Oregon v. United States, 467 U.S. 1252 (1984) – holding that the Klamath Tribe’s treaty-reserved fishing right includes instream flows which may be enforced by preventing others from diverting water needed by fishery. The Adair court rejected contentions that the primary purpose of the Klamath Reservation was to convert the Indians to an agricultural way of life and that hunting and fishing was a secondary purpose.

The Court held that preservation of the Tribe's way of life, including the continuation of its members' ability to make a living from their lands, was a primary, not secondary, purpose for reserving their homeland, relying on "an analysis of the intent of the parties to the 1864 Klamath Treaty as reflected in its text and the surrounding circumstances." *Adair*, 723 F.2d at 1409, citing *Fishing Vessel*, 443 U.S. at 675-676, and *Winters*, 207 U.S. at 575-576. The court concluded; that **both objectives qualified as primary purposes** of the 1864, *Adair*, 723 F.2d at 1410; that termination of the reservation did not affect the Tribes' water rights," *Adair*, 723 F.2d at 1411; and that the water rights accompanying the Tribes' fishing rights had a **priority date of time immemorial.**" *Adair*, 723 F.2d at 1414.



- **The McCarran Amendment, 43 U.S.C. § 666(a) (1952).**

Treaty issues involve federal questions which are heard in federal court because the United States and Indian tribes generally are immune from suit in state courts. The McCarran Amendment, however, **waived federal sovereign immunity from suit in state court** for purposes of general stream adjudications. In order to be considered a “**general stream adjudication**” the proceedings must determine all the rights of all water users on a particular river – such as the Snake River

- Indian water rights are held in trust by the United States, so McCarran has been interpreted to **also waive tribal sovereign immunity** when states initiate a general stream adjudications. *See Colorado River Water Conservation Dist. V. United States*, 424 U.S. 800 (1976) (McCarran Amendment gives state courts jurisdiction over Indian water rights); *see also Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983) (state courts have jurisdiction whether the United States files the claims on behalf of a tribe or the tribe files the claims on its own behalf).

II. The Importance of Fish and Water to the Nez Perce People

- For thousands of years prior to contact with Euroamericans, Nez Perce people exclusively occupied an area of approximately 14,000,000 acres that stretched from the continental divide on the Montana border on the east to the Blue Mountains of northeastern Oregon on the west. In addition, they regularly fished, hunted, gathered, and used other resources in areas outside their exclusive-use area.

- The principal fish were the salmon, including sockeye (red fish or blueback salmon) and chinook (quinnat or tyee salmon), and steelhead trout. In addition, the Nez Perce caught cutthroat trout, Waha lake trout, sturgeon, suckers, Dolly Varden (or bull trout), whitefish, chiselmouth, and Lamprey eel.





- In those early days, fish accounted for up to half of the Nez Perce people's subsistence needs (300 to 600 pounds of salmon per person per year), in addition to other types of fish, game, and roots and other plant products.



- Nez Perce culture and subsistence activities revolved around the fish and water. Nez Perce people defined themselves in terms of their association with, and relationship to, fish and water and other natural elements. In the Nez Perce language, the names of several months of the year are named for salmon and other fishing times. Fish and water continue to be culturally, spiritually, and materially essential in Nez Perce life.



- In the late 1840's and 1850's, Isaac I. Stevens, who was Governor and Superintendent of the Washington Territory, negotiated 10 treaties with tribes, including the Nez Perce, throughout the Pacific Northwest in what are now the states of Washington, Oregon, Idaho and Montana.

- Governor Stevens quickly discovered that these tribes would not agree to the provisions of his template treaty without a guarantee that they could retain their fishing, hunting, and gathering rights. As a result, the Nez Perce Treaty of 1855 contains reservations of the tribe's exclusive right to fish on the reservation, the Tribe's shared right to fish outside the boundaries of the reservation at "all usual and accustomed places," as well as the Tribe's right to hunt, gather, and pasture animals off-reservation on all "open and unclaimed land." The other Stevens treaties contain similar provisions.

III. Background on the SRBA and the Nez Perce/United States Claims

- The State of Idaho commenced the Snake River Basin Adjudication (“SRBA”) in **1987**. The SRBA involves approximately 150,000 water rights in the Snake River basin and all its tributaries including the Salmon and Clearwater River basins.
- Since the SRBA is considered a classic “general stream adjudication,” all claims by the United States and the Tribe to water rights in the three basins had to be filed in the SRBA or be forever lost.



