BP-24 Rate Proceeding

# ADMINISTRATOR'S FINAL RECORD OF DECISION

BP-24-A-02

July 2023

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# COMMONLY USED ACRONYMS AND SHORT FORMS

| | |
|---|---|
| AAC | Anticipated Accumulation of Cash |
| ACNR | Accumulated Calibrated Net Revenue |
| ACS | Ancillary and Control Area Services |
| AF | Advance Funding |
| AFUDC | Allowance for Funds Used During Construction |
| AGC | automatic generation control |
| aMW | average megawatt(s) |
| ANR | Accumulated Net Revenues |
| ASC | Average System Cost |
| BAA | Balancing Authority Area |
| BiOp | Biological Opinion |
| BPA | Bonneville Power Administration |
| BPAP | Bonneville Power Administration Power |
| BPAT | Bonneville Power Administration Transmission |
| Bps | basis points |
| Btu | British thermal unit |
| CAISO | California Independent System Operator |
| CIP | Capital Improvement Plan |
| CIR | Capital Investment Review |
| CDQ | Contract Demand Quantity |
| CGS | Columbia Generating Station |
| CHWM | Contract High Water Mark |
| CNR | Calibrated Net Revenue |
| COB | California-Oregon border |
| COI | California-Oregon Intertie |
| Commission | Federal Energy Regulatory Commission |
| Corps | U.S. Army Corps of Engineers |
| COSA | Cost of Service Analysis |
| COU | consumer-owned utility |
| Council | Northwest Power and Conservation Council (see also “NPCC”) |
| COVID-19 | coronavirus disease 2019 |
| CP | Coincidental Peak |
| CRAC | Cost Recovery Adjustment Clause |
| CRFM | Columbia River Fish Mitigation |
| CRITFC | Columbia River Inter-Tribal Fish Commission |
| CSP | Customer System Peak |
| CT | combustion turbine |
| CWIP | Construction Work in Progress |
| CY | calendar year (January through December) |
| DD | Dividend Distribution |
| DDC | Dividend Distribution Clause |
| dec | decrease, decrement, or decremental |
| DERBS | Dispatchable Energy Resource Balancing Service |
| DFS | Diurnal Flattening Service |

| | |
|---|---|
| DNR | Designated Network Resource |
| DOE | Department of Energy |
| DOI | Department of Interior |
| DSI | direct-service industrial customer or direct-service industry |
| DSO | Dispatcher Standing Order |
| EE | Energy Efficiency |
| EESC | EIM Entity Scheduling Coordinator |
| EIM | Energy imbalance market |
| EIS | environmental impact statement |
| EN | Energy Northwest, Inc. |
| ESA | Endangered Species Act |
| ESS | Energy Shaping Service |
| e-Tag | electronic interchange transaction information |
| FBS | Federal base system |
| FCRPS | Federal Columbia River Power System |
| FCRTS | Federal Columbia River Transmission System |
| FELCC | firm energy load carrying capability |
| FERC | Federal Energy Regulatory Commission |
| FMM-IIE | Fifteen Minute Market – Instructed Imbalance Energy |
| FOIA | Freedom of Information Act |
| FORS | Forced Outage Reserve Service |
| FPS | Firm Power and Surplus Products and Services |
| FPT | Formula Power Transmission |
| FRP | Financial Reserves Policy |
| F&W | Fish & Wildlife |
| FY | fiscal year (October through September) |
| G&A | general and administrative (costs) |
| GARD | Generation and Reserves Dispatch (computer model) |
| GDP | Gross Domestic Product |
| GI | generation imbalance |
| GMS | Grandfathered Generation Management Service |
| GSP | Generation System Peak |
| GSR | Generation Supplied Reactive |
| GRSPs | General Rate Schedule Provisions |
| GTA | General Transfer Agreement |
| GWh | gigawatthour |
| HLH | Heavy Load Hour(s) |
| HYDSIM | Hydrosystem Simulator (computer model) |
| IE | Eastern Intertie |
| IIE | Instructed Imbalance Energy |
| IM | Montana Intertie |
| inc | increase, increment, or incremental |
| IOU | investor-owned utility |
| IP | Industrial Firm Power |
| IPR | Integrated Program Review |

| | |
|---|---|
| IR | Integration of Resources |
| IRD | Irrigation Rate Discount |
| IRM | Irrigation Rate Mitigation |
| IRPL | Incremental Rate Pressure Limiter |
| IS | Southern Intertie |
| kcfs | thousand cubic feet per second |
| kW | kilowatt |
| kWh | kilowatthour |
| LAP | Load Aggregation Point |
| LDD | Low Density Discount |
| LGIA | Large Generator Interconnection Agreement |
| LLH | Light Load Hour(s) |
| LMP | Locational Marginal Price |
| LPP | Large Project Program |
| LT | long term |
| LTF | Long-term Firm |
| Maf | million acre-feet |
| Mid-C | Mid-Columbia |
| MMBtu | million British thermal units |
| MNR | Modified Net Revenue |
| MO | market operator |
| MRNR | Minimum Required Net Revenue |
| MW | megawatt |
| MWh | megawatthour |
| NCP | Non-Coincidental Peak |
| NEPA | National Environmental Policy Act |
| NERC | North American Electric Reliability Corporation |
| NFB | **N**ational Marine Fisheries Service (NMFS) **F**ederal Columbia River Power System (FCRPS) **B**iological Opinion (BiOp) |
| NLSL | New Large Single Load |
| NMFS | National Marine Fisheries Service |
| NOAA Fisheries | National Oceanographic and Atmospheric Administration Fisheries |
| NOB | Nevada-Oregon border |
| NORM | Non-Operating Risk Model (computer model) |
| NWPA | Northwest Power Act/Pacific Northwest Electric Power Planning and Conservation Act |
| NWPP | Northwest Power Pool |
| NP-15 | North of Path 15 |
| NPCC | Northwest Power and Conservation Council |
| NPV | net present value |
| NR | New Resource Firm Power |
| NRFS | NR Resource Flattening Service |
| NRU | Northwest Requirements Utilities |
| NT | Network Integration |

| | |
|---|---|
| NTSA | Non-Treaty Storage Agreement |
| NUG | non-utility generation |
| OATT | Open Access Transmission Tariff |
| O&M | operations and maintenance |
| OATI | Open Access Technology International, Inc. |
| ODE | Over Delivery Event |
| OS | oversupply |
| OY | operating year (August through July) |
| P10 | tenth percentile of a given dataset |
| PDCI | Pacific DC Intertie |
| PF | Priority Firm Power |
| PFp | Priority Firm Public |
| PFx | Priority Firm Exchange |
| PNCA | Pacific Northwest Coordination Agreement |
| PNRR | Planned Net Revenues for Risk |
| PNW | Pacific Northwest |
| POD | Point of Delivery |
| POI | Point of Integration or Point of Interconnection |
| POR | point of receipt |
| PPC | Public Power Council |
| PRSC | Participating Resource Scheduling Coordinator |
| PS | Power Services |
| PSC | power sales contract |
| PSW | Pacific Southwest |
| PTP | Point-to-Point |
| PUD | public or people's utility district |
| RAM | Rate Analysis Model (computer model) |
| RAS | Remedial Action Scheme |
| RCD | Regional Cooperation Debt |
| RD | Regional Dialogue |
| RDC | Reserves Distribution Clause |
| REC | Renewable Energy Certificate |
| Reclamation | U.S. Bureau of Reclamation |
| REP | Residential Exchange Program |
| REPSIA | REP Settlement Implementation Agreement |
| RevSim | Revenue Simulation Model |
| RFA | Revenue Forecast Application (database) |
| RHWM | Rate Period High Water Mark |
| ROD | Record of Decision |
| RPSA | Residential Purchase and Sale Agreement |
| RR | Resource Replacement |
| RRHL | Regional Residual Hydro Load |
| RRS | Resource Remarketing Service |
| RSC | Resource Shaping Charge |
| RSS | Resource Support Services |

| | |
|---|---|
| RT1SC | RHWM Tier 1 System Capability |
| RTD-IIE | Real-Time Dispatch – Instructed Imbalance Energy |
| RTIEO | Real-Time Imbalance Energy Offset |
| SCD | Scheduling, System Control, and Dispatch Service |
| SCADA | Supervisory Control and Data Acquisition |
| SCS | Secondary Crediting Service |
| SDD | Short Distance Discount |
| SILS | Southeast Idaho Load Service |
| Slice | Slice of the System (product) |
| SMCR | Settlements, Metering, and Client Relations |
| SP-15 | South of Path 15 |
| T1SFCO | Tier 1 System Firm Critical Output |
| TC | Tariff Terms and Conditions |
| TCMS | Transmission Curtailment Management Service |
| TDG | Total Dissolved Gas |
| TGT | Townsend-Garrison Transmission |
| TOCA | Tier 1 Cost Allocator |
| TPP | Treasury Payment Probability |
| TRAM | Transmission Risk Analysis Model |
| Transmission System Act | Federal Columbia River Transmission System Act |
| Treaty | Columbia River Treaty |
| TRL | Total Retail Load |
| TRM | Tiered Rate Methodology |
| TS | Transmission Services |
| TSS | Transmission Scheduling Service |
| UAI | Unauthorized Increase |
| UDE | Under Delivery Event |
| UFE | unaccounted for energy |
| UFT | Use of Facilities Transmission |
| UIC | Unauthorized Increase Charge |
| UIE | Uninstructed Imbalance Energy |
| ULS | Unanticipated Load Service |
| USFWS | U.S. Fish & Wildlife Service |
| VER | Variable Energy Resource |
| VERBS | Variable Energy Resource Balancing Service |
| VOR | Value of Reserves |
| VR1-2014 | First Vintage Rate of the BP-14 rate period (PF Tier 2 rate) |
| VR1-2016 | First Vintage Rate of the BP-16 rate period (PF Tier 2 rate) |
| WECC | Western Electricity Coordinating Council |
| WPP | Western Power Pool |
| WRAP | Western Resource Adequacy Program |
| WSPP | Western Systems Power Pool |

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# PARTY ABBREVIATIONS

| | |
|---|---|
| AC | Avista Corporation |
| AR | Avangrid Renewables, LLC |
| AW | Alliance of Western Energy Consumers |
| BR | Brookfield Renewable Trading and Marketing LP |
| CR | Columbia River Inter-Tribal Fish Commission |
| EP | Emerald People's Utility District |
| FR | Franklin County Public Utility District No. 1 |
| ID | Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United |
| IP | Idaho Power Company |
| NE | NorthWestern Corporation |
| NI | Northwest & Intermountain Power Producers Coalition |
| NR | Northwest Requirements Utilities |
| NS | NewSun Energy Transmission Company LLC |
| NW | Northwest Irrigation Utilities |
| PC | PacifiCorp |
| PG | Portland General Electric Company |
| PN | Pacific Northwest Generating Cooperative |
| PP | Public Power Council |
| PS | Puget Sound Energy, Inc. |
| PX | Powerex Corporation |
| RN | Renewable Northwest |
| SE | City of Seattle |
| SN | Snohomish County Public Utility District No. 1 |
| TA | City of Tacoma |
| TC | TransAlta Energy Marketing (U.S.) Inc. |
| WG | Western Public Agencies Group* |
| YN | The Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Columbia River Inter-Tribal Fish Commission |

* The Western Public Agencies Group ("WPAG") petition for leave to intervene states that each of the utilities that comprise WPAG individually file the petition requesting leave to intervene. These utilities are Eugene Water & Electric Board, Benton Rural Electric Association, Umatilla Electric Cooperative, the cities of Port Angeles, Ellensburg and Milton, Washington, the towns of Eatonville and Steilacoom, Washington, Elmhurst Mutual Power and Light Company, Lakeview Light and Power Company, Ohop Mutual Light Company, Parkland Light and Water Company, Public Utility Districts No. 1 of Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, Kittitas, Lewis, Mason, and Skamania Counties, Washington, Public Utility District No. 3 of Mason County, Washington, and Public Utility District No. 2 of Pacific County, Washington.

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# ADMINISTRATOR'S PREFACE

I am pleased to present this Final Record of Decision (ROD) containing the Bonneville Power Administration's (BPA's) power and transmission rates for fiscal years 2024-2025. I want to express my appreciation to the rate case parties for their constructive feedback and participation. The collaborative process resulted in a broadly supported settlement that formed the basis of BPA's initial proposal and, ultimately, this ROD.

Consistent with the settlement, BPA will hold power and transmission rates flat relative to BP-22 levels for the BP-24 rate period. Not only are rates remaining stable during the upcoming rate period, we have taken additional measures that support our efforts to sustain financial strength over the long term. Consistent with our Sustainable Capital Financing Policy, power and transmission rates include amounts for revenue financing to help fund capital investment. In addition, power rates include an unprecedented level of risk mitigation with the addition of $258 million over the rate period that can be used to meet any unexpected costs.

This is a remarkable accomplishment that could not have been achieved without the cooperation and commitment of BPA's regional customers and stakeholders. I must also recognize BPA staff for maintaining fiscal discipline, prioritizing projects that deliver on our mission and adding value to the region, all while minimizing rate pressures across the agency.

Every rate case, however, elicits a diverse range of interests and perspectives. In this proceeding, tribal and environmental parties raised several concerns, principally around BPA's cost projections and compliance with the Northwest Power Act and other laws. I appreciate the perspective brought by these parties and have considered their views in detail in several chapters of this document.

As we conclude this rate case, we are looking ahead – not just to the next rate period, but long into the future. In just a few days, BPA will release a new strategic plan that outlines how we will remain competitive and meet our customers' evolving needs in the years to come. Central to our strategy is to determine the future of power products, services, contracts and rates through Provider of Choice. On the transmission side, we're looking forward to a decade of expansion to meet a range of clean energy and reliability needs.

As we implement these and other strategic objectives, we are coming from a place of financial strength with competitive rates, ample liquidity and access to capital – which will only be strengthened by today's decision.

Thank you again for your participation in this process, and I look forward to seeing what we will achieve together through our continued partnership.

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# 1.0 GENERAL TOPICS

## 1.1 Introduction

This Final Record of Decision (ROD) contains the decisions of the Administrator of the Bonneville Power Administration (BPA) based on the record compiled in this proceeding with respect to the adoption of Power, Transmission, and Ancillary and Control Area Service rates for the two-year rate period of October 1, 2023, through September 30, 2025 (fiscal years (FY) 2024–2025). The rate schedules and General Rate Schedule Provisions (GRSPs) established in this proceeding will replace existing rate schedules and GRSPs that expire on September 30, 2023.

The BP-24 rate proceeding has included an evidentiary hearing, submission of written briefs by the parties, and publication of a Draft ROD. This Final ROD provides background information, addresses the issues raised in the parties' briefs, responds to participant comments submitted during the public comment period, and summarizes BPA's assessment of the potential environmental effects of implementation of the FY 2024-2025 rates consistent with the National Environment Policy Act (NEPA).

## 1.2 Procedural History

### 1.2.1 Workshops Prior to the BP-24 Rate Proceeding

Beginning in the spring of 2022, BPA sponsored a series of pre-rate case workshops and other meetings to discuss certain topics related to power and transmission rates before the start of the BP-24 rate proceeding and the release of BPA's Initial Proposal. BPA designed the workshops to allow BPA Staff and interested parties to develop a common understanding of specific topics, generate ideas, and discuss alternative proposals.

BPA held workshops on April 27, May 25, June 29, and July 27, 2022. Customers led workshops on June 8, July 13, and August 10, 2022.

### 1.2.2 Settlement Discussions Prior to the BP-24 Rate Proceeding

On August 5, 2022, BPA announced the suspension of the pre-rate case workshop process to hold discussions regarding the potential for settlement of the BP-24 proceeding and other issues. BPA provided notice of the settlement discussions through its Tech Forum email distribution list and the service list from the BP-22 rate proceeding. Settlement conferences were held on August 11 and 25, and September 14, 2022.

The settlement discussions resulted in a package of proposed settlements that address the BP-24 rate proceeding, the FY 2024-2025 Average System Cost Review process, and the FY 2022 Power Reserves Distribution Clause.[1] The BP-24 Rates Settlement (Settlement) includes proposed power and transmission rates and other terms and conditions for FY 2024-2025. On September 21, 2022, BPA provided public notice of the package of proposed settlements through the Tech Forum email distribution list, posted the

[1] The FY 2024-2025 Average System Cost Review and FY 2022 Power Reserves Distribution Clause processes are separate and distinct from the BP-24 rate proceeding.

documents on its website, and requested affected stakeholders to notify BPA of any objections by October 6, 2022. Based on the responses received by October 6, 2022, Staff moved forward with proposing adoption of the Settlement in its Initial Proposal in the BP-24 rate proceeding. The Settlement is attached as Appendix A and described in Chapter 2 of this Final ROD.

### 1.2.3 BP-24 Rate Proceeding

Section 7(i) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. § 839e(i), requires that BPA's rates be established according to specific procedures that include, among other things, issuance of a notice in the Federal Register announcing the proposed rates; the opportunity for interested parties to submit written and oral views, data, questions, and arguments; and a decision by the Administrator based on the record. This proceeding is also governed by BPA's Rules of Procedure, which were published in the Federal Register, 83 Fed. Reg. 39,993 (Aug. 13, 2018), and are posted on BPA's website at https://www.bpa.gov/energy-and-services/rate-and-tariff-proceedings/rules-of-procedure-revision-process. The Rules of Procedure implement the Section 7(i) requirements.

On November 18, 2022, BPA published notice of the BP-24 rate proceeding in the Federal Register. *Fiscal Year (FY) 2024-2025 Proposed Power and Transmission Rate Adjustments Public Hearing and Opportunities for Public Review and Comment*, 87 Fed. Reg. 69,259 (Nov. 18, 2022). The rate proceeding began with a prehearing conference and the release of BPA's Initial Proposal for FY 2024-2025 power and transmission rates on December 2, 2022. After the prehearing conference, the Hearing Officer issued orders granting petitions to intervene and adopting other procedures for the proceeding.

BPA's Initial Proposal was supported by Staff's studies and written testimony proposing adoption of the power and transmission rates and other terms in the Settlement. *See, e.g.,* Fredrickson *et al.* BP-24-E-BPA-09. Consistent with the terms of the Settlement, BPA filed a motion on December 2, 2022, requesting the Hearing Officer to establish a deadline for parties to file any objections to the Settlement. Motion of Bonneville Power Administration to Establish Deadline for Objections to Proposed Settlement, BP-24-M-BPA-01. On December 6, 2022, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Columbia River Inter-Tribal Fish Commission (collectively referred to as the "Tribal Parties") submitted an Answer to BPA's motion requesting additional time to submit objections. Tribal Parties' Answer to Motion of the Bonneville Power Administration to Establish Deadline for Objections to Proposed Settlement, BP-24-M-YN-01, at 2.

In orders issued December 7 and 12, 2022, the Hearing Officer established a December 21, 2022, deadline for objections. Order Establishing Process for Objections to BP-24 Rates Settlement (Corrected), BP-24-HOO-01-E01; Order Regarding Motion for Clarification, BP-24-HOO-04. In response to a subsequent motion by BPA, the Hearing Officer extended the deadline to January 11, 2023. Order Extending Deadline for Objections to BP-24 Rates Settlement, BP-24-HOO-06; Motion of the Bonneville Power Administration to Extend Deadline for Objections to Proposed Settlement, BP-24-M-BPA-03.

Although the majority of parties did not oppose the Settlement, the Tribal Parties, NewSun Energy Transmission, LLC, and a group of parties consisting of Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United (collectively referred to as the "Environmental Parties") each filed objections. Notice of Objection to BP-24 Settlement Proposal, BP-24-M-YN-02; Objection to Settlement of NewSun Energy Transmission Company, LLC, BP-24-M-NS-01; Notice of Objection to Settlement, BP-24-M-ID-02. The objections of the Tribal Parties and the Environmental Parties are discussed in Chapters 2 through 6 of this Final ROD. Under the terms of the Settlement, any party that had not previously objected to the Settlement had the opportunity to withdraw its assent after the objections were filed. No parties withdrew. Because of the limited number of parties that objected to the Settlement, the limited scope of the objections, and the fact that no other party withdrew its assent after the objections were filed, Staff continued forward with its recommendation to adopt the Settlement despite the objections.

On January 20, 2023, after conferring with the parties, BPA filed a motion proposing adoption of a procedural schedule for the rest of the proceeding. Motion of the Bonneville Power Administration to Adopt Procedural Schedule, BP-24-M-BPA-04. The Hearing Officer established the procedural schedule in an order issued January 23, 2023. Order Adopting Procedural Schedule, BP-24-HOO-08; *see also* Order Amending Procedural Schedule, BP-24-HOO-11.

On February 7, 2023, BPA filed a motion requesting to preserve certain arguments and evidence from the BP-22 rate proceeding for purposes of the record in the BP-24 rate proceeding. Motion of the Bonneville Power Administration to Incorporate Arguments and Evidence from BP-22 Rate Case, BP-24-M-BPA-05. The Hearing Officer granted BPA's motion on February 9, 2023. Order on Incorporation of BP-22 Record and Preservation of Issues, BP-24-HOO-09.

The parties filed direct testimony and related exhibits on February 17, 2023. Staff and the parties filed rebuttal testimony and related exhibits on March 24, 2023. The litigants elected not to conduct clarification of the direct and rebuttal testimony, and the clarification sessions were cancelled.

Staff and the parties elected not to conduct cross-examination, and the hearing scheduled for April 21, 2023, was cancelled. All testimony and exhibits were admitted.

Parties filed initial briefs by May 8, 2023, and oral argument was held May 15, 2023. Only the Tribal Parties presented oral argument. On May 16, 2023, the Tribal Parties submitted a supplemental brief addressing a question raised during oral argument.

A Draft ROD was issued on June 20, 2023. The Tribal Parties and Environmental Parties filed briefs on exceptions on July 6, 2023. This Final ROD is being issued July 28, 2023.

BPA received one written comment during the participant comment period, which ended December 9, 2022.[2] The comment is summarized and addressed in Chapter 7. The comment may be viewed on BPA's website at https://publiccomments.bpa.gov/CommentList.aspx?ID=471.

### 1.2.4 Waiver of Issues by Failure to Raise in Briefs

Pursuant to Section 1010.17(f) of the Rules of Procedure, arguments not raised in parties' briefs are deemed to be waived. Under this provision, a party's brief must specifically address the legal or factual dispute at issue, except that, in this proceeding, the Hearing Officer has explicitly preserved certain arguments and evidence from the BP-22 rate proceeding. Order on Incorporation of BP-22 Record and Preservation of Issues, BP-24-HOO-09. Blanket statements that seek to preserve every issue raised in testimony will not preserve any matter at issue.

Sections 1010.17(b) and (c) of the Rules of Procedure set forth the requirements applicable to initial briefs and briefs on exceptions. Pursuant to Section 1010.17(c) of the Rules of Procedure, a party that raises an issue in its initial brief need not reassert that issue in its brief on exceptions in order to avoid waiving the issue; all arguments raised by a party in its initial brief are deemed to have been raised in the party's brief on exceptions.

## 1.3 Legal Guidelines Governing Establishment of Rates

### 1.3.1 Statutory Guidelines

Section 7(a)(1) of the Northwest Power Act directs the Administrator to establish, and periodically review and revise, rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power. 16 U.S.C. § 839e(a)(1). Rates are to be set to recover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (FCRPS) (including irrigation costs required to be paid by power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator under the Northwest Power Act and other provisions of law. *Id*. Section 7 of the Northwest Power Act also contains rate directives describing how rates for individual customer groups are established.

Section 7(a)(1) of the Northwest Power Act reaffirms the applicability of Section 5 of the Flood Control Act of 1944 (Flood Control Act), which directs the Secretary of Energy to transmit and dispose of electric power and energy in such manner as to encourage the most widespread use of power at the lowest possible rates to consumers consistent with sound business principles. 16 U.S.C. § 839e(a)(1); *see also* 16 U.S.C. § 825s. Section 5 of the

[2] For interested persons who are not eligible or do not wish to become parties to the formal evidentiary hearings, BPA's Rules of Procedure provide opportunities to participate in the ratemaking process through submission of comments as "participants." *See* Rules of Procedure § 1010.8. Participant comments are part of the record upon which the Administrator bases the decisions. No party may submit comments as a participant, and comments so submitted will not be included in the record. *Id*. § 1010.8(d).

Flood Control Act provides that rate schedules will be drawn having regard to the recovery of the cost of producing and transmitting electric energy, including the amortization of the Federal investment over a reasonable number of years. 16 U.S.C. § 825s.

Section 7(a)(1) of the Northwest Power Act also reaffirms the applicability of Sections 9 and 10 of the Federal Columbia River Transmission System Act of 1974 (Transmission System Act), 16 U.S.C. §§ 838g–838h, which contain requirements similar to those of the Flood Control Act. Section 9 of the Transmission System Act, 16 U.S.C. § 838g, provides that rates must be established (1) with a view to encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles; (2) with regard to the recovery of the cost of producing and transmitting electric power, including amortization of the capital investment allocated to power over a reasonable period of years; and (3) at levels that produce such additional revenues as may be required to pay, when due, the principal, premiums, discounts, expenses, and interest in connection with bonds issued under the Transmission System Act. Section 10 of the Transmission System Act, 16 U.S.C. § 838h, allows for uniform rates for transmission and for the sale of electric power and specifies that the costs of the Federal transmission system shall be equitably allocated between Federal and non-Federal power utilizing the system.

### 1.3.2 The Broad Ratemaking Discretion Vested in the Administrator

The Administrator has broad discretion to interpret and implement statutory directives applicable to ratemaking. These directives focus on cost recovery and do not restrict the Administrator to any particular rate design methodology or theory. *See Pac. Power & Light v. Duncan*, 499 F. Supp. 672 (D. Or. 1980); *accord City of Santa Clara v. Andrus*, 572 F.2d 660, 668 (9th Cir. 1978) ("widest possible use" standard is so broad as to permit "the exercise of the widest administrative discretion"); *ElectriCities of N.C. v. Se. Power Admin.*, 774 F.2d 1262, 1266 (4th Cir. 1985).

The United States Court of Appeals for the Ninth Circuit has recognized the Administrator's ratemaking discretion. *Cent. Lincoln Peoples' Util. Dist. v. Johnson*, 735 F.2d 1101, 1120-29 (9th Cir. 1984) ("Because BPA helped draft and must administer the Northwest Power Act, we give substantial deference to BPA's statutory interpretation"); *PacifiCorp v. FERC*, 795 F.2d 816, 821 (9th Cir. 1986) ("BPA's interpretation is entitled to great deference and must be upheld unless it is unreasonable"); *Atl. Richfield Co. v. Bonneville Power Admin.*, 818 F.2d 701, 705 (9th Cir. 1987) (BPA's rate determination upheld as a "reasonable decision in light of economic realities"); *Dep't of Water and Power of L.A. v. Bonneville Power Admin.*, 759 F.2d 684, 690 (9th Cir. 1985) ("Insofar as agency action is the result of its interpretation of its organic statutes, the agency's interpretation is to be given great weight"); *Pub. Power Council v. Bonneville Power Admin.,* 442 F.3d 1204, 1211 (9th Cir. 2006) ("[The GRSPs] are entirely bound up with BPA's rate making responsibilities, and we owe deference to the BPA in that area"). The United States Supreme Court has also recognized the deference given to the Administrator's interpretation of the Northwest Power Act. *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389 (1984) ("The Administrator's interpretation of the Regional Act is to be given great weight.").

## 1.4 Federal Energy Regulatory Commission Confirmation and Approval of Rates

Under the Northwest Power Act, BPA's rates become effective upon confirmation and approval by the Federal Energy Regulatory Commission (FERC or Commission). 16 U.S.C. § 839e(a)(2) & (k). The Commission's review is appellate in nature, based on the record developed by the Administrator. *U.S. Dep't of Energy—Bonneville Power Admin.*, 13 FERC ¶ 61,157, at 61,339 (1980). The Commission may not modify rates proposed by the Administrator but may only confirm, reject, or remand them. *U.S. Dep't of Energy – Bonneville Power Admin.*, 23 FERC ¶ 61,378, at 61,801 (1983). Pursuant to Section 7(i)(6) of the Northwest Power Act, 16 U.S.C. § 839e(i)(6), the Commission has promulgated rules establishing procedures for the approval of BPA's rates. 18 C.F.R. Part 300 (1997).

### 1.4.1 Standard of Commission Review

The Commission reviews BPA's rates under the Northwest Power Act to determine whether they (1) are sufficient to ensure repayment of the Federal investment in the FCRPS over a reasonable number of years after first meeting BPA's other costs; and (2) are based on BPA's total system costs. *See* 16 U.S.C. § 839e(a)(2)(A)-(B). With respect to transmission rates, Commission review includes an additional requirement: to ensure that the rates equitably allocate the cost of the Federal transmission system between Federal and non-Federal power using the system. *See* 16 U.S.C. § 839e(a)(2)(C); *see also U.S. Dep't of Energy – Bonneville Power Admin.*, 39 FERC ¶ 61,078, at 61,206 (1987). The limited Commission review of rates permits the Administrator substantial discretion in the design of rates and the allocation of power costs, neither of which is subject to Commission jurisdiction. *Cent. Lincoln Peoples' Util. Dist.*, 735 F.2d at 1115.

## 1.5 Related Topics and Processes

This section includes a discussion of topics and processes separate and distinct from this rate proceeding that provide information and policy context to the proceeding, including program cost estimates developed in the Integrated Program Review (IPR), the 2012 Residential Exchange Program Settlement Agreement (2012 REP Settlement), and the Rate Period High Water Mark (RHWM) Process. Issues related to those processes are outside the scope of the BP-24 rate proceeding. 87 Fed. Reg. at 69,260-61 (Nov. 18, 2022).

### 1.5.1 Cost Forecast Review

Since 1986, in a process separate from its rate proceedings, BPA has conducted a public review of forecast expense and capital spending levels used in the development of rates, now known as the IPR. This process provides interested parties the opportunity to review and provide comment on all of BPA's program expense and capital spending level estimates prior to the use of those estimates in setting rates.

In June 2022, BPA began a series of public workshops to review the forecast program expense and capital spending for FY 2024-2025 in advance of the development of proposed power and transmission rates for the BP-24 rate period. This process provided opportunities for the public to review and comment on Power, Transmission, and Agency service forecast expense programs, and included detailed review of asset strategies and

associated forecast capital spending levels. BPA issued a Closeout Report for the IPR in October 2022, responding to public comments and concluding the review of the FY 2024-2025 forecast program costs and capital expense levels. IPR Closeout Report (Oct. 2022), *available at* https://www.bpa.gov/-/media/Aep/finance/integrated-program-review/bp-24-ipr/bp-24-ipr-closeout-report.pdf.

### 1.5.2 2012 Residential Exchange Program Settlement Agreement

On July 26, 2011, the Administrator executed the 2012 REP Settlement, which resolved longstanding litigation over BPA's implementation of the Residential Exchange Program under Section 5(c) of the Northwest Power Act, 16 U.S.C. § 839c(c), through 2028. The Administrator's findings regarding the legal, factual, and policy challenges to the 2012 REP Settlement are thoroughly explained in the REP-12 Record of Decision. The 2012 REP Settlement and the Administrator's decision in the REP-12 Record of Decision to sign the settlement were upheld by the Ninth Circuit Court of Appeals in *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939 (9th Cir. 2013).

### 1.5.3 Rate Period High Water Mark Process

BPA has established FY 2024-2025 RHWMs for customers with Contract High Water Mark (CHWM) contracts. In the RHWM Process, which preceded the BP-24 rate proceeding and concluded in August 2022, BPA established the maximum planned amount of power a customer is eligible to purchase at Priority Firm Tier 1 rates during the rate period, the Above-RHWM Load for each customer, the System Shaped Load for each customer, the Tier 1 System Firm Critical Output, RHWM Augmentation, the Rate Period Tier 1 System Capability (RT1SC), and the monthly/diurnal shape of RT1SC. The RHWM Process provided customers an opportunity to review, comment, and challenge BPA's RHWM determinations. The RHWMs and related outputs of the RHWM Process are combined with the rate case load forecast to develop billing determinants and for other ratemaking purposes.

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# 2.0 SETTLEMENT

Almost all parties in the BP-24 rate proceeding either support or do not oppose the adoption of the rates and other terms in the BP-24 Rates Settlement. *See* Appendix A (Settlement); *see* Motion of the Bonneville Power Administration to Establish Deadline for Objections to Proposed Settlement, BP-24-M-BPA-01; Order Establishing Process for Objections to BP-24 Rates Settlement (Corrected), BP-24-HOO-01-E01; Order Regarding Motion for Clarification, BP-24-HOO-04. The Settlement was structured to require parties to file any objections on the record by a deadline or waive the right to object; it also provided non-opposing parties the opportunity to withdraw in the event an objection was filed. Three parties filed objections to the Settlement, but no party withdrew from the Settlement as a result of the objections.

The Tribal Parties (the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Columbia River Inter-Tribal Fish Commission) and Environmental Parties (Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United) submitted initial briefs opposing adoption of the Settlement. These parties' positions are summarized in the issue that follows and addressed in detail in Chapters 3 through 6 of this Final ROD.

***Issue 2.1***
*Whether BPA should adopt the Settlement.*

**Parties' Positions**

The Alliance of Western Energy Consumers, Northwest Requirements Utilities, Public Power Council, and Western Public Agencies Group all filed initial briefs supporting adoption of the Settlement. AWEC Br., BP-24-B-AW-01, at 1; NRU Br., BP-24-B-NR-01, at 1; PPC Br., BP-24-B-PP-01, at 1; WPAG Br., BP-24-B-WG-01, at 1.

The Environmental Parties oppose the Settlement on the basis that the proposed rates would not provide "equitable treatment" for fish and wildlife, do not satisfy BPA's obligation to take the Council's fish and wildlife program into account "to the fullest extent practicable," and are inconsistent with the Council's program. Environmental Parties Br., BP-24-B-ID-01, at 3, 6, 9.

The Tribal Parties oppose the Settlement on the basis that the proposed rates do not provide sufficient fish and wildlife funding to support BPA's Federal treaty and trust obligations, are inconsistent with BPA's obligations under the Northwest Power Act, and do not fully recover the costs of all of BPA's obligations. Tribal Parties Br., BP-24-B-YN-01, at 25, 32, 51, 66. The Tribal Parties also maintain the BP-24 rate proceeding has violated procedural laws and policies. *Id.* at 66.

In response to the Hearing Officer's order establishing a deadline for objections to the Settlement, NewSun Energy Transmission, LLC submitted a filing to specify that it did not "assent" to the terms of the Settlement, as provided in Section 3 of the agreement.

Objection to Settlement of NewSun Energy Transmission Company, LLC, BP-22-M-NS-01, at 1. NewSun did not file an initial brief on its position.

**BPA Staff's Position**

Staff supports adoption of the Settlement notwithstanding the objections by the Environmental Parties and Tribal Parties.

**Evaluation of Positions**

As described in Chapter 1, the Settlement was developed in discussions that followed the pre-rate case workshop process held before the start of the BP-24 rate proceeding. BPA appreciates the time, effort, and constructive approach that all parties dedicated to the settlement discussions and other processes since that time. This Final ROD adopts the Settlement for purposes of setting power and transmission rates for the FY 2024-2025 rate period.

The Settlement addresses all power and transmission rates at issue in the BP-24 proceeding and includes other terms and conditions detailed in the agreement. *See* Appendix A (Settlement). Most of the parties in the BP-24 proceeding, including all customers and customer groups, either support or did not file briefs objecting to the proposed rates under the Settlement. Parties that did not object cannot contest adoption of the agreement in the BP-24 Proceeding, or other forums, or the implementation of the Settlement pursuant to its terms, through the end of FY 2025. The Settlement undoubtedly has helped to limit the contested issues in the BP-24 rate proceeding. There are no objections or contested issues related to the adoption of the proposed transmission rates under the Settlement. Although adoption of the proposed power rates does not enjoy unanimous support, the contested issues are limited in number and scope. BPA places significant weight on the benefits of adopting an outcome that reflects a compromise and at least some degree of consensus among most parties. *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (it "hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation.").

The Environmental Parties and Tribal Parties oppose adoption of the proposed power rates under the Settlement. Environmental Parties Br., BP-24-B-ID-01, at 1; Tribal Parties Br., BP-24-B-YN-01, at 1. The Environmental Parties and Tribal Parties raise a number of legal arguments against the proposed power rates. *See, e.g.,* Environmental Parties Br., BP-24-B-ID-01, at 3-10; Tribal Parties Br., BP-24-B-YN-01, at 33-51. The Environmental Parties and the Tribal Parties each raise similar legal objections under the Northwest Power Act, Section 4(h)(10)(A) and Section 4(h)(11)(A)(i) and (ii). *Id.* The Tribal Parties separately raise unique tribal trust and treaty arguments as well as allege procedural violations with the development of the proposed rates and BPA's cost projections. Tribal Parties Br., BP-24-B-YN-01, at 25-33, 66-68.

Apart from legal arguments, the Tribal Parties challenge three underlying assumptions used in developing the proposed power rates. First, the Tribal Parties assert that BPA's cost projections for its fish and wildlife costs are not accurate. *Id.* at 51. The Tribal Parties claim BPA's "true" fish and wildlife cost will be much higher, and that BPA's projections

"grossly underestimat[e] its total system costs." *Id.* at 65. The Tribal Parties point to a number of proposals, recommendations, reports, and outstanding legal processes as support for their position that BPA must revise its fish and wildlife cost projections consistent with the Tribal Parties' recommendations. *Id.* at 51-57.

Second, the Tribal Parties assert BPA has not accounted for operational changes to the Federal hydroelectric system that may impact the revenue BPA expects to receive over the rate period. *Id.* at 52, 53, 57-61. The Tribal Parties claim operational changes are likely from Clean Water Act requirements, outstanding litigation, the Columbia River Treaty, and from other events likely to occur during the rate period. *Id.*

Third, the Tribal Parties claim BPA has not accounted for the risks of cost and revenue changes that may occur during the rate period associated with the above issues. *Id.* at 61-64, 65-66. The Tribal Parties maintain BPA's risk mitigation has not taken various risks into account and that BPA's risk mitigation tools are inadequate to ensure payment to the Treasury. *Id.* at 61-62.

For the reasons explained in the sections described below, BPA is not persuaded by the Environmental Parties' or Tribal Parties' arguments that the proposed power rates are legally deficient or unsupported by the record in this case. The Environmental Parties raised many of the same legal arguments in the BP-22 rate proceeding, and BPA addressed those arguments in detail in the Administrator's Final ROD in BP-22. *See* Administrator's Final Record of Decision, BP-22-A-02, at 17-69. The Environmental Parties have since appealed that decision to the United States Court of Appeals for the Ninth Circuit and the case remains pending. *See Idaho Conservation League v. Bonneville Power Admin.*, No. 22-70122 (9th Cir. filed June 16, 2022). The limited objections raised by the Environmental Parties and Tribal Parties in this proceeding provide an insufficient basis to reject a reasonable, negotiated, and otherwise uncontested outcome for rates and other issues. As explained in the remainder of this Final ROD, the record in this proceeding demonstrates the proposed rates under the Settlement satisfy the statutory directives that apply to BPA ratemaking, and the Settlement provides a reasonable basis for the adoption of those rates for the FY 2024-25 rate period. *See Ass'n of Pub. Agency Customers v. Bonneville Power Admin.,* 733 F.3d 939, 967 (9th Cir. 2013) ("So long as the Settlement complies with the relevant statutory authority . . . BPA does not need its customers to unanimously agree to the rates it sets in accordance with the Settlement.").

Chapters 3 through 6 of the Final ROD addresses all of the parties' arguments in detail.

- The Tribal Parties' cost projection concerns are discussed in Section 3.2.
- The Tribal Parties' concerns with risks associated with the operations underlying BPA's rate assumptions are addressed in Section 3.3.
- The Tribal Parties' objections to the risk study and risk mitigation used in the rates proposal are discussed in Section 3.4.
- The Environmental Parties' and the Tribal Parties' Northwest Power Act legal claims are addressed in Section 4.2.

- The Tribal Parties' Treaty concerns are discussed in Section 5.1.
- The Tribal Parties' procedural objections are addressed in Chapter 6.

Furthermore, adopting the BP-24 rates Settlement is in BPA's business interest and comports with BPA statutory requirements.

From a business and statutory perspective, the BP-24 rates proposal provides numerous benefits that would not be available in the absence of the rate Settlement. Among other features, the Power-portion of the Settlement holds power rates flat relative to the BP-22 rate level for the FY 2024-25 rate period. Fredrickson *et al.*, BP-24-E-BPA-09, at 6. Absent the Settlement, power rates for FY 2024-2025 likely would have *declined* from the BP-22 rate level. *See id.* at 10-12; Fisher *et al.*, BP-24-E-BPA-10, at 61. To hold power rates flat, Staff added $258 million in Planned Net Revenue for Risk (PNRR) ($129 million a year). Fredrickson *et al*., BP-24-E-BPA-09, at 11. This additional $258 million is available for risk during the BP-24 rate period. *Id.*

Staff explained that the risk mitigation supporting the Power-rate portion of the Settlement, which includes $258 million of additional PNRR, along with BPA's traditional risk mitigation measures, provides a high level of cost recovery certainty. Fisher *et al.*, BP-24-E-BPA-10, at 61. Indeed, the proposed power rates would meet BPA's long-standing measure for cost recovery—the Treasury Payment Probability (TPP) standard—by providing a "greater than 99.9 percent" chance of making the Treasury payment over the BP-24 rate period. *Id.* This is 4.9 percentage points higher than the 95 percent normally required for the TPP standard, which Staff noted is "the widest margin we have seen in quite some time." *Id.* The risk analysis developed by Staff shows the durability of the proposed rates. BPA could sustain a $450 million per year unexpected cost or reduction in revenue—$900 million for the rate period—and still make the payment to the Treasury on time, and in full. *Id.* at 64.

Apart from achieving a high level of cost recovery, the Settlement also has helped to avoid litigation on numerous issues. In particular, the Settlement permitted BPA and its customers to reach agreement on a number of issues that would have been active issues in the BP-24 rate proceeding. *See* Fredrickson *et al.*, BP-24-E-BPA-09, at Appendix A, Attachment 3, Pt. II. Thus, BPA avoided contentious litigation and debate on, among other matters, issues such as:

- BPA's rate models and analysis
- The level and design of the PF rate and Demand rate
- Issues related BPA FPS (surplus rate)
- New Firm Water Transition Rate
- HLH Energy Amounts
- PF Short-Term and Load Growth Rate
- Resource Adequacy issues, Mid-C pricing issues

- Issues related to the First Jurisdictional Deliverer (FJD) status of BPA for compliance with the Washington State Cap-and-Invest Program
- Generation inputs
- Columbia Generating Station Decommissioning Trust Fund cost allocation and treatment
- Product Switching and Risk Adjustment issues

*Id.* Avoiding costly, contentious, and burdensome litigation over these (and other) issues, while achieving an unprecedented level of cost recovery, is definitively a sound business decision.

**Decision**

*The Settlement is consistent with the applicable ratemaking standards. The Administrator adopts the Settlement for the purpose of establishing BPA power and transmission rates for the FY 2024-25 rate period.*

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# 3.0 FISH & WILDLIFE COST PROJECTION & RISK MITIGATION ISSUES

## 3.1 Introduction

In their Initial Brief, the Tribal Parties raise a number of concerns with the underlying assumptions BPA used in the BP-24 Power Rate proposal. First, Tribal Parties object to BPA's cost projections for its Fish and Wildlife Program, claiming they do not reflect the "true cost" of BPA's fish and wildlife obligations. Second, Tribal Parties contend BPA's revenue projections are faulty because they fail to reflect possible changes to hydroelectric operations stemming from a variety of outstanding processes. Third, Tribal Parties argue that BPA's risk mitigation fails to take into account the risks identified by Tribal Parties. The Tribal Parties assert these problems in BPA's rate assumptions make it "unlikely" BPA will be able to repay Treasury and meet all of its obligations. This chapter addresses those issues.

## 3.2 Cost Projection Issues

### 3.2.1 Overview of BPA's Cost Projections

When developing rates, BPA estimates the costs that it expects to incur over the rate period. Fisher *et al.*, BP-24-E-BPA-10, at 54. These cost projections are included in the Revenue Requirement, which are then used to establish the level of rates for the rate period. Power Revenue Requirement Study, BP-24-E-BPA-02, at 1, 3. As BPA has done in past rate cases, BPA developed its fish and wildlife cost projections through the IPR process, which commenced before the BP-24 case began. *See* BP-24 FRN, 87 Fed. Reg. at 69,259. IPR is a separate, informal, process where BPA describes to stakeholders the projected costs BPA intends to recover in its rates during the upcoming rate period. *Id.; see also* Fisher *et al.*, BP-24-E-BPA-10, at 19.

In developing its fish and wildlife cost projections, BPA started from the premise that the fish and wildlife mitigation projects funded and implemented during the BP-22 rate period would largely continue during the BP-24 rate period. Fisher *et al.*, BP-24-E-BPA-10, at 25. These cost projections included projects established from decades of guidance from the Northwest Power and Conservation Council's (NPCC or Council) Fish and Wildlife Program and the Council's project review and recommendation process. *Id.* These cost projections also included ongoing mitigation work associated with BPA's Endangered Species Act (ESA) consultations. *Id.* This includes non-operational measures for ESA-listed salmon and steelhead such as conservation and safety-net hatchery programs, predation management, and habitat improvement actions. Targeted research, monitoring, and evaluation to support seasonal and annual adaptive management is also part of this ongoing work. *Id.* at 25-26.

BPA then looked to identify known or expected sources of additional costs beyond that BP-22 level. *Id.* at 25. BPA determined that costs were likely to increase in five specific categories within its Fish and Wildlife Program. These included (1) increased costs associated with multi-year project implementation agreements, such as the Columbia Basin

Fish Accords; (2) asset management, reflecting BPA's Strategic Asset Management Plans analysis; (3) new work related to Columbia River System Operations Environmental Impact Statement (CRSO EIS) and associated ESA consultation commitments; (4) PIT-tag costs; and (5) other materials, equipment, and other cost pressures, adjusted based on the expectation that cost pressures do not have consistent impacts across projects and programs, while also acknowledging and accounting for historical data showing that the actual annual expenditures of BPA's Fish and Wildlife Program is consistently below IPR cost projections. BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 12-15.

