

Department of Energy

Bonneville Power Administration
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ENVIRONMENT, FISH AND WILDLIFE

June 20, 2005

Mr. Jerry Meninick, Chairman
Yakama Tribal Council
Confederated Tribes and Bands of the Yakama Nation
P.O. Box 151, Fort Road
Toppenish, WA 98948

Mr. Olney Patt, Jr., Executive Director
Columbia River Inter-Tribal Fish Commission
729 N.E. Oregon Street, Suite 200
Portland, Oregon 97232

Dear Chairman Meninick and Mr. Patt:

Thank you for your May 16 and 20, 2005, letters concerning future fish and wildlife program implementation costs of the Bonneville Power Administration (BPA). As with other areas of BPA spending, current program funding levels and the policy choices that influence future agency program cost projections have been widely discussed and considered during the Power Function Review (PFR) process convened by BPA's Power Business Line. The feedback and comment during the PFR series of meetings – from tribal resource managers and policy makers, fish and wildlife interests, customer groups, and others – has been lively and diverse.

As you know, BPA pursues its fish and wildlife mitigation and salmon recovery efforts through implementation of an overall unified plan. A mainstay of this plan is the “integrated” Fish and Wildlife Program (Program) intended to address our responsibilities under the Northwest Power Act, our Endangered Species Act (ESA) offsite fish and wildlife requirements under the Federal Columbia River Power System (FCRPS) biological opinions from the U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration Fisheries, and to be consistent with our tribal trust responsibilities. Current rate-period expense funding for implementation of the Program is \$139 million yearly (average). Consideration of the issues affecting future program levels and influencing anticipated costs led to our initial proposal of a \$143 million Program expense level in a draft PFR close out letter dated May 2, 2005 (<http://www.bpa.gov/power/pl/review/announcements.shtml>), the subject of your correspondence and comment.

In your letters, you raise concerns about the adequacy of the level of funding proposed by BPA for meeting all of its fish and wildlife mitigation and salmon recovery commitments and responsibilities. I appreciate the perspectives you have shared, and again acknowledge the considerable effort undertaken by tribal policy representatives and program staff in developing

the program funding level proposal reflected in your letters. As explained in greater detail in the enclosure with this letter, and in my April 22, 2005, letter and enclosure to the Columbia Basin Fish & Wildlife Authority, BPA is unable to adopt the spending levels proposed by the Yakama Nation and CRITFC. To serve as a useful influence on program levels in the PFR, funding proposals simply must be more appropriately matched and accurately sized to BPA's protection, mitigation, enhancement and recovery responsibilities.

It is important to note that subbasin planning was designed to guide Council evaluation and recommendation of projects for the region to implement, and not just by way of BPA funding. Consequently, a summing-up of a list of preferred management actions – implemented as projects addressed to a broad and historic range of impacts from human use and development of the Columbia River – is simply not an appropriate indication of an aggregate funding level that should be shouldered by BPA ratepayers alone. Although subbasin plans are an extremely useful guide for the enhancement or offsite component of the Direct Program under the Northwest Power Act, not all of the mitigation and recovery needs of fish and wildlife are attributable to impacts of the development and operation of the Federal Columbia River Power System. To be complete, funding estimates to implement individual subbasin plans must include the costs of action and investment expected of others in the region who are also responsible for affecting the health of fish and wildlife populations and their habitat.

As you know, BPA has encouraged the Council to take the time necessary to meaningfully “roll-up” the biological goals and objectives found in individual subbasin plans into broader provincial, geographic or population level biological objectives. Articulating biological objectives and clear performance expectations through roll-up will provide a solid foundation for Council project funding recommendations to BPA, and for better integration, allocation and pace of needed effort and associated funding responsibility to others.

However, a roll-up limited to the development of habitat or population-level biological objectives would still be incomplete absent the important additional component of prioritization. Prioritizing effort and investment at a provincial and basin-wide scale means more than a rigid or rank order of the importance of measures. In our view, prioritization entails determining which actions address priority objectives, determining biological, geographical and temporal priorities for actions, and addressing which actions are outside the capacity of BPA to undertake as well as which actions entail shared mitigation responsibilities.

In the interim, I believe there is room for improvement through principled reallocation of current spending and closer collaboration with you, our implementation partners. Analysis of the past four years of program expenditures has shown that less than 60 percent of existing funding is actually applied to on-the-ground work, with almost a third of the funding expended for research, monitoring and evaluation (RM&E) efforts. By shifting roughly \$15 million of FY 2001-2004 average current expense spending away from RM&E and related support activities, we seek to apply a greater proportion of funds to actual on-the-ground work such as habitat and hatchery efforts, during the next three-year rate period. This reallocation of program investment will move overall funding closer to spending targets of 70% on-the-ground, 25% RM&E and 5% for

coordination and information management. Carefully managing the resulting \$143 million funding level to these allocations may not change the misconceptions about the scale of BPA's perceived funding obligations. Nevertheless, this proposed allocation can provide a substantial funding increase for subbasin plan and ESA-driven habitat enhancement work, and an allowance for inflation in existing spending for hatchery operations and maintenance.