Tribal consultants and attorneys worked with tribal staff, tribal elders, and other tribal members to:

- develop a list of tribal priority streams based on historical and current fishing, hunting, and gathering practices;

- estimate the amount of water necessary for the Tribe's planned hatchery purposes;

- develop supporting background on the historic and current uses of springs by Tribal members; and

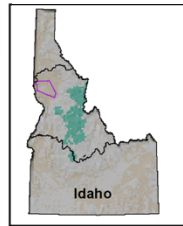
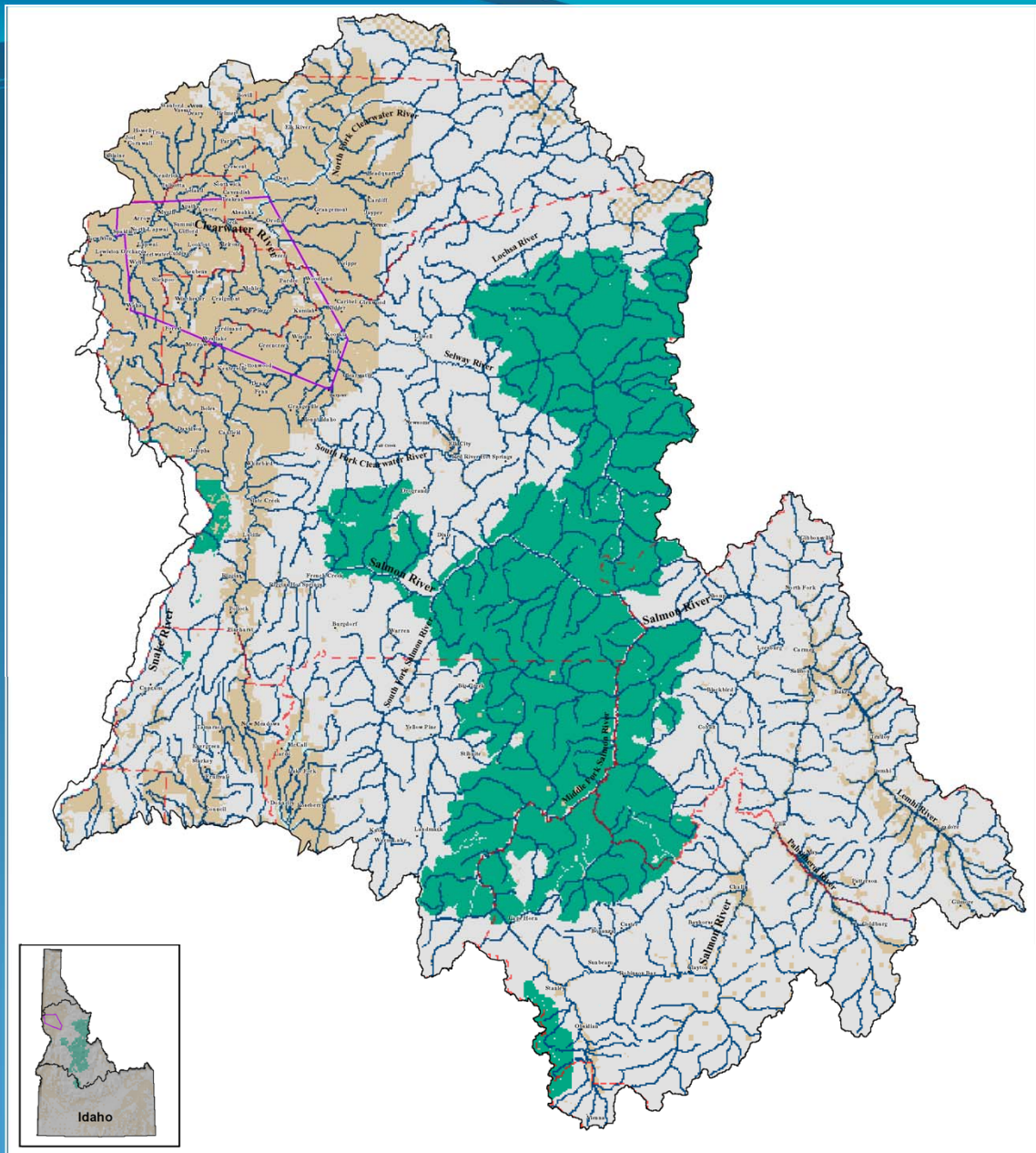
- estimate the amount of water necessary for other cultural purposes.