BPA took comments on its fish and wildlife cost projections in IPR, including from the Tribal Parties. *See, e.g*., Yakama Nation BP-24 IPR Comment Letter, BP-24-E-YN-29; CRITFC BP-24 IPR Comment Letter, BP-24-E-YN-30. BPA responded to these comments in the IPR Closeout Report, which was issued in October 2022, two months before the commencement of the BP-24 rate case. IPR Closeout Report, BP-24-E-YN-23, at 11-17. In the IPR Closeout Report, BPA made adjustments to its projections for costs that were reasonably likely to occur during the rate period. For instance, the U.S. Fish and Wildlife Service (USFWS) noted that the likely costs of the Lower Snake Compensation Plan for the BP-24 rate period would be slightly higher than BPA had forecasted. BPA responded by increasing that forecast by $500,000. *Id.* at i; *see also* BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 15. At the conclusion of the IPR process, BPA's fish and wildlife cost projection had increased by 8.7 percent from the BP-22 cost projection, to $269 million annually, which was the "second largest dollar increase of any program recovered in Power rates." Fisher *et al.*, BP-24-E-BPA-10, at 33, 45. This amount does not include costs directly paid to the USFWS for the Lower Snake River Compensation Plan (LSRCP) ($32.7 million) and BPA's direct funding of the Corps of Engineers (Corps') operations and maintenance (O&M) for fish and wildlife ($50 million). *Id.* at 45. Altogether, BPA's fish and wildlife costs are over $350 million annually. *Id.*

During the rate case, the Tribal Parties submitted much of the same information as they submitted in IPR, and some additional arguments, on BPA's fish and wildlife cost projections. *See generally* Hesse *et al.*, BP-24-E-YN-103. BPA Staff filed over 70 pages of testimony and hundreds of pages of attachments in response. *See generally* Fisher *et al.*, BP-24-E-BPA-10 and Attachments (BP-24-E-BPA-10-AT01 to -AT30). The Tribal Parties repeat in their briefs the arguments raised in IPR and in their Direct Testimony regarding their view on the level of BPA's cost projections. Tribal Parties Br., BP-24-B-YN-01, at 51-66. The Tribal Parties argue they identified "known, but yet unquantified, cost pressures for the BP-24 rate period associated with inflation, climate change, ongoing legal proceedings, increasing implementation needs associated with existing legal commitments, and obligations stemming from recent Federal commitments to support a long-term salmon restoration strategy." *Id.* at 52. The Tribal Parties style their objections as showing BPA's "true costs" for its fish and wildlife program. *Id.* at 51.

This section addresses the specific issues parties raised related to BPA's fish and wildlife cost projections and risk mitigation measures.

### 3.2.2 Issues

***Issue 3.2.2.1***
*Whether BPA's cost projections for its Fish and Wildlife Program must be adjusted for inflation.*

**Parties' Position**

The Tribal Parties argue BPA's BP-24 Rate Proposal is neither based on a realistic projection of BPA's costs for the BP-24 rate period, nor the information provided by the Tribal Parties prior to or at the time of BPA's rate setting. Tribal Parties Br., BP-24-B-YN-01, at 51. Tribal Parties argue BPA's erroneous cost projections vastly underestimate likely fish and wildlife costs during the BP-24 rate period, making it unlikely that BPA will be able to recover its true costs and repay Treasury. *Id.* They argue BPA must increase its fish and wildlife costs to account for the Tribal Parties' recommendations. *Id.* at 65-66.

In their Brief on Exceptions, the Tribal Parties contend that, though BPA stresses flexibility in its financial policies, "the Tribal Parties have not witnessed such flexibility." Tribal Parties Br. Ex., BP-24-R-YN-01, at 20. Tribal Parties also contend BPA has "strong adherence to its flat funding policy as it relates to projects" and this policy has been "strictly enforced." *Id.*

WPAG, AWEC, PPC, and NRU all support BPA's cost projections. WPAG Br., BP-24-B-WG-01, at 5-7; AWEC Br., BP-24-B-AW-01, at 12-13; PPC Br., BP-24-B-PP-01, at 7-9, 12-13; NRU Br., BP-24-B-NR-01, at 6.

**BPA Staff's Position**

BPA's fish and wildlife cost projections are based on reasonable estimates of its fish and wildlife obligations. Fisher *et al.*, BP-24-E-BPA-10, at 25. An across the board inflation adjustment is not warranted or reasonable. *Id.* at 34.

**Evaluation of Positions**

A central theme of the Tribal Parties' argument is that BPA's projected fish and wildlife costs, as a whole, fail to account for inflation. Tribal Parties Br., BP-24-B-YN-01, at 44-51. The Tribal Parties claim that BPA has engaged in a systemic policy of "flat funding" that has resulted in a 20 percent reduction in program funding over the past five years. *Id.* at 45. Tribal Parties also assert BPA intends to "hold its Fish and Wildlife Program funding flat, regardless of additional costs required through litigation or subsequent biological opinions." *Id.* The Tribal Parties note that the NPCC and Independent Scientific Review Panel[3] (ISRP) have identified that some projects have not received inflation increases in over a decade. *Id.* The Tribal Parties also claim the NPCC identified the need for additional resources in the 2020 Addendum to the Columbia Basin Fish and Wildlife Program. *Id.* at 47. The Tribal Parties argue that "BPA's failure to adequately address inflationary pressures on the Fish and Wildlife Program funding and implementation" has been a recurring point in discussions between BPA and the signatories to the Lower River Tribes'

[3] The ISRP is formed under the NPCC's program.

Fish Accords. *Id.* The Tribal Parties describe their view of the consequences of a "flat funding" policy on the implementation of the on-the-ground projects. *Id.* at 48. By failing to take this information into account, the Tribal Parties claim BPA's cost projections "vastly underestimate likely fish and wildlife costs during the BP-24 rate period, making it unlikely that BPA will be able to recover its true costs and repay Treasury." *Id.*

BPA extensively analyzed the Tribal Parties' concerns with inflation in its IPR Closeout Report before the rate case, and again in rebuttal testimony within the rate case. IPR Closeout Report, BP-24-E-YN-23, at 11-17; Fisher *et al.*, BP-24-E-BPA-10, at 31-37. BPA finds that its projections are accurate and that an across-the-board inflation increase is not necessary or warranted. Several reasons support BPA's decision.

*Financial Policy Flexibility*

First, Tribal Parties are incorrect in asserting that BPA has a "flat-funding policy" that applies "regardless of additional costs required through litigation or subsequent biological opinions." Tribal Parties Br., BP-24-B-YN-01, at 44-45. BPA's 2022 Financial Plan, which provides the most recent explanation of BPA's policy goals, and which is applicable for the BP-24 rate period, is clear that BPA's cost management discipline objective is a *goal* that is subservient to BPA's statutory obligations. Fisher *et al.*, BP-24-E-BPA-10, at 32; *see also* 2022 Financial Plan, BP-24-E-YN-22, at 9. Specifically, it states:

> BPA aggressively manages the costs of operating the federal power and transmission systems, consistent with its mission objectives and statutory obligations. To that end, BPA established the management goal of holding the sum of program costs, by business line, at or below the rate of inflation through 2028 from rate period to rate period. This means that some programs might be higher than inflation and some might be below inflation, but in total, our goal is for program costs to be at or below the rate of inflation, in aggregate, for each business line.

2022 Financial Plan, BP-24-E-YN-22, at 9. Furthermore this goal is to manage BPA's costs at or below inflation in the *aggregate,* across all programmatic costs. Again, as BPA explained in the 2022 Financial Plan:

> The goal to manage these costs in the aggregate at or below the rate of inflation during this period is BPA's demonstration of our commitment to deliver competitive and stable rates over the longer term and to maintain BPA's position as the provider of choice for regional public power customers when new power sales contracts are negotiated prior to 2028. This goal also leaves BPA flexibility to adjust its program costs when needed to ensure it meets its various statutory obligations.

*Id*. BPA's objective, then, is not a hard and fast "flat funding" mandate that applies "regardless" of additional fish and wildlife needs. *See* Tribal Parties Br., BP-24-B-YN-01, at 45. It is a "goal" that permits flexibility to "adjust [BPA] program costs when needed to ensure [BPA] meets its various statutory obligations." 2022 Financial Plan, BP-24-E-YN-22, at 9.

In their Brief on Exceptions, the Tribal Parties contend that, though BPA stresses flexibility in the policy, "the Tribal Parties have not witnessed such flexibility." Tribal Parties Br. Ex., BP-24-R-YN-01, at 20. Tribal Parties also contend BPA has "strong adherence to its flat funding policy as it relates to projects" and this policy has been "strictly enforced." *Id.*

The Tribal Parties' arguments are not supported by facts. As BPA explains more fully below, BPA is not holding fish and wildlife costs "flat" this rate period and routinely develops internal budgets for its Fish and Wildlife Program that exceeds its rate case forecast. These actions do not reflect the presence of a "strict" policy that BPA "strongly adheres to" regardless of the needs of particular mitigation programs.

*Fish and Wildlife Cost Forecast Increase for BP-24*

Second, as just noted, BPA is not holding its fish and wildlife cost projections "flat" for the BP-24 rate period. As explained in the introduction to this section, for this rate period BPA included in its IPR projection an 8.7 percent increase to BPA's fish and wildlife costs—the second largest dollar increase of any program recovered in Power rates. *See* IPR Closeout Report, BP-24-E-YN-23, at i, 3, Table 2. This 8.7 percent increase accounts for project-level budget increases related to inflation, while acknowledging other factors that affect fluctuations in actual spending. *See* BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 14-15.

The Tribal Parties claim that the 8.7 percent increase will not be adequate to "catch up" from past "deficient funding." Tribal Parties Br., BP-24-B-YN-01, at 48; *see also* Tribal Parties Br. Ex., BP-24-R-YN-01, at 18-19. As explained below, BPA disagrees that its past funding has been deficient. But even if there were deficiencies, it is not the place of the rate case or BPA rates to "make up" for any alleged prior funding limits. BPA is setting its rates for the BP-24 rate period, and therefore, must forecast its costs for the next two years. Fisher *et al.*, BP-24-E-BPA-10, at 41-42. BPA is unaware of any requirement that it increase funding for this rate period for its Fish and Wildlife Program to "catch up" for a past alleged limit. Indeed, even the NPCC and ISRP material cited by the Tribal Parties do not suggest BPA "catch up" for past suggested underfunding in this rate period, but simply note that *persistent* flat funding over time can have long-term detrimental impacts. NPCC 2020 Addendum to 2014 F&W Program, BP-24-E-YN-09, at 45; NPCC 2022 AFHH Review, BP-24-E-YN-26, at 14. BPA has not held funding flat for this rate period, so the Tribal Parties' concerns with past cost projections do not apply to BPA's present projections. As noted in Chapter 4, BPA does not grant that the NPCC or ISRP's recommendations control BPA spending. *See infra* Issue 4.2.2.

Moreover, BPA does not agree that its approach to forecasting costs for its Fish and Wildlife Program demonstrates any sort of systemic underfunding of its obligations. Tribal Parties contend that certain programs have not had an increase in "over a decade" while others have gone without an adjustment for up to "15 years." Tribal Parties Br., BP-24-B-YN-01, at 45. These individual anecdotes do not portray the whole picture. As a general matter, BPA Fish and Wildlife Program costs have *increased* over the past 15 years. Fisher *et al.*, BP-24-E-BPA-10, at 36. Importantly, as explained more fully below under the heading "Historical Spending," in most of these years, BPA's actual spending was below the forecast of fish and

wildlife costs used in ratemaking. *Id.* at 35-36 In other words, for most of the past decade, BPA's customers have paid rates that included higher costs for the Fish and Wildlife Program than BPA was able to spend.

In more recent years, BPA has made efforts to right size its rate case forecasts with actual spending. This right sizing did not mean fish and wildlife programs across the board experienced less funding overall. Actual funding for individual projects varied. Some projects received funding increases associated with negotiated mitigation implementation agreements or budget flexibility allowed by such agreements (*e.g.,* projects associated with the Columbia Fish Accords and wildlife settlements). *Id.* at 36. Other project budgets may not have received the same increase or were decreased in certain circumstances as their objectives were successfully accomplished, or due to changes in BPA's compliance actions (*e.g.*, from updated ESA consultations). *Id.* These adjustments, thus, were part of an ongoing cost-management initiative that was tailored to the specific needs of the Fish and Wildlife Program. *Id.* at 38. The Council itself recognized the importance of "fiscal discipline" and noted that holding some budgets flat over time can "remove inefficiencies" and is a "legitimate tool for Bonneville to apply." NPCC 2020 Addendum to 2014 F&W Program, BP-24-E-YN-09, at 45. Thus, to the extent BPA's past projections of its Fish and Wildlife Program matter for this rate case—and BPA doubts they do—those past cost projection adjustments reflect an effort by BPA to resize its cost projections to be closer to its actual spending.

The Tribal Parties also assert that the 8.7 percent increase only applies to FY 2024, and there is not a separate increase in FY 2025, meaning the projects are "back on the path of flat funding for the foreseeable future." Tribal Parties Br., BP-24-B-YN-01, at 48. The Tribal Parties did not raise this factual issue until its brief, but nonetheless, this observation is of little import. BPA cost projections and revenues are estimated for each year of the rate period and then averaged into a single value for the rate period. This approach allows BPA to perform its cost recovery tests and to simplify its ratemaking process. Thus, the fact BPA reflected an 8.7 cost increase in FY 2024, and then used that same figure for both years of the rate period, is simply the way rates are set, and not an implicit return to some flat-funding policy. BPA would apply the same cost projections for both years regardless of whether the cost increase was 10 percent, 20 percent or 100 percent. The Tribal Parties have presented no argument or evidence stating that BPA must depart from this long-standing practice of forecasting costs on a multi-year, averaged basis.

*Not all Projects Require Inflationary Increases*

Third, the Tribal Parties' argument for inflation rests on the mistaken premise that inflation increases are necessary for all fish and wildlife projects. Fisher *et al.*, BP-24-E-BPA-10, at 34. BPA's Fish and Wildlife Program is not a single unit that expands at the same rate across all projects. Rather, it is comprised of over 300 projects that are implemented through approximately 1,000 contracts. *Id.* at 27-28. Each of these projects has unique, individual characteristics and needs that are developed through the annual start-of-year budget development process. *Id.* at 27. Each year, changes occur to these projects, with some closing, some expanding, and others merging. *Id.* at 26. Developing a cost projection

for these programs for purposes of rates occurs at the programmatic level – meaning it is an aggregated level for all projects within the scope of the BPA Fish and Wildlife Program. *Id.* at 27. Developing cost projections at the aggregate level allows BPA to consider the program as a whole, recognizing cost savings from one program, while acknowledging cost increases from another. The broad nature of the cost projections lends itself to offsetting costs and efficiencies when developing the cost projections for the rate case.

For example, BPA acquires Passive Integrated Transponders (PIT-tags) in bulk to negotiate a lower price per tag. *Id.* at 34. BPA also pays for certain hatchery O&M costs directly, such as for fish food and electricity, which can likewise result in lower costs. *Id.* Another example is that BPA often uses internal expertise to assist with design and project management tasks, which decreases the need to contract for such work externally. *Id.* All of these examples would appear as a decrease in BPA's fish and wildlife cost projections when compared to a prior year's projected forecast. BPA does not believe it is either reasonable or required for BPA to implement its Fish and Wildlife Program in the most expensive way possible. Given the complexity and scope of BPA's Fish and Wildlife Program, BPA finds it is eminently reasonable to consider the individual needs of programs, and leverage efficiencies and cost-savings when appropriate, to develop its projections. This includes making adjustments that recognize inflation, as needed, but not to apply an across-the-board inflation adjustment. IPR Closeout Report, BP-24-E-YN-23, at 13.

*Historical Spending*

Fourth, in evaluating the Tribal Parties' request for an inflationary increase for the Fish and Wildlife Program for the BP-24 cost projections, BPA reviewed its actual historic spending for this program. Fisher *et al.*, BP-24-E-BPA-10, at 28-31. Between 2007 and 2022, fish and wildlife expenditures were routinely lower than the rate case forecast. *Id.* at 28-29. The reasons for these differences were multifaceted, including the capacity of BPA's implementation partners (*e.g.,* states, tribes, other fishery co-managers) to complete work, high or low stream flows preventing in-stream work, wildfire risk, permits, or material delays. *Id.* at 29-30. Other types of projects are just inherently difficult to predict, such as acquisitions of land. *Id.* at 30. These projects may be delayed because of appraisals, buyers backing out, or waiting on applicable approvals. *Id.* Whatever the reason, in 14 out of the past 15 years, BPA's Fish and Wildlife Program spent less than projected levels that were assumed in rates. *Id.* at 35.

When developing a cost forecast "consistent with sound business principles," BPA finds it reasonable to take into account the past realities of actual fish and wildlife spending. In this case, actual spending has almost universally been under the rate case forecast, which leads BPA to conclude that sound business practices would not require BPA to apply a uniform inflation increase across the entirety of the fish and wildlife projects. *Id.* A more targeted approach—allocating funds to projects that have demonstrated needs—is therefore a reasonable approach when considering that not all funds are likely to be expended during the rate period.

On a related and significant note, BPA has been taking active steps to minimize the

difference between rate case forecasts and actual spending. Since at least 2007, BPA has developed internal budgets that *exceed* the rate case forecast in an effort to get fish and wildlife expenditures more closely aligned to the rate case forecast. *Id.* at 28-30. Thus, BPA sets its internal fish and wildlife budgets *higher* than the rate case forecast with the intent of giving project managers flexibility to repurpose spending that may be delayed to other projects in order to expend the entire projected cost of the Fish and Wildlife Program. *Id.* at 30-31.

*Carryover Funds for Some Projects*

Fifth, and finally, some of BPA's project-level agreements contain clauses that carry over underspent amounts between years. *Id.* at 37. That is, some agreements contain clauses that allow a project manager to apply funds not spent in one year to a future year. *Id.* Currently, across all agreements, that amount is more than $70 million. *Id.* Thus, up to $70 million in unspent funds from existing agreements remains available for use in the BP-24 rate period. The fact that BPA is contractually committed to make this money available under these agreements is another reason that adding costs to BPA's projections for inflation is not warranted. *Id.*

In sum, BPA finds that its projections are reasonable, realistic, and based on sound business principles. An across-the-board inflation adjustment is unnecessary and, in light of the above factors, not required given the facts and circumstances applicable to the BP-24 rate period.

*Tribal Parties' Arguments Regarding on the Ground Impacts of not Providing Inflation for All Projects*

The Tribal Parties discuss at length the "on-the-ground" impacts of BPA's alleged "flat funding" policy. Tribal Parties Br., BP-24-B-YN-01, at 48, 52. The Tribal Parties point to the effects that cost pressures (such as higher salaries for employees, costs of supplies, less buying power, and other impacts) have on the overall effectiveness of fish and wildlife programs. *Id.* at 48.

The Tribal Parties' alleged "on-the-ground" impacts—which are uncited and not clearly connected to BPA's responsibilities—cannot be resolved in the rate case, which, as discussed above, relies on cost projections at the "programmatic" level. Fisher *et al.*, BP-24-E-BPA-10, at 27. It may be, as the Tribal Parties assert, that certain projects have specific inflationary needs that BPA may need to address when developing annual budgets for particular projects. But nothing in BPA's cost projections would preclude such adjustments from occurring. As noted above, BPA's rate case projections are just that—a projection. They do not set BPA's annual budget for any particular project, and actual annual spending may be above or below what was provided in the rolled up programmatic budget. *Id.* at 30-31. BPA's annual internal budgetary process allows BPA to reasonably plan its expenditures to make appropriate adjustments to specific projects, "consistent with the recommendations and realities affecting projects in real-time." *Id.* at 31. This flexibility includes redirecting funds "if a project is delayed, postponed, or canceled, to other projects that have greater needs or to fund new projects not previously considered." *Id.* Thus, if particular projects have needs that require adjustments for inflation or other costs, BPA

can make adjustments at the project level to address them. BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 15 ("The specific work elements and associated funding for each project within the Fish & Wildlife Program will be determined as part of the FY 2024 start of year budget development process.") This appears to be consistent with the Council's recommendation on the issue of inflation:

> Consistent with the Fish and Wildlife Program, Bonneville should work with all project sponsors to identify projects (those in this review and all other ongoing projects) that are experiencing issues related to inflation that are faced with reducing the amount of substantive work they can do and develop options for relief.

NPCC 2022 AFHH Review, BP-24-E-YN-26, at 15.

BPA does not believe it is necessary to assume *every* one of BPA's 300-plus projects has the same need for inflation, and to blindly apply an across the board inflationary adjustment to every project (and the roughly 1,000 contracts), regardless of need, past spending, project characteristics, current priorities, or a host of other factors. While the Tribal Parties highlight the general needs for increasing "salaries schedules" of employees, and the need to maintain the purchasing power of funding over time, such generic requests must be considered in light BPA's other statutory duties, such as setting rates as low as possible consistent with sound business principles. *See* 16 U.S.C. §839e(a)(1). For BPA's public customers, BPA rate increases are not a matter of "dry economics," but a serious concern for their consumers, particularly those in vulnerable and disadvantaged communities. *See* Deen *et al.*, BP-24-E-PP-01, at 2; *see id passim*.

Increasing BPA's fish and wildlife cost projections for an across the board inflation increase means additional costs recovered from these customers. If BPA does not spend this money (as has been the case in most prior years), or does not need this money to meet its obligations (as described in the following chapters of this record of decision), then the funds collected simply accumulate in the BPA Fund at the Treasury. BPA must not only develop projections of its costs sufficient to meet its statutory funding obligations but also exercise its ratemaking authority in such a way to establish rates as low as possible consistent with sound business principles. Here, BPA has done so by developing a realistic projection of its costs (which is 8.7 percent higher than last rate period) for its Fish and Wildlife Program over the BP-24 rate period.

*Providing Inflation as a Matter of Compliance with the Council's Program*

Finally, to the extent the Tribal Parties contend BPA *must* provide an inflation adjustment to be consistent with the Council's Program or the Northwest Power Act, *see* Tribal Parties Br., BP-24-B-YN-01, at 48, BPA addresses that argument in Issue 4.2.2.

## Decision

*BPA's cost projections are reasonable and based on sound business principles, and do not need to include an across-the-board increase for inflation.*

***Issue 3.2.2.2***

*Whether BPA's fish and wildlife cost projections properly account for costs related to the Biological Opinion (BiOps) and Columbia River System Operation Environmental Impact Statement.*

## Parties' Positions

Tribal Parties argue that BPA's IPR cost forecast for the Integrated Fish and Wildlife Program underestimates the cost of implementing the actions identified in the current ESA BiOps. Tribal Parties Br., BP-24-B-YN-01, at 55-56. They argue the forecast "should be at least $283 million in FY 2024 to keep up with inflation . . . ." *Id.* at 55.

## BPA Staff's Position

BPA's cost projections are reasonable and should recover the costs of BPA's actions with respect to the CRSO EIS ROD and associated ESA consultations. Fisher *et al.*, BP-24-E-BPA-10, at 25-26.

## Evaluation of Positions

As noted earlier, BPA's Fish and Wildlife Program cost projections include costs associated with ESA compliance. *Id.* The measures associated with these costs were developed in the CRSO EIS and associated ESA consultations and selected in the CRSO EIS ROD, which were all issued in 2020. IPR Closeout Report, BP-24-E-YN-23, at 13. In the CRSO EIS, BPA estimated the implementation costs using cost data from BPA's BP-16 rate case, resulting in a range from $235 million to $282 million annually. *Id.* BPA did not, however, make any actual funding decisions for the BPA Fish and Wildlife Program through the CRSO EIS process. *Id.*

For this rate process, BPA relied on the CRSO EIS and 2020 CRS BiOps to develop up-to-date projections of its Fish and Wildlife Program cost projection levels. When developing IPR cost estimates for BP-24, BPA reviewed the 2020 Proposed Action (PA), 2020 CRS BiOps, and the CRSO EIS ROD Mitigation Action Plan in order to identify specific mitigation actions likely to occur in FY 2024 and FY 2025. BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 14, 34. For new work that is likely to occur in FY 2024 and FY 2025, BPA subject matter experts reviewed the cost estimates developed as part of the CRSO EIS and refined those estimates based on their experience working on similar projects and discussions with other BPA project managers, subject matter experts and policy leads. *Id.* at 34. For some of the actions included in the 2020 PA and 2020 BiOps, costs were not included in the CRSO EIS because they would be implemented under existing programs and funding sources. *Id.* at 34-35. For these actions, and for all new and ongoing obligations, BP-24 IPR cost estimates were developed to determine the level of additional funding that would be required for implementation. *Id.* at 35. Through the IPR process, BPA refined the cost projections for FY 2024-2025 to be approximately $269 million annually. IPR Closeout Report, BP-24-E-YN-23, at 13.

*BPA Accounted for Forecast Obligations*

The Tribal Parties raise concerns with these cost projections, asserting BPA is failing to "account for its funding obligations set forth in the 2020 CRSO EIS and resulting BiOps." Tribal Parties Br., BP-24-B-YN-01, at 55. The Tribal Parties argue that in 2020, the CRSO EIS included estimated costs in the range of $249 million. Applying an inflation factor to this figure results in a cost projection of "at least $283 million in FY 2024 . . . ." *Id.* The Tribal Parties express "extreme[] concern" that the proposed BP-24 rates represent a reduction of 20 percent in spending power in real dollars compared to the cost projections from BP-16. *Id.* at 55-56. The Tribal Parties also claim this "functional decrease in spending power undermines the effective implementation of existing fish and wildlife mitigation projects upon which the ESA BiOps relied." *Id.* at 56. BPA disagrees that its projection is flawed.

First, the Tribal Parties do not specify any particular omissions from BPA's projections, nor do they assert that BPA's projections will render BPA unable to implement any specific aspect of mitigation commitments associated with the CRSO EIS decision. The sum total of their concern appears to be that, when comparing the figures from 2020 CRSO EIS, those figures do not "keep up with inflation" as calculated by the Tribal Parties. *Id.* at 55. But, as noted in Issue 3.2.2.1, a straight application of inflation to BPA's Fish and Wildlife Program is unnecessary and unwarranted considering the historic *underspend* for that program, Fisher *et al.*, BP24-E-BPA-10, at 28-29, 35-36.

Second, as BPA explained above and in the IPR Closeout Report, the cost estimates from the CRSO EIS were not intended to be binding projections. IPR Closeout Report, BP-24-E-YN-23, at 13 ("Funding decisions for the Bonneville F&W Program were not made as a part of the CRSO EIS process."). This was made clear in the CRSO EIS itself, wherein BPA and the other Federal Action Agencies expressly stated that future processes would determine the appropriate fish and wildlife costs:

> Funding decisions for the Bonneville F&W Program *are not being made as part of the CRSO EIS process.* However, a range of potential F&W Program costs are included to inform the broader cost analysis for each alternative in the EIS, which is discussed in Section 3.19. *Future budget adjustments would be made in consultation with the region through Bonneville's budget-making processes and other appropriate forums and consistent with existing agreements.* In the case of the Preferred Alternative, Bonneville included a range of potential F&W Program costs to acknowledge the possibility that the Preferred Alternative could provide biological benefits to anadromous fish species (see Section 7.7.5) and that this could, in turn, reduce the need for some offsite mitigation funded through the Bonneville F&W Program. By analyzing a range of costs, Bonneville reflects the year-to-year fluctuations related to managing its program and also acknowledges the uncertainty around both the magnitude of biological benefits and the potential effects on funding, including the timing of funding decisions.

CRSO EIS Chapter 7, BP-22-M-ID-02-AT06, at 7-205 to -06 (emphasis added).

Third, BPA expressly considered increased costs associated with the CRSO EIS in the projections for the fish and wildlife cost projections for BP-24, and these costs formed part of the 8.7 percent cost increase BPA projected was needed for its Fish and Wildlife Program overall. BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 13-14. Specifically, BPA's cost projections for the BP-24 rate case reflect appropriate "adjustments" made through the forums BPA uses (IPR) to develop its most up to date assessment of its ESA costs. In developing the projection of $269 million, BPA incorporated inflation adjustments for certain work and materials and fully incorporated the expected costs of mitigation actions related to the CRSO EIS ROD and associated ESA consultations that were likely to be ready for implementation through BPA's Fish and Wildlife Program in FY 2024 and FY 2025. IPR Closeout Report, BP-24-E-YN-23, at 13. These projections, which were developed over the summer and fall of 2022 in IPR, and again revisited in this rate process in the winter and spring of 2023, are the most recent projections on the costs of implementing mitigation actions associated with the CRSO EIS and related BiOps during the FY 2024-2025 period.

In any event, the actual funds needed to perform BPA's obligations under the CRSO EIS and related BiOps will be provided. As BPA develops its annual budgets for its programs, BPA will continue to coordinate with other Federal Action Agencies and the USFWS and National Marine Fisheries Service (NMFS) regarding actions that were included in the proposed action and consulted upon under the ESA and report on the implementation of these actions throughout the period of time covered by the 2020 CRS BiOp. *Id.* As described in the previous issue, if additional needs for funding are identified or required to implement ESA obligations, BPA can make adjustments to the annual funding of the required program. The fact that BPA did not include a specific "inflation" adjustment to the programmatic cost projection in the rate case does not prevent BPA from making specific project adjustments when needed.

Fourth, and finally, BPA notes that the BP-24 rate case is *not* the forum for determining compliance with its ESA obligations. BPA's rates must recover its projected costs in total, and thus, BPA is not deciding which projects to pursue and whether those projects meet applicable requirements. If actual compliance costs are higher, BPA will pay those as they come due, and nothing in BPA's projections prevent those costs from being covered. Fisher *et al.*, BP-24-E-BPA-10, at 22-23.

*BP-24 Rates Result in a High TPP*

The Tribal Parties also assert that by not adjusting the projected costs for ESA compliance for inflation, BPA is "[u]nderestimating its total system costs" and "increas[ing] the likelihood" that BPA will not recover its costs and miss a payment to the Treasury. Tribal Parties Br., BP-24-B-YN-01, at 56. The Tribal Parties' claim, however, is without foundation.

The Tribal Parties provide no analysis to support their allegation that BPA's cost forecast "makes it unlikely that BPA's proposed rates for BP-24 are sufficient to recover its true costs and repay Treasury." *Id.* at 55. Even assuming the Tribal Parties are correct that BPA's actual fish and wildlife spending reaches $283 million, the net difference is only $15 million when compared to BPA's current projection. This amount would not even

marginally impact the Treasury Payment Probability (TPP) calculation. The model that evaluates BPA's TPP calculation, ToolKit, modeled a large magnitude in variation of end-of-period reserves (*e.g.,* standard deviations of $245 million and $258 million for FY 2024 and FY 2025, respectively). Fisher *et al.*, BP-24-E-BPA-10, at 75. BPA's proposed rates were sufficient for BPA to make its Treasury payment in every game, and it would take an additional cost, beyond all the variability already modeled in BPA's risk analysis, of over $450 million *per year* to cause TPP to drop below 95 percent. *Id.* at 64. While costs exceeding forecast by any amount would affect BPA's net revenue calculation, *see id.* at 65, BPA's rates and available liquidity tools are sufficient to address a $15 million increase without calling into question BPA's ability to repay Treasury over the two-year rate period. *Id.; see also* Section 3.4.1.4 (describing BPA's risk mitigation tools).

**Decision**

*BPA's cost projections reasonably account for the costs of the CRSO EIS and associated ESA BiOps.*

***Issue 3.2.2.3***
*Whether BPA should adjust its cost projections to reflect potential costs from pending litigation.*

**Parties' Positions**
The Tribal Parties assert BPA's cost projections fail to account for risk of increased costs or reduced revenues related to: (1) the *NWF v. NMFS* litigation over the CRSO EIS and related decisions, filed in the U.S. District Court of Oregon, and which is currently stayed during a mediation process, and (2) the case of *Idaho Conservation League v. Bonneville Power Admin.*, filed in the Ninth Circuit, which involves the BP-22 rates and BPA's compliance with Sections 4(h)(11)(A)(i) and (ii). Tribal Parties Br., BP-24-B-YN-01, at 53, 57. The Tribal Parties also assert BPA should presume certain outcomes from the Federal mediation process in the *NWF v. NMFS* mediation process. *Id.* at 57.

**BPA Staff's Position**

There have been no court rulings in either case, and BPA does not intend to speculate on potential outcomes. Fisher *et al.*, BP-24-E-BPA-10, at 66-67. Use of the status quo for cost projection purposes is reasonable. *Id.* at 68.

**Evaluation of Positions**

The Tribal Parties contend that BPA's projections are faulty because they do not take into account potential changes to BPA's costs and revenues that may result from ongoing litigation. Specifically, the Tribal Parties point to the litigation and mediation over the CRSO EIS and associated BiOps in *Nat'l Wildlife Fed'n v. NMFS*, Case No. 3:01-cv-00640-SI (D. Or. 2022), Tribal Parties Br., BP-24-B-YN-01, at 56-57, and a challenge to BPA's BP-22 rates in *Idaho Conservation League v. Bonneville Power Admin.,* Case No. 22-70122 (9th Cir.

2022), Tribal Parties Br., BP-24-B-YN-01, at 53.[4] As explained below, neither case has progressed to a decision, and BPA's decision to not speculate on potential outcomes in those cases is reasonable and consistent with sound business principles.

*Nat'l Wildlife Fed'n v. NMFS, Case No. 3:01-cv-00640-SI (D. Or. 2022)*

As noted above, in 2020 Federal Action Agencies issued the CRSO EIS ROD, which selected an alternative that the agencies consulted upon under the ESA with NMFS and USFWS. Several parties subsequently filed challenges to NMFS's, USFWS's, and the other Federal agencies' decisions in the CRSO EIS, and those cases were consolidated into *Nat'l Wildlife Fed'n v. NMFS* in the U.S. District Court and *PCFFA v. Bonneville* in the Ninth Circuit. Fisher *et al.*, BP-24-E-BPA-10, at 66. Those cases were subsequently stayed in October 2021, pending confidential mediations.

The Tribal Parties cite to *Nat'l Wildlife Fed'n v. NMFS* as containing "legal obligations likely to accrue during the BP-24 rate period." Tribal Parties Br., BP-24-B-YN-01, at 56. Tribal Parties argue that "[n]ot incorporating the potential costs associated with the result of the litigation stay result in BPA's failure to appropriately project total costs and will ultimately increase the risk that BPA will be unable to ensure repayment to Treasury." *Id.* at 57.

BPA disagrees that its projections are faulty or that changes to its projections are needed on account of *Nat'l Wildlife Fed'n v. NMFS.*

First, there have been no court rulings regarding BPA's or the other Federal agencies' positions in the CRSO EIS or associated ESA consultations. Fisher *et al.*, BP-24-E-BPA-10, at 66. As such, adjusting BPA's cost projections or revenues to account for an adverse outcome in litigation would be highly speculative. As BPA explained in the record:

> Ultimately, the question of who will prevail at court and on what grounds is a legal question, and what remedies might be ordered is pure speculation. Similarly, we cannot say what the outcome of the mediation process will be. We can say, however, that from an analytical perspective, a status quo approach such as the one we have used, is a reasonable—and arguably the only—approach in these types of situations. Other approaches would require us to speculate on matters in active litigation or mediation and would be notoriously difficult to predict. Rather than speculate, we chose to assume that the status quo is retained until the time at which enough new information is available to support something other than the status quo; that time has not yet come for the risks raised by the Tribal Parties.

*Id.* at 68.

[4] Tribal Parties devote a single sentence to state "BPA is also engaged in ongoing litigation following the BP-22 Rate Case regarding the NWPA's equitable treatment clause." BPA understands this to be referring to the case of *Idaho Conservation League v. Bonneville Power Admin.,* although Tribal Parties instead cite to *Nat'l Wildlife Fed'n v. NMFS*, and do not elaborate.

Second, the confidential mediation process has yet to produce a resolution of the issues in litigation that would require changes to BPA's projections. While Tribal Parties criticize BPA's "silen[ce]" in its Revenue Requirement Study and IPR cost projections on the litigation stay, they are themselves equally silent regarding the alleged cost and likelihood of "additional . . . obligations" arising from the mediation process. Tribal Parties Br., BP-24-B-YN-01, at 56-57. As the Tribal Parties acknowledge:

> Because the mediation proceedings are both confidential and ongoing, the Tribal Parties are not in a position to specify or quantify how the outcome of the FMCS mediation will affect BPA's obligations; and the Tribal Parties object to this request to the extent that it calls for speculation on the effect of ongoing legal proceedings where details of the legal proceedings are protected from disclosure.

Fisher *et al.*, BP-24-E-BPA-10, at 67, *citing* BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 211.

The Tribal Parties nonetheless urge BPA to speculate on potential outcomes of the mediation and litigation. Tribal Parties Br., BP-24-B-YN-01, at 56-57. Citing two documents—the CEQ's News & Updates Blog (BP-24-E-YN-49) and United States Commitments to support the development of a long-term strategy (*NWF et al. v. NMFS et al.,* 3:01-cv-00640-SI, ECF 2423-2 (Aug. 4, 2022))—the Tribal Parties suggest that these documents create commitments from the Federal government that produce "potential costs" that BPA must incorporate into its projections. *See id.* Tribal Parties do not, and cannot, specify a particular obligation or cost that BPA has failed to take into account as a result of these documents. Instead, Tribal Parties assert that "[s]ignificant concerns have also been expressed" through the documents, which BPA should consider. Tribal Parties Br., BP-24-B-YN-01, at 54 (citing Yakama Nation CRSO EIS Comments from April 2020).

How the positions and statements from these documents may translate into actual costs through the confidential mediation process has yet to be determined. Requiring BPA to preemptively decide the scope of the Biden Administration's commitments in the mediation process (which is confidential and ongoing), and then speculate on the cost changes that may result from those commitments in its projections, is neither required to recover its costs nor consistent with BPA's duty to determine its costs based on information "available at the time the rates were set . . . ." *Golden NW Aluminum, Inc., v. Bonneville Power Admin.*, 501 F.3d 1037, 1053 (9th Cir. 2007).

Furthermore, reaching the projection suggested by the Tribal Parties in their brief would require BPA to make a series of findings, each of which would require an additional layer of speculation on BPA's part. First, BPA must either assume that the court adopted petitioners' legal interpretation of BPA's duties, or that through mediation the parties have come to some unspecified agreement. Next, BPA must assume that the costs of this unknown outcome is greater than the costs BPA included in its forecast, and that such costs must be paid within the two-year BP-24 rate period. Third, BPA must assume that it does not already have the ability to meet those greater costs within its existing rate design and risk mitigation measures.

Even if BPA could develop such a projection, uncertainty would still exist as to whether BPA should include it in its rates. The scope of the Biden Administration's commitments, and involvement of other Federal agencies, as described by the Tribal Parties' exhibits, indicates that BPA's customers may not be solely responsible for funding actions that might be agreed to through this mediation. Thus, it remains unclear *who* may have obligations within the interagency group, *what* actions and costs may apply to BPA, *when* new costs might be due, *where* actions may take place (*e.g.,* whether as part of BPA's obligation to mitigate the impact of the Federal hydrosystem), *why* the actions would be required (*e.g.,* under existing statutory obligation or requiring new legislation), and *how* BPA might mitigate such risk (*e.g.,* whether BPA has the ability to meet new obligations with existing revenue and risk mitigation tools).

The way the Tribal Parties request BPA to account for the potential litigation costs risks in rates is also problematic. The Tribal Parties argue BPA should modify its cost forecast to include a cost for these potential litigation outcomes in BPA's revenue requirement. *See* Tribal Parties Br., BP-24-B-YN-01, at 57 ("BPA's failure to appropriately project total costs . . . .") (citing Power Revenue Requirement Study), 65 (requesting BPA "adopt the cost projections calculated by the Tribal Parties, including increased costs associated with . . . the litigation stay."). In other words, the Tribal Parties would have BPA "account" for pending litigation by adding potential costs as a line item in the Revenue Requirement. The effect of such a line item would be to collect real dollars from BPA's customers in order to be prepared to pay for the unsubstantiated *possibility* that some unknown amount of costs *may* occur *at some time* in the future. Unquestionably, BPA must develop its rates and cost projections consistent with sound business principles. How BPA can meet that requirement when there is so little information about the alleged risk is difficult to see. Thus, it is reasonable for BPA's cost forecast to not include speculative litigation outcomes, and simply assume the status quo.

Finally, as a policy matter, BPA disagrees that it is required to adjust its projections to anticipate the outcome of pending litigation. It is easy to imagine the negative results if BPA were *required* to forecast the amount that it will be liable for, or projecting the probability of such cost occurring. Doing so could undermine BPA's litigation or negotiation position as a statement against interest. Further, such testimony would, within the 7(i) ratemaking process, be subject to discovery and cross-examination to justify the reasonableness of those projections. BPA should not be required to disclose and justify its legal assessment of pending or threatened litigation through its cost projections.

Tribal Parties assert, without evidence of a quantifiable cost or likelihood, that failing to project the cost of this pending litigation "will ultimately increase the risk that BPA will be unable to ensure repayment to Treasury." *Id.* at 57. The Tribal Parties provide no analysis to support their TPP conclusion. This omission is discussed in greater detail in the TPP analysis in Issue 3.4.2.1.

*Idaho Conservation League v. Bonneville Power Administration, Case No. 22-70122 (9th Cir. 2022)*

As described in Chapter 4, the Environmental Parties have challenged BPA's BP-22 power rates, alleging that BPA's rates and cost projections have not properly considered Sections 4(h)(11)(A)(i) and (ii). The Tribal Parties provide their own interpretation of this provision, to which BPA responds in Chapter 4. The Tribal Parties list the risk associated with the *Idaho Conservation League v. Bonneville Power Admin.* case as among other risks that "adds up" to a substantial and significant risk that "BPA does not appear to have analyzed" in developing its BP-24 rate proposal. Tribal Parties Br., BP-24-B-YN-01, at 53-54.

Consistent with the previous discussion, BPA does not find it reasonable to speculate on the outcome of the *Idaho Conservation League* case. Oral argument on the *Idaho Conservation League* case concluded on June 8, 2023, and supplemental briefs were filed on June 23, 2023. As such, that case is still ongoing, and, at this time, BPA has no basis to assume any changes to its proposed cost projections.

**Decision**

*BPA will not adjust its cost projections to reflect potential costs from pending litigation. It is proper and reasonable to not include speculative cost estimates from pending litigation in BPA's cost projections.*

***Issue 3.2.2.4***
*Whether BPA should modify its cost projections as requested by the Tribal Parties.*

**Parties' Positions**

Tribal Parties contend the "established level" of projected fish and wildlife costs will not meet BPA's NWPA requirements. Tribal Parties Br., BP-24-B-YN-01, at 65. As such, BPA should reject the BP-24 rate proposal, and increase its fish and wildlife cost projections as suggested by the Tribal Parties. *Id*. at 65-66. Tribal Parties also argue BPA should revise its cost projections "up to the maximum of BPA's affordability capacity" and claim that these cost projections fail to meet various requirements, including obligations under Tribal treaties. Tribal Parties Br. Ex., BP-24-R-YN-01, at 6-7.

**BPA Staff's Position**

BPA's cost projections properly recover the costs of BPA's fish and wildlife and other obligations, are realistic, and are based on sound business principles. Fisher *et al.*, BP-24-E-BPA-10, at 25.

**Evaluation of Positions**

In the Tribal Parties' requested action portion of its brief, they argue that BPA must include the "above discussed" costs in its calculation and rate determinations for BP-24. Tribal Parties Br., BP-24-B-YN-01, at 65. These costs include the "cost projections" calculated by the Tribal Parties for increased "fish and wildlife mitigation," "fulfilling the federal government's obligations to the Yakama Nation and CTUIR, increased costs associated with

federal commitments, BiOps, and the litigation stay." *Id.* The Tribal Parties also assert BPA has not properly considered their comments in developing its cost projections for the BP-24 rate period. *Id.* at 48-49.

*Tribal Parties Cost Projection Adjustments*

BPA disagrees that its projections need to be adjusted as requested by the Tribal Parties or that BPA has not considered and evaluated the Tribal Parties concerns. BPA has already addressed the specific adjustments requested by the Tribal Parties in the previous issues. BPA notes that, in most of the previous issues, the Tribal Parties do not "calculate" specific cost projections or adjustments for BPA to adopt. To the extent the Tribal Parties identified specific dollar adjustments, BPA has addressed those concerns. In other parts of their brief, the Tribal Parties generically request BPA to "significantly increase NPCC Fish and Wildlife Program spending above $283 million, increase available funding for the Lower Snake River Compensation Plan to $35.79 million, and to make at least $30 million available to the [Corps] for operations and maintenance costs on fisheries infrastructure within the FCRPS." *Id.* at 32-33, 50-51. BPA has explained its rationale for not increasing its Fish and Wildlife Program cost forecast above the IPR projections. *See* Issue 3.2.2.1. Additionally, as explained below in Issue 3.3.2.1, BPA adopted the Corps' request for fish and wildlife O&M costs, and BPA does not have the ability to require the Corps to take more funds for that program.

The Tribal Parties also request additional funds for the Lower Snake River Compensation Plan (LSRCP), increasing the program from BPA's forecast of $32.7 million to $35.79 million, a difference of $3.09 million. *Id*. The LSRCP originated in the Water Resources Development Act of 1976 (Pub. L. No. 94-587, 90 Stat. 2917) and was developed by Congress to offset fish and wildlife losses caused by construction and operation of the four lower Snake River dams. Fisher *et al.*, BP-24-E-BPA-10, at 46. The LSRCP facilities were constructed by the Corps; upon their completion and at the direction of Congress, jurisdiction and control of the facilities passed to the USFWS, along with responsibility to administer the LSRCP program. *Id.* BPA funds the USFWS directly for the LSRCP through a Memorandum of Agreement (MOA). BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 15.

For the cost projections used in the IPR, pursuant to the procedures established in that MOA, USFWS and BPA initially determined that a $1.265 million increase would be appropriate to reflect projected increased LSRCP costs, including personnel costs and projected increased costs of fish food. *Id.* Projected costs also included an increase for deferred and non-routine maintenance consistent with the cost of work expected to occur during FY 2024 or FY 2025, and some improvements and efficiencies in the spring Chinook component of the LSRCP. *Id.* Based on updated cost estimates provided by USFWS during the IPR comment process, and subsequent coordination between BPA and USFWS, BPA increased its cost projections for this program by an additional $500,000 for the BP-24 rate period. *Id.* The Tribal Parties' brief, nonetheless, requests BPA increase this value by an additional $3.09 million. The basis of this increase is not clear from the Tribal Parties' brief, nor the reason why BPA would be unable to meet its obligations under BPA's current forecast. BPA views the increased forecast already adopted in response to USFWS'

requests as the best projections of the LSRCP costs and does not see a basis to adjust this cost forecast further as suggested by the Tribal Parties.

*Consideration of Tribal Parties' and other Fishery Manager Comments in Developing the BP-24 Cost Projections*

The Tribal Parties also assert BPA has not properly considered their comments and the comments of other fishery co-managers in developing its cost projections for the BP-24 rate period. Tribal Parties Br., BP-24-B-YN-01, at 48-49. Specifically, the Tribal Parties contend BPA was required to give "substantial weight" to the evidence and analysis provided by the Tribal Parties and other fishery co-managers when forecasting its projected costs. *Id.*

BPA has considered the Tribal Parties and other co-managers comments in developing its cost projections, both during the IPR process and again in this proceeding. BPA responded to these comments in the IPR Closeout Report, which was issued in October 2022, two months before the commencement of the BP-24 rate case. IPR Closeout Report, BP-24-E-YN-23, at 11-17. BPA Staff also filed over 70 pages of testimony and hundreds of pages of attachments in response to the arguments and evidence submitted on the record by the Tribal Parties. *See generally* Fisher *et al.*, BP-24-E-BPA-10 and Attachments (BP-24-E-BPA-10-AT01 to –AT30).

Nonetheless, in their Initial Brief, the Tribal Parties contend that BPA "ignored or misrepresented the comments and recommendations of the Fisheries Co-Managers" in the IPR Closeout Report. Tribal Parties Br., BP-24-B-YN-01, at 20. Elsewhere, after restating the various exhibits they filed, the Tribal Parties claim that "[n]one of this information was included or assessed in BPA's analysis for the BP-24 Rate Proposal." *Id.* at 58. These objections, however, are unfounded. The Tribal Parties' brief entirely fails to engage with BPA's responses from the IPR Closeout Report, the numerous responses BPA provided in discovery, or BPA Staff's rebuttal testimony. *See* IPR Closeout Report, BP-24-E-YN-23, at 11-17; BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 1-219; *see generally* Fisher *et al.*, BP-24-E-BPA-10 and Attachments (BP-24-E-BPA-10-AT01 to -AT30). While it may be that the Tribal Parties disagree with BPA's reasoning and conclusions, it cannot be said that BPA has not considered and evaluated the recommendations and evidence submitted by the Tribal Parties. *See also* Issue 4.2.3.