I acknowledge that you have requested substantially increased spending levels for BPA's direct program. With this letter, I have attempted to both respond meaningfully to your rationale and concerns and to articulate the thinking behind BPA's proposal. My hope is to renew a more direct dialogue with both the Yakama tribal government and the Columbia River InterTribal Fish Commission about your management objectives, continued Program direction and evolution, the issues BPA needs to factor into its decisionmaking, and managing program implementation now and into the future. I believe the essential question is whether BPA is proposing to provide a level of funding during a period of transition that is adequate to sustain program levels that fulfill its statutory mandates, support trust and treaty commitments, and promote public agency resource stewardship responsibilities. While the pace of mitigation progress that BPA believes is adequate may not meet your expectations, BPA is making steady progress through actions and investments that provide considerable protection, mitigation, and enhancement of the fish and wildlife impacted by the FCRPS, at a pace that is well in excess of what is nominally required by law.

Today, BPA has institutionalized its fish and wildlife responsibilities as critical to BPA's overall mission, on a par with the Power and Transmission Business Lines. Since the passage of the Northwest Power Act in 1980, the financial effects of BPA's annual fish and wildlife mitigation efforts to BPA's ratepayers has increased from less than \$50 million dollars before the Act to over \$500 million dollars. We have proposed an overall further increase to a \$691.7 million for the next rate period. The federal hydrosystem managers have adjusted system operations, at a loss of an annual average of 1000 megawatts in power production, by releasing water from storage reservoirs to provide flows for spawning, incubation, and fish migration, and spilling water to facilitate juvenile anadromous fish passage past the dams. Juvenile salmonid survival through the hydrosystem has doubled in just the last decade. The Ninth Circuit has twice found BPA does indeed provide equitable treatment to fish and wildlife, along with the other purposes for which the hydrosystem is operated. We have built numerous hatcheries, repaired roads and culverts, protected and improved habitat, screened irrigation diversions, purchased land, and secured instream flows for the benefit of fish and wildlife. We provide the backbone of the region's scientific knowledge base for contemporary research on Columbia River basin fish and wildlife. Our spending proposal for the next rate period allows us to continue this tradition of supporting the region's benchmark mitigation investments and accomplishments, and a proud record of achievement.

Thank you for your active participation in the Power Function Review process. Again, I ask for your ongoing support as we work to better position the agency to fully and effectively meet its mitigation, trust and treaty, and salmon recovery responsibilities by focusing a greater proportion of fish and wildlife program spending in on-the-ground efforts to increase the abundance,

distribution and diversity of fish and wildlife populations and their habitats. I sincerely appreciate and respect the strength of your convictions and your commitment to fish and wildlife.

Sincerely,

/s/ G.K. Delwiche

Gregory K. Delwiche
Vice President, Environment, Fish and Wildlife

Enclosure

CRITFC and the Yakama Nation

The Yakama Nation and Columbia River Inter Tribal Fish Commission (CRITFC) comments on the Bonneville Power Administration's (BPA) draft Power Function Review (PFR) close out letter, and the documentation they referenced, are extensive. The Yakama and CRITFC comments, however, largely restate the perspective and suggestions derived from the draft cost proposal developed by the Columbia Basin Fish and Wildlife Authority (CBFWA) staff. BPA has previously responded to those comments in an April 27, 2005, letter and attachment to CBFWA.

BPA has carefully reviewed the latest versions of the Yakama and CRITFC comments and has attempted to respond meaningfully. However, because the Yakama and CRITFC comments rely extensively on the draft CBFWA funding proposal, and BPA has already explained in detail why that proposal is based on assumptions and analysis that cannot be supported or sustained, our earlier responses to the CBFWA proposal apply to the Yakama and CRITFC recommendations in this instance as well.

CRITFC and Yakama Nation's \$310 Million Funding Proposal

BPA believes that CRITFC and the Yakama under-represent the cost of their recommendation when they refer to it as being \$240 million annually. Based on the proposed draft CBFWA document from which they derive this figure (Yakama letter at 49), the recommendation is \$310 million annually if BPA does not use fish and wildlife capital borrowing of \$100 million annually. BPA explained in its April 27, 2005, letter to CBFWA why it would be fiscally impossible to sustain fish and wildlife program borrowing at their proposed \$100 million level for even a few years. The CRITFC and Yakama comments are unresponsive on this point, and do not reflect the reality of overall agency financial management constraints. Consequently, the more appropriate way to represent the proposal upon which CRITFC and the Yakama rely is that it would be \$310 million in expense spending annually. Combined with the other fish and wildlife costs BPA proposes to incur in FYs 2007-2009, the annual total cost of the tribes' proposal would be approximately \$823 million.