So, as a part of the SRBA, the Nez Perce Tribe and the United States, as trustee for the Tribe, filed in 1993 **three different sets of claims to water rights**, based on treaties with the United States from 1855 and 1863. Water rights were claimed for:

- **ONE: Instream flows** in approximately 1100 locations on streams and rivers throughout Nez Perce aboriginal territory to protect the Tribe's treaty-reserved fishing rights. These claims were based on Article 3 of the 1855 Treaty which reserved right of the Tribe and its members to "take fish at all usual and accustomed fishing places."
- The Nez Perce claims were the only ones for instream flows that were actively pursued in the SRBA.
- The next slide features the claim area:





• City or Town	Basin Boundary	NHD Water Body	landuse04
— River	□ Not Priority Basin	■ Lake/Pond	■ Federal Non-Wilderness
- - - County Boundary	□ Priority Basin	■ Reservoir	■ Open Water
■ Nez Perce Reservation	— Priority Stream	■ Swamp/Marsh	■ State and Private
	— Not Priority Stream		■ Wilderness
	— Priority Stream		



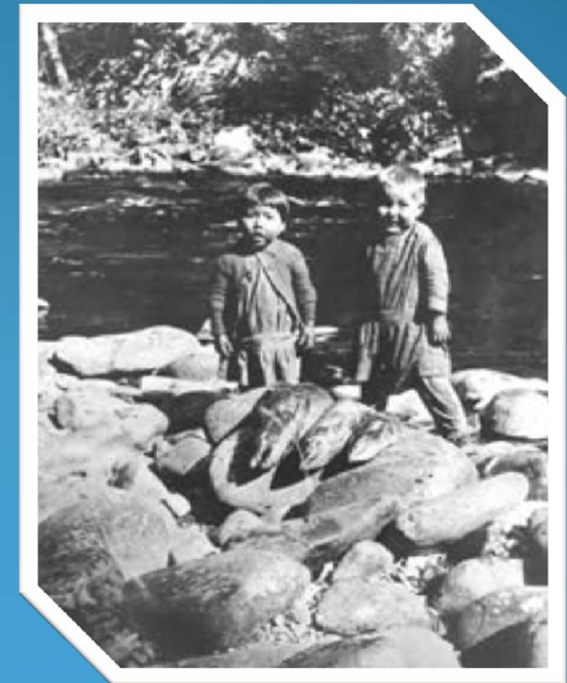
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 Confidential - Subject to
 Nez Perce Mediation Protective Order -
 Not for Public Disclosure
ENTRIX