In their Brief on Exceptions, Tribal Parties clarify that their argument is that BPA should increase fish and wildlife funding "up to the maximum of BPA's affordability capacity" to mitigate for the "impacts of the Columbia River hydropower system on the Yakama Nation's and CTUIR's Treaty-reserved fishing rights . . . ." Tribal Parties Br. Ex., BP-24-R-YN-01, at 7; *see also id.* at 6 ("The Administrator's DROD demonstrates a misunderstanding of the issue presented by the Tribal Parties in their Initial Brief, which is properly understood as a challenge to whether BPA's proposed rates for the BP-24 rate period are based on cost projections sufficient to mitigate for the Columbia River hydropower system's impacts on the Yakama Nation's and CTUIR's Treaty-reserved fishing rights."). Tribal Parties argue BPA should explain in this ROD "how the fish and wildlife cost projections being used to establish its BP-24 rate decision are sufficient to implement

mitigation for the impacts of the Columbia River hydropower system on fish and wildlife at a level that maximizes BPA's capability to make progress towards the 5 million fish recovery goal consistent with its Treaty obligations to the Yakama Nation and CTUIR." *Id.* at 6.

BPA disagrees that additional explanation is needed to support its fish and wildlife cost projections. BPA's rates must be set to recover its projected fish and wildlife costs consistent with "sound business principles," *see Golden NW,* 501 F.3d at 1053, not to the "maximum of BPA's affordability" as suggested by the Tribal Parties. BPA has thoroughly described the basis for its cost projections and has responded to the concerns raised by the Tribal Parties throughout this chapter. No additional explanation of these projections is needed. Furthermore, the arguments raised by the Tribal Parties in their Brief on Exceptions ultimately concern the sufficiency of the BPA mitigation measures themselves. That is not a rate issue nor can it be solved through revisions to BPA's cost projections. The Tribal Parties' specific objections go to the scope of BPA's fish and wildlife obligations—*e.g.,* whether BPA is supporting fish and wildlife programs consistent with the Council's Program, whether BPA's Fish and Wildlife Program is achieving appropriate results, whether BPA's cost projections satisfy treaty commitments—and are addressed in other portions of this ROD. *See* Chapters 4 and 5.

**Decision**

*BPA will not modify its cost projections. BPA's cost projections are realistic, based on information available to BPA at the times rates were set, and are consistent with sound business principles.*

## 3.3. Operational Risk Issues

### 3.3.1 Overview of BPA's Operational Assumptions

BPA's power rates are developed using estimated amounts of hydroelectric power from the Federal Columbia River Power System (FCRPS) over the rate period. Fisher *et al.*, BP-24-E-BPA-10, at 50. To make this estimate, BPA forecasts how much power it expects the FCRPS to generate, per year, using 30 years of historical streamflows from BPA's hydrosystem model (HYDSIM). *See* Power Loads and Resources Study, BP-24-E-BPA-03, § 3.1.2.1. The FCRPS is operated for a number of objectives, many of which can impact the amount and timing of power generation. Fisher *et al.*, BP-24-E-BPA-10, at 50. These objectives include flood risk management, navigation, hydropower production, irrigation, recreation, municipal and industrial water supply, and—relevant here—fish and wildlife protection, although the objectives differ for each FCRPS project. *Id.* at 50-51. Planned fish and wildlife operations that can impact energy production include actions like spill (releasing water that bypasses the turbines, producing no energy) and reshaping water release between different seasons (*e.g.,* reshaping the release of water from winter to spring to support fish migration). *Id.* at 51.

The hydrological modeling BPA conducts for the rate case is a projection of FCRPS operations for the rate period under a range of water conditions. *Id.* By making these

projections, BPA is not establishing, through the rate case, actual or final operations for the FCRPS. *Id.*

For the BP-24 rate period, BPA used the planned operations described in the CRSO EIS ROD, issued in September 2020, as the basis of the operational assumptions used in ratemaking. *Id.*; *see also* Power Loads and Resources Study, BP-24-E-BPA-03, § 3.1.2.1.1. The operations from the CRSO EIS ROD were, at the time of the analysis, the best information BPA had about the operations of the FCRPS for the BP-24 rate period. Fisher *et al.*, BP-24-E-BPA-10, at 51.

Operational updates developed through regional agreements for 2022 and 2023 were also considered. *Id.* at 52. While these regional agreements do not cover the BP-24 rate period (*i.e.,* FY 2024-25), BPA analyzed the impacts of these operations and found that the proposed operational modifications would not result in substantial modification to the Selected Alternative and are consistent with the effects described in the CRSO Final EIS. *Id.; see also* CRSO Final EIS Supplement Analysis 01-03, BP-24-E-BPA-10-AT22.

This section addresses Tribal Parties' objections to BPA's rate proposal and the underlying operational assumptions BPA used in establishing its rates.

### 3.3.2 Issues

***Issue 3.3.2.1***
*Whether BPA should have adjusted the operational assumptions underlying its rate case projections to account for Clean Water Act requirements or Tribal Parties' Energy Vision.*

**Parties' Positions**
Tribal Parties argue BPA's rate proposal does not address operational risks associated with the Clean Water Act, making it unlikely that BPA's rates will recover its total costs and ensure repayment of the Treasury. Tribal Parties Br., BP-24-B-YN-01, at 57.

**BPA Staff's Position**

The operational assumptions BPA used in developing its rates are reasonable. Fisher *et al.*, BP-24-E-BPA-10, at 71. No new information has occurred requiring adjustments to those operations because of Clean Water Act requirements. *Id.* at 71-72. To the extent there are variances to operations, BPA has chosen to address those risks through its risk mitigation. *Id.* at 53-61.

**Evaluation of Positions**

Tribal Parties assert BPA's BP-24 rate proposal fails to account for operational and structural changes needed to meet Clean Water Act requirements. Tribal Parties Br., BP-24-B-YN-01, at 57. For support, the Tribal Parties point to (1) the EPA's May 2020 Total Maximum Daily Load Report, (2) EPA National Pollutant Discharge Elimination System Permits effective April 2022 and July 2023, and (3) Tribal Parties' estimate of Clean Water Act-related operational and structural changes from comments they submitted to the Corps and operational changes described in their Energy Vision proposal. *Id.* at 57-58. Tribal Parties claim BPA has "fail[ed] to analyze these additional requirements and cost

increases[,]" which the Tribal Parties claim will increase the risk that BPA will not set its rates high enough to ensure repayment of the Treasury. *Id.* at 58. As described below, BPA has considered all of the documents and recommendations identified by the Tribal Parties and concludes that none require BPA to make any additional adjustments to its rate proposal.

*EPA's May 2020 Total Maximum Daily Load Report and National Pollutant Discharge Elimination System Permits*

The Tribal Parties argue the U.S. Environmental Protection Agency (EPA) issued a Total Maximum Daily Load Report (TMDL) that pointed to the FCRPS as a "primary source for thermal impairments throughout the Columbia River Basin." *Id.* The Tribal Parties claim the TMDL "clarifies that significant changes to dam operations and alternative management of reservoir releases will be necessary to achieve temperature reductions and to limit the magnitude of impairments." *Id.* The Tribal Parties also argue that water quality standards were imposed on lower Columbia River and lower Snake River dams through National Pollutant Discharge Elimination System Permits (NPDES permits), and compliance with these permits will require changes to BPA's rate proposals. *Id.*

BPA considered the Tribal Parties' arguments in its rebuttal testimony. Fisher *et al.*, BP-24-E-BPA-10, at 71. Contrary to the Tribal Parties' claims, the TMDL does not direct operational changes at the Federal projects located on the lower Snake and Columbia Rivers for the BP-24 rate period. *Id.* In the TMDL, the EPA clearly states, "this Federal TMDL is being issued by EPA, which lacks authority to implement nonpoint source controls or otherwise assure reductions in nonpoint source pollution." EPA-TMDL Snake River Update, BP-24-E-BPA-10-AT25, at 93.

Moreover, EPA identified the next steps after issuance of the TMDL: "EPA is transmitting this TMDL to the States of Oregon and Washington for incorporation into their current water quality management plans." *Id.* at 9. Similarly, the NPDES permits that have been issued so far do not direct changes in operations; the permits acknowledge there is a future step, development of a Water Quality Attainment Plan, which is where operational discussions would occur. *See, e.g.,* Lower Columbia NPDES Permits, BP-24-E-BPA-10-AT26, at 14 (describing Water Quality Attainment Plan for McNary).

Even the Tribal Parties acknowledge there are outstanding processes regarding whether and how operations for the BP-24 rate period on TMDL may be required to differ from the CRSO:

> Without the Federal agencies' final Water Quality Attainment plans available, it is difficult to identify the operational strategies and structural alternations that must be implemented to meet temperature load reduction obligations.

BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 178. Given that Water Quality Attainment Plans are still under development, any operational changes are speculative at this time. Fisher *et al.*, BP-24-E-BPA-10, at 72. The operational assumptions underlying BPA's BP-24 rates, therefore, remain valid.

The Tribal Parties also argue that changes will be required to address high water temperatures in the Columbia River System (CRS), which have known detrimental outcomes on fish survival and recovery. Tribal Parties Br., BP-24-B-YN-01, at 53. For support, the Tribal Parties point to the NOAA 2015 Adult Sockeye Salmon Passage Report. BP-24-E-YN-35. This report, however, does not establish operations for the FCRPS for the BP-24 rate period, but "document[s] the conditions that occurred throughout the Columbia River basin in 2015 and . . . describe[s] and assess[es] the actions that were taken to minimize these impacts by the federal hydrosystem operators . . . to reduce adult mortality." *Id.* at 7. The paper concludes with "recommendations" to Federal hydropower operators and regional co-managers. *Id.* at 53. It is unclear from the Tribal Parties' brief whether these recommendations, which were developed in 2015, are still applicable or have any import on the actual operations of the river for the rate period. In any event, these recommendations were issued five years before the 2020 CRSO EIS, which is the best available data on river operations for the BP-24 rate period.

*Tribal Parties Estimates of Clean Water Act Related Costs and Structural Changes*

The Tribal Parties assert that BPA has also failed to consider the Tribal Parties' estimate for the cost of operations needed to meet Clean Water Act requirements. Tribal Parties Br., BP-24-B-YN-01, at 58. The Tribal Parties estimate that BPA's compliance costs will exceed $60 million per year, with "near-term structural changes estimated at more than $96 million per year." *Id.*

The Tribal Parties' estimate of Clean Water Act-related operational and structural changes requires clarification. First, the $60 million estimate is the Tribal Parties' assessment of reduced revenue resulting from lost generation from the changes in operations they recommend in their Energy Vision document. Hesse *et al.*, BP-24-E-YN-103, at 31-32. The Tribal Parties' Energy Vision is a document produced by the Columbia River Inter-Tribal Fish Commission (CRITFC) and consists of over 40 recommendations to various entities (not just BPA) on a wide array of topics related to energy production, energy consumption, transmission, and other policy matters, including operation and configuration of hydroelectric power projects in the Columbia River basin, and including breaching the four lower Snake River dams. Fisher *et al.*, BP-24-E-BPA-10, at 14. BPA's understanding of the Energy Vision is that it represent the authors' aspirations for energy policy in the Columbia River basin. *Id.* In that regard, it is informative, but not a binding decision or mandate to implement the recommendations therein on any entity. *Id.* Nor does the Energy Vision direct BPA's or any other entity's operational compliance with the Clean Water Act or any other law. Thus, while the Energy Vision provides an important perspective on a number of regional issues, it does not overtake the operations BPA has assumed to be in place for the rate period. *See* Section 3.3.1.

Second, the Tribal Parties argue BPA has failed to account for $96 million in "structural changes" per year in its cost projections. Tribal Parties Br., BP-24-B-YN-01, at 58. This argument is also incorrect. The Tribal Parties did not identify this number in its Direct Testimony, so BPA has had to reconstruct it from the Tribal Parties' exhibits. It appears that this number comes from recommended funding levels provided by CRITFC to the

Corps on the Corps' costs for fish and wildlife O&M ($29 million), the Columbia River Fish Mitigation (CRFM) program ($48.6 million), and Lamprey program ($18.4 million) averaged over an eight-year timeframe. CRITFC USACE Needs Report, BP-24-E-YN-24, at 11.

Importantly, the Tribal Parties' $96 million recommendation involves matters funded by the Corps' budget, and not BPA. *Id.* at 1 ("The spreadsheets in this document were compiled by CRITFC staff to help better understand the budgetary needs and shortcoming of both the [Corps'] . . . (CRFM) and the [Corps'] Operational and Maintenance budget (O&M)."). BPA does not set the Corps' budget for these (or any) programs. Fisher *et al.*, BP-24-E-BPA-10, at 45; *see also* BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 78. As explained in the record:

> The Corps determines its own priorities and the associated budgets for those priorities in its fish and wildlife spending forecasts. BPA is involved only to the extent that it direct funds the power share of the Corps' [O&M] costs, including fish and wildlife, pursuant to the Energy Policy Act of 1992 and the direct-funding agreements between the agencies.

Fisher *et al.*, BP-24-E-BPA-10, at 45, *quoting* BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 78. For the BP-24 rate period, the Corps provided BPA with an overall annual budget request of $264 million, of which $50 million per year is associated with the Corps' fish and wildlife O&M. *See* BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 78. BPA adopted the Corps' fish and wildlife O&M costs request "without revision." Fisher *et al.*, BP-24-E-BPA-10, at 45; *see also* -24 Data Responses, BP-24-E-BPA-10-AT01, at 78 ("For the BP-24 rate case, the Corps provided BPA with an initial forecast of its O&M expenses for the FY 2024-2025 period in September 2021, which was inclusive of the Corps' projected fish and wildlife costs. The fish and wildlife costs forecasts were subsequently adjusted upwards to $49,998,000 for FY 2024 and $50,823,000 for FY 2025, and were included in BPA's IPR cost projections and the cost projections used in the BP-24 rates.").[5] The Corps determines its own level for CRFM funding and receives this funding directly from Congress. BPA reimburses the Corps for the portion related to power generation. *See* IPR Closeout Report, BP-24-E-YN-23, at 3. Thus, BPA does not control the Corps' CRFM funding, nor is BPA able to command the Corps to request additional funds from Congress. BPA is also not involved in determining the Corps' funding for lamprey.

In sum, BPA's cost projections for the BP-24 rate period properly incorporate BPA's share of the Corps' costs as requested by the Corps, which is the best information available at the time BPA set its rates. To the extent the Tribal Parties contend the Corps should have adopted different costs for its programs, that issue cannot be addressed in this rate case. If the Corps, subsequent to BPA's final decision, revises its cost on any program, BPA has risk

[5] BPA projected costs for the Corps' fish and wildlife O&M ($50 million a year) is almost double what CRTIFC requested from the Corps ($29 million).

mitigation mechanisms to address the risk that actual costs exceed forecast, as described in Section 3.4 below.

*Other Operational Changes from Energy Vision*

The Tribal Parties also contend their Energy Vision document shows that Federal reservoirs are used to integrate renewable energy, especially very-low cost or negative-cost electricity from solar power system in California. Tribal Parties Br., BP-24-B-YN-01, at 53. They claim that when this power is available, Federal dams are reducing flows to very low levels to store power in the reservoirs to generate electricity when the sun goes down in California. *Id*. According to the Tribal Parties, these extreme river fluctuations are lethal to juvenile and adult salmon that rely on river flows to migrate, and addressing this problem in its immediate context will affect BPA's revenues from electricity generation at the dams. *Id.* Tribal Parties claim BPA has not addressed these potential costs or the risk and uncertainty it faces in its BP-24 Rate Proposal. *Id.*

As noted above, the Tribal Parties' Energy Vision document is an aspirational, policy planning document that does not dictate mandatory actions or outcomes for particular entities. Fisher *et al.*, BP-24-E-BPA-10, at 14-15. Thus, BPA does not view it as displacing the operational requirements set forth in the CRSO EIS nor as undermining the underlying operational assumptions BPA used in developing its power rates. *See* Section 3.3.1.

Moreover, the Tribal Parties do not identify any specific operational adjustments that must be adopted to address the concerns they raise in the Energy Vision paper, or state how any such unknown operational changes would impact BPA's proposal. Nor do the Tribal Parties explain why the operations BPA is currently relying on—the CRSO EIS and related documents—fails to account for the operations identified in their documents. To the extent the operations at hydroelectric facilities exceed permissible levels because of storing energy from California as suggested by the Tribal Parties' argument—a premise BPA does not grant—then that issue must be raised in the forum where those operations are determined. That forum is emphatically not this rate case, as BPA Staff made clear in its testimony:

> *Q. Does BPA "set" the hydrological operations for the FCRPS through the rate case?*
>
> A. No. The *hydrological* modeling we do for the rate case is a projection of FCRPS operations for the rate period under a range of water conditions. By making these projections, we are not establishing, through the rate case, the actual or final operations for the FCRPS.

Fisher *et al.*, BP-24-E-BPA-10, at 51. Lacking both certainty and specificity as to the nature of the operational changes the Tribal Parties believe will occur as a consequence of the Energy Vision, BPA does not agree that the operational projections underlying its rates are faulty. *Id.* at 53.

*Risk Mitigation and Operational Adjustments*

Finally, to the extent that actual operations deviate from projected operations used in ratemaking, BPA has developed risk mitigation measures in its rates to address such variances. If operations from the FCRPS differ from the rate case assumption, the impact is felt in BPA's costs and revenues. In other words, it is a *financial* impact. *Id.* Thus, a reasonable way to manage the cost and revenue risks associated with operational uncertainty is to address it through BPA's risk mitigation measures and TPP analysis. *Id.* That is how BPA has decided to manage this risk. In particular, the risks associated with Federal hydro generation uncertainties are considered in the operational risk model (RevSim), which is discussed in more detail below in Section 3.4.1. As described in that section, the Tribal Parties have not raised any substantive problems with BPA's risk mitigation tools or methodology.

**Decision**

*The operational assumptions underlying BPA's rate case projections are reasonable and do not need to be modified to account for the Tribal Parties' Clean Water Act recommendations or Energy Vision document.*

***Issue 3.3.2.2***

*Whether BPA should have assumed operational changes in the BP-24 rate case resulting from outstanding litigation and mediation discussions.*

**Parties' Positions**

The Tribal Parties assert BPA's operational assumptions should be modified to account for the risk of increased costs or reduced revenues related to the *NWF v. NMFS* litigation over the CRSO EIS and related decisions, filed in the District Court of Oregon, and associated mediation. Tribal Parties Br., BP-24-B-YN-01, at 56-57.

**BPA Staff's Position**

BPA properly relied on the CRSO EIS for its operational assumptions. Fisher *et al.*, BP-24-E-BPA-10, at 66-68.

**Evaluation of Positions**

As described above in *Issue* 3.2.2.3, the Tribal Parties have argued ongoing litigation in the case of *Nat'l Wildlife Fed'n v. NMFS*, Case No. 3:01-cv-00640-SI (D. Or. 2022) (*NWF v. NMFS*) may result in additional cost responsibilities that BPA should have taken into account. Relatedly, they also contend that the *NWF v. NMFS* case and associated mediation may affect the operations of the FCRPS, thereby impacting BPA's revenues. Tribal Parties Br., BP-24-B-YN-01, at 56-57. The Tribal Parties do not elaborate in their brief on what operational changes BPA should assume for purposes of the BP-24 rate case. In reviewing the record, the Tribal Parties note in a data response that in "prior iterations" of the *NWF v. NMFS* litigation, Plaintiffs' request for injunctive relief, including spill, have been granted by the Court, so BPA should consider the Tribal Parties' request for injunctive relief as a "reasonably foreseeable example of what the Court could order for the injunctive relief if a

settlement is not achieved . . . ." BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 206. At the very least, the Tribal Parties contend, "BPA should have . . . evaluated this as a potential operation that could occur in 2024-2025." *Id.*

Assuming that is the position of the Tribal Parties in their brief, for the reasons described above in *Issue* 3.2.2.3, BPA does not find it reasonable to speculate on the outcome of potential litigation. The operations underlying BPA's rates follow the operations selected in the CRSO EIS ROD, which as discussed above, are the best available information at the times rates were set. Nor does BPA agree that adopting Tribal Parties' litigation position is a reasonable alternative. Regardless of Plaintiff's success in past cases, BPA does not view its rate case as the place to forecast litigation outcomes.

Furthermore, BPA Staff considered the operational amendments that have occurred during the stay of the *NWF v. NMFS* litigation. Fisher *et al.*, BP-24-E-BPA-10, at 52; *see also* CRSO Final EIS Supplement Analysis 01-03, BP-24-E-BPA-10-AT22. These regional agreements are set to expire before the BP-24 rate period (*i.e.,* FY 2024-25), meaning the operations in the CRSO EIS ROD would once again become the default operations for the BP-24 rate period. Nonetheless, BPA analyzed the impacts of these supplemental operations when developing BPA's rate assumptions and found that the proposed operational modifications did not result in substantial modification to the Selected Alternative and are consistent with the effects described in the CRSO Final EIS. Fisher *et al.*, BP-24-E-BPA-10, at 52.

The Tribal Parties contend that once the current stay—which runs until August 31, 2023—expires, "the Parties would likely need to reach agreement on 2024 hydro system operations" and that those new operations "would likely result in either increased costs or decreased revenue for BPA." BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 206. BPA does not agree that is, in fact, certain. Nevertheless, even if that were the case, at this point neither BPA nor the Tribal Parties have definitive information as to what those operations or increased costs may be. If the continued operations are similar to the existing regional agreements, as noted in the previous paragraph, BPA has already evaluated them and found them consistent with the effects described in the CRSO Final EIS. If they are entirely new operations, BPA has risk mitigation tools to address higher costs or lower revenues. *See* Section 3.4.1. Without more certain information, BPA finds it does not have a basis to substitute the existing CRSO EIS operations with other operations.

**Decision**

*BPA properly relied on the CRSO EIS operations for its rate proposal and need not speculate on potential changes to those operations resulting from outstanding litigation and mediation discussions.*

***Issue 3.3.2.3***
*Whether BPA's assumptions are reasonable in light of ongoing Columbia River Treaty negotiations.*

**Parties' Positions**
The Tribal Parties assert that BPA has not adequately accounted for changes to hydroelectric operations under the Columbia River Treaty (Treaty) that are expected in September of 2024. Tribal Parties Br., BP-24-B-YN-01, at 54, 58-61. The Tribal Parties state that the Corps' flood control operation will change in September 2024 as set out in a 2011 Corps White Paper. *Id.* at 60. The Tribal Parties argue that such changes to flood control operations will have significant impacts on generation and revenues, and BPA's initial proposal is inadequate because it does not reflect such impacts. *Id.*

In addition, the Tribal Parties state that the Treaty requires the United States to pay Canada for economic losses from "on call" flood control, and it is unclear how the United States will pay for such economic losses, suggesting that BPA should consider putting such costs in its rates. *Id.* at 60-61.

**BPA Staff's Position**

There is a high degree of uncertainty concerning the amount of water storage in Canada available under a modernized Treaty after 2024 and the management of that storage. Fisher *et al.*, BP-24-E-BPA-10, at 70. Tribal Parties do not explain why the potential loss of an unspecified amount of Canadian storage, if it were to occur, will "dramatically change" the Federal system, nor do they quantify how those potential changes may affect the power portion of the Treaty or BPA's costs or revenues. *Id.* It would be speculative to presume there would be a dramatic change in water management for the system. *Id.*

**Evaluation of Positions**

Tribal Parties argue it is unreasonable for BPA to assume the operations developed in the CRSO EIS. *See* Tribal Parties Br., BP-24-B-YN-01, at 59 (BPA's assumption of CRSO EIS operations "demonstrates that BPA is not basing its costs and revenue estimates on reasonable projections based on information 'available [to it] at the time rates were set.'"). They argue that the current flood control provisions of the Treaty expire in September of 2024 and BPA has not considered the impact of new flood control operations in BP-24 studies. *Id*.

BPA acknowledges that if the Treaty is not modernized, under the terms of the current Treaty the applicable flood control provisions will change on September 16, 2024. The United States and Canada are currently working to negotiate a modernized Treaty, and are hopeful that modernized Treaty provisions will be in effect by that date. The December 2013 "U.S. Entity Regional Recommendation for the Future of the Columbia River Treaty After 2024," which is being used to help guide negotiations, specifies that it is a regional goal to maintain an acceptable level of flood risk, which is defined in the Regional Recommendation as similar to the current level of flood risk. *See* U.S. Entity Regional Recommendation for the Future of the Columbia River Treaty After 2024, *available at* *https://www.bpa.gov/-/media/Aep/projects/columbia-river-treaty/crt-regional-*

*recommendation-12-13-13.pdf*. However, if negotiations are unsuccessful or not concluded in time, the current Treaty provisions will apply. Currently under the Treaty, the United States has access to both preplanned storage in Canada for flood control, and "on call" storage in Canada for flood control. Beginning September 16, 2024, Canada will no longer be required to provide pre-planned flood control to the United States. The only flood control Canada will be required to provide to the United States will be on an "on call" or "real-time" basis. Treaty, Article IV.2 & 3. The United States has not utilized "on call" flood control before, so the details about how hydro operations would change in such a scenario are uncertain.

The Corps is the Federal agency that is in charge of flood control for the United States entity under the Treaty. The Corps has been planning for flood control under two potential scenarios: 1) a modernized Treaty scenario in which United States and Canada have reached agreement on a modernized Treaty, and 2) an "on call" scenario in which negotiations are not successful or complete by September 16, 2024, and the pre-planned flood control provisions expire leaving only "on call" flood control.

Basing BP-24 studies on either of these scenarios would be highly speculative and untenable due to the uncertainty in the information currently available to BPA. For scenario 1, it would be impossible to base rate case studies on a renegotiated Treaty because negotiations have not concluded; BPA does not yet know the final content of a potential modernized Treaty and whether there would be any changes to current hydroelectric operations. For scenario 2, it is untenable for BPA to base its rate case studies on a new operation that implements "on call" flood control because BPA does not know the details of the "on call" flood control operation or how it will be different than current operations. The Corps is currently finalizing a plan about how it will operate in an "on call" flood control scenario so that it will be prepared if that occurs. The Corps plans to share detailed information and engage with the public on its plan in the coming months, well after studies need to be completed for this rate case.

The Tribal Parties state that "the United States may need to put at least eight of its reservoirs to full effective use before it can 'call upon' Canada to provide additional storage for flood control." Tribal Parties Br., BP-24-B-YN-01, at 59. Tribal Parties' interpretation of the Columbia River Treaty is not authoritative. The reality is that the United States and Canada have different views on how "on call" flood control will be implemented, and given that it has not been implemented in the past, BPA does not have reliable information on which to assess how that "on call" operation will work or how it will impact hydroelectric operations.

The Tribal Parties cite the 2011 Corps White Paper as evidence of the changes to operations that will occur under an "on call" flood control scenario. *Id.* at 60. Based on the content of the White Paper the Tribal Parties conclude that during certain times of high water years, United States projects would need to be drawn down in the spring, "which will have significant power generation and revenue impacts."[6] *Id.* The Tribal Parties' reliance

[6] This White Paper is not in the record and the Tribal Parties present it for the first time in their brief.

on the 2011 Corps White Paper is misplaced. The White Paper is 12 years old and no longer accurately reflects the Corps' position on operations under "on call" flood control. The Corps has stated that the 2011 White Paper is no longer accurate and should not be relied upon. *See* Letter from USACE to B.C. Hydro & Power Authority (Dec. 17, 2019), BP-24-E-BPA-13, at 4 n.4 ("I will also note that you refer to 'documented differences between the entities' and cite a Corps white paper as your support for this assertion. As has been previously explained, that document does not reflect any position of the U.S. Entity or the U.S. Government.").[7] For BPA to base its rate case studies on a document that reflects outdated ideas on a scenario that may or may not occur would be unsupportable and imprudent.

Given the current uncertainty of the two potential future scenarios, BPA based its BP-24 rate studies on the best information it has, which is current operations under the CRSO EIS. BPA expects to have complete information on changes to flood control operations within the coming year, and will include such information in its analysis for future rate cases as appropriate.

The Tribal Parties state that "[w]hen BPA developed its BP-24 Rate Proposal, it appears it was relying on speculative amendments to the existing Columbia River Treaty." Tribal Parties Br., BP-24-B-YN-01, at 59. This assertion is not true. As explained above, BPA based its BP-24 rate studies on current operations, which is under the CRSO EIS. BPA specifically did not base its BP-24 proposal on a potential Treaty negotiation scenario because BPA does not yet have reliable information about how hydroelectric operations would change under that scenario.

Tribal Parties state that "BPA has not developed a reasonable cost projection based on the information available to it at the time of rate setting" and argue that, in order to be reasonable, BPA's cost forecast should assume that BPA will either (1) incur additional "costs or reduced power generation revenues to address the expiration of the current Columbia River Treaty," or (2) incur "additional costs or reduction in revenue if the flood control provisions are extended under an amended Columbia River Treaty." *Id.* at 61. As explained above, BPA does not have sufficient information to assess whether there will be any impact to generation based on the potential scenarios of future operation under the Treaty. It is worth noting, however, that in its speculation on future Treaty impact on generation and revenue, the Tribal Parties do not consider the upside risk that an amended Columbia River Treaty could reduce BPA's costs or increase revenues, which is also a potential outcome.

In addition, the Tribal Parties raise Article VI(4) of the Treaty, which applies beginning September 16, 2024, and requires the United States to pay Canada for certain costs related to Canada providing "on call" flood control. The Tribal Parties state that it is unclear how the U.S. government would pay such costs or which part of the U.S. government would be

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Nonetheless, BPA is addressing this issue in this decision and, in doing so, may add additional material to the record to respond to it. *See* 16 U.S.C. § 839e(i)(5).

[7] BPA officially notes this document. *See* Rules of Procedure, 1010.16; 16 U.S.C. § 839e(i)(5).

responsible for these costs, suggesting that BPA should consider including such costs in its rates. Tribal Parties Br., BP-24-B-YN-01, at 61. Such suggestion is unfounded because BPA has no reason to believe it would be responsible for paying such costs because that would be payment for flood control, and flood control is not within BPA's mission or purpose under its founding statutes.

Finally, as discussed in Issue 3.2.2.3, requiring BPA to forecast the cost and revenue impact, or assigning probabilities to different outcomes, could adversely impact negotiations. Here, by assigning a dollar value to the Treaty or supporting the probability of a certain outcome, BPA would risk undermining the negotiating position of the U.S. government. The accuracy of BPA's political assessment would then be subject to discovery and cross-examination. This result is not required in order for BPA's proposed rates to be based on substantial evidence, or to be the "lowest possible consistent with sound business principles."

**Decision**

*BPA's assumptions are based on the best information available to BPA, and need not be revised in light of ongoing negotiations regarding the Columbia River Treaty.*

## 3.4 Risk Analysis Issues

### 3.4.1 Overview of BPA's Risk Analysis

#### 3.4.1.1 Purpose of BPA's Risk Analysis and Mitigation

BPA's rates would not need risk mitigation if BPA had perfect foreknowledge of its spending during the rate period, the amount of power produced by the Federal system, the amount of power its customers would purchase, and market prices. With perfect foresight, the rates BPA set would generate the exact amount of revenue needed to meet BPA's obligations, including its payment to the U.S. Treasury, and BPA would begin and end the rate period with the same amount of cash.

BPA, however, does not have perfect foresight, and BPA's actual costs and revenues will almost certainly be higher or lower than forecast. Fisher *et al.*, BP-24-E-BPA-10, at 54. When actual results deviate from forecast, the impact is typically felt in BPA's financial reserves, with those financial reserves increasing or decreasing by year's end. Compared to the rate case forecasts, BPA has seen its financial reserves unexpectedly fall by as much as $439 million in a single year (FY 2010) or increase by over $625 million (FY 2022). *Id.*

BPA includes risk mitigation in its rates to address the uncertainty of real-life costs and revenue risk. *Id.* Risk mitigation simply refers to the general group of tools available to BPA to increase its revenue or generate cash to ensure it can pay its obligations. The idea of risk mitigation follows from BPA's statutory obligation to set its rates "with a view to encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles . . . ." Transmission System Act § 9, 16 U.S.C. § 838g (2022); *see also* Northwest Power Act § 7(a)(1), 16 U.S.C. § 839e(a)(1) (2022); Flood Control Act of 1944, 16 U.S.C. § 825s (2022). The clause "consistent with sound business principles" tempers the "lowest possible" clause, allowing

BPA to consider the cost of risk mitigation, financial health, and incurring near-term costs to achieve long-term benefits. BPA has broad discretion to best determine how to operate consistent with the "business-oriented philosophy" reflected in BPA's statutes. *See Ass'n of Pub. Agency Customers v. Bonneville Power Admin*., 126 F.3d 1158, 1171 (9th Cir. 1997) ("The statutes governing BPA's operations are permeated with references to the 'sound business principles' Congress desired the Administrator to use in discharging his duties. Thus, although Congress did not prescribe the parameters of the Administrator's authority, it granted BPA an unusually expansive mandate to operate with a business-oriented philosophy.") (Internal citations omitted).

This standard is reflected in how BPA conducts its Revenue Requirement Study and Risk Study. First, BPA puts together a preliminary revenue requirement, including forecast program costs and principle and interest on debt. However, BPA recognizes risk around its forecasts, which inevitably will not be perfect. This is the nature of a forecast. Therefore, BPA conducts a risk analysis to determine whether additional risk mitigation is needed to meet the TPP standard. If there is, Planned Net Revenues for Risk (PNRR) is added as a new line item in an updated revenue requirement. Power Revenue Requirement Study, BP-24-E-BPA-02, at 2. PNRR functions to increase BPA's financial reserves, which would then be available to meet any cost or revenue risk. Fisher *et al.*, BP-24-E-BPA-10, at 57. Whereas the "purpose" of the revenue requirement study is to "establish the revenues . . . that are necessary to recover, in accordance with sound business principles," BPA's power-related costs, Power Revenue Requirement Study, BP-24-E-BPA-02, at 1, the "purpose" of the risk study is to "demonstrate [] that BPA's proposed rates and risk mitigation tools together meet BPA's standard for financial risk tolerance: the TPP standard." Power and Transmission Risk Study, BP-24-E-BPA-05, at 1.

#### 3.4.1.2. Treasury Payment Probability (TPP)

The TPP standard, developed in 1993, is a BPA-established policy designed to help guide BPA's decisions on risk tolerance. Fisher *et al.*, BP-24-E-BPA-10, at 55. Historically, BPA experienced significant volatility between forecasts and actuals, resulting in BPA missing several Treasury payments in the 1980s. *Id.* The TPP standard was meant to rebuild trust in BPA's ability to meet its statutory requirement to repay the Federal investment within a reasonable number of years. *Id.* This policy requires BPA to set rates to achieve a high probability of meeting its payment obligations to the Treasury. *Id.* TPP is borne out of the legal principle that BPA's payment of the costs owed to the Treasury will be the last, and lowest, priority payment BPA makes. *Id.; see also* 16 U.S.C. § 839e(a)(2)(A); 16 U.S.C. § 838k(b). If BPA can assure a high probability of making its annual payment to the Treasury over the rate period, BPA will simultaneously be demonstrating an even higher probability of meeting its other costs. Fisher *et al.*, BP-24-E-BPA-10, at 55.

#### 3.4.1.3 Risk Study Summary

The TPP calculation is the main output from the Risk Study. Power and Transmission Risk Study, BP-24-E-BPA-05, at 3. TPP is calculated by running a stochastic (random) model, called ToolKit. Fisher *et al.*, BP-24-E-BPA-10, at 62.

The primary inputs into ToolKit are the results from (1) RevSim (operating/revenue risk), and (2) Power Non-Operating Risk Model (P-NORM) (non-operating/cost risk). *Id.* at 55-56; Power and Transmission Risk Study, BP-24-E-BPA-05, at 58.

The largest volatility measured by ToolKit comes from operational risk, modeled through RevSim. *See* Fisher *et al.*, BP-24-E-BPA-10, at 54, 56, 57. Three of the main sources of uncertainty modeled within RevSim are the risk that customer *load* will fluctuate from forecast, that *water* available for Federal hydro generation will be impacted by streamflow timing and volume, and that the market electricity *price* will impact the revenue BPA receives from sales and costs BPA incurs from augmentation purchases. *Id.* at 55-56; Power and Transmission Risk Study, BP-24-E-BPA-05, at 28 (load), 26 (water), 34 (price). Each model uses historical data to calibrate a statistical model. *Id.* at 15.

- *Load* growth and weather variability are derived from Pacific Northwest load variability simulated in the load risk model for WECC. *Id.* at 28.
- *Water* risk is accounted for based on hydro generation estimates from the HYDSIM model for monthly streamflow patterns experienced from 1989-2018. *Id.* at 26.
- *Price* risk is accounted for through the Aurora model using data from the developer, Energy Exemplar Proprietary Limited, and several load and generation forecasts. *Id.* at 34; Power Market Price Study, BP-24-BPA-04, at 3 & § 2.3.

BPA also models costs risk through P-NORM. Though historically much less volatile than revenue risks, BPA includes estimates of the central tendency and potential variability for various cost risks. Fisher *et al.*, BP-24-E-BPA-10, at 56.

All of this data is input into the ToolKit probabilistic model to generate 3,200 random games. Each game calculates the amount of financial reserves BPA would have at the end of each fiscal year. This data is analyzed to determine the Treasury Payment Probability. Power and Transmission Risk Study, BP-24-E-BPA-05, at Table 9. The Risk Study determined the proposed rates had a two-year TPP of greater than 99.9 percent. *Id.* End-of-year financial reserves for FY 2025 ranged from a 5$^{th}$ percentile of $334 million to a 95$^{th}$ percentile of $1.168 billion. *Id.*

If the data had shown that fewer than 95 percent of the games resulted in BPA making its payment to Treasury, BPA would have mitigated risk by adding PNRR to the revenue requirement to provide more revenue. Fisher *et al.*, BP-24-E-BPA-10, at 57. Notably, PNRR is a cost, but not a cost associated with any particular program or purpose; it is agnostic to the source of uncertainty. *Id.* All of BPA's risk mitigation tools address risk on an aggregate basis. *Id.* at 60.

#### 3.4.1.4 Available Risk Mitigation Tools

When evaluating the proposed rates for compliance with the TPP standard in the Risk Study, BPA does not assume that it will have only the projected revenue from the proposed rates to meet costs. Instead, BPA recognizes all the forms of liquidity will be available to help pay BPA's obligations. These include five forms of liquidity:

- **Financial Reserves.** BPA has financial reserves available for risk attributable to Power Services that have accrued over time. *Id.* at 58. Even before BP-24 rates begin to generate revenue, BPA has over $1 billion in the Bonneville Fund available to meet its payment obligations. Power and Transmission Risk Study, BP-24-E-BPA-05, at 58.
- **Treasury Note.** BPA also has access to a $750 million Treasury Note. Fisher *et al.*, BP-24-E-BPA-10, at 59. If costs exceed revenue, BPA can use this short-term line of credit to borrow to meet its near-term expense obligations.
- **PNRR.** The proposed rates are set to recover $129 million a year—$258 million for the rate period. *Id.* This PNRR was added as a function of the proposed BP-24 Settlement, and is *not* required to meet the TPP standard. This PNRR will provide additional risk mitigation and cost recovery certainty by generating additional financial reserves that will be available to meet any cost BPA incurs in the BP-24 rate period, including any "unplanned or unexpected costs associated with BPA's Fish and Wildlife Program." Fredrickson *et al.*, BP-24-E-BPA-09, at 11.
- **Repurposed Revenue Financing.** The rates also include $54.6 million to finance a portion of the BP-24 capital costs with revenue rather than debt. Fisher *et al.*, BP-24-E-BPA-10, at 59. BPA has designed this revenue financing as an additional liquidity tool; if actual costs exceed revenue, BPA can apply the $54.6 million ($27.3 million a year) as liquidity to meet current expenses and choose to instead finance the relevant capital with debt.
- **Cost Recovery Rate Mechanisms.** The rates also include mechanisms that automatically increase rates, without a new rate case, if additional revenue is needed. *Id*. The Financial Reserves Policy (FRP) Surcharge may increase power rates up to $80 million over the rate period ($40 million a year), and the Cost Recovery Adjustment Clause (CRAC) may increase power rates up to $600 million ($300 million a year). These risk mechanisms are consistent with the FRP, which was adopted as a more robust liquidity policy than solely relying only on the TPP standard.

These tools are all available to mitigate risk from any source, including the risk that actual fish and wildlife costs exceed BPA's forecast.

Obviously, if BPA is depleting its liquidity tools in a rate period, there could be significant financial consequences. *Id.* at 65. As a practical matter, the FRP Surcharge and CRAC triggering would increase the nominal dollar-per-megawatt rates paid by customers. Repurposing financial reserves would provide near-term liquidity at the expense of BPA's long-term financial health. The next rate period's revenue requirement would include an amount to repay borrowing on the Treasury Note, as well as the costs of maintaining financial strength by rebuilding financial reserves or revenue financing.

### 3.4.2 Issues

***Issue 3.4.2.1***
*Whether BPA's risk analysis and mitigation reasonably account for risk in the BP-24 power rates.*

**Parties' Positions**

Tribal Parties request BPA "update its risk mitigation measures based on new information provided by the Tribal Parties or otherwise explain how the BP-22 risk mitigation measures are sufficient for the significant known risks projected for the BP-24 rate period." Tribal Parties Br., BP-24-B-YN-01, at 65.

Tribal Parties assert, without quantifying the potential cost or probability of occurrence, that "BPA's failure to reasonably project its BP-24 rate period costs makes it unlikely that its rates will recover its total system costs. This makes it unlikely that BPA will be able to repay Treasury as is required under the NWPA." *Id.* at 54-55.

WPAG argues Tribal Parties misapprehend how BPA conducts its Risk Study, and would require BPA to evaluate risks that are either within the range of outcomes already modeled or of the type generally excluded from BPA's risk analysis because they are not reasonably quantifiable or require BPA to speculate on a particular outcome of unknown likelihood. WPAG Br., BP-24-B-WG-01, at 5. WPAG asserts the better path is to rely on BPA's current Risk Study, which analyzed the rates' sufficiency over a wide range of potential outcomes—including outcomes with significantly higher costs and revenue reductions that could result from any number of potential causes—rather than individually model them as Tribal Parties suggest. *Id.* at 6. Out of the 3,200 simulations performed, the rates were sufficient for BPA to make its Treasury payment in every single one. *Id.* at 6-7.

AWEC argues BPA's proposed rates are sufficient to ensure repayment of BPA's Treasury obligation and are based on the Administrator's determination of total system costs. AWEC Br., BP-24-B-AW-01, at 12. AWEC asserts BPA adequately considered the risks in the rate proceeding. *Id.* at 15. AWEC argues the record supports the conclusion that the proposed rates are sufficient given that the rates passed the TPP standard by the widest margin BPA has seen in quite some time, and that BPA's analysis includes games where BPA's risks exceed the risk quantified by the Tribal Parties. *Id.* at 15-16. AWEC emphasizes the many risk mitigation features included in the proposed rates, which operate to ensure BPA has the revenues necessary to cover its costs and meet its Treasury payment obligations. *Id.* at 17-18. AWEC discusses the burden of increased rates on its members. *Id.* at 18.

PPC argues that setting rates to recover more than BPA's statute-driven costs would be contrary to BPA's obligation to set cost-based, lowest possible rates consistent with sound business principles. PPC Br., BP-24-B-PP-01, at 9. PPC asserts that BPA's IPR cost forecast affirms that amount satisfies BPA's responsibility to comply with all applicable environmental laws and regulations, *id.* at 10, and argues it would be unlawful for BPA to arbitrarily increase the amount thereafter. *Id.* at 11. There has been no evidence presented

in this proceeding that Congress, a court, or even BPA has identified any particular fish and wildlife project or measure that is required by BPA's legal obligation to be included in the rate period but has not been accounted for in the IPR cost projections. *Id.* at 12-13. BPA has sufficient risk mitigation tools in place to provide additional funding should an actual need arise to include an additional project or measure. *Id.* at 13. PPC argues, given a history of underspending, that adding a speculative cost would be unlawful and imprudent. *Id.* at 14.

NRU argues BPA's proposed rates are sufficient to recover its true costs and repay Treasury. NRU Br., BP-24-B-NR-01, at 7. BPA's Rebuttal Testimony clarifies that Tribal Parties' allegations are based on outdated information, factually inaccurate assumptions, and faulty math. *Id* at 8. BPA modeled 3,200 simulations, and—even assuming the $56 million requested by the Tribal Parties was a certainty—BPA successfully made its Treasury payment in every single scenario. *Id.* at 8-9.

**BPA Staff's Position**

Staff considered each of the risks raised by Tribal Parties. Fisher *et al.*, BP-24-E-BPA-10, at § 5. BPA's risk analysis does not separately model hypothetical scenarios, but runs a stochastic model that generates 3,200 games, covering a range of risk potentials. *Id.* at 62. The risks raised by Tribal Parties are either of the type generally excluded from the risk analysis because they are not reasonably quantifiable or require BPA to speculate on a particular outcome of unknown likelihood. *Id.* To the extent the Tribal Parties present any financial impact with their risks, the potential cost and revenue uncertainty is already represented within the range of outcomes BPA modeled. *Id.*

**Evaluation of Positions**

Tribal Parties argue BPA did not account for "risks" associated with each of the alleged "obligations" discussed above. Tribal Parties Br., BP-24-B-YN-01, at 62; *see also id.* at 52, 53, 54, 57, 58. In particular, Tribal Parties argue BPA should have incorporated in its risk analysis the list of risks identified in their brief, *e.g., id.* at 53, and the "unquantified[] cost pressures for the BP-24 rate period associated with inflation, climate change, ongoing legal proceedings, increasing implementation needs associated with existing legal commitments, known operational changes identified in the Columbia River Treaty, and obligations stemming from recent Federal commitments to support a long-term salmon restoration strategy." *Id.* at 62. They argue BPA must "update its risk mitigation measures based on new information provided by the Tribal Parties" or demonstrate that "the BP-22 mitigation measures are sufficient for the significant known risks projected for the BP-24 rate period." *Id.* at 65.

In variations of the same sentence, Tribal Parties argue "BPA's failure to account for" various obligations "makes it unlikely that its proposed BP-24 rates are sufficient to recover its true costs *and* repay Treasury." *See id.* at 51, 55, 56, 57, 58. While they "are concerned that BPA did not properly evaluate risks," they do not explain what they believe a "proper" evaluation would entail. *Id.* at 62. Tribal Parties do not elaborate on how they propose BPA should "account for" their alleged risks, or how BPA should "update its risk mitigation measures." *See id.* at 61, 65. Finally, the Tribal Parties take issue with BPA's

FY 2022 Power RDC decision and make a general observation on the operation of the ToolKit risk model. *Id.* at 64.