F&W Managers have not developed realistic and reasonable cost estimates

The Yakama Nation expresses disappointment that BPA's three page letter and 14 page attachment in April was not more deliberative with regard to the draft cost estimates they developed with CBFWA. It believes the CBFWA draft proposal is the most comprehensive information available on the subject. BPA disagrees, and has continued to elaborate the many reasons why unsupportable assumptions used in the CBFWA draft proposal undermine the validity and accuracy of the analysis and subsequent cost projections.

**enclosure with errata corrections*

From the outset, BPA thoroughly examined that draft proposal and concluded it was not realistic or reasonable for the reasons discussed in our April 27, 2005, letter and attachment. To summarize and recount, the draft CBFWA proposal was based on imprecise estimates and extrapolation; it sought funding for a considerable amount of mitigation that is not attributable to the impacts of the federal hydropower system and not BPA's responsibility; it did not meaningfully consider the effects of the proposal on BPA's customers and their rates; and it did not account for the limits to BPA's available capital (for borrowing from the U.S. Treasury). With such serious flaws in its scope, methods, and analysis BPA thought it unreasonable to integrate the draft CBFWA cost estimate into BPA's proposed spending levels.

Further undermining the utility of the draft estimate is the "no confidence" vote it received from many CBFWA members. CBFWA did not finalize its draft proposal and did not submit it as a completed cost estimate to BPA "since there is no consensus on the Rate Case Analysis. . . ." ¹ The U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration (NOAA) Fisheries did not support the draft analysis, and it was specifically rejected by the Coeur D'Alene Tribe, Confederated Colville Tribes, Spokane Tribe of Indians, Kootenai Tribe of Idaho, and the Kalispel Tribe. In addition, the State of Oregon had earlier noted its disagreement with parts of the analysis. With the concerns raised by our own review of the draft CBFWA cost estimate, and its rejection by many of CBFWA's own members, BPA concluded the draft cost estimate was not an appropriate basis for projecting the future costs of proposed program spending levels.

A fundamental error CRITFC and the Yakama analysis makes is that it consistently overstates both the impacts of the Federal Columbia River Power System (FCRPS) and BPA's mitigation responsibilities. So long as the tribal proposal misconstrues the agency's underlying obligations, it will overestimate the funding levels BPA should support. The non-discretionary or "fixed" part of BPA's proposed direct program annual spending level is approximately \$70M. This leaves another \$73 million, plus \$36 million a year in capital—for a total of \$179M—available for discretionary offsite mitigation and recovery actions. Desires for fish and wildlife project funding in the Columbia River basin will probably always be greater than the financial resources available to meet them. BPA cannot and will not attempt to meet all those needs whether identified in subbasin or recovery plans or other such plans. BPA will fulfill its responsibilities under the Northwest Power Act, ESA, and other statutes to ensure that it continues as a pillar of the region's mitigation and recovery efforts.

Responsibility for All Offsite Mitigation

BPA is puzzled by the Yakama's belief "that under the Northwest Power Act, BPA is responsible for implementing the off-site actions necessary to achieve the Northwest Power and Conservation Council (Council) Program goal. There are no other Federal

¹ CBFWA, Members Management Group Revised Agenda for the May 31, 2005 MMG Teleconference (May 24, 2005).

agencies that have this responsibility.” Yakama letter at 33. We disagree, and believe our response to the draft CBFWA proposal has already addressed this concern.

The Government Accountability Office has observed that “[u]nder the Northwest Power Act, the [Council] has a duty to prepare and adopt the [program] to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries, for impacts of *all federal and nonfederal* hydroelectric projects in the basin.”² The hydrosystem the Act engages includes all the hydroelectric projects in the basin, not just those from which BPA markets electricity. To achieve that broader mitigation objective, NOAA Fisheries, USFWS, and Federal Energy Regulatory Commission (FERC) can require offsite mitigation from hydroelectric projects they regulate. Similarly, the Corps of Engineers (Corps) and Bureau of Reclamation (Reclamation) have both undertaken offsite mitigation. The Corps has constructed and operated hatcheries and undertaken mitigation in the estuary and elsewhere. Reclamation helps screen irrigation diversions within its project areas and provides technical design assistance to BPA and others as we plan mitigation actions. Throughout the region, there are many examples of other agencies having the authority to implement offsite mitigation.

In addition, much of the offsite mitigation the Yakama Nation and CRITFC propose for BPA funding is addressed to the effects of farming, grazing, water withdrawals, logging, road building, mining, over-fishing, hatcheries, and development. When the entities responsible for causing those adverse effects are considered, along with those that are authorized or required to mitigate for them, BPA does not stand alone as the only entity in a position to implement the offsite mitigation the tribes’ desire.