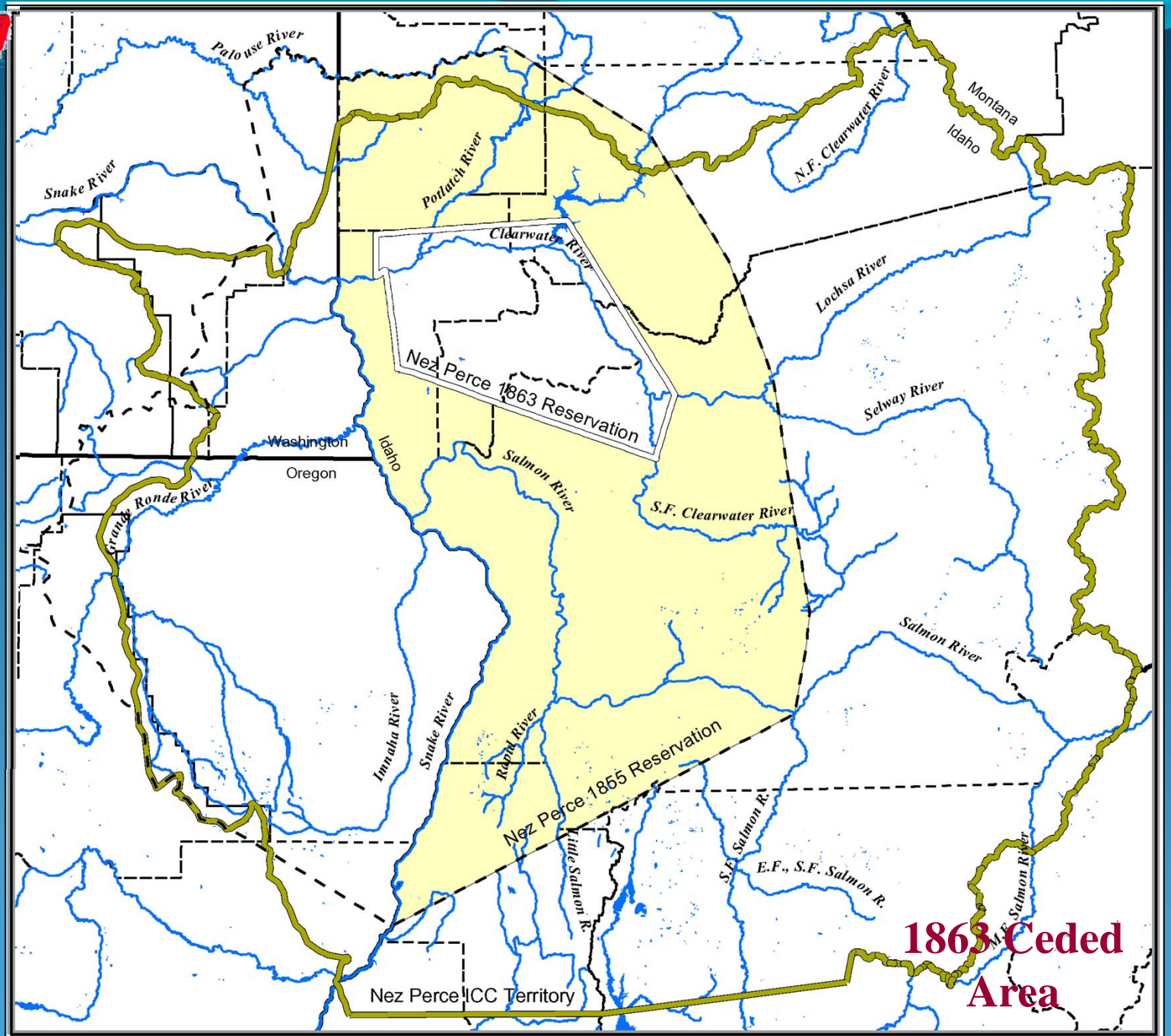


- **TWO: Springs** (almost 1900) on federal, state and private lands, based on the last paragraph in Article 8 of the 1863 treaty :

“The United States also agree to reserve all springs or fountains not adjacent to or directly connected with the streams or rivers within the lands hereby relinquished, and to keep back from settlement or entry so much of the surrounding land as may be necessary to prevent the said springs or fountains being enclosed; and further, to preserve a perpetual right of way to and from the same, as watering places, for the use in common of both whites and Indians.”

- The next slide highlights the springs claim area in yellow:





- **THREE: On-reservation multiple uses** – the classic “*Winters*” claims for homeland purposes based on both the 1855 Treaty and the 1863 Treaty.
- These claims were for a variety of purposes:
 - domestic, commercial, municipal, and industrial (DCMI);
 - cultural;
 - hatchery;
 - springs and ponds for livestock and wildlife;
 - irrigation from surface water and from groundwater;
 - development of wildlife habitat;
 - recreation; and
 - a small amount of hydroelectric production.



III. General Overview of the Agreement

A. Nez Perce Tribal Component

1. Water Rights
2. Resource Agreements
3. Trust Funds and Land Transfer

B. Salmon/Clearwater River Basins Component

1. Instream Flows
2. Section 6 Agreements

C. Upper Snake River Basin Component

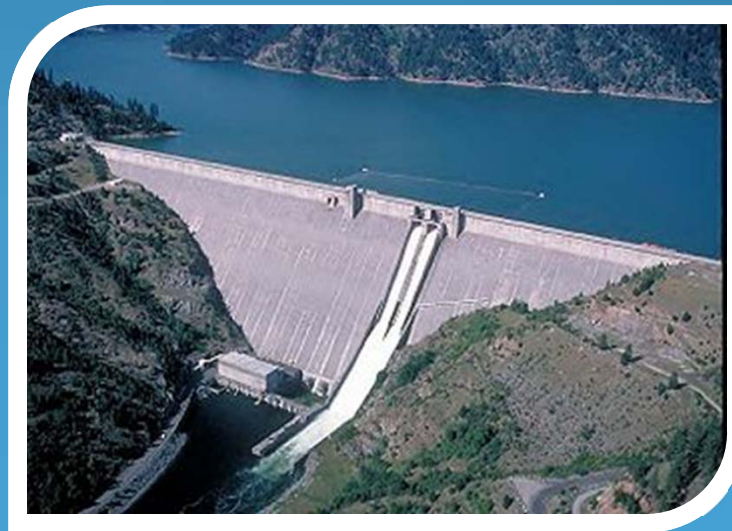
A. Nez Perce Tribal Component

1. Water Rights:

- The Tribe's multiple-use water rights [*Winters*] were decreed in the amount of 50,000 acre-feet per year, primarily from the Clearwater River.
 - Individual allotments can receive a portion of the 50,000 acre feet for agricultural purposes.
- Approximately 587 rights were decreed to the Tribe for springs located on federal lands in the 1863 ceded territory, but claims to approximately 1,263 springs on state and private lands were dismissed
- All of the Tribe's off-reservation, instream flow claims were dismissed, but state-law based minimum stream flows were decreed to the State on 207 Tribal priority streams.