Entities representing BPA's power ratepayers and retail consumers disagree. WPAG, AWEC, PPC, and NRU all support BPA's risk mitigation analysis and tools, and conclude that none of the risks identified by the Tribal Parties warrant adjustments to BPA's rates, risk analysis, or risk mitigation. *See, e.g.,* WPAG Br., BP-24-B-WG-01, at 5; AWEC Br., BP-24-B-AW-01, at 12-18; PPC Br., BP-24-B-PP-01, at 13; NRU Br., BP-24-B-NR-01, at 6-7.

As explained below, the Tribal Parties' arguments rest on a misunderstanding of (1) BPA's approach to risk analysis, (2) the results of the risk study, and (3) the import of the FY 2022 Power RDC decision and the operation of BPA's ToolKit risk model.

## A. Tribal Parties Misunderstand BPA's Approach to Risk Analysis

Tribal Parties' Initial Brief asserts "BPA's risk analysis fails to account" for various obligations in its risk analysis. Tribal Parties Br., BP-24-B-YN-01, at 61. In discovery, BPA specifically asked how the Tribal Parties would propose each risk be modeled. The Tribal Parties responded:

> The Tribal Parties propose that BPA model the *NWF v. NMFS* plaintiffs' requested injunctive relief as it is written to evaluate the estimated cost difference between a potential judicial action and the BP-24 Proposed Operation. This would provide bookends for assessing what level of risk BPA is accepting in its BP-24 Rate Settlement. BP-24-E-YN-50.
>
> In addition, BPA should model "worst case" scenarios for the Columbia River Treaty, managing temperature, and climate change to provide bookends for accounting for potential environmental risk during the rate period.

BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 200.

In effect, Tribal Parties assert BPA must use a "scenario based" approach to risk analysis in order to "account" for their risks, *i.e.,* by specifically demonstrating that the proposed rates would enable BPA to repay Treasury under certain hypothetical scenarios. *See* Tribal Parties Br., BP-24-B-YN-01, at 9-10. As explained below, the Tribal Parties misunderstand BPA's approach to analyzing risk in the Risk Study, and BPA is not inclined to abandon its long-standing approach now for several reasons.

### *1. BPA's Risk Analysis Approach Is Reasonable*

BPA uses a Monte Carlo simulation to model risk, which is a common approach to analyze business and financial risk. *See* BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 86. BPA "model[s] reasonably quantifiable parameters around categories of revenue and expense risk and probabilistically model[s] thousands of games to assess risk." Fisher *et al.*, BP-24-E-BPA-10, at 58. The approach is probabilistic (produces a range of potential outcomes to consider with varying likelihoods) rather than deterministic (mathematically calculates a certain outcome). Therefore, the result is not a deterministic answer (*e.g.*, conditioning the sufficiency of BPA's rates for Treasury repayment on a particular scenario), but a

probability distribution (*e.g.*, there is greater than 99.9 percent probability BPA's rates will enable it to repay Treasury under a wide range of outcomes).

The Tribal Parties, nonetheless, claim BPA's methodology fails to "account" for the particular risks identified in their evidence. *See* Tribal Parties Br., BP-24-B-YN-01, at 9-10, 51, 55, 56, 57, 58. This argument misses the point. BPA does not need to "account" for these risks by demonstrating that BPA repays Treasury under their specific "worst-case" scenarios because BPA's existing risk analysis already addresses uncertainty probabilistically. Indeed, BPA's probabilistic approach is *superior* to the scenario approach requested by the Tribal Parties.

First, BPA's approach is beneficial because it recognizes *randomness* as a variable. BPA's stochastic model recognizes that *randomness* plays a role in forecasting future events. Such a model is well suited to BPA's situation, where independent variables can pull in different directions, and where completely unforeseen causes can impact the variables. For example, BPA knows there is volatility around the size of its customers' load, but could not have anticipated that a pandemic would occur, or how such an event would differently impact electricity usage in various communities.

Further, a probabilistic approach is important because risks may either be additive or offset one another. Tribal Parties allege that certain fish and wildlife costs could be considerably higher than BPA has planned. *Id.* at 63. But, even in that event—wherein BPA pays its costs despite them being greater than forecast—other costs may be below forecast, or customer load may be greater than forecast, or more water may be available than forecast, or secondary revenue may be greater than forecast. It is just as unrealistic to assume every risk will cut against BPA as to assume they all fall in BPA's favor.

Second, BPA's approach is beneficial because it allows BPA to analyze the *likelihood* of outcomes. BPA's model allows BPA to analyze trends in the data to consider the *likelihood* of various outcomes. One can imagine numerous possible scenarios, but without a probabilistic analysis, it is difficult to judge whether an individual scenario is so likely that it is reasonable to increase rates (and by how much). It is not reasonable to increase rates as if a scenario of unknown probability was a certainty.

BPA's analysis indicates the range of possible outcomes over 3,200 iterations. These outcomes do not represent—and are not constrained by—specific, deterministic, hypothetical scenarios. Instead, BPA can analyze the range of outcomes to address risk on a holistic, aggregate basis. The value is not in specific games; there is no guarantee that the actual outcome will even be within the modeled range. However, when analyzed as a whole, the data points to trends. As applicable here, if 95 percent of games result in BPA meeting all payment obligations, then the TPP policy does not require additional risk mitigation to be added to the proposed rates.

Third, a scenario-based risk analysis would quickly convert BPA's risk analysis into a backdoor method for adding speculative costs to the revenue requirement. Indeed, Tribal Parties' request exemplifies this situation. They first argue that BPA's cost projections are too low, and then that "[t]his makes it unlikely that BPA will be able to repay Treasury . . . ." *Id.* at 55; *see also, e.g., id.* at 56 ("Underestimating its total system costs increases the

likelihood that BPA will be unable to . . . ensure repayment to Treasury . . . ."). The Tribal Parties' assumption seems to be that, even if a potential cost is too speculative to include in BPA's revenue requirement cost forecast (as BPA has found; *see supra* Sections 3.2 and 3.3), BPA must nonetheless quantify each risk and increase rates to demonstrate that the proposed rates would ensure BPA paid Treasury under the potential costs of their worst-imaginable risk scenario. *See* Tribal Parties Br., BP-24-B-YN-01, at 62-63. If BPA did what the Tribal Parties' request, and adjusted its risk analysis for these unquantifiable, and speculative costs, BPA would be adding to rates through the risk analysis the very same speculative costs BPA was unable to add directly as part of BPA's cost projections.

Finally, even if Tribal Parties' scenario-based approach were a viable alternative approach to measuring BPA's risk, BPA does not agree that it would be reasonable to abandon BPA's existing risk analysis approach. BPA has modeled risk probabilistically for decades. Shifting to a deterministic scenario analysis would entail a wholesale restructuring of the risk analysis BPA has performed for many rate periods. As Staff noted in Rebuttal, "[i]t is not clear how modeling specific hypothetical scenarios would be incorporated into the structure of our existing probabilistic model." Fisher *et al.*, BP-24-E-BPA-10, at 76. Tribal Parties have not challenged the risk analysis on methodological grounds, nor presented a viable reason for BPA to change its long-standing approach, and consequently, BPA declines to abandon its approach to risk analysis.

#### *2. BPA's Approach Appropriately Excludes Risks That Are Not Reasonably Quantifiable from Its Analysis*

Throughout their brief, the Tribal Parties identify risks that they claim BPA must "account for," but then often leave their alleged risks unquantified. *See* Tribal Parties Br., BP-24-B-YN-01, at 57 (litigation risk unquantified), 61 (Columbia River Treaty risk unquantified), 57 (tribal treaty risk unquantified). In the few instances when they quantify their risks, the Tribal Parties in no way attempt to suggest the probability of these risks occurring. *See id* at 55-56 (asserting Fish and Wildlife Program costs should be at least $283 million), 58 (estimating $60 million reduced revenue from operational changes to meet Clean Water Act requirements). Ultimately, the Tribal Parties try to shift the burden of quantifying the amount and probability of these costs to BPA. Oral Ar. Tr., BP-24-TA-BPA-01, at 15, lines 5-6 ("It is Bonneville's job to account for these risks in its rates, not the Tribal Parties' . . . ."). However, their hesitancy to quantify these risks is likely due in part to such risks not being reasonably quantifiable or requiring speculation on a particular outcome of unknown likelihood. They acknowledge, regarding litigation risk,

> Because the mediation proceedings are both confidential and ongoing, the Tribal Parties are not in a position to specify or quantify how the outcome of the FMCS mediation will affect BPA's obligations; and the Tribal Parties object to this request to the extent that it calls for speculation on the effect of ongoing legal proceedings where details of the legal proceedings are protected from disclosure.

BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 211; *see also id.* at 162 (Tribal Parties noting they "are not in a position to specify or quantify" regarding "BPA's revenues from electricity generation"); *supra* Issues 3.2.2.2, and 3.3.2.2.

BPA's risk analysis is subject to the requirements of Section 7(i), and must, therefore be supported by evidence in the ratemaking record. *See* 16 U.S.C. § 839e(i)(5). That means BPA Staff require sufficient information from which to perform statistical risk analysis. Ultimately, the risk study requires parameters, ranges, and probabilities to consider the impacts of a risk on BPA's ability to repay the Treasury. By their nature as risks, these values cannot be objectively certain, and will be a function of reasoned judgment. However, given that rate case parties may disagree on the values used, there must be some basis to support *why* these *values* are reasonable assumptions. Although the Tribal Parties have introduced many materials describing various concerns with fish and wildlife funding, FCRPS operations, and the overall state of salmon, Tribal Parties provide very little information about how these concerns translate into quantifiable and measurable risks that BPA could reasonably rely on to adjust rates or the risk analysis. This latter point needs to be emphasized. It is not enough for a party to simply identify a risk, allege that some negative outcome is not impossible, and then step back and require BPA to modify its risk analysis in some way to "account for" it. At a minimum, there should be some factual evidence supporting the magnitude of the risk, the likelihood of the risk, and the timing of that risk before BPA could begin making adjustments to its risk analysis. Section 7(i) requires no less.

The fact that Tribal Parties fail to quantify their risks, and to support such quantifications, is evidence that there is not enough information available to *reasonably* quantify these risks. For the vast majority of the risks identified by Tribal Parties—*e.g.,* litigation risk, Tribal Treaty risk, Columbia River Treaty risk, survival of the salmon risk—there is too little quantifiable information for either the Tribal Parties or BPA to make an informed assessment about how that risk would be measured or addressed under BPA's risk mitigation for its BP-24 Power rates proposal. This lack of information has informed BPA's conclusion that changes to its risk analysis are unwarranted. As noted by Staff: "[t]he risks raised by Tribal Parties are either of the type generally excluded from our risk analysis because they are not reasonably quantifiable or require us to speculate on a particular outcome of unknown likelihood." Fisher *et al.*, BP-24-E-BPA-10, at 62.

This is not to say that BPA does not evaluate outcomes that are adverse to its original assumptions when there is some quantitative basis for an alternative outcome. For example, in the BP-18 rate case, there was outstanding litigation over the operations of the FCRPS in a prior iteration of the *NWF v. NFMS* case. *Id.* at 60. At the time of the initial rate proposal, there was no information on the potential outcome of the litigation. Because the outcome of that case was uncertain (much like in this case), Staff did not specifically model risk associated with the litigation, and assumed existing operations. During the BP-18 rate case, however, the court issued a ruling that it would order "increased spill" at specified Federal dams during the rate period. *Id.* Now that the effects of the case were more certain, BPA determined to address the impact of the court order through a flexible rate mechanism: the Spill Surcharge. *Id*.

In the present case, there is no court order or other subsequent development that would support modifying BPA's rates or risk mitigation to specifically address the Tribal Parties' risks. Without some additional intervening factor or new information, it is sensible for BPA to not "speculate on a particular outcome—especially when the *status quo* is a reasonable and potential outcome itself." *Id.* at 58. Indeed, as Staff explained:

> [F]rom an analytical perspective, a status quo approach such as the one we have used, is a reasonable—and arguably the only—approach in these types of situations. . . . Rather than speculate, we chose to assume that the status quo is retained until the time at which enough new information is available to support something other than the status quo; that time has not yet come for the risks raised by the Tribal Parties.

*Id.* at 68. In the few places where the Tribal Parties *have* quantified their requested cost forecast increases, BPA has explained the basis for retaining its forecast, and—as discussed below—demonstrated that even including Tribal Parties' quantified "risks" as certainties would not cause BPA to fail the TPP standard.

In sum, BPA's risk analysis is reasonable and appropriately excludes risks that are not reasonably quantifiable, which is the type of risks the Tribal Parties raise.

## B. Tribal Parties Misunderstand the Results of the Risk Study

Another common theme in the Tribal Parties' brief is that "BPA's failure to account for" various risks identified by Tribal Parties "makes it unlikely that [BPA's] proposed BP-24 rates are sufficient to . . . repay Treasury." Tribal Parties Br., BP-24-B-YN-01, at 51, 55, 56, 57. It is telling that in *none* of the risks identified by the Tribal Parties do they once quantify how their alleged risk impacts BPA's ability to meet the 95 percent TPP standard. In other words, while Tribal Parties assert that BPA's rates and risk mitigation make it "unlikely that BPA will be able to meet its Treasury obligations . . . ," *id.* at 22, they never actually show BPA failing the TPP standard.

The Tribal Parties' silence is not surprising because, as Staff mention, the BP-24 Power Rate proposal "passed the TPP standard by the widest margin we have seen in quite some time." Fisher *et al.*, BP-24-E-BPA-10, at 61. Simply put, the proposed BP-24 Power Rates are not on a razor's edge of meeting the TPP standard. Under BPA's TPP policy, so long as 95 percent of modeled outcomes show the Treasury being paid under the proposed rates (with risk mitigation), BPA's rates include sufficient risk mitigation to address BPA's business risk. This means that, as a matter of policy and business judgment, BPA is able to tolerate the risk that up to 5 percent of modeled outcomes result in deferring a Treasury payment. Under the BP-24 Power Rate proposal, however, *none* of the 3,200 games evaluated resulted in a deferral. *Id.* The proposed rates result in a two-year TPP of greater than 99.9 percent. *Id.* In the face of this robust, and unrebutted, statistical analysis, the Tribal Parties' claims that BPA's rates are "unlikely" to repay the Treasury are unfounded.

Indeed, the Tribal Parties fail to engage with the BP-24 risk mitigation features BPA has repeatedly discussed throughout the case. As described in Section 3.4.1, the proposed rates include a deep bench of risk mitigation tools. BPA is beginning the BP-24 rate period from

a strong starting position, with more than $1 billion in financial reserves. The resulting "unusually high TPP" is further a product of the "proposed rates themselves." *Id.* Against a historical practice of nearly 100 percent debt-financing its capital program, these rates include $54.6 million of revenue financing that BPA can also use as a liquidity tool. The proposed BP-24 Power Rates also include $258 million in PNRR—over a quarter *billion* dollars – that will be recovered from ratepayers and be available to mitigate cost and revenue risk. *Id.* This PNRR is a function of the proposed settlement and is not required by BPA's TPP policy. *Id*. These facts cannot be brushed aside with the Tribal Parties' blanket assertions that BPA's rates make it "unlikely that BPA will be able to repay Treasury . . . ." *See* Tribal Parties Br., BP-24-B-YN-01, at 55. From a Treasury repayment risk perspective, the BP-24 proposed rates are among the most risk averse in BPA's history.

*1. Results: Import of BPA Staff's $450 Million Calculation*

At the end of the Tribal Parties' brief, the Tribal Parties make their only attempt to show how additional costs could influence BPA's TPP analysis and, by extension, increase BPA's risk of missing a Treasury payment. Tribal Parties Br., BP-24-B-YN-01, at 62-63. Specifically, the Tribal Parties note that "BPA could incur up to $450 million per year . . . and still meet the TPP standard . . . ." *Id.* at 62. They argue, however, that if BPA's "unforeseen costs, or reduced revenues," exceed $450 million per year, the TPP drops below 95 percent. *Id.* at 62-63. The Tribal Parties note that while BPA's rates address "some unforeseen risk," it is unclear how BPA would "secure the necessary liquidity" if additional costs or reduced revenues were "beyond $450 million." *Id.* at 63. The Tribal Parties conclude that their evidence and arguments "provide adequate justification to be concerned that risks could be considerably higher than BPA has planned." *Id.*

Tribal Parties' argument, however, centers on a misuse of Staff's analysis in rebuttal testimony. There, Staff asked what level of deterministic (*i.e.,* fixed) cost increase would cause the proposed rates to *not* meet the TPP standard. Fisher *et al.*, BP-24-E-BPA-10, at 64. That is, having run 3,200 games that produce a wide distribution of outcomes, Staff were testing the model to see how much *more* costs would need to be added to fail TPP.

The Tribal Parties misinterpret Staff's analysis to mean $450 million is the maximum variation from forecast that the rates could endure. Tribal Parties Br., BP-24-B-YN-01, at 62. However, Staff's analysis was adding $450 million per year to *each* of the 3,200 games. Those games already had considerable volatility. In the worst modeled game, end-of-year financial reserves were $194.3 million. Fisher *et al.*, BP-24-E-BPA-10, at 75. Start-of-year reserves attributable to Power were $1.244 billion. *Id.* at 59. This means that, in the worst game, costs exceeded revenue by $1.0497 *billion*, and BPA was still able to make the payment to the Treasury. When Staff then added an *additional* $450 million per year cost to each game, some games started to result in missing the Treasury payment, including this "worst game." But even then, the TPP standard was still met because it requires only 95 percent probability.

The study also demonstrates that a $450 million cost shock is highly unlikely. For perspective, the ToolKit model showed that power net revenue had a modeled standard deviation of $245 million and $258 million. *Id.* at 75. From that distribution, a $450 million

cost shock relative to forecast would be associated with a movement from the mean of almost *two standard deviations*. This places the outcome in the fifth percentile "tail" regions of those annual distributions, *i.e.,* the narrow, tapered end of a bell curve. There is no basis to assume such an outcome is likely, especially as an *incremental* increase over the modeled risks.

Nonetheless, Tribal Parties take this highly unlikely conjecture and reframe it as normative. Tribal Parties "found [it] very concerning" that TPP would decrease if amounts *greater* than $450 million per year were added to each game. Tribal Parties Br., BP-24-B-YN-01, at 62-63. That is, if $500 million ($1 billion over the rate period) was added to each game, the TPP drops to 90.3 percent. *Id.* at 63. If an additional $1 billion ($2 billion over the rate period) was added to the risk already modeled in each game, TPP drops to 12 percent. *Id.* This appears to be the extent of Tribal Parties analysis of the Risk Study. *See* BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 216-19; *cf.* BP-24 Data Responses Admitted via Motions, BP-24-E-BPA-14, at 17-18 (Data Response YN-BPA-32-52).[8] Tribal Parties err in making the inferential conclusion that rates would not be robust against large unanticipated cost increases. Obviously, if BPA's forecast is off by several *billion* dollars, BPA will have a difficult time meeting its payment obligations, and the consequences of such a catastrophic under-forecast would go well beyond the two-year rate period. But BPA does not, and indeed, *should not* set its rates based on assuming catastrophic, worst-possible-case scenarios. It would likely be inconsistent with Congress' direction to set the "lowest possible rates consistent with sound business principles" to set rates assuming that actual costs will be billions higher than BPA's best forecast.

Nothing in the record supports that there is more than $900 million missing from the revenue requirement. Tribal Parties do not allege such a scenario as a risk, let alone that such a scenario is certain, such that BPA should model it as a determinative cost increase in every modeled game.

*2. Results: Tribal Parties' Risks are Within the Range of Outcomes BPA Considered*

As noted above, the Tribal Parties allege BPA has "fail[ed] to account for known and likely risks." *See* Tribal Parties Br., BP-24-B-YN-01, at 51, 55, 56, 57, 58, 61, 65. BPA has considered these risks in affirming its cost forecast, and has probabilistically modeled risk across thousands of games. While modifications to ToolKit inputs would affect the range of modeled outcomes, as discussed above, the magnitude of such modifications would need to be immense, and the likelihood near-certain, for the range of outcomes to move significantly. Therefore, while BPA did not specifically model scenarios, BPA notes that the few risks Tribal Parties did attempt to quantify are well within the range of outcomes BPA modeled. Fisher *et al.*, BP-24-E-BPA-10, at 62. Tribal Parties' general assertions do not demonstrate that BPA's risk analysis is insufficient to recover their alleged costs. For

[8] The Tribal Parties moved to admit a list of data responses to the record of the proceeding, which the Hearing Officer granted. *See* Motion to Admit Evidence into the BP-24 Record, BP-24-M-YN-01; Order Granting Tribal Parties' Motion to Admit Evidence, BP-24-HOO-13. BPA has uploaded these data responses on the secure website in order to create citable exhibit.

example, the 3,200 modeled games include outcomes that exceed Tribal Parties' alleged $60 million revenue reduction due to operational changes. *Id.* at 72. As discussed above, BPA did model a deterministic cost increase of $450 million per year and the proposed rates still met the TPP standard. It is also unclear whether the alleged risk should be incremental to the parameters BPA has already included in its analysis. The HYDSIM dataset probabilistically models 30 years of historical streamflows, which produces a wide range of variability for water available for hydropower generation.

BPA modeled outcomes with standard deviations of $245 million and $258 million for FY 2024 and FY 2025, respectively. *Id.* at 75. The jaws of end-of-rate-period results ranged from a 5th percentile of $334 million to a 95th percentile of $1.168 billion. Power and Transmission Risk Study, BP-24-E-BPA-05, at Table 9. Even excluding "tail" outcomes below the 5th percentile, and above the 95th, these results represent a range of outcomes where costs exceed revenues by $910 million to $76.3 million (based on starting reserves of $1.2443 billion). *See id.* at 51.

Considering only operating risk, where the bulk of volatility lies, BPA's RevSim modeled net revenue end-of-rate-period outcomes that ranged from a minimum *negative* $289.8 million to a maximum $1.487 billion. *Id.* at Table 1. Even across this wide range of outcomes, no game resulted in BPA deferring a Treasury payment. Fisher *et al.*, BP-24-E-BPA-10, at 61. The appropriate conclusion from these results is that BPA's proposed rates are robust, resilient, and more than sufficient to meet the TPP standard.

## C. Misunderstandings of the Import of the FY 2022 Power RDC Decision and the Operation of BPA's ToolKit Risk Model

### *1. Import of FY 2022 Reserves Distribution Clause*

Within its risk analysis argument, Tribal Parties argue BPA missed "a great opportunity to create an additional cushion for the likely event that fish and wildlife costs exceed those projected by BPA for the BP-24 period" with its FY 2022 Power Reserves Distribution Clause (RDC) decision. Tribal Parties Br., BP-24-B-YN-01, at 64. PPC states that, absent settlement, power customers would likely have argued that the full RDC amount should have been applied to a power rate reduction, rather than $50 million to address, on an accelerated one-time basis, certain needs of existing fish and wildlife mitigation assets. PPC Br., BP-24-B-PP-01, at 14, 18. PPC emphasizes that BPA customers bear all the risks of BPA's ratemaking and should receive all the upside. *Id.* at 15-18.

BPA's FY 2022 RDC decision addresses BPA's implementation of the Power RDC from the BP-22 rates for FY 2022. As such, that decision, which was made in January 2023, is outside the scope of the BP-24 rate proceeding, and will not be revisited in this case. Moreover, each rate case must be analyzed based on current forecasts and available liquidity tools (included financial reserves available for risk). The BP-24 Risk Study demonstrates that additional risk mitigation was not necessary.

*2. RDC Frequency and Expected Value in ToolKit*

Finally, Tribal Parties "noted that it appears that the Reserve Distribution Clause Frequency (RDC Frequency, Cell C33) and the Expected Value for the Reserve Distribution Clause (EV RDC, Cell C34) are hardwired into BPA's financial management plans for a 93 percent probability to protect $437 million in reserves for [FY 2024]." Tribal Parties Br., BP-24-B-YN-01, at 64. Tribal Parties do not elaborate on the import of this note. However, BPA clarifies that the Tribal Parties' observation mischaracterizes the modeling. The observed result is based on the FY 2023 power net revenue forecast at the start of year. This forecast is subject to revision through the fiscal year, as evidenced by BPA's public Quarterly Business Review results, which have already shown those likelihoods and expected values deteriorate. BPA is not hardwiring a 93 percent RDC frequency or a $437 million RDC expected value.

**Decision**

*BPA's risk analysis and mitigation reasonably addresses risk in the BP-24 power rates.*

***Issue 3.4.2.2***

*Whether BPA's risk analysis and rate proposal are consistent with Golden NW Aluminum.*

**Parties' Position**

Tribal Parties argue that, under *Golden Nw. Aluminum, Inc.*, *v. Bonneville Power Admin.*, 501 F.3d 1037 (9th Cir. 2007) (*Golden NW)*, BPA's decision to maintain its BP-22 risk projections violates the Northwest Power Act. Tribal Parties Br., BP-24-B-YN-01, at 54.

WPAG argues that Tribal Parties' unquantifiable and speculative claims are in stark contrast to the situation in *Golden NW* where, most significantly from the court's perspective, BPA failed to update its cost projections after signing a Memorandum of Understanding that committed it to spend an additional $300 million per year on fish and wildlife costs. WPAG Br., BP-24-B-WG-01, at 6. WPAG argues that, by adopting Tribal Parties proposal, BPA would fail the *Golden NW* requirement to "develop a realistic projection of fish and wildlife costs that accurately reflect[s] the information available at the time the rates [are] set and the cost recovery mechanisms adopted," because Tribal Parties' proposal is based on outdated and incorrect information, faulty assumptions, and ordinary bad math. *Id.* at 4-5.

**BPA Staff's Position**

This is a legal issue raised in Tribal Parties' Initial Brief.

**Evaluation of Positions**

Tribal Parties argue that "[b]y disregarding the considerable risks and costs identified by the Tribal Parties and instead maintaining its BP-22 risk projections, BPA did not base its BP-24 rates on a 'reasonable projection' of the costs based on information 'available [to it] at the time rates were set,' in violation of the NWPA" and *Golden NW*. Tribal Parties Br., BP-24-B-YN-01, at 54; *see also id.* at 51-52, 65. Contrary to the Tribal Parties' arguments,

BPA ran a new risk analysis for BP-24, and the court's holding in *Golden NW* does not require BPA to modify its risk analysis.

First, the Tribal Parties' reference to "BP-22" in their brief continues to misstate the analysis BPA performed. BPA updated its risk analysis and mitigation for BP-24. BPA has already clarified this point to Tribal Parties:

> BPA conducted a new risk study for the BP-24 proceeding and determined there is a greater than a 99.9 percent Treasury Payment Probability. BPA did not rely on the risk study performed in the BP-22 rate case for this proceeding. The BP-24 risk study ran new games with new inputs to analyze the sufficiency of the proposed BP-24 rates to recover forecast costs for the BP-24 rate period. For example, the study used current financial reserves levels, and new amounts of proposed PNRR and revenue financing. The proposed BP-24 rates retain all of the risk mitigation *measures* that were included in the BP-22 rates. BP-24-E-BPA-09. Those risk mitigation measures include new values, and are described in BPA's response to YN-BPA-32-24.

BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 85; *see also id.* at 67-68 (describing risk mitigation). The Tribal Parties appear to conflate BPA's *tools* available for risk mitigation with BPA's risk *analysis*. *See* Tribal Parties Br., BP-24-B-YN-01, at 65. These are separate components of BPA ratemaking. The risk *tools* (or measures) that BPA uses to mitigate risk on an aggregate basis are often carried over from one rate period to the next. These are simply the mechanisms to implement risk mitigation. An example would include the CRAC, which has been a feature of BPA's risk mitigation for decades. *See* Section 3.4.1.4 (describing BPA's risk mitigation tools).

BPA's *risk analysis* has been updated with up-to-date information. The record is clear on this point. BPA is now forecasting $1,244.3 million in starting financial reserves attributable to Power, compared to $435.3 million in BP-22. Power and Transmission Risk Study, BP-24-E-BPA-05, at 51; Power and Transmission Risk Study, BP-22-FS-BPA-05, at 59. The amount of revenue financing that can be relied on for risk mitigation is $54 million ($27 million a year), which is slightly less than in BP-22. Power and Transmission Risk Study, BP-24-E-BPA-05, at 54-55. As a function of the Settlement, the BP-24 Power Rate proposal includes $129 million per year of PNRR; the BP-22 included none. Fredrickson *et al.*, BP-24-E-BPA-09, at 11. The $750 million Treasury Note, and the FRP Surcharge and CRAC, have not changed. BPA then performed a new risk analysis—with updated cost forecasts and risk parameters and inputs—that modeled the updated tools as available sources of liquidity. If this new analysis had suggested additional risk mitigation was needed, BPA would have added more PNRR. The new analysis demonstrated that additional risk mitigation was not needed. *See* Power and Transmission Risk Study, BP-24-E-BPA-05, at 42 ("For BP-24, no PNRR was needed to meet the TPP target.").

The Tribal Parties' application of *Golden NW* to BPA's risk analysis is also inapposite. In *Golden NW*, BPA relied on three-year-old cost projections and excluded new, contradictory information from the record. 501 F.3d at 1051-52. The new information in *Golden NW* was not speculative; "most significantly," BPA had signed a Memorandum of Understanding

committing BPA to spend an additional $300 million per year. *Id.* at 1052. BPA had also declared a financial emergency, and a district court ruling had been issued, without BPA revisiting its cost projections. *Id.* The Court held "[b]ecause BPA discounted and ignored crucial facts presented to it, we hold that BPA's fish and wildlife cost estimates . . . were not supported by substantial evidence." *Id.* The Court also held that BPA's obligation to periodically revise its rates to ensure that it recovers its costs "in accordance with sound business principles" required BPA "to develop a realistic projection of fish and wildlife costs that accurately reflected the information available at the time . . . ." *Id.* at 1052-53. That is, it was not "in accordance with sound business principles" for BPA to have "simply excluded information" related to its cost projections.

Here, as discussed above, BPA's cost projections are reasonable and supported by the record. BPA has allowed Tribal Parties to present their arguments and evidence, and has considered the information received. Nothing in *Golden NW* requires BPA to increase its cost projections *above* a reasonable forecast of costs. Nor does *Golden NW* require BPA to model and incrementally increase rates for every imaginable hypothetical scenario. Further, BPA has considered the information raised by Tribal Parties and determined that such information does not require modifying its risk analysis. BPA's proposed rates are based on reasonable cost forecasts, and the risk analysis demonstrates a greater than 99.9 percent probability that BPA has sufficient risk mitigation tools to meet all of its obligations and repay Treasury over the two-year rate period. Finally, as described above, there have been no intervening events, new court orders, or other significant facts that have occurred between the development of BPA's projections and risk analysis that would require BPA to revisit its assumptions.

**Decision**

*For the reasons stated above, BPA's risk analysis and rate proposal are consistent with Golden NW Aluminum.*

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# 4.0 NORTHWEST POWER ACT FISH & WILDLIFE ISSUES

## 4.1 Introduction

In their Initial Briefs, the Tribal Parties and the Environmental Parties generally argue that the BP-24 rate proposal fails to comply with BPA's statutory duties for fish and wildlife under the Northwest Power Act.[9] Specifically, both the Tribal Parties and Environmental Parties allege that BPA's proposed rates do not adhere to the requirements of Sections 4(h)(11)(A)[10] and 4(h)(10)(A).[11] This section of the ROD addresses these allegations.

## 4.2 Issues

***Issue 4.2.1***
*Whether the proposed BP-24 rates fail to comply with Section 4(h)(11)(A) of the Northwest Power Act.*

**Parties' Positions**

Both the Environmental Parties and the Tribal Parties claim that BPA's rate proposal would violate BPA's statutory duty to provide fish and wildlife equitable treatment under Section 4(h)(11)(A)(i) of the Northwest Power Act. Tribal Parties Br., BP-24-B-YN-01, at 33; Tribal Parties Br. Ex., BP-24-R-YN-01, at 10; Environmental Parties Br., BP-24-B-ID-01, at 4-6 (arguing equitable treatment applies to BPA's rate decisions and has not been adequately demonstrated here); Environmental Parties' Br. Ex., BP-24-R-ID-01, at 2-3. These parties further assert that the equitable treatment duty applies in the context of BPA's fish and wildlife mitigation funding decisions. Tribal Parties Br., BP-24-B-YN-01, at 33 (arguing that inadequate funding for fish and wildlife costs violates equitable treatment); Environmental Parties Br., BP-24-B-ID-01, at 2 (arguing that equitable treatment applies to BPA's funding decisions). These contentions contain the assumed premise that BPA makes fish and wildlife mitigation funding decisions through its ratemaking process. Tribal Parties Br., BP-24-B-YN-01, at 33 (alleging decision on fish and wildlife funding level is made in BPA's BP-24 rate case).

In addition, the Environmental Parties claim that BPA must take into account, to the fullest extent practicable, the NPCC[12] fish and wildlife program through its rate proposal, and that

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[9] The Tribal Parties cast the alleged statutory non-compliance as the proposed rates being "inconsistent" with the certain provisions of the Northwest Power Act, *see generally* Tribal Parties Br., BP-24-B-YN-01 at 33–51 (Issue #2), while the Environmental Parties cite several provisions of Section 4(h) of the Act which they contend apply to the rate proposal and that the pending decision either cannot or has not fulfilled with the rates as proposed, *see generally* Environmental Parties Br., BP-24-B-ID-01, at Issues #1, 2 and 3; *see id.* at 1 ("[T]he proposal violates the Act in several ways."). In both cases, the parties' bottom-line allegation is clear: the BP-24 rate proposal does not comply with legal requirements in 16 U.S.C. § 839b(h) – Section 4(h) of the Northwest Power Act.

[10] 16 U.S.C. § 839b(h)(11)(A).

[11] *Id.* § 839b(h)(10)(A).

[12] The Northwest Power Act established the Northwest Power and Conservation Council ("the Council"), *see*

BPA is obliged to show how it has done so as part of its rate decision. Environmental Parties Br., BP-24-B-ID-01, at 6-9. The Environmental Parties suggest that BPA cannot make this showing because, in the Environmental Parties' opinion, "the BP-24 rate proposal appears to be in tensions with, if not outright contrary to, certain portions of the Council's program." *Id.* at 7; *see also* Environmental Parties Br. Ex., BP-24-R-ID-01, at 3-4.

**BPA Staff's Position**

The question of whether BPA's proposed rates comply with relevant statutory provisions is a legal issue. *See* Fisher *et al.*, BP-24-E-BPA-10, at 3-4.

**Evaluation of Positions**

## A. Statutory Analysis of Section 4(h)(11)(A)

Under Section 4(h)(11)(A) of the Northwest Power Act, BPA has two distinct responsibilities for fish and wildlife. The first is BPA's duty to protect, mitigate, and enhance fish and wildlife in a manner that provides them with "equitable treatment" with other purposes for which the facilities of the Federal Columbia River System are operated and managed. *See* 16 U.S.C. § 839b(h)(11)(A)(i). The second is BPA's duty to take into account, to the fullest extent practicable, the Council's Program at each relevant stage of decision making. *See id.* § 839b(h)(11)(A)(ii).

### *1. BPA's Statutory Analysis*

BPA provided a detailed analysis and interpretation of Section 4(h)(11)(A) in its BP-22 Record of Decision. *See* Administrator's Final Record of Decision, BP-22-A-02, at Chapter 4 (BP-22 ROD). That analysis spoke to the scope and applicability of the provision, and rebutted the Environmental Parties' contention that Section 4(h)(11)(A) applies to BPA's expenditure of funds and its rate decisions. Because these matters have now been briefed extensively—both in the BP-22 proceedings and in subsequent Ninth Circuit filings—BPA will not repeat its analysis and arguments in full here, but incorporates them by reference. BPA continues to adhere to the interpretation it explained in the BP-22 ROD[13] and subsequent legal briefs,[14] which is briefly summarized here for context:

- As a matter of statutory interpretation, BPA's duties under Section 4(h)(11)(A) pertain only to its management and operation of Federal dam and reservoir

16 U.S.C. § 839b(a), which the Ninth Circuit has held is an interstate compact agency and policy-making body. *Seattle Master Builder Ass'n v. Pac. Nw. Elec. Power and Conservation Planning Council*, 786 F.2d 1359, 1363, (9th Cir. 1986); *see also id.* at 1365 (describing the Council as a policy-making entity). The Council has two primary policy-making roles under the statute. The first is to develop a program to protect, mitigate, and enhance fish and wildlife on the Columbia River and its tributaries. *See generally* 16 U.S.C. § 839b(h)(1)–(9). The second is to develop a regional power plan. *See id.* § 839b(d)–(e). The Ninth Circuit has explained that the Council's authority is limited, and that it may "guide but not command" the Federal agencies through its policy documents—the program and the plan. *See NRIC 1994*; *see also NEDC v. BPA*, 117 F.3d 1520, 1532 (1997) (recognizing that "the Council's Program is not binding on BPA").

[13] *See* Order on Incorporation of BP-22 Record and Preservation of Issues, BP-24-HOO-09.

[14] *See* BP-24-E-BPA-10-AT02 (BPA Brief in 9th Circuit Case No. 22-70122).

projects, not to its separate fish and wildlife mitigation efforts undertaken with the expenditure of funds, which is governed by Section 4(h)(10)(A), or to BPA's ratemaking. *See generally* BP-22 ROD, BP-22-A-02, at 17-30.

- Because they do not prescribe, alter, select, or otherwise affect system operations or management, BPA's rate processes are not implicated by Section 4(h)(11)(A). BPA's ratemaking is governed by the prescriptive processes of Section 7 of the Northwest Power Act, which makes no express reference to Section 4(h) fish and wildlife duties and does not incorporate their substance into BPA's ratemaking requirements.
- In addition, BPA rate decisions do not "significantly affect" fish and wildlife because they do not determine which fish and wildlife mitigation projects will be undertaken, whether to undertake such projects, or the project-level or programmatic funding for the projects; nor do they decide or affect system operations. *See* BP-22 ROD, BP-22-A-02, at Issue 4.2.2; *see also* Fisher *et al.*, BP-24-E-BPA-10, at 21-24; *Golden NW*, 501 F.3d 1037, 1053 (9th Cir. 2007) (acknowledging that the BPA rate case is not the forum for making fish and wildlife mitigation decisions). Therefore, BPA's rates do not meet the Ninth Circuit's test for when BPA's duty to demonstrate compliance with equitable treatment arises – that is, when BPA makes an operations/management decision that "significantly impacts" fish and wildlife. *See Confederated Tribes of Umatilla Indian Reservation v. BPA*, 342 F.3d 924, 931 (9th Cir. 2003) ("*Confederated Tribes*"); BP-22 ROD, BP-22-A-02, at Issue 4.2.2.

In short, the Tribal Parties' and Environmental Parties' claims that BPA, through its BP-24 rate proposal, has failed to comply with the duties of Section 4(h)(11)(A) are without merit because that provision of the statute does not apply to BPA's rates or to mitigation funding matters.

*2. The Tribal Parties' Alternative Statutory Analysis*

In their Initial Brief, the Tribal Parties posit a novel alternative analysis of the Section 4(h)(11)(A) that differs from the Environmental Parties' but that they claim leads, again, to both their and the Environmental Parties preferred result: namely, that "BPA is required to afford equitable treatment to fish and wildlife across the totality of its funding decisions." Tribal Parties Br., BP-24-B-YN-01, at 35; *see also* Environmental Parties Br., BP-24-B-ID-01, at 2 (asserting Section 4(h)(11) applies to BPA's rates and funding decisions).

The Tribal Parties' interpretation grounds itself in a highly selective quotation of the relevant statutory provision, omitting and reordering parts of the statutory language. For clarity, the relevant portion of Section 4(h)(11)(A), unedited, is as follows:

> The Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall
>
> (i) exercise such responsibilities consistent with the purposes of this chapter and other applicable laws, to adequately protect, mitigate, and

> enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated . . . .

16 U.S.C. § 839b(h)(11)(A).

In contrast, citing to Section 4(h)(11)(A)(i), the Tribal Parties state:

> The statute mandates that BPA provide "equitable treatment for fish and wildlife . . ." as it carries out its responsibility to "protect, mitigate, and enhance fish and wildlife . . . affected by [hydroelectric] projects or facilities . . . ."

Tribal Parties Br., BP-24-B-YN-01, at 34 (all modifications – ellipsis, quotation marks, and brackets – in original). Examining the Tribal Parties' citation alongside the full statutory language shows how the Tribal Parties' reading genericizes the "responsibility" to which the provision applies, broadening it to BPA's general duty to protect, mitigate, and enhance fish and wildlife rather than to "such responsibilities" – that is, managing or operating the system – that the statutory text plainly identifies.

The Tribal Parties attempt to support this expansion with a "plain language" reading of the statute. Their theory is that the phrase "such responsibilities" in Section 4(h)(11)(A) – *i.e.*, those responsibilities that are subject to equitable treatment – "should be interpreted as referencing the immediately preceding list of fish and wildlife-related responsibilities set forth in Section 4(h)(10)," thereby capturing BPA's mitigation funding duty under Section 4(h)(10)(A). Tribal Parties Br., BP-24-B-YN-01, at 36. This reading is incorrect for two reasons.

First, the Tribal Parties' reading ignores the fact that the text of Section 4(h)(11)(A)(i) *expressly specifies* the responsibilities to which it refers; and it does so twice. The first, in the introductory language of 4(h)(11)(A), creates a direct textual link to the specific responsibilities in play with the phrase "responsible for managing, operating, or regulating." Next, the language of 4(h)(11)(A)(i) reiterates the connection of "such responsibilities" to the verbs "manage" and "operate" when it discusses the "other purposes for which such system and [hydroelectric] facilities are *managed and operated*." 16 U.S.C. § 839b(h)(11)(A)(i) (emphasis added). The Tribal Parties offer no textual (or other) basis to assume that the phrase "such responsibilities" should be read to refer back to a separate section of the statute rather than to the responsibilities that are expressly identified and textually linked in the same statutory sentence. And relevant canons of statutory construction confirm that the Tribal Parties' reading is incorrect.[15]

[15] The nearest-reasonable-referent canon of statutory construction holds "that a 'postpositive modifier normally applies only to the nearest-reasonable-referent.'" *Prison Legal News v. Ryan*, 39 F.4th 1121, 1131 (9th Cir. 2022) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012)). In addition, the rule of the last antecedent directs that a limiting clause or phrase should be read as modifying only the noun or phrase that it immediately precedes or that it immediately follows. *See United States v. Paulson*, 68 F.4th 528, 537 (9th Cir. 2023).

Second, Section 4(h)(10)—which occupies three full pages of the United States Code—creates numerous obligations for numerous entities in addition to BPA, including the Council, the Independent Scientific Review Panel, certain Scientific Peer Review Groups, and the National Academy of Sciences. *See generally* 16 U.S.C. § 839b(h)(10)(A)–(D). Notably, none of these additional entities have responsibilities to manage, operate, or regulate hydroelectric projects of the Columbia River. *See Nw. Resource Info Center v. Nw. Power Planning Council,* 35 F.3d 1371, 1379 nn.14-15 (9th Cir. 1994) (*NRIC 1994*) (identifying the "four federal water managers" affecting Columbia River flows as Corps, Reclamation, BPA and FERC). Moreover, the Federal entities that *do* have such responsibilities (Corps, Reclamation, FERC) are nowhere to be found in the duties enumerated in Section 4(h)(10).

For these reasons, the Tribal Parties' alternative reasoning is incorrect. The phrase "such responsibilities" in Section 4(h)(11)(A)(i) is interpreted much more simply and accurately as referring to the responsibilities that are expressly identified in the same statutory sentence, and that Congress explicitly designated as responsibilities: that is, "responsible for managing, operating, or regulating." This is precisely how BPA interpreted the provision in its BP-22 ROD. BP-22 ROD, BP-22-A-02, at Issue 4.2.1.

*Brief on Exceptions*

In their Brief on Exceptions, the Tribal Parties note that "BPA and the Tribal Parties have a fundamental legal disagreement" about the requirements of the Northwest Power Act's equitable treatment provision. Tribal Parties Br. Ex., BP-24-R-YN-01, at 10. In support of their view, the Tribal Parties reincorporate the various arguments already made on this issue—their own from this proceeding, as well as the Environmental Parties' from BP-22 and subsequent briefing at the Ninth Circuit challenging the same. *Id.*

The Tribal Parties then offer a lengthy discussion of statutory purpose and context, arguing, in essence, that an "equitable treatment" theme is so readily inferred throughout the Northwest Power Act that it must be understood as applying implicitly to "all of the provisions" of the Act. *Id.* at 14; *see generally id.* at 11–15; *see, e.g.*, *id.* at 12 (describing equitable treatment as a "foundational concept" of the NWPA "reflected in" its purposes); *id.* (describing equitable treatment as an "underlying policy" that is "reflected" across a range of the statute); *id.* at 13 (inferring the "principle of equitable treatment"); *id.* at 14 ("foundational principle"); *id.* at 15 ("fundamental tenet").

The Tribal Parties' discussion does not present any new legal theories or arguments regarding this issue. At most, it is a variation on arguments that the Environmental Parties advanced in BP-22, and in the litigation that followed, regarding the context and purposes of the Northwest Power Act. *See, e.g.,* Environmental Parties Br. Ex, BP-22-R-ID-01, at 3-12; Environmental Parties' Opening Brief, BP-24-E-ID-01-AT25, at 27–34. The Tribal Parties' ranging statutory citations—emphasizing most anywhere that both fish and power interests are discussed in reference to each other—do nothing to deal with the specific statutory analysis of the equitable treatment provision that BPA reasoned and endorsed in BP-22. *See* BP-22 ROD, BP-22-A-02, at 21-30; BPA Brief in 9th Circuit Case No. 22-70122, BP-24-E-BPA-10-AT02, at 20-30, 37-43; *see also Kaiser Aluminum and Chemical Corp. v.*

*Bonneville Power Admin.*, 261 F.3d 843, 845 (9th Cir. 2001) (emphasizing the "variety of detailed and potentially conflicting statutory directives" that apply to BPA) (citing *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1164 (9th Cir. 1997)).

And as the Tribal Parties seem to recognize, what's notably missing from their broad citations here is any actual mention of "equitable treatment." *See* Tribal Parties Br. Ex., BP-24-R-YN-01, at 14. In short, the fact that they infer an equitable theme from these provisions is insufficient to overcome the specific statutory analysis BPA has explained and endorsed as to the correct interpretation of § 4(h)(11)(A)(i)—the equitable treatment provision—itself.[16] *See* BP-22 ROD, BP-22-A-02, at 18-21; BPA Brief in 9th Circuit Case No. 22-70122, BP-24-E-BPA-10-AT02, at 20-30. Moreover, BPA has explained that its interpretation of § 4(h)(11)(A) is in harmony with the context and purposes of the statute. *See* BP-22 ROD, BP-22-A-02, at 19-20, 25-26; BPA Brief in 9th Circuit Case No. 22-70122, BP-24-E-BPA-10-AT02, at 25-30, 37-43.[17] Thus, the Tribal Parties' argument here is unpersuasive.