This view is consistent with a principle the Council must follow in developing the program’s offsite or enhancement measures. Specifically, section 4(h)(8)(C) indicates that offsite measures that “deal with impacts caused by factors other than development and operation of the electric power facilities” must “be implemented in accordance with agreements among the appropriate parties providing for the administration and funding” of those measures. The Act expressly recognizes that BPA is not primarily responsible for offsite mitigation of impacts that the FCRPS did not cause.

Responsibility for All Salmon Losses

The Northwest Power Act is unique in that it calls for mitigation of fish and wildlife losses on a system-wide basis. The goal was not to mitigate one dam and then another, but to address the basin’s 126 hydroelectric dams collectively, as a system. The primary focus of the current program is on the FCRPS and how the Council would like to see its effects mitigated. The program does not coordinate the mitigation for these 29 federal dams with the mitigation that is the responsibility of the owners and operators of the other 97 dams. To suggest that BPA should be solely responsible for the Council’s goal of 5 million fish by 2025, as the Yakama Nation and CRITFC do, is contrary to the Act’s

² GAO, Columbia River Basin, A Multilayer Collection of Directives and Plans Guides Federal Fish and Wildlife Activities at 20 (June 2004) (emphasis added).

fundamental principle that mitigation should be done based on system-wide planning. When it wrote the Act, Congress had already seen the flaws of managing mitigation on a project-by-project basis and wanted a more comprehensive, integrated approach. Congress recognized the hydrosystem affecting the region was not just 29 federal dams from which BPA marketed power, but over one hundred dams, many of which predated the FCRPS. The Act did not direct BPA alone to implement offsite mitigation, or to meet the program's anadromous fish goals. The Act mandates mitigation from over one hundred dams and their operators, not just BPA.

Perhaps the most troubling aspect of the tribal proposal is the underlying assumption that alone, mitigation of the FCRPS can return 5 million adult salmon and steelhead annually. Scientific evidence and over twenty years of experience suggests that without dramatic improvements in environmental conditions throughout the region, BPA funding at any level will not result in 5 million returning adults. There has been since 1980, however, the sound scientific (and legal) supposition that to be successful, mitigation under the Northwest Power Act must be system-wide and include all the basin's hydroelectric dams, not just the FCRPS. Even this, though, may be one-dimensional mitigation planning because it deals with one H only, the hydrosystem, when there are at least four Hs that need to be addressed in concert before we can reasonably expect to see the program's goals met. It is illogical and legally unsupportable to expect BPA alone to have to meet the 5 million fish goal, set for a 126 dam hydrosystem, when factors limiting the achievement of that goal abound throughout the basin, and are outside of the agency's unilateral control, influence, and competencies. BPA has and will continue to fully meet its legal obligations to provide the mitigation under the Northwest Power Act and recovery under the ESA, but we are not required to meet, and indeed cannot build to, the program's aspirational goals by ourselves. Rebuilding the Columbia River ecosystem will involve everyone in the basin.

BPA has incurred costs of nearly \$9 billion dollars in the past 25 years. Among the results of that effort has been a doubling of juvenile salmon and steelhead survival through the FCRPS. If adult returns have not increased during a time when hatchery production has been decreased, and run levels are just holding their own with these hydrosystem improvements—even in years with favorable ocean conditions—several explanations are possible. First, the mitigation undertaken to date may not have been the correct mitigation—but it is what has been recommended by the fish managers and the Council as the best mitigation for BPA to implement. Second, something, perhaps ocean conditions, so dwarfs hydrosystem impacts that onshore mitigation efforts produce relatively insignificant results. Third, the Council's goal may be unattainable because of the historic impacts from all causes of mortality to the genetic composition of the stocks at issue, and because the program addresses only the hydrosystem—one of four Hs (and then only the FCRPS part of that). Fourth, harvest levels continue at rates that reduce population growth levels of weak stocks. Finally, as Dr. Robert Lackey suggests, the trend line for salmon populations for the last 150 years is steeply downward and offers little hope of improvement given the multiples causes of decline.³

³ Dr. Robert T. Lackey, *Defending Reality Fisheries* (26:6 26-27)
<http://www.epa.gov/wed/pages/staff/lackey/pubs/reality.pdf>

This may indicate that there may be much bigger challenges to the recovery of Pacific salmon populations, to goals such as the Council's doubling the runs goal, because of climate changes and the cumulative impacts of settlement and degradation of the Northwest. While we collectively struggle to reverse this trend, the solution is not going to be found by assuming all effects—or solutions—stem solely from the FCRPS.