2. Resource Agreements:

- The United States and Tribe have entered into agreements providing for tribal management of the Kooskia National Fish Hatchery and co-management of the Dworshak National Fish Hatchery.
- The United States and the Tribe have entered into a MOA for the shaping of the release of 200,000 acre-feet of water in Dworshak Reservoir as part of a flow augmentation plan to achieve salmon habitat improvements and recreational benefits.





3. Trust Funds and Land Transfer:

- A \$60.1 million water and fisheries trust fund for use by the Tribe in: acquiring land and water rights, restoring and improving fish habitat, fish protection, agricultural development, cultural preservation, and water resource development.
- A \$23 million sewer and water fund for construction of projects for local Nez Perce communities.
- A \$38 million fisheries habitat fund to implement flow and habitat improvement projects.
 - expenditure of one-third of the Fund is directed by the Tribe;
 - expenditure of two-thirds of the Fund is directed by the State with input from the Tribe.
- Approximately 11,000 acres of BLM land within the boundaries of the 1863 Nez Perce Reservation were transferred to the BIA in trust to the Tribe.
- The Settlement releases only certain water claims; it does not alter any of the Tribe's treaty fishing, hunting, gathering and pasturing rights.

B. Salmon/Clearwater River Basins Component

1. Instream Flows:

- Flow protection will vary based on land classifications. Two-thirds of the land in this region is in federal ownership which facilitated this portion of the Agreement.
- The minimum stream flows are subordinated to future DCMI uses and to an identified amount of water for other uses.
- Of the 205 streams, 183 streams ["A List" Streams] will be quantified pursuant to a formula set forth in the Agreement.
- Minimum stream flows on the remaining 22 developed streams ["B List" Streams] remain to be negotiated at the local level in a process similar to the Lemhi Conservation Plan.



2. ESA Cooperative Agreements:

- Under Section 6 of the ESA, the federal government is authorized to enter into cooperative agreements with states for the purpose of managing a program for conservation of protected species.
- Under the Tribe's SRBA Agreement, Idaho was to implement two such programs, the State and the United States still have not completed the Section 6 Agreements.

Under the Forestry Program, there would have been a *voluntary* enrollment program and private landowners will agree to implement measures for riparian areas and roads to improve habitat for aquatic species on enrolled lands.

Under the Instream Flow Program, private water users would have been able to enroll in a *voluntary* program for making flow and non-flow improvements and receive incidental take coverage under the Endangered Species Program.

C. Upper Snake River Basin Component

- A 30-year Biological Opinion (BiOp) issued by NOAA Fisheries covering all protected species affected by BoR Upper Snake operations. The BiOp was issued March 31, 2005.
- The Flow Augmentation Program required renewal of an Idaho statute that allows the Bureau of Reclamation to buy water for flow purposes.
- Under the Program, a maximum of 487,000 acre feet of water will be released annually from the Upper Snake River for salmon.
 - BoR will lease up to 427,000 acre-feet of that total other water users (generally, irrigators).
 - BoR will either permanently acquire or lease an additional 60,000 acre feet.
- Minimum flows negotiated in an earlier Idaho Power agreement (the Swan Falls Agreement) will be decreed by the SRBA Court and held by the State.

IV. IMPLEMENTING LEGISLATION

- A. Federal Approval.** The Snake River Water Rights Act of 2004, Public Law 108- 447 [Title X of Division J], 18 Stat. 3431 – 3441, was passed by Congress on November 20, 2004, and signed into law by President Bush on December 8, 2004.
- B. State Approval.** Chapter 150 of the 2005 Idaho Session Laws, enacted March 21, 2005 and signed into law by Governor Kempthorne on March 24, 2005.
- C. Tribal Approval.** Resolution No. 05-210, was enacted on March 29, 2005, contingent upon the completion of all other provisions of the Agreement necessary to it becoming final.



Thank You