*3. The Environmental Parties' "Inconsistency" Theory*

The Environmental Parties incorporate an argument that they advanced in their Opening Brief to the Ninth Circuit in their challenge to the BP-22 rate decision in *Idaho Conservation League v. Bonneville Power Admin.,* Case No. 22-70122 (9th Cir. 2022): that BPA has been inconsistent in its interpretation of the equitable treatment provision, as indicated by excerpts of select BPA documents curated by the Environmental Parties.[18]

As BPA noted in its Answering Brief at the Ninth Circuit, the proffered statements (from decades past) do not establish an inconsistent interpretation, if indeed any of them could be considered "interpretations" at all. BPA has explained that they are not. First, the cited documents do not include any legal analysis or interpretation of the statutory provision. Second, the excerpted statements were not the product of an administrative proceeding in which the meaning of the statutory provision was at issue or contested, unlike the interpretation discussed in BP-22. Third, the cited documents do not endorse a particular reading of the statute, or explain the agencies' reasoning for arriving at that interpretation,

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[16] The Tribal Parties' reliance on similarly general statements in legislative history is likewise unconvincing, offering no insight on the issue in dispute: whether BPA's fish and wildlife mitigation funding under § 4(h)(10)(A) is subject to the equitable treatment provision of § 4(h)(11)(A). *See* Tribal Parties Br. Ex., BP-24-R-YN-01, at 10. If anything, their legislative history cuts against their own position and in support of BPA's. *See id.* at 15 (citing Congressional Record – House, Vol. 26 at 27815, which states an expectation that "the *river will be operated* in a manner which produces a more equitable balance between fish and power interests.") (emphasis added).

[17] In addition, that the Tribal Parties' reading of equitable treatment "is both supported by and supports the position advanced by the Environmental Parties . . ." is of no consequence. Tribal Parties Br. Ex., BP-24-R-YN-01, at 15. The BP-22 ROD and BPA's brief to the Ninth Circuit have explained why the Environmental Parties' position is in error.

[18] The Environmental Parties presented this notion in their briefing to the Ninth Circuit solely for the purpose of informing the Court's consideration of the amount of deference that BPA's statutory interpretation is entitled to. They offer no other reason for raising this point in their Initial Brief in the BP-24 rate case.

as the BP-22 decision did. For these reasons, the past "interpretations" that the Environmental Parties claim are inconsistent with BPA's current reading are not interpretations at all. Furthermore, in oral argument before the Ninth Circuit, the Environmental Parties conceded that these prior statements do not present "a case about BPA making a formalized, formal interpretation of the statute and then changing course."[19]

Standing in stark contrast to the Environmental Parties' excerpts, BPA's interpretation of Section 4(h)(11)(A) in BP-22 was thorough and searching, is supported by the merits of its own analysis, and states the agency's definitive position. Even more, BPA's BP-22 interpretation is wholly consistent with the interpretation BPA made when it evaluated the applicability of Section 4(h)(11)(A) in a contested rate case following the issuance of the Council's first Fish and Wildlife Program in 1982. In the WP-83 rate case ROD, BPA addressed legal arguments about the scope of Section 4(h)(11)(A), noting:

> By its own terms, Section 4(h)(11)(A) applies to the responsibilities of BPA and other federal agencies in the management and operation of the hydroelectric system on the Columbia River and its tributaries. Section 4(h)(10)(A) . . . not Section 4(h)(11)(A), defines BPA's responsibilities with respect to use of the BPA fund to protect, mitigate, and enhance fish and wildlife affected by the development and operation of hydroelectric facilities on the Columbia River and its tributaries.

WP-83 ROD, BP-24-E-BPA-10-AT21, at 8. Almost 40 years later, BPA reached the same conclusion in the BP-22 rate case ROD. *See* BP-22 ROD, BP-22-A-02, at Issue 4.2.1. BPA has not been inconsistent.

In any case, even assuming *arguendo* that the documents *suggest* an inconsistency, they certainly do not establish one. At worst, the cited statements reflect nothing more than occasional imprecise wording in a few stray remarks, which is not altogether unexpected given their broader contexts. As BPA has explained, because the Northwest Power Act envisions two distinct means of mitigating fish and wildlife—equitable treatment through system operations and mitigation funding—it is unremarkable that they are often discussed in tandem, particularly given that the successes of one may often complement the achievements of the other. This is essentially what BPA's past statements acknowledged: that mitigation funding can "support" (not *provide*) equitable treatment.

Citing a 2009 ROD for a mitigation funding agreement, the Environmental Parties suggest that BPA has interpreted equitable treatment "in the context of funding [as] providing 'adequate financial . . . certainty for fish.'" *See* Environmental Parties Br., BP-24-B-ID-01, at 6, n.23. This suggestion confuses BPA's words and omits relevant text and context. What BPA said was: "Overall, the [funding agreement] *in combination with* [a biological opinion addressing system operations] and the 2008 Columbia Basin Fish Accords provides a higher level of financial *and operational* certainty for fish, further solidifying BPA's efforts

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[19] *See* https://www.ca9.uscourts.gov/media/video/?20230608/22-70122/ at 9:40 ("Of course there's the past inconsistency, which I will grant that those past discussions were not in sort of a formalized . . . this isn't a case about BPA making a formalized, formal interpretation of the statute and then changing course.").

to manage the FCRPS equitably for both fish and power." Administrator's Record of Decision, Washington-Action Agency Estuary Habitat Memorandum of Agreement, BP-24-E-ID-01-AT27, at 21 (emphasis added). This discussion, blending mitigation funding and system operations topics, corroborates what BPA explained above: that its two distinct means of aiding fish and wildlife are often logically discussed together because they both work towards the same end and the efforts in one can support the efficacy of the other. *See also id.* at 20 (stating that the funding agreement "support"—but again, not "provide"—equitable treatment). The Environmental Parties' other examples are no more compelling.

In their Brief on Exceptions, the Environmental Parties state they are "unconvinc[ed]" by BPA's explanation. Environmental Parties Br. Ex., BP-24-R-ID-01, at 2. That may be. But BPA has given its explanation of the statements the Environmental Parties are concerned with and sees no reason to engage in further debate of their meaning. Notwithstanding such statements, this discussion should resolve any remaining misunderstanding the Environmental Parties or others may have about how BPA interprets Section 4(h)(11)(A) of the Northwest Power Act and its reasoning for that interpretation.[20]

## B. Equitable Treatment Arguments Specific to BP-24 (Section 4(h)(11)(A)(i))[21]

### *1. The Environmental Parties' Equitable Treatment Arguments in BP-24*

The Environmental Parties claim that BPA's failure to provide fish and wildlife equitable treatment is evident in the "modest" 8.7 percent increase that BPA has projected for its fish and wildlife spending during the BP-24 rate period and the "decision to pre-commit to using the first $129 million of any RDC amount to lower rates rather than retaining discretion to use that money for fish." *See* Environmental Parties Br., BP-24-B-ID-01, at 5-6.

Although BPA disagrees that its fish and wildlife mitigation funding is subject to the equitable treatment provision, BPA notes that the so-called "modest" increase BPA has projected for fish and wildlife mitigation is the second largest increase of all programs funded by BPA's power rates. *See* Fisher *et al.*, BP-24-E-BPA-10, at 33. Indeed, the Environmental Parties ignore how the fish and wildlife projections compare to other projections for the BP-24 rate period, and instead resort to comparisons with past fish and

[20] The Environmental Parties first presented their inconsistency argument in their brief to the Ninth Circuit, and solely for the purpose of informing the Court's consideration of the amount of deference that BPA's statutory interpretation is entitled to. Here, they offer no other reason for raising this point in the BP-24 rate case. If they do so to suggest that BPA should be bound by its supposed earlier interpretation—the Environmental Parties' preferred reading—BPA again declines to depart from the interpretation it endorsed in the BP-22 decision, which is independently substantiated by the analysis BPA provided there and certainly outweighs the interpretation that the Environmental Parties strain themselves to find in BPA's past. Nor can the Environmental Parties credibly argue that the alleged inconsistency is "unexplained," given the explanation BPA has provided here.

[21] BPA addresses these arguments to provide for appropriate consideration of the issues raised before the agency; however, BPA does not concede that equitable treatment must be addressed or demonstrated in BPA ratemaking. *See* BP-22 ROD, BP-22-A-02, at Chapter 4. BPA's discussion of the topic here is at its discretion and is not a precedent for future rate cases. BPA's position, that the duties of Section 4(h)(11)(A) are not implicated by this proceeding, remains as stated. *Id.*

wildlife cost levels. They insist that BPA "must explain how, despite its history of flat funding, the backlog of mitigation projects, and the declining state of salmon, the BP-24 rate proposal . . . provides 'equitable treatment' for fish and wildlife." Environmental Parties Br., BP-24-B-ID-01, at 5. The Environmental Parties fail, however, to offer any explanation of how these retrospective points of comparison are relevant to a statutory provision that balances fish and wildlife with "the other *purposes* for which [the hydroelectric] system and facilities are operated and managed." 16 U.S.C. § 839b(h)(11)(A)(i) (emphasis added).

The Environmental Parties also argue it is incompatible with equitable treatment for BPA "to pre-commit to using the first $129 million of any RDC amount to lower rates rather than retaining discretion to use that money for fish." Environmental Parties Br., BP-24-B-ID-01, at 6. The Environmental Parties fundamentally misunderstand that component of the rate proposal and how it relates to a corresponding increase of $129 million in the revenue requirement. BPA's BP-24 power rates hold the Power rate flat for the BP-24 rate period. To do that, though, and as a function of the Settlement, BPA needed to add an additional $129 million per year of Planned Net Revenues for Risk to the Power revenue requirement. Fredrickson *et al.¸* BP-24-E-BPA-09, at 11. Without this adjustment, Power rates would have *declined* over the BP-24 rate period. The additional PNRR in Power rates is not associated with any forecast cost or risk, but rather generates revenue to increase financial reserves for risk. *Id.* Normally, PNRR is added when necessary to comply with BPA's risk mitigation policy: the TPP policy. Fisher *et al.*, BP-24-E-BPA-10, at 54. Here, however, PNRR was not required by the TPP standard; it is over and above. *Id.* at 61. The financial reserves generated by this PNRR, which BPA will collect from its Power customers, will be available for *any* category of costs that may arise, including fish and wildlife. *Id.* 3. But in the BP-24 Settlement, BPA agreed to return to customers any unused PNRR as a rate credit through the Power RDC. Fredrickson *et al*., BP-24-E-BPA-09, at 7. This was a sensible tradeoff because, absent BPA's customers agreeing to the inclusion of PNRR in the Power rate, the proposed Power rates would have been lower and this source of risk mitigation would not have been available to BPA during BP-24, including for fish and wildlife costs. Fish and wildlife are treated no differently than any other cost in terms of eligibility to draw on the PNRR-generated funds if the need arises. Thus, the Environmental Parties are incorrect in claiming that this feature of the BP-24 Settlement undermines "financial certainty" for fish and wildlife or is incompatible with the equitable treatment.

Finally, the Environmental Parties suggest there is a heightened need for BPA to demonstrate equitable treatment in fish mitigation funding, given certain factual circumstances and developments—namely, the rate of inflation in recent years and status of the certain anadromous fish species. *See* Environmental Parties Br., BP-24-B-ID-01, at 2, 4. These circumstantial observations are irrelevant to how the statute operates. Either the equitable treatment provision applies in this context or it does not. BPA has explained its

reasoning for why it does not, and the factual circumstances that the Environmental Parties highlight are beside the point.[22]

### *2. The Tribal Parties' Equitable Treatment Arguments in BP-24*

Although the Tribal Parties contend that "BPA did not afford equitable treatment to fish and wildlife costs in its BP-24 Rates Proposal, rendering it inconsistent with the NWPA," BP-34-B-YN-01 at 38, they never quite explain how or why BPA's BP-24 Power Rate proposal fails to meet their interpretation of Section 4(h)(11)(A)(i). *See id.* at 6; *see also id.* at 33 (where Tribal Parties note BPA made an unspecified "decision not to adequately fund fish and wildlife costs"—as the minor premise establishing BPA's violation of equitable treatment). Indeed, beyond making general statements about their legal premise (that equitable treatment applies to BPA's funding of fish and wildlife mitigation), they have not offered any evidence that BPA failed to satisfy it.

The closest the Tribal Parties come is an allegation that BPA's fish and wildlife cost projection—an 8.7 percent increase—is inadequate when compared to past spending levels. *See* Tribal Parties Br., BP-24-B-YN-01, at 33. The Tribal Parties attempt to transform BP-24's projected 8.7 percent cost increase into a 20 percent decrease by applying an inflation calculation to 2016 funding levels. *Id.*; *see also* Tribal Parties Br. Ex., BP-24-R-YN-01, at 18–19. But, hypothetically, even if these cost matters were relevant to the equitable treatment provision, the Tribal Parties' narrow focus excludes a much broader (and presumably relevant) context that shows how BPA's fish and wildlife costs relate to the agency overall. The Tribal Parties' view ignores, for example, that:

- BPA's cost projection for fish and wildlife mitigation spending during BP-24 is the second largest projected increase of all programs funded by BPA's power rates, s*ee* Fisher *et al.*, BP-24-E-BPA-10, at 33;
- BPA's projected fish and wildlife mitigation spending is the third largest line-item cost in BPA's entire revenue requirement (the total amount of money BPA has projected it needs to recover to function), Power Revenue Requirement Documentation, BP-24-E-BPA-02A, at 22-24;

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[22] In their Brief on Exceptions, the Environmental Parties fault BPA's "apparent attempt to demonstrate equitable treatment" because it does not articulate "any coherent theory of what 'equitable treatment' means in the context of BPA's funding obligations." Environmental Parties Br. Ex., BP-24-R-ID-01, at 2–3. But BPA has expressly emphasized that its equitable treatment discussion in this section "does not concede that equitable treatment must be addressed or demonstrated in BPA ratemaking," *see supra* note 21 , and thus there is no reason that BPA would specify a theory or a standard or a test for equitable treatment in a context where the agency maintains it does not apply. Moreover, BPA's equitable treatment argument does not, as the Environmental Parties claim, "boil[] down to 'we're spending *a lot* of money on fish and wildlife.'" Environmental Parties Br. Ex., BP-24-R-ID-01, at 3. Rather, BPA's discussion in this section has simply drawn attention to certain context and facts that would likely be relevant to a court's review. *See Confederated Tribes*, 342 F.3d at 931–32 (explaining that BPA's decisions triggering equitable treatment must "allow[] for meaningful review" but that the statute does not require any specific mechanism to demonstrate compliance); *see also id.* at 932–33 (accepting a bullet list of relevant factors as allowing for meaningful review and demonstrating equitable treatment).

- BPA's cost management practices have been applied across all of the agency's programs, *see* Fisher *et al.*, BP-24-E-BPA-10, at 42-43, which has resulted in comparable reductions to other agency programs, most of which are not projected to see a nearly 9 percent increase in projected costs during the BP-24 rate period, as the fish and wildlife costs are;
- BPA's Jan. 2023 decision on its Reserves Distribution Clause, which informed settlement discussions that led to the BP-24 rate proposal, repurposed financial reserves of $50 million specifically dedicated to the fish and wildlife mitigation program, which was the *only* BPA program to receive additional funding from that decision, *see* 2022 RDC Decision Letter, BP-24-E-YN-91, at 42;
- BPA's Fish and Wildlife Program has a demonstrable history of failing to spend the full amount of funds available to it, Fisher *et al.*, BP-24-E-BPA-10, at 29, 35, 36; *see also id.* at 34, 37-39 (giving other reasons that strict adherence to inflation and uniform project budget increases are not warranted);
- Additional fish and wildlife implementation funding (above the levels projected for BP-24) is available under existing contractual commitments, *see id.* at 36, 37;
- BPA's Fish and Wildlife Program develops annual mitigation budgets that *exceed* rate case projections as a way to facilitate a higher mitigation spending rate, *id.* at 31.

The Tribal Parties' accusation also illustrates a further defect in the theory that BPA's rates – a cost recovery tool – must provide equitable treatment to fish and wildlife *costs*. *See* Tribal Parties Br., BP-24-B-YN-01, at 38. BPA's rates are agnostic to the underlying costs that they recover, whether for fish and wildlife or otherwise; all of BPA's costs are objective estimates that its rate proceedings simply take as a given and determine how to solve for. Thus, the notion that BPA should apply equitable balancing considerations to what is supposed to be an objective cost estimate is misplaced.

The Tribal Parties, like the Environmental Parties, present their concerns of inequitable fish and wildlife funding in terms comparison to past years. *See e.g.,* Tribal Parties Br., BP-24-B-YN-01, at 33. And like the Environmental Parties' argument, this one suffers from the same defect. The equitable treatment standard, by its express language, applies in relation to the "other purposes for which the [hydroelectric] system and facilities are managed and operated." 16 U.S.C. § 839b(h)(11)(A)(i). There is no textual indication that a comparison of funding across years is relevant, if funding were even relevant to the inquiry at all.

What's more, even a hypothetical approach that would have the equitable treatment inquiry hinge on a comparison between fish and wildlife costs and other agency costs would be unsupported by the text of the statutory provision which, again, focuses on a balancing across system *purposes*, not system costs. Such an approach would see fish and wildlife cost forecasts determined in relation to other cost levels, rather than substantial evidence of a program's actual needs. It would see fish and wildlife cost forecasts "equitably" slashed if other programs saw cost decreases, despite the actual needs of the fish and wildlife program, or vice versa. This is inconsistent with BPA's responsibility to

forecast costs based on substantial evidence. Further, once each "purpose" is untethered from an independent cost forecast, it is not clear which purpose's cost forecast should be the point of comparison for an "equitable" analysis. Arguably any level of cost forecast would be appropriate, regardless of actual needs, as long as the relative level as between fish and wildlife and other purposes was "equitable." This once again illustrates a fundamental flaw in how Tribal Parties and Environmental Parties would have the equitable treatment provision apply.

Finally, under an equitable treatment theory that compares fish and wildlife funding against its historic levels, BPA's compliance with the equitable treatment duty would presumably depend on providing an ever-increasing, irreducible amount of mitigation funding even if, for example, sound business principles and actual expenditure trends would counsel against the need for additional increases. *See, e.g.*, Section 3.2.2.1 (explaining why strict adherence to inflation and uniform project budget increases can be unwarranted as a business practice). This result would not make sense considering Congress' instruction for BPA to set the lowest possible rates consistent with sound business principles, and given the considerable discretion it affords to the Administrator in doing so while balancing numerous conflicting interests. *See Pub. Power Council v. Bonneville Power Admin.*, 442 F.3d 1204, 1209 (9th Cir. 2006) (noting that "Congress 'granted BPA an unusually expansive mandate to operate with a business-oriented philosophy.'") (Internal citation omitted); *see also Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1164 (9th Cir. 1997) (noting that BPA's enabling statutes "subject BPA to a variety of detailed and potentially conflicting statutory directives.")

### C. Taking Council program into Account to Fullest Extent Practicable (Section 4(h)(11)(A)(ii))

The Environmental Parties argue that BPA's IPR process and this BP-24 rate proceeding are both "relevant stages" at which BPA is obligated to take the Council's Program into account to the fullest extent practicable under Section 4(h)(11)(A)(ii). *See* Environmental Parties Br., BP-24-B-ID-01, at 7. As a threshold matter, discussed above, Section 4(h)(11)(A), including romanette (ii), does not apply in the context of BPA's funding, so the Environmental Parties attempt to impose it on financial processes is misplaced.

But beyond that, the Environmental Parties' theory here appears to be premised on their view that "spending decisions [are] made during IPR." *Id.* at 5. This is simply not the case. As BPA staff has explained, the IPR is its "cost projection process"—a "discretionary process where BPA takes stakeholder input and feedback on the projected costs of various programs." Fisher *et al.*, BP-24-E-BPA-10, at 30; *see also* BP-22 ROD, BP-22-A-02, at Issue 4.2.4. Staff further explained that cost projections from the IPR do *not* establish the level of funding for BPA's fish and wildlife program, and that "[t]his is an important point to emphasize." Fisher *et al.*, BP-24-E-BPA-10, at 22; *see also id.* ("The cost projections from IPR are just that: projections."). Staff continued:

> The rate case projections we use are for cost-recovery purposes when setting BPA's rates, but do not establish actual funding for the fish and wildlife

> program in general or any program specifically. Stated another way, the fact that we include a particular cost item in our cost projection does not mean that particular program or project will definitively be funded during the rate period. . . . Similarly, if we don't include a particular program or activity in our cost projection in rates, it does not mean BPA is precluded from funding that program during the rate period.

*Id.* at 22.[23]

Distinct from fish and wildlife IPR cost forecasts, BPA's fish and wildlife mitigation budgets are developed through a separate process on its own track. *See id.* ("There are multiple steps that occur *outside of* IPR and the rate case process that ultimately determine when and whether a fish and wildlife mitigation action is actually funded. This includes things like prioritizing projects, contract negotiations, the awarding of contracts, acquiring materials, working with contractors, and others. BPA has a website (www.cbfish.org) dedicated to managing the hundreds of contracts and contractors that implement these programs."). In contrast to the two-year IPR cost projections, the fish and wildlife budgets are developed annually by

> summing all the [fish and wildlife project] planning budgets together [which] results in an internal fish and wildlife program budget that is, typically, larger than the cost projections included in the rate case. This internal budget is what BPA uses to fund its projects, award contracts, and pay for mitigation activities.

*Id.* at 30; *see also id.* at 28 ("Individual project-level funding is determined through the BPA Fish and Wildlife Program's start-of-year budgeting process and subsequent contracting, or through implementation agreements that establish project funding multiple years in advance."); 16 U.S.C. § 839b(h)(10)(D)(iv) (discussing projects "funded through BPA's *annual* fish and wildlife budget) (emphasis added).

This annual budget development approach "allows [BPA] to make necessary adjustments to individual project levels, consistent with the recommendations and realities affecting the projects in real-time." Fisher *et al.*, BP-24-E-BPA-10, at 31. In addition, as Staff explained, actual fish and wildlife spending is affected by numerous factors. *See id.* at 29-30.

What all of this testimony shows is that, contrary to the Environmental Parties' view, the IPR does not—indeed *cannot*—make fish and wildlife spending decisions. *See* BP-22 ROD, BP-22-A-02, at 56-64; *see also* Fisher *et al.*, BP-24-E-BPA-10, at 28. Those occur through an entirely separate annual budgeting process and subsequent implementation and contracting actions. *Id.* The upshot here is that the Environmental Parties' theory about

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[23] BPA staff rebutted the Environmental Parties' charge that BPA's separation of its costs processes from its rate case is "artificial," explaining that Environmental Parties' fixation on fragments of a 1982 comment document—describing an initial position that BPA later repudiated—is misplaced. *See* Fisher *et al.*, BP-24-E-BPA-10, at 23–24.

IPR, used in the rate case, being a "relevant stage of decision-making" for fish and wildlife mitigation funding is, simply put, factually untrue.

Furthermore, neither the IPR nor the rate case prescribes, selects, or alters the management and operation of the hydropower system; decisions on such matters occur in entirely different processes, such as the Columbia River System Operations EIS process. Those decisions are taken, unaltered, as a given in ratemaking. *See* Fisher *et al.*, BP-24-E-BPA-10, at 50–53; *see also* BP-22 ROD, BP-22-A-02, at 19. This includes operations that benefit or affect fish and wildlife. Fisher *et al.*, BP-24-E-BPA-10, at 51. Therefore, neither the rate case nor the IPR is a "relevant stage of decision-making" because it does not make any relevant decisions within the meaning of Section 4(h)(11)(A)(ii).

Nonetheless, the Environmental Parties allege two specific examples of BPA's failure to take the program into account to the fullest extent practicable. First, the Environmental Parties complain that the BP-24 rate decision is "in tension with, if not outright contrary to" a Council program provision calling for BPA to increase the mitigation that it funds in the portion of the upper Columbia River basin currently blocked to anadromous fish. Environmental Parties Br., BP-24-B-ID-01, at 7-8. Second, they complain BPA's proposed rate decision "appears to ignore . . . the call to 'work with project sponsors to identify when project budgets need to increase to reflect the effects of inflation and preserve substantive work.'" *Id.* at 8.

Insofar as these examples are concerned with BPA's fish and wildlife mitigation funding or budgets, they do not implicate a duty under Section 4(h)(11)(A), as explained above. Similarly, the rate case is not the forum to determine which fish and wildlife mitigation actions to implement. *See Golden NW*, 501 F.3d at 1053. Thus, neither of the Environmental Parties' examples is a matter to address via BPA's rates. Further, as staff explained, BPA is not precluded from undertaking actions that were not specifically forecast prior to BPA's rate case. *See* Fisher *et al.*, BP-24-E-BPA-10, at 39; *see also infra* Chapter 6; BP-22 ROD, BP-22-A-02, at 56-64. So, the Environmental Parties' concern about the BP-24 rate decision being BPA's "last opportunity to comply"[24] is without merit.

Assuming *arguendo* that Section 4(h)(11)(A)(ii) applies to BPA's mitigation funding, BPA has taken steps to address the provisions of the Council's Program that the Environmental Parties cite, contrary to Environmental Parties' assertions. *See* Fisher *et al.*, BP-24-E-BPA-10, at 40-41 (describing BPA's response to the Council program provision regarding increased mitigation in the upper Columbia River region; *id.* at 36 (describing how BPA works to tailor individual project budgets based on unique needs and circumstances).

In their Brief on Exceptions, the Environmental Parties criticize BPA's points in this prior paragraph, claiming that they ignore statements by the Spokane Tribe, the Coeur d'Alene Tribe, and others regarding their need for more money. *See* Environmental Parties Br. Ex., BP-24-R-ID-01, at 3–4. To the contrary, BPA responded to those statements when they

[24] *But cf. NEDC v. BPA*, 117 F.3d 1520, 1532 (9th Cir. 1997) (recognizing that "the Council's Program is not binding on BPA").

arose in other processes, and likewise elsewhere explained why an entity's assertion of funding needs does not translate directly into BPA funding duties. *See, e.g.*, *infra* note 41; 2022 RDC Decision Letter, BP-24-E-YN-91 at 31–32; *see generally* IPR Closeout, app. A, BP-24-E-ID-01-AT24. Moreover, the Environmental Parties' conclusion here—that such statements "evince a *systemic* underfunding problem that should prompt a reevaluation of *total* fish and wildlife spending levels during this rate case," Environmental Parties Br. Ex., BP-24-R-ID-01, at 4—is demonstrably refuted by the persistent underspend in BPA's total fish and wildlife budget. *See supra* Issue 3.2.2.1 ("Historical Spending"); Fisher *et al*., BP-24-E-BPA-10, at 35–37; 2022 RDC Decision Letter, BP-24-E-YN-91, at 32 n. 169.

Finally, the Environmental Parties are also incorrect in their contention that BPA's rate proceedings and IPR must "show how it has taken the Council's Program into account." Environmental Parties Br., BP-24-B-ID-01, at 9. They cite no statutory provision—whether under Section 4(h) or Section 7(i)—requiring BPA to make such a showing in a rate proceeding, and the Ninth Circuit has declined to impose procedural requirements for Section 4(h)(11)(A) that the statute does not. *See Confederated Tribes*, 342 F.3d at 931. Furthermore, this argument is even less persuasive considering Congress knew how to incorporate references to Section 4 into BPA ratemaking, but chose not to impose any substantive duties in ratemaking related to the Council's Fish and Wildlife Program at all. Section 7 of the Northwest Power Act contains the provisions relating to BPA's ratemaking. *See* 16 U.S.C. § 839e *et seq.* Nowhere in these pages of code does Congress state BPA must show how it "took into account" the Council's Fish and Wildlife Program.

Indeed, there are two references to the Council in Section 7—one specifically to the Council's Program—and in neither does Congress impose any statutory duties on BPA's ratemaking in relation to section 4(h)(11). The first is in Section 7(h), where Congress directs the Administrator to "adjust power rates" to reflect surcharges recommended under Section 4(f)(1) by the Council's Power Plan for customers that have not adopted model conservation standards. 16 U.S.C. § 839e(h). The second is in Section 7(m)(1), where Congress mentions both the Council's Program and Power Plan in reference to the timing of when BPA can develop annual impact aid payments to communities affected by transmission lines. 16 U.S.C. § 839e(m)(1) ("Beginning the first fiscal year after the plan and program required by section [4(b)] and [4(h)] of this title are finally adopted, the Administrator may . . ."). These references show that Congress knew how to direct BPA ratemaking actions in response to findings and recommendations from the Council's Plan (which includes the fish and wildlife program), *see* Section 7(h), and knew how to expressly refer to Section 4(h), *see* Section 7(m)(1). Because Congress did not choose to reference Section 4(h)(11)(A)(ii) in Section 7 in relation to any ratemaking *duty*, it would be improper for BPA to *assume* such a reference exists and then create wholly new and unintended obligations and showings in ratemaking.

## Decision

*Neither of BPA's duties from Section 4(h)(11)(A) of the Northwest Power Act is applicable to BPA's funding of the fish and wildlife mitigation or to BPA's ratemaking processes. Therefore, BPA's proposed rates would not violate the provisions in this section of the statute.*

### *Issue 4.2.2*

*Whether the proposed BP-24 rates fail to comply with Section 4(h)(10)(A) of the Northwest Power Act.*

## Parties' Positions

The Tribal Parties claim the BP-24 rate proposal is not consistent with the Council's Program, and therefore not compliant with Section 4(h)(10)(A) of the Northwest Power Act. Tribal Parties Br., BP-24-B-YN-01, at 38 ("BPA's proposed BP-24 rates violate the NWPA because they are inconsistent with the NPCC's Fish and Wildlife Program and the purposes of the NWPA."). The Tribal Parties allege two points of inconsistency between BPA's proposed rates and the Council's Program: first, that the proposed rates will not meet the Council's "five-million fish mitigation goal," and second, that the proposed rates would "keep[] fish and wildlife project budgets at or . . . below inflation rates, in contravention of the [Council's] recommendations." *Id.* at 40–41.

The Environmental Parties also allege that BPA's proposed rates are inconsistent with discrete portions of the Council's Program, and that the rates, therefore, "would violate the law." Environmental Parties Br., BP-24-B-ID-01, at 9; *see also id* ("[S]everal features of the BP-24 proposal appear to be inconsistent with the Council's program.").

In their Briefs on Exceptions, both Tribal Parties and the Environmental Parties take issue with BPA's conclusion that compliance with the consistency requirement of Section 4(h)(10)(A) does not depend on the level of BPA's spending. *See* Environmental Parties Br. Ex., BP-24-R-ID-01, at 5–6; Tribal Parties Br. Ex., BP-24-R-YN-01, at 23–24. These parties also contest the adequacy of BPA's approach to funding hatchery asset maintenance. Their main complaint seems to be that BPA does not plan to do everything all at once. *See* Environmental Parties Br. Ex., BP-24-R-ID-01, at 7–8; Tribal Parties Br. Ex., BP-24-R-YN-01, at 19; *see also* Environmental Parties Br., BP-24-B-ID-01, at 10 n. 35.

## BPA Staff's Position

The question of whether BPA's proposed rates comply with relevant statutory provisions is a legal issue. *See* Fisher *et al.*, BP-24-E-BPA-10, at 3-4.

## Evaluation of Positions

Both the Tribal Parties and the Environmental Parties contend that BPA's proposed rates are inconsistent with the Council's fish and wildlife program, and thus fail to comply with BPA's duty, under Section 4(h)(10)(A) of the Northwest Power Act, to "protect, mitigate, and enhance fish and wildlife . . . in a manner consistent with the [Council's power plan and fish and wildlife program], and the purposes of the Act." Tribal Parties Br., BP-24-B-YN-01, at 38; Environmental Parties Br., BP-24-B-ID-01, at 9. This contention reflects a

misapplication of Section 4(h)(10)(A), and an overly exacting reading of the "consistency" duty that it contains. Accordingly, BPA's analysis begins by addressing these problems.

## A. Overview of Section 4(h)(10)(A)

### 1. *The Subject of the Consistency Requirement is BPA's* Mitigation Actions *(Not its Rates)*

Regarding consistency with the Council's Program, Section 4(h)(10)(A) concerns itself with the actions that BPA takes to protect, mitigate, and enhance fish and wildlife. Under the statute, the program consists of "measures"—that is, actions that can be taken. *See* 16 U.S.C. § 839b(h)(6); *see also* 839b(h)(2)(A) (calling for "measures which can be expected to be implemented"). Neither the rate case nor the rates themselves are a means by which BPA undertakes fish and wildlife mitigation actions.

The language of the Northwest Power Act expressly ties the prescribed consistency to the verbs "protect, mitigate, and enhance," but identifies no specific duties for BPA when setting its rates:

> The Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this chapter and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, if in existence, the program adopted by the Council under this subsection, and the purposes of this chapter.

16 U.S.C. § 839b(h)(10)(A). Despite this, the Tribal Parties and Environmental Parties argue that BPA's *rates* must be consistent with the Council's Fish and Wildlife Program. This is incorrect.

As an initial matter, Section 4(h)(10)(A) is not a ratemaking provision. The "consistency" requirement that it imposes on BPA is expressly in reference to the manner in which BPA "protect[s], mitigate[s], and enhance[s]" fish and wildlife; it has nothing to say about how BPA recovers these costs through rates. *See* 16 U.S.C. § 839b(h)(10)(A). Thus, the parties are mistaken in their initial premise that BPA's *rates* must be consistent with the Council's Program. That is not the case and simply would not make any practical sense, given that the statutorily prescribed content of the Council's Program is wholly unrelated to BPA's power rates. *See generally* 16 U.S.C. § 839b(h)(2)–(7).

This lack of rates-related content in the Council's *Fish and Wildlife Program* is even more telling when it is contrasted with the fact that, under the statutory provisions governing the Council's *Power Plan*,[25] the Council's authority on matters that might impact rates is notably limited and narrow. For example, the Council may propose a methodology for

[25] Not to be confused with its Fish and Wildlife Program, the Council's Power Plan is developed under separate statutory provisions and focuses on matters such as energy conservation and forecasting power demand. *See generally* 16 U.S.C. § 839b(d)–(f).

calculating energy conservation surcharges and recommend that the BPA Administrator impose such surcharges on its rate-paying power customers. *See id.* §§ 839b(e)(3)(G), 839b(f)(2). In contrast, when it comes to fish and wildlife mitigation, the statute directs that "[t]he program shall consist of *measures* . . ." 16 U.S.C. § 839b(h)(5). In support of such a program, the statute describes the Council's process for receiving recommendations, 16 U.S.C. § 839b(h)(2)-(4), and standards for mitigation measures, 16 U.S.C. § 839b(h)(6). The statute does not direct the Council's Program to address BPA's ratemaking, like it does with the energy conservation surcharge example through the Council's Power Plan.

The ratemaking provisions in Section 7 of the statute likewise confirm the lack of connection between BPA's power rates and the "consistency" requirement of Section 4(h)(10)(A). This section meticulously describes the substantive and procedural standards applicable to BPA's ratemaking. *See* 16 U.S.C. § 839e *et seq.* Yet nothing in Section 7 indicates that BPA's rates must be "consistent with" the Council's Program. Congress knew how to direct BPA to make showings in rates, and mandated BPA to set rates consistent with certain statutory criteria in no less than four instances. *See* 16 U.S.C. §§ 839e(a)(2)(set rates equitable between federal and non-federal transmission users), (b)(2)(A)–(E) (compare power costs with and without certain rate assumptions), 839e(c)(2) (criteria for setting rates for Direct Service Industrial customers equitably in comparison to public customer industrial customers); 839e(f) (surplus sales); 839(l) (sales to non-U.S. entities must be equitable in relation to purchases made by Administrator from non-U.S. entities). Nowhere in this carefully crafted list of ratemaking requirements does Congress hint that BPA must make a showing related to the Council Program.

Moreover, Congress knew how to cite Section 4 of the NWPA in its ratemaking provisions and use the words "consistent with," but Congress chose not to use either term in Section 7 to reference either the Council's Program or Section 4(h)(10)(A). As noted in the previous issue, Congress refers to Section 4 in Section 7 two times: once in Section 7(h), where Congress directs BPA to include surcharges arising under Section 4(f)(1) of the Council's Power Plan, and once in connection to the timing of certain discretionary rate actions in Section 7(m)(1). 16 U.S.C. § 839e(h); § 839e(m)(1). Neither reference imposes any duties on BPA regarding Section 4(h)(10)(A). No other references to Section 4 exist in Section 7. Elsewhere, in two instances, the words "consistent with" are incorporated by reference into Section 7—once in reference to Section 9 of the Transmission System Act (16 U.S.C. § 838g(1)), and once in reference to Section 5 of the Flood Control Act of 1944 (16 U.S.C. § 825s). In both instances, Congress chose to incorporate statutory language that used the words "consistent with" as it related to setting BPA's rates so that they are "the lowest possible . . . consistent with sound business principles." *Id.* Yet Congress never uses the words "consistent with" in Section 7 in reference to the Council's Program, nor does Congress incorporate into Section 7 any reference to Section 4(h)(10)(A).

BPA is, of course, required to set its rates to recover its forecast costs. *See* 16 U.S.C. § 839e(a)(1). That would include the forecast mitigation costs that BPA incurs under Section 4(h)(10)(A). The general instruction to recover costs, however, applies to all of BPA activities that result in costs—from fish and wildlife costs, to resource acquisition costs, to staff costs, to bond and interest costs on outstanding debt. Being that there are

no specific duties set forth in section 7 requiring BPA to develop its fish and wildlife projections in any manner different than any other costs, BPA declines to add such duties to its ratemaking.

In addition to their misplaced suggestion that BPA's *rates* must be consistent with the Council's fish and wildlife program, the Tribal Parties go a step further in contending that BPA's "*spending*" must be consistent with the Council's Program. Tribal Parties Br., BP-24-B-YN-01, at 38 (emphasis added).[26] Presumably, the Tribal Parties reach this conclusion on the assumption that the statutory phrase "in a manner consistent with" attaches to the Administrator's "use [of] the BPA fund." *See* 16 U.S.C. § 839b(h)(10)(A). The phrase "use the BPA fund" simply identifies the *source* of funding that BPA must use to protect, mitigate, and enhance fish and wildlife.

Regardless, the Tribal Parties' statutory interpretation that BPA must "spend" consistent with the program is incorrect and would not make sense for at least three reasons.

*First*, as a textual matter, such reading would have the modifying phrase ("in a manner consistent with") skip over the immediately preceding verbs ("protect, mitigate, and enhance") before attaching to a much earlier clause of the sentence ("use the BPA fund"). The structure of the sentence does not support this result.[27] *Second,* as the Tribal Parties acknowledge, the Ninth Circuit has explained that BPA retains final authority over what actions it takes with respect to the Council program. Tribal Parties Br., BP-24-B-YN-01, at 39 (citing *NRIC*, 25 F.3d at 874). It follows even more that decisions on the expenditure of Federal funds are reserved exclusively to the Federal entity authorized to expend. Federal budgeting and expenditures are ultimately and inherently Federal matters. *Third*, prior findings by the Council support the conclusion that matters related to fish and wildlife project budgets, contracting and administration are matters within BPA's purview and discretion. *See* 2009 Columbia River Basin Fish and Wildlife Program Findings, BP-24-E-BPA-10-AT04, at 227 ("The Council agrees with Bonneville that implementation

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[26] This contention is nonetheless irrelevant here because BPA's ratemaking is not, and does not entail, spending decisions. BPA's rates are set to recover a cost forecast. Actual spending decisions will occur during the rate period. *See* BP-22 ROD, BP-22-A-02, at 56-62; *see infra* Chapter 6; *see also* Fisher *et al.,* BP-24-E-BPA-10, at 4 (noting BPA's "projections . . . do not act as legally binding constraints on BPA spending, and BPA can (and does) deviate from those projections when actually implementing its fish and wildlife mitigation. The specific mitigation actions BPA may implement throughout the rate period are not being decided through these projections and BPA retains discretion to adjust its mitigation programs and funding to account for the real-world needs of its programs."); *see also id.* at 30 (describing annual planning budget process). *See also Golden NW*, 501 F.3d at 1053 (noting BPA's rate cases are "not the forum for making decisions regarding which fish and wildlife alternative[s] to implement. . ."). BPA's rates neither commit BPA to make certain expenditures, nor prohibit BPA from choosing to make other expenditures. *See* BP-22 ROD, BP-22-A-02, at 59.

[27] The nearest-reasonable-referent canon of statutory construction holds "that a 'postpositive modifier normally applies only to the nearest-reasonable-referent'" *Prison Legal News v. Ryan*, 39 F.4th 1121, 1131 (9th Cir. 2016) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 152 (2012)). In addition, the rule of last antecedent directs that a limiting clause or phrase should be read as modifying only the noun or phrase that it immediately precedes or that it immediately follows. *See United States v. Paulson*, 68 F.4th 528, 537 (9th Cir. 2023).

provisions related to how the program and projects are implemented, how project budgets are set, how program budgets are managed, how contracts are managed, and similar budget and contract management matters should be and are largely handled in the day-to-day implementation of the program and are largely the responsibility of, and within the ultimate authority of, Bonneville.").

Finally, there are suggestions throughout their Initial Brief indicating that the Tribal Parties believe that BPA's "consistency" duty extends even beyond the Council's Program, to regional fish and wildlife plans and even general recommendations fish and wildlife managers might make in any forum. For instance, the Tribal Parties criticize BPA for insufficient funding of the fish and wildlife program, "and more broadly fish and wildlife recovery throughout the Columbia River Basin." Tribal Parties Br., BP-24-B-YN-01, at 15. They go on to assert that the "recommended actions" from reports issued by the Columbia Basin Partnership[28] are "squarely within BPA's funding duties" (presumably under Section 4(h)(10)(A) and its consistency requirement). This uncited assertion that BPA has a duty to finance the broadscale recovery or restoration of Columbia Basin fisheries is not supported in law and BPA has addressed this and other examples in staff's rebuttal testimony. *See generally* Fisher *et al.*, BP-24-E-BPA-10, at 10-16, §§ 3.2, 3.4 (explaining that certain regional recommendations and goals do not create legal obligations or costs for BPA). With respect to the Columbia Basin Partnership specifically, BPA noted that the cited Partnership report clearly states:

> This report does not constitute a regulatory or policy requirement and does not supersede or modify existing analyses in ESA recovery plans, viability assessments, 5-year reviews, or ESA consultation documents. The report also does not assess the impacts of implementing any rebuilding measures nor suggest funding sources, needed authorizations, or regulatory compliance measures required implementation.

*Id.* at 15-16.

In sum, the Environmental Parties and Tribal Parties incorrectly attempt to broaden the applicability of section 4(h)(10)(A)'s "consistency" requirement beyond Congressional intent. That requirement pertains to BPA's mitigation *actions* but does not create a separate duty that BPA must demonstrate when setting its rates. Neither is compliance with the "consistency" requirement dependent on the level of BPA's spending, which in any event, would be irrelevant here since ratemaking does not involve spending decisions. Section 4(h)(10)(A) does not apply in ratemaking.

*Briefs on Exceptions*

In their Briefs on Exceptions, the Tribal Parties and the Environmental Parties take issue with BPA's conclusion that compliance with the consistency requirement of

[28] A coalition convened by the National Marine Fisheries Service and including state, tribal, Federal, industrial, and stakeholder groups.

Section (h)(10)(A) does not depend on the level of BPA's spending. Environmental Parties Br. Ex., BP-24-R-ID-01, at 5–6; Tribal Parties Br. Ex., BP-24-R-YN-01, at 23–24.

The Environmental Parties argue that this conclusion is "inconsistent with the position BPA took in the BP-22 administrative proceeding and throughout the Ninth Circuit litigation over the BP-22 decision . . . ." Environmental Parties Br. Ex., BP-24-R-ID-01, at 5. They cite recent examples in which BPA made statements about funding fish and wildlife mitigation in a manner consistent with the Council's program. *Id.* (citing the BP-22 Record of Decision ("[Section 4(h)(10)(A)] requires the agency to fund fish and wildlife mitigation '*in a manner consistent with*' the Council's [fish and wildlife] program") and Ninth Circuit oral argument (similar)). There is no inconsistency between these positions, and in fact, they speak—harmoniously—to separate issues.

The point BPA makes in this ROD is that the "in a manner consistent with" standard of Northwest Power Act § 4(h)(10)(A) should be understood in reference to the substantive mitigation actions that BPA funds, not to the funding itself or the amount BPA spends. In arguing that this represents an inconsistency with BPA's position in BP-22, the Environmental Parties sever BPA's past statements from the context in which they were made. Those BP-22 statements spoke to the question of whether § 4(h)(10)(A) is subject to the provisions of § 4(h)(11)(A)—a central issue in the BP-22 proceedings. Thus, the ultimate point BPA was making in BP-22 was simply that § 4(h)(10)(A) pertains to funding, while § 4(h)(11)(A) does not. But the issue the Environmental Parties highlight now—how the "in a manner consistent with" standard of § 4(h)(10)(A) should be interpreted or applied in its own right—is distinct. That latter question was not presented, analyzed, or decided, in the BP-22 rate case or the litigation that followed. For that reason, the Environmental Parties cannot assert an "inconsistency" in BPA's interpretation of § 4(h)(10)(A) by comparing analysis from a context that squarely considered the issue (this proceeding) to incidental statements from another that did not (BP-22).

Furthermore, BPA's positions on these two issues are entirely harmonious. While BPA's compliance with § 4(h)(10)(A) was not at issue in the BP-22 proceedings, BPA nonetheless noted its view that "consistency" with the Council Program is not a matter of funding levels. As the BP-22 ROD stated, "Congress did not direct BPA to demonstrate in the rate-setting process that its *mitigation funding levels* were 'consistent with' the Council's program." BP-22 ROD, BP-22-A-02, at 19 n.4 (emphasis added).

That statement aligns with the overarching point BPA makes here: that § 4(h)(A)(10) concerns mitigation *actions,* not levels of funding. Thus, BPA's response here is not "inconsistent" with what BPA said in BP-22. Rather, it merely addresses and clarifies that more fundamental point raised in this proceeding. Furthermore, BPA's conclusion on this point makes sense considering the practical reality, noted by the Council, that budgeting matters properly reside within BPA's day-to-day administration of its fish and wildlife mitigation projects. *See* 2009 Columbia River Basin Fish and Wildlife Program Findings, BP-24-E-BPA-10-AT04, at 227 ("The Council agrees with Bonneville that implementation provisions related to how the program and projects are implemented, how project budgets are set, how program budgets are managed, how contracts are managed, and similar

budget and contract management matters should be and are largely handled in the day-to-day implementation of the program and are largely the responsibility of, and within the ultimate authority of, Bonneville."); *see also* Columbia River Basin Fish and Wildlife Program 2014, BP-24-E-ID-01-AT26, at 112 ("T]he program is not a vehicle to guarantee funding for a particular project, entity, or individual. The fact that a specific measure is included in the program, even as referenced in a biological opinion or accord, does not by itself constitute a funding obligation . . . .").