Value of Mitigation to the CRITFC Tribes

We also think the tribes have overlooked an important element of the unique value BPA provides when it exercises its discretion to implement the Council's program in ways that benefits tribal interests. Perhaps of the greatest significance is that since BPA began implementing the direct program, artificial production capacity and out planting of juvenile salmonids has increasingly shifted up-river into treaty-reserved fishing areas to help create greater tribal fishing opportunity and employment. Cle Elum, Nez Perce Tribal, Hood River, and Umatilla hatcheries—BPA chose to mitigate anadromous fish in ways that provided tribes tangible, direct hatchery management opportunities where few if any existed before. Rainwater Ranch, Wagner Ranch, the Dworshak Trust, Yakama riparian/wetlands restoration—in the past 25 years BPA has selected projects that have resulted in greater investments in habitat acquisition and improvement, through contracts with CRITFC tribes or contracts directly benefiting them, than any other entity. BPA has also funded research, and even a tribal research facility, to improve the ability of the CRITFC tribes to enhance their co-manager status, expertise, and influence. The CRITFC tribes top a list of 120 contractors that conduct BPA-funded project work in the direct program: Nez Perce are second at \$85.4 million, Yakama fourth at \$73.3 million, Umatilla eighth at \$34.7 million, and the Warm Springs ninth at \$32.8 million.⁴ Although the Council's aspiration of 5 million fish has not been realized, BPA's discretionary efforts have increased tribal fishing opportunities, contributed to the doubled runs of returning adult salmon in recent years, and helped the tribes address their interests in these resources and their ability to co-manage them. There are a number of goals and objectives in the program, and many ways to achieve them. Attempting to hold BPA accountable for a 5 million adult salmon goal, a shared responsibility, overlooks the other goals and objectives BPA is meeting and the additional, exceptional benefits that directly accrue to CRITFC and to the tribal communities in the Columbia River Basin.

Issues In Current Litigation

The Yakama Nation raises a number of issues related to current ESA and rate case litigation. BPA will generally let the responsive documentation in those proceedings also serve as its PFR response. There are, however, several specific items raised that are appropriate to mention here.

- The tribes incorporated and elaborated upon some CBFWA documentation meant to address BPA's historical fish and wildlife costs. The cost assessments

⁴ Council, Draft Fourth Annual Report to the Northwest Governors on Expenditures of the Bonneville Power Administration (doc. 2005-5) <http://www.nwppc.org/library/2005/2005-5.pdf>

and “historical” interpretations were, however, often unrelated to or inconsistent with BPA’s independently audited records and accounts, so the comments and their documentation are difficult to constructively examine or critique.

Nevertheless, it is clear enough that BPA does not agree with many of the interpretations. Generally, BPA recommends the Council’s annual reports to the Northwest Governors, past rate case documentation, and our responses to General Accounting Office inquiries as providing accurate cost information.

- According to the Yakama Nation, BPA allegedly forces power system risk on fish instead of increasing rates to cover all of its costs. This issue was before the Ninth Circuit in 2003. The Court found BPA provided equitable treatment for fish and wildlife. Fish and wildlife costs now exceed the costs of the entire Transmission Business Line. Fish and wildlife mitigation has been integrated into the agency mission as a critical element. To that end, risk to fish and wildlife spending levels and system operations will be addressed in the same manner as the agency’s other risks.
- The scope of the rate case. BPA will determine the scope of the rate case and publish that information in the Federal Register at the outset of the rate proceeding.

Managing Risk

The issues that the tribes identified as having the potential to “significantly increase” BPA’s fish and wildlife costs includes several examples illustrative of how the tribes’ underlying assumptions do not mesh with BPA’s mission and responsibilities. The issue the tribes identify that may indeed affect spending levels in ways not fully accounted for is pending ESA litigation. This, however, is already on BPA’s list of risks to address as part of the overall agency risk package for the forthcoming rate period. The Administrator indicated in the final PFR managers meeting on May 16, 2005, that BPA would be working to address risk issues meaningfully before the beginning of the rate case.

In addition, BPA also has the ability in the coming rate period to conduct a new rate case if BPA failed to properly account for the variability around a particular cost category, including fish and wildlife costs. This was not the case during the prior rate period because the Subscription contracts contain a “rate lock” that did not allow base rates to be adjusted during the rate period. While the particular manner BPA will deal with the risks surrounding fish and wildlife spending levels will ultimately be resolved in the upcoming rate case, these risks will be addressed in a similar manner to the way BPA addresses all the other PBL risk considerations.

Additional Costs BPA May Incur

To begin, the tribal proposals observe that if other federal agencies do not receive adequate appropriations, “the region will need to address how to accomplish this work.” Yakama letter at 3. The tribal proposals raise this point because they view BPA as the back-up source of funds within the region to bolster inadequate levels of appropriations

to other federal agencies. This view, however, cannot be reconciled with two important legal principles: the “in lieu” prohibition of the Northwest Power Act and the Act’s requirement that the Council’s program seek from electric power ratepayers only the costs of mitigating the Columbia River basin’s hydroelectric dams. It is not the responsibility of BPA to mitigate for over-fishing, grazing, mining, logging, irrigation, or the dozens of other activities that adversely affect fish and wildlife. BPA need only engage in offsite mitigation under the Northwest Power Act, “where appropriate.” Under the ESA, BPA provides offsite mitigation as needed to avoid jeopardizing listed species and to aid in their recovery. Additional measures for impacts caused by factors other than the development and operation of the FCRPS should be implemented by the entities responsible for causing those impacts.

Next the tribal proposals attempt to create uncertainty in the draft spending level by suggesting that unnamed staff from NOAA Fisheries have indicated “subbasin plans may not address all of the activities in the forthcoming recovery plans.” CRITFC letter at 3. Recovery plans are required to address how to conserve ESA listed species, and they, unlike the Council’s program, are not limited to addressing only the impacts of the Columbia River Basin hydroelectric system. BPA fully expects to shoulder its share of the FCRPS’ recovery effort (with the Corps and Reclamation assuming responsibility for the non-power share of the effort). Our ratepayers, however, are not required to financially insure the entire recovery effort.

In response to the suggestion that spending levels should be higher to anticipate implementation of the Council’s Mainstem Amendment, it is important to clarify that the amendment is implemented primarily through FCRPS operations, and not direct expenditures. The 2003 Mainstem Amendment is also very closely tied to the ESA biological opinions, and so the Implementation Plans prepared by the FCRPS Action Agencies include many actions recommended in the Mainstem Amendment.

Perhaps most revealing of the differences between these tribal views and BPA’s responsibility is the assertion that when favorable ocean conditions deteriorate BPA will be required to mitigate the resulting decline in fish runs. This is another example of how the tribal proposal goes well beyond BPA’s statutory mitigation responsibilities. BPA mitigates the development and operation of the FCRPS. There is no basis in law or public policy to believe electric power consumers should assume the responsibility to offset changes in ocean conditions and the global climate.

The tribal proposal also over-estimates the costs of hatchery reforms. It assumes that BPA has much greater responsibilities with regard to hatcheries than is the case. BPA already included Hatchery Genetic Management Plan (HGMP) development costs in its 2001-2005 spending levels consistent with FCRPS Biological Opinions. The additional work related to hatcheries called for by the 2004 Biological Opinion has been included as new work in the 2007-2009 spending level proposal. Because NOAA Fisheries has not finalized its hatchery policy and has not approved HGMP reforms, there are no established reform priorities. BPA has proposed \$36 million annually in capital funding, and much of that is available for hatchery construction and renovation as well as land

acquisitions for habitat protection (consistent with BPA's capitalization policy). We believe these funding levels are adequate to address the reforms to hatcheries for which BPA currently has funding responsibility. First, those hatcheries include the facilities BPA has built since passage of the Northwest Power Act (and those are the region's newest, most state of the art facilities that will need relatively little work to meet HGMP and Artificial Production Review and Evaluation (APRE) standards); the Lower Snake River Compensation Plan hatcheries; the Corps mitigation hatcheries; and the Leavenworth hatchery complex. Second, BPA does not have direct funding responsibilities for reforms of capital facilities at hatcheries except for those built directly by BPA. Third, BPA is not responsible for hatcheries under other programs, such as the Mitchell Act. Consequently, the \$192 million of hatchery work identified by the tribes in the estuary and lower Columbia will not rest with ratepayers because those are primarily Mitchell Act or state hatchery management responsibilities.

Be clearer and more flexible with the capitalization policy

BPA's use of capital funding with regard to water is very clear: water acquisitions may not be capitalized. As for land, beginning with the changes in the 2003 SN CRAC rate case, BPA agreed, at the urging of regional interests, to allow capitalization of land. This was not a change in the capitalization policy. It was notice to the ratepayers that BPA would classify certain land acquisitions as meeting Statement of Financial Accounting Standard (FAS) 71 requirements, and amortize those costs, setting rates to recover the costs over time, not recover them in the year incurred. BPA refined the capitalization policy to develop criteria that would ensure that eligible land acquisitions—including conditions for the grouping of properties to meet the \$1 million threshold—would be financially prudent and acceptable from the view point of its independent external auditors.

Applying the capitalization policy to land is still relatively new. It has taken BPA and its mitigation partners time to learn what projects meet the capitalization policy criteria. BPA expects that now that the region sees what is required to capitalize land under conditions where properties would otherwise on their own not meet the policy, more projects will be proposed that fit the criteria, and habitat protection efforts will move ahead more quickly. In any event, applying the capitalization policy to land acquisitions in 2004 BPA funded the protection of 12,047 acres of habitat selected by wildlife managers specifically for wildlife. So far in 2005, 23 acquisitions totaling 21,910 acres are pending. Thus, in two years when the capitalization policy allegedly "stalled" wildlife habitat protection efforts, BPA is likely to secure nearly 34,000 acres—almost exactly one-tenth the acreage actually inundated by the FCRPS. By way of contrast, after a decade of spending \$310 million annually, the tribes indicate their proposal would only provide protection for 48,000 acres of habitat. (Yakama letter at 21).