The Tribal Parties' Brief on Exceptions similarly misunderstands BPA's point. BPA does not argue, as the Tribal Parties suggest, that BPA's Section 4(h)(10)(A) duty to protect, mitigate, and enhance fish and wildlife is "isolate[d]" from the Council's Fish and Wildlife Program. Tribal Parties Br. Ex., BP-24-R-YN-01, at 24. To the contrary, BPA acknowledges that its duty to protect, mitigate, and enhance fish and wildlife is linked to the Council's Fish and Wildlife Program via the Section 4(h)(10)(A) "consistency" requirement. Again, BPA's point is simply that the consistency requirement should be understood as relating to the mitigation actions themselves, not the amount of money that BPA spends.[29] (The Environmental Parties' hyperbolic gloss here is unconvincing. BPA does not argue that it could "'fund' every BPA-related project recommended in the Council's Program at a level of $1 per project [and] be acting 'consistent' with the Program . . . ." Environmental Parties Br. Ex., BP-24-R-ID-01, at 6. In all likelihood, doing so would prevent BPA from implementing actions reasonably calculated to advance Council Program measures. But again, any inconsistency would stem from the substance of the mitigation actions being implemented, not the funding level itself vis-à-vis an "implicit" funding adequacy standard. *See id.*)

Finally, the Environmental Parties also suggest that BPA interprets the Northwest Power Act improperly here by reading it "in a way that furthers its own . . . financial interests rather than giving the statute its most natural interpretation." Environmental Parties Br. Ex., BP-24-R-ID-01, at 5–6 (citing *Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 834 (9th Cir. 2009)) (internal quotations omitted). For the reasons BPA has articulated previously, BPA's interpretation is consistent with the plain language, purpose and intent of § 4(h)(10)(A), and thus is the "most natural interpretation" of the provision. In addition, the principles of *Amalgamated Sugar* are of dubious applicability to BPA, an agency that is "required by statute 'to operate with a business-oriented philosophy,'" *Pac. Nw. Generating Coop. v. Bonneville Power Admin.,* 596 F.3d 1065, 1073 (9th Cir. 2010), and whose actions

[29] The Tribal Parties also take issue with BPA's view of Section 4(h)(10)(A) because it "separate[s] the 'use [of] the BPA fund' language from the consistency requirement" and thereby "divorces the words of 4(h)(10)(A) from their context and the overall statutory scheme, and would ultimately undermine Congress's purposes in adopting the NWPA." Tribal Parties Br. Ex., BP-24-R-YN-01, at 23. This contention is without merit. As BPA has explained, *supra*, the phrase "use the BPA fund" identified the source of funding that BPA will use to protect, mitigate, and enhance fish and wildlife under Section 4(h)(10)(A). Far from undermining the statutory scheme or Congress's purpose, this reading comports with a simple point the Ninth Circuit has long recognized: that through the Northwest Power Act, Congress "tapped [the] revenues of the Basin's hydropower system as a *source for financing* the biological restoration." *Nw. Res. Info. Ctr. v. Nw. Power Planning Council*, 35 F.3d 1371, 1378 (9th Cir. 1994) (emphasis added). The phrase "use the BPA fund" is plainly where Congress did so as to BPA.

are routinely evaluated against that standard. *Id.*; *see also Public Power Council, Inc. v. Bonneville Power Admin.,* 442 F.3d 1204, 1209 (9th Cir. 2006); *Ass'n of Pub. Agency Customers v. Bonneville Power Admin*., 126 F.3d 1158, 1171 (9th Cir. 1997); *Portland Gen. Elec. Co. v. BPA*, 501 F.3d 1009, 1029 (9th Cir. 2007) (noting that BPA is "charge[d] to function as a business.").

*2. "Consistency" Does Not Demand Wholesale Adoption of, or Rigid Adherence to, The Council's Program*

The Environmental Parties and Tribal Parties nonetheless seek to turn BPA's ratemaking process into a referendum on BPA's fish and wildlife mitigation and its adherence to the Council Program. In doing so, they advance an overly prescriptive and unsupported view as to what "consistency" with the Program requires of BPA—arguing that the Council's Program is essentially a mandatory compliance framework with which BPA must stay in lock-step. *See, e.g.*, Environmental Parties Br., BP-24-B-ID-01, at n.36 (suggesting that BPA is obliged to "comply" with the Council's Program); *id.* at 9 (claiming that BPA's actions "*violat[e]*" the Council's Program) (emphasis added); *but see* Environmental Parties Br. Ex., BP-24-R-ID-01, at 6 (clarifying that "the Environmental Parties do not contend that the consistency requirement sets up a mandatory compliance framework with which BPA must stay in lock-step.") (internal quotations omitted).

Although not relevant to the ratemaking process, the 4(h)(10)(A) consistency requirement can be satisfied in the totality of BPA's mitigation by implementing a suite of actions generally designed and reasonably calculated to advance actionable "measures" in the Council's Program, while taking into account the Council's Power Plan and the broader purposes of the Northwest Power Act as well. *See* 16 U.S.C. § 839b(h)(10)(A). "Consistency," however, should not be read to demand a precise conformity of BPA's mitigation actions to every aspect of the Program's guidance.

The plain meaning of the relevant phrase confirms this. "Consistency" is "marked by harmony, regularity, steady continuity throughout," "showing no significant change," "co-existing;" "compatible." *Webster's Third New Int'l Dictionary* (1965) at 484. These definitions, far from suggesting a strict equivalency, indicate that the consistency requirement of 4(h)(10)(A) can be met by actions that exhibit an overall compatibility and support of the Program's mitigation measures, but not requiring exactness. *Accord* Words and Phrases, Vol. 8A (explaining that the "[p]hrase 'consistent with' . . . did not mean 'exactly alike' or 'the same in every detail,' but, instead, meant 'in harmony with,' 'compatible with' . . . ") (internal citations omitted). This reading is particularly appropriate because it accommodates the latitude and exercise of discretion that is necessary for BPA's consistency not only with the Council's Program, but also the Council's Power Plan and the purposes of the Northwest Power Act. *See* 16 U.S.C. § 839b(h)(10)(A).

Ninth Circuit caselaw supports this reading as well. *See, e.g.*, *Nw. Res. Info. Ctr. v. Nat'l Marine Fisheries Serv.*, 25 F.3d 872, 874 (9th Cir. 1994) ("The Bonneville Power Administration must act consistently with the Council's Program, but in the end has final authority to determine its own decisions.") (citing *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power Planning and Conservation Council*, 786 F.2d 1359, 1362 (9th Cir. 1986)); *NEDC*

*1997*, 117 F.3d at 1532 (noting that "the Council's program is not binding on BPA," even though BPA must take it into account to the fullest extent possible).

This also comports with the Council's view:

> [t]he legal obligation on Bonneville does not mean there must be absolute correspondence between the Council's program and Bonneville's actions at the level of detail of the hundreds of measures and projects, especially not in the implementation details that are largely committed to Bonneville in terms of the how and who and the details of the contracts. Reasonable deviations, modifications, and elaborations are likely to occur in the detail of Bonneville's implementation decisions.

Br. of Intervenor Nw. Power and Conservation Council at 33, *Northwest Environmental Defense Center v. Bonneville Power Administration*, Case Nos. 06-70430 and 06-71182 (9th Cir. June 16, 2006), BP-24-E-BPA-15.[30]

Tribal Parties' and Environmental Parties' strict view of "consistent with" is unsupportable.

*3. "Consistency" Can Be Viewed in the Totality*[31]

The Environmental Parties in particular seem to suggest that BPA's compliance with the consistency requirement of Section 4(h)(10)(A) is jeopardized by deviations of any sort, or by BPA's not implementing discrete components of the Council's Program. *See, e.g.*, Environmental Parties Br., BP-24-B-ID-01 at 9 (alleging that failure to "increase significantly" BPA's mitigation in the upper Columbia River would be a violation of law). Again, BPA's ratemaking makes no decisions on the mitigation activities or expenditures that may occur during the rate period. But moreover, as discussed above, the consistency requirement is not that exacting. Further, BPA disputes the notion that compliance with the consistency requirement is necessarily dependent on consistency with discrete, individual components of the Council's Program. *See, e.g.*, 2022 RDC Decision Letter, BP-24-E-YN-91, at 50 (describing BPA's duty under section 4(h)(10)(A) as "consistency across the totality of fish and wildlife mitigation that BPA funds"). Instead, consistency between BPA's mitigation and the Council's Fish and Wildlife Program exists in the totality of mitigation actions BPA undertakes.

Indeed, viewing BPA's consistency in the totality is the most sensible approach. Doing so accommodates the realities and complexities associated with implementing mitigation under a framework of this size and breadth. *See, e.g.*, *NRIC*, 35 F.3d 1371, 1375 (9th Cir. 1994) (describing the Council's fish and wildlife program as "the world's largest program of biological restoration"). For example, the Council's Program measures rarely equate

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[30] BPA officially notes this document. *See* Rules of Procedure § 1010.16; 16 U.S.C. § 839e(i)(5).

[31] In its BP-24 Draft ROD, BPA used the term "holistically" in this section. This Final ROD refers to the "totality" instead because that term better reflects the phrasing BPA used when discussing this issue in the 2022 Power RDC decision. *See* 2022 RDC Decision Letter, BP-24-E-YN-91, at 50 (describing BPA's duty under section 4(h)(10)(A) as "consistency across the totality of fish and wildlife mitigation that BPA funds.").

neatly to a defined mitigation project. Instead, the Program measures often focus on general categories of actions or geographic areas. *See, e.g.*, BP-24-E-ID-01-AT26, at 39 (Columbia River Basin Fish and Wildlife Program 2014) ("Protect and enhance ecological connectivity between aquatic areas, riparian zones, floodplain, side channels, and uplands."); *id.* at 42 ("Improv[e] the amount, timing, and duration of instream flows through water rights and acquisitions."). The Council has also explained that some program measures "stand as a pool of *possible* measures for implementation in future years." *Id.* at 112. In addition, the Council itself has been clear that "the program is not a vehicle to guarantee funding for a particular project, entity, or individual. The fact that a specific measure is included in the program, even as referenced in a biological opinion or accord, does not by itself constitute a funding obligation." *Id.* at 112).

Addressing the consistency requirement in the totality also recognizes that BPA may disagree with, and decline to follow aspects of, the Council's Program or recommendations because BPA has the "final authority to determine its own decisions." *NRIC*, 25 F.3d at 874. BPA has taken principled and reasoned positions rejecting Council guidance at various points in the past, and finds it can do so without compromising its overall "consistency" with the Council's Program. *See, e.g.*, Letter from BPA Administrator to Council Chairman, Mar. 5, 2002, BP-24-E-BPA-16, (explaining BPA's reasons for declining to follow a policy adopted by the Council).[32]

This is not all to say that "consistency" at the level of individual mitigation projects or discrete measures is irrelevant. BPA acknowledges that there could be consistency concerns if individual agency decisions present a conflict or contradiction with long-running implementation of measures in the Council Program, a challenge to BPA's "consistency" under Section 4(h)(10)(A) would presumably be available to affected parties on that basis. *See generally NEDC v. BPA*, 477 F.3d 668, 686 (questioning whether a BPA decision regarding a provision of the Council's Program was "consistent with" the program).[33] The consistency requirement is also presumably in play in final agency decisions that involve multiple mitigation actions bundled together, such as Willamette Wildlife Settlement that the Environmental Parties attached to their Direct Case. *See* Administrator's Record of Decision, Willamette River Basin Memorandum of Agreement Regarding Wildlife Habitat Protection and Enhancement Between the State of Oregon and the Bonneville Power Administration, BP-24-E-ID-01-AT28. BPA's record of decision for that agreement expressly explains how its 10+ year, multi-entity implementation and funding for mitigation of both fish and wildlife across an entire watershed was "consistent with" the Council's Program. *See id.* Any party concerned with this type of broader action,

[32] BPA officially notes this document. *See* Rules of Procedure, 1010.16; 16 U.S.C. § 839e(i)(5).

[33] The Ninth Circuit found the BPA decision challenged in this case was contrary to law and not supported by reasoned decision-making as required by the APA, and ruled against BPA on that basis. The Court did not reach a determination on whether the decision was or was not consistent with the Council's Program. *See NEDC 2007*, 477 F.3d at 690, n.19.

and BPA's compliance with its legal duties under Section 4(h)(10)(A), would presumably have an opportunity to bring a challenge at the time of that decision.

## B. The Environmental Parties' "Inconsistency" Arguments in BP-24

As described above, BPA's rates process is not the forum for determining BPA's compliance with the Council's Program. The parties, nonetheless, proffer examples of BPA's alleged "inconsistency" with the Council's Program. To the contrary, these examples do not establish that BPA's fish and wildlife mitigation—let alone its BP-24 rate proposal—is inconsistent with the Council's Program.

The Environmental Parties largely ignore the comprehensive suite of mitigation that BPA implements. *See, e.g.*, BPA Response to Anadromous Fish Categorical Review Recommendations (Mar. 23, 2023), BP-24-E-BPA-10-AT19 (reporting BPA's intent to continue funding implementation of the over 100 mitigation projects recommended by the Council after its most recent scientific review); Fisher *et al*., BP-24-E-BPA-10, at 27–28 (noting funding of over 300 mitigation projects and 1,000 contracts); *id.* at 26 (noting that, between 2020 and 2022, out of over 300 projects, seven projects were closed at the project sponsor's request, typically because the project had achieved its objective, and in three instances, pairs of projects were merged in order to consolidate work and increase administrative efficiency). Looking at the totality of the suite of mitigation actions that BPA implements shows a consistency with the measures of the Council's Program, and the costs of that mitigation are projected in BPA's forecasts for BP-24. Nonetheless, the Environmental Parties zero in on two discrete points from the Council's Program where they insist BPA's "inconsistency" can be inferred. As discussed above, examining the "consistency" of BPA's mitigation in the totality is a more supportable approach, but even looking at the specific examples offered by Environmental Parties shows they cannot establish a meaningful "inconsistency."

The Environmental Parties first claim that BPA's proposed rates would preclude a significant increase in the level of mitigation in the upper Columbia as called for in the Council's Program. BPA has explained numerous times that this is simply not the case. *See* discussion and citations *supra* Issue 4.2.1 (Section C, "Taking Council program into Account to the Fullest Extent Practicable"); *see also* Fisher *et al*., BP-24-E-BPA-10, at 22 ("Similarly, if [BPA does not] include a particular program or activity in our cost projection in rates, it does not mean BPA is precluded from funding that program during the rate period."). In addition, the Environmental Parties' contention on this point ignores the rebuttal testimony that BPA staff provided which describes the steps and actions that BPA has begun in response to this provision of the Council program. *Id.* at 40-41. But most foundationally, the rate case does not select the mitigation work that will be implemented. *See Golden NW*, 501 F.3d at 1053.[34]

[34] In their Brief on Exceptions, the Environmental Parties recycle their past criticisms by claiming that BPA has "ignore[d]" portions of the Council Program because they and others feel BPA's efforts to increase mitigation in the upper Columbia have not been "significant[]" or rapid enough. *See* Environmental Parties Br. Ex., BP-24-R-ID-01, at 6–7. At most, the Environmental Parties raise a question of degree here—not of

Next, the Environmental Parties take issue with BPA's plan for addressing maintenance of its existing fish and wildlife mitigation assets. They charge that BPA's proposed rates would "not allow sufficient funding to address maintenance and upgrade needs . . . in violation of the Program's call for BPA to '[p]rovide for funding long-term maintenance of the assets that have been created by prior program investments'" on a "timely basis." Environmental Parties Br., BP-24-B-ID-01, at 9; *see also* Environmental Parties Br. Ex., BP-24-R-ID-01, at 7-8 (similar). BPA has recognized the need for an increase in mitigation asset maintenance efforts, and has responded accordingly by increasing its projected costs for these areas in its forecasts. For example, in its 2022 IPR Closeout Report, BPA explained that its projected mitigation asset maintenance costs for the BP-24 rate period

> represent[] an approximate $2.2M increase in asset management investment compared to prior rate periods, and would likewise allow for an increased pace of implementation for known maintenance needs. The nature of a sound investment strategy for asset management is that it occurs on a rolling basis in response to priority needs. Thus, Bonneville's projected increase in spending for fish and wildlife asset management recognizes the urgency of addressing priority maintenance needs in a timely manner. To the extent that comments on this topic suggest that the projected asset management spending level increases the risk of asset failures, Bonneville notes that the agency retains its ability to reprioritize asset management work based on the most urgent known needs, including as informed by new developments that arise during the upcoming rate period; furthermore, the expected asset management expenditure level reflected in this IPR does not in any way preclude Bonneville from addressing additional costs of maintenance needs that might arise unexpectedly during the next rate period.

IPR Closeout Report, BP-24-E-ID-01-AT24, at 15.

In addition, separate from this rate case, through the 2022 Power RDC decision, BPA dedicated an additional $50 million to non-recurring maintenance needs for fish and wildlife mitigation assets. *See* 2022 RDC Decision Letter, BP-24-E-YN-91. The Council supported this decision. *See id.* at 48 ("Other Council processes and comments confirm that BPA's RDC proposal for hatchery maintenance is consistent with the Council program. The Council itself commented favorably on BPA's proposal to use $50 million of the RDC for maintenance of fish and wildlife mitigation assets, and gave no indication that doing so would somehow amount to an inconsistency with its Program. Members of the Council's

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"ignoring"—and they refuse to acknowledge the practical complexities of developing appropriate new or expanded mitigation initiatives. At the time the Council adopted this provision, BPA objected and raised significant concerns with its merits. *See* BPA Comments on Draft 2020 Addendum to the Columbia River Basin Fish and Wildlife Program, BP-24-E-BPA-10-AT10, at 5. Nonetheless, BPA has worked (and continues to work) with the Tribes involved with this provision to select appropriate expanded and additional mitigation actions through ongoing discussions. The Environmental Parties would have BPA put the cart before the horse, though, blindly adding funding without planned mitigation actions to which the funding would attach—and all to satisfy the Environmental Parties' repeated emphasis of the phrase "significantly."

Fish and Wildlife Committee, including the committee Chair, likewise voiced their support for BPA's proposal during the November 2022 F&W Committee meeting."); *see also id.* at 45–51 (discussing consistency of the RDC decision with the Council's Program).

In their Briefs on Exceptions, the Environmental Parties and the Tribal Parties continue to contest the adequacy of BPA's approach to funding hatchery asset maintenance. Their main complaint seems to be that BPA does not plan to do everything all at once. *See* Environmental Parties Br. Ex., BP-24-R-ID-01, at 7–8; Tribal Parties Br. Ex., BP-24-R-YN-01, at 19; *see also* Environmental Parties Br., BP-24-B-ID-01, at 10 n.35. But in arguing that BPA's asset management is thus deficient, these parties mistake or misrepresent the scope of the hatchery maintenance needs that they cite, and the extent to which BPA has a duty to address them. For example, the Tribal Parties argue that the $50 million in RDC funding for fish and wildlife infrastructure maintenance is insufficient to meet the needs of the "249 mission critical elements, and 1,234 essential elements" in the "40 hatcheries under BPA's purview," and that BPA therefore needs to add even more hatchery asset management costs to its BP-24 projections.[35] Tribal Parties Br. Ex., BP-24-R-YN-01, at 19. An initial problem with these numbers is that the Tribal Parties did not provide a citation for them, so BPA cannot be sure of their source (or how the Tribal Parties arrived at their conclusion that the RDC funding is insufficient as to these elements). BPA presumes the numbers were likely derived from information in recent presentations that BPA staff gave to the Council. *See, e.g.*, Memorandum on Asset Management Strategic Plan Priorities for FY 2024 for hatcheries and screens, BP-24-E-BPA-17, at 12.[36] The bigger problem is that the Tribal Parties misunderstand the information that these presentations offered, and thus the conclusions they draw here are unsupported.

These presentations included discussion of BPA's recently updated 2022 Hatchery Condition Assessment, which helps to inform BPA's prioritization of hatchery maintenance based on those elements most urgently in need of investment (consistent with guidance in BPA's Strategic Asset Management Plan for hatcheries). Importantly, the "mission critical" and "essential" labels in the condition assessment are criticality categories; that is, they identify those elements of a hatchery whose failure would be most detrimental. For example, backup emergency generators are always ranked as "mission critical." But these labels do not speak to the age or health of an asset itself. There are many assets classified as "mission critical" that have many years of life left and are in good functioning condition. Thus, the Tribal Parties' contention that $50 million would be inadequate to replace all assets in these categories is entirely beside the point. *See* Tribal Parties Br. Ex., BP-24-R-YN-01, at 19 ("BPA has not alleged, because it would not be factual, that $50 million is sufficient to meet these outstanding needs [*i.e.*, the 249 mission critical and 1,234 essential hatchery elements]."). Instead, the point BPA made in this presentation was that the

[35] While the Tribal Parties advanced their hatchery maintenance criticisms in the context of their equitable treatment argument, the crux of their point there—that the RDC decision left these "critical" fish and wildlife infrastructure needs unmet—is undercut by BPA's discussion in this section. *See* Tribal Parties Br. Ex., BP-24-R-YN-01, at 19.

[36] BPA officially notes this document. *See* Rules of Procedure § 1010.16; 16 U.S.C. § 839e(i)(5).

hatchery condition assessment aimed to "address all mission critical and essential assets that are *expired* or in *poor* condition at all program hatcheries." Memorandum on Asset Management Strategic Plan Priorities for FY2024 for hatcheries and screens, BP-24-E-BPA-17, at 13 (emphasis in original). Further, BPA explained that the $50 million in RDC funds and the increase in BPA's projections for asset management during BP-24 would allow BPA to "cover existing high and medium priority needs for the Lower Snake River Compensation Plan (LSRCP) assets, and to also cover the most critical existing needs at [BPA's Fish and Wildlife] Program Hatcheries . . . ." *Id.* at 10.

The Environmental Parties, meanwhile, make two more assertions that are even more sprawling. First they complain that BPA's rate case does not redress a hundreds of millions of dollars—or even a billion dollar—"backlog" in deferred maintenance for regional fish and wildlife infrastructure. Environmental Parties Br. Ex., BP-24-R-ID-01, at 7–8; *see also* Environmental Parties Br., BP-24-B-ID-01, at 10 n.35 (citing a letter regarding $1 billion of "unfunded capital and deferred maintenance needs throughout the basin"). But what the Environmental Parties ignore—and what their own citation shows—is that this region-wide figure represents a universe of fish and wildlife infrastructure extending well beyond BPA's purview.

The letter that the Environmental Parties cite notes that hatchery construction in the Columbia River Basin was authorized across many decades, under numerous statutes, and for a range of purposes. *See* NPPC Hatchery Needs Letter, BP-24-E-YN-47, at 1. It states that the hatchery facilities and programs associated with the Council's Fish and Wildlife Program or BPA funding are a "component" of a bigger picture: "the basin's regional efforts to mitigate impacts to fish due to dams and development." *Id.* at 2. The letter then states that a "coordinated regional approach to adequately fund all hatchery operations and maintain and modernize hatchery infrastructure to meet their intended goals is critical to meeting federal mitigation obligations in the entire Columbia River Basin." *Id.* The letter's attachment—tallying up the regional maintenance "backlog"—shows hatchery infrastructure falling under numerous funding and administration categories, including the Mitchell Act, *id.* at 3, which is separate from BPA's funding duties. *See, e.g.*, Press Release, U.S. Senate Comm. on Commerce, Science, & Transportation, NOAA announces $3.31 Billion Investment in Coastal Resilience, Salmon Recovery, and Infrastructure – Largest in Agency's History (June 6, 2023), BP-24-E-BPA-18 (announcing $300 million in appropriations to NOAA for salmon and steelhead hatchery infrastructure, including Mitchell Act facilities).[37] Thus, the Environmental Parties' grossly overreach with their insistence that the BP-24 rate case address this matter in its entirety.

Returning to the matter of consistency with the Council's Program, the example of RDC maintenance funding further illustrates the propriety of BPA's approach to evaluating the "consistency" requirement of Section 4(h)(10)(A) in the totality. BPA's rate case cost projections provide only a snap-shot of the actions BPA estimates it may take to support its

[37] BPA officially notes this document. *See* Rules of Procedure, 1010.16; 16 U.S.C. § 839e(i)(5).

fish and wildlife program over the rate period. These rate projections in no way preclude BPA from taking additional actions, which is precisely what BPA did in FY 2023. As noted above, BPA decided to make more funding available in FY 2023 than was forecast in the BP-22 rate case through the FY 2022 Power RDC for fish and wildlife infrastructure support by setting aside an additional $50 million for that purpose.

Second, the Environmental Parties' claim that the "pre-commitment of FY 2024 RDC funds compounds this problem" is baseless. *See* Environmental Parties Br., BP-24-B-ID-01 at 10. As discussed *supra*, this relates to a corresponding increase in the power revenue requirement for a liquidity tool—"PNRR"—which is available to address any type of agency cost risk, including fish and wildlife mitigation asset needs. *See* discussion *supra* Issue 4.2.1 (section B.1 "The Environmental Parties' Equitable Treatment Arguments in BP-24").

In short, neither of the Environmental Parties' points is sufficient to establish a meaningful inconsistency in BPA's fish and wildlife mitigation.

## C. The Tribal Parties' "Inconsistency" Arguments in BP-24

Like the Environmental Parties, the Tribal Parties argue that BPA's rate proposal is not consistent with the Council's Program. Their argument focuses on (1) the Council's five million fish goal, and (2) the supposed continuation, through BP-24 rates, of "flat funding" for fish and wildlife mitigation.

### *1. The Council's Five Million Fish Goal*

The Tribal Parties offer a lengthy history of the Council Program's goal for a rolling 10-year average of five million adult salmon and steelhead returning to the Columbia River Basin annually. Tribal Parties Br., BP-24-B-YN-01, at 41-44. The Tribal Parties' bottom-line is clear: achieving five million fish is a substantive obligation for BPA, and failure to deliver would be "inconsistent" with the Council's Program and a violation of the Northwest Power Act. *See* Hesse *et al.*, BP-24-E-YN-103, at 13 ("[T]he 5 million fish goal was established in 1987 as a mitigation obligation for BPA."); *id.* (asserting that the goal is "directly attributable to BPA"); Tribal Parties Br., BP-24-B-YN-01, at 31 (describing the Council's five million fish goal as a "directive" that BPA is "falling millions of fish short" of), 35 ("Congress obligated BPA to dedicate funding to achieve this goal."), 13 (describing the goal is a "mandate").

The Tribal Parties' premise here is flawed. The five million fish goal is not a substantive obligation that BPA is bound to deliver.

First and foremost, BPA's legal duties are established solely by Congress. Although the Council functions as a policy-making body that can "guide" BPA, *see NRIC*, 35 F.3d at 1378, its status as an interstate compact agency forecloses its ability to impose substantive legal obligations on Executive Branch agencies of the U.S. Government. *See Seattle Master Builders v. Council*, 786 F.2d 1359 (9th Cir. 1986); *see also Lane v. Pena,* 518 U.S. 187, 192 ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text."). Because the five million fish goal comes from the Council

and not from the statute that Congress enacted, it does not represent a legal obligation for BPA.

To the extent that BPA's duties under the consistency requirement of Section 4(h)(10)(A) implicate this Council goal at all, BPA finds it is appropriately addressed by the mitigation actions that BPA implements, and which the Council has proposed as a means to that end. *See* discussion *supra* Issue 4.2.2 (Section A.1, "The Subject of the Consistency Requirement is BPA's Mitigation Actions (Not its Rates)"). In addition, since BPA has final authority to determine its own actions, *NRIC*, 25 F.3d at 874, it stands to reason that non-actionable provisions of the Council Program, such as desired outcomes or policies goals, are not legally binding duties for BPA.

To be clear, a policy goal is precisely what this is. BPA staff's rebuttal testimony emphasized this point: "our understanding of the Council's 5 million adult fish goal is that it is not an obligation; it is a policy goal—a desired outcome—that the Council program's mitigation measures (*e.g.,* actions) are intended to facilitate." Fisher *et al.*, BP-24-E-BPA-10, at 6-7.

In addition, whatever the import of the goal, achieving it undoubtedly involves other parties as well as BPA. It is well-settled that the Council's Program applies to three Federal agencies in addition to BPA. *See Pub. Util. Dist. No. 1 of Douglas Cnty. v. BPA,* 947 F.2d 386, 389 (9th Cir. 1991) ("The Program is implemented by the Bonneville Power Administration (BPA), the Corps of Engineers, the Bureau of Reclamation, and the Federal Energy Regulatory Commission (FERC) and its licensees."). Thus, it is incorrect to suggest, as the Tribal Parties do, that the goal falls to BPA alone as a "mitigation obligation." *See* Hesse *et al.*, BP-24-E-YN-103, at 13 ("[T]he 5 million fish goal was established in 1987 as a mitigation obligation for BPA.").[38]

For its part, the Council has consistently referred to this goal as a "goal." *See* Fisher *et al.*, BP-24-E-BPA-10, at 7 ("As far as we are aware, throughout that time the Council has consistently expressed its goal as just that – a goal."). And as the Tribal Parties' Initial Brief shows, the Council described its goal's purpose as a measurement tool: a means to *measure mitigation progress*, not a statutory debt that is owed. *See* Tribal Parties Br., BP-24-B-YN-01, at 41 (citing the Council's 1987 explanation that a system-wide goal was needed "against which progress . . . could be measured").[39]

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[38] The Tribal Parties point to certain statements by the Council where it has claimed to narrowly tailor its Program provisions to focus only on the fish and wildlife impacts caused by hydropower. Tribal Parties Br., BP-24-B-YN-01, at 41, 43–44. The Tribes' apparent implication here is that the entirety of the Council program, including its five million fish goal, is appropriate for BPA to address as hydropower mitigation. This is not so because (1) the Program applies to additional entities other than BPA, as noted in the text above, and (2) despite the Council's cited statements, the substance of many of its Program provisions belies this premise. *See, e.g.*, 2020 Addendum to Council's Program, BP-24-E-YN-09 (including provisions for preventing introduction of invasive freshwater mussels from outside the Columbia River Basin—with no causal connection to hydropower).

[39] In fact, at the same time the Council first adopted the five million fish goal in the 1987 Program, it made clear that "[h]ydropower-related losses are *not intended to represent an absolute obligation to replace the*

As discussed *supra*, the proper subject of the Northwest Power Act's consistency requirement is BPA's mitigation actions. *See also* Tribal Parties Br., BP-24-B-YN-01, at 42 (noting that the content of the Council's Program is an underlying "framework for achieving that goal"). In short, the Tribal Parties' highlighting of certain points related to the five million fish goal—and whatever "expect[ations]" they infer from those points[40]—does nothing to establish any meaningful inconsistency between the mitigation actions that BPA implements and the Council program's guidance with respect to such actions.

*2. BPA's Mitigation Funding Levels*

The Tribal Parties' second basis for arguing that BPA's rates are "inconsistent" with the Council's Program is the alleged continuation of "flat funding" for fish and wildlife mitigation. The crux of their argument is that BPA's rates would impermissibly withhold inflation-based budget adjustments for fish and wildlife mitigation, and thus be inconsistent with the Council's Program. *See* Tribal Parties Br., BP-24-B-YN-01, at 40–41 ("BPA's BP-24 rate proposal maintains a flat funding approach, keeping fish and wildlife project budgets at or . . . below inflation rates, in contravention of the NPCC's Fish and Wildlife Program recommendations . . . .").

Textually, the Northwest Power Act does not make BPA's compliance with the consistency requirement of Section 4(h)(10)(A) dependent on providing for individual or programmatic budgets that track to inflation. There are several reasons for this.

For one, Congress is patently clear when it expects Federal programs to provide for inflation, and it gave no such indication in Section 4(h)(10)(A). Several examples from the U.S. Code demonstrate that, when it intends to, Congress expressly accommodates for the effects of inflation in programs administered and funded by Federal agencies: 20 U.S.C. § 1135d(a)(1) (directing payments to be "adjusted annually thereafter in accordance with inflation as determined by the Department of Labor's Consumer Price Index for the previous calendar year"); 42 U.S.C. § 12742(e)(1) ("Adjustments shall be made annually to reflect inflation."); *id*. § 1759a ("adjusted annually for inflation"). No analogous language exists in Section 4(h)(10)(A) with respect to BPA's fish and wildlife mitigation funding duties. It is notable, as well, that Section 4 of the Northwest Power Act shows Congress considered issues related to the changing value of a dollar over time where it wanted to. Specifically, it did so in Section 4(h)(10)(D)(vii) where it allowed for BPA's funding of the Independent Scientific Review Panel to account for inflation. *See* 16 U.S.C.

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*number of fish lost*." 1987 Columbia River Basin Fish and Wildlife Program and Appendices, BP-24-E-BPA-10-AT03, at 240 (emphasis added). Further, the 1986 study that preceded the goal "did not reach conclusions on relative responsibilities for losses or specifically identify hydropower's contribution to those losses." 1987 Columbia River Basin Fish and Wildlife Program and Appendices, BP-24-E-BPA-10-AT03, at 281 (Compilation of Information on Salmon and Steelhead Losses in the Columbia River Basin, at 3).

[40] *See* Tribal Parties Br., BP-24-B-YN-01, at 44 ("The history and the record demonstrate that for the NPCC's development and adoption of the past five Columbia Basin Fish and Wildlife Program amendments, it was expected that BPA would fund the Fish and Wildlife Program at levels that would achieve the Program's interim fish goal of five million by 2025.").

§ 839b(h)(10)(D)(vii) ("The annual cost of this provision shall not exceed $500,000 in 1997 dollars."). No comparable language appears in Section 4(h)(10)(A).

Second, the consistency requirement of Section 4(h)(10)(A) relates to the substance of BPA's mitigation actions, not to Federal budgeting, which the Council's Program is not empowered to dictate. *See* discussion *supra* Issue 4.2.2. (Section A.1, "The Subject of the Consistency Requirement is BPA's Mitigation Actions (Not its Rates)") (explaining that decisions concerning the expenditure of Federal funds are reserved exclusively to the Federal entity authorized to expend them, and indicating Council's agreement on this point).

Third, the Council Program provisions that the Tribal Parties cite regarding the effects of inflation raised general observations and points of concern only. *See generally* Tribal Parties Br., BP-24-B-YN-01, at 45-47. However, BPA has explained elsewhere that, as a matter of policy and sound business principles, BPA does not find providing universal inflation adjustments as a matter of course to be warranted. *See supra* Issue 3.2.2.1; *see also* Fisher *et al*., BP-24-E-BPA-10, at 34-37 (discussing considerations related to inflation), 41-42 (discussing past funding levels and underspend trends).[41]

**Decision**

*The Tribal Parties' and Environmental Parties' claims that BPA's ratemaking must be "consistent with" the Council's Fish and Wildlife Program are unsupported by the statute and incorrect. The consistency requirement simply does not apply in this ratemaking context. Moreover, even if it did, the parties' examples fail to establish any meaningful inconsistency between the substance of BPA's mitigation actions and the relevant corresponding provisions of the Council's Program under a proper application of Section 4(h)(10)(A).*

*The parties here have not alleged that the mitigation actions BPA funds and implements are substantively inconsistent with the guidance in the Council program. And the record available in this proceeding reveals BPA's consistency with the Council's Program and recommendations in the totality. See, e.g., 2022 RDC Decision Letter, BP-24-E-YN-91, at 47–48 (describing 2022 Power RDC Decision's responsiveness to Council recommendations regarding mitigation asset maintenance); BPA Response to Anadromous Fish Categorical Review Recommendations (Mar. 23, 2023), BP-24-E-BPA-10-AT19 (reporting BPA's intent to continue funding implementation of the over 100 mitigation projects recommended by the Council after its most recent scientific review); Fisher et al., BP-24-E-BPA-10, at 27–28 (noting funding of over 300 mitigation projects and 1,000 contracts), 26 (noting that, between FY 2020 and FY 2022, out of over 300 projects, seven projects were closed at the project sponsor's request, typically because the project had achieved its objective, and in three*

[41] Insofar as the Tribal Parties' invoke concerns about whether funding levels allow mitigation projects to be implemented "as proposed," *see, e.g.*, Tribal Parties Br., BP-24-B-YN-01, at 17, BPA notes that whether projects are implemented as proposed by sponsoring entities is not the relevant benchmark for BPA's mitigation duties. Project proponents can, and often do, propose mitigation for BPA-funding that is wholly unrelated to its duty to mitigate for the impacts of Federal hydropower development and operation.

*instances, pairs of projects were merged in order to consolidate work and increase administrative efficiency).*

*BPA's proposed rates do not violate Section 4(h)(10)(A) of the Northwest Power Act.*

***Issue 4.2.3***
*Whether BPA has adequately considered the views and expertise of fish and wildlife managers including the Tribal Parties.*

**Parties' Position**

The Tribal Parties' claim that BPA "failed to give substantial weight to input from the Tribal Parties when setting its proposed BP-24 rates." Tribal Parties Br., BP-24-B-YN-01, at 48. They claim that this alleged failure is a substantive violation of the Northwest Power Act. *Id.* at 50.

**BPA Staff's Position**

BPA adequately considered the input of fish and wildlife managers, including the Tribal Parties, under relevant standards.

**Evaluation of Positions**

As support for their position that BPA has a *statutory* duty to give "substantial weight" to input from fisheries managers, the Tribal Parties cite Section 4(h)(5) of the Northwest Power Act. *See* Tribal Parties Br., BP-24-B-YN-01, at 48. That section applies to the Council's development of its Fish and Wildlife Program. *See* 16 U.S.C. § 839b(h)(5) ("The Council shall develop a program on the basis of such recommendations supporting documents, and views and information obtained through public comment and participation, and consultation with the agencies, tribes, and customers referred to in subparagraph (A) of paragraph (4)."). [42] There is no statutory provision requiring BPA to give "substantial weight," so there is likewise no substantive statutory violation stemming from the Tribal Parties' allegation that BPA failed to do so.

To be sure, there is judicial guidance on this matter, as the Tribal Parties noted. *See Golden NW*, 501 F.3d at 1051 ("[F]isheries managers and agencies responsible for managing fish and wildlife possess 'unique experience and expertise,' which requires that their analysis be given substantial weight."). But in *Golden NW*, the Court's holdings concerned the standards of review under the Administrative Procedure Act:

> Because BPA discounted and ignored crucial facts presented to it, we hold that BPA's fish and wildlife cost estimates and, by extension, the rates set pursuant to those estimates, were not supported by substantial evidence.

[42] Similarly, the statute also directs the Council to give "due weight to the recommendations, expertise, and legal rights and responsibilities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes" when resolving inconsistencies among recommendations for the program). *See* 16 U.S.C. § 839b(h)(7).

> We also hold that, to the extent BPA simply excluded information related to fish and wildlife costs, it acted contrary to law.

*Id.* at 1052. Moreover, the problem with BPA's rates in *Golden Northwest* stemmed from BPA's failure to reckon with "undisputed testimony" offered by the fish and wildlife managers. *Id.* The record in BP-24, however, stands in stark contrast to the *Golden Northwest* facts.

Thus far in BP-24 and other processes, BPA has:

- Admitted without protest all evidence and arguments advanced by the Tribal Parties or other fish and wildlife managers, unlike in the rate proceeding leading to *Golden Northwest*;
- Considered and responded in detail to all evidence, arguments, and requests for information by the fish and wildlife managers; *see, e.g.*, IPR Closeout Report, BP-24-E-ID-01-AT24 (evaluating and addressing fish and wildlife managers' comments in BPA's IPR Closeout Report); 2022 RDC Decision Letter, BP-24-E-YN-91 (evaluating and addressing the comments of fish and wildlife managers in BPA's 2022 Power RDC decision); BP-24 Data Responses, BP-24-E-BPA-10-AT01 (BPA Responses to Tribal Parties' Data Requests); Fisher *et al.*, BP-24-E-BPA-10 (addressing Tribal Parties' arguments); *see also* Chapters 3, 4, 5, and 6.
- Adjusted BPA's cost projections in response to evidence presented by fish and wildlife managers, *see* Fisher *et al.,* BP-24-E-BPA-10 at 46 (describing changes to hatchery cost projections in response to information received during BPA's Integrated Program Review).

Furthermore, to the extent that the Tribal Parties might suggest that giving "substantial weight" requires BPA to agree with and adopt fisheries' managers evidence or recommendations, BPA disputes that premise. *Golden NW* explained that BPA must estimate its costs "in accordance with sound business principles." 501 F.3d at 1052-53. In the record developed in this proceeding, BPA provided comprehensive, reasoned analysis in response to the information offered by fish and wildlife managers, as well as explanations justifying sound business reasons for BPA's cost and operational projections.

Finally, the Tribal Parties advance a complex and ranging argument that attempts to establish BPA must "defer" to the Council's Program. *See* Tribal Parties Br., BP-24-B-YN-01, at 49; BP-24-B-YN-02 (Tribal Parties' Supplemental Brief). Their argument, essentially, is that they read the statutory language of Sections 4(h)(10)(A) and 4(h)(11)(A) as requiring BPA to "afford deference" to the Council Program. *Id.* at 3. But because the Tribal Parties do not explain the impact of this interpretation, or how it is meaningfully different from the actual statutory language of those provisions, BPA sees no need to engage the merits of this proffered interpretation. To the extent the Tribal Parties might suggest it would constrain BPA's ability to make decisions with respect to the Council's Program, BPA would dispute that contention based on Ninth Circuit precedent: BPA has final authority to determine its own decisions. *NRIC*, 25 F.3d at 874.

**Decision**

*BPA has adequately considered the views of fish and wildlife managers under all relevant standards.*

# 5.0 TRIBAL TREATY ISSUES

## 5.1 Introduction

This portion of the ROD addresses tribal trust and treaty issues raised by parties to the BP-24 rate case in their briefs.

***Issue 5.2.1***
*Whether BPA's cost forecasts must be updated to reflect assertions of additional costs associated with its treaty and trust obligations.*

**Parties' Positions**
The Tribal Parties contend that BPA has violated the Yakama Nation's and CTUIR's treaties with the United States. Tribal Parties Br., BP-24-B-YN-01, at 25. The Tribal Parties contend that the Northwest Power and Conservation Council's goal of annual runs of five million adult salmon and steelhead is the United States' "own" quantification of the United States treaty obligation. *Id.* at 29. Tribal Parties contend that BPA must, therefore, set rates to ensure fish and wildlife mitigation funding sufficient to support the return of five million fish annually. *Id*. Anything short of the Council's goal, Tribal Parties contend, "constitutes a violation of the Yakama Nation's and CTUIR's respective treaties, and a violation of BPA's fiduciary obligations as a federal trustee." *Id.*

In their Brief on Exceptions, Tribal Parties' argument is somewhat altered. Though still heavily reliant on the Council's five million fish goal and related loss assessments, they assert the import of such numbers is that they are evidence of the quantified impacts of the hydropower system on Columbia Basin fisheries. Tribal Parties Br. Ex., BP-24-R-YN-01, at 6. This, they assert, "represents the minimum possible level of fisheries recovery that BPA has legal mitigation obligations to address." *Id.* at 5-6. Their argument is "properly understood as a challenge to whether BPA's proposed rates for the BP-24 rate period are based on cost projections sufficient to mitigate for the Columbia River hydropower system's impacts on the Yakama Nation's and CTUIR's Treaty-reserved fishing rights." *Id.* at 6. Therefore, they argue that BPA must, at a minimum, achieve the Council's five million fish goal in order to not violate Yakama Nation's and CTUIR's treaties. *Id.* at 5-6 (stating that the five million fish goal is "commensurate with the minimum estimate of the hydropower system's annual impact on the Columbia River fishery, and thus represents the minimum possible level of fisheries recovery that BPA has legal mitigation obligations to address."); *id.* at 7 ("BPA's proposed rates in the [Draft ROD] are not based on projected fish and wildlife costs anywhere near sufficient to meet the minimum mitigation and fisheries restoration targets set by the Council under the [Northwest Power Act], and thus these cost projections are, on their face, also insufficient to implement mitigation actions sufficient to meet BPA's Treaty-based fisheries restoration obligations to the Yakama Nation and CTUIR."); *but cf. id.* at 6 (alleging a duty to "maximize[] BPA's capability to make progress towards the 5 million fish recovery goal consistent with its Treaty obligations . . . .").

**BPA Staff's Position**

This is a legal matter raised in the Tribal Parties' briefs.

**Evaluation of Positions**

**A. Introduction**

In their Initial Brief, Tribal Parties argued, "BPA must set forth rates that ensure mitigation funding to support a 10-year rolling average return of 5 million fish per year. Anything short of that constitutes a violation of the Yakama Nation's and CTUIR's respective Treaties, and a violation of BPA's fiduciary obligations as a federal trustee." Tribal Parties Br., BP-24-B-YN-01, at 28-29 (internal citation omitted). They described the Council's five million fish regional goal as "the federal government's own measure of its Treaty obligations . . . ." *Id.*

In the Draft ROD, BPA explained that the Council's regional goal was not a statutory obligation on BPA, and had not been adopted by BPA or the United States as a standard to measure compliance with tribal treaties. Administrator's Draft Record of Decision, BP-24-A-01, at 62-63. BPA declined to accept a new "numeric quantification of treaty reserved fishing rights." *Id.* at 61.

In their Brief on Exceptions, the Tribal Parties clarify that the focus of their argument is BPA's cost projections. Tribal Parties Br. Ex., BP-24-R-YN-01, at 6. Their argument is "properly understood as a challenge to whether BPA's proposed rates for the BP-24 rate period are based on cost projections sufficient to mitigate for the Columbia River hydropower system's impacts on the Yakama Nation's and CTUIR's Treaty-reserved fishing rights." *Id.* Though still heavily reliant on the Council's five million fish goal, they assert the import of this regional goal is that it is evidence of the quantified impacts of the hydropower system on Columbia Basin fisheries. *Id.* This, they assert, "represents the minimum possible level of fisheries recovery that BPA has legal mitigation obligations to address." *Id.* at 5-6.

The Tribal Parties' Brief on Exceptions has helped focus the issue before BPA in this rate proceeding as it relates to the Tribal Parties' arguments. For that reason, BPA has revised its issue statement and response to focus on the Tribal Parties' clarified framing and matters relevant to the decision BPA is making here, which are decisions on the power rates for the BP-24 rate period.

Section B describes the legal standards relevant to BPA's cost forecasts. Section C explains that Tribal Parties have not shown that their interpretation of the treaty obligation they ascribe to BPA is, at the time of this ratemaking, so certain that BPA is required to revise its cost forecasts. It is unnecessary, for ratemaking purposes, for BPA to resolve assertions about the extent of tribal treaty rights or corresponding federal duties in the rate case. Assuming *arguendo* that BPA must make such determinations, Section D discusses existing case law concerning treaty-reserved fishing rights and the limited authorities Congress has delegated to BPA. BPA concludes that its cost forecasts do not need to be revised.

## B. Review of BPA's Cost Projections

Because Tribal Parties have framed their argument as a matter of BPA cost projections, and the reasonableness of those projection to meet various obligations, BPA begins by highlighting the standards that apply to developing those projections.

BPA is a creature of statute, and "accordingly possess[es] only the authority that Congress has provided." *NFIB v. OSHA*, 142 S.Ct. 661, 665 (2022). As an agency of the federal government, BPA "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). In the present context, BPA's rate authority is set forth in Section 7 of the Northwest Power Act (NWPA). 16 U.S.C. § 839e *et seq.* Under these provisions, BPA is tasked with setting its rates to recover its projected costs, recovering the federal investment over a reasonable period of years, allocating costs among the various rate pools and customers, and ensuring that the specific showings and requirements identified in Section 7 of the statute are met. *Id.*

With that general context, BPA turns to the question of how its cost projections are reviewed within the rate case. The relevant legal standards for assessing BPA's cost forecasts are discussed in *Golden Northwest Aluminum. Golden NW*, 501 F.3d at 1052-53. There, the Court found that BPA's cost forecasts must be supported by "substantial evidence" available at the time it sets rates and estimated "in accordance with sound business principles." *Id.*; *see also* 16 U.S.C. §§ 839e(a)(1), 839f(e)(2). Importantly, these projections are supposed to reflect "realistic" projections of BPA's costs as measured by the "information available at the time the rates were set . . . ." *Golden NW*, 501 F.3d at 1053. BPA's rate determinations must also not be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Id.* at 1051 (internal citation omitted).