Use a Longer Amortization Period for Fish and Wildlife Capital Projects

Some comments suggested that it makes little sense for a hatchery funded with appropriated capital dollars to the Corps to be amortized over 50 years, yet BPA's policy

is to amortize all BPA fish and wildlife program capital spending, even brick and steel facilities like hatcheries, over just 15 years. Since these projects result in non-revenue generating assets with no direct future economic benefit, Bonneville utilizes FAS 71, Accounting for the Effects of Certain Types of Regulation, to defer the current costs of such projects to future periods. The policy, which is based on requirements from FAS 71, was established over 20 years ago. The policy establishes the 15 year life based on conservative accounting principles applied to using section 4(h)(10)(B) of the Northwest Power Act as guidance for funding actions that help implement the Council's program. By contrast, hatcheries funded through the Corps of Engineers with appropriations are tied to the dams, revenue generating assets, and capitalized as part of that asset. There is a direct relationship in the operation of the dam and the hatchery—it becomes a component of the hydroelectric project from an accounting sense. Hatcheries not associated with the specific hydroelectric projects are classified as non-revenue generating and fall under the BPA policy for FAS 71 assets.

Lost Revenues

One aspect of BPA's overall fish and wildlife mitigation effort involves supporting changes in hydropower operations to improve in-river migration conditions for salmon. These hydropower operations for fish reduce power generation, which can affect BPA rates in two ways: (1) requiring BPA to purchase power to meet loads and (2) requiring BPA to forgo revenues it could otherwise have earned through power generation, also referred to as lost opportunity costs, which directly affect power rates for BPA's utility customers. CRITFC, the Yakama, and Save our Wild Salmon suggest that it is inappropriate for BPA to consider the cost of the second item, forgone revenues, as a fish cost. To the contrary, tracking the lost opportunity costs of hydro operations for fish recovery is appropriate in at least three respects.

First, a principle guiding the development of the Council's fish and wildlife program under the Northwest Power Act is that "[m]onetary costs and electric power losses resulting from the implementation of the program shall be allocated by the Administrator consistent with individual project impacts and system-wide objectives of this subsection." See 16 U.S.C. § 839b(h)(8)(D). If BPA does not track forgone revenues, this principle cannot be applied. Through the Act, Congress identified lost revenues from fish operations as a system cost, and expressed an expectation that lost revenues would be tracked separately.

Second, the lost opportunity to generate revenue during fish operations significantly reduces the amount of power and revenue BPA can expect from the hydrosystem. This impact has totaled over \$1 billion dollars since the passage of the 1980 Act (see "Forgone Revenues" under "River Ops" in the Council's Annual Report to Northwest Governors).⁵ While this is just one aspect of the federal government's commitment to salmon mitigation and recovery in the Northwest, it does show the significant changes

⁵ Council, Draft Fourth Annual Report to the Northwest Governors on Expenditures of the Bonneville Power Administration (doc. 2005-5) <http://www.nwppc.org/library/2005/2005-5.pdf>

and choices made to treat fish equitably. The federal hydrosystem managers have reduced power production by an annual average of 1000 megawatts to benefit migrating salmonids. This is roughly equivalent to the annual output of a large nuclear power plant, or the amount of energy needed to light a city the size of Seattle. At the same time, BPA is obligated to serve the electric firm power load requirements placed on it (16 U.S.C. § 839c(b)(1)) and provide equitable treatment for fish and wildlife (16 U.S.C. § 839b(h)(11)(A)(i)). Even if Congress had not required the tracking of lost opportunity costs, doing so provides a useful measure of the priorities of the FCRPS and how BPA is attempting to balance its multiple responsibilities and the public policy implications of these choices.

Third, where BPA has obligations for other system purposes that result in ratepayer costs, such as irrigation assistance,⁶ those costs are reported and taken into account in BPA's financial statements and rate-making processes. Congress has not, however, required that BPA track lost revenues from other non-power FCRPS purposes, such as irrigation, flood control, or recreation, over which BPA has no responsibility or control.

4(h)(10)(C) Credit

Some comments also criticized BPA's representation of fish and wildlife credits taken pursuant to section 4(h)(10)(C) of the Northwest Power Act. As a technical matter, the credits do not reduce BPA's rates. The credits make ratepayers whole when BPA funds mitigation on behalf of all the purposes of the hydrosystem, not just power. By law, BPA can only charge its ratepayers the costs related to power. BPA cannot take 4(h)(10)(C) credit for forgone revenues. The credit returns the non-power share of the costs BPA incurs. The credits do not lower BPA's rates; by being applied to BPA's payments to the U.S. Treasury they keep ratepayers from paying the share of mitigation costs allocable to navigation, irrigation, and flood control. And while BPA secures the credit at the end of each fiscal year, it must have sufficient operating revenues to be able to implement the mitigation, or sustain the costs (as in the case of lost revenues), until the credit is acknowledged. BPA's PFR proposed spending levels reflect the estimates of 4(h)(10)(C) credits that the U.S. Treasury will allow us to take in the future. These credits do not create a new source of funds.