## C. BPA's Cost Projections and the Tribal Parties' Treaty Claims

In Chapters 3 and 4 of this ROD, BPA responds to the cost projection concerns raised by the Tribal Parties, as well as the claims that BPA's rates fail to follow various provisions of the NWPA. *See supra* Chapters 3 and 4. There, BPA explains in detail the basis for its cost projections, responds to the parties' evidentiary and legal arguments, and addresses the Tribal Parties' specific claims that BPA is bound to achieve the Council's goal of five million fish. *Id.* at Chapter 3 (cost projections and risk mitigation) and Chapter 4 (NWPA compliance). These chapters show that, based on the record before the Administrator, BPA has met the requirements of the NWPA, and its projections are "realistic" and based on "sound business principles."

In their Brief on Exceptions, however, the Tribal Parties raise another basis to contend BPA's cost projections are insufficient. Tribal Parties Br. Ex., BP-24-R-YN-01, at 6. Specifically, they assert, BPA must

> use its Final Record of Decision to explain how the fish and wildlife cost projections being used to establish its BP-24 rate decision are sufficient to implement mitigation for the impacts of the Columbia River hydropower system on fish and wildlife at a level that maximizes BPA's capability to make progress towards the 5 million fish recovery goal consistent with its Treaty

> obligations to the Yakama Nation and CTUIR. If BPA thinks that the impacts of the hydro system are less than 5-11 million fish annually, it should say so and support it with science. Short of that quantification, BPA is charged with implementing a Fish and Wildlife Program that is based on mitigating a minimum annual impact of 5 million fish by 2025.

*Id.*

With this argument, the Tribal Parties advance what appears to be a novel standard for compliance with the Yakama Nation's and CTUIR's treaties. That is, to comply with the Tribal Treaties, BPA's cost projection must be consistent with achieving, or "maximiz[ing] BPA's capability to make progress towards," the "5 million fish recovery goal . . . ." *Id.* The Tribal Parties argue that BPA's cost forecasts are insufficient because they fail to take into account this new standard. *Id.*

BPA recognizes that the Yakama Nation and CTUIR hold reserved fishing rights under their respective treaties. However, it is far from certain whether a minimum numeric quantification of fish is guaranteed, or what that number would be. The Tribal Parties assert that number should be at least five million salmon and steelhead that survive to adulthood and return to the Columbia River, and point to the Council's Program as support. But, as explained in the next paragraph, the Tribal Parties' claims do not rely on settled law. Ultimately, BPA's cost forecasts must be supported by substantial evidence, and must be estimated in accordance with sound business principles, including a realistic projection of costs that accurately reflect the information available at the time the rates were set. *Golden NW*, 501 F.3d at 1053. BPA's cost projections meet these requirements, and need not be revised in response to Tribal Parties' new assertion of what is required of BPA for treaty compliance. Several reasons support BPA's conclusion.

First, Tribal Parties' assertion that a certain quantity of fish must be available to the Tribes, and that the United States must take steps to assure such number, is not based on settled law. In developing a forecast for the rate case, the Court in *Golden NW* was clear that BPA must develop its cost projections from "information available at the time rates were set . . . ." *Id.* At this time, there is no established figure for the minimum quantity of fish in the river necessary to address the treaty-reserved rights or any corresponding duty of the federal government. *See* Treaty with the Yakamas, BP-24-E-YN-01, at 3 (Article III); Treaty with the Walla Walla, Cayuse, and Umatilla, BP-24-E-YN-03, at 2 (Article 1). BPA has reviewed the text of the treaties themselves, and BPA respectfully notes that it observes the treaties contain no express guarantee of a certain numeric quantity of fish. BPA is also unaware of any case declaring a numeric quantity. Courts have interpreted these treaty-reserved fishing rights to include: (1) an implicit right to have fish to harvest, (2) the right to take up to 50 percent of harvestable fish, and (3) the right to take enough fish to meet ceremonial, subsistence needs, and to support a "moderate living." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686-87 (1979). The U.S. Supreme Court recognized these rights and standards associated with treaty-reserved fishing rights, but did not decide what minimum quantity of fish in the river would satisfy those rights. *See id.* ("[W]hile the maximum possible allocation to the Indians is fixed at 50%, the minimum is not . . . .").

As such, BPA finds that Tribal Parties have not shown, based on the information available at the time, that BPA's original assumption for its projected fish and wildlife costs is faulty or must be higher to achieve or progress towards a certain quantity of fish for treaty purposes. On this point, BPA notes the Tribal Parties do not state the specific numeric quantity of fish that they assert is the standard for compliance with their treaty-reserved fishing rights. Instead, they assert a right to "more" than the quantity of fish presently in the river, and "far in excess of 5 million."[43]

BPA's observations here do not purport to interpret the treaties in question definitively or on behalf of the federal government as a whole. But, without clarity on the nature and extent of the foundational legal premise[44] that is the basis of the Tribal Parties' arguments, it remains "consistent with sound business principles" to base BPA's cost forecast on the information known at the time, and to not speculate as to the numeric quantity of fish secured by the Tribal treaties and associated costs, and to not adjust BPA's cost projections. *See Golden NW*, 501 F.3d at 1053; *see also supra* Issues 3.2.2.3, 3.3.2.2 (describing BPA decision to not speculate on unknown outcomes in litigation.).[45]

Second, it would not be appropriate for BPA to treat the Council's five million fish goal as binding for purposes of BPA's cost projections. As described in their Initial Brief, Tribal Parties argued, "BPA must set forth rates that ensure mitigation funding to support a 10-year rolling average return of 5 million fish per year. Anything short of that constitutes a violation of the Yakama Nation's and CTUIR's respective Treaties, and a violation of BPA's fiduciary obligations as a federal trustee." Tribal Parties Br., BP-24-B-YN-01 at 28-29 (internal citation omitted). There, the Tribal Parties described the Council's five million fish goal as "the federal government's own measure of its Treaty obligations." *Id.* This is incorrect. Nothing in the rate case record demonstrates that either BPA or the United States has adopted a five million fish goal as the threshold for treaty compliance.

The five million fish figure derives from the Council's Columbia River Basin Fish & Wildlife Program. *Id*. at 13. The Council first offered the five million fish goal in its 1987 Fish and Wildlife Program. *See* 1987 Fish and Wildlife Program, BP-24-E-BPA-10-AT03 at 19. The Council's 1987 Program expressly did not take a position on whether the five million goal was adequate with respect to treaty rights: "The Council is not in a position to adjudicate [Indian] rights and does not purport to do so . . . ." *Id.* at 34. The Council is an interstate

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[43] Tribal Parties Br. Ex., BP-24-R-YN-01, at 3; *see also id.* at 3 & Tribal Parties Br., BP-24-B-YN-01, at 30-31 (rights exceed current returns); Tribal Parties Br., BP-24-B-YN-01, at 32 & Tribal Parties Br. Ex., BP-24-R-YN-01, at 3, 5-6 (rights exceed five million); Tribal Parties Br., BP-24-B-YN-01, at 29 ("reserved the right to harvest up to 50% of the harvestable catch of an annual run exceeding 10 million fish."); Tribal Parties Br. Ex., BP-24-R-YN-01, at 2 ("At the time the Yakama Nation's and CTUIR's Treaties were signed, it is estimated that approximately 16 million fish returned annually to the Columbia River Basin.").

[44] That premise being that treaties with the United States guarantee a certain numeric quantity of fish in the river.

[45] This finding, of course, does not *preclude* BPA from paying for such costs, should they become more certain and definitive during the rate period. BPA must pay its actual costs regardless of whether they are higher or lower than forecast in the rate case. *See supra,* Section 3.4.

compact agency, and not an arm or agency of the federal government. The Tribal Parties cannot impute the goal of an interstate compact agency to the United States as a measure of its treaty obligation. To treat this goal or its underlying studies as binding obligations in BPA's cost projections would be to give them greater weight than is required or reasonable, and is unsupportable as a matter of "substantial evidence" and "sound business principles."[46]

Third, adjusting BPA's cost projections in an attempt to guarantee five million fish would require assuming that the entire burden of the alleged obligation falls on BPA. That assumption is not reasonable. In effect, the Tribal Parties demand BPA make two unprecedented assumptions in revising its cost projections: not only that (1) BPA must independently accept the Tribal Parties' interpretation of the treaties as including a quantity-based obligation on the United States as to the number of fish in the river, but also that (2) BPA is fully responsible to meet that obligation.

These assumptions are far from certain. For one, BPA has never before, in its 40 years of setting rates under the NWPA, had to make a finding that its rates are sufficient to guarantee a certain number of fish in the river. As a creature of statute, BPA has limited delegated authority. *NFIB,* 142 S.Ct. at 665; *La. Pub. Serv. Comm'n,* 476 U.S. at 374. Therefore, even assuming *arguendo* that the *United States* has an obligation to guarantee a numeric quantity of fish, the proper analysis here is whether BPA's rates are consistent with its delegated authority (*i.e.,* the NWPA). As discussed in Chapter 3 and 4, BPA has concluded its rates are consistent with such authority. To find that BPA must do more is to assume Congress intended the NWPA to be legislation designed to implement the United States' treaty obligations, which, as described below, is not indicated. Taken together, these considerations strongly suggest that assuming BPA would bear the full, and sole, cost responsibility for guaranteeing five million fish would not be a reasonable cost assumption for BPA's rates.[47]

Fourth, sound policy reasons support BPA's decision to not engage this new question—the quantity of fish secured by the Yakama Nation's and CTUIR's treaties or required as a federal treaty obligation—as part of BPA's cost projection in this rate case. As the Tribal Parties have mentioned in their brief, the treaties the Yakama Nation and the CTUIR hold are with the United States. Other treaty tribes in the Columbia River Basin—not participating in this rate case—have similar treaty-reserved fishing rights. If BPA accepted a novel interpretation of treaty rights or duties through this administrative proceeding, even if just for cost projection purposes, it could have unforeseen and prejudicial impacts

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[46] Furthermore, as BPA explains in Issue 4.2.2, this number represents a regional policy goal, not a legal obligation on BPA.

[47] Indeed, it is not clear what this would entail for a two-year rate period. Tribal Parties' evidence indicates that, if certain conditions continued beyond 2025, achieving the Council's five million fish goal would require on the order of "$22-25 billion" and take "80-90 years" to accomplish. Tribal Parties Br., BP-24-B-YN-01, at 14, *citing* ISAB Review of the 2014 Columbia River Basin Fish and Wildlife Program (Mar. 23, 2018), BP-24-E-YN-15, at 91. BPA notes that the scale of Tribal Parties' "Requested Action" does not correspond to this number and timeline. *See* Tribal Parties Br., BP-24-B-YN-01, at 32.

on the United States government's position as a whole as well as impact the rights of other tribal entities not participating in this case.[48]

As this discussion shows, BPA has not ignored the Yakama Nation's or CTUIR's treaties in evaluating its cost projections. *See* Tribal Parties Br. Ex., BP-24-R-YN-01 at 4. BPA concurs that it must act in accordance with law, and agrees that the Yakama Nation's and CTUIR's treaties are the supreme law of the land. *Id.* But BPA's cost projections for rate-setting purposes must be supported by substantial evidence, and based on "sound business principles," including a "realistic projection of . . . costs that accurately reflect[] the information available at the time the rates [are] set . . . ." *Golden NW*, 501 F.3d at 1053. They also must be in accordance with existing law. Here, however, Tribal Parties advance novel claims about the meaning of Tribal treaties that are not based on settled law. While the Tribal Parties may seek determinations on these issues in the appropriate forums, nothing requires these issues to be resolved through this rate case in order for BPA's cost projections to be reasonable based on the information available. Such argument would undoubtedly be better addressed through development of a factual record in a forum other than a BPA administrative proceeding to set electric power rates. Nor does BPA agree that in order to develop a reasonable forecast of its projected cost for the rate period, BPA has a duty to either (1) independently accept the proffered interpretations of the United States' treaty obligation in such a way as to establish a novel duty that has not been recognized in existing treaty standards; or (2) assume in its cost projections that it is fully responsible for the costs of achieving this new standard. BPA's cost forecasts are, therefore, reasonable.

## D. Treaty and Tribal Trust Considerations

For the reasons articulated above, BPA finds that its fish and wildlife cost projections are reasonable and do not need to be adjusted in light of the arguments raised by the Tribal Parties in regard to the Yakama Nation's and CTUIR's treaties. BPA reaches this conclusion without finding a need to address all specific arguments by the Tribal Parties' regarding rights or obligations under those treaties. Nevertheless, assuming *arguendo* that it is proper for BPA to evaluate the legal merits of the Tribal Parties' arguments and associated interpretation of their treaties, BPA provides the following discussion and considerations.

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[48] Nor would it be reasonable to assume other tribal entities would have been on notice that issues involving their treaty rights would be discussed in this rate case. The Federal Register Notice for the BP-24 rate case limits the scope of the rate proceeding to setting BPA's wholesale power and transmission rates and excludes any other matters not related to those rates from the scope of the proceeding:

> The BP–24 proceeding is a joint proceeding for the adoption of both power and transmission rates for FY 2024–2025 . . . This section provides guidance to the Hearing Officer regarding the scope of the rate proceeding and identifies specific issues that are outside the scope. In addition to the issues specifically listed below, <u>any other issue that is not a ratemaking issue is outside the scope of this proceeding</u>.

BP-24 FRN, 87 Fed. Reg. 69,259, 69,260, BP-24-FR-BPA-01, at 2 (emphasis added).

1. *BPA's cost projections and rates are reasonable and are not inconsistent with Yakama's and CTUIR's Treaties*

BPA disagrees with the Tribal Parties' contention that BPA's BP-24 Rate Proposal represents a material breach of the Yakama Nation's and CTUIR's treaties. Again, the Tribal Parties contend that BPA's failure to provide for annual returns of at least five million adult fish amounts to a treaty violation.[49] Tribal Parties Br., BP-24-B-YN-01, at 29. As explained in the prior section, the five million fish goal is not an established measure of the United States treaty obligation under existing law. The Tribal Parties hold reserved fishing rights under their respective treaties. *See* Treaty with the Yakamas, BP-24-E-YN-01, at 3 (Article III); Treaty with the Walla Walla, Cayuse, and Umatilla, BP-24-E-YN-03, at 2 (Article 1). These treaties secure an "exclusive right of taking fish in all the streams, where running through or bordering said reservation . . ." and a right of "taking fish at all usual and accustomed places, in common with citizens of the Territory." Treaty with the Yakamas, BP-24-E-YN-01, at 3 (Article III). The Treaty with the Walla Walla, Cayuse, and Umatilla includes nearly identical language respecting reserved fishing rights.[50] The BP-24 rates do not violate these treaties.

First, the treaties themselves specify neither a quantity of fish that the tribes have a right to, nor a federal obligation to ensure a certain quantity of fish in the river for the United States to fulfill its duties under the treaties. As explained above in subpart C of this issue, the Supreme Court has interpreted fishing rights to include the right to take enough fish to meet ceremonial purposes, subsistence needs, and to support a "moderate living." *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 686-87. However, Tribal Parties have not argued that any particular number is the minimum necessary to fulfill ceremonial, subsistence, and economic needs;[51] instead they argue that—under the

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[49] BPA disputes, on a factual basis, the Tribal Parties' implicit premise that a rate decision such as BP-24 can achieve (or fail to achieve) an outcome of this type. *See supra* Chapter 3 (discussing how BPA's rate decisions do not make decisions or implement actions regarding the existence or operation of the federal hydropower system—what the Tribal Parties allege harms the Yakama Nation's and CTUIR's treaty resource). *See also* Tribal Parties Br., BP-24-B-YN-01, at 11 (blaming collapse of fish runs on construction of dams throughout the Columbia River basin); *id.* at 23 (stating that operation of the Columbia River hydropower system is responsible for the loss of at least five million adult salmon and steelhead returns); *compare with infra* Chapter 6 (discussing how BPA's rate decisions do not select or implement mitigation actions that BPA might decide to fund—the requested action that the Tribal Parties seek to redress their treaty/trust claims). *See also* BP-22 ROD, BP-22-A-02, at 56-62 (explaining BPA's cost projections in rate case not binding constraints on actual BPA spending); *Golden NW*, 501 F.3d at 1053 (noting that the rate case is not the forum to select fish and wildlife mitigation alternatives)); *supra* Issue 4.2.2., subpart C.1 (noting numerous intervening factors that influence the number of adult fish that return to the river).

[50] ". . . [T]he exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States . . . ." Treaty with the Yakamas, BP-24-E-YN-01, at 3 (Article III); Treaty with the Walla Walla, Cayuse, and Umatilla, BP-24-E-YN-03, at 2 (Article 1).

[51] Such argument would undoubtedly be better addressed through development of a factual record in a forum other than a BPA administrative proceeding to set electric power rates. *See, e.g.*, *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 686-87 ("[W]hile the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will, upon proper submissions to the District Court, be modified

treaties—BPA must take steps to achieve or make substantial progress towards assuring a quantity of fish "commensurate with the minimum estimate of the hydropower system's annual impact on the Columbia River fishery"—*i.e.*, five million fish.

Second, even assuming the accuracy of that estimate (developed through the Council's Program), BPA has no basis to accept the Tribal Parties' contention that it defines a federal government treaty obligation—*i.e.,* an affirmative duty for the government to guarantee any particular number of fish or to undertake expenditures or actions to increase overall fish abundance towards a certain minimum numeric threshold.[52] *See Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1813–14 (2023) (declining to expand treaty beyond its "clear terms" to find an affirmative duty of the United States) (citing *Choctaw Nation v. United States*, 318 U.S. 423 (1943).

Third, it is unclear whether BPA even has authority to make a determination on behalf of the United States government regarding treaty obligations.[53]

Fourth, Congress did not intend the NWPA to be a means to fulfill or implement the United States' treaty obligations. Congress typically enacts specific legislation to address the United States' duties under tribal treaties or with respect to the tribes' treaty rights. The Supreme Court has stated "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Rice v. Cayetano*, 528 U.S. 495, 519 (2000); *see also id.* at 519 (observing that such legislation "dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians") (citing *Morton v. Mancari¸* 417 U.S. 535, 552 (1974); Stephen L. Pevar, The Rights of Indians and Tribes at 33 (4th ed. 2012) ("[S]tatutes are the vehicles by which Congress creates programs and services necessary to fulfill its treaty promises . . . . [T]he primary means by which Congress [can] satisfy its treaty commitments [is] by enacting laws that create[] programs or services for Indians and tribes.")).

The NWPA and its legislative history give no indication that Congress intended that statute as a means to fulfill or implement the United States' treaty obligations. Neither the enacted statutory purposes nor the NWPA's legislative history make any mention of implementing treaties with Indian tribes. The statute does include provisions (1) calling for the Council program's inclusion of measures to be "consistent with the legal rights of appropriate Indian tribes in this region," 16 U.S.C. § 839b(h)(6)(D), and (2) stating that the statute does

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in response to changing circumstances."); 28 U.S.C. § 1362.

[52] *Cf.* Treaty with the Yakamas, BP-24-E-YN-01, at 3 (Articles IV, V) (establishing affirmative duty of the federal government to make payments, construct and maintain buildings, and provide services); Treaty with the Walla Walla, Cayuse, and Umatilla, BP-24-E-YN-03, at 2 (Articles 3, 4) (similar language creating affirmative duty).

[53] Indeed, BPA is unsure that it would even be authorized to accept the Tribal Parties' characterization of Federal treaty obligations through this administrative proceeding. *See, e.g.*, *Arizona v. Navajo Nation*, 143 S. Ct. at 1813 (noting that Congress and the President are responsible for exercising the Federal government's "sovereign function" of managing and structuring relationships with Indian tribes) (citing *United States v. Jicarilla Apache Nation,* 564 U.S. 162, 175, 131 S. Ct. 2313, 2323–24, (2011)).

not "modify any treaty or other right of an Indian tribe." 16 U.S.C. § 839g(e) The second reference recognizes Congress' understanding that the NWPA did not abrogate Indian treaties.[54] While the NWPA states that its purposes are intended to be construed in a manner consistent with applicable law, this is far from a statutory delegation empowering and requiring BPA to fulfill or implement the United States' treaty obligations. 16 U.S.C. § 839. The statute defines BPA's responsibilities, and as with administrative agencies generally, BPA's actions must be in accordance with the law. *See* 16 U.S.C. § 839f(e)(2). But the NWPA does not give any indication that it implements treaty obligations by, for instance, establishing services or programs, or directing BPA to manage tribal resources for the benefit of tribes. *See* 16 U.S.C. § 839g(e); 16 U.S.C. § 839b(h)(6)(D). For example, the fish and wildlife provisions of the statute focus on mitigation of affected fish and wildlife resources themselves, not of tribes, political entities, communities, or even fisheries. *See* 16 U.S.C. § 839(6) (specifying a stated purpose of the NWPA to "protect, mitigate and enhance the fish and wildlife . . . .").

Additionally, the NWPA does not "single out" tribal constituencies for special treatment. *See Rice v. Cayetano*, 528 U.S. at 519. To be sure, the statute provides for participation and consultation with Indian tribes, but does so alongside states, local governments, river users, and the public at large. *See* 16 U.S.C. § 839(3); *see also* 16 U.S.C. § 839b(h)(11)(B) (requiring BPA to "consult" with various federal agencies, "State fish and wildlife agencies of the region, appropriate Indian tribes, and affected project operators . . . ."). Similarly, even where the statute affords tribes heightened influence in the development of the Council's fish and wildlife program, it does so on the basis of their status as fish and wildlife resource managers, and not their treaty status. *See generally* § 839b(h)(2)-(7). The NWPA affords that same heightened influence to state fish and wildlife agencies. *Id*. The fact that these provisions apply to states as well as tribes is a strong indication that the provisions were not intended to address tribal treaties.

For the foregoing reasons, BPA disagrees with Tribal Parties' contention that the BP-24 rate decision violates the Yakama Nation's and CTUIR's treaties. BPA finds it reasonable to not adopt five million fish as the minimum measure of treaty compliance as a basis for forecasting costs to set rates in the BP-24 rate case, as Tribal Parties suggest is required. As explained above and in Chapter 3 and 4, BPA has set its rates consistent with substantial evidence and based on forecasted costs of the fish and wildlife program.

*2. Tribal Trust Arguments*

The Tribal Parties also allege a breach of BPA's duty as a federal trustee. Tribal Parties Br., BP-24-B-YN-01, at 28.

[54] Contrary to suggestions in the Tribal Parties' Brief on Exceptions, BP-24-R-YN-01 at 4 and 7, BPA does not contend that the Tribal Parties' treaties have been abrogated or that BPA has authority to abrogate a treaty, and disputes that its decision here has the effect of doing so. Furthermore, BPA does not dispute that the Tribal Parties' treaties constitute federal law.

a. General Trust

There is an "undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). As an agency of the federal government, BPA shares this general trust responsibility to Indian tribes.

The general trust responsibility is "discharged by the agency's compliance with general regulations and statutes . . . ." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998); s*ee also Pawnee v. United States*, 830 F.2d 187, 191 (Fed. Cir. 1987); *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308-09 (9th Cir. 1997) (FERC exercises its trust responsibility in the context of the Federal Power Act and is not required to afford Indian tribes greater rights than they would otherwise have under that Act.). As BPA has explained elsewhere in this ROD, the BP-24 rate decision complies with applicable statutes, including the NWPA. As discussed in numerous Ninth Circuit and other cases, in the absence of statutory, regulatory, or judicial guidance, it is unclear exactly what more, if anything, an agency must do in a particular circumstance to fulfill its trust responsibility. *See e.g., Inter Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (citing the *U.S. v. Mitchell* standard that the federal government can incur specific fiduciary duties toward particular Indian tribes when an agency manages or operates Indian lands or resources).

b. Specific Trust

The trust responsibility can develop into one of a more specific nature in which the federal government has specific duties that it must discharge under fiduciary standards. For example, when the federal government is charged with managing resources on behalf of the tribes, the government must fulfill this fiduciary responsibility as a "moral obligation[] of the highest responsibility" to be "judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (holding United States to a "fiduciary" standard in the management of treaty payments of funds held by the federal government). In that context, a *specific* fiduciary responsibility is thus established when treaties, statutes, regulations, or executive orders direct the federal government to hold substantial management or control over a specific Indian resource for the benefit of the Indians. The Supreme Court articulated this point in *United States v. Mitchell*:

> [i]n contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government *full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship* and define the contours of the United States' fiduciary responsibilities.

463 U.S. at 224 (1983) (emphasis added).

BPA does not hold or manage any Indian resources on behalf of tribes. *See* Tribal Parties' Br., BP-24-B-YN-01, at 26. Indeed, no provision of law authorizes or directs BPA to manage fisheries or any tribal asset. As discussed above, the NWPA provides for participation and consultation with Indian tribes alongside states, local governments, river users, and the public at large. *See* 16 U.S.C. § 839(3); *see also* 16 U.S.C. § 839b(h)(11)(B). Similarly, the

NWPA affords that same heightened influence in development of the Council's Fish and Wildlife Program to state fish and wildlife agencies, treaty tribes, and non-treaty tribal fish and wildlife managers. *See generally* § 839b(h)(2)-(7). There is no suggestion that the NWPA intended for BPA to manage fish and wildlife resources on behalf of tribes.

Furthermore, to maintain a breach of trust claim against the federal government, a tribe must establish that the text of a treaty, statute, or regulation has imposed certain duties on the United States. *See Arizona v. Navajo Nation*, 143 S. Ct. at 1813; *see also Jicarilla*, 564 U.S. at 173–74, 177–78. Whether the federal government has expressly accepted such duties—thus making them judicially enforceable—requires an inquiry into whether "specific rights-creating or duty-imposing" language can be found in a treaty, a statute, or a regulation. *Arizona v. Navajo Nation*, 143 S. Ct. at 1813. This is the framework for determining the trust obligations of the United States for any claim seeking to impose trust duties on the federal government, and is not limited to claims seeking money damages. *Id.* n.1; *but cf.* Tribal Parties Br. Ex., BP-24-R-YN-01, at 8 (distinguishing between trust claims for monetary damages and non-monetary claims based on a trust relationship).

Thus, the question presented by the Tribal Parties' contention is whether the federal government has expressly accepted the duty alleged by the Tribal Parties—that is, assurance of five million fish. As discussed above, the Yakama Nation's and CTUIR's treaties do not establish an affirmative duty on the federal government to assure a specific number of fish and thus do not create the specific fiduciary trust duty that the Tribal Parties allege. Similarly, as discussed above, the NWPA does not establish a specific trust duty for BPA because it does not place Indian resources under BPA's management or control.

Importantly, in arguing a breach of BPA's trust duty, the Tribal Parties place their emphasis not on the text of the Yakama Nation's and CTUIR's treaties, or of relevant statutes, but on statements or findings endorsed or adopted by an interstate compact agency (*i.e.,* the Council). As the Tribal Parties' Initial Brief indicates, and as described above in more detail, the five million fish figure derives from the Council's Columbia River Basin Fish & Wildlife Program. Tribal Parties Br., BP-24-B-YN-01, at 13. As described above, and again in Issue 4.2.2., the Council's regional goal is not binding on BPA or the United States. The Tribal Parties cannot impute a regional goal or assessment of impact established by an interstate compact to the United States to create the trust or treaty obligation that they allege is breached by the BP-24 rates decision. As such, BPA is not violating a specific trust duty to the Yakama Nation and CTUIR by not adopting the five million fish goal as the minimum measure of treaty compliance as a basis for forecasting costs to set rates in the BP-24 rate case.

In conclusion, Congress has not placed tribal trust assets under BPA's management. Nor has BPA asserted management responsibilities over fisheries. Thus, BPA does not have a separate fiduciary trust duty to the Yakama Nation and CTUIR. Rather, BPA has a general trust responsibility that is "discharged by the agency's compliance with general regulations and statutes." *Morongo Band of Mission Indians*, 161 F.3d at 574; s*ee also Pawnee*, 830 F.2d at 191; *Skokomish Indian Tribe*, 121 F.3d at 1308-09. This responsibility has been met by

BPA setting rates in compliance with the NWPA.

**Decision**

*BPA's cost forecasts are reasonable and based on a realistic projection as measured by the information available at the time the rates are being set. Tribal Parties have not shown that their interpretation of the treaty obligation they ascribe to BPA is, at the time of this ratemaking so certain that BPA is required to revise its cost forecasts. While BPA finds no need to reach a definitive conclusion regarding Tribal Parties' novel interpretation in order for BPA's cost forecasts to be reasonable, assuming arguendo that BPA is required to do so, BPA finds the BP-24 rate decision does not violate the Yakama Nation's and CTUIR's treaties or constitute a breach of BPA's trust responsibilities.*

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# 6.0 PROCEDURAL ISSUES

## 6.1 Introduction

This chapter of the Final ROD addresses procedural issues raised by parties in their briefs to the BP-24 rate case.

## 6.2 Issues

***Issue 6.2.1***
*Whether BPA should exclude the arguments and evidence that challenge BPA's cost projections from the record of the BP-24 Rate Case.*

**Parties' Positions**
The Tribal Parties contend that BPA has impermissibly limited the scope of the BP-24 Rate proceeding in the Federal Register Notice (FRN) by excluding evidence on "an expansive variety of topics," including BPA's cost projections and anything related to potential environmental impacts of the BP-24 rate determinations. Tribal Parties Br., BP-24-B-YN-01, at 66. In their Brief of Exceptions, the Tribal Parties take issue with BPA's view that the rate case is not the proper forum for challenging BPA's compliance with the equitable treatment requirement and fish and wildlife funding, noting that the rate case is the only "final agency decision" that will address the total anticipated needs of BPA's fish and wildlife program. Tribal Parties Br. Ex., BP-24-R-YN-01, at 20.

The PPC contends that BPA should exclude from the record the material submitted by the Tribal Parties regarding BPA's cost projections, noting that the FRN expressly directs the Hearing Officer to exclude all such evidence from the record. PPC Br., BP-24-B-PP-01, at 5-6. AWEC similarly notes that the FRN excludes from the scope of this case spending projections on fish and wildlife costs, and that BPA should disregard the objections of Environmental Parties and the Tribal Parties. AWEC Br., BP-24-B-AW-01, at 7-8. AWEC notes that the Tribal Parties concerns with the scope is also moot, since all of their evidence has been admitted into the record. *Id.* at 10.

**BPA Staff's Position**

Staff contends that the rate case is not the forum to determine the extent of BPA's fish and wildlife legal obligations through its cost projections. Fredrickson *et al.*, BP-24-E-BPA-09, at 11; *see* BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 16. Staff also notes that the settlement discussions did not address cost projections. Fisher *et al.*, BP-24-E-BPA-10, at 18-21.

**Evaluation of Positions**

Pursuant to Section 7(a) of the Northwest Power Act (NWPA), BPA is required to "establish, and periodically review and revise" rates for the sale and disposition of electric energy and capacity." 16 U.S.C § 839e(a)(1). Those rates must meet a variety of statutory requirements set forth in Section 7 of the NWPA, including the recovery of the

> cost associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (including irrigation costs required to be repaid out of power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator pursuant to this chapter and other provisions of law.

*Id.* The procedures the Administrator uses to set these rates are established in Section 7(i) of the NWPA, wherein BPA is directed to conduct a hearing to "develop a full and complete record . . . related to such proposed rates." *Id.* § 839e(i)(2). Parties are also afforded an opportunity to rebut or provide refutation to any material submitted in the hearing. *Id.* § 839e(i)(2)(A).

As the statutory language makes clear, the scope of BPA's rate proceedings under Section 7(i) is not unlimited. Material submitted in the proceeding must be "related to such proposed rates." *Id.* § 839e(i)(2). To that end, BPA develops a scope limitation in the FRN announcing the rate case to focus parties' arguments and evidence to matters that will be decided through ratemaking. *See Fiscal Year (FY) 2024-2025 Proposed Power and Transmission Rate Adjustments Public Hearing and Opportunities for Public Review and Comment,* 87 Fed. Reg. 69,259, 69,260-62 (Nov. 18, 2022) (BP-24 FRN). Since BPA's rates only address recovering BPA's costs consistent with BPA's statutory mandates, decisions unrelated to ratemaking are excluded from the scope of the hearing.

One such area that has routinely been excluded from BPA rate proceedings is the cost projections for BPA-funded programs. *Id.* at 69,260; *see also* BP-22 FRN, 85 Fed. Reg. 77,189, 77,190 (Dec. 1, 2020) (noting the exclusions for cost projections). BPA's rationale for excluding these cost projections from the rate case is founded on the premise that BPA is not making final cost decisions on its programmatic spending in the rate case. As explained in detail in previous RODs—*see*, *e.g.*, Administrator's Final Record of Decision, BP-22-A-02, at 56-64—BPA's cost projections are not spending decisions, and may go through further revisions and adjustments in other forums. Moreover, BPA conducts processes outside of the rate proceeding to consider input from stakeholders on these issues. *See* BP-24 FRN, 87 Fed. Reg. at 69,259. Specifically, BPA's cost projection is developed through the Integrated Program Review (IPR), which draws from forecasts and projections developed by BPA's staff. *Id.; see also* Fisher *et al.*, BP-24-E-BPA-10, at 19; *see e.g,.* BP-24 IPR FCRPS Program Strategy Presentation, BP-24-E-BPA-10-AT29; BP-24 IPR Environment, Fish and Wildlife Presentation, BP-24-E-BPA-10-AT30. The IPR is a discretionary process where BPA takes stakeholder input and feedback on the projected costs of various programs that will be used in setting rates over the rate period. BP-24 FRN, 87 Fed. Reg. at 69,259. The IPR process for the BP-24 rate period commenced in June 2022, and concluded in October 2022 with a "close-out" report that summarized the cost projections. Fisher *et al.*, BP-24-E-BPA-10, at 19*; see also* IPR Closeout Report, BP-24-E-14-YN-23. The Tribal Parties were actively involved in the IPR process. *See, e.g*., Yakama Nation BP-24 IPR Comment Letter, BP-24-E-YN-29; CRITFC BP-24 IPR Comment Letter, BP-24-E-YN-30.

Another area BPA typically excludes from the scope of its rate case are matters related to BPA's environmental compliance. BP-24 FRN, 87 Fed. Reg. at 69,262. These issues are often addressed in other forums, such as the Columbia River System Operations Environmental Impact Statement. BPA also conducts a National Environmental Policy Act review separate from the rate case. *Id.; see also* Chapter 8 in this Final ROD.

The BP-24 FRN excluded matters related to BPA's cost projection forecasts and environmental compliance from the record of the BP-24 rate proceeding. BP-24 FRN, 87 Fed. Reg. at 69,260. The FRN also explained that if adjustments to BPA's cost projections were needed, they would occur "at the discretion of the Administrator" in processes outside of the rate case. *Id.* at 69,259. Notwithstanding this limitation, the Tribal Parties filed thousands of pages of materials challenging BPA's cost projections and BPA's compliance with various provisions of the NWPA and Tribal treaties. *See generally* Hesse *et al.*, BP-24-E-YN-103; Tribal Parties Testimony Attachments, BP-24-E-YN-01 to -102, -105 to -112. Many of the arguments raised by the Tribal Parties were previously raised during the IPR process, and BPA responded to them in the IPR Closeout Report. IPR Closeout Report, BP-24-E-YN-23, at 11-17.

PPC contends that, in view of the scope limitations in the BP-24 FRN, the Administrator must exclude all the arguments and evidence pertaining to the composition, scope, extent, and sufficiency of BPA's Fish and Wildlife Program and mitigation efforts, including BPA's fish and wildlife cost forecasts, as expressly outside the scope of the BP-24 rate proceeding. PPC Br., BP-24-B-PP-01, at 7. AWEC makes a similar argument, noting "BPA's rate proceeding process does *not* include setting the funding levels and budgets for various BPA programs, including fish and wildlife mitigation costs." AWEC Br., BP-24-B-AW-01, at 7. AWEC notes, though, that all of the Tribal Parties' materials have been admitted into the record, and thus, their concerns with the scope of the rate case is moot. *Id.* at 10.

The Tribal Parties argue that the FRN scope limitation is "impermissibly" too narrow. Tribal Parties Br., BP-24-B-YN-01, at 66. Relying on *Golden Nw. Aluminum, Inc., v. Bonneville Power Admin.,* 501 F.3d 1037, 1045 (9th Cir. 2007), Tribal Parties claim BPA is prohibited from "exercising its authority to define the scope of the Rate Proceeding in a manner inconsistent with the administrative structures enacted by Congress under applicable law." *Id.*

BPA, in general, agrees with PPC and AWEC that the scope of the rate case should exclude debate regarding the underlying programs that make up BPA's cost projections. Cost projections are an input into BPA's rates, and the rate case is not the forum to decide which programs to pursue, nor which programs to reject. BPA has been clear on this point for 40 years. *See* 1983 Wholesale Power Rates Record of Decision, WP-83-A-02, at 84 (BP-24-E-BPA-10-AT21) (WP-83 ROD)(stating that section 7(i) ratemaking hearings "do not place BPA's individual programs at issue" and the purpose of BPA's rate case testimony is "not to justify every program that contributes to BPA's costs."). Certainly, BPA's cost projections must rely on up to date and realistic information. *See Golden Nw. Aluminum, Inc.,* 501 F.3d at 1052-53. But, BPA's rate cases are not the forum to establish what BPA's environmental obligations are or whether BPA is meeting them.

Additionally, the process for Federal review of BPA spending decisions, which involve oversight by both the President and Congress, further undermines the Tribal Parties' assertion that Congress intended BPA to subject its projected costs to administrative and (potentially) judicial scrutiny through the Section 7(i) hearing. *See* Government Corporate Control Act, 31 U.S.C. § 9103 (under which BPA submits a "business-type budget" to the President, and the President then "shall submit the budget . . . (as changed by the President)."). Congress can, and has, stepped in to modify or restrict BPA spending. *See, e.g.,* Energy and Water Development Appropriations Act of 2002, Pub. L. No. 107-66, § 316 (2001) (limiting BPA's ability to fund certain energy efficiency services); Energy and Water Development Appropriations Act, 1996, Pub. L. No. 104-46, § 508(e) (1995) (increasing BPA's spending in the residential exchange program).

Recent legislation also makes clear that the Administrator has discretion in determining the forum for discussions on BPA's programmatic costs. Specifically, in 16 U.S.C. § 838m(c)(1), Congress added the requirement that the Administrator shall "engage, in a manner determined by the Administrator, with customers and stakeholders with respect to the financial and cost management efforts of the Administrator through periodic program reviews." This language reaffirms the broad discretion BPA has to determine the scope and forum for discussing cost projections and its programs.

The issue of excluding contention over BPA's fish and wildlife program from its rate case is not a new issue. BPA has been consistent since WP-83—one of the earliest rate cases in which BPA recovered fish and wildlife costs from the Council's Program—in finding that its rate cases are not the forum for debating BPA spending decisions. As noted in the WP-83 ROD:

> The purpose of BPA testimony concerning fish and wildlife program levels is to substantiate the revenue requirement in the rate case, not to justify BPA's fish and wildlife responsibilities. The hearing requirements of section 7(i) of the [NWPA] do not place BPA's individual programs at issue. To provide such programmatic justification would necessitate going far beyond the scope of the ratemaking process. The purpose of testimony concerning BPA's revenue requirements is to examine on the record whether BPA's rates satisfy section 7(a)(1) of the [NWPA], not to justify every program that contributes to BPA's costs.

WP-83 ROD, WP-83-A-02, at 84 (BP-24-E-BPA-10-AT21).

Nonetheless, for the BP-24 rate proceeding, the materials submitted by the Tribal Parties will be permitted and addressed for this rate period. Three reasons support this decision.

First, the Tribal Parties' materials were admitted into the record by the Hearing Officer without dispute from Staff or any other party. *See* Hearing Officer Order Granting Tribal Parties' Motion to Admit Evidence, BP-24-HOO-13. Removing these materials at this point in the case, after they had been admitted by the Hearing Officer without contention, would be prejudicial to the Tribal Parties, who have relied on these materials in their initial briefs.

Second, permitting these materials on the record does not prejudice any other party. Staff filed responsive material to the Tribal Parties' arguments. *See* Fisher *et al.*, BP-24-E-BPA-10; Fisher *et al.* Attachments, BP-24-E-BPA-10-AT01 to -AT30. PPC and AWEC similarly filed rebuttal testimony. Deen *et al.*, BP-24-E-PP-01; Deen, BP-24-E-PP-02; Chalier, BP-24-E-AW-01. Thus, the record contains multiple perspectives on the subjects identified by the Tribal Parties and permitting these materials to be reviewed in this proceeding does not prejudice any party's rights.

Finally, the issues presented in the BP-24 rate are closely connected to arguments made in the case of *Idaho Conservation League v. Bonneville Power Admin.*, Case No. 22-70122, which is currently pending before the U.S. Court of Appeals for the Ninth Circuit. That case challenges BPA's decisions in the BP-22 rate proceeding regarding BPA's cost projections' compliance with Sections 4(h)(11)(A)(i) and (ii). To minimize duplicative arguments and evidence, in response to an unopposed motion submitted by BPA, the Hearing Officer incorporated by reference the entirety of the BP-22 record. *See* Order on Incorporation of BP-22 Record and Preservation of Issues, BP-24-HOO-09. The BP-22 record includes arguments regarding the legality of BPA's fish wildlife cost projections and the compliance with statutory provisions. Because the appeal of the BP-22 decision is pending, and because this BP-24 rate case involves many of the same legal issues, BPA concludes that retaining the BP-22 record in its entirety is prudent and reasonable. Given that BPA is permitting record material from the BP-22 rate case that challenged the legality of BP-22 cost projections, it would be incongruent to simultaneously exclude similar types of material for the BP-24 rate case.

In their Brief of Exceptions, the Tribal Parties take issue with BPA's view that the rate case is not the proper forum for challenging BPA's compliance with the equitable treatment requirement and fish and wildlife funding. Tribal Parties Br. Ex., BP-24-R-YN-01, at 20. The Tribal Parties argue BPA's rate decisions are the "only final agency decision that will consider the total anticipated funding needs of BPA's fish and wildlife program during the BP-24 period, and thus will have impacts on fish and wildlife during the rate period." *Id.*

BPA disagrees with the Tribal Parties' premises. First, as described in Chapter 4, BPA disagrees that the equitable treatment provisions apply to BPA's funding decisions. Second, BPA disagrees that its cost projections are (or can become) "final agency decisions." *See id.* As BPA previously explained in the BP-22 ROD, BPA's cost projections are general in nature, subject to change after the rate case by BPA, the Executive Branch, and Congress, and do not commit or constrain BPA to fund any particular project. BP-22 ROD, BP-22-A-02, at 56-62. Thus, these projections do not meet the requirements for review as a final agency action. *Id.* at 58 ("Thus, BPA's budget recommendations from IPR do not become 'final' with the final rate determinations.")

To support their argument, the Tribal Parties cite to *Golden NW,* noting that if BPA does not set its rates high enough to cover the costs of its fish and wildlife mitigation measures during the rate period, it will be "'less likely that BPA w[ill] ultimately be able to live up to its statutory obligations and other commitments, including its commitment to fund fish mitigation measures." Tribal Parties Br. Ex., BP-24-R-YN-01, at 20, *citing Golden NW*,

501 F.3d at 1052. The Tribal Parties then explain what they believe the Court meant: "BPA's setting of power rates establishes the funding mechanism for fish and wildlife mitigation measures during the relevant rate period." Tribal Parties Br. Ex., BP-24-R-YN-01, at 20-21.

The Tribal Parties misconstrue *Golden NW*. Earlier parts of the very sentence that the Tribal Parties quote make clear that the Court's concern was with the *staleness* of BPA's cost projections, not that BPA was failing to actually fund its fish and wildlife programs. The full sentence is as follows:

> Relying on outdated assumptions did not help BPA to 'keep its options open'; rather, such reliance made it less likely that BPA would ultimately be able to live up to its statutory obligations and other commitments, including its commitment in the Principles to maintain sufficient financial reserves for the post-2006 rate period.

*Golden NW*, 501 F.3d at 1052. As explained in Chapter 3, BPA's cost projections for the BP-24 rates are based on the most up-to-date information, and BPA's rates contain robust risk mitigation to address uncertainty with those projections.

Furthermore, the Court in *Golden NW* was clear that the rate case was *not* the forum for deciding on which fish and wildlife programs to pursue and which to fund: "we understand that the WP-02 rate case was not the forum for making decisions regarding which fish and wildlife alternative to implement . . . ." *Id.* at 1053.

Finally, BPA's power rates are not the "funding mechanism" for BPA's fish and wildlife mitigation measures in the sense argued by the Tribal Parties. BPA's rates are certainly the primary *source* of revenue that BPA uses to fund for its various operations. And BPA's cost projections must be reasonable and based on "substantial evidence" in the aggregate. *Id.* at 1051. But BPA's actual funding for its programs is not, ultimately, determined by its rate case projections. If, during a rate period, BPA decides to spend *more* than it projected for a program, BPA is able to adjust its actual spending. This follows from the fact that BPA retains discretion to use its revenues and cash to meet BPA's actual costs, whether they be fish and wildlife, IT, energy efficiency or some other cost. In simple terms, BPA's rate case cost projections are not binding earmarks for BPA funding, and BPA has discretion within a year to shift funds around to enable BPA to meet its statutory and contractual obligations. As BPA previously explained:

> Furthermore, while BPA's cost estimates are based upon existing or anticipated obligations, they do not create such obligations nor do they have any binding legal effect on those obligations. Said another way, BPA's inclusion of a program in its forecast of costs for rate purposes in no way decides that such program will be pursued. Similarly, if a cost item was not included in BPA's projected funding levels, that omission in no way prohibits BPA from funding that particular measure during the rate period. To that end, the rate case contains no findings of exactly which programs and projects will be funded by the revenues recovered in rates, a point the Environmental Parties readily acknowledge.

BP-22 ROD, BP-22-A-02, at 59. Ultimately, whether a particular project receives funding depends on BPA's internal annual budget review process, which considers "the recommendations and realities affecting projects in real-time." Fisher *et al.,* BP-24-E-BPA-10, at 31. This flexibility includes redirecting funds "if a project is delayed, postponed, or canceled, to other projects that have greater needs or to fund new projects not previously considered." *Id.* Thus, if particular projects have needs that require adjustments (such as for inflation or other costs), BPA can make adjustments at the project level to address them.

In short, the rate case is not, as asserted by the Tribal Parties, the forum to determine the level of funding for BPA's fish and wildlife programs. Nor are these projections "final decisions" by BPA on the total level of funding for these programs. The scope limitations of the rate case reflect this reality. Nonetheless, for the reasons described above, BPA is permitting the materials submitted by the Tribal Parties in the evidentiary phase of this case—which were admitted without objection. Given that these materials are in the record, the Tribal Parties' objections to the *scope* limitation of the FRN are rendered moot. By permitting these materials into the record, however, BPA is not agreeing with the Tribal Parties' legal premise that BPA's cost projections are reviewable final decisions.

Lastly, to be clear, the conclusion to permit these materials in the rate case has been reached because of the unique circumstances surrounding the BP-24 rate case and currently pending litigation. The decision not to exclude these materials in this proceeding is not intended to be precedential, and BPA may in a future case remove materials from the record that are not permissible under the scope limitations set forth in the FRN. In allowing this one-time exception, BPA does not intend to suggest any departure or change from the position BPA has taken since the WP-83 ROD regarding the limited scope of ratemaking proceedings, which remains BPA's position today.

**Decision**

*The evidence submitted by the Tribal Parties, Environmental Parties, BPA Staff, PPC, and AWEC will be retained in the record.*

***Issue 6.2.2***
*Whether BPA developed its cost projections and rates in appropriate forums.*

**Parties' Positions**

The Tribal Parties contend that BPA unlawfully determined its BP-24 rates in separate settlement discussions without input from the Tribal Parties, outside of the section 7(i) rate proceeding. Tribal Parties Br., BP-24-B-YN-01, at 67-68. The Tribal Parties also assert BPA settled its fish and wildlife cost projections outside of IPR and without input from the fish and wildlife co-managers. *Id.* at 67.

**BPA Staff's Position**

BPA's settlement discussions did not settle the cost projections to be used when setting the BP-24 rates. Fisher *et al.*, BP-24-E-BPA-10, at 20-21. In addition, the Settlement did not

determine BPA's power rates in contravention to the statutory requirements of Section 7(i). *Id.*

**Evaluation of Positions**

In addition to objecting to the scope limitations set forth in the FRN, the Tribal Parties also contend that BPA "prematurely settled" its fish and wildlife costs "regardless" of input from fish and wildlife co-managers who submitted substantial justification and comments for additional funding in the IPR process. Tribal Parties Br., BP-24-B-YN-01, at 67. The Tribal Parties contend that under existing law, BPA was required to give "substantial weight" to the Tribal Parties' recommendations before "establishing" its proposed FY 2024-2025 rates. *Id.* The Tribal Parties assert BPA failed to do this by developing its BP-24 rate proposal via settlement discussions outside and prior to the conclusion of the IPR process and without input from the Tribal Parties. *Id.* at 68. The Tribal Parties further contend these discussions were held with "certain power interests" and those who were parties from the BP-22 rate case, which did not include the Tribal Parties. As a result, BPA failed to address the Tribal Parties' concerns with the "sufficiency of its proposed BP-24 rates and associated settlement terms." *Id.*

The Tribal Parties' argument misunderstands the facts, the purpose of IPR, and the issues addressed in the Settlement.

First, BPA did not "establish" its rates in or through the Settlement. Rates are established in the rate case process, which is a formal administrative hearing conducted under Section 7(i) of Northwest Power Act. 16 U.S.C. § 839e(i); Fisher *et al.*, BP-24-E-BPA-10, at 19. While the Settlement was developed prior to the start of the BP-24 rate proceeding, no rates were established through the settlement process.

Indeed, it is not unusual or unlawful for BPA to hold public processes to work with stakeholders prior to the commencement of a formal rate case to discuss issues and attempt to develop consensus around proposals. To that end, for many years now, prior to the commencement of each rate case, BPA has held a series of public workshops to discuss with stakeholders issues and proposals it expects to address in the case. Fisher *et al.*, BP-24-E-BPA-10, at 19. Through these workshops, BPA receives input and feedback from stakeholders and customers on the proposals and options BPA is considering for the Initial Proposal in the formal rate case. *Id.* These processes are extremely helpful in shaping Staff's proposals, which in turn minimizes unnecessary controversy and litigation in BPA rate cases. *Id.* As BPA meets with prospective rate case parties during public workshops, settlement options are often suggested. *Id.* at 20. However, even though these processes and discussions may help Staff develop proposals *for* the rate case, they are not a substitute for the formal hearing process. After BPA concludes these processes and discussions, BPA initiates the formal hearing required by the Northwest Power Act, and Staff files its Initial Proposal recommending adoption of Staff's rate proposals.

That is what occurred here. The BP-24 pre-rate case workshop process started in April, 2022. Fisher *et al.*, BP-24-E-BPA-10, at 20. In August 2022, BPA paused its pre-rate case workshops to discuss settlement of the BP-24 rates. BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 11; Fisher *et al.*, BP-24-E-BPA-10, at 20. Further public discussions were held,

and on September 21, 2022, Staff posted the Settlement on BPA's website and asked participants in the settlement discussions and any other stakeholders to notify Staff by October 6, 2022, of any objections. Fredrickson *et al.*, BP-24-E-BPA-09, at 2; BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 65. Almost all of the customers and other stakeholders that responded by the deadline either supported or did not object to moving forward with the Settlement. Fredrickson *et al.*, BP-24-E-BPA-09, at 2. As a result, Staff notified participants in the settlement discussions and other stakeholders on October 11, 2022, that Staff would move forward with recommending adoption of the Settlement in the BP-24 rate proceeding. *See id.*

No rates were established through the Settlement itself. Moving forward with the Settlement in the BP-24 rate proceeding simply meant Staff would propose the terms of the Settlement as the Initial Proposal. *Id.*; Appendix A at A-1. The Settlement provides Staff would "*propose and support* adoption of the terms set forth in Attachment 3 in the BP-24 rate proceeding." *Id.* In agreeing to make this proposal, BPA Staff had no ability to alter the Administrator's legal responsibility to make a final decision based on the record in this case. *See* 16 U.S.C. § 839e(i)(5). The Settlement explicitly addresses the potential for the Administrator not to adopt Staff's proposal, stating that "if the Administrator does not adopt this Agreement in the Final Record of Decision in the BP-24 Proceeding, the Agreement will be void *ab initio*." Appendix A at A-1.

Staff's initial proposal followed these recommendations. *See* Fredrickson *et al.*, BP-24-E-BPA-09, at 1. Once the Tribal Parties filed their objection, the rate case proceeded with the standard procedures, including direct testimony, discovery, rebuttal, cross examination (which the Tribal Parties waived), oral argument (which the Tribal Parties presented), and briefing. *See* Hesse *et al.*, BP-24-E-YN-103; Hesse *et al.*, BP-24-E-YN-104; Tribal Parties Testimony Attachments, BP-24-E-YN-01 to -102, -105 to -112; Motion to Admit Evidence into the BP-24 Record, BP-24-M-YN-03; Notice of Intent to Present Oral Argument, BP-24-M-YN-04; Tribal Parties Br., BP-24-B-YN-01. The Tribal Parties have been afforded the full panoply of procedural rights of a rate case party, and the process in the BP-24 rate case process has complied with the requirements of Section 7(i).

Second, the Settlement did not "establish" the costs to be recovered in power rates. There are no cost numbers in the Settlement, and the Settlement says nothing about BPA's projected costs being maintained at any particular level. Rather, BPA's cost projections were developed in the IPR review process. As in prior rate cases, the IPR process commenced around June 2022, and concluded in October 2022 with a "close-out" report that summarized the cost projections for the BP-24 rate period. *Id. See* BP-24-E-14 YN-23. The Tribal Parties were actively involved in the IPR process. *See*, *e.g.*, Yakama Nation BP-24 IPR Comment Letter, BP-24-E-YN-29; CRITFC BP-24 IPR Comment Letter, BP-24-E-YN-30.

In preparing the settlement documents that included rate projections, BPA made clear that the IPR process was ongoing and, consequently, the rates part of the settlement could change based on the outcome of the IPR process. Thus, for instance, BPA noted in the August 11, 2022, draft of the settlement proposal that the rate portion of the settlement was subject to change:

> PF Power Rate. Planned Net Revenues for Risk (PNRR) will be added to the BP-24 rates until the BP-24 PF Effective Tier 1 Rate, as calculated in cell D30 on the "ResultsDetail" tab in the Rates Analysis Model, is no greater than $34.93/MWh. If for some reason the BP-24 PF Effective Tier 1 Rate is greater than $34.93/MWh without any PNRR, Bonneville shall promptly schedule a meeting with the Parties to this Agreement to discuss how to proceed and will provide notice and the opportunity to participate to parties to the BP-24 Proceeding.

Fisher *et al.*, BP-24-E-BPA-10, at 20, *citing* BP-24 Data Responses, BP-24-E-BPA-10-AT01, at 63 (Data Response YN-BPA-32-21). In effect, the above description means that the rate "settled" in the proposal could change as final numbers were developed from the output of a number of processes, including the IPR. The rate value did, in fact, change after this proposal was shared, with the next iteration resulting in a higher rate due to a change in the way the rate was measured. *See* Fredrickson *et al.*, BP-24-E-BPA-09, Appendix A at A-10 (noting PF power rate of $35.64/MWh). And even up to the eve of the Initial Proposal, the rate proposal could be adjusted for known cost increases from IPR. This is because the rate proposal contained a $258 million "buffer" of additional PNRR that could be reduced in the event of an increase in IPR cost projections. Staff explained in testimony how potential additional cost increases would have affected the proposed settlement, noting:

> Depending on the size of the change, one of two things could have occurred. First, if BPA's projected costs increased, we would have correspondingly reduced the amount of Planned Net Revenue for Risk (PNRR) in the proposed settled rate. Second, if the projected cost increase was larger than the amount of PNRR we had anticipated putting in rates, thereby increasing the rates above the $[35.64]/MWh we included in the settlement, then we would have held separate workshops to consider whether there was any interest in continuing to propose a settlement.

Fisher *et al.*, BP-24-E-BPA-10, at 21. Thus, BPA did not "prematurely settl[e] on its BP-24 fish and wildlife costs" prior to the end of the IPR process, but left the Settlement flexible to allow for changes for programmatic cost projections that could occur with the conclusion of IPR. Tribal Parties Br., BP-24-B-YN-01, at 67.

The Tribal Parties also suggest that BPA intended to simply "extend the BP-22" rate as part of the IPR process. Tribal Parties Br., BP-24-B-YN-01, at 20. The Tribal Parties do not provide the full citation in their brief. In fact, BPA stated: "For BP-24, Bonneville is working toward proposing a rate settlement that would extend the BP-22 rates." IPR Closeout Report (Oct. 2022), BP-24-E-YN-23, at i (emphasis added). Thus, BPA was clear in its IPR Closeout Report that the Settlement would be presented as a *proposal*, and that further procedures were necessary to establish the rates.

The Tribal Parties also contend BPA did not give their recommendations "substantial weight" when developing its cost projections, and instead "developed its BP-24 Rate Proposal via settlement discussion conducted outside and prior to the conclusion of the

BP-24 IPR process without input from fisheries co-managers, including the Tribal Parties." Tribal Parties Br., BP-24-B-YN-01, at 68.

As described above, the Settlement did not establish any cost projections. Moreover, BPA did not ignore the Tribal Parties' concerns with those cost projections in the IPR. Far from it, BPA fully responded to the objections and concerns of IPR stakeholders, including Tribal Parties, in the IPR Closeout Report. *See* IPR Closeout Report (Oct. 2022), BP-24-E-YN-23, at 11-17. BPA also responded to the Tribal Parties' objections in rebuttal testimony in this proceeding. *See* Fisher *et al.*, BP-24-E-BPA-10. BPA addresses the substantive arguments raised by the Tribal Parties in Chapters 3, 4, and 5 of this Final ROD.

**Decision**

*BPA properly determined its rates in this Section 7(i) rate proceeding, properly developed its fish and wildlife cost projections in the IPR, and considered the Tribal Parties' comments in both processes.*

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# 7.0 PARTICIPANT COMMENTS

This chapter summarizes and evaluates the comments of participants in the rate case. As defined in BPA's procedures for conducting rate proceedings, "participants" are persons who comment on BPA's rate proposal but do not take part in the formal hearing process with the responsibilities of "parties." Rules of Procedure § 1010.8(a)–(c). Participant comments are part of the official record of the rate proceeding and are considered when the Administrator makes his final decisions.

As described in Chapter 1, the Federal Register notice for this proceeding set a deadline of December 9, 2022, for participant comments. 87 Fed. Reg. 69,259, 69,260 (Nov. 18, 2022). BPA received one comment through the participant comment process, which can be viewed at https://publiccomments.bpa.gov/CommentList.aspx?ID=471. A summary of the comment, and BPA's response, is provided below.

**Comment BP2024220001** – Coeur d'Alene Tribe. The Coeur d'Alene Tribe (Coeur d'Alene) commented that the BP-24 rate proposal fails to satisfy BPA's legal obligations under the Northwest Power Act to demonstrate the rates will provide "equitable treatment" of fish and wildlife resources and to take the Northwest Power and Conservation Council's fish and wildlife program into account "to the fullest extent practicable." *Citing* 16 U.S.C. §§ 839b(h)(11)(A)(i), (h)(1)(A)(ii) *and Confederated Tribes of Umatilla Indian Reservation v. BPA*, 342 F.3d 924, 930 (9th Cir. 2003).

Coeur d'Alene comments that the rate proposal provides insufficient funding for fish and wildlife mitigation measures to meet BPA's legal obligations, respond to inflationary pressures, account for new funding to support fish passage, address "a backlog of needs" resulting from BPA maintaining "flat" funding levels, and to support the reintroduction of salmon in the upper Columbia River. Coeur d'Alene also states steps must be taken to ensure BPA's budget is sufficient to address these issues and that BPA should increase fish and wildlife program funding to at least twice the proposed amount.

Coeur d'Alene states the FCRPS has cut off anadromous fish in the upper Columbia River, which has impacted the Coeur d'Alene's culture, health, and livelihood, but that it gets minimal mitigation assistance compared to other Tribes. Coeur d'Alene also states BPA has denied its recent requests for additional funds for mitigation projects without adequate explanation.

Coeur d'Alene requests government-to-government consultation to discuss the IPR process and BPA's budget proposal before it is finalized.

**Response to Comment BP2024220001.** The comments about BPA's legal obligations under the Northwest Power Act are the same or similar to legal arguments made by the Tribal Parties and Environmental Parties in this proceeding and in the BP-22 rate proceeding. BPA discusses these arguments in Chapters 2 through 6 of this Final ROD and in Chapter 4 of the Final ROD from the BP-22 rate proceeding. Please see those discussions for BPA's response to the comments about BPA's legal obligations.

With respect to the comments about the sufficiency of the BP-24 rate proposal for funding specific fish and wildlife mitigation measures or other actions, those concerns also are addressed in Chapter 3 of this Final ROD. BPA notes the Coeur d'Alene submitted similar comments about the sufficiency of BPA's fish and wildlife funding in the BP-24 IPR process that preceded the BP-24 rate proceeding. Please see the BP-24 IPR Closeout Report, BP-23-E-YN-23, for additional discussion and BPA's response on these issues.

The level of mitigation assistance provided to Coeur d'Alene, and BPA's response to requests for additional mitigation assistance, are outside the scope of the BP-24 rate proceeding. The Environmental Parties raised similar arguments in testimony in this proceeding about the Coeur d'Alene's need for additional mitigation funding. Cutter, BP-24-E-ID-01, at 3-4. In response, BPA described and provided an October 2020 letter to the Coeur d'Alene recounting a recent meeting with the Coeur d'Alene about additional mitigation funding and providing a thorough explanation of BPA's process for evaluating requests for new or expanded mitigation measures. Fisher *et al.*, BP-24-E-BPA-10, at 38-39; Letter from BPA to Coeur d'Alene Tribe (Oct. 16, 2020), BP-24-E-BPA-10-AT28, at 1-2.

With respect to the request for government-to-government consultation before the finalization of the IPR process and BPA's budget proposal, the IPR process concluded in October, 2022. BPA's annual budget review process is also outside the scope of this rate case. Nonetheless, BPA acknowledges the request for government-to-government consultation and will coordinate with the Coeur d'Alene outside of the rate case.

# 8.0 NATIONAL ENVIRONMENTAL POLICY ACT ANALYSIS

Consistent with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, BPA has assessed the potential environmental effects that could result from implementation of BPA's FY 2024-2025 proposed power, transmission and ancillary and control area service rate adjustments. The NEPA process was conducted separately from the formal rate process.

In the Federal Register notice for the BP-24 rate proposal, 87 Fed. Reg. 69,259 (Nov. 18, 2022), BPA provided interested parties the opportunity to submit public comments concerning potential environmental effects of the proposal, which would be considered by BPA's NEPA compliance staff in the NEPA process for the proposal. No comments concerning NEPA compliance or potential environmental effects to consider in the NEPA process were received before the comment deadline of December 9, 2022.

The decision to adopt the proposed rates is primarily administrative, strategic, and financial in nature. The rate proposal largely continues the same rate construct as in previous years and is intended to ensure that there are sufficient revenues to meet BPA's financial obligations and other costs and expenses while using existing generation sources operating within normal limits. Given this, adoption of the rate proposal is not expected to result in reasonably foreseeable environmental effects.

Accordingly, BPA has determined that the BP-24 rate proposal falls within a class of actions excluded from further NEPA review pursuant to U.S. Department of Energy NEPA regulations, which are applicable to BPA. More specifically, this proposal falls within Categorical Exclusion B4.3, found at 10 C.F.R. § 1021, subpt. D, app. B, which provides for the categorical exclusion from further NEPA review of "[r]ate changes for electric power, power transmission, and other products or services provided by a Power Marketing Administration that are based on a change in revenue requirements if the operations of generation projects would remain within normal operating limits." BPA has prepared a categorical exclusion determination memorandum that documents this categorical exclusion from further NEPA review, which is available at the BPA website: https://www.bpa.gov/learn-and-participate/public-involvement-decisions/categorical-exclusions.

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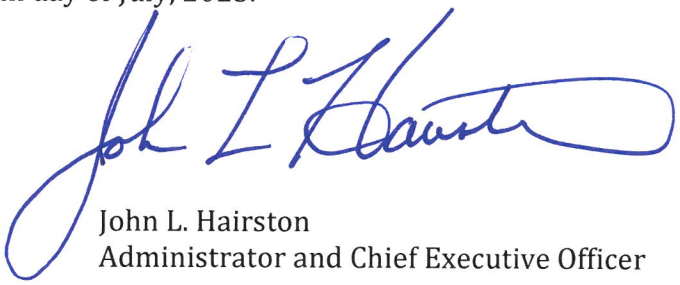
# 9.0 CONCLUSION

As required by law, the rates established and adopted in this Final ROD have been set to recover the costs associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the FCRPS (including irrigation costs required to be repaid out of power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator in carrying out the requirements of the Northwest Power Act and other provisions of law. In addition, these rates have been designed to be the lowest possible rates consistent with sound business principles, to encourage the widest possible use of BPA's power, and to satisfy BPA's other ratemaking obligations. The transmission and ancillary services rates have been designed to equitably allocate the costs of the Federal transmission system between Federal and non-Federal power utilizing such system.

BPA has established these rates pursuant to the procedural requirements in Section 7(i) of the Northwest Power Act, and all interested parties and participants were afforded the opportunity for a full and fair evidentiary hearing, as required by law. In addition, consistent with NEPA, BPA has evaluated the potential environmental impacts that could result from implementation of the rate proposal.

Based upon the record compiled in this proceeding, the decisions expressed herein, and all requirements of law, I hereby establish the accompanying 2024 Power Rate Schedules and General Rate Schedule Provisions (GRSPs) and the 2024 Transmission, Ancillary, and Control Area Service Rate Schedules and GRSPs as Bonneville Power Administration rates. In accordance with Federal Energy Regulatory Commission requirements, 18 C.F.R. § 300.10(g), I hereby certify that the power and transmission rate schedules and GRSPs adopted herein contain the lowest possible rates consistent with sound business principles and are consistent with other applicable laws.

Issued at Portland, Oregon, this 28th day of July, 2023.



John L. Hairston
Administrator and Chief Executive Officer

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# APPENDIX A

## BP-24 Rates Settlement Agreement

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**PRINCIPLES OF SETTLEMENT FOR**
**THE BP-24 RATE PROCEEDING, FY 2024-2025 AVERAGE SYSTEM COST PROCESS, AND THE FY 2022 POWER RESERVES DISTRIBUTION CLAUSE PROCESS**

This document sets forth the principles of settlement for the Bonneville Power Administration's ("Bonneville") BP-24 rate proceeding, Fiscal Year ("FY") 2024-2025 Average System Cost ("ASC") Review process, and FY 2022 Power Reserves Distribution Clause ("RDC") process.

1. Bonneville initiated settlement discussions and has developed a package of proposals for settlement of the following processes, which collectively shall be known as the "Relevant Processes":

    a. The FY 2024-2025 ASC Review Process ("ASC Review Process");

    b. The implementation of the FY 2022 Power Reserves Distribution Clause ("2022 Power RDC Process");

    c. The Power Rates and General Rate Schedule Provisions for the FY 2024-2025 Rate Period ("BP-24 Rate Period"); and

    d. The Transmission, Ancillary, and Control Area Services Rates and General Rate Schedule Provisions for the BP-24 Rate Period.

2. Bonneville and a majority of stakeholders in the settlement discussions agree that Bonneville's proposal for settlement of the Relevant Processes as a package, without additional litigation or dispute, is in the interest of the region.

3. Bonneville provided notice of the proposed settlement package and set a deadline of noon on October 6, 2022, for stakeholders to notify Bonneville of any objections.

4. As long as Bonneville receives no objection that would cause it to decide not to continue to support adoption of the proposed settlement in the Relevant Processes, Bonneville agrees as follows:

    a. Bonneville will propose and support adoption of the terms set forth in Attachment 1 in the ASC Review Process.

    b. Bonneville will propose and support adoption of the terms set forth in Attachment 2 in the 2022 Power RDC Process.

    c. Bonneville will propose and support adoption of the terms set forth in Attachment 3 in the BP-24 rate proceeding.

5. Any parties to the Relevant Processes that do not object to Bonneville's proposals by the noon on October 6, 2022, deadline or in accordance with the procedures established in such processes will waive the right to object or raise any issues in such processes except as provided in the attachment hereto applicable to such process.

**Attachment 1 – ASC Review Process Settlement Proposal**

**FY 2024-2025 Average System Cost Settlement**

1. The settlement will settle the Average System Costs ("ASCs") and Residential Loads for all Residential Exchange Program participants and intervening parties in the ASC Review processes (collectively "Parties") for the FY 2024-2025 Rate Period.

2. The ASCs and Residential Loads for the FY 2024-2025 Exchange Period, by utility, will be as follows:

| Average System Cost | | |
|---|---|---|
| Utility | FY 24-25 Exchange Period ASC* $/MWh (with operational Resources as of 9/14/2022) | FY 24-25 Exchange Period ASC* $/MWh (with New Resources coming online prior to the Exchange Period) |
| **Avista** | $70.61 | - |
| **Idaho Power** | $64.37 | $66.03 |
| **NorthWestern** | $83.73 | - |
| **PacifiCorp** | $84.08 | - |
| **Portland General Electric** | $79.90 | $80.83 |
| **Puget Sound Energy** | $81.53 | - |
| **Clark PUD** | $48.45 | |
| **Snohomish County** | $54.02 | |

* *These ASCs do not reflect NLSLs which may come online during the exchange period.*

**IOUs FY 2024-2025 Monthly Exchange Loads (in kWh)**

| *Month* | *Avista* | *Idaho* | *NorthWestern* |
|---|---|---|---|
| October*** | 254,896,410 | 464,614,902 | 49,059,251 |
| November*** | 306,989,036 | 436,477,870 | 52,412,131 |
| December*** | 410,968,484 | 545,726,592 | 68,040,771 |
| January | 459,293,631 | 676,924,657 | 80,254,707 |
| February | 418,801,445 | 640,200,234 | 73,179,518 |
| March | 430,263,572 | 577,788,005 | 71,477,216 |
| April | 317,825,895 | 484,722,765 | 63,502,607 |
| May | 273,566,623 | 515,838,359 | 54,613,895 |
| June | 268,443,327 | 563,855,197 | 52,447,198 |
| July | 335,108,767 | 796,248,816 | 60,598,907 |
| August*** | 369,713,867 | 824,027,789 | 66,273,532 |
| September*** | 283,005,946 | 638,153,856 | 54,476,646 |

**** indicates forecast is based on one month.*

| *Month* | *PacifiCorp* | *Portland General* | *Puget Sound* |
|---|---|---|---|
| October*** | 600,842,934 | 575,519,405 | 831,586,516 |
| November*** | 698,195,427 | 625,580,649 | 1,025,013,678 |
| December*** | 924,210,227 | 839,111,983 | 1,273,760,274 |
| January | 1,043,903,330 | 967,677,241 | 1,421,121,809 |
| February | 924,505,586 | 849,427,060 | 1,297,789,990 |
| March | 830,985,541 | 770,349,915 | 1,277,713,501 |
| April | 699,203,263 | 674,466,322 | 1,098,609,043 |
| May | 643,950,649 | 607,178,824 | 922,766,622 |
| June | 675,340,155 | 607,491,702 | 832,916,697 |
| July | 826,475,403 | 704,237,207 | 849,676,386 |
| August*** | 857,511,640 | 797,305,458 | 852,098,164 |
| September*** | 694,034,020 | 642,653,734 | 819,498,426 |

**** indicates forecast is based on one month.*

3. Parties that do not object to the proposed settlement by noon, October 6, 2022: (1) waive any right to request review or modification of, or submit issue lists on, the ASCs of their own utility or the ASCs of any other utility; and (2) will not contest their own, or any other entity's, Final ASC determination at the Federal Energy Regulatory Commission (FERC) or in any court, provided that, any Party may object or raise any

issues in the ASC Review processes for the FY 2024-2025 Rate Period in response to an objection made by another Party.

4. BPA will issue Draft ASC Reports consistent with the table in Section 2. Parties will have two business days to confirm that the Draft ASCs are consistent with this settlement.

5. BPA will issue Final ASC Reports consistent with the table in Section 2. BPA will note in the Issues sections of each Final ASC Report that the ASCs were the result of a settlement, that nothing in the report is precedential, and that the Parties and BPA reserve all rights to raise issues in future ASC Reports. Each Draft and Final ASC Report will include the following language:

   > Bonneville, the Parties to this proceeding, and the Exchanging Utility acknowledge that this Final ASC reflects a compromise in their positions with respect to the FY 2024-2025 ASC Review, and that acceptance of the settlement does not create or imply any agreement with any position of any other Party, Bonneville, or the Exchanging Utility. Bonneville, the Parties, and the Exchanging Utility agree not to assert in any forum that anything in this ASC Report, or that any action taken or not taken with regard to this ASC Report, creates or implies: (1) agreement to any particular or individual treatment of costs, expenses, or revenues; (2) agreement to any particular interpretation of Bonneville's statutes; (3) agreement to any interpretation of the 2008 ASC Methodology; or (4) any basis for supporting any ASC for any period after the end of FY 2025.
   >
   > Bonneville, the Parties to this proceeding, and the Exchanging Utility agree that this Final ASC establishes no precedent and that Bonneville and the Parties will not be prejudiced or bound thereby in any future ASC proceeding. Bonneville, the Parties to this proceeding, and the Exchanging Utility will not be deemed to have approved, accepted, agreed or consented to any concept, theory or principle underlying or supposed to underlie any of the matters provided for in this Final ASC Report.

6. Nothing in this settlement is intended in any way to alter the Administrator's authority and responsibility to establish a utility's ASC pursuant to the terms of the 2008 Average System Cost Methodology and section 5(c) of the Northwest Power Act.

## Attachment 2 –2022 Power RDC Settlement Proposal

1. Following Bonneville's calculation of Power's financial reserves for FY 2022, if there is a Power RDC Amount, Bonneville will propose the following:

    a. Seventy (70) percent allocated to a Power Dividend Distribution ("DD") to reduce FY 2023 power rates consistent with the 2022 Power Rate Schedules and General Rate Schedule Provisions (FY 2022-23);

    b. Up to twenty (20) percent allocated to reduce debt or revenue finance, with any amount not used to reduce debt or revenue finance left as financial reserves to support Bonneville's liquidity and/or increase the probability of a 2023 Power RDC Amount;

    c. Ten (10) percent designated as Reserves Not for Risk to address, on an accelerated, one-time basis, certain non-recurring maintenance needs of existing fish and wildlife mitigation assets that (i) Bonneville anticipates would otherwise need to be addressed during future rate periods and (ii) will result in avoidance of those costs in future rate periods. For purposes of this section, mitigation assets are those Bonneville determines that (a) have resulted in tangible and measurable benefits or improvements for fish and wildlife, and (b) are directly related to mitigating for the effects of the construction or ongoing operation of the FCRPS projects.

2. Participants in the 2022 Power RDC process that do not object to the proposed settlement by noon, October 6, 2022, agree not to challenge or raise adverse comments to Bonneville's proposal for the Power RDC Amount as set forth in section 1 above. Participants in the 2022 Power RDC process further agree not to challenge in any forum Bonneville's proposed use for the 2022 Power RDC Amount.

3. Bonneville and the participants agree that the 2022 Power RDC Amount proposal is the result of a compromise and establishes no precedent and neither Bonneville nor the participants will be prejudiced or bound thereby in any future Power RDC process. The Parties will not be deemed to have approved, accepted, agreed or consented to any concept, theory or principle underlying or supposed to underlie any of the matters provided for in the 2022 Power RDC Amount.

## Attachment 3 – BP-24 Rates Settlement

This Settlement Agreement ("Agreement") is among the Bonneville Power Administration ("Bonneville") and parties to the BP-24 rate proceeding as provided for below in section I.D of this Agreement (such parties in the singular, "Party," in the plural, "Parties").

## I. General Terms

A. In the BP-24 Rate Proceeding ("BP-24 Proceeding"), Bonneville staff will file and recommend that the Administrator adopt a proposal consistent with this Agreement for power and transmission rates for Fiscal Years ("FY") 2024 and 2025. The proposal will include only the terms specified in this Agreement and in Attachments A and B.

B. This Agreement settles all issues within the scope of the BP-24 Proceeding.

C. The terms of this Agreement are intended to be a part of a settlement package that also includes the settlement of (1) the FY 2022 Power RDC ("Power RDC Settlement"); and (2) the Average System Cost Review process for FY 2024-2025 ("ASC Settlement"). As a condition to this Agreement, the Parties agree not to contest the Power RDC Settlement or the ASC Settlement.

D. Bonneville will notify the Hearing Officer about this Agreement and move the Hearing Officer to (1) require any party in the BP-24 Proceeding that does not sign the Agreement to state any objection to the Agreement by a date established by the Hearing Officer; and (2) specify that any party in the proceeding that does not state an objection to the Agreement by such date will waive its rights to preserve any objections to the Agreement and will be deemed to assent to this Agreement.

E. If in response to the Hearing Officer's order made pursuant to section I.D, any party to the BP-24 Proceeding states an objection to the Agreement, Bonneville and any Party to this Agreement will have two business days from the date of the objection to withdraw its assent to the Agreement. If Bonneville or any Party to this Agreement withdraws its assent to the Agreement, Bonneville shall promptly schedule a meeting with the Parties to this Agreement to discuss how to proceed. Bonneville will provide notice of the meeting and the opportunity to participate to parties in the BP-24 Proceeding.

F. This Agreement will terminate on September 30, 2025, except that, if the Administrator does not adopt this Agreement in the Final Record of Decision in the BP-24 Proceeding, the Agreement will be void *ab initio*.

G. Preservation of Settlement

1. The Parties agree not to contest this Agreement in the BP-24 Proceeding, or any other forum, or the implementation of this Agreement pursuant to its terms, through the end of FY 2025.

2. The Parties agree to waive their rights to file testimony, submit data requests, conduct cross examination, or file briefs in the BP-24 proceeding with respect to any issue within the scope of the Agreement, except in response to issues raised by any party in the proceeding that objects to this Agreement in response to the Hearing Officer's order made pursuant to section I.D.

3. Bonneville and the Parties agree that this Agreement does not constitute consent or agreement in any future Bonneville proceeding, and that they retain all of their rights to take and argue whatever position they believe appropriate as to such matters in such proceedings.

4. Bonneville and the Parties acknowledge that this Agreement reflects a compromise in their positions with respect to the issues within the scope of the Agreement, and that acceptance of the settlement does not create or imply any agreement with any position of any other Party. Bonneville and the Parties agree not to assert in any forum that anything in the Agreement, or that any action taken or not taken with regard to this Agreement by Bonneville or any Party, the Hearing Officer, the Administrator, the Federal Energy Regulatory Commission, or a court, creates or implies: (1) agreement to any particular or individual treatment of costs, expenses, or revenues; (2) agreement to any particular interpretation of Bonneville's statutes; (3) any precedent under any contract or otherwise between Bonneville and any Party; or (4) any basis for supporting any Bonneville rate or general rate schedule provision for any period after the end of FY 2025.

5. Bonneville and the Parties agree that this Agreement establishes no precedent and that Bonneville and the Parties will not be prejudiced or bound thereby in any proceeding, except as specifically provided in this Agreement. The Parties will not be deemed to have approved, accepted, agreed or consented to any concept, theory or principle underlying or supposed to underlie any of the matters provided for in this Agreement.

H. Conduct, statements, and documents disclosed in the negotiation of this Agreement, the Power RDC Settlement, and ASC Settlement will not be admissible as evidence in the BP-24 Proceeding, any other proceeding, or any other judicial or administrative forum, nor will the fact that the Parties entered into this settlement be cited or used in any future proceedings or Administrator decisions as support for any matters, other than application or enforcement of this Agreement.

I. Reservation of rights

1. Except as provided in section I.G.2 above, no Party waives any of its rights, under Bonneville's enabling statutes, the Federal Power Act, or other applicable law, or to pursue any claim that a particular charge, methodology, practice, or rate schedule has been improperly implemented.

2. Bonneville and the Parties reserve the right to respond to any filings, protests, or claims by Bonneville, any Party, or others; however, the Parties will not support a challenge to any rates, terms and conditions, or other matters described in this Agreement.

3. No Party agrees or admits that the level of financial reserves resulting from the Power or Transmission Rates, if any, is acceptable or otherwise appropriate, and nothing in this Agreement shall limit, waive, or otherwise alter a Party's right to challenge in future rate proceedings the level of Bonneville's financial reserves.

4. No Party agrees or admits that the level of revenue financing included in the Power or Transmission Rates is acceptable or otherwise appropriate, and nothing in this Agreement shall limit, waive, or otherwise alter a Party's right to challenge in future rate proceedings Bonneville's inclusion of revenue financing in rates, the level of any such revenue financing, the application of depreciation to assets funded by revenue financing, or the accounting or other rate treatment of amounts included in rates for revenue financing or debt prepayment.

5. Except as provided in section I.G.2 above, no Party waives any rights to challenge Bonneville's Sustainable Capital Financing Policy, which is outside of the scope of this Agreement. In particular, nothing in this Agreement limits, waives, or alters the Parties' rights: (1) to challenge the Sustainable Capital Financing Policy Record of Decision under and subject to applicable law; and (2) to challenge, in future rate proceedings, the application of the Sustainable Capital Financing Policy. Furthermore, the Parties are not conceding any application of any such policies by agreeing to this Agreement.

6. The Parties acknowledge that the BP-22 rates are currently being challenged in the U.S. Court of Appeals for the Ninth Circuit, in the case of *Idaho Conservation League, et al., v. Bonneville Power Administration*, Case No. 22-70122 ("BP-22 Litigation"). Nothing in this Agreement precludes the Administrator from considering any ruling in the BP-22 Litigation in any decision in the BP-24 Proceeding or revisiting any decision in the BP-24 Proceeding in order to respond to such a ruling. In the event that Bonneville must revisit any decision in the BP-24 Proceeding due to a ruling in the BP-22 Litigation, BPA may convene a meeting with the Parties to determine what, if any, adjustments need to be made to the BP-24 rates to respond to the Court's ruling.

J. If, because of a ruling issued in response to a legal challenge, Bonneville is required to materially modify or discontinue any of the rates, terms and conditions, or other matters provided in this Agreement, Bonneville may seek, and the other Parties agree not to contest, a stay of enforcement of that ruling until after the end of FY 2025.

K. Attachment A (FY 2024-2025 Power Rate Schedules and General Rate Schedule Provisions) and Attachment B (FY 2024-2025 Transmission, Ancillary, and Control Area Rate Schedules and General Rate Schedule Provisions) are made part of this Agreement.

L. Nothing in this Agreement is intended in any way to alter the Administrator's authority and responsibility to periodically review and revise the Administrator's rates and terms and conditions of transmission service or the Parties' rights to challenge such revisions.

M. Notwithstanding section I.F of this Agreement, sections I.G, I.H, and I.I will survive termination or expiration of this Agreement.

N. This Agreement may be executed in counterparts each of which is an original and all of which, taken together, constitute one and the same instrument.

## II. Terms for Rate Issues for FY 2024-2025

A. Power Rates

1. Models and Documentation. Bonneville will model and produce studies supporting the BP-24 Power Rates.

2. PF Power Rate. Planned Net Revenues for Risk (PNRR) will be added to the BP-24 rates until the BP-24 PF Effective Non-Slice Tier 1 Rate, as calculated in cell D50 on the "ResultsDetail" tab in the Rates Analysis Model, is no greater than $35.64/MWh.

3. Demand Rate. The annual cost of capacity used to calculate the demand rate will be $114.54/kW/year calculated using the methodology and cost of a reciprocating engine as discussed at the July 27, 2022, BP/TC-24 workshop.

4. FPS Rate Schedule. The FPS rate schedule will include a new surplus power rate that will be applicable to specific Slice customers in need of a product to help transition them to Bonneville's 30 water year and 10th percentile approach for measuring firm output. The terms and amount of power to be sold at that rate will be as follows:

a. New Firm Water Transition Rate. The new FPS rate will be called the Firm Water Transition ("FWT") Rate, and will be set equal to Bonneville's PF Tier 1 Equivalent Energy Rates.

b. HLH Energy Amounts. Bonneville will sell the following amounts of surplus power at the FWT Rate to the following customers. These amounts will be added to the customer's scheduled block amount and identified in Exhibit D of the customer's contract.

| *aMW HLH* | *Nov-23* | *Dec-23* | *Jan-24* | *Feb-24* | *Nov-24* | *Dec-24* | *Jan-25* | *Feb-25* |
|---|---|---|---|---|---|---|---|---|
| *Clatskanie PUD* | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| *Cowlitz County PUD #1* | 9 | 9 | 9 | 8 | 8 | 9 | 9 | 8 |
| *Eugene Water & Electric Board* | 3 | 4 | 4 | 4 | 3 | 4 | 4 | 4 |
| *Idaho Falls Power* | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| *Lewis County PUD #1* | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 |
| *Snohomish County PUD #1* | 13 | 15 | 14 | 13 | 12 | 14 | 14 | 13 |
| *Tacoma Public Utilities* | 6 | 8 | 7 | 7 | 6 | 8 | 7 | 7 |

5. PF Short-Term and Load Growth Tier 2 Rates. The Remarketing Value will be calculated for each year as the average of (1) the annual firm power price as calculated for a flat block of power using the Aurora model used to calculate the BP-24 power rates, and (2) the average Intercontinental Exchange (ICE) Mid-C settlement prices for a flat annual block of power for the same year as reported on August 15 through August 19, 2022. The Short-Term and Load Growth Tier 2 Rates will be $63.83/MWh in 2024 and $60.25/MWh in 2025.

6. Resource Adequacy Incentive. This incentive will only be applicable if Bonneville begins participation in the Western Resource Adequacy Program (WRAP) 3B Binding Program and elects a binding summer 2025 season (June 2025 through September 2025).

   a. A Load Following customer with non-federal resources serving Above-RHWM Load will be eligible to receive a monthly credit in FY 2025 if the customer meets the WRAP forward showing qualifying capacity capability (QCC) requirement for such non-federal resources. The customer must submit QCC resource information to Bonneville by September 15, 2024, for the summer 2025 season.

      i. GRSP rate: FY 2025 monthly rate is negative $2.73/MWh.

ii. GRSP billing determinant: The qualifying non-federal resource amounts for October 2024 through September 2025 (in megawatthours) to be identified in Exhibit D of the customer's CHWM contract.

b. A Load Following customer with a New Large Single Load (NLSL) will be subject to a monthly charge in FY 2025 if the customer does not submit to Bonneville, by September 15, 2024, for the summer 2025 season, either: (a) an approved exclusion attestation for the NLSL in accordance with the WRAP; or (b) QCC resource information for any non-federal resources serving the NLSL.

i. GRSP rate: FY 2025 monthly rate is $2.73/MWh.

ii. GRSP billing determinant: The qualifying forecast NLSL amounts for October 2024 through September 2025 (in megawatthours) to be identified in Exhibit D of the customer's CHWM contract

7. Powerdex Mid-C price index. The Powerdex Mid-C index used as an hourly market price index in the GRSPs will be replaced with the hourly average Energy Imbalance Market (EIM) Load Aggregation Point (LAP) price for BPA's BAA. This revision will impact the charge for Unauthorized Increase (UAI) in Energy, the Forced Outage Reserve Service (FORS) energy rate, and the Transmission Curtailment Management Service (TCMS) rate. A cost cap will also be added to Power's UAI as described in II.A.13 below. All other components of Power's UAI will remain the same as BP-22 as updated for the BP-24 demand rate. The calculation of the TCMS charge will be updated to remove the bands applied to the TCMS billing determinant.

8. First Jurisdictional Deliverer (FJD). The Washington State Cap-and-Invest Program ("Program") was created by Washington's Climate Commitment Act, RCW 70A.65. The Program takes effect on January 1, 2023. Entities importing power into the state (called a "First Jurisdictional Deliverer" (FJD)), including from the federal power system, will be obligated to surrender allowances to the state to cover carbon emissions attributed to power deliveries. Many of Bonneville's Washington customers will be the FJD for federal power sales and thus have a carbon compliance obligation. The Program gives Bonneville the option to be the FJD, and thus take on a carbon compliance obligation on behalf of retail customers that Bonneville delivers power to in Washington.

   Bonneville is currently deciding whether to take on the FJD role, and expects to make a choice in Spring 2023. Therefore, the earliest Bonneville may become the FJD would be for calendar year 2024. BPA commits to a public process with customer input and a decision document regarding its potential role as First Jurisdictional Deliverer in the Washington State Cap-and-Invest program.

a. No Transfer of Allowances Charge. All Washington utilities that are subject to the Program are eligible to receive no-cost allowances if they register with Washington Department of Ecology. The intent of these no-cost allowances is to cover the utility's cost burden, mitigating the utility's ratepayers from costs of the Program. If Bonneville is not the FJD, then the Program's compliance obligation will be directly on Bonneville's Washington firm power customers, who can use the allowances to cover their compliance obligation. If Bonneville is the FJD, then Bonneville will be taking on the carbon compliance obligation on behalf of its customers. Accordingly, equity dictates that customers in Washington should transfer their no-cost allowances for the federal system to Bonneville so that Bonneville can use them to meet the compliance obligation that Bonneville would be incurring on their behalf. A mechanism is needed to ensure that customers transfer their no-cost allowances to Bonneville, or otherwise provides for an equitable outcome.

   If Bonneville elects to be the FJD, the presumption is that Washington customers will sign the Exhibit D revision and transfer their no-cost allowances to Bonneville. However, in the event that Washington customers do not, a rate mechanism would be needed to ensure that other Bonneville customers would not bear the cost that Bonneville incurred in meeting the carbon compliance obligation for those Washington customers that did not transfer to Bonneville their no-cost allowances. The rate mechanism would include a cost adder of 25 percent to ensure a Washington customer not transferring its no-cost allowances does not unduly benefit from the decision at the expense of Bonneville and its other customers.

   Bonneville will charge PF customers with retail load in Washington for the full cost that Bonneville incurs purchasing allowances to cover emissions for federal service to their loads plus a 25 percent cost adder if such PF customer:

   i. does not register and thus does not receive no-cost allowances from the Washington Department of Ecology, or

   ii. does not sign a power sales contract revision and therefore does not agree to transfer their allocation of no-cost allowances for the federal system to Bonneville.

b. Rate Setting FJD Cost Treatment. If Bonneville elects to be the FJD, Bonneville expects to incur costs under the Washington Cap-and-Invest-Program for procuring allowances for surplus and for PF sales if compliance is greater than no-cost allowances, and for administrative purposes. Although Bonneville may reflect these costs in future rates, BP-24 power rates will not reflect any costs associated with these aspects of the program.

9. Generation Inputs. Power will reduce the GARD costs associated with Non-Regulation Balancing Reserves by 95 percent when Bonneville calculates its inter-business line transfer. All other inter-business line transfer line items will be calculated using the same methodology as applied in BP-22 with updated BP-24 inputs.

10. Columbia Generating Station (CGS) Decommissioning Trust Funds. The power revenue requirement will include $15.1 million per year for CGS decommissioning trust fund contributions compared to the $4.6 million per year included in the BP-22 power revenue requirement.

    By September 1, 2023, BPA will hold a customer workshop that addresses the funding of the CGS Decommissioning Trust Fund. This workshop will provide information to help determine the amount of funding that is needed.

11. Product Switching and Risk Adjustments. For FY 2024, the three Power risk adjustment clauses will not be applicable to the portion of a customer's service at PF Tier 1 rates that has been converted from a Slice product to a non-Slice product beginning October 1, 2023. However, the three risk adjustment clauses will apply to such customer's entire service at PF Tier 1 rates for FY 2025. The three Power risk adjustment clauses are the Power Cost Recovery Adjustment Clause; the Power Reserves Distribution Clause; and the Power Financial Reserves Policy Surcharge.

12. Power FY 2024 and FY 2025 RDC. The FY 2024-2025 Power Rate Schedules and General Rate Schedule Provisions will specify that:

    a. For FY 2024 and FY 2025, the Administrator shall apply the RDC Amount to reduce power rates through a Power DD in an amount that is the lesser of 1) the RDC Amount, or 2) the Planned Net Revenues for Risk included in power rates for the same year in which the RDC is applied ([amount] in FY 2024 and [amount] in FY 2025). Any remaining Power RDC Amount may be applied to reduce debt, incrementally fund capital projects, further decrease rates through a Power DD, distribute to customers, or any other Power-specific purposes determined by the Administrator.

    b. A Maximum RDC Amount (Cap) will not be applicable to the calculated Power RDC Amount for FY 2024 and FY 2025.

13. For FY 2024-2025, the Power Unauthorized Increase Charge will be limited to the higher of $2,500/MWh or 125 percent of the California Independent System Operator's Hard Energy Bid Cap. Bonneville will revisit this price cap and Power's Unauthorized Increase Charge prior to the BP-26 rate proceedings.

14. Other Issues. All other issues will be addressed consistent with the BP-22 Final Proposal methodology as updated with BP-24 inputs.

B. Transmission Rates

1. Bonneville and the Parties agree that this a "black box" settlement of the rates for Transmission, Ancillary, and Control Area services for FY 2024 and 2025. Any testimony, studies, and other analysis published by Bonneville in support of such rates are subject to all other provisions of this Agreement, including the reservation of rights for Bonneville and Parties to take and argue any position in any future proceeding.

2. BP-26 Pre-Rate Case Workshop Process

   a. By May 1, 2024, Bonneville will hold at least one BP-26 workshop to discuss the Utility Delivery segment and related issues as part of a broader review of Bonneville's segmentation methodology.

   b. By March 1, 2024, Bonneville will hold at least one BP-26 workshop to discuss the balancing service rate methodology and a summary of the FY 2023 historical use of Operational Controls for Balancing Reserves (OCBR) and Oversupply Management Protocol (OMP). Bonneville will discuss the effects seen on balancing reserves deployment from the Energy Imbalance Market (EIM). Bonneville will make reasonable efforts to respond to customer requests for data related to Bonneville's balancing service rate methodology, OCBR, and OMP, provided that the request seeks data that is in Bonneville's possession, not unduly burdensome to gather and provide, and can be made publicly available. Bonneville will have no obligation to conduct analysis of any data.

   c. Nothing in this section II.B.2 obligates Bonneville or any Party to any specific outcome or decision with respect to any workshop or to any outcome or decision regarding any Bonneville rates or terms and conditions for transmission, ancillary, and control area services.

**Appendix B:** FY 2024-2025 Power Rate Schedules and General Rate Schedule Provisions

**Appendix C:** FY 2024-2025 Transmission, Ancillary, and Control Area Rate Schedules and General Rate Schedule Provisions

BONNEVILLE POWER ADMINISTRATION
DOE/BP 5252 – July 2023