Inflation Costs

There is an inflation factor applied to many categories of the proposed fish and wildlife spending levels. For the Integrated Program, a higher across-the-board increase is inappropriate because the program is not currently based on cost-effectiveness principles, it is not prioritized, and it is not focused on achieving specific, measurable biological or environmental performance standards for which BPA is responsible. BPA believes that efficiencies in both management and focus of the program during the

⁶ In some instances, BPA is required to repay from BPA power revenues U.S. Bureau of Reclamation FCRPS project construction costs allocated to irrigation use that are beyond the irrigators' "ability to repay," see 16 U.S.C. § 835k.

2007-2009 transition period are likely to provide additional funding to on-the-ground projects that benefit the resources directly, rather than a blanket increase for inflation.

Spending What is Collected Through Rates for Fish and Wildlife

The tribes express a concern that BPA may have set its 2002-2006 rates to recover \$186 million annually but only spent \$140 million average, and that the funding collected but not spent should remain available to the fish and wildlife program. This concern is misplaced. First, BPA did not set 2002-2006 rates to recover \$186 million per year. Rates were set to recover \$139 million of projected actual direct program expense and the depreciation and interest on \$36 million of capital investment on an expected value basis. The average expense level so far over the rate period is \$139 million. While the capital program has under-spent, the difference in depreciation and interest is much smaller than the difference in the capital investment amounts.

Second, BPA manages its finances on an agency-wide basis. While rates are set to recover a forecasted level of expense, actual spending will vary from the projections used in the rate case. Under-spending in one program can be more than offset by overspending in another area.

Third, even if rates had been set to recover a higher amount and BPA spent less, the difference is not kept in a separate account for a specific program area's future spending. Revenues that are collected in excess of actual spending go to the BPA Fund creating reserves. The reserves serve as a cushion mitigating the financial risks facing BPA when it works through the rate-making process and enters the next rate period. BPA uses reserves as a financial risk mitigation tool to ensure it is able to pay all of its bills. BPA does not use reserves to increase program level spending in future rate periods. In the May 2000 power rate proposal, the forecasted reserve level for the Power Business Line was \$840M. In the supplemental power rate proposal, the forecast dropped to \$500M. The current forecast for Power Business Line reserves at the start of FY 2007-2009 is now about \$280M.

Trust and Treaty Responsibility

The Yakama Nation's comments have also suggested that it is displeased with the way BPA has fulfilled its trust responsibility in the PFR process. This displeasure seems misplaced given BPA's willingness to open to the tribes its internal processes for considering future spending levels. The spending level proposals are wholly within the agency's discretion; no public process, rulemaking, or policy development is required by law. Instead, such financial matters are related to agency management, personnel, public property, and public benefits. To the extent a federal agency may have a trust responsibility to consider a tribe's input when the agency opens its own internal draft financial proposals to public scrutiny, we believe we met that obligation by inviting the tribes to participate, giving them time at our public meetings to make presentations and comments, and responding to their comments.

Finality of the Close-out Letter and BPA's Firm Commitment to Fish and Wildlife

The Yakama note that "decisions in the Power Function review do not appear to fit in the list of final actions subject to judicial review under 16 U.S.C. 839g(e)." Yakama letter at 36. We agree. The proposed spending levels in the close-out letter are not final actions.

While the Yakama and CRITFC comments seek ways to justify increased funding for the direct program, the essential question is really whether BPA is proposing to provide adequate funding to fulfill its statutory mandates. The evidence is overwhelming that BPA meets those mandates by providing considerable protection, mitigation, and enhancement of the fish and wildlife well in excess of what is nominally required by law. Today, BPA has institutionalized its fish and wildlife responsibilities as part of the Power Business Line and they are critical to BPA's overall mission. Since the passage of the Northwest Power Act in 1980, the financial effect to ratepayers of BPA's annual fish and wildlife mitigation efforts has increased from less than \$50 million dollars before the Act to over \$500 million dollars. We have proposed to increase our costs to \$691.7 million annually for the next rate period. The federal hydrosystem managers have reduced power production by an annual average of 1000 megawatts to benefit anadromous fish. Juvenile salmonid survival through the hydrosystem has doubled in just the last decade. The Ninth Circuit has twice found BPA does indeed provide equitable treatment to fish and wildlife along with the other purposes for which the hydrosystem is operated. We have built numerous hatcheries, repaired roads and culverts, protected and improved habitat, and screened irrigation diversions for the benefit of fish and wildlife. We provide the backbone of the region's scientific knowledge base for contemporary research on Columbia River basin fish and wildlife. Our spending proposal allows us to continue this tradition.